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GRAND JURY REFORM

HEARINGS

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, AND INTERNATIONAL LAW

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

H.R. 94

GRAND JURY REFORM

MARCH 17, APRIL 27, JUNE 1 AND 29, 1977

Part 1

Serial No. 22

46863 1 of 2

Printed for the use of the Committee on the Judiciary

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NCJRS
APR 17 1978
ACQUISITIONS

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
91-400 O WASHINGTON : 1977

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GRAND JURY REFORM

THURSDAY, MARCH 17, 1977

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION,
CITIZENSHIP, AND INTERNATIONAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:30 a.m., in room 2237, Rayburn House Office Building, Hon. Joshua Eilberg (chairman of the subcommittee) presiding.

Present: Representatives Eilberg, Hall, Harris, Evans, Fish, and Railsback.

Staff members present: Garner J. Cline and Martin H. Belsky, counsel; and Alexander B. Cook, associate counsel.

Mr. EILBERG. The subcommittee will come to order.

Last year, for the first time in the history of our Nation, Congress began a comprehensive review of the Federal grand jury system and proposed reforms of that system. This subcommittee heard testimony from Attorney General Levi, Members of Congress, representatives of the American Bar Association, of the Judicial Conference, and of several grand jury reform groups. Because of the press of other legislative business, we were unfortunately unable to complete our hearings and report out legislation. However, we did prepare a comprehensive record of our proceedings, with extensive research materials, which we have made available to the Members and the public.

Since our hearings, a number of important developments have occurred. First, and most important, there is a new administration. Unlike former Attorney General Levi, Attorney General Bell, at his confirmation hearings and in private conversations with me, has indicated that he supports legislation to provide additional safeguards in the grand jury system and to eliminate abuses. He has asked for time to review specific proposals and will testify at a future hearing.

Next, at my request, the Library of Congress completed a detailed analysis of alleged grand jury abuses. This study, which I have placed in the Congressional Record, documents the need for legislation eliminating the recurrence of such abuses.[1]

A series of articles in magazines and journals have described defects in the federal grand jury system and many reputable legal and social groups have urged reforms. For example, the New York Times in an article, and the Christian Science Monitor in an editorial, stressed the need for the types of reforms this subcommittee is consid-

[1] The Library of Congress study may be found in app. 4 at p. 1438.

ering; and the Newspaper Guild and New York State Assembly have published reports suggesting our proposed reforms.[2]

Finally, the American Bar Association has moved quite close to adopting a series of grand jury standards, which parallel the suggested reforms of my bill. Although the House of Delegates has postponed final approval of these standards until this summer, so as to give the Attorney General time to review their specifics, the section on Criminal Justice has adopted them. One of our witnesses today, Richard Gerstein, State's Attorney for Dade County (Miami), Florida, chairman of the committee which proposed these standards, will fill us in on the ABA position when he arrives and it becomes his turn to testify.

As a result of our hearings, and the subsequent events I noted, I have introduced a new Grand Jury Reform bill, H.R. 94. This bill, titled the Federal Grand Jury Reform Act of 1977, is much more comprehensive than H.R. 1277, which I introduced last Congress. I am pleased to say that it has been reintroduced as H.R. 3150, with twelve cosponsors, including the distinguished ranking minority member of this subcommittee.

I have also introduced four proposed constitutional amendments, all of which would eliminate the constitutional requirement of a grand jury indictment for "infamous crimes" but all of which would allow investigative grand juries to be convened. Much has been written and said about the "rubber stamp" nature of the grand jury when it approves an indictment. All of our witnesses last session conceded that in 95 percent of the cases, the grand jury merely ratifies the decision of the Government attorney to prosecute or not prosecute. These proposed constitutional amendments can serve as a basis for testimony this session as to whether the constitutional requirement should be eliminated and, if so, should indictments be allowed by statute for certain types of cases, or be allowed by statute at the election of the prosecutor.

H.R. 94 is an attempt to provide procedural due process in investigating grand juries, while at the same time avoid delays, obstructions, or interference with the work of the grand jury. For example, counsel is provided for grand jury witnesses, but counsel may only advise his client and cannot otherwise participate. Adequate notice is to be provided to witnesses prior to their testimony, prior to a grant of immunity, and prior to a hearing for contempt for refusal to testify, but the period for notice and the preparation time can be shortened or eliminated if the Government attorney can demonstrate a need for prompter action.

H.R. 94 also seeks to insure the independence of the grand jurors. For example, grand juries are required to be fully advised of their rights and duties and can conduct an independent inquiry, with their own counsel if necessary. Requests to testify by any citizen or potential defendant and all exculpatory evidence are to be considered by the jurors.

H.R. 94 also seeks to increase judicial supervision of grand juries. Detailed standards are established for subpenaing witnesses, venue, granting immunity, and imposing jail terms or fines for contempt.

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[2] These articles may be found in app. 4 at p. 1438.

The court is to apply these standards at any hearing challenging these grand jury procedures.

H.R. 94 seeks to prevent grand jury leaks. Unauthorized disclosure of grand jury information is made a crime, ordinarily punishable by 6 months in jail and/or a $500 fine. To preserve the integrity of the grand jury, knowing and unauthorized disclosure for money or to affect legal proceedings is made a more serious offense, punishable by up to 5 years and/or a $20,000 fine.

To avoid meritless prosecutions, H.R. 94 requires that all cases be presented to the court for a preliminary examination prior to trial. Some have suggested that challenges to evidence be permitted in the grand jury. I believe this could cause delays and minitrials. My proposal, adopting the practice in most States, would allow a neutral judicial determination prior to trial of the probable cause for a charge and of the availability of admissible evidence to support such a charge.

Finally, to increase public confidence in the grand jury system, H.R. 94 would require all proceedings to be transcribed, with appropriate limitations on pretrial disclosure. In addition, it requires periodic reports by the Justice Department on grand jury activities so as to allow appropriate congressional oversight.

I would like to conclude my opening remarks by stressing that my proposals are only offered as a basis for discussion and comment. Other proposals and suggestions[1] and, of course, recommendations from the administration, judges, lawyers, and others, will also be carefully considered. With the cooperation of all concerned, we are anxious to report out comprehensive legislation this Congress and thus return the grand jury to its historic role as a protector and not an oppressor.

[Copies of H.R. 94 and H.J. Res. 59, H.J. Res. 60, H.J. Res. 61, and H.J. Res. 62; a summary of H.R. 94 and H.J. Res. 59 to 62; and a comparison of H.R. 1277, 94th Congress, and H.R. 94, 95th Congress can be found in app. 1 at p. 964.]

TESTIMONY OF PANEL CONSISTING OF LINDA BAKIEL, GRAND JURY PROJECT; PROF. JOHN ANTHONY SCOTT, LEGAL HISTORIAN, RUTGERS UNIVERSITY SCHOOL OF LAW; ROBERT L. BOROSAGE, CENTER FOR NATIONAL SECURITY STUDIES; AND DORIS PETERSON AND RHONDA COPELON, CENTER FOR CONSTITUTIONAL RIGHTS

Mr. EILBERG. We have several witnesses in this panel: Ms. Linda Bakiel, Professor John Anthony Scott, Mr. Robert L. Borosage, Ms. Doris Peterson, and Ms. Rhonda Copelon.

Ladies and gentlemen, we are delighted to have you here this morning. I have had occasion to look through your statements, and obviously a great deal of work has been done in preparing for this hearing. But we do have a time problem. Obviously time does not permit the reading of your entire statements, and I would urge that you each speak for about 10 minutes, at the end of which time, mem-

[1] Copies of H.R. 406; H.R. 1830; H.R. 2620; H.R. 3736; and H.R. 4908, and S. 1449 and comparisons to H.R. 97 can be found in the app. 1 at p. 964.

bers of the subcommittee will ask questions. No doubt we will not be able to complete all the questions because this member, at least, will be interrupted to go to the floor for the opening of the House today. We will go as long as we can and come back after that point and have more questions and answers.

We would like to place your formal statements in the record, and we will take them one at a time, and hope and expect your opening statements will be about 10 minutes in length.

So if I may, the first we'd like to have would be Mr. Robert L. Borosage of the Center for National Security Studies.

TESTIMONY OF ROBERT L. BOROSAGE, CENTER FOR NATIONAL SECURITY STUDIES

Mr. BOROSAGE. Thank you, Mr. Chairman.

I'd like to thank the chairman and committee for inviting me to testify today on the issue of Federal grand juries. Although the views I express here are purely my own, I approach the subject from the perspective of the Center for National Security Studies.

Mr. EILBERG. Mr. Borosage, unless you'd like it not to be part of the record, I'd like to have your full statement made part of the record.

Mr. BOROSAGE. I'd like that.

Mr. EILBERG. Without objection, it will be made part of the record.

[The prepared statement of Mr. Borosage follows:]

STATEMENT BY ROBERT L. BOROSAGE, DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES

I thank the Committee for inviting me to testify on the issue of the abuse of the federal grand juries. Although the views I express are purely my own, I approach the subject from the perspective of the Center for National Security Studies. The Center is a non-profit institution devoted to nonpartisan research on issues of national security. Over the past three years, a major emphasis of our work has been the intelligence agencies and their relationship to the constitutional liberties of American citizens. Members of the Center have investigated the range of intelligence agency activities and abuses. We have published three collective works on the general subject, "The CIA File" (Grossman, 1975), "The Abuses of the Intelligence Agencies" (CNSS 1975), and "The Lawless State" (Penguin, 1976). In our work, we have tried to explore the threats posed to our constitutional system by intelligence agencies engaged in political spying and disruption. It is from this perspective that I will speak to the question of grand jury abuse.

One legacy of the Nixon Administration is the transformation of the modern grand jury into an instrument of political surveillance, disruption and intimidation. The Senate and the House committees investigating the abuses of the intelligence agencies did not include the Justice Department's misuse of the grand jury in their investigation. This unfortunate omission may be attributed to the arbitrary limits imposed by scarce resources, for the modern grand jury surely falls within the mandate of those committees. The omission makes the task of this Committee both more difficult and more imperative, for it is up to this Committee to take the steps necessary to correct this deformation of the grand jury. Although designed as a "people's panel" to shield the innocent from overreaching prosecutors and unwarranted prosecutions, the grand jury has been transformed into a modern inquisitor, a major weapon in the government's arsenal of political repression, similar in function if not in form to the FBI's COINTELPRO, the IRS's politically-motivated tax audits, or the Congress' anti-subversive investigating committees.

This deformation of the grand jury is best described in relation to its lineage. One task of the modern intelligence agencies has been the collection of intelligence on suspect political groups and individuals. The collection of information creates an imperative to make use of it, and one constant theme of the intelligence apparatus has been the search for ways to harass and disrupt the activities of those groups and individuals who come under surveillance. Since World War II, the instruments of political surveillance have remained relatively constant: the informer, the wiretap and the bug, the screening of mail, of movements and of open records. Each era of political repression seems also to develop a new technique of spying and disruption, an instrument which comes to symbolize the campaign against political associations.

For example, in the anti-communist hysteria of the late forties and fifties, the entire panoply of governmental weapons was mobilized against communists and "communist sympathizers." Informers and wiretaps abounded; tax investigations were frequent; deportation proceedings, the Attorney General's list, and numerous criminal prosecutions were brought to bear against the Left.[1] But the characteristic instrument of the era was the congressional investigating committee—the House Un-American Activities Committee, the Senate Internal Security Committee and their brethren.[2] Working in close cooperation with the FBI, congressional committees were used to amass great amounts of information on suspected "subversives." The hearings often served as the basis for later prosecutions or persecutions.

More importantly, the committees themselves served as a major instrument of disruption and harassment. Witnesses were hailed from across the country to testify either in executive session or in public. Public hearings were filled with remorseful confessions, with the naming of names, or with repeated invocations of the Fifth Amendment, widely accepted as clear evidence of guilt. In the atmosphere of hostility and fear about communism, public hearings were effective in directing fierce public censure. Mere appearance before the committee could lead to dismissal from jobs, blacklisting, public condemnation, social ostracism, and threats to life and property.[3]

The demise of Joe McCarthy in the mid-fifties was the first sign of the passing heyday of the congressional committee, although major hearings would be held for another decade. As the anti-communist hysteria subsided, the committee lost its effectiveness. Public attention became increasingly difficult to capture; the media provided ever less coverage. The courts slowly began to limit the discretion of the committee.[4]

The congressional committee was soon replaced by another instrument of political disruption: the FBI's counter-intelligence program or COINTELPRO. As the Supreme Court made legal action against communists increasingly difficult and public apathy made public denunciation less effective, the FBI went underground, its own memos justifying the action because it had "become impossible to prosecute Communist Party members" and some alternative was needed to "contain the threat."[5] In 1956, the Bureau formalized its long-standing, somewhat desultory covert action program against the Communist Party into the first COINTELPRO operation. Over the next decade, COINTELPRO slowly expanded to encompass the Socialist Worker's Party by 1961, "White Hate" groups (the Klu Klux Klan, the Minutemen) in 1964, "Black Nationalists" in 1967, and the "New Left" in 1968.[6]

COINTELPRO became the characteristic intelligence operation used against protest movements in the sixties, although it was once again but one of many techniques turned on the civil rights and anti-war movements. Since both movements had substantial sympathy in the middle class and in the press, COINTELPRO was secret, a covert disruption program which "under no circumstances" was to be "made known outside of the Bureau."[7] Its tactics were often illegal

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[1] "The Blessings of Liberty" by Chafee (1956); "Senator Joe McCarthy" by Rovere (1959).
[2] "The Committee" by Walter Goodman.
[3] "Scoundrel Time" by Lillian Hellman (1976).
[4] *Watkins* v. *United States*, 354 U.S. 178 (1957). *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963).
[5] Final report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, U.S. Senate, 94th Cong., 2d sess., Intelligence Activities and the Rights of Americans, book II (hereinafter book II), p. 67.
[6] Book III, pp. 15–23.
[7] Book III, p. 64.

and certainly beyond any charter of the FBI. Activities ranged from instigating conflicts within organizations, to planting "snitch jackets" to create the impression that "leaders are informants for the Bureau," [8] to planting unfavorable press stories, to more dangerous attempts to spark inter-group violence and struggle.

COINTELPRO was illegal and secret, often even from the FBI's supposed overseers in the Justice Department. Its activities were accordingly limited by those restraints. While COINTELPRO operations seem to have been most effective against Black political groups where the most "unsavory and vicious" tactics were employed, they seem to have had little effect on the loosely-structured, transitory and open groupings of the "new left," and the middle-class anti-war movement. Thus although the program continued until exposed to the public, it was soon superceded by another weapon against dissent.

The first years of the Nixon Administration witnessed the culmination of the peace movement, which challenged the the President's war policies abroad, and grew in size and in intensity as impatience spread with the President's policy of waging war while declaring peace. The response of the Nixon Administration, as we all have now learned, included the entire range of intelligence agencies and activities but its characteristic weapon was the political grand jury.

Recourse to the grand jury was in part an expression of Nixon's frustration with established intelligence agencies, which seemed intractable. The initial attempt to gin up domestic intelligence operations was the infamous Huston Plan. The plan had two major parts, the removal of restraints on illegal surveillance techniques like mail opening and break-ins, and the creation of a committee of all the intelligence agencies to coordinate information and operations. Nixon's brief approval of the plan constituted one count in the impeachment resolutions against him, but the plan itself floundered on the unbending opposition of J. Edgar Hoover. This history has been carefully documented by the impeachment and intelligence inquiries of the House and Senate.[9] What has received far less attention and analysis is the Nixon Administration's response to the failure of the Huston Plan.

Essentially, the White House set out to create its own intelligence apparatus, and to proceed by working around Hoover if necessary. By the end of 1970, Robert Mardian was named the head of a re-vitalized Internal Security Division in the Justice Department. Mardian created two new sections—the Special Litigation Section and the Intelligence and Analysis Section, and these became the center of the new intelligence thrust. I&A was to coordinate intelligence collection and develop assessments on internal security matters. It housed the IDIU, the Interdivisional Information Unit, a computerized information network, which received information from "the FBI, and the U.S. Attorneys . . . and other intelligence gathering bodies within the Executive Branch." [10] I&A also secreted the new Inter-agency Evaluation Committee (the IEC), which included representatives from the CIA, Army counterintelligence, the FBI, and the National Security Agency, and had access to domestic intelligence from NSA, the CIA's mail-opening and CHAOS programs, and, of course, the FBI.

The Special Litigation Section, placed under the leadership of Guy Goodwin, provided the other arm of the Justice Department offensive: the political grand jury. Goodwin launched an unprecedented series of grand jury investigations. From 1970 to 1973, ISD conducted over 100 Guy Goodwin-supervised grand juries in eighty-four cities of thirty-six states, and called some 1000 to 2000 witnesses by subpoena.[11] Targets included the Black Panther Party, the Vietnam Veterans against the War, Daniel Ellsberg, the Los Angeles anti-draft movement, the Catholic Left, Mayday, the Puerto Rican independence movement, the women's movement, and Irish unification supporters. Senator Edward Kennedy summarized the situation in testimony before this subcommittee in 1973, stating:

"The use of 'political' grand juries by the present administration is unprecedented. In a sense, of course, the practice is a throwback to the worst excesses of the legislative investigating committees of the 1950's. In this respect, the Internal

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[8] Book III, p. 8.

[9] Book III, pp. 923–982. Statement of information, hearings before the Committee on the Judiciary, House of Representatives, 93d Cong., 2d sess., pursuant to H. Res. 803, Book VII, part I (hereinafter statement of information).

[10] Book II, p. 80.

[11] "A Kind of Immunity That Leads to Jail: The New Grand Jury" by Paul Cowan. New York Times magazine, Apr. 29, 1973.

Security Division represents the Second Coming of Joe McCarthy and the House Un-American Activities Committee." [12]

The abuses involved in this campaign have been amply documented by others before this committee and elsewhere, and need not be repeated here.[13] What is clear is that, although grand juries had been used for political ends before, never before had the grand jury served as the primary instrument of a coherent program of political surveillance and harassment.

The Nixon Justice Department discovered that the lawful attributes of the grand jury gave it enormous potential as an instrument for both surveillance and disruption. The independence of the "people's panel" had succumbed to prosecutorial domination long ago. As Herbert Miller, former Chief of the Justice Department's Criminal Division commented, the "grand jury pretty much acts as an appendage of the prosecutor; it is subject to the whim and will of the prosecution." [14] Given this control, the vast powers of the grand jury—its protected secrecy, its purported investigative powers and its popular legitimacy—can be twisted to serve the political purposes of the executive.

The Nixon Administration used the grand jury network as an independent source of intelligence information on political dissidents. Although it has never been documented that the Special Litigation Section fed raw data to the FBI or the IEC, it is simply inconceivable that the grand jury network was not used for that function. When asked editors of the Columbia Law Review if information collected by ISD grand juries was fed into the IDIU network, the ISD's carefully worded response stated that "no inquiries are conducted for the purpose of supplying intelligence type information to any other office of the government." (emphasis added) [15] That is as close as anyone in the Nixon Administration ever came to an open admission.

Thus, Guy Goodwin became famous for his broad inquiries about the private and political activities and associations of grand jury witnesses.[16] Moreover, the major intelligence gathering resulting from the grand juries occurred not in front of the panel, but in the hundreds of FBI interviews which could use the threat of a grand jury subpoena to "encourage" cooperation from citizens. Added together, it is clear that the grand jury network provided the Nixon Administration with a major source of intelligence information on the political activities of its political targets.

The primary utility of the grand jury was not for intelligence collection, but for the disruption and "neutralization" of political groups and activities, the same objectives as the FBI's Cointelpro. The protected secrecy of the grand jury panel invites and cloaks abuse. The prosecutor may publicly label an organization as terrorist simply by convening a grand jury, announcing its purpose, and then subpoenaing members of the organization. The protected secrecy of the proceedings can then mask the absence of any evidence to support the public association. For the political group, the grand jury becomes a secret ordeal, in which the stigma attaches when the subpoena arrives. In this, the grand jury has vast advantages over the FBI's Cointelpro, which had to rely on articles planted with sympathetic journalists to achieve a similar effect. The grand jury's secrecy can also be used to control the information available to the public about an investigation, for it virtually insures that the prosecutor will control the flow of formal announcements and informal leaks.

The extraordinary legal powers of the grand jury provides the prosecutor with a range of tactics to be used against a political target. In federal grand juries, compulsory process extends through the country; a prosecutor may subpoena an individual from anywhere in the country at anytime. The purpose of the investigation need not be explained; the relevance or the witness's testimony need not be demonstrated. In a political context this provides the license for abuse.

For example, one of the hair-brained plots hatched by G. Gordon Liddy for Nixon's re-election campaign was to kidnap likely demonstrators at the Republi-

[12] The Testimony of Senator Edward M. Kennedy, hearings on the Fort Worth Five and grand jury abuse before the House Judiciary Subcommittee No. 1, Mar. 13, 1973.
[13] Federal Grand Jury, hearings before the House Judiciary Subcommittee on Immigration, Citizenship, and International Law, 94th Cong., 2d sess.
[14] 73 Columbia Law Review 873–4 (1973).
[15] Letter to Columbia Law Review from William Olson, Assistant Attorney General from ISD, Oct. 3, 1972.
[16] Grand Jury "Horror" Stories, compiled by Barry Winograd, Mar. 15, 1973. Available from the Coalition to End Grand Jury Abuse, 105 Second St. NE., D.C. 20002.

can convention then planned for San Diego, and hold them in Mexico for the week. Attorney General John Mitchell found the suggestion unpalatable and ordered Liddy back to the drawing board.[17]

Yet when the Republican convention moved to Miami, the Justice Department used a grand jury to achieve remarkably similar effects. The Vietnam Veterans Against the War planned a series of demonstrations at the Democratic and Republican conventions in July and August. Three days prior to the Democratic convention, Guy Goodwin issued a batch of 23 subpoenas to members of the VVAW, including many of the national, regional and state organizers. They were summoned to a grand jury in Tallahassee, 500 miles from Miami on the very day their demonstration was scheduled to take place. Many were held a week, asked a few desultory questions and released. Four were jailed for up to forty days until their contempt citations were reversed. Eight were ultimately indicted for conspiracy to commit violence at the Republican convention in August. All were acquitted on all counts, but the VVAW's activities were totally disrupted, its activists removed from politics during the course of the conventions, and its members branded with a terrorist label from that time on.[18]

Perhaps most important, the Nixon Administration grasped the fearful weapon which could be fashioned from the ability to grant involuntary immunity to a witness before a grand jury. A witness stands before a grand jury alone, without notice of questions to be asked, without instruction as to his or her rights, without an attorney. If he or she invokes a Fifth Amendment right to remain silence, involuntary immunity can force the solitary figure back before the panel. Refusal to respond can then lead to imprisonment for contempt. The prosecutor can effectively offer a citizen the choice of secretly informing against his or her colleagues, or the public disgrace of incarceration for contempt of the "people's panel." In Cointelpro, the FBI planted misinformation to make associates believe that a colleague was a Bureau informer. In the grand jury, the prosecutor can seek through coercion to turn the person into an informer. If cooperation is still not forthcoming, the prosecutor may seek a contempt citation, or simply dismiss the witness from the secret proceedings, and thereby create exactly the same suspicion sought by the FBI's "snitch jacket."

Moreover, the more politically committed the witness, the less likely he or she is to cooperate with the grand jury. The grand jury subpoena becomes a predictable invitation to jail. Here the grand jury takes on the odious form of the self-contained executive court of the police state, for all of the proceedings from subpoena to imprisonment fall within the virtually complete control of the prosecutor, with the jury panel too often serving as an eerie silent witness, occasionally called on to chorus their approval of the prosecutor's whim.

In all of this, the grand jury's legitimacy only adds to its potential for political abuse. The research for a legitimate cover for political spying is a continual concern of the intelligence agencies. Political surveillance and disruption is inherently suspect in a democracy and must parade under other labels: the investigation of subversives, the prevention of terrorism, the legislative mandate of Congress. Former CIA Director William Colby now stumps the nation and the Congress calling for a CIA "compatible with the Constitution," an altogether admirable goal although the CIA has not yet found a way to achieve it without substantially amending the Constitution. Similarly, the FBI is now developing a new justification for its political spying. Terrorism and the anticipation of violence have replaced subversion and international conspiracy in the lexicon of FBI political spying.

In contrast the legitimacy of the grand jury is even today only somewhat tarnished by the excesses of the past years. When a grand jury is empanelled, few of us doubt that a proper criminal investigation is taking place. Persons summoned before the secret panel became immediately labelled with the crime purportedly under investigation. Our courts continue to defer to the fiction of a citizen's panel engaged in an independent inquest.

The Nixon grand jury offensive ended in 1973, and its architects found themselves the targets of a grand jury investigation. The demise of the Nixon Administration did not insure the end of grand jury abuse, however. The powers of the grand jury remain intact, and the potential for misuse unchecked.

Indeed, as early as the spring of 1975, there were new indications of a resurgence of political grand juries. At that time, FBI agents descended upon the

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[17] Statement of Information, Book VII, part I.
[18] "The Lawless State: The Crimes of the Intelligence Agencies" by CNSS, ch. 9, p. 216.

women's community in Lexington, Ky., and New Haven, Conn., allegedly pursuing a tip about Susan Saxe and Katherine Powers, already under indictment for bank robbery in Boston. Hundreds of people were interviewed and asked detailed personal questions. Several who refused to answer the FBI's questions, were subpoenaed and jailed for contempt.

No indictments were handed down in either community.

Under severe criticism for its improper political spying, the FBI can cloak its political surveillance in the cloth of grand jury investigations, using the grand jury as a legitimate cover for its traditional intelligence collection. In New Haven and Lexington, most of the interrogation took place outside of the grand jury. Only persons who refused to cooperate with the FBI were subpoenaed to appear before the panel. Cooperation from others was obtained by either the suggestion or direct threat of subpoena. In Detroit, U.S. Attorney Ralph Guy has admitted that FBI agents are often sent to question people with blank grand jury subpoenas in their pockets.[19]

With the Internal Security Division dismantled, the FBI may be coordinating the nationwide direction of grand jury probes, taking advantage of the increased reliance now being placed on local U.S. Attorneys. If the Bureau can coordinate national information collection through grand juries, it will be able to channel much of its political spying through the new cover.

Another instance of recent use of the grand jury for political purposes arises out of the 1976 grand juries in New York and Puerto Rico investigating "bombing and explosive charges." The grand juries were used to subpoena people identified in some manner with the Puerto Rican independence movement. Again the FBI used the occasion to interview hundreds in the Puerto Rican community about their activities and associations, threatening the recalcitrant with subpoena. The investigation initially focused on members of the Puerto Rican Socialist Party at the time of an electoral campaign in Puerto Rico in which PSP was an active participant, and during PSP organizing efforts for a July 4 demonstration in Philadelphia to call for a "Bicentennial Without Colonies." The bombings under question were "claimed" by the "Armed Forces of Puerto Rican Libration (FALN). A June 18 issue of the FBI's "Domestic Terrorist Digest" identified PSP with the FALN because PSP called for Puerto Rican independence, and "independence has been one of the demands of the [FALN]." Not surprisingly, the focus of the grand jury shifted to other Puerto Rican groups once the elections and demonstrations had passed without incident.

Grand jury investigations aimed at the American Indian Movement, individuals associated with the Chicano movement, members of the gay community, and activist lawyers indicate that a new wave of political grand juries started in 1975. Yet this charge is not any easy one to prove because of legitimacy accorded to the grand jury and its misuse may not be readily apparent. The normal standards used to differentiate between a permissible investigation and a political intelligence operation are not adequate.

For example, the stated purpose of the grand jury investigation will not be helpful, for all panels must have a criminal predicate. In most jurisdictions, a prosecutor can attest that the purpose of the panel is to investigate violation of the laws of the United States or the general conspiracy statute.

One possible test is whether a witness comes under investigation because of his or her political affiliations. A political nexus should at least provide a strong presumption of impropriety. Yet a federal court in the New York bombing grand jury accepted the propostion that mere association with the Puerto Rican Socialist Party was sufficient to justify a subpoena.[20]

The apparent scope of the grand jury investigation will not necessarily reveal the political character of a grand jury. The Senate Committee on Intelligence distinguished between legitimate information and "intelligence about the political advocacy and actions and private lives of citizens."[21] Yet a prosecutor may subpoena a witness to a grand jury panel only to make good the agents' threats to unwilling interviewees and thereby gather intelligence. A series of carefully tailored questions may then be put to the subpoenee which would not offend the most stringent relevancy test.

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[19] "The FBI Connection," Grand Jury Report, published by the Coalition to End Grand Jury Abuse (Winter 1976), p. 5.

[20] In re Torres, S.D.N.Y. No. 76 Misc. 11–188 (1976).

[21] Book II, p. 3.

The Senate Committee also looked for instances in which the information gathered "has been used to discredit the ideas advocated and to neutralize the actions of their proponents." [22] But in the grand jury context, discreditation follows from the wholly legitimized of subpena, and may be reinforced if contempt proceedings result from involuntary grants of immunity.

Occasionally, of course, current political abuse parallels the blatant excesses of Guy Goodwin era. For example, last month, a New York grand jury was informed that an alleged member of the FALN was an employee of the Hispanic Commission of the Episcopal Church. A grand jury subpoena was issued to the Bishop for:

Any and all records, documents, reports, notes, lists memoranda, statements, books, papers and things in your care, custody, possession or control which relate to, concern or reflect for the years 1970 up to and including 1977:

(1) the members of the National Commission of Hispanic Affairs [hereinafter "Commission"];

(2) financial statements of the Commission including, but not limited to statements showing expenses, salaries, income, gifts and the sources thereof;

(3) names and addresses of all personnel employed by the Commission;

(4) a list of all meetings, conferences and convocations sponsored in whole or in part by the Commission;

(5) the names and addresses of all persons attending said meetings, conferences and convocations.

The Episcopal Church voluntarily provided the requested files to the grand jury. Nothing could better illustrate how simple it is for the unrestricted powers of the grand jury to be used once again for political intelligence and harassment.

For this Congress and for this committee, the Nixon legacy is not a matter of the past, safety attributed to the isolated excesses of a discredited president. Without legislation, the grand jury will remain unchecked, and even further legitimated by a Supreme Court which continues to curtail rights rather than constraining abuses.[23] Now that the ominous potential of the political grand jury for surveillance and harassment has been demonstrated, reform is required simply to insure that the abuses do not continue.

A detailed analysis of the several reform proposals before this committee is beyond the scope of my testimony. It should be clear however that any reform program must seek to limit those powers which make the grand jury such a seductive instrument for political abuse. Some fundamental guidelines for reform are clear:

1. The grand jury must be given greater independence and be freed from the control of the prosecutor;

2. Restrictions must be placed on the use of the subpoena power, by requiring prior approval of either the grand jury or a judicial officer;

3. Perhaps most important, compulsory immunity must be terminated. No other measure will suffice to eliminate the extraordinary power which this measure affords prosecutors to harass the politically active.

Mr. BOROSAGE. The Center for National Security Studies has for the past 3 years focused on the intelligence agencies of our government and the conflict between their activities and the constitutional rights and liberties of American citizens. The members of the Center have investigated intelligence agencies and their abuses, and it is in that context and from that perspective that I'd like to make some of the comments that I have on the question of grand jury abuse.

It seems to me that the way to begin any reform program is to begin, as Confucius suggested, by calling things by their right names. I think what you have in the grand jury is an institution that was transformed by the Nixon administration into a fearful instrument for political surveillance, intimidation, and disruption. When you talk about

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[22] Book II, p. 3.

[23] *Branzburg* v. *Hayes*, 408 U.S. 669 (1972); *Kastegar* v. *U.S.*, 406 U.S. 441 (1972); *United States* v. *Dionisio*, 410 U.S. 1 (1973); *Galandro* v. *United States*, 414 U.S. 338 (1974); *United States* v. *Mandujano*, 48 L. Ed. 212 (1974).

reform of the grand jury system, you are now talking about the reform of an intelligence system which engaged in programmatic abuse over a period of years against political "dissidents" in this country.

One way to highlight that fact is to look at the lineage of political repression. We discover that the grand jury is similar in function if not in form to the FBI's Cointelpro, the IRS's politically-motivated tax audits, or the Congress anti-subversive investigating committees.

One of the tasks of intelligence agencies over time has been to gather information on suspect political groups and individuals and use that intelligence to harrass or disrupt their activities. Since World War II, the instruments of political surveillance have remained relatively constant: the informer; the wiretap and the bug; the screening of mail, of movement, and of open records. But the instruments for disruption change from period to period.

In the 1950's, for example, in the campaign against Communists and subversives and Communist sympathizers, the entire range of Government institutions turned on them and they came under Government repression. But the characteristic instrument of the period was the congressional investigating committee. Using the great public consensus against Communists and the great stigma that would attach to anyone known as a Communist or Communist sympathizer, the congressional committees led in the attempt to disrupt or harass the Communist Party in the 1950's. It is clear from the work of McCarthy and others, the committee was the major instrument of disruption and harassment in that period.

In the 1960's, the situation changed. Public attention became increasingly difficult to capture; the media provided ever less coverage, and far less stigma was attached to being a member of the Communist Party.

As a result, the FBI went underground with Cointelpro. Cointelpro eventually spread to encompass the entire range of dissent in the 1960's. And I would suggest that the characteristic method of disruption of political groups in the 1960's was the secret and covert disruption Cointelpro program of the FBI.

In the 1970's the dissidence increased. When the Nixon administration came into office, it faced the culmination of the antiwar movement, which grew as the administration continued its war in Vietnam. The administration attempted to line up each of the intelligence agencies to turn their attention to domestic dissidents, to gather intelligence on their operations, and help in the attempt to control them. In the infamous Huston plan, each of those agencies, including the foreign intelligence agencies, was brought together in an attempt to coordinate intelligence gathering. But the Huston plan floundered and was eventually abandoned on the objections of J. Edgar Hoover.

At that point the Nixon administration turned to a different track. It turned to the Internal Security Division of the Justice Department and developed the political grand jury as a systematic instrument for not only political intelligence gathering, but for political disruption.

I think this committee is well aware of the statistics of the number of grand jury probes that were launched by ISD under Guy Goodwin. From 1970 to 1973, ISD conducted over 100 Guy Goodwin-supervised grand juries in 84 cities of 36 States, and called some 1,000 to 2,000

witnesses by subpena. Targets included the Black Panther Party, the Vietnam Veterans Against the War, Daniel Ellsberg, the Los Angeles antidraft movement, the Catholic Left, Mayday, the Puerto Rican independence movement, the women's movement, and Irish unification supporters—the entire range of the peace and civil rights movement of the time.

The grand jury was used both for intelligence collection and for harassment. It is fairly clear, ISD fed information collected by the grand juries into the interdivisional information unit, the IDIU, which collected data from the FBI and other intelligence agencies and spread it out through the government. There is no absolute documentation of this practice, but we can tell from various pieces of evidence that now exist that, in fact, the IDIU did receive documents from the ISD political grand juries.

But the major portion of the intelligence gathering didn't take place within the grand jury panel. It took place around it; that is, the ability of the FBI to threaten people it was interviewing with subpena before a grand jury greatly increased its ability to gather intelligence. And so the very existence of the grand jury enabled the Government to exercise its intelligence-gathering function against political dissidents in a way that it could not before.

The second thing the grand jury was effective at doing was political disruption. It did this in a variety of different ways, and I'd like to give two or three examples.

One is the use of compulsory process, the subpena, to disrupt the activities of a political group.

For example, one of the plans that G. Gordon Liddy brought before John Mitchell in reference to the Nixon reelection campaign was a proposal: Kidnap demonstrators who might gather outside the Republican convention in San Diego, take them to Mexico, and hold them for a week. Obviously, the Attorney General found that ridiculous and told Liddy to go back to the drawing board.

Yet, some months later the same process took place with the appearance of legality through the grand jury. When the Republican convention moved to Miami, the grand jury was used to subpena members of the VVAW who had planned to set up demonstrations around those conventions, drag them off to Tallahassee, some 500 miles away, to hold them there a week or longer to testify before the grand jury and totally disrupt their plans.

What G. Gordon Liddy had suggested to the Attorney General to do illegally, the grand jury had done through its normal process.

Compulsory immunity has the same kind of effect. One of the things the FBI would do in the Cointelpro was to plant "snitch jackets" on political dissidents. A "snitch jacket" is a packet of information which would lead your colleagues to believe that you are an FBI informer. The Bureau did this with some regularity, both in black movements and with the Communist Party. Obviously, the attempt is to create suspicion in the group.

The grand jury process in its use of compulsory immunity has the same effect. If you call a witness before the grand jury, force him or her to testify in secret, overcome his objections to doing so through compulsory immunity, then the prosecutor has a whole range of things

that he may do. He may hold the witness in contempt if he continues to refuse to testify, or he may simply let the witnesses go without holding them in contempt, and suspicion attaches as to whether or not the witness did testify in secret against his colleagues.

The same effect of the "snitch jacket" is achieved through the grand jury.

So, I think that when you approach the reform of the grand jury, you must approach it as a Nixon legacy which is now bequested to us. For when the Executive claims a new set of powers or exercises a new systematic form of abuse, that will slowly become legitimated over time unless the Congress or courts act to cut it back.

And we can see from all present indications that once again some political grand juries are taking place. It is time, it seems to me, for this committee to carry through the great promise that it has already shown, and attempt to bring about the reforms that are necessary to return the grand jury to the protection of American citizens.

I am not going to get into the details of that at this point, partly because my colleagues plan to do that, but it seems to me there are obviously three principles that should be followed, and I think H.R. 94 does a great deal in each of those areas.

One is that the independence of grand jury from the prosecutor must be established and defended.

The second is that limits must be put on compulsory process in the use of the subpena. There is no question that the use of the subpena can be used to disrupt political movements in a way that democracy cannot stand.

And third, compulsory immunity must be removed from the process. The ability to force people inside a secret panel to testify under compulsion gives the prosecution a tool which greatly adds to the authority over political dissidents.

I thank you.

Mr. EILBERG. That was Robert L. Borosage, representing the Center for National Securities Study.

I appreciate very much your staying within the time limit.

Next we will have Ms. Linda Bakiel, representing the grand jury project.

TESTIMONY OF LINDA BAKIEL, GRAND JURY PROJECT

Ms. BAKIEL. Thank you.

The grand jury project is an organization that attempts to provide information to prospective grand jury witnesses and to political groups and communities about their rights. It attempts to help them protect their rights under the current laws regarding grand jury testimony.

One of our major concerns is to prevent the use of grand juries as a means of doing things, such as described by Mr. Borosage, and I would like to describe to you the ways in which present grand jury procedure has permitted the use of grand juries as an effective Cointelpro program to disrupt political activities and the lives of people who have been subpenaed.

I became concerned with the problem in the spring of 1971 where the very small neighborhood I was living in in Philadelphia was liter-

ally invaded by cars full of FBI. There were over 50 extra agents assigned to this small area. The agents were following people to work, photographing them on the street, following them in their cars, breaking into houses, and stealing people's typewriters, all in an effort to discover who had taken the documents describing the Cointelpro program, and making them public for the first time, from the FBI offices in Media, Pa.

On the heels of that FBI invasion there were a number of subpenas issued to witnesses to come to Harrisburg, Pa., and testify before a grand jury there. We never knew exactly how many subpenas were issued. Many were not served. The FBI frequently told people they had been subpenaed, that subpenas had been or were going to be issued for them in response to their refusal to cooperate. One husband and wife spent 14 months in jail in connection with that investigation.

As a result of that combined invasion by the FBI and grand jury, that small community of people virtually disintegrated. Many people moved away from the area and out of the State. Many stopped their political activity. And the political activity of a community of people that had been accustomed to relying on each other's judgment and trusting each other and planning political activities together was totally disrupted.

Between the end of 1972 and 1975, this pattern of abuse seemed to slow down considerably, and in early 1975 it regenerated in the form of FBI and grand injury investigations which were alleged to be about the search for women who were fugitives from the FBI.

The effect of these grand juries was initially to put the women's movement in considerable disarray. One of the things that the FBI was doing at that time was threatening and carrying through other threats to inform employers and parents of women who were lesbians about their sexual orientation.

Another effect was that a great concern in the women's movement then about the presence of informers, and the openness and trust which had characterized the women's movement began to dwindle. Offices of women's newspapers were vandalized and objects with considerable market value left untouched while address lists had disappeared.

The pattern followed in these investigations in Lexington and New Haven is typical of the kind of chilling effect that these investigations, which are always backed up with the grand jury subpenas, have on a political community.

For the moment, though, I'd like to focus not on a community but on a specific individual. Follow me, if you will, through an imaginative exercise, focusing on one person.

Imagine that you are a father. You have a son who is about 20 years old. Your son was a college student and a very promising sports writer. You were very proud of him. You didn't go to college. However, your son now has not had a regular job for over 2 years. His sports writing career is over. Your son is in jail. He has been accused of no crime. He never had a trial. He is in jail because the Government says that it is trying to find out whether Patricia Hearst was in Pennsylvania in the summer of 1974.

You see Patricia Hearst interviewed on television. She is at home with her parents. She has had a trial. She has been convicted of armed robbery, and she is at home with her parents. She is giving interviews on national television. Your son is in jail. You are angry.

In March of 1975, when Jay Weiner was a college student, agents of the FBI threatened him with their guns, interrogated him in a sealed-off building in Oberlin, Ohio, through the early morning hours without allowing him a phone call or attorney, and then served him with a subpena commanding him to appear before a grand jury in Pennsylvania less than 36 hours later.

He went to Harrisburg, found an attorney, and testified. At the end of his testimony, he was threatened with prosecution because one of the U.S. attorneys didn't believe that his testimony was consistent with what he told the FBI.

As the father of this son, you feel like you are waking from a nightmare. You believe it's all over. You are wrong.

This was only the first of four subpenas over a period of 2 years commanding Jay Weiner to appear and give testimony in Harrisburg, Pa., in California, and two again in Scranton.

It is 2 years later. Your son has been in jail since November 30, 1976. He is imprisoned ostensibly for refusing to answer questions about Phillip Shinnick, a man who was jailed with him and then released when the Government discovered it didn't need this evidence. Your son is in jail because the U.S. attorney has said he is investigating the possibility that somebody harbored Patricia Hearst in Pennsylvania almost 3 years ago, and he thinks your son can aid in this investigation.

At the contempt hearing for your son, the FBI agent testified that there were 58 field officers involved in this investigation, and you read in the newspapers that over 27,000 people were questioned in San Francisco alone about the missing heiress. You know her mother testified before a Harrisburg grand jury and that in her own trial Patricia Hearst gave enough evidence to issue indictments for harboring. You were angry when you heard the FBI threatened Jay Weiner with guns, and you were angry when they asked you to help get inside his head, but you thought they would go away. You thought it would be over soon. Now you are beginning to think it will never be over because it isn't just happening to your son. The nightmare about midnight interrogations, secret police flashing guns and bright lights and jailing people when they don't hear what they want, putting people in cold storage for claiming the right to remain silent, for refusing to talk to prosecutors in secret about their friends and associates—this nightmare is called the grand jury investigation. You are afraid it will never go away.

This single example is a capsule version of what kind of impact grand jury subpenas and coerced immunity have on the lives of individuals. It is no worse than what happens to other grand jury witnesses. It is one case out of many. It doesn't illustrate all of the abuses, but I think it shows clearly the effect of the power of the U.S. attorney in cooperation with the FBI to issue grand jury subpenas to a witness, to hold witnesses in contempt for not giving information to the grand jury clearly doesn't need that information.

I think Doris Peterson from the Center for Constitutional Rights will talk about the kinds of legal protections we think are necessary to correct this abuse. I would just focus your attention on two major aspects.

One is the abuse of the subpena power, and I talk about abuse because I think the mere issuance of a subpena has a very strong negative effect on the person subpenaed and the political group, if there is one.

The subpena carries with it a considerable stigma. The average lay person has no understanding of the function of the grand jury and equates a subpena with a warrant, and involvement with any phase of the criminal justice system as quilt. The subpena, therefore, effectively accomplishes one of the purposes of the Cointelpro programs. It disrupts efforts, takes people's efforts away from legitimate political activities and brings them into defending themselves against the grand jury system. It discredits either the organization or the individual and also chills other people from associating with that group.

As a result of subpenas issued in Hartford and New Haven, Conn., the women's movement in Hartford virtually disintegrated. The women's center closed down and never reopened. Many people moved away. One of the grand jury witnesses who was merely subpenaed but never called reported that many of her best friends refused to talk to her because they were afraid if they were seen with her the FBI would come after them.

There is a further stigma once the witness goes into the grand jury room, and you don't need to be told about the effect of that stigma.

In addition, there is the stigma of coerced immunity, forcing people to choose between going to jail or giving testimony in secret about associates, and this creates an aura of being a turncoat or informer.

Finally, there is the danger of being prosecuted for perjury or false statements on inadvertent misstatements or rather minimal inconsistencies between what someone said under great duress to the FBI and what someone says in the presence of the grand jury.

Finally, I think that one of the conditions that has to be addressed by any kind of grand jury reform is a recognition of the kind of coercion that is involved in appearing alone before a large body of strangers, before a prosecutor, without an attorney, and being told that as a result of that appearance you must either answer all the questions that are put to you or face the substantial risk of going to jail. Leaving the grand jury room to consult with an attorney is some relief from that, but very often adverse comments are made about leaving the room and coming back, and time limitations are put on the amount of time people can spend out of the room.

Doris Peterson will talk about the ways of remedying these abuses.

Mr. EILBERG. Thank you very much, Ms. Backiel.

I assume you have no objection to your full statement being made a part of the record?

Ms. BAKIEL. That is right.

Mr. EILBERG. Without objection, it will be made a part of the record. And I might add that if any of the witnesses desire after the hearing to supplement their statements, you are encouraged to do so as we consider this statement further.

[The prepared statement of Ms. Bakiel follows:]

STATEMENT OF THE GRAND JURY PROJECT ON GRAND JURY REFORM ACT OF 1977

Originally organized to facilitate communication among communities of women undergoing intensive surveillance, questioning and other forms of harassment by the FBI, the Grand Jury Project quickly became an information center for a variety of political groups which attracted the attention and animosity of the FBI. The Project now provides general information and educational materials about the rights of grand jury witnesses and grand jurors, and maintains contacts with those doing legal and educational work in relation to grand juries affecting political groups around the country.

In the past 5 years over 150 witnesses have refused to cooperate with grand juries being used to gather political intelligence, to disrupt communities, to harass activities, or for other improper purposes. Not all of these witnesses have gone to jail, but many have spent months and some well over a year waiting for a grand jury term to expire so they can go free. They have chosen this course because they believe that the power of the FBI, working closely with complaint prosecutors, threatens us all with a spectre against which Supreme Court Justice Hugo Black warned in 1957:

"Secret inquisitions are dangerous things justly feared by free men [and women] everywhere. The are often the beginning of tyranny as well as indispensable instrument for its survival. Modern as well as ancient history bears witness that both innocent and guilty have been seized by officers of the state and whisked away for secret interrogation."

In recent years we have grown distressingly familiar with this phenomenon. Grand juries have been diverted from their historic constitutional mission, and have become convenient tools for a Federal Bureau of Investigation frustrated, and at times outraged at its own inability to comprehend those who are radically dissatisfied with the present distribution of the economic wealth and political power in this country. Increasingly, we have seen grand jury subpoenas arrive on the heels of a refusal to talk with the FBI and increasingly find subpoenas served by the FBI, with judicial approval.

Following the alleged discovery of a number of explosives in an apartment in the Puerto Rican section of Chicago recently, fifty extra agents were reportedly assigned there. People active in the Puerto Rican independence movement were followed, and FBI vans were parked outside their homes and certain churches for days (and nights) on end. Some activists received no mail for an entire month. One woman who lives in the area explained that local police and FBI agents were randomly stopping cars and looking for a man they described as a "fugitive." She asked not to be identified in the national press for fear she would be interviewed or subpoenaed. "It's like a dragnet," she commented. Of the eight people subpoenaed from Chicago to the grand jury there, all but one had already refused to talk with the FBI. An agent served one subpoena while pointing a gun at the prospective witness saying, "Now you'll have to talk."

Secret interrogations and dangerous things. In March, 1975, twenty-year old Jay Weiner was visiting friends at the Oberlin College campus. As he pulled out of a college parking lot late one night, his car was cut off by two others. Three men lept from the other cars and prevented him from moving. One jumped into his car and commanded him to drive to the college security office. Once Jay and the agents were inside the building, it was locked so that none but the FBI agents could enter or leave the building. They questioned Jay for several hours about his relation to former Oberlin athletic coach Jack Scott, among others, and finally served him a subpoena returnable in Harrisburg, Pa. the next morning. At the beginning of the "interview" one of the agents removed his jacket and, pointing to his shoulder holster, asked, "Does this intimidate you, Jay?

The moral: tyranny does not being in the grand jury room. It is futile to attempt meaningful grand jury reform without first considering the relation between abuses of power by the FBI and grand jury abuse. The Grand Jury Project has found that one of the most serious abuses of the grand jury system today is as a coercive adjunct to the FBI. When the investigator can get no more information voluntarily, he often serves a subpoena. In addition to perverting the original purpose of the grand jury, this practice enables an executive investigatory body to exercise considerably more power over the lives of individuals and the fate of communities than be tolerated in a democracy.

In the case of Jack and Micki Magee Scott, Judge R. Dixon Herman of the Middle District of Pennsylvania acknowledged that the witnesses' affidavits "allege outright police state tactics on the part of the FBI, which, if believed, would be reprehensible, and far beyond proper investigation." The government made no effort to deny the truth of those allegations, but Judge Herman felt that it was not proper to quash subpoenas flowing from such "police state tactics" because those tactics were attributable to the FBI and not the grand jury itself. "Further," he wrote:

"if the alleged FBI misconduct was attributable to the grand jury, and an evidentiary hearing held, the court would find itself in the position of passing judgment on the prudence or imprudence of individual FBI agents' investigative techniques."

In this case, and in the case of Jay Weiner, the district judges refused to find that quashal of the subpoenas was an appropriate remedy to "police state tactics." The witnesses were instead reminded of their rights to sue the individual agents for civil damages.

In other words, given the present state of the law, judges believe that witnesses may be compelled to testify in the face of abuse of their rights amounting to police state tactics, as long as the harassment is not the "sole or dominant purpose" of the subpoena. A prosecutor's representation—often in camera and ex parte—of some colorable relation to an ongoing investigation is all that is required to defeat this claim.

Despite consistent Congressional refusal to authorize the FBI to subpoena witnesses and material, it is only a fiction that they do not presently enjoy that power. Witnesses are frequently questioned by FBI agents carrying subpoenas to be served should the interview not produce all the information desired or anticipated. Often, U.S. Attorneys learn from agents of the FBI the names of persons to be subpoenaed and even more often, grand jurors have not even heard the name of a witness whose testimony is characterized by the prosecutor as "essential to their investigation."

As long as there are no requirements of probable cause, no need to seek the approval of a neutral and detached magistrate, the subpoena power will effectively be in the hands of investigators who do not believe citizens have a right to remain silent. And as long as there is coerced immunity, the FBI effectively has the power to nullify that right.

Individuals have many reasons for declining to be interviewed by an investigator, including the desire to preserve what has been referred to as "the ordinariness" of everyday life. Indeed, under the Constitution no reason at all is good enough. The disruption of ordinary life is often a real and long-lasting consequence of being in the path of an FBI/grand jury investigation.

In Lexington, Kentucky many of those who ultimately cooperated with the investigation allegedly concerned with the possibility that Susan Saxe and Kathryn Power had been harbored as fugitives in the area only because the FBI threatened to reveal their homosexuality to parents or employers. Those who withstood these threats often received grand jury subpoenas after information about their personal lives had been revealed in ways calculated to damage them.

In Chicago recently the FBI tried to scapegoat political activists for a rash of serious fires which took 26 lives in the Puerto Rican section of town. The fires were all accidental; if they had a single "cause" it was economic discrimination, inadequate housing and negligent enforcement of building codes and fire regulations. The FBI however, suggested that "mad Puerto Rican bombers" were responsible for the deaths, and that "arson" was the subject of the grand jury investigation to which numerous Puerto Rican activists were subpoenaed.

In Seattle, Washington four out of seven people subpoenaed to a grand jury were single mothers faced with the anxiety of separation from their young children and the threat of losing custody should they resist and be held in contempt. A similar pattern of targeting parents of young children was also apparent in native American communities.

The danger illustrated by these examples is not merely the disruption of individual lives, but the creation of a national network of unpaid informers—people who are so terrified by the FBI and the threat of jail for contempt that they are willing to incriminate themselves, their friends, loved ones and political associates. The result of this is the disruption of an already tattered social fabric stitched together by fragile relations of trust and confidentiality, expectations of privacy and "ordinariness"—defined as freedom from governmental intrusions into one's every day life.

INDICTING OR INVESTIGATING GRAND JURIES?

There are several specific proposals in the Grand Jury Reform Act now pending before this Committee upon which the Grand Jury Project would like to make specific comments and recommendations, based upon our familiarity with the experiences of grand jury witnesses. With respect to other proposals not directly addressed by us, we endorse and adopt the recommendations made by the Center for Constitutional Rights.

The Grand Jury Reform Act under consideration contains three separate proposals for eliminating the constitutional requirement of an indicting grand jury while permitting the use of grand juries as investigative bodies. The Grand Jury Project believes that grand juries as they are presently constituted and conducted rarely offer any protection to those accused of crime, and often serve as little more than a legal excuse to harass and intimidate people against whom prosecutors could not, even under the present system, obtain an indictment. We therefore have little hope that the present grand jury system will ever be able to fulfill its historic role as a shield for the accused.

We do, however, support the goals of that historic mission—the protection of the accused from politically motivated prosecution and the protection of citizens from crimes by government officials. It is our position that no one should be accused of a crime and forced to defend against the accusation upon the recommendation of a prosecutor alone. We therefore support the principle that all accusations should be screened by a truly independent lay body whose composition accurately reflects the numbers of women, young, working and poor people, and members of ethnic and racial minorities in our society.

Substantial reform in almost every area of grand jury practice could make the constitutional requirement of indictment meaningful. On the other hand, we oppose the proposal to legitimize the investigative function of the grand jury because we believe that it is in the exercise of that function that most of the abuses are committed, and because it would, as a practical matter, extend the investigative powers and techniques of the prosecutor far beyond those permitted by the Constitution and pervert the historic function of the grand jury.

RECALCITRANT WITNESSES

The proposals as to recalcitrant witnesses contained in the bill under consideration by this Committee include reforms in several major areas including:

guaranteeing the right to counsel, appointed if necessary, at every stage of the grand jury proceedings;
providing notice and time to prepare for each stage;
replacing "use" with "transactional" immunity;
reducing the permissible length of confinement;
providing for confinement in a suitable federal institution;
prohibiting reiterative contempt;
requiring the granting of a stay or bail pending appeal; and
making violation of wiretap statutes a defense to contempt.

The Grand Jury Project supports these general proposals for reform, and would like to make specific recommendations as to several, and document the need for extending the spirit of these proposals.

1. Right to representation and adequate notice

On Friday, January 7, 1977, Maria Cueto, Director of the National Commission on Hispanic Affairs, was served with a subpeona to appear before a federal grand jury the following Monday and 10:00 AM. Ms. Cueto called the U.S. Attorney's office and requested her appearance be postponed as she anticipated trouble securing an attorney over the weekend. She was told to appear as scheduled and see about having the matter adjourned at that time. She appeared as scheduled, without an attorney, and was ordered into the grand jury room. Not wishing to take any actions which might affect her legal status without first consulting with an attorney, she declined to take the oath. She was shortly held in contempt for persisting in this refusal and committed to Metropolitan Correctional Center. Her release was not secured until the following day, by which time her family and friends had found an attorney who entered a stipulation to the effect that the witness would be sworn without waiving any rights to object to the subpoena.

This history illustrates the necessity of prohibiting the practice of compelling a witness to appear before a grand jury without: (1) prior notice of the right

to legal assistance; (2) meaningful opportunity to consult with counsel, including time to file motions to quash if requested; and (3) signed formal waiver of counsel if none is desired.

The present proposal for 72 hours notice does not allow sufficient time to permit a witness to consult with counsel and file motions in many circumstances. Ms. Cueto was unable to secure counsel given almost 72 hours in New York City because her subpoena was served on a Friday and because of her lack of previous encounters with the criminal justice system. Consider the problem of 20 native American activists and supporters subpoenaed to Norman, Oklahoma from South Dakota, New Mexico, Wisconsin, Colorado and elsewhere. 72 hours was hardly adequate time to locate attorneys to represent the witnesses in Oklahoma, much less to interview them, consult with others and prepare responses to the subpoenas. We believe that the right to counsel cannot be adequately protected unless a grand jury witness is guaranteed at least 14 days notice from the time the subpoena is served until the date of the initial grand jury appearance.

We also oppose any provision which would permit the government to shorten the amount of time available to a witness to obtain counsel or prepare for any stage of the grand jury proceedings. Our experience has demonstrated that the urgency of the need for a witnesses' testimony or the danger of her disappearance is often greatly exaggerated, if not substantially misrepresented by the government.

JoAnna LeDeaux, a legal worker who studied and interpreted treaties between the U.S. and various native tribes, lived on the Rosebud reservation at the time of the Wounded Knee occupation. She was near the scene at the time of a shooting incident which left two FBI agents and one native American youth dead. Several months after the incident FBI agents with sniper rifles stationed themselves around the house where JoAnna lived with her parents and kept a vigil through the night. Early the next morning they broke into the house and dragged the young woman downtown to the federal courthouse in her nightgown. They had a material witness warrant to bring her before a grand jury, and insisted that the danger she would flee from the midst of these heavily armed men was such that she could not be given the time to change into street clothes. The affidavits on the basis of which the material witness warrant was obtained contained statements known by the FBI agents to be false. We have no reason to trust that such tactics would not be to circumvent the requirement of notice and opportunity to consult with counsel, were a specific exception written into the reform bill.

2. No reiterative contempt

JoAnna LeDeaux was eventually imprisoned for refusing to testify before the grand jury. Also imprisoned at the same time were Angie and Ivis Longvisitor, the parents of three small children. Angie and Ivis eventually agreed to testify because there was no one to care for their children while they were in jail. Over a year later Angie was arrested by six heavily armed FBI agents who broke into her sister's bedroom while she slept. Once again, they were executing a "material witness" warrant for a trial scheduled for six weeks hence. She was held in jail some time pending the reduction in bail set for her, and, should she refuse to testify at the upcoming trial of Leonard Peltier, she will have been jailed three times as a witness to the same event. We therefore believe that the proposed ban on reiterative contempt must be written into any comprehensive grand jury reform act.

3. "Suitable" Federal correctional institution

Jill Raymond was held in Kentucky county jails for fourteen months for her refusal to testify before a federal grand jury in Lexington. Often she was watched by male guards, had no privacy, no ventilation, and seriously inadequate nutrition. We believe that if witnesses are to be confined pursuant to the order of a federal district judge, they should be confined in federal facilities unless they request otherwise. However, it should be remembered that the vast majority of those confined as recalcitrant witnesses in cases involving political activists in recent years have been women. The very small number of federal facilities for women renders the "50 mile" provision proposed in the reform bill practically meaningless for most of these witnesses. When JoAnna LeDeaux requested a transfer in the hope of avoiding severe malnutrition during pregnancy she was shipped 1,500 miles from her family, to the federal correctional facility for women at Terminal Island, California.

Since the purpose of confinement for civil contempt is not punishment, but coercion, we believe reform legislation must specify that incarceration of witnesses for civil contempt must be at the nearest suitable federal facility, and if there is none within 50 miles of the witnesses' home, then at the nearest minimum security facility for prisoners serving comparable sentences.

4. Maximum period of confinement

We support the reduction of the amount of time to be spent in custody by a recalcitrant witness. Experience demonstrates, however, that no coercive purpose is served by incarceration beyond 30 days. Most witnesses who are eventually amenable to coercion testify within a week or two of incarceration. We would therefore further reduce the maximum period of confinement to 30 days.

5. Stay or bail

In light of the fact that the right to be free on bail pending appeal belongs to those convicted of serious crimes, we believe it is essential to explicitly guarantee the right of witnesses adjudged in civil contempt the right to a stay or bail until the resolution of all pending appeals. It is unlikely that incarceration will have any coercive effect upon a recalcitrant witness until her or his constitutional claims are all finally resolved.

IMMUNITY: TRANSACTIONAL OR USE?

The present form of coerced immunity which may be imposed in lieu of a person's unqualified right to silence is a cruel hoax offering no real protection at all. Under the present "use" immunity statute, "A" can be compelled to give information about "B", and "B" against "A". Each may then be prosecuted for his or her part in the transaction; there is no bar on the use of the fruits of the compelled testimony against the other participants. A return to transactional immunity would at least truly immunize a witness from subsequent prosecution for the same transaction.

However, we believe that even transactional immunity is entirely too small a fee to pay for an individual's giving up the right to be free from compulsory self-incrimination, unreasonable searches and seizures and invasions of the right to be let alone. Prior to 1954 this nation did not know coerced immunity; the exchange of coerced use immunity for Fifth Amendment rights was not ratified until 1973. Since that time it has been widely used not against organized crime, but against men and women whose sensitivity and responsibility to others has led them to actively oppose injustice and oppression in its many forms. When used against those reputed to be involved in "organized crime," coerced immunity has proved notoriously ineffective. When used against political activists, it has been successful only in creating more knowledgeable and embittered critics of the criminal justice and prison systems.

We believe that no coerced immunity can adequately replace an individual's Fifth Amendment rights. We believe that if an individual is not willing to accept voluntary immunity, she should be allowed to assert the Fifth Amendment and be left alone. However, if some of you believe that coerced immunity is necessary to abolish government corruption or organized crime, we would like to suggest a systematic study of its efficacy in those areas. If after such a study coerced immunity still appears advisable, we would urge the adoption of the following minimal protections for recalcitrant witnesses:

(1) Transactional, not use immunity;
(2) To be imposed only for specific, enumerated crimes relating to "organized crime" and government corruption;
(3) Strict procedural safeguards and articulated standards regulating the impostion of immunity;
(4) Judicial supervision of the immunization process; and
(5) Judicial review of the grant of immunity, including review of the asserted nexus between the witness and the subject of the investigation.

COERCED IMMUNITY: INCOMPATIBLE WITH A FREE SOCIETY

A. The effects of a subpoena

The issue of of coerced immunity, along with abuse of the subpoena power, present the major opportunities for abuse of the grand jury system and therefore, we believe, deserve consideration in some detail. Coerced immunity forces the witness to choose between becoming an informer or going to jail. It should

not be imposed on the mere word of the prosecutor that the testimony sought is necessary and in the public interest. The witness should at least be given a hearing and an opportunity to contest the factual basis of the determination that the testimony is necessary and in the public interest. The burden at this hearing must be on the government to demonstrate (1) a substantial nexus between this witness and specific information related to a matter presently pending before a grand jury considering possible violations of specific criminal statutes within the district, and (2) the unavailability of other more appropriate sources for this information.

We also strongly urge that no witness be called to appear before a grand jury without immunity once the prosecutor has been notified in writing that the witness intends to invoke the Fifth Amendment. This protection, together with stricter standards for and judical review of the issuance of subpoenas is necessary because even an appearance behind the closed doors of the grand jury room may give rise to fears and suspicions about the witness. This danger was recognized in the case of Marti Copleman, an attorney participating in the Wounded Knee Legal Defense/Offense Committee.

The Committee was organized to help native Americans defend against myriad criminal charges and grand jury subpoenas arising out of the occupation of Wounded Knee, and to assist them in vindicating their civil rights. Ms. Copleman was subpeonaed to appear before a grand jury to answer questions about a client of hers who failed to appear as scheduled for a criminal trial. Although the questions proposed were not strictly within the attorney-client privilege, the district court recognized the danger of an appearance of betrayal and suggested alternatives to a secret grand jury appearance.

Another frequent result of a witness' receiving a subpoena and/or testifying is what is becoming recognized as "conviction by subpoena." Political careers, including that of former Michigan Supreme Court Justice Swainson, have been broken by the public's learning of the issuance of a subpoena or the giving of testimony to a grand jury. The real problem is not the violation of grand jury secrecy, but the bad faith issuance of the subpoena and the implications of testifying in secret or refusing to do so. In Mr. Swainson's case the subpoena led to widespread media predictions that the former Justice would be indicted. He was—but the only charge that seemed to a jury to have any substance was a perjury charge based on his grand jury testimony.

Towards the other end of a political spectrum, one woman subpoenaed to a Seattle grand jury charged that the prosecutor wanted to make it apparent that people working to end grand jury abuse were guilty of something. Because of the District Attorney's issuing the subpoenas and making public statements linking the subpoenaees to a bombing, the subpoenaees found themselves "in the position of being on public trial without ever having been charged with a crime. We have been branded in the public mind," she wrote, "and now have to spend a lot of energy in trying to refute a charge that should never have been made," she added:

"I believe that this net of slander was deliberate. I believe that the government knew we were concerned with grand jury abuse, and that we would be unwilling to cooperate with them. I believe that this sort of thing was designed to cast suspicion on us so that our anger at our treatment, and our denunciation of their actions, and their repeated abuse of the grand jury process, would not appear as the acts of principle that they truly are, but rather the acts of guilty people covering up."

Confidentiality and constitutional rights must be protected in the first instance, by requirements of prior judicial approval for the issuance of subpoenas. Once a witness has established by uncontroverted affidavits or at an evidentiary hearing that confidential relationships or constitutional rights have been invaded, we believe the government should show a compelling necessity for the witness' appearance. Otherwise the grand jury process will remain a convenient tool for harassment, even if the subpoena is ultimately unenforceable. One attorney, whose subpoena was quashed as an abuse of process, described the human cost of defending against such a subpoena:

"This subpoena took a tremendous amount of time and energy and expense for me . . . not only in hiring an attorney but also doing some of the research myself, trying to go out and organize support and generally making me so worried about the possibility of going to jail that I was unable to deal with the other cases I had, There's a tremendous amount of fear and anxiety that attaches to a subpoena, even though I knew it was off the wall."

Needless to say, this attorney who was experienced at representing others in grand jury proceedings, was much better prepared for the experience than most lay witnesses.

B. The effects of coerced immunity

Brenda Carter, subpoenaed to a grand jury in Seattle, explained to the grand jurors:

"I have the choice of giving information about my personal friends and political associations—of being an informer—or of going to prison.

"To deprive me of the same protections guaranteed any other citizen is to continue to move in the direction of suppression of all people working for change in this country and finally a police state. I ask each of you members of the grand jury, do you believe my rights and the rights of others can be eroded away in this fashion and have no effect on your own rights?"

We would ask you, members of Congress, to do what Brenda Carter asked of the Seattle grand jurors:

"Try to imagine what it feels like to have the police going through your garbage can, searching your house, forcing you to testify or go to jail, all in an effort to get information about the people you love and work with."

Brenda Carter's subpoena was dropped, at least in part because those grand jurors did understand that we cannot have a nation which is free for some and acts like a police state with respect to others. Coerced immunity is one of the primary reasons that the way grand juries are abused today threatens all of us with the prospect of living in a police state in the near future.

"We want to get into Jay's head," FBI agents told Jay Weiner's father. An inquisitorial power, interfering in intimate and confidential relations, the disruption of communities based on trust and the loss of individual self-respect resulting from the violation of these human rights are the hallmarks of a police state. Over and over the "recalcitrant" witnesses make it clear that they are willing to go to jail, not to protect themselves or others from criminal prosecutions, but to maintain their individual self-respect and collective trust. These values are often maintained and reaffirmed in direct opposition to attempts by agents of the government to subvert them and disrupt almost every human relationship considered fundamental or sacred.

The brother of one witness, now in jail, relates that his parents, initially skeptical of the charges of bad faith and misconduct by the FBI became bitter as they watched the judicial machinery grind on towards the jailing of their son, impervious to the documented abuses of power by the FBI. One night, searching for some diversion on television, the mother tuned in on a show, watched it for several minutes until she recognized the FBI show. She walked up to the television set and turned it off in disgust saying, "I don't want to watch that. That is the enemy."

By and large, the FBI's efforts to use parents to "get inside" their children's heads have failed. Nancy Compez, mother of a Seattle prison activist, was subpenaed to a grand jury in Portland after she refused to talk with the FBI about her credit card account. "I knew of no problem with this account," she said, "and since the reputation and credibility of the FBI have been questionable in the past few years, I did not wish to talk to them.

"I guess they figure I'm a straight middle class person who's going to go in and talk . . . I haven't done anything, but I suppose I could go to jail because I won't talk about my daughter."

When she appeared before the grand jury, there were no questions about the credit card, but two hours of interrogation regarding her daughter. "If this is why I am here, I am shocked that a judicial body such as the grand jury would expect me to violate the very profound and sacred trust relationship between parent and child," she told the grand jurors. Both Ms. Coupez' former husband and 22 year old son were also questioned by the FBI. "In a time when the family structure is disintegrating anyway, here's the grand jury contributing to it, she observed." Coerced immunity, with the threat of almost certain incarceration for refusal to inform on loved ones, places a heavy strain on that structure. And although parents are not routinely called to testify about their children before grand juries, the practice seems to be gaining in popularity with U.S. Attorneys and agents of the FBI.

Invasions of family relationships not specifically protected by any Constitutional guarantee or other privilege is just one common example of abuses of the grand jury process not yet addressed in any specific reform proposals. The Grand Jury Project would support and extend the proposal contained in the Grand

Jury Reform Act presently under consideration that violation of the wiretap statute be recognized as a defense in a contempt proceeding. We believe that in addition to this defense, any grand jury reform must, to be effective, also contain provisions recognizing violation of other Constitutional rights and confidential relationships as just cause for refusal to testify. This position is based on the large number of cases in which the government has been allowed to benefit from flagrant violations of a witnesses' rights. Violations of First, Fourth and Sixth Amendment rights have raised particularly serious, recurring problems in the grand jury context, and will be considered in some detail.

First amendment violations.—FBI official Edward S. Miller justified his request for increased authority to conduct domestic security wiretaps against "people who are talking about revolution" with the observation that it was impossible to catch these thought criminals by ordinary investigative means. Their conversations tended to be "abstract, with no suggestion that a particular crime has or will take place." Certain *ideas* are dangerous, the argument goes; in order to avert disaster we need to monitor what people think. Such was the apparent thought behind subpoenas issued to the director of radio station KPFA for tapes of poetry read by women of the Weather Underground. This subpoena was quashed for the government's failure to show "that there is a substantial possibility that the tape will lead to information on criminal activities." The purpose of the subpoena was, in all likelihood, not to obtain information on criminal activities, but to prevent the poetry from being read on the air.

Another giant step toward 1984 was taken when grand jury subpoenas were issued for "all motion picture film, including but not limited to all negatives, working copies and prints and all sound tracks and sound recordings made in connection with such motion pictures concerning a group known as the "Weather Underground." The three subpoenaed film makers were in the process of editing the film at the time the subpoenas were served. The film makers, who resisted the subpoena, pointed out that if they were allowed to finish the movie, the FBI was welcome to see it. Once again, the purpose of the subpoena was not to aid a grand jury considering whether to issue indictments, but to prevent the expression of views considered subversive by agents of the FBI. The subpoenas were dropped in the face of widespread protest from film makers and others who perceived it as an attack on the First Amendment harking back to the early 1950's.

Freedom of expression through public media is not the only First Amendment freedom infringed by grand jury subpoenas. Rights of political association are particularly vulnerable, and have frequently been the object of grand jury attacks. The Puerto Rican Socialist Party was cast under suspicion by the issuance of grand jury subpoenas to its members during the first electoral campaign in which it had entered a candidate in Puerto Rico. The entire Puerto Rican independence movement has been tainted by repeated subpoenas to members of various legitimate political and even religious organizations in connection with bombings that have gone unsolved for years.

Recently labor unions have also been targeted for disruption by grand jury subpoenas, often in the midst of a strike when solidarity is especially important and resources usually strained. Most recently members of the Washington Post Pressman's Union, the United Transportation Union, United Electrical Workers, and a local union at a shrimp processing plant in Tampa have been commanded to testify during an ongoing strike.

Perhaps the most serious negative effect of subpoenas which interfere with First Amendment rights is the effect they can have on the internal relationships between members of the group. As with family relationships, there is no specific Constitutional protection against the effects of coerced immunity on political associations. Prosecutors are well aware of the disruption and chaos which can result from the discovery of an informer—even an unwilling one—in a group advocating controversial positions.

Women subpoenaed to a grand jury in New Haven, Connecticut in the spring of 1975 while agents of the FBI were combing the country for traces of Susan Saxe and Kathryn Power, explained:

"We have seen how the government, acting through the FBI and grand juries, has used inquiries such as this to harass and gather information on political leftists and feminists. . . Any person who talks with FBI agents or to grand juries runs the risk of having what they say used in some twisted way against them or their friends. . . . This is a total invasion of privacy and should not be

tolerated. These tactics have also been used by the government to create distrust, confusion and disunity among people and break up communities of women and other political groups."

Of four women subpoenaed in New Haven, one decided, for personal reasons, that she could not face the prospect of going to jail and reluctantly testified. Although the three resolutely "recalcitrant" witnesses wanted to extend their personal sympathy and support to her, they recoghized that her decision was only strengthening the government's position wth respect to their testimony. If she had given in to the pressure, a little more might convince the others to testify. The women's community in New Haven was confused and at times sharply divided by the personal and political implications of the choices forced upon these women.

As a result of this FBI/grand jury investigation the women's movement in Hartford, where the investigation began, virtually came to a halt. Many women moved away. The local women's center, which had been a clearing house of information and activities, was closed and never reopened. Women were afraid to conduct meetings or talk in public. In the course of its investigation the FBI had asked questions about the associations and activities of women in consciousness raising and other groups in which one of the ground rules was personal candor and honesty. These groups were premised on the understanding that the experiences, feelings and attitudes revealed there would never be exposed to "outsiders." The level of trust and expectation of privacy was at least as great as between therapist and client or priest and penitent. Yet women were forced to reveal facts derived from their experiences in these groups under threat of going to jail. One Hartford woman who was subpoenaed four times and interrogated by the U.S. Attorney but never brought before the grand jury stated simply, "My life was totally disrupted for an entire year."

The principle of "non-collaboration" invoked by the witnesses in New Haven and elsewhere is premised on an understanding of personal and moral obligations which are the foundation for a humane society. The New Haven witnesses explained:

"Our refusal to speak with FBI agents was based on a number of reasons. We have an absolute moral belief that the investigation the government is involved in will violate our basic constitutional and human rights. We believe that the right to privacy and confidentiality in human relationships goes beyond those traditiaonally recognized confidences such as attorney-client, spouse-spouse, doctor-patient. We believe that every person has the right to to keep her affairs private without intervention by government agents."

In order to protect those principles and preserve those human rights and commitments intact, two women went to jail for 8 months in Connecticut and one for fourteen months in Kentucky. Three witnesses are presently in jail for contempt of grand juries whose terms will not expire until July 1977 and April 1978, respectively.

The trend which is apparent from a review of recent cases is not toward extending the protections of the Constitution and various testimonial privileges so as to protect the principles invoked by these witnesses, but rather, to sharply limit the application of already-established protections. This trend is particularly noticeable and dangerous in increasing use of the grand jury to limit the Fourth and Sixth Amendment rights of witnesses.

Fourth amendment violations—The power of prosecutors to compel the production of real evidence which is theoretically outside the Fifth Amendment and therefore does not even require the formality of an immunization procedure is an increasingly popular one. In many of the most recent grand jury cases—New York, Chicago, Seattle—witnesses' homes, offices and/or persons were subjected to extensive searches prior to or concurrent with the service of their subpoenas. In other instances, subpoenas have been used by agents of the FBI as if they were search warrants, delivery of requested items to the agents being "deemed" by them compliance with the subpoena. Often items seized or delivered form the basis of further demands for the production of exemplars. Here's how it happened to one group of people living together in a collective in Seattle, Washington:

"Shortly before 11:30 AM on May 1, 1976, approximately 15 Federal agents and Seattle police entered our Capitol Hill home with a search warrant authorizing them to seize guns, ammunition, explosives, written information about the George Jackson Brigade and the production of explosives, and miscellaneous items including typewriters, red tip pens, wire, flashlight batteries, bricks, alarm clocks and friction tape.

"For the next three and a half hours the house was sealed off and ransacked. We were separated into two different rooms and not permitted to move. During this time two of us . . . were served with subpoenas to appear before the federal grand jury . . .

"When the police and government agents finished searching the entire house, they had found none of the contraband items listed on the warrant . . . The items seized . . . were all things commonly found in most households. In addition, personal letters and diaries, business papers, leaflets and the financial records of the Committee to End Grand Jury Abuse were taken."

One of those whose handwriting was demanded after her diary was seized described the effect the search had on her life:

"I am 28 years old, and the mother of a two and a half year old boy. Before May 1st I lived a relatively quiet life raising my son. I had a home I liked, roommates I cared about, and was putting together a wonderful garden of vegetables and flowers. My life was similiar to the lives of hundreds of other people.

"Then on May 1st, the peace and enjoyment of my life was shattered and has never been regained. On that day 15 agents of the Alcohol, Tobacco and Firearms division of the Treasury Department burst into my house. For an hour and a half I was not allowed to leave the chair in my dining room. For three hours we were held incommunicado. Two armed Seattle police stood over my son, my roommate and myself to make sure we didn't move, even though we had in no way acted in anything but a reasonable and calm manner, especially when you consider what was going on. All of us, including my son, were bodily searched to the very soles of our feet. We had to watch while these people went through all the rooms of our house. We were powerless to stop them from taking anything they wanted to."

As the result of her diary having been seized in the course of this search, this witness was subpoenaed and commanded to produce handwriting exemplars. As is often the case when exemplars are demanded, the government admits having possession of or access to other copies of the desired exemplars. In this case the U.S. Attorney admitted in an affidavit that the witness was the owner of the confiscated diary, which contained over a hundred pages written in her hand.

In the case of Phillip Shinnick the government had access to handwriting samples from the days when the former Air Force Captain submitted handwritten reports on a regular basis. They also had a copy of his fingerprints, which they produced in court, but argued that they were entitled to "better evidence." The district and Circuit judges agreed with their position, and Mr. Shinnick went to jail rather than furnish the exemplars. Why? "It is simply a matter of self respect," explained Katie Mitchell:

"I couldn't stop the government from ransacking my house, strewing garbage around, leaving my son's art work all over the living room floor, or turning people's bedrooms upside down.

And I couldn't stop them from taking and reading my diary. All this was done without my cooperation. But now they need my cooperation. After all that has happended to me I hope that you can understand why I must refuse to provide my handwriting and my fingerprints."

It would be ironic in the extreme for this Congress to enact legislation which would permit a witness to assert the electronic overhearing and/or recording of a telephone conversation as "just cause" for refusal to testify or produce evidence, but would allow the government to base a demand for the same on materials obtained by such gross invasions of a citizen's right to be secure in her home and free from unreasonable searches and seizures. We would therefore strongly urge that grand jury subpoenas for the production of non-testimonial evidence, including exemplars, be subjected to the same standards as other search warrants, and that the fruits of unreasonable searches and seizures not be permitted to provide the basis of demands for the production of further evidence before a grand jury.

Sixth amendment violations.—The Grand Jury Project endorses the proposal to allow attorneys to accompany witnesses into the grand jury room, but would like to point out that the provision which would permit the removal of an attorney from a case could easily render the protection meaningless. We can think of no situation in which it is more important to have counsel in which the client has absolute confidence than in a grand jury appearance. However, in recent years, one major aspect of grand jury abuse has been the use of grand jury subpoenas to drive a wedge between lawyer and client and separate political activists from attorneys who can be effective advocates for their cause.

The attorney-client privilege, which many may presume would prohibit the subpoenaing of an attorney for questioning about a client, is, in the words of one defense attorney, "being whittled away bit by bit in courtroom after courtroom." Lawyers who had been present in the courtroom during the sentencing of members of the Black Liberation Army were subpoenaed for questioning in connection with the alleged transfer of contraband to the prisoners during the sentencing. The lawyers resisted the subpoenas because they considered "this grand jury to be an attack on the people's right to attend trials and the rights of defendants to have open trials and a vigorous defense." Various attorneys and legal workers from the Wounded Knee Legal Defense/Offense Committee have also been subpoenaed to provide information about clients.

James Diorio, chair person of the American Trial Lawyers Association's Criminal Law Section sees government prosecutors using grand jury subpoenas to lawyers as "shortcuts to get to clients" and attributes this tactic to the increasing use of crime as a scapegoat in hard economic times. He believes that the independence of the trial bar is threatened by an increasingly narrow interpretation of the lawyer client privilege. Professor Matt Zwerling of San Francisco School of Law wrote:

"We face a potentially troubled time in which lawyers may be attacked for their politics, or simply for their zealous defense of their clients and their steadfastness in preserving the confidence of their clients. . . . If prosecutors are allowed to use grand juries to break up the [attorney-client] privilege, the erosion of our civil liberties will have progressed a further step and the grand jury, once an institution seen as the great protector of individual liberty, will be that much closer to an institution of prosecutorial repression."

CONCLUSION

"I thought I was living in the United States in 1976," said a white middle-aged, middle class woman subpoenaed to a grand jury, "but I feel like I'm in Germany in 1935." Lawyers are not the only ones who fear that the grand jury process is becoming a powerful instrument of repression rather than a steadfast guardian of the people's rights. The current epidemic of serious abuses of power by investigative agencies and grand juries is posing the issue in the minds of many Americans.

Democracy or police state? Due process of law did not protect Michelle Whitnack from being choked unconscious by federal investigators and local police so that they could obtain her fingerprints. They never had a warrant; they didn't need one. Michelle was already in jail for contempt of a grand jury; the purpose of her incarceration, in theory, was to coerce her into cooperating with the fingerprinting procedure. As a matter of conscience, she resisted. Until she lost consciousness at the hands of eight agents, armed with an order to use whatever "reasonable force" was necessary to obtain the exemplars. The order was premised on a representation that the exemplars were a necessary part of the routine booking procedures of the jail and in no way related to the grand jury investigation. But as soon as they were obtained Michelle was released from jail. She has, of course, still not been accused of any crime. Democracy, or police state tactics?

The present epidemic of abuses of power by investigative agencies and grand juries is posing the issue in the minds of many Americans. The choice cannot be left in the hands of individual prosecutors or executive or judicial agencies; it cannot even be determined by the lay persons sitting on today's prosecutor-dominated grand juries. It can only be made by the people, through you, the legislators. On behalf of all the victims of grand jury abuse, the Grand Jury Project brings a mandate for grand jury reform as suggested in this testimony. It is up to you, the legislators to carry out that mandate. The choices you make will affect not just the friends and loved ones, political supporters and relatives of those subpoenaed and the "recalcitrant" witnesses themselves, but every one who looks to the Constitution to protect her or himself from the arbitrary interference of the State into her or his home, thoughts and activities. Ultimately, it means making the choice to reject legal and political developments which characterize the police state as incompatible with the Constitution and a democratic form of government.

Mr. EILBERG. The next witness is Ms. Doris Peterson. You have submitted a statement, and I assume you would like your full statement to be made a part of the record.

Ms. PETERSON. Yes; I would.

Mr. EILBERG. Without objection, the statement will be made part of the record.

[The prepared statement of Ms. Peterson follows:]

STATEMENT ON BEHALF OF THE CENTER FOR CONSTITUTIONAL RIGHTS

(By Doris Peterson)

The Center for Constitutional Rights (hereinafter CCR) wishes to thank this Committee for inviting us to share our experience and views on the issue of the abuse of Federal grand juries and our recommendations for grand jury reform.

These Congressional hearings, the first on the Federal grand jury system in our 200-year history, represent an important recognition of the role which Congess must play if the rights guaranteed by the Bill of Rights are to be preserved. As an organization primarily concerned with the preservation and expansion of people's rights, CCR has come to view abuse of the grand jury in this decade as one of the gravest threats to our democratic system. We wish to acknowledge the vital leadership role which the chairman, Representative Eilberg, has played in facilitating full exploration of the issues of grand jury abuse and reform. We view enactment of a strong reform bill in this session as a matter of great urgency.

It is a remarkable *tour de force* that the grand jury system, which historically was the shield for protecting the individual against unwarranted prosecution, has become a powerful weapon of oppression by the Executive Branch. The growth of prosecutorial control over the grand jury and the whittling away of the Fifth Amendment privilege provided the matrix for this perversion of the grand jury. But it is important to observe that the consolidation of this process is recent and directly attributable to the Nixon-Mitchell administration.

A TOOL TO SUPPRESS DISSENT

In 1970, the Federal grand jury began to be used to gather intelligence, harass, stigmatize, and destroy groups working for social change. The best known text in the field of Federal criminal procedures puts the matter as follows:

"[W]hen technical and theoretical distinctions are put aside, the true nature of the grand jury emerges—i.e., it is 'basically . . . a law enforcement agency.' Nowhere is this characterization more apt than in considering the use of grand jury proceedings by the Nixon administration. In Nixon's war against the press, the intellectual community, and the peace movement generally, the Federal grand jury has become the battleground. As a result, the courts—whose workload the Administration is ostensibly seeking to reduce—are now confronted with a large amount of grand jury litigation. It is clear that the administration's legal position in many of the pending cases is exceedingly weak, but this is to be expected in the light of the administration's political strategy which is based on harassment of the opposition. If the time, money, and energies of newsmen, intellectuals, and other leading critics of the administration can be diverted from affirmative action to defending themselves against grand jury inquisition, and if in the process these critics can be publicly stigmatized as outlaws, the administration may prove to have won the political war while losing the legal battle. 8 Moore's Federal Practice § 6.02[1]b."

In the past seven years, hundreds of people have been subpoenaed to appear before Federal grand juries all over the country, often thousands of miles away from family and friends, frequently with little or no notice. Federal grand juries have been employed against the following:

Women's Movement, Native American Movement, Anti-war activists including Catholic peace people, the Vietnam Veterans Against the War (hereinafter VVAW), anti-war writers, critics, scholars and publishers, Black Movement, Irish-Americans, Chicanos, defense attorneys, Congresspersons and Senators and their aides, the Puerto Rican Independence Movement, radical sports activists, prison movement, union members, social workers, clergy, lay ministers and their assistants, media people—film makers, reporters, publishers, writers, and researchers.

The massive and abusive use of the grand juries has produced a flood of litigation. Judge Hufstedler of the United States Court of Appeals for the Ninth Circuit has said:

"Today, courts across this country are faced with an increasing flow of cases arising out of grand jury proceedings concerned with the possible punishment of political dissidents. *Bursey* v. *United States*, 466 F.2d 1059, 1089 (9th Cir. 1972)."

From the first evidence of such grand jury abuse, CCR applied its experience and skills to the defense of grand jury witnesses. For the past seven years, CCR attorneys have been involved in litigative and/or consulting roles in connection with hundreds of grand jury subpoenas throughout the country and in Puerto Rico concerning grand jury abuse. The positions taken here regarding grand jury reform are based on this widespread litigative and consultive experience.

Although the flagrant abuse of the grand jury began with the Nixon Administration, it did not end with it. Grand jury abuse continues both in the same and more subtle forms today.

FROM AN ACCUSATORIAL TO INQUISITORIAL SYSTEM

In our system of checks and balances, the grand jury was designed as a check against the otherwise totally unregulated power of the prosecutors to determine whether or not to prosecute. Under the Fifth Amendment, no person has to stand trial unless the government can present enough evidence to convince a grand jury to vote an indictment.

Despite this clear historical purpose, it has long been recognized that the grand jury does not function as a buffer. As long ago as 1931, the Wickersham Committee[1] said:

"The Grand Jury usually degenerates into a rubber stamp wielded by the prosecuting officer according to the dictates of his own sense of propriety and justice."

But something even worse than the loss of an independent grand jury has been taking place in the last few years. The grand jury's powers, particularly the subpoena power, are being used at will by prosecutors and the FBI despite the fact that Congress has consistently refused them this power. Thus, the shield has become a weapon against those whom it was designed to protect.

Prosecutors have free rein with grand juries. They are protected by grand jury secrecy. Much of what they tell the grand jury is not recorded. There is no scrutiny and review, and no adversary counsel. Prosecutors have virtually absolute control over what the grand jury hears, sees, and understands as its duty. They are in a clear conflict of interest position insofar as they function as the grand jury's legal adviser while simultaneously attempting to secure indictments and using its powers for their own investigative work.

Grand jury witnesse are deprived of rights we consider fundamental to our constitutional system: the right to counsel—even to be told of the right to consult counsel before appearing and the right to have counsel in the grand jury room; the right to remain silent; the right to know if one is a target; the right not to have to assist in preparing one's own indictment; the right to know what is being investigated and what the potential charges are; to be told what one's rights are and warned about perjury; to know why one is being subpoenaed; to not be questioned on the basis of illegally seized evidence; to get copies of the government's version of prior information supplied to the government by the witnesses; and statutory rights to which persons other than grand jury witnesses are entitled.

The witness is put to the same intolerable trilemma that faced witnesses summoned to the High Commission and the Star Chamber: (1) to be forced to give self-incriminating evidence; (2) to risk prosecution for perjury; or (3) to be punished for asserting the right to remain silent and to withhold self-incriminating eivdence. The witness contemnor is presumed not innocent but guilty and the government escapes its burden of proof.

JUDICIAL EROSION OF SAFEGUARDS

In our country we have been accustomed to look to the courts for protection of constitutional rights. But on the matter of grand jury abuse, for reasons we

[1] National Commission on Law Observance and Enforcement, Report on Prosecution 125 (1931).

are about to explain, the American people must turn to Congress to protect their constitutional rights. It is the wisdom of our system of checks and balances that every branch of government is the guardian of the Constitution and when, as we shall show, the courts have faltered in their traditional responsibility, the Congress has the power and duty to act in support of the Constitution.

At the same time as the Nixon Administration massively expanded both the dimension and repressive impact of grand juries, the Supreme Court of the United States, dominated by appointees of that same Administration, has in a series of decisions, fostered grand jury abuse.

Thus, in the well-known case of *United States* v. *Calandra*, 414 U.S. 338 (1974), in a decision which effectively overruled Mr. Justice Holmes' historic pronouncement in the *Silverthorne*[2] case, the Court held that a grand jury could use illegally seized evidence.

In 1973, in *United States* v. *Dionisio*, 410 U.S. 1, the Court held that the Fifth Amendment applied to actual testimony only and accordingly permitted grand jury subpoenas to compel production of voice and handwriting exemplars. And in *Fisher* v. *United States*, 48 L. Ed. 2d 39 (1976) the Court strongly indicates that despite the Fifth Amendment, any witness may be required to produce private documents and papers. The latter decision effectively overruled one of the landmarks of constitutional law, namely, *Boyd* v. *United States*, 116 U.S. 616, 631–32 (1874) which held that:

"[A]ny compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."

Again, the spring of 1976, Chief Justice Burger in his opinion in *United States* v. *Mandujano*, 48 L. Ed. 2d 212, legitimized the procedure developed by the Nixon Administration of routinely calling the target of an investigation and forcing him/her to testify and be exposed to a perjury prosecution or plead his/her Fifth Amendment privilege without even being given notice of applicable constitutional rights.[3]

Perhaps most serious of all is the Court's 1972 decision in *Kastigar* v. *United States*, 406 U.S. 441, sustaining the 1970 statute by which any witness (including a target) in any criminal case, at the sole discretion of the Department of Justice and with no judicial review, may be given a very limited immunity (use immunity), although s/he might subsequently be prosecuted not only on the general subject matter but on the very act about which s/he testified.

Kastigar buries the Fifth Amendment privilege which was intended to provide a "shield of absolute silence." *Brown* v. *Walker*, 161 U.S. 591 (Field, J. dissenting). It gives the government the power to "probe the secrets of every conversation, or society by extending compulsory pardon to one of its participants, and thus turns him into an involuntary informer." *U.S.* v. *James*, 605 F. 2d 257 264, upheld by dissenters in *Brown* v. *Walker*, *supra*.

Indeed, *Kastigar* bears out Mr. Justice Field's warning in *Brown*, addressed to a limited transactional immunity statute, that the smallest compromise of constitutional guarantees is the first step to their wholesale abrogation. Conferring upon the executive the power to coerce immunity ignores the origin of the Fifth Amendment as the basic guarantor against totalitarian power. Again we quote Justice Field's dissent:

"[B]oth the safeguard of the Constitution and the common law rule spring alike from the sentiment of personal respect liberty, independence, and dignity which has inhabited the breasts of English-speaking peoples for centuries, and to save which they have always been ready to sacrifice many governmental facilities and conveniences. In scarcely anything has that sentiment been more manifest than in the abhorrence felt at the legal compulsion upon witnesses to make concessions which must cover the witness with lasting shame, and leave him degraded both in his own eyes and those of others."

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[2] *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920).

[3] The anomalous nature of this practice is revealed by the fact that the "Handbook for Federal Grand Jurors," which was published by the GPO a few years ago and is still being distributed in some District Courts, includes the following statement:

"Neither the person under investigation (sometimes referred to as the 'accused,' although this does not imply he is guilty of any crime) nor any witnesses in his behalf normally will testify before the grand jury.

The impact of this series of decisions, which has made the grand jury the major loophole for constitutional rights, is to legitimize the shift from an accusatorial to an inquisitorial system of justice.

The framers' insistence on an accusatorial rather than an inquisitorial system was the fundamental guarantor against the excesses of executive power, fought in England and the colonies. As the Supreme Court stated in 1961:

"[O]urs is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. *Rogers* v. *Richmond*, 365 U.S. 534, 541 (1961)."

Together with the Fifth Amendment privilege against compulsory swearing, the presumption of innocence and the burden on the state to demonstrate guilt without the assistance of suspect or accused, the grand jury was an essential bulwark of the accusatorial system. Even the Department of Justice concedes that "the Constitution explicitly refers only to its [the grand jury's] protective function." (Office of Policy and Planning, U.S. Department of Justice, "Memorandum on the Grand Jury," *Hearings*, p. 87). Today, however, the grand jury, under the sway of the prosecutor, unconstrained by constitutional rights, and recently equipped with the power to coerce testimony and other evidence, functions purely as the mainstay of a viscious inquisitorial system. It bears only superficial resemblance to the people's protector envisaged by the framers.

The effects of this shift from an accusatorial to an inquisitorial system are felt not only by the grand jury witnesses, the target, and the accused, but all society. When the use of illegally seized evidence before the grand jury is authorized, no one is safe or secure in their houses or effects.

When these inquisitorial powers are applied to the investigation of crime, they are oppressive enough; but, as we have seen, when applied to even the mildest political dissidents, they threaten the basic workings of our democratic system.

THE CONGRESSIONAL TASK: "RECONSTITUTIONALIZING" THE GRAND JURY

For all the foregoing reasons, Congress must now consider a wide range of proposals which will re-establish the historic role of the grand jury and protect the citizenry from abuses. We are firmly committed to the principle that the grand jury must be preserved and equipped to function as a shield against an overreaching executive. As stated by the Supreme Court in *Wood* v. *Georgia:*

"Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill-will . . . [I]t [is] important that freedom of communication be kept open and that the real issues not become obscured to the grand jury. It cannot effectively operate in a vacuum. 370 U.S. 375, 390 (1962)."

The task of this Committee and the Congress is to "reconstitutionalize" the grand jury. To do this, the following must be the guiding principles:

1. Ensure the grand jury's independence from the prosecutor.
2. Confine the grand jury to its constitutional accusatory screening function.
3. Reinvest the process with basic constitutional rights.
4. Eliminate any form of coerced immunity which was unknown at common law.

SUBPOENAS

Today, there is no supervision over the issuance of grand jury subpoenas. Prosecutors and federal agents serve them at will. Grand juries are generally ignorant of the fact or purpose of the subpoenas served in their name.

The absence of any check on the issuance of subpoenas significantly expands the repressive powers of the law enforcement establishment. The abuses are perhaps most flagrant in the political context.

Grand jury proceedings are usually presaged by the descent of the FBI or other investigating agents on the targeted community. People who are hesitant to talk to the FBI may be urged into cooperation by the suggestion or being subpoenaed. Those who assert their right not to be interrogated are often explicitly threatened with subpoena. In many of the grand jury cases in which we have been involved, mere refusal to talk to the FBI was taken by the agents as a presumption of relevant testimony.

There have been numerous occasions when agents have not only threatened an unwilling interviewee with subpoena, but have filled in blank ones on the spot; altered them, substituting organizations and addresses; or subpoenaed people to non-existent grand juries hoping to be given the information in advance. Subpoenas for tangible evidence commonly carry the following note (or words to the same effect):

[NOTE.—The requirement of this subpoena may be satisfied by delivery of the material called for by the subpoena to a Special Agent of the FBI at or before the time required herein for its production.]

Occasionally the prosecutor has clearly not been involved in the process at all.

Subpoenas are served and withdrawn for many reasons, not the least being that they served their purpose without involving the grand jury. Subpoenas have been dropped after agents have gained access to books, records, files, or answers to questions. Although there are undoubtedly numerous occasions when a subpoena is either desired or voluntarily accepted, the use of the subpoena power to trick or coerce a person into compliance is unconscionable and must be stopped. As no records are kept on the issuance of subpoenas, it is impossible to measure the extent of these abuses.

Few of the witnesses we have counseled knew anything about the grand jury process. Many equated the subpoena with immediate jailing and were unaware of their right to challenge the legality of their subpoena. Never have we counseled a witness who was not terrified or whose life was not turned inside-out by the prospect of their appearance before the grand jury. As lawyers for witnesses, we have never taken on a case which did not require extraordinary round-the-clock attention in order to be prepared on the return date.[4]

Because of the dangers of abuse and the enormous impact on an unwilling subpoenee, we think the following safeguards essential:

(1) That every subpoena be justified by an affidavit signed by the prosecutor, stating its purpose and the nexus between the testimony or tangibles sought and the investigation;

(2) That the issuance of the subpoena be approved by a majority of the grand jury or by a detached judicial officer if the grand jury declines to exercise this power, but this approval carries no presumption of regularity;

(3) That every subpoena be served at least two weeks in advance of the return date with the notice of rights contained in H.R. 94 § 3330B(b) and H.R. §§ 3736, 3330A(b), attached to the affidavit described in (1) above;

(4) That the FBI or other investigating or prosecutorial authority be prohibited from threatening persons with subpoena in order to encourage them to informal interrogation; and

(5) That violation of any of the foregoing safeguards be grounds for quashal of the subpoena and/or a defense to contempt.

The showing of nexus and legitimate purpose required to approve a subpoena at this *ex parte* stage should be the one referred to as the "Schofield" criteria, established by the Third Circuit,[5] exercising supervisory power over grand juries, and adopted by other district courts[6] and in some districts by United States Attorneys. Although the Schofield standard was formulated in the context of a witness moving to quash a subpoena as improper, its standards should be applied *ex parte* as a test for issuance. Schofield would then require the government to file an affidavit showing at a minimum that the testimony or evidence sought is:

(1) Relevant to an investigation;
(2) Currently being conducted by the grand jury;
(3) Concerning violations of specific criminal statues; and
(4) Properly within the jurisdiction of the grand jury.

The affidavit should contain (or have in appendices) sufficient facts to enable the grand jury or other judicial officer to determine from its face whether the subpoena is legitimately connected with a particular grand jury investigation,

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[4] Our recommendation in ¶ 3 below that subpoenas be served at least two weeks prior to the return date is based on our experience that most witnesses not subpoenaed for business purposes do not know and need time to find counsel, and that preparation of the motion to quash is severely prejudiced by insufficient time.

[5] *In re Grand Jury Proceedings (Schofield)*, 486 F. 2d 85 (3d Cir. 1973), referred to as "Schofield I" and *In re Grand Jury Proceedings (Schofield)*, 507 F. 2d 963 (3d Cir. 1975), referred to as "Schofield II."

[6] *In re Grand Jury Subpoenas Duces Tecum Addressed to Certain Executive Officers of the M. G. Allen and Associates, Inc.*, 391 F. Supp. 991 (D. R.I. 1975) and *In re Grand Jury Investigation*, No. 76-5 (S.D. Fla., Jan. 18, 1977).

and whether there is reason to believe the witness summoned can provide the evidence sought. Of course, an additional showing may be required.

Because many subpoenas are negotiated and issued on consent, prior approval of the subpoena may be knowingly and intelligently waived in writing as long as the witness has received the above-mentioned notice of rights. Abuse of consensual service can be deterred by allowing the witness to raise, as a defense to the subpoena or later contempt, that the waiver was not voluntary.

MOTION TO QUASH SUBPOENA

The motion to quash is the witness' first formal opportunity to challenge the legality and permissibility of the subpoena. It is a critical stage in the proceedings. It should guarantee immediate vindication from wrongful process. It should protect the witness against the needless anxiety and disruption occasioned by delay. Full and prompt consideration is particularly necessary where the witness is engaged in First Amendment protected activities.

Early determination of the witness' challenge to the subpoena is also required to prevent needless invocation of the Fifth Amendment by the witness. Although the Amendment prohibits legal deprivation for claiming the privilege, the plea of the Fifth is widely viewed and often exploited as tantamount to guilt. Media stories which refer repeatedly to the fact that a witness took the Fifth may obviate the need to go on trial if the government's purpose is served by stigmatization alone. The effect of the plea of the Fifth in the First Amendment context is also particularly severe.

Today, motions to quash are at best tolerated in the courts. They are almost never granted. With rare exception they are decided on the basis of affidavits with no adversarial proceedings. The legal grounds for quashal are rapidly being cut away by the Supreme Court. The standards of illegality are impossible to meet. If the Court errs in its denial of the motion, the issues are not appealable until the witness, divested of the Fifth Amendment privilege, has been cited and usually, jailed for contempt.

Under these circumstances, the motion to quash cannot safeguard the rights of the witness nor check the abuse of the grand jury. From 1970 to the present, the only limit on the grand jury has been the willingness of hundreds of courageous women and men to go to jail rather than violate principle or conscience.

The bills before the Committee recognize the importance of the motion to quash stage, but they do not go far enough. To alleviate the present situation, Congress must instruct the courts to:

1. Recognize, as grounds for quashing the subpoena, the violation of constitutional and statutory rights, violation of confidential relationships, and abuse of the grand jury function and prosecutorial misconduct.

2. Order adversarial evidentiary hearings where material and contested issues of fact as understood by Rule 56 of the Federal Rules of Civil Procedure are joined in the motion to quash.

3. Apply reasonable standards for and impose practical safeguards against illegality and abuse.

4. Entertain an immediate appeal from denial of a motion to quash.

5. Guarantee the witness the right to the effective assistance of counsel of choice, appointed by the Course where necessary.

Grounds and standards of quashal

An exhaustive discussion of the law as applied to motions to quash would fill volumes. We have selected examples illustrative of the need for directing the courts to meaningfully review and enforce basic constitutional, legal and human rights.

a. *Constitutional rights (first amendment)*.—Certain fundamental constitutional safeguards are being written off as a check on the subpoena power of the grand jury. A witness has no right to complain that the subpoena is the fruit of a Fourth Amendment violation;[7] the Fourth and Fifth Amendments no longer protect against compulsion of physical evidence;[8] the Fifth provides brief protection only if the witness knows about it;[9] and the Sixth Amendment right to counsel is in jeopardy.[10] These and other rights should be guaranteed by a provision that any violation of a defendant's rights is grounds for a motion to quash.[11]

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[7] *Calandra* v. *United States, supra.*

[8] *Mara* v. *United States, supra; Dionisio* v. *United States, supra; Fisher* v. *United States, supra.*

[9] *Mandujano* v. *United States, supra.*

[10] *Mandujano* v. *United States, supra; Weatherford* v. *Bursey*, — U.S. —, 45 U.S.L.W. 4154 (Feb. 22, 1977).

The First Amendment presents a different problem. It is an example of a guarantee to which the courts continue to give lip service but rarely enforce.[11] The status, or lack thereof, of the First Amendment in grand jury proceedings bears this Committee's careful examination because the grand jury, when used against political dissent, deeply threatens our democratic system. The impact of the grand jury on political rights can be summarized as follows:

The grand jury is a weapon of political intelligence-gathering. Witnesses are asked to name names, repeat what occurred at formal and informal meetings, catalogue people's whereabouts, travels, and relationships—political, personal and sexual. Moreover, the FBI's power to coerce the reluctant interviewee with a subpoena indicates that what happens before the grand jury is just the tip of the iceberg of political intelligence-gathering and intimidation.

It generates suspicion and divides friends, communities and families. People question why a person was selected or not selected for subpoena. As proceedings are secret, no one knows for sure what breach of privacy or trust may have occurred behind closed doors.

It diverts constructive political energy into all-consuming legal defense and is calculated to disrupt on-going work. Subpoenas are often timed to interfere at critical moments in organizing activities, force people to travel great distances from their homes and communities, and remove leadership by jailing them for contempt.

It frightens and deters people from becoming politically involved either by stigmatizing leadership or striking those on the fringes. Its message: unless you are willing to become an informer, you had better stay away from exercising political and civil liberties. The price can be a court battle, the threat of going to jail, implication of criminal involvement, loss of privacy, job, and harassment of friends and family.

It stigmatizes and discredits legitimate political activity by linking it with criminal conduct. Mere issuance of a subpoena plants the suspicion. Judicial approval, pleading the Fifth, and contempt legitimate and confirm the equation of ideology and terrorism. Spurious indictments may follow to justify the subpoenas and further "disrupt, discredit and neutralize" effective organizations.

Finally, the grand jury gives the prosecutor the power to jail activists for contempt for long periods without any evidence of crime, without indictment, trial or any of the constitutional protections guaranteed to defendants in the criminal process.

Since the Supreme Court's refusal in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972) to give weight to First Amendment rights in the grand jury context, grand jury witnesses' First Amendment claims have been consistently ignored or subjected to impossible burdens of proof. As a result, protected associational activity or espousal of dissident political viewpoints has become a permissible basis for singling a person out for subpoena. This McCarthyite tactic did not abate with the end of the Nixon Administration but continues right up to the present:

Lureida Torres, a Puerto Rican teacher, spent four months in jail for contempt. The first time she was subpoenaed she was asked about her associations as a university student eight years earlier. The second time the prosecutor asked her to identify persons involved in FALN bombings. Looking only to these laundered questions, the Court disregarded the fact that she was selected for subpoena solely because of her membership in PSP. The FBI's "Domestic Terrorist Digest" links PSP and FALN, simply because they both support Puerto Rican independence. Her supporters were photographed by the FBI at the court and their pictures shown in the community. (*In re Torres*, S.D.N.Y., No. 76 Misc. 11–188, (1976).

Edgar Maury also espouses Puerto Rican independence. FBI agents told him that he was selected for questioning before a federal grand jury in Puerto Rico because during a time period covered by a government investigation he had

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[11] Section 3330A(n) of H.R. 3736 is essential to guarantee the witness against submission of unconstitutionally or illegally obtained evidence. This does not go far enough. For example, to protect constitutional rights and prevent abuse of the grand jury process, overbroad subpoenas should be subject to quashal. In addition, we assume these prohibitions to be likewise enforcible by the witness by motion to quash though the ground is not one listed in subsection 3330A(k). As discussed above, vindication of these and other constitutional rights should not have to await the contempt stage, although we support the right to raise them there as well. See H.R. 3736, Section 2 amending 1826(c).

[12] See discussion of the first Amendment in the grand jury context, *Bursey* v. *United States*, 466 F. 2d 1059, 1081–1088 (9th Cir. 1972).

rented a truck, was a supporter of Puerto Rican independence and his father had been a member of the Nationalist Party in the 1950's. It was the latter considerations which caused the FBI to single him out from the hundreds of other truck renters in Puerto Rico.

The virtual repeal of First Amendment rights in the grand jury process is illustrated by the standard applied by the First Circuit in Maury's case:

The legitimacy of the purpose of the grand jury also tends to negate Maury's charge that he was called before the grand jury merely to harass him for his unpopular political beliefs. The First Amendment generally does not offer protection from a duty to testify before the grand jury. See *Branzburg* v. *Hayes*, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 732, 747–49 (5th Cir. 1972). While use of the grand jury for *bad faith harassment of a political dissident with no expectation that any testimony concerning the commission of a crime would be forthcoming would constitute an abuse*, that is not the situation in this case. The district court did not err in refusing to hold an evidentiary hearing in regard to charges of abuse of the grand jury (italics added). *In re Maury*, 533 F.2d 727, 730 (1st Cir. 1976).

In order to get a hearing, Maury had the impossible burden of proving that the investigation was completely illegitimate or that his subpoena promised no expectation of testimony concerning a crime. This is an ominous departure from the traditional principle that First Amendment interests weigh heavily in the balance and are not to be infringed except upon a showing of overriding and compelling need or clear and present danger (*Brandenburg* v. *Ohio*, 395 U.S. 44 [1944]).

If a hearing had been held and the traditional standard applied in connection with subpoenas to 23 VVAW members and supporters, tremendous cost to both First Amendment rights and to the government could have been saved. These subpoenas tied up some of the key organizers of a lawful anti-war demonstration at the 1972 Democratic Convention. Although some of the subpoenees were later excused without being questioned, four spent forty days in jail for contempt; eight were indicted for conspiracy and acquitted a year later by a jury, after little more than an hour's deliberation; two were named as "unindicted coconspirators," and vindicated by the Fifth Circuit three years later. Precious resources of VVAW, as well as CCR which represented them, were diverted into their defense.

The VVAW witnesses raised First Amendment claims in a motion for a temporary restraining order (at least equivalent to a motion to quash) and as a defense to contempt. Each time they were summarily denied by the district court and affirmed on appeal.[13]

Vindicating the unindicted co-conspirators in 1975, the Fifth Circuit finally acknowledged that impermissible political reasons underlay all these events:

Nine of the ten persons named in the indictment were active in the Vietnam Veterans Against the War, an anti-war group. The naming of appellants as unindicted co-conspirators was not an isolated occurrence in time or context. The same procedure was employed in other cases. See Note, Federal Grand Jury Investigation of Political Dissidents, 7 Harv. Civ. Rts.-Civ. Lib. L. Rev. 432 (1972). There is at least a strong suspicion that *stigmatisation* of appellants was *part of an overall governmental tactic directed against disfavored persons and groups. Visiting opprobrium on persons* by officially charging them with crimes while denying them a forum to vindicate their names, undertaken as extrajudicial punishment or *to chill their expressions and associations is not a governmental interest that we can accept or consider.* (footnotes omitted, italics added.) *U.S.* v. *Briggs*, 514 F.2d 794, 805–806 (1975).

First Amendment rights cannot afford the luxury of hindsight. They should be heard immediately and subjected to rigorous scrutiny.

To this end we suggest that the courts be instructed, through statute or legislative history, as follows:

1. Whenever a witness claims that the subpoena or inquiry violates the First Amendment, the court should hold an evidentiary hearing, including the right to confront government witnesses.

2. A *prima facie* case of First Amendment abuse is established by demonstrating a basis to believe that the inquiry was initiated or pursued or the witness identified or selected for subpoena in whole or in part (i) on the basis of her/his

[13] See *Beverly* v. *United States*, 468 F. 2d 732, 747–749 (1972), reversing the contempts on other grounds.

exercise of First Amendment rights; (ii) for the purpose or with the effect of obtaining information about First Amendment protected associations, activities or beliefs; or (iii) for the purpose or with the effect of otherwise "chilling" such rights.

3. The *prima facie* case raises a presumption of illegality, shifting the burden to the government to demonstrate by a preponderance of concrete evidence, independent of First Amendment activity, that (i) the predominant basis, purpose or effect of the inquiry or the subpoena is not (i), (ii) or (iii) set forth in paragraph 2 above; (ii) the evidence sought from the witness is necessary to effectively pursue the investigation at that time (i.e. all alternatives have been exhausted); (iii) the investigation or portion thereof affecting the witness is of overriding public importance; and (iv) adequate safeguards against improper use of any First Amendment protected information.

4. Where the witness demonstrates that the purpose or effect of the inquiry or subpoena is to obtain information about or to chill First Amendment protected associations, activities or beliefs, the witness shall be entitled to claim an absolute privilege under the First Amendment. This privilege shall apply to journalists, scholars, broadcasters, lay ministers, etc.

b. *Abuse of the grand jury function.*—Guaranteeing effective relief against grand jury abuse presents a similar problem to that discussed in respect to constitutional rights. There are a number of grounds occasionally recognized by the courts as abusing the proper judicial function of the grand jury, e.g. collecting evidence after indictment for use at trial ("after-acquired evidence"); collecting evidence unnecessary for indictment but useful at trial; supplementing the investigatory powers of the FBI; discovering the defendant's case; gathering evidence for other agencies of the executive branch; freezing testimony; searching for fugitives; subpoenaing witnesses for questioning by the FBI and/or prosecutors outside the grand jury room. There are other forms of abuse which are not permissible executive or judicial functions: i.e. intelligence-gathering, harassment, and using the grand jury to discredit the witness or defendant in the press. Reform bills H.R. 94 and 3736 codify the after-acquired evidence problem. Lest the omission of other abuses be construed to negate them, all the aforementioned forms should be codified as grounds for quashal in order to confine the grand jury to its constitutional function.

These claims, however, will never prevail unless a realistic standard is applied. The courts presently ask whether the illegal purpose is the "sole or dominant" one. Where allegedly legal and demonstrably illegal purposes coexist, the courts almost invariably accept the legal one as major and characterize the illegal one as "incidental."[14]

We urge Congress to instruct the courts to abandon the sole or dominant purpose standard, and adopt a standard which would authorize quashing a subpoena whenever the government cannot deny that a substantial purpose or effect of the subpoena or questioning is an abuse of the grand jury function. The "primary purpose" standards suggested in bills H.R. 94 § 3330B(d)(d)(A) and H.R. 3736 § 3330A(k)(1) is an improvement but does not go far enough. In addition, where any illegal purpose or effect is shown, Congress should require the court to fashion sameguards against the government's deriving even incidental benefit. The inability to benefit, though difficult to enforce, should have some deterrent effect on the issuance of subpoenas for these purposes.

c. *Statutory rights (electronic surveillance).*—Though we do not discuss them individually, we strongly favor the statutory provisions, such as venue, reiterative contempt, and jurisdiction contained in the proposed bills.[15]

We also support the provision which would codify that any violation of 18 U.S.C. § 2515 is a defense in any civil or criminal contempt proceeding against the witness where the subpoena and/or request for testimony or production is based on or directly or indirectly derived from such violation.

The right to raise and litigate the claim that electronic surveillance taints the proceeding should not have to await the contempt stage. There are many in-

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[14] The misuse of two grand juries to acquire evidence for the Ellsberg trial is well described in an article, "The Grand Jury Network," by Frank J. Donner and Eugene Cerruti published in *The Nation*, Jan. 3, 1972. *Hearings*, pp. 474, 483. On the impossibility of meeting the sole and dominant purpose standard we refer the Committee to *United States v. Doe* (Application of Ellsberg), 455 F. 2d 1270 (1972). See also, *In re Raymond, infra.*

[15] Codification of the procedures and grounds for quashing subpoenas in H.R. 3736 § 3330A and H.R. 94 § 3330B are essential to prevent abuses. We also strongly support those provisions giving the witness a choice of forum as to where to make a quash motion and a stay pending determination. H.R. 3736 § 3330A(1), H.R. 94 § 3330B(1), (2) and (3).

stances where the claim of electronic surveillance is properly raised on a motion to quash, i.e. when the claim is that identification or selection of the individual for subpoena was based directly or indirectly on electronic surveillance. The prohibition on use embodied in 18 U.S.C. § 2515 is absolute, and applies to compelling the appearance of the witness as well as attempting to exact her/his testimony. If electronic surveillance taints the subpoena, the witness should be entitled to discover that and invalidate the subpoena at the earliest opportunity.

The right to raise and litigate the claim of electronic surveillance is also broader than that guaranteed by § 2515 because it is constitutionally and statutorily founded. Electronic surveillance legal under the statute may violate the Fourth, Fifth and/or Sixth Amendments, e.g. where the surveillance invades matters relating to the legal representation of the witness.[16] The right of the witness, just discussed, to raise all claims of unconstitutionality thus applies to electronic surveillance.

Some of the problems enforcing the ban on use of electronic surveillance before grand juries bear discussion. While electronic surveillance claims are technically entertained by the courts, they are virtually impossible to substantiate because the courts deny meaningful discovery.

If the witness only suspects electronic surveillance (i.e. alleges a "mere claim"), the courts accept a conclusory denial by the government as sufficient. However, as electronic surveillance is conducted secretly, the insistence on more than a "mere claim" before ordering a meaningful search makes the witness' right to discover electronic surveillance dependent on the government's carelessness.

Even where the claim is substantiated, the courts consistently refuse to order the government to make a meaningful search. Just two weeks ago, in connection with an alleged investigation of a bombing conspiracy, the district court did not even require the government to search the Bureau of Alcohol, Tobacco and Firearms, which conducts electronic surveillance and together with the FBI, conducts such investigations. (*In re Nemikin and Cueto*, S.D.N.Y. 77 Cr. Misc. M 11-118.) Rarely do the courts require that a search be made of local law enforcement agencies cooperating with federal agencies, although their cooperation may be demonstrated by the witness or simply a matter of common knowledge or sense. It is well documented that the fruits of electronic surveillance are often camouflaged in the information exchanged between investigating agencies and the prosecutor.

One of the greatest loopholes in the scheme affecting every surveillance claim is the FBI's Elsur Index (Electronic Surveillance Index) which is designed to conceal rather than reveal electronic surveillance. It contains only those conversations which the monitoring agents prepared for indexing, and only so much of those as the field offices send to FBI headquarters. There is no retrieval system for the vast majority of conversations where the caller uses only her/his first name, and the government consistently refuses to check the records of surveillance on telephones which the witness alleges s/he frequently uses unless the Fourth Amendment "interest in the premises" test is met. While we recognize that record-keeping and indexing problems transcend the scope of these hearings, they emphasize the necessity of requiring the government to conduct a full search for electronic surveillance, including all federal, state and local agencies and their subdivisions arguably contributing to a particular investigation, and to have the scope and results of the search subject to question in adversarial proceedings (as some courts have been willing to do).

Meaningful discovery not only guards the witness against further violation of rights based on illegal surveillance; it also safeguards the process and the rights of future defendants against the "laundering" of illegally seized information through compulsion of the testimony of grand jury witnesses.

If 18 U.S.C. § 2515 is to be enforced and the government prevented from benefitting from illegally and improperly seized communications, uniform standards must be established for courts dealing with electronic surveillance claims of grand jury witnesses, with respect to both themselves and their counsel.

d. *Relationships meriting recognition as confidential (lawyers and others).*—Increasingly, grand jury subpoenas are being used against people having recognized confidential relationships. The lawyer-client relationship is particularly threatened. In cases involving political dissidents, attorneys are being subpoenaed as sources of information desired for the purpose of locating, apprehending or

[16] See discussion in the section entitled "Ex Parte in Camera," *infra*, of the government's wrongful denial of overhearing of counsel for the Fort Worth Five and the manner in which the present Attorney General, as Judge of the Fifth Circuit, dealt with it. *In re Tierny*, 465 F. 2d 806 (5th Cir. 1972).

indicting their clients. For example, a subpoena to a New York City attorney was quashed on the ground that the lawyer was being used as an arm of the FBI to locate his client for the purpose of questioning.[17] An attorney connected with the Wounded Knee Legal Defense-Offense Committee has for over a year fighting a subpoena which would compel her to tell the court whether she instructed her client about a court hearing, information needed to indict her client as a fugitive.[18] Such abuse of the subpoena power should be prohibited, designed as it is to drive lawyers from controversial clients and to drive a wedge of distrust between them. We favor an absolute bar against subpoenaing attorneys to get information about their clients because of the chilling effect on precious Sixth Amendment rights and this essential confidential relationship.

However, if such subpoenas are permitted, it is essential to resolve the attorney-client privilege issue on a motion to quash. If the attorney is forced into the grand jury room, it may adversely affect his/her client's confidence and trust in her/him. The government should *inter alia* be required to demonstrate the purpose of the subpoena and provide a list of all the questions to be propounded to to the attorney so s/he can demonstrate that some or all are protected by the privilege. Congress should provide that great weight should be given to the protection of the privilege in its broadest sense.

Congress must also address itself to situations where a deep moral and confidential relationship exists, if not yet recognized as legally privileged. The relationship of parent and child is recognized as of fundamental constitutional dimension.[19] Nonetheless, parents have been subpoenaed to grand juries to be interrogated about their children.[20] No parent should be faced with the dilemma of choosing between destroying a relationship of mutual trust with a child, albeit a grown up son or daughter, or being jailed for contempt.

Husbands and wives should also be guaranteed absolute confidentiality. Moreover, as patterns of relationships among adults are undergoing radical changes, privilege should be accorded all relationships which share the intimacy traditionally accorded the marital relationship. As the courts won't provide these guarantees, it is Congress' task to do so.

e. *The necessity for compelling testimony.*—The integrity of the accusatorial system and the entire democratic process has been deeply undermined by the failure to question the assumption that compulsion of testimony or evidence is a necessary and proper component of the grand jury's powers. History demonstrates that the grand jury never had this power at common law and that those authorities that aquired it, i.e. the High Commission and the Star Chamber, were the most oppressive weapons of state tyranny. The modern grand jury's inquisitional powers, disconnected from its accusatorial function and expanded by the ability to punish a refusal to testify, must be undone.

One means (discussed *infra*) is elimination of coerced immunity. We also urge that at every juncture where the powers to sustain compulsory process or coerce or punish recalcitrance are exercised, the court be required to determine whether the witness' testimony is necessary to the grand jury's ability to exercise its proper function. If alternative sources of evidence are available, the subpoena should be quashed or stayed until these sources are explored. If the court does not rule enforcement improper on any of the grounds discussed in the preceding sections, and holds this necessity test satisfied, it must then determine whether the significance of the evidence which can reasonably be expected to be obtained by compulsion overrides the interests the witness puts forth.

The right to a hearing

Without the right to a hearing on the claims raised in the motion to quash, the motion is a useless remedy. As a test for when a hearing is appropriate we would urge that the standard applied by the courts in resolving summary judgment motions under Rule 56 is fair, workable and familiar to judges. Thus a witness would be entitled to a hearing whenever a material and contested issue of fact is presented by the motion. Courts could no longer resolve these questions on the basis of untested, conclusory or secret[21] submissions, sworn or unsworn, of the government.

The Burger Court frequently reiterates the claim that grand jury proceedings should not be saddled with mini-trials. Congress must repudiate this position

[17] *In re Stolar*, 397 F. Supp. 520 (S.D.N.Y. 1975).
[18] *In re Copleman*, No. M-1-59 U.S.D.C. (S.D. Iowa) (1974).
[19] *Stanley* v. *United States*, 405 U.S. 645 (1972).
[20] *In re Kinoy*, 326 F. Supp. 400 (S.D.N.Y. 1970).
[21] See *Ex Parte in Camera*, *infra*.

since the efficacy of almost every reform ultimately depends upon meaningful judicial review. If the grand jury is going to continue to be permitted to compel testimony, approve any form of immunity, or authorize accusations for contempt, then substantial constitutional and other rights will be at issue in the grand jury process and mini-trials will be essential to guarantee fundamental fairness. The critical nature of the grand jury stage, both to the witness and to the integrity of governmental process and law enforcement, requires that the same modicum of efficiency must be sacrificed therein, as in every other context where rights must prevail.

COUNSEL FOR THE WITNESS

There is too much at stake for a grand jury witness to be denied the right to counsel. The witness faces the possibility of having his/her Fifth Amendment right against self-incrimination taken away without consent, being jailed for contempt, prejury or evasive answers, as well as possible indictment. Counsel is essential to enable the witness to challenge the subpoena and thereby minimize the systematic effect of the widespread abuse of the grand jury process. The Supreme Court's decision in *United States* v. *Mandujano, supra* illustrates the need for a legislative guarantee of the right of grand jury witnesses to counsel.

Counsel has a pivotal role to play at every stage: raising the witness' rights in court, advising the witness in the appearance before the grand jury, and presenting a witness' claims to the grand jury to ensure that it can fully evaluate the need and impact of the exercise of its coercive or punitive powers * * *[32]

We find outrageous the Justice Department's position that grand jury witnesses should not be informed of their rights because they might exercise them. Witnesses without counsel may incriminate themselves without even realizing that their own words could be used to convict them of a crime. People should not be tricked into jail.

We also find the Department's position that "[t]here is nothing about grand jury proceedings that renders them hostile or threatening" to be disingenuous. Even though represented by counsel and assured by us of their right to leave the grand jury room to consult, our clients are terrified to go into the grand jury room alone, fearing they will be tricked or coerced. Often the appearance before the grand jury creates more anxiety than going to jail. They are intimidated about leaving the room. The prosecutor may ridicule them for leaving or create the impression that to leave without permission will constitute contempt or otherwise prejudice the grand jury against them. For this reason we strongly support the provisions of H.R. 94 § 3330A and H.R. 3736 § 3330A, entitling the witness ot counsel inside the grand jury room.

It is essential, however, that these provisions will not deny counsel and the witness their right to privately consult outside the presence of the jurors. Counsel is a protection but not a guarantee against intimidation. The secrecy and lack of ground rules in the grand jury process is intimidating even to the most experienced lawyer.

Effective representation of counsel in grand jury proceedings must include the right of counsel to address the grand jurors and advise them of his/her client's position and their powers and duties with respect thereto. Participation by the witness' counsel is the baseline guarantee that the grand jury be able to question the prosecution,[33] exercise its powers independently, and respect the rights of both the witness and potential accused.

For this reason we strenuously oppose the provision of § 3330A(c), which absolutely prohibits counsel from "address[ing] the grand jurors or otherwise tak[ing] part in proceedings before the grand jury." Likewise, the sanctions provision of § 3330A(d) must be struck as it is an open invitation to harass and intimidate witness' counsel and to deprive the witness of effective representation of counsel of her/his choice. Courts are already equipped with all the powers necessary to deter and punish exercise conduct by counsel. These powers are too often abused in cases involving politically controversial defendants or attorneys.[34]

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[32] See p. 38, *infra*.

[33] Occasionally in grand jury proceedings, the witness is able to show that the prosecutor has failed to give the jurors full or accurate information. In the Shinnick proceedings, in which the subpoena sought the witness' fingerprints, the prosecutor did not tell the grand jury that he had of the fingerprints in his possession, nor that the witness had previously provided the government with prints, e.g. in connection with military service.

[34] See, e.g. *In re Dellinger*, 461 F. 2d 389 (7th Cir. 1972); *Banks* v. *Holder*, 417 U.S. 187 (1974).

In the often highly charged atmosphere of grand jury proceedings, the potentiality for abuse of these powers is particularly acute. Rather than requiring or even authorizing removal of defense counsel, it would be far more appropriate to authorize sanctions and removal of misbehaving prosecutors.

IMMUNITY

Under the common law, the grand jury could not invade a person's privacy or effects because it had no power to compel someone to take the oath or to punish anyone for not doing so. The State's right to "every man's evidence" was thus severely qualified by the person's absolute right to refuse to give it. The Fifth Amendment, which codifies this right, used to be the ultimate protection of the citizen against grand jury abuse. Today only lip service is paid to the Fifth Amendment in grand jury proceedings. It has been divested of its original character and power as a check on the exercise of compulsory process by the power of the State to force immunity and thereafter punish for contempt.

We urge enactment of the provisions in Sec. 4 of H.R. 3736 requiring the written consent of the witness before transactional immunity may be conferred, as the only course truly consistent with the Fifth Amendment and as the most effective means of constraining grand jury abuse.

On the issue of immunity, the entire matter is in the hands of Congress. Immunity is based on legislation; without it no court can take away Fifth Amendment rights. Since the entire system of immunity emerges from the Congress, it is its responsibility to take a careful look at the impact and workings of the system.

In *Ullman* v. *United States*, when the cry for "law and order" was as loud as it is today and when, like today, "national security" had become a slogan in the name of which constitutional liberties were abridged, Justice Frankfurter spoke eloquently and at length on the "spirit in which the Fifth Amendment's privilege against self-incrimination should be approached."

"It is relevant to define explicity the spirit in which the fifth amendment's privilege against self-incrimination should be approached. This command of the fifth amendment ('nor shall any person * * * be compelled in any criminal case to be a witness against himself * * *') registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.' [Citing Griswold, 'The Fifth Amendment Today' (1955), 7.] Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They, too, readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States. The Founders of the Nation were not naive or disregardful of the interests of justice. 350 U.S. 422 at 426 (1956)."

A century of erosion of the Fifth Amendment culminated in the Supreme Court's decision sustaining the Nixon Administration's use immunity statute[25] in *Kastigar* v. *United States*.[26] Since the *Kastigar* decision, government attorneys have been literally conferring immunity at will. Federal courts have been rubber stamping government attorneys' decisions to divest witnesses of their Fifth Amendment right against self-incrimination. As the present use immunity statute is being interpreted, the determination of when there is a sufficient public interest to deprive someone of a constitutional right is left entirely in the hands of the Department of Justice. There is no judicial review of this determination. Constitutional rights are too precious to allow the executive branch alone to decide which citizens should be allowed to retain them.

Furthermore, the protection provided by use immunity is limited. A witness testifying under use immunity may provide leads that result in his/her conviction. Our own experience has convinced us that government attorneys are not

[25] The decisions of the Court, discussed in the Introduction, which hold that the Fifth Amendment applies only to testimonial compulsion and does not protect against the compulsion to produce physical evidence and private records also constitute a major dilution of the accusatorial system of justice.

[26] 406 U.S. 441 (1972).

above perjury in pursuit of disfavored persons. We therefore believe that when a witness is willing to exchange her/his privilege for testimony, transactional and not use immunity should be given. When immunity is used as a carrot and not a stick, it does not violate the Fifth Amendment. To make the exchange both fair and desirable, however, transactional immunity is necessary.

There is no doubt that the power to force immunity is the *sine qua non* of the unprecedented grand jury abuse in this decade. The usefulness of coerced immunity in combatting white collar and organized crime, which was its original justification, is hotly disputed. To this debate the Department of Justice, its chief proponent, has failed to provide the data necessary to allow a thorough examination of the way forced immunity has been used; whether it is useful, if so, in what areas; what the alternatives are (i.e. other investigative techniques and the sufficiency of voluntary transactional immunity); and what the cost is to law enforcement of returning to a system of voluntary immunity. They have given us only selective, conclusory, self-serving statistics and professions of need.

It is enormously frustrating to us, trained as constitutional litigators, to be unable to put the government's allegations of need and good faith to the test of discovery and trial, and present our findings to this Committee. Since the courts have accepted the fiction that immunity is not a divestiture of the Fifth Amendment right they do not provide a forum for this test.

We do not believe the marginal efficiency that coerced immunity might contribute to law enforcement could ever justify dismantling the Fifth Amendment. The absence of a compelling and particularized showing of need from the government dictates against authorization by this Congress of any form of coerced immunity.

It is clear from our experience with subpoenas invasive of First Amendment protected activities, that coercion of immunity does not produce useful information to the government. Rather it facilitates the gathering of political intelligence and incarceration of the political resistor. Thus, if coerced transactional immunity were ever to be approved by the Congress, it would have to be limited to enumerated crimes or circumstances where compelling justification and overriding public interest were shown. In this way, Congress would at least reclaim the threshold control over the use of coerced immunity.

Congress would also have to ensure strict judicial review on a case by case basis. Congress must mandate the courts to determine in an adversarial proceeding that the information sought to be compelled is necessary to the investigation alleged and not sought for political reasons; that the investigation is of overriding importance; that the coercion of immunity is the only way to obtain the information sought; and that the information is likely to be provided if immunity is ordered. This kind of scrutiny is the minimally necessary check on an inherently totalitarian power.

Under the above it is essential that notice of intent to apply to the Court for an immunity order be given to the person who stands in danger of losing his/her constitutional right against self-incrimination before the plea of the Fifth is publicly made and at least 14 court days before the immunity hearing. Congress should require that immunity be authorized by a person currently serving as Attorney General and signed no more than two weeks prior to service of the notice. All papers presented to the Attorney General requesting authorization to apply for immunity for a witness, a copy of the signed authorization, and any special instructions or restriction placed thereon by the authorizing party should be attached to the notice to the witness. A list of the questions to be asked of the witness should also be attached, to help protect the witness from having his/her entire personal and political life subject to inquiry.

Any of the above-listed rights could be waived voluntarily and knowingly by the witness in writing. But even grants of voluntary immunity should be reviewed by the court, to ensure that the waiver is freely and intelligently given.

Congress should (1) repeal the use immunity statute, (2) enact a transactional immunity statute providing for voluntary immunity, specify that such immunity must be given before the production of any evidence claimed to be self-incriminating can be compelled, and containing the procedural safeguards suggested above, (3) study for a period the impact of the absence of a non-consensual immunity statute on law enforcement, to see if, as we believe, the benefits to constitutional liberty outweigh the cost, if any, in lost convictions. All of the above would help restore our accusatorial system of criminal justice.

EX PARTE IN CAMERA PROCEEDINGS

It is a fundamental principle in our system of justice that persons not be deprived of significant rights or privileges without an opportunity to rebut the evidence against them. The right to confrontation is explicitly codified for criminal proceedings in the Sixth Amendment. This right is also recognized in civil matters as part of the due process of law guaranteed by the Fifth Amendment.

In both civil and criminal proceedings there must be a sanction for withholding adverse information. In the criminal context, the rule is that unless the government discloses potentially relevant evidence, the prosecution must be dismissed.[27] In the civil context, the government may not restrict First Amendment rights unless the person has an opportunity to contest the government's claimed need for restraint, even where "top secret" or other highly sensitive information is involved.[28]

Today, the courts are beginning to recognize that the government may not clear itself of liability for wrongdoing on the basis of secret submissions to the court.[29] The principle inheres also in the sanctions authorized for failure to disclose information by Rule 37 of the Federal Rules of Court Procedure.

There is, however, a growing tendency in the federal courts to accept *ex parte in camera* submissions (the one-sided submissions of the government) in a variety of contexts. This tendency presents a very real threat to the adversarial principle, and the grand jury process has been allowed by the courts to be the worst offender.

It has become routine in grand jury cases for the government to submit *ex parte in camera* affidavits designed to justify the investigation and the relevance or necessity of the witness' testimony whenever a serious challenge to the grand jury is made. The witness never has an opportunity to rebut the conclusions, facts or inferences contained in these submissions, yet they are the basis on which the witness' challenge to the legality of the grand jury subpoena is rejected, that immunity is directed, and that a person is ultimately cited and jailed for contempt.

For example, Jill Raymond spent 14 months in jail for contempt of a grand jury in Lexington, Kentucky.[30] She challenged her subpoena on the ground that the grand jury was being illegally used to apprehend fugitives rather than to investigate the commission of crimes in the district. The evidence of abuse was substantial: The FBI agent responsible for the investigation has admitted to people that he was sure no one in Lexington knew the identity of the fugutives; the foreman of the grand jury explained the purpose of the investigation was "to find out where these two girls [Lena Paley a/k/a Susan Saxe and May Kelley a/k/a Katherine Powers] are or who they were with"; the Court characterized the investigation as concerning the "whereabouts" of the fugutives; and the United States Attorney insisted on speedy incarceration of the recalcitrant witnesses because time would allow the fugitives to escape the FBI net.

On appeal, the Sixth Circuit took this evidence as a *prima facie* showing of abuse and remanded for a hearing on whether the sole or dominant purpose of the investigation was to apprehend fugitives. This hearing never took place. The Court accepted at face value the secret submissions of the government alleging that harboring was the primary purpose of the grand jury and the witnesses' counsel was given no opportunity to examine either the agents or the prosecutors on this question. After Ms. Raymond was jailed, the so-called "harboring" investigation halted. A similar pattern of abuse and use of secret submissions was followed in New Haven, Connecticut in connection with the same fugitive search.[31]

In the case of the Fort Worth Five, which this Committee reviewed in 1973 and which the Chairman has indicated inspired these proceedings; the use of *ex parte in camera* submissions likewise blocked the witnesses, jailed for contempt, from discovering and demonstrating that an electronic overhearing of their counsel invaded their Sixth Amendment rights. CCR attorneys were co-counsel in that case.

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[27] *Alderman* v. *United States*, 394 U.S. 165 (1969).
[28] *New York Times* v. *United States*, 403 U.S. 713 (1971); *United States* v. *Marchetti*, 466 F. 2d 1309 (4th Cir.) cert. den. 409 U.S. 1063 (1972).
[29] See e.g. *Kinoy* v. *Mitchell*, 67 F.R.D. 1 (S.D.N.Y. 1975).
[30] *In re Raymond*, Civ. No. 75–26 (E.D.N.Y.).
[31] *In re Grusse and Turgeon*, Civ. No. 75–122 (D. Conn.).

While the contempts were on appeal, the government admitted that the electronic overhearing occurred two days before the witnesses were to appear before the grand jury and was "in connection with a separate aspects of the investigation." Attorney General Griffin Bell, then Circuit Justice Bell, wrote the opinion of the Court affirming the contempts.[32] Ignoring the cardinal rule of *Alderman*, he fused disclosure of the *in camera* logs. Had disclosure been ordered, we would have timely discovered that the overheard conversation was between co-counsel and another witness whom he represented in connection with the same grand jury proceedings. The lack of disclosure deprived the incarcerated witnesses of the opportunity to demonstrate Sixth Amendment taint to the Court. We learned the contents of the overheard conversation as a result of a disclosure order in connection with a federal prosecution in a New York case in which the same counsel represented the defendant. At that point the witnesses had served ten months in jail. On the basis of this discovery, Justice Douglas ordered them bailed and the grand jury expired shortly thereafter.[33]

Because these affidavits are central to the witness' challenge to the grand jury process and because of the severe consequences to the witness in term of loss of constitutional rights and liberty itself, we urge that the reform legislation contain a provision applying the "disclosure-or-dismiss" rule of *Alderman* to the grand jury process. The government must choose between attempting to compel or coerce a person's testimony and the necessity of giving up some information about its investigation. Such a rule is not only required by basic principles of due process; it is the only means of guaranteeing that questions as to abuse of the grand jury will really have their day in court, and give the government an incentive to limit is use of compulsory process to those cases where the need for the information is tested by some cost to law enforcement.

A number of lower federal courts have insisted on disclosure. The Ninth Circuit has stated the applicable principle:

"[R]udimentary concepts of fair play mean that the affidavit must be disclosed to Dinsio and her counsel [cities omitted] . . . The grand jury must make a fundamental showing that exemplars have some relevance to the investigation that it is conducting. Dinsio cannot be expected to demonstrate just a cause in a factual vacuum. She cannot be relegated to the status of a 'blind man striking at an invisible foe.' (*Chernekoff* v. *United States*, 219 F.2d 721, 724 [9th Cir., 1955]). She is entitled to an uninhibited adversarial hearing in which she can develop her proof that she has just cause to refuse the grand jury's demand . . . Nothing in the remand before us provides any basis upon which we could or would impermissibly comprise the secrecy of grand jury proceedings. Moreover, 'modest breaches of grand jury secrecy may be required when nondisclosure would defeat fundamental constitutional rights, including the right to due process.' *United States* v. *Dinsio*, 468 F.2d 1392, 1394 (9th Cir., 1972)."[34]

On the other hand, the major trend in the courts is reflected by the *Raymond* and *Tierney* cases. For this reason we feel that Congress must codify a disclosure rule.

RECORDING

We support the provisions in H.R. 94, § 3333 and H.R. §2333OA(i) that all proceedings before federal grand juries be recorded except the deliberative and voting processes of the grand jury. However, the actual vote should be recorded. Such deliberations and voting should be conducted in the presence of no one but grand jurors. If the approval of the grand jury is required for any matter besides the approval or disapproval of an indictment, the same rules should apply. Obviously the witnesses and their counsel must be able to consult without being overheard, and such consultations should not be recorded.

In the Memorandum on the Grand Jury prepared by the Office of Policy and Planning, U.S. Department of Justice, published in the hearing of this Committee

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[32] Judge Bell wrote:

"We have made an in camera examination of the transcript of this overhear. It contains nothing of evidentiary substance nor does it in anywise have to do with the right to counsel or the adequacy of representation by counsel. This incident does not afford a basis for the refusal of appellants to testify before the grand jury. *In re Tierney*, 465 F. 2d 806, 813 (5th Cir., 1972)."

[33] *In re Tierney*, No. A–148 (Order Dated Oct. 1, 1973).

[34] Accord, *Bursey* v. *United States*, 466 F. 2d 1059, 1077, 1091 (9th Cir., 1972); *In re September 1971 Grand Jury*, 454 F. 2d 580, 582–584 (7th Cir., 1972), *rev'd. on other grounds sub nom Mara* v. *United States*, 410 U.S. 19. See *also In re Grand Jury Proceedings, Schofield*, 486. F. 2d 85, 93 (3d Cir., 1973); *In re Vericker*, 446 F. 2d 244, 247 (2d Cir., 1971); *In re Bart*, 304 F. 2d 631, 637 (D.C. Cir., 1960).

at p. 86, it is stated at p. 103: . . . one of the major factors preventing recordation of grand jury testimony at the present time is the unavailability of court reporters in many areas.

This is a truly extraordinary assertion by the Department, particularly in light of the fact that beginning in the 1550's recordation was a requirement in the English magistrate's and coroner's inquests. IV Wigmore *Evidence* § 1326 n.1 (3d ed.). Federal district courts are not located in the middle of cornfields. Their very presence creates centers of legal activity, demanding the services of court reporters.

The Department's position against mandatory recordation serves first and foremost to circumvent the requirement of the Jencks Act, 18 U.S.C. § 3500, that the government produce the grand jury testimony of its witnesses. There is substantial evidence that government attorneys engage in selective recordation of grand jury testimony. The testimony of the court reporter in the Shinnick-Weiner case provides a clear example:

Q. Is everything before the grand stenographically transcribed?

A. Not always, no.

Q. Could you tell me the occasions when it is and when it's not?

A. I believe when the agents report to the grand jury, then I don't—I am not in the room. I'm dismissed for the time they are in there.

Q. Who dismisses you?

A. Whichever Assistant Attorney is in charge.

Q. So that it's the United States Attorney who either requests that you be there or that you not be there? Or dismisses you?

A. Yes.

Q. And that the practice, to your knowledge, is that when an agent—you mean an FBI agent—testifies, then under those circumstances you are dismissed?

A. Sometimes, not always.

Q. But have you ever been dismissed when any witness other than an FBI agent testifies?

A. I don't think so.

(Transcript, 9/17/76 pp. 111–112)

The *Shinnick* case is but one example of what appears to be a daily practice in many federal courts. The Circuit Courts have unanimously refused to require recordation of the testimony of government witnesses. By contrast, the leading authorities on criminal procedure urge mandatory recordation as an essential ingredient of fairness, 8 *Moore Federal Practice* (Cipes) ¶ 6.02[2] p. 6–23 (1976); 1 *Wright Federal Practice and Procedure*, § 103 (1969), as does the American Bar Association Project on Standards For Criminal Justice, *Standards Relating to the Prosecution Function* (Approved Draft 1971) § 3.5(c) p. 87–88. In addition, Moore sees recordation as "controlling overreaching or improper examination of witnesses by the prosecutor," *Id.* at 6–23. The ABA emphasizes the importance of recording the prosecutor's communications and representations to the jury to prevent his "tak[ing] advantage of his role as *ex parte* representative of the State . . . to unduly or unfairly influence it" in voting upon charges brought before it. *Id.* at 88.

Urging adoption of a mandatory recording rule, Judge Oakes of the Second Circuit explains that it also "go[es] to the integrity of the grand jury process" because it makes a future charge of prejury the price of dissembling before the grand jury, and it enables the defendants to challenge the sufficiency of the indictment. See *U.S.* v. *Cramer*, 447 F.2d 210, 222 (2d Cir. 1971) cert. denied 404 U.S. 1024.

Complete recordation of the proceedings is also essential to enable the witness to challenge the legality of the grand jury's investigation and subpoena effectively. The practice of selective recordation in the Eastern District of Kentucky prevented Jill Raymond from being able to prove her well-substantiated claim that the grand jury was improperly being used to assist in the apprehension of fugitives. She was unable to prove it because the FBI agent and/or prosecutor's "background" statements to the grand jury were not recorded, although the testimony of non-government witness was.

Recalcitrant witnesses

Civil contempt, which purports to be only a coercive power, is most often used to punish. A system of voluntary transactional immunity[35] would greatly reduce

[35] See discussion, *supra*.

the number of persons who would face confinement under the recalcitrant witness statute.

Proposals to prevent reiterative contempts, whether civil or criminal, are urgently needed (H.R. 94 § 1826, H.R. 3736 § 1826 and H.R. 406 § 1826). CCR attorneys represented a recalcitrant grand jury witness, who, while still in prison, was resubpoenaed to a successor grand jury.[36] After spending fourteen months in jail, Jill Raymond was threatened with being resubpoenaed. This threat appears commonplace. 28 U.S.C. § 1826 in its present form and as interpreted, has built in the possibility of unlimited confinement.

The above proposals as to reiterative contempts very properly apply to both grand jury and court proceedings.

We understand the reform bills to intend to limit the punishment for contempt, whether civil or criminal, to a maximum of six months for refusal to testify in connection with a particular transaction or set of transactions. However, the bills contain two loopholes which we believe to be an oversight in drafting.

The provisions of H.R. 94, H.R. 3736 and H.R. 406 share these problems. The way the bills are presently drafted, they would permit a person to be punished under both 28 U.S.C. § 1826 and 18 U.S.C. § 401 for the same refusal to testify. This is the implication of the use of the term "subsequent" in the sections amending § 1826, H.R. 94, p. 3, L. 18, and adding § 403, p. 5, L. 6. This loophole could be corrected by adding the words "same or" before "subsequent" in each instance.

CCR attorneys are presently of counsel for a defendant who was confined during a trial for refusal to testify and is now under indictment facing trial for the same refusal.[37] Such double punishment is unfair. The bar against Double Jeopardy was intended to prevent double punishment whether the label to "criminal" or "civil." Congress should prevent this abuse of its laws.

Secondly, the bills still permit open-ended punishment for criminal contempt. Unless Congress includes in proposed Section 403 the same limitation on the term of sentence applied to § 1826, the government can simply shift from using the recalcitrant witness statute to § 901 and circumvent this critical protection of the reform bills.[38]

We support a one-month limitation on contempt sentences for recalcitrant witnesses whether the court proceeds under 28 U.S.C. § 1826 or 18 U.S.C. § 401. Our experience has been that it is the threat of any incarceration rather than its length that coerces a witness to testify. We believe that a study would show that most witnesses comply shortly after incarceration or not at all.

Should the six-month limit on sentence proposed in the reform bills be adopted, we believe there should be no confinement when a witness has made a showing that s/he won't be coerced. A substantial showing was made in the case of Jay Weiner,[39] that he could not be coerced into testifying because of firm moral principles against doing so, yet he has been confined since November, 1976.

The courts should also be mandated to periodically reconsider whether continued confinement is punitive rather than coercive. It is important in § 1826 that the witness is entitled to such review but the courts rarely grant release. The most noteworthy exception is *In re Grumbles*, U.S.D.C., N.J., Crim. No. 722-71.[40] Patricia and Donald Grumbles were released after fourteen months imprisonment because the court found their sentence had become punitive.

We support grand jury participation in deciding if contempt should be sought. H.R. 3736(a)(1). (See discussion, *infra*, "Voting by the Grand Jury.")

Fourteen days notice of a contempt hearing should be the minimum required, unless the witness consents to a shorter period. It is difficult to show cause why a witness should not be held in contempt. Unlike criminal cases, the presumption

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[36] *In re Maury, supra.*

[37] *United States* v. *Hughey*, 76 Cr. 406 (S.D.N.Y.).

[38] The Warren Court rule enunciated in *Shillitani* v. *United States*, 384 U.S. 364 (1966) that the government should use coercive contempt before punitive was cast in question last term in *United States* v. *Wilson*, — U.S. —, 95 S. Ct. 1802, 1807 n. 9, and 1809, n. 2. (Blackman, J. concurring) (1975).

[39] Jay Weiner was incarcerated with Philip Shinnick but is not a public figure and was not released when Dr. Shinnick was. After an article about Dr. Shinnick entitled "A Modern Inquisition" by Tom Wicker appeared in the New York Times on Dec. 31, 1976, the government attorneys moved for his release and he was set free without any involvement of the grand jury.

[40] The Third Circuit denied the government's motion for summary reversal. *In re Grumbles*, No. 73-1184, 3d Cir., 1973.

is really guilt, not innocence. In preparation for a contempt hearing, witnesses often have to be interviewed and subpoenaed, affidavits prepared, and evidence gathered and examined. Undue haste deprives a witness of the barest opportunity to show cause.

Bail or release during appeal should be routine. The formulation that bail or release should be granted unless the appeal is "patently frivolous," H.R. 3736 § 1826(c) and H.R. *406* § 1826(c) is the best proposed.

The change proposed by H.R. 94 § 1826(c) requiring bail or release "unless it affirmatively appears that the appeal is frivolous or taken for delay" is a vast improvement over the "no bail unless" formulation of the present statute, but we fear it will be interpreted to deny release.[41]

As an alternative to the present formulations we urge that there should be an absolute right to bail pending appeal. Expedited treatment of these appeals which the bills require, will take care of the problem of frivolous appeals as they can be quickly denied by the Circuit.

We agree that appeal from contempts should be dealt with expeditiously by appellate courts and that no contemnor should under any circumstances remain incarcerated for more than thirty days while their appeal is pending.

The 30-day time period for the circuit to decide, however, should not remain mandatory. This requirement is confusing to the courts. The various circuits have differed on their interpretation of the present 30-day rule. See *In re Milickian*, 20 Crim. L. Rep. 2382 (8th Cir., 1977), which analyzes the widely disparate results reached by different circuits in interpreting the 30-day provision. It also prevents the courts observing the rule from giving full consideration to the issues presented, and encourages unexplained affirmances.

We agree that these appeals should be dealt with expeditiously. If anyone is to be incarcerated pending appeal, they should be entitled to release after 30 days until resolution of the appeal. No appeal requiring more than 30 days to decide can be considered frivolous. Jill Raymond sat in jail for five months waiting for the Sixth Court's decision.

We urge reforms to make confinement less onerous. The "Fort Worth Five" case, where confinement in Texas made visits from families an impossibility, was especially oppressive. Both the "Fort Worth Five" (during a large part of their incarceration in Texas) and the VVAW grand jury witnesses confined in a county jail in Florida got no fresh air for weeks on end. Such conditions are intolerable.

We have discussed *supra*, the issues of counsel for grand jury witnesses (See "Counsel") and the necessity to guarantee the right to raise constitutional and statutory violations in defense to contempt, although we believe these rights should also be available at the motion to quash stage. (See "Motion to Quash.")

SAFEGUARDING THE ACCUSATORIAL FUNCTION

The grand jury cannot reclaim its historical role as a "people's panel" exercising independent accusatory powers without significant institutional and legal changes. These are necessary to ensure that it exercises its powers in the name of the community in a truly democratic fashion.

The need for independent counsel to the grand jury

It is commonly accepted that the modern grand jury acts as the prosecutor's rubber stamp. Characterizing the grand jury as "essentially controlled by the United States Attorney and . . . his prosecutorial tool," one court recently adopted the following description of the process:

One experienced practitioner has noted:

"Indeed, generally, it is the prosecutor and not the grand jury that provides the only potential protection that exists between a possible accused and the bringing of criminal charges. . . .

"In theory, the grand jury could function without the prosecutor's direction and control. . . . However, as a practical matter, in the federal context, it is the prosecutor who provides the initiative and impetus needed for an effective grand jury investigation. He controls the commencement, pace, direction and scope of the investigation and serves the grand jury in the dual capacity of legal advisor and chief full-time investigator. He decides what witnesses,

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[41] In the VVAW grand jury case, the government claimed the appeal was frivolous and taken for delay. The Fifth Circuit refused bail even though it later reversed the contempts. *Beverly v. United States*, 468 F. 2d 732 (5th Cir. 1972).

evidence and information must be subpoenaed. He drafts the subpoenas and sets the date for each grand jury meeting. He conducts screening interviews with witnesses before they testify. . . . He places witnesses before the grand jury and normally conducts the initial examination. He will secure investigative support. . . . He will represent the grand jury in any legal proceedings ancillary to the investigation—for example, motions to quash subpoenas and contempt proceedings. He will obtain immunity grants and . . . will ultimately draft the indictment or information, if one is needed. *Panel and Discussion . . . The Ethical, Moral and Legal Obligations of the Prosecutor in a Grand Jury Investigation*, 67 F.R.D. 536, 539–39 (D.C. Cir. Judicial Conf. 1975) (remarks of S. Glanzer).[42]"

Important insights into prosecutorial domination of the grand jury were recently provided by an angry Atlanta grand jury. The Atlanta Journal reported:

"In an apparently unprecedented move, a federal grand jury here has sent U.S. District Court Judge Charles A. Moye a private memorandum harshly criticizing the administration of the grand jury system and asserting—among other things—that the jurors sometimes felt they were 'simply there to be used at the whim' of the U.S. Attorney's office.

"The jurors began their 11-page memorandum with a complaint that they had been empaneled in July 1975 to consider evidence in an investigation of two federal housing agencies and—despite the passage of 15 months—had yet to hear any testimony on the case.

"At another point in the memorandum, the jurors said that over a three-month period they had taken testimony in connection with a probe of alleged banking irregularities here, only to see their involvement in the investigation unexpectedly halted.

" 'Suddenly,' the memo states, 'we not only are not hearing evidence presented on this investigation, we cannot even learn what has happened to the investigation; what its status is, etc.' (Dec. 3, 1976).

* * * * * * *

" 'There have been times when the members of the Pitzer [the foreman] grand jury have felt that they were simply there to be used at the whim or desire of whatever attorney in the U.S. Attorney's office needed a 'warm-bodied grand jury' to hear testimony,' they complained in the memo.

"One day, Pitzer recalled, an assistant U.S. attorney annoyed the jurors by trying to take full control of questioning a witness. If the jurors had any questions to ask, the attorney reportedly told them, they could ask them only through him.

* * * * * * *

"The attorney had been handling the Atlanta grand jury as he was accustomed to handling grand juries in New York, explained his boss, chief U.S. Atty. John Stokes (Dec. 5, 1976)."

The prosecutor's usurpation of the grand jury's power and function precludes the grand jury from effectively exercising its watchdog function. The prosecutor must be divested of the anomalous function of legal adviser to the grand jury. So blatant a conflict of interest is not tolerated in any other judicial context, let alone one which so pervasively threatens basic constitutional rights.

Not only must the prosecutor be returned to the common law status as litigant before the grand jury, but the grand jury must be equipped with the resources necessary to enable it to act independently on a consistent basis. It is universally recognized that, given the increasing complexity of the law, a modern grand jury, particularly one concerned with white collar and organized crime, cannot function without legal assistance. It is also clear that the grand jury needs professional assistance to fully exercise its duty to question the prosecutor's evidence and representations.

Accordingly, we urge that a baseline step towards reestablishing the independence of the grand jury is for Congress to require the appointment of independent counsel for the grand jury. Such counsel would point out legal issues, help analyze testimony, ferret out exculpatory information not presented by the prosecution, assist the grand jury in exploring areas not touched by the prosecution, and in all other respects contribute to the functioning of the grand jury as an independent body consistent with its historic role.

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[42] Quoted in *Robert Hawthorne, Inv. v. Director of Internal Revenue*, 406 Supp. 1098, 1110, n. 37 (E.D.P. 1976).

Because of the need for an independent advisor on a continuing basis, we do not think that the appointment of grand jury counsel should be limited to those situations where the grand jury is embarked on an independent inquiry. (See H.R. 94 § 3330(b) and H.R. 3736 § 3330(a)(3)).

The institutionalization of grand jury counsel does not eliminate the need for appointment of special counsel to assist the grand jury in independent investigations. But we believe that history and sound public policy dictate that the power to conduct an independent inquiry must be confined to situations in which official misconduct is at issue.

Charge to grand jury

Grand jury reform cannot be effective unless grand jurors understand the importance of their independent role and function as guardians of constitutional rights of both targets and witnesses. We agree with the idea embodied in H.R. 94 § 3329 and H.R. 3736 § 3329 that Congress should mandate the matters on which grand juries must be instructed.

The sanctions contained in H.R. 3736 § 3329 for failure to instruct are necessary. We agree with the provision in both bills requiring district courts to guarantee that grand jurors understand the instructions given them. We feel that the charge should be given by the district court orally and that each grand jury should be given copies thereof. However, neither of the proposed bills charges in the manner we believe required to expedite a return of the grand jury to its independent institutional role, as they emphasize inquisitorial rather than accusatorial duties.

Just as petit juries are carefully instructed by the courts concerning their responsibilities, district courts should be required to instruct grand juries on their historical and constitutional function as a shield. This includes two prime duties:

First, it must determine whether or not the prosecutor has presented sufficient evidence upon which to found an indictment.

Secondly, even when the government has presented legally sufficient evidence on which to base an indictment it must act as the conscience of the community to determine whether one should be issued in a particular case. The grand jury's power of nullification was an integral part of their historic role. Instructing grand jurors that they have this power is essential to their independence and fulfillment of their constitutional function.

Rights of targets and witnesses

The grand jury cannot effectively exercise its accusatorial function unless certain rights, historically inherent in the grand jury process, are restored to the target or potential accused.

a. *The right to appear before the grand jury.*—Unlike many state jurisdictions, the target or potential accused has no right to appear before a federal grand jury. Yet the grand jury process exists to prevent a person from suffering the ignominy, trauma and disruption inevitably caused by indictment and subsequent trial, even if the defendant is ultimately acquitted. To deny the accused the right to possibly avert indictment by facing the grand jury, presenting her/his side of the story, answering questions, and presenting or suggesting exculpatory evidence that should be subpoenaed by the grand jury undermines its essential function.

At common law, the potential accused had this right as a matter of course. Denial of this right is explicable only as a concomitant of the growth of prosecutorial control over the grand jury. The return of this right fosters the grand jury's independence.

The right to communicate one's position to grand jurors outside the grand jury room so that they do not decide "in a vacuum" was recognized by the Supreme Court in the early 60's.[43] To be meaning, this right should be guaranteed inside the grand jury room as well.

We support the provisions of H.R. 94 § 3329(b) and 3736 § 3329(A)(a) requiring the United States Attorney to notify the target of the proceedings and of her/his right to request an opportunity to appear before the grand jury. But we do not believe that the decision whether or not to hear the target should be left to the grand jury. An absolute right to appear before the grand jury is a safeguard against an overreaching prosecutor. Moreover, to make it meaning-

[43] *Wood* v. *Georgia, supra.*

ful, the grand jury should either reveal to the accused the inculpating evidence or at least present a fair summary of it. Failure to allow a target to appear before the grand jury should be grounds for dismissing the indictment.

b. *The right to have exculpatory evidence presented to the grand jury.*—It is irreconcilable with the grand jury's screening function not to insist that the prosecutor present to the grand jury exculpatory information either in his possession or reasonably available in the exercise of due diligence.

Beginning with *Mooney* v. *Holohan*, 294 U.S. 103 and continuing up to the recent case of *United States* v. *Agurs*, 96 S.Ct. 2392, it has been recognized that due process of law prohibits a prosecutor from basing a prosecution on perjured testimony and requires that s/he notify a defendant of exculpatory evidence reasonably in the government's possession.

But generally speaking, courts refuse to sanction prosecutors who fail to provide a grand jury evidence which they know may tend to exculpate the defendant.

Prosecutors should have a statutory duty to present to the grand jury all the evidence that is or may be exculpatory. Otherwise abuses like those in connection with the indictment pending against former Representative Henry Helstoski will go unchecked. For two years, nine separate grand juries heard evidence, some of which was exculpatory. Though the United States Attorney promised the indicting grand jury that they would hear all the evidence presented to the other eight panels, he gave them only part of the evidence, omitting exculpatory portions. The court criticized the prosecutor's conduct as "wrong" and as "magnifying the significance of the omission of certain exonerating evidence from the presentation," but declined to quash the indictment.

Very occasionally, an indictment is dismissed because of the prosecutor's failure to present exculpatory evidence to the grand jury. For example, in dismissing the indictment in *United States* v. *DeMarco*, 401 F. Supp. 505, 514 (C.D. Calif. 1975), the Court wrote:

"Despite the defendant's colorable claim that the [illegible] was the product of improper motives and the defendant's colorable claim that the charge in question had been the subject of improper threats, the prosecutor did not disclose to the grand jury that the charge could be attacked as an unjustifiable exercise of the charging power. The grand jury was entitled to be appraised of that information so that it could make an independent judgment as to whether it was appropriate to return an indictment under the circumstances."

Also in *United States* v. *Basurto*, 497 F. 2d 781 (9th Cir. 1974) a conviction was reversed because the prosecutor found out after indictment that the government's principle witness had committed perjury before the grand jury.

Cases giving relief to indicted defendants are rare, however, because it is almost impossible to meet the standard set by the courts. The most recent example of this is the *Helstoski* case. Refusing to dismiss the indictment, even though the prosecutor had failed to present clearly exculpatory material to the grand jury, the court, quoting quite out of context from *Costello* v. *United States*, 350 U.S. 359 (1956) said: "An indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face is enough to call for trial of the charge on the merits.

Slip Opinion, p. 6.

In principle the distinction between the obligation of a prosecutor at the grand jury stage and the obligation at the trial stage cannot be justified. Withholding exculpatory evidence at the grand jury stage of a proceeding stultifies that body and denies it the opportunity to exercise its independent judgment in determining whether an accused should be prosecuted.

We therefore support the provisions of H.R. 94, § 3329(c) and H.R. 3736 § 3329A(d) which codify the prosecutor's duty to advise the grand jury of exculpatory evidence. We think, however, that to have teeth, the law should insist on the presentation of such evidence and make the failure to do so grounds for dismissal of the indictment.

Other rights must be guaranteed to witnesses and targets to safeguard against prosecutorial tactics which unfairly manipulate the power to indict.

c. *The right not to have one's plea of the fifth amendment presented to the grand jury.*—We also strongly support the provision contained in H.R. 94 § 3329(d) and H.R. 3736 § 3330(c) which precludes the prosecutor from bringing before the grand jury any witness who has given notice of her/his intention to plead the Fifth Amendment, or from informing the grand jury that the Fifth was invoked by one witness outside the presence of the grand jury.

The urgent need for such restraints is demonstrated in the record of a recent case where for some 20 pages of transcript, in a manner reminiscent of the McCarthy period, a witness was compelled to plead the Fifth Amendment repeatedly. This serves only to prejudice the witness and to influence the grand jury toward indictment, regardless of whether indictment is supported by the evidence or appropriate. The non-target witness is also threatened by this process as it influences the jury to charge the witness with contempt, although we believe this contempt power should be returned to the grand jury.

Again, the violation of this simple prohibition should be a ground for dismissal of the indictment or quashal of the subpoena.

d. *The prohibition on reiterative investigation.*—The provisions of H.R. 94 § 3329(e) and 3330B(e)(3) and H.R. 3736, § 3329A(f), and 3330A(h) requiring judicial approval for the use of multiple grand juries to obtain an indictment is also crucial to the reemergence of the grand jury as a shield to the accused. As recognized in the recent decision in the *Helstoski* case, the use of multiple grand juries "holds forth a high potential for prosecutorial abuse." (Slip Opinion p. 14.)

The standard for permitting additional consideration of the evidence should be a strict one: the newly discovered evidence should be significant and previously undiscoverable by due diligence. The prosecutor should be required to advise the grand jury of the action of its predecessor(s).

The sanction for failure to seek judicial approval should be dismissal of the indictment or quashal of the subpoena.

e. *Safeguards against a set up for perjury.*—It has become the practice of federal prosecutors in many jurisdictions to "set up" perjury prosecutions in a manner which seriously prejudices the rights of witnesses and defendants and effectively corrupts the institution of the grand jury.

The scenario adopted by a prosecutor intent on indicting a "target" is to call the person before a grand jury on several occasions and question him/her about a wide range of matters. The target, loath to plead the Fifth Amendment, answers the questions. The ultimate indicment is then handed down with a number of perjury counts based on inconsistencies in that testimony. Perjury before a grand jury is easy to establish these days because of a 1970 statute enacted at the request of the Department of Justice eliminating the "two witness" rule for perjury before such a body. The U.S. Attorney always presses the court not to sever the perjury counts from the substantive counts—and most courts go along in the interest of judicial economy.

The result is an open invitation to trial juries to compromise their verdicts and find guilt on perjury even if the substantive offense is not established.

The same scenario may be used against the witness as to whom there is insufficient evidence to obtain indictment for the substantive crime under investigation.

The bills before this Committee contain the essential protective ingredients: (1) The right, in advance of the witness' appearance before the grand jury, to be supplied with all prior statements in the government's possession (H.R. 94, § 3334(a) and H.R. 3736, § 330A(j)); (2) the right to examine a copy of transcript of the witness' testimony in the grand jury (H.R. § 3334(b) and H.R. 3736, § 3330A(i)(2)); and (3) the right to reappear before the grand jury to explain any inconsistencies (H.R. 3330A(i)(2)). We strongly urge adoption of these safeguards and making their disregard grounds for quashal of the subpoena or an absolute defense to a perjury indictment or contempt.

f. *Voting by the grand jury.*—We support the provisions of H.R. 3736 which require an affirmative vote by the grand jury: (1) before a witness is subpoenaed to testify or produce, H.R. 3736 § 3330A(a); (2) before the government submits an application for immunity to the court, H.R. 3736 § 2514(a)(1); and (3) before the attorney for the government applies for an order for a witness to show cause why s/he should not be held in contempt. As the immunity hearing could lead to taking a constitutional right away from the witness and a contempt hearing could lead to incarceration, we feel that applications relative to immunity and contempt should be filed only after a unanimous affirmative vote by the grand jury.

The potential contemnor faces the same jeopardy as a potential defendant. The principles discussed as to why an indictment should only be based on a unanimous vote of the grand jury (Statement p. 37) are applicable to requiring a wit-

ness to show cause at a contempt hearing. A charge of contempt before a grand jury is as a factual matter almost tantamount to conviction. Only if a unanimous vote of the grand jurors is required can the grand jury's nullification function come into play.

The grand jury should be allowed to vote on these three matters because they all involve whether or not the grand jury can obtain certain evidence. Increased grand jury involvement in that process would help eliminate the prosecutorial subterfuge of using the grand jury process and powers to obtain evidence for other purposes and help restrict application to the actual needs of the grand jury.

Before the grand jury votes on applications for immunity and contempt, it should hear arguments from the witness and/or witnesses' counsel. See discussion Statement, p. 19, re the role of witness' counsel in the grand jury room.

g. *Preliminary examination.*—The provision in H.R. 94 § 3368 for a post-indictment preliminary examination is sorely needed. The availability of such hearings should not depend on whether or not an indictment has been issued.[44] They would serve a triple function. First, to make sure that the grand jury has properly exercised its screening function and the government has sufficient evidence that the defendant committed the offense charged to require him/her to stand trial; second, to permit the defendant to examine government witnesses and prepare a defense; and third, to allow the defendant to present evidence on his/her own behalf. Many of the protections of the Sixth Amendment will be rendered more meaningful by such preliminary hearings including "to be informed of the nature and causes 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." If impeaching witnesses are available, the defendant will have adequate time to assure their appearance at trial. Totally exculpatory material may be presented that could put an end to the whole matter.

Size and representativeness

The right to indictment by a grand jury reflecting a fair cross-section of the community is firmly embedded in our constitutional law. The Federal Jury Selection and Service Act attempts to implement strict standards of representatives.[45]

Proposals to reduce the size of the grand jury threaten this constitutional right and the grand jury's ability to act in the name of the community. A grand jury of 23 is necessary to insure that there will be an adequate representation of minority groups. As a disproportionate number of minority persons are targets of criminal investigation, representation is crucial to equal and fair justice.

You may ask why the grand jury must be larger than the petit jury for it to be representative and fair. The answer lies in basic differences between the two. Grand jurors are screened only for eligibility and availability. There is no opportunity—as there was under the common law—for the witness or the accused to screen or *voir dire* the grand jury for prejudice. By contrast, the petit jury is *voir dired* and selected from a venire of 40 in the usual case or of over 100 in the more controversial case. The *voir dire* process is designed to have a mitigating impact on the jury prejudice, as is the fact that it witnesses the full adversarial process of the criminal trial. In general, the grand jury is likely to see only the prosecutor's case, even under the reforms envisaged.

Shrinking the present size of the grand jury virtually guarantees against minority voices being heard. Relevant sociological studies on small group interactions demonstrate that a member of a minority group will be silenced or confused by the majority even where the minority person is objectively correct in his/her perception. Conversely, it has been shown that the minority voice begins to make itself felt when a minority group of two, three or more is able to form. With a grand jury of twelve, most minority populations will lose the opportunity to be heard either because they are too small, or because discrimination in the

[44] Rule 5.1(a) of the Federal Rules of Criminal Procedure provides for a preliminary hearing only in those cases where a complaint has been filed. Thus, in federal crimes which require indictments, such hearings are presently available only where the indictment is preceded by a complaint. The right to a hearing is lost by indictment. Prosecutors can manipulate the timing of indictments to deprive defendants of this important right.

[45] 28 U.S.C. § 1861 *et seq.*

composition system disproportionately underrepresents them in the pool.[46] A larger size is necessary to give voice to cross-sectional differences which may well be decisive on the issue of indictment or no bill.

For the same reasons, we strongly support the reform legislation which would require a unanimous vote of the grand jurors to indict. The lesser probable cause standard applied by a grand jury, compared with the reasonable doubt standard at rial, also argues for unanimity. If the government is unable to convince a grand jury, unscreened for prejudice, in a non-adversary proceeding, that someone should be indicted, then there can be no likelihood of a conviction. Thus unanimity would both save prosecutorial resources and make possible a grand jury's function as a shield to the accused.

GRAND JURY SECRECY AND LEAKS BY PROSECUTORS

Grand jury secrecy is an important protection for the accused. But, like the grand jury as a whole, this protective device is manipulated by prosecutors against the potential defendant. After an exhaustive study of the problem, the New York State Commission on Investigations identified the prosecutor as the chief culprit:

Although most prosecutors disagreed, the testimony adduced at the hearings supports the conclusion that a substantial percentage of the improper disclosure emanates from prosecutors' offices.[47] Report on Improper Disclosures of Grand Jury Proceedings, 3/24/76, pp. 4–5.

In the many federal grand juries with which CCR has been involved, we have seen evidence of prosecutorial leaks that could only have come from either the Department of Justice or the local United States Attorney's office.

The most recent example of this was in connection with the Phillip Kent Shinnick/Jay Weiner case in the Middle District of Pennsylvania. In a contempt proceeding, the court refused to allow the defendants to put the United States Attorney, S. John Cottone, on the stand to examine him regarding information contained in newspaper articles quoting him on the progress of the grand jury investigations (i.e., when indictments would be forthcoming, and what evidence was available).

In connection with the Vietnam Veterans Against the War (VVAW) grand jury in Tallahassee, Florida, the government attorneys refused to disclose the subject matter of the investigations to the witnesses' attorney. However, an article in the *Atlanta Constitution* on July 12, 1972, based on a Justice Department source, revealed that V.V.A.W. members were being investigated in connection with a bomb plot.

The damage done to individuals and groups who find themselves accused of wrongdoing through grand jury leaks is self-evident. Steps must be taken to stop those responsible for law enforcement from abusing the information and power in their hands.

New remedies must be designed to deter leaks of grand jury information and to remedy the harm done. We do not object to the provisions in H.R. 94, 18 U.S.C. § 1512, imposing criminal penalties on grand jurors and government officials for violations of grand jury secrecy, but we feel that there is little likelihood of prosecution of government attorneys or agents by other government attorneys. Although leaks are also punishable by contempt, we know of no instance of a government attorney ordered to show cause as to why he should not be held in contempt because of such leaks to the press.

The remedy must not depend on the state or local criminal justice machinery. The reason for this is obvious. History has shown that prosecutors don't prosecute themselves or their colleagues.

Nor does the remedy lie with the bar associations. As the Association of the Bar of the City of New York concluded after extensive study:

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[46] Systematic underrepresentation of minority communities is almost universal in the federal system. Voting lists are still largely relied upon as the sole source for the jury pool, despite the supplementation mandate of 28 U.S.C. § 1863(b)(2). Census Bureau figures for the 1974 election show a national average underrepresentation of 11.7 percent of Blacks (45.1 percent of Blacks not being registered) and of 43.9 percent of Latinos (65.1 percent not being registered). *Voting and Registration in the Election of November 1974*, Series p. 20, No. 293 (1976).

[47] The Report on Improper Disclosures of Grand Jury Proceedings, pp. 4–5 (Mar. 24, 1976).

"Grievance committees of state or local bar associations have been overwhelmingly unsympathetic to disciplinary actions against public prosecutors." [43]

The only effective deterrent is one which can be invoked by the aggrieved party. We recommend legislation to provide a cause of action to persons about whom grand jury information has been leaked. The action should be against the prosecutor or law enforcement official who leaked the information.

In 1968, Congress made such a civil damage remedy available for victims of illegal electronic surveillance by passing Section 2520 of Title 18 of the United States Code. Today, victims of illegal electronic surveillance are vigorously suing the wrongdoers, who were never prosecuted, although such electronic surveillance has long been a crime.

Similar federal legislation on illegal grand jury leaks could provide for liquidated or actual damages, whichever is higher, as well as for punitive damages, attorneys' fees, and costs to a successful litigant. The statute should negate any claims of governmental or prosecutorial immunity or privilege.

Just as witnesses, their counsel, and media representatives are exempt from criminal sanction under H.R. 94, they should not be subject to civil suit. Nor should they be forced to testify in connection with any such proceeding although their voluntary testimony is, of course, permissible.

Ordinarily, government attorneys represent government officials who are sued. In grand jury leak damage suits, such representation should be contingent on execution of an affidavit by the alleged wrongdoer affirmatively denying responsibility for grand jury leak(s) and setting forth any information she/he has as to who was responsible for said leaks. Affidavits, if later proved false, could result in perjury penalties as well as punitive damages.

The passage of such legislation will serve as a deterrent to prosecutors and others who are charged with keeping grand jury information secret, but leak it with impunity. The character assassination caused by grand jury leaks must be stopped. A civil remedy would help stop them.

Additionally, if a no-bill is voted by a grand jury or the investigation is dropped, and there has been previous improper release of information regarding an investigation, the person(s) who was the target of the investigation should be notified, and given the option to request the prosecutor's office to issue a statement announcing the no-bill or dropping of the investigation. Victims of improper leaks should be able to use the grand jury's decision in whatever additional way they think will help make them whole.

In discussing grand jury secrecy, it is necessary to distinguish between secrecy necessary to avoid character assassination, and unwarranted secrecy inconsistent with an open society. The recently publicized crimes committed by those in high office, who hid behind claims of privilege, should make us take a fresh look at grand jury secrecy. How much secrecy is necessary? In his dissenting opinion in *Pittsburg Plate Glass Co.* v. *United States*, 360 U.S. 395 at 405, Justice Brennan summarized the justifications for grand jury secrecy:

(1) To prevent the accused from escaping before he is indicted and arrested or from tampering with the witnesses against him. (2) To prevent disclosure of derogatory information presented to the grand jury against an accused who has not been indicted. (3) To encourage complainants and witnesses to come before the grand jury and speak freely without fear that testimony will be made public thereby subjecting them to possible discomfort or retaliation. (4) To encourage the grand jurors to engage in uninhibited investigation and deliberation by barring disclosure of their votes and comments during the proceedings.

When considering whether or not to disclose information about a grand jury investigation in a particular situation, many of the above reasons for secrecy may not be applicable. We refer the Committee to an excellent discussion on this issue by United States District Judge Ferguson in *In re Russo*, 53 F.R.D. 564 (1971). The whole issue of grand jury secrecy requires serious rethinking.

We strenuously support the continuation of the policy that grand jury witnesses and their attorneys not be bound by grand jury secrecy.

Grand jury secrecy should not be used to prevent courts from exercising their supervisory power over grand juries. It is impossible to determine whether or not a grand jury is being improperly used or whether the constitutional and other rights of witnesses are being violated without an adversary hearing with

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[43] Dorsen and Friedman, *Disorder in the Court: Report of the Association of the Bar of the City of New York*, Special Committee on Courtroom Conduct, p. 187 (Pantheon, 1973).

disclosure of all evidence on which each side relies. A technique adopted by the Second Circuit in *In re Vericker*, 446 F.2d 244, n.2 (1971), shows how targets can be protected from unfair publicity. Following the example set by our brief in that case, the Second Circuit edited out the names of the persons inquired about.

It is important for the public to be aware of grand jury abuse, so that necessary reforms can be brought about. Secrecy should not be allowed to hide misuse of the grand jury process or violations of the right of witnesses.

We strongly support a requirement that the entire record of the grand jury proceedings be made available to the defendant shortly after formal accusation. After indictment, the considerations justifying secrecy no longer obtain. Full disclosure is necessary to permit the defendant an effective challenge to the indictment. It is also necessary to prevent the government from manipulating the testimony before the grand jury to reduce the possibilities of impeachment of its witnesses (e.g. the practice of putting one investigating or undercover agent before the grand jury and saving his/her partner for trial). Giving defense counsel the right to examine the transcript is the only means of assuring that all testimony or evidence material to the defense will come to light.

CONCLUSION

As counsel to victims of grand jury abuse, we cannot overstate the critical role Congress and only Congress can play at this juncture to curtail this growing menace to our fundamental liberties. Neither the executive nor the courts will do so.

The protection of constitutionally cherished rights and values falls to Congress in times like these when conservative Supreme Court majorities leave them in jeopardy. Just as Congress stepped in after the Court's decision in *Olmstead v. United States*, 277 U.S. 438 (1928) to curtail the investigatory powers of the state by prohibiting wiretapping, so must this body today assume the duty to safeguard the rights of the people which the grand jury was designed to protect.

TESTIMONY OF DORIS PETERSON, CENTER FOR CONSTITUTIONAL RIGHTS, ACCOMPANIED BY RHONDA COPELON, CENTER FOR CONSTITUTIONAL RIGHTS

Ms. PETERSON. I am a staff attorney at the Center for Constitutional Rights, and with me today is Rhonda Copelon who is another staff attorney who will help me in responding to questions.

The center has been involved for many years in representing victims of grand jury abuse. I have personally been involved in either representing grand jury witnesses or consulting with other attorneys, in over 100 cases, including the Fort Worth Five, the VVAW grand jury, the Boston Pentagon papers grand jury, and the *Phillip Shinnick* case. In all of those cases I was personal counsel for the witnesses.

We get many calls each week at the Center for Constitutional Rights from attorneys around the country with problems about grand juries. These calls come from as far away as Puerto Rico, Alaska, and California. The center views grand jury abuse as one of the gravest threats to our democratic system, and we welcome this committee's efforts to find a solution to this problem.

The previous administration vastly expanded the dimensions and repressive impact of grand juries. The FBI and prosecutors have begun massive borrowing of grand jury subpena power and are responsible for its abuse, so that we cannot look to the Executive for reform. The Supreme Court, through a series of decisions, has fostered grand jury abuse. It clearly cannot be counted upon to stop these abuses.

Therefore, the job is up to Congress. Congress must come forward to protect the constitutional rights of witnesses. The committee has before it many wonderful proposals in the bills, and we have not been

able to respond to all of those proposals, but our lack of response does not mean that we are not very impressed with the job that you have done in this matter. We would especially like to compliment the chairman of the committee.

Mr. EILBERG. Thank you for that. And again I stress that the record will remain open so that you can respond to anything that you want to subsequent to the hearing.

Ms. PETERSON. Thank you very much. We feel that the prime task is to restore the grand jury to its constitutional function. Professor Scott will discuss the historical and constitutional role of the grand jury and how it should properly function.

We have been moving in this country from an accusatorial system of justice, which is our basic system of justice, to an inquisitorial one. This is most manifest in the area of grand jury abuse. Two things are necessary to help restore the accusatorial system.

One is the adoption of voluntary immunity. We think that the step proposing the return to transactional immunity is a good one, but we do not support coercive immunity of any kind.

Second, we believe that it is necessary to restore the independence of the grand jury. This can be done by freeing the grand jury from the control of the prosecutor. As long as prosecutors control the grand jury, there is a built-in conflict of interest, and the grand jury cannot be independent. That is why we propose special counsel to the grand jury.

The special counsel we suggest is different from the special prosecutor proposed in the bills. The special counsel's only function would be as an adviser to the grand jury. He would not prosecute cases after indictment. He would just help the grand jury to review the evidence to fulfill its constitutional role which Professor Scott will discuss.

In order to protect the rights of witnesses, we feel that it is of prime importance that counsel for the witness be allowed in the grand jury room. We oppose that proposal for the removal of counsel for the witness, because we think that that invites abuse and will be used to harass grand jury witnesses. There are other ways of controlling the behavior of counsel. Removal of witness counsel would also be very much under the control of the prosecutor who would suggest to the court that counsel for the witnesses be removed. Yet the prosecutors have been among the prime abusers of the grand jury process and I know of no example where a prosecutor has been removed from a particular grand jury case, no matter what excesses he or she engaged in.

We also feel that the grand jury should be permitted to hear counsel for the witness if they want to. There may be occasions on which the grand jury would feel that the witness' counsel could make a valuable contribution, and we don't think that the bill should contain a bar against the witness' counsel ever speaking, because that takes away from the grand jury's independence to determine what they want to hear.

Another basic right for witnesses that should be guaranteed is that no witness should either be deprived of the fifth amendment right against self-incrimination or subject to punishment through contempt on the basis of ex parte submissions which the witness has no opportunity to answer.

It is a fundamental principle in our system of justice that persons should not be deprived of significant rights without an opportunity to rebut the evidence against them.

In the case of Jill Raymond, an FBI agent told persons in the community that they were looking for two fugitives but that they did not think that anyone in Lexington knew who they were. The foreman of the grand jury, in a very unusual occurrence, told one of the witnesses in the grand jury room that the grand jury was conducting the investigation to find two fugitives. The district court characterized the investigation at one point in the record as concerned with the whereabouts of fugitives. The prosecutor argued that the witnesses should not be freed on bail because unless the witnesses were forced to testify immediately the fugitives would escape.

The sixth circuit took this as a prima facie showing of abuse and remanded the case for a hearing. At the hearing the Government submitted an *ex parte, in camera* affidavit which the attorneys for the witnesses were never allowed to see. The witnesses' attorneys were not allowed to examine the prosecutor or the foreman of the grand jury as to the purpose of the grand jury, or to enable the FBI agent who had given a "background" statement to the grand jury.

But on the basis of the Government's *in camera* submission, the court found that the purpose of that grand jury was to investigate harboring and not look for fugitives.

This case illustrates the need for full disclosure when witnesses are going to be punished, either by deprivation of constitutional rights or by incarceration. Such things could not happen at a criminal trial.

Where the witness has made a showing of abuse, the counsel for the witness should at least be entitled to know what information the Government relies on before the court overrules the witness' contentions.

Another critical safeguard for the rights of witnesses is evidentiary hearings. They must be made more available to witnesses when necessary. All the warnings about minitrials really mean no protection for the rights of witnesses, even for the constitutional rights of witnesses. Hearings are often necessary to protect these rights.

This committee held a hearing in the case of the Fort Worth Five which revealed a great deal of evidence as to why they had been subpenaed to Texas. There was no reason for them being called that far away, but we could not have gotten that information during the grand jury proceedings, nor could we have had that hearing in New York as the reform bill would allow.

In the *Phillip-Shinnick* case the Government was subpenaing handwriting and fingerprint examples. At the contempt hearing, which is the trial, we were not allowed to put the U.S. attorney on the stand to prove that the Government had no need for examplars which it was trying to get from Dr. Shinnick, even though this was our contention and we had put into the record that the Government already had these examplars. We were also not allowed to put the foreman of the grand jury on the stand to prove that the grand jury was being used simply to collect evidence for the FBI and for a trial and that the grand jury did not need the evidence sought.

After an month in jail, the Government released Dr. Shinnick, admitting that they did not need these examplars.

Thank you very much.

Mr. EILBERG. Thank you, Ms. Peterson.

TESTIMONY OF PROF. JOHN ANTHONY SCOTT, LEGAL HISTORIAN, RUTGERS UNIVERSITY SCHOOL OF LAW

Mr. EILBERG. Next we will have Professor John Anthony Scott. And I assume you are agreeable to your statement being made part of the record?

Professor SCOTT. Yes.

Mr. EILBERG. Without objection, it is made part of the record.

[The prepared statement of Professor Scott follows:]

STATEMENT OF PROFESSOR JOHN ANTHONY SCOTT, LEGAL HISTORIAN AND LECTURER IN LAW, RUTGERS UNIVERSITY SCHOOL OF LAW, NEWARK, N.J.

As a student of the common law origins of our Constitution, particularly of the Bill of Rights, I am delighted at the opportunity to address this Committee.

The work of the Committee is of truly historic importance. This decade is experiencing the culmination of a shift from the accusatorial system of justice, dictated by the framers of the Constitution, to one with the characteristics of the inquisitorial system against which they and their English forebearers revolted.

The grand jury was written into the Bill of Rights because it became, in common law England and particularly in the colonies, a leader and symbol of community resistance to arbitrary and oppressive state power. History teaches that in both England and the colonies, despotic rulers were constantly experimenting with more "efficient" and controllable mechanisms to circumvent the grand jury. The most devasting of these were the High Commission and the Star Chamber which claimed also the power to punish a person for refusing to give testimony.

The modern grand jury, dominated by, and indeed a tool of the prosecutor, and aided by the power to punish a person for asserting the right to silence which the Fifth Amendment originally guaranteed, bears more resemblance to these hated instruments of power than to its democratic predecessor. Particularly within the last decade, under the Nixon Administration, the full force of this oppressive instrumentality has been brought to bear—and frequently against political dissidents.

Distortion of both the form and the purpose of the "investigatory" powers of the common law grand jury has both camouflaged and abetted this transformation of the grand jury. As we shall see, the medieval grand jury's "investigations" consisted of examining physical evidence and talking with community people willing to give evidence. As the justice apparatus of the state developed and magistrates, invested with subpoena power, began to collect evidence, the grand jury exercised its subpoena power, particularly in the colonies to assure itself of the appropriateness of indictment. The critical and ignored fact is that the common law grand jury was valued as an independent body; when it investigated it was in the name of the community and not of the king. Moreover, the investigative powers of the common law grand jury were always critically limited by a person's right to refuse to take the oath. The long struggle to reclaim that right as against the Star Chamber's oath ex officio was summarized in the 17th Century in the fierce and eloquent personnage of John Libourne.

Though the development of the grand jury after 1870 falls outside the scope of the research I have prepared today for the Committee, it is important to note briefly that the exercise of independent investigatorial powers of the American grand jury developed primarily after the civil war when corrupt practices by elected officials and wrongdoing by business corporations began to assume enormous proportions. Public anger brought a response from grand juries, which began to assume sweeping powers in the investigation of governmental crime, municipal corruption, and business conspiracies in restraint of trade. This type of investigation was not infrequently carried forward in the teeth of governmental opposition and prosecutorial indifference. Again, the critical and overlooked element is the degree of independence enjoyed by American grand juries until quite recent times.

Thus, the inquisitorial powers claimed by both the Executive and the Supreme Court for the modern grand jury are a perversion of its historical role and function. The power to inquire which inhered in the common law grand jury was connected to its accusatorial or screening function. This is the function mandated by the Constitution. Later, the grand jury as in independent citizen's

body undertook to initiate investigations against officials and magnates where the prosecutor defaulted. This exercise of power, though it may be salutary for a democratic society, is not mandated by the Constitution. In neither instance, however, was the grand jury acting as the tool of the prosecutor. It is the acquisition of control of the grand jury by the Executive, together with the power to force immunity which has effectively converted the grand jury into a star chamber, which was its very antithesis.

This is not to say that the grand jury itself, even an independent one, never functioned oppressively. Those examples are well known. What is less well understood is that there was, in England and particularly in colonial America, a ferocious struggle to preserve the grand jury as a protector of the people against their rulers. The Framers' understanding of the continuing need for that protection explains the requirement of the grand jury in the Bill of Rights. It is this history that I have summarized for the Committee today.

Before I begin that I would like to draw what I believe are the lessons that should guide this Committee in its historic task. The first is not to try to abolish the grand jury because it has been captured by the law enforcement establishment, but rather to redefine its duties and powers as envisaged by the Framers of the Constitution. The power to compel immunity and thereafter punish for recalcitrance, a very recent addition, must be eliminated and the Fifth Amendment restored for any reform to be meaningful. Beyond that is the slow process of restoring independence to the grand jury which was the essence of its strength.

1. IN ITS ORIGINS THE ESSENCE OF GRAND JURY PROCEDURE WAS THE ACCUSATION OF SUSPECTED PERSONS

Juries, or groups of neighbors sworn to provide the King with information which they personally possessed, were a fact-finding instrument systematized in England by the Norman Kings after the Conquest. Such juries were supposed to tell the King whatever he wanted to know; and, because he belonged to a foreign conquering dynasty, usually he wanted to know a great deal. The compilation of Doomsday Book, a complete and incredibly detailed picture of English landholding in the late 11th century, is a good example of what was accomplished by the use of local juries.

During the reign of Henry II, in the latter part of the 12th century, the use of juries began to become specialized. The jury emerged as an instrument, not at first for the trial, but for the detection of crime. The first grand juries were set up all over England with the command that they accuse people suspected of crime, so that such people might then be brought before the royal justices and sent to trial. The relevant portion of the Assize of Clarendon promulgated by Henry II in 1166 reads:

"For the preservation of peace and the enforcement of justice, inquiry shall be made in every county and in every hundred through twelve of the more lawful men of the hundred and through four of the more lawful men of each vill, put on oath to tell the truth, whether in their hundred or in their vill there is any man accused or publicly known as a robber or murderer or thief . . . since the lord king has been king. And let the royal justices make this investigation in their presence and the sheriffs in their presence." [1]

This method of handling presentment and accusation was confirmed by the Assize of Northampton, passed in 1176. The severity of the punishment inflicted upon those who failed to clear themselves was greatly increased—guilty persons were to be deprived of a hand and a foot and sent into exile. Even those who cleared themselves at trial, if their reputation was bad, must nonetheless go into exile and not return under penalty of death or whatever punishment the King might decree.

Why did Henry II institute these new grand jury proceedings?

The Norman kings found the adversary principle rooted in their English domains, and this was a national tradition that could be traced back to the very origins of the Anglo-Saxon peoples. This adversary principle would survive in a unique way in England when it had passed out of use in the rest of Europe.

Anglo-Saxon jurisprudence knew nothing of the distinction between civil and criminal actions which is so fundamental to our modern law. Virtually any wrong inflicted upon one person by another, whether intentionally or not, was emendable, that is, could be set right by the payment of an appropriate sum of

[1] C. Stephenson and F. G. Marcham, "Sources of English Constitutional History" (New York, 1972), 1, 77.

money. With tiny, even if important exceptions, the whole range of human behavior fell under this rule. Homicide itself was a form of damage that could be paid for.

There was a certain charming simplicity about this scheme of things. For one, it ruled out the question of motive. A man was responsible for everything that he did no matter what his motive. He was responsible for harm inflicted by his sword if it had been borrowed by a friend, or for the damage inflicted by his runaway horse. For what you did, or for what was done by yours, you paid. And the sanction for payment rested not with a court, but with the kin. The family of a damaged person were in duty bound to prosecute his affairs, to defend his interests, and to exact the stipulated payment, if necessary at the point of the sword.

Almost all law, in other words, was private law, and the adversary procedure was rooted in the kinship system which sustained it, which initiated suits, which prosecuted actions, which collected payments. The process of bringing a wrongdoer to court and, face to face, making an accusation before a judge, was known as the appeal. This is not to be confused with our modern use of the same word, which has quite a different meaning in law. The ancient appeal, quite simply, was a face to face accusation in a properly constituted court.[2]

By the 12th century appeals, or suits brought by private individuals, were no longer sufficient to maintain law and order. The old kinship system had been weakened by centuries of social change and by the rise of serfdom. The lawlessness of the rural population had increased greatly since the Conquest. This, of course, was not the lawlessness of Norman barons who could and did fight each other, as in the reign of Stephen (1100–35), but the lawlessness of an oppressed peasantry whose degree of exploitation had increased directly with the Conquest and the enormous additional burdens which this imposed upon them.[3]

The Norman state, therefore, had to find additional ways of punishing criminals at a time when the traditional method of private prosecutions conducted by individuals and their kin had become entirely inadequate.

The introduction of the grand jury for this purpose was a brilliant stroke. The Norman state in the 12th century was still very weak by modern standards. The very concept of royal prosecutorial authority, of the royal conduct of trials, of royal responsibility for initiative in the enforcement of criminal law, of special legal staffs to implement such things, was not even in its infancy—it had not yet been born. Henry therefore decided to use the community itself, under oath, to initiate those prosecutions or appeals which private enterprise—i.e., private appeals—could or would no longer do. Grand jury proceedings would supplement, and in time supplant, the purely private accusations or appeals which traditionally had been the way in which all legal suits were initiated.

In initiating this form of royal prosecution Henry was the prisoner of his own weakness and of Anglo-Saxon tradition. The initiation of criminal proceedings assumed the same adversary form as the private appeal. The only difference, now, was that the appeal was made by and on behalf of the community in which the accused person lived, not by an individual.

This utilization of English villagers and freeholders in the development of the grand jury is a fact of enormous importance in understanding the essence of the institution. The central purpose of the grand jury, at the very root of the innovation, was not the investigation of crime but the accusation of an already suspect party. It is more than likely that Henry was only further systematizing what had been accusatorial procedure even in the late Anglo-Saxon times. The laws

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[2] Shakespeare gives matchless dramatic expression to the appeal process in *Richard II* when Bolingbroke comes before the King to "appeal" or accuse Thomas Mowbray. Richard opens court and opens the play with these words:

"Old John Gaunt, time-honored Lancaster,
Hast thou, according to thy oath and bond,
Brought hither Henry Hereford thy bold son,
Here to make good the boisterous late appeal,
Which then our leisure would not let us hear,
Against the Duke of Norfolk, Thomas Mowbray?"

The "appealer" and the "appealed" appear before the king and greet him. Richard then says

"We thank you both; yet one but flatters us,
As well appeareth by the cause you come;
Namely to *appeal each other* of high treason." (Emphasis added)

[3] For the significance of struggle in the medieval countryside see Rodney Hilton, "Bond Men Made Free: Medieval Peasant Movements and the English Rising of 1381" (New York, 1973).

of Ethelred II include an ordinance for the swearing in, in the shire court, of 12 senior landholders; they must take an oath, that they will not fail to accuse the guilty, but that, too, they will not accuse the innocent. Such accusing bodies, under oath, must avoid false accusation, and they must present those who, from their own knowledge, are suspect.

2. THE ORIGINAL GRAND JURY HAD NO INVESTIGATORY FUNCTION

The concept of pretrial investigation of criminal acts was utterly unknown in 12th century England and would have been meaningless. The grand jury was not a permanent body of permanent membership, but a group of freeholders selected *ad hoc* by the sheriff before the royal judge, who rode "circuit," arrived. They were assumed to know everything and were bound to accuse from their own knowledge of local people and their reputation. When the royal judge left they were disbanded. Though they may have acted on rumors or gossip, they were not constituted to investigate them.

Persons presented by the grand juries thus set up were then sent to trial. It is crucial for us, in understanding the significance of the grand jury, also to understand what "trial" meant and not to fall into the unhistorical trap of assuming that a 12th century trial was in essence a secular proceeding with a jury like a modern trial might be. Most trials in those days were conducted by the Church. The function of either the royal or seigneurial court was simply to hear the accusation, to determine the mode of trial, and to pronounce sentence. Until well into the 13th century, and certainly long after Magna Carta in 1215, the commonest mode of trial was the ordeal.

It is also important to understand that 12th century Englishmen viewed the ordeal as a basic human right. The very idea that mere men could establish the truth in the matter of appeals would have been inconceivable to them. To the 12th century mind only God knew the truth of such matters and could alone reveal that truth if he was approached with the appropriate ritual. Ordeal was the cherished right handed down from early Anglo-Saxon days. The Catholic Church having in vain tried to stamp out this pagan practice had taken it over. By the end of the Anglo-Saxon era the Church was conducting hundreds of ordeals and the prayer books were filled with instructions as to the appropriate rituals to be conducted in these legal causes.[4]

The ordeal was not tantamount to condemnation and death. Many survived and if the ordeal failed, the royal or seigneurial courts imposed the punishment.[5] The grand jury's accusation, though greatly feared, was not the equivalent of guilt. Though the grand jury was bound not to accuse falsely, it was a matter of faith that false accusations would be vindicated since the trial was conducted by God and the Church.

There were, in the 12th century, some direct penalties arising from grand jury accusation, but these were temporary. By the statute of Northampton, 1176, persons who were cleared by the ordeal might still have to go into exile if they were of notorious reputation:

"And if he should be cleared by the ordeal of water let him find sureties and remain in the kingdom, unless he has been accused of murder or other disgraceful felony by the community of the county and the lawful knights of his own

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[4] The historical fact is that trial by jury did not begin to make headway until after the Lateran Council abolished trial by ordeal in 1215; and then it took the best part of a century to get itself established in the fact of a determined opposition by the English community.

[5] Here is an account of the cold water trial and the pretrial procedures. "Let the hands of the accused be bound together under the bent knees. . . . Then he shall be bound around the loins with a rope strong enough to hold him; and in the rope will be made a knot at the distance of the length of his hair; and so he shall be let down gently into the water so as not to make a splash. If he sinks down to the knot he shall be drawn up and saved; otherwise let him be adjudged a guilty man by the spectators."

In the hot iron trial the procedure (dooms of Aethelstan) was as follows:

"An equal number of men from both parties shall go in and stand along the church on each side of the ordeal, and all of them shall be fasting and shall have held themselves from their wives during the previous night. And the priest shall sprinkle them all with holy water and give them to taste of the holy water; and he shall give them the Book to kiss and the sign of Christ's cross. And no one shall build up the fire any more after the consecretation has begun, but the iron shall lie on the embers till the last collect. Then it shall be laid on the post. And nothing else shall be said inside the Church except a prayer to God Almighty that He disclose the fullness of truth. And his hand shall be sealed; and after the third day it shall be inspected to whether, within the sealed wrapping, it is foul or clean."

countryside. If he has been accused in the aforesaid manner of this, although he has been cleared by the ordeal of water, let him nevertheless go out of the kingdom within 40 days. . . ."[8]

This regulation did not outlast the thirteenth century. By the end of that time right to jury trial had become clearly established. Banishment after being cleared by one's peers would have been considered double jeopardy.

3. ORIGINALLY A SYMBOL OF ROYAL OPPRESSION, THE GRAND JURY BECAME VIEWED AS A PROTECTOR OF THE COMMUNITY

Utilization of the English freeholders in the development of the grand jury is a fact of great importance in understanding the history of the English legal system. By 1215, when Magna Carta and clause #39 were enacted, the guarantee of due process meant (a) presentment by a grand jury and (b) trial by battle or ordeal.

Though established to do the king's bidding grand juries functioned, even under Henry, to protect the community. Though subject to penalties, grand jurors had the power not to accuse even those known to be guilty of offenses. Absent a private appeal or the accusation of a grand jury, the king was stymied and could not punish the wrongdoer. It was not uncommon in Henry's reign for grand juries to flee to the woods rather than report what the royal inquisition demanded.

The provision that accusation must come from an outside source was thus an important bulwark against royal oppression. It also meant that no man could be required to accuse himself. The outside source could only be: a private appellor, a grand jury, or, in special cases, Parliament itself. These guarantees had by 1215 become part of the law of the land and the fundamental law.

4. EVOLUTION OF THE GRAND JURY DURING THE MIDDLE AGES

Grand juries evolved during the 13th and 14th centuries in three important ways:

(a) Grand juries not only presented accused persons, but they began to indict. In the course of time it became customary for private parties to make their accusations not directly to a royal court, but to a Crown official, i.e., a sheriff or magistrate; or to the grand jury itself. Thus the grand jury evolved into an institution that had the obligation to screen all accusations or appeals prior to referral to the royal courts for trial.

(b) The abolition of the ordeal in the 13th century created a crisis for English justice and for the English people which it took more than fifty years to resolve. The resolution ultimately was logical enough; it substituted jury trial, the petty jury, the verdict of a man's "country," for trial by God. At first resisted fiercely as a Norman encroachment upon cherished rights, by the end of the 13th century jury trial was on the way to being accepted as "the palladium of English liberties." Thus criminal procedure in England was becoming something that would be viewed by Europeans with wonderment. The screening process and the trial process that must be conducted before a suspect was found innocent or guilty, involved two separate panels of up to 36 people in all.

(c) After the shotgun approach of the Assize of Clarendon—which required the grand juries to name people suspected of crime in general rather than to present people accused of a specific crime or crimes—the old appeal was restored to its rightful dignity and proper place in English jurisprudence. Presentment or indictment became a specific accusation with which an accused person was publicly confronted.

THE CORONER'S JURY

The operation of the system is well illustrated by an examination of that special grand jury, known as the coroner's jury, which had the obligation of initiating proceedings on behalf of the Crown when a corpse was found and the possibility of foul play needed to be investigated.

The medieval coronor[9] was a royal official brought into being in the reign of Richard I (1189-99) when the justices were instructed to see to the election in

[8] Stephenson and Marcham, "Sources," cited above, 80.
[9] See R. F. Hunniset, "The Medieval Coroner" (New York, 1961).

every country of freemen to be keepers of the Pleas of the Crown (i.e., criminal actions). The coroner's function soon developed into the narrow but important task of investigating suspicious deaths.

The coroner's office grew up naturally enough because the grand jury system, without special support, was not likely to produce all the indictments that the King might wish it to. Jurors, for example, had a direct interest in concealing the death of Normans; when such deaths were established and the perpetrators not produced, the community was subject to a heavy fine. Both in terms of royal security and of revenue the Norman kings were concerned to locate corpses and to establish their identity before local people whisked them away into an unmarked grave.

When a body was found the coroner had to be summoned. Before setting out to view the corpse the coroner ordered the sheriff to summon a jury. This "inquest" jury was composed of men from the hundred and from the four villages closest to where the body had been found; the number varied from 12 to 24. When the jurors were assembled, the coroner swore them in, and accompanied them on a field trip to view the corpse. All of them then retired indoors and conducted their investigation with respect to the identity of the dead person and the reasons for his demise:

(*a*) The jury heard testimony of kin, that the dead man was related to them, and that he was indeed English. This was known, logically enough as "presentment of Englishry or Welshry." If the jurors had had to report the presence in their community of a Norman corpse, but failed to produce a person accused of slaying the victim, the community would incur a heaving fine or "murdrum". One kinsman was required to attend the jury proceedings for this purpose.

(*b*) On the assumption that they knew a good deal about the circumstances of the death, the jurors then had to answer questions which the coroner posed to them. If they did not seem to know enough, they might be sent away with instructions to learn more. The jurors did not summon witnesses to their presence, but went out into the community to gather whatever facts people were willing to provide them.

(*c*) If the jury pleaded ignorance, there was nothing that either the coroner or the jury itself could do except return a verdict of felonious death at the hands of person or persons unknown.

(*d*) The inquest might also result in indictments being handed down against persons charged either with homicide or aiding and abetting it. It was then up to the coroner to order the arrest of such persons, to seek them if they had fled, and to capture them. Witnesses, too, might have to be indicted—it was an offense, for example, not to raise the hue and cry.

5. THE ORIGIN OF THE INDICTMENT PROCEDURE

The grand jury entered the modern period (16th century) firmly established as part of due process of law. A statute enacted in the 14th century stated that no man could be held for treason or other capital crime except upon presentment or indictment by a grand jury, and this measure accurately reflected the decline of the private "appeal" as a way of instituting a criminal suit. By the middle of this century it was common practice for local magistrates to accept private accusations by petition, and then to submit them to the grand jury. If the grand jury decided that these were "true bills," trial proceeded as if an old-style presentment had been made. This procedure became "indictment" in the strict meaning of that term. Thus we see the evolution in the high middle ages of a process wherein the accusation comes from a member of the community and is screened by other members of the community. Grand jury procedure develops, then, as a synthesis between the traditional Anglo-Saxon "appeal" and the sworn witnesses brought into being by the Assizes of Henry II.

6. EVOLUTION OF GRAND JURY PROCEDURE, 16TH–18TH CENTURIES

In the 16th century the advent of the Tudor dynasty marked a rapid growth in the prosecutorial power of the state and the development of Crown officials at both local and national levels armed with formidable new powers. The medieval office of Justice of the Peace was turned into a powerful local magistracy; the attorney general made his appearance to coordinate the work of lawyers doing

Crown business, and developed into an authority of central importance during the 16th century.[10]

During this century (16th) important changes were occurring in the indictment procedure, which now followed for the most part only after the arrest of an accused person. The necessary information on suspects was now not being provided by jurors to Crown officials, but the other way around. Pretrial examinations were conducted by Justices of the Peace, who had the power to summon witnesses by compulsory process, and to administer oaths. We may illustrate by an example.

"John Smith was assaulted by William Higgins, and complained to a local justice, who perhaps took his deposition but certainly required his recognizance and the recognizances of two sureties and any witnesses to appear at the next quarter-sessions; and the clerk of the peace perhaps on the basis of Smith's deposition, drew up an indictment endorsed by Smith's witnesses, who might be examined by the Grand Jury before it approved or dismissed the charge."[11]

Although by the 16th century the grand jury had become armed with the power to subpoena witnesses, this power was usually exercised by the investigating magistrate, rather than by the grand jury itself.

The subpoena power compelled a person to appear but could not be used to compel them to testify or give evidence. Justices of the Peace were not supposed to place suspected persons under oath, and they were not supposed to question such persons directly if they did not wish to be questioned. The right against self-incrimination, as a corollary of the right to grand jury indictment, was a well-recognized right of late medieval times. The right against self-incrimination was an absolute right to silence. No person could be forced to take the oath and if the oath was refused no punishment could be imposed. But it is clear that the bullying magistrates of Tudor days often paid as little heed to these rights as modern police do.

In practice the institution of the grand jury was used not only for the presentment of felonies but of misdemeanors as well. Grand Juries were now being asked to examine and endorse a prima facie case for prosecution that had been submitted to them by a magistrate: here the change from the medievel role becomes immediately apparent. The grand jury might find that the case before them was not a "true bill," but the investigating authority might submit more evidence later to the same or to a different grand jury if such evidence could be gathered; ignoramus might be replaced by billa vera.

William Blackstone summarized the situation as it existed in the middle of the 18th century—this is regarded as an authoritative and accurate expression of grand jury indictment as it prevailed in England—but not, as we shall see, the Colonies—on the eve of the American Revolution:

"An indictment is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury. . . . This grand jury are previously instructed in the articles of their enquiry, by a charge from the judge, who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution; for the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to enquire upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities; a doctrine that might be applied to very oppressive purposes."[12][13]

In Blackstone's time grand juries may still have functioned to some extent to protect people from governmental harassment and arbitrary prosecution. But the

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[10] "The Reformation settlement brought with it numerous questions which had to be settled in the courts—questions of land titles arising out of the dissolution of the monasteries, questions of criminal law created by the insecurity of the dynasty, and still more difficult questions of constitutional law due to the inadequacy of the medieval financial system. . . . A single solicitor-general and attorney general were, of course, unable to deal with the mass of business created by the sixteenth-century State, and it therefore became necessary for them to secure a more or less permanent staff of assistants." Theodore F. T. Plucknett, "A Concise History of the Common Law" (Boston, 1956), 229–30.

[11] Alan Harding, "A Social History of English Law" (Baltimore, Md., 1966), 273.

[12][13] William Blackstone, "Commentaries on the Law of England" (Oxford, 1765), IV, 300.

effectiveness of the institution had been undermined by the growth in the power of the central state and its seizure of the initiative in the matter of pretrial examination and the gathering of evidence. Even more significant for the decay of the power of the grand jury was the development of prosecution "on information."

7. TRIAL "BY INFORMATION" CIRCUMVENTED THE GRAND JURY

One central factor in the decline of the power of the grand jury was the rise in the Tudor period of prosecutions initiated "by information," rather than by grand jury presentment or indictment. The rise of this legal technique to haul subjects before special courts, endowed the Tudor monarchs with a fearsome power to initiate prosecutions without having to secure the permission of grand juries, to harass dissenters and objects of their animosity at will, and to dispense not only with the grand jury but with jury trial as well.

Tudor claims to absolute power could not be realized so long as these monarchs had to cope with community power in the form of the "double screen" of grand jury presentment and petty jury trial. The excuse given by the Crown for legislation authorizing discretionary abolition of grand jury indictment and jury trial was the insecurity of the dynasty, the violence in the countryside, and the need of a strong hand to suppress the lawlessness of the rich which an intimidated community was powerless to cope with.[14] For our purposes it is enough to note that this use of the prerogative courts far outlasted the crisis that occasioned it, and indeed grew more high-handed the greater the prestige and security of the dynasty became.[15]

The battle between royal absolutism and the old common law came to its climax in the revolutionary struggle of the years 1641–49. The Crown found a powerful ally in ecclesiastical law and procedure.

After the Conquest the English Catholic Church introduced the practice of receiving denunciations from private parties in secret. On the basis of such "informations," or allegations provided by informers, the ecclesiastical judge conducted a trial in which he combined the roles of accuser, prosecutor and judge all rolled into one. On appearing before the court the accused person was obliged to submit to what later on would be called "the Star Chamber oath," or the oath ex officio. This placed the victim between the hammer and anvil. He must swear, tell the truth, and be condemned out of his own mouth, or he must lie and be convicted of the heinous ecclesiastic offense of perjury. And for refusal to take the oath he could be punished anyway.

As we see, the English common law system was diametrically opposed to this form of procedure. Critical to common law proceedings was grand jury presentment which provided the accused with the precise and specific charges against him.[16] And of course there could be no prosecution at all without public grand jury indictment and a face-to-face confrontation at trial between the accused person and his accuser. Thus the introduction of inquisitorial procedure in the 18th century into trials for heresy, perjury, bigamy, incest, and other heinous sins provoked a bitter reaction in England, where freemen saw, in the years after Magna Carta, a menace to due process and the right to fair trial. Bans upon

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[14] "England," writes a noted authority about the early 16th century, "remained a country of ready violence. . . . In the absence of a police force there could be no hope of preventing trouble; one could only make the consequences so unpleasant that people would learn to curb their tempers and to seek satisfaction for their claims and grievances in the long-drawn agony of the law courts instead of the sharp exhilaration of riot." The procedure for securing convictions "even when juries refused to indict patent transgressors," was for the Royal Council (Star Chamber) to act on information received from the local magistrate, to issue a subpoena to the offenders, to hale the accused before the court either in London or the provinces, and to convict without a jury. G. R. Elton, "England Under the Tudors" (London, 1955), 59.

[15] Star Chamber and High Commission, the most powerful prerogative courts, reached the apogee of their power in the late 16th and early 17th centuries.

[16] Part of the glory of the common law was the incredible precision which judges came to insist upon in an indictment if it was not to be thrown out on its face. By the 18th century the conservatism of judges "was counterbalanced by their regard for the minutiae of their profession. The slightest error in an indictment was sufficient to secure the acquittal of the prisoner." In the case of John Tutchin, whom the government prosecuted for seditious libel in 1704, the defense maintained that the indictment ought to be dismissed because he was not given there the title of "gentleman." And the indictment was dismissed because of an error in the date, Laurence Hanson, "Government and the Press, 1695–1763" (Oxford, 1936), 57. "The grand jury not only stood between the suspect and the government which sought to prosecute him; the judge himself subjected the indictment to the most exacting scrutiny. It was the only written document in the proceedings, which were in all other respects oral." L. Levy, "Origins of the Fifth Amendment" (New York, 1968), 30.

such procedures were issued both by King and Parliament during the 12th and 13th centuries, but the Church ignored them.[17]

By the time of the Tudors, royal opposition to inquisitorial procedure had evaporated. The prerogative courts began to develop in the 15th century in response to the chaos and disintegration of the feudal order, and the thrust of the central state for greater powers of control. By the end of the fifteenth century the Tudors were consciously borrowing from the ecclesiastical, or civil law courts, legal weapons with which to free themselves from the restraints of the old common law and its community foundations. These new prerogative courts were erected by royal commission. They acquired in the course of time an extensive criminal jurisdiction and an almost unlimited power to harass, oppress and persecute English subjects without restraint.

Star Chamber was the principal secular weapon of Tudor despotism; the judges were members of the King's Council sitting alone or as a group. Cases were brought before them upon information provided by informers or at the initiative of the government itself.[18] Witnesses were summoned by subpoena, and the oath was administered to them. These proceedings swept away the guarantees of due process which had developed during the medieval period—the right to grand jury indictment, the right to jury trial, the right to remain silent in the absence of public accusation.

The basic weapon for the stamping out of heresy was the Court of High Commission which was established by Elizabeth in 1580 and which reached its apogee under Archbishops Whitgift and Laud during the period 1583–1641. Henry VIII's repudiation of papal supremacy in 1527 had brought the English Catholic Church under the direct control of the Crown. After that time the Crown itself took over the responsibility for the crushing of anti-Catholic heresy and for the punishment of offenses against Church law. The Crown itself inherited the techniques of ecclesiastical law and of the Inquisition, and became a principal agency of religious persecution. In this work the Tudors faced in two directions, punishing Catholic champions of papl supremacy and radical Protestants, with bland impartiality. By the time of Elizabeth, heresy and treason had become almost indistinguishable crimes.[19] It did not make much difference in practice—though there was some in theory—whether you landed up before Star Chamber or High Commission.

The pattern for the persecution of protestants and Catholics was the same: suspected persons were hauled before High Commission or Star Chamber on the initiative of the government itself or of an informer. Charged with no specific offense against the law, suspects were administered the oath ex officio, that they would tell the truth and answer whatever questions were asked them; they were required themselves to provide the information upon the basis of which they could be sent to prison or to the stake. Such trials, which bypassed grand jury procedure, were said to be initiated "on information" brought before the court by informers or by the government itself.

By the beginning of the 17th century prerogative courts, Star Chamber and High Commission, had become hated symbols of royal tyranny to Catholics and radical Protestants alike. Both courts were abolished by the Long Parliament in 1641 at the opening of the Revolution that began to accomplish the conversion of the English state from an authoritarian system into a constitutional monarchy under the control of Parliament. But the years of prosecution "on information" left deep marks upon the common law and upon the Parliamentary leaders who championed it. Henceforth indictment by information—at the initiative of the attorney general or following the depositions of an informer, entered common law practice and remained there side by side with the traditional form of grand jury indictment. This was the more true in that England's conservative bourgeois

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[17] As early as 1164, in the Constitutions of Clarendon, Henry II had forbidden the use of inquisitorial procedures in the church courts when laymen were brought before them. See Leonard Levy, "Origins of the Fifth Amendment" (New York, 1968), 43–8. Inquisitorial procedure was vigorously attacked by Parliament as contrary to Magna Carta No. 39 by petitions of 1331 and 1347, and by an act of 1352 which provided that "none shall be taken by petition or suggestion made to our lord the king, or to his Council, unless it be by indictment of good and lawful people of the same neighborhood where such deeds be done. . . ." Same, 52.

[18] The Tudors relied heavily upon informers to maintain their authority, and the country swarmed with government spies who provided a foundation for the growth of arbitrary power and the setting aside of the common law. See G. R. Elton, "Star Chamber Stories" (New York, 1958), 79–80, and Levy, "Origins of the Fifth Amendment," cited above.

[19] "In practical effect the distinction between heresy and treason was nugatory, and the penalties, publicly administered for nugatory effect, were equally horrible. . . ." William Haller, "Foxe's Book of Martyrs and the Elect Nation" (London, 1963), 43.

leadership of the late 17th and 18th centuries found that this particular type of legal repression was as useful a weapon in its hands as it had previously been in the hands of Stuart or Tudor kings.

This fact is of importance in understanding the history of the grand jury both in the Old World and in the New. It provoked a fresh round of political struggle, both in England and in America, during the late 17th and the 18th centuries. It provides the key to the fact that the right to grand jury indictment was provided for not only in the Bill of Rights but in all American jurisdictions following the accomplishment of the Revolution in 1776.

Blackstone provides an excellent and lucid summary of the process of indictment by information as it existed in bourgeois England during the 18th century and at the time of the American Revolution:

"The only species of proceeding at the suit of the king, without a previous indictment or presentment by a grand jury, now seems to be that of information.

"Informations are of two sorts: first those which are partly at the suit of the king, and partly at that of a subject; and secondly, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer. . . .

"The objects of the king's own prosecutions . . . are properly such enormous misdemeanors, as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offenses so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal. . . .

"The objects of the other species of information, filed by the master of the crown-office upon the the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the attorney general) but which, on account of their magnitude or pernicious example, deserve the most public animadversion." [20]

Blackstone then pointed out that in constitutional law, trial upon information had originally been applicable to misdemeanors only, and not to capital offenses; and in this form it was revived, after sharp controversy, during the reign of William and Mary. Blackstone argued that when trial upon information was restored to the control of King's Bench and the common law, the subject had no further reason for complaint; "the same notice was given, the same process was issued, the same pleas allowed, the same trial by jury was had, as if the prosecution had originally been by indictment." [21, 22]

Blackstone was a conservative and a defender of the legal status quo. British subjects on both sides of the Atlantic had good reason in the 18th century to be bitterly critical of indictments on information.

With the restoration of Charles II in 1660 the revolutionary movement that had so shaken English society during the 1640's and early 1650's came to a close. A narrow oligarchy of land owners and commercial magnates succeeded in thrusting back the impetus of the popular revolutionary movement and in seizing and consolidating power for themselves. This oligarchy, that ruled England in the late 17th and throughout the 18th century possessed a very narrow political base, was aware of the precarious nature of its hold upon the masses, and feared greatly the power of the political opposition and of the press. It embarked upon a new struggle to curb freedom of expression, and for this purpose it utilized the old laws against seditious libel, and added new ones.

The struggle thus joined lasted for more than one hundred years (about 1670-1815). There were hundreds of convictions for seditious libel during this period. For every conviction there were several prosecutions which resulted in acquittal; for every prosecution there were probably many indictments that were never brought to trial.

Seditious libel was a very elastic concept that enabled the government to prosecute virtually any utterance which, it imagined, brought it into public contempt. Libels were misdemeanors the punishment of which did not expose

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[20] William Blackstone, "Commentaries," cited above, IV, 303 ff.
[21, 22] Same, 305.

the victim to death or mutilation, as was the case with felonies. But the penalties inflicted were rigorous enough: next to fine and imprisonment the most common punishment was the pillory and the lash. The pillory in particular came to be regarded by defiant British printers and writers in the 18th century as a badge of honor. Seditious libels, as misdemeanors, could be brought to trial by the attorney general upon information. This bypassing of the grand jury process greatly increased the ease with which the government could harass its opponents by illegal search and seizure of materials, by arrest and jailing without warning.

All persons involved in the writing, printing and distribution of seditious libels were liable to prosecution. While it is true that in such cases the accused had a right to jury trial, the government, thanks to the years of Star Chamber procedure, had been able in fact to eviscerate the jury and reduce its role to a minor one, one indeed that was almost miniscule. The function of the jury was simply to establish the fact of publication and the meaning of the "innuendos." [23] Whether what was printed was in fact libelous was a matter for judicial determination alone.

The law of seditious libel in England was doubly offensive to the opposition. It shortcircuited, in cases involving liability to crippling fines and bodily harm, an Englishman's right to grand jury indictment. It undermined the sanctity of jury trial itself.

In the century-long struggle to muzzle the press the government initiated a series of extraordinary prosecutions. It appealed, to be sure, to provincial grand juries to hand down indictments on their own initiative; but for the most part it filed its own information; and this was its preferred method of proceeding. Freed from the restraint of having to summon and convince intractable London jurymen, the government was able to act with speed and flexibility. The victims charged, and with good reason, that the government made frequent arrests aimed only at harassment. Incredible militancy in the struggle for freedom of the press alongside savage repression; these were characteristics of the English political scene during the 18th century.

Dramatic evidence concerning the value that Englishmen placed upon grand jury indictment for common law misdemeanors as well as felonies is provided by the continuing opposition throughout the 18th century to the prosecution of criminal libels upon information.

On June 7, 1775, the Rev. John Horne, a notorious civil libertarian, placed the following advertisement in the "Public Advertiser" and several other publications:

"At a special meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed that a subscription should be immediately entered into by such of the members present who might approve the purpose, for raising the sum of £100 to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were for that reason only inhaumanely murdered by the King's troops at or near Lexington and Concord, in the province of Massachusetts, on the 19th of last April. And this sum was immediately collected."

The Attorney General proceeded against Horne by information that is, without grand jury proceedings. Horne's trial opened on July 7, 1775, and this champion of a free press conducted his own (often hilarious) defense. He made a frontal attack on the government's initiation of the prosecution by the filing of an information. The central point of his argument was that the Attorney General was a political appointee who could abuse power to harass his political enemies, whereas the temptation to do this would be much less if a grand jury of Londoners had been assembled, every time he wished to undertake such a prosecution. "The Attorney General," said Horne, "accuses men neither on the oath of others, nor yet upon his own oath. If he believes the matter of the accusation true, it is but the belief of one man, and he a prejudiced man, and the most improper man in the kingdom for his authority to be taken in such a case. But, gentlemen, what is much worse, it frequently happens that no man whatever avows the accusation, or believes it . . . The apparent object of this prosecution is to take what little money out of my pocket I may have

[23] If, e.g., the royal family were attacked under assumed names, would the ordinary reader interpret the article as an attack upon the royal family?

there, and to imprison me, and so exclude me from that society of which I have rendered myself unworthy." [24]

8. THE GRAND JURY IN COLONIAL AMERICA

The value of the grand jury as a shield to the ordinary subject against oppressive government was grasped nowhere with more certainty than in colonial America. The institution, along with other central features of the common law, was transplanted to America where it bloomed with all the vigor of a native plant.

In Virginia grand juries were empanelled both in the General Court and in lower criminal courts. The Governor's charge to the jury emphasized the jury's obligation with respect to law enforcement and the prosecution of criminals, but also underlined that "it is your duty, gentlemen, with great care, to examine into the facts for which (alleged criminals) have been committed, and on proper proofs to find the different bills and present them to the court for their trial."

Indictment, rather than presentment, was the rule in 18th century Virginia. Indictments were drawn by the attorney general and submitted to the grand jury, who might then call and examine witnesses. The testimony of one witness was sufficient to find a true bill in all criminal cases except treason. But, no more than in England itself, was the Virginia grand jury an investigatory body. Its function, purely and simply, was to accuse.[25]

As for Massachusetts, provision for grand jury indictment was made in Article 49 of the "Body of Liberties." As in England, magistrates tried criminal cases with a petty jury when these had been brought before them after presentment or indictment.[26]

For the colonial period the most detailed study of the operation of grand juries has been done for New York. Distinguished authorities emphasize that: "New York grand juries followed the English medieval tradition rather than the less democratic procedures then prevailing in England. With great tenacity the freemen of the Province held fast to their prerogatives as the accusers for their respective countries . . . but for this, ex officio information would have crowded out popular participation." [27]

In New York the engines of the law were set in motion when the injured person appeared before a magistrate alleging the commission of a crime. The accusation was entered in the form of an affidavit, or information under oath. The accused, but not under oath, would then be called in to be examined. If he found sufficient cause, the examining magistrate would then bind the accused over to appear at the next court sessions, where proceedings before the grand jury would take place. If no accuser or prosecutor appeared the accused would be discharged even before grand jury proceedings had been instituted. Such witnesses were not subpoenaed for a grand jury appearance, though the grand jury might hold a prisoner in the hope that witnesses would show up.

When a sufficient number of grand jurors had appeared the panel was called over and the jurors were sworn. The charge was then given, the jurors being exhorted not to present the innocent and to preserve the secrecy of their proceedings at that time and later. Such charges might underline the fact that grand jury presentment was a basic right of the subject deriving from Magna Carta:

"And amongst all our valuable privileges as Englishmen it is justly esteemed one of the greatest and has all the securities of Magna Carta that the King (who holds the sword of justice . . . will yet give sentence upon no man's person or property but by trial of his equals; and the method prescribed of putting the

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[24] "State Trials: Treason and Libel" (vol. I), ed. Donald Thomas (London, 1972), 181. Sentenced to jail Horne continued to have the company of his friends and the pleasure of a weekly dinner at the Dog and Duck, procuring large quantities of claret to preserve him from jail fever. He passed the time in the study of his favorite languages—Norse, Gothic and Old English. One of the judges who presided at the trial was himself a former champion of a free press—John Wilkes. As for poor people, like the "mercuries"—street women who hawked papers and sang satirical songs—not even arrest on an information was necessary. They were simply committed to prison as vagrants on the order of a magistrate; and there they stayed for 10 days, minus both friends and claret.

[25] Hugh F. Rankin, "Criminal Trial Proceedings in the General Court of Virginia" (Williamsburg, Va., 1965), 84.

[26] George Lee Haskins, "Law and Authority in Early Massachusetts" (New York, 1960), 176. Edwin Powers, "Crime and Punishment in Early Massachusetts 1620–92" (Boston, 1966), 96.

[27] Julius Goebel, Jr. and T. Raymond Naughton, "Law Enforcement in Colonial New York: A Study in Criminal Procedure 1664–1776" (New York, 1944), 330.

law in execution is by presentment of a Grand Jury: who represent the country as well as by living in it. . . ." [28]

The bulk of the cases that came before grand juries in New York were those of persons bound over by the magistrates, but in some instances the jurors themselves heard persons who were aggrieved. The grand jury was "clothed with vast prerogatives in respect of summons and examination." [29] By the end of the 18th century witnesses were usually bound over to give evidence directly to the grand inquest. But we should note that the king's officer was not present at these proceedings, and whatever written material was produced from magistrates' examinations was put before the jurymen by the clerk of the court. There seems to have been a growing reluctance to examine such written materials. Willful refusal to appear before the jury constituted a contempt, and witnesses who did appear were put under oath.

Refusal to give evidence for the king before the grand jury under oath was contempt of court, but persons who were afraid of incriminating themselves refused to take the oath. It is interesting to note that no penalty attached to this refusal, since it was still recognized that a man's right of protection against self-incrimination was as basic to the British constitutions as the right of grand jury indictment itself. Goebel and Naughton make reference to "innumerable entries" in the record that substantiate this fact.

In 1764, for example, seven persons were indicted by the grand jury and subsequently fined for obstructing the King's Highway. Summoned before trial to appear before the grand jury that indicted them, all refused to take the oath and to give evidence on behalf of the King. No penalty attached to this refusal. They were eventually indicted for "stopping up the King's Highway with force and arms unlawfull and injuriously to the great damage and common nuisance of the King's subjects and against the peace." [30]

Accusations by New York grand juries were largely informal—written out, as it were, on the backs of old envelopes. Grand juries then transmitted these scraps of paper to the court; and one of the clerk's chores was to put the amateur indictments into more polished form. In the Supreme Court of New York this task was allotted to the attorneys general and was one of his principal responsibilities. One such gentleman found this chore an awful bore, and lamented that such work "cost me a great deal of thought, pains and care. . . ." [31] At some stage along the way the accusation, written down and then worked up, was metamorphosed from a mere bill into an indictment through the endorsement, billa vera. All this is highly interesting as it illuminates the jealous autonomy of the colonial grand jury and the quite subordinate role in which both magistrates and Crown prosecutors were cast at this particular stage of criminal proceedings.

When we compare the New York grand jury practice in the 18th century with contemporary English practice, it is clear that in the Province the grand jury had an infinitely greater independence of action. Whereas in England the initiative in making accusations had passed largely to the Crown and its central and local officers, in New York this was emphatically not true. In terms of initiative the Grand Jury still retained its earlier and more vital medieval role. Note the crucial and absolutely critical conclusion reached by Professor Goebel:

"In New York," he tells us, "the Grand Jury recaptured its ancient autonomy in the process of accusation, so that in the majority of cases presentment preceded the forming a bill of indictment . . . . The colonists were bent upon preserving the maximum of liberty for the inquest and the maximum of control over accusations, neither of which objectives was achieved merely by voting on what authority had made ready in advance . . . . This is the more remarkable since in general English practices were unresistingly duplicated." [32]

This is a fact of great significance for understanding the provision for grand jury indictment that was written into the Federal Bill of Rights and also into the State constitutions. It was an accurate reflection of 18th century colonial practice under which popular presentment not professional indictment remained the rule until the end of the colonial period and indictment by information was virtually unknown. Grand jury men were inbued with a sense of responsibility for their own investigations—it was not a matter simply of rubberstamping the probable correctness of somebody else's findings.

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[28] Same, 346.
[29] Same, 350.
[30] Same, 350–1.
[31] Same, 353–4. The lament is James Alexander's.
[32] Same, 355–6.

9. THE GRAND JURY AND THE ZENGER CASE[33]

Crown officers who sought to bypass the grand jury system and to introduce indictment by information flouted public opinion and did so at their own peril. This is dramatized and proved by the Zenger case in 1734, though, strangely enough the centrality of the grand jury issue to Zenger's trial and acquittal has on the whole been overlooked by both lawyers and historians.

On January 15, 1734 Justice DeLancey of the New York Supreme Court made a charge to the Grand Jury and drew their attention to the circulation of newspapers which were attacking the unpopular Governor Cosby and villifying his administration. The authors, he told the jury, were unknown, but it was easy to guess who they were. "I know most of you personally," said his Lordship, "and I make no doubt but that you will discharge your duty."

Having been invited to indict Johann Peter Zenger, publisher of the New York Weekly Journal and the immediate cause of the governor's anguish, the grand jury then returned no indictments. Emboldened by this check to the censorship activities of the Crown, Zenger and his employers became more brazen than ever. When the time came in the fall of 1734 to elect new magistrates and councilmen, the voters turned out to elect the opposition candidates. Salt was rubbed in the wound by the circulation of a ballad:

> To you good lads that dare oppose
> All lawless power and might,
> You are the theme that we have chose
> And to your praise we write:
> You dared to show your faces brave
> In spite of every abject knave,
> with a fa la la

On October 15 the Chief Justice returned to the attack and delivered yet another charge to the Grand Jury on the subject of libels. "If you gentlemen," he told them, "do not interpose, consider whether the ill consequences that may arise from any disturbances of the public peace, may not in part lie at your door?" He called also for the suppression of the authors, printers and publishers of certain "scandalous songs that are handed about . . . ."

Thus pressed the Grand Jury returned presentments on the songs on two of them, but reported that they were unable to discover the authors, printers and publishers of said songs.

The attempt to proceed against Zenger by grand jury indictment on two separate occasions is interesting, because it indicates that proceeding by information was not considered constitutional in New York, and the government only resorted to this "Star Chamber method" when faced with grand jury defiance. An attempt, too, to secure the cooperation of the Assembly in suppressing Zenger also failed.

Cosby then advertised a reward for information about the publisher and printer of the songs and the anti-administration articles that had appeared in the Journal. Early in November Zenger himself was arrested under a warrant from the Governor's Council—in itself an extraordinary and highly unusual proceeding.

Zenger was then indicted on the filing of an information by the Attorney General, and this news he made known to the public through the Journal in January 1735: [bail having been set too high for him to meet] "I returned to jail, where I lay until Tuesday, January 28, 1735 . . . and the Grand Jury having found nothing against me, I expected to be discharged from my imprisonment, but my hopes proved vain: for the Attorney General then charged me by information, for printing and publishing parts of my Journals . . . as being false, scandalous, malicious and seditious."

Opinion, which even before this was inflamed against the governor, became even more inflamed. This mode of proceeding was not recognized in the colony and it seemed to the colonists—as it would to medieval Englanders—that such a thing violated the basic guarantees of due process as established by Magna Carta. To make doubly sure there would not be a fair trial but that Zenger's conviction would be secured at all costs, the New York Supreme Court issued an order for the exclusion from the court of Zenger's attorney, James Hamilton.

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[33] This account is based upon the trial records published by Livingston Rutherford, ed., "John Peter Zenger: His Press, His Trial" (New York, 1904). See also John A. Scott, "Settlers on the Eastern Shore" (New York, 1967), 120 ff.

The trial opened on August 4, 1735. Richard Bradley, the Attorney General, read the "information":

"Be it remembered that Richard Bradley, Esq., Attorney General of our sovereign Lord the King, for the Province of New York, who for our said Lord the King in this part prosecutes, in his own proper person comes here into the Court of our said Lord the King and for our said Lord the King gives the Court to understand, and be informed, that John Peter Zenger, late of the City of New York, printed, . . . did falsely, seditiously, and scandalously publish, and cause to be printed and published, a certain false, malicious, seditious and scandalous libel, entitled the New York Weekly Journal."

The information, as was customary in these cases, then quoted in detail those passages in the Journal that Bradley thought constituted a seditious libel.

At this point Andrew Hamilton, America's most eminent lawyer, appeared in court to defend Zenger. As Bradford and the justices listened in consternation Hamilton launched a frontal attack upon the practice of indicting British subjects upon information.

It was, he said, the very essence of Star Chamber practice, and so, unconstitutional. "I was in hopes," he told the Court, "as that terrible court [of Star Chamber] . . . was long ago laid aside, as the most dangerous court to the liberties of the people of England, that ever was known in this kingdom; that Mr. Attorney knowing this would not have attempted to set up a Star Chamber here, nor to make their judgments a precedent to us. . . . Informations for libel is a child, if not born, yet nursed up and brought to full maturity, in the Court of Star Chamber."

And, he continued: "The practice of informations for libels is a sword in the hand of a wicked King, and an arrant coward, to cut down and destroy the innocent; the one cannot because of his high station, and the other dares not, because of his want of courage, revenge himself in another manner." [34]

Later in the trial Hamilton returned to this theme and hammered in this point. Prosecutions for libels, since the time of Star Chamber, he said, had generally been initiated at the instance of the Crown or its ministers. Star Chamber had established the precedent for this, and for bypassing the Grand Jury. "Instead," he said.

"Of being lawfully accused by 24 good and lawful men of the neighborhood and afterwards tried by 12 like men, here is a power given to the Lord Chancellor, Lord Treasurer, the Keeper of the King's Privy Seal, or two of them, calling to these a bishop, a temporal lord, and other great men mentioned in the act . . . to receive information against any person for any of the misbehaviors cited in the act, and by their discretion to examine, and to punish them according to their demerit." [35]

The danger of reviving this awesome power, which had been cut down by the abolition of Star Chamber in 1641, was obvious. "If," Hamilton went on,

"Mr. Attorney is at liberty to come into court, and file an information in the King's name, without leave, who is secure, whom he pleases to prosecute as a libeller? . . . And give me leave to say . . . that the mode of prosecuting by information (when a grand jury will not find billa vera) is a national grievance, and greatly inconsistent with that freedom, which the subjects of England enjoy in most other cases." [36]

All the more reason, concluded Hamilton, for the trial jury to take matters into their own hands and insist upon finding as to the truth or falsity of the allegations as well as on the fact of publications:

"Here," Zenger's attorney concluded, "are two statutes [3 and 1[5] Henry 7] that are allowed to have given the deepest wound to the liberties of the people of England to any that I remember to have been made, unless it may be said that the statute made in the time of Henry VIII, by which his proclamations were to have the effect of laws, might in its consequence be worse. . . . By those pretences the people of England were cheated or awed into delivering up their ancient and sacred right of trials by Grand and Petit Juries."

The abrogation of basic common law rights, Hamilton warned, through the instrumentality of Star Chamber procedures, brought on the English Revolution.

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[34] Zenger, cited above, 94. This remark drew from the shocked Attorney General the exclamation "Pray Mr. Hamilton, have a care what you say, don't go too far neither. I don't like those liberties!"

[35] Zenger, cited above, 108. The Act referred to is 3 Henry 7.

[36] Same, 118–19.

This great lawyer, speaking in 1735, cast a prophetic shadow that reached forward 40 years into the future.

Zenger, as we know, was acquitted, but the historic importance of the case has not always been rightly understood. It did not establish "freedom of the press." Colonial authorities, as much as those in London, believed in the concept of seditious libel, were prepared to punish libellers, and had as yet little understanding of the more absolutist ideas of freedom of expression which—in theory at least—would triumph in the 19th century.[37] What was asserted here was that government could not tamper with grand jury indictment and that the petty jury was judge not merely of the fact of publication but also of the libelous nature or otherwise of the material under examination. New Yorkers had vindicated the idea that both grand and petty juries were shields of the colonial innocent against the harassment and persecution of their imperial masters.

This idea was embodied in the common toast at revolutionary gatherings in the 1760's and 1770's: "To the Grand Jury, defender of American liberties!"

10. *Sewell* v. *Hancock*

The key role played by grand juries in the period leading up to the American Revolution in defending the rights of Americans against the imperial authorities who sought to abolish those rights is well illustrated by the cast of *Sewall* v. *Hancock*.

In May 1768, officers of the Crown boarded Hancock's sloop the *Liberty* and made preparations to confiscate the ship as surety for the payment of penalties that might be levied against Hancock for the smuggling of wine. A mob of sailors and wharfingers gathered and a riot ensued. This disturbance provided the occasion for the military occupation of Boston by the Crown authorities in September 1768.

The Attorney General Jonathan Sewall then filed an information against Hancock in Admiralty Court. The suit was based on the Trade Act of 1764 which decreed that people landing goods without payment of duties should forfeit treble the value of what had been smuggled. Sewall alleged that Hancock had aided in landing 100 pipes of Madeira wine knowing that duties had not been paid; a penalty of £9,000 was sought.

The government chose to proceed in Admiralty Court rather than by common law. For one thing, common law juries in America would not convict smugglers. For another the Admiralty Courts, even like Star Chamber and High Commission, permitted the initiation of a suit by the filing of private and/or government informations. Admiralty proceedings bypassed the common law requirement for a grand jury indictment which the government could no way have procured.

Jonathan Sewall was as reluctant to proceed in this way as the New York Attorney-General Richard Bradley had been. He knew that such proceedings flew in the face of the colonial conviction that grand jury indictment was a constitutional right. He resorted to the Admiralty procedure, as he very well knew, at the risk of inflaming the temper of the community. As he himself admitted, "This method has seldom been used in Massachusetts without the consent of the Judges. . . ."

The government in Massachusetts, as in New York, was faced with the resistance of a hostile community. In this situation—even as in Star Chamber days—the informer played a crucial role in ensuring the success of the prosecution.

Josephy Maysel was a key witness against John Hancock. Maysel was a government informer, a man, evidently, who had an unenviable reputation in the Boston community. In March 1769, while Hancock's trial was continuing, the Suffolk grand jury indicted Maysel on a charge of perjury; and the authorities at once spirited him out of the jurisdiction. Sewall, deprived of his key witness, moved for a dismissal of the case.

The lengthy trial, which had begun in December 1768, and which collapsed on March 25, 1769, saw the appearance in court of John Adams as counsel for the defense. The draft of his argument in this case is of particular interest to us. His editors call it "an unfinished contribution to the political literature of its time."[39]

"The Courts of Admiralty," wrote Adams, "are authorized under the Act (of 1764) to proceed on the initiative of the informer or prosecutor. Thus these

[37] For the proof of this important point, see Leonard Levy, "Freedom of Speech and Press in Early American History: Legacy of Suppression" (Cambridge, Mass.: 1960).

[39] L. Kinvin Wroth and Hiller B. Zobel, eds., "Legal Papers of John Adams" (Cambridge, Mass., 1965), II, 193. Adams' "Argument" is reproduced in the same place, pp. 194–210.

extraordinary penalties are to be heard and tried—how? Not by a jury, not by the law of the land, but by the civil law and a single judge. Unlike the ancient barons who *una voce responderunt, nolumus leges Angliae mutare* [replied with one voice, we refuse to change the laws of England] the barons of modern times have answered that they are willing that the laws of England should be changed, at least with regard to all America, in the most tender point, the most fundamental principle.

"Is it not directly a repeal of Magna Carta, as far as America is concerned? . . .

"The people of England are attached to Magna Carta. By the 29th [sic] chapter of that Statute, 'Nullus liber Homo capiatur, vel imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittimus, nisi per legale judicium parium suorum vel per legem terrae.'[40] This 29th chapter of Magna Carta has for many centuries been esteemed by Englishmen, as one of the noblest monuments, one of the firmest bulwarks of their liberties—and we know very well the feelings and reflections of Englishmen whenever this chapter has been infringed upon even by Parliament. One proof has been given us by Lord Coke, in his exposition of this chapter:

> 'Against this ancient and fundamental law, and in the face thereof I find an Act of Parliament made, that as well Justices of Assize as Justices of Peace without any finding or presentment of 12 men, upon a bare information for the King before them made, should have full power and authority by their discretions to hear and try men for penalties and forfeitures.'"

Adams concludes with a solemn warning. Let Parliaments beware, that instead of using the ordinary trial per legem terrae, they introduce "absolute and partial trials by discretion."

We need to study carefully the part played by colonial grand juries in the struggle against the British and against the subversion of the British constitution. This may be a key to our perception of the future role of the grand jury in this country, and the rescue of this popular institution from the forces that have usurped control over it.[41]

11. THE GRAND JURY AND ABOLITION[42]

Antislavery lawyers, almost from the beginning of the 19th century, pondered the anomaly of a law of slavery that was supreme even in the North where the common law was supposed to be sovereign. This paradox centered around the status of the fugitive slave. The master was authorized by the Constitution itself (IV 2) to seize his slave wherever he might find him, and drag him "home" with little or no legal formality. This procedure opened the door to a flood of abuses, including the growth of a traffic in kidnap victims seized by proslavery bandits wherever they might find them and shipped south for sale.

To be accused of being a slave, then, was an extraordinary type of accusation! A white man could level it against a Black one as and when he pleased—he did not even have to file an information with a court! For the Black victim there was neither shelter in the law, nor remedy. And it was federal law itself which sanctioned this outrage, this trampling upon the common law constitution.

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[40] I am puzzled why Adams and other lawyers refer to this as the 29th chapter of Magna Carta when in actual fact it is No. 39: "No free man shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or the law of the land." W. S. McKechnie, "Magna Carta" (Glasgow, 1914), 375.

[41] Leroy D. Clark dismisses the role of the grand jury in the anticolonial struggle as something "illegal." He writes "The grand jury did not function in any strict sense to protect the 'innocent' against arbitrary and unfounded persecution. Much of the colonialists' activity, such as burning tea chests brought to the colonies by the British ships in 1774 [sic] was blatantly illegal, yet the grand jury blocked charges brought against the participants." The Grand Jury, 17–18. Clark's conclusion ignores the dimension of the colonial struggle for grand jury indictment as part of the fundamental law against the British drive to destroy that law; it muffles the central thrust of the struggle against Admiralty Courts as tools for the conviction of those who challenged the arbitrary and unconstitutional legislation of King-in-Parliament; and it overlooks that essential to the protective function of the jury was the power to *nullify* the state's attempt to enforce the law where it was perceived as oppressive.

[42] An elementary treatment of the legal struggle for the rights of free Black people in the ante-bellum period is in John A. Scott, "Hard Trials on My Way: Slavery and the Struggle Against It" (New York, 1974), Chapter 9, "Unreasonable Searches and Seizures," pp. 163–76. This piece is weakened by the fact that, while it deals with the due process clause of the Fifth Amendment, it neglects the clause relating to indictment for a capital or otherwise infamous crime.

Clearly—thought the lawyers—such accusations were equivalent to accusations for capital or otherwise infamous crimes. Was not the punishment resulting from this accusation a deprivation of property, family, liberty, even of life itself?

Starting with Indiana, New York and Vermont, state after state began to insist upon the extension of the full panoply of due process rights to Black people accused of the "infamous crime" of being a slave—a day in court, the right to counsel, jury trial, the right to summon witnesses for the defense, the right to testify on one's own behalf, and so on. But the grand jury implications of the liberty laws have not been sufficiently emphasized. At that time virtually every jurisdiction in the United States provided that "no person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a Grand Jury." The extension of this right to Black people meant that a Black person could not even be accused of being a slave, if he was in a jurisdiction where slavery was outlawed, without grand jury indictment. The fact is that by the late 1830's it would have been hard to find, anywhere in the North, a community prepared to hand down such an indictment no matter what the evidence might have been.

The Supreme Court of the United States grasped this clearly when it struck down the liberty laws in the case of *Prigg* v. *Pennsylvania* (1842). It affirmed in that case that a slaveholder's right to recapture his property was a national right overriding any legal barriers that might be set up by the states in accordance with the provisions of the common law.

As the opposition to the recapture of fugitives deepened in the decade 1840–50, it became necessary for the slaveholders to involve the Federal Government itself with its own law enforcement agencies, and primarily the Army, to participate actively in and to guarantee the return of fugitives. This was accomplished by the passage of a second Fugitive Slave Act in 1850. This act set up special courts to hear cases involving fugitives (or alleged fugitives); the judges or "commissioners" of these courts being appointed by the United States Circuit Courts. Owners of slaves were authorized to arrest fugitives themselves, take them before a commissioner, establish the identity of the prisoner, and receive a written authorization to take the captured person back to the South. The testimony of the accused was not to be accepted as evidence. The writ of habeas corpus to procure the release of seized persons was forbidden. There was to be no jury trial. The slaveowner's right to seize suspects precluded automatically the community's right to pass upon the validity of the accusation or to interfere in any way in the process.

Champions of the Fugitive Slave Act of 1850 argued that the recovery of fugitives was analogous to the extradition of criminals: "rendition of fugitives from service," said Commissioner Curtis, "is an act analogous to the rendition of fugitives from justice, and the two cases . . . are of the same general character and may be provided for by the same general means." [43] But central to the position of the antislavery people was the point that in fact there was a big difference between the two cases. A criminal sought for extradition was a person who had been charged in one state with the commission of a felony, and whose return was sought, "not to avoid a trial, but to have one." As Horace Mann put it, "The original indictment or charge, the arrest in a foreign state, and the delivery and transportation to the place of trial were separate parts of one legal proceeding." The proceedings for extradition of fugitive criminals were preliminary; the proceedings for the extradition of fugitive slaves were final.

Thus a central feature of the popular struggle against slavery in the decade 1850–60 was for the abolition of a Star Chamber-type court, the commissioner's court, that bypassed, even as Star Chamber, High Commission and the Admiralty Courts had done, the citizen's right to public indictment and common law due process. The continuity of the struggles for the grand jury and against illegal or ex parte indictment, in the Old World and the New for three and one-half centuries, from the sixteenth until 1860, is something that needs to be noted, and the appropriate conclusions drawn. People, it seems obvious enough, would not have struggled so bitterly and so continuously for this right if they did not feel that something substantial was to be gained from it.

CONCLUSION

Grand jury indictment was a right of the American colonists that protected them from oppressive government. The protective function of the grand jury

[43] The statement was made at a Boston hearing, *in re* Thomas Sims, March 1851.

threads the entire history of the common law, and emerges most decisively from the struggle against prerogative and admiralty courts from the sixteenth to the last half of the eighteenth century.

A central feature of British government during the 18th century was the jailing, fining, lashing and harassment of people on both sides of the Atlantic for their political opposition. The main path to success in this type of persecution, since the time of the Star Chamber, was the elimination of the time-honored right of community indictment and community trial. In the 18th century colonial situation the existence of a strong tradition that grand jury indictment might not be set aside had provided a major obstacle to the kind of political repression that developed at the same time in England.

The guarantee of grand jury indictment for capital and otherwise infamous crimes included the crime of seditious libel. It was designed, first and last, to prevent the use of governmental power for purposes of political harassment and repression. It was designed to prevent governmental shortcircuiting of community power by devices such as the ex officio oath, informations and the absolute requirement, to which there were no exceptions, that accusation must come from the mouth(s) of the community and not from the mouth of the individual who was accused.

Beginning in the 19th century but with accelerating speed after World War II the grand jury has been converted both into a rubber stamp for the initiative of the Attorney General and into an inquisitorial body whose function is not so much to indict as to ferret out information upon the basis of which indictments can be handed down. It has become an instrument of the very political persecution and intimidation which is forbidden by the fifth amendment. Today once more, as in the days of Star Chamber and High Commission, people are between hammer and anvil; either take the oath to answer truthfully the questions put to you, or go to jail for your refusal. Either lie under oath and be convicted of perjury, or tell the truth and be convicted of your own mouth.

Possible remedies might be

(a) in the spirit of constitutional checks and balances create an elected body which is completely independent of the Department of Justice and which is empowered to check the validity of and to veto Government-inspired prosecutions;

(b) eliminate the prostitution of the grand jury to inquisitorial uses and the extraction by compulsion of information upon which indictments may be based.

Mr. EILBERG. Will you proceed, Professor Scott.

Professor SCOTT. Mr. Chairman, my name is John Anthony Scott. I am a student of the Anglo-Saxon common law origins of our Constitution, and the jurisprudence of the Bill of Rights, and I would like to add my congratulations to those of other people who have appeared before you upon the work that you have undertaken of casting a spotlight on the operations of the grand jury and the very serious problems of grand jury reform.

I would like to spend just a few minutes within the time allotted to me to highlight the conclusions which I think flow from the draft of a statement on the history of the grand jury which you have before you, which I plan to expand upon later in the year, and to publish as an article.

Mr. EILBERG. We read your statement, Professor, and it is a very scholarly one. It does require some pinpointing for the subcommittee, however, in terms of the legislation that we are considering.

Professor SCOTT. Yes. The statement is designed to provide something of the constitutional framework within which the question of grand jury reform needs to be examined.

I think the main points made in the statement are that the grand jury developed originally as an independent community voice in the accusatorial process. It was something that was taken over by the community and became a basic part of the community's role in the accusing of persons. The basic principle established long before the end of the Middle Ages was that an accusation must come from the mouth of a

person in the community and, by the end of the Middle Ages, must come from the community itself as organized and represented by the grand jury. The flip side of that coin is that the accusation in no sense and no way comes from the mouth of the accused person himself. By the end of the Middle Ages this has become established as a fundamental principle of the advisory process.

Both in England and in the colonies, despotic rulers mounted over the centuries an unending battle to short circuit the grand jury and get around what they so rightfully saw was a most formidable obstacle to the development of their powers. Despotic monarchs sought above all to undermine the independent powers of the grand jury as a bulwark of the community rights and interests against the tyranny and power inherent in governments.

The technique they used was to attempt indictment, and therefore to trigger trial of persons as a result of "information" provided by government informers or information provided by the Attorny General himself. Thus they used trial "by information" as a means of short circuiting the grand jury's independent decision. And again, when these trials took place, they used, in the courts of Star Chamber and high commission, enforced oath-taking and compelled testimony as the basic tools to extract information out of people and to compel them to convict themselves out of their own mouths. If they said nothing, they were convicted of contempt. If they took the oath, they might be convicted out of their own mouth, or they might be punished severely for perjury if they were thought to have lied.

The classic example of subversion of the grand jury process, which, as you know, had been written into Magna Carta, were the courts of Star Chamber and High Commission of the Tudor and Stuart kings in the 16th and 17th centuries. The struggle between those kings and their subjects around the subversion of the grand jury and the protection of the English Constitution are written large on the history of England throughout those centuries. Hundreds were brought before those courts; hundreds went to jail; and hundreds even died rather than give up the grand jury protection of the British Constitution and the right to silence.

In the 18th century, in England the government continued to be successful in the abuse of the grand jury institution, and was able to mount literally hundreds of trials, or hundreds of accusations rather than trials, for sedition against English subjects, and it chilled and harassed political dissent.

But we also note that the struggle for the grand jury as an independent agency of the people and the community came to its very height in the 18th century in America because the grand jury came here and began to flourish in all its independent glory as part of the colonial experience.

We know, for example, so well was it known by the British subjects that the right to grand jury presentments or indictments was a fundamental part of the British Constitution, there was the utmost reluctance of colonial governors in this Nation to indict "on information." The star case here is that of Johann Peter Zenger whom two grand juries refused to indict, whereupon the Government tried him "on information." We know the resounding success of his acquital,

reflecting the affirmation of the jury that trial "by information" was a crime against the Constitution.

The grand jury came to its height, as a defender of the American people against the harassment and arbitrary rule of the British imperial masters from the period from 1673 until the opening of the Revolution. One of the causes of that revolution was the passage by Britain of measures to bring all cases arising under the acts of trade before special admiralty courts. And we remember those courts were characterized by the fact that prosecution might take place before them on information from the Attorney General without having to go through a colonial grand jury. The use or the attempted use of these admiralty courts and the bypassing of the grand jury protection was, indeed, one of the causes of the Revolution. It was not for nothing, gentlemen, that in colonial days there was a universal toast in this country before the Revolution, "To the grand jury, the protector of our liberties."

All of this struggle of four centuries was then recorded and summarized with great conciseness in the Bill of Rights, and especially in the fifth amendment. The essence of the matter was that the struggle showed that the most precious right of an accused person was the right not to have to incriminate himself out of his own mouth and without the protection of the grand jury. And so important was this viewed that the Founding Fathers did not state this once in the fifth amendment, they stated it twice:

> No person shall be held to answer for 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; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself.

That situation was summarized with great conciseness by the distinguished commentator and Associate Justice of the Supreme Court, Joseph Story, when he wrote:

> Grand juries perform most important public functions, and are a great security to the citizen against vindictive prosecutions, either by the Government or by political partisans or by private enemies.

In the latter part of the 19th century, grand juries began to reflect the rage of the American people at profound governmental corruption, like the Tweed ring, municipal corruption and abuse of power by the great corporations and railroad monopolies, and they began to develop on their own independent initiative far-ranging investigative powers. I think it remained for the Nixon administration not to set aside or sidetrack the grand jury but to convert it into its opposite, into an inquisitorial apparatus which the Constitution forbids, and make it a tool in the hands of the Government for the harassment of political dissent.

What I am saying here, gentlemen, is absolutely nothing new. This reality of what the Constitution mandates is familiar to all students of the law, but perhaps it is timely at this point to reaffirm what is fundamental. The grand jury was not brought into being by the Founding Fathers to preside over the persecutions and inquisitions of Government against the citizen. It was, on the contrary, designed to protect the citizens against the persecutions of the Government. And

it was designed, I think, to be a watchdog and defender of the rights of the community and the citizen. It seems to me the Constitution and the history of this experience mandates that the grand jury be returned to that fundamental role which it is supposed to play.

And it is in that sense, in terms of remedies, leaving the details to my colleagues, I would conclude by saying that it is not—emphatically not—important or right, in my opinion, to have constitutional amendments to abolish the accusatory grand jury. I think that, on the contrary, an accusatorial role has to be maintained in order to act as the Constitution mandates. What is important is to return the grand jury to its independent role as a guardian of people's rights. And it is that task, I think, which is before the committee and in which I am sure we all wish it the utmost of success.

Mr. EILBERG. Thank you, Professor Scott.

The members will now ask questions under the 5-minute rule, and the questions may be asked, of course, of any member of the panel or of the panel as a whole. If directed to the panel generally, I would suggest asking for volunteers from the panel to answer any questions that might come from the subcommittee.

I will start with a few questions, first to Ms. Peterson.

One of the many arguments made against grand jury reform in general is that abuses are a result of improper use of the system and not the system itself. For example, last year former Attorney General Levi stated that grand jury problems can be minimized by the selection of honest, qualified prosecutors and that no legislated reforms could provide adequate protections if abusive government attorneys are in power. Would you comment on this?

Ms. PETERSON. Could Mr. Borosage comment on this? Government misconduct is one of his specialties.

Mr. BOROSAGE. Purely an avocation, not a vocation.

The problem with the "good prince" theory is that it sets us up for a bad one. In the intelligence field, we have seen over the years continual proof of the fact that you cannot trust good men or good women to protect our liberties. It doesn't take much of a memory to remember that the Senate committee found that one of the people approving the appointment of J. Edgar Hoover to be head of the FBI was Roger Baldwin of the ACLU who considered Hoover to be one of the stars in civil liberties and civil rights.

It was Richard Helms, before all the abuses of the CIA came out, who said when asked how we could trust the CIA's activities without congressional oversight, said "You must assume we, too, are honorable men in the service of our country."

Obviously, what I think this committee should conclude about the grand jury is that good men or good women are not enough, and you must create checks and balances in legislation; you must create standards to which people can be held accountable.

Mr. EILBERG. Ms. Peterson, the Center's statement notes that you were cocounsel in the *Fort Worth Five* case. As you said, this controversy was really the inspiration for my bills and these hearings. Can you tell us, step by step, what has happened in that investigation since the confinement of the five and if there are any present proceedings in that case?

Ms. PETERSON. The five were found in contempt and incarcerated. We made bail applications which were denied both by the district judge, and by the fifth circuit in a panel on which the present Attorney General sat and wrote the opinions. Then we applied to the Supreme Court, and Justice Douglas let them out on bail pending the filing of our petition for certiorari. By that point, the fifth circuit had affirmed the contempts.

They were released, the first time mainly because of the issue of the possibility of foreign prosecution.

When the Supreme Court denied certiorari, they were reincarcerated. Wire top logs obtained in a criminal action in New York in which Frank Durkan was counsel for the defendant revealed that the government's denial of electronic surveillance of counsel for the witnesses had been inaccurate, as one of the Texas grand jury witnesses whom he and I represented had been overheard talking to Mr. Durkan on the phone. A habeas proceeding was started to get the witnesses out. A bail application was made in connection with that. At this point I was in Florida defending the VVAW and not actively involved in the *Fort Worth Five* case, so I was only consulting with Mr. Durkan by phone.

The district court denied bail, the fifth circuit denied bail. Justice Powell denied bail but Justice Douglas granted bail because of the attorney-client overhearing. I believe the grand jury expired while they were out on bail. They were threatened with being resubpenaed. They have never been resubpenaed. They have never been prosecuted. As far as I know, they have never been called as witnesses. There has never been any case that I know of that was brought in Texas or elsewhere out of that investigation.

Mr. EILBERG. Professor Scott, in the center's statement, there is a suggestion that the Supreme Court has, by a series of recent decisions, fostered grand jury abuse. Because of this perception by lawyers, have fewer cases of abuse been appealed, and are State appellate courts more liberal in their decisions as to rights and protections surrounding the grand jury?

Ms. COPELON. If the Chairman would permit me, perhaps I could answer that, since Ms. Peterson and myself are engaged in litigating these cases.

Mr. EILBERG. May we have your name again.

Ms. COPELON. I am Rhonda Copelon and a staff attorney at the Center for Constitutional Rights.

The Supreme Court's hostility to preserving constitutional rights in the grand jury process is evidenced in a number of ways.

No. 1, to my knowledge, the Supreme Court has affirmed only one case of a grand jury witness who won a favorable decision below. This was *Gelbard* v. *United States* a./k./a. the *Egan* case, which had to do with the wiretapping in violation of 2515.

In every other instance in which the Supreme Court has granted certiorari it has reviewed and reversed a decision sustaining the witness' constitutional rights. And so we have had a series of reversals starting in 1972 with *Branzburg* v. *Hayes*, and coming right up to the present with *United States* v. *Mandujano*.

It is a devastating series of opinions. There are cases presently pending in the Court.

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In addition, there have been a lot of erosions of due process and substantive rights by virtue of the Supreme Court's very process of denying certiorari in the cases that are decided against the witness below, even though the denial of certiorari does not, technically, have precedential effect. These decisions have a very real impact on what counsel does when confronted with going to the Supreme Court today.

For example, we have indicated to the committee that we think it is extremely important, as part of the reforms, that the prohibition on ex parte, secret, in camera material, be articulated in the bills in order to enforce what is the fundamental guarantee of *Alderman* v. *United States*, which is the requirement of disclosing information as a precondition to putting someone in jail or depriving them of significant liberty. Thus, if you don't disclose, you have to dismiss the proceeding. Our position is that the situation that happened in Jill Raymond's case should not have happened. We did not go to the Supreme Court for certiorari in Jill Raymond's case. She did not want to take the risk of their taking her case and making bad law.

Two justices of the Supreme Court, including Justice Douglas, who was extremely ill at that time, denied a stay when we made an application to the Supreme Court. And she decided that in view of that, the hostility of the Court was so great she didn't want them to take her case, even though there was an overwhelming factual showing which is also impossible to develop in grand jury litigation—it may not look overwhelming to you because there are holes in it we were never able to prove, but considering the limited discovery allowed in a grand jury case, it was extraordinary. We did not take that to the Supreme Court. She felt that to do that would be a waste of time or would give the Court an opportunity through denying certiorari or affirming the contempt, to make further bad law.

Mr. EILBERG. Thank you.

Mr. Fish.

Mr. FISH. In order to save the committee time, Mr. Chairman, may I ask that with respect to the Center for Constitutional Rights, the Grand Jury project, and the Center for National Security Studies, the committee be supplied with information concerning the entities, such as the principal officers or board of governors or trustees.

Mr. EILBERG. They have indicated they agree to supply that to the subcommittee.

Ms. PETERSON. We will supply that information for the Center for Constitutional Rights.

[The material referred to follows:]

CENTER FOR CONSTITUTIONAL RIGHTS, 853 BROADWAY, NEW YORK, N.Y.

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CENTER FOR NATIONAL SECURITY STUDIES

BRIEF DESCRIPTION OF BACKGROUND AND ACTIVITIES

Background

The Center for National Security Studies was organized in the Fall of 1974 in response to the exercise of Executive power and prerogative in the name of "national security"—and the growth of instructions which claim that rationale. Through five administrations these institutions have fostered wars and repeated acts of intervention abroad, and the erosion of our liberties at home. Indochina and Watergate are shameful monuments to the widely shared assumption that matters of "national security" are above the limits of law, and beyond the control of the Congress or the people. And while the Watergate revelations have encouraged some to question Presidential claims to national or internal security prerogatives, neither the end of our involvement in Indochina nor the removal of a President has greatly circumscribed the powers of the Executive or the license of our national security institutions.

The Center's primary objective is to contribute to a public reappraisal of the purposes and policies of our national security institutions. The Center works with other groups and with concerned citizens in exposing secret policies to public debate.

The Center for National Security Studies is funded, by grants from the Field Foundation, the Veatch Committee, the Stern Fund and others. It is sponsored by the Fund for Peace, a non-profit institution concerned with world peace and justice.

Center activities

The Center

Conducts research and produces information on issues of national security;

Provides information and expertise to concerned groups, individuals, the press and Congress;

Sponsors conferences and public meetings designed to open national security issues to public discussion;

Coordinates the efforts of citizens' groups and individuals concerned about the issues;

Develops reform proposals to hold national security institutions accountable to the Congress and responsive to the people;

Assists individuals and groups seeking information under the Freedom of Information Act and coordinates litigation in related areas.

Center projects

The work of the Center is separated into a number of inter-related projects, each directed by an associate with experience and expertise in the area. The main projects include:

Project on the CIA and Covert Action.—Directed by John Marks. Operating in secret, and engaging in covert action beyond the reach of the law and without the knowledge or consent of the people, the CIA is the institutional expression of Executive national security prerogative. This Center project engages in extensive investigations of the CIA's clandestine operations at home and abroad, and seeks to stimulate public debate on U.S. involvement in covert action.

Project on Democracy and the Military.—Directed by David Cortright. The Vietnam War revealed widespread unrest in the military over undemocratic procedures and practices. This project explores the widespread disaffection in the military and the growing union organizing movement. It cooperates with other groups working on issues such as amnesty, troop reductions and military reforms.

Project on Domestic Security.—Directed by Jerry Berman. This project is designed to monitor and challenge Executive claims to internal security prerogatives. The focus of the project is the Federal Bureau of Investigation. It publishes materials on political intelligence, coordinates a committee of groups exploring ways to reform intelligence agencies, and works closely with organizations engaged in litigation to curb the illegal and unconstitutional activities of those agencies.

Project on National Security and Civil Liberties.—Directed by Morton Halperin. Secrecy has provided a veil for national security institutions, behind which every intelligence agency has engaged in activities which violate the rights and liberties of citizens at home and abroad. This project is designed to challenge these abuses. It encourages the use of the newly amended Freedom of Information Act, coordinates litigation and exposes information about various policies of national security bureaucracies, and uses the Act to reveal improperly classified information. It publishes a monthly newsletter which explores the relationship between national security prerogatives and civil liberties.

Project on Southern Africa and National Security.—Directed by Courtland Cox. U.S. policy toward southern Africa provides an important case study of national security policy abroad. A 1970 White House policy review placed the United States in greater sympathy with the white regimes in southern Africa, slighting internationally-declared objections, and the smoldering aspirations of the black majorities. This project has undertaken a study of the policies of national security institutions in this area. It seeks to inform Americans, especially black Americans on evolving American policy toward southern Africa.

Project on Interns.—Directed by Susan Kaplan. Undergraduate, graduate and law students work at the Center during the academic year as part of the Center's intern project, participating in the various projects. During the summer they participate in special "task forces" focusing on topics which have included: military intelligence; policing in the social service agencies; and racism in the military.

Special studies sponsored by CNSS include:

Project on U.S. Labor and Western Europe.—Directed by Elizabeth Eudy. This project is writing a book on CIA/U.S. Labor activities in France and Italy.

Project on Police and Military Arms Trade and Aid Abroad.—Directed by Mike Klare. This project carries on research and writing on the nature of American aid to police in other nations, and the trade and aid in armaments throughout the world.

CENTER FOR NATIONAL SECURITY STUDIES

The Center for National Security Studies is an independent organization devoted to nonpartisan research and publication on national security issues. A central concern is the relationship between traditional liberties and freedoms and the exercise of state power in the name of national security. The principal purpose of the Center is to promote public understanding and involvement in these issues of national importance.

The Center is an independent, non-profit, tax-exempt project of the Fund for Peace. It is financed by tax-deductible contributions from private donors and foundations and receives no government funds or support.

Mr. FISH. Professor, I was very interested in what you had to say as far as the history, and what I'd like to explore since you mentioned the term "Anglo-American jurisprudence" is the role, for example, of the grand jury in other English-speaking countries like Great Britain and Canada.

It is my understanding that just about the time the grand jury was developing in this country, the English saw no further need for it and abolished it. And I don't think the Canadians today use it.

What have they substituted for an independent community role and a guarantee that the rights of the accused be addressed?

Mr. SCOTT. I wish I could answer your question. I think that I have to say that I don't know. As you know, the British abolished the

grand jury in 1933 or thereabouts after a long period of grand jury decay. What the experience of Great Britain and Canada has been, what they have substituted for community role, what new problems of abuse of power they have faced, if any, I cannot tell you.

I would say this, though, that I think in these hearings we owe a great debt of gratitude, not because we have answers but because you are raising new questions. And I think one of the things that concerns me and my students at Rutgers is to try and begin now to find answers posed by the extraordinary actions of the Nixon administration and the past years. And all I can say at the moment is that we are going to focus our investigations for the next period very, very closely on precisely this kind of question.

I cannot answer your question substantively at this time because I don't know.

Mr. EILBERG. Professor, would you be able to supply for the record that information? If you can get it together for us, I think it would be a useful addition to the record.

Professor SCOTT. I'd be more than happy to undertake that project for you, yes.

Mr. FISH. Without going into specifics, very recently, as occurs frequently, a group of Congressmen went up to Canada, and in the course of our discussions with members of Parliament I think a number of us came away with the feeling that there was a first-class viable democracy, but they didn't go anywhere near as far as we do as far as rights of the individual.

First, let me ask a question of everybody. Is anybody in favor of abolishing the grand jury? You all think that this is a patient that can be restored to good health?

Ms. PETERSON. I think I can speak on behalf of the panel that we are all vigorously opposed to abolishing the function of the grand jury which is provided for in the Fifth Amendment. We are very much opposed to tampering with the Bill of Rights at all. We believe in expanding the rights of the people.

Mr. FISH. I think it was you, Ms. Peterson, who made a suggestion that the prosecutor does not go before the grand jury, but the individual who presents the case to the grand jury is a different individual from the person who will be prosecuting the case. Is that what you're saying?

Ms. PETERSON. Let me explain that a little more. The prosecutor now is in a conflict of interest situation. The prosecutor is a litigant before the grand jury; its constitutional role is to screen or question the sufficiency and appropriateness of this request for an indictment. At the same time, however, he is the advisor to the grand jury on legal questions. And if the grand jury has a question, for example, about how much evidence he should present in order for it to be proper for them to vote an indictment, the prosecutor is now the person whom they must ask. If there were special counsel, the prosecutor would be more clearly confined to the litigant role of presenting evidence to the grand jury, and would be less able to dominate and control its review.

At present, grand juries don't act independently. They don't decide who to call before them, what questions to ask, when to excuse witnesses.

Phillip Shinnick recently was released from prison. I am sure the grand jury was never consulted about whether or not he should have been released, just as they were never consulted on whether or not he should have been called. The prosecutor makes all of these decisions.

We are glad he was released, but nonetheless, it was not the grand jury that made the decisions; it was the prosecutor and/or the FBI. The grand juries are supposed to be screening the prosecutor's evidence, but they can't independently screen the evidence of somebody who is controlling them. That is why we think it's necessary to separate these two functions and to give the grand jury a legal advisor so that they do not need to constantly turn to the prosecutor.

Mr. FISH. Let me cut you short because we are operating on the 5-minute rule.

You are not talking about an assistant district attorney as distinct from the district attorney. You are talking about somebody entirely separate.

Ms. PETERSON. Yes; we are not talking about a regular or special prosecutor who would initiate proceedings or superintend the gathering of evidence. We are talking about someone who can assist the grand jury when it seeks legal advice. The simplest and, we believe, most effective way of institutionalizing this advisory role is through the system of law clerks to the grand jury. After graduation from law school some students become law clerks to Federal judges. They serve for only a year or two.

Likewise, law clerks could be appointed on a short term basis to serve as legal advisor to one or more grand juries. These clerks would be employees of the judiciary and given instruction in how to fulfill their duty of assisting the grand jury in the exercise of its independent screening function. The grand jury is supposed to be an arm of the court, and yet its advisor is now a member of the executive branch.

Mr. FISH. Thank you very much.

Mr. EILBERG. Before introducing the next member, I have the obligation to leave this hearing and go to the floor of the House to both get permission for the subcommittee to sit after 11 o'clock, and to introduce the guest chaplain for today, so I will be leaving in a few minutes and I will ask Mr. Hall to take the chair.

Mr. Hall, please.

Mr. HALL. One question I would like to ask. With reference to the Fort Worth case, did I detect that there is any attacking of the court system as to the manner in which they interpreted it and carried out the mandate of what they thought was right in the Fort Worth case? I gather that in some instances the lady who spoke here last—you got some stays from Justice Douglas, and then you had a panel decision in the fifth circuit which upheld certain things that were done in the Fort Worth case.

Are you attacking the court system as it applied to the Fort Worth case?

Ms. PETERSON. No; I was attacking specific decisions. For example, the decision of the panel to take in camera material and not show it to us after the Government on appeal admitted that it had discovered some wiretap. It said the wiretaps were in a separate investigation. During the district court proceedings the Government had denied such wiretap.

The procedure under Alderman is to remand for a taint hearing before the district court. The fifth circuit did not follow that procedure.

Mr. HALL. I don't intend to interrupt you, certainly, but as I gather, we are getting away from the function of what we are here for today. In that instance, as I understand it, the court took evidence and made certain decisions based upon the evidence as presented to it from the five and made its findings; is that correct?

Ms. PETERSON. Yes, but what we are recommending is that such findings should not be made without adversarial hearings. We are recommending that teeth be put into legislation that is passed requiring such adversarial hearings.

Ms. COPELON. Mr. Hall, if I could add to that, your question raises a very good question as to why we as litigators are here before the Congress today.

In response to Mr. Eilberg's question before, I indicated that we are in a time when the courts are withdrawing the rights of the people. And we do not agree with the interpretation of the Constitution as expounded by the Supreme Court today and as applied by the lower courts. When the courts fail to fulfill the constitutional duty to safeguard the Bill of Rights, then is the legislature's duty to fill that void.

The task of this body is to reinvest the judicial system with the rights guaranteed by the Constitution, and with the standards of review and with the procedures required to ensure that these constitutional rights are protected. We cannot deny or fool ourselves that there is in the judicial decisions today there is a real erosion of fundamental constitutional guarantees. This erosion of rights generally, as well as in the grand jury process, is part of the legacy of the Nixon administration.

Mr. HALL. Well, it is not your testimony here today that all of the evils of the grand jury system originated in the Nixon administration, is it? I have noticed that has been in the testimony of all the witnesses—not all of them but some—that all of this peaked during this era.

Ms. COPELON. It is the testimony, I think, of the panel—and others could add their comments on that—that the Nixon administration took advantage of a gradual and very limited process of erosion to accomplish an immense erosion of fundamental guarantees.

The fifth amendment, for example, has been whittled away over time. But it is only in the last few years that through the Organized Crime Control Act of 1970 which provided use immunity, and a series of decisions putting targets, for example, at the mercy of the grand jury, that we see the culmination of that development, which is unprecedented in history of this country.

Mr. HALL. Thank you.

Mr. Harris.

Mr. HARRIS. Thank you, Mr. Chairman.

I'd like to ask Ms. Backiel: You all have been studying grand jury abuses for a couple of years, as I understand it. Do you feel that the incidence of grand jury abuses is tended to recede or increase over the past few years?

Ms. BACKIEL. Statistically I couldn't say. It seems to me that the targets of politically motivated investigations are different. Originally it was the antiwar movement and the veterans' movement, and it has been the black movement; it has been the women's movement. Now the focus seems to be on the Puerto Rican movement and the native American movement. I don't see any decrease quantitatively. I do see a shift in the targets of the politically motivated investigations.

Mr. HARRIS. You think that the incidence of abuse has been relatively constant, right?

Ms. BACKIEL. Certainly between the end of 1973 and the beginning of 1975 there was a large lull in the activity that coincided somewhat with the Watergate grand jury. And I think for awhile grand juries were not being used in that Cointelpro fashion.

But I don't feel now that the use of politically motivated grand juries is on the wane—no, not right now.

Mr. HARRIS. There have been a number of cases where individuals have gone to jail rather than testify before the grand jury under a grant of immunity.

Ms. BACKIEL. Quite a few.

Mr. HARRIS. Would you summarize for me why someone would go to jail instead of testifying.

Ms. BACKIEL. I think that there are a number of reasons, but they cluster around the feeling that the fifth amendment protects one's right not only to be free from compulsory self-incrimination but also a right to silence, to protect other values, for example, values of confidence and trust in a relationship which doesn't fall within any particular evidentiary privilege; values of community coherence and cohesion, a feeling that it is improper for the Government to compel an individual to name all of his or her political associates and describe their affiliations and activities; that that kind of information should not be compelled from an individual. And to protect the integrity of those activities and organizations and individuals and relationships, an individual will go to jail—also to protect his or her beliefs in what the Constitution says and the applicability of the Bill of Rights to people subpenaed before a grand jury.

Mr. HARRIS. So, it is not a matter of being stubborn is it?

Ms. BACKIEL. I think they have commitments that they consider more important than going to jail for 18 months.

Mr. HARRIS. I was impressed, frankly, at your uniform definition of the grand jury system. I have never known that many people who have served on a grand jury.

Ms. BACKIEL. Neither have I.

Mr. HARRIS. Are there uniform standards for appointing grand jurors, are those standards met nationwide?

Ms. BACKIEL. Rhonda Copelon should answer that question.

Ms. COPELON. I am a board member of the national jury project and have been involved for the past 4 or 5 years in a number of challenges to the composition of grand juries and am somewhat familiar with that situation.

There is, in fact, a standard method which was enacted in 1968 by the Congress for selecting grand and petit jurors, and that is in 28 U.S.C. 1861.

That procedure is supposed to guarantee representative cross-sectional petit and grand juries, and it is supposed to guarantee the right of every person to serve on grand juries.

There are very substantial problems with the implementation of that act, which I will not go into in depth here. One of the fundamental problems with it is with the voter registration lists. The voter registration list is mandated as the basic source for the drawing of names. The voter registration list is very underrepresentative of minority populations. That has been documented by the census.

The statute is actually a very good statute in that it says,

> Where there is a substantial underrepresentation of a minority community, the court shall order that the voter lists be supplemented from other sources which would make the list more representative.

The courts are terribly unwilling to apply the congressional mandate to supplement. I think there is one Federal district in the country now which is using multiple source lists which, in fact, is drawing representational grand juries. Clearly to be able to fulfill its constitutional function, the grand jury must adequately reflect the minority populations.

Mr. HALL. I hate to interrupt you, but it is the 5-minute time.

Mr. HARRIS. I want to thank you for your answer. I appreciate it very much.

Thank you, Mr. Chairman.

Mr. HALL. Mr. Evans.

Mr. EVANS. Directed at the panel, do you find that most of the grand juries now in fact operate under the concept that they are a tool of the prosecutor rather than the prosecutor being an aid to the grand jury and is it fairly uniform?

Ms. PETERSON. That has been our experience, and the attitude which grand jurors have reflected as reported to us by witnesses who have been in grand jury rooms and talked to them.

Mr. EVANS. Do you have documented cases of abuse from witnesses who have appeared before the grand juries that they were harassed by the prosecutor in the grand jury room?

Ms. PETERSON. Yes. For example, witnesses have the right to come out in the hall and consult with counsel. In the case of the Fort Worth five when they asked to exercise this right witnesses were told, they would have to wait. They would be asked several questions before they were allowed to leave. Witness was asked whether he was sitting in a chair to convey to the grand jury that the witness was doing something wrong by leaving to and consulting with counsel. Or a witness will be asked "Who are your attorneys? Where are they?" Witnesses are made to feel very intimidated by having to go out. They feel that somehow they are going to be punished for that, too.

Ms. BACKIEL. I think there is also a problem of grand jurors being intimidated by a prosecutor who tells them that if they don't issue indictments when he leaves, there is enough evidence, they will be dismissed. Or grand jurors are abused because they are not informed of the subject matter of the investigation, and they are expected to just sit there and literally rubberstamp.

And grand juries in some cases are beginning to issue reports complaining about this, the supervising, and things like that, and I think

we are just beginning to learn about grand juries who are sometimes dismissed in the middle of an investigation because the prosecutor doesn't consider them to be competent enough.

Mr. EVANS. You have given a lot of testimony dealing with the use of grand juries in intimidating political dissenters. Do you also find abuse in the investigation of organized crime or investigations under the omnibus crime bill?

Ms. PETERSON. I am afraid we are not as familiar with that and we really can't comment on that.

Mr. EVANS. Well, can you imagine that there would be the same type of abuses in these cases, especially under the most recent administration?

Ms. PETERSON. For some time now, the Justice Department has pursued a policy of punishing people who wouldn't cooperate by putting them in jail for contempt where they couldn't use the substantive statutes against them. Paul Cowan addresses this in a New York Times magazine article.

Mr. EVANS. Do you see any difference between the use of the fifth amendment rights or protecting one's rights not to testify against himself and the right not to testify at all before a grand jury?

Ms. COPELON. I am not sure I understand your question. I think our position on what the fifth amendment means is that it means that there is an absolute right to silence. Now, I don't know if that answers your question.

Mr. EVANS. That answers my question.

You are saying there is no difference, that if you don't want to testify you shouldn't have to testify whether it involves you or not.

Professor SCOTT. Historically, as I understand it, sir, there never was any penalty for refusal to testify. Grand juries in the earlier period, for example, would subpena witnesses. If the witnesses refused to answer, there was no penalty. There was no conception of coercive immunity. There was no possibility to coerce the witness to compel him to testify.

I think I'd have to say that from the historical evidence, the concept of the right to silence embodied in the fifth amendment right is not, as it is so often called, a privilege, but as near to an absolute right as one can conceive in the Constitution.

Mr. EVANS. I think if we will continue along this path we will not have to worry about obtaining evidence. We can just make someone appear and testify and convict them on the basis of that and also convict their friends or associates. So we shouldn't have to have an investigatory power at all. We just need the police to get them in and question everybody and put them in jail if they don't testify.

Would you say that is the trend in which we are headed?

Ms. BAKIEL. I don't think we are terribly far from that now.

Ms. COPELON. In addition, in organized crime there are people who have spent 4 or 5 years in jail before they have gotten out, and it seems to me that is a clear example of using contempt as a substitute for attempting to prove substantive crimes.

Mr. EVANS. Thank you.

Thank you, Mr. Chairman.

Mr. HALL. Mr. Railsback.

Mr. RAILSBACK. I don't have any questions.

Mr. HALL. Mr. Fish.

Mr. FISH. Thank you, Mr. Chairman.

If we could pursue this role of investigatory power. Let's say it's eliminated as a power of the grand jury. Wouldn't that lead to a direct investigatory power being granted to the FBI or the prosecutors and, if so, isn't this far more dangerous?

Ms. COPELON. We don't see that the elimination of the investigatory function of the grand jury as an adjunct to the FBI or the prosecutor leads to that result. In fact, what we have today is a system where the grand jury is simply a thin veil for what the prosecutor and what the FBI want to do.

Through it, the FBI and the prosecutor have the very power that we have all wanted to keep away from them.

I think that we all share a horror of the executive branch of the Government having that kind of power. It is seen, for example, in the less visible aspects of grand jury abuse which Ms. Bakiel described before, where what you have is terror in the community, intelligence gathering in the community, fears and divisions, simply by virtue of the fact that the FBI agents have effectively the subpena power in their pocket.

One need not have an agency equipped with the power to punish the assertion of the right to silence. It is not something which is or would be asserted that often, particularly in a system which could encourage participation by voluntarily exchanging transactional immunity for testimony. The power to punish for contempt, which the grand jury or the prosecutor acquires through the ability to coerce immunity, is the power to push people into jail, avoiding all the accusatorial guarantees of presumptions of innocence, of burdens of proof, of jury trials, of basic due process rights.

In fact, the modern state has a wealth of investigatory instruments that far transcend the imagination of the framers. The easy use of the subpena power to force people to testify at the cost of going to jail is something which invites abuse and circumvention of the true investigatory function of the executive.

Mr. FISH. This question is addressed to anybody who cares to answer it, but I think it is one of the center's suggestions of reform, the presence of the counsel in the proceedings.

And I'd just like someone to explore the function—and remember, we have also advocates-prosecutors, not the law clerk now.

What would be the function of an attorney for the witness in the grand jury room? And to elaborate on a comment one of you made in your oral presentation, which was that any uses or any behavior that were remarked on by the witnesses and attorneys could be done in other ways. Would you elaborate on that?

Ms. PETERSON. There is available to the courts at the present time the contempt power which can be used against attorneys. The contempt power is used only against attorneys for defendants. It is never used against prosecutors for equal or worse behavior. Also, a matter can be referred to bar disciplinary committees which help to control the behavior of lawyers.

I am concerned about adding another sanction—the removal of counsel—in the grand jury situation because it will be used by prosecutors or courts who don't like the attorneys who are vigorously representing certain witnesses—to get rid of counsel of choice.

This hapepned in the case of Arthur Banks, which I referred to in our long statement, where he had selected an attorney of his choice. The district court removed that attorney claiming misbehavior. It took litigation all the way up to the Supreme Court to get Mr. Banks counsel of his choice. Fortunately the appellate courts stayed his trial pending their review of the exclusion of his counsel. But such stays are not routinely granted in respect to trials and would be even rarer in the grand jury context. In the face of a statute authorizing removal of counsel, the prosecutor or court could easily force either the incarceration of a witness or his/her testimony and there would be, at best, belated review for the contemnor. Indeed, if a witness, by being deprived of counsel of choice, can be cajoled or frightened into testifying, there would be no occasion for the appeals courts to review the removal. This would be an ominous power.

Mr. FISH. Professor, in your historical perspective, do you see any grounds for a grand jury being used as an investigative mechanism, or do you think it should be limited strictly to the original purpose that you described?

Professor SCOTT. Well, of course, the original purpose as an accusatory body and as endorsing, if you like, or OK'ing deliberations of pretrial investigations of the magistrate—there was an inevitable investigatory aspect in the grand jury from quite early days. If they had a suspect before them, they might want to investigate, that is, hear a couple of witnesses to assure themselves that, indeed, there was a *prima facie* case. The point there is that they were investigating in the context of a suspect whose name was before them.

Now, it is very clear that that investigatorial role expanded to an enormous degree in the period after the Civil War and between the Civil War and World War I and was directed to official corruption or a crime or gambling or whatever.

It does seem to me there is a role for both of these functions, but that the investigatorial type which was a much broader type of investigation directed to alleged public corruption requires, indeed, some further statutory regulation and control.

It does seem to me that there are, indeed, grounds historically for maintaining both these somewhat distinct functions as important functions of the grand jury.

Mr. FISH. I am glad you mentioned that, sir, because before this committee also is the question of whether or not we should establish an office of special prosecutor, largely to look into matters of official corruption. And, of course, that brings up questions as to why shouldn't the Justice Department do this itself? Why should it need to have an independent special prosecutor?

So I gather what you are saying is that in those cases you see a legitimate role for a grand jury.

Professor SCOTT. Yes, I think precisely on account of the abysmal experience of the Nixon administration, that wide-ranging investigatorial role does require statuatory and congressional definition.

Mr. FISH. Is there time for one more?

Mr. HALL. Yes.

Mr. FISH. The Grand Jury project in its prepared testimony states the vast majority of those confined as recalcitrant witnesses in political cases were women.

I must confess I was surprised to hear this. Can you tell me what kind of cases we are talking about and the basis for this statement?

Ms. BACKIEL. There are a couple of reasons for that. One is that the early 1975 investigation centered around the women's activities in New Haven and Hartford because the FBI said they were trying to find suspects who were women who they suspected had lived with women or gay communities.

Subpenaed before the grand jury in New Haven were four witnesses, all of whom were women. So the investigation that took place really nationwide but culminated in only two grand juries was specifically focused around women active in the women's movement.

That is one reason.

I think the other reason is that grand jury subpenas are often calculated to put people who are considered the most vulnerable in the position of choosing whether or not to go to jail.

Another phenomenon we have noticed is grand jury witnesses being singled out not so much according to any predictable or rational pattern for who would have the most evidence, but rather who was most vulnerable. Therefore, subpenas have been issued to single mothers who have the additional problem of figuring out who'd have custody of their children and facing the possibility of losing their children if they chose to go to jail rather than testify.

We think the singling out of women is symptomatic of the perception of the FBI that women are not particularly strong or vulnerable to a lot of pressure and will be crushed under the pressure; and also that women who are alone and caring for children are in a difficult position with respect to choosing to go to jail.

Mr. HALL. One question I'd like to ask the panel. You dispute the contentions by the Justice Department that immunity is a necessary weapon against organized crime. What do you base that upon? It appears to me you'd have to have an immunity provision in many instances where you were having to get into the organized crime that exists in this country today.

Ms. COPELON. Mr. Hall, the reality of the history of this country is that immunity was very rarely used up until 1970, so that we survived many years without having to have the power to compel people to talk or face going to jail.

Our position is that the fifth amendment guarantees against being compelled to testify under pain of contempt, and that the fifth amendment brooks no arguments of efficiency.

Even if one moves from that position, it is indisputable that the fifth amendment, at the very least, places on the executive branch of Government an extraordinarily heavy burden to prove with particularity where immunity is useful.

The Justice Department has not done that. The Justice Department has told us that a survey of prosecutors says that compelled immunity is useful. That is not something you can tackle. It is not something you can evaluate. You cannot tell, for example, in what narrow cir-

cumstances, if any, compelled immunity might work. You don't know that. The Department has refused to provide this committee with the kind of information that would enable it to examine the purported usefulness in the different criminal law contents. We say that where you are going to take away rights that are of the dimension of the fifth amendment, there is an enormous burden on the Government. The Government has survived in the past without the power to immunize.

Mr. HALL. Don't you think that in the past several years you have had a change in the type of crime that we now see running around in this country, and just under the very situation that now exists it is nearly mandatory to a Federal prosecutor or to the Federal agencies, in order to make a case, in order to have the power and the right to grant immunity, to have some people who will help them in these particular areas.

Ms. COPELON. I think that is an assumption. It is not substantiated. The Watergate special prosecutor did not employ compelled immunity; he got the testimony that he wanted through consensual immunity. If there were a transactional immunity statute which was consensual, the Government would, in fact, be giving people something for their testimony and it would be a real carrot to people to go along with and provide the evidence to the Government.

It is impossible even to judge the effectiveness of immunity in terms of its consensual possibilities under a system of use immunity, because use immunity is not a meaningful guarantee to anyone, particularly to someone who is, for example, an accessory, against whom the Government has plenty of information, and whose testimoney is only going to add the tail on the dog, in terms of their vulnerability to prosecution. There is also no guarantee that the Government will not manufacture a trial to the very evidence which the immunized testimony provided.

I think we are in a situation where it is impossible to judge the difference between the effectiveness of voluntary transactional and coerced immunity. The burden is on the Department of Justice at the very least to give us the objective information necessary to determine whether there is any circumstance where immunity could be justified.

We don't think it would ever be constitutionally justified, but in terms of testing the assumptions which led, in fact, to the Organized Crime Control Act of 1970, a case analysis should be made.

Mr. HALL. That is all I have, Mr. Chairman.

Professor SCOTT. Can I add a word to that which is outside of the context of the law but perhaps is relevant.

I think that the Nixon legislation was based upon a tremendous and justified fear of the disintegration of the social order and increased crime. However, I would add the point here that one could argue that the enormously increased crime rates of the last few years might be thought of as a function of the decay of our cities and the disintegration of the social order arising out of a failure of Government at all levels to cope with tremendous new economic and social needs. If this new economic and social crisis results in crime which is then used as an excuse for taking away fundamental constitutional rights, I think we have the whole thing the wrong way around. And I think the Congress has to focus on the most fundamental causes of crime rather than try to wash the tides back with a broom. And

the facts of crime arising out of intolerable social conditions must not be used as a reason for the abolition of fundamental constitutional rights.

Mr. BOROSAGE. I think one of the functions this committee could serve would be to have the GAO do a study of those instances in which forced immunity was useful, what the crimes were, who the people who received immunity were, what they confessed to or what they testified to, whether it was important or not, instead of having to debate our contention versus the contention of the Justice Department, which is where it is at now.

I suspect there is a great dilemma here, using Mr. Hall's standards of commonsense, if you are a member of an organized crime coterie, you face a more severe sanction for talking than you do for silence. The only way you are going to be able to use forced immunity to force someone like that to talk is to put him behind bars for a very long time. Six months or a year they can do standing on their hands. One of the things I am certain that most people in this panel, and I would hope in the Congress, are unwilling to do is to give a weapon to the prosecutor by which he can put someone in jail for years and years without a trial and without review. If you are not willing to do that, I think maintaining forced immunity with a reiterative shorter penalty serves only to harass the weak or politically active and nothing much more.

Mr. HALL. As an example, this committee had testimony last week, if I may get into it, with reference to the illegal alien situation in these United States. We had a man who appeared before this committee who has turned what I call State's evidence to help the Federal people and the immigration people to break in and determine how the immigrants are getting into this country. And he came in with a hood because of fear of what might happen to him.

Well, in many instances the Federal Government, customs people, immigration people, would have a difficult job, as I see it, trying to ferret out and find out and determine how these people are getting into this country unless they had someone they could rely upon.

Mr. BOROSAGE. But the person you could rely on is the man who came to you with a hood, who volunteers to take immunity. The person forced to take immunity may not tell you the truth, and may resist saying anything at all of worth.

Mr. HALL. I am not saying what this man said was truthful, but I am saying I can see a situation like that where they'd need some sort of assistance.

Mr. BOROSAGE. I agree with you. I think giving voluntary immunity is an important function that allows the Government to break into the hierarchical or secret organization—give someone immunity and have him testify and go up the ladder. That is what happened in the Watergate investigation. But that is voluntary. And the person who volunteers for immunity you can rely on generally, and you can get testimony. The person you force immunity on is in a very different situation, and is not the person who came before you in the committee and is not the person who is going to be particularly helpful in the illegal alien situation.

Mr. HALL. Thank you, Mr. Chairman.

Mr. EILBERG. Mr. Evans.

Mr. EVANS. Addressing this to the panel again, I agree with the concept you have on force immunity. I think you get a very unreliable witness when you force immunity on a person, and oftentimes that person is in more danger of his life by testifying than he is by refusing to testify and go to jail. But I am concerned somewhat about the opinion you expressed on the fifth amendment right.

It has always been my concept that the fifth amendment right was against self-incrimination and that the public has a right to some extent to have testimony where that testimony does not incriminate the person testifying. And I think I have seen cases in the past in which the public does have a right to this testimony where it does not incriminate the person testifying.

Do you see any instances, or are there any precedents that you have seen, in which the public has a right to testimony of individuals where it does not incriminate that person?

It is sort of a duty of citizenship type concept.

Ms. COPELON. There is a concept of the duty of citizenship, and I think maybe Professor Scott should answer this. Historically what has been described as the grand jury's "right to every man's evidence" or every person's evidence—that right was always limited, until coerced immunity came in, by the fifth amendment. That is, by the concomitant right of the person not to give evidence. This does not mean that there is not a penalty attached, socially, publicly, economically, to the claim of the fifth amendment. It is not that by claiming the fifth amendment nothing happens to a person. Obviously, there can be a tremendous impact on refusing to give testimony. So there are enormous social pressures in certain kinds of circumstances to cooperate, just as there are enormous pressure not to in other circumstances.

But the coersion of testimony is not the way to deal with that problem, and the fundamental right to refuse one's evidence, in order to be meaningful, must be that original right to silence that the common law understood.

Mr. BOROSAGE. The other problem, Congressman, is the notion of waiver, that if you testify a little bit about something you can't then refuse to answer the next question, because that one will incriminate you. The court decisions that you can waive your fifth amendment rights, opening the door to a line of questioning, make attorneys wary of recommending to their witnesses that they testify in a situation where they could be incriminated. They say, "After you say your name, don't say anything else."

Mr. EVANS. I think my question is a little more basic than that in that it would involve people who would not be incriminated in any way by their own testimony but would have special knowledge of events which would aid in the prosecution of a case. I have sat outside the grand jury room on many occasions to consult with witnesses, so I am familiar with what you are talking about. I am wondering if there is any concept in which you felt that the public or the State had a right to testimony where it did not incriminate the person giving the testimony, but that person might not want to give it because he was a reporter and he didn't want to give a source, or it was a friend and he didn't want to incriminate a friend.

Is there a public right to information in such instances?

Professor SCOTT. I think that the fifth amendment would indicate that the balancing and the decision here rests with the individual. I

think perhaps I'd also have to say at the risk of being called an idealist, that democracy, which is at best an uncertain experiment, rests ultimately, if you like, on a Jeffersonian notion, that the ordinary citizen who, indeed, does have an interest in law and order and a peaceful and secure life ordinarily has a very profound interest ordinarily in revealing wrongdoing.

We all know—and it happens every day of the week—there are people who, for one reason or another, will not get involved because they are not involved. But I think in the last resort we are saying that the investigation of crime and the maintenance of public law and order depends upon the cooperation of the citizenry. And it is that cooperation which I think normally, since we have faith in people, we assume, and that normally, even though there are costs and even though the right may be abused, we say the public has such an overwhelming interest, too, in the right to silence and non-self-incrimination that the price of that constitutional right also has to be paid. What is being done here, in effect, is balancing off a number of important values, one against another, all of which compete, and all of which have a right to be heard. There is in a fundamental sense no ultimate answer to your question, except the inculcation of a strong sense of civic duty in citizens, and also a clear understanding of the nature of the privilege or the immunity that the fifth amendment gives them, so when that right is exercised it will, indeed, be exercised responsibly and not irresponsibly.

Mr. EVANS. Thank you.

Mr. EILBERG. I want to say that the subcommittee is very grateful to all members of the panel. We thank you for giving us the product of your experience and your study and research, and we look forward to continuing to hear from you. And in that connection, we would like to submit the questions that we did not have time to ask this morning, and hope that you will let us have responses as soon as you reasonably can. We want to have your input.

You may not want to comment on this, but the bills introduced under my signature represent things we learned from the hearings in the last Congress, and we hope it is in the right direction. Of course, it remains to be seen how the House feels about these matters.

Thank you again, Thank you very much.

Ms. COPELON. Thank you.

Professor SCOTT. Thank you.

Ms. PETERSON. Thank you.

Ms. BACKIEL. Thank you.

[The questions submitted to this panel and their responses follow:]

SUPPLEMENTAL WRITTEN ANSWERS TO QUESTIONS FROM THE SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP AND INTERNATIONAL LAW OF THE COMMITTEE ON THE JUDICIARY FROM THE PANEL CONSISTING OF DORIS PETERSON AND RHONDA COPELON OF THE CENTER FOR CONSTITUTIONAL RIGHTS; LINDA BAKIEL OF THE GRAND JURY PROJECT; ROBERT L. BOROSAGE OF THE CENTER FOR NATIONAL SECURITY STUDIES; AND PROF. JOHN ANTHONY SCOTT, LEGAL HISTORIAN, RUTGERS UNIVERSITY SCHOOL OF LAW

Q 1. One of the many arguments made against grand jury reform in general is that abuses are a result of improper use of the system and not the system itself. For example, last year former Attorney General Levi stated that grand jury problems can be minimized by the selection of honest, qualified prosecutors and that no legislated reforms could provide adequate protections if abusive government attorneys are in power. Would you comment on this?

A 1. This question was answered by Mr. Borosage in his oral testimony.

Q. 2. Issue of grand jury abuse is an elusive concept which is often difficult to document. On the other hand, in my judgment, there are certain activities which are a clear indication of abuse of this institution. In this regard, can you indicate how often the following has occurred based on your research or alternatively can you give us specific examples of the following: (1) reiterative contempt (2) subpoenaing of targets before the grand jury (3) use of grand jury to gain evidence in pending cases (4) use of grand jury to gather intelligence information?

A 2. It is even more difficult to quantify the problem of grand jury abuse than it is to define it. The Department of Justice, which is the only agency in a position to keep track of how many times targets are subpoenaed, how many times coerced immunity yields usable results or how often grand jury investigations are used to accomplish pretrial discovery in pending cases, does not record this information and/or make it accessible to the public. Specific examples illustrate the problems, however.

(1) *Reiterative contempt.*—It is rare that a grand jury witness incarcerated for civil contempt after refusing to cooperate with an investigation for political reasons is released without at least a reminder of the power of the U.S. Attorney to resubpoena her or him. Threats to this effect were made explicit in the cases of Phil Shinnick ("SLA" investigation), Jill Raymond ("Susan Saxe/Kathy Power" investigation), Lureida Torres (1975 "FALN" investigation) and others. In the Shinnick-Weiner and Raymond cases it was clear that the investigations focusing on them stopped as soon as they were jailed for contempt.

Among political grand jury contempt prisoners who have been served second subpoenas in connection with a single investigation are: Pedro Archuletta (currently imprisoned on two citations of civil contempt in related "FALN" investigations in Chicago and New York). In Chicago, explicit threats were made by members of U.S. Attorney Margolis' office to the effect that new subpoenas would be issued to recalcitrant witnesses presently jailed when the term of the current grand jury expires in February, 1978.

In New Haven, Connecticut, Terri Turgeon and Ellen Grusse were both resubpoenaed the day of their release from prison and served an additional six months after being held in contempt a second time for refusal to answer any questions in relation to the Saxe/Power investigation. We believe these examples illustrate on ever-present potential for abuse.

There are also several variations on the problem of reiterative contempt, including the "material witness arrest" and subsequent contempt confinement of Leslie Bacon and Ivis Longvisitor, and the criminal contempt indictment of Jane Alpert, following a commitment for contempt for refusing to testify during the course of a criminal trial.

(2) *Subpoenaing of targets.*—In the political cases, many of those subpoenaed are frequently also targets of the investigation. For example, eight of those subpoenaed to Tallahassee in connection with the VVAW investigation were later indicted (and subsequently acquitted).

Phil Shinnick, Jay Weiner, Jack and Micki McGee Scott, and others were subpoenaed to Harrisburg and Scranton in connection with the "SLA" investigation. To the extent that it was a bona fide investigation into whether federal fugutives had been harbored in the jurisdiction, the "witnesses" were also targets of potential harboring prosecutions. (No indictments on this charge were ever issued.)

In the current New York and Chicago investigations, at least one witness—Pedro Archuleta, has been identified by U.S. Attorneys in Chicago as a "subject" of the investigation, jailed for refusing to furnish exemplars, and not granted immunity there. In New York the same witness was immunized and jailed for refusing to answer questions clearly related to the subject matter of the Chicago investigations following an invocation of his Fifth Amendment rights. Once again, we believe these examples illustrate a serious problem which is presently unchecked and which must be limited by specific legislation.

(3) *After acquired evidence.*—The refusal of the prosecutors to certify evidence already obtained at the time of an order compelling testimony suggests strongly that grand juries are viewed by them as a means of obtaining evidence for trial. Protective orders and requests for certification of evidence were resisted and denied in every case we have been involved in. The most flagrant recent example is the case of Pedro Archuleta (simultaneously a witness and a target). Indictments are pending in both jurisdictions. Also, orders compelling the pro-

duction of physical exemplars—which account for six of the present nine civil contempt prisoners in the New York-Chicago investigations—suggest that the grand jury is being used as a pretrial discovery device. The prosecutorial insistence on "fresh" evidence is to get evidence admissible for trial purposes. In the Phil Shinnick case the prosecutors insisted on Shinnick supplying fresh fingerprints and handwriting exemplars even though he had previously supplied such exemplars to the government which would have satisfied the grand jury's needs. However, for trial purposes, the prosecution would run into problems with old fingerprints or handwriting samples in establishing chain of custody.

(4) *Use of grand jury to gather intelligence information.*—The unrestrained use of the subpoena for the production of documents and exemplars as well as the power to compel testimony under threat of incarceration for 18 months is a powerful tool in the intelligence gathering arsenal of the Department of Justice and the FBI. Potential witnesses are often threatened with grand jury subpoenas and incarceration for exercising their rights not to answer questions posed by agents of the FBI, many of which are clearly of a general intelligence gathering nature. Extremely broad duces tecum subpoenas such as were directed at the National Commission on Hispanic Affairs of the Episcopal Church are clearly aimed at learning the names and addresses of persons who contribute to or attend conferences concerning important social justice issues (e.g. the independence of Puerto Rico). Many of those whose connections to this Episcopal organization are remote have themselves become the targets of FBI inquiries. Many activists in the women's movement are still learning that the FBI is asking their friends, employers, and former co-workers about their political beliefs, activities and associations as a result of the investigations by the FBI and grand juries which jailed eight persons active in the women's and gay rights movement in 1975–1976. Without strict control over the issuance of subpoenas—especially duces tecum subpoenas to organizations—the intelligence gathering potential of grand juries cannot be limited.

For a detailed study of how grand juries are misused to gather intelligence, see Donner and Cerutti, "The Grand Jury Network," *The Nation*, January 3, 1972 and Donner and Lavine, "Kangaroo Grand Juries," *The Nation*, November 19, 1973.

Q 3. In the Center's statement (Page 4), you suggest that the Supreme Court has, by a series of recent decisions, fostered grand jury abuse. Because of this perception by you, and other lawyers, have fewer cases of abuse been appealed, and are state appellate courts more liberal in their decisions as to rights and protections surrounding the grand jury?

A 3. This question was partially answered by Ms. Copelon in her oral testimony. Our experience has primarily been with federal grand juries.

Q 4. The Center speaks of "reconstitutionalizing" the grand jury by mandating reforms. This is, of course, our desire and hope. One example cited is the abuse of subpoenas by the FBI, shown by subpoenas that say on their face that they can be satisfied by delivery to an FBI agent. Have you, or your clients, received such subpoenas? In what types of cases? Have you checked on their original source? Can you submit copies of these subpoenas for our record?

A 4. Although none of us have represented witnesses who have received such subpoenas, subpoenas with such notations have come to our attention in connection with cases on which we have worked. The examples we have are in connection with investigations of church groups involved in funding Hispanic community needs and in connection with supporters of Puerto Rican independence. Copies of two subpoenas are annexed illustrating the type of abuse inquired about in this question. One of these subpoenas was made out to the Jewish Human Resources Center requesting the personnel file of Martha Schwartz. It contains a note: "Compliance with this subpoena may be satisfied by delivering copies of the above described material to the Federal Bureau of Investigation Agents serving the subpoena." The subpoena was served on the Jewish Family Service of New York where Ms. Schwartz works. When the FBI agents were informed that there was no organization called the Jewish Human Resources Center, one of the agents crossed out that name and substituted Jewish Family Services of New York. Ms. Schwartz was represented by attorneys from the Center for Constitutional Rights.

The other subpoena was served on Bishop Milton Wood in connection with the alleged "FALN" grand jury investigation. It was made part of the record in connection with litigation surrounding subpoenas issued in that matter. It contains a note: "The requirements of this subpoena may be satisfied by delivery of the

material called for by the subpoena to a Special Agent of the F.B.I. at or before the time required herein for its production."

Q 5. Some of you suggest there is little possibility that the grand jury will ever be able to properly act as a shield. I am not as pessimistic as you, and in addition, I am concerned about the alternatives. If the investigatory power of the grand jury is eliminated, would not this lead to direct investigatory power being granted to the FBI or prosecutors, and is this not a much more dangerous procedure?

A 5. The grand jury process is not the only one which can lead to abuses of civil rights and a perversion of the judicial process for political ends. However, its almost unlimited power o compel the production of testimonial, documentary and physical evidence and its power to imprison creates several serious problems not likely to arise if the investigatory function were confined to the executive branch where it properly belongs. The broad powers of the grand jury to compel the production of evidence are derived from its function to serve "as a primary security to the innocent against hasty, malicious and oppressive persecution." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962). It possesses the subpoena power to carry out that judicial function, and not to supplement the executive function of discovering evidence and fixing responsibility for crime. Citizens retain a perfect right not to answer questions put to them by official investigators; to remove this right is to move towards a police state.

The distinctions between the power of a grand jury and that of an investigator attached to the executive branch illustrate the serious problems created by a merger of the executive and judicial powers in the grand jury. Before an investigator from state or local police or the FBI can detain a person and/or compel the production of physical or documentary evidence or testimony, the investigator must obtain judicial approval upon a showing of "probable cause" to believe the evidence is pertinent to a criminal investigation and likely to be found in the place described. A grand jury subpoena compelling the production of the same evidence may be obtained with no prior consultation or judicial approval, on the merest suspicion that some relevant information may be obtained.

Clearly defining the different functions of grand juries (determining whether individuals should be formally charged with specific crimes—an integral part of the judicial process) and investigators (determining whether a crime has been committed and gathering evidence to be used against those accused) can only emphasize and strengthen our constitutional commitment to an accusatory system of justice. To argue that the power to compel the production of evidence under penalty of incarceration must then be officially lodged in an executive agency is to imply that we have acquiesced in a *de facto* conversion from an accusatory to an inquisitorial system of criminal justice, the Constitution notwithstanding.

Q 6. You state that "the only limits" on grand jury abuses have been the willingness of "hundreds" to go to jail. You indicate that over 150 have refused to cooperate with so-called political grand juries and that some have gone to jail, as a result. We have had some great difficulty in learning of the number of people who have been held in contempt and either fined or imprisoned for refusal to testify before a grand jury. Do you have any statistics on this, and can you supply us, at a further date, with the individual particulars surrounding these 150 witnesses?

A 6. Like you, we have had great difficulty keeping track of the number of people subpoenaed to grand juries, the number who were coerced into answering improper questions put to them by the FBI under a misapprehension of their rights and improper threats of jail or worse. We have no comprehensive picture of the numbers of people who have refused, as a matter of principle, personal or political loyalty, for religious or other reasons, to testify or produce evidence following a grant of immunity. According to one source, between the effective date of the new "use immunity" provisions of the Organized Crime Control Act (1970) and January 1973, between 1,000 and 2,000 grand jury subpoenas were issued in connection with special ISD grand juries conducted by Guy Goodwin. The thrust of these grand juries was almost exclusively political, with special emphasis on anti-war and black activists. As a result of those subpoenas, at least 30 persons were cited with contempt. ("A Kind of Immunity That Leads to Jail: The New Grand Jury," Paul Cowan, *New York Times Magazine*, April 29, 1973.) The conviction rate on the resulting 400 indictments was 15% as compared to the normal rate of 65%. ("The Grand Juries, An American Inquisition," Judy Mead, Center for National Security Studies. Reprint 105. Information on ISD conviction rate from

Cowan, supra.) See "The Organized Crime Control Act or Its Critics: Which Threatens Civil Liberties?" McClellan, 46 *Notre Dame Lawyer*, 55, 60 (1970), for conviction rate of "regular" grand jury indictments.

Since 1973 several major grand jury investigations have focused on political activists, their families, friends and communities.

The "SLA" investigation involed 58 FBI field officers and led to the questioning of thousands of people in San Francisco alone. Three persons were jailed for contempt after orders to testify or produce exemplars. More than a dozen subpoenas were issued in Pennsylvania.

Eight people were jailed for refusing to cooperate with grand juries in Lexington and New Haven investigating members and friends of activists in the women's liberation and gay rights movements in 1975–1976.

At least 13 Hispanic activists, including Chicanos and supporters of Puerto Rican independence have been jailed in the last few years for contempt of grand juries in Denver, Colorado, Puerto Rico, New York and Chicago.

At least 3 persons active in Native American rights movements have been jailed for contempt of grand juries. At one point subpoenas were issued for 20 Native American and Hispanic activists from all over the southwest. Most of these were continued indefinitely or dropped. Ten persons refused to testify, none jailed.

In Washington, D.C., over 20 members of a labor union refused to testify when questioned about events which occurred during a strike at the *Washington Post*. Many of those subpoenaed were later indicted; there were no contempt citations after grants of immunity.

We believe it is the obligation of the Department of Justice to maintain accurate grand jury in Seattle, Washington purportedly investigating the George Jackson Brigade.

We believe it is the obligation of the Deuartment of Justice to maintain accurate figures on the numbers of people subpoenaed, immunized, jailed and coerced by means of the grand jury process, and to analyze the value of testimony received after grants of use immunity are resisted by the witness. Until this is done, it will be impossible to monitor the use of this process and accurately assess its effectiveness and abuses.

Q 7. You repeatedly describe the use by the Federal Bureau of Investigation of grand jury procedures to conduct political investigations and to harass dissidents. H.R. 94 attempts to provide much more independence to the grand jurors, and to detail specific safeguards as to grand jury procedures, such as the assurance of subpoenas. Would this not effectively eliminate possible FBI misuse?

A 7. Additional safeguards to protect the ability of grand jurors to act independently of a prosecutor who may be using the grand jury to obtain information desired by the FBI will certainly improve the grand jury process and curb some of the present abuses. However, further safeguards must be created to (1) enhance the grand jurors' independence and (2) prevent abuses which now occur without the knowledge of the grand jury. Grand jurors should have access to independent legal counsel in order to protect their ability to serve as a shield between the accused and a prosecutor whose responsibility is both to advise them and obtain convictions. While safeguarding the independence of grand jurors is an essential part of any meaningful reform, it will not correct improper exercise of the subpoena power itself unless that power is put under strict judicial supervision and/or shared by the grand jurors themselves. Likewise, independence of the grand jurors will not curb abuses of the power to impose use immunity unless they are given the power to determine whether a particular witness should be immunized. Guarantees of effective assistance of counsel and meaningful notice requirements are essential complements to grand jury independence.

See further discussion in Ms. Peterson's and Ms. Copelon's oral testimony.

Q 8. You note that Congress has continually refused to authorize the FBI to subpoena witnesses and material, and that the FBI, in fact, has maintained this power through use of grand jury authorizations. Do you believe this problem could be eliminated if we specifically prevent the FBI from serving or using subpoenas, and requiring such subpoenas to be served by marshals or others under the direct supervision of the court?

A 8. Legislation specifically prohibiting the service of subpoenas by the FBI would help to curb some of the most egregious examples of the abuse of the subpoena power—e.g. FBI agents filling out blank subpoenas with the names of those who decline to talk to them, FBI issued subpoenas commanding the attend-

ance of witnesses at grand jury proceedings at a time the U.S. Attorney is out of town and the grand jury is not sitting,[1] subpoenas stating on their faces that they may be complied with by handing over material to the FBI, etc.

However, these facial defects are not the heart of the problem, and legislation prohibiting the service of subpoenas by agents of the FBI would not reach the more serious problem of U.S. Attorneys authorizing the issuance of subpoenas in response to the desire of FBI agents to obtain information from an individual reluctant to talk with them. This more serious problem can only be corrected, as your question suggested, through the creation of judicially enforceable standards for the issuance of subpoenas.

Q 9. The Center notes that you were co-counsel in the Fort Worth Five case. As you said, this controversy was really the inspiration for my bills and these hearings. Can you tell us, step by step, what has happened in that investigation since the confinement of the five and if there are any present proceedings in that case?

9. This question was answered by Ms. Peterson in her oral testimony.

Q 10. We have been told that it is the policy of the Justice Department that grand jury witnesses are free to leave the room at any time to consult with their counsel. You note that often witnesses are intimidated about leaving the room. Do you know of any cases where witnesses are not allowed to leave the room to consult with their attorney? If an attorney is allowed to be outside and a witness is indigent, who pays for this lawyer, if anyone?

A 10. See discussion by Ms. Peterson about witnesses being harassed in connection with their request to consult counsel. Attorneys for witnesses in political cases most often volunteer their services as the witnesses do not have funds to pay attorneys. This was true, for example, in the Fort Worth Five case, the VVAW case, the Shinnick-Weiner case, and with the women's movement witnesses subpoenaed in Kentucky and Connecticut.

It is essential, however, that grand jury witnesses be assured the right to counsel through statutory authorization of court-appointed counsel for the indigent. The jeopardy faced by a grand jury witness is enormous as is the potential for government manipulation of the witness to her or his own detriment.

Q 11. We are convinced that in addition to assisting the government in prosecuting for perjury, recordation would be of invaluable assistance to immunitized witness in the event of prosecution—i.e. to show that the evidence may have been derived directly or indirectly, knowingly or unknowingly from his testimony. Have U.S. Attorneys, to your knowledge, ever granted use immunity and failed to provide for recordation of the testimony of immunitized witnesses?

A 11. We are not familiar with any cases where immunity was granted and a witness's testimony not recorded. The problem arises because of selective recordation. For example, in the VVAW grand jury, reporter were present in the grand jury room when potential defense witnesses were being questioned. Apparently the testimony of not one government witness was recorded, as none was turned over to defense attorney as Jencks Act material at the trial. This same pattern of non-recordation of government witnesses, except of hostile witnesses, was evident in the case of *United States* v. *Butler and Robideau* in the Eighth Circuit. The VVAW case was in the Fifth Circuit.

Q 12. Based on your extensive experience in this area, can you briefly summarize or alternatively can you document for the record the various policies of U.S. Attorneys with regard to (A) subpoenaing targets to testify before the grand jury; (B) recordation of grand jury proceedings—responsiveness to request by defense attorneys for recordation; (C) calling newsmen to testify before grand jury—extent to which U.S. Attorneys follow or supplement Department of Justice guidelines in this area.

A 12. (A) There seems to be a fairly common practice among U.S. Attorneys of subpoenaing targets. We know of no case where the U.S. Attorney voluntarily declined to subpoena a particular witness because s/he was considered a target. Whereas in the early 70's many witnesses were subpoenaed purely for intelligence-gathering purposes, today, U.S. Attorneys are more boldly claiming subpoenees

[1] Such a subpoena was issued in Chicago, commanding one Eddie Izzarri, a young man of 18 to appear before a grand jury. The subpena was issued without the knowledge of the U.S. Attorney conducting the investigation, and quashed. However, several months later the same person was subpenaed once again, this time by means of a facially proper subpena. Clearly the demand for his appearance came from the FBI, not the grand jurors. A similar use of grand jury subpena to obtain information for the FBI is documented in *In re Stolar*, 397 F. Supp. 520 (S.D.N.Y. 1975).

to be targets. This creates not only an intolerable situation in terms of the original meaning of the Fifth Amendment, but also enhances the stigmatizing power of the grand jury. See answer to question No. 2, *supra*.

(B) See answer to question No. 11, *supra*.[2]

(C) See testimony of the Reporters Committee for Freedom of the Press delivered by Jack C. Landau. We have no information beyond that which he supplied.

Q 13. You dispute contentions made by the Justice Department that immunity is an essential weapon against organized crime. What do you base this decision on?

A 13. The testimony of the Coalition to End Grand Jury Abuse effectively refutes this argument, and we adopt their response to it.

14 Q. You indicate that "use immunity" can be used by playing off one witness against another. Specifically, you note that Witness "A" can be compelled to give testimony against Witness "B" and "B" against "A". Each is then prosecuted for their own part, using the other person's testimony. Can you give us any examples of this use of "use immunity"?

14 A. Our experience is primarily, if not uniquely, with political individuals who refuse to testify before grand juries; even after a grant of immunity, precisely because they do not wish to give even the appearance of providing information to prosecutors which could subsequently be used (and misused) as the basis of prosecutions against friends and associates, and to destroy the organizations with which they work. There is absolutely no bar to the use of A's compelled testimony against B and B's against A so long as the prosecutor conducting the grand jury investigation refuses to record and provide the witness with copies of his or her testimony and certify the evidence against him or her prior to the compelled testimony. This is true because the government's theoretically "heavy burden" to show that A's prosecution is not derived from his or her immunized testimony is considerably lightened when A has no means of challenging the representation that there are independent sources for the prosecution.

15 Q. You indicate that compulsory immunity does not, in fact, secure any evidence that consensual immunity would not also obtain and that it has "marginal efficiency." Also, obviously many judges and prosecutors disagree. What evidence do you have on the ineffectiveness of immunity to secure evidence? We have been told that in many cases, involving organized crime, or plain nonpolitical prosecutions, like bank robbery, valuable evidence has been obtained. Do you believe that there are any types of crimes or circumstances that would justify the use of coerced testimony assuming that transactional immunity is restored?

15 A. The Coalition to End Grand Jury Abuse has addressed the question of the issue of coerced immunity in "organized crime" and similar investigations. We would add that we firmly believe any form of coerced immunity to be unconstitutional and contrary to our history of maintaining a judicial system committed to an accusatorial system of justice. See also oral testimony of Mr. Borosage.

16 Q. What specific changes would you make in the Department of Justice procedures which are followed in requesting and receiving immunity grants? Do you envision any problems or delays in having the Attorney General himself review immunity requests?

16 A. We believe that the only entirely satisfactory solution is restoring transactional immunity and limiting the imposition of immunity to those situations where a witness voluntarily exchanges immunity from prosecution for his or her Fifth Amendment rights. Short of this, we believe that the Department of Justice should be required to follow the procedures currently described as "guidelines" for obtaining immunity, and that compliance with those guidelines should be a prerequisite to a judicial order granting immunity. Failure to consider all the factors listed in the guidelines, including the value of the testimony and the hardship to the witness and unlikelihood of coercion should be grounds for vacating the immunity or contempt order.

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[2] The case law of several Circuits makes it clear that there is currently no requirement with regard to recording grand jury testimony. See, e.g. *United States* v. *Evans*, 542 F. 2d 805 (10th Cir. 1976), *United States* v. *McDaniel*, 428 F. Supp. 1226 (D.C. Okl. 1977). The Eighth and Sixth Circuits also do not require recordation.

It is apparent from the legislative history of 18 U.S.C. § 6002 *et seq.* that Congress intended, when enacting the use immunity statute, to centralize the decision to grant immunity and strictly limit the power of the Attorney General to delegate the power to make this decision. We believe that this desire represents a concern for the orderly administration of justice which cannot be circumvented in the interest of speedy decision-making.

There should be relatively few applications, as there were prior to the immunity binge which followed congressional approval of the 1970 Omnibus Crime Control and Safe Streets Act. A large number of applications for immunity suggests that the grand jury process is indeed focusing not on witnesses who have information relevant to the grand jury's determinations, but either on those who are likely to prove the targets of the investigation or those whom the prosecutor does not expect to comply with an immunity order and who are targeted for incarceration for political reasons.

17 Q. What practical problems, if any, will result from requiring the prosecutor to attach a letter of proposed questions to be propounded to the witness to his immunity request? Will this unduly limit the prosecutor when the witness actually testifies? Both of these recommendations were made by the Center for Constitutional Rights.

17 A. A list of propounded questions should be attached to all requests for an immunity authorization to enable the Department of Justice to determine the scope of the questioning anticipated. It is hard to understand how an intelligent decision to authorize a grant of immunity can be made without this information. A list of such questions would also enable a witness to make an informed decision as to his or her course of action before the grand jury and better enable him or her to protect legal rights involved. Such a list of proposed questions is essential to a determination of the transactions under investigation and whether the proposed subject of the investigation is proper. See, e.g., *In re Vericker*, 446 F. 2d 446 (2nd Cir. 1971), where questions demonstrated that subject of the investigation differed from what prosecutors had represented. The only limitation such a procedure would place on the prosecutor would be to prevent him from using the grand jury to conduct a fishing expedition.

18 Q. You would provide numerous defenses to testify, including "personal relationships", family relationships, lawyer-client relationships or even just personal attitude. As I am sure you know, the courts have repeatedly held that compulsory testimony, if necessary after a grant of immunity, is constitutional. Congress has repeatedly provided for procedures for compulsory testimony, although, Congress has varied on whether immunity should be "use" or transactional. Under H.R. 94, we make every attempt to insure that immunity and compulsory testimony are only to be used to secure information as part of a criminal investigation, and not to punish someone. Isn't this sufficient?

18 A. We do not suggest that the existence of certain relationships based upon confidence and trust provide an absolute defense to a subpoena or an order to testify. We are, however, concerned about the use of orders to testify or produce other evidence which have the effect, if not the purpose, of undermining certain vital relationships. For example, the Director of the National Commission on Hispanic Affairs and her secretary have been incarcerated for resisting an investigation which demanded the names and addresses of all who had attended conferences sponsored by an organization whose mission was to establish the trust of Hispanic people in the Episcopal Church. They believe that their mission was chilled and thwarted by this investigation, and that the credibility of the religious oragnization which employed them would have been destroyed by their compliance with orders to provide information. Examples of subpoenas aimed at compelling information gained through confidential relationships are also contained in the oral testimony of the Grand Jury Project.

These relationships include those which are analogous to those accorded an evidentiary privilege—e.g. husband and wife—but which do not meet the traditional definitions of those relationships (e.g. common law marriages, lay ministers, members of a political collective or communal living arrangement). Others, like the relationship between parent and child, one would expect a democratic society to protect instinctively. Since the grand jury has sought to interfere in this relationship (*In re Kinoy*, 326 F. Supp. 400 (SDNY 1971)), statutory recognition of the privilege is required. We believe these relationships play an important role in modern society, and that the common law evidentiary privileges have not kept pace with the societal changes they reflect.

19 Q. The project states that the vast majority of those confined as recalcitrant witnesses in "political cases" are women. I must admit that I am surprised at this. What kind of cases are we talking about and why do you think this is true?

19 A. The Grand Jury Project believes that one of the major reasons a majority of the political activists jailed as civil contempt prisoners were women is an inaccurate perception on the part of the FBI and the Department of Justice of the role and strength of women. In recent years women in political movements have demonstrated that they are no more afraid of jail than men, and have gone to jail rather than testify despite conditions which made their incarceration much more harsh than that of male civil contempt prisoners. (e.g. the jailing of Jill Raymond for fourteen months in Kentucky county jails, often without any female guard, or the incarceration of Joanne LeDeaux for the length of her pregnancy). The decision to subpoena a disproportionate number of women reflects a prosecutorial desire to use the grand jury and the threat of jail to obtain information not otherwise available about political movements, and to harass and chill dissidents in the exercise of their First Amendment rights.

20 Q. You suggest a maximum period of incarceration for contempt of 30 days. Many have indicated that even our six month maximum period may be too short in that someone would be willing to wait out the six months and not testify, rather than obey an order to testify. Do you have any statistics, or examples, proving that no constructive purpose is served by incarceration beyond 30 days?

20 A. We know of no case in the last five years in which a political activist jailed for refusing to testify changed his or her mind after a period of thirty days or more in jail. We do know of several cases in which witnesses jailed from a period of less than one day (in the current Chicago investigation) to overnight (same investigation), several days (Lexington, Kentucky investigation) to approximately one week (also Lexington) have decided to testify. It is one experience that the fear of jail is the greatest coercion; to testify once a person has been in jail for thirty days, an adjustment is made and, if anything, the determination to continue to resist grows increasingly stronger.

21 Q. You seem possibly confused and the purpose of my provision on punishment for recalcitrance. If civil contempt for coercive purposes is desired, there would be a six month maximum. If criminal contempt for punitive purposes is desired, the period of imprisonment could be longer—but all due process rights, including a jury trial, would necessarily be involved. This would force an election. Would you comment on this proposal.

21 A. We believe this proposal represents an important step toward resurrecting the important differences between civil and criminal contempt, thereby reducing the usefulness of grand juries as a tool for harassment of dissidents. We would, however, propose a maximum of one month for "coercive" civil contempt because we have found that longer periods are not coercive, but punitive. We would also urge a six-month maximum for criminal contempt, with a jury trial required. If the penalty for contempt is left open-ended, the recalcitrant witness is completely at the mercy of the court and judges have been known to be as or more vindictive than prosecutors. (*In re Raymond.*) Since the grand jury subpoena can so effectively stigmatize the unwilling witness as a criminal, a maximum is necessary to insure that a witness will not be effectively punished for the underlying offense, through the easy route of contempt (to which there are few defenses).

22 Q. You suggest that there should be an absolute right to bail pending appeal by witnesses adjudged in contempt. Last year, a former Attorney General forcefully argued that this would interfere with the investigatory function of the grand jury. Witnesses out on bail would delay, and delay, and delay appellate proceedings so that investigation would be necessarily frustrated. The ABA, which supports many reforms, also opposes any automatic bail—saying it would lead to extensive delays and effectively thwart the investigations and the coercive intent of confinement. Would you comment?

22 A. A provision for bail pending appeal of a civil contempt citation is necessary to avoid an anomalous situation currently met by many witnesses; most judges are firmly convinced that time spent in jail is not actually "coercive" until all hope of legal vindication has been lost—i.e., all legal appeals have been rejected. The only legitimate purpose of incarceration in civil contempt cases is coercion; therefore, incarceration prior to the resolution of appeals is punitive and therefore illegal. Any comprehensive reform of the grand jury system must resolve this problem by providing for bail pending appeal.

Moreover, denial of bail means the witness is punished by the court's delay. To avoid unnecessary delay, such appeals can be heard on an expedited schedule.

23 Q. You complain of the improper use of grand jury subpoenas to get around the Fourth and Fifth Amendments and suggest that the exclusionary rule should apply to grand jury proceedings. Studies have shown that the exclusionary rule results in exclusion of evidence in a small number of cases and the admissibility of evidence in most cases. By applying the exclusionary rule to grand jury proceedings, we are requiring competent counsel to file a motion to suppress as to each witness and their potential defendant. This would mean many hearings and much delay—and result, if history is any indication, in exclusion in only a few cases. HR 94 would require the government to "put up or shut up" at a preliminary examination prior to trial whether or not there is an indictment. On balance, is not this procedural protection and even exclusion at trial enough—as prosecutors would not secure indictments only to have charges dismissed at the preliminary examination or trial? Would the "new hearings" on motions to suppress be an unwarranted procedural hindrance and delay legitimate grand jury proceedings?

23 A. We soundly applaud your proposal to require a preliminary hearing prior to trial. But this protects only some of the rights of the defendant. Under the Supreme Court rulings, the defendant cannot complain of the violations of the witnesses' rights unless he/she has standing to complain of them as breaches of his/her own privacy. The witness is likewise denied the right to complain and there is accordingly no deterrent to using the grand jury wantonly to violate the rights of the citizenry and effectively launder illegally seized evidence for trial.

Recent House and Senate committee investigations have revealed the shocking extent to which federal agents have violated constitutional rights in pursuit of political dissidents. Justice Brandeis warned many years ago about the danger when government becomes the wrongdoer. Delay is a relative thing. Star chamber proceedings and torture get quicker results than due process but have fortunately been rejected in favor of an adversarial system of justice. Years of McCarthyism in this country demonstrated the chilling effect upon all society of not stopping improper practices at the earliest possible moment. The suppression of the fruits of all violations of constitutional rights would deter such violations. The earlier improperly seized evidence is suppressed, the more time that will be saved.

24 Q. I am concerned about your suggestions that the issuance of a subpoena, the order of immunity, a request for contempt citation—all be by a majority vote of the grand jurors. Would this not lead to possible prejudice as to particular witnesses. If the grand jurors are to vote on these items, they need some information about the case to show the need for a particular piece of evidence, or order. Such information might be vague and hearsay. Why is not the establishment of standards, and the judicial enforcement of such standards, sufficient?

24 A. The establishment of judicially enforceable standards for the issuance of a subpoena is essential. But the issuance of a subpoena cannot be left to prosecutors if the independence of the grand jury is to be re-established. This requirement would not prejudice jurors any more than the present practice.

Moreover, we suspect that it is common for prosecutors to provide vague hearsay statements to "prepare" the jurors. For example, in the Lexington grand jury, it was revealed that the FBI agent gave the grand jurors "background statements" explaining the purpose of the investigation and of the witnesses' testimony. As this statement was unrecorded, we do not know its contents. Your proposal for recordation of the entire proceedings provides the most effective safeguard against the kind of prejudice to which you refer. On the other hand, we believe there is no substitute for the exercise of an independent community judgment on the justifiability of subpoena, immunity and contempt.

25 Q. In addition to suggesting a requirement for decisions by a majority of grand jurors, you suggest extensisve periods of notice for subpoenas, immunity grants, contempt hearings, etc. Last year, the judicial conference, representing local federal district judges, indicated that such notice periods can cause problems. Specifically, they noted that in many districts, jurors are convened for short periods, maybe a few days a week, or even every other or every third week. Requiring them to come together to vote, and giving long periods of notice, would cause hardships as to the jurors would have to be called back

and forth, sometimes over great distances, and at a doubling or tripling of costs and great inconvenience.

My bill would provide shorter notice periods but allow continuances, or quashing of subpoenas, of citations, if the notice period is unduly burdensome or oppressive; and for strict enforceable standards for the granting of subpoenas, and of immunity and contempt orders. Is this not sufficient?

25 A. Notice periods can always be waived. Most criminal trials do not depend upon the coercion of unwilling witnesses. The cases where there will be some delay are cases where the government is trying to make a case with the help of the target (whose cooperation will probably not be forthcoming in any event) or from persons who are being required to exchange their Fifth Amendment right against self-incrimination for limited use immunity, and cases where First Amendment rights are at stake. How much time a recalcitrant witness has to present proof and litigate claims should not depend on drawing a sympathetic judge who resists the government's argument that the statutory periods are *per se* reasonable. Only Congress can provide the uniform justice that is needed through adequate minimum time safeguards.

26 Q. You oppose any provision that would allow short periods of notice in certain circumstances and base your opposition on the fact that the urgency of the need for testimony is often "greatly exaggerated." Does not the establishment of judicial standards for allowing shorter periods of notice eliminate this problem, while at the same time allow prompt action if necessary?

26 A. The problem has been to determine when prompt action is really necessary. Government claims of urgency which have been persuasive to courts in our cases have often later proved to be unfounded. For example, 23 Vietnam veterans were subpoenaed to a grand jury in Tallahassee, Florida. Government attorneys and the court refused to grant *any* delay. Three years later a United States Circuit Court in *United States* v. *Briggs*, 514 F. 2d 794, 805 (1975) said as to some of the subpoenees: "There is at least a strong suspicion that stigmatization of appellants was part of an overall government tactic directed against disfavored persons and groups." Because of the *in camera* method the government adopts in presenting claims of urgency to courts in grant jury proceedings, it is virtually impossible for a witness to prevail when government attorneys want to steamroll proceedings.

The old slogan that haste makes waste should be heeded. Political dissidents, not organized crime witnesses, suffer from speed. The latter are likely to have lawyers ready to defend them at a moment's notice. Grand juries are not crime prevention agencies. They indict for crimes already committed. The extra few days are necessary to ensure the substance as well as the "appearance of justice." (*Offutt* v. *United States*, 348 U.S. 11 (1959)). See also answer of Ms. Copelon in her oral testimony.

27 Q. You oppose our provision limiting the role of counsel in the grand jury room. We did this to avoid making the grand jury an adversarial proceeding and hoped to resolve the problem of frivolous prosecutions by mandating a prompt preliminary hearing. If all proceedings are to be recorded, how can restricting the role of counsel, tied to a prompt hearing, lead to harassment and intimidation?

27 A. Our concern is that Congress not preclude a grand jury from hearing from counsel for a witness if the *grand jury* determines that such testimony would be useful. This is not unlike the rule in the Senate which provides that "each standing, select or special committee of the Senate adopts its own rules." This allows committees to give counsel greater scope than permitted under House Rule XI, cl. 2(k)(3) which limits counsel to an advisory role and which appears to be the model followed in the Chairman's proposed bill. Thus, for example, Rule 8.4(a) of the Senate Select Committee on Intelligence, which precludes counsel from direct or cross-examination, does give counsel scope to present problems directly to the Committee:

However, counsel may submit in writing any question he wishes propounded to his client or to any other witness and may at the conclusion of his client's testimony, suggest the presentation of other evidence or the calling of other witnesses. The Committee may use such questions and dispose of such suggestions as it deems appropriate.

In the grand jury context, we think that greater scope should be allowed to the witness' counsel. The Senate Select Committee negotiated with witnesses' counsel respecting problems of possible recalcitrance before the Committee. As

the grand jury witness communicates with the grand jury only in formal proceedings, there are clearly additional concerns which counsel should be permitted to address directly to the grand jurors. At present, the witness is entitled to make such statements; allowing counsel to do so as well is a crucial safeguard for the less articulate or sophisticated witness.

A grand jury should have available to it the explanations of the witness' counsel which may result in the dismissal of the witness. Like the role of counsel before the Senate Select Committee, grand jury witness's counsel should be permitted to suggest information that the witness would be willing to supply and which would meet the needs of the grand jury, as well as additional information which the grand jury might seek.

The preliminary hearing provides no remedy for the witness who is neither target nor defendant. For such a witness, prompt dismissal and/or protection from improper incarceration can be secured only by his/her attorney's having the opportunity to address the grand jurors.

Moreover, it is important to emphasize that the mere presence of an attorney in the grand jury room does not necessarily guarantee against intimidation and harassment. Although recordation might deter the prosecutor from making derogatory remarks about the witness' need to consult with his/her attorney, the pressure to rush, inherent in the circumstances and communicated by prosecutors in non-verbal ways, can unfairly influence even an attorney experienced in grand jury matters.

The sanction contained in 3330A(d) unnecessarily adds to the pressure on the witness' counsel and adds nothing to the court's inherent and statutory power to discipline an attorney. Thus, whatever role the Committee ultimately defines for the witness' counsel, it is unnecessary to legislate additional sanctions.

28 Q. You have indicated that the grand jury is often used to drive a wedge between lawyers and clients. Your discussion of this issue does not seem to distinguish between a lawyer's action as counsel and action in a personal relationship to others. The Code of Professional Responsibility makes it clear that a lawyer may not encourage, incite and certainly not participate in any illegal activities. In addition, the code makes it clear that the lawyer-client privilege is not as absolute as you might suggest. Why should protections, or restrictions, be placed on proper investigations, which might involve the testimony of an individual who happens to be a lawyer and why should these protections or restrictions be applied in grand jury cases while they don't apply in any other type of proceeding?

28. A. Our discussion was not intended to extend a lawyer in personal relations with others but to attorneys being asked about clients. Nor do we suggest that attorneys have any kind of immunity to engage in illegal activity.

By contrast, we note that the government asserts a sweeping form of immunity for its attorneys' conduct. See the recent decision of the United States Court of Appeals for the District of Columbia, *John Briggs* v. *Guy Goodwin*, No. 75-1642. That case involves perjury by a government attorney in connection with a grand jury proceeding. The cases in which we have been involved respecting attorneys subpoenaed to grand juries have not in any instant involved claims that the attorney committed any crime; rather they have all been cases in which the government has attempted to secure information from the attorney about a client. The calling of attorneys before grand juries for such purposes threatens the independence of the bar and the constitutional right to the effective assistance of counsel.

29 Q. You suggest that it is possible for individuals to be "convicted by subpoena". H.R. 94 provides detailed safeguards as to a subpoena, and also punishes violations of secrecy by making such violations criminal offenses. Do you think these provisions would lessen the possibilities of prejudicial publicity?

29 A. It has long been possible to punish violations of secrecy through contempt, yet no violating prosecutors have ever been punished. Prosecutors do not and will not prosecute themselves. For example, the Department of Justice was ordered to investigate the source of highly prejudicial information concerning a grand jury witness which appeared on the front page of the Sunday edition of the *New York Times*. The information was attributed to "federal law enforcement sources." No report has been filed, and no action taken against any prosecutor or agent. See *in re Archuleta*, F. Supp. (SDNY, 1977).

We feel that damage actions are the only effective deterrent.

30 Q. You suggest an automatic right to testify for any "target." I provide a qualified right for any witness to testify. Many have argued that it is impossible to determine when one is a "target". How would you define it?

You attack my provision providing for the grand jury to determine if a witness should be allowed to testify, yet in almost all other situations—for subpoenas, immunity, contempt—you provide for the grand jurors to decide. Are not these two positions inconsistent?

30 A. (1) We would propose defining a target as any person about whom questions are asked during the course of grand jury examination or any person whose name is mentioned in a context which would imply the possibility of criminal liability for the offenses under investigation. (2) We believe the witness' historic and absolute right to testify makes this question moot.

31 Q. You complain that present procedures to check our allegations of illegal electronics surveillance are insufficient. Specifically, you note that the Surveillance Index does not cover cases where the FBI cannot trace the surveillance to the witness. If the FBI cannot so trace, then is there not little likelihood of harm and little likelihood that surveillance was in any way related to an investigation of an individual?

31 A. See attached testimony of John Smythe, custodian of the central file of electronic surveillance records of the FBI for an illustration of the problems inherent in the current FBI record keeping system. Information may flow from illegal electronic surveillance to a prosecutor without his knowledge. FBI files may not reveal the illegal source of the information.

32 Q. Would you elaborate on the need for uniform, mandated instructions to grand juries during the impanelling process. Should these instructions be written and provided to each grand juror? Should the instructions include any additional items not mentioned in H.R. 94 (i.e. that grand jurors are not to draw any inferences from a witness' assertion of Fifth Amendment rights, the nature of use immunity)?

32 A. See attached instructions for example of those which we would propose be given to inform grand jurors of their rights and powers under the present grand jury system. Additional instructions should be given as appropriate concerning any significant reform in this system. Instructions should be written and provided to each grand juror as well as read to each panel at the inception of its term so that grand jurors would understand that they had powers, duties and rights among themselves and enforceable by a judicial officer. This is a small but essential step in reinforcing the independence of grand juries from prosecutors.

33 Q. You state that the standard and duty of the grand jury is to "act as the conscience of the community to determine whether an indictment *should* be issued." This is not my historical understanding. The grand jury is only to determine if there is a *prima facie case*—not whether an individual should or should not be prosecuted or convicted. What is the historical basis for your position?

33 A. Professor Scott answered this question in his oral testimony.

34 Q. You suggest that each grand jury has "independent counsel". One possible problem with this suggestion is that there could be thereby established hundreds of little prosecutorial fiefdoms—without any overall policy. Each jury and each "independent counsel" could go their own way—conduct their own investigations (perhaps even duplicative of others), have their own rules, and standards—and not be bound to a nationwide policy. Should there not be some centralized control?

34 A. Your concern for fiefdoms and arbitrariness is well-taken. In our oral testimony we advocated the institutionalization of "independent counsel" through the appointment of law clerks to federal grand juries, simply expanding the present practice which is to appoint law clerks to individual district and circuit judges and also assist motions panels of the circuit. Indeed, the only institution of the judiciary which does not have the assistance of a law clerk is the grand jury. As law clerks are recent graduates of law schools, and, therefore at a very early point in their careers, they could be easily instructed as to their role and duties by an orientation program or manual, the problems you raise should be easily avoided. Selection of the clerk could be made by a panel of judges.

35 Q. You suggest that the actual vote of grand jurors be recorded. Letters to this Committee from former grand jurors indicate that they fear retribution if public access could be had as to their votes on particular cases. Do you wish such recordation by name or would a tally sheet be sufficient?

35 A. We would oppose any proposal to require grand jurors' votes to be recorded in any way which would reveal the vote of individual grand jurors. A numerical tally would be sufficient.

36 Q. You oppose our proposals to reduce the size of the grand jury. Some studies have shown that the larger a group, the more likely they will follow a group consensus—the "herd effect"—and thus rely more on the leader—here the prosecutor. A smaller jury would give more opportunity for active participation by each member of the jury—and less opportunity for prosecutorial domination. Would you comment?

36 A. Ms. Copelon has answered this question in her oral testimony.

EXHIBIT TO A 4

UNITED STATES CIRCUIT COURT

SOUTHERN DISTRICT OF NEW YORK

To: Jewish Family Services of New York, 33 West 60th Street, Manhattan, New York.

Greeting:

WE COMMAND YOU that all business and excuses being laid aside, you appear and attend before the GRAND INQUEST of the body of the people of the United States of America for the Southern District of New York, at a District Court to be held at Room 1403 in the United States Courthouse, Foley Square in the Borough of Manhattan, City of New York, on the 14th day of May, 1976, at 10:30 o'clock in the fore noon, to testify and give evidence in regard to an alleged violation of Title 18, United States Code, Section 371 and not to depart the Court without leave thereof, or of the United States Attorney, and that you produce at the time and place aforesaid the following:

Personnel file for Martha Schwartz, employee at the West Side Crisis Center, 216 West 102nd Street, Manhattan, New York.

And for failure to attend and produce the said documents you will be deemed guilty of contempt of Court and liable to penalties of the law.

Dated: New York, N.Y., May 13, 1976.

RAYMOND F. BURGHARDT,
Clerk.

ROBERT B. FISKE, Jr.,
U.S. Attorney for the Southern District of New York.

NOTE: *Report at Room 450.* In order to secure your witness fees and mileage, it is necessary that you retain this Subpoena and present the same at the United States Attorney's Office, Room 450, upon each day on which you attend Court as a witness.

Assistant JAMES E. NESLAND, Room 637, (212) 791-0047.

NOTE.—Compliance with this subpoena may be satisfied by delivering copies of the above described materials to the Federal Bureau of Investigation agents serving said subpoena.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

To: Milton L. Wood, Bishop, Episcopal Church Center, 815 Second Avenue, New York, New York.

Greeting:

WE COMMAND YOU that all business and excuses being laid aside, you appear and attend before the GRAND INQUEST of the body of the people of the United States of America for the Southern District of New York, at a District Court to be held at Room 1403 in the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 3rd day of December, 1976, at ten o'clock in the fore noon, to testify and give evidence in regard to an alleged violation of Title 18, United States Code, Section 371 and not to depart the Court without leave thereof, or of the United States Attorney, and that you produce at the time and place aforesaid the following:

1. Samples of typewriting from every typewriter on the premises of the Episcopal Church Center for the years 1974-1976, inclusive;

2. Any and all records, diagrams, invoices, memoranda or documents which in any way relate to the location and use of Gestetner machines by employees whether lay or clergy, on premises of the Episcipal Church in New York City for the years 1974–1976, inclusive;

3. Any and all records, documents, and files within your care, custody, control, or possession relating to Maria Cueto and Raisa Nemikin, including personnel files;

4. Any and all financial records within your care, custody, control, or possession for the years 1974–1976 showing disbursements paid by the Episcopal Church Center, ———— of the City of New York for the reimbursement of travel expenses;

And for failure to attend and produce the said documents you will be deemed guilty of contempt of Court and liable to penalties of the law.

NOTE.—The requirements of this subpoena may be satisfied by delivery of the material called for by the subpoena to a Special Agent of the ———— at or before the time required herein for its production.

Dated; New York, N.Y., November 24, 1976.

Clerk.

ROBERT B. FISKE, Jr.,
U.S. Attorney for the Southern District of New York.

NOTE: *Report at Room 450.* In order to secure your witness fees and mileage, it is necessary that you retain this Subpoena and present the same at the United States Attorney's Office, Room 450, upon each day on which you attend Court as a witness.

Assistant THOMAS E. ENGEL, Room 633—One St. Andrews Plaza, New York, New York 10007. Tel.: 791–1931.

EXHIBIT TO A 32

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Swearing in and instructions to a new panel of Federal grand jurors, convening for deliberations in the United States Court House, Scranton, Pennsylvania, on Monday, January 26, 1976, at 10:10 a.m.

Before: Honorable William J. Nealon, United States District Judge, at Scranton, Pennsylvania, on Monday, January 26, 1976, at 10:10 a.m.

Appearances for the Government: S. John Cottone, Esq., United States Attorney, for the Middle District of Pennsylvania, Scranton, Pennsylvania.

The COURT. Good morning, Members of the Jury. I've asked Mr. Harding to serve as Foreman of the Grand Jury and Mrs. Phillips to serve as Deputy Foreman. And I'll ask the Clerk now to administer the Oath to Mr. Harding and Mrs. Phillips and I ask all Members of the Grand Jury to listen closely to the Oath, as it applies equally to all the Members of the Grand Jury.

Deputy Clerk MILLER. Would you stand, please? Do you solemnly swear by almighty God, the searcher of all hearts, that as Foreman and Deputy Foreman of this Grand Jury, you will diligently inquire and a true presentment make, of all such matters and things as shall be given you in charge. As of those things which you shall know to be presentable here, the Government Counsel's, your fellows and your own, you will keep secret. You will present no one for envy, hatred, malice or ill will. Neither will you leave anyone unpresented through fear, favor, affection, reward, gain or any hope thereof, but will present all things truly as they shall come to your knowledge and the best of your understanding. So help you God.

Mr. HARDING. I do.

Mrs. PHILLIPS. I do.

Deputy Clerk MILLER. Thank you. Please be seated.

The COURT. Now the Clerk will administer the Oath to all Members of the Grand Jury.

Deputy Clerk MILLER. Please rise. Raise your hands. You, and each of you, do swear by almighty God, the searcher of all hearts, that the same oath that your Foreman and Deputy Foreman hath taken, to observe and keep on his part, you, and each of you, will well and truly observe and keep on your part. So help you God.

GRAND JURORS. I do.

Deputy Clerk MILLER. Thank you. Please be seated.

The COURT. Mr. Berry, we have a full complement of 23; do we?

Chief Clerk BERRY. Yes, sir.

The COURT. Members of the Grand Jury, you're about to embark upon a very serious and a very responsible assignment. You're being assembled here from various walks of life and different sections of the Middle District of Pennsylvania to serve as Grand Jurors and to inquire into the commission of public offenses against the laws of the United States.

You might ask: What is a Grand Jury; and, what is its function? You have received a handbook from the Clerk's Office which sets forth the purpose, origin and procedure for a Federal Grand Jury. But it is necessary for the Court to instruct you as to your duties. In my instructions, incidentally, I'll use the masculine gender. But, of course, my words apply equally to our female Jurors.

The Supreme Court of the United States has on several occasions spoken out on the function of the Federal Grand Jury. In the case of Costello versus the United States the Supreme Court stated that the basic purpose of the Grand Jury is to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. The Grand Jury is convened as a body of laymen; free from technical rules; acting in secret; pledged to indict no one because of prejudice; and to free no one because of special favor.

Also, in the case of Wood versus Georgia, the Court emphasized further, and I quote, "Historically the Grand Jury has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or is dictated by an intimidating power or by malice and personal ill will."

In addition, in the case of the United States versus Calandra, the Supreme Court reiterated, and I quote again. "Its," referring to the Grand Jury, "Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions."

"The scope of the Grand Jury's powers reflects its special role in insuring fair and effective law enforcement. A Grand Jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an ex parte investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person."

From that language several things should become obvious. If it were not for the Grand Jury the prosecuting agencies, the accusers, would be free to arrest and bring to public trial anyone they felt should be prosecuted for whatever reason.

But, as the Supreme Court has stated, you stand between the accuser and the accused. And in that capacity serve an invaluable function in our society in insuring fair and effective law enforcement.

You're expected to be fair and you're to act independently. That is, you may vote an indictment, or refuse to do so, as you deem proper without regard to the recommendations of the Judge, the United States Attorney, his assistants, the prosecuting agency, or any other person.

In other words, the United States Attorney is your legal advisor but he cannot tell you or require you to return an indictment: Neither can the Court; nor anyone else. This is a decision that you must make. You would do a great disservice to your Oath and the tradition of the Grand Jury if you were to merely rubber stamp the contemplated prosecutions that are brought before you. Similarly, you would perform a disservice if you didn't indict where the evidence warranted an indictment.

Historically, the Grand Jury system originated in England more than seven centuries ago. It was recognized in the Magna Carta, the first English constitutional document, which King John granted in the year 1215 at the insistence of his subjects.

Over the years the Grand Jury developed into a separate entity independent of the King. So that the King could not charge a subject with a serious crime, but had to first submit the evidence and the witnesses to a grand Jury, who then decided whether to return an indictment against the accused.

America has inherited the institution of the Grand Jury. It was so firmly established in the traditions of our founding fathers that they included it in the Fifth Amendment of the Constitution of the United States. The Fifth Amendment provides in part that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

The Fifth Amendment has been implemented in the federal system by Rule Six of the Federal Rules of Criminal Procedure, which establishes the procedure under which the Grand Jury operates. Now pursuant to that rule the United States Attorney for the Middle District of Pennsylvania has certified in writing to this Court that there is necessity for Grand Jurors to meet for the consideration of bills of indictment. That is why you have been summoned here.

The Middle District of Pennsylvania embraces that area contained in 32 counties of Pennsylvania, extending from the New York-New Jersey boundary to the State of Maryland. Your deliberations will concern the subject of federal crime primarily in the northern tier of the Middle District of Pennsylvania.

During the course of proceedings the United States Attorney or one of his assistants will submit bills of indictment to you for your consideration. An indictment is an accusation, in writing, presented by the Grand Jury to the Court charging a particular person with a crime.

Your prime function is to decide whether or not sufficient evidence has been produced to indicate that a federal crime probably has been committed by the person accused. If the evidence produced does not meet the standard necessary for an indictment, because you cannot conclude that a crime probably has been committed by the accussed, you should have no hesitancy in refusing to vote for an indictment.

You're not a Trial Jury, however. That is, it is not your responsibility to determine the innocence or guilt of an accused defendant, but solely to determine whether or not sufficient evidence has been produced to indicate that a federal crime probably has been committed by the person accused. If the evidence is sufficient, then you should indict. If it is not sufficient, then you should not indict.

Specifically you have been convened here pursuant to Rule Six of the Federal Rules of Criminal Procedure. This rule provides in pertinent part, and I'll read these sub-sections to you. Sub-section "(a) Summoning Grand Juries. The Court shall order one or more Grand Juries to be summoned at such times as the public interest requires. The Grand Jury shall consist of not less than 16 nor more than 23 members. The Court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement."

Sub-section "(c) Foreman and Deputy Foreman. The Court shall appoint one of the jurors to be Foreman and another to be Deputy Foreman. The Foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the Clerk of the Court, but the record shall not be made public except on order of the court. During the absence of the Foreman, the Deputy Foreman shall act as Foreman."

Sub-section "(d) Who may be present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer . . . may be present while the Grand Jury is in session, but no person other than the jurors may be present while the Grand Jury is deliberating or voting."

Sub-section "(e) Secrecy of proceedings and disclosure. Disclosure of matters occurring before the Grand Jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer . . . may disclose matters occurring before the Grand Jury only when so directed by the Court preliminarily to or in connection with a judicial proceeding or when permitted by the Court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the Grand Jury."

Sub-section, "(f) Finding and return of indictment. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the Grand Jury to a Judge in open Court. If the defendant is in custody or has given bail and 12 jurors do not concur in finding an indictment, the Foreman shall so report to the Court in writing forthwith."

Sub-section, "(g) Discharge and excuse. A Grand Jury shall serve until discharged by the Court but no Grand Jury may serve more than 18 months."

So that, Members of the Jury, is a brief resume of Rule Six. Therefore, as you can see, the Grand Jury is composed of no more than 23 members and not less than 16. Your Foreman is appointed by the Court and must preside at all sessions. He must administer oaths and affirmations and sign all indictments.

When he's absent the Deputy Foreman, also appointed by the Court, acts as Foreman. At least 16 of your members must be present at all times when you are in session. At least 12 of your members must concur before an indictment is returned.

Neither the Government's attorney or any witness is allowed to be present while you deliberate and vote. In other words you must be alone. That is, just the Members of the Grand Jury should be present when you deliberate as to whether an indictment should be returned; and, of course, only you, the Grand Jury, should be present when you vote as to whether an indictment should be returned.

Witnesses will be called before you and will be sworn by the Grand Jury Foreman, or, in his absence, by the Deputy Foreman. The United States Attorney is your legal advisor and may be present at the examination of witnesses to assist you, if necessary, in asking questions and advising you from time to time as to the applicable law.

Ordinarily the United States Attorney or one of his assistants questions the witness first; followed next by the Foreman; and then other members of the Grand Jury may question the witness. All questions asked by each witness must be relevant and proper. Witnesses should be treated courteously when they appear before the Grand Jury. Questions should be put to them in an orderly fashion.

Because of the need for secrecy, it is very important that only authorized persons be present in the Grand Jury Room while evidence is being presented. This means only the Grand Jury; the United States Attorney or an Assistant United States Attorney; and the witness who is then being examined. If a witness refuses to answer a question, the Grand Jurors, accompanied by the United States Attorney or one of his assistants, may bring this matter before the Court in order to obtain a ruling as to whether or not the witness must answer the question.

However, if a person is under investigation and appears before you as a witness, he cannot be forced to testify because of the provision in the Fifth Amendment of the Federal Constitution against self-incrimination. In fact, he must first be advised of his right not to testify and should be required to sign a formal waiver before his testimony is received.

Moreover, if such a person exercises his Constitutional right not to testify, you must not and you cannot draw an inference of guilt or any inference of any kind against him because of his failure to testify. I emphasize again that it would be improper for you to draw any adverse inference against one who exercises his Constitutional right not to testify.

Another point that I wish to make special reference to is the obligation of secrecy imposed on each Grand Juror. You must not discuss the case under investigation with anyone except fellow Grand Jurors, and the United States Attorney or his assistants, and then only in the Grand Jury Room.

Grand Jury proceedings are not to receive any publicity. The tradition of secrecy is a vital part of the Grand Jury system. No one, whether it be Members of the Grand Jury, the United States Attorney and his assistants, the prosecutors, or witnesses are permitted to disclose to anyone outside the Grand Jury Room any matters occurring before the Grand Jury. Furthermore, you're to avoid reading, viewing, or listening to any comment or speculation in the public media concerning matters that are before you.

Summing up then, your inquiry is limited to offenses committed or which are triable in the Middle District of Pennsylvania. The United States Attorney will bring before you charges against various persons and it is for you to explore the nature and inquire into the basis for these charges that have been made, and then determine whether or not the defendant should be made to stand public trial.

The accused is not called before you to deny the charge or introduce any testimony in his own behalf. You hear only the government's case. And because of this you must be scrupulously careful to respect the Constitutional rights of the accused and not commence any prosecution, if, in your good judgment, such a prosecution is not well founded. Because if you indict then the accused will be put to the expense, the inconvenience and notoriety of a public trial. However, we do not want any person to escape trial where the evidence presented to you is such that you really believe that it warrants going before the public with a public trial.

If you return an indictment this means that at a subsequent week that case will be aired publicly. In other words, at the trial later on everybody will be present; the government will present its witnesses; and the defendant will be there with his witnesses; and at that time a Jury of twelve will determine the guilt or innocence of the defendant.

You're considered by the law to be practical men and women and you're asked to apply your common sense and judgment in your deliberations. Only the evidence presented to you in the Grand Jury Room may be considered in determining whether to vote an indictment. Each Grand Juror must be absolutely fair and impartial in his judgment of the facts. Otherwise he will defeat the democratic purpose the Grand Jury is designed to serve.

The Grand Jury is therefore both a sword and a shield of justice. A sword because it is the terror of the criminals; a shield because it is the protection of the innocent against unwarranted prosecution. You can, therefore, realize the importance of your duties. And, needless to say, your duties should be carried out with the highest motives and sense of justice.

Are there any requests for additional instructions from the United States Attorney?

Mr. COTTONE. No, Your Honor.

The COURT. All right. Members of the Grand Jury, you may now proceed to the Grand Jury Room with the United States Attorney and his assistants and commence your deliberations.

(Record is closed.)

CERTIFICATE

I hereby certify that the proceedings are contained fully and accurately in the stenographic notes taken by me during the hearing of this matter, and that this copy is a true and correct transcript of my said notes.

_____,

Official Court Reporter.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 4636; NO. 4643

In re: Grand Jury Proceedings Scranton, Pennsylvania,
SUPOENA OF JAY WEINER,
SUBPOENA OF PHILLIP KENT SHINNICK.

Before: Honorable William J. Nealon, Chief United States District Judge for the Middle District of Pennsylvania, at Scranton, Pennsylvania, on Friday, August 13, 1976, at 10:30 a.m.

Appearances:

For the Government: S. John Cottone, ESQ., United States Attorney for the Middle District of Pennsylvania, and LAWRENCE KELLY, ESQ., Assistant United States Attorney for the Middle District of Pennsylvania, Scranton, Pennsylvania.

For the Defendants: Kairys, Rudovsky & Maguigan, Esqs., By: Holly Maguigan, Esq., Suite 200 1427 Walnut Street, Philadelphia, Pennsylvania. For Defendant Weiner.

Morton Stavis, ESQ., Center for Constitutional Rights, 853 Broadway, New York, New York. For Defendant Shinnick.

Mr. KELLY. O.K. Would you people——

Miss MAGUIGAN. We'll hang around.

The COURT. Court is recessed.

The CLERK. Court is now recessed.

[11:15 a.m., Court recessed.]

[11:50 a.m., Court resumed.]

[Grand Jury present in the Court Room.]

The CLERK. Court is now in session, please be seated.

The COURT. Mr. Foreman, we have a return, do we?

The FOREMAN. Yes, sir, Your Honor.

The COURT. That's eight indictments?

The FOREMAN. Eight, Your Honor.

The COURT. All right. The clerk will record the indictments and impound the voting slips.

Members of the grand jury:

If you'll recall, the first day when you appeared here, the Court gave you certain instructions as to your functions as grand jurors. I'm going to make some additional comments for you now which I ask you to incorporate with the instructions that I have given you previously.

I would like you to know that witnesses who are called before the grand jury have the right to leave the grand jury room to consult with their attorneys. And you are to draw no adverse inferences from such actions.

And I would point out also that in the case of a witness who appears before you and is given a grant of immunity that immunity protects the witness only from the use of any statements made before the grand jury or any consequences stemming from his testimony before the grand jury. And that a witness, even after the grant of immunity, can later be indicted for perjury resulting from statements that he may have made before the grand jury.

And finally, members of the jury, even though a witness is brought before you, if he turns out to be a recalcitrant witness, that is, one who is reluctant to testify, you have the option of declining to question him. In other words, the fact that he comes before the grand jury doesn't make it obligatory that he be asked questions. You still have that discretion or that option. If you decide with a particular witness that you don't desire to ask him any questions, you may consequently refrain from asking him any questions.

All right, the grand jury may now return and resume their work.

Miss MAGUIGAN. May I see you at side-bar. please, Your Honor?

The COURT. Surely.

[At side-bar.]

Miss MAGUIGAN. Judge, would you instruct the grand jurors that if they decide to persist in questioning a recalcitrant witness that that could result in an imprisonment for the life of their time, so that they know what the options are. That if they persist that the United States Attorney would request that he be held in contempt. That if he were held in contempt that he would go to prison. But that they can——

The COURT. He might go.

Miss MAGUIGAN. But he could. That he might go. And that they can decide, after listening to the reasons for his refusal to testify, that they don't wish to make him choose between prison and violation of his conscience.

The COURT. O.K.

Miss MAGUIGAN. Thank you.

[The Proceedings proceeded within the full hearing of the jury.]

The COURT. Members of the grand jury:

I believe that when I charged you originally I made some reference to possibility that some witnesses may refuse to testify before the grand jury. I think in fairness we should—would you mind taking the child out of the court room, please. That a witness if brought before you may claim his 5th Amendment rights not to incriminate himself. That then you may decide not to question him any further or you may decide to grant him immunity. If the witness is granted immunity as I have explained it to you, and is then brought again before the grand jury and persists in his refusal to testify, then the government may seek to have the Court order the witness to testify. If the witness is then brought before the Court and the Court orders the witness to testify and he reurns to the grand jury and once again refuses to testify, then the government may move to have the witness held in contempt.

Now, if a witness is thus held in contempt by the Court, the Court may confine him. That is, imprison him for the balance of the term of the grand jury, or until he agrees or decides to testify. And it is your option that if a witness nevertheless refuses to so testify and exposes himself to contempt, you may decide not to question him any further rather than have him make that choice of whether he's going to testify before you or the possible consequence that he will be held in contempt and ordered imprisoned for the balance of the term of the grand jury.

You may now return, members of the grand jury, and resume your deliberations.

Mr. KELLY. We would like to ask Jay Weiner to appear before the grand jury now.

The CLERK. Court is now adjourned.

EXHIBIT TO A 31

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 4636; NO. 4643

In re: Grand jury proceedings, Scranton, Pennsylvania, Subpoena of Jay Weiner, Subpoena of Phillip Kent Shinnick.

Before: Honorable William J. Nealon, Chief Judge, Middle District of Pennsylvania, Contempt Hearing, Volume I, at Scranton, Pennsylvania, on Friday, September 17, 1976, at 11:05 a.m.

Appearances:

For the Government: S. John Cottone, Esq., United States Attorney for the Middle District of Pennsylvania, and Lawrence Kelly, Esq., Assistant United States Attorney for the Middle District of Pennsylvania, Scranton, Pennsylvania.

For the Defendants: Kairys, Rudovsky & Maguigan, Esqs., By: Holly Maguigan, Esq., Suite 200-1427 Walnut Street, Philadelphia, Pennsylvania, For Defendant Weiner.

Morton Stavis, Esq., & Doris Peterson, Esq., Center for Constitutional Rights, 853 Broadway, New York, New York, For Defendant Shinnick.

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The CLERK. Raise your right hand, please.

JOHN L. SMYTHE, called on behalf of respondent being first duly sworn, testified as follows:

The CLERK. And would you state your name for the record, please.

The WITNESS. John L. Smythe.

The CLERK. Would you spell your name.

The WITNESS. S-m-y-t-h-e.

The CLERK. Thank you.

By Miss MAGUIGAN.

[Direct examination.]

Q. Do I address you as Agent or Mr. Smythe?

A. It doesn't matter.

Q. I will use Mr. then.

You are the same John L. Smythe are you not, who prepared affidavits concerning electronic surveillance——

A. That's correct.

Q. [continuing] In this matter. Those affidavits you signed on August 2d, 1976; is that correct?

A. I believe that's correct.

Q. Do you have copies of those affidavits with you?

A. No, I do not.

Q. Have you reviewed them before you testified?

A. I have reviewed them yesterday.

Q. Did you review them today?

A. No, I haven't seen them.

Q. When was the last time you reviewed them?
A. Yesterday.
Oh, excuse me. Day before yesterday.
Q. I have copies of those here. If at any time during your testimony you would like to look at them to refresh your recollection, don't hesitate to ask to look at my copies.
A. Thank you.
Q. What is your rank?
A. I'm a special agent supervisor.
Q. Now, what is a special agent supervisor?
A. I'm assigned at FBI headquarters in a supervisory capacity, performing a specific function.
Q. What function is it that you perform?
A. Well, among other things, I maintain and control the electronic surveillance indices, which is known as the ELSUR indices.
Q. The what?
A. ELSUR, E-L-S-U-R, electronic surveillance indices.
Q. Would you describe what those indices are; physically, how are they maintained?
A. They are 3x5 cards maintained in indices cabinets.
Q. 3x5 cards. If you pulled out one of those 3x5 cards, what information——
A. It would be the name of the individual overheard, the date of the overhear and the source of the overhear.
Q. What do you mean by source of overhear?
A. The identifier as to the—it's a code symbol number to the electronic device whereby they were overheard, over which they were overheard.
If it were a telephone, it would be a code symbol designating a telephone.
Q. Is that the only information that is contained on these cards?
A. That is all.
Q. Is that the only information that you have?
A. That I have?
Q. Yes. In your indices do you have any back-up information to the information contained on the 3x5 card?
A. In some instances there might be some specific identifier relative to the individual overheard. Not very often, but ever once in a while the agent who has prepared the card may put down the name of a company or something like this, some type of identifying data relative to the individual who was overheard.
Q. Can you tell from looking at the card who the agent is who conducted the overhear?
A. No, no, I can only tell which field office it was that conducted the surveillance.
Q. That is reflected on the card then?
A. That's contained within the code symbol.
Q. The code symbol lets you know what sort of surveillance it was and lets you know—
A. No, it does not tell me what sort of surveillance it was.
Q. Tell me, then, what does the code symbol let you know?
A. It tells me the field office that conducted the surveillance and the code number that that field office is utilizing to identify the source.
Q. Do you know how to decode the field office code number?
A. No. Well, I can tell if it is a security surveillance or if it is a criminal surveillance.
Q. Criminal meaning the FBI is acting criminally or the FBI is investigating a crime?
A. If it involves a specific electronic surveillance of an individual involved in a criminal activity.
Q. I see. Can you tell from looking at the 3x5 card whether the surveillance with which you're dealing is authorized by court order or not?
A. I can tell if the—if it's a title 3. I can tell if it's under title 3.
Q. Could you describe briefly what you mean by "If it's under title 3," you can tell.
A. Title 3 is the Omnibus Crime Control and Safe Streets Act of 1968 whereby a procedure for court-authorized electronic surveillance was established by Congress and specifically—
Q. How can you tell if it's a title 3 tap?
A. Because it's on a blue card.

Q. What other color cards are there?
A. White.
Q. Only blue and white?
A. Blue and white.
Q. So if you have a white card, you know it's not a title 3 tap; is that right?
A. It's a security tap.
Q. If you have a white card, you know it's not a title 3 tap; is that correct?
A. That's correct.
Q. Do you know what kind of tap it is?
A. Pardon me? If it's what?
Q. If it's on a white card, what kind of tap is that?
A. An intelligence security tap.
Q. What do you mean by "An intelligence security tap"?
A. It's one that is conducted in the area of intelligence or national security.
Q. From looking at that white card you cannot tell whether that is a court-ordered tap or not; is that right?
A. No, I cannot.
Q. Where do you get your information, Mr. Smythe?
A. Where do I get what information?
Q. The information that comes into those indices?
A. In the cards?
Q. Right.
Q. From the field office. Is it telephoned in to your office?
A. No.
Q. Do they make up the cards and send them in?
A. That's correct: they make up the cards and send them in.
Q. How many field offices send information into your department?
A. How many do on a regular basis?
Q. Right.
A. I can't tell you.
Q. Are all of them supposed to, if they conduct taps?
A. All of them are supposed to; that's correct.
Q. Do you know whether all of them do?
A. I have no way of knowing.
Q. Who would know?
A. Who would know—
Q. Whether all the field offices send information in to you about taps?
A. Only the field office. Only the specific field office itself.
Q. To the best of your information, when a field office sends you a card, does the field office keep a copy of the card?
A. That's correct.
Q. Does the field office send you anything except the card?
A. Nothing else.
Q. Do you know, Mr. Smythe, how many field offices were involved in any aspect of the Patricia Hearst investigation?
A. 58.
Q. Of those field offices, do you know how many sent cards in to your office?
A. None.
Q. None. Do you know of those 58 field offices how many maintained cards in their field offices relative to wire-tapping?
A. Relative to any wiretap?
Q. Right.
A. No, I couldn't give you a specific number.
Q. Do you know of those 58 field offices how many maintained cards relative to wiretaps conducted in the course of the Patricia Hearst investigation?
A. There are none.
Q. Do you know that? How do you know this?
A. How do I know what?
Q. How do you know that among—from all of those 58 field offices there are none which maintained cards describing wiretaps conducted in the Patricia Hearst investigation?
A. There have been no wiretaps.
Q. I thought all you had was——
A. Wait a minute.
Q [continuing]. The cards that were sent you.

Q. So that, for instance, if the Bureau of—that is it? Tobacco, Alcohol and
Q. Right. From your information, there are no wiretaps.
A. That's correct.
Q. That's your position.
A. That's correct.
Q. Now, I am asking you to step back a bit and tell me whether there are wiretaps where the records are maintained only in those field offices?
A. I can't answer that.
Q. Who could answer that?
A. The specific field office.
Q. The information which comes to your office, is that information relative only to FBI-conducted wiretaps?
A. That's correct.
Q. What about information which comes from wiretaps conducted by other agencies and transmitted to the FBI?
A. No, we get——
Q. Does your office maintain a record of that?
A. No, we do not.
Q. So that, for instance, if the Bureau of—that is it? Tobacco, Alcohol and Firearms had maintained a tap in the Patricia Hearst investigation, and the FBI had been given information resulting from that tap, your office would not be able to say whether or not there had been that tap?
A. That's corect. Uh-huh.
The COURT. But you say that you maintain no cards if another agency sent in wiretap information to your office?
The WITNESS. No, we would not have cards on it because we did not conduct the wiretap.
The COURT. All right.
Q. Now, Mr. Smythe, you testified before to the Court of information that's—that's on a 3x5 card. There is no topical indexing of those cards; is that correct?
A. That's correct.
Q. So that there might, in fact, be wiretaps conducted in the course of the Patricia Hearst investigation which you wouldn't be able to turn up because you didn't recognize the name of the person overheard; is that correct?
A. By just looking at the cards, I could not make a determination relative to that.
Q. So you are not in a position to say that there has been no wiretapping conducted by the FBI in connection with the Patricia Hearst investigation; are you?
A. I am.
Q. How are you?
A. Because I did further review of records relative to this matter.
Q. Was that before or after the August 2nd affidavit?
A. Before.
Q. What was that search of records, review of records?
A. A search of the general indices and a review of all file references.
Q. The general indices of what and all file references?
A. Of FBI headquarters.
Q. The general indices including wiretap and everything else?
A. And everything else.
Q. And what did you discover when you did your search of the general indices?
A. That there was no information relative to any wiretapping relative—
Q. What did you look for?
A. What did I look for?
Q. Right. How did you set about to look for that? How are those indices arranged?
A. They are by name.
Q. By name of?
A. The individual.
Q. So what names did you use in this search?
A. Jay Weiner and Phillip Shinnick.
Q. Now, those are the only names you used?
A. Phillip Kent Shinnick.
Q. Jay Weiner?
A. Yeah.
Q. Phillip Kent Shinnick?
A. That's correct.

Q. Those are two names that you looked through the general indices for? Is that right?
A. Yes.
Q. Did you look for any other names?
A. No. Relative to these two men? Relative to Weiner and Shinnick?
Q. You just stated that you did a review of records before you prepared this affidavit.
A. That's correct.
Q. Now, who asked you to do this affidavit?
A. The Department of Justice.
Q. Do you know specifically who asked you to do it?
A. Yes.
Q. Who was that?
A. Brandon Alvey.
Q. And what information—who is Brandon Alvey?
A. He's an attorney at the Department of Justice.
Q. What did Brandon Alvey ask you to look for?
A. Any indication of electronic surveillance, legal or illegal, consentual or nonconsentual.
Q. Pertaining to?
A. These two individuals. Jay—
Q. Did he ask you to look and see whether there's been any electronic surveillance, legal or illegal, conducted in the course of the Patricia Hearst investigation?
A. Not specifically.
Q. Now, the indices—the general indices are maintained in the same general fashion as the indices that are under your supervision?
A. Yes.
Q. By name?
A. By name. They have other—there are different things—different indexable items that they would have in there, but I am not familiar with the general indices. I don't work it, so I am not really an expert at it, so I can't exactly tell you how they index everything.
Q. So there might have been information about Jay Weiner or Phillip Kent Shinnick only you didn't have the tools to retrieve it; is that right? You didn't know how the general indices worked?
A. No, that's not correct.
Q. I thought you just said you weren't an expert at those indices.
A. No. I didn't do the search of the general indices.
Q. You did not personally do that?
A. No, I did not personally do that.
Q. I thought your affidavit said that you did.
A. I said I conducted a search of the electronic surveillance indices.
Q. Oh, I see. "I have also caused a search to be made of the general indices." Who made that search?
A. The personnel of the general—of the—that handled the general indices.
Q. You didn't make the search. You are not in a position then to say, from your own personal knowledge, whether there was information relevant to electronic surveillance of these two men contained in those general indices; is that right?
A. I caused the search to be made, and, based upon the information provided to me.
Q. Do you know how that search was made?
A. I——
Q. I beg your pardon?
A. What do you mean by "how it was made"?
Q. Do you know whether the person or persons who conducted that search did anything except look under the names of these two men?
A. I'm sure that's the way they did it.
Q. But you don't know for sure what they did?
A. That's what they did.
Q. How do you know?
A. I was not there with them but that is the procedure.
Q. But you don't know what they did; is that right?
A. That's correct.
Q. Now, in the general indices, do you know whether there is also topical indexing?
A. No, I don't.

Q. Did you ask the person or persons who did the search of the general indices to check under topical indexing?

A. No.

Q. For information relative to these two men?

A. No.

The COURT. Well, did you say indices?

Miss MAGUIGAN. Topical.

The COURT. Are there topical indices?

The WITNESS. There would be in certain instances, but only if a code name or something had been given to a specific investigation.

Q. Was a code name given to the Patricia Hearst investigation or any aspect of it?

A. Yes.

Q. What's that code name?

A. HERNAP.

Q. Her nap?

A. HERNAP.

Q. HERNAP. Did you ask the person or persons who checked the general indices to look under HERNAP?

A. No, I didn't.

Q. Now, you testified earlier that the information on your cards, the blue and the white ones, are by name of person overheard; is that correct?

A. That's correct.

Q. Full name?

A. That's correct.

Q. Maintained alphabetically?

A. That's correct.

Q. According to last name?

A. That's correct.

Q. What does your agency do if there is an overhear of a person whose last name is not stated during the overhear? How do you index that tap?

A. It's not indexed.

Q. It's not indexed.

It might be topically indexed; is that correct?

A. Negative, no. It would not be.

Q. It would not even be——

A. Not in the electronic surveillance indices.

Q. What about in the general indices?

A. No, it wouldn't be.

Q. Why not?

A. Because the electronic surveillance overhears are not placed in the general indices.

Q. I see. I see.

What about a tap on, say, John Jones' telephone in which someone called up and said, "Hi, John. This is Mary," giving no last name. How is that indexed?

A. It's not indexed.

Q. It's not indexed at all?

A. No, not in the electronic surveillance indices or in the general indices. It may be indexed in the field office. It's an unidentified person and, therefore, until the person is identified—now, if Mary is identified as Mary Jones, then the card is sent into the electronic surveillance indices.

Q. Now, let me get a couple things straightened out. What about John Jones? Would it be indexed in your office under that?

A. Yes, it would.

Q. But if I represent Mary Smith and I want to know about a tap in which she has been overheard, I have to ask you for John Jones to find that out; right?

A. (no audible reply)

Q. Assuming that the conversation on John Jones' phone was "Hi, John, this is Mary." Is that right? In order to get to the tap of Mary's conversation, I would have to ask you to look under John Jones; right?

A. Right.

Q. So, if, for instance.——

The COURT. Even if her last name is identified?

The WITNESS. Well, all that would do, if she says she wants to know about John Jones, then I can tell her when John Jones was overheard. That's all I can

tell her. "John Jones was overheard," if he's identifiable with the person making the request.

The COURT. But if—using that hypothetically if someone called and said, "This is Mary," and the field office is able to identify Mary as Mary Smith—

The WITNESS. She would go in as Mary Smith, in the indices.

The COURT. Okay.

Excuse me. Go ahead.

The WITNESS. If the person is identified, they are placed in the file. If they are unidentified, they are not.

Q. That is if the field office reports that to you; isn't that right?

A. That's right.

Q. But the field office can keep it in their office and not send that in to you; isn't that right?

A. It's possible.

The COURT. Well, are they required under any rule——

The WITNESS. They are required to send it in. The rules state that every person identified must be sent in.

Q. That doesn't always happen; does it, Mr. Smythe?

A. I do not know if it hasn't happened. I have no knowledge one way or the other.

Q. But you say to the Court that all the information that is required to be sent in to your office is, in fact, sent in?

A. No.

Q. Now, if I—so that it's—excuse me. Let me strike that.

So it's possible that an agent in the field office would know that the Mary on our hypothetical conversation was Mary Smith, but would not put that information down and send it to you unless she said, "Hi, John. This is Mary Smith." Is that right?

That's possible?

A. No, that's not right.

Q. Why not?

A. If he identifies her—if a Mary calls——

Q. That's right.

A. [continuing]. And he doesn't know who she is, but later determines who she is, he will sent in the card. He is required to send in the card.

Q. Very often, FBI agents do not do what they are required to do; isn't that correct?

A. I won't—can't answer that. You're saying that.

Q. Well. Mr. Smythe, let me ask you another thing: Are you prepared to take responsibility for the agents in the field offices and vouch for the fact that they send in cards when they are supposed to?

A. No.

Q. I don't blame you.

Mr. KELLY. Your Honor, I object to that last remark. It's out of order.

The COURT. Yes, strike that and we will have no response from the people in the back of the courtroom. That remark was uncalled for, Miss Maguigan, and let's not go into it.

Miss MAGUIGAN. Well, Judge, I apologize if I offended the Court by that.

The COURT. Well, you're an officer of the Court and I want you to direct your questions for the benefit of the Court and not for the benefit of anyone in attendance.

Miss MAGUIGAN. But, Judge——

The COURT. And I can assure you that I won't be impressed by your emotional reaction to it.

Miss MAGUIGAN. Judge, one of the things that we have tried to do with our subpoena to Clarence Kelley is to get someone who could answer these questions. I want to make a record of the fact that this agent cannot.

The COURT. Absolutely. That's understandable.

Miss MAGUIGAN. Thank you.

Q. Now, Agent Smythe, if I wanted to find out about conversations in which Jay Weiner had been overheard and there has not during the relevant period been a telephone registered in his name, but I had reason to believe he had been overheard, I would have to submit to you the names of the persons on whose telephones I thought he had been overheard; isn't that right? Before you could make a check.

A. Uh-huh.

Q. Your you answer "Yes" or "No."
A. Yes.
Q. Yes.
The COURT. You mean—do I understand this? Is the question that if you identified him by name——
The WITNESS. Are you talking about—by name?
Q. Right.
A. If he is not in the indices by name, then we have no knowledge of him anywhere on any phone at any time.
Q. But supposing we have a situation where there's a surveillance going on of someone with whom Jay Weiner has conversations regularly, and supposing, during those conversations Jay just says, "Hi, this is Jay," and they talk. If you were going to determine to a certainty that those conversations had not been overheard, you would have to check the phones on which he made the calls; isn't that right?
I would have to give you a list and say, Here are 12 phones on which Jay Weiner has been overheard and you would have to check those phones in order to say to a certainty that he had not been overheard; isn't that right?
A. Right, if he didn't give his name. If it was somebody like Jay, just Jay.
Q. If it was just Jay. If he was talking to a friend——
A. Uh-huh.
Q. [Continued]. And said, "This is Jay."
A. Right.
Q. You would have to check that friends phone in order to determine to a certainty that that conversation was not overheard?
The COURT. Was what?
Miss MAGUIGAN. Was not overheard.
The WITNESS. Well, we would be dependent then upon you telling us that this is Jay Weiner making that conversation, and we would have no way of knowing it was him, unless you told us it was him.
The COURT. Would your card show, say Jay Weiner called Frank Smith and said, "Hello, this is Jay," and no one knows who Jay is, would Frank Smith's card say that there was a call from a man named Jay?
The WITNESS. No.
The COURT. Well, then, you couldn't find that out even by checking Frank Smith's card.
The WITNESS. Well, if we checked Frank Smith and you made a specific statement that Jay Weiner called Frank Smith on such a day and used the name Jay and then we checked Frank Smith, and we did have a surveillance on that phone, and the log showed a Jay calling, who had not been identified, then that's Jay and you are telling us it's him. But we have no way of knowing it.
The COURT. All right. I understand you then. You are not saying that the card would make any—as far as you have it—would make any reference to Jay. Frank Smith's card would make no reference to Jay unless Jay was identified by a last name.
The WITNESS. Unless he was identified by last name, that's correct.
If he were identified, which would therefore make the information obtained usable, then it would be entered in the indices. Otherwise, it would be just, you know, unusuable information that is waiting for some unraveling, I guess.
The COURT. I understand. If Jay calls Frank Smith and says, "I am Jay," and no one in the field office knows who Jay is, you have no record of that anywhere.
The WITNESS. That's correct. That's correct. We would have nothing anywhere. Except it would be in the logs of the surveillance.
The COURT. Yes. All right.
Q. Mr. Smyth, what if the agent in the field office thought it might be Jay Weiner? What would he do then?
A. Well, they would have to make a determination one way or the other whether it is or not, and then opt in favor of his suspicion that it might be, and send a card in.
If he thinks it's somebody but he's not sure, he should send a card in. He would send the card in.
Q. What are the logs?
A. There are no laws relative to maintenance of the ELSUR indices.
Q. But you have testified about logs here.
A. Oh, logs. I thought you said "laws." Excuse me.

Q. Logs, l-o-g-s.

A. The logs are the—are the—every time a call comes in, under an electronic surveillance, the overhearing agent writes down descriptive information as to what that call is: the time of it, incoming or outgoing, who answered, who's calling and a brief description of the conversation.

Q. So that if I wanted to get at this conversation between Jay Weiner and Frank Smith, and I told you that I thought he'd been overheard on Frank Smith's phone, you would go to Frank Smith, is that right, and check and see if there was an overhear on Frank Smith or not?

A. That's right.

Q. Do you have copies of the logs at your office?

A. No.

Q. So then if you were going to do a search, you'd go back to the field office and ask them to check the logs on the Frank Smith transaction; is that correct?

A. That's correct.

Q. And you would ask them to check the logs to see whether there had been any phone calls where someone called up and said, "Hi, this is Jay," is that right? Or other information.

A. That's right.

Q. You did not do that in this case, did you?

A. No.

Q. Did Brandon Alvey tell you that Jay Weiner submitted a list of names?

A. OK, that was done then. If a list of names and telephone numbers was submitted, which was possibly so, then they have been checked.

Q. Were they submitted to you?

A. Yes. And then I sent them to the field office.

I don't know. I don't recall offhand. You've got me——

Q. You said before that the only names you got were Jay Weiner and Phillip Kent Shinnick. I asked you that a couple of times.

A. That's correct.

Q. Now, you say, if there was a list, there was a list and you checked it through the logs.

A. OK.

Q. How can you say that if you don't even remember?

A. Well, if you sent——

Mr. KELLY. Excuse me, your Honor. At the initial time that this witness was called, of course, he was being called subject to the objections to the relevancy of the testimony at all. Now, I understood the Court was taking it under the assumption that it was going to be short, but at this time I would like to submit that, if possible, we could save time by arguing whether or not the witness should testify at all, rather than waiting until the conclusion of the testimony.

The COURT. Well, do you have——

Mr. KELLY. In other words, the——

The COURT. Let's find out first, do you have much more examination of this witness?

Miss MAGUIGAN. I don't have too much more. Mr. Stavis has some examination of this witness. We are not going to duplicate, he has some additional examination.

Mr. KELLY. Well, any number of cases have held, time and again, that the affidavits, such as what Mr. Smythe has filed previously in this case, were sufficient denial to satisfy the 3504 issue and I respectfully submit that that issue is just as established now as it was before, which makes his testimony now completely irrelevant and immaterial and going far beyond anything that we have ever had to produce before in even a contempt hearing such as this. So at this time I would like to ask the Court to entertain my motion to strike the testimony of this witness.

Miss MAGUIGAN. May I be heard?

The COURT. Oh, yes.

Miss MAGUIGAN. The first thing is that this Court definitely ruled at the stage of the motion to quash that the affidavits were sufficient.

The COURT. Pardon me?

Miss MAGUIGAN. That you ruled, when we filed the motion to quash, that the affidavits satisfied you.

The COURT. Yes.

Miss MAGUIGAN. At that time you also denied our motion for an evidentiary hearing on the issue. I mean that was one motion for disclosure and for an evidentiary hearing. You were satisfied with the affidavits and denied those.

We are now at the stage of having to show cause why the witness should not be held in contempt and that is the state that is peculiarly appropriated for an evidentiary hearing.

The COURT. Can you show me any authority, once again, that says that this type of evidence is appropriate on it—or at the hearing to show cause?

Miss MAGUIGAN. Gelbard. I mean Gelbard suggests that, if nothing else, that if you have a claim of taint that that is relevant to the issue of cause for refusal to testify.

The COURT. Well, Gelbard did not have an affidavit, did it?

Miss MAGUIGAN. No, Judge, I am talking about that's the principle for the relevance of this kind of—what I'm trying to do now is go behind the affidavit and I think I'm on the road to showing the insufficiency of the affidavit and that's why Mr. Kelly has objected at this point, he sees that this affidavit is not sufficient.

While it was sufficient at the motion to quash stage, we're able to show now that this agent cannot categorically state what he stated apparently categorically in the affidavit submitted to this Court. He simply is in no position to know. What I'm trying to do is explore the parameters of his lack of knowledge.

The COURT. Well, it's—if you had made this motion originally, I would be happy to entertain it, but I think it's quite belated.

Mr. KELLY. Well, it was my understanding, your Honor, that we—that that was the understanding in which you allowed the witness to take the stand in the first place.

The COURT. Are you saying now that you don't want to accommodate him, take him off the stand and——

Mr. KELLY. Well, we were doing it for the purpose of time-frame. It was my understanding that the witness' appearance would not be protracted and it turns out that it is and that's the problem.

Miss MAGUIGAN. I should say that Mr. Kelly did not ask us how long he would be here. He got no representation from me as to how long.

Mr. KELLY. That's true.

The COURT. All right. Overruled. You may proceed, with the same understanding. Relevancy and materiality will be determined after he is finished.

Q. Agent Smythe, have you brought with you any notes that you made at the time you conducted the search that Mr. Alvey requested?

A. I was not requested to bring anything. I did not bring anything.

Q. All right. You did not bring any notes?

A. Right.

Q. Now, you testified that the names you remembered checking out for Mr. Alvey were Phillip Kent Shinnick and Jay Weiner; is that right?

A. Yeah, that's the—in conducting the search it was relative to Jay Weiner and Phillip Kent Shinnick. If you submitted to me or to Mr. Alvey a list of individuals and addresses, which is—which gives the address and the telephone numbers—is that what you submitted?

Q. We didn't submit addresses? Is that necessary?

A. Telephone numbers?

Q. Telephone numbers and names.

A. Okay, then they go——

The COURT. You don't know what was submitted?

The WITNESS. I don't recall.

The COURT. Do you know what was submitted?

Mr. KELLY. I'm certain their motion would have it.

Miss MAGUIGAN. What we have annexed as Exhibits A–1 and A–2 to Jay Weiner's motion for disclosure are lists, some with addresses and some not. List of all the addresses where Jay Weiner has resided with telephone numbers.

The COURT. And were these—Mr. Kelly, were these submitted then to Mr. Alvey for purposes of the affidavits that were filed?

Mr. KELLY. I'm not in a position to certify, your Honor, I can tell you that my procedure throughout was to forward whatever we—whatever we received from the witnesses' counsel to Mr. Alvey as a matter of form. And when the Court entered the first order, we asked Mr. Alvey to make the search in compliance with the Court's order. But, as I say, I'm not in a position to certify that I sent a copy of that motion to Mr. Alvey with instructions.

The COURT. Do you recall whether you, in checking the ELSUR—is that what you call it?

The WITNESS. ELSUR indices.

The COURT. You checked those yourself, did you?

The WITNESS. Yes.

The COURT. Do you recall whether you checked in this matter names other than Messrs. Weiner and Shinnick?

The WITNESS. No, I wouldn't—I would not check any other names. If there are other names and addresses, they would go to the field office covering that individual area to determine if there was any coverage of that specific individual or telephone.

I cannot determine at headquarters whether a specific phone has been—had electronic surveillance.

So I then send what was sent to me, giving the telephone numbers and so forth to the field office that covers that area, to determine if there was any electronic surveillance of that specific telephone number or address.

In this case I was advised there had been none, relative to that.

The COURT. And—but I am asking, did you send to the field offices just the names of Messrs. Weiner and Shinnick?

The WITNESS. No, I send them exactly what I receive, from Brandon Alvey. A copy of his letter transmitting the identifying data and the rest of the data, to each appropriate field office covering the areas where—of the addreses within the petition.

The COURT. And you don't know if that—

The WITNESS. I do not know.

The COURT. —what that was?

The WITNESS. I do not.

The COURT. All right.

The WITNESS. In—relative to that, if—if an individual who has not been identified is overheard on a tap, and the information—whatever he said is unusable and it's not—you are not able to put it anywhere or use it, if you can't identify the person. When the person is identified, a card is sent in thereby making that information retrievable.

So, if an individual named Jay had called and the information was utilized in any way by the FBI, it would only be if he was identified as Jay Weiner, thereby making it usable information.

Then, by the rules, he should have been identified and a card sent in. That's the best I can say.

Q. Mr. Smythe, do you have any special way of categorizing the electronic surveillance information you get that relates to, say, the Domestic Terrorists Digest? Do you code in that way? Information that comes through the FBI as part of their participation in compiling the Domestic Terrorists Digest?

A. I don't even know what the Domestic Terrorists Digest is.

Q. Okay. Then you can't answer any questions with reference to that Digest?

A. No. All I can answer is whether an individual has been overheard or not.

Q. Do you know what sort of records are maintained in field offices relative to taps that are not conducted directly by the FBI?

Just: Do you know what kind of information they might maintain about such taps, that they would not, under the rule, send to you?

A. No, I would not know.

Q. So that there may be information in field offices about taps of Jay Weiner, conducted by state or local authorities and you would have no way of knowing that from your records; is that right?

A. Well, it would be in the files. It would be in the file in the field office, as relative to individual. And in the request that I send out, they would respond if there was or there wasn't, if it was in the file.

Q. But you didn't send out to field offices in this case, did you?

A. Yes, I did.

Q. I thought you just said that you checked your indices and the general indices.

A. That's correct. And I also sent out to the field offices.

Q. Whose names did you send out to field offices?

A. I sent the request from the Department of Justice, a copy of the request from the Department of Justice.

Q. Do you remember what names were in that request from the Department of Justice?

A. I don't recall offhand. I know Mr. Weiner and Mr. Shinnick were in there.

Q. Did you send that request to all 58 field offices involved in the Patty Hearst investigation?

A. No, I did not.

Q. To what field offices did you send your request?

A. To all the offices reflected by addresses within the request. The addresses of the individuals and any other addresses that appear within the request.

Q. What field offices were those in this case?

A. I can't recall right offhand. It would be—well, Newark, Portland, I think there was Oberlin, Ohio, Cincinnati or Cleveland, whichever covers that one. San Francisco, Los Angeles.

Q. Who made the decision which field offices to check?

A. I did.

Q. But you don't remember now on what basis you made that decision except that it was from addresses?

A. On all of those offices that had addresses and I sent, I think in this matter, knowing that it was relative to HERNAP, I think I sent to the major offices in the HERNAP case. San Francisco——

Q. What are the offices?

A. [Continuing.] Primarily.

Q. So that you did not check—that sounds like about maybe six or eight of the 58 field offices involved in this investigation.

A. That's correct.

Q. So there could be logs or other records reflecting wiretaps of Jay Weiner and Phil Shinnick in those remaining 50 field offices and you wouldn't know, because you didn't check them; is that right?

A. Well, the reason for the——

Q. You would not know because you did not check them?

A. The reason for the electronic surveillance indices is to tell me that they have been overhead and identified in the field office, and that's the field office I would go to. If I saw in the electronic surveillance indices a card reflecting an overhear on that individual, I would go to that field office. There were no cards in the indices relative to Weiner or Mr. Shinnick.

Q. Right, but say you had in mind to determine whether those field offices had wiretap information that they got from state or local agencies or that they got from the Bureau of Alcohol, Tobacco and Firearms or from other federal agencies, if you wanted to know that—

A. Uh-huh.

Q. You would send to the individual field offices for that information; is that right?

A. That's correct.

Q. So we are talking now about federal taps not done by the FBI, tap by federal agencies not the FBI or a tap by a state or local agency.

The COURT. If a field office had information, one of your field offices, from the Alcohol, Tobacco and Tax Division, they would not send a card to you?

The WITNESS. No.

The COURT. It's only an FBI tap——

The WITNESS. That is correct.

The COURT [continuing]. That would be in your——

The WITNESS. I believe that when an ELSUR check is done, they would go to every federal agency and ask. I would expect in this case they did also. I don't know for sure.

The COURT. But if—if a field office had information from a state tap in a file, bearing the name of Jay Weiner, for example, that wouldn't be—show up in your file, would it?

The WITNESS. No, it would not.

The COURT. But you're saying that you did send inquiries to those field offices associated with the addresses listed in the request from Mr. Alvey?

The WITNESS. That is correct.

The COURT. And they came back negative?

The WITNESS. That is correct.

The COURT. Go ahead.

Q. You don't remember——

The COURT. Is that available? Is that hard to find, that request of Mr. Alvey to you?

The WITNESS. No. It's not hard to find.

The COURT. Where would it be?

The WITNESS. It's in my office.

The COURT. Okay. Go ahead. I am sorry.

Miss MAGUIGAN. That's all right, Judge.

Q. There is some—just before I go on to another area, there is some 50 field offices that you did not check with regard to wiretap of Jay Weiner and Phil Shinnick; is that right?

A. That's correct.

Q. Did you make any check after you executed your August 2nd, 1976 affidavit?

A. Is this the one here?

Q. Right.

A. No.

Q. All right. During the checks that you made, that are reflected in that affidavit, did you check to determine whether there was a wiretap on any attorney telephones?

A. Was that requested in your request?

Q. I don't know. Did Mr. Alvey request it of you?

A. I don't recall it. If you requested—if you sent your name in, then it was done. I don't recall.

Q. Mr. Smythe, I know what I sent in, what I submitted to this Court but there's a long chain. What I submitted to the Court, a copy of which goes to Mr. Kelley and Mr. Cottone, that's one, that's pretty direct. I know what they got. Then there's what they give to Mr. Alvey. I don't know what that was. Then there's what Mr. Alvey gave to you, and I don't know what that was. Do you see what I mean?

A. Right. I do not recall your name appearing, so that's——

Q. What about Thomas Menaker? Do you recall that name?

A. I don't recall. If it was sent—the only two names that I searched in this was Mr. Weiner and Mr. Shinnick.

Q. Those are the only names that you personally searched?

A. That I personally searched. I don't know what there was on the other—on the addresses.

Q. Okay. So you did not personally search the ELSUR indices for Holly Maguigan, to determine whether my telephone had been tapped?

A. No.

Q. And you did not personally search to determine whether Thomas Menaker's telephone had been tapped?

A. No.

Q. Or Morton Stavis?

A. No.

Q. Or Doris Peterson?

A. No.

Q. Margaret Ratner?

A. No.

Q. William Kuntsler?

A. No.

Q. Center for Constitutional Rights?

A. No.

Q. Mr. Smythe, do you know what a "Do Not File" file is?

A. Only what I read in the newspaper.

Q. We're in the same boat.

Do you have—what I'm trying to establish is you've talked about the rules that govern transmittal of information from field offices to your office.

A. Yes.

Q. When you describe that, you presume good faith on the part of the field agents in the field office; is that right?

Mr. KELLY. Well, I object to the apparent line of questioning, Your Honor. If they want to stick to the question of electronic surveillance and his manner of checking——

The COURT. Yes. Let's keep it to what he would know about.

Miss MAGUIGAN. That's what I'm trying to find out, Judge.

Q. Whether: Do you have any information that would lead you to have a conclusion one way or the other whether the concept of "Do Not File" file applies also to information on electronic surveillance?

Mr. KELLY. I object.

The COURT. Overruled.

Do you have any information?

The WITNESS. No, I don't.

Miss MAGUIGAN. Thank you.

If you will indulge me for a minute we wil try to tighten this up a little bit.

The COURT. Well, while you're doing that, we'll take a brief recess.
[Recess, 3 p.m.]
[3:15 p.m., Court resumes.]
The CLERK. Court is now in session.
By Miss MAGUIGAN.
Direct examination [continued].
Q. Agent Smythe, the Brandon Alvey request——
A. Yes.
Q [Continued]. Pursuant to which you conducted the investigation about which you testified, was that request addressed to you personally?
A. No.
Q. How was it addressed?
A. Director of Federal Bureau of Investigation, attention to our section.
Q. Are you the person who normally conducts searches pursuant to that sort of request?
A. Yes.
Q. Is there anyone else in your department who conducts searches?
A. Yes, when I'm not there, someone will fill in and conduct a search.
Q. Is that a situation where in your absence you delegate your authority to do that?
A. No, they are equal authority.
Q. How many people are there?
A. Two others that do them.
Q. What are their names?
A. Walter Mangicotti and Michael Keown.
Q. Do you maintain files of searches you conducted pursuant to requests like Mr. Alvey's request?
A. Yes.
Q. Do you and the other two persons authorized to make searches keep a joint file or do you keep personal files of those searches that you do?
A. They're all filed in the regular file, they're in a special file.
Q. Do you happen to know whether either of those two persons conducted a search for electronic surveillance relative to Jay Weiner and Phil Shinnick?
A. The individual who had the—who was doing it prior to me, before I came to Washington, did one, I believe. In 1975, maybe.
Q. Who would that be?
A. William Harwood.
Q. Harwood. And tha twas in relation to Phil Shinnick or Jay Weiner or both?
A. If they both came at the same time, then he probably did both of them. I recall that he did one on Jay Weiner; I know that.
Q. Do you recall whether he did one on Phil Shinnick?
A. No, I don't recall.
Q. Did you participate in that earlier search?
A. No.
Q. So you can't testify of your own personal knowledge how that search was conducted or what it turned up?
A. It was negative.
Q. You know that through what Mr. Harwood told you?
A. Well, I know what the file reflects. It was negative.
Q. But you don't know what kind of a search that was? Is that right?
A. It was an ELSUR search.
Q. All right. But do you know how many field offices Mr. Harwood caused to be searched?
A. No. Certainly Not.
Q. Do you know whether, since your—your tenure of office was about a year; is that right?
A. That's correct.
Q. Since your tenure of office, has anyone in your department, besides yourself, conducted a search for tapping of Jay Weiner or Phil Shinnick?
A. I don't believe. Not to my knowledge.
Q. Have you made a request to any Federal agencies to determine whether they had information on surveillance of Jay Weiner or Phil Shinnick?
A. No. When we make a response to the Department, we have a paragraph in which we say, "It is suggested that you contact any other federal agencies to determine if they have conducted any electronic surveillance."
Q. And what are the federal agencies that in your opinion would be appropriate to contact?

Mr. KELLY. I object, your Honor. That's outside the purview of his knowledge.

The COURT. Sustained.

Q. When you receive a request, do you also suggest that the person making the request check State and local agencies?

A. No.

Q. Could you estimate how long is the time sequence between a field office obtaining information about a wiretap and your office obtaining a card that reflects that information?

A. They're supposed to send them every Friday of the week in which the surveillance was conducted, cards are sent.

Q. So, to the extent of your knowledge, the time lag would be not more than a week-to-week allowing for the vagaries of the mail—are they sent by mail?

A. Yes.

Q. What does a log in a field office look like? Do you know if it's in a loose-leaf binder or is it on government forms?

A. It's a form type of thing generally. It is a form type of thing with a column that would show type of call, incoming or outgoing, time of call, individuals, and nature of the call. Length of the call.

Q. Is there a separate sheet for each call or are several calls reflected on one?

A. Several are reflected on one.

Q. The last column that you described, that contains more subjective information than the other columns? Is that correct?

A. That's correct.

Q. And that would contain information like what the subject matter of the call was thought to be if it wasn't spelled out.

A. That's correct.

Q. It might contain information about who a particular agent thought was being overheard even if he wasn't certain. He would send you a card on that person, is that correct.

A. That's correct.

Q. Would that log be the place in the field office where information obtained as a result of taps by other federal agencies was contained?

A. No.

Q. Where would that information be.

A. That would be in the file, case file.

Q. What about information obtained as a result of wiretaps conducted by state or local agencies? Would that be in the log?

A. No, that would be in the case file.

Q. Now, when you send the request, to the six or eight of the 58 field offices in this case, you just ask them to check their logs; is that right?

A. No, they check the files also. The procedure is to check the files. If they have a—if they have a file relative to the individual, or if they're indexed into a file, for instance if John Smith is part of the Hearst file, he is indexed into the file. And then a review is conducted of that file relative to that individual.

Q. You don't know of your own personal knowledge what kind of search was done by each of the field offices you contacted; is that right?

A. I was not there. I would not.

Q. Can you estimate, if you take the information in the field office that's obtained as a result of state or local wiretaps and add to that the information that's obtained as a result of wiretaps by other federal agencies, add to that information pertaining to telephone calls in which the party overheard may not be fully identified, right, take all that information, can you estimate what percentage of that information is reflected in the cards that you make?

A. The cards that we make?

Q. Right, the cards that you maintain in your department.

A. There would be none.

Q. There would be none.

A. That's correct.

Miss MAGUIGAN. Just a minute.

The COURT. I don't think anyone's being accommodated any longer. Does he have a plane to make or something?

Mr. KELLY. Well, he did, your Honor, but at four o'clock but he's obviously not going to make it.

The COURT. And you have some more questions?

Miss MAGUIGAN. Yes.

The COURT. All right. Take him off the stand.

You go ahead with your case.
Mr. KELLY. Okay.
[Mrs. Alice Glatz, called on behalf of being duly sworn, testified as follows:]
The CLERK. Would you state your name, please.
The WITNESS. Alice Glatz, G-l-a-t-z.
By Mr. KELLY.
[Direct examination.]
Q. Now, Mrs. Glatz, where do you live, please?
A. Wyoming, Pennsylvania.
Q. And how are you employed?
A. I am a legal secretary and I am—do court reporting.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 4636; NO. 4643.

In re: Grand Jury Proceedings, Scranton, Pennsylvania,
Subpoena of Jay Weiner, Subpoena of Phillip Kent Shinnick.
Before: Honorable William J. Nealon, Chief Judge, Middle District of Pennsylvania, Contempt Hearing, Volume II, a Scranton, Pennsylvania, on Thursday, September 23, 1976, at 11:08 a.m.
Appearances:
For the Government: S. John Cottone, Esq., United States Attorney for the Middle District of Pennsylvania, and Lawrence Kelly, Esq., Assistant United States Attorney for the Middle District of Pennsylvania, Scranton, Pennsylvania.
For the Defendants: Kairys, Rudovsky & Maguigan, Esqs., By: Holly Maguigan, Esq., Suite 200—1427 Walnut Street, Philadelphia, Pennsylvania, For Defendant Weiner.
Morton Stavis, Esq., & Doris Peterson, Esq., Center for Constitutional Rights, 853 Broadway, New York, New York, For Defendant Shinnick.

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The COURT. Good morning.
Mr. KELLY. Good morning, Your Honor.
The COURT. When we had adjourned the last time we heard some testimony. Is Mr. Smyth here?
Mr. KELLY. Yes, sir.
The COURT. All right. We heard some testimony from Mr. Smyth. And I had obtained an offer of proof from counsel for the witnesses, and it's my desire now, under the same conditions as previously expressed, to ask Mr. Smyth to return to the stand for continued examination.

Mr. KELLY. Excuse me, Your Honor. We would like to interpose an objection to Mr. Smyth testifying in this matter for the reasons substantially set forth in our supplemental memorandum filed on August 3rd, which points out that in the absence of critical and conflicting evidence from the witness, indicating that the government's denial of electronic surveillance is false, there is no bases for an evidentary hearing in this matter, and citing several cases. I would respectfully submit that notwithstanding whatever Mr. Smyth's testimony has been heretofore in this hearing, that there is a definite absence of any credible evidence indicating that there has been any interception of either of the witnesses in this case. And therefore I respectfully submit that it's improper to have testimony of Mr. Smyth in this matter.

The COURT. Well, I haven't rule on that and so that motion will be taken under advisement. But we will ask Mr. Smyth to retake the stand. You're still under oath, Mr. Smyth.

Mr. SMYTH. Yes, sir.

[John L. Smyth, recalled.]

The COURT. You may proceed.

Miss MAGUIGAN. Thank you, Judge.

By Miss MAGUIGAN.

[Direct examination.]

Q. Mr. Smyth, when you testified last Friday, and you testified that you had received a request to do a search of Elsur indices from Brandon Alvey; is that correct?

A. That's correct.

Q. When you were in court last Friday you did not have with you a copy of your request from Mr. Alvey; is that correct?

A. That's correct.

Q. Do you have that request with you today?

A. No.

Q. Have you brought with you today any notes or memoranda or any documentation concerning the request from Mr. Alvey?

A. No. All I brought was a list of the telephone numbers that were provided to me last week by the Department.

Q. There were telephone numbers provided to you last week?

A. Yeah. In Mr. Alvey's request the—all he requested was the name of Jay Weiner and his address in Philadelphia, was the request that we received to do the Elser check on.

Q. And what did you get last week?

A. The full—what is it, the motion that was provided to the government.

Q. Do you have a copy of that?

A. No, I don't have a copy of it. I have a Thermo-Fax that was sent to our office in Washington.

Q. And when was that sent to your office?

A. Monday.

Q. Monday of last week?

A. That's correct.

Q. Were you aware of that when you testified last week?

A. No.

Q. You had not received that personally?

A. Never received it prior to Monday.

Q. May I see the Thermo-Fax that you have?

A. I don't have it with me. I did not bring it with me.

Q. Did you bring anything at all with you, Mr. Smyth?

A. I just brought a list of the telephone numbers that were included on that thing.

Q. I see. Can I see that list?

Mr. KELLY. Excuse me, Your Honor. I submit that the list that she has includes issues that have not yet been presented before the Court. And for that reason I respectfully submit that this goes beyond the scope of the inquiry at the present time. And by elaboration——

The COURT. I don't understand.

Mr. KELLY. By various motions they have submitted numerous telephone numbers to determine whether or not there have been any electronic surveillance on them. Among the numbers are those of counsel that they have made allegations with reference to and issues that are separate from the issues to whether or not either Mr. Weiner or Dr. Shinnick have been overheard at any time. For

that reason I submit that any numbers that he gives her at the present time should be restricted to those that have been made in the first motions seeking any electronic surveillance on the witnesses themselves.

The WITNESS. Well, if the inquiry had determined that we had conducted an electronic surveillance over that telephone number, there would be logs of the intercepted conversation. And in the logs it would have the names of individuals who were participating in the conversation and the topic of their conversation.

The COURT. I see, Well, are you in a position then to say whether the reports back as to these numbers in the August 23rd affidavit would indicate to you whether there had been any conversation concerning—where the name of Messrs. Shinnick or Weiner appeared?

The WITNESS. That's correct, that's correct, yes.

The COURT. All right. O.K., the Court will take a brief recess.

Mr. STAVIS. May we ask him a question?

The COURT. After the recess you might.

Mr. STAVIS. Thank you, Your Honor.

[5:25 p.m., Court recessed.]

[6 p.m., Court resumed.]

The CLERK. Court is now in session.

The COURT. Mr. Smyth.

[Mr. Smyth resumes the stand.]

The COURT. So that I will understand, that you called the field offices represented by the area codes of the phone numbers contained in Mr. Weiner's motion, which is Docket entry No. 4, Appendix A–1 and A–2, and Shinnick motion, Docket entry No. 2, which contains phone numbers in paragraph 16, to check their files and see if they ever conducted any electronic surveillance as to those numbers. And the answer came back negative; is that correct?

The WITNESS. That's correct.

The COURT. All right. So I take it then that that would indicate that of course not having been the subject of electronic surveillance, that not only Mr. Weiner and Mr. Shinnick did not participate in telephone conversations as to those numbers that were recorded, but also that their names weren't even mentioned?

The WITNESS. That's correct.

The COURT. O.K. Now, as to the phone numbers on the Shinnick August 23 affidavit, you said that the offices, the field offices represented by those numbers were canvassed as to whether, first, whether those phones had been the subject of electronic surveillance?

The WITNESS. That's correct.

The COURT. And if they had been, and either Mr. Weiner or Mr. Shinnick's names were the topic of conversation, then this would be recorded on their logs and reported back to you——

The WITNESS. That's correct.

The COURT [continuing]. From the field office? All right. Now, are you familiar with these? I have the affidavit of Mr. Shinnick here. No, not that one, I'm talking about another one. And in paragraph four he identifies—he says, "My calls to my attorneys have been made from the following numbers: Area Code 201–932–3233, and Area Code 201–246–8557?"

The WITNESS. Yes.

The COURT. Now, were those numbers checked in the field office?

The WITNESS. Yes, they were.

The COURT. And what was the report on those?

The WITNESS. We never conducted any electronic surveillance on those telephone numbers.

The COURT. All right. And Mr. Stavis' telephone numbers are listed, Area Code 201–622–3789–90–91–92, Area Code 201–624–0471, Area Code 201–485–3926, were those numbers checked?

The WITNESS. You lost me on the numbers there.

The COURT. All right. Do you want me to repeat them?

The WITNESS. Yes.

The COURT. Area Code 201, No. 622–3789–90–91–92; do you have that now?

The WITNESS. Yes.

The COURT. You also have 201–624–0471, and Area Code 201–485–3926?

The WITNESS. Yes.
The COURT. All right. And did you check those numbers?
The WITNESS. Yes, I did.
The COURT. And what was the report on those?
The WITNESS. We've never conducted any electronic surveillance on those telephone numbers.
The COURT. All right. Now, as to Mr. Stavis' affidavit, he identifies phone numbers with whom he has been in contact, and it's Area Code 914–657–8257?
The WITNESS. 657–8257?
The COURT. Yes. And Area Code 212–924–5661.
The WITNESS. Yes.
The COURT. And Area Code 212–431–4118, and 4119?
The WITNESS. Yes.
The COURT. And you checked those numbers; did you?
The WITNESS. Yes.
The COURT. And have those numbers been the subject of electronic surveillance?
The WITNESS. Those numbers have never been the subject of any electronic surveillance.
The COURT. Now, there's also mentioned Area Code 212, No. 674–3303 et seq?
The WITNESS. Yes.
The COURT. Has that number been the subject of electronic surveillance?
The WITNESS. That number has never been the subject of electronic surveillance.
The COURT. So you're saying none of the numbers——
The WITNESS. None of the numbers have been the subject of electronic surveillance.
The COURT. All right, do you want to question?
Mr. STAVIS. Yes.
By Miss MAGUIGAN.
[Direct examination:]
Q. Mr. Smyth, were you provided with an affidavit which I submitted, which I signed August 20th, 1976, if I give you the phone numbers will you be able to tell me if you checked them?
The COURT. I'm sorry, I overlooked those. Can you tell me what——
Miss MAGUIGAN. Yes, sir, these were the ones that were submitted in my affidavit which was attached to my answer to the petition for order to show cause.
The COURT. He's gone over those, hasn't he?
Miss MAGUIGAN. I'm not sure. You haven't asked him any questions about these.
The COURT. Oh, I haven't?
Miss MAGUIGAN. Some of the numbers are duplicative. I just want to get his answer that he'd give as to the numbers that are not duplicative before we explore the manner by which he came to that conclusion.
The COURT. What numbers would they be?
Miss MAGUIGAN. They would be, for instance, 717–236–9341.
The COURT. That's Mr. Menaker. Do you have that number?
The WITNESS. Yes.
The COURT. And what would your answer be to that one?
The WITNESS. No electronic surveillance.
Miss MAGUIGAN.
Q. 212–255–1851?
The COURT. Do you have that?
The WITNESS. I have that number.
The COURT. What's your report on that?
The WITNESS. No electronic surveillance.
Mr. KELLY. Excuse me Your Honor, do I understand that my objection to standing still on the record?
The COURT. Yes, it still is, and I will explain my position in time. O.K.
Miss MAGUIGAN.
Q. 215–LO—or, 563–8312, 8313, 8314?
A. I have those. No electronic surveillance on those numbers.
Q. 215–GE8–6139?
A. I have that number. No electronic surveillance on that number.
Q. 215–SH4–9374?
A. I have that number. No electronic surveillance on that number.
Q. 215–349–9058?
A. I have that number. No electronic surveillance on that number.
Q. 215–EV6–0948?

A. I have that number. No electronic surveillance on that number.
Q. 609-966——
A. Pardon me, what was the area code?
Q. 609-966-6194?
A. I have that number. No electronic surveillance on that number.
Q. Now, you have answered in response to all of the telephone numbers submitted, no electronic surveillance. Is your answer to each of those numbers that there has never been electronic surveillance at any time ever, whether related to this case or not?
A. That's my answer, yes. There has never been electronic surveillance on those telephone numbers.
Q. Now, I ask you when you were earlier on the stand Mr. Symth, whether you had brought with you any documentation and said you had not; remember saying that?
A. I said I brought a list of telephone numbers which you asked me, and that was the last thing that we had.
Q. Yes, I see that you're referring to pieces of paper as you testify. Are those the lists that you brought?
A. Right, they are.
Q. You selected those from a packet of pieces of paper; is that correct?
A. You mean this thing? They're blank cards, or cards that say pick up groceries, or whatever it is. It's mine.
Q. What appears on the cards that are laid out in front of you at the witness stand?
A. Telephone numbers.
Q. Written in hand, or written by machine?
A. Yes, I wrote them. No, I wrote them myself.
Q. Now, before I get into those numbers, you testified, I believe, that you had never seen Appendix A-1 and Appendix A-2, either appendices that were submitted to you; is that correct, in connection with Jay Weiner?
A. That's correct, I had not.
Q. How do you know then that you have checked all the numbers listed in these appendices?
A. Because I was given an affidavit or something Monday, and I checked those numbers.
Q. How do you know that they're the same numbers?
A. They have been cross-checked against all of the affidavits that are here.
Q. Did you cross check them?
A. Yes.
Q. Now, you've made the search that allows you to answer a sto each of these numbers since Monday of this week; is that right?
A. The Shinnick list that was submitted in June was done prior to last week. The rest of the numbers were done since last week.
Q. Who did the Shinnick list that was submitted in June?
A. I did.
Q. When you were here on Friady my recollection of your testimony is that you only remembered getting Phil Shinnick's name?
A. No, I think I stated that I thought that possibly there was a list of telephone numbers with it but I was not sure and that I would have to recheck to find out.
Q. Now, how did you check each number?
A. I called the field office covered by that area code and instructed the supervisor who handles the electronic surveillance indices and the searches to certify to me the information relative to that telephone number.
Q. Do you know how each supervisor conducted the check?
A. By searching the indices in the field office.
Q. Do you know in each field office contacted how the index is maintained?
A. This is, the index is maintained—well, it's the whole indices for the entire office. It contains names of every individual in which—who is named in a file or who has been indexed. It contains telephone numbers, vehicle identification numbers, any other identifying data that can be catalogued in an index system to allow for retrieval of the information.
Q. Do you know whether the telephone numbers that each supervisor checked were listed under topical headings, or under names, or do you know how they were listed?
A. No, they're listed by number. They have a way of indexing numbers. In other words, telephone numbers are indexed by the—the numbers. Starting, I guess, with O and then they have a system whereby they can index numbers.

Q. Do you know how that system works?
A. Not, not really.
Q. You haven't yourself done that kind of retrieval?
A. No, I have done it, but I don't recall right offhand how—how they index it. I am not familiar with the indexing system but I have retrieved that information myself in the field office.
Q. In relation to the numbers involved in this case, you did not personally retrieve that information with regard to any of these numbers; is that right?
A. No, I did not. I did not, no.
Q. Mr. Smyth, do you know whether there are certain sorts of F.B.I. investigations which are specially denominated so that electronic surveillance conducted in the course of those investigations would not turn up either in your Elsur indices or in the field office indices?
A. I do not.
Q. You do not know?
A. I do not know.
Q. For instance, do you know whether if an investigation is denominated domestic-subversive—excuse me, let me start all over again. If an investigation is denominated domestic-subversive, do you know whether there are separate electronic surveillance files from the files of which you have knowledge?
A. I have no knowledge of that.
Q. Do you know whether a domestic-subversive investigation, if it were not—I'm sorry, if a wiretap in a domestic-subversive investigation were not authorized under Title 3, do you know whether it would appear under national security?
A. I don't know.
Q. So that a domestic-subversive wiretap might appear under national security or might appear in a separately maintained file?
A. I don't know.
Q. Agent Smyth, do you know what a pen register is?
A. Yes.
Q. What is a pen register?
A. Pen register is a device that will indicate what number is being dialed from a telephone.
Q. When you check a field office to determine whether a telephone has been subjected to electronic surveillance, does that check include a determination whether that particular phone has been monitored by a pen register?
A. A pen register is not considered electronic surveillance.
Q. So that pen registers could have been employed in this case to keep track of phone calls out of a certain phone and you would have no record of that nor would your check have turned it up?
A. If a pen register had been utilized it would have been indexed in the indices, thereby indicating some type of activity on the phone. I would say that a pen register was not used.
Q. But you don't know that for sure? I mean, when I asked you before it was did you check a field office for electronic surveillance, will they answer as to pen register?
A. I think they would answer to pen register but it is not technically electronic surveillance.
Q. So you don't know whether an individual field office would include pen registers in electronic surveillance; is that right?
A. I can't say positively.
Q. Excuse me just a minute, please. The names of the various attorneys who've been mentioned in court today Mr. Smyth——
A. Yes.
Q. [Continuing] Did you check those names in the Elsur index?
A. No, I did not.
Q. Those names will be Maguigan, Ratner, Menaker, Kunstler, Stavis, Peterson, that list of names?
A. Yes.
Q. You checked none of those names?
A. That's correct.
Q. So you did not make any determination whether any of us might have been overheard in a fashion that would be reflected in your indices as a cross-check against your check of the field offices?
A. I did not check the indices, that's correct.
Q. So the thing that you could have personally have done and told this Court about you did not do? You were able to tell the Court what's been certified

to you from the field offices but you are not in a position to know the method of check that was done in the field office?

A. That's correct.

Q. Do you know which other federal agencies conduct either Title 3 or national security wiretaps?

A. No, I don't.

Q. So you're not in a position to say whether other federal agencies may or may not have been involved in surveillance in this case, electronic surveillance?

A. That's correct.

Q. Did you check whether there had been wiretap information given to the F.B.I. as a result of taps conducted by state or local agencies either with regard to these witnesses or with regard to the attorneys?

A. I checked—I have not personally. I don't know how to answer that. Are we talking in reference to the Hearst case?

Q. Well, would the answer be different if it were a general question—

A. I can only speak for the Hearst case.

Q. Why is that? I didn't think you kept topical indices?

A. Well, I had a review done of the Hearst file. A file review of the Hearst case.

Q. When did you have that done?

A. Prior to the time I was here last time.

Q. And what kind of check was that on the Hearst case?

A. It was a file review conducted at headquarters and in the field. At the office of origin, San Francisco, in the Hearst case where all—all investigation conducted throughout the country and all of the field offices goes to San Francisco file as the office of origin. And I had a file review done in San Francisco. I did not do it. I had a file review done here at headquarters, and it was done by two individuals at headquarters to determine if there was any indication of any electronic surveillance of any kind, anyplace, anytime, on anybody in the Hearst case.

Q. And the result of that check to the best of your knowledge as it was transmitted to you by other persons?

A. There was one Title 3, and there was some—one consensual monitoring.

Q. And the Title 3 tap was of none of the attorneys in this case?

A. None of the attorneys, none of the individuals involved here.

Q. And now are you in a position to say—excuse me. You did that check before you testified on Friday; is that correct?

A. Yes.

Q. On Friday do you remember saying there had been no electronic surveillance conducted inthe course of the Hearst investigation?

A. Relative to these individuals.

Q. No, I also asked you if there had been any electronic surveillance and you answered that there had been none?

A. Well, I knew that there had been a Title 3. If you had asked me the question that you are saying you're asking me I would have indicated that there was.

Q. I see. Now, you did not check any of the attorneys' names in your indices to see whether any of us had been overheard on either the Title 3 tap, or the consensual tap; did you?

A. That's correct.

Q. Now, would your check of the Hearst investigation file reveal whether there was information in the F.B.I. file that had been supplied as a result of a wiretap conducted by another federal agency or by a state or local agency?

A. It would if there was anything in the file. That's what you asked me, if there was anything in the file would I know it?

Q. Right.

A. Yes, based upon the way I asked, it would.

Q. But you don't know—excuse me, strike that. In relation to the indices maintained in a field office, do you know whether the field office indices reflect the fact that information is provided to the field office as a result of a wiretap conducted by another agency or by a state or a local agency?

A. It would not be reflected in the indices. It would be reflected only in the file.

Q. You did not check each file in each field office; did you?

A. Each of the field offices contacted, of the ones that were contacted, the ones I previously indicated to the Judge that were contacted, searched their indices and reviewed their file relative to this.

Q. But what I asked you was whether information would turn up either in the file or in the indices, if it was the result of a wiretap conducted not by the F.B.I. but by another federal agency or by the state or local agency?

A. It would not show in the indices. In the event, and something occurred as you indicate, it would be reflected in this case file itself. Where the agent receiving the information would say on such and such a date I received such information from so and so, if that were the case.

Q. But that information might not contain the phone number tapped by the state or local agency; is that right?

A. That's right.

Q. So that your check of the phone numbers from the field offices would not show whether those numbers had been the subject of a tap by another federal agency or by a state or local agency?

A. That's right. I can't certify to any other agency or any law enforcement agency. All I can certify to is the result of my check regarding the F.B.I.

Q. Just one minutes, please. So what you're telling us really is that on the basis of your check you can say that the F.B.I. did not conduct taps, but you cannot say whether the F.B.I. has operated with information supplied by other federal agencies, or state or local agencies which may have been the result of wiretaps conducted by those agencies?

Mr. KELLY. Your Honor, I object to the repetitious nature of that question. It has been asked four times previously.

The COURT. It has, but I'll allow him to answer.

The WITNESS. No, I can't say one way or the other.

Miss MAGUIGAN.

Q. I asked on Friday whether you had personally checked with other federal agencies and I believe your answer was you have not?

A. That's correct.

Q. Since Friday have you checked with any other federal agencies?

A. No.

Q. We have no other questions.

The COURT. Do you have any questions?

Mr. KELLY. I have no questions, Your Honor.

The COURT. All right.

Mr. EILBERG. Our next witness is Richard E. Gerstein, State's attorney, Metropolitan Dade County, representing the American Bar Association.

He has come to us from Florida, and we are very appreciative of this. When he appeared the last time he was extremely helpful, and it is good to have Mr. Gerstein once again.

TESTIMONY OF RICHARD E. GERSTEIN, STATE'S ATTORNEY, METROPOLITAN DADE COUNTY, REPRESENTING THE AMERICAN BAR ASSOCIATION; ACCOMPANIED BY DAVID T. AUSTERN, ATTORNEY, WASHINGTON, D.C.

Mr. GERSTEIN. Thank you very much, Mr. Chairman.

Mr. Chairman and members of the subcommittee, I have a brief statement.

My name is Richard E. Gerstein, and I am State attorney of the 11th Judicial Circuit of Florida, which is the Greater Miami area. I have held this office for over 20 years. I have served as president of the National District Attorneys Association. I am now serving my second year as chairman of the Grand Jury Committee of the American Bar Association Criminal Justice Section. Accompanying me today is David T. Austern, an attorney in private practice in Washington, D.C., and a member of my committee.

I welcome the opportunity to appear a second time before this subcommittee on behalf of the American Bar Association to present

the views of the ABA on changes in grand jury procedure proposed by H.R. 94.

The ABA Criminal Justice Section created a committee on the grand jury in September 1974. The committee's mandate is to examine pending legislation to revise grand jury procedure and to offer proposed changes for association approval.

In August 1975 our committee successfully obtained section and ABA house of delegates approval for a policy supporting certain provisions of H.R. 1277—94th Congress—sponsored by Mr. Eilberg.

Many key aspects of grand jury reform are covered in this already-established association policy—such elements as counsel in the grand jury room; amendment of the recalcitrant witness statute; provision of transactional immunity; increasing penalties for violation of grand jury secrecy; issuance of subpoenas; and appointment of a special prosecutor.

Believing that the ABA policy should be broadened, my committee presented a comprehensive report with the recommendations to the section of criminal justice governing council in November 1976. That report, containing 23 legislative principles—some of which are elaborations on existing ABA policy—to which we believe grand jury legislation should adhere, was unanimously approved by our section council. The section then submitted the report to the ABA's policy-making house of delegates at its midyear meeting in Seattle last month. As you are no doubt aware, Attorney General Griffin Bell personally appeared before the house of delegates and asked that body to defer action on our report until the August 1977 annual meeting, to allow him time to thoroughly study our proposals. I briefly advised the house of delegates in Seattle of the development of the principles by my committee, and I pointed to the extensive prosecutorial experience of its members. The criminal justice section then moved, in deference to the Attorney General, to delay consideration of the principles until the house of delegates meeting in August.

I must emphasize, therefore, that the legislative principles contained in that report represent only the views of the criminal justice section at this point, and have not been acted upon by the American Bar Association.

In my remarks today, I will thus confine my comments to the policy previously established by the ABA house of deleates in August 1975.

It is perhaps significant to note that the 1,100 members of the ABA criminal justice section, which formulated the recommendations I present today, represent every segment of the criminal justic system: prosecutors, trial and appellate judges, public and private defense attorneys, corrections officials, persons engaged in investigation and enforcement, and law teachers and students.

I believe it is noteworthy to comment upon the make-up of my committee to allay fears which have been expressed by some critics that the pending legislation represents idealistic, but pragmatically unsound, proposals. In that connection, I again point to my own extensive prosecutorial experience and that of the majority of my committee.

One of the members of my committee served for 4 years as an assistant district attorney in New York City, and for 4 years as an assistant U.S. attorney here in Washington, Charles Ruff. The current Watergate special prosecutor, is a member of the committee. My committee

includes Federal and State prosecutors, criminal defense lawyers, public defenders, judges, law professors, and law students. The committee has met on 10 occasions in the past 2½ years to study grand jury procedures.

First, as we have informed this subcommittee before, the American Bar Association opposed in principle House Joint Resolution 46 in the 94th Congress, which would have amended the fifth amendment to the U.S. Constitution to eliminate the requirement that a defendant to be charged for any "capital or otherwise infamous crime" against the United States be proceeded against by way of indictment. I note that this has been reintroduced by Congressman Eilberg in the 95th Congress as House Joint Resolution 61. Although the ABA is aware of the expense and time consumed in presenting many Federal offenses to a grand jury which might more efficiently be prosecuted by way of information—for example, interstate transportation of stolen motor vehicles—we do not believe that a constitutional amendment provides the appropriate resolution to this problem.

As you know, the American Bar Association has endorsed in principle, and opposed in principle, certain amendments to titles 18 and 28 of the United States Code as proposed by H.R. 1277, the legislation which Mr. Eilberg sponsored in the 94th Congress. Many of these comments are also applicable to H.R. 94.

Section 2(a) of the bill would amend the Recalcitrant Witness Statute (28 U.S.C. 1826(a)) to reduce the maximum period of confinement for refusal to testify before a grand jury from 18 months to 6 months for civil contempt. The ABA has gone on record opposing this reduction. While this is the current Association policy, you should be aware that our section will be asking the ABA House of Delegates in August to revise that policy to support the 6-month maximum contained in the legislation. This is not yet the Association's position, however.

Mr. EILBERG. Mr. Gerstein, I do not like to interrupt you, but we have a rollcall, and I think we'd better recess at this point, and we will come right back.

Mr. GERSTEIN. Surely.

Mr. EILBERG. The subcommittee is recessed.

[Whereupon, a short recess was taken.]

Mr. EILBERG. The subcommittee will come to order.

Mr. Gerstein, would you be good enough to proceed.

Mr. GERSTEIN. The ABA supports in principle H.R. 94's provisions in sections 2(a) and 2(c) which would amend the Recalcitrant Witness Statute (28 U.S.C. 1826(a)) and add a new section 18 U.S.C. 403 to prohibit multiple confinements of a witness upon subsequent refusals of the witness to testify about the same transactions. The ABA believes such a measure is needed to limit potential abuse, possibly if issuance of continuing subpenas are coupled with multiple confinements.

Section 2(a) of H.R. 94 would amend 28 U.S.C. 1826(b) to place the burden of opposing bail pending appeal upon the Government, following confinement of a witness for a refusal to testify before a grand jury. The ABA has opposed this amendment, believing that the intent of the existing law is appropriately to limit frivolous appeals. Under this bill, the prosecutor would have to affirmatively show that

an appeal is frivolous; this is inconsistent with the established policy of the ABA in its standards relating to criminal appeals (standard 2.4).

Section 2(b) of H.R. 94 would amend 18 U.S.C. 2515 to provide that a witness before a Federal grand jury may allege a violation of title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 251, the Federal Wiretapping Act), as a defense to an action brought against him or her under the Recalcitrant Witness Statute. The association supports this provision in principle, believing that the Government ought not to be able to take advantage of any improper governmental conduct to lay a foundation for questioning the witness before the grand jury.

Section 3(a) of H.R. 94 addresses the question of witness immunity. The American Bar Association has already gone on record supporting amendment of 18 U.S.C. 6002 to provide transactional immunity—rather than the use immunity presently provided under Federal law 18 U.S.C. 1525(b) and under *Kastigar* v. *U.S.*, 406 U.S. 441 (1972).

The ABA does not lightly urge a restoration of transactional immunity. This position is rooted in the belief that use immunity is not only susceptible of prosecutorial abuse, but can be a subtle invitation to perjury on the part of the witness. Since the witness knows what he says can be used to impeach him, it can be an encouragement to slant his testimony in a manner most favorable to him. If what is sought is truthful testimony, the witness must feel no constraints that what he says, will, in fact, be used against him. In sum, testimony obtained in this manner is simply less reliable.

Further, a witness told—as he is when use immunity is granted—that, "We retain the right to prosecute you," is being told that his ultimate fate depends on the prosecutor's view of the acceptability of his testimony. This can lead to such abuses as the prosecutor's playing off one witness against another. While use immunity is constitutional (see *Kastigar*, supra), its desirability is another matter. The rationale that without use immunity guilty persons would go free does not appear sufficient—for the U.S. Department of Justice reports that in practice few witnesses granted it are subsequently prosecuted for crimes described in their immunized testimony (see 14 American Criminal Law Review 275, 282). If the theoretical goal of use immunity is more prosecutions, this does not then seem to be the actual result. We believe use immunity represents the most grudging interpretation of the constitutional right against self-incrimination, and favor a return to transactional immunity, as provided in H.R. 94.

Section 5 of the Eilberg bill addresses the serious question of violations of grand jury secrecy. Secrecy is fundamental to the grand jury if it is to function fairly and effectively. As you know, the ABA went on record in 1975 supporting that section of H.R. 1277 in the 94th Congress—but calling for increased penalties for unauthorized disclosure of grand jury information. We are pleased to note that section 5 of H.R. 94 provides additional provisions with much strengthened penalties—a fine of not more than $20,000 or imprisonment of not more than 5 years—for disclosure when motivated by monetary gain or by an attempt to affect the actions or decisions of that grand jury or to influence further legal proceedings. We also note the exceptions provided, including the provision that this section

would not apply to press representatives acting in a professional capacity.

The ABA thus supports in principle the strengthening of penalties for unauthorized disclosure of grand jury information.

Section 6(a) of H.R. 94 provides that a grand jury may conduct an independent inquiry, and that, while it should generally utilize the attorney for the Government, when it finds him or her unable to impartially assist, refusing to assist, or hindering or impeding the grand jury, the grand jury may request that the court appoint a special prosecutor.

The association in 1975 went on record opposing a provision in H.R. 1277 in the 94th Congress—which would have required the court to appoint such a special attorney upon the request of a grand jury conducting an independent inquiry. The ABA's concern had been founded on the mandatory nature of the grand jury's request to the court to appoint a special prosecutor; and we thus find the present, more discretionary provision in H.R. 94 preferable.

Counsel would be allowed to accompany and advise witnesses appearing before a grand jury under section 7(a) of H.R. 94. This would add a new section 3330A to chapter 215 of title 18. The ABA went on record in 1975 supporting a similar provision in H.R. 1277.

The association believes that a witness' attorney should be allowed to be present in the grand jury room during the testimony of that witness, in order to advise the witness of his or her rights in connection with the appearance. We feel that this is a key provision in the legislation currently pending before the Congress, and one which will more meaningfully effectuate the sixth amendment right to assistance of counsel. Almost nowhere else in the criminal justice system is a person who desires a lawyer denied that right—except before the grand jury.

At present, a witness may receive advice of counsel outside the grand jury room; the witness must frequently be excused to consult with counsel. We believe this not only unnecessarily prolongs the proceeding, but also places the witness in an unfavorable light before the grand jury. It is extremely damaging to the witness continually to get up, go outside, and consult with counsel. It is our understanding that several States have already instituted the practice of allowing counsel in the grand jury room. We do not agree with those critics who claim such a proposal will disrupt the grand jury or prolong its proceedings.

I would like to expand on the question of counsel in the grand jury room for 1 minute.

This provision in the pending legislation seems to have drawn considerable attack. I am certain you are aware that the prestigious American Law Institute in its model code of prearraignment procedure has gone on record supporting this practice, as has the association of bar of the city of New York.

We understand some eight States now allow this practice—Arizona, Illinois, Kansas, Michigan, before a one-man grand jury, Minnesota, Oklahoma, South Dakota, and Washington State. The section has talked with attorneys in those States in an effort to find out whether problems are being encountered. While we have not undertaken any large sampling or empirical research, you may be interested to know

that none of the persons with whom we spoke reported disruptions, delays, or other problems as a result of allowing counsel in the grand jury room with a witness. Several prosecutors who said they were initially opposed told us they now favor the concept.

Let me briefly share some of their comments with you. In the Cook County, Ill., State attorney's office, a prosecutor with many years experience handling the grand jury told us that Illinois' 18-month-old statute allowing counsel to appear with witnesses is in no way disruptive and does not delay the proceedings. In fact, he believes it furthers the interest of justice. Consistent with the ABA position, the Illinois law restricts the attorney's participation to advising the witness. The prosecutor told us he had heard no opposition among his fellow prosecutors. Another attorney in the same office likewise reported no troubles with the practice, although he had opposed it initially.

I note from the record of the July hearings which your subcommittee held that Shelvin Singer, an Illinois attorney representing the National Legal Aid and Defender Association, similarly reported that, "* * * this has not created any problems or obstructed grand jury investigations in Illinois."

A justice on the Minnesota Supreme Court, responding to our inquiry, said there has been no problem with the practice in that State, and their experience has been most favorable. In Minnesota, by the way, the statute does allow counsel to address the grand jurors.

In Arizona, where a grand jury witness who is the target of the investigation is entitled to counsel, a leading defense attorney there reports that the provision, which is more than 1 year old, has not created any problems among either prosecutors or defense counsel.

A Kansas attorney, who recently served 4 years as a district attorney, told us that that State's law had worked well and that there was no indication that counsel impeded the proceedings. In fact, she said she strongly favors the concept of allowing counsel in the grand jury room.

I would also remind the subcommittee that a member of my committee, Charles Ruff, the Watergate Special Prosecutor, has gone on record before the Senate subcommittee hearings last September supporting counsel in the grand jury room.

The Justice Department has expressed concern that allowing counsel in will have the potential effect of producing time-consuming delays, interfering with the grand jury's ability to conduct an effective investigation, and discouraging witness cooperation. We just don't see, from the contacts we have made, that these concerns are borne out in the States which have already adopted this practice.

Section 7(a) of H.R. 94 would add a new section 3330B to title 18, chapter 214, concerning subpenas. The present ABA policy only addresses a small portion of the proposals in this section of the bill. With respect to the provision which would delay for 1 week the appearance of a subpenaed witness, the association has urged that this be amended to provide a 72-hour period, rather than 1 week, unless special need is shown by the Government attorney. The ABA's rationale was that the longer period would unduly prolong grand jury proceedings and reduce the effectiveness of grand jury investigations.

In conclusion, I reiterate that my comments today have been restricted to the previously approved ABA policy. My committee on the grand jury is continuing its work; we have drafted a series of proposed grand jury standards, now under consideration by the ABA Special Committee on Administration of Criminal Justice. As I mentioned above, we will be presenting our grand jury legislative principles to the ABA house of delegates in August, and hope thereafter to have the opportunity to appear before you again to set forth a more comprehensive ABA policy.

However, in the event your subcommittee intends to move grand jury legislation prior to our August meeting, I would appreciate very greatly the opportunity to present the Criminal Justice Section's recommendations to you, if it appears that the ABA's timetable would deprive us of the chance to set forth a formal ABA position.

The Criminal Justice Section is committed to the concept of grand jury reform. We believe this to be important work, and we applaud Congressman Eilberg and the subcommittee for your continuing attention to these issues.

I thank you for the opportunity to appear here today for the American Bar Association. I will be happy to answer any questions you may have.

Mr. EILBERG. Thank you very much, Mr. Gerstein. I would say that your statement is a very fine one, indeed, and we certainly will keep in mind all of your observations. We appreciate your cooperation.

I'd like to ask some questions.

One common complaint made about proposals to reform the Federal grand jury system is that reform suggestions are really only the position of defense counsel and a few fringe groups. You note that the ABA recommendations were based on involvement of every segment of the criminal justice system, and included prosecutors, and trial and appellate judges. Could you describe for us the variations of positions and attitudes which occurred in your committee, and in the section, as to various reform suggestions. And I say that from my background in Pennsylvania, with bar associations there, where sometimes a few lawyers made decisions for the entire association.

Mr. GERSTEIN. In this instance, the committee I chair is a very representative group with extensive prosecutorial experience. As I said, I have had more than 24 years' experience myself and am serving my sixth term in elective office. We also have Richard Kuh, the former district attorney of New York who succeeded Frank Hogan, the current Watergate prosecutor, Charles Ruff; the former State attorney of Tampa, Fla; three members who have served as assistant U.S. attorneys in the Washington, D.C. area. Seymour Glanzer was one of the original Watergate prosecutors.

In the Criminal Justice Section of the American Bar there are other former Federal prosecutors on the council—Sylvia Bacon, Paul K. Rooney of New York, Donald Santerelli of Washington, and three prominent district attorneys: Carol Vance, the district attorney of Houston, Tex.; William Randall, a long-time district attorney of St. Paul, Minn.; and John Price, the long-time district attorney of Sacramento. These three gentlemen are former presidents of the National District Attorneys Association.

In fairness, I must say that although Mr. Vance voted for these proposals, he has had some second thoughts on some of the issues, particularly counsel for witnesses in the grand jury room. But he did vote in support of the proposals at the time they came before the criminal justice section.

So the criminal justice system represents a very composite group of all elements that are interested in the administration of justice, and it does not represent fringe elements or people who might be termed radical. In fact, I think, if anything, these people might be termed quite establishment.

Mr. EILBERG. Can you give us any idea of those who were active with you in the development of these principles?

Mr. GERSTEIN. There are approximately 10 lawyers, including the former and present prosecutors I have named. Several judges have been active on this committee. We have met 10 times and debated and discussed these principles at great length. They are the product of a great deal of work. It is a committee that consists of approximately 10 persons, almost all of whom have had extensive prosecutorial background. The principles were then submitted to the criminal justice section council where there were some 25 to 30 persons present who approved them unanimously. Those voting had diverse backgrounds in the various elements of the administration of justice.

Mr. EILBERG. Would you say that any Federal prosecutors, especially those presently serving, supported reform at any of your meetings or perhaps by letters or in other ways?

Mr. GERSTEIN. Mr. Charles Ruff, the present Watergate Special Prosecutor, participated actively in the deliberations of the committee and testified before a Senate subcommittee, and he has supported almost totally all of these reforms. I believe that he differed with us on the length of time for which a recalcitrant witness should be jailed, but he was in favor of counsel in the grand jury room for witnesses, and in favor of all the other reforms which we have advocated.

Mr. EILBERG. I wonder if you could further briefly describe for us the variations of positions which occurred in your committee. Perhaps we can get a little better feeling of the process.

Mr. GERSTEIN. There was some disagreement, of course, over the immunity question, as to whether transactional or use immunity should be granted. The length of incarceration for recalcitrant witnesses was another area of disagreement, and whether or not there should be a vote by the grand jury on the granting of immunity, and whether or not there should be court approval of the granting of immunity was an area of some disagreement.

I might add further, to amend my previous answer, that when the council considered these principles and voted to approve them at a meeting in Arizona, there were representatives of the Justice Department there to oppose some of the principles, and they were given an opportunity to present their views fully, and it was after hearing those views that the section unanimously approved these principles.

Mr. EILBERG. Mr. Fish.

Mr. FISH. Thank you, Mr. Chairman.

If I understood you correctly, Mr. Gerstein, the attorney general has asked the house of delegates not to act until this summer on the latest proposals of your group.

Mr. GERSTEIN. That is right.

Mr. FISH. I don't remember your saying whether or not you expected to hear the attorney general's position well in advance of that date.

Mr. GERSTEIN. I would hope to. I saw the attorney general in California 2 days ago, and I requested of him that he put me in touch with the person in the Justice Department who was formulating his position, and he gave me the name of the gentleman in the Justice Department to whom he has assigned that task. I expect to contact that person, and I would hope to have some opportunity to meet with them and to discuss any differences that we might have.

I would hope that expeditiously the Justice Department will formulate a position on both Congressman Eilberg's bills and the views of the criminal section.

Mr. FISH. You think it was just a new Attorney General asking to be given time to see what his options are before he is committed to the program?

Mr. GERSTEIN. I think I would be presumptious to assume what his position will be, Congressman. I do know at the hearings held when his appointment was under consideration he indicated he favored some grand jury reform. I think he has expressed some concern about the right of a witness to have counsel in the grand jury room. I do not know what his ultimate position on that issue will be.

Mr. FISH. I think I am correct, am I not, Mr. Chairman, that we might have started these hearings a month ago had it not been that the Attorney General indicated to us he'd like to have a look at the issues. I am giving the benefit of the doubt. He just has an awful lot of problems all at once.

Mr. GERSTEIN. It was for that reason that we have readily gone along with his request that the matter be delayed until August. And I myself appeared before the house of delegates and joined in that request.

Mr. FISH. Mr. Gerstein, however, I would hope that this committee would be in a position to report out legislation prior to August.

Mr. GERSTEIN. I would hope so.

Mr. FISH. The Chairman feels that way, and I certainly do. In fact, in August we'd be in recess anyway, so we are talking about 4 months.

Mr. GERSTEIN. It is for that reason I have suggested in my testimony I would appreciate the opportunity to reappear before you in the event that it becomes necessary for you to hear further from us, because of your desire to move the legislation through the Congress.

Mr. EILBERG. I might observe, Mr. Fish, that we are awaiting the departmental position from the Justice Department. I hasten to add, that we were in the same position in the last Congress where we were kept waiting for a long period of time because of the reluctance of the then Attorney General to appear, but it is my expectation that Justice will promptly respond and we will move quickly now.

Mr. FISH. Mr. Chairman, what do you think of asking our witness if he could submit to us at this point the recommendations that are pending, for the views of the Attorney General or the views of the house of delegates, or would that be improper?

Mr. EILBERG. We have those already, I believe.

Mr. GERSTEIN. Yes, and I believe in the next 30 to 60 days we will have some additional principles. I am confident that one of the additional principles we will adopt which was overlooked through some

oversight was one that will require the prosecutor to place before the grand jury any exculpatory evidence which I believe is a provision of your bill, and which is also a part of the standards approved by the national District Attorneys Association. It was an oversight that we did not include that provision.

Mr. EILBERG. Unless there is objection, I ask that we submit for the record at this point the principles and their rationale, and without objection they will be a part of the record at this point.

[The document follows:]

AMERICAN BAR ASSOCIATION—REPORT TO THE HOUSE OF DELEGATES—SECTION OF CRIMINAL JUSTICE—RECOMMENDATION

The Section of Criminal Justice recommends adoption of the following resolutions:

Be it resolved, That the American Bar Association support in principle grand jury reform legislation which adheres to the following principles:

1. A grand jury witness shall have the right to be accompanied by counsel in his appearance before the grand jury; the role of such counsel should be the same as that before a Congressional committee.

2. A subject of a grand jury investigation shall be given the right to testify before the grand jury, provided he/she signs a waiver of immunity. Prosecutors shall notify such subjects of their opportunity to testify unless notification may result in flight or endanger other persons; or the prosecutor is unable with reasonable diligence to notify said persons.

3. The grand jury shall not consider unconstitutionally obtained evidence.

4. The grand jury shall not name a person in an indictment as an unindicted co-conspirator to a crimal conspiracy.

5. A grand jury should not issue any report which singles out persons to impugn their motives, hold them up to scorn or criticism or speaks of their qualifications or moral fitness to hold an office or position. No grand jury report shall be accepted for filing and publication until the presiding judge submits *in camera* a copy thereof to all persons named or identifiable and such persons are given the opportunity to move to expunge any objectionable portion of said report and have a final judicial determination prior to the report's being published or made public. Such motion to expunge shall be made within ten days of receipt of notice of such report. Hearings on such motions shall be held in camera.

6. The grand jury should not be used by the prosecutor in order to obtain tangible, documentary or testimonial evidence to assist the prosecutor in preparation for trial of a defendant who has already been charged by indictment or information. However, the grand jury should not be restricted in investigating other potential offenses of the same or other defendants.

7. The grand jury should not be used by the prosecutor for the purpose of aiding or assisting in any administrative inquiry.

8. Witnesses who have been summoned to appear before a grand jury to testify or to produce tangible or documentary evidence should not be subjected to unreasonable delay before appearing or unnecessarily repeated appearances or harassment.

9. It shall not be necessary for the prosecutor to obtain approval of the grand jury for a grand jury subpoena.

10. A grand jury subpoena should indicate the statute or general subject area that is the concern of the grand jury inquiry.

11. In any case in which a subpoenaed witness or a person directly affected thereby moves on proper grounds to quash a grand jury subpoena, the prosecutor should be required to make a reasonable showing in camera and on the record before the court convening the grand jury that the evidence being sought is:

(a) relevant to the grand jury investigation;
(b) properly within the grand jury's investigation; and
(c) not sought primarily for another purpose.

12. A subpoena should be returnable only when the grand jury is sitting.

13. When the circumstances make it reasonable, motions to quash or modify subpoenas may be brought at the place where the witness resides, the documents sought are maintained, or before the court which issued the subpoena at the election of the witness. Such motions should be heard in camera and on the record.

14. All matters before a grand jury, including the charge by the impaneling judge, if any; any comments or charges by any jurist to the grand jury at any time; any and all comments to the grand jury by the prosecutor; and the questioning of and testimony by any witness, shall be recorded either stenographically or electronically. However, the deliberations of the grand jury shall not be recorded.

15. Expanding on the already-established ABA position favoring transactional immunity, immunity should be granted only when the testimony sought is in the public interest; there is no other reasonable way to elicit such testimony; and the witness has refused to testify or indicated an intent to invoke the privilege against self-incrimination.

16. Immunity shall be granted on prosecution motion in camera by the trial court which convened the grand jury, under standards expressed in Principal No. 15.

17. The granting of immunity in grand jury proceedings should not be a matter of public record prior to the issuance of an indictment or testimony in any cause.

18. If the court determines that there is multiple representation of witnesses in a grand jury proceeding, it shall advise the witnesses that they have the right to be separately represented by counsel, and explain that conflicts of interest may otherwise arise.

19. The confidential nature of the grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny.

20. It is the duty of the court which impanels a grand jury fully to charge the jurors by means of a written charge completely explaining their duties and limitations.

21. All stages of the grand jury proceedings should be conducted with proper consideration for the preservation of press freedom, attorney-client relationships, and comparable values.

22. The period of confinement for a witness who refuses to testify before a grand jury and is found in contempt should not exceed 6 months.

23. The court shall impose appropriate sanctions whenever any of the foregoing principles have been violated.

Be it further resolved, That the President of the Association or his designee be authorized to present testimony in support of the Association's position before the appropriate committees of Congress.

REPORT

Background

The Criminal Justice Section first set up a Committee on Grand Jury Matters in August of 1974. In August 1975, the Criminal Justice Section obtained ABA House of Delegates approval for a policy on grand jury legislation addressing a limited number of issues. Because the existing ABA policy confined its comments largely to one bill—H.R. 1277, 94th Congress—the Section Committee on the Grand Jury continued its analysis of pending legislation. The Committee has reviewed a large number of bills in the past 18 months. These included H.R. 2986 (94th Congress, 1st Session), sponsored by Congressman John Conyers (D–Mich.) and S. 3274 (94th Congress, 1st Session), introduced by Senator James Abourezk (D–S.D.). Both bills have a much broader focus than does H.R. 1277.

The Criminal Justice Section, based on this comprehensive study, now urges the House of Delegates to broaden the existing ABA policy on grand jury reform. This is particularly timely not only because of the increasing public, press and professional attention to this issue, but because early hearings—and action—are anticipated in the 95th Congress. Because the multitude of grand jury bills introduced in the 94th Congress have now died, and because they will probably be revised prior to introduction in the 95th Congress, the Section has addressed grand jury legislative principles to which it believes and ABA-supported legislation should adhere. The 23 principles here proposed thus represent some 18 months of intensive work by the Section and its Grand Jury Committee.

It should be noted that the proposed principles were drafted by a Committee composed almost entirely of present and former prosecutors, and chaired by Richard E. Gerstein, State Attorney for the greater Miami, Fla. area, and former President of the National District Attorneys Association. The principles further represent a consensus of the Section's Council—which includes prosecutors, State and Federal judges, law teachers and defense lawyers—based on action at its fall, 1976 meeting in Scottsdale, Ariz.

In recent years the grand jury as an institution has come under increasing criticism for a number of reasons and from a number of sources. It has been accused of an absence of procedural safeguards. Reflecting these and other concerns, England abolished the grand jury in 1933, and most states allow prosecution either by indictment or by information. However, it remains a part of the federal system and in many state systems because of constitutional provisions. The Section believes that its proposed legislative principles will go a long way towards correcting the ills of the grand jury as an institution.

Principles

Following are comments regarding the 23 principles for which ABA House of Delegates support is sought:

1. The Association has already gone on record, in August 1975, supporting the right of witnesses to have counsel present in the grand jury room. That policy does not spell out, however, what the role of counsel should be. The Section's proposed Principle No. 1 defines counsel's role as one of advising the witness—but would not allow counsel to address the grand jurors or in any other way take part in the proceedings. Most of the grand jury legislation pending before the Congress would provide a right to counsel. Almost nowhere else in the criminal justice system is a person who desires a lawyer denied that right—except before the grand jury. The Principle analogizes the role of counsel to that before Congressional hearings, in which the attorney plays a similar advisory function. Presently, a witness may receive advice of counsel outside the grand jury room. In practice, witness' counsel waits at the door to the grand jury room and the witness is frequently excused to consult with counsel. This unnecessarily prolongs the grand jury proceedings, and places the witness in an unfavorable light before the grand jury. The Section believes it is extremely damaging to the witness continually to get up, go outside, and consult with counsel. It is the Section's understanding that some states have already instituted the practice of allowing counsel in the grand jury room. The Principle analogizes the role of counsel to that before a Congressional hearing, since the attorney would be playing a similar advisory function. Enactment of this provision will more meaningfully effectuate the Sixth Amendment right to assistance of counsel.

2. Principle No. 2 would require that the subjects of grand jury investigations, before an indictment is returned against them, be given the right to testify and present their side of the facts, provided such persons sign a waiver of immunity. The Section's proposal would require a prosecutor to take all reasonable steps to notify each prospective defendant, but recognizes that in certain circumstances the prosecutor will truly be unable to locate such persons; or that, under some circumstances, the prosecutor will fear the person would flee if notified, or, once notified, would endanger witnesses or other persons. In such instances, notification would not be required under the Principle. The purpose of this proposal is to insure that fair and just opportunity is given an individual to testify in his or her own behalf prior to being indicted. The Section believes this to be an essential ingredient in a fairly functioning grand jury—and criminal justice—system.

3. The third Principle would forbid the grand jury to consider unconstitutionally obtained evidence. The Section believes that the integrity of the grand jury will best be served by prohibiting grand jury consideration of unconstitutionally-obtained evidence, notwithstanding *U.S.* v. *Calandra*, 414 U.S. 338 (1974), in which the United States Supreme Court declared that a grand jury may consider illegally obtained evidence. The Section does not believe that such a principle will harm the effective functioning of the grand jury, but will serve instead to insure its integrity.

4. Principle No. 4 would prohibit naming a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. The Section believes that naming of persons as unindicted co-conspirators visits approbrium upon them—by charging the named persons with the commission of a crime but denying them a forum in which to seek acquittal or vindication. This is another instance, the Section feels, in which reforms are necessary to insure the fair functioning of the grand jury. The United States Court of Appeals for the Fifth Circuit has already held in accord with this principle in *U.S.* v. *Briggs*, 514 F.2d 794 (1975).

5. The issuance and publication of grand jury reports which single out persons for scorn or criticism, impugn their motives, or denigrate their moral fitness to hold office have the effect of charging such persons with misconduct or unfitness —without affording them any forum in which to refute the charges or to seek vindication. The Section is not proposing that such a report be forbidden from commenting on the job that an office holder is performing, but such reports should

not condemn character alone. Grand jury reports which do single out persons in the manner described tend to undercut the fairness of the grand jury. Such misuse of the grand jury can, in fact, affect the political process. The procedures proposed in Principle No. 5 will assist in insuring that such abuses do not occur. See *U.S. v. Briggs*, 514 F.2d 794 (1975) and Report of Grand Jury Proceedings, U.S. Court of Appeals for the Fifth Circuit, 479 F.2d 458 (1973).

6. The Section opposes the practice of a prosecutor's using the grand jury to obtain tangible, documentary or testimonial evidence to assist in his or her preparation for trial of a defendant already charged by indictment or information. This is an abuse of the grand jury and transforms it into a mere tool and arm of the prosecutor's office—a role which is contrary to the grand jury's historical purpose and function. Grand juries would not, of course, be prohibited from investigating other potential offenses of the same defendant; Principle No. 6 makes this clear.

7. The Section strongly opposes prosecutorial use of the grand jury to assist in noncriminal—e.g., income tax—investigations. Such improper utilization of the grand jury warps its true function and leads to abuses such as those described in No. 6, supra.

8. The Section supports legislation which would end the practice of repeatedly calling a witness to appear before a grand jury. In some instances, grand jury witnesses have been subjected to unreasonable delays or unnecessarily repeated appearances or other forms of harrassment. Legislation to end such practices is necessary. A lack of concern for the convenience of a grand jury witness who must wait unnecessarily long to be called is as objectionable as the use of a grand jury subpoena to harass or inconvenience a witness.

9. Many of the grand jury reform bills before the Congress (e.g., H.R. 2986 and S. 3274 from the 94th Congress) would require grand jury approval of any subpoenas issued. The Section opposes such a procedure. It believes this requirement would not only be cumbersome, but would cause unnecessary delay. The prosecutor is better suited to make determinations regarding issuance of subpoenas than are lay grand jurors.

10. Principle No. 10 would require that a grand jury subpoena indicate the statute or general subject area that is the focus of the grand jury inquiry. This requirement is intended to enable the recipient and the court to determine more accurately questions of relevancy; it would also enable more effective and efficient use of counsel, court, and grand jury time. The Principle does not intend that a detailed description of the statutory and subject areas be required; but that a broad statutory citation or general description of the subject be included. Such a legislative requirement will lend a further element of fairness to the grand jury system.

11. Principle No. 11 is designed to prevent improper use of grand jury process. It provides that a prosecutor must show, in resopnse to a motion to quash a subpoena, that the evidence subpoenaed is relevant to the grand jury investigation; properly within its investigation; and not sought primarily for other purposes. The Section's proposal would safeguard this process by providing that the showing be made in camera and on the record. In order to limit the applicability of this requirement, the Section included language specifying that the person bringing the motion have a sufficient interest—that it either be the subpoenaed witness or a person directly affected. The motion must further be made "on proper grounds."

12. Principle No. 12 specifies that a grand jury subpoena not be returnable except when the grand jury is sitting. This is intended to avoid potential abuse of the subpoena power by the prosecutor's office, and would help to insure the integrity of the grand jury function.

13. The Section carefully weighed the assertion that this Principle would place too heavy a burden on prosecutors—who might be forced to travel extensively to answer such motions. The Section believes, however, that the language "when the circumstances make it reasonable" will preclude the procedure's becoming the norm. The Principle will help to work minimal hardship on witnesses.

14. Principle No. 14 would mandate stenographic or electronic recording of all matters before the grand jury, except the deliberations of the grand jury itself. This requirement would be a major step forward in grand jury reform; it is not inconsistent with the necessity of maintaining grand jury secrecy. The comments of the judge charging the grand jury as to its function and responsibilities would be recorded, as would the prosecutor's introductory comments and testimony and questioning of all witnesses. Rule 6 of the Federal Rules of Criminal Procedure currently has no such requirement, although it does require that if a stenographer is present, that he or she must leave the grand jury room during deliberations.

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15. At the August 1975 Montreal Annual Meeting, the ABA House of Delegates supported amendment of 18 U.S.C. 6002 to provide "transactional" immunity, rather than "use" immunity, as presently provided in federal law. Under "transactional" immunity, a witness may be statutorily compelled to give testimony which might otherwise violate the privilege concerning self-incrimination, provided the witness is given immunity from prosecution from any crime which is referred to in the testimony. Under 18 U.S.C. 1525(b), Part V of the Omnibus Crime Control Act of 1970, and under *Kastigar* v. *U.S.*, 406 U.S. 441 (1972), only "use" immunity need to be afforded; this merely prevents the prosecution from using the actual testimony of the witness in any future trial. The Section urges the Association to broaden its previously-adopted policy to specify proper instances in which transactional immunity should be issued. The Principle states that such instances would occur only when it is in the public interest; when there is no other reasonable way to elicit the testimony; and when the witness has refused to testify, or stated he or she will invoke the Fifth Amendment. This is intended to insure that grants of immunity are carefully considered prior to issuance and that they are not issued when other means could be used to obtain the needed information.

16. Several of the grand jury bills (e.g., H.R. 2986 and S. 3274) before the 94th Congress included provisions requiring approval of immunity grants by a majority vote of the grand jury. While many supporters of this provision believe that it would help to insure the independence of the grand jury, the Section does not support such a requirement. Instead, Principle No. 16 would provide that immunity be granted on prosecution motion in camera by the trial court which convened the grand jury; the standards outlined in Principle No. 15 would be followed in determining whether such a grant should be made. The Section believes that lay grand jurors are not adequately oriented to make determinations regarding immunity grants; and that this is properly an executive function with court overview.

17. Principle No. 17 would forbid making the granting of immunity in grand jury proceedings a matter of public record before the issuance of an indictment or testimony in any cause. To make public such grants undercuts the function of the grand jury by selectively publicizing its investigations—and has the definite potential of harm to those to whom immunity is alleged to have been granted.

18. The controversial question of multiple representation of defendants before the grand jury is addressed by Principle No. 18. It would spell out the court's role as one of advising the witnesses of potential conflicts of interest and alerting them to their right to separate representation. It would no grant the court a more intrusive role or stronger hand, such as authority to prohibit such multiple representation. The Section does not believe that the prosecutor should properly take action in such multiple representation situations by personally contacting witnesses. The Section, in adopting this Principle, considered multiple representation to include the following: two or more witnesses in a grand jury proceeding who may have conflicting interests; a witness and a potential defendant in a grand jury proceeding; or a witness whose counsel fees are paid by a third party who is a witness or potential defendant in a grand jury proceeding. The Principle further assumes that defense counsel who are fulfilling their professional responsibilities will also themselves fully advise their clients of the possible effects of multiple representation.

19. The identity of witnesses coming before the grand jury must be shielded from public scrutiny in order to prevent unjust harm to witnesses and potential defendants. The practice in some jurisdictions of having witnesses exposed to public and press as they emerge from the grand jury room is an unfair one, the Section believes, for it taints the witnesses' reputations by the mere fact of their appearance before the grand jury.

20. The Section supports legislation which mandates the court's charging grand jurors orally on impanelling as to their duties and responsibilities; written copies of the charge should be distributed to the grand jurors at that time for their own continuing reference. It is believed that detailing to grand jurors their powers, responsibilities and rights will help to insure comprehensive understanding by them of their proper role, and will thereby help to strengthen the independence and fair functioning of the grand jury. Several of the bills pending in the 94th Congress included such a provision.

21. In adopting Principle Number 21, the Section urges the ABA to go on record as recognizing potential abuses of newspersons who are called as witnesses before the grand jury and then claim a First Amendment privilege not to testify.

In some prosecutors' offices around the country, office policy already exists which forbids calling of newspersons before the grand jury. Principal number 21 is further intended to express Section concern about the increasing number of instances nationally in which criminal defense lawyers are themselves being subpoenaed to testify before grand juries. The Section purposely did not go into further detail in this proposed Principle, believing that an expression of Association concern about present abuses of the grand jury vis-a-vis the press and the criminal defense bar would call attention to what appears to be a growing problem.

22. In August, 1975, the ABA House of Delegates opposed amendment of the Recalcitrant Witness Statute (28 U.S.C. 1826(a)) to reduce from 18 to 6 months the maximum period of confinement on a civil contempt order for refusal to testify before a grand jury. The Section is now asking the Association to revise the previously-adopted position, and to support—as provided in several grand jury bills—a maximum of 6 months confinement. It is believed that this should be sufficient to compel a witness to testify. (The Section previously obtained ABA support for legislation to prohibit multiple confinements upon a subsequent refusal by a witness to testify about the same transaction.) Many of the grand jury bills before the Congress provide a 6-month maximum confinement, and the Section is now convinced that this is sufficient to compel a witness to testify, while avoiding the longer, more punitive confinement. The Section thus urges Association support for a 6-month maximum.

23. Rather than specify proposed sanctions for violation of each proposed grand jury legislative Principle outlined supra, the Section simply notes that the court should exercise its power to impose appropriate sanctions whenever the proposed Principles are violated. Such sanctions will obviously be fashioned in any proposed legislation; but it is not the Section's intent, in proposng Association policy on the grand jury, itself to suggest statutory language.

* * * * * * *

Conclusion

The Criminal Justice Section urges ABA House of Delegates approval for the 23 above-described legislative Principles. A statement on the grand jury by the nation's organized bar is essential; it is probable that attention will be given this timely subject early in the 95th Congress, and a continued professional, media and public focus in this area can be expected. A comprehensive Association policy is thus needed to help fashion well-reasoned, workable and effective grand jury reform legislation.

Respectfully submitted,

ALAN Y. COLE,
Chairman.

December 1976.

Mr. FILBERG. May I ask, Mr. Gerstein, rather than waiting specifically for us to contact you, if you don't mind. Will you keep us apprised of significant developments by your section?

Mr. GERSTEIN. We will certainly do that.

Mr. FILBERG. Mr. Fish.

Mr. FISH. Mr. Gerstein, you mentioned one possible area of disagreement with the Attorney General was the appearance of counsel for the witness in the grand jury room. This was true of his predecessor in his testimony before us last year.

Mr. GERSTEIN. I am aware of that.

Mr. FISH. I think one of the arguments was that the presence of counsel would violate grand jury secrecy, make the witnesses less willing to testify fully. And I just wonder if your rationale responds to these objections, or would you like to elaborate on it at this point?

Mr. GERSTEIN. Well, under present law the witness has a right to relate to his counsel the matters that occurred in the grand jury room, to discuss his testimony and discuss the questions posed to him by the prosecutor with his defense counsel. So certainly a provision could be made that would limit counsel in making public or publishing any

matters before the grand jury in the same fashion that grand jurors are limited.

In my State, witnesses are limited, but I know of no other State that has that provision. In Florida, witnesses cannot repeat to anyone any matters that have transpired before the grand jury. You can certainly bind counsel to where he could discuss with no one other than his client the matters that transpired before the grand jury.

Mr. FISH. Mr. Chairman, I note that you are as pleased as I am that the ABA has supported as many provisions of your legislation as they are.

Mr. EILBERG. Indeed, I am.

Mr. FISH. The two areas where there still seems to be some disagreement—one is over bail and the other is over the length of incarceration if held in contempt. Are those areas that you plan to go into?

Mr. EILBERG. Yes.

Mr. FISH. Then I defer to you.

Mr. EILBERG. Go ahead.

Mr. FISH. The Chairman wants to reduce the length of incarceration, and I gather the ABA position is opposed to that. We heard from previous witnesses earlier today that in some cases it might take years. The testimony was if it was only 18 months, you could stand on your hands for that length of time if you are going to get in trouble by talking. So what are we talking about?

Mr. GERSTEIN. I don't approach with any cavalier attitude a stretch of 18 months for anyone. I suppose there are some people who could, to use that phrase, stand on his hands and do 18 months.

The position of the ABA was a longer period of confinement. The position of my committee, my Grand Jury Committee, with Mr. Ruff casting a dissenting vote, recommended a reduction in the period of maximum confinement to 6 months.

I think it is necessary to draw a line here between a period of confinement that is likely to make the witness cooperative and a period of confinement that substitutes for inability to convict the witness of a substantive crime. Are you thereby using the confinement to punish him when you feel he is engaged in an illegal activity and you do not have evidence to convict him of a substantive crime.

And I think lengthy periods of incarceration tend to do that rather than to be for the purpose of encouraging a witness to be cooperative.

Mr. FISH. Would you prefer to see far more discretion in court over the length?

Mr. GERSTEIN. I do not think that there should be discretion in the court, because I don't think that the court is privy to the information upon which it can make a valid decision.

I think it would be better to set a period of time by statute that is a reasonable punishment likely to cause a witness to cooperate if he is ever going to cooperate, and not so lengthy as to be a substitute for a failure to have sufficient evidence to convict him of a substantive crime and to want to punish him for real or imagined conduct.

I believe that there is a great deal of misunderstanding about the role of the court. The court is not privy to the grand jury testimony, not privy to information which the prosecutor has, and I do not think in a better position than the Congress to set any limit as to the length of incarceration.

Mr. FISH. I appreciate that. Thank you.

Mr. EILBERG. Mr. Gerstein, in your statement and in the ABA resolution, you discuss one of my recent proposals to eliminate the grand jury indictment. I have introduced four proposed amendments this year. Three of those amendments will only eliminate the constitutional requirement of an indictment and still allow Congress to authorize an indictment in particular cases, for particular crimes, or in the discretion of the prosecutor. Have you had an opportunity to review these proposals and could you comment on them? Last year Mr. Austern indicated that the Grand Jury Committee was considering proposals to define "infamous crimes" so as to lessen the need for indictments. Has there been any further work on this proposal?

Mr. GERSTEIN. Regrettably, there has not and that is something to which we must address ourselves. We have not had that opportunity, and thus I cannot articulate a new position.

Mr. EILBERG. And you will keep us posted on further developments?

Mr. GERSTEIN. I will, indeed.

Mr. EILBERG. The ABA supports the right to counsel in the grand jury room. We have heard a lot of comment on this, both from witnesses at these hearings and from few letters and various other sources. Some witnesses have indicated that counsel should have an active rather than a passive advisory and observer role. What do you believe should be the role of counsel in the grand jury room?

Mr. GERSTEIN. The role should be a passive one. An active role would indeed do what the Attorney General stated he feared would happen. It would cause, in effect, two trials to take place, and it would be totally disruptive. So I strongly support a passive role and strongly oppose an active role, and congratulate you Congressmen for having placed in your bill a provision that would enable obstreperous counsel to be removed and to be replaced by other counsel.

Mr. EILBERG. Also in that connection, Mr. Gerstein, I wonder if you have given thought to the possibility of going to the Justice Department and indicating your views as to counsel in the grand jury room? From public statements of the Attorney General, something is on his mind as to counsel in the grand jury room. He seems to think that "mini-trials" will be involved, and he has not decided whether to endorse it or not. It occurs to me the work and research you have done may be persuasive along those lines.

Mr. GERSTEIN. We hope to have the opportunity to convey our views to the Justice Department and the Attorney General and will try to do that.

Mr. EILBERG. Mr. Gerstein, I have other questions, but because of the lateness of the hour I think we will adjourn at this time and submit the questions to you, if we may, for answer.

Mr. GERSTEIN. Fine.

Mr. EILBERG. We thank you once again for your tremendous role in helping us to develop our thinking. The new bills that we produced are the result, to a large extent, of the testimony that we got in the last Congress, so we are getting a clearer and better picture as we go, which is very important for us and for the country, we hope.

Thank you very much for coming all the way from Miami.

Mr. GERSTEIN. I thank you, Mr. Chairman, on behalf of the American Bar Association, and on my own behalf, and request the opportunity to reappear should we formulate additional principles which may be helpful to you.

[The prepared statement of Richard E. Gerstein follows:]

STATEMENT OF RICHARD E. GERSTEIN, CHAIRMAN, COMMITTEE ON THE GRAND JURY, CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION

Mr. Chairman and members of the subcommittee; my name is Richard E. Gerstein, and I am State Attorney of the 11th Judicial Circuit of Florida, which is the greater Miami area. I have held this office for over 20 years. I have served as President of the National District Attorneys Association. I am now serving my second year as Chairman of the Grand Jury Committee of the American Bar Association Criminal Justice Section. Accompanying me today is David T. Austern, an attorney in private practice in Washington, D.C., and a member of my Committee.

I welcome the opportunity to appear a second time before this Subcommittee on behalf of the American Bar Association to present the views of the ABA on changes in grand jury procedure proposed by H.R. 94.

The ABA Criminal Justice Section created a Committee on the Grand Jury in September, 1974. The Committee's mandate is to examine pending legislation to revise grand jury procedure and to offer proposed changes for Association approval.

In August 1975, our Committee successfully obtained Section and ABA House of Delegates approval for a policy supporting certain provisions of H.R. 1277 (94th Congress), sponsored by Mr. Eilberg.

Many key aspects of grand jury reform are covered in this already established Association policy—such elements as counsel in the grand jury room; amendment of the recalcitrant witness statute; provision of transactional immunity; increasing penalties for violation of grand jury secrecy; issuance of subpoenas; and appointment of a special prosecutor.

Believing that the ABA policy should be broadened, my Committee presented a comprehensive report with recommendations to the Section of Criminal Justice governing Council in November, 1976. That report—containing 23 legislative principles (some of which are elaborations on existing ABA policy) to which we believe grand jury legislation should adhere—was unanimously approved by our Section Council. The Section then submitted the report to the ABA's policy-making House of Delegates at its Midyear Meeting in Seattle last month. As you are no doubt aware, Attorney General Griffin Bell personally appeared before the House of Delegates and asked that body to defer action on our report until the August 1977 annual meeting, to allow him time to thoroughly study our proposals. I briefly advised the House of Delegates in Seattle of the development of the principles by my Committee, and I pointed to the extensive prosecutorial experience of its members. The Criminal Justice Section then moved, in deference to the Attorney General, to delay consideration of the principles until the House of Delegates meeting in August.

I must emphasize, therefore, that the legislative principles contained in that report represent only the views of the Criminal Justice Section at this point, and have not been acted upon by the American Bar Association.

In my remarks today, I will thus confine my comments to the policy previously established by the ABA House of Delegates in August 1975.

It is perhaps significant to note that the 11,000 members of the ABA Criminal Justice Section—which formulated the recommendations I present today—represent every segment of the criminal justice system: prosecutors, trial and appellate judges, public and private defense attorneys, corrections officials, persons engaged in investigation and enforcement, and law teachers and students. I believe it is noteworthy to comment upon the make-up of my Committee to allay fears which have been expressed by some critics that the pending legislation represents idealistic—but pragmatically unsound—proposals. In that connection, I again point to my own extensive prosecutorial experience and that of the majority of my Committee. Mr. Austern, for example, served for four years as an Assistant District Attorney in New York City, and for four years as an Assistant U.S. Attorney here in Washington. My Committee includes federal and state prosecutors, criminal defense lawyers, public defenders, judges, law professors and law students. The Committee has met on 10 occasions in the past 2½ years to study grand jury procedures.

First, as we have informed this Subcommittee before, the American Bar Association opposed in principle House Joint Resolution 46 in the 94th Congress,

which would have amended the Fifth Amendment of the U.S. Constitution to eliminate the requirement that a defendant to be charged for any "capital or otherwise infamous crime" against the United States be processed against by way of indictment. I note that this has been reintroduced by Congressman Eilberg in the 95th Congress as H.J. Res. 61. Although the ABA is aware of the expense and time consumed in presenting many federal offenses to a grand jury which might more efficiently be prosecuted by way of information—e.g., interstate transportation of stolen motor vehicles—we do not believe that a Constitutional amendment provides the appropriate resolution to this problem.

As you know, the American Bar Association has endorsed in principle (and opposed in principle) certain amendments to Titles 18 and 28 of the United States Code as proposed by H.R. 1277, the legislation which Mr. Eilberg sponsored in the 94th Congress. Many of these comments are also applicable to H.R. 94.

Section 2(a) of the bill would amend the Recalcitrant Witness Statute (28 U.S.C. 1826(a)) to reduce the maximum period of confinement for refusal to testify before a grand jury from 18 months to 6 months for civil contempt. The ABA has gone on record opposing this reduction. While this is the current Association policy, you should be aware that our Section will be asking the ABA House of Delegates in August to revise that policy to support the 6-month maximum contained in the legislation. (This is not yet the Association's position, however).

ABA supports in principle H.R. 94's provisions (in Section 2(a) and 2(c) which would amend the Recalcitrant Witness Statute (28 U.S.C. 1826(a)) and add a new section 18 U.S.C. 403 to prohibit multiple confinements of a witness upon subsequent refusals of the witness to testify about the same transactions. The ABA believes such a measure is needed to limit potential abuse, possible if issuance of continuing subpoenas are coupled with multiple confinements.

Section 2(a) of H.R. 94 would amend 28 U.S.C. 1826(b) to place the burden of opposing bail pending appeal upon the government, following confinement of a witness for a refusal to testify before a grand jury. The ABA has opposed this amendment, believing that the intent of the existing law is appropriately to limit frivolous appeals. Under this bill, the prosecutor would have to affirmatively show that an appeal is frivolous; this is inconsistent with the established policy of the ABA in its *Standards Relating to Criminal Appeals* (Standard 2.4).

Section 2(b) of H.R. 94 would amend 18 U.S.C. 2515 to provide that a witness before a federal grand jury may allege a violation of Title III of the Omnibus Crime Control and Safe Street Act of 1968 (18 U.S.C. 251, the "Federal Wiretapping Act") as a defense to an action brought against him or her under the Recalcitrant Witness Statute. The Association supports this provision in principle, believing that the government ought not to be able to take advantage of any improper governmental conduct to lay a foundation for questioning the witness before the grand jury.

Section 3(a) of H.R. 94 addresses the question of witness immunity. The American Bar Association has already gone on record supporting amendment of 18 U.S.C. 6002 to provide transactional immunity—rather than the "use" immunity presently provided under federal law under 18 U.S.C. 1525(b) and under *Kastigar* v. *U.S.*, 406 U.S. 441 (1972).

The ABA does not lightly urge a restoration of transactional immunity. This position is rooted in the belief that "use" immunity is not only susceptible of prosecutorial abuse, but can be a subtle invitation to perjury on the part of the witness. Since the witness knows what he says can be used to impeach him, it can be an encouragement to slant his testimony in a manner most favorable to him. If what is sought is truthful testimony, the witness must feel no constraints that what he says will, in fact, be used against him. In sum, testimony obtained in this manner is simply less reliable.

Further, a witness told—as he is when "use" immunity is granted—that "we retain the right to prosecute you," is being told that his ultimate fate depends on the prosecutor's view of the acceptability of his testimony. This can lead to such abuses as the prosecutor's playing off one witness against another. While "use" immunity is Constitutional (see *Kastigar*, supra), its desirability is another matter. The rationale that without "use" immunity guilty persons would go free does not appear sufficient—for the U.S. Department of Justice reports that in practice few witnesses granted it are subsequently prosecuted for crimes described in their immunized testimony (see 14 *American Criminal Law Review*

275, 282). If the theoretical goal of "use" immunity is more prosecutions, this does not then seem to be the actual result. We believe "use" immunity represents the most grudging interpretation of the Constitutional right against self-incrimination, and favor a return to transactional immunity, as provided in H.R. 94.

Section 5 of the Eilberg bill addresses the serious question of violations of grand jury secrecy. Secrecy is fundamental to the grand jury if it is to function fairly and effectively. As you know, the ABA went on record in 1975 supporting that section of H.R. 1277 in the 94th Congress—but calling for increased penalties for unauthorized disclosure of grand jury information. We are pleased to note that Section 5 of H.R. 94 provides additional provisions with much strengthened penalties—a fine of not more than $20,000 or imprisonment of not more than five years—for disclosure when motivated by monetary gain or by an attempt to affect the actions or decisions of that grand jury or to influence further legal proceedings. We also note the exceptions provided, including the provision that this section would not apply to press representatives acting in a professional capacity.

The ABA thus supports in principle the strengthening of penalties for unauthorized disclosure of grand jury information.

Section 6(a) of H.R. 94 provides that a grand jury may conduct an independent inquiry, and that, while it should generally utilize the attorney for the government, when it finds him or her unable to impartially assist, refusing to assist, or hindering or impeding the grand jury, the grand jury may request that the court appoint a special prosecutor.

The Association in 1975 went on record opposing a provision in H.R. 1277 in the 94th Congress—which would have required the court to appoint such a special attorney upon the request of a grand jury conducting an independent inquiry. The ABA's concern had been founded on the mandatory nature of the grand jury's request to the court to appoint a special prosecutor; and we thus find the present, more discretionary provision in H.R. 94 preferable.

Counsel would be allowed to accompany and advise witnesses appearing before a grand jury under Section 7(a) of H.R. 94. This would add a new § 3330A to Chapter 215 of Title 18. The ABA went on record in 1975 supporting a similar provision in H.R. 1277.

The Association believes that a witness's attorney should be allowed to be present in the grand jury room during the testimony of that witness, in order to advise the witness of his/her rights in connection with the appearance. We feel that this is a key provision in the legislation currently pending before the Congress—and one which will more meaningfully effectuate the Sixth Amendment right to assistance of counsel. Almost nowhere else in the criminal justice system is a person who desires a lawyer denied that right—except before the grand jury.

At present, a witness may receive advise of counsel outside the grand jury room; the witness must frequently be excused to consult with counsel. We believe this not only unnecessarily prolongs the proceeding, but also places the witness in an unfavorable light before the grand jury. It is extremely damaging to the witness continually to get up, go outside, and consult with counsel. It is our understanding that several states have already instituted the practice of allowing counsel in the grand jury room. We do not agree with those critics who claim such a proposal will disrupt the grand jury or prolong its proceedings.

Section 7(a) of H.R. 94 would add a new § 3330B to Title 18, Chapter 214, concerning subpoenas. The present ABA policy only addresses a small portion of the proposals in this section of the bill. With respect to the provision which would delay for one week the appearance of a subpoened witness, the Association has urged that this be amended to provide a 72-hour period—rather than one week, unless special need is shown by the government attorney. The ABA's rationale was that the longer period would unduly prolong grand jury proceedings and reduce the effectiveness of grand jury investigations.

In conclusion, I reiterate that my comments today have been restricted to the previously-approved ABA policy. My Committee on the Grand Jury is continuing its work; we have drafted a series of proposed grand jury standards, now under consideration by the ABA Special Committee on Administration of Criminal Justice. As I mentioned above, we will be presenting our grand jury legislative principles to the ABA House of Delegates in August, and hope thereafter to have the opportunity to appear before you again to set forth a more ABA comprehensive policy.

However, in the event your Subcommittee intends to move grand jury legislation prior to our August meeting, I would appreciate very greatly the opportunity

to present the Criminal Justice Section's recommendations to you, if it appears that the ABA's timetable would deprive us of the chance to set forth a formal ABA position.

The Criminal Justice Section is committed to the concept of grand jury reform. We believe this to be important work, and we applaud Congressman Eilberg and the Subcommittee for your continuing attention to these issues.

I thank you for the opportunity to appear here today for the American Bar Association. I will be happy to answer any questions you may have.

[The following communication was received after the hearings:]

AMERICAN BAR ASSOCIATION,
Washington, D.C., May 5, 1977.

Hon. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship, and International Law, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CONGRESSMAN: When I testified recently on grand jury legislation before your Subcommittee, you asked our ABA Section of Criminal Justice Committee on the Grand Jury to comment on the four House Joint Resolutions you have sponsored—H.J. Res. 59, 60, 61, and 62, proposing an amendment to the U.S. Constitution.

My Section Grand Jury Committee has now had an opportunity to carefully study these proposals. While we believe them to be well conceived, my Committee does not intend at this time to recommend any change in the current ABA policy opposing a Constitutional amendment to eliminate the requirement that a defendant must be proceeded against by way of an indictment. We believe your suggested Constitutional amendment might well, in fact, result in more expeditious and efficient criminal justice administration. We are wary of supporting any move to amend the Bill of Rights and support, instead, legislation (such as H.R. 94) to effect reforms in the present system.

We do support your efforts to focus attention on the need for grand jury reform.

Sincerely,

RICHARD E. GERSTEIN,
Chairperson, Committee on the Grand Jury.

[On May 2, 1977, the ABA Grand Jury Committee made additional recommendations as follows:]

AMERICAN BAR ASSOCIATION,
Washington, D.C., May 2, 1977.

MEMORANDUM

Re Report with recommendations of Grand Jury Committee.
To: Officers, council, liaison, committee chairpersons, and other meeting attendees.
From: B. James George, Acting Chairperson.

Enclosed is a report with recommendations which Grand Jury Committee Chairperson Richard E. Gerstein will present at the forthcoming Council meeting in Los Angeles. Please bring your copy with you to the meeting.

MAY 1977.

REPORT WITH RECOMMENDATIONS OF THE GRAND JURY COMMITTEE TO THE CRIMINAL JUSTICE SECTION COUNCIL

RECOMMENDATION

Be it resolved, That the Section of Criminal Justice approve the following three additional grand jury legislative principles:

The prosecutor shall disclose to the grand jury any evidence which he or she knows will tend to negate guilt or preclude the finding of an indictment.

* * * * * * *

A prosecutor should recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing law.

The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

Be it further resolved, That the Section of Criminal Justice approve revisions in Principle #1 and Principle #18 of the 23 grand jury legislative principles, so that they will read as follows:

1. Expanding on the already-established ABA policy, a witness before the grand jury shall have the right to be accompanied by counsel in his or her appearance before the grand jury. Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in proceedings before the grand jury. The court shall have the power to remove such counsel from the grand jury room for conduct inconsistent with this principle.

* * * * * * *

18. A lawyer should not continue multiple representation of clients in a grand jury proceeding if the exercise of his or her independent professional judgment on behalf of one of the clients will be or is likely to be adversely affected by his or her representation of another client. If the court determines that this principle is violated, it may order separate representation of witnesses, giving appropriate weight to an individual's right to counsel of his or her own choosing.

REPORT

The Section of Criminal Justice Grand Jury Committee urges Council approval for three additional grand jury legislative principles to add to the package of 23 principles approved by the Council in November 1976. The three new principles are almost identical to already-approved Association policy in the ABA Standards for Criminal Justice; and also mirror Standards approved by the National District Attorneys Association (NDAA).

The Committee also asks Council approval for two revised versions of existing principles. Principle #1 has been rewritten to spell out more clearly what role counsel would play in the grand jury room; this had been misunderstood by some persons commenting on our principles. Principle #18 has also been revised and expanded.

The Grand Jury Committee, in considering additional principles, has reviewed to add to those which will be presented to the ABA House of Delegates at the Annual Meeting in August. As members of the Council are probably aware, our report came before the House of Delegates at the February Midyear Meeting in Seattle. Action was deferred until August at the personal request of Attorney General Griffin Bell, who asked for more time to study our proposals.

The Grand Jury Committee, in considering additional principles, has reviewed the National Prosecution Standards recently promulgated by the National District Attorneys Association; the NDAA Standards contain a chapter on the grand jury. The three new principles for which we now ask Council approval are identical to NDAA Standards. Further, two are identical to existing Association policy in the ABA Standards for Criminal Justice Relating to the Prosecution Function; the third is very similar to the ABA Standard. While we are aware that these already constitute ABA-approved policy, we believe their addition will make our grand jury legislative principles more comprehensive and complete.

The first additional principle would require the prosecutor to present the grand jury with an exculpatory evidence of which he or she is aware. The Committee believes that this is a key element in bringing fairness to the grand jury process and is essential to prevent the indictment of innocent persons. The grand jury legislation now pending before the Congress includes such a requirement. ABA Prosecution Function Standard 3.6(b) reads very similarly: "The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt." NDAA Standard 14.2D is identical to our proposal. As the commentary to the ABA Standard states, "Such a procedure tends to insure public confidence in the ultimate decision as to prosecution. The obligation to present evidence which tends to negate the guilt of the accused flows from the basic duty of the prosecutor to seek a just result." The NDAA volume notes that such a standard "provides for a greater accuracy in the indictment determination by providing that the grand jury be allowed to consider—as the trial fact finder would—any facts tending to negate the defendant's guilt."

The second new principle would require the prosecutor to recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing law. This language is identical to that of both the NDAA Standard (14.2E) and the ABA Standard (Prosecution Function 3.6(c)). Pending legislation also contains such a provision. The NDAA Standards commentary notes that this standard "recognizes the prosecutor's right and duty as legal advisor to the grand jury to recommend action to the grand jury. The prosecutor has a great deal more experience than the grand jurors in the strength and likely credibility of the evidence before a trial court. Since it will be his office's duty to prosecute the case, the prosecutor has a direct interest in assuring that resources are not squandered on unwinnable or otherwise cases." Our Grand Jury Committee agrees with this rationale, and believes incorporation of this into our existing principles will insure substantial justice within the grand jury room.

The third new principle which we propose is also taken directly from the NDAA (14.4B) and the ABA Standards (Prosecution Function 3.5(b)). It would prohibit the prosecutor from making statements or arguments to influence the grand jury action in a manner which would not be permitted before the trial jury. As the commentary to the ABA Standards notes, "A prosecutor should not take advantage of his role as the *ex parte* representative of the state before the grand jury to unduly or unfairly influence it in voting upon charges brought before it. In general, he should be guided by the standards governing and defining the proper presentation of the state's case in an adversary trial before a petit jury." The Committee feels that incorporation of this into our package of legislative principles will serve to define more specifically what role the prosecutor should play before the grand jury. Because of the secret nature of grand jury proceedings, the lack of direct court supervision, and the fact that the prosecutor's is a unilateral presentation, the prosecutor must avoid unduly influencing the grand jurors by means which would not be felt appropriate in the public courtroom, before a petit jury.

The three new principles which we urge the Council to approve are needed to better define the role of the prosecutor before the grand jury. Much of the recent furor surrounding the grand jury has centered on the accusation that its original function has been warped and that it now too often serves as a tool of the prosecutor. The Grand Jury Committee believes that by incorporating these into our set of principles we will be stating, in effect, that when the prosecutor does follow basic rules of conduct and procedure—ones which the National District Attorneys Association has endorsed—that grand jury abuse is far less likely to occur. Such professional self-discipline is a needed first step in reform of the grand jury.

The Committee is also asking Council approval for revised versions of two of the principles contained in our Midyear Meeting report.

The first principle has been rewritten to define more specifically and comprehensively what role counsel should play before the grand jury. (The original wording of Principle #1 is as follows: "A grand jury witness shall have the right to be accompanied by counsel in his appearance before the grand jury; the role of such counsel should be the same as that before a Congressional committee.") As spelled out in our rewritten version, counsel's role is very carefully defined so that it is clear that it is strictly limited to one of advising his or client. Counsel is not allowed to address the grand jurors or in any other way take part in the proceedings. Further, a mechanism has been provided (adapted from language in Congressman Eilberg's legislation) to remove counsel who are disruptive or who do not stay within the boundaries of counsel's role, as spelled out in the principle. As the Council is aware, the ABA has previously gone on record in support of counsel in the grand jury (in August 1975). The American Law Institute and other national groups have similarly endorsed this position. Our Committee has conducted further research in this area, as well, and has found that the experience of the nine states which have adopted such a practice has been good. The Committee believes that the more specific definition of counsel's role incorporated into rewritten Principle #1 will help to allay the fears of those who wrongly interpreted our Principle, as first presented, as allowing some sort of "mini-trial."

The second principle which our Committee has redrafted addresses the question of multiple representation of witnesses before a grand jury. Critics of the proposal to allow counsel in the grand jury room have focused much of their objection on problems which could occur when one attorney represents more than one

witness in a grand jury proceeding. Our Committee has therefore redrafted and strengthened Principle #18 to spell out the responsibilities of an attorney not to continue multiple representation of clients in a grand jury proceeding if conflicts can arise. As originally worded, our Principle #18 provided that, "If the court determines that there is multiple representation of witnesses in a grand jury proceeding, it shall advise the witnesses that they have the right to be separately represented by counsel, and explain that conflicts of interest may otherwise arise." Under the proposed redraft of Principle #18, the burden is initially placed on the attorney to assume responsibility for remedying situations when conflicts from multiple representation arise or could arise. If the court finds that this principle is not being followed, however, it would have the authority under our principle to order separate representation. We have included a phrase, "giving appropriate weight to an individual's right to counsel of his or her own choosing," to avoid a situation in which the court summarily excludes certain counsel from representing any witness in the proceeding.

* * * * * * *

At its recent meeting the Grand Jury Committee also reviewed proposed commentaries to the Standards on the Grand Jury which we drafted last year. These proposed commentaries were prepared by the American Bar Foundation, with whom our Committee is working closely. They will be referred to General Kenneth J. Hodson's Special Committee on the Administration of Criminal Justice, to whom our Standards were referred last year by the Criminal Justice Section Council.

Our Committee also continues to monitor the status of grand jury legislation before the Congress. On March 17, I testified on behalf of the American Bar Association before Congressman Eilberg's House Judiciary Subcommittee. We will continue to follow closely Congressional progress in this area.

Respectfully submitted,

RICHARD E. GERSTEIN,
Chairman, Grand Jury Committee,
ABA Criminal Justice Section.

[In June of 1977, the Criminal Justice Section approved recommendations to the American Bar Association House of Delegates as follows:]

The attached presently represents only the policy of the ABA section of Criminal Justice, and not the position of the American Bar Association. This report will be presented to the ABA House of Delegates in August 1977.

AMERICAN BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES SECTION OF CRIMINAL JUSTICE

RECOMMENDATION

The Section of Criminal Justice recommends adoption of the following resolution:

Be it resolved, That the American Bar Association support in principle grand jury reform legislation which adheres to the following principles:

1. Expanding on the already established ABA policy, a witness before the grand jury shall have the right to be accompanied by counsel in his or her appearance before the grand jury. Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in proceedings before the grand jury. The court shall have the power to remove such counsel from the grand jury room for conduct inconsistent with this principle.

2. No prosecutor shall knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt.

3. A prosecutor should recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing law.

4. A target of grand jury investigation shall be given the right to testify before the grand jury, provided he/she signs a waiver of immunity. Prosecutors shall notify such targets of their opportunity to testify unless notification may result

in flight or endanger other persons or obstruct justice; or the prosecutor is unable with reasonable diligence to notify such persons.

5. The prosecutor shall not present to the grand jury evidence which he or she knows to be constitutionally inadmissible at trial.

6. The grand jury shall not name a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. Nothing herein shall prevent supplying such names in a bill of particulars.

7. A grand jury should not issue any report which singles out persons to impugn their motives, hold them up to scorn or criticism or speaks of their qualifications or moral fitness to hold an office or position. No grand jury report shall be accepted for filing and publication until the presiding judge submits *in camera* a copy thereof to all persons named or identifiable and such persons are given the opportunity to move to expunge any objectionable portion of said report and have a final judicial determination prior to the report's being published or made public. Such motion to expunge shall be made within ten days of receipt of notice of such report. Hearings on such motions shall be held *in camera*.

8. The grand jury should not be used by the prosecutor in order to obtain tangible, documentary or testimonial evidence to assist the prosecutor in preparation for trial of a defendant who has already been charged by indictment or information. However, the grand jury should not be restricted in investigating other potential offenses of the same or other defendants.

9. The grand jury should not be used by the prosecutor for the purpose of aiding or assisting in any administrative inquiry.

10. Witnesses who have been summoned to appear before a grand jury to testify or to produce tangible or documentary evidence should not be subjected to unreasonable delay before appearing or unnecessarily repeated appearances or harassment.

11. It shall not be necessary for the prosecutor to obtain approval of the grand jury for a grand jury subpoena.

12. A grand jury subpoena should indicate the staute or general subject area that is the concern of the grand jury inquiry. The return of an indictment in a subject area not disclosed by the grand jury subpoena shall not be a basis for dismissal.

13. In any case in which a subpoenaed witness moves on proper grounds to quash a grand jury subpoena, the prosecutor should be required to make a reasonably showing *in camera* (which may be *ex parte* at the court's discretion) and on the record before the court convening the grand jury that the evidence being sought is:

(*a*) likely to be relevant to the grand jury investigation.

(*b*) not sought primarily for an improper purpose.

14. A subpoena should be returnable only when the grand jury is sitting.

15. When the circumstances place a hardship on the witness, motions to quash or modify subpoenas may be brought at the place where the witness resides, the documents sought are maintained, or before the court which issued the subpoena at the election of the witness. Such motions should be heard *in camera* and on the record.

16. All matters before a grand jury, including the charge by the impaneling judge, if any; any comments or charges by any jurist to the grand jury at any time; any and all comments to the grand jury by the prosecutor; and the questioning of and testimony by any witness, shall be recorded either stenographically or electronically. However, the deliberations of the grand jury shall not be recorded.

17. The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

18. Expanding on the already-established ABA position favoring transactional immunity, immunity should be granted only when the testimony sought is in the public interest; there is no other reasonable way to elicit such testimony; and the witness has refused to testify or indicated an intent to invoke the privilege against self-incrimination.

19. Immunity shall be granted on prosecution motion *in camera* by the trial court which convened the grand jury, under standards expressed in Principle No. 18.

20. The granting of immunity in grand jury proceedings should not be a matter of public record prior to the issuance of an indictment or testimony in any cause.

21. A lawyer or lawyers who are associated in practice should not continue multiple representation of clients in a grand jury proceeding if the exercise of the lawyer's independent professional judgment on behalf of one of the clients will be or is likely to be adversely affected by his or her representation of another client. If the court determines that this principle is violated, it may order separate representation of witnesses, giving appropriate weight to an individual's right to counsel of his or her own choosing.

22. The confidential nature of the grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny.

23. It is the duty of the court which impanels a grand jury fully to charge the jurors by means of a written charge completely explaining their duties and limitations.

24. All stages of the grand jury proceedings should be conducted with proper consideration for the preservation of press freedom, attorney-client relationships, and comparable values.

25. The period of confinement for a witness who refuses to testify before a grand jury is found in contempt should not exceed 6 months.

26. The court shall impose appropriate sanctions whenever any of the foregoing principles have been violated.

REPORT

Background

The Section of Criminal Justice urges House of Delegates approval for 26 legislative Principles to which it believes grand jury reform legislation should adhere. The Section has spent more than three years studying the grand jury. In August 1975—at Section urging—the House of Delegates approved a policy addressing one grand jury bill (H.R. 1277) in the 94th Congress. That policy is a limited one, but includes Association support for such key elements of grand jury reform as allowing counsel in the grand jury room, transactional immunity, and strengthened penalties for unauthorized disclosure of grand jury information. Since 1975, the Section's Grand Jury Committee has analyzed a number of pending bills, including H.R. 2986 and S. 3274 (94th Congress), both with a broader focus than H.R. 1277, on which the current ABA policy was formulated. New legislation, including H.R. 94, H.R. 3736, and S. 1449, has been introduced in the 95th Congress; hearings are already being held on these proposals.

Based on its continued study of this issue since 1975, the Criminal Justice Section now asks House of Delegates adoption of Association policy addressing a broader range of grand jury issues. This is timely not only because of the increasing public, press and professional attention being focused on this issue, but also because action is anticipated in the 95th Congress on the pending legislation. Further, a number of states are now considering—and some have already enacted into law—similar bills.

In February, 1977, the Section asked the House of Delegates to approve a package of 23 legislative principles. At the personal request of Attorney General Bell, the Section asked the House to defer action until the August Annual Meeting. Since February the Section has revised several Principles to clarify intent; has added 3 new Principles concerning prosecutorial conduct; and has met with Honorable Benjamin Civiletti, Assistant Attorney General in charge of the Criminal Division, U.S. Department of Justice, and other Department representatives to discuss the Principles. Mr. Civiletti has expressed support for some 15 of the Principles, and noted that the Department would take no position on an additional five. On several additional Principles, Mr. Civiletti said that some rephrasing might moot Department objections. In an attempt to reach compromise in as many areas as possible, the Section's Grand Jury Committee held a special meetin gin early June, made additional amendments to a number of the Principles, and gained Council approval for these changes via a special mail ballot.

It should be noted that the proposed Principles were drafted by a Committee composed almost entirely of present and former prosecutors. It is chaired by Richard E. Gerstein, State Attorney for the greater Miami area for more than 20 years, and former President of the National District Attorneys Association. The Committee also included members with state and federal prosecutorial experience (including the last Watergate Special Prosecutor, Charles Ruff), judges, law professors and members of the defense bar. The Principles further represent a consensus of the Criminal Justice Section Council, which includes a similar mix of persons from all parts of the criminal justice system. Most of the Principles were approved by the Council unanimously.

In recent years, the grand jury as an institution has come under increasing criticism for a number of reasons and from a number of sources. It has been accused of an absence of procedural safeguards. Reflecting these and other concerns, England—where the grand jury originated—abolished the institution in 1933; the majority of states in our country allow prosecution either by indictment or by information. However, it remains a part of the federal system and in many state systems because of constitutional provisions. The ABA House of Delegates in 1975 went on record opposing amendment of the United States Constitution to eliminate the requirement for indictment by a grand jury. That position of the ABA should not be changed, but a comprehensive effort is needed to correct existing abuses. The Section believes that its proposed legislative Principles will go a long way toward remedying the ills of the grand jury as an institution.

PRINCIPLES

Following are comments on each of the 26 proposed Principles:

1. The American Bar Association has already gone on record (in August, 1975) supporting the right of a witness to have counsel present in the grand jury room. Principle #1 represents a reaffirmation of that position. Since this report was first presented to the House of Delegates in February, the Section has rewritten Principle #1 to spell out more specifically what role counsel should play in the grand jury room. That role is now carefully defined in the Principle to make it clear that it is strictly limited to advising the witness. This limited role will preclude the grand jury's becoming a "mini-trial"—as some have feared—and will not impair expeditious investigations. Under the proposed Principle, counsel is not allowed to address the grand jurors or in any other way take part in the proceedings. Further, the Section had added a provision to allow removal of counsel who are disruptive or do not otherwise stay within the prescribed boundaries laid down by the Principle. Clarification of the attorney's limited role, coupled with the mechanism for removing disruptive counsel, should meet the objections raised by those who have feared creation of a "mini-trial."

Almost nowhere else in the criminal justice process—except before the grand jury—is a person who desires a lawyer denied that right. Requiring a witness who needs advice of counsel to consult his attorney outside the grand jury room door is awkward and prejudicial. It unnecessarily prolongs the grand jury proceeding and places the witness in an unfavorable light before the grand jurors. The American Law Institute has called it a "degrading and irrational" procedure. It is extremely damaging to the witness to continually get up, go outside, and consult with counsel. A recent Seventh Circuit decision (*U.S. v. Kopel*, 552 F.2d 1265 (1977)) points to additional problems with the procedure of consulting outside the grand jury room. In that case, the Seventh Circuit said the U.S. Attorney, who had granted the witness permission to leave the grand jury room, was free at trial to bring up this fact as relevant to the perjury charges against the defendant. Dissenting, Judge Swygert decried the fact that the government was "permitted to 'sandbag' him [the defendant] by using the fact that he consulted his attorney against him." Nor is the right to leave the grand jury room to consult counsel absolute. (See *In re Tierney*, 465 F.2d 806 (5th Cir. 1972), in which the court said a limit could be placed on how frequently the witness could leave the room to consult his lawyer.)

The prestigious American Law Institute, in its Model Code of Pre-Arraignment Procedure adopted in 1975, supports counsel in the grand jury room. "While this is a break with tradition and prevailing practice," the ALI notes, "it is consistent with the provisions of some recent state procedure codes . . . it seems *unfair and inefficient* to require a witness to leave the grand jury room each time he wishes to consult with counsel." [at 237; emphasis added] The ALI commentary goes on to state that "exclusion of counsel . . . is closely related to the traditional view that proceedings should be secret, and concern lest the presence of counsel hamper the freedom of the grand jury and the prosecutor in their investigation . . . The difficulty with this view . . . is that complex and important legal issues face a witness before a grand jury. An appearance before that body may subject an individual to the grave danger of self-incrimination or imprisonment for contempt . . . The witness may also inadvertently lose his right to claim the privilege by operation of the doctrine of waiver . . . And the inherent pressure and accompanying nervousness of a grand jury appearance upon an individual may make it very difficult for him to remember his attorney's instructions . . . For effective implementation of this right, an attorney should be present to follow the flow of the interrogation." [at 601]

Some nine states now have statutes allowing counsel to be present in the grand jury room—Arizona (for target witnesses), Illinois (for target witnesses), Kansas, Michigan (one-man grand juries), Oklahoma, South Dakota, Minnesota, Virginia and Washington State. The Section has contacted practicing attorneys and prosecutors in these states; none has reported problems. In fact, some prosecutors who said they initially fought the procedure now support it as a means of insuring fairness in the system. Congressman Joshua Eilberg (D–PA), writing in a recent issue of *Judicature* (Vol. 60, No. 8), similarly reported that those states which have implemented the practice have not reported any serious problems. Further, a number of additional states are now considering such legislation—including Colorado (where it has passed both houses of the legislature), New York, Massachusetts, and California (where it has the support of the state's Attorney General).

Several arguments are raised by opponents. First, it is argued that allowing counsel in the grand jury room will be a breach of the secrecy rule. In fact, grand jury secrecy is not served by keeping the lawyer outside the grand jury room, since the witness is free to tell his attorney anything that occurred inside (Federal Rule of Criminal Procedure 6(e)). Secondly, it is argued that the presence of the witness' lawyer will restrict free testimony in cases of organized crime, corporate and political corruption investigations. The Section notes that the states which allow counsel in the grand jury room have retained the grand jury in most instances as an investigatory body for precisely these kinds of investigations, and have no record of negative results. Further, there are alternate ways of securing a cooperative witness' statement, and this evidence can be summarized for the grand jury in the form of hearsay, *Costello* v. *United States*, 350 U.S. 359 (1956). When a witness is called to testify before a grand jury, the witness' attorney, sitting outside the grand jury room, can easily conclude from the time spent with the jury whether the witness takes the Fifth Amendment or testifies in full. Experienced prosecutors, further, have noted that very few witnesses indicate a desire to cooperate without the knowledge of their counsel; if the witness' testimony is helpful to the government, that fact will become evident to the attorney fairly quickly.

Recognizing that problems arising from multiple representation of witnesses could be exacerbated by allowing counsel in the grand jury room, the Section has strengthened Principle #21, which addresses that subject.

The presence of the attorney will not only reduce unfair speculation about the prosecutor's conduct, but will also serve to inhibit the prosecutor from possible improper conduct. Analogous to having counsel present to witness a line-up, the presence of the attorney in the grand jury room will help to insure the fairness of the proceedings. Watergate Special Prosecutor Charles Ruff—in supporting this proposal in recent Congressional testimony—declared that ". . . the mere possibility of occasional disruption simply cannot overcome the right of the individual witness to consult his attorney without going through the mildly absurd process of leaving the grand jury room every time. Indeed, most prosecutors would admit, I think, that they count on the burden of leaving the room to dissuade the witness from asserting his right to counsel." (Testimony before House Judiciary Subcommittee, April 27, 1977, at 3.)

The American Bar Association has traditionally been a leader in asserting the right to assistance of counsel in the criminal justice process. As the ABA Standards on Providing Defense Services (§ 1.1) declare, "The objective of the bar should be to ensure the provision of competent counsel to all persons who need representation in criminal proceedings . . ." Enactment of Principle #1 will more meaningfully effectuate the Sixth Amendment right to assistance of counsel; but the limitations on the role of counsel will forestall the grand jury's being turned into an adversary proceeding.

2. Principle #2 states that the prosecutor shall not knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt. The Section believes this to be a key element in bringing fairness to the grand jury process, and essential to prevent indictment of innocent persons. The Association has already gone on record in the ABA Standards for Criminal Justice Relating to the Prosecution Function (§ 3.6(b)) supporting this, declaring that, "The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt." The National District Attorneys Association (NDAA) Prosecution Standard 14.2D is also similar to Principle #2. As the commentary to the ABA Standard states, "Such a procedure tends to insure public confidence in the ultimate decision as to prosecution. The obligation to present evidence which tends to negate the guilt of the accused flows from the basic duty of the

prosecutor to seek a just result." The NDAA Standards note that such a standard "provides for a greater accuracy in the indictment determination by providing that the grand jury be allowed to consider—as the trial fact finder would—any facts tending to negate the defendent's guilt." Indictments have been overturned on the grounds of due process when a court has ascertained that the prosecutor *knowingly* used perjured evidence or failed to present evidence that squarely negated guilt. *U.S.* v. *Basurto*, 497 F. 2d 781 (9th Cir., 1974); *Johnson* v. *Superior Court of California*, 15 Cal. 3d 248, 124 Cal. Rptr. 32, 539 P. 2d 792 (1975). This is a new Principle, added by the Section since the Principles were presented to the House of Delegates in February. At the suggestion of U.S. Department of Justice representatives, who questioned the mechanics of the Principle as first drafted, the Section has written it so as to clarify its coverage and intent, since this is a legislative Principle, and not simply a more general standard for prosecutorial conduct.

3. The third Principle is also a new one, added since the report was presented to the House of Delegates in February. This would require the prosecutor to recommend that the grand jury not indict if he believes the evidence presented does not warrant an indictment under governing law. This language is identical to that of both ABA Standards on the Prosecution Function 3.6(c) and the National District Attorney's Association Standard (14.2E). The NDAA Standards commentary notes that this standard "recognizes the prosecutor's right and duty as legal advisor to the grand jury to recommend action to the grand jury. The prosecutor has a great deal more experience than the grand jurors in the strength and likely credibility of the evidence before a trial court. Since it will be his office's duty to prosecute the case, the prosecutor has a direct interest in assuring that resources are not squandered on unwinnable or otherwise improper cases." The Section agrees with this rationale. Adoption of the Principle will help to insure substantial justice within the grand jury room. The U.S. Department of Justice had indicated support for this Principle, which is, as noted above, already ABA policy.

4. Principle #4 would require that the target of a grand jury investigation be given the right to testify and present his side of the facts before an indictment is returned—provided such person signs a waiver of immunity. Under this proposal, the prosecutor would be required to take all reasonable steps to notify such prospective defendants—but recognizes that in some instances the prosecutor will truly be unable to locate such persons; or that, under some circumstances, notification may result in the person's fleeing, or his endangering witnesses or other persons, or obstructing justice. In such instances, notification would not be required. The Section has made two changes in this Principle since its initial presentation in February: First, at the suggestion of the Justice Department, the term "subject" was replaced by "target." The Department suggested this as more appropriate wording, since "target" is the term generally used in federal law enforcement. Secondly, Justice Department representatives suggested addition of the phrase "or obstruct justice" as an additional condition under which the prosecutor need not notify a target. (The Section also made this amendment, believing it to be inherent in the original Principle. Principle #4 is intended to insure that fair and just opportunity is given individuals to testify in their own behalf prior to being indicted. Such groups as the Association of the Bar of the City of New York have supported such a right. This is an essential ingredient, the Section believes, in a fairly functioning grand jury—and criminal justice—system. Without it, the grand jury's essential function of arriving at an accurate indictment is undermined.

5. The Fifth Principle has been rewritten since presentation of the report in February. As originally phrased, it stated the grand jury "shall not consider unconstitutionally obtained evidence." In the light of concerns raised by the Justice Department, the Section has rewritten Principle #5 to put the affirmative burden on the prosecutor not to present evidence which he knows to be constitutionally inadmissible at trial. It thus makes the burden more specific. The Section believes that the integrity of the grand jury will best be served by prohibiting presentation of unconstitutionally-obtained evidence by the prosecutor. Already-approved Association policy in the ABA Standards on the Prosecution Function (§ 3:6(a)) declares that "a prosecutor should present to the grand jury only evidence which he believes would be admissible at trial." Notwithstanding the U.S. Supreme Court's decision in *U.S.* v. *Calandra*, 414 U.S. 338 (1974), the Section believes that this Principle is needed to insure the integrity of the grand jury process; indeed, the Court in *Calandra* noted that "for the most part, a

prosecutor would be unlikely to request an indictment where a conviction could not be obtained" because of use of illegally-seized evidence. The Principle is thus not totally inconsistent with the thrust of *Calandra*.

6. Principle #6 would prohibit naming a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. The Section believes that naming of persons as unindicted co-conspirators visits opprobrium upon them—by charging the named persons with the commission of a crime but denying them a forum in which to seek acquittal or vindication. This stains the reputation of the person without providing any means for the person to show his innocence. This is an instance in which reforms are needed to insure the fair functioning of the grand jury. The United States Court of Appeals for the Fifth Circuit has already held in accordance with this principle in *U.S.* v. *Briggs*, 514 F.2d 794 (1975). The Section has added a second sentence to the Principle since its original presentation. This states that supplying such names in a bill of particulars would not be prohibited. This would permit the prosecutor to respond to a request by the defense to reveal the names of co-conspirators who were not indicted. The Section felt the addition of this sentence is needed to spell this out to avoid potential confusion in interpretation of this Principle.

7. The issuance and publication of grand jury reports which single out persons for scorn or criticism, impugn their motives, or denigrate their moral fitness to hold office have the effect of charging such persons with misconduct or unfitness—without affording them any forum in which to refute the charges or to seek vindication. The proper purpose of grand jury reports is to inform the public of situations requiring administrative, judicial or legislative corrective action—not the castigation of individuals when the fact-finding forum insured by the finding of an indictment is absent. The Section is not proposing that such grand jury reports be prosribed from commenting on the job that an office holder is performing; but such reports should not condemn character alone. Grand jury reports which do single out persons in the manner described tend to undercut the fairness of the grand jury. Such misuse of the grand jury can, in fact, affect the political process. Judicial scrutiny of the report is essential to prevent spurious attacks on indviduals when no forum of trial is available. The states that have recently considered this issue have reinforced control over the reporting process. *People* v. *Superior Court of Santa Barbara County*, 531 P. 2d 761 (Cal. 1975); Del. Rules, R. 6 (1975); Fla. STAT. ANN. § 905.28 (1975). The procedures proposed in Principle # 7 will assist in insuring that such abuses do not occur. See *U.S.* v. *Briggs*, 514 F.2d 794 (1975) and Report of Grand Jury Proceedings, U.S. Court of Appeals for the Fifth Circuit, 479 F.2d 458 (1973). The National District Attorneys Association Prosecution Standards commentary (discussing an NDAA proposed standard on this subject, modeled on recent New York legislation) notes that, ". . . an unfavorable report may stand as a severe form of extra-judicial punishment, from which there is no appeal . . . the quasi-judicial nature of the grand jury gives it an apparent reliability which may not be justified . . . grand jurors are accountable to one one . . . grand jurors may impose a personal standard of morality on persons, rather than an abstract and neutral conception of right and wrong."

8. The Section opposes the practice of a prosecutor's using the grand jury to obtain tangible, documentary or testimonial evidence to assist in his preparation for trial of a defendant already charged by indictment or information. This is an abuse of the grand jury, and transforms it into a mere tool and arm of the prosecutor's office—a role which is contrary to the grand jury's historical purpose and function. The Department of Justice supports this Principle; in a Department Office of Policy and Planning statement filed in 1976 with the House Judiciary Subcommittee examining grand jury legislation, the Department states that, "It is well-established under federal case law that a grand jury should act only with a view toward returning an indictment or to satisfy itself that no crime has occurred . . . It would be an abuse of legal process for a government attorney to use a grand jury to discover or build up evidence for trial of an existing indictment. Courts would discipline attorneys who did so and the Department would not countenance such action by its representatives" This principle is in accord with well-settled case law *United States* v. *Dardi*, 330 F.2d 316 (2d Cir. 1964); *United States* v. *Doss*, 545 F.2d 548 (6th Cir. 1976). In the *Doss* decision, the Court declared that, "We find no constitutional, statutory or case authority for employment of the grand jury as a discovery instrument to help the government prepare evidence to convict an already-indicted defendant. Such a

use of the grand jury would pervert its constitutional and historical function . . ." The Court called it "a possible revival of a version of the Star Chamber of 18th Century England . . ."

9. The Section strongly opposes prosecutorial use of the grand jury to assist in administrative investigations—e.g., Internal Revenue income tax investigations. Such improper utilization of the grand jury warps its true function and leads to abuses such as those described in # 8, *supra*. The ABA House of Delegates in February, 1977—in addressing a proposed amendment to Federal Rule of Criminal Procedure 6(e)—expressed concern regarding dissemination of grand jury information to government experts for use in unrelated civil proceedings. The Section report accompanying the House-approved resolution declared that disclosure of grand jury information to a broad group of governmental personnel might be used as "subterfuge by some agencies to obtain information through the grand jury process which was not legitimately required for the purposes of the pending grand jury investigation . . . The dissemination of information to serve particularized departmental or agency needs would not be a legitimate one." (House of Delegates Report book, 2/77 Midyear Meeting, at 138-9). A U.S. Department of Justice paper submitted to the House Congressional hearings echoes this concern: "[o]ne of the primary abuses of the grand jury which must be avoided . . . is the attempted use of its broad investigative powers by government agencies in pursuit of investigations that are solely their own rather than the grand jury's." (U.S. Department of Justice Office of Policy and Planning, Memorandum on the Grand Jury, p. 106; printed in record of House Judiciary Subcommittee Hearings.) In the case of *United States* v. *Doe*, 72 Crim. Misc. 1 (S.D.N.Y. 1972), the court in denying a government motion to examine special grand jury minutes to determine violations of Titles 18 and 28 *and* "to determine civil tax liability," declared that, "The grand jury's role is properly confined . . . when it is held empowered to conduct investigations that are in their inception exclusively criminal." It should be noted that the Attorney General's Advisory Committee of U.S. Attorneys has expressed its support for this proposed Principle.

10. Principle # 10 provides that witnesses summoned before grand juries should not be subjected to unreasonable delays or unnecessarily repeated appearances or harassment. The Section supports legislation which would forbid such practices. In some instances, these abuses have occurred and grand jury witnesses have been repeatedly called to appear; or have been subjected to unreasonable delays or other forms of harassment. An indifference to the convenience of a grand jury witness is as objectionable as the use of a grand jury subpoena to harass a witness, and is a subtle means of intimidating the witness before his appearance. The ABA Standards for the Prosecution Function (§ 5.7(a)) recognize the prosecutor's obligation to handle witnesses "fairly, objectively and . . . without seeking to intimidate or humiliate the witness . . ." The U.S. Department of Justice supports this Principle, as does the Advisory Committee of U.S. Attorneys.

11. Several of the grand jury reform bills before the 95th Congress (e.g., H.R. 3736) would require grand jury approval of any subpoenas issued. The Section opposes such a procedure. It believes this requirement would not only be cumbersome, but would cause unnecessary delay. The prosecutor, the Section believes, is much better suited to make determinations regarding issuance of subpoenas than are lay grand jurors. The Section thus does not support these provisions in pending legislation. The Advisory Committee of U.S. Attorneys supports this Principle.

12. Principle #12 would require that a grand jury subpoena indicate the statute or general subject that is the focus of the grand jury inquiry. This requirement is intended to enable the recipient and the court to determine more accurately questions of relevancy. It would also enable the witness to prepare himself more adequately for his appearance, and would insure more effective and efficient use of counsel, court and grand jury time. The Principle does not intend that a detailed description of the statutory and subject areas be required; but that a broad statutory citation or general description of the subject be included. Justice Department representatives have expressed support for this Principle; but indicated concern that, as initially written, the Principle would leave open the question of later challenges to the indictment based on the fact that the defendant was charged under statutes not named in the subpoena. To meet this concern and clarify the Principle's original intent, the Section has added the second sentence; this makes it clear that the indictment cannot be vitiated if the

person is indicted under a statute or in a subject area not mentioned in the subpoena. The Advisory Committee of U.S. Attorneys supports this Principle.

13. Principle #13 is designed to prevent improper use of grand jury process. The Section has revised this proposal since its initial presentation in February. As now written, it provides (that a prosecutor must show—in response to a motion to quash a subpoena—that the evidence subpoenaed is likely to be relevant to the grand jury investigation and is not sought primarily for an improper purpose.) The Section's proposal represents a narrowed verision of the requirements set out by the *Schofield* court. In *In Re Grand Jury Proceedings* (*Schofield I*), 486 F.2d 85 (1973), the Third Circuit held that the government was required, before the subpoenas would be enforced, to make a preliminary showing that the subpoenaed records were relevant to an ongoing investigation, properly within the grand jury's jurisdiction, and were not sought primarily for another purpose. Expanding on its rationale in a later case, *In Re Grand Jury Proceedings* (*Schofield II*), 507 F.2d 963 (1975), the Third Circuit argued that this procedure "is designed to prevent abuse of the grand jury process by requiring a minimum disclosure of the grand jury's purpose in every case." The U.S. Attorney General's Advisory Committee of U.S. Attorneys objected to our Principle's initial wording, which granted not only the subpoenaed witness but also "a person directly affected thereby" standing to move to quash a subpoena. Responding to this concern, the Section has amended #13 to delete that phrase, finding merit in the Advisory Committee's view that granting standing to third parties could cause unreasonable delays. Additional changes have been made in response to Justice Department suggestions. As originally phrased, the Principle would have required the prosecutor to make a reasonable showing that the evidence sought was relevant to the grand jury investigation; properly with the grand jury's investigation; and not sought primarily for another purpose. The Section has amended and narrowed these requirements. The Section does not believe that these changes violate the Principle's original intent, however. Further, the proposal has been amended to provide that the court, at its discretion, can allow the prosecutor to make the showing *ex parte*, thus not forcing him to disclose his investigative strategy to the defense.

14. A grand jury subpoena should not be returnable except when the grand jury is sitting. This proposal is intended to avoid potential abuse of the subpoena power by the prosecutor's office. It will help to insure the integrity of the grand jury function. Both the Justice Department and the Attorney General's Advisory Committee of U.S. Attorneys support this Principle.

15. Principle #15 would allow a witness to bring a motion to quash or modify subpoenas at the place where the witness resides, the documents are kept, or before the issuing court when the circumstances place a hardship on the witness. As originally worded, this Principle would have allowed this procedure "when the circumstances make it reasonable." This language was amended in response to U.S. Department of Justice concerns that it would be expensive and burdensome on Government attorneys, in cases in which a large number of witnesses are subpoenaed, to be forced to travel all around the country to answer motions to quash subpoenas. The amendment lessens the burden on the prosecution by spelling out that this Principle would only apply when there is real hardship on the witness to bring such a motion in the district in which the grand jury is sitting. As rewritten, the Section does not believe this places too heavy a burden on the prosecution; it will help to work minimal hardships on witnesses. Such legislation is needed, however, since under existing law, motions to quash subpoenas must be heard by the court under whose authority they were issued; this has involved considerable inconvenience for some witnesses.

16. Principle #16 would mandate stenographic or electronic recording of all matters before the grand jury—except the deliberations of the grand jury itself. This would represent a logical step forward in grand jury reform, and is not inconsistent with the necessity of maintaining grand jury secrecy. The judge's charge to the grand jury would be recorded, as would the prosecutor's introductory remarks and testimony and questioning of all witnesses. Some 31 states already require recording of all grand jury proceedings other than votes and deliberations, and an additional 6 states permit it, according to a Library of Congress study (printed in 1976 Hearings record, House Judiciary Subcommittee on Immigration, Citizenship and International Law, p. 714. Several federal district courts already record all grand jury proceedings—including the District of Rhode Island, the Eastern District of Washington, and the Northern District

of Illinois. The Ninth Circuit has ruled that a prospective defendant who makes a timely request cannot be arbitrarily denied a recordation of grand jury proceedings. *United States* v. *Thoreson*, 428 F.2d 654 (1970); *United States* v. *Price*, 474 F.2d 1223 (1973).

Major groups have supported this requirement. The American Law Institute, in its Model Code of Pre-Arraignment Procedure, urges that a record be made of all proceedings before the grand jury. The ABA Standards for Criminal Justice on the Prosecution Function (§ 3.5(c))—already ABA policy—provide that, "The prosecutor's communications and presentations to the grand jury should be on the record." The accompanying commentary points out that "since grand jury proceedings are generally secret and *ex parte*, it is particularly desirable that a record be made of the prosecutor's communications and representations to the jury." The recently-issued Prosecution Standards of the National District Attorneys Association (§ 14.2(F)) also urge that "all testimony before the grand jury should be recorded." Recording will aid the prosecution—by insuring that perjured testimony does not go unpunished. Recording would also act as a restraint on the prosecutor not to exercise undue or improper influence on the grand jury.

The Justice Department supports this Principle to the extent that it would require recordation of the judge's charge and the questioning and testimony of witnesses, but opposes recording the prosecutor's comments to the jury. The U.S. Attorney's Advisory Committee argues that this would "formalize what should be an informal working relationship between grand jurors and government attorneys." (From position paper submitted to Section Council, May 14, 1977, p. 7.) It is exactly that "informal" relationship which invites subtle abuses of the grand jury, the Section believes; that is itself a cogent argument in favor of recordation. The Advisory Committee further argues that a recordation requirement would "impose severe and undue administrative burdens" (p. 7 of position paper, *supra*); and the Justice Department points to "unavailability of court reporters in many areas" (p. 103 of House Judiciary Subcommittee hearings record, *supra*). There are real benefits to be gained by recording matters before the grand jury—for the prosecution, as well as for the defense. Raising administrative hurdles is *not* sufficient argument against this proposal, which truly goes to the integrity of the grand jury process.

17. This Principle—which has been added since February—is identical to National District Attorneys Association Prosecution Standard (§ 14.4B) and the ABA Standards for Criminal Justice Relating to the Prosecution Function (§ 3.5(b)). It thus already is Association policy. It would prohibit the prosecutor from making statements or arguments to influence the grand jury action in a manner which would not be permitted before the trial jury. This is essential because of the prosecutor's role as the only legally-trained person before the lay grand jurors. As the commentary to the ABA Standards notes, "A prosecutor should not take advantage of his role as the *ex parte* representative of the state before the grand jury to unduly or unfairly influence it in voting upon charges brought before it. In general, he should be guided by the standards governing and defining the proper presentation of the state's case in an adversary trial before a petit jury." Because of the secret nature of the grand jury proceedings, the lack of direct court supervision, and the fact that the prosecutor's is a unilateral presentation, he must avoid unduly influencing the grand jurors by means which would not be appropriate in the public courtroom before a petit jury. This is essential to prevent the grand jury's becoming a mere echo of the prosecution. As one writer has noted, "[G]rand jurors must place enormous trust in the prosecutor's guidance. It is he, after all, who tells them what the charge is, who selects the facts for them to hear, who shapes the tone and feel of the entire case . . ." [emphasis added] (Antell, "The Modern Grand Jury; Benighted Super-government," 51 A.B.A.J. 153, 154 (1965). The Justice Department has expressed its support for this Principle.

18. Principle #18 calls on the ABA to broaden its previously-adopted policy concerning immunity to specify proper instances in which immunity should be issued: when it is in the public interest; when there is no other reasonable way to elicit the testimony; and when the witness has refused to testify, or stated he will invoke the Fifth Amendment. This is intended to insure that grants of immunity are carefully considered prior to issuance and that they are not issued when other means could be used to obtain the needed information. The ABA House of Delegates (at the 1975 Annual Meeting) has already supported amendment of 18 U.S.C. 6002 to provide "transactional" immunity, rather than "use"

immunity provided under present federal law. Under transactional immunity, a witness may be statutorily compelled to give testimony which might otherwise violate the privilege concerning self-incrimination, provided the witness is given immunity from prosecution for any crime referred to in the testimony. Under 18 U.S.C. 1525(b), Part V of the Organized Crime Control Act of 1970, and under *Kastigar* v. *U.S.* 406 U.S. 441 (1972), only "use" immunity need be afforded. This merely prevents the prosecution from using actual testimony (or leads derived therefrom) in any subsequent criminal prosecution. Some 31 states currently provide transactional immunity, according to the House Judiciary Subcommittee Hearings record (*supra*). The National Conference of Commissioners on Uniform State Laws has supported it, in the Uniform Rules of Criminal Procedure (Rule 732(b)). "Use" immunity, while Constitutional (see *Kastigar*, *supra*), should be rejected for several practical reasons. It is not only susceptible of prosecutorial abuse, but can be a subtle invitation to perjury on the part of the witness. Since the witness knows what he says can be used to impeach him, it can be an encouragement to slant his testimony in a manner most favorable to him. Testimony thus obtained is not accurate. Witness cooperation is essential to an effective grand jury investigation, yet the uncertainty generated by "use" immunity, and the difficulties in determining the scope of the protection afforded the witness, can chill and inhibit his cooperation. Transactional immunity better encourages accurate testimony and minimizes witness resistance to questioning. The small number of actual successful prosecutions of immunized witnesses with "use" immunity indicates that a return to transactional immunity will not remove a significant weapon against organized crime (see, 14 American Criminal Law Review 275, 282, wherein U.S. Department of Justice reports that, in practice, few witnesses granted "use" immunity are subsequently prosecuted from crimes described in their immunized testimony). "Use" immunity represents the most grudging interpretation of the Constitutional right against self-incrimination, the Section believes.

19. Several of the grand jury bills pending before the 94th Congress include a provision requiring approval of immunity grants by a majority vote of the grand jury. While many supporters of this provision believe that it would help to insure the independence of that body, the Section does not support such a requirement. Instead, Principle #19 would provide that immunity be granted on prosecution motion *in camera* by the trial court which convened the grand jury; the standards outlined in Principle #18 would be followed in determining whether such a grant should be made. Lay grand jurors are not adequately oriented to make determinations regarding immunity grants, the Section believes. This is properly an executive function with court overview.

20. Principle #20 would forbid making the granting of immunity in grand jury proceedings a matter of public record before the issuance of an indictment or testimony in any cause. To make public such grants undercuts the function of the grand jury by selectively publicizing its investigations—and has the definite potential of harm to those to whom immunity is alleged to have been granted. The U.S. Department of Justice had indicated its agreement with this Principle.

21. The question of multiple representation of witnesses in grand jury proceedings has recently received increasing attention both from members of the private bar and from government attorneys. (See, e.g., Cole, "Time for a Change: Multiple Representation Should be Stopped," 2 *Journal of Criminal Defense* 149 (1976); and Speech May 3, 1977 to Chicago Bar Association on "The Perils of Multiple Representation in Criminal Antitrust Proceedings," by Richard Favretto, Deputy Director of Operations, Antitrust Division, U.S. Department of Justice.) Recent court opinions have also tried to grapple with the question (see, e.g., *In Re Investigation Before April, 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976)). Principle #21 has been substantially rewritten by the Section since February to strengthen its provisions, to meet concerns raised by critics of the proposal to allow counsel in the grand jury room. Opponents of that Principle have focused much of their objection on problems which could arise when one attorney represents more than one witness in a grand jury proceeding. The Section has redrafted Principle #21 to spell out the professional responsibility of an attorney *not* to continue multiple representation of clients in a grand jury proceeding if conflicts can arise. As originally worded, the Principle provided that, "If the court determines that there is multiple representation of witnesses in a grand jury proceeding, it shall advise the witnesses that they have the right to be separately represented by counsel, and explain that conflicts of interest may otherwise arise."

Under the newly-redrafted Principle, the burden is initially placed on the defense attorney to assume responsibility for remedying situations when conflicts from multiple representation arise or are likely to arise. If the court finds that this principle is not being followed, however, it would have the authority to order separate representation. The phrase "giving appropriate weight to an individual's right to counsel of his or her own choosing" has been added to avoid a situation in which the court summarily excludes certain counsel from representing any witness in the proceeding. In adopting this Principle, the Section considered multiple representation to include the following: two or more witnesses in a grand jury proceeding who may have conflicting interests; a witness and a potential defendant in a grand jury proceeding; or a witness whose counsel fees are paid by a third party who is a witness or potential defendant in a grand jury proceeding. The significant ethical concerns involved in multiple representation when the clients have actual or potential conflicting interests; the potential compromises to the Constitutional guarantee to effective assistance of counsel; and the potential for inhibiting the public's right to an effective grand jury investigation require the private bar to deal seriously with this issue. As Alan Y. Cole noted in a recent article (*supra*) "To avoid the Scylla of conflict, the defense attorney with multiple clients will likely become engulfed in the Charybdis of ineffective assistance of counsel . . ." Benjamin Civiletti, head of the Justice Department's Criminal Division, has expressed his support for this Principle as now formulated.

22. Principle #22 provides that the confidential nature of grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny. Shielding their identity is necessary to prevent unjust harm to witnesses and potential defendants. The practice in some jurisdictions of having witnesses exposed to public and press as they emerge from the grand jury room is an unfair one—it taints the witnesses' reputations by the mere fact of their appearance. The importance of maintaining the secrecy of grand jury proceedings has already been recognized by the Association, when, in its 1975 policy, it urged strengthened penalties for unauthorized disclosure of grand jury information. The Justice Department supports this Principle.

23. The Section supports legislation which would mandate the court's charging grand jurors orally on impanelling as to their duties and responsibilities; written copies of the charge would then be distributed to the grand jurors for their continuing reference. Detailing to grand jurors their powers, responsibilities and rights will help to insure their comprehensive understanding of their proper role, and will thereby help to strengthen the independence and fair functioning of the grand jury. Several of the bills pending in the 95th Congress contain such provisions, as does pending legislation in several states. The Department of Justice has indicated its support for this Principle.

24. In adopting Principle #24, the Section urges the Association to go on record as recognizing potential abuses of newspersons who are called as witnesses before the grand jury and then claim a First Amendment privilege not to testify. In some prosecutors' offices around the country, office policy already exists forbidding the caling of journalists before the grand jury. As the U.S. Supreme Court has noted, "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification . . . We do not expect courts will forget that grand juries must operate within the limits of the First Amendment, as well as the Fifth." *Branzburg* v. *Hayes*, 408 U.S. 665, at 707–708 (1972). Supporting the need for legislation in this area, a Newspaper Guild spokesperson declared in testimony before the House Judiciary Subcommittee hearings in June 1977, "The issuance of subpoenas to news gatherers has become a veritable contagion . . ." Principle #24 is further intended to express Section concern about the increasing number of instances nationally in which criminal defense lawyers are themselves being subpoenaed to testify before grand juries. Abuse of grand jury subpoenas used against persons having recognized confidential relationships appears to be increasing; this can drive a wedge of distrust between defense attorney and client, and has a chilling effect on 6th Amendment rights and confidential relationships. The Section purposely did not go into further detail in this proposed Principle, believing that an expression of Association concern about present abuses of the grand jury vis-a-vis the press and the criminal defense bar would call attention to what appears to be a growing problem. The Justice Department has expressed its support for this Principle.

25. In August, 1975, the ABA House of Delegates opposed amendment of the Recalcitrant Witness Statute (28 U.S.C. 1826(a)) to reduce from 18 to 6 months

the maximum period of confinement on a civil contempt order for refusal to testify before a grand jury. The Section is now seeking revision of the previously-adopted position. This Principle would support—as provided in several pending grand jury reform bills—a maximum of six months confinement. It is believed that this length of confinement should be sufficient to compel a witness to testify. (It should be noted that the ABA has previously gone on record supporting legislation to prohibit multiple confinement upon a subsequent refusal by a witness to testify about the same transaction.) The Section now believes that this is sufficient to compel a witness to testify, while avoiding the longer, more punitive confinement. This has been an area in which many abuses have allegedly occurred (*See* record of 1976 hearings before House Judiciary Subcommittee on Immigration, Citizenship and International Law). The Section thus urges ABA support for a 6-month maximum.

26. Rather than specifying proposed sanctions for violation of each proposed grand jury legislative Principle outlined herein, the Section simply notes that the court should exercise its power to impose appropriate sanctions when the proposed Principles are violated. Such sanctions will obviously be fashioned in any proposed legislation; but it is not the Section's intent, in proposing ABA policy on the grand jury, itself to suggest statutory language.

* * * * * * *

CONCLUSION

When the grand jury was created in 12th Century England, it was intended to serve as a shield between the citizen and the Crown. In recent years, the grand jury has come under increasing attack: observers charge that the grand jury system is riddled with abuse, and is no longer a shield for the citizen but a shield for the government. Critics declare that it has departed from its proper Constitutional function of protecting citizens from unwarranted prosecutions.

The Section of Criminal Justice, based on the work of its Grand Jury Committee, chaired by experienced prosecutor Richard E. Gerstein, believes that reforms are needed to insure fairness—but without undercutting the grand jury's legitimate functions or destroying it as an institution. While legitimate objections to these Principles have been raised, resistance to change from those within the criminal justice system cannot in itself be sufficient reason to reject well-considered—and needed—proposals.

The Section urges the House of Delegates to support the 26 legislative Principles. The Congress and many state legislatures are now acting on grand jury reform proposals; professional, media and public focus on this subject cannot be expected to abate. The Association—as in its landmark Standards for Criminal Justice project—has long been in the forefront of criminal justice improvement.

ABA leadership is now needed to help fashion well-reasoned, workable and effective grand jury reform legislation.

Respectfully submitted,

B. JAMES GEORGE, JR.,
Acting Chairperson.

[On August 9, 1977, the American Bar Association adopted the following resolution:]

AMERICAN BAR ASSOCIATION,
Chicago, Ill., August 29, 1977.

Re Grand Jury Reform.

Hon. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship and International Law, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: At the meeting of the House of Delegates of the American Bar Association held August 8–10, 1977 the attached resolution was adopted upon recommendation of the Section of Criminal Justice.

This resolution is being transmitted for your information and whatever action you may deem appropriate. If hearings are scheduled on the subject of this resolution, we would appreciate your advising Herbert E. Hoffman, Director of the American Bar Association Governmental Relations Office, 1800 M Street, N.W., Washington, D.C. 20036, (202) 331-2210.

Please do not hesitate to let us know if you need any further information, have any questions or whether we can be of any assistance.

Sincerely yours,

HERBERT D. SLEDD, *Secretary.*

AMERICAN BAR ASSOCIATION,
Chicago, Ill., August 29, 1977.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, D.C.

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Please do not hesitate to let us know if you need any further information, have any questions or whether we can be of any assistance.

Sincerely yours,

HERBERT D. SLEDD, *Secretary.*

Be It Resolved, That the American Bar Association support in principle grand jury reform legislation which adheres to the following principles:

1. Expanding on the already-established ABA policy, a witness before the grand jury shall have the right to be accompanied by counsel in his or her appearance before the grand jury. Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in proceedings before the grand jury. The court shall have the power to remove such counsel from the grand jury room for conduct inconsistent with this principle.

2. Every witness before a grand jury shall be informed of his privilege against self-incrimination and right to counsel and shall be advised that false answers may result in his being charged with perjury. Target witnesses shall be told that they are possible indictees.

3. No prosecutor shall knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilty.

4. A prosecutor should recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing law.

5. A target of a grand jury investigation shall be given the right to testify before the grand jury, provided he/she signs a waiver of immunity. Prosecutors shall notify such targets of their opportunity to testify unless notification may result in flight or endanger other persons or obstruct justice; or the prosecutor is unable with reasonable diligence to notify said persons.

6. The prosecutor shall not present to the grand jury evidence which he or she knows to be constitutionally inadmissible at trial.

7. The grand jury shall not name a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. Nothing herein shall prevent supplying such names in a bill of particulars.

8. A grand jury should not issue any report which singles out persons to impugn their motives, holds them up to scorn or criticism or speaks of their qualifications or moral fitness to hold an office or position. No grand jury report shall be accepted for filing and publication until the presiding judge submits *in camera* a copy thereof to all persons named or identifiable and such persons are given the opportunity to move to expunge any objectionable portion of said report and have a final judicial determination prior to the report's being published or made public. Such motion to expunge shall be made within ten days of receipt of notice of such report. Hearings on such motions shall be held *in camera.*

9. The grand jury should not be used by the prosecutor in order to obtain tangible, documentary or testimonial evidence to assist the prosecutor in preparation for trial of a defendant who has already been charged by indictment or information. However, the grand jury should not be restricted in investigating other potential offenses of the same or other defendants.

10. The grand jury should not be used by the prosecutor for the purpose of aiding or assisting in any administrative inquiry.

11. Witnesses who have been summoned to appear before a grand jury to testify or to produce tangible or documentary evidence should not be subjected to unreasonable delay before appearing or unnecessarily repeated appearances or harrassment.

12. It shall not be necessary for the prosecutor to obtain approval of the grand jury for a grand jury subpoena.

13. A grand jury subpoena should indicate the statute or general subject area that is the concern of the grand jury inquiry. The return of an indictment in a subject area not disclosed by the grand jury subpoena shall not be a basis for dismissal.

14. A subpoena should be returnable only when the grand jury is sitting.

15. All matters before a grand jury, including the charge by the impaneling judge, if any; any comments or charges by any jurist to the grand jury at any time; any and all comments to the grand jury by the prosecutor; and the questioning of any testimony by any witness, shall be recorded either stenographically or electronically. However, the deliberations of the grand jury shall not be recorded.

16. The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

17. Expanding on the already-established ABA position favoring transactional immunity, immunity should be granted only when the testimony sought is in the public interest; there is no other reasonable way to elicit such testimony; and the witness has refused to testify or indicated an intent to invoke the privilege against self-incrimination.

18. Immunity shall be granted on prosecution motion *in camera* by the trial court which convened the grand jury, under standards expressed in Principle No. 17.

19. The granting of immunity in grand jury proceedings should not be a matter of public record prior to the issuance of an indictment or testimony in any cause.

20. A lawyer or lawyers who are associated in practice should not continue multiple representation of clients in a grand jury proceeding if the exercise of the lawyer's independent professional judgment on behalf of one of the clients will be or is likely to be adversely affected by his or her representation of another client. If the court determines that this principle is violated, it may order separate representation of witnesses, giving appropriate weight to an individual's right to counsel of his or her own choosing.

21. The confidential nature of the grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny.

22. It is the duty of the court which impanels a grand jury fully to charge the jurors by means of a written charge completely explaining their duties and limitations.

23. All stages of the grand jury proceedings should be conducted with proper consideration for the preservation of press freedom, attorney-client relationships, and comparable values.

24. The period of confinement for a witness who refuses to testify before a grand jury and is found in contempt should not exceed one year.

25. The court shall impose appropriate sanctions whenever any of the foregoing principles have been violated.

As approved by the ABA House of Delegates, August 9, 1977

[Only the resolution set forth represents official ABA policy; the accompanying report is for background purposes only]

AMERICAN BAR ASSOCIATION—REPORT TO THE HOUSE OF DELEGATES

SECTION OF CRIMINAL JUSTICE

REPORT

Background

The Section of Criminal Justice urges House of Delegates approval for 25 legislative Principles to which it believes grand jury reform legislation should adhere. The Section has spent more than three years studying the grand jury. In August 1975—at Section urging—the House of Delegates approved a policy addressing one grand jury bill (H.R. 1277) in the 94th Congress. That policy is a limited one, but includes Association support for such key elements of grand

jury reform as allowing counsel in the grand jury room, transactional immunity, and strengthened penalties for unauthorized disclosure of grand jury information. Since 1975, the Section's Grand Jury Committee has analyzed a number of pending bills, including H.R. 2986 and S. 3274 (94th Congress), both with a broader focus than H.R. 1277, on which the current ABA policy was formulated. New legislation, including H.R. 94, H.R. 3736, and S. 1449, has been introduced in the 95th Congress; hearings are already being held on these proposals.

Based on its continued study of this issue since 1975, the Criminal Justice Section now asks House Delegates adoption of Association policy addressing a broader range of grand jury issues. This is timely not only because of the increasing public, press and professional attention being focused on this issue, but also because action is anticipated in the 95th Congress on the pending legislation. Further, a number of states are now considering—and some have already enacted into law—similar bills.

In February, 1977, the Section asked the House of Delegates to approve a package of 23 legislative principles. At the personal request of Attorney General Bell, the Section asked the House to defer action until the August Annual Meeting. Since February, the Section has revised several Principles to clarify intent; has added 3 new Principles concerning prosecutorial conduct; and has met with Honorable Benjamin Civiletti, Assistant Attorney General in charge of the Criminal Division, U.S. Department of Justice, and other Department representatives to discuss the Principles. Mr. Civiletti has expressed support for some 15 of the Principles, and noted that the Department would take no position on an additional five. On several additional Principles, Mr. Civiletti said that some rephrasing might moot Department objections. In an attempt to reach compromise in as many areas as possible, the Section's Grand Jury Committee held a special meeting in early June, made additional amendments to a number of the Principles, and gained Council approval for these changes via a special mail ballot.

It should be noted that the proposed Principles were drafted by a Committee composed almost entirely of present and former prosecutors. It is chaired by Richard E. Gerstein, State Attorney for the greater Miami area for more than 20 years, and former President of the National District Attorneys Association. The Committee also included members with state and federal prosecutorial experience (including the last Watergate Special Prosecutor, Charles Ruff), judges, law professors and members of the defense bar. The Principles further represent a consensus of the Criminal Justice Section Council, which includes a similar mix of persons from all parts of the criminal justice system. Most of the Principles were approved by the Council unanimously.

In recent years, the grand jury as an institution has come under increasing criticism for a number of reasons and from a number of sources. It has been accused of an absence of procedural safeguards. Reflecting these and other concerns, England—where the grand jury originated—abolished the institution in 1933; the majority of states in our country allow prosecution either by indictment or by information. However, it remains a part of the federal system and in many state systems because of constitutional provisions. The ABA House of Delegates in 1975 went on record opposing amendments of the United States Constitution to eliminate the requirement for indictment by a grand jury. That position of the ABA should not be changed, but a comprehensive effort is needed to correct existing abuses. The Section believes that its proposed legislative Principles will go a long way towards remedying the ills of the grand jury as an institution.

Principles

Following are comments on each of the 25 proposed Principles:

1. The American Bar Association has already gone on record (in August, 1975) supporting the right of a witness to have counsel present in the grand jury room. Principle No. 1 represents a reaffirmation of that position. Since this report was first presented to the House of Delegates in February, the Section has rewritten Principle No. 1 to spell out more specifically what role counsel should play in the grand jury room. That role is now carefully defined in the Principle to make it clear that it is *strictly* limited to advising the witness. This limited role will preclude the grand jury's becoming a "mini-trial"—as some have feared—and will not impair expeditious investigations. Under the proposed Principle, counsel is not allowed to address the grand jurors or in any other way take part in the proceedings. Further, the Section had added a provision to allow removal of

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counsel who are disruptive or do not otherwise stay within the prescribed boundaries laid down by the Principle. Clarification of the attorney's limited role, coupled with the mechanism for removing disruptive counsel, should meet the objections raised by those who have feared creation of a "mini-trial."

Almost nowhere else in the criminal justice process—except before the grand jury—is a person who desires a lawyer denied that right. Requiring a witness who needs advice of counsel to consult his attorney outside the grand jury room door is awkward and prejudicial. It unnecessarily prolongs the grand jury proceeding and places the witness in an unfavorable light before the grand jurors. The American Law Institute has called it a "degrading and irrational" procedure. It is extremely damaging to the witness to continually get up, go outside, and consult with counsel. A recent Seventh Circuit decision (*U.S.* v. *Kopel*, 552, F.2d 1265 (1977)) points to additional problems with the procedure of consulting counsel outside the grand jury room. In that case, the Seventh Circuit said the U.S. Attorney, who had granted the witness permission to leave the grand jury room, was free at trial to bring up this fact as relevant to the perjury charges against the defendant. Dissenting, Judge Swygert decried the fact that the government was "permitted to 'sandbag' him [the defendant] by using the fact that he consulted his attorney against him." Nor is the right to leave the grand jury room to consult counsel absolute. (See *In re Tierney*, 465 F.2d 806 (5th Cir. 1972), in which the court said a limit could be placed on how frequently the witness could leave the room to consult his lawyer.)

The prestigious American Law Institute, in its Model Code of Pre-Arraignment Procedure adopted in 1975, supports counsel in the grand jury room. "While this is a break with tradition and prevailing practice," the ALI notes, "it is consistent with the provisions of some recent state procedure codes . . . it seems *unfair and inefficient* to require a witness to leave the grand jury room each time he wishes to consult with counsel." [at 237; emphasis added] The ALI commentary goes on to state that "exclusion of counsel . . . is closely related to the traditional view that proceedings should be secret, and concern lest the presence of counsel hamper the freedom of the grand jury and the prosecutor in their investigation . . . The difficulty with this view . . . is that complex and important legal issues face a witness before a grand jury. An appearance before that body may subject an individual to the grave danger of self-incrimination or imprisonment for contempt . . . The witness may also inadvertently lose his right to claim the privilege by operation of the doctrine of waiver . . . And the inherent pressure and accompanying nervousness of a grand jury appearance upon an individual may make it very difficult for him to remember his attorney's instructions . . . For effective implementation of this right, an attorney should be present to follow the flow of the interrogation." [at 601]

Some nine states now have statutes allowing counsel to be present in the grand jury room—Arizona (for target witnesses), Illinois (for target witnesses), Kansas, Michigan (one-man grand juries), Oklahoma, South Dakota, Minnesota, Virginia and Washington State. The Section has contacted practicing attorneys and prosecutors in these states; none has reported problems. In fact, some prosecutors who said they initially fought the procedure now support it as a means of insuring fairness in the system. Congressman Joshua Eilberg (D–PA), writing in a recent issue of *Judicature* (Vol. 60, No. 8), similarly reported that those states which have implemented the practice have not reported any serious problems. Further, a number of additional states are now considering legislation—including Colorado (where it has passed both houses of the legislature), New York, Massachusetts, and California (where it has the support of the state's Attorney General).

Several arguments are raised by opponents. First, it is argued that allowing counsel in the grand jury room will be a breach of the secrecy rule. In fact, grand jury secrecy is not served by keeping the lawyer outside the grand jury room, since the witness is free to tell his attorney anything that occurred inside (Federal Rule of Criminal Procedure 6(e)). Secondly, it is argued that the presence of the witness' lawyer will restrict free testimony in cases of organized crime, corporate and political corruption investigations. The Section notes that the states which allow counsel in the grand jury room have retained the grand jury in most instances as an investigatory body for precisely these kinds of investigations, and have no record of negative results. Further, there are alternate ways of securing a cooperative witness' statement, and this evidence can be summarized for the grand jury in the form of hearsay, *Costello* v. *United States*, 350

U.S. 359 (1956). When a witness is called to testify before a grand jury, the witness' attorney, sitting outside the grand jury room, can easily conclude from the time spent with the jury whether the witness takes the Fifth Amendment or testifies in full. Experienced prosecutors, further, have noted that very few witnesses indicate a desire to cooperate without the knowledge of their counsel; if the witness' testimony is helpful to the government, that fact will become evident to the attorney fairly quickly.

Recognizing that problems arising from multiple representation of witnesses could be exacerbated by allowing counsel in the grand jury room, the Section has strengthened Principle No. 20, which addresses that subject.

The presence of the attorney will not only reduce unfair speculation about the prosecutor's conduct, but will also serve to inhibit the prosecutor from possible improper conduct. Analogous to having counsel present to witness a line-up, the presence of the attorney in the grand jury room will help to insure the fairness of the proceedings. Watergate Special Prosecutor Charles Ruff—in supporting this proposal in recent Congressional testimony—declared that ". . . the mere possibility of occasional disruption simply cannot overcome the right of the individual witness to consult his attorney without going through the mildly absurd process of leaving the grand jury room every time. Indeed, most prosecutors would admit, I think, that they count on the burden of leaving the room to dissuade the witness from asserting his right to counsel." (Testimony before House Judiciary Subcommittee, April 27, 1977, at 3.)

The American Bar Association has traditionally been a leader in asserting the right to assistance of counsel in the criminal justice process. As the *ABA Standards on Providing Defense Services* (§ 1.1) declare, "The objective of the bar should be to ensure the provision of competent counsel to all persons who need representation in criminal proceedings . . ." Enactment of Principle No. 1 will more meaningfully effectuate the Sixth Amendment right to assistance of counsel; but the limitations on the role of counsel will forestall the grand jury's being turned into an adversary proceeding.

[2. Principle number two was added by the ABA House of Delegates at August, 1977 Annual meeting in Chicago as a proposed amendment to the Criminal Justice Section Principles offered by the Judicial Administration Division.]

3. Principle No. 3 states that the prosecutor shall not knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt. The Section believes this to be a key element in bringing fairness to the grand jury process, and essential to prevent indictment of innocent persons. The Association has already gone on record in the *ABA Standards for Criminal Justice Relating to the Prosecution Function* (§ 3.6(b)) supporting this, declaring that, "The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt." The National District Attorneys Association (NDAA) Prosecution Standard 14.2D is also similar to Principle #3. As the commentary to the ABA Standard states. Such a procedure tends to insure public confidence in the ultimate decision as to prosecution. The obligation to present evidence which tends to negate the guilt of the accused flows from the basic duty of the prosecutor to seek a just result." The NDAA Standards note that such a standard "provides for a greater accuracy in the indictment determination by providing that the grand jury be allowed to consider—as the trial fact finder would—any facts tending to negate the defendant's guilt." Indictments have been overturned on the grounds of due process when a court has ascertained that the prosecutor *knowingly* used perjured evidence or failed to present evidence that squarely negated guilt. *U.S. v. Basurto*, 497 F.2d 781 (9th Cir., 1974); *Johnson v. Superior Court of California*, 15 Cal. 3d 248, 124 Cal. Rptr. 32, 539 P. 2d 792 (1975). This is a new Principle, added by the Section since the Principles were presented to the House of Delegates in February. At the suggestion of U.S. Department of Justice representatives, who questionsd the mechanics of the Principle as first drafted, the Section has written it so as to clarify its coverage and intent, since this is a legislative Principle, and not simply a more general standard for prosecutorial conduct.

4. The fourth Principle is also a new one, added since the report was presented to the House of Delegates in February. This would require the prosecutor to recommend that the grand jury not indict if he believes the evidence presented does not warrant an indictment under governing law. This language is *identical* to that of both *ABA Standards on the Prosecution Function* 3.6(c) and the National District Attorneys Association Standard (14.2E). The NDAA Standards commentary notes that this standard "recognizes the prosecutor's right and duty

as legal advisor to the grand jury to recommend action to the grand jury. The prosecutor has a great deal more experience than the grand jurors in the strength and likely credibility of the evidence before a trial court. Since it will be his office's duty to prosecute the case, the prosecutor has a direct interest in assuring that resources are not squandered on unwinnable or otherwise improper cases." The Section agrees with this rationale. Adoption of the Principle will help to insure substantial justice within the grand jury room. The U.S. Department of Justice had indicated support for this Principle, which is, as noted above, already ABA policy.

5. Principle No. 5 would require that the target of a grand jury investigation be given the right to testify and present his side of the facts before an indictment is returned—provided such person signs a waiver of immunity. Under this proposal, the prosecutor would be required to take all reasonable steps to notify such prospective defendants—but recognizes that in some instances the prosecutor will truly be unable to locate such persons; or that, under some circumstances, notification may result in the person's fleeing, or his endangering witnesses or other persons, or obstructing justice. In such instances, notification would not be required. The Section has made two changes in this Principle since its initial presentation in February: First, at the suggestion of the Justice Department, the term "subject" was replaced by "target." The Department suggested this as more appropriate wording, since "target" is the term generally used in federal law enforcement. Secondly, Justice Department representatives suggested addition of the phrase "or obstruct justice" as an additional condition under which the prosecutor need not qualify a target. The Section also made this amendment, believing it to be inherent in the original Principle. Principle No. 5 is intended to insure that fair and just opportunity is given individuals to testify in their own behalf prior to being indicted. Such groups as the Association of the Bar of the City of New York have supported such a right. This is an essential ingredient, the Section believes, in a fairly functioning grand jury—and criminal justice—system. Without it, the grand jury's essential function of arriving at an accurate indictment is undermined.

6. The sixth Principle has been rewritten since presentation of the report in February. As originally phrased, it stated that the grand jury "shall not consider unconstitutionally obtained evidence." In light of concerns raised by the Justice Department, the Section has rewritten Principle No. 6 to put the affirmative burden on the prosecutor not to present evidence which he *knows* to be constitutionally inadmissible at trial. It thus makes the burden more specific. The Section believes that the integrity of the grand jury will best be served by prohibiting presentation of unconstitutionally-obtained evidence by the prosecutor. Already-approved Association policy in the *ABA Standards on the Prosecution Function* (§ 3.6(a)) declares that "a prosecutor should present to the grand jury only evidence which he believes would be admissible at trial." Notwithstanding the U.S. Supreme Court's decision in *U.S.* v. *Calandra*, 414 U.S. 338 (1974), the Section believes that this Principle is needed to insure the integrity of the grand jury process; indeed, the Court in *Calandra* noted that "for the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained" because of use of illegally-seized evidence. The Principle is thus not fully inconsistent with the thrust of *Calandra*.

7. Principle No. 7 would prohibit naming a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. The Section believes that naming of persons as unindicted co-conspirators visits opprobrium upon them—by charging the named persons with the commission of a crime but denying them a forum in which to seek acquittal or vindication. This stains the reputation of the person without providing any means for the person to show his innocence. This is an instance in which reforms are needed to insure the fair functioning of the grand jury. The United States Court of Appeals for the Fifth Circuit has already held in accordance with this principle in *U.S.* v. *Briggs*, 514 F. 2d 794 (1975). The Section has added a second sentence to the Principle since its original presentation. This states that supplying such names in a bill of particulars would not be prohibited. This would permit the prosecutor to respond to a request by the defense to reveal the names of co-conspirators who were not indicted. The Section felt the addition of this sentence is needed to spell this out to avoid potential confusion in interpretation of this Principle.

8. The issuance and publication of grand jury reports which single out persons for scorn or criticism, impugn their motives, or denigrate their moral fitness to hold office have the effect of charging such persons with misconduct or unfitness—without affording them any forum in which to refute the charges or to

seek vindication. The proper purpose of grand jury reports is to inform the public of situations requiring administrative, judicial or legislative corrective action—not the castigation of individuals when the fact-finding forum insured by the finding of an indictment is absent. The Section is not proposing that such grand jury reports be proscribed from commenting on the job that an office holder is performing; but such reports should not condemn character alone. Grand jury reports which do single out persons in the manner described tend to undercut the fairness of the grand jury. Such misuse of the grand jury can, in fact, affect the political process. Judicial scrutiny of the report is essential to prevent spurious attacks on individuals when no forum of trial is available. The states that have recently considered this issue have reinforced control over the reporting process. *People* v. *Superior Court of Santa Barbara County*, 531 P. 2d 761 (Cal. 1975); Del. Rules, R. 6 (1975); Fla. STAT. ANN. § 905.28 (1975). The procedures proposed in Principle No. 8 will assist in insuring that such abuses do not occur. See *U.S.* v. *Briggs*, 514 F. 2d 794 (1975) and *Report of Grand Jury Proceedings*, U.S. Court of Appeals for the Fifth Circuit, 479 F. 2d 458 (1973). The National District Attorneys Association Prosecution Standards commentary (discussing an NDAA proposed standard on this subject, modeled on recent New York legislation) notes that, ". . . an unfavorable report may stand as a severe form of extra-judicial punishment, from which there is no appeal . . . the quasi-judicial nature of the grand jury gives it an apparent reliability which may not be justified . . . grand jurors are accountable to no one . . . grand jurors may impose a personal standard of morality on persons, rather than an abstract and neutral conception of right and wrong."

9. The Section opposes the practice of a prosecutor's using the grand jury to obtain tangible, documentary or testimonial evidence to assist in his preparation for trial of a defendant *already* charged by indictment or information. This is an abuse of the grand jury, and transforms it into a mere tool and arm of the prosecutor's office—a role which is contrary to the grand jury's historical purpose and function. The Department of Justice supports this Principle; in a Department Office of Policy and Planning statement in 1976 with the House Judiciary Subcommittee examining grand jury legislation, the Department states that, "It is well-established under federal case law that a grand jury should act only with a view toward returning an indictment or to satisfy itself that no crime has occurred. . . . It would be an abuse of legal process for a government attorney to use a grand jury to discover or build up evidence for trial of an existing indictment. Courts would discipline attorneys who did so and the Department would not countenance such action by its representatives." This principle is in accord with well-settled case law. *United States* v. *Dardi*, 330 F. 2d 316 (2d Cir. 1964); *United States* v. *Doss*, 545 F. 2d 548 (6th Cir. 1976). In the *Doss* decision, the Court declared that, "We find no constitutional, statutory or case authority for employment of the grand jury as a discovery instrument to help the government prepare evidence to convict an already-indicted defendant. Such a use of the grand jury would prevent its constitutional and historical function . . ." The Court called it "a possible revival of a version of the Star Chamber of 18th Century England . . ."

10. The Section strongly opposes prosecutorial use of the grand jury to assist in administrative investigations—e.g., Internal Revenue income tax investigations. Such improper utilization of the grand jury warps its true function and leads to abuses such as those described in No. 9, *supra*. The ABA House of Delegates in February, 1977—in addressing a proposed amendment to Federal Rule of Criminal Procedure 6(e)—expressed concern regarding dissemination of grand jury information to government experts for use in unrelated civil proceedings. The Section report accompanying the House-approved resolution declared that disclosure of grand jury information to a broad group of governmental personnel might be used as "subterfuge by some agencies to obtain information through the grand jury process which was not legitimately required for the purposes of the pending grand jury investigation . . . The dissemination of information to serve particularized departmental or agency needs would not be a legitimate one." (House of Delegates Report book, 2/77 Midyear Meeting, at 138–9). A U.S. Department of Justice paper submitted to the House Congressional hearings echoes this concern: "[o]ne of the primary abuse of the grand jury which must be avoided . . . is the attempted use of its broad investigative powers by governmental agencies in pursuit of investigations that are solely their own rather than the grand jury's." (U.S. Department of Justice Office of Policy and Planning, *Memorandum on the Grand Jury*, p. 106; printed in record of House Judiciary Subcommittee Hearings.) In the case of *United States* v. *Doe*, 72 Crim.

Misc. 1 (S.D.N.Y. 1972, the court, in denying a government motion to examine special grand jury minutes to determine violations of Titles 18 and 28 *and* "to determine civil tax liability," declared that, "The grand jury's role is properly confined . . . when it is held empowered to conduct investigations that are in their inception exclusively criminal." It should be noted that the Attorney General's Advisory Committee of U.S. Attorneys has expressed its support for this proposed Principle.

11. Principle No. 11 provides that witnesses summoned before grand juries should not be subjected to unreasonable delays or unnecessarily repeated appearances or harassment. The Section supports legislation which would forbid such practices. In some instances, these abuses have occurred and grand jury witnesses have been repeatedly called to appear; or have been subjected to unreasonable delays or other forms of harassment. An indifference to the convenience of a grand jury witness is as objectionable as the use of a grand jury subpena to harass a witness, and is a subtle means of intimidating the witness before his appearance. The *ABA Standards for the Prosecution Function* (§ 5.7(a)) recognize the prosecutor's obligation to handle witnesses "fairly, objectively and . . . without seeking to intimidate or humiliate the witness . . ." The U.S. Department of Justice supports this Principle, as does the Advisory Committee of U.S. Attorneys.

12. Several of the grand jury reform bills before the 95th Congress (e.g., H.R. 3736 would require grand jury approval of any subpoenas issued. The Section opposes such a procedure. It believes this requirement would not only be cumbersome, but would cause unnecessary delay. The prosecutor, the Section believes, is much better suited to make determinations regarding issuance of subpoenas than are lay grand jurors. The Section thus does not support these provisions in pending legislation. The Advisory Committee of U.S. Attorneys supports this Principle.

13. Principle No. 13 would require that a grand jury subpoena indicate the statute or general subject that is the focus of the grand jury inquiry. This requirement is intended to enable the recipient and the court to determine more accurately questions of relevancy. It would also enable the witness to prepare himself more adequately for his appearance, and would insure more effective and efficient use of counsel, court and grand jury time. The Principle does *not* intend that a detailed description of the statutory *and* subject areas be required; but that a broad statutory citation or general description of the subject be included. Justice Department representatives have expressed support for this Principle; but indicated concern that, as initially written, the Principle would leave open the question of later challenges to the indictment based on the fact that the defendant was charged under statutes not named in the subpoena. To meet this concern and clarify the Principle's original intent, the Section has added the second sentence; this makes it clear that the indictment cannot be vitiated if the person is indicted under a statute or in a subject area not mentioned in the subpoena. The Advisory Committee of U.S. Attorneys supports this Principle.

14. A grand jury subpoena should not be returnable except when the grand jury is sitting. This proposal is intended to avoid potential abuse of the subpoena power by the prosecutor's office. It will help to insure the integrity of the grand jury function. Both the Justice Department and the Attorney General's Advisory Committee of U.S. Attorneys support this Principle.

15. Principle No. 15 would mandate stenographic or electronic recording of all matters before the grand jury—except the deliberations of the grand jury itself. This would represent a logical step forward in grand jury reform, and is not inconsistent with the necessity of maintaining grand jury secrecy. The judge's charge to the grand jury would be recorded, as would the prosecutor's introductory remarks and testimony and questioning of all witnesses. Some 31 states already require recording of all grand jury proceedings other than votes and deliberations, and an additional 6 states permit it, according to a Library of Congress study (printed in 1976 Hearings record, House Judiciary Subcommittee on Immigration, Citizenship and International Law, p. 714). Several federal district courts already record all grand jury proceedings—including the District of Rhode Island, the Eastern District of Washington, and the Northern District of Illinois. The Ninth Circuit has ruled that a prospective defendant who makes a timely request cannot be arbitrarily denied recordation of grand jury proceedings. *United States* v. *Thoreson*, 428 F.2d 654 (1970); *United States* v. *Price*, 474 F. 2d 1223 (1973).

Major groups have supported this requirement. The American Law Institute, in its Model Code of Pre-Arrangement Procedure, urges that a record be made of all

proceedings before the grand jury. The *ABA Standards for Criminal Justice on the Prosecution Function* (§ 3.5(c))—already ABA policy—provide that, "The prosecutor's communications and presentations to the grand jury should be on the record." The accompanying commentary points out that "since grand jury proceedings are generally secret and *ex parte*, it is particularly desirable that a record be made of the prosecutor's communications and representations to the jury." The recently-issued Prosecution Standards of the National District Attorneys Association (§ 14.2(F)) also urge that "all testimony before the grand jury should be recorded." Recording will aid the prosecution—by insuring that perjured testimony does not go unpunished. Recording would also act as a restraint on the prosecutor not to exercise undue or improper influence on the grand jury.

The Justice Department supports this Principle to the extent that it would require recordation of the judge's charge and the questioning and testimony of witnesses, but opposes recording the prosecutor's comments to the jury. The U.S. Attorneys' Advisory Committee argues that this would "formalize what should be an informal working relationship between grand jurors and government attorneys." (From position paper submitted to Section Council, May 14, 1977, p. 7.) It is exactly that "informal" relationship which invites subtle abuses of the grand jury, the Section believes; that is itself a cogent argument in favor of recordation. The Advisory Committee further argues that a recordation requirement would "impose severe and undue administrative burdens" (p. 7 of position paper, *supra*); and the Justice Department points to "unavailability of court reporters in many areas" (p. 103 of House Judiciary Subcommittee hearings record, *supra*). There are real benefits to be gained by recording matters before the grand jury—for the prosecution, as well as for the defense. Raising administrative hurdles is *not* sufficient argument against this proposal, which truly goes to the integrity of the grand jury process.

16. This Principle—which has been added since February—is identical to National District Attorneys Association Prosecution Standard (§ 14.4B) and the *ABA Standards for Criminal Justice Relating to the Prosecution Function* (§ 3.5(b)). It thus already is Association policy. It would prohibit the prosecutor from making statements or arguments to influence the grand jury action in a manner which would not be permitted before the trial jury. This is essential because of the prosecutor's role as the only legally-trained person before the lay grand jurors. As the commentary to the ABA Standards notes, "A prosecutor should not take advantage of his role as the *ex parte* representative of the state before the grand jury to unduly or unfairly influence it in voting upon charges brought before it. In general, he should be guided by the standards governing and defining the proper presentation of the state's case in an adversary trial before a petit jury." Because of the secret nature of the grand jury proceedings, the lack of direct court supervision, and the fact that the prosecutor's is a unilateral presentation, he must avoid unduly influencing the grand jurors by means which would not be appropriate in the public courtroom before a petit jury. This is essential to prevent to the grand jury's becoming a mere echo of the prosecution. As one writer has noted, "[G]rand jurors must place enormous trust in the prosecutor's guidance. It is he, after all, who tells them what the charge is, who selects the facts for them to hear, *who shapes the tone and feel of the entire case . . .*" [emphasis added] (Antell, "The Modern Grand Jury: Benighted Supergovernment," 51 A.B.A.J. 153, 154 (1965). The Justice Department has expressed its support for this Principle.

17. Principle No. 17 calls on the ABA to broaden its previously-adopted policy concerning immunity to specify proper instances in which immunity should be issued: when it is in the public interest; when there is no other reasonable way to elicit the testimony; and when the witness has refused to testify, or stated he will invoke the Fifth Amendment. This is intended to insure that grants of immunity are carefully considered prior to issuance and that they are not issued when other means could be used to obtain the needed information. The ABA House of Delegates (at the 1975 Annual Meeting) has already supported amendment of 18 U.S.C. 6002 to provide "transactional" immunity, rather than "use" immunity provided under present federal law. Under transactional immunity, a witness may be statutorily compelled to give testimony which might otherwise violate the privilege concerning self-incrimination, provided the witness is given immunity from prosecution for any crime referred to in the testimony. Under 18 U.S.C. 1525(b), Part V of the Organized Crime Control Act of 1970, and under *Kastigar* v. *U.S.*, 406 U.S. 441 (1972), only "use" immunity need

be afforded. This merely prevents the prosecution from using the actual testimony (or leads derived therefrom) in any subsequent criminal prosecution. Some 31 states currently provide transactional immunity, according to the House Judiciary Subcommittee Hearings record (*supra*). The National Conference of Commissioners on Uniform State Laws has supported it, in the Uniform Rules of Criminal Procedure (Rule 732(b)). "Use" immunity, while Constitutional (see *Kastigar, supra*), should be rejected for several practical reasons. It is not only susceptible of prosecutorial abuse, but can be a subtle invitation to perjury on the part of the witness. Since the witness knows what he says can be used to impeach him, it can be an encouragement to slant his testimony in a manner most favorable to him. Testimony thus obtained is not accurate. Witness cooperation is essential to an effective grand jury investigation, yet the uncertainty generated by "use" immunity, and the difficulties in determining the scope of the protection afforded the witness, can chill and inhibit his cooperation. Transactional immunity better encourages accurate testimony and minimizes witness resistance to questioning. The small number of actual successful prosecutions of immunized witnesses with "use" immunity indicates that a return to transactional immunity will not remove a significant weapon against organized crime (see, 14 *American Criminal Law Review*, 275, 282, wherein U.S. Department of Justice reports that, in practice, few witnesses granted "use" immunity are subsequently prosecuted for crimes described in their immunized testimony). "Use" immunity represents the most grudging interpretation of the Constitutional right against self-incrimination, the Section believes.

18. Several of the grand jury bills pending before the 94th Congress include a provision requiring approval of immunity grants by a majority vote of the grand jury. While many supporters of this provision believe that it would help to insure the independence of that body, the Section does not support such a requirement. Instead, Principle No. 18 would provide that immunity be granted on prosecution motion *in camera* by the trial court which convened the grand jury; the standards outlined in Principle No. 17 would be followed in determining whether such a grant should be made. Lay grand jurors are not adequately oriented to make determinations regarding immunity grants, the Section believes. This is properly an executive function with court overview.

19. Principle No. 17 would forbid making the granting of immunity in grand jury proceedings a matter of public record before the issuance of an indictment or testimony in any cause. To make public such grants undercuts the function of the grand jury by selectively publicizing its investigations—and has the definite potential of harm to those to whom immunity is alleged to have been granted. The U.S. Department of Justice had indicated its agreement with this Principle.

20. The question of multiple representation of witnesses in grand jury proceedings has recently received increasing attention both from members of the private bar and from government attorneys. (See, e.g., Cole, "Time for a Change: Multiple Representation Should be Stopped," 2 *Journal of Criminal Defense* 149 (1976); and Speech May 3, 1977 to Chicago Bar Association on "The Perils of Multiple Representation in Criminal Antitrust Proceedings," by Richard Favretto, Deputy Director of Operations, Antitrust Division, U.S. Department of Justice.) Recent court opinions have also tried to grapple with this question (see, e.g., *In Re Investigation Before April, 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976)). Principle No. 20 has been substantially rewritten by the Section since February to strengthen its provisions, to meet concerns raised by critics of the proposal to allow counsel in the grand jury room. Opponents of that Principle have focused much of their objection on problems which could arise when one attorney represents more than one witness in a grand jury proceeding. The Section has redrafted Principle No. 20 to spell out the professional responsibility of an attorney *not* to continue multiple representation of clients in a grand jury proceeding if conflicts can arise. As originally worded, the Principle provided that, "If the court determines that there is multiple representation of witnesses in a grand jury proceeding, it shall advise the witnesses that they have the right to be separately represented by counsel, and explain that conflicts of interest may otherwise arise."

Under the newly-redrafted Principle, the burden is initially placed on the defense attorney to assume responsibility for remedying situations when conflicts from multiple representation arise or are likely to arise. If the court finds that this principle is not being followed, however, it would have the authority to order separate representation. The phrase "giving appropriate weight to an individual's right to counsel of his or her own choosing" has been added to avoid a situation in which the court summarily excludes certain counsel from representing *any*

witness in the proceeding. In adopting this Principle, the Section considered multiple representation to include the following: two or more witnesses in a grand jury proceeding who may have conflicting interests; a witness and a potential defendant in a grand jury proceeding; or a witness whose counsel fees are paid by a third party who is a witness or potential defendant in a grand jury proceeding. The significant ethical concerns involved in multiple representation when the clients have actual or potential conflicting interests; the potential compromises to the Constitutional guarantee to effective assistance of counsel; and the potential for inhibiting the public's right to an effective grand jury investigation require the private bar to deal seriously with this issue. As Alan Y. Cole noted in a recent article (*supra*), "To avoid the Scylla of conflict, the defense attorney with multiple clients will likely become engulfed in the Charybdis of ineffective assistance of counsel . . ." Benjamin Civiletti, head of the Justice Department's Criminal Division, has expressed his support for this Principle as now formulated.

21. Principle No. 21 provides that the confidential nature of grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny. Shielding their identity is necessary to prevent unjust harm to witnesses and potential defendants. The practice is some jurisdictions of having witnesses exposed to public and press as they merege from the grand jury room is an unfair one—it taints the witnesses' reputations by the mere fact of their appearance. The importance of maintaining the secrecy of grand jury proceedings has already been recognized by the Association, when, in its 1975 policy, it urged strengthened penalties for unauthorized disclosure of grand jury information. The Justice Department supports this Principle.

22. The Section supports legislation which would mandate the court's charging grand jurors on impanelling as to their duties and responsibilities; written copies of the charge would then be distributed to the grand jurors for their continuing reference. Detailing to grand jurors their powers, responsibilities and rights will help to insure their comprehensive understanding of their proper role, and will thereby help to strengthen the independence and fail functioning of the grand jury. Several of the bills pending in the 95th Congress contain such provisions, as does pending legislation in several states. The Department of Justice has indicated its support for this Principle.

23. In adopting Principle No. 23, the Section urges the Association to go on record as recognizing potential abuses of newspersons who are called as witnesses before the grand jury and then claim a First Amendment privilege not to testify. In some prosecutors' offices around the country, office policy already exists forbidding the calling of journalists before the grand jury. As the U.S. Supreme Court has noted, "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification . . . We do not expect courts will forget that grand juries must operate within the limits of the First Amendment, as well as the Fifth." *Branzburg* v. *Hayes*, 408 U.S. 665, at 707–708 (1972). Supporting the need for legislation in this area, a Newspaper Guild spokesperson declared in testimony before the House Judiciary Subcommittee hearings in June 1977, "The issuance of subpoenas to news gatherers has become a veritable contagion . . ." Principle No. 23 is further intended to express Section concern about the increasing number of instances nationally in which criminal defense lawyers are themselves being subpoenaed to testify before grand juries. Abuse of grand jury subpoenas used against persons having recognized confidential relationships appears to be increasing; this can drive a wedge of distrust between defense attorney and client, and has a chilling effect on 6th Amendment rights and confidential relationships. The Section purposely did not go into further detail in this proposed Principle, believing that an expression of Association concern about present abuses of the grand jury vis-a-vis the press and the criminal defense bar would call attention to what appears to be a growing problem. The Justice Department has expressed its support for this Principle.

24. In August, 1975, the ABA House of Delegates opposed amendment of the Recalcitrant Witness Statute (28 U.S.C. 1826(a)) to reduce from 18 to 6 months the maximum period of confinement on a civil contempt order for refusal to testify before a grand jury. The Section is now seeking revision of the previously-adopted position. This Principle would support—as provided in several pending grand jury reform bills—a maximum of six months confinement. It is believed that this length of confinement should be sufficient to compel a witness to testify. (It should be noted that the ABA has previously gone on record supporting

legislation to prohibit multiple confinement upon a subsequent refusal by a witness to testify about the same transaction.) The Section now believes that this is sufficient to compel a witness to testify, while avoiding the longer, more punitive confinement. This has been an area in which many abuses have allegedly occurred (*See* record of 1976 hearings before House Judiciary Subcommittee on Immigration, Citizenship and International Law). The Section thus urges ABA support for a 6-month maximum.

25. Rather than specifying proposed sanctions for violation of each proposed grand jury legislative Principle outlined herein, the Section simply notes that the court should exercise its power to impose appropriate sanctions when the proposed Principles are violated. Such sanctions will obviously be fashioned in any proposed legislation; but it is not the Section's intent, in proposing ABA policy on the grand jury, itself to suggest statutory language.

Conclusion

When the grand jury was created in 12th Century England, it was intended to serve as a shield between the citizen and the Crown. In recent years, the grand jury has come under increasing attack: observers charge that the grand jury system is riddled with abuse, and is no longer a shield for the citizen but a shield for the government. Critics declare that it has departed from its proper Constitutional function of protecting citizens from unwarranted prosecutions.

The Section of Criminal Justice, based on the work of its Grand Jury Committee, chaired by experienced prosecutor Richard E. Gerstein, believes that reforms are needed to insure fairness—but without undercutting the grand jury's legitimate functions or destroying it as an institution. While legitimate objections to these Principles have been raised, resistance to change from those within the criminal justice system cannot in itself be sufficient reason to reject well-considered—and needed—proposals.

The Section urges the House of Delegates to support the 25 legislative Principles. The Congress and many states legislatures are now acting on grand jury reform proposals; professional, media and public focus on this subject cannot be expected to abate. The Association—as in its landmark Standards for Criminal Justice project—has long been in the forefront of criminal justice improvement.

ABA leadership is now needed to help fashion well-reasoned, workable and effective grand jury reform legislation.

Respectfully submitted.

B. JAMES GEORGE, JR.,
Acting-Chairperson.

In November of 1977, the formal policy of the American Bar Association on the Grand Jury was forwarded to Congress as follows:

AMERICAN BAR ASSOCIATION POLICY ON THE GRAND JURY

(Prepared by the Section of Criminal Justice, Washington, D.C.)

INTRODUCTION

This report with recommendations represents the accomplishment of the ABA Section of Criminal Justice Grand Jury Committee, which spent more than three years in developing comprehensive recommendations with respect to the grand jury. The leadership of its chairperson, Richard E. Gerstein, played a major part in the development of this product.

The recommendations contained herein—25 legislative principles—were approved by the American Bar Association's policy-making House of Delegates on August 9, 1977. They thus now represent approved ABA policy. The work of the Section of Criminal Justice and the Committee will now continue with efforts to secure adoption of legislation on the federal level. The Section is also encouraged to note increasing parallel efforts in many of the states—and would be interested in hearing from those actively involved in grand jury reform work.

The preparation of these proposals represents only one of many timely areas in which the Section of Criminal Justice is working. If you are not already a member, I encourage you to join and to become active. A membership application is included in the back of this publication.

B. JAMES GEORGE, JR.,
Section Chairperson.

AMERICAN BAR ASSOCIATION COMMITTEE ON THE GRAND JURY (1977-78 MEMBERS)

Richard E. Gerstein, Chairperson, Miami, Fla.; Paul B. Johnson, Vice-Chairperson, Tampa, Fla.; David T. Austern, Vice-Chairperson, Washington, D.C.; Charles Ruff, Washington, D.C.; George D. Crowley, Chicago, Ill.; Richard Kuh, New York, N.Y.; Peter F. Langrock, Middlebury, Vt.; Judge H. Paul Baker, Miami, Fla.; Professor George Pugh, Baton Rouge, La.; Sol Rosen, Washington, D.C.; Judge Jack Rosenberg, New York, N.Y.; Bernard Carey, Chicago, Ill.; Louis Bergna, San Jose, Calif.; Dale Tooley, Denver, Colo.; Prof. Melvin B. Lewis, Chicago, Ill.; Judge Sylvia Bacon, Washington, D.C.; Robert Edwards, Atlanta, Ga.; and Donald McIntyre (ex officio), Chicago, Ill.

COMMITTEE STAFF

Laurie Robinson, Assistant Section Director, Washington, D.C.

AMERICAN BAR ASSOCIATION POLICY ON THE GRAND JURY

Based on proposals of the section of criminal justice approved by the ABA House of Delegates on August 9, 1977. Only the principles set forth below represent official ABA policy; the accompanying report is for background purposes only.

RECOMMENDATIONS

The American Bar Association supports grand jury reform legislation which adheres to the following principles:

1. Expanding on the already-established ABA policy, a witness before the grand jury shall have the right to be accompanied by counsel and his or her appearance before the grand jury. Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in the proceedings before the grand jury. The court shall have the power to remove such counsel from the grand jury room for conduct inconsistent with this principle.

2. Every witness before a grand jury shall be informed of his privilege against self-incrimination and right to counsel and shall be advised that false answers may result in his being charged with perjury. Target witnesses shall be told that they are possible indictees.

3. No prosecutor shall knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt.

4. A prosecutor should recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing law.

5. A target of a grand jury investigation shall be given the right to testify before the grand jury, provided he/she signs a waiver of immunity. Prosecutors shall notify such targets of their opportunity to testify unless notification may result in flight or endanger other persons or obstruct justice; or the prosecutor is unable with reasonable diligence to notify said persons.

6. The prosecutor shall not present to the grand jury evidence which he or she knows to be constitutionally inadmissible at trial.

7. The grand jury shall not name a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. Nothing herein shall prevent supplying such names in a bill of particulars.

8. A grand jury should not issue any report which singles out persons to impugn their motives, hold them up to scorn or criticism or speaks of their qualifications or moral fitness to hold an office or position. No grand jury report shall be accepted for filing and publication until the presiding judge submits *in camera* a copy thereof to all persons named or identifiable and such persons are given the opportunity to move to expunge any objectionable portion of said report and have a final judicial determination prior to the report's being published or made public. Such motion to expunge shall be made within ten days of receipt of notice of such report. Hearings on such motions shall be held *in camera*.

9. The grand jury should not be used by the prosecutor in order to obtain tangible, documentary or testimonial evidence to assist the prosecutor in preparation for trial of a defendant who has already been charged by indictment or

information. However, the grand jury should not be restricted in investigating other potential offenses of the same or other defendants.

10. The grand jury shall not be used by the prosecutor for the purpose of aiding or assisting in any administrative inquiry.

11. Witnesses who have been summoned to appear before a grand jury to testify or to produce tangible or documentary evidence should not be subjected to unreasonable delay before appearing or unnecessarily repeated appearances or harassment.

12. It shall not be necessary for the prosecutor to obtain approval of the grand jury for a grand jury subpoena.

13. A grand jury subpoena should indicate the statute or general subject area that is the concern of the grand jury inquiry. The return of an indictment in a subject area not disclosed by the grand jury subpoena shall not be basis for dismissal.

14. A subpoena should be returnable only when the grand jury is sitting.

15. All matters before a grand jury, including the charge by the impaneling judge, if any; any comments or charges by any jurist to the grand jury at any time; any and all comments to the grand jury by the prosecutor; and the questioning of and testimony by any witness, shall be recorded either stenographically or electronically. However, the deliberation of the grand jury shall not be recorded.

16. The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

17. Expanding on the already-established ABA position favoring transactional immunity, immunity should be granted only when the testimony sought is in the public interest; there is no other reasonable way to elicit such testimony; and the witness has refused to testify or indicated an intent to invoke the privilege against self-incrimination.

18. Immunity shall be granted on prosecution motion *in camera* by the trial court which convened the grand jury, under standards expressed in Principle number 17.

19. The granting of immunity in grand jury proceedings should not be a matter of public record prior to the issuance of an indictment or testimony in any cause.

20. A lawyer or lawyers who are associated in practice should not continue multiple representation of clients in a grand jury proceeding if the exercise of the lawyer's independent professional judgment on behalf of one of the clients will be or is likely to be adversely affected by his or her representation of another client. If the court determines that this principle is violated, it may order separate representation of witnesses, giving appropriate weight to an individual's right to counsel of his or her own choosing.

21. The confidential nature of the grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny.

22. It is the duty of the court which impanels a grand jury fully to charge the jurors by means of a written charge completely explaining their duties and limitations.

23. All stages of the grand jury proceedings should be conducted with proper consideration for the preservation of press freedom, attorney-client relationships, and comparable values.

24. The period of confinement for a witness who refuses to testify before a grand jury and is found in contempt should not exceed one year.

25. The court shall impose appropriate sanctions whenever any of the foregoing principles have been violated.

REPORT

Background

These twenty-five Principles were approved by the American Bar Association House of Delegates on August 9, 1977, during the ABA Annual Meeting in Chicago. They are now approved Association policy. The Principles represent the proposals off the ABA Section of Criminal Justice, and its Committee on the Grand Jury, chaired by Richard E. Gerstein.

The ABA believes that the grand jury reform legislation now pending before the Congress should adhere to these legislative principles. These proposals represent more than three years of study of the grand jury by the Section of Criminal Justice. In August, 1975, at Section urging, the ABA House of Delegates approved a policy addressing one grand jury bill (H.R. 1277) in the 94th Congress. That policy was a limited one, but included ABA suport for such key elements of grand jury reform as allowing counsel in the grand jury room, transactional immunity, and strengthened penalties for unauthorized disclosure of grand jury information. Since 1975, the Section's Grand Jury Committee has analyzed a number of pending bills, including H.R. 3736 and S. 3274 (94th Congress), both with a broader focus than H.R. 1277, on which the former ABA policy was formulated. New legislation, including H.R. 94, H.R. 3736 and S. 1440, was introduced at the beginning of the 95th Congress, and hearings have been held on these proposals.

Based on its continued study of this issue since 1975, the Criminal Justice Section asked the ABA in August 1977 to adopt an Association policy addressing a broader range of grand jury issues. This was felt timely not only because of the increasing public, press and professional attention focused on this issue, but also because action was anticipated in the 95th Congress on the pending legislation. Further, the Section recognized that a number of states are considering—and some have already enacted into law—similar bills.

In February, 1977, the Section asked the ABA House of Delegates to approve a package of 23 legislative principles. At the personal request of Attorney General Bell, the Section moved that the House defer action until the August 1977 Annual Meeting. In the interim, the Section revised several Principles to clarify intent; added three new Principles concerning prosecutorial conduct; and met with Honorable Benjamin Civiletti, Assistant Attorney General in charge of the Criminal Division, U.S. Department of Justice, and other Department representatives to discuss the Principles. Mr. Civiletti expressed support for some fifteen of the Principles, and noted that the Department would take no position on an additional five. On several additional Principles, Mr. Civiletti said that some rephrasing might moot Department objections. In an attempt to reach compromise in as many areas as possible, the Section's Grand Jury Committee held a special meeting in June, 1977, made additional amendments to a number of the Principles, and gained Council approval for these changes via a special mail ballot.

It sould be noted that the Principles were drafted by a Committee composed almost entirely of present and former prosecutors. It is chaired by Richard E. Gerstein, State Attorney for the greater Miami area for more than 20 years, and former President of the National District Attorney Association. The Committee also included members with state and federal prosecutorial experience (including the last Watergate Special Prosecutor, Charles Ruff), judges, law professors and members of the defense bar. The Principles further represent a concensus of the Criminal Justice Section Council, which includes a similar mix of persons from all parts of the criminal justice system. Most of the Principles were approved by the Council unanimously.

During the ABA Annual Meeting debate on this subject in August 1977, the House of Delegates approved the vast majority of these Principles by overwhelming voice vote. The hotly-contested question of allowing counsel in the grand jury room—Principle Number 1—was approved bp the House by a two-to-one margin (196 to 83), despite subtantial opposition voiced by the U.S. Department of Justice. Similarly, despite articulate criticism of Principle Number 17, supporting transactional immunity, the ABA reaffirmed its support for that position.

In recent years, the grand jury as an institution has come under increasing criticism for a number of reasons and from a number of sources. It has been accused of an absence of procedural safeguards. Reflecting these and other concerns, England—where the grand jury originated—abolished the institution in 1933; the major of states in our country allow prosecution either by indiement or by information. However, it remains a part of the federal system and in many state systems because of constitutional provisions. The ABA House of Delegates in 1975 went on record opposing amendment of the United States Constitution to eliminate the requirement for indictment by a grand jury. That position of the ABA should not be changed, but a comprehensive effort is needed to correct existing abuses. The Section believes that its proposed legislative Principles will go a long way toward remedying the ills of the grand jury as an institution.

Principles

Following are comments on each of the twenty-five Principles:

1. The American Bar Association has previously gone on record (in August, 1975) supporting the right of a witness to have counsel present in the grand jury room. Principle Number 1 spells out specifically what role counsel should play in the grand jury room. That role is carefully defined in the Principle to make it clear that it is *strictly* limited to advising the witness. This limited role will preclude the grand jury's becoming a "mini-trial"—as some have feared—and will not impair expeditious investigations. Under the Principle, counsel is not allowed to address the grand jurors or in any other way take part in the proceedings Further, the Section included a provision to allow removal of counsel who are disruptive or do not otherwise stay within the prescribed boundaries laid down by the Principle. Clarification of the attorney's limited role, coupled with the mechanism for removing disruptive counsel, should meet the objections raised by those who have feared creation of a "mini-trial."

Almost nowhere else in the criminal justice process—except before the grand jury—is a person who desires a lawyer denied that right. Requiring a witness who needs advice of counsel to consult his attorney outside the grand jury rooom is awkward and prejudicial. It unnecessarily prolongs the grand jury proceeding and places the witness in an unfavorable light before the grand jurors. The American Law Institute has called it a "degrading and irrational" procedure. It is extremely damaging to the witness continually to get up, go outside, and consult with counsel.

A recent Seventh Circuit decision [*U.S.* v. *Kopel*, 552 F.2d 1265 (1977)] points to additional problems with the procedure of consulting counsel outside the grand jury room. In that case, the Seventh Circuit said the U.S. Attorney, who had granted the witness permission to leave the grand jury room, was free at trial to bring up this fact as relevant to the perjury charges against the defendant. Dissenting, Judge Swygert decried the fact that the government was "permitted to 'sandbag' him [the defendant] by using the fact that he consulted his attorney against him." Nor is the right to leave the grand jury room to consult counsel absolute. [*See In re Tierney*, 465 F.2d 806 (5th Cir. 1972), in which the court said a limit could be placed on how frequently the witness could leave the room to consult his lawyer.]

The prestigious American Law Institute, in its Model Code of Pre-Arraignment Procedure adopted in 1975, supports counsel in the grand jury room. "While this is a break with tradition and prevailing practices," the ALI notes, "it is consistent with the provisions of some recent state procedure codes . . . it seems *unfair and inefficient* to require a witness to leave the grand jury room each time he wishes to consult with counsel." [at 237; emphasis added] The ALI commentary goes on to state that "exclusion of counsel . . . is closely related to the traditional view that the proceedings should be secret, and concern lest the presence of counsel hamper the freedom of the grand jury and the prosecutor in their investigation . . . The difficulty with this view . . . is that complex and important legal issues face a witness before a grand jury. An appearance before that body may subject an individual to the grave danger of self-incrimination or imprisonment for contempt . . . The witness may also inadvertently lose his right to claim the privilege by operation of the doctrine of waiver . . . And the inherent pressure and accompanying nervousness of a grand jury appearance upon an individual may make it very difficult for him to remember his attorney's instructions . . . For effective implementation of this right, an attorney should be present to follow the flow of the interrogation." [at 601]

Some nine states now have statutes allowing counsel to be present in the grand jury room—Arizona (for target witnesses), Illinois (for target witnesses, Kansas, Colorado, Michigan, (one-man grand juries), Oklahoma, South Dakota, Minnesota, Virginia and Washington State. The Section contacted practicing attorneys and prosecutors in these states; none reported problems. In fact, some prosecutors who said they initially fought the procedure now support it as a means of insuring fairness in the system.

Congressman Joshu Eilberg (D–Pa), writing in *Judicature* (Vol. 60, No. 8), similarly reported that those states which have implemented the practice have not reported any serious problems. Further, a number of additional states are now considering such legislation—including New York, Massachusetts, and California (where it has the support of the state's Attorney General).

Several arguments are raised by opponents. First it is argued that allowing counsel in the grand jury room will be a breach of the secrecy rule. In fact, grand jury secrecy is not served by keeping the lawyer outside the grand jury room, since the witness is free to tell his attorney anything that occurred inside. [Federal Rule of Criminal Procedure 6(e)]. Second, it is argued that the presence of the witness' lawyer will restrict free testimony in cases of organized crime, corporate and political corruption investigations. In fact, the states which allow counsel in the grand jury room have retained the grand jury in most instances as an investigatory body for precisely these kinds of investigations, and have no record of negative results. Further, there are alternate ways of securing a cooperative witness' statement, and this evidence can be summarized for the grand jury in the form of hearsay [*Costello v. United States*, 350 U.S. (1956)] When a witness is called to testify before a grand jury, the witness' attorney, sitting outside the grand jury room, can easily conclude from the time spent with the jury whether the witness takes the fifth amendment or testifies in full. Experienced prosecutors, further, have noted that very few witnesses indicate a desire to cooperate without the knowledge of their counsel; if the witness' testimony is helpful to the government, that fact will become evident to the attorney fairly quickly.

Recognizing that problems arising from multiple representation of witnesses could be exacerbated by allowing counsel in the grand jury room, the Section has strengthened Principle Number 20, which addresses that subject.

The presence of the attorney will not only reduce unfair speculation at the prosecutor's conduct, but will also serve to inhibit the prosecutor from possible improper conduct. Analogous to having counsel present to witness a line-up, the presence of the attorney in the grand jury room will help to insure the fairness of the proceedings.

Watergate Special Prosecutor Charles Ruff—in supporting this proposal in recent Congressional testimony—declared that ". . . . the mere possibility of occasional disruption simply cannot overcome the right of the individual witness to consult his attorney without going through the mildly absurd process of leaving the grand jury room every time. Indeed, most prosecutors would admit, I think, that they count on the burden of leaving the room to dissuade the witness from asserting his right to counsel." [Testimony before House Judiciary Subcommittee, April 27, 1977, at 3.]

The American Bar Association has been a leader in asserting the right to assistance of counsel in the criminal justice process. As the ABA Standards on Providing Defense Services (§ 1.1) declare, "The objective of the bar should be to ensure the provision of competent counsel to all persons who need representation in criminal proceedings . . ." Principle Number 1 would more meaningfully effectuate the sixth amendment right to assistance of counsel; but the limitations on the role of counsel will forestall the grand jury's being turned into an adversary proceeding. This proposal was approved by the ABA House of Delegates by an overwhelming 186–93 margin.

2. Principle Number 2 was added by the ABA House of Delegates at the August, 1977 Annual Meeting in Chicago as a proposed amendment to the Criminal Justice Section Principles offered by the ABA Judicial Administration Division. During the debate, the U.S. Department of Justice representatives said that they did not oppose this Principle.

3. Principle Number 3 states that the prosecutor shall not knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt. The ABA believes this to be a key element in bringing fairness to the grand jury process, and essential to prevent indictment of innocent persons. The Association already had gone on record in the ABA Standards for Criminal Justice Relating to the Prosecution Function (§ 3.6[b]) supporting this, declaring that, "The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt." The National District Attorneys Association (NDAA) Prosecution Standard 14.2D is also similar to Principle Number 3. As the commentary to the ABA Standard states, "Such a procedure tends to insure public confidence in the ultimate decision as to prosecution. The obligation to present evidence which tends to negate the guilt of the accused flows from the basic duty of the prosecutor to seek a just result." The NDAA Standards note that such a standard "provides for a greater accuracy in the indictment determination by providing that the grand jury be allowed to consider—as the trial fact finder would—any facts tending to negate the defendant's guilt."

Indictments have been overturned on the grounds of due process when a court has ascertained that the prosecutor *knowingly* used perjured evidence or failed to present evidence that squarely negated guilt. [*U.S. v. Basurto*, 497 F.2d 781 (9th Cir., 1974); *Johnson v. Superior Court of California*, 15 Cal. 3d 248, 124 Cal. Rptr. 32, 539 P.2d 792 (1975).] At the suggestion of U.S. Department of Justice representatives, who questioned the mechanics of the Principle as first drafted, the Section rewrote it to clarify its coverage and intent, since this is a legislative Principle, and not simply a general standard for prosecutorial conduct. The Justice Department did not oppose this Principle in the House of Delegates debate.

4. The fourth Principle would require the prosecutor to recommend that the grand jury not indict if he believes the evidence presented does not warrant an indictment under governing law. This language is *identical* to that of both ABA Standards on the Prosecution Function 3.6(c) and the National District Attorneys Association Standard 14.2E. The NDAA Standards commentary notes that this standard "recognizes the prosecutor's right and duty as legal advisor to the grand jury to recommend action to the grand jury. The prosecutor has a great deal more experience than the grand jurors in the strength and likely credibility of the evidence before a trial court. Since it will be his office's duty to prosecute the case, the prosecutor has a direct interest in assuring that resources are not squandered on unwinnable or otherwise improper cases." The ABA agrees with this rationale. Implementation of this Principle will help to insure substantial justice within the grand jury room. The U.S. Department of Justice has indicated support for this Principle.

5. Principle Number 5 would require that the target of a grand jury investigation be given the right to testify and present his side of the facts before an indictment is returned—provided such person signs a waiver of immunity. Under this proposal, the prosecutor would be required to take all reasonable steps to notify such prospective defendants—but recognizes that in some instances the prosecutor will truly be unable to locate such persons; or that, under some circumstances, notification may result in the person's fleeing, or his endangering witnesses or other persons, or obstructing justice. In such instances, notification would not be required.

The Section made two changes in this Principle during the drafting process. First, at the suggestion of the Justice Department, the term "subject" was replaced by "target." The Department suggested this as more appropriate wording, since "target" is the term generally used in federal law enforcement. Second, Justice Department representatives suggested addition of the phrase "or obstruct justice" as an additional condition under which the prosecutor need not notify a target. The Section also made this amendment, believing it to be inherent in the original Principle. Principle Number 5 is intended to insure that fair and just opportunity is given individuals to testify in their own behalf prior to being indicted. Such groups as the Association of the Bar of the City of New York have supported such a right. This is an essential ingredient, the ABA believes, in a fairly functioning grand jury—and criminal justice—system. Without it, the grand jury's essential function of arriving at an accurate indictment is undermined. The Justice Department did not oppose this Principle in the House of Delegates debate.

6. The sixth Principle puts the affirmative burden on the prosecutor not to present evidence which he *knows* to be constitutionally inadmissible at trial. This was rewritten by the Section during the drafting phase to meet Department of Justice concerns about the Principle as originally phrased. (It had originally stated that the grand jury "shall not consider unconstitutionally obtained evidence.") The ABA believes that the integrity of the grand jury will best be served by prohibiting presentation of unconstitutionally-obtained evidence by the prosecutor. Association policy in the ABA Standards on the Prosecution Function (§ 3.6[a]) declares that "a prosecutor should present to the grand jury only evidence which he believes would be admissible at trial." Notwithstanding the U.S. Supreme Court's decision in *U.S. v. Calandra*, 414 U.S. 338 (1974), the ABA believes that this Principle is needed to insure the integrity of the grand jury process; indeed, the Court in *Calandra* noted that "for the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained" because of use of illegally-seized evidence. The Principle is thus not inconsistent with the thrust of *Calandra*.

7. Principle Number 7 would prohibit naming a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. The ABA believes that naming of persons as unindicted co-conspirators visits opprobrium upon them—by charging the named persons with the commission of a crime but denying them a forum in which to seek acquittal or vindication. This stains the reputation of the person without providing any means for the person to show his innocence. This is an instance in which reforms are needed to insure the fair functioning of the grand jury.

The United States Court of Appeals for the Fifth Circuit has already held in accordance with this principle in *U.S. v. Briggs*, 514 F.2d 794 (1975). A second sentence states that supplying such names in a bill of particulars would not be prohibited. This would permit the prosecutor to respond to a request by the defense to reveal the names of co-conspirators who were not indicted. The Justice Department has not opposed this Principle.

8. The issuance and publication of grand jury reports which single out persons for scorn or criticism, impugn their motives, or denigrate their moral fitness to hold office have the effect of charging such persons with misconduct or unfitness—without affording them any forum in which to refute the charges or to seek vindication. The proper purpose of grand jury reports is to inform the public of situations requiring administrative, judicial or legislative corrective action—not the castigation of individuals when the fact-finding forum insured by the finding of an indictment is absent. The ABA is not proposing that such grand jury reports be proscribed from commenting on the job that an office holder is performing; but such reports should not condemn character alone. Grand jury reports which do single out persons in the manner described tend to undercut the fairness of the grand jury. Such misuse of the grand jury can, in fact, affect the political process. Judicial scrutiny of the report is essential to prevent spurious attacks on individuals when no forum of trial is available. The states that have recently considered this issue have reinforced control over the reporting process. [*People v. Superior Court of Santa Barbara County*, 531 P.2d 761 (Cal. 1975); Del. Rules, R.6 (1975); FLA. STAT. ANN. § 905.28 (1975).]

The procedures proposed in Principle Number 8 will assist in insuring that such abuses do not occur. [See *U.S. v. Briggs*, 514 F.2d 794 (5th Cir. 1975) and *Report of Grand Jury Proceedings*, 479 F.2d 458 (5th Cir. 1973).] The National District Attorneys Association Prosecution Standards Commentary (discussing an NDAA proposed standard on this subject, modeled on recent New York legislation) notes that ". . . an unfavorable report may stand as a severe form of extra-judicial punishment, from which there is no appeal . . . the quasi-judicial nature of the grand jury gives it an apparent reliability which may not be justified . . . grand jurors are accountable to no one . . . grand jurors may impose a personal standard of morality on persons, rather than an abstract and neutral conception of right and wrong." This proposal was not opposed by the Justice Department during the August debate.

9. The ABA opposes the practice of a prosecutor's using the grand jury to obtain tangible, documentary or testimonial evidence to assist in his preparation for trial of a defendant *already* charged by indictment or information. This is an abuse of the grand jury, and transforms it into a mere tool and arm of the prosecutor's office—a role which is contrary to the grand jury's historical purpose and function. The Department of Justice supports this Principle. In a Department Office of Policy and Planning statement filed in 1976 with the House Judiciary Subcommittee examining grand jury legislation, the Department stated that, "It is well-established under federal case law that a grand jury should act only with a view toward returning an indictment or to satisfy itself that no crime has occurred . . . It would be an abuse of legal process for a government attorney to use a grand jury to discover or build up evidence for trial of an existing indictment. Courts would discipline attorneys who did so and the Department would not countenance such action by its representatives."

This principle is in accord with well-settled case law. [*United States v. Dardi*, 330 F.2d 316 (2d Cir. 1964); *United States v. Doss*, 545 F.2d 548 (6th Cir. 1976).] In the *Doss* decision, the Court declared that, "We find no constitutional statutory or case authority for employment of the grand jury as a discovery instrument to help the government prepare evidence to convict an already-indicted defendant. Such a use of the grand jury would pervert its constitutional and historical

function . . ." The Court called it "a possible revival of a version of the Star Chamber of 18th Century England . . ."

10. The ABA strongly opposes prosecutorial use of the grand jury to assist administrative investigations—e.g., Internal Revenue income tax investigations. Such improper utilization of the grand jury warps its true function and leads to abuses such as those described in Number 9, *supra*. The ABA House of Delegates in February, 1977—in addressing a proposed amendment to Federal Rule of Criminal Procedure 6(e)—expressed concern regarding dissemination of grand jury information to government experts for use in unrelated civil proceedings. The Section of Criminal Justice Report accompanying the House-approved resolution declared that disclosure of grand jury information to a broad group of governmental personnel might be used as "subterfuge by some agencies to obtain information through the grand jury proces which was not legitimately required for the purposes of the pending grand jury investigation . . . The dissemination of information to serve particularized departmental or agency needs would not be a legitimate one." [House of Delegates Report Book, 2/77 Midyear Meeting, at 138-9.]

A U.S. Department of Justice paper submitted to the House Congressional hearings echoes this concern: "One of the primary abuses of the grand jury which must be avoided . . . is the attempted use of its broad investigative powers by governmental agencies in pursuit of investigations that are solely their own rather than the grand jury's." [U.S. Department of Justice Office of Policy and Planning, *Memorandum on the Grand Jury*, p. 106; printed in record of House Judiciary Subcommittee Hearings.] In the case of *United States* v. *Doe*, 72 Crim. Misc. 1 (S.D. N.Y. 1972), the court, in denying a government motion to examine special grand jury minutes to determine violations of Titles 18 and 28 *and* "to determine civil tax liability," declared that, "The grand jury's role is properly confined . . . when it is held empowered to conduct investigations that are in their inception exclusively criminal." It should be noted that the Attorney General's Advisory Committee of U.S. Attorneys has expressed its support for this proposed Principle.

11. Principle Number 11 provides that witnesses summoned before grand juries should not be subjected to unreasonable delays or unnecessarily repeated appearances or harassment. The ABA supports legislation which would forbid such practices. In some instances, these abuses have occurred and grand jury witnesses have been repeatedly called to appear; or have been subjected to unreasonable delays or other forms of harassment. An indifference to the convenience of a grand jury witness is as objectionable as the use of a grand jury subpoena to harass a witness, and is a subtle means of intimidating the witness before his appearance. The ABA Standards for the Prosecution Function (§ 5.7[a]) recognize the prosecutor's obligation to handle witnesses "fairly, objectively and . . . without seeking to intimidate or humiliate the witness . . ." The U.S. Department of Justice supports this Principle, as does the Advisory Committee of U.S. Attorneys.

12. Several of the grand jury reform bills before the 95th Congress (e.g., H.R. 3736) would require grand jury approval of any subpoenas issued. The ABA opposes such a procedure. It believes this requirement would not only be cumbersome, but would cause unnecessary delay. The prosecutor, the ABA believes, is much better suited to make determinations regardng issuance of subpoenas than are lay grand jurors. The ABA thus does not support these provisions in pending legislation. The Advisory Committee of U.S. Attorneys supports this Principle.

13. Principle Number 13 would require that a grand jury subpoena indicate the stature or general subject that is the focus of the grand jury inquiry. This requirement is intended to enable the recipient and the court to determine more accurately questions of relevancy. It would also enable the witness to prepare himself more adequately for his appearance, and would insure more effective and efficient use of counsel, court and grand jury time. The Principle does *not* intend that a detailed description of the statutory *and* subject areas be required: but that a broad statutory citation or general description of the subject be included. Justice Department representatives have expressed support for this Principle, but indicated concern that, as initially written, the Principle would leave open the question of later challenges to the indictment based on the fact that the defendant was charged under statutes not named in the subpoena. To meet this concern and clarify the Principle's original intent, the Section added

the second sentence; this makes it clear that the indictment cannot be vitiated if the person is indicted under a statute or in a subject area not mentioned in the subpoena. The Advisory Committee of U.S. Attorneys supports this Principle.

14. A grand jury subpoena should not be returnable except when the grand jury is sitting. This proposal is intended to avoid potential abuse of the subpoena power by the prosecutor's office. It will help to insure the integrity of the grand jury function. Both the Justice Department and the Attorney General's Advisory Committee of U.S. Attorneys support this Principle.

15. Principle Number 15 would mandate stenographic or electronic recording of all matters before the grand jury—except the deliberations of the grand jury itself. This would represent a logical step forward in grand jury reform, and is not inconsistent with the necessity of maintaining grand jury secrecy. The judge's charge to the grand jury would be recorded, as would the prosecutor's introductory remarks and testimony and questioning of all witnesses. Some 31 states already require recording of all grand jury proceedings other than votes and deliberations, and an additional 6 states permit it, according to a Library of Congress study (printed in 1976 Hearings Record, House Judiciary Subcommittee on Immigration, Citizenship and International Law, at 714). Several federal district courts already record all grand jury proceedings—including the District of Rhode Island, the Eastern Ditsrict of Washington, and the Northern District of Illinois. The Ninth Circuit has ruled that a prospective defendant who makes a timely request cannot be arbitrarily denied recordation of grand jury proceedings. [*United States* v. *Thoreson*, 428 F.2d 654 (9th Cir. 1970); *United States* v. *Price*, 474 F.2d 1223 (9th Cir. 1973)]

Major groups have supported this requirement. The American Law Institute, in its Model City of Pre-Arraignment Procedure, urges that a record be made of all proceedings before the grand jury. The ABA Standards for Criminal Justice on the Prosecution Function (§ 3.5[c])—already ABA policy—provide that, "The prosecutor's communications and presentations to the grand jury should be on the record." The accompanying commentary points out that "since grand jury proceedings are generaly secret and *ex parte*, it is particularly desirable that a record be made of the prosecutor's communications and representations to the jury." The recently-issued Prosecution Standards of the National District Attorneys Association (§ 14.2[F]) also urge that "all testimony before the grand jury should be recorded." Recording will aid the prosecution—by insuring that perjured testimony does not go unpunished. Recording would also act as a restraint on the prosecutor not to exercise undue or improper influence on the grand jury.

The Justice Department indicated during the August 1977 House of Delegates debate that it now would not oppose this Principle. The U.S. Attorneys' Advisory Committee has opposed recordation of prosecutorial comments to the grand jury, arguing that this would "formalize what should be an informal working relationship between grand jurors and government attorneys." (From Position Paper submitted to Section Council, May 14, 1977, at 7.)

It is exactly that "informal" relationship which invites subtle abuses of the grand jury, the ABA believes; that is itself a cogent argument in favor of recordation. The Advisory Committee further argues that a recordation requirement would "impose severe and undue administrative burdens" (Position Paper, *supra* at 7); and the Justice Department points to unavailability of court reporters in many areas" (House Judiciary Subcommittee Hearings Record, *supra* at 106). There are real benfits to be gained by recording matters before the grand jury—for the *prosecution*, as well as for the defense. Raising administrative hurdles is *not* sufficient argument against this proposal, which truly goes to the integrity of the grand jury process.

16. This Principle is identical to National District Attorneys Association Prosecution Standard (§ 14.4B) and the ABA Standards for Criminal Justice Relating to the Prosecution Function (§ 3.5[b]). It would prohibit the prosecutor from making statements or arguments to influence the grand jury action in a manner which would not be permitted before the trial jury. This is essential because of the prosecutor's role as the only legally-trained person before the lay grand jurors. As the Commentary to the ABA Standards notes, "A prosecutor should not take advantage of his role as the *ex parte* representative of the state before the grand jury to unduly or unfairly influence it in voting upon charges brought before it. In general, he should be guided by the standards governing and defining the proper presentation of the state's case in an adversary trial before a petit jury."

Because of the secret nature of the grand jury proceedings, the lack of direct court supervision, and the fact that the prosecutor's is a unilateral presentation, he must avoid unduly influencing the grand jurors by means which would not be appropriate in the public courtroom before a petit jury. This is essential to prevent the grand jury's becoming a mere echo of the prosecution. As one writer has noted, "[G]rand jurors must place enormous trust in the prosecutor's guidance. It is he, after all, who tells them what the charge is, who selects the facts for them to hear, *who shapes the tone and feel of the entire case . . .*" [emphasis added] [Antell, *The Modern Grand Jury: Benighted Super-government*, 51 A.B.A.J. 153, 154 (1965.)] The Justice Department has also expressed its support for this Principle.

17. Principle Number 17 broadens a prior ABA policy concerning transactional immunity to specify proper instances in which immunity should be issued: when it is in the public interest; when there is no other reasonable way to elicit the testimony; and when the witness has refused to testify, or stated he will invoke the fifth amendment. This is intended to insure that grants of immunity are carefully considered prior to issuance and that they are not issued when other means could be used to obtain the needed information.

The ABA House of Delegates (at the 1975 Annual Meeting) had already supported amendment of 18 U.S.C. 6002 to provide "transactional" immunity, rather than "use" immunity provided under present federal law. Under transactional immunity, a witness may be statutorily compelled to give testimony which might otherwise violate the privilege concerning self-incrimination, provided the witness is given immunity from prosecution for any crime referred to in the testimony. Under 18 U.S.C. 1525(b), Part V of the Organized Crime Control Act of 1970, and under *Kastigar* v. *U.S.*, 406 U.S. 441 (1972), only "use" immunity need be afforded. This merely prevents the prosecution from using the actual testimony (or leads derived therefrom) in any subsequent criminal prosecution.

Some 31 states currently provide transactional immunity, according to the House Judiciary Subcommittee Hearings Record, *supra*. The National Conference of Commissioners on Uniform State Laws has supported it, in the Uniform Rules of Criminal Procedure (Rule 732[b]). "Use" immunity, while constitutional (*see Kastigar, supra*) should be rejected for several practical reasons. It is not only susceptible of prosecutorial abuse, but can be a subtle invitation to perjury on the part of the witness. Since the witness knows what he says can be used to impeach him, it can be an encouragement to slant his testimony in a manner most favorable to him. Testimony thus obtained is not accurate. Witness cooperation is essential to an effective grand jury investigation, yet the uncertainty generated by "use" immunity, and the difficulties in determining the scope of the protection afforded the witness, can chill and inhibit his cooperation. Transactional immunity better encourages accurate testimony and minimizes witness resistance to questioning.

The small number of actual successful prosecutions of immunized witnesses with "use" immunity indicates that a return to transactional immunity will not remove a significant weapon against organized crime. [*See* 14 Am. Crim. L. Rev. 275, 282 (1977), wherein the U.S. Department of Justice reports that, in practice, few witnesses granted "use" immunity are subsequently prosecuted for crimes described in their immunized testimony.] "Use" immunity represents the most grudging interpretation of the Constitutional right against self-incrimination, the ABA believes.

18. Several of the grand jury bills pending before the 94th Congress include a provision requiring approval of immunity grants by a majority vote of the grand jury. While many supporters of this provision believe that it would help to insure the independence of that body, the ABA does not support such a requirement. Instead, Principle Number 18 would provide that immunity be granted on prosecution motion *in camera* by the trial court which convened the grand jury; the standards outlined in Principle Number 17 would be followed in determining whether such a grant should be made. Lay grand jurors are not adequately oriented to make determinations regarding immunity grants, the ABA believes. This is properly an executive function with court overview.

19. Principle Number 19 would forbid making the granting of immunity in grand jury proceedings a matter of public record before the issuance of an indictment or testimony in any cause. To make public such grants undercuts the function of the grand jury by selectively publicizing its investigations—and has

the definite potential of harm to those to whom immunity is alleged to have been granted. The U.S. Department of Justice has indicated its agreement with this Principle.

20. The question of multiple representation of witnesses in grand jury proceedings has recently received increasing attention both from members of the private bar and from government attorneys. [*See, e.g.*, Cole, *Time for a Change: Multiple Representation Should be Stopped*, 2 Nat'l. J. Crim. Def. 149 (1976); and Speech, May 3, 1977, to Chicago Bar Association on *The Perils of Multiple Representation in Criminal Antitrust Proceedings*, by Richard Favretto, Deputy Director of Operations, Antitrust Division, U.S. Department of Justice.] Recent court opinions have also tried to grapple with this question. [*See, e.g., In Re Investigation Before April 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976).] Principle Number 20 was substantially rewritten by the Section during the drafting stages to strengthen its provisions, to meet concerns raised by critics of the proposal to allow counsel in the grand jury room. Opponents of that Principle have focused much of their objection on problems which could arise when one attorney represents more than one witness in a grand jury proceeding.

Principle Number 20 spells out the professional responsibility of an attorney *not* to continue multiple representation of clients in a grand jury proceeding if conflicts can arise. As originally worded, the Principle provided that, "If the court determines that there is multiple representation of witnesses in a grand jury proceeding, it shall advise the witnesses that they have the right to be separately represented by counsel, and explain that conflicts of interest may otherwise arise." Under the redrafted approved Principle, the burden is initially placed on the defense attorney to assume responsibility for remedying situations when conflicts from multiple representation arise or are likely to arise. If the court finds that this principle is not being followed, however, it would have the authority to order separate representation. The phrase "giving appropriate weight to an individual's right to counsel or his or her own choosing" was added to avoid a situation in which the court summarily excludes certain counsel from representing *any* witness in the proceeding. Multiple representation is considered to include the following: two or more witnesses in a grand jury proceeding who may have conflicting interests; a witness and a potential defendant in a grand jury proceeding; or a witness whose counsel fees are paid by a third party who is a witness or potential defendant in a grand jury proceeding.

The significant ethical concerns involved in multiple representation when the clients have actual or potential conflicting interests; the potential compromises to the Constitutional guarantee to effective assistance of counsel; and the potential for inhibiting the public's right to an effective grand jury investigation require the private bar to deal seriously with this issue. As Alan Y. Cole noted in a recent article (*supra*), "To avoid the Scylla of conflict, the defense attorney with multiple clients will likely become engulfed in the Charybdis of ineffective assistance of counsel . . ." The Justice Department has expressed its support for this Principle.

21. Principle Number 21 provides that the confidential nature of grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny. Shielding their identity is necessary to prevent unjust harm to witnesses and potential defendants. The practice in some jurisdictions of having witnesses exposed to public and press as they emerge from the grand jury room is an unfair one—it taints the witnesses' reputations by the mere fact of their appearance. The importance of maintaining the secrecy of grand jury proceedings had already been recognized by the Association, when, in its 1975 policy, it urged strengthened penalties for unauthorized disclosure of grand jury information. The Justice Department supports this Principle.

22. The ABA supports legislation which would mandate the court's charging grand jurors orally on impanelling as to their duties and responsibilities; written copies of the charge would then be distributed to the grand jurors for their continuing reference. Detailing to grand jurors their powers, responsibilities and rights will help to insure their comprehensive understanding of their proper role, and will thereby help to strengthen the independence and fair function of the grand jury. Several of the bills pending in the 95th Congress contain such provisions, as does pending legislation in several states. The Department of Justice has indicated its support for this Principle.

23. In adopting Principle Number 23, the ABA goes on record recognizing potential abuses of newspersons who are called as witnesses before the grand

jury and then claim a first amendment privilege not to testify. In some prosecutors' offices around the country, office policy already exists forbidding the calling of journalists before the grand jury. As the U.S. Supreme Court has noted, "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification . . . We do not expect courts will forget that grand juries must operate within the limits of the First Amendment, as well as the Fifth." [*Branzburg v. Hayes*, 408 U.S. 665, at 707–708 (1972).] Supporting the need for legislation in this area, a Newspaper Guild spokesperson declared in testimony before the House Judiciary Subcommittee hearings in June 1977, "The issuance of subpoenas to news gatherers has become a veritable contagion . . ."

Principle Number 23 is further intended to express ABA concern about the increasing number of instances nationally in which criminal defense lawyers are themselves being subpoenaed to testify before grand juries. Abuse of grand jury subpoenas used against persons having recognized confidential relationships appears to be increasing; this can drive a wedge of distrust between defense attorney and client and has a chilling effect on sixth amendment rights and confidential relationship. The ABA purposely did not go into further detail in this proposed Principle, believing that an expression of Association concern about present abuses of the grand jury vis-a-vis the press and the criminal defense bar would call attention to what appears to be a growing problem. The Justice Department has expressed its support for this Principle.

24. In August, 1975, the ABA House of Delegates opposed amendment of the Recalcitrant Witness Statue [28 U.S.C. 1826 (a)] to reduce from 18 to 6 months the maximum period of confinement on a civil contempt order for refusal to testify before a grand jury. The Criminal Justice Section, in its study of grand jury legislation after the 1975 action, became convinced that this position should be reconsidered, and supported a six-month maximum, as contained in several pending grand jury reform bills. The Section felt that this length of confinement would be sufficient to compel a witness to testify. In June, 1977, the U.S. Department of Justice—softening its original opposition to any change in current law—agreed to support a maximum 12-month confinement. During the ABA House of Delegates debate in August 1977, the Section agreed to support the 12-month maximum as a compromise. While recognizing that abuses have occurred [*see* Record of 1976 hearings before House Judiciary Subcommittee on Immigration, Citizenship and International Law], the Section believes the ABA-approved 12-month maximum will help to avoid long, punitive confinement. It should be stressed that the Association has previously gone on record supporting legislation to prohibit multiple confinement upon a subsequent refusal by a witness to testify about the same transaction.

25. Rather than specifying proposed sanctions for violation of each proposed grand jury legislative Principle outlined herein, the ABA simply notes that the court should exercise its power to impose appropriate sanctions when the proposed Principles are violated. Such sanctions will obviously be fashioned in any proposed legislation; but it is not the ABA's intent to suggest statutory language.

Conclusion

When the grand jury was created in 12th Century England, it was intended to serve as a shield betweent the citizen and the Crown. In recent years, the grand jury has come under increasing attack: observers charge the grand jury system is riddled with abuse, and is no longer a shield for the citizen but a shield for the government. Critics declare that it has departed from its proper constitutional function of protecting citizens from unwarranted prosecutions.

The American Bar Association—based on the work of the Criminal Justice Section and the C.J.S. chaired by experienced prosecutor Richard E. Gerstein—believes that reforms are needed to insure fairness—but without undercutting the grand jury's legitimate junctions or destroying it as an institution. While objections to these Principles have been raised, resistance to change from those within the criminal justice system cannot in itself be sufficient reason to reject well-considered—and needed—proposals. Efforts to implement the Principles are now needed.

The Congress and many state legislatures are now acting on grand jury reform proposals; professional, media and public focus on this subject cannot be expected to abate. The Association—as in its landmark Standards for Criminal Justice project—has long been in the forefront of criminal justice improvement.

The ABA presents the 25 Principles as a contribution towards helping to fashion well-reasoned, workable and effective grand jury reform legislation.

COMPARATIVE SUMMARY OF DIFFERENCES BETWEEN H.R. 94 AND RESOLUTION APPROVED BY THE ABA HOUSE OF DELEGATES, AUG. 9, 1977

	H.R. 94	ABA
I. RECALCITRANT WITNESS		
A. Application	Federal court and grand jury witnesses	Grand jury witnesses (No. 24).
B. Initiation	Prosecutor	Prosecutor (comment to No. 24; ABA resolution of August 1975).
C. Procedure	(1) Show cause hearing, (2) with counsel, and (3) 72 hr notice.	No provision.
D. Place of confinement	Federal correctional institution within 50 mi unless witness requests other suitable institution.	No provision.
E. Period of confinement	Not more than 6 mo	Not more than 12 mos (No. 24).
F. Reiterated contempt	Bars use of 28 U.S.C. 1826 or 18 U.S.C. 401 for same witness and same transaction after 1 use of either.	Bars multiple imprisonment of the same witness for the same transaction (No. 24 comment).
G. Bail	Applies 18 U.S.C., ch. 207 unless appeal is frivolous or taken for delay.	No provision.
H. Expedited appeal	Within 30 days	No provision.
I. Applicability of § 3006A	Yes	No provision.
J. Defenses	Questions may not be based on violations of Federal wiretap law.	Supports (ABA resolution of August 1975).
II. IMMUNITY		
A. Type	Transactional	Transactional (No. 17).
B. Prosecution permitted	Perjury, false statements, or failure to comply	Same (No. 17 comment; earlier ABA resolution).
C. Procedure		
1. Notice	(1) 1 week except in case of special need, (2) scope and nature of immunity, (3) right to counsel and availability of §3006A.	No provision.
2. Authorized to request order	U.S. Attorney with Attorney General's approval.	Prosecutor (No. 18).
3. Witness consent	Not required	Not required.
4. Conditions for issuance	(1) Court determines order is in the public interest.	Same.
	(2) No danger of foreign prosecution	No provision.
	(3) Witness will or has claimed his 5th amendment privilege.	Same.
	(4) Grand jury cases:	No other reasonable way to elicit testimony (No. 17).
	(A) evidence sought is relevant to scope of immunity and inquiry.	
	(B) investigation is authorized.	
	(C) summary of evidence is provided to the court.	
5. Secrecy	No provision	Motion made in camera (No. 18).
	No provision	Granting of immunity secret until indictment or testimony (No. 19).
6. Indictment of immunized witness.	Barred in case of the same grand jury before which the witness testifies.	No provision.
D. Congressional immunity	Attorney General notification repealed	No provision.
III. SIZE OF GRAND JURY		
A. Reduced	6 to 15 members	No provision.
B. Selection after failure of sufficient number to appear.	Not from bystanders	No provision.
C. Number required for indictment	2/3 of 9 or more	No provision.
IV. DISCLOSURE CRIMES		
A. Unlawful disclosure by those present.	Matters occurring before the grand jury—$500 and/or 6 mo.	Supports (ABA resolution on August 1975).
B. Unlawful disclosure for profit or to obstruct justice.	Matters occurring before the grand jury—$20,000 and/or 5 yr.	No provision.
C. Exceptions	Disclosures ordered by the court, to or by attorney for the government, and by witness or his attorney.	Supports (ABA resolution on rule 6(e)).
	Press exempt from B	Identity of witnesses appearing before grand jury not available to public (No. 21).
V. RIGHTS AND DUTIES		
A. Notice to grand jury	Duty to inquire into alleged Federal crimes committed within the district.	Written charge completely explaining their duties and limitations (No. 22).
	Right to independent inquiry	Prosecutor not to make statements or arguments that would be impermissible at trial (No. 16).
	Right to call and question witnesses.	
	Right to require production of evidence.	
	Subject matter of inquiry.	
	Statutes involved.	
	Basis for indictment.	Prosecutor not to recommend indictment by grand jury if evidence does not warrant (No. 4).
	Obligation of secrecy.	
	Other matters in the discretion of the court.	

V. RIGHTS AND DUTIES—Continued		
B. Requests to testify	Anyone may request attorney for the government which is forwarded to the grand jury.	Target has right to testify before the grand jury (No. 5).
	Grand jury may refuse to receive evidence.	No provision.
	Targets must be notified of right to request to appear unless result in flight, would endanger other witnesses, or delay investigation.	Targets must be notified unless that would result in flight, danger or obstruction of justice or unless notification not possible.
	Public record or requests to appear maintained.	No provision.
	Witness appearing under request waives his fifth amendment privilege.	Same (No. 5).
C. Duties of attorneys for the government	Advise jury of impeachment or exculpatory evidence.	Advise jury of evidence which would "tend substantially to negate guilt" (No. 3).
	Avoid calling witnesses who intend to assert the 5th amendment privilege.	No provision.
	May not initiate inquiry without additional evidence after earlier grand jury has failed to return indictments.	No provision.
	No provision	Recommend against indictment if evidence does not warrant (No. 4).
	No provision	Avoid presentation of evidence which would be constitutionally inadmissible at trial (No. 6).
	No provision	Avoid use to secure evidence against an already charged defendant, but no bar to inquiry into other crimes or defendants (No. 9).
	No provision	Avoid use to secure evidence for noncriminal proceedings (No. 10 and comment).
	No provision	Make statements to influence jury action which could not be made to a petit jury (No. 16).
VI. INDEPENDENT GRAND JURY INQUIRY		
A. Scope	Alleged violations of Federal law within their district.	No provision.
B. Term	18 mo with 6-mo extensions not to exceed 36 mo.	No provision.
C. Special attorney to assist grand jury.	Appointed by court upon request of majority or grand jury.	Opposes (ABA resolution of August 1975).
	Special attorney may appoint assistants.	
	Special attorney may assist in conduct of inquiry, prepare and sign indictments, conduct all other phases of related criminal prosecution, obtain material from other agencies, be supplied by GSA, be funded out of Department of Justice appropriations.	
VII. RIGHTS OF GRAND JURY WITNESSES		
A. Counsel	Witnesses have right to have attorney present to assist them.	Same (No. 1).
	Application of §3006A	Same (comment to No. 1, prior resolution, August 1975).
	Attorney may be present in grand jury room with his client but only to advise client; may not address the grand jury.	Same (No. 1).
	Attorneys may be removed for addressing the grand jury or to prevent delays or impediments.	Attorneys may be removed for conduct inconsistent with limited role (No. 1); court may remove counsel representing multiple witnesses (No. 20).
B. Subpena:		
1. Delay between issuance and and appearance.	1 week except for special need or consent of witness.	No unreasonable delays (No. 11); 72 hours unless special need or consent (ABA resolution Aug. 1975).
2. Information in subpena	Right counsel	Same (No. 2).
	5th amendment privilege	Same (No. 2).
	Subject matter of inquiry	Subject matter or statutes involved (No. 11).
	Whether witness is target	Same (No. 2).
	Statutes involved	Subject matter or statutes involved (No. 11).
	Other matters in court's discretion	No provision.
	No provision	False answers constitute perjury (No. 2).

VII. RIGHTS OF GRAND JURY WITNESSES—Continued		
B. Supena—Continued		
3. Motions concerning subpenas.	Venue in district where issued or served or where the witness resides.	No provision.
	Motion may be made at any time but one not made before appearance must be made where the grand jury is sitting.	
	Motion stays requirement for appearance.	
4. Grounds for quashing or modifying subpenas.		Court should impose appropriate sanctions for violation of principles which include:
	Evidence sought against one who is already formerly accused.	Grand jury should not be used to gather evidence against a formerly charged defendant (No. 25), (No. 9).
	Witness has previously been held in contempt concerning the same transaction.	Same (No. 24 comment).
	Written notice that the witness intends to claim 5th amendment privilege.	No provision.
	Witness was not advised of his rights	Advised of right to counsel and 5th amendment privilege (No. 2), traget advised of right to appear (No. 5), advised of subject matter or statutes involved in investigation (No. 13), and target advised that he is such (No. 2).
	Compliance would be unreasonable, oppressive and require unnecessary appearance.	Not subjected to unreasonable delay in appearance, unnecessary and repeated appearances, or harassment (No. 11).
	Purpose is punitive	No provision.
	Evidence sought is not relevant or is not within the grand jruy's jurisdiction.	No provision.
	No provision	(e) Grand jury should not be used to gather evidence for noncriminal proceedings (No. 10).
	No provision	(f) Subpenas should not be returnable when the grand jury is not sitting (No. 14).
	No provision	(g) Preservation of press freedom, attorney-client relationships and comparable values should not be threatened (No. 23), but identity witnesses should not be made public (No. 21).
5. Jurisdictional limitation	Grand jury may only investigate where violation of a substantive criminal law may have occurred.	No provision.
6. Grand jury approval	No provision (assumes jury approval not required).	Jury approval not required for issuance of subpena (No. 12).
VIII. RECORDINGS, TRANSCRIBING AND AVAILABILITY OF GRAND JURY PROCEEDINGS		
A. Recordings	Stenographic or electronic recording of notice of grand jury perogatives, charges and comments of the court, statements of attorney for the government, questioning and testimony of witnesses, interchanges between witnesses and attorneys, but not grand jury deliberations.	Stenographic or electronic recording of all matters before the grand jury, charges and comments of the court, statements of attorney for the government, questioning and testimony of witnesses, but not grand jury deliberations (No. 15).
B. Witness access	Examine and copy any of witness' statements in possession of the government prior to grand jury testimony.	No provision.
C. Defendant access	Examine and copy after formal accusation: grand jury testimony of all witnesses to be called at trial, statement to grand jury by attorneys for government relating to case, other exculpatory or material grand jury evidence.	No provision.
D. Restricted access	Court may deny or restrict disclosure and must preserve record.	No provision.
IX. PRELIMINARY EXAMINATION		
A. Right	Defendant is entitled to one after formal accusation except on petty offenses or unless waived.	No provision.
X. REPORTS CONCERNING GRAND JURY INVESTIGATIONS		
A. To Congress and Administrative Office of U.S. Courts.	By Attorney General at the beginning of each session of Congress.	No provision.

X. REPORTS CONCERNING GRAND JURY INVESTIGATION—Continued		
B. Content	By judicial district: (1) the number and description of grand jury investigations, (2) number of requests and approvals for immunity applications, (3) number of immunity applications, (4) number of immunity applications granted, (5) date, number and duration of grand jury contempts, (6) number of arrests, convictions, indictments, no-bills resulting from immunity grants, (7) description of Justice Dept. use and storage of grand jury information and (8) other information concerning grand juries.	No provision.
XI. GRAND JURY REPORTS		
A. Prohibitions	No provision.	Singling out persons to impugn motives, hold them up to scorn or criticism, or address-ing fitness to hold office (No. 8).
B. Procedures	No provision.	All reports submitted in camera with those named afforded an opportunity to move in camera for expungement (No. 8).
XII. OTHER PROVISIONS		
A. Effect on other laws	Any other rights or privileges not affected by bill.	No provision.
	Inconsistent provisions of Fed. Rules of Criminal Procedure inapplicable.	No provision.
B. Other rights	No provision.	Unindicted coconspirators should not be named, but bill of particulars unrestricted (No. 7).
	No provision.	Identity of grand jury witnesses should not be made public (No. 21).

Mr. EILBERG. The subcommittee is adjourned.

[Whereupon, at 12:30 p.m., the hearing was adjourned.]

GRAND JURY REFORM

WEDNESDAY, APRIL 27, 1977

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP,
AND INTERNATIONAL LAW OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:10 a.m., in room 2226, Rayburn House Office Building, the Honorable Joshua Eilberg [chairman of the subcommittee] presiding.

Present: Representatives Eilberg, Hall, Evans, Fish, and Sawyer.

Staff present: Garner J. Cline, Arthur P. Endres, Jr., Martin H. Belsky, and Alfred M. Nittle, counsel; and Alexander B. Cook, associate counsel.

Mr. EILBERG. The subcommittee will come to order.

This is the second in our series of hearings in the 95th Congress on proposals to reform the Federal grand jury system. Last month we heard from witnesses representing the American Bar Association and representing various grand jury reform groups. Today, we are pleased to receive the testimony of prosecutors and former prosecutors, of former grand jurors, and from a District court judge representing the Judicial Conference of the United States. These witnesses should be able to describe for us what, in fact, occurs in the grand jury room and the legal and policy issues surrounding grand jury proceedings.

We hope by our hearings to direct public attention to a long overlooked step in the criminal justice system—the grand jury.

At our hearings during the 94th Congress, and again on March 17 of this year, the subcommittee heard numerous complaints about alleged grand jury abuses and reviewed detailed requests for legislative reforms. A recent television drama, called the "Rockford Files," brought increased public awareness to present grand jury practices and the need for reform. A series of recent cases, involving witnesses allegedly involved in the harboring of Patty Hearst, and witnesses allegedly involved in terroristic activities in behalf of the Puerto Rican liberation movement, have similarly highlighted present Federal grand jury rules. Finally, investigations in New York State as to the propriety of actions by prosecutors and special State grand juries have led to public questioning of the "protective" role of the grand jury.[1]

Recently, the House passed some technical amendments to rule 6 of the Federal Rules of Criminal Procedure and disapproved some proposed substantive changes to this rule. Rule 6 deals with the authorization of persons to be present in the grand jury room and the need to

[1] Articles on these and other events and issues may be found in app. 4 at p. 1438.

insure secrecy in grand jury proceedings. Because several proposed provisions of our bill deal with the same provisions, the subcommittee has agreed to consider the possible amendment of rule 6 as part of our total consideration of changes in the Federal grand jury system. We, of course, will work closely with the Subcommittee on Criminal Justice, chaired by the distinguished Member from South Carolina, Mr. Mann, on any proposed Federal rules changes.

The focus of our hearings is H.R. 94, the proposed Federal Grand Jury Reform Act of 1977, which I have introduced and which has now been cosponsored by 12 Members. Other bills have also been introduced and these alternative proposals will, of course, be considered by the subcommittee. We expect to continue our hearings in future months by receiving the testimony, comments, and suggestions, of other legal organizations, attorneys, citizen groups, judges, businessmen, and prosecutors. The official position of the Department of Justice will also be given at later hearings.

I hope and expect to bring a bill to the floor during this session. We will be able to report out comprehensive legislation this session, and then, working with the Senate, enact needed reforms and changes into law.

First, let me thank all those who are present for their interest and for coming here to Washington to testify before us. This is the first serious attempt to look at the grand jury in the history of our country and what we are doing may have historic connotations.

With that, I would like to welcome to the stand the Honorable Frederick B. Lacey, district judge of New Jersey, representing the Judicial Conference of the United States, together with Carl Imlay.

Will you gentlemen forgive me? I did not see the chairman of our full committee here. Mr. Chairman, will you please come forward and help us?

Mr. RODINO. I don't want to interrupt the committee, but I did want to come here and say hello to my friend, Judge Lacey and welcome him to the committee. I know you have got Mr. Del Tufo in the audience and I thought I'd come and just welcome them. I don't want to take the time of the subcommittee, but you will be interested, I know, in hearing Judge Lacey and Mr. Del Tufo.

Mr. EILBERG. Gentlemen, I know that you have statements and you may read them or summarize them. If you decide to summarize them we can place the statements in the record and we have some questions we'd like to ask after you have concluded.

TESTIMONY OF HON. FREDERICK B. LACEY, DISTRICT JUDGE, NEW JERSEY, REPRESENTING JUDICIAL CONFERENCE OF THE UNITED STATES; ACCOMPANIED BY CARL IMLAY, GENERAL COUNSEL, OF THE ADMINISTRATIVE OFFICE, UNITED STATES COURTS

Mr. LACEY. Mr. Chairman and members of the committee: First, I'd like to identify my role. I'm a member of the Supreme Court's Advisory Committee on Criminal Rules and as of approximately February 1, I was appointed by Judge Lumbard, who's chairman of that

committee on grand jury procedures. My predecessor was Judge Russell Smith from Montana who I believe appeared before your committee approximately a year ago.

At that time Judge Smith indicated that the Advisory Committee had not considered all of the legislation that was then pending before you section by section and bill by bill, and my presentation suffers from the same disability. Having been appointed recently, I have not had an opportunity to confer with the new committee about H.R. 94 and therefore what I will do will be to combine with a reiteration of what the committee position was on certain precursors of the provisions of H.R. 94 my own reaction to provisions of the legislation.

I will simply say briefly that I have been on the Federal bench for 6 years. I was U.S. attorney for the district of New Jersey immediately prior to that for approximately 18 months and practiced law for approximately 20 years in New York City, New Jersey, and Washington, D.C.

Mr. EILBERG. Judge Lacey, if I may interrupt, I hope you will feel very free, even after today, to submit any further reflections or comments on our bill H.R. 94 or any of the other bills that are in the hopper.

Mr. LACEY. I had remarked preliminarily to Mr. Belsky that in informal conversation that I have had with trial judges active on a day to day basis I was somewhat chagrined to find lack of information and lack of understanding and knowledge on the part of trial judges at the Federal level throughout the country about this legislation. I indeed mentioned to Mr. Belsky that it might well be a good project to be undertaken by the Federal Judicial Center to try to complement what the Judicial Conference has been doing and will in the future do; but I wanted to be sure before I brought that up this would not run counter to any program your committee had.

Mr. EILBERG. It would not run counter, but it is our desire in view of the importance of the subject and the abuses that we have been hearing about that have occurred over the years that we move as promptly as we can.

Mr. LACEY. Let me express my appreciation for having been invited to appear here today on a subject that insofar as the criminal justice system is concerned is the most important matter Congress is going to consider in my lifetime. I'm going to deal in summarizing my statement with just a few of the provisions.

Mr. EILBERG. If I may, then at this point I will be glad to accept your statement for the record, unless there's objection. Hearing none, we will make the statement part of the record.

Mr. LACEY. Thank you.

[The prepared statement of Hon. Frederick B. Lacey follows:]

STATEMENT OF FREDERICK B. LACEY, UNITED STATES DISTRICT JUDGE, DISTRICT OF NEW JERSEY

I am a United States District Judge from New Jersey and a member of the Supreme Court's Advisory Committee on Criminal Rules.

I was appointed to the Federal bench in February 1971. Prior thereto I was United States Attorney for the District of New Jersey for approximately 18 months. In private practice I was active as a trial lawyer with offices in Newark, New Jersey, New York City, and Washington, D.C.

I appear here today as chairman of a subcommittee appointed by the Advisory Committee chairman, Judge Lumbard, to study grand jury operations and procedures.

As chairman of the grand jury subcommittee, I succeed Judge Russell E. Smith of Montana. Judge Smith appeared before this committee on July 1, 1976 and, in a prepared statement, submitted to you the comments of the Advisory Committee on the various bills and resolutions which were before you at that time. These included the following:

H.J. Res. 46 (Eilberg).
H.R. 213 (Ms. Jordan).
H.R. 1277 (Eilberg).
H.R. 2986 (Conyers).
H.R. 4604 (Conyers; same bill as 2986).
H.R. 6006 (Kastenmeier).
H.R. 6207 (Rangel).
H.R. 10947 (Badillo).

In his presentation Judge Smith noted that the Advisory Committee had issued in November 1975 a preliminary report concerning the Federal grand jury and that this report was before you and set forth at length reasons for proposals relating to the Federal grand jury. Thereafter, Judge Smith then devoted his submission to "those matters which were discussed [by the Advisory Committee] but which did not find their way into definite recommendations to the Judicial Conference." Judge Smith further noted that the Advisory Committee had not considered the then pending bills section-by-section and, for that reason, he was unable to express the Advisory Committee's recommendations on a bill-by-bill and section-by-section basis.

My presentation suffers from the same disability. The Advisory Committee has not had the opportunity to review H.R. 94, nor have I taken up its provisions with my subcommittee. Accordingly, I hereafter set forth the Advisory Committee position on legislative provisions which were precursors of H.R. 94 and my own comments on H.R. 94.

Insofar as my own observations are concerned, I offer them against a background of judicial experience in an active district with a substantial number of trials involving organized crime and political corruption. Additionally, my reflections draw upon my prosecutorial experience in the same environment.

PRELIMINARY REMARKS

At the outset, I wish to express to this Committee my appreciation for its invitation to address it on what is probably the most important matter relating to the criminal justice system which the Congress will deal with in my lifetime. Having expressed by graditude at having been invited here, I regret that I must take issue with several provisions of the legislation you are considering. Having review the history of your consideration of grand jury legislation, and the remarks of your chairman and other proponents of this legislation, I fear that you have allowed the "Watergate syndrome" to draw you into concluding that there have been widespread abuses of the grand jury system, which require not mild medicine but rather drastic surgery. I make these comments assured that you want from me a frank and candid statement rather than a half-hearted and diluted analysis of this legislation.

PROPOSED CONSTITUTIONAL CHANGES

Judge Smith commented last year upon H.J.Res. 46 and noted that the recommendation of the Advisory Committee was contained at pages 2–5 of the Committee report. As there stated, the Committee approved that portion of the resolution which continues the investigatory function of the grand jury and the idea in the resolution that there should be some method of charging serious crimes other than by the indictment. The position of the Advisory Committee remains unchanged.

H.R. 94

Sec. 2(a). Recalcitrant witnesses

The Advisory Committee's position remains unchanged. *See* Report, pages 62–63. It opposes impairment of a grand jury's investigation by (a) reducing

the maximum period of confinement for contempt; and (b) barring a second confinement. A witness, granted immunity, nonetheless can frustrate a grand jury inquiry by refusing to testify. Reduction of sanctions is not in aid of the public interest overall.

Sec. 3. Immunity

The Advisory Committee's position is unchanged. *See* Report, pages 63–65. Thus "use" and not "transactional" immunity is favored. My own observations follow.

My personal view is that this section involves the court in what should not be a matter of judicial concern. By hedging the granting of immunity with so many restrictions to aid a witness who does not want it, the court has been brought into what is essentially an executive decision.

I object to the requirement that the court must be satisfied that the various requirements of the statute have been met, particularly when such nebulous concepts must be evaluated. A hearing will invariably be necessary to determine whether the sought-for testimony "is within the scope of the investigation and is relevant thereto"; and is "relevant to the subject matter of the immunity order"; and that "a grant of immunity . . . would be adequate for the purposes of the investigation." Indeed, the court must even review "a summary of the evidence relating to the witness."

These requirements, which must be met before immunity can be granted, suggest that a subject of a grand jury investigation now has standing to contest a grant of immunity to a witness. If the trial judge errs, grants immunity, and indictment and thereafter conviction follow, is the conferring of immunity an appealable issue?

I respectfully suggest that, to cure the one-in-a-thousand case (e.g., the dissident who does not want to betray a friend, yet who does not want to be imprisoned either), you are adding immeasurably and needlessly to the judicial workload.

Sec. 4. Size of grand juries

This reduction in size of the grand jury and accompanying provisions are in accordance with the Advisory Committee's position. *See* Report, pages 5–17.

Sec. 5. Violations of grand jury secrecy

Providing for criminal sanctions for violation of grand jury secrecy is in accordance with the Advisory Committee's position. *See* Report, pages 37–47.

I add my personal concern, related to the right of a witness to have an attorney before the grand jury, over the provision which would allow the attorney, who has been present in the grand jury room to advise a witness, to disclose to others what took place. Thus, if an attorney jointly represents two or more grand jury witnesses, he may freely disclose to each of his clients the testimony of the other or others. No attorney-client privilege is involved, although ethical considerations are. These will be dealt with under the "right to counsel" section. In any case, while it is popular to accuse the prosecutor of violations of grand jury secrecy, my own experience indicates that counsel for those under investigation—or the subjects themselves—are just as often, if not more often, guilty of such violations.

Sec. 6(a). Rights and duties of grand jurors: Independent inquiry

The Advisory Committee has recorded its opposition to so much of this provision as relates to the power of the grand jury to conduct an independent inquiry and to the appointment of an independent prosecutor. *See* Report, pages 65–66. Its position is unchanged.

In our district I was the grand jury judge and regularly empanelled the grand jury. I favor giving instructions such as those set out at § 3229(a) (1), (3), (4), (7), (8), as well as others of like import. Thus grand jurors are told that their dissatisfaction with the presentation or conduct of the United States Attorney, any questions they have, or any other matters which concern them, may be brough directly to me. On the other hand, when I empanel a grand jury which will consider hundreds of matters, I cannot tell them, as (5) and (6) require, what they will be "investigating." The Advisory Committee has not taken a position on this matter of instructions by the court.

As to § 3229(b)(1) and (2), the Advisory Committee has stated its preference for the present practice under which a person desiring to testify is generally

permitted to do so. *See* Report, pages 51–52. It raises the caution that, under certain circumstances, it will be unwise to notice anyone of a right to testify. This of course suggests an objection to (b)(2)(B).

My own personal view is that the granting of an absolute right to testify is unwise. It requires that "reasonable steps" be taken to give notice of such right. What are "reasonable steps"? While such are being taken, proceedings are delayed. The "safety valve" allowing application to the court for relief from this provision simply adds one more burden to the court.

On the basis of my own experience, very few defendants will take advantage of the notice of the right to testify—except in cases of narcotics investigations, for example—to flee. The people who will accept the opportunity to testify for the most part already know of the right to apply to give testimony. They have retained counsel. They usually are those involved in "white collar" or political corruption cases who know they are under investigation. If it be said that United States Attorneys are recommending rejection of such applications, this is easily remedied. The Justice Department can be called upon to set out guidelines for their offices which require the government attorneys to forward such applications, with a favorable recommendation, to the grand jury.

Section 3229(c) also gives me concern, again because it raises so many problems which will ultimately be laid before the court. The experienced attorney for one under investigation can suggest to the government attorney many things which "might tend to materially affect the credibility of any witness or tend to negate the guilt of any prospective defendant." This information may be remote, unreliable, or "a trap." Yet the attorney must pass it on to the grand jury, and under another provision of this legislation, the attorney, whose client has now been indicted, can obtain the record of what the government attorney told the grand jury. The normal grand juror will ask, on the record, for an evaluation. The government attorney, also on the record, may make an erroneous evaluation discounting the significance of the information. This can easily happen. At an early stage, that which "might" exculpate or impeach is not always easy to calculate. What is the result? Is it dismissal of the indictment? Is a hearing required? Are witnesses to be called? Is the defense attorney to be a witness? Clearly the government attorney would have to testify why he did not credit or relay the information. What about one or more grand jurors who, let us assume, may not have voted to indict had they been given the alleged exculpatory or impeaching material? Are they to be witnesses too?

The proposed language includes the words "materially affect." Yet, "material" is undefined. Does it mean that the information would have led to a no-bill rather than indictment? *Cf. United States* v. *Agurs*, 427 U.S. 97 (1976), setting out three standards of "materiality" in varying situations at trial. *See also, Brady* v. *Maryland*, 373 U.S. 83 (1973). The fact is that in a grand jury context this requirement is vague and impossible to interpret. Every complex fact pattern includes inconsistencies, varying observations, differences in recollection or ability to narrate, and credibility considerations, e.g., Federal Rule of Evidence 608(b) "bad act," or 609 conviction, material, which are not susceptible to easy analysis at the grand jury stage. Moreover, if the government attorney "knows" of such material, then it is a ready step to conclude that he "should" know it. How great is this burden? What are the sanctions if he fails to discharge it? I can envisage too that there will often be a dispute over whether the government attorney did or did not know of the exculpatory or impeaching information.

These are practical questions, yet they have a ring of unreality about them. And the reason why is clear: this provision actually converts a grand jury proceeding into a trial-type proceeding. The burden of proof in the grand jury is that there be legally sufficient evidence before the grand jury, which establishes probable cause to believe that the defendant committed that crime. The function of the grand jury is to decide whether or not the individual is guilty.

This provision would by its terms, require the presentation of all types of purportedly exculpatory evidence, of whatever apparent weight or reliability. Let me give an example. A member of a gang of thieves decides to cooperate with the government. He testifies before a grand jury. The grand jury, under this provision, would be told, in the record, everything impeaching this witness' credibility. Assume he has testified in two other cases in other districts. His cross-examination was relentless. Everything he had ever done in his life was brought out. The transcripts run a few hundred pages. Under your requirement the government attorney would have to bring all this out and, to be safe, bring

it out in detail. Why, I ask? At trial it will be available. Why convert the grand jury proceeding into a trial?

No one wants to charge an innocent person with a crime, or to indict where a case cannot be won. The *Brady* evaluation can be made at trial. The grand jury stage is not the time for it.

Sec. 7. Rights of grand jury witnesses

The Advisory Committee has taken a position opposed to allowing a witness to have counsel in the grand jury room. See Report, pages 53–56. This position stands unchanged.

The Report points out the problems inherent in the proposal. *Id.* at 54.

My own views coincide. Let us assume that the ordinary witness, having been warned of his privilege against self-incrimination, decides he wants a lawyer, while also taking the position that there is no reason why he should retain one. An indigency hearing must follow. This can go on through a day, requiring indigency hearings and exploration of a witness' financial background, while a jury trial or other judicial business is stalled. Then counsel must be found and another date set for grand jury appearance to allow that counsel to confer with his client and arrange his own schedule so that he can go into the grand jury room. Parenthetically, it is noted that an appointment of a Federal Public Defender for a witness will probably disqualify the former from representing a defendant later in that matter.

I am mindful that this legislation endeavors to restrict a witness' counsel in what he can do in the grand jury room. I respectfully suggest it is impossible to prevent counsel's interference if he seeks to do so.

An "objection" on grounds of "hearsay" or "relevancy" seemingly is still available as is a direction to his client not to answer. Indeed, under his right "to advise the witness," counsel can in fact address the grand jury. Through his client's mouth counsel can make himself heard.

In § 3330A(d) you empower the court to remove counsel and order the witness to obtain new counsel. I question the validity of this interference with the witness' right to counsel of his own choice. On the other hand, the presence of this proviso reflects the well founded concern that there will be obstructionists from time to time who seek to frustrate an investigation. What is the court to do? Contempt is available but that too causes delay.

If removal of counsel is attempted, immediate appeal, with more delay, will follow, or, alternatively, the witness will have to be excused while other counsel is retained and makes himself available.

I raise one more consideration. The phenomenon of joint representation grows; in a grand jury investigation one lawyer in our district recently represented nine witnesses. Let's take an example. A corporation and its top officers are under investigation. Subordinates are subpoenaed. To protect the higher-ups, it is suggested to them they retain the same corporate counsel. This legislation would allow the attorney into the grand jury room to monitor that subordinate's testimony to be sure it is not hurtful to the planned defense.

I would suggest that, if this provision stays, and you continue to believe you can, under certain circumstances, dictate choice of counsel, you consider an opinion I recently wrote in the area of joint representation. You may find it of interest.

Sec. 3330B. Subpenas

Judge Smith last year expressed the Advisory Committee's objection to giving a witness one week's notice, absent a judicial finding of "special need." The position of the Advisory Committee remains unchanged.

My own view of this provision is that it is undesirable in that it will undoubtedly lead to numerous applications to the court on what is generally a trivial matter. Under the present practice, where a subpena issues and it is burdensome or oppressive on the witness, an application can be made to the court by the witness and these matters are resolved by the court readily. The present practice places the burden where it should be. The other provisions of this subsection were likewise addressed by Judge Smith and the Advisory Committee's position is unchanged.

My own view of this subsection is that it is going to create much doubt and confusion and lead to numerous applications for clarification and relief thereunder.

In the first place, what is "adequate and reasonable" notice? Is it sufficient if the "notice" required is embodied in a writing which is served along with the subpena? Can it be done orally? Is a letter to counsel sufficient?

Why every witness, including those who are ordinarily run of the mill witnesses testifying to facts they observe, has to be frightened by being advised of their right to counsel and privilege against self-incrimination is hard for me to discern. The very giving of the warning will lead the average witness to feel that he should obtain counsel, resulting in unnecessary expense to him. The fact that he may apply for appointment of counsel is dealt with under the appropriate subsection.

I can think of no better way to destroy the traditional secrecy which surrounds grand jury proceedings than to require that "adequate and reasonable" notice be given to every witness concerning the subject matter of the grand jury investigation. Moreover, the term itself, that is, "subject matter," is vague and ambiguous. Is it to be defined in terms of persons, areas (e.g., political corruption in Hudson County, etc.) or in some other fashion?

I see no objection to telling a witness whether his own conduct is under investigation. I note, however, that to tell him that on the one hand while advising him of right to counsel and privilege of self-incrimination, is likely to leave him a rather puzzled witness.

This subsection also states that there shall be "adequate and reasonable" notice of "any other rights and privileges which the court deems necessary and appropriate." Unless every other subpena is cleared with a court, how will the court be in a position to require notice of "other rights and privileges"?

Still dealing with this subsection, it is noted that a motion relating to a subpena may be made at any time, even after the appearance of a witness before a grand jury. If made after appearance, but is one "relating to a subpena," what relief is available? May such a witness through his attorney move to strike the testimony he has already given? If so, on what grounds may such a motion be made?

The fact that a motion may be made before the return day (which already has a built-in seven-day lead time) and stays the appearance until the court rules, means first of all that in each and every instance a lawyer representing any grand jury witness may, utilizing such motion practice, effectively halt a grand jury investigation. Under this subsection, upon "proper motion," the attorney for the government must make a showing of government compliance with certain provisions. This "showing" motion, I predict, will become almost a reflex on the part of counsel for witnesses. Moreover, there are certain provisions, incorporated in the "showing" requirement that will create problems. Thus, the government must make a "showing" that the evidence sought is "relevant" to the grand jury investigation. What is the standard of relevancy here? How can a judge possibly define this in terms that have any meaning unless he reads a great deal of grand jury transcript? What does "relevant" mean in this context? Is it to be defined in terms of Federal Rule of Evidence 401?

The government must also come forward upon a "showing" motion and actually endeavor to prove a negative, that is, that "compliance with the subpena would not be unreasonable or oppressive." Traditionally, the burden has been on the witness to prove oppressiveness. It should remain this way.

It is also noted that the court may impose appropriate santions to secure compliance with this subsection. Among the sanctions is quashing of subpenas. What, however, as I have already inquired, is the sanction available where the motion is not brought until the witness has testified?

Sec. 8. Recording, transcribing and availability of grand jury proceedings

§ 3333. Recording

The Advisory Committee favors recording "[a]ll proceedings during which a witness is present." *See* Report, pages 20–28. The statutory provision goes much further. Virtually everything said before the grand jury must be recorded. The costs of complying with this mandate will, of course, be tremendous; however, this is a matter for the Justice Department to discuss. I am concerned with the additional grist thus provided for the resourceful defense attorney, who, to avoid a later 28 U.S.C. § 2255 attack upon his competence, will move for all this material before he will advise his client to plead guilty. You might wish to consider what effect an error in carrying out the mandate of this legislation by either the court or the government attorney will have upon an indictment when a subsequent motion to dismiss is made. For example, let us assume the government attorney advises the grand jury upon the law of conspiracy. Is he required to give essen-

tially the same instruction to the grand jury that the trial judge later must give to the trial jury? If he errs, is it ground for dismissal of the indictment?

Parenthetically, there are many instances now created by this legislation which place before a trial judge matters, at the grand jury stage, which may be claimed to warrant recusal at trial. Has this Committee considered this, and if so, what is its reaction? In the multi-judge districts, only a minor problem is created; however, in the one and two judge district, recusal can be disastrous for the trial calendar in that district.

§ 3334. Availability of grand jury transcripts and other statements

(a) The Advisory Committee has taken no position. I favor this provision.

(b) The Advisory Committee's position is in accord with this provision. *See* Report, pages 61–62.

(c) The Advisory Committee's position is in accordance with this provision insofar as the testimony of witnesses is concerned. It has not taken a position on the other provisions of this subsection. *See* Report, pages 47–49. However, it believes that the pre-trial turning over should be subject to withholding, under the direction of the court, of such material upon certification by the government attorney that there is good cause for doing so.

The Advisory Committee has taken no position on (c)(2), (3) or (4).

I am concerned over the turnover required under (c)(2). What is intended? Is it contemplated that the defendant may move for dismissal for some inadvertent misstatement or omission of fact or law? The fact that this is tied to (3) makes this likely.

As to (3), the words "which in any matter could be considered exculpatory" is an incomplete explication of the *Brady* (and *Agurs*) standard.

(4) This subsection puts a burden on the court which, in a substantial political corruption or white collar investigation, is intolerable. Defense counsel will automatically move for production of "all other grand jury testimony" and the court will have to review the testimony to determine materiality, against a sketchy background of knowledge of the government's case and probably none of the defense. This gives rise again to the problem of recusal. Does a defendant who, by his motion exposes the court to what may be a great deal of disparaging evidence about the defendant, waive his right to move thereafter for recusal?

This is the appropriate place, I suggest, for a statement that an indictment will not be dismissed for insufficient or incompetent evidence or for reasons suggested by subsections (c)(2), (3) and (4).

Sec. 9. Preliminary examination

The Advisory Committee has taken no position on this matter.

My own concern is that, once again, the reality of our criminal justice system is undetected. Over 90 percent of all criminal indictments result in pleas of guilty, entered after a judicial hearing pursuant to Fed.R.Cr.P. 11. Indeed, it is only because of this high percentage of guilty pleas that we are able to meet the requirements of the Speedy Trial Act, although the adverse impact upon the adverse impact upon the court's civil calendar is severe.

Now you are giving us for each of those guilty plea cases a minitrial. You even require that the examination be conducted by a judge and not a magistrate.

Every lawyer will have to counsel his client to request such a hearing or face a later attack, post-conviction, upon his competence.

Of course, the standard of proof, I assume, is probable cause. Yet that is what the grand jury acted upon. What purpose is served?

Do not be deceived by the thought that these can be handled in a few minutes. Even a relatively simple case can easily run several hours. The costs, the terrible drain on the criminal justice system, lead me to implore you to reconsider your position.

Sec. 9. Grand jury reports

The Advisory Committee has taken no position on this section.

SUMMARY

I predict that this legislation if passed will at least double the amount of time judges currently are spending on their criminal calendar. Congress passed the Speedy Trial Act. We are striving mightily to comply with it. In some districts, e.g., Arizona, as well as others, including my own, civil trials are rare now for many judges. This legislation will aggravate the situation.

Thus, the potential for requiring judicial action is created by—

(a) the necessity for a preliminary examination in each and every case;

(b) the judical review and findings required for every grant of immunity, and appointment of "adequate" counsel;

(c) the various applications the government may make to be relieved of burdens now thrust upon them;

(d) the resolution of problems created by witness' counsel in the grand jury room who advertently or inadvertently interferes with the grand jury investigation;

(e) the resolution by motion of problems of "relevancy" arising from the imposition of that requirement in connection with subpenas;

(f) the "showing" motion permitted every witness under § 3330B(d);

(g) the motion permitted for all recorded material under § 3334(c) and (d);

(h) the post-indictment motions for whatever relief is afforded by this bill;

(i) the necessity for dealing with "exculpatory" problems arising during grand jury proceedings;

(j) motions for appointment of counsel for indigent witnesses.

Again, I thank the chairman, members and staff of the Committee for your invitation and your attention to my remarks.

Mr. LACEY. The Advisory Committee position as stated by Judge Smith a year ago with respect to recalcitrant witnesses, section 2A(f) of H.R. 94, remains unchanged. It opposes impairment of the grand jury investigation by reducing the maximum period of confinement for contempt and barring a second confinement.

With respect to immunity, again, the Advisory Committee position, as stated by Judge Smith, remains unchanged. Use immunity is preferred over transactional immunity.

I would like to deal with one aspect of the immunity provision, section 3, from my own point of view. By hedging the granting of immunity with so many restrictions to aid a witness who, for one reason or another, doesn't want immunity—the court has been brought into what is essentially a decision of the executive department of Government. I find objection, for example, to the requirement that the court must be satisfied that the various requirements of the statute have been met, particularly when such nebulous concepts have to be evaluated. As I see it, a hearing will ultimately be required to determine whether the sought-for testimony is within the scope of the investigation and is relevant thereto, and is relevant to the subject matter of the immunity order and a grant of immunity would be adequate for purposes of the investigation and, indeed, as I construe the legislation, the court would even have to review what is labeled a summary of the evidence relating to the witness.

I suggest that these requirements, all of which must be met to the satisfaction of a judge before immunity can be conferred, suggests that a subject of a grand jury investigation may now have standing to contest a grant of immunity to a witness. If that not be so, why is it required that the judge make findings as to all of these matters?

I raise one other question: If the trial judge errs and grants immunity and indictment and conviction thereafter follow, is the conferring of immunity an appealable issue? I respectfully suggest that to cure the one-in-a-thousand case, for example, the dissident who does not want to betray a friend, yet who does not want to be imprisoned either, you are adding immeasurably and needlessly to the judicial workload.

With respect to size of grand juries, the reduction in size was favored by the Advisory Committee, as you know, Mr. Chairman, and as you know, members of the committee.

With respect to section 5, violations of grand jury secrecy, the Advisory Committee favored, as do I, making violation of grand jury secrecy a criminal offense. I add my personal concern with respect to something that is now opened up by reason of another provision in the legislation affording a witness the right to counsel. The secrecy provision in article 5 exempts from the requirement of nondisclosure an attorney who has been in the court and the jury room to advise the witness. Thus, if an attorney jointly represents two or more grand jury witnesses, he may freely disclose to each of his clients the testimony of the other or others. Moreover, if he is placed there by, let us assume, the president of a corporation under investigation in order to monitor the testimony of subordinates who are testifying before the grand jury, he's under no secrecy requirement at all and may disclose to the president of that corporation or anybody else for that matter what the subordinate testified to before the grand jury. There's no attorney-client privilege involved, although ethical considerations are, and I deal with these, incidentally, in an opinion which I submitted as part of my paper, *United States* v. *Garafola and Dolan.*

It's an opinion that deals with the problem that's bedeviling trial judges throughout the country—the matter of joint representation. It's one that trial judges are grappling with not too successfully, but nonethless, I do raise that issue and I thought that in that respect the copy of my opinion might be helpful.

I might say this further, that while it's popular to accuse the prosecutor—and I was one—of violations of grand jury secrecy, my own experience indicates that counsel for those under investigation or the subjects themselves just as often, if not more often, are guilty of such violations.

Section 6(a), I deal with just in highlighting it, because my statement is rather complete on that. For a year I held, just recently surrendering the honor to another judge, the position of grand jury judge in our district. I empaneled the grand jurors, I favor what you require in 6(a); that is, a judge laying out precisely the rights and duties of the grand jury. I think that this has been long needed. Indeed, I think that the Justice Department and the courts bear a great deal of responsibility for the looseness around the country, as I perceived it to be, when I made inquiry when I first took on that assignment, in terms of judges handling this assignment, and so we were very strict about what we laid out to grand jurors.

There are a couple matters I might mention to you that I think are trivial matters but nonetheless I raise them.

Where a grand jury is being empaneled to handle a myriad of cases or investigations, items 5 and 6 of 6(a), more precisely numbered section 3329(a)(5) and (6), cannot be complied with because I can't tell the grand jury what they are going to be investigating. If, on the other hand, it's a special grand jury investigation going into a particular matter, then of course I can.

The matter of permitting a witness subject to investigation to testify, I deal with in my paper. I think I would disagree with the requirement that notice go out to anybody who is the subject of an investigation. Your bill requires that "reasonable steps" be taken to give notice of such right. I might in this regard point out that we have a time problem that I would respectfully bring to the attention of your committee.

Mr. Chairman, the ultimate limits of the Speedy Trial Act set a limit of 30 days from the time of arrest to the time of return of an indictment. In this period of time generally there will be a lag of a week or 10 days before the U.S. Attorney gets things underway. He will then have to take the reasonable steps required to give the notice that is demanded here. Thereafter, if a subpena goes out, as H.R. 94 proposes, where somebody indicates that he wants to testify, a 7-day notice provision must be given. I recognize these are all subject to safety valves on application to the court, but nonetheless, it is a time factor that I thought I would and should bring to the attention of the committee.

I might add that on the basis of my own experience, the person who, having received notice of his right to testify, will apply therefor, will be one in 100, or one in 1,000, or even less. The people generally who want to testify, those involved in white collar and political corruption investigations, know that they are under investigation. They have counsel. They are well advised of their right to apply to testify and those applications are made today.

I'm completely on the track of the committee in this sense. I have always believed that when anybody wants to testify before a grand jury the prosecutor should recommend to the foreman of the grand jury that that person be permitted to do so. I am completely in accord with that view. I recognize that your bill does preserve the right of the grand jury by a vote of a majority to deny the application to testify. I think, however, that on balance I would disagree with the requirement that notice must be given to everybody who is a subject of a grand jury investigation of the right to testify.

Section 3229(c) gives me great concern. It raises so many problems that will ultimately be laid before the court. If I, as an experienced defense attorney, want to create chaos in the grand jury room, you have given me the ticket to do it. I can write a letter to the U.S. Attorney's Office and lay out a laundry list of what I suggest are exculpatory items or items that will reflect unfavorably on the credibility of a witness. Do not underestimate the resourcefulness of those of us who were once defense counsel. I can put myself in the shoes of some of my good friends who are on the other side of the bar these days trying cases for defendants and I can tell you with utmost sincerity that they can bring to a halt the grand jury investigation once they perceive the U.S. Attorney is handcuffed in terms of proceeding with his investigation.

The difficulty is innate, in the legislation which requires that the prosecution advise the Grand Jury of anything that "might tend to materially affect the credibility of any witness or tend to negate the guilt of any prospective defendant." This converts the grand jury into a trial proceeding.

I often have difficulty in a post-conviction application when all the evidence is in, in determining whether under *Brady* v. *Maryland*, or now as formulated in *United States* v. *Agurs*, whether information withheld by the prosecutor was in fact "material" to the case. I can't conceive of how a judge at a preliminary stage, such as grand jury can make the "materiality" determination required in order to assess whether this provision has been violated.

Now, does he have to make that determination?

I assume from the bill that he must make that determination on motion at a certain stage and, if that be so, while he's deciding that motion, nothing happens within the grand jury room. I would urge that very serious consideration be given to withdrawing that provision from the legislation.

I have elaborated on that point in my prepared statement.

Rights of the grand jury witnesses are dealt with by section 7 of your legislation. The ordinary witness is warned of his privilege against self-incrimination. I visualize my friends who receives a warning of his privilege against self-incrimination. He's also told he has a right to a lawyer. He's also told, "we are not investigating you." The latter doesn't give him much comfort. He decides he wants counsel and then he thinks, "well, why should I hire my own attorney?" He's told that he may have counsel appointed for him. We must then take on in court an indigency hearing. I don't believe that in this context very often we will find a witness indigent to the extent that he cannot afford $200 or $300 that a attorney will require to represent a witness at a grand jury hearing. This means then that the witness is going to have to assume this burden in effect thrust upon him by a good motive, but nonetheless, I think that I would draw a distinction between the ordinary witness who has no need for counsel and the target defendant, and I leave that thought with you as well.

As to the matter of counsel, I'm gravely concerned about that provision in the bill. I recognize that you have done everything that you believe is feasible to restrict the ability of counsel, or perhaps the propensity of counsel, to obstruct grand jury proceedings. I submit, however, that inherent in the concept is failure. Counsel has a right to object on the basis of relevancy—is the question within the scope of the grand jury subpoena or the scope of the grand jury investigation as previously defined in the subpena? If counsel doesn't object, he's faced with the possibility that he may have waived a right. Therefore, he' going to object.

Additionally, counsel, while not addressing the grand jury, can, through the mouth of the witness address the grand jury. I recognize that you give us the right to remove counsel where obstreperous or obstructionist tactics are used. I question, however, once the right to counsel is conferred by H.R. 94, whether we have the power to do this. Even if we do, a hearing will be required.

Now while I'm talking about that, I now come back to the Garafola and Dolan opinion that I mentioned. I would urge, Mr. Chairman, that if you and the committee preserve the right to counsel in grand jury and if you also continue to feel that you have the right under certain circumstances to dictate the choice of counsel, that you give consideration to the problem of joint representation.

In a recent grand jury investigation, a lawyer in our district was permitted by the court of appeals to represent nine witnesses who were potential defendants in a grand jury investigation. I have recently been advised in connection with someone who was seeking a copy of my Garafola opinion that there's now an attorney in my district representing 15 persons who are subjects of the grand jury investigation. This is a dreadful problem. It creates all kinds of problems in the bar.

Now in that respect, you will see in my opinion a reference to a statement by Alan Cole who headed the Criminal Section of the Amer-

ican Bar Association. I don't subscribe to what I call his pungent criticism of the bench and bar, but nonetheless, the fact that he, in the position he finds himself, sees the necessity for making the strident comment he makes, underscores the difficulty that we face, and I would leave that with the committee.

Well, I have certainly gone over my 10 minutes and I don't want to take up any more time and I will submit to questions.

Mr. EILBERG. Judge Lacey, let me say that unless there's objection, we will put your opinion, *United States* v. *Garafola* on the record at this point.

Mr. LACEY. It's been published, but I thought I would leave it with you anyway.

[The opinion referred to follows:]

UNITED STATES OF AMERICA, PLAINTIFF,

v.

MICHAEL GARAFOLA AND JOHN DOLAN, DEFENDANTS

United States District Court, District of New Jersey

(Criminal No. 77-1—Opinion)

D. J. LACEY

The problems which can result from indifference to the biblical teaching that "no man can serve two masters," [1] transposed into an attorney's joint representation of two defendants, have now emerged in this matter.

Jointly charged under 18 U.S.C. § 659 (1976), in a one-count indictment, with unlawful possession of chattels stolen from foreign commerce, Michael Garafola and John Dolan were arraigned in this district on January 14, 1977. Each entered a plea of not guilty. Because they were represented by the same attorney, my colleague, Judge Herbert J. Stern, presiding at arraignment, conducted a *United States ex rel. Hart* v. *Davenport* [2] hearing. Responding to his questions, defendants and their attorney stated that there was no conflict of interest between the defendants; and the defendants, notwithstanding Judge Stern's advice on their right to separate legal representation, announced that they desired to continue to be represented by their jointly retained attorney there present.[3]

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[1] *Matthew* 6:24.

[2] 478 F. 2d 203 (3d Cir. 1973). No transcript was prepared; that there was such a hearing, however, is undisputed. See also *United States* v. *Mari*, 526 F. 2d 117 (2d Cir. 1975); *United States* v. *DeBerry*, 487 F. 2d 448 (2d Cir. 1973); *United States* v. *Alberti*, 470 F. 2d 878 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973); ABA standards relating to the function of the trial judge, § 3.4(b), at 11, 44 (approved draft 1972).

[3] New Jersey disciplinary rule DR 5–105 provides:

> Refusing to accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer.
>
> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5–105(C).
>
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5–105(C).
>
> (C) In situations covered by DR 5–105 (A) and (B) except as prohibited by rule, opinion, directive or statute, a lawyer may represent multiple clients if he believes that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the facts and of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
>
> (D) If a lawyer is required to decline employment or to withdraw from employment under DR 5–105, no partner or associate of his or his firm may accept or continue such employment.

See also Canon 6 of the American Bar Association's Canons of Professional Ethics ("Adverse Influences and Conflicting Interests"); American Bar Association, code of professional responsibility, Canon 5 ("A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client"); and see local rule 6 of the U.S. District Court for the District of New Jersey ("the Code of Professional Responsibility, adopted by the American Bar Association, shall govern the conduct of . . . the members of the Bar admitted to practice in this court.")

On the day of trial, just before jury selection, defendants' counsel advised me that one of his clients, Garafola, had decided to retract his not guilty plea and plead guilty to the charge. A Rule 11, Fed.R.Crim.P., proceeding followed, at which Garafola, in open court, under oath and with counsel present, admitted his guilt in terms which enabled me to find a basis in fact for the guilty plea, which was then and there accepted; and a sentencing date was then set.

Prior to commencement of the Rule 11 proceedings, I had conducted another *Davenport* hearing. Again, Garafola and Dolan, and their attorney, all flatly stated that there was no conflict of interest; and both Garafola and Dolan reiterated that they wanted the same attorney to continue to represent both of them.

Following the entry of Garafola's guilty plea, the trial commenced against Dolan. The government's testimony, in summary, was that Garafola and Dolan, as railroad co-workers, had been arrested by a railroad detective while in the act of removing stolen television sets from an abandoned trailer, described by a government witness as a "well-known stash." One government witness testified that, an instant before the arrest, Dolan had picked up from the floor of the "stash," one of the stolen sets.

Following my denial of his motion for judgment of acquittal, Dolan took the stand as the first witness in his own defense. He testified that he was in the abandoned trailer and was about to pick up a television set to remove it therefrom when he was placed under arrest. He denied knowing that the set was stolen. He was, he said, simply assisting Garafola, who had asked Dolan to help him, Garafola, "get the television sets back." It was obvious from the testimony thus presented that Dolan's defense would be that, while he may have possessed the stolen property, he lacked that state of mind requisite for guilt under 18 U.S.C. § 659. The trial day ended while Dolan was on cross-examination.

Upon the resumption of trial the next day, I conducted a further inquiry into the conflict of interest problem. Dolan's attorney stated that he saw no ethical impropriety in his representation of Garafola and Dolan, before or during trial; that Garafola could in fact exculpate Dolan; but that he had decided not to call Garafola as a witness because he would not make a "good" impression.

The government, on the other hand, indicating that it was going to call Garafola as a rebuttal witness, had him in court under subpoena. I asked defense counsel what he intended to do when Garafola was called. He responded that he did not think that Garafola should testify, having not yet been sentenced, particularizing that Garafola would doubtless consult him about his, Garafola's, rights, and that he would advise Garafola of his fifth amendment privilege against compulsory self-incrimination.

I then inquired of counsel whether any advice he now gave Garafola would be rendered by his acting solely in Garafola's interest, or would be influenced, even slightly, by his continuing representation of Dolan. Indeed, I found it further of interest to speculate on how, if Garafola, contrary to his counsel's advice, decided to testify, the latter could cross-examine Garafola while still representing him in connection with the upcoming sentence. Counsel responded by stating that he still perceived no conflict of interest between Garafola and Dolan and saw no reason why he could not continue to represent Dolan effectively.

Because I am granting defendant's motion for mistrial for reasons unconnected with the issue of joint representation, I have the opportunity of implementing and enforcing what I regard, under the circumstances, as the appropriate standard of legal representation in a criminal case. I find that present counsel cannot effectively represent both Garafola and Dolan, and I am directing that he withdraw from representing either of them. Counsel and the two defendants are to appear before me on a date to be set, at which time the matter of future legal representation will be resolved.[3a]

What has occurred requires comment. The trial judge is placed in a difficult position when, at arraignment, he is confronted with joint representation by defendants' counsel. The *Davenport* inquiry, by and large, is an ineffective charade. The judge and counsel know the purpose of the inquiry: to forestall a convicted defendant from later successfully urging on appeal that he did not at trial have effective assistance of counsel. Put in other words, it is done to construct a predicate for claiming later that there has been a waiver of a constitutional right. For reasons I shall explicate, it fails utterly as a means of assur-

[3a] On Mar. 15, 1977 counsel appeared before me to state that Garafola was obtaining new counsel but that Dolan continued to want present counsel to represent him. I advised counsel that I am adhering to my original ruling.

ing an informed consent from jointly represented—and unsophisticated—defendants.

In the recently decided *Matter of Grand Jury Empaneled January 21, 1975*, 536 F. 2d 1009 (3d Cir. 1976), the court of appeals stated that, as is the case with other constitutional rights, "the *Davenport* right may be waived." *Id.* at 1012. The court went on to find that "a waiver is exactly what the district court elicited from each of the appellants at the hearings conducted in this case." *Id.*[4] With all deference, I question whether there can be a waiver in the *Johnson* v. *Zerbst* sense.[5]

Many trial judges are concerned about the ability and capacity of any defendant knowingly and intelligently to waive his sixth amendment right to the effective assistance of counsel within the context of a *Davenport* inquiry into joint representation. The average defendant cannot possibly understand fully and completely the extent to which his counsel's trial strategy may be affected by his representation of other defendants. Moreover, what of the situation, not uncommon, where a "strong defendant" thrusts his own attorney upon a "weak" co-defendant? The latter does not dare indicate his displeasure with the joint representation. In simple terms, the *Davenport* inquiry, to the extent it is directed at the defendants, is a futile exercise. There can be no real waiver.[6]

Respectfully it is submitted that the trial judge cannot conduct a meaningful inquiry. He does not know the case. He cannot know the facts or the inferences which may be fairly drawn from them. He is unaware of the quality of the witnesses and the trial strategy the government and the defendants will pursue.

I do not join in Mr. Cole's pungent criticism of the bar and bench; however, it is deserving of reflection that a leading member of the bar, active in the defense of criminal cases, finds the situation warrants such candid comment. Nor can he inquire into the defense without violating defendant's fifth and sixth amendment rights; and this is so whether the interrogation is held in open court or *in camera*. He is restricted to imparting vaguely contoured, abstract advice on a doctrine as to which the lawyer then and there present has undoubtedly already advised his clients. Indeed, the attorney's words will have more meaning to the defendants because they are not empty abstractions but related to the facts of the case. He has already told his clients that there is no conflict in their interests. Thus, when the defendants answer the court's inquiry, they actually are relying upon the advice received from their lawyer. If he tells them there is no conflict and that he can effectively represent them, how can their responses to the court be deemed to amount to a *Johnson* v. *Zerbst* waiver of their sixth amendment to effective aid of counsel? *Cf. Fay* v. *Noia*, 372 U.S. 391 (1963).[7]

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[4] Other circuits have also adopted the principle that effective assistance of counsel can be waived in a joint representation situation, *United States* v. *Garcia*, 517 F.2d 272 (5th Cir. 1975), after holding "defendants may waive the right to conflict-free assistance of counsel," detailed the procedure a trial judge should follow in advising "of the potential dangers of representation by counsel with a conflict of interest." Id. at 277–78. Cf. In re Investigation Before April 1975 Grand Jury, 531 F. 2d 600 (D.C. Cir. 1976). See also *United States* v. *Carrigan*, 543 F. 2d 1053 (2d Cir. 1976).

[5] 304 U.S. 458 (1938).

[6] In a paper adapted from a speech given at the National College of Criminal Defense Lawyers and Public Defenders in Houston, Tex., on June 24, 1976, Alan Y. Cole, Esq., Chairman of the Section of Criminal Justice, American Bar Association, has stated, after discussing the Third Circuit [536 F. 2d 1009 (1976)] and District of Columbia Circuit [531 F. 2d 600 (1976)] cases,

> This is a dismal scene. The attorney conduct involved in these cases is hardly of a nature that enhances the image of the profession. It does not reflect respect for the principles underlying the canon of ethics. It suggests that self-regulation is essentially non-existent. The judicial response is likewise unsatisfactory to a society which is already disenchanted with its lawyers and its courts.

Cole, Time for a Change: Multiple Representation Should Be Stopped 9–10 (unpublished) (footnote omitted).

[7] *See* Circuit Judge Lumbard's concurrence in *United States* v. *Carrigan*, *supra*, note 4, at 1058:

> It would be a rare defendant who could intelligently decide whether his interests will be properly served by counsel who also represents another defendant. However parallel his interests may seem to be with those of a co-defendant the course of events in the prosecution of the case, the taking of a guilty plea, or the conduct of the trial may radically change the situation so as to impair the ability of counsel to represent the defendant most effectively. Even defense counsel, who all too frequently are not adequately informed regarding the evidence available against their clients, may not be in a position to judge whether a conflict of interest between their clients may develop.

Even when the government is compelled to outline its prospective proofs, the problem remains. *Cf. Abraham* v. *United States*, Nos. 603, 625, 655, 735 (2d Cir., filed Jan. 21, 1977), a proceeding brought under 28 U.S.C. § 2255, challenging, on deprivation of effective assistance of counsel grounds, a conviction upheld in *United States* v. *Sisca*, 503 F. 2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974). In *Abraham* the Court of Appeals details and approves District Judge Bryan's joint representation inquiry. Slip opinion at 1513–15.

The reasoning supporting the "waiver" doctrine in this context of joint representation seemingly is founded upon an analysis of the sixth amendment from which there emerges the concept that, because there is a right to waive counsel altogether, *Farretta* v. *California*, 422 U.S. 806 (1975), there is also a right to waive effective assistance of counsel. Like so many seemingly simple truths, this one has its frailties. The absolute, that is, counsel or none, as is so often the case, is easier to define and deal with than the relative, that is, is one counsel or another better able to represent the defendant. A trial judge can quite readily advise a defendant on the wisdom of proceeding with counsel, the bases for his advice and the pitfalls which a defendant will encounter absent counsel. On the other hand, in view of the limitations already alluded to in this opinion, the joint representation inquiry falls far short of assuring a knowing and intelligent waiver. *Cf. United States* v. *Paz-Sierra*, 367 F.2d 930, 932 (2d Cir 1966).

The efficacy of a trial judge's joint representation inquiry is largely a function of how the attorney views his role. As I have stated, the responses of the jointly represented defendants will in reality be their attorney's response. Predictably, once they state there is no conflict, and that they desire his continued representation, he too will advise the court there is no conflict in his representing the two or more defendants involved.

Clearly, then, it is primarily, if not exclusively, the responsibility of the attorney to avoid joint representation which has any possibility, no matter how remote, of a conflict of interest. If he is representing

> multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment [and he is to] resolve all doubts against the propriety of the representation.

Code of Professional Responsibility, Ethical Consideration 5–15.

See also ABA Standards Relating To The Defense Function, § 3.5(b), at 159, 211 (Approved Draft 1971), which state that the

> potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.

The next question to be put is whether joint representation should be allowed, no matter how remote the possibility of a potential conflict of interest. Unfortunately, no matter how thorough an attorney's investigation, he may not be aware of those facts which suggest the possibility of a conflict. As was stated by Judge Lumbard, concurring in *United States* v. *Carrigan*, 543 F.2d 1053, 1058 (2d Cir. 1976):

> It is a rare defendant in a criminal case who fully advises his own counsel of all he knows about the charges against him. Accordingly, most counsel must operate somewhat in the dark and feel their way uncertainly to an understanding of what their clients may be called upon to meet upon a trial. Consequently, counsel are frequently unable to foresee developments which may require changes in strategy.
>
> It follows that there will be cases where the court should require separate counsel to represent certain defendants despite the expressed wishes of such defendants. Indeed, failure of the trial court to require separate representation may, in cases such as this, require a new trial, even though the defendants have expressed a desire to continue with the same counsel. The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of criminal justice that it must in some cases take precedence over all other considerations, including the expressed preference of the defendants concerned and their attorney.
>
> Our burgeoning criminal calendars and the need to try a larger percentage of criminal cases under the provisions of the Speedy Trial Act and court rules for the prompt disposition of criminal cases have made it all the more necessary for our federal trial courts to take all measures to avoid the necessity for the retrial of multi-defendant cases. One such measure is to require separate counsel for each defendant in a multi-defendant case.

See also United States v. *Mari*, 526 F.2d 117, 119–21 (2d Cir. 1975) (Oakes, C. J., concurring).

That there is much wisdom in the suggestion made by Judge Lumbard that there be "separate counsel for each defendant in a multi-defendant case" (543 F.2d at 1058) is further underscored by the fact that it is not possible to "antic-

ipate with complete accuracy the course that a criminal trial may take. *Fryar* v. *United States*, 404 F.2d 1071, 1073 (10th Cir. 1968), *cert. denied*, 395 U.S. 964 (1969), which also notes "the practical difficulty for a trial judge to determine the existence of a conflict of interest between co-defendants without encroaching upon the fifth amendment." *Id.*

See also American Bar Association Standards Relating to the Defense Function, *supra*, at 214:

> the risk of an unforeseen and even unforeseeable conflict of interest developing is so great that a lawyer should decline multiple representation unless there is no other way in which adequate representation can be provided to the defendants.

While it may be contended that what amounts to a *per se* rule barring joint representation in a criminal case intrudes upon a defendant's right to choose his own counsel, it is well established that the right is not an absolute one. Indeed, *Matter of Grand Jury Empaneled January 21, 1975*, *supra*, 536 F.2d at 1012, indicated "without deciding" that, in the context of grand jury representation

> the government may obtain, in appropriate circumstances, judical interference with private arrangements for multiple legal representation of witnesses called to testify before a grand jury, on the theory that the multiple representation impedes the effectiveness of the grand jury investigation.

Cf. In re Gopman, 531 F.2d 262, 268 (5th Cir. 1976); *Pirillo* v. *Takiff*, 341 A.2d 896, 900–05 (Pa. 1975), *appeal dismissed and cert. denied*, 423 U.S. 1083 (1976).[8]

The trial judges are in need of guidance in this delicate and sensitive area.[9] Until it is forthcoming in the form of a rule of the Supreme Court,[10] or a directive from our court of appeals in the exercise of its supervisory power, it would seem that no case of joint representation should be permitted unless counsel can state that he knows all of the facts of the defense; that he is totally aware of the government's case; that there is absolutely no possibility, however remote, of a conflict arising in his joint representation of the defendants; and that his analysis and response are made with a total understanding of the canons and rules applicable to attorneys engaged in joint representation of defendants in a criminal case.

Should it later develop, as the proceeding moves to trial, that counsel has misstated the situation, disciplinary measures should be pursued by the offended trial judge.

It follows that the same rule should apply where one or all of the jointly represented defendants intends to, or does, plead guilty. As Circuit Judge Oakes stated in his concurrence in *United States* v. *Mari*, *supra*, 526 F.2d at 120:

> The problem is that even where as here both codefendants pleaded guilty there are frequently potential conflicts of interest. . . . [T]he prosecutor may be inclined to accept a guilty plea from one codefendant which may harm the interests of the other. The contrast in the dispositions of the cases may have a harmful impact on the codefendant who does not initially plead guilty; he may be pressured into pleading guilty himself rather than face his codefendant's bargained-for testimony at a trial. And it will be his own counsel's recommendation to the initially pleading co-defendant which will have contributed to this harmful impact upon him. . . . [I]n a given instance it would be at least conceivable that the prosecutor would be willing to accept pleas to lesser offenses from two defendants in preference to a plea of guilty by one defendant to a greater offense.

Moreover, the aforesaid rule is also called for when the joint representation comes about by virtue of each defendant being represented by attorneys associated with each other in practice. *See* Code of Professional Responsibility (New Jersey Disciplinary Rule) DR5-105(D), n.3, *supra*.

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[8] *See* the Criminal Justice Act, 18 U.S.C. § 3006A(b): "The United States magistrate or the court shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel . . . ." The District of Columbia Circuit, recognizing that "the burden placed on the trial judge by the Act, to decide before trial whether separate counsel for co-defendants are required, is an exceedingly onerous one," requires that separate counsel be appointed for each defendant initially. *Ford* v. *United States*, 379 F.2d 123, 125–26 (D.C. Cir. 1967). Counsel have the right later to apply to the court to allow joint representation. *Id.*

[9] In Matter of Grand Jury Empaneled Jan. 21, 1975, *supra*, the court referred to the trial judge's barring of an attorney's joint representation of nine grand jury witnesses as "draconian," 536 F.2d at 1012, meaning, of course, harsh, severe, or rigorous.

[10] The Supreme Court Advisory Committee on Criminal Rules is presently considering a rule requiring judicial inquiry into joint representation.

A suggested form to be signed by counsel who jointly represents multiple defendants in a criminal case is annexed as Appendix A to this opinion. The judge, of course, is not relieved thereby of making the *Davenport* inquiry.

In conclusion, it is appropriate to quote again from the earlier cited paper by Mr. Cole:

> Reliance upon the right to select counsel is not a very persuasive factor in this context. There are more than enough good defense lawyers to go around. Though multiple representation does not permit some saving in fees, it does not appear that this factor is the principal motivation in the many cases in which this conduct occurs.
>
> A more realistic analysis of these situations suggest that multiple representation is more often prompted by the desire to keep certain persons in "friendly" hands. What better way can there be for an attorney to learn what a witness or codefendant will say or do than by representing such a person? Indeed, by representing him, an attorney not only will *know* what he will say or do; he will even be able to guide him. Such a witness will remain "friendly," because his attorney will keep him that way.
>
> This may be advantageous to the attorney's principal client, but is it fair to the other clients? Will an attorney who is representing multiple defendants be as aggressive in seeking a plea bargain for Client No. 2 as he would be if Client No. 2 was his only client? Would he even consider obtaining a grant of immunity for Client No. 3 when that client's testimony might affect the destinies of Clients Nos. 1 and 2? Because conflict is generally inherent in any criminal proceeding involving multiple defendants, it is generally impossible for one lawyer zealously to represent more than one client in any such proceeding. To avoid the Scylla of conflict, the defense attorney with multiple clients will likely become engulfed in the Charybdis of ineffective assistance of counsel.[11]

As I have already noted, I regard it highly significant that a leading member of the criminal defense bar would regard the matter of joint representation in criminal cases as requiring presently that he express himself in such critical terms. It would seem that the time is at hand when serious consideration must be given to the issues raised by this case. The responsibility lies with bench and bar alike.

Reverting to the specific issue raised herein by Garafola's decision now to retain separate counsel, the position of conflict in which defense counsel knowingly placed himself from and after arraignment continues to persist. This is so for several reasons. Simply by way of example, should Garafola be called as a witness by the United States upon re-trial, how can he be cross-examined effectively by his former attorney without intruding into matters protected by the attorney-client privilege.[12] Moreover, what is to be done if Dolan wishes to waive the attorney-client privilege but Garafola does not? What is present counsel then to do? A myriad of equally complex questions are presented, simply because counsel did not, when he first ascertained all of the facts of the case, exercise that prudence which was required. Accordingly, I adhere now to my ruling of March 10, 1977, and order that Dolan retain new counsel to represent him at re-trial.

FREDERICK B. LACEY,
U.S. District Judge.

DATED: March 16, 1977.

APPENDIX A

I, _____ a member of the Bar of _____, appear to represent jointly the following defendants:

1. _____
2. _____
3. _____
_____ etc.

I have thoroughly investigated the facts of this case and am aware of the facts as they will affect each of the defendants I represent. I have also considered what the theory of the United States may be in the prosecution of this case, the witnesses it may call, and the trial strategy I will follow.

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[11] Cole, *supra*, note 6, at 12–13 (footnote omitted). *Cf.* Morgan, *The Evolving Concept of Professional Responsibility*, 90 Harv. L. Rev. 702, 727–28 (1977).

[12] *See* Transcript of hearing held in chambers on Mar. 10, 1977, at 16.

Moreover, the foregoing elements have been considered in the light of the ethical considerations presented by the New Jersey Disciplinary Rules, including but not limited to DR5–105, the Canons of Professional Ethics, and the American Bar Associations' Standards Relating to the Defense Function, including but not limited to § 3.5, and the commentary thereto.

I represent to the court that, having given full consideration to the foregoing, I am certain that there is no conflict in interest between the defendants I represent.

I recognize that should later events disclose that my assessment of the matter of conflict-in-interest was in error, I may be subject to court-imposed or other sanctions as may be deemed appropriate under the circumstances.

I further state to the court that I have conferred with each of my clients, discussed with them the facts of the case, their own status alone and as it may be affected by the status of the others I represent, and the trial strategy I plan to pursue, including the witnesses I plan to call. I have also advised them of their right to separate counsel; however, I have advised them that I presently perceive no conflict in the interest of any one defendant as against any other defendant jointly represented by me.

_____,
Attorney for the defendant.

DATED:

Mr. EILBERG. Before proceeding to question you, after your very lucid and forceful presentation, I'm wondering if Mr. Imlay has any formal statement or any comments that he wishes to make at this point. We have questions for you, also. What is your pleasure?

Mr. IMLAY. I would be very pleased to defer to Judge Lacey for the questions, Mr. Chairman.

Mr. EILBERG. All right. I believe we do have some questions for you, Mr. Imlay, in addition to some for Judge Lacey. We do have your statement and, without objection, we will put your statement in the record at this point, Mr. Imlay.

Mr. IMLAY. Thank you, Mr. Chairman.

[The prepared statement of Mr. Imlay follows:]

STATEMENT OF CARL H. IMLAY, GENERAL COUNSEL OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

I am Carl H. Imlay, General Counsel of the Administrative Office of the United States Courts.

I appear here today to express some views on behalf of the Administrative Office of the United States Courts on H.R. 94 and related grand jury measures. I should emphasize at the outset that the Judicial Conference of the United States has not had the opportunity to study and comment on most aspects of these bills, and therefore my testimony does not necessarily express a judicial consensus in these matters. I do, however, want to be helpful in expressing the thoughts of my own office.

The Judicial Conference of the United States has spoken to those features of H.R. 94 which were present in two precursor bills, H.R. 1277 and H.R. 2986 of the 94th Congress, as is reflected in the following extract of the report of its session of September 1975, to wit:

"LEGISLATION REGARDING THE GRAND JURY

"The Committee reported that the Conference's views had been requested on two bills pending in the Congress, H.R. 1277 and H.R. 2986. These bills would effect radical changes in grand jury practices and procedures permitting any grand jury to turn itself into an independent grand jury operating independently of the Department of Justice and would permit witnesses the right to assistance of counsel while testifying before grand juries. The Conference agreed with the committee recommendation in disapproving each of the two pending bills."

I should like to address various other features of the bill seriatim.

SECTION 2. RECALCITRANT WITNESSES

The proposal to amend 28 U.S.C. § 1826 describes the procedures to be followed in civil contempt proceedings. Section 2(a) has no bearing on the alternative criminal contempt remedy under 18 U.S.C. § 401 or procedures on criminal contempt under Rule 42 of the Federal Rules of Criminal Procedure. Compare *Shillitani* v. *United States*, 384 U.S. 364 (1966), with *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966).

With respect to the procedures set forth in proposed Section 1826(a)(2), we see no basic problem. Hearings are already being held on civil contempt in such situations, and attorneys do appear. Where the charged witness is without funds, it is the policy of the Judicial Conference that an attorney shall be appointed for him and compensated pursuant to 18 U.S.C. § 3006A.

However, we have serious difficulty with proposed Section 1826(a)(3), which allows 72 hours' notice to the witness who has refused to testify. This provision would allow a witness to bring a grand jury proceeding to a standstill for three days or more until a hearing before a judge could be scheduled. Since a witness charged with civil contempt can purge his contempt at any time by compliance with the court order in question, this delay would give a contumacious witness the power to delay grand jury proceedings without valid cause, and if the term of a grand jury were about to expire, perhaps he could thereby escape testifying altogether. While the court can create exceptions to the 72-hour rule on application of the government, this sort of extra appearance at which a showing of special need must be made would itself create a delay of several days. We therefore recommend the deletion of subparagraph (3), leaving that procedural subject matter to rulemaking.

With respect to Section 1826(b)(1), we have no problem with the first sentence inasmuch as it is addressed to the Bureau of Prisons and the United States marshals. However, we urge the deletion of the second sentence, which requires the judge to order confinement at a specific institution. This decision is a prerogative of the Attorney General, who is otherwise charged by law with making such determination of availability and appropriateness of prison facilities.

Section 1826(b)(1) and (2) place limitations on confinement, which are matters of policy upon which I shall not attempt to comment.

The provision for bail at proposed Section 1826(c) adopts the provisions of the criminal code in this respect and thereby largely removes the distinction between civil and criminal contempt which was established by the Supreme Court in *Shillitani* v. *United States*, 384 U.S. 364 (1966). The use of the civil contempt remedy is to compel prompt testimony and not to punish (an objective left to the criminal contempt remedy). If, as suggested in Section 1826(c), a witness is given an absolute right to bail pending appeal of the district court order affecting him, he could frustrate the grand jury's inquiry to the point of rendering it useless. This might well be the result even though bail could be denied if *"it affirmatively appears that the appeal is frivolous or taken for delay"*. A mere notice of appeal would not reflect this kind of determination, and thus bail or release under the presently proposed language would effectively become a matter of absolute right. Furthermore, this bail provision borrows the Bail Reform Act provisions of 18 U.S.C. §§ 3146 and 3148, which are in some respects inconsistent with the civil contempt remedy. Finally, the section fails to take into account the witness' status if, after appeal, he files a petition for a writ of certiorari.

We would therefore strongly suggest that all of subsection (c) of proposed Section 1826 be deleted and the following substituted:

> "Any person confined pursuant to this section may take an appeal. The appeal shall be heard expeditiously, without the necessity of briefs, after reasonable notice to the attorney for the government, upon such papers, affidavits, and portions of the record as the parties shall present or which may otherwise be of record. The court of appeals or a judge thereof may order the release of the appellant pending the appeal on bail or otherwise, and may impose such conditions on release as may be appropriate, including a condition that the appellant remain under the supervision of a designated person or organization agreeing to supervise him."

This language would adopt the abbreviated form of appeal of Rule 9 of the Federal Rules of Appellate Procedure. It would make bail a matter of judicial discretion, rather than of right, and would allow the use of third party release supervision by a pretrial service agency (see 18 U.S.C. § 3154) or by any other public or private supervisory agency.

With respect to the appointment of counsel, proposed Section 1826(d) suggests that counsel "for any person unable to obtain adequate representation" may be "*appointed* as provided in section 3006A of title 18, United States Code." This not only fails to provide for compensation to the attorney but is also so broad as to apparently include persons who are not financially disabled but who cannot find an attorney "adequate" in their own judgment.

In order to assure compensation of counsel provided under the "Grand Jury Reform Act of 1977" and to provide guidance as to the amount of compensation, it is suggested that the amended Section 1826(d) of Title 28 and Section 6002(c) and 3330A(b) of Title 18 should both be further amended to provide specific provisions as to compensation. An alternative method would be to include as Section 7(c) to the Grand Jury Reform Act, an additional amendment to the Criminal Justice Act, Section 3006A, which might read as follows:

"(c) Section 3006A(d)(2) of Title 18, United States Code, is amended by adding after the last sentence thereof, the sentence: "For representative of a witness, pursuant to Section 1826(d) of Title 28, or Section 3330A or 6002(c) of Title 18, the compensation to be paid to an attorney shall not exceed $400.'"

AMENDMENT OF WIRETAP STATUTE

We have no comment on Section 2(b) of the bill, which would extend the exclusionary rules to civil and criminal contempt cases.

GRAND JURY PROCEEDINGS

Section 2(c) of the bill is apparently intended to preclude dual civil and criminal contempt penalties for the same acts of contempt. The difficulty is that this statutory jeopardy provision goes beyond questions relating to the same transaction and uses the term "set of transactions." Such a term could apparently mean that, if a bookmaker is once held in contempt for failure to respond to questions concerning certain gambling transactions, he could not thereafter be cited for refusing to answer as to other perhaps unrelated gambling transactions if the term "set of transactions" is intended to mean, "series of transactions." I suggest substitution of the term "related transactions" to effectuate the apparent purpose of this section to prevent harassment.

WITNESS IMMUNITY

Section 3 of the bill would extend transactional immunity to witnesses called to testify pursuant to 18 U.S.C. §§ 6002 and 6003, a policy about which I will not comment at this time. We do note that Section (b) suggests that an application to the court can be made to consider special need to require a witness to testify without the usual week's notice to him. This kind of emergency hearing would be extremely inconvenient for the court to schedule on such short notice, and we suggest the deletion of such provision.

Subsection (c) requires that a person presiding over an inquiry (including agency and congressional hearings) shall advise the witness of the nature and scope of the immunity from criminal prosecution, and of the right of the witness to be represented by counsel "in any proceeding" challenging the order or confinement or fines, and that "*if he is unable to obtain adequate representation, counsel will be furnished for him as provided in section 3006A, title 18, United States Code.*"

Aside from the policy issue of assigning this function to any agency as defined in present 18 U.S.C. § 6001(1), the right to counsel is unclear, as it applies to a right "*in any proceeding*" which could presumably include civil and administrative proceedings, as well as to Federal criminal proceedings covered by the Criminal Justice Act, 18 U.S.C. § 3006A. The section does not indicate any source of payment for such counsel in proceedings not encompassed by the Criminal Justice Act, and therefore the proposal is at variance with the terms of that Act, i.e., 18 U.S.C. § 3006A.

Moreover, the Criminal Justice Act does not now provide for the appointment of counsel for a person "if he is unable to obtain adequate representation", but for a "person *financially* unable to obtain representation", a phrase with a significant difference. We suggest either that some additional independent funding provision be substituted, or if so intended, that the Criminal Justice Act be amended to reconcile the two statutes. We suggest deletion of (c).

SIZE OF GRAND JURIES

The principle of reducing the grand jury in size has considerable support, and the instant proposal was endorsed by the Judicial Conference Committee on the Administration of the Criminal Law.[1] A panel of 23 is administratively unwieldy, costly, and unnecessary. As a matter of fact, the actual number of grand jurors which sat on a grand jury in session in Fiscal Year 1976 was 19.9, while some sat with only 16, the number necessary for a quorum under the present law.

A grand jury of not less than nine nor more than 15 would be easier to assemble and therefore could go about its business more expeditiously. This would ease some of the problems imposed by the Speedy Trial Act, which would by July 1, 1979, demand return of an indictment within 30 days following the arrest (18 U.S.C. § 3161(b)).

Our experience is that it is easier to summon a smaller panel than a larger one from throughout the larger districts.

The necessity of concurrency by two-thirds "of those present" may be ambiguous (e.g., suppose 11 or 13 grand jurors were in attendance). This number might be stated in absolute figures to resolve doubt.

We also suggest that the provision that the marshall summon additional jurors "from the body of the district, etc.," if less than nine appear, be deleted, and the following be substituted:

> "If less than nine of the persons summoned attend, they shall be placed on the grand jury and the court shall order that an additional number of persons be summoned to complete the grand jury in a manner ordered by the court in accordance with procedures set forth in section 1866 of title 28, United States Code."

This would bring the procedure into line with the comparable situation under the Jury Selection and Service Act where shortages of petit jurors exist.

UNAUTHORIZED DISCLOSURE OF GRAND JURY INFORMATION

We have no specific comment on proposed Section 1512, imposing penalties on violations of grand jury secrecy. Our lack of comment, however, is based on our interpretation that subsection (g) preserves the power of courts, through rules and orders, including the Free Press-Fair Trial Guidelines of the Judicial Conference (45 F.R.D. 391) to insure constitutional trials by fair and impartial juries and to prohibit disclosures dehors the record of the trial.

RIGHTS AND DUTIES OF GRAND JURORS; INDEPENDENT INQUIRY

We have no particular over-all positions on proposed Section 3329 with some exceptions, such as the reference to independent inquiries discussed hereafter. Also we might note that in the life of a grand jury hundreds of matters might be brought before it, and therefore such a body in a busy court could not usually be informed at impanelment of "the subject matter of the investigations" (5), or the criminal statute or statutes involved (6).

Our major objection is to Section 3329(e), which would preclude a second grand jury inquiry following an ignoramus returned by a first grand jury, "unless the court finds, upon a proper showing, that additional evidence relevant to such inquiry has been discovered." This would require a judge to review, at great expense of court time, a transcript of a first grand jury proceeding, and then hold an extensive hearing on newly discovered evidence. In view of the mounting backlogs, Federal district judges do not have the time to do this except at the expense of further postponing their trial calendars. They could not review all the actions of, for example, a special grand jury inquiry conducted over many months, unless they declare a moratorium on all other matters before them. The Speedy Trial Act, moreover, demands that the criminal trial calendar be expedited. We recommend deletion of (e).

With respect to proposed Section 3330 providing for an "independent grand jury inquiry," the Judicial Conference, as noted above, has specifically objected to such a provision in the context of an earlier bill. A group of lay citizens could not be expected to be familiar with the intricacies of Federal jurisdiction and criminal law and, despite the provision for a special attorney, could not render effective assistance to the courts in returning indictments. Indeed, they

[1] See p. 59, Reports of the Proceedings of the Judicial Conference of 1974.

might, without the guidance of the Department of Justice or some special national officer such as the recent Special Prosecutor's Office, do more harm than good.

RIGHTS OF GRAND JURY WITNESSES

We would not support the provision in Section 7 of the bill for allowing counsel in the grand jury room, first on the basis that it would inevitably delay such proceedings by encouraging non-targeted witnesses to enter into conferences prior to answering questions while advice is sought and obtained. Grand juries question many witnesses, many to get routine information of a non-incriminating sort. This Act would allow any such witness to bring an attorney into the grand jury room, and thus inevitably delay the proceedings.

As shown in the attached Exhibit A, grand jury proceedings are becoming longer and more frequent year by year, but are doing less work. We feel that to allow each witness to bring in his private counsel would work a delay of the grand jury proceeding without benefit to anyone else, and to the considerable detriment of the defendant (who is paying legal fees all the while) and the courts (who must have indictments filed within 30 days of arrest of a defendant to meet the schedule of 18 U.S.C. § 3161(b)).

The provision creates a doubt as to whether it intends to amend 18 U.S.C. § 3006A(g), which now provides for *discretionary* appointments of counsel for persons "in custody as a material witness." This ambiguity is not clarified by Section 7(b) of the bill which would add as a new category of persons covered by the Criminal Justice Act, specifically Section 3006A(a), one "who is a witness before a grant jury impaneled before the district court." Not only is there this ambiguity, but no explanation is made as to compensation of such attorney by my office, or who would approve such claim for compensation, especially claims in excess of maximum amounts (see 18 U.S.C. § 3006A(d), "Payment for representation").

Having counsel present for each and every witness would make it extremely difficult to insure against prejudicial publicity and would impede the court in finding an unprejudiced petit jury, particularly in view of the final sentence of § 3330A(b), which suggests that counsel in the grand jury proceeding are under no secrecy constraint.

The provision relating to subpoenas in proposed section 3330B creates additional problems. How can each witness be given "adequate and reasonable notice of" the broad subjects listed from one to six at the time the summons is served and, if counsel is appointed, why would such abstract notice be necessary or useful? Who would give such notice in view of the fact that the subpoena issues from the court, not the office of the United States Attorney?

Proposed section 3330B(c) would apparently allow a witness to move to quash a subpoena and to obtain a stay of the inquiry pending hearing thereon. This procedure again would delay the grand jury inquiry an intolerable time, interrupt the schedule of a busy judge, and generally impact on the present case backlogs in all courts. Some judges could not reach such matters for weeks for hearing and then would be required to study a lengthy grand jury transcript, perhaps consuming additional weeks of time. This would be the consequence of requiring a judge, prior to the appearance of the witness before the grand jury, to determine such issues as whether "the evidence sought is relevant to the grand jury investigation properly conducted within the grand jury's jurisdiction" (§ 3330B(d)(1)(C)). A grand jury organized under Chapter 216 of Title 18, United States Code, may have produced a transcript record of over 18 months of grand jury inquiry (up to 36 months). In short, this burden of rendering speculative opinions of this nature would create severe burdens on the ability of judges to manage their caseloads, in addition to stalling the accusatory function of the grand jury.

RECORDING, TRANSCRIBING AND AVAILABILITY OF GRAND JURY PROCEEDINGS

Section 8 of the bill relates to the recording of grand jury testimony, making it available to witnesses, and a repeal of the Jencks Act. Since the Advisory Committee on the Federal Rules of Criminal Procedure has studied and is studying these matters *in extenso*, I will leave this subject to Judge Frederick B. Lacey who appears today as a witness. Judge Lacey will also address the issue of availability of the transcript.

On the issue of availability however, I might note that one critical objection we have is that if reporters (grand jury reporters are contracted for by the

Department of Justice) had to separately record the grand jury testimony for every one of the witnesses and make it available in transcription form or in the form of edited electronic recordings, "a reasonable time prior to trial," the courts simply could not comply with the demands of the Speedy Trial Act, 18 U.S.C. § 3161.

Under Section 3161(c) of that Act, arraignment must be held within ten days from the filing date of the indictment or from the date it is made public if a sealed indictment is returned. Up to this time it will not be known how the defendant or defendants will plead so as to necessitate publication to anyone of a transcript or electronic record. After arraignment 60 days are allowed to the commencement of the trial (18 U.S.C. § 3161(c)). After that the United States Attorney would have to identify witnesses to be called, an *additional* court hearing would have to be scheduled and convened to comply with proposed Section 3334(c) and (d), and then transcripts or edited electronic recordings would have to be supplied to each witness a sufficient time in advance of the remainder of the 60 days to trial as to constitute "a reasonable time prior to trial." This schedule would seriously conflict with the main business of the court in trying cases.

PRELIMINARY EXAMINATION

The preliminary hearing is largely a duplication of the role of the grand jury, insofar as it seeks to resolve the issue of probable cause to justify further criminal proceedings. The preliminary hearing is exclusively an exploration into probable cause to hold the accused to answer the prosecution further. *Coleman* v. *Burnett*, 477 F.2d 1187 (C.A.D.C. 1973). There is no logic in duplicative proceedings which greatly increase attorney costs for the defendants and further delay the courts in handling other matters. Certainly there would be no benefit in a preliminary hearing after an indictment is filed. The filing of an indictment resolves the probable cause issue and causes the case to be opened in the court.

Not only would such duplicative proceedings cause delay and create problems under the Speedy Trial Act, but they would further harass the witnesses who may have appeared several times in court already (preliminary hearings may be held before magistrates in different places within the district than where the grand jury sits, and the witnesses may have to travel to distant places for such hearings).

In many respects preliminary hearings are fairer to defendants as a vehicle for testing probable cause. If a device were worked out giving a defendant the option of having a preliminary hearing *in lieu* of a grand jury hearing, such proposal would probably receive more support.

Our experience shows, however, that year after year there are fewer waivers of grand jury hearings (see Exhibit B attached) due in some part perhaps to the refusal of the United States Attorney to accede to such waiver, but also in part to the interest of defense counsel in enhanced fees based on time sheets.

REPORTS CONCERNING GRAND JURY INVESTIGATIONS

Section 9 of the bill provides for a report to be made to the Congress and to the Administrative Office by the Attorney General of numerous details concerning grand jury business. While we are concerned with selection, utilization and payment of grand jurors, and procure our own statistics on those subjects, we are not sure why we were included as a recipient of such reports, although we have no objection to such receipt.

In essence, the major concern we have with the bill is that it would so greatly increase time delays in the criminal process as to swell the backlog of criminal and civil cases remaining untried and would collide with the imperatives of the new Speedy Trial Act. Our most recent statistics, those for fiscal year 1976, show that civil cases increased by 11.3 percent, and many courts declared a virtual moratorium on civil dockets because of preoccupation of the courts in meeting the imperatives of the Speedy Trial Act in trying criminal cases. As of June 30, 1976, there were 351 civil cases pending per judgeship, 52 more than the year before. These include everything from civil rights cases to antitrust suits. The judicial system simply cannot absorb the additional judicial hearings that would be created by some of the provisions we have identified in this bill.

Mr. Chairman, I want to thank you and the Committee for letting us express our views.

Highlights of Grand Juries

July 1974–June 1975

During the 30-month period: 672 grand juries were discharged; 553 of these were "regular"; 119 of these were "special".

A. The 237 grand juries which were in existence for 18 months accounted for 35.3 percent of all grand juries discharged.

B. 38 special grand juries lasted more than 18 months. 5.7 percent of the grand juries discharged lasted beyond 18 months while 1.2 percent lasted the full 36 months. Twenty-seven special grand juries, or 4.0 percent, lasted from 2 to 3 years in length.

C. 152 grand juries, or 22.6 percent, lasted 6 months or less; 141 grand juries, or 21.0 percent, lasted between 7 and 12 months; 340 grand juries, or 50.6 percent, lasted between 13 and 18 months; 39 grand juries, or 5.8 percent, lasted between 19 and 36 months.

EXHIBIT A

DURATION OF GRAND JURIES DISCHARGED IN FISCAL YEAR 1975 (JULY 1974–JUNE 1975)

	Number of months																										
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	20	21	24	26	30	31	35	36	Total
Grand juries impaneled:																											
Fiscal year 1972:																											
Number of regulars																							1				1
Number of specials																						1	2	1	1	4	9
Total																						1	3	1	1	4	10
Fiscal year 1973:																											
Number of regulars																1	6	18									25
Number of specials													1				1	3	2	1	6		1				15
Total													1			1	7	21	2	1	6		1				40
Fiscal year 1975:																											
Number of regulars	10	7	6	4	7	8	6	1	2	1	1		2														54
Number of specials			2	1	1				2						1												7
Total	10	7	7	5	8	8	6	1	4	1	1		2		1												61
Fiscal year 1974:																											
Number of regulars	1	1	2	5	3	10	6	5	7	6	9	9	8	6	5	4	10	33									130
Number of specials				1			1			2		1	3	2	1	1	1	14									27
Total	1	1	2	6	3	10	7	5	7	8	9	10	11	8	6	5	11	47									157
Total—grand juries discharged in fiscal year 1975:																											
Number of regulars	11	8	7	9	10	18	12	6	9	7	10	9	10	6	5	5	16	51					1				210
Number of specials			2	2	1		1		2	2		1	4	2	2	1	2	17	2	1	6	1	3	1	1	4	58
Total	11	8	9	11	11	18	13	6	11	9	10	10	14	8	7	6	18	68	2	1	6	1	4	1	1	4	268

DURATION OF GRAND JURIES DISCHARGED IN FISCAL YEAR 1976 (JULY 1975–JUNE 1976)

	Number of Months																							
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	24	26	29	31	36	19	Total
Grand juries impaneled:																									
Fiscal year 1973:																									
Number of regulars																									
Number of specials																					1	1	4		6
Total																					1	1	4		6
Fiscal year 1974:																									
Number of regulars													2	1	2		2	47							54
Number of specials																		5	1	1				1	8
Total													2	1	2		2	52	1	1				1	62
Fiscal year 1975:																									
Number of regulars	1	1	1	4	4	6	13	4	3	5	5	16	3	1	1	4	12	42							126
Number of specials			1						2		3		1		2	1		7							17
Total	1	1	2	4	4	6	13	4	5	5	8	16	4	1	3	5	12	49							143
Fiscal year 1976:																									
Number of regulars	9	4	4	9	7	10	2	2	1																48
Number of specials	1																								1
Total	10	4	4	9	7	10	2	2	1																49
Total grand juries: Discharged in fiscal year 1976:																									
Number of regulars	10	5	5	13	11	16	15	6	7	5	5	16	5	2	3	4	14	89							228
Number of specials	1		1						2		3		1		2	1		12	1	1	1	1	4	1	32
Total	11	5	6	13	11	16	15	6	6	5	8	16	6	2	5	5	14	101	1	1	1	1	4	1	260

DURATION OF GRAND JURIES DISCHARGED IN THE FIRST HALF OF COURT YEAR 1977 (JULY-DECEMBER 1976)

	Number of months																							
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	23	24	26	33	Total
Grand juries impaneled:																									
Fiscal year 1974:																									
No. of regulars																									
Number of regulars																									
Number of specials																							1	1	2
Total																							1	1	2
Fiscal year 1975:																									
Number of regulars												1				3	5	56							65
Number of specials																		12	5	1	1	1			20
Total												1				3	5	68	5	1	1	1			85
Fiscal year 1976:																									
Number of regulars	1		1	3	4	2	3	2	2	6	4	4	1	1	4	1									39
Number of specials							2					2	2		1										7
Total	1		1	3	4	2	5	2	2	6	4	6	3	1	5	1									46
1st half court year 1977:																									
Number of regulars	3	2	1	4		1																			11
Number of specials																									
Total	3	2	1	4		1																			11
Totals—grand juries: Discharged in 1st half court year 1977:																									
Number of regulars	4	2	2	7	4	3	3	2	2	6	7	5	1	1	4	4	5	56							115
Number of specials							2					2	2		1			12	5	1	1	1	1	1	29
Total	4	2	2	7	4	3	5	2	2	6	4	7	3	1	5	4	5	68	5	1	1	1	1	1	144

DURATION OF GRAND JURIES DISCHARGED DURING THE 30-MONTH PERIOD, JULY 1, 1974–DEC. 31, 1976

	Number of months																														
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	23	24	26	29	30	31	33	35	36	Totals
Grand juries impaneled: fiscal year 1972 through 1st half court year 1977:																															
Number of regulars	25	15	14	29	25	37	30	14	15	18	19	30	16	9	12	13	35	196								1					553
Number of specials	1		3	2	1		3		4	2	3	3	7	2	5	2	2	41	6	3	1	1	8	3	1	3	2	1	1	8	119
Total	26	15	17	31	26	37	33	14	19	20	22	33	23	11	17	15	37	237	6	3	1	1	8	3	1	4	2	1	1	8	672
Percent of total	3.9	2.2	2.5	4.6	3.9	5.5	4.9	2.1	2.8	3.0	3.3	4.9	3.4	1.6	2.5	2.2	5.5	35.3	0.9	0.4	0.1	0.1	1.2	0.4	0.1	0.6	0.3	0.1	0.1	1.2	----

FIGURE 35.—PROCEEDING BY INDICTMENT AND GRAND JUROR USAGE, U.S. DISTRICT COURTS, JULY 1–DEC. 31, 1974–76

National totals	Proceedings commenced by indictment		Grand jury sessions convened	Hours in session
	Cases	Defendants		
1974	12,412	18,430	3,508	18,194
1975	12,838	19,150	3,908	20,818
1976	12,095	17,558	4,188	22,244

FIGURE 32.—U.S. DISTRICT COURTS GRAND JUROR STATISTICS—NATIONAL TOTALS JULY 1–DEC. 31, 1974–76

Grand jurors and juries	1974	1975	1976	1976 over 1975	
				Increase	Percent increase
Total number of:					
Sessions convened	3,508	3,908	4,188	280	7.2
Jurors in session	69,163	77,329	82,818	5,489	7.1
Hours in session	18,194	20,818	22,244	1,426	6.8
Average number of:					
Jurors per session	19.7	19.8	19.8	----	----
Hours per session	5.19	5.33	5.31	----	----
Total number of grand juries:					
In existence	398	[1] 446	493	47	10.5
Impaneled	119	144	150	6	4.2
Discharged	121	[1] 124	145	21	16.9

[1] Revised to more accurately reflect the count of grand juries in fiscal year 1975.

FIGURE 33.—NUMBER OF GRAND JURIES, U.S. DISTRICT COURTS, JULY 1–DEC. 31, 1976

District	Number on July 1, 1976	Number impaneled in the 6-mo period	Number discharged in the 6-mo period	Number on Dec. 31, 1976	Total number in existence in the 6-mo period
Total all districts	[1] 343	150	145	348	493
District of Columbia	[1] 12	6	6	12	18
FIRST CIRCUIT					
Maine	2	----	----	2	2
Massachusetts	[1] 8	2	2	8	10
New Hampshire	1	----	----	1	1
Rhode Island	1	1	----	2	2
Puerto Rico	2	----	----	2	2
SECOND CIRCUIT					
Connecticut	5	4	3	6	9
New York:					
Northern	2	2	1	3	4
Eastern	[1] 18	11	9	20	29
Southern	32	12	12	32	44
Western	3	----	1	2	3
Vermont	2	1	1	2	3
THIRD CIRCUIT					
Delaware	2	1	1	2	3
New Jersey	6	3	2	7	9
Pennsylvania:					
Eastern	8	2	2	8	10
Middle	4	----	----	4	4
Western	6	1	1	6	7
Virgin Islands [2]	----	----	----	----	----
FOURTH CIRCUIT					
Maryland	6	4	4	6	10
North Carolina:					
Eastern	1	1	1	1	2
Middle	1	----	1	----	1
Western	2	----	2	----	2
South Carolina	1	----	----	1	1
Virginia:					
Eastern	9	4	9	4	13
Western	6	4	4	6	10
West Virginia:					
Northern	1	----	----	1	1
Southern	2	3	1	4	5

FIGURE 33.—NUMBER OF GRAND JURIES, U.S. DISTRICT COURTS, JULY 1–DEC. 31, 1976—Continued

District	Number on July 1, 1976	Number impaneled in the 6-mo period	Number discharged in the 6-mo period	Number on Dec. 31, 1976	Total number in existence in the 6-mo period
FIFTH CIRCUIT					
Alabama:					
Northern	1	1	1	1	2
Middle		1		1	1
Southern	1	1		2	2
Florida:					
Northern	2	1	1	2	3
Middle	7	2	3	6	9
Southern	12	4	4	12	16
Georgia:					
Northern	15	1	1	5	6
Middle	3	1	1	3	4
Southern	2			2	2
Louisiana:					
Eastern	4	1	1	4	5
Middle	1	1		2	2
Western	5	2	4	3	7
Mississippi:					
Northern	1		1		1
Southern	1			1	1
Texas:					
Northern	9	2	4	7	11
Eastern	2			2	2
Southern	16	6	2	10	12
Western	10	6	5	11	16
Canal Zone[2]					
SIXTH CIRCUIT					
Kentucky:					
Eastern	3		2	1	3
Western	3	1	1	3	4
Michigan:					
Eastern	9	5	3	11	14
Western	1			1	1
Ohio:					
Northern	6	3	1	8	9
Southern	4	2	1	5	6
Tennessee:					
Eastern	2	3	1	4	5
Middle	1	1	1	1	2
Western	1	1		2	2
SEVENTH CIRCUIT					
Illinois:					
Northern	8	6	7	7	14
Eastern	1			1	1
Southern	3	1	2	2	4
Indiana:					
Northern	3	1	1	3	4
Southern	1	2	2	1	3
Wisconsin:					
Eastern	2	1	1	2	3
Western	1			1	1
EIGHTH CIRCUIT					
Arkansas:					
Eastern	2	1	1	2	3
Western		1		1	1
Iowa:					
Northern	2			2	2
Southern	2			2	2
Minnesota	1	1		2	2
Missouri:					
Eastern	4	1	3	2	5
Western	3			3	3
Nebraska	1			1	1
North Dakota	1			1	1
South Dakota	2	2	2	2	4
NINTH CIRCUIT					
Alaska	1	1	1	1	2
Arizona	4			4	4
California:					
Northern	4	2	2	4	6
Eastern	11	1		2	2
Central	18	8	11	15	26
Southern	8	2	2	8	10

FIGURE 33.—NUMBER OF GRAND JURIES, U.S. DISTRICT COURTS, JULY 1–DEC. 31, 1976—Continued

District	Number on July 1, 1976	Number impaneled in the 6-mo period	Number discharged in the 6-mo period	Number on Dec. 31, 1976	Total number in existence in the 6-mo period
NINTH CIRCUIT—Continued					
Hawaii	2	1	1	2	3
Idaho	2	1	1	2	3
Montana		1		1	1
Nevada	2	1	1	2	3
Oregon	3	2	1	4	5
Washington:					
Eastern	1			1	1
Western	2			2	2
Guam	1			1	1
TENTH CIRCUIT					
Colorado	1	1	1	1	2
Kansas	3	2	2	3	5
New Mexico	3	1	1	3	4
Oklahoma:					
Northern	1			1	1
Eastern	1			1	1
Western	1		1		1
Utah	2			2	2
Wyoming		1		1	1

[1] Revised to more accurately reflect the number of pending grand juries.
[2] The districts of Virgin Islands and Canal Zone reported no grand juries in existence during the 6-mo period July–December 1976.

FIGURE 34.—GRAND JUROR USAGE U.S. DISTRICT COURTS, JULY 1–DEC. 31, 1976

District	Number of			Average number of jurors per session	Average number of hours per session
	Sessions convened	Jurors in session	Hours in session		
Total all districts	4,188	82,818	22,244	19.8	5.31
District of Columbia	316	6,390	1,557	20.2	4.93
FIRST CIRCUIT					
Maine	5	92	32	18.4	6.40
Massachusetts	96	1,793	471	18.7	4.91
New Hampshire	6	128	32	21.3	5.33
Rhode Island	16	318	89	19.9	5.56
Puerto Rico	20	383	119	19.2	5.95
SECOND CIRCUIT					
Connecticut	48	965	285	20.1	5.94
New York:					
Northern	29	582	128	20.1	4.41
Eastern	242	4,816	977	19.9	4.04
Southern	466	9,411	1,870	20.2	4.01
Western	37	708	143	19.1	3.86
Vermont	17	331	91	19.5	5.35
THIRD CIRCUIT					
Delaware	27	542	95	20.1	3.52
New Jersey	134	2,479	751	18.5	5.60
Pennsylvania:					
Eastern	152	2,960	685	19.5	4.51
Middle	25	488	120	19.5	4.80
Western	51	933	312	18.3	6.12
Virgin Islands [1]					
FOURTH CIRCUIT					
Maryland	74	1,469	299	19.9	4.04
North Carolina:					
Eastern	9	181	56	20.1	6.22
Middle	10	195	63	19.5	6.30
Western	6	109	41	18.2	6.83
South Carolina	13	244	97	18.8	7.46
Virginia:					
Eastern	54	1,040	325	19.3	6.02
Western	9	163	49	18.1	5.44
West Virginia:					
Northern	3	65	22	21.7	7.33
Southern	13	271	90	20.8	6.92

FIGURE 34.—GRAND JUROR USAGE U.S. DISTRICT COURTS, JULY 1–DEC. 31, 1976—Continued

District	Number of			Average number of jurors per session	Average number of hours per session
	Sessions convened	Jurors in session	Hours in session		
FIFTH CIRCUIT					
Alabama:					
Northern	13	284	100	21.8	7.69
Middle	5	115	30	23.0	6.00
Southern	12	229	87	19.1	7.25
Florida:					
Northern	5	113	35	22.6	7.00
Middle	76	1,468	468	19.3	6.16
Southern	136	2,691	854	19.8	6.28
Georgia:					
Northern	79	1,509	498	19.1	6.30
Middle	22	434	171	19.7	7.77
Southern	11	195	49	17.7	4.45
Louisiana:					
Eastern	69	1,339	430	19.4	6.23
Middle	34	676	186	19.9	5.47
Western	30	625	211	20.8	7.03
Mississippi:					
Northern	13	263	85	20.2	6.54
Southern	14	313	83	22.4	5.93
Texas:					
Northern	63	1,273	403	20.2	6.40
Eastern	18	325	103	18.1	5.72
Southern	57	1,175	348	20.6	6.11
Western	56	1,160	275	20.7	4.91
Canal Zone [1]					
SIXTH CIRCUIT					
Kentucky:					
Eastern	7	130	38	18.6	5.43
Western	41	809	230	19.7	5.61
Michigan:					
Eastern	132	2,608	788	19.8	5.97
Western	8	149	43	18.6	5.38
Ohio:					
Northern	71	1,454	385	20.5	5.42
Southern	29	578	190	19.9	6.55
Tennessee:					
Eastern	7	146	44	20.9	6.29
Middle	8	160	44	20.0	5.50
Western	35	708	250	20.2	7.14
SEVENTH CIRCUIT					
Illinois:					
Northern	165	3,379	870	20.5	5.27
Eastern	12	227	72	18.9	6.00
Southern	13	264	76	20.3	5.85
Indiana:					
Northern	36	730	224	20.3	6.22
Southern	24	511	168	21.3	7.00
Wisconsin:					
Eastern	45	880	292	19.6	6.49
Western	10	193	62	19.3	6.20
EIGHTH CIRCUIT					
Arkansas:					
Eastern	16	343	95	21.6	5.94
Western	2	44	11	22.0	5.50
Iowa:					
Northern	21	424	147	20.2	7.00
Southern	10	186	62	18.6	6.20
Minnesota	35	706	152	20.2	4.34
Missouri:					
Eastern	53	981	261	18.5	4.92
Western	17	317	104	18.6	6.12
Nebraska	8	167	53	20.9	6.62
North Dakota	7	146	37	20.9	5.29
South Dakota	13	273	74	21.0	5.69
NINTH CIRCUIT					
Alaska	13	278	61	21.4	4.69
Arizona	79	1,457	455	18.4	5.76
California:					
Northern	59	1,146	344	19.4	5.83
Eastern	20	420	69	21.0	3.45
Central	191	3,644	946	19.1	4.95
Southern	76	1,492	367	19.6	4.83
Hawaii	32	619	191	19.3	5.97
Idaho	19	358	136	18.8	7.16
Montana	4	84	28	21.0	7.00
Nevada	73	1,398	425	19.2	5.82
Oregon	39	787	203	20.2	5.21

FIGURE 34.—GRAND JUROR USAGE U.S. DISTRICT COURTS, JULY 1–DEC. 31, 1976—Continued

District	Number of			Average number of jurors per session	Average number of hours per session
	Sessions convened	Jurors in session	Hours in session		
NINTH CIRCUIT—Continued					
Washington:					
Eastern	7	128	44	18.3	6.29
Western	23	489	157	21.3	6.83
Guam	5	94	20	18.8	4.00
TENTH CIRCUIT					
Colorado	18	338	130	18.8	7.22
Kansas	20	427	134	21.4	6.70
New Mexico	26	540	153	20.8	5.88
Oklahoma:					
Northern	10	183	65	18.3	6.50
Eastern	15	327	102	21.8	6.80
Western	8	157	57	19.6	7.12
Utah	32	633	149	19.8	4.66
Wyoming	3	61	21	20.3	7.00

[1] The Districts of Virgin Islands and Canal Zone reported no grand juries in existence during the 6-month period, July–December 1976.

EXHIBIT B

TABLE 61.—CRIMINAL CASES COMMENCED SHOWING NATURE OF ORIGINAL PROCEEDINGS DURING THE FISCAL YEARS 1968 THROUGH 1976 (EXCLUDES TRANSFERS)

Nature of proceeding	Criminal cases commenced								1976	
	1968	1969	1970	1971	1972	1973	1974	1975	All offenses reported	Felonies and misdemeanors only
Total	30,714	33,585	38,102	41,290	47,043	40,367	37,667	41,108	39,147	34,113
Proceedings commenced by:										
Indictment	19,565	22,554	26,283	28,666	31,601	29,152	25,448	26,775	26,150	25,932
Information-indictment waived	5,229	5,921	5,919	5,445	4,402	3,481	3,023	2,782	2,583	2,570
Information—other	4,979	4,317	5,009	6,356	10,268	6,894	8,278	10,384	9,577	4,862
Removed from State court	71	71	122	103	62	68	78	69	95	65
Juvenile delinquency proceedings	828	662	711	642	668	699	727	522	300	287
All other proceedings	42	60	58	78	42	73	113	576	442	397

Mr. EILBERG. We have a very lengthy list of witnesses on a very vital subject today and there is great interest as evidenced by the very good attendance of our subcommittee this morning, so I think all we will have time for is perhaps for each of us to ask a few questions and we will do the best we can to accommodate all the witnesses today, many of who have come some distance.

Judge Lacey, how often does a witness come with a counsel who waits outside the grand jury room to give advice?

Mr. LACEY. Very rarely. Again, where this comes up, I would just give you my estimate, is in the political corruption case or the organized crime investigation or the combination of the two such as we had on the prosecution of the city of Newark and the Hudson County investigation and prosecution.

In the routine case, the bank robbery investigation, you're not getting close enough to the targets of the investigation, that kind of

grand jury presentation, where the people concerned will bring lawyers in. It happens, but happens only rarely. When it does happen, the permission is freely given. There is no unseemly atmosphere created. I have noted that some statements submitted to you suggest that the witness is repeatedly in and out of the grand jury room for one reason or another. It certainly doesn't happen that way. Certainly it didn't in the 18 months while I was U.S. attorney.

Mr. EILBERG. How would you characterize the delays that occur where there is counsel outside?

Mr. LACEY. No delay at all. It's a matter of a few seconds out on a particular area of questioning. What happens is that the attorney knows by the time his client goes in the grand jury room generally what the areas of questioning are going to be and if there is thereafter a doubt created in the mind of a witness as to question he seeks permission to leave and he goes out briefly. This is not the kind of thing where you have a coach on the sidelines calling play by play. It just doesn't happen that way and to say it does is to mislead the committee. Certainly my experience would not support that kind of horror picture I know has been created for you.

Mr. EILBERG. You testified as to funds for indigent witnesses and raised some interesting questions there. We have been told that the present federal law does not allow funds for indigent witnesses to have counsel to be outside the grand jury room. You say that fees involved are relatively small and you question the practicality of having hearings on indigency in those cases. Yet $150 or $200 may be a lot of money to many people who may be called as witnesses, and the question I would ask is, do you believe it's fair that the rich can have lawyers and the poor not?

Mr. LACEY. Obviously not, but you're asking me first to accept your premise about rich and poor. Let me try to draw the parallel because you hit I think on a very significant area.

We judges day-in and day-out are struggling with this concept of indigency, recognizing we are dealing with the taxpayers' money. More and more our threshold is dropping lower and lower as to what constitutes indigency. As lawyer's fees rise, the defendant who is unrepresented and who has an income of $10-, $12-, or $15,000 says, "I can't afford to hire counsel to defend me in this case. Every lawyer I have consulted wants $5-, or $6-, or $7,000." So we have finally a situation develop where a judge says, "Well, I have to declare this man incapable of hiring his own counsel. I will appoint counsel for him."

On the other hand, where we're talking about a witness, the ordinary witness, who has been reminded of his privilege against compulsory self-incrimination and his right to the lawyer and decides he wants a lawyer but doesn't feel he should hire his own, says, "I can't afford a lawyer for one appearance in the grand jury room." He's only going to be in there perhaps 15 minutes or a half-hour. Yet he decides he wants counsel and he has the right to apply to the court. The court says, "You're making $10,000 a year and of course you can afford $200 to hire a lawyer." That was the point I was making.

I don't see counsel for every witness required. I would draw a line, as to appointment of counsel and warning of rights between the ordinary witness and the so-called "target" witness. I see no necessity for giving the ordinary witness court-appointed counsel and a warning.

As to a "target" witness, however, I agree with providing for counsel and warning. Counsel should not, however, be permitted in the grand jury. I agree completely with the philosophy that underlies the legislation.

Mr. Imlay reminds me I haven't answered one point you made. There is payment made for counsel for targeted witnesses.

Mr. EILBERG. I will ask one more question and then yield to my colleagues. Concern is often raised about a witness granted use immunity later being prosecuted and being unable to show that leads, direct or indirect, from his testimony led to his prosecution. Have you ever had to review challenges to an indictment from a previously immunized witness, and how do you determine if there is a taint?

Mr. LACEY. I have had no case put before me since I have been on the bench in that area, Mr. Chairman, but I know this to be so: the burden upon the United States is so substantial, so heavy—it must show that the prosecution is founded on information that was not obtained from the witness or represents the fruits of what was obtained from the witness. So the burden is not upon the witness to prove the affirmative. Instead, the burden is upon the Government to prove the negative. I'm aware of only one recent case, where it was quite clear there was a challenge made and the Government did demonstrate that the prosecution was founded on an independent source.

So I think that use immunity is appropriate and I don't agree with those who feel that while it conforms constitutionally, it's a grudging concession. I think it's an appropriate concession and strikes the appropriate balance between the rights of the defendant or the witness on the one hand, the interest of the Government on the other, and the third party, the public.

Mr. EILBERG. Mr. Fish.

Mr. FISH. Thank you, Mr. Chairman, and thank you, Judge Lacey. I think you have given us a lot of homework to do as we go over carefully your testimony.

Mr. Chairman, I presume in the interest of time that it will be possible to submit some questions to Judge Lacey.

Mr. EILBERG. Yes; we will do that. Judge Lacey, with your permission, and also for all the other witnesses. Obviously, with a panel this size and such an important subject, we cannot begin to cover it adequately today. That is, the hearing time does not permit that.

Mr. LACEY. I would be delighted to.

Mr. FISH. I'm going to restrict myself to one area because my colleague, Congressman Sawyer, is far more experienced in this field, but I would like just to go back to your criticism of 3329B(2)(b) which concerns the reasonable steps to notify any person of his intention to present evidence. Starting at the bottom of page 5 of your testimony you're critical of that section. But are we talking about the subject of the grand jury investigation?

Mr. LACEY. No, sir. I wanted to be sure—and perhaps I didn't make it clear, but I wanted to be sure that it was understood that my position is that a line should be drawn between the ordinary witness on the one hand and the target or subject of an investigation on the other; in connection with providing for counsel and for the warnings that I think should go only to the "target" witness. As to notice, you're asking me what should be done. My concern is this—and I raise it in my

submitted statement. I know of very few defendants, who, when they were the subject of an investigation, would have taken advantage of the right to come in and testify. The ones who would, already know of that right and therefore I see no reason to give them notice.

Mr. FISH. But this is the subject—we are talking about the subject?

Mr. LACEY. Yes; I'm talking about the subject. I think that there's no reason to. Let's assume we have a narcotics investigation underway. Recently there was an arrest of 40 people in the State of New Jersey. The indictments will be processed shortly and if I'm lucky the case won't be assigned to me, but as each one of these cases goes forward, ultimately a notice will have to go out. None of these—I feel completely safe in saying that not one of these defendants is going to take the opportunity to come in and testify before the grand jury. Why? Because guilty or innocent, the feeling is that you can't help yourself in this testimony.

What is done then by the notice? Well, where there's an arrest, as here, it doesn't make much difference of course because the subject has already been advised of what lies ahead. But where an investigation is begun by an indictment, what you're doing is giving the narcotic suspect an opportunity to flee and this is what's going to happen.

If, on the other hand, you have a political corruption case, a white-collar crime case, this is in an area where prospective defendents have lawyers. The lawyers know of their right to apply to testify. We did get applications when I was U.S. attorney. I have reason to believe that those applications continue and where they come in, my policy was to recommend always to the grand jury that they hear the witness. Again, on a practical basis, from the point of view of the prosecutor, whatever the witness has to say we wanted to hear. We don't want to indict in a case where the trial jury, when it hears this witness, is going to decide he's innocent. There's also, of course, the right of this witness to be heard. I always felt he had that right if he wanted to be heard.

But I suggest that those who are going to take advantage of this already know of that right. I'm dealing, I recognize, in an area that's subject to speculation, but on the other hand, speculation backed by my own experience. I don't see any need to send out to every subject of an investigation the fact that he's under investigation by a grand jury and has a right to apply to testify.

Mr. FISH. Have you considered, Judge, the possibility of making this a right but one that is qualified so that a judicial officer could find otherwise in those cases such as the narcotics case that you cited?

Mr. LACEY. I recognize and I think it's a wise provision to have in there. I think this is again a safety valve that you have in there where an application can be made. I raise this, however, in that regard. Indeed, what I am about to say applies not only to that provision but to several others. It relates to grand jury secrecy. With this kind of application, which incidentally adds to the workload of the court and may require us to read grand jury transcripts in order to determine what we are being told is accurate—what about grand jury secrecy? Is this application to be made in camera and considered in camera? Is it to be made in open court? This runs through much of my presentation and I raise this not only in connection to your question but with respect to other aspects as well.

Mr. FISH. Thank you, Mr. Chairman.

Mr. EILBERG. Mr. Hall.

Mr. HALL. Judge, I appreciate your very capable testimony. You made a comment at the end of this testimony that I find myself in total agreement with; that is, that the workload of the present judiciary is such that this is going to double your workload and I'm not unmindful of the fact that constitutional rights are involved in what we are talking about. But looking at this from your standpoint, is this legislation that we're talking about here today needed?

Mr. LACEY. I put it in these terms. I think there are many things this legislation deals with that need to be done. What I feel has happened here is that the Department of Justice has been remiss and, gentlemen, the judiciary has been remiss. I indicated earlier on the basis of my own experience, having been assigned as grand jury judge, we did not have a grand jury judge in my district until I suggested that we have one. It coordinated then in one chambers all of the grand jury problems. The grand jury was told by me that any criticism they had of any assistant could be brought to me and I received some and I dealt with them. Mr. Belsky knows me well enough to know when I say I dealt with them, I dealt with them. I heard many good things about the presentations, too, but there were some complaints. One grand juror came to me and said he had not been allowed by an assistant on the strike force to ask a question, and I inquired into that and found out there was more to it than that simple declaration. But the point is that I think that given a tight control by the judiciary and given an uniformity of instruction emanating from the Justice Department, much of what concerns the proponents of this legislation, if not all, can be resolved.

Mr. HALL. If you had a uniform set of criminal rules, rules promulgated by the Department of Justice, given to the various judges, could they not in their own bailiwick handle this problem without going through the throes of all of this legislation and still protect the rights of the parties involved?

Mr. LACEY. What you're saying is that we would know what the Justice Department had been given?

Mr. HALL. Yes.

Mr. LACEY. Yes. I think the answer to it lies in this solution. When a grand jury judge in a district calls in the U.S. attorney and says, "Now here's the first thing we're going to do. You've got a large staff here. You're going to have your grand jury presentations centered in a few people." I understand Mr. Curran will be here later today or perhaps is sitting in the room now, and he probably can tell you what his staff did with well over 100 assistants. Center the presentation in a few assistants who know what they are doing and who will not inadvertently transgress.

The U.S. attorney—and I made this a requirement incidentally—must constantly be in touch with the grand jury. He must go in there at least once during a given week in order to ascertain things are being done as they should. The prosecutor should conduct himself as if he were at a trial, avoiding none of the informality that prevails all too often.

I think if you can, through those means, tighten up the controls, center responsibility in the courts, and let the courts know this has to

be done, let the Justice Department know that this has to be done, that virtually everything that you take care of here is going to be resolved except, of course, things like granting the right to counsel in grand jury rooms. But I'm frank to admit that there just was too much looseness.

In the first grand jury session, I sat in on when I became U.S. attorney, a strike force attorney who was about 6 months out of law school was making a presentation, and I walked out of there having tried cases for my 20 years and I couldn't believe this. Grand jurors were languishing, drinking coffee, conversation was going on in the room all while this fellow was stumbling back and forth, and we got that straightened out.

Mr. HALL. Well, it didn't take an act of Congress to get that straightened out.

Mr. LACEY. It took an act of mine.

Mr. HALL. That's all I have, Mr. Chairman.

Mr. LACEY. Apropos of that, I just refer to the last two pages of my statement.I point out that there are potentials A through J for conferring or thrusting upon the judge work that the judge has not had heretofore. Motion that will come on, climaxed of course by the preliminary examination in the hearing that he must have. So I think if you will review that you will see where I think that we will not be able to handle a civil calendar if we're going to have this workload added.

Mr. EILBERG. You understand, Judge Lacey, in our attempt to be fair, we are trying to include every possible point of view.

Mr. LACEY. Absolutely, and I appreciate that.

Mr. EILBERG. That's the only thing we can do if Congress is to do its job.

Mr. LACEY. Absolutely.

Mr. EILBERG. Mr. Sawyer.

Mr. SAWYER. Judge Lacey, first, I want to say I substantially concur in just about everything, you've said. I was not a member of this subcommittee at the time we were hearing the other side apparently of this on March 17, and I kind of regret that I wasn't because I'm sure I would have had more questions of that side of the presentation.

For your information, I practiced trial law for 30 years, a fellow of the American College and the International Academy and then spent 2 years of State prosecutorship where we ran grand juries too, and I'm sure you will concur that the basic function of a grand jury is sort of a double one: One, to protect the citizen against whom there is insubstantial evidence from being subjected to a felony trial; and the other side, the investigative side, where they are investigating situations; and the functions are quite different. And I saw this "Rockford File" picture, too, and it certainly was a horror story, but I think your experience has been parallel to mine, that in 30 years of practice I have not been aware in the State of Michigan of any such horrendous abuses. They may have existed but they certainly must have been scarce.

Mr. LACEY. It was intended to be fiction.

Mr. SAWYER. Do you concur that the grand jury as it presently operates and under its present rules, with as you say perhaps some procedural tightening up under the control of the judiciary really, is a

good system and operates well, functions well, and does not trample on the rights of citizens?

Mr. LACEY. I believe it does, sir. There's a factor here that nobody has really described in appropriate terms. Again, drawing on my own experience, I told my assistants, "Now look, I don't want to indict anybody that we don't convict. I've got my reputation to think of. You have your reputation to think of. We know probable cause is the standard but that's not the standard in this office." Also, I think what really gets buried under a lot of emotional argument is that there are 23 people from all walks of life who have friends who may not like the U.S. attorney and I simply put it in those terms to let you know that I think the average U.S. attorney recognizes that, when he makes a presentation or one of his assistants does, in the grand jury room. While this may be secret in terms of the content of the testimony of the witnesses, there is no secrecy in terms of the reaction of those grand jurors to that office, and it's beyond me how anybody can overlook that. Yet I know that a lot of people in the private bar who are on the defense side overlook that. They think the prosecutor or the U.S. attorney is unmindful of those practical consideration of life and he's not.

Mr. SAWYER. Under the present rules, the defense attorney can apply to the district judge to get a full copy of the minutes of a grand jury proceeding affecting his client. Don't you feel that if this were just open to request as a matter of right that you would find that district attorneys who have pretty well—either they or their investigators—have pretty well talked to most of the witnesses that appear in a grand jury and know what they are going to say, that they will tend to cut their presentation to the bare bones so that they produce no more witnesses than they could help before the grand jury in order to secure an indictment?

Mr. LACEY. Well, presently under rule 16, the defendant is entitled to get only a transcript of his testimony and then the other testimony is Jencks Act material and the bill would change that. Incidentally, in that respect, I thing this bill is helpful. Indeed, I lean very hard on the Government attorneys to get what is traditionally Jencks Act material to the defense attorney well before the Government witness takes the stand so we don't have any undue delay after direct examination. Most trial judges I know do exactly that.

What you say in terms of strategy I think is accurate. I would say that generally speaking the presentation by the United States in the grand jury room is done in recognition of the fact that what is being generated is rule 16 material or Jencks Act material and, therefore, is cut to a minimum in order to conform on the one hand to the probable cause requirement, but on the other, to avoid making available a lot of material under section 3500 or rule 16.

Mr. SAWYER. You addressed yourself in your written statement which I read to the question allowing an attorney in the room during an interrogation of a witness, and I recognize the problem of a multiple defendant, too. That's an obvious problem in that. But under our State law in the State of Michigan, we, in addition to a citizen grand jury, also have what we call a one-man grand jury or so-called judicial investigation is the technical term. And under that statute an attorney is permitted in the room.

We found or have found that to be practically uncontrollable. There is practically no way that you can prevent an attorney from obstructing the—and that's even with a judge there presiding actively in the matter. Do you feel that there is any really practical way to allow a defense attorney in the room in a grand jury proceeding and still conduct an orderly proceeding?

Mr. LACEY. No. This is exactly the point that I have made. If this is done, and if the attorney wants to intrude, wants to interfere, I don't think that you can really effectively stop him. This atmosphere that's been created of the witness running back and forth and in and out of the grand jury room, one of your witnesses who appeared here I think said that it creates an impression on the grand jury that is unfavorable to the witness. It doesn't happen that way.

If you want to argue that position, picture now a trial and the defendant is on the stand. At a very critical point in the trial he says, "I'd like to talk to my lawyer." What is the jury going to think of that as he's conferring in whispers with counsel or, worse still, because he and his counsel want to be sure they are not overheard, he or his counsel request permission to confer outside the courtroom.

Now let's take it back to the grand jury room. At a very critical point the witness says, "I'd like to talk with my lawyer," and the lawyer is there and they hold a whispered conference, or ask to confer outside the courtroom. Is the impression less favorable or more favorable than leaving the room under the present system. The argument that's made that there's going to be a delay of proceedings while the witness is out back and forth, under the present system, that doesn't hold water, nor does the argument that the present system creates a bad impression by leaving and coming back, whereas putting counsel in the grand jury would not. The other side of it is, on balance, that you're providing the opportunity to disrupt proceedings; and this cannot be controlled no matter how, with all good motives, you have tried to do it in this legislation.

Mr. SAWYER. If we assume in an antitrust case, particularly, let's say, a price fixing case, where a number of sales people and various other people of a corporation—clerks and what-not—are called to testify, do you see a problem there with particularly if counsel who may have been employed by the corporation for all of the witnesses sitting there present in the courtroom while they're being asked to testify?

Mr. LACEY. You mean in the grand jury room?

Mr. SAWYER. Yes.

Mr. LACEY. This is exactly the point I make in my statement. Indeed, I have been told that there was recently a price fixing investigation in New York City where this was exactly what was done. A corporate lawyer, paid for by the corporation, represented everybody who went into the grand jury room and, of course, in this way he was able to keep his finger on everything that took place.

Mr. SAWYER. I'm sure it had a dampening effect on the testimony of the witnesses.

Mr. LACEY. Now this is the next point. We have from time to time this kind of problem. In my statement I refer to the weak defendant and the strong defendant. The strong defendant says—we'll take a bank robbery case—says to the weak defendant, "I've got a lawyer for you. He's going to represent you." The weak defendant says, "I don't

want that lawyer. I'm going to get my own." He says, "No; I told you he's going to represent you." And we all know why this is done. We have been around. We understand. We had the Hudson County investigation. The man who ultimately made that case, the county engineer, was the fellow who ultimately broke away from the others under investigation and came to the Government. He came to me one day and said he wanted to talk and he was the one who made the case which led ultimately to the demise of the John B. Kenny machine in Hudson County. This man was initially taken to a law firm representing three of the other defendants and told, "Here's the firm that's going to represent you." Fortunately, because even then he was thinking of cooperating with the Government, he was able to say, without arousing suspicion, "I have a brother who's a lawyer and I think I'd better go to see him and let him represent me." It happened to be true. He did go to his brother. His brother recognized the situation and brought him to an attorney who saw that he should cooperate. But right in the beginning the attempt was made to shackle him to the other defendants. This goes on day in and day out in the real world. We all know this is happening.

A guard will be given a message. That happened not too long ago in the U.S. attorney's office in New Jersey. Judge Whipple had to bring in the lawyer and suggest that now there was a conflict. But what happened was this: The lawyer represented two defendants, both in the Manhattan Correctional Center in New York City. One defendant got the message through a guard to the U.S. attorney's office that he wanted to talk but he didn't trust his lawyer because his lawyer also represented the codefendant against whom he wanted to give testimony.

Now we all know this is what is going on. The secrecy, of course, that you talk about and which I am so much in favor of, gets eroded completely when you say that the attorney who's in there for witnesses is not under the constraints of secrecy. He can tell anybody anything that went on there and I just think it's wrong.

Mr. SAWYER. Thank you, Judge Lacey. Thank you, Mr. Chairman.

Mr. EILBERG. Mr. Evans.

Mr. EVANS. Judge, how would you guarantee against abuse by the district attorney? It's a difficult question to ask a district attorney who obviously takes his work or did take his work seriously, but I think we're talking about a system of laws and not of individuals. My question is, how do you guarantee against abuse of the witnesses by the district attorney where there's no defense counsel present?

Mr. LACEY. What do you mean by abuse?

Mr. EVANS. I mean questions such as, "You're lying. You know what the penalty for perjury is." Badgering a witness or abusing a witness who comes in the grand jury room and generally using the grand jury for the DA's purposes rather than the other way around which is the way it's supposed to be.

Mr. LACEY. Well, first of all, I subscribe completely to the requirement that all testimony of witnesses should be reported. The *Crutchley* case in the third circuit says if the U.S. Attorney is going to report and transcribe any testimony, he must do it with all. I would require by way of rule that all testimony of witnesses be transcribed. You see, the Federal system has this advantage that State systems don't. I

think you have, if it's used, the opportunity in the Federal system for the Attorney General to tighten up the controls, to do the things I was talking about before, to have periodic review of what's going on in the U.S. Attorney's office, have somebody there who is constantly monitoring this grand jury transcript that's being generated.

Now no system is perfect, but I submit that on balance that kind of approach makes more sense than some of the things that are urged in this legislation.

This would be my answer to you, sir, that it's recorded. If it's in there and ultimately it comes out at trial, the embarrassment, indeed perhaps the devastation in front of a petit jury to that kind of approach is a preventive. Indeed, what is the attorney going to do who's in there? He's going to object. It's brought to a judge. But ultimately it's going to be brought to a judge anyway if there's a conviction.

Moreover, while I recognize that there are abuses as I have said, I think the answer lies with better administrative controls out of the agency involved here, the Justice Department.

May I just add this: I don't mean this in any pedagogical or didactic sense. I urge that it not be forgotten what I said earlier, that there are 23 people sitting there and some of these people you know are in touch with the real world outside. These are responsible people. These are not just a lot of people who were brought in and sit there like manikins. These are people who are responsible people and can go to a judge and say:

> Look, we want to report. We want to take advantage of what you said we should do. We are bringing to you a complaint. We don't like what's going on in that grand jury room. There's an assistant—the rest are good, but one fellow comes in and he badgers the witness. We don't like this.

If the judge tells the grand jury this at the outset as I did, they know that avenue is open.

So, Congressman, I feel, given that kind of approach, you will resolve this problem.

Mr. EVANS. I agree with that, Your Honor, if you give that kind of approach, but the potential for abuse is still there. The potential for abuse on the part of the district attorney is there and having seen it and speaking from firsthand experience from sitting outside jury rooms and dealing with inexperienced grand jury men under a revision of grand juries in the South, where the people really don't know what their role is and they know what they have been instructed but they go along with what the district attorney does, the abuse is there and it's bad and I don't know whether this is the proper answer or not, but I appreciate your suggestions.

Mr. LACEY. I think the Judicial Conference probably has the channel that I mentioned of utilizing—and this is getting around all the judges—a standard instruction. This is definitely a must, no matter how this legislation comes out—definitely a must, a standard instruction to be given all over the United States when a judge empanels a jury.

Mr. EILBERG. Judge Lacey, we thank you very much and we would observe that if there were more people like you with your kind of background and experience in the criminal justice system, perhaps we would not be sitting here right now reviewing this legislation. But it's my opinion that a great many do not have your qualities, sir, and

I respectfully have to keep that in mind. We will submit further questions to you because we have only scratched the surface.

Mr. LACEY. Mr. Chairman, thank you very much and I want to thank all of you for the opportunity to be here, for the attention you gave me, and for the courtesy extended.

[The questions and responses follow:]

QUESTIONS FOR CARL IMLAY, COUNSEL, JUDICIAL CONFERENCE OF THE UNITED STATES

1. Mr. Imlay, la[illegible]ear Judge Smith testified as to proposed recommendations of the Judicial Conference. I understand that grand jury issues are being considered by a number of committees. Could you tell us how consideration is parceled out and when you believe a comprehensive official proposal will be forwarded to Congress?

2. One continuing recommendation of the Judicial Conference is the reduction in the size of the grand jury. Some witnesses scheduled to testify later today have opposed this proposal—saying that it might reduce the representability of grand juries. Would you comment?

3. As you might know, the House of Representatives has rejected a substantive amendment to Rule 6(e), which would have allowed additional persons to be present in the grand jury room, and has referred the proposed rule change to this subcommittee. Why does the Judicial Conference believe such a rules change is warranted?

4. The Judicial Conference supports the recording of all grand jury proceedings but I understand there is some conflict between committees as to the method of recording. Could you comment on this?

5. Your committee on the Administration of Criminal Law has previously supported our ban on reiterative contempt. What is the position of the Conference on this today?

6. The committee also supported a return to transactional immunity. What is the position of the Judicial Conference today?

ADMINISTRATIVE OFFICE OF THE,
UNITED STATES COURTS,
Washington, D.C., May 12, 1977.

Hon. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship and International Law, House Judiciary Committee, Washington, D.C.

DEAR CONGRESSMAN EILBERG: At the conclusion of the hearing on H.R. 94 and related bills before your Subcommittee on Immigration, Citizenship and International Law of the House Judiciary Committee, I was asked to respond to a series of questions, a copy of which I attach.

My responses to the questions follow:

1. The subjects proposed in the grand jury bills touch the interests of four Committees. First, the Advisory Committee on Rules of Criminal Procedure has under study several proposed changes to Rule 6 of the Federal Rules of Criminal Procedure including provisions for the recording of proceedings and a provision that an indictment may not be dismissed on the ground that the evidence before the grand jury was not sufficient or competent. The Committee also has a subcommittee on grand juries chaired by Judge Frederick B. Lacey who appeared before your Committee as a witness. This subcommittee is conducting a broadscale inquiry into the grand jury system and to this end has asked the Federal Judicial Center to make a general inquiry into some of the aspects of the proposed legislation.

The Conference Committee on the Administration of the Criminal Law is also concerned with various features of the proposals such as the scope of immunity, the rights of witnesses, the law of contempt and other subjects. This Committee has been passing its comments on to the Rules Committee.

The Committee on the Operation of the Jury System has responsibility in several areas such as the selection process and the cross-sectional and representative nature of grand jury selection, and the efficient utilization of grand juries (overseeing the statistical, fiscal and reporting programs of the Administrative Office). In addition this Committee has a subcommittee on "Free Press-Fair Trial" which is concerned with problems of prejudicial pretrial publicity.

Finally, the Conference's Committee to Implement the Criminal Justice Act oversees the program of compensating private attorneys, the management of Federal Public Defenders' and Community Defenders' offices, and establishing guidelines for awarding counsel fees.

These Committees are working in tandem and will assist the Judicial Conference in formulating its consensus on these proposals at its next session on September 15th and 16th, when a full report to your Committee will be rendered.

2. The assumption that a larger accusatorial body is less likely to vote a true bill than a smaller one, or that it represents the community less adequately, is a highly speculative matter, having no basis in proof. First, whether larger or smaller, the selection process may skew the representativeness of the final selection. As a matter of fact, the Jury Selection and Service Act of 1968 only requires that the original base of names from which names to be considered for either grand or petit jury service are originally selected be representative, but not necessarily the final array. See the attached extract from Senate Report No. 891, 90th Congress, 1st Session, p. 25. Given the fact that the winnowing process (excuses, exclusions, disqualifications and challenges) could equally skew the representativeness of a grand jury whether it be 23 or 15, it simply is not logical to assume that 23 persons constitutes a panel which is more proportionate to the elements of the greater community, than one of smaller size (actually as pointed out in our testimony, the present national average size of a grand jury is 19.8 persons and not 23).

Moreover, there is not the same representativeness problem with respect to grand juries as there is with petit juries. With petit juries the difference of one vote in voting a verdict can make a crucial difference in the outcome of a case so that representativeness is more crucial. Grand juries are subject to a majority vote rule (12 of 23) and thus a reduction in the size of the panel has far less tendency to affect the representativeness assuming the relative proportions remain a constant.

As a matter of fact, Section 4 of H.R. 94, would *increase* the proportion needed to vote a true bill of "two-thirds of those present," thus greatly increasing proportionately the chances for a defendant to avoid indictment. In this major respect the bill, from the standpoint of the defendant, represents an improvement in his chances of avoiding indictment.

As far as giving various elements of the community a chance to serve is concerned, the reduction of the panel size would not per se have a tendency to create any skewing. Even with respect to petit juries, a change in one vote would affect the outcome, the Supreme Court has in recent years twice refused to credit the notion that a jury of 6 is necessarily less representative than 12. *See: Colgrove* v. *Battin*, 413 U.S. 149 (1973); *Williams* v. *Florida*, 399 U.S. 78, 102 (1970). In *Colgrove* the Supreme Court noted that (413 U.S. at p. 158 n. 15), "one study suggests that the decrease in the size of the jury from 12 to 6 is conducive to a more open discussion among the jurors, thereby improving the quality of the deliberative process." The logic of this observation is far stronger in a grand jury room where in a group of 23 the persuasive voice of each individual is diminished in inverse proportion as a function of its greater size.

Moreover, if grand juries are suspected of being less than proportional at any time, there is a whole battery of remedies available in 28 U.S.C. § 1867. Also the Judicial Conference has an established program of sampling jury wheels to detect imbalances in jury wheels by race or sex so that remedial action can be taken by any court so affected.

One factor which tends to make a grand jury less representative in its final makeup is the length of service required. For example, proposed Section 3330(a)(2) of H.R. 94 speaks in terms of grand jury sessions from 18 to 36 months in duration. Only a certain proportion of persons could devote that much time away from jobs and families without experiencing that "undue hardship or extreme inconvenience" which entitles them to an excuse from such service under 28 U.S.C. § 1866(c)(1), or a permanent excuse if they belong to one of the categories defined in the plan pursuant to 28 U.S.C. § 1863(b)(5). Women with children, farmers, ranchers, commission salesmen, pieceworkers, owners of one-person businesses, and many other categories of persons would face extreme hardship in serving such periods of time, and thus the jurors finally selected would be only those persons with enough economic independence or lack of commitment to others to be able to perform jury service over such extended periods.

Attached hereto is a report of a subcommittee of the Committee on the Operation of the Jury System which relates to grand jury tenure (extracted from "The Jury System in the Federal Courts," West Publishing Co.). This is a matter which will continue to be explored.

3. The most adequate response to this question is to reiterate the Advisory Committee's Note to proposed Rule 6(e) as it appears in House Document No. 94-464, 94th Congress, 2d Session, a copy of which I attach. The proposal was, of course, subject to intense study prior to approval by the Supreme Court in its order of April 26, 1976.

4. With respect to the methods of recording grand jury testimony, we are not immediately aware that the problem has been formally studied and reported on. This, however, will presumably be included in the Conference report on the subject of this proposed legislation.

5 and 6. The Judicial Conference has not itself taken a position either on reiterative contempt or transactional immunity although these matters have been discussed by its Committees, Presumably again, any appropriate comments thereon will be included in the Judicial Conference report.

If I can be of any further assistance, please let me know.

Sincerely,

CARL H. IMLAY,
General Counsel.

Attachments.

IMPROVING THE SYSTEM'S OPERATION

After the number needed is determined, the number to be summoned must be calculated. This is done by adding the percentage of expected non-respondents and excuses to the number needed. Here records from previous terms are used.

Once the call-in is made it is difficult to summon additional jurors for the term. For this reason, it is wise to err on the side of caution, and allow a margin of safety over the minimum in determining the number of summonses to be sent.

F. UTILIZATION OF GRAND JURORS

Rule 6(g), Rules of Criminal Procedure, specifies that "no grand jury may serve more than 18 months." Are all federal grand jury terms across the country of 18 months duration? How many days do federal grand jurors actually serve during a term? Will it be possible to get busy citizens to serve on special grand juries whose tenure may be extended to 36 months or beyond under 18 U.S.C. §§ 3331(a) and 3333(e) 1970? These and other questions are considered in this study of federal grand jury utilization. It has been conducted by a Subcommittee of the Committee on the Operation of the Jury System, Judge Irving R. Kaufman, Chairman.

Improving the utilization of grand juries also has a dollars and cents side. Costs of the jury system have soared in the past ten years, reaching $16,617,100.00 in fiscal year 1972. What is not generally known is that the cost of grand juries has risen in relation to similar petit jury costs. The cost of grand juries now accounts for eighteen percent ($3,085,800.00 in fiscal year 1972) of the total cost of the jury system (grand and petit).

Part I of the report is compiled from data supplied from 28 district courts situated in all eleven circuits. Twenty-seven clerks and one United States Attorney answered the first letter of the Subcommittee. Questions asked for the total number of grand jurors who have served within the past four years, the allocation of grand jurors by length of service (15 to 18 months, 12 to 15 months, and less than 12 months), and the average days served by grand jurors in each period of service.

In responding to the first letter, the Clerk for the Southern District of New York attached a table prepared by the jury deputy clerk. The table provided statistics for each grand jury identified by return date of panel. With respect to each grand jury, the chart itemizes the number of jurors on the panel, number of substitutes, number of months served, days served in each month, and total number of days panel served. A second letter asked the same district courts, to the extent records permitted, to furnish statistics of the kind and detail furnished by the Southern District of New York, and to comment on the adaptability of this kind of record keeping in the respective district. So far, 16 districts have forwarded additional statistics comparable to the Southern District of New York report.

Attached to this report as an appendix are the responses to one of several questions submitted to 43 grand jury foremen of discharged grand juries. The grand jury foremen interrogated served on the United States District Courts for the District of Columbia, for the Southern District of Indiana, for the Middle District of Louisiana, and for the Northern District of Ohio, Eastern Division.

The Judges who composed the Subcommittee serve in those districts and submitted the questions to the foremen.

Part II of the report contains the Committee's recommendations.

Part I

Differences in the keeping of grand jury records is revealed in the responses to the Subcommittee's letters. The complete records that are maintained by a jury clerk in the Clerk's office of the Southern District of New York have already been itemized. In contrast, in the Northern District of Ohio the Clerk's office maintains no grand jury records other than copies of the payroll vouchers. Whatever records there are, are kept in the office of the United States Attorney in Cleveland. One of his assistants writes:

"The Attendance Record Book is kept with the minutes book in the office of the United States Attorney. The older records are difficult to trace because there is no continuity of place and length of time for retaining them."

He continues:

"[T]here was not much uniformity in marking grand jurors present, absent, or excused. No initial of the secretary or forman appeared on the sheet. The pages were looseleaf and many pages had torn their punch holes. Seldom was a record entered in the book as to date of discharge."

Assistant United States Attorney Clarence L. Sharpe concludes by saying, "* * * since the grand jury is a court function the record keeping might well be centered in the office of the Clerk of Courts." Fortunately, the records were sufficiently adequate to permit Mr. Sharpe to meet the Subcommittee's second request of January 26, 1972, with "grand jury statistics designed after those submitted by the Southern District of New York and taken from the records in this office."

The Clerks of the Eastern District of Kentucky and the District of Nebraska supplied the statistics requested in the first letter. In response to the second letter, Clerk McGarvey of the Eastern District of Kentucky writes:

"The vouchers for pay to grand jurors which are audited by the Administrative Office reflect the number of grand jurors serving, days served and when finally excused.

"Maybe some day the Administrative Office Data Section will find a combination of buttons that can be punched to record this information and produce a "print out sheet" for the benefit of committees or officials who need the information."

In reply to the Subcommittee's second letter, Clerk Peck of the District of Nebraska explained that grand juries are impaneled every 18 months, that periodic sessions are from two to four days' duration, and "that recalls into such sessions average no more than five or six times over an eighteen-month period." He adds:

"Accordingly, we keep no detailed records such as that provided to you by the Southern District of New York. Moreover, I can see no usefulness to this court, or to one of equal or smaller size, in the maintenance of such a record. For us it would be a record kept for the mere sake of record keeping, and in this era of increasing workloads the judicial system ought to diligently avoid that temptation."

None of the 16 districts that responded to the second letter keep records as detailed as those of the Southern District of New York. However, from the records that they do keep these districts have supplied the Subcommittee with grand jury statistics "in the format that is used by the Southern District of New York," as Clerk Evensen of the Northern District of California put it in his letter. Clerk Cunningham of the Northern District of Illinois, submits reports "covering grand jury activities for 1969, 1970, and 1971 in the same format as those of New York Southern." He explains that his office uses a reporting system that keeps track of "(a) number of grand juries still sitting; (b) number of days on which a given grand jury sat during its first month of service; (c) number of days a given grand jury sat other than the first month." As to record keeping he suggests these "minimum necessary documents,"

(*a*) An order impaneling the grand juries;

(*b*) A sign-in sheet or some sort of form to show which grand jurors are present on which days;

(*c*) Copy of payroll voucher; and

(*d*) Order extending or discharging grand jury.

"Noting that "statistics can be gathered from four types of documents to serve most needs," he stresses:

"The regular reporting of grand jury operations should probably be kept to a minimum (if only to make sure that such reports are not regarded as more in an endless series of forms to be "filed")."

Clerk Cunningham concludes with comments on internal reporting and cost control:

"In this district we have concentrated more on the petit jury operations than on the grand jury operation in terms of internal reporting and cost control. This is basically because the total fees in the petit jury operation are more than twice as large as those in grand jury. However, with the steady increase in grand jury costs I suspect we will shortly be examining that area more closely."

On the same subject of grand jury costs, John J. Harding, Clerk of Eastern District of Pennsylvania, through his deputy Michael Kunz, recommends that "grand juror cost data be included in utilization reports."

Part I now turns to an analysis of the grand jury statistics which the Subcommittee has obtained. A preliminary note is essential. The grand jury statistics furnished by the Southern District of New York and thereafter by 16 other districts in response to the second letter, discloses that the four-year study period includes grand juries impaneled before January 1, 1968, that continued into the next years. Also included are some grand juries impaneled during the period that were still sitting December 31, 1971. All statistics of grand jurors reported from all 28 districts are included in the computations of numbers of different jurors and average days of service of individual jurors for the four years examined. But only grand juries (as distinguished from grand jurors) that were both impaneled and discharged within the four-year period are included in the computed numbers of months of service of grand juries and total days of service of grand juries.

Figure 1 tabulates statistics as to service of grand jurors.

FIG 1.—SERVICE OF GRAND JURORS

District court	Number jurors past 4 yr	Number jurors serving— 15–18 mo	12–15 mo	Less than 12 mo	Average days of jurors serving— 15–18 mo	12–15 mo	Less than 12 mo
District of Columbia, Washington	1,265	69	69	1,127	106.0	54.0	33
1st circuit:							
Maine	156	133	23	0	6.0	4.0	0
Massachusetts [1]	414	23	0	391	115.0	0	20.4
2d circuit:							
New York, southern district	1,815	220	69	1,526	73.0	43.0	24
Vermont	269	0	0	269	0	0	4
3d circuit:							
Delaware	84	20	44	20	15.0	15.0	15
Eastern District, Pennsylvania	249	136	46	67	45.0	29.0	12
Middle district, Pennsylvania	212	212	0	0	20.5	0	0
4th circuit:							
Maryland	414	69	46	299	22.0	42.5	11.6
North Carolina, middle district	106	0	63	43	0	6.0	3
5th circuit:							
Alabama, northern district	92	23	69	0	[2] 11.5		
Georgia, middle district	160	0	0	160	0	0	8
Louisiana, eastern district	299	0	23	276	0	31.2	28
6th circuit:							
Kentucky, eastern district	674	0	0	674	0	0	2.04
Michigan, eastern district	299	46	46	207	83.0	54.0	28
Ohio, northern district, eastern district	322	46	69	207	63.0	45.0	20
7th circuit:							
Illinois, northern district	1,127	92	69	966	23.0	28.0	15.5
Indiana, southern district	266	0	0	266	0	0	22
Wisconsin, eastern district	91	0	69	22	0	30.0	19
8th circuit:							
Minnesota	95	0	72	23	0	28.0	7
Missouri, eastern district	207	0	23	184	0	26.0	26
Nebraska	69	69	0	0	22.0	0	0
9th circuit:							
California, northern district	332	0	0	332	0	0	16
California, central district	943	368	69	506	32.0	34.0	25
Idaho	67	16	44	7	14.0	7.0	4
10th circuit:							
Colorado	69	69	0	0	27.0	0	0
Kansas	224	110	66	48	10.0	9.0	4
New Mexico	137	0	0	137	0	0	13

[1] Period covered is 1967 through 1970.
[2] Days per each year.

Districts among the 28 reporting who used more than 1,000 grand jurors during the four-year study period include Southern District of New York (1,815); District of Columbia (1,265); and Northern District of Illinois (1,127). Districts using between 500 and 1,000 grand jurors during the period include Central District of California (943) and Eastern District of Kentucky (674). Each of the remaining 23 districts used less than 500 grand jurors during the four-year study period.

Some may wonder how Eastern District, Kentucky joins company with four metropolitan districts in the use of more than 50 grand jurors during the four-year period. Clerk McGarvey writes:

"Six hundred and seventy four different individuals. About 10 grand juries a year; they sit in five different places; they serve one or two days only and are discharged. One day the grand jury returned 105 indictments. They really work and want to get home."

Columns 2, 3, and 4 of Figure 1 reflect the wide distribution of number of jurors in terms of months of service. Months served include any month in which a juror sat. In 15 districts a majority of the jurors served less than 12 months. In six districts a majority of jurors served 12 to 18 months. In two districts all jurors served 12 to 18 months with a majority of them serving 18 months. In three districts all jurors served the full 18 months. In six districts all jurors served less than 12 months.

Columns 5, 6, and 7 reflect the varying average days served by jurors who served 15 to 18 months, 12 to 15 months, and less than 12 months. In 11 districts the highest average days of service in any category ranged from 2 to 16 days. In 10 other districts the average highest days of service in any category ranged from 20 to 34 average days. In two other districts the highest average days of service in any category are 42 to 45 days. In two other districts the average highest days of service in any category are 63 and 73 days. In one other district the highest average days of service in any category is 83 days. In the last two districts the highest average days of service in any category are 106 and 115 days.

Ticking off statistics does not make for easy reading. However, the statistics of Figure 1 convey at least these messages. Most grand jurors are not being required to serve 18 months, the maximum life of a regular grand jury. But from the averages so far examined it appears that a substantial number of grand jurors are serving more than 30 days. Yet only 30 days of service are required of petit jurors under 28 U.S.C. § 1866(e) (1970) during any two-year period. The same section merely limits grand jurors to "one grand jury" in a two-year period.

Before arriving at any final conclusions we turn to the statistics supplied by 17 districts as to all grand juries in these districts that have been impaneled and completed service during the four-year study period. One of these districts, Northern District of Illinois, as noted in Clerk Cunningham's letter, reports statistics for the three-year period 1969, 1970, and 1971.

From the supplied statistics the Subcommittee extracted for each of the districts the following compilations: (a) the total number of grand juries; (b) the number of months that each grand jury served; (c) the number of grand juries that have served for the indicated number of months; (d) for each category of grand juries in (c) the greatest number of days served in one month; and (e) for the designated range of days served, i.e. 1–19, 20–29, 30–39, etc., the number of grand juries serving a total of days within each range. In the distribution within the ranges of total days served each grand jury is identified by its total length of service in months.

The Administration of Justice Committee in Cleveland, Ohio (hereafter called called AJC), an affiliate of Government Research Institute, is a non-profit private, foundation funded, criminal justice system reform agency. AJC was asked by the Subcommittee to cast the foregoing compilations into graphic form to show grand jury utilization. AJC willingly agreed. Its helpful and professional service is gratefully acknowledged. AJC first prepared two tables that condense the compilations previously itemized. These tables appear on pages 251 and 252 as Figures 2 and 3. However, AJC determined that to provide statistical comparisons to aid the study of grand jury utilization it was necessary to use weighted averages, computed by appropriate equations. Applying this method it computed weighted averages from the compilations (raw data) supplied by the Subcommittee. Weighted averages have been calculated for grand juries as to each of the 17 districts, and as to all 17 districts both as to months and days served. These comparisons appear in tabular form (Figure 4) on page 253; and as a bar graph (Figure 5) on page 254.

FIG. 2.—COMPARISON OF NUMBER OF MONTHS SERVED BY GRAND JURIES (17 DISTRICTS)

Months	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	Total
District of Columbia:																				
Grand juries [1]	3	7	20	6	2	2		1	1	1	2	1					1	2		49
Days served [2]	11	18	18	15		13		20	14		15	12					9	17		
New York, southern district:																				
Grand juries [1]	2	25	15	3	1	3	1	2	2		1	2		1	2	1	2	1	2	66
Days served [2]	12	25	20	18	15	12	16	13				25			12	15	9	17	19	
Pennsylvania, eastern district:																				
Grand juries [1]				1				1							1		1		2	6
Days served [2]				7				5							6		4		7	
North Carolina, middle district:																				
Grand juries [1]						2						3								5
Days served [2]						1						1								
Alabama, northern district:																				
Grand juries [1]												3			1					4
Days served [2]															5					
Georgia, middle district:																				
Grand juries [1]						7														7
Days served [2]																				
Michigan, eastern district:																				
Grand juries [1]					1			2	3					1				1		8
Days served [2]					6			9	7					11				9		
Ohio, northern district, eastern district:																				
Grand juries [1]									1				1		1		3			6
Days served [2]									8				12		8		12			
Illinois, northern district:																				
Grand juries [1]	7	6		2	1		1	2		1		2		1			3			26
Days served [2]	11	10		13	19		17		13		11									
Indiana, southern district:																				
Grand juries [1]			5	4	2															11
Days served [2]			8	13	15															
Wisconsin, eastern district:																				
Grand juries [1]											1		1	1						3
Days served [2]																				
Missouri, eastern district:																				
Grand juries [1]				1				1	2	1		2								7
Days served [2]				7				6	5	9		4								
California, northern district:																				
Grand juries [1]			10	1													1	1		13
Days served [2]			9	7													7	7		
California, central district:																				
Grand juries [1]				1	1	3	7	2	1			2	2	2		1	5	5		32
Days served [2]					6	5	5	8	10			4	5				10	4		
Idaho:																				
Grand juries [1]															1	5				6
Days served [2]															4	2				
Colorado:																				
Grand juries [1]																	2			2
Days served [2]																	5			
New Mexico:																				
Grand juries [1]				1		1	2					1								5
Days served [2]				4		1	2					4								

[1] Number of grand juries.
[2] Greatest number of days served in 1 month.

FIG. 3.—COMPARISON OF DAYS SERVED BY GRAND JURIES—17 DISTRICTS [1]

Days served	1–19	20–29	30–39	40–49	50–59	60–69	70–79	80–89	90–99	100–109	110–119	160–70	Total grand juries
District of Columbia	4	6	27	6	1	2			1	1	1		49
New York, southern district	13	37	8	2	1	2			2				66
Pennsylvania, eastern district	1	1	1	2		1							6
North Carolina, middle district	5												5
Alabama, northern district	4												4
Georgia, middle district	7												7
Michigan, eastern district	2	1	3			1	1						8
Ohio, northern district, eastern district			1	4		1							6
Illinois, northern district	17	7	2										26
Indiana, southern district	5	3	2	1									11
Wisconsin, eastern district	2	1											3
Missouri, eastern district		4	2										6
California, northern district	10	3											13
California, central district	4	17	8	1	1	1							32
Idaho	6												6
Colorado		1	1										2
New Mexico	4	1											5

[1] Number of grand juries for each range of days served appears in row opposite district.

FIG. 4.—AVERAGE NUMBER OF DAYS SERVED BY GRAND JURIES

Months served by grand juries	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	Average number of days
District of Columbia	17	32	37	28	27	40		65	35	10	45	65					115	100		39
New York, southern district	10	20	24	27	25	28	25	40			40		55	80	35	60	164	50		30
Pennsylvania, eastern district				10				25							35		45		55	38
North Carolina, middle district						3					6									5
Alabama, northern district											10				15					11
Georgia, middle district						3														3
Ohio, northern district and eastern district								35					45		45		52			47
Michigan, eastern district					10		17	35					75				65			36
Indiana, southern district			16	20	40															21
Wisconsin, eastern district										10		25	10							15
Missouri, eastern district				25			35	25	35		25									28
Illinois, northern district	10	10		22	25		10	25		25		30		25			17			16
California, northern district				12	10											25	25			13
California, central district				25	25	21	23	30	33			30	28	35			39	27		29
Idaho														10	10					10
Colorado																	30			30
New Mexico				10		10	10					25								13
All districts:																				
Average number of days	10	16	24	20	23	17	24	25	36	34	15	25	33	43	33	22	61	61	44	
Average number of days per month	10	9	8	5	5	3	3	3	4	3	1	2	3	3	3	1	4	3	2	

In each of the Figures the District of Columbia is listed first followed by 16 districts arranged according to circuit. To illustrate Figure 2, the 49 grand juries of the District of Columbia are distributed according to the number of months each grand jury served. Thus, line (a) discloses that three grand juries served a total of two months, seven served three months, 20 served four months, etc. Line (b) shows that for the three grand juries that served two months the greatest number of days served in one month was 11 days.

Explaining Figure 3 also by the District of Columbia entries, its 49 grand juries are distributed according to the total days served by those grand juries. Thus, four grand juries served a total number of days that fall within the 1–19 range, six within the 20–29 range, 27 within the 30–39 range of days, etc.

For each district Figure 4 records the average number of days served by grand juries that served in that district for the indicated length of months. Figure 4 also gives the average number of days served by all grand juries in each district and the average number of days served by all grand juries in all 17 districts for the indicated length of months.

Referring to Figures 2, 3, and 4, four districts are well above all other districts in use of grand juries during the four-year study period. These are New York Southern (66); District of Columbia (49); California Central (32); and Illinois Northern (26) (but only for three years). The average number of days served by all grand juries in these districts are New York Southern (30); District of Columbia (39); California Central (29); and Illinois Northern (16).

The middle tier of grand juries used are California Northern (13) with average number of days 13; Indiana Southern (11) with 21 days; Michigan Eastern (8) with 36 days; Missouri Eastern (7) with 28 days; Georgia (7) with 3 days; Pennsylvania Eastern (6) with 38 days; Ohio Northern ED (6) with 47 days (the highest average number of days of any district); and Idaho (6) with 10 days.

The lowest tier of grand juries used includes New Mexico (5) with average number of days 13; North Carolina Middle (5) with 5 days; Alabama Northern (4) with 11 days; Wisconsin Eastern (3) with 15 days; and Colorado (2) with 30 days.

Variations in grand jury usage, marshaled in these figures, are even more marked when viewed in the bar graph that follows on page 205.

The left half of Figure 5 depicts the wide range in average numbers of months served by all grand juries in the 17 districts. A five to one ratio exists between Ohio Northern ED and Idaho grand juries averaging respectively 15.8 and 15.5 months and the average of 3.7 months served by all grand juries in Indiana Southern.

It will be recalled that New York Southern (66) and District of Columbia (49) led all the districts in numbers of grand juries. One of the proximate factors is now visualized by the relatively low average months served by all grand juries in each district: 5.2 months in New York Southern and 5.8 months in District of Columbia. Closely following is the 6.4 average months served by the 27 grand juries in Illinois Northern.

In California grand juries in the Central District served months whose average was 2 to 1 the average months served by the Northern District—12.1 in California Central and 6.2 in California Northern.

The right half of Figure 5 reveals that the average number of days served by grand juries in the 17 districts presents even a wider range than the left half of the graph.

Ohio Northern ED leads with 47 days as the average days served by all its grand juries. At the other end of the range is Georgia Middle with three days. Nine districts (a majority of 17) have average numbers of days that exceed 20. Six districts, a third of the 17, have average days served that range from 30 to 47.

Summing up, the statistics of Part I, both as to grand juries and grand jurors, conclusively show that grand jury service is falling unevenly on our citizens in different federal district courts. Equally plain, in at least a third of the districts (but actually 137 of 255 grand juries) the average number of days served by grand juries ranges from 30 to 47 days—in excess of 30 days, the maximum required petit jury service.

COMPARATIVE SERVICE OF GRAND JURIES

AVERAGE NUMBER OF DAYS AND MONTHS SERVED

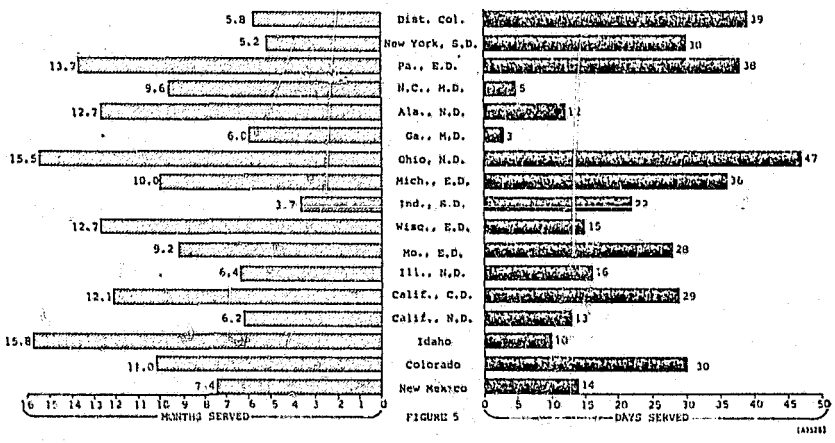

FIGURE 5

Part II

This study discloses that there is need to better utilize the services of grand jurors and grand juries. This need is particularly acute in large metropolitan districts, but is also present in other federal court districts. However, because the problems vary from district to district the study's recommendations are offered as general guidelines, not intended to be rigidly applied.

1. Traditionally the study shows that each grand jury appoints a secretary who maintains a record, often looseleaf, of the names of the grand jury's mem-

bership and attendance at sessions. The quality and completeness of these records has depended on the efficiency of the grand jury secretary, and its foreman.

The Committee finds that grand jurors like petit jurors report daily to the office of the Clerk of Court to verify the juror's entitlement to compensation. The Clerk's Office pays the grand jurors by vouchers; and different Clerks keep varying additional types of grand jury records in different district. All Clerks are required to keep the grand jury votes on indictment.

The Committee believes that individual grand juries should continue to keep their records in accordance with Rule 6(c) of the Federal Rules of Criminal Procedure. However, the Committee recommends that to aid in better utilization of grand juries and to assist the Administrative Office in properly maintaining its statistical records and fiscal control minimal statistical source records should be kept and permanently maintained by each Clerk of Court. Therefore, the following minimum records should be kept by each Clerk:

(*a*) An Order impaneling the grand jury.

(*b*) A sign-in sheet or equivalent record that will show attendance on a daily basis of grand jurors and the total hours of service on each day of service.

(*c*) Copies of payroll vouchers of individual grand jurors and covering payroll vouchers for each grand jury.

(*d*) Grand jury votes on indictment.

(*e*) Any Order extending the term of grand jury; and the Order discharging the grand jury.

2. For the convenience of grand jurors and to achieve the maximum utilization of their services, sessions should be scheduled for days certain when a sufficient accumulation of business exists fully to occupy their time.

3. The Committee directs attention to the attached appendix which contains the condensed responses to one of several questions submitted to 43 foremen of discharged grand juries in four districts. Their comments relate in part to the length of grand jury services, and the duration of sessions. Whether or not this sampling of the responses of these 43 grand jury foremen warrants further study by an appropriate committee of the Judicial Conference, this Committee expresses no recommendation.

The above report has been submitted to Henry Peterson, Assistant Attorney General in charge of the Criminal Section of the Department of Justice for consideration and comment. The Subcommittee recognizes the contribution of Judge Oliver Gasch of the District of Columbia, the former chairman of this Subcommittee in the planning and the preparation of the study and report.

Respectfully submitted.

WILLIAM K. THOMAS, *Chairman.*
WILLIAM E. STECKLER.
E. GORDON WEST.
HOWARD F. CORCORAN.

APPENDIX

What recommendations would you make for controls on such things as the length of the term of the grand jury, the number of days that grand jurors can be expected to sit, the designation of the secretary of the grand jury as the person with whom records and other materials produced by a subpoena duces tecum might be filed in the first instance?

DISTRICT OF COLUMBIA

1. Told he would serve three days and five hours a week, he served longer hours and more days. He was not paid by his employer for lost time.

2. None.

3. A regular grand jury should sit for 90 days only. Present practice is to hear cases during the entire period. Foremen should be responsible for records.

4. Eighteen months with service for four days a week was all right. Person who handles records should be in regular attendance.

5. A four-month term was not excessive; nor was three days a week.

6. Term not long enough and five days instead of three should be served—since the week was broken up anyway.

7. Length of his grand jury service (two months) was not excessive. No comment on the number of days.
8. If a juror is required to serve for a protracted period court should have more contact with the employer to ease pressure. Questions whether secretary had requisite skills for maintaining jury book.
9. (Special) Eighteen months' service not too long a period of service. No interference with her duties as housewife. Many of the jurymen who worked for the government could get off when needed. Objects to secretary getting documents.
10. (Special) Believes term was almost two years but could have been 18 months. Met approximately 20 times, several times a month, and average of three hours a day. Eighteen months should be sufficient, two months' service clearly would not be sufficient to accomplish things expected of an investigative or special grand jury. Two years might be too long and might prove oppressive, particularly for grand jury foremen in the employ of the federal government. Some employers objected to service during an 18-month period, as did some government people. Sees no need for change whereby secretary could receive documents.

SOUTHERN DISTRICT OF INDIANA

1. "Term should be extended to one year. Jurors should be able to serve at least three days a month."
2. "More careful selection."
3. "I do not believe that the length of term or number of days jurors are required to sit to be excessive. [By court rules three grand juries are impaneled each year.]"
4. Blank.
5. Blank.
6. Blank.
7. Blank.
8. "More time should be given to calling jurors, due to distance some must travel."
9. "Term could be as long as 6 months if case preparation and witness preparation could be better organized."
10. None.
11. Blank.
12. ". . . an exact schedule of time should be given. Some employers will not tolerate the on again off again routine."
13. "Length of term of the grand jury in my opinion is alright."
14. "The length of meeting is too long as it presents a definite hardship upon its members . . . ."
15. "One of the problems I observed was the fact the District Attorney did not have his cases ready."
16. None.
17. "The length of term should certainly be reduced from the present three months. One month should be sufficient with no more than one week at a time."
18. "If possible for cases to be ready to present, several could be handled and number of days served lessened."
19. None.

MIDDLE DISTRICT OF LOUISIANA

1. "I think that four months should be the maximum for a member to serve [reasons given]."
2. "They should [be] three months, average two days a week . . . . The U.S. Attorney's office should be responsible for records and material taken by a subpoena duces tecum."
3. None.
4. ". . . I'd say a three month term should be a fair one and unless something unusual should arise possibly one day per week would suffice for meetings."
5. "The length of term apparently did not cause undue inconvenience. No one objected."
6. None.

NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

1. "I believe that a term of 12 months would be preferable. . . . The Secretary of the grand jury being a member of such, should not be required to be the custodian of records . . . ."

2. "The length of term is too long. . . . I would recommend (1) more grand juries; (2) for shorter terms, say six months; with (3) a specified maximum number of days per month, say 3 to 4. This would make grand jury service more practicable for business people and others who must plan their schedules more precisely than is now possible."

3. "Jurors should not be expected to sit more than one week out of every four weeks or one-two days per week."

4. "Not to have the grand jury appear more than one time in any given month, for the benefit of employers. And when called to serve a minimum of a full week and leave the term at the present 18 months."

5. "Recommend a shorter term; 18 months worked a hardship on my duties in my occupation. Suggest maximum of one year."

DEPARTMENT OF JUSTICE,
Washington, March 8, 1973.

MR. CARL IMLAY,
General Counsel, Administrative Office of the United States Courts, Supreme Court Building, Washington, D.C.

DEAR MR. IMLAY: This is in reply to your letter of February 13, 1973, inviting our comments upon a report of Judge William K. Thomas' subcommittee studying the utilization of grand jurors.

This matter of making a proper use of the time of grand jurors is certainly worthy of attention, and I favor the early implementation of the subcommittee's recommendations that certain specified records be kept about the grand jury system. The keeping of the specified records should not be particularly onerous, and the informational needs warrant such recordkeeping.

In light of the subcommittee's recommendation that grand jury proceedings be planned more carefully so as to avoid less than full day sessions, I will alert the United States Attorneys to the problem and ask them to give it appropriate attention. As a general guideline, grand jury sessions should be scheduled, as the subcommittee recommends, for days certain and when a full day's work is at hand. I do believe, however, that the demands upon the United States Attorney's Offices may be such that they cannot always utilize a grand jury in the way they would like because other business takes precedence or for other good reasons. The statement of the general guideline might take this more directly into account by recommending that the close scheduling be accomplished to the fullest extent practicable.

Several of the grand jurors polled indicated that they felt their number to be too large and that the system would work as well, if not better, with fewer members. The subcommittee might wish to consider recommending that appropriate attention be given to the question whether grand juries should be composed of substantially fewer than the presently prescribed 16 to 23 members, with fewer needed as a quorum and to return indictments.

I appreciate being afforded an opportunity to comment upon these matters. Let me know if I may be of any further assistance.

Sincerely,

HENRY E. PETERSON,
Assistant Attorney General.

[From S. Rept. No. 891, 90th Cong., 1st sess., p. 25]

The new section 1861 sets forth the policy underlying the legislation. It establishes, as the policy of the United States, that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a cross section of the community. No litigant has the right to a jury that itself mirrors the makeup of the community. On any single jury some groups may be overrepresented and others under-represented. But the technique of random selection tends to ensure, according to the laws of probability, that distortions most often will be minor and will even out in the long run. If a given jury is not a perfect cross section of the community that situation is a product of the laws of chance, together with the permissible statutory grounds for elimination from service set forth in the act, and not of impermissible discrimination.

APPENDIX A

Excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the U.S.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6. The Grand Jury

* * *

(e) SECRECY OF PROCEEDINGS AND DISCLOSURE. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be to the attorneys for the government for use in the performance of their duties. *For purposes of this subdivision, "attorneys for the government" includes those enumerated in rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties.* Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The *federal magistrate to whom an indictment is returned* [court] may direct that [an indictment] *it* shall be kept secret until the defendant is in custody or has [given bail], *been released pending trial. Thereupon* the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(f) FINDING AND RETURN OF INDICTMENT. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a [judge] *federal magistrate* in open court. If [the defendant is in custody or has given bail] *a complaint or information is pending against the defendant* and 12 jurors do not concur in finding an indictment, the foreman shall so report to [the court] *a federal magistrate* in writing forthwith.

ADVISORY COMMITTEE NOTE

(Rule 6)

The proposed definition of "attorneys for the government" in subdivision (e) is designed to facilitate an increasing need, on the part of government attorneys, to make use of outside expertise in complex litigation. The phrase "other government personnel" includes, but is not limited to, employees of administrative agencies and government departments.

Present subdivision (e) provides for disclosure "to the attorneys for the government for use in the performance of their duties." This limitation is designed to further "the long established policy that maintains the secrecy of the grand jury in federal courts." *United States* v. *Procter and Gamble Co.*, 356 U.S. 677 (1958).

As defined in rule 54(c), "'Attorney for the government' means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam * * *." The limited nature of this definition is pointed out in *In re Grand Jury Proceedings*, 309 F.2d 440 (3d Cir. 1962) at 443:

"The term attorneys for the government is restrictive in its application. * * * If it had been intended that the attorneys for the administrative agencies were to have free access to matters occurring before a grand jury, the rule would have so provided."

The proposed amendment reflects the fact that there is often government personnel assisting the Justice Department in grand jury proceedings. In *In re Grand Jury Investigation of William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971), the opinion quoted the United States Attorney:

"It is absolutely necessary in grand jury investigations involving analysis of books and records, for the government attorneys to rely upon investigative personnel (from the government agencies) for assistance."

See also 8 J. Moore, Federal Practice ¶ 6.05 at 6-28 (2d ed. Cipes, 1969):

"The rule [6(e)] has presented a problem, however, with respect to attorneys and nonattorneys who are assisting in preparation of a case for the grand jury. * * * These assistants often cannot properly perform their work without having access to grand jury minutes."

Although case law is limited, the trend seems to be in the direction of allowing disclosure to government personnel who assist attorneys for the government in situations where their expertise is required. This is subject to the qualification that the matters disclosed be used only for the purposes of the grand jury investigation. The court may inquire as to the good faith of the assisting personnel, to ensure that access to material is not merely a subterfuge to gather evidence unattainable by means other than the grand jury. This approach was taken in *In re Grand Jury Investigation of William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971); *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956); *United States* v. *Anzelmo*, 319 F. Supp. 1106 (D.C. La. 1970). Another case, *Application of Kelly*, 19 F.R.D. 269 (S.D.N.Y. 1956), assumed, without deciding, that assistance given the attorney for the government by IRS and FBI agents was authorized.

The change at line 27 reflects the fact that under the Bail Reform Act of 1966 some persons will be released without requiring bail. See 18 U.S.C. §§ 3146, 3148.

Under the proposed amendment to rule 6(f), an indictment may be returned to a federal magistrate. ("Federal magistrate" is defined in rule 54(c) as including a United States magistrate as defined in 28 U.S.C. § 631–639 and a judge of the United States.) This change will foreclose the possibility of noncompliance with the Speedy Trial Act timetable because of the nonavailability of a judge. Upon the effective date of certain provisions of the Speedy Trial Act of 1974, the timely return of indictments will become a matter of critical importance; for the year commencing July 1, 1976, indictments must be returned within 60 days of arrest or summons, for the year following within 45 days, and thereafter within 30 days. 18 U.S.C. §§ 3161(b) and (f), 3163(a). The problem is acute in a one-judge district where, if the judge is holding court in another part of the district, or is otherwise absent, the return of the indictment must await the later reappearance of the judge at the place where the grand jury is sitting.

A corresponding change has been made to that part of subdivision (f) which concerns the reporting of a "no bill," and to that part of subdivision (e) which concerns keeping an indictment secret.

The change in the third sentence of rule 6(f) is made so as to cover all situations in which by virtue of a pending complaint or information the defendant is in custody or released under some form of conditional release.

Rule 23. Trial by Jury or by the Court

* * * * * * *

(b) JURY OF LESS THAN TWELVE. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 *or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.*

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,
Washington, D.C., October 25, 1977.

HON. PETER W. RODINO, JR.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Judicial Conference of the United States on the pending bill, H.R. 94, to make certain changes respecting the procedures of grand juries in the United States district courts. The Judicial Conference considered this legislation at its recent session on September 15 and 16, 1977. It has determined to oppose the bill.

In support of this action by the Judicial Conference, I am enclosing a letter and accompanying report addressed to Congressman Joshua Eilberg, the chairman of the subcommittee before which this legislation is pending, by Judges Murray I. Gurfein (a member of the Conference's Committee in the Administration of the Criminal Law) and Walter R. Mansfield of the United States Court of Appeals for the Second Circuit. These materials, which have already been transmitted to Congressman Eilberg on a personal basis by Judges Gurfein and Mansfield, were approved and adopted by the Judicial Conference in explanation of its position

on H.R. 94 and are therefore being sent to you at this time on behalf of the Conference.

On the basis of the study and report on H.R. 94 performed for the Judicial Conference by its Criminal Law Committee, the Conference concluded that this legislation would have the effect of making a grand jury proceeding an adversary one and that it would greatly harm the administration of justice by increasing the opportunity to obstruct, delay, and disrupt the investigatory and accusatory processes with no showing of a counterbalancing gain for the public or for the protection of individual rights. The Conference is further of the view that the enactment of this bill would impose an enormous and unconscionable burden upon an already overloaded federal judiciary.

The Judicial Conference believes that any benefits which might possibly derive from the provisions of H.R. 94 are at best speculative and could generally be achieved by less radical means. For example, the Conference's Advisory Committee on Criminal Rules has already recommended the amendment of Rule 6(e), Fed.R.Crim.P., to require the recording of all testimony and other relevant proceedings before the grand jury except for its deliberations. In light of the speculative nature of these benefits, the Conference is of the view that its cost in terms of the time which would have to be expended under the various provisions of this bill for judicial hearings, examinations of evidence, and findings would be excessive.

In addition to the matters treated in the report by Judges Gurfein and Mansfield. I should also like to point out one aspect of H.R. 94 that is of particular concern to the Judicial Conference's Committee on the Operation of the Jury System, which has also studied this bill. This is a provision contained in section 4 of the bill amending section 3321 of title 18, United States Code, but retaining so much of its present language as requires the district courts, when an insufficient number of grand jurors appear in response to summons, to order the marshal to summon "from the body of the district, and not from the bystanders" a sufficient number of persons to complete the grand jury. It is the view of the Judicial Conference that this procedure for selecting additional grand jurors would be contrary to the philosophy of the Jury Selection and Service Act of 1968 that federal jurors shall be selected at random from a fair cross section of the community. The Conference therefore recommends that the following alternative language be incorporated in section 4, reflecting the procedure now employed in the case of an unanticipated shortage of petit jurors, as provided at 28 U.S.C. § 1866(f), for the marshal to summon additional persons directly from the voter lists or other source lists specified in the court's jury selection plan:

"If less than nine of the persons summoned attend, they shall be placed on the grand jury and the court shall order that an additional number of persons be summoned to complete the grand jury in a manner ordered by the court in accordance with procedures set forth in section 1866 of title 28, United States Code."

I should also point out that the Judicial Conference at its recent session instructed its Jury Committee to work toward the promulgation of a model charge to federal grand juries which would serve to place the jurors on notice as to their rights and responsibilities and would be helpful in controlling the possible badgering or abusive treatment of witnesses before grand juries by prosecutors. The Conference would also wish to express the additional point that this legislation would in its view grant to witnesses and their attorneys too broad a license to disclose grand jury proceedings without being subject to the criminal penalties created by section 5 of the bill in enacting proposed 18 U.S.C. § 1512. While the enactment of this provision would still leave the courts free to enforce their local rules limiting the dissemination of information adversely affecting the prospects for a fair trial of the cause, the Judicial Conference nevertheless believes that the exemption of witnesses and their attorneys from the specific criminal penalties provided in this bill might be reexamined.

I hope that these observations may be of assistance to your committee in its consideration of H.R. 94. If there is any further assistance which the Judicial Conference can provide, please so advise me.

Sincerely,

WILLIAM E. FOLEY, *Deputy Director.*

Enclosure.

U.S. COURT OF APPEALS,
SECOND CIRCUIT,
U.S. COURTHOUSE,
New York, August 2, 1977.

Re H.R. 94—Grand Jury Procedures and Rights and Liberties of Grand Jurors.

Hon. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship and Naturalization Law, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN EILBERG: We take the liberty of expressing our deep concern about some of the proposals in H.R. 94, which is now under consideration by your Committee. Since federal judges are required as part of their duties to deal on a day-to-day basis with grand juries, which act under the supervision of the judiciary, and with problems raised by the grand jury system as it presently functions, your Committee may be interested in our views.

The grand jury is one of our oldest public institutions, dating back to pre-Colonial days. Although long ago it was sometimes used for political purposes, it has since limited itself for the most part to the important public function of investigating crime and to fulfillment of the public's interest in seeing that where there is probable cause to believe that a person has committed a crime that person will be accused and brought to trial. On the other hand, where no such probable cause is shown every federal grand jury is usually advised by the court that its duty is to protect persons under investigation against unwarranted injury to their reputation. The grand jury, operating with the aid of federal prosecutors, has accordingly conducted its proceedings in secret in order to protect the innocent, encourage full investigation, disclosure and deliberation, prevent persons from tampering with witnesses or suborning perjury, and preclude the escape of those likely to be indicted.

By and large the federal grand jury, despite some faults, has functioned satisfactorily under the guidance of prosecutors held to high standards. It has filed public accusations only where there has been probable cause to believe the accused guilty, as is attested to by the fact that almost all federal indictments result in guilty pleas or convictions after trial. The grand jury, moreover, has served as a moderating influence on any tendency on the part of prosecutors to be overzealous and has brought nonprofessionals into the decision-making process.

As with every public institution, there is undoubtedly room for improvement in the federal grand jury. However, where an institution such as a grand jury has functioned reasonably well in the past, it seems wise to scrutinize proposed "improvements" most carefully, particularly where the "abuses" against which they are purportedly aimed may have been minimal or nonexistent and the reforms pose a risk of harm or of unnecessary and costly burdens. Guided by this approach, we believe that some of the proposals advanced by H.R. 94 may well serve to improve the administration of justice. We refer, for instance, to the proposal to criminalize unauthorized disclosure of evidence presented to a grand jury (proposed § 1512), which might serve to protect against leakages of the type that can cause harm to those under investigation as well as to the Government's investigation itself. Recording of all grand jury proceedings, including statements of the prosecutors and of grand jurors (as proposed in § 3333), might serve to protect against misstatements or misconduct in the grand jury room. Authorizing the court to disclose to a defendant prior to trial the grand jury testimony of witnesses to be called at trial and exculpatory testimony given before a grand jury could promote Congress' policy in favor of fairness and prompt disposition of criminal proceedings. Reduction in the size of the grand jury, while more debatable, could conceivably improve the process by leading to greater active participation by individual jurors.

As against these potentially helpful proposals, others—particularly those which would tend to turn the grand jury proceeding into an adversarial one—appear to pose great harm to the administration of justice by needlessly increasing the opportunity for obstructing, delaying, disrupting and prolonging the investigatory and accusatory process, with no showing of a counterbalancing gain to the public or to individual rights. If enacted, this legislation would, furthermore, impose an enormous and unconscionably disproportionate additional burden on an already overworked federal judiciary. If a Judicial Impact Statement (similar to an Environmental Impact Statement) were prepared with respect to these proposals, it would demonstrate that in exchange for

benefits that are at best speculative the cost in terms of judicial hearings, examinations of evidence and findings would be excessive. For instance, the proposed legislation would almost certainly require the judiciary to resolve such issues as—

(1) Whether a grant of transactional immunity to a witness would be "adequate for the purposes of the investigation,"

(2) Whether the interrogation of a witness for whom immunity is sought could be attributed directly or indirectly to wiretapping in violation of 18 U.S.C. § 2515,

(3) Whether such a witness' testimony is "necessary to the public interest,"

(4) Whether a witness, if granted immunity would be exposed to the danger of foreign prosecution and, if so, whether he has been provided with "adequate safeguards,"

(5) Whether a request for immunity complies with Department of Justice guidelines or other practice,

(6) Whether the testimony of such a witness would fall "within the scope" of the grand jury's investigation and be "relevant" thereto as well as to the immunity order itself,

(7) Whether the Government has reasonable grounds to believe that a witness would be an accused,

8. Whether the Government properly refrained from advising a witness that he was a target of a grand jury investigation on the ground that, if so advised, he might flee, tamper with witnesses or otherwise seek to delay the investigation,

(9) What information concerning a grand jury's investigation should have been imparted to a witness in order to enable him to prepare and seek permission to present rebuttal evidence to the grand jury,

(10) What sanctions should be imposed on the Government for failure to comply with its obligations under the proposed legislation,

(11) Whether evidence not presented to a grand jury might be "exculpatory," see *Brady* v. *Maryland*, 373 U.S. 83 (1973), or might have "materially" affected the testimony of a witness who appeared before the grand jury, see *United States* v. *Agurs*, 427 U.S. 97 (1976),

(13) Whether a witness is not "financially able" to retain his own counsel and thus entitled to an assigned counsel under the Criminal Justice Act.

(13) Whether the conduct of a witness' counsel in the grand jury room in advising his client and in objecting to questions has been so disruptive as to require his removal from the grand jury room and the substitution of other counsel for the witness.

14. Whether the substitution of such counsel would violate a witness' statutory or constitutional right to counsel of his own choice.

(15) Whether counsel for a possible target of a grand jury investigation may appear in the grand jury room as counsel for more than one witness without involving conflicts of interest.

(16) What relief may be granted retroactively with respect to a subpoena that is quashed after the witness has appeared and testified before the grand jury,

(17) Whether a subpoena must be quashed because it is "oppressive," "punitive" or because the witness' appearance is "unnecessary" or his testimony would be "privileged" or "cumulative."

The foregoing examples of the issues that would be repeatedly faced by federal judges in administering the proposed legislation demonstrate that the court would be called upon to interpret many terms that are vague and general in their import and to review evidence, much of it complex in nature, to make the necessary rulings.

The proposed legislation, if enacted, may also prevent the federal courts from complying with the mandate of the Speedy Trial Act, 18 U.S.C. §§ 3161–3174, to the effect that, beginning in July 1979, they must dismiss indictments that were not filed within 30 days after the defendant had been arrested or served with a summons in connection with the charges against him, see 18 U.S.C. §§ 3161 (b), 3162(a)(1). Although the Speedy Trial Act excludes certain periods of delay in computing the prescribed time limits, see 18 U.S.C. § 3161(h), the excluded periods are so limited in nature that delays of the type that will inevitably occur under the amendments proposed by H.R. 94 will create a possibly irreconcilable tension between these two statutes.

Since it would not be appropriate to attempt in this letter a detailed analysis of each of the omnibus provisions of H.R. 94, we attach hereto a memorandum setting forth some of the major provisions to which we are opposed and the grounds of our opposition. We believe that the views stated in this memorandum are generally in accord with those of the Committee on Administration of the Criminal Law of the Judicial Conference of the United States, which we are advised will be set forth in a report to be forwarded shortly to your Committee.

We would appreciate your furnishing a copy of this letter and enclosure to the members of your Committee. We stand ready, should the Committee desire, to answer questions or to furnish such additional information as may be available.

Respectfully yours,

WALTER R. MANSFIELD, C.J.
WILLIAM H. MULLIGAN, C.J.
WILLIAM H. TIMBERS, C.J.
MURRAY I. GURFEIN, C.J.
ELLSWORTH A. VAN GRAAFEILAND, C.J.
THOMAS J. MESKILL, C.J.

Memorandum re: Certain proposals in H.R. 94, a bill dealing with grand jury procedures and the rights and liberties of grand jurors

The following is an analysis of certain sections of H.R. 94 to which various members of the Second Circuit Court of Appeals are opposed. The memorandum does not deal with proposals, some of which are mentioned in a letter dated July 1977, signed by certain members of the court, that may be favored or unopposed.

1. *Restrictions on the court's power to hold a recalcitrant witness in civil contempt under 28 U.S.C. § 1826*

The bill would amend 28 U.S.C. §1828 to limit the court's use of civil contempt power in dealing with recalcitrant witnesses before a grand jury by

(1) requiring that the witness be given 72 hours' notice of a contempt hearing, absent a showing of special need for speed;

(2) placing a 6-month maximum on the period of confinement that might be imposed, or a period equal to the length of the court proceeding or of the grand jury, whichever is lesser;

(3) barring further confinement of a grand jury witness for a subsequent refusal to testify concerning the same transaction or event;

(4) requiring that a witness held in contempt be admitted to bail pending appeal unless the appeal is frivolous;

(5) providing counsel under the Criminal Justice Act, 18 U.S.C. § 2006A, for any witness unable to obtain adequate representation;

(6) prohibiting contempt proceedings against a witness interrogated on the basis of illegal wire intercepts in violation of 18 U.S.C. § 2515.

Comments: A witness charged with civil contempt before a grand jury should, of course, be afforded reasonable notice and opportunity to defend. However, reasonable notice in a particular case ordinarily depends on such circumstances as the nature and complexity of the evidence to be obtained and presented, the extent of preparation needed to present it, and the amount of time remaining before the grand jury's term is terminated.

Rather than fixing the required notice at a specific period (e.g., 72 hours), a better approach, which would recognize flexibility as essential, would be to provide that reasonable notice be given, since there would be many cases where less than 72 hours' notice would be consistent with due process and with the public interest in avoiding unnecessary delay in the investigation and prosecution of crimes, which Congress mandated in enacting the Speedy Trial Act, 18 U.S.C. §§ 3161, *et seq.*

Similarly, to limit confinement for civil contempt to a maximum of six months, regardless of the possibly longer remaining term of the grand jury, and to bar any further confinement for the witness' subsequent refusal to testify concerning the same transaction or event, unnecessarily weakens the court's power to require a recalcitrant witness to give testimony to which the grand jury is entitled in its search for the truth. The purpose of § 1826 is not to punish but to provide a weapon that can be used to require a witness to furnish material testimony which he is obligated to give in the public interest. The witness, of course, holds the key to his own release, which he normally obtains upon his testifying. The length of incarceration, however, that will induce a witness to fulfill this obligation will vary according to the witness and the circumstances of each case.

Some witnesses would fulfill their legal obligation only if faced with the prospect of incarceration longer than six months, whereas others would be induced to act by the prospect of a much shorter commitment. The court should be vested with the flexible power to impose whatever term appears reasonably necessary under the circumstances of each case rather than be hobbled by a fixed maximum period that may be shorter than the remaining term of the grand jury.

Bail pending appeal from a civil contempt order issued under § 1826 should be fixed where the witness can demonstrate a likelihood of success on appeal from the district judge's order. The proposal that bail be granted except where the appeal is found to be frivolous places the burden on the wrong person—the prosecutor. After a district judge, following a hearing, has decided the merits against the witness, the burden should normally be on the witness. If it appears that there are close or difficult questions warranting review, the district court or the court of appeals, in the exercise of their discretion, would then normally admit the witness to bail pending the appeal. But a witness should not be presumptively entitled to bail after a hearing has gone against him.

To prohibit holding in contempt a witness who has been interrogated on the basis of illegally obtained wiretaps runs directly counter to the Supreme Court's sound reasoning in *United States* v. *Calandra*, 414 U.S. 338 at 349–50 (1974). Because a grand jury does not finally adjudicate the guilt or innocence of a person but merely determines whether there is probable cause to believe that the person has committed a crime, the grand jury has always been permitted to pursue its investigatory and accusatory functions unhampered by procedural and evidentiary restrictions applied in a criminal trial. Moreover, the Supreme Court concluded in *Calandra* that the incremental deterrence against police misconduct that would result from extending the exclusionary rule to grand jury proceedings would be speculative at best and not justify extension of the rule to grand jury proceedings even though it would be enforced at trial.

Regardless whether one agrees with the Supreme Court's reasoning, there can be no doubt that the proposed prohibition against interrogation of grand jury witnesses on the basic of illegally obtained intercepts would place a very heavy additional burden on already overworked federal courts. As the Supreme Court noted in *Calandra:*

"Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings. 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. . . . In sum, we believe that allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties." 414 U.S. at 349–50.

As matters stand today, the demands of competent trial counsel for wiretap canvasses and checkouts on the part of the Government, each of which usually require weeks for a report and are often followed by court hearings to determine whether there was strict adherence to the procedures prescribed by 18 U.S.C. §§ 2516–19 frequently delay or prolong criminal trials. If this proposal were adopted and each witness provided with competent counsel, the prohibition against interrogation of grand jury witnesses on the basis of illegally obtained intercepts would enable counsel to stall grand jury investigations indefinitely and to raise issues that would involve the court in countless hearings.

2. *Proposals to change the type of immunity that may be granted to recalcitrant witnesses under 18 U.S.C. §§ 6002–3 from "use" to "transactional" immunity and to change the conditions for granting immunity.*

Under 18 U.S.C. §§ 6002–3 as this statute presently stands a United States Attorney, when he believes it necessary to the public interest, may, with the approval of the Attorney General, Deputy Attorney General or any designated Assistant Attorney General, request the district court to issue an order compelling a grand jury witness who has invoked his Fifth Amendment privilege to testify in exchange for a grant of immunity under which no testimony or information provided by the witness may be used directly or indirectly against him in any criminal case except perjury. Upon the making of such a request the court is obligated to grant such "use" immunity to the witness.

H.R. 94 would shift from the United States Attorney to the federal court the duty of determining to its "satisfaction," upon a request by the Attorney General, Deputy Attorney General, or designated Assistant Attorney General, (1) whether the testimony of a witness is necessary in the public interest, (2)

whether there is danger of foreign prosecution of the witness, (3) whether the grand jury investigation is legally authorized and the request for immunity complies with the Department of Justice guidelines, (4) whether the proposed testimony is within the scope of the grand jury's investigation and relevant thereto as well as relevant to the immunity order, and (5) whether a grant of immunity would be "adequate for the purposes of the investigation." Only if satisfied that these conditions have been met and if furnished with a certified "summary of the evidence relating to the witness," would the court be permitted to grant immunity. Even then the court might in its discretion refuse to grant immunity. The immunity granted, moreover, would not simply prohibit use of the witness' testimony against him (directly or indirectly) but would immunize him from prosecution on account of any "transaction, matter or thing" concerning which he was compelled to testify.

Comments.—This proposal is most unwise and would place an intolerable additional burden on already overtaxed federal courts. Except in extraordinary cases (e.g., Watergate), under the principle of separation of powers, which is an integral part of our Constitution, the Attorney General, not the federal court, is the party who determines whether an immunity grant would be in the public interest. It is the function and duty of the Attorney General, not that of the court, to investigate and prosecute those cases which will best insure that the federal laws will be carried out and to coordinate prosecutorial efforts toward that end.

Moreover under our system of government the Attorney General and his subordinates are far better equipped than a federal judge to make the necessary determination. The prosecutor is ordinarily the only person sufficiently familiar with the details of pending investigations and prosecutions to determine whether a grant of immunity is essential to obtain important evidence or to secure an indictment or conviction. In contrast, the court is not sufficiently acquainted with the general program for federal law enforcement in the community or the particular problems in each case to determine whether a witness' testimony would warrant a grant of immunity, much less to determine whether such a grant would be in the public interest.

The new duties placed by the new amendment on the federal judiciary would be staggering. To carry them out the court would have to play a role that has traditionally been exercised only by the Executive Branch, studying the background of the grand jury's proposed or pending investigation, acquainting itself with the relationship of the investigation to other federal law enforcement programs, and delving into the often complex evidence in each case to appraise the relevancy, adequacy and need for the testimony of the witness whose immunity is sought. Only after steeping himself in the background could the judge be satisfied that the conditions imposed by the legislative proposal were met. This would require in many cases an enormous amount of time and effort to be invested by already overworked judges. It might also require judges in some cases later to excuse themselves from sitting as the trial judge because of inability to preside without being influenced by the background information acquired in the investigation to determine whether immunity should be granted.

The proposal that, where an immunity grant is necessary, it must be of "transactional" rather than "use" immunity is also unwise. A grant of immunity represents an accommodation between a witness' Fifth Amendment privilege and society's need for evidence essential to law enforcement. As the Supreme Court recognized in *Kastingar* v. *United States*, 406 U.S. 441 (1972), as long as a grant of immunity is "co-extensive with the scope" of the witness' Fifth Amendment privilege he receives all of the protection to which he is entitled under the Constitution, no more, no less, i.e., the right to be protected against the use of his testimony against him, with the government bearing the burden of proving that any later prosecution against him has not been based on or derived from his testimony. After some six years of experience under 18 U.S.C. §§ 6001-3 we know of no evidence that the broader transaction immunity is necessary to protect witnesses against prosecution derived from disclosures which they have been compelled to make through grants of "use" immunity. Since use immunity fully protects the witness' constitutional rights, transactional immunity is therefore unnecessary.

3. *Imposition of various conditions upon the prosecutor's presentation of evidence to a grand jury (proposed § 3329).*

H.R. 94 would add a new § 3329 to Title 18, U.S. Code, which, among other things, would require that the court, in giving preliminary instructions to each grand jury, "assure that the Grand Jury reasonably understands . . . (5) the

subject matter of the investigation." The proposal would also permit any person to ask to testify or to produce records before the grand jury, whereupon the prosecutor would be required to notify the grand jury and, if he wished, make recommendations with respect to the handling of the request. Unless a majority of the grand jury voted to the contrary, the prosecutor would be required to subpoena the evidence or witness, who must then be permitted to testify upon waiving immunity.

The prosecutor would also (1) be required to notify a person against whom evidence is to be offered that he has a "right to testify and present evidence," unless the prosecutor can prove that the person would flee, endanger other witnesses, or unduly delay the investigation and prosecution; (2) be required to advise the grand jury periodically of the nature and existence of any evidence, not yet received, "which might tend to materially affect the credibility of any witness or tend to negate the guilt of any prospective defendant"; (3) be barred from representing a case to another grand jury after a grand jury has failed to return an indictment unless the court finds that additional relevant evidence has been discovered.

Comments.—This proposal would heap enormous and difficult burdens on the judiciary, precluding it from performance of other essential duties, including compliance with the Speedy Trial Act.

Turning first to the requirement that the judge assure that the grand jury understands the "subject matter of the investigation" of each case, this would be difficult enough to achieve in a district where grand jury investigations were few and far between. But in a large urban center such as New York the court would find it virtually impossible to comply. In the Southern District of New York, for instance, there may be as many as 25 grand juries functioning simultaneously, with a half dozen sitting at the same time, of which some are "regular" grand juries hearing a series of cases in one day's sitting, following each of which a vote is taken on whether to indict. To satisfy the proposed amendment several judges would be required daily to acquaint themselves with the background of each case and to instruct the jury accordingly. There simply would not be enough judicial time to meet this additional obligation unless new judgeships were created or existing judges abandoned important trials and hearings of other cases to perform this new duty.

The other proposed amendments, aside from policy considerations which might be debated at length, pose problems that could be resolved in specific cases only after evidentiary hearings. For instance, where a prosecutor fails to notify a person against whom evidence is offered because the Government did not become aware that he was likely to be a target until all the evidence was in and an indictment filed against him, a motion to dismiss the indictment for failure to receive notification would be filed, which would require the court to unravel the background in order to make findings.

The proposed amendment also raises a question as to when a prosecutor is justified in concluding that a person need not be notified because he might flee, endanger other witnesses or unduly delay the investigation. The assumption that the Government can always come in with tangible proof on this issue seems unreal. In many cases knowledge that a grand jury investigation is pending may lead a person to flee or to start tampering with witnesses even though no tangible evidence could have been adduced that he would do so until the misconduct occurred.

Assuming that a prospective accused is given the opportunity to give rebuttal evidence to the grand jury, there arises the question of how much information must be furnished to him by the Government regarding the case in order to enable him to prepare and present his evidence. Must the Government make a detailed disclosure that would outline the evidence against him? If so, would this not turn the grand jury proceeding into a preliminary mini-trial on the merits? Assuming there is a failure on the part of the prosecutor to comply with these proposed requirements as construed by the courts, what sanctions could be imposed? Dismissal of an indictment? All of these questions would have to be resolved by the courts.

The proposed amendments further appear unnecessary. In most cases the evidence of probable cause is clear. The defense could at best raise issues for trial rather than be entitled to a "no true bill." A grand jury is instructed by the court at the outset, and the prosecutor recognizes, that its duty is not merely to indict but to protect the innocent against unwarranted indictment. Although the grand jury looks principally to the prosecutor for production of relevant

evidence, it may in close or doubtful cases protect against arbitrary accusations by notifying the target of its investigation and permitting him to testify or to point to exculpatory evidence. Nor does anything prevent the grand jury from directing the prosecutor to subpoena witnesses or other evidence that may be relevant. However, to impose upon the prosecutor the statutory duty of converting the grand jury's investigation into an adversary proceeding goes too far. Moreover, it is impractical for the reason that it is frequently impossible for prosecutor or court to make the kind of decisions dictated by the proposed amendment, since the lines at the preliminary investigatory stage are often not as bright and sharp as they later become at trial, after the parties have the benefit of additional evidence that was not uncovered or available at the time when the indictment was filed.

For these reasons it is also inadvisable to require the prosecutor to advise the grand jury of all *Brady* or impeachment material. In many cases the Government simply is not in a position at the investigatory stage to determine what is or may be exculpatory. Nor can the court or prosecutor, before the facts are uncovered, determine whether evidence not presented to the grand jury would have "materially" affected at witness' credibility or negotiated guilt.

In short, these proposals, if adopted, could have the effect of delaying, obstructing and prolonging grand jury investigations by turning the grand jury proceeding into a preliminary mini-trial in which the Government, the grand jury and the court would be forced to devote a disproportionate amount of time to issues that should be saved for resolution at trial. Rather than expose the Government and the courts to such unconscionable burdens at the risk of having a resulting indictment dismissed, the better course would be to rely upon the integrity of the Government and the disposition of grand juries to act fairly and to hear both sides where there are doubts about the existence of probable cause. Ordinarily neither the grand jury nor the prosecutor has a motive to indict unless there is probable cause to believe that on the record as a whole the accused committed the crime. The prosecutor hardly desires an indictment unless he believes he will be able to obtain a conviction after trial.

4. *Right of grand jury witness to have counsel* (§ 3330A)

At present a grand jury witness may retain counsel whom he may consult outside of the jury room. H.R. 94 would add a § 3330A to Title 18 U.S.C. to the effect that (1) every witness should be entitled to the assistance of counsel, with counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A, for any person financially unable to obtain counsel, (2) counsel would have the right to be present with the witness when interrogated in the grant jury room and to advise him but not to address the grand jurors, and (3) if counsel violated the limits on his function in the grand jury room, he could be removed by the court and the witness ordered to obtain new counsel.

Comments.—In theory the presence of counsel with the witness in the grand jury room instead of outside of the grand jury room seems reasonable enough, particularly if the witness is a possible target of the grand jury's investigation. Counsel, if present, might be more effective in improving his client's understanding of his constitutional rights and protecting him against violation of those rights or of statutory privileges and against harassment, misunderstandings and the like.

In practice, however, admitting counsel to the grand jury room poses the serious risk that the proceedings will be protracted and disrupted, with the court being forced to intervene repeatedly. Experience in criminal trials demonstrates that many lawyers simply would not adhere to the idealistic conception that they would limit themselves to advising their clients in *sotto voce*. Once in the grand jury room, many counsel, unimpeded by the presence of the court, would seek to influence the grand jury, using tactics of the type frequently employed in criminal trials, e.g., lengthy objections to questions, in which counsel refers to irrelevant prejudicial material as the basis for an objection. Advice to a witness could be given in tones that would be overheard by every grand juror. A witness' answers would be those of the attorney rather than of the witness himself. Judges would inevitably be invoked to rule on preliminary objections as to the relevancy and materiality of questions, to discipline or remove counsel from the grand jury room and to substitute new counsel. Moreover, should a judge discipline or remove a witness' counsel, a serious question would then arise as to whether he had interfered with the witness' constitutional or statutory right to counsel of his own choice.

To provide counsel for every grand jury witness "financially unable to obtain legal representation," as would be mandated by the proposed § 3330A, would probably tax our limited pool of available lawyers versed in criminal matters beyond the breaking point, rendering them unavailable for the more important task of trying cases. To provide counsel for such witnesses would also increase enormously the appropriations required to finance appointments under the Criminal Justice Act, since the number of indigent witnesses called before grand juries would be far greater than the number of indigent accused.

On balance, the harm that would flow from the proposal to provide each witness with counsel in the grand jury room substantially outweighs the speculative benefits from such a procedure. The present federal grand jury system has worked reasonably well in protecting witnesses' rights. The only person normally desiring counsel at the grand jury's investigatory stage is a possible target of the investigation. Most, if not all, federal prosecutors advise such persons of their status if it is known to the prosecutor and of their *Miranda* rights, including the right to have counsel available for consultation. Indeed the giving of such a warning could well be mandated.

Under the existing system, moreover, the target of an investigation has the option of invoking his privilege. Although the witness may not be as competent to judge the significance of a question as would be his counsel, there is no reason to assume that the prosecutor or grand jurors would be unfair in questioning him. The risk that a witness would be improperly questioned is outweighed by the disruption, obstruction and delay that could be expected if each witness, regardless of whether the witness is or might be a target, were provided with counsel at his elbow.

5. *Quashing of grand jury subpoenas* (*§ 3330B*)

H.R. 94 would add a new § 3330B which, among other things, would require that a witness subpoenaed to appear before a grand jury be given notice of his right to counsel, including appointed counsel, his Fifth Amendment privilege, the "subject matter of the investigation" and statutes involved, and whether his own conduct is being investigated.

A motion to quash, which could be made in the district where the witness resides or in the district where the subpoena has been issued, would automatically stay compliance with the subpoena until the court had ruled on the motion. The Government would be obligated to show that the testimony was not sought to secure information for trial or regarding activities of a person already under indictment, and that the evidence would be "relevant to the grand jury investigation properly conducted within the grand jury's jurisdiction." The Government would furthermore be required to show that compliance with the subpoena would not be "unreasonable or oppressive," would not require "unnecessary appearance" and would not lead to testimony or information that would be "cumulative, unnecessary or privileged, would not be primarily for punitive purposes or would not involve other like circumstances." The court could quash or impose sanctions upon findings that the witness had already been confined for civil contempt under § 1826 for refusal to testify, that the witness had given notice of intent to claim his privilege, or that a previous grand jury had failed to indict him on the same evidence.

Under the amendment a grand jury could be convened only in the district where "elements" of the criminal conduct under investigation occurred and the court could quash a subpoena upon finding that a witness' appearance would impose a serious hardship on him or his family because of the grand jury's location, or could transfer the grand jury proceedings to some other district.

Comments.—This proposal for the most part is contrary to the public interest. It would greatly increase the opportunities for obstruction and delay of grand jury proceedings without any apparent gain in the administration of justice. It would impose additional, unnecessary burdens on the prosecutor and would enormously and unnecessarily increase the work of overloaded federal judges.

If a prosecutor has reason to believe that a witness is a target of a grand jury investigation, he should advise the witness. This is the practice currently followed by most federal prosecutors. But to require the Government to advise every witness of the "subject matter" or purpose of a grand jury investigation and of the relevancy of the information sought from the subpoenaed witness would tend to destroy the objectives of grand jury secrecy, which are to prevent the escape of prospective accused, insure deliberation by the grand jury free from importuning or harassment, prevent subordination of perjury or tampering with witnesses, and encourage free disclosure and protection of the innocent

from unwarranted accusations. Disclosure of subject matter and relevancy would in many instances be the equivalent of publicly broadcasting the grand jury's investigation rather than keeping it secret. The time for such disclosure is after the accusation, if any, is made, and at the ensuing trial rather than during the grand jury's investigation, which is not an adversary proceeding.

Usually it is inconvenient for most witnesses to be required by subpoena to attend any proceeding, whether it be a trial or a grand jury inquiry. Although witnesses should be protected against harassment or oppression, there is no reason to believe that such tactics are common as to require the type of showing or sanction that would be imposed by § 3330B. As against the witness' convenience, moreover, there is the public importance of the grand jury's investigation which should come first. Where it investigates a crime believed to have been committed within its jurisdiction, there is no adequate substitute for the personal testimony of witnesses, whether they are nearby or must come from a distance. Their travel and living expenses are paid by the Government, and it is usually in the interest of all parties concerned to examine the witness promptly and to release him for return to the district of his residence. In these days when one can travel in a matter of hours by air to almost any point from which a witness might be subpoenaed the danger of oppression is minimal.

Whether a witness' testimony is "relevant," "necessary," and not "cumulative," "unreasonable," "privileged," "oppressive" or "exceedingly burdensome" is a matter of opinion which can be arrived at by a judge only after examination into the entire background and circumstances, which are often complex. For this purpose additional court hearings would be triggered by the inevitable motions to quash. The result would probably be a series of small trials on the merits to determine whether a witness, advised by counsel provided under the Criminal Justice Act, must appear in response to the subpoena. Moreover, if the witness chose to seek relief in the district of his residence rather than in the court which issued the subpoena the prosecutor, although the balance of conveniences weighed in his favor against that of the witness, would have to leave the situs of the grand jury investigation to acquaint the non-issuing court with the essential facts. The prosecutor would thus be forced to suspend his supervision of the grand jury investigation in which other witnesses might be appearing. Similarly, the court's time would be unnecessarily absorbed in hearings to determine whether the venue of the grand jury should be changed to suit a witness' convenience. The potential for abuse and prolongation of the investigatory procedure is substantial.

The provision obligating the Government to show that a witness' testimony is not sought for trial or that information is not sought regarding activities of a person held under indictment appears to be unnecessary. As federal decisional law now stands the grand jury may not be used to develop evidence for trial.

6. *Encouragement of independent grand jury inquiries* (*§ 3330*)

H.R. 94 would also add a new § 3330, which is designed to encourage grand juries to undertake independent inquiries of the "runaway" type. It would provide them with special counsel and investigators for the purpose, should the Government attorney refuse to cooperate. The grand jury's term would be extended at its request up to 36 months. The special counsel would have the powers and pay of a federal prosecutor, including staff, appropriations, reimbursement of expenses, etc.

Comments.—This proposal is unwise for several reasons. It would pose the risk of abuse of power by an inexperienced, rump body going off on its own, misguided by a special prosecutor who might be motivated by reasons inconsistent with sound administration of justice and unfamiliar with sensitive policies formulated over many years by the Department of Justice regarding such important matters as division of responsibility between state and federal governments and guidelines for exercise of prosecutorial discretion. The result could be not only confusion but the filing of indictments without adequate groundwork.

Any accusatory system can become an instrument of oppression in the wrong hands. Although, under the existing system, there may have been occasions where federal prosecutors have failed in their duties or abused their power as the advisors depended upon by grand juries to guide them, the instances have been rare and do not warrant broad and sweeping authorizations of the type here proposed. A provision for runaway grand juries may occasionally be salutary in state practice or even in federal (e.g., Watergate) but it poses too great a risk of irresponsible encroachment upon the Executive Branch in our federal system to be encouraged without strict limitations of a type not found in the proposed § 3330.

7. *Availability of grand jury transcripts of testimony of witness* (§ 3333)

A separate provision, § 3333 would make available to any grand jury witness a copy of any earlier statement by him in the Government's possession and of the transcript of electronic recording of his testimony before the grand jury. Prior to trial a defendant would be entitled to the grand jury transcripts of all witnesses to be called by the Government at trial, all statements made to the grand jury by the prosecutor and all grand jury testimony or evidence "which in any manner could be considered exculpatory," or which the court might deem "material" to the defense. Upon a showing of good cause the court could deny or restrict such disclosures.

Comments.—To the extent that transcripts of grand jury testimony would aid a trial court and jury in its search for the truth, there should be no objection to disclosures of such transcripts. However, the initial determination of what constitutes exculpatory material should, as under Title 18 U.S.C. § 3500, rest upon the shoulders of the Government, with the court being called upon to rule only where the Government had doubts or there is reason to believe that the Government has not furnished all exculpatory material. No purpose would be served by adding a clause "in any manner" before the term "exculpatory." The standard should be whether, under the circumstances known to the Government, the testimony or evidence could reasonably be considered exculpatory.

Nor would any purpose be served by requiring disclosure to the accused of the prosecutor's statements to the grand jury, except to the extent that such statements might reasonably lead to exculpatory evidence. A prosecutor's statement is not evidence.

8. *Defendant's right to a preliminary examination* (§ 3368)

H.R. 94 would add § 3368 guaranteeing each defendant a preliminary examination, unless waived, which might be held before or after the filing of an indictment or information in the district court. A preliminary examination after the filing of an indictment would be a sheer waste of time since the indictment evidences the existence of probable cause. Defense could in such a case demand a preliminary examination in order to seek discovery or protect themselves against possible later § 2255 applications or suits for malpractice. It would be an unnecessary burden on the court, particularly since most indictments result in pleas of guilty.

9. *Reports concerning grand jury investigations*

We live in an age when reports seem to have assumed a sacred character in themselves. Unnecessary statistics are being gathered by the trunkful. This bill requires a report by the Attorney General to the Administrative Office of the number of investigations undertaken by a grand jury with a description of the nature of each investigation undertaken. What this hope to accomplish, we do not know. Reporting would also require a list of immunity requests by the Attorney General and orders granting immunity, the number of contempt cases, the number of arrests, indictments and convictions resulting from testimony obtained under orders granting immunity and a description of data banks by which grand jury information is processed by the Department of Justice. Some of this material is not in itself objectionable except that resources may be better used to a more appropriate purpose.

Mr. EILBERG. Our next witness is Mr. Charles S. Ruff, Watergate Prosecutor. We welcome you, Mr. Ruff.

Do you wish to submit your statement for the record or summarize it? Either would be in order and I would also suggest if you wish to address yourself perhaps to any particular points raised by Judge Lacey that might be helpful for the record also, but you go your own way and then we'll ask you some questions.

TESTIMONY OF CHARLES S. RUFF, WATERGATE PROSECUTOR

Mr. RUFF. Thank you very much, Mr. Chairman.

Mr. Chairman and members of the committee, I appreciate the opportunity to appear before you today. I will indeed, if it meets the committee's concerns, simply leave on the record the statement which

I have already submitted and try to restrict my presentation to just a few minutes and then respond to whatever questions the committee may have.

Mr. EILBERG. Without objection, your statement will be made part of the record.

[The prepared statement of Mr. Ruff follows:]

STATEMENT OF CHARLES F. C. RUFF, WATERGATE PROSECUTOR

Mr. Chairman and members of the committee: Thank you for giving me the opportunity to appear before you today and to testify concerning the important legislation that you have under consideration. I should note at the outset that I appear neither in my official capacity as Director of the Watergate Special Prosecution Force nor as a representative of the American Bar Association Grand Jury Committee; hence my views are mine alone and not those of either organization.

Most thoughtful analysts of the federal grand jury system agree that some changes are necessary. Unhappily, however, much of the debate over the extent of those changes seems to have become polarized, with critics urging extensive reform and charging wholesale repression of individual rights while defenders deny that anything is wrong. There are, of course, exceptions—commentators like Judge Frankel who approach the problem with a broad scholarly and practical background and whose recommendations address the crucial issues in measured terms. It is important, I submit, that the Congress take such a balanced approach, but I question whether the bill now before this Subcommittee does so. Much of the proposed legislation has merit, but on the whole it is, I fear, an overreaction to problems more illusory than real.

Any attempt to reform the grand jury must begin from the premise that it is the pre-eminent vehicle for the investigation of white-collar, organized and other complex criminal activity. It is no accident that the last fifteen years have seen a quantum leap in the prosecution by the federal government of sophisticated fraunds, public corruption and similar offenses while state prosecutors have remained incapable, for the most part, of equally vigorous enforcement. The success of the Department of Justice and the United States Attorneys is due, in large measure, to their increasingly effective use of the investigative grand jury. But with this success came, undeniably, overreaching—particularly but not solely in the realm of the quasi-political investigations of the late 1960's and early 1970's. This overreaching has prompted much of the criticism, some of it justified, of the present grand jury process. For the first time attention has been paid to the rights of those called as witnesses as well as those who are the subjects of the grand jury's inquiry—interestingly, attention little paid when the principal focus of the grand jury's activity was the member of organized crime.

Obviously, respect for individual rights must be weighed heavily in the balance but no more heavily than constitutional and other societal interests truly require. It is the appropriate balance between the public's interest in effective law enforcement and the public's interest in protecting the rights of individual citizens that Congress must strike in drafting grand jury legislation, and on one major point H.R. 94 achieves that goal.

The proposal to permit every witness to have counsel present in the grand jury room has met, and will undoubtedly continue to meet, substantial opposition from prosecutors. The principal grounds for that opposition are two: first, that the presence of an attorney will disrupt the conduct of the investigation whatever statutory restrictions are placed on his role; and second, that his presence may intimidate a witness who might otherwise have been willing to be candid if a lawyer hired by his employer could not hear what he was saying. Neither ground in my judgment justifies the refusal to afford to the grand jury witness the meaningful assistance of counsel without the artificial barrier of the jury room door between them.

The fear that the presence of a lawyer in the grand jury room may prove disruptive cannot be dismissed as idle—the history of the defense bar in pressing aggressively to expand individual rights during the criminal justice revolution of the last fifteen years is likely to continue when the forum of the grand jury is

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opened. If the legislation specifically limits the lawyer's role, however, and the Committee's report makes it clear that judges are expected to enforce this restriction, the mere possibility of occasional disruption simply cannot overcome the right of the individual witness to consult his attorney without going through the mildly absurd process of leaving the grand jury room every time. Indeed most prosecutors would admit, I think, that they count on the burden of leaving the room to dissuade the witness from asserting his right to counsel.

The problem of a lawyer's interference with an otherwise cooperative witness is more difficult to resolve. There is no question that the problem of multiple representation of witnesses during the investigative process is a serious one and surfaces most frequently in just the kind of investigation in which the grand jury is most important. Movement has begun in the organized bar and in the courts to address the problem by clarifying and enforcing the ethical obligation of attorneys, but the movement has been slow. Nonetheless, in my judgment the proposal to allow counsel in the grand jury room will not have any appreciable impact on the level of improper influence exercised by counsel on witnesses.

In my experience I have encountered very few witnesses who indicated a desire to cooperate without the knowledge of their counsel. In the typical grand jury investigation into the activities of any hierarchically structured organization, a witness from the lower or middle levels represented by counsel hired by his superiors will meet with the prosecutor and there will be some discussion both about his status and about the nature of his prospective testimony. If his lawyer advises him to assert his privilege against self-incrimination, and the prosecutor decides not to immunize him, it is difficult to see what added harm is created by permitting the witness' lawyer to be in the grand jury room. If the witness is advised to testify without asserting his privilege, there is some risk that he will be less candid if his employer's representative is present, but I question whether the risk is measurably greater than it is with the lawyer outside the grand jury room, since, if the witness' testimony is helpful to the government, that fact will probably become evident to the lawyer in fairly short order. If the government decides to immunize the witness, it has already announced that it considers him a potential witness against his employer, and has laid a firm basis for the disqualification of counsel.

In any event, whether there will be an increase in the risk of improper influence is, at best, speculative, and there does exist an alternative solution. Motions to disqualify are now being made with increasing frequency, although they have not met with uniform success. More importantly, distinguished members of the defense bar are speaking out on the dangers inherent in multiple representation, and there is, therefore, some meaningful hope both for increased judicial receptiveness and for self-policing by the profession. Against this background, although the question is not an easy one, I do not believe that the critics have made out their case against the presence of counsel.

Although, as I have indicated, I believe that the proposal to permit counsel in the grand jury room strikes an appropriate balance between the need for effective investigation and the need to protect the rights of the witness, the same cannot be said for other portions of the pending bill. I will sketch out briefly some of my concerns and will be glad to elaborate if the Subcommittee so wishes.

Recalcitrant witnesses.—Although it is now the policy of the Department of Justice not to seek repeated confinement of witnesses who refuse to testify after being immunized and it is reasonable to codify that policy, the reduction of the maximum period of confinement to six months means that a witness can achieve perpetual freedom from compulsion to testify about the most serious offenses by serving that relatively short term. It is, of course, difficult to judge just how many months in jail will serve as an an effective but not excessive sanction, but I think it safe to say that six months will not deter the witness who knows that at the end of that time he will never again be obliged to give testimony about the same transaction. I would recommend the retention of the present eighteen-month maximum. In addition, I believe it preferable to permit separate contempt citations for refusal to testify before the grand jury and before the court.

Immunity.—Two aspects of the proposals concerning immunity are troublesome. First, the decision to return to transactional immunity is, by and large, a meaningless effort to provide a protection which the witness does not need. In the absence of some showing that the government has abused the use immunity process by compelling witnesses' testimony and then prosecuting them, the

requirement that transactional immunity be conferred actually removes a safeguard now afforded to all witnesses. Testimony compelled under a grant of use immunity cannot be used against the witness in anyway, except in a perjury prosecution, but testimony given under a grant of transactional immunity could be used, for example, to impeach the witness who is charged with an unrelated offense.

Second, to give the ultimate immunity decision to the courts rather than to the executive is to infringe on the prosecution function without real justification. The decision to immunize a particular witness is made against the background of an entire investigation, with information developed from a variety of sources and judgments to be made about the likelihood of convicting those seen as principal actors in the criminal activity. This discretion has historically been reserved to the prosecutor subject to limited review where it is exercised in constitutionally impermissible fashion and subject to the sanction of the jury's refusal to convict. The proposed bill asks the judge not to decide a legal issue but to decide whether a particular prosecution serves the amorphous public interest and whether the prosecutor's choice of means in conducting an investigation is the right one. Further, to give the judge sufficient information to make an informed decision would require virtually wholesale disclosure of vital information to the witness and his lawyer. Beyond this, except in those few cases where a witness does not wish to be immunized, either the witness will acquiesce in the request and the judge will serve as a mere rubber stamp, or the government will make an informal arrangement with the witness in order to secure his testimony—a procedure frequently used even under the present immunity laws.

Rights of witnesses.—The provision for advising the grand jury witness of his rights upon service of a subpoena seems wholly appropriate. It has been suggested that to advise a non-target witness of his privilege against self incrimination will dissuade a possibly reluctant witness from testifying, but two points should be made on that issue: first, the experience of the Watergate Special Prosecution Force, which followed an extremely liberal policy concerning warnings, showed no marked increase in the number of uncooperative witnesses; and second, even if there were such an increase, it is difficult to justify a failure to warn the witness on the ground that he may decide to exercise a privilege which clearly is his to assert.

One caveat, however: the provision that the witness be advised of the subject matter of the investigation beyond a listing of the statutes being investigated presents a serious risk of disseminating information about the persons who are the subjects of the grand jury's inquiry, of permitting a witness to structure his testimony artificially, and of permitting interested third parties to alter or destroy evidence or to interfere with the witness himself. Further, it should be made clear that a good faith effort to list the principal statutes under consideration by the grand jury will suffice, so that a failure to list what may be one of twenty possible federal offenses will not undermine the validity of the subpoena.

The provision that motions to quash may be heard in the district where the witness resides or is served does little except to disrupt the orderly grand jury process. The thrust of this and the related provisions concerning the showing required to be made by the government is clearly to establish a presumption in favor of the witness' right to refuse to testify and against the legitimacy of the grand jury's inquiry. I respectfully submit that such a presumption flies in the face of the historic obligation of the citizen to give evidence without a showing that there has been widespread abuse of the grand jury process. Would Congress enact a similar provision governing its own subpoenas?

There already exists a right in every witness to quash a subpoena if compliance would be unreasonable or oppressive. In the vast majority of cases, however, the motion to quash never becomes necessary because the time, place and manner of compliance are negotiated with the prosecutor who caused the subpoena to issue. I would think it reasonable, as an alternative, to provide that, where a witness has requested a stay of his appearance, and the prosecutor has refused, application could be made in another district for a temporary stay that would permit the appropriate request to be made in the district where the grand jury is sitting.

The provision concerning venue for grand jury investigations is, at best, meaningless and, at worst, extraordinarily burdensome. The requirement that a grand jury investigate only offenses that have occurred in its district is already the law.

The problem that the bill seeks to address is caused by existing venue rules that permit the trial of any conspiracy or other multi-district offense wherever any part of that offense was committed. To attempt to solve those venue problems by legislating grand jury reform is a useless exercise. Further, to provide that a court can transfer grand jury proceedings from one district to another to meet the needs of an individual witness is to play havoc with any sort of orderly investigation. Certainly the court retains sufficient authority to quash, stay or modify subpoenas to deal with the witness who is truly unable to comply without undue hardship.

Although the requirement that a complete recording of grand jury proceedings be kept is entirely appropriate, even recognizing the financial burden involved in compliance, there is no justification for providing each witness with a transcript of his testimony. I fail to see how such a requirement protects the witness in any meaningful fashion, but it certainly would mean that confidential and potentially damaging information would be given widespread currency. If the purpose is to permit a witness to revise testimony that he has given, certainly it would be sufficient to give him the opportunity to review a transcript on request in the prosecutor's office.

Nor does the requirement that the equivalent of the Jencks Act be made applicable to grand jury proceedings meet any real need. It seems a wholly legitimate tactic of examination and an aid to truth-finding for a prosecutor to examine a witness on the basis of prior statements without having given him the opportunity to conform his testimony. If the concern is that prosecutors will entrap a witness into perjury, it should be noted that courts have shown some willingness to dismiss charges on that basis, and any prosecutor will tell you that perjury convictions are the most difficult ones to secure.

Independent grand jury inquiries.—The grand jury is an investigative not a prosecutive agency, but the proposed legislation seems to treat it as having both functions. Is it intended that a special attorney be appointed by the court serve merely as the functionary of the grand jury—that he sign whatever indictment the grand jury prepares? Or is it intended that he exercise some discretion, and if so, when will the grand jury no longer be entitled to the substitution of an attorney who will comply with its wishes? Does the court have any discretion to refuse the appointment of a special attorney? None of these questions is answered by H.R. 94.

But beyond this, I have substantial qualms about the appointment of any prosecutor other than by the Executive Branch, and certainly about the appointment of a prosecutor responsible to no one in the carrying out of his duties. It is my understanding that another Subcommittee is now considering legislation to provide for the appointment of temporary special prosecutors, and I would suggest that the many and varied constitutional and practical problems involved in such appointments can better be addressed outside the narrow realm of the grand jury.

Duties of the attorney for the Government.—The requirement that the attorney bring to the attention of the grand jury a request by a citizen to appear or give evidence is a reasonable one, but I question the reasonableness of a blanket rule requiring that a subject of a grand jury's investigation be notified of his status and given the opportunity to appear. The Watergate Special Prosecution Force, as a matter of policy, frequently did give potential defendants that opportunity, but it must be remembered that the work of that office involved matters already much in the public eye and also involved subjects who posed little risk of flight or injury to others. The grand jury is charged with the duty of determining whether there is probable cause to believe that an individual has committed a crime, and there is no societal interest to be served by expanding the scope of its inquiry to the point where it becomes a trial on the merits. Nor, in the vast majority of cases, will a prospective defendant be well served by a decision to testify; I dare say that almost every prosecutor would like nothing better than to have the defendant's testimony under oath, and only in extraordinary cases will that testimony influence the grand jurors to refuse to indict.

The proposal that the prosecutor advise the grand jury of evidence "which might . . . tend to negate the guilt of any prospective defendant" is not well considered. Clearly, the knowing suppression of exculpatory evidence is improper and should be subject to some sanction, but if it is intended that there be a full-blown, retrospective examination of all the evidence that might have been presented in order to determine whether it might have led the grand jury not to indict, I would suggest that the elements of the *Brady* doctrine are difficult enough to apply at trial and ought not to be inserted into the investigative

process. In a jurisdiction where the prosecutor charges by information, he may base his judgment on whatever facts he chooses so long as he can establish probable cause at a subsequent preliminary examination; in a system where probable cause is determined by a body of citizens, I question whether there is any need to apply standards which heretofore have been reserved for the protection of the defendant on the issue of guilt or innocence.

With respect to the requirement that the prosecutor advise the grand jury of evidence "which might tend to materially affect the credibility of any witness," I would only point out that, although the intent of the drafters was undoubtedly to alert the grand jurors to the weaknesses of testimony from those with prior convictions or those who had made a deal with the government, the real impact of the rule would be to permit the government to attack the credibility of witnesses who give testimony favorable to the prospective defendant.

Grand jury secrecy.—The proposal to make disclosure of matters before the grand jury a criminal offense is an important one, and I have only one major comment. The restriction of the prohibition in proposed Section 1512(a) to those who were present in the grand jury room leaves open the substantial risk that a government employee or someone having access to the stenographic record will reveal protected information. Further, I suggest that the seriousness of the offense is not reflected in the sanction provided for under subsection (a); it would seem more suitable to provide for punishment at least at the typical misdemeanor level of one year's imprisonment and/or fine of $1,000.

In conclusion, I respectfully submit, that, although H.R. 94 accomplishes much that is worthwhile in the reform of the grand jury process, in many areas it tips the balance too far against the important societal interest in effective law enforcement. Despite the abuses that have occurred during the past several years, and I believe that they have not been as pervasive as some critics have argued. I retain my belief in the ability of the Department of Justice, with some measure of judicial supervision, to adhere to appropriate standards of conduct, and suggest that the appropriate role of the Congress is to address through legislation only those areas that are most clearly in need of reform.

Mr. RUFF. I think from my point of view, and it's the point of view of a prosecutor, one whose experience has been almost entirely in the area of white collar crime, organized crime, and public corruption cases, it's important to begin any look at this subject from a couple of very basic premises: first, the presumption, if you will, of the validity of the grand jury process insofar as it concerns the crucial function of acting as the vehicle for the investigation of these very sophisticated forms of criminal activity; and second, the presumption—and I think this is historically accurate—that the citizen who's called upon by the grand jury to give testimony has an inherent obligation to cooperate, short of the assertion of his fifth amendment privilege or any other applicable privilege which may in fact be asserted at the appropriate time.

But if in fact we begin with those two presumptions, the validity of the grand jury process and the obligation of the citizen to give information when called on, it seems to me that there must be afforded to that witness the protections which will insure that in fact he is not deprived of whatever privileges he may enjoy and in fact, as Congressman Evans suggested, is not abused during the course of his cooperation with the grand jury.

On this score, this attempt to strike the balance between the needs for and the presumptive validity of the grand jury process and the rights of the individual witnesses, it seems to me the crucial point made in this legislation is affording of counsel in the grand jury room. It's an issue obviously that Judge Lacey dealt with at some length and I'd like to address it briefly because my position is, although consistent with Judge Lacey's on many points that he makes, very different from

his on the issue of counsel in the grand jury room. Indeed, I suspect that at least most of the Federal prosecutors with whom I'm familiar would disagree with my position. Nonetheless, I set it out for what it's worth.

The attacks on the proposals to permit counsel in the grand jury room essentially take two avenues: first, the suggestion that it will permit disruption in the grand jury, that it will create minitrials; and that that disruption will not in fact be able to be controlled either by the prosecutor in the grand jury or the judge if called on to do so. The second avenue of attack is a very important one and one that can't be lightly dismissed and that's the problem of multiple representation which has already been discussed here this morning.

With respect to the issue of disruption, obviously, in the Federal system at least, all we can do is speculate—to extrapolate from experience in other aspects of the criminal justice system to what might happen in the grand jury if counsel were permitted.

My experience, and particularly over the last 3 or 4 years in the life of the Watergate Special Prosecutors, is that witnesses who come before the grand jury frequently are represented by counsel. One knows before that witness goes into the grand jury room essentially what the witness is prepared to testify to. Conversations have been held with counsel for that witness in most cases and in most situations I have found counsel to be cooperative, protective of his client's rights, but not in any sense attempting to disrupt the orderly functioning of the grand jury.

I have no basis for believing, other than pure speculation, that that would change were counsel permitted to enter the grand jury room. I have had some experience with the situation in which a witness has frequently gotten up and asked permission to leave the grand jury room—to go out and consult with counsel. Sometimes I have had the feeling that it was done to obstruct the grand jury's inquiry. Sometimes, however, and more frequently, I suspect, I found that they were perfectly legitimate exercises of the right to consult with counsel, and I found it mildly absurd that he would have to get up and go outside the room and consult with counsel. Sometimes I would have to go outside the room and talk to counsel if requested to do so when, in fact, it seemed to me that most of the questions either could have been readily answered with counsel there advising his client and without the need to go through what I really view as something of a charade.

I had occasion a couple weeks ago to discuss this problem with the district attorney for Denver who recently has had experience with, and I believe has indeed submitted some comments to the committee on, the subject. He's had experience with permitting counsel in the grand jury room, as have a few States, and is seeking legislation in the Colorado Legislature to permit just that.

He indicated to me that his experience along these lines was not that of disruptive counsel. Indeed, he was content, if not pleased, with the experience he's had under this rule. I grant you that I have the normal prosecutor's suspicion that energetic competent defense counsel will take all possible steps to protect their client's rights and may indeed overstep the bounds of zealous representation, but I suggest—

and it's my conclusion in this regard—that that speculation, that guess, as to what will happen if we permit counsel in the grand jury room is not a sufficient concern to overcome what seems to me to be the basic right to have simple and ready access to the advice of counsel in the grand jury room.

With respect to multiple representation, this is an issue that I have addressed in public on a number of occasions and feel very strongly about, and it's certainly an issue that has arisen perhaps more frequently in the context of the Watergate Special Prosecutor's work over the last 3 or 4 years than in most contexts. We have had situations, without question, in which we have been investigating a hierarchally structured organization in which someone in the middle levels of that structure is represented by counsel hired by his superiors or by the corporation or by the organization that's under investigation. We have on a number of occasions expressed directly to counsel our concern about the possible existence of conflicts of interest and on occasion we have had counsel say, "Yes; I agree with you," and withdraw. On more occasions—and I consider this a serious problem—counsel has said, "No; I don't see it." The witness himself, for whatever reasons, proper or improper, has acknowledged that he understands that he has the right to independent counsel, but has decided not to take advantage of that right.

Mr. EILBERG. Mr. Ruff, may I interrupt at this point by asking how would you respond to Judge Lacey's point, in his testimony, that allowing counsel limits the search for the truth when a lawyer represents multiple witnesses or an organization and a witness?

Mr. RUFF. I agree entirely with Judge Lacey's basic premise. Indeed, it's one that I, myself, expressed on a number of occasions. Multiple representation poses a serious risk to the truth-finding process. It presents problems not only involving disruption of the grand jury process but, more importantly—and I think this is where the organized bar and the courts themselves have fallen down on this issue—it represents a serious threat to the right of the individual who's being represented by a lawyer who does not in fact devote his full energies and his full concerns to that client's welfare. Indeed, I think in recent years and perhaps the last 2 years, this issue has surfaced repeatedly in the courts, in various meetings of the organized bar, and I think there is now a recognition of this problem and some movement in both the bar and the courts to do something about it. But there is no question that it's an extraordinarily serious problem and one that those of us who are involved in this kind of investigation of sophisticated criminal activity confront all the time.

My difference with Judge Lacey is on this point. I think that putting the counsel in the grand jury room does not measurably add to that risk or danger. To the extent that it does have some incremental risk attached to it, I think it's one that has to be dealt with not by restricting the basic right to be advised by counsel, but one that has to be addressed by the bar, by prosecutors who are willing to confront the problem, and most importantly—and I'm afraid that Judge Lacey is an exception to the rule—in the judicial reaction to this problem—by judges who are willing to say:

Yes; I recognize that it is a violation of the ethical obligation of counsel. It infringes on the right of the client to zealous representation of his interest and

I'm going to do something about it by ensuring that in fact this client, if he wishes to, and perhaps even if he doesn't wish to—

(and that's the hangup that most judges find themselves disturbed by)

is going to have independent representation.

In sum on this issue, I think the answer is not to say keep that lawyer outside the door, because realistically he's going to have a pretty fair notion of what his client said inside the room. The answer is to make a forthright attempt to provide adequate representation and solve the other problems directly headon by addressing them for what they are.

There are a number of points contained in this legislation which, as my statement indicates, I do not think strike the appropriate balance between the needs for effective grand jury investigation and the needs of the individual defendant and/or witness for protection. I won't go into them at any length because I have stated my position clearly I think in my statement but I would, if the committee has any questions, be glad to respond to them.

Mr. EILBERG. Just one or two questions from me at this point. Do you agree that a witness should be advised of his rights? Specifically what does your office do now in this regard?

Mr. RUFF. Congressman Eilberg, I do agree that the witness should be advised of his rights, including, of course, the right to his privilege against self-incrimination. The Watergate Special Prosecution Force followed over the course of its existence a very liberal—put the word "liberal" in quotes—policy with regard to warning witnesses of their right to counsel, of their right to privilege against self-incrimination, and on occasion, other privileges which seemed applicable under the circumstances. Not only target witnesses, but in many of our investigations all witnesses are warned.

Frequently what will happen is this. We will meet with a lawyer for a particular witness and say:

We want your client to come in and testify. We are going to advise him in the grand jury room of his rights, but we want to tell you and we want to tell your client right now we do not feel him at the moment to be a subject of this investigation.

We have encountered, I think, no difficulty in giving those warnings. We have produced no more reluctant witnesses, I believe, than we had already, particularly in a situation where the witness is represented by counsel.

I think there is a risk that in a situation where you have the untutored witness, the witness who is unrepresented by counsel, that he may be taken aback. He may say, "my goodness, I have a right not to testify. I think I will assert it." But I question whether that risk is a really substantial one and, even if it is, I question whether or not it's appropriate to deny advice to the untutored witness with respect to the assertion of a constitutional privilege if the fear is that they might assert that privilege.

For that reason, I agree with the proposal in the bill that all witnesses be advised of their right to refuse to testify on the grounds of self-incrimination.

Mr. EILBERG. It is the policy I believe of your office not to call any witness if he has given written notice of his intention to invoke his

privilege against self-incrimination. Do you favor our provision making that mandatory?

Mr. RUFF. I certainly do and I think our position on this score was not something we simply dreamed up out of the blue. It is in fact part of the ABA standards on the prosecution function and one that seems to me entirely appropriate.

I might point out that there are problems in this rule which have not yet been confronted. For example, supposing that a grand juror asked a prosecutor why haven't we heard from "x"? How should the prosecutor respond to that question, if in fact what he's received is a letter saying, "I'm not going to appear because I'm going to assert my fifth amendment privilege"? We haven't really run into that problem but it is one that's lurking out there in the background somewhere and one that hasn't been solved.

Nonetheless, I don't think it's a sufficient problem to justify opposing the rule that you suggest here.

Mr. EILBERG. What is your policy as to the presentation of exculpatory evidence?

Mr. RUFF. Well, I agree here entirely with Judge Lacey. He approaches the problem both from his experience as a prosecutor and his experience as a judge, and I have only half of that experience. But without question, the application of the Brady exculpatory evidence rule is perhaps the most difficult one for the prosecutor to deal with during the investigative and trial process and certainly during the postconviction and review process, and I would find it virtually impossible to make the kinds of judgments that are called for by the provisions of this bill during the investigative process or indeed to defend retrospectively my judgments about whether or not a particular piece of evidence was exculpatory during the trial or in a postconviction review process.

I simply think those protections are indeed appropriate and obviously constitutionally mandated at the stage where we are determining guilt or innocence. At the investigative stage two factors are at work. One, the good faith of the prosecutor—and that's not to be idly dismissed because I think most of my brethren in the Federal prosecution system meet the highest professional standards—and second, the notion that the prosecutor must look forward to the day not in which he's simply achieved the resounding triumph of getting 23 or 12 of the 23 citizens to vote a true bill, but when he has to convince all 12 petit jurors to convict, and if he goes forward suppressing what may be exculpatory material and forges ahead to the point of indictment only to find himself confronted with an unwinnable case, then he's not accomplished anything at all. He has violated not only his professional responsibility but any guidelines for the exercise of the prosecutorial function.

Mr. EILBERG. Thank you, Mr. Ruff.

Mr. Sawyer.

Mr. SAWYER. I have no questions, Mr. Chairman.

Mr. EILBERG. Mr. Hall.

Mr. HALL. You question the 6 months confinement of a grand juror or a witness before a grand jury. You indicate that it should remain at the 18-month level. How many times in your experience have you had a situation where the testimony of one person was crucial to the return of an indictment?

Mr. RUFF. I have run into innumerable cases in which the testimony of one individual was crucial to the making of the case and have been unable to get that testimony, simply because we couldn't find the evidence to indicate that the testimony that he did give was perjurious, we couldn't make a legitimate decision to immunize the particular witnss in order to overcome the assertion of privilege, and we wouldn't overcome the assertion of attorney-client privilege or other applicable privileges. In only one situation have I been confronted—and my experience is not necessarily typical—with a witness who when immunized refused to testify and on whose testimony the making or breaking of the case rested.

On that occasion the witness was held in contempt, jailed, and after 3 or 4 months decided that he preferred cooperation to the not very prepossessing confines of the jail in which he was incarcerated. He decided to testify, and the case was made.

My objection to the 6-month limitation is this—and it goes back to the point I made at the very beginning. There should be a presumption in favor of a witness' obligation to testify and not against.

Mr. HALL. Why? Why do you make that statement?

Mr. RUFF. Because every citizen it seems to me—and I think this is historically founded as well as constitutionally founded—has the obligation to cooperate with legitimate demands of his government and one of those legitimate demands is that he come forward with evidence of a crime if he has that evidence in his possession.

If, in fact, you accept that presumption, and I begin there, it seems to me that, yes, we should surround that witness with whatever appropriate protections may be required and perhaps one of those protections should be a prohibition against repeated confinement if he has in fact elected to refuse to testify after an immunity order. But I think we ought to attempt to strike a balance between the level at which it's, if not easy at least acceptable, for him to elect not to cooperate and that level in which it becomes a truly burdensome and excessive punishment. It seems to me that the 6-month period doesn't strike that balance; that if in fact the witness elects to refuse to testify, 6 months, although it's impossible to predict what the impact of that kind of sentence is, is simply too short. If you're going to give him permanent freedom from that obligation to testify, I submit that the 18-month maximum is an appropriate balance to strike.

Mr. HALL. I think you were here when Judge Lacey testified about the instructions, the mandatory instructions that should be given. Do you think that if those instructions were given, that a trial judge who was in charge of his court and understood the workings of that court, could solve some of the problems that this legislation is trying to solve without going through the procedure of an act of Congress.

Mr. RUFF. I do indeed, and I concur wholeheartedly on what Judge Lacey had to say on that point. It seems to me that two forces can act effectively without the need for congressional intervention: as he suggested, the Attorney General, by the formulation of strict, clear guidelines, and, perhaps one step that Judge Lacey did not specifically mention, although it was implicit in what he said, the intensive education of those who carry the responsibility of being Federal prosecutors; and, second, the active involvement of the courts in seeing to it that those guidelines are adhered to.

As he indicated, there are certain points here that I do think are important and are addressed by this legislation: One, counsel in grand jury room and, two, the proposed new offense of leaking of grand jury information. Both are very important for this Congress to take action on. But, by and large, as I indicate in my statement, much of what needs to be accomplished can be accomplished by the actions of the Department of Justice, and I think one function that this set of hearings performs, perhaps, or should perform, is to bring to the forceable attention of the Department of Justice the need for just that kind of activity.

Mr. HALL. Thank you. That's all I have.

Mr. EILBERG. Mr. Evans.

Mr. EVANS. Mr. Ruff, you seem to indicate that there is a duty on the part of the citizenry to come forward with information on any crime if they have any special knowledge, that it's their duty to give that. It's my understanding of the system that we have that the powers of the Government are given by the consent of the governed and, further, that these certain rights were kept for the people and only certain restricted rights were given to the Government.

One of the rights, of course, that were kept for the people was the right against self-incrimination under the fifth amendment. Another was the right to indictment by a grand jury which would seem to me to indicate that the grand jury system is set up for the protection of the people rather than for the investigation of white collar or any other crime that you referred to.

Is your concept consistent with these principles that I have just espoused?

Mr. RUFF. I believe it is entirely consistent, Congressman. Indeed, the provision of the fifth amendment, that no shall be charged with an infamous crime except by indictment of a grand jury, is intended to serve as a protection for the individual who is subjected to the rigors of the criminal justice system, but I think if you go behind that bare wording of the fifth amendment you will find the grand jury historically playing a role which can't be ignored, and that is the protection of the public interest in the prevention of criminal activity.

Clearly, that protection can never override the right of the individual defendant nor the right of the witness who is called to give testimony, but I think the Constitution makes clear the boundaries within which that balancing has to take place, and it has said the privilege against self-incrimination is one, and one of a very few ways, that an individul can refuse to give testimony under oath. I think we ought not to expand those protections which are inherent in the Constitution to provide other exits from the obligation to cooperate with the Government.

Mr. EVANS. Let me get you to address, if you will, Mr. Ruff, one other part of that, and that is the granting of use immunity which is a fairly recent development and this is specifically the area that I was concerned about.

I certainly agree with the other statement that you made, but it seems to me we have restricted this constitutional guarantee by this particular granting of use immunity and making witnesses testify—we have restricted this fifth amendment right.

Mr. RUFF. Well, of course, the easy answer to that would be that the Supreme Court of the United States has said it's constitutional, but that's not the answer because the Congress certainly has the right to say:

I don't care what the minimum constitutional requirements are, we, as a matter of social policy are going to expand them or treat them differently in a way that is consistent with the Constitution but also consistent wih other concerns that we have.

I would suggest this: the debate between transactional and use immunity is a debate I think without substance. Congressman Eilberg, I think, asked Judge Lacey about the burden that falls on the individual who has been granted use immunity to establish that in fact he's not being prosecuted with the use of the testimony he's giving. I think if you took a survey—and I've not taken a complete one—you would find that the Government is faced with an almost insuperable burden of establishing that it may prosecute an individual without having used testimony that he gave, and, indeed, I think you will find an almost universally adhered to policy in the Department of Justice not to prosecure people who have been given use immunity. The transactional immunity that was afforded under the old law and that would be afforded under this proposed provision of H.R. 94, is then in my view not a measurable step forward in affording protections to the defendant, and, indeed, I point out in my statement that, in fact, it offers less protection in one aspect because it means that if you brought somebody in in the middle of a narcotics investigation, for example, and gave him transactional immunity and he testified that he had been engaged in narcotics activity and some time thereafter he was brought to trial on a totally different transaction, that testimony would be usable to impeach him at trial. Thus, transactional immunity would provide less protection rather than more in comparison with the present law.

Mr. EVANS. Well, actually, immunity itself is a fairly recent development in our jurisprudence system.

Mr. RUFF. Something approaching 100 years approximately, and I think another point to be made here and one that is perhaps overlooked in much of this debate over the question of immunity, much of what happens in the immunization process happens totally outside the courtroom, totally outside the boundaries of this proposed legislation. Immunization is a decision that's made all the time by a prosecutor—the decision not to proceed against one individual or to proceed against another.

We meet with a witness in his office and say, "Don't worry about a thing. Cooperate with me. Nothing you say will be used against you." That kind of thing goes on all the time and will be enforced by the courts. So that this debate over transactional versus use immunity really deals with the very tip of a rather large iceberg and I think is really not as serious a problem as some of the critics of the grand jury process would have the committee believe.

Mr. EVANS. Thank you.

Mr. EILBERG. Mr. Sawyer.

Mr. SAWYER. The observation you just made I think is something that is overlooked, that even without the use of a grand jury very often prosecutorial immunity is granted. I have done it many times myself.

If you're willing to testify on this thing we will not prosecute the case against you or we will not prosecute you on it and it has backup sanction that the judges will enforce it and, second, if you deviate from it you're not going to get the essential testimony from that witness.

Mr. RUFF. That's right.

Mr. SAWYER. So I think a lot of this is attributed to a grand jury where under our State practice we normally didn't use grand juries, we used information and preliminary exams in trials. So it was entirely a matter handled by the prosecutors and it functions the same way and it's almost essential to the operation of the system really.

Mr. RUFF. I agree entirely, Congressman, and that bears directly I think on the question of who should be making that decision, and it's partly for that reason that I indicated in my statement that I oppose the attempt to prepose the discretion of the immunity in the judicial rather than the executive branch.

Mr. SAWYER. I think always—and perhaps you would agree—we tend too much to think of the witnesses as "Mr. Nice Guys." Very often you get this tremendous reluctance to testify even when they are not involved themselves. They are in league with their own community or group and would feel much like a Frenchman in Nazi occupied France testifying against his neighbor to a Nazi court about the fact that he did some stealing. You have a tremendous problem there as a prosecutor.

Mr. RUFF. I'm not sure I'll buy your analogy, but yes, the underlying concern is present, yes.

Mr. SAWYER. Thank you. That's all.

Mr. EILBERG. Mr. Ruff, we are indeed indebted to you for coming to testify today. We have some questions we'd like to mail you if we may.

Mr. RUFF. Absolutely. I would be glad to respond to any questions you may have to submit and, once again, let me say I appreciate the opportunity to address this problem which is of concern not only to prosecutors but to academics, both of which I try to be.

Mr. EILBERG. Thank you very much.

Our next witness is Mr. Edwin L. Miller, district attorney, San Diego, Calif., representing the National District Attorneys Association.

Mr. Miller, we welcome you here this morning and once again you may read your statement, summarize it, and proceed in any way you see fit.

TESTIMONY OF EDWIN L. MILLER, DISTRICT ATTORNEY, SAN DIEGO, CALIF., REPRESENTING NATIONAL DISTRICT ATTORNEYS ASSOCIATION

Mr. MILLER. I have submitted the statement and would request that that be incorporated in the record and then I will address a couple of subjects which are of very serious concern to me in this legislation.

Mr. EILBERG. Without objection, the statement will be made part of the record.

[The prepared statement of Mr. Miller follows:]

STATEMENT OF EDWIN L. MILLER, JR., DISTRICT ATTORNEY, COUNTY OF SAN DIEGO, CALIF.

Members of the committee: I am honored to have the opportunity to discuss with you the ramifications of H.R. 94.

I am a former United States Attorney, the first person to be appointed to that position in the Southern District of California. Currently, I am the District Attorney for San Diego County, an officer in the California District Attorneys Association and the National District Attorneys Association, Chairman of the Metropolitan District Attorneys Committee and a member of the American Bar Association's Committee on the Defense Function. I would hope to give you a view of H.R. 94 which you might not otherwise receive.

The grand jury is one of the oldest institutions of Anglo-American civilization, with a history of more than nine hundred years, from origins in the common law to today.

Indeed, the practice of summoning a body of citizens to investigate crime and to bring formal charges against an accused preceded the development of trial by jury.

The Fifth Amendment to the United States Constitution carried the concept of the Grand Jury into our criminal justice system by requiring that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . ."

The federal grand jury as part of our system has the responsibility to investigate criminal activity and to accuse those suspected of crimes.

H.R. 94 radically modifies historical concepts and actual operation of the federal criminal justice system. Some of the individual proposals in the Bill do have merit. In reality, however, they are either already incorporated in federal statutory or decisional law or are generally observed by federal prosecutors. These are the measures which limit grand jury investigations to criminal conduct, assure grand jury secrecy and require that grand jury subpoenaes are returnable only when the grand jury is sitting.

Other provisions, however, will materially affect the government's ability to seek out and prosecute crime. The grand jury, as the accusatory and investigatory mechanism of the criminal justice system, stands at the initiation and not the conclusion of the criminal process.

The position of a witness summoned to appear before the grand jury is not that of an accused, one whom society has determined should be called to account for his actions, but rather is that of one who has been called upon to fulfill a duty of citizenship by providing information to assist the grand jury in performing its function. He is not being proceeded against and probably will not be. However, if he becomes the accused—as opposed to one whose aid is being sought to uncover the facts—he will be accorded his full panoply of rights in the adversary stage of the system.

But because the grand jury inquiry is not itself an adversary proceeding, the procedural and evidentiary rules designed to bring about a fair verdict at trial are largely unnecessary and irrelevant to the proper discharge of the grand jury's responsibilities. Restrictions on litigation of issues involving the conduct of grand jury proceedings are designed to avoid precipitating the adjudication of issues properly reserved for trial on the merits.

In large measure the latitude accorded the grand jury in performing its function is predicated on a policy of discouraging the "litigation of issues only tangentially related to the grand jury's primary objective." *United States* v. *Calandra*, 414 U.S. 338, 343–44; 38 L.Ed.2d 561; 94 S.Ct. 613 (1974).

For, as the Supreme Court has stated, to "saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionizio*, 410 U.S. 1 (1973) at page 17.

My first major concern with this Bill is the language in Section 3329(4)(c) which, I believe, will result in each and every indictment handed down by a grand jury being later challenged by lengthy and costly legal motions. The language of that Section is:

"The attorney for the Government and the special attorney shall periodically advise the grand jury of the nature and existence of evidence, *as yet not received*, which might tend to materially affect the credibility of any witness or tend to negate the guilt of any prospective defendant." (Emphasis added.)

That provision—although admirable on its face—will, if the California experience is to be believed, result in a new focus on federal criminal prosecution: no longer will the courts be concerned with the guilt or innocence of the defendant; they will be trying the legal abilities of United States Attorneys.

Motions will be heard to determine if the U.S. Attorney has been responsible in his efforts to seek out favorable defense material and damaging evidence against the credibility of prosecution witnesses.

The idea of prosecutors having a duty to seek out and present exculpatory evidence to grand juries was first contained in a 1975 California Supreme Court case, *Johnson* v. *Superior Court*, 15 Cal. 3d 248, 124 Cal. Rptr. 32, 539 P.2d 792.

In writing the opinion for the majority of the court, Justice William P. Clark, Jr. stated:

"When a district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obligated . . . to inform the grand jury of its nature and existence . . . (*Johnson*, *supra* at 255.)

In practice, however, the meaning of the words used by the Justice has been lost. Trial courts are beseiged by defense attorneys bringing so-called "Johnson motions" alleging the prosecution failed to seek out and find any item which would tend to mitigate the evidence against a defendant. The result has been the calling to the witness stand and cross-examination of prosecutors who presented the case to the grand jury. The prosecutors are put on trial to determine if they did—even without realizing it—have evidence or the ability to find evidence which a court, in hindsight, could interpret as favorable to the defendant. If such evidence did exist, then the indictment is not valid and the prosecution and costs start again.

It would seem clear from an insurance carrier's point of view that the failure of a defense attorney to attack an indictment under this provision would border on malpractice. This provision also would require the attorney to go behind the indictment and have full discovery of everything which transpired, not only in the grand jury room, but in the offices of the prosecutor and the law enforcement investigators. How else would the defense know the substance of the evidence available to the prosecutor and whether that evidence was presented to the grand jury?

The attorney, of course, would have an appeal from an adverse ruling by the District Court and the delays caused to the grand jury function become real, not imaginary.

Because of the harassment of prosecutors in California which the *Johnson* case allows and the numerous avenues which must be checked and rechecked by the prosecution before a grand jury presentation can be made, most California prosecutors are refusing to take cases to the grand jury. They, instead, present evidence at a preliminary hearing. In California we have that choice—either to present evidence to a grand jury or before a magistrate at a preliminary hearing. Federal prosecutors, however, do not have a choice; the United States Constitution mandates that they proceed by Grand Jury indictment.

But even the California Court did not heap upon the prosecution the added burden of investigating the background of all witnesses to determine their credibility.

Take now the problems created by the affirmative duty to seek out evidence favorable to the defendant, add the "Johnson motion" harassment of prosecutors and multiply that circumstance by one hundred fold and you might have some concept of the chaos which will be created by Section 3329(4)(c).

The second concept contained in this Bill which is taken from the *Johnson* case is the idea of post-indictment preliminary hearing.

The germ of this procedure is contained in a concurring opinion written by Justice Stanley Mosk.

In that opinion Justice Mosk somewhat cavalierly dismisses the key argument against a post-indictment preliminary hearing as being superfluous.

The primary purpose of a presentation to a grand jury or a hearing before a magistrate is to determine whether there is probable cause to believe a crime has been committed and whether there is probable cause to believe the person charged by the prosecutor committed the crime.

There is no reasonable doubt standard at either type of hearing as the question of guilt or innocence is not before the court. Jeopardy does not attach.

Therefore, the Constitutional idea of the existence of probable cause is completed when an indictment is returned.

I do not believe it is contained in this Bill, and I do not believe it is the purpose of Congress to give to the preliminary hearing magistrate the power to overturn an indictment by the grand jury.

So, the real purpose—in fact, the only purpose under the Bill—is to create a post-indictment discovery hearing to give the defense attorney the ability to cross-examine prosecution witnesses.

Recognizing the true purpose of the Section and, if that is—in fact—the Congress' desire, then I would recommend a modification of Rule 16 of the Federal Rules of Criminal Procedure, the discovery rule.

If, however, it is the Committee's belief that every defendant in a criminal case should be entitled to a determination of probable cause by a magistrate, then I recommend a Constitutional amendment be sought. If, on the other hand, it is the Committee's belief that the integrity of the grand jury should be maintained, then it is my position that the two provisions taken from California's *Johnson* case effectively frustrate the indictment function of the grand jury and should not become law.

The second function of the grand jury is the responsibility to investigate criminal activity.

Other proposals contained in H.R. 94 will be detrimental or completely eliminate the grand jury's ability to investigate and uncover political corruption, massive white-collar or consumer-oriented fraud and organized criminal conduct.

The proposals which will cause the greatest hindrance are:

Authorizing grand jury witnesses to be accompanied by counsel in the grand jury room; and

Shifting the burden to the prosecution to prove grand jury subpoenas are reasonable and not oppressive.

Both proposals will create new grounds for dismissal of criminal charges and grounds for legal motions and hearings which do not now exist in the federal system and will create intolerable delays in the administration of justice.

Additionally, these provisions are in direct conflict with the Constitutional purpose of the grand jury:

A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an ex parte investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person. *United States* v. *Calandra, supra*, at p. 343–44.

Even though H.R. 94 says the role of counsel in the grand jury room will be similar to that of an attorney for a witness before a Congressional Committee, such a limitation cannot be enforced.

Lawyers—without a Judge or a Congressional Committee Chairman to keep order—will not remain silent. Their objection to questions, challenges to relevancy, arguments over claims of privilege and other legal issues will inevitably disrupt and unreasonably draw out a grand jury investigation.

Since judges will not be present to rule on each objection by an attorney, the only solution will be to interrupt the grand jury for repeated trips to the courtroom.

But more important is what I believe will be the final ramification to this legislative door-opening: The Sixth Amendment to the Constitution requires counsel. The courts have toyed and struggled through the decades to decide in which legal proceedings that a person be capable of having that constitutional guarantee of counsel. If the Legislature decides a grand jury proceeding is such a hearing, the courts would have to find that any limitation—such as that written in H.R. 94—on the effective representation of those clients would be unconstitutional. The constitutional right to counsel is a right to have not just an attorney standing there but a capable, competent lawyer actively and adequately representing his client. *Anders* v. *California*, 386 U.S. 728, 18 L.Ed.2d 493, 87 S.Ct. 1396; reh.den. 388 U.S. 924, 18 L.Ed.2d 1377, 87 S.Ct. 2094 (1967).

This also raises the question of the purpose of the grand jury. Isn't it to seek truth? Surely it is clear that when a witness is being advised how to answer questions by his counsel the testimony tends to become more that of the lawyer than the witness.

And, since the defense attorney must effectively advise his client how to answer questions from the prosecutor, this provision raises the question of pre-testimony discovery of the prosecutor's files. An attorney would be effectively blocked from competently advising his client during testimony without being able to review relevant information which is in the prosecutor's possession.

Also, counsel cannot be restricted exclusively to those who can afford to hire an attorney. Therefore, with the adoption of this provision, the Committee must also set up the administrative mechanism to offer, supply and pay counsel to all persons subpoenaed before a grand jury.

The provision does not face the problem of multiple representation. In other words, how do you prevent cover-ups when the attorney representing the "small fry" is being paid and controlled by the president of the corporation, the President of the United States or the Chieftain of organized crime?

How do you deal with investigation in these types of criminal activities when the grand jury runs into "house counsel"? With house counsel present in the grand jury—a presence that as a practical matter cannot be avoided—an employee, officer or organized crime lieutenant will not be in a position to cooperate with the grand jury and maintain the secrecy of his cooperation. As society demands vigorous investigations of official corruption, white collar and organized crime conspiracies, the ability of prosecutors to penetrate these conspiracies will be circumscribed by the omnipresent counsel. By knowing all that transpires in the grand jury, it will be easier for defenses and responses to criminal investigations to be orchestrated and the investigations obstructed.

Currently a witness in the grand jury, if confused about a particular question or uncertain how to respond to it, can request permission to be excused for an opportunity to consult with counsel. This counsel remains outside the grand jury room. The permission to consult with counsel, if not abused, is routinely granted. In addition, a counsel can, of course, debrief his client after he testifies. This being so, it might be argued that the proposal to have counsel in the grand jury is hardly a significant change.

The change, however, is dramatic.

Most important, the mere presence of "house counsel" inside the grand jury will necessarily deter any one of those he represents from cooperating with the investigation since cooperation inside the grand jury will immediately become known. Moreover, because of the tremendous advantages gained by having an "ear" in the grand jury and thereby knowing precisely what was asked and what was answered, the pressures for multiple representation by a "house counsel" will increase significantly. As it is, under existing practice, multiple representation of possible subjects of an investigation as well as witnesses poses a major, if not the chief, obstacle to effective fraud and corruption investigations.

The information these counsel can obtain now by consulting with their clients outside the grand jury during their testimony or debriefing them after they testify permits orchestration of responses to investigations. To allow counsel inside the grand jury room as this proposal would do, will necessarily increase the prospects of orchestration.

These objectionable proposals will, as the Supreme Court has stated, "saddle a grand jury with minitrials and preliminary showings" and thereby "assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionizio, supra.*

But it is not just political corruption, white-collar and organized crime investigations which will suffer if these provisions become law.

Alan Y. Cole, Chairman of the Criminal Justice Section of the American Bar Association analyzed other types of cases in a speech given in Houston on June 24, 1976. He said:

In the fall of 1975, the contract between the Washington Post and its pressmen's union came to an end. The union went on strike at 5:30 a.m., on October 1. At that time, 100 pressmen were working the early morning shift. After they left the job, all nine of Post's presses were found to be seriously damaged. Five days later, a Federal grand jury began an investigation. Twenty-one of the 100 pressmen were subpoenaed to testify.

The union's general counsel, using union funds, retained an experienced defense lawyer to represent the subpoenaed members of the union before the grand jury. This attorney recognized the potential for conflict generated by his multiple representation. He could not interview each pressman—for if he were to learn something from one detrimental to another, he could not disclose that information without breaching his confidential relationship with the first and thus would not be able to fully counsel the second. To solve the problem, he studiously avoided individual consultation with any of his clients. Instead, he gave all of them—collectively—what he described as a lecture. He told them of their privilege against self-incrimination, their obligation to testify if granted immunity, and their possible waiver of constitutional rights. He neither sought

to ascertain the extent to which each of his clients participated in or observed any criminal activity, nor did he make any effort to negotiate with the Government for immunity in exchange for the testimony of any his clients. In due course, two of the twenty witnesses told the grand jury they had seen nothing and the other nineteen invoked the Fifth Amendment. The grand jury investigation came to an abrupt end.

The prosecutors did not contest the pressmen's assertion of their Fifth Amendment privilege, nor did they offer immunity to any of them. Instead, they moved to disqualify the attorney. They argued that the pressmen were making legally unwarranted assertions of the Fifth Amendment, that they could not receive the effective assistance of counsel, and that the efforts of the grand jury to ascertain the truth had been obstructed.

The District Court held that the witnesses' rights freely to choose and associate and to retain counsel are not absolute, that the public has an interest in thorough investigation by the grand jury, and that the witnesses' rights must yield to preserve the effective functioning of the criminal justice system.[1] The judge ordered the attorney to cease representing the pressmen. And although not a single pressman was before him, the judge ordered each of the pressmen who wished to be represented by counsel to retain separate counsel.

The United States Court of Appeals vacated the District Court's order. It held the evidence insufficient to establish that each witness regarded the attorney as his personal legal representative or that absent unified representation, each witness would retain personal counsel and cooperate more fully with the Government.[2] The Court advised the Government to seek judicial hearings to determine the applicability of the Fifth Amendment to particular questions asked before the grand jury and to confer immunity upon some of the witnesses. "Until accommodation . . . (through these procedures) has been demonstrated to be not feasible or contrary to the public interest", the Court of Appeals held, "it is surely premature to seek it through disqualification of counsel whose advice to his clients the Government does not like."[3]

Following the Court of Appeals' decision, the grand jury investigation resumed. Some of the pressmen testified before the grand jury.[4] Fifteen pressmen were indicted and variously charged with inciting to riot, destruction of property, grand larceny, and assault.[5] Others have been permitted to plead to misdemeanor charges in return for their testimony.[6]

This affair is hardly one which reflects glory upon the criminal justice system. The defense attorney spent more time defending himself than his clients, the courts produced decisions which were less than satisfactory and the profession was badly damaged in the public eye.[7]

Another high profile confrontation with respect to multiple representation occurred recently in the investigation into the disappearance of Jimmy Hoffa. A father and son team of lawyers who had been representing several targets in the grand jury investigation appeared also as attorneys for four persons subpoenaed to testify as witnesses. Two of these witnesses, moreover, had been granted immunity. The prosecutors moved to disqualify the attorneys from representing the witnesses, and the District Court granted this motion.[8] The Court held that the conflict of loyalty arising when counsel learned of one witness' testimony which might incriminate another witness represented by the same

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[1] In re Investigation Before April 1975 Grand Jury, 403 F. Supp. 1176, 1180–82 (D.D.C. 1975), vacated, 531 F. 2d 600 (D.C. Cir. 1976) (per curiam).

[2] In re Investigation Before April 1975 Grand Jury, 531 F. 2d 600, 607–08 (D.C. Cir. 1976) (per curiam).

[3] Id. at 600. The Third Circuit, like the District of Columbia Circuit, has also held disqualification of an attorney to be inappropriate in similar circumstances. In re Grand Jury Empaneled Jan. 21, 1975, 536 F. 2d 1009 (3d Cir. 1976). In that case, one attorney was permitted to represent nine officers and employees of the National Maritime Union where the attorney affirmed he would withdraw as counsel to any witness offered immunity or a plea by the Government. Id. at 1012–13.

[4] See Eight Pressmen to Testify on Violence at the Post, Washington Post, Feb. 26, 1976; Ex-Pressman Testified Two Hours on Violence, id., June 3, 1976.

[5] See Eight Pressmen Are Indicted, id., July 22, 1976; Seven Pressmen Are Indicted for Rioting, Damage at Post, id., July 15, 1976.

[6] See Two Post Pressmen Plead Guilty, Will Testify in Damage Probe, id., June 2, 1976.

[7] Despite the damages to its presses, the Washington Post continued to publish and report on the court proceedings concerning the pressmen's legal representation. See Lone Lawyer Ruled Out for Pressmen, id., Nov. 14, 1975; Rule Delays Probe of Pressmen, id., Nov. 19, 1975; Court Reverses Lawyer Ruling, id., Feb. 4, 1976.

[8] In re Grand Jury Proceedings, — F. Supp. — (E.D. Mich., July 9, 1976) (No. 75-1421), appeal docketed (6th Cir.).

counsel was sufficient to support disqualification.[9] The Court was not persuaded by the fact that each of the witnesses had submitted an affidavit affirming his knowledge and acquiescence in any conflict of interest by his attorney; the Court held that the public had a right to an effective functioning grand jury investigation and that this right prevailed over the witness' Sixth Amendment right to select counsel.[10] This decision is presently being appealed.

These are sensational cases, but they are hardly unique. For example, in the case of *In re Gopman*,[11] the Fifth Circuit upheld the disqualification of an attorney who sought to act simultaneously on behalf of a union and three of its officials in a grand jury investigation into the whereabouts of certain union records. The union's interest was in full disclosure of the records, while the witnesses' interest was in refusing to incriminate themselves. The irreconcilable conflict is manifest.

In *Pirillo* v. *Takiff*,[12] two attorneys representing twelve policemen subpoenaed by a grand jury were disqualified. The attorneys, who were paid by the policemen's union, testified that they would not on their own raise the subject of cooperation in exchange for immunity and also stated they would withdraw as counsel for any witness who indicated that he would consider cooperation. The Pennsylvania Supreme Court upheld the disqualification order, not because multiple representation violated the witnesses' Sixth Amendment rights,[13] but rather because it considered that the public interest in the grand jury's investigatory power, its secrecy, and in the prevention of conflicts of interests outweighed the witnesses' rights to associate and freely choose legal representation.[14]

The problem of multiple representation has even found its way into administrative proceedings. In *SEC* v. *Csapo*,[15] the Securities and Exchange Commission refused to permit two lawyers to appear with a witness during an SEC investigation. These lawyers had represented eight other witnesses in that same investigation, and some of those witnesses had been pressured to accept the services of these attorneys with a promise that "council fees would be taken care of." However, because the record was deemed not to be adequate, the Commission's order was reversed in the District of Columbia courts.[16]

This is a dismal scene. The attorney conduct involved in these cases is hardly of a nature that enhances the image of the profession. It does not reflect respect for the principles underlying the canons of ethics.[17] It suggests that self-regulation by the profession is essentially non-existent. The judicial response is likewise unsatisfactory to a society which is already disenchanted with its lawyers and its courts.

It is especially disturbing that in each of these cases the prosecution instigated the challenge to the defense lawyer's conduct. Indeed, it may be that the action taken in these cases may be pursuant to a recently embraced prosecutorial policy.[18] This is a bad business and will certainly encourage those who have urged federal legislation authorizing the Federal Bureau of Investigation to investigate, and United States Attorneys to enforce, disciplinary proceedings against defense lawyers in the federal courts.[19] It is also disturbing that in a good number of these cases there was either an actual or an anticipated assertion of Fifth Amendment rights.

The following observation, contained in a Memorandum recently prepared and submitted by the Department of Justice to the House Judiciary Committee, is of interest:

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[9] Id. at 5.
[10] Id. at 7.
[11] 531 F. 2d 262, 266 (5th Cir. 1976).
[12] 341 A.2d 896 (Pa. 1975), appeal dismissed and cert. denied, 423 U.S. 1083 (1976).
[13] See id. at 903.
[14] See id. at 905.
[15] 533 F. 2d 7, 9 (D.C. Cir. 1976).
[16] See id. at 11–12.
[17] Under Canon 8 of the Code of Professional Responsibility, lawyers are expected to "assist in improving the legal system," and Canon 1 asserts that all lawyers have a responsibility to maintain the integrity of the legal profession.
[18] It is only in the last two years that prosecutors—state and federal—have begun actively to challenge in court lawyers representing multiple clients with conflicting interests by seeking to disqualify the attorneys.
Address by Earl J. Silbert, United States Attorney for the District of Columbia, to the Federal Bar Association, Sept. 15, 1976.
[19] See S. 2723, 94th Cong., 1st sess. (1975); H.R. 6044, 94th Cong., 1st sess. (1975). Both bills were opposed by the American Bar Association. See ABA, Summary of Action of the House of Delegates 17 (February 1976); id. at 25 (August 1975).

Not infrequently, particularly in investigations of organized crime and of business frauds and other whitecollar offenses, one attorney represents several potential witnesses. At times, counsel is retained—by the very business, union, or other organization, the activities of which are under the investigation—to represent all persons connected with an organization. In such situations, the individual witness may possess relevant information and may be willing to cooperate with the investigation. Understandably, however, he may desire that his cooperation not become known to his employer, fellow union members, or others whom he knows the attorney has been associated. Even at present, the multiple representation of witnesses by a single attorney has occasioned problems in conducting complex investigations.[20]

Reliance upon the right to select counsel is not a very persuasive factor in this context. There are more than enough good defense lawyers to go around. Though multiple representation does permit some saving in fees, it does not appear that this factor is the principal motivation in the many cases in which this conduct occurs.

A more realistic analysis of these situations suggests that multiple representation is more often prompted by the desire to keep certain persons in "friendly" hands. What better way can there be for an attorney to learn what a witness or co-defendant will say or do than by representing such a person? Indeed, by representing him, an attorney not only will *know* what he will say or do; he will even be able to guide him. Such a witness will remain "friendly" because his attorney will keep him that way."

This detriment, this blockade of justice by those who can afford it is real and concrete. Therefore, I strongly urge you to eliminate this provision from the Bill.

My second concern when it comes to the investigative function of the grand jury is the numerous attacks which will be brought against grand jury subpoenaes. In fact, if the wording of Section 3300b is adopted into law, a lawyer once again would be guilty of malpractice if he does not bring a motion challenging the subpoena.

Present law requires the person challenging a subpoena to establish the unreasonableness or oppressiveness of the subpoena. See Rule 17(c), Federal Rules of Criminal Procedure; *In re Loprato*, 511 F.2d 1150 (1st Cir. 1975); *Universal Manufacturing Co.* v. *U.S.*, 508 F.2d 684 (8th Cir. 1975); *In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 991, 994–95 (D.C., R.I. 1975); *In re Morgan*, 377 F. Supp. 281 (Southern District, N.Y. 1974).

Under this Section, however, the mere filing of a motion to quash shifts burden to the prosecutor and requires a demonstration that:

(A) a primary purpose or effect requiring such person to so testify or to produce such objects to the grand jury is not or will not be to secure for trial testimony or to secure other information regarding the activities of any person who is already under indictment by the United States, a State, or any subdivision thereof for such activities; or of any person who is under formal accusation is by some form other than indictment;

(B) the witness has been advised of his rights, as specified in subsection (b);

(C) the evidence sought is relevant to the grand jury investigation properly conducted within the grand jury's jurisdiction;

(D) compliance with the subpena would not be unreasonable or oppressive, as such subpena would not require unnecessary appearances by the witness, would not lead to testimony or other information that is cumulative, unnecessary or privileged, would not be primarily for punitive purposes or would not involve other like circumstances; and

(E) such other information as the court deems advisable.

Three of those requirements—the ones which require the prosecutor to demonstrate the evidence sought is: relevant to the investigation, properly within the grand jury's investigation and not sought primarily for another purpose—are apparently taken from an opinion by the United States Court of Appeals for the third Circuit in *In re Grand Jury Procedures* (Schofield I) 486 F.2d 85, 93 (1973).

However, these standards have not been accepted in other federal jurisdictions and place a near-impossible burden on prosecutors.

The fact of the matter is that relevance is particularly difficult to demonstrate at the early stages of a grand jury investigation.

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[20] Memorandum on the Grand Jury, Office of Policy and Planning, United States Department of Justice, June 5, 1976 (submitted to the House Judiciary Committee, Subcommittee on Immigration, Citizenship, and International Law), pp. 55–56.

Some exploration or fishing necessarily is inherent and entitled to exist in all documentary productions sought by a grand jury." *United States* v. *Schwimmer*, 232 F.2d 855, 862–863 (8th Cir.), cert. den., 352 U.S. 832 (1956). As the Supreme Court explained in *Blair* v. *United States*, 250 U.S. 273, 282 (1919):

It (the grand jury) is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.

The standards unjustifiably require prosecutors to do that which the Supreme Court in *Blair* ruled was not required: establish at the beginning of or during a grand jury investigation what can only be determined at its conclusion.

It would cripple the administration of justice to require the grand jury to demand documents with a particularity "which presupposes an accurate knowledge of such papers, which the tribunal describing the papers would probably rarely, if ever, have." (Citation omitted). *In re Grand Jury Subpoena Duces Tecum*, 203 F. Supp. 575, 579 (S.D., N.Y. 1961).

In summary, the federal system—as opposed to a system such as California in which the grand jury is used in only special cases—must use the grand jury for all felony prosecutions. Many measures in the proposed legislation are designed to deal with problems which presently arise only in unique or highly sensitive cases. As such, the restrictive rules, the new motions and the new rights granted to both defendants and witnesses will wreak havoc with literally thousands of federal prosecutions—the so-called routine cases which heretofore have not presented any appreciable problems, either for the government or in the nature of significant claims of violations of substantive rights of individuals.

In the special cases in which witnesses are likely to seek the assistance of counsel or in which the issues of exculpatory evidence is likely to occur, the proposed legislation unnecessarily shifts the balance away from the interests of society—that interest in effectively dealing with corruption of public officials, the depradations of the sophisticated white collar criminal and the ever increasing controls of organized crime.

The federal grand jury presently remains as the only effective tool to deal with conspiratorial crimes, those which often require the government to bring pressure upon lesser figures in order to reach the important individuals who make the conspiracy work. The proposed legislation, as I have indicated, places unnecessary restrictions on the ability of the government to deal with these highly dangerous forms of crime. Restrictions contained in the legislation are, in large part, unnecessary because the federal courts have demonstrated both the willingness and the power to prevent oppression of individuals by the government. And, this includes persons called as witnesses before the grand jury and those persons who are the subject of the grand jury investigation.

There is no demonstrated need to shove prosecutors off the scales of justice at this time in favor of a more restrictive control on the federal grand jury. Frankly, this legislation is not needed and should not be adopted.

Thank you.

Mr. MILLER. As you noted, I'm appearing today as a representative of the National District Attorneys Association and I speak both as the district attorney and as a former U.S. attorney. I have had both experience with State grand juries under the California grand jury system as well as the Federal system, and it is with that experience in mind that I would like to discuss if I may the analogous application of section 3329, subsection 4(c), which in effect creates many of the same problems under Federal legislation—that of exculpatory evidence—which have occurred as a result of the Supreme Court opinion rendered in September of 1975.

I would like to illustrate what has occurred since that Supreme Court opinion in order to point out some of the pitfalls I think that may be facing us in this Federal area.

In September of 1975 a California court ruled that a prosecutor who has possession of exculpatory evidence must bring the evidence to the

attention of the grand jury and on the surface, of course, that requirement does not seem onerous; but let me just discuss if I may the application of that requirement in California.

We have seen, through ingenious efforts of criminal defense attorneys, virtual emasculation of the grand jury system in California as we know it. Those legal maneuverings are referred to in California as the *Johnson* motion which is named after the particular Supreme Court case. Let me describe for you some of the problems that our office encountered as a result of *Johnson* and, again, while it may seem on balance fairness would require that the prosecutor make available those matters which are of an exculpatory nature, the manner in which this subject has been approached by criminal defense attorneys has put such a burden upon our office that we have gradually discontinued the use of the California grand jury. In fact, nearly all criminal matters now go to the alternative preliminary hearing in California, and I might add that is an alternative that is not available to Federal prosecutors.

Let me give you an example of what actually occurred. A criminal defense attorney, knowing that his client is the subject of an investigation, will wait until just prior to the culmination of the investigation and then will contact the prosecutor handling the case and inform him that the defendant believes the prosecutor has within his possession exculpatory evidence. When the prosecutor asks the nature of the evidence, the criminal defense attorney then declines to become more specific. Now in this particular case involving a complex fraud, the prosecutor may have in his possession several thousand documents. The prosecutor is put in the position of literally—if he is to comply with the alleged requirement concerning exculpatory evidence—having to search every single document in order to determine whether within all of those thousands of documents he could find something which could conceivably pertain to matters of an exculpatory nature. This simply is not only impractical, but impossible.

First, there may be no exculpatory evidence existent to substantiate the claim made by the defense attorney and, second, even if the document in question is reviewed, the prosecutor may not have all of the facts available to even make a judgment as to whether that document is in fact exculpatory. This was the subject of the *Johnson* motion, taking several days, but that does not include other *Johnson* motions which included several weeks and in many instances a longer period of time than the trial itself.

Let me give you another example of what occurred under the *Johnson* motion. There's a communication during the course of an investigation in which the defense attorney offers to bring the suspect into the grand jury for purposes of testifying with respect to exculpatory evidence. The problem with that avenue—and this is based upon our own experience—is that the defense attorney then states that his client will testify before the grand jury as to the exculpatory nature of his defense but he will not permit the prosecutor or the grand jury to question him on any matter, including his testimony.

Now all of these approaches to this issue obviously are specious, but in each and every instance they permit the laying of a foundation which ultimately results in protracted motions, motions in which as I mentioned may last for several days and sometimes in excess of a

month. Consequently, at least from a cost and efficiency standpoint, the prosecutor may just as well take that matter to a preliminary hearing which is the alternative in California, because the motion itself from our experience might very well take longer than the period of time to process an actual trial.

Now I mention this because this is our actual experience in California and rest assured that the same tactical approach is going to be used on the Federal side and you're going to see it is even a larger burden to be placed upon the Federal prosecutor because in his instance he doesn't have the State alternative that we do, that is the preliminary hearing.

Now bear in mind that we aren't talking about, in most instances, a situation in which a prosecutor actually has in his possession exculpatory evidence which will explain away the charge. This is not the circumstance. What we have, instead, under this *Johnson* rule, is the possibility of possession, a possibility engendered by the communications and allegations made by a criminal defense attorney pending the outcome of the grand jury presentation. So therefore, in California, to reiterate, the deputy district attorneys in my office and the deputy district attorneys in most jurisdictions in the State, by virtue of this experience, are simply now taking all of their criminal matters to preliminary hearing.

Now to turn to another subject and one which has been discussed both by Judge Lacey and Mr. Ruff, and one which is pending I might add before our own State legislature as well as in H.R. 94, and that is the requirement that a witness be permitted to be accompanied by his attorney in the grand jury room. Mind you, with the *Johnson* motion, we have in effect almost seen the demise of the grand jury system as we have known it in California. I can only say that if this provision is added to the problems encountered through our exculpatory evidence requirement, then the demise of the grand jury system in California as we know it will be complete and the Federal system will remain but with a combination of those two matters it will remain only because it's constitutionally mandated. It's just simply impractical and it's impossible—and my experience I think says something for it—to control the actions of a criminal defense attorney in a grand jury room, and I really don't care what kind of restraints or conditions that you lay down for an attorney who appears; it is going to be impossible to regulate his actions in any way, and I say this because I have been dealing with these matters for a great many years and I believe I appreciate the ingenuity of attorneys who are involved in criminal defense work. I hasten to say that I don't mean their attempts to protect their client are in any way not honorable. I simply mean attorneys are not going to go into a grand jury room and advise their client without attempting in many instances and in many ways to affect the questioning of the particular witness, his demeanor and his attitude.

I foresee that a criminal defense attorney, if a question is asked which in his mind presents a problem, will speak out and object. Consequently, of necessity, a judge will then have to rule on each objection and if the judge believes the particular criminal defense attorney has not adhered to the guidelines as set down in this bill, then he, of course, can remove the attorney; but that doesn't really make any difference. The next attorney could put the grand jury in virtually the same position, causing in effect inordinate delays.

Mr. EILBERG. Mr. Miller, may I interrupt with a question at this point? I would be very interested in having your comment or reaction to an analogy that has been made; namely, counsel representing a witness before a congressional hearing to counsel representing a witness in a grand jury room.

Mr. MILLER. I think there's a big distinction because people at least in the Federal system who are members of the grand jury, are picked at random. They are lay people. In most instances they have had no experience whatsoever with conducting hearings and they are not sophisticated in dealing with attorneys or with disruptions within a grand jury room and I think in their instance they would be placed in a defensive posture and that is not true when people who are experienced or conducting congressional hearings of a judge is conducting a trial.

Mr. EILBERG. But you do have an attorney or assistant district attorney present to participate and perhaps complain to the judge, do you not?

Mr. MILLER. Well, this is exactly what would result. What would result would be a complaint to the judge. The judge would then have to make a ruling and an obstreperous defense attorney could then go back in the grand jury room and continue objecting to questions which——

Mr. EILBERG. And if he does, could not the judge then impose contempt on that particular lawyer?

Mr. MILLER. Well, sure. There are a lot of remedies, but I don't foresee under the federal system, or even under the State system, very much coming out of that. I have seen very few contempt proceedings against attorneys who have in many instances conducted themselves in a much more onerous way than that. So I don't see as a practical matter much coming from the contempt proceeding.

In the Johnson motion that I have discussed with you, as we have seen by way of example under California law, it's being used to illustrate what can happen when some of these matters are incorporated into law.

Now much has been said about the traditional problem of multiple representation. The American Bar Association Committee on Defense Function, on which I have been recently serving, has recently taken a very strict approach to multiple representation of clients. In fact, our committee has recommended that except for very minor circumstances and prehearing situations, multiple representations be prohibited. But that is only a standard of conduct. It doesn't mean that any vehicle in the law currently exists whereby we can foreclose or prohibit multiple representation as applied to witnesses in the grand jury room.

As a result, we are going to see witnesses appearing in the grand jury room with attorneys for the future defendant. We have been working on this matter of multiple representation and I include in my statement comments made by Mr. Cole, and it is an extremely serious problem. I think it goes without saying that neither of the two major objections that I have raised today as to the so-called grand jury reform are really going to have much impact or effect upon subjects who are charged with the traditional or routine crimes. You know, the application of these proposed rules will only have their impact in areas which involve such matters as complex fraud cases, organized crime or public corruption, and you can rest assured, these

rules as applied to those people who are poor, young, or of a minority background will be presented just as they have been in the past. The people who will take advantage of this type of reform will be the sophisticated criminal, the major mobster, and the corrupt public official who will be represented for the most part by experienced, high-priced, sophisticated criminal defense attorneys.

Now, in conclusion, while I concede from a procedural standpoint there are a number of matters which require improvement, including as has been mentioned by the two previous witnesses, the recording of testimony before the grand jury and an improvement of the discovery procedures, I do urge you to retain the Federal grand jury system in essence as it exists today.

Now under the California grand jury system we do record all testimony. We do record all statements made by attorneys and by grand jurors and it seems to me that that is the direction in which many of the protections that you're concerned about can be attained.

Just as a final matter, to alert you to the differences within the various jurisdictions, you not only have investigative grand juries on the Federal side, but you also have the routine presentations of criminal matters to the grand jury and in some jurisdictions—San Diego is one—you have enough crimes committed on the border so you will have upward of 40, 50, and sometimes 60 indictments returned in a single day. So the kind of jurisdictions that cross the federal system should be of some concern to you in the application of any changes in the law.

I also believe, and finally, than whenever you change the law in these areas—again illustrating the Johnson type of motion—you in effect create a brandnew set of pretrial motions. If my understanding is correct with respect to the provisions of the new Federal Speedy Trial Act, if all of these matters are culminated in a series of new motions, postindictment, which will take time and effort and cost in the future, then certainly you're going to run into a problem in the application of the Speedy Trial Act.

Thank you.

Mr. EILBERG. Thank you, Mr. Miller, for a very thoughtful and searching review of the issues involved. That's not to say we agree with you in many respects, but we thank you for the time and trouble you took for your presentation today.

I have a few questions. In a letter addressed to me dated February 14, 1977, Patrick Healy, executive director of the National District Attorneys Association, stated that the NDAA endorsed the grand jury reforms advocated by the ABA. As you know, these reforms track H.R. 94 very closely. How many prosecutors were involved in this decision? Is this still the NDAA position?

[The February 14, 1977, letter follows:]

NATIONAL DISTRICT ATTORNEYS ASSOCIATION,
Chicago, Ill., February 14, 1977.

Congressman JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship, and International Law of the Judiciary Committee, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN EILBERG: Thank you for your letter of January 24 along with a copy of your proposed legislation, H.R. 94.

The Executive Committee of the Association has just endorsed the grand jury reform changes being advocated by the American Bar Association. In those situations where your Bill is in agreement with the ABA's suggested reforms, we

undoubtedly support it and conversely in those situations where your Bill is in opposition, I am sorry but it will be impossible for us to support it. There are many areas where your Bill is silent and we have not had the opportunity to examine it. So, at this time, we are not in a position to take a stand one way or the other.

Yours very truly,

PATRICK F. HEALY,
Executive Director.

Mr. MILLER. I believe this NDAA position is to oppose H.R. 94. In my conversations with Mr. Healy and in our latest board of directors meeting, we took the position, first of all, that we would oppose the proposal to put an attorney with his witness in the grand jury room. Now we didn't cover every single proposal of the ABA but that was the major concern of the members of the District Attorneys Association.

[In May of 1977, the National District Attorney's Association adopted "National Prosecution Standards." The standards on the grand jury follows:]

CHAPTER 14. THE GRAND JURY

The grand jury is a traditional mechanism in the judicial process. It plays a role that is felt to be vital by some, and a waste of time by others in the normal processing of cases. Eastern and southern states regard it with high esteem, yet it is seldom used in western states.

The grand jury has two basic functions: charging and investigation. Investigation is most frequently used in economic crime, public corruption and such other issues that require a broad investigative base. Charging is very similar to what a prosecutor can do without grand jury action. Generally, following the decision of the lower court in the preliminary hearing or probable cause determination, to "bind over" a defendant the formal "charge" is made. This can be accomplished quite simply by the prosecutor filing a document called the "information." However, if a grand jury is used the process is more complex and time consuming, for the decision at the preliminary hearing/probable cause determination only binds over the accused for further consideration by the grand jury. Again, the prosecutor must demonstrate, this time to the grand jury, that there is probable cause. If the grand jury agrees, it issues a document called the "indictment" which constitutes the formal charge. If the grand jury does not find probable cause the case is dismissed. In some jurisdictions both a preliminary hearing/probable cause determination and a grand jury are not necessary; then only one of the methods to charge is used.

A defendant can take part in preliminary hearings/probable cause determinations, but can not in grand juries. Empaneling and servicing a grand jury requires a costly expenditure of facilities, manpower, and budget. The National Advisory Commission found the grand jury basically a waste of time and money, except where notorious cases required a community voice or in politically sensitive issues, and the indictment process not justifying the delay and inconvenience it causes.

This chapter looks at the positive and negative factors of grand juries, both as a charging and investigation function. It recommends that both functions be available to prosecution in all jurisdictions, but it strongly advocates that prosecution have a bypass process (information) available. Utilization is left to prosecutorial discretion; bypassing the grand jury is called for in most cases, with the provision for a probable cause determination. The Standards also address the prosecutor's role in relation to the grand jury, indicating that the grand jury needs to receive legal advice while also remaining independent to adversary arguments of prosecution. Several limitations are called for in prosecution's conduct, which the Task Forces feel will aid in assuring that independence, legal knowledge, and judicial esteem are achieved.

STANDARD 14.1. CONTINUATION

There should be in each jurisdiction a grand jury possessing both indictment and investigatory powers, which may be called into session by the court or the prosecutor.

STANDARD 14.2. CHARGING

A. The prosecutor should have the option to bypass the grand jury as long as there is provision for a probable cause determination.

B. Where charges are reviewed by a grand jury, the requirement for a probable cause determination should be eliminated.

C. When hearsay evidence is presented to a grand jury, the primary source is expected to be available for testimony at trial.

D. The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt or preclude the finding of an indictment.

E. A prosecutor should recommend that the grand jury not indict if he believes the evidence presented does not warrant an indictment under governing law.

F. All testimony before the grand jury should be recorded.

STANDARD 14.3. INVESTIGATIVE

A. The precise scope of grand jury investigatory functions should be determined by each state.

B. Witnesses before grand jury investigating panels should be allowed the assistance of counsel, unless and until immunity is granted. Counsel should not accompany the witness into the grand jury room during the testimony, but should only be available for consultation outside the grand jury room.

C. State law should provide that upon petition from two or more prosecutors, a grand jury be impaneled to investigate matters of a special nature, and to bring charges based upon that investigation based on activities within all the counties joining the petition.

D. Where grand jury reporting is provided for, the reporting function should be governed by the following procedures:

1. The grand jury may submit to the court by which it was impaneled a report:

(*a*) Concerning misconduct, non-feasance or neglect in public office by a public servant as the basis for a recommendation of removal or disciplinary action; or

(*b*) Stating that after investigation of a public servant it finds no misconduct, non-feasance or neglect in office by that individual provided that such public servant has requested the submission of such report; or

(*c*) Proposing recommendation for legislative, executive or administrative action in the public interest based upon stated findings.

2. The court to which such report is submitted shall examine it and the minutes of the grand jury and, except as otherwise provided in subdivision (4) four, shall make an order accepting and filling such report as a public record only if the court is satisfied that it complies with the provisions of subdivision (1) one and that:

(*a*) The report is based upon facts revealed in the course of an investigation and is supported by the preponderance of the credible and legally admissible evidence; and

(*b*) When the report is submitted pursuant to paragraph (a) of subdivision (1) one, that each person named therein was afforded an opportunity to testify before the grand jury prior to the filing of such report, and when the report is submitted pursuant to paragraph (b) or (c) of subdivision (1) one, it is not critical of an identified or indentifiable person.

3. The order accepting a report pursuant to paragraph (a) of subdivision (1) one, and the report itself, must be sealed by the court and may not be filed as a public record, or be subject to subpoena or otherwise be made public until at least thirty-one days after a copy of the order and the report are served upon each public servant named therein, until the affirmance of the order accepting the report, or until reversal of the order sealing the report, or until dismissal of the appeal of the named public servant by the appellate division, whichever occurs later. Such public servant may file with the clerk of the court an answer to such report, not later than twenty days after service of the order and report. Such an answer shall plainly and concisely state the facts and law constituting the defense of the public servant to the charges in said report, and except for those parts of the answer which the court may determine to be scandalously or prejudicially and unnecessarily inserted therein, shall become an appendix to the report. Upon the expiration of the time set forth in this subdivision, the prosecuting attorney shall deliver a true copy of such report, and the appendix if any, for appropriate action, to each public servant or body having removal or disciplinary authority over each public servant named therein. The determination

by the court as to whether a report is in compliance with the requirements of this standard, and should be filed as a public record, or whether it should remain sealed for any reason, including prejudice to an on-going criminal matter, should be subject to appellate review.

4. Upon the submission of a report pursuant to subdivision (1) one, if the court finds that the filing of such report as a public record, may prejudice fair consideration of a pending criminal matter, it must order such report sealed and such report may not be subject to subpoena or public inspection during the pendancy of such criminal matter, except upon order of the court.

5. Whenever the court to which a report is submitted pursuant to paragraph (a) of subdivision (1) one is not satisfied that the report complies with the provisions of subdivision (2) two, it may direct that additional testimony be taken before the same grand jury, or it must make an order sealing such report, and the report may not be filed as a public record, or be subject to subpoena or otherwise be made public.

Task Force V.—Each state should adopt procedures adequate to assure that:

A. The grand jury report is supported by the findings made during an investigation;

B. Each person named in connection with a report under paragraph (c) of subdivision (1) of Section D of this standard was given an opportunity to testify before the grand jury prior to the release of the report.

STANDARD 14.4. PROSECUTOR'S RELATION WITH THE GRAND JURY

A. Where the prosecutor is authorized to act as legal advisor to the grand jury the prosecutor may appropriately explain the law and express his opinion on the legal significance of the evidence but he should give due deference to its status as an independent legal body.

B. The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

COMMENTARY

History

The grand jury was created in England in 1166.[1] It was initially conceived, and served for the first 500 years of its existence, as an instrument for the consolidation of royal power.[2] Only in the 17th Century did it begin to gain the level of independence that transformed the grand jury into a shield against oppression by the state. The grand jury continued to be a feature of the English legal system until the 1960's. Suspended by war-time emergency measures, it was finally abolished by Parliament in 1933.[3]

The concept of the grand jury was part of the common law brought by English settlers to the New World. By the end of the colonial period, the grand jury had come to serve as an indepensable part of colonial government.[4] Essentially the grand jury served as a kind of ongoing town meeting—as sounding board for judical and lay opinion on a variety of governmental activities.[5] During the era of the American Revolution "[Grand Juries] enforced or refused to enforce laws as they saw fit, and stood guard against indiscriminate prosecution by royal officials." [6] The grand jury was retained by each of the original states following independence.

In the years following the U.S. Civil War, there was a strong movement to eliminate the grand jury, and especially its indictment function.[7] Curiously, many of the basic arguments heard then are still germane today—that the grand jury is time-consuming and inefficient and that it offers only a limited protection to individual rights. This abolition movement received a boost in 1884, when the Supreme Court in *Hurtado* v. *California*,[8] ruled that the 14th Amendment, read with the 5th, did not require the use of a grand jury indictment in state prosecu-

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[1] Spain, "The Grand Jury, Past and Present: A Survey," 2 Am. Crim. L.Q. 119 (1964).
[2] Schwartz, "Demythologizing the Historic Role of the Grand Jury," 10 Am. Crim. L. Rev. 701 (1972).
[3] Calkins, "Abolition of the Grand Jury in Illinois," 1966 U. Ill. L. F. 423 (1966).
[4] Younger, The People's Panel: The Grand Jury in the U.S., 1634–1941, 20 (1963).
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] 110 U.S. 516 (1884). The Court stressed a flexible interpretation of the due process clause, and was unable to find that substitution of a prosecutor's information, after certification by a magistrate as to probable cause, was not due process. Justice Harlan dissented, arguing that the requirement for an indictment was a right of every American citizen.

tion of crimes. Rather, the Court held that "due process of law" included any system of prosecution which preserved liberty and justice.[9]

Between the 1850's and 1920's, most states west of the Mississippi abolished the regular grand jury for indictment of crimes, substituting the prosecutor's "information." This reform movement, however, had almost no impact in the South, and made little headway in the East.

The momentum for abolition continued into the '20's and '30's, marked by reports from Raymond Moley,[10] Wayne Morse [11] and National Commission on Law Observance and Enforcement (Wickersham Commission)[12] which urged a shift to prosecution by information. Younger, in his study *The People's Panel*, reports, however, that about the same time the grand jury regained public esteem by spectacular probes of governmental corruption and organized crime.[13] For whatever reason, the movement toward prosecution by information suffered a key defeat in the late 1930's, when the New York constitutional convention reaffirmed the state requirement for initiation of charges by indictment.[14] Since then, there has been little change in the number of states utilizing a charging grand jury. Even in states lacking indicting grand juries, the institution has been retained in its investigatory and supervisory capacities.

Presently, about 24 states require use of indictment in felony prosecutions, 20 or so allow use of either information or indictment (and rely largely on the former); the remainder reserve grand juries for initiation of prosecution in some special class of cases (capital crimes, high felonies, etc.). A few states require indictment for some serious misdemeanors.[15]

Strengths and weaknesses of the grand jury

The major criticisms made of the grand jury throughout the years have been that it is inefficient, causing needless expense and delay in prosecution of offenders. But it is impossible to consider the inefficiency argument apart from its key assumption—which is that the grand jury performs limited or nonexistent protective functions against arbitrary or oppressive prosecution, or that such functions merely duplicate those already provided effectively by the prosecutor or the courts. No critic argues that a grand jury which acts as a necessary and viable protection of individuals should be abolished because it is inconvenient. Therefore, because the assertions of the grand jury's inability to function as intended in protecting the individual form the underpinning for much of the criticism addressed against the grand jury, it is appropriate to begin the discussion on this point.

The grand jury is alleged to be a "rubber stamp" for the prosecutor. Critics cite statistically low "no bill" rates in many American jurisdictions. Even these low rates may be deceptive, since, in many instances, the prosecutor concurs with the grand jury's refusal to indict.[16]

James Shannon, in a recent New Mexico Law Review article, sees the grand jury as an administrative tool of the prosecutor that serves merely to protect the prosecutor's exercise of discretion in cases from public scrutiny.[17] Further, he asserts that many grand juries lack one or more of the factors that would enable them to serve as effective checks on the prosecutor—impartial selection, representativeness, freedom from antecedent bias and prejudice, freedom excessive prosecutorial domination, and internal leadership and independence.[18]

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[9] Younger, *supra* note 4, at 143–44. *See also*, 110 U.S. 516 (1884).

[10] Moley, "The Initiation of Criminal Prosecution by Indictment or Information," 29 *Mich. L. Rev.* 403 (1931).

[11] Morse, "A Survey of the Grand Jury Systems," 10 *Ore. L. Rev.* 101 (1931).

[12] National Commission on Law Observance and Enforcement, *Report on Prosecution* (1931). (Wickersham Report). During this period the grand jury was not without defenders, however. *See* Dession, "From Indictment to Information—Implications of the Shift," 42 *Yale L.J.* 163 (1932); Hall, "Analysis of Criticism of the Grand Jury," 22 *J. Crim. L.C. & P.S.* 692 (1932).

[13] Younger, *supra* note 4, at 232–35.

[14] Hall *et al.*, *Modern Criminal Procedure* 780 (3d ed. 1969).

[15] Spain, *supra* note 1, at 126–142; Calkins, *supra* note 3, at 423–24. Calkins includes listing of the status of the grand jury in each state. Spain is somewhat more detailed, containing information on size, selection method, and investigatory/supervisory functions as well as the necessity for indictment.

[16] Some prosecutors, in fact, use the grand jury to screen out cases by presenting the facts and advising grand jurors, directly or indirectly, that an indictment should not be returned.

[17] Shannon, "Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?," 2 *N.M.L. Rev.* 141, 142 (1972).

[18] *Id.* at 146.

This "rubber stamp" character is attributed to several factors. First, grand jurors are inexperienced and untrained in law, and so are unable to make independent evaluation of evidence and elements of offenses.[19] Second, most grand juries have little opportunity to obtain outside assistance of counsel or independent investigation. Third, the jurors in most states are allowed to hear only the prosecution side of the case. Finally, grand jurors are criticized as demonstrating a "passive acceptance of anything which seems to bear the sovereign's approval"—the idea that the prosecutor would not be presenting a case unless the accused was probably guilty.[20]

The second major criticism of the grand jury sytsem is that it is inefficient. Even those critics who assume that the grand jury does serve a protective role, argue that its function is redundant since other aspects of the legal system can serve the same function for less cost in money, prosecutorial and citizen resources, and delay. Proposed as alternative sources of this protection are the prosecutor in his screening function, and the judicial system through the mechanism of probable cause determinations.

The assertion that the prosecutor can do as good or better a job in "screening out" cases unworthy of prosecution has several aspects. Prosecutors have a great incentive to screen out bad cases since the prosecutor must try the case, and pursuing them only adds to their usually large workload. In fact, the standards for eliminating cases used by many prosecutors is "convictability" rather than the less stringent test of "probable cause" utilized by the grand jury.[21] Antell asserts that in fact it is more common for a prosecutor to protect an individual from a provoked grand jury than for the grand jury to interpose itself between prosecutor and individual.[22]

Reformers promote the preliminary hearing as an adequate substitute for grand jury protection.[23] An oft-made argument is that in many states probable cause determinations occur anyway, and the use of two procedural steps—grand jury and preliminary examination—to reach the same probable cause determination is redundant and wasteful. Among the negative effects resulting from this redundancy are:

1. additional burden on witnesses (multiple appearances),
2. additional opportunities (assuming preliminary examination and grand jury transcripts available to defendant) for inconsistencies in testimony that would aid defendant.

Further, while historically grand jury secrecy has been justified as serving to protect the reputation of persons for whom indictments were denied, in fact, where a probable cause determination exists, these accusations have already been made a matter of public knowledge.[24]

A third fundamental criticism of the grand jury is that regardless of its effectiveness or ineffectiveness as a buffer to arbitrary and untrue charges, it is often a source of injustice for either failing to charge when the law clearly requires or for indicting unjustly and irresponsibly.

It is pointed out, for example, that grand juries in the Reconstruction South failed to bring charges for violations of civil rights, including voting rights.[25] Shannon draws attention to the failure of some modern grand juries—for various improper reasons—to indict. Among the cases cited are the Kent State shooting and three killings by police officers in New Mexico where the decision of the grand juries not to indict was "on face contrary to statutory and decisional law of the state."[26] The same author sees a trend toward the grand jury becoming a shield protecting officers of the law from possible criminal charges by citizenry.[27]

The grand jury may over-prosecute as well as under-prosecute, and even where no charges are brought, grand jury investigations can be misused. Judge

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[19] Antell, "The Modern Grand Jury: Benighted Super Government," 51 *A.B.A.J.* 153, 154 (1965).
[20] *Id.* at 154–55.
[21] Miller, *Prosecution: The Decision to Charge a Suspect With A Crime* 22 (1969).
[22] Antell, *supra* note 19, at 156.
[23] TheNational Advisory Commission on Criminal Justice Standards and Goals cites reports concluding that the preliminary hearing served as a more effective screening device. NAC *Courts* 75. Calkins claims that the implementation of preliminary hearings in England led to abolition of the grand jury by reducing it to a "useless appendage." Calkins, *supra* note 3, at 430.
[24] *Id.* at 439.
[25] Younger, *supra* note 4, at 127.
[26] Shannon, *supra* note 17, at 164.
[27] *Id.* at 167.

Antell notes that grand juries are sometimes "engines of oppression" [28] and it is clear that others believe some grand jury investigations and indictments are more tailored to repression of dissent than punishment of criminals. A pertinent example of this is the recent role of federal grand juries in anti-war dissent cases.[29]

The final criticism of grand juries is in some ways a summation of ones preceding. It is that the grand jury, as an institution, has lost the respect and confidence of the people, perhaps irreparably.[30]

Proponents of the continued extensive use of grand juries for both charging and investigative purposes have taken a fundamentally different direction from their opponents. Generally, they concede that the grand jury does have a significant cost in terms of money, manpower and citizen time, although they see the time delay as minor, especially in relatively populous areas or areas where a grand jury meets frequently.[31] However, while conceding the costs, grand jury defenders dispute assertions that the grand jury is a rubber stamp, that it is redundant, and that it has lost the confidence of the people.

The most prevalent argument in favor of the grand jury is that it plays an important role in the democratic process itself. C. W. Wickersham, replying to Judge Antell's claims, starts with the premise that effective democratic government depends on participation, and that the grand jury is a "highly important instrument" for this purpose.[32] The late Senator Kefauver, in similar terms, favored grand juries because they were close to the people.[33] Another writer disapproved a shift to an information system because it would eliminate community participation in prosecutorial decision-making.[34]

Younger perhaps best summarizes the arguments on this point. Condemnation of the grand jury system on a strictly utilitarian basis, he points out, has the effect of narrowing debate to one of democracy versus efficiency.[35] While acknowledging grand jury limitations—in terms of subservience to the prosecutor and abuses of authority—he believes that there are ways to eliminate these. The most significant aspect of the grand jury is its democratic and local character and he argues that, at least potentially, the grand jury is an effective weapon against "big government and statism." [36]

Moving beyond the philosophical to the pragmatic, there is a considerable dispute over whether grand juries are in fact rubber stamps for the prosecutors' wishes. Wickersham cites a 1960 survey showing that a New York grand jury in 1960 dismissed outright over one-fifth of the complaints, and reduced 25% of the rest.[37] Others explain that the high incidence of agreement between prosecutor and grand jury is a result merely of the prosecutor's careful pre-screening of cases.[38] The prosecutor may be *predicting* grand jury reaction rather than controlling it. The same source insists that even the small number of cases thrown out at the indictment stage is adequate justification for using grand juries in this process. Professor Dession in his 1932 study pointed out that given a standard of probable cause, the open-and-shut nature of the great majority of cases was not expected. However, he asserted that it was in the record of the small minority of difficult cases that reputation of the grand jury was to be judged.[39]

The grand jury's indictment review is not necessarily duplicative of the prosecutor's screening decision and the court determination of probable cause. While there is no reason to suspect wide-scale prosecutorial misbehavior in charging, allowing a prosecutor to bring persons to trial by simply filing an information may place a power too susceptible to political and personal abuses in the hands of a single individual. Thus, th egrand jury serve to thwart certain abuses from time to time, even though it is somewhat passive during the normal situations

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[28] Antell, *supra* note 19.
[29] *See* Tiger and Levy, "Grand Jury as the New Inquisition," 50 *Mich. S.B.J.* 693 (1971).
[30] Shannon, *supra* note 17, at 169.
[31] Hall, *supra* note 14, at 791.
[32] Wickersham, "The Grand Jury: Weapon Against Crime and Corruption," 51 *A.B.A.J.* 1157, 1161 (1965).
[33] *Id.* at 1158.
[34] Comment, "The Grand Jury: Powers, Procedures and Problems," 9 *Colum. J.L. & Soc. Prob.*, 681, 730 (1973).
[35] Younger, *supra* note 4, at 243.
[36] *Id.* at 246.
[37] Wickersham, *supra* note 32, at 1158.
[38] Comment, "An Examination of the Grand Jury in New York," 2 *Colum. J.L. & Soc. Prob.* 88, 98 (1966).
[39] Dession, *supra* note 12 at 176–78.

when the rposecutor does not misuse his office. Ironically, some prosecutors themselves seem uneasy about the breadth of their discretion in charging; prosecutors can use the grand jury to protect themselves from criticism by presenting sensitive cases to the grand jury and in effect receiving citizen ratification for their intended course of action.[40]

One answer to the claim that the preliminary examination provides an adequate determination of the existence of probable cause is that such a process is an imperfect device for this purpose and that the judicial evaluations of the sufficiency of a case is in any case often *de minimis*. An article discussing the status of the grand jury in New York argues, for example, that preliminary examination often take place soon after arrest, when there is little chance for investigation or other case preparation, and that it can't be expected to accomplish a thorough examination looking to the protection of the accused.[41]

Finally, the evidence that grand juries have lost the confidence of the public is presently subject to question. In some states at least—New York is an outstanding example—citizen involvement and support seem high. More recently, the joint performance of prosecutors and grand juries in the Watergate case, in the Agnew case and investigating other political corruption in various areas of the country belie this opinion. Of course, these are examples of the investigative rather than the charging function of grand juries, but to many defenders of the institution, and perhaps to the public, the distinction is not a clear one. Finally, even among some critics there is dispute as to the public regard for the grand jury. Though he thinks the opinion unjustified, Antell admits that the grand jury generally has public trust and confidence.[42]

Charging function

The Task Forces' adoption of a position favoring continued use of the grand jury in investigative and indicting roles is made with an awareness of the views of the various proponents and opponents of the grand jury concept. Task Force members are also aware of the tremendous variety in grand jury usage, ranging from states relying largely on a prosecutor's information for initiating charges, to states where even serious misdemeanors are required to be initiated by indictment. There are similar differences encountered in the cost of grand juries in both money, and case processing delay, in the independence and quality of grand jurors, in the scope and procedures for preliminary hearing, and in the scope of the investigatory and supervisory roles. Finally, there are great disparities in citizen involvement and interest in the grand jury concept, and in the degree of public trust in the institution. All these factors make it difficult or impossible to adopt any useful standards on the scope of the grand jury's indictment or investigating functions. Instead, those matters are left for resolution to the individual jurisdictions.

Prosecutor's option

Standard 142A does propose that while states do not necessarily have to require use of the grand jury indictment, in some or all cases, they should at least allow the district attorney discretion to send cases to the grand jury for review. It may be of special value to community confidence in the criminal justice system to have citizen involvement in cases where a decision either to charge or not to charge would be subject to public suspicion, mistrust, or belief that the district attorney's decision was motivated by political considerations.[43]

Prosecutors have been charged with improperly using the grand jury process to evade preliminary hearings, often to avoid the resultant discovery by the defendant. It is doubted that this criticism has substantial merit. The Supreme Court's recent decision in *Gerstein* v. *Pugh* indicated that, as a constitutional matter, the process of grand jury indictment is an acceptable and appropriate alternative to a magistrate's determination of probable cause.[44] Also, the Standards calling for general reciprocal discovery in criminal cases, and for disclosure of general jury testimony for impeachment purposes, will operate to reduce the importance of a preliminary hearing as a discovery device. Thus, the fact that

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[40] Calkins, *supra* note 3, at 435.
[41] *An Examination*, *supra* note 38, at 100–02. Miller raises the issue of whether in fact the preliminary hearing is or can be made a sufficiently valuable process to justify its retention as a separate step in charging. Miller, *supra* note 21, at 46.
[42] Antell, *supra* note 19, at 154.
[43] NAC *Courts* 74–75.
[44] 420 U.S. 103 (1975).

defendants might gain knowledge of the state's case through preliminary hearing should not play any role in the determination of whether the indictment/grand jury or information/probable cause determination (or preliminary hearing) process is utilized.

Duplication eliminated

In a minority of jurisdictions, a preliminary hearing is used to determine whether sufficient evidence exists to warrant presentation of a case to the grand jury for indictment. Where it exists, the procedure should be abolished. Both grand jury and preliminary hearings engage in a determination of whether there are sufficient grounds on which a criminal prosecution may be based. The delay occasioned by requiring both findings to be made is costly both to defendants and the system in terms of delaying ultimate disposition of cases.

However, in eliminating the dual use of grand jury and preliminary hearings, states will be somewhat restricted by the terms of *Gerstein* v. *Pugh*. *Gerstein* requires that, if an accused is deprived of personal liberty in some manner, there must be a reasonably speedy determination of probable cause.[45] When the grand jury is unable to consider the charge within a short time, a summary, non-adversary examination of probable cause may be necessary. (See Standard 12.2).

Quality of evidence

Evidence which would be inadmissible at trial (for example, illegally obtained, or hearsay) may not serve as sufficient basis for indictment. Grand juries without legal training may return an indictment based on evidence inadmissible at trial. For example, a common procedure subject to some criticism is the utilization of a witness such as a law enforcement officer to summarize the state's evidence—including the testimony of absent witnesses. This has been criticized as denying grand jurors the opportunity of observing the demeanor of the witness who will be testifying at trial.[46]

On the other hand, the grand jury's screening function can be best carried out if it has all the facts; the prosecutor is usually available to offer advice about the admissibility of certain items, and has no incentive to have the grand jury indict a defendant who prosecution knows will be non-convictable. Even if the prosecutor does not process admissible evidence on a key point, further investigation might produce such before trial. Further, the use of a single official to summarize other witnesses is fast and saves witnesses from the inconvenience of multiple appearances.

New York and 16 other states in some way limit grand jury consideration of non-legal evidence;[47] New York courts will dismiss an indictment based solely on inadmissible evidence. Some states limit the use of a summarizing witness' hearsay to situations where the witness is unavailable.[48]

Section 14.2D, of this Standard provides for a greater accuracy in the indictment determination by providing that the grand jury be allowed to consider—as the trial fact finder would—any facts tending to negate the defendant's guilt.[49] This requirement to disclose exculpatory evidence is analogous to the finding of the Supreme Court in *Brady* v. *Maryland*[50] that the prosecutor had a duty to disclose exculpatory material to the defense.

Section 14.2E of the Standard recognizes the prosecutor's right and duty as legal advisor to the grand jury, to recommend action to the grand jury. The prosecutor has a great deal more experience than the grand jurors in the strength and likely credibility of the evidence before a trial court. Since it will be his office's duty to prosecute the case, the prosecutor has a direct interest in assuring that resources are not squandered on unwinnable or otherwise improper cases.

"A prosecutor should not, however, take advantage of his role as the *ex parte* representative of the state before the grand jury to unduly or unfairly influence it in voting upon charges brought before it. In general, he should be guided by the standards governing and defining the proper presentation of the state's case in an adversary trial before a petit jury. Since grand jury proceed-

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[45] *Id.*
[46] *The Grand Jury*, *supra* note 34, at 728.
[47] Hall, *supra* note 14, at 797.
[48] *The Grand Jury*, *supra* note 34, at 728.
[49] ABA *Prosecution Function* 88 § 3.6–3.7.
[50] 373 U.S. 83 (1963). The analogy is discussed in Comment, "Defense Access to Grand Jury Testimony: A Right in Search of a Standard," 1968 *Duke L.J.* 556, 583–84.

ings are generally secret and *ex parte*, it is particularly desirable that a record be made of the prosecutor's communications and representations to the jury." [51]

Investigative function

Jurisdictions utilize the investigatory and supervisory capacities of grand juries in a large variety of ways. The Standard does not address the basic investigatory functions a grand jury should have, leaving these matters to the individual jurisdictions. However, the Standard does not propose the adoption of two procedures, wherever the investigatory powers of grand juries are used.

Right to counsel

While many normal procedural safeguards for witnesses are lacking in grand jury investigations, it was determined as early as 1892 that such witnesses do retain the privilege against self-incrimination.[52] This constitutional protection was later extended to witnesses testifying before state grand jury panels.[53]

In order to allow greater testimony before grand jury investigations, most states have statutes granting immunity, which allow the compelling of testimony without intruding on the 5th Amendment privilege. However, witnesses may encounter a problem in seeking to handle the immunity or to invoke the 5th Amendment. Courts in all jurisdictions have been reluctant to extend rights of counsel to grand jury proceedings.[54] So, a witness, without the direct advice of counsel, must determine individually the incriminating nature of questions and answers, and must avoid waiving this privilege against incrimination.[55]

Section 14.3B of the Standard, based on the Washington Criminal Investigation Act of 1971[56] would avoid the problem by providing a limited right to counsel, but only until or unless immunity was granted. Counsel would be available only for advising the witness; presence of counsel would not create a quasi-trial adversary proceeding. There are some problems with the procedure—including the adverse effect of counsel presence, especially where counsel represents a crime syndicate or the head of a conspiracy. The attorney might in such cases act to coordinate witnesses' responses in such a way as to thwart an investigation.[57] However, the ability to exclude counsel as soon as immunity is granted offers a valuable option. Judges should retain the power to issue protective orders excluding counsel likely to be in the service of the conspiracy, etc., upon showing of a reasonable likelihood of interference with the investigation. In such a case, the witness should be able to depend on some other source for legal advice about this privilege.

Reporting procedure

Section 14.3D of the Standard presents a procedure for reforming and standardizing the issuance of grand jury reports. For purposes of the Standard, a report may be defined as an informal, written accusation, directed at either general conditions in the community or a specific individual, from which no indictment is framed.[58]

Although the controversy over the propriety of the grand jury's reporting power is not a new one, the historical roots of the practice are solid. One of the first cases approving, at least implicitly, a grand jury report charging misconduct by named individuals occurred in 1683.[59] The breadth of grand jury inquiry in England was broad, including both criticisms of specific individuals and informational reports into broad areas of public concern.[60] "Some of the American colonies also adopted the practice of allowing the grand jury to issue reports on matters of public concern." [61]

Modern American practice regarding the scope of grand jury investigative and reporting power varies considerably. Based on the common law, many courts permit a general, informational type of report to be made; on the other hand, a majority of courts which have addressed the issue have disapproved reports

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[51] ABA *Prosecution Function* 88 § 3.5.
[52] *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892).
[53] *Murphy* v. *Waterfront Comm'n.*, 378 U.S. 52 (1964).
[54] Comment, "Criminal Procedure—Right to Counsel in Investigative Grand Jury Proceedings; Washington Criminal Investigatory Act of 1971," 47 *Wash. L. Rev.* 511, 512 (1971).
[55] *Id.* at 517.
[56] *R.C.W.* § 10.27.120–140 (1971).
[57] These problems are discussed further in *Criminal Procedure, supra* note 54, at 520.
[58] Cannon, "The Propriety of a Breach of Grand Jury Secrecy When No Indictment Is Returned." 7 *Houston L. Rev.* 341, 348 (1970).
[59] *Id.* at 349.
[60] *Id.*
[61] *Id.*

which publicly criticize an *individual* without indictment.[62] Some states have resolved the issue by statute. In California, for example, the grand jury is assigned the duty to routinely investigate county government officials and agencies.[63]

Many spokesman strongly favor a continuation, or even an expansion of the investigative/reporting roles of the grand jury. Even though an investigation may not lead to criminal charges:

"Much conduct which is not subject to criminal penalties is nevertheless a legitimate matter of public concern, for example, inefficient or corrupt city government, improperly administered police or fire departments, and the like."[64]

Further, if the grand jury, while investigating alleged criminal activity, discovers misconduct which is less than that which should be indicted, it is argued that limiting the right to report on these matters would thwart legitimate public interest.[65] Other strengths of the grand jury are its non-political nature, and the ability of its reports to stimulate public discussion on issues. A recent California decision emphasized these factors:

"In our system of government, a Grand Jury is the only agency free from possible political or official bias that has an opportunity to see the picture of crime and the operation of government relating thereto on any broad basis. It performs a valuable public purpose in presenting its conclusions drawn from that overview. The public, may of course, ultimately conclude that the jury's fears were exaggerated or that its proposed solutions are unwise. But the debate which reports, such as the one before us, would provoke could lead only to a better understanding of public governmental problems. They should be encouraged and not prohibited.[66]

Finally, while even many defenders of the grand jury report express misgivings over reports criticizing private individuals' activities, they believe there are no such objections to reports on public officials. "Public servants, especially elected officials, occupy positions of public trust, and as trustees of the public welfare these officials assume a risk that they will be the subject of close scrutiny and public comment."[67] Of course, even these public officials deserve certain fundamental protections against improper grand jury reports.[68]

There are also a number of serious criticisms of grand jury reports, especially, though not exclusively, those which criticize named individuals. First, an unfavorable report may stand as a severe form of extra-judicial punishment, from which there is no appeal. Second, the quasijudicial nature of the grand jury gives it an apparent reliability which may not be justified. Third, the secrecy of grand jury proceedings prevents any accused from knowing the basis for the accusations; the accused is denied the chance to cross-examine accusers, or to present one's own side in the dispute. At least where an indictment is returned on the basis of such proceedings, there will be an opportunity to respond to the charges at trial. Fourth, grand jurors are accountable to no one. Fifth, grand jurors may impose a personal standard of morality on persons, rather than an abstract and neutral conception of right and wrong.[69]

Section 14.3D of the Standard, recognizing the complexity of arguments for and against grand jury reporting, neither endorses nor opposes the concept. However, where the grand jury is given reporting powers, the procedures contained in the Standard would operate to eliminate most of the negative aspects of reporting. The Standard is that of recent New York legislation[70] which permits grand juries to report on misconduct of less than a criminal level.

The statute has several notable features. First, the precise reporting responsibilities of the grand jury are defined. Specifically, these do not include reports on private individuals. Second, the report is examined by the court prior to public dissemination. Before releasing it, the judge is charged to determine the reliability of the report by assuring that its conclusions are based upon the preponderances of credible, legally admissible evidence. Further, the judge must assure

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[62] Glynn, "The Grand Jury Report as an Infringement of Private Rights," 23 *Hastings L.J.* 561, 568 (1972).
[63] *Cal. Penal Code* § 914.1 (1970). *See Dummit*, "Investigatory Powers of California Grand Juries," 46 *Calif. S.B.J.* 467 (1971).
[64] Glynn, *supra* note 62, at 577.
[65] Cannon, *supra* note 58, at 350.
[66] *Monroe v. Garrett*, 17 Cal. App. 3d 380, 94 Cal. Rptr. 531 (1971) cited in Glynn, *supra* note 62, at 569.
[67] *Id.* at 575.
[68] *Id.*
[69] These complaints are discussed in greater length in *Id.* at 572–75.
[70] *N.Y. Crim. Pro. Law* § 190.85 (McKinney 1971).

that the criticized individuals had an opportunity to testify. Together, these features operate to limit reports based on one-sided unreliable information. Third, issuance of the report may be delayed to allow named public servants to reply to the charges, with such replies to be included as an appendix to the report itself. Fourth, the court may suppress temporarily the report where it might prejudice a pending criminal matter.

Together, these features of the statute "appear to reconcile the public's right to know of socially harmful conditions with the right of the individual to due process of law." [71]

Prosecutors' relations with grand jury

The final section of the Standards directly addresses the prosecutor's role in dealing with the grand jury.[72] While the grand jury has often been criticized for being a rubber stamp for the prosecutor in granting or denying indictment, it is difficult to ignore the legitimate need for the grand jurors to receive legal advice on matters beyond their experience and knowledge. Instead, the Standard forthrightly accepts the prosecutor's responsibility in this regard.

But at the same time, the Standard recognizes that public confidence in the indictment process may be dependent on the independence of the grand jury, and its ability to refuse to charge when it believes an accusation is unfounded. Therefore, several limitations are placed on how the prosecution must conduct itself. Though it does not define how this is to be done, the Standards call on the prosecutor to respect the independence of the grand jury. The prosecutor must also not attempt to unduly influence the jurors. Partly to permit supervision of this standard of conduct, the grand jury statements of prosecutor should be recorded. The Standard does not define who is to review such statements.

While some prosecutors may feel that these procedures interfere too greatly with their relationship with the grand jury, the adoption of such a standard of conduct does have fundamental importance to continuation of the grand jury's indictment functions. For if the prosecutors do not clearly respect the independence of the grand jury as a check on their great discretion, then the grand jury process may be rightly regarded as a mere cloak for the prosecutor's absolute control over the formal charging decision.

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ABA, *The Prosecution Function*: 3.5, 3.6.
NAC, *Courts*: 4.4.
NDAA: 5.17, 9.1–9.4, 12.1–12.4, 16.1, 16.7, 17.9, 19.1–19.3, 19.11, 20.1, 20.1, 26.3, 27.1, 27.3, 27.5.

Mr. EILBERG. Mr. Miller, you spoke about grand jury proceedings required to be transcribed under the California law and then being given to a defendant. H.R. 94 has a similar requirement. Would you have us legislate in that direction?

Mr. MILLER. Yes. You see, this is part of the reason I think I was asked to testify before you, and that is that I have had the opportunity to be intimately familiar with both the federal system and our State grand jury systems and while I wouldn't go so far as to put down the stringent requirements that we have under California law because of the constitutional nature of the indictment process on the Federal side, I could recommend without reservations the recording of testi-

mony and the submission to the defense attorney of that recorded testimony at an appropriate time.

Under California law, of course, we go one step further. We are required to present competent evidence in every respect and that can be challenged in the postindictment hearing, but I just don't think it's practical to require that on the Federal side because of some of the obvious problems just in processing routine cases. I wouldn't say that you should be permitted to use rank hearsay, but I don't think you're going to be able to get away from the use of hearsay recorded or not on the Federal side. We can do it on the State side. I don't think it's a practical thing to require on the Federal side.

Mr. EILBERG. Speaking of hearsay evidence, your California law does not allow the grand jury to consider hearsay evidence unless in a deposition or evidence that would be inadmissible at trial. Consideration of this evidence does not, however, automatically invalidate an indictment.

The question is, how are challenges to evidence made and what are the remedies, if any, in California?

Mr. MILLER. Yes; we have a postindictment hearing in California known as the 995 hearing, in which an indictment can be attacked on the basis that there was not sufficient evidence to find probable cause, and in the attack on that indictment there can be raised the question of the type of evidence that's used and whether that evidence would be admissible in court.

Consequently, you do have under the California system the availability of a remedy. Now that's in conjunction with supplying to the defense attorney the entire transcript and in my office, while it's not required as a matter of State law, I require all statements made, whether by the deputy district attorney, whether by the grand jury, whether it's of an advisory nature or not, to be recorded. The requirement under California law is that all testimony be recorded. We require everything to be recorded.

Mr. EILBERG. Mr. Sawyer.

Mr. SAWYER. I assume, as in Michigan where we have the same State alternative procedures, that you would only use grand juries for rather special type important cases, so therefore it may be practical to require only competent evidence to be introduced and to engage in all these protective procedures because you're only giving a very small portion of your prosecutions. Isn't that correct?

Mr. MILLER. That's correct. The percentage has changed radically since the *Johnson* case, but prior to *Johnson*, we probably sent less than 3 percent of our cases to the grand jury.

Mr. SAWYER. And that would be even more true under the Michigan procedure. We probably use it less than 1 percent. But the Federal prosecutorial authorities have to run every single minor case through a grand jury.

Mr. MILLER. Absolutely.

Mr. SAWYER. And they have no alternative procedure constitutionally available to them.

Mr. MILLER. That's why I attempted to point out the fact that we do have that alternative under California law. We can go to the preliminary hearing even if it means that we take a fraud case which we otherwise would have taken to the grand jury to preliminary hearing

which might result in a preliminary hearing taking several weeks. But we do have the alternative. You don't have the alternative on the Federal side. You have to take these matters to the Federal grand jury. So you've got to consider the burden to be placed as a result of that constitutionally mandated requirement.

Mr. SAWYER. From the duality of your experience with both Federal and State prosecution, isn't it your impression that there are really a much greater percentage of relatively nonserious type cases prosecuted in the Federal court as Federal crimes than there are in the State courts? Do you have that impression?

Mr. MILLER. Nonserious?

Mr. SAWYER. Well, you know, the statutory type violation.

Mr. MILLER. I don't think I could generalize on that except to say this: my experience is that in San Diego a vast majority of the Federal crimes are smuggling crimes, smuggling narcotics, smuggling aliens, the crimes that occur at the border, and I suppose if numbers mean anything you could reach the point where you almost take the position that they aren't as serious as, say, the organized crime case, but they are important crimes.

Mr. SAWYER. I didn't mean to infer that. All our crimes are important. What I'm getting at basically is there is an inordinate amount of somewhat routine—which is perhaps a better word—routine Federal prosecution going on but it still has to go through a grand jury while under State law you would never run it through a grand jury. Isn't that true?

Mr. MILLER. That's right, and of course to give you a typical example of a Federal crime under our jurisdiction is stopping a car at the border. The car contains contraband of some sort. The car is taken to the secondary. The person is arrested. If he decides to make a statement, he makes a statement. If you have the contraband, that's the case. That's a routine type of Federal crime occurring in that jurisdiction but they are countless. They increase in numbers every year, but they have to go to the grand jury.

Mr. SAWYER. Whereas that kind of thing you never would run through a grand jury in the State process?

Mr. MILLER. Never.

Mr. SAWYER. Thank you. That's all I have.

Mr. EILBERG. Mr. Hall.

Mr HALL. Mr. Miller, I want to ask you one question. What's your thinking, having been in both State and Federal practice, about the giving of a week's notice to a person who will appear before a grand jury as a witness? Do you do that now?

Mr. MILLER. Yes. We give them notice. Typical witnesses that come before a grand jury—well, let me think for a second. We do have some other crimes which wouldn't touch on the Federal problem at all having to do with child molest witnesses——

Mr. HALL. Let's just restrict it to Federal crimes. Is that an impractical situation to find yourself under, that you have to give a week's notice to a witness before he or she can testify before a Federal grand jury?

Mr. MILLER. I don't know that it's necessary. I really don't perceive the reason for it. In many instances a subpena is given to a person and then a contact is made with them as to the particular time at which

they are to appear, and in many instances it's at their convenience and it's a scheduling matter.

Mr. EILBERG. Under the bill, as I recall our bill, we provide for a week's notice or less if the court so decides, and I believe the thrust of Mr. Hall's question is what do you think of that provision?

Mr. MILLER. Well, I don't think that it's necessary really.

Mr. HALL. There was testimony earlier that in certain cases that a person may, in a narcotics case, leave if they get advance notice of that.

Mr. MILLER. I really don't see the necessity of that rule.

Mr. HALL. All right. Now under your *Johnson* case, the *Johnson* motion as you refer to it—and I'm looking at page 5 of your testimony speaking from Justice Clark:

> When a district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obligated to inform the grand jury of its nature and existence.

Now do I understand you to say that under the *Johnson* motion, as you call it, that you have to ferret through all of the testimony that you may have or that you may have had to determine if such is in existence?

Mr. MILLER. No. It is not an established legal requirement, but it has become a practical necessity in application.

Mr. HALL. And if you don't find it and if it's there, does that negate a conviction or an indictment?

Mr. MILLER. No. But a tremendous burden is placed on the prosecutor to show good faith. Certainly, if the prosecutor had exculpatory evidence in his possession and knew it, the conviction or indictment would be set aside. Let me hasten to add that we have survived the *Johnson* motions. I don't recall, except in one instance, where a couple of counts were dismissed, that we did not survive the *Johnson* motion.

The point I'm trying to make is that that's the way the foundation is laid in order to bring the motion. The motion itself is a tedious matter in which the defense attorney continues to allege during the hearing that we have exculpatory matters and puts us in a defensive position where we are either accused of not producing it or of not ferreting it out. So, consequently, the rulings under *Johnson* ultimately have been in our favor. It's just that it's been more of a discovery type of procedure in which there is a great deal of questioning concerning what the prosecutor has in his possession in order to determine that point. Every *Johnson* motion that we have had in California—and I forgot to mention this—every *Johnson* motion that we have had has required that every prosecutor handling that case testify as a witness and every prosecutor who testifies as a witness is asked questions which pertain to every single contact that he had with that case, what materials he's had in his hands right down to the work product, in order to determine whether he has exculpatory evidence in his possession.

Mr. HALL. All right. With reference to H.R. 94, it says the attorney for the Government and the special attorney shall periodically advise the grand jury of the nature and existence of evidence as yet not received which might tend to materially affect the credibility of any witness or tend to negate the guilt of any prospective defendant.

Would that work a burden on a district attorney to have to do that?

Mr. MILLER. Oh, that goes much further than the Johnson motion. Sure. Of course. It's an impossible burden.

Mr. HALL. How could you do it?

Mr. MILLER. You couldn't. We can't comply with Johnson in the strictest sense and it puts our integrity in issue in every single case because the accusation is made that we have in effect exculpatory evidence in our possession when we don't.

Mr. HALL. I believe that's all. Thank you, Mr. Miller.

Mr. EILBERG. First, let me thank you very much, Mr. Miller, for coming and being so very well prepared, and we will have additional questions which we would like to send you.

[The questions to Mr. Miller and his responses follow:]

OFFICE OF THE DISTRICT ATTORNEY,
COUNTY OF SAN DIEGO,
San Diego, Calif., May 4, 1977.

HON. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship, and International Law, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN EILBERG: The answers to those written questions posed by your committee in connection with H.R. 94 are enclosed. In the event you require follow-up questions or additional questions which did not come to mind during the course of my testimony, please do not hesitate to contact me and I will attempt to comply.

During the course of my testimony I neglected to thank you and your committee members for their courteous treatment as well as your sincere attempt to obtain answers to penetrating questions. I was impressed with the committee's objective approach to the entire subject of federal grand jury reform.

Sincerely,

EDWIN L. MILLER, Jr.,
District Attorney.

QUESTIONS FOR EDWIN L. MILLER, Jr., DISTRICT ATTORNEY, SAN DIEGO, CALIF. (REPRESENTING THE NATIONAL DISTRICT ATTORNEYS' ASSOCIATION)

Question 1. Your law allows subpoenas for witnesses whose testimony "is material in an investigation before the grand jury." Who determines whether testimony is "material" and what is the standard?

Answer. Any witness appearing before a California Grand Jury has the right to challenge his subpoena by bringing a motion to quash the subpoena before the Superior Court. The Grand Jury is under the supervision of the Superior Court and therefore it is that Court which makes the determination of whether or not the testimony to be given is material to the investigation. It should be noted that as to all questions which arise as the result of challenges brought by a witness before the Grand Jury, it is the Court which ultimately decides the propriety of the action and only the Court which may impose sanctions for failure to comply.

Question 4. Your law provides that an indictment is to be returned only when "all the evidence before it, taken together, if unexplained or uncontradicted would, in its judgment, warrant a conviction by a trial jury." This standard of proof, commonly called a "prima facie" case, is almost universally the standard for indictments. Can a defendant challenge the sufficiency of evidence for an indictment and if so how?

Answer. A defendant in California may challenge the indictment based upon the insufficiency of evidence by means of a statutory procedure codified in California Penal Code section 995. That Section provides in pertinent part:

"The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

"If it be an indictment:

"(1) Where it is not found, endorsed, and presented as prescribed in this code;

"(2) That the defendant has been indicted without reasonable or probable cause . . ."

The test for insufficiency of the evidence has been determined to be whether or not the evidence establishes reasonable or probable cause which is the same standard for a bindover following preliminary examination. The challenges are made by motions filed in the Superior Court and the Court makes the determination upon the transcript of the grand jury proceedings. It should be noted that all proceedings before a California grand jury are recorded and the defendant is entitled to a copy of those proceedings within a specified time following arraignment. If the defendant is unsuccessful in his motion in Superior Court, he has a right to pretrial appellate review by way of a Writ of Prohibition in accordance with California Penal Code section 999(a).

Paragraph 1 of Penal Code section 995 above has also been deemed to be sufficiently broad to allow the defendants to challenge procedural violations in the presentation of evidence. It was this particular provision that gave jurisdiction to the Court in *Johnson* v. *Superior Court*, 15 Cal. 3d 248, 124 Cal. Rptr. 32, 539 P.2d 792, in ruling that exculpatory evidence must be presented.

Question 5. Your law allows the grand jury to report or declare that a person called before a grand jury was a witness only and that if a witness was a target that there was not sufficient evidence to indict. How often does this occur?

Answer. When a grand jury returns an indictment, the names of all witnesses testifying are endorsed upon the back of the indictment and their testimony is made available to the defendant. It is highly unusual for a grand jury to publicly report that an individual was called as a witness only or that there was "not sufficient evidence to indict." The latter provision is called for under California Penal Code section 939.91 which did not take effect until January of 1976. Since grand juries have been used with even less frequency since 1976, we have not seen any examples of cases falling within the above Penal Code section.

Question 7. Our studies indicate that in California, few cases proceed by indictment alone. Rather, most proceed by complaint and preliminary hearing. I have proposed eliminating the indictment function of the grand jury. Do you agree?

Answer. I strongly disagree with the proposal of eliminating the indictment function for California grand juries. While it is true the overwhelming number of cases proceed by complaint and preliminary examination, the ability to utilize a grand jury in selected cases is an absolute necessity for proper enforcement of the criminal laws. The ordinary street crime which is brought to the District Attorney following police investigation can be processed in this state by complaint and preliminary examination. Investigations involving complex financial schemes, corruption of public officials and organized crime simply cannot be handled through the normal complaint and preliminary hearing process. Those cases require the utilization of immunity, secrecy and subpoena power in order to develop information sufficient to prosecute the leaders of sophisticated conspiratorial crimes. Abolition of the indictment function would result in the state abdicating its responsibility to protect the citizens from the most sophisticated and insidious crimes. It would result in the prosecutor being capable only of prosecuting the poor, the ignorant and the minorities who find themselves in the environment in which street crimes are committed and would grant immunity to the corruptor, the money manipulator and the organized crime chieftain.

Question 8. As most California cases proceed by preliminary hearings, why do you oppose H.R. 94's provision requiring a preliminary hearing in every federal case, whether there is an indictment or not—especially as this is an alternative to those proposals allowing an attack on the presentation of incompetent or inadmissible evidence to the grand jury?

Answer. I oppose the provision of H.R. 94 requiring a preliminary hearing in each case as being an unnecessary step in the proceedings. The purpose of a preliminary hearing is to determine whether there is probable cause to hold the defendant pending the Grand Jury. Once a grand jury has returned an indictment, the purpose of a preliminary hearing cannot conceivably be to determine probable cause. If review of the sufficiency of the indictment is to be granted, it should be before a district court and not before a magistrate. The only possible purpose of a post-indictment preliminary hearing would be to grant the defendant additional discovery rights, most notably by way of testimony of witnesses at the preliminary hearing. If it is the desire of Congress to grant additional discovery, then it should do so through modification of Rule 16 of the Federal Rules of Criminal Procedure. Discovery should not be the purpose of a preliminary examination.

Question 10. Do you believe potential defendants should be called, if it is known they will invoke their privilege against self-incrimination?

Answer. I do not believe that potential defendants should be called to the grand jury for the purpose of having them invoke their privilege against self-incrimination. I believe that in a number of instances the potential defendant should be notified of the investigation and given an opportunity to appear if he so desires. Simply calling the proposed defendant to invoke the privilege against self-incrimination runs the risk of creating a false aura of consciousness of guilt before the grand jury.

Question 11. California law does not allow a witness to have his counsel present in the grand jury room but counsel may stay outside and be available to the witness. Does this cause delays? Wouldn't these delays be eliminated by having counsel in the room? Why do you believe that our limitation on the role of counsel cannot be enforced when our study indicates that in those states where it is law—it is enforced, with few problems?

Answer. With regard to counsel for witnesses allowed inside the grand jury room. I believe such practice will cause rather than prevent delays. Most studies with which I am familiar dealing with counsel being permitted inside the grand jury room have dealt basically with street crimes in which there would be no problem of dual loyalty on the part of counsel. In most of these cases with which I am familiar counsel presents no particular benefit nor any particular detriment. The cases simply were not good tests cases. Allowing a witness to exist the grand jury room for consultation certainly may cause delay in the presentation, but I have never experienced an incident where this arrangement has been overly abused or resulted in inordinate inconvenience. If the delays become abusive however, assistance can be sought from the supervising judge.

I believe that to permit counsel inside the grand jury will in many instances destroy the effectiveness of the grand jury. Most grand jury witnesses are percipient witnesses to a criminal event. To these witnesses such a provision will make no difference because the overwhelming majority have no desire for counsel.

It is in the significant cases in which conspiratorial conduct is at issue when counsel will pose a tremendous detriment to the interests of justice. In many instances persons peripherally involved in crime are called upon to testify against persons who are more culpable. In a high percentage of cases of that type, particularly cases involving corporations, counsel is provided for the witness by the subject of the inquiry. A witness will not truthfully inculpate the subject of the inquiry in the presence of counsel. Further, once Congress deems the right of a witness to have counsel present within the grand jury room, then Congress, I submit, cannot limit the effective assistance of counsel by preventing counsel from objecting to questions and seeking rulings from the supervising judge before allowing the witness to answer those questions. Tremendous delays will result from that practice.

In addition, in many instances the witness will be given the opportunity to confer with counsel and have counsel fashion the answer to the question. This means the grand jury will not be receiving the witness' testimony, but rather the testimony of the witness' attorney mouthed by the witness. The placement of the witness' counsel inside the grand jury will virtually terminate the use of the grand jury as a device to ferret out covert conspiratorial crimes, particularly those involving corruption or coercion such as is present in the case of organized crime. There have simply been no valid studies to my knowledge dealing with the use of the grand jury in these areas where witness counsel has been present.

Question 12. Why cannot the problems of multiple representation and "house counsel" be handled, case-by-case, by the Court?

Answer. The problem of multiple representation by house counsel cannot effectively be handled on a case-by-case basis by the Court. While the Court may suspect or even draw inferences concerning the source of the funds for counsel, there is no present ability existent in the Court to force a witness to divulge the source of payments to his counsel. Further, the witness can be persuaded by the suspect of the investigation in most cases to waive any conflict caused by the "multiple representation." It is a drastic step for the Court to interfere with the attorney/client relationship, and courts simply will not do so absent a clear showing that the representation by counsel is a sham device designed to protect someone else. That showing is almost impossible to make on a case-by-case basis. Even if the showing can be made, it can only be accomplished after lengthy hearings which will further delay and compound grand jury proceedings.

Mr. EILBERG. Let me say that there are three private bills value which will only take a few moments when time is of the essence. If counsel is ready to present them, we shall do so. Then it is the Chair's intention to recess 45 minutes after that. To those present who are witnesses, we will resume at 1:15. We are now proceeding with other legislative business in the jurisdiction of the subcommittee.

[Whereupon, at 12:30 p.m., the hearing was recessed, to be reconvened at 1:15 p.m. this same day.]

AFTERNOON SESSION

Mr. EILBERG. The subcommittee will come to order, and the witness is Paul J. Curran, Esq., former U.S. attorney, Southern District of New York.

We are very happy to welcome you back before the subcommittee again, Mr. Curran, and we apologize to you for causing you to stay over as long as you have. So please proceed.

TESTIMONY OF PAUL J. CURRAN, ESQ., PRIVATE ATTORNEY—FORMER U.S. ATTORNEY, NEW YORK CITY

Mr. CURRAN. Thank you, Mr. Chairman. I enjoyed listening this morning so it was no hardship at all.

As I think my secretary told one of the committee secretaries yesterday, I do not have a prepared statement to submit. I hoped to, but I have been out of my office most of the past week and wasn't in it yesterday.

I do have some notes on the bill which I would like to address. If the chairman desires it, I would be pleased to submit a prepared statement promptly. If you don't, I, of course, will not.

Mr. EILBERG. Mr. Curran, it would be helpful I think for at least the other members of the subcommittee as well as the full committee and the House, to perhaps have a formal statement.

Mr. CURRAN. I will, sir. I will try to get that together this weekend and get it down early next week.

In addition to serving as U.S. attorney for the Southern District of New York from 1973 to 1975, I was an assistant in that district for 3 years, 1958 through 1961. And I spent 5 years as chairman of the New York State Commission of Investigations, which is not a prosecutive agency but does investigations of organized crime and official corruption, among other things.

I have also represented defendants in Federal court, and represented witnesses before grand juries in Federal court.

My comments today are based primarily upon my experiences as a prosecutor, leavened somewhat by my defense counsel experience which presently is more current than my prosecution experience.

The bill, H.R. 94, as I understand it and read it, would make, I think, dramatic and drastic changes in the present Federal grand jury system, and would impact, I believe, on the whole at least, adversely the public interest and law enforcement in the Federal system. My philosophical problem with the measure, I suppose, is that, as I see things, organized crime is doing pretty well these days, white collar crime is booming, antitrust and security frauds, mail frauds, land frauds. Official corruption is a ceaseless concern.

This bill, I think, would clearly make those kinds of cases much more difficult to investigate and to prosecute. If that is recognized as a fact, and I think what I just said really can't be disputed, then I think that we have to think very long and hard as to whether we really want to do at least some of the things the bill would propose to do. I think that the bill, looking at it now as a lawyer who has represented, and still does represent targets, witnesses before Federal grand juries, it is just terrific for people like me now. I love it, talking just as a lawyer, if somebody came to me and I have some such clients, now it is tremendous from that standpoint. But I think really from the standpoint of the public interest and the interest of justice, the bill is not sound.

I would like, if I may, sir, and this is briefly and obviously a real overview, and pretty superficial, to touch upon some of the sections which have troubled me. There are one or two that I like substantially. Then perhaps if there are questions I will try to respond to them.

The 6-month limit on contempt, I heard Mr. Ruff talk about that this morning, with no subsequent prosecution or attempt to get information from the witness permitted; I really don't want to be belabor that. I agree, I think I can say, entirely with what Mr. Ruff had to say about that particular issue, and I would leave that for now.

On witness immunity, eliminating use and going back to transactional immunity, I think that the option to the Government which presently exists and which has been upheld by the Supreme Court should be continued. I don't get terribly excited about that because, as has been said, by other witnesses, this is a situation which rarely, as a practical matter, makes much difference. My attitude, when I was U.S. attorney, was that we used, as distinguished from the strike force, immunity very sparingly. Certainly this was true of formal immunity. And I don't recall having a case when I was U.S. attorney where we prosecuted someone who had received formal use immunity. Our attitude was (I know I discussed it at staff meetings at length with my criminal division chief at the time), if we were going to try to have a case—I don't recall we ever did—we would have taken everything we had before that person went before the grand jury under a grant of use immunity and put it under seal. Because we really felt that to be the only certain thing you could do and still prosecute that case without a great deal of trouble and perhaps having it thrown out.

Literally take the evidence and seal it somewhere. Perhaps even go to the court and ask that the evidence be put under some sort of seal. We never did it but that was our attitude about that situation.

So I don't think as a practical matter it makes terribly much difference. I don't believe it is wise, as I understand the bill, to hold a court hearing on a grant of immunity. I understand the bill would require that. I think that whether or not to grant immunity is an executive department decision, if you will, a prosecutors decision, and that the court has enough problems without getting involved in that kind of a decision which has always been, as I said, a prosecutors decision and one which I think properly belongs in the executive department.

Or, I suppose in some cases, if it is a legislative matter, with the legislative committee that may be interested in granting immunity.

On pages 10 and 11 of the bill leaks are dealt with. I applaud those measures and favor very substantially what is there. I am pleased to say I know of no leak that ever came from my office when I was U.S. attorney, because the rule was that I didn't leak, and if an assistant leaked, he would be fired at least. If I wanted to do it, I suppose the court wouldn't have stood for it anyway. It didn't happen. I have one problem I would mention here. The bill appears to exempt the media.

It seems to me, if you are going to make it a Federal crime to leak grand jury information, the media shouldn't be treated differently. If a media person who knows what he's doing gets together with an assistant U.S. attorney or with the U.S. attorney and they get together and decide the U.S. attorney or assistant leaks to the media person and they work it out, you would have the anomalous situation of the U.S. attorney or assistant being prosecuted and the other person, because he is in the media, walking away laughing. I don't think we should have a different law for media people in this area because a leak is a leak. If it is wrong, it should apply to everybody.

Otherwise I do applaud—I think it does make some sense to have a specific criminal sanction for leaks, as distinguished from now in the Federal system, at least, where you have to rely on a contempt approach.

Page 12 begins to deal with the rights and duties of the grand jury and attorney for the Government. Much of the preliminary material tracks present practice, at least as I practiced it in the Southern District of New York, and I believe my predecessor and successor do. Here I subscribe to most of what Judge Lacey says.

On page 14 is the provision that defendants get notice of indictment unless there is proof submitted to the court that it should not have to be done. I think, as Judge Lacey pointed out, that in most investigations, even those where there has been no arrest on a complaint because they already have the notice, obviously, defendants or prospective defendants know when something is going to happen. Indeed, the common practice—I am talking now of securities fraud cases, official corruption cases—the lawyer for that target who already knows he is a target, will come in and see the assistant, and sometimes will come to the U.S. attorney. My policy always was to see lawyers, not their clients, but if a lawyer wanted to come in and discuss with me why his client should not be indicted, we had an absolute policy in the office he could do that. I would have the assistant present who was involved, and hear him out.

In some situations, based upon a presentation in the office, what the assistant decided was altered. The assistant was present. But I don't think that in those cases there is any element of surprise.

I do believe and I know that in organized crime cases, and we prosecuted a lot of them in the southern district, particularly in the narcotics area, when word gets out that something is going on, that somebody is informing, and that the Feds are working on a narcotics conspiracy, prosecution people do vanish. There is no question about that.

I think in terms of grand jury secrecy, and opening this up even further, this could be a dangerous approach.

On page 15, 4BJ provides that a witness not be brought before the grand jury if he gives written notice that he intends to exercise

his privilege. I don't have, as a general proposition, much problem with that except I don't believe it should be mandated so absolutely. Let me say why.

Judge Lacey mentioned this in a little different context. There are cases, and I know of them, where some witnesses have lawyers who are not really their lawyers. It happens a lot in organized crime cases. And there have been cases where a witness has gone before a grand jury, his lawyer isn't there because he assumes he's going to assert his privilege and is going to talk for various reasons but usually to help himself.

Under the present law, I believe a witness has to invoke his privilege, before immunity can be granted. Situations do change. So I think the general point there is a sound one. I do not believe that it is wise to mandate it so firmly and flat that it would have to be observed without any deviation in any case; if there was a deviation you could end up with, perhaps, a troublesome litigation.

On the issue, Mr. Chairman, of counsel before the grand jury, I think in my Law Journal article which I submitted to staff last year, or to you, sir, I set forth my basic feelings. I agree with what Judge Lacey had to say. I would love this, love this as a defense counsel; no question about it, it would be terrific.

Mr. EILBERG. Mr. Curran, let me just interrupt.

Having forwarded us your New York Law Journal article, we would like to insert this in the record, and, frankly, we used it as a basis for preparing questions for you this afternoon. So with your permission, we would like to insert your letter of June 29 and the January 22, 1976, Law Journal article in the record at this point.

Do you have any objection to that?

Mr. CURRAN. No, sir. Thank you, Mr. Chairman.

[The documents referred to follow:]

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER,
New York, N.Y., June 29, 1976.

Hon. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship, and International Law, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN EILBERG: An article in today's edition of the New York Law Journal stated that the Subcommittee which you chair is conducting hearings on grand jury "reform" and that your Subcommittee welcomes hearing from lawyers familiar with the Federal grand jury process.

I served for three years as an Assistant United States Attorney in the Southern District of New York and, more recently, for some two and one-half years as the United States Attorney for that district. I was also for five years Chairman of the New York State Commission of Investigation and for four years a member of the New York State Assembly. I have been engaged in the private practice of law, except for the time that I was United States Attorney, since 1961 and have represented persons under investigation by Federal grand juries. I set forth this background in order to demonstrate that I have substantial familiarity with the Federal grand jury system and how it works in the busiest Federal judicial district in the United States.

I respectfully disagree with your apparent conclusions that the grand jury system needs to be changed drastically. In support of the proposition that the kinds of change you advocate are unwise and clearly not in the public interest, I am taking the liberty of enclosing a copy of an article which I wrote for the Law Journal and which appeared in that newspaper last January 22. This article sets forth in some detail why I believe very strongly that the present Federal grand jury system has served the people of the United States well and should

be continued. I am prepared to testify before your Committee on this issue and to discuss my position with you or an appropriate member of your staff at any mutually convenient time. With the exception of establishing criminal penalties for unauthorized grand jury "leaks", I believe that the "reforms" which the Law Journal has stated you are sponsoring make no sense and will do grave harm to the administration of criminal justice in the Federal courts.

Sincerely,

PAUL J. CURRAN.

THE GRAND JURY NEEDS PROTECTION FROM THOSE WHO ABUSE IT, NOT MAJOR SURGERY—THE GRAND JURY SYSTEM DEFENDED

(By Paul J. Curran)

Roy M. Cohn asserts that in "Grand Jury—An Institution on Trial," Judge Frankel and Mr. Naftalis have concluded that "the grand jury system, as now constituted, has outlived its usefulness." If that is the authors' finding, they have concealed it very well indeed. In fact, while arguing for certain "reforms and directions", the totality of their article presents a reasonably balanced case for their conclusion that the federal grand jury system should be retained.

Mr. Cohn wants grand juries scrapped because "they have become rubber stamps for prosecutors." He does not trace when this happening occurred, but it is clear that the present grand jury system has operated substantially unchanged for at least many decades and that it has operated in the public interest and without oppression of individuals. (Of course, the public interest usually conflicts with the interests of targets of grand jury investigations.) It's somewhat surprising that it has taken Mr. Cohn, who was an Assistant U.S. Attorney some twenty-five years ago, so long to reach his conclusions.

NOT RUBBER STAMPS

Composed of twenty-three citizens selected just as petit jurors are selected and carefully instructed by the Court before undertaking their duties, grand jurors are not "rubber stamps for prosecutors" or for anyone else. In fact, in hundreds, if not thousands, of cases grand juries annually return "No True Bills" signifying their refusal to indict in cases presented to them by prosecutors. Moreover, my personal experience has been that although prosecutors of course draft indictments and appear before the grand jury to question witnesses, most grand jurors are extremely conscientious, live up to their oaths in all respects, and do not blindly accept prosecutors' recommendations.

At any rate, the bulk of Mr. Cohn's case for abolition rests upon claimed improperties by prosecutors. But with no grand juries, investigations will then be conducted by prosecutors alone, with no citizen review of their conduct or of the charges until after an indictment is filed. This is a power which no prosecutor needs or deserves and, given Mr. Cohn's horror stories, it is difficult to understand how he can possibly advocate this result. Thus, rather than serving "to rent a seam in the schemes of various prosecutors", abolition of the grand jury will, for some prosecutors, serve to legitimize the very conduct about which Mr. Cohn complains.

SCRAP THE PROSECUTOR

The answer to a prosecutor's abuse of the grand jury system is not to scrap the grand jury. The answer is to scrap the offending prosecutor. And in the federal system there are ample means available to lawyers to have such complaints heard and the offender disciplined. These include, but are not limited to, bringing the matter to the attention of the U.S. Attorney personally or, if necessary, to the Attorney General, raising the complaint with the District Court of which the grand jury is an arm, or referring the grievance to the bar association. In my experience the bar association, although not always as vigorous when it comes to the questionable activities of defense counsel, is not at all loath to investigate the conduct of federal prosecutors upon the complaint of lawyers, or even in some cases *sua sponte*. Such grievances are even sometimes investigated by the media. The point is that any lawyer or citizen who has a legitimate complaint about the conduct of a government lawyer has means to redress his grievances.

The recent hue and cry for abolishing or reforming the federal grand jury system constitutes an unwarranted assault upon the one part of the criminal justice system which functions as effectively as it has functioned in years past. If abuses take place, they can and should be stopped and the offenders punished, but the misconduct of individual government lawyers should not be used to injure the public by scrapping the grand jury.

CLAIM "MISLEADING"

Further, Mr. Cohn's claim that "a potential defendant who knows of exculpatory evidence and witnesses is powerless to require their disclosure to the grand jury" is totally misleading if not just plain wrong. In my five and one-half years as a federal prosecutor I never saw or heard of a case where such exculpatory material was suppressed by the government. Moreover, counsel or even a private citizen can bring such matters to the grand jury's attention, even without government action, by simply setting forth the facts in a letter to the foreman or to all of the grand jurors.

However, even accepting, *arguendo*, Mr. Cohn's entirely erroneous premise that all prosecutors are devious, ruthless and bent far more on their prey than on fairness, his suggestion that prosecutors secure indictments of innocent people by hiding exculpatory evidence and witnesses from the grand jury makes no sense. When indictments are filed they do not disappear—they must be tried. Mr. Cohn's prosecutor, no matter how reckless or venal he is, can only be far less embarrassed by a grand jury's secret no true bill than by an acquittal in open court.

UNLIKELY DEVELOPMENT

A prosecutor would not only have to be unethical but indeed utterly devoid of reason to secure the indictment of an innocent man by concealing from the grand jury exculpatory evidence which will necessarily be before the jury at a trial where the government has a higher burden of proof.

Finally, if, as Mr. Cohn seems to suggest, self-interest is the noblest motivation that can be ascribed to a prosecutor presenting a case to the grand jury, one wonders why such a prosecutor, far from shunning the summoning of witnesses favorable to the defendant, would not welcome their appearance in a forum where, without interference by opposing counsel, he may learn their testimony before trial, "freeze" their stories under oath, and cross-examine as he chooses.

As for Judge Frankel's and Mr. Naftalis's proposed "reforms and directions" the majority simply state what has been the practice at least in the Southern District of New York for many years. This applies to the three recommendations dealing with a prospective defendant's appearance upon request, his being given "target warnings" if in fact a target, and consideration to hearing from witnesses suggested by a prospective defendant.

PROPOSAL WITHOUT MERIT

Moreover, the recommendation that witnesses not be subpoenaed solely to have them invoke their Fifth Amendment privilege also reflects general present practice. Witnesses are never subpoenaed solely for that reason. However, the proposition that a witness should *never* be called before the grand jury if he states in advance that he will assert his privilege lacks merit for at least two reasons. First, there are situations where witnesses have abandoned their prior stated intent when appearing in the secrecy of the grand jury room and this cannot be ruled out in every case. Second, in cases involving grants of immunity the witness must assert the privilege before the grand jury itself before the prosecutor can apply to the Court for immunity.

There are, however, "reforms" proposed by Judge Frankel and Mr. Naftalis, which seem to me to be ill-considered. Presently, grand jury witnesses who are later indicted are entitled to receive, pre-trial, copies of their own grand jury testimony. Further, defendants also receive at trial for cross-examination copies of the grand jury testimony of any witnesses who testify against them at the trial itself. In addition, grand jury testimony can be obtained by application to the Court upon a showing of "compelling necessity" and "particularized need". Thus, witnesses and others whose need for grand jury testimony is genuine and urgent may obtain such testimony at any time.

"NOT FAIR ENOUGH"

However, Judge Frankel and Mr. Naftalis suggest that these procedures are not fair enough, that defendants should profit from "access to the full grand jury record" pre-trial, and that witnesses should receive copies of their testimony. This should be done, it is argued, because this would be helpful to defendants and to witnesses I have no doubt that it would indeed be helpful to them. It would help some defendants to do everything possible to obstruct justice and evade conviction. It would help some witnesses to structure later testimony, either grand jury or trial, so as to cast their activities and a defendant's activities in the best possible light. However, it would not help at all the administration of justice. If there were some showing that the present federal grand jury system leads to the conviction of innocent people or is in some less sinister way unfair to defendants and witnesses, then I would understand the need for these "reforms". But no such claims are made.

In fact, there are a dozen or more reported opinions by the Court of Appeals for the Second Circuit in the past several years which establish that defendants threaten, assault, bribe, and even kill witnesses to prevent their trial testimony. These suggested reforms would only aggravate what is already a demonstrably grave threat to the enforcement of law and the administration of criminal justice. Moreover, in those reported cases and in others not reported, of which I have personal knowledge, a "protective order" can only be described as a joke.

ILL-ADVISED SUGGESTION

Another ill-advised proposal is to permit lawyers to accompany their clients into the grand jury room and participate in the proceedings. The lawyer, it is claimed, would help to expedite the proceedings by being inside rather than just outside the room. It is also asserted that the lawyer's presence would "help to avoid confusion, ambiguities and derailment of the investigation" and "could expedite the inquiry by raising points about the questions and offering proposals to improve them."

Without question, a lawyer's presence *could* accomplish all of these *desiderata*. However, there is serious doubt as to whether a lawyer's presence *would* do so in most cases.

My experience in conducting private hearings with lawyers present to counsel the witnesses has been that too often the lawyers have attempted to create such problems and not "avoid" them. And surely some lawyers representing witnesses will wish to see the investigation's "derailment" take place as promptly as possible. Indeed, as advocates, such lawyers will undoubtedly argue eloquently and properly why "derailment" is deserved.

PROBLEMS OF CONFLICT

Further, in many grand jury investigations lawyers who appear for witnesses also often represent initially other interested parties. Frequently, problems of conflict arise as an investigation progresses, facts are developed, and targets surface. The presence of counsel in the grand jury room will serve to exacerbate these problems which, under present practice, are already fraught with sufficient difficulty. Further, adoption of this proposal would unquestionably contribute toward delay and increased procedural litigation and would thereby place uncalled for additional burdens upon an already overburdened criminal justice system.

Finally, this suggestion assumes that all lawyers are sufficiently detached from their client's problems so as to be able to function as a lawyer must. Regrettably, this is simply not the case. There have been and undoubtedly still are cases in which the lawyers themselves are deeply involved in the matters under investigation and in these cases the lawyers' presence in the grand jury room cannot be assumed to be automatically helpful either to the "client" witness or to the interests of justice. Moreover, it is a fact of life that not every lawyer who appears for a client in this setting actually represents that individual to the exclusion of all others. Sometimes lawyers appear for clients when their real clients are others. Obviously this is not always susceptible of proof and even if it were, sometimes such proof cannot be offered without endangering the witness. In those situations at least, the dangers to justice and even to the witness of a lawyer's presence before the grand jury are manifest.

I take no pleasure in noting that in the two and one-half years that I was privileged to serve as U.S. Attorney forty-one lawyers were convicted of federal felonies in the Southern District of New York and another eighteen were under indictment on Nov. 1, 1975. Very few of these forty-one convicts have been disbarred. My point is that unfortunately one may not assume that the presence of a lawyer in the grand jury room necessarily means that the proceedings have been graced by an ethical and responsible member of the bar.

There presently exist ample means for dealing with allegations of unfair treatment of witnesses in the grand jury room without introducing lawyers into that room. Those who advocate this radical change have the burden of proving its need—a burden which has not been sustained.

Almost fifty-three years ago Judge Learned Hand rejected broadening discovery of grand jury proceedings. In language that is even more apposite today Judge Hand wrote:

"Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted where there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime." *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

I'll stick with Judge Hand and I believe our system of justice should, too.

EVILS OF "LEAKS"

Judge Frankel's and Mr. Naftalis's remarks on the evils of grand jury leaks deserve both applause and implementation. Although I agree that "stronger sanctions should be employed to plug" them, I suggest that the real answer to this burgeoning criminal conduct lies not so much in stronger sanctions but rather in observance and enforcement of existing sanctions.

Leaking by a prosecutor of matters under investigation in the grand jury is a misdemeanor under New York law and a contempt under federal law. Thus, when a prosecutor engages in such outrageous conduct he not only acts unethically but he also is gulity of a crime. It follows logically that such leaks by a prosecutor make him unfit to continue in office.

Prosecutors who violate the law in this fashion presumably attempt to rationalize their actions on the ground that some worthy end is being served by tarring suspects publicly but this is simply another restatement of the Watergate and Ellsberg themes that somehow perceived noble ends can justify illegal means. This kind of thinking overlooks the fact that the justice system is tested by the conduct of those who are responsible for its operations and, in addition to the obvious dangers of harming innocent people and alerting subjects by premature disclosure of investigations public confidence is undermined and destroyed when those who are sworn to uphold the law willfully violate it in this fashion.

Leaks by prosecutors have not been a problem in the Southern District of New York insofar as I am aware. They appear to be a grave and continuing problem in the state system, notably in the office of the Deputy Attorney General for New York City's Criminal Justice System. Certainly, for over three years and continuing up to the end of last month there have been many media accounts which raised on their face at least a serious question that such leaks were coming out of Mr. Nadjari's office.

NO INQUIRIES

Yet, so far as I or the public can tell, no inquiry has ever been conducted to determine whether the criminal laws of New York or provisions of the Code of Professional Responsibility have been violated. No State judge appears to be disturbed. No one superior to Mr. Nadjari in the Executive Department exhibits concern. Mr. Nadjari himself seems oblivious to any possible problem. The bar

association is silent and inactive. In short, the leaks which obviously come from some source are not even denounced by any responsible official and they (and thus possible crimes) continue unabated and are not even investigated.

Surely, one cannot expect the media to protest because, after all, they are the beneficiaries. Their revelling in such information is perhaps understandable but they also may understand that in some situations their own representatives may have been accomplices to misdemeanors and, thus, they may be caught up in their own Watergate-type ends-can-justify-means illegalities.

Now the State Commission of Investigation is studying this problem at the behest of among others, State Senator Roy M. Goodman. I applaud the Commission's energy but I suggest that there is not too much to study, unless of course the Commission intends to investigate specific situations. Illegal leaks of grand jury investigations could be drastically curtailed and probably eliminated altogether tomorrow if those responsible took the following few simple steps.

OBSERVE THE RULE

First, every prosecutor should make it plain to his staff that he will not leak confidential information himself and that no member of his staff may do so without being at least fired. The prosecutor should then observe this rule scrupulously.

Second, the courts of New York should make clear, as the federal courts have, that such leaks will not be tolerated and judges should inquire diligently into any leaks that appear, and act if they find violations of law or professional ethics.

Third, the bar association and the bar generally should insist that grand jury leaks be investigated by appropriate and available means and, if prosecutors are involved, that their derelictions be dealt with. If the leaks are not investigated properly by the responsible public officials, then the bar association's Grievance Committee should involve itself.

Finally, prosecutors should be prohibited from hiring press agents. A prosecutor has no legitimate need for such non-lawyer personnel. They can only get him in trouble while attempting to earn their high salaries. In any case there is no sound reason why the people should have to lift the anchor for such talent in connection with the investigation and prosecution of crime and criminals.

In sum, the grand jury has been a great and effective instrument for good. It needs no major surgery but it does need to be protected from those who in any way subject its delicate machinery to unfair or illegal abuse. That is the most clear and present danger to a grand jury system that has served the public well and should be allowed to continue to do so.

Mr. CURRAN. This business of counsel before the grand jury has been discussed at length by other witnesses and, as I said, I agree with most of what has been said. As a defense counsel, again, I think it is great. It is very helpful for discovery purposes because now if you have conferences among counsel on a grand jury investigation, each counsel has to rely upon a debriefing of a witness that he took afterwards.

The conflict problem is a very real one. Lawyers do not always represent those whom they purport to represent. That is a fact of life, particularly in organized crime, and indeed in some business crime situations. Not every lawyer, unfortunately, who appears is an ethical member of the bar. When I was U.S. attorney in the southern district we convicted on Federal felonies 41 lawyers; that is not indicted, convicted. It was security fraud, mail fraud, selling narcotics, obstruction of justice, and it is still going on.

Mr. EILBERG. And they used to talk about Philadelphia lawyers.

Mr. CURRAN. So I don't think it is necessary. A person has his privilege and he can confer by going outside. That privilege or that right is granted liberally, in my experience.

On the issue of subpena notice, again I don't think it is wise to do that flat out. Target warnings we always gave, but normally a person getting a subpena had a week or 2 weeks' service before the return

date. Sometimes he had notice beforehand that he was going to be served. But again there are special situations, and I don't believe it is wise to get into a court hearing on this point because of secrecy and the harm in fostering additional litigation.

I think there can be cases where one should not have to go to the court. If someone is aggrieved by that procedure he can go to the court. If the U.S. attorney is acting improperly—it's happened—and there are some cases in the southern district, or I should say in the second circuit reported on that. A forthwith subpena was used and they attempted to actually drag the person to the grand jury; the person didn't go, and one of the judges wrote an opinion about it and said that forthwith is fine but you can't do it that way. The law is clear that if a person is subpenaed he has an absolute right to consult with a lawyer, any assistant or U.S. attorney who tried to stop that, by relying on a forthwith subpena where the person said I want to talk to a lawyer, would be acting at least unethically and certainly very improperly, if he then forced that person before the grand jury.

I don't feel terribly strongly about that, but again, I question whether it is wise to involve the court in this kind of a procedure. If the U.S. attorney or assistant is abusing his process in this fashion, at least in the Southern District of New York there are many remedies available to stop it. Lawyers can go right to the chief judge; they can go to the U.S. attorney if it is an assistant; they can go to the Attorney General; go to the media; the Bar Association, and they regularly do all those things if they feel they are aggrieved.

I think it is fair to say that, while I was there at least, I don't think any of the complaints were founded. But certainly there are avenues for redress where this kind of abuse occurs.

With respect to grand jury transcriptions, it was our practice that the minutes of what transpired before the grand jury were recorded. On the question of getting the grand jury transcript I'd be opposed to that for I think reasons which have been alluded to. This is really pretrial discovery.

A year ago or more there were between, 1972 and 1975 in the second circuit, some dozen reported cases where witnesses had been threatened, bribed, and in a couple of instances killed. Granted, they were trial witnesses. But that is always a problem, and in most of those situations it could not have been anticipated so well in advance that you could go to a judge and say don't reveal that name, or don't give that person's testimony because there is a danger to the witness. We operated on the assumption in many kinds of cases, and it was true, certainly in any organized crime case, indeed in some others, that there is always a danger.

I think to the extent you open up in advance this kind of discovery, which is ample now certainly for trial purposes, you create dangers of obstruction of justice, and dangers to witnesses. People get together to try to tailor testimony. I don't believe any of that serves the legitimate ends of justice.

Now, one can get grand jury transcript by showing a compelling necessity or a particularized need. If someone is indicated he gets his or hers with the indictment. Under section 3500 of title 18, the grand-jury testimony of trial witnesses has to be made available. We normally made it available in advance of trial in some cases; in some cases in

advance of the witness' appearance. But under the law, as you know, sir, you don't have to do that. You have a right to wait until the witness has finished his direct testimony. We tried not to wait that long except in very extreme cases.

Finally on that point too, as I read the measure, it talks about even other evidence. This is pretrial. "All other evidence," I think was the language used. As far as I can tell, that is really saying that pretrial the Government should turn over its file to the defendant. I don't think that makes any sense; I don't think it is in the public interest.

The final comment I have is on preliminary examination requirement. I must confess I don't understand the reason for that. If a grand jury has found probable cause, I don't quite understand the point of a preliminary examination, except to discover the Government's case by methods other than the regular pretrial, postindictment motions that one would make. So on that one I can only comment to that extent.

That, sir, very briefly constitutes my comments, and I know it has been pretty superficial, but I tried to hold pretty close to the time. I will give a written submission.

Mr. EILBERG. Thank you very much, Mr. Curran.

Mr. Curran, you state that most grand jurors are extremely conscientious and do not blindly accept prosecutors' recommendations. In your experience, how often did a grand jury refuse to indict over the recommendation of the prosecutor?

Mr. CURRAN. Well, when I was an assistant, I know of one case that I personally handled. I didn't have any others personally, but then I wasn't comparing notes around the office. When I was U.S. attorney, I can think, I guess, of one. But we sort of prided ourselves on going beyond the probable cause standard and being satisfied, at least in the office, that we were morally certain of the person's involvement or guilt before we recommended an indictment. We tried to apply a pretty strict standard.

I was speaking in the article at that point, sir, more to the State systems around the country, where I had heard, or read some figures I should say, where I am told thousands, several thousands or more cases are dismissed by grand juries. I believe there are some witnesses from the New York State Grand Juries Association here who have information on that, and I believe in New York State they dismiss—the grand jury has dismissed—now I don't know whether that is always against the recommendation of the prosecutor, but sometimes, I am sure it is. They throw cases out in the thousands in New York State; 2,000, 3,000 a year, I think, under that circumstance.

Mr. EILBERG. On the same line, how often, in your experience, did a grand jury indict over the negative recommendation of a prosecutor? Ever?

Mr. CURRAN. I remember some cases, sir, where the grand jury felt very strongly about a particular situation, and we would go and explain to them that despite their feelings about the person, there was insufficient evidence or there were legal reasons why they should not indict, and they would accept that statement. I don't recall any case where that happened, sir.

Mr. EILBERG. That is from your experience.

Mr. CURRAN. In my experience, at least.

Mr. EILBERG. I infer from the answers that you have given, based on your own experience, that it bears out my feeling that to a large extent the grand jury is, indeed, a rubberstamp, and this is what we are concerned with.

Mr. CURRAN. Well, I think nationally, as I said, there are a lot of cases that are no true billed or dismissed in the State systems. Rubberstamp, I don't believe it necessarily follows that if a prosecutor is conducting his office diligently and as fairly as he can and still serving the public interest and going after criminals, that it follows that if a grand jury, hearing competent evidence, decides to indict people based upon a recommendation or the facts that they are rubberstamping. You could call it a rubberstamp, but you could also say they are fulfilling their duty, hearing evidence and filing indictments.

It seems to me rubberstamp is kind of a rhetoric sort of word that conjures up things where prosecutors get them to indict somebody where there was insufficient evidence to indict simply for the sake of getting them indicted. That would be, it seems to me, the kind of rubberstamp activity that really is rubberstamping.

The prosecutor goes in and gets what he wants. I don't think he can do that with grand juries in the Federal system.

Mr. EILBERG. Some of the witnesses have testified about multiple grand juries in a district investigating the same transaction. Have you ever observed this and, if so, why are multiple juries needed?

Mr. CURRAN. You mean grand juries sitting in different judicial districts, or different U.S. attorneys?

Mr. EILBERG. No; in the same district.

Mr. CURRAN. You mean you had two grand juries investigating the same matter?

Mr. EILBERG. Yes.

Mr. CURRAN. In one U.S. attorney's office?

Mr. EILBERG. Yes.

Mr. CURRAN. I am not familiar with that, sir. I don't understand why it should happen. There is no point to that, obviously.

There is no point to the multidistrict either, really, because what I would always do in something like that is call the U.S. attorney and work it out. One of us would go with the case.

Mr. EILBERG. Of course you know about the *Fort Worth Five* case which this subcommittee looked into.

Mr. CURRAN. I have read about it a little bit, sir. I don't really know about it.

Mr. EILBERG. Five Irish Americans who lived in New York City were required to go to Forth Worth and then pleaded the fifth, granted immunity, and were incarcerated. We never did get a satisfactory answer from the Justice Department as to why it was necessary to have the grand jury hear testimony in Texas. This is one of the evils, if it was an evil.

Mr. CURRAN. I can't speak to that case, sir, but if there are abuses, and I said that—this in the article, and I really believe it; I don't think you should scrap the present system which has functioned effectively for decades. I think you should scrap the abuser.

The grand jury system in the Federal courts is the one arm of the system that functions as effectively, it seems to me, now, or almost as effectively, as effectively as it has in decades past. I don't believe the same can be said for the rest of the system.

Mr. EILBERG. In your article for the New York Law Journal you state that the answer to abuse of grand jury is not necessarily reform, but rather disciplining the prosecutor. Can you tell us of any examples where prosecutors were disciplined for abuses, including grand jury leaks?

Mr. CURRAN. I can tell you of a situation which occurred before I was U.S. attorney where the court directed my predecessor to conduct an investigation of a grand jury leak. That leak did not come from the U.S. attorney's office, but at the time it came out nobody knew where it came from.

I didn't have any leaks when I was there that had to be investigated. I have no doubt had there been some which emanated from my office, that I would have been in deep trouble with the chief judge of the district court and chief judge of the second circuit. If I did it outrageously depending on what happened and how it occurred, I or my assistants might have been in more than trouble.

Certainly, in the district I operated in, the judges wouldn't tolerate it if the prosecutor wanted to do it, and we didn't do it. I know one of the things that has occurred to me, from seeing the State system operate at least in New York is that the judges, many of them at least over the years, appear not to get concerned, or members of the executive department, for that matter, about what appear to be leaks from prosecutors. They never investigate it or check out. I think they should. Leaks don't always come from prosecutors, but I think that the courts should do more disciplining in that area.

I don't know of any in my district. We really haven't had the problem that I am aware of.

Mr. EILBERG. You stated in your article that you never heard of a case where exculpatory evidence was withheld from a jury. Do you believe the prosecutor has the duty to disclose such evidence?

Mr. CURRAN. I don't know whether that was the whole sentence. I think that when you are talking about a grand jury investigation, a prosecutor has a duty above all not to try to indict somebody where there is any doubt in his mind that the person did the act, committed the crime. I think that in terms of what you present to the grand jury, and I believe that Judge Lacy talked about this a little bit, you have to examine what you are talking about by way of exculpatory evidence.

If, for example, in a, let's say, bank robbery case you have evidence that the—credible evidence that the person was 100 miles away or 500 miles away, you probably shouldn't present the case to the grand jury, if that is credible evidence. On the other hand, I don't know that you have an obligation at that stage to conduct an investigation to find exculpatory evidence. If it is presented to you by the defendant, if he's been arrested on a complaint, or by his lawyer, I think you should probably bring that to the attention of the grand jury.

In terms of a person himself testifying before the grand jury, our practice always was to tell the grand jury that the prospective defendant who has been arrested on a complaint wanted to testify and to recommend that the grand jury hear from him or from her.

Mr. EILBERG. You oppose an absolute rule prohibiting the calling of a witness who indicates he will invoke his privilege against self-incrimination. As a practical matter, does not taking the fifth in front of the jurors bias them?

Mr. CURRAN. I think the assistant or the person who has entered the case will tell the grand jury, certainly should, and normally do I believe, that this is not an admission of anything, the person has a right to do this. It certainly doesn't help him. I would never put somebody before a grand jury simply to have him assert his privilege and thereby prejudice him.

My point there was, and I think I mentioned it briefly just now, the point was that I would not make that a flat, inflexible rule because there are situations where that doesn't, where a person says he's going to take the fifth and then doesn't for some reason. Under present law, as I understand it, in order to receive a grant of immunity the person must first assert his privilege. That would be done before the grand jury.

Mr. EILBERG. Do I understand you to say that in your practice as U.S. attorney, that your assistants were required to tell the grand jury not to infer any negative evidence from the taking of the fifth amendment?

Mr. CURRAN. "Required" is probably too strong. I can't tell you I personally ever did that. I think the Criminal Division Chief did. But my practice was to tell the grand jury that person had a right to take the fifth amendment and that wasn't proof of anything.

Mr. EILBERG. You state, or just stated that some witnesses abandon their intent to invoke their privilege when actually called to testify. How often does this occur?

Mr. CURRAN. Rarely, but it has happened.

Mr. EILBERG. Can this not be determined by the prosecutor or judge without parading the witness before the jurors?

Mr. CURRAN. You mean whether they are going to——

Mr. EILBERG. In fact take the fifth amendment.

Mr. CURRAN. I can think of one or two cases where we had, I had talked to someone and suggested he testify, and his lawyer was there and he said no, and went before the grand jury. We had some indication that he might be weakening or might really want to talk, and he talked. But I think in most cases, yes. Again, sir, I go to this business about an absolutely inflexible rule. I agree with the general proposition, but I would not mind it to that extent. I wouldn't make it so hard and fast that never should it be done. I mean, as I said, I think it is dead wrong to put somebody in just to have them take the fifth.

Mr. EILBERG. You state that it is necessary that the witness assert the privilege before immunity is granted. Why can't this be legislatively changed?

Mr. CURRAN. It could be. When I wrote that article that was law, sir, and it is still law. It certainly could be.

Mr. EILBERG. You state that there would be a grave threat to the administration of justice if a witness were to automatically obtain a copy of his testimony. Many other prosecutors and former prosecutors disagree. Can you give us illustrations of the existence of this grave threat?

Mr. CURRAN. That comes up in several contexts. If you are talking about a witness obtaining his—a copy of his own grand jury testimony during the investigation, you will then, I think it is fairly simple, you will then have all the other targets and witnesses obtaining copies of their testimony. It then becomes infinitely easier for other people who

have not yet appeared before the grand jury, let's say, in an antitrust investigation or substantial fraud or official corruption case to see verbatim what each person has said and to tailor his testimony.

I think that that is elementary, and we know testimony tailoring happens. If someone goes before a grand jury and testifies truthfully, and he's not yet indicted, why does he have to have a copy of his testimony? If everybody gets his or her testimony you simply are going to have all the grand jury testimony out in the open because the lawyers will exchange it if the individuals don't, and there goes your grand jury secrecy and everything else.

I don't see any need for it. Again, as a defense counsel, I think it is terrific.

Mr. EILBERG. Do you see any need for it on the basis that people's memories fade as time goes by.

Mr. CURRAN. Are they going back before the grand jury now, or on trial?

Mr. EILBERG. On trial.

Mr. CURRAN. They have the testimony if they get indicted. I wouldn't give it to them before that, sir. That is my point. If someone is indicted he gets his grand jury testimony after indictment. Under rule 16. Automatically, sir.

Mr. EILBERG. Counsel is suggesting this may have been the case, or been the case in your district, but he questions this is universal around the country. In fact, the court can prohibit such release.

Mr. CURRAN. It may still be under rule 16, but I know of no judge, at least in the southern district, who doesn't require it. It is just done automatically, sir. In many cases it is done without a motion. Right after the indictment comes down the lawyer gets automatically the grand jury testimony of his client who becomes a defendant.

Mr. EILBERG. You oppose allowing a lawyer to be in the grand jury room as this would cause problems. A recent study by Richard Gerstein, district attorney of Dade County, and head of the ABA Grand Jury Committee, in those States which allow it, eight or nine, has indicated that few, if any, problems arise, if counsel is limited to giving advice only as provided in H.R. 94. Problems of obstreperous conduct or multiple witnesses can be handled by the court, case by case. What do you think?

Mr. CURRAN. Well, I heard the testimony this morning and I agree with what Judge Lacy had to say about that. I would add I conducted private hearings at the State commission investigation for 5 years, and the lawyers weren't supposed to be obstreperous but they can be. What do you do about it? You go before a judge; there are strong judges, medium judges, and weak judges. The judge gives him a lecture and he goes back; he does it again.

"I will have to cite you for contempt. Well, I will do that tomorrow." The grand jury investigation stops, the jurors go home. Well let's wait a week. The judge then gets his back up, says, well, if you do it again you go in the can. Let's say he does it again. The judge cites him for contempt. He wants to appeal it. The grand jury investigation stops, the client now has to get a new lawyer.

I just don't really see any point to it. I don't think individuals are being abused now. I think the system is more than fair to defendants. I don't think the goal should be to make it any tougher to prosecute cases. I think it is tough enough.

Again, I say, as a person on the other side, these matters are definitely beneficial to people representing targets of investigations. They really are.

Mr. EILBERG. You certainly don't maintain conditions are the same throughout the country in all the districts?

Mr. CURRAN. I really can't speak to other districts, sir, but if there are problems that the Justice Department or your committee is aware of, I think those problems should be addressed. Again, as I talk about leaks in that article that you are quoting from, I think you have to take hold of that office and tell them how to do it properly.

I do think if district judges are vigilant, it probably would be done even without words from Washington. But the combination of the two should certainly do the trick.

Mr. EILBERG. You raise the question in your testimony earlier about why do we require a preliminary hearing in the bill.

Mr. CURRAN. Where there was an indictment, sir. Yes; I didn't understand.

Mr. EILBERG. Yes; forgive me for not being complete in that.

Don't you think the preliminary hearing is a useful device in determining whether admissible evidence or hearsay evidence is used, or whether, indeed, these are part of the Government's case?

Mr. CURRAN. I really don't because now, with the speedy trial rule, now you have to put witnesses on the stand promptly to prove the case after probable cause is found. But what happens after the preliminary examination where you have already gotten an indictment. The magistrate says, well, you haven't established probable cause. That doesn't vitiate the indictment necessarily, nor should it.

All you are doing, it seems to me, is affording the defendant discovery different from the kind of discovery he should get by motion.

Mr. EILBERG. I was assistant district attorney in Philadelphia under Richardson Dilworth in the early 1950's. I had occasion to observe our own grand jury in various cases. It was standard practice, I tell you, for the arresting officer to have his criminal report with him, report on summarizing the arrest and just read the summary. Do you think that kind of practice is fair?

Mr. CURRAN. No; but he probably could get away with the same thing in a preliminary hearing under the present rules of evidence. No; I wouldn't do it that way, sir. I would have someone come in and testify, at least lay out the essential elements of the crime and establish probable cause based on some personal knowledge.

You do have some hearsay situations in the grand jury, but I think there should be credible evidence with the least hearsay possible.

Mr. EILBERG. You don't think having a preliminary hearing where the defendant has a lawyer, the defendant's rights would be better protected after an indictment?

Mr. CURRAN. No; I don't because I think you would get more discovery of the Government's case perhaps in a different fashion. But what I don't quite understand is, if at the preliminary hearing the judge or magistrate finds there is not probable cause, what happens to the indictment? Is the indictment then dismissed? Because it doesn't follow that what was brought out at the preliminary hearing is what was presented to the grand jury. I don't see how you can dismiss indictments based upon another proceeding, to wit, a preliminary hearing postindictment.

Mr. EILBERG. Mr. Curran, we have had a very interesting session. We appreciate everything you have said, and hope that you will give us a statement when you can. Thank you very much.

Mr. CURRAN. Thank you, sir.

Mr. EILBERG. Next we have Mr. Robert J. Del Tufo, First Assistant Attorney General and Director of the Division of Criminal Justice, State of New Jersey.

TESTIMONY OF ROBERT J. DEL TUFO, FIRST ASSISTANT ATTORNEY GENERAL AND DIRECTOR OF THE DIVISION OF CRIMINAL JUSTICE, STATE OF NEW JERSEY

Mr. DEL TUFO. Thank you, Mr. Chairman.

Mr. EILBERG. We apologize for requiring you to stay all day.

Mr. DEL TUFO. Not at all. It's been very interesting, really. I heard most of the testimony this morning, and questions and comments; it was very instructive.

Mr. EILBERG. Please proceed in your own way. If you wish to summarize your statement, we can place it in the record.

Mr. DEL TUFO. Very good, Mr. Chairman. I am bombarding you with statements. We have a very lengthy statement which sets forth Attorney General Hyland's position and my own on grand juries in general, and on H.R. 94. I guess we also included some references to H.R. 3736.

We also submitted the grand jury manual prepared by our office and county prosecutors in New Jersey, which is in operation in the State of New Jersey. And I, if I may, would like to make some brief remarks which would tend to summarize some of the things set forth in the statement.

Mr. EILBERG. Do you have a statement? It will be made part of the record without objection.

[The documents referred to follow:]

STATEMENT OF WILLIAM F. HYLAND, ATTORNEY GENERAL OF NEW JERSEY, AND ROBERT J. DEL TUFO, FIRST ASSISTANT ATTORNEY GENERAL OF NEW JERSEY AND DIRECTOR OF THE DIVISION OF CRIMINAL JUSTICE

I. INTRODUCTION

At the outset I wish to express my appreciation to this committee for its invitation to testify concerning the Federal Grand Jury Reform Act. We in New Jersey have become acutely aware that in recent years the grand jury system as variously administered has been the source of much criticism and reappraisal throughout the country and other nations. Some have recommended elimination of the grand jury requirement except for special situations where its traditional investigative functions must be preserved. Others have questioned whether the grand jury is effective as a buffer between the State and one suspected of having committed a criminal offense.[1] Nevertheless, our present system is not without

[1] See, e.g., Antell, "The Modern Grand Jury: Benighted Super-Government," 51 A.B.A.J. 153 1965); Baime, "Altering the Role of the Grand July: Prosecution by Information and the Grand Jury's Residual Function," 4 Crim.Just.Q. 1 (1976); Boylan, "on restructuring the Grand Jury System," 98 N.J.L.J. 473 (1975); Brogan, "Should the Grand Jury Be Abolished," 45 Ky.L.J. 151 (1956); Calkins, "Abolition of the Grand Jury Indictment in Illinois," U.Ill.L.F. 423 (1966); Coates, "The Grand Jury, The Prosecutor's Puppet, Wasteful Nonsense of Criminal Jurisprudence," 33 Pa.B.A.Q. 311 (1962); Kaufman, "The Grand Jury—Its Role and Its Powers," 17 F.R.D. 331 (1955); Kuh, "The Grand Jury Presentment: Foul Blow or Fair Play?" 55 Colum.L.Rev. 1103 (1955); Scigliano, "The Grand Jury, The Information and the Judicial Inquiry," 38 Ore.L.Rev. 303 (1959); Whyte, "Is the Grand Jury Necessary," 45 Va.L.Rev. 461 (1959). National Advisory Commission on Criminal Justice Standards and Goals, p. 75 (1973).

its defenders. It may be fairly argued that the grand jury properly fulfills its extraordinary dual functions. It both indicts persons upon a finding of probable cause, and protects citizens from inquisitional conduct on the part of public officials.[2] Moreover, it provides a mechanism for active citizen participation in government. Finally, our grand jury system has historically insulated the criminal charging process from political considerations.

The bills presently pending before this Committee must be reviewed against the backdrop of this continuing national controversy concerning the efficacy of the grand jury and the need for reform. Therefore, while the provisions of H.R. 94 will be the focal point of my remarks, I feel it incumbent upon me to address the broader problem of defining the proper parameters of grand jury action. In this context I am particularly concerned with H.R. 3736, which adopts an approach similar to H.R. 94, but which may be fairly characterized as even more drastic in its terms.

Succinctly stated, I believe that the approach taken in both H.R. 94 and H.R. 3736 is largely misdirected. Initially, I would observe that these bills reveal an unfortunate lack of confidence in executive officers entrusted with the enforcement of the criminal laws. They are premised upon the erroneous assumption that the grand jury has become the mere "rubber stamp" of the federal prosecutor and does not exercise sufficient independent judgment. The inference is that prosecutors commonly intrude upon the independence of the grand jury. In my view this charge constitutes a gross generalization and is not substantiated by empirical evidence. As a general rule, prosecutors are dedicated public servants whose ethical duty is not to convict but to insure that justice is done. It is as much the prosecutor's obligation to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. These obligations are not mere theoretical concepts or idealistic abstractions. They are responsibilities imposed on prosecutors as a matter of law.

It would be well to observe in this context that our government is founded upon trust. We entrust those who govern with the power to fulfill their public mission, and we have faith that they will properly perform that obligation. Prosecutors stand in a fiduciary relationship to the people whom they serve. As fiduciaries of the public trust they are under an inescapable obligation to serve the people with the highest fidelity. History has sadly revealed, however, that faith in government and its officers is not enough. Although our government is one of law, it is managed by men. It would be naive indeed to assume that all public prosecutors will be immune from human frailties and excesses. Yet, to deny to prosecutors, on that account, the authority that they must have to execute their public duties would be destructive. A certain degree of mistrust is not only healthy, but necessary to the preservation of our democracy. Nevertheless, it would be sheer folly to deprive prosecutors of their power to deal with crime merely because of a figment of fear that government itself may run amuck.

We must not be unmindful of the fact that in a prior administration, executive arrogance reached to the highest levels of government. This insolence in office, however, was not checked by legislation in the final analysis, but by the people relying heavily on the grand jury. The action of the grand jury, in returning indictments against the highest officials of government, should serve as a strong reminder that those entrusted with enforcement of the law must live within its proscriptions. In short, the vitality of the grand jury system was plainly demonstrated by its response to executive arrogance. Should this proposed legislation be enacted, it is inevitable that the grand jury's ability to respond to similar assaults on our democracy will be substantially diminished.

What has been said thus far should not detract from what I perceive to be the need for grand jury reform. I strongly endorse adoption, at least in a modified form, of several provisions in the bills under consideration. For example, I believe that pretrial discovery of grand jury minutes should be available immediately following the return of an indictment. Further, it is my view that, absent some compelling justification, it should be incumbent on a prosecutor to introduce only competent and admissible evidence. Nevertheless, I am constrained to disagree with the principle thrust of the proposed bills, which will

[2] See Committee on Criminal Courts, Law and Procedures; and the Committee on the Federal Courts, "Strengthening the Role of the Federal Grand Jury: Analysis and Recommendations," 29 Rec.A.B.City N.Y. (May/June 1974).

inevitably impair the prosecutor's ability to effectively perform his public responsibilities.

It is axiomatic that any conceivable accusatorial process administered by executive officers, provided with discretion, presents an opportunity for abuse. In my view, our greatest insurance against overzealousness on the part of prosecutors, rests in attempts to professionalize law enforcement through the administrative authority of the Attorney General. In this context, I would note that New Jersey's criminal justice system is similar to that of its federal counterpart. The Attorney General of New Jersey exercises broad supervisory powers over the local prosecutors,[3] in much the same manner as the federal Attorney General.[4] In my role as chief law enforcement officer of New Jersey, my office has promulgated specific rules and standards which are contained in a comprehensive manual to guide prosecutors in the presentation of matters to the grand jury. Moreover, the Attorney General in New Jersey is statutorily empowered to sanction an errant prosecutor, and in certain circumstances to supersede him. I will subsequently describe my efforts in this regard in greater detail. Suffice it to say, at this point our experience in New Jersey strongly indicates that administrative supervision of prosecutors best insulates the grand jury from prosecutorial impropriety. In short, we have utilized the administrative process to facilitate the evolution of the common law grand jury into an institution which jealously guards the rights of all elements of society.

In sum, I believe that federal grand jury reform is necessary. That reform should be viewed as a natural consequence of the growing complexity of modern problems. Nevertheless, we must not lose faith in the very institution which has allowed the people to vindicate their fundamental right to self-government in accordance with the law. Reform need not entail destruction. The vitality of the grand jury as an institution has not wilted in the heat of political corruption, nor should our faith in the grand jury be frozen by fear of innovation.

II. COMPARATIVE ANALYSIS OF H.R. 94 AND H.R. 3736

Proposed bills H.R. 94 and H.R. 3736 are similar responses to the admitted need for reform of the federal grand jury system. The proposed legislation would transpose essential elements of trial procedure to the grand jury stage. The effect of these changes would substantially impair the orderly administration of justice.

These bills are generally directed toward severe curtailment of executive discretion. Further, grand jury witnesses are accorded substantive rights which are far in excess of constitutional requirements. In our view, the net effect of the proposed legislation is to deprive government of the ability to fulfill its primary mission, to protect the citizen against criminal attack in his home, his place of business and on the streets. Our comparative analysis of H.R. 94 and H.R. 3736 will focus on the following topical areas:

A. Grants of Immunity.
B. The Rights of Witnesses and Suspects.
C. Contempt Procedures.
D. Grand Jury Independence.
E. The Grand Jury as an Institution.

A. Grants of immunity

1. Transactional Immunity.—Transactional immunity in return for compelled testimony is proffered by both bills.[5] Transactional immunity affords the witness full immunization from prosecution for the offense to which the compelled testimony relates.[6] The witness is thus provided with considerably broader protection than is required by the Fifth Amendment.[7] The Fifth Amendment privilege has never been construed to mean that one who invokes it cannot be subsequently

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[3] N.J.S.A. 52:17B-97 et seq.
[4] E.g., 18 U.S.C. § 5001 et seq. (Youth Corrections Act); 18 U.S.C. § 6004 (immunity provisions).
[5] H.R. 94, § 3, p. 5, line 10 to 6, line 6, amending 18 U.S.C. § 6002; H.R. 3736, § 4, p. 7, line 5 to 22, amending 18 U.S.C. § 2514.
[6] See, e.g., *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964); *Allman* v. *United States*, 350 U.S. 422 (1956); *Smith* v. *United States*, 337 U.S. 137 (1949); *Blair* v. *United States*, 250 U.S. 273 (1919); *Brown* v. *Walker*, 161 U.S. 591 (1896); *Counselman* v. *Hitchcock*, 142 U.S. 542 (1892).
[7] See *Kastigar* v. *United States*, 406 U.S. 441, 458–59 (1972), Cf. *Chapman* v. *California*, 386 U.S. 18 (1967).

prosecuted.[8] The sole concern of the Fifth Amendment is to insure protection against compelled self-incrimination.[9] Thus, immunity from use of compelled evidence, as well as evidence derived directly or indirectly therefrom, provides that insurance.[10] Use immunity is not discordant with the just and compelling interest of the government in the prosecution of crime.

We fail to perceive why plenary immunity from prosecution should be required where an admitted misdemeanant or felon is compelled to give evidence which can never be used against him. Moreover, an individual accorded use immunity is not dependent for the preservation of his rights upon the integrity and good faith of the executive. The Constitution imposes upon the government the affirmative duty to prove that any evidence it proposes to use at trial is derived from a legitimate source, wholly independent of the compelled testimony.[11]

In our view, abrogation of the use plus fruits immunity doctrine would substantially impair the grand jury's function. Traditionally, the grand jury has been accorded wide latitude to inquire into violations of the criminal law.[12] It is a grand inquest, a body with powers of investigation, the scope of whose inquiries should not be limited by doubts as to whether any potential individual will be found properly subject to an accusation of crime.[13] Significantly, the grand jury is not an officious meddler, for its investigative function "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." [14] It should be recognized that the grand jury's investigative power must be broad if its proper responsibility is adequately to be discharged. The principal function of the grand jury is to determine the truth.

It is to be observed in this context that truth and justice are inseparable. A deliberately false judgment debases the grand jury process. Yet, transactional immunity works to conceal evidence of guilt to the end that the witness and others will escape detection and conviction. When the truth is suppressed and the criminal is set free, the pain of suppression is felt, not by some inanimate state, but by the offender's next victims for whose protection we hold office. Therefore, transactional immunity, which is not required by our Constitution, is contrary to the public interest.

2. *Notice of Intent to Confer Immunity.*—H.R. 94 provides a witness with a period of one week before an order immunizing him and requiring him to testify becomes operative.[15] While the one week notice provision allows the prospective witness an opportunity to apepal, it also provides him the ability to flee. To syndicated crime, pledged to a code of silence, flight or the destruction of evidence is favored over immunity from prosecution.[16] More importantly, those who may be incriminated by the immunized testimony are, in effect, given one week to eliminate or otherwise hinder the source of their potential crimination. Lastly, this period of grace provides the witness with time to tailor his testimony. In my view, there is no valid reason for inclusion of this notice provision. In short, once immunity has been granted, the witness has no choice but to tell the truth and to produce the relevant evidence.

3. *Conditions for Obtaining Immunity.*—H.R. 3736 provides that twelve grand jurors must concur before the government may seek immunity. The bill further requires that a court must concur in the decision to grant immunity. Lastly, the proposed legislation mandates that the witness must consent in writing and that the prosecution must obtain the approval of the Attorney General before applying to a court for an order granting immunity.[17]

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[8] *Kastigar* v. *United States*, supra.
[9] *Jackson* v. *Denno*, 379 U.S. 368 (1964); *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Spano* v. *New York*, 360 U.S. 315 (1959); *Bram* v. *United States*, 168 U.S. 532 (1897).
[10] *Kastigar*, supra. Accord, *Baxter* v. *Palmigiano*, 96 S. Ct. 1551 (1976); *Lefkowitz* v. *Turley*, 414 U.S. 70, 80 (1973); *Uniformed Sanitation Men Association* v. *Comm. of Sanitation of New York*, 392 U.S. 280, 284 (1968); *Gardner* v. *Broderick*, 392 U.S. 273, 278 (1968); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967).
[11] *Kastigar*, supra; *Murphy* v. *Waterfront Commission*, supra. In re *Buonacoure*, 412 F. Supp. 904 (E.D. Pa. 1976).
[12] *United States* v. *Calandra*, 414 U.S. 338, 341 (1974).
[13] See the President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Organized Crime (1967), pp. 83–91; Grand Jury Association of New York County, Inc., The People's Big Stick (1963); Kuh, "The Grand Jury 'Present-ment': Foul Blow or Fair Play?" 55 Colum. L. Rev. 1103 (1955).
[14] *Blair* v. *United States*, supra at 282.
[15] H.R. 94, § 3, lines 7 to 12, amending 18 U.S.C. § 6002.
[16] Task Force Report: Organized Crime, supra 7–8.
[17] H.R. 3736, § 4, p. 6, line 5 to p. 7, line 4 amending 18 U.S.C. § 2514.

It is my position that the decision to grant immunity is one which must remain exclusively within the province of the executive. Granting leniency to an individual in return for his cooperation is a most delicate and complicated matter. The objectives and interests of thorough and diligent law enforcement must always be considered in the context of dealing fairly and justly with actual or potential defendants. As a general rule, it should be our policy to confer the least possible consideration in obtaining the cooperation of witnesses. If a witness will testify truthfully with no immunity at all, he should receive none. The central question is how much, if anything, should we sacrifice when we immunize such potential witnesses and how does it balance against what we can anticipate in return. Also to be weighed is the effect of any consideration upon the individual as a witness before a trial jury. Ultimately, immunity should be granted only after all of its implications have been fully assessed.

It is impossible to set forth a precise formula by which the decision to confer immunity is to be made. However, there are certain factors which should be weighed by the prosecutor when considering any form of immunity. Among these considerations are: (1) whether the information can be obtained from another source, (2) how useful the information is for purposes of criminal prosecution, (3) the likelihood that the witness can be successfully prosecuted, (4) the relative significance of the witness as a potential defendant, (5) the importance of the investigation, and finally, (6) the impact that an order granting immunity will have on public confidence in the law enforcement process.

Mere recitation of these factors strongly militates in favor of permitting experienced prosecutors to determine independently whether immunity should be requested. Members of the grand jury do not possess the requisite experience and insight to make such delicate law enforcement policy judgments. The tenure of grand jurors is brief. Their knowledge of the criminal law is minimal. Substitution of their judgment for that of a qualified professional can only hinder and impede the investigation and detection of serious criminal conduct.

We also take strong exception to H.R. 94 which requires, as a prerequisite to the issuance of an order granting immunity, a judicial finding that the information is necessary to the public interest.[18] In essence, the bill compels judicial encroachment in an area properly within the domain of the prosecutor. The Attorney General is the chief law enforcement officer in the United States.[19] In this role he is obliged to use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the law. To the end that he may satisfactorily execute these solemn obligations he is vested with broad discretion.[20] Investigation of criminal conduct and preferring charges against persons who allegedly have committed crimes are two vital responsibilities of the Attorney General.[21] The power to investigate and the charging decision is the heart of the prosecutor's function.[22] His broad discretion in these areas should be limited only by the requirement that he not act beyond the powers of his office or in bad faith.

It is axiomatic that whether immunity should be sought may well depend upon matters of public policy beyond the legal competence of the judiciary. Historically, prosecutorial decisions concerning enforcement of the criminal law comprises a part of the executive's responsibilities, and are matters of discretion particularly in the province of the executive department.[23] It is antithetical to our notions of judicial integrity to involve the courts in the decision with respect to whom to prosecute. The court, immersed in judicial matters, should not be expected to expend the time and effort to appreciate the basis of the prosecutor's decision.

Another consideration strongly mitigating against judicial review of immunity grants is the attendant loss of time and resources. Certainly, if a court is required to make a finding with respect to the efficacy of an immunity grant, then it will be necessary to engage in a "mini-trial" at which time, all relevant data concerning the ongoing investigation will be detailed. Clearly, such an untimely and great expenditure of judicial resources is unconscionable.

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[18] H.R. 94, § 3, p. 7, line 21 to p. 9, line 9 amending 18 U.S.C. § 6003.

[19] E.g., In re Coleman, 208 F. Supp. 199 (D. Miss. 1962), aff'd 313 F. 2d 867 (5 Cir. 1963).

[20] E.g., *United States* v. *Boulier*, 395 F. Supp. 165 (S.D.N.Y. 1972), aff'd *United States* v. *Nathan*, 476 F. 2d 456 (2 Cir. 1972), cert. denied 414 U.S. 823 (1972).

[21] E.g., In re Persico, 522 F. 2d 41 (2d Cir. 1975).

[22] American Bar Association Project on Standards for Criminal Justice: Standards Relating to the Prosecutor Functions, Commentary to § 3.9 (Approved Draft, 1971).

[23] See generally, *Newman* v. *United States*, 382 F. 2d 479 (D.C. Cir. 1967).

A most disturbing aspect of H.R. 3736 is the requirement that a witness consent to a grant of immunity.[24] Immunity predicated on the consent of a witness totally destroys the government's power to compel testimony. Under the proposal a witness would determine when immunity is to be granted. In short, consensual immunity would allow witnesses to define the scope of the grand jury's inquiry.

Both bills are consistent with current law in requiring the Attorney General's approval for grants of immunity.[25] We believe that this is a needed protective device. This type of review is consonant with our conception of close administrative supervision within the executive department.

B. Rights of witnesses and suspects

Both proposed bills attempt to supplement the rights of grand jury witnesses and suspects. We limit our discussion to the most important proposed changes. These proposals include: (1) notice to targets of grand jury investigations, (2) subpoenas containing advice respecting the rights and duties of witnesses, (3) the right to have counsel present in the grand jury room, (4) the requirement that the prosecution must present all exculpatory evidence to the grand jury, (5) the applicability of the rules of evidence to grand jury proceedings and (6) the right of an accused to pretrial discovery of all grand jury minutes. Violation of any of these provisions would result in dismissal of an indictment or the conferral of transactional immunity. Further, prosecutors would also be required to notify all targets of their intention to present evidence to the grand jury unless they can "satisfy a court that notice would result in flight of the person, would endanger other witnesses, or would unduly delay the investigation or prosecution." Finally, H.R. 94 would afford all indicted defendants the right to a preliminary examination.

1. Notice to Witnesses of Rights and Duties

Both bills require that subpoenas advise witnesses of the following.

(1) right to counsel;
(2) privilege against self-incrimination;
(3) the subject matter of the grand jury investigation;
(4) whether his own conduct is under investigation by the grand jury;
(5) the substantive criminal statute or statutes, violation of which is under consideration by the grand jury, if these are known at the time of issuance of the subpoena, and
(6) any other rights and privileges which the court deems necessary or appropriate.[26]

We are in partial agreement with this provision. In our view, targets of grand jury investigations should be advised of their rights. As will be noted later, this is our practice in New Jersey. Federal law is not yet settled on this subject,[27] but we believe that considerations of fair play dictate that targets be informed of the nature of the interrogation, the fact that they are putative defendants, that they have the right to counsel, and that they may refuse to testify based upon their privilege against self-incrimination. In addition, it is our practice to inform nontarget witnesses of the circumstances of the grand jury's investigation as they relate to him. Nevertheless, we can ascertain no compelling reason for requiring that such witnesses be provided with subpoenas setting forth information solely applicable to target witnesses.[28]

One further matter deserves attention. As presently written, H.R. 94 (at p. 15 and 23–24) precludes the prosecutor from calling a witness before the grand jury when the witness has given written notice that he intends to exercise his Fifth Amendment privilege. This provision conflicts with the time honored principle (see *Hoffman* v. *United States*, 341 *U.S.* 479, 486–87 (1951)) that a witness may not make himself the final judge of the availability of the Fifth Amendment privilege and hence enough much appear to permit a court to pass upon it. We thus believe that ordinary witnesses should be required to appear before the grand jury and assert the privilege. On the other hand, target witnesses should be allowed to invoke their Fifth Amendment privilege on the record out of the presence of the grand jury.

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[24] H.R. 3736, § 4, p. 6, lines 16 to 17, amending 18 U.S.C. § 2514.
[25] 18 U.S.C. § 6002.
[26] H.R. 94, § 7, p. 21, lines 7 to 24, H.R. 3736, § 5, p. 15, line 24 to p. 16, line 8.
[27] *United States* v. *Mandujano*, — U.S. —, 96 S. Ct. 1768 (1976). See, e.g., *United States* v. *Lawenberg*, 374 F. 2d 241 (6 Cir. 1967); *United States* v. *Orta*, 253 F. 2d 312 (5 Cir.), cert. denied, 357 U.S. 905 (1958); *United States* v. *Pepe*, 307 F. Supp. 365 (D.Conn. 1973); *United States* v. *Grossman*, 154 F. Supp. 813 (D.N.J. 1957).
[28] H.R. 94, § 7, p. 21; H.R. 3736, § 5, p. 15.

In any event, we strongly disagree with the remedy of transactional immunity provided in H.R. 3736 with respect to witnesses who are not properly advised of their rights.[29] We have already discussed our position with respect to transactional immunity. Suffice it to say, use immunity is constitutionally permissible and is supported by sound policy considerations.

2. Presence of Counsel in Grand Jury.—Both proposed bills permit counsel to be present with the witness in the grand jury room.[30] This, of course, deviates from the present law.[31] H.R. 94 specifically forbids counsel from speaking with anyone other than the witness.[32] H.R. 3736 is silent on the permissible extent of counsel's participation. We believe that adoption of these provisions would disrupt the grand jury proceedings. Grand jurors would not act with the independents required of an accusatory and inquisitorial body. The proposal would substantially inhibit inquiries by grand juries and detract from the well recognized policies supporting the secrecy doctrine. Moreover, there may be instances, especially involving syndicated crime, where the presence of counsel would be undesirable from the witness's perspective. In short, we urge retention of our present rule which insures the utmost freedom to the grand jury during its investigation.

3. Disclosure of Exculpatory Evidence.—We have no doubt that our Constitution presupposes a grand jury acting independently of either prosecuting attorney or judge whose mission is to clear the innocent, no less than to bring to trial those who may be guilty. Both bills propose that all exculpatory evidence in a prosecutor's possession be disclosed to a grand jury.[33] It is thus suggested that the grand jury's ability to fulfill its public responsibilities is compromised to the extent that the prosecutor is not currently required to present all exculpatory evidence to it for its consideration.[34] We note that it is highly unlikely that the grand jury will learn of exculpatory evidence unless the prosecutor brings it to its attention. Hence, the tenable possibility exists that an individual may be compelled to undergo the trauma of a felony trial based upon an *ex parte* proceeding from which he and all his evidence are excluded.

In other jurisdictions, it has been held that "if the district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obliged to inform the grand jury of its nature and existence."[35]

This rule appears to be consistent with the prosecutor's principal responsibility, *i.e.*, to see that justice is done. Therefore, in New Jersey, we have administratively adopted a standard requiring disclosure of evidence which a prosecutor knows may exonerate the accused. A.B.A. Standards, *The Prosecution Function*, § 3.6(b). Nevertheless, we believe that the present proposals should not be the subject of legislation. In many cases it will be difficult for a prosecutor to determine exactly which evidence might be deemed exculpatory. The quality of evidence varies depending on the subjective values and perspective of the evaluator. Thus, while prosecutors should present evidence which will exonerate, legislation requiring production of all exculpatory evidence is unrealistic. Moreover, the drastic remedy of dismissal is clearly without legal justification.

4. Application of Rules of Evidence.—H.R. 3736 provides that indictments must be based on competent and admissible evidence.[36] An exception exists where the government demonstrates good cause supporting the admission of "summarized or hearsay evidence alone."[37]

The bill further would prevent the prosecutor from presenting illegally obtained evidence.[38] Significantly, violations of this rule would serve to vitiate a well-founded indictment.[39]

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[29] H.R. 3736, § 5, p. 16, lines 9 to 15, enacting 18 U.S.C. § 3330A.
[30] H.R. 94, § 7, p. 19, line 20 to 21, line 9, enacting 18 U.S.C. § 3330A; H.R. 3736, § 5, p. 16, line 17 to 22, line 9, enacting 18 U.S.C. § 3330A.
[31] E.g., *United States* v. *Mandujano*, supra.
[32] H.R. 94, § 7, p. 20, line 10 to 14 enacting 18 U.S.C. § 3330A.
[33] H.R. 94, § 6, p. 15, lines 12 to 16, enacting 18 U.S.C. § 3329; H.R. 3736, § 5, p. 12, lines 1 to 5, enacting 180 U.S.C. § 3330A.
[34] See, e.g., *United States* v. *Ruble*, 524 F. 2d 1133 (6 Cir. 1975); *United States* v. *Del Toro*, 513 F. 2d 656 (2 Cir. 1975).
[35] See *Johnson* v. *Superior Ct.*, 15 Cal. 3d 248, ——— Cal.Rptr. ———, ——— P.2d ——— (1975).
[36] H.R. 3736, § 5, p. 23, lines 9 to 11, enacting 18 U.S.C. § 3330A.
[37] H.R. 3736, § 5, p. 23, lines 11 to 13 enacting 18 U.S.C. § 3330A.
[38] H.R. 3736, § 5, p. 24, lines 7 to 11, enacting 18 U.S.C. § 3330A.
[39] H.R. 3736, § 5, p. 23, line 23 to p. 24, line 2, enacting 18 U.S.C. § 3330A.

At present, reception before a grand jury of inadmissible or even illegally obtained evidence procured in violation of an individual's constitutional rights does not serve to vitiate the resulting indictment.[40]

In most jurisdictions the grand jury is not limited to receiving evidence admissible at trial.[41] As a general rule, the competency of evidence presented to the grand jury may not be the subject of judicial inquiry.[42]

Although the great weight of authority supports this rule, many have argued that it ought to be modified. It has been suggested that the failure to apply any evidentiary controls results in unnecessary trials and permits improper rummaging into personal lives of witnesses.[43] In point of fact, several states have, by statute, limited the power of the grand jury to receive inadmissible evidence.[44] In addition, the American Bar Association Project on Standards for Criminal Justice has provided:

"A prosecutor should present to the grand jury only evidence which he believes would be admissible at trial. However, in appropriate cases the prosecutor may present witnesses to summarize admissible evidence available to him which he believes he will be able to present at trial." [45]

In the accompanying commentary, the Bar Association noted that "as a general principle, the use of secondary evidence before a grand jury should be avoided unless there are cogent reasons justifying" deviation from that course.[46] For example, the need to use a summary of available evidence may arise "in cases involving voluminous records or where an absent witness has given a written statement but is not available at the time and circumstances justify prompt grand jury action.[47] So too, the Bar Association advocates the use of hearsay evidence "where the victim of a criminal act is seriously injured and therefore is unavailable. . . ." [48] Another example set forth in the commentary is "where the safety of an important witness reasonably warrants that his identity remain covert." [49] In such a case the witness' statement, if sufficiently detailed, can be presented to the grand jury.

The American Law Institute has adopted a similar approach in its Model Code of PreArraignment Procedure.[50] Under the Code, prosecutors may present "secondary" evidence only where the opposite course would impose an unreasonable burden on one of the parties or on a witness.[51]

We recommend that prosecutors should, as a general rule, seek to present only admissible evidence to the grand jury. Incompetent and also illegal evidence should not be presented to the grand jury. So too, as a general rule, evidentiary privileges should be honored and not violated at the grand jury stage of proceedings. Where a privilege is personal to a defendant or the target of an investi-

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[40] See, e.g., *United States* v. *Calandra*, 414 U.S. 343 (1974); *United States* v. *Blue*, 384 U.S. 251 (1966); *Lawn* v. *United States*, 355 U.S. 339 (1958); *Costello* v. *United States*, 350 U.S. 359 (1956); *Holt* v. *United States*, 218 U.S. 24 (1910). One line of cases, however, has indicated that where a target of an investigation is compelled to give incriminating evidence before a grand jury, that same grand jury cannot permissibly indict for the offenses to which he has confessed. See e.g., *Goldberg* v. *United States*, 472 F. 2d 513, 516 (2 Cir. 1973); *Jones* v. *United States*, 342 F. 2d 863 (D.C. Cir. 1964); *United States* v. *Tane*, 329 F. 2d 848 (2 Cir. 1964); *United States* v. *Lawn*, 115 F. Supp. 674 (S.D.N.Y. 1953), appeal dismissed sub nom. *United States* v. *Roth*, 208 F. 2d 467 (2 Cir. 1953). For example, the court in *Goldberg* v. *United States*, supra, observed that an indictment might be invalid if returned by the same grand jury before whom a defendant was compelled to testify against himself under a grant of immunity and who actually testified as to incriminating matters. The court applied the rationale of *Bruton* v. *United States*, 391 U.S. 123 (1968), to the grand jury setting in finding that under such circumstances "it would be well nigh impossible for the grand jurors to put [defendant's] answers out of their minds." Thus, the very testimony which was compelled by the grant of immunity might be used against him by the grand jury. *Goldberg* v. *United States*, supra at 516.

[41] See generally, e.g., Grossman, Baime and Mandel, "The Grand Jury: Its Evolution and Alternatives—A National Survey," 3 Crim. Just. Q. 114 (1975).

[42] See, e.g., *United States* v. *Calandra*, 414 U.S. 33 (1974).

[43] See Clark, "The Grand Jury: The Use and Abuse of Political Power," p. 145 (1975). See also Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure," 69 Yale L.J. 1149, 1171 (1960); Comment, 58 Mich.L.Rev. 1218 (1960); Note, 72 Yale L.J. 18 (1973).

[44] See, e.g., Cal. Penal Code § 936.6 (1970); Nev. Rev. Stat. § 172.135 (1967); N.Y. Crim. P. Law § 190.30 (1971).

[45] American Bar Association Project on Standards for Criminal Justice, Standard Relating to the Prosecution Function (Tent. Draft 1971).

[46] Id.

[47] Id.

[48] Id.

[49] Id.

[50] Model Code of Pre-Arraignment Procedure, § 330.4(4), § 330.5.

[51] Id.

gation and that individual has the right to claim the privilege, it can be assumed that the individual will exercise the privilege. In all other instances where the privilege is not personal, consideration should be given to the nature of the privilege, the individual who has a right to exercise it and other surrounding circumstances.

Failure to observe evidentiary controls results in unnecessary trials and permits improper rummaging into the personal lives of witnesses. Further, a wrongful indictment is "no laughing matter," for it indelibly stains the reputation of the accused. Nevertheless, the nature of the grand jury process also suggests that some exceptions be made to the policy requiring that only admissible evidence be presented to the grand jury. For example, investigative grand juries must often sift through all available clues to determine whether a crime has been committed. It would be unwise to restrict the scope of the investigative grand jury's inquiries by requiring that only competent, admissible evidence be received. So too, expert reports may often be presented to the grand jury in the interest of economy. Ordinarily, where an expert would merely testify as to the contents of his report, his presence before the grand jury would not be needed. It seems only fair, however, that the prosecution clearly inform the grand jury of the availability of better or firsthand evidence so that it can, if it wishes, request presentation of such proofs.

Nevertheless, we believe that dismissal of an indictment is far too drastic a remedy for violation of this rule. (For further discussion of the inappropriateness of this remedy with respect to illegally seized evidence, see pp. 34 to 37, *infra*). In short, we recommend adoption of the following standard which best protects the rights of the public and those of the witness:

"The grand jury shall receive none but evidence that would be admissible over objection at the trial of a criminal action, absent justification for introduction of incompetent or inadmissible evidence which justification shall be stated on the record at the time of its admission; but the fact that evidence which would have been excluded at trial was received by the grand jury does not render the indictment void where sufficient competent evidence to support the indictment was received by the grand jury."

5. Pretrial Discovery of Grand Jury Minutes.—Both H.R. 94 and H.R. 3736 provides for limited discovery of grand jury minutes. Any witness who testifies before the grand jury may, upon written request, be entitled to examine and copy a transcript of that individual's testimony before the grand jury.[52] Under H.R. 3736 the transcript must be available 48 hours after the conclusion of the witness' testimony.[53] After examination of the testimony the witness may request permission to reappear before the grand jury to explain his testimony.[54]

We believe that the right to pre-trial discovery of grand jury minutes should not be so limited. In our view, disclosure, rather than suppression of relevant materials ordinarily promotes the proper administration of civil and criminal justice. If justice is to be meaningful, the search for the truth should not be unduly circumscribed. In short, we favor full pre-trial discovery of all grand jury minutes by the defendant, other than matters relating to deliberations. Secrecy, of course, impedes the search for truth and hence must rest firmly upon some greater social need. We perceive no countervailing value which would require circumscribing the accused's right to discovery of grand jury minutes.

The reasons supporting the traditional secrecy policy have been aptly summarized in the oft-quoted language of the Court of Appeals for the Third Circuit in *United States* v. *Rose*, 215 F.2d 617, 628–29 (3 Cir. 1954). Succinctly stated, the secrecy doctrine is designed to (1) prevent the escape of those whose indictment may be contemplated, (2) insure the utmost freedom to the grand jury during its deliberations, and to prevent persons subject to indictment or their friends from importuning grand jurors, (3) prevent subornation of perjury, (4) encourage free and untrammeled disclosure by persons who have information with respect to the commission of crimes, and (5) protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation. However, it is to be observed that a defendant in the federal courts is entitled to review a witness' grand jury testimony for the purpose of cross-examination during the trial.[55] In many instances, there can be no difference between disclosure at trial and disclosure before trial. Further, the courts have

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[52] H.R. 94, § 8, p. 27, lines 4 to 17, enacting 18 U.S.C. § 3334; H.R. 3736, § 5, p. 19, lines 3 to 15, enacting 18 U.S.C. § 3330A.

[53] H.R. 3736, § 5, p. 19, lines 3 to 15, enacting 18 U.S.C. § 3330A.

[54] Id.

[55] 18 U.S.C. § 3500; F.R.Crim.P. 16.

ample power to excise what should not be revealed and doubtless could exercise it in the area under discussion without prejudice to the accused.[56] A protective order would suffice to protect the interests of the prosecution and those of the witnesses who appeared before the grand jury.

6. Preliminary Hearing Requirement.—H.R. 94 requires that a preliminary hearing be conducted in every case regardless of whether there is an indictment.[57] The attorney for the government has the option to provide the preliminary hearing before or after indictment.[58] Current federal law provides that the return of an indictment supersedes the right to a hearing on probable cause.[59] We believe that the present practice should not be abandoned. Initially, it is to be observed that the grand jury bases its decision to indict on a finding of probable cause.[60] Therefore, a post-indictment hearing would be merely duplicative of proceedings before the grand jury and would serve no purpose since the function of the hearing is to determine whether the accused is to be bound over for the grand jury. Moreover, a defendant may exercise his right to move prior to trial for a dismissal of the indictment for want of probable cause, thereby achieving the desired result.[61] And finally, we note that it is our view that grand jury minutes should be discoverable by the accused before trial, thereby obviating any possible need for a post-indictment preliminary hearing.[62]

C. Contempt procedures

1. Methods of Instituting Contempt Proceedings.—Contempt of the grand jury traditionally has been in the form of recalcitrance. Contempt is not actionable in a punitive sense. Thus, the law affords the prosecution a means to coerce evidence in a manner consistent with due process, and that for the reason that the grand jury is entitled to "every man's evidence." [63] Stated somewhat differently, the object of the contempt remedy is not to punish but to place on the recalcitrant witness a sufficiently onerous burden as to compel him to testify.[64]

Both H.R. 94 and H.R. 3736 would significantly amend federal law relating to contempts committed by recalcitrant witnesses. Presently, a witness who refuses, without just cause, to respond to a grand jury demand for evidence, may be summarily committed for contempt.[65] The proposed legislation makes contempt actionable only upon service and disposition of an order to show cause.[66] H.R. 3736 would further limit executive action by requiring an "affirmative vote of 12 or more members of the grand jury that such refusal was without just cause" prior to institution of contempt proceedings.[67] We urge rejection of both proposals.

Summary contempt procedures permit a recalcitrant witness to be brought directly from the grand jury to the court. The witness is immediately confronted with the choice of producing evidence or being incarcerated. In contrast, contempts punishable only on orders to show cause require suspension of the proceedings.[68] Both means of instituting contempt proceedings are necessary.

Witnesses are called before the grand jury under varying circumstances. Consequently, the government should be accorded alternative methods of dealing with contumacious conduct. An evaluation of the character of the witness is often considered by the government in its determination respecting how to proceed. In other words, the possible involvement of the witness in the criminal conduct which is the subject of investigation may be significant. So too, the wit-

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[56] See e.g., 472 F. 2d 599 (2 Cir. 1973).
[57] H.R. 94, § 9, p. 28, lines 16 to 23, enacting 18 U.S.C. § 3368.
[58] Id.
[59] F.R. Crim.P. 5.1(a).
[60] See, e.g., *Gerstein* v. *Pugh*, 420 U.S. 103 (1975).
[61] F.R.Crim.P. 12.
[62] *Harris* v. *United States*, 382 U.S. 162 (1965).
[63] *United States* v. *Nixon*, supra; *Branzburg* v. *Hayes*, supra; Cf. *United States* v. *Dionisio*, 410 U.S. 1 (1973).
[64] *United States* v. *Wilson*, 421 U.S. 309 (1975); *Cluft* v. *Hammons*, 305 F. 2d 565 (5 Cir. 1962).
[65] 18 U.S.C. § 401, 402, 3151; F.R.Crim.P. 42; *Codispoti* v. *Pennsylvania*, 418 U.S. 506 (1974); *United States* v. *Barnett*, 376 U.S. 681 (1964). Cf. *United States* v. *Wilson*, supra; *Harris* v. *United States*, supra.
[66] H.R. 94, § 2, p. 2 lines 5 to 22, amending 28 U.S.C. § 826; H.R. 3736, § 2, p. 2, lines 2 to 10, p. 3, lines 15 to 20, amending 28 U.S.C. § 1826.
[67] H.R. 3736, § 2, p. 2, lines 7 to 10, amending 28 U.S.C. § 1826.
[68] H.R. 94 provides that no contempt proceeding be commenced prior to 72 hours after the refusal to answer. H.R. 3736 grants 10 days notice. While both bills destroy the coercive effect of summary contempt, H.R. 3736 clearly contemplates a plenary trial on the issue. Appellate matters are to be expediently processed under both bills and H.R. 3736 provides an automatic release if an incarcerated contemnor's appeal is not disposed of within 30 days. Bail pending appeal permitted by both bills, unlike current federal law, and free counsel is explicitly made available to indigents. We strenuously object to dissolution of the summar contempt power, but we endorse the rights to counsel and bail.

ness' prior record, if any, may have a bearing on whether summary contempt procedures are to be utilized. The urgency of the evidence is also relevant to this decision. In any event, maximum flexibility is necessary in order to insure the cooperation of even the most hardened criminal. We thus urge retention of both methods of instituting contempt proceedings. Rather than abrogating summary contempt procedures, the Attorney General should be afforded the opportunity to promulgate guidelines for federal prosecutors to be used in deciding whether to proceed against a recalcitrant witness summarily or on an order to show cause. In this way, the competing interests of the witness and society can be constitutionally accommodated.

2. Length of Confinement.—The length of confinement of contemnors is crucial to analysis of the coercive nature of the contempt remedy. The proposed legislation limits confinement to a period of six months.[69] The effect of this limitation is to establish a specific criminal sentence for the commission of civil contempt. As we have noted, however, civil contempt does not seek to punish one for recalcitrance. Rather, its purpose is to encourage the witness to produce evidence by penalizing his refusal to comply with the legitimate demands of the grand jury. In short, the government's interest is in obtaining evidence and not in punishment.

Logic dictates that the period of confinement be limited only by its coercive effectiveness. The apparent concern of the authors of the proposed legislation is that witnesses will be confined well beyond the period necessary to determine whether incarceration will have a coercive effect. This concern can be alleviated by adopting a provision permitting a witness to obtain release when he can demonstrate that confinement has ceased to be coercive and has become punitive in nature.[70]

3. Reinstitution of Contempt Procedures.—The proposed bills provide that once a witness has been confined for contempt, he may never again be incarcerated for failure to produce evidence relating to the same investigation. Specifically, H.R. 94 prohibits confinement for "subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or set of events." [71] H.R. 3736 utilizes the same language, but it also prohibits confinement for subsequent refusal to give evidence concerning any "related transaction." [72] Thus, the grand jury would no longer be entitled to evidence within the possession of a witness who has previously been held in contempt.

We believe that such a result is untenable. Evidence discovered at a later date might well create a pressing need to compel the witness to testify again. To justify so serious an insult to the truth-finding process, some compensating gain should be incontestable. We perceive no such compelling justification.

4. Illegally Obtained Evidence As A Bar To Contempt.—Both bills modify present federal case law which makes it just cause to refuse to answer questions derived from illegal electronic surveillance.[73] H.R. 3736, however, extends that defense to "any evidence obtained by an unlawful act or in violation of the witness's constitutional right or rights established by any statute of the United States." [74] Most significantly, violation of this provision would vitiate a subsequent indictment.[75] We believe that this expansion of a witness's rights is ill-advised and unwarranted.

The Fourth Amendment prohibits the admission of evidence procured by means of an unlawful search or seizure.[76] The efficacy of that rule is presently under attack.[77] Many legal scholars hold the view that civil damages are a sufficient remedy for violation of Fourth Amendment rights.[78] The Fifth and Sixth Amend-

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[69] H.R. 94, § 2, p. 3, lines 6 to 13, amending 18 U.S.C. § 1826; H.R. 3736, § 2, p. 3, lines 8 to 14 amending 18 U.S.C. § 1826. The current provisions permit a witness to be incarcerated during the life of the grand jury.

[70] See *Catena* v. *Seidl*, 65 N.J. 257, 321 A. 2d 225 (1974), appeal after remand, 66 N.J. 32, 327 A. 2d 658 (1974), appeal after remand 68 N.J. 224, 343, A. 2d 744 (1976).

[71] H.R. 94, § 2, p. 3, lines 14 to 20, amending 28 U.S.C. § 1826; § 2, p. 5, lines 8 to 21, amending 18 U.S.C. § 403.

[72] H.R. 3736, § 2, p. 3, line 21 to p. 4, line 3, amending 28 U.S.C. § 1826; § 3(a), p. 5, lines 8 to 21, amending 18 U.S.C. § 403.

[73] 18 U.S.C. § 2515; 3504; *Gelbard* v. *United States*, 408 U.S. 43 (1972); In re Grand Jury Investigation (Maratea), 444 F. 2d 499 (3 Cir. 1971) (en banc); In re Evans, 452 F. 2d 1239 (D.C. Cir. 1971).

[74] H.R. 3736, § 2, p. 4, line 23 to p. 5, line 4, amending 18 U.S.C. § 401.

[75] Id.; H.R. 3736, § 5, p. 24, lines 7 to 11.

[76] E.g., *Weeks* v. *United States*, 233 U.S. 343 (1914).

[77] *Stone* v. *Powell*, 96 S. Ct. 3037 (1976).

[78] See generally, e.g., Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U.Chi.L.Rev. 665 (1970); Spiotto, "Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives," 2 J. Legal Studies 243 (1973).

ments prohibit admission at trial of involuntary confessions [79] and suggestive identifications.[80] H.R. 3736 would extend these protections to the grand jury room. Moreover, the bill would also provide witnesses with protections derived from every other federally assured right, whether it be created by the Constitution or by statute. Under this proposal, a suppression motion and hearing would be required during the grand jury investigation. Thus, a separate mini-trial would be necessary before the answer to any question could be compelled.

We reiterate our position that this is an inefficacious misapplication of judicial resources and an unwise extension of the prophylactic measures which now surround the right to a fair trial. The strain on the judiciary would be incalculable. The economic and social cost of indictments, investigations and trials would spiral.

As we have noted, we believe that absent some compeling justification, a prosecutor should be duty-bound to present only competent and admissible evidence. In New Jersey we have administratively adopted such a rule. However, quashing an otherwise well-founded indictment merely because inadmissible evidence has been introduced is truly a draconian remedy. The Attorney General may wish to adopt a standard requiring federal prosecutors to introduce only competent evidence, along the lines we have previously suggested. In the alternative, the bills should be amended to require dismissal of an indictment only when no admissible evidence supporting the charge has been presented to the grand jury.

D. Grand jury independence

Both H.R. 94 and H.R. 3736 provide for independent grand jury inquiries. H.R. 94 would permit the federal grand jury to "inquire upon its own initiative into offenses against the criminal laws of the United States" committed by any individual.[81] H.R. 3736 would limit independent investigations to federal offenses believed to have been committed "by any office or agent of the United States or of any state or municipal government." [82] Furthermore, both bills permit the grand jury to petition the courts for appointment of a special prosecutor. H.R. 94 limits appointment of a special prosecutor to situations where the attorney for the government is "unable to impartially assist, refuses to assist, or hinders or impedes the grand jury" in the conduct of any independent inquiry.[83] Under H.R. 3736, a special prosecutor may be appointed whenever twelve grand jurors conclude that such a course is necessary.[84]

Independent inquiry has always been a mainstay of the common law grand.[85] Federal grand juries are statutory,[86] however, and legislative codification of their independent status is laudable. Nevertheless, we harbor deep reservations concerning the provisions of H.R. 94 which permit undue external interference with the grand jury's function.

H.R. 94 provides that "any person" may request to appear and give evidence before a grand jury. That request must be presented to the grand jury by the prosecutor and it must be voted upon.[87] Equally disturbing is that provision which requires independent grand jury investigation upon the request of "any person." [88] These provisions are cumbersome and laborious. The grand jury should be insulated from potentially petty grievances which would occupy their precious time with nonsense. Certainly, the prosecutor can be relied upon to bring to the grand jury's attention any viable complaint or request to appear.

E. Grand jury as an institution

The grand jury's basic structure would be altered by H.R. 94. That bill decreases the size of the grand jury. A federal grand jury would consist of from nine to fifteen members, with nine constituting a quorum. Concurrence of two-thirds of the total number present would be sufficient to return an indictment.[89]

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[79] *Miranda* v. *Arizona*, 384 U.S. 436 (1966); Cf. *Chapman* v. *California*, 386 U.S. 18, 24 n. 8 (1967); *Jackson* v. *Denno*, 378 U.S. 368, 376–77 (1964); *Payne* v. *Alabama*, 356 U.S. 560 (1958).

[80] E.g., *Neil* v. *Biggers*, 400 U.S. 188 (1972); *Simmons* v. *United States*, 390 U.S. 377 (1968); *Stovall* v. *Denno*, 388 U.S. 293 (1967); *United States* v. *Wade*, 388 U.S. 218 (1967).

[81] H.R. 94, § 6, p. 16, lines 7 to 15, enacting 18 U.S.C. § 3330.

[82] H.R. 3736, § 5, p. 12, line 22 to page 13, line 9, enacting 18 U.S.C. § 3330.

[83] H.R. 94, § 6, p. 17, lines 13 to 17.

[84] H.R. 3736, § 5, p. 14, lines 9 to 13.

[85] See generally, Oliver, "The Grand Jury: An Effort To Get a Dragon Out of His Cave," 1974 Wash.U.L.Q. 166, Younger, The People's Panel: The Grand Jury in the United States, 1634–1941 (1963); Note, "The Grand Jury as an Investigatory Body," 74 Harv.L.Rev. 590 (1961).

[86] *Screws* v. *United States*, 325 U.S. 91 (1945).

[87] H.R. 94, § 6, p. 13, lines 17 to 24.

[88] Id.

[89] H.R. 94, § 4, p. 9, line 21 to p. 10, line 11, amending 18 U.S.C. § 3321.

Current federal law provides that a grand jury be comprised of 16 to 23 persons.[90] Presently, twelve grand jurors must concur before an indictment is returned.[91]

We do not endorse a reduction in the size of the grand jury. The grand jury's size should be sufficient to represent a cross-section of the community. A diminution of the size of the grand jury might well preclude representation on the panel of all recognized groups in the community.

H.R. 94 attempts to codify traditional notions of grand jury secrecy.[92] Grand-jury secrecy is both a shield for the innocent and a cloak for the legitimate interest which law enforcement officials have in preventing premature disclosure of their efforts. Although there are extant various mechanisms for controlling violations of grand jury secrecy,[93] we favor the proposed legislative formulation. We believe that this is a proper subject for the legislative process.

Both legislative proposals mandate that a judge inform grand jurors, before impanelment, of their rights and duties.[94] H.R. 3736 requires that these instructions be in writing.[95] That bill permits an indictment to be dismissed if the charge is not given.[96] We favor adopting a "model grand jury charge" which would be distributed to all federal judges. The model instructions would emphasize the independent role of the grand jury. The charge would also stress that the judiciary is accessible to respond to questions that the grand jurors might have. We in New Jersey have adopted such a model charge.

III. THE NEW JERSEY EXPERIENCE

New Jersey is one of the most densely populated and highly urbanized states in the nation. Therefore, it is not surprising that our law enforcement officials are continually engaged in combatting the ugly realities of crime. Yet, despite the difficulties of this task, we have maintained a high level of respect for the rights of those accused of criminal wrongdoing. This tradition has been manifested, in large measure, by the safeguards provided those who have become the focus of grand jury inquiries.

As we have observed, the ability of the grand jury to prevent unwarranted prosecutions and to act independently has been the subject of much public debate. Yet, the charge that prosecutors abuse their powers in grand jury proceedings is wholly unsubstantiated in New Jersey. In point of fact, specific instances of prosecutorial misconduct have been rare in our State. We believe that the success of the New Jersey system is premised largely on our efforts to professionalize law enforcement through the administrative authority of the Attorney General. Close supervision of well-trained professionals is the best guarantee against prosecutorial excesses.

Toward this end, the Attorney General of New Jersey and I commissioned a task force consisting of county prosecutors and members of the Division of Criminal Justice to prepare a grand jury manual for the use of State and local law enforcement agencies. Our efforts were designed to select the best procedures presently in force as opposed to merely weeding out the worst.

The manual, in its completed form, extensively sets forth recommended practices for prosecuting attorneys in presenting cases to grand juries. It provides for uniformity of prosecutorial conduct in every grand jury in New Jersey. It also constitutes a valuable orientation document for newly appointed Deputy Attorneys General and Assistant Prosecutors.

The manual, the first of its kind, codifies the best practices presently utilized by state and local prosecutors in presenting matters to grand juries. It provides a comprehensive statement of the prosecutor's duties and ethical obligations before the grand jury. The manual addresses such important areas as grand jury orientation, the role of the prosecutor in grand jury proceedings, the rights and duties of witnesses appearing before the grand jury, standards for determining whether immunity should be employed as an investigative tool, guidelines for dissemination of information to the media, preparation of cases prior to presentation to the grand jury and post-indictment procedures. The textual portion of the Manual has been supplemented with an extensive appendix consisting of model forms for use during the investigative phase of the grand jury function. Copies of the manual will be supplied to the members and staff of this Committee.

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[90] 18 U.S.C. § 3321; F.R.Crim.P. 6(a).
[91] Id.
[92] H.R. 94, § 5, p. 16, line 17 to p. 12, line 10, enacting 18 U.S.C. § 3329.
[93] E.g., F.R.Crim.P. 6(e).
[94] H.R. 94, § 6, p. 12, line 16 to p. 13, line 16, enacting 18 U.S.C. § 3329. H.R. 3736, § 5, p. 8, line 1 to line 17, enacting 18 U.S.C. § 3229.
[95] H.R. 3736, § 5, p. 8, line 3, enacting 18 U.S.C. § 3229.
[96] H.R. 3736, § 5, p. 10, lines 7 to 12, enacting 18 U.S.C. 3229.

Many of the reforms presently being considered by this Committee, as well as numerous others, have already been instituted through the administrative process in New Jersey. For example, the manual provides that: (1) the grand jury must be furnished with exculpatory evidence which makes it unlikely that the prosecution will be able to sustain its burden of proof before a petit jury, (2) evidence may be submitted by a target when there is clear indication that he will be exonerated thereby, (3) targets must be warned of their rights and duties prior to being called before the grand jury, (4) the prosecutor is prohibited from stating an opinion or urging a point of view, or commenting on the weight or sufficiency of the evidence, except that he may comment on reasonable doubt as to the guilt of the accused, the extent of harm caused by the offense, nonenforcement of the statute in question, improper motives of a complainant and the cooperation of the accused, (5) the prosecutor may not without justification, present illegal or incompetent evidence, (6) the prosecutor is specifically prohibited from usurping the grand jury's power to subpoena, (7) guidelines are established to assist in the determination of whether to seek a summary contempt order or to proceed by a show cause order in cases of recalcitrant witnesses, (8) standards are articulated to formalize procedures to be used in extending immunity or other consideration to a witness, and (9) prosecutors are to assist the grand jury in the exercise of their function by reminding the jurors that they have the right to request additional witnesses and that they may put questions to any witness.

In sum, our grand jury manual was the product of a painstaking effort to define the rational bounds of prosecutorial discretion. It seeks to facilitate the need for a flexible system, which ensures individual rights, while permitting prosecutors to have sufficient authority to fulfill their sworn duties. Further, those who deviate from the standards set forth in the manual may be administratively disciplined. Adherence to the articulated standards set forth in the manual will ensure that prosecutors in New Jersey will continue to be solicitous of the rights of defendants and witnesses in grand jury proceedings.

Our experience clearly indicates that the best means of insuring against prosecutorial overzealousness is through the professionalization of our law enforcement personnel by utilization of the administrative authority reposed in New Jersey's Attorney General. Nevertheless, grand jury reform has also been the subject of joint action by the courts and prosecuting attorneys. For example, we have prepared a model charge which emphasizes both the grand jury's independence and the accessibility of the court to respond to questions. Further, as a result of such joint efforts, New Jersey's criminal discovery rules are probably the most liberal in the nation. We have totally rejected the notion that the criminal trial is a contest. Accordingly, grand jury minutes are available to all defendants subsequent to a routine discovery request. Discovery of grand jury minutes provides an important check on any possible abuses in the grand jury process. Moreover, full discovery of grand jury minutes provides the basis for legal challenges to the sufficiency, weight, competency and admissibility of the evidence presented. Public recordation of the evidence upon which the prosecutor seeks to found an indictment gives strong incentive for professionalism.

In our view the response to purported abuses of the grand jury system should reflect the trust and confidence which a free society must repose in its executive officers. We reiterate that under present law prosecutors are duty bound to serve the public with the highest fidelity. In discharging the duties of their office, prosecutors must act reasonably and not arbitrarily. Above all, they must display good faith, honesty and integrity. Enactment of broad remedial legislation to ameliorate the effect of specific and isolated instances of abuse of the grand jury is not the answer. While we do not question that grand juries have been misused by individual prosecutors, law enforcement as an entity has performed in a responsible and professional manner. Legislation will only breed further mistrust and skepticism. Moreover, the proposed legislation would seriously impair the ability of the grand jury to perform its historical function without any compensating social gain. The federal Attorney General's supervisory power over United States Attorneys is the best means of preventing prosecutorial excesses. Indeed, in New Jersey the administrative process has been, for the most part, responsible for insuring the successful operation of our grand jury system. Public faith in our present institutions, coupled with necessary administrative reforms, will enhance the ability of grand juries to protect citizens against unwarranted prosecutions and ferret out criminal conduct.

GRAND JURY MANUAL FOR PROSECUTORS:

CRIMINAL JUSTICE STANDARDS

Prepared by:
Office of the Attorney General,
Division of Criminal Justice
and the County Prosecutors Association

(Final Draft - January, 1977)

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GRAND JURY ORIENTATION

The responsibility for indoctrinating a newly constituted grand jury, the members of which have little or no knowledge or understanding of how they are supposed to function, rests with the Prosecutor.

Accordingly, on the day the grand jurors are sworn in, they should be addressed by the Prosecutor who will be presenting most of the cases to them.

At this time, the jurors should be given a brief outline of the criminal justice system. They should be informed that, in most cases, the first step in a criminal prosecution is the filing of a complaint in a municipal court in which a defendant is charged with the commission of a specific crime. The complaint is usually signed by either the alleged victim or a police officer. The succeeding steps after the filing of a complaint should be detailed, tracing a case through the municipal court, the Prosecutor's office, the grand jury and the trial court.

It should be explained how cases will be submitted to them, how they will receive testimony, deliberate and act. They should be advised that, in presenting a case, it is not the practice, nor is it necessary, for the Prosecutor to bring before them all the available witnesses, provided the testimony of those witnesses who are produced provides sufficient legal evidence to establish

a prima facie case upon which an indictment may be based, i. e., evidence which if unexplained or uncontradicted, would carry the case to a trial jury and justify the conviction of the accused. However, it should be emphasized that the grand jury, as an independent body, has the right to request that additional witnesses or other evidence be produced before them.

It would be advisable to suggest to them that, if a juror has personal knowledge of the facts of a case or is acquainted with a complaining witness, victim or defendant, that fact should be called to the attention of the Foreman. The juror should consider disqualifying himself or herself from deliberating and voting in the matter.

Cases to be presented to a grand jury for its first two or three sessions should be screened so as to exclude matters involving major crimes or cases of a complex nature.

The terms "Indictment," "No Bill" and "No Bill-Remand" should be defined for them, and the legal and practical significance of each clarified.

The respective duties of the Foreman, Deputy Forman and Clerk of the Grand Jury should be outlined, particularly those duties referred to in Rule 3:6. Thus, it should be stated that the Forman, and in his or her absence the Deputy Foreman, presides over the daily sessions, administers the oaths, moderates discussions, and endorses all indictments and presentments. It

should also be stated that it is the duty of the Clerk of the Grand Jury to make and keep the minutes of the proceedings as well as to record the vote of each juror, by name, on each considered matter.

They should be advised that, in accordance with R. 3:6-6(a), the Prosecuting Attorney, the Clerk of the Grand Jury, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session. No person other than the jurors, the Clerk and the Prosecuting Attorney may be present while the grand jury is deliberating. The grand jury, however, may request either the Prosecuting Attorney or the Clerk to leave the jury room during its deliberations.

Finally, the role of the Prosecutor in relation to the grand jury should be set forth. The grand jury should be informed that it is the responsibility of the Prosecutor presenting a case to examine witnesses and to introduce other evidence. Further, the Prosecutor is to advise members of the grand jury as to the admissibility of evidence and the propriety of specific questions which they may wish to ask witnesses. Often grand jurors are tempted, particularly in marginal cases, to ask experienced police officers what their opinion is with respect to the guilt or innocence of a putative defendant. Grand jurors should be instructed not to ask "opinion" questions with respect to laymen witnesses. Finally, the Prosecutor should note that, when necessary, it is incumbent upon him to explain and relate the testimony with reference to applicable statutes and legal principles.

THE ROLE OF THE PROSECUTOR

A prosecutor's duty before the grand jury is to present the evidence and explain the law, thereby assisting the grand jury to accomplish its purpose which, simply stated is:

1) to ensure that persons will be brought to trial only if a reasonable basis for the charge exists; and

2) to ensure that those brought to trial will be adequately informed of the charges against them.

In a typical situation, a complaint which has been forwarded to the grand jury (realistically the Prosecutor's Office) after the probable cause hearing should be initially reviewed by an assistant prosecutor to determine if additional investigation is necessary or whether, in the particular case, administrative action or other alternative to prosecution is appropriate. After having thoroughly reviewed the entire file and determining that the matter should be presented to the grand jury, the assistant prosecutor must decide which witnesses are to be called before the grand jury. The witnesses will testify to matters the assistant prosecutor thinks necessary for a proper understanding of the charge made and also will present sufficient evidence to sustain the charge. As a practical matter the number of witnesses is controlled in part

by the time available and the number of cases that must be heard by the grand jury on a given day. This is not to say that a particularly complex case should be inadequately presented because of the lack of time. Time must be made to accommodate those cases where extended testimony is necessary in order to give the grand jury a full understanding of the charge and the defendant's involvement or lack of it in the crime. A survey of New Jersey prosecutors indicates that almost without exception, prosecutor's offices in this State are committed to placing experienced and capable lawyers in charge of the grand jury. This experience is put to good use in deciding the quantity of testimony that is necessary for the grand jury's knowing evaluation of a case, the context of the examination of witnesses and the charges ultimately included in the indictment. Of course, it is within the sphere of the authority of the grand jury to call for additional witnesses that they may wish to hear in a particular case. Toward that end, the prosecutor should remind them of that prerogative.

The prosecutor may also make the determination that the potential defendant or target should, at least, be offered the opportunity to testify in his own behalf. This situation may arise in a number of circumstances, among them being the neighbor-type dispute, domestic or inter-family quarrel, or those instances where there is a suspicion that the complainant possibly has improper motives for signing the complaint. The target himself

may initiate a request to be heard by the grand jury; the prosecutor may grant such a request if the ends of justice require it, or to assure a full presentation of the matter to the grand jury. Whether the defendant chooses to testify or not, the prosecutor presenting the case may have, or receive from the target, evidence that would tend to exculpate the target. It is axiomatic that if reliable, exculpatory evidence exists, the prosecution is not likely to sustain its burden of proof before a petit jury, and therefore would justify submission of same to the grand jury. However, care must be taken not to present a "trial" of the issue before the grand jury, and certainly not to create an adversary hearing of any variety. It is therefore recommended that, in the ordinary case, evidence offered by the defense (other than through the testimony of the target of the investigation) be submitted to the grand jury only when there is a clear indication that the target would be exonerated thereby.

In presenting the typical criminal complaint to a grand jury, it is necessary at the outset that the prosecutor say a few words about the complaint. He should set the scene for the grand jurors by spelling out the charge or charges including the elements where it would assist the jurors in considering the facts and the witnesses to be called. In more complex cases, a brief explanation of the testimony that is anticipated may be of assistance. While in no way expressing

an opinion nor urging a point of view, a prosecutor should prepare the grand jurors with the factual background necessary for what they are about to hear thereby making the testimony meaningful. In examining the witnesses before the grand jury, it is imperative that questions be concisely and simply stated to elicit answers that are relevant and clearly within the understanding of the grand jurors. It would be well to remember that grand jurors have varied educational backgrounds, comprise many occupational levels, and range in age from 18 to 70. They bring to their duties their life experiences, also their pre-conceived ideas of the criminal justice system, often gleaned from television and other public media. Also it should be kept in mind that while the prosecutor examining the witness has had the benefit of reading all the reports in the case, perhaps more than once, the grand jurors are hearing the testimony for the first time and performing the difficult task of placing the testimony that they are hearing into the overall framework of the case. It is in this area that the experienced prosecutor can, while maintaining an objective stance, be of immeasurable assistance to the grand jury in fulfilling its function. Witnesses' examination should be brief, with concentration on the elements that must be shown to establish a prima facie case. Leading questions are often necessary, and entirely proper to assure that the witness keeps to relevant issues, and to handle expeditiously matters presented to the grand jury.

Occasionally, it will be necessary to "cross-examine" a witness. Normally, such an approach is necessary (1) when there is an obvious inconsistency between the witness's testimony before the grand jury and his prior statements; (2) when the witness's story is "unlikely"; (3) when there is a conflict in testimony between witnesses; (4) when the witness appears evasive or hostile; or (5) when there appears to be a strong probability that the witness is not being truthful. It is the prosecutor's duty to elicit the truth from the witnesses appearing before the grand jury; probing examination is therefore essential when it is suspected that a witness is being less than honest or forthright.

After the prosecutor has concluded his examination of the witness, the grand jurors should be questioned to determine if they have any questions to put to the witness. From our survey of Prosecutors' Offices throughout the State, there appear to be two methods of dealing with grand jurors' questions. Both methods are acceptable. As a matter of practice the prosecutor should consider the merits of both and make his decision accordingly. The first method is to permit the grand jury to ask questions directly of the witness. Utilizing this procedure requires that the prosecutor be on his guard to cut off an improper question, i. e. "Have you ever arrested this man before, Officer"; "does the defendant have a prior record?". In short, there is no prior determination by counsel as to propriety and relevance. If an improper question is asked and answered before the

assistant prosecutor can interrupt, the only thing to be done is to instruct the grand jury on the record to disregard the answer and not to consider it in their deliberation.

The second method requires that the witness leave the jury room, and have the prosecutor and other grand jurors screen the questions before being asked of the witness to avoid improper query, and more importantly, improper responses. Aside from the obvious improper question which could place inadmissible or unnecessary information before the grand jury, direct questioning by the grand jury is a problem for several other reasons: (1) There is always the possibility irrelevant or improper inquiries could harm an investigation or prosecution; (2) The time consumed by irrelevant and repetitious questions could interfere with the work of the grand jury. It is the responsibility of the prosecutor to help the jury discipline itself to limit questioning of witnesses to pertinent matters.

After all the witnesses have been examined and have left the grand jury room, the assistant prosecutor may fairly and impartially summarize the evidence and explain the testimony with reference to the law of the case. For instance, if the charge is armed robbery and there has been testimony that the weapon employed was a toy gun, it is absolutely necessary that the grand jurors be given a brief and simple explanation that the law permits a charge of armed robbery even though the gun was not

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in fact operable, nor capable of inflicting injury. Similarly, it may be necessary to read the statute on robbery to put the testimony regarding the fear that the victim felt (or lack of it) in the proper perspective. Although over a period of months grand jurors gain some slight expertise in the law and a superficial knowledge of the applicable criminal statutes, they are still lay people who have little or no training in the law, or in how the law relates to the facts presented to them. It is the prosecutor's obligation to explain these matters to them with simplicity and clarity. In complex cases a draft indictment may be prepared beforehand and used as an aid in relating the testimony to each of the possible charges. Of course, the Assignment Judge is available to the Grand Jury for instruction independent of the prosecutor and the grand jury should be reminded of that from time to time. However, as a practical matter, it is generally not feasible to transport the grand jury to the court after they have heard evidence in each case. Therefore, it is incumbent upon the assistant prosecutor to gain the grand jury's collective confidence in his judgment, honesty, good faith and fairness. Adequate preparation by the prosecutor is an absolute necessity to achieving this desired rapport.

The prosecutor's role before the grand jury is not easily defined. "[T]here is no impropriety in the prosecutor assisting in the investigation and examination of witnesses;

in advising the grand jury as to the admissibility of evidence and the proper mode of procedure and in explaining the testimony with reference to the law of the case . . . [H]e may not [however] participate in its deliberations, or express his views on questions of fact, or comment on the weight or sufficiency of the evidence, or in any way attempt to influence or direct the grand jury in its findings . . . [that is, toward the return of an indictment]," State v. Hart, 139 N.J.Super. 565, 567-568 (App.Div. 1976).

While the broad pronouncements quoted above appear to apply without variation, there are numerous situations in which additional information within the knowledge of the prosecutor should be brought to the attention of the grand jury to assure that justice is done. The following is a partial list of those situations:

a. The prosecutor's reasonable doubt that the accused is in fact guilty;

b. The extent of harm caused by the offense;

c. The disproportion of the authorized punishment in relation to the particular offense or the offender;

d. Possible improper motives of a complainant;

e. The prolonged non-enforcement of a statute, with community acquiescence;

f. The reluctance of the victim to testify;

g. Cooperation of the accused in the apprehension or conviction of others;

h. Availability and likelihood of prosecution by another jurisdiction.

(White Paper: F. O. No. 11- 1976)

In short, a prosecutor may recommend a "no bill" in those instances where justice requires. In some cases, substantial justice will best be achieved by a remand of the matter to the Municipal Court; the prosecutor should be prepared to discuss the possible penalties and consequences of such a remand in the event of a "no bill."

There is no doubt of the impropriety of a prosecutor who influences the grand jury to indict when there is a lack of evidence to support such indictment. State v. Hart, supra; State v. Ferrante, 111 N.J.Super. 299, 304-306 (App.Div. 1970). However, it is equally clear that, in the rare case when a grand jury votes not to indict and the prosecutor is convinced that a real and obvious miscarriage of justice has thereby occurred, the prosecutor should not hesitate to seek to re-present the matter to another grand jury. In short, the prosecutor must be guided by the dictates of justice, with recognition of the deference given his position by the jurors and the influence his comments might have. Cf. State v. Farrell, 61 N.J. 99 (1972).

GRAND JURY WITNESSES

The responsibilities of the prosecuting attorney to particular witnesses vary greatly depending upon the status of the witness subpoenaed to or appearing before a grand jury. In order to catalogue the duties of the prosecutor, it is necessary to distinguish between the different classes of witnesses likely to be encountered.

Non-target (non public employee) -

A non-target witness is one who is not identified or reasonably identifiable by the prosecutor as an object of the grand jury inquiry or investigation. The prosecutor's good faith determination as to the "status" of a particular witness will prevail, and the burden is on the witness to demonstrate that the inquiry was a "ruse" to induce the witness "to unwittingly give evidence against himself." State v. Cattaneo, 123 N.J.Super. 167, 172 (App.Div. 1973), certif. den. 63 N.J. 324 (1973). See also State v. Vinegra, 134 N.J.Super. 432 (App.Div. 1975), appeal pending

It is not necessary to advise a non target witness of his Fifth Amendment privilege against self-incrimination if he is called to testify before a grand jury conducting a "general investigation." "Where the inquiry is in fact a general investigation

not aimed at the witness and the witness fails to claim the privilege, his testimony can be used against him and can even be the basis of an indictment." State v. Fary, 19 N.J. 431 (1955). Thus, the witness need not be advised of his privilege when he is summoned to give testimony before a grand jury if there is only the mere possibility that he may later be indicted. State v. Fary, supra; United States v. Luxemberg, 374 F.2d 241 (6 Cir. 1967).

This general rule does not, however, preclude a witness from claiming his Fifth Amendment privilege against self-incrimination. This privilege extends to all witnesses, whether or not they are targets of the investigation. State v. DeCola, 33 N.J. 335 (1960). The privilege may not, however, be claimed prior to the oath being administered and a question being asked. Vineland v. Maretti, 93 N.J.Eq. 513, 521 (Ch. 1922). Moreover, the witness must be prepared to demonstrate a factual basis to the court to justify his claim of privilege. If the question is answered by the witness without claim of privilege, he waives his Fifth Amendment rights. State v. Toscano, 13 N.J. 418, 423 (1953). In short, a non-target witness called before a grand jury need not be warned of his Fifth Amendment right against self-incrimination, and any testimony elicited from him may later be used against him.

A non-target witness may only refuse to answer a question which, in fact, will incriminate him. Rule 24 of the New Jersey Rules of Evidence defines incrimination:

> Within the meaning of this article, a matter will incriminate (a) if it constitutes an element of a crime of this State or another

> state or the United States, or (b) the circumstances which with other circumstances would be a basis of a reasonable inference of the commission of such crime, or (c) is a clue to the discovery of a matter within clauses (a) or (b) above; provided, a matter will not be held to incriminate, if it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution . . .

Thus, a question is incriminating if the response reveals the commission of an element of a crime, furnishes new evidence that the witness committed a crime, or creates an inference that the witness has committed a crime. The right against self-incrimination extends not only to answers which within themselves would support a conviction under a criminal statute, but also to those answers which would furnish a link in the chain of evidence necessary to prosecute one under a criminal statute. Malloy v. Hogan, 378 U.S. 1 (1964).

When a non-target witness, claiming his Fifth Amendment privilege, refuses to answer a question, the prosecuting attorney may properly challenge whether the witness may validly claim this privilege. This determination must be made by the court, usually the assignment judge, before whom the witness can be brought. The assignment judge cannot accept merely the witness's statement that the requested answer will tend to incriminate him. In re Boiardo, 34 N.J. 599 (1961). See also In the Matter of Carl "Pappy" Ippolito, --N.J.Super. -- (App.Div. 1976). Rather the witness must support his invocation of the privilege by a statement indicating the nature or area of the criminal exposure which he fears. It is necessary for him to pinpoint the area to the extent necessary to support his claim of privilege to the satisfaction of the court. The witness must show sufficient facts to the

assignment judge to indicate a legitimate basis for his fear of criminal prosecution. State v. DeCola, 33 N.J. 335 (1960); In re Boyd, 36 N.J. 285 (1962).[1] If, in making this disclosure, factual incriminating material is elicited, the witness is protected against the use of such evidence and its fruits. In re Boyd, supra. If a witness is a "target" he need show no more than that fact in order to support his Fifth Amendment claim. In re Addonizio, 53 N.J. 107 (1968).

The assignment judge is usually the final arbiter of the applicability of the Fifth Amendment privilege. He must determine whether the witness has a reasonable basis on which to "apprehend the peril." The danger must be real and appreciable, rather than of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency. In re Pillo, 11 N.J. 8 (1953). In making this determination, the court must consider all the facts and circumstances of the case.

> In determining whether a matter is incriminating . . . and whether a criminal prosecution is to be apprehended, other matters in evidence, or disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations and all other factors should be taken into consideration. Rules of Evidence 24.

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1 Federal courts have held that a spurious assertion of a claimed apprehension is punishable as perjury. Carlson v. United States, 209 F.2d 209, 214 (1 Cir. 1954).

In order for the court to find that a witness has no basis for an assertion of the Fifth Amendment privilege, it must be clear from a careful consideration of all the circumstances in the case that the witness is mistaken, and that the answer cannot have a tendency to incriminate. Malloy v. Hogan, supra. If the court determines that there is no basis for the claim he will order the witness to return to the grand jury and answer the questions put to him by the prosecutor. If, in a later proceeding, it is revealed that the privilege was improperly denied, the testimony elicited may not be used against the witness. State v. DeCola, supra. If the court finds that the witness has a basis for his claim of privilege, the witness does not have to answer the questions unless his testimony has been legally compelled, that is the witness has been immunized against the use or derivative use of his testimony in a subsequent criminal prosecution against him.[2]

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2 Generally such applications should be held in camera.

Target (non public employee) Witnesses

The latitude afforded the questioning of a "non-target" witness, as discussed above, does not apply to a witness who is the target of a grand jury's investigation. Even if the State makes the allegation that the proceedings are a general investigation, the "target" witness must be warned if the facts and circumstances show that in truth the witness is a target for indictment. State v. Vinegra, supra; State v. Cattaneo, supra; State v. Sibilia, 88 N.J.Super. 546 (Cty.Ct. 1965). A witness becomes a target of the investigation when he is called in order to obtain evidence to fix a criminal charge; he must then be given the appropriate warnings. State v. Sarcone, 96 N.J.Super. 501 (Law Div. 1967); State v. Fary, supra. It is not necessary for a witness to have had formal charges filed against him in order for him to be considered such a target. It is only necessary that an intent to indict him at the time of questioning is present. However, if a witness is subsequently indicted after he has testified before a grand jury, not having been given warnings, the burden is on the witness to show that "there was a ruse by which it was sought to induce him unwittingly to give evidence against himself." State v. Fary, supra; State v. Grundy, 136 N.J.L. 96, 98 (Sup.Ct. 1947). Any doubt is resolved in favor of the validity of the indictment, that is, the indicted witness is treated as merely an ordinary witness who has waived the privilege by not claiming it. State v. Fary, supra.

It should be noted, however, that the State's ability to call a "target" witness before a grand jury has been regulated to assure maximum protection to the individual. State v. Sarcone, supra. In Sarcone, a trial court held that the appearance of a "prospective defendant" before a grand jury, absent the warnings and a subsequent waiver, mandates a dismissal of a resulting indictment. But see State v. Vinegra, supra. It does, however, appear that a target witness may be called before the grand jury for the purpose of having him claim his privilege. Almost all of the federal circuit courts, as well as most of the state courts, hold that a prospective defendant may properly be subpoenaed to testify before a grand jury, placing the obligation upon the target, having been duly warned, to claim privilege. See 1 Crim.Jus.Quar. at 49. Although our Supreme Court has not conclusively ruled on the issue, it has inferentially upheld the holding in Sarcone [In re Addonizio, 53 N.J. 107 (1968)], and is at present specifically considering the issue in State v. Vinegra.

It would appear that a target may be summoned before a grand jury, and after proper advisements may claim privilege or may elect to testify before the grand jury; in the latter situation, it is necessary to obtain a waiver of immunity from that witness after advising him that he is a target, has the right to remain silent and the right to the advice of an attorney. Again, it is noteworthy that a witness who has been subpoenaed to testify before a grand jury, who has not been given the appropriate warnings and who has not signed a waiver of immunity, has the burden of proof in

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establishing that he was, in fact, a target when he testified. State v. Cattaneo, supra; State v. Grundy, supra. Nevertheless, in view of the present status of the law, it is recommended that procedures outlined below be followed when any witness is subpoenaed to appear before a grand jury when it is evident that the inquiry has centered upon him and it appears that the investigation will result in formal charges being lodged against him:

> The "target" witness should be advised
>
> (1) that he is the "target" of the investigation;
>
> (2) that the investigation pertains to [relate a specific description of the factual matters involved];
>
> (3) that the target witness has the right to consult with an attorney;
>
> (4) that the target witness has the right to refuse to answer any question on the ground that it may tend to incriminate him personally; and
>
> (5) that, should he answer any questions or make any statements, his responses or statements may be used against him in a court of law.

The "target" witness should respond to each inquiry separately, and finally be asked if he understands that to which he has been advised. See State v. Fary, supra; State v. Sarcone, supra.

A target (at least in those cases where no complaint has been lodged) should be advised as outlined above "on the record" but generally outside the presence of the grand jury. It is further recommended that these advisements be given in the presence of counsel (if the witness has an attorney) and that counsel's presence be noted on the record. Further, it is recommended that, whenever practicable, the target be questioned as to his understanding of the advisements on the record. In addition (or in the alternative when both procedures cannot be followed), a written waiver in the form appended should be executed by the target.

It is not recommended that "target warnings" be repeated in the presence of the grand jury, inasmuch as such a procedure might be considered a communication of the prosecutor's view of what the result of the grand jury investigation should be. Moreover, there appears no reason for such advisements to be repeated in the presence of the grand jury. In short, the target witness has been provided with the alternative courses of action open to him, and he must elect either to waive or claim the privilege against self-incrimination.[3]

Upon a "target" witness claiming the Fifth Amendment privilege, the factual basis for the claim may not be sought by the prosecuting attorney.

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3 This recommendation is in no way intended to preclude a prosecutor from reviewing the circumstances surrounding the appearance of the target witness to assure the grand jury that the target is voluntarily appearing with a full understanding of the circumstances of the investigation.

Cross Complainant Witnesses:

In those situations in which potential grand jury witnesses are the subject of cross-complaints arising from the same factual transaction, such persons should be advised of the existence of the criminal complaint and provided, as a courtesy, advisements similar to those given a target. It is recommended that a witness who is the subject of a cross-complaint should be advised of his right to the advice of counsel, that he is the subject of a criminal complaint arising from the same factual transaction to which he is to testify, a description of the nature of the charges lodged against him, and that the witness therefore could incriminate himself by providing testimony to the grand jury. As in the case of target warnings, it is recommended that, whenever practicable, these warnings be given on the record, outside of the presence of the grand jury.

Cross-complaint situations are generally sensitive in nature, involving as they do claims of wrongdoing by both the "victim" and the "culprit." Unfortunately, neither the prosecuting attorney nor the grand jury can always identify the offender before all the facts are presented, and therefore all "witnesses" should be encouraged to testify. At the same time, given the fact that a criminal complaint has been lodged against the "witness," he should not generally be "compelled" to testify. This recommendation should be followed strictly in those situations involving a cross-complaint against a police officer. In short, inasmuch as the prosecuting

attorney has the authority by virtue of N.J.S.A. 2A:81-17.2(a)(1), et seq. to compel the testimony of a public officer without court supervision, care should be taken that neither de facto nor statutory immunity results from the grand jury's inquiry.

Public employees (non-target)

Every public officer and employee[4] has the obligation to cooperate and to testify in any investigation pertaining to his public office or employment. However, this obligation cannot circumvent the Fifth Amendment protection against self-incrimination.

In the case of a non-target public employee, no warnings need be given prior to appearance before or questioning by the grand jury. If a non-target public employee declines, without claim of privilege, to appear or to testify, he is to be handled as any other witness, that is by contempt process pursuant to R. 1:10-1, et seq. Moreover, the public officer or employee is subject to removal from office for his failure, without justification, to cooperate in the investigation. N.J.S.A. 2A:81-17.2(a)(1) et seq.

In order to seek removal for failure to appear or failure to testify, it is necessary that the public employee be advised of the consequences of his decision. See Kugler v. Tiller, 127 N.J.Super. 468 (App.Div. 1974) and discussion infra. In those situations in which the public officer appears but declines to testify, he should be advised on the record of his obligation to

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4. The definition of "public employee" is of broad scope.

"For the purposes of this act the term 'public employee' shall mean any person who occupies any office, position or employment in the government of the State of New Jersey, or the several counties and municipalities thereof, or any political subdivision of the State, or a school district, or any special district, or any authority, commission, board, or any branch or agency of the public service. This term shall include, but shall not be limited to, elected and appointed persons." N.J.S.A. 2A:81-17.2(a).

testify and the consequence of his refusal. In those situations in which the public employee declines to appear after having been subpoenaed, he should be arrested on a bench warrant duly issued and apart from all other advisements upon his being presented to the court, he should be advised of the consequences of his refusal to appear. If the public employee immediately alters his position and appears to testify, removal proceedings could be foregone. Cf. Hyland v. Smollok, 137 N.J.Super. 456 (App.Div. 1975).

In those situations in which a non-target public employee appears and claims the Fifth Amendment privilege, his public office does not alter his status vis-a-vis the prosecutor's right to challenge the basis for claiming privilege. See discussion on non-target witness, supra.

If the claim of privilege is upheld, the prosecutor must decide (as in the case of a target public employee) whether to "compel" the testimony of the public officer under threat of removal from office. If the prosecutor elects to "compel" the testimony of the public officer, the testimony given will be protected from use or derivative use against that officer in any subsequent criminal prosecution; in effect, the public officer will have been granted use plus fruits immunity.

If the public officer, "compelled" to testify pursuant to N.J.S.A. 2A:81-17.2(a)(1), et seq., persists in his refusal to testify, having been properly warned of the consequences of his refusal, he may be subject to removal from office. N.J.S.A. 2A:81-17.2(a)(3). If the public officer, while testifying,

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admits the commission of a crime relating to his public position, he is likewise subject to removal. Id. (See appendix for applicable forms).

Public employee-target witness

The public employee-target witness situation presents the most complex situation, involving as it does the absolute right of a target to claim privilege and the conflicting obligation of the public officer to cooperate.

The public officer-target should be considered a target first, thereby being warned as described in the "target witness" section. If a waiver of immunity cannot be secured (and after following the procedures for immunity considerations outlined infra), the testimony of the public employee-target can be compelled pursuant to N.J.S.A. 2A:81-17.2(a)(1), et seq., provided the "target-public employee" witness has claimed the Fifth Amendment privilege. The result of such action, that is compelling the public officer to testify, eliminates him as a "target" of the investigation, and immunizes him against the use and derivative use of his testimony. N.J.S.A. 2A:81-17.2(a)(2). Since there is no court supervision, and since the prosecuting attorney need do no more than to ask questions to grant this "immunity," it is absolutely necessary that each prosecutor understand the nature of the statutory provision (N.J.S.A. 2A:81-17.2(a)(1), et seq.) and the consequences of his actions.

By recent amendment, the Public Employees Immunity Law reduced the risks of mistake. Now, in order for immunity to result, the public officer must first claim the privilege against self-incrimination, thereby putting the prosecutor on notice that the provisions of the Act may come into play. If the prosecutor persists in asking questions after claim of privilege and responsive answers are given, use plus fruits immunity will result.

The key event in the public employee situation is the officer's claim of privilege. Upon that occurrence (assuming the privilege claim is valid), the prosecutor must elect to immunize the witness or to break off questioning. If the prosecuting attorney elects to continue the inquiry, he must advise the public officer as follows:

1. That he is a public officer or employee within the meaning of N.J.S.A. 2A:81-17.2(a) et seq.;
2. That pursuant to that Act, he has the duty to appear and to testify upon matters directly related to the conduct of his public position;
3. That if he fails to appear and to testify, he is subject to removal from office pursuant to that Act;
4. That if he does give testimony pursuant to this inquiry, neither that testimony nor anything derived from that testimony can be used against him in a

subsequent criminal prosecution except for perjury or false swearing.

5. That if he declines to provide testimony, in addition to any action the court may take in the nature of contempt, he is subject to removal from office for his refusal to provide testimony pertaining to the conduct of his office; and

6. That if he admits the commission of a misdemeanor or high misdemeanor relating to his public employment, office or position, he is subject to removal from office.

As in the case of target warnings, these advisements should be placed on the record (although there is no reason that this particular proceeding cannot occur in the grand jury). The public officer should be questioned as to his understanding of the advisements and his opportunity to consult with counsel as well. See generally Hyland v. Ranone, 141 N.J.Super. 48 (App.Div. 1976); Hyland v. Smollok, supra; Kugler v. Tiller, supra, and forms appended.

Refusal to Answer Non-Incriminatory Questions or to Respond After Testimony Has Been Compelled

After a witness has unsuccessfully claimed his privilege before the assignment judge he must, upon the urging of the grand jury, answer the questions or face a contempt charge. Likewise, a witness whose testimony has been legally compelled must respond to interrogation or be faced with contempt, assuming this course of action is sanctioned by the grand jury.[5]

There are two distinct ways that the matter of contempt can be approached. The court offended (usually the assignment judge) can bring summary contempt proceedings pursuant to Rule 1:10-2, or the offense can be treated as a common law crime punishable under N.J.S.A. 2A:85-1.

> A contempt, in the court's discretion, may be prosecuted summarily, i. e., without indictment and without trial by jury as provided in R.R. 4:87-1 to 4, or as a crime under N.J.S.A. 2A:85-1. In re Buehrer, 50 N.J. 501, 522 (1967).

If the matter is heard in a summary manner, as should be preferred, there is some question as to procedure to be utilized. The issue is whether the contempt is one considered to be in the presence of the court (R. 1:10-1) or whether the contempt action must be pressed by notice and order to show cause. See R. 1:10-2.

The court in In re Schwartz, 133 N.J.L. 79, 84-85 (Sup.Ct 1945), determined that the grand jury is an arm of the court, that proceedings before it are to be considered as proceedings in court, and that contempts in the presence of the grand jury are to be

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5 It is recommended that in all instances in which a contempt citation is to be sought, the grand jury should affirmatively commission the prosecutor to pursue that particular action against the witness.

treated as taking place in the presence of the court. This ruling was overruled by In re Schwartz, 134 N.J.E. 267 (E. & A. 1946), where the court, determining that there was no contempt in that there was no violation of a court order, determined that the contempt, the refusal to answer questions before the grand jury, if it existed, would have been for the disobeyance of a court order and would not have been contempt in the actual presence of the court.

Ignoring the decision of the Court of Errors and Appeals, the State Supreme Court in State v. Haines, 18 N.J. 557 (1955), addressing the issue of whether the grand jury is part of the court, quoted, attributing it to the Court of Errors and Appeals, the language in 133 N.J.L. that contempt in the presence of the grand jury is to be treated as taking place in the presence of the court. See also In re Caruba, 139 N.J.Eq. 404 (1947), aff'd 140 N.J.Eq. 563 (1947).

Other cases have, however, cast the foregoing conclusions in doubt. For example, in Swanson v. Swanson, 8 N.J. 169 (1951), the court stated that where the contempt is in facie curiae but depends on proof from persons other than the judge himself, the proceedings for contempt should be by an order to show cause. In In re Finkelstein, 112 N.J.Super. 534 (Ch.Div. 1970), while the court determined that contempt at a court ordered deposition might be contempt in facie curiae, it held that where the proof of the contempt would depend on those attending the deposition, an order to show cause procedure should be followed. See In re Tiene, 17 N.J. 170 (1954) (contempt proceeding for failure to obey court issued subpoena instituted by order to show cause).

The latter view is consistent with the apparent position of the federal courts. In Harris v. United States, 382 U.S. 162 (1965), the court held that prosecutions for contempt for refusing to answer questions before the grand jury were to be prosecutions upon notice and with an opportunity to defend. Cf. U. S. v. Wilson, 421 U.S. 309 (1975). Thus it is recommended that, in those situations in which time is not of the essence, summary contempt be pressed by notice and order to show cause.[6] In those situations having time pressures, it is suggested that the witness be brought before the court directly, that the witness be requested by the court to comply with its previous directive, and that the witnesses's intention be solicited by the court. In developing a record for contempt, it would be most desirable (in addition to the court reporter and the unresponsive answers of the witness being presented to the court) that the court actually conduct the same inquiry in its presence.

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6 1. The judge whose order was allegedly breached may not hear the charge unless the witness consents.

2. The contempt process may be instituted only by the court lest a litigant turn it to private gain.

3. Defendant shall be informed plainly whether the proceeding is penal as distinguished from one civil in nature, that is punishment imposed until the party complies with the court's directive.

4. A penal charge may not be tried with a civil contempt unless consented to by the party.

5. A conviction is reviewable upon appeal both upon the law and the facts.

6. There is a presumption of innocence.

7. Charges must be proven beyond a reasonable doubt. In re Buehrer, supra; Rule 1:10.

CONSIDERATION TO WITNESSES

The judgments which attend possible grants of immunity and other possible consideration to witnesses are often among the most sensitive and difficult a prosecutor is called upon to make. Great care must be exercised to ensure that rightfully culpable defendants do not escape prosecution and, quite frankly, that third parties are not unjustly accused by an actual or potential defendant who seeks personal exoneration at any cost.

On the other hand, immunity - as a matter of prosecutorial discretion as well as statutory mandate - is a concept of long standing in our jurisprudence and is an important concomitant to Fifth Amendment privileges in the context of the social interest in proper and thorough law enforcement efforts. In short, the concept of immunity provided to the prosecutor a mechanism to obtain evidence that otherwise would not be got:

> "The Fifth Amendment privilege is an exception to the longstanding principle that the public has a right to every man's evidence, a principle which is particularly applicable to grand jury proceedings . . . On occasion, however, immunity provisions have for a considerable period of time filled the need of achieving a further balance - some say implementing the balance - between the individual's right not to provide information incriminatory of himself and society's need for his information to pursue its investigation of the criminal activity of others. The practice of providing immunity

> against the use of compelled incriminatory testimony has an unquestioned tradition in English legal history. Certain offenses, such as bribery, are of such a character that the only persons possessing helpful knowledge thereof are oftentimes those who themselves are implicated in the offense. If the investigation of crime is not frustrated in such circumstances, there must be a means of both securing the citizen's privilege against compulsory self-incrimination and obtaining the necessary information." [7]

Ideally, of course, our citizenry should be uniformly forthright and willing to come forward at all times with relevant information, a situation which would of course obviate the need to immunize. Practically speaking, such is obviously not the case. And, as stated above, the nature of many crimes, including the consensual conspiratorial character of criminal conduct in the official corruption and organized crime areas, requires the use of immunity as an investigative tool to identify factually the criminal event and to reach the key participants:

> "One might wish that our society were so structured that the investigation of crime could rely solely upon the wholly voluntary cooperation of citizens. But it is not and has never been. If the grand jury is to perform its historic function of investigating crime and returning only well founded indictments, it must have available to it compulsory process and the testimony of witnesses who sometimes are themselves involved in the matters under inquiry. Increasing the rights of witnesses to

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7 Statement of Attorney General Levy before the House Judiciary Committee, Subcommittee on Immigration, Citizenship, and International Law, on Grand Jury Reform, June 10, 1976.

> refuse to comply with a grand jury inquiry, whatever the merits of the suggestion, would seriously hamper the grand jury in its investigative efforts."[8]

Likewise, apart from statutory immunity, other forms of favorable consideration to a witness may also be required in the context of a grand jury inquiry. The sensitivity of all such decisions, as well as their effect on any potential prosecution, is apparent. For that reason, standards governing the procedure to be followed and the criteria utilized in reaching these decisions are required.

Procedure

Appended is a memorandum which, once adapted to a particular prosecutor's office, shall be utilized in situations involving immunity or other substantial concessions to a witness in a grand jury context.

I.

With respect to immunity or other substantial concession to a witness, the obtaining of all approvals shown on the face of the memorandum, including the prosecutor or his designee, constitutes a prerequisite to the grant of use plus fruits immunity (both in informal and in the formal statutory situations), de facto transactional immunity, civil considerations or other substantial concessions to a witness for testimony in a grand jury or investigative context. In addition, the procedure shall be pursued prior to seeking the

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8 Statement of Attorney General Levy before the House Judiciary Committee, Subcommittee on Immigration, Citizenship, and International Law, on Grand Jury Reform, June 10, 1976.

testimony of a public official pursuant to N.J.S.A. 2A:81-17.2(a), et seq., and thus possibly invoking the statutory immunity there conferred. Attached to the memorandum, as noted upon its face, should be a supplemental memorandum giving a brief background of the case listing the names of known and potential defendants and discussing the factors referred to in the section of this Manual dealing with the criteria to be utilized in weighing a decision to grant concessions to a witness.

II.

With respect to an investigative or field attorney's interview of witnesses without prejudice, an informal understanding with the witness that an interview will be conditioned on an agreement by the prosecutor that nothing the witness says or leads therefrom shall be used against him may be made after obtaining oral approval from their immediate superior. No such agreement should be made by investigators or detectives without the approval of the appropriate assistant prosecutor. Such agreements, which shall be as clear and precise as possible in their terms, shall be promptly reduced to writing in the form of a memorandum from the attorney to the section or bureau chief, and a copy of the memorandum shall be included in the case file. Further, such agreements will always be entered into with extreme caution, and within the prosecutor's discretion, only in situations where it appears to the attorney from the information available to him that the witness has valuable information which cannot be obtained from other sources, and where the object of the interview is to obtain facts concerning potential defendants other than the witness himself. In cases of extreme

sensitivity or significance, before entering such agreements, the section or bureau chief shall obtain written approval from the prosecutor or his designee in the manner outlined above for other concessions to witnesses.

Criteria for Granting Consideration to a Witness

Granting leniency to an individual in return for his cooperation is a most delicate and complicated matter. The objectives and interests of thorough and diligent law enforcement must always be considered in the context of dealing fairly and justly with actual or potential defendants.

Although the circumstances of each situation differ widely, it is, has been and should be the general policy of the State's prosecutors to give up the least possible consideration in obtaining the cooperation of witnesses. If a witness will testify truthfully with no immunity at all, he should receive none. The question we must always answer is how much, if anything, are we giving up when we immunize such a potential witness and how does it balance against what we can anticipate obtaining in return from the witness. Also to be considered is the effect of any consideration upon the individual as a witness before a jury. Ultimately, a "bargain" should be struck only after all of its implications have been fully assessed.

To understand how immunity can be used in a limited fashion in order to develop an investigation to a point where final judgments can be made, it is necessary to discuss the nature of the following forms of agreement between prosecutor and witness: (1) an informal understanding that an interview will be conditioned on an agreement by the prosecutor that nothing said in the course of the interview will be used against the witness; (2) a formal grant of "use plus fruits" immunity by court order; and (3) a commitment by the State that in addition to "use plus fruits" immunity, some degree of leniency will be shown to the witness in connection with the disposition of a criminal or civil right of action against the witness, or that the witness will be totally insulated from criminal prosecution for the entirety of the criminal episode ("transactional immunity").

The first two categories involve no commitment by the State other than that of the witness's information itself and any leads derived therefrom will not be used against him. Such immunity is not a bar to the prosecution of the witness in the event that evidence derived from sources independent of the witness's statements is developed. The drawback involved, from a prosecutorial standpoint, in using limited immunity is that if and when the witness is subsequently prosecuted, the State must prove that its evidence was derived from an independent source. In re Petition to Compel Testimony of Tusa, 140 N.J.Super. 500 (App.Div.1976), certif. granted -- N.J. -- (1976); Kastigar v. United States, 406 U.S. 441 (1972), 32 L.Ed.2d 212, rehearing den. 408 U.S.931 (1972);

Ziccarelli v. N.J.State Commission of Investigation, 406 U.S. 472, 32 L.Ed. 234 (1972). Additionally, when using use plus fruits immunity, we must avoid compelling the witness to testify before a grand jury which might later indict him for an offense other than perjury or false swearing. Tuso, supra. If proper care is taken in the course of the investigation in anticipation of a subsequent taint hearing, the result of a grant of use plus fruits immunity can be nothing more than the inconvenience of an additional proceeding at the time of trial. The most difficult situation from a judgment standpoint occurs in negotiating some other form of consideration to a potential witness. The alternatives range from an agreement to accept a guilty plea to a reduced charge with no recommendation as to sentencing, to an agreement to dismiss all pending criminal cases and not to institute a civil action against the witness.

It is impossible to set forth a precise formula by which the decision to negotiate immunity is made, but there are certain factors which should be weighed when considering any form of immunity.

1. Can the information be obtained from any source other than a witness who wants to negotiate immunity? It should be understood here that it is our policy never to negotiate any form of actual leniency until we have received and evaluated the information being offered. If a potential witness refuses to disclose his information before such negotiations take place, we should attempt to compel his testimony through statutory forms of immunity or drop our efforts to deal with him.

It should again be stressed that use plus fruits immunity (N.J.S.A. 2A:81-17) should be used cautiously and sparingly, even though from a purely legal standpoint prosecution of the individual would not necessarily be foreclosed. There is no question but that legal difficulties will present themselves (proving independent basis) if prosecution of the witness is pressed, and practical difficulties in the believability of the witness in prosecution against others.

2. How useful is the information for purposes of criminal prosecution? From time to time law enforcement agencies make various kinds of deals with informants to obtain intelligence type information. Such negotiations are not the subject of this memorandum. We are concerned here with the development of admissible evidence which can be corroborated in the context of a grand jury inquiry.

3. What is the likelihood that the witness can successfully be prosecuted? When no case at all exists against the witness, immunity sacrifices only a vague possibility that one might be developed. If there is little chance of a successful prosecution, or if the case against the witness is relatively minor in nature, the State gives up less than it would if the potential prosecution of the potential witness is solid and significant.

4. What is the relative significance of the witness as a potential defendant? Such a witness must be considered in

the broadest possible context of his background, power and influence as well as the severity of the offenses committed and the extent of the potential witness's participation in responsibility for them.

5. What is the relative significance of the potential defendant against whom the witness offers to testify? Again, this kind of a judgment should not be made in the narrow confines of the case itself. The defendant's importance must be measured by the seriousness of the social harm which will result from not prosecuting him, thereby leaving him free to exercise his power and influence.

6. What is the value of the testimony of the witness to the case? Where the testimony forms the core evidence upon which the prosecution is based, it is of greater value than testimony which is corroborative or merely cumulative.

7. What impact will immunity - particularly the terms of transactional immunity and consideration in the civil sense - have on the credibility of the witness at trial? The more the State has given up to obtain the testimony, the more likely it is that the witness will not be believed. We should make all judgments on consideration with the realization that any negotiations and the final results thereof must be disclosed. In each case there comes a point at which the terms of the immunity agreement are so favorable to the witness or outrageous to the jury that a jury will not accept the testimony.

8. What impact will immunity - again, particularly the terms of any transactional immunity and civil consideration - have on the prosecutor's personal credibility and that of his office? A prosecutor has an affirmative duty to engage in conduct which will assure the public that his office is being run in a fair and responsible manner. In weighing the relative significance of potential witnesses and targets of investigations, we must avoid even the appearance of making our judgments on the basis of personal or political motives.

Statutory Immunity - Procedure

Inasmuch as use plus derivative use immunity is provided as a prosecutorial tool pursuant to N.J.S.A. 2A:18-17.3, the statutory procedure is recommended for all situations in which "immunity" is either part or all of the consideration given a particular witness.

The Statute specifies that a petition, approved by the Attorney General may be presented to the court for an order compelling the testimony of a particular witness. The petition must set forth the justification for the prosecutor's determination that the witness's testimony ought to be compelled; that is, the witness has knowledge of particularized crimes. (See form of petition, appended).

A prerequisite to the court's compelling the witness's testimony, and as a consequence granting use plus fruits immunity,

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is the requirement that the witness claim his privilege against self-incrimination (preferably under oath in response to questions before the grand jury). The fact of the witness's claim of privilege and the specific questions to which that claim was asserted should be part of the petition in support of the prosecutor's application.

The petition being in proper form, and approved by the Attorney General, the court generally may not question the decision of the prosecutor to immunize the witness, and therefore must sign the order. (Form appended). In only one instance, In re Tuso, 140 N.J.Super. 500 (App.Div. 1976), appeal pending, has the court denied the prosecutor's application to compel testimony. Tuso involved an attempt to compel the testimony of an individual who was already under indictment for the same transaction in which his testimony was sought.[9]

(See Forms which are reproduced in Appendix - Part I, pp.1a - 9a)

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9 Inasmuch as the procedures utilized in Tuso are under review, the precautions which would entitle a prosecutor to attempt such a procedure will be added as a supplement upon the State Supreme Court decidir the issues involved.

THE GRAND JURY SUBPOENA

The Grand Jury is a law enforcement body that is charged with various investigatory and accusatory duties. Likewise, the County Prosecutor, as the Chief law enforcement officer within his respective counties, is charged with the duties, among others, to detect and prosecute violators of the law.[10] Since the Constitution of the State of New Jersey requires that no person shall be held to answer for a criminal offense unless indicted by a Grand Jury,[11] the County Prosecutor and the Grand Jury must jointly discharge their responsibilities to the end that justice is done, i. e. to assure that all indictments or presentments are supported by sufficient evidence.[12] Toward that end, the Grand Jury and its legal counsel, the County Prosecutor, has been provided with legal process, that is the grand jury subpoena.

The Issuance of the Grand Jury Subpoena:

The Grand Jury, traditionally and historically, has

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[10] State v. Winne, 12 N.J. 152 (1953)

[11] N.J.Const. Art. 1, par. 8

[12] State v. Ferrante, 111 N.J.Super. 99 (App.Div. 1970).

authority to issue subpoenas to gather evidence and the Prosecutor, to assist the Grand Jury, may issue the Grand Jury's subpoena for evidence gathering purposes.[13] This power to issue the Grand Jury's subpoenas is limited to the Prosecutor and his Assistant Prosecutors. County Detectives or Investigators or Police Officers have no such authority, unless delegated by the Prosecutor. County Investigators or police officers are not to be given blank subpoenas or the authority to issue the same based on their own discretion. In sum, police officers have no authority to issue their own subpoenas except as provided by R. 7:3-3. More importantly, the decision to issue a subpoena, especially a subpoena duces tecum, has legal ramifications that fall within the realm of a prosecutor. As a general proposal, all County Prosecutors should direct that the service of all subpoenas be authorized by a prosecutor. Once the subpoena is authorized by a prosecutor it can be served by the police officer or anyone else eighteen (18) years old or older.

Form of the Subpoena:

The subpoena ad testificandum shall identify the grand jury, the title of the action and shall command the person to whom it is directed to attend and give testimony at the time and place specified therein without prepayment of any witness fee.

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[13] In re Addonizio, 53 N.J. 107 (1969)

Generally, the subpoena should specify the name of the defendant or subject under investigation. However, when secrecy so requires it, the subpoena ad testificandum need not identify the subject matter of the testimony sought or identify the cause to which it pertains.[14]

The subpoena duces tecum should follow the same form as the subpoena ad testificandum except the subpoena must indicate, with some degree of specificity, a description of the records sought.[15] The Courts have given wide latitude in compelling production of records covering many years, regardless of any statute of limitations.[16] However the subpoena must be limited in scope, relevant in purpose and specific in directive so that compliance will not be unreasonably burdensome. (See attached form).

Notice Requirements:

The New Jersey Rules of Court do not specify any notice requirements for service of the subpoena. In theory, a subpoena can be served, compelling testimony or production of evidence immediately at the Grand Jury. However the courts do apply the subjective test of reasonableness depending on the nature of the testimony or records sought.[17] In an emergent situation, the

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[14] In re Application of Waterfront Comm., 32 N.J. 323 (1960)

[15] In re Addonizio, supra.

[16] In re Addonizio, supra.

[17] In re Addonizio, supra.

Court may well deny a motion to quash a subpoena ad testificandum requiring a witness to testify at Grand Jury with one (1) day notice. However in dealing with the subpoena duces tecum for large quantities of records, the return date of the subpoena should be sufficiently in the future as to give the witness a reasonable time to comply.[18] All subpoenas, whether it be a subpoena ad testificandum or subpoena duces tecum, must be made returnable for a day in which the Grand Jury is actually sitting.

Standards for Issuance of the Subpoena:

The Grand Jury has the duty not only to investigate violations of the law, but also the duty to investigate conditions of public interest even though no violation of a penal statute is, in fact, involved.[19] In order to satisfy this duty, the Grand Jury may investigate and subpoena evidence based upon anonymous charges, rumors or hearsay even though such an investigation will entail a "fishing expedition."[20]

The Subpoena Duces Tecum: What can be subpoenaed:

Generally the subpoena duces tecum is directed to three (3) areas: Municipal records, corporate records and personal papers.

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[18] State v. Asherman, 91 N.J.Super. 159

[19] In re Addonizio, supra.

[20] Blair v. U. S., 250 U.S. 273 (1918); In re Addonizio, supra.

1. Municipal Records: All municipal records including records of municipal agencies, zoning boards, school boards and the like are subject to subpoena restricted only by the test of reasonableness. These records may be subpoenaed on rumor or suspicion alone, and probably on the ground that the Grand Jury desires to inquire whether the public agency is operating properly. These records can be subpoenaed even though the municipal official to whom the records pertain is the target of the investigation.

2. Corporate Records: Generally, all records of any corporation, including any utility company whether it be a public corporation or closed corporation can be subpoenaed, restricted only by the Fourth Amendment test of reasonableness, even if the corporate official, or the corporation itself, is the target of the investigation.[21] This broad power of process is based on the premise that only natural persons can resist the subpoena of papers and records on the grounds of self incrimination. This rule would apply to subpoenas directed to a corporation in which the target of the investigation is, in effect, the sole owner of the corporation.[22]

3. Personal Records of Target and Non-Target Witnesses: As a general rule, all individuals and the evidence possessed by them are subject to the Grand Jury subpoena unless such testimony

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[21] Hale v. Henkel, 201 U.S. 43 (1905)

[22] State v. Asherman, supra.

or evidence to be produced is protected by the Fourth or Fifth Amendment, or unless otherwise protected by statute or Court Rule.[23]

In dealing more specifically with the subpoena of testimony or documentary evidence from a target witness, such subpoena would likely be subject to a motion to quash because of the Fifth Amendment protection afforded to the target-witness. In other words, a valid subpoena to obtain personal papers or documents in the possession of a defendant or a target-witness probably could not withstand a claim of Fifth Amendment privilege,[24] since the target would be obligated to respond by personal and affirmative action.[25] However, a non target-witness can be compelled to produce his personal records pursuant to a Grand Jury subpoena provided that such records are not personally incriminatory or otherwise not protected by statutory privilege.

4. Personal Papers or Records of a Defendant or Target-Witness that are in the Possession of Another Person: Pursuant to the Fifth Amendment protection, a defendant or target-witness cannot be compelled to testify or produce evidence that would incriminate him. However, once the constitutionally protected evidence is transferred by the defendant or target-witness

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23 U.S. v. Dionisio, 410 U.S. 1 (1974); see N.J.Rules of Evidence, Rules 23-40

24 In re Addonizio, supra.

25 Andresen v. Maryland, - U.S. - , 96 S.Ct. 2737 (1976)

to another person, these records can be subpoenaed from that other person unless otherwise protected by a statutory privilege.[26] For example, a defendant's incriminatory financial records in his possession are not subject to a subpoena. A search warrant would be needed to obtain these records. However, if the defendant transfers those records or the information contained therein to his bank or broker, the records and the information contained therein can be subpoenaed from that bank or broker.[27]

Subpoena of non-testimonial evidence:

The Grand Jury subpoena can be used to compel a person to appear at the Grand Jury for the purpose of obtaining his fingerprints, voice prints, handwriting examplars and other types of non-testimonial evidence. Such evidence has been regarded as non-testimonial in nature, and therefore not protected by the Fifth Amendment. Likewise, provided that the inquiry is reasonable, the subpoenaed material is not protected by the Fourth Amendment since the subpoena is not a seizure within the scope of the Fourth Amendment.[28]

Voluntary Compliance with a Grand Jury Subpoena In lieu of Actual Appearance at the Grand Jury:

The issuance of the Grand Jury subpoena serves the sole

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[26] In re Addonizio, supra.; United States v. Miller, - U.S. -, 96 S.Ct.1619 (1976).

[27] Id.; see also Andresen v. Maryland, supra.

[28] U.S. v. Dionisio, supra; U. S. v. Mara, 410 U.S. 19 (1971).

purpose of obtaining evidence for the Grand Jury consideration. Once a subpoena duces tecum is issued, the subpoenaed witness is required to physically appear at the Grand Jury and deliver the requested material. However, especially relating to subpoenas served upon business entities and public agencies, the subpoenaed party often prefers to deliver the subpoenaed material directly to the investigator at time of service, in lieu of actual appearance at the Grand Jury. Such pre-grand jury compliance is permissible.

Use of the "Office Subpoena ad Testificandum":

A prosecutor has no subpoena power to compel a witness to appear at the Prosecutor's Office to elicit testimony.[29] It appears to be improper for a Prosecutor's Office to issue what is commonly known as an "office subpoena" commanding a witness to appear at the prosecutor's office or place other than the grand jury room for the purpose of obtaining his testimony.[30] However, the prosecutor's office should not be discouraged from requesting a witness to appear at the prosecutor's office for an interview in lieu of a grand jury appearance. Nor should the foregoing discourage a prosecutor from pre-grand jury interviews with prospective witnesses. In short, a grand jury subpoena should

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[29] State v. Eisenstein, supra.

[30] ABA Standards, Section 76 (1970)

be issued only when that prosecutor has a good faith belief that the particular witness could be of some assistance to the grand jury's inquiry.

THE SUBPOENA OF OUT OF STATE WITNESSES

Occasionally cases arise in which a vital state's witness resides outside the State of New Jersey.

If Grand Jury testimony is required from such a witness, two (2) procedures may be utilized. Firstly, a subpoena should be mailed to the non-resident witness directing his appearance at the Grand Jury session. However, the mailing of a subpoena to a witness who is residing in another state is nothing more than a request for that witness to voluntarily return to the State of New Jersey to testify. No sanction can be imposed upon that witness for failure to appear. If the witness declines to honor the subpoena, the prosecutor may, of course, resort to utilization of the Uniform Act to secure the attendance of a witness from without a State in criminal proceedings.

Pursuant to N.J.S. 2A:81-20, The Uniform Witness Act provides:

> 1. If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to

> commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.
>
> If the witness is summoned to attend and testify in this state he shall be tendered the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and $5 for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this State, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this State.

Pursuant to this Act, if a material witness, who is presently residing in another state, refuses to return to New Jersey to testify, he can be compelled to do so, provided that that sister state is a signatory of the Uniform Act.[31]

Procedure: Once the decision is made to compel the appearance of an out-of-state resident, the Assistant Prosecutor

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31 The Uniform Act to secure witnesses has been adopted in 47 states as well as in the District of Columbia, Puerto Rico, Panama Canal Zone and the Virgin Islands. Only Alabama, Iowa and Georgia have declined to adopt the Uniform Act.

must prepare a petition outlining the nature of testimony sought from the witness with a showing of the materiality of this testimony. A certification must also be prepared and signed by the Judge. This certification is simply a determination made by the Court from the petition that the out-of-state resident is a material witness in a pending Grand Jury matter. Once the court signs the certification,a certificate must be obtained from the County Clerk stating that the Judge signing the certification is a Judge of a court of general jurisdiction and entitled to try indictments.

These three (3) documents, that is, the petition, the Court certification and the affidavit of the County Clerk should be forwarded to the prosecuting authority of the county in the State where the witness is to be found, along with the appropriate fee as specified by Statute. An order to show cause will be issued by the court of that foreign jurisdiction compelling the witness to appear before that court for a hearing. At this hearing, if the court finds that the testimony to be sought is material, the court will order that witness to return to New Jersey to testify.

(See Forms which are reproduced in Appendix - Part II, pp.10a - 24a)

PRESS GUIDELINES

Freedom of the press and the right to a fair trial are fundamental, but sometimes are in collision. It is incumbent upon a prosecutor not only to maintain the rights of individuals involved in the criminal process of the State, but to also fully inform the public concerning the operation of law enforcement agencies and the dispensation of criminal justice. In the course of a criminal proceeding, however, an effort to satisfy both duties must give rise to a dilemma: The release of certain information may tend to impair a defendant's ability to receive a fair trial, while the withholding of that same information may seemingly deny to the public its "right to know," and to some extent the full satisfaction of its First Amendment free speech and free press rights. The guidelines set forth below are intended to assure a fair accommodation of both interests and to satisfactorily resolve most free speech/fair trial problems which may confront a prosecutor. These guidelines are based in part on a Statement of Principles and Guidelines for the Reporting of Criminal Procedures, as adopted by the New Jersey Supreme Court in March, 1972.

1. The following information should be made available for the use of the press upon the return of an indictment:

(a) Background information concerning the defendant, such as his name, age, residence, occupation, marital status and so forth.

(b) The text of the indictment or complaint.

(c) Identification of the investigating and arresting agency and personnel and the length of the investigation.

(d) Circumstances immediately surrounding the arrest, including but not limited to the time and place of arrest; resistance, if any; pursuit; possession, nature and use of weapons and ammunition by the suspect and police.

(e) Circumstances surrounding bail, whether it was set, whether it was posted and the amount.

2. Publication of the following items of information may jeopardize a defendant's right to a fair trial and should not, therefore, be released to the press:

(a) Statements regarding the existence, nonexistence or progress of an investigation. Obviously, this policy should be flexible and the public should, in certain instances, be given such information. However, as noted at page 58, the prosecutor should establish internal controls in his office to ensure that decisions with respect to the release of such information are to be

made by him or his designee.

(b) Opinions concerning a defendant's guilt or innocence.

(c) Admissions, confessions or statements attributable to the defendant, or his refusal to provide the same.

(d) The defendant's record of prior arrests and/or convictions.

(e) References to the use of certain investigative procedures such as fingerprints; polygraph, ballistics or laboratory tests; wiretaps or electronic surveillance. No information should be released concerning a defendant's refusal to participate in any such tests.

(f) Statements concerning the credibility or anticipated testimony of prospective witnesses.

(g) Opinions concerning evidence or argument in the case whether or not it is anticipated that such evidence or argument will be used at trial.

(h) The possibility of a plea of guilty to the charged offense or to a lesser offense, or other disposition.

3. Where publication of the identity of the victim would be embarrassing or demeaning to that person, it is recommended that such information not be released. (The rationale here, of course, has nothing to do with the possible impairment of a fair trial, but arises out of consideration for victims of certain crimes, such as rape or other sexual offenses.)

4. During the course of an ongoing grand jury investigation, no information concerning the grand jury proceedings should be released to the press. R. 3:6-7 requires that all grand jury proceedings remain secret. All persons other than witnesses are required to take an oath of secrecy as a condition to their admission to a grand jury session. Four basic reasons have been set forth as grounds for this requirement of secrecy: (1) to prevent the escape of persons under investigation (2) to prevent tampering with witnesses (3) to insure deliberative freedom for the grand jury (4) to protect the reputation of an accused who is ultimately not indicted. State v. Clement, 40 N.J. 139 (1963).

5. Photographing a Defendant

The photographing of suspects or defendants when they are in public places should be neither encouraged nor discouraged. In no event should an accused be photographed in a posed position. Photographing of a defendant in places where the general public has no right of free access should not be permitted (i. e. inside the police station, a lock-up or jail).

If it is deemed necessary to place a defendant or suspect under physical restraint, such as handcuffs, these restraints need not be removed or concealed from view simply because photographs may be taken. (The New Jersey Supreme Court has suggested that prior to conviction, except at the time of arrest, the press should not publish any photographs of a defendant in handcuffs or under restraint. Guidelines with Regard to Photographing of Court Proceedings, approved by the Supreme Court September 5, 1968.)

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6. Photographing evidence

(a) Displayed evidence. To the extent that the above guidelines permit the release of a verbal description of a given item of demonstrative evidence, then the display of that evidence for the purpose of photographing by the press is also permitted. Since the manner in which such evidence is displayed could tend to prejudice a defendant, it is recommended that this practice be employed on a very limited basis and be confined to those situations where there is a public interest to be served. When a display is made, the utmost care should be taken so that it is not done in a way that would tend to be prejudicial to the defendant. In no event should the defendant be photographed in the presence of displayed evidence.

(b) Crime scene. It is recommended that representatives of the press be kept out of restricted crime scene areas to the same extent that members of the general public are so restricted. If a press photographer is in an area which is not restricted to the public he should be neither encouraged nor discouraged from taking photographs. In no event should evidence be displayed at a crime scene for the purpose of photographing by the press.

Each office should establish internal controls governing release of information to the media. As a general rule, all releases of information to the media should be made by, or approved in advance, by the County Prosecutor or his designee, unless a particular release is permitted by someone else by specific office policy.

CASE PREPARATION

I. Introduction

When a criminal complaint or investigation is referred to the Prosecutor, he must decide its future course in the criminal process. It is essential in this screening process that the Prosecutor have all information relevant to determining the proper course to be followed.

Certain cases may be susceptible to disposition prior to grand jury presentation by early plea negotiations, referral to municipal courts, or by resort to pretrial intervention programs. Many of the matters referred to the Prosecutor will, however, be presented to the grand jury for its determination as to whether or not an indictment should be returned. Therefore, it is most important that the Prosecutor employ appropriate procedures to ensure that he has a complete file prior to presentation of the matter to the grand jury.

In many Prosecutor's Offices, Detectives or Investigators are assigned the task of "working the case up for grand jury," and they therefore have the responsibility for the completeness of the file. After the case is "worked up" by an Investigator or Detective it should be reviewed by an Assistant Prosecutor for a determination as to whether the matter is "ready" for grand jury presentation. In short, it is the responsibility of the Prosecutor in every case to assure an investigative file is complete.

The materials discussed in this segment of the manual deal with the suggested preparation of files for grand jury presentation.

II. Checklist of materials which generally should be in an investigative file prior to grand jury presentation:

1. Complaint
2. Police reports (including incident, arrest and investigative reports)
3. Witnesses' statements
4. Rap sheets (State and Federal)
5. Certified or exemplified copies of conviction
6. Scientific reports
   (a) Firearms, drugs, or other laboratory reports
   (b) Handwriting reports
   (c) Fingerprint reports
7. Search warrants, affidavits and inventory returns
8. Business records or official certifications
9. Medical reports
10. Photographs or other types of demonstrative evidence and an indication of the witnesses necessary to identify same
11. Statements made by the defendant and police reports concerning the circumstances surrounding the making of that statement

12. Reports and documents (photographs, transcripts, etc.) concerning any pretrial identification made of the defendant

13. Evidence report (a complete inventory including the location of all evidence and the persons involved in the chain of evidence)

14. A list of potential witnesses including their date of birth, sex, residence, business, and telephone numbers

15. A summary of the case prepared by a Prosecutor's Office Detective or Investigator

16. Preliminary hearing transcript

17. Legal analysis by reviewing assistant prosecutor

18. Correspondence section (kept in chronological order).

III. Suggested procedures for preparation of grand jury files.

1. A check list should be kept in or on the file.

2. The grand jury investigator should check with the local police departments and other agencies to make sure he has all reports and witnesses' statements. (This procedure should be continually updated. It may include having the actual police file brought down to the prosecutor's office for examination and comparison with the items on file in the prosecutor's office.) It is suggested that a case transmittal form, such as the UCP-D9, used in Union County, be utilized to ensure that the necessary items in each case are forwarded to the prosecutor's office by the local police department for grand jury presentation. (See form number 3.)

3. The files should be properly docketed with notations as to the bail, plea, defense counsel's name, and other items including whether there are other codefendants or additional charges pending against the defendant. One file should contain all items involved in a single case. Therefore, if there are codefendants involved in a transaction, their files or matters should be included in the same file. If there are juveniles charged as codefendants, both the adult and juvenile files should be cross-referenced to reflect this. All charges which may be the subject of the mandatory joinder rule under State v. Gregory, 65 N. J. 510 (1975), should also be handled in one case file.

In reviewing the file, the assistant prosecutor should make a complete legal analysis of the operative facts and the relevant statutes, and determine the charges which should be included in the grand jury presentation. The grand jury investigator should prepare a list of witnesses, as well as other documents or exhibits that should be presented to the grand jury.

Whenever possible, the assistant prosecutor presenting the matter to the grand jury should speak personally with witnesses prior to their testimony, and review with them their previous statements and reports.

The following are forms that can be utilized to prepare the case files for presentation to the grand jury:

Form 1: Investigation check list

Form 2: Request to local police for transmittal of their investigative file to the Prosecutor's Office

Form 3: Transmittal from the local police of their investigative file

Form 4: Request for State rap sheet

Form 5: Request for Federal rap sheet

Form 6: Request for hospital records

Form 7: Request for examination of evidence

Form 8: Request for certified copy of motor vehicle registration

Form 9: Evidence inventory report

Form 10: Request for exemplified copy of conviction

Form 11: Witness list for grand jury

Form 12: Prosecutor's Case Review and Plea Form.

(See Forms which are reproduced in Appendix - Part III, pp. 25a - 39a)

EVIDENCE BEFORE THE GRAND JURY

As a general rule, presentation of inadmissible or even illegally obtained evidence procured in violation of an individual's constitutional rights before a grand jury does not serve to vitiate the resulting indictment.[32] In most jurisdictions, including New Jersey, the grand jury is not limited to receiving evidence admissible at trial.[33] And for the most part, the

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32 See e. g., United States v. Calandra, 414 U.S. 343 (1974); United States v. Blue, 384 U.S. 251 (1966); Lawn v. United States, 355 U.S. 339 (1958); Costello v. United States, 350 U.S. 359 (1966); Holt v. United States, 218 U.S. 24 (1910). One line of cases, however, has indicated that where a target of an investigation is compelled to give incriminating evidence before a grand jury, that same grand jury cannot permissibly indict for the offenses to which he has confessed. See e.g., Goldberg v. United States, 472 F.2d 513, 516 (2 Cir. 1973); Jones v. United States, 342 F.2d 863 (D.C.Cir. 1964); United States v. Tane, 329 F.2d 848 (2 Cir. 1964); United States v. Lawn, 115 F.Supp. 674 (S.D.N.Y. 1953), appeal dismissed sub nom United States v. Roth, 208 F.2d 467 (2 Cir. 1953). For example, the court in Goldberg v. United States, supra, observed that an indictment might be invalid if returned by the same grand jury before whom a defendant was compelled to testify against himself under a grant of immunity, and who actually testified as to incriminating matters. The court applied the rationale of Bruton v. United States, 391 U.S. 123 (1968), to the grand jury setting in finding that under such circumstances "it would be well nigh impossible for the grand jurors to put [defendant's] answers out of their minds." Thus, the very testimony which was compelled by the grant of immunity might be used against him by the grand jury. Goldberg v. United States, supra at 516.

33 See e.g., State v. Chandler, 98 N.J.Super. 241 (Cty.Ct. 1967); see also State v. Ferrante, 111 N.J.Super. 99 (App.Div. 1970); State v. Garrison, 130 N.J.L. 350 (S.Ct. 1943); State v. Donovan, 129 N.J.L. 478 (S.Ct. 1943); State v. Ellenstein, 121 N.J.L. 304 (Sup.Ct. 1938); State v. Dayton, 23 N.J.L. 49 (S.Ct. 1850).

competency of evidence presented to the grand jury may not be the subject of judicial inquiry.[34]

The reason for the rule is obvious. Traditionally, the grand jury "has been accorded wide latitude to inquire into violations of [the] criminal law."[35] "It is a grand inquest, a body with powers of investigation, the scope of whose inquiries is not to be limited . . . by doubts whether any particular individual will be found properly subject to an accusation of crime.'[36] It has been recognized that "the grand jury's investigative power must be broad if its public responsibility is adequately to be discharged."[37] Significantly, the grand jury is not "an officious meddler,"[38] for its investigatory function "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed."[39] "Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors."[40]

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[34] State v. Chandler, supra.

[35] United States v. Calandra, supra at 341.

[36] Blair v. United States, 250 U.S. 273, 282 (1919).

[37] Branzburg v. Hayes, 408 U.S. 665 (1972)

[38] In re Addonizio, 53 N.J. 107, 124 (1968).

[39] United States v. Stone, 429 F.2d 138, 140 (2 Cir. 1970).

[40] Branzburg v. Hayes, supra at 701.

One caveat is plainly in order. The policy prohibiting dismissal of an indictment by virtue of the introduction of inadmissible evidence does not apply to what has been characterized as "grand jury misconduct." Our courts have held that "in order to promote the purity of the administration of justice and for greater security of the citizen,"[41] an indictment may be quashed by virtue of misconduct by the grand jury. Misconduct occurs when the grand jury "indifferently and openly without having some evidence,"[42] brings charges against an individual by returning an indictment. However, an indictment will not be dismissed as long as some legal evidence was presented which supports the charges.[43]

What has been said thus far should not be construed as a blanket endorsement of a policy permitting prosecutors to utilize incompetent and inadmissible evidence in grand jury proceedings. While it is true that reception of inadmissible evidence by the grand jury does not serve to vitiate a resulting indictment, it is a far different thing to suggest that prosecutors are not subject to any restraints in this regard. The American Bar Association Project on Standards for Criminal Justice has provided:

> A prosecutor should present to the grand jury only evidence which he believes would be admissible at trial. However, in

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41 State v. Dayton, supra at 88.

42 State v. Donovan, supra at 479.

43 State v. Smith, supra at 343.

> appropriate cases the prosecutor may present witnesses to summarize admissible evidence available to him which he believes he will be able to present at trial[44]

In the accompanying commentary, the Bar Association noted that "as a general principle, the use of secondary evidence before a grand jury should be avoidad unless there are cogent reasons justifying" such a practice. For example, the need to use a summary of available evidence may arise "in cases involving voluminous records or where an absent witness has given a written statement but is not available at the time and circumstances justify prompt grand jury action." So too, the Bar Association advocates the use of hearsay evidence "where the victim of a criminal act is seriously injured and therefore is unavailable. . . ." Another example set forth in the commentary is "where the safety of an important witness reasonably warrants that his identity remain covert." In such a case, the witness's statements, if sufficiently detailed, can be presented to the grand jury.

The American Law Institute has adopted a similar approach in its Model Code of Pre-Arraignment Procedure.[45]

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[44] American Bar Association Project on Standards for Criminal Justice, Standard Relating to the Prosecution Function (Tent. draft 1971).

[45] Model Code of Pre-Arraignment Procedure, §330.4(4), §330.5.

Under the Code, prosecutors may present "secondary" evidence only where the opposite course would impose an unreasonable burden on one of the parties or on a witness.

In a similar vein, the California Penal Code provides that "the grand jury shall receive none but evidence that would be admissible over objection at the trial of the criminal action . . ."[46] However, the mere fact that "evidence which would have been excluded at trial was received by the grand jury does not render the indictment void" where sufficient competent proofs were also presented. Other jurisdictions have adopted similar statutes and rules.[47]

We recommend that prosecutors should, as a general rule, seek to present only admissible evidence to the grand jury. Incompetent and also illegal evidence should not be presented to the grand jury. So too, as a general rule, evidentiary privileges should be honored and not violated at the grand jury stage of proceedings. Where a privilege is personal to a defendant or the target of an investigation and that individual has the right to claim the privilege, it can be assumed that the individual will exercise the privilege. In all other instances where the privilege is not personal, consideration should be given

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46 Cal. Pen. Code 939.6(b).

47 See, e.g., Alaska Rules of Criminal Procedure, Rule 6(r); Nev. Rev. Stat. §172.135(2).

to the nature of the privilege, the individual who has a right to exercise it and other surrounding circumstances.

Failure to observe evidentiary controls results in unnecessary trials and permits improper rummaging into the personal lives of witnesses. Further, a wrongful indictment is "no laughing matter," for it indelibly stains the reputation of the accused. Nevertheless, the nature of the grand jury process also suggests that some exceptions be made to the policy requiring that only admissible evidence be presented to the grand jury. For example, investigative grand juries must often sift through all available clues to determine whether a crime has been committed. It would be unwise to restrict the scope of the grand juries' inquires by requiring that only competent, admissible evidence be received. So too, expert reports may often be presented to the grand jury in the interest of economy. Ordinarily where an expert would merely testify as to the contents of his report, his presence before the grand jury would not be needed. It seems only fair, however, that the prosecution clearly inform the grand jury of the availability of better or firsthand evidence so that it can, if it wishes, request presentation of such proofs.

POST-INDICTMENT PROCEDURE

Upon the return of a "True Bill" by the grand jury, the indictment must be presented in open court to the Assignment Judge or to any other judge authorized by R. 3:6-8(a) to receive indictments. Such action must be taken in the presence of at least twelve members of the grand jury.

The indictment itself, and all related papers, must be entitled in the Superior Court. The indictment is sufficient if it consists simply of a written statement of the essential facts constituting the offense charged, a citation to the specific statute or statutes allegedly violated, and concludes with the words "against the peace of this State, the government and dignity of the same." Each indictment must be signed by the prosecuting attorney and endorsed as a true bill by the foreman (or, in his absence, by the deputy foreman). R. 3:7-3.

If, at the time the indictment is presented, a defendant named therein is not yet under bail, the county clerk must issue a warrant unless requested by the prosecutor to issue a summons instead. R. 3:7-8. In order to ensure that the State Bureau of Identification is able to maintain a complete record concerning all persons charged with indictable offenses, it is recommended that all indicted defendants who are not yet under bail be

processed, that is photographed and fingerprinted.[48] If prior agreement for processing with a defendant or counsel exists, a summons may be used for sake of convenience.

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[48] Upon the arrest of a person for an indictable offense, all law enforcement officers are required to fingerprint that person and forward copies of those prints along with photographs, other identifying data and a history of the charged offense to the State Bureau of Identification. N.J.S. 53:1-15.

APPENDIX

PART I

GRAND JURY WITNESSES

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE

MEMORANDUM

TO: Robert J. Del Tufo, Director
Division of Criminal Justice

FROM: (The Deputy Attorney General handling the case)

SUBJECT: STATUTORY IMMUNITY (N.J.S.A. 2A:81-17.3 ( )

PUBLIC OFFICER IMMUNITY (N.J.S.A. 2A:81-17.1a( )

INFORMAL IMMUNITY OR AGREEMENT ( )

CIVIL CONSIDERATION ( )

OTHER CONCESSIONS ( )

ATTACHED IS A SUPPLEMENTAL MEMORANDUM CONTAINING A DESCRIPTION OF THE CRIMINAL CHARGES INVOLVED, AND THE REASONS UPON WHICH APPROVAL OF THE IMMUNITY GRANT IS SOUGHT AND MAY BE JUSTIFIED.

(SIGNATURE OF ASSISTANT PROSECUTOR IN CHARGE OF CASE)

REVIEWED AND APPROVED AS TO BOTH FORM AND SUBSTANCE ON THE DATES HEREINAFTER SET FORTH:

ASSISTANT PROSECUTOR IN CHARGE OF SECTION, UNIT OR BUREAU _____

FIRST ASSISTANT PROSECUTOR _____

COUNTY PROSECUTOR _____

IN STATUTORY GRANTS UNDER 17.3:

DIRECTOR, DIVISION OF CRIMINAL JUSTICE _____

ATTORNEY GENERAL _____

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SUPERIOR COURT OF NEW JERSEY
COUNTY
STATE GRAND JURY NUMBER _____

STATE OF NEW JERSEY)
v.)
JOHN DOE)

PETITION TO COMPEL TESTIMONY
UNDER N.J.S.A. 2A:81-17.3

(1) I, William F. Hyland, am the Attorney General of New Jersey.

(2) There is presently pending before the State Grand Jury an investigation involving a violation of the following New Jersey Statutes: N.J.S. 2A:119-2 (larceny), N.J.S. 2A:89-2 (arson), N.J.S. 2A:85-1 (misconduct in office), N.J.S. 2A:94-1 (burglary), N.J.S. 2A:105-3 (extortion), N.J.S. 2A:139-1 (receiving stolen property), and N.J.S. 2A:98-1 and 2 (conspiracy).

(3) The conduct which is being investigated by the Grand Jury occurred during the calendar year , principally within the County of . The conduct involved an organized criminal operation in the County of and the involvement of a public official in that activity.

(4) The Grand Jury, in its investigation, has learned that JOHN DOE, of , has direct and personal knowledge about and in connection with the aforesaid activities.

(5) On , 197 , the said JOHN DOE was served with a subpoena to testify before the State Grand Jury. On , 197 , the said JOHN DOE did appear before the State Grand Jury, at , New Jersey, and did refuse to answer questions propounded to him concerning his knowledge of the illegal activities in County and other areas of the State of New Jersey.

(6) The questions which the said JOHN DOE refused to answer before the State Grand Jury on _____, 197_, on the grounds that the questions might tend to incriminate him are as follows:

[Set out fully each question which the witness refused to answer on such grounds]

WHEREFORE, I, WILLIAM F. HYLAND, Attorney General of New Jersey, do herewith petition the court pursuant to N.J.S. 2A:81-17.3 to order JOHN DOE to answer any and all questions propounded to him in the Grand Jury concerning illegal activities in _____County and other areas of the State of New Jersey.

DATED:_____

_____
William F. Hyland

SUPERIOR COURT OF NEW JERSEY
COUNTY OF MERCER

STATE OF NEW JERSEY)
v.) ORDER
JOHN DOE)

William F. Hyland, Attorney General of New Jersey,
, Deputy Attorney General, appearing, having on this date made written and oral application for an order compelling John Doe to answer questions and to testify before the duly constituted State Grand Jury, pursuant to N.J.S. 2A:81-17.3; and

The said John Doe , on , 19 , having declined to answer questions in the said State Grand Jury on the grounds that his answers might tend to incriminate him, the Grand Jury then and there inquiring, inter alia, into possible violations of N.J.S. 2A:119-2, N.J.S. 2A:89-2, N.J.S. 2A:85-1, N.J.S. 2A:94-1, N.J.S. 2A:105-3, N.J.S. 2A:139-1, and N.J.S. 2A:99-1 and 2,

On this day of June, 1975, ORDERED that the said John Doe appear on the day of , 1975, at , Trenton, New Jersey, before the said State Grand Jury and answer the questions propounded to him before the said State Grand Jury and contained in the written application filed herewith, and to testify and produce evidence in response to all other questions propounded to him concerning the inquiry before the said State Grand Jury.

It is further ORDERED by the court that in accordance with the provisions of N.J.S. 2A:81-17.3, testimony given or evidence produced by the said

John Doe or any information directly or indirectly derived from such testimony or evidence, shall not be used against the said John Doe in any proceeding or prosecution for a crime or offense concerning which the said John Doe gave answers or produced evidence pursuant to the order of this court.

Judge of the Superior Court

WAIVER OF IMMUNITY (Public Employee)

I, _____, a public employee by virtue of my position as _____, hereby acknowledge that I have been advised of the scope of the present Grand Jury investigation. I understand that the investigation concerns:

_____

_____

I have also been advised that this investigation relates to the conduct of my office, position or employment, and that my refusal to testify will subject me to removal from my public office, position, or employment. I have been advised and know that I have a right to consult an attorney for advice before giving any testimony or making any statement.

With a full understanding of my rights and without any promises or representations being made to me or any express or implied coercion by statute or otherwise of any kind whatsoever being exerted against me, I am willing to testify before the _____ Grand Jury. I hereby waive all immunity from prosecution for any offense which shall be disclosed or indicated by my testimony or statement, now or in the future, before the Grand Jury. I understand that any testimony that I give may be transcribed and introduced in evidence against me in any subsequent criminal proceeding. I further waive all rights and privileges I may have pursuant to *N.J.S.* 2A:81-17.2a1 or otherwise, to prevent my testimony before the Grand Jury from being used against me in any subsequent criminal proceeding.

This waiver of immunity shall remain in full force and effect during the life of these Grand Jury proceedings.

_____

Dated: _____

Witness: _____

WAIVER OF IMMUNITY (Target Witness)

I, _____, hereby acknowledge that I have been advised of the scope of the present Grand Jury investigation. It is my understanding that the investigation concerns:

_____

_____

I have also been advised and I understand that I may refuse to testify or make any statements that tend to incriminate me, and that any testimony I give or statements that I make can be transcribed and introduced into evidence against me in any subsequent criminal proceeding. I have been advised and understand that I have the right to consult an attorney for advice before giving any testimony or making any statement.

With full understanding of my rights, without any promises or representations having been made to me, and without any express or implied coercion by any means having been exerted against me, I knowingly, understandingly, and voluntarily waive immunity from prosecution for any offense which may be disclosed or indicated by my testimony or statement. I hereby waive any right which I might have to prevent the use of the testimony which I shall give before this Grand Jury in any court of law and in any criminal proceeding now or in the future.

I also fully understand and agree that this Waiver of Immunity shall remain in full force and effect during the life of these Grand Jury proceedings.

_____

Dated: _____

Witness: _____

6. I am represented by an attorney whose name and address is . I have consulted with my attorney, have had adequate time with which to confer with him and am satisfied with his legal services and advise.

7. Both my attorney and I hereby request and ask that I be permitted to appear and testify before the aforesaid grand jury. I understand that should I appear before the grand jury, my appearance would be for the sole purpose of answering questions propounded by a Deputy Attorney General and that I will be fully questioned about all facts which the Deputy Attorney General deems relevant to the grand jury investigation of which I am a target or possible target. I recognize that should I appear and testify before the aforesaid grand jury that my testimony may, in a future proceeding, be used for or against me, and that I will receive no immunity of any kind by reason of such testimony.

8. I represent and certify that my request to appear before the aforesaid grand jury is not as the result of any threat, promise or representation by any member of the Attorney General's Office, the New Jersey State Police, or any other entity or person, but that it is for the purpose and motivated solely in order to testify before the grand jury in order to more fully apprise the grand jury of the facts about which I will be questioned by a Deputy Attorney General.

Witnessed by:

APPENDIX

PART II

THE GRAND JURY SUBPOENA

FILE NO.

STATE OF NEW JERSEY)
) SS.
COUNTY OF _____)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CRIMINAL
_____ COUNTY

CRIMINAL ACTION
SUBPOENA

TO: _____

You are hereby commanded to appear before the _____ County Grand Jury sitting in the Grand Jury Room at the Court House in _____, New Jersey, on 19 , at o'clock in the noon to testify on the part of the State in the case of State vs. _____.

And you are ordered to appear without prepayment of a witness fee. Failure to appear will subject you to the penalties as provided by law.

_____ _____
_____COUNTY PROSECUTOR CLERK

Dated:

FILE NO.

STATE OF NEW JERSEY)
) SS
COUNTY OF _____)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CRIMINAL
_____COUNTY

CRIMINAL ACTION
SUBPOENA DECES TECUM

TO:_____

You are hereby commanded to appear before the _____County Grand Jury sitting in the Grand Jury Room at the Court House in _____, New Jersey, on 19 , at o'clock in the noon to give evidence before the said Grand Jury in the case of State vs. _____ and you are ordered to appear without prepayment of witness fee and bring with you the following records:

_____

_____

_____

Failure to appear and produce the said records will subject you to the penalties as provided by law.

_____ _____

_____COUNTY PROSECUTOR CLERK

Dated:

[Optional: You may be excused from actually appearing at the Grand Jury if you make arrangements to produce the subpoenaed documents in advance of the above date.]

_____, 197__

District Attorney's Office
_____County
_____
_____

Re: State of New Jersey v. _____
(Material Witness - _____
Present address: _____)

Gentlemen:

Pursuant to the "Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings" (McKinney's Crim. Code §618-a), enclosed please find certified and exemplified copies of Petition signed by me, and Certificate adjudging the named person to be a material witness, signed by the Honorable _____, Judge of the Superior Court, Law Division, Criminal, _____ County, New Jersey. Also enclosed please find a set of plain copies of Affidavit and Certificate.

Also enclosed is Check No. _____, dated_____ in the amount of $_____, payable to _____ covering mileage at the rate of ten cents per mile from _____, _____, to _____, New Jersey, and return, plus the required payment of $5.00 per day for _____days attendance.

The witness is required to be at the _____ _____, _____, New Jersey, on_____ 197_. On the aforesaid dates, he should be told to contact _____, whose office is on the _____floor of the _____building (telephone _____).

I have taken the liberty of drafting an Order to Show Cause and Order to be presented to your Court, copies of which are also enclosed.

Very truly yours,

_____
Assistant Prosecutor
_____County

Encs.

[Name and address of
Prosecutor]

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CRIMINAL
_____COUNTY

THE STATE OF NEW JERSEY)
)
v.) PETITION
) IN ACCORDANCE WITH
JOHN DOE,) N.J.S. 2A:81-18, et seq.
)
Defendant(s))

STATE OF NEW JERSEY)
) SS
COUNTY OF _____)

_____, of full age, being duly sworn according to law, upon his oath deposes and says that:

1. I am an Assistant Prosecutor of the County of _____, State of New Jersey, and as such am familiar with the facts and matters herein set forth.

2. There is now pending before the Grand Jury of _____County a criminal prosecution by the State of New Jersey against John Doe, who stands accused and charged with having committed the following criminal offenses against the laws of the State of New Jersey, to wit:

3. Jane Jones, now residing at _____

_____, _____, is a necessary and material witness for the State of New Jersey by means of the following:

[She was the victim of the aforementioned offenses (see attached copy of written statement given by Jane Jones on _____, to the _____Police Department, attached hereto and made part hereof)] and her presence is required at the Grand Jury proceedings regarding the aforementioned matter on the _____day of_____, 197_, at _____ M., at _____, _____, in _____, New Jersey, for purposes of giving testimony.

4. On _____, I telephoned Jane Jones in _____, and requested that she voluntarily appear before the _____County Grand Jury to give testimony in the case of State v. John Doe. She refused and told me that she would refuse to voluntarily return to the State of New Jersey to testify at the Grand Jury proceedings.

5. Since Jane Jones will not appear voluntarily it is therefore necessary that the Prosecutor of _____County obtain from the _____County Court a certificate under the seal of the Court, certifying the facts herein set forth in order that the State of New Jersey may obtain a summons to be issued by a competent court of the State of _____, requiring the appearance of the said Jane Jones as a witness in the jurisdiction of the _____County Court under the provisions of N.J.S. 2A:81-18, et seq.

6. If the said Jane Jones comes into the State of New Jersey in obedience to a summons directing her to attend and testify at said Grand Jury proceeding, the laws of the State of New Jersey and of any other state t hrough which said witness may be required to pass by the ordinary course of travel to attend said proceeding, gives her protection from arrest or the service of process, civil or criminal, in connection with matters which arose before her entrance into said state, pursuant to said summons.

WHEREFORE, it is requested for and on behalf of the State of New Jersey that Your Honor certify to the above and foregoing by the issuance of a certificate thereto under the seal of the Superior Court of New Jersey, Law Division (Criminal), for the County of _____, for the purposes of being presented to a Judge or a court of record in the State of _____ in a proceeding to compel the attendance of said Jane Jones as a witness at said Grand Jury proceeding to compel the attendance of said Jane Jones as a witness at said Grand Jury proceeding for the time and date set forth and pursuant to law.

_____

Assistant Prosecutor
County of _____

Sworn and subscribed to
before me this day
of , 197 .

_____

Notary Public of New Jersey

[Name and address of
Prosecutor]

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CRIMINAL
_____COUNTY

THE STATE OF NEW JERSEY	)	
	)	CERTIFICATE OF JUDGE
v.	)	ADJUDGING [NAMED PERSON]
	)	TO BE A MATERIAL WITNESS
JOHN DOE,	)	UNDER N.J.S. 2A:81-18, et seq.
Defendant(s)	)	

I,_____,
Judge of the Superior Court of New Jersey, Law Division (Criminal), a court of record, do hereby certify:

1. There is now pending before the Grand Jury of _____County a criminal prosecution by the State of New Jersey against John Doe, who stands accused and charged with having committed the following criminal offenses against the laws of the State of New Jersey, to wit:

2. Jane Jones, now residing at _____
_____, _____, is a necessary and material witness for the State of New Jersey by means of the following:

[repeat information contained in petition]

and that the presence of the said Jane Jones, personally, at said Grand Jury proceedings, at _____, _____, New Jersey, for the purpose of giving testimony therein will be required on _____, 197___, and that the presence of the said Jane Jones cannot be voluntarily insured.

3. That if the said Jane Jones comes into the State of New Jersey in obedience to a summons directing her to attend and testify at said Grand Jury proceedings, the laws of the State of New Jersey and of any other state through which said witness may be required to pass by the ordinary course of travel to attend said proceedings, gives her protection from arrest or the service of process, civil or criminal, in connection with matters which arose before her entrance into said state, pursuant to said summons.

4. That this certificate is made for the purpose of being presented to a judge of a court of record of the County of _____, State of _____, where said Jane Jones now is, upon proceedings to compel said Jane Jones to attend and testify at said Grand Jury proceedings in the County of _____, State of New Jersey, upon the dates and days hereinabove set forth.

WITNESS The Honorable _____, Judge of said court, at _____, New Jersey, this _____ day of _____, 197_____.

_____
J. S. C.

17a

STATE OF NEW JERSEY)
: SS
COUNTY OF _____)

I, _____, Clerk of the _____ Court, State of New Jersey, do certify that the Honorable _____, by whom the foregoing certification was made, and whose name is thereto subscribed, was, at the time of making thereof, and still is a Judge of the _____ Court of New Jersey, a court of general jurisdiction, duly commissioned to try indictments found in the Superior Court of New Jersey, County of _____, Law Division, Criminal, to all whose acts, as such, full faith and credit are and ought to be given, as well in Court of Judicature as elsewhere.

IN ADMITTANCE THEREOF, I have hereunto set my hand and affixed the seal of the said Court this _____ day of _____, 197_,

_____

Clerk of the _____ County Court

_____ COURT OF _____
CRIMINAL DIVISION
_____ COUNTY
DOCKET NO.

IN THE MATTER OF	:	
JANE JONES, A MATERIAL	:	
WITNESS	:	PETITION FOR ISSUANCE OF ORDER TO SHOW CAUSE
. . . . .	:	
STATE OF NEW JERSEY	:	
v.	:	
JOHN DOE,	:	
DEFENDANT.	:	

The undersigned, _____, an Assistant District Attorney for _____County, respectfully petitions the Court as follows:

1. Petitioner is in receipt of an exemplified Petition and Certificate of a judge of a court of record of the State of New Jersey adjudicating one Jane Jones as a material witness in a criminal prosecution by the State of New Jersey against John Doe now pending before the Grand Jury of _____County, in the State of New Jersey, under the "Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings" in accordance with McKinney's Criminal Code, §618-a.

2. Said Petition and Certificate of a judge of record of New Jersey are attached hereto.

3. In accordance with the provisions of the Uniform Act, above cited, your petitioner seeks an Order to Show Cause directing

the witness Jane Jones to appear before a Judge of the _____ Court of _____, Criminal Division, _____County, to show cause why an order should not be entered directing her to appear as a material witness before the Grand Jury of _____ County, New Jersey, at _____, _____, New Jersey, on _____, 197____, to give testimony in the criminal prosecution by the State of New Jersey against John Doe now pending before said Grand Jury.

_____

Assistant District Attorney
_____County, _____

Dated: _____, 197 .

_____ COURT OF _____
CRIMINAL DIVISION
_____ COUNTY
DOCKET NO.

IN THE MATTER OF :
JANE JONES, A MATERIAL :
WITNESS :
. . . . . :
STATE OF NEW JERSEY :
v. :
JOHN DOE, :
DEFENDANT. :

ORDER TO SHOW CAUSE

MATERIAL WITNESS
JANE JONES
[address]

This matter being brought on before the Court by _____, Assistant District Attorney of _____ County, and whereas it appears that a Petition and Certification naming Jane Jones as a material witness in a criminal prosecution pending before the Grand Jury of _____County, in the State of New Jersey, has been filed with this Court, and good cause being shown;

IT IS, therefore, on this _____day of _____, 197__

ORDERED that Jane Jones [address]

appear and show cause on the _____day of_____, 197__, at _____o'clock in the _____noon, before the Honorable _____, Judge of the _____Court of _____, Criminal Division, _____, County, at _____, County of _____, State of _____, why an order should not be signed by the said Judge of the said Court ordering

the said Jane Jones to appear as a material witness before the Grand Jury of _____ County, New Jersey, at _____, _____, New Jersey, on _____, 197____, to give testimony in the criminal prosecution by the State of New Jersey against John Doe now pending before said Grand Jury.

_____
Judge,
_____ Court of _____
_____ County

_____ COURT OF _____
CRIMINAL DIVISION
_____ COUNTY
DOCKET NO. _____

IN THE MATTER OF JANE JONES, :
A MATERIAL WITNESS IN A :
CRIMINAL PROCEEDING (STATE :
OF NEW JERSEY v. JOHN DOE, :
DEFENDANT) :

ORDER
(SUMMONS)

This matter having been presented to the Court by _____, the District Attorney for _____ County, State of _____, in the presence of Jane Jones, the material witness named in the certificate (copy attached) signed by the Honorable _____, Judge of the _____ Court of _____ County, New Jersey, requesting that Jane Jones be ordered to appear as a necessary material witness before the _____ County Grand Jury in the criminal prosecution for _____ by the State of New Jersey against John Doe, and good cause being shown,

IT IS, therefore, on this _____ day of _____, 197__,

ORDERED, pursuant to the provisions of the "Uniform Act to Secure the Attendance of Witnesses From Within or Without a State in Criminal Proceedings" (McKinney's Crim. Code, §618-a; N.J.S. 2A:81-18, et seq.) that said Jane Jones appear and testify before the _____ County (New Jersey) Grand Jury,

at_____, _____, New Jersey,
on the _____day(s) of _____, 197_,
at _____o'clock in the _____noon, in the criminal prosecution
pending before said Grand Jury by the State of New Jersey
against John Doe, and it is

FURTHER ORDERED that Check No._____, dated
_____, 197_, made payable to Jane Jones, in the sum of
$_____, be delivered to the said Jane Jones, for mileage at
the rate of 10 cents per mile from _____, _____
to _____, New Jersey, and return, plus the required
payment of $5.00 per day for _____days' attendance.

_____
JUDGE _____COURT
OF _____

APPENDIX

PART III

CASE PREPARATION

Form 1

INVESTIGATION CHECK LIST

STATE VS._____

	YES	NO
1. Has form letter been forwarded to Police Department requesting submission of all particulars?.....	____	____
2. Are all names, addresses & telephone numbers of all witnesses in the file?.....	____	____
3. Have all witnesses been interviewed?.....	____	____
4. Are all statements of witnesses, defendant in file?.....	____	____
5. Is defendant out on bail?.....	____	____
6. Is name of Bondsman in file?.....	____	____
7. Has defendant been processed through Sheriff's Office?.....	____	____
8. Is Criminal Record in the File?.....	____	____
9. Is chain of custody of the evidence established?.....	____	____
10. Have the correct charges been made?.....	____	____
11. Is photograph of defendant in file?.....	____	____
12. Will other photographs help case?.....	____	____
13. Will sketch help case?.....	____	____
14. Copy of applicable statutes attached?.....	____	____
15. Are all police reports in file?.....	____	____
16. Have all police witnesses submitted statements?.....	____	____
17. Will all exhibits be available for trial?.....	____	____
18. Have you examined the Statute Law in this case?.....	____	____
19. Will the use of scientific device, laboratory or special expert aid the case?.....	____	____
20. Have all sources of information been explored?.....	____	____
21. Have you obtained personal data of defendant, such as age, occupation, place of employment, place of residence, family, etc.?.....	____	____
22. Would a polygraph test be advisable?.....	____	____
23. Can all witnesses identify the defendant?.....	____	____
24. Has scene of crime been visited by the investigating officers?.....	____	____
25. Is it necessary to interrogate more witnesses?.....	____	____
26. Have you examined all elements of the case, such as, WHO, WHAT, WHEN, WHERE, HOW, WHY?.....	____	____
27. Has any alibi of defendant been checked?.....	____	____
28. Are hospital and doctors reports in file?.....	____	____
29. Can you draw any conclusion from the physical or circumstantial evidence?.....	____	____
30. In larceny cases, do you have the true full name of owner, full description and values of stolen property?.....	____	____
31. Are you satisfied that the case has been fully investigated for trial?.....	____	____
32. If the case is not fully investigated for trial, have you advised the prosecuting attorney?.....	____	____

PLEASE DO.

REMARKS: _____

_____

_____ Investigator

Use reverse side if additional space is needed to answer any questions.

Form 2

Re: State vs. _____

Dear Officer:

A complaint has been received by this office in the above matter.

Will you kindly forward your police report, statements and any other information you may have pertaining to this case to this office.

Very truly yours,

County Prosecutor

Form 3

REPORT OF A CRIMINAL INVESTIGATION

TO: _____ DATE:
County Prosecutor of _____County

FROM: _____, Police Department _____

State v. _____ Crime:_____

Complainant: _____ Address:_____

Date of Crime:_____ Place:_____

SUMMARY OF FACTS

[Where statement of witness or item of evidence is enclosed precede witness's name or item by sumbol (*)]

POLICE WITNESSES (Give full name, rank and shield number)	Report Filed (Yes or No)

Form 3 - continued

OTHER WITNESSES (Give full name and address)	STATEMENT GIVEN (Yes or No)	(Oral or Written)

EVIDENCE

(Articles preceded by symbol (*) are submitted herewith.)

Photographs? Photographer?

Maps or Sketch? By Whom?

Weapons?
(If guns, give make, serial number and caliber)

Physical evidence? (List articles, giving description, serial number, value, etc.)

Articles not submitted herewith are in whose custody?

Give names of police officers who handled evidence from scene of crime or place where found to Police Property Clerk:

REMARKS

SUBMITTED BY: _____
Name and Rank

28a

Form 3 - continued

REVIEWED AND APPROVED BY:_____

_____

Receipt of items preceded by sumbol (*) acknowledged this _____ day of _____, 197_____.

_____COUNTY PROSECUTOR

By:_____
Title

SUBMIT POLICE REPORTS OF INVESTIGATION, STATEMENTS OF WITNESSES, MAPS AND PHOTOGRAPHS TOGETHER WITH THIS FORM.

Form 4

OFFICE OF THE COUNTY PROSECUTOR
DETECTIVE BUREAU
_____ COUNTY COURT HOUSE
_____ N. J.

State Bureau of Identification
Division of State Police
Trenton, New Jersey

Re: State vs.
Complaint #

Gentlemen

Please check your files to ascertain if there is a record of the following defendant.

Name: Alias:

Last Address: P.O.B.

Date of Birth:

Description:

Social Security #:
S.B.I. #:
F.B.I. #:

Please forward abstract of Criminal Record to the attention of the undersigned if on file. Thank you for your assistance in this matter.

Very truly yours,

_____
Chief of County Detectives

By:_____
County

Form 5

OFFICE OF THE COUNTY PROSECUTOR
DETECTIVE BUREAU, _____ COUNTY
COURT HOUSE
_____ NEW JERSEY

ORI

NAME

Hon.
Director
Federal Bureau of Investigation
U.S. Department of Justice

RE: State vs.
Complaint #

Dear Director:

Please check your files to ascertain if there is a record of the following defendant.

NAME:

LAST ADRESS:

DATE OF BIRTH:

DESCRIPTION:

SOCIAL SECURITY #:

N.J.S.B.I. #:

Please forward abstract of criminal record to the undersigned, if on file. Thank you for your assistance in this matter.

Very truly yours,

_____
Chief of County Detectives

By: _____
County

UCDS Form 1

Form 6

INFORMATION REQUESTED FOR PROSECUTOR'S OFFICE

----- County Prosecutor's Office

File No. _____ Date _____

The information requested and listed below is of a confidential nature, and is to be used only in the preparation of criminal cases for ------County Grand Jury action and Court trials. Please print or type.

NAME OF PATIENT _____

ADDRESS _____

STATE vs _____ CRIME _____

NAME OF HOSPITAL _____

DATE OF ADMITTANCE _____ TIME OF ADMITTANCE _____

HOW PATIENT WAS BROUGHT IN _____

FULL NAME OF ADMITTING DOCTOR _____

FULL NAME OF TREATING DOCTOR _____

DIAGNOSIS OF INJURIES _____

_____

_____

SPECIFIC TREATMENT ADMINISTERED _____

_____

_____

DATE OF DEATH _____ or DATE OF DISCHARGE _____

TIME OF DEATH _____ PRONOUNCED DEAD BY DOCTOR _____

BODY RELEASED TO _____

REMARKS _____

_____

Return to:

----- County Prosecutor's Office
----- County Court House
--------- New Jersey

Record given by:

_____
Historian of records

91-400 O - 78 - pt. 1 - 30

Form 7
State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF STATE POLICE

COLONEL Clinton Pagano
SUPERINTENDENT

RECORDS AND IDENTIFICATION SECTION
POST OFFICE BOX 68
WEST TRENTON, NEW JERSEY 08625

REQUEST FOR EXAMINATION OF EVIDENCE

Crime _____ In County of _____ Lab. No. _____

Victim _____ Suspect _____

Submitting Agency _____

Forward Replies to _____

Invest. by _____ Delivered by _____
SIGNATURE OF PERSON DELIVERING EVIDENCE

Brief History of Case:

Examination Requested:

List of Specimens:

Form 8

Mrs. Marie Carter*
Division of Motor Vehicles
25 South Montgomery Street
Trenton, New Jersey

RE: STATE vs. _____
Our case _____

Dear Mrs._____:

Please forward a certified copy of an application for registration for the above named subject for a _____

Please cover the period of _____

Thank you in advance for your cooperation.

Very truly yours,

_____
Chief of County Detectives

By:_____
County _____

*Note: After 1/1/77 such requests should be sent to:
Mrs. Kathryn Filidore
at the same address as above

Form 9

COUNTY PROSECUTOR'S OFFICE, _____, NEW JERSEY

INVENTORY OF EVIDENCE

Submitted by: _____ Title: _____ Date: _____

State vs: _____

Pros File No.: _____ Date of Offense: _____ Municipality: _____

Indictment No.: _____ Charge: _____

ITEM No.	Quantity	DESCRIPTION OF ARTICLES (Model, Serial #, Identifying marks, value & condition if available)

Received by: _____ Agency: _____

Storage Location: _____ Received by: (Signature): _____ Date: _____

(For evidence custodian only) Dept/Agency: _____

POST-TRIAL INFORMATION

Trial dates: _____ Judge: _____

Trial Prosecutor: _____ Defense Atty: _____

Verdict(s): _____

Remarks: _____
(Disposition of other evidence not listed herein, etc.) This form will be used for disposition of all evidence, & returned to Evidence Custodian)

Form 10

OFFICE OF THE COUNTY PROSECUTOR
DETECTIVE BUREAU
_____ COUNTY
COURT HOUSE
_____, NEW JERSEY

Re:

Dear Sir-

The above subject is presently awaiting disposition of a criminal charge.

To properly present this charge at trial it is necessary that we have an exemplified copy of the defendant's conviction for

Please find enclosed voucher to be filled out by you to cover the cost for this service.

Respectfully yours,

_____
CHIEF OF COUNTY DETECTIVES

By _____
County

Encl.

Form 11

PROSECUTOR'S OFFICE

WITNESS LIST FOR GRAND JURY

STATE vs. _____

FILE NO. _____ DATE: _____

CHARGE _____

_____

NAME	ADDRESS

Subpoenaes and Notices sent to above witnesses on:

Date: _____

By: _____

_____
Detective Assigned

37a

Form 12

REMOVE FROM FILE BEFORE GIVING DISCOVERY

PROSECUTOR'S CASE REVIEW AND PLEA FORM

Defendants Names & D.O.B.'s:

Offenses

Municipality

Docket No.

Ind. No.

Prior Criminal History: (Include: any arrests, juvenile record, pending cases and criminal conviction of each defendant.)

Complainant

Municipality Detectives Assigned & Date

Early Case Review:	A/P	Date
__Complaint		__Statement of Deft.
__Rap Sheets		__Line-up or I.D. Procedure, Photos Documents
__Arrest or Incident Report		__Weapons - Test-fired
__Detective Reports		__Firearms Incident Report
__Lab Reports		__Medical Reports
__Official Certifications		__Physical Evidence
__Handwriting Report		__Photo of Defendant
__Witnesses Statements		__Photographs
__Fingerprint Report		__Bank Transcripts-Check Cases
__Search Warrants, Affidavits & Return Inventories		

Additional Witnesses needed and/or Statements:

Form 12 - continued

Other Investigation Needed:

Further Investigation:

Assigned to Det._____Date:_____

Recommendations of Processing:

____Grand Jury Charges ___Dismissal Reason Downgrade Charges & Reason

Plea Bargaining:

Other Comments:

Case is ready for Trial:_____Date:_____

Signature of Assistant Prosecutor:_____

Mr. DEL TUFO. Let me thank you for the opportunity to appear before you today, on both my own behalf and on behalf of Attorney General Hyland. In New Jersey, as in the Federal system, the attorney general has broad supervisory responsibilities over the operations of prosecutorial agencies.

I might say in passing that New Jersey has one of the most extensive legislative delegations of criminal justice authority in the country. We have, within the division of criminal justice, approximately 100 attorneys and some 50 investigators. In addition, we have the division of State police, which is another arm of the attorney general's office, to use in an investigative capacity. We have units which investigate white collar crime, drug offenses, organized crime activities, antitrust matters, and which present cases to State grand juries.

In addition to that, have supervisory responsibility over the operation of the 21 county prosecutor's offices. Over the past years, the attorney general has promulgated standards to govern the conduct of county prosecutors and other law enforcement officers in a variety of areas, including that of grand jury practice.

The grand jury manual, which you have, was commissioned by Attorney General Hyland and myself in an effort to compile and codify uniform standards of professional prosecutorial responsibility throughout the State. It was put together by a task force composed of representatives of our office and the various county prosecutors. It now governs grand jury presentations and related matters by county prosecutors, and by our office, in presentations to the State grand jury and in every other grand jury in the State of New Jersey.

The manual, I believe, is an important and significant achievement. In terms of my appearance here today, I believe it is relevant in many respects to the issues before us. First of all, the substantive aspects of the manual demand attention because they deal, I feel, in a positive, fair way with many areas of consequence. I am talking, for example, about grand jury orientation, the prosecutor's role before the grand jury, the rights and duties of both regular witnesses and targets, standards for determining whether or not immunity should be employed, guidelines for dealing with the media, preparation of cases for grand jury presentation, and post-indictment procedures.

The administrative approach to the subject matter, which is pursued in New Jersey under the same type of supervising authority that the U.S. Attorney General has over U.S. attorneys, provides the flexibility necessary to deal with changing circumstances and with changing judicial precendent.

Beyond this, I think the manual demonstrates that responsible regulatory control of grand jury matters can come from the law enforcement community itself in a manner which recognizes and seeks to protect individual rights, yet which preserves the investigative and other tools which are so necessary to successful criminal prosecution.

On this latter score, I believe we must bear foremost in our minds that criminal enterprise must be countered effectively, and that we must maintain a viable prosecutorial presence in order to do so. If we were to strip away the resources of the grand jury from the prosecutor, either by encumbering its investigations with time-consuming ancillary court proceedings, or by turning the grand jury itself into an adver-

sary proceeding, society would be left vulnerable to the most sophisticated criminal activity.

For example, no technique is as essential in combating organized crime as a grand jury investigation. By operating in secrecy for the protection of witnesses and to guard against perjured testimony and fabricated defenses, grand juries have been able to penetrate deeply into the activities of organized crime. We must recognize that in dealing with such societal problems we are met with carefully structured criminal groups which receive excellent legal advice and are designed to insulate those in control from detection and prosecution.

An imaginative and determined prosecutor, with sufficient resources can be successful in overcoming these obstacles without abusing the rights of those who are targets of or who appear before the grand jury.

In this connection, I would emphasize to you the need to avoid the pitfalls of distrust. I have detected an unfortunate distrust in some areas, or a lack of confidence, I imagine is a better phrase, in executive officers entrusted with the enforcement of the criminal laws, a situation which may very well be a reaction to specific instances of arrogant grand jury misuse which occurred several years ago.

However, we should be careful to avoid an overreaction to specific past abuses in a way which unduly hampers efficient, fair law enforcement efforts in the future. We have viable institutions for the fair administration of the Criminal Justice System. We must, of course, jealously guard those institutions and make changes in a sensible way when circumstances warrant. But we must, I believe, also trust in those charged with the responsibility for operation of the system since, by and large, our Nation's prosecutorial officers are dedicated public servants who discharge their ethical duties to see that justice is done, and in the last analysis, any system is only as good or effective as those who run it.

In essence, then, I call for a balanced judgment and approach, one which seeks to regulate in an atmosphere of confidence, one which seeks reform in a manner not destructive of the prosecutor's ability to perform properly and effectively, and one which recognizes the flexibility and other advantages of an administrative as opposed to a legislative approach to regulations in many areas.

Turning to H.R. 94 itself, I shall comment only briefly about certain of its most salient features, in view of the time constraints, and in view of the more extensive discussion which is contained in the prepared statement itself.

First of all on immunity. Transactional immunity, in our judgment, goes well beyond the protection required by the fifth amendment and could lead to possible undesirable results. One consequence, possible consequence, is the prospect of criminal conduct going unpunished—either that of the immunized witness or that of the target of the sought-after testimony. Regardless of the burden upon the prosecution to show the insulation of evidence, that it was not derived from the mouth of the witness who was given immunity, we favor retention of use immunity. This approach permits law enforcement to function properly while at the same time does adequately and constitutionally protect individual rights.

In a decision, the question of whether or not to immunize a witness is truly an executive judgment and should remain as such. Many deli-

cate prosecutorial factors must be weighed in reaching a decision on this score and fall within the executive domain outside the traditional role of the judiciary. For that matter, from a practical resource standpoint, involving the courts in judgments of this sort at this stage in criminal proceedings would overly strain judicial resources, and in the bargain, would bring grand jury proceedings to a standstill to the prejudice of the prosecutorial effort.

I wholeheartedly agree with Judge Lacey's comments this morning on the strain on judicial resources which ancillary proceedings of this type would cause.

Second, on the subject of rights of witnesses and suspects, as the discussion in the formal statement which has been made part of the record suggests, different regulations should be promulgated for witnesses not suspected of criminal activity and for targets of a grand jury investigation. In both instances the regulation should be meaningful without being unnecessarily burdensome, such as requiring a variety of notices upon the service of the subpena and without carrying the extreme penalty of the dismissal of the indictment for good faith violations.

One of the best examples of the differences noted, which I have just noted between targets and other witnesses, lies in advice concerning the privilege against self-incrimination. A witness not suspected of criminal wrongdoing who is called before a grand jury to give evidence should not, under usual circumstances, be advised of his rights because, really, in the general run of things, there is no reason to do so. Should he register a fifth amendment claim during the course of the examination, the prosecutor should have an opportunity to explore the basis for the assertion to ascertain its legitimacy before reaching the question of whether or not to confer immunity.

This is why H.R. 94's reference to a conferment of immunity immediately upon a claim of fifth amendment rights is too broad. There are many situations in which witnesses assert fifth amendments rights when they have no right to do so. In those cases, they are brought before a judge who makes that judgment. I am talking about regular witnesses who are subpoenaed before a grand jury, or who appear before a grand jury.

Target witnesses, as we call them in New Jersey, or punitive defendants, as I believe is the Federal term, should have different treatment. They should be advised of their rights. They should be advised of their status as possible punitive defendants. All of these things should take place outside the presence of the grand jury. If a fifth amendment claim is asserted by a target witness, that is the end of it. He is not called before the grand jury, and there is no more, no further dealings with him by the prosecution.

Finally, we disagree with the proposition that counsel for witnesses should be allowed in a grand jury room. Such a practice could be disruptive, and I don't believe it would necessarily be conducive to the proper discharge of its functions, the grand jury functions. There has been a lot of discussion about that this morning, and I certainly subscribe to some of the reasons that have come forward.

On the subject of evidence, we agree that generally only competent evidence should be presented to a grand jury with the reasonable and pragmatic exceptions to that rule as are more particularly discussed

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in the statement which has been submitted to you. The prosecutor should also most certainly present to the grand jury evidence which tends to exonerate a criminal defendant. The requirement should be stated in that fashion, however, and not in terms of an obligation to present all exculpatory evidence.

We have also heard a lot about this, this morning. But what is or is not exculpatory in character is often a very subjective, ambiguous question, and one more for a defense attorney and a prosecutor to decide.

In addition, a requirement to present evidence which might be exculpatory but would not tend to exonerate a criminal defendant really would serve no useful purpose, and would only tend to unduly protract grand jury proceedings.

If I may digress just for a second—I am almost finished with these remarks, but I am going to talk about discovery.

I think at this point I should also say that the answer to any number of concerns that were registered on both sides of the table this morning may be broad discovery rules which permit a criminal defendant to examine the prosecutor's file. I think that removes a many concerns about preliminary hearings and being able to evaluate the evidence.

Discovery also touches upon evidence which may be exculpatory but which does not tend to exonerate the defendant. At least the defendant, if there is anything in there, in the prosecutor's file, will know about it.

In addition, I suggest to you that the grand jury stage of proceedings is not the stage upon which to embark upon a determination as to whether or not evidence has been improperly obtained in violation of constitutionally or statutorially assured rights, such as evidence seized by virtue of a possible illegal search and seizure. Such questions are often complex and require extended judicial proceedings for determination. To pursue them at the grand jury stage could lead to unwarranted and unconscionable delay in investigative efforts, and perhaps unnecessarily deplete judicial resources as, for example, in situations in which an indictment is not returned by a grand jury.

I note here also that the remedy of dismissal of the indictment for a possible violation is far too extreme a remedy.

On the question of discovery, we believe discovery should go beyond that called for in H.R. 94. Each defendant after indictment should receive a copy of all grand jury minutes other than matters relating to deliberations of the grand jury, as soon after the indictment is handed up as possible. We also believe defendants should have broad rights to examine all materials in the prosecutor's file. It has been our experience in New Jersey that in criminal as in civil causes, disclosure of all relevant information promotes the proper administration of Justice.

As I mentioned to you before, this type of disclosure, discovery, would obviate the mandatory call for preliminary hearing set forth in H.R. 94 to the extent that it is suggested that it be there for discovery purposes. I believe in the explanation of H.R. 94 that particular reasoning is set forth.

On a miscellaneous basis, we favor retention of the present size of the grand jury, retention of summary contempt procedure in order to maintain a flexible posture and to deal with things as circumstances

may require, and retention of the concept of a term of contempt incarceration which is limited only by its coersive effectiveness and not by some arbitrary figure.

In conclusion then, let me say that, as I have noted, both Attorney General Hyland and myself agree with many of the proposals contained in H.R. 94. We are opposed to those which would unduly impede the law enforcement effort, and which are largely unnecessary, in our judgment, from a practical standpoint, for the protection of individual rights.

We call for the trust and confidence which a free society must impose in its executive officers, and we urge upon you recognition of the advantages of achieving reform administratively under the Federal Attorney General's supervisory power over U.S. attorneys. On this score, we again call attention to the New Jersey experience and the fairness and effectiveness of the system which is now in operation in that State.

Mr. EILBERG. Thank you very much for your very extensive statement. You have put a great deal of effort into this.

I would reply to your last comment, and I do not mean this in a personal sense or personal attack, but the last Attorney General did not agree with any idea of internal reform or any reform of any kind, sitting at that table. So that while that is a possibility, depending upon the person who is in charge of the Justice Department, it certainly was not possible until 1977. if then.

Mr. DEL TUFO. I don't think I am—well, I understand what you are saying. I am not breaching any confidences, I don't think, but in the context of coming here this morning to talk to you about grand juries and to suggest some type of administrative approach to reform, I did make a contact with the U.S. Attorney General's Office at a responsible level, and I believe that you will find that the present Attorney General and his Assistant in charge of the Criminal Division are most interested in the subject matter of grand jury reform, are meeting with U.S. attorneys to come up with suggestions, and are most amenable to the idea of exercising Attorney General supervisory powers over U.S. attorneys to do so.

Mr. EILBERG. I am very glad to hear that.

Just a few questions because of the constraints of time, as you have pointed out. This is a subject we could spend many, many days on and still not arrive at consensus, but just a few questions.

You state that absent some compelling justification only competent and admissible evidence should be presented to a grand jury. What would be such compelling justifications?

Mr. DEL TUFO. I think all that I refer to in making that statement, and I believe I set forth in the lengthy statement of the Attorney General and myself, I am really making reference to the ABA standards more than anything else. In other words, you may have a situation where there are voluminous records, and it would seem in the interest of everybody's time and expediency without in any way prejudicing someone that those records should be summarized rather than spending a great deal of time going through them individually; or there might be a situation where it is in the best interest of a particular witness not to appear and there might be some reliance on some hearsay testimony; or there might be an instance of summarization.

But it is essentially the type of thing that is recommended by the American Bar Association in those standards governing criminal justice administration.

Mr. EILBERG. You oppose dismissals for violation involving evidence which is not competent. What should be the remedy for presenting incompetent or inadmissible evidence?

Mr. DEL TUFO. As long as there is—we are talking about the handing up of a criminal charge and the processing of a criminal proceeding. If there is sufficient competent evidence presented to a grand jury upon which an indictment is based, the fact that there incidentally might be some incompetent evidence should not result in the dismissal of the indictment.

As to how we deal with presentation to grand juries on the type and quality of information that is presented to them, I think that is best handled, again, by the administrative supervisory control over the actions of the prosecutorial authorities by the U.S. Attorney General in the Federal system, in a manner akin to what we are doing in the State system in New Jersey.

Mr. EILBERG. You oppose proposals allowing only consensual immunity and requiring the jurors to vote on immunity grants. I share your concerns and provide only in my bill for judicial approval with standards; yet, you oppose this, as well. If the grand jury is, in fact, an arm of the court and not the prosecutor, why should not the court determine not who should be immunized, but whether established standards have been followed?

Mr. DEL TUFO. There are two reasons. I think one has to do with the concept of divisions of responsibility in our Government between different branches of government. I am thinking at this point of the executive and judicial. I am also thinking from a pragmatic standpoint of the need to have grand jury investigations, the investigative process, proceed with dispatch so that the grand jury can accomplish its work, especially in organized crime situations, and with the demands upon existing judicial resources. All of our resources are finite, and we have to use them to the best advantage.

Now, first of all, on the first point, whether or not to prosecute, whether or not to launch a criminal proceeding, whether or not to proceed, are traditionally prosecutional, executive types of judgments. They involve many factors that have to be evaluated and balanced, many delicate factors. It is not lightly that a prosecutor decides that he is not going to pursue a case against someone or he is going to seek his cooperation. He must take into account any number of things. For example, questions include: Can this type of information be secured from another source? What is the relative culpability of this particular defendant? What is the quality of the information that this defendant might offer, and against whom would it be offered in terms of societal values? What will be the public reaction to immunization in a certain case, because public confidence in the proper running of prosecutorial offices is of utmost importance.

All of these things must go through the prosecutor's mind. He must review them in the context of his entire file, of his entire case, and reach some type of judgment as to whether or not under the circumstances the witness' testimony is more important than anything else. This type of judgment is really not within the judicial domain. The

courts are not in the business of saying who should be prosecuted and who should not be prosecuted. This is a prosecutorial type of judgment.

Beyond this, if you do involve the courts at this stage, you are going to end up in a quagmire. First of all, while a determination is being made by a court as to whether or not immunity should be granted, very often the grand jury proceeding comes to a standstill and the investigative effort cannot proceed as it should. The court must take the time not only to look at the surface papers which might be presented on immunity, but frankly, in order to make a judgment as to whether it is in the public interest which, again, is not a judicial judgment to make at this point in time, the court must really analyze most everything that is in the prosecutor's file. It must acquaint itself fully with what has gone on heretofore in a grand jury.

If it is an investigative grand jury involved in a protractive, long-term investigation, say, in the organized crime context, that is a considerable burden for the court to undertake. After that you are faced with the possibility of more protracted types of delays.

I am suggesting that every—the Government is entitled to every man's evidence. That was also discussed here this morning. As long as a witness is protected so that nothing that he says can possibly be used against him in any way, his rights are protected. The judgment as to whom to prosecute and how to move along a criminal case is that of the prosecutor. It is not a judicial judgment.

The courts come in at a later point in time to offer any other type of protection that might be warranted. In any event, to involve the judiciary at this point would take over many resources required for other things. Once that precedent were established there might be no end to the types of things which would be brought to the attention of a court at really what is a preliminary stage in criminal proceeding.

Mr. EILBERG. Mr. Del Tufo, under New Jersey law a witness can attack a contempt sentence on the basis that it is no longer coercive. What are the standards as to coerciveness?

Mr. DEL TUFO. The cases you refer to are cases involving the incarceration of alleged organized crime figures under subpenas issued by the State Commission of Investigation, which is a quasi law enforcement agency in New Jersey.

Essentially, the court has to make some judgment and determination as to whether there is still any utility in the incarceration as a mechanism of trying to induce the person to come forward and purge his contempt by giving the information that is required. I think in some of those cases, frankly, the term of incarceration without any positive results has been something which has been of influence to the courts. But it is a delicate judgment and analysis that has to be made in each instance.

Mr. EILBERG. There is difficulty in defining standards, I take it?

Mr. DEL TUFO. It is. It is a very difficult question. As soon as you start putting time limits on it, then a person who does not want to give information can say to himself, is it worth it for me to wait 3 months, 6 months, 1 year, rather than talking at this time? On the other hand, if there is no limit on it, the person is faced with a protracted period of incarceration and the inducement to purge the contempt is certainly greater in that sense.

But, by the same token, it is difficult to assess when that coercive atmosphere has evaporated, and we certainly don't want to see people in jail on any extended basis on a civil contempt charge.

Mr. EILBERG. If you have any further thoughts after today's hearing, we would certainly be glad to hear about what possible standards there are. It is a very perplexing and very important question.

Mr. DEL TUFO. I shall be glad to send something along.

Mr. EILBERG. Finally, in a recent case, *State* v. *Schamberg*, the New Jersey Appellate Division upheld an interrogation of a grand jury witness even though the prosecutor stated in front of the jury that he believed the witness perjured himself, but did strongly disapprove the practice.

What action, if any, is contemplated against the prosecutor for this abuse?

Mr. DEL TUFO. I am generally familiar with the *Schamberg* case. I have not read the decision. First of all, it is my understanding that the witness who appeared before the grand jury was a target of the grand jury, and was so advised that he was the target; he had a right to counsel and the other types of warnings prior to his appearance in the grand jury. I believe it was for that reason that the court, appellate division, upheld the indictment.

It disapproved of the assistant prosecutor's reference to a prior inconsistent statement in suggesting that he may have perjured himself, though he did have his warnings before he came into the grand jury. Upon learning of that case itself, we counseled the assistant prosecutor so that that type of comment would not occur again, as far as he was concerned.

We also immediately sent a directive out to all the prosecutors offices in the State calling attention to the decision, and indicating that comments of this type should not be made before a grand jury.

Mr. EILBERG. You did not attempt to bring him before the ethical committee or board or provide any kind of punitive treatment?

Mr. DEL TUFO. As I say, my recollection of the facts of the case did not suggest to me that that was required in this case. I understand that there was a statement of this witness presented to the grand jury, I think in recorded form. The witness had been advised outside the presence of the grand jury that he was a target, his rights of the fifth amendment, that he did not have to testify, and a variety of other things.

He came into the grand jury. The prosecutor, not in any sense trying to prejudice the man, but merely to say to him we have heard a statement by you under oath which suggests that you are not telling the truth now, do you want to change your statement. I think it was an error of judgment in saying that particularly at that time in front of the grand jury.

But the rest of the—the manner in which he conducted himself in other aspects of it, I believe to the best of my recollection, was all right.

Mr. EILBERG. Mr. Del Tufo, you have been very helpful and candid. You have a great abundance of experience. We are really very grateful for your appearance. We are going to send you some questions also, if you don't mind, so we can get some more answers.

Mr. DEL TUFO. Very good. Thank you very much, and thank you for letting me come.

[The questions to Mr. Del Tufo and his responses follow:]

STATE OF NEW JERSEY,
DEPARTMENT OF LAW AND PUBLIC SAFETY,
DIVISION OF CRIMINAL JUSTICE,
Princeton, N.J., August 8, 1977.

HON. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship, and International Law, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN EILBERG: I wish to take this opportunity to express again my appreciation for affording me the opportunity to testify before your subcommittee concerning the Federal Grand Jury Reform Act of 1977. I hope that the statement submitted by Attorney General Hyland and myself, as well as my oral testimony, will be of some assistance. The purpose of this letter is to supplement my testimony and to respond to the written questions propounded by you.

Question No. 1. You claim that H.R. 94 indicates a lack of confidence in prosecutors. I must respectfully disagree. I am a former prosecutor and understand and sympathize with a prosecutor's problems. However, there are areas where some prosecutors have abused the grand jury process and other areas where reforms would establish a better balance between the court, the prosecutor, the grand jurors, and the witnesses. That is our intent—not to hamstring effective law enforcement but rather to increase public confidence in the criminal justice system. You can comment, if you wish!

Answer. I appreciate the statement of your personal views and of your awareness of prosecutorial problems. However, I respectfully suggest that the underlying premise of H.R. 94's orientation is that prosecutors will not act responsibly unless severe restraints are legislatively imposed upon their activities. This premise is unjustified. Human nature dictates an absence of perfection in any endeavor. There will thus always be mistakes and excesses. However, in my experience, the incidence of abuse in law enforcement has proven to be the exception rather than the rule. As stated in my testimony, H.R. 94 seems to constitute an over-reaction to past occurrences and may well tip the balance in a dangerous direction. First of all, while I agree with your statement that the legislative intent is not to "hamstring" effective law enforcement, I fear that enactment of H.R. 94 in its present form could inevitably lead to that result. Secondly, and of even more importance, the attitude reflected in the legislation will not work to bolster public confidence but, by truly suggesting a congressional distrust of prosecutors will cause a deterioration of public respect for law enforcement.

Question No. 2. You support reforms providing pre-trial discovery of grand jury minutes. This, I note, is required by New Jersey Law. Some have complained that this can lead to a "framing of testimony" by witnesses. Have you observed any such problems?

Answer. As you know, we favor full pretrial discovery of grand jury minutes. Specifically, R.3:13-3 of the New Jersey Rules of Criminal Practice provides that "the prosecuting attorney shall permit defendant to inspect and copy * * * any relevant * * * grand jury testimony * * *." Further, as a matter of general practice, prosecutors in New Jersey permit full pretrial examination of their files. On the other hand, R.3:13-3 permits the State a limited right of reciprocal discovery. We believe that our criminal discovery rules have a salutary effect on the administration of criminal justice.

In New Jersey we have not experienced any significant problem with regard to subornation of perjury by virtue of these discovery practices. Of course, discovery of grand jury minutes may only be had subsequent to the return of an indictment. Therefore, the opportunity to subvert the grand jury's function by orchestrating a defense is simply not present. In sum, liberal pretrial discovery has done much to promote the search for truth and has led to rejection of the notion that a criminal trial is a contest.

Question No. 3. You state that "absent some compelling justification", only competent and admissible evidence should be presented to a grand jury. What would be such "compelling justifications?" You oppose dismissals for violations. What should be the remedy for presenting incompetent or inadmissible evidence?

Answer. As you know, it is our practice in New Jersey to present only competent and admissible evidence to the grand jury absent some compelling justification. Nevertheless, the nature of the grand jury process suggests that some exceptions must be made to this general policy. Thus, where there is adequate

justification, a prosecutor should be allowed to present otherwise inadmissible and incompetent evidence. However, when incompetent and inadmissible evidence has been admitted absent justification, the indictment should not be dismissed where sufficient legal evidence was presented which supports the charges.

While it is true that mere reception of inadmissible evidence by the grand jury should not serve to vitiate a resulting indictment, it is a far different thing to suggest that prosecutors are not subject to any restraints in this regard. The American Bar Association Project on Standards for Criminal Justice has provided:

"A prosecutor should present to the grand jury only evidence which he believes would be admissible at trial. However, in appropriate cases the prosecutor may present witnesses to summarize admissible evidence available to him which he believes he will be able to present at trial."

In the accompanying commentary, the Bar Association noted that "as a general principle, the use of secondary evidence before a grand jury should be avoided unless there are cogent reasons justifying" such a practice. For example, the need to use a summary of available evidence may arise "in cases involving voluminous records or where an absent witness has given a written statement but is not available at the time and circumstances justify prompt grand jury action." So too, the Bar Association advocates the use of hearsay evidence "where the victim of a criminal act is seriously injured and therefore is unavailable. . . ." Another example set forth in the commentary is "where the safety of an important witness reasonably warrants that his identity remain covert." In such a case, the witness' statements, if sufficiently detailed, can be presented to the grand jury.

The American Law Institute has adopted a similar approach in its Model Code of Pre-Arraignment Procedure. Under the Code, prosecutors may present "secondary" evidence only where the opposite course would impose an unreasonable burden on one of the parties or on a witness.

In a similar vein, the California Penal Code provides that "the jury shall receive none but evidence that would be admissible over objection at the trial of the criminal action * * *." However, the mere fact that "evidence which would have been excluded at trial was received by the grand jury does not render the indictment void" where sufficient competent proofs were also presented. Other jurisdictions have adopted similar statutes and rules.

In sum, it would be unwise to restrict the scope of the grand jury's inquiries with the absolute requirement that only competent, admissible evidence be received. Given proper justification, otherwise incompetent evidence may be utilized. For example, investigative grand juries must often sift through all available clues to determine whether a crime has been committed. So too, expert reports may often be presented to the grand jury in the interest of economy. Ordinarily where an expert would merely testify as to the contents of his report, his presence before the grand jury would be needed. Specifically, in narcotics cases the State chemist need not necessarily be present. In autopsy-toxocological situations the State Medical Examiner need not always be called. Of course, this discussion does not exhaust the situations which might form a basis for the introduction of incompetent or inadmissible evidence. Nevertheless, as a practical matter we should ensure that the grand jury's time and that of potential witness is not needlessly wasted.

Question No. 4. You oppose a return to transactional immunity. Have you ever had prosecutions, other than for perjury, after a grant of immunity? Are not targeted defendants reluctant to testify with only a grant of use immunity?

Answer. We have instituted prosecutions against individuals who had been granted use plus fruits immunity. However, it is our practice in such cases to present independent incriminatory evidence against the immunized individual before a grand jury panel other than that which initially heard his compelled testimony. The difficulty which grand jurors encounter in compartmentalizing immunized testimony from independent evidence militates in favor of our practice. Thus, in New Jersey a new panel must hear the independent incriminatory evidence against the immunized individual. We take further precautions to ensure that the witness' immunized testimony and its fruits will not be used against him in any way at a later date. More specifically, the attorney who elicited the immunized testimony is not permitted to continue handling the case and a new attorney is assigned. In such instances, the State's attorneys are not permitted to communicate with each other concerning the case and as required by *United States* v. *Kastiger*, 406 U.S. 441 (1971) we are prepared to prove beyond a reasonable doubt that the evidence at trial was derived from an independent source.

Utilization of these procedures does not preclude subsequent prosecution of an individual who is compelled to produce incriminating evidence and thus does not confer an unnecessary benefit upon those who might otherwise seek to subvert the truth. We thus oppose adoption of the transactional immunity principle. A recent case in New Jersey illustrates graphically the undesirability of transactional immunity. A well-known political figure in this State was indicted by a State grand jury for various corrupt acts. Several months thereafter this individual was indicted by the Federal Government. Before his State trial he was granted transactional immunity in return for his testimony in Federal court. At that time transactional immunity was the sole method of compelling testimony in cases in which the witness refused to testify based upon his Fifth Amendment privilege against self-incrimination. While testifying at the federal trial, the individual related incriminatory facts concerning the State indictment despite the fact that the federal and state prosecutions were unrelated. The effect of the grant of transactional immunity was to preclude New Jersey from prosecuting the witness with respect to the State offense. Granting transactional immunity was wholly unnecessary in a constitutional sense and drastically prejudiced the rights of the people in New Jersey.

In response to the latter part of your question, it has been our experience that all target witnesses are naturally reluctant to testify. In my view, however, this reluctance would not be diminished were transactional, rather than use plus fruits, immunity to be granted.

Question No. 5. You would preclude notice as to an immunity grant. In every other procedure, adequate notice is given. To prepare for the proceeding, H.R. 94 would give one week's notice, unless the court is shown a need for a shorter period. Why do you oppose this?

Answer. H.R. 94 provides a witness with a period of one week before an order immunizing him and requiring him to testify becomes operative. While the one week notice provision allows the prospective witness an opportunity to appeal, it also provides him with the ability to flee. To syndicated crime, pledged to a code of silence, flight or the destruction of evidence is favored over immunity from prosecution. More importantly, those who may be incriminated by the immunized testimony are, in effect, given one week to eliminate or otherwise hinder the source of their potential crimination. Lastly, this period of grace provides the witness with time to tailor his testimony. In my view, there is no valid reason for inclusion of this notice provision. It bears repeating that once immunity has been granted, the witness has no choice but to tell the truth and to produce the relevant evidence.

Question No. 6. You oppose proposals allowing only consensual immunity and requiring the jurors to vote on immunity grants. I share your concerns and provide only for judicial approval, with standards. Yet you oppose this as well. If the grand jury is, in fact, an arm of the court and not the prosecutor, why should not the court determine *not* who should be immuned, but whether established standards have been followed?

Answer. I concur with your position that the court should determine whether established statutory prerequisites have been followed in the granting of immunity to a particular witness. However, it is my position that the decision to grant immunity is one which must remain exclusively within the province of the executive. Any dilution of the executive's role in this area would unduly delay investigations. Moreover, it would be violative of extant notions of separation of powers.

It is axiomatic that whether immunity should be sought may well depend upon matters of public policy beyond the traditional purview of the judiciary. Historically, prosecutorial decisions concerning enforcement of the criminal law comprise a part of the executive's responsibilities, and are matters of discretion particularly in the province of the executive department. It is antithetical to our notions of judicial integrity to involve the courts in the decision with respect to whom to prosecute. The court, immersed in judicial matters, should not be expected to expend the time and effort to appreciate the basis of the prosecutor's decision.

Another consideration strongly militating against judicial review of immunity grants is the attendant loss of time and resources. Certainly, if a court is required to make a finding with respect to the efficacy of an immunity grant, then it will be necessary to engage in a "mini-trial" at which time, all relevant data concerning the ongoing investigation will be detailed. Clearly, such an untimely and great expenditure of judicial resources is unconscionable. Members of the judiciary are detached from the investigatory process and rightly so. Their

interest in particular investigations is properly limited to concern for the observance of a citizen's constitutional rights. Empowering a court to determine whether the public needs certain information can only hinder and impede the investigation of serious criminal conduct. So too, reposing a significant aspect of the executive's power to combat crime within the judiciary transgresses the line which separates judicial and executive functions.

Conversely, judicial review of whether established statutory prerequisites have been complied with is necessary to ensure that the constitutional rights of an immunized witness are adequately protected. This function comports with the traditional role of the judiciary in law enforcement. For example, current federal law requires that the protection which immunity affords must be coextensive with and provide a complete substitute for the Fifth Amendment privilege.[1] The judiciary is uniquely suited to make this type of determination. Succinctly stated, the ability to render definitive legal decisions is solely within the province of the judiciary just as formulation of qualitative investigatory procedures are reserved to the executive.

In New Jersey a statutory grant of immunity may be preceded by court inquiry as to the validity of the Fifth Amendment claim.[2] This measure is intended to prevent spurious claims of the privilege. Ministerial functions such as this accord with efficient and effective law enforcement. Any extension of the court's involvement would be unwise.

In conclusion, the power of government is divided among the three branches to prevent despotic behavior within any of them. This delicate balance would be upset if the judiciary interfered with another branch upon nothing more than a fear that its officers will be unfaithful to their oaths or unequal to their responsibility. Where the Constitution arms the executive it disarms the judiciary. This proper and time-tested circumscription of the powers of co-equal branches of government must be given due deference. We must be as fearful of the judiciary overpowering the executive as we are of the executive overbearing the citizenry.

Question No. 7. As you note, New Jersey now provides that putative defendants should be warned of their rights. Yet you oppose notice to less culpable witnesses in a subpoena even though it is your practice. If individuals have rights, how can they effectuate them without knowing them?

Answer. We believe that considerations of fair play dictate that targets be informed of the nature of the investigation, the fact that they are putative defendants, that they have the right to counsel, and that they may refuse to testify based upon their privilege against self-incrimination. We can ascertain no compelling reason for requiring that such witnesses be provided with subpoenas setting forth information solely applicable to target witnesses.

In our view unnecessary recitation of *Miranda* warnings may have an inhibitive effect on a non-target witness. Improvidently given warnings may unduly frighten a witness in a situation where the State has no reason to believe that he will incriminate himself. Witnesses who provide testimony at trial are not administered warnings though they are required to swear to testify truthfully. Stated somewhat differently, trial witnesses are not informed, prior to testifying, that failure to tell the truth exposes them to criminal liability. Further, they are not informed that they have a right to refuse to testify concerning matters which may be incriminating. We believe that witnesses before a grand jury should not be accorded greater rights than those who appear at trial.

The Fifth Amendment does not say that a man shall not be permitted to incriminate himself. It says no more than that a man shall not be "compelled" to give evidence against himself. As to the culprit who reveals his guilt unwittingly with no intent to shed his inner burden it is no more unfair to use the evidence he reveals than it is to turn against him clues at the scene of the crime which a brighter, better informed, or more gifted criminal would not have left.

Question No. 8. You oppose prohibiting witnesses, other than targets, from being called before a jury merely to invoke his privilege. We have been repeatedly told that it is often impossible to determine who is or is not a target? How do you determine it? Does not the invocation of the privilege against self-incrimination by a witness bias his testimony, and thus affect the credibility of that witness in the eyes of the jurors? Is not this contrary to the protection of the Fifth Amendment?

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[1] See generally 18 U.S.C. § 6002.
[2] *In re Addonizo*, 53 N.J. 107 (1968).

Answer. We believe that ordinary witnesses should be required to appear before the grand jury and assert the privilege. Target witnesses should be allowed to invoke their Fifth Amendment privilege on the record *out* of the presence of the grand jury. Our position accords with the time honored principle that a non-target witness may not make himself the final judge of the availability of the Fifth Amendment privilege and hence enough must appear to permit a court to pass upon it.[3]

A witness becomes a target of an investigation when he is called in order to obtain evidence to fix a criminal charge; he must then be given the appropriate target warnings.[4] It is not necessary for a witness to have had formal charges lodged against him in order for him to be considered such a target. It is only necessary that an intent to indict him at the time of questioning is present. However, if a witness is subsequently indicted after he has testified before a grand jury, not having been given warnings, the burden is on the witness to show that "there was ruse by which it was sought to induce him unwittingly to give evidence against himself."[5] Any doubt is resolved in favor of the validity of the indictment and the indicted witness is treated as merely an ordinary witness who has waived the privilege by not claiming it.[6]

You inquire whether invocation of the privilege against self-incrimination by a witness tends to bias the grand jury against him. We believe that such bias can be eliminated if certain precautionary procedures are utilized. Specifically, the prosecutor should forcefully instruct the grand jury that invocation of the privilege by the witness is a constitutional right and should not be considered in their deliberations.

Question No. 9. You oppose allowing counsel in the grand jury to be present to advise his client only. We have been told that in most jurisdictions, counsel can wait outside and the witness can leave at any time to consult with him. Is this New Jersey practice? If so, would not the presence of counsel eliminate the delays inherent in such a procedure?

Answer. We believe that the presence of counsel in the grand jury room would disrupt the grand jury proceedings. Grand jurors would not act with the independence required of an accusatory and inquisitorial body. Further, the presence of counsel would substantially inhibit inquiries by grand jurors and detract from the well recognized policies supporting the secrecy doctrine.[7] Moreover, there may be instances, especially involving syndicated crime, where the presence of counsel would be undesirable from the witness' perspective. In our view, these problems substantially outweigh the benefits that might follow were the witness' attorney permitted to be present in the grand jury room.

Question No. 10. If we are to avoid mini-trials and not allow challenges to evidence in the grand jury room why should we not grant the defendant the right to see the case against him in a preliminary hearing. Under New Jersey law, may you try an individual on an indictment, without a preliminary hearing and if so, when and how is this true?

Answer. Wholly apart from New Jersey's constitutional prescription of indictment by grand jury, this State has long required a finding of "probable cause" as an additional procedural device to "screen out" unwarranted prosecutions.[8] Initially designated as a "preliminary examination", and since 1967 as a "probable cause" hearing, this procedure is neither a constitutionally guaranteed stage, nor an essential part, of the prosecution and may thus be superseded by the prior return of an indictment.[9]

H.R. 94 requires that a preliminary hearing be conducted in every case regardless of whether there is an indictment.[10] The attorney for the government has the option to provide the preliminary hearing before or after indictment[11]

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[3] *Hoffman* v. *United States*, 341 U.S. 479, 486–87 (1951).
[4] *State* v. *Sarcone*, 96 N.J. Super. 501 (Law Div. 1967).
[5] *State* v. *Grundy*, 36 N.J.L. 96, 96 (Sup. Ct. 1947).
[6] *State* v. *Farg*, 19 N.J. 431 (1955).
[7] The same counsel may represent several witnesses. This situation coupled with counsel's admission into the grand jury room may adversely affect the secrecy of the proceedings. For example, counsel may be duty-bound to reveal confidential information to one client which he learned while actively representing another.
[8] R. 3:4–2.
[9] See, e.g., *State* v. *Ordog*, 45 N.J. 347 (1965), cert. den. 354 U.S. 1022 (1965); *State* v. *Dennis*, 43 N.J. 418 (1964); *State* v. *Cox*, 114 N.J. Super. 556 (App. Div. 1971); *State* v. *Boykin*, 133 N.J. Super. (Law Div. 1971).
[10] H.R. 94, § 9, p. 28, lines 16 to 23, enacting 18 U.S.C. No. 3368.
[11] Id.

Current federal law, as does the law of New Jersey, provides that the return of an indictment supersedes the right to a hearing on probable cause.[12] We believe that the present practice should not be abandoned. Initially, it is to be observed that the grand jury bases its decision to indict on a finding of probable cause.[13] Therefore, a post-indictment hearing would be merely duplicative of proceedings before the grand jury and would serve no purpose since the function of the hearing is to determine whether the accused is to be bound over for the grand jury. Moreover, a defendant may exercise his right to move prior to trial for a dismissal of the indictment for want of probable cause, thereby achieving the desired result. It is our view that grand jury minutes should be discoverable by the accused before trial, thereby obviating any possible need for a post-indictment preliminary hearing.

What has been said thus far in no way derogates against use of the pre-grand jury preliminary hearing as a device to "screen out" unwarranted prosecutions. Nevertheless, we believe that the prosecutor should be permitted to expeditiously bring a matter before the grand jury. Since a defendant in New Jersey routinely obtains the grand jury transcript and may move to dismiss the indictment against him, he is in no way prejudiced by virtue of the failure to provide him with a preliminary hearing.

Question No. 11. Under New Jersey Law, as you note, a witness can attack a contempt sentence on the basis that it is no longer coercive. What are the standards as to coerciveness?

Answer. An immunized witness' failure to testify results in his confinement for contempt. Confinement for contempt in refusing to testify despite a grant of immunity is a coercive measure. Such confinement cannot be used to punish a witness for remaining silent or any other shortcoming of which he has not been convicted. Thus, confinement of a contumacious witness must be terminated when the legal justification for it ends in that it appears that it has lost its coercive power. In New Jersey, a witness is entitled to be released upon a showing that there is no substantial likelihood that further confinement would accomplish the coercive purpose of the order on which the confinement is based.[14]

Stated somewhat differently, relief from confinement is granted when the witness demonstrates that the contempt order has become punitive rather than coercive. Each case is decided on an independent evaluation of all the particular facts, among which age, state of health and length of confinement are factors to be weighed. In short, when a contumacious witness' confinement has ceased to have a coercive effect in that he will not be compelled to testify by its continuation, such confinement becomes punishment which must be abated.

Question No. 12. The Department of Justice and the Judicial Conference have both indicated that reducing the size of the grand jury would result in substantial savings, with little practical effect on the return of indictments. You oppose this reduction. Why?

Answer. We do not endorse a reduction in the size of the grand jury. The grand jury's size should be sufficient to represent a cross-section of the community. A dimunition of the size of the grand jury might well preclude representation on the panel of all recognized groups in the community.

Undoubtedly a reduction in the size of the grand jury would result in substantial monetary savings. The practical effect on the return of indictments caused by such a reduction is a matter of speculation.[15] We believe that the added expense concomitant to a larger grand jury is a necessary cost. Our system is founded upon the principle of representative government. Every citizen must have a voice in government. So too, every citizen must have a voice in the administration of justice. The grand jury has historically insulated the criminal charging process from political consideration because it is a body composed of the people. That body must have sufficient breadth to encompass all established groups in society. Only in this way can the grand jury retain all of the people's

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[12] F.R. Crim. P. 5.1(a).

[13] See, e.g., *Gerstein* v. *Pugh*, 420 U.S. 103 (1975).

[14] The prime purpose of confinement for contempt is to satisfy the public need for information irrespective of the stubbornness of the witness. "Mere punishment of a recalcitrant witness would not achieve that end." *Catena* v. *Scidl*, 68 N.J. 224, 231 (1975).

[15] A reduction in the size of the grand jury would reduce the diversity of viewpoints contained within a panel. A practical effect of such a reduction would be that the grand jurors would not have the benefit of the present wide range of knowledge and perception. This dimunition of knowledge and experience would definitely affect the quality of deliberations.

confidence in its ability to protect the governed against potential excesses and abuses by their governors.

Question No. 13. We are most impressed with your grand jury manual for prosecutors. Is there such a manual for grand jurors?

Answer. We are gratified by your appreciation of our grand jury manual for prosecutors. No such manual exists for grand jurors. However, as noted in our statement, we have prepared a model grand jury charge which discusses the grand jury and the context in which it must make decisions.[16] The assignment judge reads the charge to the grand jurors and provides copies to be utilized by them throughout their tenure.

Question No. 14. In a recent case, *State* v. *Schamberg*, the New Jersey Appellate Division upheld an interrogation of a grand jury witness even though the prosecutor stated in front of the jury that he believed the witness perjured himself, but did strongly disapprove the practice. What action, if any, is contemplated against the prosecutor for this abuse?

Answer. The appellate court found in *State* v. *Schamberg*, — N.J. Super. — (App. Div. 1977) that there was no misconduct or abuse occasioned by the prosecutor's comments to the grand jury witness.[17] Therefore, no reason for disciplinary action exists. Nevertheless, a departmental memorandum was dispatched to each prosecutor, assistant prosecutory and deputy attorney general informing him of the opinion and its contents. The consciousness and experience of law enforcement officials grows with the occurrence of each novel situation. *Schamberg* presents us with a supervisory teaching guide.

We have investigated prosecutorial misconduct in the past. Further, we have kept all prosecutors, assistant prosecutors and deputy attorneys general fully apprised of judicial decisions relating to the parameters of their conduct. These measures, coupled with strong administrative supervision, will ensure that prosecutorial conduct will continue to be a rarity in this State.

As I noted at the outset, I hope that these responses will be of some assistance to you. I believe that Federal Grand Jury Reform is necessary. I strongly endorse adoption at least in modified form of several provisions of the bills under consideration. Nevertheless, I remain firm in my belief that many provisions presently contained in the bills would seriously impair the ability of public prosecutors to perform their constitutional mission without any compensating social gain.

Very truly yours,

ROBERT J. DEL TUFO, *Director.*

Enclosures.

STATE OF NEW JERSEY

v.

ALAN SCHAMBERG

146 N.J. Super. 559; 370 A.2d 482

LARNER, J. A. D.

This is an appeal by the State from the dismissal of an indictment for perjury committed by defendant as a witness before the grand jury. The dismissal was granted because of prosecutorial interference with the independence of the grand jury.

Defendant signed a waiver of immunity after being advised that he was a target of an investigation into the East Rutherford Sewerage Authority of which he was a commissioner. Toward the end of his testimony the assistant prosecutor asked him a series of questions pertaining to conversations with others relating to the subject matter under inquiry. He denied having had such conversations.

After his repeated denials the prosecutor stated:

Question. Mr. Schamberg, I just want to tell you now that I'm going to give you one last opportunity to recant the testimony you have just given.

After that, you will not have any opportunity to do that. Do you understand?

Answer. (Witness nods in the affirmative.)

Question. Okay. Fine.

Answer. Yes.

[16] A copy of our model charge is appended hereto.

[17] A copy of this decision is appended hereto.

Question. I have reason to believe that you have just perjured yourself and I reiterate to you that you have the right to remain silent and anything you say can be and will be used against you.

You have the right to consult with an attorney.

I want to ask you one more time if you wish to change any of the last answers you have just given.

Answer. I don't think I lied to you.

Question. So, you don't want to change any of your answers?

Answer. I don't think so.

Question. Well, this is all the time you have to think about it. Yes or no.

Answer. No.

This interchange with the witness occurred after the grand jury heard a tape recording of a conversation between the witness and another person involving the subject matter referred to in the foregoing interrogation. Subsequently the same grand jury indicted defendant for perjury arising out of his denial of having certain discussions.

Relying upon *State* v. *Hart*, 139 N.J. Super. 565, 354 A.2d 679 (App. Div. 1976), the trial judge concluded that the statement in the prosecutor's question to the witness, "I have reason to believe that you have just perjured yourself * * *," constituted an unwarranted interference with the independence of the grand jury.

In *State* v. *Hart*, *supra*, we quashed an indictment because of egregious prosecutorial impingement upon the independent function of the grand jury to deliberate, weigh the evidence and determine whether or not to indict. The significant element of that case is the fact that the prosecutor improperly offered his opinion as to the failure of the jury to return an indictment, with the result that the jury reconsidered and indicted the defendant.

We find that *State* v. *Hart* is clearly distinguishable and is not controlling on the fact herein. The remark by the prosecutor in this case was the culmination of efforts on his part to give the witness the opportunity to change his testimony and avoid the possible sanction of a perjury charge. It was not addressed to the grand jury, nor was it intended to direct the grand jury to indict. Under such circumstances, should such an unfortunate remark, not deliberate or calculated, be construed as a substantial invasion of the independence of the grand jury so as to vitiate the indictment?

The objectionable comment was not couched in terms material to the subject matter of the inquiry—namely, official corruption, just as the indictment in question was not targeted to that inquiry or the purpose for which defendant was called to testify. The indictment came about as a collateral consequence of the conflict of defendant's testimony with that previously submitted to the grand jury. And it is therefore apparent that the prosecutor did not make the comment to induce the grand jury to indict but rather as a means of urging the witness to tell the truth. There is nothing before us to indicate that the prosecutor's remark to the witness played any part in the deliberation or determination of the grand jury.

[1] Contrary to the practice in some states, our rules permit the prosecutor not only to be present before the grand jury to question witnesses, but also during deliberations to advise as to the law and its application to the facts in the case. R. 3:6-6(a). Although he should not attempt to influence or direct the grand jury in its findings, nevertheless he is not expected to limit his participation to an innocuous presentation. There is no legal bar to the use of vigorous and skillful questioning which will elicit and compel truthful responses from reluctant witnesses. See, *e.g.*, *United States* v. *Rintelen*, 235 F. 787, 791 (S.D.N.Y.1916).

[2,3] Although we disapprove the form of comment made by the prosecutor herein, we do not consider it to be of such content or magnitude as to constitute an invasion or attempt at invasion of the grand jury's independence. The prejudicial effect of prosecutorial conduct must be judged from a different viewpoint when it occurs before a grand jury as compared with a petit jury. Improper and overreaching comments before a petit jury often result in judicial intervention through mistrials or reversals because of the court's sensitivity to the prejudicial impact of a prosecutor's comments upon the body which determines the guilt or innocence of defendant. Contrariwise, a chance remark or improper question before a grand jury does not affect the ultimate determination of defendant's guilt and therefore should not be judged with as critical an eye. See *State* v. *Riley*, 97 N.J.Super. 542, 548, 235 A.2d 503 (Law Div.1967), aff'd 101 N.J.Super.

402, 244 A.2d 513 (App.Div.1968). aff'd 53 N.J. 576, 252 A.2d 153 (1969), *cert.* den. 390 U.S. 969, 88 S.Ct. 1085, 19 L.Ed.2d 1177 (1968).

[4] Unless the prosecutor's misconduct before a grand jury is extreme and clearly infringes upon the jury's decision-making function, it should not be utilized as a stepping stone to dismissal of an indictment. As has often been observed, an indictment should only be quashed on the clearest and plainest grounds. *State* v. *Weleck*, 10 N.J. 355, 364, 91 A.2d 751 (1952) ; *State* v. *Blackman*, 125 N.J.Super. 125, 309 A.2d 8 (App.Div.1973) ; *State* v. *Silverstein*, 76 N.J.Super. 536. 185 A.2d 45 (App.Div.1962), aff'd 41 N.J. 203, 195 A.2d 617 (1963).

Defendant refers to *United States* v. *Wells*, 163 F. 313 (D.Idaho 1908), as a precedent for his position. That case is inapposite for it concerned the validity of an indictment returned by a grand jury which was exposed to the following prosecutorial excesses:

The conduct of the district attorney before that body was the equivalent of expressing the unqualified opinion that the evidence established the guilt of the defendants; that they ought to indict them; that the department at Washington wanted them indicted, and it was therefore the duty of the grand jury under the circumstances to do so; that the defendants Martin and Pritchard, being guilty, had in their testimony purposely lapsed into forgetfulness. * * *.

[163 F. at 322]

In addition, the prosecutor refused to leave the jury room when requested by the grand jury and instructed the foreman to sign the indictment without discussion by the jury as a whole. Such extraordinary coercive conduct can hardly be equated with the objectionable comment in this case.

In *Beck* v. *Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962), the court summarily dismissed a constitutional attack on an indictment grounded upon a prosecutor's conduct before the grand jury. The conduct is strikingly similar to that pointed up in the case at bar. The summary by the court is informative:

Petitioner also contends that a witness before the grand jury was improperly interrogated in a manner which prejudiced his case before that body. It appears that an employee of petitioner's union was called before the grand jury to testify in reference to activities within his employment. During his first appearance he made statements which he subsequently changed on a voluntary reappearance before the grand jury some two days before the indictment was returned. On the second appearance the prosecutor attacked the witness' changed story as incredible and warned him that he was under oath, that he might be prosecuted for perjury, and that there was no occasion for him to go to jail for petitioner. The record indicates that the prosecutor became incensed over the witness' new story; and though some of his threats were out of bounds, it appears that they had no effect upon the witness whatsoever for he stuck to his story. We can find no irregularity of constitutional proportions, and we therefore reject this contention. [369 U.S. at 555, 82 S.Ct. at 963, 8 L.Ed.2d at 110]

In *United States* v. *Bruzgo*, 373 F.2d 383 (1967), the Third Circuit, although recognizing that the comments of the prosecutor exceeded the bounds of proper conduct and deserved condemnation, nevertheless held that such conduct did not vitiate the indictment which concededly was based upon sufficient evidence.

In view of the foregoing, it is our considered opinion that the trial judge mistakenly exercised his discretion in quashing the indictment. The order is reversed and the indictment is reinstated.

Model Grand Jury Charge

Ladies and Gentlemen: In my own name and on behalf of the citizens of our county I welcome you to your term of service as grand jurors. We realize that responding to this summons to public duty will cause inconvenience to each one of you and that your service will represent personal sacrifice. We ask that you accept that inconvenience and make the sacrifice in a generous spirit, knowing that the work you will do is essential to the well-being of all citizens of this county and fundamental to the proper administration of justice. Without the service of citizens acting as grand jurors the criminal justice system under which we live could not function.

The grand jury as a part of the criminal justice system is an institution of ancient origin. We inherit it as part of the English common law which was adopted when this state was established. A grand jury similar to this exists in each of the 21 counties of our state. The usual period of service is — weeks unless for good cause that time is extended by the order of the assignment judge.

As has already been explained to you, you will sit to hear and consider matters on a regular basis — days each week.

The office of grand juror is one of vital importance. It bears with it great responsibility. If you perform your duties conscientiously and unselfishly you will not only find the experience rewarding but will bring well deserved credit and distinction to yourself.

Citizens in general have only a vague idea of what a grand jury is and what its functions are. Since you are now members of the grand jury for it appears with—in originnal County you should be clear as to the functions you fulfill and the responsibilities placed upon you under our law. The term "grand" jury is sometimes misunderstood. It must be differentiated from the term "petit" jury. Both expressions are French in origin. "Grand" means large; "petit" means small. The terms refer to the size of membership of each jury—not the importance of the respective functions. Both juries— grand and petit—are essential to our system of justice, although their size and function differ. The grand jury is composed of 23 members; the petit or trial jury is composed of 12 members.

The function of the grand jury is not to determine whether someone is guilty or not guilty of a crime—that is the responsibility of a petit jury. Rather, the primary function of the grand jury is to make a determination whether there is probable cause to believe that a crime was committed and that the accused committed it. While I will shortly define your obligations in greater detail, suffice it to say at this point that the grand jury serves as a screening mechanism to protect citizens from having to respond to unfounded charges. It is designed to insure that before persons are required to stand trial on a criminal charge that there be a basis for it—and to prevent persons being exposed to the rigors of a criminal trial when the charge is baseless.

As I have noted, your principal function will be to consider alleged violations of the criminal law. You will determine whether or not an indictment should be returned against a person accused of violating the law. Under our system of justice, it is not enough that someone simply accuses another of committing a crime. After the accusation and before the person is made to stand trial on the charge, there must be an inquiry made by a grand jury to determine whether there is a basis for the charge. If the grand jury determines that there is an adequate basis for the charge, it votes to return an indictment against the accused. An indictment is a formal document brought in the name of the State of New Jersey, naming the accused as defendant and setting forth in writing the specific date and place of the alleged offense; the name of the alleged victim; the facts and circumstances making the alleged conduct criminal and the specific section of the criminal statutes of this state violated that alleged conduct. If the grand jury decides that there is not an adequate basis for the charge it votes not to return an indictment or, in legal parlance, "no bills" the charge.

Whether or not there is an adequate basis shown for an indictment is known in legal language as "probable cause." "Probable cause" is not a technical concept. It has a practical meaning. Probable cause exists where the evidence presented is sufficient to lead a reasonable person to believe that a crime has been committed and that the accused committed it. Again, be clear that your function is not to decide beyond a reasonable doubt whether the evidence presented indicates that the accused committed a crime. A full-blown trial is not conducted before you; the technical rules of evidence do not apply; lawyers for the accused are not present to present a defense; the accused and any witnesses he may produce at a trial are generally not heard. In short, an indictment is merely the mechanism by which the criminal trial process is commenced. What you have to decide, based on what is presented to you, is whether there is reasonable ground to believe that a crime has been committed and that the accused committed it. If you do not believe that to be so you should vote against returning an indictment.

We have thus far limited our consideration of your function to criminal charges—to deciding whether or not to indict a person. But since the grand jury is that independent investigative body which represents the public concern of the community, you may also inquire into matters which, while not strictly of a criminal nature, still have overtones of wrongdoing. You may become aware of official acts or omissions which fall shoft of criminal conduct and yet those acts or omissions are not in the public interest. It is certainly in the public interest that such conduct be revealed in an effective, well-considered manner. To investigate such matters you have those broad, comprehensive and independent powers I have previously alluded to. If you feel, after a well considered investigation, that some problem of public concern or some aspect of public business or some evil ought to be brought to the attention of the general

populate you may do so by way of a presentment. A presentment, then, is a formal document, presented by you to the public in which you set forth your findings as to some problem in public affairs or public concern or derelictions in duty of public officers.

A presentment requires the exercise of sensitive judgment on your part. It involves serious matters and may not be returned lightly. It cannot be used to single out persons in private or unofficial positions to impugn their motives or hold them up to scorn. A presentment has to do with matters of public concern, not idle curiosity. If there is a problem of which the public should be aware and if the problem is caused in whole or in part by the noncriminal misconduct of a public official that individual may be named and indeed criticized. But before such a presentment is voted you must be satisfied that the proof of such wrongdoing is conclusive for once the presentment is made public there is no reversing its effect. And so as a matter of fundamental fairness a presentment naming and censuring a specific individual in a position affected with a public interest will not be made public, after being handed up, until the assignment judge obtains and reviews the full record of the testimony and exhibits and determines that sufficient evidence has been presented to support such charges.

With respect to both indictments and presentments, the proofs respecting the alleged offense or public condition will be presented to you in the grand jury room in the form of witnesses or documentation. For the orderliness of the proceeding the matters will be presented and the witness called, in the usual case, by the prosecuting attorney. If, after hearing those witnesses called you feel that you wish to hear from additional witnesses before deciding whether or not there is an adequate basis for an indictment or a presentment you have the right to ask the prosecutor to subpoena them and if he refuses you may request the assistance of the assignment judge. If any difficulties arise in this regard, always understand that I am available to respond to your request for additional instructions.

As I have said, the prosecuting attorney will present the various matters to you for your consideration. But understand clearly that the grand jury is an independent legal institution. It is not the agent of the prosecutor. It functions under our Constitution as the representative of the community with is own separate and distinct powers. It may investigate matters of a criminal nature of which its members may be aware even though not presented by the prosecutor. The same is true with respect to a presentment. The prosecutor, as a lawyer, is available to advise you on legal questions and you should freely call upon him for such legal advice—as you may the Court if you deem it necessary. You may, if you wish, ask the prosecutor for his opinion as to the sufficiency or insufficiency of the evidence. However, the prosecutor is not the one who decides whether to indict or not, or whether to return a presentment or not.

The prosecutor is not entitled to be present during your discussions. If during your discussion you do not want the prosecutor present you may ask him to leave the room and he must comply. Such requests are requests of the grand jury not individual jurors, and are to be determined by a majority of the jurors present.

It should be obvious that because of the sensitive nature of the matters which may come before you, these proceedings must be conducted in complete confidence. It would be dereliction of your duty and a violation of your oath were you ever to discuss with anyone outside the grand jury room what you may have heard while there. Untold and irreversible harm could be done to individual reputations were it otherwise. Remember, one of the prime functions of a grand jury is to protect the good name of individuals from unfounded charges. There are times when you may be tempted to enhance our own importance by passing along "inside" information. You must unfailingly resist any such impulse.

Therefore, all your deliberations and discussions must take place in the grand jury room while you are in session. It is wrong for jurors to confer or deliberate together privately or by telephone concerning grand jury matters outside the grand jury room. A grand jury must confer together and act as a body. Your deliberations must likewise be kept secret. Each juror has the right to expect that his or her communications with fellow jurors during deliberations will remain confidential. There must be the utmost freedom of expression and debate in the grand jury room uninhibited by fear on the part of any juror that his views or expressions will be revealed or "leaked" outside of the grand jury room. The consequences of such breach of confidentiality are apparent and appalling to any responsible person. The oath you take is not an empty gesture. A

copy of it and my remarks will be distributed to you so that you may reread them in a more meaningful way during your term of service.

If, during your service, anyone should attempt to influence you in the performance of your duties, it would be an unquestionable violation of the law on the part of that person. Bring any such conduct to my attention immediately. Such breach will be dealt with by me expeditiously.

The grand jury is made up of 23 members. In order to have an official session there must be at least 12 members present, i.e., a quorum. Moreover, independent of the number of jurors deliberating in any given case, no person can be indicted and no presentment can be returned unless 12 or more members of the grand jury concur. Your deliberations will be presided over by your foreman who will administer the oath to all witnesses. You are expected to attend each and every session. If, for some urgent and meritorious reason, you cannot attend a particular session, you must notify the foreman or clerk ahead of time. The clerk of the grand jury will be present with you at all times except those when for good reason you ask him to leave. It is his duty to record and keep the vote of each juror by name on each matter presented to the grand jury for consideration. That record is never revealed.

An official certified court reporter will be present in the grand jury room at all times when you are in session. It is that person's obligation to faithfully and accurately record all that transpires during the session. That reporter takes an oath of secrecy also. The testimony of witnesses including that in response to your questions is later transcribed if an indictment or presentment is handed up in the matter and is available for the trial of the case. However, the comments of the grand jurors in their discussions and deliberations and their vote on indictments or presentments are never recorded or transcribed. Further, the court reporter is not to be present in the grand jury room during your deliberations.

Any indictments you vote to return shall be handed up to me as assignment judge in open court. In my absence they may be handed up to another of our Superior Court judges whom I shall designate. If you vote not to indict; that is "no bill" a matter, that document should immediately be signed by your foreman and returned to the Court the same day it is voted upon so that the individual, if in custody on that pending charge, may be immediately released. If you decide to return a presentment your foreman shall notify me ahead of time so that I may arrange to be present to receive it.

Now that you understand what is required of you we will ask the clerk to call the roll and administer to you your oath as grand jurors.

Mr. EILBERG. Now we have representatives of Grand Jury Associations. I wonder if they would step forward. It would assist us if they would sit in alphabetical order perhaps.

Mr. Sheldon Ashley is chairman of the Federation of Grand Jurors Associations of New York State. Mr. Gloege, William P. Gloege, vice president, Association for Effective Grand Juries, California. Mr. John J. Lyons, chairman of the Bronx County Grand Jurors Association.

We unfortunately have taken a great deal of time, although it has been necessary. We would ask each of you, if you can, to summarize your statements, then we will get to some questions. We have your statements and have read them.

Let me call first then upon Mr. Ashley.

TESTIMONY OF SHELDON ASHLEY, CHAIRMAN, FEDERATION OF GRAND JURORS ASSOCIATIONS OF NEW YORK STATE; WILLIAM P. GLOEGE, VICE PRESIDENT, ASSOCIATION FOR EFFECTIVE GRAND JURIES, CALIFORNIA; AND JOHN J. LYONS, CHAIRMAN, BRONX COUNTY GRAND JURORS ASSOCIATION

Mr. ASHLEY. Thank you.

Mr. EILBERG. Do you have a statement?

Mr. ASHLEY. Yes; thank you indeed, sir.

You, of course, have my prepared statement; we would appreciate inclusion for the record.

Mr. EILBERG. It will be included at this point.

[The prepared statement of Mr. Ashley follows:]

STATEMENT OF SHELDON ASHLEY, CHAIRMAN, FEDERATION OF GRAND JURORS ASSOCIATIONS OF NEW YORK STATE, INC.

Mr. Chairman and members of the subcommittee, I welcome the opportunity to discuss with you, as a citizen of the United States, the implications and effects of H.R. 94. My additional and pressing concern is the influence you will have on the laws of my state. As we know, the Federal law leads, and the actions you take here will reverberate in state capitols as well as in the Halls of Congress.

As President Ford noted to the Congress last year:

"The fact is—the Federal role in the fight against crime, particularly violent crime, is a limited one. With few exceptions, the kinds of crime that obsess America—murder, robberies, rape, muggings, holdups, breakins—are solely within the jurisdiction of state and local governments."

The Omnibus Crime Control and Safe Streets Act of 1968 asserts that crime is primarily a local problem and criminal justice needs vary widely. A state is generally in a better position than the Federal government to determine its own criminal justice needs and priorities.

With H.R. 94, you sorely hurt the Grand Jury System of my state, and undoubtedly other states as well. In the interests of time, I will leave Federal considerations to others. In the interest of justice, I will remind you that this bill can do nothing but weaken the constitutionally protected right of a grand jury.

The Grand Jury exists for the people. It is a bulwark, between the state and the accused, against unfounded prosecution. What you do here, as legislators, should not denude the people of this protection, nor should it lessen it.

In 1970, Benjamin Landis was quoted in the ABA journal as being in favor of the elimination of jury trials in civil cases. If this were done, it would be just a matter of time until this followed in criminal proceedings. You have started us on the way with the provisions of this bill which reduce the number of Grand Jurors to nine. You are whittling away at the peoples' participation in the judicial system. You are laying the groundwork for the usurpation of power from the people to the legislature and the judiciary.

When you speak of Grand Jury reforms, please be gracious enough, and truthful enough, and honest enough to admit that what you seek is a convenient way to get rid of that dreadful annoyance, the Grand Jury. With this, we come on open ground, and we can argue.

It is worth noting that some of the organizations which have been most vocal in calling for Grand Jury reform have also been the most diligent in instructing witnesses in ways to deflect and subvert. This is not reform.

H.R. 94 calls for a witness' right to counsel in a Grand Jury room. My organization stands opposed to such an incursion, and the Federal courts have also repeatedly repudiated that "right." The New York courts have also rejected that claim. Supreme Court Justice Powell has said that a grand jury is not an adversary proceeding. This being the case, there is no need for counsel. But, the bill before you says otherwise.

H.R. 94 allows witness' counsel to disclose matters which occur before the Grand Jury. Indeed. Why bother with rules of secrecy at all if you will breach them in this way?

The Supreme Court has said that Rules of Evidence need not be adhered to in Grand Jury investigations. But the bill before you says otherwise.

My organization agrees with the bill in calling for instruction of Grand Jurors. We would, in fact, greatly fortify and enhance the language that "the grand jury reasonably understands. . . ." It is also our strong belief that at least some jurors be called from regular grand jury rolls, so that there will always be a cadre of experienced jurors who will know, first hand, their rights and responsibilities and duties.

Although having no special disagreement with transactional immunity, we find it necessary to again cite the U.S. Supreme Court in *Kastigar* v. *United States* where the courts held "use" immunity to be sufficient.

The American people have no argument with the grand jury because, of course, they are the grand jury—the peoples' "Big Stick." But the threat is often to the public official who does not care to have an investigation of his office backed up by the power of subpena.

H.R. 94 requires informing the witness of the subject matter of the investigation. We would point out that, in *Blair* v. *United States*, the Supreme Court said that "the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the Grand Jury's labors, not at the beginning."

My organization feels that H.R. 94 has many faults. We urge that you return this bill for further deliberation.

Mr. ASHLEY. As you had mentioned, sir, my organization is the Federation of Grand Jurors Associations of New York State. The Federation is composed of county associations throughout the State; the overall purpose of the Federation is the protection, the enhancement, the preservation of the grand jury system in our State.

We fully realize the scope of your hearings here, your deliberations here, and we are concerned, indeed, about what has come forth in the hearings. We continue to voice our concern, the details of which are in my statement.

Mr. EILBERG. Mr. Ashley, may I just interrupt by saying, today we basically called witnesses up until now who were generally considered to be against grand jury reform. We have had many other days of hearings, but we wanted every point of view to be heard and to be made part of the record. So I just wanted you to know that.

Mr. ASHLEY. Yes; I do. Thank you, indeed.

Our overall question then is whether or not reform is actually what is being called for. This is not resolved in our minds. On a State level we are currently hearing similar comments; similar testimony from the various committees of the New York Assembly, the New York Senate. They are generally directed in the same way and for the same purpose as you are.

We admit that there are possible areas of reform that could be instigated for the bettermen of the system. We are not fully convinced that this is what is actually called for.

First, as far as these hearings are concerned, we did note that one of the motivating forces apparently behind all of these hearings are some various other organizations; for example, this coalition for grand jury reform. We have seen some of the material that has come forth from them. We are, again, not convinced that what is called for, what is actually asked for, is reform. We have suspicions that what is desired on the State level, what is desired on the Federal level, is subsequent abolition of the grand jury system as we know it today. If not abolition, then certainly a watering down to a point where the system is nothing very much more than an innocuous investigative body.

There have been statements already where the indicting power of the grand jury is something to be done away with.

I mentioned the other organizations that have been quoted here, and I mention this coalition. My files are rather interesting on the point.

Mr. EILBERG. Mr. Ashley, I have to interrupt you by telling you that the interest of this subcommittee was developed basically during the investigation of the *Fort Worth Five* case. I have to disagree with

you as to the influence of any particular organization. When we got into the *Forth Worth Five* case it excited our interest.

Mr. ASHLEY. All right. If I may, I will limit that remark to just one other point, and we will go on from there if we may.

We mentioned the coalition. From my own files comes forth some rather interesting material, something issued just a few years ago by one of the member organizations of the coalition. It is a rather interesting little booklet on actually how to deflect, how to subvert a grand jury. There is no mention of reform; there is no intent of reform here.

We question whether or not this is actually what is being called for. The most important point that we hear from you——

Mr. EILBERG. Do you have an extra copy of that publication?

Mr. ASHLEY. I wish I did, because apparently it is rather popular now that I am showing it around. I have promised to "Xerox" it for some other people, and I would be happy to do it for you.

Mr. EILBERG. We wish you would.

Mr. ASHLEY. Indeed.

[A copy of the brochure referred to follows:]

So You're Going To Be a Grand Juror?

a guide
for more effective
citizen participation
in the grand jury system

prepared by the
Coalition to End Grand Jury Abuse
Washington, D.C.

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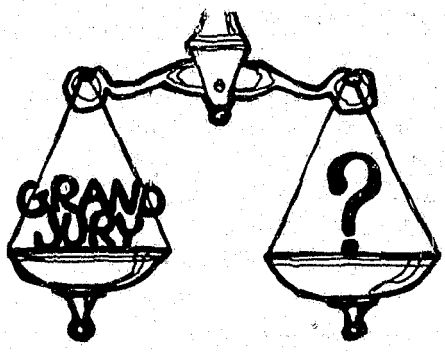

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Introduction

Welcome to the grand jury.

We know that you intend to do your best to become a conscientious grand juror, and we have designed this booklet to help you in that effort.

Who are *we?* We are the former grand jurors, lawyers, judges, legislators and just plain citizens who have joined together to form the *Coalition to End Grand Jury Abuse.* We think we know what it takes to make a grand jury work well—if only because our experiences have shown us so many work poorly.

This booklet is a guide for both local and federal grand jurors, not an exhaustive examination of the grand jury system. We have tried to discuss grand jury issues that are likely to affect grand jurors on all levels, but some important aspects of grand jury procedure do vary markedly between jurisdictions. If you are ever in doubt which procedures are applicable to your grand jury situation, check with your panel's legal advisors. For those of you who would enjoy delving deeper into the grand jury process, we have included a list of valuable readings and sources.

We don't expect you to accept every word of this booklet unquestioningly. In fact, the *primary* point we hope to make in the pages that follow is that meaningful grand jury action is impossible *unless* grand jurors have the courage and wisdom to question and think for themselves.

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The historical background

The trust reposed in grand juries is of great and general concernment. To them is committed the custody of the portals of the law, that into the hallowed dome no injustice may be permitted to enter. They make, in the first instance, the important discrimination between the innocent and the guilty. To the former, they give a passport of security; the latter they consign to a final trial by a traverse jury.

-- James Wilson, early U.S. Supreme Court Justice, 1790

Most historians trace the grand jury's origins back to 12th century England, a time of bitter power struggles between the crown and its baronial and clerical rivals. In the 1160's, King Henry II, alarmed by noble and church control over large portions of England's judicial system, moved to consolidate his royal political power by creating the forerunner of our modern grand jury, a series of 16-member panels directly answerable to the crown.

The representatives of the local populace selected to serve on the King's panels were obligated to uncover and "indict" law-breakers. Their indictment was tantamount to a modern conviction. Those poor souls indicted by these early juries could only prove their innocence by successfully undergoing an impossible "trial by ordeal"—plunging a hand into boiling water, for example—without sustaining an injury.[1] The jurors didn't have an easy time of it either. They could be and were fined heavily if they didn't return the indictments the king sought.

King Henry's grand jury was not, of course, the model for the grand jury incorporated into our Constitution in 1791. Between Henry II's rule and the American Revolution, the grand jury had evolved, at least in theory, into a source of people's power against the king, thanks largely to one celebrated 17th century case. The case involved the Earl of Shaftesbury, a troublesome political opponent of the then reigning monarch, Charles II. In 1681 Charles brought treason charges against the Earl before a London grand jury, but the grand jurors, unexpectedly, refused to indict. Worse yet from the King's perspective, they demanded the right to meet in secret session, free from crown interference.

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In the short run, this show of grand juror independence was futile. The King simply took his charges to a different and more pliant grand jury panel. But the Shaftesbury uproar did wrap the grand jury system in an aura of popular sovereignty, and it was this spirit that English emigrants to the American colonies took with them. In 1735, for instance, a grand jury twice refused to indict a New York printer, John Peter Zenger, for libeling the royal governor, and later, during the pre-Revolutionary War years, grand juries repeatedly refused to return the indictments sought by royal authorities. By the Revolution's end, the grand jury was firmly implanted in the colonial mind as an indispensable citizen protection arbitrary authority.

In the new nation

Liberty to the first citizens of the young American republic meant, among other things, freedom of the press, freedom of speech, the right to a trial before a jury of one's peers *and* the right of every accused to a grand jury indictment. When the Bill of Rights was ratified midway through George Washington's first term, the grand jury stood as the first clause of the Fifth Amendment:

> *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 . . .*

There was no mystery behind the grand jury's inclusion in the Bill of Rights. The people who won our independence were well aware that a government could manipulate the criminal law to punish its critics—and they were determined to prevent that kind of oppression from rearing its head in their new nation. Making a person stand trial, they realized, was in itself a penalty of sorts, an emotionally and financially draining ordeal that even an eventual verdict of not guilty could never erase. No citizen should suffer this experience, the authors of the Bill of Rights felt, unless an *independent* panel of citizens, the grand jury, decided that the evidence warranted bringing an accused to trial. A free people, after all, could not allow the government to decide whom to bring to trial. The danger that politically motivated or overzealous prosecutors would subject the innocent to trial on trumped-up charges or whitewash the crimes of the guilty was just too great.

Setting a poor example

Our early leaders were not demigods sent from Mt. Olympus. With their noble and eloquent words, they were only reflecting the

widespread public conviction that the people could not afford to trust the individuals who led them. This skepticism about power was well-founded, as some of the first officials of the new republic soon set about demonstrating. Almost from the start of our nation's existence, there were federal officials who looked to the Constitution not for inspiration, but for loopholes—of which the grand jury seemed an inviting example. Grand jury procedures were then, as now, ill-defined, and among the first to exploit the opportunities this situation offered were federal judges. Instead of instructing newly impaneled grand jurors on their historic responsibility to return impartial decisions, some members of the federal bench *charged* grand jurors with diatribes against their political enemies. Supporters of Thomas Jefferson, before he became president, were the frequent victims of this improper judicial pressure. These grand jury attacks taught Jefferson a lesson, but the wrong one. Years later, when Jefferson himself was president, he ignored the decisions of two grand juries that had refused to indict his archenemy, Aaron Burr, and had a third grand jury, packed with Jeffersonians, convened. Predictably, this third panel returned the indictment Jefferson so desperately wanted. Burr was later acquitted.

These inauspicious beginnings set the grand jury pattern. Grand juries, especially on the federal level, came to spend more time rubberstamping prosecutorial decisions than vigilantly watchdogging prosecutorial conduct. There were exceptions, particularly during the latter 1800's and early 1900's when grand juries successfully exposed municipal corruption—often over roadblocks set by local district attorneys—in city after city. One such city was Minneapolis where, in 1902, grand jurors hamstrung by the foot-dragging of the corrupt county prosecutor spent their own money to hire private investigators. In short order, the grand jury compiled enough damning evidence to chase the city's crooked mayor out of office.

Such heroism was not, however, the rule. The grand jury's record remained, on the whole, an uninspiring one, so much so that the majority of states entering the union after 1850 opted to do so without constitutionally mandating the right to a grand jury indictment.

In the states where a grand jury indictment is not required before an accused can be made to stand trial, the accused are now brought to trial on the basis of *informations*, formal written charges

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filed by prosecutors against individuals suspected of criminal activity. These charges must be heard by a magistrate at an open courtroom session called a *preliminary hearing*. At this hearing, the accused is entitled to an attorney, and strict rules of courtroom fairplay apply. After the government presents its case against the accused, the defense can challenge it or present its own. There is no citizen input during a preliminary hearing. The magistrate alone decides whether or not the evidence presented warrants bringing the accused to trial.

Many find the information process an attractive alternative to the grand jury indictment. In 1931 a blue-ribbon presidential commission recommended the abolition of the grand jury on the federal level and its replacement by informations.[3] By 1948 England, the birthplace of the grand jury, had done just that.

Our federal government has not followed suit, at least partly because abolishing the grand jury would require an exhausting effort to amend the Constitution. Similarly, while only a minority of states require a grand jury indictment before an accused is brought to trial, no state has completely abolished the grand jury indictment as a method of initiating criminal prosecutions. But the questions raised by the grand jury abolition movement remain. Are grand juries an anachronism? Is it realistic to expect a panel of citizens unversed in the law to rigorously oversee prosecutorial conduct? Do government prosecutors, in fact, really still pose a threat to our basic freedoms that must be vigilantly guarded against?

These are questions that every serious grand juror must face.

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The roots of prosecutorial misconduct

The prosecutor has more control over life, liberty, and reputation than any other person in America. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. While the prosecutor at his best is one of the most beneficient forces in our society, when he acts from malice or other base motives, he is one of the worst.

—Robert H. Jackson, U.S. Attorney General
and Supreme Court Justice, 1940

The founders of our nation considered prosecutorial misconduct a menace 200 years ago. It remains a menace today. In 1976 a New York State legislative committee, after studying only recent New York court records, found 100 instances of prosecutorial misconduct.[4] There is no reason to believe that New York prosecutors are any worse or any better than prosecutors in other states or in the federal system. Undoubtedly, similar laundry lists of misconduct could be drawn for every judicial subdivision in the United States.

But why? Are people who become prosecutors inherently insensitive to the Bill of Rights? Of course not. But prosecutors do occupy a special and central position in our criminal justice system which subjects them to pressures and lures that encourage behavior a free society cannot tolerate. While no prosecutor is immune from these pressures, many can and do perform their jobs fairly and rigorously despite them. Some, however, cannot.

Protecting citizens from this latter category of prosecutors is your most difficult responsibility as a grand juror. Your task will be a great deal easier once you understand why prosecutors sometimes,

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as Supreme Court Justice Robert Jackson succinctly put it a generation ago, "pick people they think they should get instead of cases that need to be prosecuted."

One: The prosecutor is a political animal.

Whether elected or appointed, prosecutors are neck-deep in politics. They have constituencies or superiors to please—sometimes both—and the decisions they do or do not make as prosecutors can make or break their own future careers, as well as the careers of their superiors, colleagues, friends or rivals. Over the years, countless prosecutors have built ladders to higher office out of the grand jury chamber, some with the patient, plodding work that produces solid grand jury indictments, others with shortcuts that generate more headlines than convictions. The bigger the case, the greater the temptation to manipulate the grand jury process. Faced with pressure from the community to "do something" about some particularly heinous crime, an ambitious prosecutor has everything to gain by widely scattering subpoenas on anyone even remotely connected to the case as proof that something is being done. The resulting media coverage is sure to keep the prosecutor's name in the news—and shatter the reputations of the people subpoenaed.

Two: The prosecutor is no more free of personal bias than any other member of our society.

Prosecutors, like all of us, are products of a social order still flawed by discriminatory attitudes of many kinds, and, for some, overcoming these attitudes is a real problem. One prosecutor might feel that people of certain backgrounds or beliefs are not to be trusted or that others must be trusted. Another prosecutor might be horrified when a striker throws a punch on a picket line, but unmoved by an allegation of white collar crime. Other prosecutors might have compiled a personal "enemies' list" of people who have dealt them real or imagined wrongs. Prosecutors may, in short, be unable to distinguish between people they dislike and people who have committed crimes.

Three: For prosecutors, overzealousness is an occupational hazard.

The prosecutor's job is to make sure that the perpetrators of crime are brought before the bar of justice, and this is a heavy responsibility to bear, too heavy for some prosecutors. These prosecutors begin to see themselves as the community's only defense against the relentless march of crime and lose all sense of

proportion. Minor incidents become serious crimes. Serious crimes become rationalizations for ignoring basic rules of decency. Persecution, not prosecution, becomes the order of the day.

Whenever ambition, bias or zeal take command, grand jury abuse of some sort is almost a given—except when grand jurors exercise the check on prosecutorial misconduct they are supposed to provide. Unfortunately, spotting misconduct is not always easy. Indeed, the entire structure of the modern grand jury process is geared to make you see things a prosecutor's way. As confident as you may be that *your* grand jury panel would never let a manipulative prosecutor get to first base, the sad truth is that grand jurors not only frequently let overzealous or politically motivated prosecutors get past first base, they often find themselves cheering as the prosecutors near home plate.

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The grand jury's boss

Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury.
--William Campbell, U.S. District Court Judge, 1972

Why do grand jurors, as Judge Campbell notes and experienced observers agree, invariably do what prosecutors want them to do?

Essentially because prosecutors control the grand jury process. This control is nowhere mandated by the law. Prosecutors can't legally force grand jurors to do anything. What prosecutors do control, however, is information. Grand jurors see and hear whatever prosecutors want them to see and hear.

It is the prosecutor who generally determines which witnesses will appear before the grand jury. In fact, prosecutors may bring any witness they choose into the grand jury chamber. This sweeping prerogative derives from the grand jury's status as a "creature of the court." As such, grand jurors have access to judicial *compulsory process* authority, which means that a person can be ordered to appear before a grand jury. These orders to appear are called *subpoenas,* and although the power to subpoena does not belong to prosecutors, it is the prosecutor who almost always has witnesses subpoenaed to the grand jury.

Besides subpoenaing anyone they choose before a grand jury, prosecutors can also subpoena *anything.* In a normal, non-grand jury setting, prosecutors cannot have a person's home searched and personal possessions seized unless they can convince a judge that there is enough indication of wrong doing to justify a search warrant. But if a prosecutor before a grand jury wants to get a hold of someone's personal papers, all that prosecutor has to do is have the papers subpoenaed. The person must either produce the papers inside the grand jury chamber or face a penalty for contempt of court.

There is virtually nothing that a prosecutor can't bring before a grand jury. At a trial, illegally seized material—items police have

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improperly expropriated—cannot be introduced as evidence. In the grand jury chamber, a prosecutor may introduce illegal evidence, even without informing the grand jurors of its illegality. The same situation holds for what is called *hearsay evidence.* Hearsay—asking a third party to testify to what an eyewitness saw or heard instead of asking the eyewitness directly—cannot be introduced, with some exceptions, during an actual trial. But prosecutors on the federal level and in many, although not all, states may ask a grand jury to return an indictment *solely* on the basis of hearsay evidence.

While prosecutors may bring anyone or anything they choose before a grand jury, they may also withhold any information they want. If there is evidence that would tend to show an accused's innocence—*exculpatory evidence,* in legal jargon—the prosecutor is not obliged to share this evidence with the grand jury. Nor does a prosecutor have to let an accused present exculpatory evidence directly to the grand jury.

The end result of all this is that if the government wants a particular indictment badly enough, the government will get it. According to surveys, grand juries return "no bills"—refuse to indict—in only five per cent of the cases brought before them.[5] Only some of these no bills, however, reflect instances where a grand jury actually disagrees with a prosecutor. In certain controversial cases involving public figures a prosecutor would rather not indict, the prosecutor may softpedal the case against the accused, hoping that the grand jury will get the prosecutor "off the hook" by not indicting. Moreover, in those cases where a grand jury does not find the prosecution's evidence sufficient to indict, the government can keep bringing the same case before different grand juries until it finds one that will indict.

Added together, all these powers give prosecutors total discretion inside the grand jury chamber. A fair-minded prosecutor can use this discretion to develop the truth. A narrow-minded one can exploit it to put blinders on your eyes.

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Danger Signals

Haldeman: (Inaudible) Well, there is danger in a Grand Jury.
Dean: Well, there are no rules.
President: Well, Grand Juries are not very fair sometimes—
Dean: That's right.
--from the Watergate Transcripts, conversation of March 22, 1973

Given the government's lockgrip on what goes on inside the grand jury chamber, can grand jurors avoid becoming the unwitting accomplices of manipulative prosecutors? We think so, provided grand jurors learn to recognize the *danger signals* that give away prosecutorial misconduct. Some danger signals are obvious, others much more subtle. No list of danger signals can be complete, but the one below does outline the pressures you may find yourself up against. If you and your grand juror colleagues start noting any of the danger signals that follow on a regular basis, tread carefully. Trouble may be "a brewing."

Loose Language

"Watch what they do, not what they say" is a solid maxim citizens should apply to all government officials. But when it comes to prosecutors, grand jurors have to watch what they say as closely as what they do. That's because there are many comments a prosecutor can make to prejudice your deliberations.

As a grand juror, you are entitled to hear hard evidence, actual facts. If the evidence a prosecutor presents is strong, the prosecutor should have little trouble getting grand jurors to return a true bill. If, however, the only evidence the government has is flimsy, the prosecutor may try to "improve" a weak case with irrelevant or loaded comments and asides.

A prosecutor, for example, may choose to argue a case on evidence grand jurors will never be able to examine for themselves:

Unfortunately, the government's most important witness, John Smith, died six months ago. But if Mr. Smith were here today, he would have a remarkable story to tell.[6]

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Or a prosecutor may constantly refer to an accused with disparaging remarks:

This man is a disgrace to our city's good name.

Grand jurors are not legal experts, for the most part, and a prosecutor may attempt to overawe you with his or her professionalism:

In all my years in the district attorney's office, I have never seen a case as open and shut as this one.

A prosecutor may try to get you to make your decision on the basis of an issue that has nothing to do with the case at hand:

What's at stake here is the reputation of the police. If no indictment is returned here today, this panel is telling the world that our police are a bunch of liars.

While it is a grand jury's job to make sure that no accused person stands trial unless there is good reason—probable cause—to believe that he or she has committed a crime, a prosecutor may attempt to pull a true bill out of a hesitant grand jury by downplaying the significance of the indictment process:

By indicting this woman, you're not sentencing her to jail. If she is innocent, the jury will acquit her at trial. That's what the jury system is for.

A prosecutor may seek to bias you against a witness with embarrassing questions:

Are you married? To whom are you married? You have a son, don't you? Do you love your son? Why are you ashamed to answer questions about your son? Who is the father of your child?

Some questions may reveal a prosecutor who has more in mind than helping you determine whether or not to indict a particular individual, the only proper grand jury function. Be especially alert for broad, open-ended questions. This question was asked by a federal prosecutor in 1970:

I want you to tell the grand jury what period of time during the years 1969 and 1970 you resided at 2201 Ocean Front Walk, Venice (Los Angeles), who resided there at the time you lived there, identifying all the persons you have seen in or about the premises at that address, and tell the grand jury all of the conversations that were held by you or others in your premises during the time you were at that address.[7]

A prosecutor who asks questions like these is more likely interested in filling intelligence dossiers on private citizens than presenting evidence. Intelligence gathering is not a proper function of the grand jury.

Neither is using the grand jury to "fish" for information that could be used against an already indicted defendant at trial. This practice most commonly arises in cases where the government has had a suspect hastily indicted on scanty evidence, then finds itself in desperate need of evidence that will stand up in court. Be wary whenever a prosecutor begins questioning a witness about a crime for which someone has already been indicted.

Prosecutors have in the past tried to intimidate witnesses to get information:

Do you really expect this grand jury to believe that? Don't you know that people can go to jail for lying to a grand jury?

Such questions unfairly undercut a witness' credibility, a function also served by badgering witnesses who ask permission to leave the grand jury chamber to see their attorney outside:

Don't you know this grand jury is working on a tight schedule? You've already gone out to see your lawyer before. What's the matter? Do you have something to hide?

Going through the motions

What prosecutors do can be every bit as telling as what they say. Bad deeds belie good faith every time, and it's not difficult to pinpoint some of the prosecutorial actions that should start those danger signals flashing for you.

- The first thing to check when you begin considering a case is whether the proceedings are being recorded. While not all jurisdictions require that grand jury proceedings be recorded, it's impossible to hold prosecutors accountable for what they do and say before a grand jury without a permanent record. With recording devices so simply and inexpensively available, there is no legitimate excuse for not recording grand jury exchanges involving the prosecutor.

It's essential that *all* prosecutor-grand jury interactions be recorded, not just the interrogation of witnesses. A prosecutor can make highly improper remarks when a witness or suspect is not inside the grand jury chamber.

Once recording has begun, make sure it continues. If a prosecutor should ever have a recording apparatus turned off (or a stenographer stopped) in order to make an "off-the-record" comment, you should, as a self-respecting grand juror, hit the roof. Internal grand jury deliberations, of course, should not be recorded. Secrecy is necessary here to maintain the integrity of the grand juror decision-making process. If prosecutors should ever walk in on your

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internal jury deliberations, inform the judge who has impanelled your grand jury *immediately.*

• Justice delayed, the legal saying goes, is justice denied, and the right of every individual to a speedy disposition of the government's charges against him or her is a fundamental aspect of civil liberty. But sometimes a prosecutor's speed inside the grand jury chamber may be designed to benefit the government, not the accused. Legal observors have dubbed this undue haste the "race to indict." This unusual dash occurs in judicial districts where the grand jury and information coexist as methods of charging. In such circumstances, an arrested suspect may choose to waive the right to a grand jury indictment and seek instead to be charged by information. An information requires, as we have noted above, a public preliminary hearing where an accused hears and can challenge the government's evidence. A person charged via the grand jury route has no such opportunity, which is why some prosecutors will rush to get an indictment returned before the accused has an opportunity to call for a preliminary hearing.

At other times, undue haste may take the shape of subpoenas that demand a witness' immediate presence before a grand jury. Witnesses have been called before grand juries on only minutes' or hours' notice by subpoenas that indicate neither the crime under investigation nor the reason the person has been subpoenaed. Aside from disrupting a person's life—*if you were ordered at this very moment to appear at the local courthouse in one hour, how would that affect you and your family?*—such last-minute subpoenas effectively prevent a witness from arranging for legal advice. The resulting confusion is only likely to panic an already apprehensive witness.

The harassment factor in these subpoenas is obvious. What they contribute to the grand jury's dispassionate search for truth is not.

• Subpoenas themselves can put out danger signals. A subpoena that, for instance, demands the grand jury appearance of a public official in the midst of a heated election campaign or a subpoena that forces a witness to travel long distances, at great inconvenience, to be before the grand jury should raise questions in grand jurors' minds about what the prosecutor may be up to. As a general rule, any subpoena that causes a witness personal hardship entitles you and your fellow grand jurors to, at the least, a convincing explanation of why the subpoena was necessary.

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Such a rule also applies equally to a *subpoena duces tecum*, a special kind of subpoena that demands the production of books, documents and the like. A *subpoena duces tecum* that orders a witness to turn over enormous numbers of papers to a grand jury could conceivably paralyze a particular organization or enterprise. This dislocation might be justifiable, but conscientious grand jurors cannot assume that the prosecutor can justify it. Ask.[8]

A wide-ranging *subpoena duces tecum* may also indicate that the government has tried to get a search warrant and failed because it could not prove to a judge that the warrant was proper under the circumstances. In cases like these, a *subpoena duces tecum* becomes a substitute for a search warrant, an end run around court rulings the government doesn't like.

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When silence isn't golden

Meetings, groups, associations, and conversations are the First Amendment building blocks of our political process. Unless the government is engaged in a bona fide presentation of evidence of criminal activity to a grand jury, it has no business probing into such activities, frightening citizens away from them, or punishing people who resist revealing them to hostile authorities.
--Charles Goodell, former United States Senator, 1973

The danger signals of prosecutorial misconduct may be, as we have seen, comments or deeds. They may even be a single word. In fact, there are two words you might hear as a grand juror that should start red lights flashing just by their mere mention: *immunity* and *perjury*. Their mention inside the grand jury chamber doesn't mean something improper is about to happen, but it does increase the chances. Prosecutors who improperly manipulate immunity and perjury are the most dangerous you will ever face.

Immunity

Immunity has been variously described as an indispensable law enforcement tool, a slipshod legalism that rewards criminal behavior and a trapdoor to prison for those who value their personal privacy. It is, in short, a highly controversial item.

What is immunity? In its best sense, a bargain between a witness and the government. In return for a witness' testimony, the government promises not to prosecute the witness on the subject he or she may testify about.

Why should the government have to promise immunity in order to obtain a witness' information? The answer is in the Constitution. The Fifth Amendment of the Bill of Rights states that no person "shall be compelled in any criminal case to be a witness against himself (sic)." This clause, usually referred to as "the privilege against self-incrimination" is no mere technicality. It is the bedrock of our criminal justice philosophy.

In our judicial system, anyone accused of a crime is presumed innocent. The government must prove guilt beyond a reasonable

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doubt; the individual need not prove innocence. He or she is free to remain silent, and the right to this silence is crucial. If a suspect did not have a lawful right to silence, the government, with all the resources at its command, could pressure a person into saying what the government wanted to hear. Indeed, if the government had the authority to force citizens to answer its questions, privacy and the freedoms to speak, write and read freely would never be secure.

In the United States the government does not have the authority to force people to answer its questions. The Fifth Amendment protects our right to silence, and the government cannot revoke it. But while the government cannot force a person to relinquish this protection, federal and state legislation has given prosecutors the ability to replace the right to silence with a different sort of protection: immunity. Once the government removes the possibility of self-incrimination by immunizing a person from future prosecution, that person has no Fifth Amendment right to remain silent.

Used correctly, immunity can benefit *both* the immunized witness and society. Consider, for example, a case where the government has identified a minor participant in a criminal conspiracy, but needs more evidence to indict the higher-ups. The small-timer could provide that evidence, but he, understandably, is reluctant to answer questions that would help the government convict him. So the government strikes a bargain: if the witness testifies inside the grand jury chamber, the government will grant the witness immunity from future prosecution. The witness agrees and, immunized, appears before the grand jury. His testimony leads to the indictments of his criminal superiors, and all the parties to the bargain walk away from it pleased—the government because the serious criminals are headed for jail, the immunized witness because he's not.

Immunity, however, does not always work so well. While prosecutors can immunize the criminal "small-fry" to obtain evidence against the criminals who really matter, they may also grant immunity to important criminals who should be prosecuted for their crimes, not immunized from them.

These *immunity baths,* as they are sometimes called, can seriously undermine public confidence in the judicial system. Today, though, immunity's greatest danger is not that prosecutors will use it to "reward" their criminally involved friends, but that they will manipulate it to punish their "enemies." Immunity can enable

prosecutors to jail people without having to bother proving them guilty in a court of law.

The process may begin whenever a grand jury witness invokes the Fifth Amendment. On the federal level, a prosecutor can obtain an authorization to immunize this silent witness by filing a brief form with the Attorney General's office in Washington. Approval here is usually automatic, and once this authorization is signed by the appropriate federal judge, who by law must sign it once the Attorney General's office has given its approval, the grant of immunity becomes an order. The witness who refuses to comply with it—that is, testify—may be brought before the judge and found in *contempt.*

The destination for a witness found in contempt is jail. The length of the witness' stay behind bars depends on the nature of the contempt. *Civil contempt* is meant to coerce a recalcitrant witness (a witness who refuses to testify under court order) into testifying. A civil contempt incarceration lasts as long as the immunized witness' silence, and that, theoretically, could be a very long time. The witness may be kept in jail for as long as the grand jury that seeks his or her testimony sits. When the grand jury's term expires, the witness may be resubpoenaed before a new grand jury, immunized and jailed again. What this means is that a person found in civil contempt can be jailed indefinitely for what amounts to the "crime of silence."

Criminal contempt, on the other hand, is designed to punish a recalcitrant witness for interfering with the judicial process, not to coerce a witness into answering questions. A witness jailed for criminal contempt cannot end the confinement by simply deciding to testify, because the confinement is for a fixed term.

A judge unilaterally may sentence a recalcitrant witness to up to six months in jail for criminal contempt, but if a sentence of more than six months is contemplated, the witness must be tried before a jury on the criminal contempt charges.

Prosecutors usually justify the jailing of silent witnesses by citing society's "right to every man's evidence." Interestingly, however, forcibly immunizing witnesses and threatening them with jail if they refuse to answer questions seldom produces valuable evidence, which is really not surprising.

There are, after all, many reasons behind a witness' silence, some base, but others perfectly understandable—even admirable. On the former end of the silent scale are people involved in

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organized crime intrigues. They often won't testify inside the grand jury room because they fear the consequences of testifying against their criminal colleagues. Given the choice between confinement for contempt if they don't answer questions and the proverbial "cement shoes" if they do, professional criminals immunized without their consent will choose silence.

Silence, though, is hardly the sole preserve of the disreputable. The ranks of the silent may, at various times, include:

- political activists who feel that they have only been subpoenaed because they are members of a group the government wants to discredit and disrupt with a headline-ridden grand jury witch hunt.[9]
- journalists who believe that the obligation of reporters to protect the identity of their sources is essential to a free and vibrant press.[10]
- lawyers who would rather face a finding of contempt than answer questions about their clients and break the confidentiality that is necessary for a meaningful attorney-client relationship.[11]

We could continue this categorization of silent witnesses for some time, but, suffice it to say, there can be legitimate reasons behind a witness' decision not to answer questions inside the grand jury chamber.

Sometimes, however, the Fifth Amendment right to silence will be invoked for no apparent reason: a witness asked an innocuous question like "Where do you work?" will respond by invoking the Fifth Amendment. Is this witness mocking the integrity of the grand jury process? Not at all. The witness is simply taking a constitutional precaution. The Supreme Court has ruled that a sworn witness cannot pick and choose the questions he or she will answer and which he or she won't. Once a witness has begun to answer questions in the grand jury room, he or she has lost the right to invoke the Fifth Amendment on other questions.

Prosecutors know this, of course, but many grand jurors do not. Thus, a prosecutor may try to bias an unknowing grand jury against a witness by labelling a witness' apparent nonsensical invocation of the Fifth Amendment a disrespectful act, which it is not. In fact, since so few grand jurors understand that an invocation of the Fifth Amendment is *not* an admission of guilt, a prosecutor can bias a grand jury against a witness simply by forcing an invocation of the Fifth Amendment on any question. This is why the American Bar Association's standards for ethical prosecutorial

conduct deem it improper for a prosecutor to call before a grand jury a witness who has already told the prosecutor he or she plans to invoke the Fifth Amendment inside the grand jury chamber.

The American Bar Association also maintains that it is wrong for a prosecutor to call a *target*—the subject of an investigation—before a grand jury without informing that person that he or she is under suspicion. On the federal level and in many states, there is no legal provision stopping prosecutors from engaging in this very practice. A grand jury witness who doesn't know whether he or she may be indicted on the basis of the testimony he or she is being asked to give has another good reason to remain silent.

Forcing immunity onto silent witnesses makes them choose between their commitment to silence and jail. For those whose decision to remain silent is based on conscience, there is only one choice. They will go behind bars rather than answer questions. In cases like these, immunity benefits neither the witness nor society.

As a grand juror, you can play a key role in preventing immunity abuse. Whenever an immunity order is contemplated, ask if the prosecutor really expects the grant of immunity to produce testimony of value to the grand jury. If your prosecutor cannot answer with more than vague conjecture, be persistent. Has the witness in question refused to talk to prosecutors outside of the grand jury room? Why? Is the witness afraid of testifying? Will a grant of immunity and its corresponding threat of contempt overcome that fear? Or has the witness refused to answer questions because he or she objects, on a principled basis, to the prosecutor's questions? If need be, let the silent witness explain his or her position, even if that means asking the prosecutor to leave the grand jury chamber temporarily.

Under current immunity statutes, grand jurors are not asked to approve or deny a prosecutor's request for an immunity order. But this doesn't mean that a grand jury is helpless in the face of what it considers an improper immunity order. If you should feel that a particular immunity order does not serve the public interest, inform the court. Also keep in mind that an immunized witness' refusal to testify is only contemptuous as long as the grand jury demands the witness' testimony. By withdrawing a subpoena or refusing to pursue the disputed questions, your grand jury panel can prevent the confinement of a silent witness.

The misuse of use immunity

Since 1970 the form of immunity applicable on the federal and

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most state levels has been a special type called limited or *use* immunity.[12] A witness granted use immunity can be forced to testify about an incident, even if that testimony is self-incriminatory, yet still be prosecuted for that incident at a later time—as long as the government does not use the immunized witness' testimony, either directly or indirectly, in a future prosecution.*

This use immunity, which has been the subject of intense controversy, adds an extra dimension of risk to grand jury proceedings. Use immunity has helped some prosecutors improperly discover defendants' trial strategy. A suspect about to be indicted on the basis of evidence a prosecutor has already accumulated is subpoenaed before a grand jury, immunized and interrogated about the alleged crime. If the person admits guilt, the prosecutor knows the government has an open-and-shut case that cannot be refuted. If the person claims exonerating circumstances, the prosecutor learns the details of the defense the potential defendant plans to give later at trial. Armed with this information, the prosecutor can specifically tailor the government's case to rebut the defense's contentions. The defendant, of course, has no comparable means to force the prosecutor to reveal the government's trial strategy.

Unfair discovery is one way prosecutors may abuse use immunity. There is another, which brings us to our second *danger* word . . .

Perjury

Definitions of perjury vary somewhat, but most people would agree that to perjure oneself means to deliberately lie under oath. Perjury is and should be a crime. No one should be able to swear to tell the truth and then not. But should the government be able to make a perjurer out of someone who walks into the grand jury chamber with no intention of lying?

Sound preposterous? It can happen when a prospective defendant is called before a grand jury and compelled to testify by a grant of use immunity. If the witness denies his or her guilt, the prosecutor can ask the grand jury to indict the witness for perjury as well as for the alleged criminal act under consideration, reasoning that if the grand jury feels there is probable cause to prosecute, then the accused must have been lying when he or she denied committing

*Under the traditional *transactional* immunity, which still applies in some states, the government may never prosecute an immunized witness on the subject described in his or her testimony, unless the witness is guilty of perjury.

the crime. By branding the defendant as a perjurer like this, the prosecutor has immeasurably strengthened the government's chances of getting a conviction from the trial jury.[13]

There are other unsavory ways perjury indictments can be built out of grand jury proceedings. Prosecutors, for instance, can call witnesses repeatedly before one or more grand juries over a long span of time and ask the same questions, hoping that recollections, and hence answers, will differ from one appearance to the next. Since witnesses are not allowed by right to see their earlier grand jury statements, made perhaps when the event in question was fresher in their minds, the chances that inadvertent discrepancies will appear are high.

But honest mistakes are not perjurous statements. A sufficiently zealous prosecutor can trap almost anyone into a mistake, but no prosecutor should ever be able to trap a grand jury into returning an unjust perjury indictment. As always, be alert!

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Some precautions

Every time you hand down an indictment, you are sitting there not as a rubber stamp for a district attorney, not as people who read the law and apply it rigidly, but as people who say: "We live in this city, we know its problems and we are going to hand down indictments in accordance with the necessities of modern life, and last and always the most important, we are going to see that no district attorney, no irresponsible assistant, no cop seeking revenge, no judge, if you will, can charge, or get us into a situation where even a subpoena which can destroy the good name of a friend is issued, or an indictment handed down, unless we know that it is not being done for political purposes, for revenge, for satisfying a private grudge, or is contrary to the conscience of the community."

--Thomas Dewey, prosecutor and Governor of New York

How can you prevent grand jury abuse? You have already taken the first step by studying what can go wrong inside the grand jury chamber. Now combine that knowledge with the basic guidelines below, and you will be well on your way to becoming a serious, thoughtful grand juror.

Be skeptical.

Don't take what you hear inside the grand jury chamber at face value. Most grand jurors realize that they can question witnesses to clarify a confusing point. Sometimes, however, it may be just as important to question prosecutors. Make sure you understand what your prosecutor is doing every step of the way. If you don't fully understand what is transpiring before you, ask. A *confused* grand juror is a *worthless* grand juror.

Be watchful.

Keep your eye out for the tell-tale signs of grand jury abuse discussed earlier in this booklet. Anyone can spot misconduct after it takes place. The trick is to prevent abuse before it occurs.

Be independent.

Grand jurors may see and hear what they want. Don't limit

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yourself to only what the government would like you to know. Ask your prosecutor if any other evidence exists that would shed a different light on the case at hand. Subpoena witnesses whose testimony you feel would increase your understanding of the case. If you ever feel that a prosecutor is deliberately dragging his or her feet to prevent an indictment that should be returned, make your displeasure known to the prosecutor. If the foot-dragging continues, request a new, special prosecutor from the court.

Above all, remember that while you do not have to be *convinced* of a person's guilt to return an indictment, the grand jury's democratic purpose is to guarantee that no individual be made to stand trial on flimsy charges. That's a tall order, and, as a grand juror, you will have to stand tall to achieve it.

Good luck.

After it's over

When your stint as a grand juror is over, then what are you going to do?

File the experience off in some dusty corner of your memory and forget about it? We certainly hope not. Whether your grand jury experience was rewarding or frustrating, you owe it to yourself—and the rest of us—to think about your grand jury encounter.

If your grand jury experience was a joy, then share it. The grand jury is a misunderstood and seldom appreciated institution. Take the time to explain the grand jury process to others in your community. Write a letter to the editor, give a little talk to a local club or group.

And if you found the grand jury a deeply flawed judicial mechanism, then do something to change it. There is a wide range of grand jury reform activity now going on in cities, statehouses and Washington. In 1976, for instance, both the Senate and the House of Representatives opened the first Congressional hearings on grand jury reform ever held.

The *Coalition to End Grand Jury Abuse* keeps an extensive record of all these activities and publishes a quarterly publication, *Grand Jury Report,* for those interested in restoring the grand jury to the honored place it once held in American life. For more information write:

Coalition to End Grand Jury Abuse
105 Second St., N.E., Washington, D.C. 20002

State legislatures and Congress can do much to cure the ills of the grand jury system, but effective grand jury action ultimately depends on the existence of effective grand jurors. No one knows that better than former grand jurors themselves. Yet although former grand jurors have a unique perspective to offer on the grand jury system, precious little effort has been made to determine what they feel makes grand jurors effective. You can help break this silence by completing the questionnaire on the following page. Thank you.

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A questionnaire for former grand jurors

1. Before I was called to serve on the grand jury, I
____ was well-versed on the function and purpose of grand juries.
____ had a rough idea of how grand juries operate.
____ knew virtually nothing about the grand jury process.
additional comments:

2. The grand jury I served on was
____ on the federal level.
____ on the state or local level.

3. During most of the grand jury proceedings, I
____ was kept fully informed about what was happening and why.
____ was often confused.
____ was lost.
additional comments:

4. The grand jury on which I served returned the indictments sought by the government:
____ 100 per cent of the time.
____ 95-99 per cent of the time.
____ 90-94 per cent of the time.
____ other, please estimate

5. I felt the prosecutor(s) who presented cases before my grand jury
____ was sensitive to the rights of suspects and witnesses.
____ was insensitive to the rights of suspects and witnesses.
additional comments:

6. In answering grand jury questions and requests, the prosecutor was:
____ very cooperative.
____ uncooperative.
additional comments:

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7. I feel my service on the grand jury:
____ was an exhilarating experience.
____ served no real purpose.
additional comments:

8. I found this handbook:
____ very useful.
____ sometimes useful.
____ irrelevant.
additional comments:

9. I would be interested in participating in an organization of former grand jurors:
____ yes.
____ no.

10. I would be interested in attending a grand jurors' conference:
____ yes.
____ no.

11. Please use this space for any further comments.

Name _____

Address _____

City _____ **State** _____ **Zip** _____

PLEASE RETURN QUESTIONNAIRE TO: **Coalition to End Grand Jury Abuse, 105 Second St., N.E., Washington, D.C. 20002.**

For your information

Publications

Younger, Richard, **The People's Panel: The Grand Jury in the United States, 1634-1941.** Brown University Press: Providence, 1963. The classic survey of American grand jury history.

Clark, Leroy D., **The Grand Jury: the Use and Abuse of Political Power.** Quadrangle: New York, 1975. A closer look at modern grand jury abuses.

Harris, Richard, "Taking the Fifth," *New Yorker Magazine,* April 5, 12 and 19, 1976. Combines an in-depth examination of one recent instance of grand jury abuse with a perceptive discussion of the grand jury's historical background. Available from the Coalition to End Grand Jury Abuse as a reprint or in book form as a chapter in **Freedom Spent** (Little Brown: Boston, 1976).

American Bar Association, **Standards Relating to The Prosecution Function and The Defense Function.** New York: ABA Project on Standards for Criminal Justice, 1971. Includes an important discussion of prosecutorial ethics.

Sources

House of Representatives Judiciary Subcommittee on Immigration, Citizenship and International Law, Rayburn House Office Building, Washington, D.C. 20515. This panel has conducted extensive hearings on the grand jury system, which have been published under the title, **Federal Grand Jury.**

Senate Judiciary Subcommittee on Constitutional Rights, Russell Senate Office Building, Washington, D.C. 20510. This subcommittee has also published a report, **Reform of the Federal Grand Jury System.**

State of New York Assembly Codes Committee, Legislative Office Building, Rm. 717, Albany, N.Y. 12224. Write for this panel's excellent report on the grand jury system, **Abuse of Power** (1976).

Coalition to End Grand Jury Abuse, 105 Second St., N.E., Washington, D.C. 20002. A wide variety of articles and reports on the grand jury system is available upon request.

Grand Jury Project, Rm. 1415, 853 Broadway, New York, New York 10003. Publishes a newsletter which details grand jury activity that violates the exercise of First Amendment rights.

Notes

[1]Prof. Leroy Clark's recent book, **The Grand Jury: the Use and Abuse of Political Power** (New York: 1975), includes a survey of this early grand jury history. For a more detailed analysis, check Leonard Levy, **The Origins of the Fifth Amendment** (New York: 1967).

[2] Every grand juror should be familiar with the Fifth Amendment and the other sections of the U.S. Constitution that guarantee individual freedoms. A good introduction to the subject is the *Citizens' Guide to Individual Rights Under the Constitution,* prepared by the Senate Judiciary Subcommittee on Constitutional Rights. Copies, at 35 cents each, are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 (minimum charge of $1.00 for each mail order).

[3]See Richard D. Younger, **The People's Panel: The Grand Jury in the United States, 1634-1941** (Providence: 1963), for a fuller discussion.

[4]State of New York Assembly Codes Committee, **Abuse of Power** (Albany: 1976), p. 33.

[5]This five per cent figure was most recently cited by U.S. Attorney General Edward Levi in his June 10 testimony before the House Judiciary Subcommittee on Immigration, Citizenship and International Law's 1976 grand jury hearings.

[6]Most of the examples given here are adapted from **Abuse of Power,** op. cit.

[7]Question asked by Department of Justice prosecutor Guy Goodwin in 1970, quoted by Rep. John Conyers in **Congressional Record,** February 6, 1975.

[8]In 1975, for instance, a U.S. Attorney in San Francisco subpoenaed over 1,000,000 documents from a local labor union. Complying with the subpoena, the union's attorneys charged, would have prevented the union from paying benefits to its disabled or retired members. *San Francisco Chronicle,* February 19, 1975. The court agreed and quashed the subpoena.

[9]There are a number of articles discussing this aspect of grand jury abuse. See especially Frank J. Donner and Richard I. Lavine, "Kangaroo Grand Juries," in *The Nation,* November 19, 1973.

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[10]For up-to-date reports on this phenomenon, check the *Press Censorship Newsletter,* published by the Reporters' Committee for Freedom of the Press, 1750 Pennsylvania Ave., N.W., Washington, D.C. 20006.

[11]See Fred Solowey, "The Grand Jury: Making Trouble for Movement Lawyers," in *Juris Doctor,* March, 1976.

[12]Use immunity was created by the passage of the Organized Crime Control Act of 1970. Since 1974 it has been the only form of immunity in the federal system.

[13]An excellent discussion of this danger was given in testimony before the Senate Judiciary Subcommittee on Constitutional Rights September 28, 1976 by Prof. Melvin Lewis of the National Association of Criminal Defense Lawyers.

Mr. ASHLEY. One of the most important subjects that comes up here and on the State level is the matter of counsel in grand jury rooms. This was a subject that was passed in the Senate and the Assembly in New York a couple of years ago, was subsequently vetoed by the Governor, and we think correctly so. We cannot see anything worthwhile coming out of all of this.

We, of course, point to all of the testimony that has gone before, the expert testimony of Judge Lacy, Mr. Curran, and the rest, that it would be a disruptive force. We don't see it accomplishing anything worthwhile, and we, of course, do see serious matters of breach of secrecy in permitting counsel into the jury room. We can see nothing worthwhile coming out of it.

We again make the point as it is in my statement that as laymen we can still see no real reason for it. We point out that the Supreme Court's version of all of this, that a grand jury is not an adversary procedure. If it is not an adversary procedure, then certainly there is no requirement for, or should not be any requirement for counsel in the jury room, and we do think this is very pertinent.

Now, the subject of rubberstamping, rubberstamp grand juries, has come up. I am not—I am purposely not going to comment on this matter; I am going to defer in a moment, if I may, to Mr. Lyons, who I know will want to talk in this direction, and I realize that this is the other important matter in front of you.

The way we do see it is this; if you are going to reform the grand jury system, then the reform really should be directed toward the district attorneys or the attorneys. Perhaps this is where the reform should come from.

We don't see abuse. I have never heard of any abuses caused by grand juries themselves. I have never heard of any leaks caused by grand jurors, but what you are talking about here is bringing grand jurors to a point where they are so bogged down and so hog-tied by the proposed legislation that the press will inevitably have a magnificent field-day and eventually call for the abolition of the system as being inefficient and not representative. This thing is an inevitable development; this is, I think, most undesirable, indeed.

We are concerned here, and we are here today because, as I mentioned in my statement, we fully realize that the Federal law leads. And we are concerned about what the actions that you take here will be construed as on a State level. As I point out, the bill as—your bill, as it stands, will sorely hurt the State system, at least as far as New York is concerned. It will sorely hurt the State; this is our primary concern. It is noted that in vetoing the bill for counsel in grand jury rooms in New York State, one of the points that Governor Carey mentioned, of course, was that counsel is not allowed on a Federal level and there has been no real reason for it to be allowed on a State level.

Now I do say in one other statement here, if there is one instrument of the judicial system that perhaps rates or deserves unique treatment it is the grand jury system. Because this is the one instance in all, this is the one instance that the public has representation within all of the judicial procedures. It is the public, and what I offer to you is this, it is the public that is important in here, at least in this instance it is the public that is important.

The desires, the propensity, the necessities of the judicial system, of the judges, of the district attorneys, of the prosecutors and what have you, are, of course, important, but they are in this instance perhaps secondary. The grand jury is still the people's big stick. And it is the grand jury which is important; it is the grand jury as the representation of the people within the judicial system; it is that body that is important.

It is commendable, indeed, that the prosecutors, that the attorneys, that the judiciary be that concerned with reform. But what we say to you is that in the instance of grand jury reform, it is very possibly more important indeed that the public input receive perhaps the greatest consideration. Now we are not speaking within the legalese which I understand and I fully realize is important in the consideration, especially——

Mr. EILBERG. We are interested, Mr. Ashley, in your experience sitting in grand jury rooms.

Mr. ASHLEY. Yes.

Mr. EILBERG. Would you for the record just tell us, have you served, and when and where did you serve?

Mr. ASHLEY. Rockland County, N.Y.

Mr. EILBERG. For what period of time and when? What year, or years?

Mr. ASHLEY. The last time was approximately 5 years ago.

Mr. EILBERG. And for how long?

Mr. ASHLEY. We serve on a monthly basis.

Mr. EILBERG. You serve for 1 month?

Mr. ASHLEY. One month at a time, yes, sir.

Mr. EILBERG. How many months have you served?

Mr. ASHLEY. Total?

Mr. EILBERG. Total.

Mr. ASHLEY. Approximately 6 months. Roughly 6 months.

Mr. EILBERG. All right. Now, if you will excuse me, we will have to leave shortly after 3. I apologize to you for that. I think we will just have to go to the next witness. If we have time for questions, fine; if not, we will send them to you and ask you to reply to us in writing.

Mr. Gloege.

Mr. GLOEGE. My name is William Gloege. I submitted a prepared statement.

Mr. EILBERG. It will be made part of the record.

[The prepared statement of Mr. Gloege follows:]

TESTIMONY OF WILLIAM P. GLOEGE, VICE PRESIDENT, ASSOCIATION FOR EFFECTIVE GRAND JURIES

Mr. Chairman and Members of the Subcommittee, my name is William P. Gloege. While I am Vice President of a group of former grand jurors from Santa Clara County, Calif., known as the Association for Effective Grand Juries, I appear today on my own behalf. The views expressed are my own, and are based on my experience as a Federal grand juror during the first half of 1975 in San Francisco.

During our term there were two other grand juries impaneled to explore special areas (police corruption and income tax matters). Ours was the general grand jury, hearing a variety of routine matters such as bank robberies, mail thefts and crimes committed on Federal property. A major part of our work toward the end of our term involved an extensive investigation of airlines selling tickets at prices under those set by the C.A.B.

Let me first give you my overall impression of the Federal grand jury system from a vantage point inside the jury room. In my statement I discuss problems I saw during my term as a grand juror, then I indicate how H.R. 94 contributes to resolution of these problems. Additional areas needing reform, from my point of view, are also discussed.

OVERALL IMPRESSION OF THE FEDERAL GRAND JURY SYSTEM

It may be useful to provide some brief details on my personal orientation. I am employed by a large metropolitan police agency as an administrator in the office of the Chief of Police. This experience has shown me that there are individuals in our society that need to be vigorously pursued and prosecuted. It has shown me that lack of such vigor on the part of police and prosecutors can create a vacuum in society into which an undesirable element will flow to the detriment of the rest of the populace.

Prosecutors at the Federal, State and local levels need to be vigorous; they need our support and they need all the legitimate tools we can provide them to be successful in the pursuit of lawbreakers.

Having said this, my impression of the grand jury system is that it is a weak link in the fine system of justice we have in the United States. Perhaps the reason is the secrecy of the system which keeps its workings out of the public eye. Perhaps it is due to the feeling of the ordinary citizen who makes up the grand jury that he cannot or should not question the government.

THE ACTUAL JURY ROOM EXPERIENCE

There was never any question who was in charge of our grand jury. The U.S. Attorney (I assume with concurrence of the Court) selected our foreman—a pleasant, older gentleman who was about to retire from his job in the Postal Service. The vice-foreman was selected in the same manner. We received brief instruction from the judge, but it was the prosecutor who told us in detail what was expected.

The United States Attorney was an impressive figure to us—urbane, friendly, intelligent, highly skilled in the law and respectful toward we grand jurors. He never became ruffled, not even after long days of testimony or in the face of a grand juror or two who persisted in disagreement.

The U.S. Attorney explained to us that there had been accusations that grand juries served as a "rubber stamp" for the prosecutor. He didn't want us to be a "rubber stamp," he said. But we got down to business and were soon turning out indictments—in batches. We would hear five or ten cases before deliberating and voting the indictments.

The principal impression I received was that the process is very one-sided. It is designed that way, and it will take major and innovative changes to achieve a more balanced and fair process.

On one side is the prosecutor and his team of able assistants. They were, most of them, very sincere individuals, and it was hard or impossible to imagine them doing anything less than honorable in their pursuit of criminals. Aiding the U.S. Attorney and his assistants, other impressive groups and individuals are brought into play: FBI agents—sober, matter-of-fact, no-nonsense, speaking with authority, but sometimes making depreciating remarks about the accused; Treasury agents—well trained, technicians; Immigration agents—harried, undermanned and undermined by the Executive, Congress and others. Agents from other departments or agencies fell into similar categories.

The point is, on the prosecutor's side were good-intentioned federal attorneys and agents whose only concern seemed to be to do their job simply and fairly. We could identify with them. Like us, they were middle class, with possibly a little more education than the average grand juror. They treated us in a friendly manner as if we were both there for the same purpose—on the same side of the fence, as it were.

And vaguely lurking in the background was the whole power of the Federal Government—Army, Navy, Air Force—everything. The U.S. Attorney was the Establishment—the established order and all the power and prestige it had at its command.

On the other side was the accused. Usually one person, but sometimes three, four or more. The U.S. Attorney and the agents that testified told us what the person had done, and it was obvious that our job was to vote an indictment. On occasion we were read a "rap sheet" of the person's former criminal history.

(This history usually consisted of charges against the person, with no indication of whether he or she had subsequently been found guilty.)

Only on a few occasions out of hundreds of cases did we jurors see the accused. Of these, there were a few who turned out to fit what we expected; but more often a person surprised us by making a better impression than expected—based on what we'd heard.

Given the forces on the side of issuing an indictment—their impressive numbers and demeanor, our identification with the establishment, the fact we seldom knew the accused in person and the unsavory light the accused was sometimes cast in—all this made the outcome of our cases and the path every grand jury follows all but inevitable.

CHALLENGING THE U.S. ATTORNEY'S CASE

Questioning the case of the prosecutor was a difficult and thankless job for the few grand jurors who at first tried. One assistant to the U.S. Attorney bristled at any suggestion his case was not airtight. He became so verbally abusive in response to grand jurors' questions, which he seemed to consider "insolent," that he began to alienate otherwise submissive and very pro-prosecution jurors.

Grand jurors seemed to fall into three categories in terms of their attitude toward their role. About one quarter were what might be termed prosecution "hawks"—they were for indictment on every case. Their attitude was that the Government would not bring a case before the group that wasn't worthy of an indictment. By definition indictments should be issued on all cases. This group had the upper hand from the start since they had on their side the U.S. Attorney who was in charge of the proceedings, plus the other array of federal forces mentioned above.

Another quarter of the group represented the opposite end of the spectrum. This group, which was much less vocal (except among themselves when they were away from the grand jury room), wanted to face every case with an open mind—which was sometimes hard, given the way cases were presented. Their posture was that of being mildly skeptical of the prosecutor's case. But the questions of this group—at first almost pointed, but later apologetic—often seemed, in the context of the way the proceedings were run, to be out of order and impertinent. The foreman was fair, but he tended to be less patient with this type of questioning. The "hawks" often openly attacked these questioners, or more subtly let them know they were "off base." The U.S. Attorney and testifying agents did nothing to discourage this attitude toward the questioners. Soon this group tired of its role owing to lack of support from other jurors (even those who felt the same), the sometimes outright hostility of prosecutors, the regular hostility of the "hawks," and the obvious futility of going against the U.S. Attorney's intention to obtain an indictment.

The remaining half of the grand jurors did not seem involved on one side or the other. Some expressed a waning interest in being a grand juror and seldom asked questions or participated in deliberations. Absences were ususally from this middle group.

About half way through the term of the grand jury an interesting event took place. The grand jury returned its one and only "no bill." The case involved an older postal worker, and there were numerous questions about whether a criminal act had actually been committed. In deliberations it suddenly became clear that we were about to return a "no bill" and a feeling of awe, daring and electricity swept the group. It was uncomfortable to go up against the government like this. When the Assistant U.S. Attorney returned to the room and learned of the "no bill" he was concerned and critical. He said something to the effect that we couldn't do it and certain forms had to be filled out which we didn't have. It was an awkward moment for all of us, and everyone was glad to move on with business. I wondered how the attorney would explain this rare event to his boss—the U.S. Attorney.

One closing note on the problems with the system encountered during service as a grand juror. At one point the U.S. Attorney assured grand jurors that those we indicted had another chance—they would get a jury trial, and if they were not guilty would not go to prison. The attorney was asked about percentage of cases he got "true bills"—he replied, "99.9 percent." "What percent of these resulted in convictions?" He did not know. Later we learned that a sizeable number (we could not get an exact figure) of cases we indicted never went to trial! This came as a shock after thinking everyone would get a second chance.

Undoubtedly indictments on numerous counts provided a powerful plea bargaining tool for the prosecutor to obtain guilty pleas and thus maintain a good record for the U.S. Attorney.

REACTION TO H.R. 94

H.R. 94 is a good bill that deserves the support of Congress. As a former grand juror, the reforms it proposes seem moderate and overdue. Below are specific comments or provisions of the bill.

GRAND JURY SIZE

The proposal to reduce the size of the grand jury may not be beneficial. In the larger group more points of view can be expressed, which would be important if grand juries do become vocal and independent. Expenditures for grand juries must represent a small fraction of costs of the Federal justice system, so a cost savings argument is not really valid.

IMMUNITY OF WITNESSES

The bill states that any individual required to give testimony may not be indicted by the grand jury before which the individual has testified. However, could the individual be indicted before a concurrent grand jury in that district, or a subsequent grand jury that would hear the compelled testimony?

Under Section 2—Recalcitrance, and Section 3—Immunity, stronger and specific provisions might be built in to protect the news media. Our grand jury had numerous cases whereby the prosecutor attempted to force information out of reporters, station managers and other news media personnel related to a crime, wherein persons claiming to have committed the act transmitted information to the news media.

Such pressure tactics on the news media could inhibit the public's ability to learn the truth. Sources will be less willing to inform the media if media personnel can be successfully compelled to reveal sources.

This method of getting evidence seems heavy-handed in view of the vast machinery at the disposal of the federal government to catch wrong-doers. To replace good investigative tactics with getting an armlock on the media seems unfair and something the public should not tolerate.

Section 6 deals with independence of the grand jury and presents good provisions for achieving independence. However, unless grand jurors have a will to be independent and other means, such as those suggested in other parts of this statement are activated, these important improvisions of H.R. 94 can easily be turned aside by the prosecutor. For example, while an individual who is to be indicted can request to appear before the grand jury, the prosecutor can make this testimony unlikely in the way he presents the request. He can remind the jury of its large volume of business, infer that such a hearing would be a waste of time based on the person's previous record, etc.

The bill indicates the Government will be required to advise the grand jury of exculpatory evidence. As a grand juror, I requested exculpatory evidence on several occasions. The response was a somewhat short-tempered reply that (a) the Government wouldn't bring us cases involving an innocent party, and (b) the Government, out of a sense of fair play, would surely inform us of any evidence which tended to excuse the individual being investigated from the act in question.

However, I cannot recall a single case of exculpatory evidence being introduced, but it is hard to imagine that in the hundreds of cases we heard there was no such evidence. Will putting this requirement in the bill insure that the prosecutor will turn over such evidence? It seems the key will be having a strong and independent grand jury that will start to ask questions if exculpatory evidence never appears.

REPORTS

The reporting requirements required in the bill are excellent. It may be useful in (b)(2), for example, to require not only the number of requests by United States grand juries to the Attorney General for approval to compel testimony, and the number approved, but also the percentage of all investigations which result in such a request. This number would be the number of

investigations the district reports under (b)(1) of this same section. The same percentage of all cases can be reported along with the number for (b)(3), (b)(4), (b)(5) and (b)(6). In this way the Congress can determine how one district compares to another, or to the average in, say, the percentage of all investigations that result in witnesses being held in contempt and confined (b)(5), or the percentage of "no bills" resulting from testimony obtained under immunity. Of course, the Congress could compute these percentages, but it may be instructive and motivating to the U.S. Attorneys to see these percentages in their reports going to the Congress.

ADDITIONAL POTENTIAL REFORMS

While H.R. 94 is a commendable bill, more could be done to correct the pervasive problem with the federal grand jury system—lack of grand jury independence.

It seems to me that independence is the key ingredient needed to make the system work. If the grand jury has the legal protections and machinery to act in an independent manner, and jurors are capable and willing to act independently, other desired reforms will follow: A truly independent grand jury will see to it that it gets needed outside counsel and expertise needed to carry out investigations, it will vigorously question misuse of immunity, it will insure that witnesses are protected and treated in a civil manner, and it will place demands on federal prosecutors and their agents to bring in well prepared cases.

GRAND JURY SELECTION

The place to start in achieving an independent grand jury is with selection of individuals who comprise the jury. In the Northern District of California jurors are selected at random from voter registration rolls. There is little opportunity for individuals who should or want to drop out to do so. The result is a group containing some unwilling members and many who have a neutral attitude toward service. This condition does not foster a strong cohesive group willing to fight the U.S. Attorney or the courts for their independence if necessary, but instead fosters an attitude that the jury should get through its weekly business and its term as quickly as possible.

A means of improving this situation might be to adopt a means of selection used by some counties in California. Allow interested individuals to "apply" for service as a grand juror. To insure a wide segment of society had the opportunity to participate, a large group of individuals could first be randomly selected from voter registration rolls. These individuals could receive information on grand jury service—its responsibilities, its educational opportunities, its valuable role in the system of justice and the need for a strong, independent grand jury to be formed. The group would be invited to apply. A panel of jurists or, perhaps, a completely independent body made up of both lay persons and experts could be convened to select jurors from the applications. In making their selection, the panel can apply criteria related to interest, independence, availability, balanced points of view, etc. The selection might take place once each year, thereby doing away with the present costly system of selecting from voter lists several times a year.

The method outlined above would seem preferable to the present system and would undoubtedly produce a more independent jury than the present system.

GRAND JURY TRAINING

Our grand jury received a handbook on being a grand juror (it was very brief and general), a set of instructions for a judge that lasted several minutes and then we were in the hands of the U.S. Attorney.

What is needed is some form of outside training for Federal grand jurors that is more thorough, considering the hundreds of cases the jury must hear and decide upon. Again, this training should be carried out by an outside, independent source, not the U.S. Attorney. The intent would not be to alienate the jury from the Government, but to clearly establish in jurors' mind their independent role and how to pursue it as the Constitution intended.

The jury should select its own foreman and vice-foreman after a suitable period when jurors get to know each other. The training could incorporate this selection process.

INDEPENDENT ATTORNEY AND STAFF

Section 3330 (b) (1) of the H.R. 94 provides conditions under which the grand jury could request that the court appoint a special attorney to assist in inquiries of the jury.

A regular, permanent independent attorney would contribute even more to grand jury independence. This attorney could be present when the U.S. Attorney presents cases for indictment and could advise the foreman without participating himself. As staff to the grand jury, the attorney could be present during deliberations, not as a participant, but to furnish legal advice as requested by grand jurors.

As a private citizen I appreciate the opportunity to testify before this Subcommittee. The Legislative branch of Federal Government has many areas of interest and responsibility, but grand jury reform, related as it is to the essence of America—individual freedom—must rank high in priority.

I would be pleased to respond to any questions the Subcommittee may have.

Mr. GLOEGE. I served as a grand juror in San Francisco in 1975. The service commenced in January 1975, and I believe our last meeting was some time in July that year. We were scheduled to serve for 4 months, but the term was extended due to several extended investigations.

It was a general grand jury that heard a variety of what is called routine cases; bank robberies, postal thefts, credit card fraud and similar cases.

Concerning my personal background: I work for a police department in a large metropolitan city, San Jose. I am very familiar with the present situation in our society now in terms of crime and the need for vigorous prosecution and police work to hold this situation in check as much as possible.

Having said that, my impression, based on my service, was that the grand jury is a weak link in an otherwise fine system of justice. It was apparent to me, and I think to all grand jurors, that the U.S. attorney was in charge of this proceeding from the beginning. I don't think that is the way the system was intended to operate, but he was. He participated with the court, in selection of our foreman and vice foreman. We received brief instructions from a judge, perhaps lasting 10 minutes. The bulk of our instruction was given by the U.S. attorney. We received a booklet on how to be a grand juror that I found very brief and general, and not terribly helpful.

My overall impression of my service was that the proceeding is one sided. You hear the prosecution's side very well and you are impressed by it. Agents from various Federal departments testify. On the other side is the accused, the subject of the investigation, who you don't see usually. We saw the subject in a few cases, but very rarely.

There were occasions when the criminal history of the individual who was the target of the indictment was read. Not the crime we were looking into at the time, but previous involvement.

Mr. EILBERG. You refer to that in your statement. I read that.

Go ahead.

Mr. GLOEGE. Yes; There was one unique "two-sided," if I can call it, case that we heard where the Government didn't have an opinion. That is the Government did not expect an automatic indictment. It was a killing that had occurred on Federal property. The Government let us debate both sides openly.

We called the person that was being investigated; we called some other witnesses, and it was a very good, balanced hearing. The vote was not the way I wanted it to come out. I mean I was on the losing side, but

I felt very good about that particular case. To me it was a clear example of what the grand jury system could be, where you have a fair exchange and where both sides get debated:

The grand jurors, to my way of thinking, fell into three groups. One group felt all cases brought to us should result in an indictment because the Government was bringing those cases and the Government wouldn't bring them in if they didn't have sufficient reason. Another fourth of the grand jurors I would characterize as mildly skeptical of the U.S. attorney's case. They were prepared, during the first part of our term, to ask questions.

I remember one assistant U.S. attorney that didn't like questions about the Government case at all. He became very hostile and, in fact, he started turning some very pro prosecution grand jurors against him. He started them asking questions—at least in their mind—because of his attitude.

Then I would say the bulk, 50 percent of the grand jurors, were somewhat neutral. We were selected at random from voter registration lists, and many of this middle group were not terribly interested in serving and looked forward mostly to finalizing their service and getting off the grand jury.

We returned one no-bill. I think that speaks more than anything else for the system and some of the problems.

Mr. EILBERG. During the entire 6-month period?

Mr. GLOEGE. Yes; and it amazed us as grand jurors, and we were kind of frightened and surprised at our action. It was a case where there wasn't clear evidence that there was probable cause to believe a crime had been committed, or committed by this individual. When he returned to the room, we informed the U.S. attorney of this eventuality, of this no-bill. He was upset and concerned, and said something to the effect that we needed to fill out some forms to do this, to return a no-bill, and we didn't have the forms.

And what happened to that case, I am not sure. We were anxious to move on with business because we felt very uncomfortable. We never did this before; we never did it again.

H.R. 94, I feel, is a good bill and I feel, based on my experience in that grand jury room, in one district, admittedly, it is a moderate bill. It doesn't go as far as I'd like—I'd like to some additional kinds of reforms which I mentioned in my statement. Let me briefly touch on the bill.

On grand jury size, I think the present size is good because it allows points of view to be expressed, particularly if we can somehow achieve an independent grand jury system where you get debate and exchange of ideas.

Pressure tactics on the news media bothered me as a grand juror. I saw the Government unable to gather evidence in cases, bringing in people from the news media who had been sent tape recordings or documents and forcing them to release this information.

I asked the U.S. attorney how many bombers or terrorizers he had caught in this manner, and he said none to his knowledge. It just seemed to be an unfair and unwarranted way to get evidence, with the Federal machinery we have to do that. Why disrupt the media and the freedom of press that we have in this country? I think it tends to inhibit freedom of the press; it tends to make other people not want

to come in and give evidence eventually letting us know, the public know, what is going on.

Exculpatory evidence; I asked on one occasion was there any evidence that tended to excuse the target of the investigation. And the assistant U.S. attorney, that I mentioned before was there, and he became irritated at the question and told me, of course, there wasn't! The government is fair, they wouldn't have brought this case if there was such evidence. It was clear to me that he resented that question.

We never heard any exculpatory evidence, in any case with exception of the killing, and that raised the question in my mind. Wasn't there any? Wasn't there one case, two cases where there was some evidence that tended to excuse the target of the investigation?

So, you know, I think there is a need to somehow bring out exculpatory evidence.

I have here some of the problems with exculpatory evidence today, but there is an urgent need though to get that before the grand jury, to have a more two-sided procedure.

A couple of possible ways to reform the grand jury and to make it independent exist. I see independence as the key, to make that group willing and able to stand up to the U.S. attorney and the courts if necessary and be independent.

Selection of grand jurors, is of prime importance in achieving independence. I would like to see some changes along these lines. Possibly draw a large number of names from the voter registration lists, as we do at present, but then from there use a system that they use in California where you could accept applications from individuals who are interested in becoming grand jurors. You could send out notices to this large number that was selected from the voter registration lists and inform them of the opportunity to serve. Invite them to apply. I think you would get a good self-selection process here that would result in willing and capable grand jurors.

Mr. EILBERG. Provided the method is constitutional. We are not absolutely certain that it is. It is a good idea but there may be some question of constitutionality.

Mr. GLOEGE. I won't say any more about that. It is covered in my statement.

I would like to see some independent training of the grand jurors, and by training I mean more extensive than they are getting now. The training should not be done by the U.S. attorney. Training should fully inform them of their rights as grand jurors, and of their responsibility to act in an independent role. This could be done perhaps by consultants or someone retained for this purpose.

Let me just briefly comment on Judge Lacy's testimony which I found very impressive, and very——

Mr. EILBERG. You are going to have to conclude shortly. We will allow you another minute or so. If you want to supplement your remarks or any of you, for the record, you may do so by mail. We are going to supply each of you with questions. If we had the time we would ask each of the three of you the same questions and then separate questions which we will have to handle by correspondence.

Mr. GLOEGE. I will make one point; the present practice of having the attorney outside the grand jury room I found to be very disruptive. To have the witness or the target going out and consulting with the defense was irritating. It made the person in the grand jury room

seem like he had something to hide. Why couldn't he answer the question?

Placing myself on his side, or her side, he or she was looking for protection and was a layman not knowing how to answer the questions. But it was disruptive. The judge said it was no problem. He said it just doesn't happen; it just doesn't cause any problem in the grand jury room. It did in our grand jury, and I can speak for other grand jurors who voiced similar complaints.

Thank you very much for the opportunity to testify today.

Mr. EILBERG. Thank you, Mr. Gloege. I am sorry to rush you.

Mr. Lyons.

Mr. LYONS. I will try to be brief in summarizing. Thank you for the opportunity to be here.

Hearing all those experts today, I am glad I put the caveat in that we are not attorneys.

Mr. EILBERG. Let me emphasize that we are interested in your experience in the grand jury room and how other grand jurors feel. We are not looking for any particular responses other than the truth as you observe it, so your contribution is unique in that many lawyers have not been in a grand jury room.

[The prepared statement of Mr. Lyons follows:]

STATEMENT OF JOHN J. LYONS, FIRST VICE PRESIDENT OF THE GRAND JURORS ASSOCIATION, BRONX COUNTY, AND DELEGATE TO THE FEDERATION OF GRAND JURORS ASSOCIATIONS OF NEW YORK STATE

Mr. Chairman and Members of the Subcommittee, thank you for this opportunity to express our views on your proposed changes to the federal grand jury system as embodied in H.R. 94.

We in the Grand Jurors Associations, active participants in the system, have been concerned for years at what appears to be a continued effort to weaken and/or destroy the effectiveness of a grand jury system that has served us in good stead for more than two centuries. Many of the provisions of H.R. 94 are those we have been fending off at the State level year in and year out. We fear their adoption by you would be used as a "compelling reason" for New York State to follow suit and make beating the system just that much easier at both levels.

Before it becomes obvious, I would like to emphasize that we are not attorneys but concerned laymen. Our interest is in the spirit of the law rather than its intricacies. We are disturbed that the successful defense attorney is the one who can search out procedural flaws in the handling of a case (be it by a careless police officer or an inexperienced prosecutor) without regard to the objective truth of the evidence, and thus free a criminal to prey again on society. We do not look with favor on more loopholes through which the guilty, aided and abetted by sophisticated counsel, can slip. We are equally, if not more concerned with the protection of the innocent. To this end we are staunch supporters of the people's right to monitor their own system of justice through effective grand juries.

It has been alleged that the grand jury is too often a "rubber stamp" for the prosecutor. Available facts do not bear this out. The most recent figures concerning the work of grand juries in the State of New York that I have been able to obtain show the following:

	Total dispositions	Indictments returned	Years of treatment recommended	Referred to lower courts	Dismissed
Year:					
1969	35,613	27,050	2,440	2,968	3,155
1970	37,019	30,545	2,196	2,821	3,457
1971	45,531	36,635	1,688	2,956	4,202
1972	51,743	43,269	(1)	3,395	5,079
1973	43,924	35,521	(1)	3,751	4,652

[1] This option removed from grand jury consideration in 1971.

At the State level we have long argued against the random selection of the entire grand jury list, believing that the presence of some experienced grand jurors on each grand jury acts as a shield against excesses which might otherwise occur. We believe there is sufficient attrition among panel members, due to relocations and other causes, to require a constant flow of new panelists—on average, 10 percent a year. This permits the orderly absorption of inexperienced grand jurors in to the work of a sitting grand jury and serves the best interests of both the accused and society. We suggest that a true reform would be to strengthen the federal grand jury system by establishing a pool of experienced grand jurors. I trust you will agree that jury service for a short period of time every other year would not create a professional jury, but would reduce exposure to possible "rubber stamp" indictments.

The secrecy of grand jury proceedings is paramount to justice. When secrecy is violated the good names, character and reputations of innocents can be maligned and irreparably damaged. H.R. 94 contains too many exemptions from its secrecy provisions. Unless and until a crime is charged, secrecy should be binding on all.

We do not support the presence of witnesses' attorneys in the grand jury room. A grand jury investigation is not an adversary proceeding. A witness who is ordered to testify after he has refused on the basis of his privilege against self-incrimination receives immunity. There is no need for a defense attorney in the grand jury room. Such presence also increases the risk of secrecy leaks, and could prove dangerous to a cooperating witness in a matter dealing with organized crime.

H.R. 94 requires, among other things, that witnesses served with a subpoena be told the subject matter of the grand jury investigation. We believe this is too broad and that it increases the risk of leaks. It should be sufficient that a witness be told the subject matter about which he will be questioned.

The reduction in the number of grand jurors to not less than nine can lead to difficulties. It makes it possible for a very small number, possibly one, to hamstring the jury. I say possibly one because it is usual for jurors who have not heard all the testimony, due to an absence during a long investigation, to refrain from voting. We would recommend staying with the present 23 jurors.

We also believe the sections of H.R. 94 relating to recalcitrant witnesses weaken the grand jury's ability to obtain necessary testimony, a step in the wrong direction.

Copy of a witness' testimony, under such conditions as the court deems reasonable (certainly subject to various interpretations), is made available to him or his attorney. Here too, secrecy is endangered. Certainly no one should need a copy of his testimony before an indictment is voted.

We find no objection to transactional immunity, a practice in New York. We support the sections relating to the appointment of a special attorney upon the request of a sitting grand jury, agree with the provisions relating to the location of proceedings, and certainly believe a grand jury should be properly instructed.

However, on balance, we do not believe H.R. 94 is a good bill. If there are prosecutors who abuse the grand jury system the remedy is to seek them out and hold them to account, not to emasculate the system and perhaps create more problems than we solve. We urge you to let H.R. 94 die in Committee.

Mr. LYONS. We are very concerned with grand jury legislation both as citizens and as participants in the system. We see the primary purpose of our criminal justice system as being to protect the innocent and punish the guilty. We take our duties seriously. We do not see a grand jury proceeding as a trial; we see it as an investigation toward the end of justice.

Any reform, I think, has to weigh and balance the rights of all, including the people. No system devised by imperfect man and operated by imperfect man is going to be foolproof. There are going to be abuses. The abusers should be sought out. We don't think you should emasculate the system.

I heard several references to the "rubber stamp" charge. In my prepared statement, I included statistics from 1969 to 1973 in New York

State which tend to refute such charges. In this regard, Mr. Curran testified that he had very few dismissals. That very well could reflect the quality of the cases he presented. In the State jury's system you hear cases referred to the grand jury by the criminal court. These may or may not have the same weight of evidence behind them.

But if reform is needed, and I don't think change necessarily means reform, one of the areas you should consider is the inclusion of some experienced grand jurors on every grand jury. You referred earlier to a possible question of constitutionality. In our State random selection is used but only to fill vacancies or expand the existing panel. This results, over the course of several years, in a rather large turnover, but also tends to put a few experienced jurors on every jury.

I think the secrecy provisions have to be strengthened to avoid doing a lot of damage to innocent people, but yet, in H.R. 94. I find several provisions that seem to mitigate against secrecy.

Counsel in the jury room. One attorney who is really representing the target, can appear to represent other witnesses. Telling witnesses the subject matter of the investigation. It seems to us it would be enough to tell them what you are going to ask about, not the whole subject matter of the investigation. This leads to leaks and to the general knowledge of an original opposition. Provisions for the distribution of witnesses' testimony—I don't think anyone needs such testimony until after there is an indictment. If testimony starts going out too early there is the risk of a trade, as Mr. Curran said, between attorneys. Again, your secrecy goes down the drain.

H.R. 94 allows too many of exceptions to secrecy requirements—third parties, the press, nearly everyone. I think the rules should apply to all, otherwise you are going to damage innocent reputations.

Again as to counsel in the jury room, we do not see it as an adversary proceeding, but rather as a review, an investigation. It is not a two-sided situation. We review the evidence to determine if a trial is warranted. I think in addition to some of the things mentioned today, you are going to have counsel in there giving advice on strategic answers, how to answer questions, how to phrase answers and perhaps orchestrating the whole investigation or hearing.

You call for a reduction in the number of jurors to possibly nine. I am not sure this would be a good step. I think, as was mentioned before, you need interaction between jurors, and with a larger group you will get more of it. In a small group it is much easier for a strong-willed person—and he could be the prosecutor or one of the jurors—to dominate. That is less likely when you have the larger number.

The penalties for recalcitrant witnesses seem very mild in my view. I believe some witnesses would be willing to take 6 months to avoid testifying and we are not only talking about past crimes; but about investigations where the crimes are still happening. I'm thinking of those groups that are conducting bombings and things like that as a form of protest.

In summary, if there are abuses in the system you should seek them out and hold them to account or get rid of them. I don't think you should knock out the system.

My experience with the grand jury—as you asked Mr. Ashley—I have been serving since about 1961. I have probably sat on 11 or 12 juries.

Mr. EILBERG. For how many months?

Mr. LYONS. We sit 1 month at a time, 2 days a week.

Mr. EILBERG. Would you mind repeating the nature of your service as a grand juror?

Mr. LYONS. Yes. Normally we serve for 1 month, unless we are held over for an ongoing investigation; and we serve 2 days a week.

Mr. EILBERG. How many months have you served, approximately?

Mr. LYONS. I have served 11 or 12 times, and with holdovers I probably have served 14 or 15 months in the aggregate over the last 17 years and I never had the experiences that everyone is talking about here. I found the jurors very conscientious and very concerned about seeking out the truth of any matter before voting.

Mr. EILBERG. Well, we have heard of abuses, and that is the reason for the various bills that have been introducted and why we are conducting extensive hearings. We have not made up our mind in a fixed fashion as to anything. All these bills represent starting points and not conclusions, and that is why we are having hearings and will continue to have hearings.

Gentlemen, once again, we are going to send you—I don't know whether counsel can do it right now while you are here—questions that we would like to have each of you separately answer, identical questions, and then questions separately for each of you, which will basically deal with your experiences in the grand jury room which we are most interested in hearing more about.

If it is possible, and we just can't predict at this point, we might have you back at another time. But there are so many people we do want to hear from.

Mr. Harris.

Mr. HARRIS. Not at all. I am conscious of the time as my chairman has been going at this for quite a few hours and now I have been very interested in the testimony.

And I have one sort of tangential question with regard to the testimony I heard from Mr. Lyons, and perhaps Mr. Ashley too. On first blush I was sort of surprised to hear you say that you had been selected 11 times for a grand jury. How does that happen? Why would you be selected 11 times for grand jury?

Mr. LYONS. We have a grand jury panel, I think at the present moment in our county it consists of 2,600 names.

Mr. HARRIS. What is the population in your county?

Mr. LYONS About a million and a half, I guess.

Mr. HARRIS. You are Bronx, right?

Mr. LYONS. Yes, sir.

Mr. HARRIS. I could tell.

Mr. LYONS. Well, we have, I think 2,600 on the panel.

Mr. HARRIS. You are on that panel and that panel gets drawn from; is that it?

Mr. LYONS. Yes. We use random selection. The county clerk uses random selection to fill vacancies or expand the number on the panel.

Mr. HARRIS. I see.

That, 2,600 names, how does that get selected; do you know?

Mr. LYONS. The selection, as far as I know, is from voter lists, utility lists, or whatever the various sources of names the county clerk uses.

Mr. HARRIS. You don't know what the random selection is from.

Mr. LYONS. No.

Mr. HARRIS. Do you know how often they update the list?

Mr. LYONS. Annually.

Mr. HARRIS. I don't exactly know what you mean. You mean annually they completely redo the random selection?

Mr. LYONS. No. I believe they use random selection only to fill vacancies. If we have 2,600 now, come December 31, we may only have 2,000 because of deaths, people moving and so forth.

Mr. HARRIS. Basically you get vacancies by deaths, resignations; that sort of thing?

Mr. LYONS. Right.

Mr. HARRIS. So if a person is once on the panel, and didn't move or die or something like that, they would stay on the panel?

Mr. LYONS. Up to now. There are attempts in the package of bills Mr. Ashley referred to, to make it entirely random selection. Once you serve you would be off the list.

Mr. HARRIS. Thank you, Mr. Chairman.

Mr. EILBERG. I'm sorry to limit you in that way because the subject is so important, but we are now being called for floor vote.

Mr. HARRIS. I am finished. Thank you.

Mr. EILBERG. Thank you very much, gentlemen. This hearing is adjourned.

[The questions to the panel with responses follow:]

GRAND JURORS ASSOCIATION,
BRONX COUNTY, INC.,
Bronx, N.Y., May 11, 1977.

Re grand jury hearing, April 27, 1977.

Hon. JOSHUA EILBERG, *Chairman, Subcommittee on Immigration, Citizenship, and International Law, Rayburn House Building, Washington, D.C.*

DEAR MR. EILBERG: Enclosed are responses to the two sets of written questions you asked me to answer by mail following my appearance before your subcommittee on April 27, 1977.

In reply to question No. 6 of the questions for grand jury panel I refer to the distribution of copies of Article 190, Criminal Procedure Law, as a supplement to the oral instructions given by the judge. For your use and reference I am including a copy herewith.

Also enclosed is a copy of a recent publication on grand juries prepared and distributed by our Association as a public education effort in our own community. I trust it will give you some sense of the respect and concern we have for the system.

Very truly yours,

JOHN J. LYONS.

Enclosed.

ANSWERS TO SPECIFIC QUESTIONS FOR JOHN J. LYONS, CHAIRMAN, LAWS & LEGISLATION COMMITTEE, GRAND JURORS ASSOCIATION, BRONX COUNTY

Question 1. You state that exempting a witness and his attorney from the secrecy requirement is unwarranted. As you might be aware, federal law now exempts witnesses and counsel from the secrecy requirements and this has caused little if any problems. Would you comment?

Answer. 1. Whether or not the present law caused or causes any problems is a matter of opinion. I would agree that the day to day work of a sitting grand jury is probably not bothered by it because the subject matter is not particularly newsworthy. However the situation seems to change where a public or other prominent figure is tied in to an on-going investigation. Here the bits and pieces are put together and the so called inside story announced to the world. This violates my sense of fairness. I believe that tightening the secrecy rules would reduce premature, and possibly erroneous, disclosure.

Question 2. Again, as to secrecy, the Department of Justice, and others, have proposed an amendment to the federal rules to allow government investigators from other agencies, such as the F.B.I. and the Internal Revenue Service, to be present in the grand jury room. Would you comment?

Answer. 2. In my view the grand jury is an independent body, representing the people, whose function is to determine whether or not there is sufficient evidence in the given circumstances to warrant a trial. It is not, and should not be, a manipulative arm of any government agency. I would oppose the presence of such observers.

Question. 3. You stated that special circumstances should allow a grand jury investigation to be extended beyond 3 years. Could you give us an illustration of such special circumstances? Would not a jury become so involved in a case at this point as to lose its alleged objectivity?

Answer 3. I had in mind the location of a previously unknown or missing key witness just prior to the expiration of the extended term of the jury. This could be cured by permitting the evidence to be resubmitted to a subsequent grand jury, but this would necessitate much duplication of effort. I do not believe that an extended term equates with a loss of objectivity. As a practical matter, at least in New York State, an extended jury meets less frequently than its regular term counterparts.

Question 4. You support provisions allowing an independent attorney to be requested by a grand jury. Under what circumstances should such an attorney be appointed? What should be his role? Would this not lead to multiple investigations as to the same incident?

Answer 4. Special counsel seldom, if ever, should be required. If a grand jury is dealing with a matter that might reflect on the prosecutor's office, or otherwise raises questions as to conflict of interest, then the alternative of an independent counsel should be available. His role would be that normally played by the prosecutor and not a parallel to it.

Question 5. You oppose telling witnesses the subject matter of an investigation. Should not a witness be able to prepare for his testimony before a grand jury, as he would for any other judical proceeding?

Answer 5. It was not my intention to suggest a witness come in cold. However I believe the words "subject matter of the investigation" are too broad and could be interpreted to mean more than "the subject matter about which he will be questioned".

Question 6. You oppose provisions allowing a witness to have his counsel present while testifying. A study made by the District Attorney of Dade County, Miami, Florida, head of the American Bar Association Grand Jury Committee, and by our staff, reveals that in the 9 states that presently allow counsel in the room, there have been few if any problems. Our bill would allow counsel to advise his client only and not to be an adversary. This would eliminate the need to have a witness go in and out of the grand jury room, as presently allowed, to consult with his attorney. In addition, obstreperous counsel, under the bill could be controlled and, if necessary, removed by the Court. Do you still oppose our proposal and if so, why?

Answer 6. Yes, I oppose it for several reasons. It increases the risk of leaks. A grand jury investigation is not an adversary proceeding and should not be turned into one. There will be more delays resulting from appearances before the judge to determine if counsel is exceeding his allowed function than we have now from the few witnesses who leave the room to consult with counsel. It creates risks for cooperating witnesses who may be forced by circumstances or associates to be represented by the target's counsel. It offers an opportunity for such counsel to orchestrate strategic answers from several witnesses. A witness with immunity should not need counsel to protect him from the People.

ANSWERS BY JOHN J. LYONS TO QUESTIONS FOR GRAND JURY PANEL

Question 1. Could you tell us how often the grand jury or grand juries on which you sat did not accept the recommendations of the government attorney and did or did not indict? Mr. Lyons has submitted some statistics but this only shows dismissals and do not relate to the recommendations of the prosecutor!

Answer 1. Most of the assistant district attorneys who presented evidence to the grand juries on which I have served have been scrupulous in explaining the possible charges to be considered depending on the jury's evaluation of the evidence. In such circumstances it is difficult to conclude how often there was agreement or disagreement with the vote as it related to the classification or degree of crime charged. The thrust of your question as to non-indicting is correct.

There were cases where no other decision was possible, and the prosecutor so advised. However, I have no recollection of ever serving on a jury that did not dismiss one or more accused contrary to the recommendation of the prosecutor.

Question 2. Were you or any grand jurors ever consulted about which witnesses were to be subpoenaed?

Answer 2. No, except in cases where the request originated with the jury.

Question 3. Were you or any other grand jurors ever consulted about which witnesses should be granted immunity?

Answer 3. This does not apply in New York State where all witnesses before the grand jury are immunized unless they sign a waiver of immunity.

Question 4. How often did the grand jurors, as separate from the prosecutor, actually ask questions?

Answer 4. Before a witness is dismissed the prosecutor asks if there are any further questions from the jurors. More often than not there are some questions, which are then asked through the prosecutor.

Question 5. Who determined, prosecutor or jurors, what cases or leads were to be investigated?

Answer 5. Cases are brought in by the prosecutor. However, based on heard testimony, it is not uncommon for the jury to ask for additional witnesses whose testimony may assist them in reaching a proper decision.

Question 6. Could you tell us what instructions, if any, the supervising judge or the prosecutor gave you as to your duties and responsibilities?

Answer 6. I found the oral instructions to be rather complete (approximately 30 to 40 minutes) in explaining the jurors responsibilities, rights and functions. They always included notice that the judge himself was available to any juror. In addition printed copies of Article 190 of the Criminal Procedure Law, relating to the grand jury and its proceedings, were distributed to each member of the panel.

Question 7. Were you ever present when a witness invoked the Fifth Amendment? If so, what was the reaction of you and your fellow jurors?

Answer 7. I have no recollection of any witness invoking Fifth Amendment rights.

Question 8. Did the prosecutor ever present evidence favorable to a potential defendant? If so, could you describe an example?

Answer 8. Yes, usually in the form of contradictory witnesses.

Question 9. Were you ever told by the prosecutor information about the case or an individual that had not been presented by a witness?

Answer 9. No. On the contrary I have been told to disregard hearsay information when it was included in a witness' reply to a question.

Question 10. What was your reaction when a witness asked to leave the grand jury room and consult with his attorney? How often did witnesses make this request?

Answer 10. I hope it would not provoke any reaction. It happened seldom, perhaps 2 or 3 times, and I have no strong recollection of anyone's reaction.

Question 11. What was your reaction when a witness asked to go before the judge to challenge some action? How often did this occur?

Answer 11. I do not recall any such request.

Question 12. Could you describe for us the process by which jurors vote on indictments? How long does this process usually take? What amount of proof did you believe necessary to indict?

Answer 12. Generally the foreman calls for comments and discussion. If there are any questions concerning the particular statute, the assistance district attorney is called in to explain it further. If there is concern about possible conflicts in testimony, or possibly other witnesses who were not heard, the jury decides whether or not to instruct the assistant district attorney to recall or obtain the witnesses needed to resolve the problem. If this is done, the vote is postponed. When there is majority agreement that the jury is ready to vote, it is done starting with the most serious charge to be considered. Depending on the case and the weight of evidence the time frame could vary from a few minutes to half an hour or more. The key factor is when the jury decides it is ready to vote. As to proof I believe the evidence and testimony presented should be sufficient to lead me to reasonably conclude that the defendant committed the crime charged.

Question 13. Were you ever aware of grand jury investigations being undertaken by more than one grand jury? What was your reaction?

Answer 12. No.

[From 38 Rev.]

Instructions to Grand Jurors

Supreme Court of the State of New York
First Judicial District—New York and Bronx Counties

Article 190—The Grand Jury and Its Proceedings
Sections 190.05 to 190.90 Inclusive, Criminal Procedure Law.

§ 190.05 Grand Jury; Definition and General Functions. A grand jury is a body consisting of not less than sixteen nor more than twenty-three persons, impaneled by a superior court and constituting a part of such court, the functions of which are to hear and examine evidence concerning offenses and concerning misconduct, nonfeasance and neglect in public office, whether criminal or otherwise, and to take action with respect to such evidence as provided in section 190.60.

§ 190.10 Grand Jury; For What Courts Drawn. The appellate division of each judicial department shall adopt rules governing the number and the terms for which grand juries shall be drawn and impaneled by the superior courts within its department; provided, however, that a grand jury may be drawn and impaneled for any extraordinary term of the supreme court upon the order of a justice assigned to hold such term.

§ 190.15 Grand Jury; Duration of Term and Discharge. 1. A term of a superior court for which a grand jury has been impaneled remains in existence at least until and including the opening date of the next term of such court for which a grand jury has been designated. Upon such date, or within five days preceding it, the court, may upon declaration of both the grand jury and the district attorney that such grand jury has not yet completed or will be unable to complete certain business before it, extend the term of court and the existence of such grand jury to a specified future date, and may subsequently order further extensions for such purpose.

2. At any time when a grand jury is in recess and no other appropriate grand jury is in existence in the county, the court may, upon application of the district attorney or of a defendant held by a local criminal court for the action of a grand jury, order such grand jury reconvened for the purpose of dealing with a matter requiring grand jury action.

§ 190.20 Grand Jury; Formation, Organization and Other Matters Preliminary to Assumption of Duties. 1. The mode of selecting grand jurors and of drawing and impaneling grand juries is governed by the judiciary law.

2. Neither the grand jury panel nor any individual grand juror may be challenged, but the court may:

(a) At any time before a grand jury is sworn, discharge the panel and summon another panel if it finds that the original panel does not substantially conform to the requirements of the judiciary law; or

(b) At any time after a grand juror is drawn, refuse to swear him or discharge him after he has been sworn, upon a finding that he is disqualified from service pursuant to the judiciary law, or incapable of performing his duties, because of bias or prejudice, or guilty of misconduct in the performance of his duties such as to impair the proper functioning of the grand jury.

3. After a grand jury has been impaneled, the court must appoint one of the grand jurors as foreman and another to act as foreman during any absence or disability of the foreman. At some time before commencement of their duties, the grand jurors much appoint one of their number as secretary to keep records material to the conduct of the grand jury's business.

4. The grand jurors must be sworn by the court. The oath may be in any form or language which requires the grand jurors to perform their duties faithfully.

5. After a grand jury has been sworn, the court must deliver or cause to be delivered to each grand juror a printed copy of all the provisions of this article, and the court may, in addition, give the grand jurors any oral instructions relating to the proper performance of their duties as it deems necessary or appropriate.

6. If two or more grand juries are impaneled at the same court term, the court may thereafter, for good cause, transfer grand jurors from one panel to

another, and any grand juror so transferred is deemed to have been sworn as a member of the panel to which he has been transferred.

§ 190.25 Grand Jury; Proceedings and Operation in General. 1. Proceedings of a grand jury are not valid unless at least sixteen of its members are present. The finding of an indictment, a direction to file a prosecutor's information, a decision to submit a grand jury report and every other affirmative official action or decision requires the concurrence of at least twelve members thereof.

2. The foreman or any other grand juror may administer an oath to any witness appearing before the grand jury.

3. During the deliberations and voting of a grand jury, only the grand jurors may be present in the grand jury room. During its other proceedings, the following persons, in addition to witnesses, may as the occasion requires, also be present:

(a) The district attorney;

(b) A clerk or other public servant authorized to assist the grand jury in the administrative conduct of its proceedings;

(c) A stenographer authorized to record the proceedings of the grand jury;

(d) An interpreter. Upon request of the grand jury, the prosecutor must provide an interpreter to interpret the testimony of any witness who does not speak the English language well enough to be readily understood. Such interpreter must, if he has not previously taken the constitutional oath of office, first take an oath before the grand jury that he will faithfully interpret the testimony of the witness and that he will keep secret all matters before such grand jury within his knowledge;

(e) A public servant holding a witness in custody. When a person held in official custody is a witness before a grand jury, a public servant assigned to guard him during his grand jury appearance may accompany him in the grand jury room. Such public servant must, if he has not previously taken the constitutional oath of office, first take an oath before the grand jury that he will keep secret all matters before it within his knowledge.

4. Grand jury proceedings are secret, and no grand juror or other person specified in subdivision three may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, or any decision, result or other matter attending a grand jury proceeding.

5. The grand jury is the exclusive judge of the facts with respect to any matter before it.

6. The legal advisors of the grand jury are the court and the district attorney, and the grand jury may not seek or receive legal advice from any other source. Where necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it, and such instructions must be recorded in the minutes.

§ 190.3 Grand Jury; Rules of Evidence 1. Except as otherwise provided in this section, the provisions of article sixty, governing rules of evidence and related matters with respect to criminal proceedings in general, are, where appropriate, applicable to grand jury proceedings.

2. A report or a copy of a report made by a public servant, or by a person employed by a public servant or agency, who is a physicist, chemist, firearms identification expert, examiner of questioned documents, fingerprint technician, or an expert or technician in some comparable scientific or professional field, concerning the results of an examination, comparison or test performed by him in connection with a case which is the subject of a grand jury proceeding, may, when certified by such person as a report made by him or as a true thereof, be received in such grand jury proceeding as evidence of the facts stated therein.

3. Wherever it is provided in article sixty that the court in a criminal proceeding must rule upon the competency of a witness to testify or upon the admissibility of evidence, such ruling may, in an equivalent situation in a grand jury proceeding, be made by the district attorney.

4. Wherever it is provided in article sixty that a court presiding at a jury trial must instruct the jury with respect to the significance, legal effect or evaluation of evidence, the district attorney, in an equivalent situation in a grand jury proceeding, may so instruct the grand jury.

§ 190.35 Grand Jury; Definitions of Terms. The term definitions contained in section 50.10 are applicable to sections 194.40, 190.45 and 190.50.

§ 190.40 Grand Jury; Witnesses, Compulsion of Evidence and Immunity 1. Every witness in a grand jury proceeding must give any evidence legally requested of him regardless of any protest or belief on his part that it may tend to incriminate him.

2. A witness who gives evidence in a grand jury proceeding receives immunity unless:

(a) He has effectively waived such immunity pursuant to section 190.45; or,

(b) Such evidence is not responsive to any inquiry and is gratuitously given or volunteered by the witness with knowledge that it is not responsive.

§ 190.45 Grand Jury; Waiver of Immunity 1. A waiver of immunity is a written instrument subscribed by a person who is or is about to become a witness in a grand jury proceeding, stipulating that he waives his privilege against self-incrimination and any possible or prospective immunity to which he would otherwise become entitled, pursuant to section 190.40, as a result of giving evidence in such proceeding.

2. A waiver of immunity is not effective unless and until it is sworn to before the grand jury conducting the proceeding in which the subscriber has been called as a witness.

3. A person who is called by the people as a witness in a grand jury proceeding and requested by the district attorney to subscribe and swear to a waiver of immunity before giving evidence has a right to confer with counsel before deciding whether he will comply with such request, and, if he desires to avail himself of such right, he must be accorded a reasonable time in which to obtain and confer with counsel for such purpose. The district attorney must inform the witness of all such rights before obtaining his execution of such a waiver of immunity. Any waiver obtained, subscribed or sworn to in violation of the provisions of this subdivision is invalid and ineffective.

4. If a grand jury witness subscribes and swears to a waiver of immunity upon an express understanding with the district attorney that the interrogation will be limited to certain specified subjects, matters or areas of conduct, and if after the commencement of his testimony he is interrogated concerning another subject, matter or area of conduct not included in the original understanding, he may withdraw or qualify his waiver of immunity accordingly by orally declaring before the grand jury his refusal to testify concerning such other matter unless he is granted immunity with respect thereto. Upon such declaration of withdrawal or qualification, the witness receives immuntiy with respect to any further testimony which he may give concerning such other matter and the waiver of immunity is to that extent ineffective.

§ 190.50 Grand Jury; Who May Call Witnesses; Defendant as Witness 1. Except as provided in this section, no person has a right to call a witness or appear as a witness in a grand jury proceeding.

2. The people may call as a witness as in a grand jury proceeding any person believed by the district attorney to possess relevant information or knowledge.

3. The grand jury may cause to be called as a witness any person believed by it to possess relevant information or knowledge. If the grand jury desires to hear any such witness who was not called by the people, it may direct the district attorney to issue and serve a subpoena upon such witness, and the district attorney must comply with such direction. At any time after such a direction, however, or at any time after the service of a subpoena pursuant to such a direction and before the return date thereof, the people may apply to the court which impaneled the grand jury for an order vacating or modifying such direction or subpoena on the ground that such is in the public interest. Upon such application, the court may in its discretion vacate the direction or subpoena, attach reasonable conditions thereto, or make other appropriate qualification thereof.

4. Notwithstanding the provisions of subdivision three, the district attorney may demand that any witness thus called at the instance of the grand jury sign a waiver of immunity pursuant to section 190.45 before being sworn, and upon such demand no oath may be administered to such witness unless and until he complies therewith.

5. Although not called as a witness by the people or at the instance of the grand jury, a person has a right to be a witness in a grand jury proceeding under circumstances prescribed in this subdivision:

(a) When a criminal charge against a person is being or is about to be or has been submitted to a grand jury, such person has a right to appear before such grand jury as a witness in his own behalf if, prior to the filing of

any indictment or any direction to file a prosecutor's information in the matter, he serves upon the district attorney of the county a written notice making such request and stating an address to which communications may be sent. The district attorney is not obliged to inform such a person that such a grand jury proceeding against him is pending, in progress or about to occur unless such person is a defendant who has been arraigned in a local criminal court upon a currently undisposed of felony complaint charging an offense which is a subject of the prospective or pending grand jury proceeding. In such case, the district attorney must notify the defendant or his attorney of the prospective or pending grand jury proceeding and accord the defendant a reasonable time to exercise his right to appear as a witness therein;

(b) Upon service upon the district attorney of a notice requesting appearance before a grand jury pursuant to paragraph (a), the district attorney must notify the foreman of the grand jury of such request, and must subsequently serve upon the applicant, at the address specified by him, a notice that he will be heard by the grand jury at a given time and place. Upon appearing at such time and place, and upon signing and submitting to the grand jury a waiver of immunity pursuant to section 190.45, such person must be permitted to testify before the grand jury and to give any relevant and competent evidence concerning the case under consideration. Upon giving such evidence, he is subject to examination by the people.

(c) Any indictment or direction to file a prosecutor's information obtained or filed in violation of the provisions of paragraph (a) or (b) is invalid and, upon a motion made pursuant to section 170.50 or section 210.20, must be dismissed; provided that a motion based upon such ground must be made not more than five days after the defendant has been arraigned upon the indictment or, as the case may be, upon the prosecutor's information resulting from the grand jury's direction to file the same. If the contention is not so asserted in timely fashion, it is waived and the indictment of prosecutor's information may not thereafter be challenged on such ground.

6. A defendant or person against whom a criminal charge is being or is about to be brought in a grand jury proceeding may request the grand jury, either orally or in writing, to cause a person designated by him to be called as a witness in such proceeding. The grand jury may as a matter of discretion grant such request and cause such witness to be called pursuant to subdivision three.

§ 190.55 Grand Jury: Matters To Be Heard and Examined; Duties and Authority of District Attorney 1. A grand jury may hear and examine evidence concerning the alleged commission of any offense prosecutable in the courts of the county, and concerning any misconduct, nonfeasance or neglect in public office by a public servant, whether criminal or otherwise.

2. District attorneys are required or authorized to submit evidence to grand juries under the following circumstances:

(a) A district attorney must submit to a grand jury evidence concerning a felony allegedly committed by a defendant who, on the basis of a felony complaint filed with a local criminal court of the county, has been held for the action of a grand jury of such county.

(b) A district attorney must submit to a grand jury evidence concerning a misdemeanor allegedly committed by a defendant who has been charged therewith by a local criminal court accusatory instrument, in any case where a superior court of the county has, pursuant to subdivision one of section 170.25, ordered that such misdemeanor charge be prosecuted by indictment in a superior court.

(c) A district attorney may submit to a grand jury any available evidence concerning an offense prosecutable in the courts of the county, or concerning misconduct, nonfeasance or neglect in public office by a public servant, whether criminal or otherwise.

§ 190.60 Grand Jury Action To Be Taken After hearing and examining evidence as prescribed in section 190.55, a grand jury may:

1. Indict a person for an offense, as provided in section 190.65;

2. Direct the district attorney to file a prosecutor's information with a local criminal court, as provided in section 190.70;

3. Dismiss the charge before it, as provided in section 190.75;

4. Submit a grand jury report, as provided in section 190.85.

§ 190.65 Grand Jury; When Indictment is Authorized 1. Subject to the rules prescribing the kinds of offenses which may be charged in an indictment, a grand jury may indict a person for an offense when (a) the evidence before it is legally

sufficient to establish that such person committed such offense and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense.

2. The offense or offenses for which a grand jury may indict a person in any particular case are not limited to that or those which may have been designated, at the commencement of the grand jury proceeding, to be the subject of the inquiry; and even in a case submitted to it upon a court order, pursuant to the provisions of section 170.25, directing that a misdemeanor charge pending in a local criminal court be prosecuted by indictment, the grand jury may indict the defendant for a felony if the evidence so warrants.

3. Upon voting to indict a person, a grand jury must, through its foreman or acting foreman, file an indictment with the court by which it was impaneled.

§ 190.70 Grand Jury; Direction To File Prosecutor's Information and Related Matters 1. Except in a case submitted to it pursuant to the provisions of section 170.25, a grand jury may direct the district attorney to file in a local criminal court a prosecutor's information charging a person with an offense other than a felony when (a) the evidence before it is legally sufficient to establish that such person committed such offense, and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense. In such case, the grand jury must, through its foreman or acting foreman, file such direction with the court by which it was impaneled.

2. Such direction must be signed by the foreman or acting foreman. It must contain a plain and concise statement of the conduct constituting the offense to be charged, equivalent in content and precision to the factual statement required to be contained in an indictment pursuant to subdivision seven of section 200.50. Subject to the rules prescribed in sections 200.20 and 200.40 governing joinder in a single indictment of multiple offenses and multiple defendants, such grand jury direction may, where appropriate, specify multiple offenses of less than felony grade and multiple defendants, and may direct that the prospective prosecutor's information charge a single defendant with multiple offenses, or multiple defendants jointly with either a single offense or multiple offenses.

3. Upon the filing of such grand jury direction, the court must, unless such direction is insufficient on its face, issue an order approving such direction and ordering the district attorney to file such a prosecutor's information in a designated local criminal court having trial jurisdiction of the offense or offenses in question.

§ 190.75 Grand Jury: Dismissal of Charge. 1. If upon a charge that a designated person committed a crime, either (a) the evidence before the grand jury is not legally sufficient to establish that such person committed such crime or any other offense, or (b) the grand jury is not satisfied that there is reasonable cause to believe that such person committed such crime or any other offense, it must dismiss the charge. In such case, the grand jury must, through its foreman or acting foreman, file its finding of dismissal with the court by which it was impaneled.

2. If the defendant was previously held for the action of the grand jury by a local criminal court, the superior court to which such dismissal is presented must order the defendant released from custody if he is in the custody of the sheriff, or, if he is at liberty on bail, it must exonerate the bail.

3. When a charge has been so dismissed, it may not again be submitted to a grand jury unless the court in its discretion authorizes or directs the people to resubmit such charge to the same or another grand jury. If in such case the charge is again dismissed, it may not again be submitted to a grand jury.

§ 190.80 Grand Jury: Release of Defendant Upon Failure of Timely Grand Jury Action. Upon application of a defendant who on the basis of a felony complaint has been held by a local criminal court for the action of a grand jury, and who, at the time of such order or subsequent thereto, has been committed to the custody of the sheriff pending such grand jury action, and who has been confined in such custody for a period of more than forty-five days without the occurrence of any grand jury action or disposition pursuant to subdivision one, two or three of section 190.60, the superior court by which such grand jury was or is to be impaneled must release him on his own recognizance unless:

(a) The lack of a grand jury disposition during such period of confinement was due to the defendant's request, action or condition, or occurred with his consent; or

(b) The people have shown good cause why such order of release should not be issued. Such good cause must consist of some compelling fact or cir-

cumstance which precluded grand jury action within the prescribed period or rendered the same against the interest of justice.

§ 190.85 Grand Jury; Grand Jury Reports 1. The grand jury may submit to the court by which it was impaneled, a report:

(a) Concerning misconduct, non-feasance or neglect in public office by a public servant as the basis for a recommendation of removal or disciplinary action; or

(b) Stating that after investigation of a public servant it finds no misconduct, non-feasance or neglect in office by him provided that such public servant has requested the submission of such report; or

(c) Proposing recommendations for legislative, executive or administrative action in the public interest based upon stated findings.

2. The court to which such report is submitted shall examine it and the minutes of the grand jury and, except as otherwise provided in subdivision four, shall make an order accepting and filing such report as a public record only if the court is satisfied that it complies with the provisions of subdivision one and that:

(a) The report is based upon facts revealed in the course of an investigation authorized by section 190.55 and is supported by the preponderance of the credible and legally admissible evidence; and

(b) When the report is submitted pursuant to paragraph (a) of subdivision one, that each person named therein was afforded an opportunity to testify before the grand jury prior to the filing of such report, and when the report is submitted pursuant to paragraph (b) or (c) of subdivision one, it is not critical of an identified or identifiable person.

3. The order accepting a report pursuant to paragraph (a) of subdivision one, and the report itself, must be sealed by the court and may not be filed as a public record, or be subject to subpoena or otherwise be made public until at least thirty-one days after a copy of the order and the report are served upon each public servant named therein, or if an appeal is taken pursuant to section 190.90, until the affirmance of the order accepting the report, or until reversal of the order sealing the report, or until dismissal of the appeal of the named public servant by the appellate division, whichever occurs later. Such public servant may file with the clerk of the court an answer to such report, not later than twenty days after service of the order and report upon him. Such an answer shall plainly and concisely state the facts and law constituting the defense of the public servant to the charges in said report, and except for those parts of the answer which the court may determine to be scandalously or prejudicially and unnecesarily inserted therein, shall become an appendix to the report. Upon the expiration of the time set forth in this subdivision, the district attorney shall deliver a true copy of such report, and the appendix if any, for appropriate action, to each public servant or body having removal or disciplinary authority over each public servant named therein.

4. Upon the submission of a report pursuant to subdivision one, if the court finds that the filing of such report as a public record, may prejudice fair consideration of a pending criminal matter, it must order such report sealed and such report may not be subject to subpoena or public inspection during the pendency of such criminal matter, except upon order of the court.

5. Whenever the court to which a report is submitted pursuant to paragraph (a) of subdivision one is not satisfied that the report complies with the provisions of subdivision two, it may direct that additional testimony be taken before the same grand jury, or it must make an order sealing such report, and the report may not be filed as a public record, or be subject to subpoena or otherwise be made public.

§ 190.90 Grand jury; Appeal from Order Concerning Grand Jury Reports 1. When a court makes an order accepting a report of a grand jury pursuant to paragraph (a) of subdivision one of section 190.85, any public servant named therein may appeal the order; and when a court makes an order sealing a report of a grand jury pursuant to subdivision five of section 190.85, the district attorney or other attorney designated by the grand jury may appeal the order.

2. When a court makes an order sealing a report of the grand jury pursuant to subdivision five of section 190.85, the district attorney or other attorney designated by the grand jury may, within ten days after service of a copy of the order and report upon each public servant named in the report, appeal the order to the appellate division of the department in which the order was made, by filing in duplicate a notice of appeal from the order with the clerk of the court in which

the order was made and by serving a copy of such notice of appeal upon each such public servant. Notwithstanding any contrary provision of section 190.85, a true copy of the report of the grand jury shall be served, together with such notice of appeal upon each such public servant.

3. The mode of and time for perfecting an appeal pursuant to this section, and the mode of and procedure for the argument thereof, are determined by the rules of the appellate division of the department in which the appeal is brought. Such rules shall prescribe the matters referred to in subdivision one of section 460.70 and in section 460.80, except that such appeal is a preferred cause and the appellate division of each department shall promulgate rules to effectuate such preference.

4. The record and all other presentations on appeal shall remain sealed, except that upon affirmance of the order sealing the report or dismissal of the appeal of the named public servant by the appellate division, the report of the grand jury, with the appendix, if any, shall be filed as a public record as provided in subdivision three of section 190.85.

5. The procedure provided for in this section shall be the exclusive manner of reviewing an order made pursuant to section 190.85 and the appellate division of the supreme court shall be the sole court having jurisdiction of such an appeal. The order of the appellate division finally determining such appeal shall not be subject to review in any other court or proceeding.

6. The grand jury in an appeal pursuant to this section shall be represented by the district attorney unless the report relates to him or his office, in which event the grand jury may designate another attorney.

THE GRAND JURY

* **WHAT IS IT?**

* **HOW DID IT ORIGINATE?**

* **HOW DOES IT FUNCTION?**

* **WHAT IS ITS WORTH?**

The cornerstone of our Republic is composed of two essential elements:

1 - PEOPLE
People are society. People decide which type of society they wish to have, and they make the laws which govern and protect their society.

2 - LAW
Any decent and free society is based upon law, with the direction of the law being subject to the desires of the majority of the people who make up and participate in the functions of that society.

These laws are quite necessary in order to insure:

a) The continuation of their society in its basic desires, and which can bend and change to accomodate the needs of the majority of its participating individuals (as a tree: it is strong, but adjusts with the winds).

b) The rights of the individual - to the extent that these rights do not infringe upon the rights of society.

And what can be said of those of us who would take this for granted, as too many of us do?

Consider

"The punishment suffered by the wise who refuse to take part in government, is to live under the government of bad men."
PLATO

"All authority belongs to the people."
JEFFERSON

Too few of our citizens are familiar with the functions of a Grand Jury.

The following information about the Grand Jury system is provided with the hope that it will encourage you to recognize its importance to the society of free men, and to study it more so that - hopefully - you will always desire to more carefully examine the contentions of those who would eliminate the Grand Jury System in this state.

Any society, or any segment of society - such as the Grand Jury system - is always under attack. The attacks are designed to change the society, or to change or eliminate the Grand Jury.

However, if you would wish to continue a system of government which has spent 200 years changing and improving itself, while always remaining the best available, you must question.

Question those who would change our systems. Most importantly, learn and understand the alternatives !

* * * * * * * * * * * * *

The Grand Jury system is something available only to those living within free nations.

In any nation of free people, its citizens are free enough to have the Grand Jury explained to them. Should they inquire, they find that it is something provided as a protection against mere 'trials'.

IN EFFECT, WHAT THE PUBLIC DOES NOT KNOW WILL HURT THEM, AND THE PUBLIC SHOULD KNOW ABOUT THE GRAND JURY SYSTEM - WHICH IS A PART OF THE JUDICIAL PROCEDURE IN THIS STATE, AND IN THE FEDERAL GOVERNMENT.

History of the Grand Jury System

The Grand Jury originated in England over 800 years ago (about 1166), and when the English colonists came to the 'new world', they brought the Grand Jury system with them.

Since 1166 the character of the Grand Jury has not changed too much. In 1365, about 600 years ago, perhaps the most important change took place: a provision was made to protect witnesses from criminal retribution from the accused, and this provision is our first comparative form of the present-day Grand Jury system. This change guaranteed that certain individual freedoms could not be violated.

Today, the reasons for Grand Jury secrecy differ only slightly from those which political conditions dictated in the late 1300's. Today's Grand Jury maintains the private hearing of testimony to preserve the freedoms of:

THE ACCUSED: From hearing evidence which might cause him to flee prior to indictment and arrest. By avoiding the publication of potentially damaging evidence.

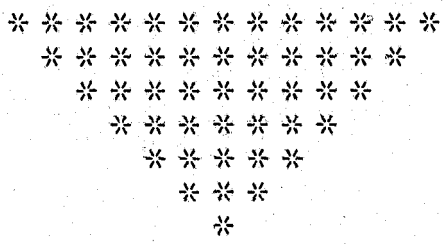
WITNESSES: From fear of reprisal from either the accused or the government (at any level).

GRAND JURORS: Who are then uninhibited by fears that their opinions and votes will be made public.

The wisdom of this secrecy is self-evident. It removes fear from what, ideally, is an impartial, closed forum within which the decision to indict an accused person is either accepted or rejected.

Since the very beginning, Grand Juries did not - and do not now - decide the guilt or innocence of anyone accused of a crime. Grand Juries are designed mainly to determine if a person is to be brought to trial. However, they also have always had the power to accuse on their own knowledge. When making an accusation on their own initiative, they make presentations and reports to the court.

The decisions they make which are based upon information originating from the outside, are "TRUE BILLS", if they feel the accusations to be true and a trial is warranted; "NO BILL" if they believe the accusations to be untrue and/or a trial is not warranted.



During the time the Grand Jury has been in use in America, it has become a most important part of our Government. This is best explained by Mr. Richard D. Younger, in his book **"THE PEOPLE'S PANEL".**

This is a book you should read if you are interested in the Grand Jury system (and even if you are not, because it presents some fascinating information about the activities of those who have attempted to subvert this segment of our judicial system).

On the following page we present a direct quote from Mr. Younger's book, **"THE PEOPLE'S PANEL".** This is done with the hope that you may better appreciate what we are trying to say here. We could not improve upon this excerpt from this fine book.

"Grand juries have the effect of placing criminal justice in the hands of members of the community. They possess broad inquisitorial powers derived from the government, yet they are of the people, not of the state. Their constantly changing personnel prevents small groups from gaining a vested interest in law enforcement and gives all persons an opportunity to participate in their government. The grand jury enables the American people to act for themselves rather than have an official act for them. It is the one institution that combines the necessary measure of disinterestedness with sufficient authority to investigate effectively malfeasance and corruption in public office. Today, as in the past, it is the one body that can effectively handle the complaints of individual citizens, whether the grievances be against their fellow citizens or against their government.

"The most significant aspects of the grand jury are its democratic control and its local character. Governmental power has to a large extent replaced other threats to liberty in the United States. The increasing centralization of governmental authority and the growth of a huge bureaucracy in no way responsible to the people have made it vitally necessary to preserve the grand jury. In some instances it is the only possible means of checking on political appointees or preventing illegal compulsion at the hands of zealous law enforcement officials. At a time when centralization has narrowed the area of democratic control, grand juries give the people an opportunity to participate in their government and to make their wishes known."

(It should be noted that in a footnote to the last paragraph above, Mr. Younger indicated the source to be the report of the Kefauver Crime Investigating Committee, and further points out that the Committee "warned Americans not to rely upon the central government to control organized crime, but to use their local grand juries to attack the problem in their own communities".)

What Makes a 'Grand Jury' Different?

We are all familiar with the word JURY. However, not everyone is familiar with the fact that there are two different types of jury:

The GRAND jury, which may, or may not, indict.
The TRIAL jury (or Petit Jury), which may, or may not, convict.

There is a most important difference between INDICT and CONVICT!!

For certain "capital or otherwise infamous crimes", as the New York State Constitution provides (Art.1, Sect.6), "no person shall be held to answer.....unless on indictment of a grand jury".

As to these crimes, a Grand Jury must first determine if there is sufficient cause for a person actually tried (by a TRIAL, or Petit jury) for a crime.

That is, are there grounds for prosecution (a 'prima facie case')? Prima Facie is Latin, and a legal term for 'the first impression of the evidence observed'.

If there is SUFFICIENT evidence presented to the Grand Jury or SUFFICIENT evidence obtained by the Grand Jury through its own efforts - including the power to subpoena - then it will INDICT.

Following any indictment, those indicted are still assumed to be innocent. THIS IS IMPORTANT TO REMEMBER!

The Grand Jury's indictment ONLY allows the matter to be FURTHER CONSIDERED, by a TRIAL jury.

ONLY A TRIAL JURY MAY DETERMINE IF A PERSON IS INNOCENT OR GUILTY.

The Grand Jury's Verdicts

At the time a Grand Jury votes, it must decide whether a TRUE BILL is required - or if a DISMISSAL is required.

(There are, infrequently, decisions to remand the matter to a lower court because, in the judgement of the Grand Jury, the nature of the alleged crime does not warrant consideration by a Superior court.)

DISMISSAL: The meaning of this is obvious.

TRUE BILL: TRUE: Being real, or genuine.

BILL: Formal statement of a case or charge.

TRUE BILL: A 'bill of indictment' found by a Grand Jury to be sustained by the evidence - "prima facie" evidence.

When a Grand Jury votes a TRUE BILL, the accused is then INDICTED (the 'true bill' indicts), and a TRIAL (a Petit Jury trial) is then required to determine the guilt or innocence of the accused (indicted)).

Size, Quorums, Decisions of the Grand Jury

(Attendance Requirements)

The Grand Jury, which is impanelled by and constitutes part of a Superior court, is a body consisting of no less than 16 nor more than 23 persons (Foreman, Asst. Foreman and Secretary included).

The proceedings of a Grand Jury are not valid unless at least 16 of its members are present. A concurrence of at least 12 members is required to:

1) Find an indictment (TRUE BILL).
2) Dismiss the presentment of the office of the District Attorney (NO True Bill).
3) Direct the filing of a prosecutor's information.
4) Submit a report.
5) Provide affirmative official action or decision (i.e.,'1 thru '4).

***

The Worth of a Grand Jury

While a Grand Jury is impanelled by and is part of a superior court and does, usually, expend most of its efforts toward the resolutions of presentations made to it on behalf of the people of the State, via the District Attorney, it most certainly is NOT solely restricted to that responsibility.

The law specifically directs that Grand Juries are responsible for other utilization of their talents (and, hopefully, experience). The law also prescribes that the Grand Jury has the responsibility whenever necessary, to provide its own presentations.

Also, the law provides that the counsel for the Grand Juries shall be the District Attorney, so it must be noted that the District Attorney works for the Grand Juries.

While the office of the District Attorney may subpoena to the extent that it makes an original presentation of the people's case before the Grand Jury, only the Grand Jury has almost unlimited power to subpoena, and may so direct the office of the District Attorney to exercise the Jury's desires in this respect.

It should be noted that the Grand Jury is not, and should never allow itself to be put in the position of being described as a "rubber stamp" for the office of the District Attorney.

In the final analysis:
The Criminal Procedure Law prescribes, in Section 190.25(5) that: "The Grand Jury is the exclusive judge of the facts with respect to any matter before it."

There are some others who have worked with or studied much about the Grand Jury System, who have this to say:

"The Grand Jury System is the bulwark of protection for the innocent and the sword of the community against wrongdoers."[1]

"It breathes the spirit of the community as no prosecutor could ever do."[2]

"The Grand Jury is the public and they have a right to investigate any evil condition of a criminal nature."[3]

"The grand-jury system has one great advantage. It is removed from the professional interests of the police and prosecution. A...grand-jury is composed of twenty three men and women drawn from the community, who sit...and listen to the proposed case presented by the police and an Assistant District Attorney. There is a presiding officer, but the grand-jury can decide to ignore the strictest interpretation of the law and vote indictments on instincts or feelings...* The rules of evidence before a grand jury are looser, more flexible than those in a regular courtroom. There is a certain unpredictability about grand juries, and experienced prosecutors are always apprehensive about the system."[4]

*We are constrained to protest that this sentance does not also say: "or vote dismissals". (This is cited from personal experience by all Grand Jurors, and is also based upon facts, instincts and compassions of at least 12 of the 23 Grand Jurors.)

1-Gov. Thomas E. Dewey
2-George Z. Medalie, U.S. District Attorney
3-John D. Lindsay,N.Y.C. District Attorney
4 - "The Alice Crimmins Case", by Kenneth Gross

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The Law - The Grand Jury - The Critics

As each Grand Jury is impanelled, it is provided with a listing of certain Criminal Procedure Law sections pertinent to the functions and duties of the Grand Jury. (This is required by law.) In addition, the presiding judge addresses the jury before it is sworn in.

The information contained herein is in no way designed to substitute for that information provided. It is given to augment such instruction, and is particularly designed to aid the new Grand Juror as well as being a point of reference for all Grand Jurors.

More detailed information relative to the operation of Grand Juries under the law are found in the New York "Criminal Procedure Law", under these sections:

Article 190 (190.05 thru 190.90)
Article 195 (195.10 thru 195.40)
Article 200 (200.10 thru 200.90)
Article 210 (210.05)

The detailed location of this information is provided for two reasons:

1 - To guide Grand Jury members in their studies of the Grand Jury System.

2 - To guide, hopefully, those critics of the Grand Jury system who would constantly put forth information(?) to the public. It is sincerely hoped that if they must expertly discuss the Grand Jury system - while they deride it - they at least know the law!

COURTS - New York State

SUPERIOR COURT: The Supreme Court; or a County Court.
LOCAL CRIMINAL COURT: A district court; the N.Y.City Criminal Court (or outside NYC, a City Court; a Town Court; a Village Court; Supreme or County judges sitting as a local Criminal Court). (CPL 10.10)

SUPERIOR Courts have exclusive trial jurisdiction of felonies.

SUPERIOR Courts have preliminary jurisdiction of all offences, but they exercise such jurisdiction only by reason and through the agency of their Grand Juries. (CPL 10.20)

A GRAND JURY is a body consisting of not less than 16 or more than 23 persons, impanelled by a SUPERIOR court and constituting a part of such court. (CPL 190.05)

Since a Grand Jury is part of a Superior Court, and Superior Courts have exclusive trial jurisdiction of felonies, it follows that.....

As regards felonies, criminal action is commenced in one of two ways: 1) "Felony Complaint", which is a verified written accusation by a person, filed with a local criminal court, charging person(s) with the commission of one or more felonies, or 2) Filing of an indictment by a Grand Jury.

Criminal action in a Superior Court can only be commenced by the Grand Jury's indictment, and may be commenced by the indictment alone. (CPL 100.05 & 100.10) However, in other than "A" felony cases, defendants may waive indictment (with the consent of the District Attorney). (CPL 195.10)

Note: CPL - N.Y.State Criminal Procedure Law sections.

FELONIES

The origin of the word FELONY and how its meaning has changed are interesting.

It is believed that it originated with the Latin stem,'fell', meaning gall; in the case of a felon, "one who is full of bitterness".

This would seem to be an apt description. When one reviews those crimes against humans which are termed "felonies", the underlying "bitterness" of the perpetrator fits.

However, with progress and adaption to less demanding of rights for society and more rights for the individual, has come acceptance of whatever conditions prevail. Thus, with more acceptances of problems as 'usual', comes a lessening of more proper condemning descriptions of such crimes.

Felonies were first described as "villany, wickedness, baseness". Time has softened such descriptions to "guilt, deceit, treachery, perfidy", and now to "a crime, misdeed, sin".

However, the intent of the word was always to attribute 'felony' to deceit, etc., involving the misappropriation of lands.

In feudal society, where this word was first applied, such theft of land was tantamount to stealing one's horse in the early days of the American West. So, a felony was indeed a perfidious crime, committed only by the basest of criminals - felons.

Since felons are still committing the worst of crimes - and there are so very many of these crimes - how much have we advanced since feudal times?

Has our continued softening of the descriptions of horrendous types of crimes contributed to a softening of the realizations of the seriousness of these crimes? The numerous 'degrees' now assigned to some of these crimes, and the latitude available in the punishment of all felonies should be considered

THE FELONIES

ABORTION, ABSCONDING, ANARCHY, ARSON, ASSAULT, BAIL JUMPING, BIGAMY, BOMBS, BRIBES(Jurors, Labor Official, Public Servants, Sports, Witnesses), BURGLARY, CHILD ABANDONMENT, COERCION, CONSPIRACY, CONTEMPT, CONTRABAND, DRUGS, EAVESDROPPING, ESCAPE, EXPLOSIVES, FACILITATION, FALSE INSTRUMENTS, FALSE REPORTING, FIREARMS, FORGED INSTRUMENTS, FORGERY, FRAUD, GAMBLING, GRAND LARCENY, HINDERING PROSECUTION, HOMICIDE, IMPRISONMENT, INCEST, INTERFERENCE WITH CUSTODIAN, KIDNAPPING, MANSLAUGHTER, MISCHIEF, MISCONDUCT, MURDER, OBSCENE MATERIAL, PERJURY, PRISON CONTRABAND, PROSTITUTION, RAPE, RECKLESS ENDANGERMENT, RIOT, ROBBERY, SEXUAL ABUSE, SLUGS, SODOMY, SOLICITATION, STOLEN PROPERTY, SUBSTITUTION OF CHILDREN, SUICIDE, TAMPERING, TRESPASS, UNLAWFUL USE OF SCIENTIFIC MATERIAL, USERY, WEAPONS, WILL, UNLAWFUL CONCEALMENT OF.

These are the crimes against humans, which are "villany, wickedness, baseness, guilt, deceit, treachery and perfidy". (Now, merely described as "a crime, a misdeed, or a sin"!!!)

There are various degrees of many of these felonies.....

WHAT CAN BE DONE TO THOSE WHO COMMIT FELONIES?

Sentences.....

I - Felony sentences are indeterminate sentences.

II - When sentences are imposed, the court has at its discretion *minimum and maximum sentence boundaries. These boundaries* are provided by the N.Y. State Penal Law (Section 70.00).

III - The sentence "boundaries" that are available to the court (i.e., *the Judge doing the sentencing)* are:

FELONY	SENTENCE POSSIBLE	
(Class)	Minimum	Maximum
A I	15 - 25 years	Life
A II	6 - 8 years., 4 mo.	Life
A III	1 - 8 years., 4 mo.	Life
B	1 year**	25 years
C	1 year**	15 years
D*	1 year**	7 years
E*	1 year**	4 years

*Alternative: If not second or persistent felony offender, regard to nature and character of circumstances of crime and history and character of defendant, court opinion that imprisonment is necessary, but indeterminate sentence is unduly harsh, allows court to impose a definite sentence of imprisonment....and fix a term of one year or less.

**Court may: Interpreting nature and circumstances of crime, history and character of the defendant...as related to justice and the best interest of the public, fix the minimum period of sentence, (but shall not fix it beyond 1/3 of the maximum).

NOTE: As regards second and persistent felony offenders, see Penal Law, Section 70.06 thru 70.10

(Emphasis Added)

FELONIES (N.Y.State)	PENALTY			CLASSIFICATION			
TYPE	A						
	I	II	III	B	C	D	E
ABORTION, 1st Degree						X	
2nd Degree							X
ABSCONDING FROM TEMPORARY RELEASE, 1st Deg							X
ANARCHY, Criminal							X
ARSON, 1st Degree	X						
2nd Degree				X			
3rd Degree					X		
4th Degree							X
ASSAULT, 1st Degree					X		
2nd Degree						X	
BAIL JUMPING, 1st Degree							X
BIGAMY							X
BOMBS, Possession of						X	
BRIBES, JUROR — To						X	
Receiving						X	
LABOR OFFICIAL — Offering To						X	
Receiving						X	
PUBLIC SERVANT - Offering to, 1st Degree				X			
2nd Degree						X	
Receiving, 1st Degree				X			
2nd Degree						X	
OFFICIAL MISCONDUCT - Rewarding, 1st Degree					X		
2nd Degree							X
Accepting, 1st Degree					X		
2nd Degree							X
FOR PUBLIC OFFICE - Giving						X	
Receiving						X	
WITNESS - Bribing of						X	
Receiving bribe						X	
BURGLARY, 1st Degree				X			
2nd Degree					X		
3rd Degree						X	
CHILD ABANDONMENT							X
COERCION, 1st Degree						X	
CONSPIRACY, 1st Degree				X			
2nd Degree							X
CONTEMPT, 1st Degree							X
CONTRABAND, In prison						X	

TYPE	PENALTY A I	PENALTY A II	PENALTY A III	CLASSIFICATION B	CLASSIFICATION C	CLASSIFICATION D	CLASSIFICATION E
DRUGS:							
CONTROLLED SUBSTANCE:							
Criminal Possession of, 1st Degree	X						
2nd Degree	X						
3rd Degree			X				
4th Degree				X			
5th Degree					X		
6th Degree						X	
CRIMINAL POSSESSION OF PRECURSERS (Items used to compound drugs) with intent to manufacture same unlawfully							X
CRIMINAL SALE OF, 1st Degree	X						
2nd Degree		X					
3rd Degree			X				
4th Degree				X			
5th Degree					X		
6th Degree						X	
INJECTION							X
PARAPHANALIA, use of						X	
EAVESDROPPING, (wiretapping/mechanical)							X
INTERFERENCE with Custodian, 1st Degree							X
DISCHARGE OF FIREARMS: at aircraft or vehicle							X
ESCAPE FROM CUSTODY, 1st Degree						X	
2nd Degree							X
EVIDENCE, tampering with							X
EXPLOSIVES: Possession of, 1st Degree				X			
2nd Degree					X		
3rd Degree						X	
Intent to use				X			
EXTRADITION, rights of accused violated during	See CPL 570.26 and 570.24						
FACILITATION, 1st Degree					X		
FALSE: Instrument - Sworn to, 1st Degree							X
Offering for filing, 1st Degree							X
Possession of, 1st Degree					X		
2nd Degree						X	
FALSIFICATION, Business records							X
FIREARMS, Criminal Possession of, etc.				X	X	X	
FORGERY: Motor vehicle I.D./Plate							X
FORGERY: 1st Degree					X		
2nd Degree						X	

TYPE	PENALTY A I	II	III	CLASSIFICATION B	C	D	E
Device, criminal possession of						X	
FORGED INSTRUMENTS, Criminal possession of,	—	—	—	—	—	—	—
1st Deg					X		
2nd Degree						X	
FRAUD: Scheme to Defraud, 1st Degree							X
GAMBLING: Promotion of , 1st Degree							X
Possession of Records, 1st Degree							X
GRAND LARCENY, 1st Degree					X		
2nd Degree						X	
3rd Degree							X
HINDERING PROSECUTION: 1st Degree						X	
2nd Degree							X
HOMICIDE, Criminally negligent							X
IMPRISONMENT, unlawful, 1st Degree							X
INCEST							X
KIDNAPPING, 1st Degree	X						
2nd Degree				X			
LIMITATIONS, Statute of **							
MANSLAUGHTER: 1st Degree				X			
2nd Degree					X		
MISCHIEF, Criminal, 1st Degree				X			
2nd Degree						X	
3rd Degree							X
MURDER, 1st Degree	X						
2nd Degree	X						
OBSCENE MATERIAL, 1st Degree						X	
Dissemination to Minors							X
PROSTITUTION, Promotion of, 1st Degree					X		
2nd Degree						X	
RAPE: 1st Degree				X			
2nd Degree						X	
3rd Degree							X
RECKLESS ENDANGERMENT						X	
RIOT, 1st Degree							X
ROBBERY, 1st Degree				X			
2nd Degree					X		
3rd Degree						X	

*New - Effective 1/1/77

** See CPL Art. 30

TYPE	PENALTY A I	II	III	CLASSIFICATION B	C	D	E
SCIENTIFIC MATERIAL, unlawful use of							X
SEXUAL ABUSE, 1st Degree						X	
SLUGS, use of							X
SODOMY, 1st Degree				X			
2nd Degree						X	
3rd Degree							X
SOLICITATION, criminal, 1st Degree						X	
STOLEN PROPERTY: Criminal poss. of 1st Degree						X	
2nd Degree							X
SUBSTITUTION OF CHILDREN							X
SUICIDE ATTEMPT, promotion of							X
TAMPERING: Criminal, 1st Degree						X	
With physical evidence							X
With public records, 1st Degree						X	
TRESSPASS WITH DANGEROUS WEAPON						X	
* USURY, criminal, 1st Degree					X		
2nd Degree							X
WEAPONS: Certain Actions (PL 265.10/265.35)						X	
Possession of , 1st Degree				X			
2nd Degree					X		
3rd Degree						X	
WILL, UNLAWFUL CONCEALMENT OF							X

*Changed 9/1/76

This material has been prepared as a supplement to the "NEWS", a quarterly publication of the Bronx County Grand Jurors Association, Inc.,Bronx, N.Y.

It has been provided for all who serve on a Grand Jury, all who will serve, and those who may not get to serve but as good citizens wish to learn about this most important part of our judicial system.

Please address any inquires relative to our publication to the Editor, at the following address:

Mr. David T. Des Biens
Senior Vice President & Secretary
North Side Savings Bank
185 West 231st Street
Bronx, N.Y. 10463

Note: This material was compiled in December, 1976, and consideration must be given to changes made in the law after that time.
(Are you familiar with the changes??)

CAMPBELL, CALIF., *May 10, 1977.*

MR. MARTIN BELSKY,
House Subcommittee on Immigration, Citizenship, and International Law, House of Representatives, Washington, D.C.

DEAR MR. BELSKY: The following are my answers to the questions given to me at the subcommittee hearings on April 27, 1977.

1. How did U.S. Attorney give Grand Jury information on the past records of the accused? Usually this was done by the witness, such as an FBI agent. It could, however, come in response to a probe by the U.S. Attorney or his assistants such as "What kind of person is this Mr. Jones??" It did not happen on every case by any means, but it did happen on more than one occasion.

2. What was response of Jurors to reading criminal records? The jurors did not know proper procedure and were interested in the information. It made it easier for them to find the person should be indicted. I did not know proper procedure either, but the practice seemed unfair to me. I though we should only consider the evidence against the accused for the case under consideration. Past charges or convictions were not relevant.

3. Were we ever told of our right to see the accused or a witness? Yes, but the most expedient way to pursue each case was laid out for us. When a certain witness or the accused were to be seen, this was "suggested." I can recall one case, out of hundreds, where we initiated requests for witnesses. It was a murder case (a killing) and the government suggested calling witnesses. This was one case in which we received instructions to really debate facts and have an open mind. The government did have an opinion in this case, but they were not firm in it and left the decision up to us. However, as the foreman did point out, even in this case we did decide in favor of the side in which the government was leaning!

Did we make requests to see witnesses? Only on one or two cases—such as the example above.

4. Did we get a chance to ask questions? One Assistant U.S. Attorney "bristled," the others, with a few exceptions, were agreeable and tolerant of the few questions asked. We did ask questions on most cases, but these were often questions like "How much money did the robber get? What did he spend the money on?" Questions that were hostile to the U.S. Attorney in the sense that they questioned the need for an indictment were tolerated to a point. These occasions took the form of a mini-argument between the questioner and the U.S. Attorney and the foreman usually cut off the debate. There was strong sentiment that the accused was "guilty" and that argument to the contrary showed permissiveness.

5. Did the Assistant U.S. Attorney try to stop no-bill. He did not really try to stop it. He just was surprised by it and critical. He said something to the effect that the government only brings in cases that are well researched and that most of them are worthy of an indictment. After a brief period of discussion and befuddlement we just went on to other business. I have no idea what became of our sole no-bill. The accused was an older man who was about to retire from his job. I think sympathy of the women in the group for him accounted for the no-bill to a great extent, rather than facts of the case and the probable cause issue.

6. Examples of pressure on the media. Without extensive research of my notes I can't give very detailed examples. I recall cases of tape recordings received by radio stations. The station manager was called in and asked to hand over the tape so it could be analyzed for evidence that might lead to terrorists. The same was done with letters sent to stations. Some stations seemed ready to comply and others did not. We did not learn the outcome of these cases. Sometimes we really did not understand what was going on or why the party was being questioned. We did not ask since we did not feel it was our right to.

7. Grand jury leaks. I know of none connected with our jury. I doubt very much if our group would let out a peep. We were given the example once of some jurors who were discussing a case in the lunch room between themselves and the conversation was overheard by some FBI agents who reported the incident to a judge. The jurors were called before the judge and dismissed in disgrace. This story kept us quiet. We did conduct a major investigation of airlines who sold tickets at under the CAB set rates. I wonder if the government didn't leak some of this investigation. I understand much information about the investigation got into the press.

8. Exculpatory evidence. I can only recall one case in which such evidence was presented—it was the unique case of a killing mentioned above. On other cases only evidence that tended to show probable cause that the accused should be indicted was presented. I only made requests for such evidence on two or three oc-

CONTINUED

6 OF 17

easions. None was forthcoming and most grand jurors thought the question was out of line. I asked it because a lawyer friend mentioned that the jurors had a right to hear such evidence if it existed.

It is hard to get the atmosphere of the grand jury room across in order to put this question about exculpatory evidence in perspective. The process is an indictment mill. Grand jurors are running on this treadmill to make it go as fast as possible so business can be finished by the afternoon. We did not know how to stand up to the U.S. Attorney, we did not understand our rights and responsibilities, we did not feel qualified to question the government. Discussion of exculpatory evidence ran counter to the process.

9. Independent attorney. This attorney could function as advisor to the grand jury. He or she could train the jury in its role of independence, providing examples of how to be independent under certain situations. Role playing type of training could take place. During presentations by the U.S. Attorney or by witnesses he could advise grand jurors upon request. He or she could do the same during deliberations.

The attorney could be paid and serve for a term. Or perhaps could be "drafted" as are jurors (and doctors into the army). The drafted attorney could serve for the same term as the jurors. The attorney would not place the jury in an adversary role to the government, but would instead keep the jury independent and uncommitted to either the government or the accused until the point of deliberations.

Selection of jurors to achieve a group that had more disposition toward independence (as discussed in my testimony) should be a part of this effort to obtain a separate attorney for the grand jury.

RESPONSES TO GENERAL QUESTIONS

1. How often did grand jury not accept recommendations of government attorney? Only one time out of perhaps 300 cases we heard.

2. Were we ever consulted about what witnesses to call? Very rarely. Perhaps on 10 occasions. On the vast majority of cases, the U.S. Attorney called in the witnesses and directed the questions.

3. Were we consulted about which witnesses should be granted immunity? No. We were told certain witnesses would be granted immunity. On occasion we were told that certain witnesses would probably refuse to testify and later be granted immunity.

4. How often did grand jurors ask questions as opposed to the government attorney? I would estimate that grand jurors asked questions on 75% of the cases. Often these cases would not relate to the decision to determine probable cause. For example, questions such as "Did you catch him yet!?" Or, "Has this person ever committed this type of crime before?" were asked.

5. Who determined what cases or leads were to be investigated? The U.S. Attorney and his Assistants. The exceptions to this rule were very insignificant and few in number.

6. Juror instructions. We heard about 10 minutes of instructions from the judge and about 45 minutes from the U.S. Attorney. We received a brief and general handbook which in retrospect did not really explain my role or responsibilities. Instruction from the U.S. Attorney is like the fox explaining to the chickens how to be on guard against foxes. It is very hard for the fox to be effective in this role, no matter how sincere he is.

7. Was I ever present when a witness invoked the fifth amendment, and if so what was the reaction of the grand jurors? Yes, I was several times. Like most targets of grand jury investigation and associated persons, these individuals looked guilty to us. Taking the fifth made them look even more so. The comments of the government attorneys and the appearance of the witness to hide something made them look bad.

8. Did the prosecutor present evidence favorable to the potential defendent? Almost never. The exception that I recall is the killing where we were told such facts as that the dead husband had a history of beating his wife and had threatened to kill her, etc. We were told about the testimony of witnesses to government agents concerning prior family history and we called some of these witnesses ourselves to hear from them.

9. Were we ever told information about a case that was not presented by a witness and was presented by the government instead? I don't recall, but most probably yes. The government was pretty free with information about subjects of in-

vestigation. We often asked the attorney for information about the subjects and were usually given an answer.

10. Reaction when witness asked to leave room to consult with attorney.

We were nearly always irritated by this . It disrupted the procedure and delayed our getting home on time. It bothered the government and we, as always, followed his lead—we were bothered too. I recall one witness, a young lady obviously very frightened. She did not have an attorney. I cut in on the government attorney's questioning and said that this person needed advice since she was being asked some very leading questions and was in no condition to properly make the best case for herself. This question went onto the record to the dismay of the attorney. The session was abruptly cancelled shortly thereafter. We, the grand jury, never learned the purpose of the questioning, the nature of the case, or the outcome. We were in the dark about other cases, but did not feel it our place to raise questions.

11. We did not learn of witnesses going before judges to challenge some action. What happened to cases before, during and after we heard them, i.e., anything that happened outside the grand jury room was a mystery. We were often curious about cases and asked questions. We did not learn much, however, except what we would read in the paper about some cases.

12. We would hear five or so cases, then deliberate for a few minutes on each case and vote an indictment. A few questions might be asked at this time about the case. Regarding the amount of evidence we needed to indict, we never quantified this. On several occasions we may have asked for more information, but this was rare. It would take perhaps an average of two minutes per indictment for deliberation. We would get a smattering of votes against indictments. Perhaps 60 percent of the indictments were unanimous. Rarely were there more than two or three votes against indictment.

13. No.

Sincerely,

WILLIAM P. GLOEGE.

[Whereupon, at 3:10 p.m., the hearing adjourned.]

GRAND JURY REFORM

WEDNESDAY, JUNE 1, 1977

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP,
AND INTERNATIONAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10 a.m. in room 2237 of the Rayburn House Office Building; Hon. Joshua Eilberg (chairman of the subcommittee) presiding.

Present: Representatives Eilberg, Hall, Harris, and Fish.

Staff present: Garner J. Cline, Arthur P. Endres, Jr., and Martin H. Belsky, counsel; Peter Regis, legislative assistant; and Alexander B. Cook, associate counsel.

Mr. EILBERG. The subcommittee will come to order.

We welcome as a witness to our committee the Honorable Donald C. Alexander, former Commissioner of the Internal Revenue Service, member of the firm of Olwine, Connelly, Chase, O'Donnell & Weyher, New York, N.Y.

We indeed welcome you, Mr. Alexander, and I apologize that the other members of the subcommittee have not yet arrived in Washington. They are all on their way back from the districts.

In the interest of conserving time, we would like you to testify, and we hope the other members will catch up with us.

We do have a number of witnesses today, and we are anxious where possible for witnesses to summarize statements that have been prepared, and then we might ask some questions.

TESTIMONY OF DONALD C. ALEXANDER, ESQ., OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER, NEW YORK, N.Y.

Mr. ALEXANDER. Thank you, Mr. Chairman.

I will summarize my statement, with the permission of the committee. I ask that my entire statement be placed in the record.

Mr. EILBERG. Without objection it will be made part of the record.

(The prepared statement of Donald C. Alexander follows:)

STATEMENT OF DONALD C. ALEXANDER

(Olwine, Connelly, Chase, O'Donnell & Weyher New York and Washington)

My name is Donald C. Alexander and I am a partner in the New York and Washington law firm of Olwine, Connelly, Chase, O'Donnell & Weyher. I am appearing at the request of the Subcommittee to discuss certain aspects of H.R. 94, the Grand Jury Reform Act of 1977.

My comments are limited to matters which which I have some personal knowledge and experience. I am not speaking on behalf of any organization, govern-

mental or private, or any client of my law firm. I am not engaged in any matter involving a grand jury.

When I was Commissioner of Internal Revenue, I twice appeared before grand juries. One of these appearances took place in Washington, D.C. and another in Miami, Florida. Because of these appearances and knowledge gained elsewhere, I became concerned about whether the grand jury as now constituted and utilized in the United States, may be far different from what our forefathers expected when the grand jury system was first brought to this country. I am speaking of the grand jury in its capacity as the entity charged with the responsibility of indicting.

I believe that the grand jury is no longer an independent group of peers, given the responsibility and capable of exercising it. to charge the guilty but protect the innocent. Instead, I question whether the grand jury may be largely a rubber stamp for the prosecution and, if so, whether this dual responsibility of the grand jury has not been assumed by the prosecutor. If so, the judgment and integrity of the prosecutor is determinative in resolving the vtial issue of whether or not to indict.

An indictment without sound support damages the fabric of our society but does far greater damage to the indicted individual. Too often the media and the public assume guilt by indictment and a later dismissal or acquittal does not remove the stigma. Indeed, in these post-Watergate days, lasting scars can result merely from often-repeated allegations which are totally and patently fallacious, even though the grand jury finds these accusations groundless. I speak from some personal experience.

If one then grants the damage that a wrongful indictment inflicts and the likelihood that a grand jury will not exercise individual responsibilities or veto actions of an overzealous prosecutor, then what should be done?

An initial question is whether it is worthwhile to review the procedures now used in other countries to see whether they provide helpful guidance in the effort to strike a sound balance between vigorous and effective law enforcement on one hand and protecting individual liberties, rights and reputations on the other.

Assuming that our present grand jury system will be continued, I think that the changes contained in H.R. 94 and discussed below should be made to achieve the proper balance which we need.

In providing for the right of counsel, Section 7 of H.R. 94 takes a sound and important step. It seems to me that limitations in this provision upon the presence and actions of counsel meet the issue of possible intrference with grand jury proceedings. Moreover, the provisions with respect to a week's notice before testifying and those providing adequate and reasonable notice of the rights of witnesses are constructive and important.

Section 8 of H.R. 94 also represents a sound step towards fairness in providing for the recording of grand jury proceedings and for making available to a witness a copy of any statement made prior to testifying and a copy of the transcript of the witness' own appearance.

Section 6 calls for the Court to advise the grand jury, assuring that the jury "reasonably understands," about its powers, its rights, its duties and its obligation of secrecy. In the complex urban world in which we live, such direction is essential. Also, this Section requires the Government attorney to advised the jury of the nature and existence of exculpatory evidence.

Finally, Section 5 provides penalties for violation of grand jury secrecy. In these days of leaks and planted stories, such protection is badly needed.

In discussing and supporting only some of the provisions of H.R. 94, I do not mean to imply that the others are not of great importance. By reason of experience and knowledge, other witnesses are in a much better position than I to evaluate these provisions.

I welcome this Committee's interest in this area of great importance to our society, and I will be glad to try to answer any questions you may have.

Mr. ALEXANDER. Mr. Chairman, I am appearing here entirely in a personal capacity. For more than 3 months I have not been Commissioner of Internal Revenue, and I am not appearing here today on behalf of my law firm or any client of my law firm. Instead I am here because the committee invited me, and I share your concern about the need of the grand jury reform.

In discussing the historic office of the grand jury, Chief Justice Burger stated in a historic decision last year that serious criminal accusations will be brought only on the considered judgment of a representative body of citizens.

I appeared before two grand juries when I was Commissioner of Internal Revenue, one in Washington on February 13, 1976, and one in Miami on April 1, 1976. Because of these appearances and knowledge and concerns gained by other experience and interest, I became concerned about whether the grand jury as now constituted and now operated is largely a rubber stamp for the prosecution. If so, does the indictment depend upon the judgment and the integrity of the U.S. attorney as contrasted with what Chief Justice Burger called the historic role of the grand jury.

As we all know, and as Judge Frank stated about 30 years ago, "a wrongful indictment is no laughing matter; often it works a grievous irreparable injury to the person indicted." This is particularly true, I might say, if the person wrongfully indicted is a public official. That injury can never be remedied, that stigma can never be removed, because too often the media and the public assume guilt by indictment. The later acquittal or dismissal does not remove the blot. Lasting scars that can result merely from unsupported, totally groundless accusations, and I speak from some personal experience in this regard, even if grand juries find the accusations to be totally groundless.

If one then grants the damage that a wrongful indictment can inflict and the likelihood that a grand jury is not in a position to exercise some of the individual responsibilities that we might expect it to exercise—and our forefathers did expect it to exercise—then what should we do about it?

Possibly one could look to seek what is being done in other countries such as England, which abolished the grand jury system back in 1933, to see what checks and what balances they have devised to strike a sound balance between vigorous and effective law enforcement on one hand and the protection of individual liberties and the rights and reputations on the other.

Assuming that the grand jury system will be continued and speaking solely about certain provisions of your bill, H.R. 94, I think that these provisions represent sound steps toward striking this proper balance between effective law enforcement on the one hand and protection of the constitutional rights and liberties on the other.

The right of counsel, section 7, which I think is supported by a number of prosecutors and lawyers in this field, is a sound and important step with the limitations spelled out in section 7—the right to have counsel in the grand jury room but without obstructing the orderly and efficient conduct of the grand jury business.

In section 8 of your bill, it calls for the recording of grand jury proceedings and for making available to a witness a copy of any statement made prior to testifying and a copy of the transcript of the witness' own appearance. I understand this is done in a number of grand juries but not in others. It should be done in all.

Section 6 calls for the court to advise the grand jury in such a way that the grand jury reasonably understands its powers, its rights, and its duties, including the necessity of sufficient evidence to form the basis of any indictment.

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In section 5 it provides penalties for violation of grand jury secrecy. There have been some problems in this respect, and I think this protection is badly needed, with safeguards, of course, and safeguards are contained in this bill with respect to freedom of the press.

In discussing only portions of H.R. 94 I don't mean to imply that other provisions are not very important, but other witnesses are in a much better position than I to evaluate these provisions.

The Attorney General, I understand, is scheduled to appear before this committee, and I am sure his testimony will be very valuable and instructive, as Attorney General Levi's was last year.

Witnesses from the Justice Department can tell you what the problems are that they foresee, why they have objections and concerns, if they have them, as to the provisions in your bill, including those that I have outlined. With the healthy skepticism that I am sure you will use in listening to their testimony, as well as mine and others, you will be able to evaluate whether the burdens which may be mentioned and which were mentioned last year by Attorney General Levi with respect to the right of counsel outweigh the benefits gained by permitting witnesses to have counsel.

I would be glad to try to answer any questions you may have.

Mr. EILBERG. Thank you, Mr. Alexander, for your contribution and your realization of the time pressures that we are under today, I would like to ask you a few questions.

In submissions to the subcommittee and in testimony to the Criminal Justice Subcommittee, some have complained that grand juries are often used for civil tax investigations.

What was your experience in this regard? Were any standards established to determine whether a case was civil or criminal in nature by the IRS and the Justice Department?

Mr. ALEXANDER. Those presently charged with the responsibility of carrying out their offices, including my successor, the Commissioner of Internal Revenue, the Assistant Attorney General in charge of the Criminal Division, and the Assistant Attorney General in charge of the Tax Division, are in a better position to respond to this important question than I.

We have heard of complaints about the use of grand juries beyond the historic purpose of the grand jury. I believe that Attorney General Levi did touch on this matter with respect to the tax system in his appearance before you last June. I can give no assurances that everything was perfect in the past. That would be an overstatement in which I will not indulge.

I can tell you that I think the Internal Revenue Service and the Department of Justice, which, after all, is charged for these matters, did conduct themselves properly as a general matter.

In a number of situations you don't know whether a criminal tax case can be made until after it has been investigated to some extent, and sometimes investigations are stymied at the water's edge by witnesses who refuse to testify. I believe, as I stated, the Internal Revenue Service and the Department of Justice employed sound procedures.

Mr. EILBERG. Procedures for administrative summons include a showing of relevancy and materiality, a right to counsel for hearing, and a right to an immediate transcript. These are avoided by use of

the grand jury subpena. Who within IRS or the Justice Department would determine whether a summons or a grand jury subpena should be utilized?

Mr. ALEXANDER. It is my understanding that the grand jury subpena can be utilized solely on the decision of the Department of Justice. Therefore, the Department of Justice will make that decision.

The IRS might well make a request of the Department of Justice. The administrative summons and rights and limitations upon the use of the summons have been reconsidered by Congress and changed by recent legislation, such as section 1205 of the Tax Reform Act of 1976, which ingrafted new limitations by use of the third-party summons.

The summons is a necessary ingredient in the enforcement of the tax laws, but a summons is an awkward and frequently ineffective way of dealing with someone who derives his living illegally and who is dedicated to the proposition that he will not comply one iota with the tax laws or one iota with the provisions of the Internal Revenue Code dealing with civil enforcement of the administrative summons.

Mr. EILBERG. Judge Becker in Philadelphia specifically granted IRS agents the right to assist attorneys in grand jury investigations, provided the information remain under the control of government attorneys.

What procedures were established, formal or informal, as to when assistance will be granted; what information would be shared; and what information was to be safeguarded?

Mr. ALEXANDER. I am not familiar with this specific case, Mr. Chairman. The assistant U.S. attorney would be in charge of a matter presented before the grand jury and the information developed by the grand jury.

The IRS agents would be working under his direction and supervision in these matters in an effort to assist him. And Mr. Levi testified last June as to what procedures were established. As to this specific case, I cannot be helpful.

Mr. EILBERG. Some have complained about interagency mingling, and that agencies like the IRS could get by indirect means all the grand jury's extraordinary powers.

How do you react to that?

Mr. ALEXANDER. That is a facet of the problem that we have been discussing.

The use of the grand jury to make a civil case—and there I refer to my earlier testimony—while I can give no negative assurances, I do think that the Department of Justice and the IRS conducted themselves soundly in the past as a general matter.

The Attorney General, if he or his designate appears, I am sure can speak to what is being done now and what he intends to do in the future to make sure that grand juries are properly used, that agencies assist where their skills and expertise are necessary to the development of the case. That is particularly true where you have complicated financial transactions.

But the grand jury does not become an extension of civil enforcement by the agency.

Mr. EILBERG. Witnesses have stated that grand jury subpenas are often for offices and not the jury room. Thus a subpena for documents would be for the U.S. Attorney's Office or FBI or IRS agent's office.

Did this occur often?

Mr. ALEXANDER. I don't think so.

Mr. EILBERG. Do you believe it proper?

Mr. ALEXANDER. No. I think that grand jury subpenas are to obtain information and testimony in the conduct of the matter before the grand jury. If the matter before the grand jury is a criminal matter—it would be criminal. The problem is you don't know, frequently, exactly what case there is or what case there isn't. When the grand jury begins, and properly so, an investigation of a series of transactions of the activities of certain persons, it is rather difficult to draw a perfect line.

Mr. EILBERG. Mr. Alexander, you have made a good statement, but before leaving the witness stand. I sense from the very opening of your statement, where you referred to your appearances before two grand juries, that these made an indelible impression on you. And one could guess that some things occurred that did not appear to be possibly fair to you. I wonder if you would feel at liberty to tell us something of your experiences so we can better put your testimony in context?

Mr. ALEXANDER. Mr. Chairman, I am a lawyer and have been a lawyer for many years. I am acquainted with questions of the straight variety and questions of the trap variety. I think I am capable of responding properly to the latter kind by dissecting them, as well as responding properly to the former. I wonder whether in the interest of having a sound balance between proper law enforcement and protecting the constitutional rights and liberties, it wouldn't be better to permit counsel to assist someone who is not a lawyer, who hasn't been trained and experienced in the law, to try to respond properly, soundly, fully, correctly, and truthfully, to questions posed before the grand jury, but also stay out of traps. A few trap questions did make an impression.

Another thing that made an impression was the fact that although I was the target of a particular investigation, many of the grand jurors appeared to be sleeping throughout my more than 3 hours of testimony. That concerned me a little bit. I asked the Washington grand jury to ask me question, and there were no questions.

A further matter that concerned me in Florida was the fact that after I had testified for some 2 hours or more, I had not yet been asked about the transaction about which I was called—which never occurred but which was a source of considerable media publicity at the time. So I told the grand jury and attorneys that I was going to ask myself questions and respond to them about this matter, because I didn't care to have this remain open for yet a third grand jury. So I did.

That can be done, I suppose, by someone who is experienced in the law and who has spent his or her lifetime in the law. But grand juries are for the protection of the rights of those who need protection, and I wonder whether our present system serves that end.

Mr. EILBERG. Mr. Alexander, we thank you very much for coming to us and being with us this morning. I assure you that your effort here is worthwhile.

Mr. ALEXANDER. Thank you, sir.

Mr. EILBERG. I ask the witnesses again—I know they will abide by it—to summarize their statements. Some of them are quite long, and counsel has gone over them thoroughly, and I, to some extent, have gone over all of them.

At this point I would like to read the following statement into the record.

This is the third in our series of hearings in the 95th Congress on proposals to reform the Federal grand jury system.

In March of this year we heard witnesses from the American Bar Association and various grand jury reform groups. As expected, these witnesses called for extensive grand jury reform and some made proposals for change far beyond those contemplated in H.R. 94, the Federal Grand Jury Reform Act of 1977.

At our second hearing we received the testimony of prosecutors and former prosecutors, of former grand jurors, and from the Honorable Frederick Lacey, representing the Judical Conference. These witnesses described what, in fact, occurs in the grand jury room. Some, like the special prosecutor Charles Ruff, and former grand juror, William Gloege, supported the reforms in H.R. 94. Others, like Judge Lacey and San Diego District Attorney Edwin Miller, believe that abuses can be limited or eliminated by insuring competent supervision by ethical prosecutors, and opposed many, but not all, of the proposed reforms.

Today, we resume our hearings with witnesses who have particular concerns with present grand jury procedures.

Before beginning our testimony today, however, I would like to make a few observations.

Last week the Supreme Court of the United States indicated in *United States* v. *Washington* that there may not be any constitutional right to warnings or instructions for grand jury witnesses. In addition, the Court specifically held, despite the practice common in most States and in most Federal jurisdictions, that there is no right for a potential defendant to receive notice that he is a target.

[A copy of *United States* v. *Washington* follows:]

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* WASHINGTON

CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 74–1106. Argued December 6, 1976—Decided May 23, 1977

Respondent, who was suspected, with others, of possible implication in a theft, was subpoenaed to appear as a witness before the District of Columbia grand jury investigating the crime. The prosecutor did not advise respondent before his appearance that he might be indicted for the theft, but respondent was given a series of warnings after being sworn, including the warning that he had a right to remain silent. Respondent nevertheless testified, and subsequently was indicted for the theft. The trial court granted respondent's motion to suppress his grand jury testimony and to quash the indictment on the ground that it was based on evidence obtained in violation of his Fifth Amendment privilege against compelled self-incrimination. The District of Columbia Court of Appeals affirmed the suppression order, holding that "the most significant failing of the prosecutor was in not advising [respondent] that he was a potential defendant" and that "[a]nother shortcoming was in the prosecutor's waiting until after administering the oath in the cloister of the grand jury before undertaking to furnish what advice was given." *Held:* Respondent's grand jury testimony may properly be used against him in a subsequent trial. The comprehensive warnings he received, whether or not such warnings were constitutionally required, dissipated any element of compulsion to self-incrimination that might otherwise have been present. The fact that a subpoenaed grand jury witness is a putative or potential defendant neither impairs nor enlarges his constitutional rights, and hence it is unnecessary to give such a defendant the warnings that the Court of Appeals held were required. Pp. 5–9.

328 A. 2d 98, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined.

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SUPREME COURT OF THE UNITED STATES

No. 74–1106

United States, Petitioner, v. Gregory V. Washington. | On Writ of Certiorari to the District of Columbia Court of Appeals.

[May 23, 1977]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this case is whether testimony given by a grand jury witness suspected of wrongdoing may be used against him in a later prosecution for a substantive criminal offense when the witness was not informed in advance of his testimony that he is a potential defendant in danger of indictment.[1]

(1)

The facts are not in dispute. Zimmerman and Woodard were driving respondent's van truck when a Washington, D. C., policeman stopped them for a traffic offense. Seeing a motorcycle in the rear of the van which he identified as stolen, the officer arrested both men and impounded respondent's vehicle. When respondent came to reclaim the van, he told police that Zimmerman and Woodard were friends who were driving the van with his permission.

He explained the presence of the stolen motorcycle by saying that while driving the van himself he had stopped to assist

[1] With *United States* v. *Mandujano*, 425 U. S. 564 (1976), and *United States* v. *Wong*, — U. S. — (1977), we have settled that grand jury witnesses, including those already targeted for indictment, may be convicted of perjury on the basis of their false grand jury testimony even though they were not first advised of their Fifth Amendment privilege against compelled self-incrimination.

an unknown motorcyclist whose machine had broken down. Respondent then allowed the motorcycle to be placed in his van to take it for repairs. Soon after this the van stalled and he walked to a nearby gasoline station to call Zimmerman and Woodard for help, leaving the van with the unknown motorcyclist. After reaching Zimmerman by phone, respondent waited at the gasoline station for his friends, then returned to the spot he had left the van when they failed to appear; by that time the van had disappeared. Respondent said he was not alarmed, assuming his friends had repaired the van and driven it away. Shortly thereafter, Zimmerman and Woodard were arrested with the stolen motorcycle in the van.

Not surprisingly, the officer to whom respondent related this tale was more than a little skeptical; he told respondent he did not believe his story, and advised him not to repeat it in court, "because you're liable to be in trouble if you" do so. The officer also declined to release the van. Respondent then repeated this story to an Assistant United States Attorney working on the case. The prosecutor, too, was dubious of the account; nevertheless, he released the van to respondent. At the same time, he served respondent with a subpoena to appear before the grand jury investigating the motorcycle theft.

When respondent appeared before the grand jury, the Assistant United States Attorney in charge had not yet decided whether to seek an indictment against him. The prosecutor was aware of respondent's explanation, and was also aware of the possibility that respondent could be indicted by the grand jury for the theft if his story was not believed.

The prosecutor did not advise respondent before his appearance that he might be indicted on a criminal charge in connection with the stolen motorcycle. But respondent, after reciting the usual oath to tell the truth, was given a series of other warnings, as follows:

"Q: . . . .

"You have a right to remain silent. You are not

required to say anything to us in this Grand Jury at any time or to answer any question.[2]

"Anything you say can be used against you in Court.

"You have the right to talk to a lawyer for advice before we question you and have him outside the Grand Jury during any questioning.

"If you cannot afford a lawyer and want one a lawyer will be provided for you.

"If you want to answer questions now without a lawyer present you will still have the right to stop answering at any time.

"You also have the right to stop answering at any time until you talk to a lawyer.

"Now, do you understand those rights, sir?

"A: Yes, I do.

"Q: And do you want to answer questions of the Grand Jury in reference to a stolen motorcycle that was found in your truck?

"A: Yes, sir.

"Q: And do you want a lawyer here or outside the Grand Jury room while you answer those questions?

"A: No, I don't think so."

In response to questions, respondent again related his version of how the stolen motorcycle came to be in the rear of his van. Subsequently, the grand jury indicted respondent, Zimmerman, and Woodard for grand larceny and receiving stolen property.

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[2] This was an obvious overstatement of respondent's constitutional rights; the very purpose of the grand jury is to elicit testimony, and it can compel answers, by use of contempt powers, to all except self-incriminating questions.

After the oral warnings, respondent was also handed a card containing all the warnings prescribed by *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and a waiver form acknowledging that the witness waived the privilege against compelled self-incrimination. Respondent signed the waiver.

Respondent moved to suppress his testimony and quash the indictment, arguing that it was based on evidence obtained in violation of his Fifth Amendment privilege against compelled self-incrimination. The Superior Court for the District of Columbia suppressed the testimony and dismissed the indictment, holding that before the Government could use respondent's grand jury testimony at trial, it had first to demonstrate that respondent had knowingly waived his privilege against compelled self-incrimination. Notwithstanding the comprehensive warnings described earlier, the court found no effective waiver had been made, holding that respondent was not properly advised of his Fifth Amendment rights. The court thought the Constitution required, at a minimum, that

> "inquiry be made of the suspect to determine what his educational background is, and whether or not he understands that this is a constitutional privilege and whether he fully understands the consequences of what might result in the event that he does waive his constitutional right and in the event that he does make incriminatory statements . . . ."

The court also held that respondent should have been told that his testimony could lead to his indictment by the grand jury before which he was testifying, and could then be used to convict him in a criminal prosecution.

The District of Columbia Court of Appeals affirmed the suppression order. *United States* v. *Washington*, 328 A. 2d 98 (1974).[3] That court also took the position that "the most

[3] The Court of Appeals declined to dismiss the indictment, however, relying on a line of cases in this Court holding that an indictment returned by a properly constituted grand jury is not subject to challenge on the ground that it was based on unconstitutionally obtained evidence. See *United States* v. *Calandra*, 414 U. S. 338 (1974); *United States* v. *Blue*, 384 U. S. 251 (1966); *Lawn* v. *United States*, 355 U. S. 339 (1958). Respondent's cross-petition seeking review of this portion of the Court of Appeals' ruling was denied, *Washington* v. *United States*, 426 U. S. 905 (1976), and the validity of the indictment is not an issue in this case.

significant failing of the prosecutor was in not advising [respondent] that he was a potential defendant. Another shortcoming was in the prosecutor's waiting until after administering the oath in the cloister of the grand jury before undertaking to furnish what advice was given." *Id.*, at 100.[4]

(2)

The implicit premise of the District Court of Appeals' holding is that a grand jury inquiry, like police custodial interrogation, is an "interrogation of persons suspected or accused of crime [that] contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda, supra,* at 467. But this Court has not decided that the grand jury setting presents coercive elements which compel witnesses to incriminate themselves. Nor have we decided whether any Fifth Amendment warnings whatever are constitutionally required for grand jury witnesses; moreover, we have no occasion to decide these matters today, for even assuming that the grand jury setting exerts some pressures on witnesses generally or on those who may later be indicted, the comprehensive warnings respondent received in this case plainly satisfied any possible claim to warnings. Accordingly, respondent's grand jury testimony may properly be used against him in a subsequent trial for theft of the motorcycle.

Although it is well settled that the Fifth Amendment privilege extends to grand jury proceedings, *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892), it is also axiomatic

[4] Though both courts below found no effective waiver of Fifth Amendment rights, neither court found, and no one suggests here, that respondent's signing of the waiver-of-rights form was involuntary or was made without full appreciation of all the rights of which he was advised. The Government does not challenge, and we do not disturb, the finding that at the time of his grand jury appearance respondent was a potential defendant whose indictment was considered likely by the prosecution.

that the Amendment does not automatically preclude self-incrimination, whether spontaneous or in response to questions put by government officials. "It does not preclude a witness from testifying voluntarily in matters which may incriminate him," *United States* v. *Monia*, 317 U. S. 424, 427 (1943), for "those competent and freewilled to do so may give evidence against the whole world, themselves included." *United States* v. *Kimball*, 117 F. 156, 163 (CC SDNY 1902); accord, *Miranda*, *supra*, at 478; *Michigan* v. *Tucker*, 417 U. S. 433 (1974); *Hoffa* v. *United States*, 385 U. S. 293 (1966). Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. In addition to guaranteeing the right to remain silent unless immunity is granted, the Fifth Amendment proscribes only self-incrimination obtained by a "genuine compulsion of testimony." *Michigan* v. *Tucker*, *supra*, at 440. Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions. Accordingly, unless the record reveals some compulsion, respondent's incriminating testimony cannot conflict with any constitutional guarantees of the privilege.[5]

The Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions. See *Garner*, *supra*; *Beckwith*, *supra*; *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 223–227 (1973). Of course, for many

[5] In *Miranda*, the Court saw as inherently coercive any police custodial interrogation conducted by isolating the suspect with police officers; therefore, the Court established a *per se* rule that all incriminating statements made during such interrogation are barred as "compelled." All *Miranda*'s safeguards, which are designed to avoid the coercive atmosphere, rest on the overbearing compulsion which the Court thought was caused by isolation of a suspect in police custody. See *Oregon* v. *Mathiason*, 45 U. S. L. W. 3505 (Jan. 25, 1977); *Beckwith* v. *United States*, 425 U. S. 341 (1976); *Garner* v. *United States*, 424 U. S. 648, 653–654 (1976); *Michigan* v. *Tucker*, *supra*, at 444.

witnesses the grand jury room engenders an atmosphere conducive to truth-telling, for it is likely that upon being brought before such a body of neighbors and fellow citizens, and having been placed under a solemn oath to tell the truth, many witnesses will feel obliged to do just that. But it does not offend the guarantees of the Fifth Amendment if in that setting a witness is more likely to tell the truth than in less solemn surroundings. The constitutional guarantee is only that the witness be not *compelled* to give self-incriminating testimony. The test is whether, considering the totality of the circumstances, the free will of the witness was overborne. *Rogers* v. *Richmond,* 365 U. S. 534, 544 (1961).

(3)

After being sworn, respondent was explicitly advised that he had a right to remain silent and that any statements he did make could be used to convict him of crime. It is inconceivable that such a warning would fail to alert him to his right to refuse to answer any question which might incriminate him. This advice also eliminated any possible compulsion to self-incrimination which might otherwise exist. To suggest otherwise is to ignore the record and reality. Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled. Moreover, any possible coercion or unfairness resulting from a witness' misimpression that he must answer truthfully even questions with incriminatory aspects is completely removed by the warnings given here. Even in the presumed psychologically coercive atmosphere of police custodial interrogation, *Miranda* does not require that any additional warnings be given simply because the suspect is a potential defendant; indeed, such suspects are potential defendants more often than not. *United States* v. *Binder,* 453 F. 2d 805, 810 (CA2 1971), cert. denied, 407 U. S. 920 (1972).

Respondent points out that unlike one subject to custodial interrogation, whose arrest should inform him only too clearly that he is a potential criminal defendant, a grand jury witness may well be unaware that he is targeted for possible prosecution. While this may be so in some situations, it is an overdrawn generalization. In any case, events here clearly put respondent on notice that he was a suspect in the motorcycle theft. He knew that the grand jury was investigating that theft and that his involvement was known to the authorities. Respondent was made abundantly aware that his exculpatory version of events had been disbelieved by the police officer, and that his friends, whose innocence his own story supported, were to be prosecuted for the theft. The interview with the prosecutor put him on additional notice that his implausible story was not accepted as true. The warnings he received in the grand jury room served further to alert him to his own potential criminal liability. In sum, by the time he testified respondent knew better than anyone else of his potential defendant status.

However, all of this is largely irrelevant, since we do not understand what constitutional disadvantage a failure to give potential defendant warnings could possibly inflict on a grand jury witness, whether or not he has received other warnings. It is firmly settled that the prospect of being indicted does not entitle a witness to commit perjury, and witnesses who are not grand jury targets are protected from compulsory self-incrimination to the same extent as those who are. Because target witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination, potential defendant warnings add nothing of value to protection of Fifth Amendment rights.

Respondent suggests he must prevail under *Garner* v. *United States, supra.* There, the petitioner was charged with a gambling conspiracy. As part of its case, the Government introduced Garner's income tax returns, in one of which he

had identified his occupation as "professional gambler," and in all of which he had reported substantial income from wagering. The Court recognized that Garner was indeed compelled by law to file a tax return, but held that this did not constitute compelled self-incrimination. The Court noted that Garner did not claim his Fifth Amendment privilege, instead making the incriminating disclosure that he was a professional gambler. *Garner* holds that the Self-Incrimination Clause is violated only when the Government compels disclosures which it knows will incriminate the declarant—that is, only when it intentionally places the individual under "compulsions to incriminate, not merely compulsions to make unprivileged disclosures." 424 U. S., at 657. But the distinction between compulsion to incriminate and compulsion to disclose what the Government is entitled to know is of no help to respondent; in this case there was no compulsion to do either.

In *Beckwith* v. *United States, supra,* decided shortly after *Garner,* we reaffirmed the need for showing overbearing compulsion as a prerequisite to a Fifth Amendment violation. There, the Government agent interrogated the taxpayer for the explicit purpose of securing information that would incriminate him. There, as here, the interrogation was not conducted in an inherently coercive setting; hence the claim of compelled self-incrimination was rejected.[6]

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[6] Although the District Court of Appeals rested its holding solely on the Self-Incrimination Clause of the Fifth Amendment, respondent urges the Fifth Amendment Due Process Clause. He contends it is fundamentally unfair to elicit incriminating testimony from a potential defendant without first informing him of his target status. This, it is argued, would alert the witness more pointedly so as to enable him to decide whether to invoke the privilege against compelled self-incrimination. This line of argument simply restates respondent's claims under the Self-Incrimination Clause and is rejected for the same reasons. Moreover, there is no evidence of any governmental misconduct which undermined the fairness of the proceedings.

(4)

Since warnings were given, we are not called upon to decide whether such warnings were constitutionally required. However, the District Court of Appeals held that whatever warnings are required are insufficient if given "in the cloister of the grand jury." 328 A. 2d, at 100. That court gave no reason for its view that warnings must be given outside the presence of the jury, but respondent now advances two justifications. First, it could be thought that warnings given to respondent inside the grand jury came too late, because of the short time to assimilate their significance, and because of the presence of the grand jurors. But respondent does not contend that he did not understand the warnings given here. In any event, it is purely speculative to attribute any such effects to warnings given in the presence of the jury immediately before taking the stand. If anything, the proximity of the warnings to respondent's testimony and the solemnity of the grand jury setting seem likely to increase their effectiveness.

Second, respondent argues that giving the oath in the presence of the grand jury undermines assertion of the Fifth Amendment privilege by placing the witness in fear that the grand jury will infer guilt from invocation of the privilege. But this argument entirely overlooks that the grand jury's historic role is as an investigative body; it is not the final arbiter of guilt or innocence. Moreover, it is well settled that invocation of the Fifth Amendment privilege in a grand jury proceeding is not admissible in a criminal trial, where guilt or innocence is actually at stake.

The judgment of the Court of Appeals is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 74–1106

United States, Petitioner, v. Gregory V. Washington. | On Writ of Certiorari to the District of Columbia Court of Appeals.

[May 23, 1977]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

The general rule that a witness must affirmatively claim the privilege against compulsory self-incrimination must in my view admit of an exception in the case of a grand jury witness whom the prosecutor interrogates with the express purpose of getting evidence upon which to base a criminal charge against him. In such circumstances, even warnings before interrogation of his right to silence do not suffice. The privilege is emptied of substance unless the witness is further advised by the prosecutor that he is a potential defendant. Only if the witness then nevertheless intentionally and intelligently waives his right to be free from compulsory self-incrimination and submits to further interrogation should use of his grand jury testimony against him be sanctioned. As I stated in dissent in *United States* v. *Mandujano*, 425 U. S., at 598–600:

> "I would hold that, in the absence of an intentional and intelligent waiver by the individual of his known right to be free from compulsory self-incrimination, the Government may not call before a grand jury one whom it has probable cause—as measured by an objective standard—to suspect of committing a crime, and by use of judicial compulsion compel him to testify with regard to that crime. In the absence of such a waiver, the Fifth Amendment requires that any testimony obtained in this fashion be unavailable to the Government for use at trial.

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> Such a waiver could readily be demonstrated by proof that the individual was warned prior to questioning that he is currently subject to possible criminal prosecution for the commission of a stated crime. . . ."

In this case, although respondent Washington was advised of his rights to silence and to talk to a lawyer before he appeared before the grand jury, he was "only told that he was needed as a witness in prosecuting the two who were occupants of the van at the time of its impoundment." *United States* v. *Washington,* 328 A. 2d 98, 100 (Dist. of Col. 1974). He was never told that he was in danger of being indicted himself, even though "at the time of his grand jury appearance respondent was a potential defendant whose indictment was considered likely by the prosecution." *Ante,* at 5 n. 4.

The ancient privilege of a witness against being compelled to incriminate himself is precious to free men as a shield against high-handed and arrogant inquisitorial practices. It has survived centuries of controversies, periodically kindled by popular impatience that its protection sometimes allows the guilty to escape punishment. But it has endured as a wise and necessary protection of the individual against arbitrary power, and the price of occasional failures of justice is paid in the larger interest of general personal security.

I would hold that a failure to warn the witness that he is a potential defendant is fatal to an indictment of him when it is made unmistakably to appear, as here, that the grand jury inquiry became an investigation directed against the witness and was pursued with the purpose of compelling him to give self-incriminating testimony upon which to indict him. I would further hold that without such prior warning and the witness' subsequent voluntary waiver of his privilege, there is such gross encroachment upon the witness' privilege as to render worthless the values protected by it unless the self-incriminating testimony is unavailable to the Government for use at any trial brought pursuant to even a valid indictment.

It should be remarked that of course today's decision applies only to application of the privilege against self-incrimination secured by the Fifth Amendment to the United States Constitution.* The holding does not affect the authority of state courts to construe counterpart provisions of state constitutions—even identically phrased provisions—"to give the individual greater protection than is provided" by the federal provision. *State* v. *Johnson*, 68 N. J. 349, 353, 346 A. 2d 66, 67–68 (1975). See generally Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harv. L. Rev. 489 (1977).

A number of state courts have recognized that a defendant or potential defendant called before a grand jury is privileged against the State's using his self-incriminating testimony to procure an indictment or using it to introduce against him at trial, even in the absence of an affirmative claim of his privilege against self-incrimination. See, *e. g.*, *People* v. *Laino*, 10 N. Y. 2d 161, 176 N. E. 571 (1961); *State* v. *Fary*, 19 N. J. 431, 117 A. 2d 499, 503 (1955); *Taylor* v. *Commonwealth*, 274 Ky. 51, 118 S. W. 2d 140 (1938); *State* v. *Corteau*, 198 Minn. 433, 270 N. W. 144 (1936); *Culbreath* v. *State*, 22 Ala. App. 143, 113 So. 465 (1925). See additional cases in "Annotation: Self-incrimination before Grand Jury," 38 A. L. R. 2d 225, 290–294 (1954). One court has specifically held that interrogating a potential defendant "under the guise of examining him as to the guilt of someone else" is a violation of the defendant's privilege against self-incrimination. *People* v. *Cochran*, 313 Ill. 508, 145 N. E. 207, 223 (1974). See also Newman, "The Suspect and the Grand Jury: A Need for Constitutional Protection," 11 U. Rich. L. Rev. 1 (1976);

*Of course, it is still open to the District of Columbia Court of Appeals, under its supervisory powers, on remand to order and enforce compliance with what it considers proper procedures before the grand jury, *Ristiano* v. *Ross*, 424 U. S. 589, 597 n. 9 (1976); *United States* v. *Jacobs*, —— F. 2d —— (CA2 1976), cert. pending, No. 76-1193.

"Comment, The Grand Jury Witness' Privilege Aagainst Self-Incrimination," 62 Nw. L. Rev. 207, 223 (1967); Meshbesher, "Right to Counsel before Grand Jury," 41 F. R. D. 189, 191 (1966). The rationale of these decisions—which I would find applicable to the case now before us—is that where the grand jury investigation is in fact a proceeding against the witness, or even if begun as a general investigation it becomes a proceeding against the witness, the encroachment upon the witness' privilege requires that a court deny to the prosecution the use of the witness' self-incriminating testimony.

Mr. EILBERG. This case, of course, establishes onl ythe outside limits of permissible action under the Constitution. Congress can, and must, in appropriate circumstances go beyond bare constitutional minimums in establishing standards for executive action and in providing procedural protections. It will be first the members of this subcommittee, then the full committee, and finally the Congress that will determine what fair play, fundamental fairness, and due process should require in grand jury proceedings.

With that, we have just heard from our first witness, Donald C. Alexander. Mr. Alexander was formerly Commissioner of the Internal Revenue Service. As I stated at our last hearing, the Subcommittee on Criminal Justice has referred to this subcommittee amendments to rule 6(e) of the Federal Rules of Criminal Procedure, that might authorize additional persons as governmental agents, in the grand jury room. Opposition to this rule's change arose from those who feared abuse of grand jury as procedures to handle civil investigations. Specifically mentioned has been the ability of the IRS to avoid the protections, such as those involving adequate notice, venue challenge, relevancy standards, and court review, involved in ordinary IRS statutory administrative summons procedures by use of a grand jury subpena, that does not have such protections.

Our next witness is Mr. Charles Perlik, Jr., president, the Newspaper Guild, Washington, D.C.

Mr. HARRIS. Mr. Chairman?

Mr. EILBERG. Mr. Harris.

Mr. HARRIS. As Mr. Perlik approaches the table I would like to take the opportunity to advise us on the committee of his long history of community service.

I have great admiration for his community service over the years, not just to the labor movement, but to the whole community. I would like to congratulate him for it and welcome him for his testimony.

Mr. EILBERG. Mr. Perlik, would you identify your associates.

TESTIMONY OF CHARLES A. PERLIK, JR., PRESIDENT, THE NEWSPAPER GUILD, AFL-CIO

Mr. PERLIK. Yes, I would be glad to.

In the process, I would like to thank Mr. Harris for his kind observations.

This is David Eisen, director of research and information, the Newspaper Guild.

We have arranged our testimony, Mr. Chairman, in such a fashion that will enable me to read the summary, accompanied by a great deal of illustrative and explanatory matters, and with your permission I will proceeed in that fashion.

Mr. EILBERG. Your statement will be made a part of the record.

[Prepared statement of Charles A. Perlik, Jr. follows:]

STATEMENT BY CHARLES A. PERLIK, JR., PRESIDENT, THE NEWSPAPER GUILD, AFL-CIO, CLC

I am Charles A. Perlik, Jr., president of The Newspaper Guild, which represents some 40,000 persons employed in the newsrooms and commercial departments of newspapers, news services, magazines and related enterprises in the United States, Canada and Puerto Rico.

Our primary function as a trade union, of course, is to advance the economic interests of our members. But, just as the teachers' union, for example, is concerned with raising educational standards as well as salaries, The Newspaper Guild has had as one of its prime concerns the preservation and improvement of a truly free press. With other media organizations, we have worked consistently to assure that the press remains free of any restriction that contravenes either the letter or the spirit of the First Amendment. That concern has brought us here to Capitol Hill many times either to oppose legislation we feel would infringe on those First Amendment rights or to seek the adoption of legislation that would protect or further them.

Our most recent visit here in that interest was in 1973, to testify on behalf of legislation recognizing the right of news gatherers to protect their information and sources. We regard this right as an integral part of that freedom conferred by the First Amendment, because without it, the trust between news gatherers and their sources is in peril. And that trust is essential to the news gatherer's ability to function and thus to the press's ability to bring the public the information to which it has a right under the First Amendment.

The affirmation of this right has been criticized in some quarters as in conflict with the needs of law enforcement and other government functions, but that, to put it most charitably, is a short-sighted view. The elementary fact is that without the confidence of their news sources, founded in their right to protect them, reporters simply aren't going to get and write the stories that impel overeager prosecutors to hale them before grand juries and into court in hopes of obtaining additional information. Killing the goose that lays the golden egg may get one more egg, but production stops there.

Before 1972, we and others in the news media, convinced that news gatherers' privilege was implicit in the First Amendment, opposed any legislative attempt to define it, since we considered that right absolute and unqualified. Our conviction hasn't changed, but, unfortunately, it is a conviction that the Supreme court in its 1972 decision on the *Caldwell*, *Branzburg* and *Pappas* cases did not share. That decision made it necessary to obtain legislation that would accomplish what the Supreme Court failed to do: affirm the right of news gatherers to shield their information and sources.

But fashioning such blanket legislation proved, in confirmation of our earlier misgivings, no easy task. As I am sure you are all aware, a number of bills were introduced to accomplish that purpose, but they became bogged down in disagreement over limitations and qualifications. We still hope that logjam will eventually be broken, but there seems to be general agreement that it won't happen soon.

For that reason, we come before you today to seek half a loaf—the half that posed relatively little problem in those abortive committee discussions on news gatherers' privilege. Your consideration of badly needed reforms in the grand-jury system offers an opportunity to give legislative sanction to the right of news gatherers to protect their information and sources from federal grand-jury inquisition and provide a model for state legislation to the same end.

While this is, to be sure, a piecemeal solution of the privilege problem, it is by no means an unnatural one. It would cover an area in which there was little controversy during the debate over general privilege legislation; while some of the legislation proposed qualified news gatherers' privilege in one way or another most of it—including the bill approved by the House Subcommittee on Courts, Civil Liberties and the Administration of Justice—provided for absolute privilege on the grand-jury level.

At the same time, the enactment of testimonial privilege in the grand-jury area would provide protection in one of the places where it is most acutely needed. A check through the records of news gatherers' subpoenas over the past six years indicates that there are few so eager as an investigating prosecutor to scatter subpoenas broadside on the press in an effort to turn reporters, in effect, into legal investigators, never mind at what cost to the press' ability to unearth the very information being sought.

Our research has logged no less than 60 subpoenas in the past six years requiring news gatherers and two or three persons in related fields to appear before grand juries, in many cases with notes, transcripts, documents, film or other materials. In 40 cases, those subpoenas were enforced, and the news gatherer was forced, willy-nilly, to appear before the grand jury. Contempt citations were issued in 17 cases in which news gatherers refused to answer questions or provide subpoenaed material, and five went to jail for varying periods of time for

that refusal. Seven were required under threat of confinement to disclose information about their sources that they had sought to protect.

The issuance of subpoenas to news gatherers has become a veritable contagion. Before 1970, it was relatively rare for a reporter to be forced to betray the confidence of his sources or go to jail. Today it has become a disgraceful commonplace, and I would hope that the subcommittee will see fit to eliminate it in one of the areas where it is most prevalent.

While falling short of that end and, indeed, not designed for that specific purpose, many of the grand-jury reform bills already introduced contain provisions that would ameliorate the situation of news gatherers confronted by a relentless prosecutor on the one hand and their consciences on the other. Our International Executive Board has endorsed these provisions, in a resolution you will find attached to this statement. There are numerous good general reasons for enacting many of the proposed legislative provisions, but I will confine myself to those that would be of specific help to news gatherers. Let me comment on these briefly, reserving more extended treatment for the latter portion of this statement, which has been submitted for your consideration and the official record.

Particularly salutary, we think, are those procedural provisions of Mr. Ellberg's bill, H.R. 94, that would allow counsel into the grand-jury room, require seven days' notice before appearance and inform the witness of the exact subject matter of the investigation. Under present barely regulated procedures, news gatherers all too often find themselves before a grand jury with the briefest of notice, little indication of what information is being sought from them, and bereft of counsel in the grand-jury room to advise them on the intricate matter of what the law may conceivably allow them to withhold. The situation is made to order for fishing expeditions in which prosecutors can seek to pick the reporter's brain for confidential information that is not even directly germane to the matter under injuiry.

We would also like to see enacted the provision in Mr. Conyers' bill, H.R. 3736, that would require a majority vote of the grand jury to issue a subpoena. Leaving this power in the hands of the prosecutor alone lays the way open for harassment of the press, a phenomenon not unknown among prosecutors.

But we would like to see something more. The Justice Department, under pressure from the news media, issued guidelines several years ago setting forth detailed procedural steps for U.S. attorneys to follow in subpoenaing news gatherers. We find the safeguards they incorporate far from adequate to the need, but they do provide some rein on government prosecutors who are ready to subpoena a reporter 10 minutes after reading his or her story. Or, more correctly, they would provide such a rein if they were adhered to. Figures released by the Justice Department two years ago showed that the supposedly binding guidelines had been violated in 29 percent of the 109 cases in which news gatherers had been subpoenaed over a 26-month period.

We think that, at the very least, these guidelines ought to be given the force of law and prosecutors barred from proceeding against any news gatherer subpoenaed in violation of their provisions. A copy of the guidelines, in their latest 1973 revision, is attached to this statement.

Another provision of Mr. Ellberg's bill that would ease the situation of news gatherers called before grand juries is the one enabling witnesses to make copies of the official transcript of their testimony. When Earl Caldwell of the New York Times was subpoenaed to testify on the Black Panthers, he refused to even enter the grand-jury room. Had he done so, he explained, there would have been no way he could have convinced Panther leaders, whose confidence he had earned with great difficulty, that he had not betrayed them. He would have been unable to so much as show them a transcript of his testimony.

H.R. 94 gives the witness the right to examine and copy the transcript or recording of his appearance but entitles him to a copy without cost only if he or she can't afford one. We don't see why witnesses subpoenaed to give testimony should have to pay for a transcript, which can be long and costly, under any circumstances and would suggest that this provision be amended to make it available to all without cost.

We are more disturbed, however, by a section of this provision that allows a judge to order the transcript withheld from the witness, and on a government showing of cause made available to the judge alone, at that. This would open the door to canceling out the reform upon the flimsiest of pretexts, not even subject

to adversary procedure. Far more in order, we think, would be a provision flying in the opposite direction, exempting such witnesses' testimony from any sort of court gag order. It does news gatherers, at least, little good a receive transcripts of their testimony if they must be kept locked in a desk drawer.

We think the six-month limit on contempt confinements in Mr. Eilberg's bill is a badly needed reform; as matters stand, news gatherers and others can be put behind bars for the length of the grand-jury term—as long as 18 months. But, in the case of news gatherers, at least, we think the provision should go farther. Whatever justification there can be for jailing reporters in order to compel their testimony, there can be none for jailing them as punishment. A news gatherer who refuses to answer questions before a grand jury is doing so in accordance with the highest standards of his profession; to punish him or her for so doing is unconscionable. The very least we feel should be enacted is a provision exempting from criminal contempt any person who refuses to give information obtained in the course of gathering, receiving or processing information for any communications medium.

Finally, a word on the subject of consensual immunity. The general philosophical basis for requiring a witness' consent to a grant of immunity before he or she can be forced to testify under it has been set forth by Mr. Conyers, Judith Avner of the Coalition to End Grand Jury Abuse and others. Thus, I will confine my observations to its effect on news gatherers.

Reporters, quite candidly, are more reluctant than most to plead the Fifth Amendment; they are much happier—if less successful—pleading the First. In the case of a news gatherer, pleading the Fifth is not only regarded, however wrongly, as implying guilt but seems to suggest an involvement not in accord with the news gatherer's role as a detached observer. But reporters have occasionally made such pleas when asked to reveal confidential information or sources; several cases are cited in the additional statement we are submitting for the record.

Forcing reporters to disclose such information or sources may be requiring them to testify to their own disadvantage, seriously damaging their ability to perform their job. If, in the words of a federal judge many years ago, compulsory immunity enables the government to "probe the secrets of every conversation, or society, by extending compulsory pardon to one of its participants," in the case of news gatherers, it makes the government a potential party to every confidence given a reporter by a source of news. As long as absolute privilege for news gatherers does not exist, they should not be denied this avenue of protection.

It is perhaps unfortunate that the concept that news gatherers have an inherent right to shield their information and sources has become known as "reporters' privilege." The term suggests that the First Amendment imposes upon the news gatherer a special benefit, whereas, in reality, it imposes not a privilege but an obligation. That is the way it was stated in The Newspaper Guild's Code of Ethics, adopted as our first annual convention in 1934. That code stated that it was "the newsman's duty" not to "reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies." (A copy of the code is attached to this statement.)

That position was reaffirmed by the Guild's 1959 Convention, which noted that it was based upon "the recognition that a newsman who disclosed confidential sources would soon be able to collect the information necessary to give meaning to a free press." And 10 years later, amidst the first flurry of what was to become a veritable blizzard of subpoenas, the Guild's convention put the matter thus:

"Though jobs in the news industry do not relieve anyone of the duties of citizenship, those duties carry protections under the Bill of Rights which should permit a news gatherer to protect the ethics of his craft and his own future ability to practice it."

Let there be no mistake about it: Demands for news gatherers' notes, tapes, films, photographs or files, or for disclosure of their information or sources, seriously endanger the trust between news gatherers and news sources. And that trust is essential both to the ability of the press to provide the public the information to which it has a right under the First Amendment and to news gatherers' ability to carry out their function under that Amendment.

That statement is not speculative. The first issue of the Press Censorship Newsletter (published by the Reporters Committee for Freedom of the Press) in 1973 reported no less than five instances in which the fear that confidentiality could not be protected forced newspapers or broadcasting stations to lose stories.

In one, CBS canceled an interview with a woman who said she would recount how she cheated on welfare if her identity could be protected. In the second, ABC News abandoned an attempt to film an interview with Black Panther leaders in their headquarters because it could not make a firm promise of confidentiality. The Louisville Courier Journal, the paper for which Paul Branzburg worked, canceled further stories on drug abuse after Branzburg was subpoenaed in one of the three cases on which the Supreme Court ruled in 1972. The Boston Globe was unable to pursue an investigation of official corruption because its sources were afraid of being identified. And a reporter from the Baton Rouge State Times had to abandon a similar story for the same reason.

Brit Hume, writing in the New York Times magazine of Dec. 17, 1972, reported several similar cases and made a key point that explains why it is truly a First Amendment right that is being breached here. He wrote:

"The [Supreme Court] decision is not likely to stem the flow of official statements or even official leaks of restricted information. The orchestrated release of classified material by those in power has long been a familiar practice in Washington. During Congressional deliberations over the Pentagon's budget requests, for instance, such leaks have been known to become a virtual shower of secret intelligence on enemy activity—usually the very kind of activity some embattled Pentagon project is designed to offset. It hardly seems likely that the Defense Department will be deterred from releasing such information by threat of a Justice Department grand-jury investigation. And journalists who act as the conduit through which such material reaches the public obviously have little to fear.

"Rather, it is reporters who cover activity frowned upon by the authorities or uncover facts embarrassing to them that seem likely to be hampered. For the sources of such information are now vulnerable to identification and punishment."

Law-enforcement officers would have you believe that their operations would suffer grievously if news gatherers had an unqualified right to protect their information and sources. They can produce few examples, however, and those few are far outweighed by the instances in which investigations that have led to indictments resulted from newspaper stories that might have never been printed if the original sources of information had not been able to count on anonymity.

News gatherers appear to be God's gift to lazy prosecutors. How much easier to "deputize" a reporter by subpoena than to have your investigators do the same legwork that produced the story originally. News gatherers are repeatedly subpoenaed for information that is available through other channels. A particularly striking example was reported by Editor & Publisher, the newspaper trade journal, in its issue of Oct. 30, 1976.

In that case, Miami Herald reporter Ron Sympson, who had refused to turn over his copy of a manuscript in a grand-jury investigation, escaped going to jail when the Herald, acting independently of Sympson, persuaded the manuscript's author to supply it with another copy and release it. The prosecutor, Editor & Publisher said, made no attempt to get the manuscript from the author before subpoenaing Sympson, who said there were eight other sources that could have been solicited for the material.

Where this sort of thing can lead was demonstrated in another Flordia case, this one involving the Fort Myers News-Press. There, two reporters, force-fed a grant of immunity, were subpoenaed to testify about taped conversations with a murder suspect. The reporters testified as to what was on the tapes, but because the News-Press had erased the tapes, it was indicted on a charge of destroying evidence. As the newspaper's attorney put it, the authorities "are trying to hold us accountable for the way we conducted the news-gathering process."

Government interference in the news-gathering process is precisely what the First Amendment is intend to prevent.

Incorporating news gatherers' privilege into the grand-jury legislation being fashioned by this Subcommittee would eliminate this sort of abuse in the area where it is at the same time perhaps most prevalent and least justified. Members of the Congress, in attempting to formulate general privilege legislation a few years ago, could not agree to apply it without qualification to criminal trials and libel suits. But there was relatively little disagreement about applying it at the investigatory level. Section 3 of H.R. 5928, approved by the Subcommittee on Courts, Civil Liberties and the Administration of Justice in 1973, provided:

Except as qualified by Sections 4 and 7 of this Act, in any Federal or State proceeding (including a grand jury or pretrial proceeding) no individual called

to testify or provide other information (by subpoena or otherwise) shall be required to disclose information or the identity of a source of information received or obtained by him in his capacity as a newsman.

Sections 4 and 7 pertained, respectively, to trials and libel suits, where the Subcommittee felt constrained to qualify the privilege. But there was no qualification on its application at the grand-jury level. We urge this Subcommittee to incorporate similar language, in relation to grand-jury testimony, in the legislation you are considering.

Both H.R. 3736 and H.R. 94 contain provisions that could be construed to protect news gatherers from being forced to testify on their information or sources. H.R. 94, in Section 3330B, Subsection (d) (1) (D) would allow a witness to refuse to testify if a court finds that compliance with the subpoena would be "unreasonable or oppressive" and would "lead to testimony or other information that is cumulative, unnecessary or privileged."

H.R. 3736, in Subsection 3330A, Subsection (k) (2) (iii) goes a bit farther, incorporating the above language but also freeing a witness from compulsion to testify if the court finds that "compliance with the subpoena would be unreasonable or oppressive because . . . the impairment or disparagement of the right of any person to counsel of her or his choice or of other lawful confidential relationship which would result from compelling the witness' testimony would outweigh the value of that testimony, even though no privilege exists . . . ."

The Newspaper Guild is firmly convinced that a reporter-source privilege is inherent in the First Amendment, and the Supreme Court's decision in the Caldwell, Branzburg and Pappas cases did not completely close the door on it. But in the light of that decision, it would be overly optimistic to rest much hope in the likelihood that the bills' present language would provide a shelter for news gatherers when they come into court to get a subpoena quashed. At best, they would give rise to a judicial balancing act in which the claims of law enforcement generally seem to weigh more heavily than the claims of a free press.

From the standpoint of a news source's confidence that his or her identity will not be disclosed, the prospect of such a balancing act would be of little comfort; the source would be playing Russian roulette with the judge spinning the gun chamber. He would be unlikely to stake his job or his freedom on the possibility that the judge will find impairment of the reporter's confidentiality of greater weight than the testimony that would result.

Under present grand-jury law, everything is stacked on the side of the prosecution, and we appreciate the effort being made in these provisions to restore badly needed balance. But as far as protecting news gathers is concerned, only an unambiguous and unqualified assertion of privilege is likely to accomplish what is necessary.

However, if, for whatever reason, such an unambiguous provision is not enacted, the procedural safeguards contained in H.R. 94 are essential if news gatherers are to have even minimal protection. The combination of seven days' notice and the requirement that the subject matter under investigation be stated would at least provide sufficient time and information to enable the news gatherer to move to quash or one or another of the grounds set forth in the bill, or on some other basis.

We also endorse, without reservation, the provision of H.R. 94 that permits counsel inside the grand-jury chamber instead of outside the door. A news gatherer may be better equipped legally than the average lay person, but his or her legal knowledge is no match for the prosecutor's. The presence of an attorney would at least assure the witness of receiving whatever minimal protection the law allows.

We do have reservations, however, about two subsections of the right-to-counsel provision.

Subsection (c) asserts that "counsel shall not be permitted to address the grand jurors or otherwise take part in proceedings before the grand jury." But what if the grand jurors have a question they would like to ask the witness's counsel? What if they would like the counsel to clarify an answer the witness has given? Would Subsection (c) mean that the counsel could not answer the grand jurors' question? On its face, it could be so interpreted. Such a complete muzzle on defense attorneys would be unwise, if not unprecedented, as far as we are aware.

In Congressional hearings, for example, a witness's counsel may answer questions and make clarifying comments. One need only recall the Senate Select Committee's hearings on Watergate, when the voices of several witnesses' attorneys became familiar to a national viewing audience.

Subsection (d) contains language that would allow judges to dismiss a witness's counsel if the court finds that the counsel has "unduly delayed or impeded" grand-jury proceedings. This language is dangerously vague. A counsel who seeks to invoke whatever protection the law contains for a news gatherer could, in the eyes of some judges, be considered delaying the grand-jury proceedings unduly.

This provision would dilute the witness' right to effective counsel by placing every attorney on notice that by vigilantly watchdogging the rights of his or her client, he or she runs the risk of being removed from the case. The courts can already punish attorneys who are truly obstructionist by contempt citations. There would seem to be no need to add this new power in an area of the judicial system where the witness's protection, even under the proposed reforms, would remain at its weakest.

The Justice Department's official guidelines on news-media subpoenas, laid down by Attorney General John Mitchell in 1970 in response to an outcry against their sudden proliferation, and revised in 1973 by Attorney General Elliott Richardson, are a far cry from the type of protection required for news gatherers. But they might provide some sort of check rein on subpoenas—if they were enforced. They require, among other things, that U.S. attorneys attempt to obtain information from other sources before turning to the news media, negotiate with the media before contemplating a subpoena, and obtain the Attorney General's authorization for such a subpoena before it is issued. They also require that any subpoenas, "except under exigent circumstances," be limited to the verification of published information and "whenever possible be directed at material information regarding a limited subject matter."

These guidelines proved, in practice, to be a sieve with holes big enough to allow almost any subpoena through. Assistant Attorney General Antonin Scalia reported to the Subcommittee on Courts, Civil Liberties and the Administration of Justice two years ago that over a 26-month period between March 1973 and May 1975, the Attorney General had approved subpoena requests in 54 of 57 cases. But in 22 additional cases, he said, subpoenas were issued without the Attorney General's approval. That's almost one out of every three.

The guidelines have been violated in other ways. In at least two cases that we know of—and there is no reason to believe that they are unique—news gatherers were subpoenaed without any negotiations whatsoever. But when the defendant in one of those cases cited this dereliction in arguing against a contempt citation, he found it wasn't enough to save him from jail. The court held that there was no burden of proof on the Justice Department to show that the guidelines had been adhered to. The defendant was Will Lewis, station manager of KPFK-FM in Los Angeles; he was found in contempt for failing to produce a terrorist group's communique handcuffed in the courtroom and jailed on the spot. Lewis spent two days behind bars before being released pending appeal; when the appeal lost, he was forced to turn over the document.

The guidelines, as we have said, are totally inadequate to the need. But if there is no general provision affirming news gatherers' privilege before grand juries, the Justice Department should be forced by law to adhere to the guidelines it has laid down.

Lewis, in the above-cited KPFK case, agreed to turn over the communique, and little wonder! He had already spent 16 days in jail the year before in a similar case and could conceivably have spent the rest of his life there for adhering to the ethics of his profession. For under current law, he could have cited for contempt and jailed repeatedly for refusing to answer the same question. This, it seems to us, violates the spirit if not the letter of the constitutional provision against double jeopardy.

Another reporter, Lucy Ware Morgan of the St. Petersburg Times, found herself courting this danger when she refused to identify the confidential source of information about a grand-jury investigation of country corruption. She was sentenced first to five months in prison for refusing to give the information to a state attorney and then to three months for refusing to divulge it to a grand jury. Both sentences were overturned for reasons unrelated to considerations of double jeopardy, but had Ms. Morgan been unfortunate enough to have been in the shoes of other reporters whose contempt sentences have been upheld, she would have faced eight months in prison.

It is gratifying that both H.R. 94 and H.R. 3736, in addition to reducing the maximum penalty to six months, seek to eliminate the possibility of this sort of double jeopardy. H.R. 94 provides that: "no person confined under this section for refusal to testify or provide other information concerning any transaction, set of transactions, event or events, may be again confined under this section, or

under section 401 of title 18, United States Code, for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events." H.R. 3736 has similar language except that it covers refusal to testify concerning "the same *or any related* transaction, set of transactions, event, or events."

It seems to us that the latter, somewhat broader, language is preferable, eliminating the possibility that a witness could be put in double jeopardy by being questioned about another aspect of the same matter on which he or she has already refused to give information. It would also be desirable to include language that would cover not just a refusal to answer the same question before a grand jury but refusal to answer it anywhere on the investigatory level. In the Lucy Ware Morgan case, she was sentenced once for refusal to answer the state attorney and a second time for refusing to answer before a grand jury, but it was clearly a refusal to answer the same question in the same forum for the same purpose.

One of the major differenecs between the various grand-jury reform bills now pending falls in the area of grand-jury authority. H.R. 3736 stipulates that before any subpoena may be issued, immunity offered or contempt proceedings against a recalcitrant witness begun, a majority of the grand-jury panel must give its explicit approval. H.R. 94 does not include this provision.

We consider this grand-jury approval provision an important element of grand-jury reform. It would place an important protection between the overzealous prosecutor and the reporter he or she may want to subpoena.

We think that citizens sitting on a grand jury will be more sensitive to news gatherers' First Amendment rights than prosecutors. We believe so, first, because grand jurors are not subject to the same motives that drive prosecutors to subpoena news gatherers in the first place, and, secondly, because grand jurors, on occasion, have already shown themselves to be more sensitive than prosecutors in this area.

We can point to an incident earlier this year in Baltimore. In January, Baltimore Sun reporter Roger Twigg wrote a story alleging improprieties in the prosecutor's office. Twigg was then subpoenaed before a grand jury by the very prosecutor whose office had been embarrassed by the Sun story.

Inside the grand-jury room, Twigg refused to answer questions about his source, invoking, it should be noted, the Fifth Amendment. He did, however, get a chance to explain the motive behind his refusal to testify. The grand jurors not only did not move to have him coerced into testifying but asked the supervising judge to appoint a new prosecutor to handle the entire matter!

We call attention, also, to testimony this Subcommittee received from a former federal grand juror in California. William F. Gloege expressed in very clear terms an acute sensitivity to the dangers inherent in the practice of subpoenaing news gatherers to grand-jury proceedings. He told the Subcommittee April 27 that:

"Our grand jury had numerous cases whereby the prosecutor attempted to force information out of reporters, station managers and other news-media personnel related to a crime, wherein persons claiming to have committed the act transmitted information to the news media.

"Such pressure tactics on the news media could inhibit the public's ability to learn the truth. Sources will be less willing to inform the media if media personnel can be successfully compelled to reveal sources.

"This method of obtaining testimony seems heavy-handed in view of the vast machinery at the disopsal of the federal government to catch wrong-doers. To replace good investigative tactics with getting an armlock on the media seems unfair and something the public should not tolerate."

We trust the instincts of citizen grand jurors like Mr. Gloege to deal more fairly with the rights of news gatherers than the instincts of over-eager prosecutors. Mandating grand-juror approval of subpoenas, immunity and contempt proceedings will thrust grand jurors into the grand-jury decision-making process, force them to confront and think out the consequences of their jury's conduct. We cannot see anything but good coming out of this process.

The Twigg case is only one of several in recent years in which news gatherers, their First Amendment rights placed in question by the Supreme Court's Caldwell decision, have felt constrained to invoke the Fifth, with varying success.

Two reporters for the Lowell (Mass.) Sun, subpoenaed in 1974 to tell the sources of their information about municipal corruption, had their First Amendment

plea thrown out but their Fifth Amendment plea sustained. The Press Censorship Newsletter commented at the time on the fragile nature of their victory:

"The problem with using the Fifth Amendment is that the judge could grant immunity from prosecution. In that event, if the reporters still refused to divulge the identity of their source, the judge could have found them in contempt of court."

Indeed, an attempt to accomplish just that was attempted, although it failed for extraneous reasons. An assistant district attorney issued a grant of immunity, but the judge ruled that the district attorney's office had no right to make such a grant under Massachusetts law and that immunity could not be granted for contempt of court or obstruction of justice.

Not so fortunate was Mary Jo Tierney, a reporter for Today, in Cocoa, Fla. She was subpoenaed in 1975 to testify on information disclosed by a grand-jury witness. Her invocation of the First Amendment was disallowed, and her invocation of the Fifth was undercut when she was granted immunity. For this and a subsequent refusal to answer the same question, she was sentenced first to six hours and then to 30 days in jail—another example of double jeopardy, it should be noted. The Florida Court of Appeal did indeed rule that she was guilty of one continuing offense rather than two, but it upheld the 30-day sentence; Ms. Tierney escaped having to serve it only because the grand jury's term had by then expired and it would no longer have been possible for her to purge herself of contempt.

How pernicious this forced granting of immunity can be in news-media cases was demonstrated in the previously cited case involving the Fort Myers News-Press, where two reporters, given the Grecian gift to such an immunity grant, were forced to provide information on the basis of which their newspaper was indicated for destroying the tape they had made. It is a compelling example of the way in which forced immunization violates the spirit of the Fifth Amendment's proscription against forcing anyone to be a witness against himself. We believe the provision of H.R. 3736 requiring the witness's consent to a grant of immunity introduces a badly needed corrective to a practice that federal law enforcement managed to survive without until two decades ago.

There is a footnote to the Lowell Sun case that is worthy of attention in the light or reform-bill provisions for adequate notice of show-cause hearings in contempt cases. The judge, irked at the haste with which the reporters were haled into court, admonished the prosecution that, should they be subpoenaed again, "procedural due process should be carefully observed by service . . . with a reasonable time being allowed for counsel to prepare for any proposed hearing. The Court disapproves of such petitions being served on a Saturday . . . and heard the following Monday."

Finally, a few words on grand-jury secrecy. It is what we see as improper prosecutorial manipulation of the secrecy doctrine that has forced some reporters behind bars and countless others through debilitating litigation.

Grand-jury secrecy is invoked when it serves the prosecution's interests and ignored when it does not. Prosecutors ignore grand-jury secrecy when they leak grand-jury material to the press. Their motives are varied. An ambitious prosecutor may want the public attention a well-placed leak on a controversial case can produce. A politically motivated prosecutor may want to embarrass a rival. A frustrated prosecutor may seek to punish an uncooperative witness. Reporters who print stories based on such leaks seldom see a subpoena.

On the other hand, prosecutors are quick to react when the leak is from another facet. The reporter is likely to be hauled before the grand jury forthwith and threatened with contempt if he or she does not disclose the source of the leak. This is particularly likely to occur if the story involved serves the public interest, for example by disclosing that the prosecutor is playing down charges of political corruption in hopes of killing the investigation by getting a no-bill.

This danger would be aggravated if reporters were subject to unauthorized-disclosure penalties that the grand-jury reform bills would add to the federal code. If reporters were subject to such penalties, it would mean that every time a reporter writes a story about a grand-jury proceeding that a prosecutor doesn't like—even a story based on an entirely legal source, such as a grand-jury witness—the prosecutor would be free to open a grand-jury investigation with the reporter as target. The reporter, who might have promised his or her source confidentiality, would have no way of showing that the disclosure was not improper, short of violating the pledge to withhold the source's identity. Writing anything about a grand-jury proceeding that a prosecutor doesn't like would

become a neven riskier procedure than it already is; only leaks with the prosecutor's imprimatur would be safe.

H.R. 94, as we read it, respects our fears about the possible manipulation of secrecy penalties against journalists. Section 1512, the new wording on unauthorized disclosure that H.R. 94 would add to the U.S. Code, would not subject journalists to criminal penalties.

H.R. 94 stipulates two levels of penalty. The more serious is for disclosure motivated by financial compensation, but Subsection (e) specifically exempts from penalty "any representative of the press, broadcasting, or information media, acting in his professional capacity." The lesser penalty, for simple unauthorized disclosure, would not apply, according to Subsection (d), "to disclosure by any person other than a person present at the grand-jury proceeding." News gatherers would definitely fall under the category of person "not present" at the grand-jury proceeding.

We wonder, however, whether this latter clause might not be open to some misinterpretation, especially since the press is specifically excluded from the penalty in one case and not specifically excluded in the other. We would suggest that a specific press-exclusion clause be included in Subsection (d) as well as Subsection (e), or, if it is felt that that would be redundant, we feel strongly that the legislative history of this bill should make it clear that news gatherers are not to be penalized under either category of unauthorized disclosure.

Reporters are not insensitive to the considerations of protecting the innocent involved in the doctrine of grand-jury secrecy. But often this consideration lies in delicate balance with that other consideration, the public's right to know, to which the news gatherer is peculiarly dedicated. What a reporter should do when supplied with information leaked from a grand jury is a question that has sparked serious ethical conflict in the ranks of journalists. But whatever their disagreements, they are pretty much united on one aspect of the question: that is a matter for individual news gatherers, not public officials, who are so often interested parties, to resolve.

Grand-Jury Reform and Reporter Privilige

Resolution—International Executive Board—The Newspaper Guild—January 24–27, 1977

Despite the alarming increase in the frequency of news-media subpoenas in the past five years, legislation fortifying newspersons' privilege to protect their news sources has made little headway on the state level and none in Congress. Newspersons continue to face the threat of jail for shielding their sources, and that threat has been transformed into a reality in several cases, most recently that of the Fresno Four. Interim relief is badly needed until Congress and the state legislatures can be persuaded to pass adequate legislation protecting newspersons' privilege.

Such relief would be provided in one of the most critical arenas of conflict, the grand jury, by legislation introduced at the last session of Congress and due for reintroduction in the new session. While these bills are directed at reforming grand-jury abuses generally and do not single out newspersons for special consideration they would materially strengthen the position of newspersons resisting grand-jury subpoenas and reduce the likelihood of their going to jail.

One or both of two bills introduced in the last Congress by Reps. John Conyers and Joshua Eilberg and roughly paralleled in the Senate by a bill from Sen. James Abourezk would have the following effect:

1. Give subpoenaed witnesses, including newspersons, seven days between the service of a subpoena and the appearance date in which to obtain an attorney and prepare a presentation. The subpoena would have to inform the witness of the exact subject matter of the investigation, a requirement that would discourage "fishing expeditions."

2. Require that newspersons appearing before the grand jury be given a transcript of their testimony, enabling them to prove to news sources that they had not violated confidentiality.

3. Give newspersons the right to counsel inside the grand-jury room.

4. Require 10 days' notice of contempt hearings where newspersons refuse to testify in response to a subpoena.

5. Prevent the jailing of newspersons for refusing to answer questions based on information obtained in violation of federal wiretap laws or in violation of the reporters' constitutional rights.

6. Limit jail terms for contempt to six months instead of the present 18 and make it impossible to jail newspersons a second time for refusing to answer the same questions.

7. Require that grand juries vote on newspersons' subpoenas and that prosecutors present full justification for such subpoenas, a provision that would prevent the issuance of subpoenas by a vindictive prosecutor out to "get" a newsperson.

8. Provide newspersons with three grounds for challenging a subpoena: 1) that it is unreasonable: 2) that it is punitive; 3) that it is intended to obtain information to help prosecute a person already indicted.

9. Enable a newsperson to avoid testimony by pleading the Fifth Amendment's "right to silence". The Conyers bill would require a witness's consent before he or she could be granted immunity from prosecution, a provision that would end the practice of forcing witnesses to testify by such a grant.

These provisions would go a long way toward ending the abuses currently being inflicted on newspersons subpoenaed to testify before grand juries. The International Executive Board strongly urges Congress to adopt legislation embodying them as one of its first orders of business. It authorizes TNG officers to testify in favor of their adoption whenever appropriate and it endorses efforts of the Coalition to End Grand Jury Abuse to bring an end to abuses of the grand-jury system affecting both newspersons and the citizenry at large.

Adopted by the International Executive Board of The Newspaper Guild meeting in Washington, D.C., January 24-27, 1977.

OFFICE OF THE ATTORNEY GENERAL, WASHINGTON, D.C. 20530

Order No. 544-73, October 26, 1973

[Order No. 544-73]

PART 50—STATEMENTS OF POLICY

Policy Regarding Issuance of Subpoenas to, and Interrogation, Indictment, or Arrest of, Members of News Media

By virtue of the authority vested in me by sections 516 and 519 of Title 28, of the United States Code, Port 50 of Chapter I of Title 28 of the Code of Federal Regulations is amended by inserting immediately after § 50.9 a new § 50.10 as follows:

§ 50.10 Policy with regard to the issuance of subpoenas to, and the interrogation, indictment, or arrest of, members of the news media.

Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover broadly as possible controversial public issues. In balancing the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice, the following guidelines shall be adhered to by all members of the Department:

(a) In determining whether to request issuance of a subpoena to the news media, the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice.

(b) All reasonable attempts should be made to obtain information from non-media sources before there is any consideration of subpoenaing a representative of the news media.

(c) Negotiations with the media shall be pursued in all cases in which a subpoena is contemplated. These negotiations should attempt to accommodate the interests of the trial or grand jury with the interests of the media. Where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the media.

(d) If negotiations fail, no Justice Department official shall request, or make arrangements for, a subpoena to any member of the news media without the express authorization of the Attorney General. If a subpoena is obtained without

authorization, the Department will—as a matter of course—move to quash the subpoena without prejudice to its rights subsequently to request the subpoena upon the proper authorization.

(e) In requesting the Attorney General's authorization for a subpoena, the following principles will apply:

(1) There should be reasonable ground based on information obtained from nonmedia sources that a crime has occurred.

(2) There should be reasonable ground to believe that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain, peripheral, nonessential or speculative information.

(3) The government should have unsuccessfully attempted to obtain the information from alternative nonmedia sources.

(4) The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

(5) Even subpoena authorization requests for publicly disclosed information should be treated with care to avoid claims of harassment.

(6) Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.

(f) No member of the Department shall subject a member of the news media to questioning as to any offense which he is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of his official duties as a member of the news media, without the express authority of the Attorney General: *Provided, however*, That where exigent circumstances preclude prior approval, the requirements of paragraph (j) of this section shall be observed.

(g) A member of the Department shall secure the express authority of the Attorney General before a warrant for an arrest is sought, and whenever possible before an arrest not requiring a warrant, of a member of the news media for any offense which he is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of his official duties as a member of the news media.

(h) No member of the Department shall present information to a grand jury seeking a bill of indictment, or file an information, against a member of the news media for any offense which he is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of his official duties as a member of the news media, without the express authority of the Attorney General.

(i) In requesting the Attorney General's authorization to question, to arrest or to seek an arrest warrant for, or to present information to a grand jury seeking a bill of indictment or to file an information against, a member of the news media for an offense which he is suspected of having committed during the course of, or arising out of, the coverage or investigation of a news story, or committed while engaged in the performance of his official duties as a member of the news media, a member of the Department shall state all facts necessary for determination of the issues by the Attorney General. A copy of the request will be sent to the Director of Public Information.

(j) When an arrest or questioning of a member of the news media is necessary before prior authorization of the Attorney General can be obtained, notification of the arrest or questioning, the circumstances demonstrating that an exception to the requirement of prior authorization existed, and a statement containing the information that would have been given in requesting prior authorization, shall be communicated immediately to the Attorney General and to the Director of Public Information.

(k) Failure to obtain the prior approval of the Attorney General may constitute grounds for an administrative reprimand or other appropriate disciplinary action.

Dated October 16, 1973.

ELLIOT RICHARDSON,
Attorney General.

[FR Doc. 73-22773 Filed 10-25-73; 8:45 am]

CODE OF ETHICS APPROVED BY 1934 CONVENTION OF AMERICAN NEWSPAPER GUILD

(1) That the newspaper man's first duty is to give the public accurate and unbiased news reports, and that he be guided, in his contacts with the public, by a decent respect for the rights of individuals and groups.

(2) That the equality of all men before the law should be observed by the men of the press; that they should not be swayed in news reporting by political, economic, social, racial or religious prejudices, but should be guided only by fact and fairness.

(3) That newspaper men should presume persons accused of crime of being innocent until they are convicted, as is the case under the law, and that news accounts dealing with accused persons should be in such form as not to mislead or prejudice the reading public.

(4) That the Guild should work through efforts of its members, or by agreement with editors and publishers, to curb the suppression of legitimate news concerning 'privileged' persons or groups, including advertisers, commercial powers and friends of newspaper men.

(5) That newspaper men shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies; and that the newspaper man's duty to keep confidences shall include those he shared with one employer even after he has changed his employment.

(6) That the news be edited exclusively in the editorial rooms instead of in the business office of the daily newspaper.

(7) That newspaper men shall behave in a manner indicating independence and decent self-respect in the city room as well as outside, and shall avoid any demeanor that might be interpreted as a desire to curry favor with any person.

The convention condemned the following practices as being inimical to the public interest, the newspapers and newspaper men:

(1) The carrying of publicity in the news columns in the guise of news matter.

(2) The current practice of requiring the procuring or writing of stories which newspaper men know are false or misleading and which work oppression or wrong to persons and to groups.

(3) The acceptance of money by newspaper men for publicity which may be prejudicial to their work as fair reporters of news. Your committee urges the particular condemnation of the practice of writing paid publicity by staff political writers, and the acceptance by sports editors and writers of money from promoters of alleged sporting events.

(4) The practice of some newspaper executives in requesting newspaper men to use influence with officials in matters other than the gathering of news.

Mr. PERLIK. Mr. Chairman and members of the subcommittee, I am Charles A. Perlik, Jr., president of the Newspaper Guild, which represents some 40,000 persons employed in the newsrooms and commercial departments of newspapers, news services, magazines, and related enterprises in the United States, Canada, and Puerto Rico.

Our primary function as a trade union, of course, is to advance the economic interests of our members. But, just as the teachers' union, for example, is concerned with raising educational standards as well as salaries, the Newspaper Guild has had as one of its prime concerns the preservation and improvement of a truly free press. With other media organizations, we have worked consistently to assure that the press remains free of any restriction that contravenes either the letter or the spirit of the first amendment. That concern has brought us here to Capitol Hill many times either to oppose legislation we feel would infringe on those first amendment rights or to seek the adoption of legislation that would protect or further them.

Our most recent visit here in that interest was in 1973 to testify on behalf of legislation recognizing the right of news gatherers to protect their information and sources. We regard this right as an integral part of that freedom conferred by the first amendment, because without it, the trust between news gatherers and their sources is in peril. And that

trust is essential to the news gatherer's ability to function and thus to the press's ability to bring the public the information to which it has a right under the first amendment.

The affirmation of this right has been criticized in some quarters as in conflict with the needs of law enforcement and other government functions, but that, to put it most charitably, is a short-sighted view. The elementary fact is that without the confidence of their news sources, founded in their right to protect them, reporters simply aren't going to get and write the stories that impel overeager prosecutors to hale them before grand juries and into court in hopes of obtaining additional information. Killing the goose that lays the golden egg may get one more egg, but production stops there.

Before 1972, we and others in the news media, convinced that news gatherers' privilege was implicit in the first amendment, opposed any legislative attempt to define it, since we considered that right absolute and unqualified. Our conviction hasn't changed, but, unfortunately, it is a conviction that the Supreme Court in its 1972 decision on the *Caldwell*, *Branzburg* and *Pappas* cases did not share. That decision made it necessary to obtain legislation that would accomplish what the Supreme Court failed to do: affirm the right of news gatherers to shield their information and sources.

But fashioning such blanket legislation proved, in confirmation of our earlier misgivings, no easy task. As I am sure you are all aware, a number of bills were introduced to accomplish that purpose, but they became bogged down in disagreement over limitations and qualifications. We still hope that logjam will eventually be broken, but there seems to be general agreement that it won't happen soon.

For that reason, we come before you today to seek half a loaf—the half that posed relatively little problem in those abortive committee discussions on news gatherers' privilege. Your consideration of badly needed reforms in the grand jury system offers an opportunity to give legislative sanction to the right of news gatherers to protect their information and sources from Federal grand jury inquisition and provide a model for state legislation to the same end.

While this is, to be sure, a piecemeal solution of the privilege problem, it is by no means an unnatural one. It would cover an area in which there was little controversy during the debate over general privilege legislation; while some of the legislation proposed qualified news gatherers' privilege in one way or another, most of it, including the bill approved by the House Subcommitee on Courts, Civil Liberties, and the Administration of Justice, provided for absolute privilege on the grand jury level.

At the same time the enactment of testimonial privilege in the grand jury area would provide protection in one of the places where it is most acutely needed. A check through the records of news gatherers' subpenas over the past 6 years indicates that there are few so eager as an investigating prosecutor to scatter subpenas broadside on the press in an effort to turn reporters, in effect, into legal investigators, never mind at what cost to the press' ability to unearth the very information being sought.

Our research has logged no less than 60 subpenas in the past 6 years requiring news gatherers and two or three persons in related fields to appear before grand juries, in many cases with notes, tran-

scripts, documents, film, or other materials. In 40 cases those subpenas were enforced, and the news gatherer was forced, willy-nilly, to appear before the grand jury. Contempt citations were issued in 17 cases in which news gatherers refused to answer questions or provide subpenaed material, and 5 went to jail for varying periods of time for that refusal. Seven were required under threat of confinement to disclose information about their sources that they had sought to protect.

The issuance of subpenas to news gatherers has become a veritable contagion. Before 1970 it was relatively rare for a reporter to be forced to betray the confidence of his sources or go to jail. Today it has become a disgraceful commonplace, and I would hope that the subcommittee will see fit to eliminate it in one of the areas where it is most prevalent.

While falling short of that end and, indeed, not designed for that specific purpose, many of the grand jury reform bills already introduced contain provisions that would ameliorate the situation of news gatherers confronted by a relentless prosecutor on the one hand and their consciences on the other. Our international executive board has endorsed these provisions, in a resolution you will find attached to this statement. There are numerous good general reasons for enacting many of the proposed legislative provisions, but I will confine myself to those that would be of specific help to news gatherers. Let me comment on these briefly, reserving more extended treatment for the latter portion of this statement, which has been submitted for your consideration and the official record.

Particularly salutary, we think, are those procedural provisions of Mr. Eilberg's bill, H.R. 94, that would allow counsel into the grand jury room, require 7 days' notice before appearance, and inform the witness of the exact subject matter of the investigation. Under present barely regulated procedures, news gatherers all too often find themselves before a grand jury with the briefest of notice, little indication of what information is being sought from them, and benefit of counsel in the grand jury room to advise them on the intricate matter of what the law may conceivably allow them to withhold. The situation is made to order for fishing expeditions in which prosecutors can seek to pick the reporter's brain for confidential information that is not even directly germane to the matter under inquiry.

We would also like to see enacted the provision in Mr. Conyers' bill, H.R. 3736, that would require a majority vote of the grand jury to issue a subpena. Leaving this power in the hands of the prosecutor alone lays the way open for harassment of the press, a phenomenon not unknown among prosecutors.

But we would like to see something more. The Justice Department, under pressure from the news media, issued guidelines several years ago setting forth detailed procedural steps for U.S. attorneys to follow in subpenaing news gatherers. We find the safeguards they incorporate far from adequate to the need, but they do provide some rein on Government prosecutors who are ready to subpena a reporter 10 minutes after reading his or her story. Or, more correctly, they would provide such a rein if they were adhered to. Figures released by the Justice Department 2 years ago showed that the supposedly binding

guidelines had been violated in 29 percent of the 109 cases in which news gatherers had been subpenaed over a 26-month period.

We think that, at the very least, these guidelines ought to be given the force of law and prosecutors barred from proceeding against any news gatherer subpenaed in violation of their provisions. A copy of the guidelines, in their latest 1973 revision, is attached to this statement.

Another provision of Mr. Eilberg's bill that would ease the situation of news gatherers called before grand juries is the one enabling witnesses to make copies of the official transcript of their testimony. When Earl Caldwell of the New York Times was subpenaed to testify on the Black Panthers he refused to even enter the grand jury room. Had he done so, he explained, there would have been no way he could have convinced Panther leaders, whose confidence he had earned with great difficulty, that he had not betrayed them. He would have been unable to so much as show them a transcript of his testimony.

H.R. 94 gives the witness the right to examine and copy the transcript or recording of his appearance but entitles him to a copy without cost only if he or she can't afford one. We don't see why witnesses subpenaed to give testimony should have to pay for a transcript, which can be long and costly, under any circumstances, and would suggest that this provision be amended to make it available to all without cost.

We are more disturbed, however, by a section of this provision that allows a judge to order the transcript withheld from the witness, and on a Government showing of cause made available to the judge alone, at that. This would open the door to canceling out the reform upon the flimsiest of pretexts, not even subject to adversary procedure. Far more in order, we think, would be a provision flying in the opposite direction, exempting such witnesses' testimony from any sort of court gag order. It does news gatherers, at least, little good to receive transcripts of their testimony if they must be kept locked in a desk drawer.

We think the 6-month limit on contempt confinements in Mr. Eilberg's bill is a badly needed reform; as matters stand, news gatherers and others can be put behind bars for the length of the grand jury term—as long as 18 months. But in the case of news gatherers, at least, we think the provision should go farther. Whatever justification there can be for jailing reporters in order to compel their testimony, there can be none for jailing them as punishment. A news gatherer who refuses to answer questions before a grand jury is doing so in accordance with the highest standards of his profession; to punish him or her for so doing is unconscionable. The very least we feel should be enacted is a provision exempting from criminal contempt any person who refuses to give information obtained in the course of gathering, receiving, or processing information for any communications medium.

Finally, a word on the subject of consensual immunity.

The general philosophical basis for requiring a witness's consent to a grant of immunity before he or she can be forced to testify under it has been set forth by Mr. Conyers, Judith Avner of the Coalition To End Grand Jury Abuse, and others. Thus, I will confine my observations to its effect on news gatherers.

Reporters, quite candidly, are more reluctant than most to plead the fifth amendment; they are much happier—if less successful—

pleading the first. In the case of a news gatherer, pleading the fifth is not only regarded, however wrongly, as implying guilt but seems to suggest an involvement not in accord with the news gatherer's role as a detached observer. But reporters have occasionally made such pleas when asked to reveal confidential information or sources; several cases are cited in the additional statement we are submitting for the record.

Forcing reporters to disclose such information or sources may be requiring them to testify to their own disadvantage, seriously damaging their ability to perform their job. If, in the words of a Federal judge many years ago, compulsory immunity enables the Government to "probe the secrets of every conversation, or society, by extending compulsory pardon to one of its participants," in the case of news gatherers, it makes the Government a potential party to every confidence given a reporter by a source of news. As long as absolute privilege for news gatherers does exist, they should not be denied this avenue of protection.

The balance of my statement is yours for the record, Mr. Chairman. I thank you very much.

Mr. EILBERG. You have obviously done a lot of work, I can see by looking through the balance of your statement. We congratulate you for that.

Mr. Perlik, in a recent resolution by the Newspaper Guild, you suggest 7 days' notice of a subpenaed witness.

The Judicial Conference, representing local Federal district judges, has indicated that such notice periods can cause problems. Specifically, they note that in many districts, especially rural districts, jurors are convened for short periods, maybe a few days a week or even every other or every third week. Requiring them to come together to vote, and giving long periods of notice would cause hardships, as the jurors would have to be called back and forth, sometimes over great distances, and in a doubling or tripling of cost and great inconvenience.

Our bill would provide shorter notice periods but allow continuances or quashing of subpenas if the notice period is unduly burdensome or oppressive, and for strict enforceable standards for the granting of subpenas.

Is this not sufficient?

Mr. PERLIK. We think not, Mr. Chairman. We think it is a rare case where this would be a burden, this would be a handicap. I don't think cost should be a consideration in providing protection that our suggestion embraces.

What the bill offers is better than the present situation.

Mr. EILBERG. I am concerned about your suggestions that the issuance of a subpena be by a majority vote of the grand jurors. Would this not lead to possible prejudice as to particular witnesses?

The grand jurors are to vote on these items, and they need some information about the case to show the need for a particular piece of evidence, and such information might be vague or hearsay.

Why is not the establishment of standards and the judicial enforcement of such standards sufficient?

Mr. PERLIK. I think because the standards are ex parte in development, and enforcement is ex parte in enforcement.

We think that the grand jury system provides citizens with competence, capability to make these distinctions and make these judgments for the betterment of the system.

Mr. EILBERG. So you are not concerned about possible prejudice by the grand jury?

Mr. PERLIK. Well, Mr. Chairman, I am concerned, but I find prejudice everywhere, and the grand jury system is no different.

Mr. EILBERG. One of the provisions I have proposed in H.R. 94 would provide for criminal penalties for violation of grand jury secrecy, but would exempt newspapermen acting in an official capacity.

I assume you favor this provision.

Mr. PERLIK. Yes.

Mr. EILBERG. Under the Caldwell, "right to every man's evidence." test, prosecutors are free to call newspapermen and to seek information about their confidential sources, as you have noted.

Are any statistics kept as to whether there has been an increase in such subpenas?

Mr. EISEN. Our research indicates that there has been no slacking of such subpenas in the last couple of years. Of the 60 cases that we logged, I think we established that almost half of them have taken place in the last 2 years.

Mr. EILBERG. What has been the success in the guild in opposing such subpenas?

Mr. EISEN. It is a mixed record. The guild, publishers, the Reporters' Committee, others in the industry have succeeded in many cases in getting subpenas quashed. In other cases they have not succeeded and reporters have been forced to appear before grand juries. And in four or five cases they have been sent to jail for refusing to testify on one source of information or another.

Mr. EILBERG. Mr. Fish.

Mr. FISH. Thank you, Mr. Chairman.

Mr. Perlik, I'm sorry, I wasn't here for all of your testimony. My plane was delayed about 40 minutes. In any event, it is tough to keep up with our chairman, who calls meetings of this committee a day after a recess.

I do have just a couple of matters I would like to elaborate on with you.

During the last Congress the Justice Department took the position that counsel for a witness in a grand jury room would, first of all, violate the grand jury secrecy and, second, make the witness less willing to testify; finally, create secrecy problems when one represents many potential witnesses.

How do you respond to that statement?

Mr. PERLIK. I would respond, Mr. Fish, by saying I think those are hazards that have to be taken into consideration.

Looking at Mr. Alexander's testimony, if a man as experienced as he is, is somewhat intimidated going before a grand jury, then what would the average citizen—what would his reaction be in such circumstances? I think presence of counsel is indispensable in a grand jury room.

Mr. FISH. I will ask you what you see as a function for an attorney for the witness in the grand jury room.

Mr. PERLIK. I think in probably every capacity that he would serve otherwise—on the appropriateness of the question, to advise as to legal responses the witness might make.

Mr. FISH. Participate in the hearing fully?

Mr. PERLIK. Yes.

Mr. FISH. Should the rules of grand jury secrecy apply to any counsel who represents a witness?

Mr. PERLIK. I think so.

Mr. FISH. Another area, in your opinion, how effective is incarceration for civil contempt in obtaining testimony from a witness?

Mr. PERLIK. Very effective.

Mr. FISH. That has been your experience?

Mr. PERLIK. I think that this effect on news gatherers has been monumental.

Mr. FISH. That is what made me think your response would be different.

Has this been correct, where news gatherers have been threatened with incarceration or even imprisonment?

Mr. PERLIK. Yes.

Mr. FISH. That they thereafter have given testimony sought?

Mr. PERLIK. I don't know about those individuals, but I think it has had a significant effect on those who follow, who subsequently are then asked to testify. There is no way we have of researching or keeping completely comprehensive records on the number of news gatherers who are taken before grand juries who do testify, and why they do so—because of the prospect of jail. On the other hand, there are many reporters who regard protection of their sources as an absolute ethical requirement and who will sit in jail forever rather than break faith.

Mr. FISH. Thank you.

Mr. EILBERG. Mr. Hall.

Mr. HALL. I have no questions at this time.

Mr. EILBERG. Mr. Harris.

Mr. HARRIS. Thank you, Mr. Chairman.

Your third recommendation says to give newspaper persons the right to counsel inside the grand jury room. You would further recommend that anyone should have counsel inside the grand jury room?

Mr. PERLIK. Yes, I would.

Mr. HARRIS. Your second recommendation requires that news persons appearing before the grand jury be given a transcript of their testimony enabling them to prove to many sources that they had not violated confidentiality.

Do you think that should apply to everyone, too, or just newspapermen?

Mr. PERLIK. I think it should be a general application. Everyone should have a copy of their testimony.

Mr. HARRIS. Your first recommendation is to give subpenaed witnesses, including news persons, 7 days before the service of a subpena and appearance. Do you think that should apply to everyone, too?

Mr. PERLIK. Yes.

Mr. HARRIS. With respect to the treatment of news persons by grand juries across the country, do you have any information to give this committee as to whether you think that situation is getting better or worse? That is, do you feel that prosecutors and others are becoming more intimidating toward news people or less, and that the grand jury is being used more as a weapon against news people or less?

Mr. PERLIK. I don't think it has changed much, Mr. Harris. It was thought that this condition reached its high during the early 1970's, as Mr. Eisen has indicated, but in the last 2 years about half the cases we have on record seem to indicate it is a rather constant and consistent pattern, if it hasn't increased.

Mr. HARRIS. Are situations bad?

Mr. PERLIK. I think it is bad, yes, indeed. Any time a news gatherer goes to jail, I think it is bad.

Mr. HARRIS. Any time anybody goes to jail, it's bad. [Laughter.]

I am sure you have given this type of testimony before, but I would like for you to briefly, if you would, tell me what special exception you think the newsperson has with regard to giving testimony.

I glean from your testimony here that there is an unwritten law with regard to certain immunities you think a newsperson should have. Could you in just one or two sentences tell me exactly, in as much precision as possible, what that immunity is?

Mr. PERLIK. Yes. I don't think it is a written law, but I think it is written predominantly in the first amendment. The Supreme Court has not agreed with us in that provision, or with most of the rest of those in the media. We do believe, nonetheless, that the unequivocal right to withhold sources, refrain from identifying sources of information, is in the first amendment.

Mr. HARRIS. You are saying, with respect to grand jury or criminal court actions on alleged offenses, that newspeople should not be required under threat of contempt or other sanctions to divulge sources of information that they have that are pertinent to such inquiry; is that correct?

Mr. PERLIK. That's correct.

Mr. HARRIS. You do not mean to include any information that that newsperson might have firsthand, do you—if the newsperson, for example, saw the murder occur, you wouldn't apply to him immunity with regard to his sources of information, would you?

Mr. PERLIK. Not as long as it is unrelated to his performance as a newsperson.

Mr. HARRIS. I am a newspaperman on my beat and I see somebody get shot. I see the guy with the gun. I see the victim. You wouldn't apply an immunity to me in that case, would you?

Mr. PERLIK. No; I would not.

Mr. HARRIS. But if somebody told me who did it——

Mr. PERLIK. That's something else.

Mr. HARRIS. Thank you, Mr. Chairman.

Mr. EILBERG. Thank you very much for coming here and your contribution today.

Mr. PERLIK. Thank you very much for your attention, Mr. Chairman.

[The following was submitted at the end of this hearing:]

GARY NEWSPAPER GUILD,
LOCAL 14, THE NEWSPAPER GUILD (AFL-CIO, CLC),
March 29, 1977.

Representative JOSHUA EILBERG,
Chairman, House Subcommittee on Immigration, Citizenship and International Law, Washington, D.C.

DEAR REPRESENTATIVE: The executive board of the Gary Newspaper Guild has passed a resolution in strong support of bills designed to protect witnesses, including newspersons, appearing before grand juries, and urges your action to further passage of such measures.

Sincerely yours,

JOHN MITCHELL, *President.*

CENTRAL CALIFORNIA NEWSPAPER GUILD,
Sacramento, Calif., August 31, 1977.

Hon. JOSHUA EILBERG,
Chairman, Judiciary Subcommittee on Immigration, Citizenship and International Law, House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE EILBERG. On behalf of the 641 members of the Central California Newspaper Guild, I would like to register support of your bill, H.R. 94, and to urge that the reforms included in Rep. John Conyers Jr.5s bill, H.R. 3736 be included in it.

We of the Newspaper Guild also feel a strong need for a provision giving news gatherers absolute and unqualified privilege on the grand-jury level.

We appreciate your consideration of our views.

Sincerely,

GEORGE C. RANDOL, *Administrative Officer.*

NEWSPAPER GUILD OF PITTSBURGH,
Pittsburgh, Pa., August 25, 1977.

Re H.R. 94.

Hon. JOSHUA EILBERG,
House of Representatives, Washington, D.C.

DEAR MR. EILBERG: Please be advised that the Executive Committee of Local 61, The Newspaper Guild of Pittsburgh, stands firmly behind your efforts to correct grand jury abuses.

Your bill offers a sound reform of an arbitrary system in which newspersons have been forced to betray news sources, thereby compromising their professional position. We have reviewed these abuses from 1970 to 1977 and feel compelled to support any measure that will eliminate what has become a blemish on our basic freedom. We are looking forward to passage of H.R. 94.

Yours truly,

WASHINGTON GJEBRE,
Chairman, Labor Reform Committee, Local 61,
Newspaper Guild of Pittsburgh.

[From the Guild Reporter, Feb. 11, 1977]

REFORM GRAND JURIES, FREE JAILED JOURNALISTS

WASHINGTON.—Reform of the U.S. grand jury system, freedom for journalists in jail abroad and an end of the U.S. Secret Service using press badges were called for by TNG's International Executive Board during its winter meeting here.

["Reporters continue to face the threat of jail for shielding their sources, and the threat has been transformed into reality in several cases," including that of the Fresno Four, the resolution on the grand jury system noted.]

"Interim relief is badly needed until Congress and the state legislatures can be persuaded to pass adequate legislation," the board said.

Bills introduced in the last session of Congress by Reps. John Conyers (D-Mich.), and Joshua Eilberg (D-N.Y.) and Sen. James Abourezk (D-S.D.) would provide protection for reporters before grand juries, the board said.

[From the Guild Reporter, Feb. 11, 1977]

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Similar bills are in the process of introduction in the current session.

The measures "would have the following effect," the IEB said:

Give witnesses before a grand jury—including journalists—time to obtain counsel and require that they be told of the precise subject of the investigation, thereby discouraging fishing expeditions.

Require that witnesses be given a transcript of their testimony, thus offering reporters an opportunity to prove to news sources that confidentiality was not breached.

Prevent the jailing of witnesses for refusal to answer questions based on information gathered in violation of federal wiretap laws or the witnesses' constitutional rights.

Limit jail terms for refusal to answer to six months, instead of the present 18. This was viewed as a first step by the board; ideally, jail sentences should be eliminated, it said.

Require that grand juries vote on whether to issue subpoenaes, preventing the issuance of a summons by a vindictive prosecutor out to get a reporter.

Provide reporters and other witnesses with three grounds to challenge a subpoena—that it is unreasonable, that it is punitive, and that it is intended to obtain information to help prosecute a person already indicted.

Enable a journalist to avoid testimony by pleading the Fifth Amendment's right to silence.

["These provisions would go a long way toward ending the abuses currently being inflicted on newspersons" in the United States, the IEB said.]

In both Canada and the United States, reporters are sometimes jailed for refusing to disclose the identities of sources, but "in many countries, imprisonment has become a routine hazard of the job"—for months, or even years—the board's resolution on journalists jailed in other nations said.

Sixty-seven journalists were in jail in 17 countries last year, according to Amnesty International (AI) reports, the board said.

AI has declared 1977 "Prisoners of Conscience Year," with emphasis on journalists and other writers.

The International Federation of Journalists (IFJ), with which TNG is affiliated, in participating in the AI campaign, the IEB noted.

A journalists' committee is being formed by AI in the United States to work to free specific journalists and raise protests whenever a prisoner's life is immediately threatened.

"For the Guild to participate fully in this effort is an elementary obligation," the IEB said.

It authorized TNG officers to "join with Amnesty International in every way feasible to aid imprisoned journalists and to intervene on their behalf in cases of extreme urgency."

"We've got a secret for the Service. You can't do anything but damage to reporters by masquerading in their roles," the IEB said in regard to the Secret Service's use of press badges when former President Ford played in a golf tournament the day after he left office.

THE NEWSPAPER GUILD,
Washington, D.C., July 26 1977.

Hon. JOSHUA EILBERG,
Chairman, Judiciary Subcommittee on Immigration, Citizenship and International Law, U.S. House of Representatives, Washington, D.C.

DEAR MR. EILBERG: The 44th Convention of The Newspaper Guild, AFL-CIO, adopted on June 30, 1977 the enclosed resolution calling for grand jury reform. The measures to do so are H.R. 3736, H.R. 94 and S. 1449.

Sincerely,

CHARLES A. PERLIK JR., *President.*

Enclosure.

GRAND-JURY REFORM AND NEWSPERSON'S PRIVILEGE

Despite the alarming increase in the frequency of news-media subpoenas in the past five years, legislation fortifying newspersons' privilege to protect their news sources has made little headway on the state level and none in Congress. Newspersons continue to face the threat of jail for shielding their sources, and that threat has been transformed into a reality in several cases, most recently that of the Fresno Four. Interim relief is badly needed until Congress and the state legislatures can be persuaded to pass adequate legislation protecting newspersons' privilege.

Such relief would be provided in one of the most critical arenas of conflict, the grand jury, by legislation introduced at the last session of Congress and due for reintroduction in the new session. While these bills are directed at reforming grand-jury abuses generally and do not single out newspersons for special consideration they would materially strengthen the position of newspersons resisting grand-jury subpoenas and reduce the likelihood of their going to jail.

One or both of two bills introduced in Congress by Reps. John Conyers (H.R. 3736) and Joshua Eilberg (H.R. 94) and roughly paralleled in the Senate by a bill from Sen. James Abourezk (S. 1449) would have the following effect:

1. Give subpoenaed witnesses, including newspersons, seven days between the service of a subpoena and the appearance date in which to obtain an attorney and prepare a presentation. The subpoena would have to inform the witness of the exact subject matter of the investigation, a requirement that would discourage "fishing expeditions."

2. Require that newspersons appearing before the grand jury be given a transcript of their testimony, enabling them to prove to news sources that they had not violated confidentiality.

3. Give newspersons the right to counsel inside the grand-jury room.

4. Require 10 days' notice of contempt hearings where newspersons refuse to testify in response to a subpoena.

5. Prevent the jailing of newspersons for refusing to answer questions based on information obtained in violation of federal wiretap laws or in violation of the reporters' constitutional rights.

6. Limit jail terms for contempt to six months instead of the present 18 and make it impossible to jail newspersons a second time for refusing to answer the same questions.

7. Require that grand juries vote on newspersons' subpoenas and that prosecutors present full justification for such subpoenas, a provision that would prevent the issuance of subpoenas by a vindictive prosecutor out to "get" a newsperson.

8. Provide newspersons with three grounds for challenging a subpoena: (1) that it is unreasonable; (2) that it is punitive; (3) that it is intended to obtain information to help prosecute a person already indicted.

9. Enable a newsperson to avoid testimony by pleading the Fifth Amendement's "right to silence." The Conyers bill would require witness's consent before he or she could be granted immunity from prosecution, a provision that would end the practice of forcing witnesses to testify by such a grant.

These provisions would go a considerable distance toward ending the abuses currently being inflicted on newspersons subpoenaed to testify before grand juries, and the Convention urges Congress to adopt legislation embodying them.

But more is needed. In considering grand-jury legislation, Congress has an opportunity to give legislative sanction to the right of newspersons to protect their sources and information in an area about which there was little or no contro-

versy when general privilege legislation was under active consideration four years ago. The Convention strongly urges Congress to include in its grand-jury reform bill a provision giving news gatherers absolute and unqualified privilege before grand juries.

Adopted by the 44th Convention of The Newspaper Guild, AFL-CIO, June 30, 1977, Honolulu, Hawaii.

TESTIMONY OF JACK LANDAU, NEWHOUSE NEWS SERVICE, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, WASHINGTON, D.C.

Mr. EILBERG. Our next witness is Mr. Jack Landau of the Newhouse News Service, representing the Reporter's Committee for Freedom of the Press, Washington, D.C.

Mr. Landau, we caution you, as we cautioned the other witnesses, to be brief if you can, possibly 5 minutes, and then we would like to ask you some questions.

Mr. LANDAU. I would like permission to have the members of the Reporter's Committee staff sit at the table.

Mr. EILBERG. Please bring them forward.

Mr. Landau, would you be good enough to identify your associates.

Mr. LANDAU. This is Ms. Fox, who is a student at Catholic University Law School.

Mr. Adler from New York is a student at George Washington University Law School.

Mr. Allen is from California, and a student at U.C.L.A. Law School.

They are on an internship program with our committee, and have helped quite extensively with this rather thick piece of testimony that you have been kind enough to accept.

[Prepared statement of Jack Landau follows:]

SUMMARY OF REPORTERS COMMITTEE TESTIMONY ON GRAND JURY REFORM

I. INTRODUCTION: TWO GOALS FOR GRAND JURY REFORM: MORE PUBLIC INFORMATION FOR MORE PUBLIC ACCOUNTABILITY: MORE PROTECTION FOR CONFIDENTIAL NEWS SOURCES

"As working news reporters, our interest in the grand jury is basically twofold:

"First, we think that the Congress ought to provide more information to the public about the decision-making processes of the grand jury because it is a most powerful body and one of the least accountable institutions of government; and,

"Second, we think that the Congress ought to provide protection for confidential and other unpublished information sought by grand juries from members of the press. We believe that the press was constitutionally designed to be an independent and free institution and was not designed to be an official investigative arm of the government, whether it be the Legislative branch here, the Executive branch or any arm of the Judicial branch, including the grand jury."

II. PUBLIC ACCOUNTABILITY OF GRAND JURY OPERATIONS

"The conclusion reached by many lawyers and others is that the grand jury has tended to become a rubber stamp for the Justice Department and has . . . lost . . . independence."

". . . (We) feel that the continuing practice of secrecy . . . is now being used . . . to protect the Executive branch of government from any meaningful inquiry into its management of the grand jury."

"Generally the prime source of news leaks about the grand jury is the prosecutor . . . (P)ermitting a political official to decide what the public shall and

shall not read about the grand jury is . . . information by government handout."

"We would argue very strongly" that "shrouding the grand jury in its current secrecy" . . . "hides Executive branch abuses and permits their continuation."

a. Names and procedures for selection of grand jurors should be public

"We start off with the presumption that grand jurors are public servants." "Therefore, it is our conclusion that the entire selection process for both regular and special grand juries should be matters of open public record in the courts."

b. Grand jury witnesses, their attorneys or nonlawyer spokespersons should be permitted to reveal a grand juror's testimony

"We support the provisions of existing law and of Mr. Ellberg's bill which permit grand jury witnesses to voluntarily disclose their testimony" because they have "a First Amendment right to voluntarily tell the public" what occurred in the grand jury chamber.

"We also support the concept . . . of permitting a grand juror witness' attorney or other spokesman . . . to disclose his or her testimony."

"Many witnesses may not be articulate enough to tell their side of the story to the public or they may be incarcerated and thus do not have easy access to the press."

c. Grand jurors should be permitted to criticize and comment on government prosecutor's handling of grand jury investigations

"There is the argument that grand juries are really puppets of prosecutors and that grand jury investigations therefore, can be conducted in a manner highly detrimental to the interests of the defendant or of the state."

"There is simply no reason why the prosecutors and the grand jury itself should not be some way subjected to evaluation for their official performance."

d. All court proceedings relating to grand juries—motions to quash, contempt, immunity, etc.—should be held in open court

"Once the grand jury leaves its cloistered room and seeks the help of the court, it is our position that all proceedings and documents relating to them (these proceedings) should be publicly available immediately."

e. All indictments should be immediately available in their entirety upon being returned

". . . once the indictment is returned, we are then involved in a most formal type of judicial proceeding. To permit . . . the prosecutor and the defendants to rewrite the indictment, putting in what they want the public to know and leaving out what they don't want the public to know, is the grossest type of censorship."

f. Federal system should adopt the California system of releasing complete grand jury transcripts within 10 days after an indictment

"We think that whatever argument there may be for secrecy of the grand jury, they evaporate when the grand jury has handed down its indictments."

"California, in an effort to make the grand juries more accountable, releases the complete transcript of the grand jury proceedings . . . We would argue that the transcripts should be made public . . . which would . . . mean that the behavior of prosecutors would be a matter of public record for the citizens to judge for themselves."

g. When there is no indictment, grand jury transcripts should be releasable by a majority vote of the grand jury

"Grand juries which do not indict may have received very valuable testimony on the operation of . . . government . . . Congress could conclude that a grand jury transcript leading to no indictment under some circumstances contains information which would be of value to the public The question is not the indictment, but the process of the grand jury. That is why we are here. The press' main function is to report how government operates and how it reaches its decision—not how it reaches only the decision which leads to an indictment.

h. Grand jury reports should be releasable by a majority vote of the grand jury

Under the law today, courts have "unbridled censorship powers over grand jury reports. We would suggest that the grand jury, by majority vote, could release the report . . ."

i. The public and the press should have "standing" to contest orders improperly sealing grand jury information and should have "notice" of attempts to seal grand jury information

The public should have "standing" in the courts because "it seems absolutely clear to us that the public and the press have a direct interest in the public availability of information about the grand jury process . . ."

A judge who seeks to seal grand jury information should give the public and the press "due process" protections, including (1) notice; (2) an opportunity to object; (3) must make specific findings of fact and conclusions of law showing "that there is a compelling reason to deprive the public of the information."

III. PROTECTION FOR CONFIDENTIAL NEWS SOURCES AND OTHER UNPUBLISHED INFORMATION SOUGHT BY GRAND JURY SUBPENA AGAINST THE PRESS

Legal Status Today

The Supreme Court five-four decision in *Branzburg* v. *Hayes* was "most unfortunate" because it said that the grand jury had a "superior compelling interest" to obtain information from news reporters than the reporters had to protect their confidential news sources. Supreme Court also appears to have approved the "balancing test" approach.

"Most state supreme courts and lower courts have followed the balancing test."

Supreme Court has cited the Attorney General's guidelines which show a decrease in subpoenaes issued from about 150 in 1959 and 1970 to 42 from May 1975 to November 1976.

"There is no way to evaluate" the accuracy of the Justice Department statistic because "the Department has repeatedly declined to identify the reporters subpoenaed."

The Reporters Committee "continues to believe that news reporters have an absolute privilege under the First Amendment to withhold the identity of their news sources and the content of the unpublished information" from grand juries.

SUGGESTIONS FOR PROCEDURAL PROTECTIONS FOR GRAND JURY SUBPOENAS TO THE PRESS

Notice—testimony, documents, notes, photos, telephone & cable records

". . . any subpoena for testimony and documents served on a recognized member of the press for information obtained during news gathering should not be returnable prior to seven days after the service of the subpoena" for information "in their possession" and for "copies" of news media telephone records and cable traffic.

PROCEDURAL PRIVILEGE PROJECTIONS AGAINST SUBPOENAS AND CONTEMPTS

a. Standing

"Congress ought to take this opportunity to construct some strong procedural protections" as an alternative to passing 'a shield law.'"

Some "courts have denied the press its 'standing' to assert the First Amendment" as a defense to subpoenas. Congress could "suggest that courts give due deliberation to the First Amendment interests by a statement of policy. . . ."

b. State shield laws privilege

"We think that reporters and news organizations should be able to invoke their state shield law before a Federal grand jury. Twenty-six state legislatures have passed state shield law privileges." The current situation gives "the Federal government a veto over the state legislatures' determination.

"Congress should extend to the professional news reporter the same privilege it has extended to the practice of other professions protected by state privilege laws in the Federal courts. Surely the dissemination of news and ideas to the public is as honorable and important in our society as the practice of law."

c. State common law privilege

Similarly, if there is a state common law or specific state interpretation of the Federal First Amendment or of the state equivalent, we think . . . that the Federal courts should be made to recognize the state privilege.

d. Justice Department guidelines

"It would be advisable for the Congress to require that any Federal grand jury subpoena . . . be accompanied by a signed statement by the Attorney Gen-

eral confirming that all the requirements of the guidelines have been followed . . ."

c. Motion to quash and stays

"Any news person or news organization (should have) 'standing' to appeal a denial of a motion to quash the subpoena."

"Immediately upon filing the notice of appeal, the judgment be stayed pending disposition" by the U.S. Court of Appeals and then by the Supreme Court.

"In short, we think that a news organization or news reporter should be free from jail until his case is heard on the merits; and that he should not have to suffer incarceration for asserting a privilege which is ultimately upheld."

CONTEMPT AGAINST THE PRESS

a. Transcripts

"Many reporters feel . . . that merely appearing in secret before the grand jury will undermine their credibility with their news sources . . ."

One solution would be to give the reporter "a complete transcript of his or her testimony" to show to the news source. Another solution would be to permit the news reporter "to appear before the grand jury in a proceeding open to the public . . ."

Any "judgment of contempt should be automatically stayed on appeal . . ."

b. No criminal contempt

We think it is "very important" that Congress prohibit the imposition of criminal contempt on news persons "for a good faith assertion of their First Amendment privilege to protect information obtained during the course of news-gathering."

This suggestion is made because several courts have recently held news reporters in criminal contempt.

c. Civil contempt

"We think that Congress ought to limit any civil contempt penalty imposed on a news reporter for a good faith assertion of his First Amendment privilege to no more than 15 days.

IV. GRAND JURY LEAKS

"Our suggestion is . . . that it can be no crime for a news organization or newsperson to obtain government information for publication unless it can be shown . . . that the publication of the information poses a 'clear and present danger' to the national security of the United States."

V. ATTORNEYS FEES

Litigating a grand jury subpoena or a case for access to criminal justice information "can easily cost a minimum of $25,000 or more in legal fees. "While many publications may be willing to spend that kind of money to defend the First Amendment there are many that cannot . . . and others who will not. Furthermore, freelance writers and investigative reporters and reporters employed by news organizations simply don't have the financial resources to defend themselves."

"Congress has passed more than 60 laws granting attorneys' fees to private citizens who successfully defend Constitutional interests . . . and a host of statutory rights."

"In view of all the other interests which receive attorneys' fees and costs for protecting important public rights, we only ask equal financial treatment to guard the public's right to obtain information about the government and evaluate its performance."

[SUBMITTED] TESTIMONY OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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SUGGESTIONS FOR MORE PUBLIC INFORMATION ABOUT GRAND JURIES

a. Names and procedures for selection of grand jurors should be public
b. Grand jury witnesses, their attorneys or non-lawyer spokespersons should be permitted to reveal grand jury witness' testimony
c. Grand jurors should be permitted to criticize and comment generally on government prosecutor's handling of grand jury investigation
d. All court proceedings relating to grand juries—motions to quash, contempt, immunity, etc.—should be held in open court
e. All indictments should be immediately available in their entirety upon being returned (except for fugitives)
f. Federal system should adopt the California system of releasing complete grand jury transcripts within 10 days after and indictment
g. When there is no indictment grand jury transcripts should be releasable by a majority vote of the grand jury
h. Grand jury reports should be releasable by a majority vote of the grand jury or by order of the court
i. Press should have "standing" to contest improper restrictions on public access to grand jury related information and should be accorded notice and a hearing

III. Protection for confidential news sources and other unpublished information sought by grand jury subpena against the press:

LEGAL STATUS TODAY

a. Supreme Court decision in *Branzburg* v. *Hayes* ruled against First Amendment newsperson's privilege: "balancing test" approval
b. Most state and federal courts have followed "balancing test" in subpenas to the press
c. Attorney General's Guidelines have decreased federal subpenas: Department is breaking guidelines: No authentic statistics available
d. Reporters Committee continues to favor absolute privilege for the press to protect news sources and unpublished information

SUGGESTIONS FOR PROCEDURAL PROTECTIONS FOR GRAND JURY SUBPENAS TO THE PRESS

Notice

a. Seven days' notice of subpenas for testimony, notes or documents
b. Seven days notice to press of subpenas to communications firms for copies of news media telephone records and cable traffic

Procedural Privilege Protections Against Subpenas and Contempts

a. Federal courts should be advised to grant "standing" to newspersons seeking to assert First Amendment privilege
b. Federal courts should recognize 26 state shield laws
c. Federal courts should recognize court-made law by states on newsperson's privilege
d. Justice Department should follow Attorney General's Guidelines
e. Motions to quash subpenas should have automatic stay on appeal

CONTEMPT

a. Transcript of reporter's grand jury testimony should be available; or grand jury interrogation of reporter could be in public
b. Civil contempt incarceration should be automatically stayed on appeal
c. No criminal contempt against press for good faith assertion of First Amendment privilege
d. Civil contempt against press: 15 days in jail maximum

GRAND JURY LEAKS

No crime for press to publish grand jury information

ATTORNEYS FEES

Amend existing Federal attorneys fees laws to include attorneys fees to newspersons and news organizations which successfully litigate cases—
(a) involving access to and publication of information related to grand jury proceedings
(b) involving protection of newspersons confidential sources and unpublished information sought by grand jury subpena or by court order in connection with grand jury proceedings

INTRODUCTION

Mr. Chairman and Members of the Subcommittee:

On behalf of the Reporters Committee, we should like to thank you for this kind invitation to testify about H.R. 94, introduced by Mr. Ellberg, and the other four bills now introduced in the house affecting grand jury reform.[1]

As working news reporters, our interest in the grand jury is basically two-fold:

First, we think that the Congress ought to provide more information to the public about the decision-making processes of the grand jury because it is a most powerful body and one of the least accountable institutions of government; and,

Second, we think that the Congress ought to provide more protection for confidential and other unpublished information sought by grand juries from members of the press. We believe that the press was constitutionally designed to be an independent and free institution and was not designed to be an official investigative arm of the government, whether it be the Legislative branch here, Executive branch or any arm of the Judicial branch, including the grand jury.

PUBLIC ACCOUNTABILITY AND THE GRAND JURY: 17TH CENTURY BRITAIN AND THE COLONIES

The grand jury today, as witnessed by the bills in this House, by the volume of law review articles[2] and by other news, has become one of the most controversial institutions in government.

There have been charges of political manipulation, perhaps best substantiated by the Watergate experience, by the hearings before this Subcommittee last year[3] and by a number of controversial prosecutions during recent years.[4]

The conclusion reached by the members of this House who have introduced these bills, by law review commentators, by outside lawyers and even the U.S. Court of Appeals for the Ninth Circuit,[5] is that the grand jury has tended to become a rubber stamp for the Justice Department and has, both in practice and in theory, lost the independence which it was initially designed to have in order to protect citizens from the power of the government.

[1] H.R. 3736, introduced by Mr. Conyers and 13 others on Feb. 22, 1977, H.R. 94, introduced by Mr. Ellberg on Jan. 4, 1977, H.R. 2620, introduced by Mr. Patterson on Jan. 27, 1977, H.R. 4808, introduced by Mr. Duncan on Mar. 14, 1977, H.R. 406, introduced by Ms. Holtzman on Jan. 4, 1977.

[2] See *Bursey* v. *United States:* the First and Fifth Amendments in the grand jury room, 24 Hastings L.J. 915 (1973); Grand Jury: powers, procedures, and problems, 9 Colum. J. Law & Soc. Prob. 681 (1973); The Grand Jury as the New Inquisition, 50 Mich. St. B.J. 693 (1971); Federal Grand Jury Investigations of Political Dissidents, 7 Harv. Civ. Rights Civ. Lib. L. Rev. 432 (1972).

[3] Hearings Before the House of Representatives Committee on the Judiciary, Subcommittee on Immigration, Citizenship and International Law, H.R. 94, H.R. 1277 and related bills, June 10, July 1, 29, Aug. 26, and Sept. 28, 1976.

[4] According to testimony previously given this Subcommittee, the Special Ligitation Section of the Department of Justice launched "political grand jury investigations" from 1970–1973 which involved 100 federal grand juries in 84 cities in 30 states, directed at such groups as the Vietnam Veterans Against the War, Daniel Ellsberg, the Puerto Rican Independence Movement and a variety of other organizations whose politics were disapproved of by the Nixon Administration. Statement on grand jury reform before the House of Representatives Committee on the Judiciary, Subcommittee on Immigration, Citizenship and International Law by the Center for National Security Studies, Mar. 17, 1977.

[5] "Today, courts across this country are faced with an increasing flow of cases arising out of grand jury proceedings concerned with the possible punishment of political dissidents." *Bursey* v. *United States*, 466 F. 2d 1059, 1089 (9th Cir. 1972).

The secrecy which was developed for the grand jury in 17th Century England, initially in the cases of Stephan College[6] and the Earl of Shaftsbury,[7] was designed primarily to insulate grand jurors from intimidation by the Crown, either because they handed down indictments disapproved by the Crown or refused to hand down indictments which the Crown favored. The intimidation was possible in those days because grand jury deliberations were public and the Crown could easily identify the recalcitrant grand jurors.

The American colonists, faced with oppression from the British Crown retained grand jury secrecy and it approved, for example, to be an important element in the seditious libel case against John Peter Zenger[8] when the grand jury in New York refused to indict Mr. Zenger and the Crown was forced to proceed by way of information.[9]

Because the grand jury had shown itself to be able to retain some semblance of independence against the Executive branch, it was adopted by the Framers in the Fifth Amendment. The English common law theory of complete grand jury secrecy was relatively well accepted in this country until the late 1940's, when the Congress adopted the Federal Rules of Criminal Procedure, most notably Rule 6 (e)[10], which breached secrecy somewhat.

The rule provides that "no obligation of secrecy may be imposed upon any person except" . . . a grand juror, attorney, interpreter and operator of a recording device.

However, we feel that the continuing practice of secrecy, which was designed to insure the independence of the grand jury, is now being used to permit almost absolute Executive branch control over the grand jury, and to protect the Executive branch of government from any meaningful inquiry into its management of the grand jury.

Therefore, we would argue very strongly that if the Congress wishes to retain the grand jury as a meaningful institution, and to preserve some semblance of its independence as a protection for the individual—that the Congress can best insure this goal by increasing the amount of information which is available to the public about the operations of the grand jury, rather than by shrouding the grand jury in its current secrecy, which hides Executive branch abuses and permits their continuation.

A second factor which has played a key role in our formulation of suggestions on these bills is that generally the prime source of news leaks about the grand jury is the prosecutor.

Prosecutors are, on both the federal and state levels, politicians. The position of prosecutor has always been thought of in this country as a stepping stone to higher political office.

Therefore, permitting a political official to decide what information the public shall not read about the grand jury is, in effect, selective dissemination of grand jury information by government hand-out. Some method must be found to stop giving government officials a virtual monopoly on information which has been presented to grand juries by using their privileges inside grand jury rooms to censor information or distribute it to the press as the government sees fit in order to further the governments political goals.

Without disclosing any confidential sources, we think it is fair to conclude, for example, that a number of recent grand jury investigations were leaked, in whole or in part, to the press by government public relations efforts. The conclusion is inescapable because stories were appearing in newspapers and on television, in some cases with verbatim transcripts before the ink was even dry.

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[6] 8 How. St. Tr. 550 (1681).
[7] 8 How. St. Tr. 759 (1681).
[8] 7 How. St. Tr. 675 (1735).
[9] Grand Jury Survey: Should Witnesses Have Access to Their Grand Jury Testimony? 20 U.C.L.A. L. Rev. 804, 808 (1973).
[10] Fed. R. Crim. P. rule 6(e):
Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

Our conclusions, that the government is frequently engaged in news leaks, appears to have been to a great degree confirmed by the recent press conference of Attorney General Bell on March 18, 1977.[11]

After conceding that the Department was responsible for a number of "leaks," the Attorney General said:

"I do not think the (grand jury) information ought to be leaked and the main reason for that is oftentimes it's inaccurate because you can't get the whole picture . . . you have an incomplete story."

It is therefore clear from the Attorney General's own statement that his complaint about grand jury leaks is not that public information about the grand jury proceedings interferes in any way with the operation of the grand jury or makes the grand jury any less effective, but only that the public will not be getting as much information as it is entitled to because there could be "an incomplete story."

In response to a question as to whether the Attorney General himself would leak information to the press about the grand jury, Mr. Bell said in some cases he would: "If someone was getting ready to print a story he had some doubts about . . . I would at least tell the reporter that they were running a high risk . . . I think it would be better to do that than to have something that's completely inaccurate."

The Attorney General then pointed out how difficult it is for the Department of Justice to keep grand jury information secret. He referred to the current grand jury investigation into alleged improper behavior by the South Korean government saying: "There were about ten people here who knew the whole story. But there were about forty who knew part of it. So, I knew then that somebody in the forty was telling these things, and that probably nobody in the ten was because not a single accurate story had been published . . . I would rather be able to tell the whole story myself."

It is, therefore, our conclusion that the present information policies involving the grand jury contradict two basic assumptions in the Constitution: First, these policies contradict the Fifth Amendment assumption that the grand jury is independent of the Executive branch of government. And second, these policies contradict the First Amendment assumption that public information about government institutions shall not be wholly in control of the government for its own political ends.

If we as reporters lived in a perfect world, we would suggest to this Subcommittee that there be no such thing as grand jury secrecy—that at some point the activity of the grand jury should be a matter of public record for the public to know about and evaluate, including the identities of witnesses, the content of testimony, the nature of information seized by subpoena, and the entire transcript of the grand jury proceedings, as well as affiliated judicial proceedings.

However, we realize that to be of any practical aid to this Subcommittee, the complete elimination of grand jury secrecy is probably an impossibility at this time, and therefore, we are going to suggest what we think are the minimally acceptable standards for grand jury reform in order to insure fair and impartial grand jury operations and public accountability of this most important and controversial government institution.

EMPANELING OF GRAND JURORS

We start off with the presumption that grand jurors are public servants, selected at random and performing a vital government function—investigating allegations of crimes, issuing idictments for crimes, or refusing to indict, and reporting on the operation of government.

However, present law and practice is confusing among the 94 district courts and it appears from the rules and the case law that a United States district court judge has virtually complete discretion, depending upon his whim, to make public or keep secret the names of grand jurors.[12]

In several states, such as Florida and California, the names of grand jurors are routinely made public and published by the local press, and we can discover no criticism by local law enforcement officials of this practice.

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[11] Transcript of press conference of the Honorable Griffin B. Bell, 9 a.m., Friday, Mar. 18, 1977, pp. 30–32.

[12] 28 U.S.C. § 1863(a)(8). See also *United States* v. *Leonetti*, 291 F. Supp. 461 (S.D.N.Y. 1968); *United States* v. *Hoffa*, 367 F. 2d 698 (7th Cir. 1966), *vacated on other grounds*, 387 U.S. 231 (1967), on remand 273 F. Supp. 141 (N.D. Ill. 1967).

Therefore, it is our conclusion that the entire selection process for both regular and special grand juries should be matters of open public record in the courts. The public should be able to know the identities of the grand jurors in the pool, and of those who are selected to serve. The public and the press should have a right to be present at the selection process, and during the judge's charge.

The only exception we would make—and we propose this exception uniformly throughout this testimony—is if disclosure of information would be shown to result in a "direct, immediate and irreparable injury" to the national security of the United States. We would impose upon the government the burden of proving this danger would occur.

It is our position that if the public has the right to know the information—such as the identities of grand jurors—then the sealing of this information amounts to a prior restraint on publication, because it virtually eliminates the possibility that the public and the press will obtain the information to which they are entitled.

We would therefore impose upon the government in this and in other areas the obligation to conform to the doctrine of *Near* v. *Minnesota*[13] and *New York Times* v. *United States*,[14] which stand for the principle that any attempt to impose prior restraints on the publication of government information, including information about the criminal justice process, comes to the court with a heavy burden against its validity and that the danger cannot be imagined or speculative, but must be real and must be substantiated by proof.

DISCLOSURE OF GRAND JURY TESTIMONY BY WITNESSES AND THEIR ATTORNEYS

We support the provisions of existing law and of Mr. Eilberg's bill (H.R. 94), which permit grand jury witnesses to voluntarily disclose their testimony in whole or in part. We think that when a citizen is called before a grand jury, he certainly has a First Amendment right to voluntarily tell the public what he wants to about what occurred in the grand jury chamber.

We also support the concept, included in the Eilberg bill (H.R. 94, Sec. 5(C)(3)), of permitting a grand jury witness's attorney, or other spokesman on the witness's behalf, to disclose his or her testimony and the identity and contents of any documentary information submitted to the grand jury. It appears clear that existing law permits the graund jury witness to disclose what he wishes and probably permits the grand jury witness to select a non-lawyer spokesman.[15] However, it is not clear in view of the pretrial rules promulgated by the American Bar Association in its Standrads Relating to Fair Trial-Free Press, Standard 1.1, and the similar American Bar Association Code of Professional Reponsibility D.R. 7–107(A)(B) and (C), which, in general, prohibit an attorney from disclosing any matter about the grand jury that is not a matter of public record; and the rule adopted by 89 of the 94 United States district courts which prohibit a lawyer from making extrajudicial statements "if there is a reasonable likelihood" that the information "will interfere with . . . the due administration of justice."[16]

However, the United States Court of Appeals for the Seventh Circuit has voided this rule on grounds that it violates the First Amendment rights of attorneys to prohibit them from making any statement unless those statements pose "a serious and imminent threat" of interference with the fair administration of justice. *Chicago Council of Lawyers* v. *Bauer*, 552 F. 2d 242, 249 (7th Cir. 1975), *cert. denied sub nom. Cunningham* v. *Chicago Council of Lawyers*, 427 U.S. 912, 96 S. Ct. 3201 (1976). Recently, the United States Court of Appeals for the Fourth Circuit upheld an order prohibiting attorneys involved in a criminal case from "mingling or being in the proximity of the press" in or near the courthouse.[17]

What we are trying to point out here is that in some district courts, lawyers cannot even be in "the proximity of the press" to discuss a criminal case; in some courts they may only tell the press that which is a matter of public record; in some courts they may give the press information as long as it is not prejudicial (whatever that means), and in some district courts they may talk freely

[13] *Near* v. *Minnesota*, 283 U.S. 697 (1931).
[14] *New York Times* v. *United States*, 403 U.S. 713 (1971).
[15] Fed. R. Crim. P. 6(e); In re Investigation Before the April 1975 Grand Jury, 531 F. 2d 600, 607 n. 11 (D.C. Cir. 1976).
[16] See, e.g., D.C. Cir. R. 1–27(c)(1).
[17] *Society of Professional Journalists* v. *Martin*, No. 77–1636 (4th Cir. May 17, 1977), *stay denied* 431 U.S. 928 (1977) (Brennan and Marshall, JJ., dissenting).

except for information which will pose a "serious and imminent threat" to the operation of the grand jury.

Many witnesses may not be articulate enough to tell their side of the story to the public or they may be ill or be incarcerated and thus do not have easy access to the press. Therefore, they may wish to select someone to speak on their behalf.

The ability of a grand jury witness to tell his story to the public should certainly not depend on his educational level or his familiarity or lack of familiarity in dealing with reporters. The basic question should be whether he wishes his testimony to be disclosed. If so, then he should be able to select the method by which the public obtains this information. This selection should not be made for him by the American Bar Association or the courts.

If, under the federal rules, the witness has the right to say anything he wishes about his grand jury testimony—regardless of how prejudicial it may be or what type of a threat it may pose to the administration of justice—then certainly it only seems fair to permit his attorney to make the same statements without becoming enmeshed in a whole range of conflicting, confusing and probably unconstitutional ethics codes.

It was this argument, involving a prisoner who asked his attorney to speak for him, which persuaded the United States Court of Appeals for the Seventh Circuit to issue its rule.[18]

Therefore, we strongly support the concepts embodied in Mr. Eilberg's bill that the witness, a non-lawyer spokesman for the witness, or his attorney, at the witness' election, should be able, if he wishes, to disclose anything concerning the witness' appearance before the grand jury.

PUBLIC CRITICISM BY GRAND JURORS OF GRAND JURY OPERATIONS

We come to a much more difficult situation when we deal with information disclosed by grand jurors themselves.

The argument, as we understand it, is that the grand jury is only able to function if it can be certain that the names and testimony of witnesses are kept secret, because public disclosure might discourage witnesses from cooperating with the grand jury. "The secrecy of grand jury proceedings is to encourage witnesses to testify without fear of retaliation and to protect the independence of the grand jury." [19]

Another argument is that many innocent persons are identified during grand jury testimony by witnesses and that this information is frequently erroneous and its publication could be damaging.

Of course, the realities of the current systems are so inconsistent with these arguments that it is difficult to justify any secrecy at all for a number of reasons:

(1) Grand jury information can be given by a witness voluntarily, permitting the press to use his or her name.

(2) It can be given voluntarily by a witness who declines to permit his or her name to be used.

(3) It can, of course, be leaked by the government or by others.

(4) The identities of witnesses and/or the questions asked of them can be publicly disclosed in motions to quash orders to show cause, in contempt hearings, in immunity proceedings and in other formal court proceedings which arise as the result of grand jury activity.

This brings us back to our original concept that most grand jury secrecy simply makes litle sense. In addition, there is the argument that grand juries are really puppets of prosecutors and that grand jury investigations therefore can be conducted in a manner highly detrimental to the interests of the defendant or the state. For example, a potential defendant may be from a political party opposing that of the prosecutor—or, on the other hand, the potential target of the grand jury investigation may be a friend or political ally of the prosecutor.

Therefore, it seems reasonable for Congress to formulate at least a rule permitting a grand juror to make a general assessment of the operation of the grand jury either during the course of the grand jury or afterwards.

Did the Watergate grand jury feel, for example, that President Nixon was being protected for too long or did the Watergate grand jury feel that the

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[18] *Holder* v. *Banks*, TH 72 CR 47 (1973), *cert. dismissed as improvidently granted*, 417 U.S. 187 (1974).

[19] *Posey* v. *United States*, 416 F. 2d 545, 557 (5th Cir. 1969).

prosecutor, under enormous political pressures, put undue pressure on the grand jury in making its report? What about the grand jury in the Berrigan case? The Gainesville Eight case? The Chicago Seven case? Shouldn't a grand juror be permitted to give the public his or her assessment of the behavior of the Executive branch official—the prosecutor—who presented the evidence to them? Or should prosecutors and fellow grand jurors be given complete immunity from any public accountability in their handling of this most important function? We think, quite simply, that a grand juror should be able to say as one grand juror did say to a reporter in Memphis, "I think this grand jury investigation was a whitewash."

There are now, as this Committee knows, a spate of books on the Watergate investigation which disclose some information about the grand jury investigation of Watergate. Furthermore, the Senate Watergate hearings, which were conducted while the Watergate grand jury was still in sessions, produced volumes of information identical to the information taken by the grand jury.

But, ironically, the Watergate grand jurors have been told by former Chief U.S. District Court Judge George Hart that they will go to jail if they discuss any aspect of the grand jury investigation with the press and the public.

Or, as Judge Hart said, the oath of secrecy "will follow you to your grave."

It should be remembered that the original Watergate indictments were for breaking and entering—and no more. We do not know to this day whether certain of the original grand jurors suspected that there was more to this matter than a simple case of alleged "extortion" against an employee of the Democratic National Committee—which was the explanation given by the Justice Department prosecutor in response to a question from the U.S. Court of Appeals.

The prosecution against the Berrigans, for example, was grounded substantially on the testimony of a cell-mate whom the government had placed with the Berrigans in order to obtain their confidence and to later testify before the grand jury.

Did any grand juror feel that this was a proper course of conduct for the government? Did certain of the grand jurors have questions as to the veracity of this witness, and how did the government prosecutor respond, if at all, to these queries? And what about the grand jury which indicted former Governor Connally, who was acquitted? Were they intimidated, cajoled or improperly persuaded to rely on the testimony of a single witness who said he had seen the alleged transaction take place from a distance of 100 feet? Would it not be of extreme importance to the public to be told now whether the grand jury in New York knew that a former agent of the FBI was perhaps behaving properly when he supervised break-ins under the orders of his superiors?

Unless we open the government prosecutor and the grand jury to some modicum of public accountability by the citizens who serve on the grand jury panel, we are going to continue the protective shield of secrecy which permits the many abuses which have resulted in the bills before this House and these hearings.

There is simply no reason why the prosecutor and the grand jury itself should not be in some way subjected to evaluation for their official performance. If history is any guide, the more there is secrecy and less accountability in government means the more there is opportunity for political corruption and abuse.

PUBLIC ACCESSIBILITY OF COURT PROCEEDINGS RELATED TO GRAND JURY PROCEEDINGS

Grand jury proceedings, of course, frequently move from the secrecy of the grand jury room into what we believe should always be a public court room. The most common proceedings are challenges to the composition of the grand jury,[20] motions to quash subpoenas [21] motions to hold witnesses in contempt,[22] and requests for immunity.[23]

Once the grand jury leaves its cloistered room and seeks the help of the courts, it is our position that all proceedings and documents relating to them should be publicly available immediately.

There is fundamentally no difference between a court hearing involving a grand jury and a hearing involving any other type of case.

Certainly prosecutors could argue, for example, that permitting the public to attend an immunity hearing would embarrass or intimidate the witness. But the

[20] Challenges, to Composition of Grand Jury, 28 U.S.C. § 1867 (1968).
[21] Motions to Quash, Fed. R. Crim. P. 17(c).
[22] Orders to Hold Witness in Contempt, 28 U.S.C. § 1826 (1970).
[23] Request for Immunity, 18 U.S.C. § 6003.

prosecutor could also make the same argument about a recalcitrant witness in a trial and that would not mean that we would have secret trials.

Furthermore, the grand jury is a somewhat amorphous body with some attributes of independence, at least in theory, some attributes of being an arm of the court and some attributes, at least in practice, of being an arm of the Executive Branch. While its unique position might militate in favor of some secrecy, certainly once grand jury proceedings reach the conventional forum of the Judicial Branch, we cannot have secret court proceedings. While the grand jury is, of course, inquisitorial in nature—an argument in favor of its secrecy—a court hearing on contempt is a conventional adversary hearing where due process attaches.

Here again, we find ourselves in a situation where public accountability of the courts for their handling of grand jury proceedings is virtually subject to the arbitrary whim of the Judicial branch.

If the government feels that it wants the public present, in a contempt hearing, for example, then the public is admitted, even if the grand jury proceedings are still continuing and the information sought might be prejudicial to innocent third parties.[24]

In another jurisdiction, however, the contempt proceeding will be closed to the public on the grounds that the grand jury is still in session and that innocent third parties could be harmed by the information sought to be disclosed.[25]

The Supreme Court, to confuse matters even further, has indicated that the standard by which to judge whether a contempt proceeding should be open is not whether the grand jury investigation is being impeded but whether the witness wants the hearing open.[26]

Therefore, we think Congress has both the constitutional and public policy obligation to insure that all information about court proceedings relating to grand jury proceedings be available—and that the public and the press are not subject to the arbitrary and perhaps the politically motivated decision of a judge in one jurisdiction, a prosecutor in another jurisdiction, a potential defendant in a third jurisdiction, a witness in a fourth jurisdiction, the interest of a third party in a fifth jurisdiction, and so on.

It is our position that, subject to the national security exemption discussed previously, all federal indictments should be immediately available to the public and the press in their entirety upon being returned—except for those indictments sealed until the defendant is in custody.

We had thought that this was the law.[27] But we have had three recent cases which indicate that courts are beginning to take a second look at this question.

Very recently in a baby selling case in Washington, we had a criminal complaint (the misdemeanor equivalent of an indictment) sealed under District of Columbia rules, which are similar to the federal rules. The judge, the prosecutor and the defendants thought that there was certain information in the criminal information which would be embarrassing to certain named parties, who were in this instance, unwed mothers.[28]

The judge ruled that the privacy interest of the unwed mothers was superior to the public's right to have access to the complete criminal information. He therefore sealed certain portions of the information which might have been used to identify the unwed mothers.

It was the position of the Washington Post Company and this Committee, which appeared in that case, that the criminal information—like the indictment—is the fundamental document upon which the jurisdiction of the court is based, and that any restriction on its public availability violates the First Amendment rights of citizens to know how their courts operate.

It was also argued by our Committee and The Post that sealing the indictment would naturally lead to secret pretrial and trial proceedings, because it would be futile to seal the criminal information in order to protect the unwed mother while subsequently disclosing her identity in the trial.

We, of course, sympathize with the problems faced by many innocent persons who are drawn into the criminal justice process, either as defendants who may be wrongly accused and subsequently acquitted, or as witnesses who may suffer embarrassment or other damage.

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[24] In re Oliver, 333 U.S. 257, 265 (1948).
[25] *United States* v. *Levine*, 326 U.S. 610 (1960); In re DiBella, 518 F. 2d 955 (2d Cir. 1975).
[26] Id.
[27] Fed. R. Crim. P. 6(e); *United States* v. *Sherwood*, 38 F.R.D. 14 (D. Conn. 1964).
[28] *Doe* v. *Risher*, Civ. No. 10997-76 (D.C. Super. Ct., decided Nov. 30, 1976).

But if the privacy of the unwed mother warrants a secret indictment, then what about the privacy of the rape victim or the privacy of the robbery victim, or the privacy of family members in intra-family assaut cases? Finally, of course, what about the organized crime witness who fears not humiliation, but, perhaps, death?

No one, of course, forces the prosecution to present a case to the grand jury, nor does anyone force the prosecution or the grand jury to return the indictment. But once the indictment is returned, we are then involved in a most formal type of judicial proceeding. To permit—as happened in the baby-selling case—the prosecutor and defendants to rewrite the indictment, putting in what they want the public to know and leaving out what they don't want the public to know, is the grossest type of censorship.

We would like to stress that this took place under a local rule identical to the Federal Rule in a federal court established by this Congress.

We have indications that this "privacy" argument is gaining favor with other courts seeking to restrict access to what should be publicly available information in criminal and civil cases.

The Oklahoma Supreme Court recently upheld an order prohibiting publication by the Oklahoma media of the identity of a juvenile who appeared in a public court proceeding. The Oklahoma Supreme Court said that public identification of the juvenile would violate his "privacy" right to be rehabilitated. Fortunately, the U.S. Supreme Court reversed the order.[29]

The Virginia Supreme Court has recently upheld the criminal conviction of *The Norfolk, Va., Pilot* for allegedly violating the "privacy" rights of a state court judge by disclosing that the judge was under investigation by a State Commission on Judicial Ethics.[30]

Last month, the Massachusetts Supreme Court upheld an order sealing a civil complaint—which is the equivalent of an indictment—and all other documents in a routine business squabble between a bank and the State Banking Commission. The Court said that release of the information in the complaint would violate the bank's right to privacy.[31]

There is also a mechanical problem with release of indictments. In Texas recently, the U.S. District Court clerk devised a bureaucratic filing routine which meant that in some cases the press could not have access to an indictment until almost 24 hours later. The problem was eventually cured.

While we understand a delay may be necessary in cases of sealed indictments, where there is a danger that the defendant may flee, we see absolutely no justification—once this matter is brought to Congress' attention—for the Congress not to insure that indictments or copies of indictments be made available immediately to the public and the press when they are returned in open court. If the district courts are worried about Xerox fees, perhaps Congress could help them out.

TRANSCRIPTS SHALL BE AVAILABLE UPON INDICTMENT

We think that whatever arguments there may be for secrecy of the grand jury, they evaporate when the grand jury has handed down its indictments. The grand jury has finished its work. The testimony is complete. The documentary materials have been collected, and the matter now goes to court.

California, in an effort to make the grand juries more accountable, releases the complete transcript of the grand jury proceedings 10 days after an indictment has been handed down.[32] We would urge the Congress to pass an amendment to the Federal Rules following the California practice.

To whatever objections are raised to this proposal, we would simply answer that we are unable to find in the legal literature any suggestion that California's law enforcement system is less effective than the federal law enforcement system.

Therefore, until it can be shown that California's practice of public accountability has in some way hindered its law enforcement process, we would argue that the transcripts should be made public in their entirety, which would, of

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[29] *Oklahoma Publishing Co.* v. *District Court,* No. 50052 (Oklahoma Sup. Ct., decided Oct. 19, 1976), rev'd 430 U.S. 308 (1977).

[30] *Landmark Communications* v. *Commonwealth of Virginia,* Record No. 760596 (Va. Sup. Ct., decided Mar. 4, 1977).

[31] *Ottaway Newspapers, Inc.* v. *Appeals Court,* No. 715 (Sup. Jud. Ct. Mass., filed May 11, 1977).

[32] Cal. Penal Code § 938.1.

course, mean that the behavior of prosecutors would be a matter of public record for citizens to judge for themselves.

We realize that this is a somewhat novel suggestion for the federal system, and we can expect, I assume, some objections from the Department of Justice.

It was the Department of Justice, we remember, that handled the so-called political indictments of the Nixon years, and if the abuses disclosed by that period require safeguards of public accountability, the Department of Justice has brought it upon itself.

Currently, there is no requirement that grand jury proceedings be recorded, and mandatory recordation, as in H.R. 94, is a valuable improvement.

Currently, under the Federal Rules, grand jury transcripts are kept secret except when selected portions are released for trials.[33]

There are many reasons for the Congress to decide that grand jury transcripts should be open. Public availability would permit the public to decide whether the evidence before the grand jury warranted an indictment or whether the information was weak and the grand jury was improperly persuaded by the prosecutor, or whether the evidence was strong but the prosecutor persuaded the grand jury to hand down an indictment for a lesser crime.

Public availability would mean that the public could judge for itself whether, in the Agnew case, the evidence actually showed more serious crimes but the defendant was permitted to plead "no contest" to a lesser crime.

It would show, for example, in the case of former Attorney General Richard Kleindienst, whether it was improper, based on the evidence before the grand jury, for the U.S. District Court judge to permit him to plead guilty to a misdemeanor.

It would allow the public to decide whether immunity was necessary or not and whether subpoenas for certain persons were necessary. In short it would give the public and the press the means—as it has in California—to decide on the fairness, effectiveness and honesty of the grand jury and the prosecutors.

We come to a more difficult situation when the grand jury declines to indict. It is our opinion that a strong argument can be made that a grand jury which declines to indict may have been as abused as a grand jury that did indict. The difference, of course, is that there is no defendant, in the view of the grand jury, even though a serious crime has occurred. Still, grand juries which do not indict may have received very valuable testimony on the operation of law enforcement bodies or other agencies of the government and may have been subjected to improper prosecutorial tactics in order to discourage indictment.

There, we would suggest that grand jury transcripts may be released upon a majority vote of the grand jury or they may be released if the court thinks that there is a substantial public interest to be saved.

Certainly Congress could conclude that a grand jury transcript leading to no indictment under some circumstances contains information which would be of value to the public. The question is not the indictment, but the process of the grand jury. That is why we are here.

The press' main function is to report how government operates and how it reaches decisions—not how it reaches only those decisions which lead to indictments.

While we would prefer that all transcripts be public, we think that at a minimum transcripts leading to indictments should be public and the grand jury and the judge ought to have the latitude to release transcripts when no indictment is handed down.

Grand Jury Reports

One aspect of the grand jury that has been completely overlooked by all of the bills is the traditional but infrequently used grand jury report—generally a report by the grand jury on a matter of governmental consequence evaluating the performance of government officials but declining to indict.[34] The most famous case is the suppressed report on the unindicted co-conspirator in the Watergate case. But other examples are the grand jury's censored assessment of the Internal Revenue Service spying operations,[35] the grand jury's suppressed report on

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[33] Fed. R. Crim. P. 6(e), 16(a)(3).

[34] A federal grand jury has the authority to issue nonindicting reports. *See* the Watergate Grand Jury Report, 370 F. Supp. 1219 (D.D.C. 1974); In re Grand Jury Proceedings, 479 F. 2d 458 (5th Cir. 1973); Application of Johnson, 484 F. 2d 791 (7th Cir. 1973).

[35] In re Disclosure of Grand Jury Report, No. 75-A (Mia) (U.S.D.C., S.D. Fla., Orders of Dec. 8, 1976 and Jan. 10, 1977).

political pay-offs which in part led to the indictment against Governor Mandel [36] and the suppressed grand jury report on Kent State.[37]

The case law in this field is very confusing. Even if the grand jury seeks to release the report, a single judge can stop that release, and the standards for this judicial decision are vague, if not wholly arbitrary.[38]

A few cases in which objections have been raised to releasing the grand jury report seem to indicate that the report could be released if the subject matter of the report is government activity and if the content of the report does not "unreasonably" damage an individual's reputation.[39] In effect then, the decision to release or not to release is as long as the chancellor's foot, and we disagree with giving the courts this unbridled censorship power over grand jury reports.

We would suggest that the grand jury, by majority vote, could release the report and that except for a clear and present danger to the national security of the United States, no federal court could suppress the report.

The current case involving the New York Times is a perfect example.[40] The grand jury handed down a report critical of a Miami newspaper's articles on the IRS. The newspaper then appeared at a secret hearing and successfully urged the judge to suppress the report. A competing Miami newspaper moved to have the report released in its entirely.

At this point, Seymour Hersh, a reporter for the New York Times, obtained a copy of the report, which he published. The judge then decided to release a highly edited version of the report and issued an order to show cause why Arthur Ochs Sulzberger, the publisher, Mr. Hersh, and A.M. Rosenthal, the managing editor, should not be held in criminal contempt for publishing the report; and, in addition, issued an order to show cause why Mr. Hersh should not be required to disclose the identity of the person who gave him the report—a subject we will address later in this testimony.

Grand jury reports have had a time-honored place in our system. As the late Chief Justice Vanderbilt of New Jersey said:

"Thus grand jury presentments of public affairs serve a need that is not met by any other procedure. The grand jury provides a readily available group of representative citizens of the county empowered, as occasion may demand, to voice the conscience of the community. There are many official acts and omissions that fall short of criminal misconduct and yet are not in the public interest. It is very much to the public advantage that such conduct be revealed in an effective, official way. No community desires to live a hairbreadth above the criminal level, which might well be the case if there were no official organ of public protest. Such presentments are a great deterrent to official wrongdoing. By exposing wrongdoing, moreover, such presentments inspire public confidence in the capacity of the body politic to purge itself of untoward conditions." [41]

The Congress has given the grand jury the power to hear witnesses, issue subpoenas and write the reports. By virtue of what sacred right or what constitutional right do the courts of the United States have power to suppress from the public view the results of Congress' grant of authority to the grand jury? Because it will embarrass a newspaper? Because it will embarrass a politician?

There is, of course, always the danger that the grand jury may be politically motivated and that the report therefore would unfairly endanger a persons' reputation. But that is precisely the defect which is possible with any grand jury proceedings, and that does not mean that a judge should be able to decide whether an indictment should be released.

Either the grand jury is an institution of government and its operations, methods and decision should be made as public as possible, (bearing in mind some minimal protections for its operations), or the grand jury is completely a creature of the prosecutor or completely a creature of the courts and under some doctrine unknown to us has no authority to address the citizens of the community unless the courts approve.

PUBLIC AVAILABILITY GRAND JURY INFORMATION—STANDING AND NOTICE

Both under the very restricted current system and under the system we would propose for more public information about grand juries, we foresee the possibil-

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[36] In re Grand Jury, January 1969, 315 F. Supp. 681 (D. Md. 1970).
[37] *Hammon* v. *Brown*, 323 F. Supp. 326 (N.D. Ohio), *aff'd* 450 F. 2d 480 (6th Cir. 1971).
[38] *United States* v. *Briggs*, 514 F. 2d 794 (5th Cir. 1975).
[39] In re Report of Grand Jury Proceedings, 479 F. 2d 458 (5th Cir. 1973), 460 n. 2.
[40] In re Disclosure of Grand Jury Report, supra note 35.
[41] In re Presentment by Camden Grand Jury, 10 N.J. 2d 23, 89 A. 2d 416, 443–44 (1952).

lty of "standing" problems when members of the public or the press seek access to information or to proceedings improperly sealed by courts.

The argument of a few courts has been that an order directed at a clerk to seal the names of grand jurors, or an order directed at attorneys forbidding them to comment cannot be challenged by the public or the press because the order does not run against the public or the press.

While two courts of appeal have ruled that the press does have "standing" to challenge orders against third parties which result in restricting the availability of criminal justice information,[42] one of those courts—the United States Court of Appeals for the Fourth Circuit—appears to have reversed itself.[43]

It seems absolutely clear to us that the public and the press have a direct interest in the public availability of information about the grand jury process and that Congress should protect this interest by requiring the federal courts to grant "standing" to litigate this type of secrecy.

A second procedural problem we run into is that courts will without notice summarily seal information about the criminal justice system and the information will remain sealed for weeks or even months while the press is litigating the constitutionality of the gag order.

While this litigation proceeds, the information remains secret and generally there is no record in the Court of Appeals indicating with any particularity the reasoning of the Judge. This means that we are, in effect, forced to delve into the mind of the Judge for all the unarticulated reasons which might justify the gag order.

We suggest that the Congress take the approach of the American Bar Association which last August adopted a set of rules designed to give the public and the press "due process for criminal justice information." [44]

Under the ABA rules, the Judge must (1) give the public and the press notice that he intends to impose the gag order on criminal justice information; (2) must give the public and the press an opportunity to object, either by written comment or by a hearing where objections can be raised with or without counsel; and (3) must make specific findings of fact and conclusions of law showing that there is a compelling reason to deprive the public of the information.

In short, all the rights in the world to challenge secrecy in the courts are of little use if we don't have the right to challenge illegal orders, or if the censorship can take place in such secrecy that the press doesn't even know when and where it has happened.

Under the current situation, a reporter may not even know that a gag order has been imposed; or he may arrive at the courthouse to find the courtroom locked or the papers sealed. Then, it may take weeks after the fact to vindicate the public and the press' rights to obtain the information. The first rule of effective censorship is to impose the censorship in total secrecy. This "due process" procedure is suggested as the first necessary weapon to challenge this type of unconstitutional action.

As Mr. Justice Clark said:

"A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." [45]

We think it necessary and proper for Congress to demonstrate its responsibility by extending the public's right to know about its government to include the grand jury system.

PROTECTION FOR CONFIDENTIAL NEWS SOURCES AND UNPUBLISHED INFORMATION—INTRODUCTION

As you may know, The Reporters Committee was established in 1970, initially in response to the wave of subpoenas being issued by the grand juries under the control of the Justice Department in an attempt to discover the confidential news sources of news reporters.

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[42] *CBS* v. *Young*, 522 F. 2d 234 (6th Cir. 1975); In re Washington Post Co., — F. 2d — (4th Cir. 1976) (Nos. 76-1695, 76-1698, 76-1699, 76-1711).

[43] *Society of Professional Journalists* v. *Martin*, supra note 17.

[44] ABA Project on Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press, March 1968, as amended, 1976.

[45] *Sheppard* v. *Maxwell*, 384 U.S. 333, 350 (1966).

Over a period of 18 months, the Department served more than 150 subpoenaes for confidential and other unpublished information from newspapers and television stations.

The press resisted these subpoenaes and this resistance resulted in what we consider a most unfortunate 5–4 Supreme Court decision from a trilogy of cases—*Branzburg* v. *Hayes* (confidential news sources of illicit drugs), In re *Pappas* (confidential news sources in a potential civil disorder) and *U.S.* v. *Caldwell* (confidential news sources inside the Black Panther movement).[46]

The four-justice plurality opinion ruled that the First Amendment did grant some protections to the press.

"Without some protection for seeking out the news, freedom of the press could be eviscerated." [47] "News gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment . . . We do not expect courts will forget that grand juries must operate within the limit of the First Amendment . . ." [48]

However, Mr. Justice White, who wrote the plurality opinion, decided that the state had a superior "compelling interest" in discovering the information obtained by the newsmen than the interest it had in protecting the public's right to know information obtained by reporters from confidential news sources.

The plurality opinion appeared especially concerned that the three newsmen were eyewitnesses to the manufacture of illegal drugs, to illegal arms possession by a militant organization and to a verbal threat to the life of the President.

The fifth and deciding vote was cast by Mr. Justice Powell, who took a somewhat narrower view.

While upholding the subpoenaes in these three cases, he said that the First Amendment interest would prevail if the information sought was "remote and tenuous," and if the news person could show that there was no "legitimate need of law enforcement." [49]

Mr. Justice Powell said that, "The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." [50]

We, in the press have relied very strongly in the lower federal and state courts on Mr. Justice White's protection for the collection and gathering of news and Mr. Justice Powell's argument for the "balancing test" to assert that the court does give some recognition to the importance of protecting confidential information.

However, the prosecutors and judges against whom we frequently litigate concentrate on other sections of the opinion:

"We are asked to create another (testimonial privilege) by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do . . ." [51]

To complicate the situation even further, Mr. Justice White cities with approval the approach taken by the Attorney General's Guidelines for the protection of newspersons subpoenaed by the Justice Department.[52]

These Guidelines basically take a "balancing test" approach. The Department is first required to attempt to negotiate with the press and then to take into consideration the seriousness of the crime, whether the information sought from the reporter is directly relevant to the investigation, whether the subpoena is for specific information or is a fishing expedition into news organization files and whether there are alternative sources for the information other than the reporter.[53]

To add to the confusion, most state supreme courts and lower courts which have considered reporters' privilege problems have followed the "balancing test." The most notable exception is in libel cases which are unique because the reporter is the defendant.

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[46] *Branzburg* v. *Hayes*, 408 U.S. 665 (1972).
[47] Id. at 681.
[48] Id. at 707.
[49] Id. at 710.
[50] Id. at 710.
[51] Id. at 690.
[52] Id. at 707, n. 41.
[53] 28 C.F.R. § 50.10 et seq. (1976).

The *Branzburg* decision was quickly picked up by U.S. attorneys and then by state and local prosecutors. Meanwhile, a series of meetings had taken place between the Justice Department and various press organizations which resulted in the promulgation, first by Attorney General Mitchell and later by Attorney General Richardson, of the Justice Department Guidelines.

According to the Justice Department, during a 26-month period between March, 1973, and May, 1975, the Department issued 75 subpoenas to 105 newspersons. Of these, 22 subpoenas, or almost one-third, were issued without the approval of the Attorney General, which is required by the Justice Department's own Guidelines.

In the 54 subpoenas approved by the Attorney General, according to the Justice Department, 42 were issued to willing news persons and 12 were issued to reporters who opposed testifying.

However, we have no way of knowing whether these statistics are accurate, and no way of verifying whether, in fact, the 42 subpoenas were more or less agreed to by the newspersons voluntarily or whether threats or other coercion were used to obtain the reporters' consent.

This is because the Department has repeatedly declined to identify the reporters subpoenaed or their news organizations.

As a result, we are unable also to confirm that the Guidelines have been followed, such as the requirement that there be no alternative sources of the information or that the information was directly relevant to the investigation of a serious crime.

As a footnote, we think that this Committee ought to obtain the identities of the subpoenaed news reporters in order to verify the Justice Department's assertion.

In the 18-month period from May 1975 to November 1976, the Justice Department served 42 subpoenas, some of them involving more than one news reporter. The Department states that 36 of these subpoenas were agreed to by the reporters or the news organizations. The Department says "the records are silent" on the remaining 6 subpoenas. But relying on what the Department says is "the reliable recollection of those involved," there was only one unwilling reporter.

The Department says that 3 of the 42 subpoenas were issued without the prior approval of the Attorney General in violation of the Justice Department's Guidelines.

Once again there is now way to evaluate whether, in fact, the subpoenas involved "willing newsmen" when issued by an agency of the Government which has broad antitrust, tax, and other criminal and civil jurisdiction over the operation of news organizations.

Congress made one major effort to address the subpoena problem during hearings held in 1974 and 1975 on shield law legislation for the press. At that time this Committee supported an absolute privilege bill—drafted by the American Newspaper Publishers Association—protecting confidential sources and unpublished information obtained during the course of legitimate newsgathering activities.

We still adhere to that position but it has become perfectly clear that there is no hope of any type of substantive shield law being passed because the press itself is now sharply divided on the issue.

There are those, like this Committee, who favor an absolute privilege. There are those who favor a qualified privilege somewhat on the lines of the balancing test. Finally, there are those who oppose any substantive Congressional legislation in this field on the grounds that any Congressional statute would undermine the First Amendment.

We continue to believe that news reporters have an absolute privilege under the First Amendment to withhold from government the identity of their news sources and the content of unpublished information. We think that the press is independent and that the public must have the confidence to feel that when it talks to a news reporter, it is not talking to the FBI or to a grand jury, based on the whim of a government prosecutor. When one considers the resources of the federal government—18,000 FBI agents, 94 U.S. district courts with the power to convene grand juries and 94 U.S. Attorneys offices plus thousands of marshals and other law enforcement agents in the Department of Treasury and the Secret Service, etc.—we think there is virtually no instance where the government, with its wiretapping, subpoena and search and seizure powers, cannot find the same information from non-press persons it wishes to discover from a news reporter if it wants to.

All too often, the first person the government decides to subpoena is the news reporter when certainly he or she should be the very last to be called on, if at all.

But government is frequently lazy and, of course, the reporter is the easiest person to pursue. His or her name is on the story. As frequently happens, he or she may not have the financial resources to litigate, or he or she may work for a news organization which is either apathetic or simply doesn't have the money to hire an attorney.

Even larger news organizations frequently think twice about subpoenas when one remembers that the cost of litigating the Caldwell case was more than $150,000 and that it is not unusual in subpoena cases for costs to routinely run from $25,000 to $40,000.

Virtually all of the news organizations agree that substantive shield law legislation is unlikely and we are not, at this time, going to renew that dispute. What we are going to do is to offer your Subcommittee some practical ways to give at least minimum procedural protection to news reporters without in any way jeopardizing the substantive protections of the First Amendment.

NOTCE OF SUBPOENAS

We think that any subpoena for testimony and documents served on a recognized member of the press for information obtained during news gathering should not be returnable prior to 7 days after the service of the subpoena. Frequently, a subpoena will be served on a Monday, returnable on a Wednesday, for example. The First Amendment case law in this field is quite complex, is newly developing and in many ways is inconsistent.

It is virtually impossible under a deadline pressure of 24 or 48 hours for even the most experienced attorney in this field to do an adequate research job to decide whether the subpoena should be resisted, and, if so, what the argument should be in favor of quashing it.

Considering the importance of the First Amendment interest here, we think that Congress ought to insist that there be at least sufficient time for the reporter or news organization to find an attorney and for the attorney to evaluate and protect that interest.

In addition to permitting news reporters and news organizations sufficient notice of subpoena efforts to obtain information in their possession, there is at least one major area we have become aware of where government has by secret subpoena attempted to obtain the identity of confidential news sources—subpoenas to the telephone company to obtain copies of the home and office telephone calls of newspersons or news organizations.

We have discovered just here in Washington that the Chesapeake & Potomac Telephone Company has complied with government subpoenas for all the long-distance home and office telephone records of columnist Jack Anderson; the home telephone records of Mr. Anderson's associate, Les Whitten; the office telephone records of the Washington bureau of the Knight-Ridder Newspapers; the office telephone records of the St. Louis Post-Dispatch Bureau; the office telephone records of the New York Times Bureau; the home telephone records of St. Louis Post-Dispatch Washington Bureau Chief Richard Dudman; and the home telephone records of New York Times Washington correspondent David Rosenbaum.

In all cases, the subpoenas were served secretly upon the telephone company, which complied with them and did not notify the newspersons and news organizations so that they had no opportunity to argue that the subpoenas were improper.

Subsequently, The Reporters Committee, the news organizations and newspersons mentioned above, and a number of other news reporters and editors filed suit against AT&T, arguing that the telephone company or the Justice Department should be required to give notice.[54] We argued that telephone toll records are, in effect, a profile of a reporter's contacts and permit the government to identify confidential news sources in violation of the First Amendment.

AT&T and the Justice Department have opposed this suit and so far they have won a decision in their favor in the United States District Court for the District of Columbia. The case is now on appeal.

We think that when Congress authorized the Federal Communications Commission to permit the telephone company to maintain toll records of subscrib-

[54] *Reporters Committee, et al.* v. *American Telephone & Telegraph Co., et al.*, Civil Action No. 74-1889 (D.D.C. Aug. 17, 1976), *appeal docketed*, No. 76-2057 (D.C. Cir. Oct. 14, 1976).

ers such as news organizations—whose toll records contain protected First Amendment information—that Congress never intended, either under the First Amendment or under the regulatory powers, for AT&T to conspire with the government or any other party to secretly disclose confidential news sources.

Therefore, we think that Congress ought to require 7 days' notice to any news organization or newsperson whose toll records are to be subpoenaed by a grand jury. This would give the news organizations and newspersons an opportunity to oppose the subpoena in court.

Also, it has come to our attention that the government has been obtaining copies of telegrams and cables, both domestic and foreign, sent and received by news organizations. Therefore, we would suggest a similar notice provision for news organization wire communications subpoenaed by grand juries from domestic and international cable carriers.

In the last session of Congress, there were at least two bills in the House, H.R. 3655, introduced by Mr. Koch, and H.R. 9165, introduced by Mr. Harrington, which would have provided for notice of seizure of news media phone records and a similar bill in the Senate, S. 1612, introduced by Mr. Nelson.

In the current session of Congress there are five bills designed to protect news media telephone records: H.R. 215, introduced by Mr. Whalen; H.R. 214, introduced by Mr. Kastenmeier; S. 14, introduced by Mr. Mathias; and H.R. 1985, introduced by Mr. Koch; and a House bill which would protect both telephone records and cable traffic, H.R. 433, also introduced by Mr. Koch.

PRIVILEGE

We think there is no question that Congress ought to take this opportunity to construct some strong procedural protections, consistent with the First Amendment, for news reporters and news organizations who are served with subpoenas for confidential news sources and other unpublished information.

In making a motion to quash a subpoena issued by any federal grand jury to any news organization or newsperson for information obtained during the course of news gathering, we think the courts should be required to recognize the First Amendment interests involved; should be required to recognize the state shield law, if any; should be required to recognize any state court interpretations of state free press privileges; and should require the Justice Department to obey the Attorney General's Guidelines.

That is to say, rather than asking Congress to pass a shield law interpreting or implementing the First Amendment, Congress could leave the First Amendment substantively to the courts. Under its power to amend the Federal Rules of Criminal Procedure, Congress could require the federal courts to impose procedural protections consistent with First Amendment interests.

THE FIRST AMENDMENT AND THE FEDERAL COURTS

While the great majority of federal courts have recognized the First Amendment interests of journalists in both civil and criminal cases,[55] a few courts have gone so far as to rule that the *Branzburg* case absolutely precludes a journalist from asserting the First Amendment in any form to protect news sources:

"Are plaintiffs as representatives of the news media to be afforded different treatment from the rest of the public under First Amendment guarantees?

"The Court finds that *Branzburg* v. *Hayes* . . . does not give this protection to reporter sources and thus forecloses plaintiff's First Amendment claim."[56]

We had another instance where a U.S. district court in West Virginia ruled that a journalist could not assert a First Amendment privilege for information not obtained in a strict confidential relationship.

In a sense, these courts have denied the press its "standing" to assert the First Amendment. We think that it is possible for Congress to *suggest* that the courts give due deliberation to the First Amendment interests by a statement of policy in the Act about the importance of confidential news sources—without actually imposing a substantive shield law.

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[55] *Bursey* v. *United States*, 466 F. 2d 1059 (9th Cir. 1972); *Baker* v. *F & F Investment Co.*, 470 F. 2d 778 (2d Cir. 1972); *Democratic National Committee* v. *McCord*, 356 F. Supp. 1394 (D.D.C. 1973) *Loadholtz* v. *Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975); *United States* v. *Steelhammer*, 539 F. 2d 373 (4th Cir. 1976).

[56] *Reporters Committee* v. *American Telephone & Telegraph Co.*, supra note 55 (judgments), Aug. 17, 1976.

As indicated by the D.C. District Court's opinion, federal courts may feel themselves free to completely ignore a First Amendment claim if Congress is silent.[57]

But should Congress want to give some guidance, either in the form of a policy statement or a statement of intent in the legislative history of this Act, we feel that it might discourage courts such as the District Court for the District of Columbia from summarily closing the courthouse door on the First Amendmnt.

We should like to emphasize that we are not advocating a federal shield law. We are advocating procedural guidance on "standing," consistent with other procedural limitations Congress has inserted in the Federal Rules.

STATE SHIELD LAW

We think that reporters and news organizations should be able to invoke their state shield law before a federal grand jury in making a motion to quash a subpoena. Twenty-six state legislatures[58] have decided that the public interest is better protected by granting a state shield law privilege to reporters in those states reporting news to the citizens of those states. There is, we submit, a very strong state interest in protecting these newspersons and this interest is easily defeated by simply arranging for the newsperson to be called before a federal grand jury.

To permit, as has happened four times in California, a federal grand jury to subpoena a reporter merely in order to avoid the state shield law is to do nothing but give the federal government a veto over the state legislature's determination.[59]

There is little agreement among the circuits, and even among various cases within each circuit, as to when privileges embodied in state law must be applied by the federal courts.[60] In civil cases governed by Rule 43(a), Federal Rules of Civil Procedure, federal courts generally follow the state law on privileges unless there exists a federal statute or rule to the contrary.[61] In diversity cases, courts with few exceptions have held that state law on privileges *must* be followed in the federal court.[62] In federal question cases, some courts have held that the state law *must* be followed,[63] while others have held that it will be followed where the state law of privilege serves substantial state interests and is not overridden by any strong federal policy.[64] In all three cases in which the question of the applicability of a state newsman's privilege law in a federal court has been raised, the courts followed the state law.[65]

In criminal trials governed by Rule 26, Federal Rules of Criminal Procedure, federal courts generally will not apply state law on the privilege of witness,[66] though one circuit has held to the contrary.[67] Rule 26, however, by its terms is not applicable to grand jury proceedings, and no federal court has previously decided the question of whether or to what extent a privilege embodied in state law is binding on a federal court in the context of a grand jury proceeding.

In the most closely analogous contest—a proceeding to enforce an IRS summons in an investigation likely to lead both to criminal prosecution and civil liability[68]—

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[57] *United States* v. *Steelhammer*, Nos. 75-2178 and 75-2179 (S.D. W. Va. Order of Sept. 8, 1975), vacated, 539 F. 2d 373 (4th Cir. 1976).

[58] American Newspaper Publishers Assn., An Analysis of State Newsmen's Privilege Legislation (1972, addendum January 1973).

[59] In re Lewis, 377 F. Supp. 297 (C.D. Cal. 1974), aff'd 501 F. 2d 418 (9th Cir. 1974), cert. denied 420 U.S. 913 (1975); In re Lewis, 384 F. Supp. 133 (C.D. Cal. 1974), aff'd 517 F. 2d 236 (9th Cir. 1975); *Pacifica Fdn., Inc.* v. *Davis*, No. 117257 (Cal. Super. Ct., Los Angeles Co. 1974); In re Lewis, No. HC 202988 (Cal. Super. Ct., Los Angeles Co. 1976) (contempt order), review denied sub nom. *Lewis* v. *Superior Court*, No. 47439 (App. Dept. Super. Ct. 1976); *Pacifica Fdn., Inc.* v. *Davis*, supra, Depositions of William T. Heins and Lee Castruita.

[60] See generally 9 Wright & Miller, Federal Practice and Procedure Par. 2408 (1971).

[61] See 5 Moore, Federal Practice Par. 43.07.

[62] See, e.g., *Hyde Construction Co.* v. *Koehring Co.*, 455 F. 2d 337, 340 (5th Cir. 1972); *Massachusetts Mutual Life Ins. Co.* v. *Brei*, 311 F. 2d 463, 466 (2d Cir. 1962).

[63] See, e.g., *United States* v. *Becton Dickinson & Co.*, 212 F. Supp. 92, 95 (D.N.J. 1962).

[64] See, e.g., *Baker* v. *F & F Investment Co.*, 470 F. 2d 778, 782 (2d Cir. 1972); *Garner* v. *Wolfinbarger*, 430 F. 2d 1093, 1100 (5th Cir. 1970).

[65] *Baker* v. *F & F Investment Co.*, supra; Application of Cepeda, 233 F. Supp. 465 (S.D. N.Y. 1964); Ex Parte Sparrow, 14 F.R.D. 351 (N.D. Ala. 1953).

[66] *United States* v. *Woodall*, 438 F. 2d 1317, 1327 (5th Cir. 1970) (en banc), cert. denied, 403 U.S. 933 (1971).

[67] *Love* v. *United States*, 386 F. 2d 260, 265 (8th Cir. 1967), cert. denied, 390 U.S. 985 (1972).

[68] See *Donaldson* v. *United States*, 400 U.S. 517, 534-35 (1971).

the privileges established by state law, at least insofar as they are not in conflict with any established federal law or public policy, are controlling.[68] No federal law or policy requires disregard of a newsman's privilege under state law. Indeed, the Supreme Court in *Branzburg* v. *Hayes*, while refusing to create "a virtually impenetrable constitutional shield, beyond legislative or judicial control," to protect newsmen's sources, strongly indicated that a state newsman's privilege law *should* be respected in federal courts:

There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding [to] their own way and construing their own constitutions so as to recognize a ne[wsm]an's privilege, either qualified or absolute.[70]

The lack of any federal law or policy *against* protection of the confidentiality of news sources is in sharp contrast to the strong state policies in favor of such protection within their respective boundaries. No fewer than twenty-six states have enacted legislation affording some measure of protection against compelled disclosure of newsmen's sources, and eleven of those statutes have been enacted or broadened within the past six years. One federal court of appeals, discussing two of these state statutes (Illinois and New York), recently stated that they "reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment . . ." [71]

Allowing federal courts to override a state shield law in the context of grand jury proceedings will effectively nullify the attempts by the state legislatures to protect this "paramount public interest" within their respective borders. The premise of shield laws—that an assurance of confidentiality will encourage the flow of information to the public and advance the cause of truth—is undermined by any substantial exceptions to the applicability of the privilege. Even if a federal court could override the state law in a criminal *trial*, however, there is a special reason to require that the state law be honored in the context of a grand jury proceeding.

Almost any crime committed in the United States today raises, at least at the initial stage of the investigation, the possibility that a federal or state law may have been violated, and a federal or state grand jury investigation thus may be initiated.[72] A refusal to apply a state shield law in a federal grand jury proceeding, therefore, will effectively negate the purpose of the privilege in every situation where a potential news source has information involving possible criminal conduct. Furthermore, it is commonplace for state and federal grand juries to undertake simultaneous investigations of the same alleged criminal conduct. To allow a federal court to override a state privilege in such circumstances thus would enable a state grand jury to obtain through cooperation with federal authorities, precisely what the state legislature has intentionally denied it. This happened recently in California.

In conclusion, we think that Congress should extend to the professional news reporter the same privilege it has extended to the practice of other professions protected by state privilege laws in the federal courts. Surely the dissemination of news and ideas to the public is as honorable and important in our society as litigating automobile negligence claims. But while state attorney-client privilege can be pleaded in automobile negligence claims cases in federal court, the state newspersons' privilege cannot be pleaded under any circumstances.

STATE FIRST AMENDMENT PRIVILEGE

Similarly, if there is a state common law or specific state interpretation of federal First Amendment or of the state equivalent, we think that the federal courts should be made to recognize the state privilege.

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[68] *Baird* v. *Koerner*, 279 F. 2d 623, 632 (9th Cir. 1960); *United States* v. *Cromer*, 483 F. 2d 99, 101 (9th Cir. 1973); *United States* v. *Ladner*, 238 F. Supp. 895, 896 (S.D. Miss. 1965).

[70] *Branzburg* v. *Hayes*, 408 U.S. 665, 706 (1972).

[71] *Baker* v. *F & F Investment Company*, *supra*, § 70 F. 2d at 782.

[72] The range of federal statutes which might be applied to criminal conduct punishable primarily under state law includes use of the mails, 18 U.S.C. § 1341; interstate transportation of proceeds of crime, 18 U.S.C. § 1961–1963; interstate conspiracy, 18 U.S.C. § 2101; and interstate flight to avoid apprehension, 18 U.S.C. § 3182.

The reason we are making this suggestion is that we have three recent decisions—from Florida, Virginia, and Vermont, which have no shield laws—stating that the state equivalent of the federal First Amendment extends some privilege to newspersons.[73]

It is our contention that if the states of Florida, Virginia, and Vermont, through their state Supreme Courts, extend a privilege to their newspersons, then Congress should require the federal courts to recognize this state interest in federal courts.

We think, as in the case of the state shield laws, that the news reporter ought to be able to elect to plead whichever privilege he thinks will give him the strongest protection.

This is similar to the civil rights acts, where a state citizen can use the state court to file either a federal or a state civil rights claim depending upon which act he feels provides him with the most protection.

Therefore, we merely suggest that the federal courts be required to give newspersons the same election when faced with one of the most serious assaults on their rights to pursue their profession free from interference by the government.

ATTORNEY GENERAL'S GUIDELINES

We are concerned, and we assume the Justice Department is concerned, that its own Guidelines have been broken when it issues subpoenas to the press. We consider this an especially serious problem because the Supreme Court said in *Nixon* v. *U.S.* that published regulations such as the Guidelines have the force of Federal law.

Therefore we think it would be advisable for the Congress to require that any Federal grand jury subpoena to a recognized member of the press be accompanied by a signed statement from the Attorney General confirming that all the requirements of the Guidelines have been followed, especially because the Guidelines themselves provide that the Attorney General must personally approve any subpoena to the press, after ascertaining that all the requirements have been met.

MOTIONS TO QUASH SUBPOENAS TO THE PRESS

If the trial judge turns down the motion to quash the subpoena, he then has under the federal rules the power to summarily hold the reporter in criminal or civil contempt and incarcerate him immediately.[74]

Here, we think there are several essential safeguards which Congress ought to include in any grand jury reform proposal.

First, that any newsperson or news organization has "standing" to appeal a denial of a motion to quash the subpoena. As you know, the Federal Rules, and interpretations of the circuits, vary on the appealability of interlocutory party and interlocutory third-party appeals in criminal litigation.

There are some courts that take the position, as this Committee takes, that a denial of a motion to quash a subpoena for testimony or for documents is a final judgment or decree and therefore is appealable on the merits. But there are some courts which take the position that there is no appealable judgment until the reporter has actually been held in contempt. This means, of course, that the reporter can be in jail while we are seeking stays and appeals even though, ultimately, the appeals court may quash the subpoena.

Therefore, in line with this problem we make two suggestions: First, that Congress statutorily confer "standing" upon any news organization or news reporter who seeks to appeal a denial of all or part of a motion to quash a subpoena seeking information obtained during the course of news gathering.

Second, that immediately upon filing the notice of appeal—seeking review of the denial of the motion to quash the subpoena—that the judgment be stayed pending disposition by the United States Court of Appeals; and that upon filing a notice of the Court of Appeals' decision in the United States Supreme Court, that the judgment be stayed pending disposition by the Supreme Court.

In short, we think that a news organization or news reporter should be free from jail until his case is heard on the merits; and that he should not have to suffer incarceration for asserting a privilege which is utilmately upheld.

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[73] *State* v. *Morgan*, 337 So. 2d 951 (Fla. 1976); *Brown* v. *Commonwealth*, 214 Va. 755; 204 S.E. 2d 429, *cert. denied* 419 U.S. 966 (1974).

[74] Fed. R. Crim. p. 42.

If the appeals on the motion to quash are turned down on the merits, then of course we have the situation where the reporter will appear before the grand jury and be asked questions.

Many reporters feel, as Mr. Caldwell felt, that merely appearing in secret before the grand jury will undermine their credibility with their news sources because their news sources have no way of knowing with any authenticity that their identity or other confidential information was protected.

Mr. Eilberg's bill offers one solution to this problem. It gives the witness who appears before the grand jury a complete transcript of his or her testimony and, we assume, that the witness is free to show this transcript to anyone.

Another solution would be to permit the news reporter, at his or her discretion, to appear before the grand jury in a proceeding open to the public and the press. The grand jury could ask its questions. The reporter could answer or not answer particular questions. The sources involved and the world at large could judge for themselves whether the reporter has carried out his obligation to protect his source.

While this may appear to be a somewhat novel solution, it is no more novel than Mr. Eilberg's suggestion that the transcripts be available to the world. In addition, under conventional grand jury practice, if a witness refuses to answer a particular question or series of questions, he is then called before the judge, generally in open court, and the questions are read aloud. Furthermore, even under current practice, a witness is free to disclose his testimony before the grand jury. Therefore, we see no reason not to permit public authentication of what in fact already exists.

If the reporter refuses to answer particular questions, then a contempt hearing is held. If the judge holds the reporter or news organization in contempt, we think, once again, as in motions to quash the subpoena, that the judgment of contempt should be automatically stayed on appeal pending disposition in the court of appeals; and that, should the court of appeals rule against the reporter, the judgment of contempt should be automatically stayed pending appeal to the U.S. Supreme Court and its disposition of the case.

Once again, we think that the news reporter should not be sent to jail until it is finally decided that he improperly asserted his First Amendment privilege.

Here we think that Congress should make one very important change in the Federal Rules. A number of reporters have been held in criminal contempt for a good faith assertion of their First Amendment privilege to protect information obtained during the course of news gathering.

Criminal contempt is a punishment with a definite sentence attached. Once a criminal contempt judgment has been handed down, the reporter may serve his sentence in jail regardless of whether a Court of Appeals subsequently rules that the questions asked of him were protected by the First Amendment or whether the information sought is necessary.

In fact, we have a case precisely like that now pending before the U.S. Court of Appeals for the Fourth Circuit.[73] The Department of Justice is seeking to send two reporters from the Charleston, West Virginia, *Gazette* to jail for six months for criminal contempt for refusing to disclose information to a federal court, even thought the case for which the information was sought is now completely over. The government is relying on the *Shillitant*[74] case for this protection.

It had always been our assumption that mere silence—asserted under a good faith claim covered by the First Amendment—could never be the subject of a criminal contempt because a criminal contempt is, as the Supreme Court has said ever since *Gompers*,[75] "punitive" while civil contempt is "remedial".

We had always assumed that, when reporters were subpoened, that the government sought contempt in a "remedial" fashion in order to obtain the information. But now we have a situation in West Virginia in the federal court and two recent cases in California in the state courts[76] where judges are imposing criminal contempt as punishment for exercising the First Amendment rather than using the contempt power to obtain information.

Recently the United States Court of Appeals ruled in *Zweibon* v. *Mitchell*[77] that former Nixon administration officials are not liable for civil damages for

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[73] *Society of Professional Journalists* v. *Martin*, *supra* note 17.
[74] *Shillitani* v. *United States*, 384 U.S. 364 (1966).
[75] *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911).
[76] *United States* v. *Steelhammer*, supra note 57.
[77] *Zweibon* v. *Mitchell*, 516 F. 2d 594 (D.C. Cir. 1975).

conducting illegal surveillance activities, if the former officials thought at the time that they were acting in good faith under what was current law. And two years ago the Supreme Court gave virtually complete immunity under Section 1983[80] to state prosecutors who intentionally violated a criminal defendant's constitutional rights.

If the federal courts are going to immunize government officials for good faith exercise of unconstitutional powers then certainly a news reporter should be granted equal protection when he or she, in good faith, asserts the First Amendment.

The alternative, of course, is civil contempt which means that the reporter stays in jail until he discloses the information or until the grand jury term ends. But federal grand juries have a life of eighteen months[81] and that can be extended by order of the court.

We have seen reporters serve as long as 46 days in a state jail[82] and as long as 18 days in a federal jail under civil contempt sentences. In the federal case in California, instead of serving in the country club atmosphere of Allenwood—as the Nixon administration criminals have served—this reporter served his time in a six by six isolated cell on Terminal Island.

We have recently had a case in California where a judge ruled that incarceration of news reporters for longer than 15 days was "punitive." The judge reasoned that if reporters were willing to spend 15 days in jail to protect the principles of the First Amendment, that it was quite likely they would stay there for an indeterminate period of time and never disclose their sources; and therefore he ruled that civil contempt was converted into criminal contempt after the 15-day period.

Based on this case and on the determination of news reporters to protect their sources, we think that Congress ought to limit any civil contempt penalty imposed on a news reporter for a good faith assertion of his First Amendment privilege to no more than 15 days.

If the reporter serves the 15 days, he or she of course can be called up before the grand jury again and put through the same charade. Therefore, we think that Congress should bar any subsequent attempts to ask the news reporter or news organization substantially the same information that resulted in the civil contempt order.

Grand Jury Leaks

The first part of this testimony was concerned with the public availability of grand jury information and the second part was concerned with the protection of news sources.

These two problems converge when a reporter is called before a grand jury to disclose the source of a grand jury leak. If news reporters have to risk going to jail—even for 15 days—as the price of informing the public about the operations of the grand jury, then this system is an effective prior restraint on publication for many reporters.

While there may be many news reporters who are willing to go to jail in order to report news to the public, there may be many who do not wish to make this sacrifice and will choose instead simply not to publish the story. We don't think that it is fair or constitutional to ask a journalist to go to jail or pay a heavy fine as the price for doing his job.

Furthermore, even under current law, the requirement of secrecy is not imposed on the press but is imposed on the grand juror and prosecutor, etc. Therefore, it is not the reporter who is violating the law. Our suggestion is—in line with *Near* v. *Minnesota* and *New York Times* v. *United States*—that it can be no crime for a news organization or newsperson to obtain government information for publication, unless it can be shown as in other circumstances, that the publication of the information poses a "clear and present danger" to the national security of the United States.

You may remember that a number of reporters—Fred Graham from CBS, Richard Cohen from the Washington Post, James Polk, then with the Washington Star, and others—were ordered by the U.S. District Court in Maryland to show cause why they should not be held in contempt for refusing to disclose the sources of their information involving the grand jury investigation into the tax violations committed by former Vice President Agnew.

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[80] *Imbler* v. *Pachtman*, 424 U.S. 409, 96 S. Ct. 984 (1976).
[81] Fed. R. Crim. P. 6(g).
[82] See *Farr* v. *Pitchess*, 522 F. 2d 464 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976).

In this case, the Vice President alleged that the release of the information violated grand jury secrecy rules and also violated his right not to have the government release prejudicial information. Certainly other lawyers may find other statutes which might be used to attempt to discover grand jury information sources of the press.

Therefore, we think that the way to handle this problem is simply to recognize a general defense for the possession or publication by newspersons of grand jury information, except information which is a "clear and present danger" to the national security.

ATTORNEYS FEES

Even if Congress implements the First Amendment by granting to the public and the press the information it ought to have about the operation of the grand jury—and even if the Congress grants to the press the procedural protections for confidential information we have suggested to protect the First Amendment—we still have the situation where inventive prosecutors and judges will improperly attempt to steal informotion or attempt to force reporters to disclose information.

Any knowledgeable editor or reporter who foresees this type of litigation knows that it can easily cost a minimum of $25,000 or more in legal fees. While many publications may be willing to spend that kind of money to defend the First Amendment, there are many that cannot because they do not have the resources, and other who will not for other reasons. Furthermore, freelance writers and investigative reporters—and reporters employed by news organizations who do not feel the expenditure can be made—simply don't have the financial resources to defend themselves.

Now Congress has passed more than 60 laws[83] granting attorneys fees to private citizens who successfully defend constitutional interests—such as the Civil Rights Attorneys Fees Act of 1976—and a host of statutory rights, such as the Clean Waters Act, the Clean Air Act, Title VII of the 1964 Civil Rights Act, etc.

We certainly think that the public's right to know how its government operates is entitled to the same financial treatment as the public's right to a clean stream.

Therefore, we think it is extremely important that Congress provide for the payment of reasonable attorneys' fees and costs for any news person or news organization which successfully litigates a case (1) to obtain information to which the public is entitled from the grand jury or related court proceedings and (2) for successfully defending all or part of a grand jury subpoena seeking confidential sources or other unpublished information sought by grand jury subpoena.

This Committee was founded on the theory that one can't put a price on the First Amendment. In view of all the other interests which receive attorneys' fees and costs for protecting important public rights, we only ask equal financial treatment to guard the public's right to obtain information about the government and evaluate its performance. Thank you.

The Reporters Committee would like to express its appreciation for invaluable aid in preparing this testimony to Allan Adler, Charles Sennet and Richard Kaye of the George Washington University Law Center · Kevin Allen of the University of California at Los Angeles Law School; and Renee Fox of Catholic University Law School. These students are on the staff of The Reporters Committee and volunteer their time as part of a clinical internship project.

Mr. EILBERG. Thank you, Mr. Landau.

Mr. LANDAU. Mr. Chairman and members of the committee, we should like to thank you for this invitation to talk about H.R. 94 and the other bill now pending before the Subcommittee on Grand Jury Reform.

My name is Jack Landau, and I am a reporter for the Newhouse newspapers in Washington, and director of the reporter's committee, and an attorney admitted to practice law in the State of New York. I have previously introduced the members of our staff.

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[83] See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 95 S. Ct. 1612 (1975), n. 33.

Our committee is a legal defense and research fund of working reporters which offers free legal advice to reporters, news editors, and photographers who have faced and continue to face such problems as subpenas, gag orders, and other threats to first amendment guarantees of freedom of the press.

Our belief is that the most fundamental protection of a free society is the right of independent press to inform the public how its Government is operating, and the grand jury is a Government institution.

As opposed to some of the other groups that have testified here, one major part of our testimony is devoted to public information reforms. We think from the volume of information you have received in your past hearings that the time has come to let some sunshine into the grand jury room. We are trying in this testimony to strike a balance between the right of the public to hold accountable this institution and the legitimate needs of the grand jury.

We did this by starting with two goals. First, we think the Congress ought to provide more information to the public about decisionmaking processes in the grand jury, because it is such a powerful body and one of the least accountable institutions of Government.

Second, we think that Congress ought to provide more protection for confidential and other public information sought by grand juries and members of the press.

We, along with the guild and other press representatives who you will invite, believe that we were constitutionally designed to be an independent and free institution and were not designed to be an official investigative arm of the Government, whether it be the legislative branch here, the executive branch, or any arm of the judicial branch, including the grand jury.

We have a number of provisions, which I will run over very quickly. They are listed in the index.

On the question of accountability, we think there are a few things that the committee might bear in mind. First of all, an enormous amount of information comes out of grand jury investigations from a number of sources. As you know, current law says that grand jury witnesses can release information.

Second, when you have an immunity hearing, a motion to quash a subpena, all of that is supposed to be held in open court, or at least, according to the rules, in different courts.

Third, probably the most common way that we can find is that the Government prosecutor frequently leaks information to the press. The Attorney General recently took note of that in a press conference, and we are including in our testimony excerpts of his remarks. But we come down to two problems. One is that the Government really is in charge of deciding most of the time what the public knows about the grand jury. It is our belief, and I hope it is the subcommittee's belief, that the Government isn't supposed to control what the public reads by its own behavior.

It should be noted prosecutors are political officials, especially local U.S. attorneys, and such officials decide what the public shall or shall not read about the grand jury and is information by Government handout.

So the rest of the suggestion that we make in the following testimony is based on an argument that the grand jury in its current secrecy really is permitting the executive branch to hide its views from any public accountability, and I gather it was the abuses which started the movement from the subcommittee to start its hearings. We will take some of the suggested procedures seriatim.

I think one problem is that grand jurys are public servants. That is their job. In many districts, under the rules, we cannot define the identity of the persons selected to serve on grand jurys. This is not true in a number of States. In California and Florida, for example, they routinely publish the names and addresses of the grand jurors who serve on panels.

Second, as you know, in existing law grand jury witnesses have a right to disclose their testimony. We are pleased that Mr. Eilber's bill would continue that right.

We do have a problem with attorneys. Many grand jury witnesses are not articulate people, and as in the case of *Holder* v. *Banks* in front of the Supreme Court several years ago, they may want to pick somebody to speak for them to the press, such as their attorney.

Now, we have run into a very, very complicated problem here, because the American Bar Association rules and the rules of 89 of the 94 district courts prohibit attorneys from talking to the press and saying anything that may be—I forget the exact language. I think we quoted it—but anything which might prejudice—I believe that's it—which might prejudice the trial.

Well, if the grand jury witness says something that might prejudice the trial, it would seem that he should be able to talk through his spokesman in any way he wishes, even if that is a lawyer.

So we may have an article III separation of powers problem because of the court's supervisory powers over the bar.

But I think, certainly, Congress has the jurisdiction to step in and tell the Federal courts that lawyers for witnesses who want their testimony disclosed should be permitted to talk to the press freely.

Another problem we have, and one you might want to address yourselves to, is the question of whether grand jurors should not be able at some point to give their general assessment of how the grand jury was handled.

As you know, you take probably the most well-known example, all of the information or a great deal of the information being submitted to the Watergate grand jury was repeated in the Senate Watergate hearings while the Watergate grand jury was was still in session, and when the Watergate grand jury were not in session, Judge Hart, I think, in his traditionally colorful language, said they would take the information to their graves and they may not talk to anyone.

Now, it seems to me that if you are interested in attempting to cure the alleged abuse of the system that one way to do it is to permit the grand jury, perhaps during the investigation or perhaps afterwards, to stand up and say, as one grand juror did in Memphis—"I think this is a whitewash. I don't think we were given all the evidence." Or as the story in the New York Times pointed out today, "I believe the Judicial Committee has found that a prosecutor intimidated the grand

jury into handing down an indictment after the grand jury initially refused to hand down the indictment."

Once the grand jury is finished with its work, certainly, these people are citizens and are serving a very important public function, and I can't see what the objection of the Justice Department would be except to protect itself from criticism to permit the grand jury witness to talk about it.

We have another problem which we might be able to deal with better on the staff level, but there is an enormous confusion in the cases on the question of whether contempt hearings are always open or sometimes open or not open at all, or whether immunity hearings are open, whether motions to quash are open, and I think that once the grand jury leaves it place, its room, and goes into a judicial forum, which is an advocate hearing with a stenographic transcript and lawyers for both sides and due process, that the public certainly ought to have an absolute right to attend, because we also now get into the question of having judiciary misbehavior and public accountability.

For clarification purposes, we had always assumed that the entire text of indictments would always be public immediately upon their release.

We had a recent case in Washington in the District of Columbia, the local court here, which has the identical rules of the Federal court, where they excised portions of the indictment in order to protect the reputation of some unwed mothers under a privacy theory.

We think that you might be able to clarify this situation by statute, simply by making a flat rule that these indictments must always be open and available to the public and the press.

Perhaps the one suggestion here that we make that might be most helpful and where we have the most experience. We suggest, and I think one of the witnesses has suggested this to you in the past, that the Federal system adopt a system of releasing the entire transcripts of grand jury proceedings after indictment.

We haven't done any exhaustive study of the California system. We have called up several professors in California who deal in this field, and they didn't feel that there is any public criticism about the California system.

As a matter of fact, one law professor said that the California prosecutors think that the Federal system is somewhat barbaric.

But, at any rate, the grand jury has its testimony and, at that point, it seems that the public could be able to monitor the behavior of the prosecutor and behavior of the grand jury.

Now, I know there are innocent persons being hurt, and I would just point out that it is a problem with the entire criminal justice process that innocent people are indicted, and people find themselves pulled into trials and their lives put on record.

I will only say that if the people of the State of California get this information, there might be serious question here as to why citizens of the United States should not have this information.

We come to a touchy subject on the question of whether, assuming that the transcript is of some value after indictment, why in perhaps selected cases trnscripts might not be of value when there is no indictment.

We discussed that in our written statement. We do have one last problem on public information, and that is the question of grand jury reports.

Under the law today, as we understand it, the district court virtually has an unbridled censorship over the grand jury report. They can suppress it for a number of different reasons, if it is unfair to an individual, if it appears to be prejudicial.

We include in our testimony, I think, a very persuasive comment by the late Chief Justice Vanderbilt in New Jersey, when he talks about the grand jury as opposed to the indictment. A report process serves the conscience of the community, when a group of citizens can get together and investigate Government problems without necessarily having to find a crime.

We have a situation in Miami, which is a perfect example of this probem. A newspaper in Miami published a story several years ago alleging that the Internal Revenue Service was engaged in some improper spying activities on citizens. A Federal grand jury in Miami did an investigation of that allegation and drew up a report which it asked the judge to make public.

The report, we discovered later, criticized the newspaper rather soundly for what it said was irresponsible reporting.

The judge, as a matter of fact, contacted the newspaper and several other people and, on motion of the newspaper, sealed the report.

The newspaper in question in Miami came in and argued the report should be opened. While all this was going on, Mr. Seymour Hersh, who is a reporter of the New York Times, got ahold of the report and published it.

He was then served with an order to show cause why he shouldn't disclose the source of the information.

Mr. Sulzberger, the publisher of the Times and Mr. Rosenthal and Mr. Hersh were all served with letters to show cause why they shouldn't be held in contempt for publishing this grand jury report.

That is where this case is now. It has been delayed twice so far. But I think that if Congress gives the grand jury the right to draw up these reports and to talk to each other as fellow citizens, it is the sheerest arrogance of a Federal judge to assert himself and stops the citizens of the community from getting this information.

We have a technical problem that arises in a number of these cases in the criminal justice process, where the courts have said the press doesn't have a standing to bring a case.

The argument in some courts is that the order, for example, not to release the names of the grand jury runs against the court clerk, not against the press.

We would suggest that in some way, either through a statement of legislative intent, perhaps, that Congress make it quite clear that the public and the press have a legal interest in the availability of information which should be publicly available and, therefore, their complaints cannot be dismissed for lack of standing.

I will now turn to the question of confidential news sources, in which the guild went over in some detail—

Mr. EILBERG. Mr. Landau, we are running behind a little bit. If you could wind up in a minute or two, we do have questions for you from the subcommittee.

Mr. LANDAU. Yes, sir.

We agree with the provision for notice. We would like to point out to you that we have evidence on the record in American Telephone & Telegraph Co. giving secret access to news media telephone records.

The home office of Jack Anderson, the home office of one of his associates, the home office telephone records of the New York Times were also given access to, and there is a lawsuit pending on this question.

Also, there is subsequent information from the cable traffic from both domestic and foreign carriers that was subpenaed. All of this information is turned over to the Government without any notice to the news organizations, so it has no way of litigating the propriety of the subpena under the first amendment.

So we would suggest that we extend the provisions in the proposed bill to cover not only the information in the possession of the news organization and report, but information in possession of the telephone company or the cable company.

We think that without getting into the subject of debate that the guild pointed out where there is a disagreement in the press on shield laws, that Congress could, under Federal rules, take a big step in protecting the press by requiring the Federal courts to recognize the shield laws of 26 States who have them.

These are States where State legislatures have said that for their citizens and reporters they believe the shield law is an adequate and necessary protection.

It could be done, as I said, without getting into the substantive debate. We agree with the guild about the Justice Department guidelines. One way, perhaps, to handle this would be to require a subpena to be accompanied by a written statement that the guidelines are to be followed.

In effect, that is supposed to happen, because the Attorney General is supposed to personally authorize every subpena but, as the Guild pointed out, the Justice Department's own statistics show that in about 30 percent of the subpena cases in an 18-month period, they violated their own guidelines because the U.S. attorneys did not ask for permission to file them.

Mr. EILBERG. After you finish your sentence, could we ask you some questions, please?

Mr. LANDAU. Yes, sir.

Mr. EILBERG. We have the testimony, and we will read it carefully.

Mr. Landau, one of the provisions in H.R. 94 would provide for the criminal penalties for violations of grand jury secrecy, but would exempt newsmen acting in an official capacity.

I assume you favor this?

Mr. LANDAU. Yes, sir.

Mr. EILBERG. Under the Caldwell "right to every man's evidence test," prosecutors are free to call newspaper men and to seek information about their confidential sources, as you have noted.

Are any statistics kept as to whether or not there has been an increase in such subpenas?

Mr. LANDAU. This dispute started on the Federal level. We had about 150 subpenas served in 1969 and 1970. Then I believe it was in

the middle of 1970 the first Justice Department guidelines came down: The Justice Department's own statistics, I think, show that in the 18-month period between 1973 and 1975, there were 109 newspersons subpenaed to testify and then, I believe, they recently did a workup of the latest statistics to show that that has dropped to somewhere around 50 in the last year and several months.

But one problem with the statistics which we bring to your attention is that the Department claims that most of these people are willing, that they sort of quietly say "We don't mind the subpena," but they decline to identify either the name of the news reporter or the name of the news organization.

We have no way of knowing in a situation where the Justice Department exercises such vast control in the investigating of tax matters and antitrust matters and other matters which affect newspapers and broadcasters, of how willing the agreement to testify was.

So we would urge you, perhaps, to ask the Justice Department to identify the names of these news reporters, so that at least we will have more accurate statistics.

Mr. EILBERG. Do you know what has been the success of the Reporter's Committee in opposing such subpenas?

Mr. LANDAU. The last major problem we had was in California about a year or several months ago, where a radio reporter was held in contempt four different times, and I believe served 16 days in jail in a 6 by 6 cell for refusing to turn over copies of the SLA tapes, and that is a very curious situation, because California has a shield law, and we have, for your information, the testimony of the California law enforcement authorities who say in their testimony, that they knew they couldn't get this tape for the State grand jury because of the California shield, so we went to talk to the Federal prosecutor and he issued the subpena for us and got the tape eventually because a newsman went to jail.

Mr. EILBERG. I am not sure you have answered the question. What has been the success of the reporter's committee?

Mr. LANDAU. You mean statistically?

Mr. EILBERG. Yes.

Mr. LANDAU. I think we win more than we lose, Congressman.

Mr. EILBERG. One constant complaint made by grand juries is "trial by newspapers." It is argued that just as prejudicial publicity can only occur with willing prosecutors, so also such publicity cannot occur without willing reporters.

What voluntary efforts are there by reporters, and should there be any efforts by reporters, to police such potential abuses? I say this in the context of so many people whose reputations are ruined by, let's say, some irresponsible conduct at various times and places.

Mr. LANDAU. That, of course, depends upon the individual reporter or editor. That is not a determination for the government to make. This prejudicial publicity specter has been raised since *Sheppard* v. *Maxwell*, and I would only urge you to consider that perhaps the most massive publicity that one could imagine was the Watergate cover-up defendants who were tried and convicted in Washington, and the Supreme Court 2 weeks ago refused to listen to their complaint. They were able to get impartial people on the jury.

So I would suggest that if they could obtain a fair trial and they were able to get fair and impartial people on the jury, I can't envision any other situation involving the justice process which would be challenged on the sixth amendment grounds.

Mr. EILBERG. One question constantly raised is, who is the press? Who should, therefore, be entitled to increased confidentiality protections? In the 1972 decision, a newspaper by the Black Panther Party, was considered to be "press" for the purpose of applying a first amendment limited privilege.

Does the committee or you yourself have an opinion as to who should be included in this category of the press?

Mr. LANDAU. This is a question that was discussed extensively at the Kastenmeier hearings, with all various kinds of bizarre things be thrown out, including the Mafia.

I think, as a matter of fact, we have had, in my experience, only one case where it was questionable as to whether a person was a reporter. I think it is a question of common sense. We do think, for example, that people who are authors, who work on their own, who spend substantial amount of time writing and researching for the public, are covered, but you can get into just numerous variations of who qualifies for the privilege.

Mr. EILBERG. You don't think that question can be answered?

Mr. LANDAU. I think it is a question of a reasonable man standard. Has this person substantially through a portion of their professional life devoted it to the dissemination of news?

Mr. EILBERG. At a recent ABA luncheon, Fred Graham stated that it was the reporter's committee position that the press had not only a right but a duty to report investigations and indictments and criticize dismissals and acquittals.

What do you believe the effect of this would be on the public perception of a person's presumption of innocence, that is, that one is not to be considered guilty until proved so beyond a reasonable doubt?

Do you see any conflict?

Mr. LANDAU. I agree with what Fred said, which is why a great deal of the first part of our testimony is devoted to trying to get this type of information out to the public.

It is very subjective. Is a person presumed guilty when indicted? Is a person presumed guilty, even though he is acquitted on a technicality?

I think that is sort of outside the realm of objective determination.

I just don't know how you would deal with this type of a problem, because it occurs at every step of the criminal justice process.

When a person is arrested, many people assume guilt.

Mr. EILBERG. Let me expand on the idea that one is innocent until proven guilty. If in court proceedings one is relieved of the charge under whatever circumstances, do you think the press still has the right to go ahead and criticize, even though there has been an official court action taken?

Mr. LANDAU. Oh, yes. I think you could probably find cases where you would want to do an analysis of why the judge directed the verdict for dismissal, because the defendant was his brother-in-law, or whatever.

Mr. EILBERG. Would it be extending your position too far by saying or suggesting to you that you see no limit to what comment might be made subsequent to any court action?

Mr. LANDAU. There is a limit. Of course, there are liberal laws which are very healthy and strict.

Mr. EILBERG. Mr. Fish?

Mr. FISH. Thank you, Mr. Chairman.

Mr. Landau, I want to thank you for your testimony, generally, and, perhaps, single out, specifically, your section on grand jury reports, because I don't remember that being covered by other witnesses.

I gather it is your view that we should have an opportunity for far greater publicity to grand jury reports, and could you tell us what your recipe is for the procedure? How would you go about it, making public a certain grand jury report? What would be the safeguards?

Mr. LANDAU. I would think you start with the assumption, that they be available in all cases. We did have this controversial case in Maryland in 1970, where the grand jury handed down a report which eventually involved the Mandel administration and it was suppressed.

You start with an assumption, at least that the grand jury has some semblance of independence from the prosecutor and from the court.

If the grand jury is a group of citizens empowered by Congress to investigate such problems and comment and criticize, then it seems to me that Congress ought to protect the rights, because the right won't have any meaning if they are going to sit and do their investigation, issue their subpenas under the power you have given them, write their report under the power you have given them, and then the judge can step in and say, "I'm sorry, I don't like it. You don't have any right to talk to your relatives."

It seems to me you are talking, in a sense, about their first amendment right which, to a great degree, has been implemented in the Federal rules.

Whether you allow release of reports by majority vote or two-thirds vote of the grand jury, whether you give the courts unlimited power, we suggest not, but perhaps that would be in an area of exploration. But it would seem to me, however, the burden ought to be extremely difficult for persons who want to suppress, and they ought to have a reason.

As I say, if it is true innocent persons may be hurt, well, that is the problem with the whole system; innocent people are hurt from the very beginning to the very end.

Mr. FISH. Mr. Landau, I was going to ask you your opinion on how effective is incarceration for civil contempt in obtaining testimony from a witness?

In your one recommendation, you say that Congress ought to limit civil contempt penalty to 15 days. I wonder if that provision answers my question?

Mr. LANDAU. You are dealing with individuals. You are dealing with a profession that has to take a certain amount of Government abuse, and probably has to expect a certain amount of Government abuse to do its job.

We had a reporter in California who sat in jail for 46 days, and he never released the testimony. We have had other reporters who feel

they don't want to go to jail, and they fight the case through and then they lose.

We had a case in New York with the only reporter involved at Attica. The only reporter inside of Attica allowed at Attica, because he was a reporter trusted by the inmates, and immediately was called in front of the grand jury and forced to tell his testimony, and later called in front of the trial.

I think it depends on the reporters. Many of them have gone and will go to jail. Others won't. I don't think that we can ask going to jail as the price to do your job. You don't ask somebody else to go to jail to perform their function.

Certainly, the first amendment didn't envision when it says there shall be no Government regulation, there can be no higher incident of regulation than to throw people in jail.

Mr. FISH. Why do you think that?

Mr. LANDAU. Mainly, because there is, of course, a substantial amount of dealing with personalities. Some guys will say they are willing to go to jail for years, and other people will say they aren't.

But we did have a case in California recently involving four reporters who were held in contempt, and the California courts ruled that after 15 days the contempt became criminal rather than civil. They thought 15 days indicated that they would spend a very long, if not indeterminate, time in jail, rather than release their sources, so the California court set the 15-day limit, and it is based on that case. It is the only case I can give you for that, where we have that kind of a finding by the court that we selected the 15 days.

Mr. FISH. What is the purpose of incarceration, just because the individual was found to be in contempt of the court, or it is really an effort to get them to talk, get them to testify?

Mr. LANDAU. We also thought up until recently, Congressman, that you could not be held in criminal contempt for assertion of the constitutional privilege. However, we are involved in a remarkable litigation with the Justice Department now, in which the Justice Departments is trying to throw in jail for 6 months two reporters from Charleston, W. Va., who have refused to disclose information to a judge, even though the proceeding for which the information is sought has been over for a year.

They want to call those reporters in criminal contempt and throw them in jail for 6 months, and they cite the *Shilitani* case as precedent for that. In view of this problem we think that the Congress can simply make a statement that the Federal courts may not hold newspersons in criminal contempt for good faith assertion of constitutional privilege to protect news sources.

I mean, if you are going to protect the government officials from civil liabilities for unconstitutional actions because they reasonably thought the actions were legal at the time, you certainly can protect the news reporters from criminal liabilities for a good faith assertion of a constitutional privilege.

Mr. FISH. Do you think any good faith assertion in the first amendment privilege would be available to a member of organized crime?

Mr. LANDAU. I don't know. That is the question that was asked at the Kastenmeier hearings, when the Mafia question became involved.

Mr. FISH. Thank you, Mr. Chairman.

Mr. EILBERG. Mr. Hall?

Mr. HALL. Mr. Landau, if all of the propositions that you and others have indicated should be written into the law, do you not effectively do away with the grand jury, as we have known it to exist over the centuries in this country?

Mr. LANDAU. No; in the 17th century in England the grand jury was the creature of the crown, because it liberated the public, and the high sheriff used to chase the grand jurors through the forest because they wouldn't bring the indictments down. So they gave them secrecy to give them a source of independence. But what has happened under the current system, under the Federal rules, is that the government prosecutor now has complete control of the grand jury, almost the way they did in the 17th century. And we maintain that if you are interested in trying to preserve what you consider the traditional role of the grand jury and its independent, you will limit the abuse that the government prosecutor can impose on a grand jury, by making it publicly accountable.

Mr. HALL. What is your position on abolishing the grand jury?

Mr. LANDAU. We have none, sir.

Mr. HALL. Do you think the grand jury in this country has served its purpose, as it was originally instituted to serve such a purpose?

Mr. LANDAU. I don't have any answer for that, sir.

Our job is to deal with the institutions as they are set up.

Mr. HALL. But, in effect, you are saying to do away with a lot of the secrecy that we have heretofore enjoyed with grand juries; is that what you have stated?

Mr. LANDAU. It hasn't apparently crippled California grand juries to release full transcripts.

Mr. HALL. They have abolished the grand jury in Great Britain; have they not?

Mr. LANDAU. I believe they have.

Mr. HALL. Do you know what procedural process they use now to go through the indictments?

Mr. LANDAU. I assume they go by information.

Mr. HALL. Do you see any reason why that would not work in this country?

Mr. LANDAU. I'm sorry; I have to apologize. We haven't done any research on matters other than the bills, and bills presume there would be grand jurors.

Mr. HALL. You are not stating that members of the press should enjoy any higher degree of recognition of grand jury information than any person or citizen; are you?

Mr. LANDAU. I think it is our position that persons engaged in news-gathering do enjoy certain protections under the first amendment that are not enjoyed by persons who are not engaged in bringing these ideas to the public.

Persons who are admitted to the bar are given special privileges.

Mr. HALL. The first amendment rights are available to all citizens of this country, aren't they?

Mr. LANDAU. That gets into the problem, who can assert the privilege?

But I don't think there's any constitutional impediment to recognize the importance of the dissemination of news, just as there is no constitutional impediment with the practice of law or practice of medicine.

Mr. HALL. Is it your understanding that a judge of a court under no circumstances would have a right to disallow grand jury testimony from being made public?

Mr. LANDAU. I believe in California they do have a provision, wherein, under certain circumstances, the transcript can be sealed until the end of the trial, and then at the end of the trial the transcript is opened, and the standard in California code is the court determines that if there is a reasonable likelihood that all or any part of the transcript may prejudice the defendant's right to a fair trial, that portion may be sealed until the trial is completed.

Mr. HALL. Do you find fault with that?

Mr. LANDAU. I only find fault with the premise, as I suggested earlier to the chairman, that in the Supreme Court's action in the *Calley* case and the Watergate cases, that one can make any firm assumption that newspaper stories will make it impossible to find 12 impartial jurors.

Mr. HALL. Do you think that allowing testimony to be released to the public under certain circumstances, affect the probability of a fair trial, on the merits?

Mr. LANDAU. Not based on the facts, sir.

Mr. HALL. I understood you mentioned the Watergate defendants which, of course, is an excellent series of events to allude. But where you have an event that occurs in a small territory, small area, rural area, wholly unlike the matters that we heard from Watergate can't you see in the smaller areas, where the releasing of this testimony would be of great damage to people who have been indicted and coming up for trial.

Mr. LANDAU. This was the problem the Supreme Court had last year and came to the conclusion in that case that despite the fact this was a small community and an extremely horrible crime, I believe involving six members of one family killed, and there was convergence of the press all over the place, they said in that case that the defendant had not shown with any specific evidence that it would be impossible to find a fair jury and, therefore, they struck the prior restraining order down.

I would mention the *Calley* case to you, because I think Calley is an excellent example.

There is a case that was tried on a military base in a very restrictive circumstance, certainly, among people who are extremely interested in the subject matter as opposed to the general public, and they said he was able to obtain on impartial courts-martial jury trial. The Supreme Court denied certiorari.

Mr. HALL. One final question. I am looking at the sheet here that indicates all of the steering committee. I notice ABC is not on it.

Mr. LANDAU. Howard K. Smith is on it, although he is in Washington.

Mr. HALL. I'm sorry. I overlooked that.

Thank you.

Mr. LANDAU. Mr. Chairman, can I take your time for 30 seconds more?

Mr. EILBERG. Go ahead, Mr. Landau.

Mr. LANDAU. We have a very big problem paying for this litigation, not the reporter's committee, because we are tax exempt, but the cost of the *Caldwell* case was $150,000, and the *Boston Globe* case ran over $30,000.

You have passed laws permitted persons who defend the public interest to get reasonable attorney's fees and costs, if they succeed. We would urge you to consider amending the code to permit news reporters to be able to collect reasonable attorney's fees and costs if they successfully litigate on behalf of the public to obtain information out of the criminal justice system, including the grand jury, and if they successfully defend all or part of a subpena. This would be an enormous help.

Many of these reporters, I think, give in, because they simply can't afford it.

In publications that are small, like small rural weeklies, they can hardly afford to lay out $50 or $60,000.

Mr. EILBERG. Mr. Landau, do you feel that the subject of attorney's fees, even in this special case, would be appropriate subject for grand jury reform or, indeed, the subject that is within our jurisdiction?

Mr. LANDAU. I think it is within your jurisdiction, sir.

Mr. HARRIS. Mr. Landau, I want to compliment you for an extremely well-organized and thoughtful statement and, if I may, I would like to say that the questions here of the members do not necessarily reflect their attitude with respect to the case involved. I was trying to think through how what you have said is in conflict with one of our previous constitutional rights, it seems to me, and that is the right to confront your accuser.

It seems to me that throughout all this we set up a situation where the person who is engaged in press activities, or says he is engaged in press activities, can indicate that he has all sorts of information without indicating who he has got the information from, and I was wondering if you had any thoughts on how he could protect an individual who may be having all this information thrown at him or her. when he doesn't have any way to find out where the information is coming from.

Mr. LANDAU. I would say a number of libel cases, including the recent case against Jack Anderson, that is exactly what happened.

They published information based on a confidential source. The person who was the subject of the article filed a libel case. He made a motion in pretrial discovery and forced him to testify in the district court and ordered him to testify and the court of appeals ordered him to testify.

I believe they finally resolved it by prevailing upon the source to release the identity, and I believe the case went to a jury last year, but this happens frequently.

We now have a case in Idaho where they have found very heavy judgment against a newspaper article. They refused to reveal the confidential source.

Mr. HARRIS. Do you agree with that?

Mr. LANDAU. Do I agree with the libel law?

Mr. HARRIS. With regard to how it is applied as it comes in conflict with notions of confidentiality of sources.

Mr. LANDAU. I think that the reporters and the news organizations should not have to disclose their news sources, whether it is in a libel case or in front of a grand jury, or in front of a congressional committee.

In the libel law you get into very technical problems. We do have, of course, an instance when a circuit court judge very eloquently stated how a person can prove his case if the reporter is the only person who knows the information.

Mr. HARRIS. You talked about the Watergate cases here before. Who was "Deep Throat"?

Mr. LANDAU. Excuse me, sir?

Mr. HARRIS. I said, I was wondering who "Deep Throat" was. Mr. Landau, could you tell the committee that?

Mr. LANDAU. You better ask someone else. I don't know.

Mr. HARRIS. In your opinion, and with your experience as a court reporter with respect to the grand jury, where do those leaks usually come?

Mr. LANDAU. I think we say in our testimony that substantial amounts of information come from Government. I think this is especially true on the local level, where the U.S. attorney uses this as a steppingstone to political office, either State or Federal office, and generally, as we understand it from our sources, they find it convenient when it suits their purposes, to get the story out and, of course, that means that they get out what they want out.

The public reads what the Government wants it to read, and there is no accountability.

Mr. HARRIS. It is your opinion and experience that a substantial amount of information from the secret grand jury investigation is often leaked out by the prosecutor?

Mr. LANDAU. In various ways. There are various techniques to do it without technically violating rule 6(e) because the prosecutor generally takes the statements before you go in front of the grand jury, for example.

Now, rule 6(e), I don't think technically prohibits the prosecutor from saying, "I can't tell you what Joe Brown said in front of the grand jury, but I have the statement," that type of thing, and that doesn't fall under the rule, and there are various other techniques to do it.

Mr. HARRIS. It was your testimony, I think, also that the making of the proceedings of the grand jury more public would give the grand jury more backbone. Was that one of the points?

Mr. LANDAU. I think it certainly would stop the prosecutor from abusing his discretion I believe you have testimony where Mr. Goodwin, in charge of the political grand juries of the Justice Department in 1973 or 1974, gave out statistics of 134 grand juries involving political dissident groups in 100 cities.

Obviously, this was not all for loyal purposes. It would make the prosecutor publicly accountable. It would produce the kind of information that the Times produced in their story this morning.

Mr. HARRIS. Even if the prosecutor had complete control over who he selected or substantial control over who was selected and not selected for the grand jury?

Mr. LANDAU. I don't think he has substantial control now.

Mr. HARRIS. I didn't suggest he did, but I was suggesting——

Mr. LANDAU. They used to.

Mr. HARRIS. But that doesn't happen anymore.

Mr. LANDAU. I think you changed the rule now, that it has to be done by voter lists and a wheel. But the extraordinary thing about it is you put all the voters' lists in the list and you can be present when the wheel is turned, and you can see them pull the slip out, but you can't see the name.

Mr. HARRIS. I guess we had testimony before the committee that indicated that at least one gentleman who had testified, he had been on the grand jury, I think he said, 15 or 16 times. But I didn't know how come his name came up on that wheel so often.

Mr. LANDAU. Maybe he voted a lot.

Mr. HARRIS. He didn't indicate he understood his responsibilities. Thank you.

Mr. EILBERG. Mr. Landau, just for the record, are you a member of the bar?

Mr. LANDAU. The State of New York, sir.

Mr. EILBERG. That was quite obvious.

Your testimony indicated a legal background.

Mr. LANDAU. We extend our appreciation to the law student staff also.

Mr. EILBERG. Our next witness is Prof. Leon Friedman of Hofstra University School of Law, who is testifying on behalf of the American Civil Liberties Union.

TESTIMONY OF LEON FRIEDMAN, HOFSTRA UNIVERSITY SCHOOL OF LAW, HEMPSTEAD, N.Y.

[Prepared statement of Prof. Leon Friedman follows:]

STATEMENT ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION ON H.R. 94, H.R. 3736 AND OTHER BILLS ON THE FEDERAL GRAND JURY—PREPARED BY PROF. LEON FRIEDMAN, HOFSTRA UNIVERSITY SCHOOL OF LAW

On behalf of the American Civil Liberties Union, I appreciate the Committee's invitation and the opportunity to comment on the H.R. 94, H.R. 3736 and other bills relating to reform of the federal grand jury. The American Civil Liberties Union, a nationwide organization with 280,000 members, has been especially concerned about the requirements of the due process and the use of fair procedures in the criminal justice system. Since so many questions have recently arisen on grand jury practice, it welcomes the attention this Committee and the sponsors of the reform bills have given to these problems.

Over the past ten years the grand jury has received considerable attention from Congress, the courts and the legal community. We can certainly understand why this occurred. The grand jury is the most powerful instrument in the criminal law today. Other legal institutions are hedged and limited by numerous safeguards that protect citizens rights: a policeman cannot stop a person to frisk him for weapons without a "founded suspicion." A person cannot be searched or arrested without "probable cause." Once arrested, he cannot be bound over for trial without reasonable cause to believe that he committed a crime. He cannot be convicted without a jury finding beyond a reasonable doubt that he was guilty. And strict rules on the need for competent and legally admissible evidence apply at the trial.

A grand jury operates under none of these constraints. It may look anywhere without justifying or announcing the scope of its inquiry. It can subpoena wit-

nesses from thousands of miles away, give them only a few hours notice of their obligation to appear and demand the production of truckloads of personal documents. It has no probable cause limitation in its operations. The Supreme Court held in *Davis* v. *Mississippi*, 391 U.S. 721 (1969) that the police cannot arrest 24 men who vaguely resembled the person they were looking for and then take their fingerprints to match against fingerprints found at the scene of the crime. This is true because the police did not have probable cause to arrest all 24 to begin with. But a grand jury can simply subpoena all 24 people in that situation, and demand fingerprints, blood samples, handwriting and voice samples (*United States* v. *Dionisio* 410 U.S. 1 (1973)) or stand them up in a line-up (See *United States* v. *Melvin*, 550 F. 2nd 674 (1st Cir. 1977).

It may consider illegally-seized evidence which is absolutely inadmissible at trial. (See *United States* v. *Calandra*, 414 U.S. 338 (1974)). It may bring a lawyer or doctor or priest or spouse into the grand jury room, and try to get one of them to breach a confidence. Since the client, patient, penitent or other spouse is not present to object, the privilege may be lost, and even if the evidence is not admissible at trial, a grand jury may presumably indict on the basis of privileged information. See *United States* v. *Mayday*, 405 F. Supp. 854 (E.D.N.Y. 1975).

BACKGROUND

Other witnesses before this Committee have gone into the historic origins of the grand jury in England. I would like very briefly to show the changes in the institution in the United States over the past 100 years.

In the nineteenth century the grand jury achieved its greatest successes as the principal weapon against municipal corruption. The familiar picture of the fighting grand jury, led by its honest foreman, defying corrupt prosecutors, policemen, and city officials to bring evil politicians to justice had much basis in fact. Many members of the Tweed gang in New York—including Mayor A. Oakley Hall, Boss William Tweed and ten other persons—were indicted in 1871 and later convicted for fraud because of the efforts of a runaway grand jury working without the assistance of the district attorneys office. In 1886 thirteen aldermen in New York City were indicted by a reform-minded grand jury for selling street-car franchises to the highest bidder. In Cincinnati in 1906 a grand jury investigated and indicted political boss George Cox for perjury and mishandling of city funds after the regular courts refused to look into the matter. St. Louis rid itself of its corrupt political bosses though a series of indictments handed up by an investigating grand jury that took ten years looking into charges of bribery and fraud by leading city officials.

Lincoln Steffens in his famous book *The Shame of the Cities* has written about the clean-up of Minneapolis then under the control of Mayor "Doc" Ames through the work of a grand jury which ignored the public prosecutor and secured indictments against many of the Mayor's lieutenants.

Moving into our own era, a New York City grand jury issued a report in 1935 calling for a special prosecutor to be appointed for the sole task of investigating organized crime and the connection between racket leaders and law enforcement officials. The special prosecutor was needed, the panel said, because of the lack of cooperation between the District Attorney and the grand jury in this area. After the District Attorney refused to select a prosecutor acceptable to the grand jury, Governor Herbert Lehman stepped in and appointed Thomas E. Dewey who proceeded to secure indictments against a number of crime leaders, thereby launching his own political career. Dewey was one of the great boosters of the grand jury for the rest of his public life.

It is important to note in almost all of these cases that the grand jury was using its subpoena authority and its secret inquisitorial powers not against the people but against the government. It was always thought of as a people's panel, either voicing the people's complaints about what government was not doing or not doing right or doing in an illegal fashion. When the grand jury performed its ordinary criminal function, of investigating common crimes and returning indictments, its powers were hedged in with various procedural restrictions protecting the rights of both potential defendants and the witnesses who appeared before the panel.

It was true that most grand juries could roam at will even in the criminal area, look into virtually any area they chose, and did not have to disclose what charges they were investigating or who was the target of the inquiry. The Supreme Court wrote in 1906:

"We deem it entirely clear that under the practice in this country, at least, the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed; that the result of their investigations may be subsequently embodied in an indictment, and that in summoning witnesses it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge against them." *Hale* v. *Henkel*, 201 U.S. 43, 65 (1906) In other cases the Supreme Court held that a witness could not object to the materiality of any question (*Nelson* v. *United States*, 201 U.S. 92, 114 (1906).) nor challenge the constitutionality of the law that was supposedly violated, *Blair* v. *United States*, 250 U.S. 273, 279 (1919).

Some states insisted that the grand jury must have probable cause to believe that a crime had been committed before it could call or interrogate witnesses, and others strictly limited the juries' area of investigation to the boundaries set out by the presiding judge.

In almost all jurisdictions there were other safeguards. Throughout the nineteenth century, it was clear that hearsay or otherwise incompetent evidence could not be used as the basis for an indictment.

Justice Stephen Field delivered the following charge to a grand jury in 1872:

"In your investigations you will receive only legal evidence, to the exclusion of mere reports, suspicions and hearsay evidence. Subject to this qualification, you will receive all the evidence presented which may throw light upon the matter under consideration, whether it tend to establish the innocence or the guilt of the accused. And more: if, in the course of your inquiries, you have reason to believe that there is other evidence, not presented to you, within your reach, which would qualify or explain away the charge under investigation, it will be your duty to order such evidence to be produced. Formerly, it was held that an indictment might be found if evidence were produced sufficient to render the truth of the charge probable. But a different and a more just and merciful rule now prevails. To justify the finding of an indictment you must be convinced, so far as the evidence before you goes, that the accused is guilty in other words, you ought not to find an indictment unless, in your judgment, the evidence before, unexplained and uncontradicted, would warrant a conviction by a petit jury." *Charge to Grand* Jury, 30 Fed. Cas. 992, 993–994 (Case No. 18, 225) (C. C. Calif. 1872).

Secondly, the Supreme Court's decision in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892) established that witnesses appearing before grand juries had the widest transactional immunity protecting them from incriminating use of their testimony as to any transactions they were questioned about. Congress and many states followed the *Counselman* case by passing generous immunity statutes which have lasted until very recent years.

Thirdly, federal and many state grand juries eventually rejected the rule that only the prosecutor's case could be presented to them. Many panels would hear the potential defendant and his witnesses who might explain away damaging evidence and thus foreclose return of an indictment. The grand jury proceeding was thus "judicialized" and transferred into a preliminary trial in which the grand jury would weight conflicting evidence and possibly save the defendant from the trouble of a public trial.

Lastly, the grand jury thought of itself as independent of the prosecutor's office and very often behaved accordingly. Since the prosecutor was, in a number of cases, the very target of its investigations, the jurors were not likely to be dominated by the district attorney when he presented indictments for common crimes to them. Grand jury panels would often demand that other witnesses be brought before it or that investigations proceed in another direction. In a large percentage of cases they would not indict on the prosecutor's say-so. In some states, the prosecutor was not allowed into the grand jury room for any purpose, even to conduct the questioning. Even where it was permissible for the prosecutor to examine witnesses, as in the federal courts, the panels often resisted, and judges had to charge grand jurors that they must allow the prosecutor into their room. Thus a Tennessee federal judge told the grand jury in 1872:

"Emmons, Circuit Judge. Gentlemen of the Grand Jury: I am informed by the district attorney that some difference of opinion exists between you in

reference to his right to be present and aid you in the examination of witnesses, and give you his advice as to the law. I cannot understand the source of such a doubt on the part of jurors long resident in Tennessee, where, alike in the federal and state court, the practice has been uniform for that officer to assist and advise the grand jury in its labors." *In re District Attorney of United States*, 7 Fed. Cas. 645 (Case No. 3925) (C. C. W. D. Tenn. 1872).

In March 1900 the foreman of a New York grand jury told the court: "We claim the right . . . to examine certain witnesses in our own way and without the presence of any members of the staff of the District Attorney." This difference of opinion on the prosecutor's function is a reflection of the skepticism of nineteenth century America toward authority in general, a skepticism that was the citizen's greatest protection against oppression by the government. It is hard to believe that many grand juries today would insist on pushing a prosecutor out of their room.

In the past fifty years many changes have taken place in the institution of the grand jury, changes which have greatly increased its potential for harm to the citizens.

First, the composition of grand juries changed dramatically. More and more states established "key-man" systems of selection under which the local sheriff, judge or some other official or jury commissioner would determine the list from which the members of the panel would be picked. They tended to be white collar workers, professionals, older or retired men who had a law and order orientation. In New York City during the 1930's and 1940's a screening committee of ex-grand jurors belonging to the local grand jury association would nominate candidates (who had to be over 35 years old and own at least $250 in property) who would be selected by a six-man board composed of four judges and two city officials—the mayor and the county clerk. An upper limit of 1,200 qualified grand jurymen were picked for the pool in New York County and many would serve again and again on panels.

This kind of inbreeding made the grand jury into a special interest group with its own outlook and orientation. The members formed clubs, published their own magazine, met socially throughout the year and exerted a powerful influence on state legislatures and local district attorneys. In the process the grand jury became far removed from a people's panel, no longer composed of the peers of potential defendants whom it might indict.

The change in composition occurred at the same time that the authority of the grand jury increased enormously. The extraordinary powers that the grand jury possessed as political superviser spilled over into its functions in the criminal process. The requirement that only competent legal evidence could be the basis for an indictment virtually disappeared, reaching its culmination in the Supreme Court's decision in *United States* v. *Costello*, 350 U.S. 359 (1956). That decision held that hearsay evidence and only hearsay evidence could be the basis for an indictment. This meant that federal courts would no longer inquire into the sufficiency of the evidence behind the return of a true bill. Thus the grand jury became the final judge of what evidence it would hear and how much would be required for an indictment. So long as a grand jury was "legally constituted and unbiased" as the Supreme Court said, its indictments must be upheld in the courts.

The irony of this development is that the grand jury's powers increased while the grand jurors control of the institution itself was weakened and displaced on to the prosecutor.

In the typical case, the grand jury hears only the evidence presented by a prosecutor and then quickly endorses the indictment prepared by him. In a recent case in New York, a federal grand jury indicted 42 draft resisters in one day, and then indicted 60 more the next day in a three-hour period, an average of 3 minutes per indictment. *United States* v. *Daneals*, 370 F. Supp. 1289 (W.D. N.Y. 1974).

Prosecutors also feel free to tell the grand jury any story they wish—no matter how unsubstantiated or prejudicial—to get them to return an indictment. In one recent case in the Third Circuit, the following statements were made:

"During the grand jury proceedings, the prosecutor informed the grand jurors that they would not hear testimony from a key government informer because 'he would be putting himself in danger in coming to Philadelphia, because the proposed defendants in this case, if you see fit to indict, are connected with organized

crime and could harm him.' Appellant claims this remark was inflammatory and prejudicial, and that the indictment returned by the grand jury was, therefore, infirm.

We view as improper prosecutor's comment connecting appellant with organized crime. However, we find the impropriety not to be of constitutional dimension nor serious enough to invalidate the indictment." *United States* v. *Riccobene*, 451 F. 2d 586, 587 (3d Cir. 1971).

In other cases, defendants are asked to appear before grand juries for the purpose of obtaining incriminating statements from them. In a case in the District of Columbia, a defendant spent two weeks in jail and then was taken before the grand jury where the prosecutor asked him immediately about certain admissions he had made when arrested. When he repeated his answers, he was then indicted. Three judges dissenting in an *en banc* hearing said about this appearance:

"No doubt it would be a boon to prosecutors if they could summon before a Grand Jury a person against whom an indictment is being sought and there interrogate him, isolated from the protection of counsel and presiding judge and insulated from the critical observation of the public. But there is a serious question whether our jurisprudence, fortified by constitutional declaration, permits that procedure.

Mere interrogation before a grand jury may harm the accused as much as mere interrogation at a trial. Even if he makes 'no direct incriminating statement, there is no way to know whether in fact his appearance was incriminating in the minds of some or all the members of the Grand Jury. *United States* v. *Digrazia*, 213 F.Supp. 232, 243 (N.D.Ill. 1963). His having been brought there may arouse suspicion. His manner and voice may arouse suspicion. Because grand jury investigations are secret, as we said in *Powell* he is 'insulated from the protection of counsel and presiding judge and insulated from the critical observation of the public.' Though he may be unqualified, as Short was, to decide for himself what questions to answer, he must decide at his peril. If he answers incriminating questions he may make it certain, as Short did, that he will be indicted. And testimony before the grand jury may be used, though Short's was not, to impeach his testimony at trial. If he refuses to answer questions that are not incriminating, he may be guilty of contempt." *Jones* v. *United States*, 342 F. 2d 863, 867–63 (D.C. Cir. 1964).

Thus under the cloak of secrecy, which was supposedly an important check upon prosecutorial pressure, district attorneys found they could more easily intimidate a defendant or sway a grand jury into returning a true bill. They prepare the indictments themselves, present cases in less than an hour, make prejudical remarks with no challenge possible by the injured parties. A federal district judge in California openly admitted that the "principle of secrecy was developed to protect the King's counsel and to permit the Prosecutors to have influence with the grand jury, and in modern times it is still useful for the same purpose." *United States* v. *Smyth*, 104 F. Supp. 283, 289 (N.D. Cal. 1952).

Grand juries have become more pliant in this century for a variety of reasons. The penal code has become more complicated, the legal rules on evidence more difficult and panels do not have access to experts who could afford them some independence from the prosecutor. The distrust of governmental authority that existed through much of the nineteenth century has largely disappeared. Instead of an institution which was representative of the local community, skeptical of, and antagonistic to authority, restricted in its powers, and concerned about the rights of the people, we now have a narrowly based panel, dominated by the prosecutor with the widest possible power to jeopardize the personal liberties of all citizens.

It was inevitable that an institution with such great prestige, which operated in secrecy and had such enormous power would be used for illegitimate political purposes. In the days of cold war hysteria beginning in 1947 many suspected Communists were brought before investigating grand juries on short notice, deceived as to the purpose of the panel's inquiry, asked incriminating questions and then subjected to summary contempt sentences for refusing to answer. In New York, a grand jury subpoenaed certain union officials who had signed the non-Communist oath required by the Taft-Hartley Act. When they refused to testify about their Communist affiliations the grand jury issued a presentment

accusing them of falsely filing the affidavits. See *In re U.E.*, 111 F. Supp. 585 (S.D. N.Y. 1959).

In a case that outraged Judge Learned Hand, the wife of William Remington, a former New Deal official who was accused of perjury for denying any Communist affiliation, was brought before a grand jury, questioned for many hours until she was tired and hungry, deceived as to the scope of her privilege not to answer, and then browbeaten into giving statements incriminating her husband. Judge Hand described the situation:

"I agree that, when faced with a patently unwilling witness, the grand jury was free to press her cross-examination hard and sharp; truth is more important than the sensibilities of the witness. Moreover, people will always differ as to the point where legitimate pressure end and improper coercion begins. I can only say that for myself the examination went beyond what I deem permissible. Pages on pages of lecturing repeatedly preceded a question; statements of what the prosecution already knew, and of how idle it was for the witness to hold back what she could contribute; occasional reminders that she could be punished for perjury; all were scattered throughout. Still she withstood the examiners, until being much tried and worn, she said: 'I am getting fuzzy. I haven't eaten since a long time ago and I don't think I am going to be very coherent from now on. I would like to postpone the hearings. * * * I want to consult my lawyers and see how deep I am getting in.' This was denied, and the questioning kept on until she finally refused to answer, excusing herself because she was 'tired,' and 'would like to get something to eat. * * * Is this the third degree, waiting until I get hungry, now?' Still the examiners persisted, disregarding this further protest: 'I would like to get something to eat. But couldn't we continue another day? Or do I have to come back?' Thereupon there took place what I quote in the margin, and what proved to be the *coup de grace*, after which she made a full disclosure of what she knew: a very large part of it what Remington had told her during their marriage and before they separated in January 1947." *United States* v. *Remington*, 208 F.2d 567, 571–72 (2d Cir. 1953) (L. Hand, dissenting)

Hand considered this action illegal:

"Even though the testimony so extracted had not so largely consisted of privileged communications, I should have hesitated a long time before I let an indictment stand that depended upon it. Especially important is the fact that the examination was *ex parte* and without the presence and control of a judge or any other impartial official, to pass upon objections made by an opposite party, or intervene *ex proprio motu* to protect the witness. The privilege against self-incrimination itself arose because of the abuses of the 'ex officio examination' in the 17th century in the Star Chamber and the Ecclesiastical Commission, where there was no judge, and which was *in camera* after the model of the Holy Office itself. Save for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked *ex parte* examination." Ibid. 571–73.

In the years since the McCarthy days, there has been an even further deterioration in the protection of personal rights before the grand jury.

(1) Paradoxically legal advances in other areas opened up the opportunity for the grand jury to be used as an anti-libertarian device. In the period since 1950 many restraints were imposed on Congressional committee investigations which had tried to question politically unpopular figures or gather intelligence on their operations. The Supreme Court's decisions in *United States* v. *Rumely*, 345 U.S. 41 (1953), *Deutch* v. *United States*, 367 U.S. 456 (1961) and *Russell* v. *United States*, 369 U.S. 749 (1962) severely restricted the efforts of the House Un-American Activities Committee and the Senate Internal Security Committee to bring witnesses before them to obtain information or incriminating statements from them. There were some who saw the chance for the grand jury to inherit that function.

(2) In the years since 1950, many agencies of government have increased their surveillance not only of radicals and politically-unpopular figures but even of leading members of the opposition party and many ordinary citizens. At the same time certain law enforcement agencies trying to obtain other information saw the need for a legal institution that could subpoena documents and compel testimony of unwilling witnesses and, better still, obtain them in secret. The grand jury served that purpose precisely. See *Levinson* v. *Attorney General of United States*, 321 F.Supp. 984 (E.D. Ia. 1970) for an example.

(3) It may also serve another function. Through the greatly-expanded use of informers, wiretaps, and electronic bugging devices, law enforcement agencies of the government could gather extensive information on the movements and actions of many of its opponents. Armed with this information, there is a great danger that they could use the grand jury not to discover what they did not know or confirm what they already knew, but to trap witnesses into making incriminating statements or to lay the basis for perjury charges or contempt citations. In their article in the *Nation* on this problem Frank Donner and Eugene Cerruti have suggested that this is one of the purposes of Guy Goodwin's grand juries. The institution then becomes a truly inquisitorial body with no other function than the Star Chamber had in the sixteenth century—to trap witnesses into incriminating themselves.

(4) The interchange of information between a grand jury and other government investigators or between two separate grand juries increased enormously, aided by the great technological advances in information gathering and storing. There are many cases in which a grand jury investigation may be initiated in the tax or antitrust fields supposedly in order to obtain indictments, but the information obtained by the government is then used in civil actions against the parties. A question has been raised with respect to the government's good faith in these investigations. See *United States* v. *Pennsalt Chemicals Corp.* 260 F. Supp 171 (E.D. Penn. 1966). *In re April 1956 Term Grand Jury*, 239 F.2d 267 (7th Cir. 1956), *People* v. *Di Napoli*, 27 N.Y. 2d 229 (1970).

(5) In recent years, there has been a significant erosion of the fifth amendment right against self-incrimination. The Organized Crime Control Act of 1970 marked the most serious effort to restrict the scope of witness immunity in many hears. Instead of granting wide transactional immunity to witnesses before grand juries, which has been the rule since the *Counselman* case, the federal government has utilized limited use immunity, providing merely for no incriminating use of the particular testimony given.

PRESENT ABUSES

Over the past years a number of specific abuses in grand jury proceedings have been identified. Some of these abuses are the subject matter of the bills now before this Committee. Some abuses are dealt with by all the pending bills, others by some bills and not by others, and some abuses are not covered at all. I propose in my testimony to outline all of the abuses that concern us and to discuss how they are dealt with by the pending legislation.

I would like to say a preliminary word about the proposal to eliminate the grand jury altogether.

We do not believe that the grand jury should be abolished by constitutional amendment. Once we begin tinkering with the Bill of Rights by rewriting it, we are concerned that other rights will also be changed or watered down in the process. We have done well with the specific wording of the first ten amendments for the past 186 years and we should be reluctant to start a process of change.

Secondly the grand jury can be reformed to serve its historical purposes. In the 1690's Lord Chief Justice Somers called it "the security of Englishmen's lives,"—a buffer between the king's ministers and the citizens. New safeguards are needed as well as a revitalizing of the layman's role in grand jury proceedings. We need more citizen participation in the criminal justice system and more decision-making authority by those serving. Thus abolition is not necessary.

Finally all the alternatives to a grand jury system are not necessarily desirable. It is true that preliminary hearings have many protections which the current grand jury procedure lacks. But if the grand jury is abolished, the alternative to its investigating function is the grant of subpoena power to the prosecutor,—a feature of some jurisdictions which do not regularly use the grand jury. This would be a very undesirable development.

Thus our recommendation would be to deal with the abuses directly instead of abolishing the entire institution.

The abuses which have been identified fall into four separate categories which I will discuss in turn.

A. Rights of Witnesses

1. *Transactional vs. use immunity.*—We endorse the proposals in both H.R. 94 and H.R. 3736 to return to transactional immunity and abolish use immunity

in the federal system. The potential abuses in the current system has been outlined by numerous witnesses. In an accusitorial system of justice, there is something instinctively wrong in requiring witness A to testify about the crimes of witness B and then requiring witness B to incriminate witness A. The prosecutor and the police need only produce the names of witnesses vaguely connected with the commission of crime and through the "ping-pong" use of the current immunity law, he can steam-roll over the Fifth Amendment rights of the witnesses he calls.

Secondly it is almost impossible to determine whether later prosecution of a witness who is given use immunity was tainted by evidence secured as a result of the immunity grant. Prosecutors are required to show that "no testimony or other information compelled under the order [granting immunity] (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case. . ." 18 U.S.C. § 6002. But it is difficult if not impossible to trace all the steps by which a prosecutor obtains his evidence.

Finally the grant of use immunity and its effect may not be understood by the grand jury itself. In a recent case in the Second Circuit, *United States* v. *Hinton*, 543 F. 2d 1002 (2nd Cir. 1976), a witness was granted use immunity and then testified concerning her involvement in the crime under investigation. Other evidence was later introduced concerning the crime. The grand jury which heard the immunized testimony indicted the witness. It was instructed to disregard the immunized testimony and weigh only the later evidence introduced by the prosecutor. But lay jurors find it very difficult to play this kind of mental gymnastics which the Supreme Court has condemned in other contexts.

See *Jackson* v. *Denno*, 378 U.S. 368 (1964); *Bruton* v. *United States* 391 U.S. 123 (1968). The Second Circuit reversed the conviction in this case noting,

"We believe that as a matter of fundamental fairness, a Government practice of using the same grand jury that heard the immunized testimony of a witness to indict him after he testifies, charging him with criminal participation in the matter being studied by the grand jury, cannot be countenanced." 543 F. 2d at 1010.

Clearly ths kind of abuse in grand jury procedure should be eliminated. This situation could not arise if transactional immunity were the rule since the witness could never be prosecuted concerning the transaction involved.

I might add that many states, including New York, have full, automatic transactional immunity for all witnesses appearing before the grand jury. The prosecutors in those states have had no difficulty investigating crime and convicting those responsible.

2. *Consensual Immunity.*—We endorse the proposal found in H.R. 3736 (but not in H.R. 94) that a person may not be granted even transactional immunity against his will. In this instance we believe in strict construction of the constitution right at stake. The Fifth Amendment says that "no person . . . shall be compelled in any criminal case to be a witness against himself." These words should mean what they say, namely that no person should be required against his will to testify about his own criminal acts. We are reminded by Leonard Levy in his brilliant book on *Origins of the Fifth Amendment* how long and difficult was the fight to gain the right against self-incrimination. John Lilbourne and his compatriots suffered torture and imprisonment to establish this most important right. But recently it has been narrowly interpreted to encompass only the right to be free from criminal prosecution as a result of giving testimony.

Recently lawyers called as witnesses before grand juries have been granted immunity in the criminal investigation but their immunized testimony can be used as the basis to disbar them by bar grievance committees. See *In re Daley*, 549 F. 2d 469 (7th Cir. 1977). A witness who is immunized but loses his job or his professional license or his respect in his community is not getting the rights which the Fifth Amendment promises him. The decision to exchange testimony for immunity should be his and not the government's.

From a law enforcement point of view, forcing immunity on a witness is seldom desirable. When he introduced H.R. 3637 Rep. Conyers quoted Peter Richards, an experienced federal and New Jersey prosecutor, about forced immunity:

"We don't like to do it because we have found that it normally does not work. The situation where a witness refuses to cooperate in the first place, then comes into the grand jury and changes his mind and cooperates and tells you the truth

and gives you something valuable is extremely, very, very, very rare. I don't think I've ever seen it happen, as a mater of fact." 123 Cong. Rec. E 859 (daily ed Feb. 22, 1977)

We also agree that immunity should not be granted unless a majority of the grand jury votes to do so. If we believe in the independence of the grand jury and the need for citizen participation in the criminal justice system, we should act according to our beliefs.

3. *Judicial Control of Immunity.*—If consensual immunity is not adopted, at a minimum we would endorse Representative Ellberg's proposal that the grant of immunity be subject to judicial control. Thus instead of the prosecutor deciding whether immunity should be granted, the judge should do so taking into account the following factors:

(1) does the witness face the danger of foreign prosecution because of his testimony

(2) the relevance of the testimony

(3) the legitimacy of the investigation by the grand jury

(4) the need for the testimony at issue.

4. *Warnings to Witnesses.*—The Supreme Court held in *United States* v. *Mandujano* 425 U.S. 564 (1796) that full Miranda warnings were not necessary for witnesses before a grand jury. And in *United States* v. *Wong* 45 U.S.L.W. 4464 (May 23, 1977) and *United States* v. *Washington* 45 U.S.L.W. 4465 (May 23, 1977) it held that no warnings of any kind were *constitutionally* necessary. These decisions permit, indeed require, that Congress pass new laws specifying that witnesses be told of their rights and warned of the dangers concerning their testimony.

Last year Congress amended Rule 11 of the Federal Rules of Criminal Procedure to require that persons pleading guilty to a crime be told of the rights they are surrendering. There was some initial objection to this proposal until it was pointed out that the warnings would take about 60 seconds of time, hardly a significant drain of time.

Similarly, telling grand jury witnesses of their right to remain silent, and their right to counsel, letting them know of the scope of the grand jury's inquiry and warning them of the fact that they may be under investigation and their testimony can be used against them involves little time or effort and can protect against some of the abuses described previously.

We therefore endorse the proposals in H.R. 94 and H.R. 3736 requiring such warnings.

I would add one other warning to the list. In a recent case in the Sixth Circuit, *United States* v. *Doss*, 545 F. 2d 548 (6th Cir. 1976), a witness had already been secretly indicted for certain crime. He was called before the grand jury and asked questions related to those charges without knowing he was already indicted. When he denied involvement in the crimes, he was indicted for perjury. The Sixth Circuit reversed that conviction. Certainly a witness deserves to know that he has already been indicted for the crime that he is being questioned about.

5. *Subpoenas to Witnesses.*—This committee has already been told about the many abuses connected with the service of grand jury subpoenas. Witnesses have often been served with subpoenas early in the morning requiring their appearance before a grand jury within two hours. This happened in the Ellsberg investigation in Los Angeles, in the Susan Saxe investigation in New Haven and in many other instances. Other witnesses have had to travel great distance to appear before a grand jury on little notice, as in the Fort Worth Five case. In a recent case in New York City a corporation and its president were ordered to produce certain documents "forthwith," that is, immediately in response to a grand jury subpoena with no opportunity to consult with a lawyer, *In re Nwanu*, 421 F. Supp. 1361 (S.D.N.Y. 1976). The FBI agent who served the subpoena told an employee that he had to hand over the records to him on the spot or he would be held in contempt. A federal district court set aside additional subpoenas after some material had already been handed over. There have been other instances when FBI agents have served subpoenas which may not even have been authorized by the prosecutor involved.

H.R. 94 and H.R. 3736 justly require one week's notice before a witness must testify or produce documents. He may move to quash in the interim before the district court for the district in which he resides or was served. If the witnesses appearance at a grand jury proceeding would create a substantial and unnecessary hardship because of the distance or financial or other burden, the subpoena may

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be quashed. The subpoena may also be quashed if the grand jury is inquiring into the same events that another grand jury has already investigated and no additional, newly discovered evidence has been produced.

The subpoena must also describe the rights of the witness, the scope of the investigation, whether the witness is himself under investigation and the criminal statutes involved.

We applaud and endorse all these proposals.

We also endorse the idea in H.R. 3637 that a majority of the grand jury must affirmatively vote to issue a subpoena. There have been instances in which grand jury subpoenas have been issued to persuade or force witnesses to testify after they refused to speak to FBI agents. The grand jury subpoenas became in effect, FBI subpoenas despite the fact that Congress has consistently refused to grant such power to that agency. They occurred in the New Haven and Kentucky investigations into the radical feminists groups. A federal district court recently quashed a grand jury subpoena because he found it has a pretext to require disclosure to the FBI. See *In re Stolar*, 397 F. Supp. 520 (S.D.N.Y. 1975).

We believe that the prosecutor should be required to sign all subpoenas and to show that a legitimate, criminal investigation is underway and that the testimony or material sought is required for the investigation. The Third Circuit established such criteria in the *Schoefield* case (486 F. 2d 85 (3d Cir. 1973)) and 507 F. 2d 963 (3d Cir. 1977) and the Schoefield criteria should be enacted into law for the entire federal system.

7. *Counsel.*—We also endorse the proposal that counsel be permitted to accompany a witness into the grand jury room. The ABA has endorsed this proposal, eight states have laws permitting counsel in the grand jury room and others are considering it, and many prosecutors such as John Van de Kamp—the Los Angeles District Attorney—think it is a good idea. I have alluded to previous examples of prosecutorial over-reaching in the grand jury room such as in the *Remington* and *Jones* cases. The presence of counsel would prevent such occurrences. Furthermore, since witnesses now consult often with their counsel outside the grand jury room, it might very well facilitate grand jury proceedings by cutting down on the time-convening trips inside and out.

A special report of three committees of the Association of the Bar of the City of New York endorsed this idea three years ago. The report noted:

It must be recognized that the grand jury inquiry is a critical stage in a criminal proceeding, since an indictment often results in a loss of reputation and employment, regardless of the ultimate outcome at trial.

Almost any grand jury witness is at a distinct disadvantage because, he is questioned by the prosecutor himself, who is free to cross-examine the witness in whatever manner he chooses and who may be more interested in obtaining impeachment testimony and perhaps a separate perjury indictment as a result of the testimony, than in obtaining information. Clearly, a lawyer could effectively assist a client who elects to testify in lessening the risk of such a result by suggesting a more considered response, or no response at all. Also, his mere presence would render the witness more relaxed and the prosecutor less intimidating. And his presence would eliminate delays occasioned by the necessity for the witness to leave the grand jury room repeatedly to consult counsel. 29 *The Record* 464, 471 (May/June, 1974)

However, we do not believe that the limitations on counsel contained in H.R. 94 are neccessary. The idea that counsel will disrupt the proceedings and make a shambles of grand jury operations is a myth. I was co-author of a study on courtroom disruption prepared by the Association of the Bar of the City of New York, called *Disorder in the Court*. We found that courtroom disruption was practically non-existent, and that lawyers were rarely responsible for what minor disorder did occur. If the lawyers do misbehave, there are ample professional sanctions to deal with them. The answer to misconduct is appropriate punishment not the denial of the Sixth amendment rights of a witness.

Lawyers appear before Congressional committees and administrative agencies and do not disrupt proceedings. We recommend that lawyer presence be permitted in the grand jury room and the extent of their involvement be established by local district rules.

The need for counsel in the grand jury room has been underscored by a recent case in the Seventh Circuit, *United States* v. *Kopel*, 21 Cr. L. 2141 (April 19, 1977). In that case the Court of Appeals held that the prosecutor could introduce into evidence grand jury transcripts that showed that a witness

went outside to consult his lawyer. This evidence was relevant to show that later perjury by the witness was knowing and deliberate. If the movement of a witness outside the grand jury room to consult his lawyer can be used against him, it is all the more important that counsel be at his side.

8. *Civil Contempt.*—The outrages connected with use of the civil contempt power have been amply documented. There have been cases where a person has been subpoenaed to appear before a grand jury within two hours. Once he arrives he is asked certain questions which he refuses to answer on Fifth Amendment grounds. He is granted use immunity and asked the questions again. If he refuses again, he is brought before a judge and with fifteen minutes notice, held in a civil contempt. See *In re Grand Jury Investigation* (*Bruno*) 545 F. 2d 385 (3d Cir. 1976). If held in civil contempt, the witness may be refused bail on appeal. He may stay in jail for the life of the grand jury, up to 18 months (see *The New York Times*, March 2, 1973, p. 39) and may be brought back before the grand jury to be asked the same questions again, facing the same penalty.

Because the proceedings are "civil" rather than "criminal" the defendant loses many of his due process rights. He may not get the notice required for a criminal charge, the standard of proof may be different, his right to counsel is not certain, he is not entitled to a jury but he is subject to a much stiffer sentence than a criminal contempt charge would bring.

Some courts have already begun the process of requiring that civil and criminal contempt be treated the same way. See *United States* v. *Alter*, 482 F.2d 1016 (9th Cir. 1973) *In re Sadin*, 509 F. 2d 1252 (2nd Cir. 1975) and *In re Grand Jury Investigation* (*Hartzell*) 542 F. 2d 166 (3d Cir. 1976). But the process must be completed by legislation. We believe that adequate notice must be given—at least 10 days. A majority of the grand jury must approve the citation. A maximum of six months should be imposed. Bail should be allowed unless "patiently frivolous" and no reiterative contempt should be allowed.

9. *Protection of First Amendment rights.*—Neither of the bills presently before this committee focus on the specific protection of First Amendment rights. Of course to the extent that the grand jury must vote on subpoenas and the grant of immunity and that the prosecutor must show that a legitimate criminal investigation is underway in accordance with the *Schofield* criteria, there may be protection against the violation of First Amendment rights. But we believe that more specific provisions are necessary.

We know that, in the past, grand jury witnesses were often asked questions about the exercise of their First Amendment rights. Witnesses before the Boston grand jury investigating the Pentagon Papers in 1971 were asked questions about the books and magazine they read and about their opinions on who possessed the Pentagon Papers. The Tucson grand jury in 1970 asked witnesses about everyone who visited a certain house in a two year period and about all conversations with those people. Other witnesses were asked about all their travels in the United States and about all their meetings with any individuals associated with SDS. Other witnesses before grand juries in New Haven and Kentucky were asked specific questions about the people they associated with in radical feminist groups. The Donner and Cerruti articles in the Nation in January 1972 and November 1973 outline many of these abuses.

These questions are clearly improper invasions into protected First Amendment activities. Grand juries should not be permitted to ask questions about protected First Amendment areas, such as the political affiliations of witnesses, what demonstrations they attended and what political activities their friends are engaged in. Even if there is some colorable connection between such questions and certain criminal activity, the government must show a compelling reason for any inquiry it is making. And it must be made to show that the need for such information far outweighs the chilling effect of this encroachment on First Amendment rights. The Supreme Court laid down such requirements in restricting legislative investigations. In *Gibson* v. *Florida Legislative Committee*, 372 U.S. 539, 570 (1963) the Court said "an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights."

Furthermore any witness who is selected to appear before a grand jury because of exercise of his First Amendment rights needs protection. Such a connection should provide a strong presumption of impropriety. There is a strong suspicion that many witnesses called before the New Haven and Lexington

grand juries were called because of their radical feminist political associations and with a view to inhibiting the exercise of their First Amendment rights. This may also have occurred in the recent investigation into the Puerto Rican Socialist Party. Adequate protections should be written into law against asking questions relating to the exercise of First Amendment rights and against subpoenaing witnesses because of their political associations.

10. *Other rights of witnesses.*—There are other important rights for witnesses contained in the bills before this committee which we endorse. We certainly approve of the provision prohibiting questioning of a witness based on illegal wiretaps. We also approve of the proposal in H.R. 94 and H.R. 3637 permitting a witness to examine and keep a transcript of his remarks before the grand jury and allowing him to appear before the grand jury again to explain his testimony. We also endorse the idea that a witness should have access to any previous statements made to the government before he testifies before the grand jury.

We also endorse the proposal not to bring before the grand jury any witness who notifies the prosecutor that he intends to invoke his Fifth Amendment rights.

B. Rights of Defendants

1. *Need for competent and admissible evidence.*—The Supreme Court's decision in *Calandra* underscores the need to revise the existing rules on the quality of evidence submitted to the grand jury. The idea that illegally seized evidence or privileged information or even hearsay should serve as the basis for an indictment is inconsistent with the dictates of the due process clause and is counter to the fair and efficient administration of the criminal justice system. If only incompetent or inadmissible evidence is available to the prosecutor, then the case should not go to trial since good evidence would have to be introduced then. If the prosecutor has competent and admissible evidence but presents only hearsay or illegal evidence to the grand jury in order to prevent discovery by the defendant in his case, such tactics should not be permitted. Judge Jack Weinstein condemned this practice, calling it "pernicious" in *United States* v. *Arcuri*, 282 F.Supp. 347 (ED. N.Y. 1968) aff'd 405 F.2d 691 (2d Cir. 1968).

Either way there is no excuse for permitting indictments only on the basis of evidence not admissible at the trial. H.R. 3637 contains a requirement for competent and admissible evidence (§ 3330A(a)). This provision is not an innovation in the law. It is borrowed almost verbatim from the New York Criminal Procedure Law, § 190.65. New York has had such a requirement for many years. It permits the weeding out of bad cases at an early stage of the proceedings and saves time for courts, prosecutors and defendants who would otherwise proceed to trial. See *People* v. *Jacob*, 55 App. Div. 2d 961 (2d Dept. 1977).

2. *Recording Minutes and Making them Available to Defendants.*—Another important protection needed is a requirement that all grand jury testimony be recorded and that all grand jury minutes be made available to a defendant after an indictment is returned. California has such a provision (Cal. Pen. Code, Sec. 938 and 938.1) and New York provides for it in certain situations. N.Y. Crim. Proc. Law, § 210.30. Prosecutors working under it have endorsed this approach. See testimony of John Van de Kamp before Senate Subcommittee on Constitutional Rights, September 28, 1976.

Full disclosure of the prosecutors case is not only desirable for due process purposes but it encourages guilty pleas and may thus further the efficient administration of the criminal justice system.

Obviously the prosecutor must also disclose exculpatory material to the grand jury as well as to the defendant in accordance with *Brady* v. *Maryland*.

3. *Opportunity to Appear before Grand Jury.*—New York has another provision which this committee should consider. Under New York Criminal Procedure Law 190.50(5)(a) a person has a "right to appear before such grand jury [considering criminal charges against him] as a witness in his own behalf, if prior to . . . indictment . . . he serves upon the district attorney . . . a written notice making such request . . ." Often a potential defendant can persuade the grand jury to dismiss or indict on a lesser offence. New York has operated well with this provision and it should be considered by this committee.

4. *Prohibition on resubmission.*—New York also prohibits the resubmission of evidence to a new grand jury after the refusal of another grand jury to indict without the permission of the court. N.Y. Crim. Proc. Law § 190.75(3). Both H.R. 94 and H.R. 3736 contain similar provisions and we endorse this idea.

5. *Preliminary examination.*—We also approve of the proposal that a preliminary hearing be held even if a grand jury indictment has been returned. An in-

dependent judicial inquiry into reasonable cause to hold a person for trial is desirable. And the rush of prosecutors to indict in order to avoid a preliminary examination should not be allowed.

6. *Prohibition on securing further evidence.*—It is black letter law that a grand jury cannot be used to secure further evidence after an indictment has been returned. Yet many cases arise in which accusations are made of improper use of the grand jury for that purpose. T[illegible] specific prohibition against such misuse would therefore be desirable.

C. Grand Jury Structure and Procedure

1. *Rights and Powers of Grand Jury Members.*—Other provisions of the pending bills deal with the basic structure of the grand jury itself and the rights and powers of grand jury members.

The idea that grand jury members should be informed of their duties, rights, authority and powers is so obvious and necessary that no objection can be raised to it. We also endorse the proposal that grand jury members actually vote on the activities carried out in their name. The grand jury should affirmatively vote to subpoena witnesses and documents, to grant immunity to a witness or hold him in contempt. These are powers which the grand jury used to exercise. We should not carry forward the myth that a subpeona eminates from a grand jury if its members have had notthing to do with it.

2. *Independent Grand Jury Inquiry.*—One provision of H.R. 94 does give us pause. Section 3330 allows each federal grand jury to request a special attorney to act in lieu of a federal prosecutor to conduct investigtions of and indict persons violating federal law. The possibility of runaway grand juries indicting persons in the community whose views it disapproved of is a real danger. In the 1950's alleged Communists were the target of such juries and in the 1960's southern grand juries indicated civil rights workers appearing before them, who were victims of the official abuse of power. We think a better proposal is found in H.R. 3736 which permits a special attorney to be appointed for violations of law by government officials only.

This committee should also consider the appointment of a special counsel to the grand jury to obtain legal advice, even if he could not conduct investigations or indict. I recall one instance of a grand jury chairperson complaining to me about the legal advice a U.S. attorney had given her grand jury about the degree of evidence necessary to indict. She had no place to turn to get advice on the matter and her grand jury indicted over her objection. Since the prosecutor is an advocate for a cause, his ability to render impartial legal advice may be compromised.

In New York, many indictments have been overturned because erroneous or incomplete legal advice has given to the grand jury. See *People* v. *Ferrara*, 82 Misc. 2d 270 (1976); *People* v. *Kinnicut*, 83 Misc. 2d 229 (1975); *People* v. *Lawson*, 84 Misc. 2d 24 (175). With an independent legal adviser, such problems would not arise.

3. *Secrecy provisions.*—We also endorse the imposition of criminal penalties for violation of grand jury secrecy. Once again New York State has such a provision, Penal Law § 215.70 although it is seldom enforced. Obviously provision must be made for the appointment of a special prosecutor to enforce this prohibition since prosecutors are often the worst offenders as a recent New York State investigation report has indicated.

This Committee and the sponsors of the bills in question must be commended for their difficult and skillful work in trying to deal with the abuses which have tainted the work of this important institution.

Mr. FRIEDMAN. My testimony is for the record, and I would like to take 5 minutes to summarize a few points which some of you have already raised.

I think if we start all over again we would not establish the grand jury system, if you think a little bit about it. There are all kinds of historical pressures that have occurred here, but the idea that a witness can be called in before a secret group, asked questions without warnings, not told whether he is the target of that investigation, have no one at his side to help him, and be able to be thrown in jail in 15 minutes' notice if he didn't answer the questions in the proper way, all

of that does not lend itself to the kind of criminal justice system that we think should be set up. It is just that we have this very long historical tradition that a grand jury is a good thing.

It can be traced to the *Earl of Shaftsbury* case—in fact, the Whigs who defended the Earl of Shaftsbury immediately came and took over control of the English Government after 1688. The grand jury was such a useful device in Revolutionary War days, the grand jury was a wonderful device for attacking municipal corruption the 19th century, and fighting prosecutors like Tom Dewey, that took them over and used an independent grand jury as a steppingstone for national office, all of that comes to us and comes to people who went to law school and working lawyers and was a tremendous historical warrant for the fact that it is a wonderful institution.

It is only recently that we have come to take a second look at this institution without this wonderful historical pedigree that we all bring it it.

I am shocked at occasionally reading a case in which some particular abuse of grand jury procedure has been outlined, and the judge says, "We all know a grand jury is the protection of the Englishmen's lives. It is the security of American citizens." Then you allow this abuse because of this stamp that it has with respect to the wonderful things that it did over the last 300 years.

If we thought about prosecutors having these powers without a grand jury being present, no one would allow it for a minute. But the fact of the matter is that the grand jurors do not, in effect, serve as a restriction on prosecutor power for the most part. It is very rare that they will stand up to the prosecutor and say, "Hey, I don't like the way you asked that question. It is an improper question. Give the witness a chance to respond." Or, "Shouldn't we tell the witness what it is we are looking for and that he is a target of our investigation?"

Grand juries do not do that, and as a result of it we have got to the point where many diverse groups have come before this committee and certainly applaud what this committee is trying to do with respect to the grand jury operation.

I think the first thing to do is to try to look at the institution without the historic justifications that have often been given to it.

Second, I think we should take a look at what the States have done in terms of grand jury reform. I think three-quarters of the reform proposals in the bills, in H.R. 94 and H.R. 3736, have models in the States, as Mr. Landau indicates, in California where they permit the transcript to be made public immediately after the indictment.

There are eight States that allow counsel in the grand jury room right now, and those States have been able to function with their grand juries without too much difficulty.

New York, where I practice, have four or five reform proposals. There is complete transactional immunity for all witnesses that appear before the grand jury. Only legally competent and legally admissible evidence may serve as a basis for grand jury indictment. You cannot resubmit to a grand jury after it has refused to return an indictment without the permission of a judge.

A defendant has an opportunity to appear at his own request. He has an absolute right to appear if he wants to, to give his side of the

story, and New York grand juries have functioned for years under these kinds of protections.

Prosecutors get indictments, the grand jury system does not collapse as a result of these kind of reforms, and I am just surprised when I see Judge Lacey and the Justice Department officials coming up before this committee last year and saying, "Well, this grand jury can't function with all these kinds of restrictions on them in terms of the contempt procedures."

There is written into rule 42(a) of the Federal Rules of Criminal Procedure all kinds of protections for criminal contempt, and it is possible to function under those proposals without any difficulty, and there seems to be no reason not to lend the basic due process rights that apply to a criminal contempt citation for a civil contempt citation. Call it "civil," but it doesn't mean that all the due process protection should not apply.

I think it is most important to try and do something about witness protection in the light of the recent Supreme Court cases.

In *United States* against *Jacobs*, which is a 2nd circuit decision in which the 2nd circuit tried to lend some witness protection to witnesses appearing before a Federal grand jury in its supervisory control over the administration of criminal justice, and there the Supreme Court has said that there is no constitutional protections, practically, for witnesses in terms of warnings, that they have to be given.

Therefore, it really is incumbent upon Congress in amending the Federal rules and on passing this kind of legislation to at least set up some basic protections for witnesses.

I would just say to look to the States to see the kind of protection that they have been trying to give to witnesses in different areas.

Thank you.

Mr. EILBERG. Professor Friedman, you have given a particularly lucid statement. I wish we had more time to listen to you, because we could learn a lot by doing so.

Your statement is part of the record, and I have just a few questions.

As you know, one of the issues we are considering is the proposed change to rule 6(e) to allow administrative agencies to assist Government attorneys in the grand jury record. You have already testified in opposition to this change before the criminal justice subcommittee.

Could you summarize now your objections?

Mr. FRIEDMAN. Very briefly, if a criminal tax investigation is undertaken and the IRS agents are allowed in the regular course of the investigation to check into ground jury testimony and to find out what was said and help the U.S. attorney in the preparation of the case before the grand jury, it seems almost impossible to imagine that won't be used in the course of a civil tax investigation, as well.

The IRS and the Justice Department pursuing a civil tax investigation simply should not be able to use the grand jury as a device to do so. This applies in SEC investigations, as well. There may be a securities fraud investigation, some of the SEC may be loaned over to the Justice Department to check on that. Will that serve as a basis for an SEC civil action?

It could happen in any number of other areas.

In an antitrust investigation, where a criminal investigation may occur, and will that testimony, with the enormous power of the grand

jury to unearth it be able to be used in a civil proceeding, as well, when normally all you have is the civil discovery provisions of the Federal Rules of Civil Procedure?

If there is a proper showing, proper safeguards in an individual case, that is okay. But it really should be done on an individual basis rather than carte blanche power being given to the specialized agents to come over and participate in a criminal investigation, and then to use their knowledge as a basis for civil investigations, as well.

Mr. EILBERG. Arguments made against grand jury reform in general state that abuses are a result of improper use of the system and not the system itself.

For example, last year former Attorney General Levy stood here and said that grand jury problems can be minimized by selection of honest, qualified prosecutors, and there are no legislative reforms that could provide adequate protections of abuse of government attorneys that are in power.

Would you comment on this.

Mr. FRIEDMAN. We all want top-flight U.S. attorneys, and we want good men and women in those positions, but it seems to me that the whole theory of the Bill of Rights and all of the protections of the Federal Rules of Criminal Procedure is that we want institutional safeguards as well, and when these problems keep recurring again and again. I heard Jonathan Goldstein speak at a bar association meeting in New York, and he has done preeminent work in uncovering corruption in New Jersey, and he was describing to us how he starts a grand jury investigation. He said:

> I have a hunch. I just have a feeling in my bones that there is something wrong in this area. So I go and subpena the bank records. I want to be sure that the persons whose records we are subpenaing dont' know about it, because the minute he knows about it, something is going to happen. So I investigate the bank records and then I get to somebody else and I grant some immunity.

And it was quite a debate in the bar association meeting, because we were working lawyers and were shocked with the idea that here is a good prosecutor, and he is certainly very capable, but he thought nothing at all about this very secret use of the grand jury subpenaing all kinds of bank records without anybody knowing about it, and not giving the person a chance to complain about it, getting all this information, which he probably shouldn't have, and his answer is, "I won't use information I shouldn't have."

It seems to me this is an awfully sad situation when we can't rely on the well-meaning prosecutors. We need some kind of institutional safeguards, as well.

Mr. EILBERG. Finally, at this time, you seem to oppose restricting the role of counsel in the grand jury room. We did this to avoid making the grand jury an adversarial proceeding and to resolve the problem of frivolous prosecution, we mandate a prompt preliminary hearing. If all proceedings are to be recorded, how can restricting the role of counsel tied to a prompt hearing be sufficient?

Mr. FRIEDMAN. I don't oppose your general proposal. I am all for counsel in the grand jury room. My concern was, you shouldn't tie the hands of counsel in the grand jury room. I think the idea that he should only advise the witness and only whisper in the witness' ear—I thought that was somewhat restrictive. I would like to comment on that.

I was co-author of a study that the city bar association had done on disorder in the court in which the problem of courtroom disruption came about, and everybody was worried about lawyers getting to court and using it for political speechmaking. The city bar association, with a grant from the Ford Foundation, did a 2-year study on this, and we found there was very little disruption, and whatever there was was easily controllable, and the existing rules on contempt, on bar association discipline, and whatever—I think concern about a lawyer in the grand jury room disrupting the proceedings is, by the same token, controllable in other ways. It is not necessary to restrict the kind of advice, the kind of participation that the lawyer can have.

In Minnesota they allow the lawyer in the grand jury room and they have had no difficulty in that kind of an operation.

Mr. EILBERG. Unfortunately, in my experience of having been an assistant district attorney, I have seen a great many lawyers operate, sometimes in questionable ways. I am afraid that when you allow them to speak in a way that you suggested, it can not be controlled, I just couldn't see some lawyers sitting still and participating quietly without being disruptive and prolonging the proceedings indefinitely. That would be my concern.

Mr. FRIEDMAN. I think maybe this would be answerable on a district-by-district basis, and give the lawyers a chance to operate and see what happens. But I think getting them in there is the first step and a very important one to perform.

Mr. EILBERG. Mr. Fish.

Mr. FISH. Following that, Professor, during the last Congress the Justice Department took the position that counsel for a witness in a grand jury room would violate grand jury secrecy and making the witness less willing to testify when the counsel represents any subsequent witnesses.

Would you care to respond?

Mr. FRIEDMAN. There is a lot of litigation on these points. Taking the last one first, on joint representation, that exists today without the lawyer being in the witness room. There are recent cases that I read on the plane today, and there were two or three cases, even fairly recently, in which that problem arises.

So it is going to arise whether the counsel is in the grand jury room or not. He represents a defendant or co-defendant or group of witnesses who go before the grand jury and then come out. That would occur no matter what happens with this legislation. If he goes in the grand jury room, it is not going to change in any way. The courts have developed various procedures trying to deal with joint representation, and that is not a problem that only relates to counsel's presence in the grand jury room.

As far as the Justice Department position that is going to make witnesses less willing to talk, as I say, there are eight States that have it already. It is going to probably be passed in New York this year, as well. Those States can still investigate crime and get indictments and still operate with their criminal justice system.

Every time there is an innovation in the criminal justice system some prosecutor is going to say it just doesn't work; it can't work.

The fifth amendment, when it was established, probably made it more difficult for prosecutors to operate. There is certainly enough cases of abuse. I have outlined some in my testimony about what hap-

pens to a witness in a grand jury room so that counsel really would be desirable in the future.

Mr. FISH. Professor, your statement is 39 pages, and I did not have a chance to read it. Like you, I flew in this morning. I look forward to reading it very much. It looks like one of our more comprehensive presentations.

Am I correct that you are submitting this on behalf of the American Civil Liberties Union?

Mr. FRIEDMAN. That's correct.

Mr. FISH. Are you in a position to tell the committee what has happened in the British experience since they abolished the grand jury?

Mr. FRIEDMAN. They have a totally different system, actually. They do use preliminary hearings. They use a magistrate and preliminary hearing for the most part. There is some opportunity for compelling testimony, documentary compulsion, before the trial. They handle it, for the most part, by using the preliminary examination or preliminary hearing as a substitute for the grand jury function.

The grand jury really does two things. It investigates and it indicts, and the whole theory about the indicting function is there should be someone looking over the prosecutor's shoulder to make sure he is not forcing someone to go to trial without reasonable cause to believe that they committed a crime. That is what a magistrate is supposed to do, and that is what he does in the system. I'm not sure how to handle all the subpena problems. You compel testimony and you compel documentary production. But I believe it is also connected with a magistrate, the use of the preliminary magistrate.

California, for example, did not use a grand jury statement for all purposes, and they also rely primarily on a preliminary examination, that kind of procedure, officially.

Mr. EILBERG. Mr. Hall, do you want to ask any questions now?

Mr. HALL. No.

Mr. EILBERG. We will recess very briefly to answer this rollcall.

Will you have any questions later?

Mr. HALL. I could ask him one question now.

What are the eight States that have adopted the rule of allowing attorneys in the grand jury room?

Mr. FRIEDMAN. I know Minnesota is one.

Mr. HALL. You can get it for me later.

Mr. FRIEDMAN. Yes.

Mr. HALL. They tell me we have it here.

Mr. EILBERG. Thank you very much. Thank you for coming.

[A staff study on those States that allow counsel in the grand jury room may be found in app. 6 at p. 1571.

Mr. EILBERG. We will recess for a brief period.

[Brief recess.]

Mr. EILBERG. Let the meeting come to order.

Is Mr. Tobin present? This is Patrick Tobin, Washington representative of the International Longshoremen's and Warehousemen's Union.

We welcome you, Mr. Tobin, and we congratulate you at the outset for having put together a very comprehensive statement, and it has to be widely read.

TESTIMONY OF PATRICK TOBIN, WASHINGTON REPRESENTATIVE, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

[The prepared statement of Patrick Tobin follows:]

STATEMENT OF PATRICK TOBIN, WASHINGTON REPRESENTATIVE, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

My name is Patrick Tobin. I am the Washington Representative of the 60,000-member International Longshoremen's and Warehousemen's Union (ILWU). The ILWU, the bulwark of democratic trade unionism on the West Coast of the United States, represents workers from San Diego, California, to Seward, Alasaka, and, in addition is the largest single union in the State of Hawaii.

Our interest in the grand jury system reflects our longstanding commitment to the principles of the Bill of Rights. Like the framers of that document, we believe that government officials cannot be trusted to behave honorably and fairly. James Madison and his illustrious generation may have learned this lesson from their study of classical history and philosophy. We have learned it from nearly five decades on the waterfront.

Over the years, the ILWU and its individual members have repeatedly been attacked by a prosecutorial establishment more interested in serving employers than the public interest. We have seen crimes against our people, including murder, ignored, and crimes alleged to our people blown into huge conspiracies. We have seen the United States law enforcement apparatus devote two decades and no one knows how many taxpayer dollars to an unsuccessful attempt to drive our union president off the waterfront, a malicious prosecution United States Supreme Court Justice Frank Murphy was eventually to call a "monument of man's intolerance to man."

Not once during these long years of the government's legal harassment did the grand jury provide the protective "shield for the innocent" that our country's founders intended it to offer. It did not because it could not. The modern grand jury, especially for working people, is structurally "rigged" to constitutionally malfunction. "Rigged" is a strong word, but, as we hope to show in the testimony that follows, it is the only word that adequately describes the due process perversion that is our federal grand jury system.

1949: THE GRAND JURY AND HARRY BRIDGES

The confrontation that truly opened ILWU eyes to the abusive potential of the federal grand jury system came some 28 years ago.

The case involved Harry Bridges, the ILWU president. The time was the early stages of the Cold War. The place was San Francisco, and the political background is best explained by the 1945 words of United States Supreme Court Justice Frank Murphy:

> For more than a decade, powerful economic and social forces (had) combined with public and private agencies to seek the deportation of Harry Bridges, who came to this country in 1920 from Australia. Emerging from the Pacific Coast maritime strike of 1934 as a recognized leader in that area, Bridges incurred the hatred and hostility of those whose interests coincided directly or indirectly with the vicious and inhuman practices toward longshoremen that Bridges was combatting. His personal viewpoint on certain matters also antagonized many people of more conservative opinions; agitation for his deportation arose. Industrial and farming organizations, veterans groups, city police departments and private under-cover agents, all joined in an unremitting effort to deport him on the ground that he was connected with organizations dedicated to the overthrow of the Government of the United States by force and violence.[1]

In 1939 the government attempted to railroad Bridges out of the country through the Immigration and Naturalization Service bureaucracy on the grounds that Bridges was a Communist Party member. The attempt failed. A few years later, the government tried again, and for a second time the government was

[1] See *Harry Bridges* v. *Wickson*, 326 U.S. 135 (1945).

rebuffed. Then, in April, 1949, the Department of Justice sent a special prosecutor to San Francisco to open a grand jury investigation into violations of the naturalization law, a mandate which translated rather crudely, as everyone knew, to "get Bridges."

Bridges was indicted the next month on essentially the same grounds on which he had been vindicated twice earlier, but federal prosecutors denied that they were subjecting the ILWU leader to triple jeopardy.

"We have new evidence which has never been presented before," one of the prosecutors told the *San Francisco Chronicle* May 26, 1949.

"The very nature of the testimony before the Grand Jury," said another prosecutor two days later in the *San Francisco Examiner*, "is of such an overwhelming character that were Bridges to learn its full significance, he might make up his mind to travel fast and far."

Interestingly, at the very time the government was doing its best to convince the public that it had an air-tight case against Bridges, federal prosecutors were wildly scrambling for evidence to support their "overwhelming" case. Shortly after the indictment against Bridges was returned, over a dozen ILWU members were subpoenaed before the same grand jury that had indicted him.

The subpoenaed ILWU members had been approached, not long before their subpoenas were served, by Immigration Service agents and asked about internal ILWU politics and if they would testify against Bridges. All had refused.

There were several motives behind the subpoenas. One was to intimidate those who might be inclined to speak out in Bridges' defense. The government wanted to serve warning that every Bridges' supporter faced the prospect of a grand jury subpoena and character-assassinating newspaper headlines tying them into "subversion" on the waterfront. Another was to create splits within the union ranks. After some witnesses appeared, the government violated grand jury secrecy and described the witnesses to the press either as "friendly" or "unfriendly." A "friendly" designation by the government, of course, meant that the witness had testified against Bridges—and could never be trusted by his union brothers again. The violation of grand jury secrecy involved here was bad enough. Even worse was that the prosecutors capriciously—if not maliciously—mislabeled the witnesses' testimony.

On June 2, 1949, for instance, federal prosecutor Joseph Donohue told the *San Francisco News* that one subpoenaee had been a "satisfactory witness" for the government. The witness' attorney immediately issued a statement denying that his client had testified against Bridges, whereupon Donohue reiterated to the papers that the witness' testimony "was very satisfactory and important to the Bridges case."

The witness himself was not free to comment. Government attorneys had forced him and all the other subpoenaed witnesses who had appeared before the grand jury to take an oath of *witness* secrecy.

"Every witness who has appeared before the Grand Jury," prosecutor Donohue told the *San Francisco Chronicle* May 31, "has been sworn not to reveal the testimony he has given to those who may ask any witness what his testimony on any subject may have been."

Such an oath was then and is now completely improper, but when ILWU attorneys ignored it and asked Donohue's grand jury witnesses what the prosecutor was up to inside the grand jury room, Donohue threatened the lawyers with prosecution for witness tampering.

After several ILWU members had appeared before the grand jury, attorneys for 11 others went to court June 3 to get their subpoenas quashed. The lawyers made a number of objections, pointing out that:

—Rule 6(e) of the Federal Rules of Criminal Procedure does not force secrecy on grand jury witnesses,

—that the witnesses had been subpoenaed to supply evidence against a person already indicted,

—that since the subpoenas to their clients did not indicate what crime was under investigation, they were unable to intelligently advise their clients on their best legal course of action,

—that the questions witnesses were being asked were fishing expeditions into the witnesses' political beliefs and labor union activities.

For proof on this latter point, the ILWU attorneys asked the court to release the transcripts of the grand jury interrogation of the witnesses who had already testified. The court refused both this request and the motion to quash the

subpoenas. The government, in the defense's only victory, did agree not to require the witness secrecy oath.

Six days later, after the subpoenaed witnesses appeared, prosecutor Donohue was back in the press.

"The investigation is ended. There will be no more indictments," Donohue told the *Chronicle*. Then he added, perhaps without thinking, a comment that totally corroborated the defense charge that the post-Bridges, indictment grand jury activity was all a ruse to build the case against Bridges.

"Today's session," Donohue said in wrapping up the grand jury's work, "was one of the more successful and the evidence conclusively establishes the allegations of the indictment."

Bridges' lawyers continued to challenge the validity of the indictments. They charged that the grand jury panel was unrepresentative. Over half of it was comprised of either businessmen, professionals or by their wives, hardly an understanding sounding board for a trade union leader whom the business leaders of San Francisco had spent the past 15 years villifying. The composition challenge, though, failed. The indictment held.

The case against Bridges went all the way to the United States Supreme Court, which smelled a politically motivated prosecution and threw it out. The ILWU, of course, was grateful that the Supreme Court, was able to see through the prosecutorial misconduct involved, but seeing through prosecutorial misconduct is the grand jury's job. If the grand jury had done its job, it would have saved the ILWU hundreds of thousands of dollars and countless hours that could have been better spent organizing to improve waterfront working conditions.

The unchanging grand jury

The state of American law has changed dramatically since 1949. Segregation is no longer legal. Rubber hoses are no longer a permissible police interrogational prop. Advances have been made seemingly everywhere—except the grand jury chamber.

It is safe to say that the grand jury system has not come a long way since the controversy that swirled around the 1949 grand jury that indicted Harry Bridges. Bridges is now nationally recognized as one of the giants of the 20th century American labor movement, but the grand jury procedures that placed him and the ILWU under such great strain a generation ago are still jeopardizing the security and liberty of trade unionists today. A look at the current status of the grand jury abuses that the Bridges case highlighted so well makes this point painfully clear.

Multiple jeopardy.—The Fifth Amendment to the Constitution states that no "person shall be subject for the same offense to be twice put in jeopardy of life and limb." The spirit of this provision was viciously violated when the government had Bridges indicted on charges that two previous Immigration bureaucracy proceedings had not been able to make stick.

That spirit was similarly violated between 1972 and 1975 when U.S. attorneys targeted three successive grand jury investigations against the striking East Coast bus drivers of United Transportation Union Local 1699. The stated rationale for each investigation differed, but the underlying purpose was always to prove UTU members guilty of something, anything. The government never did indict any UTU strikers, but its steady stream of subpoenas did sap union strength and morale. Local 1699's strike ended in defeat, and the striking workers all lost their jobs.[2]

Multiple grand juries on the same or related charges place their targets in "multiple jeopardy." H.R. 94's proposed Section 3330B(e)(3) which mandates that courts quash subpoenas when "the grand jury is inquiring into the same transaction or transactions . . . under consideration by another grand jury which failed to return an indictment based on such transaction . . . and there is no additional, newly discovered evidence relevant to such inquiry" should narrow the government's ability to "get" particular targets by focusing continual, draining grand jury probes against them.

The manipulation of grand juries by federal agents: In the 1949 Bridges case, Immigration Service agents approached ILWU members at their homes and workplaces and tried to trick or scare them into providing intelligence on fellow workers' political activities and testifying against their union president. When these ploys failed, the agents had the men subpoenaed before a grand jury,

[2] See "A bus strike with record mileage," *Business Week*, Aug. 17, 1974.

knowing full well that the men's reputations would be stained by the sensationalistic newspaper headlines that were sure to result.

In 1976, a federal grand jury indicted Alex Markley, an organizer for the United Electrical Workers (UE) and Antonio Suares of the International Brotherhood of Electrical Workers (IBEW) on explosives charges. The two had been involved in a peaceful and successful strike waged by UE Local 259 against a Springfield, Mass. company.

The indictment was based on the testimony of an Alcohol, Tobacco and Firearms Bureau (ATF) undercover agent, and immediately after it was returned, Markley and Suares were arrested and held incommunicado while ATF agents offered them a deal. If the two trade unionists agreed to spy on the local labor movement for ATF, the government would go easy on them.

In other words, the ATF agents had enlisted the grand jury as a partner in an intelligence-gathering scheme. The agents wanted a grand jury indictment which they could use—and did use—as a club to threaten Markley and Suares into becoming informers. The two indicted men refused the ATF offer, and the government didn't go easy on them. Earlier this year the two were convicted on the basis of the ATF undercover agent's testimony. Their conviction is now under appeal.

Stopping such manipulation of the grand jury by federal agents is a difficult legislative task to accomplish. Certainly, H.R. 94's proposed Section 3330B(d) which establishes grounds on which those subpoenaed can challenge "punitive" and "oppressive" subpoenas would help prevent federal agents from using subpoenas to harass witnesses who do not give government agents the answers they think they ought to get.

But the ultimate protection against the manipulation of grand jurors by federal agents, be they from Immigration, ATF or the FBI, is the integrity of the grand jurors themselves, a point we will discuss further below.

Leaking grand jury material to smear witnesses: Through the proceedings of the 1949 Bridges grand jury, prosecutors repeatedly made highly inflammatory and prejudicial statements about Bridges and other ILWU figures to the press. Such illegal prosecutorial leaks are still a grand jury fixture today.

The more notorious the case under grand jury investigation, the more devastating a prosecutorial leak can be. The Detroit federal grand jury investigation into the 1975 disappearance of Jimmy Hoffa is a case in point. To discover Hoffa's whereabouts, federal prosecutors adopted a strategy of subpoenaing anyone with the remotest of links to the case to the grand jury. Widespread publicity seemed to follow each subpoena. One New Jersey Teamster, Stephen Andretta, was subpoenaed to Detroit apparently after a New Jersey convict told the government that someone had told him that Andretta was involved. On the basis of this twice-removed hearsay, Andretta was ordered to Detroit, his name linked to the Hoffa case notoriety and his reputation forever stained. Andretta, it bears mentioning, has yet to be officially charged with any involvement whatsoever in the Hoffa case.

H.R. 94 makes violations of grand jury secrecy criminal offenses. As worded, Section 1512 could be invoked to penalize prosecutors who ruin people's good names with the unauthorized disclosure of grand jury material. In candor, however, we are not very optimistic that this section will be any more effective in curbing prosecutorial leaks than the court's existing contempt remedy.

From our experience, moreover, we fear that prosecutors might invoke these secrecy penalties to improperly harass witnesses or their counsel. As noted in the Bridges case, the prosecution improperly forced grand jury witnesses to take an oath of secrecy, then threatened ILWU Lawyers with prosecution when they attempted to uncover what the government was trying to hide.

We do not oppose the H.R. 94 secrecy provision, but we feel that if it is enacted, Congress should closely monitor its actual application.

Use of the grand jury to collect evidence against a person already indicted: The subpoenas served on ILWU members after Harry Bridges was indicted 28 years ago were, as the government subsequently admitted, intended to gather further evidence against the ILWU president. This abuse is one of the few unsavory grand jury practices that federal courts have moved to prevent. Several court cases over recent decades have affirmed that collecting evidence for the trial of a person already under indictment is not a proper grand jury activity. H.R. 94's Section 3330B(d)(1)(A) would codify these rulings.

Lack of notice on subpoenas: Back in 1949 ILWU lawyers noted that they could not represent their subpoenaed clients' interests adequately when the sub-

poenas did not notify them of the crime under investigation. The subpoena situation hasn't changed an iota.

Not only is the 1977 grand jury witness not told why he or she has been subpoenaed, but he or she is frequently not even given enough time to find counsel. We totally support the provision of H.R. 3330B(b) that lists the information each subpoena must carry. We are concerned, however, about a possible loophole in the protection offered by (a) of this same section. Under this paragraph (a), a subpoenaed witness' right to seven days between the service of the subpoena and the scheduled grand jury appearance could be lifted by the court upon a showing of special need by the government. There must be an inviolate minimum time between the service of a subpoena and its return date. Subpoenas that demand a witness' immediate appearance effectively deny a witness of most all the other grand jury rights guaranteed by H.R. 94. Three days should be the absolute minimum.

Access to transcripts: In the 1949 Bridges case, ILWU lawyers were unable to prove their contention that improper questions were being asked inside the grand jury chamber because the court would not give witnesses transcripts of their testimony.

H.R. 94's Section 3334 would enable witnesses to see copies of their own testimony and also gives indicted defendants the right to all relevant material that was presented to the grand jury. Both these provisions, combined with the requirement of Section 3333 that "all grand jury proceedings" be recorded should discourage badgering and harrassive prosecutorial interrogations.

Composition of grand juries: The law surrounding the selection of federal grand juries has become considerably more democratic since 1949 when Harry Bridges, outspoken advocate of workers' rights, faced a grand jury composed predominantly of people who hadn't the slightest idea of what Bridges had spent his life fighting for. Yet working people are still systematically underrepresented on grand jury panels, largely because grand juror service does not accommodate the needs of working people.

The standard grand juror fee, for instance, is $20 per day. For a person with a comfortable income, the loss of income grand jury service will mean is at worst an inconvenience. For an average working person strapped with bills, the difference between a regular day's wage and the daily grand juror fee can mean a family financial crisis. Grand jurors forced to worry about the money they are not earning by serving on grand juries are grand jurors who will frequently be absent and who, when they do appear, will feel pressured to get the grand jury's business over with quickly. This is not, needless to say, the atmosphere we want to be fostering inside the grand jury chamber.

Working people who serve on grand juries also have something else to worry about: their jobs. Amidst the hullabaloo over the great civic achievement of the Watergate grand jurors, little notice was paid to the fact that one of those grand jurors lost her job because of her long grand jury service.

None of the omnibus grand jury reform bills before this Congress address the question of grand jury composition, although there have been bills in past Congresses that called for higher fees and juror job security guarantees. The ILWU would certainly not want Congress to hold its consideration of other valuable pending reforms before it considers the composition question, but we do believe that improving grand jury representation is an integral aspect of grand jury renewal.

We would propose, as a first step towards broadening grand juror composition, that this subcommittee undertake a major survey of federal grand juror composition. If this study finds, as we feel it will, a systematic underrepresentation of working class people, the need for remedial steps will be obvious.

Trumped-up indictments: Indicting individuals on flimsy evidence has been the classic form of grand jury abuse—and the most ironic. If the authors of the Bill or Rights had one particular abuse in mind when they wrote the grand jury into the Constitution, it was their fear that, without a grand jury check, prosecutors would unjustifiably force people to stand through the ordeal of a trial.

In the hysterical climate of the early Cold War, the government had little trouble indicting Harry Bridges. Our political climate is more rational today, but behind the grand jury's closed doors, trumped-up indictments are still commonplace.

In 1969, for example, the Justice Department took a 36-year-old anti-racketeering law designed to combat extortion schemes by bogus trade unionists and

began to apply it against workers in legitimate strike situations. In at least five different strike situations over the next three years, strikers were indicted for violations of the Hobbs "Anti-Racketeering" Act. In one incredible instance, a strike by New York Fur, Leather and Machine Union workers who had struck a dry cleaning company that fired all its workers who signed union cards was described as a "conspiracy to extort a labor union contract," and seven trade unionists involved in the strike were indicted for extortion.

Congress had never intended strikes for legitimate union objectives like better wages and working conditions to be considered "extortion," and the courts dismissed the Nixon Administration's Hobbs Act prosecutions one by one. If the Justice Department's strained Hobbs Act interpretation were allowed to stand, wrote Supreme Court Justice Potter Stewart in 1973, then "the worker who threw a punch on the picket line, or the striker who deflated the tires of his employer's truck would be subjected to a Hobbs Act prosecution and the possibility of 20-years imprisonment and a $110,000 fine." [3]

But the court dismissals did not erase the newspaper headlines that screamed "extortion" and "racketeering" when the indictments were originally returned against the innocent trade unionists. Nor did the dismissals compensate the individuals involved for the anguish the indictments meant for their families.

Another example of trumped-up indictments—post-Nixon—is the case of *The Washington Post* pressmen, members of the International Printing and Graphic Communications Workers Local 6. In October, 1975, the District of Columbia's U.S. Attorney's office began a grand jury investigation into allegations made by the management of *The Washington Post* that its pressmen had "destroyed" the Post pressroom when they walked out on strike October 1. In July, 1976, after a long, drawn-out grand jury investigation, the D.C. U.S. Attorney's office had 15 strikers indicted on a variety of very serious felony charges, ranging from rioting to grand larceny to assault with a dangerous weapon. The charges carried a total of 268 potential years in jail. Newscasts blared the news of the indictments, and the *Post* management, which had already used the strikers' alleged criminal activity as a justification for hiring permanent non-union replacements to take their strikers' jobs, had seemingly been officially vindicated.

Nine months later, however, the government, rather than go to trial on the heavy felony charges against the 15 strikers, dropped *every single* felony charge pending and accepted pressmen guilty pleas of a handful of minor misdemeanors, many of which were for disorderly conduct.

If the government's case were so weak that prosecutors were willing to drop all felony indictments against the pressmen in exchange for misdemeanors that carried not one-twentieth of the potential jail time, then the strikers should never have been indicted on the felony charges to begin with. Because of the government's grand jury gamesmanship, the 15 strikers, their wives and children lived day and night for the nine months following the indictments with the prospect of lengthy jail terms hanging over their heads.

The only indictments that should be returned are those that the government is prepared to prove in a court of law. Neither a subsequent jury acquittal nor the dropping of an indictment by the government itself can undo all the harm caused by a trumped-up indictment.

Once reform that would make some prosecutors think twice before asking a grand jury to return an indictment the evidence doesn't warant is H.R. 94's Section 3368. This assures an accused of the right to a preliminary hearing even after an indictment has been returned. At this open courtroom hearing, the government would have to convince a judge, with normal rules of evidence in effect, that there is sufficient reason to make the accused stand trial. This preliminary hearing provision could result in the effective dismissal of many unfair indictments.

But its passage would still allow unfair indictments to be returned, and that is a situation that a society dedicated to due process cannot condone. Our only ultimate protection against the return of unfounded indictments is the grand juror panel. Informed, serious-minded, independent-thinking grand jurors are essential to the constitutional viability of the grand jury.

No reasonable person could quarrel with this last observation, yet we have a grand jury system that encourages the existence of confused, day-dreaming,

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[3] *U.S. v. Enmons*, 410 U.S. 396.

rubber-stamping grand jurors. In fact, inside the grand jury chamber, prosecutors are free to mislead jurors by introducing hearsay, concealing relevant evidence and making irrelevant, prejudicial asides.

H.R. 94 takes several steps towards remeyding this pathetic situation. First, Section 3329 stipulates that courts must rigorously inform incoming grand jurors of their duties, rights and responsibilities. This is essential. Few citizens realize that the grand jury is supposed to shield the innocent against unwarranted government prosecution.

But even the most eloquent charge by an impaneling judge will not make average citizens into Bill of Rights tigers. It is one thing for average citizens to be told that their task is to shield individuals from manipulative prosecutors, quite another for grand jurors to actually do the shielding. Modern prosecutors are very sophisticated, and those who turn this sophistication to improper ends do not stop and give grand jurors advance warning of their intentions. Their manipulations can be subtle, and grand jurors, no matter how brilliantly charged by a sensitive judge, will seldom be equipped to see past the subtleties.

Grand jurors need to be trained, not just charged. They need to understand the elements of prosecutorial misconduct and how abuses can be prevented. Such training should be provided by independent attorneys, perhaps local bar association representatives selected by the court. These independent attorneys could give grand jurors a better sense of the job that needs to be done and the confidence necessary to do it.

There are other protections society can, and H.R. 94 does, give grand jurors. Prosecutors, under Section 3329(c), would be obligated to give grand jurors all exculpatory evidence in their possession. Prosecutors, under Section 3329(e), would not be allowed to bring a case a first grand jury has no-billed before a second grand jury unless new evidence is unearthed. Most importantly, prosecutors who attempt to bulldoze grand jurors are liable to be "fired." By asking their supervising judge to appoint an independent special prosecutor under Section 3330, grand jurors would be able to remove misbehaving prosecutors.

These three H.R. 94 provisions can be described with one phrase: common sense. Arguing against the prosecutorial disclosure of exculpatory evidence means arguing for keeping grand jurors in the dark about relevant evidence. Arguing against a ban on grand jury "forum-shopping" means arguing for subjecting an accused to continual legal harassment even though a panel of his or her peers—the grand jury—has already decided that the government has no case. Arguing against the grand jury option of having an obstructive prosecutor removed means arguing for the option of prosecutors obstructing the grand jury's search for truth.

Other reforms, however, are also needed.

Under current rules, the grand jury is a dumping ground for evidence. Prosecutors can use evidence in the grand jury room that they couldn't use either before a judge at a preliminary hearing or before a trial jury in an open court of law. There seems to be a double-standard in operation here. Don't grand jurors deserve the same "clean" evidence that judges and trial juries must be given?

Even a little improper evidence can go a long (and wrong) way inside the grand jury chamber. For instance, a prosecutor's off-hand presentation of some unsubstantiated hearsay evidence against an accused may prejudice the grand jurors and turn the tide in favor of a true bill that would not otherwise have been returned. Improper evidence is improper inside the grand jury and out, and the only way to insure its absence in the grand jury process is to have courts dismiss indictments tainted by such "dirty" evidence. If the government feels that it has a legitimate need to use evidence ordinarily inadmissible at the trial stage, such as hearsay summaries, it should first be necessary to get court permision.

These evidentiary reforms, which are included in H.R. 3736, will serve notice to prosecutors that grand jury proceedings are every bit as crucial to justice as trials.

Another reform that would advance the same ends is the requirement that prosecutors obtain explicit grand juror approval before they issue subpoenas, begin contempt proceedings or offer immunity in the grand jury's name. Mandating grand juror votes on such issues would encourage grand jurors to pay closer attention to grand jury proceedings and remind them that it is they, not prosecutors, who have responsibility over what takes place inside the grand jury chamber. By forcing grand jurors to take a more active role in grand jury decision-making, as proposed by H.R. 3736, we foster independent and responsible grand juror conduct.

Given the 100-year history of trumped-up indictments against trade unionists, future politically motivated prosecutions appear an unavoidable prospect. What we can avoid, however, is the grand jury's status as a rubber-stamping panel that will accept anything the prosecutor brings before it, no questions asked. By giving grand jurors the tools with which they can act independently, by introducing some standards of fairplay inside the grand jury room, we believe the grand jury can stop malicious prosecutions.

The intimidation of defense counsel.—When ILWU attorneys tried to expose prosecutorial misconduct in the Bridges, case, the government threatened them with witness tampering charges.

Pressure on grand jury defense attorneys, if anything, seems to have increased since then. Over the last two years, the cry of "multiple representation" has grown into an extremely popular prosecutorial cover for the intimidation of defense lawyers.

Multiple representation is common in labor cases. One attorney, paid by union funds, will represent or advise several union members. There can be, admittedly, problems in mutliple representation situations. For this reason clients have to understand the potential conflicts that may arise and give their informed consent. Once this informed consent has been given, however, once the client has decided that he or she wants to be represented by a particular attorney, then the defense relationship is a proper one.

In some past multiple representation cases, prosecutors have made objections to the multiple representation involved on good faith grounds. But in others, it is clear that the government is objecting not because it is sincerely concerned about the witness(es)' best interests, but because the government doesn't like the entirely legal advice counsel may be providing.

The most dismal example of this is the *Post* pressmen case already mentioned above. At the beginning of the nine-month grand jury investigation into the pressmen strike, 19 pressmen called before the grand jury invoked the Fifth Amendment. The government charged that the one attorney advising the 19 witnesses was helping to keep criminals at large and demanded that he be dismissed from his multiple representation. The government made no effort to hide its hope that the witnesses' new attorneys would advise their clients not to invoke the Fifth.

The prosecution's attempt to purge the pressmen lawyer did not make it past the Court of Appeals, which overturned a lower court ruling favorable to the government on narrow, procedural grounds. But while the government was not able to force the pressmen attorney off the case, its pressure on that counsel did produce the desired result. The pressmen witnesses did testify, a move that turned out not to be in their best interests at all. As a result of the testimony from them and the pressmen witnesses who followed them into the grand jury chamber, the government was able to fashion the trumped-up felony indictments already discussed above.

The interests of the government and an attorney's client do not necessarily coincide in our adversarial system of justice, and we feel that the record in this and other cases demonstrates that the government will not hesitate to force certain witness behavior by pressing a witness' counsel.

That is why we are especially apprehensive about one particular clause in H.R. 94 that, in our view, would give prosecutors still another means to intimidate hard, but clean-fighting defense attorneys. That clause, part of Section 3330A which gives grand jury witnesses the right to counsel inside the grand jury room, a reform we support wholeheartedly, gives the court the power to "remove" attorneys who "unduly" delay or impede grand jury proceedings.

We see nothing but mischief arising from this provision. We see prosecutors clamoring for the dismissal of defense attorneys on the shakiest of grounds, and we see judges, many of whom are former prosecutors and not particularly sensitive to the problems of defense representation, readily acceding to their requests. We see, in short, a cowed defense bar.

Courts already have the power to find unruly defense attorneys in contempt. It has been said by some that this contempt power is rarely used and thus an ineffective deterrent. ILWU lawyers would certainly be surprised to hear this. Two of them spent six months in jail for contempt around the Bridges case. Their offense was too strenuously fighting the government's attempted railroad of Harry Bridges. If courts have the power to punish defense attorneys who challenge government misbehavior, then certainly there is nothing to stop them from punishing defense attorneys for defense misbehavior.

Use of the grand jury to break worker solidarity: The right to strike is a fundamental freedom. Where workers are not free to struggle effectively for decent working conditions, then "freedom" exists only for those who can afford it.

Our basic democratic freedoms depend, in the end, on relationships of trust. Freedom of the press, for instance, demands a trust between reporter and source, and that is why journalists so preciously guard the confidentiality of their work. Similarly, the trust between attorney and client is a fundamental building block of the right to a fair trial. The corresponding trust behind the right to strike is the trust between individual workers. In the labor movement, we call this trust "solidarity."

When workers don't trust each other, the united action that a strike requires is impossible. Once this trust is broken, a strike is lost. This is a truism of labor relations, the reason why anti-labor employers are always on the look-out for ways and means with which they can divide their workers against themselves.

When it comes to dividing workers against themselves—union-busting, if you will—a grand jury dominated by a labor-baiting prosecutor has few peers, a fact of life the ILWU learned in the Bridges case. After Bridges was indicted in 1949, prosecutors tried to split ILWU ranks by subpoenaing members before the grand jury, then implying that their testimony had betrayed their fellow trade unionists. Actually, the prosecutors didn't have to leak material to the press to raise suspicions about the subpoenaed workers. Just by grilling them behind the grand jury's closed doors, the government had created mistrust in union ranks. Had the subpoenaed unionist told the truth or lied to save his own skin? His fellow workers could never know for sure.

The Washington Post pressmen strike presents a vivid, recent example of the same grand jury danger.

Right from the start of the government's grand jury investigation of the alleged October 1, 1975 pressroom "destruction," the striking pressmen had charged that the Post was greatly exaggerating some minor damage in order to divert public attention from the unfair management labor practices, such as training strike-breakers to take over pressmen jobs, that had provoked the strike—and its accompanying bitterness—in the first place. The government totally ignored the pressmen charges.

"As was only proper," the U.S. Attorney responsible for the investigation, Earl Silbert, recently explained, the grand jury during this investigation restricted its investigation to the damage and destruction at the Washington Post. It did not, because it would have been improper to do so, investigate or pry into any labor dispute that was existing between the Washington Post and the members of the Union."

Instead, federal prosecutors spent the first nine months of the strike calling 88 pressmen before the grand jury, some for multiple appearances. How much of their testimony the government actually needed was doubtful. The Post management had earlier supplied the government with numerous identifications of those the post alleged to be responsible. What the subpoenas did do was place the striking pressmen in a cruel, double-bind situation. Answering the prosecution's questions inside the grand jury chamber would mean cooperating with an investigation they saw as loaded against them. Their words could be twisted and manipulated to indict their fellow workers or even themselves.

The answer to the subpoenaed pressmen's dilemma used to be an invocation of the Fifth Amendment. But today, unlike 1949, the Fifth Amendment protection no longer effectively exists. It has been "immunized" away.

Under the current "use" immunity, witnesses can be ordered to answer the questions the government wants answered or be held in contempt and jailed if they refuse. In strike situations like the pressmen's, immunity forces workers to choose between breaking the solidarity of their strike by answering questions behind the grand jury's closed doors or going to jail.

This emasculation of the Fifth Amendment protection is a particularly crushing blow against the right to strike. While journalists can cite reporters' privilege, defense lawyers the attorney-client privilege and clergy the priest-penitent privilege, "union solidarity" is not a legally recognized privilege.

Nor should it be. Workers don't want to be treated as a special case. Workers just want the right all Americans had when the Bill of Rights was adopted: the right to remain silent. Strikers who are forced to testify and thus cripple the solidarity of their strike are, to paraphrase the Fifth Amendment, bearing witness against themselves in a most basic way.

In our eyes, the dubious benefits of involuntary, forced immunity are far outweighed by its dangers. We support the provisions of H.R. 844 and H.R. 3736 that would make immunity conditional upon the consent of the witness to be immunized.

CONCLUSION

Last week's distressing Supreme Court rulings in the *Washington* and *Wong* cases make it plain once again that if we are to have grand jury reform, the Congress must take the initiative.

Fortunately, there is no shortage of reform proposals pending. But how should these reforms be judged? We feel strongly that every reform proposal must be measured against a yardstick that takes the grand jury's Bill of Rights mandate seriously. Will a particular change help grand jurors reach a fair judgment free from government manipulation? Will a proposed change reduce the likelihood of prosecutorial misconduct? These are the first questions the Congress should ask about the many reform proposals now before it.

Some have no patience for these questions. They look at reforms designed to curb prosecutorial misconduct, and all they can see are procedural loopholes through which all sorts of organized criminals will squirm.

No group is more concerned about organized crime than ours.—Few groups have done more to fight organized crime than ours has. Forty-three years ago we drove the mob off the West Coast waterfront, and it hasn't been back since. But we know that you don't fight organized crime by ignoring the Constitution and giving the government a blank check to operate as it pleases. We know that when those in positions of official authority are given unaccountable power, the kind of power that prosecutorial control over the modern grand jury provides, the crimes these officials can commit in the name of justice are "organized," too, and no less threatening to a free society than the exploits of organized crime.

We know this because over the past generation, we have seen federal prosecutors turn grand juries into fearsome anti-labor weapons. Strikebreaking is no longer just the province of employer-hired goons, provocateurs and spies or injunction-happy magistrates. In fact, for a trade unionist subpoenaed by a U.S. attorney, the grand jury chamber may as well be a corporate boardroom.

The situation demands reform, and the ILWU, with the reservations and additions we have noted above, supports H.R. 94 and its goal of a dynamic, fair-minded grand jury system.

Mr. TOBIN. Thank you, Mr. Chairman.

We appreciate your efforts in this whole area of grand jury reform. We think they will make a major contribution to the strengthening of the Constitution and the Bill of Rights.

Our union represents 60,000 workers in five States on the Pacific coast. We also represent sugar workers and pineapple workers in Hawaii and a variety of other workers in the State of Hawaii.

Today I am submitting for the record a fairly detailed analysis of a grand jury horror story from our own union's past, to get the grand jury back on its proper course.

It is impossible to read through texts on labor history without tripping over accounts of criminal trials that never should have taken place, cases where antilabor prosecutors were able to convince grand juries to indict union militants on flimsy, manufactured, just plain irrelevant evidence.

Fortunately, the manipulation of the grand jury process against labor is not confined to history books, as many workers from many different parts of the country have disclosed over recent years.

One need not look any further than Washington, D.C. for example.

On October 1, 1975, the printing pressmen of the Washington Post went on strike. Management quickly charged the strikers with having destroyed its presses and, indeed, the U.S. attorney's office

almost immediately began a grand jury investigation of the incident. The investigation lasted 9 months. It completely ignored exculpatory material the pressmen offered to introduce and ended by indicting 15 strikers on very serious felony charges, carrying a potential of 268 years in jail.

The union charged the indictments were deliberate exaggerations of some minor pressroom damage. The government denied that, but 9 months later, just past April, the Government dropped every single felony indictment pending against the strikers in return for pressmen's pleas on minor misdemeanors like disorderly conduct.

If the Government's case against the pressmen strikers was so weak that the prosecutor was willing to drop all pending felony counts rather than go to trial and try to prove them, then the felony indictments never should have been returned in the first place.

The 15 strikers and their families had to live days and nights for the 9 months following the indictments with the prospect of lengthy jail terms hanging over their heads. It is because of instances like these that more and more working people see the grand jury chamber as nothing more than an extension of the corporate board room and a place ready to give workers a raw deal.

The ILWU feels that H.R. 94, the Grand Jury Reform Act of 1977, will make a major contribution toward ending the grand jury abuses so evident today.

We do feel, however, that certain changes in the H.R. 94 are in order.

The most basic is the addition of a clause to the bill's immunity section making all grants of immunity dependent on the consent of the witness to be immutized.

The current involuntary, forced immunity means workers subpenaed before the grand jury can be forced to choose between becoming an informer in the eyes of their fellow workers and themselves, or going to jail for contempt. This is the kind of choice that American citizens should not have to make.

There are some clauses in H.R. 94 that we feel should be deleted.

While H.R. 94 allows a witness to bring counsel into the grand jury chamber, a reform we endorse enthusiastically, it also severely limits this right to counsel. For instance, an attorney would not be allowed to address the grand jury under H.R. 94. We feel this absolute prohibition against attorney participation is extremely unwise. Lay people may not always be able to express themselves clearly to a panel of grand jurors. If the grand jurors want a clarification of what a witness is trying to say, they should be able to ask the witness' attorney for one.

Thus, we are for allowing a witness' attorney to address the grand jury upon the grand jury's approval.

Another clause in H.R. 94 disturbs us even more. This section gives to the court the power to remove defense attorneys who unduly delay or impede grand jury proceedings. We fear that these very vague words would be invoked to punish defense attorneys who aggressively defend the interests of their clients. This clause should be deleted totally.

If defense attorneys misbehave, let the courts find them in contempt. That is deterrent enough.

One final point. Those who speak against grand jury reform, against the sort of procedural changes included in H.R. 94, usually cite organized crime as a justification. They look at reforms assigned to curb prosecutorial misconduct, and all they can see are procedural loopholes through which all sorts of organized criminals will escape. No group is more concerned about organized crime than ours. Few groups have done more to fight organized crime than ours has; 43 years ago we drove the mob off the west coast waterfront, and it hasn't been seen since. We know that you don't fight organized crime by ignoring the Constitution and giving prosecutors a blank check to operate as they please. We know that when those in positions of official authority are given unaccountable power, the kind of power that prosecutorial control over the modern grand jury brings, the crimes that these officials can commit in the name of justice are organized, too, and no less threatening to a free society than the exploits of organized crime.

The grand jury situation demands reform, and the ILWU, with the additions and deletions noted earlier in our written testimony, support H.R. 94 and its goal of a dynamic, fairminded grand jury system.

Once again, we would like to thank you, Mr. Chairman, for providing us with this forum, and I will try to answer whatever questions anyone has.

Mr. EILBERG. We thank you for the trouble you have gone to in preparing the summary statement, and your longer statement will be made part of the record, without objection.

Mr. TOBIN. Thank you.

I have one other document I would like to submit, and I didn't bring it with me. Our convention, recently held in Seattle, in April, adopted a resolution on grand jury reform, and I would like to be able, if I could, to submit that later for the record.

Mr. EILBERG. Indeed, by all means, let us have it.

[The following information was submitted for the record:]

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, 22D BIENNIAL CONVENTION, SEATTLE, WASH., APRIL 18-22, 1977

STATEMENT OF POLICY ON GRAND JURY REFORM

The grand jury system, according to the framers of the U.S. Bill of Rights in 1791, was intended to serve as the people's watchdog to make sure that prosecutors didn't bring people to trial on flimsy charges. Nearly two hundred years later that intent has given way to a system whereby the fundamental rights of Americans can be and are routinely flaunted by federal and state grand juries.

Grand juries are used as a vehicle to harass trade unions and break the solidarity which is basic to successful strike action. By manipulating grand juries, prosecutors have forced strikers to stand trial on trumped up charges, to discredit labor leaders, and routinely ignore the breaking of laws by management.

Grand juries now facilitate the very overzealous and politically motivated prosecutorial conduct they were intended to prevent. Prosecutors can subpoena anyone at any time, and don't have to give a reason why. They can interrogate subpoenaed witnesses on virtually anything they choose, and such witnesses don't have the right to have counsel present. Witnesses are subject to an array of intimidating tactics, including being jailed indefinitely without ever having been charged, tried, or convicted of a crime.

Justice Department prosecutors and FBI agents have in recent years used federal grand juries to force political activists to testify about private rela-

tionships, attorneys about their clients, reporters about their sources, and strikers about their unions.

There are a number of bills now in Congress to curb the most reckless abuses of the grand jury system. We support those legislative efforts designed to restore citizen control and governmental accountability in the grand jury system. We urge the prompt passage of comprehensive grand jury reform legislation.

We join with groups like the American Civil Liberties Union, the National Lawyers Guild, the Southern Christian Leadership Conference, the American Friends Service Committee, the Meat Cutters Union and the National Organization for Women in supporting the efforts of the Coalition to End Grand Jury Abuses, which since 1973 has worked to break the grip which prosecutors have over the grand jury process.

Mr. TOBIN. Thank you.

Mr. EILBERG. Just a couple of questions at this time, because of the time pressures we are both under.

One of the arguments made against allowing counsel in the grand jury room is that it would destroy the investigatory power of the jury in cases where counsel represents more than one witness or organization, such as a union and a witness.

Does the union ever pay for counsel for grand jury witnesses?

Mr. TOBIN. In the ILWU, the union pays attorneys' fees upon membership approval. The person to be represented always has the right to choose his attorney.

Our feelings is, every grand jury witness should have the right to have the attorney present during interrogation. We have a recent case of a man in San Francisco who was a dispatcher in local 10, the longshore local. The man was black, and two witnesses said that he had tried to extort money from them. He was dragged before the grand jury. His counsel could not enter with him, and he was finally charged with perjury by the grand jury. He is now spending a year in jail, yet he was never tried or convicted on the extortion accusation that brought him before the grand jury in the first place, to us, this sort of case makes it obvious that witnesses need assistance in the grand jury room. We don't think that allowing counsel inside in any way hampers the proper investigatory power of the grand jury.

Mr. EILBERG. Do you believe that such a payment for counsel interferes at all with the investigatory power of the jury or limits a witness's freedom to testify?

Mr. TOBIN. The witness would have the right to decide whether he wants the same counsel as, say, several other people. If he doesn't, he should then have the choice of another attorney. If he wants an attorney in the grand jury room, we believe he should have the right to have one. If he doesn't that is also his choice.

Mr. EILBERG. I take it there are no bad marks given to that witness who refuses union counsel.

In other words, there are no recriminations of any sort?

Mr. TOBIN. Our union has never forced an attorney on anyone. When it comes to the grand jury, the prosecutors are the ones who do the forcing.

Mr. EILBERG. You indicate that compulsory immunity does not, in fact, secure any evidence that consensual immunity does, and it has marginal efficiency.

Obviously, many judges and prosecutors disagree.

What evidence do you have on the ineffectiveness of immunity to secure evidence?

Mr. TOBIN. We believe that, first of all, the fifth amendment guarantees a man the right to remain silent. We believe that right should not be interfered with by legislation, judges, grand juries, or anyone else. If a witness says he does not want to tesify, he should have the right not to testify.

Mr. EILBERG. You say it is ineffective anyway.

Mr. TOBIN. Yes; I think "forced" immunity has been ineffective. I am not that familiar with evidence of its effectiveness. I know of no organized crime witness, the type of witness the present immunity law was designed to be effective against, who was immunized against his will and then testified.

Mr. EILBERG. We have been told in many cases involving organized crime, or nonpolitical prosecutions, like bank robbery, valuable evidence has been obtained.

Do you believe there are any types of crimes or circumstances that would justify the use of coerced testimony, assuming the transactional immunity is restored?

Mr. TOBIN. We are for the prosecution of criminals and crime. Our members are probably more victim of it than any other group in society. But we feel that those rights guaranteed by the Constitution should not be tampered with in an effort to get evidence. Where valuable evidence has been obtained with immunity it has been obtained because the witness wanted immunity from prosecution. In other words, the immunity used in these cases was consensual.

We believe the proper investigation by responsible U.S. attorneys or others should be able to find enough evidence in criminal cases without abusing the fifth amendment right of the Constitution.

Mr. EILBERG. Mr. Tobin, thank you very much. We appreciate your attendance.

Mr. TOBIN. Thank you very much.

Mr. EILBERG. Before I introduce our final witness, I am aware there is at least one person in the audience who would like to have something placed in the record. Any others that may want to supplement their statements that have already been made, or have contributions to put in the record, our counsel would be glad to review any such statements for possible inclusion in the record.

Our last, but not least witness, is Mr. William Thompson of the National Council of the Churches, New York, N.Y.

We welcome you, and we apologize for keeping you waiting so long.

TESTIMONY OF WILLIAM P. THOMPSON, PRESIDENT, NATIONAL COUNCIL OF CHURCHES, NEW YORK, N.Y.; ACCOMPANIED BY DEAN KELLEY, EXECUTIVE FOR RELIGIOUS AND CIVIL LIBERTIES, NATIONAL COUNCIL OF CHURCHES

Mr. THOMPSON. Thank you very much, Mr. Chairman.

I shall just very briefly summarize my testimony orally.

Mr. EILBERG. Without objection, your statement will be made part of the record, and would you be good enough to summarize it.

Mr. THOMPSON. I am happy to do that.

[The prepared statement with attachments of Mr. Thompson follows:]

STATEMENT OF WILLIAM P. THOMPSON, PRESIDENT, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.

My name is William P. Thompson. I am the President of the National Council of the Churches of Christ in the U.S.A., a cooperative agency of thirty national religious bodies of the Protestant, Anglican, and Eastern Orthodox traditions in the United States, aggregating over 40,000,000 members.

I do not purport to speak for all of those denominations or for each of their members, but for the Governing Board of the National Council of Churches, a representative body of 250 members selected by the member denominations to determine policy for their ecumenical work together, including the expression of ethical and moral concern on matters of public importance such as reform of the grand jury system.

I am also the Stated Clerk of the General Assembly of the United Presbyterian Church in the U.S.A., a member denomination of the National Council of Churches with 2,660,000 members in the United States. "Stated Clerk" is the venerable title my denomination uses for the chief executive officer of its highest governing body, and I have held that position for eleven years.

Prior to that time, I practiced law for more than twenty years, including active service in the United States Army during and after World War II in the course of which I served on a number of courts-martial and also as an Assistant Prosecutor of the major Japanese war criminals including General Hideki Tojo. Thus I have some sense of the prosecutor's responsibilities and the difficulties of fulfilling them without violating the rights of persons.

Since my years in law school, now more than thirty-five years ago, I have had the personal conviction that the grand jury should be abolished in this country as it has been in England where it originated because it is so readily subject to abuse by overzealous prosecutors. I consider the filing by the prosecutor of an information containing the charges, which it then becomes his duty to prove, to be a far more responsible model and one far less fraught with potential for abuse. The method of preliminary hearing in open court under the regular rules of evidence, with counsel for defendants present, and enjoying the right to cross-examine witnesses and to present evidence for the defense—as already provided in a number of states—seems to me a better and fairer way to determine whether or not a citizen should stand trial.

But that is not the view I am here to present. The Governing Board of the National Council of Churches did not reach the issue of whether the grand jury should be completely abolished or simply reformed. It addressed itself rather to the principles that should guide the operation of the grand jury system we now have, a system mandated in the Fifth Amendment of the Bill of Rights, but over which the Congress has wide latitude for modification as to composition and procedure.

Some observers may wonder why the churches should express concern with what to those observers may seem to be legal technicalities in which most church representatives probably have little training or expertise. In my view, the way our system of justice functions—or malfunctions—is of deep concern to every citizen. It is of particular concern to Christians who have been instructed to identify with the poor and oppressed, those most often charged with offenses. The law is too important a part of our lives to be left solely to practitioners of law. It is a matter in which everyone properly has an interest, and one not to be pursued solely by persons acting in dispersion as individuals, but by organizations through which a number of individuals can focus and express that interest. Such organizations include, where appropriate, their churches and cooperating associations of churches.

The churches have a history of deep concern for justice, a history far longer than the history of this country, going back to the days when Jesus Christ fell afoul of the law—or at least of the authorities who purported to administer the law—and died upon a cross as the result of a gross miscarriage of justice, in which the authorities did not even follow their own canons of proper procedure. In subsequent centuries, thousands of Christians were imprisoned, exiled, or executed by Roman imperial authorities, often without benefit of the "due process of law" which Rome even then had developed to a high degree.

Later on, history records impartially that church leaders not only advanced human understanding of justice, but also on occasion perverted it. But in every era there have been church leaders who sought to improve and extend the

administration of justice and to minister to and seek redress for, the victims of justice.

In these latter days, a broader understanding of justice has taken shape under the rubric of "human rights"—the ideal of "certain inalienable rights" with which all persons are "endowed by their creator," and which governments cannot give or take away, but are called to respect and effectuate. The Universal Declaration of Human Rights was adopted in 1948 by the United Nations "as a common standard of achievement for all people and all nations."

In 1963, the General Assembly of the National Council of Churches adopted a policy statement on human rights, which in some respects is even broader than the Universal Declaration, particularly in spelling out the basic rights to "due process of law" to which all persons are entitled.

A few weeks ago—on May 5, 1977, the Governing Board of the National Council of the Churches of Christ, meeting in Cincinnati, adopted a "Resolution on Grand Jury Abuse" in which the Board urged application of the principle of due process to the operation of the grand jury. Thus the Board rejected the contention that "due process of law" does not apply in the grand jury room—supposedly before jeopardy attaches. Rather, the Board responded to the contention that important rights can be and often have been lost, even at this "preliminary" stage. "Due process of law" is designed to protect the rights of persons, and where persons can lose those rights—at any stage—it should be possible for the aggrieved person to invoke "due process."

Where the proceedings of the grand jury (all too often) do not seem to be preliminary to subsequent indictment and prosecution but rather an end in themselves—that is, a "fishing expedition" carried on by the prosecutor apparently to harass and intimidate dissidents or to obtain evidence usable against persons may be impaired. Some spend months in prison for civil contempt without ever being charged with a crime, others have their lives disrupted or their reputations impaired by "leaks" to the press from prosecutors' offices—the very opposite of what the grand jury was supposedly designed to accomplish, namely the protection of citizens against whom the available evidence is inadequate to prosecute!

When these things happen, people are hurt. When people are hurt, the churches are concerned. Motivated by that deep concern for suffering human beings, the churches have a right, indeed many would insist, a duty to speak out, not necessarily to offer technical solutions but to call attention to unjust conditions and to the human suffering for which specialists can then perhaps find a suitable remedy. Ours is a moral and humane concern, not a technical one. For the reason, I shall not attempt to address some of the technical differences between the various bills before the subcommittee, but will try to express what I understand the Governing Board to propose in genuine reform of the grand jury system.

As the Governing Board sees the situation, the grand jury is an amalgam of two somewhat incompatible models: it is an adjunct of both the judicial and the executive branches, it has both accusatory and inquisitory functions, it both evaluates evidence and investigates. If Congress could separate these two models and adopt one or the other, much of the confusion would be eliminated. As the Governing Board says, "It is the Governing Board's firm conviction that the use of the grand jury's powers as an instrument of investigation in support of law enforcement rather than as an evaluator of evidence already gathered is a distortion of this quasi-judicial function.

The prosecutor is placed in a dual role where it is impossible to avoid a severe conflict of interest. He enters the grand jury room as an advocate, seeking to persuade the jurors that he has sufficient evidence to obtain an indictment. In order for the jury to evaluate the evidence, however, they must often obtain an explanation or interpretation of the law alledgedly violated. To obtain this, they turn to an arbiter—the same prosecutor who has presented the evidence! Conscientious and professional as he may be, he would need superhuman skill to do justice to both roles.

It would seem obvious common sense to separate these two essentially incompatible roles and to provide the grand jury with special counsel (perhaps comparable to the law officer in a court martial), whose role would be not to submit evidence or call and examine witnesses, but to assist the grand jury in understanding the law and applying it to the evidence brought before it by the prosecutor.

The grand jury would then more clearly be an arm of the judicial branch, and its powers would then not be as readily pressed into service for law enforce-

ment investigations, which is essentially an executive function. (This is not to say that grand juries do not have investigative powers, but such powers should be directed chiefly to matters which the ordinary law enforcement agencies are not well fitted to pursue—such as corruption within government itself—where the appointment of special counsel is often particularly necessary because of the political environment within which most prosecutors normally must operate.)

The most palpable and appalling abuses of the grand jury flow from this confusion of roles and models. Because of his dual function, the prosecutor often comes to think of himself as the proprietor and manager of the grand jury, and the grand jury often comes to think of the situation in the same way, since the prosecutor usually determines what cases they will consider, what witnesses they will hear, what laws they will apply. Increasingly, the prosecutor may be tempted to think in terms of "his" grand jury, of its powers as "his" powers, and to use it accordingly as more and more of a "rubber stamp" for what he wants to do.

From this "proprietorship" of the grand jury it is but a short step to a kind of general "monitorship" of the whole community, in which the prosecutor employs the powers of "his" grand jury—always in ostensible pursuit of heinous crimes such as bombings or bank-robberies—to comb through the dissident elements of the community, calling hundreds of witnesses before the grand jury whose only offense may be an affinity for unpopular ideas, whose only information of value to the prosecutor is more and more names for wider sweeps of the dragnet. By this device, in recent years some prosecutors have been seining the anti-war movement, the Black movement, the Vietnam Veterans Against the War, the Native American movement, the women's movement, and now it apears, the Puerto Rican and Chicano movements.

The Governing Board observed: The use of the grand jury's powers to harass and pursue political dissendent is a departure from its proper constitutional function, and is a great threat to public order, lawful government, and true domestic security.

Because two of the staff employees of one of its member denominations are now incarcerated for refusing to testify before a grand jury in New York City, the Governing Board has become keenly aware of the possible mis-use of the grand jury's powers, and urges that these powers be curbed, or rather re-directed to their proper use. It recommended: That churches and ecumenical agencies support legislation designed to enhance the rights to due process of law, freedom of association, effective legal counsel, the presumption of innocence, and the privilege against self-incrimination of persons subpoenaed to testify before grand juries.

It is ironic, even tragic, that dozens of persons have spent months in prison in the past few years—though accused of no crime, never having been tried, certainly not convicted—simply for refusing to aswer questions before a grand jury. It is precisely that type of punishment without due process of law that grand juries should prevent rather than perpetrate. The justification often given is that "the witnesses have the key to their own cells" . . . and have but to answer the prosecutor's questions to be released. Imprisonment is calculated to make reluctant witnesses tell what they know about a crime—assuming that they know something. Hardened criminals are usually not persuaded to talk by imprisonment; it is a mark of merit for them to suffer for their silence; indeed, if they were to divulge information to stay out of jail, they might well have much more to fear from their associates in crime than a few months in prison.

It is not the hardened criminals, nor even those with knowledge about crimes, who are the main victims of the modern grand jury, but often idealistic members of ethnic groups or dissident movements who for reasons of principle or loyalty refuse to name their associates—who in most instances have no connection with any crime. They are the ones who sit in jail rather than betray their friends, victims of an ancient device which has become reminiscent of the Star-Chamber Neck-lock or the Inquisitorial Triangle.

The basic design was developed by the Church—alas!—for use in correcting heretics, and has three deadly elements. A suspect is summoned by the authorities and required to take an oath to tell the truth (the oath ex officio mero). (1) If the witness refuses, he or she can be punished for recalcitrance; (2) If the witness answers falsely, he or she can be punished for violating the oath; and (3) If the witness admits to having committed a crime, he or she can be punished for the crime. There is another alternative of course: (4) The witness

could protest innocence or ignorance, but that was often not acceptable, and was treated as the first element, recalcitrance.

The Church eventually renounced the use of the Inquisitional Triangle, only to see it adopted by the Crown, which applied it to suspected traitors through the Star Chamber and the Court of High Commission. It was in resistance to these special courts of the Crown that the privilege against self-incrimination was developed; the grand jury should be the staunchest guarantor of that privilege. Instead, the grand jury has become its gravest adversary. We see in it the three elements of this ancient trap, scarcely concealed by modern trappings: (1) The witness can be sent to prison for contempt of court if she[1] or he refused to testify; (2) The witness can be punished for perjury if she or he testifies falsely; (3) If the witness claims the privilege against self-incrimination, she or he can be granted "immunity" from prosecution and compelled to testify—again under threat of imprisonment.

The form of "immunity" now being given protects the witness only from the "use" of her or his own words in court to convict her or him of crime, but evidence of the same crime ostensibly obtained independently of the witness's testimony can be used to convict her or him, despite the grant of so-called "use" immunity, so the outcome is the same as in the grimmest days of the Holy Office.

"Transactional" immunity is, of course, to be preferred (as the Governing Board indicated in a footnote), whereby the witness is protected against prosecution for the entire "transaction" or crime about which she or he testified. But even more to be preferred is a situation in which the privilege against self-incrimination in The Bill of Rights means what it says, and no forced trades are pressed upon the witness. He or she is not told, "Here is something just as good as your constitutional right not to be a witness against yourself; you must take it and tell us all you know." The alternative is not the equivalent of the constitutional right, but in a way its opposite. One is compelled to be a witness against himself or herself; he or she is simply not punished for the crime confessed (transactional immunity) or for the confession (use immunity). That is not really what The Bill of Rights provides.

The Bill of Rights, it seems to me, means that a person may remain silent, unless he choose to peak, about anything that might lead to his incrimination out of his own mouth. Therefore, I would tend to support the proposed provision for immunity which requires the witness's consent. That is the only way to eliminate one side of the Inquisitorial Triangle and let the witness go free, as the Bill of Rights meant he should be free. Certainly the grand jury should not be the setting for catching the witness in that ancient trap; rather its role should be to protect the witness against it.

The Governing Board also expressed concern about the right to legal counsel in respect to the grand jury, and desired that it be effective legal counsel. I'm not sure what all that means, but it seems to me that, at the very least, it means legal counsel in the grand jury room. I think counsel might reasonably be limited to advising the witness, as in Congressional committee hearings, but then there is no need for a special provision for counsel's dismissal by the court, since the court already has adequate contempt powers to discipline errant lawyers. This provision tends to create a presumption that witness's counsel will cause trouble, whereas in the states that already have this provision, no such trouble has emerged. The dismissal provision is therefore superfluous and prejudicial.

It should not even be necessary to add that witnesses are entitled to adequate notice in a subpoena to appear before a grand jury. Seven days is a minimum, I should think, and should not be subjected to reduction on motion of the government.

Subpoenas, in fact, should be issued by the grand jury, or with their knowledge and consent, if they are as they should be, the grand jury's subpoenas and not the prosecutor's. The grand jury should know and understand the course and purpose behind the prosecutor's presentation of evidence and not be simply a passive audience for his manipulation.

Grand jurors should be given adequate instruction by judges to prepare them for the high responsibility they hold on behalf of, and in protection of, the whole

[1] I have used the feminine pronoun first in the modern context very purposefully, to remind us that most of the recent victims of this mechanism have been women.

citizenry. The grand jury has a noble history. If this great instrument for the protection of the accused cannot be reformed so that it will perform the functions a democracy should expect of it, then we may need to consider its abolition rather than permitting it to be used to infringe upon our liberties.

HUMAN RIGHTS—ADOPTED BY THE GENERAL ASSEMBLY, DECEMBER 6, 1963

Christians believe that man is made in the image of God, that every person is of instrinsic worth before God, and that every individual has a right to the fullest possible opportunities for the development of life abundant and eternal. Denials of rights and freedoms that inhere in man's worth before God are not simply a crime against humanity; they are a sin against God.

Christians also share with people of other faiths and of goodwill in deep concern for the dignity of man, and in profound respect for the unalienable rights with which he has been endowed by his Creator, including life, liberty, and the pursuit of happiness.

Therefore, we welcome the 15th Anniversary of the Universal Declaration of Human Rights, adopted without dissent December 10, 1948, by the General Assembly of the United Nations.

We are gratified at reports of the broad influence of the Declaration on the formulation of constitutions in numerous new nations. We are heartened by its practical implementation in helping to assure the rights of refugees, of other handicapped persons, and of oppressed minorities in many parts of the world. We rejoice in the universal acclaim that the Declaration is actually, as the United Nations General Assembly in 1948 declared it to be, "a standard of achievement for all peoples and nations."

We are deeply concerned, however, that while the Universal Declaration of Human Rights is a standard for affirmation, the world has been far too slow in translating the standard into programs of action. We call to mind, for example: the denials of racial equality, in all regions of our own country, in many parts of the world, and, in a particularly vicious form, in the Republic of South Africa; the limitations on political freedoms in the still unliberated areas of Africa, as well as in the totalitarian societies in other parts of the world; and the denial of religious liberty both by avowedly atheistic governments which seek to eradicate all religious influences and by other dictatorship which hinder or even persecute specific religious groups—usually minorities.

We are convinced that the standard set forth in the Universal Declaration of Human Rights must be more rapidly and more fully achieved in policies and practices. The distance and the importance of the ultimate goal do not permit a leisurely pace in this revolutionary world. The time is now.

We note that the United States, which gave outstanding leadership in developing the Universal Declaration of Human Rights, has as yet failed to ratify a single international convenant in the field of human rights. We believe that the people of our churches and our nation must be more seriously concerned with policies, programs, and practices for human rights in our own country and around the world—now.

CONCERNS OF THE CHURCHES

We call to mind statements and actions on human rights by the World Council of Churches and its Commission of the Churches on International Affairs; a comprehensive declaration on human rights by the Federal Council of Churches in December 1948; pronouncements, resolutions, and actions of the National Council of Churches and its constituent bodies; Papal Encyclicals, especially "Peace on Earth" by Pope John XXIII in 1963; and prophetic words and acts of the Jewish community on such issues through the years.

We recall specifically policy statements of the National Council of Churches devoted in whole or in part to human rights including: "Approval of a Draft Article of the Proposed International Covenant of Human Rights," November 1951; Religious and Civil Liberties," October 1955; "Toward a Family of Nations under God—Agenda of Action for Peace," June 1960; "Freedom of Association," December 1960; "Christian Responsibility for World Community," December 1960; "The Status of Women," June 1963. We note also, since its founding, the National Council's persistent efforts for racial justice, including its sharing in an historic inter-faith national Conference on Religion and Race in early 1963, and the whole Council's commitment in the establishment of a special Commission on Religion and Race with an urgent mandate for action.

With continuing and increasing Christian concern, the General Assembly of the National Council of Churches now sets forth this comprehensive statement on human rights.

Some General Principles

Religious beliefs and their derivative moral obligations are at the center of the Christian concern for human rights.

All men are God's creatures and have personal worth to him. All men, and Christians in a particular way, are responsible to God, to love him and serve him; to obey God as the Lord of the conscience; to regard other persons as their neighbors whom they should esteem and love as themselves.

As persons have such inherent worth, they also have inherent rights and responsibilities. Every right with which man is endowed by his Creator involves a corresponding responsibility to use this right wisely and generously for constructive ends with due regard for the similarly God-given rights of others. Society must also respect these God-given rights and make provision for their realization.

All the rich gifts which God imparts to men should be available without discrimination as to creed, race, color, sex, birth, nationality, economic or social status. So the National Council of Churches has denounced and reaffirms its denunciation of patterns of segregation as contrary to the will of God for human brotherhood. The Council more strongly than ever urges the churches to find new and appropriate means of moving toward a racially inclusive church in a fully integrated society.

Religious liberty and indeed religious faith are basic both historically and philosophically to all our liberties. Thus religious and civil liberties are interdependent and indivisible.

A responsible society, according to our Christian faith, is one in which freedom is practiced by men who acknowledge responsibility to justice and public order, and where those who hold political authority or economic power are responsible for its exercise to God and to the people whose welfare is affected by it.

In accord with these principles we set forth certain of the more specific rights which we believe are due to all persons and will make for the building of the responsible society. Among the rights that are due to all persons without discrimination as to creed, race, color, sex, birth, nationality, or economic status, are the following:

General Rights Due to All Persons

General rights due to all persons because of their personal worth and inherent dignity include:

Freedom of religion and conscience, embracing rights to hold and to change faith, to express it in worship and practice, to teach and persuade others by the sharing of viewpoints in mutual respect, and to conduct religious education of children.

Freedom to marry by mutual consent and the right to protections of a minimum age of consent and a registered marriage.

Freedom of speech, press, inquiry, including expression of economic, political, and social opinions.

Freedom of peaceable association, assembly, and demonstration.

Freedom to petition government for redress of grievances.

Freedom from arbitrary arrest, arbitrary or secret imprisonment, police brutality, mob violence, intimidation, cruel or unusual punishment, and from any attempts to manipulate or tamper with human personality through drugs, hypnosis, isolation, duress, or other means of "brainwashing."

Political and Civic Rights

The right to full participation of the person in political and civic life, including the opportunity:

To vote by secret ballot, with alternative choices;

To organize peaceful politicl activity;

To be a candidate for public office;

To participate in any branch of government; to serve without discrimination in the Armed Forces, or on grounds of conscience to be excused from such service;

To receive such benefits of social welfare, health, community and other services as are provided by governments at all levels;

To enjoy equality before the law, including protection by the police; the right of an accused person to a prompt, fair, and public trial; the right of counsel; the right to be confronted with written indictment, evidence, and witnesses against him; the right to present evidence and witnesses on his own behalf and to cross-examine other witnesses; the right to have the judgment of his actions depend on an evaluation of facts in the light of law, by due process, such as by impartial judges or an impartial jury of his peers.

ECONOMIC RIGHTS

The right to participate in the economic life of the community, including the opportunity:

To earn a standard of living adequate to promote the welfare and security of the individual and family; to work in decent and healthful conditions, and to have free choice of employment, for just compensation, with protection against unemployment;

To receive, when absence of opportunity for work or other unavoidable causes prevent employment, a proper standard of relief payments from public sources;

To obtain employment solely on the basis of ability and character;

To acquire vocational, professional, or job training or apprenticeship solely on the basis of ability and character;

To receive equal pay for equal work;

To gain promotion in employment in accord with ability, experience, and character;

To own property;

To engage in an individual business enterprise or a profession;

To form voluntary economic organizations such as corporations, cooperatives, and labor unions;

To engage in social action on economic issues.

SOCIAL AND CULTURAL RIGHTS

The right to take part in the social and cultural life of the community, including the opportunity:

To have wholesome living space, necessary for the health and welfare of persons and families;

To move within a country and to leave and return to one's country;

To obtain education and training;

To make use of cultural and recreational opportunities and facilities;

To enjoy privacy, protected against invasion of personal or family life by unreasonable searches or seizures, such as wire-tapping, interception of mail, electronic eavesdropping, or other forcible or surreptitious interference;

To enjoy freedom of association with other persons regardless of racial or other distinctions;

To have access to social welfare, health and other community services;

To share equally in the use of public transportation;

To receive equal service from businesses and persons serving the public—such as stores, theaters, hotels, and restaurants.

TO THE CHURCHES

Persistence in the denial of human rights being more than a crime against humanity—even a sin against God, and practice of these rights being a partial fulfillment of the Great Commandment to love God and one's neighbor as one's self, there are divine imperatives upon Christians and churches:

To promote acceptance and observance of these requirements of human rights; to encourage the state fully to recognize these rights in law and enforcement and observance of law; to go beyond the legal standards and to seek vigorously to realize these rights, particularly when they apply within their own fellowship; to support and encourage members and ministers in conscientious endeavor to achieve these goals; at the same time, to seek solutions in a spirit of Christian reconciliation; to serve as a challenge to, and as the conscience of, the community—local, state, national, and international.

Another particular responsibility of the churches is to point out and help prepare people for the hazardous struggle for human rights at home and around the world. Difficult and uneasy as is the present, the prospect for the future is one of even more tensions, tougher trials, and more severe testing of all our proclama-

tions for human rights. Developments in science, technology, and automation pose growing perplexities as well as potentialities. At least for a time many gaps and tensions will increase between those who have more and those who have less. We are entering continuing crises which offer more judgment or grace than most of us can yet anticipate. We must think and act in ways which will open toward the future in order to escape disaster in our nation or destruction in our world. Under the Sovereign Lord of history, our churches call upon our members and other peoples to be dedicated anew to the cause of man and his dignity and rights. This means we must prepare ourselves in mind and spirit, in customs and laws, for these difficult times of testing but also of possible larger achievements in human rights.

The National Council of Churches, while noting with profound satisfaction the broad recognition and influence of the Universal Declaration of Human Rights during its first fifteen years, recommends that the churches participate fully in endeavors to encourage study and action for human rights at this time of Anniversary and after, in order that through this and succeeding years the achievement of human rights may be accelerated for all mankind.

TO THE NATION

Our nation, which has claimed such high value for the unalienable rights of persons, at this moment of history is called to bring our practices more fully into accord with our proclamations, within our country and in the world community. This is the challenge to our people and to our government to achieve moral and spiritual integrity.

Concerned for the human rights of all, we must give partcular attention to the denial of rights on the basis of race or color and to the correcting of such injustices. Those among our citizens and in our government who are struggling so hard and constructively for the realization of these rights are the human basis of hope in our nation dedicated to justice and fuller opportunity for all.

On a planet growing so small, human rights are indivisible. We must be constantly mindful that our human relations and international relations are taking place for good or for ill in a world of nations consisting mostly of peoples of color.

The quality of life in our own nation and our actions in international declarations and covenants, now more than ever, must represent in actuality our professed concern for the worth and dignity of all men.

In the growing world community, we see a ferment among all peoples, but especially among many of those who have long been concerns of our churches' missionary outreach. Among the newer nations has come most dramatically the revolution of increasingly realized expectations. Our nation can and should take increasing leadership in such constructive revolution. To do so our nation must throw its full weight behind the efforts of the United Nations to put the high expectations of the Universal Declaration of Human Rights into practice. This means leadership-in-partnership with other nations concerned for world order and human dignity, values and rights. We believe that our nation can and must make its rightfully contribution, along with others, by helping to develop international agreements such as the draft Convention on Human Rights and by ratifying others already in existence, such as the conventions for the political rights of women; for consent, age, and registration of marriage; against genocide, against slavery; and against forced labor.

Now, therefore, the National Council of Churches urges the renewed dedication of our citizens and our government to the manifold concerns for human rights within our own country and in the growing world community and thus to larger measures of justice and freedom making for more peace on earth.

347 for; 0 against; 0 abstention.

RESOLUTION ON GRAND JURY ABUSE, ADOPTED BY THE NCCC GOVERNING BOARD, MAY 5, 1977

The Grand Jury is envisioned in American law as a protector of citizens from unwarranted prosecutions. It is for this reason that its proceedings are secret and it has compulsory process for summoning witnesses.

However, in recent years there is evidence to indicate that its great powers have sometimes been misused to harass and intimidate political dissidents, including the anti-war movement, the activist student movement, the Native Amer-

ican movement, the black movement, the trade-union movement, the Roman Catholic peace movement, the feminist movement, and now seem to be aimed at the Chicano and Puerto Rican movements as well.

Since the October 1976 meeting of the Governing Board of the NCCC, several persons connected with the Hispanic ministries of the churches have been subpoenaed to testify before grand juries ostensibly inquiring into terrorist bombings, and some have gone to prison rather than divulge the names of persons they felt had been working with the church in good faith, lest they in turn be subjected to investigation.

Congress has never given the Federal Bureau of Investigation subpoena powers, yet agents today routinely threaten uncooperative persons with subpoenas from a grand jury, and often indeed serve such subpoenas upon them.

It is the Governing Board's firm conviction that the use of the grand jury's powers as an instrument of investigation in support of law enforcement rather than as an evaluation of evidence already gathered is a distortion of its quasi-judical function. The use of the grand jury's powers to harass and pursue political dissidents is a departure from its proper constitutional function, and is a great threat to public order, lawful government, and true domestic security.

Therefore, the Governing Board of the National Council of Churches, in its continuing concern for human rights, including due process of law, freedom of association, the privilege against self-incrimination, the presumption of innocence and the free exercise of religion, adopts as its own procedure and urges upon the churches and ecumenical agencies the following course of action:

1. That churches and ecumenical agencies support legislation designed to enhance the rights to due process of law, freedom of association, effective legal counsel, the presumption of innocence and the privilege against self-incrimination[1] of persons subpoenaed to testify before grand juries. As well as the problem of grand jury abuse, there are attempts by other Government agencies to intervene in the internal affairs of the churches. A full policy statement based on careful consideration of the legal ramifications needs to be developed. The Governing Board therefore also urges:

2. That each member denomination of the NCCC designate one person to keep in touch with the developments in this area and to represent it in developing a full policy statement on the subject of governmental intervention in the internal affairs of churches for presentation to a later session of the Governing Board.

In the meantime, church agencies, members and employees may well find themselves in the position of responding to inquiries by Government agencies. Until the adoption of a full policy statement, the Governing Board of the NCCC adopts as its own procedure and urges adoption of the same by the member communions:

3. That, if and when any employee of a church or church agency is approached by government investigators (on matters related to that church or agency), the inquiry be handled by the senior officer available (with appropriate legal advice);

4. That the investigators be asked to state specifically in writing what information they want, their authority for seeking it, and whether it can be or has been obtained in any other way;

5. That the church or agency make contact with specialists in the ecumenical community, such as the Committee on Religious Liberty of the National Council of Churches, and seek advice of legal counsel familiar with church-state law to determine what information, if any, can properly begiven in response to the inquiry;

6. That churches and ecumenical agencies not divulge names of contributors, members, constituents, or any persons or groups with whom they have been working in a relationship of confidence and trust;

7. That churches and ecumenical agencies not divulge without benefit of legal counsel and consent of persons concerned personnel files, correspondence or other confidential and/or internal documents or information;

8. That churches and ecumenical agencies not divulge without benefit of legal counsel and consent of persons concerned travel or expense records;

9. That the churches and ecumenical agencies inform any persons in their employment or membership about whom inquiries have been made that such investigations are in process;

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[1] Though this is supposedly afforded by the grant of "use" immunity, the fuller "transactional" immunity that was formerly granted more adequately guards the privileges.

10. That churches and ecumenical agencies give moral and material support (including continuing salary to employees) for those members and employees who for reasons of principle refuse to testify before a grand jury and risk jail rather than expose others to harassment—even if some consider their refusal unwise or unnecessary;

11. That churches and ecumenical agencies make particular provision to insure and protect the freedom of association and exercise of advocacy by members and staff in their ministries and relationships with social action agencies and oppressed and alienated groups.

12. In addition the denominations are urged to develop internal policies appropriate to their own polity and ecclesiology which will clarify their understanding of the meaning of confidentiality of communications within the fellowship and in the ministry of the church, so as to safeguard the relationship of confidence and trust that is essential to the existence and functioning of the church.

13. Churches which adopt the above recommendations should be aware that they, or their members, may be faced with the risk of civil penalties, including citations for contempt of court, in their effort to establish judicial recognition of the churches' right not to breach the relationship of confidence and trust which is essential to the functioning of the religious community.

Mr. THOMPSON. With me is the Rev. Dean Kelley, who is staff executive for religious and civil liberty of the National Council of Churches.

You have indicated that my written statement will be admitted in the record. There are attachments to it, one a policy statement adopted by the general assembly of the National Council and the other, a resolution adopted by the governing board.

Mr. EILBERG. They also will be made part of the record.

Mr. THOMPSON. I mentioned the resolution, Mr. Chairman, since I noticed that on your motion, it has already been included in the Congressional Record as of a week ago.

Mr. EILBERG. It struck me as very interesting. You would have no objection to its being admitted?

Mr. THOMPSON. None at all.

Let me begin by saying something of the role in which I testify. I am President of the National Council of the Churches of Christ in the U.S.A.

I happen to be at the midpoint in a 3-year term in that office.

The National Council of Churches is a cooperative agency of 30 national religious bodies of Protestant, Anglican, and Eastern Orthodox traditions in this country. They aggregate something over 40 million members.

I do not purport to speak for all of those denominations or each of their members. I do speak for the governing board of the National Council of Churches, which is a body made up of representatives chosen by the national religious bodies. This is a body consisting of approximately 250 members. My testimony will be based particularly on the resolution to which you just alluded.

I am also the stated clerk of the general assembly of the United Presbyterian Church in the U.S.A., one of the member churches of the National Council of Churches. This church has some two and two-thirds million members in the United States. The term "stated clerk" is curious to some. It simply means that I am the permanent officer of the highest governing body of that church. I have held that office for eleven years.

Prior to that time I practiced law for more than 20 years, including active service in the U.S. Army during and after World War II, in

the course of which I served on a number of courts-martial, both as trial judge advocate and as defense counsel. And I also served as an assistant prosecutor of the major Japanese war criminals, including General Tojo. Thus I have some sense of the prosecutor's responsibilities and the difficulties of fulfilling them without violating the rights of persons.

My written text anticipated the question which Congressman Hall put to one of the witnesses this morning.

Since my years in law school, now more than 35 years ago, I have had the personal conviction that the grand jury should be abolished in this country, as it has been in England, where it was originated for the purpose of protecting persons who were accused. I feel that it's so readily subject to abuse by overzealous prosecutors, as experience has demonstrated in this country, that its usefulness is no longer there. I am not here to present that view; obviously, that is a personal view. I am here to elucidate the positions taken by the governing board in the resolution with which you are familiar.

The governing board did not reach the issue of abolition. It was concerned with how the grand jury system might be improved and it recognized that Congress had wide latitude for the modification of the composition and procedure of the grand jury system without abolition, recognizing that the grand jury is guaranteed by the Constitution.

In that resolution, the board urged application of the principle of due process to the operation of the grand jury. Thus, the board rejected the contention that due process of law does not apply in a grand jury room, supposedly before jeopardy attaches; rather the board responded to the contention that important rights can be and often have been lost, even at this preliminary stage.

Due process of law is designed to protect the rights of persons, and where persons can lose those rights at any stage, it should be possible for the aggrieved person to invoke due process.

We have attempted to set out the concerns of the charches which relate particularly to the fact that persons who have limited opportunity for legal advice and counsel become the victims of the grand jury process. This is particularly true of persons in closely-knit ethnic and racial groups who have in recent years become the objects of fishing expeditions on the part of the prosecutors.

In many cases these persons come before the grand jury with genuine fear and they recognize that if they respond to the questions put to them they will be seen by their peers to have informed upon them, to have betrayed them. The result is that persons who have no knowledge of criminal activity at all are frequently placed in prison as a result of failure to testify.

We recognize that the system which we are complaining about really is very reminiscent of the religious courts of the Middle Ages. We have here an ingenious device which was developed by the church itself for correcting heretics. There were three elements in the inquisitorial triangle. The suspect was summoned and the authorities required that suspect to take an oath to tell the truth and, first, if the witness refused, then he or she could be punished. Second, if the witness answered falsely, he or she could be punished for violating the oath. And, third, if the witness admitted having committed a crime, he or she could be punished for that crime. There was, of course,

the other alternative; the witness might protest innocence or ignorance, but that, too, was not acceptable and was treated in most instances as but a variation of the first element: recalcitrance.

The church eventually renounced the inquisitional triangle, only to see it adopted by the Crown. It was applied to suspected traitors through the star chamber and the court of high commission. It was in resistance to these prerogative courts of the crown that the privilege against self-incrimination was developed.

The grand jury should be the staunchest guarantor of the privilege. Instead the grand jury has become its gravest adversary, and we see the three elements of that ancient trap scarcely concealed by modern camouflage. First, the witness can be sent to prison for contempt of court if he or she refuses to testify. Second, the witness can be punished for perjury, if he or she testifies falsely. Third, if the witness claims the privilege against self-incrimination, he or she can be granted immunity from prosecution and compelled to testify again under threat if imprisonment.

The governing board has indicated its preference, of course, for transactional immunity. But whatever type of immunity is granted, it is an alternative to a constitutional right and we submit it is not the equivalent of that right. It is a subversion of that right. It is for that reason that we feel the witness should be guaranteed the right to remain silent unless he or she chooses to speak. In our judgment, the only way that is possible under pending legislation is by the consent provision of one of the bills.

I do not wish to go into the detailed analysis of these bills. That is set out in the written testimony. We are concerned that unless the grand jury system is made to work more effectively, we shall eventually be faced, obviously, with the alternative of its abolition.

Mr. EILBERG. Thank you very much, Mr. Thompson, for a very fine statement and very forceful one.

I observed sometimes we do some things over here in Congress where, perhaps, which we would like to do better; but it becomes sometimes a matter of getting half a loaf but moving in the right direction.

We can't move entirely in the right direction. I just hope that you will understand that, as we move not only with this legislation, but with so much other legislation.

Mr. THOMPSON. I certainly recognize that, and I commend your own bill as a step in the right direction.

I personally feel it does not go far enough.

Mr. EILBERG. I appreciate that.

Can you explain to us what effect the resolution by the National Council of Churches has actually, as compared to theoretically, on the activities of individual churches?

You explained the hierarchy and whom you represent. I am wondering to what extent this flows down and to what extent it is binding or what influence does it have?

Mr. THOMPSON. Let me respond to your last question first. It is not binding upon any of the member bodies. This particular resolution, because it contains guidelines, is really addressed to the individual members of the churches, particularly those in positions of responsibility, who may be faced with the task of advising subordinates who are confronted with that situation.

It is for their advice and for use in developing their system, and it is widely distributed and available to them.

Mr. EILBERG. Do you happen to know whether your position has been considered by any other religious organization outside your group, for example, the Catholic bishops? I am just curious in passing, as to any activity by other religious groups?

Mr. THOMPSON. There is activity in other religious groups, but this particular resolution has been adopted so recently that I doubt that any formal consideration of it has been given by other groups.

Mr. EILBERG. The resolution suggests that there shall be a right to effective legal counsel for persons subpenaed to testify before the grand jury.

One argument made against giving a right of counsel, is that one lawyer might wind up representing any number of people in a group. If he was present in a grand jury room, then the witness would, therefore, know that his or her testimony would be immediately transmitted back to others. The witness would thus be effectively precluded from offering needed testimony to the grand jury.

Do you see any danger in this, and how would you comment on that situation?

Mr. THOMPSON. If the presence of counsel in the grand jury room is abused in the sense of counsel's not respecting the confidentiality of testimony given there, the court certainly has power to discipline the attorney.

Mr. EILBERG. Only if the court learns about that!

Mr. THOMPSON. Of course. Beyond that, I think the right of the witness is protected as the preceding witness suggested here, by the choice of other counsel.

Mr. EILBERG. Mr. Thompson, we could go on for quite a period, but I think we will have to end here.

We appreciate your contribution very much. We find this statement by the church group a significant development, and we understand this is the first time that your organization has entered into the criminal justice area, and from our point of view, we congratulate you for that movement and for coming here today.

Mr. THOMPSON. Thank you very much. We have long been concerned about the moral and ethical implications of public issues. This is perhaps the first time we have entered into the field of the administration of justice in quite this way.

Mr. EILBERG. Thank you so much.

The subcommittee is adjourned.

[The following submissions of Mr. Thompson were received after the hearing:]

[From the Washington Post, May 7, 1977]

NATIONAL COUNCIL OF CHURCHES CRITICIZES GRAND JURY SYSTEM

(By Janis Johnson)

The National Council of Churches governing board has attacked the grand jury system as riddled with abuses and urged its 31 member denominations to resist efforts by governmental investigators to obtain confidential information from church files.

The unanimous action by the 150 delegates to the semi-annual meeting of the board in Cincinnati, completed yesterday, stemmed from a grand jury probe into purported links between a military Puerto Rican independence group

and a controversial Hispanic social activist organization funded by the Episcopal church.

The federal investigation of bombings believed to be the work of the military FALN has led to the imprisonment on contempt charges of two women lay ministers of the Episcopal church's National Commission on Hispanic Affairs. They went to jail rather than testify before the grand jury. They have denied knowledge of the FALN or its members but said their resistance was "on principle."

In January Presiding Bishop John M. Allin voluntarily allowed the FBI into the Episcopal Church Center's office in New York for a week to look at non-confidential Hispanic commission files. He took this action after a subpoena served first on Bishop Milton Wood, church executive for administration, was withdrawn.

Officials of other churches have conceded they are uninformed on the implications that similar actions against their files would raise about religious liberty and separation of church and state.

In one resolution passed without dissent the governing board expressed "deep concern" over the jailing of the women "as a matter of great significance to all member churches of the National Council." It directed council president William P. Thompson to appoint a commission to meet with Bishop Allin and "aid him in securing the early release of the two women, to restore their salaries and to pay their legal expenses."

In a resolution on grand juries, pending development of a more thorough policy statement, the council declared that "the use of the grand jury's powers to harass and pursue political dissidents is a departure from its proper constitutional function (to protect citizens from unwarranted prosecutions) and is a great threat to public order, lawful government and true domestic security."

The statement listed a binding procedure for council agencies and urged member churches, which have about 40 million members, to adopt the same course of action.

FBI Maneuvers Land—Two Behind Bars

The March 2 New York Times headline was brief: "Woman Surrenders to Federal Officers in Terrorism Case."

For the surrendering woman, Raisa Nemikin, and her co-worker who was to "surrender" a week later, Maria Cueto, that simple headline cut like a knife. It meant that, instead of vindication, their five-month struggle against FBI intimidation had brought them a "terrorist" label—and probably at least 14 months in jail courtesy of a federal grand jury.

The chain of events that put the two women behind bars started innocuously enough last November when FBI agents appeared at the Episcopal Church's New York office. Cueto worked there as the director of the Episcopal National Commission on Hispanic Affairs, Nemikin as the Commission secretary.

The agents told the women that they were after information about the FALN, a mysterious terrorist band credited with some 50 bombings over the past three years. The FALN claims to be acting in the name of Puerto Rican independence, but every major independista group has denounced its bombing campaign.

Cueto and Nemikin were asked about a man named Carlos Torres, a former Commission member in whose Chicago apartment the FBI had found what it dubbed a "bomb factory." The agents asked the two women what they knew about Torres. They answered, explaining that they knew nothing either about the FALN or Torres' connections to it. That should have been that, but it wasn't.

Over the next week, the FBI agents returned for more questioning and, at one point in a two-hour grilling, accused Nemikin of being uncooperative. Two days later, agents served her church superior with a grand injury subpoena demanding samples from every typewriter in the Episcopal building plus the complete personnel files of Cueto and Nemikin.

The Episcopal official complied—much to the dismay of the two women who had become convinced that the FBI was on a fishing expedition into privileged church affairs. They felt that, by linking the FALN with the church's Hispanic Commission by the grand jury subpoena, the FBI was smearing the Commission as a terrorist front.

Nemikin and Cueto, both Puerto Rican, also felt that the FBI was trying to discredit the Puerto Rican independence movement and harass its Episcopal Church supporters.

In early January, Cueto received another FBI surprise: A grand jury subpoena demanding that the church turn over all its records, documents, notes, etc.,

relating to the Hispanic Commission from 1970 to 1977, including the names and addresses of all persons who had been involved with the Commission as well as a list of all meetings, conferences and convocations sponsored by the Commission, wholly or in part, and the names and addresses of all persons attending these meetings.

Cueto and Nemikin were appalled. For seven years they had worked to build the trust of the Hispanic community in their efforts. If they turned over the name of every person they had ever had contact with—essentially what the FBI wanted—what would happen to their credibility? How could people be expected to trust a church project that was, in effect, an intelligence gathering arm of the FBI?

Episcopal clergy and lay people moved to quash the subpoena. New York Bishop Paul Moore called it "an invasion of the confidentiality necessary to the effective working of a religious body." But the top Episcopalian hierarchy refused to challenge the subpoena. Instead, Presiding Bishop John Allin, in return for the formal dropping of the subpoena, turned over everything the government wanted voluntarily.

Meanwhile, Cueto and Nemikin themselves appeared before the grand jury, after several postponements, in mid-February. Both refused to testify and challenged the propriety of the FBI-inspired grand jury subpoenas.

But their challenge fell on deaf ears. Both were immunized, then found in contempt after they refused to answer sweeping questions about the FALN and the Hispanic Commission.

Jailed in early March, Cueto and Nemikin could remain there until the grand jury term expires in May 1978. At that time, they may be resubpoenaed before another grand jury and reincarcerated.

The only thing that will free them before next spring is a show of citizen outrage. The Committee of Concerned Church Persons Against Grand Jury Abuse (475 Riverside Dr., Rm. 1700A, N.Y., N.Y. 10027), which holds that the misuse of the grand jury in this case represents an attack on "the relationship of trust and confidence upon which the existence of the believing community exists," is now working to build that citizen pressure.

One of the least pleasant surprises in the Cueto-Nemikin case outlined above has been the conduct of the federal district court judge who found the two women in contempt, Marvin Frankel.

Frankel's name should sound familiar to grand jury reformers. His 1975 New Leader magazine article on grand jury reform was widely praised and won him the reputation as the district court judge most sensitive to grand jury abuse.

In the Cueto-Nemikin affair, however, Judge Frankel's rulings have ignored some of the very abuses his magazine piece criticized, and his new see-no-evil posture has legislative implications.

The Grand Jury Reform Act, H.R. 94, sponsored by Rep. Joshua Eilberg proposes to curb immunity abuse by establishing standards which judges can evoke to strike down immunity orders meant to trap grand jury witnesses behind bars.

But if the pressure-cooker atmosphere of a politically inspired grand jury investigation is enough to make a sensitive jurist like Judge Frankel lose sight of civil liberty, will his less sensitive colleagues actually follow legislative standards and refuse improper government immunity requests?

Congressman John Conyers, Jr., has answered that rhetorical question by including in his H.R. 3736 a provision for consensual immunity. This would give the witnesses to be immunized, in addition to the courts, the power to reject immunity traps.

What To Do When the FBI Knocks—A Primer for Pastors

(By Dean M. Kelley)[1]

On November 18, 1976, two agents of the Federal Bureau of Investigation visited the Episcopal Church Center in New York City, national headquarters of the denomination, to obtain information about one or more members of the National Commission of Hispanic Affairs (NCHA). Explaining why they came,

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the agents said that correspondence from the commission had been discovered during an FBI search of an apartment in Chicago rented in the name of Carlos Alberto Torres. The same search turned up materials suited for the making of bombs, the agents said along with literature of the Fuerzas Armadas Liberacion Nacional (FALN), a self-described Puerto Rican terrorist group. Either by its own claim or by official attribution the FALN has been connected with some 58 bombings in the past 32 months, including the January 1975 bombings of Fraunces Tavern in New York City, in which four persons were killed and 55 injured. Torres is now considered a fugitive; the FBI wanted to know anything that might help find him.

The agents met first with Bishop Richard Martin, coordinator of the church's programs for minorities, and then interviewed Maria Cueto, then executive director of the NCHA, and her secretary, Raisa Nemikin. In separate interviews lasting several hours, the two women identified a photo of Torres, and explained his service on the Theological Committee and the Theological Development Task Force of the commission. According to their account, they answered all questions put to them within the limits of their knowledge, and they believe the agents were satisfied with the results of the interrogation.

Four days later, however, agents reinterviewed the two women, with the approval of Bishop Martin and his superior, Bishop Milton Wood. No attorney was present. On this occasion Ms. Cueto and Ms. Nemikin declined to answer further questions, and [Ms. Cueto was threatened with a grand jury supoena]. Early in January, both women were subpoenaed to appear before a Federal grand jury in Manhattan, but again they refused to answer questions. They gave several grounds for their silence, the main one being that by responding they would violate the confidence and trust of persons working with the Hispanic Commission. Early in March 1977 the court rejected their claims and, when they once more refused to answer, imprisoned them for contempt of court. At this writing they are still held in the Metropolitan Correctional Center.

On their first visit to the Church Center, the FBI agents asked permission from Bishop Wood to take samples of the imprint of various typewriters. In the belief that refusal would imply lack of trust in the employees of the center, Bishop Wood approved the request. Later in November some eight or nine FBI agents were admitted to the premises after working hours, observed only by a custodian with poor sight. Critics of this action contend that no one can be sure what the agents search, what they saw, what they obtained. According to The New York Times, there is some evidence that files wholly unrelated to the Hispanic Commiseion were searched. Bishop Wood has denied that the agents inspected any records other than those of the NCHA.

In its November visits the FBI, according to Bishop Wood, had asked for "any travel or meeting expenses that Mr. Torres might have in connection with the church that might give them some information as to his whereabouts or leads." The bishop said that the information furnished to the agents was "quite public, which you can get here or can have for the asking." When the agents came back about the first of December asking for more information, the church, on the advice of counsel, requested a subpoena "for the protection of all those concerned at that point." In response to the subpoena, the information requested for the years 1974–1976, which Bishop Wood claims was "nonconfidential," was turned over to the court.

Early in January Presiding Bishop John M. Allin was served with a subpena requiring (in the words of Bishop Wood) that he supply the grand jury with the "same kind of information for the years '70 to '73 which had already been supplied for the years 1974–76." According to other sources, the information requested included personnel files, lists of members and associates of the Hispanic Commission and minutes of meetings. The Presiding Bishop's attorney persuaded the United States Attorney to withdraw the subpoena in return for the voluntary submission of material described by the church as "public" information. The material included: the names of commission members since its beginning in 1970; dates and places of all commission meetings since its founding; travel accounting records for persons who were being investigated in connection with the grand jury proceedings; biographical material which had been prepared and supplied by these persons; a list of all grant recipients in the Hispanic program since its inception; employment application forms "which contained no confidential information"; and samples of typewriter and copy-machine impressions.

Bishop Allin agreed to pay fees for attorneys chosen by Ms. Cueto and Ms. Nemikin. On March 15, however, he issued a statement characterizing their refusal to testify as "against the policy of the church." They were placed on "leave of absence" and their pay was suspended, on the ground that their inability to perform their duties resulted from actions of their own choice—that is, their decision to go to prison rather than answer questions about persons connected with the commission.

Abuse of Power?

Anyone familiar with the case will understand that the foregoing is a bare-bones outline of a complicated series of events. Even without additional details, however, it will be clear why the episode has generated a several-sided controversy. Inevitably, questions both of fact and of principle arise. Are the two women obstructing justice, or are they heroically defending their own rights and ours against abuse? Have the FBI, the prosecutors, the grand jury and the courts exceeded their powers, or are they merely doing their plodding best to safeguard the public against the violence of urban terror?

At this writing the best answer to these questions is that no one really knows. The two women have not always articulated their positions as clearly as one might hope, and the rhetoric of some of their supporters has been more indignant than informative. At least one ruling in the case was based on Government evidence which the court kept secret. In short, enough facts are available to fuel a raging debate, but not enough for partisans on any side to end the debate by demonstrating the truth of their own view.

But what about the role of the church? Here, it seems, the problem is not the absence of agreed facts but disagreement on what the facts mean. According to unnamed church officials cited by *The Times*, the "vast majority" of Episcopalians see no dilemma. Fanatic bombers threaten innocent lives; duly constituted law enforcement bodies must act against them; the church has a duty to help. On such grounds Bishops Allin and Wood find themselves unable to understand why the women withhold testimony—unable, therefore, to support their cause. Other responsible churchpeople, including Bishop Paul Moore of New York and former Presiding Bishop John Hines, have been critical of their colleagues' position.

What is important here is the future. If the churches, as one hopes, continue to seek empowerment of the oppressed, churchleaders can expect to encounter such incidents again. The present controversy rises in large part out of an excess of innocence; it points up the need of churchpeople to achieve greater empathy with their allies in the struggle for social justice, greater sophistication about the ways in which that struggle can bring them into conflict with "duly constituted authorities."

In the abstract bishops and vestrypeople, pastors, elders and church bureaucrats may understand that the guardians of law and order are often also the overzealous protectors of the status quo, and that the pursuit of felons can be used, intentionally or otherwise, for the suppression of dissent. But nothing in their life experience prepares them for midnight visits by the FBI, or for the possibility that the quest for a violent criminal may be conducted in ways that do injury to rights and values at least as important as effective law enforcement.

If we are not to learn such lessons by hindsight, an effort of imagination is needed. We should remind ourselves that the churches have sinned more often by undue conformity than by defiance and that some of the best pages in our history record our predecessors' principled stands against kings and emperors and other powers. Even in the post-Watergate, post-Viet Nam era, knowing what we now do about CIA plots and FBI break-ins, we need not be cynical about the US Government, but surely we should be vigilant and skeptical—and well-informed.

In the present context Christians have a special need to be informed about newly controversial aspects of the grand jury system. In the 1950's Congressional investigating committees were the weapon of choice for "exposing" alleged or real Communists and rendering them virtually unemployable. Against the anti-war movement in the '60's, prosecutors favored the use of conspiracy indictments to link such supposed plotters as the Spock-Coffin defendants, the Chicago Seven and the "Catholic Left" at Harrisburg. But the backlash against McCarthyism has made Congressional investigators more circumspect, and most of the jerrybuilt conspiracy indictments failed at trial. Hence the new reliance on the compulsory processes of the grand jury.

Unholy Inquisition

There are many reasons why the grand jury has come into favor with the FBI and with certain prosecutors. Grand jury proceedings are, of course, secret. A witness appears alone; he/she can obtain legal advice only by requesting permission to leave the chamber. Few grand jury members have any conception of their own powers, or of the proper limits to be set on a prosecutor's zeal. Finally, heavy sanctions are available. Lying to a grand jury risks the penalties for perjury. If the judge backs the prosecutor—and most judges do, often almost automatically—silence can bring a jail term for contempt of court, a sentence that can last as long as the life of the jury (18 months or longer), and can then be renewed when the next jury is convened.

Though employed amateurishly in earlier decades, these grand jury powers were brought to a state of systematic effectiveness by Guy Goodwin of the Internal Security Division of the Department of Justice under Richard Nixon. Setting out to apprehend the "Weathermen" and other threats to the Republic, he subpoenaed Leslie Bacon all the way from New York to Seattle to tell what she knew about bombs set off in the Capitol in Washington (D.C., not the state). Other persons, supposed to know something about such crimes, were called before grand juries, often distant from their homes, sometimes with only a few days' or hours' notice.

A perceptive article by Judge Marvin E. Frankel and Gary P. Naftalis in The New Leader (Nov. 10, 1975) makes vividly clear what can happen at this stage. (Ironically, it was Judge Frankel, a highly respected jurist, who sent Ms. Cueto and Ms. Nemikin to jail.) The article cites actual questions put to a witness by an Internal Security prosecutor before a grand jury in Tucson, Arizona:

"Tell the grand jury every place you went after you returned to your apartment from Cuba; every city you visited, with whom and by what means of transportation you traveled, and who you visited at all of the places you went during the time of your travels after you left your apartment in Ann Arbor, Michigan in May of 1970.

"I want you to describe for the grand jury every occasion during the year 1970 when you have been in contact with, attended meetings which were conducted by, or been any place when an individual spoke whom you knew to be associated with or affiliated with Students for a Democratic Society, the Weathermen, the Communist party, or any other organization advocating revolutionary overthrow of the United States, describing for the grand jury who was present and what was said by all persons there and what you did at the time that you were in these meetings, groups, associations or conversations."

A subpoenaed witness can ask the court that impaneled the grand jury to quash the subpoena, but courts are usually loath to do so. A witness can claim one of a few very narrow privileges against answering (confidentiality of communication between lawyer and client, priest and penitent and, in some jurisdictions, physican and patient or husband and wife). A witness may also assert the Fifth Amendment privilege against self-incrimination, but at that point he/she may first be given immunity against prosecution deriving from that testimony and then ordered by the court to answer the questions, under pain of contempt of court. One major problem with this kind of immunity (it is called "use immunity") is that even though it forbids direct use of a person's testimony against him/her, it can furnish leads to other ways of building a case. Obviously, then, its effect is to cancel out, or at least to weaken severely, the Constitution's ban on self-incrimination.

Witnesses sometimes appeal to the First Amendment, arguing that their right to freedom of association will be abrogated if they are compelled to tell the names of others with whom they have been associated in quite innocent activities. For experience has shown that the persons named may then be subjected to investigation, and their neighbors, employers, fellow employees and friends may be interrogated by the FBI, sometimes in intentionally embarrassing ways. The courts, however, have not been very receptive to such claims.

And there is still another pitfall: A claim of right or privilege not to answer may be asserted too late. Courts have often ruled that by answering seemingly innocuous questions ("What kind of work do you do?") one has waived any right to refuse later questions in the same line of investigation ("For whom did you agree to print handbills urging a boycott of General motors?") To guard one's rights, then, the only safe course is to give only one's names, address and

serial number and refuse to answer substantive questions until the court has ruled on one's claims. If the court denies the claims, as it often does, the only way to avoid violating one's principles may be to go to jail.

Despite the evident potential for abuse of these coercive powers, to the person on the street (or the bishop in his office), the very name of the grand jury evokes favorable associations. There are historical reasons for this attitude. As recently as Watergate, "runaway" grand juries have helped expose official wrongdoing. At its earliest introduction, in England in the 12th century, the grand jury was obviously an improvement over trial by ordeal, and on some occasions it served to check the arbitrary use of royal power.

In our own history, grand juries were often bulwarks for the colonists against the wrath of royal governors, most famously in 1743 in the case of John Peter Zenger, a newspaper publisher who criticized the governor. The governor sought to have Zenger indicted for libel, but two grand juries refused. Prior to the Civil War grand juries in the North often refused to indict persons charged with violating the Fugitive Slave Law. But these very examples point to the ease with which the grand jury is politicized, and its considerable, little-supervised powers turned to less noble purposes. After the Civil War, for instance, terrorist activities by the Ku Klux Klan often went unpunished because Southern grand juries would not return indictments.

Another widespread misconception which helps validate the grand jury in the popular mind is the belief that it functions as an arm of the judiciary rather than as an instrument of the executive. In this view the grand jury simply weighs the evidence brought to it by the prosecutor to determine whether there is a sufficient basis ("probable cause") to justify putting a citizen on trial for his/her life or liberty. This some believe, also justifies grand jury secrecy, so that, if no indictment is returned, no one's reputation is impugned.

The difficulty is that this is only one theory (or ideal) of grand jury functions—and it is not the theory under which the FBI, most prosecutors and most courts are now acting. In current practice grand juries are considered to have investigative responsibilities as well as evaluative. Prosecutors ardently favor this theory, judges back them up, and jurors themselves almost invariably go along. The consequence is an enormous increase in the powers of government over citizens.

Much of that power accrues to the FBI. Congress has repeatedly refused to give subpoena powers to the bureau, but when it is working in sympathetic collaboration with a prosecutor, its agents can threaten recalcitrant witnesses with a grand jury appearance. Not only can they so threaten, but they frequently have and still do; witness the case of Ms. Cueto and Ms. Nemikin.

No one questions the importance of law enforcement in society, or the need of law enforcement agencies to act with authority. To understand the very real conflict of values under study here, however, one must distinguish between legitimate and illegitimate uses of power. Obviously the police, prosecutors and courts are simply doing their job when they pursue lawbreakers, especially those who commit acts of violence. Even in such cases, of course, the vigor of their pursuit must be tempered by concern for due process of law. But the real difficulty rises because these same agencies of government tend to lump together with criminals all persons whose opinions or styles of life challenge the established order.

In the long run such persons may contribute to the well-being of society, as did the agitators for abolition of slavery, the rights of labor, women's suffrage and the civil rights of minorities. But when their ideas are new and controversial, they are a source of trouble and disruption, regardless of how law-abiding and peaceable their efforts for change may be; and in the eyes of the law's custodians they are not only objects of suspicion but proper targets for harassment and intimidation. Usually, moreover, there is widespread public support for such attitudes, and never more so than when (as sometimes happens) a movement for social change is afflicted by the presence of a lunatic fringe of fanatics willing to use violence to compel public attention. The syllogism goes like this: The FALN demands independence for Puerto Rico; FALN members are terrorist bombers; therefore all who advocate an independent Puerto Rico are violent criminals, and any great concern for their civil rights is misplaced.

A. Plenitude of Targets

Few of us would consciously endorse such logic—or deny that despite its faults it has subliminal power. The trouble is that even fewer understand how often

such logic has been and is being invoked in our own day, specifically in support of unchecked, wide-ranging grand jury activities that observe few if any limits on the use of the jury's coercive powers. Such tactics have been employed against the antiwar movement, the student radical movement, the American Indian movement, the Chicano movement, the left-wing Roman Catholic movement, the feminist movement and others.

It is worth noting that despite all the indictments that have resulted, there have been few convictions. The principal effect, whether so intended or not, has been disrupting these movements, sowing divisions within them, draining their energy, sopping up their money and diverting them from the entirely legitimate work they want to do. Quite apart from the erosion of our liberties and the harm done to individuals, this represents a social cost, a loss of ideas and pressures we need.

But how, more precisely, does it work? Always in ostensible pursuit of perpetrators of heinous crimes, the prosecutors and the FBI summon anyone thought to have any association with a possible suspect ("X") to get information about the person's whereabouts, or information connecting the person with the crime. So much is certainly legitimate law enforcement activity. But then the questioning turns to third parties, though still in reference to the suspect: "Who else was connected with X?" Eventually it may (more often does) come to focus on targets having only the remotest relation to X: "Who else belongs to this organization of which you and X were members?" At this point—when the prosecutor demands names and more names of persons who might have some information about the suspect—the inquiry becomes a fishing expedition, catching many innocent fish.

But if the fish are innocent, what do they have to fear? It is here that bishops and other ultra-respectable persons must use their powers of imagination. What is to be feared is what has often happened: the destruction of relationships, organizations and movements that have a right to exist. Witnesses, especially from minority communities, know perfectly well what they have to fear: Only the obloquy, calumny, suspicion and ostracism that often attach to persons thought to be either criminals or, worse, delators, informers, "stool-pigeons." When one of my associates enters the grand jury room, I have no way of knowing what goes on. Did he/she give them my name? What did she/he say about me? Will the FBI be looking into my affairs, my bank account, my past associations and activities? Nothing the witness says afterward can completely dispel the suspicion that he/she told everything and that, even if all was innocent, it may cause trouble anyway. It would be good if everyone could have confidence in the safety of the innocent from official abuse, but history, and the life experience of the poor and oppressed, do not encourage such confidence. We tend to associate rough, prolonged grillings with the Gestapo or the KGB. But there are some among us who know of such things from personal experience in America.

In the Cueto-Nemikin case, exactly these themes are being played out in the community, and this despite the principled stand the two women appear to have taken. It may well be that their sacrifice was irrelevant, on the likely assumption that the FBI had already obtained the names of persons and organizations connected with the Hispanic Commission. According to one source, NCHA records have furnished "leads" for investigations in New Mexico, California, Colorado, Florida, Ohio, Washington, D.C. and Texas. Episcopal bishops in Puerto Rico, Chicago and Colorado have been visited. Episcopal clergy and parishes in Puerto Rico, California and Colorado have been investigated. In short, because of the search for one fugitive who belonged to the commission for less than one year and who reportedly attended only a handful of meetings, all persons who worked with the NCHA in any capacity are under suspicion and subject to investigation as possible FALN members or sympathizers.

It needs no imaginative effort to grasp the devastating effect this can have, since the devastation is already happening. Credible information suggests that not only Hispanic but other minority communities are drawing away: "You work with the Episcopals and what happens? They give your name to the FBI." It does not greatly matter whether the FBI and the prosecutors intend these effects (out of a general purpose to intimidate "radicals"), or whether the intimidation is a side effect of an overzealous, overhearing disregard for the rights of citizens. Regardless of purpose, the effects do occur.

In the present instance, it is sadly ironic that the effects have occurred in the context of an effort by the church to make contact with an alienated population.

By its too-eager, too-innocent collaboration with the FBI, the Episcopal leadership has frustrated the threshold task of any such mission, the establishment of a relationship of trust. Instead of proving itself worthy of confidence, the church now appears to many minority persons as a naive or callous "stool pigeon."

A Posture for the Church

Rather than dealing only in hindsight judgments, however, this review should issue in some sort of guidelines for the future. An immediate caution: No set of guidelines can be complete, not only because circumstances differ radically from case to case, but also because in many areas the law is confused. Competent counsel is needed, not necessarily from "radical lawyers" but certainly from attorneys familiar with the territory.

At the outset there is a question of the church's attitude toward its own relationship with the civil power. It was not too long ago or far away that the civil arm had no jurisdiction over the employees of the church, and that the church could offer sanctuary even to nonemployees sought as criminals if they reached its premises. In present-day America the churches would not make such claims, but the historical reference is a useful reminder that the churches are not simply subagencies of the state. They need not, for instance, simply acquiesce when, as in the present case, a court takes upon itself the right to define which activities of a church are properly "religious." (The court said the activities of Ms. Cueto and Ms. Nemikin were to be classified as "social work" rather than any form of "religious" ministry.) At the very least, the First Amendment right of free association is not made weaker when it is coupled with the freedom of religion the amendment also guarantees.

In the nature of things, it is at the beginning of an inquiry that crucial mistakes are most likely. In consequence, several church bodies have already notified their employees that governmental investigators are to be referred to the senior officer of the church for any information about the organization, its present or past employees or other institutional matters, so that secretaries, receptionists, accountants, etc. are not placed in the position of having to respond.

And how should the "senior officer present afloat" respond? The preliminary response once made by the General Counsel of the National Council of Churches to an inquiry from the Internal Revenue Service offers one model. In substance, he replied:

"The relationship between churches and government is a very sensitive one, and a church body is protected by the First Amendment as no other kind of institution is. I am sure neither you nor we would wish to make any missteps here because of haste or carelessness. Many of the legal guidelines are not clear on such matters, and we want to preserve the right to get clarification from a court before taking any steps we might later regret. So if you will particularize in writing what exactly it is that you want, and your authority for asking it, we will review your request and determine what we can appropriately let you have. If at some point we reach a difference of opinion, then we can let the court decide."

This stance, constituting neither defiance nor instance acquiescence, is probably the most prudent course. Another model was offered by a church leader who took a stand in the doorway and said, "No farther!" (The official rather hoped that the governmental agency would challenge him; it did not.) Either strategy would in most cases be preferable to the open-door posture resting on the view that "we have nothing to hide."

Whether the church has anything to "hide" hardly defines what is at issue; in a free country government agents do not have unlimited right of access to the private affairs of citizens, their organizations or—a fortiori—their churches, regardless of the agencies' purposes in demanding such access. Before questions are answered or files are opened, other considerations must be met. What will this do to employees and constituents? What precedents will it set for other churches? What has been the pattern of Government actions in similar situations? (The question is of special pertinence where a grand jury has been or may be convened.)

Suppose that the first strategy has been adopted, the Government has stated its inquiries in writing, and the church leaders must then decide their response. According to The Times, Bishop Allin has now adopted the view, previously urged by some legal authorities, that the church will not in the future turn over personnel files without the permission of the persons concerned; the initial

response will be, "Sorry, we don't give that out." The grounding for this can be that personnel files are the joint property of employer and employee.

With respect to information about contributors, again the NCC practice may offer guidance. When asked for correspondence with contributors, the NCC declined on the ground that it considers the correspondence confidential and the identity of contributors not to be divulged. If the IRS were to ask whether a named person gave a claimed amount in a given year, NCC would answer yes or no; it would not supply such names on its own motion.

Who Owns My name?

What about lists of members? The Supreme Court has found that the mere providing of names may indeed be a sensitive matter, when it upheld the refusal of the National Association for the Advancement of Colored People to divulge its membership list to the state of Alabama (*NAACP* v. *Alabama*). In some circumstances, the Court held, freedom of association requires anonymity.

Since law enforcement also has its claims, such an argument would not always prevail. And yet it will be well for church leaders, and for all citizens, to grasp a principle repeatedly affirmed by the Supreme Court: The freedoms guaranteed by the First Amendment have a preferred position in our society. They cannot be abrogated by government except for compelling reasons, and—Mr. Justice Brennan often adds—after a showing by government that those reasons cannot be served in any other way. Here the Court is acting most clearly in our tradition, instructing us in the care and preservation of our liberty. The churches should be no less vigilant.

At the very least, then, they should not lend their cooperation to wide-ranging "fishing expeditions" that will bring innumerate persons under investigation solely through their connections with the church. Surely it will seldom, if ever, occur that the only or the best route to the apprehension of presumed criminals will be to track them to the church. Hence, when agents demand names, church leaders may well decline to comply until a showing has been made, preferably in adversary proceedings, to the effect that the information is genuinely needed and that other leads cannot be obtained in other ways. It should be demonstrated that the benefits disclosure may bring to society in terms of effective law enforcement outweigh the damage that may be done to legitimate interests of the church and its members (see 8 Wigmore *Evidence*, section 2285 at 527, McNaughton ed., 1961).

It may be granted that several levels of membership exist. Presumably, those who have been elected or selected to leadership positions can be said to have accepted a relatively high degree of visibility. Membership on an official body, such as the Hispanic Commission, may be public information to a greater degree than rank-and-file membership in the church itself. Of even less formal status would be those constituents or "seekers" who come only briefly within the ambit of the church. In general these levels of association with the church should be subject to disclosure in proportion to their eminence.

But even here circumstances alter cases. Church leaders should be knowledgeable enough, and commonsensical enough, to discern when (as in the case of the NAACP in Alabama) known association with a particular body may mean trouble, so that the presumption should be in favor of confidentiality rather than disclosure. In such cases the church should not simply hand over lists but should at most simply answer factual questions: "Was X a member in 1976?" "Yes, he was," or "No, he was not." Anything beyond this would arguably be excessive entanglement of government in the affairs of religion.

Defending his own policy with regard to the recent incidents, Bishop Milton Wood reportedly declared that, "In general, church programs can't be made confidential. The General Convention requires this. This is not Watergate." One wonders, in the first place, whether confidentiality is not more important in the life of the church than the bishop holds, and whether the General Convention can have meant to imply, "in general," church business is government business.

It may well be, for example, that communications or other kinds of information may be freely shared with church members but are not intended to be divulged to others. Consider the example of a church-sponsored study of attitudes among members toward teen-age drug abuse. The study is meant for the use of the church, but its compiler (and the respondents) may very well object to its dis-

closure to prosecutors pursuing drug abusers, lest members who had expressed opinions be thought to have evidence worthy of official investigation. A church that does *not* have confidential information of this and other kinds may well question its relevance.

Secondly, and more centrally, it appears that Bishop Wood has learned the wrong lesson from Watergate. The criminals in the original and related Watergate cases were not the officials of the Democratic National Committee, or Daniel Ellsberg's psychiatrist, or the journalists and others whose telephone lines were tapped. The crimes committed were not those of private citizens wrongfully frustrating their government. No, the criminals acted on behalf of Government officials, in most cases under color of the authority of our Chief Magistrate; and their crime was precisely the seeking of information, by illegal means, that the Government had no legal right to obtain.

Many observers have concluded that the Bill of Rights was never more at risk than during the period before the crimes associated with Watergate were exposed. The lesson to be learned is not new but a platitude: Vigilance is the price of liberty. In practical terms church officials must learn to respect their own rights, the rights of their constituents and their employees. When the agents of government come calling, their demands must be examined with care. It is not intransigence but respect for liberty which suggests the need for the churches to keep government at a distance, to offer poised and reasonable resistance against inroads on their privacy and their mission. It is hard to think of a better place to make a stand on the First Amendment than at the door of the church.

[The following was submitted for inclusion in the record of the June 1, 1977 hearing:]

1973 GRAND JURY
OF THE COUNTY OF TULARE,
Visalia, Calif., July 6, 1974.

Honorable Judge JAY R. BALLANTYNE,
Judge of the Superior Court, County of Tulare, Visalia, Calif.

DEAR JUDGE BALLANTYNE: When you impaneled us as the Tulare County Grand Jury in February of 1973, you charged us to investigate all areas of county government. I was amazed but highly pleased when you appointed me as the Foreman. That position I held with pride and gusto for a year, until February of 1974, when I resigned.

Internal conflict and turmoil arose, my motives and actions were questioned, so I resigned in order that peace and harmony could prevail among the majority of the panel.

In the beginning, the area of government that caught my attention, came as the result of many complaints from maligned and abused citizens in the field of "Law and Order". The methods of the courts, the police, the Highway Patrol and the office of the District Attorney were the basis for my zeal as an investigator for the distraught.

Also, as the Foreman, who by tradition has been accorded the honor, responsibility and opportunity of expressing himself personally as to the fairness and credibility of our system of government, I took certain liberties which seemed perfectly valid and normal. I did not know that the establishment would become so irate over my concern for fair play.

The press was generally belligerent and the Editor of the Fresno Bee attacked me editorially, questioned my ability as a leader, my knowledge, my veracity; and by innuendo, he intimated that I was trying to manipulate my Grand Jury. His comments said that the District Attorney should have the green light to run court trials as long as he wishes, forget the long suffering jurors who have to listen through legal pomp and maneuvers, and by all means forget the taxpayer, who pays the bill.

Would not justice be served if someone had the intestinal fortitude to say this case can be handled in a couple of weeks instead of three months? It appears to me that some lawyers like long, drawn out trials, especially if a Hollywood flavor exists. I was told that Grand juries are the "watch dogs" of our system and I still think we need them in that capacity, but their general utility and usefulness is being undermined by the intelligentsia.

I did not seek membership on the jury and I certainly did not ask to be designated its foreman. As a public servant most of my life, I take my oaths and obligations very seriously. At $4 per day and 5 cents a mile for traveling around the county to committee meetings and investigations, a person must be dedicated to say the least. My creed comes from the Sage who said, "God grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to know the difference."

Only the rich, the retired and the self-employed can afford the luxury of being on a Grand Jury and our lawmakers keep it that way, so that the average citizen, the poor, the common man, the laborers and the dependents of the social order have little or no chance of being selected to serve on a Grand Jury. It is, indeed, a system of government by clique selection. Somebody in Sacramento should wake up and change the procedure for Grand Juries, as the system will collapse as the people, the final judges, will have lost all their faith in the system, as it now exists.

I lament the erosion of individual freedom, the inroads of the police state and the passing of our great form of government due to greed, lust, rule by clique and the bending of laws to suit individuals in power. Justice is often meted out by the rule of economics, rather than by right or wrong.

Among the many obligations listed in your book of instructions to jurors is Section 919 of the code, which admonishes us to inquire as to the welfare of all prisoners and the conditions and management of public prisons, prisoners' rights, their indictments and counsel, etc. The only way to investigate a prison is from the inside and not by being shown through the facility on a given day and eating roast beef for lunch in the trustees mess hall. I chose to go to jail. Suffice to report here that it is quite a transition from being a free man one minute and then the next minute being a 'non-person' on the way to prison. I notice some of the Watergate culprits are given time to go home and change clothes before beginning their terms, but from the Dinuba Justice Court I was accorded no opportunity to go home to get medicine that I regularly take, nor tooth powder and general tolletries and saving supplies. Justices of certain courts show little or no compassion, often shoot from the hip and some have been observed in great anger when aroused by a recalcitrant litigant. This type of justice leaves something to be desired.

In my observation of the county jail, I find the sheriff basically following the rules of the system, poor food, little meat, lots of starch, no vitamins, no fresh milk, no doctor, but plenty of smoking tobacco, little or no exercise, few books to read and little or no training for rehabilitation. I feel strongly, as have other grand juries of the past, that the jail should be converted to a Department of Corrections, as the sheriff has plenty to do without running a jail and trying to rehabilitate criminals or improve the lot of the ignorant, the poor employment risks and the alcoholics. The jail is generally clean, well ventilated and a pretty good looking building, especially from the outside. We need laws that some help be extended to released prisoners as the private sector will not hire and will hardly take a work application from an ex-convict. Public works, a half-way house, or the like may save an unfortunate from being a repeater.

Prospective jurors should be selected from the wide spectrum of our society, not only from the upper class. Everyone should be given a chance to serve, and a jury need not be 12 persons. I firmly believe that 6 normal, intelligent and observant citizens can render a fair and just verdict.

Now, to some specifics. I went to jail, as you know, and for some very specific reasons, to study, to visit and listen. After several years of watching court trials, and especially for the year as Foreman of a Grand Jury, I wanted to visit and confer with the accused and the condemned. I am now convinced that the District Attorney and his operatives often play games with the taxpayers money, by manipulation, intrigue, plea bargaining, inordinate use of stool pigeons, informers and fall guys in order to come up with a conviction. Generally, the philosophy that prevails is that it is whether you win or lose that counts, and not how you play the game.

I lament that the sheriff has to use stool pigeons who play the role of addicts and who collect evidence for many months, and then pull a gigantic "raid" and come up with hundreds of victims arrested *en masse*. Many are innocent, maligned and their reputations ruined. If a man is caught in an illegal sale or use of narcotics, why wait for months and pick him up in a raid? If illegal trafficking is going on, he should be arrested on the spot. The Board of Supervisors could

well look into the appropriations that finance the use of inordinate subterfuge.

I would like to comment on several trials that I studied and observed in action. The Walker trial. There were weeks of preliminary hearing before a Justice of the Peace in Porterville, the Grand Jury was bypassed, and finally an indictment was issued naming two suspects. The most likely suspect on whom a guilty verdict could be obtained was an ex-convict from Illinois. Plea bargaining, legal maneuvers galore, a sick prosecutor, the hiring of a private lawyer, which cost the taxpayers in excess of $5,000, and then after several months the case was finally given to the jury. Vote your conscience the judge told them, but remember that the man on trial for his life is a liar, or words to that effect. How weird.

The Ramon Mendoza case. This young man was found guilty after three trials. Several jurors told me that there certainly was a shadow of doubt that Mendoza did the knifing. I had dinner in a holding tank with Mendoza and ate at the same table. He did not know who I was as I had been booked earlier. I listened to his story after Judge Jacobus sentenced him for murder. I'm convinced that the District Attorney used cruel and inhumane evidence in order to get a conviction. A Chicano has little or no chance to get a fair trial in our social order as the jurors are generally 98 percent Anglo and biased to begin with, and I have heard many, many times, "I'm not prejudiced, but there are too damn many Mexicans in the county . . ." This sort of philosophy has got to be abated. Fair play is fair play, regardless of color, race, creed or sex.

While I did most of my study in the field of "law and order", the police and the court system, I also had many complaints about unfair tax assessments. The rich and the favored in the establishment are apparently given benefits where tax assessment doubts exist, while some of the dissidents are harassed to the point of exasperation. Since at least 1969, when the then Foreman, Richard Keeffe, wrote in his letter to Judge John Locke that there were various inequities in property assessments, particularly in the Three Rivers area, each Grand Jury has been confronted with these unusual assessments in the Three Rivers area. Some have tried to make in-depth studies—all to no avail as the presiding clique generally ruled with the Court House Clique. There are always those who feel that high values on one particular sale determines what the assessment should be on the surrounding property, regardless of the income that the property can produce.

The assessment system as we now know it is a vestige of the Dark Ages and desperately needs overhauling and to be brought into the 21st Century. To do that we will need lawmakers who have vision and foresight, and it is high time that we elect bright young men and shelve the old line "ward heeler" types that seem to prevail today. Income should be the factor that determines what a property should be assessed and not someone's idea of what the market value is. A restored Model T Ford might be worth $3,000, but it is not worth a dime if no one will buy it. Can you imagine a pasture that doesn't have any cows, not saleable or usable for agriculture, not zoneable for commercial or a trailer park and producing no income, being assessed for as high as $10,000 per acre. Ridiculous.

Mr. Raymond Stivers and his associates have been fighting for years against exorbitant assessments and some of the litigants are in danger of losing their property by delinquent tax foreclosure. Many have shown that their property is higher in assessed valuation than property in downtown Visalia and on Mooney Blvd. Strange indeed.

Zone changes, assessments and land use factors are vast fields of controversy and clear guide lines are needed for a more content and stable society. With zoning, the issue is generally decided by who is seeking the zone change, rather than that it is a good thing for the greatest number of citizens.

A case in point is the granting of a zone change by the Board of Supervisors to a Dinuba subdivider, on a 15 acre parcel into lots of less than 1 acre, less than a mile from the city, especially after the Dinuba Planning Commission, the Dinuba City Council and the Tulare County Planning Commission recommended denial, and called the zoning inept, unsuitable and dangerous to the subterranean water supplies and not in the public interest. With arrogance and contempt for other legally constituted bodies of government, the Board of Supervisors unanimously passed the rezoning permit for the subdivider. How strange.

Finally, Your Honor, I will bring my personal observations to a close, although I could write a book. I wish to express concern for our poor people in their desire for recreation. With inflation rampant, gas shortages and crowded areas where

people gather, it is of the utmost urgency that our park and recreational areas be enchanced and expanded, and not only those around the Visalia area. The Pixley Park needs attention, and the Kings River Park, on the drawing boards for the better part of a decade, should have our Supervisors' undivided attention. I'd still like to know why and how the park was shifted from the R.B. Oliver Bridge area on Mountain View Avenue (Ave. 416) to a less favorable site with no entrance and no exit after the State of California, the Commission of Parks and Recreation, and anyone that knew anything about parks recommended the original site. The next grand jury could look into that, I tried and could get nowhere. The whole thing is a sorry mess.

The poor people have no lobby, the poor cannot afford to play golf (and by the way there is no shortage of golf courses), their children need to romp and play someplace, as federal and state monies are available. It is in poor taste to use federal revenue sharing funds to enhance a police state by hiring more police and sheriffs to ride up and down county roads, lanes and pathways, trying to impress the public, wasting gas, rubber, polluting the air with fumes in the guise that they are protecting the citizens. Does a fire engine patrol the area looking for fire, or are stations strategically located to be available when needed? The Patrol is one of the big jokes of law enforcement, and we need legislators to look into the effectiveness of the Patrol. When I see a couple of officers riding around looking askance at motorcyclists, long haired teenagers and acting like Gestapo agents, I do not wonder why the gap between the law and our people is widening, rather than coming closer together. Where is the cop on the beat, greeting the taxpayers with a smile and waving his arm in protection, rather than with a threat. We need an enlightening crusade, to bring law and order to the people, and not to see how far we can develop a rift, and alienate our people by arrogance, snobbishness, and the vigilante complex that many of our officers have, especially against minorities and our long haired progeny.

Most sincerely,

E. A. "DUTCH" GLANZER,
The Late Foreman.

[Whereupon, at 12:50 p.m., the hearing adjourned.]

GRAND JURY REFORM

WEDNESDAY, JUNE 29, 1977

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP
AND INTERNATIONAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:30 a.m. in room 2237 of the Rayburn House Office Building, the Honorable Joshua Eilberg [chairman of the subcommittee] presiding.

Present: Representatives Eilberg, Holtzman, Hall, Fish, and Sawyer.

Staff present: Garner J. Cline, Arthur P. Endres, Jr., and Martin H. Belsky, counsel; Peter Regis, legislative assistant; and Alexander B. Cook, associate counsel.

Mr. EILBERG. The subcommittee will come to order.

Before you begin, Mr. Civiletti, I must express my sense of outrage that Attorney General Bell is not here today.

The fact that he has deliberately absented himself from these hearings is a discourtesy to this subcommittee, an affront to the Congress of the United States, and an abdication of his responsibility as the chief law enforcement officer of the land.

This is no slight to you, Mr. Civiletti. We welcome your presence here today.

We had repeatedly suggested to the Attorney General that we thought you should accompany him to these hearings because you are responsible for the actions of all Federal prosecutors.

But this issue is of paramount concern to the Nation, to the Congress, to the courts, and—I would have thought—to the Department of Justice.

It demands the personal involvement and active participation of the Attorney General, himself.

Last year, under a Republican administration, former Attorney General Edward H. Levi personally presented the Justice Department's position to the subcommittee.

The absence of Attorney General Bell is exceedingly curious, because he has not hesitated, up to now, to speak out on this issue—in other places.

Let me set out the record for you:

At Mr. Bell's confirmation hearings in the Senate on January 12, 1977 he was asked a series of questions about proposals to reform the Federal grand jury system.

Mr. Bell said that he would support many grand jury reforms, although he expressed some concern about some proposals.

Specifically he stated, and I now quote:

> There need to be some safeguards built into the—Federal grand jury—system . . . I know there are some abuses in the grand jury system. I have an open mind and I am prepared to do something to make it better. . . .

The very next week I wrote the Attorney General expressing my pleasure at his testimony and offering the assistance of my staff to work with his staff in reviewing my bill H.R. 94.

In that letter I told Mr. Bell:

> To insure closer cooperation in the future, I would like to respectfully recommend that you designate a staff person to meet as promptly as possible with subcommittee staff on grand jury reform issues, and to arrange a convenient time for your testimony before the subcommittee.

Thereafter I had several opportunities to meet the Attorney General informally. Each time he stressed his personal interest in the grand jury issue, and urged that staff-to-staff contacts be made.

On Sunday, February 13, Mr. Bell was on national TV, on "Face the Nation," and was asked about Federal grand jury reform.

The American Bar Association, you will recall, had already passed a resolution supporting most of the reforms in H.R. 94, and was about to vote on more extensive grand jury proposals.

During that telecast Mr. Bell said he would ask the ABA—quote—

> To let me study it. If I have an opportunity, I would say that I just became Attorney General, and I would like to study this question.

The next day, the Attorney General got that opportunity. He went before the ABA's House of Delegates and said—and I quote him again:

> . . .I am told you are going to consider some grand jury reform. I hope, that as a courtesy to me . . . that you would put off any decision . . . until I could have a chance to study it. I won't delay you. Certainly by the next meeting of the House, I would be able to take some position . . . if you will give me that much. I will appreciate it, and I will guarantee you I will be ready by the next meeting of the House.

Because of these expressions of the Attorney General's personal interest in grand jury reform, I directed staff to begin work on our hearings and to work out a schedule to give the Attorney General an adequate opportunity to prepare for them.

Instead of beginning with the administration position, as is our usual procedure, the staff was told to schedule other witnesses first to give the Attorney General more time to put together his position on this matter.

This fact was, of course, communicated to the Attorney General. Meetings were held about policy issues and about an appearance date for Mr. Bell.

The subcommittee staff met repeatedly with Justice personnel. I met with Ms. Wald, the Assistant Attorney General in charge of congressional liaison, to review the issue, to reiterate the need for cooperation, and to emphasize the importance of the Attorney General's participation.

I was, therefore, totally surprised that, in response to my personal request to the Attorney General that he come up here to testify, I

received a short letter—almost a form letter—from Ms. Wald that, "The Attorney General has designated Assistant Attorney General Benjamin Civiletti to be the Department's spokesman" at these hearings.

I promptly contacted Justice Department representatives to express my concern over the Attorney General's refusal to appear, and I followed this with a four-page letter to Mr. Bell explaining precisely why I believed it essential that he, personally, present the Justice Department's position.

On June 13, the Attorney General responded, and again I quote:

I believe an Attorney General should speak out on issues of concern to the Department of Justice in various appropriate forums, as the opportunities present themselves, without necessarily incurring an obligation to appear before Congress personally to present these views.

In other words, Mr. Bell seems to be saying that he can talk to the media and interest groups, but that he doesn't have to talk to Congress on those selfsame issues.

Mr. Bell is willing to make statements, but he is not willing to subject himself and his views to detailed questions and, yes, challenges.

As I have said, this is an insult to this subcommittee and to the Congress. It is equally insulting to the American people.

The citizens of this Nation elect their Congressmen to, among other things, oversee the executive branch—and this includes questioning administration officials about the ways that our laws are to be enforced.

Yet the Attorney General apparently believes that he should be exempted from this kind of possibly critical evaluation.

I must say that Mr. Bell's position is not totally consistent. During these first months of the 95th Congress, he has personally testified, or is scheduled to personally testify, on FBI oversight—parole—criminal code reform—and wiretapping, before Subcommittees of both the House and Senate.

Just a week ago today, the Attorney General testified at oversight hearings on the federal judiciary.

In other words, Mr. Bell, a former appellate judge, appears to have been more interested in issues surrounding his former employment than in issues surrounding his present responsibilities.

The issue of grand jury reform is one of national interest and concern.

The ABA is about to vote in August, pursuant to the delay the Attorney General personally requested, on detailed proposals to establish standards for grand jury practices.

The National Council of Churches, the National District Attorneys' Association, the American Newspaper Guild, civil liberties groups, the Grand Jury Federation, the Judicial Conference, and others, have all taken official positions.

Recent law review, newspaper, and magazine articles have all described our review of alleged abuses and proposed reforms.

Recent cases in State and Federal courts—including the Supreme Court of the United States in *United States* v. *Mandujano* and in *United States* v. *Washington*—have all reviewed, and often criticized, present grand jury practices.

As I stated in my June 8th letter to the Attorney General, it is disturbing, and even incongruous, that:

. . . A Republican Administration would consider our hearings of sufficient importance to send the Attorney General himself as a witness and a new Democratic Administration, pledging close cooperation with a Democratic Congress, would not.

[The following letters were submitted for the record:]

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., June 8, 1977.

Hon. GRIFFIN B. BELL,
Attorney General, Department of Justice, Washington, D.C.

DEAR MR. ATTORNEY GENERAL: It was with great concern and disappointment that I received notice that you would not be attending our June 22, 1977 hearing on grand jury reform proposals.

The Subcommittee on Immigration, Citizenship and International Law has been undertaking a comprehensive review of the Federal grand jury system for over two years. The importance of this issue has been demonstrated by the numerous requests of judges, lawyers, citizen groups, state and local government officials, Federal, state and local legislators, and others to appear. In most cases, we have been able to accommodate them and they have testified at our hearings or have submitted statements for our record. That this issue is of paramount concern not only to the public and Congress, but also to the Department of Justice is demonstrated by the fact that your predecessor, former Attorney General Edward H. Levi, personally presented the position of the previous Administration to the Subcommittee last year.

I was, therefore, more than somewhat surprised that, in response to my personal request to you to personally testify, I received a short note from Assistant Attorney General Patricia Wald that "the Attorney General has designated Assistant Attorney General Benjamin Civiletti to be the Department's spokesman" at our hearings. This note was particularly disconcerting in light of the extensive discussions and communications I have had with you and your staff and that my staff has had with the Department of Justice as to working together on the issue of grand jury reform and in setting a date for your testimony.

I feel it necessary to recite the history of our discussions and to restate the importance of your personal attendance at our hearings.

1. At your confirmation hearings on January 12, 1977, you were asked a series of questions about proposals to reform the Federal grand jury system. You stated then that you would support many provisions of a grand jury reform bill, although you expressed some concern about providing an unrestricted right to counsel in the grand jury room. Specifically, you stated: "There needs to be some safeguards built into the [Federal Grand Jury] system . . . I know there are some abuses in the grand jury system. I have an open mind and I am prepared to do something to make it better. . . ."

2. On January 18, 1977, I wrote you expressing my pleasure at your testimony before the Senate Judiciary Committee on the need for grand jury reform. I offered the assistance of my staff to work with your staff on review of my bill, H.R. 94. I specifically stated: "To insure closer cooperation in the future, I would like to respectfully recommend that you designate a staff person to meet as promptly as possible with Subcommittee staff on grand jury reform issues, and to arrange to convenient time for your testimony before the Subcommittee."

3. Thereafter, I had the opportunity to meet you informally immediately after your confirmation. You told me of your personal interest in the grand jury issue and urged staff to staff contacts be made.

4. On Sunday, February 13, 1977, you were asked on a nationwide "Face the Nation" broadcast about proposals to reform the Federal grand jury system. The American Bar Association, which had already passed a resolution supporting most of the reforms in H.R. 94, was about to vote on more extensive grand jury reform suggestions. You stated that you would ask the A.B.A. "to let me study it. If I have an opportunity, I would say that I just became Attorney General, and I would like to study this question."

5. On February 14, 1977, you went before the House of Delegates of the American Bar Association and said:

"One last thing I would like to say to you is that I have just gotten into the office—it has been a harried if not a harassed life—I know you have a lot of

important things you are going to consider here, and I am told you are going to consider some grand jury reform. I hope that, as a courtesy to me, something I would deeply appreciate, is that you would put off any decisions where you are going to change any of our fundamental institutions, where you are going to do anything that might affect the rights of individuals, until I could have a chance to study it. I won't delay you. Certainly by the next meeting of the House, I would be able to take some position on these things. I don't know what issues may be voted on. I have got my book, as a member of the House of Delegates, and about that time I was designated as Attorney General, I became a media event and I have never had a chance to look at the book.

"But if you will, if you will give me that much, I will appreciate it and I will guarantee you I will be ready by the next meeting of the House."

6. Because of these expressions of personal interest in grand jury reform, I directed staff to begin work on our hearings and to schedule other witnesses to allow more time for you to work on a Justice Department position. Staff met repeatedly with Justice personnel; and I met with Ms. Wald, to review the issues and reiterate the need for cooperation and for your personal involvement with the issue, as you had indicated. The date for your testimony was then scheduled, after consultation with your office and Congressional liaison.

7. During the first months of the 95th Congress, you have personally testified or are scheduled to personally testify on FBI oversight, the parole system, criminal code reform, and wiretapping, before subcommittees of both the House and Senate. Surely, grand jury reform, about which you have expressed such a deep personal interest, is of equal importance to these issues.

The issue of grand jury reform is one of national interest and concern. The A.B.A. is about to vote in August, pursuant to the delay you requested, on detailed proposals to establish standards for grand jury practices. The National Council of Churches, the National District Attorney's Association, the American Newspaper Guild, civil liberties groups, grand jury federations, the Judicial Conference, and others have all taken official positions. Recent law review, newspaper, and magazine articles have all described our review of alleged abuses and proposed reforms. Recent cases in the state and Federal courts, including the Supreme Court of the United States in *United States* v. *Mandujano* and *United States* v. *Washington* have all reviewed, and often criticized present grand jury practices.

To restate my request made on May 2, 1977, "because of the importance of the subject matter of these hearings and the need to obtain the most complete views of the Department of Justice. . . , I would appreciate your personal appearance before the Subcommittee." It would be incongruous that a Republican Administration would consider our hearings of sufficient importance to send the Attorney General himself as a witness and a new Democratic Administration, pledging close cooperation with a Democratic Congress, would not.

Sincerely yours,

JOSHUA EILBERG.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., June 13, 1977.

HON. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship, and the International Law, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your letter of June 8 concerning your upcoming hearings on grand jury reform.

One point made forcefully in that letter is the seriousness and importance of the hearings' subject matter. I share your view that the issues related to grand jury reform are profoundly significant.

For that reason, I have asked Benjamin Civiletti to be my spokesman, and the Department of Justice's spokesman, on this subject. As Assistant Attorney General for the Criminal Division, Ben is charged with performing duties, along with this assignment, of great importance to the Department.

It is true that I too have spoken out on this subject—on February 13 on "Face the Nation" and on February 14 before the ABA House of Delegates. I believe an Attorney General should speak out on issues of concern to the Department of Justice in various appropriate forums, as the opportunities present themselves,

without necessarily incurring an obligation to appear before Congress personally to present these views. During the beginning of any new Administration, many cabinet officers, including myself, are required to act personally as a spokesman for the Department until their assistants are officially in place.

Now that most of my assistant attorneys general have been confirmed, I am striving to make the Department work more efficiently by delegating important responsibilities including appearances before Congress to those assistants most knowledgeable in the area who have my trust and confidence. Ben Civiletti is my personal choice to appear at this hearing and present the Department's views.

Very best regards.

Yours sincerely,

GRIFFIN B. BELL,
Attorney General.

WASHINGTON, D.C., *June 28, 1977.*

HON. GRIFFIN B. BELL,
Attorney General, Department of Justice,
Washington, D.C.

DEAR MR. ATTORNEY GENERAL: I have just been informed that it is still the intention of the Department of Justice to present its position on H.R. 94 and other grand jury reform proposals through the testimony of Assistant Attorney General Civiletti.

I would like to reiterate my personal request that you attend the hearings to present the position of the Department and the Carter Administration.

I have detailed the reasons for my request in my letter of June 8th, which I am attaching.

We are looking forward to hearing from you tomorrow. The hearing commences at 9:30 a.m. in room 2237 Rayburn House Office Building.

Sincerely,

JOSHUA EILBERG.

Attachment.

Mr. EILBERG. You may proceed, Mr. Civiletti.

TESTIMONY OF BENJAMIN R. CIVILETTI, ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. CIVILETTI. Thank you, Mr. Chairman.

I appreciate your expressions just given with regard to your view and the committee's view regarding the importance of the matter before you and particularly the appearance of the Attorney General.

I am not here to debate or to make representations with regard to that appearance.

I do not want to let my silence in that regard seem as if I acquiesce in all of the things which you have said.

The Attorney General early on in February began working on grand jury reform analyses, and I think some time in March—I may be mistaken, it may have been early April—assigned, as is typical with major legislation, assigned a chief person responsible for meeting, coordinating, and conducting an extensive study. The Attorney General allocated—his office allocated at that time those—and hard choices they were—those matters as to which physically he would be able to, testify personally. With 18 subcommittees and 11 full committees, of course, it is impossible for the Attorney General to appear before every important committee, and on every important piece of legislation.

Each committee, and each committee chairman, rightfully so, feels that their matters are of extreme importance. And I understand that fairly early on you were advised of that circumstance, and you rightfully persisted in bringing to the Attorney General's attention the fact

that you considered and the committee considered this matter to be such that his personal appearance would be necessary.

The Attorney General, I think, responded to those assertions in saying in effect that allocations of time were unfortunately necessary and that he intended and had designated me to testify.

This is all I have to say on that subject.

Mr. EILBERG. Mr. Civiletti, on that subject, you are aware that the subcommittee had a hearing scheduled 1 week ago today, at which time the Attorney General was scheduled to testify before another subcommittee of this committee.

Do you have any idea how that priority was decided—that he would appear before some other subcommittee rather than this one?

Mr. CIVILETTI. I think it does not at all relate to the timing sequence. I think it rather relates, as I said, to the initial assignments and scheduling priorities as to which matters, of all the important matters that he receives, he can testify to personally and which he determines, although he will follow very closely and approve and review what is done, someone else physically will express his views and the views of the Department and hopefully competently.

Mr. EILBERG. Do you know how he arrived at those priorities, that he should personally testify at hearings on parole, oversight hearings on the Federal judiciary, hearings on wiretapping? Do you have any information as to how those priorities are established?

Mr. CIVILETTI. No. I think they involve probably a lot of factors, including other commitments that were made before that, meetings that are underway, trips out of Washington, things of that sort, as well as the individual merits of the particular hearings, the subject matter, the testimony.

Mr. EILBERG. I must observe, that I have had numerous personal contacts with the Attorney General and I believe that we had a substantial commitment from him to appear before this subcommittee. So I really cannot accept your response as an answer for the Attorney General.

Mr. CIVILETTI. May I proceed, sir?

Mr. EILBERG. You may read the statement or summarize the statement, whatever is your preference——

Mr. CIVILETTI. I would like to—I will certainly serve your wishes—I would like to read a portion of the full statement and submit the remainder for the record.

It is rather long and I don't wish to occupy your time simply by reading. I would much prefer to in due course respond to your questions, if I can, and perhaps summarize some points in the testimony which are more fully elaborated on in the text.

Mr. EILBERG. Without objection then, the statement will be made a part of the record, and please proceed in your own way.

Mr. CIVILETTI. Thank you, Mr. Chairman.

[The prepared statement of Benjamin R. Civiletti follows:]

STATEMENT OF BENJAMIN R. CIVILETTI, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman and members of the subcommittee, I am pleased to be here today to present for your consideration the views of the Department of Justice on H.R. 94, a bill to "reform" the federal grand jury.

At the outset, let me confirm the Attorney General's and the Department of Justice's overriding interest in preserving and protecting the fundamental rights of all citizens in the administration of justice and in the delivery of criminal justice. Many of our proposals made to this Congress have demonstrated that deep commitment and additional proposals and reviews to those ends are underway. Our most important government institutions and systems are designed and have evolved to guarantee constitutional rights, preserve balance and maintain a free and independent society.

Beyond clear constitutional rights, we welcome and support improvements to any aspect of the federal system of justice which permit it to perform its functions better, more effectively, and more responsibly. In particular, we welcome and support improvements to the grand jury system, and we commend and appreciate the efforts of this Committee and its Chairman, Congressman Eilberg. The grand jury system is a particularly pertinent subject for attention because it is a bulwark of our criminal justice system functioning under the sound superintendence of the federal courts for two hundred years as an integral and indispensable part of that system.

Proper consideration of improvements in the grand jury system yields many different and stimulating ideas for change whether legislative, judicial or administrative. The Department of Justice has studied and reviewed proposed improvements in the grand jury system in this light and will continue to do so. We are convinced that few systems are perfect. On the whole, we believe the federal grand jury system is sound. It has served well throughout the history of our Republic, and continues to serve, as an effective, fair and essential institution for the investigation of criminal activity and the initiation of complaints or charges, which begin our adversarial system of guilt or innocence to be determined in a fair trial on the merits.

That is not to state or even suggest that we reject or ignore points or improvements to the grand jury system raised by provisions of H.R. 94; nor is it to deny that some abuses of the grand jury system have occurred, although we may not always agree on specific cases. It must be remembered that federal grand juries conduct tens of thousands of investigations each year. The fact that, on rare occasions (and I am unaware of any basis for alleging that their incidence is other than rare), some error or alleged abuse occurs within that system is not sufficient to condemn the system. Likewise we cannot assure that abuses of the grand jury will not occur in the future; so long as there are human frailties involved as a part of that system, just as with any other institution, occasional abuses may be inevitable. Of course, no abuses are excusable and all are regrettable. We share your deep interest to eliminate the occurrence of grave error and to preserve the function and integrity of the grand jury process.

We are committed to join and cooperate with Congress and this Committee in your strenuous efforts and our mutual goals to provide the public the best and soundest criminal justice system obtainable and fair and just persons to serve it.

The Department of Justice is committed to many of the principles of improvement which underlie provisions of H.R. 94 and which have been suggested by others. For example, a prosecutor has a duty to disclose to the grand jury any substantial evidence of the innocence of a putative defendant known to the prosecutor; a prosecutor should not recommend to the grand jury nor sign an indictment returned by the grand jury if the evidence presented is legally insufficient; a prosecutor should not present to the grand jury evidence known to him or her to be unconstitutionally obtained; a prosecutor should not use a grand jury to procure evidence for preparation for pending trial; prosecutors should not harass or unreasonably delay witnesses; all testimony before the grand jury should be recorded; arguments impermisible at trial should not be made to a grand jury; prosecutors should scrupulously preserve grand jury secrecy; the court's charge to the grand jury should be full and complete and available to the grand jury in writing for referral, among others.

At the same time, we must bear in mind that the grand jury system has the purpose and duty to investigate criminal action without fear or favor and to lawfully pursue evidence no matter how deeply hidden, cleverly disguised or powerfully resisted. We oppose those proposals on statutory provisions which would seriously weaken the institution of the grand jury or impede or impair the fair administration of criminal justice.

Let me now advise you in greater particularity of the Department of Justice position with respect to some of the more significant provisions in H.R. 94.

RECALCITRANT WITNESSES

Section 2 of the bill would amend 28 U.S.C. 1826, in part so that the present eighteen-month limit on confinement for civil contempt would be reduced to six months; and also so that a witness who had once been held in civil contempt could not be confined again, either for civil or criminal contempt, for a subsequent refusal to testify or provide information concerning the same transaction.

In return for the substantial benefits of order, liberty, and peace that it confers upon its citizens, our society also imposes upon them certain basic obligations such as the duty to perform service as a juror and to testify truthfully when summoned before a court, grand jury, or other lawful proceeding. Viewing the matter in this context, the Department of Justice opposes any substantial weakening of the present civil contempt remedy as inimical to the public interest. The power to compel citizens to testify, as the Supreme Court has often noted, is one of the most important and necessary powers of government in an ordered society. E.g., *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 93 (1964). To do justice, the government must frequently depend upon the contempt process with respect to persons who refuse, for reasons other than a legally recognized privilege, to perform their civic duty under law to provide evidence with respect to a possible violation of federal criminal laws to a grand jury or court. In our view, it does not necessarily follow that, because a witness has been confined for six months, the witness will not finally relent and testify. On the other hand, the present eighteen-month maximum period of confinement permitted for civil contempt under 28 U.S.C. 1826 is, we agree, beyond what is necessary to assure that the civil contempt mechanism have ample opportunity to achieve its purpose of securing the witness's compliance. Accordingly, we favor a reduction of the maximum period of confinement allowed for civil contempt purposes to twelve months.[1]

We are, however, opposed to the bill's proposal for restrictions on confinement for criminal contempt for subsequent refusals to testify involving the same transaction. This would lead to the intolerable result that a witness could refuse to testify before a grand jury, suffer a brief confinement for civil contempt, obey the order and testify, and then subsequently refuse to testify at trial, and the trial judge would be powerless to do anything about the contempt. In our view, the existing laws relating to the use of criminal contempt, as interpreted by the federal courts, operate fairly to balance the rights of the witness and the rights of society and to guard against any attempt to abuse the limited successive contempt power.[2]

WITNESS IMMUNITY

Section 3 of the bill would amend the present compulsion of testimony provisions in 18 U.S.C. 6001 et seq., which provide for prohibition on direct or indirect use of compelled testimony or information, and would reinstate the law on this subject essentially as it existed prior to 1970, so that a witness compelled to testify would receive a complete "transactional" immunity from prosecution merely be adverting generally to a particular offense. The bill would also condition the granting of immunity upon the court's need to be satisfied that various circumstances were present including a finding by the court that the proposed immunity recipient's testimony or information "may be necessary to the public interest".

The "use immunity" approach under 18 U.S.C. 6001 et seq. the constitutionality of which was upheld by the Supreme Court in 1972 *Kastigar* v. *United States*, 406 U.S. 441, has distinct advantages to society over the "transactional" immunity approach. First, it eliminates the conferring, upon a witness who has committed a criminal offense, of unnecessarily broad immunity against any criminal liability at all, and substitutes only the protection from use of compelled testimony required by the Constitution. Thus, unlike "transactional" immunity, the "use immunity" process does not create the risk that a witness, who is subsequently and independently found to be more deserving of prosecution than originally thought, will be absolutely immune from prosecution despite the

[1] This does not mean that a court is required to keep a recalcitrant witness in confinement for up to the maximum permissible period under the statute. A court is free to conclude at any time that further incarceration of a recalcitrant witness will not cause the witness to relent and testify, and, upon such grounds, to release the witness from confinement.

[2] *Shillitani* v. *United States*, 384 U.S. 364 (1966).

existence of such independent evidence. Second, "use immunity" removes the incentive for a witness to give wide-ranging but incomplete and shallow testimony. "Transactional immunity" encourages such testimony, while failing to encourage complete candor, specificity, and detail, for it provides absolution for every offense touched upon, however lightly. A witness compelled to testify under the 1970 statute, and thereby afforded "use immunity" no broader than constitutionally required, legally stands to gain little or nothing by his testimony and lacks motivation to withhold or to fabricate evidence.[3]

We also oppose the bill's proposal to require that a court be satisfied, and not only the Department of Justice, that the granting of immunity may be in the public interest. This is to involve the judiciary in prosecutive policy and functions and poses serious constitutional questions under the separation of powers. Deciding the uses to be made in the public interest of immunity grants as prosecutive tools requires the Department of Justice to bring to bear, upon a frequently complex set of facts, all of its experience, information, and judgment, in weighing such factors as the seriousness of the crime that the witness will be used to prove, his own culpability in that crime, the potential otherwise for prosecuting the case, and others. Such appraisals are inappropriate to the judiciary and, incidentally, would often disqualify the judge involved from presiding or continuing to preside at the trial of the case.[4]

UNAUTHORIZED DISCLOSURE OF GRAND JURY INFORMATION

Section 5 of the bill would create criminal sanctions to protect grand jury proceedings from improper disclosures, a concept which the Department of Justice supports. The section establishes two levels of offenses. Under subsection (a), it would be made a petty offenses, punishable by a maximum of six months in prison and a $500 fine, for anyone knowingly to disclose any matter occurring before a federal grand jury. Subsection (b) would punish the same conduct of knowing disclosure of matters occurring before the grand jury by up to five years in prison and a $20,000 fine, if the disclosure was made with the intent to secure compensation, to affect the actions or decisions of the grand jury, to affect further legal proceedings against a witness, or to affect further legal proceedings as to the subject matter of the investigation.

Subsection (c) exempts from both offenses disclosures authorized by law, that is, disclosures to or by an attorney for the government in the performance of his duties, judicially authorized disclosures, and disclosures by witnesses[5] and their counsel[6] of matters concerning the witness's appearance before the grand jury.

Subsection (d) exempts from the petty offense provision disclosure by any person other than a person present at the grand jury proceeding.

Subsection (e) exempts from the felony offense provision disclosure by any representative of the press, broadcasting or information media, acting in his professional capacity.

Under present law, the only criminal sanction available for a disclosure of grand jury matters in violation of Rule 6(e), F.R.Crim.P., is contempt. Because

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[3] The contrary allegation that testimony compelled pursuant to 18 U.S.C. 6002 is "less reliable" than testimony compelled from a witness who has been granted "transactional" immunity, which was contained in the statement of Richard Gerstein on behalf of the Criminal Justice Section of the American Bar Association submitted to this Subcommittee on March 17, 1977, was based on the proposition that "use immunity can be a subtle invitation to perjury. . . . Since the witness knows what he says can be used to impeach him, it can be an encouragement to slant his testimony in a manner most favorable to him." However, this premise is inaccurate. Under 18 U.S.C. 6002, a witness' compelled testimony may *not* be utilized to impeach him. E.g., *United States* v. *Frumento*, 552 F. 2d 534 (3d Cir. 1977) (en banc). Thus, the conclusion of the American Bar Association's Criminal Justice Committee with respect to the inferior reliability of "use immunity" compelled testimony is without foundation. Indeed, for the reasons noted above, quite the contrary is the case.

[4] The Department of Justice is aware that some apparently favor a proposal to bar a grant of immunity unless, among other things, the witness himself consents. See H.R. 3736. Such a proposal would mean, in effect, an end to immunity and borders upon the irresponsible. Not only would such a law encourage attempts at intimidation (to induce the witness not to consent), it would reflect the indefensible view that criminal justice is to be measured by the often distorted values of accomplices and associates of accused wrongdoers (the class of persons to whom, typically, immunity is extended). Organized crime and official corruption would certainly prosper if the government were ever forced to play by those rules.

[5] The bill defines "disclosure by a witness" to allow any other person to disclose matter that was learned from a witness.

[6] Under Section 7 of this bill counsel for a witness could be permitted inside the grand jury room, and counsel would be authorized to make disclosure of what transpired in the grand jury. The Department is opposed to both of these provisions, for the reasons to be given in discussing Section 7 of the bill.

of the legal problems associated with contempt actions, the Department of Justice supports the concept of enacting legislation specifcally to punish the unauthorized disclosure of grand jury information.

In our judgment, however, the approach taken in H.R. 94 is not entirely satisfactory. In particular, we suggest that the distinctions in terms of intent embodied in the bill with respect to the gravity of the offense may not be justified. While acting with bad intent is often a basis in crimianl law for imposing or increasing the penalties for certain conduct, intent has little relevance to a prohibition designed to preserve the secrecy of grand jury information. For example, a breach of secrecy for money would not necessarily be more serious than a breach of secrecy otherwise motivated. Nor would a disclosure for the purpose of affecting a legal proceeding be necessarily more harmful than a disclosure with the idea of causing some public scandal or bringing a prosecutor or grand juror into disrepute. All things considered, we suggest that a unitary offense be created which would eliminate the element of certain specific intent associated with the improper disclosure; any knowing disclosure in violation of the secrecy prohibition should be punishable. Because the offense would be new and there is not showing as yet of the need for felony treatment, we think it should be graded as a misdemeanor, punishable by up to one year in prison and a suitable fine.

EXCUSING WITNESSES WHO PLAN TO INVOKE THE FIFTH AMENDMENT

Section 6 of the bill would prevent a witness from being taken before a grand jury if the witness notified the attorney for the government in writing that he intended to exercise his Fifth Amendment privilege against compulsory self-incrimination. The government attorney would be forbidden to disclose to the jurors that the witness had invoked the privilege, unless the witness was granted immunity.

The duty of a citizen to testify is so absolutely vital to the administration of justice that the law has not permitted the Fifth Amendment privilege to be asserted in advance of a legal hearing. Every witness has a duty, first to take an oath or affirmation, and then to tell what he knows, in answer to each and every question, up to but not beyond the point of possible self-incrimination. *United States* v. *Brickey*, 426 F.2d 680, 688 (C.A. 8, 1970), cert, 400 U.S. 828 and cases cited therein.[7]

The provision assumes that the witness knows the precise questions to be asked of him, and also in an accurate judge as to the availability, as to those questions, of a Fifth Amendment privilege. Neither assumption is warranted.

SUCCESSIVE GRAND JURY INVESTIGATIONS

Section 6 of the bill also provides that if a grand jury "has failed to return an indictment," no subsequent grand jury investigation of the same subject matter could be initiated unless a court found that new evidence had been discovered.

We concur in the principle underlying this proposal that persons should not be needlessly subjected to the potential ordeal and harassment of a second grand jury investigation after a first grand jury has concluded on the merits that an indictment should not be returned. Indeed, codification of such a principle could tend to cause the government to conduct its initial grand jury investigations more thoroughly and thus could operate in many instances to the public's advantage. Accordingly, we would not be opposed to legislation which provided that, if a grand jury determined on the merits—e.g., by voting a "no bill"—not to return an indictment, no subsequent grand jury investigation based upon the same subject matter could be initiated unless a court found that new evidence had been discovered.

There are, however, a number of problems with the proposal as drafted in the bill. The proposal assumes that the failure to indict always reflects a determination by the grand jury of lack of probable cause, after all the government's evidence has been presented. However, a grand jury which does not

[7] If a witness refuses to answer a question on the basis of a privilege, and a judge determines that the privilege is improperly invoked, he may order the witness to answer. A court does not have to accept an assertion of the Fifth Amendment privilege at face value; and a witness must claim his privilege as to each individual question asked so there can be individualized rulings; a blanket refusal to answer questions constitutes contempt. *Hoffman* v. *United States*, 341 U.S. 479 (1951); *Enricht* v. *United States*, 212 F. 2d 702 (C.A. 10, 1954).

indict frequently does not make such a determination. A grand jury may fail to indict for want of time to hear all the evidence before its discharge, or for various other reasons having nothing to do with the merits of the case. For example, the investigation could indicate the existence of venue in another district where the case might more properly be instituted. Certainly, such inconclusive action should not prevent subsequent grand jury investigation and indictment.

DUTY OF PROSECUTOR TO PRESENT EXCULPATORY EVIDENCE

Section 6 of the bill would require the attorney for the government to "periodically advise the grand jury of the nature and existence of evidence, as yet not received, which might tend to materially affect the credibility of any witness or tend to negate the guilt of any prospective defendant."

The Department supports the principle and follows in practice the standard that if a prosecutor is personally aware of significant evidence which directly negates the guilt of a subject or target of an investigation, he or she should, and we think uniformly does, present the evidence to the grand jury for its consideration. It serves no interest, and indeed would be improper, for a prosecutor to seek and indictment as to which he has not a reasonable and sound prospect of a guilty verdict at trial. But this is a far different proposition from that in the bill, which acknowledges no distinction of kind or degree between the grand jury and trial stages.[8]

But adoption of this provision for grand juries, which as written in H.R. 94 goes beyond even the present duty of the prosecution to present exculpatory evidence at trial, see *United States* v. *Agurs*, 427 U.S. 97 (1976), would be unwise and inconsistent with the nature of the grand jury's function to determine, under a probable cause rather than a reasonable doubt standard, whether criminal charges should be brought against a person. To impose a duty upon a prosecutor to apprise the grand jury of all material that is conceivably exculpatory would convert the grand jury process into something akin to an ex parte trial on the merits, and would assuredly lead to a plethora of defense motions to dismiss the indictment or to suppress the testimony of a particular grand jury witness based on the contention that the prosecutor had not sufficiently complied with the obligation to disclose facts that "might" have tended to affect the witness's credibility or to negate guilt.

In general, the full presentation of exculpatory matter is properly reserved for the trial. However, in accordance with the principle earlier expressed, the Department of Justice will adopt in the United States Attorneys' Manual binding regulations or guidelines which will instruct prosecutors to disclose to the grand jury any significant evidence of the innocence of a putative defendant that is personally known to the prosecutor.

NOTIFYING POTENTIAL TARGETS OF INVESTIGATIONS

Section 6 of the bill would require the attorney for the government to attempt to notify a potential target of a grand jury investigation a reasonable time before seeking an indictment in order to afford that person an opportunity to testify before the grand jurors, if so desired by them. The notification would not be required if the government could prove to the satisfaction of the court that notice "would result" in the flight of the person, endangerment to other witnesses, or undue delay.

The Department of Justice believes that in the vast majority of grand jury proceedings, such a notification to a potential target is unnecessary and, in regard to many investigations, would be unwise. Only rarely, such as in a case in which the evidence of probable guilt turns upon the testimony of a single, arguably unreliable, witness, might the grand jury desire to hear the testimony of the potential target before deliberating whether to return an indictment. Yet, if the requirement to notify all potential targets were made a general rule, we foresee the prospect of substantial litigation revolving around the exercise by the govern-

[8] Under the bill's proposal, for example, the prosecutor would be obliged to apprise the grand jury of every prior conviction and prior inconsistent statement of a witness of which he was aware (and conceivably, although it is unclear under the bill, of which the government as a whole was aware) that might tend to affect the witness's credibility. So onerous a requirement would overturn longstanding law and practice. e.g., *United States* v. *Gardner*, 516 F. 2d 334, 338–339 (7th Cir.), cert. denied 423 U.S. 861 (1975), and confuses the limited role of the grand jury as a determiner of whether to bring charges, not a determiner of guilt.

ment of any necessary exceptions to the notification requirement. In our view, the good faith determination by a United States Attorney that notification in any given case should not be made ought not to be the predicate for the drastic remedy of a motion to dismiss the indictment.

Second, we believe that the standard in H.R. 94 that notification "would result" in any of the consequences listed in the bill is too strict. It would seldom be possible for the government to aver that notification "would result" in such harmful action, yet experience teaches that notification to a suspect of the existence of a grand jury investigation into his activities would frequently cause the suspect to flee or take other measures, such as the destruction of evidence, preparation of a false alibi, or intimidation of witnesses, designed to thwart the investigation.[9] We point out that today notification is sometimes deferred even after a grand jury indicts. Rule 6(e) of the Federal Rules of Criminal Procedure vests discretion in courts to seal indictments until defendants are in custody or have given bail. In making the determination to seal an indictment, courts do not generally require an affirmative proof that the defendant will flee; rather, those decisions are made on the basis of a realistic possibility, under all the circumstances, that flight *might* occur.

Although, for the foregoing reasons, we are opposed to this aspect of H.R. 94, we have no objection to the principle of affording notification and an opportunity to testify to a target of a grand jury investigation whenever such notification seems appropriate and can be made without unduly jeopardizing the investigation or prosecution. In our view, recognition of the necessary flexibility to the government that must be extended in these situations, as well as the desirability of avoiding litigation about the matter, lead to the conclusion that the issue is one best handled through specific regulations of the Department. At my request, the Department of Justice is currently working toward an affirmative proposal to amend the United States Attorneys Manual so as to allow the opportunity for such notification and possible appearance of the individual[10] in the exceptional case.

SPECIAL ATTORNEY FOR THE GRAND JURY

Section 6 of the bill would also authorize courts, upon a majority vote of the grand jurors, to appoint a special attorney to assist a grand jury in an independent investigation. A special attorney could be appointed if the attorney for the government was unable impartially to assist, refused to assist, or hindered or impeded the grand jury in its independent inquiry. The special attorney would be empowered to sign indictments an to conduct all phases of a criminal prosecution arising from the grand jury's inquiry.

We are strongly opposed to this legislation. This provision poses serious threats to equal treatment and protection of individual rights. To sever the grand jury's traditional ties with the executive branch of the government carries the direction that the grand jury should act according to its own notions of what federal statutes mean and what federal prosecutive policy should be. The propose legislation would set up a miniature executive branch of government consisting of a special lawyer answerable to no one and it would allow such miniature branches to spring up from time to time throughout the United States.

In our view, the proposal for a non-executive branch prosecutor is unconstitutional. Beyond that, it would work substantial injustice in subjecting persons to a myriad of disparate prosecutive standards without control.[11]

COUNSEL FOR WITNESSES IN THE GRAND JURY ROOM

Section 7 of the bill contains a proposal to allow a witness to have counsel accompany him into the grand jury room. The court would be required to appoint counsel for any witness financially unable to retain counsel. Counsel would be authorized to "advise the witness" but not to "address the grand jurors or

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[9] We note that H.R. 94 is deficient in enumerating the kinds of harmful results that "would" flow from notification. Although the bill mentions flight, endangerment of other witnesses, and undue delay, it fails to include the destruction or falsification of evidence, types of obstruction of justice that could commonly occur following notification to a potential defendant.

[10] Obviously, such an appearance would have to be pursuant to a waiver of the target's Fifth Amendment rights. The target would not be compelled to appear.

[11] These points are elaborated on in Appendix I, Special Attorney, herein.

otherwise take part in the proceeding before the grand jury." The court would be empowered to remove counsel and order the witness to obtain new counsel if counsel exceeded his proper role in the grand jury room or if removal and replacement were necessary to avoid undue delay or obstruction of the grand jury proceeding. A witness's counsel would be authorized to disclose matters occurring before the grand jury while counsel was in the grand jury room with the witness.

As you know, Rule 6(d) of the Federal Rules of Criminal Procedure reflects the prevailing practice and tradition in the federal criminal justice system that a witness may not be accompanied by counsel into the grand jury room. The Attorney General is firmly of the view, as am I, that this rule is necessary to preserve the grand jury as an effective investigatory institution.

The Department of Justice opposes this fundamental change for the following reasons in summary:[12]

First: Grand jury fact-finding will be severely impaired and impeded because lawyers will lawyer—that is, object, move to strike, and insist on question rephrasing; also client-witnesses will consult and look to the lawyer on every question. Witnesses at trials and in other evidentiary proceedings are not permitted to consult with their counsel before responding to questions exception in rare instances. The grand jury should have the full and frank testimony of the witnesses in his own words.

Second: Witness counsel in the grand jury room, appointment and removal, will cause delay. More importantly the motions, petitions, refusals to respond, all requiring judicial interventions and hearing, will cause enormous delay and convert probable cause determinations to adversarial proceedings akin to a trial of guilt or innocence on the merits.

Third: This proposal provides further opportunity for breach of grand jury secrecy which everyone abhors.

Fourth: The largest beneficiaries of counsel for witnesses in the grand jury room will be those most closely associated with the most serious and most profitable criminal violations who will have counsel provided by their associates or who can afford their own. Indigents will obtain appointed counsel. The vast bulk of honest Middle Americans will not seek the expense of counsel simply to be a fact witness before the grand jury.

Fifth: Technical deficiencies on small points relating to third party witnesses will be utilized by defendants to attack sound indictments and complicate and impair trial proceedings.

NOTICE OF RIGHTS IN GRAND JURY SUBPOENAS

Section 7 of the bill would also require, in part, that in serving a grand jury subpoena the witness shall be given adequate and reasonabe notice of: (1) his right to counsel, (2) his privilege against self-incrimination, (3) the subject matter of the grand jury investigation, (4) whether the witness's own conduct is under investigation, (5) the substantive criminal statutes involved, if known at the time of the issuance of the subpoena, and (6) any other rights and privileges which the court deems necessary or appropriate.

With respect to the first three items, the Department of Justice supports the proposal. Certainly, there is no difficulty in advising every witness of his right to have counsel available outside the grand jury room for limited appropriate consultation during his grand jury appearance. And adequate warning of his "privilege against self-incrimination"[13] is a reasonable added protection to individual witnesses.[14] With respect to the duty to advise a witness of the subject matter of the investigation, so long as the notice is sufficiently general,

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[12] These points are elaborated on in Appendix I, Counsel for Witness, herein.

[13] We assume, however, that a defendant would not have standing to move to suppress the testimony of a witness (other than his own testimony) on the ground that such warning was inadvertently omitted.

[14] As the Supreme Court recently observed in *United States* v. *Washington*, —— U.S. —— (decided May 22, 1977), it is a fact that for many witnesses the grand jury "engenders an atmosphere conducive to truth-telling," by virtue of the setting whereby the witness is brought before a "body of neighbors and fellow citizens" and placed under a "solemn oath." This truth-engendering atmosphere of the grand jury is sufficient in our view to dispel the concern that the giving of such a warning will frighten non-target witnesses and lead to grand juries being deprived of testimony that otherwise would be offered. Such warnings, moreover, serve the public's perception of fundamental fairness and, as will be discussed shortly, would be served wholly to meet any contention by a witness, barring extraordinary circumstances, that his Fifth Amendment rights were overborne by the grand jury.

there is little basis for concern that the proposal will lead to unintended litigation. And such notification, which most witnesses receive today in any event, is useful in that it may enable the witness to refresh his memory as to the events being investigated in preparation for his appearance, thus aiding the grand jury in its inquiry.

The Department of Justice is, however, strongly opposed to that part of the bill mandating advance warning as to whether a witness's "own conduct is under investigation". Last year this Department suggested that consideration of provisions of this kind await decision in the cases of *United States* v. *Wong* and *United States* v. *Washington*, in which certiorari had been granted by the Supreme Court. The Supreme Court decided these cases in favor of the government on May 23, 1977. Because the *Wong* case was resolved on a narrow ground, only the decision in *Washington* is relevant to the issue posed by the bill.

The defendant in *Washington* had been subpoenaed to testify before a local grand jury in the District of Columbia investigating theft of a motorcycle. After being sworn, the defendant was advised (in effect) of his Fifth Amendment privilege against self-incrimination, but he was not told that he was a suspect in the theft or that he was a potential target of the grand jury's investigation.

Following his indictment, the defendant filed a motion to suppress his testimony before the grand jury. The trial court and the court of appeals held that the testimony should be suppressed, on the ground that the movant was entitled to have been warned that he was a potential defendant.[15] The Supreme Court reversed. The Court declined to determine whether any warning as to Fifth Amendment rights was constitutionally required for grand jury witnesses. It held, however, that a witness who has been given such a warning has no constitutional right to a further warning concerning his potential defendant or "target" status.[16]

But beyond the constitutional issue the Court, in a paragraph clearly pertinent to this aspect of H.R. 94, indicated that such "target" warnings would serve no legitimate objective, whether or not other warnings were given. The Court stated:

> [W]e do not understand what constitutional disadvantage a failure to give potential defendant warnings could possibly inflict on a grand jury witness, whether or not he has received other warnings. It is firmly settled that . . . witnesses who are not grand jury targets are protected from compulsory self-incrimination to the same extent as those who are. Because target witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination, potential defendant warnings add nothing of value to protection of Fifth Amendment rights.

In light of the Court's reasoning in *Washington*, with which we concur, the Department of Justice is opposed to that part of the bills' proposal that would require warning a subpoenaed witness whether his own conduct is under investigation by the grand jury.

We also believe that the proposal goes too far in mandating notice of "the substantive criminal statute or statutes, violation of which is under consideration by the grand jury, if these are known at the time of issuance of subpoena." Listing such statutes and giving "target" warnings would, apart from other factors, likely generate considerable post-indictment litigation as to the adequacy of the warnings, particularly if the grand jury developed evidence of criminality that was not clearly foreseen when the witness was called. One troublesome question in such litigation would be whether the test is properly objective or subjective; in any event, it would be difficult to establish whether consideration of a particular violation by the grand jury was known or unknown at any given point in time during the investigation.

RIGHTS OF GRAND JURY WITNESSES

Section 7 would permit a court to quash a subpoena or transfer a grand jury proceeding into another district where it might properly have been convened if the court finds that the movant-witness's appearance would "impose a sub-

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[15] The appellate court also found error in the fact that the Fifth Amendment warning was given in the presence of the grand jurors, who may have drawn an adverse inference from an invocation of the privilege. The Supreme Court rejected this argument.

[16] The Court, by way of analogy, pointed out that even the *Miranda* case, requiring warnings in the "presumed psychologically coercive atmosphere of police custodial interrogation," does not require that the subject be given any special warnings about being a potential defendant.

stantial and unnecessary hardship on such witness or his family because of the location of the proceeding."

The proposal is bottomed on the proposition that the convenience of a witness should, at least on some occasions, be permitted to supersede the convenience of the grand jurors, the federal prosecutor, and the other witnesses who might be called, But a witness ought not to be able to select his grand jury forum based upon considerations of his own convenience. Such a proposition is contrary to the "longstanding principle that the public has a right to every man's evidence", irrespective of personal hardship, a principle "particularly applicable to grand jury proceedings." See *Branzburg* v. *Hayes*, 408 U.S. 665, 668 (1972); *Blair* v. *United States*, 250 U.S. 273 (1919). A transfer could waste the work of one grand jury and cause considerable delay before another grand jury could take up the investigation.

There is an even more fundamental objection to this proposal, Questions of venue are not mere matters of legal procedure; they involve "deep issues of public policy." *United States* v. *Johnson*, 323 U.S. 113, 276 (1944). Venue is a matter of the public's interest and the Sixth Amendment rights of criminal defendants; witnesses as such do not fit into the scheme of things. Thus, a transfer of a criminal prosecution under Rule 21, F. R. Crim. P., is predicated upon motion of the defendant, and while the convenience of the witnesses is an important consideration, the witnesses have no standing to ask for a transfer. Carrying this over to the matter under discussion, a grand jury inquiry should not be transferred at the behest of a witness when such a transfer could, for all that is known, be disadvantageous to the prospective defendants.

Courts control grand jury subpoenas and should be especially sensitive now to the potential for abuse of process. Furthermore, the government does not generally have any motivation for causing witnesses any hardship; the government is seeking to win the cooperation of witnesses to testify at trial. There is simply no need for creating elaborate machinery to prevent some exceptional happening. Legislation of this kind might prompt more witnesses to try to avoid what may very well be a burdensome duty to testify, but one that society must ask of its citizens if it is to maintain an effective criminal justice system.

Section 7 of the bill contains a related proposal that would vest concurrent jurisdiction to hear and determine any motion relating to a grand jury subpoena in the district court for the district in which the subpoenaed person resides or was served, in addition to the district in which the grand jury is sitting. In effect, this proposal would allow subpoenaed persons to litigate motions to quash in a district other than that from which the grand jury process emanates.

Again, the convenience of witnesses cannot be thus served without wreaking a prohibitive cost and delay upon the system as a whole. A challenge made by a witness to a grand jury subpoena on almost any conceivable ground (e.g. relevance or oppressiveness) will require the court to learn the background of the grand jury's investigation in order to assess the witness's claim. In practical terms, this will often necessitate a physical transfer of the records to such court. The delays and expense involved in only one such transfer are considerable. When it is appreciated that a complex fraud or antitrust investigation may involve subpoenaing scores of witnesses in large numbers of districts, the prospect of giving each of them an opportunity to contest the grand jury's process in a court of his residence or place of service would lead to delays, costs, and inefficiencies of staggering proportions that could wholly impede a grand jury's investigation. The proposal is simply unworkable. Here, as elsewhere in our criminal justice system, the convenience of witnesses must yield to a greater societal good.[17]

GRAND JURY RECORDING

We favor mandatory recordation of all testimony in grand jury proceedings, but we believe the present provision goes too far. Currently, recording of grand jury proceedings is permitted but not required by the Federal Rules of Criminal Procedure. Recordation, in varying degrees, is the practice in many districts. Recordation also provides a measure of protection against unduly coercive or

[17] We note that, to a certain extent, the obligations of witnesses to respond to Federal process are compensated by existing laws which reimburse the witness for travel and per diem expenses. Not presently compensated, however, are travel and per diem expenses in connection with hearings on motions to quash grand jury subpoenas, as well as expenses associated with the transfer and assembly of records subpenaed by a grand jury. In our view this is a matter meriting consideration and rectification by the subcommittee.

other improper interrogational tactics. And it preserves testimony for defense impeachment purposes at trial. Under the Jencks Act, 18 USC 3500 and prevailing case law, a defendant is entitled to a copy of the prior statements of the prosecution witnesses who testify against him at trial, as well as any exculpatory evidence within the possession of the government. Recording the testimony of grand jury witnesses insures that this testimony will be available for either of these purposes.

The bill's proposal to require recordation of all interchanges between the attorney for the government and the grand jurors when no witness is present, however, raises distinctly different considerations. At the outset, it should be noted that safeguards already exist for controlling prosecutorial misconduct. As an attorney, the prosecutor is held to conform to the highest professional standards of an officer of the court, a member of the bar of a State, and an employee of the Department of Justice. For any misconduct in office, he is accountable to the court, the State bar association, and this Department.

Moreover, any incremental protection which might be afforded the accused by requiring that all grand jury proceedings be recorded must be balanced against the disadvantages of a blanket recordation requirement. Chief among these is the likelihood that such a requirement would promote increased litigation over the conduct of grand jury proceedings. In our view, to permit such litigation, aimed at the suppression of evidence or the dismissal of an indictment, as to any unintentional error or omission in the oral presentation by the government attorney of the technical nuances of criminal law [19] would be clearly inappropriate. At the same time, the occurrence of deliberate prosecutorial misconduct would certainly be extremely rare, yet it would be unrealistic not to assume that frequent requests would be made for disclosure or for judicial review of the grand jury's proceedings upon the mere speculation that misconduct may have taken place.

Lastly, we are concerned at the impact of a "blanket" recording requirement, such as that proposed in H.R. 94, upon the grand jurors themselves. The proposal in the bill would require recordation of the comments not only of the government attorney but of the grand jurors among themselves or to the government attorney made during the course of the investigation and prior to the grand jury's "secret deliberations." Such a requirement might well operate to inhibit communications by members of the grand jury and thus would have an undesirable chilling effect on proper inquiry and discussion.

For the reasons indicated earlier, however, the Department would not be opposed to a recording requirement similar to that presently pending before the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States as a proposed amendment to Rule 6, F.R.Crim. P., as follows:

Rule 6. The Grand Jury.

* * * * *

(e) *Recording and Disclosure of Proceedings.*—(1) Recording of Proceedings. All proceedings during which a witness is present shall be recorded stenographically or by an electronic recording device. An inadvertent failure or any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording relating to any indictment returned by the grand jury, or any transcript prepared therefrom, shall be filed under seal with the clerk of the court.

The Department is also opposed to that aspect of the bill that would repeal the Jencks Act, 18 U.S.C. 3500, in favor of a provision entitling the defendant, except for good cause shown, to pretrial discovery of the grand jury testimony of the witnesses to be called by the prosecution at trial. Under 18 U.S.C. 3500, prior statements of the government's witnesses may not be revealed to the defendant until after the conclusion of the witness' testimony on direct examination; Rule 16, F.R. Crim. P., further implements this restriction on pretrial discovery by expressly providing that discovery of grand jury testimony is not authorized thereunder. Any relaxation of this salutary restriction would create real hazards

[19] As one means of seeking to minimize such errors, however, the Department is currently exploring the concept of developing patterned grand jury instructions for use by Government prosecutors. In addition, we point out that nothing prevents a grand jury from requesting the court to furnish it with instructions as to the elements of particular crimes. We would not be opposed, moreover, to legislation requiring the court to comply with such a request and apprising the grand jurors of their right to propound it.

for the safety of the government's witnesses in certain cases, by prematurely notifying the defendant of their identity. The Congress in 1975 specifically rejected a proposal, which would have had a similar impact, to require the government in advance of trial to disclose the names of its witnesses to the defendants, subject to a "good cause" exception. We believe that rejection was wise.

We are, however, not opposed in principle to the proposal in H.R. 94 to permit a witness, under such conditions as the court deems reasonable, to obtain a copy of the transcript of his own testimony before a grand jury. But, unlike the bill's provision, which would confer an absolute right upon the witness, we consider it essential that the government have the right to prevent or delay the witness' access to the transcript upon a showing to the court that to provide the transcript might impede the investigation or result in injury or death to any person or property. We are concerned that, in certain instances, pressure may be focussed upon a witness who has testified before the grand jury by persons under investigation to obtain a copy of the transcript so that the potential targets of the investigation may learn of the progress of the investigation and take steps to frustrate it, or to intimidate the witness to change his testimony, or not to testify, at trial.

PRELIMINARY EXAMINATION AFTER INDICTMENT

Section 9 of the bill would entitle a defendant to a preliminary examination when charged with any offense other than a petty offense, notwithstanding the fact that an indictment had been returned.

The proposal is in direct conflict with 18 U.S.C. 3060(a), enacted in 1970, and is without a substantial purpose since, after an indictment is returned, there is no function to be served by a preliminary hearing. The preliminary hearing is designed to benefit a person who has been arrested but not yet formally charged by indictment or information. The sole function of the proceeding is to determine whether there is probable cause to hold the arrestee for grand jury action. 8 Moore's *Federal Practice*, § 5.102. Even if the arrested person prevails at the preliminary hearing, that does not prevent a grand jury from subsequently indicting him. 18 U.S.C. 3060(d).

Since the only mission of a preliminary hearing is to test probable cause, it is settled law that, once probable cause is determined by another means such as the return of an indictment, a preliminary examination is inappropriate. E.g., *United States* v. *Farries*, 459 F.2d 1057, 1061–1062 (3rd Cir. 1972), cert. denied, 419 U.S. 1114.

Since the bill does not purport to alter the present nature of the preliminary examination itself,[10] it is difficult to perceive the rational underlying the proposal that an accused person be entitled to a preliminary hearing after being indicted. In short, the bill would create another cumbersome layer of pretrial proceedings in criminal cases, for no apparent reason. As noted in *Sciortano* v. *Zampano*, 385 F.2d 132, 133, (2nd Cir. 1967), cert. denied, 390 U.S. 906:

> A post-indictment preliminary examination would be an empty ritual, as the government's burden of showing probable cause would be met merely by offering the indictment. Even if the [magistrate] disagreed with the grand jury, he could not undermine the authority of its finding.

APPENDIX I

SPECIAL ATTORNEY FOR THE GRAND JURY

The Constitution of the United States knows only one executive power, that of the President, whose duty to "take care that the law be faithfully executed" includes the duty and the power to execute them according to his construction and understanding of those laws. Corwin, *The President: Office and Powers* 100 (1948). As the Supreme Court recently declared, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States* v. *Nixon*, 418 U.S. 683, 693 (1974). Moreover, even before the *Nixon* case, it was settled constitutional doctrine that a grand jury is powerless to return an indictment without the concurrence of the attorney for the government. E.g., *United States* v. *Cox*, 342 F.2d 167 (5th Cir. 1965), cert. denied, 391 U.S. 935. Accordingly, the proposed legislation would vest powers in the grand jury and its special counsel which are not the Congress' or the courts' to give.

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[10] See Rule 5.1, F.R. Crim. P.

In addition to being invalid, the bill's proposal is unsound. Under the legislation, questions regarding the legality of a person's conduct might be answered in different ways by different grand juries; there would be no single standard in use by all. The special counsel could also exercise discretion, for example to confer immunity on a witness, in a manner inconsistent with the criteria in force for the executive branch. A consequence of breaking up the executive power in order to make grand juries independent is, in short, to make the ideal of equal justice for all persons impossible of achievement. Enforcement of the criminal laws is not a mechanical task. To the contrary, in discharging this executive branch function, the Department of Justice must construe statutes and legal precedents, make legal and factual judgments, formulate policy to guide the United States Attorneys uniformly in all the various districts. This governing power is derived from the electorate. No person should have to answer to criminal charges lodged by a grand jury upon the advice of an attorney not within the executive branch and indeed not subject to any control, when other citizens similarly situated would be spared such jeopardy in the ordinary course. There are thus in our view compelling legal and practical reasons militating against this proposal.

COUNSEL FOR WITNESSES

The sole purpose in calling a witness before the grand jury is to elicit from him whatever facts he knows that may be pertinent to the grand jury's investigation.

If a witness had counsel at his side and was permitted to consult him before answering questions, in our view the factfinding process would be severely impaired because of the tendency for the witness to become dependent upon, and to repeat or parrot responses discussed with the lawyer, rather than to testify fully and frankly in his own words. For similar reasons, we point out, witnesses at trial and in other proceedings are not permitted to consult with their counsel before responding to questions, save in rare instances.[30]

We recognize some advocates for the proposal rely on some state experience; we believe that reliance is misplaced.[31]

The fundamental change proposed would transform the federal grand jury proceedings into proceedings of an adversarial nature inconsistent with the function of the grand jury as a charging (rather than a guilt-determining) body. The result of such a proposal would be substantially increased delays, which are ill-affordable in our criminal justice system.

At the core of our deep-seated concern in this respect is our belief that counsel for the witness will act—inevitably even if not intentionally—in a manner that will disrupt and delay the grand jury's investigation. It is naive to expect that counsel for a witness facing a grand jury will fail to do everything in his power to seek to protect his client from questions that he regards as irrelevant, overboard, or in some way technically defective; evidentially that is the function of an adversarial lawyer and it is to be anticipated that most lawyers representing grand jury witnesses, if given the chance to accompany their client into the grand jury room, would seek zealously to perform that function. While

[30] A witness may be permitted to confer with counsel with regard to whether or not to invoke the Fifth Amendment. The infrequent instances in which such advice is needed as to a grand jury witness are met by the witness's right, without prejudice, to leave the room for a brief period for that purpose.

[31] As one of the reasons given for favoring a proposal for witness's counsel in the grand jury room, Mr. Richard E. Gernstein, appearing before the Subcommittee on Mar. 17, 1977, on behalf of the ABA Criminal Justice Section, noted the alleged problem-free experience of eight States—Arizona, Illinois, Kansas, Michigan, Minnesota, Oklahoma, South Dakota, and Washington—with the practice. Following this representation (which Mr. Gernstein acknowledged was not based upon "any large sampling or empirical research") the Department of Justice surveyed the United States Attorneys in these States. A summary of the survey is set forth in Appendix II herein. In general, it showed that in nearly all of the eight States substantial limitations, either of law or practice, exist with respect to the right of counsel for a witness to be inside the grand jury room. Thus, in at least one of the States, this practice is permitted only with respect to a one-man grand jury. In many of the States, moreover, the law allows counsel for a witness only under special circumstances such as where the witness is a target of the investigation, has waived his privilege against self-incrimination, or has received statutory immunity. In a number of the States in which the practice exists the grand jury is not commonly used; rather the prosecutor institutes criminal charges by information. In sum, the experience of the eight States cited by Mr. Gernstein is no predicate for concluding that the practice could be successfully adopted by the federal criminal justice system.

the bill attempts to limit counsel's role by precluding him from addressing the grand jurors, nothing in the bill appears to prevent counsel for a witness from making objections to comments or questions to the prosecutor. And, even if that opportunity were to be withdrawn, counsel could still as a practical matter speak through the witness. In this way, objections predicated upon various rules of evidence and procedure that have been held inapplicable to grand jury proceedings could be raised, and, unlike in a courtroom or before a congressional committee, there would be no official present, such as a judge or committee chairman, to rule authoritatively on such objections. To deal with any obstreperous witness would require a break in the proceedings in order to obtain the aid of a court to control the witness under penalty of contempt; and we believe that the incidence of problems of this kind would mushroom if the long-established prohibition against having counsel present in the grand jury room was abandoned. Similarly, we doubt the practicability of the provisions in the bill for replacement of counsel if the proceedings were unduly delayed or impeded. To begin with, the very act of seeking a judicial hearing on the matter would likely consume several days; and it is our belief that courts would be extremely reluctant to order a witness's counsel removed or replaced for a breach of the bill's provisions. There is, in addition, at least in the case of a witness who has retained his own counsel, a substantial constitutional difficulty in ordering the witness to obtain other counsel against his wishes.

Beyond the problems of interruption and delay that would be caused by letting counsel for witnesses into the grand jury room, a further important concern arising from this proposal relates to impairment of the secrecy of grand jury proceedings, which exists in large part for the benefit of the witnesses themselves. Not infrequently, particularly in investigations of organized crime, business frauds, antitrust violations, and other white collar offenses, one attorney represents several potential witnesses. At times counsel is retained, by the very business, union, or other organization whose activities are under investigation, to represent all persons connected with the group. In such situations, the individual witness may possess relevant information and be willing to cooperate with the investigation. Understandably, however, he may desire that his cooperation not become known to his employer, fellow union members, or others whom he knows his attorney represents or with whom the attorney has been associated. The problem should not be underestimated. Recently the Special Watergate Prosecutor, in his report to the Congress, noted that multiple legal representation—several witnesses being represented by one attorney affiliated with an organization—operates "in many cases" to preclude a witness from "giving adequate consideration to the possibility of cooperating with the Government." Report, Watergate Special Prosecution Force, p. 140. This view has also been echoed by other commentators.[22] The courts have been cognizant of these difficulties, but thus far have not generally required separate representation for fear of interfering with a witness's right to counsel of his apparent choice.[23]

In our view, this problem has become so acute that congressional action thereon is necessary to deal with it. We strongly recommend that this Subcommittee include in any legislation that it processes calling for changes in the grand jury system an absolute prohibition of counsel (or counsel associated in practice with such counsel) simultaneously representing more than one witness before a federal grand jury.

Absent such a solution being adopted, the point to be made with respect to H.R. 94, is that the problems of witnesses who have counsel representing other witnesses before the grand jury or representing the organization whose activities are under investigation would be exacerbated considerably if counsel were allowed to accompany the witness into the grand jury room. Under the present system, in which counsel remains outside the grand jury room, the witness, while able to disclose as much of his testimony as he chooses, retains the important right to

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[22] See e.g., Alan Y. Cole, Time for a Change: Multiple Representation Should be Stopped (1976), an article distributed by Mr. Cole as Chairman to the members of the ABA Criminal Justice Section; remarks by Richard J. Favretto, Deputy Director of Operations, Antitrust Division, Department of Justice on May 3, 1977, before the Chicago Bar Associations Spring Antitrust Symposium entitled "The Perils of Multiple Representation in Criminal Antitrust Proceedings." We are providing the Subcommittee with a copy of each of these publications and urge their incorporation into the Subcommittee's hearing record.

[23] E.g., In re Investigation Before April 1975 Grand Jury, 531 F. 2d 600, 607–608 (D.C. Cir. 1976); In re Grand Jury Empaneled Jan. 21, 1975, 536 F. 2d 1000 (3d Cir. 1976),

conceal the extent of his cooperation or the fact that he was required to supply evidence against others. Were the practice changed to admit counsel into the grand jury room, the witness in such a situation might feel less free to testify. As a practical matter, he could not bar his attorney from the grand jury room without his action being given the worst possible interpretation by those who might wish that the investigation be thwarted.

There are two other subsidiary aspects of this proposal that we find troublesome. The first is the proposal to mandate the appointment of counsel for indigent grand jury witnesses. This proposal could cause substantial delay and be a source of litigation, by virtue of the fact that courts in many instances would have to conduct an inquiry into the person's ability to pay; moreover, appointed counsel might not be immediately available on the date when the grand jury wishes to hear the witness's testimony. The anomaly of this requirement can be exposed by noting that the law does not, save in exceptional circumstances, permit much less require the appointment of counsel for witnesses at trial. The proposal for appointment of counsel for grand jury witnesses, few of whom, we point out, are even in serious jeopardy, is, in short extravagant and unnecessary.

Second, we are disturbed at the bill's proposal to authorize a witness's counsel to disclose matters that occurred before the grand jury while such counsel is in the grand jury room. A witness, we agree, should certainly not be placed under an obligation of secrecy. But the reasons for giving the witness a freedom to disclose (primarily to permit him to consult with counsel and with associates about his grand jury testimony; see Advisory Committee Note to Rule 6(e), F.R. Crim. P.) in no way apply to his counsel. Like the attorney for the government, a witness' counsel should be under an obligation of secrecy. If the witness's interests might be served by the disclosure, counsel can advise the witness accordingly; but the choice should remain with the witness.

APPENDIX II

LAW AND PRACTICE IN STATES REPRESENTED AS PERMITTING COUNSEL IN THE GRAND JURY ROOM

1. Arizona

Based on information received from Michael D. Hawkins, United States Attorney, Phoenix, Arizona.

1. The Rules of Criminal Procedure in Arizona (Rule 12.6) allow for persons under grand jury investigation to be accompanied by counsel in the grand jury. The rule provides for summary expulsion if counsel communicates or attempts to communicate with anyone other than his client.

2. Witnesses not the subject of the investigation may not have counsel present in the grand jury room.

3. Since as a matter of office policy, subjects of grand jury investigation are not ordinarily subpoenaed, there has been little actual experience with counsel in the grand jury room.

2. Illinois

Based on information received from Frederick J. Hess, United States Attorney, East St. Louis, Illinois, and Samuel K. Skinner, United States Attorney, Chicago, Illinois.

1. A relatively new Illinois statute allows counsel to accompany a witness into the grand jury room only in two situations. Counsel may accompany a witness who has already been charged with an offense, and counsel may accompany a witness against whom the State is seeking indictment. 38 Ill. Rev. Stat. § 112–4B.

2. Not only is the statute narrowly drawn, but the statute is of little consequence when it does apply, because the tendency is to subpoena targets only toward the conclusion of an investigation. Targeted witnesses will usually invoke their privilege against self-incrimination, so that the presence of counsel serves no real purpose.

3. United States Attorney Skinner has found that state prosecutors are concerned over the new statute. He has heard complaints from Cook County prosecutors focussing upon white-collar type crimes that counsel do attempt to avoid the limitation in the statute that there be no participation except for advising the witness. Even when action is taken to stop counsel's overt participation, certain counsel have advised the witness in "stage whisper" fashion, audible to the jurors.

4. Mr. Skinner advises further: "Each head of the "white collar" financial crime divisions [in the Cook County State's Attorneys Office] stated that [he] would object to any enlargement of the scope of the Illinois statute."

3. Kansas

Based on information received from E. Edward Johnson, United States Attorney, Topeka, Kansas:

1. While Kansas law allows counsel in the grand jury room, Mr. Johnson is not aware of any broad-based support for that rule among state prosecutors.

2. There is no "one-man" grand jury in Kansas, but there is a procedure under Section 22-3101 *et seq* of the Kansas statute whereby certain prosecutors in the State can institute a criminal investigation in a proceeding conducted before a State judge.

4. Michigan

Based on information received from Philip Van Dam, United States Attorney, Detroit, Michigan.

1. Mr. Van Dam writes, "Mr. Gerstein's comments are not quite correct in that they suggest a broader allowable participation of counsel for a witness than actually exists." Although correct in regard to one-man grand juries, Mr. Gerstein's comments do not reflect the practice in regard to a citizens' grand jury.

2. Under Michigan law, counsel for a witness before a citizens' grand jury is not allowed in the grand jury room, except when the witness has been ordered to testify under a grant of immunity. Michigan Compiled Laws Annotated 767.19e.

3. Since Michigan enacted the provision for citizens grand juries, the one-man grand jury has fallen into disuse.

4. In practice, then, the only time counsel is allowed in the grand jury room in Michigan is when a witness before a citizens' grand jury has been immunized.

5. The counsel for the witness is sworn to secrecy. As far as Mr. Van Dam knows, the presence of counsel has not been disruptive but has aroused apprehensions when one attorney represents multiple witnesses.

5. Minnesota

Based on a letter received from the United States Attorney's Office, Minneapolis, Minnesota:

1. The grand jury is not commonly used in Minnesota. Grand jury indictment is required only in cases of first degree murder, public corruption, and treason.

2. Minnesota law, effective July 1, 1975, allows for counsel in the grand jury room only if the witness waives his privilege against self-incrimination.

3. There has been little actual experience with counsel in the grand jury in Minnesota since the grand jury is not commonly used and since witnesses who are concerned about having counsel will not want to waive their privilege against self-incrimination in advance.

4. Mr. Gerstein's statement that counsel can address the grand jury in Minnesota is erroneous. Counsel is specifically prohibited under Minnesota Criminal Rule 18.04 from participating in the grand jury proceeding beyond advising the witness.

6. Oklahoma

Based on information received from Nathan G. Graham, United States Attorney, Tulsa, Oklahoma.

1. Oklahoma, by statute, allows one attorney to be present as counsel for a witness in the grand jury room.

2. The primary method of charging offenders in Oklahoma is by means of informations. Grand juries are not often used.

7. South Dakota

Based on information received from William F. Clayton, United States Attorney, Sioux Falls, South Dakota.

1. The statutes of South Dakota do not provide for counsel in the grand jury, but do provide that grand juries may hear only legally admissible evidence. In this context, it has been customary for some prosecutors in South Dakota, under ground rules agreed to in advance, to permit witness's counsel in the grand jury room.

2. Mr. Clayton believes that counsel in the grand jury room could prove disruptive and could cause delays in unusual investigations, e.g., of activities (like the Wounded Knee incident) charged with passion or strong feeling.

8. Washington

Based on information from Dean Smith, United States Attorney, Spokane, and J. Ronald Sim, United States Attorney, Seattle, Washington.

1. It is rare that a grand jury is used in Washington. Thus the fact that the State of Washington permits counsel in the grand jury is of virtually no significance in considering a proposal to allow counsel in the grand jury under federal law.

2. In general, criminal prosecutions are instituted in Washington by means of informations signed by the prosecuting attorney. Historically, grand juries have been used only in public corruption cases. There have been only two state grand juries of record used in the Western District of Washington; while Washington law allows for inquiry judges to conduct grand jury type proceedings, inquiry judges are not commonly used either.

Mr. CIVILETTI. Mr. Chairman and members of the subcommittee, I am pleased to be here today to present for your consideration the views of the Department of Justice on H.R. 94, a bill to "reform" the Federal grand jury.

At the outset, let me confirm the Attorney General's and the Department of Justice's overriding interest in preserving and protecting the fundamental rights of all citizens in the administration of justice and in the delivery of criminal justice.

Many of our proposals made to this Congress have demonstrated that deep commitment and additional proposals and reviews to those ends are under way.

Our most important government institutions and systems are designed and have evolved to guarantee constitutional rights, preserve balance, and maintain a free and independent society.

Beyond clear constitutional rights, we welcome and support improvements to any aspect of the Federal system of justice which permit it to perform its functions better, more effectively, and more responsibly.

In particular, we welcome and support improvements to the grand jury system, and we commend and appreciate the efforts of this committee and its chairman, Congressman Eilberg.

The grand jury system is a particularly pertinent subject for attention because it is a bulwark of our criminal justice system functioning under the sound superintendence of the Federal courts for 200 years as an integral and indispensable part of that system.

Proper consideration of improvements in the grand jury system yields many different and stimulating ideas for change whether legislative, judicial, or administrative.

The Department of Justice has studied and reviewed proposed improvements in the grand jury system in this light and will continue to do so.

We are convinced that few systems are perfect. On the whole, we believe the Federal grand jury system is sound.

It has served well throughout the history of our republic, and continues to serve as an effective, fair, and essential institution for the investigation of criminal activity and the initiation of complaints or charges, which begin our adversarial system of guilt or innocence to be determined in a fair trial on the merits.

That is not to state or even suggest that we reject or ignore points or improvements to the grand jury system raised by provisions of H.R. 94; nor is it to deny that some abuses of the grand jury system have occurred, although we may not always agree on specific cases.

It must be remembered that Federal grand juries conduct tens of thousands of investigations each year. The fact that, on rare occasions—and I am unaware of any basis for alleging that their incidence is other than rare—some error or alleged abuse occurs within that system is not sufficient to condemn the system.

Likewise, we cannot assure that abuses of the grand jury will not occur in the future; so long as there are human frailties involved as a part of that system, just as with any other institution, occasional abuses may be inevitable.

Of course, no abuses are excusable and all are regrettable. We share your deep interest to eliminate the occurrence of grave error and to preserve the function and integrity of the grand jury process.

We are committed to join and cooperate with Congress and this committee in your strenuous efforts and our mutual goals to provide the public the best and soundest criminal justice system obtainable and fair and just persons to serve it.

The Department of Justice is committed to many of the principles of improvement which underlie provisions of H.R. 94 and which have been suggested by others.

For example, a prosecutor has a duty to disclose to the grand jury any substantial evidence of the innocence of a putative defendant known to the prosecutor.

A prosecutor should not recommend to the grand jury nor sign an indictment returned by the grand jury if the evidence presented is legally insufficient.

A prosecutor should not present to the grand jury evidence known to him or her to be unconstitutionally obtained.

A prosecutor should not use a grand jury to procure evidence for preparation for pending trial.

Prosecutors should not harass or unreasonably delay witnesses.

All testimony before the grand jury should be recorded.

Arguments impermissible at trial should not be made to a grand jury.

Prosecutors should scrupulously preserve grand jury secrecy.

The court's charge to the grand jury should be full and complete and available to the grand jury in writing for referral, among others.

At the same time, we must bear in mind that the grand jury system has the purpose and duty to investigate criminal action without fear or favor and to lawfully pursue evidence no matter how deeply hidden, cleverly disguised, or powerfully resisted.

We oppose those proposals on statutory provisions which would seriously weaken the institution of the grand jury or impede or impair the fair administration of criminal justice.

I will now turn to the more significant provisions on which I will have more direct comment.

With regard to recalcitrant witnesses, which is provided for in section 2 of the bill and would amend title 28, U.S.C. 1826, we support in part that provision.

We agree that 18 months is maybe too long a time for civil contempt in an effort to have the witness come and testify, to allow him time to reflect on that duty which all citizens have to give evidence.

And we have recommended to the committee in our view that the period be not 6 months but 12 months.

We also recommend strong support for the principle that S. 1826 prohibits any successive 12-month commitments for civil contempt.

That is the Department's view. We think that is sound law. And, therefore, we don't disagree that there ought to be any express terms which would in the statutory language prohibit a circumstance wherein someone who was called before a grand jury on a legitimate inquiry is asked questions, refuses to answer on grounds which are not privileged or recognized by the law, he is then committed by the court under the civil contempt, serves at the court's discretion, serves, let's say, 11 months, and then is released, then a year later or 9 months later he is called back in, the same questions are asked, and he refuses to answer those questions; rather than being subject to another 12-month period, we suggest the law is firm, we suggest that appropriately within the bill that such successive incarcerations for any period in excess, cumulatively, of 12 months is unnecessary and unlikely to produce the desired result that the witness give the testimony which is required by law.

We suggest that with regard to criminal contempt, which is an entirely different matter, that the bill be silent, that we not interfere.

And I know of no prior interference with the district courts' broad discretion with regard to criminal contempt which is, as we all recognize, a concept of punishment and would not apply in the ordinary refusal circumstance.

It would have to be an aggravated situation with a showing of vile disrespect or whatever, as in the whole range of criminal contempt processes.

With regard to witness immunity, section 3 of the bill, it is slightly, we suggest, different in focus than grand jury, but not inappropriate to be considered at the same time that grand jury improvements are to be considered.

Our view there is that we are better served, that is the administration of justice is better served, by "use" immunity rather than "transactional" immunity.

And those reasons are stated in the testimony generally.

Unauthorized disclosure of grand jury information, section 5 of the bill, in general we support that provision wholeheartedly. We think it is extremely important.

The abuse of grand jury secrecy, given the right of individual witnesses, and the important right that they have their right to freedom of speech, and given the important duty and right and fervent pursuit of freedom of the press by the press, and with those two as proper and lawful rights to preserve, other than that we feel that any other leaks, disclosures, are a great threat to the peace, the reputations, to the standing of individuals and are one of the most unfortunate consequences or abuses of grand jury proceedings, and how they occur is difficult to determine.

Some people suggest that it is the witnesses. Some people suggest that it is the prosecutors from time to time. Other people suggest that it is the personnel related to the grand jury.

Some suggest it is the grand jurors themselves.

But I think that this will give us, this provision will give us a proper tool in order to try to reestablish sound grand jury secrecy.

We do suggest that rather than have a double standard, so to speak, dependent upon the intent, that the offense of disclosures be a misdemeanor offense, and that initially at least, since this would be a new crime, in the arsenal of Federal crimes, that any knowing disclosure be subject to a misdemeanor penalty since the real risk is not so much the motivation of the discloser, but the disclosure itself.

And with regard to section 6 or that part of it which relates to excusing witnesses who plan to invoke the fifth amendment, we think that that is unnecessary and therefor we oppose it.

We certainly can sympathize with an attitude that would try to design a method wherein it could be done in writing. However, we think that is very difficult to accomplish and we believe that the present system, since it does relate not simply to an appearance but it relates to a court's proper determination when the occasion arises as to the legitimacy of the assertion of the fifth amendment right, that the questions asked do probe into an area which may tend to incriminate, and it is very difficult, if not impossible, to determine that type of issue without in fact posing the specific questions and followup questions to the witness rather than expressing to him the general subject matter through a letter and response method or through some other, perhaps more convenient but less substantial way.

Section 6 of the bill addresses successive grand jury investigations. I think we support that in principle. But we point out that merely because a grand jury considers a particular matter and then does not indict, does not mean that the grand jury has absolved the subjects involved in that matter or has made a determination on the merits that there is no justification for prosecution.

Rather, there are innumerable reasons for a grand jury to stop its proceeding altogether, to halt it, or to transfer it, and we suggest rather that if the real intent and purpose is that if a grand jury has considered on the merits facts to establish or not establish probable cause to believe that there is evidence which shows that the defendant has committed a crime and has determined, based on those facts, on the merits, that no crime, no probable cause exists, in that instance there should not be second and third and fourth bite at the apple of the grand jury by prosecutors unless there is additional evidence developed or determined through investigation or disclosure of new evidence. So that if there has been a determination on the merits, we would suggest that there be no successive grand juries, as we think is the thrust of the provision and, therefore, we support that thrust in principle.

With regard to the duty of the prosecutor to present exculpatory evidence, we have no disagreement in principle.

We suggest it could even be stronger, but use a different method.

We disagree with two parts of this provision in section 6, and that is the breadth of its language and, second, perhaps the consequences

of a failure to live up to a full meaning of its terms. The great difficulty in the federal system since we are all considered one government, and you are exposed to that difficulty, I guess, as much as anyone else—I am sure constituents believe that you have your fingers on all sources of information and are all-knowing—that it is sometimes extremely difficult with the best efforts to discover what information lies in so many different areas of the Government.

The assistant U.S. attorney presenting a bank robbery case indictment through his best efforts may not have either the capacity or knowledge or ability to produce an employment application for Veterans' Administration jobs which may be in a Government file, or a Government agency in some place and which may be exculpatory.

So that we suggest with regard to the prniciple of the duty of the prosecutors to present exculpatory evidence, that that principle be adopted, but that the full presentation of exculpatory evidence, and the breadth involved, be preserved for the trial on the merits, and the Department of Justice adopt in the U.S. Attorney's Manual a binding regulation which will disclose to the grand jury any significant exculpatory evidence that is known to the prosecutor.

By that we mean personally known. And that would include his office or any of the assistants within it.

Mr. EILBERG. Excuse me. We will have to recess at this point and vote. We will be right back.

Mr. CIVILETTI. All right, sir.

[Recess.]

Mr. EILBERG. The subcommittee will come to order.

Mr. Civiletti, I am most anxious that we do complete the summary of your testimony. And would ask all of the members to try to refrain from asking questions during your summary.

But I feel constrained to make an objection at this point with regard to your suggestion about U.S. attorneys and the U.S. Attorney's Manual.

Do you really believe that the manual would be effective, irrespective of the character or integrity of the Attorney General or top officials of the Justice Department at any given time?

In other words, we are contemplating legislation which would hopefully tend to minimize people with evil motives from committing wrongdoing. And this is a very serious problem to my mind. And I am inclined to reject your proposal of relying on a manual for that reason.

I would like to get your reaction to that.

Mr. CIVILETTI. My reaction is that we deal with systems and procedures, and we deal with basically legislation or manuals or rules with an assumption that people are honest and have integrity. The best rules, the best legislation, if you have dishonest people, people with no integrity who lie and cheat, it won't matter what the legislation says, or what the rules are. The system won't work with dishonest people.

Mr. EILBERG. But the rules are much clearer when we have legislation. And there is some control.

Mr. CIVILETTI. My view is that your oversight responsibilities which are heavy and thorough are not dependent upon any particular piece

of legislation. That they as much go to published and issued U.S. Attorneys Manuals which are directives from the Department, policies of the Department, the manner in which they allocate resources without regard to any particular piece of legislation.

Mr. EILBERG. Please proceed.

Mr. CIVILETTI. All right, Mr. Chairman.

I think I left off on the subject of exculpatory evidence and now move to notifying potential targets of indictment. We are opposed to that provision. We think it is unworkable as an absolute requirement.

We do feel, however, as I refer to it at greater length in the testimony, that it is appropriate under certain circumstances and those circumstances would largely be when there is no danger of flight, no danger of coercion of other witnesses, no danger of destruction of evidence, no danger of an ongoing investigation being jeopardized, that in those circumstances, on a voluntary basis, a punitive target of the subject, ought to be given an opportunity to testify on a waiver, of course, of his rights and being subject to examination by the prosecutor before the grand jury.

As to special attorneys for the grand jury, which is the subject matter of section 6, we are extremely concerned with that idea and opposed to its implementation through legislation. Because we feel that it would threaten equal treatment and equal rights to have ad hoc individual attorneys appointed throughout the 94 U.S. attorneys' districts without requisite training, without supervision, without being subject on a continuing and regular basis through coordination with the Department of Justice and with the policies and principles, which this Congress reviews, and it would be extremely difficult, if not impossible to control, and would result in, I think, a great unevenness in the administration of justice at least to the extent that it is involved with the grand jury process.

Section 7 and perhaps the most dramatic change or fundamental change proposed by that section is counsel for witnesses in the grand jury room, at least as far as the federal system is concerned, we are opposed to that. The essential basis of the opposition is that we feel the grand jury process in principle by design and duty is an investigatory, charging or discharging body. It is not a trial on the merits. It is not an adversarial proceeding. It is not an open hearing. And that counsel for witnesses in the grand jury room would definitely present and change that fundamental purpose and design from what I just stated it to be, to a minitrial, to an adversarial proceeding which is, we believe, unnecessary and undesirable.

There are five principal points in opposition to this provision, with regard to counsel in the grand jury room which I have stated on page 18 of the testimony. And I will not stop here to repeat those principles.

They are further elaborated on in the appendix, which is attached to the testimony.

Notice of rights provisions in section 7 of the bill would require, I believe, six notices to be uniformly made with regard to testimony. We support and commend and think workable, despite prior positions of the Department, the first three notice provisions—right to counsel, right to the privilege against incrimination, and the statement of the

subject matter of the grand jury investigation. We oppose the remaining two specified ones and the general catchall one because we think in a great many instances, at the beginning of the investigation, and midway through the investigation, it is difficult, if not impossible, to determine if particular criminal statutes are involved or whether many criminal statutes are involved. And, of course, in the criminal law, the statement of notice becomes an essential right and provides for challenges if we mention the bribery statute and find that it is dead at the end of the investigation, it may be turned into extortion or some other related crime.

Section 7 deals with several subjects under a general heading that I refer to as rights of grand jury witnesses. We suggest here that the fragmentation of grand jury proceedings, of motions to quash, is largely detrimental to the administration of justice, that it is a better scheme to have one judge or at least one court and one district where appropriate, handle all such motions, become familiar with them, become familiar with the proceedinsg, and familiar with the local situation familiar with the grand jury matters and, of course, the grand jury is under the supervision of that court.

But we are sensitive to the inconvenience, to the lack of compensation and the hardship which are afforded by subpenaing witnesses to, say, Los Angeles, involving alleged activity in Los Angeles for those witnesses and citizens who may be domiciled in Washington, D.C., or Chicago or somewhere else.

We suggest that the provisions for compensation, for travel compensation, be enlarged, and be enlarged in two ways: First, that they include the transportation of any documents, papers, records, matters of that kind, which are necessary in connection with the testimony; and second, would be enlarged to provide, which they don't provide now, that on challenges to such subpenas, motions to quash and other things, that witnesses who are asserting such challenges be paid the same travel allowance, the same per diem rates that they are paid when they are testifying without challenge.

Mr. EILBERG. How would you facilitate lawyers for such witnesses, members of their families, who come and visit them, to meet with their clients or relatives and so forth?

Mr. CIVILETTI. Well, as you know, Mr. Chairman, in trials themselves, many witnesses are from out of state. Many parties are from out of state. They are sued in different areas and the jurisdiction rests in different areas. I have found in most instances with clients when I was in private practice, who are witnesses or parties, I had little difficulty in obtaining counsel familiar with the subject matter in the jurisdiction in which the proceeding was pending, and engaging him to represent my client.

Mr. EILBERG. Are you saying there are no abuses in this area where Justice Department personnel do not bring their witnesses from great distances?

Mr. CIVILETTI. No. I am not suggesting that there may not be instances in which certain facts or activities may be looked upon as abuse.

What I am saying is that just because a grand jury proceeding is being conducted in one place in connection with this activity, and that

investigation reveals evidence that may be very important, it does not mean that if you subpena people in this case, involving antitrust, that you have abuse if you subpena records or people from California, Texas, New York or anywhere else.

Mr. EILBERG. Do you automatically assume that the transfer to the distant jurisdiction is based upon the situs of a situation even where there had been no events in that situs that would justify that jurisdiction?

Mr. CIVILETTI. Then, I think the empaneling of the jury in that place is highly questionable. There has to be some nexus with the district in which the grand jury is empaneled in order to give it any kind of commonsense.

Mr. EILBERG. Please proceed. And excuse me for interrupting.

Mr. CIVILETTI. Thank you.

Grand jury recording is a subject which we have some slight disagreement with, but in general, I think we favor the provisions of the bill. We support and recommend that there be amendments to the Jencks Act under title 18, section 3500, if necessary, to permit subject to opposition, to permit upon request witness for the grand jury to obtain their testimony a reasonable time after the request, and again, so long as it does not jeopardize the investigation through coercive activity, destruction, or perhaps as importantly, if not more importantly, does not jeopardize the investigation or harm individuals by the dissemination of that testimony in a flagrant and abusive manner. And that is the risk we are prepared to agree with the committee on, that perhaps the need to have the testimony, and review it, is stronger and greater than the risk to those innocent people who may suffer from its full release.

Preliminary examination after indictment, section 9 of the bill, we are opposed to that because we believe it is without purpose. That is the very issue, that the grand jury determines, and is a secondary proceeding, and we think that many of the pretrial proceedings of a trial on the merits are focused and appropriately focused intensely on the assurance that a defendant who is innocent in the law, and all defendants are presumed innocent, has his full day in court with only proper evidence received against him and corrective action is taken by the court in those involved and substantial proceedings.

So that on both grounds, the preliminary examination to the extent we understand it as described in the bill is not warranted.

I think I have touched on, I hope I have, all of the important provisions I have addressed in my testimony.

So, that would conclude my presentation.

Mr. EILBERG. We thank you for your statement, and we have a great many questions.

In appendix 2 you refer to the laws and practices in States as permitting counsel in the grand jury room. In every single case, I believe, in that appendix, you give as the basis of the information, the U.S. attorney in that district.

The question arises, was an effort made to get an opinion from the State officials or the attorney general of the State, districts within the State? Why did you go to the U.S. attorney to determine what the State laws is?

Mr. CIVILETTI. We go to the U.S. attorney because they are members of the Department of Justice. They are governmental employees. And they would be—it would be like you going to a member of your staff or your counsel to get information on questions. And they are, of course, hopefully, competent lawyers, and I believe as the appendix indicates, they consulted with State lawyers in the particular States. And there is no dispute as to many of the statutory provisions.

This appendix, as indicated, was simply in order to present another side of the information to some of the assertions that were made by other witnesses before the committee.

Mr. EILBERG. I observe that our staff has made a study of these States also, and in many cases they came up with different responses. That is why I asked you the question.

Without objection I will put the study of our staff in the record,[1] and suggest that—there is a question in my mind as to the validity of the statements made in appendix 2.

Mr. CIVILETTI. They contain both—I am assuming your staff view is this also, that they contain not only the statutory provisions, but I am sure they express viewpoints, opinions, and understandings which may well differ.

Mr. EILBERG. Mr. Civiletti, in my opinion the reason you are here today representing the Justice Department is that the Attorney General would not subject himself, personally, to standing up for the positions which you have been compelled to advocate here this morning. In short, I confess that I am disappointed.

All my fears and apprehensions have been confirmed. Your statement is a virtual restatement of prior positions of the Justice Department—total opposition to all reform. Despite repeated public statements by the Attorney General for reforms, increasing evidence of abuses, and mounting support for legislative change, the Justice Department continues to be concerned only with retaining its prosecutorial functions without constraint and continues to ignore the need to insure preservation of the grand jury as a shield to protect citizens from potential governmental abuse.

Mr. CIVILETTI. This testimony is supported by, and is approved by administration. And, therefore, I think that remark is not exactly——

Mr. EILBERG. What is exactly correct is that the Domestic Council presented a series of recommendations, which recognized our bill and agreed with the points of our bill, to the President of the United States and the President decided not to go with the recommendations of the Domestic Council and to go with the position of the Attorney General.

That, I think, is an accurate statement, Mr. Civiletti. And I ask you to deny that, if you can.

Mr. CIVILETTI. The statement is inaccurate in that it says or suggests that, that there were hard lines presented by the Domestic Council as a body or approved as a unit. Certainly you would expect that the Justice Department conducted an openminded review, heard viewpoints from whomever they could, and had healthy discussions about the wisdom of one or more provisions and were not of a monolithic mind concerning any particular issue.

[1] This study can be found in app. 3 at p. 1571

The same is true of the Domestic Council as well as many other offices with which we consulted within and without the Department. And then agreements were reached and determinations made which we felt balanced all proper considerations and were the most suitable and worthwhile, which I have tried to present in some form to you.

Mr. EILBERG. I have on numerous occasions detailed the moderate reforms proposed in H.R. 94. Many witnesses have criticized the bill as not going far enough, for example, in not eliminating compulsory immunity or in not eliminating use of hearsay, irrelevant or unconstitutional evidence, or in limiting the role of counsel to advice only. I believe H.R. 94 is a good bill—making changes but not making drastic, possibly detrimental changes.

The organized bar has proposed detailed standards very close to my proposed reforms. Many States have passed or are considering bills to reform their State grand jury laws.

Citizen groups, like the National Council of Churches, have urged reforms. Businessmen have indicated concern with grand jury practices. All are looking to this subcommittee and the Justice Department for cooperative efforts to work out legislative changes.

From early statements by the Attorney General, we were all encouraged that this cooperative effort would be made. We were all wrong! For that, I am not only deeply disappointed, but also saddened.

Without objection I would like to enter into the record at this point the summary prepared by subcommittee staff of the positions advocated by you and the Department so that those Members of Congress who wish to, may have the opportunity to briefly read what you support and what you oppose and to judge the quality of the statement that I have just made.

[The document referred to follows:]

DEPARTMENT OF JUSTICE POSITION

SUPPORTS

Reduction of maximum confinement for civil contempt from 18 months to 12 months, instead of 6 months proposed by H.R. 94.

Criminality penalties for unauthorized disclosure of grand jury information, but believes that uniform penalties should be prescribed regardless of motivation for disclosure.

Does not oppose prohibition on successive grand jury investigations, but only if a "no bill" is presented.

Requirement (by administrative regulation not by statute) that prosecutor present exculpatory evidence, but only "significant evidence . . . personally known to the prosecutor."

Advising witnesses in the subpoena of the right to counsel, the privilege against self-incrimination and the subject matter of the grand jury investigation but not whether he is a target, or the criminal offenses to be investigated.

Recordation of testimony of witnesses but not comments of prosecutor or grand juror.

Allowing witnesses to have transcript of their testimony, but only "under such conditions as the court deems reasonable."

OPPOSES

Elimination of reiterative contempt.
Return to transactional immunity.
Judicial review of immunity applications.
Counsel in the grand jury room.

Providing targets with notice and opportunity to testify before the grand jury in all cases, and believes that such issue would be better handled through administrative regulations, allowing notice to, and testimony of, target where "appropriate."

Special attorney for the grand jury.

Allowing witnesses to use "forum non conveniens" as a basis for motion to quash a grand jury subpena.

Preliminary examination after indictment.

Mr. CIVILETTI. I disagree with your statement, of course, as I have tried to elaborate in my written and oral testimony. And I think it is—I have not seen what you are going to submit in the record. But I am sure I will have a copy of it in due course.

Mr. EILBERG. We will be glad to give you a copy. And you will have it in short order.

I do have an extensive series of questions to ask. If for some reason we cannot cover them all I will submit them to you for later response.

I would like to give the other members of the subcommittee an opportunity to be heard. And we will try to go by the 5-minute rule. And I now call on Mr. Fish.

Mr. FISH. Thank you, Mr. Chairman.

My first question concerns the recalcitrant witness and the Department's belief in 12 months, that 12 months is preferable to 18 months. I wonder, is this based on any history of lengthy incarceration matched up against the success of getting the witnesses to testify?

Mr. CIVILETTI. No.

Mr. FISH. Well, then on what basis was it——

Mr. CIVILETTI. Simply a matter of judgment. How do you pick 6 instead of 12, 8 instead of 10? It is a matter of judgment as to the amount of time, with the court's full discretion to choose, to allow 30 days, 60 days, 90 days, as to the time within which he thinks, the court that is, thinks it proper for a particular witness to consider the duty to testify and change his opinion where he has no legal right to withhold evidence.

Mr. FISH. It would be helpful in picking a period for incarceration to know what is prudent to be successful, as far as the period of incarceration in the past.

Mr. CIVILETTI. It varies depending upon the individual and the nature of his reason for refusal to testify. I don't think there is any way to predict whether 12 months will be best for one witness, or at what point he will decide that he must disclose the evidence, or feels prison confinement is so distasteful to him that his freedom controls his disposition.

Mr. FISH. On the subject of successive grand jury investigation, section 6, you recognize, of course, in your statement that persons should not be needlessly subjected to potential harassment. And to avoid this, only in a situation where the grand jury determines on the merits, that this should be done.

Wouldn't it be possible for a prosecutor who wished to harass an individual simply to see that the grand jury does not vote on the bill,, so that he could see it is not done on the merits?

Mr. CIVILETTI. Is that a possibility?

Mr. FISH. How could you deal with that potential abuse?

Mr. CIVILETTI. By the statement I have put in here. Any determination on the merits, not necessarily exclusively no-true bill.

If an investigation shows that there is no promise to it, that the claims of wrongdoing albeit very serious and grave, in effect have no evidence to substantiate them, the grand jury determines at that time to close the investgiation. If in a situation of this kind, they do not go to the trouble or difficulty of an indictment because the charges are so clearly nonsupportive and they enter in their book, in their trial proceeding book, investigation closed, we would suggest that that would be appropriate to constitute a closing on the merits, a determination on the merits that the investigation should not be continued.

Mr. EILBERG. Do you know how many no-true bills have been entered?

Mr. CIVILETTI. Yes. In 1976 a little over 23,000 indictments were returned; 123 no-true bills were reported. I do not know and do not have statistics to present to you the number of investigations which were closed without a true bill and without an indictment.

Mr. EILBERG. Do you believe that those numbers are really significant?

Mr. CIVILETTI. I think they are extremely significant.

And I think that the people who were subject to those 123 occurrences would agree that they were very substantial and significant.

Mr. EILBERG. We believe that is a paltry number.

Mr. CIVILETTI. That is an interesting question, because we would be happy, if we determined that we had 10,000 no-true bills? With 10,000 grand jury proceedings in which people were put before the grand jury, they gave of their time and effort and had elaborate proceedings, documents presented, and at the end there was no-true bill, would that show a better system of justice?

Mr. EILBERG. You seem to insist that you want to continue with a rubber stamp grand jury. That is the way it appears to me.

Mr. FISH. How many grand juries were followed by a second grand jury involving the same target witness? Do you have that figure?

Mr. CIVILETTI. Same target witness?

Mr. FISH. Yes.

Mr. CIVILETTI. I don't have that figure. And it depends upon whether you mean on the same subject matter allegation or on a different allegation.

For instance, IBM may have had 14 grand jury proceedings on the same subject matter, antitrust violations. And yet they may have been all different facts and circumstances and relations.

And con artists and white collar criminals are frequently investigated on a series of unrelated, other such acts.

So, it is very difficult to determine that particular item.

Mr. EILBERG. The subcommittee will take a brief recess.

[Recess.]

Mr. EILBERG. The subcommittee will come to order.

Mr. Fish.

Mr. FISH. Thank you, Mr. Chairman. At this time, my final question goes to the notice of rights of grand jury witnesses. You spoke favorably about this on page 19 of your testimony, about rights enumerated 1, 2, and 3. And then you get to rights 4, whether the witness' own conduct is under investigation.

It seems that the objection to that is based on the lack of a constitutional right, and your testimony relies heavily on the *Washington*

case. It seems to me it is a matter of playing favorites, and an individual can be told whether or not his conduct is the subject of a grand jury investigation, not just the fact that he is a witness.

Aside from showing a lack of constitutional right, what is the objection of letting this individual know that his conduct is under investigation?

Mr. CIVILETTI. The objection goes beyond the reference to constitutional rights. I think, frankly admitted by all of us, that the bill generally, and all of those things with which we agree, go far beyond constitutional rights and none of these provisions of new additional safeguards or protections are constitutionally mandated under at least all recent interpretations of the Supreme Court.

The objection is two-fold. One, as you know, and I know, when we begin an investigation we have sometimes fairly concrete allegations as to the subject matter but no identification of individuals.

Other times, frequently, we have allegations as to certain individuals which are totally wrong. So that very frequently during the course of the investigation, initiation, a third of the way through, even a half of the way through, sometimes even two-thirds of the way through, there is no distinct knowledge on the part of the grand jury nor on the part of the government that that witness' particular conduct is within the thrust of the intended investigation of criminal activity.

Most frequently, the witness is unrelated to the criminal activity and is a witness of facts, be they oral facts or documentary facts and is asked to disclose those facts to the grand jury.

So that, as a practical matter, though it is very difficult, in most investigations even half of the way through, to ask or to determine at that stage of the investigation, as to a particular witness, is he a target or is he not?

Second, and of course you don't want to promise, we don't and you don't, any thing with regard to notice, rules, statutory provisions, that we can't live up to, to the extent humanly possible—when you get toward the end of the grand jury session ordinarily the subjects or targets, so to speak, in the vast majority of grand jury investigations are never subpenaed before the grand jury, never would appear before the grand jury.

The independent evidence, independent of their own testimony, has either established or failed to establish the probable cause necessary for the return of the indictment. To formally notify a prospective subject that he is under investigation at that end session, we feel is unnecessary because he is under very little, very little misapprehension in any significant investigation that he may indeed be a target.

And, of course, it is not a situation where you are in effect surprising anyone. We all know what our conduct is. We all know what our actions have been. We all know whether we have extorted someone, whether we have bribed someone, whether we have stolen a car. So the witness, if he is in a situation where he has committed criminal actions, he is aware of his risk, although the Government may not be fully aware that he, in fact, is the criminal.

In drug circumstances, for example; in many drug investigations we have information as to a distributor of drugs from one source or another. And during the course of the investigation, people who are related to that distribution will—inquiry will be made of them, they

will be subpenaed before the grand jury; they will give evidence with regard, perhaps, to that distribution. And in a fair number of cases that have come to my attention in the last 5 months, we later find that the next stage of the investigation or after a more thorough presentation of witnesses to the grand jury, that one of those early witnesses is the very one who although not a distributor was a wholesaler of the drugs, and, of course, concealed that, and presented a very narrow point of view to the grand jury. So, essentially, we think that it is impossible to abide by the rule as a practical matter.

Mr. FISH. It seems to me that if you don't know that the witness would be subject to the investigation, then obviously you cannot so advise him. And if he is not called anyway, that is another category. But, I think the provision has to be with regard to witnesses that are subpenaed.

On page 21, of the legislation, where it says: "Four, whether his own conduct is under investigation by the grand jury"; would you have language such as, if known by the Government or when known by the Government?

Mr. CIVILETTI. I don't see the problem that we are addressing, the weakness or the unfairness involved. If a person has committed unlawful acts and knows himself, which I assume if rational, he or she would know that he has engaged in conduct which is either illegal, dramatically illegal or probably illegal, he is fully aware of the risks that he is under.

If he is engaged in no such conduct, then he is free.

Mr. FISH. The Government knows it; he knows it. Then why not say so?

Mr. CIVILETTI. But we don't know. We don't know what is in his mind.

Mr. FISH. If you don't know, obviously, you can't tell them.

Mr. CIVILETTI. But we have a duty, if this condition is imposed, we would have a duty to try to discover that as to every defendant who is indicted—everybody would raise a motion that we knew, and had not given him such notice. It would require hearings to determine what was in the mind of the prosecutor on every such occasion.

And I don't think that is in our best interest in the administration of justice or of citizens who are free and innocent citizens.

Mr. FISH. That is all I have, thank you, Mr. Chairman.

Mr. EILBERG. Mr. Sawyer.

Mr. SAWYER. Yes. I happen to agree with your position on most of these points, Mr. Civiletti. One that I, however, have to take some exception to is your position on the indictments. You are entitled to preliminary examinations in Michigan after indictment. And while it may be somewhat duplicative, it is the first and maybe the only opportunity to evaluate to any extent what kind of a case he is facing from the Government. And particularly for his lawyer to make that evaluation. He may be very well advised. But as you know from your experience, very often a criminal defendant is not really fully advised by his own counsel.

It seems to me that it gives the counsel a chance to evaluate the Government's case because he might not be allowed to get copies of the grand jury minutes, and also to engage, then perhaps, in some meaningful plea bargaining or to pursue the thing further.

I just don't agree with your position on the elimination of the preliminary exam on the basis that it is totally duplicative of the grand jury because the defendant does not get exposure to the grand jury and neither does his attorney.

Mr. CIVILETTI. I think that is a distinction which you bring up, and the distinction seems to me not to go to the direction or the thrust of a preliminary examination to determine probable cause; it goes more, as you express it, to a feeling that there ought to be a disclosure to the defendant of a different kind than exists today.

And I think that really is better addressed through, as we have done from time to time, through modification of the disclosure or discovery rules in the criminal process as to what a defendant ought to receive fairly promptly after indictment, so that he may prepare meaningful motions in the trial process and also prepare for the trial of the case.

I am not suggesting that we turn to the civil discovery procedure which has many, many problems. But I am suggesting that if the main idea is to give an opportunity to the defendant and his counsel to learn more of the subject and scope of the case against him, and what it consists of, that a preliminary examination would be not, perhaps, the best way to do it. As you may know from the Michigan practice—and other States have a great many preliminary examinations before indictment to determine whether they should be held over for those felonies or not—what develops is a superficial preliminary examination where the Government puts on, one witness who lays out the elements of the crime.

Of two, documents, and that is sufficient to meet the standard of most preliminary examinations. If the effect is to, or if the desire on the defendant's part and his counsel's part is to, learn the case, that desire is thwarted, and we go through an exercise of fairly meaningless procedure.

Mr. SAWYER. But the defense counsel is entitled to subpena these witnesses. So it is a better way of going through discovery, rather than interrogatories, and depositions on different days, and so forth. You get it all over in one afternoon.

I know it is a practice in Michigan. And, of course, we don't use grand juries anywhere to the extent that the Federal Government is mandated to use them. We would only use them in complex cases.

Mr. CIVILETTI. I believe you have a special procedure in Michigan, a one-man grand jury.

Mr. SAWYER. Yes. And that is perhaps why I agree with your objection to counsel being in the jury room, because under our one-man grand juries, that is permitted. And it is hard to do, if you are trying to accomplish these things. But I know as a matter of practice, that whenever it is intended to defend a case or at least a preliminary judgment is made to defend the case, as opposed to pleading the case, a preliminary examination is uniformly demanded, and for the purpose of giving defense counsel, really, a feel or an evaluation of the case, so he can make a judgment, and then advise his client.

So, I don't see what your objection is to this, to have available at least on request a preliminary examination after an indictment.

Mr. CIVILETTI. Well, as I stated, we saw it as a duplicative process. We were not focusing from the language of the bill on it developing

into a disclosure proceeding for the benefit of an examination by defense counsel of the nature of the case for proper considerations, for a trial on the merits or plea bargaining, or whatever. And I have some, not having any experience that you address, I have some difficulty in determining whether or not a preliminary examination whose focus is not to determine probable cause, perhaps, but it is to determine the essential elements of the case, the essential nature of the case, whether that is best handled through a small adversary proceeding where counsel calls witnesses, cross-examination, which would be a new innovation in Federal law, or whether handled by simply what is in a good many cases an open file practice, where defense counsel comes and examines the U.S. attorney's file in the case, and learns in 2 hours what we have.

Mrs. SAWYER. Even getting the grand jury minutes you know, very often the witness will not be asked questions that you would have liked to have asked to find out what his response would have been. And in Michigan maybe it is designed for just that, just a determination of the fact that a crime was committed, with probable cause to believe that the accused is the party involved.

But it is run on a little more of a full-fledged basis. The district judges, which are the lower court judges there, require a pretty good admissible showing before they do that. It is rare that they will dismiss. But they do on occasion.

And they do require a substantive showing. And certainly it is a valuable thing, I think, not in cases where you are going to plead, but in cases where you are trying to evaluate whether to go to trial or not.

Mr. CIVILETTI. Today in Federal practice, in a good many cases, and particularly in substantial cases, I think that part of motions to suppress, motions to dismiss the indictment, motions to obtain grand jury testimony, are utilized in much the same fashion as evidentiary hearings before a court in a proceeding to determine not so much exclusively whether it is a dismissible matter, but in the course of that thing, to educate the defense counsel.

Mr. SAWYER. I have no further questions.

Thank you, Mr. Chairman.

Mr. EILBERG. Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

With respect to the Department's proposed 12-month term for recalcitrant witnesses, I believe you said in your testimony that you felt there was a greater likelihood that somebody after 6 months would rethink the position on silence and decide to speak.

I wonder if——

Mr. CIVILETTI. I am sorry, I missed the key point, that I have testified that——

Ms. HOLTZMAN. I believe you testified in substance that a 12-month period was preferable to 6 months because in that extra 6-month period of time you had an additional chance that a witness might decide to speak.

Mr. CIVILETTI. No; I did not testify to that. I said that is a matter of—a difficult matter to determine.

I said it is a matter of judgment on individual circumstances. I think perfectly, it is permissible for a court to determine after 30

days, 15 days, or to determine that after 8 months, depending on the nature of the circumstances whether a witness is likely to purge himself under civil contempt and discover and determine that it is in the best interests of the country and everyone else to give evidence which he has no legal right to withhold.

I did not—what I am saying is I did not define the magical mark where someone 6 months in and does not testify, suddenly because he is 8 months in he is going to testify.

Ms. HOLTZMAN. I did not mean to imply that. But there must be something about that additional six months that leads you to believe that the witness will no longer not be recalcitrant.

I wonder if you have any statistics to suggest that anybody who has been incarcerated for civil contempt for 6 months has thereafter decided to go before the grand jury and answer questions.

Mr. CIVILETTI. I don't have any statistics that I am aware of. I do know that witnesses—I have a dim recollection—I believe that witnesses who have been incarcerated for long periods of time under civil contempt, and by long to me that would be 8 months, 9 months, 10 months, have perhaps not exclusively through confinement, but through some other factors influencing them, have determined to testify after those periods of time.

It is not an empty proceeding. If it were totally empty altogether then I think the thrust of the logical arguments would be to have no contempt proceeding, to allow anybody to take independently, and determine individually when to testify and when not to.

Ms. HOLTZMAN. But I don't believe that is the logical conclusion of the point I am making. The Supreme Court decided that it was not constitutional for a judge to imprison somebody for criminal contempt for more than 6 months without calling a jury.

What I am saying is that if the Justice Department is coming here to say that it opposes a 6-month limit and proposes instead a 12-month limit, I think it should be in a position to state that there is some evidence to warrant that 6-month additional period.

Mr. CIVILETTI. I think that is not capable of such evidence. The Congress in 1970 decided in its wisdom after receiving evidence that 18 months is appropriate. I cannot challenge that 18-month determination. I can only give you our best views and judgments, and you can determine what you believe is appropriate.

Ms. HOLTZMAN. Thank you.

Turning a moment to the issue of permitting a change of venue with respect to witnesses who are imprisoned for civil contempt, do you favor those portions of the bill?

Mr. CIVILETTI. I am sorry. You will have to refer me to the provision of the bill which you are addressing.

Ms. HOLTZMAN. It is page 2, section B–1.

It is my understanding that at the present time there is no provision for a change of venue for somebody held in civil contempt. The bill provides for such relief in cases of need or hardship.

Have you taken a position on those provisions? I would say personally that I think they are very desirable and I have included them in my bill.

Mr. CIVILETTI. We took no—as I recall—we took no position with regard to that in my testimony. With regard to a change of venue.

It seems to me offhanded, and the Department did not take a position on this, it seems to me that a change of venue would certainly be appropriate in certain circumstances, and the compulsion of the thing, in my mind this compulsion would apply regardless if you are here or you are there or 50 miles away.

So that personally I can see no reason for not committing and allowing a change of venue to be closer to human considerations which involve third parties that are not directly involved in the contemptuous act.

I am not—I am not certain if that is permissible at the present time. I do know that the Bureau of Prisons in the federal system from time to time in cases of family circumstances, in cases of illnesses and treatment, in cases of potential abuse and other things do have what I consider to be a positive attitude toward changes.

Whether or not it ought to be an absolute right, I don't know.

Ms. HOLTZMAN. I think the provision says upon a showing of need or hardship.

Mr. CIVILETTI. I don't have any quarrel with that personally.

Ms. HOLTZMAN. Thank you.

I know that you have taken a position in your testimony that the Justice Department is opposed to allowing counsel for the witness to enter the grand jury room.

Mr. CIVILETTI. Yes.

Ms. HOLTZMAN. I wonder if you have had an opportunity to review the book that has been written on the subject of grand jury reform by Judge Marvin Frankel.

Mr. CIVILETTI. I have read excerpts of that book.

Ms. HOLTZMAN. Judge Frankel suggests that the right to counsel in the grand jury room ought to be granted. He says, and I quote from the book:

> We have considered the argument that a lawyer for a witness would delay the grand jury's work. The argument is not weightless. The remedy, however, in the grand jury as elsewhere, is not to deny altogether the assistance of counsel which is often the result of barring the lawyer for the witness from the grand jury room. The remedy is to regulate the counsel's role—a kind of control familiar and effective in the courtroom, legislative hearings and administrative proceedings. It would require a combination of remarkably ineffectual prosecutors and judges to defeat the efficacy of such supervision.

Mr. CIVILETTI. We disagree with that view expressed by Judge Frankel. The Department of Justice does. And I think the Supreme Court advisory committee on rules does as well, and almost all Federal district court judges.

Ms. HOLTZMAN. Is the objection that the lawyer in the grand jury room would obstruct the proceedings?

Mr. CIVILETTI. There are five specific objections that I highlighted on page 18 of the testimony.

One of them is that counsel will, as he has a duty to do, and primarily his first duty, represent his client. And although he would have a limitation on his conduct as it is mandated in the proposed legislation, he would have great freedom through objections, rephrasing, et cetera, et cetera, hearings, instructions not to answer, and we would develop—we would develop a situation where there would be much delay, and obstruction, and continuations.

Mr. EILBERG. How would you differentiate between the role of the attorney with the witness in the grand jury room as compared with the role of an attorney with a witness before a congressional hearing?

Mr. CIVILETTI. As you know, Mr. Chairman, neither before a congressional hearing, an administrative hearing, or a court trial does any witness have a right to consult with his client after every question, nor does he have the right to object, instruct the witness not to answer without such penalties as are provided for.

Mr. EILBERG. What is your basis for that?

Mr. CIVILETTI. I think that is universal law. I have never seen a lawyer stand alongside of a witness on that witness chair under oath and be allowed to consult with that attorney before answering questions.

Mr. EILBERG. What about the witness before a congressional hearing?

Mr. CIVILETTI. Before the congressional hearing?

Mr. EILBERG. Yes.

Mr. CIVILETTI. The chairman is there. The committee is there to conduct the proceedings.

If the witness is reading simply the statements of counsel, to instruct the witness to only consult with counsel on privileged matters, to only consult with counsel on confused questions.

I don't think that it would be—it would be my judgment, I don't know this, that you would not tolerate from a factual witness that you were inquiring, a simple parroting of that counsel's views or testimony through the mouth of the witness, his counsel's viewpoints, opinions, retailored facts, nor would you tolerate a lawyer objecting to your questions, telling you to rephrase them, saying that they were irrelevant or immaterial, instructing the witness not to answer.

So you have an immediate control right at the time of the hearing without adjourning and going to the full House, for instance, as an example, and debating whether or not a particular question or series of questions or line of questions were appropriate or not appropriate.

Mr. EILBERG. In our bill we would require the transcript of whatever was said to be made a part of the record which could be immediately brought to the judge, certainly in the same building, and perhaps just a few feet away.

Mr. CIVILETTI. Can you imagine with 23,000 indictment proceedings, the enormity of the number of questions ruled upon by a judge in that instance, the number of hearings that would have to be held?

We just think it is unnecessary and very unwise.

Ms. HOLTZMAN. Mr. Chairman, I think you have raised a very important point. And I was going to go through that with Mr. Civiletti, because I think that there are some things that really should be clarified.

In the first place, I think that Judge Frankel is correct, that with respect to the question of obstructing the proceedings, it would take a great deal of ineptness on the part of the judges and the prosecutor to allow obstruction to take place.

Let's go back to your first objection—that lawyers may insist on rephrasing questions.

Isn't justice served by requiring questions to be stated clearly to the witness?

Mr. CIVILETTI. Certainly.

Ms. HOLTZMAN. Suppose the prosecutor asks a question that is incomprehensible. Is justice served by not having that question clarified?

Mr. CIVILETTI. No. No.

Ms. HOLTZMAN. Don't you think that would benefit the proceedings?

Mr. CIVILETTI. No. That is like saying, when do you stop beating your wife?

Ms. HOLTZMAN. No, it's not. I say to you that this is something that could benefit the proceedings.

Mr. CIVILETTI. That's not the sole objection. That was an example of the type of conduct that counsel can enter into. Counsel for the witness in the grand jury room has no separate interest to see that that grand jury proceeding continues directly and expeditiously and favorably.

He has his own exclusive right and duty to protect his witness as his witness deems it correct to be protected. If he can delay the proceeding, if he can object to every question, if he can ask for rephrasing, if he can instruct the witness not to answer, it doesn't so much depend upon the artfulness of the question as it does the subject matter.

Ms. HOLTZMAN. We are not talking about the same provision of the bill. The bill in section C does not permit the lawyer to address the grand jury under any circumstances.

Mr. CIVILETTI. I didn't say anything about addressing the grand jury.

Ms. HOLTZMAN. He should ask the witness to——

Mr. CIVILETTI. He addresses the prosecutor and says, "I object to the question," or he tells the witness to say, "We object to the question, refuse to answer; please restate it."

Ms. HOLTZMAN. It says that he can do nothing but discuss the questions with the witness. That is how I interpret it. And therefore, it seems to be that justice is served by allowing counsel to say to the witness, "This question is not clear, and if you answer it, you will either trap yourself or you will not be able to give a proper answer."

I think in those kinds of cases that we are really talking about having counsel assist the functioning of the grand jury, not obstructing the proceedings.

Mr. CIVILETTI. We just disagree on that issue.

Ms. HOLTZMAN. Well, since the counsel cannot object vocally——

Mr. CIVILETTI. The bill does not say that. That is your interpretation.

Ms. HOLTZMAN. Let's say that we make it clear that the only words counsel could utter would be to the witness, and not loudly enough that it would obstruct the hearings in any manner, would your position change?

Mr. CIVILETTI. No. No.

Ms. HOLTZMAN. You would still be opposed to it?

Mr. CIVILETTI. Yes.

Ms. HOLTZMAN. On what grounds?

Mr. CIVILETTI. First, we think that the grand jury and the witness in a probable cause examination are entitled to frank, responsive answers in the witness' words to the questions asked.

There are only two occasions—one principal one—that I know of in which legal advice is necessary concerning the grand jury examination. One is, of course, the assertion of the fifth amendment privilege, which is easily provided by the present system.

And the second is that there is a privilege, such as attorney-client, in which there is a right for refusal to answer.

Otherwise for witnesses—and I am not talking about defendants, witnesses—if there is a certain assumption that they can hear and understand, and if they don't know the question or whatever, they can say, "I don't understand the question, I don't know what you are asking me."

So that I see no—even assuming all of these things, assuming all the lawyer does is sit with the witness and communicate on questions—I see no need substantively for the counsel to advise the witness after every question. It is not done in any other proceedings of any other kind, be they public or private.

And also, I think it is a further risk and breach of the grand jury secrecy provisions, because the bill does not provide for prohibition of disclosure by counsel.

Ms. HOLTZMAN. Right now, if the witness tells the counsel what went on in the jury room, counsel would then be informed. And counsel is then bound——

Mr. CIVILETTI. I am not sure of that.

Ms. HOLTZMAN. The witness is not bound.

Mr. CIVILETTI. That is an entirely different thing. The witness is clearly not bound.

Ms. HOLTZMAN. Is his counsel?

Mr. CIVILETTI. The counsel is bound by all ethical rules and considerations. He cannot have a press conference concerning grand jury testimony. He cannot——

Mr. HOLTZMAN. But he is subject to contempt. Isn't that correct?

Mr. CIVILETTI. That is not correct. He could be subject to disbarment for doing it.

Ms. HOLTZMAN. I am not talking about the ethical rules.

Mr. CIVILETTI. If you will throw out the ethical rules, then you will have a lot of trouble.

Ms. HOLTZMAN. We are talking about laws in addition to ethical rules. We have laws governing our conduct aside from ethical rules. And that is what I am talking about. As a matter of law, this person is free to say what happened in the grand jury room.

Mr. CIVILETTI. The witness is.

Ms. HOLTZMAN. And his counsel.

Mr. CIVILETTI. And his counsel is, as far as statutory law, but not as far as ethical law.

Ms. HOLTZMAN. Those ethical principles would still govern him in the grand jury room.

Mr. CIVILETTI. Yes, but the primary ethical principle is service of the client, exclusively, and not the grand jury, not the court, not anyone else.

Ms. HOLTZMAN. If the ethical principles work outside of the grand jury room there is no reason they can't work inside as well.

Mr. EILBERG. It seems to me you are establishing a double standard, one for prosecutors, one for all other lawyers.

Mr. CIVILETTI. I hope not.

Mr. EILBERG. Why do you say prosecutors are more trustworthy than other lawyers?

Mr. CIVILETTI. I don't mean to suggest that they are more trustworthy. What I mean to suggest very strongly is that their duties are entirely different.

Of course, they coincide in many respects. They are both governed by the same code of ethics. But the duty imposed on the prosecutor is substantially greater than it is on defense counsel.

Now, the prosecutor represents the Federal Government, and should be beyond reproach. His duty is a concern for the entire administration of justice, and not for particular indictments of a particular prosecution or a particular defendant. An individual lawyer's primary responsibility is directed on the contrary, almost solely to the individual client and his circumstances.

Mr. EILBERG. But his standards should be no less ethical.

Mr. CIVILETTI. I would hope so. I would hope that would be true. But he has no greater interest, he has no greater duty than that particular client under ethical principles and guidelines, certainly.

But the prosecutor's duty, his role, his function is substantially greater. He is bound by not only all of the intricacies of the law, but all of the policies of the Government in doing his duty to preserve justice and the entire system.

And with regard to—his conduct, he is subject to—directly subject to not only simple ethical codes, but he is an officer of the U.S. Government, he is an officer of the State government, he is an officer of the court, and he conducts himself before those 23 witnesses, and all these bodies have great latitude in whatever direction, suspension, penalty they want to impose for the conduct by the prosecutor.

The same latitude is not available to control private lawyers.

Mr. EILBERG. Would you comment on this question—namely—that in case after case, the U.S. attorney is enthusiastic, perhaps overenthusiastic, that many of these prosecutors are really running for political office, and that there are other elements present in the U.S. attorney's decisions which do not necessarily assist his proper professional role?

Mr. CIVILETTI. I would not think that that was the general practice, no. Nor do I concede that simply running for public office or holding office is a disqualification.

Mr. EILBERG. You don't feel that any Federal attorney has or does use the Federal attorney's office for advancement of his public image in terms of running for political office later?

Mr. CIVILETTI. No. I think that people are tall and short, and bright and not so bright, and some have big egos and some not.

And——

Mr. EILBERG. And some are ethical and some are not ethical?

Mr. CIVILETTI. That is right.

Mr. FISH. On page 3 of your testimony, Mr. Civiletti, it starts off:

> The Department of Justice is committed to many principles for improvement which underlie the provisions of H.R. 94, and which have been suggested by others,

And then you give examples—many of the responsibilities of the prosecutor. And my question to you is: How do you see that the prosecutor lives up to these standards? What monitoring systems do you have to see that he lives up to those standards?

Mr. CIVILETTI. There are numerous monitoring systems. First, whatever he does, he does before 23 witnesses in the grand jury room; 23 people who are free to go to the court at any time when they feel there has been any misconduct, any harassment, any oversteppings, or whatever. I think that ought to be exercised.

Second, he is under the supervision of the U.S. attorney, who has been confirmed and found to be suitable, competent, of high integrity by the Senate and by the President, and by the court with whom he practices generally.

Any misconduct, any impropriety or mistakes made in the appointment of the assistants are continually rectified by removals, discharges, and the rest.

Third, any number of defendants and some witnesses, a good many witnesses have counsel, they communicate with counsel extensively before they go into the grand jury room, and they communicate with them in the debriefing session.

And counsel is looking for any means to properly represent his client. If there is related to counsel a circumstance of impropriety, wrongful argument, abuse, or whatever, there would not be a moment's hesitation for such counsel to file a petition, bring a proceeding, either before the court administering the activity, or before the Bar Association.

Fourth, we have in the Justice Department an Office of Professional Responsibility, and we periodically receive in the criminal division and other divisions a complaint about a particular course of conduct, either from an individual involved, from counsel, from the press, from some other source or from Congress, concerning the conduct of a particular person in a particular situation.

In each instance, that conduct is investigated, reviewed. Many times the investigative agencies do it. Other times affidavits are taken, personal interviews are conducted, and a determination is made as to whether the complaint is warranted or unwarranted, and whatever remedial action is necessary.

Those are some of the provisions for safeguards.

Mr. FISH. Thank you.

Mr. EILBERG. You have expressed your belief that the Department can and will police itself without legislative reforms. In a recent case, *U.S.* v. *Litton Systems*, a Federal district judge in Alexandria described how Federal prosecutors threatened indictment unless Litton would agree to make a civil monetary settlement of a Government claim, despite the fact that one grand jury had investigated the matter and did not return an indictment. When Litton refused, the prosecution presented hearsay evidence to a second grand jury and secured an indictment. The judge saw this as a clear abuse of prosecutorial discretion. What sanctions, if any, were taken against the prosecutors involved in response to this abuse?

Mr. CIVILETTI. That matter I am fairly familiar with. The holding of the court—Judge Bryan, I think it was—was that the interplay prior to the grand jury action, second grand jury action, the interplay

by the prosecutor and defense counsel in discussing an alternative to criminal indictment, a reopening of civil proceedings so that fraud evidence could be produced to see whether or not in that proceeding the Government and the public could be saved somewhere near $20 million in submarine construction—was an appropriate remedy rather than indictment—the judge held that it was inappropriate to hold such discussions with the threat of indictment over the head of the defendant in this case, Litton, and that, therefore, the proceedings should not go forward.

The judge did not address in the holding any conduct before the grand jury whatsoever. What he said, as an aside, was that after 18 months of investigation and a full presentation of evidence, he thought it unwise—and I think it probably colored and influenced his decision—he thought it unwise at the expiration of that first grand jury to go back with a second grand jury and summarize the evidence as a matter of efficiency, which had been presented periodically over 18 months, and summarize that in a very much shorter period of time.

In that particular instance the first grand jury expired without ever having considered the merits of the indictment or nonindictment. It expired by its term.

The second grand jury was impaneled to pickup where the first one had left off. And an effort was made to accelerate by summarizing the prior testimony and presenting it and allowing the grand jury to examine it. The heart of the *Litton* case, and why it was proceeded, was the viewpoint within the Department of Justice on the facts presented and reviewed by it, that the proposal with regard to the alternative civil proceedings had been first presented, encouraged by defense counsel, and that we were responding to that request, and considering it and reviewing it.

The court, based on the evidence that it heard, I think, on paper, without the witnesses before it, determined that that was not so, that it appeared to the court that that was the prosecutor who had proposed the alternative and used the potential of indictment as an unfair advantage and club in order to get Litton to reopen the civil matter and relitigate on the issue of fraud.

Mr. EILBERG. So no sanctions were taken?

Mr. CIVILETTI. Well, it's on appeal right now. It's under consideration for appeal right now.

Mr. EILBERG. The case is to be prosecuted?

Mr. CIVILETTI. We are not convinced, despite the opinion that all of the facts were disclosed to the court.

Mr. EILBERG. You have testified from your recollection and opinion, and I read now from the opinion in the record, where the judge said:

> When prosecutorial discretion is abused, dismissal of the indictment is warranted.

And the court also says:

> There is further evidence of the cynical view that has been taken of the grand jury, namely [as a] mere echo of the office of the United States attorney.

Mr. CIVILETTI. I have read the opinion.

Mr. EILBERG. Do you agree with those statements?

Mr. CIVILETTI. No, I don't agree with the statement that it's a mere echo of the U.S. attorney's office.

Two matters have been presented not long ago on very sensitive matters by U.S. attorneys with the Department's knowledge, and the grand jury in both cases returned no-true bills. If the grand jury had been a rubber stamp of the U.S. attorney's office, I think that indictments would have been sought or obtained or evidence brought forth in that instance.

Mr. EILBERG. So what policy standards or procedures have been established by the Department and made binding, not just as instructions to U.S. attorneys, as to the variety of subjects, such as the granting of immunity, preserving grand jury secrecy, notice of witnesses, repeated instructions to grand juries to secure indictments—what does your manual include?

Mr. CIVILETTI. I cannot respond in a very brief way. The issuance of immunities involve very close safeguards. They all must be reviewed by me personally. The U.S. attorney has no authority to issue them, or any assistant, without such a careful check and review. Subsequently, of course, they go before the court. The detailed contents of the grand jury instructions and commitments are in title IX of the U.S. attorney's manual, beginning with page 1, and they involve over 44 pages of instructions, including all kinds of restrictions, limitations.

Mr. EILBERG. Would you provide that to us?

Mr. CIVILETTI. I would be happy to, yes.

Mr. EILBERG. When was it put together?

Mr. CIVILETTI. Well, of course, it has been—it has been in existence since when I was an assistant U.S. attorney in 1960. At that time it was a small book. Now it is a multivolume production, and I think these chapters were approved in January of 1977 by my—by my predecessors. And that manual is the one to which I made reference and will provide to the committee if the committee is interested in it, the precise language that I would suggest in those provisions which I have suggested in my testimony I feel are in need of revision to comply with the principles, some of the principles, in the ABA standards.

Mr. EILBERG. Are the provisions in that manual binding?

Mr. CIVILETTI. Yes.

Mr. EILBERG. Do they touch on the subjects that I have referred to—immunity, preserving grand jury secrecy?

Mr. CIVILETTI. Yes.

Mr. EILBERG. Notice to witnesses?

Mr. CIVILETTI. No.

Mr. EILBERG. Warning of rights?

Mr. CIVILETTI. Yes.

Mr. EILBERG. Repeated submissions to grand juries to secure indictments?

Mr. CIVILETTI. I think they touch on that, since the law permits now the presentation of matters to a successive grand jury if the attorney determines that there is new evidence that the grand jury improperly did not find an indictment, that somehow they were inflamed by their own passions in the community. For instance, in some circumstances different geographic areas are reluctant to indict certain members, certain groups, whatever the facts are, because of their predilections. And in those instances, it's perfectly acceptable to go to a second grand jury. So that what I have suggested here as the Department's position, and our approval of this bill's provisions with regard to pro-

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hibiting successive grand juries would be a sharp departure from prior conduct and from the present law. And hardly amounts to the Department laboring and producing a mouse.

Mr. EILBERG. What is the Department's policy with regard to the issuance of press releases?

Mr. CIVILETTI. Neither at the time of investigation, at the time of grand jury proceedings, at the time of trial, or post-trial, should the U.S. attorney be issuing press releases.

Mr. EILBERG. Where does that appear?

Mr. CIVILETTI. It's in the manual. But it's not in the grand jury section entirely. Just that part relating to grand jury secrecy would be in the grand jury section.

Mr. EILBERG. Are those provisions binding with regard to issuing releases, press conferences?

Mr. CIVILETTI. Certainly they are binding. You can't detail, just as in legislation we cannot detail every circumstance. There is followup regulation. There is a law with a measure of sound judgment, and integrity.

Mr. EILBERG. Do you know of any case where a U.S. attorney or assistant U.S. attorney was reprimanded or given any punishment of any kind for violating the provisions against releases and press conferences?

I say that because I come from the State of Pennsylvania. And there are many lawyers in the State that believe that—there are U.S. attorneys issuing such releases, engaging in this kind of practice.

Mr. CIVILETTI. Myself, since I have been in office, I cannot talk really in depth about particular matters that I did not pay attention to when I was in private practice. But since I have been in office, I have been extremely concerned, not necessarily with the U.S. attorneys, but in those instances when it may have related to U.S. attorneys with grand jury release, with information, with hearings.

We have, for example, conducted private investigations concerning leaks, leaks involving the CIA investigation, leaks involving the ICC investigation, and expressed to whatever U.S. attorneys may have been involved, and there have been many of them, the absolute requirement that they do everything within their power to prevent such leaks. And I am opposed, and is the Department, to any kind of special treatment associated with the office.

Mr. EILBERG. You know of no situation where a U.S. attorney has been chastised for such conduct?

Mr. CIVILETTI. Well, the difficulty is in determining whether the conduct, in fact, occurred. They have been warned, they have been chastised in the sense that we have said that, indications that a leak may be from their office and we want them to take every effort and we won't tolerate that kind of conduct.

And that may play a part in some of the, which I am not directly involved in, it may play a part in some of the removals or changeovers of U.S. attorneys.

Mr. EILBERG. Another question. Last year H.R. 1277 provided for a penalty of 6 months and a $500 fine for violations of grand jury secrecy. Witnesses, including judges and prosecutors, testified that this provision was not strong enough as it did not cover third party groups or leaks made that would affect later trial proceedings.

Therefore, our new bill establishes an added penalty of five years in prison and $20,000 applicable to third parties. Yet, you oppose this provision and suggest only a misdemeanor offense. Under our bill you would have ability to use or not use the felony offense.

Why do you insist that all violations are the same, that there are not degrees of potential seriousness of this kind of violation?

Mr. CIVILETTI. That is a very fair question. I think the answer is the feeling was that the great harm is the disclosure itself. And that the motivation is irrelevant. And therefore, although it has set up difference degrees, and it may address culpability, but it doesn't do anything more to preserve the real harm that we are trying to avoid or to preserve the safety against the harm which we are trying to preserve. The provision serves to confuse, to make the law less enforceable because its harshness would be so great, and we would be better off in testing the waters for the first time with the new crime with the uniform readily understandable misdemeanor provision.

If, in your judgment, you decided and determined that the present law was what you thought was more adequate, I think that is a matter of judgment. This is not an absolute area that we are supporting. We support the principle fully. It is a matter of degree and we just give you our best advice with regard to it.

Mr. EILBERG. I just don't understand your position on this point. And——

Mr. CIVILETTI. Does it make any difference if someone hates you or someone wants to do you in, that they disclose improperly and under the penalty of the provisions, matters that come before the grand jury, to do you great damage, if that is the motivation, or if they are paid $5,000 to do it? What is the difference? You suffer anyway.

It seems to me there are distinctions drawn, with some wisdom, in regard to culpability in other areas but here the real harm is your suffering and the tampering with the system, not whether or not it is hateful or not hateful or misguided or not misguided. It ought to be prosecuted and we agree with that.

Mr. EILBERG. Mr. Sawyer?

Mr. SAWYER. Thank you, Mr. Chairman.

I just—having practiced 28 years, and having been a prosecutor for 2 years, I want to compliment you on your testimony. I think you have handled yourself beautifully. And I feel much more secure with you as the head of our Criminal Justice Division.

Mr. CIVILETTI. Thank you very much.

Mr. EILBERG. Ms. Holtzman, do you have anything else?

Ms. HOLTZMAN. If I may, just a brief question.

I didn't notice in your written testimony whether or not you commented on the provisions of the bill regarding instructions by the court to the grand jury about the rights and powers of the grand jury.

Mr. CIVILETTI. It may have been the appendix. We did comment on that. Our attitude was that those instructions ought to be given and generally we are in support of the principles that they ought to be full and complete; they sought to be in writing; there ought to be supplemental ones if the grand jury needs them. And we feel very strongly about it.

We go further than that and feel that any advice given by the assistant U.S. attorneys ought to be subject to the same kind of petit jury formal instructions that are given and that at any time during the course of the proceedings, if the jury wants more instructions or advice with regard to the law, they ought to go to the court.

Mr. EILBERG. We will be submitting questions.

Mr. FISH. One area that we didn't cover this morning, many of our witnesses have testified about the use of the grand jury for political purposes. This is still a real problem. And we will be submitting questions directed at that issue.

Mr. CIVILETTI. I would like to make one brief comment with regard to that.

It is too easy to say there will be no political prosecutions in this administration and that, of course, in the true sense, a political prosecution is a very serious matter, but it has happened before. And therefore, the potential of it happening again somewhere may exist.

But we have to distinguish between investigations which seemingly affect a particular group, criminal investigations that seemingly affect a particular group such as the Lion's Club, such as the Catholic Archdiocese in Baltimore, not because the group is being prosecuted, but because people acknowledge, members of the group, participants in the group, have committed very violent crimes.

Naturally, as in any investigation, it is the people with whom you associate and communicate who have evidence of admissions, who have knowledge of the circumstances, who may have relevant evidence. Therefore, sometimes when pursuit and inquiry is made in the natural avenues of investigation it gets mixed up by others with the idea that the group has certain trusted and legitimate freedoms and therefore although we are investigating a crime, we are accused of violating, so to speak, an attitude or philosophy and that is not so, although it sometimes can be alleged that it is so.

We firmly believe that regardless of an individual's association, no matter how strong your beliefs, you cannot commit criminal acts and then masquerade behind a political or social or economic or religious front no matter how genuine the group's activities.

Mr. EILBERG. Mr. Civiletti, our time has run out this morning. And rather than call another hearing, we are very anxious to give you a set of questions, which I hope you will respond to.

Mr. CIVILETTI. I will be delighted to direct my attention to them immediately. And thank you very much for allowing me to appear here today and present these views of the Department of Justice.

[The following information was submitted by the Justice Department:]

DEPARTMENT OF JUSTICE,
Washington, D.C., November 23, 1977.

HON. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship and International Law, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed are the answers of the Department of Justice to the grand jury questions you posed as a sequel to my testimony on H.R. 94 on June 29, 1977. In addition, we understand it is your Subcommittee's intention soon to mark up H.R. 94, and in that regard your Subcommittee staff has solicited the Department's comments upon those parts of the bill not addressed in my statement or in the enclosed answers. Our comments on these matters are also enclosed.

Please be assured that we stand ready and willing to work with the Subcommittee during its processing of H.R. 94 if desired.

Very truly yours,

BENJAMIN R. CIVILETTI,
Assistant Attorney General, Criminal Division.

RESPONSE TO REQUEST OF SUBCOMMITTEE STAFF FOR COMMENTS ON OTHER ASPECTS OF H.R. 94

1. IMMUNITY

Section 3 of the bill provides, in part, that a person required to give testimony under a grant of immunity "may not be indicted for any offense" by the same grand jury before which he testifies. (Proposed 18 U.S.C. 6003(d)).

The provision is apparently intended to codify the rule in *United States* v. *Hinton*, 543 F.2d 1002 (2d Cir. 1976), cert. denied, —— U.S. —— (1977), in which the Second Circuit held that it would be unfair ordinarily for the grand jury that has heard the immunized testimony of a witness to then indict the witness, even though based upon independent evidence, for participation in the matters under investigation. However, the Second Circuit subsequently announced an important exception to the *Hinton* doctrine where the indictment is for contempt or perjury. *Langella* v. *Commissioner of Corrections*, 545 F.2d (2d Cir. 1976). The court observed (*id.* at 823):

> In *United States* v. *Camporeale*, 515 F.2d 184, 189 (2d Cir. 1975), we affirmed "the settled practice of permitting the same grand jury which heard the witness to file an indictment charging him with perjury. Having had the opportunity to observe his demeanor on the stand, it was in a superior position to determine whether there were reasonable grounds to believee that he was deliberately giving false [immunized] testimony. The grand jury's knowledge of a witness' prior criminal record, furthermore, should not preclude its filing the indictment, which merely represents a charge." We think similar considerations warrant having the same grand jury return the indictment for criminal contempt,[8] especially where, as here, the charged offense involved refusal to answer, not any crime revealed in the immunized answers.
>
> [8] In *United States* v. *Hinton*, 543 F.2d. (2d Cir. 1976), this court held that it was reversible error for the same federal grand jury which heard Hinton's immunized testimony in 1973 concerning narcotics transactions to indict her in 1975 for violating federal narcotics laws. We noted that Hinton's appeal did not involve perjury or contempt. *Id.*, 1010 n. 9.

Even as limited by the Second Circuit, the *Hinton* doctrine in our view is open to serious question since it establishes a conclusive presumption and denies to the government any opportunity to prove that an indictment was founded on wholly independent evidence. If, however, the Subcommittee determines to incorporate the *Hinton* rule into H.R. 94, the provision should be amended to recognize the exceptions, which accord with the fact that the Fifth Amendment and 18 U.S.C. 6002 afford an immunized witness no protection against prosecution for perjury, giving a false statement, or otherwise failing to comply with the order to testify. Accordingly, we suggest adding to the bill the language "except for an offense involving perjury, giving a false statment, or otherwise failing to comply with the order."

2. IMMUNITY

Section 3 of the bill provides, in part, that a court shall not order a person to testify under a grant of immunity if the court finds that the person is in danger of being prosecuted, or subjected to penalty or forfeiture, by the government of another country on account of any transaction, matter, or thing concerning which he may be ordered to testify, unless the court also finds that the person has been provided adequate safeguards to minimize such danger. (Proposed 18 U.S.C. 6003(b)).

It is an open question under case law whether or to what extent the Fifth Amendment privilege against compulsory self-incrimination applies in respect to a possible foreign prosecution. See *Zicarelli* v. *New Jersey Investigation Commission*, 406 U.S. 472 (1972); *In Re Tierney*, 465 F.2d 806 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973). It has been held that a witness is not protected

against the law of a foreign state which makes the very act of testifying a criminal offense; the Fifth Amendment protection is concerned only with the use of the *content* of compelled testimony. *In Re Grand Jury Proceedings*, 532 F.2d 404 (5th Cir. 1976). (Although couched in "transactional" immunity terms—a matter on which we continue to lodge the strongest objections—we understand the pertinent provisions of H.R. 94 to embody this principle and to cover only the content of compelled testimony).

As suggested in *In Re Grand Jury Proceedings*, *supra*, the issue is perhaps one of international relations rather than constitutional law. Nations may be required to moderate the exercise of their enforcement jurisdiction in consideration of such factors as the relative importance of the competing interests involved and the nationality of the individual. It would not seem appropriate for a nation to have to forego testimony in an extremely important case if the witness was one of its nationals and the possible foreign offense was a relatively minor one. The proposal in the bill itself reflects a view that the witness's right should not be absolute but should yield if the risk of foreign prosecution is minimized. Under the circumstances, we suggest that enactment of this provision would be premature in the absence of further judicial delineation of the scope of the Fifth Amendment privilege; the provision may well confer more protection than the Fifth Amendment requires. Moreover, the entire matter is one that the courts themselves can handle very much as the proposal contemplates even assuming applicability of the Fifth Amendment to a foreign prosecution; legislation on the subject would seem unnecessary.

3. IMMUNITY

Section 3 of H.R. 94 would, in part, repeal subsection (c) of 18 U.S.C. 6005(c), which requires the district court to delay the issuance of an order to compel testimony in a congressional proceeding for up to twenty days upon the application of the Attorney General.

One purpose of the Congress in enacting the provision was to give the Department an opportunity to review the prospective grant of immunity and to express to the Congress (or the committee involved) any concerns that the Department might have about it of which the Congress might not be aware. Another purpose was to afford the Department more time than the ten days allowed under 18 U.S.C. 6005(b)(3) to obtain an indictment, lodge evidence with the court, or otherwise prepare to handle potential complications arising out of the compelled testimony. The purposes are as valid today as they were in 1970.

It would seem clear that an Attorney General would not seek any delay under the statute without being convinced that a grant of immunity to the witness could involve serious hazard o the public interest. To our knowledge, the Department has availed itself of a twenty-day delay in only one matter. See *Application of United States Senate Select Committee on Presidential Campaign Activities*, 361 F. Supp. 1270 (D.D.C. 1973). There is certainly a danger that a committee of the Congress might seek to compel testimony without being aware of a planned investigation or prosecution of the witness or of other information on the Department has about the witness, and that an immunity granted too hastily might have regrettable consequences. In these circumstances, we believe that 18 U.S.C. 6005(c) is a safeguard against precipitous action which the Congress, in its own interests, would be unwise to repeal.

4. SIZE OF GRAND JURY

Currently, under 18 U.S.C. 3321 and Rule 6 of the Federal Rules of Criminal Procedure, a grand jury consists of 16–23 members, 12 or more of whom must concur in finding an indictment (thus 12 is considered a quorum for grand jury action).

Section 4 of H.R. 94 would amend 18 U.S.C. 3321 to reduce the size of the grand jury to 9–15 members and to require that at least 9 members be present and two-thirds of those present concur in finding an indictment. The proposal is very similar to one approved by the Advisory Committee on Criminal Rules of the Judicial Conference.

The Department in the past has favored a reduction in the size of the grand jury and we continue to do so. Apart from the financial savings to be realized, reducing the size of the grand jury should improve the quality of its deliberative

process, since responsibility will not be so diffused and the number will not be so great as to militate against each juror's active participation. Cf. *Williams* v. Florida, 399 U.S. 78, 100 (1970). Moreover the requirement that at least two-thirds of the jurors concur in an indictment should more than compensate for the reduction in the absolute number of those who today must concur; the judgment of six out of nine or ten out of fifteen voting grand jury members would seem at least as reliable as the judgment of twelve of twenty-three such members. Weighed against this is the fact that a reduction will, to an extent, lessen the number of citizens who can be engaged in the criminal justice process. On balance, however, we are of the view that the interest in improving the quality of grand jury deliberations outweighs other considerations, and we therefore support the enactment of section 4 of the bill. It is suggested, however, that the section be revised to amend the appropriate parts of Rules 6(a) and (f), F.R.Crim.P., as well as 18 U.S.C. 3321.

1. *The Participatory Role of Grand Jurors*

The question is what should be the participatory role of grand juries.

The principal functions of the grand jury are to investigate for facts involving violations of federal criminal laws, to receive and evaluate information and evidence relating to possible violations of the federal criminal laws, and to determine whether probable cause exists from the evidence received that particular individuals violated the federal criminal laws and thus should be charged by indictment so that guilt or innocence can be determined by an adversary trial on the merits. In carrying out that responsibility, it is expected that the grand jurors will be active participants in the proceedings and not passive observers. Accordingly, grand jurors should ask probing questions of the prosecutor and, under appropriate circumstances, they should similarly inquire of the witnesses who appear before them.

An instance such as you describe in which an attorney for the government allegedly "bristled" and "stopped" a grand juror from putting a question to a witness would not be in accord with common civility and respect for the rights of grand jurors. However, a prosecutor must be careful that improper inflammatory or abusive questions are not forced on witnesses by grand jurors. During the actual taking of testimony, moreover, it is sometimes wise to request the grand jurors to hold their questions of the witness in abeyance until the attorney for the government has completed his examination and thus explored the relevant facts by proper questioning. This procedure is calculated to prevent the injection of prejudice or unfairness into the proceedings as well as to insure that the witness' testimony will be more orderly and comprehensible to the grand jurors.

2. *Self-Regulation—United States v. Litton System*

The question is what sanctions have been imposed by the Department against the prosecutors involved in *United States* v. *Litton Systems*.

Since the Department has appealed the district court's ruling, any detailed discussion of this case would be inappropriate. However, as I pointed out in my testimony before the Subcommittee on June 29, 1977, the district court's opinion reflects, in our judgment, a fundamental misunderstanding of the relevant events. Since it is our belief that no prosecutorial misconduct whatever was involved in that case, the imposition of sanctions against Department personnel would obviously be unwarranted. The alleged misconduct if any did not involve the internal grand jury proceedings but rather the prosecutorial determination of whether appropriate civil proceedings were a proper alternative to seeking grand jury determinations.

3. and 31. *United States Attorneys' Manual*

The questions ask for the Department's policies, standards, or procedures relating to: 1) granting immunity; 2) preserving grand jury secrecy; 3) notice to witnesses; 4) warning of rights; and 5) repeated submissions of proposed indictments to grand juries.

These policies, standards, and procedures are discussed in the context of our responses to other specific questions herein. See items 4, 7, 9–12, 14, 15, 17, 20, and 22–27.

You also ask whether the policies and standards contained in the Manual are "made binding, not just instructive, on U.S. Attorneys."

The policies, standards, and procedures contained in the U.S. Attorneys' Manual are issued pursuant to the Attorney General's statutory authority to "super-

vise all litigation" and to "direct all United States Attorneys . . . in the discharge of their respective duties." 28 U.S.C. 519. Hence, as directives of the Attorney General, the provisions of the Manual are binding on Department of Justice employees and any Departmental employee (including U.S. Attorneys and their assistants) who disregarded such instructions would be subject to discipline. The guidelines are, however, designed for effective internal administrative purposes only and are not intended to nor do they legally confer judicially enforceable rights on third parties.

4. *"Target" Warnings*

You ask what the Department's position is with respect to the handling of "target" witnesses.

I indicated in my testimony before the Subcommittee on June 29, 1977, that, although the Department of Justice is opposed to legislating potentially litigable provisions relating to target witnesses before federal grand juries, the Department was at that time in the process of developing guidelines with respect to the treatment of targets. Those guidelines, which go substantially beyond the requirements of the law, have recently been approved and promulgated in the United States Attorneys' Manual. Department of Justice personnel have been instructed to advise target witnesses[1] of the following matters: (1) the general nature or subject matter of the grand jury's inquiry (to the extent that such disclosure does not compromise the progress of the investigation or otherwise inimically affect the administration of justice); (2) that the witness may refuse to answer any question if a truthful answer to the question would tend to incriminate him; (3) that anything that the witness does say may be used against him; (4) that the grand jury will permit the witness to step outside the grand jury room to consult with counsel if he desires; and (5) that his conduct is being investigated as a possible violation of federal criminal law. See, U.S. Attorneys' Manual § 9–11.250. Similarly, the Department has instructed its attorneys not to compel targets to appear before the grand jury to testify about their involvement in the crime under investigation without first securing the approval of the responsible United States Attorney (U.S. Attorneys' Manual § 9–11.251); that under normal circumstances requests by targets personally to testify before the grand jury should be given favorable consideration (U.S. Attorneys' Manual § 9–11.252); and that under normal circumstances a target should be excused from testifying before the grand jury if the target and his attorney state in writing that the target will refuse to testify on Fifth Amendment grounds (U.S. Attorneys' Manual § 9–11.254). Moreover, Department of Justice prosecutors are officially encouraged, in appropriate cases, to notify targets before indictment in order to afford them an opportunity voluntarily to testify before the grand jury. (U.S. Attorneys' Manual § 9–11.253.)

5. *Right to the Presence of Counsel*

You ask how the provisions of H.R. 94 relating to counsel accompanying the witness into the grand jury room could in any way interfere in grand jury investigations.

Recent history and current events underscore the fact that in order effectively to combat insidious and complex criminal conspiracies, white-collar criminality, organized crime and political corruption, it is imperative that the public have a forceful means of ferreting out the truth no matter how deeply hidden, cleverly disguised, or powerfully resisted. It is our strong belief that permitting counsel to accompany witnesses inside the grand jury room would seriously undermine the efficiency and efficacy of the grand jury as an investigatory institution and would create more problems than it would eliminate.

As I pointed out in my testimony before the Subcommittee in June, there are five principal reasons why we believe that the law should not be changed to permit counsel to accompany witnesses inside the grand jury room. In sum, they are as follows: 1) the presence of counsel will impair and impede the fact-finding process due to the inevitable interposition of technical objections and because of the risk that the witness' answers will be in the words of his lawyer rather than his own; 2) resolution of even obviously unfounded objections by counsel will

[1] A "target" is defined in the U.S. Attorneys' Manual (§ 9–11.250) as a "person as to whom the prosecutor or the grand jury has substantial evidence linking him to the commission of a crime and who, in the eyes of the prosecutor, is a putative defendant."

cause inordinate delays because in each instance the proceedings will have to be held in abeyance while the lawyers search out a judge to rule on counsel's objections; 3) the physical presence of counsel will increase the likelihood of breaches of grand jury secrecy; 4) the "reality" of multiple representation will make it much more difficult for grand juries in multi-party conspiracies to discover the true involvement of the higher-ups; and 5) technical deficiencies on small points relating to third party witnesses will be utilized by defendants to attack sound indictments and complicate trial proceedings.

The suggestion that the foregoing problems are imaginary because "there have never been any problems" in the eight states which permit counsel to accompany witnesses into the grand jury room is simply not persuasive. For example, Congressman Sawyer has indicated that on the basis of his experience, which is not insubstantial, counsel in Michigan's one-man grand juries are "practically uncontrollable: and there "is practically no way that you can prevent an attorney from obstructing [the proceedings]." See also April 27, 1977, testimony of Hon. Frederick B. Lacey at 34. Moreover, as pointed out in the appendices to my formal statement of June 29, 1977, there are substantial limitations, in either law or practice, on the right to counsel inside the grand jury room in those few states where the practice is permitted. In addition, there are significant differences in the role played by the federal grand jury, with its constitutional predicate, and the role played by most state grand juries. Hence, the limited experience of a few states which permit counsel in the grand jury room under varying but nevertheless limited circumstances is not, in our view, persuasive evidence that the practice could successfully be engrafted onto the federal criminal justice system.

Since in our view it has not yet been shown that the present system of permitting a witness to consult with counsel outside the grand jury room is either unfair or unworkable and since altering the present system to permit counsel physically to accompany the witness inside the grand jury room will raise the serious problems discussed above, the "counsel-in-the-grand-jury-room" provisions of H.R. 94 are unnecessary as they are unwise. The enactment into law of these provisions would deal a serious blow to effective law enforcement.

6. The Presence of Counsel

You suggest that the Department establishes a "dual standard—one for prosecutors and one for all other lawyers"—and you ask why we "say prosecutors are more trustworthy than other lawyers."

This question is framed in the classic mode of "when did you stop beating your wife? We establish no double standard and we do not suggest prosecutors are more trustworthy than other lawyers. Prosecutors are compelled by law to perform different duties than private counsel. Private counsel have an absolute and overriding duty to their client. The public prosecutor has a duty to the Government to prosecute vigorously but an equal duty to see that justice is done in accordance with elemental fairness and due process.

For these reasons and those summarized in the previous answer, we do submit that the presence of counsel in the grand jury room would be undesirable. However, we do not base this opposition on the theory that prosecutors are more trustworthy than defense lawyers. Our position simply recognizes that the prosecutor and the defense lawyer play different roles and that defense counsel's normally acceptable conduct has no place in the grand jury room. Defense counsel is an advocate who properly owes to his client the duty to serve as his champion with courage, devotion, and zeal, according to law. Unless the grand jury proceedings were perceived to be conducted for the benefit of his client, such an advocate would ordinarily find it appropriate to interpose technical objections to grand jurors' questions and to otherwise object to the conduct of the proceedings on any possible procedural ground. Moreover, even though the law might not fully recognize such objections in the context of grand jury proceedings, the defense lawyer would be inclined nevertheless to raise such objections. In a trial setting, for example, it is a not uncommon and much tolerated practice for lawyers to ask witnesses questions that are legally questionable in order to elicit a certain answer and obtain the certainty of a court ruling even if such answer is ordered stricken from the record and from the jury's consideration. There is no reason to believe the grand jury context will evoke any different behavior from defense counsel nor to doubt that within the broad term "advise" counsel will do everything possible with courage, devotion, and zeal to further his client's interest.

7. Statutory Notice Requirements

The question is why existing law with respect to subpoenas, immunity, and contempt should not be altered to provide for specified minimum notice requirements with "shortened periods if good cause is shown by the Government."

The government acts pursuant to short notice only when time is of the essence. To shift the burden to the government to prove to a court in every such case that time is needed of the essence would simply inject another time-consuming procedural step into the process and *ipso facto* defeat the government's interest in acting speedily, e.g., to prevent destruction of records or the flight of a witness. It must be remembered that the court plays a direct and important role in connection with subpoenas, immunity, and contempt proceedings and, hence, a United States District Judge is available to redress any undue hardship or unfairness associated with proceedings conducted after short notice to a citizen. Moreover, with respect to forthwith subpoenas, the Department has recently adopted an internal policy of self-restraints: such subpoenas are to be used only when swift action is important and then only with the prior personal approval of the United States Attorney. (See U.S. Attorneys' Manual § 9–11.230). It is submitted that when viewed in the light of the Department's self-restraint, the absence of widespread abuse, and the direct supervision of the courts, the notice provisions of H.R. 94 are unnecessary and would be productive of needless litigation.

8. Recordation of Comments by Prosecutors and Comments Among Grand Jurors

The Department of Justice favors mandatory recordation of all testimony before the grand jury, but we are opposed to provisions which would also require recordation of interchanges between the attorney for the government and the grand jurors. You ask, if these are not recorded, what guarantee exists that irrelevant, prejudicial or other information will not be conveyed to jurors or discussed by them.

Attorneys for the government are instructed by the Department of Justice about proper conduct before the grand jury (U.S. Attorneys' Manual § 9–11.015) and they are expected to conform to those instructions as well as to all other relevant standards of conduct as stated in statutes, rules, court decisions, codes, canons, or other standards of professional conduct. If one presumes that prosecutors and grand jurors are not honorable people who will misbehave at every opportunity, then perhaps some sort of limitation, such as the proposed recordation requirement, would be justified. However, we do not share that presumption and we oppose the recordation requirement because it would very likely inhibit free and frank discussions among grand jurors and thereby have an undesirable chilling effect on proper inquiry and discussion.

More fundamentally, however, the Department opposes this proposal because it will substantially further a most undesirable trend in the criminal law—the search for procedural error. As Judge Lacey, the Chairman of the Grand Jury Subcommittee of the Supreme Court's Advisory Committee on Criminal Rules, said in his testimony before your Subcommittee on April 27, 1977, resourceful defense attorneys will feel constrained to move for disclosure of all grand jury proceedings so they can assure themselves that no error took place before the grand jury. This in turn will lead to time-consuming *in camera* inspections of often voluminous grand jury transcripts, the examination of motions, and the hearing of arguments by already overburdened district judges. This burden is one the federal criminal justice system can ill afford to bear. Until it can be demonstrated that the proposal's benefits, which we regard as incremental at best, outweigh its detriments, the dialogue of prosecutors and grand jurors should remain off the record.

9. and 12. Comparing Use Immunity with Transactional Immunity

The questions are whether the Department has made or intends to make a comparison of the results achieved under the relatively new use immunity statute with the results achieved under the former transactional immunity provisions, and whether the Department intends to monitor the results of approved immunity applications.

The Department is attempting to learn as much as possible concerning the circumstances surrounding orders to compel testimony under 18 U.S.C. 6001–6004. At present each authorization to seek such an order is accompanied by Form CRM–167 (Witness Follow-Up Report), which must be completed and returned to the Department whether or not the order is utilized. A copy of Form CRM–167 is attached for your information. The Form will provide a basis for

evaluating the true extent of the use of such orders and provide some basis for evaluating the quality of the results derived from compelling testimony.

It is, however, not clear how the Department could, as a practical matter, make a valid empirical comparison as to the reliability and usefulness of testimony obtained under the current use immunity statute with the reliability and usefulness of testimony obtained under the former transactional immunity provisions. It would appear that, in order to make such a comparison, it would be necessary, *inter alia*, to determine how much information witnesses actually withhold under the respective types of immunity, a determination that would generally be very difficult to make. Although empirical data is probably unattainable, logic tends to support the thesis that the reluctant witness who is compelled to testify will say no more than he has to if but a single admission gains him full immunity from prosecution. Conversely, if the extent of the witness's protection from prosecution is dependent upon the extent of the information he provides in his testimony, the witness will be motivated to volunteer as many details as possible, since this makes it less likely the government could meet its heavy prosecutive burden of establishing an independent source for its evidence. Accordingly, we believe that the testimony resulting from the current use immunity statute is generally much more truthful, detailed, and credible than that which would be forthcoming from a transactional immunity statute.

WITNESS FOLLOW-UP REPORT

(18 U.S.C. 6001–6003; 28 C.F.R. 0.175–0.178)

(To be completed, signed, and returned as soon as:
(a) compulsion of a witness's testimony has been completed, or
(b) it has been decided not to use the authorization to obtain a compulsion order.)

Name of Witness (last name first)_____
Date of Authorization_____
WRU USE ONLY—WRU #_____
Proceeding_____ District_____
Violation (title and section)_____

(1) Was the authority to seek an order of compulsion used? ——Yes ——No
(a) If the authority was not used, what was the reason for not using it?
(i)__Witness did not assert his privilege.
(ii)__Witness's testimony was found unnecessary.
(iii)__Other (describe)_____
(b) If the authority was used:
Date order to compel testimony issued:_____
Title of Proceeding:_____
Ditrict:_____ Division:_____
Docket #:_____D.J. # (if known):_____

(2) Did the witness testify pursuant to the order? —— Yes —— No
(a) If "yes";
Date witness testified: _____
Title of Proceeding: _____
District: _____ Division: _____
Docket #: _____ D. J. # (if known):_____
Location of required verbatim recording (or transcript):
———— In files relating to the above case.
———— Other (specify) _____
(b) If witness refused to testify, were contempt proceedings instituted?
——Yes ——No
(i) If contempt proceedings were instituted, please describe nature and state of proceedings (Rule 42(a), Rule 42(b); 28 U.S.C. 1826)
(ii) If contempt proceedings were not instituted, please explain why.

(3) In your opinion, was the testimony obtained under the compulsion order:
———— essentially truthful or
———— significantly untruthful?
(a) If, in your opinion, the testimony was essentially truthful was it:
———— less valuable than anticipated?
———— about as valuable as anticipated?
———— more valuable than anticipated?

(b) If, in your opinion, the testimony obtained under the order was significantly untruthful, has:
———— a perjury prosecution commenced?
———— a perjury prosecution been completed?
Explain the current status of the perjury prosecution, or the reasons for declining to prosecute:

(4) Did witness's testimony contribute to an indictment or conviction: ——Yes ——No.
In your opinion, was the witness's testimony or evidence
———— Essential for proof of the government's case?
———— Helpful, but not essential, for proof of government's case?
———— Unnecessary for proof of the government's case?

(5) What was the final disposition of the case or investigation in which the witness was compelled to testify?

(6) Please describe any special or unanticipated problems related to the compulsion order (*e.g.*, disclosure of crimes unknown to the government prior to the order), and add any comments which you consider relevant.

Signed:_____ Date:_____
Typed Name:_____

10. *Departmental Guidelines on Immunity*

In response to your request, a copy of the Department's guidelines for processing immunity applications, promulgated on January 14, 1977, is attached herewith.

11. *Statistical Information on Immunity*

The question calls for a statement of the Department's overall plans for gathering and maintaining statistical information about immunity grants.

See the answer to questions 9 and 12. It is contemplated that the information in the follow-up reports, which are required by the guidelines, will eventually be processed by means of a computer. The forms for such reports have, however, only been in use since mid-April of this year. Our present thinking is that more information should be collected before computer analysis is undertaken.

12. *Follow-Up Reports on Immunity Grants*

The response to this question is given in answer to question 9.

13. *Preliminary Examination After Indictment*

The question is why H.R. 94's proposal for a preliminary examination after indictment is opposed by the Department.

In short, we oppose this provision of H.R. 94 because it would unnecessarily add yet another layer to the already cumbersome pretrial proceedings in criminal cases. The purpose of a preliminary examination is to determine whether there is probable cause to believe that an offense has been committed and that the defendant committed it. F.R.Crim.P. 5.1(2). Most preliminary hearings are routine matters with but one or two witnesses to establish basic probable cause and are not by any means a full presentation of the prosecution "case".

Since the grand jury, by returning an indictment, has already performed this function, a subsequent probable cause determination would be redundant unless one presumes that grand juries routinely act capriciously. If, as Congressman Sawyer indicated at the hearings, the proposal is designed to afford defense counsel an opportunity for pretrial discovery, via cross-examination of some of the government's witnesss, beyond what is available today under the Federal Rules of Criminal Procedure, we believe that this issue should be addressed directly through a proposed amendment to those Rules rather than indirectly and cumbersomely through the creation of a new and largely duplicative pretrial hearing procedure. The further suggestion raised in support of the preliminary examination proposal, that this approach would eliminate the need for "mini-trial" would simply be moved from the suppression hearing to the preliminary examination.

14. *News Media Leaks*

You ask "what procedures, standards, or guidelines have been established by the Justice Department to limit leaks by U.S. Attorneys and their assistants?"

The Department has promulgated formal regulations strictly limiting the kind of information relating to both civil and criminal proceedings which Department

personnel can properly release to the news media. See 28 C.F.R. § 50.2 (1976). In sum, the guidelines preclude the release of information which is intended or might reasonably be expected to influence the outcome of a pending or future trial. Department personnel are also expected to comply with applicable canons of ethics and other standards of professional responsibility.

Insofar as grand jury leaks are concerned, attorneys for the Justice Department are specifically precluded by the Federal Rules of Criminal Procedure from disclosing such information to non-governmental personnel except as authorized by the court. When the occasional transgression does occur, it is a matter of utmost concern to the Department. Attorney General Bell has most vehemently stated his abhorrence of any prejudicial leaks and has ordered internal Department investigations to try to determine any violation. The Office of Professional Responsibility plays an important and continuing role in the Department's efforts to assure there are no such abuses.

Of course neither defendants nor witnesses nor even witnesses' counsel are within the grand jury secrecy prohibitions and much of what might appear to be an improper leak is accumulated information collected by resourceful reporters and printed in non-attributable form to protect the identity of the reporter's sources.

15. *Penalties for Unlawful Breaches of Grand Jury Secrecy*

Section 5 of H.R. 94 would make unlawful breaches of grand jury secrecy punishable, depending upon the intent, either as felonies or as petty offenses. The Department has suggested that Section 5 be revised to create a unitary offense punishable as a misdemeanor. The question calls for an explanation as to why the Department would not want discretion in certain cases to proceed either on a felony or on a petty offense basis.

Although there is much merit in the fundamental approach now taken in Section 5 of H.R. 94, we adhere to the view that the bill would be considerably improved by having only a single misdemeanor offense created.

Our concern is that the distinctions drawn in the bill are not wholly rational and thus leave too much latitude to the prosecution. In general, we doubt that the receipt of compensation should be made the gravamen of a felony offense for breach of grand jury secrecy. The real thrust of the offense—a thrust that might be lost sight of by focussing upon compensation—lies elsewhere. If, for example, a prospective defendant paid to learn the identity of an informant witness, the payment would not necessarily make the situation more serious than if the disclosure had not been compensated. Whether or not compensation is involved, the essential damage done to the criminal justice system is in the breach of grand jury secrecy itself. Witnesses frequently are compelled to furnish incriminatory or otherwise sensitive information to a grand jury, perhaps under an assurance that the witness's cooperation will remain secret unless criminal prosecution is undertaken. Breaches of grand jury secrecy, for whatever motive or intent, inevitably tend to discourage witnesses from cooperating with the government.

In our judgment a misdemeanor provision (allowing for imprisonment up to one year) would afford a generally sufficient deterrence to improper breaches of grand jury secrecy. If a breach of grand jury secrecy is committed with a corrupt purpose, the activity will often be punishable at a felony level as an obstruction of justice. For the present, and until experience can be had with a statute like that proposed in Section 5 of H.R. 94, the Department much prefers creating a misdemeanor offense that applies to any deliberate breach of grand jury secrecy without regard to motivation.

16. *Presentation of Exculpatory Evidence*

The question is what measures the Department has taken to insure that United States Attorneys present exculpatory evidence to grand juries, and how "exculpatory evidence" is defined for such purposes.

The Department recognizes that public confidence in the criminal justice system will be diminished if an appreciable number of indictments are returned which will not support a successful prosecution. Since there is no purpose or interest in returning indictment if an acquittal is expected at trial, if exculpatory evidence exists which is of such persuasive force as to make such a result reasonably likely, common sense and basic fairness would dictate that any decision to go forward with the prosecution should be made by the government and the grand jury with a full awareness of such exculpatory evidence. Accordingly,

the Department has recently adopted a formal policy governing the presentation of exculpatory evidence to the grand jury. The relevant provision of the U.S. Attorneys' Manual provides in pertinent part as follows: "[W]hen a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor should present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." See U.S. Attorneys' Manual § 9–11.334.

It is submitted that the Department's policy formulation is the fairest and the most workable of the known alternatives. To require the presentation to the grand jury of all information, direct and indirect, which could conceivably be of benefit to the prospective defendant would tend to make a grand jury investigation more like a trial than the probable cause-determining proceeding it was intended to be. The *Brady-Agurs* standard is difficult enough to apply at trial and, as Judge Lacey pointed out in his testimony, the grand jury stage is not the time to apply such a difficult standard. See *Brady* v. *Maryland*, 373 U.S. 83 (1963); *United States* v. *Agurs*, 427 U.S. 97 (1976). Moreover, as Judge Lacey suggested in his statement, the legislative encapsulation of any such standard would place a tremendous and unnecessary burden on the courts. It is submitted that the Department's approach strikes the proper balance between fairness to the accused and the public's interest in efficient grand jury proceedings.

17. *Invocation of the Fifth Amendment Privilege Against Compulsory Self-Incrimination*

The question asks for the Department's policy with respect to advance assertions of prospective grand jury witnesses of an intention to refuse to testify on Fifth Amendment grounds.

The relevant section of the U.S. Attorneys' Manual (§ 9–11.254) provides in pertinent part that if a "target" of the investigation (as defined in § 9–11.250) and his attorney state in writing, signed by both, that he will refuse to testify on Fifth Amendmen grounds, the witness should be excused from testifying unless the United States or the responsible Assistant Attorney General insists on his appearance. In determining the desirability of insisting on the appearance of such a person, consideration should be given to the factors which justified the subpoena in the first place, *i.e.*, the importance of the testimony or other information sought, its unavailability from other sources, and the applicability of the Fifth Amendment privilege to the likely areas of inquiry. (See § 9–11.251 *supra*.) Consideration should also be given to whether a claim of privilege made in the presence of the grand jury would be likely to prejudice the witness in the eyes of the grand jurors. An absolute prohibition on calling a witness before a grand jury who has indicated his intention to invoke the Fifth Amendment would be excessive since, among other reasons, it would deny the government the right to obtain a judicial review of the propriety of such invocation in response to a particular question.

18. *Statistical Information and Reports*

Your Committee previously requested statistical information about grand jury practices, much of which was determined to be unavailable. The questions are whether such statistical information will be kept in the future, and whether the Department foresees difficulty in meeting the reporting requirements at pages 29–30 of H.R. 94.

The availability of statistical information requires that the basic data be recorded in each United States Attorney's Office, and that all the information be put together and maintained in a retrievable form. The Department does keep various kinds of statistical information now; and the system is reviewed from time to time with the purpose of making changes to improve administrative control and to serve other needs.

With some difficulties and certain changes in existing practices (see the response to question 9), the Department would be able to meet most of the reporting requirements at pages 29–30 of H.R. 94, the bulk of which pertain to grants of immunity. About 95 percent of the grand jury investigations undertaken each year are accounted for in the felony case statistics set out in the Attorney General's annual reports to the Congress.

With regard to the particular reports required by the bill, section 9(b)(2) is inappositely phrased in that it refers to the "number of requests by United States grand juries to the Attorney General for approval to apply to the court for an

order compelling testimony under section 2003 of title 18, and the number of such requests approved by the Attorney General." The United States Attorney, not the grand jury, is the sole authority empowered to seek approval of an application for statutory immunity. Moreover, under section 6003 (not 2003) of title 18, not only the Attorney General, but the Deputy Attorney General and any designated Assistant Attorney General, may approve such applications.

Section 9(b)(6) of the bill may ask for the impossible in seeking a report on the "number of arrests, indictments, no-bills, trials, and convictions *resulting from* testimony obtained under orders granting immunity." It would be very difficult if not impossible to determine whether an indictment or a conviction resulted from particular testimony. Presumably, what is sought is information of the number of convictions, no-bills, etc., resulting from proceedings in which testimony obtained under orders granting immunity was given.

With respect to section 9(b)(7), no data bank system for grand jury information exists or is contemplated.

19. *Potentially Improper Uses of Grand Jury*

Four questions are asked about potentially improper uses of grand jury subpoenas.

A and B. The first two questions concern situations in which the attorney for the government discloses grand jury information to Federal investigators, such as Internal Revenue Service agents, in order to obtain their expert assistance in the investigation. The principal question raised is how such situations will be handled administratively to prevent a civil use being made of evidence obtained under grand jury subpoenas.

Rule 6(e) of the Federal Rules of Criminal Procedure, as amended by Public Law 95-78, effective October 1, 1977, grants specific authority to attorneys for the government to disclose grand jury information, as deemed necessary, to government personnel assisting them in enforcing federal criminal laws. The amended Rule requires government attorneys to provide the courts promptly with the names of government agents to whom disclosures are made; and agents are expressly prohibited under the Rule from making any use of disclosed material other than to assist government attorneys enforce federal criminal laws. The amended Rule specifically provides that knowing breaches of grand jury secrecy may be punished as contempts of court.

The legislative history of the amendment notes that most grand jury proceedings are based upon investigations conducted by federal agents, who often work along with grand juries and serve government attorneys afterward, even during the course of trial. The amendment rests upon a conclusion that "[t]here is no reason for a barrier of secrecy to exist between the facets of the criminal justice system upon which we all depend to enforce the criminal laws." S.Rep.No. 95-354, 95th Con., 1st Sess. 6 (1977).

Disgressing for a moment to respond to a subsidiary question, there is a clear dichotomy between civil tax cases and criminal tax cases. Civil tax cases are generally designed to collect taxes that should have been paid (with penalties). Criminal tax cases are instituted to impose penal sanctions for violation of criminal laws. An intelligence division agent within the Internal Revenue Service is responsible for criminal investigations; a separate kind of agent—a revenue agent—is responsible for civil investigations. Normally, the criminal investigations involve potential civil liability but the civil aspects are put aside and held in abeyance until the criminal aspects are exhausted. A conviction can usually be used to prove essential facts in a related civil tax case.

The Department does not see a need for setting up administrative barriers to the use by United States Attorneys and other government attorneys of the provisions of amended Rule 6(e). Controls would, of course, be put into effect should experience demonstrate a need for them; but the Rule itself seems to exert adequate control. Thus, having to give the courts the names of agents receiving grand jury information should serve as an effective reminder to the government attorney and the agent of the limitations upon this respective authority and of the possibility he or the agent will have to answer for any subsequent breach of grand jury secrecy. The government attorney will want to protect himself and his agent; and the agency will want to be able to negate any claim that it acquired evidence improperly. There are many reasons why this Department would not tolerate an abuse of the much-needed authority to obtain expert assistance in grand jury investigations. Not the least of these is the vital importance of grand

jury secrecy to law enforcement. There have been pressures in recent years to erode the tradition of grand jury secrecy, and it would invite such erosion for the Department to do less than rigidly adhere to the rules.

C. The question is whether a grand jury subpoena may properly be used to gain the attendance of a witness simply for an office interview; whether grand jury subpoenas are often used for such a purpose; and why they would be so used.

Grand jury subpoenas are issued pursuant to Rule 17 of the Federal Rules of Criminal Procedure. It is improper to issue subpoenas under the Rule, whether grand jury or trial subpoenas, to compel a witness's appearance for a private interview, although, if accomplished in a non-coercive manner, there is nothing wrong with taking the occasion of the witness's appearance to talk with him privately. See, *e.g.*, *Durbin* v. *United States*, 221 F.2d 520 (D.C. Cir 1954); *United States* v. *Standard Oil Co.*, 316 F.2d 884 (7th Cir. 1963). These cases and others involving misuse of subpoenas have been called to the attention of the United States Attorneys in Departmental publications, and the law on the point is clear.

There are many reasons why a government attorney might want to question a witness in the office, notwithstanding that the grand jury proceeding offers him a full opportunity to do so. A major reason would be to expedite the proceedings, which are often conducted under a tight schedule. Time may be saved in various ways by interviewing the witness in advance of his appearance. The interview might enable the attorney to go directly to the essential points with the witness in the grand jury room; or the interview might be used to allay the concerns the witness expressed to an investigative agent; or the purpose could be to obtain from the witness investigative leads, which federal agents could pursue immediately. Otherwise a purpose of the office interview might be to ascertain whether the witness intends to invoke his privilege against self-incrimination; and, if so, to enable the attorney to decide upon the proper course to take in such circumstances. Again, there is no impropriety in conducting a preliminary interview; the impropriety lies in subpoenaing a witness without contemplating his actual appearance before the grand jury. This does not mean that the witness's appearance should never be dispensed with. If the witness offers his cooperation and wants to leave as soon as possible—a situation that arises frequently when business records are subpoenaed—it may be appropriate to excuse the witness if no real benefit is to be derived by taking him before the grand jury. This is part of a larger role a government attorney will perform for the grand jury. See *United States* v. *Kleen Laundry and Cleaners, Inc.*, 381 F. Supp. 519 (E.D.N.Y. 1974). Thus, a government attorney will excuse subpoenaed witnesses from time to time, or postpone their appearance, to avoid hardship or serious inconvenience. By no standard, however, is it proper to compel a witness to appear when the grand jury will not be in session or to try to expedite matters by pressing a witness unwillingly to submit to an office interview. We feel sure that the United States Attorneys are fully aware of the impropriety of any such action.

D. The question is whether it is proper for federal agents to "threaten" prospective witnesses with grand jury subpoenas if they choose not to cooperate with the agents.

The answer is no, if a real threat is involved. But this answer must be understood in perspective. There is nothing amiss in an agent pointing out that the alternative to a failure to cooperate with him may or will likely be a compelled appearance before a grand jury (if that is indeed the situation), just as it has been held wholly proper, and not to violate an ensuing consent to search, for an agent truthfully to advise a person that if he declines consent a search warrant will be obtained. See *United States* v. *Faruolo*, 506 F.2d 490, 495 (2d Cir. 1974).

Although most federal cases are not investigated by grand juries but by trained investigative agents, if an investigative agency cannot complete an investigation, *e.g.*, because it lacks compulsory process, the plainly appropriate governmental course is for the grand jury to use its process to complete the investigation. Even in those cases in which a grand jury may undertake a major investigative role, investigative agents normally assist under the direction of the United States Attorney. The emphasis of an investigative grand jury is often on speed in ascertaining the leads and subpoenaing the essential evidence, before the defendants act to defeat justice or before something dangerous occurs. Thus, if an investigative agent has cause to question a person in a pending felony investigation, it follows that a grand jury would have cause to question that person directly. While the Department does not approve of witnesses being threatened—that not being a very good way to win the cooperation of essential witnesses and, in general, poor public relations for a governmental agency—

investigative agents have a duty to be truthful and we cannot criticize the agents for pointing out the actual alternatives.

Moreover, it should not be assumed that a person who refuses to answer questions for an investigative agent will not cooperate with the grand jury. It is not unusual for crucial witnesses in important federal investigations to be reluctant or unwilling to cooperate initially. This is so for many reasons, such as a concern over possible reprisal, or a concern over the hardship of having to go to court several times. Some witnesses are pleased to cooperate if they can have subpoenas that show they did not volunteer information.

There are undoubtedly witnesses who feel unfairly treated or threatened by investigative agents who explain the alternatives involved. This is regrettable. But, again, the fact is that an investigative agent must acquire the information from the person for eventual use by the grand jury, or the grand jury must get it from the person directly. The agent is not acting for himself; nor does the grand jury use its subpoena for the agent's benefit. Nor can an investigative agent simply walk away from a witness and avoid the problem. The government would be justly criticized from every quarter if it accepted a witness's initial refusal to talk to an investigative agent as the end of the matter. The grand jury, and ultimately society itself, would never tolerate that.

20. *Superseding Indictments*

The question is whether there is any objective way of determining that a second or subsequent grand jury proceeding with respect to a person already under indictment is for a valid purpose and not engineered as a means of preparing for trial under the existing indictment.

As a general matter, the good faith of a government attorney in instituting a second or subsequent grand jury inquiry into a case will be obvious: it will be reflected in the return of a new indictment containing a substantial change from the old one (e.g., correcting a legal deficiency, altering or adding to the charges, or naming additional defendants or coconspirators). The government then usually has the pending indictment dismissed.

Ascertaining good faith in this context, as in others, is not a novel or impossible endeavor for the courts or the Department. There have been substantial issues raised, either by subpoenaed witnesses or defendants, causing judges to conduct careful inquiries into the basis for grand jury subpoenas. See, e.g., *Beverly* v. *United States*, 468 F. 2d 732, 742–744 (5th Cir. 1972) (and cases cited therein).

21. *The Speed Trial Act and H.R. 94*

The question calls for an appraisal of H.R. 94 in relation to the purposes and provisions of the Speedy Trial Act, 18 U.S.C. 3161 et seq.

The Speedy Trial Act reflects the determination of the Congress to mandate speedier trials. At the time the Act was enacted, it was taking almost a year for the typical Federal prosecution to get to trial. The situation had to be remedied for reasons beyond the defendant's constitutional right to a speedy trial. Swift punishment was deemed essential in deterring criminal activity; thus, the Speedy Trial Act had the purpose expressed in its title "of reducing crime and the danger of recidivism by requiring speedy trials." (Public Law 93–619). See Remarks of Sen. Ervin, 119 Cong. Rec. 3263–3265 (1973).

It seems clear that the complex of procedural commands contained in H.R. 94 could be used by witnesses with the result that grand jury proceedings would take much longer than they do now. Putting to one side the time limits in the Speedy Trial Act, the Department continues to be concerned that H.R. 94 runs counter to or at cross-purposes with the Act. Whereas the Act would speed the process up to benefit society and criminal defendants, the bill would slow the process down to benefit witnesses. Being dependent upon these witnesses, the Department would hardly suggest that their interests be ignored; but, in general, no new procedural step or basis for pretrial litigation can be implemented without a resulting diminution of the interest in speedy trials.

H.R. 94 would create new procedures that would delay trials. Section 3 would involve judges in a wholly new kind of discretionary review of grants of immunity from prosecution. Today, while judges review the form of immunity applications, they have no discretion to deny an immunity order application that is in proper form. Section 6 would create a mechanism whereby grand juries might obtain non-governmental counsel. Section 9 would require preliminary examinations to be conducted after indictment—a wholly new and unnecessary

procedural layer. Section 7 would generate potentially complex and time-consuming litigation over the venue of grand jury proceedings, requiring judges to weigh all sorts of factors beyond what they would currently consider.

But the Department's concern is not altogether with new procedures in parts of H.R. 94. We are concerned also with the increased potential for pretrial litigation. As more requirements are legislated, more possibilities arise for complaint. Motions to quash that would be considered frivolous today would become *de rigeur* under H.R. 94. A witness who wants to resist a subpoena can be expected to raise every possible defect in it, and every new requirement for subpoenas allows for new complaints. The results can hardly be calculated. Certainly there would be more motions to quash. Moreover, if a witness appeared under a subpoena and subsequently was held in contempt or prosecuted for perjury, there would be occasion again for arguing defects in the subpoena. If the court found a defect, it would be faced with the difficult legal problem of determining the effect to be given the error or omission. Federal courts would be shouldered with expanded litigation and be so much less able to try cases speedily.

A separate question is whether H.R. 94 could work a miscarriage of justice by preventing compliance with the Speedy Trial Act. The answer to this may depend upon the facts one is willing to hypothesize and the way one interprets the legislation. The Speedy Trial Act is very complex, and there has as yet been relatively little judicial experience with the Act.

Since the Speedy Trial Act does not operate until formal criminal procedures are begun, a grand jury would not always have a time limitation to meet. The Act poses a problem for a grand jury when a person has been arrested and held to answer. Currently, indictment must be returned within 45 days of arrest; the limit changes to 35 days in July, 1978, and to 30 days in July, 1979.

H.R. 94 contemplates that, as a norm, witnesses will be allowed a week before having to appear under a grand jury subpoena, another week between a refusal to testify and an order pursuant to a grant of immunity, and three days between another refusal to testify and contempt proceedings. The bill favors releasing a witness held in contempt during the pendency of an appeal. It can thus be seen how short a time a grand jury might have, especially if it did not get started promptly after arrest. Then, too, it is not always possible to serve all the witnesses at the same time. In a more complicated case, one witness may be subpoenaed to supply information allowing for the subpoenaing of another witness. The problem of delay caused by one witness can be exacerbated by every successive witness. In addition, if the case is not patently a single venue case, a motion to transfer the proceedings could cause considerable delay.

If a United States Attorney receives a report of an apparent Federal violation and (as will often happen) does not want to take any action prior to indictment, the grand jury will not need to comply with the Speedy Trial Act. Therefore, by avoiding arrests, the Act could be avoided. But that would not generally be practicable, nor would it seem an appropriate policy. The Department attaches the same value to speedy trial as does the Congress, and for that reason we have urged your Committee to weigh very carefully the potential delays involved in H.R. 94 against the paramount interests meant to be served by the Speedy Trial Act.

Since probable cause must exist to hold a person to answer, and since that probable cause can be established by hearsay, which is also usable in a grand jury proceeding, it may appear that indictment will always be possible after arrest, even if only a minimal presentation can be made to the grand jury. Such a generalization is erroneous. An indictment is sought not on the basis of probable cause alone, but only when there is sound reason to believe a conviction (requiring proof beyond a reasonable doubt) can be obtained. Moreover, if an essential witness balks at grand jury process, especially if the witness had been formerly cooperative, the grand jury will not want to indict, nor would the government want an indictment with the evidence at risk.

All things considered, we see much in H.R. 94 that militates against speedy trial in the general sense and that could cause serious difficulties in meeting the time limits set by the Speedy Trial Act.

22. *Advising Witnesses of Statutes Possibly Violated*

The question is whether the Department's views on Section 7 of H.R. 94 allows for sufficient information to be given the witness in the subpoena to enable him to refresh his recollection and to make an intelligent decision about seeking legal

counsel. The question relates specifically to our objection to requiring that subpoenas cite the criminal statutes thought possibly to have been violated.

The Department supports, it should be emphasized, the requirement in H.R. 94 that the subpoenaed witness be notified of the subject matter of the investigation in general terms. This should enable the witness to refresh his recollection in preparation for his appearance, and it should also enable a witness to decide whether to obtain the advice of an attorney.

It would be most unwise, except in rare instances, for a witness to base a decision about seeking counsel on the citation of statutes. Citations might be of help to an attorney but not usually to a layman. Citing statutes in subpoenas could be misleading, for, as we have indicated, the grand jury may develop evidence of criminality that was not foreseen initially. To avoid argument over whether the grand jury knew of the particular violations when the subpoenas issued, the natural tendency would be to cite all possible criminal statutes, and the whole requirement would almost certainly be an occasion for litigation.

23. *Prosecuting Witnesses Compelled to Testify*

This question concerns the propriety of granting immunity to two witnesses and then prosecuting both, using each one's compelled testimony against the other.

To my knowledge, no such situation has ever occurred or is likely ever to occur. Department guidelines concerning the use of compelled testimony (a copy of which is being supplied to you; see question 10) prohibit the prosecution of a person for an offense or offenses first disclosed in or closely related to his compelled testimony without the express written approval of the Attorney General. The situation posed by the question, while hypothetically feasible under use immunity, conflicts with Department policy, which discourages the use of prospective defendants as witnesses. The guidelines place a burden upon a federal prosecutor to justify such a prosecution to show (a) the unusual circumstances surrounding the prosecution, (b) the method by which he will be able to establish the government's affirmative burden of proving that all the evidence necessary for a conviction was in the hands of the Government before the defendant testified and was not the result of focusing investigation upon him because of his compelled disclosures, and (c) how he will affirmatively show that no other "non-evidentiary" use has been made or will be made of the compelled testimony in connection with the proposed prosecution (for example, having the prosecution handled by an attorney unfamiliar with the substance of the compelled testimony).

24. *Effectiveness of Immunity Grants*

This question again concerns statistical information bearing upon the effectiveness of using grants of immunity.

As indicated in response to question 9, the Department is in the process of gathering information concerning the outcome of all orders to compel testimony. Until a substantial number of the Follow-Up forms have been completed, returned and analyzed, conclusions about the information obtained via orders compelling testimony would be speculative.

25. *Processing of Immunity Applications*

The question is whether an expedited handling of immunity applications requires any special approval within the Department.

The answer is no. The system is designed so applications will be handled expeditiously when that is necessary.

A period of two weeks is the time normally required for authority to seek compulsion orders. In the case of trial (as distinct from grand jury) witnesses, there is often much less advance notice. Where it is necessary to do so, an authorization to seek an order to compel a witness to testify at a current trial is processed on an emergency basis. No official determines whether a particular application justifies such treatment; emergency handling is not based on the type of case involved but solely upon the exigencies of time with respect to the proceeding for which the order is required.

26. *Explaining Immunity to Witness*

The question concerns the necessity for giving a witness detailed information about a prospective grant of immunity and whether the Department would oppose a "statutory requirement that all aspects of immunity" be explained to witnesses "in great detail."

The Department is opposed to the creation of such a statutory requirement primarily because of its tendency to engender litigation. Regardless of the witness's understanding, it is the fact that the government cannot use a compelled witness's testimony against him in a subsequent criminal proceeding. When the witness asserts his Fifth Amendment right, the government has the option to respect it or to seek an order to compel him to testify under a statute that prohibits the government from thereafter using the testimony or its fruits against him. If the government elects to compel his testimony, the witness has no lawful choice but to testify; educating him fully about the extent of the protection that use immunity or the Fifth Amendment affords, so as, *e.g.*, to inform him of the possible consequences of a refusal to obey the order, is not a sole prosecutive function but rather is clearly the primary responsibility of the witness's attroney and the court.

A statute requiring notice by the prosecutor to the witness concerning all aspects of immunity would create the slight benefit of additionally educating the witness at the expense of burdening the government with litigation on the issue whether the statute has been complied with.

27. *Showing That Compelled Testimony was Used*

The question concerns the administrative handling of prosecutions of witnesses who were compelled to testify under grants of use immunity, and reflects a concern that witnesses may not be able to show the use that had been of the compelled testimony.

The compelled witness, as indicated in answer to question 23, will seldom be prosecuted. Indeed, we are aware of only two instances in which a witness was sought to be prosecuted following a federal grant of use immunity. See *United States* v. *Hinton*, 543 F.2d 1002 (2d Cir. 1976); *United States* v. *Henderson*, 406 F. Supp. 417 (D.Del. 1975). In the event of prosecution, moreover, the Supreme Court, in *Kastigar* v. *United States*, 406 U.S. 441, has cast upon the government the affirmative "heavy burden" of establishing that neither the testimony nor its fruits has tainted the prosecution. Thus, the witness need not go forward with any evidence to show lack of use of his compelled testimony. The federal courts, in addition, have construed the government's burden of proof in a manner highly protective of the defendant-witness. See, *e.g.*, *United States* v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973) (vacating conviction of a witness, who previously had testified pursuant to a state grant of immunity, notwithstanding the existence of sufficient untainted evidence to support his conviction, because the prosecutor had read a transcript of the witness's compelled testimony, albeit without being aware that it had been compelled).

In respose to your question as to Department standards governing such prosecutions, Department guidelines do cover certain recurring situations—for example, where a compelled witness is awaiting sentencing or is to be prosecuted on the basis of independent evidence—to insure that compelled testimony is sealed and not used directly or indirectly to the detriment of the witness.

28. *Opening Grand Jury Proceedings to the Press*

We are asked to comment upon testimony given on behalf of the Reporter's Committee for Freedom of the Press that grand jury proceedings should be more open, in order to insure public accountability.

In our judgment, it is a matter of fundamental importance to the criminal justice system, especially in preserving the vitality of the investigative type of grand jury, that grand jury proceedings be kept secret to the fullest practicable extent. There are many reasons for the tradition of grand jury secrecy. Grand jury secrecy is maintained primarily: (1) to encourage witnesses to testify freely; (2) to minimize the risks that prospective defendants will flee or use corrupt or violent means to thwart investigations or escape conviction; (3) to safeguard the grand jurors themselves and the proceedings from extraneous influences and pressures; and (4) to avoid unnecessary disclosures that may make persons appear to be guilty of misconduct without their being afforded adequate opportunity to challenge the accusations. See, *e.g.*, *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677 (1958); *In re Grand Jury January 1969*, 315 F. Supp. 662 (D. Md. 1970). It must be recognized, too, that witnesses may be compelled by grand jury process to tell things they would not voluntarily disclose. It is particularly fitting under such circumstances that the compelled information be kept confidential unless the exigencies of public justice require disclosure.

The concept of public accountability is a sound one but is at this stage far outweighed by the above considerations. Furthermore the indictments returned by a grand jury are, of course, made public, and the trials of the charges are public. It is in these results primarily that the grand jury proceedings cannot be made more open without sacrificing one or more of the interests mentioned above which the tradition of grand jury secrecy has served to protect.

29. *The Independence of the Grand Jury*

Under Section 6 of H.R. 94 (at pages 13–14), any person would be authorized to make a written request of the attorney for the government to be allowed to testify before a grand jury, and the attorney for the government would have a duty to submit the request to the grand jurors for final determination. The Department does not support this provision, and the question is whether the provision is necessary in order to accord the grand jury a proper independence.

In performing its function of protecting citizens against unfounded criminal charges, the grand jury derives its independence from several sources. Under the constitution, only a grand jury can lodge felony charges, and there is nothing to command a grand jury to return an indictment. The grand jurors are not governmental employees but rather members of the general public, chosen under 28 U.S.C. 1861 "at random from a fair cross section of the community." The proceedings of a grand jury are conducted in secrecy in part to safeguard the members from extraneous pressures and influences. See Rule 6(e), F.R.C.R.; *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958). To insure the independence of the grand jurors, Rule 6(d) of the Federal Rules of Criminal Procedure forbids anyone other than the jurors to be present when the grand jury deliberates or votes. See also 18 U.S.C. 1507. Under such circumstances, a grand jury is a highly independent body.

But a grand jury is not independent in every respect. It must depend upon the court for authority to issue and enforce subpoenas and for its tenure (unless it is a special grand jury); and it must depend upon the government for basic legal counsel, the structuring of its investigations, and the approval of its indictments. A grand jury proceeding is a cooperative venture, involving court, prosecutor, and grand jury, each with a constitutionally based independence and complementary powers. See *United States* v. *Chanen*, 549 F. 2d 1306 (C.A. 9, 1977) (and cases cited therein).

The government attorney bears a heavy responsibility in a grand jury proceeding to screen out unreliable evidence. *Coppedge* v. *United States*, 311 F.2d 128 (D.C. Cir. 1962), cert. denied, 373 U.S. 946 (1963); *United States* v *Chanen*, *supra*. A person seeking to testify before a grand jury might feel deeply about the importance of the information he has to offer; yet, such information could be highly objectionable and legally inadmissible. While it is true that grand jury proceedings are not vitiated by the receipt of inadmissible evidence, this rule has been fashioned in the overriding interest of preserving the grand jury proceedings from disruptions and the many restraints applicable at a trial on the merits. See *United States* v. *Calandra*, 414 U.S. 338 (1974). If all sorts of information of dubious legality or credibility were received by the grand jury, it would not provide that objective assessment of the merits of the government's case that our criminal justice system really needs.

Furthermore, United States Attorneys reject numerous complaints each year as being obviously without merit. Such complaints are often pressed insistently by persons lacking an appreciation of the limits of federal criminal law. No useful purpose would be served by allowing such persons to press their complaints with grand juries; indeed to permit such a result would be a potentially very costly and wasteful practice.

30. *Advising Grand Jurors of Their Rights and Duties*

The question is whether the Department supports the provisions of H.R. 94 to require judges to give grand juries certain standard instructions at the time of impaneling.

The Department supports the basic idea and most of the specifics. In fairness to the courts, in our view judges now in nearly all instances give appropriate instructions to newly impaneled grand juries, but it is correct that such instructions are not uniform and we therefore favor enactment of standardized requirements.

Our support for the provisions at pages 12–13 of H.R. 94 is, of course, limited by what we have said about other parts of the bill. We have no objection, then,

to subparagraphs (1), (3), (4), (7), (8), and (9) of the proposed new statute. We object to subparagraph (2) because of our objection to the corresponding substantive provision, and we have practical problems with subparagraphs (5) and (6).

To require the impaneling judge, under subparagraphs (5) and (6), to mention the subject matter and the statutes involved in the prospective investigations might be beneficial if the grand jury was going to consider but one or two cases. Most grand juries consider a large number of cases, however. Also, the public mention of the subject of the investigation in general terms might allow some persons to identify the specific matter to be investigated, with a possible sacrifice of interests protected by the tradition of a grand jury secrecy. All in all, we do not see any predominating reason for requiring a judge to give the "instructions" contained in subparagraphs (5) and (6), which do not pertain to the rights, duties, and powers of the jurors.

31. *U.S. Attorney's Manual*

You ask whether the provisions of the United States Attorneys' Manual regarding grand jury practice are binding.

As we elaborated in our answer to your question number three, *supra*, United States Attorney are indeed bound by these Departmental policies.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., January 14, 1977.

To: Heads of offices, divisions, and bureaus, and United States Attorneys.
From: The Attorney General.
Subject: Guidelines relating to use of statutory provisions to compel testimony or production of information

I am attaching guidelines and appendices dated January 14, 1977, relating to the compulsion of testimony or production of information pursuant to 18 U.S.C. 6001–6003. Please take whatever steps are necessary to assure their implementation.

As is the case with the United States Attorneys' Manual, these materials provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

This Memorandum supersedes Criminal Division Memorandum No. 595, as supplemented.

Attachments.

GUIDELINES RELATING TO USE OF STATUTORY PROVISIONS TO COMPEL TESTIMONY OR PRODUCTION OF INFORMATION

1. These provisions apply to all cases in which testimony or production of other information is to be compelled pursuant to the provisions 18 U.S.C. 6001–6003.

COMMENT

These guidelines concern the utilization of the principal federal statutes pertaining to compulsion of witnesses to testify or provide other information, despite their assertion of the Fifth Amendment privilege against compulsory self-incrimination (18 U.S.C. 6001–6003). The heart of the statutory scheme, section 6002, provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to . . . a court or grand jury of the United States, . . . and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such tesimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Although similar provisions are set forth, redundantly, for drug cases in 21 U.S.C. 884, the Department will rely upon the Title 18 provisions for all cases.

The statutory provisions represent an accommodation between competing interests: the government's need, on the one hand, to obtain testimony that may be necessary to the public interest, and the witness's right, on the other hand, to withhold his testimony by asserting his Fifth Amendment privilege against compulsory self-incrimination. The power to compel testimony of witnesses has long been held in Anglo-American jurisprudence to be a legitimate imperative of government (see, e.g., *Kastigar* v. *United States*, 406 U.S. 441 (1972)), but equally fundamental to our system is the proposition that no person may be compelled to incriminate himself. In enacting these statutes, Congress recognized that some crimes can be proved only by witnesses who are themselves implicated, and that it may be necessary to compel them to testify in order to obtain the conviction of other participants.

The statutes require a district judge, upon motion by a United States Attorney, to order a witness to testify or provide other information, notwithstanding his Fifth Amendment privilege. The witness is not "immunized" from prosecution or given any benefit he would not otherwise have. The only consequence as far as he is concerned is that no testimony or other information compelled under the order, or any information directly or indirectly derived from such testimony or other information, may be used against him in a subsequent criminal prosecution. This leaves him in the same position as if he had not been compelled to testify. He may still be prosecuted for perjury, giving a false statement, or failure to comply with the order, and even for the transaction concerning which he testified. See *United States* v. *Henderson*, 406 F. Supp. 417 (D. Del. 1975).

In upholding the constitutionality of the statutory provisions, the Supreme Court found that the prohibition concerning the direct or indirect use of the compelled testimony in any criminal prosecution of the witness adequately met the Fifth Amendment proscription against forcing a person to serve as a witness "against himself." *Kastigar* v. *United States*, 406 U.S. 441 (1972). See also *United States* v. *Calandra*, 414 U.S. 338 (1974); *Zicarelli* v. *New Jersey Investigation Comm's*, 406 U.S. 472 (1972). The Court emphasized, however, the absolute nature of the use prohibition, and placed a heavy burden on the government to prove in any future prosecution of the witness that is evidence was derived independently of the testimony that the witness provided under compulsion.

The statutes provide the government with an important and effective device for obtaining needed testimony, and they have, under appropriate circumstances, significant advantages over former "transactional immunity" statutes in that they provide no gratuity to a testifying witness, they encourage the giving of more complete testimony by proscribing use of everything the witness relates, and they still permit a prosecution of the witness in the rare case where it can be shown that the supporting evidence clearly was obtained only from independent sources.

While the Department encourages the use of these statutes, their use will be authorized only when it appears that the public interest may be best served thereby. In order to preclude misuse of orders to compel testimony, and to avoid jeopardizing prosecutions of defendants or potential defendants in on-going cases or investigations, these guidelines set forth uniform standards and procedures to be followed prior to filing motions for such orders. Included in Appendix A is a series of forms and sample pleadings.

2. An attorney for the government may request authorization, from the Assistant Attorney General with responsibility for the subject matter of the case, to apply for an order, pursuant to 18 U.S.C. 6003, compelling a person to testify or provide other information when, in his judgment, it may be necessary to the public interest to obtain such testimony or information and the person has refused or is likely to refuse to provide such testimony or information on the basis of his privilege against self-incrimination. The request for authorization shall contain sufficient information to permit the Assistant Attorney General, and the United States Attorney for the district in which the motion for the order is to be made, to make an independent judgment regarding the public interest and the likelihood of the refusal to testify.

COMMENT

18 U.S.C. 6003 makes it clear that a compulsion order should not be sought by the government without the judgment that two conditions exist: first, that the testimony or information sought may be in the public interest, and second, that the person to whom the order will be directed has refused or is likely to refuse to pro-

vide the testimony or information on the basis of his privilege against self-incrimination. That judgment must first be made by the attorney for the government initiating the process to obtain the compulsion order, and must thereafter be concurred in by the appropriate Assistant Attorney General and the United States Attorney for the district in which the motion for the order is to be made.

Although motions to the court for compulsion orders under 18 U.S.C. 6003 must be made by the United States Attorney for the district in which the court is sitting, requests for authorization to apply for such orders may be initiated by any Department of Justice attorney. A request ordinarily should be in writing, using the departmental form developed for the purpose (see Appendix A1,) but under exigent circumstances an oral request and oral justification may be submitted, with the written materials to follow as soon as possible.

Requests initiated by Assistant United States Attorneys must be approved either by the United States Attorney or, in his absence, by a senior supervisory assisant, and should be sent to the Witness Records Unit of the Criminal Division which will forward them to the appropriate Assistant Attorney General.

Requests initiated by attorneys assigned to a litigating division of the Department should be sent to the appropriate Assistant Attorney General, with a copy transmitted to the Witness Records Unit of the Criminal Division. The attorney initiating the request need not obtain the approval of the United States Attorney for the district in which the proceeding will be conducted prior to submitting the request. He must, however, send an informational copy of the request to the United States Attorney (see Appendix A2), and take whatever other steps are necessaery to facilitate review of his request by the United States Attorney. The United States Attorney, as soon as possible after his receipt of this informational copy of a request for authorization, should inform the Witness Records Unit of the Criminal Division of any objection he may have to the approval of the request. This procedure is advisable since the United States Attorney must, under the statute, personally conclude that it is necessary and desirable to seek a compulsion order in his district. All departmental attorneys should allow for sufficient time and consultation as may be necessary for the United States Attorney to discharge his statutory responsibility.

The Assistant Attorney General in charge of the Criminal Division has been authorized to approve requests for authorization in cases and proceedings arising under the laws within the purview of that Division and in cases in which divisional jurisdiction is in doubt. 28 C.F.R. 0.175. Assistant Attorneys General in charge of the Antitrust, Civil, Civil Rights, Land and National Resorces, and Tax Divisions similarly have been authorized to approve requests with respect to cases and proceedings within the cognizance of their respective Divisions, subject to the condition that no such authorization may be given unless the Criminal Division has first indicated that it has no objection to the proposed compulsion order. This condition is designed to minimize the danger of inadvertent interference with current criminal investigations or prosecutions, most of which fall within the jurisdiction of the Criminal Division. The Assistant Attorney General with jurisdiction over the prosecution, however, has the primary responsibility for approving the application. Upon receipt by the Criminal Division of a request for its acquiescence—or of a direct request for Assistant Attorney General Authorization— the Witness Records Unit will request the Federal Bureau of Investigation, and such other federal law enforcement agencies as may be appropriate, to conduct a search of investigative files concerning the witness and to report thereon to the Criminal Division. Except in the most imperative circumstances, the Criminal Division will defer its approval until the Federal Bureau of Investigation has reported the results of its file search.

If a request for authorization is approved by the Assistant Attorney General, a written authorization will be sent to the attorney initiating the request (see Appendix A3) or, when time is critical, a written authorization will be sent by a facsimile transmitter or by teletype or an oral authorization will be telephoned and confirmed by teletype.

It is expected that in particularly sensitive cases the Assistant Attorney General whose authorization is sought will consult with the Attorney General or Deputy Attorney General in the course of his review of the request and its supporting documentation.

3. In determining whether it may be necessary to the public interest to obtain testimony or other information from a person, the attorney for the government should weigh all relevant considerations, including:

(a) the importance of the investigation or prosecution to effective enforcement of the criminal laws;

(b) the value of the person's testimony or information to the investigation or prosecution;

(c) the likelihood of prompt and full compliance with a compulsion order, and the effectiveness of available sanctions if there is no such compliance;

(d) the person's relative culpability in connection with the offense or offenses being investigated or prosecuted, and his history with respect to criminal activity;

(e) the possibility of successfully prosecuting the person prior to compelling him to testify or produce information; and

(f) the likelihood of adverse collateral consequences to the person if he testifies or provides information under a compulsion order.

COMMENT

This section contains guidelines for attorneys for the government, and those whose approval they must secure, in deciding whether it may be necessary to the public interest to compel the giving of testimony or information in a particular case. The considerations listed here are not intended to be all-inclusive or to require a particular decision in a particular case. Rather, they are meant to focus the decision-makers' attention on factors which probably will be controlling in the vast majority of cases. Of course, the significance of the presence or absence of any one or more of these factors in a particular case is a matter to be determined by the decision-maker.

(a) *Seriousness of offense and importance of case.*—Although the Department encourages the use of compulsion orders as a means of obtaining necessary evidence in appropriate cases, it will not routinely or indiscriminately authorize requests to be made for such orders. For this reason, an application for authorization to seek a compulsion order should not be made unless the testimony or information desired concerns the commission of a serious crime or successful prosecution of the case is otherwise important in achieving effective enforcement of the criminal laws.

(b) *Value of the testimony or information.*—Under 18 U.S.C. 6002, testimony or information provided under a compulsion order cannot be used, directly or indirectly, in a prosecution of the person who provides it, except a prosecution for perjury, making a false statement, or failing to comply with the compulsion order. Although the person may still be prosecuted on the basis of independent evidence for any offense about which he testifies, in practice, the government's burden of proving the independent nature of its evidence is so great that successful prosecution usually would be extremely difficult. Consequently, under the circumstances of many cases, use of the statute will effectively preclude a future prosecution of the witness for the matters to which his testimony relates. Accordingly, since the giving of testimony or information under a compulsion order may foreclose enforcement of the criminal law against a person otherwise subject to prosecution, a compulsion order should not be sought without a careful assessment of the probable value to the government of the testimony or information.

It is of primary importance that there be good reason to believe that the testimony or information would, if true, be helpful to the government. If possible, the attorney for the government should obtain an indication of the potential witness's probable testimony from the witness or his attorney. If this is not possible, the government attorney should make an assessment based on other information available to him, such as the relationship between the witness and the defendant, the witness's role in the offense, and the statements the witness may have made to others about his knowledge. The government attorney can then weigh the anticipated testimony in terms of the case at hand. In doing so, he should consider whether the testimony will be credible, whether it will materially assist the investigation or prosecution, and whether substantially the same benefit can be obtained from someone else without resort to a compulsion order. Taking all these factors into account, together with any others that may be relevant, the government attorney can then judge the strength of his case with and without the person's testimony.

(c) *Likelihood of prompt and complete compliance.*—Orders to compel testimony must be predicated upon the conclusion that the testimony sought to be

elicited may further the public interest; they are not to be procured solely to make possible the securing of a perjury or contempt conviction against the witness. However, recourse to the procedure is not to be avoided simply because the witness might lie or disobey the order. Nevertheless, in assessing the value of a person's anticipated testimony, the attorney for the government should consider whether the testimony will be promptly and fully forthcoming if a compulsion order is issued. The witness might refuse to comply with the order, for example, or his testimony might be less than candid and forthright. In the first instance, the government attorney would have to consider whether to seek a contempt citation and whether such a course would provide an effective remedy. (A short review of the applicability of civil and criminal contempt sanctions appears in Appendix B). In the second instance, it would be hazardous to use the witness at all, even though he might recant if subjected to a perjury prosecution. In either event, delay might hinder or thwart the underlying proceeding and the compulsion order would be of little value.

(d) *Relative culpability and criminal history.*—In determining whether it may be in the public interest to compel the testimony of a person who has violated the law, it is also important to consider the degree of his culpability relative to others who are subjects of the investigation or prosecution, as well as his history of criminal involvement. Of course, because of the difficulty of prosecuting a witness for matters relating to his compelled testimony, in the absence of unusual circumstances it would not be in the public interest to compel testimony of a high-ranking member of a criminal enterprise in order to convict one of his subordinates, nor would it serve the public interest to compel the testimony of a person with a long history of serious criminal involvement in order to obtain the conviction of someone else on less serious charges. In this connection, it is also important to consider whether the person has a background of cooperation with law enforcement officials, either as a witness or an informant, and whether he has previously been the subject of a compulsion order or has escaped prosecution by virtue of an agreement not to prosecute—information that may be available by telephone from the Witness Records Unit of the Criminal Division. Finally, consideration should be given to the relationship between the witness and the person against whom his testimony is sought. Only in exceptional circumstances will authorization be granted to compel the testimony of a witness who is a close family relative of the defendant on trial or of the person upon whose conduct grand jury scrutiny is focusing.

(e) *Conviction prior to compulsion.*—Recognizing that it is preferable as a matter of policy that an offender formally incur liability for his criminal conduct, and recognizing the difficulty in prosecuting a witness for matters relating to his compelled testimny, the attorney for the government should consider the possibility of securing the witness's conviction before asking the court to compel his testimony. In some situations there may be time to prosecute the witness before compelling his testimony; in other situations a witness may be willing to enter a plea of guilty to all or some of the charges in lieu of being prosecuted.

In a case in which the attorney for the government is considering the appropriateness of an agreement to terminate a prosecution against a potential witness in return for a guilty plea to fewer than all charges, in addition to weighing the considerations usually involved in deciding to accept a plea, he should also make a careful assessment of any offer of testimonial or other cooperation by the person with whom the agreement is to be made. A difficulty with any agreement involving the testimony of a witness is, of course, that the defense may argue to the jury that because the witness made a "deal" with the government his testimony is inherently suspect.

If the witness can be convicted as a result of prosecution or the entry of a plea of guilty prior to the time his testimony is needed, the witness may no longer have a Fifth Amendment privilege with respect to the testimony sought. In such a case it would be unnecessary to resort to the compulsion statutes in order to obtain his testimony. If some areas of the testimony sought still would be covered by a Fifth Amendment privilege, however, the compulsion statutes may be employed to obtain the necessary testimony.

It should be noted that conviction prior to compulsion will reduce the likelihood that the defense will seek to suggest to the jury that the compelled testimony is suspect because the witness has been "granted immunity" for his criminal acts. As noted below, such arguments should be countered in any case in which a compulsion order has been employed, but a particularly strong argument can be made if the witness already has been convicted for his conduct.

(f) *Adverse consequences to witness.*—The attorney for the government should consider the possibility of harm to a witness who testifies pursuant to a court order, bearing in mind that retaliation against the witness may take economic as well as physical forms. The attorney for the government should consider making use of the government's Witness Protection Program in situations in which there is a real danger that a witness may be harmed as a result of his testimony. (See Departmental Order OBD 2110.2.) Also available to deter abuse of witnesses are the obstruction of justice statutes (18 U.S.C. 1503 and 1510) which prohibit attempts to influence or intimidate witnesses and retaliation against witnesses.

4. In determining whether a person has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination, the attorney for the government shall make an independent judgment regarding the availability of the privilege under the circumstances and shall be prepared to contest the assertion of the privilege if he believes it to be unfounded.

COMMENT

One of the two prerequisites to an application for a compulsory order is a judgement that the subject of the order has refused to testify, or is likely to so refuse, on the basis of his Fifth Amendment privilege against self-incrimination. Requests for authorization should be made only when there is a reasonable expectation that the witness will assert his privilege against self-incrimination, or when he has already done so, and when there also is a reasonable expectation that the application of the privilege may be recognized by the court. In this connection, the attorney for the government should not automatically accept at face value an assertion of the privilege. Rather, he should make an independent judgment, based on the law and the facts of the particular case, as to whether the privilege is available. If he believes that there is no sound basis for invocation of the privilege under the circumstances, he should take appropriate steps to have the validity of its assertion determined by the court before seeking a compulsion order. The authority to apply for a compulsion order should be used only when the expectation of its necessity proves to be correct.

5. Upon receipt of authorization from an Assistant Attorney General, the United States Attorney for the district in which the order is to be issued may file a written motion pursuant to 18 U.S.C. 6003 to obtain a compulsion order.

COMMENT

Section 6003 of Title 18, United States Code, requires a court to issue a compulsion order upon proper motion of the United States Attorney. The sole function of the court is to ascertain that there has been compliance with the statute; the court is not empowered to inquire into the merits of the application. *In re Kilgo*, 484 F.2d 1215, 1219 (4th Cir. 1973). Accordingly, once departmental authorization has been obtained, the matter of actually seeking a compulsion order lies in the discretion of the attorney for the government. A motion for a compulsion order should be made in writing (an example of an appropriate section 6003 motion, which may be modified to conform to local district court practice, appears in Appendix A4; a sample compulsion order appears in Appendix A5) and may be made *ex parte*. Such a motion may be made prospectively in order to avoid undue disruption of trial or grand jury proceedings at a later date, if the attorney for the government is satisfied that the witness will not testify voluntarily.

Any attempt by defense counsel or counsel for the witness to challenge the validity of a compulsion order should be vigorously opposed. In particular, government attorneys should oppose requests for affidavits concerning the authenticity of signatures on departmental authorizations. Compliance with such requests would place an unnecessary burden on the Department in such cases and in other situations requiring approval by a departmental official who is not present in the district. In any event, neither the compulsion statute nor the pertinent regulations require an Assistant Attorney General's authorization to be in writing.

Should the attorney for the government be confronted with a witness who, having previously testified pursuant to a court order, seeks to assert his privilege at a subsequent ancillary proceeding or at a second trial involving the same matter concerning which the witness had earlier testified, the United States Attorney may move for an additional compulsion order. The letter of authorization

from the Assistant Attorney General will be sufficiently broad to constitute the requisite approval for the additional order, thereby eliminating any delay incident to litigating the availability of the privilege (*cf. Ellis* v. *United States*, 416 F.2d 791 (D.C. Cir. 1969)) or requesting additional authorization. Where more than six months have intervened since the date of the letter of authorization, an additional inquiry to the authorizing Assistant Attorney General and to the Witness Records Unit must be made to determine that during the interim no other matters pertaining to the witness have come to the Department's attention which would make the compulsion order undesirable. Similarly, any substantial change in the information contained in the original request for authorization should be brought to the attention of the Witness Records Unit.

6. In a case in which the person who is the subject of a compulsion order is awaiting sentencing, the attorney for the government should ensure that the substance of his compelled testimony not be made known to the sentencing judge.

COMMENT

This guideline is intended to forestall claims by witnesses who testified under compulsion that their sentences were adversely influenced by the substance of their compelled testimony. The safest way to avoid such a claim is to defer taking the compelled testimony until after the witness has been sentenced. If it is not possible or desirable to postpone the sentencing, the attorney for the government should attempt to ensure that the substance of the compelled testimony does not come to the attention of the sentencing judge before the imposition of sentence. This guideline does not apply, of course, if the witness himself requests that the substance of his compelled testimony be brought to the court's attention prior to sentencing.

7. In a case in which a person is to testify or provide other information pursuant to a compulsion order:

(a) if it then appears that the public interest may warrant a future prosecution of the witness, on the basis of independent evidence, for his past criminal conduct about which he is to be questioned, the attorney shall:

(1) before the witness has testified or provided other information, prepare for the case file a signed and dated memorandum summarizing the evidence then known to exist concerning the witness, and designating its sources and date of receipt;

(2) ensure that all testimony given, or information provided, by the witness be recorded verbatim and that the recording or reporter's notes, together with any transcript thereof, be maintained in a secure location and that access thereto be documented; and

(3) maintain a record of the nature, source, and date of receipt of evidence concerning the witness's past criminal conduct that becomes available after he has testified or provided other information; or

(b) if it appears that the public interest may not warrant a future prosecution of the witness, on the basis of independent evidence, for his past criminal conduct about which he is to be questioned, the attorney for the government shall:

(1) ensure that all testimony, or information provided, by the witness be recorded verbatim; and

(2) maintain a record of the nature, source, and date of receipt of evidence concerning the witness's past criminal conduct that becomes available after he has testified or provided other information.

COMMENT

These guidelines are intended to ensure the integrity of any future prosecution of a witness who is compelled by court order to testify or provide other information.

The provisions of subsection (a) should be followed when, on the basis of the information available at the time the testimony is to be given or the information is to be provided, it is anticipated that a future prosecution of the witness, for any prior offense about which he is to be questioned, may be in the public interest. In the event of future prosecution (except a perjury, false statement, or contempt prosecution based on the compelling of the testimony),

the government must be in a position to demonstrate convincingly that its evidence was developed independently of the witness's compelled testimony or of information derived therefrom. The government will also have to show that it has made no "non-evidentiary" use of the testimony or its fruits, such as a decision to focus on the witness as a potential defendant. For these reasons, it is essential that a record be maintained of all untainted evidence against a witness who is compelled to testify, that his compelled testimony be maintained in a secure place, and that access to such testimony be documented. Unless these steps are taken, it may prove impossible to establish the purity of the government's case in a future prosecution of the witness.

The provisions of subsection (b) should be followed when, on the basis of the information then available, it does not appear that a future prosecution would be in the public interest. The precautions are lessened to reflect the lesser likelihood of prosecution, but still help assure that a future prosecution could be initiated on the basis of demonstrably independent evidence.

8. In a case in which a person testifies or provides other information pursuant to a compulsion order, the attorney for the government shall oppose any requested defense instructions and defense arguments to the jury that seek to suggest that the witness's testimony or other information is suspect because it was compelled.

COMMENT

A witness who is compelled to testify under 18 U.S.C. 6001–6003 is not "granted immunity" as would have occurred under the former "transaction immunity" statutes, nor is he thereby provided any other inducement to testify. Nevertheless, it is not uncommon to encounter defense requests for jury instructions depicting such a witness as the recipient of a benefit, one whose testimony may have been colored thereby, and therefore one whose testimony should be weighed with special circumspection. Such instructions should be opposed. A witness whose testimony is compelled after asserting a Fifth Amendment privilege is substantially in no different a position than an ordinary reluctant witness who is compelled by legal process to testify without asserting a privilege—both are testifying under threat of contempt and both have nothing to gain and everything to lose by testifying falsely. There is no reason to treat the testimony of one as more suspect than that of the other, and the standard instruction on the credibility of witnesses in general is ordinarily sufficient for either situation. *See, e.g., United States* v. *Holmes*, 453 F.2d 950 (10th Cir. 1972); *but see United States* v. *Leonard*, 494 F.2d 955, 961–62 (D.C. Cir. 1974); *United States* v. *Demopoulos*, 506 F.2d 1171, 1179–80 (7th Cir. 1974).

There will be situations, of course, in which the testimony of a witness may warrant a special instruction for reasons independent of its being compelled. For example, an instruction on accomplice testimony may be warranted in many such situations. In other situations, however, it may not be. In responding to requests for such instructions, care should be taken to point out that *compulsion* of an accomplice's testimony is not the situation for which the standard accomplice instructions were originally designed. Although the voluntary testimony of an accomplice who has turned on his former associate may warrant special scrutiny, the rationale for such special scrutiny would usually not apply to the compelled testimony of an accomplice who does not wish to take the witness stand.

In addition to defense arguments in support of cautionary instructions, defense arguments to the jury may often exploit the popular misconception that has been fostered by the term "immunity," as colloquially applied in this context, by suggesting that the testifying witness has "sold out" to the government. As noted previously, this situation can be ameliorated if the witness has been prosecuted, convicted, and sentenced before he testifies. In cases in which it is not possible to prosecute the witness prior to eliciting his testimony, the attorney for the government should counter any defense attacks on the witness's credibility which unfairly suggest that a "deal" has been made between the witness and the government and should point out that the witness was compelled, not induced, to testify.

9. In a case in which the attorney for the government has been authorized to apply for a compulsion order, the attorney shall, immediately upon conclusion of the proceeding, report in writing to the Witness Records Unit of the Criminal Division whether the compulsion order was obtained and used, the outcome of

the use of the order, and the location of any recording, reporter's notes, or transcript of the compelled testimony.

COMMENT

The follow-up report required under this guideline is intended to facilitate identification for departmental attorneys of persons who have been the subject of a compulsion order, of the result of the use of the order, and of the location of the transcript, recording, or reporter's notes of the testimony. A form for such a report will accompany the letter of authorization sent by the Assistant Attorney General (see Appendix A6); it should be completed and returned to the Witness Records Unit immediately upon the conclusion of the proceeding.

10. After a person has given testimony or provided information pursuant to a compulsion order, an attorney for the government shall not initiate or recommend prosecution of the person for an offense or offenses first disclosed in or closely related to, such testimony or information, without the express written authorization of the Attorney General.

COMMENT

In *Kastigar* v. *United States*, 406 U.S. 441 (1972), the Supreme Court stressed that the constitutionality of 18 U.S.C. 6001–6003 was tied to a "sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom" against the witness—including use as an investigatory lead. 406 U.S. at 460. One appellate court has suggested that "such use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." *United States* v. *McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973).

In seeking to prosecute a person who has been compelled to testify, the government has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar* v. *United States*, *supra*. As a matter of departmental policy, in cases where the witness is to be charged with an offense either first disclosed in or closely related to his compelled testimony, prosecution shall not be initiated unless the Attorney General personally authorizes the prosecution. This requirement does not apply to cases where a defendant is being tried for an offense unrelated to his compelled testimony.

The attorney for the government should transmit his request for authorization through his supervisors to the appropriate Assistant Attorney General. In his memorandum requesting approval for prosecution of the witness, he should indicate (a) the unusual circumstances which justify prosecution, (b) the method by which he will affirmatively establish either that all evidence necessary for a conviction was in the hands of the government prior to the date of the defendant's compelled testimony or that it came from sources independent of the witness's testimony and was not the result of focusing an investigation on the witness because of his compelled disclosures, and (c) how he will show affirmatively that no other "non-evidentiary" use has been or will be made of the compelled testimony in connection with the proposed prosecution (for example, by having the prosecution handled by an attorney unfamiliar with the substance of the compelled testimony).

The general ban on use of compelled testimony of course does not apply to perjury or false statement prosecutions directed at false testimony given while testifying under compulsion, or to contempt prosecutions for failure to comply with the compulsion order. Such offenses are not prior events about which the witness is compelled to testify; rather they are new offenses arising out of the failure to comply with the compulsion order itself. Accordingly, Attorney General authorization is not required in such cases.

In weighing the public interest in prosecuting a person for an offense first disclosed in, or closely related to, his compelled testimony, the attorney for the government should take into account, *inter alia*, the importance of encouraging free and full disclosure by witnesses whose testimony is compelled. He should also take into account the extent to which the potential defendant had testified freely and fully in compliance with the order. Since a major advantage of the compulsion statutes as opposed to the old "transaction immunity" statutes is

that they encourage more complete testimony (under the former the more information a witness reveals the more difficult it is for the government to prosecute him on the basis of demonstrably independent evidence, while under the latter a witness could reveal just enough to acquire blanket immunity against prosecution and then profess to remember no more), less than complete testimony should not appear to be rewarded by a declination of prosecution in a case where independent evidence clearly exists and the situation otherwise warrants prosecution.

11. The provisions of 18 U.S.C. 6001–6003 are not to be used to compel testimony or production of other information on behalf of a defendant except in extraordinary circumstances where the defendant plainly would be deprived of a fair trial without such testimony or other information.

COMMENT

Arguably, under 18 U.S.C. 6001–6003 it is possible for the government to apply for an order compelling the testimony of a defense witness. The statute does not limit itself to prosecution of government witnesses, and it is conceivable that an attorney for the government might feel that a particular defense witness's testimony "may be necessary to the public interest." However, there are both legal and practical reasons why the government has not sought to compel the testimony of a reluctant defense witness and why it should not do so.

It is well established that neither the courts nor defense counsel have a legal or constitutional right to use such a statute, or to force the government to use such a statute, to compel the testimony of a defense witness. *Earl* v. *United States*, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967); *Morrison* v. *United States*, 365 F.2d 521 (D.C. Cir. 1967); *United States* v. *Jenkins*, 470 F.2d 1061 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); *Cerda* v. *United States*, 488 F.2d 720 (9th Cir. 1973); *United States* v. *Berrigan*, 482 F.2d 171 (3rd Cir. 1973); *United States* v. *Ramsey*, 503 F.2d 524 (7th Cir. 1974); *In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973); *United States* v. *Allstate Mortgage Corporation*, 507 F.2 492 (7th Cir. 1974); *United States* v. *Bautista*, 509 F.2d 675 (9th Cir. 1975); *United States* v. *Alessio*, 528 F.2d 1079 (9th Cir. 1976); but see *United States* v. *Morrison*, 535 F.2d 223 (3rd Cir. 1976). The defendant's Sixth Amendment right to compulsory process must yield to the witness's Fifth Amendment privilege against self-incrimination (*Earl*, *supra*) and to the executive branch's authority to decide whether to prosecute a case (*Alessio*, *supra*; *United States* v. *Nixon*, 418 U.S. 683 (1974)).

As a practical matter, a requirement that the government seek to compel the testimony of defense witnesses would place the government in an intolerable situation. It is safe to assume that once the government, at the court's or defense counsel's request, were required to seek a compulsion order to obtain the testimony of a defense witness, it would be inundated with further such requests. Certainly, the government could not grant them all, since such orders would seriously jeopardize future prosecutions of the witnesses. Nor could it give reasons for denying such requests without possibly jeopardizing other investigations and prosecutions. Moreover, in many instances the government would not know what a witness's testimony would be; thus the government would have no basis for concluding that compulsion of his testimony might be in the public interest.

Consequently, attorneys for the government should oppose attempts to use the compulsion statutes on behalf of defendants. The concern that the jury might not hear potentially exculpatory testimony because of this policy can usually be met by careful screening of cases; in a situation where the prosecutor realizes that a potential defense witness will exercise his privilege against self-incrimination, he has discretion as to whether he should proceed with the case in view of his estimate of the truthfulness, materiality, and exculpatory nature of the potential testimony.

The "extraordinary circumstances" exception to the policy against compelling the testimony of defense witnesses is intended to provide for unusual cases in which the defendant plainly would be denied a fair trial unless he had the benefit of compelled testimony. In *Earl* v. *United States*, *supra*, at 534, then Judge Burger observed in a footnote that a due process problem might exist if the government compelled the testimony of a prosecution witness but refused to compel that of a defense witness in the same case. This issue has rarely arisen, but in *United States* v. *Alessio*, *supra*, where it did, the court apparently agreed

that the government's refusal to compel the testimony of a defense witness might constitute a denial of due process. In that case, however, the court ruled that the defendant was not deprived of a fair trial by the government's refusal because the proffered defense testimony would only have been cumulative. In view of these authorities, an attorney for the government faced with a defense request for a compulsion order in a case in which the prosecution has used compelled testimony should oppose the request unless the defendant makes a convincing demonstration that the extraordinary circumstances of the case make the testimony sought essential to assure him a fair trial.

APPENDIX A

FORMS AND SAMPLE DOCUMENTS PERTAINING TO ORDERS TO GIVE TESTIMONY OR TO PROVIDE OTHER INFORMATION

The use of compulsion orders is a valuable means of securing needed testimony that otherwise would be unavailable. In order to assure that in appropriate cases authority to apply for such orders is granted promptly upon request, government attorneys must exercise care to provide Assistant Attorneys General with the necessary information and to follow the procedures established by the Department. The following forms and sample documents are designed to facilitate such efforts.

All requests for authorization to apply for compulsion orders shall be made on the form attached as Appendix A 1, which should be sent to the Witness Records Unit of the Criminal Division. Detailed information should be provided concerning the proposed witness's identity and role in the offense, together with an explanation of how the compulsion of his testimony may be necessary to the public interest. There must also be included the witness's FBI record, or an explanation of why it is not included, and available local criminal records, as well as information concerning federal or local charges known to be pending against the witness. Where the witness is awaiting trial or sentencing, or where his case is on appeal, the requesting attorney should attach a statement explaining what actions he will take to avoid having the compelled testimony taint any subsequent proceeding. The request shall also identify those federal and local law enforcement officials contacted regarding the compulsion request, and include a statement of any opposition they have to the request.

The summary of the witness's anticipated testimony should include any proffer which has been obtained concerning the nature of the witness's testimony. This summary should also discuss the legal basis for an assertion by the witness of a Fifth Amendment privilege. Assistant Attorneys General have received requests for authorization in a number of cases in which no substantial reason to expect the assertion of a Fifth Amendment claim was apparent, and the lack of explanation has caused unnecessary delays.

Requests for authorization should be made only when there is a reasonable expectation that the witness will invoke his privilege against self-incrimination; they should not be made merely as a form of "insurance" to cover a remote contingency. However, if there is reason to believe that a recess would not be allowed at trial for the purpose of obtaining authorization to seek a compulsion order, the authorization should be requested prior to trial. In this connection, it is recognized that, despite efforts to anticipate the invocation by a witness of his privilege against self-incrimination, there will be extraordinary instances necessitating the processing of a request for authorization to compel testimony more rapidly than the normal processing time of two weeks. Where the time within which the authorization decision must be made is one-to-three days, departmental attorneys should submit their requests, labelled "Emergency Request," to the Witness Records Unit via the GSA teletype connection with the Criminal Division or the commercial teletype receiver no. 710–822–907 located in the Criminal Division. Where the time involved is less than one day, requests may be submitted by telephone to the attorney-in-charge of the Witness Records Unit at 739–4594.

He will assure that all available information is brought to the immediate attention of the appropriate Assistant Attorney General, as well as such other departmental personnel as may be necessary. He will also assure the prompt communication of the authorization decision to the requesting attorney. After receiving authorization pursuant to an oral request, the requesting attorney

should promptly send to the Witness Records Unit a confirmatory, written request for authorization on the form attached as Appendix A 1.

Under *Gelbard* v. *United States*, 418 U.S. 41 (1972), a witness called before a grand jury may refuse to testify, pursuant to 18 U.S.C. 2515, despite a compulsion order, if the interrogation is based on the illegal electronic interception of the witness's communications. Accordingly, the completed form should reflect any information with respect to any electronic interception of the witness's communications of which the requesting office is aware. When such an interception has occurred, a report thereof should be attached to the request.

The form also requires a separate listing of all other witnesses for whom orders to compel testimony have been authorized in the case or investigation, or with whom agreements not to prosecute have been made. This listing should include an explanation of the role of each of these witnesses in the matter under investigation.

In addition to the information specifically required, any other information concerning the witness or the proceeding in which the witness is to testify, which might be of assistance in evaluating the request, should be furnished.

APPENDIX A 1

REQUEST FOR AUTHORIZATION TO APPLY FOR COMPULSION ORDER

(18 U.S. 6001–6003; 28 C.F.R. 0.175–0.178)

From:
To: Witness Records Unit, Criminal Division, U.S. Department of Justice, Washington, D.C. 20530.
Name of Witness (last name first)_____
Residence Address of Witness_____
Aliases _____
Date of Birth_____
Place of Birth_____
FBI Identification No._____
Local Police Identification No. (If available) _____
Nature of Proceeding:
[ ] Trial [ ] Grand Jury
Business Address of Witness_____
_____
District _____
Docket No._____
D.J. File No. (if known)_____
Title or Description of Case/Matter
Violation: (Title and Section):
The Witness Records Unit should conduct a National Records check with:
[ ] DEA [ ] AT&F [ ] INS; [ ] Secret Service; [ ] Intel. Division of IRS; [ ] Other_____;
Investigative Agency_____
FBI records will always be checked.
This Box for Witness Records Unit Use Only:
WRU # Index # Type of Request: Ref'd to:____

(If more space is needed, attach additional sheets)

1. Attach witness's FBI Identification Record ("rap sheet") and summarize any other known criminal activity. If the FBI Record is unavailable, explain. List any charges or investigations pending against the witness. If the witness is currently awaiting trial or sentencing, or if his case is on appeal, explain what actions will be taken to avoid having the compelled testimony taint the subsequent proceeding (e.g., sealing the record; assuring sentencing by a different judge).
2. List the names and addresses of federal and local law enforcement officers notified of this request, and report any pertinent comments they may have.
3. Give a brief resume of the background of the case or proceeding:
4. Witness's role in the case or matter under investigation:
5. Summarize witness's anticipated testimony, discussing the legal basis and motive for the assertion of Fifth Amendment privilege, and the content of any proffer of testimony or the reason one was not obtained.

6. Is the witness likely to commit contempt rather than obey the court's order to testify?

7. What federal or local offenses committed by the witness may be disclosed in the course of his immunized testimony?

8. List all other witnesses for whom authorization to compel testimony has been requested in this matter, or with whom an agreement not to prosecute has been made. Specify whether each is the subject of an authorization or an agreement.

9. Has an electronic surveillance been conducted involving this witness? If so, attach a summary report thereof.

(This box for DJ Division): A copy of this request was sent to the U.S. Attorney on the following: _____

(This box for U.S. Attorney's Office): United States Attorney Action: Approval for Transmittal (initials) _____

Date Reply is Needed: _____ (generally allow two weeks)
Witness Records Unit Use Only:

Signature of Requestor: _____
Typed Name: _____
Office: _____
Office Address: _____
Telephone Number: _____

APPENDIX A 2

SAMPLE INFORMATION MEMO TO U.S. ATTORNEY FROM ATTORNEY FOR THE GOVERNMENT

To: United States Attorney.
From: Attorney for the Government.
Subject: Pending request for authorization to compel testimony of: (name of witness(es)).

Attached is a copy of a request for authorization to file a motion in this district for a court order compelling the testimony of, or the production of information by, the person(s) named above, pursuant to 18 U.S.C. 6003. I have submitted the request today to the Assistant Attorney General in charge of the _____ Division.

In the event that the Assistant Attorney General authorizes an application for such a court order pursuant to 18 U.S.C. 6002, you will be asked to make an independent assessment that the order may be necessary to the public interest and to sign the motion for the order.

If you have any objections or reservations concerning this matter, please contact me, the AAG for the Division indicated, or the Witness Records Unit of the Criminal Division within seven days so that your views may be taken into account by the AAG prior to reviewing the request.

APPENDIX A 3

SAMPLE AUTHORIZATION LETTER

Honorable _____
United States Attorney
_____ District of _____
Attention: _____, Assistant United States Attorney
Re: _____
(Name of witness(es))

Pursuant to the authority vested in me by 18 U.S.C. 6003(b) and C.F.R. 0.175(a) I hereby approve your request for authorization to apply to the United States District Court for the _____ District of _____ for an order pursuant to 18 U.S.C. 6002-6003 requiring _____
(Citation to grand jury investigation or trial)
to give testimony or provide other information in the above matter and in any further proceedings resulting therefrom or ancillary thereto.

Sincerely,

ASSISTANT ATTORNEY GENERAL.

APPENDIX A 4

SAMPLE MOTION

In the United States District Court for the _____
District of _____, _____ Division
In re Grand Jury Proceeding: No. _____

MOTION

_____, United States Attorney for the _____ District of _____ hereby moves tthat this court issue an order pursuant to the provisions of Title 18, United States Code, Section 6001 et seq., compelling _____ to give testimony or provide other information, which he refuses to give or provide on the basis of his privilege against self-incrimination, as to all matters about which he may be interrogated before the grand jury of the United States presently empaneled within this District, and respectfully alleges as follows:

1. The said _____ [has been] [may be] called to testify or provide other information before said grand jury;

2. In the judgment of the undersigned, the testimony or other information from said witness may be necessary to the public interest.

3. In the judgment of the undersigned, said witness [has refused] [is likely to refuse] to testify or provide other information on the basis of his privilege against self incrimination.

4. This application is made with the approval of _____, Assistant Attorney General in charge of the _____ Division of the Department of Justice, pursuant to the authority vested in him by 18 U.S.C. 6003 and 28 C.F.R. 0.175. A copy of the letter from said Assistant Attorney General expressing such approval is attached hereto.

UNITED STATES ATTORNEY.

APPENDIX A 5

SAMPLE ORDER

United States District Court for the _____ District of _____, _____ Division.
In re Grand Jury Proceeding: No. _____

ORDER

On motion of _____, United States Attorney for the _____ District of _____, filed in this matter on _____, 19____;

And it appearing to the satisfaction of the Court:

1. That _____ [has been called] [may be called] to testify or provide other information before the grand jury of the United States presently impaneled within this District; and

2. That in the judgment of the said United States Attorney, said _____ [has refused] [is likely to refuse] to testify or provide other information on the basis of his privilege against self incrimination; and

3. That in the judgment of the said United States Attorney, the testimony or other information from said_____may be necessary to the public interest; and

4. That the aforesaid Motion filed herein has been made with the approval of the Assistant Attorney General in charge of the_____Division of the Department of Justice, pursuant to the authority vested in him by 18 U.S.C. 6003 and 28 C.F.R. 0.075.

Now, therefore, it is ordered pursuant to 18 U.S.C. 6002 that the said _____give testimony or provide other information which he refuses to give or to provide on the basis of his privilege against self-incrimination as to all matters about which he may be interrogated before said grand jury.

This order shall become effective only if after the date of this order the said _____refuses to testify or provide other information on the basis on the basis of his privilege against self-incrimination.

UNITED STATES DISTRICT JUDGE.
_____, 19____.

APPENDIX A 6

WITNESS FOLLOW-UP REPORT

(18 U.S.C. 6001–6005; 28 C.F.R. 0.175–0.178)

(To be completed, signed, and returned as soon as:
(a) compulsion of a witness's testimony has been completed, or
(b) it has been decided not to use the authorization to obtain a compulsion order.)

Name of Witness (last name first)_____ (WRU use only)
Date of Authorization:_____ WRU No_____
Proceeding: _____ District: _____
Violation (title and section):_____

(1) Was the authority to seek an order of compulsion used? —Yes —No
(a) If the authority was not used, what was the reason for not using it?
i) —Witness did not assert his privilege.
ii) —Witnesse's testimony was found unnecessary.
iii) —Other (describe)_____
(b) If the authority was used:
Date order to compel testimony issued:_____
Title of Proceeding:_____
District: _____ Division: _____
Docket No.:_____ D.J. No. (if known):_____
(2) Did the witness testify pursuant to the order? —Yes —No
(a) If "yes";
Date witness testified:_____
Title of Proceeding:_____
District: _____ Division: _____
Docket No.:_____ D.J. No. (if known):_____
Location of required verbatim recording (or transcript):
————In files relating to the above case.
————Other (specify)_____
(b) If witness refused to testify, were contempt proceeding instituted? —Yes —No
(i) If contempt proceedings were instituted, please describe nature and state of proceedings (Rule 42(a), Rule 42(b); 28 U.S.C. 1826).
(ii) If contempt proceedings were not instituted, please explain why.
(3) In your opinion, was the testimony obtained under the compulsion order:
————essentially truthful, or
————significantly untruthful?
(a) If, in your opinion, the testimony was essentially truthful, was it:
————less valuable than anticipated?
————about as valuable as anticipated?
————more valuable than anticipated?
(b) If, in your opinion, the testimony obtained under the order was significantly untruthful, has:
————a prejury prosecution commenced?
————a prejury prosecution been completed?
Explain the current status of the perjury prosecution, or the reasons for declining to prosecute:
(4) Did witness' testimony contribute to an indictment or conviction?—Yes —No
In your opinion, was the witness' testimony or evidence
————Essential for proof of the government's case?
————Helpful, but not essential, for proof of government's case?
————Unnecessary for proof of the government's case?
(5) What was the final disposition of the case or investigation in which the witness was compelled to testify?
(6) Please describe any special or unanticipated problems related to the compulsion order (*e.g.*, disclosure of crimes unknown to the government prior to the order), and add any comments which you consider relevant.

Signed: _____
Date: _____
Typed Name:_____

APPENDIX B

ENFORCEMENT OF ORDERS TO GIVE TESTIMONY OR TO PROVIDE INFORMATION—CIVIL AND CRIMINAL CONTEMPT

The refusal of a witness to testify or to produce other information subsequent to the issuance of an order of compulsion under 18 U.S.C. 6002 is punishable by contempt. The Supreme Court has admonished the district courts to consider first the feasibility of effecting compliance with compulsion orders through the imposition of civil contempt, under 28 U.S.C. 1826. " 'The judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate.' " *United States* v. *Wilson*, 421 U.S. 309, 317 n. 9 (1975), quoting *Shillitani* v. *United States*, 384 U.S. 364, 371 n. 9 (1966).

1. CIVIL CONTEMPT.

28. 28 U.S. 1826, a codification of existing practices, was enacted in 1970 to provide a statutory basis for the application of summary civil contempt powers to reclacitrant witnesses. The purpose of the statute is to secure the testimony of other evidence through the creation of an incentive to compliance for the witness, not to punish the witness by imprisonment. When the witness complies with the order, he must be released. Thus, confinement is limited to the life of the court proceeding or the term of the grand jury, but in no event may be confinement exceed eighteen months.

Section 1826(a) provides that, upon the refusal of a witness without just cause to testify or provide other information, as ordered, in any proceeding before or ancillary to any court or grand jury of the United States, the court may order the witness confined summarily. However, section 1826(a) cannot be invoked simply upon the refusal of a witness to testify before a grand jury; the witness in such a case must be brought before a judge and ordered to testify, and he must then refuse to comply with the order.

Section 1826(b) prohibits granting bail during the pendency of an appeal from an order of confinement if the appeal appears to be frivolous or taken for delay. An appeal from a confinement order under this section is to be disposed of "as soon as practicable" but not later than thirty days from the filing date. These provisions lend a certainty to the sanction consistent with the urgent public need to obtain testimony. See *United States* v. *Coplon*, 339 F.2d 192 (6th Cir. 1964). Thus, the statute, itself, affords a sound predicate for government opposition to an application for bond pending appeal in such instances.

2. CRIMINAL CONTEMPT.

Where it is appropriate to impose punishment upon a recalcitrant witness, the court may invoke the provisions of 18 U.S.C. 401 and Rule 42 of the Federal Rules of Criminal Procedure. Rule 42(a) provides for summary punishment of the contempt "if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court," while Rule 42(b) requires notice and a hearing for contempts not committed in the presence of the court.

In *United States* v. *Wilson*, *supra*, the Supreme Court upheld contempt convictions summarily imposed under Rule 42(a), in a case where two witnesses refused to testify during a bank robbery trial despite having been ordered by the trial court to do so pursuant to 18 U.S.C. 6002. The Supreme Court distinguished the refusal of a witness to testify before a grand jury—where the proceeding may be interrupted while the witness is afforded notice and a hearing under Rule 42(b)—from refusal to testify at a trial. In the latter instance, the Court observed, there is a need for a swift summary decision: "The face-to-face refusal to comply with the court's order itself constituted an affront to the court, and when that kind of refusal disrupts and frustrates an ongoing proceeding, as it did here, summary contempt must be available to provide the recalcitrant witness with some incentive to testify." 421 U.S. at 316. "Where time is not of the essence, however, the provisions of Rule 42(b) may be more appropriate to deal with contemptuous conduct." *Id.* at 319. See also *Harris* v. *United States*, 382 U.S. 162 (1965).

Criminal contempt is punishable under 18 U.S.C. 401 by fine or imprisonment. Courts may not impose both a fine and imprisonment, nor a fine coupled with

probation. *Mac Neil* v. *United States*, 236 F.2d 149 (1st Cir.), *cert.* denied, 352 U.S. 912 (1956). While case law limits summary punishment under Rule 42(a) to imprisonment for six months, there is no maximum set for punishing criminal contempt after notice and hearing under Rule 42(b). See e.g., *United States* v. *Sternman*, 415 F.2d 1165 (6th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970) (three years' imprisonment). Indeed, so that an adjudication of criminal contempt not be deprived of efficacy where the contumacious witness is already serving a sentence for another criminal offense, that sentence may be interrupted to compel the witness to serve an intervening contempt sentence. *United States* v. *Liddy*, F.2d 669, 672–673 (D. C. Cir. 1974) *cert. denied*, 420 U.S. 980 (1975).

Bail for a defendent found in criminal contempt of court is controlled by the provisions of Rule 46, F.R.Cr.P.

Mr. EILBERG. Thank you for your statement.

The subcommittee is adjourned.

[Whereupon, at 12:20 p.m., the hearing was adjourned.]

GRAND JURY REFORM

THURSDAY, OCTOBER 13, 1977

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, AND
INTERNATIONAL LAW OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:35 a.m. in room 2237, Rayburn House Office Building, the Honorable Joshua Eilberg [chairman of the subcommittee], presiding.

Present: Representatives Eilberg, Hall, Fish, and Sawyer.

Also present: Garner J. Cline, Arthur P. Endres, Jr., Martin H. Belsky, counsel; Peter Regis, legislative assistant; and Alexander B. Cook, associate counsel.

Mr. EILBERG. The subcommittee will come to order. This is our fifth, and possibly our last, hearing on H.R. 94 and other bills to reform the Federal grand jury system. After receiving the testimony of our witnesses today, and collecting reports, letters, and submissions for inclusion in our record, we intend to proceed to markup of H.R. 94 at the earliest possible time, probably early in the next session. Comprehensive grand jury reforms will be considered—and, I believe, approved—by the House of Representatives during the 95th Congress. Hopefully, the Senate will also consider, review, and approve grand jury reforms.

There is therefore a real possibility of comprehensive grand jury legislation in the near future—the first reforms in the history of our Republic.

As our hearings and recent events demonstrate, such reforms are essential to restore the true purpose and function of our grand jury system. During our hearings, witness after witness—citizen, prosecutor, and judge—all noted abuses of the grand jury and the politicalization of that body. Of course, these witnesses differed in their recommendations. Most suggested legislation; some relied on judicial controls; others indicated that in-house formulation of policies would be sufficient.

I believe it is Congress' role to establish the standards and procedures for the grand jury and all other judicial proceedings. We cannot rely on a case-by-case determination to insure protection of an individual's rights or to guarantee the independence of a grand jury. We cannot rely on a case-by-case determination of issues by judges who are already overworked and who do not have any guidelines as to

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how to resolve these issues. We should and can detail the responsibilities of the prosecutor and the standards for the courts—by legislation.

That legislation is needed has been demonstrated by the recent action of the American Bar Association. At their annual meeting, the ABA recommended that legislation be enacted to insure grand jury fairness and independence. The recommendations closely parallel the provisions in my bill, H.R. 94.

First, the ABA, and H.R. 94, provide for a right to counsel in the grand jury room—whose role would be limited to an advisory one—and provide for procedures to deal with abuses and conflicts of interests by these lawyers;

Second, the ABA and H.R. 94, provide for a return to transactional immunity and for standards for the courts to consider and then apply in approving or disapproving immunity grants;

Third, the ABA and H.R. 94 set limits on the maximum period of confinement for civil contempt for refusal to testify or supply evidence;

Fourth, the ABA and H.R. 94 establish a new crime of unlawful disclosure of grand jury information—leaks;

Fifth, the ABA and H.R. 94 would require detailed instructions to grand jurors of their rights and duties;

Sixth, the ABA and H.R. 94 grant basic rights to grand jury witnesses and targets—such as adequate notice and an opportunity to testify—with certain limitations; and

Seventh, the ABA and H.R. 94 require an accurate transcript or recording of all grand jury proceedings except deliberations.

For the convenience of the Members of the subcommittee and the Congress, I have placed all the ABA recommendations in the Congressional Record and have also placed in the record the numerous articles, editorials, and comments urging enactment by us of these reforms.

Our witnesses today should present varied views on these and other grand jury reforms.

The Honorable William A. Sessions is a U.S. District Judge, for the Western District of Texas, appearing in behalf of the District Judges Association of the Fifth Circuit. Judge Sessions and the Fifth Circuit Conference have been extensive research on the Federal grand jury and have submitted a detailed memorandum.

Gary Naftalis is a former assistant U.S. attorney in New York City and presently in private practice. He is co-author, with the Honorable Marvin Frankel, of a recent book on the grand jury. I must note that I have carefully read this book. It is not only informative as providing the necessary background to the whole grand jury reform issue but also helpful as suggesting and documenting needed reforms.

Rod Sager is also a former assistant U.S. attorney, for Virginia. He has had extensive experience with Federal grand juries and, in fact, was involved in a unique grand jury investigation that he will describe.

The Honorable Bruce Babbitt is the attorney general of Arizona.

And, General Babbitt, the order in which the names appear here reflects only the order in which the information was received in our office that witnesses definitely would appear; it has no other meaning.

General Babbitt has been involved in extensive statewide grand jury investigations and has publicly described the benefits of and protections needed for such investigations.

David Rein is a practicing attorney long involved in grand jury reform issues and is here today in behalf of the Coalition to End Grand Jury Abuse. The coalition has been very active in documenting grand jury abuses and in detailing and justifying needed reforms.

I welcome our witnesses today and am confident that their testimony will be of great benefit to us in our deliberations next session.

Because the House is terribly busy at this time—in these closing weeks—we are suggesting that the witnesses give shorter statements rather than use the longer ones they have submitted although we want to hear everything you know.

Before proceeding with our first witness, I would like to introduce our colleague, Mr. Sawyer—Congressman Sawyer of Michigan.

Mr. SAWYER. Thank you, Mr. Chairman. And I wonder if I may just make a brief statement since this is one of the few areas in which I and the chairman disagree.

We have, in fact, heard some horror stories on grand juries, but I'm sure we've heard horror stories and occasional abuses of almost every function we have in the Government. And I don't think that these few isolated horror stories, when we think of the numbers of grand juries that are operating throughout the country, merit destroying or severely weakening a jury which is a very useful investigative tool any more than abuses of a former President might indicate we should strip the President of his powers to function.

While I have been very short in tenure of experience in Congress, I spent 30 years as a practicing trail lawyer and chairman of a 52-man law firm, fellow in the American College of Trial Lawyers, and director of the International Academy of Trial Lawyers—several others. I served some 2 or 3 years as prosecuting attorney in a 450,000 person county, and I may be the only person in the United States who has only tried 10 first degree murder cases, five on one side and five on the other, and it's the only kind of case I never lost.

I have had experience representing defendants in price-fixing and antitrust cases—corporate defendants—whereas I was on the other side of the fence, and they were being paraded through grand jury proceedings and engaged in briefing and so forth.

So, I think I speak from a warm background out in the field as opposed to sitting in Congress. And I, personally, was tremendously impressed and totally agreeing—substantially in total agreement—with the testimony of Judges Lacey and Mr. Civiletti who have appeared before this committee. So, while the chairman has his point of view, certainly supported by some facts, I wish for the record to be clear that I do not make the same observation as the chairman in this area.

Thank you, Mr. Chairman.

Mr. EILBERG. I take this opportunity to thank Mr. Sawyer. He has worked closely with us over this year and he's worked on the subcommittee; certainly we can afford to disagree. I know that we'll come out with some agreement.

And, without further ado, we would like to get to this witness, Attorney General Babbitt.

TESTIMONY OF HON. BRUCE BABBITT, ATORNEY GENERAL, STATE OF ARIZONA

Mr. BABBITT. Mr. Chairman, committee members, I very much appreciate the chance to be here. I must say this is the first time I've ever been ahead of a U.S. District Judge; in general I won't draw any inferences from that. It is a pleasure to be here.

Arizona has had a great deal of experience with grand jury work, and, I think, also a great deal of history of interaction between the legislative, the judicial, and the executive in shaping the laws that control grand juries.

I was interested in the chairman's comment that legislation does have a role in specifying how grand juries work. That has been the case in Arizona; there the legislature has taken a very active role, reforming and defining by legislation what the function of the grand jury is.

Likewise, historically, the courts have been much closer to the grand jury than is the case at the Federal level; the courts have actively supervised the grand jury proceedings in a way that I will describe shortly.

The other general observation, on the other hand, is that there is renewed interest in the grand jury system in Arizona. Contrary to many national trends toward abolishment of the grand jury, we have gone in precisely the opposite direction. Largely, because in recent years, our State has been plagued with tremendous problems, organized crime, white-collar crime, political corruption, and massive frauds.

In 1975, at my request, the State Legislature created a statewide grand jury with broad, statewide jurisdiction. The State grand jury act explicitly recognized the investigative function of the grand jury and strengthened the powers of the grand jury—subject to careful judicial supervision.

I might add—very briefly I would like to talk about two or three areas where our experience may be of some assistance to you. First one——

Mr. EILBERG. Could you summarize your statement and not read it?

Mr. BABBITT. Absolutely.

Mr. EILBERG. Without objection we will receive your formal statement into the record.

[The prepared statement of Mr. Babbitt follows:]

STATEMENT OF BRUCE E. BABBIT, ATTORNEY GENERAL OF ARIZONA

I am pleased to have the opportunity to appear before this Subcommittee. Your hearings into the functioning of the Federal grand jury system are indeed an important and historic undertaking.

I share the views of many committee members that during the last decade, the grand jury system has on occasion been badly abused by the Justice Department, and I agree that changes can be made to reduce the chances of such abuse in the future.

At the same time, I believe that we must take great care to assure that changes are truly necessary and that they do not have unintended adverse effects. My specific concern lies with the investigative function of the Grand Jury.

Arizona has endured nearly two decades of massive criminal frauds and associated violence that has attracted national attention. Many of our problems are wel known; the details are not important to this analysis. In dealing with these problems, we learned a great deal about the use of grand juries in the criminal justice system.

The centerpiece of our reform effort has been the creation of a statewide grand jury with broad jurisdiction to investigate and indict cases involving fraud, extortion, securities and tax violations, narcotics, labor racketeering, political corruption and all the related areas that come within the general definition of white collar crime and organized crime.

In the past two years, we have learned a great deal about the extreme difficulties of prosecuting these crimes. The most important lesson is that these crimes are seldom detected and almost never prosecuted without a grand jury equipped with broad investigative powers. The asssitance of the investigative subpoena of the grand jury is a power not usually possessed by prosecutors or by police. But it is indispensable to detecting "paper crimes." The broad investigative reach of our state grand jury has been strengthened and confirmed by court tests.[1]

I would like to address just three of th areas covered by H.R. 94, areas which relate to the investigative function and areas in which our own experience may be of some value.

The best and most important single feature of H.R. 94 is the requirement of Section 8 that a complete written transcript be kept of both testimony and arguments of counsel, excluding only the actual deliberations of the jury. Much of the grand jury abuse of the past decade can be traced to the traditional hands-off attitude taken by Federal courts toward their grand juries. Many Federal prosecutors have kept no transcripts of grand jury proceedings. Without a complete record, there is no effective way that judges can control prosecutors who pressure and abuse witnesses. Likewise, without a written record there is no way for a judge to review the record to assure that at least some modicum probably cause underlies the indictment.

In Arizona, court rules require a complete transcript of testimony and arguments.[2] Arizona trial courts routinely review these transcripts to rule on defense challenges of procedural irregularities including prosecutorial misconduct. Not infrequently, indictments are remanded because of procedural errors. The result has been the development by major prosecution offices of written guidelines that conform closely to the standards developed by case decisions. These standards proscribe any attempt by a prosecutor to impair the grand jury's deliberative function. As a result, Arizona has not had the problems of grand jury abuse encountered at the federal level.

The best answer to abuse of grand jury procedures is judicial supervision. The grand jury is a quasi judicial body; it should function as such and its proceedings should be subject to court scrutiny much as an appellate court reviews the activity of a trial court. If Federal grand juries can be brought under the effective supervision of the courts, many of the detailed procedural matters treated in H.R. 94 could appropriately be left for the courts to evolve by rule-making based on the results of review. I believe this approach is superior to freezing detailed grand jury procedures into statutory form.

I do not share the reservations expressed by the Justice Department about transcribing arguments to the jury by the prosecutor. There is ample evidence that some prosecutors do abuse witnesses and pressure the jury in their arguments, and it seems entirely appropriate that judges should have the means to control such conduct. Frivolous challenges will inevitably be made by defense counsel, but in our experience the courts have generally sorted out the good from the frivolous expeditiously and with a fair degree of consistency.

There are two provisions in H.R. 94 which I believe will seriously and unjustifiably impede the investigative function. The first and most difficult issue is the provision of Section 7 granting the right to counsel in the grand jury room.

It is an unfortunate fact that unscrupulous or unwitting lawyers are willing to represent, directly or indirectly, multiple defendants in both civil and criminal litigation in situations which pose serious conflict problems. And there are

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[1] See e.g., *State of Arizona ex rel Bruce Babbitt* v. *Marston, Inc.*, 114 Az. 260, 560 p. 20, 778 (1977).

[2] Rule 12.8, Arizona Rules of Criminal Procedure.

lawyers willing and able to suborn the system by orchestrating a defense for the principal defendant by advising and sometimes coercing other defendants into a pattern of cooperation that is often against their individual best interests.

In Arizona, court rules allow counsel in the grand jury room for targets, but not for witnesses.[3] We cannot point to specific instances of abuses on the part of counsel, but only because we have structured major cases so that no more than one related target is subpoenaed before the grand jury in any case. This procedure has real drawbacks in some types of cases, and even our Arizona rule is troublesome. Were the rule extended to witnesses, we believe the situation would become intolerable.

One may fairly question why we are so sure that a problem exists when we cannot point to specific cases of abuse. In nearly every complex case prosecuted by our office, a lawyer has been involved—and usually indicted. This includes land fraud cases, swindles involving securities, financial institutions and insurance.

To say, as the ABA apparently does, that conflict and multiple representation problems can be resolved by simply reiterating that such practices are prohibited by the canons of ethics is not convincing.

Section 7(d) of H.R. 94 anticipates and attempts to deal with the problem by authorizing the court to replace a lawyer where "necessary to insure that the activities of a grand jury are not unduly delayed or impeded."

This section does not add anything to the inherent power already possessed by the court. The problem is that neither inherent power nor statutory power are adequate to deal with subtle and largely undetectable efforts of unscrupulous lawyers to suborn the grand jury process. I do not mean to impugn the generally high standards of the legal profession. It is simply a fact that the most successful and highly organized criminals are the most likely to attract the few unscrupulous lawyers that are present in the profession.

The second area of specific concern is the provision of Section 9 requiring a preliminary hearing, in addition to the present Fifth Amendment requirement of a grand jury indictment for all infamous crimes. The clear effect of this will be to turn the present two step criminal process into a three tiered proceeding. In complex paper cases this extra step, interposing an additional adversary proceeding, will burden both prosecution and courts to the breaking point.

Our office has prosecuted and is presently prosecuting complex fraud cases, often involving the reconstruction of several years of business transactions and accumulated financial records. These cases routinely require a year or more of investigation by many investigators and lawyers aided by the grand jury's subpoena power. The investigation is then followed by months of accounting testimony before the indicting grand jury. After indictment, this type of case will then require several months of trial time.

In Arizona a preliminary hearing has become a species of mini trial which can drag out for weeks even in relatively uncomplicated cases. In our experience, complex paper cases cannot be effectively handled through the preliminary hearing route.

Absent the strictures of the Fifth Amendment, many federal cases would probably be more suitable for a preliminary hearing than grand jury action. I believe that in many types of cases both prosecutors and defense counsel would generally agree that the preliminary hearing is a superior alternative.

But in some areas, particularly complex financial cases, the preliminary hearing, as a form of mini trial, is not feasible. The large case involving multiple defendants, scores of witnesses and literally rooms of paper is a new phenomenon that presents special problems. Few jurisdictions outside the Federal government have experience in this area. The apparent lack of objection from many states to the preliminary hearing proposal of H.R. 94 should not be interpreted as endorsements based on experience with this type of prosecution.

For these reasons, I strongly endorse the passage of House Resolution 60 which would eliminate the requirement of a grand jury proceeding and give Congress the authority to test separately both the indictment and the information procedures.

The comparative merits and drawbacks of the preliminary hearing and the grand jury indictment have not been exhaustively studied, largely I think, because of the lack of extensive comparative experience at the Federal level. The

[3] Rule 12.5, Arizona Rules of Criminal Procedure.

best approach, in my view, would be to amend the Fifth Amendment to give Congress the authority to specify by statute either the indictment or the information, or both, as the proper way to commence a criminal proceeding. Congress can then experiment with both methods, compare their acceptability in different types of cases, and make reasoned distinctions based on actual experience.

Mr. EILBERG. Please proceed.

Mr. BABBITT. There are three areas where I think we have some experience that might be of help to you.

First, with respect to the requirement of a written transcript of the proceedings, we have that requirement by law in Arizona. It extends to witnesses and to counsel alike, excluding only the deliberations of the grand jury. I recommend it without reservation.

The transcript requirement ties the conduct of the proceedings to the supervision of the judiciary—makes it absolutely necessary. I am quite surprised at the way the Federal grand juries are run—without any real possibility of review by the judges—since there are no transcripts required. I believe it perfectly appropriate to make transcripts available to defendants. The transcript also serves as the basis of a great variety of challenges to procedures under which the grand jury is conducted.

If there is one fundamental reform, which would be most effective in curing the problems, it is judicial review. Judicial review not only corrects abuses, it prevents them from happening in the first place. All our lawyers go to the grand jury with a written script and set of procedures to make certain that the record will be free of error. The transcript requirement does chill the proceeding in the sense that it requires rigorous decorum, extremely careful conduct of the case by counsel, who know that judicial review will follow with a remand for any substantial irregularity.

Second, I would summarize briefly the requirement that counsel be allowed in the grand jury room. Arizona has taken an intermediate position here. Our law says that counsel may accompany only targets to the grand jury.

I must tell you that we have real reservations about the requirement of counsel for targets. It's a real problem in practice, not because of disruptions in the grand jury room. The law clearly says that if a lawyer creates problems he is summarily expelled. There have been a few occasions where that happened—the prosecutor simply goes to a judge and gets an order expelling the lawyer. The lawyer does not create problems in the grand jury room.

However, we have been unable to find answers to the problems that are created by unethical, corrupt lawyers orchestrating the testimony, reporting back, coercing potential defendants. I don't think some of the testimony on the problem has been candid enough. The American Bar Association counters the problem by saying it will reemphasize the Canons of Ethics. But the problem is that in virtually every major grand jury case we've initiated in the last few years—financial frauds, insurance frauds, land frauds, murder—there has been a lawyer involved in the crime itself. Most of our major indictments, it seems, include lawyers as defendants. That's the kind of lawyers we're dealing with. Ethical admonitions are simply not adequate deterrants.

We have attempted to handle this problem by structuring grand jury proceedings so that we do not generally call more than one poten-

tial defendant to testify, thereby minimizing the chance for lawyers to orchestrate testimony.

For these reasons I have tremendous reservations about extending our counsel rule to witnesses.

The third area where we've had some experience is with the preliminary hearing proposed by H.R. 94. I think most prosecutors—and all defense lawyers in Arizona—would tell you that in the vast majority of cases, the preliminary hearing is the better alternative. It's a better alternative for two reasons: first, the prosecution doesn't need the grand jury; and, second, there's no question that the adversary open preliminary hearing provides certain advantages for the defendant, which they shouldn't be denied unless there is some compelling reason. And most cases probably don't need the investigative function of the grand jury.

That leads me to conclude that the fifth amendment ought to be modified. Given the effective preliminary hearing device, given the historical changes since 1781, I support without reservation House Joint Resolution 60, which would modify the fifth amendment and give Congress the power to prescribe which of the two procedures is appropriate in which cases. That is what the Arizona legislature has done.

My concern with H.R. 94 is what I would call a two-tier requirement: Grand jury indictment—preliminary hearing—trial. It's going to be unworkable in complex cases. Most of the problems that I'm talking about today arise out of complex cases. Those are, increasingly, the areas prosecution is focusing on.

We routinely handle cases involving 1 to 2 years of investigation, usually involving two or three lawyers, maybe six or eight investigative personnel. Then we take that case to an investigative grand jury, principally for use of the subpena power to get records and to shape the case up with testimony. That may go on for months.

We have a 6-month grand jury session. We had a case last spring that consumed the entire grand jury session. After indictment we go to trial, and, routinely, those cases can take literally months to try. If Congress interposes a preliminary hearing in that process, the Federal criminal prosecution effort will be protracted even more.

It's a severe problem; we'll grind the system to a halt. A preliminary hearing is the ideal route for 95 percent of the cases. The other 5 percent, the complex cases, are serious problems. We must address the question whether it is appropriate to simply start stacking one proceeding on top of another, instead of eliminating the grand jury outright in those cases where its investigative functions is not required.

Thank you for your attention. If you have any questions, I would be happy to respond.

Mr. EILBERG. We appreciate it, and appreciate your summarizing your statement, as many witnesses as we have.

You have referred to one of the bills that has been introduced. We've introduced four different proposed constitutional amendments to eliminate the requirements of an indictment for infamous crimes. The Arizona Constitution allows the State to proceed by way of information or indictment. How is it determined and what standards have been established as to when the prosecutor proceeds by way of indictment or information?

Mr. BABBITT. In the case of the Attorney General, the legislature debated that very extensively. The legislature gave us access to these special grand juries for specified categories of offenses—the statute defines jurisdiction in terms of organized crime, white-collar crime, multicounty offenses—which automatically limits us to the investigative type cases. Any other type of case we must take by preliminary hearing.

That distinction is not made at the local prosecutor level.

Mr. EILBERG. In those cases you have said, you would proceed by indictment rather than by preliminary hearing, I take it.

Mr. BABBITT. Yes.

Mr. EILBERG. H.R. 94 provides that a witness may request to testify or present other evidence to the grand jury. The Arizona Criminal Code provides that a witness or defendant may ask to have witnesses examined on his behalf. Has this ever been used in State grand jury investigations and has this ever, either pursuant to a grand jury or prosecutorial investigation, led to a withdrawal of the prosecution?

Mr. BABBITT. Mr. Chairman, we do have a statute that allows witnesses for targets or potential defendants to ask to testify before the grand jury. It is entirely discretionary with the grand juries as to whether or not they want to hear him. The grand jury has responded to some requests by targets in some cases. We do get "no bills," and we have, on our own, dropped investigations.

I think the cause and effect relationship is difficult to trace, but I think I can say, yes, there are cases where a defendant, taking the initiative in getting testimony before the grand jury, has probably contributed to either dropping the investigation or to a "no bill."

Mr. EILBERG. In other words, what are the statistics on this point?

Mr. BABBITT. Mr. Chairman, there aren't; I could give you statistics as to "no bills," and possibly as to how many investigations were dropped, but it's very difficult to correlate that to defense initiated testimony before the grand jury. Numbers are extremely small. The number of "no bills" is very small, because we normally don't take a case to the grand jury unless we are a long ways down the road. I view an investigative grand jury as a very serious matter. It's got to investigate, but it had better not be doing it in the absence of something approaching probable cause.

Mr. EILBERG. One of the concerns raised by many prosecutors is that the grand jury is necessary to allow the prosecutor to subpena witnesses and evidence. As you know, Congress has consistently refused to give direct subpena power to the FBI or to prosecutors, and, as a result, the grand jury is used.

Under Arizona law, the prosecutor can, on his own or at the request of the grand jury, subpena witnesses. Could you describe for us how the process works, what reviews are made as to this subpena power, and whether you believe this has led to any abuses?

Mr. BABBITT. We have not had abuses. We have grand jury subpena power; the prosecutor has unilateral authority to issue the grand jury subpenas. The grand jury does not vote on subpenas, the court does not review them in advance.

The protection is, of course, that they are returnable to the grand jury. At that point, everything is of record. A witness who has been

subpenaed may move to quash his subpena, thereby triggring judicial review. As to the scope of the subpena, the courts have interpreted it very broadly.

I think it's a very workable system. I think there are real drawbacks to a grand jury on voting on the subpenas. It's very difficult to conceive of how a grand jury can be educated in advance of testimony as to the reach of the invstigation.

Again, in my view, the key is having the subpena returnable of record with a right of review.

Mr. EILBERG. H.R. 94 provides that detailed instructions be provided to the grand jurors of their rights and duties. Arizona law provides that on advice of the prosecutor the court is to charge the grand jury on its duties and rights. Have you established any procedures or standards as to what should be included in a charge?

Mr. BABBITT. Mr. Chairman, we have—or, more accurately, the court has. At the commencement of each grand jury proceeding, the court reads a very lengthy charge to the jury. It recapitulates the function of a grand jury—all of the applicable law—with emphasis on their ability to call witnesses and their responsibilities.

Mr. EILBERG. H.R. 94 provides for standards and procedures for judicial approval of immunity grants. This has been opposed as an infringement on "prosecutorial discretion." In 1975, your criminal code was amended to provide that a court can deny requests for immunity if it states the reasons in writing.

Could you describe for us any illustrations where the court has denied an immunity request and what problems, if any, this judicial approval mechanism has caused?

Mr. BABBITT. I think this procedure has worked well in Arizona, requiring the prosecutor to go through the court for an immunity grant. Immunity requests are not frequently made. I think there are two reasons for that. The first is we are very careful about requests for immunity.

We never ask for them for the purpose of simply fishing. I think that is where the problem has come up with the Tucson Federal grand jury and others. I think our courts would step in if there weren't a clear statement on the record justifying the request. Secondly, we don't make any judicial requests for immunity. And the reason for that is that a cooperative witness will often testify under an informal grant of immunity from the prosecutor in the form of a written statement of our intention not to prosecute.

So, we have been very careful about the immunity request. The judicial review of that, I think, is entirely appropriate.

Mr. EILBERG. Mr. Sawyer, we have just a few minutes.

Mr. SAWYER. Just a few questions.

Was Jim Zagel your chief assistant down there?

Mr. BABBITT. Mr. Sawyer, he was indeed. I called him the day after the election and said, "We've got some problems; I must have your help." He came out to be my first assistant for approximately 6 months. He made an extraordinary contribution to the people of Arizona.

Mr. SAWYER. A very impressive young man.

Mr. BABBITT. Mr. Zagel, Ms. Holtzman, and I were all classmates—a distinguished class in some respects.

Mr. SAWYER. In Michigan, in the State courts, the prosecutory system, we proceed in almost all of the cases by complaint and warning, and then with preliminary examination, and I recognize that the Federal prosecutors are stuck with having to go through a grand jury for routine things where you don't need them, rather than just rubberstamp run through that you've got enough evidence to prosecute. And I agree with you that that is really an encumbrance imposed by the fifth amendment. It seems to me that preliminary examination right, which can either be waived or exercised by the accused, is a much more satisfactory procedure in anything but the cases where you need a grand jury for investigative purposes. I suppose that you agree with that?

Mr. BABBITT. I absolutely agree with that. It seems to me that that's the fundamental issue in much of this discussion—no question.

Mr. SAWYER. And I suppose, too, the area proceeds as we do, in 99 percent of the cases that you are going to give immunity. You either plea bargain or give prosecutory immunity, in effect, or agree to accept a certain plea, recommend a certain sentence, to the court if they cooperate as opposed to not.

Mr. BABBITT. The chances of getting useful testimony out of compelled immunity are pretty risky, and, normally, we don't go that route. In some cases, however, compelled immunity is certainly necessary and appropriate.

Just a small footnote, one reason the preliminary hearing route is superior in many cases—and even in some complex cases—is because of the need to preserve testimony. We take the possibility that a witness may be murdered. We may take even a complex case to a preliminary hearing in order to preserve testimony by cross examination. But, certainly, in routine cases it's a preferable alternative in my view.

Mr. SAWYER. Under Michigan law you're required, even with a grand jury indictment, to go to preliminary examination following, and it's used for that purpose, too, preserving the testimony—which isn't much good if it's just in the grand jury. How do you feel about the reduction of the 18-month maximum incarceration for refusal to testify down to 6 months?

Mr. BABBITT. We have not had a lot of experience in that area. I suppose I'm less concerned about reduction from 18 months to 6 months than I am about the prohibition of any future incarcerations. I think the 6 months to 12 months is entirely liveable, provided that some discretion remains for using the contempt power in subsequent proceedings. I read that bill as prohibitive in subsequent proceedings.

Mr. SAWYER. That's all I have, Mr. Chairman.

Mr. EILBERG. Thank you, Mr. Sawyer.

General Babbitt, just—I'm sorry.

Mr. Hall.

Mr. HALL. If I may ask one question, Mr. Babbitt: Can you not envision a situation where a person would rather take 6-months imprisonment rather than tell a grand jury what he knows, as opposed to an 18-month incarceration, he might be more inclined to talk if he had something beneficial for a grand jury.

Mr. BABBITT. Certainly many witnesses will weigh very consciously the length of the term as against the disadvantages of testifying. I think it is fair to say that if you reduce it you will lose some testimony

that you might otherwise get, probably not a lot. I don't know where the balance point is.

Mr. HALL. Are we out of time?

Mr. EILBERG. Yes.

Mr. HALL. I believe that's all. Thank you.

Mr. EILBERG. General Babbitt, we thank you for your contribution, and you are excused.

Mr. BABBITT. Thank you Mr. Chairman and committee members.

[Recess.]

Mr. EILBERG. The subcommittee will come to order. We are pleased this morning to have U.S. District Judge, the Honorable William B. Sessions, from El Paso, Tex.

Judge Sessions, welcome.

TESTIMONY OF HON. WILLIAM S. SESSIONS, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF TEXAS, EL PASO DIVISION

Judge SESSIONS. Thank you, Mr. Chairman. I hasten to correct my middle initial; it is "S". I think the "William B." comes from William Bill, which I was called as a boy, and there are some who persist in it; but by name is William Steele.

Mr. EILBERG. Let the record so indicate.

Judge SESSIONS. Thank you, Mr. Chairman.

I additionally, in response to the committee's earlier inquiry, gave my written testimony and filed it back some time in August. I did not file the original because I was not certain that I would ever actually appear before the subcommittee, and I will now tender it and a signed copy of the original statement.

I recognize the committee has other matters they want to proceed with. I intended full well all along to simply submit myself for questioning by the subcommittee on the expectation there might be things you would want to discuss, and you could easily read the testimony which I have given in writing. There are, I think, several things which you should know.

Mr. EILBERG. Judge Sessions, I take it, then, that you're not planning to read this statement?

Judge SESSIONS. If that is favorable with the committee. If the committee chooses; but I assume that you prefer that I not.

Mr. EILBERG. You've put an awful lot of work into it—some 44 pages worth—but I'm afraid that it would take a great deal of time to read it.

Judge SESSIONS. No; my testimony itself is some 15 pages. There is an addendum to it, Congressman Eilberg, which is the result of rough briefing—which you have—which I simply supplied for the committee because I thought you would be entitled to have the result of my own efforts back some years ago.

Mr. EILBERG. As to my own personal preference, I would prefer that you would summarize and go ahead, if you would do that. We generally leave this to the discretion of the witness; how he would like to proceed.

Judge SESSIONS. Well, let me indicate this. I, of course, appear here at the behest of——

Mr. EILBERG. You don't have to read your statement, Judge. As a matter of fact, we prefer that you summarize it, but we leave it to the discretion of the witness.

Judge SESSIONS. Thank you.

It might be purposeful at this stage to say that I am here at the behest of president of the District Judges Association of the Fifth Circuit, the Honorable James Lawrence King. He was kind enough to appoint me as chairman of the legislation committee of the District Association, and, in that capacity, I appear.

I hasten to tell you that although I circulated my remarks among the District Judges Association, I would have to put a disclaimer on it. I have received no response from any judge in the negative; however, I do not presume that each of those judges agrees with the statement that I make here in my testimony.

The second point to observe is that since the time of submission of my testimony, several significant things have happened, each of which, I'm sure, the committee and the Chairman are aware of.

Mr. EILBERG. Just so we get the record straight, you're not going to read a statement; is that correct?

Judge SESSIONS. I will not read it, sir.

Mr. EILBERG. That being the case, without objection, the statement will be made part of the record.

Judge SESSIONS. Thank you.

[The prepared statement of Judge Sessions follows:]

STATEMENT OF WILLIAM S. SESSIONS, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF TEXAS, EL PASO DIVISION

I am a United States District Judge from the Western District of Texas sitting at El Paso, appearing before this Subcommittee as the Legislation Committee Chairman of the District Judges Association of the Fifth Circuit. I was appointed to chair that Committee by the Honorable James Lawrence King on June 1st of this year. The District Judges Association of the Fifth Circuit has a membership comprised of all but two or three of the 85 active and senior trial judges of the Fifth Circuit.

While the District Judges Association has expressed its general disagreement with H.R. 94 in its present form, (a copy of which was forwarded to each member of the Congress), the comments I make concerning specific parts of the legislation are my own and are not necessarily the views of all, or even a majority, of the Judges of the Association.

I wish to express my deep appreciation to your Chairman, Congressman Joshua Eilberg, for honoring the request of the Association's President, the Honorable James Lawrence King, that a representative of the Association appear before the Committee and express the views of the Association. The pursuit of equal justice under law must be our unflagging cause, because law is the cornerstone of our liberty.

I was appointed to the Federal Judiciary in December of 1974. Prior to that time, I was the United States Attorney for the Western District of Texas at San Antonio from July of 1971 until December of 1974. From August of 1969 until July, 1971, I served as Chief of the Government Operations Section of the Criminal Division in the Department of Justice in Washington, D.C.

My active experience and knowledge of Federal grand jury operations stems from my supervision of grand jury investigations conducted by attorneys of the Government Operations Section in cooperation with various United States Attorneys investigating violations of law involving the Federal Corrupt Practices Act, the Obscenity Statutes and the Selective Service Act. Thereafter, in my capacity as U.S. Attorney, I supervised and conducted grand jury proceedings in the Western District of Texas including a year-long grand jury investigation into political corruption in Duval County, Texas.

While there are many elements which must be analyzed by this Committee in making its decision concerning the worthiness of this proposed grand jury legislation, the testimony I give here today can properly be construed as encouraging the Committee to preserve and enhance the ability of a grand jury to serve as an *investigative grand jury*, thereby enabling it to perform its investigative function within the protective confines prescribed by the United States Constitution. No other investigative structure is better equipped to insure the protection of the Constitutional rights of the witness and of the accused than is the grand jury.

The well chosen words of the former United States Attorney for the Southern District of New York, Whitney North Seymour, Jr., in his book *United States Attorney*, 1975, graphically illustrate the importance of the investigative grand jury:

"The third major source of prosecutions consists of cases initiated within the United States Attorney's office itself, sometimes in cooperation with one of the Federal investigative agencies. These cases are often the most important Federal criminal cases, and their success depends largely on the staff's strength and experience. Notable recent examples of this type of prosecution include the indictment of former Vice President Spiro Agnew by the U.S. Attorney's office under George Beall, in Baltimore; prosecution of public officials and organized-crime figures by the U.S. Attorney's office under Herbert Stern and Frederick Lacey, in Newark; and conviction of state and local public officials in Illinois by the U.S. Attorney's office under James Thompson in Chicago. *The primary investigative tool in these cases is the grand jury.*"

In 1973, the Honorable William J. Campbell, a former United States Attorney of the Northern District of Illinois and former Chief Judge of the Northern District of Illiniois, published an article in Volume 64, No. 2 of The Journal of Criminal Law and Criminology of the Northwestern University School of Law entitled "Eliminate the Grand Jury". His article prompted me to undertake a good deal of research and I have enclosed my notes as an attachment to this testimony. I invite your perusal of the writings, both "pro" and "con", on the problems posed by this type of legislation. I would additionally invite your attention to an article by Cornelius W. Whickersham, Esquire, of the New York Bar, in the December, 1965 issue of the American Bar Association Journal (Vol. 55, Page 1157) entitled "The Grand Jury: Weapon Against Crime And Corruption".

In his opinion in "In Re Grand Jury Subpoena To Central States, Southeast And Southwest Areas Pension Fund, August Term, 1963, et. cet. 225 F.Supp. 923, the then Chief Judge William J. Campbell stated:

"The grand jury contrary to what seems to be the prevailing general belief is an integral part of the judicial arm of the Government and is not a mere tool of the prosecutor. The United States Attorney, the Federal Bureau of Investigation and other branches of the Department of Justice are integral parts of the Executive Branch of the Government. The grand jury, being part and parcel of the Judicial Branch of Government, is subject to a supervisory power in the courts, aimed at preventing abuses of its process or authority. However, in as much as the United States Attorney's Office and the Federal Bureau of Investigation are not part of the Judicial Branch of the Government, they are not in the performance of their executive functions, by reason of our Constitutional separation of powers system, subject to the supervisory power of the courts. This is properly as it should be."

In all branches of government, there are those who would abuse their power and authority and embarrass and frustrate the ideals of good government. Abuses of power and authority by grand juries and prosecuting attorneys, however, are not necessarily symptoms of weakness in the system or the law.

Accordingly, this distinguished Subcommittee has an awesome responsibility to insure that it does not mortally impair the ability of the investigative grand jury by constructing an impenetrable protective shield around the law breaker, and thereby frustrating the ability of the prosecutor to enforce the laws enacted by the Congress of the United States.

In commenting on the various sections of H.R. 94, I will at times refer to the position of the Advisory Committee on Criminal Rules of the Judicial Conference of the United States, the Honorable J. Edward Lumbard, Chairman, the testimony before this Subcommittee by the Honorable Frederick B. Lacey, on April 27, 1977, and the testimony before this Subcommittee by the Honorable Benjamin J. Civiletti on June 29, 1977.

RECALCITRANT WITNESSES

H.R. 94 amends Section 2A of 1826 Title 28 to limit to *six* months the maximum possible time to be served for contempt upon refusal to comply with a Court order to testify or produce records (1826(b)(2)) after a 72-hour notice of hearing (1826(a)(3)). The Section further bars a second confinement (1826(b)(3)) (new 18 USC S 403).

I join the Advisory Committee and Judge Lacey in opposing a reduction of the maximum period of confinement for contempt and barring a second confinement, agreeing that "a witness, granted immunity, nonetheless can frustrate a grand jury inquiry by refusing to testify" and that "reduction of sanctions is not in the aid of public interest overall." Additionally, I believe that adoption of such a section *invites* contempt by minimizing punishment, frustrates investigations of sophisticated, multi-member enterprises and/or corrupt activities, political and otherwise, and facilitates the ability of such enterprise to put forward a "scapegoat" whose testimony may be essential to such an investigation. To suggest that such will not be the case if the contempt sanction is reduced seems to ignore history.

IMMUNITY GENERALLY

Without commenting further on immunity, it seems that Section 3(b) of 6002 requiring that "No order . . . shall require any witness to testify . . . prior to the day one week . . . after the order was communicated, and Section (c) providing for notice and right to counsel in a proceeding challenging such order invites challenge to the grant of immunity as well as adding a potentially heavy burden to the existing monumental judicial workload.

NUMBER OF GRAND JURORS, ETC., SEC. 3321(A)(B)

I concur in the view of Judge Lacey and the Advisory Committee that the reduction in size of the grand jury and the accompanying provsions pose no real problem.

VIOLATIONS OF GRAND JURY SECRECY

Section 1512 of H.R. 94 provides criminal sanctions for violation of grand jury secrecy which meet the approval of the Advisory Committee and Judge Lacey. I would join Judge Lacey, however, in his expressed concern over the provision contained in Section 1512(c)(3) that would allow disclosure by a witness who has appeared before the grand jury, *or* by his attorney, of *any* matter concerning which the witnesses testified. This provision appears to allow an attorney who jointly represents two or more grand jury witnesses (or potential defendants) to disclose to each of his clients the testimony of the other or others, and, for that matter, would permit disclosure to the public at large, thus providing for wholesale violations of the secrecy of the grand jury.

SEC. 3329 RIGHTS AND DUTIES OF GRAND JURY AND ATTORNEY FOR GOVERNMENT

H.R. 94 would amend Section 6(a), Chapter 215 of Title 18, United States Code, by adding a new section which requires the Court, when empaneling a grand jury to give instructions, among others, concerning:

(1) The subject matter of the investigation. (3329(a)(5)), and,

(2) The criminal statute or statutes involved, if these are known at the time the grand jury is empaneled. (3329(a)(6)).

I recommend the deletion of Section 3329(a)(5) and (6) because of the difficulty or impossibility of the Courts complying with the two requirements. Except in the cases of Special grand juries, summoned and serving under 18 USC S 3331, et seq., it would be impractical or impossible to instruct the grand jury as contemplated in these provisions. A court would be required to summarize for the jury the entire criminal code unless the Court were to call the grand jury back before each session, and, after inquiring of the United States Attorney what matters he intends to present to the grand jury, instruct the grand jury concerning the applicable statute. As I observed earlier in the quote from Judge Campbell's opinion at 225 F. Supp. 923, though the grand jury is subject to the supervisory power of the Courts, the "United States Attorney's Office . . . (is) not part of the Judicial Branch of the Government" and is not "in the performance of its executive functions, by reason of Constitutional separation of power system, sub-

ject to the supervisory power of the Court." Inquiry by the Court into the nature and extent of an investigation as a predicate for instructing the grand jury under the proposed sections, might seem to invade a forbidden area. In any event, the United States Attorney routinely instructs the grand jury concerning the applicable statutes and this function should not be imposed upon the courts.

SECTION 3329(b)(2)(B)

This Section requires the U.S. Attorney to take reasonable steps to notify any person that evidence will be presented against that person and that a presentment or indictment will be requested. The U.S. Attorney would also be required to notify a potential indictee of his right to testify or present evidence before the grand jury. This notice is required unless the attorney for the Government "can prove to the satisfaction of the Court that notice would result in the flight of a person, would endanger other witnesses, or would unduly delay the investigation and prosecution".

At the present time, the Speedy Trial Act (Public Law 93-619) allows no greater than 45 days from arrest to indictment and will ultimately allow no greater than 30 days. In a complicated conspiracy case, even under the most favorable circumstances, it is extremely difficult for the United States Attorney to coordinate and prepare the presentation of the matter to the grand jury in that short period of time. To additionally encumber the Government with the burden of proving to the Court the Government's *feeling* that the person would flee or endanger other witnesses, hangs another "albatross" around the neck of the United States Attorney. Further, the burden on the Courts in processing and hearing the requests of the United States Attorney would be considerable and counterproductive. This procedure would also seriously endanger the secrecy of the grand jury proceedings.

Aside from the potential problems it creates for the United States Attorney and the Courts, this Section seems to invite a defendant to take action detrimental to his best interest and the ends of justice. In response to notification, a potential defendant might flee, interfere with an investigation, interfere with witnesses, or destroy or secrete evidence, or any combination of these four. I agree with Assistant Attorney General Civiletti of the Criminal Division of the Department of Justice in his testimony supporting the principle of affording notification and an opportunity to testify . . . but only when such notification seems appropriate within the discretion of the U.S. Attorney and can be made without unduly jeopardizing the investigation or prosecution.

SECTION 3329(c) REVEALING EXCULPATORY EVIDENCE

Section 3329(c) requires the Government's attorney to "periodically advise the grand jury of the nature and existence of evidence, as yet not received, which might tend to materially affect the credibility of any witness or tend to negate the guilt of any prospective defendant."

Judge Lacey expressed his concern about this section "because it raises so many problems which will ultimately be laid before the Courts." Mr. Civiletti observed that to "impose a duty upon a prosecutor to apprise the grand jury of all material that is conceivably exculpatory would convert the grand jury process into something akin to an ex parte trial on the merits, *and* would assuredly lead to a plethora of defense motions to dismiss the indictment or suppress the testimony of a particular grand jury witness based on the contention that the prosecutor had not sufficiently complied with the obligations of disclosing facts that 'might' have tended to effect the witness's credibility or to negate guilt." I concur with the observations of Judge Lacey and Mr. Civiletti and would observe further that such a requirement is incompatible with the mandate of the Speedy Trial Act.

SECTION 3330 A COUNSEL

H.R. 94 amends Section 7(a), Chapter 15 of Title 18, United States Code, to allow every witness subpoenaed to appear and testify before a grand jury to have available assistance of counsel *in the grand jury room.* It further provides for appointment of counsel under Section 3006A of Title 18 and allows counsel to remain in the jury room during questioning of the witness whom he represents. The Court has the power to remove the attorney if it finds that counsel

violates the rule and addresses grand jurors or otherwise takes part in the proceedings.

Judge Lacey and Assistant Attorney General Civiletti have clearly articulated the debilitating problems which may arise if this section is enacted. Currently, any witness testifying before a grand jury is entitled to seek counsel outside the grand jury room before answering any questions propounded to him. To suggest that a witness will be abused and questioned in an unlawful manner or dealt with in an unconstitutional manner is to suggest that the United States Attorney, sworn to uphold the Constitution, will violate his oath.

The requirements of the Speedy Trial Act make it increasingly difficult to complete the grand jury presentation in a timely fashion. The most difficult cases to present are conspiracies, which require extensive preparation before presentation of the grand jury. It is in these very cases, where multiple defendants are involved, that counsel's presence in the jury room would most seriously impede the expeditious conduct of the investigation. If the grand jury investigation is forced to yield to inventive tactics and devices utilized by counsel to frustrate the proceeding to which his client is called as a witness, then justice will neither be served nor done.

SECTION 3330B SUBPOENAS

Section 3330B requires, except when the Court finds special need, that no subpoena may require any witness to testify or produce other information before one week subsequent to the service of the subpoena.

It further requires the Government to produce information *upon the service of any subpoena* to give notice of seven items, including "the subject matter of the grand jury investigation."

Once again, the testimony of Judge Lacey and Assistant Attorney General Civiletti clearly bring into focus the problems that would be created by the enactment of this section. In addition to their concern, my experience teaches me that prior notice, of any sort, often invites and sometimes insures the "loss or destruction" of subpoenaed records.

SECTION 3333 RECORDINGS OF GRAND JURY PROCEEDINGS

This section provides for a complete and accurate stenographic or electronic recording of all grand jury proceedings except deliberations and consultations between witnesses and their counsel. The proceedings to be recorded include the Court's notice to the grand jury of its rights and duties and other comments or charges, *all* introductory comment made by the Government attorneys, witnesses and their counsel (although 3330A(c) provides that counsel shall *not* be permitted to address the grand jurors or otherwise take part in the proceedings before the grand jury); and all interchanges between the grand jury and the attorneys (unspecified).

In addition to the caveats of Assistant Attorney General Civiletti concerning these "blanket" recording requirements and those comments of Judge Lacey on the cost factor, I believe the Committee must keep in mind that the purpose of a grand jury is to find probable cause for, and to return indictments, and to conduct appropriate investigations. Because this is the historic right of a grand jury, evidence, not competent at trial, may well be introduced for the grand jury's consideration and discussion. Section 3333, when coupled with required subpoena notice, the presence of witnesses' counsel in the grand jury room, and the Court's various instructions, might well create a climate so intimidating to the grand jurors as to make their meaningful participation in the grand jury's processes impossible.

SECTION 3332 AVAILABILITY OF GRAND JURY TRANSCRIPTS AND OTHER STATEMENTS

I concur with Judge Lacey's position approving Sections 3334 (a) and (b) insofar as these Sections allow a person subpoenaed to testify before the grand jury to examine previous statements he has made and any prior grand jury testimony he may have given. I also concur in the position of the Department of Justice urged by Assistant Attorney General Civiletti opposing the aspects of Section 3334 that would effectively repeal the Jencks Act, 18 USC § 3500. As Judge Lacey notes, competent counsel will routinely move for the production of "all of the grand jury testimony", thereby requiring the court to review and

determine materiality, etc. In addition to the extremely burdensome problem of review, this process may ofttimes require later refusal by the Court in the case. Once again, the requirements of this section seem totally incompatible with the mandate of the Speedy Trial Act. Additionally, the provisions of 3334 (c) (2) portend yet another monumental pre-trial burden for the Courts, impairing the ability of the Courts to meet the mandate of the Speedy Trial Act.

SECTION 3368 PRELIMINARY EXAMINATION

Section 3368 mandates that a defendant is entitled, unless waived, to a preliminary post-indictment examination. From the wording of Section (a), it is unclear to me whether the Congress intends that the preliminary examination be conducted by the District court or that a preliminary examination must be had (possibly before a magistrate) when a defendant is charged with an offense that must be tried by the District court.

Regardless of the interpretation of the language, I believe the Congress should look carefully at the cost and manpower requirements of this Section, as the preliminary hearing required therein needlessly duplicates the effort of the grand jury in arriving at probable cause for the return of an indictment. Whether a District court judge or a magistrate is required to hold such a preliminary examination, the judge's time consumed in such a mini-trial, the additional manpower required by the United States Attorney's office to staff the hearing, the requirements of Government agents to be off the job and in the courtroom, the cost of reporters, transcription, and of associated personnel, appear to be monumental and totally unjustified. The observations of Judge Lacey and Mr. Civiletti in this regard are well reasoned.

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3. *Grand Jury: Sleeping Watchdog or Expensive Antique?*, Lewis Watts, Jr., 37 No. Car. L. Rev. 290 (1959).
4. *The Federal Grand Jury*, Lester B. Orfield, 22 F.R.D. 343, 394 (1958).

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11. *The Initiation of Criminal Prosecutions by Indictment or Information*, Raymond Moley, 29 Mich. L. Rev. 403 (1931).
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13. *Criminal Procedure—Should the Grand Jury System be Abolished?*, Beauchamp Brogan, 45 Ky. L. J. 151 (1967).
14. *A Survey of the Grand Jury System*, 10 Oregon L. Rev. (1930–31), Wayne L. Morse, Part I—101–160; Part II—217–257; Part II (Contd) 295–305.
15. *Delays in Criminal Cases*, Hon. William J. Campbell, 55 F.R.D. 229 (1972) (Xeroxed in part).
16. *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153, Melvin P. Antell (1965).
17. *From Indictment to Information—Implications of the Shift*, George H. Dession, 42 Yale L. J. 163 (1932).
18. Comments, *Legality of the Grand Jury Report*, 52 Mich. L. Rev. 711 (1954).
19. *Grand Jury Secrecy*, Richard Calkins, 63 Mich. L. Rev. 455 (1965).
20. *Defendant's Right to an Unbiased Federal Grand Jury*, Joseph W. Bartlett, 47 B.U.L. Rev. 551 (1967).
21. Note, *American Grand Jury: Investigatory and Indictment Powers*, 22 Cleveland State L. Rev. 186 (1973).
22. *The Federal Grand Jury*, Leonard B. Boudin, 61 Georgetown L. Rev. 1 (1972).
23. Symposium, *The Grand Jury*, 10 American Crim. L. Rev. 671 (1972); *Demythologizing the Historic Role of the Grand Jury*, Helene E. Schwartz, at page 701.

[1] Dissents.

V. ARTICLES IN SUPPORT OF GRAND JURIES

1. *The Grand Jury—Its Role and Its Powers*, Hon. Irving R. Kaufman, 17 F.R.D. 331 (1955).
2. *Shall the Grand Jury in Ordinary Criminal Cases be Dispensed with in Minnesota?*, Paul J. Thompson, 6 Minn. L. Rev. 615 (1922).
3. Footnotes, *A Survey of the Grand Jury System*, Wayne L. Morse, 10 Ore. L. Rev. 351–353 (1931) (Xeroxed in file).
4. *In Re Murchison*, 349 U.S. 133 (1955).
5. *The Grand Jury Under Attack*, Richard D. Younger, 46 J. Crim. Law & Crim., Parts I and II—26; Part III—214 (1955).
6. Note, *The Grand Jury—Its Investigatory Powers and Limitations*, 37 Minn. L. Rev. 586 (1953).
7. Note, *Powers of Federal Grand Juries*, 4 Stanford L. Rev. 68 (1951).
8. Comment, *Grand Jury Proceedings: The Prosecutor, the Trial Judge, and Undue Influence*, Roger T. Brice, 39 U. of Chicago L. Rev. 761 (1972).
9. *A Layman Looks at the Grand Jury*, Robert H. Rawson, 4 West. Res. L. Rev. 19 (1952).
10. *The Grand Jury: Weapon Against Crime and Corruption*, Cornelius W. Wickersham, 51 A.B.A. J. 1157 (1965).
11. *In Re Grand Jury, January 1969*, 315 F. Supp. 662, 675 (D.C. Md., 1970).
12. *United States* v. *American Medical Assn.*, 26 F. Supp. 429 (D.C. D.C., 1939).
13. *Is the Grand Jury Necessary?*, James P. Whyte, 45 Va. L. Rev. 461 (1959) (Xeroxed).
14. *The Propriety of the Grand Jury Report*, J. Hadley Edgar, Jr., 34 Tex. L. Rev. 746 (1956).
15. *Analysis of Criticism of the Grand Jury*, Jerome Hall, 22 J. of Crim. Law 692 (1931–32).
16. *From Indictment to Information—Implications of the Shift*, George H. Dession, 42 Yale L. J. 163 (1932).

I. PURPOSE OF GRAND JURY

In Re Grand Jury Proceedings, 4 F. Supp. 283, 284 (E. D. Pa., 1933),

"The inquisitorial power of the grand jury is the most valuable function which it possesses today and, far more than any supposed protection which it gives to the accused, justifies its survival as an institution. As an engine of discovery against organized and far-reaching crime, it has no counterpart. Policy emphatically forbids that there should be any curtailment of it except in the clearest cases."

The following information comes from an article entitled *Grand Jury: Sleeping Watchdog or Expensive Antique?*, Lewis Watts, Jr., 37 No. Car. L. Rev. 290, 291, 292 (1959).

"The grand jury has served two basically different but related functions.

"One is accusatory. The grand jury considers the bill submitted by the solicitor; if it finds probable cause, it makes the formal accusation of crime which brings the defendant into the criminal court. The chief reasons for retaining the grand jury as an accuser historically was to protect defendants from unjustified prosecution at the hand of an overzealous prosecutor in the days before our public prosecutions of today. A few speak of the protective function of the grand jury, but most writers think of it as an integral part of the jury's accusatory procedure.

"The other function is investigatory or inquisitorial. In the beginning the jurors inquired among themselves for knowledge of crime committed within the county. Later they sat as an inquest and heard witnesses in this regard. Also, the grand jury served as a kind of supervisor of the local government machinery, apparently with the power to make necessary investigations."

This next information comes from the case styled *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962).

"This body has been regarded as a primary security to the innocent against hasty, malicious, and oppressive persecutions; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge

is founded upon reason or was dictated by an intimidating power or by malice and personal ill will. Particularly in matters of local political corruption and investigations is it important that freedom of communication be kept open and that the real issues not become obscured to the grand jury. It cannot effectively operate in a vacuum. . . . The necessity to society of an independent and informed grand jury becomes readily apparent. . . ."

II. History of the Grand Jury

United States v. *Olmstead*, 7 F. 2d 756 (W.D. Wash., 1925), at page 758.

"The grand jury is of ancient origin; it goes back many centuries. It is said the institution existed among the Saxons. By the Constitution of Clarendon, the grand jury was recognized, if not established. It originated when there raged a conflict between the rights of the subject and the power of the crown. Its object was to secure to the subject the right of appeal to his peers under the immunity of secrecy before he could be brought to trial. It was at first a body which not only arrested, but which tried, public offenders. It was at the time of the settlement of this country an informing and accusing tribunal only. It is a distinct, independent body, and must act free from influence, fear, favor, affection, reward, or hope thereof proceeding from, or without, the court. The Constitution of the United States, as well as the constitutions of all the states show it is adopted as a means of protection as well as a necessary aid to public justice. The grand jurors being sworn officers of the court, the presumption is that the indictment was found only upon proper evidence and before the court would, under any circumstances, enter upon an investigation, it must appear by strong, positive proof that the inhibitions of the law had been violated and the presumption overcome."

The following information is from a comment entitled *The Grand Jury: Its Present Day Function and Correlative Powers* in Volume 29, Fordham Law Review, page 152 (1960).

"The grand jury was created in the common law courts as an instrument of the crown in order to expand the power of king over the feudal courts. Shortly thereafter, it developed into an independent body which inquired into all crimes committed or triable within its jurisdiction. In this capacity, it served a dual purpose; (1) to indict and present for trial persons believed guilty of a crime; and (2) to protect innocent persons from unwarranted prosecution. Protection of the innocent was insured by a requirement of strict secrecy, established early in the history of the grand jury. Later, the grand jury assumed an additional role of investigating into and reporting on public matters, encompassing such subjects as abusive market practices, horseracing, and maintenance of bridges, highways, and public property. Misconduct of public officials was another important subject of inquiry."

III.—Grand Jury's Scope and Powers

Initially, probably one of the better places to start in terms of the information we have gathered is in the xeroxed portions of the power sections of the article entitled *The Federal Grand Jury* by Lester B. Orfield, 22 Federal Rules Decision at page 343 (1958).

The following information comes from the case *Blair* v. *United States*, 250 U.S. 273 (1918), at page 281.

"It is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government, is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself, entitling the witness to be excused from answering anything that would tend to incriminate him. . . . [Page 282] A defendant is not entitled to challenge the authority of the court or of the grand jury, provided they have a de facto existence and organization.

"A defendant is not entitled to set limits to the investigation that the grand jury may conduct. The Fifth Amendment and the statutes relative to the organi-

zation of grand juries recognize such a jury as being possessed of the same powers that pertained to its British prototype, and in our system examination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual. It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.

"And, for the same reasons, witnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation. In truth it is in the ordinary case no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not. [Page 283] At least, the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction."

The following information comes from the case *United States* v. *Cox*, 342 F. 2d 167 (5th Cir), cert. denied, 331 U.S. 935 (1965).

"The requirement of the signature of the United States Attorney on an indictment is for the purpose of evidencing joinder of attorney for the United States with the grand jury in instituting a criminal proceeding in the Court. Without the signature there can be no criminal proceeding brought upon an indictment." [Page 172]

"A federal grand jury has the unquestioned right to inquire into any matter within the jurisdiction involving violations of law and to return an indictment if it finds a reasonable probability that a crime has been committed. This it may do at the instance of the court, the District Attorney, the Attorney General or on its own initiative, from the evidence it may gather or from knowledge of its members." [Page 175]

"The United States Attorney cannot, except in an advisory capacity, inquire into the merits of whether indictments should be found and returned in particular cases being considered by the grand jury. Only the grand jurors themselves have that power. It would be grossly wrong for it to be usurped. Moreover, that is practically impossible, because 'no person other than the [grand] jurors may be present while the grand jury is deliberating or voting.' Rule 6(d), F. R. Crim. P. The responsibility of finding and returning an indictment rests solely on the grand jurors." [Page 176]

The following information comes from the case *People* v. *Sears*, 273 N.E. 2d 380 (Ill., 1971), at page 391.

"The grand jury, prior to return of an indictment, is subject to the supervisory power of the court where questions of the court's process are involved."

[Page 392] "The grand jury is an integral part of the court and not the tool of the prosecutor and neither the prosecutor nor the grand jury is vested with power to proceed without regard to due process."

The following information comes from the case styled *United States* v. *Corallo*, 413 F. 2d 1306 (2d Cir.), cert. denied, 396 U.S. 958 (1969).

In here we will be discussing the requirements of the grand jury in giving warnings to each witness.

[Page 1328] "In the Grand Jury room, Motto and Fried were separately warned that they had a right to remain silent, that the Grand Jury was investigating the offense of using an interstate facility to further the state crime of bribery of a municipal official, that each was the subject of the investigation, and that he had a right to consult with an attorney. They were also asked whether they had attorneys present. . . . Finally, they were told whatever they said might be used against them. . . . These warnings were completely adequate."

The following information comes from the case styled *Stirone* v. *United States*, 361 U.S. 212 (1960), at pages 215–17.

"Ever since *Ex parte Bain*, 121 U.S. 1, was decided in 1887 it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself. In that case, the court ordered that some specific and relevant allegations the grand jury had charged be stricken from the indictment so that Bain might be convicted without proof of those particular allegations. In holding that this could not be done, Mr. Justice Miller, speaking for the Court, said:

"If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the commonlaw attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed." 121 U.S. 1, 10.

[Page 217] The Court went on to hold in *Bain:*

"That after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney. . . ." 121 U.S. 1, 13.

The *Bain* case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. See also *United States* v. *Norris*, 281 U.S. 619, 622.

The following information comes from *Dennis* v. *United States*, 384 U.S. 855 (1966), at pages 869–70.

"In general, however, the Court has confirmed the trial court's power under Rule 6(e) of the Federal Rules of Criminal Procedure to direct disclosure of grand jury testimony "preliminarily to or in connection with a judicial proceeding.' [This information is on page 870.] In *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 234, the Court acknowledged that 'after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it.' In *Proctor & Gamble*, *supra*, the Court stated that 'problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility . . .' are 'cases of particularized need where the secrecy of the proceedings is lifted discreetly and limitedly,' 356 U.S., at 683. . . .

"These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."

The following information comes from the case styled *Costello* v. *United States*, 350 U.S. 359 (1956).

"A defendant in a criminal case in a federal court may be required to stand trial and his conviction may be sustained while only hearsay evidence was presented to the grand jury which indicted him. An indictment based solely on hearsay evidence does not violate the 5th Amendment. In the exercise of its power to supervise the administration of justice in the federal courts, this Court (Supreme Court) declines to establish a rule permitting defendants in criminal cases to challenge indictments on the ground that they are not supported by adequate or competent evidence."

Further information on the scope and the powers of the federal grand jury in a more detailed form (with cases also footnoted therein) is contained in the article *Federal Grand Jury* by Lester B. Orfield, 22 Federal Rules Decisions, pages 343–463, 1958. Part of this article has been xeroxed and is within this file. For further information, this article may be consulted for more specifics as needed.

The following information comes from an article entitled *Grand Jury: Bulwark of Prosecutorial Immunity?* by Michael K. Williams. Comment, 3 Loyola of Chicago L. J. 305 (1972) at pages 309–310.

"American courts set forth five reasons for secrecy that 'bear little similarity' to their traditional purpose of assuring the protection of the citizen from oppressive prosecution. These reasons are:

"(1) To prevent the escape of those whose indictment may be contemplated;

"(2) To insure the utmost freedom to the grand jury in its deliberations and to prevent persons subject to indictment or their friends from importuning the grand jurors;

"(3) To prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it;

"(4) To encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes;

"(5) To protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

In *Crowley* v. *United States*, 194 U.S. 461, 475 (1903), the Supreme Court said: "The *indictment* embodies charges made by grand jurors, and *the signature of the United States Attorney merely attests the action of the grand jury*, whereas an *information* rests upon the responsibility of the attorney representing the government, and imparts an investigation of the facts by him in his official capacity." [Emphasis added.]

The following information comes from the case styled *In Re Dymo Industries, Inc.*, 300 F. Supp. 532 (N.D. Cal., 1969), aff'd, 418 F. 2d 500, cert. denied, 397 U.S. 937 (1970).

"The grand jury is a creation of the Fifth Amendment and is not wholly identifiable with any one of the three traditional branches of government. . . . The prosecuting agency may not use for its own purposes the processes available to the grand jury."

* * * * *

". . . the grand jury's purpose is to determine whether cause exists upon which indictment would lie and its investigatory powers are not limited only to cases in which such cause exists."

* * * * *

[Page 536] ". . . subpoenas [duces tecum commanding corporate movants to produce documentary evidence before the grand jury] . . . are lawful without a showing that their issuance was based on good cause."

United States v. *Steel*, 238 F. Supp. 580 (S.D. N.Y., 1965), (at page 582) the U.S. Attorney decides whether to present matters to the grand jury, it is the grand jury alone that determines by vote whether to return an indictment. There is a "strong presumption of regularity according to deliberations of findings of grand jury's." (At page 583) If a second grand jury returns an indictment where a first grand jury returned a no true bill, "this furnishes no basis for drawing the inference that the succeeding grand jury which did return the indictment acted without evidence. . . ."

The following information comes from *State* v. *Good*, 460 P. 2d 662 (Ariz. Ct. App., 1969).

[Page 665] "Exortations and factual interpretations by County Attorney to the Grand Jury are improper; the members of Grand Jury should be permitted to act free from sway or control from any source and without favor."

The following information comes from the case styled *United States* v. *Kysar*, 459 F. 2d 422 (10th Cir., 1972), pages 422–23.

"We conclude that prosecution on a subsequent grand jury indictment returned after dismissal of complaint by Commissioner for failure to show sufficient evidence to detain the defendant was not barred by earlier dismissal. If the indictment is fair upon its face and properly found and returned, the trial court cannot look behind the indictment to determine if it is based on inadequate or incompetent evidence."

The folowing information comes from the case *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), page 688.

"Although the powers of the grand jury are not limited and are subject to the supervision of a judge, the long-standing principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, is particularly applicable to grand jury proceedings."

The following information comes from the case styled *City of Los Angeles v. Williams*, 438 F. 2d 522 (9th Cir., 1971).

"By undertaking to decide the issue of whether material subpoenaed by the grand jury was privileged, the district court was acting within jurisdiction and was not engaged in a 'usurpation of power.'"

The following information comes from the case styled *United States* v. *United States District Court for the Southern District of West Virginia*, 238 F. 2d 713 (4th Cir., 1956), cert. denied *sub nom.*, 352 U.S. 981 (1957), at page 715.

"Where the grand jury is summoned, impaneled and sworn by the court, it is essentially independent of court control and the court cannot peremptorily require an indictment by the grand jury nor prevent the presentment of an indictment except by summary discharge. Where the grand jury was impaneled to investigate local milk industry with the view of determining whether indictments on anti-trust laws should be returned, instructions that the jury must vote either

to indict or not to indict and might not take an adjournment for summarization of the testimony taken was a clear invasion of the grand jury's powers."

The following information comes from the case styled *Hammers* v. *State*, 337 P. 2d 1097 (Okla. Ct. Crim. App., 1959), at page 1099.

"The county attorney has a duty to avoid presenting incompetent witnesses in evidence against one under grand jury investigation. He is not only the custodian of the state's security, but is also the guardian of the rights of one under investigation. [At page 1104]. The court may examine and excuse any of the jurors for bias or prejudice or other legal grounds, going to qualifications which shall be deemed expedient, but that does not mean he shall act arbitrarily or from malice or favoritism [thus, grand juries are truly representative of the people]."

The following information comes from the case styled *In Re National Window Glass Workers*, 287 F. 219 (N.D. Ohio, 1922), at page 220.

"The process by which witnesses are compelled to attend a grand jury investigation is the process of the court, and not of the grand jury or of the district attorney, and the court has a supervisory duty of seeing that its grand jury and its process are not abused or used for purposes of oppression and injustice."

The following information comes from the case styled *In Re Grand Jury Investigation*, 32 F. R. D. 175, appeal dismissed, 318 F. 2d 533 (2d Cir.), cert. dismissed per stipulation, 375 U.S. 802 (1963), at page 183.

"As for criminal proceedings, so long as the motivating purpose of the grand jury investigation is not the accumulation of evidence for a pending criminal case, the Government may use evidence incidentally acquired in the course of a legitimately instituted grand jury in the pending criminal case. [Thus, the defendant seems to be raising an argument against grand juries that the government at times uses grand juries only to accumulate evidence in a pending criminal case.]"

The following information comes from the case styled *In Re Dionisio*, 442 F. 2d 276 (7th Cir., 1971), rev'd on other grounds, 410 U.S. 1, (1973), at page 281;

". . . the grand jury is not required to have a factual basis for commencing an investigation and can pursue rumors and clues which further investigation may prove groundless. The grand jury does not need probable cause to subpoena witnesses. But that is not to say that the grand jury may misuse its subpoena power to effect a seizure which in other contexts would be violative of the Fourth Amendment."

[Page 279–80] "The Government argues that it is premature to consider these Fourth Amendment claims because the witnesses' remedy, if any, lies in the exclusion of the evidence at trial if one ultimately ensues. The argument is not persuasive. . . ."

IV.—Articles Against Grand Juries

The following articles comes from Beauchamp Brogan's *Criminal Procedure—Should the Grand Jury System be Abolished?*, 45 Ky. Law Journal 151, 152, 154–157 (1956).

"Under the present English system (this article was written in 1956; the grand jury in England was abolished in 1933), any person may prefer a bill of indictment charging an indictable offense, provided the accused has been committed for trial or that the bill is preferred by the direction or consent of a judge of the High Court. The bill becomes an indictment when signed by a proper officer of the Court, who must be satisfied that the requirements for filing have been met. This provision gives the prosecutor an opportunity of getting a decision of the examining magistrate overruled if he is not satisfied. Most charges, however, are made by magistrates who have conducted the preliminary examination. (The author seems to favor the present English system. This article then states seven different arguments against grand juries.)"

[Page 154] "First, it may be suggested that there is no reason for a second hearing, provided a full and adequate hearing is given by the magistrate. The grand jury, in general, follows the advice of the prosecutor in acting on charges brought before it. Where two hearings are held, there is unecessary delay in the administration of justice. Witnesses must appear at both hearings and again must be dragged before the trial court in case the accused is indicted. Much time usually lapses between the preliminary hearing and the empaneling of the grand jury. This can be detrimental to both sides. If the accused is innocent and the charge dismissed, he may have been made to wait in jail for long periods of time. On the other hand, the delay also hurts the prosecution. Witnesses may be moved from the jurisdiction of the Court and cannot be found. It is estimated that about

20 percent of the cases originally instigated have to be dropped for lack of witnesses."

"Second, the elimination of the grand jury for the purpose of returning indictments would save the public much money. When the accused is committed to jail for several months preceding the calling of the grand jury, he is an expense to the community. The cost of the services of the prosecuting attorney, the members of the grand jury, and all who are involved in the grand jury system must be taken into account. And, after several months the position of the accused is probably the same had no grand jury been called. In short, if the time is ripe for trial, nothing can be lost by proceeding. Following the preliminary hearing, the action by the grand jury is a duplication of effort.

"Third, the grand jury poses a burden on citizens who must leave their jobs to serve as jurors.

"Fourth, an argument can be made against the lack of an opportunity for the accused to be heard. The grand jury is supposed to return an indictment if in its judgment the evidence is sufficient to justify a trial. But how can it determine validly such sufficiency if the accused may not present rebutting evidence.

"Fifth, it might be argued that the prosecutor avoids responsibility by getting the grand jury to return "no bills." If he does not wish to prosecute a case, he can present it in such a way that the grand jury will probably not return an indictment.

"Sixth, the abolishment of the indictment might actually reduce the number of persons brought to trial. It is true that a grand jury eliminates many cases before a trial is held. But it is also true that many cases go to trial that would not have if the accused had been given an opportunity to defend himself before the grand jury.

"Seventh, a current defect in the present grand jury system is the inability to amend an indictment."

The following information comes from an article entitled *Should the Grand Jury System be Abolished?*, George Lawyer, 15 Yale Law Journal 178 (1905), at pages 180–181.

"The first, and probably the paramount objection (to grand juries) lies in the fact the free man may be held to answer for a felony, as a suspect, in secret proceedings. He may never know he is under suspicion until apprehended as a criminal after indictment. The evidence on which the indictment is based is presented to the jurors without notice to the party against whom the accusation is made. The ex parte statements of witnesses, who may be influenced by malice and revenge, are sufficient to brand the most innocent citizen with the foulest crime. And the accused is unheard!"

[Page 182] "A further serious objection (to grand juries) is that the inquisition is frequently made the instrument of extortion. It is quite immaterial whether the suspected person be guilty or innocent. If innocent, his fears are worked upon. He dreads the permanent disgrace of a charge, however unfounded it may be. It means, at least, a blight to his own hopes and the humiliation of his family. . . . If the party be guilty, there is still a deeper motive for compromise."

The following information comes from an article entitled *Information or Indictment in Felony Cases*, R. Justin Miller, 8 Minnesota Law Review, 379 (1924), at page 381.

"There is today nothing any more dignified or impressive about the indictment to justify its preferment than the historically less important information; and so far as effectiveness is concerned, men guilty of murder have been just as effectively hanged, following prosecution upon informations in appropriate jurisdictions, as has ever been true in jurisdictions where prosecutions for murder are possible only upon indictments. The indictment is a declaration by grand jury that a certain person has committed a crime, contrary to the law of the land. The information is exactly the same thing, except that the declaration is made by a duly authorized officer such as an attorney general or a district attorney. In the absence of any express constitutional limitation, a prosecution initiated by an information 'is due process of law and violates none of the constitutional rights of the accused.'"

The following information comes from an article entitled *Grand Jury Menace: The Unreasonable Rule of Secrecy*, Arthur H. Sherry, 48 Virginia Law Review, 668 (1962), at page 684.

"An effective, useful and functioning grand jury system has demonstrated that its operations have not been impaired by requirement of compulsory disclosure

of the evidence taken in support of an indictment. None of the dire forebodings of the defenders of grand jury secrecy have been borne out. In the light of this experience, and since it is self-evident that disclosure is far more compatible with a just, fair and equitable administration of justice than the policy of secrecy, it seems plain that there is no rational basis for the opinion that complete grand jury secrecy is indispensable. Liberal as some courts may be in permitting inspection of the minutes for the purpose of impeachment or in the case of 'particularized need,' the prevailing, traditional policy of secrecy is an anachronism that has long outlived any real necessity. Let the defendant have or make a copy of the transcript as a matter of right. Justice requires no less."

The following article is entitled *Grand Jury: Sleeping Watchdog or Expensive Antique?*, Louis Watts, Jr., 37 North Carolina Law Review 290 (1959), at page 295.

"The successful New York grand juries (of the 1930's) are taken from "blue-ribbon" panels which are carefully screened. It seems unlikely that the New York jurors selected in another manner would have been so consistently effective. The question has been raised whether an attempt to duplicate the "blue-ribbon" selection might not result in the same group of men being called with *onerous frequency*. [Page 296] A doubt has been voiced as to the effectiveness of "blue-ribbon" jurors as investigators in smaller communities where jurors would likely be friends or acquaintances of public officials whose administration might be subject to investigation."

The following information comes from an article entitled *Grand Jury Practice in the 1970's*, David Foster, 32 Ohio State Law Journal, 701, (1971), at page 701.

"In addition, the witness must walk into the grand jury room alone facing, in the secrecy of those chambers, questions of prosecutor and grand juror without the protection afforded by counsel or by presence of the court. Without the help of his lawyer the witness may be led into discussions of privileged communications or into admissions which he would not have made if he had been refreshed on the basis of all the facts. He cannot object to questions that are leading, double-edged, or otherwise improper in form. Only parts of documents, or only one document of a series, may be shown to him. He cannot demand that he be allowed to explain or to controvert facts brought out before the grand jury. He may not be cross-examined to bring out full and complete facts.

"In these circumstances the average individual testifies under considerable mental stress. He may forget facts that under more favorable circumstances he would readily recall. Through suggestions of the prosecutor and grand jurors he "recalls" matters of which he actually has no knowledge. He gives incomplete answers. He may tend to tell the grand jurors what he believes they wish to hear. To relieve the pressures upon himself he may make irrelevant accusations about the conduct of third persons. . . ."

[Page 702] "The grand jury remains a blunt, crude instrument of brute power. Its unparalleled investigatorial powers are admittedly of vast importance to the government in anti-trust cases. But, it has lost the counterbalancing characteristics which made those powers tolerable—the protection of the innocent accused against unfounded accusation.

"To summarize, a grand jury has no necessary functions to perform in an anti-trust case since the case can proceed without it. Moreover, it has no logical function to perform since the layman's view of the propriety of conduct in question is not really of compelling concern to the Anti-trust Division. But the grand jury does have one improper function. It provides an opportunity for secret, backroom-type interrogation without counsel present which would seem to violate the policy which underlies *Miranda* v. *Arizona*."

The following information comes from the article entitled *The California Grand Jury: Vestige of Aristocracy*, Patricia Mar, 1 Pacific Law Journal 36 (1970), at page 37, *Legislative Efforts at Reform*.

"Assembly Bill 459 would have split the civil and criminal functions of the grand jury by establishing two grand juries for each county. One grand jury would be concerned with investigating governmental affairs in the county, while the other would consider and return criminal indictments."

At page 58, *"The Need for Legislation.* It is unlikely that a grand jury that is truly representative of all segments of the community will be selected unless the criminal indictment and criminal investigative functions of the grand jury are separated by creating two grand juries. As long as a grand jury indicts

and also watches over the county governmental affairs, judges will continue to select grand jurors with an eye for the latter function."

At page 47. "*Constitutional issues and grand jury selection.*—The method by which California grand juries are selected is susceptible to challege as violating the constitutional right to equal protection and due process under the 14th Amendment. First, selection procedure raises the question of racial discrimination when it results in total exclusion or gross underrepresentation of minority groups. Second, and related to the first, is the question of whether California grand juries are discriminatory against not only minority group defendants, but all low-income persons because of an economic class discrimination in the selection procedure."

The following information comes from an article entitled *The Initiation of Criminal Prosecutions by Indictment or Information*, Raymond Moley, 29 Michigan Law Review 403 (1931), at page 404.

"Professors W. A. Mikell and E. R. Keedy in the preparation of the draft for the Code for the American Law Institute likewise reviewed the entire subject and came to conclusions similar to those of Dean Miller. These conclusions summarized are:

"(1) The use of the information provides a more expeditious procedure.

"(2) It is less expensive, not only in the saving of the cost of grand juries but in the lessened burden which is imposed upon the other agencies of law enforcement.

"(3) It makes possible a more efficient disposition of cases; not so many unsuccessful prosecutions are initiated. Less energy is required of judges, jurors, and prosecutors, and unnecessary duplication of effort is largely eliminated. Speed, economy, and efficiency were thus the claimed advantages derived from the use of the information."

[Page 414] "The grand jury really has little independent power of initiation or action."

The following information comes from an article entitled *Grand Jury: Bulwark of Prosecutorial Immunity?*, Michael Williams, 3 Loyola of Chicago Law Journal 305 (1972), at pages 310–311.

"When looking at the question in terms of the protection of the accused from the abuses of the prosecutor, secrecy seems detrimental in that the secrecy rules may allow the prosecutor to act with impunity before the grand jury. The grand jury would not, therefore, be able to perform its function of 'standing between the accuser and the accused.' Affidavits and oral testimony of grand jurors are normally the only means available to a defendant to show that his indictment resulted from undue influence of the prosecutor over the grand jurors rather than from evidence presented. If the court refuses to admit such testimony, the grand jury may be a "skirt" behind which a malicious prosecutor can hide to prosecute unjustly an accused."

The following information comes from an article entitled *Comment, Evaluating the Grand Jury's Role in a Dual System of Prosecution: An Iowa Case Study*, 57 Iowa Law Review 1354 (1972), at page 1358.

"The grand jury represents unnecessary lay interference in law enforcement."

[At page 1364.] "The survey indicates that few Iowa grand juries independently perform the special investigative duties assigned to them by statute. In two-thirds of the counties surveyed, the grand juries have not initiated such an inquiry in the last five years. Even in those counties where the survey revealed that grand juries have initiated some investigations, most investigations are initiated by county attorneys. Thus, although grand jury investigations of the statutorily enumerated circumstances have occurred in a majority of the counties surveyed, county attorneys appear to have assumed the responsibility for initiating such grand jury investigations."

[At page 1365.] "One explanation for the grand jury's failure in initiating investigations is that the county attorneys are preempting any need for such action by fully assuming the responsibility for initiating needed investigations. An alternative explanation is that the grand juries are unresponsive to need for investigation because they are not accountable to the public for their acts or omissions. Both of the possible explanations for lack of initiative by Iowa grand juries constitute reasons for transferring the grand jury's duty to investigate in enumerated circumstances to the county attorney."

[At page 1366.] "A county attorney's decision not to prosecute a person who has been arrested or is the subject of a complaint does not bar a grand jury

from investigating and indicting a person. In actual practice, no grand jury review of the discretionary decision by county attorneys to forego prosecutions is possible if grand juries do not know when the county attorney has made such decisions. The county attorney learns of the commission of crimes from law enforcement officials and complaining parties, then informs a grand jury in his county only if he decides to give them the information because he wants to prosecute by indictment."

The following information comes from an article entitled *The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?*, James P. Shannon, 2 New Mexico Law Review 141 (1972).

"Recent critics of the grand jury have questioned whether it has been used to harass dissident groups and unfriendly witnesses who appear before it."

The following information comes from an article entitled *The Modern Grand Jury: Benighted Supergovernment*, Melvin P. Antell, 51 American Bar Association Journal 153 (1965), on page 154.

[On page 154 it is said] "It simply is not true that the grand jury system protects the individual from oppression; indeed, it has a far greater potentiality as an instrument of oppression."

"It is no less absurd to place these same well-intentioned people on a grand jury, charge them with the duty of enforcing hundreds of laws, almost none of which have they even heard of, protecting individual liberties, and keeping a watch on the general level of morality and efficiency of government. Yet, our present system requires precisely this.

"In short, the only person who has a clear idea of what is happening in the grand jury room is the public official whom these twenty-three novices are expected to check. So that even if a grand jury were disposed to assert its historic independence in the interest of an individual's liberty, it must, paradoxically, look to the very person whose misconduct they are supposed to guard against for guidance as to when he is acting oppressively.

[Page 155] "Often their restiveness finds expression when one of the number will say 'let's indict him anyway.' The insistence is upon action, on getting things done. If a man has behaved badly he should be punished—not just for violating the law, but for *misbehaving*. Personal standards of conduct supplant those established by the legislature and each grand juror looks for a way to suppress what is unacceptable to him.

"The other area in which grand juries function has to do with maintaining vigil over the conduct of public officials.

"It is really unthinkable that there could be a productive grand jury investigation that has not been preceded by a prolonged period of study and preparation by a prosecutor's office. The so-called grand jury "investigation," therefore, is really nothing more than a review of the prosecutor's predigested evidence and a ratification of his conclusions. Thus viewed, the presentment power is only a device whereby a prosecutor may popularize his own law enforcement philosophies and direct attention to the inadequacies of other government officials.

In answer to the article written by Antell, Cornelius W. Wickersham wrote an article in 51 American Bar Association Journal, on page 1157, (1965), entitled *The Grand Jury: Weapon Against Crime and Corruption*. This article is more or less in rebuttal to the article by Mr. Antell. The article by Wickersham is possibly of some use. As it is somewhat lengthy, it has been xeroxed and is contained within the file given to you with "Grand Jury" written across the front of it.

The reason the Wickersham article was xeroxed is because it is an article in rebuttal to another article and it does make some good points in relation to the articles or arguments against the grand jury.

The information following is from an article entitled *Defendant's Right to An Unbiased Federal Grand Jury*, Joseph W. Bartlett, 47 B. U. Law Review 551 (1967), at page 552.

"Objections to grand jury practice frequently point with alarm to the power of the grand jurors to consider matters which could not be introduced in a trial before a petit jury and to consult in an overly intimate fashion with the prosecution."

[At page 555] "Moreover, even if one should be able to assert successfully bias and prejudice under Rule 6, [Federal Rules of Criminal Procedure] it appears the accused must show that, of the normal complement of twenty-three grand jurors, a sufficient number were infected with bias so that there did not

remain twelve unbiased grand jurors concurring in the indictment. It has been suggested that if bias is shown on the part of one or more jurors they have the capacity to infect the entire panel, but several courts have read Rule 6 as imposing this apparently crushing burden on the movant.

"In short, little comfort can be found in the Federal Rules or complimentary statutory authority for the notion that grand jury bias is a viable basis for quashing a federal indictment."

The following information is from an article in 10 Oregon Law Review, page 101, entitled *A Survey of the Grand Jury System* by Wayne L. Morse, dated 1931.

Page 101 states that "Accusations that the grand jury is merely a rubber stamp for the district attorney, the use of which enables him to escape his responsibilities and to cover up his inefficiencies, are frequently made. Some attack the grand jury as being a relic of medievalism, cumbersome, slow, inefficient, and costly. An institution that has outgrown its usefulness."

"On the other hand, the defenders of the grand jury proclaim it to be one of the bulwarks of our liberties, a protector of the innocent, a training school for citizenship, the people's weapon for preventing abusive practices by public officials."

"For the most part, however, the debate has hinged upon subjective value judgments. Such esoteric conclusions are of little assistance in any program of reform which aims to place the administration of criminal justice on a more scientific basis." [Morse's statistical study involves the study of 7,414 grand jury cases involving 21 states in an attempt to reveal that the grand jury isn't necessary and is merely a rubber stamp. Also, in part 2 of his article, he relies upon the information obtained from 545 judges in response to questions posed by him.] On page 154, he says: "The advocates of the indictment method sometimes argue that the grand jury system protects innocent persons from suffering the publicity of a public trial. But the statistics set forth in his report show that there is little difference between the opinions of the prosecutors and grand juries as to what should be done with the cases. It would, therefore, seem to follow that they agree as to who are innocent persons. Thus, if the honesty and integrity of our prosecutors in performing their public duties can be relied upon, it would seem to follow from these statistics that innocent persons would be as well protected under the information method as under the indictment method."

In "Part 2, Continued," the third section of his article, which begins on page 295, Wayne L. Morse states, on pages 344–45, "The advantages accredited to the information system can be classified for the most part under four points: efficiency, speed, economy, and the fixing of responsibility." On page 353, Morse continues, "Many judges—especially those in indictment states—fear that it is dangerous to give one man, the prosecutor, practically complete power in the initiating of criminal prosecutions. Probably these judges are influenced by the historical traditions behind the grand jury system. Undoubtedly, in the times when the masses suffered from the tyrannies off an absolute monarchy, [continuing on page 354] the accusing jury was truly a bulwark of liberty and a protection for the innocent. But today, under representative government, the argument that the people have much to fear from the information system, because it gives the prosecutor too much power, no longer holds good, and is highly tinged with emotional connotations."

On page 356, Morse states: "The need of coordination in the criminal law machinery is imperative. The devices which can be used to escape responsibility need to be carefully scrutinized. The grand jury is such a device; it is not a continuing body, it is subject to comparatively little control, and a weak or corrupt prosecutor can always make use of it as an aid in helping him shirk and shift his responsibilities. But under the dual system, where the grand jury is seldom used, the prosecutor must stand or fall upon his record and he cannot use the grand jury as a scapegoat.

The following information comes from an article entitled Comment, *Legality of the Grand Jury Report*, 52 Michigan Law Review 711 (1954), at page 713. The article mentioned several instances in which grand juries would not indict someone, but who would, nevertheless, in a report state malicious things about certain peoples or groups.

". . . in none of these instances was a group or an individual charged with an offense against the criminal law of state or nation, nor was the report intended to serve as the basis for such a charge. While it is indisputably the function of

the grand jury to present and to indict for violations of the law of its jurisdiction, serious question may be raised about grand jury reports which go beyond this in censuring individuals and groups for conduct which, however blameworthy, cannot for one reason or another be made the basis of criminal sanction. The legality of reports of this nature has been commonly tested in two ways: (1) by a motion to expunge from the records of the court such portions of the report as are alleged to be both defamatory and outside the province of the grand jury, and (2) by an action for libel against one or more of the grand jurors themselves."

The following information comes from an article entitled Note, *American Grand Jury: Investigatory and Indictment Powers*, 22 Cleveland State Law Review 136 (1973). The information herein is on page 155.

"Specifically, this examination of the grand jury system demonstrates that: (1) grand juries do not act independently of the prosecutor; (2) prosecutors initiate cases of at least the same or better merit than those commenced by grand juries themselves; (3) the quality of cases presented by the prosecutor would not decrease if the indictment were abolished; (4) the facets of due process present in a purely judicial proceeding which guard and protect the rights of the accused are absent from grand jury proceedings; and (5) the speedy administration of criminal justice as guaranteed by the Constitution is delayed by prosecution via the indictment.

"It is concluded and recommended, therefore, that the grand jury indictment be abolished in all cases, both federal and state, and replaced by a uniform preliminary hearing followed by the prosecutor's information.

"While it is recommended that the indictment be abolished, it is not suggested that the grand jury itself be dissolved. It has been outlined that the American tri-partite form of government requires the existence of a quasi-judicial investigatory body. The grand jury serves this purpose. Additionally, should the indictment be abolished, the investigatory powers off the grand jury should be retained . . . ."

The following information comes from an article entitled *The Federal Grand Jury*, by Leonard B. Boudin, 61 Georgetown Law Review (1972), page 1. The general premise of the article is that: "The grand jury can play a significant role through vital protection from governmental oppression and lawlessness but not without major reform in its current use, because the traditional role of the grand jury as the arbiter of government prosecution has been eroded by recent government practice and Supreme Court decisions to a status as merely another weapon in the government's fact-finding arsenal. On page 35, in his conclusion he states:

"Present grand jury policies no longer serve a useful purpose. Denying a witness or de facto defendant counsel before the grand jury, preventing pre-trial disclosure of grand jury minutes to the defendant, and refusing to quash an indictment based on incompetent or illegal evidence, are all holdovers from a time when the grand jury was or was believed to be the people's shield against governmental tyranny. But the grand jury has changed radically in function. It is no longer a group of peers sitting to protect citizens; instead, it is an arm of the state, more powerful than ever before, serving the ends of the prosecution. The only result of the present policy is to deprive defendants of the full exercise of their rights, and to force them to undergo what may be needless, expensive, embarrassing, and hazardous trials.

"The greatest hope for reform lies in strong remedial legislation aimed at eliminating the various abuses detailed above, for courts tend to cling steadfastly to precedents. Statutory rights should be created to provide for counsel before the grand juries; to provide for full disclosure of the minutes of grand jury proceedings after the proceedings are concluded and prior to trial; to provide that grand jury inquiry end upon securing an indictment, so that the grand jury cannot be used by the prosecutor as an evidence-gathering tool; and to require that no indictment be returned except upon legal and admissible evidence, with the provision that one not so based shall be quashed. This legislative reform might well re-establish the grand jury as the guardian of individual rights. With less secrecy and more accountability to the public, the grand jury could better fulfill its responsibility of making an initial determination of probable cause and become a fairer stage in our criminal justice system."

The following information comes from The American Criminal Law Review, Volume 10, at page 671, from an article, (a symposium) entitled *The Grand*

Jury, written in 1972. The symposium consists of five parts by a number of authors; any information to come will be from the article entitled *Demythologizing the Historic Role of the Grand Jury*, at page 701, by Helene E. Schwartz. The purpose of her article is merely to raise the level of awareness of the existence of pressure, abuses, and manipulation by determined partisans upon the grand jury as a vulnerable institution. Mainly in her final section she cataloged some of the ways in which the grand jury, as the shield against political persecutions, can and has been circumvented and suggests how historic abuses are being used today. Included in her catalog of abuses are the following:

"(1) *The political persuasion of the Judge.*—The ways in which a judge may influence a grand jury are so varied that the mere fact of his partisanship, even when covert, may affect the outcome of its deliberations. The judge's bias may extend to a particular political party. The most overt manifestation of a judge's political feelings is often his charge to the grand jury." [That information was contained on page 750.] Interestingly enough, on pages 752 through 755 she talks about Judge William Campbell, Chief Judge of the United States District Court for the Northern District of Illinois, who is the author of the abolition of the grand jury article, and his methods of conveying his political beliefs or his beliefs as to how a case should be handled to the grand jurors. She gives an example of a case where in spite of the opposition of the Attorney General, Campbell was determined to see the demonstrators indicted. (2) Number two in her catalog of abuses is the *Intimidation of Grand Jurors.* She says that: "Unfortunately, however, intimidation of grand jurors has not ceased in America; it has merely become more subtle. A judge, for example, may interfere with the right of a grand jury independently to determine whether or not to indict by refusing to discharge the grand jury. A judge may also thwart a grand jury's determination to indict by prematurely discharging it." [That information was contained on pages 755 through 756.] On pages 758 and 759, she also discusses that the grand jury can be manipulated through the machinations of a prosecutor. (3) Number three in her catalog of abuses is *Packed Panels.* "The parallel today to this practice is that most grand jurors are white, middle-class men, conservative in outlook and with little concern for protecting the rights of their fellow citizens." [That information is on page 759.]

(4) Number four under catalog of abuses is *Multiple Grand Juries.* ". . . legal advisors ultimately achieved victory by changing venue and presenting the same facts to a second grand jury." [Page 761] (5) Number five, the *Use of Misdemeanor Charges* is stated in pages 763 and 764. (6) Number six [page 764] Another abuse which negates the function of the grand jury to protect the accused is a *change of venue.* (7) Number 7 [page 765] is *Insufficient Evidence to Try.* The likely conclusion is that the government is using the hovering threat of indictment and possible trial as a means to silence agitation against a particular law or policy. Pages 766 and 767 deal with improper presentments by the grand jury; she seems to feel that the unsolicited comments of the grand jury which accompany the indictment are often unnecessary and libelous, for which there is no protection afforded the accused. And, in conclusion, on page 769, she states:

"As this study has shown, the grand jury has exhibited a lamentable willingness to return indictments in the political cases arising out of these controversies, and to allow itself to become a tool for personal vengeance, as in the case of Aaron Burr. This is not to say that there have never been times when the grand jury successfully acted as a buffer to prevent persecutions, but merely that it is unreliable and overly vulnerable to both overt and subtle manipulation by determined partisans."

[On page 770] "Abolition of the grand jury is not the answer. Even the most conservative among us recognize that 'the myth that "ours is a government of law, not men" is infinitely cherished, and it is infinitely hollow.' Constitutional provisions are therefore subject to evolution by interpretations which change as swiftly as does membership on the bench of the Supreme Court. Facing the likelihood of narrowed protections at the secondary (trial) level, it would be foolish indeed to abandon the primary barrier between the accused and the accuser, the grand jury. In this age of conflict, it is infinitely more important that the traditional shield be reenforced; that it not continue to degenerate into a mere shibboleth, lauded as a protection when in reality it is not."

The following information comes from an article entitled *Grand Jury Secrecy*, Richard Calkins, 63 Michigan Law Review 455 (1965), at page 461.

"First, the rule of secrecy concerning matters transpiring in the grand jury room is designed primarily as an aid and protection to the grand jury not the witnesses appearing before it. A witness is not a confidential informant; he must consider his testimony subject to all the obligations of oath required in any judicial proceeding. In revealing damaging evidence before the grand jury, the witness must expect that such evidence will be disclosed at trial. Therefore, any hesitancy that a witness might have in divulging harmful evidence before the grand jury ordinarily would be based upon a fear of the eventual necessity of giving that same evidence in open court rather than the fear that, having once given such harmful evidence, his grand jury testimony might be divulged. Disclosure of the prior testimony will not unduly discourage free statements by witnesses before the grand jury.

"Second, that disclosure of a witness's grand jury testimony cannot cause any fear of retaliation or embarrassment that is not already created by the testimony given in open court. Normally such disclosure will only affirm that the same damaging evidence was given before the grand jury.

"Third, a policy of continued secrecy concerning grand jury testimony will have little deterrent effect on the defendant who seeks to tamper with or suborn witnesses at his trial. If an unscrupulous party wishes to tamper with a witness's testimony, he will do so regardless of whether the minutes are made available to him.

"A person, assured that his grand jury testimony will remain forever inviolate, could testify to one thing before the grand jury and to something entirely different before the petit jury. And, unless the subsequent testimony ran counter to that which the prosecution wished to obtain, there would be no way for the defendant to submit the contradiction to the jury."

V.—Articles in Support of Grand Juries

The following information is from an article entitled *The Grand Jury Under Attack*, by Richard D. Younger, Journal of Criminal Law, Criminology and Police Science, Volume 46 (1955). In Part I, on page 26, speaking in regard to a talk given by Justice James Wilson, it is said:

"Wilson stated that he saw in the grand jury more than a body set up merely to seek out law violators. He viewed it as an important instrument of democratic government, 'a great channel of communication between those who make and administer the laws and those for whom the laws are made and administered.' Elaborating upon his statement, Justice Wilson pointed out that all the operations of government and all its officers came within the view of grand juries, giving them an unrivaled ability to suggest public improvements and expose corruption in government."

[In Part II of Younger's article, on page 41, the following information is contained] "As early as 1872 the Wisconsin Supreme Court decided that the Fourteenth Amendment did not prevent states from ceasing to use the indictment, but the question remained a point of controversy [continued on page 42] until the United States Supreme Court settled it in 1884. The test case arose in California when Joseph A. Hurtado challenged his murder conviction on the ground that he had come to trial on an information rather than a grand jury indictment. The high court gave the judicial green light to states which desired to get rid of the grand inquest. Citing the Wisconsin decision with approval, the justices announced that "due process of law" included any system of prosecution which preserved liberty and justice and was not limited to indictment by a grand jury. Justice John M. Harlan's vigorous dissent stated the case for those who believed that indictment by a jury of his neighbors was the right of every American citizen."

[The citations to the Wisconsin and U.S. cases are as follows: *Rowan* v. *State*, 30 Wisconsin 129 (1872) and *Hurtado* v. *California*, 110 U.S. 516 (1884). Harlan's dissent contained therein may be of interest!]

[Continuing in the Younger article on page 45] "At a time when public confidence in the grand jury was wavering under the barrage of abuse and cries for reform, there were few persons who saw the institution as a potent instrument of the people. Judge Harman Yerkes of Pennsylvania, [continued on page 46] however, retained the belief that grand juries could provide a means of extending democratic control of government. In September, 1901, he told jurors of Bucks County that bodies such as theirs, representing the people of the community, were not outmoded or useless. In times of great public peril or in the event of deep-seated

abuses, Judge Yerkes observed, 'The divided yet powerful and also combined responsibility of the secret session of the grand jury . . . has worked out great problems of reform and correction.' He pointed out that abolition of the grand inquest would leave the accused citizen completely at the mercy of 'an unjust or unwise judge or district attorney,' or subject to contrivances of an unscrupulous prosecutor. Judge Yerkes dispelled the often repeated idea that because the United States was not ruled by a tyrannical king, grand juries had ceased to be necessary as guardians of individual liberty. He explained that tyrants even more irresponsible than the despots of old sought to dominate local, state and national governments. Giant business monopolies restless of legal restraints and party bosses who did not hesitate to break judges and create courts took the place of tyrannical monarchs as a danger to freedom in the United States. Against such ruthless forces Judge Yerkes saw grand juries as powerful agencies of the people, challenging businesses or boss domination of government. At a time when many legal scholars advised abandoning the grand inquest as an archaic relic of the past, the Pennsylvania judge saw what they had failed to see, that there were enemies of freedom in America which demanded the watchful eye of the grand jury if the American people were to control their government."

[Continuing on page 49] "Publisher George Haven Putnam recognized that inquests could be slow and unwieldy bodies which frequently tried the patience of judges and prosecutors, but he did not believe it was fair to judge the institution solely on that basis. Democracy did not necesarily mean efficiency. It meant a careful concern for the rights of persons who had been arrested as well as the ability of citizens to initiate investigations of abuses in government and make officials responsible to them. After serving on grand juries in New York City over a period of thirty-five years. Putnam became convinced that no other institution provided such a degree of popular participation in government. He recognized that during their term of office the jurors acted as the representatives of the people of the county and in that capacity could call before them all public officials, high or low. When such bodies ceased to sit, the cause of popular government had suffered a severe blow."

[The following information is from Part III of Younger's article, on pages 224–225.] "Today, the most important aspects of the grand jury are its democratic control and its local character. Governmental power has to a large extent replaced all other threats to democracy in the United States. The increasing centralization of government authority and the growth of a huge bureaucracy in no way responsible to the people, has made it vitally necessary to preserve the grand jury. It often serves as the citizens' only means of checking on political appointees or preventing illegal compulsion at the hands of zealous law enforcement officials. At a time when centralization of power in Washington has narrowed the area of democratic control, grand juries give the people an opportunity to participate in government and make their wishes known. In 1951, the Kefauver Crime Investigating Committee warned Americans not to rely upon the central government to control racketeering and organized crime in the United States. The committee advised the people to use their local grand juries to attack conditions in their own communities. Citizen panels have demonstrated repeatedly in the past that they could protest effectively in the name of the people against centralized authority. Today, grand juries remain potentially the strongest weapon against big government and the threat of 'statism.'"

The following information is from an article entitled Note, *The Grand Jury—Its Investigatory Powers and Limitations*, 37 Minnesota Law Review 586 (1953), on pages 606 and 607.

"Since the grand jury is an institution born and nurtured in common law, it lacks in many ways the tools necessary for investigations in a modern society. Nevertheless, the grand jury is better endowed than the other investigative organs of government which are in some manner more limited in inquisitorial power than the grand jury. For instance, the public prosecutor may inquire into criminal matters but is in most jurisdictions without the aid of subpoena and contempt powers. A magistrate on the other hand has subpoena power but his investigations are limited generally by a specific charge and necessity of probable cause that a definite crime was committed by a designated person. Legislative committee investigations are at least formally limited by the requirement that they be made as a basis for future legislative action, whereas special administrative investigation board and commissions are generally confined to inquiries regarding specific irregularities."

[Continuing on page 607] "Further, all these investigatory bodies are more susceptible than the grand jury to obstructionist tactics such as perjured or evasive testimony and attacks on jurisdiction and scope of inquiry. Some states, realizing that the common law type of grand jury cannot continue to meet the competition of other investigatory agencies, have made rapid progress in providing the grand jury with the powers it needs in order to carry on modern day investigations. The grand jury has been permitted to use stenographers, utilize fully the office of the district attorney, initiate investigations on its own motion, and consider hearsay evidence. But there is room for improvement such as permitting the grand jury to employ its own counsel, accountants and detectives. Even if it should be considered that an extension of the present grand jury power is undesirable, a complete and thorough codification of these powers is needed and would be welcomed in most jurisdictions."

In an article entitled *Analysis of Criticism of the Grand Jury*, by Jerome Hall, Volume 22, Journal of Criminal Law and Criminology (1931-32), on page 692, the author, in criticizing the method of statistical formulation used by Professor Raymond Moley in his study of criminal prosecutions, makes some good rebuttal arguments to the statistics used by Moley which were also used as a part of the smaller study conducted by Mr. Morse. So for purposes of statistical rebuttal the Hall article can be useful for that purpose.

Further, on page 694, in Footnote 5, Mr. Hall criticizes the statistical method therein used by Morse as creating arbitrary classifications and on page 694 states:

"Yet, because of the technique employed one gets the impression that the bringing of a criminal action is a particular, methodical, clock-like operation; it ignores complexity of factors, psychological, economic, and political, that condition all prosecutions."

The following information comes from an article entitled *Grand Jury Proceedings: The Prosecutor, the Trial Judge, and Undue Influence*, comment by Roger T. Brice, in 39 University of Chicago Law Review (1972), page 762.

"Because the grand jury is generally thought to be a safeguard against unwarranted criminal charges, grand jury indictment has a more serious impact on the accused than does accusation by information. While a state's prosecutor acting alone may be suspected of political or personal motives, the public generally gives greater credence to the pronouncements of the grand jury, whose members are drawn from—and presumably represent—the community. Whatever the final outcome of his case may be, indictment can cause the accused loss of employment, lessening of community respect, and an expensive, time-consuming legal battle."

[Page 764] "But grand jurors today lack the intimate knowledge of community activity possessed by grand jurors of pre-urban society. They also lack the investigative tools now necessary to find evidence of crime. Allowing professional investigative agencies to gather relevant facts and present them to the grand jury through the prosecutor has increased efficiency in investigation and decision making periods. At the same time, however, it has made the modern grand jury a generally more passive instrument than its precursors. Grand juries now conduct their investigations almost exclusively within the confines of the grand jury room, rely almost entirely on the prosecutor to determine the subject matter and general direction of the investigation, and seldom issue documents unrelated to some specific criminal activity or malfeasance in office.

. The relative decline in importance of the grand jury as an independent investigative body underscores the continued importance of its remaining function: determining probable cause. The grand jury's independent judgment of probable cause serves as a basic check on prosecutorial discretion. Although there are agencies better able to detect crimes and to accuse individuals of having committed them, the grand jury is the only institution that can shield one wrongfully accused from the power of the state to bring individuals to trial."

[Page 767] "The powers of the grand jurors counterbalance and compliment those of the prosecutor. Grand jurors may extent or broaden the scope of the investigation, call for the production of witnesses and documents, question witnesses, and request legal advice from both the prosecutor and the judge. The power of the grand jury relative to that of the prosecutor is augmented by forbidding the prosecutor to comment on the weight or sufficiency of the evidence and by barring him from the grand jury room during the actual deliberations in voting."

[Page 769] "If the prosecutor has engaged in behavior that is likely to have had such a strong effect on the grand jurors that they would have been unable to

make an independent judgment, any indictment or report returned by the grand jury will be quashed or expunged regardless of whether the defendant can prove that the prosecutor's behavior did, in fact, result [continuing on page 770] in prejudice. Although these prohibitions do not affect the influence inherent in a well-prepared case, they free the grand jury from overt prosecutorial pressure to indict. If the defense attorney [continuing on page 771] does manage to discover specific acts of prosecutorial behavior that are proscribed by the undue influence doctrine, he may nevertheless be faced with substantial difficulty in proving his contention."

[Page 775] "In sum, because vigorous enforcement of the undue influence doctrine may be the only way to prevent the grand jury from being a "rubber stamp" for the prosecutor, neither unwarranted fears of grand jury harrassment nor questionable calculations of judicial economy should be allowed to hamper that enforcement."

[Page 781] "The grand jury exists to protect individual citizens from oppression by the state. The major danger inherent in the system is that it may easily be converted into a tool of prosecutorial oppression if the prosecutor and the trial judge do not conform their behavior to the standards of procedural fairness evolved by the appellate courts. Although these standards seem adequate to control prosecutorial behavior, several jurisdictions have severely reduced their effectiveness by excluding evidence of prosecutorial misbehavior and by refusing to extend the protections of the undue influence doctrines to the prosecutors' public statements."

[Page 782] "To protect the major remaining function of the modern grand jury—making an independent determination of probable cause for bringing suspects to trial—the grand jurors must be shielded from overbearing influence by the prosecutor. The undue influence doctrine requires that indictments be quashed when the prosecutor behaves in a manner that is presumed to influence the grand jurors' evaluation of the facts. This doctrine is well adapted to protect the independence of the grand jury's investigation from the prosecutor. Two changes in the courts' application of the doctrine are necessary, however, to make it truly effective. First, the grand jurors should be allowed to testify to acts of the prosecutor that may constitute undue influence. And second, the doctrine should be extended to the prosecutor's public statements, which may undermine grand jury independence to the same extent as direct statements to the grand jurors."

The following is from an article entitled *A Layman Looks at the Grand Jury*, by Robert H. Rawson, 4 Western Reserve Law Review 19 (1952). On page 22, the author states:

"If the present grand jury system is to be effective as a means of citizen participation in the administration of criminal justice, however, certain improvements should be seriously considered. The charge that the grand jury, in its function of holding hearings in felony cases, tends to be a mere rubber stamp for the prosecutor would be deprived of some of its force if independent counsel were readily available to the jury. At present, the prosecutor is the sole legal advisor of the grand jury. Only in certain extraordinary circumstances can the jury secure the services of counsel other than the prosecutor. In its report our grand jury recommended that independent counsel be readily available. The mere availability of such counsel would be an incentive to the prosecutor's office to function so effectively as to make it unnecessary to call upon independent counsel. The prosecutor should welcome the opportunity to secure independent corroboration for a legal ruling which he may have given the grand jury but upon which the jury might want an independent opinion. The theoretical independence of the grand jury would become more real if it could turn to someone other than the prosecutor for legal advice."

[Page 23] "The availability of independent counsel, a clear exposition on the subject of evidence, in a good indoctrination program have been suggested as methods of strengthening the grand jury for the effective performance of its function of holding hearings in felony cases."

[Pages 26 and 27] "One of the objectives of the secrecy statutes is to protect witnesses. Yet the list of witnesses subpoenaed is apparently available to newspaper reporters. They know in advance who is to appear before the grand jury and frequently publicize the fact. Under such circumstances the witnesses have little protection."

[Page 30] "Many regard the investigatory power of the grand jury as much more important, substantively, than its function of holding hearings in felony cases.

It is generally agreed, however, that the grand jury has not been able to exercise effectively this power of investigation. If the grand jury, therefore, is not to sink into "innocuous desuetude," vigorous steps must be taken to strengthen it. One of the most effective steps would be to free the grand jury from what seems to the layman to be an excessive dependence on the prosecutor."

[Page 31] "Some of the means of strengthening it suggested in this article, it is believed, would require changes in the law. These include providing for independent counsel, making funds available to the jury, changing the quorum in voting requirements, and, if not existing under present law, specifically giving the jury authority to conduct broad investigations and to submit written reports of its work. Other of the proposals for strengthening the jury require no legislation. These include tightening the enforcement of the secrecy statute, placing before the foreman the statements used as a basis for questioning witnesses, clarifying for the jury the weight of the evidence necessary for an indictment, improving the indoctrination of the jurors, and topping the practice of turning over to the prosecutor the voting records of the jurors. These objectives can be attained by cooperative action by the court, the prosecutor, and the grand jury."

From an article entitled Note, *Powers of Federal Grand Juries*, 4 Stanford Law Review 68 (1951); the author on page 70 states:

"It is said that in practice the United States attorney manages the proceedings of the grand jury. He selects, and in large part questions, the witnesses who appear before the grand jury. He determines what matters shall be considered, and the order of their presentation. Only rarely will a grand jury consider matters other than those presented by the United State attorney.

"The grand jury relies on the guidance of a United State attorney because of practical and legal limitations on the investigative abilities of a body of private citizens. In early days, the citizens who composed a grand jury could directly investigate community conditions, and make accusations based on their own knowledge. But modern crime is more complex. Expert assistance—counsel, investigators, accountants—is necessary to effective investigation. No existing statute or case authority allows a grand jury to seek assistance on its own. It is expected to rely upon the United States attorney's office, which can supply the investigative aid. Money is a restraining factor. The grand jury budget characteristically covers only fees of jurors and witnesses. This discourages any direct hiring of counsel and investigators. In addition, time is needed. Jurors are ordinary citizens, unskilled in criminal investigation, who devote only a limited part of their time to jury duties. These are powerful practical factors compelling reliance on the United States attorney's office."

[The remainder of this article is xeroxed from pages 76 through 78 in the file under "Grand Jury."]

In the case of *In Re Presentment of Special Grand Jury Impaneled January 1969*, 315 F. Supp. 662 (D.C. Md., 1970), on page 675 it said:

"The common law powers of a grand jury clearly include the power to make presentments, sometimes called reports, calling attention to certain actions of public officials, whether or not they amounted to a crime. The reasons for allowing such presentments or reports were eloquently stated by Chief Justice Vanderbilt, *In Re Presentment by Camden Grand Jury*, 10 N.J. 23, 89A. 2d 416, 443-444 (1952), as follows: "We are not unaware of a respectable body of authority in other jurisdictions that frowns on the exercise by the grant jury of its common-law right to make presentments of matters of public concern unaccompanied by indictments. In some of these jurisdictions the powers of the grand jury are governed by statute and the problem there is solely one of statutory construction, but such is not the case here. The practice imported here from England three centuries ago as part of the common law and steadily exercised ever since under three successive State Constitutions is too firmly entrenched in our jurisprudence to yield to fancied evils. If presentments of matters of public concern were found necessary in the public interest in the relatively simple conditions of English and colonial life three centuries ago, how much more essential are they in these days when government at all levels has taken on a complexity of organization and of operation that defies the best intentions of the citizen to know and understand it. What is not known and understood is likely to be distrusted. What cannot be investigated in a republic is likely to be feared. The maintenance of popular confidence in government requires that there be some body of laymen which may investigate any instances of public wrong doing. . . .

" 'Thus grand jury presentments of public affairs serve a need that is not met by any other procedure. The grand jury provides a readily available group of representative citizens of the county empowered, as occasion may demand, to voice the conscience of the community. There are many official acts and omissions that fall short of criminal misconduct and yet are not in the public interest. It is very much to the public advantage that such conduct be revealed in an effective, official way. No community desires to live a hairbreadth above the criminal level, which might well be the case if there were no official organ of public protest. Such presentments are a deterrent to official wrongdoing. By exposing wrongdoing, moreover, such presentments inspire public confidence in the capacity of the body politic to purge itself of untoward conditions.' "

In the case of the *United States* v. *American Medical Association*, 26 F. Supp. 429 (D. D.C., 1939); 28 F. Supp. 752 (D.C. D.C., 1939); 10 F. 2d 703 (D.C. Cir., 1940); 130 F. 2d 233 (D.C. Cir., 1942), cert. denied, 308 U.S. 599, 84 L. E. 502, 60 S. Ct. 131; cert. denied, 310 U.S. 644, 84 L. E. 1411, 60 S. Ct. 1096; 317 U.S. 519, 87 L. E. 434, 63 S. Ct. 326 (1943), on page 430 it is said:

"Considerations of public policy demand a lasting secrecy. Jurors are thereby inspired with assurance of security in discharging their important duties and restrained from impeaching their findings. Witnesses are encouraged to truth and frankness. Innocent citizens are protected against the stigma of complaints which upon investigation fail of presentment or indictment. Then, too, many courts have stressed as another reason for secrecy that it prevents an accused from securing testimony that the government expects to use against him at the trial."

The following information comes from an article entitled *The Propriety of the Grand Jury Report*, by J. Hadley Edgar, Jr., 34 Texas Law Review 746 (1956), at page 754.

"The three reasons for requiring this secrecy are: (1) To allow the grand jurors to perform their duties in confidence and without fear of retaliation by the accused or another interested party. (2) To obtain maximum disclosure by witnesses who would otherwise be reluctant to testify. But, so long as only the conclusion of the grand jury, rather than the witnesses names or their testimony, is published in the report, attainment of this objective is unimpaired. (3) To protect those who are under investigation from irreparable damage if no indictment is found. Absolute protection would prohibit all methods of communication by the grand jury."

The following information is from an article entitled *From Indictment to Information—Implications of the Shift*, by George H. Dession, 42 Yale Law Journal 163 (1932). On page 164 it is said:

"His successor in office, George Z. Meddalie, added with particular reference to federal grand juries: '. . . in many sections of the country Washington is regarded more or less as a distant agency. Unless the people through their own representatives are able to voice the local sentiment concerning the law, and the local sense of justice, they will feel decidely insecure, *and the Grand Jury is the particular body that breathes the spirit of the community.*' "

[That quote came from the article by George Mendalie, entitled *Grand Jury's Value—Presentments—Fraudulent Bankrupts*, 1931 in No. 9, The Panel, No. 2, at page 16.]

[The following information is on page 165 of the Yale article.] "However, accumulations of data on those points which did lend themselves to the method—i.e., speed, economy of operation, efficiency and rubberstamping, even in the artificial sense in which these had to be defined in response to the exigencies of the data—are apt to be quite disproportionately influential. Here, as elsewhere, the imponderable encountering the ponderable is likely to be honored chiefly in gesture. In the whirl of discussion eddies coming to being, sweeping together those tangible, measurable particles of data into masses which catch the focus of attention, relegating the incoherent intangibles to the out-of-focus. It is the familiar process by which, under compulsion of a feeling that the mind must be made up regardless, a problem susceptible of varied pose is transformed into a set of conventional issues which can be answered on the data at hand. Attention on both sides to date has, moreover, been concentrated on the alleged shortcomings of grand juries."

[The above statement was given in reference to the statistical study done by Moley in the article entitled *The Initiation of Criminal Prosecutions by Indictment or Information*, 29 Michigan Law Review 403, pages 410 through 412, specifically, and written in 1931. That's the end of the information from the Yale Law Journal article.]

Judge SESSIONS. Since the time of submission of my testimony in August 1977, of course the House of Delegates has met at the ABA meeting in Chicago, and, of course, the chairman has noted their action in connection with their own recommendations.

Additionally, my brother, the Honorable Judge Frankel, has written his book, along with his illustrious colleague. That book was only recently available to me. I have read it, and with great interest—as has the chairman, I'm sure.

Additionally, of course, there has been a good deal of notoriety attached with H.R. 94, and I would say this only as a characterization of my remarks here today. I respect the efforts of this committee to do what it feels compelled to do concerning the reform of grand jury procedures. My fondest hope in your struggle is that in doing so you will not impair the absolutely essential investigative ability of the grand jury. I, along with Congressman Sawyer, join in noting that there are abuses and there will be abuses in all halls of Government, but the abuse does not dictate that you impair or emasculate any given branch of power, and particularly the grand jury in it's investigative stance, Mr. Chairman. That, to me, would be critical.

I do not presume to have great expertise, but I do have strong feelings about the correctness and the rightness of what our forefathers did in insuring the availability of grand jury indictment. You know, and I know, that it is not necessary for a Federal prosecutor to proceed by indictment unless it is insisted upon—or waived or not waived—by a defendant. So, we have discussed briefly this morning with Mr. Babbitt the right of preliminary examination. Of course, if a charge is brought and the defendant is charged and requests, he has an absolute right to a preliminary hearing within ten days of his being charged unless the matter is presented to a grand jury.

And, as Congressman Sawyer notes, for the most part that's the way matters are handled unless the matter proceeds to the grand jury.

So, many of these things that are routine and handled by a U.S. attorney in a routine fashion, obviously, need not be presented to a grand jury. But it is in its stance as an investigative body that I believe the subcommittee is thoughtful and very careful in proceedings so as not to impair those rights and those obligations.

I came simply to respond to the committee, any questions that it might have, and I am here for that purpose and I'll do my best to respond to any questions that you might have.

Mr. EILBERG. Thank you very much, Judge Sessions. You've obviously done a lot of work on this matter and the subcommittee is indebted to you. In fact, Congress is indebted to you.

Judge SESSIONS. Thank you, sir.

Mr. EILBERG. In your statement, I'm advised, you say that you believe not that there have been, in fact, abuses of power and authority by individuals in relation to grand juries. However, you continue that these are not the result of weaknesses in the system or law.

Could you describe to us what kind of cases you received involving grand jury abuses?

Could you, also, describe what action, if any, you and other judges in your district have taken in your supervisory role over the grand jury to lessen abuses?

Judge SESSIONS. All right. In the first question, those cases where I have, in fact, received notice of abuse, I have received none at all. Now, you know that I am formerly a U.S. attorney, and you know that I am formerly with the Department of Justice, and I have heard, infrequently, of occasions where procedures were recommended in connection with Drug Enforcement Administration cases—that the Department recommended the bringing of targets before grand juries for harrassment purposes. It was not termed harrassment, but it, essentially, was that. I have never seen it, I have never heard of it actually being done.

Mr. EILBERG. Judge, may I interrupt?

I don't know the exact line before me, but counsel advises me that you state that, in fact, there have been abuses of authority—you refer to the fact that there have been, in fact, abuses of power and authority.

Judge SESSIONS. Oh, I simply accept that there must have been, but I know of none personally. I know of no cases that have been brought before the El Paso Division of the Western District of Texas and none before any judge in the Western District of Texas regarding grand jury abuse. I know of none.

Mr. EILBERG. So that you could not tell us more about what should be done about these abuses since they're not in your direct knowledge.

Judge SESSIONS. I don't know that I could respond to the question generally; I could say that I've had none, sir.

Mr. EILBERG. You oppose the section in H.R. 94 limiting to 6 months the maximum term to be served for contempt. The ABA is now supporting, and the Justice Department has agreed to, a 12-month maximum term.

Judge SESSIONS. Yes, sir.

Mr. EILBERG. Could you comment on this proposal?

Judge SESSIONS. Well, my general opinion—feelings—are compatible with those of Mr. Babbitt. I'm not certain what effect a 6-month or a year sentence would have. I know that I would join him again in saying that it is likely that any witness who is under great pressure from external forces not created by the grand jury to not testify, might well be persuaded that his best interest lie in not testifying and yielding, rather, to being imprisoned for a period of 6 months, particularly if it ends up being coupled in legislation with the inability of that matter being presented again to a grand jury, or of his being presented again to a grand jury, and held in contempt upon appearance and subsequent refusal to testify.

I would think that it would be unfortunate if, in those cases particularly involving systematic organized criminal activity, that a potential defendant were able to opt for a 6-month term of imprisonment rather than being compelled to testify.

Mr. EILBERG. The law provides for criminal contempt, that avenue is open; we don't attempt to preclude that in the bill.

Judge SESSIONS. Yes.

Mr. EILBERG. So I would raise the question: What is so vital about being able to have a longer period of incarceration for civil contempt, and reiterate that incarceration—when the government attorney can proceed through criminal contempt and provide the rights and privileges to the witness or the defendant?

Judge SESSIONS. Well, not to disparage any rights that would be available, or any procedures that would be available in connection with criminal contempt, you know, of course, that the procedure there is greatly lengthened, and a man is, of course, entitled to a jury trial in that procedure.

And, again, the purposes of the investigation might well, itself, be compromised; I do not know. The circumstances under which it can take place, Mr. Chairman, are varied. But I will say this, that it is a much more difficult procedure, not that when you are imprisoning somebody for their exercise of the right to silence, and they have taken that right and, understand, under a grant of immunity, it is a serious matter. And I don't mean to in any way detract from the right of trial by jury; it simply is much more difficult.

Mr. EILBERG. Now, judge, you oppose, in H.R. 94, the provision providing for judicial approval of immunity grants, including a hearing with notice and the right to counsel. We've been told repeatedly by witnesses that motions challenging immunity grants are filed today. In any case, where immunity is nonconsensual, why would immunity standards provide extensions of such hearings and increase work loads?

Judge SESSIONS. Well, of course the——

Will you give me the section, please?

Mr. EILBERG. Certainly. Take your time.

Judge SESSIONS. Could you give me the section of the bill?

Mr. EILBERG. Page 6 of your statement at the top. Do you want the section of the bill?

Judge SESSIONS. Yes, sir. Is it section 6003?

Mr. EILBERG. 6002—page 5 of the bill.

We'll give you a copy.

Judge SESSIONS. Yes, sir; I have that. Here, again, you're talking about the entire bill on immunity generally and the right of a witness to be represented by counsel in challenging an order of confinement. Or, are you talking about immunity in general?

Mr. EILBERG. Immnuity in general.

Would you like for me to repeat the question?

Judge SESSIONS. No, I'm familiar with the question. Several things relate here.

First of all, on page 6 of the bill, line 7—that is in section 6002—it indicates that:

> No order under this part shall require any witness to testify or provide other information prior to the day one week after the day on which such order was communicated to the witness, except that a witness may be required to testify or produce such information prior to such day if the court, upon a showing of special need, so orders.

Thereafter it talks about the "communication to the witness of any order under this part," and the right to counsel.

I presume that under that particular section, when a witness chooses not to testify that there will be not simply an immunity-type hearing, but that there would be an extended type hearing that would take—might well take extensive time in a one-judge court in a division, which most of the courts are, of course, in this country. You might well have an impairment of an entire grand jury investigation for an indefinite period of time in that circumstance.

Mr. EILBERG. My question is that we know that there are hearings being given today.

Judge SESSIONS. That is correct.

Mr. EILBERG. And my question really is, What's wrong with providing standards for those hearings?

Judge SESSIONS. I would say there would be nothing wrong with providing standards for those hearings. I would say that, as a timing factor, it could be a tremendous problem.

Mr. EILBERG. Taking the time of the judge.

Judge SESSIONS. Well, of course, the bill itself, Mr. Chairman, incorporates a number of additional responsibilities for it, and each of those adds to a considerable burden already carried and not the least of which is to speed trial requirements.

Mr. EILBERG. You complain in your statement about the requirements of H.R. 94 that "The grand jury should be told the subject matter of investigation and the criminal statutes involved." I would like to point out that these requirements only apply when such information is available, and to the extent available at the time of the summoning of the grand jury. With such limitation, are you still opposed to this provision?

Judge SESSIONS. Probably. I didn't state it as clearly as I could have. My main concern there, Mr. Chairman, was this: a grand jury, in a normal session—not in any special session—might be undertaking a number of investigations in a number of areas. For the court to require, then, of the U.S. attorney about each of those matters which he intends to present, and each law under which he intends to present it, and then explain to the grand jury the various laws that are being the subject of the grand jury investigation at that time, is a very burdensome thing.

On the other hand, if it is a special investigation of some sort, or if there is——

Mr. EILBERG. Would you explain, sir?

Judge SESSIONS. On the other hand, if it is a special investigation of some sort, or a special grand jury, obviously the court could easily carry that out with no problem.

Mr. EILBERG. You complain about H.R. 94's provision that a potential indictee be told of his right to testify or present evidence because you believe it could cause speedy trial problems. As I see the Speedy Trial Act, the 45-day rule only applies after an arrest: As most grand jury procedures occur prior to arrest, how could there be speedy trial problems?

Judge SESSIONS. Well, there well could be in connection with, for example, a normal drug conspiracy case if you had 20 people who were targets in a sizable drug conspiracy. It normally takes approximately 45 days for that matter even to reach grand jury after an arrest; and under those kinds of circumstances, it could well impede the ability to get to not only the indictment, but subsequently to trial on time.

Mr. EILBERG. That would be in a noninvestigatory proceeding.

Judge SESSIONS. Sir?

Mr. EILBERG. That would be in a noninvestigatory proceeding.

Judge SESSIONS. Well, no; what could happen is, those matters are not—well, yes, in your sense; I agree with that. I would agree with that; yes.

Mr. EILBERG. Mr. Sawyer.

Mr. SAWYER. Just one or two questions.

I just want to concur in the judge's observation, that while heard these horror stories, again, 30 years of extensive trial practice in both the eastern and western districts of Michigan, where in the eastern part—together with the State—we have some three grand juries in operation all the time—always one in the western district. So, over the period there have been a lot of them, and I haven't heard of any abuse either with the grand jury.

I'm sure that when you take the number of grand juries that are in operation in the United States at all times, it's awfully minimal, although you can single out a few—make them sound like national disasters.

In your experience, do you have any feeling about why a defendant would be prejudiced at all by the presence of the ex parte system of minimizing? It just doesn't seem to me the defendant would have any legitimate objection of being granted immunity.

Judge SESSIONS. If you're speaking of circumstances about which General Babbitt spoke, that is informal immunity as opposed to a formal grant of immunity.

I can conceive of circumstances where a defendant in a large criminal conspiracy—where he has a number of people who are working with him, and he has been the one who has been tagged, and the arm has been put on his shoulder to come to testify—and he has been granted immunity, I can understand great indecision on his part as to whether he would take the grant and testify or suffer contempt and go to jail. I can envision very easily a great fear and trepidation on the part of that witness to accept immunity and testify.

Mr. SAWYER. But I wonder—I'm just curious—because I've listened to the discussion on this, and I don't see any legitimate reason why a defendant who was going to be immunized has to have an opportunity to be heard and test his immunization. I would recognize he may have some very practical, but not legally cognizable, reasons as to why he would prefer not to be immunized. But his legal rights certainly aren't—could not be—impaired by the granting of immunization.

Judge SESSIONS. Well, I would agree.

Mr. SAWYER. That's all I have.

Mr. EILBERG. Judge, you complained about a requirement that exculpatory evidence be made available to the grand jury.

Judge SESSIONS. Yes.

Mr. EILBERG. Again, I note that the Speedy Trial Act would not apply until after the arrest, and most grand jury investigations lead to indictments which precede arrest.

On the merits, it is presently the ethical responsibility of prosecutors to produce exculpatory evidence to the grand jury—detailed in ABA Standards on the Prosecutory Function—why is this anything more than legislative enactment of the standard?

Judge SESSIONS. Well, I think it's a matter of timing, Mr. Chairman. As you know, *Brady* v. *Maryland* requires production of exculpatory material, and by the time the Government rests its case—closes its case in chief. It must be supplied by that time. And if it is not, of course, then the prosecution suffers the ultimate possible pain and penalty of losing its prosecution totally for failure to comply.

If you get into—in a grand jury forum—a circumstance beyond the simple finding and seeking of probably cause and, in the investigative stance, get into the presentation of materials that you may have at that time—or, possibly should have at that time—that are exculpatory in nature, I think, as Judge Lacey observes, you can convert the grand jury proceedings into a minitrial. It is not an adversary proceeding; it is not a guilt or innocence proceeding; it is a probably cause proceeding. And I would question the advisability of it, particularly when there will then come into question what materials were actually available and what were not available.

I believe that a conscientious prosecutor, discussing with the grand jury matters which he believes will impair the prosecution, is the custom rather than the exception. If the prosecutor has a problem with his own view as to whether or not the indictment should be returned, then the chances are the prosecutor will discuss that with the grand jury, and it will probably include, basically, exculpatory material. But, as to the requirement that it be furnished at that particular stage, I would think that the committee would be better advised not to do it.

Mr. EILBERG. On the same subject, presently motions are filed pretrial complaining about the failure to present exculpatory evidence. Would not H.R. 94, by this requirement, decrease the number of such motions filed later and, thus, lessen delay?

Judge SESSIONS. It could, obviously, if the material was there. It involves, of course, a myriad—or an indefinite number—of motions or matters because of questions, whether or not it was available at that time. It well might not be available to prosecutors at the grand jury proceedings.

I would go back, Mr. Chairman, again to the purpose—the bedrock purposes—of the grand jury, and that is not basically an adversary proceeding but a probably cause proceeding to see whether or not an indictment should be returned at all.

Mr. EILBERG. Judge, I disagree, of course, with your objection to our provisions providing for counsel in the grand jury room.

Judge SESSIONS. Yes.

Mr. EILBERG. With the exception of some Federal judges, a few prosecutors—and some members of the subcommtitee may wish to correct me as far as my recollections are concerned—and some others, there is substantial agreement that providing for counsel in the grand jury would lessen disruptions, speed up the investigatory process, provide a check on improper prosecutorial actions, and, generally, insure fairness. The ABA, by vote of over 2 to 1, has recently endorsed H.R. 94's provision providing for the presence of counsel to give advice only. Both the ABA recommendations and my bill would provide for removal of disruptive counsel and counsel who might have a conflict of interest.

I must say that I cannot quite understand why you and the District Judges Association oppose this provision. Would you explain?

Judge SESSIONS. First of all, as far as the right to counsel, it is a cherished right, and nobody disputes the aid to any person in his time of need—to have counsel there. When you go into a grand jury room, however, and if you have that right to counsel, you have the right to counsel of your own choice. And if, in fact, that counsel for some reason becomes disruptive or goes beyond the powers enumerated in the bill, it may be necessary for the court to act to remove him—which is one circumstance that might arise. If the court were to do that, does he deprive the witness of the right to counsel of his own choice?

That's one small part; that's not the major cause of my concern. The major cause of my concern arises from a conflict of interest, Mr. Chairman. There are, again, circumstances where there are multiple potential defendants, or there are witnesses who may have corporate counsel, or may have counsel whose real interest is not, necessarily, that of the particular witness who is a prospective defendant. And to allow—and to require—counsel to be there in the grand jury room, where you are seeking only probable cause—to see if there is probable cause—invites what you are allowing to happen if a counsel may reveal to his clients and is not bound by the secrecy that traditionally follows the grand jury. And one of the provisions of your bill, of course, relates to secrecy.

Again, counsel for the witness has the ability to facilitate that without any problem at all.

Mr. EILBERG. Mr. Hall.

Mr. HALL. Judge Sessions——

Mr. EILBERG. Mr. Hall, would you yield for just a moment? Would one of the members be kind enough to make a motion that we have unanimous consent for photographs to be taken?

Mr. SAWYER. I so move.

Mr. EILBERG. That motion is granted.

Excuse me, Mr. Hall.

Mr. HALL. Judge, if you will turn to page 12 of this bill, which is section 3329 dealing with the "'Rights and duties of grand jury and attorney for Government," where it speaks of the impaneling of a grand jury, you will find listed 9 subjects that a judge charges a grand jury concerning its duties, and obligations. Of the 9 listed—appearing on pages 12 and 13—how many of these subjects do you charge when you impanel a grand jury?

Judge SESSIONS. Well, No. 1, No. 3, No. 4, No. 7, No. 8, and I would put the catch-all No. 9. There are a number of things about which the grand jury is instructed, most specifically concerning the nature of its own obligation.

I invariably, Mr. Congressman, inform a grand jury that the indictments which may be returned, if any, are not the indictments of the prosecutor, of the U.S. attorney; that they are, in fact, their indictments if they are returned at all, and they must, individually, make up their own mind as to whether or not there is probable cause; and that they should not hesitate if they have question, or if they are hesitant, to express that in the grand jury; and that, in fact, when an indictment is returned, the court needs to know that when 20 or 23 votes of those people are noted, each of them, individually, has done that.

Now, there are other general instructions that I give, but——

Mr. HALL. I understand.

No. 6, which you did not indicate that you instructed on, with reference to "the criminal statute or statutes involved, if these are known"——

Judge SESSIONS. Yes, sir.

Mr. HALL [continuing]. "At the time the grand jury is impaneled," and drawing upon your experience as a Federal district attorney, and as a Federal judge, have you had situations arise where at some point during the grand jury investigation matters came up that were not know, to you as a district attorney when that grand jury was first impaneled?

Judge SESSIONS. Yes, sir, very definitely. It is routine.

Mr. HALL. If a court had to instruct a grand jury on the law and the statutes involved, could that not become an insurmountable task and slow the processes of a grand jury?

Judge SESSIONS. I don't think there's any question but what it could, depending upon what statutes were involved. As U.S. attorney in my own particular district I followed the procedure, always, myself, individually, and required the assistant U.S. attorneys to do so, to always inform the grand jury of the exact statute on which they were proceeding at that paricular time if they knew.

And investigative grand jury, as you note, may welcome information on additional violations that relate to matters not known at that time.

Mr. HALL. And do you, under the provisions as set out in this act, contemplate that that would call upon the court at that time—whenever it was made known to him that additional matters were being brough up before the grand jury—to stop the proceedings and go into No. 6 and tell the grand jurors what the criminal statutes are or what might be involved in addition to what you had already instructed them at the beginning?

Judge SESSIONS. Well, in all likelihood, the court would not know unless the court instructed the U.S. attorney or the foreman of the grand jury that if, in fact, the matters being investigative went beyond the statutes which were explained that they should inform the court.

Now, Judge Campbell, you know, as I noted in my testimony, long ago talked about the nature of the grand jury. Of course, the court appoints it, but it is basically executive in its function, and there is always the problem about the separation of powers—invading the province of the grand jury.

I don't object, you understand, to the carrying out of No. 6. I think it is simply extremely burdensome and probably not necessary at all.

Mr. EILBERG. Would the gentleman yield?

Mr. HALL. Yes.

Mr. EILBERG. I just call attention—our opinions may very well vary—but as I read section 3329, page 12, it says that upon impanelment the court shall do these various things. And it's not the intention of this bill, as I view it, for the judge to keep advising the grand jury as to laws that are enacted or that come to his attention.

Please proceed.

Mr. HALL. All right.

Judge SESSIONS. If I might respond, Mr. Chairman.

Mr. EILBERG. Of course.

Judge SESSIONS. Again, you note the words, "upon impanelment." Again, a grand jury is impaneled to act for 18 months, which, again, leave the court wide open as to what they might choose to investigate or any of the various codes—United States Code, et cetera.

It seems to me that the provision should be eliminated altough, as I say, I think it's incumbent upon the U.S. attorney, when he has knowledge of a particular statute, to inform the grand jury of exactly under which statute he is proceeding.

Thank you.

Mr. HALL. All right, continuing, if——

Excuse me just a minute.

Judge SESSIONS. I understand.

Mr. EILBERG. We have another minute or two; the second bell has not rung.

Mr. HALL. All right.

I have a few more questions, Mr. Chairman, if I may wait until we get back from the vote to proceed.

Mr. EILBERG. If Judge Sessions will be kind enough to remain until after the recess.

Judge SESSIONS. Yes, I will.

[Recess.]

Mr. EILBERG. The subcommittee will come to order, and as we left Congressman Hall was proffering some questions.

Congressman Hall.

Mr. HALL. Judge, I think we were discussing No. 6 of H.R. 3329, and it was indicated by the chairman of this subcommittee that it was not the intention of H.R. 3329 that the court would find it necessary to charge a grand jury other than when that grand jury was impaneled, which I'm glad to know.

Now, one or two things further, we have a provision in this law dealing with a witness having a lawyer in a grand jury room with him during the interrogation. As it is now, he is entitled to representation outside——

Judge SESSIONS. That is correct.

Mr. HALL. The grand jury room.

I cannot help but think of some lawyers that you and I know in Texas, and some who are out of Texas, who could make a shambles of a grand jury investigation if they were allowed to sit in the grand jury room with a witness, by constant interruptions, because the court is not present, although—the district attorney would be present.

But can you see any good—and I mean that literally—concerning the overall proceedings of the grand jury, to have an attorney in the grand jury room with the witness at all times?

Judge SESSIONS. Obviously, for the witness himself, the presence of counsel would be a great comfort. I think anyone appearing before a grand jury could well be comforted by the fact that his attorney was there. I think, however, the need of the grand jury—and the problems are, I think, likely to arise from the presence of counsel, some of which we have discussed—outweighs the need for presence of counsel. I would think a U.S. attorney or assistant U.S. attorney would be derelict—and I have read some cases where the court, where the U.S. attorney, has refused to allow a witness to exit the grand jury room

and talk with counsel, but I believe any U.S. attorney or assistant U.S. attorney would be derelict—in disallowing any witness at any time to step outside to talk with his counsel.

Mr. EILBERG. Would you yield?

Mr. HALL. Yes.

Mr. EILBERG. Does the judge know of any cases where any U.S. attorney has been censored for any conduct like that?

Judge SESSIONS. No; I have only read—and I apologize for not being able to give the citation—of a U.S. attorney who refused—it was probably in Judge Frankel's book where I read it—refused to allow the witness to exit the grand jury room, but insisted that he answer, and instructed the grand jury foreman to discuss it with him, and he did, and they did not allow him. I think it was in Judge Frankel's book; you have the co[illegible]her here and he may be able to allude to it. But I know of none, personally; no, sir.

Mr. HALL. Don't you think that if the grand jury proceedings were transcribed in its entirety, that that would go a long way toward getting into fraudulent actions on the part of the district attorney or assisant, in not allowing a person to consult with his attorney outside of the court room?

Judge SESSIONS. I would think, obviously; again, the record would be there for review, and when records are available for review, it tends to require anybody—or tends to straighten anybody out and take those conservative actions they should probably take. I would think, yes.

I don't agree with the recording of all grand jury testimony, and you know that I don't; but my view of it is more on both the cost and the availability of the transcript.

Mr. HALL. I think that any proceeding of that nature should be transcribed, as it is a hearing—whether it be a pretrial matter, which are not transcribed in the easern district of Texas, and I don't think would be in your district either unless requested by the parties. But I certainly believe the transcription of grand jury testimony would go a long way toward doing away with some of the evils that we are talking about, however fraught we may be with those evils and whether or not it's something that is not as prevalant as we might understand it is.

Now, you mentioned one thing a moment ago that I differ with you, and that is dealing with exculpatory statements in the grand jury proceeding. Now, you indicated—and rightfully so—that, the purpose of a grand jury, is to deal with probable cause, which is correct. But in looking back over about 30 years of practice in the State and Federal courts of Texas and Louisiana, I can envision some instances where, if the exculpatory statements of a witness or a prospective defendant had been allowed before a grand jury, that it might have—probably with some degree—have mellowed the basis for probable cause, and maybe a grand jury would not have indicted that person.

As you and I well know, when a district attorney is seeking an indictment, he is not going to volunteer anything that is going to hurt his case. That is commonsense. I know that, and you know that.

But I do believe—and I know in the State proceedings—that if the district attorney introduces a statement, that he's bound by those exculpatory statements that are in that statement that goes before a

court or jury. And, in many instances, exculpatory statements are so powerful that a basis for probable cause might be diminished.

I understand you don't desire to get into the adversary proceeding in a grand jury hearing, but don't you think that the introduction of exculpatory information may be of value to a group of men or women sitting there trying to determine whether to return a bill of indictment against this individual?

Judge SESSIONS. Oh, I would have to agree that, undoubtedly, that if they were acting as a petit jury it would be very helpful, and it probably would be helpful in the grand jury on whether or not to return an indictment.

But I think, at the same time, the effect of it and the problem for the court dealing with those exculpatory statements that were made—reviewing the records, going back in, making of motions—filing of motions—by counsel to review those—I think those burdens are a very great burden, and the question comes as to whether or not it is all given—at what stage it is properly given—and whether the indictment is effective if afterward there was more exculpatory material found.

I think it is opening a "can of worms," but I agree with you. Yes, obviously, if a grand jury had the exculpatory material that a petit jury might receive, they might not return an indictment, just like a petit jury might not find guilt. But that is not the purpose, again, of the grand jury.

Mr. HALL. It's not the purpose of the grand jury solely to return a bill of indictment either.

Judge SESSIONS. Well, that is correct, but its function is to see whether or not there is probable cause to believe reasonably there has been a crime committee. That is the purpose of it. It is an accusatory body, and that is its function, and we reserve the other function—that is guilt or not guilt—to a petit jury, trial by one's peers.

But, again, I would have to agree with you, Congressman, that obviously it could affect them, it could be meaningful. A U.S. attorney who knows that he is going to reveal those matters—which he must under the law—if he goes to indictment and there is an indictment returned, and he himself feels the exculpatory revealed is so great, he knows that at some place he is going to pay the price for not giving it and the chances are he will.

Mr. HALL. It would be better from the standpoint of a defendant and overall justice, to get that issue out of the way at the very beginning.

Judge SESSIONS. That could well be, sir, but I would not advise doing it.

Mr. EILBERG. Judge, I respect you very much, and the Congressman from your district is well represented. We have some basic disagreements—really basic—as to what the grand jury role is. I think it should also be a place of protection against an overly zealous district attorney or administration. I mean, you seem to completely ignore that or minimize that. It's just the basic different conception of the purpose of the grand jury.

Judge SESSIONS. Oh, I don't—We haven't addressed that particular portion of it at all, Mr. Chairman. I would have to agree with you that an overly zealous, hammering, prosecuting U.S. attorney can be

a very unfortunate thing. I think that that is a problem we have not yet discussed, and if you choose to, I'll be pleased to.

Mr. EILBERG. All right, I would like to hear your reaction to that question. What responsibility does the grand jury have to the community as a whole rather than to the district attorney?

Judge SESSIONS. First of all, the U.S. attorney is appointed by the President of the United States with the advice and consent of the Senate. He is appointed for a 4-year term although he may not serve it out. He has, I think, the often quoted responsibility to strike hard blows though not unfair or foul blows. He has an obligation to present those matters to the grand jury which he believes will bring to their attention the possibility of crimes that have been committed.

In an investigatory grand jury he may conceivably have outside political interests, and I understand that. He must ignore those. His responsibility is not to strike political blows, but his responsibility is to bring to the attention of the grand jury the possibility of commitment of crime.

Now, if he, through his office, pushes—shoves——

Mr. EILBERG. If I may interrupt. You've already said you're not aware of any U.S. attorney being abusive in any way.

Judge SESSIONS. No; but you were predicating your question upon an overzealous grand jury—pardon me, an overzealous prosecutor; and I was saying if they do exist, if there is one, it is not proper for him to be in that capacity.

He does not participate in their deliberations; therefore, he does not, outside of the deliberations, set a stage that will enforce his own views purely for improper purposes. If he believes an indictment should be returned, that he should respond, he should not force and he certainly should not be overzealous.

Of course, the question of over zealousness is a relative analysis.

Mr. EILBERG. Judge Sessions, we're indebted to you for your very sincere, clear comments this morning. We're glad you came, and thank you very much.

Judge SESSIONS. Mr. Chairman, you have honored me by allowing me to come and speak with you, and I appreciate your allowing the time. Thank you. It's a pleasure to meet with you.

May I be excused?

Mr. EILBERG. Yes, sir.

Judge SESSIONS. Should I deliver this to the secretary? To whom should I deliver it?

Mr. EILBERG. Right over here.

Judge SESSIONS. I have signed a copy, sir.

Mr. EILBERG. Thank you again.

Our next witness will be Mr. Sager, former U.S. attorney for Virginia.

Mr. SAWYER. Mr. Chairman, may I just make a legislative inquiry?

Mr. EILBERG. Certainly.

Mr. SAWYER. I read Mr. Sager's statement, and it seems to me—and particularly with respect to a named U.S. district attorney there—that proposing to take his testimony in a public hearing would violate rule X(k)(5)(A) of the House Rules, which, in effect, says: "If the committee determines that evidence through testimony is investiga-

tive, hearing may tend to defame, degrade or incriminate any person, it shall be able to receive such evidence and testimony in executive session."

And, as I read the testimony of Mr. Sager, it most certainly does that.

Mr. HALL. Mr. Chairman, I agree. I certainly agree with Mr. Sawyer that it could be.

Mr. EILBERG. Well, the question, that I have just discussed with counsel, is if the witness does not relate his experiences with names, then it would not be—I would suggest that the witness talk about the problems without naming the individuals, or at least naming the experiences as much and identify them in an identifiable way. Is that in agreement?

Mr. SAWYER. I just presumed he was going to give the testimony in this way.

Mr. FISH. Mr. Chairman.

Mr. EILBERG. Mr. Fish.

Mr. FISH. I question the circulation of the testimony today. In other words, do members of the press presently in the room already have a copy of this?

Mr. EILBERG. Since there is—I can't answer that question. I don't know that the statement itself relates any answers that would be meaningful in connection with individual names other than the fact that he feels that the individual has done a wrong thing.

If it's the wish of the subcommittee, I'd be glad to close the meeting.

Mr. SAGER. Mr. Chairman, I'd be happy to refrain to making any reference to that particular name. That will not disrupt my presentation.

Mr. SAWYER. Well, either by name or by identifiable, personal experiences, that could be easily identified.

Mr. EILBERG. I think—If I may, Mr. Sager, we are interested in getting the fullest possible benefit of your testimony, and if we keep the meeting open excluding information that might be useful to us in preparing this legislation or reviewing the legislation, I don't think that we're acting in the national interest.

Do I have a motion that we close the meeting?

Mr. SAWYER. I so move.

Mr. EILBERG. Any objection?

Mr. SAGER. I did not intend to mention his name during the actual presentation.

Mr. EILBERG. There's nothing wrong with that, but its certain that the Chair is interested in everything you have to say or wish to say.

We will pause and ask the public, obviously not wishing to offend anyone, we will have to ask everyone to leave during this portion of the hearing.

I'm advised there has to be a rollcall vote on this. All of those in favor please say aye.

[Chorus of ayes.]

Mr. EILBERG. Oppose nay.

[No response.]

Mr. EILBERG. The ayes have it, then, I assume. Mr. Sawyer, Mr. Fish, Mr. Hall voted on it—as I have.

This is not to be taken as a criticism of you, Mr. Sager.

[Recess, the open hearing to reconvene following a closed session.]

[On November 3, 1977, the subcommittee voted to open this session and to include Mr. Sager's testimony as part of the hearing record. The committee also voted to supply the Department of Justice a copy of the transcript and to allow them to respond. Mr. Sager's testimony; the letter to the Department of Justice, and the Justice Department's response follow:]

GRAND JURY REFORM
Closed Session

THURSDAY, OCTOBER 13, 1977

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP,
AND INTERNATIONAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 11:25 a.m. in room 2237, Rayburn House Office Building, the Honorable Joshua Eilberg (chairman of the subcommittee), presiding.

Present: Representatives Eilberg, Hall, Fish, and Sawyer.

Also present: Garner J. Cline, Arthur P. Endres, Jr., Martin H. Belsky, counsel; Peter Regis, legislative assistant; and Alexander B. Cook, associate counsel.

Mr. EILBERG. Mr. Sager, we have received and read your testimony. It's most fascinating. We look forward to hearing from you.

Mr. BELSKY. We have a staff member present from Congressman Harris' office, Mr. Chairman.

Mr. EILBERG. Is there any objection to allowing a staff member from Mr. Harris' office to be here? He's on the subcommittee.

[No objection was heard.]

She may stay.

Mr. SAGER. Is it permissible for my wife to remain so that I won't have to explain everything to her on the way home?

Mr. EILBERG. If you don't mind, we'd prefer that she not be here.

Mr. SAWYER. I might say, Mr. Chairman, that I wouldn't have any objections to his wife being here, because it's obvious he's said all the same things to her at one time or another.

Mr. EILBERG. Would you bring your wife back in. We are sorry if we have caused you any embarrassment. We did not intend to do so. We're most anxious to have your contribution. You have had extraordinary experience, according to your statement, and, frankly, we wish that you'd just not be inhibited but just let us have it.

Please proceed.

Mr. SAGER. Thank you, Mr. Chairman.

TESTIMONY OF RODNEY SAGER, FORMER U.S. ATTORNEY FOR VIRGINIA

Mr. SAGER. As I indicated at the beginning of my written statement, my background includes serving almost 7 years as an assistant U.S. attorney.

Mr. EILBERG. Without objection, since you're not reading your statement, the statement will be made part of the record—without objection.

Mr. SAGER. Well, I'm going to paraphrase my statement.

Mr. EILBERG. That's fine, but we just have to have the statement on the record. You just proceed in your own way.

Mr. SAGER. Thank you, sir.

[The prepared statement of Mr. Sager follows:]

STATEMENT OF RODNEY SAGER

THE POWER TO DESTROY

MEMORANDUM ON THE GRAND JURY

Introduction

For almost seven years, I served as an Assistant United States Attorney for the Eastern District of Virginia; and, for two of those years, I served as Senior Assistant in charge of the Richmond, Virginia, office. During this time, and incident to my responsibilities in this position, I personally attended and/or supervised approximately 100 separate grand jury sessions, which return approximately 1,000 criminal indictments. Additionally, I participated in and supervised numerous investigatory grand jury sessions giving rise to major fraud indictments. In such capacity, I participated in the direct examination of literally hundreds of individual witnesses before the grand jury.

One of my major responsibilities during the last several years of my association with the Justice Department was the responsibility of overseeing major fraud investigations. The last grand jury of this nature which I supervised was that leading to the nationally publicized indictment of Allied Chemical Corporation regarding Kepone poisoning within the State of Virginia. In addition to this experience within the Department, I also have served as a law clerk to a federal district judge and as an attorney in private practice with substantial participation in defense of criminal cases within the State of Virginia.

Perhaps more important than all of the above, I had the sobering experience of being a witness subjected to approximately 15 hours of interrogation and harassment by one of the Department's most publicized prosecutors, Guy Goodwin. That experience alone enables me to speak to the workings of our historic system with an insight that appears to be totally lacking in the presentments of Departmental officials opposing grand jury reform. It is imperative that the truth be known as to the actual daily functioning of the present federal system.

The "power to destroy" is herein offered upon my experience as a law clerk, a prosecutor, a defense attorney and a witness. The context of these remarks accepts the unfortunate truism that the prosecution and conviction of everyday street crime, including drugs and violence, is difficult at best. While the typical bank robber and drug pusher may not be initimidated by interrogation, there is a group of investigations, sometimes referred to as political or white collar, wherein our system has clothed the prosecutor with the overwhelming power to destroy.

H.R. 94—GENERAL REMARKS

I have reviewed with interest previous Departmental submissions to this committee including the testimony of individuals such as former Attorney General Edward B. Levi. I am disappointed that many of the remarks from persons opposing reform are predicated mainly upon theory and historic perspective and conveniently avoid the realities of the everyday functioning of federal grand juries throughout the country. Examples of theoretical references include phrases such as, "the grand jury functions as a barrier to reckless charges," and "the grand jury is both a sword and a shield." Of particular interest, is the following statement of Mr. Levi:

For centuries, the grand jury has operated as the voice of the citizenry in the criminal justice system. It is this which has accounted for its historic vitality, and it is the "independence, alertness, and common sense" of the grand jurors themselves which must ultimately be relied upon to prevent the erosion of this important institution.

The Department of Justice has a special responsibility with respect to the grand jury. Like the traditional role of the grand jury itself, the responsibility is twofold. As the prosecutorial agency of the Federal Government, the Department needs the effective investigative mechanisms which the grand jury can provide. But the Department also has the duty to preserve and protect individual rights guaranteed by the Constitution.

The simple fact is that today's system clothes a prosecutor with virtually unbridled power. The historic comments compared to the realities of today show that the so-called functions of a grand jury in being a protector of individual's rights is meaningless. To the contrary, the person protected by this system is the prosecutor. In my approximately 1,000 indictments, I had no more than five no-true bills, and in those instances, the negative action was specifically requested by my office. In complicated investigations involving witness examination, grand jurors yield almost completely to the will, advice and actions of the prosecutor.

Of extreme importance is the "little treated" situation of the young lawyer who becomes a federal prosecutor and finds himself in an awesome position of power. A lack of experience and a lack of empathy produces a number of prosecutors who many times unwittingly take advantage of the situation in which they have been placed. The over-aggressive prosecutor is a reality of this system and ironically is created by the very same grand jury system that was meant to protect against such a happening.

Many times I have overheard well meaning prosecutors brag about raking witnesses over the coals, causing witnesses to sit and wait for long periods of time to teach them lessons, and how they ridiculed and destroyed certain witnesses before a grand jury proceeding. One individual in particular has been the target of numerous publications detailing his numerous abuses of the system, yet he remains with impunity on the federal payroll. Guy Goodwin is an example of what our system breeds, and, yet, the Department, who speaks of protecting witnesses, continues to protect Guy Goodwin. The question can only be asked of the well meaning representatives from the Justice Department—why?

I will be pleased to respond in detail about the abuses I have seen and of my confrontation with Mr. Goodwin, but I do not wish to unduly lengthen this written presentment. With respect to H.R. 94, my feelings, where appropriate, are as follows:

Recalcitrant Witnesses § 1826(2):

This section reduces maximum confinement for refusal to comply with the provisions therein to a period not to exceed six months. From past experiences, I would suggest that there would be a number of witnesses that would be content to serve only six months in exchange for failure to testify. Simply speaking, this particular provision is too lenient to achieve the needed purposes of obtaining testimony, and I would accordingly request the committee to reconsider and increase the provision to at least twelve months confinement.

Witness Immunity § 6002:

The thrust of this section is of course to grant "transactional immunity" where "use immunity" now exists. The issue is a difficult one to address, as the present use immunity with proper safeguards does seem to have an additional incentive for truthful testimony by a witness. As an extra incentive for a witness to cooperate, assuming the Congress passes this provision granting transactional immunity, would be to allow for the prosecution of obstruction of justice in addition to the listed areas of perjury, giving a false statement, or for otherwise failing to comply with the court order. Perjury is difficult, at best, to prosecute and prove, and a skilled witness can be evasive and therefore not give meaningful testimony after his grant of transactional immunity. Under those circumstances, there might well lie a proper charge of obstruction of justice for purposes of prosecution and would therefore set forth the additonal incentive of which I have made reference.

My office on a number of occasions was frustrated by difficult witnesses wherein we found that the restricted area of perjury or giving false testimony did not technically or literally apply, but where the broader range offered by obstruction of justice did in fact have meaning and application. An amendment, therefore, to this issue would be meaningful in light of the results sought to be achieved by the granting of transactional immunity.

Violations of Grand Jury Secrecy § 1512(c)(3):

It is unclear by the present language allowing an attorney to publicly disclose matters concerning his client's testimony as to whether the historical client/attorney privilege controls; that is, whether this section allows the attorney to so disclose with or without the consent of the client. To avoid misinterpretation, language should be added stating that such disclosure can only be made by the attorney upon the written consent and permission of his client. This brief addi- so disclose with or without the consent o fthe client. To avoid misinterpretation, and conflicts and would enure without question to the benefit of the witness.

A brief additional thought might be to impose a 30 or 60 day time limit during which no such disclosure could be made, so as to allow an investigatory session to proceed with other material witnesses without exposing a particular area then under investigation. There are instances where premature disclosure by a witness or his attorney might adversely affect the ability of the grand jury to obtain meaningful testimony on a given point from other sources.

Rights and Duties of Grand Jury and Attorney For Government § 3329(b)(2)(B):

This section refers to giving notice to so-called "target defendant" so as to allow him the opportunity to testify and present evidence. This section does not, however, distinguish between the normal situation wherein an indictment is based solely on the testimony of government agents as opposed to the so-called investigatory grand jury where individual witnesses other than government agents are subpoenaed, I am advised that the intent of this committee is to limit the notice provision to the latter situation. It is therefore imperative that language be added to this section so as to avoid misunderstanding and the attendant problems of a court ruling that notice must be given in all situations. Needless to say, such a notice required in all situations, would be oppressive and literally unworkable.

Appearance of Counsel With Witness Before Grand Jury § 3330A:

Allowing the presence of counsel within the grand jury is excellent and is a long overdue safeguard both for the rights of the witness and for protection against the over-aggressive prosecutor. Past experience clearly indicates that the presence of such an individual will have a meaningful impact upon the conduct of the prosecutor. A clear example is my recent appearance before a Virginia state grand jury session as counsel for a client under investigation. During the course of that proceeding, one of the prosecutors began laughing at my client's testimony and, in fact, responded with a joke and a critical comment. A brief exchange between the two of us brought an apology from him and quickly terminated the improper and unneeded conduct in line of inquiry. I might add that my appearance in no way hampered the investigation of the state grand jury and, in fact, expedited same inasmuch as I could confer immediately with my client rather than him leaving the grand jury room for every needed conference with his attorney.

I do have a suggestion with respect to subparagraph (d). Giving the court power to remove an attorney under certain circumstances. The current draft refers to removal and replacement where necessary to insure that the activities of a grand jury are "not unduly delayed or impeded." Under normal interpretation, such language does not address itself to the situation where one attorney seeks to represent numerous clients as to the same investigation before a particular grand jury. Federal courts in some instances have reversed criminal convictions, holding that such dual representation is tantamount to ineffective assistance of counsel. Likewise, federal law allowing the appointment of counsel in indigent cases speaks to the issue that only one attorney can be appointed per client. Under these circumstances, additional language should be added that the attorney shall not represent more than one client in the same general investigation.

Subpenas § 3330B(c)(1):

I must take issue with this one section granting district courts with concurrent jurisdiction as to motions to quash a given subpena. Briefly speaking, I would suggest that such a procedure might well be disruptive of the entire process and is not warranted by the rare situations that might give rise to an abuse allowing for the granting of such a motion. The only exception might be a severe medical

condition wherein such a procedure would have meaning. Other than this point, I would yield to the arguments submitted through the submissions of other witnesses to this committee.

Recording of Grand Jury Proceedings; and Availability of Grand Jury Transcripts and Other Statements §§ 3333 and 3334:

Other than allowing the presence of counsel within the grand jury room, these two referenced provisions are perhaps the most outstanding additions that can be made to our system. Indeed, the single most sobering impact that can be had upon a prosecutor is the knowledge that every word he utters within the grand jury will be recorded. The present system is full of gross abuses. Transcription is not required, and where required, the prosecutor has the authority at will to tell a court reporter when to cease transcription. It is the rule rather than the exception that prosecutors give detailed background information to grand juries about individual witnesses which comments are never recorded. Such comments include telling grand jurors that certain witnesses are "crooks," "con-men," "members of organized crime," "hostile," and "liars," just to name a few. Grand jurors are captive audiences to such traumatic dialogue from their legal advisor. So programed, it is no wonder that they are robbed of their individuality and impartiality and that they greet the witness with hostility and with a predetermination as to his role in the drama already set forth by the prosecutor.

Likewise, the availability of the written transcript and record to a particular witness will also serve to curb the improper actions of some prosecutors. Additionally, such availability will allow a particular witness to calmly review his testimony, refresh his recollection, and perhaps even correct the record as to errors or misunderstood questions and related responses. Can anyone deny the fairness of such a procedure?

Underscoring the need for these provisions is my own personal experience as a witness which is in addition to my observations as a prosecutor. For approximately 15 hours, I was exposed to ridiculous and harassing questions by Guy Goodwin of the Department of Justice with respect to a wiretap inquiry at Richmond, Virginia. Initially, I was a friendly witness prior to the grand jury session. I made the mistake, however, of criticizing Goodwin's actions within my district to his superiors in Washington, even before he began his grand jury inquisition. Immediately after my first objection to his conduct, he became aggressive and hostile, not only towards me, but towards the entire staff in Richmond. It was obvious that his superiors in Washington did not wish to acknowledge their mistake regarding his presence and conduct in Richmond. Numerous complaints from my office were literally ignored and only given surface treatment by responsible individuals within the Department of Justice.

During and after the referenced grand jury investigation by Godwin, I was given permission by the federal district court to review my testimony before the grand jury. Notwithstanding that provision, the Department refused to allow me access to the transcripts in question. It is patently obvious that they did not want documented for the public record the improper conduct of one of their own. Even after the investigation was terminated and the announcement made that there would be no indictments, the Department continued to deny me access to those documents which I had requested for the purpose of documenting and underscoring my previous complaints against Goodwin of prosecutorial misconduct and his related abuse of the grand jury system. The conspiracy of silence had manifested itself, and it was crystal clear that the "sword and shield" was solely that of Guy Goodwin and not that of the people who were supposed to be protected by the system which the Department continues to support.

I will be pleased to make available to this committee the numerous letters and complaints which I forwarded to the Department, along with advising you of the other complaints of which I was personally familiar. Once again, it can only be asked to the Department why they have refused to allow the documentation of improper conduct against one of their own. In all fairness, I must add that all of this took place under the administrations of Edward H. Levi and Harold Tyler, although they, too, had announced a sincere public desire to expose abuses and protect society.

The passage of these two provisions, along with the allowance of counsel in the grand jury in an of themselves will bring back to our system the stability which the original founders of the grand jury concept had envisioned.

Preliminary examination § 3368:

This section indicates that an indicted individual is entitled to a preliminary hearing. Under current practices, such a hearing is conducted by a magistrate who is to determine whether or not probable cause exists for the then pending complaint. Your draft does not suggest what would happen after an indictment should such a magistrate find a lack of probable cause. If it is contemplated that a magistrate has the authority to dismiss an indictment under such circumstances, then I must take issue with this section unless there is some recourse or appeal to the district judge for a second hearing on the point.

Additionally, the present practice allows the government agent to summarize the evidence therefore admitting hearsay. Assuming such a practice would continue, part of my concern would be relieved inasmuch as full-blown preliminary hearings could disrupt the entire criminal and judicial process. With the many protections already offered by this resolution, and with the obvious fact that harmful publicity has already been generated by an indictment, then I would say little merit is achieved in the requirement of a preliminary hearing at this stage. Little could be gained under those circumstances.

My position as to this section is, of course, predicated on the assumption that the other safeguards in the bill will be passed including the early release of grand jury information as to witnesses and who will be called by the prosecution at trial. I would suggest to you that a probable cause for preliminary hearing based on the summary testimony of an agent reveals little and, in fact, would reveal less than that which eventually would be forthcoming under the previously-cited provisions of this proposed act.

CONCLUSION

It has been my desire throughout this written presentation to be as objective as possible as to H.R. 94 and grand jury reform in general as based upon my own personal experiences. I must agree with the well-expressed statements of others that the grand jury should not be turned into a "mini trial" and that its secret proceedings were never meant to be an adversary procedure, but rather an investigative process to protect the innocent while bringing wrongdoing to the surface. My purpose herein is a deep desire to see that the innocent are indeed protected and that the "shield" for such protection be returned to their possession.

If this committee wishes to see a clear situation of the type of wrong that H.R. 94 is meant to correct, then I would suggest you attempt to get from the Department of Justice the voluminous transcripts of the Richmond, Virginia, wiretap investigation of late 1975 and early 1976, wherein you will have first-hand evidence of what in fact was a grand inquisition. In that investigation, Guy Goodwin, supported by his superiors, was allowed to accumulate thousands of pages of testimony and spend literally thousands, if not hundreds of thousands of dollars, of taxpayers' money in a whirlwind investigation which produced little more, if anything, than that which had already been discovered by a prior investigation by the Richmond United States Attorney's Office.

It was obvious in Richmond that once you disagreed with a person such as Guy Goodwin you became a target of his over-aggressive and abuse style. His conduct was identical to that quoted by numerous other individuals in many publications prior to his arrival at Richmond. Such is a clear example of the "power to destroy" wherein a prosecutor can literally attack anyone at will. Faced with a dilemma, it is obvious why the Department eventually terminated the investigation without any indictments. Because of his actions, the original wrongdoer, being a local police officer, not only remains unpunished, but continues at his daily activities with the Richmond Bureau of Police. The respect that many of us within my own office had for the Department of Justice was literally destroyed by their actions in this case, and I personally resigned from my position partially as a result of the despair and frustrations I felt because of those events.

I highly commend Congressman Eilberg and all other members of this committee and supporting staff for their courageous efforts in seeking and promulgating needed reform. The time has come for our system to again have meaning and to stand as true bulwark against oppression. I urge action on this measure, and I stand ready to be of assistance in any way that I can.

Respectfully submitted,

RODNEY SAGER.

Mr. SAGER. For almost 7 years I served as an assistant U.S. attorney for the eastern district of Virginia. I might point out that by departmental statistics, the Eastern District of Virginia is one of the most active in the United States with respect to criminal indictments and presentments.

In addition to serving as an assistant U.S. attorney, I served as a law clerk with a Federal judge, and I'm now beginning my second year in private practice.

Also, I was a senior assistant; that is, in the eastern district there are three full-time staffed offices, and I was in charge of the Richmond division, office of the eastern district of Virginia for the last 2 years of my tenure with the Government.

One of my major responsibilities as an assistant U.S. attorney, especially in my later years of this association with the Department of Justice, was to oversee major grand jury investigations. As a matter of fact, the last grand jury I personally supervised prior to my resignation was the Allied Chemical Corp. Kepone probe which I supervised and participated in as to all phases of its investigation including the subpenaing and examination of witnesses. Additionaly, I had three other special attorneys working under me.

I would point out, also, that I've had the experience of being a witness in a grand jury—for almost 15 hours—with respect to an investigation by a particular departmental prosecutor.

So, I am here today to try to offer my testimony based on experiences as a law clerk, a prosecutor, a defense attorney, and as a witness.

Now, I think that as we comment on H.R. 94, and in light of some of the previous remarks that I have heard it is important to point out that the overwhelming majority of your grand juries are not investigatory grand juries, but rather ones where agents just appear, summarize testimony, and you have an indictment. These are the ones that have often been referred to as your rubber-stamp indictments. These are where 20 or 30 indictments on a particular day are returned from the same grand jury hearing based upon a 3- or 4-minute summary of evidence.

So, we begin by looking at a small percentage of grand juries that are so-called investigative in nature.

I have reviewed in particular the previous testimony of former Attorney General Edward Levi, and also the prepared remarks by the Department of Justice when he was Attorney General. I notice with interest that most of the remarks made by him and presented by the Department in many of their submissions deal with historic perspective and theory.

I'm here to suggest that, the simple fact is today our system clothes the prosecutor with virtually unbridled power. It's interesting to note from the historic comments that the so-called functions of the grand jury is to act as a protector of the individual's rights. I would respectfully suggest that in modern day practice that term is completely meaningless. To the contrary, the person protected by the modern-day grand jury is the prosecutor.

While I was an assistant U.S. attorney, I attended or supervised grand juries that returned approximately 1,000 criminal indictments. I had no more than five no-true bills in those 7 years, and, I might add, we asked for those no-true bills.

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With respect to the so-called investigatory grand jury in all such situations the grand jurors, as far as my experience has been, yield almost completely to the will, advice, and actions of the prosecutor. I mention here—and I won't speak to it in any great length—about the young prosecutor who has little past experience but finds himself clothed with awesome power. As such, without controls, it is very simple for even a well-meaning prosecutor to take advantage of such a situation.

It's ironic that the grand jury that was meant to protect against an overly aggressive prosecutor is the same system that has, in fact, brought into being the overly aggressive prosecutor.

Now, let's talk about some specifics. I recall with interest the comments that there have been very few reports to the courts—such as the testimony from Judge Sessions and other individuals—with respect to abuses. Well, there are two outstanding reasons why that does not occurr: No. 1, when you do have a grand jury stenographer in the grand jury room—which, I might add, is not required by today's system—the prosecutor has full authority to tell the grand jury stenographer what to take down and what not to take down. And, my friends, you'd better believe that if the prosecutor has some strong words to say about a witness, he advises the court reporter to cease the transcription. So, those words are not a part of any record. Second, when you speak in terms of the written record, where in a written record does it show what the prosecutor did with respect to a question? Did he yell? Did he raise his voice? Did he stomp around the room? Did he throw papers down in front of the witness? And this, of course, is when there is a court reporter in the grand jury room.

The simple fact is we're talking about a fraternal organization. That fraternal organization is the Department of Justice, and most of the U.S. attorneys and assistant U.S. attorneys, who work within that framework and within that fraternal concept, follow the concept that if one is attacked, that most must come to his aid.

I'll touch on a little bit later and perhaps in more detail—if the committee so likes—the particular experience I had in having to testify 15 hours in front of a Federal grand jury. The reason I had to so testify is I made the mistake of calling the Criminal Division of the Department of Justice and suggesting they remove a special prosecutor in the Richmond area.

Up until that point I was a friendly witness for the Government. Within 24 hours of that point I all of sudden became labeled a hostile witness to the Government and a threat to its organization.

Mr. EILBERG. Mr. Sager, if I may interrupt. I think the chairman is of the opinion that the members have read your statement, so we get the innuendos, and we've gotten many of the points you have already described. We would like to get the maximum benefit of your time. I don't want to control you, but I just want you to know this.

Mr. SAGER. Let me, then, proceed. I've commented on several provisions of the bill. I have not spoken to all of the issues.

The first one I touched on very briefly is the recalcitrant witness aspect, the 1826 section. I did not spend much time here. I simply suggested—as others have done—that 6 months might well, indeed, be too

lenient a period of time with respect to confinement of the witness if he refuses to testify. As a prosecutor I have seen individuals that would be more than willing to serve 6 months if they did not have to give testimony. And, of course, I have opted for a 12-month compromise.

Now, Mr. Chairman, you did suggest earlier the possibility of criminal contempt, but I'm not sure that the bill doesn't negate such a proceeding, because it says in mandatory language "shall not serve more than 6 months." But it's an open-ended question, and I just bring it up—as far as my reading is concerned.

As to the witness immunity section of the bill, I am fully familiar with the pros and cons of use immunity and transactional immunity. I have indicated some feelings that perhaps use of immunity provides more incentive for—an incentive to testify. However, I have suggested that should you go through with the transactional immunity, that in my experience threat of perjury, while it sounds very strong, is almost meaningless because it is extremely difficult to prove, and that, possibly, one might consider adding "obstruction of justice" as an allowable prosecution against an individual who might give "peripheral testimony" or conveniently forgets items, or other such types of evasions.

With respect to violations of grand jury secrecy, 1512(c)(3), it's unclear—and I go by the written word—as to whether the historic attorney-client privilege applies, and I think everyone assumes that it does apply; but the language in the statute specifically indicates that the attorney may disclose matters that occurred before the grand jury. I would suggest that you might consider adding in there, "upon the written consent of his client," so there will be no misunderstanding about whether or not there is an attorney-client privilege.

I believe somewhere in your bill you do speak of written consent, and if you speak of it in one instance, I think you should speak of it clearly in the other.

"Rights and duties of the grand jury, the attorney for the grand jury." It is not clear from the bill as to whether or not a target defendant is one that falls in the class of testimony where it is summarized by the agent as opposed to investigative grand jury. I understand the intent of the committee is that it applies only to the investigative grand jury. That being the case, it should be written in, as there really isn't any distinguishing factor in our present system between a regular and investigative grand jury unless you specifically call a special grand jury. This is so because we currently use regular grand juries as investigative grand juries in most situations.

And I would suggest that if notice is required to the 1,000 individuals we indicated, by means of the so-called regular grand jury then, obviously, that would make the system literally unworkable.

Mr. FISH. Excuse me, did you refer to A1 of the bill?

Mr. SAGER. Yes, sir, I'm referring to section 3329(b)(2)(B)—as in boy—"Rights and duties of grand jury and attorney for the Government."

Mr. FISH. Thank you.

Mr. SAGER. Some sections I didn't comment on because I have no differences with the committee whatsoever—or suggestions.

I believe this begins on page 12, "Rights and duties of grand jury and attorney."

"Appearance of counsel with witness before the grand jury." I suggested that this provision is excellent, and is a long overdue safeguard both for the rights of the witnesses and protection against the overly aggressive prosecutor.

I might add an additional experience that I had most recently, to appear with a client at a special Virginia State grand jury session, which now allows counsel in the grand jury room under their so-called investigative grand jury. They have two separate grand jury systems in Virginia.

By being with the witness in the grand jury room several things were accomplished. In one instance the prosecutor began to belittle the witness and started cracking some jokes. After a very brief exchange between us, the prosecutor calmed down, apologized, and continued with a meaningful line of inquiry. Second, I was able to confer with my client and, therefore, expedite—and I must emphasize "expedite"—the investigation; because, frankly, had I been at that grand jury session and not have been allowed to enter the room I would have done one of two things as a defense attorney: I would have either advised my client to take the fifth amendment to every question asked, or I would have advised my client to get up and come into the hall and confer with me after each and every question.

And I might say—I forgot to put this in my paper, but the grand jury takes a dim view of witnesses who get up and leave the grand jury to confer with their attorney—which is a right that is granted to them—and it is a sign to the grand jury, "Does the witness feel he has to hide something, because he keeps running out of the room." And when he goes out of the room often, grand jurors become rather impatient. And if they weren't mad at him to begin with, I can assure you that they are very irritated with him at that point.

I do have one suggestion with respect to this. You have some language here that counsel can be removed if he impedes the proceedings. I spoke with Mr. Belsky briefly about this. It is my suggestion, and I think it is crucial—I think it will serve to answer challenges to this section—that you write in a provision that an attorney may not represent more than one defendant as to the same investigation.

This limited representation is a fact in Federal law with respect to court appointment of attorneys for indigent clients. Unless the statute has been changed since I last read it, it says the court will appoint only one attorney per client with respect to indigent cases. This is, perhaps, the only area of concern and conflict that I can see as to this section. And there are Federal decisions that have reversed cases where lawyers have represented more than two or more defendants jointly, and it has happened in my own court.

Mr. EILBERG. Mr. Sager, have you completed the section of your remarks dealing with appearance of counsel?

Mr. SAGER. Yes.

Mr. EILBERG. May I suggest it is now 11.45, and we have so many things that we must do, and with the permission of the subcommittee, I would like to curtail your summary at this point for the purpose of asking a few questions. I may also add that we have a number of questions that we would like to ask you that we would like to submit in

writing to you, if you'd be kind enough to respond to them. That would be most helpful to us all.

So, is that agreeable to you?

Mr. SAGER. Yes.

Mr. EILBERG. Now I would like to mention to the subcommittee, counsel advises me that when we go into questions, that these do not become part of the record unless the subcommittee votes and decides to do that. Any testimony taken with regard to Mr. Goodwin is not exposed to the public without the express approval of the subcommittee.

With that explanation, the first question I would like to ask, Mr. Sager is: Would you summarize as best you can your experience with Mr. Goodwin and your experience as a witness in the grand jury room.

Mr. SAGER. The situation with respect to Mr. Goodwin—as brief as I can make it—involved a situation where some FBI agents failed to report accurately their findings with respect to a wiretap involving a single—local Richmond—police officer.

The Richmond office discovered the so-called improper conduct, and the inquiry was begun at the request of the U.S. attorney at that time. There were two inquiries: One against the local police officer for the wiretap, and one with respect to the FBI agents. It was determined—it was not my decision, but it was determined—that the initial inquiry with respect to the FBI be by a grand jury with the purpose of making it public, which is obviously and completely contrary to what happened.

I handled only the police officer's phase of it since I was considered a material witness to the other phase of improper conduct by the FBI. That investigation took nearly two weeks, and a detailed written report was submitted by the U.S. attorney to Washington by Mr. Cummings who had been in contact with Mr. Thornberg.

It's ironic that, primarily at my suggestion, Mr. Cummings finally prevailed upon the Department of Justice to send a neutral prosecutor into Richmond because the morale of the FBI agency had dropped to such an all-time low that we found it difficult for any of the assistants to have any cooperation on other cases. And we felt like since he had finished the report, that someone in Washington should make a decision as to the alternative choices that he had laid out in his written report.

Several days later an individual showed up whom I had never heard of by the name of Guy Goodwin, with an associate by the name of Merkle. I was in charge of the Richmond office, and extended to him all of the courtesies of the office.

During the several-day period of time, he would take me from my activities and we would sit down in a room and he would start asking questions. Well, his questions became so ridiculous that they began to defy my imagination and logic as a prosecutor with 6 years of experience. I mean he wanted to know everything that my office had done from day one including where the hour and second hand on the clock was at every moment.

Finally, I had some words with Mr. Goodwin, suggesting to him that I could not comprehend what in the world he was trying to do, that if, in fact, someone felt there was a violation all he was doing was

ruining any good evidence. I'm afraid, because of some righteous indignation, I called Washington.

The U.S. attorney at that time, Mr. Cummings, had not been in office more than three weeks, or a month, and had no previous criminal experience. He really—didn't know what was happening.

Mr. EILBERG. Mr. Cummings?

Mr. SAGER. Yes, sir.

I managed to make my way up the line of telephones, I guess, to Mr. Thornberg who became rather indignant that an assistant U.S. attorney would call complaining about one of his own men in Washington.

The next day came around, and Mr. Goodwin indicated that he was going to "get" me if it was at all humanly possible. Then he said to me, "Mr. Sager," he says, "You complained a little bit, and I want to protect you." I said, "Protect me? What do you mean 'protect' me?" He said, "Well, I want to advise you of your rights." I said, "Man, you've got to be crazy."—in rather polite language.

He had also convinced the U.S. attorney he was going to protect the Richmond office by taking this new course of procedure. I proceeded to continue to answer all of his questions after I was told by officials in Washington that no one in my office was suspected of any improper conduct whatsoever, and that this was just Mr. Goodwin's way of handling things and "you should go along with it," that Mr. Thornberg himself, as he—Thornberg—stated to me, had been advised of his constitutional rights in an investigation several years prior, and there was just nothing to it. So I said, "OK." I didn't want to lose my job, so we put up with it.

So the questioning went on, day, after day, after day—By the way, I said, "Mr. Goodwin, I don't mind answering any questions, but I tell you what, let's put them on a tape recorder, let's have a stenographer in, or let's have someone else in."

"Mr. Sager, I've never heard of such a request in my life." And he says, "Under no circumstances will I conduct my investigation with a tape recorder on."

I said, "I have nothing to fear for what I have to say, Mr. Goodwin."

To make a long story short, there was no tape recorder, there was no transcript from this pre-grand jury encounter. About the only thing that was gained was, after several more complaints, I came to Washington and had several different assistant attorney generals sit in on later phases of the so-called interrogation; all of this time we were told, "We just want to get all of this, and we don't want it on the record because we don't want 'Jinck's Act' material."

I'm sure everyone is familiar with what "Jinck's Act" material is; that is a written report or statement of a witness that has to be turned over to a defendant at a trial

I said, "Okay, you don't want 'Jinck's' material."

So, this fiasco kept up. Then for no reason whatsoever he started going to the grand jury. I said, "What is the purpose of the grand jury?"

"We want to conduct an independent investigation."

So, he started a so-called independent investigation. The next thing I know he said, "We want you to testify." I said, "I've already given you on the outside 15 hours of testimony, which you and your associate

have written down in detail. I'll swear to it; I'll sign an oath to it. What do you want me in the grand jury for?"

"Well, we want to make it part of the record."

I said, "Well, you didn't want to make it part of the record before."

So, we went in the grand jury, again and again and again, and, for about the 18th time, he advised me of my rights. There was an obvious concerted effort by Goodwin to get me to take the fifth amendment, which I would not do.

There may have been 50 witnesses, give or take, by the time he got through with his so-called investigation grand jury blitz in Richmond, Va. He even went so far as to subpena the defense attorney of the primary defendant, the Richmond police officer. The defense attorney, being a former judge, told me that Mr. Goodwin threatened to have him locked up by comment made to his secretary if he didn't show up for the grand jury; that when he got into the grand jury room Mr. Goodwin asked, "Do you have the wiretap equipment?" Whereupon, the fellow laughed in his face—from what I gather—had a few choice words for him, and left the grand jury room.

The witnesses reported to me, grand jurors reported to me, and court reporters reported to me, that 90 percent of Mr. Goodwin's effort through the entire investigation was directed at trying to get evidence to inculpate Rodney Sager with respect to improper activities of the FBI.

Despite all of this, the Department of Justice kept saying, "Just put up with it."

I might add Goodwin and his associate were thrown out of the office once, by the U.S. attorney, because of their conduct. He went throughout the U.S. attorney's office and said, "We don't trust any assistants in Richmond, everything here is going to be done top secret." Newspaper reporters were asked to testify, police as far away as Charlottesville, Va., were brought in and asked to disclose names of informants.

Finally, I went to the district judge with a number of complaints—and this is rather interesting—the ruling was made that I could have access to my grand jury transcripts; and I must have access to them if the Department ever called me back in to the grand jury.

I had been called in three times, the U.S. attorney was called in three times and testified for approximately 7 hours, and another assistant who had worked on this same case with me was called in and testified almost 7 hours. So, the staff of the U.S. attorney's office were being witnesses.

Mr. EILBERG. Would you characterize the nature of your testimony during your 15 hours in the grand jury room?

Mr. SAGER. Well, first he started off by advising me of my rights in the grand jury room—which was not required by the law pursuant to the attendant circumstances—which he had done on numerous occasions before, and which he continued to do in the grand jury room. And I don't have to tell you what a grand jury might think when a prosecutor sits and starts advising you of your rights—in front of a grand jury.

First, he asked me to summarize everything that happened from day one with respect to my offices—overseeing or investigation of this

wiretap matter. It took me about an hour to summarize what I could recall. And then he went over every single item—point, by point, by point, by point. And the second time we went in he started over on the same thing—point, by point, by point. The third time he started out all over the same thing.

As an example, when I was trying to determine what had happened with this wiretap, I called two agents in the office and said, "I want to know what the truth is about this case, because a reporter has provided me information that you have not." Mr. Goodwin wanted to know why I didn't have a court reporter in my office transcribing an interview between myself and those FBI agents, individuals whom I interview almost every day of a given week.

There was an error in a written submission to my office in that the second corrected submission was stronger that the first. Consistent with past practices we allowed the FBI to correct their report. Mr. Goodwin thought that was just outright conspiracy. He wouldn't accept the fact that agents come into the U.S. attorney's office daily and make corrections to reports where there are errors. We obviously don't want incorrect items in a report. I'm just talking about the so-called 302's that we use merely for investigative aid purposes; it doesn't go anywhere, but are used only for internal information purposes.

And it was this type of constant badgering, over and over and over again; and I might say, I can make any human being in the United States look bad before a grand jury with this type of questioning: "What did you say 4 days ago at 3:10 in the afternoon? And how can you not tell us exactly what you said?" I mean, just constantly. And, of course, he'd stand up once in a while and walk around. Guy Goodwin is a very mild mannered individual; he's not one of the so-called screaming, overly aggressive individuals in the vein. But he just sits there and just asks broad, sweeping questions that have no relevance whatsoever and are virtually impossible to answer. And whe he does raise his voice—which the transcripts do not indicate—it's like, "How could you allow someone to tear up a piece of paper? That had to be a conspiracy." Why did you do something on such-and-such a date?" after we'd testified 15 times why it was done and, in fact, that it was normal practice for the office to do such.

So, those are just several examples that come to mind.

As a matter of fact, that following all of this, I had written numerous letters to the Department of Justice complaining, and asked for my transcript. I said, "Now, certainly why don't you give me my transcript and I'll point out the grand jury abuses; I'll point out the misleading statements that this man has made with impunity to the grand jury."

To this date, I have never gotten my transcript. Why? The investigation was eventually closed, and there were no indictments.

When an individual is willing to give an affidavit, has testified or is allowing himself to be subjected to interviews, you don't put him in the grand jury. I mean, that is a rule of practice that we follow with precision, unless he was criminal and we were afraid that he might vacilate, and we needed to lock him in and put more pressure on him in the absence of a sworn affidavit.

He subpenaed the defense attorney. That is unheard of. He had no reason to subpena the defense attorney for the grand jury.

I might add, he gave immunity to the wrong FBI agent during the course of his investigation—which was just comical at the time.

Mr. EILBERG. Mr. Sager, are you reading from a summary of your statement?

Mr. SAGER. I made a summary which I forwarded to the Department.

Mr. EILBERG. Might we also have a copy of that summary? And, again, that will be on a confidential basis so that it could not be released without agreement of the subcommittee.

Mr. SAGER. Yes, sir.

I'll tell you a real horror story. Goodwin was examining one of the FBI agents, and Goodwin had the FBI file, and in the FBI file was a brown envelope that was to contain a receipt for a certain item. This receipt was not in the envelope for the simple reason it had been returned by another agent at a previous time.

Goodwin handed the file to the FBI agent—as it was related to me—and said: "Is there a receipt in that envelope? Tell the grand jury why the receipt isn't there."

Can you imagine?

The agent, not knowing where the receipt is because someone else had turned it over, and the impact on the grand jury——

Mr. EILBERG. Mr. Sager, we're running out of time. I'm sorry. This is all very interesting; we'd like to have you for hours, but time simply doesn't permit it.

I'm simply going to ask my colleagues if they have any questions at this point.

Mr. Fish?

Mr. FISH. No.

Mr. EILBERG. Mr. Sawyer?

Mr. SAWYER. Yes, I do.

Were you indicted?

Mr. SAGER. No, sir. I might add that the Allied Chemical Kepone grand jury probe which I headed was subsequent to this probe.

Mr. SAWYER. Apparently, the grand jury didn't follow Mr. Goodwin very far. I assume they handed down a no-true bill.

Mr. SAGER. No, sir; they did not hand down a no-true bill. The investigation was terminated by a higher-up in Washington.

Mr. SAWYER. Well, in any event, you know, if I were voting here based on what I heard, I certainly would vote to hand down an indictment on Goodwin; you certainly sold me on that. I've had the unpleasantness over many years of running into a lawyer—not necessarily a prosecutor—who may have shared some of these characteristics.

And I do think you've made a contribution here. You do have the rare experience of not only having been on both sides of the fence, but also a witness—which very few of us have had the opportunity of being.

But during the 7 years that you were active as an assistant U.S. district attorney, did you abuse the grand jury in an investigative way?

Mr. SAGER. I think, in hindsight, there are things that I did that I would have done differently, in some instances.

Mr. SAWYER. Were you aware of—within the Western District of Virginia, if that's the correct district——

Mr. SAGER. Eastern district.

Mr. SAWYER. Eastern district—of abuses going on regularly in grand juries by the U.S. district attorney's office?

Mr. SAGER. Well, sir, the answer would depend on how you define "abuses." I was aware—I observed—situations where prosecutors, off the record, told grand jurors that certain witnesses were crooks, that they were con men, that they were expected to be evasive in their responses to questions, that—not to pay attention to anything that they might have to say. I have been in the grand jury when the prosecutor, off the record, joked with the grand jurors about the testimony of the particular witness.

And let me say, I have never seen an instance in my district where the grand jury refused to follow the suggestions of any assistant U.S. attorney. And I might suggest, also, that it's not the grand jury that conducts these investigations. They sit back, and out of 20 to 23 grand jurors, I don't think that four or five ever ask questions with respect to a detailed investigation.

Mr. SAWYER. Of course, in the regular proceeding, almost all State courts run through rubberstamp ones as a practical matter. U.S. district attorney's issue a warrant and proceed without the benefit of a grand jury. They have the power to proceed without warrant of a grand jury.

Mr. SAGER. Well, in the Federal system that is not exact——

Mr. SAWYER. I know that's not true except that if you run through a rubberstamp to get away from it, but in most State court proceedings—in most States that I'm familiar with—they only use grand juries, really, for investigative purposes when they convene—when it's kind of an event. And, usually, they operate by warrant of complaint—warrant in filing information for a preliminary hearing—so that—you know—the fact that the prosecutor can make the unilateral decision as to whether or not to prosecute is not an unusual situation. The usual situation is where he rubberstamps it through a grand jury or where he does it without a grand jury.

Mr. SAGER. Yes, sir, but with respect to the grand jury system, that is not the way that the system was meant to work when it was established many, many, many years ago.

Mr. SAWYER. That might be, but in the State, most all States—at least States I'm familiar with, and I probably shouldn't say most all, but many of the States—only convene a grand jury if they really need subpena power, for all practical purposes. And a prosecutor, unilaterally, makes the decision to proceed with the prosecution, based on the evidence he has. And that is a practical matter that is probably true in 90-odd percent of the Federal prosecutions where they merely let the agent do the same thing, that a grand get a rubberstamped 30 in a day, and——

Mr. SAGER. That's entirely correct.

Mr. SAWYER [continuing]. So that is there anything so unusual that in an investigative grand jury, which is really convened—as you know and I know—to get subpena power? That is the big thing you get out of an investigative grand jury that you don't have otherwise.

Mr. SAGER. No; you get something more than that. You get the opportunity to get a witness alone without his counsel, in a room in front

of—what is it, 19 to 23 individuals? And you can rant and rave to your heart's content with that witness without anyone, really, ever having any idea about what's going on inside that grand jury room.

Mr. SAWYER. Did you rant and rave when you conducted a grand jury?

Mr. SAGER. No, sir, but I raised my voice at witnesses. I've told witnesses, frankly, that I thought they were lying to the grand jury.

Mr. SAWYER. Well, one thing—you know—with the statement that you made, I'm in favor of a full transcript of the hearings, by your raising the additional question that that doesn't show the inflections or the facial grimaces, or other things that don't go into a printed record. But isn't that true of every trial judge operating with a jury—and a petit jury, when you go on appeal? Judges can say things 15 different ways, as you know, and have a tremendous impact on the jury, and it doesn't show in the printed record. And yet——

Mr. SAGER. That is not exactly correct, sir. There are two phases to that question that are entirely different from the grand jury: one, what a judge says is all on the record for appeal purposes; and, second, there have been many instances where the attorneys have been diligent in pointing out and placing objections into the record about the comments of the judge—they way he has placed himself in trial, even his voice fluctuation—and has carried such issues on appeal to the court of appeals. The witness in the grand jury has no such opportunity.

And that is why these so-called abuses are not reported to the judge. Where is he going to see them? Most of the witnesses that go into the grand jury room never ask for an attorney anyway. Furthermore, let's not fool ourselves that by allowing counsel in the grand jury that we're going to do anything extraordinary with respect to slowing down the process.

But even without counsel in the grand jury room, a sobering impact on any prosecutor is that every word he utters will be a record. And I'm here to tell you——

Mr. SAWYER. I don't disagree with that.

Mr. SAGER. I'm here to tell you that I have observed and heard, and personally witnesses, on numerous occasions, prosecutors saying to the court reporter, "That's enough; this is off the record."

Mr. EILBERG. Would the gentleman yield?

We have two other witnesses scheduled, and we have a very brief time in which to continue. If you have additional questions, Mr. Sawyer, unless there's something you must have right now, would you submit them to the witness so that he may respond to them?

Mr. SAWYER. Surely, I'd just like to ask one more question.

Supposing the prosecutor, through—if we take as an example our friend Goodwin, let's assume he got an indictment out of this thing, what does it profit him to get an indictment, let's say unethically or whatever, if he then has the pleasure of trying a case in open court to a petit jury with a judge and another lawyer; he hasn't gotten himself much has he?

Mr. SAGER. Oh, yes he has. First of all, Mr. Goodwin prosecuted very, very few of his cases. He was a circuit rider. His prosecutions were left to others. He got his indictments and disappeared. Contrary to the experience that 95 percent of all indictments end in convictions,

I understand that 75 percent of Mr. Goodwin's indictments were either dismissed before ever going to trial, or reduced—which indicates, without any question, that individuals were indicated without the least scintilla of evidence.

Second, depending upon the individual's reputation, he has ruined somebody in the public eyes. If I were indicted, and the case was thrown out tomorrow, the stigma that would attach to what happened to me would never be erased in my community.

Mr. SAWYER. But the record in the national statistics indicates, then, that—thank goodness—we're blessed with a very, very minimal amount amount of "Mr. Goodwins;" right?

Mr. SAGER. That is a fact with respect to indictments such as that; but, sir, this is just one of many examples, I understand, that has been pointed out.

Mr. SAWYER. All right, I yield.

Mr. EILBERG. We're very much indebted to you. We could spend hours with you, but we can't. And we thank you very much for your contribution here today. I'm sure you made a contribution to the subcommittee and to whatever the subcommittee and the House might do.

Mr. SAGER. May I just say that I did not want my testimony today, in any way, to sound as a vendetta against Guy Goodwin. I have tried to be honest and forthright with my comments on my 8 years, now, of experience, and I would like that experience and my comments to be taken in that vein—anything I have to say about Goodwin is only as an example of a situation that can arise.

And I'm certainly pleased, I might add, and as my written comments show, that the other two strong areas of the bill were the requirements of recording of all proceedings and the availability of grand jury transcript.

Mr. EILBERG. You will let us have a summary of your evaluation of the Goodwin situation.

Mr. SAGER. What summary, sir?

Mr. EILBERG. In your statement you were referring to notes involving your experience with——

Mr. SAGER. I had a letter, that a year later I tried to recall some deals. We can get it Xeroxed. I'll be happy to let you have a copy of it.

And I would like to congratulate the committee and Mr. Eilberg for their efforts. I think this movement and this measure is long overdue.

Mr. EILBERG. Thank you very much, Mr. Sager.

Thank you, Mrs. Sager, for being here.

Mr. SAGER. Thank you very much. I'll have copies of the document forwarded to the staff.

Mr. EILBERG. Thank you.

[The following material was submitted to the subcommittee for inclusion in the record:]

MARTIN, MEYER AND ROTHENBERG,
Richmond, Va., January 17, 1977.

Re Richmond FBI Wiretap Investigation.

Hon. HAROLD R. TYLER, JR.,
Deputy Attorney General, Main Justice Building,
Washington, D.C.

DEAR JUDGE TYLER: As you can tell by the attached letter which was prepared back in July of 1976, I had debated the usefulness of additional correspondence. Inasmuch as the local bureau of police continues to protect the orig-

inal wrongdoer, I must, as a matter of conscience, forward this letter to correct the record once and for all prior to your departure. The recent promotion of the involved Richmond police officer after all the federal agents had been disciplined is an insult that cannot be ignored. Why your office refuses to take appropriate action is a perplexing and troublesome mystery. Justice has certainly suffered as a result thereof, most of which must be attributed to Guy Goodwin who remains on the federal payroll.

Notwithstanding these problems, I nevertheless wish you the best in your new endeavors.

Very truly yours,

RODNEY SAGER.

Attachment.

MARTIN, MEYER AND ROTHENBERG,
RICHMOND, VA.,
Typed July 11, 1976, mailed January 17, 1977.

Re Richmond FBI Wiretap Investigation.

HON. HAROLD R. TYLER, JR.,
Deputy Attorney General,
Main Justice Building,
Washington, D.C.

DEAR JUDGE TYLER: It is with the greatest of respect for you as an individual and for your position as Deputy Attorney General of the United States that I reply to your letter of June 17, 1976. My conscience compels that I respond to what I believe to be major errors contained therein. I trust you will give this your mature consideration.

Your second paragraph suggests that one-half of our personal conference of April 13, 1976, was devoted to my allegations of misconduct directed against Mr. Goodwin. Such was not the case. Of approximately one hour and 20 minutes, I would suggest that less than 15 minutes in total was devoted to Goodwin and Merkle. Your Associate, Mr. Giuliani, had instructed me that I was *not* to document any complaints against these men at this meeting, but that I could make reference to Goodwin in explaining certain of our actions within the Richmond office. These are precisely the guidelines that were followed in the conference. In fact, Judge Tyler, you stated on at least two occasions during the meeting that you would not have handled the investigation in the manner in which Goodwin did and that a former law clerk of yours had previously been extremely critical of Goodwin's conduct as a Justice Department official. While I was critical of Goodwin during my recitation. I can assure you that there was no attempt to document allgations at this meeting, especially in light of your Office's refusal to allow me access to my grand jury testimony, which you said access has been approved by the Court.

Your letter next suggests that Goodwin and Merkle were the individuals who were primarily responsible for uncovering misconduct of Richmond FBI Agents. Such a statement is completely and totally erroneous and wholly contrary to the facts as they exist. The so-called "misconduct of the FBI Agents" was initially uncovered by myself along with the assistance of another Assistant United States Attorney in the Richmond office on June 27, 1975, long before Goodwin and Merkle were ever dispatched to Richmond. A detailed report was immediately given to Mr. Cummings, the United States Attorney for the Eastern District of Virginia, who, shortly thereafter, empaneled a Richmond grand jury to probe this area. Mr. Cummings advises me that at all times during this initial probe he was in direct contact with Richard Thornburgh, your Assistant Attorney General in charge of the Criminal Division. The referenced grand jury investigated the matter thoroughly, resulting in Mr. Cummings presenting a detailed memorandum to Mr. Thornburgh containing specific suggestions as to courses of action that should be pursued.

With respect to the Richmond police officer involved in the alleged wiretap, my office was preparing to take criminal action against him, and, in fact, informal plea negotiations had begun. Goodwin did not appear until after the above events occurred, and the net results of his worldwind blitz is that on one has or will be charged by the Federal government, including the original wrongdoer—the subject police officer. Perhaps it would please you to know that that individual has recently been promoted to Acting Lieutenant on the local police force!

Whoever has advised you that Goodwin is responsible for doing anything other than jeopardizing the Richmond case has unfortunately distorted the truth as it exists. It would appear that Mr. Thornburgh should correct the record, as I am

advised that he directly supervised Goodwin's handling of the Richmond case for a substantial period of time. At any rate, your advisors have not been candid with you as to the true and accurate facts in this matter.

You next invite me to bring forth additional information as to alleged misconduct against Messrs. Goodwin and Merkle. I am sure you recognize the difficulty in searching back almost one year to pinpoint such areas, especially since Goodwin, with approval from Mr. Thornburgh, removed all of the original records from our office. This is further complicated by the continuing refusal of the Department to allow me access to my grand jury testimony. Nevertheless, I invite your attention to the following areas of suggested misconduct, prosecutorial abuse, and/or professional malfeasance:

1. All substantive statements given by me in Goodwin's grand jury were previously given and available without the necessity of Goodwin's 15 hours of harrassment: Such conduct served only to obscure the salient facts involved, wasted taxpayers' money, and produced nothing original. What, then, was its purpose?

2. The harrassment by Goodwin of a United States Attorney, William B. Cummings, by subjecting him to over seven hours of grand jury testimony and badgering, when, in fact, he had always been a friendly witness: There was no purpose for him to be taken before a grand jury and therein mistreated.

3. Over six hours of grand jury cross-examination of Assistant United States Attorney David A. Schneider regarding his assistance in uncovering the referenced conduct when, in fact, he likewise had previously been a friendly witness who had already given a detailed deposition as to the facts: Again, such grand jury behavior would serve only to ruin Mr. Schneider as a potential witness for the government. What purpose was served and how can Goodwin's conduct herein be supported.

4. Mr. Goodwin's subpoenaing to the grand jury of a defense attorney representing the Richmond police officer: This lawyer was a former judge of a court of record within the State and at all times a distinguished member of the Virginia Bar. David Meade White, the gentleman in question, advised me that Goodwin badgered his secretary and impuned his integrity by asking him in the grand jury without any supporting facts as to whether he possessed certain wiretap equipment. Since no action has ever been taken against this former judge by Goodwin, his questions must have been without factual support and, therefore, highly unprofessional and belittling. Such an act in and of itself would warrant immediate reprimand.

5. Goodwin's giving of immunity to the wrong FBI agent: Such a grossly negligent act in a case involving serious and far-reaching issues would again suggest professional incompetence warranting immediate reprimand.

6. Information that Goodwin misled and deceived the grand jury by asking FBI Agent Del Roberts to produce a receipt for certain equipment from a file handed him in the grand jury by Goodwin when, in fact, such receipt was absent from the file and had been given to the previous grand jury through another witness: Such conduct, if accurate, is inexcusable.

7. Guy Goodwin causing a Federal Treasury Agent in Richmond to be censored by his inspectors because he exercised his constitutional freedom in sending a letter to the editor of a Richmond newspaper referencing the then pending investigation: The individual is Fred Denham, and he was acting solely and exclusively as President of the Federal Criminal Investigators Association and not as a local agent. If this allegation is accurate, then it is a throw-back to totalitarian government.

8. The published and reported articles indicating that over 50 percent of Goodwin's previous indictments in other cases have been dismissed prior to trial: Such a record would suggest gross incompetence and must be used as background in reviewing the Richmond situation.

9. Comments of various United States Attorneys criticizing Goodwin's conduct with respect to matters of which they were personally aware: I have offered these names before and was shocked to hear that my complaint was dismissed by Shahen without their having been contacted as to their knowledge of Goodwin. I again offer the names of the Honorable Stan Pitkin, John Goldstein, Sid Lezack and certain of his Assistants, the Honorable Robert Rusk, and the Honorable Whitney North Seymore, Jr.; as to Merkle, the Honorable Robert Rusk, John Boyd, and William Deachman.

10. Slanderous statements by Goodwin that he did not trust any of the Assistant United States Attorneys in the Richmond office, along with his advising

secretaries at Richmond to keep matters from me and other members of the staff: Can such conduct be condoned?

11. Goodwin's abuse of his authority by questioning Assistants in the Richmond office as to whether I had complained about his actions: This was in no way material to his criminal investigation and served only to intimidate other Assistant United States Attorneys as to matters with which it was not his responsibility or authority to investigate.

12. Consant harassment of myself by Goodwin which began immediately after I had offered constructive criticism as to his conduct. This reactive conduct underscores his poor judgment and abuse of discretion.

13. The reported conduct of Goodwin and Merkle referencing their repeated attempts to force law enforcement agents to disclose the names of their informants before the grand jury: Such conduct is highly irregular. Should it be condoned?

14. Goodwin's accumulation of thousands of pages of grand jury transcripts which, I am sure, caused the taxpayers, with all costs taken into consideration, in excess of $100,000.00 without even the original wrongdoer being indicted: Without access to the records, I can only suggest from my observations coupled with my own in-depth grand jury experience that Goodwin learned little, if anything, that was not originally reported by the first grand jury. It would appear that even successful prosecution of the original wrongdoer may have been severely jeopardized if not made impossible by such tactics.

15. A letter of August 28, 1975, from William B. Cummings to your office, copy enclosed, documenting a threatened assault to his person by Merkle on August 27, 1975: Such letter also underscored certain of Goodwin's improper conduct and behavior. Copies of the letter also went previously to Mr. Thornburgh. Nevertheless, no action was ever taken as to Goodwin or Merkle. One can only ask, "Why not?"

16. Mr. Goodwin's highly-improper directive and warning to myself and Mr. Schneider in August of 1975 that we were not to discuss facts of which we were personally aware with any of the defendant's attorneys: Such a directive was in total contravention of the law and again suggests incompetence and/or abuse of prosecutorial authority.

17. Mr. Goodwin's constant refusal to allow me to record or transcribe those sessions where he interrogated me at length prior to the grand jury: His statements that he did not want Jencks Act material were completely contradicted by his requiring my appearance and testimony at numerous grand jury sessions thereafter. Within the grand jury, he attempted to use his unverified notes to impeach my testimony, which, in essence, made him a witness without being sworn. Such conduct again is unprofessional, irregular and improper.

18. A letter to Mr. Thornburgh from me dated September 3, 1975, copy enclosed, suggesting at that time improper conduct by Goodwin: No response was ever received to that communication, and, apparently, no action was taken to correct the areas of concern. In light of Mr. Goodwin's previous track record, one again must ask, "Why not?"

19. An article printed in the January 1973 *Juris Doctor* magazine which I supplied to you previously and which documents numerous areas of prosecutorial misconduct as to Goodwin: Any of the matters so suggested, if accurate, would warrant disciplinary action. These matters of necessity should have been incorporated into any investigation of my complaints as they strengthen the credibility of my allegations. Indeed, any of them substantiated should warrant immediate discipline.

20. The printed statement of Whitney North Seymore, Jr., a former United States Attorney from New York, that Goodwin had conducted "free-wheeling" grand jury investigations with "little apparent regard for the rights of witnesses" and leaving behind him "a trail of outraged government and private lawyers": Such a strong indictment must surely corroborate the complaints from Richmond and in and of itself deserves serious consideration.

In conclusion, I again ask for you to supply me with my grand jury testimony so that I may underscore additional areas of what I feel to be improper prosecutorial conduct. As to the above-stated matters, I can assure you that they are a result of only a brief reflection by me of the events that occurred in the summer and fall of 1975. Since I am no longer employed by the government, I can only emphasize that my interest is to have the record reflect the facts accurately and fairly. As you know, on my own initiative and without suggestion

of anyone else. I voluntarily took a polygraph test which clearly and unequivocally cleared me of any improper conduct with respect to the alleged FBI coverup. I have no reason, therefore, to bear a grudge or to contrive meaningless accusations. My desire is that justice will be done, and I, accordingly, hope that you review this letter with an open mind and an impartial attitude.

Respectfully yours,

RODNEY SAGER,
Former Senior Assistant U.S. Attorney.

Enclosures.

ROSMAN, HELLER & SAGER, P.C.,
Richmond, Va., November 12, 1977.

Re Enclosure of Seven-page Letter For Inclusion in the Congressional Testimony of Rodney Sager as to H.R. 94.

Hon. BENJAMIN R. CIVILETTI,
Assistant Attorney General, Criminal Division, Department of Justice, Washington, D.C.

DEAR MR. CIVILETTI: Pursuant to our telephone conversation of November 9, 1977, I am enclosing herein a letter of July 11, 1976, to Harold Tyler and a cover letter thereto of January 17, 1977, which said letter and comments are being made a part of my referenced Congressional testimony. These, while referred to in my testimony, had not been forwarded to Congressman Eilberg at the time of his November 3, 1977, letter to you containing my unedited transcript. This seven-page letter is forwarded to enable you to have access to the entire record for purposes of your response to the Committee.

I want to sincerely thank you for personally speaking with me by telephone about the Goodwin fiasco in Richmond. It was meaningful and encouraging that you have taken under advisement my request to meet with you personally in a final effort to resolve the problems that affect me, the Richmond United States Attorney's Office, and Guy Goodwin. Your consideration is requested upon my seven years of commitment to the Department of Justice. Underscoring my request and sincerity is an enclosed resume revealing my credentials for your use and information. Also enclosed is an August 29, 1975, memorandum which in and of itself exonerates me of any improper conduct, as well as a letter of May 31, 1976, to Michael Shaheen, Jr., depicting my utter frustration with the then existing Office of Professional Responsibility. I apologize to you for the righteous indignation expressed in that letter to Mr. Shaheen, but the substance of same is offered in response to your question as to whether there has ever been a full hearing before that Committee. Obviously, the answer is "no".

My specific requests in summary form, as related during our conversation, are as follows:

1. Requested clearance to cooperate with Richmond area prosecutors as to their investigation into the original Richmond wiretaps matter;
2. To meet with you personally in an atttempt to have the happenings at Richmond fairly and impartially reviewed;
3. To have my previous complaint against Guy Goodwin as to professional misconduct fully heard, and to have access to the entire record of his investigation at Richmond in order to document my complaints; and
4. To review my grand jury transcripts (permission previously having been granted by the Court) in order to clarify same and to further document the record.

In conclusion, I would like to again thank you for your sincere attention to these problems. A great injustice has been committed by the prior administration in this matter and in other matters as to protecting Goodwin, and it is with optimism and hope that I look forward to the possibility of working with you toward the common objective to correcting same. Your administration now has the opportunity to correct these past injustices and to gain meaningful experience and insight therefrom in making the Department of Justice truly responsive to the citizens of this great country. With these objectives, I look forward to meeting with you personally in the near future.

Respectfully yours,

RODNEY SAGER.

Enclosures.

P.S. Bill Grey, who was Executive Director of United States Attorneys during these problems, had the opportunity then to review most of the facts as an

impartial observer. I spoke with him recently, and he is willing to discuss the matter with you if you so desire. As your know, he is now the United States Attorney for Vermont. He was reviewing the record and had personnally spoken to Goodwin, myself, and others within the Department just prior to my resignation in 1976.

Mr. SAGER. And I would like to congratulate the committee and Mr. Eilberg for their efforts. I think this movement and this measure is long overdue.

Mr. EILBERG. Thank you very much, Mr. Sager.

Thank you, Mr. Sager, for being here.

Mr. SAGER. Thank you very much. I'll have copies of the document forwarded to the staff.

Mr. EILBERG. Thank you.

[Whereupon, at 12:05 p.m., the closed session was adjourned.]

NOVEMBER 3, 1977.

Re Attached testimony of Rodney Sager, Esquire.

Mr. BENJAMIN R. CIVILETTI,
Assistant Attorney General, Criminal Division, Department of Justice, Washington, D.C.

DEAR MR. CIVILETTI: On October 13, 1977, the Subcommittee on Immigration, Citizenship, and International Law, considering H.R. 94, heard the testimony of Rodney Sager, Esquire. A motion to go into Executive Session to receive his testimony was approved—to allow the Subcommittee to hear the testimony and to determine whether it should be included as part of the record. Today, the Subcommittee voted to open the session and include Mr. Sager's testimony as part of the published record on H.R. 94 and other bills.

The Subcommittee also voted to supply the Department of Justice, and through the Department, Guy Goodwin, Esquire, within the Department, a copy of the transcript and the formal statement of Mr. Sager and to provide an opportunity to respond if so desired. The response would be limited to Mr. Sager's testimony of a particular investigation in Virginia involving Mr. Sager and Mr. Goodwin.

I am, therefore, transmitting with this letter a copy of the relevant portions of the transcript of Mr. Sager and his formal statement and inviting you to forward a copy of the transcript and the statement to Mr. Goodwin in your office and provide him an opportunity to discuss with you whether or not a response should be forthcoming.

The staff of the Subcommittee is presently editing the hearing transcript and we would like to complete the editing process by the end of November. Thus, if any response is to be made, we would like to have it within the next two weeks. In addition, we have never received the Department of Justice's formal comments on H.R. 94, nor the response of the Department to questions submitted at the time of the testimony. We would like these documents, as well, no later than two weeks from today.

Thank you again for your cooperation. If there are any questions concerning this matter, please feel free to contact the Subcommittee Counsel, Martin H. Belsky, at 225-5727.

Sincerely,

JOSHUA EILBERG, *Chairman.*

DEPARTMENT OF JUSTICE,
Washington, D.C., November 28, 1977.

Hon. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship and International Law, Committee on the Judiciary, House of Representatives, Washington D.C.

DEAR MR. CHAIRMAN: Your letter of November 3, 1977 transmitted to me a copy of the testimony of Mr. Rodney Sager before your Subcommittee and requested my response thereto. I welcome the opportunity to fully and completely respond to former Assistant United States Attorney Sager's accusations regarding the investigation conducted by attorneys of the Criminal Division of the Department of Justice into allegations of illegal wiretapping by a member of the Richmond, Virginia police and into allegations of misconduct by agents of the Federal Bureau of Investigation in their concealment of this crime.

Mr. Sager's charges of harassment and grand jury abuse are unfounded, and I respectfully submit that an attempt to mount an argument for grand jury reform based upon the testimony of this witness is ill conceived. The charges made by Mr. Sager were thoroughly investigated by the Department's Office of Professional Responsibility and by former Deputy Attorney General Harold Tyler and found to be groundless. I am enclosing letters stating their conclusions in this regard by Mr. Michael Shaheen, Director, Office of Professional Responsibility and former Deputy Attorney General Harold Tyler. This case has also been reviewed by me and I agree with the conclusion of Judge Tyler that there is "absolutely no merit" to Mr. Sager's accusations.

The circumstances of the investigation in Richmond, Virginia, were unusual. The Department of Justice conducted a criminal investigation of agents of its own investigative branch, and during the course of this investigation alleged questionable conduct on the part of Assistant United States Attorney Sager, the Government's principal witness to the alleged wrongdoing of the agents, was suggested by information provided by the Federal Bureau of Investigation agents. Admissions made by Mr. Sager, but later retracted, supported the questionable conduct which consisted generally of (1) discussing destruction of an incriminating Federal Bureau of Investigation Headquarters document; (2) discussing false evidence to replace the wiretap equipment seized by the agents and improperly returned to the suspect in the wiretapping case; (3) discussions with Federal Bureau of Investigation agents about changing the contents of Federal Bureau of Investigation documents in a manner which concealed their original efforts to cover-up their discovery of an operational wiretap; (4) agreeing with the Federal Bureau of Investigation agents to delay the required reporting of the wiretap case to the Department of Justice: (5) telling the Federal Bureau of Investigation agents that he had not reported all of their misconduct to the United States Attorney; and (6) agreeing with the Federal Bureau of Investigation agents to urge the United States Attorney that it was unnecessary to report the agents' misconduct to Federal Bureau of Investigation Headquarters in Washington and to take no criminal action against the agents.

As a result of these charges of misconduct on the part of Mr. Sager and his conflicting and contradictory statements regarding them, any criminal prosecution of the agents was rendered impossible. At the conclusion of the grand jury proceedings in this case, the prosecutive merits of the case were reviewed by officials of the Department of Justice, including then Assistant Attorney General, Criminal Division, Richard L. Thornburgh. Prosecution of the Federal Bureau of Investigation agents was thoroughly considered and Assistant Attorney General Thornburgh in a memorandum to Attorney General Edward Levi in January 1976, concluded that the prosecution of the Federal Bureau of Investigation agents for their misconduct "was compromised by the conduct of the Assistant United States Attorney involved" as it has been described herein. Assistant Attorney General Thornburgh also concluded that "contradictory" and "conflicting" testimony of Mr. Sager rendered him a witness upon whom a successful prosecution of the Federal Bureau of Investigation agents could not be based. However, the Federal Bureau of Investigation agents were disciplined and Assistant United States Attorney Sager was notified of the intention of the Department of Justice to initiate administrative proceedings against him to reach a determination as to his questioned conduct and the appropriate sanctions if his actions were found to be official misconduct. Mr. Sager's resignation followed.

Mr. Sager makes numerous groundless accusations of misconduct on the part of the attorneys of the Criminal Division who were assigned to this investigation. However, his principal complaint seems to be that he was singled out for harassment and advised of his rights by attorney Goodwin as a means of retaliation in order to "get" Mr. Sager. This is not the case. The Criminal Division attorneys began a new grand jury proceedings in this case when it was learned that members of the United States Attorney's office who had handled the original grand jury had allowed it to become hopelessly "tainted" by permitting unauthorized persons, the very agents under investigation, to be present in the grand jury room during the testimony of a witness. Since under the law any indictment returned by this grand jury would have been invalid it was necessary to begin anew with a fresh grand jury. In preparation of the new grand jury inquiry, it was necessary to interview Mr. Sager regarding previously undisclosed details of an almost five hour conversation he had with the accused Federal

Bureau of Investigation agents on the night he learned of the agents' concealment of the local wiretap. According to the agents it was during this five hour conversation that many of the alleged acts of misconduct by Sager occurred. During the first interview Mr. Sager made admissions to the Departmental attorneys which appeared to corroborate certain of the allegations of misconduct on his part which had been previously reported by the agents. As a result it appeared that he may have been involved in the effort to conceal the criminal activity of the Federal Bureau of Investigation agents. It was therefore necessary to treat both the agents and Mr. Sager as possible subjects of the investigation, advising them of their rights and dealing with them in an arms length manner. The decision to advise Mr. Sager of his rights at this time was one that was concurred in by officials of the Criminal Division as a necessary prerequisite to further questioning of Mr. Sager.

As you can see from the facts set forth above, there was a valid basis for the Criminal Division's decision to advise Mr. Sager of his rights at this juncture of the investigation. Thus, the act of doing so was not done merely as an act of retalation by Goodwin as Mr. Sager testified before your Subcommittee. In his testimony before your Subcommittee, Mr. Sager stated that Goodwin told him that Goodwin "was going to get me" and then added "you complained a little bit, and I want to protect you," apparently by advising him of his rights. (Page 17, Transcript of Testimony of Rodney Sager before the Subcommittee, October 13, 1977.) This testimony has been emphatically denied by both attorneys who jointly conducted all inteviews of Mr. Sager. Mr. Goodwin and Mr. Merkle also deny Mr. Sager's similar statement, quoted in the *Richmond Times Dispatch*, October 20, 1977, that Goodwin "said he was going to get me and my assistants and make us part of the conspiracy."

Mr. Sager also complains to your Subcommittee that interviews of him by Departmental attorney Goodwin were conducted for fifteen hours and consisted of "ridiculous" questions which had to do with "everything that my office had done from day one including where the hour hand was on the clock," (page 16, Transcript of Testimony of Rodney Sager before the Subcommittee, October 13, 1977). This allegation is without merit. The interviews of Mr. Sager attempted to recreate previously undisclosed details of the almost five hour meeting between Mr. Sager and the Federal Bureau of Investigation agents on June 27, 1975 during which had occurred many of the improper acts of Sager which the agents had reported. In addition the interviews attempted to learn the details of subsequent meetings of Mr. Sager with the agents and with various members of the Richmond police Department involved in this case.

To recreate the details of these lengthy meetings required a substantial amount of interview time. Contemporaneous records of the attorneys involved indicate that the interviews of Mr. Sager totalled, not fifteen hours as Mr. Sager claims, but approximately eight or nine hours over a period of three weeks. Present during the last half of these interviews in addition to Mr. Goodwin and Mr. Merkle were Deputy Assistant Attorneys General of the Criminal Division. These officials also deny that any improper questioning of Mr. Sager occurred during his interviews. In regard to his grand jury testimony, Mr. Sager complains that the questioning consisted of "broad sweeping" and repetitious questions that had no relevance to the inquiry being conducted. Reviews of the grand jury transcriptions of Mr. Sager's testimony disclose that this is not the case. While the questioning was probing and detailed it was entirely proper under this facts of the investigation and was necessitated by contradictions between statements made in his earlier interviews and his grand jury testimony. These were the express findings of former Deputy Attorney General Tyler who reviewed the transcripts and found "absolutely no merit" to Mr. Sager's claim of abuse. Judge Tyler's letter dated June 17, 1976 to Mr. Sager is attached hereto.

You may also find illuminating the observations of the Honorable Robert R. Merhige, Jr., United States District Court Judge in Richmond, Virginia. As related to Mr. John Dowd of the Criminal Division, Judge Merhige's opinion was that Mr. Goodwin and his associate Mr. Merkle had conducted themselves in a "highly professional" manner throughout the investigation and were "a credit to the Department of Justice." A copy of Mr. Dowd's memorandum of February 12, 1976, reflecting Judge Merhige's comments is attached.

A review of Mr. Sager's testimony before your Subcommittee reveals other charges regarding the manner in which this investigation was conducted which compel emphatic disavowal. After the case was assigned to Departmental attorneys, Mr. Sager was, as a result of his status in the investigation, denied

access to the results of the investigation conducted by the Federal Bureau of Investigation, Departmental attorneys and the grant jury. Thus he is not in a position to judge the propriety of the decision to grant immunity to certain Federal Bureau of Investigation agents who had invoked their Fifth Amendment rights. His complaint to your Subcommittee that Mr. Goodwin gave immunity to the wrong Federal Bureau of Investigation agents (page 24, Transcript of Testimony of Rodney Sager before the Subcommittee, October 13, 1977), is thus a judgment based on incomplete facts. At you know, no immunity under Title 18, United States Code, Section 6602, *et seq.*, can be granted without the authorization of the appropriate Assistant Attorney General. In this case, the immunities granted by the Court were granted only after former Assistant Attorney General Richard L. Thornburgh of the Criminal Division had reviewed the facts relative to the immunity requests and had approved the grant of immunity. Since Mr. Thornburgh was presented the facts and approved the immunity, I cannot conclude that Mr. Goodwin committed any error in seeking the immunity.

Mr. Sager also attempts to find some misconduct in the subpoenaing of a defense lawyer before the grand jury, (page 23, Transcripts of Testimony of Rodney Sager before the Subcommittee, October 13, 1977). However, the investigation had developed some information that the missing wiretap equipment which had been improperly returned by the agents to the policeman was given to the lawyer. As a result he was requested to testify whether he had possession of the equipment. Although he originally declined to answer claiming an attorney-client privilege, he provided the desired information after a conference with United States District Court Judge Robert Merhige who advised the lawyer that an attorney-client privilege did not protect the disclosure sought by the Government. I concur in the Court's determination of this matter and find no misconduct in the Government's effort to make this inquiry.

In an apparent effort to discredit the investigation conducted in this case, Mr. Sager states that Mr. Goodwin's prior cases consisted of indictments without a "scintilla of evidence," since seventy-five percent of Mr. Goodwin's previous cases were dismissed or reduced. (Page 31, Transcripts of Testimony of Rodney Sager before the Subcommittee, October 13, 1977.) In the same manner that previously published reports erroneously state that Goodwin has returned 400 indictments which were largely unsuccessful, Mr. Sager misspeaks the true facts. According to Departmental records, Mr. Goodwin and attorneys under his supervision have participated at trial or grand jury in only 108 cases where indictments were obtained.

In eleven of these cases the defendants are still fugitives, thus there has been no disposition in these cases. In the ninety-seven cases. In the ninety-seven cases disposed of, seventy-four resulted in convictions of some or all of the defendants. These figures indicate not only that Mr. Sager's figures are erroneous, but that cases prosecuted by Mr. Goodwin have been based on sufficient evidence to convict. As a former trial prosecutor with extensive personal experience before Federal grand juries, I can assure you that these grand juries do not return indictments without a "scintilla of evidence," but in fact seriously and carefully consider the sufficiency of the evidence before returning indictments.

No further purpose will be served by additional comments on the testimony of Mr. Sager other than to again advise the Subcommittee that I have reviewed the investigation conducted in this case and I concur in the conclusion previously reached by the Department's Office of Professional Responsibility and by former Deputy Attorney General Tyler that Mr. Sager's complaints about Mr. Goodwin are "absolutely without merit."

I regret that the time and energy of your Subcommittee and its staff have been expended in the pursuit of testimony of such ephemeral value to your inquiry as that of Mr. Sager. However, I am sure you will agree that the circumstances surrounding Mr. Sager's involvement in this case are, in fact, a strong argument in support of the grand jury's investigative power because, without the grand jury, the problems concerned might not have been reviewed.

I appreciate the opportunity to provide you with the Department's views on this matter.

Very truly yours,

BENJAMIN R. CIVILETTI.
Assistant Attorney General,
Criminal Division.

Enclosures.

U.S. DEPUTY ATTORNEY GENERAL,
Washington, D.C., June 17, 1976.

MR. RODNEY SAGER,
Assistant U.S. Attorney, Eastern District of Virginia, Richmond, Va.

DEAR MR. SAGER: This refers to your letter of May 31, 1976, to Michael E. Shaheen, Jr., Counsel, Office of Professional Responsibility, in which you criticize his office's review of your complaint against Department attorneys Guy Goodwin and Robert Merkle.

Your letter of January 21, 1976, to me charged Messrs. Goodwin and Merkle with misconduct in their handling of the Richmond, Virginia Police and FBI Wiretap Case. You complained that Mr. Goodwin abused his prosecutorial authority, and more specifically, "willfully misused the Grand Jury." As I recall, in spite of instructions to the contrary, nearly half of our April 13, 1976, conference was devoted to your allegations of misconduct directed against Mr. Goodwin.

Both this Office and the Office of Professional Responsibility participated in the review of your complaint, a review which included, but was not limited to, an examination of grand jury transcripts and statements from Department attorneys Goodwin and Merkle. An examination of this material does not in any way support your allegations and, in fact, demonstrates that both Department attorneys conducted themselves properly throughout this entire difficult investigation. In fact, contrary to a recently published article, which accuses Mr. Goodwin of trying to cover up for the FBI, as you know, Messrs. Goodwin and Merkle were the ones who were primarily responsible for uncovering the misconduct of the FBI agents.

In any event, I have read your allegations, I have heard you describe them, and I have reviewed this matter in detail on several occasions and I find absolutely no merit to your complaints. I agree entirely with Mr. Shaheen's decision.

However, if you have additional information that was not contained in earlier correspondence to this Office or raised at the April 13, 1976, conference and which bears on your allegations of misconduct against Messrs. Goodwin and Merkle, then Mr. Shaheen and I have no objection to your bringing such information to our attention.

If no such information is available, Mr. Shaheen and I will consider this matter closed.

Sincerely,

HAROLD R. TYLER, *Deputy Attorney General.*

MR. RODNEY SAGER,
Assistant United States Attorney, Eastern District of Virginia,
Richmond, Va.

DEAR MR. SAGER: This is in reference to your letter of January 13, 1976, in which formal complaint was made against Department attorneys Guy L. Goodwin and Robert W. Merkle. Shortly after this complaint was received, an inquiry into this matter, including a review of grand jury minutes, was conducted to determine whether there was any basis to these allegations.

This inquiry has been completed. Our review of its findings indicates that these allegations are without merit and that Messrs. Goodwin and Merkle's conduct during the Richmond wiretapping investigation was not improper.

In my letter of March 17, 1976, I indicated that the Deputy Attorney General or I would be available to consider your allegations in conference. Because these matters were in fact raised at your April 13, 1976, conference with the Deputy Attorney General, I have made my determination on Messrs. Merkle and Goodwin's conduct in consultation with the Deputy Attorney General and members of his staff, and I find that no useful purpose would be served by holding an additional conference on this matter.

Sincerely,

MICHAEL E. SHAHEEN, JR., *Counsel.*

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF PROFESSIONAL RESPONSIBILITY,
Washington, D.C. May 14, 1976.

Mr. GUY L. GOODWIN,
Attorney, General Division, U.S. Department of Justice,
Washington, D.C.

DEAR MR. GOODWIN: On January 13, 1976, Mr. Royney Sager, Assistant United States Attorney, Eastern District of Virginia, filed a complaint against you and Mr. Robert W. Merkle alleging improper conduct in the handling of the Richmond wiretapping investigation. We requested an inquiry into this matter to determine whether there was any basis to these allegations.

This inquiry has been completed. Our review of its findings indicates that these allegations are without merit and that Mr. Merkle and you conducted yourselves in a professional manner throughout the investigation. Deputy Attorney General Harold R. Tyler, Jr. and I have confidence in Mr. Merkle and your abilities to carry out your prospective responsibilities with the Department.

Sincerely,

MICHAEL E. SHAHEEN, JR., *Counsel.*

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF PROFESSIONAL RESPONSIBILITY,
Washington, D.C., May 14, 1976.

Mr. ROBERT W. MERKLE,
Attorney, Criminal Division, U.S. Department of Justice,
Washington, D.C.

DEAR MR. MERKLE: On January 13, 1976, Mr. Rodney Sager, Assistant United States Attorney, Eastern District of Virginia, filed a complaint against you and Mr. Guy L. Goodwin alleging improper conduct in the handling of the Richmond wiretapping investigation. We requested an inquiry into this matter to determine whether there was any basis to these allegations.

This inquiry has been completed. Our review of its findings indicates that these allegations are without merit and that Mr. Goodwin and you conducted yourselves in a professional manner throughout the investigation. Deputy Attorney General Harold R. Tyler, Jr. and I have confidence in Mr. Goodwin and your abilities to carry out your prospective responsibilities with the Department.

Sincerely,

MICHAEL E. SHAHEEN, Jr., *Counsel.*

U.S. DEPARTMENT OF JUSTICE

FEBRUARY 12, 1977.

Memorandum to: Richard L. Thornburgh, Assistant Attorney General, Criminal Division.
From: David M. Dowd, Special Attorney, Criminal Division.
Subject: Allegations against Guy L. Goodwin and Robert Merkle.

Mr. Giuliani asked that I convey the following information to you. On February 11, 1976, I had occasion to speak with the Honorable Robert R. Merhige, Jr., United States District Judge for the Eastern District of Virginia in Richmond, Virginia, concerning scheduling matters in the Small Business Administration fraud and corruption cases. At the end of our conversation Judge Merhige indicated he was aware that Assistant United States Attorney Rodney Sager had made certain allegations of improper conduct against Messrs. Goodwin and Merkle concerning the investigation of certain Federal Bureau of Investigation personnel and Mr. Sager in Richmond, Virginia. Judge Merhige stated that Mr. Sager had come to him to complain to him about Messrs. Goodwin and Merkle but the Judge refused to hear him. At that time Mr. Sager told the Judge he was going to file a complaint with the Department of Justice against Messrs. Goodwin and Merkle. The Judge advised Mr. Sager against filing the complaint.

In addition, the Judge advised me that based upon his observations, Messrs. Goodwin and Merkle had conducted themselves in a highly professional manner throughout the investigation. He stated that they were gentlemen for whom he had high respect and in his judgment were a credit to the Department of Justice. I told the Judge I was aware of the matter. I asked him if I could convey his remarks to you, Mr. Shaheen and Mr. Giuliani. The Judge stated he hoped that I would and hoped his observation would be of assistance to you in resolving this matter.

[The Washington Post, November 10, 1977]

"WITCH FINDER" UNDER INVESTIGATION

(By Jack Anderson and Les Whitten)

Back in the bad old days of Watergate, a briefcase-packing, circuit-riding prosecutor traveled around the country hunting subversives. In the process, Guy Goodwin hurried from place to place indicting people for their political beliefs. We called him Richard Nixon's witch finder.

Justice Department source say he supervised about 100 grand jury investigations in 36 states. He returned more than 400 indictments. There was one trouble; few of the indictments stuck. The rare convictions were often for minor offenses, having nothing to do with the subversive activities Goodwin was investigating. Goodwin sought contempt and perjury indictments when he couldn't make a better case.

Now the witch finder himself is under investigation. Charges have been brought against him behind closed doors on Capitol Hill. The most devastating testimony has come from a former Justice Department colleague and ex-assistant U.S. attorney for Virginia, Rodney Sager.

The testimony was taken in the strictest of secrecy by a House Judiciary subcommittee. Sager cited abuse after abuse by the hit-and-run Goodwin. "His prosecutions were left to others," said Sager. "He got his indictments and disappeared."

Normally "95 per cent of all indictments end in convictions," Sager reported. But Goodwin seemed unable to distinguish between violent, bombthrowing revolutionaries and peaceful, antiwar activists. No more than 25 per cent of those Goodwin indicted were ever convicted, Sager charged.

This "indicates without any question," he said, "that individuals were indicted without the least scintilla of evidence." Innocent people can be "ruined," he warned, by careless indictments. "If I were indicted and the case thrown out tomorrow," he said, "the stigma that would attach to what happened to me would never be erased in my community."

Yet despite Goodwin's "numerous abuses of the system," Sager declared, "he remains with impunity on the federal payroll . . . The Justice Department, which speaks of protecting witnesses, continues to protect Guy Goodwin. The question can only be asked of the well-meaning representatives from the Justice Department—why?"

Goodwin is an improbable witch finder, an impeccable, subdued, handsome man with styled gray hair and a soft voice. Testified Sager: "Guy Goodwin is a very mid-mannered individual. He's not one of those so-called screaming, overly aggressive individuals. But he just sits there and just asks broad, sweeping questions that have no relevance whatsoever and are virtually impossible to answer."

Here are a few of the "horror" stories that Sager recalled from his personal experience with Goodwin:

Goodwin "went so far as to subpoena that defense attorney of the primary defendant" in a Richmond, Va., case. Goodwin even "threatened to have him locked up . . . if he didn't show up for the grand jury." Inside the grand jury room, Goodwin demanded whether the attorney had any "wiretapping equipment." Recounted Sager: "The fellow laughed in his face . . . had a few choice words for him and left the grand jury room."

During the same investigation, Goodwin granted immunity to the wrong witness. Sager considered this to be "just comical" but also concluded it was a "grossly negligent act . . . (that would) suggest professional incompetence."

When Sager criticized Goodwin's performance, the witch finder tried to indict him. As Sager recalled this startling development: "He said to me, 'Mr. Sager,' he said, 'you complained a little bit, and I want to protect you.' I said, 'Protect me? What do you mean protect me?' He said, 'Well, I want to advise you of your rights.' I said, 'Man you've got to be crazy.' "

Nevertheless, Goodwin went ahead with an investigation of Sager and actually hauled him before a grand jury. Sager recalled that Goodwin's questions "were so ridiculous that it would defy my imagination and logic as a prosecutor with six years of experience." The grand jury found no misconduct by Sager. He responded by filing charges against Goodwin, but these were ignored by his superior, then-Assistant Attorney General Richard Thornburgh. So Sager quit in disgust. "I'm disappointed and disillusioned," he said.

Goodwin is now keeping in the shadows, but he is still keeping an eye out for witches in the Justice Department's Internal Security Section.

Footnote: Goodwin refused to take our calls for his comment.

[Washington Post, November 13, 1977]

THE DAY OF THE PROSECUTOR

(By Jack Anderson)

The post-Watergate crusade against corruption has spurred aggressive prosecutors across America to enforce the law with a vengeance. It is the Day of the Prosecutor.

Some don't always wait for a crime to occur. They organize a task force, select the "bad guys" and crack down. They sometimes conduct what one prosecutor described approvingly as "investigation by terrorism." Suspects are harassed; witnesses are intimidated; the uncooperative are jailed for contempt.

Some prosecuting attorneys use grand juries to hound victims and compel their associates to testify against them. Witnesses can be subpoenaed and interrogated under oath. Those who refuse to answer questions can be cited for contempt; those who lie can be indicated for perjury.

Unfortunately, this has perverted the original purpose of the grand jury, which was established to protect innocent citizens from overzealous prosecutors. The grand jury was supposed to consider the prosecutor's charges in secret, weed out the irresponsible accusations and permit only substantive charges to reach open court.

Now the grand jury, like the appendix, has lost its function and no longer filters out the poison. Raw, unsubstantiated allegations not only reach open court but the open press. The derogatory information is sometimes leaked by the prosecutors.

Martin G. Holleran, former executive director of the New Jersey State Commission of Investigations, told prosecutors at a closed-door seminar that every Justice Department task force should have "a special grand jury impaneled exclusively" for its use. "You can use this grand jury as an investigative and intelligence-gathering tool by calling organized crime figures" before it. This tactic, he acknowledged, "is subject to cries of harassment. . . . But so be it: that is the way it goes."

Many lawmen were elated over the 1974 Supreme Court ruling that allows evidence seized in violation of the Constitution to be used in grand-jury proceedings. As Maryland Judge Charles E. Moylan Jr. observed ruefully: "The prosecutor can burn the Bill of Rights seven days out of seven and bring the fruits of unconstitutional activity to a grand jury. No court in the country has the power to look behind what the grand jury considers or why it acts as it does."

Not only are aggressive prosecutors using grand juries to harass alleged wrongdoers, with little real regard for constitutional activity to a grand jury. No court in the country has the power to look behind what the grand jury considers or why it acts as it does."

Not only are aggressive prosecutors using grand juries to harass alleged wrongdoers, with little real regard for constitutional rights and guarantees; they are also sending suspected criminals to prison without a trial.

Martin Holleran explained to his fellow prosecutors how to do it. Simply grant the suspect immunity so he can't plead the Fifth Amendment against self-incrimination, Holleran advised. Organized crime figures, he said, have "a code of silence." Therefore, they usually "refuse even to give their addresses" and place themselves in contempt. "They have the key to the jailhouse door in their own pocket," he said.

No doubt many of these witnesses belong behind bars. But if they can be put in prison without a trial, every citizen suddenly is in jeopardy. As one troubled prosecutor put it: "That's totalitarian. It offends me."

Rodney Sager, a former Assistant U.S. Attorney for Virginia, warned a House Judiciary subcommittee behind closed doors: "The simple fact is today our system clothes the prosecutor with virtually unbridled powers. It's interesting to note from the historic comments that the so-called 'function of the grand jury' is to act as a prosecutor of the individual's rights. I would respectfully suggest that in modern-day practice that term is completely meaningless. To the contrary, the person protected by the modern-day grand jury is the prosecutor."

Citing his own experience as a prosecutor, Sager testified that grand jurors "yield almost completely to the will, advice and actions of the prosecutor." He cautioned that "the young prosecutor who has little past experience finds himself with awesome power, and it is very simple for even a well-meaning prosecutor to take advantage of such a situation."

Again drawing on his own experience, Sager said: "I observed situations where prosecutors, off the record, told grand jurors that certain witnesses were crooks, that they were con men, that they were expected to be evasive in their responses to questions and not to pay attention to anything that they might have to say.

"I have been in the grand-jury rooms when the prosecutor, off the record, joked with the grand jurors about the testimony of the particular witness. . . . You get the opportunity to get a witness alone without his counsel. And you can rant and rave to your heart's content with that witness without anyone, really, ever having any idea about what's going on inside the grand-jury room."

Explained Sager: "The prosecutor has full authority to tell the grand-jury stenographer what to take down and what not to take down. And, my friends, you'd better believe that if the prosecutor has some strong words to say about a witness, he advises the court reporter to cease the transcription, so those words are not a part of any record."

The former prosecutor summarized his own testimony in these blunt words: "It's ironic that the grand jury, which was meant to protect against an overly aggressive prosecutor, is a system that has, in fact, brought into being the overly aggressive prosecutor."

Mr. EILBERG. Let's open the meeting.

Our next witness is David Rein, a practicing attorney with the Coalition to End Grand Jury Abuse, together with Ms. Mary Emma Hixson, Director of the Coalition.

We welcome you again to our subcommittee to hear your expressions, and we regret that you've had to wait so long. And we regret also that out time is so limited. So please try to give us a summary of your remarks.

Do you have a statement there, by the way? Was there a statement?

Ms. HIXSON. Mr. Chairman, I would like to move that the statement be included in the record. We'll make a brief oral statement at this time.

Mr. EILBERG. The statement will be made part of the record together with all of the material that you have.

Ms. HIXSON. Thank you.

[The prepared statement and accompanying materials of Ms. Hixson follow:]

STATEMENT OF THE COALITION TO END GRAND JURY ABUSE

(Presented by Mary Emma Hixson, Director and David Rein, President, Coalition to End Grand Jury Abuse)

Mr. Chairman and distinguished members of this subcommittee, on behalf of the 21 national bar, civil liberties, labor, religious and women's organizations that comprise the Coalition to End Grand Jury Abuse, I thank you for the opportunity to testify before you this morning. My name is Mary Emma Hixson, and I am the Director and staff counsel of the Coalition. With me today is David Rein, our Coalition president.

The Coalition to End Grand Jury Abuse began its work in April, 1973, and in the years since then we have learned a great deal about both the democratic potential and the frightening perversion of the contemporary federal grand jury. We have traveled extensively from coast to coast, met with critics and defenders of the grand jury status quo, digested literally thousands of pages of articles, depositions and briefs and followed closely every major—and many minor—controversial grand jury proceedings of recent years.

We have also followed closely, of course, the progress of this subcommittee under the able leadership of its chair, Rep. Joshua Eilberg. We commend this panel for its serious and painstaking examination of the federal grand jury system, an examination that has lasted four years and produced a wealth of information on virtually every aspect of our modern grand jury problem. But now, as the first Congressional voting on grand jury reform proposals in American history nears, it is time to take a step back from the voluminous and valuable evidence this subcommittee has collected and ask a very basic question: what does it all mean?

In this, our second appearance before this subcommittee, we would like to attempt to answer this question by highlighting the three major themes that weave their way through the mass of material this panel has accumulated. We feel that the evidence brought before this subcommittee demonstrates beyond a doubt that:

I. Grand jury reform is necessary because the deeply flawed institution that is our modern grand jury poses a serious threat to the rights and liberties of American citizens.

II. The arguments against grand jury reform advanced by the Department of Justice and other apologists for the grand jury status quo have been totally unconvincing.

III. Our society will pay a heavy price if the Congress chooses not to reform the grand jury.

We hope that our discussion of these themes—and our specific legislative suggestions which will follow—will help subcommittee members cut the complex issue of grand jury abuse down to a manageable and resolvable size.

I. Grand jury reform is necessary because the deeply flawed institution that is our modern grand jury poses a serious threat to the rights and liberties of American citizens.

One hundred and eighty-six years ago, the grand jury was incorporated into the Constitution of the United States as part of the Bill of Rights. The purpose of the grand jury to that generation of 1776 was self-evident: to protect citizens from the zeal or malice of government prosecutors. No person, those early Americans believed, should be forced to stand through the ordeal of a trial unless a panel of fellow-citizens—the grand jury—first determined that there was sufficient evidence to warrant further prosecution.

Our republic's first citizens did not write the grand jury into the bill of Rights because they considered every prosecutor a tyrannical ogre. They did so because every prosecutor, no matter how conscientious and upright, faces a decision that a democracy cannot afford to leave in one person's hands, the decision to prosecute an accused. Some 149 years after the Bill of Rights was adopted, United States Attorney General Robert H. Jackson restated the Framer's problem:

Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all the cases in which he receives complaints.[1]

[1] Robert H. Jackson, "The Federal Prosecutor," *Journal of Criminal Law and Criminology*. Vol. 31 (May–June, 1940), 5.

The dilemma presented by this "picking" process, Attorney General Jackson continued, is clear:

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted . . . It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.[2]

For the authors of the Bill of Rights, the grand jury was the institutional answer to this dilemma. It would shield the accused and serve, as one commentator exulted in 1785, as "a great security to the citizens against vindictive prosecutions, either by the government, by political parties or by private enemies."[3]

But the grand jury no longer plays this noble role. The evidence this subcommittee has heard over its years of hearings makes this assertion incontrovertible. This is not to say that every indictment, every subpoena that emanates from a federal grand jury is tainted by abuse. It is to say, however, that under current grand jury procedures, prosecutors can *and have* used the grand jury to "embarrass persons they dislike, can *and have* used the grand jury to look for offenses against those whose only "real crime" is being "unpopular with the predominant or governing group." In those cases where a prosecutor is out to "get" a person or group, the modern grand jury does not provide the protection the Bill of Rights intended. Indeed, the modern grand jury facilitates the "getting."

This modern grand—and the modern grand jury controversy—did not exist in the pre-World War II world of Attorney General Robert Jackson. In 1940, there was no tumultuous grand jury "issue." While a few observors did rail at grand jury abuses, the abuses they described—rubberstamping grand juror panels, leaks that injured innocent people's reputations—were the same abuses that had been bothering Americans since the days of Thomas Jefferson, and there was no sense of urgency to their attacks.

The real burning issues of civil liberty in those days were to be found elsewhere in the criminal justice system. "Rubber hoses" and the "third degree" were still standard operating procedure in many police headquarters across the country. Suspects were convicted on the basis of illegally seized evidence, and the poor, who could not afford attorneys, sometimes were convicted on the basis of hardly any evidence at all. Political dissidents, meanwhile, were being attacked by and, in turn, were attacking the growing threat to the exercise of First Amendment freedoms posed by legislative anti-subversive panels like the House Committee on Un-American Activities (HUAC).

These injustices were all the subject of heated debate, and, especially as the nation tumbled through the '60's, they were gradually brought under control or eliminated. But what was not eliminated were the motives that prompted these injustices in the first place, and what we have found is that the zeal and malice of politically motivated government officials that led to the beating of suspects and legislative inquisitions have reappeared cloaked in the mystery and secrecy of grand jury proceedings. In other words, as our society has tightened its controls on government misbehavior, the grand jury has evolved into the joker in our criminal justice deck, the one niche in our criminal justice system where the constitutional safeguards taken for granted everywhere else do not apply.

In the name of the grand jury, prosecutors and the federal agents with whom they work now claim the authority to traipse through people's lives—without any explanation or justification—and force the production of any and all testimony and documents they choose. Those who resist these intrusions face the threat of an indefinite contempt confinement.

To set this situation back into constitutional order, grand jury reformers have come before Congress. Congress is a fitting forum for it is the Congress that provided the spark for the grand jury abuse of recent years, the Organized Crime Control Act of 1970. This ill-advised legislation created, among other

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[2] *Ibid.*

[3] J. Story, *Constitution*, 165 (5th ed., 1891).

things, limited "use" immunity and thus stripped Americans of the Fifth Amendment's historic protection against over-reaching government pressure. But the grand jury's transmogrification from a shield over to a threat against people's liberties cannot really be reduced to a specific date or event. The grand jury's deterioration is a continuing process. In the early years after the passage of the 1970 Act, for instance, the Department of Justice's Internal Security Division used the grand jury to disrupt and harass Nixon Administration "enemies" by forcing individual political activists (and journalists, scholars, etc.) to give testimony that the government could use to harass or indict their friends and colleagues. That was bad, but as time has worn, prosecutors have gone further still with their grand jury powers. Increasingly, they use the grand jury not merely to fish through people's public and private lives, but to force already targeted suspects to produce the evidence that will be used to convict them.

One of the most recent grand jury controversies, the grand jury investigation of the Church of Scientology begun two months ago is a significant example. In the course of this grand jury activity, which followed July 8 FBI raids on church property in Los Angeles and Washington that the courts have since ruled illegal, prosecutors have frankly conceded to defense counsel "that they are now placing citizens believed by them to be guilty of crimes directly on the witness stand and threatening them with contempt and prison unless they give over to the U.S. Attorney they very evidence which the U.S. Attorneys themselves are certain will directly convict them of crime."[4]

We do not intend to detail here every sorry case of grand jury abuse we have encountered over the four and a half years of our existence. We and others have already described specific incidents in previous testimony, and, of course, the literature dealing with these abuses has reached awesome proportions.[5] These case histories of abuse powerfully dramatize the bankruptcy of our modern grand jury system.

Discussing individual cases of abuse, however, is not the only way to dramatize the bankruptcy of the grand jury system. The system's failure can be exposed quite graphically merely by listing the supporters of the grand jury status quo—or, more accurately, merely by noting the *absence* of supporters.

Who supports the grand jury status quo anyway? This question deserves a serious answer.

Are legal scholars satisfied with the contemporary grand jury? Not at all. Some of the most impressive witnesses this subcommittee has heard have been legal academicians: Prof. J. Anthony Scott of Rutgers University School of Law, Prof. Leon Friedman of the Hofstra University School of Law and Prof. Shelvin Singer of the Chicago Kent College of Law. Their testimony has been critical, and, more importantly, representative of their profession.

What about the organized bar? How does it feel about the grand jury system? We do have a number of organizational indications. The National Legal Aid and Defender Association, the legal voice of the nation's poor, the National Bar Association and the National Conference of Black Lawyers, the nation's two premiere associations of Black attorneys, the National Lawyers Guild and the Criminal Section of the Association of Trial Lawyers of America are all members of the Coalition to End Grand Jury Abuse. The National Association of Criminal Defense Lawyers has testified in favor of reform legislation before the Senate and held special seminars on the dangers of the modern grand jury.

Local bar associations, including the prestigious Association of the Bar of the City of New York, have endorsed proposals for serious grand jury reform. Finally, of course, the House of Delegates of the American Bar Association has endorsed sweeping grand jury reform recommendations, including the abolition of "use" immunity and the right to counsel inside the grand jury chamber.

Shifting from the bar to the pulpit, the story is the same: overwhelming reform sentiment. The United Methodist Church considers reforming the current grand jury so essential that it has made the Coalition to End Grand Jury Abuse a project of its Board of Church and Society. Many other denominations have since joined the Coalition's reform effort—the Jesuit Office of Social Ministry, the Church of the Brethren, the Unitarian Church—but the most striking indication

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[4] In re: An Executive Department-Issued Subpoena Using the Color of the Authority of the Federal Grand Jury in the Scientology Investigation, In the United States District Court for the District of Columbia, No. 77-0159 (June 25, 1977).

[5] The issues of *Grand Jury Report*, published quarterly in Washington, D.C., by the Coalition to End Grand Jury Abuse, are an up-to-date source of information about recent articles.

of how the nation's religious community feels about the grand jury came this past May 5 when the Governing Board of the National Council of Churches unanimously voted to support legislative reform efforts.

Who speaks for the grand jury status quo? The albor movement? Three International union conventions—the International Printing and Graphic Communications Union and the International Brotherhood of Teamsters in 1976 and the International Longshoreman's and Warehouseman's Union in 1977—have passed reform resolutions. In addition, endorsers of the Coalition include the Amalgamated Meat Cutters and Butcher Workmen of North America and The Newspaper Guild as well as union officials from unions like the Oil, Chemical and Atomic Workers and the Distributive Workers of America. Still other unions like the International Typographical Union have published critiques of the grand jury status quo in their newspapers and magazines.

Who speaks for the grand jury status quo? The business community? More and more business leaders are expressing outrage at modern grand jury practices. "You need due-process protections in grand jury proceedings just as much as in a trial—or more," said one business official in a recent *Wall Street Journal* article devoted to business critiques of the grand jury.[6] Most recently, General Motors, the nation's largest corporation, has denounced the manipulation of the grand jury process by agents of the Internal Revenue Service.

And how does the press feel about all this? The two leading organizations representing American reporters, the above-mentioned Newspaper Guild and the Reporters Committee for Fredom of the Press, have alreeady testified before this subcommittee and urged the enactment of strong reform legislation.

Many of the nation's daily newspapers have editorially gone on record for changes in current grand jury procedures. An incomplete list is sufficient to give an idea of the geographic diversity of editorial reform sentiment: *Wisconsin State Journal, St. Louis Post-Dispatch, Palm Beach Post, Christian Science Monitor, Orlando Sentinel Star, Louisville Times, Evansville Post, Charlotte Observor, Boston Globe* and *Austin American-Statesman.* Nor have other branches of the media ignored what is seen as the grand jury "problem." News documentaries have been broadcast on network and local levels. Even a popular detective series has devoted an hour to a dramatic critique of the grand jury system.[7] Viewers responded to this episode of *The Rockford Files,* according to NBC, in unprecedented numbers. They were appalled to learn that every indignity the show portrayed was entirely permissible under existing grand jury law.

Who, then, speaks for the grand jury status quo? Essentially, only those who are connected to it: prosecutors, judges, grand juriors. But even here the support is far from universal. Those grand jurors, for instance, who support the status quo are usually found in situations where grand jury panels are not particularly representative of their communities, which means on the state level. In many states, grand jurors are either selected by law enforcement officials or allowed to volunteer. Either way, these grand jurors may serve many terms on a grand jury and eventually come to reflect very closely the views of the prosecutors who come before them. On federal grand jury panels, where juror selection is random, though not as representative as they should be, grand juriors are much more likely to look at the current system with a sharper eye. This subcommittee has already heard a very moving critique of current grand jury procedures from one such grand juror, William Gloege. There are many others like him.

Critics of the grand jury status quo are also found in prosecutorial ranks and on the bench. The chairman of the special ABA grand jury committee that brought a reform proposal to the attention of the House of Delegates was Richard Gerstein, a respected Florida prosecutor. The most recent book-length call for grand jury reform, *The Grand Jury: An Institution on Trial,* was written by a sitting federal judge, Marvin Frankel, and a former prosecutor, Gary Naftalis.[8]

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[6] Carol Falk, "Under Indictment: GM, Other Unlikely Critics Accuse Grand Juries of Abusing Rights They Are Supposed to Protect," *Wall St. Journal,* June 23, 1977.

[7] *Wisconsin State Journal,* May 8, 1977; *St. Louis Post-Dispatch,* April 6, 1977; *Palm Beach Post,* August 15, 1977; *Christian Science Monitor,* February 16, 1977; *Orlando Sentinel Star,* February 7, 1977; *Louisville Times,* November 15, 1976; *Evansville Post,* November 18, 1976; *Charlotte Observor,* July 11, 1977; *Boston Globe,* July 8, 1977; *Austin American Statesman,* July 30, 1977.

[8] Marvin E. Frankel and Gary P. Naftalis, *The Grand Jury: An Institution on Trial,* New York (Hill and Wang, 1977).

But we will readily admit that the majority of prosecutors and judges (most of whom are former prosecutors) in the federal system would be content to freeze the grand jury at its 1977 status quo. We readily admit this fact because it supports our contention that the grand jury system needs a thoroughgoing overhaul. No one, after all, enjoys having their conduct subjected to close scrutiny. That the prosecutorial establishment—and the prosecutorial establishment virtually alone—is happy with the modern grand jury suggests strongly to us that the grand jury is not watchdogging prosecutorial conduct as tightly as it should.

The argument could be made, of course, that the prosecutorial establishment, headed by the Department of Justice, opposes grand jury reform not because it does not want an effective watchdog looking over its shoulder, but because it has reached the well-reasoned conclusion that grand jury reform is unnecessary. Accepting this argument, however, would mean assuming that the nation's legal scholars, bar and religious leaders and many of its labor, business and press representatives are (1) hopelessly naive characters who do not know the first thing about the administration of justice, (2) dangerously clever characters out to conceal their own criminal activity behind a smokescreen of grand jury reform, or (3) both. Accepting this argument also means assuming that the prosecutorial establishment has perfectly valid reasons for opposing grand jury reform. This assumption simply cannot be made.

The Department of Justice does *not* have valid reasons for opposing grand jury reform. The arguments for the status quo that prosecutors and allied judges have advanced are either contrived, misleading or utterly abhorrent to our nation's democratic ethos, as we hope to show in the following discussion.

II. The aruments against grand jury reform advanced by the Department of Justice and other apologists for the grand jury status quo have been totally unconvincing.

There is no one argument against grand jury reform, but there are certain contentions that appear over and over in anti-reform testimony and literature. We would like to give each of these arguments its own consideration.

Anti-reform argument #1: there is no abuse

The most common argument—we might label it, for convenience's sake, the "stonewall" position—holds that we do not need reform because we do not have abuse, or not much of it at least. Former Watergate Special Prosecutor Charles Ruff has told this subcommittee that much of the reform legislation before it is "an overreaction to problems more illusory than real." [9] Federal Judge Frederick B. Lacey warns against enacting broad reforms "to cure the one-in-a-thousand case." [10] New Jersey First Assistant Attorney General Robert Del Tufo deems it "sheer folly" to hamstring prosecutors with reforms introduced "because of a figment of fear that government itself may run amuck." [11]

The official Department of Justice position has been slightly more restrained. "On the whole, we believe the federal grand jury system is sound," Assistant Attorney General Benjamin Civiletti stated June 29. "That is not to . . . deny that some abuses of the grand jury system have occurred, although we may not always agree on specific cases." [12]

Looking back over recent history, it might be more accurate to say that the Department of Justice seldom, if ever, agrees with reformers that the grand jury system has been abused in "specific cases." Certainly it is true that the Department has never publicly admitted that any one of the many people jailed for refusing to give testimony or physical evidence to a federal grand jury system has been abused in "specific cases." Certainly it is true that the Department has never publicly admitted that any one of the many people jailed for refusing to give testimony or physical evidence to a federal grand jury has ever been wronged. In fact, the government will sometimes go to absurd lengths to avoid admitting that an injustice has been done. In November, 1976, for instance, Rutgers University Prof. Philip Shinnick was found in contempt and confined in the name of a Scranton, Pa., federal grand jury for refusing to supply

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[9] Charles S. Ruff, written testimony before House Judiciary Subcommittee on Immigration, Citizenship and International Law, April 27, 1977, p. 1.

[10] Judge Frederick B. Lacey, written testimony before House Judiciary Subcommittee on Immigration, Citizenship and International Law, April 27, 1977, p. 4.

[11] Robert J. Del Tufo, written testimony before House Judiciary Subcommitee on Immigration, Citizenship and International Law, April 27, 1977, p. 3.

[12] Assistant Attorney General Benjamin Civiletti, written testimony before House Judiciary Subcommittee on Immigration, Citizenship and International Law, June 29, p. 2.

handwriting exemplars and fingerprints as subpoenaed. Two months later, U.S. Attorney S. John Cottone dropped the subpena, noting that there was no longer a need for Shinnick's "evidence," and the professor was freed. Interestingly, Shinnick's incarceration had begun only after a half-year courtroom battle to quash his subpena had failed.

During all that time, the government had continually stressed that Shinnick's compliance with the grand jury subpoena was of utmost importance. Why did that compliance suddenly become unimportant? No mystery here. What happened between Shinnicks' confinement in November and his release in January was that Shinnicks' incarceration became an embarrassment for the government. On December 31, nationally syndicated columnist Tom Wicker of the *New York Times* wrote a strong denunciation of Shinnick's treatment. His article was followed by a longer analysis in the January 11 *Washington Star*. Rather than attempt to justify the unjustifiable, the Justice Department simply had Shinnick released without receiving an iota of the "evidence" it had formerly argued was so essential.

The Justice Department's unwillingness to attempt to defend its grand jury procedures in the Shinnick case was no aberration. We have looked in vain through Department testimony and briefs for prosecutorial rebuttals to citizen charges that FBI agents routinely use the grand jury's subpoena power to compel behavior they otherwise cannot legally compel. We have searched without success for any official answer to charges that IRS agents aim grand jury subpoenas against their targets in order to sidestep the protections suspects are accorded under normal IRS administrative summonses. We have yet to see the Department address the charge that witnesses are purposely called before the grand jury to try to induce them to commit perjury.

Justice Department officials do not try to defend these practices. Instead, they assert that since their grand jury conduct does not violate any grand jury law of the land, no abuse has been committed.[11a]

This argument is fairly ingenuous. The reason why reformers have come before Congress is not that prosecutors are breaking existing grand jury law, but that under existing law, injustices are possible and plentiful. Thus, to define grand jury abuse as engaging only in conduct that the courts have censured, as the Department of Justice so defines it, is to paper over the injustices of the modern grand jury system.

Let us be more specific. When five Los Angeles antiwar activists were subpoenaed to Tucson, Arizona, in December of 1970, told to tell prosecutors the who, what and where of every antiwar meeting they had attended for the previous year and then jailed when they refused, their confinement was upheld by the courts as legal under existing grand jury law. Their confinement may have been "legal," but can we define it as "just"?

When 23 members of the Vietnam Veterans Against the War (VVAW) were subpoenaed from Miami, where they were planning demonstrations around the 1972 summer political conventions, to Tallahassee 500 miles away, they protested, but their subpoena challenges were disregarded. Later, after some VVAW members had been indicted for bombing conspiracy, a trial jury acquitted them on all charges. But the jury's verdict did not undo the damage that had been done. The VVAW's plans to express its opinions at the conventions had been sabotaged by wild subpoenas and newspaper headlines based on trumped up bombing accusations that could not stand up in open court. Was the VVAW abused by the grand jury system? Not according to the law of the grand jury status quo.

When Jill Raymond, a Kentucky feminist, was subpoenaed before a Lexington federal grand jury in 1975 because she exercised her legal right not to answer FBI questions, no law was broken. When Raymond subsequently refused to answer grand jury questions, was found in contempt and spent the next 14 months in a series of Kentucky county jails so unsuitable for female prisoners that one of them did not even have a matron, the government did not behave

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[11a] Even when the courts have held that an abuse has taken place, the Justice Department is loathe to admit, let alone correct, any wrongdoing. We were particularly struck in this regard by Assistant Attorney General Civiletti's oral testimony before this subcommittee. Asked by Rep. Eilberg about the recent Litton Industries case in which Federal Judge Albert V. Bryan, Jr., called the government's grand jury conduct "a serious abuse of prosecutorial power," Civiletti refused to acknowledge that anything improper had occurred.

illegally. Raymond, it is worth noting, had not been then and has not been since either formally accused, tried or convicted of any criminal activity. Is she the victim of grand jury abuse? The court says "no."

When federal prosecutors in Detroit called Michigan State Supreme Court Justice John Swainson before a Detroit grand jury amidst widespread newspaper headlines about a bribery investigation and grilled him with vague and ambiguous questions, no law was broken. Indicted for bribery conspiracy and perjury before the grand jury, Swainson was tried late in 1975. He was found innocent of having anything to do with the bribery, yet convicted of lying to the grand jury. The verdict meant that Swainson was guilty of lying about a crime that never took place or, to put it another way, that Swainson's only crime was manufactured inside the grand jury chamber. Was Swainson a victim of our grand jury system? Not legally.

When Pedro Archuleta, a community organizer from a poor New Mexico county, was approached by FBI agents in November, 1976, he told them that, without his lawyer present, he was not going to answer questions that he felt were designed to link him with bombings in New York and Chicago. The Bureau responded by having Archuleta subpoenaed to a Chicago grand jury. Archuleta challenged that subpoena, and when the Chicago judge with jurisdiction patiently sat down to consider the challenge, impatient Justice Department officials had Archuleta subpoenaed before a different federal grand jury in Manhattan, where he was immunized and jailed June 30 for refusing to answer grand jury questions. Legally, Pedro Archuleta has not been wronged by the grand jury system, but only a legal mind trained by the Spanish Inquisition could believe that Archuleta's rights have been scrupulously respected.

We could go on with examples, but we think this partial list drives home our contention that the only way grand jury abuse can be described as "illusory" or a "figment of fear" or a "one-in-a-thousand" case is to ignore behavior that a democratic society cannot tolerate.

Anti-reform argument #2: grand jury abuse is already under control

It is the Justice Department's failure to recognize the injustices of our modern grand jury system that makes its second major argument against reform—we can regulate ourselves—so ludicrous. Until the Justice Department gives some indication that the wholesale subpoenaing of citizens and their effects will not be countenanced as a law enforcement strategy, our nation's jails will continue to be stocked with Pedro Archuletas and victimizations like Judge Swainson's will continue to raise eyebrows and fears.

Even if the Justice Department did begin to admit that not every subpoena was conceived in good will and ethical professional judgment, there still would be ample reason to suspect the Department's ability to police federal grand jury proceedings. That ample reason comes directly from the Department's own statistics on the subpoenaing of journalists.

The Department has had internal guidelines on the issuance of subpoenaes to reporters since 1970. These rules are intended, or at least billed, as the Department's means of protecting the First Amendment rights of journalists. By the Justice Department's own admission, these guidelines are violated with, if not impunity, regularity. Between March, 1973, and May, 1975, of 70 cases which involved subpoenas to journalists, only 57 went to the Attorney General's office for review, as required by the guidelines.[12a]

The reality, however, is worse than the numbers indicate, as The Newspaper Guild President Charles Perlik has already pointed out to this panel. Those who are subpoenaed in direct violation of the Justice Department's journalist guidelines cannot use a prosecutorial failure to follow the guidelines as a legal basis on which they can have their subpoenas quashed. KPFW-FM station manager Will Lewis in Los Angeles was found in contempt in 1975 and jailed for refusing to turn information subpoenaed in direct violation of the Justice Department guidelines.[13]

We are not proposing that the Justice Department's existing guidelines be scrapped, merely noting that those prosecutors most likely to take advantage of the broad prerogatives the grand jury system offers are the prosecutors least likely to pay any attention to guidelines. For guidelines to be effective, it must

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[12a] Charles Perlik, written testimony before House Judiciary Subcommittee on Immigration, Citizenship and International Law, June 1, 1977, pp. 12–13.

[13] *Ibid.*

be clear that those who step over the bounds of acceptable conduct will pay the consequences.

This is not the case. The Justice Department's internal ethics bureaucracy has not been able or willing to fully investigate complaints of abuse and take suitable action against errant prosecutors, and the Rodney Sager controversy is a distressing case in point.

Rodney Sager was no normal victim of grand jury abuse. In fact, at the time of his victimization, he was a U.S. Attorney in Richmond. Last year, while Sager was conducting an investigation of FBI misconduct, the Justice Department sent down from Washington to assist him Guy Goodwin, the prosecutor whose activities in the early 1970's became the symbol of everything wrong with the grand jury.[14]

Goodwin's conduct in Richmond soon disturbed Sager, who concluded that he had no choice but to move to have Goodwin removed from the case. Goodwin, however, had other ideas. He called Sager himself before the grand jury and grilled him for 15 hours!

An incredulous Sager responded with a long complaint to the Justice Department that charged Goodwin with "gross professional misconduct and gross abuse of the grand jury system." According to columnist Jack Anderson, the complaint was dismissed by Department ethics czar Michael Shaheen after only a perfunctory examination. Sager quit government service in disgust last June.[15]

Perhaps more than any other grand jury controversy of recent memory, the Sager case presented the Department with an excellent opportunity to speak out against grand jury abuse. The complainant was a respected U.S. Attorney. The accused abuser was one of the most notorious prosecutors in the country. Yet the Department threw the complaint out without even seriously considering it. If the Department of Justice will not seriously consider a charge of grand jury abuse from one of its own, what hope is there for the average citizen? More importantly, what hope is there for the citizen expressing unorthodox views, the person most in need of protection?

In our constitutional scheme of things, of course, our liberties are not supposed to be dependent on the Justice Department's interest in protecting them. We have the right to go before the bench and petition for constitutional relief. Some prosecutors claim that the existence of this judicial remedy makes legislative reform superfluous. Asserted a National District Attorneys Association spokesman before this panel last April:

Restrictions contained in the legislation, in large part, are unnecessar ybecause the federal courts have demonstrated both the willingness and the power to prevent oppression of the individual by the government.[16]

There is no doubt that one part of this statement is true. Courts do have the power to prevent oppression, but it is equally true that they have not exercised this power on grand jury matters. There are exceptions, to be sure. We think immediately of cases like the 1975 decision in which a New York District Court judge ruled, after FBI agents had subpoenaed an attorney who had refused to give them information about his client, that "(j)ust as the grand jury is not meant to be 'the private tool of (the) prosecutor,' it should not be allowed to become an arm of the FBI."[17] Or the 1976 case where the Sixth Circuit Court of Appeals threw out a perjury conviction that had been obtained after the government called an already indicted man before a grand jury and interrogated him about the crime in question. Judge George Edwards likened that government conduct to a "revival of the Star Chamber."[18] But such decisions are few and far between, and, significantly, ignored by other courts. Thus, scores of subpoenas issued upon FBI initiative have been challenged and *not* quashed since the 1975 ruling noted above. Moreover, while some lower courts have tried to safeguard the rights of grand jury witnesses, the Supreme Court has, invariably, thwarted their efforts on appeal. In each of the last three major grand jury cases brought before the Supreme Court—

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[14] Jack Anderson and Les Whitten, "Witch-Hunter General," June 8, 1976, syndicated column.
[15] *Ibid.*
[16] Edwin Miller, San Diego District Attorney, written testimony before House Judiciary Subcommittee on Immigration, Citizenship and International Law, p. 23.
[17] *In Re Stolar*, 397 F. Supp. 520, 523 (S.D.N.Y. 1975).
[18] *U.S. v. Doss*, 545 F.2d 548 (1976).

Mandujano, Washington and Wong—the high court has overturned lower court rulings sustaining the rights of grand jury witnesses.[19]

In sum, the courts have not prevented grand jury abuse. Sums up California Supreme Court Justice Stanley Mosk: "Unfortunately, to date courts have been loathe to shine the revealing light of due process analysis into the secret recesses of the grand jury room." [20] Assistant Attorney General Civiletti's smug assurance that "safeguards already exist for controlling prosecutorial misconduct" cannot and should not be taken seriously. [21]

Anti-reform argument #3: reform will wreak havoc in the War Against Crime

The best defense, the old adage goes, is a good offense, and the Justice Department has taken this wisdom to heart. Department spokesmen and friends have devoted much of their defense of the grand jury status quo to an attack on the proposed reforms.

We are told by San Diego D.A. Edwin Miller that:

". . . proposals contained in H.R. 94 will be detrimental or completely eliminate the grand jury's ability to investigate and uncover political corruption, massive white-collar or consumer-oriented fraud and organized criminal conduct." [22]

New Jersey prosecutor Robert Del Tufo sternly lectures that:

". . . the net effect of the proposed legislation is to deprive government of the ability to fulfill its primary mission, to protect the citizen against criminal attack in his home, his place of business and on the streets." [23]

Reforming the grand jury, in other words, will wreck the War Against Crime. It is truly amazing how often this assertion is made. But repetition does not make make truth, only evidence does, and anti-reform prosecutors have not presented any evidence that indicates either that the existing grand jury procedures under attack make any positive contribution to crime-busting or that changes in them would paralyze law enforcement.

The debate over immunity reform demonstrates our point quite well. Prosecutors contend that the federal immunity now in existence—that is, limited immunity that can be imposed against a witness' will—is absolutely essential to the fight against crime. Reform porposals to change this current immunity law in any way have been met with fierce prosecutorial opposition. H.R. 94's substitution of "transactional" for "use" immunity, say New Jersey's Del Tufo, "would substantially impair the grand jury's function." [24] Assistant Attorney General Civiletti says that H.R. 3736's proposal to make immunity orders conditional upon the consent of the witnesses to be immunized "borders upon the irresponsible." [25]

Our position is that it is these frenetic defense of forced, "use" immunity that "border upon the irresponsible." For a New Jersey prosecutor like Del Tufo to claim that substituting "transactional" for "use" immunity would "substantially impair" the grand jury effectiveness against crime is incredible. Surely Del Tufo must be aware that across the Hudson River from New Jersey lies a land where "use" immunity that can be imposed against a witness' will—is absolutely State, and before Del Tufo, or anyone else, can expect reasonable people to believe that "use" immunity is essential to crime-busing, he will have to show some evidence that indicates that New Jersey prosecutors have had more success in combatting organized crime than New York prosecutors. He does not and he cannot present that evidence because it does not exist.

The defense forcing immunity onto unwilling witnesses is equally specious. We are told that vast organized crime conspiracies can only be broken if the government has the power to force one conspirator to testify against others.

"The concept of forced immunity has been approved by the U.S. Supreme Court and to change the process would destroy the grand jury system," Assistant Attorney General Civiletti has said. "If we allowed immunity on a consent basis, no one involved in a case would testify, they'd just keep the information to themselves." [26]

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[19] *U.S. v. Mandujano*, 425 U.S. 564 (1976); U.S. v. Wong, — U.S. — (1977); U.S. v. Washington, — U.S. — (1977).

[20] Justice Stanley Mosk, written testimony published in *Reform of the Grand Jury System*, Subcommittee on Constitutional Rights of the Committee on the Judiciary, September 28, 1977, p 90.

[21] Civiletti, *op. cit.*, p. 26.

[22] Miller, *op. cit.*, p. 8.

[23] *Del Tufo*, op. cit., p. 7.

[24] *Ibid.*, p. 9.

[25] Civiletti, *op. cit.*, p. 8.

[26] *Macomb* (Michigan) *Daily*, June 22, 1977.

The facts are quite different. Forced immunity is not indispensable to the war on crime. It would be more accurate to say that the power to forcibly immunize mobster witnesses is meaningless. Indeed, the Department of Justice has yet to identify *a single case* where a mobster, forced inside a grand jury room and immunized against his will, has given testimony that led to the conviction of a mob higher-up!

The plain truth is that forcing mobsters to testify with immunity does not make them talk, and prosecutors, when they talk "shop" among themselves, admit as much.

Peter Richards is one of our nation's prosecutoral experts on immunity. In August, 1976, when the Cornell University Institute on Organized Crime held a seminar for state and federal prosecutors, Richards was selected as the lecturer on the immunity field. As the deputy attorney general in charge of the New Jersey Division of Criminal Justice's Special Prosecution Section and a former special attorney in the U.S. Justice Department's Organized Crime and Racketeering Section, Richards certainly came with the proper credentials.

Smart prosecutors, Richards told his audience of over 100 prosecutors, do not force immunity onto mobster witnesses against their will. Before taking witnesses before the grand jury, they first try to gain their cooperation.

The initial step in this process, Richards explained, is meeting with the prospective witness in an informal, off-the-record interview to find out what he knows. This step is crucially important. Without knowing if a mobster has testimony of value to give, a prosecutor can never rationally determine whether society's best interests would be served by immunizing or prosecuting the prospective witness.

Why would any self-respecting mobster talk to a prosecutor in an informal interview? Because the prosecutor holds a trump card, the threat of prosecution. The prosecutor, said Richards, must go out and build such a strong case against a prospective mobster witness that the mobster will realize that the only way he is going to avoid a sure conviction and prison term is by accepting a grant of immunity and testifying.

If a prosecutor doesn't secure a mobster witness' cooperation, Richards told his prosecutorial audience, "if you stick him in a grand jury cold without knowing what you're going to get, it creates really bad problems."

"Giving him immunity in the grand jury," Richards continued, forcing him to testify by court order over his clear objections—we don't like to do it because we have found that it normally does not work. The situation where a witness refuses to cooperate in the first place, then comes into the grand jury and changes his mind and cooperates and tells the truth and gives you something valuable is extremely, very, very, very rare. I don't think I've ever seen it happen, as a matter of fact. If the witness won't come around beforehand, sticking him in the grand jury cold is not going to do you much good.[37]

H.R. 3736's consensual immunity proposal, then, is not some radical new departure that will hamstring prosecutors, but rather a sensible measure that codifies the existing practice of effective organized crime prosecutors. By so codifying the immunity procedure that brings the results that a democratic society wants—the prosecution of organized criminal activity—the enactment of a consensual immunity statute would prevent the manipulation of immunity for purposes a democratic society cannot tolerate. Making immunity consensual would make it impossible for the government to trap people into jail by forcing them to respond to questions they cannot in good conscience answer.

Consensual immunity would also help prevent perjury traps. Peter Richards, for example, cites only one general exception to his rule-of-thumb that a prosecutor should not immunize witnesses against their will, and that exception is when the government is certain that the witness in question will testify falsely and be prosecuted for perjury.

The Justice Department, significantly, never publicly uses this very real perjury-trap dimension as a justification for forced immunity, and for good reason. The only purpose of every piece of immunity legislation ever enacted has been to facilitate the gathering of information otherwise unobtainable. The grand jury chamber was never intended to be a place where crime is created.

Forced, "use" immunity, in sum, is ineffective in doing what it is supposed to do—obtain valuable anti-crime information—and effective in doing what it was never intended to do—trap people prosecutors don't like into jail or perjury.

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[37] Speech before Cornell Institute on Organized Crime, 1976 Summer Seminar Program. August 10, Ithaca, New York.

This description could be applied, with equal relevancy, to many of the other unique grand jury prerogatives that prosecutors so ardently defend: the ability to quiz witnesses outside of their attorneys' presence, to not inform witnesses why they have been subpoenaed or whether they are targets of the investigation, and so forth. These prerogatives do not help place sophisticated organized criminals behind bars. The government gains nothing by not telling an organized crime witness what crime he is suspected of committing. The mobster witness already knows the crimes that he has committed. Against a cleverly constructed organized crime conspiracy, the prosecutorial power to sidestep due process safeguards via the grand jury is a crime-busting wash-out. An example: the Jimmy Hoffa disappearance case.

Former Teamster President Jimmy Hoffa disappeared July 30, 1975 from the parking lot of a suburban Detroit restaurant. Law enforcement officials quickly concluded that the disappearance was a result of organized crime foul play and began a massive investigation. Within a week after the disappearance, the FBI and prosecutorial officials involved decided to use the grand jury to break the case.[28] On August 13, the government began preparing a list of people to bring before the grand jury, and the grand jury activity itself started September 2. It continued almost daily until early November, then later resumed until over 100 witnesses had been called.[29]

Prosecutors stated quite frankly that they were using the grand jury as "an investigative tool." Stuck without concrete leads, the government simply scattered subpoenas on anyone it felt might have information. Then Detroit U.S. Attorney Ralph Guy described the strategy as "just hoping for a good lead."[30]

One of the early witnesses brought before the grand jury was the reputed Detroit underworld figure the press had been told was behind Hoffa's disappearance. Hauled before the grand jury September 8, this witness invoked the Fifth Amendment and was sent on his way, a sequence of events that raised serious questions about why the government had called the witness to begin with. The government must have realized that any defense lawyer who did not advise the widely heralded suspect, who was under indictment in an unrelated case, to invoke the Fifth would be guilty of legal malpractice. Just as certainly, since the subpoenaee was a prime target of an investigation that had yet to produce any tangible evidence, the government must have realized that it was not prepared to overcome the witness' Fifth Amendment invocation with even a grant of limited immunity. The conclusion is inescapable that the witness was called chiefly to show the press and public that the government was working hard to break the case—or, if one is less charitably inclined, to provide a scapegoat for the government's failure to unearth Hoffa's abductors.

There were other witnesses who also refused to testify. One was Charles O'Brien, Hoffa's foster son who was reputed to have been somehow involved in the abduction. Before he went before the grand jury, O'Brien had spent several hours answering FBI questions. He declined to answer questions during his grand jury appearance because he felt that the FBI might be trying to trick him into a perjury indictment. Another witness, Stephen Andretta, refused to testify in December, 1975, after being subpoenaed to Detroit from New Jersey, because his lawyer had been hospitalized and was not available to advise him. The court found Andretta, who had been immunized, in contempt and kept him in contempt and confined even after his lawyer had recovered and Andretta was answering grand jury questions.

All this fancy grand jury maneuvering by the government failed to advance the investigation, and as witnesses continued to pour through the grand jury's doors, there were murmurs of discontent. As *The New York Times* reported:

"Some Federal officials in Washington felt that officials in Detroit went to the grand jury too fast before amassing any useful information. 'You don't solve a murder in the grand jury,' a Washington official said."[31]

That official's wisdom has been vindicated by the utter failure of the Hoffa grand jury-powered investigation: you can't solve a murder in the grand jury. Unfortunately, in the eyes of the federal law enforcement officials in the Hoffa case, the opposite view—that you can do *anything* inside the grand jury room—prevailed. For them and too many of their colleagues, the grand jury has become

[28] *New York Times*, August 8, 1976.
[29] *Macomb Daily*, June 21, 1977.
[30] *New York Times*, July 7, 1977.
[31] *Ibid.*, November 26, 1975.

a crime-busting *deus ex machina*, and they have substituted a dogmatic faith in subpoenas and immunity orders for the time-honored gumshoe legwork that actually solves crimes.

But some will say that the Hoffa case is a misleading example and that the modern grand jury, as presently constituted, can be effectively employed to crack criminal conspiracies. For these people, Watergate stands as the grand jury success story of our times. Dare we tamper with the grand jury and lose its ability to bust conspiracies such as Watergate? New Jersey prosecutor Robert Del Tufo put this attitude in blunt terms last April:

In short, the vitality of the grand jury system was plainly demonstrated by its response to executive arrogance. Should this proposed legislation be enacted, it is inevitable that the grand jury's ability to respond to similar assaults on our democracy will be substantially diminished.[32]

But the grand jury history of Watergate, far from showing a system at peak operating efficiency, shows a system grievously out of whack, a system totally at the mercy of the prosecutor who directs its every move. During the Watergate grand jury's first investigation, that directing prosecutor was Earl Silbert, now U.S. Attorney for the District of Columbia. We now know, thanks to an extensively documented report by Charles Morgan, Jr., former director of the Washington office of the American Civil Liberties Union, that Silbert's grand jurors never had a chance at getting at the truth behind the Watergate break-in. The prosecution portrayed "G. Gordon Liddy as the man with ultimate responsibility for the crime when there was every indication to the contrary." Morgan's recital of leads not followed, key witnesses not called and important areas of questioning not pursued paints a frightening picture of how a prosecutor can guarantee that an investigation will reach a prefigured result.[32a]

Silbert's grand jury indicted Liddy, Howard Hunt and their CIA-trained Cuban friends. A trial jury subsequently convicted the bunch, and there the entire Watergate affair would have remained if one of the defendants had not decided to "spill the beans" in early 1973. On the basis of James McCord's startling revelations, Congress empowered a Special Prosecutor to get to the bottom of Watergate. That prosecutor, Archibald Cox, made headway, not by aimlessly throwing subpoenas at anyone remotely connected with the scandal, but by patiently gathering evidence to present to the grand jury. Cox did not have to force immunity onto unwilling witnesses. The witnesses immunized during the Watergate affair wanted immunity. They were willing to trade immunity for testimony because they feared the consequences of not testifying—a long jail sentence for their Watergate role—more than the threat of contempt confinement.

There was one uncooperative witness in the Watergate affair, Gordon Liddy. Liddy served 18 months for contempt. He totally refused to speak and the confinement did not break his will. Watergate, of course, was solved without Liddy's testimony. His incarceration is a sterling example of the futility of forced immunity.

Watergate also demonstrates the importance of insuring grand jury independence against executive branch domination. Archibald Cox was fired in October, 1973. The entire investigation would have been paralyzed were it not for the incredibly angry response of the American people, a response that forced then President Nixon to name a new prosecutor of independent stature. Had it not been for that pressure, Nixon would have been able to appoint a more trusted, and malleable, figure to succeed Cox. That puppet special prosecutor could have hamstrung the grand jury in the same sorts of ways as Earl Silbert had.

H.R. 94's provision that gives grand jurors the right to obtain their own independent counsel is one way we can prevent prosecutors beholden to powerful political interests from strangling the prosecution of official corruption.

One final point about the current grand jury's alleged indispensability in the War Against Crime. Sometimes the exercise of the prerogatives that prosecutors now enjoy inside the grand jury room does lead to convictions that might not otherwise be obtained. But in these cases it is crucial to note whether the conviction was the conviction that best served society's interests.

We will take the case of Roy Mandujano as an example. Mandujano's name is familiar because his case went all the way to the Supreme Court. In May, 1976, the high court refused to overturn Mandujano's conviction for perjury, with

[32] Del Tufo, *op. cit.*, p. 4.

[32a] Charles Morgan, Jr., "A Report to the Special Prosecutor on Certain Aspects of the Watergate Affair," June 18, 1973.

Chief Justice Warren Burger ruling that the failure to notify a grand jury witness of his or her right to silence and an attorney is not a deprivation of constitutional rights.

Mandujano, a San Antonio bar owner, had been suspected by the government in 1973 of drug-dealing, but he was not, by anyone's definition, a major operative. In March of that year, a police undercover agent asked Mandujano where he could get drugs. Mandujano made some phone calls, but no sale was ever made. Later, on the basis of the agent's testimony, Mandujano was brought before a grand jury and asked if he had ever discussed a drug sale. Confused, scared and ignorant of the government's evidence against him, Mandujano, who could not afford an attorney, perjured himself. He is now serving a 25-year sentence. The government never did nab any of the drug wheeler-dealers who stood above Mandujano.

Could things have been different? Could the real drug king-pins have been apprehended? Let's explore that possibility. What if, instead of concealing from Mandjuano the evidence gathered against him, the government had warned him strainght-forwardly when he was subpoenaed that he was under suspicion for drug-dealing. What if, instead of denying Mandujano an attorney, the government had guaranteed that he have one. It seems likely that if Mandujano knew the government had a case against him and had an attorney with whom he could discuss his predicament, he might very well have been willing to bargain his testimony against big-time San Antonio drug dealers for lenient treatment on his own drug offense charge. The government, of course, would have lost its perjury conviction against Mandujano if it had given him warnings and an attorney, but it might have achieved something far more important, a serious blow against San Antonio drug traffic.

Grand jury reform, then, will not cripple the legitimate war on crime. It might even help.

Anti-reform argument #4: delay

A favorite argument against H.R. 94, H.R. 3726 and other grand jury reform bills is that reforming the grand jury will so delay grand jury proceedings that the system will collapse from the inefficiency of it all.

Federal Judge Frederick Lacey's pessimistic prediction is typical:

"I predict that this legislation if passed will at least double the amount of time judges currently are spending on their criminal calendars." [33]

Adds the Department of Justice, opposing the grand jury witness right to counsel reform provision:

"Witness counsel in the grand jury room, appointment and removal, will cause delay. More importantly the motions, petitions, refusals to respond, all requiring judicial interventions and hearings, will cause enormous delay and convert probably cause determinations to adversarial proceedings akin to a trial of guilt or innocence on the merits." [34]

Two observations are in order here. The first is that "delay" is in the eyes of the beholder. Any due process safeguard can be attacked on the grounds that it causes delay. Forcing police to obtain search warrants before they raid homes causes delay, examining trial jurors for bias causes delay, allowing post-conviction appeals causes delay. In fact, the entire criminal justice tradition that has evolved over the past millennium of Anglo-American experience has unquestioningly produced delay. Questions of "delay" obviously cannot be examined isolated from questions of "justice." While justice delayed is justice denied, serving justice, not saving time, must be the goal of every democratic criminal justice system.

More fundamentally, however, we question the prosecutorial assumption that the current grand jury system operates efficiently without delay. While apologists for the grand jury status quo continually raise the spectre of a reformed grand jury system sinking in the quicksand of procedural litigation, the reality is that the grand jury system is already neck-deep in litigation.

Some striking, but typical, evidence: the case of Maria Cueto and Raisa Nemikin, two Episcopal Church employees who have refused to testify before a Manhattan federal grand jury investigating bombings credited to a tiny band called the "FALN." What happened when the government decided it needed Cueto and Nemikin's testimony? Was the government able to get its grand jury questions answered quickly efficiently? The following chronology will answer these questions:

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[33] Lacey, *op. cit.*, p. 15.
[34] Civiletti, *op. cit.*, p. 18.

Nov. 18, 1976.—FBI agents visit Episcopal New York City headquarters and are referred to Cueto and Nemikin. The two answer questions.

Nov. 19, 1976.—FBI reappears to question Nemikin, apparently dissatisfied with her original answers.

Nov. 22, 1976.—FBI again interrogates Nemikin. Agents threaten her and Cueto with grand jury subpoenas.

Jan. 7, 1977.—Cueto and Nemikin receive subpoenas for Jan. 10 and 14 grand jury appearances, respectively.

Jan. 10, 1977.—Because Jan. 7 was a Saturday, Cueto was not able to find an attorney. She requests a postponement. Court refuses request and jails Cueto for contempt when she refuses to take oath.

Jan. 11, 1977.—Friends find Cueto lawyer and court releases her.

Feb. 14, 1977.—After more than a month of litigation over the constitutionality of a related subpoena duces tecum for church records, Cueto and Nemikin appear before grand jury and refuse to testify on First, Fourth, Fifth and Sixth Amendment grounds.

Feb. 18, 1977.—Nemikin granted immunity, but still refuses to answer grand jury questions.

Feb. 26, 1977.—Federal judge finds Nemikin in contempt and allows two days for appeal.

Feb. 28, 1977.—Appeal denied.

March 1, 1977.—Nemikin incarcerated.

March 4, 1977.—Judge immunizes Cueto, who still remains silent.

March 5, 1977.—Judge finds Cueto in contempt.

March 7, 1977.—Appeal denied.

March 8, 1977.—Cueto incarcerated.

From the time the government first decided that Cueto and Nemikin had information that should be extracted by the grand jury to the time the government had them jailed for refusing to supply that information, a period of three and a half months passed. Their long, torturous grand jury route is not exceptional. In fact, Pedro Archuleta, the New Mexican activist first approached by the FBI at the same time and for the same matter as Cueto and Nemikin, was not confined for his refusal to cooperate with a federal grand jury until June 30, over seven months later!

Will delays become longer and more frequent when and if grand jury reforms are enacted? It is hard to see how. The current state of grand jury law does not prohibit witnesses from challenging subpoenas, immunity or contempt orders. It just dooms their litigation to failure and encourages prosecutors to continue using the grand jury in ways calculated to raise the litigational resistance of individuals and groups who feel that their constitutional rights are being violated. Not to litigate would be an admission that the government is behaving honorably, and that is an admission abused people will not, understandably, make.

Reform, however, holds out the promise of *decreasing* delay because it will give individuals run through the grand jury wringer a fighting chance to win their court challenges.[34a] Once chastened by a few court setbacks, prosecutors will no longer cavalierly issue subpoenas without thinking about the consequences. As the number of abusive subpoenas subsides, so will the litigation challenging them. Judge Lacey's calendar will not be so crowded after all.

The "delay" argument against reform is at its silliest when applied to the proposal that counsel be allowed to accompany witnesses into the grand jury room. Currently, witnesses must ask permission to see their attorneys, who must, in turn, wait outside the grand jury room while their clients are testifying. A witness' trips back and forth for counsel can take up enormous amounts of unnecessary time. In Detroit, last year, a witness excused himself 1,203 times to see his attorney outside the grand jury door.[35] The government's refusal to allow attorneys to accompany their clients into the grand jury room are directly to blame for this delay.

Anti-reform argument No. 5: beware of defense attorneys!

To prosecutors opposed to grand jury reform, no figure is as loathsome as the defense attorney, not even the grand jury contemnor. At August's ABA convention in Chicago, Attorney General Griffin Bell hinted none too subtlely that

[34a] We refer here particularly to reform provisions of H.R. 94 and H.R. 3736 that instruct the courts to quash subpoenas whenever witnesses can show that the subpoenas are unreasonable, oppressive, irrelevant, etc. There can be no meaningful grand jury reform until subpoenas are so controlled.

the campaign to put lawyers into the grand jury chamber was a barresterial plot to drum up new clients, "a lawyers' relief act," he called it. That same idea was brought before this panel last April by Carl Imlay, the general counsel of the Judicial Conference. Imlay charged that permitting counsel inside the grand jury room would not only do no good, but actually work "to the considerable detriment of the defendant (who is paying legal fees all the while)."

Defense lawyers are even likely, added Imlay, to disrupt orderly grand jury proceedings by refusing to waive grand jury hearings because of their "interest in enhanced fees based on time sheets."[36]

Against this image of the depraved, fee-hungry defense counsel, the Justice Department posits the noble prosecutor that none but the guilty need fear:

". . . the government does not generally have any motivation for causing witnesses any hardship; the government is seeking to win the cooperation of witnesses at trial."[37]

Somehow, we doubt that there is anything more ennobling about working as a prosecutor than as a defense attorney. Indeed, given the constant crossover between defense and prosecutorial ranks, the notion that prosecutors, as a group, are saints and defense attorneys sinners is rather comical. Do prosecutors check their ethics at the courthouse door when they leave a U.S. Attorneys office to enter private practice? Are defense attorneys who enter government service outfitted with a shining suit of ethical armor before they are allowed into a grand jury room?

The prosecutorial attack on the character of the defense bar cannot be taken very seriously as a manifestation of a dangerous prosecutorial mindset, a mindset that considers justice a mortal combat between the forces of good—the prosecution, of course—and the forces of evil—the accused and their counsel. To prosecutors with this world view, the ends justify the means, and anything the defense does in response is based on the vilest of obstructionist motives. It is this attitude that fuels grand jury abuse, and one example among many is the grand jury litigation around Seymour Gopman.

Gopman is a veteran Miami labor lawyer who, for the past six years, has clashed repeatedly with local federal Strike Force prosectuors. There is a long, complicated history behind these clashes, which need not detain us here, but suffice it to say that there is no love lost between Gopman and Florida federal prosecutors. What we should note here, however, is how the government has extended its distaste for Gopman to those who have spoken out in his defense.

Last year, for instance, prosecutors served a broad subpoena on Gopman's law firm's records. After the papers were turned over, the government charged that Gopman had not turned over everything ordered and moved to have him found in contempt. In the course of the litigation around this motion, secret grand jury material came to press attention, and Gopman was subjected to unfavorable media attention. The court subsequently denied the government's contempt motion, and Gopman, in turn, moved to have the prosecution held in contempt for violating grand jury secrecy. To investigate Gopman's charges, another judge appointed a respected local attorney, Stanley Meyers, as Special Attorney.

Meyers concluded that the prosecution had violated grand jury secrecy, and for that finding found his own character viciously attached by the prosecutor involved. How viciously? We cannot say because there is no longer a written record of the prosecutor's remarks. U.S. District Judge Sidney M. Aronowitz, who ruled against Gopman's challenge after the previous judge in the case took responsibility for the grand jury leak, ordered the prosecutor's "intemperate statements" stricken from the record this past April 5.[38]

The prosecutor's vituperative remarks against the Special Attorney were the last straw for Gopman's counsel, William Meadows, Jr., the former head of the Justice Department's Miami office and Florida Circuit Court Judge. On April 20, 1977, he wrote Attorney General Bell a long letter tracing the long history of

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[35] *Macomb Daily*, June 21, 1977.

[36] Carl Imlay, General Counsel to Judicial Conference, written testimony before House Judiciary Subcommittee on Immigration, Citizenship and International Law, April 27, 1977, pp. 10–11.

[37] Civiletti, *op. cit.*, p. 23.

[38] *In Re: Grand Jury Proceedings*, In the United States District Court for the Southern District of Florida, Grand Jury No. 75–6, 76–4, order dated April 5, 1977.

conflict between Gopman and the prosecutor who had attacked Special Attorney Meyers and concluded:

"It would be unreasonable to expect a Department Attorney who has been accused of misconduct during an investigation and forced to defend his conduct before the court to dispassionately exercise prosecutorial discretion toward the persons who caused these unusual steps to be taken." [39]

On July 6, Assistant Attorney General Civiletti replied for Attorney General Bell. That he refused to acknowledge any substance to Meadows' complaint was not particularly surprising. What was surprising—and disturbing—was the threatening tone Civiletti addresses to Meadows, himself a former federal prosecutor! After dismissing Meadows' allegations as "totally unfounded and unfair," Civiletti went on to write:

"There has been a growing tendency among certain members of the defense bar to employ the tactic of attacking the professionalism and integrity of Government attorneys without any factual basis for their accusations. As you know, that tactic is prohibited by the Code of Professional Responsibility and has been condemned by the courts." [40]

Then, to leave no doubt that Meadows himself was one of these unprofessional attorneys, Civiletti added:

"The able, dedicated and honest attorneys who work for the Justice Department know that we will not tolerate departures from the high standards upon which we insist, but they are also entitled to expect that the Department will respond firmly to lawyers who make unfounded accusations against them. Your letter affords me a clear opportunity to fulfill that obligation." [41]

It is in statements like these that the Justice Department's "them-against-us" zeal exhibits itself most clearly. Such an attitude is just one more compelling reason why protections are so desperately needed inside the grand jury chamber.

Anti-reform argument #6: the grand jury is not an adversary proceeding

Besides asserting that the pending grand jury legislation is unnecessary, dangerous and disruptive, apologists for the grand jury status quo have also attempted to stake out a more philosophical position against grand jury reform.

The first of these philosophical musings holds that since the grand jury is not a forum where guilt or innocence is battled out, enacting reforms to protect the rights of grand jury witnesses is patently ridiculous. Reforms would only make the grand jury a minitrial and force wasteful duplication. The trial before a petit jury is the adversary stage of our criminal justice system, and it is here, we are told, that safeguards should be and are guaranteed.

To witnesses who have been trapped into perjury through a prosecutor's clever grand jury interrogation, the contention that the grand jury is not an advesary proceeding probably would not strike a responsive chord. Nor would it for reporters ordered before a grand jury and asked to reveal their sources on pain of jail or political activists given no explanation why their grand jury appearance has been demanded and grilled about their activities and friends.

The grand jury, to be sure, does not determine guilt or innocence, but the determination it does make—whether or not to make an accused stand trial—is a fundamentally important one. As an important decision, a decision that causes irreversible injury, the decision whether or not to indict must be reached fairly.[41a] But in our modern grand jury chamber, prosecutors are now free to manipulate a grand jury determination unfairly. There is no justification for this. The absence of a defense presence throughout grand jury proceedings cannot be used as a justification for allowing one side of an adversarial relationship, the prosecution, to treat the other unjustly.

Anti-reform argument #7: current grand jury procedures are historically tested

Reformers are warned over and over that we must not tamper with grand jury procedures now in effect because they have stood the test of time. In 1974, for instance, the Supreme Court justified its refusal to apply the exclusionary rule to grand jury proceedings in the *Calandra* case by asserting that applying

[39] Letter to Attorney General Griffin Bell from William A. Meadows, April 20, 1977.
[40] Letter to William A. Meadows from Assistant Attorney General Benjamin Civiletti,
[41] *Ibid.*
[41a] An indictment is definitely an irreversible injury. An acquittal at trial does not remove its stain on a person's reputation, nor does it erase the huge emotional and financial toll that every trial exacts from a defendant and family.

that rule to the grand jury would constitute a bold, new departure in constitutional theory. The leading contemporary constitutional historian in the United States, Leonard Levy, disagreed—strongly:

". . . for over half a century the exclusionary rule (has) barred grand juries from using evidence derived from illegal searches and seizures. To talk about an 'unprecedented' or a 'proposed' *extension* of the exclusionary rule, as if its application to grand-jury proceedings was novel, broached judicial perjury." [42]

Levi's point—that it is the government that has tampered with the historical grand jury—has been echoed by other historians. As Prof. Leon Friedman explained to this subcommittee June 1, the hearsay evidence that prosecutors routinely present before grand jurors today was not considered proper fodder for grand jurors all throughout the 19th century.[43]

But it is the immunity question that best illustrates the incompatibility of current undemocratic grand jury practices with the grand jury's historical tradition. Before 1954, there was no way a 20th century prosecutor could neutralize a witness' invocation of the Fifth Amendment before a grand jury with a grant of immunity. Immunity was then strictly a regulatory phenomenon, and the only immunity laws on the statute books covered the activities of regulatory agencies like the ICC. This absence of an immunity law applicable to criminal proceedings proved to be an important safeguard during the anti-communist hysteria of the early 1950's. By invoking the Fifth Amendment, the targets of witch-hunting grand juries put at least a modicum of space between themselves and their inquisitors.

In fact, this safeguard was so effective that the red-hunting zealots of the day took steps to eliminate it. In 1954, at the height of Cold War frenzy, the first 20th century immunity law applicable to criminal matters was passed.[43a] This act extended the applicability of immunity only to "subversive" crimes like espionage. Immunity was not extended to most criminal offenses until 1968 and not extended to all federal criminal offenses until the 1970 passage of the Organized Crime Control Act. That same act created "use" immunity and, in doing so, ignored the spirit of the Supreme Court's *Counselman* decision which deemed unconstitutional anything less than full, transactional immunity.[44]

In the field of immunity, then, just as in the fields of hearsay and illegally seized evidence, the prosecutorial grand jury prerogatives that grand jury reformers are fighting today are perverse additions to, not historical aspects of, traditional grand jury procedure.

Anti-reform argument No. 8: the government has a "right to everyman's evidence"

A reader of recent government briefs and Supreme Court decisions could very easily conclude that our entire Constitution is built around the notion that the government has a "right to every man's evidence." This doctrine is exclaimed whenever prosecutors' attempts to forcibly subpoena or immunize information out of witnesses are challenged.

The Constitution, however, nowhere speaks of the government's "right to every man's evidence." Instead, it speaks of the right of every person not to be forced to bear witness against himself or herself. A generation ago, Supreme Court Justice William Douglas called this right "the right of silence." [45]

We hold, with Justice Douglas, that the Fifth Amendment means just what it says: that people cannot be forced to do themselves harm out of their own mouths. Harm, moreover, springs not just from admitting acts that can be construed as criminal, self-incrimination, but also from being forced to make statements that would subject an individual to the scorn or "infamy" of his or her community, self-infamation.

Certainly, there is no historical doubt that throughout the 17th and 18th centuries in England and its American Colonies, self-incrimination and self-infamation were considered twin evils. This conception underlined the Fifth Amendment and shaped the thinking of early United States jurists, as a fascinating 1802 case made plain.

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[42] Leonard Levy, *Against the Law*, Harper & Row (New York: 1974), p. 424.
[43] Leon Friedman, written testimony before the House Judiciary Subcommittee on Immigration, Citizenship and International Law, June 1, 1977.
[43a] An immunity law applicable to judicial criminal proceedings was on the books for 80 years in the 19th century. It was invoked on an average of once a decade.
[44] *Counselman v. Hitchcock*, 142 U.S. 547 (1892).
[45] *Ullmann v. U.S.*, 350 U.S. 445 (1956).

The case involved an old, blind Pennsylvania man, who had apparently been a Tory sympathizer during the Revolutionary War. On a local election day, the old gentleman appeared at the appropriate polling place to vote, but the registrar, an ardent patriot, refused to register the poor man unless he first answered what would have been embarrassing questions about his pro-British past.

The question infuriated the blind man's son, who had accompanied his father to the polls. He lunged at the registrar, precipitated an altercation and was subsequently indicted for his disruptive behavior. The Pennsylvania Supreme Court, however, dismissed the indictment, explaining that the registrar had absolutely no right to ask the old man the questions that had enraged his son. Said the court:

". . . the true meaning of the constitution and law is, that no question shall be asked a person, the answer to which may tend to charge him either with a crime, or bring him into disgrace or infamy." [40]

Still, the right-to-every-man's-evidence doctrine is not a figment of the Justice Department's imagination. It does have a heritage in Anglo-American law. How can that be? Isn't there a glaring contradiction between the government's right to evidence and the citizen's right to silence? The government maintains that there is, that there is no right to silence that can override the government's need for information inside the grand jury chamber.

But, despite this government assertion, there is no contradiction here. The government's right to evidence simply means that no citizen has the right to obstruct justice by withholding evidence of criminal activity. Obstructing justice in such a way is a crime. There are various criminal statutes that address this crime, and penalties have been ascribed to them. As is the case with any crime, no person can be subject to these penalties unless first proved guilty in a court of law, and the burden of proof, as always, is on the government. It must be able to present evidence and witnesses who will testify that the accused is obstructing justice. This evidence, of course, cannot be forced out of the accused.

If the government cannot prove that a witness is interfering with justice, then it has no business using the subpoena-immunity-civil contempt process to punish him or her for silence. This is what the right of silence should guarantee. But today it doesn't. By forcing immunity upon a silent witness, the government can have him or her jailed indefinitely without ever having to prove him or her guilty of committing a crime.

The right to evidence is no justification for allowing the government to march through people's lives in search of information they do not want to provide. Just as the right to free speech does not protect fraudulent advertising, the right of silence does not protect obstructing justice. But in each case, the crime must be proved, not merely asserted, by the government.

Anti-reform argument No. 9: Reforms give witnesses before the grand jury rights that they enjoy nowhere else in the criminal justice system

We cite this argument, which is sometimes dredged up to attack allowing counsel in the grand jury room, merely to show how far grand jury apologists will go to justify the grand jury status quo. This argument holds that since a witness does not have the right to consult with counsel at trial before answering each question, a grand jury witness should not have this right either.

This argument falls rapidly apart under any sort of serious scrutiny. At a trial, there are very strict rules of relevancy that govern the questions a witness may be asked by either the prosecutor or defense counsel. At a trial, there is a judge present to ensure that questions asked of any witness do not go beyond the proper boundaries. There is no such mediator present in a grand jury room to protect a witness from totally irrelevant, vague or harassing questions.

It is also totally erroneous to assert that witnesses at trial are not allowed the presence and advocacy of counsel. Witnesses at trial do in fact enjoy the right to representation by counsel. Perhaps the most current example is the increasing tendency on the part of prosecuting witnesses in rape trials to retain their own counsel to ensure their protection from questions concerning their previous sexual experience posed by defense counsel in an attempt to discredit the witness in the eyes of the jury.

Such counsel for the witness has an active role and will approach the judge at any point to raise objections to specific questions or a line of questioning which affects the rights of the witness.

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[40] *Commonwealth v. Gibbs*, 3 Yeates, 429, 432.

But what makes this Justice Department argument absurd is that grand jury witnesses already have the ability to consult their attorneys after each question, only they must leave the grand jury room after each question to do so!

III. Our society will pay a heavy price of the Congress chooses not to reform the grand jury

Prosecutors have spoken ominously—and, as we have shown, unjustifiably—about the dangers of enacting grand jury reform legislation. We would be remiss if we did not point out to this subcommittee and to the Congress as a whole that grave dangers lie ahead should Congress decide *not* to reform the grand jury system.

In 1970, only a miniscule percentage of the American people knew much about the grand jury. But that is no longer the case. Since then, seven years of publicized grand jury controversies have given millions of citizens a frightening glimpse at what may go on behind the grand jury's closed doors. Many Americans now know that grand jury witnesses surrender their constitutional birthright when they enter the grand jury room. They know that inside the grand jury chamber prosecutors can wield awesome, unaccountable power. Many of these Americans consider a grand jury subpoena an invitation to an inquisition, and, given that invitation, they will refuse to attend, they will go to jail rather than cooperate with an institution that infringes upon their righs.

This feeling is not limited to a few radicals or stubborn reporters. It is widespread among broad sectors of our society, and every time a person is jailed for the "crime" of silence, every time someone's reputation is ruined by a grand jury fishing expedition, every time a perjury trap is laid inside the grand jury chamber, this sentiment spreads a little more.

It has already spread quite far. Last May, when the National Council of Churches enacted its grand jury reform recommendation, it also called upon all member denominations to "give moral and material support (including continuing salary for employees) for those members and employees who for reasons of principle refuse to testify before a grand jury." With those words, the National Council of Churches is calling on the national religious community to support civil disobedience against the grand jury.

As long as the grand jury system is not reformed, civil disobedience to grand jury orders will become more and more frequent. The number of contemnors will increase, the amount of litigation will increase, citizen distrust of the criminal justice system will increase.

Finally, as long as the grand jury system is not reformed, the lives and reputations of who-knows-how-many people will be ruined by what can go on inside the grand jury room. We say that not one more person must suffer an injustice at the hands of grand jury power. We say that not one person should have suffered an injustice at the hands of grand jury power because the grand jury was written into the Law of our land to prevent injustice. We say that it is long past the time for Congress to act.

LEGISLATIVE SUGGESTIONS

As previously stated, we view H.R. 94 as an important reform bill. There are, however, certain provisions in the bill which we feel are both unnecessary and potentially dangerous. In this section of our testimony, we would like to identify these sections and also offer a few additions to the bill for your consideration.

1. Counsel in the grand jury chamber

There has been a great deal of confusion over the role that counsel for a witness should play before the grand jury. The present language of H.R. 94, which explicitly limits counsel to advising witnesses, appears to have been drafted to disarm the Department of Justice and other critics of reform who have opposed allowing counsel into the grand jury room on the grounds that witness attorneys would be disruptive. Yet it is abundantly clear now that the Justice Department will oppose counsel despite the restrictive language of H.R. 94. language which was not in H.R. 1277, its predecessor in the last Congress.

This continued Justice Department opposition can only be explained to our satisfaction by realizing that the disruption issue is a phony one. What is bothering prosecutors is not the possibility of disruption, but the loss of prosecutorial maneuvering room that will result once defense attorneys are allowed

inside the grand jury chamber. With defense counsel on hand, prosecutors so inclined will no longer be able to play on the legal ignorance of grand jurors and stage inquisitorial interrogations.

While the present language of H.R. 94 does not change the attitude of Department of Justice prosecutors—who will oppose a counsel provision no matter how it is drafted—it does make a great deal of difference to the defense bar. Under the current language of H.R. 94, as opposed to the language of last year's H.R. 1277, defense counsel will enter the grand jury room muzzled, unable to speak to anyone but the witness even if the grand jury wants to hear from counsel.

H.R. 94 would also subject defense counsel to removal from the grand jury room at the whim of the court. This clause is a clear interference with the Sixth Amendment right to counsel of one's choice and it places an unholy power in the hands of the district court judge. Courts already have the power to discipline and control unruly attorneys with contempt procedures. We do not see why this additional defense attorney removal clause is necessary or desirable.

We urge a particularly close examination of the language used in this section. A district court judge would be authorized to fire defense counsel to "insure that the activities of a grand jury are not unduly delayed or impeded". We suggest that the use of the words "delayed or impeded", broad language lacking objective standards to guide the court, invites abuse.

An additional, subtle problem exists in connection with subsection (d) which raises the issue of how the witness' counsel can delay or impede the proceedings if she or he is not also in violation of subsection (c). Subsection (c) virtually prohibits all activities of counsel except advising the witness. Therefore, by a deductive argument, delaying or impeding the proceedings must refer to periods when counsel and witness are conversing. To find an attorney guilty of delaying or impeding, there would presumably have to be a determination that said conversations were overly long and conducted in bad faith. This raises the issue of intent, exactly the kind of nebulous area drafters of legislation should avoid.

We suggest that this subcommittee strike out lines 10–22 on page 20 of H.R. 94 and insert in lieu thereof the following:

(c) The role of such counsel shall be the same as that of counsel for a witness before a committee of Congress.

This change would effectively give control over the defense attorney's role to grand jurors in the same manner as members of Congressional committees control a committee witness' attorney. To totally prohibit a defense counsel from addressing grand jurors is not the way to foster the spirit of grand jury independence.

IMMUNITY

As we have previously addressed the issue of immunity at length, we need only note here that simply adding "Consent of the witness to the guidelines proposed in Section 6003(c) would eliminate much of the problem of grand jury abuse.

TESTIMONIAL PRIVILEGES

One of the most serious abuses which takes place inside the grand jury chamber is the coercion of privileged testimony. The privilege violated may be obvious, as in the case of an attorney forced to testify about a client, or it may involve a confidential relationship which is not clearly estabilshed as privilege, such as the right of a law minister to preserve confidential information obtained through the course of her or his ministry. In order to preserve the sanctity of the confidential relationships so vital to a democratic society, we would suggest that on page 23 of H.R. 94, subclause (E) at line 18 be re-lettered as (F) and that the following language be inserted in lieu thereof as sub-clause (E):

(E) compliance with the subpoena would not impair or disparage the right of any person to counsel of her or his choice or of any other legal confidential relationship (even though no privilege exists).

This language was suggested originally by Prof. Melvin Lewis of the National Association of Criminal Defense Lawyers and is, we believe, an excellent approach to a tricky problem. It would empower the district court judge to determine if compliance with a subpoena would require a witness to violate a confidential privilege that society should protect.

CONTEMPT HEARINGS

For a recalcitrant witness before a grand jury, the contempt hearing is the first and only opportunity to establish a legitimate basis for a refusal to testify. Even under the reform provisions of H.R. 94, a witness would still face a six-month deprivation of liberty for a refusal to testify, a fact that makes the contempt hearing a critical and crucial stage in the criminal justice process.

Present procedures, however, guarantee that the contempt hearing is only a formality. Contempt hearings may be held on only a few hours notice, and, in that brief time, a witness must obtain counsel, if that has not already been done, and counsel must prepare the case.

The proposal in H.R. 94 that a witness be given 72 hours notice before a contempt hearing is insufficient. In many instances the defense needs to subpoena witnesses for its case. Seventy-two hours is not enough time to make the proper arrangements.

Moreover, by giving a judge the opportunity to shorten the notice upon a showing of special need by the prosecutor, H.R. 94 further undercuts a witness' right to a meaningful contempt hearing. "Special needs" come easily to prosecutors and, we are afraid, to far too many judges. We propose that lines 18–22 of page 2 be stricken and the following inserted in lieu thereof:

"(3) No hearing under this subsection shall be held unless ten days notice is given to the witness who has refused to comply with the court order, except where the court finds special need upon a showing by the attorney for the government or a special attorney appointed under this title or where the witness waives her or his right to ten days notice, but in no event shall any hearing be held under this subsection unless five days notice is given to the witness."

Five days is the minimum amount of time in which a recalcitrant witness can expect counsel to prepare an adequate case for the witness' refusal to testify. Additionally, witnesses need time to set their personal lives in order before their contempt hearings. They need time to prepare themselves and their families for the possibility of a long incarceration: Is it unreasonable to take these human practicalities into consideration? We think not. A civil contemnor, after all, has not been convicted or even tried for a crime.

SUBPOENA NOTICE

For a witness subpoenaed before a federal grand jury, or ordered to turn over documents or exemplars, response to the subpoena is necessarily inconvenient and disruptive to the ordinary conduct of home and business. H.R. 94 would greatly ameliorate this situation by requiring seven days between the witness' receipt of the subpoena and compelled appearance and/or production. But by allowing a district court judge to reduce this period to any minimum upon a potentially arbitrary determination of "special need", this provision severely undercuts the effectiveness of the excellent seven days requirement.

We suggest that the same purpose can be better achieved by adding a new clause to § 3330B of H.R. 94, inserting a commo after the word "subpena" at line 6 of page 21, and adding: . . . but in no event shall any subpena be returnable in less than seventy-two hours from the date of service of the subpena.

Seventy-two hours is the minimum amount of time to allow a witness to arrange her or his affairs at home or work to allow for a possibly lengthy grand jury appearance, to collect documents subpoenaed to make any travel arrangements required by the appearance, and to consult with counsel if desired. Any lesser period of time, such as forty-eight hours, would mean that a witness subpoenaed on a Friday could be compelled to appear on a Monday, having had no opportunity to consult with counsel or arrange business affairs.

A witness forced to drop everything in an almost immediate response to a grand jury subpena is likely to be too harassed, confused and worried to be a valuable witness.

BAIL

If a witness is found in contempt for a refusal to testify and if bail is denied, as is customary in contempt cases, the witness must sit in jail pending a determination of the appeal. Requiring the appeal's court to act within 30 days is absolutely necessary in a civil contempt situation, but the requirement itself is useless without some sort of enforcement clause. We suggest that the language proposed by Rep. Holtzman in H.R. 406 would best solve this enforcement problem. This language could be incorporated into H.R. 94 by adding a new sentence after the word "appeal" at line 5 on page 4:

"If the appellate court shall fail to dispose of the appeal of a person who remains imprisoned within 30 days, the person shall automatically be released on her or his personal recognizance pending disposition of the appeal."

CONDITIONS OF CONFINEMENT

How grand jury contemnors have been forced to spend their confinement time should be an important consideration in grand jury reform. Witnesses have been incarcerated for as long as 14 months in miserable county jails which are not permitted to hold convicted felons for periods longer than twelve months. There is absolutely no justification for incarcerating a civil contemnor under worse circumstances than a person actually convicted of a criminal offense.

The facilities in which civil contemnors are incarcerated should be as uniform as possible and should be federal facilities equipped to handle long-term prisoners. We find no basis at all for H.R. 94's stipulation that such federal facilities must be located within 50 miles of the court ordering confinement and suggest that this requirement be stricken. Proximity to the courts has not been a concern to district court judges in the past who have ordered witnesses confined in county jails as much as 100 miles from their courthouse when there were adequate federal correctional facilities within a few miles. Neither should it be a concern now, for, if it is, contemnors will continue to be forced to serve time in miserable county jails unfit for this purpose.

DEFENSES TO CONTEMPT

While H.R. 94 establishes violations of the federal wiretap law as a defense to any action brought against a witness under section 401 of title 18, United States Code, or section 1826 of title 28, United States Code, it does not establish a defense for violations of other statutes or constitutional rights which are equally important. Accordingly we suggest that lines 10–17 at page 4 be stricken and the following substituted:

"(b) A refusal to answer a question or provide other information before a grand jury of the United States shall not be punishable under this section or under section 401 of title 18, United States Code, if the question asked or the request for information is based in whole or in part upon evidence obtained by an unlawful act or in violation of the witness' constitutional rights or of rights established or protected by any statute of the United States."

STANDARD OF EVIDENCE

The standard of evidence necessary to indict is of major importance. Presently, indictments may be based on anything from hard evidence to hearsay to extraneous remarks by the prosecutor. The deterrent value of the exclusionary rule is therefore attenuated; it always will be attenuated as long as law enforcement officials know that evidence obtained illegally can form the basis of any indictment.

H.R. 94 addresses this issue quantitatively by requiring that evidence be "sufficient" to form a basis for indictment. We think that the better approach is to address the specific nature of the evidence—the quality of the evidence on which grand jurors may base an indictment. We suggest that lines 10–11 at page 13 of § 3329(a) be striken and the following inserted in lieu thereof:

(7) the necessity that an indictment be based on evidence that is legally sufficient, competent and admissible.

GRAND JURY SIZE

H.R. 94 proposes a reduction in the size of federal grand juries from the traditional 16–23 members to 9–15. This proposal, while well-intentioned, has serious drawbacks. For one, it will mark a setback in the long struggle to make grand jury panels representative of the communities they are supposed to serve. A large panel provides the potential of a fuller cross-section of the community.

A smaller panel may well be of "one mind" and not provide the variety of background and opinion that is necessary for a true "people's panel." At a time when the independence of grand jurors is in grave danger, it makes no sense to us to present prosecutors with a potentially more pliable group of grand jurors. We suggest that this would be the ultimate result of the provisions in Section 3321 and consequently we suggest that this section be omitted from H.R. 94.

SPECIAL ATTORNEYS

The grand jury has historically served to protect the citizenry in two ways. First, it protects individual citizens by preventing prosecutors from bringing an accused to trial on trumped-up charges. Secondly, it protects the citizenry at large by preventing prosecutors from covering up official crime and corruption.

To perform this second function, grand jurors need the freedom to investigate government misconduct. We support the "special attorney" section of H.R. 94 in this regard. It would enable grand jurors to "fire" prosecutors who are impeding official corruption probes. The language of H.R. 94's special attorney proposal is, however, dangerously broad. It would allow grand jurors to obtain a special prosecutor and independently investigate any possible criminal conduct they desire.

It is not the grand jury's task to "solve" crimes that have nothing to do with official misconduct. Investigating such crimes is the job of the executive branch, which should not be allowed to misuse the grand jury for that purpose.

GRAND JUROR DECISIONMAKING

In keeping with the intent of grand jury reform legislation to restore the time-honored independence of grand juries, we believe that grand jurors themselves should vote on whether to issue subpoenas, grant immunity or press contempt charges. There is nothing to stop the grand jurors, of course, from taking a prosecutor's advice on these matters, nor should there be. It is vitally important, however, that grand jurors be aware that theirs is the authority and theirs the ultimate decision.

Witnesses before this subcommittee have recounted at length how prosecutors routinely issue subpoenas about which grand jurors have no knowledge. Many times, prosecutors subpoena witnesses directly into their offices instead of the grand jury chamber. Forcing prosecutors to obtain prior approval of witnesses to be subpoenaed would end these abuses. We suggest that this subcommtitee make the following changes in H.R. 94 to allow for grand jury decision-making:

For subpoenas—strike lines 24 and 25 at page 20 and lines 1–6 at page 21 and insert in lieu thereof the following:

"(a) A subpena summoning a witness to appear and testify before a grand jury of the United States, or to produce books, papers, documents, or other objects before such grand jury, shall be issued only upon an affirmative vote of twelve or more members of the grand jury, and such subpena may not be returnable on less than seven days notice, except with the express consent of the witness or upon a showing to the court by the attorney for the government of special need, but in no event shall any subpena be returnable in less than seventy-two hours from the date of service of the subpena."

For contempt—amend § 1826(a)(1) by inserting the following between the words "may" and "apply":

". . . only upon an affirmative vote of twelve or more members of the grand jury that such refusal was without just cause . . ."

For immunity—add a new subclause to § 6003(c)(4) as follows:

"(F) there is an affirmative finding by twelve or more members of the grand jury that such testimony or other information sought to be obtained by the witness is necessary to the public interest;"

REITERATIVE CONTEMPT

No person should be jailed more than once for a refusal to answer the same questions. This is the intent of H.R. 94's prohibition against reiterative contempt confinements for grand jury contemonors.

We fear, however, that under H.R. 94's present wording which bans reiterative confinements in the course of grand jury investigations into the "same" transactions, prosecutors would be albe to force reiterative contempt confinements by making some fine distinction between the subject matter of the grand jury investigation in question and a previous investigation. We propose that Section 1826(c) at page 3, line 19, be amended by inserting the words "or any related" between the words "same" and "transaction" and that this change also be made in Section 403 at page 5, line 7, and in Section 3330B, page 24, at lines 4 and 10.

Coalition To End Grand Jury Abuse

List of member organizations September 1977

American Civil Liberties Union; National Lawyers Guild; National Emergency Civil Liberties Committee; United Methodist Church Board of Church and Society, Department of Law, Justice and Community Relations; Unitarian Universalist Association; Church of the Brethren; Jesuit Conference Office of Social Ministry; United Methodist Board of Global Ministries (Women's, National Divisions); American Friends Service Committee; International Longshoremen's and Warehousemen's Union; Women's International League for Peace and Freedom; Association of Trial Lawyers of America (Criminal Section); National Legal Aid and Defender Association; National Conference of Black Lawyers; Southern Christian Leadership Conference; National Bar Association; Amalgamated Meat Cutters and Butcher Workmen of North America; National Student Association; National Organization for Women; The Newspaper Guild; and United Church of Christ Office of Church and Society.

So You're Going To Be a Grand Juror?

A guide for more effective citizen participation in the grand jury system

Prepared by the Coalition to End Grand Jury Abuse, Washington, D.C.

(By the Coalition to End Grand Jury Abuse, 1977)

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Introduction

Welcome to the grand jury.

We know that you intend to do your best to become a conscientious grand juror, and we have designed this booklet to help you in that effort.

Who are *we?* We are the former grand jurors, lawyers, judges, legislators and just plain citizens who have joined together to form the *Coalition to End Grand Jury Abuse.* We think we know what it takes to make a grand jury work well—if only because our experiences have shown us so many work poorly.

This booklet is a guide for both local and federal grand jurors, not an exhaustive examination of the grand jury system. We have tried to discuss grand jury issues that are likely to affect grand jurors on all levels, but some important aspects of grand jury procedure do vary markedly between jurisdictions. If you are ever in doubt which procedures are applicable to your grand jury situation, check with your panel's legal advisors. For those of you who would enjoy delving deeper into the grand jury process, we have included a list of valuable readings and sources.

We don't expect you to accept every word of this booklet unquestioningly. In fact, the *primary* point we hope to make in the pages that follow is that meaningful grand jury action is impossible *unless* grand jurors have the courage and wisdom to question and think for themselves.

The Historical Background

The trust reposed in grand juries is of great and general concernment. To them is committed the custody of the portals of the law, that into the hallowed dome no injustice may be permitted to enter. They make, in the first instance, the important discrimination be-

tween the innocent and the guilty. To the former, they give a passport of security; the latter they consign to a final trial by a traverse jury.—James Wilson, early U.S. Supreme Court Justice, 1790

Most historians trace the grand jury's origins back to 12th century England, a time of bitter power struggles between the crown and its baronial and clerical rivals. In the 1160's, King Henry II, alarmed by noble and church control over large portions of England's judicial system, moved to consolidate his royal political power by creating the forerunner of our modern grand jury, a series of 16-member panels directly answerable to the crown.

The representatives of the local populace selected to serve on the King's panels were obligated to uncover and "indict" lawbreakers. Their indictment was tantamount to a modern conviction. Those poor souls indicted by these early juries could only prove their innocence by successfully undergoing an impossible "trial by ordeal"—plunging a hand into boiling water, for example—without sustaining an injury.[1] The jurors didn't have an easy time of it either. They could be and were fined heavily if they didn't return the indictments the king sought.

King Henry's grand jury was not, of course, the model for the grand jury incorporated into our Constitution in 1791. Between Henry II's rule and the American Revolution, the grand jury had evolved, at least in theory, into a source of people's power against the king, thanks largely to one celebrated 17th century case. The case involved the Earl of Shaftesbury, a troublesome political opponent of the then reigning monarch, Charles II. In 1681 Charles brought treason charges against the Earl before a London grand jury, but the grand jurors, unexpectedly, refused to indict. Worse yet from the King's perspective, they demanded the right to meet in secret session, free from crown interference.

In the short run, this show of grand juror independence was futile. The King simply took his charges to a different and more pliant grand jury panel. But the Shaftesbury uproar did wrap the grand jury system in an aura of popular sovereignty, and it was this spirit that English emigrants to the American colonies took with them. In 1735, for instance, a grand jury twice refused to indict a New York printer, John Peter Zenger, for libeling the royal governor, and later, during the pre-Revolutionary War years, grand juries repeatedly refused to return the indictments sought by royal authorities. By the Revolution's end, the grand jury was firmly implanted in the colonial mind as an indispensable citizen protection arbitrary authority.

In the new nation

Liberty to the first citizens of the young American republic meant, among other things, freedom of the press, freedom of speech, the right to a trial before a jury of one's peers *and* the right of every accused to a grand jury indictment. When the Bill of Rights was ratified midway through George Washington's first term, the grand jury stood as the first clause of the Fifth Amendment:

> *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 . . .*[2]

There was no mystery behind the grand jury's inclusion in the Bill of Rights. The people who won our independence were well aware that a government could manipulate the criminal law to punish its critics—and they were determined to prevent that kind of oppression from rearing its head in their new nation. Making a person stand trial, they realized, was in itself a penalty of sorts, an emotionally and financially draining ordeal that even an evetual verdict of not guilty could ever erase. No citizen should suffer this experience, the authors of the Bill of Rights felt, unless an *independent* panel of citizens, the grand jury, decided that the evidence warranted bringing an accused to trial. A free people, after all, could not allow the government to decide whom to bring to trial. The danger that

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[1] Prof. Leroy Clark's recent book, "The Grand Jury: The Use and Abuse of Political Power" (New York: 1975), includes a survey of this early grand jury history. For a more detailed analysis, check Leonard Levy, "The Origins of the Fifth Amendment" (New York: 1967).

[2] Every grand juror should be familiar with the Fifth Amendment and the other sections of the U.S. Constitution that guarantee individual freedoms. A good introduction to the subject is the *Citizens' Guide to Individual Rights Under the Constitution*, prepared by the Senate Judiciary Subcommittee on Constitutional Rights. Copies, at 35 cents each, are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 (minimum charge of $1.00 for each mail order).

politically motivated or overzealous prosecutors would subject the innocent to trial on trumped-up charges or whitewash the crimes of the guilty was just too great.

Setting a poor example

Our early leaders were not demigods sent from Mt. Olympus. With their noble and eloquent words, they were only reflecting the widespread public conviction that the people could not afford to trust the individuals who led them. This skepticism about power was well-founded, as some of the first officials of the new republic soon set about demonstrating. Almost from the start of our nation's existence, there were federal officials who looked to the Constitution not for inspiration, but for loopholes—of which the grand jury seemed an inviting example. Grand jury procedures were then, as now, ill-defined, and among the first to exploit the opportunities this situation offered were federal judges. Instead of instructing newly impaneled grand jurors on their historic responsibility to return impartial decisions, some members of the federal bench *charged* grand jurors with diatribes against their political enemies. Supporters of Thomas Jefferson, before he became president, were the frequent victims of this improper judicial pressure. These grand jury attacks taught Jefferson a lesson, but the wrong one. Years later, when Jefferson himself was president, he ignored the decisions of two grand juries that had refused to indict his archenemy, Aaron Burr, and had a third grand jury, packed with Jeffersonians, convened. Predictably, this third panel returned the indictment Jefferson so desperately wanted. Burr was later acquitted.

These inauspicious beginnings set the grand jury pattern. Grand juries, especially on the federal level, came to spend more time rubberstamping prosecutorial decisions than vigilantly watchdogging prosecutorial conduct. There were exceptions, particularly during the latter 1800's and early 1900's when grand juries successfully exposed municipal corruption—often over roadblocks set by local district attorneys—in city after city. One such city was Minneapolis where, in 1902, grand jurors hamstrung by the foot-dragging of the corrupt county prosecutor spent their own money to hire private investigators. In short order, the grand jury compiled enough damning evidence to chase the city's crooked mayor out of office.

Such heroism was not, however, the rule. The grand jury's record remained, on the whole, an uninspiring one, so much so that the majority of states entering the union after 1850 opted to do so without constitutionally mandating the right to a grand jury indictment.

In the states where a grand jury indictment is not required before an accused can be made to stand trial, the accused are now brought to trial on the basis of *informations*, formal written charges filed by prosecutors against individuals suspected of criminal activity. These charges must be heard by a magistrate at an open courtroom session called a *preliminary hearing*. At this hearing, the accused is entitled to an attorney, and strict rules of courtroom fairplay apply. After the government presents its case against the accused, the defense can challenge it or present its own. There is no citizen input during a preliminary hearing. The magistrate alone decides whether or not the evidence presented warrants bringing the accused to trial.

Many find the information process an attractive alternative to the grand jury indictment. In 1931 a blue-ribbon presidential commission recommended the abolition of the grand jury on the federal level and its replacement by informations.[3] By 1948 England, the birthplace of the grand jury, had done just that.

Our federal government has not followed suit, at least partly because abolishing the grand jury would require an exhausting effort to amend the Constitution. Similarly, while only a minority of states require a grand jury indictment before an accused is brought to trial, no state has completely abolished the grand jury indictment as a method of initiating criminal prosecutions. But the questions raised by the grand jury abolition movement remain. Are grand juries an anachronism? Is it realistic to expect a panel of citizens unversed in the law to rigorously oversee prosecutorial conduct? Do government prosecutors, in fact, really still pose a threat to our basic freedoms that must be vigilantly guarded against?

These are questions that every serious grand juror must face.

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[3] See Richard D. Younger, The People's Panel: The Grand Jury in the United States, 1634–1941 (Providence: 1963), for a fuller discussion.

THE ROOTS OF PROSECUTORIAL MISCONDUCT

The prosecutor has more control over life, liberty, and reputation than any other person in America. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. While the prosecutor at his best is one of the most beneficient forces in our society, when he acts from malice or other base motives, he is one of the worst.—Robert H. Jackson, U.S. Attorney General and Supreme Court Justice, 1940.

The founders of our nation considered prosecutorial misconduct a menace 200 years ago. It remains a menace today. In 1976 a New York State legislative committee, after studying only recent New York court records, found 100 instances of prosecutorial misconduct.[4] There is no reason to believe that New York prosecutors are any worse or any better than prosecutors in other states or in the federal system. Undoubtedly, similar laundry lists of misconduct could be drawn for every judicial subdivision in the United States.

But why? Are people who become prosecutors inherently insensitive to the Bill of Rights? Of course not. But prosecutors do occupy a special and central position in our criminal justice system which subjects them to pressures and lures that encourage behavior a free society cannot tolerate. While no prosecutor is immune from these pressures, many can and do perform their jobs fairly and rigorously despite them. Some, however, cannot.

Protecting citizens from this latter category of prosecutors is your most difficult responsibility as a grand juror. Your task will be a great deal easier once you understand why prosecutors sometimes, as Supreme Court Justice Robert Jackson succinctly put it a generation ago, "pick people they think they should get instead of cases that need to be prosecuted."

One: The prosecutor is a political animal.

Whether elected or appointed, prosecutors are neck-deep in politics. They have constituencies or superiors to please—sometimes both—and the decisions they do or do not make as prosecutors can make or break their own future careers, as well as the careers of their superiors, colleagues, friends or rivals. Over the years, countless prosecutors have built ladders to higher office out of the grand jury chamber, some with the patient, plodding work that produces solid grand jury indictments, others with shortcuts that generate more headlines than convictions. The bigger the case, the greater the temptation to manipulate the grand jury process. Faced with pressure from the community to "do something" about some particularly heinous crime, an ambitious prosecutor has everything to gain by widely scattering subpoenas on anyone even remotely connected to the case as proof that something is being done. The resulting media coverage is sure to keep the prosecutor's name in the news—and shatter the reputations of the people subpoenaed.

Two: The prosecutor is no more free of personal bias than any other member of our society.

Prosecutors, like all of us, are products of a social order still flawed by discriminatory attitudes of many kinds, and, for some, overcoming these attitudes is a real problem. One prosecutor might feel that people of certain backgrounds or beliefs are not to be trusted or that others must be trusted. Another prosecutor might be horrified when a striker throws a punch on a picket line, but unmoved by an allegation of white collar crime. Other prosecutors might have compiled a personal "enemies' list" of people who have dealt them real or imagined wrongs. Prosecutors may, in short, be unable to distinguish between people they dislike and people who have committed crimes.

Three: For prosecutors, overzealousness is an occupational hazard.

The prosecutor's job is to make sure that the perpetrators of crime are brought before the bar of justice, and this is a heavy responsibility to bear, too heavy for

[4] State of New York Assembly Codes Committee, Abuse of Power (Albany: 1976), p. 33.

some prosecutors. These prosecutors begin to see themselves as the community's only defense against the relentless march of crime and lose all sense of proportion. Minor incidents become serious crimes. Serious crimes become rationalizations for ignoring basic rules of decency. Persecution, not prosecution, becomes the order of the day.

Whenever ambition, bias or zeal take command, grand jury abuse of some sort is almost a given—except when grand jurors exercise the check on prosecutorial misconduct they are supposed to provide. Unfortunately, spotting misconduct is not always easy. Indeed, the entire structure of the modern grand jury process is geared to make you see things a prosecutor's way. As confident as you may be that *your* grand jury panel would never let a manipulative prosecutor get to first base, the said truth is that grand jurors not only frequently let overzealous or politically motivated prosecutors get past first base, they often find themselves cheering as the prosecutors near home plate.

The Grand Jury's Boss

Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury.—William Campbell, U.S. District Court Judge, 1972

Why do grand jurors, as Judge Campbell notes and experienced observers agree, invariably do what prosecutors want them to do?

Essentially because prosecutors control the grand jury process. This control is nowhere mandated by the law. Prosecutors can't legally force grand jurors to do anything. What prosecutors do control, however, is information. Grand jurors see and hear whatever prosecutors want them to see and hear.

It is the prosecutor who generally determines which witnesses will appear before the grand jury. In fact, prosecutors may bring any witness they choose into the grand jury chamber. This sweeping prerogative derives from the grand jury's status as a "creature of the court." As such, grand jurors have access to judicial *compulsory process* authority, which means that a person can be ordered to appear before a grand jury. These orders to appear are called *subpoenas*, and although the power to subpoena does not belong to prosecutors, it is the prosecutor who almost always has witnesses subpoenaed to the grand jury.

Besides subpoenaing anyone they choose before a grand jury, prosecutors can also subpoena *anything*. In a normal, non-grand jury setting, prosecutors cannot have a person's home searched and personal possessions seized unless they can convince a judge that there is enough indication of wrong doing to justify a search warrant. But if a prosecutor before a grand jury wants to get hold of someone's personal papers, all that prosecutor has to do is have the papers subpoenaed. The person must either produce the papers inside the grand jury chamber or face a penalty for contempt of court.

There is virtually nothing that a prosecutor can't bring before a grand jury. At a trial, illegally seized material—items police have improperly expropriated—cannot be introduced as evidence. In the grand jury chamber, a prosecutor may introduce illegal evidence, even without informing the grand jurors of its illegality. The same situation holds for what is called *hearsay evidence*. Hearsay—asking a third party to testify to what an eyewitness saw or heard instead of asking the eyewitness directly—cannot be introduced, with some exceptions, during an actual trial. But prosecutors on the federal level and in many, although not all, states may ask a grand jury to return an indictment *solely* on the basis of hearsay evidence.

While prosecutors may bring anyone or anything they choose before a grand jury, they may also withhold any information they want. If there is evidence that would tend to show an accused's innocence—*exculpatory evidence*, in legal jargon—the prosecutor is not obliged to share this evidence with the grand jury. Nor does a prosecutor have to let an accused present exculpatory evidence directly to the grand jury.

The end result of all this is that if the government wants a particular indictment badly enough, the government will get it. According to surveys, grand juries return "no bills"—refuse to indict—in only five percent of the cases brought before them.[5] Only some of these no bills, however, reflect instances

[5] This five per cent figure was most recently cited by U.S. Attorney General Edward Levi in his June 10 testimony before the House Judiciary Subcommittee on Immigration, Citizenship and International Law's 1976 grand jury hearings.

where a grand jury actually disagrees with a prosecutor. In certain controversial cases involving public figures a prosecutor would rather not indict, the prosecutor may softpedal the case against the accused, hoping that the grand jury will get the prosecutor "off the hook" by not indicting. Moreover, in those cases where a grand jury does not find the prosecution's evidence sufficient to indict, the government can keep bringing the same case before different grand juries until it finds one that will indict.

Added together, all these powers give prosecutors total discretion inside the grand jury chamber. A fair-minded prosecutor can use this discretion to develop the truth. A narrow-minded one can exploit it to put blinders on your eyes.

Danger Signals

> Haldeman: (*Inaudible*) *Well, there is danger in a Grand Jury.*
> Dean: *Well, there are no rules.*
> President: *Well, Grand Juries are not very fair sometimes*——
> Dean: *That's right.*
> —from the Watergate Transcripts, conversation of March 22, 1973.

Given the government's lockgrip on what goes on inside the grand jury chamber, can grand jurors avoid becoming the unwitting accomplices of manipulative prosecutors? We think so, provided grand jurors learn to recognize the *danger signals* that give away prosecutorial misconduct. Some danger signals are obvious, others much more subtle. No list of danger signals can be complete, but the one below does outline the pressures you many find yourself up against. If you and your grand juror colleagues start noting any of the danger signals that follow on a regular basis, tread carefully. Trouble may be "a brewing."

Loose Language

"Watch what they do, not what they say" is a solid maxim citizens should apply to all government officials. But when it comes to prosecutors, grand jurors have to watch what they say as closely as what they do. That's because there are many comments a prosecutor can make to prejudice your deliberations.

As a grand juror, you are entitled to hear hard evidence, actual facts. If the evidence a prosecutor presents is strong, the prosecutor should have little trouble getting grand jurors to return a true bill. If, however, the only evidence the government has is flimsy, the prosecutor may try to "improve" a weak case with irrelevant or loaded comments and asides.

A prosecutor, for example, may choose to argue a case on evidence grand jurors will never be able to examine for themselves:

> *Unfortunately, the government's most important witness, John Smith, died six months ago. But if Mr. Smith were here today, he would have a remarkable story to tell.* [6]

Or a prosecutor may constantly refer to an accused with disparaging remarks:

> *This man is a disgrace to our city's good name.*

Grand jurors are not legal experts, for the most part, and a prosecutor may attempt to overawe you with his or her professionalism:

> *In all my years in the district attorney's office, I have never seen a case as open and shut as this one.*

A prosecutor may try to get you to make your decision on the basis of an issue that has nothing to do with the case at hand:

> *What's at stake here is the reputation of the police. If no indictment is returned here today, this panel is telling the world that our police are a bunch of liars.*

While it is a grand jury's job to make sure that no accused person stands trial unless there is good reason—probable cause—to believe that he or she has committed a crime, a prosecutor may attempt to pull a true bill out of a hesitant grand jury by downplaying the significance of the indictment process:

> *By indicting this woman, you're not sentencing her to jail. If she is innocent, the jury will acquit her at trial. That's what the jury system is for.*

A prosecutor may seek to bias you against a witness with embarrassing questions:

> *Are you married? To whom are you married? You have a son, don't you? Do you love your son? Why are you ashamed to answer questions about your son? Who is the father of your child?*

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[6] Most of the examples given here are adapted from Abuse of Power, op. cit.

Some questions may reveal a prosecutor who has more in mind than helping you determine whether or not to indict a particular individual, the only proper grand jury function. Be especially alert for broad, open-ended questions. This question was asked by a federal prosecutor in 1970:

> *I want you to tell the grand jury what period of time during the years 1969 and 1970 you resided at 2201 Ocean Front Walk, Venice (Los Angeles), who resided there at the time you lived there, identifying all the persons you have seen in or about the premises at that address, and tell the grand jury all of the conversations that were held by you or others in your premises during the time you were at that address.*[7]

A prosecutor who asks questions like these is more likely interested in filling intelligence dossiers on private citizens than presenting evidence. Intelligence gathering is not a proper function of the grand jury.

Neither is using the grand jury to "fish" for information that could be used against an already indicted defendant at trial. This practice most commonly arises in cases where the government has had a suspect hastily indicted on scanty evidence, then finds itself in desperate need of evidence that will stand up in court. Be wary whenever a prosecutor begins questioning a witness about a crime for which someone has already been indicted.

Prosecutors have in the past tried to intimidate witnesses to get information:

> *Do you really expect this grand jury to believe that? Don't you know that people can go to jail for lying to a grand jury?*

Such questions unfairly undercut a witness' credibility, a function also served by badgering witnesses who ask permission to leave the grand jury chamber to see their attorney outside:

> *Don't you know this grand jury is working on a tight schedule? You've already gone out to see your lawyer before. What's the matter? Do you have something to hide?*

Going through the motions

What prosecutors do can be very bit as telling as what they say. Bad deeds belie good faith every time, and it's not difficult to pinpoint some of the prosecutorial actions that should start those danger signals flashing for you.

The first thing to check when you begin considering a case is whether the proceedings are being recorded. While not all jurisdictions require that grand jury proceedings be recorded, it's impossible to hold prosecutors accountable for what they do and say before a grand jury without a permanent record. With recording devices so simply and inexpensively available, there is no legitimate excuse for not recording grand jury exchanges involving the prosecutor.

It's essential that all prosecutor-grand jury interactions be recorded, not just the interrogation of witnesses. A prosecutor can make highly improper remarks when a witness or suspect is not inside the grand jury chamber.

Once recording has begun, make sure it continues. If a prosecutor should ever have a recording apparatus turned off (or a stenographer stopped) in order to make an "off-the-record" comment, you should, as a self-respecting grand juror, hit the roof. Internal grand jury deliberations, of course, should not be recorded. Secrecy is necessary here to maintain the integrity of the grand juror decision-making process. If prosecutors should ever walk in on your internal jury deliberations, inform the judge who has impaneled your grand jury immediately.

Justice delayed, the legal saying goes, is justice denied, and the right of every individual to a speedy disposition of the government's charges against him or her is a fundamental aspect of civil liberty. But sometimes a prosecutor's speed inside the grand jury chamber may be designed to benefit the government, not the accused. Legal observors have dubbed this undue haste the "race to indict." This unusual dash occurs in judicial districts where the grand jury and information coexist as methods of charging. In such circumstances, an arrested suspect may choose to waive the right to a grand jury indictment and seek instead to be charged by information. An information requires, as we have noted above, a public preliminary hearing where an accused hears and can challenge the government's evidence. A person charged via the grand jury route has no such opportunity, which is why some prosecutors will rush to get an

[7] Question asked by Department of Justice prosecutor Guy Goodwin in 1970, quoted by Rep. John Conyers in Congressional Record, February 6, 1975.

indictment returned before the accused has an opportunity to call for a preliminary hearing.

At other times, undue haste may take the shape of subpoenas that demand a witness' immediate presence before a grand jury. Witnesses have been called before grand juries on only minutes' or hours' notice by subpoenas that indicate neither the crime under investigation nor the reason the person has been subpoenaed. Aside from disrupting a person's life—*if you were ordered at this very moment to appear at the local courthouse in one hour, how would that affect you and your family?*—such last-minute subpoenas effectively prevent a witness from arranging for legal advice. The resulting confusion is only likely to panic an already apprehensive witness.

The harassment factor in these subpoenas is obvious. What they contribute to the grand jury's dispassionate search for truth is not.

Subpoenas themselves can put out danger signals. A subpoena that, for instance, demands the grand jpury appearance of a public official in the midst of a heated election campaign or a subpoena that forces a witness to travel long distances, at great inconvenience, to be before the grand jury should raise questions in grand jurors' minds about what the prosecutor may be up to. As a general rule, any subpoena that causes a witness personal hardship entitles you and your fellow grand jurors to, at the least, a convincing explanation of why the subpoena was necessary.

Such a rule also applies equally to a *subpoena duces tecum*, a special kind of subpoena that demands the production of books, documents and the like. A *subpoena duces tecum* that orders a witness to turn over enormous numbers of papers to a grand jury could conceivably paralyze a particular organization or enterprise. This dislocation might be justifiable, but conscientious grand jurors cannot assume that the prosecutor can justify it. Ask.[8]

A wide-ranging *subpoena duces tecum* may also indicate that the government has tried to get a search warrant and failed because it could not prove to a judge that the warrant was proper under the circumstances. In cases like these, a *subpoena duces tecum* becomes a substitute for a search warrant, an end run round court rulings the government doesn't like.

When Silence Isn't Golden

> *Meetings, groups, associations, and conversations are the First Amendment building blocks of our political process. Unless the government is engaged in a bona fide presentation of evidence of criminal activity to a grand jury, it has no business probing into such activities, frightening citizens away from them, or punishing people who resist revealing them to hostile authorities.*—Charles Goodell, former United States Senator 1973

The danger signals of prosecutorial misconduct may be, as we have seen, comments or deeds. They may even be a single word. In fact, there are two words you might hear as a grand juror that should start red lights flashing just by their mere mention: *immunity* and *perjury*. Their mention inside the grand jury chamber doesn't mean something improper is about to happen, but it does increase the chances. Prosecutors who improperly manipulate immunity and perjury are the most dangerous you will ever face.

Immunity

Immunity has been variously described as an indispensable law enforcement tool, a slipshod legalism that rewards criminal behavior and a trapdoor to prison for those who value their personal privacy. It is, in short, a highly controversial item.

What is immunity? In its best sense, a bargain between a witness and the government. In return for a witness' testimony, the government promises not to prosecute the witness on the subject he or she may testify about.

Why should the government have to promise immunity in order to obtain a witness' information? The answer is in the Constitution. The Fifth Amendment of the Bill of Rights states that no person "shall be compelled in any criminal case to be a witness against himself (sic)." This clause, usually referred to as "the

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[8] In 1975, for instance, a U.S. Attorney in San Francisco subpoenaed over 1,000,000 documents from a local labor union. Complying with the subpoena, the union's attorneys charged, would have prevented the union from paying benefits to its disabled or retired members. *San Francisco Chronicle*, February 19, 1975. The court agreed and quashed the subpoena.

privilege against self-incrimination" is no mere technicality. It is the bedrock of our criminal justice philosophy.

In our judicial system, anyone accused of a crime is presumed innocent. The government must prove guilt beyond a reasonable doubt; the individual need not prove innocence. He or she is free to remain silent, and the right to this silence is crucial. If a suspect did not have a lawful right to silence, the government, with all the resources at its command, could pressure a person into saying what the government wanted to hear. Indeed, if the government had the authority to force citizens to answer its questions, privacy and the freedoms to speak, write and read freely would never be secure.

In the United States the government does not have the authority to force people to answer its questions. The Fifth Amendment protects our right to silence, and the government cannot revoke it. But while the government cannot force a person to relinquish this protection, federal and state legislation has given prosecutors the ability to replace the right to silence with a different sort of protection: immunity. Once the government removes the possibility of self-incrimination by immunizing a person from future prosecution, that person has no Fifth Amendment right to remain silent.

Used correctly, immunity can benefit *both* the immunized witness and society. Consider, for example, a case where the government has identified a minor participant in a criminal conspiracy, but needs more evidence to indict the higher-ups. The small-timer could provide that evidence, but he, understandably, is reluctant to answer questions that would help the government convict him. So the government strikes a bargain: if the witnes testifies inside the grand jury chamber, the government will grant the witness immunity from future prosecution. The witness agrees and, immunized, appears before the grand jury. His testimony leads to the indictments of his criminal superiors, and all the parties to the bargain walk away from it pleased—the government because the serious criminals are headed for jail, the immunized witness because he's not.

Immunity, however, does not always work so well. While prosecutors can immunize the criminal "small-fry" to obtain evidence against the criminals who really matter, they may also grant immunity to important criminals who should be prosecuted for their crimes, not immunized from them.

These *immunity baths*, as they are sometimes called, can seriously undermine public confidence in the judicial system. Today, though, immunity's greatest danger is not that prosecutors will use it to "reward" their criminally involved friends, but that they will manipulate it to punish their "enemies." Immunity can enable prosecutors to jail people without having to bother proving them guilty in a court of law.

The process may begin whenever a grand jury witness invokes the Fifth Amendment. On the federal level, a prosecutor can obtain an authorization to immunize this silent witness by filing a brief form with the Attorney General's office in Washington. Approval here is usually automatic, and once this authorization is signed by the appropriate federal judge, who by law must sign it once the Attorney General's office has given its approval, the grant of immunity becomes an order. The witness who refuses to comply with it—that is, testify—may be brought before the judge and found in *contempt*.

The destination for a witness found in contempt is jail. The length of the witness' stay behind bars depends on the nature of the contempt. *Civil contempt* is meant to coerce a recalcitrant witness (a witness who refuses to testify under court order) into testifying. A civil contempt incarceration lasts as long as the immunized witness' silence, and that, theoretically, could be a very long time. The witness may be kept in jail for as long as the grand jury that seeks his or her testimony sits. When the grand jury's term expires, the witness may be resubpoenaed before a new grand jury, immunized and jailed again. What this means is that a person found in civil contempt can be jailed indefinitely for what amounts to the "crime of silence."

Criminal contempt, on the other hand, is designed to punish a recalcitrant witness for interfering with the judicial process, not to coerce a witness into answering questions. A witness jailed for criminal contempt cannot end the confinement by simply deciding to testify, because the confinement is for a fixed term.

A judge unilaterally may sentence a recalcitrant witness to up to six months in jail for criminal contempt, but if a sentence of more than six months is contemplated, the witness must be tried before a jury on the criminal contempt charges.

Prosecutors usually justify the jailing of silent witnesses by citing society's "right to every man's evidence." Interestingly, however, forcibly immunizing witnesses and threatening them with jail if they refuse to answer questions seldom produces valuable evidence, which is really not surprising.

There are, after all, many reasons behind a witness' silence, some base, but others perfectly understandable—even admirable. On the former end of the silent scale are people invloved in organized crime intrigues. They often won't testify inside the grand jury room because they fear the consequences of testifying against their criminal colleagues. Given the choice between confinement for contempt if they don't answer questions and the proverbial "cement shoes" if they do, professional criminals immunized without their consent will choose silence.

Silence, though, is hardly the sole preserve of the disreputable. The ranks of the silent may, at various times, include:

politcal activists who feel that they have only been subpoenaed because they are members of a group the government wants to discredit and disrupt with a headline-ridden grand jury witch hunt.[9]

journalists who believe that the obligation of reporters to protect the identity of their sources is essential to a free and vibrant press.[10]

lawyers who would rather face a finding of contempt than answer questions about their clients and break the confidentiality that is necessary for a meaningful attorney-client relationship.[11]

We could continue this categorization of silent witnesses for some time, but, suffice it to say, there can be legitimate reasons behind a witness' decision not to answer questions inside the grand jury chamber.

Sometimes, however, the Fifth Amendment right to silence will be invoked for no apparent reason: a witness asked an innocuous question like "Where do you work?" will respond by invoking the Fifth Amendment. Is this witness mocking the integrity of the grand jury process? Not at all. The witness is simply taking a constitutional precaution. The Supreme Court has ruled that a sworn witness cannot pick and choose the questions he or she will answer and which he or she won't. Once a witness has begun to answer questions in the grand jury room, he or she has lost the right to invoke the Fifth Amendment on other questions.

Prosecutors know this, of course, but many grand jurors do not. Thus, a prosecutor may try to bias an unknowing grand jury against a witness by labelling a witness' apparent nonsensical invocation of the Fifth Amendment a disrespectful act, which it is not. In fact, since so few grand jurors understand that an invocation of the Fifth Amendment is not an admission of guilt, a prosecutor can bias a grand jury against a witness simply by forcing an invocation of the Fifth Amendment on any question. This is why the American Bar Association's standards for ethical prosecutorial conduct deem it improper for a prosecutor to call before a grand jury a witness who has already told the prosecutor he or she plans to invoke the Fifth Amendment inside the grand jury chamber.

The American Bar Association also maintains that it is wrong for a prosecutor to call a target—the subject of an investigation—before a grand jury without informing that person that he or she is under suspicion. On the federal level and in many states, there is no legal provision stopping prosecutors from engaging in this very practice. A grand jury witness who doesn't know whether he or she may be indicted on the basis of the testimony he or she is being asked to give has another good reason to remain silent.

Forcing immunity onto silent witnesses makes them choose between their commitment to silence and jail. For those whose decision to remain silent is based on conscience, there is only one choice. They will go behind bars rather than answer questions. In cases like these, immunity benefits neither the witness nor society.

As a grand juror, you can play a key role in preventing immunity abuse. Whenever an immunity order is contemplated, ask if the prosecutor really expects the grant of immunity to produce testimony of value to the grand jury. If your

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[9] There are a number of articles discussing this aspect of grand jury abuse. See especially Frank J. Donner and Richard I. Lavine, "Kangaroo Grand Juries," in *The Nation*, November 10, 1973.

[10] For up-to-date reports on this phenomenon, check the *Press Censorship Newsletter*, published by the Reporters' Committee for Freedom of the Press, 1750 Pennsylvania Ave., N.W., Washington, D.C. 20006.

[11] See Fred Solowey, "The Grand Jury: Making Trouble for Movement Lawyers," in *Juris Doctor*, March, 1976.

prosecutor cannot answer with more than vague conjecture, be persistent. Has the witness in question refused to talk to the prosecutors outside of the grand jury room? Why? Is the witness afraid of testifying? Will a grant of immunity and its corresponding threat of contempt overcome that fear? Or has the witness refused to answer questions because he or she objects, on a principled basis, to the prosecutor's questions? If need be, let the silent witness explain his or her position, even if that means asking the prosecutor to leave the grand jury chamber temporarily.

Under current immunity statutes, grand jurors are not asked to approve or deny a prosecutor's request for an immunity order. But this doesn't mean that a grand jury is helpless in the face of what it considers an improper immunity order. If you should feel that a particular immunity order does not serve the public interest, inform the court. Also keep in mind that an immunized witness' refusal to testify is only contemptuous as long as the grand jury demands the witness' testimony. By withdrawing a subpoena or refusing to pursue the disputed questions, your grand jury panel can prevent the confinement of a silent witness.

The misuse of use immunity

Since 1970 the form of immunity applicable on the federal and most state levels has been a special type called limited or *use* immunity.[12] A witness granted use immunity can be forced to testify about an incident, even if that testimony is self-incriminatory, yet still be prosecuted for that incident at a later time—as long as the government does not use the immunized witness' testimony, either directly or indirectly, in a future prosecution.*

This use immunity, which has been the subject of intense controversy, adds an extra dimension of risk to grand jury proceedings. Use immunity has helped some prosecutors improperly discover defendants' trial strategy. A suspect about to be indicted on the basis of evidence a prosecutor has already accumulated is subpoenaed before a grand jury, immunized and interrogated about the alleged crime. If the person admits guilt, the prosecutor knows the government has an open-and-shut case that cannot be refuted. If the person claims exonerating circumstances, the prosecutor learns the details of the defense the potential defendant plans to give later at trial. Armed with this information, the prosecutor can specifically tailor the government's case to rebut the defense's contentions. The defendant, of course, has no comparable means to force the prosecutor to reveal the government's trial strategy.

Unfair discovery is one way prosecutors may abuse use immunity. There is another, which brings us to our second *danger* word . . .

Perjury

Definitions of perjury vary somewhat, but most people would agree that to perjure oneself means to deliberately lie under oath. Perjury is and should be a crime. No one should be able to swear to tell the truth and then not. But should the government be able to make a perjurer out of someone who walks into the grand jury chamber with no intention of lying?

Sound preposterous? It can happen when a prospective defendant is called before a grand jury and compelled to testify by a grant of use immunity. If the witness denies his or her guilt, the prosecutor can ask the grand jury to indict the witness for perjury as well as for the alleged criminal act under consideration, reasoning that if the grand jury feels there is probable cause to prosecute, then the accused must have been lying when he or she denied committing the crime. By branding the defendant as a perjurer like this, the prosecutor has immeasurably strengthened the government's chances of getting a conviction from the trial jury.[13]

There are other unsavory ways perjury indictments can be built out of grand jury proceedings. Prosecutors, for instance, can call witnesses repeatedly before one or more grand juries over a long span of time and ask the same questions, hoping that recollections, and hence answers, will differ from one appearance to the next. Since witnesses are not allowed by right to see their earlier grand jury statements made perhaps when the event in question was fresher in their minds, the chances that inadvertent discrepancies will appear are high.

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[12] Use immunity was created by the passage of the Organized Crime Control Act of 1970. Since 1974 it has been the only form of immunity in the federal system.

[13] An excellent discussion of this danger was given in testimony before the Senate Judiciary Subcommittee on Constitutional Rights September 28, 1976 by Prof. Melvin Lewis of the National Association of Criminal Defense Lawyers.

*Under the traditional *transactional* immunity, which still applies in some states, the government may never prosecute an immunized witness on the subject described in his or her testimony, unless the witness is guilty of perjury.

But honest mistakes are not perjurous statements. A sufficiently zealous prosecutor can trap almost anyone into a mistake, but no prosecutor should ever be able to trap a grand jury into returning an unjust perjury indictment. As always, be alert!

Some Precautions

> *Every time you hand down an indictment, you are sitting there not as a rubber stamp for a district attorney, not as people who read the law and apply it rigidly, but as people who say: "We live in this city, we know its problems and we are going to hand down indictments in accordance with the necessities of modern life, and last and always the most important, we are going to see that no district attorney, no irresponsible assistant, no cop seeking revenge, no judge, if you will, can charge, or get us into a situation where even a subpoena which can destroy the good name of a friend is issued, or an indictment handed down, unless we know that it is not being done for political purposes, for revenge, for satisfying a private grudge, or is contrary to the conscience of the community."*—Thomas Dewey, prosecutor and Governor of New York

How can you prevent grand jury abuse? You have already taken the first step by studying what can go wrong inside the grand jury chamber. Now combine that knowledge with the basic guidelines below, and you will be well on your grand juror is a *worthless* grand juror.

Be skeptical.

Don't take what you hear inside the grand jury chamber at face value. Most grand jurors realize that they can question witnesses to clarify a confusing point. Sometimes, however, it may be just as important to question prosecutors. Make sure you understand what your prosecutor is doing every step of the way. If you don't fully understand what is transpiring before you, ask. A *confused* grand juror is a *worthless* grand juror.

Be watchful.

Keep your eye out for the tell-tale signs of grand jury abuse discussed earlier in this booklet. Anyone can spot misconduct after it takes place. The trick is to prevent abuse before it occurs.

Be independent.

Grand jurors may see and hear what they want. Don't limit yourself to only what the government would like you to know. Ask your prosecutor if any other evidence exists that would shed a different light on the case at hand. Subpoena witnesses whose testimony you feel would increase your understanding of the case. If you ever feel that a prosecutor is deliberately dragging his or her feet to prevent an indictment that should be returned, make your displeasure known to the prosecutor. If the foot-dragging continues, request a new, special prosecutor from the court.

Above all, remember that while you do not have to be *convinced* of a person's guilt to return an indictment, the grand jury's democratic purpose is to guarantee that no individual be made to stand trial on flimsy charges. That's a tall order, and, as a grand juror, you will have to stand tall to achieve it.

Good luck.

After It's Over

When your stint as a grand juror is over, then what are you going to do?

File the experience off in some dusty corner of your memory and forget about it? We certainly hope not. Whether your grand jury experience was rewarding or frustrating, you owe it to yourself—and the rest of us—to think about your grand jury encounter.

If your grand jury experience was a joy, then share it. The grand jury is a misunderstood and seldom appreciated institution. Take the time to explain the grand jury process to others in your community. Write a letter to the editor, give a little talk to a local club or group.

And if you found the grand jury a deeply flawed judicial mechanism, then do something to change it. There is a wide range of grand jury reform activity now going on in cities, statehouses and Washington. In 1976, for instance, both the Senate and the House of Representatives opened the first Congressional hearings on grand jury reform ever held.

The *Coalition to End Grand Jury Abuse* keeps an extensive record of all these activities and publishes a quarterly publication, *Grand Jury Report*, for those interested in restoring the grand jury to the honored place it once held in American life. For more information write:

Coalition to End Grand Jury Abuse,
105 Second St., N.E., Washington, D.C. 20002

State legislatures and Congress can do much to cure the ills of the grand jury system, but effective grand jury action ultimately depends on the existence of effective grand jurors. No one knows that better than former grand jurors themselves. Yet although former grand jurors have a unique perspective to offer on the grand jury system, precious little effort has been made to determine what they feel makes grand jurors effective. You can help break this silence by completing the questionnaire on the following page. Thank you.

A Questionnaire for Former Grand Jurors

1. Before I was called to serve on the grand jury, I
——was well-versed on the function and purpose of grand juries.
——had a rough idea of how grand juries operate.
——knew virtually nothing about the grand jury process.
additional comments:

2. The grand jury I served on was
——on the federal level.
——on the state or local level.

3. During most of the grand jury proceedings, I
——was kept fully informed about what was happening and why.
——was often confused.
——was lost.
additional comments:

4. The grand jury on which I served returned the indictments sought by the government:
——100 per cent of the time.
——95–99 per cent of the time.
——90–94 per cent of the time.
——other, please estimate

5. I felt the prosecutor(s) who presented cases before my grand jury
——was sensitive to the rights of suspects and witnesses.
——was insensitive to the rights of suspects and witnesses.
additional comments:

6. In answering grand jury questions and requests, the prosecutor was:
——very cooperative.
——uncooperative.
additional comments

7. I feel my service on the grand jury:
——was an exhilarating experience.
——served no real purpose.
additional comments:

8. I found this handbook:
——very useful.
——sometimes useful.
——irrelevant.
additional comments:

9. I would be interested in participating in an organization of former grand jurors:
——yes.
——no.

10. I would be interested in attending a grand juror's conference:
——yes.
——no.

11. Please use this space for any further comments.

Name_____

Address_____

City_____ State_____ Zip_____

Please return questionnaire to: Coalition to End Grand Jury Abuse, 105 Second St., N.E., Washington, D.C. 20002.

For Your Information

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House of Representatives Judiciary Subcommittee on Immigration, Citizenship and International Law, Rayburn House Office Building, Washington, D.C. 20515. This panel has conducted extensive hearings on the grand jury system, which have been published under the title, "Federal Grand Jury."

Senate Judiciary Subcommittee on Constitutional Rights, Russell Senate Office Building, Washington, D.C. 20510. This subcommittee has also published a report, "Reform of the Federal Grand Jury System."

State of New York Assembly Codes Committee, Legislative Office Building, Rm. 717, Albany, N.Y. 12224. Write for this panel's excellent report on the grand jury system, "Abuse of Power" (1976).

Coalition to End Grand Jury Abuse, 105 Second St., N.E., Washington, D.C. 20002. A wide variety of articles and reports on the grand jury system is available upon request.

Grand Jury Project, Rm. 1415, 853 Broadway, New York, New York 10003: Publishes a newsletter which details grand jury activity that violates the exercise of First Amendment rights.

Coalition To End Grand Jury Abuse

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American Civil Liberties Union, National Lawyers Guild, National Emergency Civil Liberties Committee, National Conference of Black Lawyers, National Bar Association, National Legal Aid and Defender Association, Association of Trial Lawyers of America (Criminal Section), Unitarian Universalist Association, United Methodist Board of Church and Society, Department of Law, Justice and Community Relations, United Methodist Board of Global Ministries, National, Women's Division, Church of the Brethren, Jesuit Conference Office of Social Ministry, Southern Christian Leadership Conference, Amalgamated Meat Cutters and Butcher Workmen of North America, International Longshoremen's and Warehousemen's Union, American Friends Service Committee, National Student Association, National Organization for Women, Women's International League for Peace and Freedom, and International Printing and Graphic Communications Union.

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AAUW Journal

[Published by the American Association of University Women, April 1977]

Grand Jury Abuse:

A case in point

(By Emmy Hixson)

Emmy Hixson is now Staff Attorney with the Coalition to End Grand Jury Abuse in Washington, D.C. Jill Raymond now lives in Washington, D.C. and works with ACLU National Prison Project.

Strange things happen in isolated rural county jails, most of which we never hear about. I will never forget one such scene which I witnessed, a happy event which meant the end of a 14-month ordeal for my friend and client, Jill Raymond. It happened at about midnight of May 4, 1976, at the Madison County Jail in Richmond, Kentucky. During the past year I had made the 2½-hour drive to Richmond from my office in Louisville dozens of times. Richmond is on the fringe of the eastern Kentucky coal country, a sleepy little town built around a "square," smack in the middle of which is the country courthouse. Behind the courthouse is a low white building which houses both the Madison County Jail and the living quarters of the jailer and his family. A friendly looking sign announces "Frank King, Jailer, You-Alls Friend." The Madison County Jail is a family enterprise where Frank and his wife Katherine serve as jailer, matron (and in Katherine's case, cook), and raise 13 children, with the older sons serving as guards.

This midnight scene in particular looked like a family reunion until one noticed the odd assortment of personages gathered there in the shabby lobby of the county jail. Reporters with cameras, university students with "End Grand Jury Abuse" buttons, all surrounded Katherine and Frank sitting on the torn vinyl couch beneath a 19th-century photograph of Frank's parents. Despite the late hour a couple of the inevitable courthouse hangers-on were there, "local yokels" making full use of the strategically placed spittoons. Young children wandered in and out, trying to get Katherine's attention. The room fell quiet suddenly as two very official looking men in business suits came through the door. These were the long-awaited U.S. Marshals bringing what we hoped was the court order which would free Jill Raymond from her 14 months behind bars. The U.S. Marshal handed a document to Frank, unaware that he had never learned to read and relied on Katherine's literacy. Katherine took the document and her face lit up as she read the words which finally brought freedom to Jill Raymond. As Jill had been the lone female prisoner in the jail for weeks at a time, she and Katherine had become more friends than matron and prisoner. Katherine got up, pulled a huge ring of keys from her pocket, and entered the barred thick metal door, over which hung a crude handmade sign with a quote adapted from Matthew 25:35–46:

"For they were hungry, and ye gave them food. They were thirsty and ye gave them drink. They were naked and ye clothed them . . . And they will go away into eternal punishment, but the righteous into eternal life."

Katherine returned shortly with a sleepy young woman with long brown hair who was immediately surrounded by the jubilant crowd—Jill Raymond was free for the first time in 14th months. She had never even been charged with a crime.

How did this happen and what was it all about? It all began with a visit from the FBI . . .

A VISIT FROM THE FBI

In the summer of 1975 two young women named Lena Paley and May Kelley had lived and worked in the gay and feminist communities in Lexington, Kentucky. They moved on after that summer, and in the following winter the FBI received information which led them to believe that the women were, in fact, two anti-war activists, Susan Saxe and Katherine Powers, fugitives under indictment for charges stemming from a bank robbery in Boston in the late 1960s. Upon learning that these women may have been the two who lived in Lexington, the FBI descended on Kentucky feminists and gays and began a round of interrogations there that was to end with six young feminist and gay activists in jail.

These six young people, all between the ages of 19 and 23, were those who had refused to cooperate with the FBI. It is probable that others would have refused to answer the personal and inquisitional questions asked them (hundreds were questioned) but most were terrified, and unaware they were under no legal obligation to cooperate.[1] Gay persons questioned, in particular, were frightened of losing their jobs or of other ramifications if they did not place themselves at the disposal of the FBI. Jill Raymond was one who did know her rights and pushed her fears aside to stand on them—this only aroused the hostility of the FBI agents. "When the FBI first came to my house, the most threatening thing to me was their encroachment on my personal relationships," Jill remembers.

[1] Citizens are not required to answer FBI questions; however, those who do so may be charged with lying to the FBI if they give false information—this crime carries a possible 15-year sentence.

"They said that two people whom I cared about very much were wanted by the FBI, and they wanted me to give information about them." As Jill remained firm in her desire not to be involved in the FBI investigation, the FBI had agents visit people she knew in eight different cities across the country—names apparently obtained from a list of persons she had phoned long-distance in the past year.

These people were interrogated and threatened with subpoenas. The FBI visited Jill's sister at work and told her, in the presence of co-workers, that Jill was in jail (this occurred before Jill was incarcerated). They visited her grandmother in Cleveland, frightening her with stories that Jill was in terrible trouble. It is both a credit to Jill and a comment on the FBI tactics that both her sister and grandmother supported her throughout her ordeal.

As the FBI interrogations proceeded, the personal lives of the six gradually became public. Some were disowned by their families; others were under intense pressure to cooperate, not because the FBI was in the right, but because they were powerful and could destroy lives. Besieged with the mounting awareness that their lives were slipping out of their control, the six obtained a panel of attorneys, led by Prof. Robert Sedler of the Kentucky Civil Liberties Union, and a defense committee was formed. The FBI had threatened the six with grand jury subpoenas—a threat they were to make good.

The Not-So-Grand Jury

Shirley Hufstedler, a judge on the Ninth Circuit Court of Appeals, observed recently:

"Today, courts across this country are faced with an increasing flow of cases arising out of grand jury proceedings concerned with the possible punishment of political dissidents. It would be a cruel twist of history to allow the institution of the grand jury that was designed at least partially to protect political dissent to become an instrument of political suppression."[2]

Federal grand juries are panels of citizens chosen from voter registration records. They serve 18-month terms during which time they issue *indictments*—criminal charges against persons alleged to have committed federal criminal offenses. Their other function is to investigate crimes in such areas as organized crime, political corruption, and tax evasion, to name a few. Grand juries are an arm of the judicial branch of the federal government, and as such they have the power to *subpoena*—both people and things. People subpoenaed to a grand jury have no choice but to respond and give testimony, unless they refuse to testify because to do so would violate a constitutional right, notably the Fifth Amendment against self-incrimination. This right has been gradually eroded over the years, and has been virtually non-existent in grand jury cases since the enactment of the "use immunity" laws by the Nixon administration. At that time *immunity* became a powerful tool in Nixon's "war on dissent" waged by federal grand juries, which came to be virtually an arm of the executive branch of government, run by the Justice Department.

The institution of the grand jury was wide open for this abuse and exploitation by the executive branch. Originally created in the Constitution as a panel of citizens to serve as an intermediary between the people and the government to restrain the government from wrongfully prosecuting its political enemies, the framers of the Constitution saw no need to give people a slate of protections and safeguards before the grand jury—there was no need to protect the people from the people. At first, grand juries operated on their own, but as the laws became more complex, bewildered grand jurors turned to the U.S. Attorney, who would later prosecute the cases where indictments were issued, to assist them in understanding the law. Today the government attorney is the central figure in the grand jury room—literally running the grand jury. An example of this can be found in the area of subpoenas—issued under the grand jury's name, but actually controlled by the U.S. Attorney. Grand jurors often have no idea who or what has been subpoenaed until they actually have the witness or the object before them.

Thus the grand jury is as much an arm of the executive branch as it is of the judicial, and today is often deprecated as a mere "rubber stamp" for the government attorney.

During the late 60s and early 70s the Nixon Justice Department hired a special prosecutor, Guy Goodwin, and sent him all over the country to use grand juries

[2] Barry Winograd and Martin Tassler, *Trial*, January/February 1973, p. 16.

to investigate dissident political organizations. With the enactment of "use immunity" laws, this was an easy task. Using the grand jury subpoena, the activist was brought to the grand jury chamber, where she or he had no right to an attorney. If the activist pleaded the Fifth or other Constitutional rights, she or he was "immunized"—given partial protection from prosecution for anything that might be said before the grand jury. Once immunized, the witness lost all right to refuse to answer questions—questions about private lives, organizations, meetings and names of those in attendance, any and all information the government needed to compile its dossiers. Those who could not bring themselves to testify were jailed for contempt—jailed without trial wherever the government chose to imprison them. Once imprisoned, the witnesses would remain there until they either testified, thus "purging" themselves of contempt, or until the 18-month grand jury term expired. However, the new grand jury could subpoena them again, and the entire process repeated—theoretically a witness could be returned to jail over and over again for the term of each new grand jury.

The Nixon years created a pattern of grand jury abuse which continues today.

The Lexington Grand Jury

The FBI does not have subpoena power—Congress has repeatedly refused to give them this powerful tool. But the FBI found a local U.S. Attorney Eugene Siler, (appointed to a federal district judgeship by then-President Ford shortly thereafter), who was willing to cooperate. Using the grand jury subpoena, Siler had the six brought before the federal grand jury which had been sitting in Lexington for a few months. An FBI agent, Peter MacDonald, emerged from the grand jury room to call the first of the six witnesses before the grand jury. Once inside, the witness observed the agent entering an anteroom, where with the door partly ajar, he could presumably listen to the proceedings.

Over and over, the witnesses were later to point out this abuse of the grand jury function to perform FBI investigations, and over and over again their protests would fall on deaf ears. One by one the witnesses entered the grand jury room alone, required to leave Attorney Sedler in the hallway. Once inside, they refused to answer questions, citing the Fifth and other Constitutional amendments. Shortly afterwards, they were "immunized" by the Justice Department and returned to the grand jury room. When they again refused to testify, they were notified that there would be a hearing in a few hours before a federal judge to determine if they were in contempt.

The arch-conservative federal judge, Bernard Moynihan, opened the proceedings with hostile admonitions to spectators against any interruption, and by requiring one of the witnesses to remove his shirt which was sloganed "Stop FBI Harassment". To the spectators who had entered the impressive federal courtroom with every expectation of justice, this was the first warning of what was to come. A court reporter read to the judge the refusal of the "immunized" witness to testify. This was sufficient to establish contempt, unless the witness could come up with a defense the judge would listen to. The basic defense in the Lexington case was grand jury abuse—that the grand jury was being used to force citizens to cooperate with the FBI, that the Lexington grand jury was not investigating crimes committed within their district (Saxe and Power being already under indictment elsewhere), and also that the witnesses' and attorneys' phones were wiretapped. Judge Moynihan ruled immediately at the close of the testimony that the witnesses were to be imprisoned—until they testified or the grand jury term expired. Before leaving the courtroom the witnesses all stood together, joined hands, and listened as Attorney Sedler read a statement that they had written:

"We believe that we have just cause for our refusal to answer questions propounded to us by the Grand Jury. We state to the Court that none of us know the present whereabouts of the persons who are known to us as Lena Paley or May Kelley. We further state to the Court that we had no knowledge or reason to believe that Lena Paley or May Kelley were persons other than the persons they claimed to be, or that they were fugitives from justice."

Handcufffed, the six young people were led away. The young man, Carey, and one woman, were sent to the Madison County Jail where Jill would eventually end up. Jill and one other woman were taken to the Bell County Jail in Pineville, Kentucky. The other two women went to the Franklin County Jail in the state capital, Frankfort, Kentucky. As federal prisoners, particularly in non-criminal cases, it at first seemed odd that they were not incarcerated in the modern federal facility there in Lexington. Ultimately it became clear that by

placing them in poor quality county jails, at some distance from each other, the defense committee, attorneys, family and friends, Judge Moynihan hoped to encourage them to take the easy way out and testify. Their ordeal had begun in earnest.

Life in the County Jail

All of the jails had certain conditions in common—poor food, cramped cells, poor lighting, no facilities for fresh air or exercise. The 19-year old gay male, Carey, was beaten after a short time at the Madison County Jail. He and Debbie, alone in the female section of that jail, were the first to testify after a few weeks. Three others managed to tolerate the conditions for another four months. The women in Frankfort were particularly miserable because they had no privacy for bathing or toilet use. There were no curtains to draw in the cell which was next to the elevator and the jail office, so the male guards (there were no matrons) would amuse themselves by watching the women. Later, at this same jail, Jill was to fend off "pawing" attempts by a male guard.

Finally, after five months, the U.S. Court of Appeals for the Sixth Circuit returned the case to Judge Moynihan for a finding as to whether the Lexington grand jury was conducting a legitimate investigation. On the basis of a sealed affidavit from the U.S. Attorney, which neither the witnesses nor their attorneys were allowed to examine, Judge Moynihan ruled that the investigation was legitimate. Subsequent legal appeals failed in deference to this finding. The other witnesses testified, unable to continue their struggle, and sick of the disruption of their lives.

Jill Raymond is a woman of strong principles and the will to live by them. She is extremely repelled by attempts to glorify her stand, but the fact is that the history of English and American law reveals that rights we cherish, such as the Fifth Amendment, were created because someone had the strength to resist injustice. Jill's remaining nine months in prison were spent largely at the Madison County Jail. Her experiences there ranged from the almost comic—such as the time Frank was angered by a research paper written by a university student visiting Jill, which Frank of course, could not even read—to the terrifying—night after night alone on the third floor of the old facility. It was a day-to-day ordeal that only those of us who were close to Jill were able to even partially understand, made bearable by the support of the defense committee and family, and by the essential humanity of the matron, Katherine. Jill always maintained that she would suffer more by allowing her right to silence and privacy to be destroyed in the grand jury room than by resisting and being imprisoned. She was not re-subpoenaed by the next grand jury—her case had received too much publicity for the Justice Department to risk further outcry. The grand jury which had sent her to jail never issued a report on the investigation, or handed down any indictments in the case.

Ending Grand July Abuse

The House of Representatives began a second round of hearings on Grand Jury Reform in March. The House is studying legislation introduced by Representatives Conyers, Eilberg, Holtzman, Drinan and Patterson which included the following reforms:

Immunity

Abolish forced immunity (Conyers H.R. 3736; Drinan H.R. 844)

Abolish "use" immunity and replace with broader "transactional" immunity; take authority to issue immunity away from Justice Dept.; give it to federal district judges with guidelines as to when to grant immunity (Eilberg H.R. 94)

Subpoena

Require majority of grand jurors to vote to subpoena (Conyers, Patterson)

Require subpoena to inform witness of rights (Conyers, Eilberg, Patterson)

Allow 7 days notice in most cases between receipt of subpoena and date of appearance (Eilberg, Conyers, Patterson)

Right to Counsel

Allow witness to be represented by attorney in grand jury room (Eilberg, Conyers, Patterson)

Contempt

Limit imprisonment to six months (Eilberg, Conyers, Patterson, Holtzman)
Imprisonment must be in federal institution (Conyers, Patterson, Holtzman; if one located within 50 miles—Eilberg)

Other Cases of Grand Jury Abuse

The following persons are presently in jail in cases involving FBI investigations:

Jay Weiner—23-year-old sportswriter has been in Allenwood federal prison in Pennsylvania since November 1976.

Maria Cueto and Raisa Nemikin—employees of Episcopal Church Hispanic Commission, imprisoned in New York City Metropolitan Detention Center in March 1977.

For more information about these cases write to:

Coalition to End Grand Jury Abuse
105 2nd Street, N.E.
Washington, D.C. 20012

[From the Christanity and Crisis, May 2, 1977]

What To Do When the FBI Knocks—A Primer for Pastors

(By Dean M. Kelley)

Dean M. Kelley is executive for Religious and Civil Liberty in the Division of Church and Society, National Council of Churches, and chairperson of the National Church-State Committee, American Civil Liberties Union.

On November 18, 1976 two agents of the Federal Bureau of Investigation visited the Episcopal Church Center in New York City, national headquarters of the denomination, to obtain information about one or more members of the National Commission on Hispanic Affairs (NCHA). Explaining why they came, the agents said that correspondence from the commission had been discovered during an FBI search of an apartment in Chicago rented in the name of Carlos Alberto Torres. The same search turned up materials suited for the making of bombs, the agents said, along with literature of the Fuerzas Armadas Liberacion Nacional (FALN), a self-described Puerto Rican terrorist group. Either by its own claim or by official attribution the FALN has been connected with some 58 bombings in the past 32 months, including the January 1975 bombing of Fraunces Tavern in New York City, in which four persons were killed and 55 injured. Torres is now considered a fugitive; the FBI wanted to know anything that might help find him.

The agents met first with Bishop Richard Martin, coordinator of the church's programs for minorities, and then interviewed Maria Cueto, then executive director of the NCHA, and her secretary, Raisa Nemikin. In separate interviews lasting several hours, the two women identified a photo of Torres, and explained his service on the Theological Committee and the Theological Development Task Force of the commission. According to their account, they answered all questions put to them within the limits of their knowledge, and they believed the agents were satisfied with the results of the interrogation.

Four days later, however, agents reinterviewed the two women, with the approval of Bishop Martin and his superior, Bishop Milton Wood. No attorney was present. On this occasion Ms. Cueto and Ms. Nemikin declined to answer further questions, and Ms. Cueto was threatened with a grand jury subpoena. Early in January, both women were subpoenaed to appear before a Federal grand jury in Manhattan, but again they refused to answer questions. They gave several grounds for their silence, the main one being that by responding they would violate the confidence and trust of persons working with the Hispanic Commission. Early in March 1977 the court rejected their claims and, when they once more refused to answer, imprisoned them for contempt of court. At this writing they are still held in the Metropolitan Correctional Center.

On their first visit to the Church Center, the FBI agents asked permission from Bishop Wood to take samples of the imprint of various typewriters. In the belief that refusal would imply lack of trust in the employees of the center, Bishop Wood approved the request. Later in November some eight or nine FBI agents were admitted to the premises after working hours, observed only by

a custodian with poor sight. Critics of this action contend that no one can be sure what the agents searched, what they saw, what they obtained. According to *The New York Times*, there is some evidence that files wholly unrelated to the Hispanic Commission were searched. Bishop Wood has denied that the agents inspected any records other than those of the NCHA.

In its November visits the FBI, according to Bishop Wood, had asked for "any travel or meeting expenses that Mr. Torres might have in connection with the church that might give them some information as to his whereabouts or leads." The bishop said that the information furnished to the agents was "quite public, which you can get here or can have for the asking." When the agents came back about the first of December asking for more information, the church, on the advice of counsel, requested a subpoena "for the protection of all those concerned at that point." In response to the subpoena, the information requested for the years 1974–1976, which Bishop Wood claims was "nonconfidential," was turned over to the court.

Early in January Presiding Bishop John M. Allin was served with a subpoena requiring (in the words of Bishop Wood) that he supply the grand jury with the "same kind of information for the years '70 to '73 which has already been supplied for the years 1974–76." According to other sources, the information requested included personnel files, lists of members and associates of the Hispanic Commission and minutes of meetings. The Presiding Bishop's attorney persuaded the United States Attorney to withdraw the subpoena in return for the voluntary submission of material described by the church as "public" information. The material included: the names of commission members since its beginning in 1970; dates and places of all commission meetings since its founding; travel accounting records for persons who were being investigated in connection with the grand jury proceedings; biographical material which had been prepared and supplied by these persons; a list of all grant recipients in the Hispanic program since its inception; employment application forms "which contained no confidential information"; and samples of typewriter and copy-machine impressions.

Bishop Allin agreed to pay fees for attorneys chosen by Ms. Cueto and Ms. Nemikin. On March 15, however, he issued a statement characterizing their refusal to testify as "against the policy of the church." They were placed on "leave of absence" and their pay was suspended, on the ground that their inability to perform their duties resulted from actions of their own choice—that is, their decision to go to prison rather than answer questions about persons connected with the commission.

Abuse of Power?

Anyone familiar with the case will understand that the foregoing is a barebones outline of a complicated series of events. Even without additional details, however, it will be clear why the episode has generated a several-sided controversy. Inevitably, questions both of fact and of principle arise. Are the two women obstructing justice, or are they heroically defending their own rights and ours against abuse? Have the FBI, the prosecutors, the grand jury and the courts exceeded their powers, or are they merely doing their plodding best to safeguard the public against the violence of urban terror?

At this writing the best answer to these questions is that no one really knows. The two women have not always articulated their positions as clearly as one might hope, and the rhetoric of some of their supporters has been more indignant than informative. At least one ruling in the case was based on Government evidence which the court kept secret. In short, enough facts are available to fuel a raging debate, but not enough for partisans on any side to end the debate by demonstrating the truth of their own view.

But what about the role of the church? Here, it seems, the problem is not the absence of agreed facts but disagreement on what the facts mean. According to unnamed church officials cited by *The Times*, the "vast majority" of Episcopalians see no dilemma. Fanatic bombers threaten innocent lives; duly constituted law enforcement bodies must act against them; the church has a duty to help. On such grounds Bishops Allin and Wood find themselves unable to understand why the women withhold testimony—unable, therefore, to support their cause. Other responsible church people, including Bishop Paul Moore of New York and former Presiding Bishop John Hines, have been critical of their colleagues' position.

What is important here is the future. If the churches, as one hopes, continue to seek empowerment of the oppressed, churchleaders can expect to encounter

such incidents again. The present controversy rises in large part out of an excess of innocence; it points up the need of church people to achieve greater empathy with their allies in the struggle for social justice, greater sophistication about the ways in which that struggle can bring them into conflict with "duly constituted authorities."

In the abstract bishops and vestry people, pastors, elders and church bureaucrats may understand that the guardians of law and order are often also the overzealous protectors of the status quo, and that the pursuit of felons can be used, intentionally or otherwise, for the suppression of dissent. But nothing in their life experience prepares them for midnight visits by the FBI, or for the possibility that the quest for a violent criminal may be conducted in ways that do injury to rights and values at least as important as effective law enforcement.

If we are not to learn such lessons by hindsight, an effort of imagination is needed. We should remind ourselves that the churches have sinned more often by undue conformity than by defiance and that some of the best pages in our history record our predecessors' principled stands against kings and emperors and other powers. Even in the post-Watergate, post-Viet Nam era, knowing what we now do about CIA plots and FBI break-ins, we need not be cynical about the US Government, but surely we should be vigilant and skeptical—and well-informed.

In the present context Christians have a special need to be informed about newly controversial aspects of the grand jury system. In the 1950's Congressional investigating committees were the weapon of choice for "exposing" alleged or real Communists and rendering them virtually unemployable. Against the antiwar movement in the '60's, prosecutors favored the use of conspiracy indictments to link such supposed plotters as the Spock-Coffin defendants, the Chicago Seven and the "Catholic Left" at Harrisburg. But the backlash against McCarthyism has made Congressional investigators more circumspect, and most of the jerry-built conspiracy indictments failed at trial. Hence the new reliance on the compulsory processes of the grand jury.

Unholy Inquisition

There are many reasons why the grand jury has come into favor with the FBI and with certain prosecutors. Grand jury proceedings are, of course, secret. A witness appears alone; he/she can obtain legal advice only by requesting permission to leave the chamber. Few grand jury members have any conception of their own powers, or of the proper limits to be set on a prosecutor's zeal. Finally, heavy sanctions are available. Lying to a grand jury risks the penalties for perjury. If the judge backs the prosecutor—and most judges do, often almost automatically—silence can bring a jail term for contempt of court, a sentence that can last as long as the life of the jury (18 months or longer), and can then be renewed when the next jury is convened.

Though employed amateurishly in earlier decades, these grand jury powers were brought to a state of systematic effectiveness by Guy Goodwin of the Internal Security Division of the Department of Justice under Richard Nixon. Setting out to apprehend the "Weathermen" and other threats to the Republic, he subpoenaed Leslie Bacon all the way from New York to Seattle to tell what she knew about bombs set off in the Capitol in Washington (D.C., not the state). Other persons, supposed to know something about such crimes, were called before grand juries, often distant from their homes, sometimes with only a few days' or hours' notice.

A perceptive article by Judge Marvin E. Frankel and Gary P. Naftalis in *The New Leader* (Nov. 10, 1975) makes vividly clear what can happen at this stage. (Ironically, it was Judge Frankel, a highly respected jurist, who sent Ms. Cueto and Ms. Nemikin to jail.) The article cites actual questions put to a witness by an Internal Security prosecutor before a grand jury in Tucson, Arizona:

"Tell the grand jury every place you went after you returned to your apartment from Cuba, every city you visited, with whom and by what means of transportation you traveled, and who you visited at all of the places you went during the time of your travels after you left your apartment in Ann Arbor, Michigan in May of 1970.

"I want you to describe for the grand jury every occasion during the year 1970 when you have been in contact with, attended meetings which were conducted by, or been any place when an individual spoke whom you knew to be associated with or affiliated with Students for a Democratic Society, the Weathermen, the Communist party, or any other organization advocating revolutionary overthrow of the United States, describing for the grand jury who was present and what was

said by all persons there and what you did at the time that you were in these meetings, groups, associations or conversations."

A subpoenaed witness can ask the court that impaneled the grand jury to quash the subpoena, but courts are usually loath to do so. A witness can claim one of a very narrow privileges against answering (confidentiality of communication between lawyer and client, priest and penitent and, in some jurisdictions, physician and patient or husband and wife). A witness may also assert the Fifth Amendment privilege against self-incrimination, but at that point he/she may first be given immunity against prosecution deriving from that testimony and then ordered by the court to answer the questions, under pain of contempt of court. One major problem with this kind of immunity (it is called "use immunity") is that even though it forbids direct use of a person's testimony against him/her, it can furnish leads to other ways of building a case. Obviously, then, its effect is to cancel out, or at least to weaken severely, the Constitution's ban on self-incrimination.

Witnesses sometimes appeal to the First Amendment, arguing that their right to freedom of association will be abrogated if they are compelled to tell the names of others with whom they have been associated in quite innocent activities. For experience has shown that the persons named may then be subjected to investigation, and their neighbors, employers, fellow employees and friends may be interrogated by the FBI, sometimes in intentionally embarrassing ways. The courts, however, have not been very receptive to such claims.

And there is still another pitfall: A claim of right or privilege not to answer may be asserted too late. Courts have often ruled that by answering seemingly innocuous questions ("What kind of work do you do?"), one has waived any right to refuse later questions in the same line of investigation ("For whom did you agree to print handbills urging a boycott of General Motors?") To guard one's rights, then, the only safe course is to give only one's name, address and serial number and refuse to answer substantive questions until the court has ruled on one's claims. If the court denies the claims, as it often does, the only way to avoid violating one's principles may be to go to jail.

Despite the evident potential for abuse of these coercive powers, to the person on the street (or the bishop in his office), the very name of the grand jury evokes favorable associations. There are historical reasons for this attitude. As recently as Watergate, "runaway" grand juries have helped expose official wrongdoing. At its earliest introduction, in England in the 12th century, the grand jury was obviously an improvement over trial by ordeal, and on some occasions it served to check the arbitrary use of royal power.

In our own history, grand juries were often bulwarks for the colonists against the wrath of royal governors, most famously in 1743 in the case of John Peter Zenger, a newspaper publisher who criticized the governor. The governor sought to have Zenger indicted for libel, but two grand juries refused. Prior to the Civil War grand juries in the North often refused to indict persons charged with violating the Fugitive Slave Law. But these very examples point to the ease with which the grand jury is politicized, and its considerable, little-supervised powers turned to less noble purposes. *After* the Civil War, for instance, terrorist activities by the Ku Klux Klan often went unpunished because Southern grand juries would not return indictments.

Another widespread misconception which helps validate the grand jury in the popular mind is the belief that it functions as an arm of the judiciary rather than as an instrument of the executive. In this view the grand jury simply weighs the evidence brought to it by the prosecutor to determine whether there is a sufficient basis ("probable cause") to justify putting a citizen on trial for his or her life or liberty. This, some believe, also justifies grand jury secrecy, so that, if no indictment is returned, no one's reputation is impugned.

The difficulty is that this is only one theory (or ideal) of grand jury functions—and is not the theory under which the FBI, most prosecutors and most courts are now acting. In current practice grand juries are considered to have *investigative* responsibilities as well as *evaluative*. Prosecutors ardently favor this theory, judges back them up, and the jurors themselves almost invariably go along. The consequence is an enormous increase in the powers of government over citizens.

Much of that power accrues to the FBI. Congress has repeatedly refused to give subpoena powers to the bureau, but when it is working in sympathetic collaboration with a prosecutor, its agents can threaten recalcitrant witnesses with a grand jury appearance. Not only can they so threaten, but they frequently have and still do; witness the case of Ms. Cueto and Ms. Nemikin.

No one questions the importance of law enforcement in society, or the need of law enforcement agencies to act with authority. To understand the very real conflict of values under study here, however, one must distinguish between legitimate and illegitimate uses of power. Obviously the police, prosecutors and courts are simply doing their job when they pursue lawbreakers, especially those who commit acts of violence. Even in such cases, of course, the vigor of their pursuit must be tempered by concern for due process of law. But the real difficulty rises because these same agencies of government tend to lump together with criminals all persons whose opinions or styles of life challenge the established order.

In the long run such persons may contribute to the well-being of society, as did the agitators for abolition of slavery, the rights of labor, women's suffrage and the civil rights of minorities. But when their ideas are new and controversial, they are a source of trouble and disruption, regardless of how law-abiding and peaceable their efforts for change may be; and in the eyes of the law's custodians they are not only objects of suspicion but proper targets for harassment and intimidation. Usually, moreover, there is widespread public support for such attitudes, and never more so than when (as sometimes happens) a movement for social change is afflicted by the presence of a lunatic fringe of fanatics willing to use violence to compel public attention. The syllogism goes like this: The FALN demands independence for Puerto Rico; FALN members are terrorist bombers; therefore all who advocate an independent Puerto Rico are violent criminals, and any great concern for their civil rights is misplaced.

A Plenitude of Targets

Few of us would consciously endorse such logic—or deny that despite its faults it has subliminal power. The trouble is that even fewer understand how often such logic has been and is being invoked in our own day, specifically in support of unchecked, wide-ranging grand jury activities that observe few if any limits on the use of the jury's coercive powers. Such tactics have been employed against the antiwar movement, the student radical movement, the American Indian movement, the Chicano movement, the left-wing Roman Catholic movement, the feminist movement and others.

It is worth noting that despite all the indictments that have resulted, there have been few convictions. The principal effect, whether so intended or not, has been disrupting these movements, sowing divisions within them, draining their energy, sopping up their money and diverting them from the entirely legitimate work they want to do. Quite apart from the erosion of our liberties and the harm done to individuals, this represents a social cost, a loss of ideas and pressures we need.

But how, more precisely, does it work? Always in ostensible pursuit of perpetrators of heinous crimes, the prosecutors and the FBI summon anyone thought to have any association with a possible suspect ("X") to get information about the person's whereabouts, or information connecting the person with the crime. So much is certainly legitimate law enforcement activity. But then the questioning turns to third parties, though still in reference to the suspect: "Who else was connected with X?" Eventually it may (more often: does) come to focus on targets having only the remotest relation to X: "Who else belongs to this organization of which you and X were members?" At this point—when the prosecutor demands names and more names of persons who *might* have some information about the suspect—the inquiry becomes a fishing expedition, catching many innocent fish.

But if the fish are innocent, what do they have to fear? It is here that bishops and other ultra-respectable persons must use their powers of imagination. What is to be feared is what has often happened: the destruction of relationships, organizations and movements that have a right to exist. Witnesses, especially from minority communities, know perfectly well what they have to fear: Only the obloquy, calumny, suspicious and ostracism that often attach to persons thought to be either criminals or, worse, delators, informers, "stool-pigeons." When one of my associates enters the grand jury room, I have no way of knowing what goes on. Did he/she give them my name? What did she/he say about me? Will the FBI be looking into my affairs, my bank account, my past associations and activities? Nothing the witness says afterward can completely dispel the suspicion that he/she told everything and that, even if all was innocent, it may cause trouble anyway. It would be good if everyone could have confidence in the

safety of the innocent from official abuse, but history, and the life experience of the poor and oppressed, do not encourage such confidence. We tend to associate rough, prolonged grillings with the Gestapo or the KGB. But there are some among us who know of such things from personal experience in America.

In the Cueto-Nemikin case, exactly these themes are being played out in the community, and this despite the principled stand the two women appear to have taken. It may well be that their sacrifice was irrelevant, on the likely assumption that the FBI had already obtained the names of persons and organizations connected with the Hispanic Commission. According to one source, NCHA records have furnished "leads" for investigations in New Mexico, California, Colorado, Florida, Ohio, Washington, D.C. and Texas. Episcopal bishops in Puerto Rico, Chicago and Colorado have been visited. Episcopal clergy and parishes in Puerto Rico, California and Colorado have been investigated. In short, because of the search for one fugitive who belonged to the commission for less than one year and who reportedly attended only a handful of meetings, all persons who worked with the NCHA in any capacity are under suspicion and subject to investigation as possible FALN members or sympathizers.

It needs no imaginative effort to grasp the devastating effect this can have, since the devastation is already happening. Credible information suggests that not only Hispanic but other minority communities are drawing away: "You work with the Episcopals and what happens? They give your name to the FBI." It does not greatly matter whether the FBI and the prosecutors intend these effects (out of a general purpose to intimidate "radicals"), or whether the intimidation is a side effect of an overzealous, overbearing disregard for the rights of citizens. Regardless of purpose the effects do occur.

In the present instance, it is sadly ironic that the effects have occurred in the context of an effort by the church to make contact with an alienated population. By its too-eager, too-innocent collaboration with the FBI, the Episcopal leadership has frustrated the threshold task of any such mission, the establishment of a relationship of trust. Instead of proving itself worthy of confidence, the church now appears to many minority persons as a naive or callous "stool pigeon."

A Posture for the Church

Rather than dealing only in hindsight judgments, however, this review should issue in some sort of guidelines for the future. An immediate caution: No set of guidelines can be complete, not only because circumstances differ radically from case to case, but also because in many areas the law is confused. Competent counsel is needed, not necessarily from "radical lawyers" but certainly from attorneys familiar with the territory.

At the outset there is a question of the church's attitude toward its own relationship with the civil power. It was not too long ago or far away that the civil arm had no jurisdiction over the employees of the church, and that the church could offer sanctuary even to nonemployees sought as criminals if they reached its premises. In present-day America the churches would not make such claims, but the historical reference is a useful reminder that the churches are not simply subagencies of the state. They need not, for instance, simply acquiesce when, as in the present case, a court takes upon itself the right to define which activities of a church are properly "religious." (The court said the activities of Ms. Cueto and Ms. Nemikin were to be classified as "social work" rather than any form of "religious" ministry.) At the very least, the First Amendment right of free association is not made *weaker* when it is coupled with the freedom of religion the amendment also guarantees.

In the nature of things, it is at the beginning of an inquiry that crucial mistakes are most likely. In consequence, several church bodies have already notified their employees that governmental investigators are to be referred to the senior officer of the church for any information about the organization, its present or past employees or other institutional matters, so that secretaries, receptionists, accountants, etc. are not placed in the position of having to respond.

And how should the "senior officer present afloat" respond? The preliminary response once made by the General Counsel of the National Council of Churches to an inquiry from the Internal Revenue Service offers one model. In substance, he replied:

"The relationship between churches and government is a very sensitive one, and a church body is protected by the First Amendment as no other kind of

institution is. I am sure neither you nor we would wish to make any missteps here because of haste or carelessness. Many of the legal guidelines are not clear on such matters, and we want to preserve the right to get clarification from a court before taking any steps we might later regret. So if you will particularize in writing what exactly it is that you want, and your authority for asking it, we will review your request and determine what we can appropriately let you have. If at some point we reach a difference of opinion, then we can let the court decide."

This stance, constituting neither defiance nor instant acquiescence, is probably the most prudent course. Another model was offered by a church leader who took a stand in the doorway and said, "No farther!" (The official rather hoped that the governmental agency would challenge him; it did not.) Either strategy would in most cases be preferable to the open-door posture resting on the view that "we have nothing to hide."

Whether the church has anything to "hide" hardly defines what is at issue; in a free country government agents do not have unlimited right of access to the private affairs of citizens, their organizations or—a fortiori—their churches, regardless of the agencies' purposes in demanding such access. Before questions are answered or files are opened, other considerations must be met. What will this do to employees and constituents? What precedents will it set for other churches? What has been the pattern of Government actions in similar situations? (The question is of special pertinence where a grand jury has been or may be convened.)

Suppose that the first strategy has been adopted, the Government has stated its inquiries in writing, and the church leaders must then decide their response. According to *The Times*, Bishop Allin has now adopted the view, previously urged by some legal authorities, that the church will not in the future turn over personnel files without the permission of the persons concerned; the initial response will be, "Sorry, we don't give that out." The grounding for this can be that personnel files are the joint property of employer and employee.

With respect to information about contributors, again the NCC practice may offer guidance. When asked for correspondence with contributors, the NCC declined on the ground that it considers the correspondence confidential and the identity of contributors not to be divulged. If the IRS were to ask whether a named person gave a claimed amount in a given year, NCC would answer yes or no; it would not supply such names on its own motion.

Who Owns My Name?

What about lists of members? The Supreme Court has found that the mere providing of names may indeed be a sensitive matter, when it upheld the refusal of the National Association for the Advancement of Colored People to divulge its membership list to the state of Alabama (*NAACP v. Alabama*). In some circumstances, the Court held, freedom of association requires anonymity.

Since law enforcement also has its claims, such an argument would not always prevail. And yet it will be well for church leaders, and for all citizens, to grasp a principle repeatedly affirmed by the Supreme Court: The freedoms guaranteed by the First Amendment have a *preferred position* in our society. They cannot be abrogated by government except for *compelling* reasons, and—Mr. Justice Brennan often adds—after a showing by government that those reasons cannot be served in any other way. Here the Court is acting most clearly in our tradition, instructing us in the care and preservation of our liberty. The churches should be no less vigilant.

At the very least, then, they should not lend their cooperation to wide-ranging "fishing expeditions" that will bring innumerable persons under investigation solely through their connections with the church. Surely it will seldom, if ever, occur that the only or the best route to the apprehension of presumed criminals will be to track them to the church. Hence, when agents demand names, church leaders may well decline to comply until a showing has been made, preferably in adversary proceedings, to the effect that the information is genuinely needed and that other leads cannot be obtained in other ways. It should be demonstrated that the benefits disclosure may bring to society in terms of effective law enforcement outweigh the damage that may be done to legitimate interests of the church and its members (see 8 Wigmore *Evidence*, section 2285 at 527, McNaughton ed., 1961).

It may be granted that several levels of membership exist. Presumably, those who have been elected or selected to leadership positions can be said to have accepted a relatively high degree of visibility. Membership on an official body, such as the Hispanic Commission, may be public information to a greater degree than rank-and-file membership in the church itself. Of even less formal status would be those constituents or "seekers" who come only briefly within the ambit of the church. In general these levels of association with the church should be subject to disclosure in proportion to their eminence.

But even here circumstances alter cases. Church leaders should be knowledgeable enough, and commonsensical enough, to discern when (as in the case of the NAACP in Alabama) known association with a particular body may mean trouble, so that the presumption should be in favor of confidentiality rather than disclosure. In such cases the church should not simply hand over lists but should at most simply answer factual questions: "Was X a member in 1976?" "Yes, he was," or "No, he was not." Anything beyond this would arguably be excessive entanglement of government in the affairs of religion.

Defending his own policy wtih regard to the recent incidents, Bishop Milton Wood reportedly declared that, "In general, church programs can't be made confidential. The General Convention requires this. This is *not* Watergate." One wonders, in the first place, whether confidentiality is not more important in the life of the church than the bishop holds, and whether the General Convention can have meant to imply that, "in general," church business is government business.

It may well be, for example, that communications or other kinds of information may be freely shared with church members but are not intended to be divulged to others. Consider the example of a church-sponsored study of attitudes among members toward teen-age drug abuse. The study is meant for the use of the church, but its compiler (and the respondents) may very well object to its disclosure to prosecutors pursing drug abusers, lest members who had expressed opinions be thought to have evidence worthy of official investigation. A church that does *not* have confidential information of this and other kinds may well question its relevance.

Secondly, and more centrally, it appears that Bishop Wood has learned the wrong lesson from Watergate. The criminals in the original and related Watergate cases were not the officials of the Democratic National Committee, or Daniel Ellsberg's psychiatrist, or the journalists and others whose telephone lines were tapped. The crimes committed were not those of private citizens wrongfully frustrating their government. No, the criminals acted on behalf of Government officials, in most cases under color of the authority of our Chief Magistrate; and their crime was precisely the seeking of information, by illegal means, that the Government had no legal right to obtain.

Many observers have concluded that the Bill of Rights was never more at risk than during the period before the crimes associated with Watergate were exposed. The lesson to be learned is not new but a platitude: Vigilance is the price of liberty. In practical terms church officials must learn to respect their own rights, the rights of their constituents and their employees. When the agents of government come calling, their demands must be examined with care. It is not intransigence but respect for liberty which suggests the need for the churches to keep government at a distance, to offer poised and reasonable resistance against inroads on their privacy and their mission. It is hard to think of a better place to make a stand on the First Amendment than at the door of the church.

For More Information

Organizations: A newly formed group rising out of the Cueto-Nemikin case is the Grand Jury Education Project of the Hispanic American Task Force, associated with the Joint Strategy and Action Committee, Room 1700A, 475 Riverside Drive, New York, N.Y. 10027, (212)870-3105. Other groups:

Coalition to End Grand Jury Abuse, 105 Second St. N.E., Washington, D.C. 20002, (202)547-0138. Among member organizations: American Civil Liberties Union, Southern Christian Leadership Conference, National Organization for Women, Church of the Brethren, Unitarian-Universalist Association, National Conference of Black Lawyers, Amalgamated Meat Cutters and Butcher Workmen.

The Grand Jury Project, 853 Broadway, New York, NY 10003, (212) 533-2299. Co-sponsored by the National Lawyers Guild.

[Reprinted From the May 2 issue of Christianity and Crisis by the Coalition to end Grand Jury Abuse, Copyright (c) 1977 by Christanity and Crisis, Inc.]

EDITORIALS

[From the St. Louis Post-Dispatch, April 6, 1977]

GRAND JURY ROLE

The criminal justice section of the American Bar Association has added its voice to those of other critics in favor of legislative safeguards against abuse of the grand jury. The ABA group has recommended that Congress, among other things, allow witnesses before grand juries to have legal counsel, ban the repeated imprisonment of witnesses for refusing to testify before grand juries, and allow grand jury witnesses to use a violation of the federal wire-tapping law as a defense.

Such protections are needed because of the evolution of the grand jury from what originally was its role as a shield against unjust prosecution to its present role as a tool of the prosecution. The abuse of the grand jury reached a peak under the Nixon Administration, which used the grand jury as an investigative lever to force delivery of evidence in violation of the spirit of the Fifth Amendment's guarantee against self-incrimination.

Legislative reforms, such as the ABA group is proposing, are designed to return the grand jury to its intended constitutional purpose as a shield for the people against the government rather than a sword for the government against the people.

[From the Boston Globe, July 8, 1977]

GRAND JURY REFORM

There were undoubtedly those who saw a certain irony in the complaints by General Motors last month that the Federal government was abusing the grand jury process by hauling in GM officials to testify under oath about corporate tax matters. In recent times, at least, complaints about grand jury abuses have come most frequently not from the offices of the nation's corporate executives but from political radicals charging grand juries have been employed to quash their activities.

In theory, the grand jury serves a laudable purpose. It allows possible criminal charges against an individual to be screened in secrecy by an independent panel of the accused's peers before they are publicly lodged.

In fact, however, the grand jury has become a tool of the prosecutor. By both establishing the grand jury's agenda and orchestrating the quality and quantity of the evidence presented, the prosecutor almost invariably determines who is and is not indicted.

But the grand jury can still provide valuable protection to individuals and the most prudent course now is to increase those safeguards. At the Federal level, legislation to do this—which could well serve as a model for similar state actions—has been introduced by Rep. Joshua Eilberg (D-Pa.). It received a cool reception from the Carter Administration at a hearing last week but it points in the right direction.

It would repeal the "use" immunity law enacted at the urging of the Nixon Administration under which witnesses can be compelled to testify before a Federal grand jury and then, despite the constitutional guarantees against self-incrimination, be tried for activities about which they testified as long as the specific testimony is not used. The Eilberg legislation would return the Federal system to "transactional" immunity under which a witness compelled to testify could not later be tried for crimes detailed in that testimony.

The Eilberg legislation would also allow defense attorneys into the grand jury room to advise their clients (now they wait outside the room and their clients can go out to them) and, not incidentally, to monitor the process. A similar proposal for Massachusetts grand juries was recently approved by the state Senate.

Another meritorious provision of the Eilberg legislation would require that a judge screen Federal grand jury indictments prior to their issuance to make sure that they are based upon sufficient admissible evidence and that the proce-

dures were appropriate. The proposal is designed to avoid needless damage to reputations arising from improper indictments.

None of these proposals has won the general approval of prosecutors. Yet none should generally impair prosecutors' work. Whatever the grand jury's original function, in a complex industrial society, where crime is commonplace and crime fighting sophisticated, the professionals—the prosecutors—will play the dominant role. But it is in exactly such a society that sufficient measures must be taken to protect the rights of individuals.

[From the Wisconsin State Journal, May 3, 1977]

GRAND JURY REFORM

The grand jury system in this country needs reform.

The system, devised under English law to provide a more democratic way of bringing charges against persons suspected of crimes, has been perverted into a prosecutors' tool to get around constitutional guarantees.

Almost nowhere else in the criminal justice system is a person who wants a lawyer denied that right. Someone hailed before a grand jury must submit to questioning under oath with no professional legal help at his side. He can receive advice from counsel outside the jury room but must ask for and be granted permission to leave the room when he wants it.

Richard F. Gerstein, chairman of the American Bar Assn.'s (ABA) criminal justice section's grand jury committee, said this not only unnecessarily prolongs the proceedings but also places the witness in an unfavorable light before the jury.

"It is extremely damaging to the witness to continually get up, go outside, and consult with counsel," Gerstein, a prosecutor for more than 20 years, said.

What would be wrong with permitting someone testifying before a grand jury to have legal counsel at hand? He's allowed it outside the room. Why go through the clumsy motions of leaving the room to talk to a lawyer?

Other reforms are needed. The following changes have been recommended by the ABA:

Witnesses forced by law to give testimony that might violate the guarantee against self-incrimination should be given immunity from prosecution for any crime referred to in the testimony.

Witnesses who refuse on several occasions to testify about the same event.

Increased penalties for unauthorized disclosure of grand jury information.

The Sixth Amendment to the United States Constitution says:

"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 crimes shall have been committed . . . 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 defence."

The rights spelled out in that amendment should not stop at the door to the grand jury room.

[From the Charlotte Observer, July 11, 1977]

LEAKY SHIELD—GRAND JURIES NEED REPAIR

The constitutional provision for grand juries was intended to protect citizens from repressive government, to place a shield between the prosecutor and the accused.

That function has become obscured, however. It's time for Congress and the states to tackle grand jury reform.

Hearings on one such bill for the federal judicial system before a House Judiciary subcommittee are about to end. The bill will go before the full House this fall. The Carter administration has announced its opposition to some of the bill's key provisions, contending that grand jury abuse is rare. There is evidence that it may be more common than the administration thinks.

Grand jury witnesses do not enjoy the constitutional protections they'd get in a trial. And the grand jury can become a tool of the government whose power it was meant to check. That became clear during the early '70s, when the U.S. Justice Department used grand juries to harass antiwar activists.

Among the questions Congress must answer are these:

Should witnesses be denied the constitutional privilege against self-incrimination because a judge grants them immunity from prosecution for anything they might tell a grand jury? Under federal law, a grand jury witness can be forced to testify if the judge promises immunity.

Two Charlotte police officers faced that situation recently in a grand jury investigation of alleged illegal police wiretapping. U.S. District Judge James McMillan expressed his disagreement with the law, though he saw no alternative to enforcing it.

"Given a free choice in the matter, I would refuse (to do so)," the judge said. ". . . Locking a person up for not talking is . . only a small degree removed from other traditional types of torture used to make men talk, such as the rack, the saw, the screw, the water treatment. . . ." We share the judge's distaste for forced testimony.

Should witnesses be denied the presence of an attorney inside the grand jury room?

Presently, witnesses must leave their lawyers outside the hearing room. They must face questioning by the jurors and district attorney on their own, traipsing back and forth to the hallway to seek legal advice. Prosecutors argue that allowing lawyers in would delay things and cause more breaches in grand jury secrecy. We need to hear more arguments pro and con before we take a position on this issue.

Should grand juries be allowed to seek help from independent lawyers and investigators?

Grand juries must rely for impartial legal counsel primarily on the same person who wants them to return indictments: the prosecutor. The availability of advice from an independent attorney would help prevent charges of collusion and make the grand jury system work as it's supposed to.

It's hard to say how widespread grand jury abuses may be. But the present system leaves too much room for them to occur.

[From the Austin American-Statesman, July 30, 1977]

Grand Jury Reform Needed

When the Bill of Rights was adopted, the grand jury was seen as a libertarian device against oppression by the British crown. The grand jury system has become, through the Fifth Amendment, central to the national criminal justice system.

Yet there is a growing sentiment that the grand jury is too much abused, too much a tool of the government's prosecutors. So much so that the Congress is considering reform legislation designed to protect the citizen against heavy-handed prosecutorial use of the grand jury.

A good bill, H.R. 94, introduced by Rep. Joshua Eilberg, D-Pa., takes a middle-of-the-road approach to the reformation of the grand jury. It should be enacted.

The bill would do several things.

It would allow a witness to have counsel to advise him during grand jury proceedings, a practice not now permitted.

It would limit to six months the time a recalcitrant witness could be jailed for contempt. Currently, a witness in contempt can be held through the term of the grand jury and when a new grand jury is empaneled the process can be repeated ad infinitum.

It would allow grand jurors to hire their own investigators if they don't trust the ones provided by the prosecutor.

It would provide stiff penalties for leaking grand jury information, though it would protect witnesses and their lawyers and journalists from the $20,000 fine or five-year imprisonment contemplated.

There are other provisions, but those are the important ones. They would help to prevent the sort of kangaroo grand jury witnessed during the Nixon administration.

The American Bar Association's policy-making House of Delegates next month will consider a resolution supporting grand jury reform. The proposal envisions allowing a witness the right to counsel, and would keep prosecutors from using a grand jury to aid administrative inquiries.

When the administration took its position on grand jury reform before the Immigration, Citizenship and International Law Subcommittee of the Judiciary

Committee a couple of weeks ago, Rep. Eilberg was disappointed. The administration "didn't think much of" the Eilberg bill, one of his aides reported. Eilberg had thought a Democratic administration would be more inclined to grand jury reform.

Nevertheless, the bill still is said to have the best chance of all those proffered to succeed. And it should. If the grand jury system is to become what it was envisioned to be, vigorous, independent, and a hedge against oppression, reforms are necessary. The Carter administration should be pushing the reforms, not opposing them.

[From the Dayton Daily News, August 13, 1977]

NOT-SO-GRAND JURIES

It's too bad Attorney General Griffin Bell does not like the idea of letting witness take lawyers with them when they testify before a grand jury. But that ought not deter those who believe the grand jury system is in need of serious reform.

The proposal comes from a committee of the American Bar Association that also recommended 25 other changes in the system to make it more just.

Mr. Bell calls the idea "the lawyers relief act" because it would mean more business for the pinstriped folks with briefcases. He has a point, but virtually every governmental change these days means more business for lawyers. Before the century is out everyone may be a lawyer because we won't be able to sneeze without filling out a form or getting sued.

But that is not sufficient reason to avoid correcting a situation that has gotten out of hand. The federal government itself is one of the biggest abusers of the grand jury system, using it in the 1960s and early 1970s to badger dissidents and investigate their doings even when there was little likelihood of obtaining convictions or even indictments.

Witnesses before a grand jury are thrust into an unfamiliar and threatening situation and questioned by trained prosecutors who can spring evidence on them without warning. If they don't answer they can be held in contempt and jailed.

Mr. Bell says lawyers to help the witnesses could prolong matters and slow down the judicial process. But that risk, and it is real, is not as important as preventing miscarriages of justice.

[From the Salt Lake Tribune, August 12, 1977]

GRAND JURY SYSTEM WOULD GAIN FROM ABA REFORM PACKAGE

If American Bar Assn. (ABA) policy is eventually reflected in law, and it often is, the grand jury system is in for some long overdue change.

The association's House of Delegates took the position this week that witnesses before grand juries should be allowed to have an attorney at their side to advise them. Some two dozen other changes designed to provide greater protection for individuals in grand jury proceedings were also approved, sometimes over the protest of Atty. Gen. Griffin Bell.

On too many occasions grand jurors have been reduced to little more than a rubber stamp for the prosecutor, the only lawyer permitted to address and advise them. There also have been frequent charges that grand juries used a new limited immunity grant weapon as an instrument of intimidation. And some critics believe grand juries have been employed as an investigative arm of established law enforcement agencies.

The ABA acted to stem these and other flaws in the face of a warning from Mr. Bell that the lawyers were destroying the grand jury and making law enforcement in some fields impossible. The attorney general's objections smacked of regret over the prospect of losing the government's overwhelming advantages under present grand jury procedures.

If the ABA recommendations become law an overly zealous prosecutor would no longer find it easy to browbeat a witness into possibly inadvertently incriminating himself or associates. Instead of having to leave the jury room to consult with a lawyer after each question put to him, a witness would have counsel with him.

Proposed limitations on grants of use-immunity would force prosecutors to develop evidence through investigation rather than extract it from an unwilling possible suspect under threat of contempt sentences.

The ABA recommendations came about because the grand jury system is being subverted and individual rights ignored or circumvented much too often. If, as Mr. Bell predicted, adoption of the reforms destroys the grand jury, then it deserves destruction.

If a cog in the criminal justice machine must rely on infringement of the very rights the system is designed to uphold, then the machine would run better without that cog. But it won't come to that.

If the ABA reforms are enacted into law the grand jury will survive and be better for them. Prosecutors may even find rewards in the return to traditional methods of case building sans questionable grand jury shortcuts.

[From the Norfolk Virginia-Pilot, August 11, 1977]

GRAND JURY REFORM

The American Bar Association's 24-point proposal to reform the grand jury is intended to put a stop to abuses by political prosecutors without killing off the system.

The fundamental reform is to give more protection to witnesses. There is now no requirement that those who are subpoenaed to testify before a grand jury be informed of their right to counsel, their privilege against self-incrimination, or that they could be indicted for perjury for giving false testimony.

Under current practice in most states, a witness may not be accompanied by counsel into the grand jury room, but can consult outside the room after a question is put. (Only nine states permit a lawyer to advise a client inside the grand jury room.) The ABA is recommending that an attorney be allowed to advise a witness before the grand jury, but not permitted to address the grand jury or participate in the proceedings.

The recommendation is sensible. Attorney General Griffin Bell's objection that the change would make the grand jury system unworkable and is meant only to provide "plenty of work" for lawyers is unpersuasive.

The Bar Association also recommends a tightening of the circumstances under which a witness could be granted immunity to testify. It endorses the principle of secrecy under which the grand jury operates.

There is no question that the device of the grand jury has been abused for political purposes in recent times. But it remains useful in circumstances where alternative procedures might not serve so well, as evidenced by the tenure of the Watergate grand jury.

The grand jury originated in England, but was abolished there in 1933. It is better to reform the system than to eliminate it altogether, which has happened in several states. Congress and the states ought to act upon the bar's advice.

[From the Bloomington (Ind.) Herald-Times, August 14, 1977]

GRAND JURY REFORM

We often find ourselves at odds with the American Bar Association on proposals to change the legal system. Most revisions put forth by the ABA are designed to promote the interests of lawyers at the expense of the public. But last week the ABA, meeting in Chicago, did urge a major policy change that we find appealing and appropriate.

The ABA urged Congress and the states to adopt a broad program of grand jury changes aimed at curbing abuses by prosecutors and providing more protection for witnesses.

Over objections by the Department of Justice in two instances, the association's House of Delegates approved a 24-point program that would permit witnesses to have their attorneys in the grand jury room and require the government to inform witnesses, who are possible targets of the inquiry, of that fact.

The proposed code for criminal investigation would also limit the circumstances under which grand juries can grant a witness immunity, while broadening the area of such immunity once granted. It would strongly uphold the principle of

grand jury secrecy but attempt to prevent the use of grand juries for political purposes.

At present, there is no requirement that federal or state grand juries provide any legal information to witnesses subpoenaed to testify. Under the code adopted by the ABA Tuesday, the witnesses would be told of their privilege against self-incrimination, their right to counsel and the possibility that any false testimony could lead to a perjury indictment.

Under current practice in all but nine states, witnesses may not have lawyers with them in the grand jury room, although they can go outside after a question and consult their lawyers in the corridor.

Under the ABA proposal, an attorney could advise his client in the grand jury room but could not address the grand jury or participate otherwise in the proceedings. If he violated these rules, the prosecutor could ask the court to remove him.

Appearing briefly, Attorney General Griffin B. Bell argued that this was "overkill," a move that would either make the grand jury system unworkable or else constitute a "lawyers' relief act" providing "plenty of work" for the profession.

Bell's comments are well taken. However, it is important that witnesses be fully advised of their constitutional rights against self-incrimination guaranteed under the 5th Amendment. Given the premise that most Americans are ignorant of the breadth of their rights, they should have an attorney on hand—if they so desire—to guide them throughout the usually treacherous course of grand jury proceedings.

It is simply not enough that attorneys are permitted to await consultation in the corridors. They should be present when grand jury questions are posed. After all, lawyers—better than others—know the extent of liability to which witnesses expose themselves by answering leading grand jury questions.

Despite our past differences, we now side with the ABA in seeking much-needed grand jury reform. It is long overdue.

[From the Lexington (Ky.) Herald Leader, August 14, 1977]

Grand Jury System Should Permit Witness to Have Attorney Present

In the American criminal justice system grand juries have two roles: They investigate possible wrongdoings and screen evidence to determine if there are reasonable grounds for criminal indictments—formal accusations.

Originally, grand juries were intended to serve as panels of unbiased citizens acting as a buffer between the formal machinery of criminal justice and the individual.

Increasingly, however, grand juries have become tools of the prosecution—mere rubber stamps. One study of 6,500 cases in Ohio, Illinois and New York reported that grand jurors disagreed with the preferences of prosecutors only five per cent of the time.

The grand jury is a particularly powerful tool for the government because of the secrecy of its work and the prosecutor's privileged position as the only lawyer present.

Not every state uses the grand jury, though Kentucky is one of those that does. The fifth amendment requires the federal government to use grand juries in criminal cases.

Rule 6(d) of the Federal Rules of Criminal Procedure specifies that the prosecutor is the only lawyer permitted in the federal grand jury room. Kentucky's procedural rules are the same.

Both these rules should be modified to allow a witness before a grand jury to be accompanied by his or her attorney. But the attorney should only be allowed to advise his client, not address the grand jury or take any other part in its activities.

Nine states already permit this procedure.

The American Bar Association recently backed such a modification of the federal rule. The Kentucky Bar Association should similarly push for a modification of the state rule.

The time has come to open up this medieval institution to ensure that its proceedings are fair.

[From the Springfield (Mass.) Republican, August 14, 1977]

GRAND JURIES: CASE FOR REFORM

It is probably asking too much to expect the scrapping of the grand jury system within the reasonable future, flawed though it may be. It is not asking too much to seek a reform of grand jury procedures to provide more protection for witnesses and prevent the possibility of abuse of the system.

The American Bar Association has come up with an eminently reasonable series of recommendations to improve the grand jury system. The most important, and one which is pending in the Massachusetts Legislature, would permit witnesses to have their attorneys present in grand jury rooms.

This proposal has run into opposition from prosecutors on both the federal and state levels. They contend it would make the grand jury system unworkable and result in interminable delays in the administration of criminal justice.

However, the ABA proposal—and the Massachusetts legislation—would bar attorneys from addressing the grand jury or participating in the proceeding. They would have only the right to advise their clients. Given the lopsided advantage of prosecutors in grand jury proceedings, this is a more than reasonable recommendation, particularly since the proposal would uphold the principle of grand jury secrecy.

In the long run, the proposal could benefit the prosecutors themselves by encouraging them to present their best possible case before grand juries. And it would minimize the chances of inadvertent false testimony by badgered and confused witnesses.

Although outdated, the grand jury system will probably be around for the foreseeable future. Thus, the federal and state governments have a responsibility to insure that the system is fair to all parties.

[From the Palm Beach Post, August 15, 1977]

GRAND JURY REFORM

The American Bar Association (ABA) is not known for challenging long-accepted methods of operation in the legal system. So when the ABA calls for radical change, something must be radically wrong.

Such is the case with the grand jury system, a system so thoroughly riddled with the potential for abuse that even the ABA was moved to throw its considerable weight behind a program of comprehensive reform.

The United States inherited the grand jury system from England, where, in a bygone era, it was an effective buffer between innocent citizens and officials of the Crown. But on American soil the grand jury has turned into something very different; in the hands of the unscrupulous prosecutor, the grand jury can be and often is political plaything. The prosecutor holds all the cards, and the target of the investigation—who theoretically enjoys a presumption of innocence—is helpless against the overzealous prosecutor.

Grand jury abuse has been so well-documented and so widespread that even the staid ABA agrees that the time for reform has come.

Unfortunately that opinion is not shared by Atty. Griffin Bell, who showed up at the ABA's annual meeting last week to try to dissuade the bar from urging Congress and the states to adopt a broad range of grand jury reforms. Mr. Bell labeled the proposal "overkill."

To our way of thinking, the overkill lies in the present grand jury system, which compels citizens to attend closed proceedings and answer questions without knowing whether they are the target of the investigation, without having an attorney or even a friend in the courtroom, without being advised of their privilege against self-incrimination, and without being told that if they get their facts wrong, they could be indicted for perjury.

Under the ABA proposal, grand jury proceedings would still be kept secret, making it all but impossible for the public to know what kinds of games might be going on inside. But if games there must be, it's only fair that the unwitting players know something about the rules.

[From the Greenville (S.C.) News, August 15, 1977]

GRAND JURY WORK

Legislation pending in Congress to change the rules under which federal grand juries operate got a helping hand Wednesday when the American Bar Association approved a set of principles for grand-jury reform. Chief among them is a recommendation that a witness be allowed to have a lawyer present when being questioned in the grand-jury room.

This recommendation, if accepted by Congress—and we hope it will be—should go a long way toward eliminating the abuses by prosecutors that have made the grand-jury system suspect. In doing so, it may save the grand jury from extinction.

Originally created in England as a mechanism for protecting citizens against an overbearing government, the grand jury has been used instead by many prosecutors as an instrument for harassing witnesses and browbeating defendants before they are indicted. The Nixon administration was especially skillful at using grand juries for political rather than law enforcement purposes.

While the Department of Justice has recognized the need for new rules to end such abuses, it is not prepared to go as far as the Bar Association in fundamental reform. Attorney General Griffin Bell, in fact, argued before the lawyers against giving witnesses the right to have a lawyer with them—at present, witnesses' lawyers are required to wait outside the grand-jury room.

His fear, and that of many prosecutors, is that grand-jury proceedings will come to resemble those of a trial, thus making the task of law enforcement officials even more formidable than it is now. We think such fear is exaggerated. But even if it were not, this basic change in the law would be needed to preserve the grand jury's intended function.

Grand juries have been much criticized in the past few decades. They were abolished in England in 1933 and have been eliminated in several states. Their life expectancy in the remaining states and in the federal system was not considered great a few years ago because of the ways in which the juries had been abused.

But that has changed. The Watergate affair provided a striking example of their usefulness in investigating and bringing indictments in situations where no other technique could have enjoyed public confidence.

They are worth saving—but only if they are restored to the function intended by the Bill of Rights. The best way to do that would be for Congress to pass legislation along the lines suggested this week by the nation's lawyers.

[From the Las Vegas Sun, August 16, 1977]

GRAND JURY IMPROVEMENTS INEVITABLE

In 1166 King Henry II devised the grand jury to intimidate villagers suspected of challenging royal authority. The indicted villager was tossed into the water. If he sank, he was innocent. If he floated, he was guilty.

By the late 1600s, the villagers had learned to use the grand jury system. They refused to indict people King Charles II wanted to imprison. This notion, brought to the Colonies, led to the inclusion of the grand jury in the Fifth Amendment—to protect citizens against government repression.

BLOODHOUNDS

In the 1790s, when the Bill of Rights was adopted, Thomas Jefferson charged the Federalists used grand juries as prosecution bloodhounds to hush those who believed in free speech.

Now, the American Bar Association has urged procedural changes to limit the power of prosecutors and give witnesses more protection. It proposes:

Letting witnesses have their attorney in the grand jury room.

Prosecutors must tell witnesses they may be targets for indictment.

Limiting the ways of granting grand jury immunity, but broadening that area once granted.

Telling witnesses they can have a lawyer present, and could be charged with perjury if they lie.

MIXED BAG

There's strong disagreement on the need for continuing the grand jury system. Prosecutors could proceed on informations; justices of the peace and could make findings of probable cause. Both eliminate the requirements for a grand jury.

But it was the grand jury system that toppled Spiro Agnew; that led to the bribery trial against Agnew's successor as Maryland governor, Marvin Mandel (that trial being unresolved on Monday).

MAKE WORK

Some will challenge the need for these changes—coming from the American Bar Association—as a way of making work for more lawyers. It certainly will.

But it will also make more work for prosecutors, who might just learn not to use grand juries for fishing expedition if more restraints are placed on their conduct before these select secret groups.

CANDOR

Atty. Gen. Griffin Bell opposes the reforms. "A lawyer's relief act," he calls them.

U.S. Dist. Judge William J. Campbell says grand juries are "the total captive of the prosecutor who—if he is candid—will concede that he can indict anybody at any time, for almost anything, before any grand jury." He'd abolish the grand jury system.

But it's part of the Fifth Amendment. We're stuck with it. The bar association's proposals will do more to protect persons called before grand juries. We're willing to settle for that improvement.

[From the Wilmington News Journal, August 21, 1977]

GRAND JURIES IN OUR TIMES

No person shall be held for a capital, or otherwise infamous crime, except on a presentment or indictment of a Grand Jury . . . U.S. Constitution, amendment V.

Despite that constitutional injunction, the grand jury is in danger of becoming the vermiform appendix of the criminal justice system, a useless or abused organ that constantly presents the danger of infection to the body politic.

Abandoned by many states, accused of being a rubber stamp of federal prosecutors, and generally misunderstood by the public, there is good reason to believe that the grand jury, as an institution, is going to be excised from the system unless it is seriously reformed.

That's a historical irony. The institution dates back to medieval England, where the grand (or large) jury of freemen was established as a control on the tendency of the royal courts to push other freemen around. The grand jury, as it developed in English common law (and was transferred to the United States) was to be a protection for citizens against malicious or frivolous prosecution, in that authorities or prosecutors had to convince the grand jury that they had a sufficient case against a citizen to cause his indictment and trial.

Today, the most serious charge being brought against grand juries is that they do exactly the opposite, that they are a tool and device of prosecutors, who control the grand juries and can get anything out of them they wish.

The reform proposals have now come from no less a body than the American Bar Association which, at its recent convention in Chicago, made two proposals affecting federal grand juries: that witnesses before the grand jury be allowed counsel inside the jury room, and that the rules governing grand juries be modified so that it would be more difficult for the jury to grant a witness immunity to force him to testify—that is, giving him the choice of accepting immunity or going to jail for contempt.

The ABA also made some secondary suggestions that would halt the growing trend of abuse of grand jury powers to put news reporters and lawyers in danger of contempt if they refuse to testify on matters they consider confidential.

These reforms should be considered minimal. They would afford at least a thin coat of protection for witnesses (who are very liable to end up as the accused or indicted) in the federal jurisdiction. It is only speculative whether they would accomplish any substantial reform. And, note well, even these reforms are

opposed by the U.S. Department of Justice, which uses the grand juries to its best advantage in prosecutorial roles, and sees itself in an adversary role with the private lawyers in this argument.

More practically, the federal government could minimize or even eliminate the role of the grand jury and proceed on the "information" of a prosecutor to a court that a crime has been committed and that a certain person could have committed it. It could, that is, if it were not for the italicized quotation that heads this column.

As for the states, those who do not have constitutional inhibitions have long since taken end runs around grand juries, usually by proceeding on information and skipping the *pro forma* indictments. Some states keep the institution of a grand jury on standby, for use in special investigations of corruption or wrong doing in governmennt. In those instances, the mere convening of a special grand jury can have a chilling effect on official hanky-panky.

Delaware, alas, is among the states which require by constitution the grand jury process. A footnote on the Delaware Code in the state's 1897 constitution says that the grand jury is "enshrined" in our legal process, and the word is apt. Over the years, there has been a constant drumbeat of criticism to and from the grand juries, which are convened by counties, but constitutional reform would be necessary to operate in a less clumsy fashion, and constitutional reform is not a politically popular cause in Delaware today.

[From the Newsday (Long Island, N.Y.), August 24, 1977]

GETTING BACK TO BASICS WITH THE GRAND JURY

The grand jury, conceived as a protective shield between citizens and the awesome powers of their government, has increasingly evolved into a prosecutor's tool. The use of grand juries to obtain indictments for routine offenses in New York and 20 other states adds little by way of safeguards for defendants even as it makes the process of bringing criminals to justice unnecessarily cumbersome.

The latest step in the evolution was the passage in 1970 of the Organized Crime Control Act, which rewrote the rules governing witness immunity and came dangerously close to nullifying Fifth Amendment rights against self-incrimination. As predicted by critics at the time, the act has been used not only to combat organized crime but to harass and intimidate potential witnesses and suspects in a wide variety of cases.

Demands for reform have been fueled by the fact that witnesses must appear before grand juries without legal representation. Even though the American Bar Association could be accused of trying to get more work for its members, it makes a good case for allowing a lawyer to be present in the grand jury room.

The Bill of Rights says, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," with some exceptions involving military service or public danger. But the Supreme Court has ruled the states exempt from the provision, and 29 states now allow indictments on the basis of prosecutors' information and preliminary hearings—a system that seems to work well for all parties. New York would do well to follow that example, reserving grand juries for special investigations or cases where a witness might be endangered if his or her identity became known.

The problem is more complicated on the federal level; Congress is wary of tampering with the Bill of Rights. An attempt by Representative Joshua Eilberg (D-Pa.) to reform the system stands a far better chance. In essence, Eilberg would reverse the tilt toward the prosecution by allowing the presence of lawyers and restoring the immunity rules employed before 1970. His bill would also make grand juries more independent of prosecutors and attempt to prevent leaks of grand jury proceedings, which are supposed to be kept secret.

Attorney General Griffin Bell opposes the two key provisions on the ground that they may hamper the grand jury's work. But the safeguards in the Bill of Rights weren't intended to make the law enforcement system more efficient. And when those safeguards become largely meaningless, as has happened with the grand jury system, it's time to search for alternatives.

[From the Columbia Journalism Review]

GRAND-JURY REFORM—ALTERNATIVE TO SHIELD LAWS

(By Sam Pizzigati, co-director of the Coalition to End Grand Jury Abuse, in Washington)

The fifteen days the Fresno Bee Four spent behind bars in September for refusing to reveal their source for a Bee exposé were, on one level, a courageous example of journalistic integrity. But on another equally valid and far more depressing level, their incarceration was no inspiration. It was a sorry reminder of how far the drive for an effective press shield hasn't come. Nearly fifty years after the push for press shield laws began, journalists can still be jailed for engaging in their profession.

The sacrifice of the Bee Four is not likely to change things. It will not, for instance, spark the enactment of a new California press shield law. When the four Fresno reporters and editors were initially subpoenaed, California already had a solid shield statute, but it didn't do the Bee Four much good. The judge in the case simply shrugged the state press shield off as unconstitutional. Nor will the Fresno horror prod Congress into action. The pending federal press shield bills are bogged down in legitimate problems with definitions: what is a "journalist" anyway?

All this leaves reporters where they have always been: at the mercy of criminal-justice officials. If a prosecutor or judge wants the name of a reporter's source badly enough, the journalist is in for a draining ordeal. Simply put, the drive to protect journalistic confidentiality has stalled. Perhaps it is time, then, to step back and rethink the press shield law movement's single-minded concern for who is being subpoenaed and start asking questions about who is doing the subpoenaing—and in most of the controversial press subpoena cases that means the grand jury.

By and large, journalists have not asked these questions yet. They have accepted the standard law-enforcement contention that grand juries are bulwarks against crime entitled "to every man's evidence" while trying to argue, without much success, that the importance of an unfettered press makes the journalist an *exception* to the grand-jury obligations of ordinary citizens.

Others, however, have challenged the government's conception of the grand-jury process. Lawyers subpoenaed before grand juries to testify about their clients, political activists grilled about their politics, and strikers questioned about their unions have pointed out that the grand jury was incorporated into the Bill of Rights in 1791 to check, not facilitate, prosecutorial power. They have shown that the grand jury has become exempt from due process and will do anything a prosecutor wants, and they have taken the case for fundamental grand-jury reform before Congress—and found a favorable reception. More than thirty representatives and senators have sponsored reform bills and, while none of these bills specifically mentions "journalists," all would profoundly affect the ability of journalists to protect the confidentiality of their sources. They offer, in effect, and alternative to what may be a dead end.

An example: Each major reform bill now before Congress would entitle every grand-jury witness to a copy of his or her testimony. Under current federal rules, this grand-jury transcript need not even be kept, let alone be accessible to witnesses. Without a transcript of their testimony, there is no way subpoenaed journalists can prove they have not violated a sources confidence short of total silence inside the grand-jury chamber. With a transcript guaranteed, journalists could conceiveably testify before a grand-jury and maintain credibility with their sources at the same time.

The omnibus grand-jury reform bills introduced by Representative Joshua Eilberg, a Democrat from Pennsylvania, and John Conyers, Jr., a Democrat from Michigan, among others, include dozens of such procedural changes that should make prosecutors think twice before embarking on headline-hunting expeditions or mad scrambles to fill the holes in hastily drawn indictments.

Conyer's H. R. 11660, for instance, spells out a legal foundation for subpoena challenges. The bill authorizes the bench to quash a subpoena whenever the subpoenaed journalist (the bills, remember, cover all witnesses) can show that the subpoena would impose an unreasonable burden, that the purpose of the subpoena is punitive, or that the subpoena represents an attempt to build the case against someone who has already been indicted.

Should none of these categories be found appropriate by the court, confinement would still not be automatic for journalists who refuse to betray their sources. Eilberg's H. R. 1277 says that no witness can be found in contempt if the questions he or she refuses to answer are based on a violation of the federal wiretap statute. Under Conyer's bill, no witness could be confined for refusing to answer questions based on any violation of the witness's constitutional or statutory rights—which means that the First Amendment would become a defense at a contempt hearing.

Should a judge refuse to recognize these contempt caveats, no journalist, in any case, could be confined for more than six months, according to the reform bills. Reducing the current threat of indefinite contempt confinement to six months should bolster the resolve of journalists to resist subpoena pressure, and prosecutors, faced with journalists willing and able to hold out for six months, might not choose to bother with them in the first place.

In most cases, moreover, an additional key provision in Conyer's reform package would do away with the threat of even this six-month incarceration. Conyers proposes the abolition of "forced" immunity, the government's ability to overcome witnesses' Fifth Amendment objections to questions by immunizing them against their will. Under the Conyers bill, witnesses would have to consent before a grant of immunity could be ordered. Subpoenaed journalists, then, could invoke the Fifth Amendment.

But is a journalist justified in taking the Fifth Amendment? Certainly the usual newspaper shortland for the Fifth, "the privilege against self-incrimination," ignores the long philosophical tradition which holds, as Justice William Douglas said two decades ago, that the right not to bear witness against oneself is "a right to silence."

"Reporters," explains Representative Conyers, "should not be placed in a position where they must either go to jail for contempt or 'incriminate' themselves in the eyes of their sources and colleagues."

The Justice Department, predictably, opposes any tinkering with the grand-jury system. Testifying before Representative Eilberg's House Judiciary Subcommittee last June, Attorney General Levi said reformers should trust the government to police its own grand-jury conduct, and, ironically, cited his department's internal guidelines on press subpoenas as an example of effective self-policing.

Levi's remarks should have been ripped apart by the press, but they weren't. With a few exceptions, the media have been indifferent to the grand-jury issue, slow to grasp the shield potential of grand-jury reform, and that is unfortunate. At a time of widespread distrust of the media, the drive to protect the confidentiality of the news-gathering process could profit by emphasizing the rights journalists share with their fellow citizens, not the privileges that set them apart.

COALITION TO END GRAND JURY ABUSE

American Civil Liberties Union, National Lawyers Guild, National Emergency Civil Liberties Committee, National Conference of Black Lawyers, National Bar Association, National Legal Aid and Defender Association, Association of Trial Lawyers of America (Criminal Section), Unitarian Universalist Association, United Methodist Board of Church and Society, Department of Law, Justice and Community Relations, United Methodist Board of Global Ministries, National, Women's Division, Church of the Brethren, Jesuit Conference Office of Social Ministry, Southern Christian Leadership Conference, Amalgamated Meat Cutters and Butcher Workman of North America, International Longshoremen's and Warehousemen's Union, American Friends Service Committee, National Student Association, National Organization for Women, Women's International League for Peace and Freedom, and International Printing and Graphic Communications Union.

TESTIMONY OF MARY EMMA HIXSON, DIRECTOR, COALITION TO END GRAND JURY ABUSE, ACCOMPANIED BY DAVID REIN, PRESIDENT

Ms. HIXSON. Mr. Chairman and distinguished members of the subcommittee, on behalf of the 21 national bar, civil liberties, labor,

religious and women's organizations that comprise the Coalition to End Grand Jury Abuse, I thank you for the opportunity to testify before you this morning.

My name is Mary Emma Hixson, and I am the director of the coalition. As one of the attorneys who represented Jill Raymond, one of the more publicized recent victims of grand jury abuse, during her 14-month ordeal in the county jails of Kentucky for her refusal to testify before a 1975 Federal grand jury in Lexington, Ky., I have witnessed grand jury abuse first hand.

With me today is David Rein. Mr. Rein has been a member of the bar since 1935, and has practiced law in the District of Columbia for over 30 years. Through these years he has had many experiences with grand juries which he would be glad to share with this committee.

The Coalition to End Grand Jury Abuse began its work in April of 1973, and in the years since then we have learned a great deal about both the democratic potential and the frightening perversion of the contemporary Federal grand jury.

We have also followed closely, of course, the progress of this subcommittee under the able leadership of its chairman, Representative Eilberg. We commend this panel for its serious and painstaking examination of the Federal grand jury system, an examination that has produced a wealth of information on virtually every aspect of our modern grand jury system and its problems.

But now pending is the first congressional voting on grand jury reform proposals in American history years. It is time to take a step back into the voluminous and valuable evidence this subcommittee has collected and ask a very basic question: "What does it all mean?"

Despite the overwhelming evidence that prosecutors have consistently and continuously taken advantage of the broad powers of the grand jury to further their political careers, gather domestic intelligence, and to punish political and religious dissidents—to name a few of the more obvious perversions, we are told by the Department of Justice that there are: one, no abuses; two, if there are any abuses, they are abberations; and, therefore, that we should trust the Department of Justice to "watch-dog" prosecutorial conduct.

We are, in essence, to overlook the lessons of the 1970's. We are to overlook the fact that a former Attorney General is currently in prison for a felony; that the Department of Justice itself was, in very recent times, a hotbed of criminal activity. We are to ignore the fact that the one prosecutor that has been most closely linked to grand jury abuse, whose abuses are part of the public record, is still sent on grand jury missions by the Department of Justice.

As you have just heard from Mr. Sager, this example is just one more piece of evidence to us that the Department of Justice cannot be counted on to protect our constitutional liberties. Indeed, we sometimes wonder whether the Justice Department truly understands the meaning of our Bill of Rights guarantees.

In August, for example, I appeared on public television with Assistant Attorney General Benjamin Civiletti, who has testified before this subcommittee. Mr. Civiletti was asked a question about immunity, and I think his answer is quite revealing of a very disturbing mentality in the Department of Justice.

The question was: "Now, what about the ABA recommendation of changing back to transactional immunity rather than the current use immunity?"

Mr. Civiletti's answer:

> We think it unnecessary and undesirable. We are talking about people who have violated the law. We think that they ought to be given the most limited protection required by the Constitution, which is use immunity and approved under constitutional principles.

Mr. Civiletti says, "We are talking about people who have violated the law." That is a strange way to describe people who assert the fifth amendment, an amendment which Supreme Court Justice Goldberg, writing for the majority in the 1964 *Murphy* v. *Waterfront Commission* case noted: "while sometimes a shelter to the guilty, it is often a protection to the innocent."

We find it unnerving, to say the least, that the head of the Criminal Division of the Justice Department is not aware of this distinction.

The Department of Justice, as an institution, has violated its trust with the American people. It is up to Congress to assure that ours is a Government of laws and not men, and to protect the American people from those men who would abuse and make a mockery of the grand jury system.

As we speak before this subcommittee today, there are nine persons who are in prison for refusing to cooperate with grand jury probes—who are defying familiar old abuses and a few new ones. Three of these persons are church employees who contend that their first as well as their fifth amendment rights have been stolen from them. The National Council of Churches has been so outraged by these cases that it has not only passed a strong grand jury reform resolution, but has called upon churches to offer both material and moral support to recalcitrant witnesses such as these. The National Council of Churches, in other words, is supporting civil disobedience.

Of the other six imprisoned, five are political activists in the Puerto Rican independence movement, and one, a community health organizer from New Mexico, who has been subpenaed in both New York and Chicago, and, ultimately, imprisoned in Chicago.

Grand jury abuse is not an aberration of the Nixon era. It is a thriving cancer on the system, and these, now, are its current victims. Unless Congress acts—and soon—we can only expect this cancer to increase in strength and volume.

At this point I would like to defer to Mr. Rein for a few brief remarks on the role of counsel and immunity.

Mr. REIN. I want to make just a few remarks on the two subjects which, I think, are most crucial to this bill: one is the question of immunity, and the other is the presence of counsel and the right of witnesses to counsel.

As you know, we have come out for the repeal of all compulsory immunity, and we feel that the record justifies the committee taking that action now. I listened to the distinguished attorney general from Arizona today, and he was asked questions by Congressman Sawyer about the use of immunity. Both of them agreed that when a prosecutor uses immunity, for it to be meaningful, you sit down and bargain with someone: You tell them, "I'll give you this, I'll give you that,"

or plea bargaining, in other wordss, and that the immunity arrived at in this way is meaningful to the prosecutor; but when you use immunity compulsorily and don't know what you're getting or what you're giving, it is very rarely of any use.

The record has shown that there have been and are people in jail for long periods of time who have never been accused, tried, or convicted of a crime. We have constantly said that this is gross abuse. The answer the Department of Justice has given, I understand, to this committee—the answer it has given to us through Mr. Civiletti—is that this is necessary in order to prosecute organized crime.

We have presented the challenge to the Department of Justice—and I understand this committee also has:

> Can you, on the basis of the record of having this tool for the last 14 years—however long you've had it—show that the use of compulsory immunity has enabled you to get evidence from any recalcitrant witness or to convict anybody in an organized crime matter.

So far I have never heard the Department of Justice come forth with a single example.

In the area of organized crime where witnesses refuse to talk because of fear, the Government has not gotten any testimony. It did not get any forced testimony in the Hoffa case; it did not get any testimony in any of these cases.

And yet if there has not been a single case where testimony has been obtained in an organized crime case through compulsory immunity, why is this a useful tool that should be kept on the books when its only utility and its only use, so far as we can see, is to put people in jail who have not committed any crime and have not been convicted.

I thought it rather odd, in the context of the Attorney General's discussion this morning, that while he doesn't think forced immunity is a useful tool, and while he's never wanted to use it, he engages in this theoretical discussion of, "Well, maybe if it was 18 months these recalcitrant witnesses who won't talk might talk, but if it were 2 years they would talk. Maybe if you would have kept them there for life they might talk."

But when you get into that area it seems to me you are speculating. In order to justify continuing use of that tool, I think that the Department of Justice has a burden to come forward to show that it has been useful, and that it has not just been used in an abusive fashion.

Second, I want to speak on the question of the role of counsel in the grand jury. And here, too, there's been a tremendous misconception of why counsel is necessary in the grand jury. And there's been talk about how, after all, it's just "probable cause."

The purpose of a counsel in the grand jury is—he's not representing a defendant—he is representing a witness who is called before the grand jury, and he is there because this witness needs the protection of counsel because of certain rights that he has. And experience has shown that these rights are not accorded to him by the prosecution, and that unless he has advice of counsel, he is not going to have those rights.

One of the arguments made is that you would be giving him rights that witnesses normally do not get in an ordinary trial. That is not true. Any witness that is called in an ordinary trial that feels that he

is entitled to a reporter's privilege, or a privilege he gets from self-incrimination, or husband-wife privilege, or whatever—priest-penitent privilege—is entitled to have counsel come before the judge and argue that that witness should not be required to answer those questions.

That experience happened just recently in a case here in the superior court. All judges recognize the rights of witnesses to be represented by counsel when their rights are involved in a trial. We ask for no more than that with regard to the right to counsel in the grand jury.

Now, the main objection we hear, again, to this is this picture that is conjured up by the prosecution, and apparently by some members of the committee, that on the one side we have the shining knights in white armor—people from the Department of Justice—and on the other side we have these malevolent defense attorneys who are in there not to practice law but to obfuscate, delay, and obstruct justice.

I submit to you that that is not the picture, that it is not accurate; that this picture of the shining knights in white armor does not describe the normal U.S. attorney—and I'm talking about all the way down the line—assistant U.S. attorney, is a man who feels that the way way to do his job is to get convictions and to prosecute people. He is not nice to witnesses; if he can browbeat a witness he will do it—and I'm talking about the normal. And I would say it is unusual not to browbeat a witness if he thinks it's going to serve his purpose. If counsel is present, he will not browbeat a witness.

I would say for the defense that the defense has as strong a standard of ethics as the prosecution anywhere, and that if there are defense lawyers who abuse the standard of ethics, they are subject to disciplinary procedures.

Now, the argument has been made time and time again the Department of Justice bar is subject to disciplinary procedures. I would suggest to you that the likelihood of having disciplinary procedures against a member of the defense bar is far greater than against anybody from the Department——

Mr. EILBERG. May I interrupt you?

Do you personally have, or can you gather for use, any evidence of disciplinary actions taken against any U.S. attorneys, assistant U.S. attorneys, in connection with grand jury abuses?

Mr. REIN. I've never heard of any.

Mr. EILBERG. All right.

Mr. REIN. So, I submit to you that this argument that the lawyer—the only function a lawyer can have in a grand jury is for disruption is just not sound; and that is why he is there, and why he is needed to be there, is that the witness—remember, he represents a witness, not a defendant, and when a witness feels that he needs counsel, he needs counsel.

And they talk about this tremendous delay that we have. The ordinary grand jury—we've heard about the ordinary grand jury. If the Government is going to come in—the U.S. attorney—with witnesses who are perfectly happy to testify, he's talked to them, and they give their testimony. Those proceedings will go just as they are now; there will be no problem.

The only place you need a lawyer is when a witness feels—not that he is a cooperative witness—when he is the target, when he is reluctant, when he is being badgered. And I would say to you that if a witness

feels he needs a lawyer, he is right. And we don't have to take the answer of the Department of Justice, or the judiciary, to say to a witness, "You may feel you need a lawyer, but you don't. There are other people here to protect your rights." I think we should trust the witness to determine when he needs a lawyer.

And that does not mean that every witness will have a lawyer, because every witness will not feel he needs a lawyer. There will not be this great disruption, there will not be this great delay; what you will have will simply be a device where witnesses who have rights will have some means of protecting these rights. To the extent that that results in any delay whatsoever in the grand jury, I would say to you that that is the same consequence that follows from respecting the Bill of Rights anywhere along the line of criminal justice. Certainly, trials would be much more expeditious if we got rid of jury trials, if we got rid of every other step, if we got rid of the fourth amendment.

I don't think there would be much delay. Whatever delay there would be would be worthwhile in preserving the right of witnesses.

Mr. EILBERG. Just one or two questions, and then we'll recess.

I understand—this is a rather long question. I understand that your organization has had meetings with representatives of the Department of Justice concerning grand jury reforms. Could you describe for us the nature of these meetings? What agreements and disagreements developed? What is your present attitude toward the Department of Justice's ability to deal with grand jury abuses?

I ask this question specifically because, as you know, Assistant Attorney General Civiletti has stated that he believes most abuses can be dealt with in-house administratively.

Mr. REIN. We had a fairly long session with Assistant Attorney General Civiletti; I think it went on for 2 or 3 hours. We were very encouraged with that because we had asked for this meeting on the basis of our prior experience, and Attorney General Levi testified before this committee and stonewalled the whole issue, said he wasn't interested at all. We were quite encouraged with the fact that Assistant Attorney General Civiletti agreed to sit down with us and discuss these issues.

We must say, however, that the basis of that discussion—we found, really, basically, no different position than that of Attorney General Levi. Mr. Civiletti was very persuasive—very persuasive; and, as a matter of fact, it was impossible for us frequently to even get a word in. But his general position was that: "Well, there's nothing here to talk about." And if I may say, my comment about the characterization of the prosecution brought against the defense as shining knights in white armor fighting the devil was about the way Mr. Civiletti looked at the problem.

Mr. EILBERG. So, how do you respond to the question I asked: What is your present attitude toward the Department of Justice's ability to deal with grand jury abuses?

Mr. REIN. I don't think it recognizes that there is a problem, and if it doesn't recognize that there is a problem, I don't see how it can deal with abuses, to be perfectly frank.

Mr. EILBERG. Your organization has cataloged, I understand various cases or illustrations of abuses. Would you make this catalog avail-

able to the subcommittee? And, could you tell us what are the most common abuses?

Ms. HIXSON. We'll be glad to make that available. It would really be an incredibly massive undertaking to try to compiel all of the abuse cases of which we have knowledge; what we have compiled is an example of cases that illustrate the need for the provisions in H.R. 94, and there are cases to justify each one of those provisions without exception.

[Information to be furnished.]

Mr. EILBERG. Before you proceed to answer, may I also suggest to you that you know my position on H.R. 94; I think that is pretty clear. I wish that you would think about how we could better inform the Congress as to the abuses. And it's obvious that we can't submit thick volumes; they don't have time for such volumes if we did. So, why don't you help us educate the Members or think about what devices we might use for that purpose.

Ms. HIXSON. We'll be very glad to cooperate with that effort.

In terms of the most common abuses, I would say that the use of the grand jury subpena by the prosecutor, in cooperation with the FBI or other agencies—in other words, the subpena not really being issued by the grand jury but by the prosecutor working with other agencies—is a very common abuse.

The other, related, abuse is subpenaing people from great distances with very, very short notice periods; for instance, in Mr. Archuleta's case, being subpenaed from New Mexico to New York and then Chicago, and given 3 days' notice to accomplish that feat; this is a very common abuse.

Simply the use of the subpena to punish and harass is very common.

The use of otherwise inadmissible evidence before grand juries to get indictments is a common abuse.

I think that more and more we are seeing severe abuses in the forms of leaks—gradual leaks of secret information that ruin people's reputation and destroy their lives.

And lastly, and very emphatically, forcing immunity on people who have principles but don't have information.

Mr. EILBERG. I wish we had more time. Our time has run out. I would like to submit to you a list of questions; once again, would you assist us in answering them?

Oh, I'm sorry, Mr. Sawyer. I looked in your direction a moment ago and you were not there.

Mr. SAWYER. No; I was here all the time.

Mr. EILBERG. I'm sorry.

Mr. SAWYER. First of all, let me ask Ms. Nixon, I wasn't sure if I understood.

When you started out did you say you spent some 14 months incarcerated?

Ms. HIXSON. It felt that way. No; I represented a young woman—in fact, who is present here today—Jill Raymond, who was in prison for 14 months for, basically, refusing to cooperate with an FBI investigation.

Mr. SAWYER. Why did she refuse?

Ms. HIXSON. She did not trust the FBI. She felt that any names that she gave the FBI would be people that would then, themselves,

be victims of FBI harassment. Her case was one in which the FBI descended on Kentucky and began to question every person who had been involved in the local feminist community.

Mr. SAWYER. Would she have refused to testify even before a Federal grand jury?

Ms. HIXSON. Yes; this was a Federal grand jury in 1975.

Mr. SAWYER. Was she indicted?

Ms. HIXSON. She was given forced immunity after refusal to answer questions and jailed for contempt. She was never indicted—no one was in this investigation.

Mr. SAWYER. And her basic reason for refusal was that she felt she might—her testimony involved the incrimination of others?

Ms. HIXSON. She claimed the first, fourth, fifth, and sixth and ninth amendments to the U.S. Constitution for her basis to refuse to testify.

Mr. SAWYER. Now, Mr. Civiletti—you are aware of course that Mr. Civiletti was a private sector trial lawer up until just a matter of a few months ago, having had some extensive experience.

Mr. REIN. He was in the district attorney's office prior to that.

Mr. SAWYER. But then he was in the private sector practicing.

Mr. REIN. I don't know how long. I would say that he retains the prosecutorial point of view, not the private sector.

Mr. SAWYER. If the witness wants immunity—not immunity; if he wants counsel, would you propose that if they were unable to that the public pay for their counsel?

Ms. HIXSON. I would say absolutely. We can't have a situation where witnesses, because they have a lot of money, could get a lawyer, and others—indigents—couldn't. I think that has got to be in there just as it is in trial situations.

Mr. SAWYER. Would you propose to put in a limitation on counsel in the jury room as to how many people they can represent that are appearing before the grand jury?

Mr. REIN. Well, let me tell you; that presents a very serious problem, and I've had that. And the situation arises.

I represented recently a trade union, a number of people——

Mr. EILBERG. Mr. Rein—and Mr. Sawyer—

Mr. SAWYER. Yes?

Mr. EILBERG. I have a compelling engagement, and I am going to leave and let you ask other questions that you have. And then we have another witness who has just arrived, and he is Mr. Naftalis. I suggest that we postpone him until at least 2 o'clock.

So, may I ask you to proceed later?

Mr. SAWYER. I have only a couple of more questions.

Mr. EILBERG. So the committee will then recess until we get back sometime after 2 o'clock.

Mr. SAWYER. You want to come back at 2 o'clock?

Mr. EILBERG. Yes; just to wind up with the last witness, and also for the consideration of prisoner exchange legislation.

Excuse me.

Ms. HIXSON. Thank you, Mr. Eilberg.

Mr. REIN. Just let me answer the question. These individuals opted to have—they took a common point-of-view, and they all wanted to have one counsel. Now, as a matter of fact, if they were forced to accept

counsel, I don't think that they could have afforded it, and I did not want to be in the situation of having counsel appointed.

In that kind of a situation, it seems to me that we should have the same rule about conflict of interest that you have with regard to representatives or different people in other situations.

This is what happened in a particular case with Judge Shaw. He called the witnesses in, he told them that they had a right to choose their own counsel. This was even if the counsel was standing outside. And that there is a conceivable conflict of interest with one witness; and if you are fully aware of that conceivable conflict of interest, what is your decision. And they made the decision; and I think it should be up to the witness to make the decision—in the light of all the information and all the knowledge with regard to it—as to whether he wants to be represented by a particular lawyer, and that any other rule, really, to deprives him of counsel of his choice.

Mr. SAWYER. Of course, one of the—You know, I've spent a lot more time on the private sector side of the grand juries than I have the prosecutorial. But I know that one of the great concerns that you have with people who are appearing before a grand jury is, since we all know that almost all perjury indictments that come down come down out of grand juries as opposed to coming out of trial lawyers or requests, and that one thing you are fearful of is that they—you know totally instruct them that no matter where chips fall, to tell the truth

Mr. REIN. We said that; better keep quiet——

Mr. SAWYER. And part of the reason for doing that is that they can't know, and you don't now, what that grand jury already has. And then that puts you in a terrible position if you are a lawyer and you do know what the prior witnesses have said. It seems to me you're almost dutybound to tell your client what the prior witnesses have said, just for his own protection. I don't think you have the right to hide that from him and still act as his counsel.

Mr. REIN. Well, as a matter of fact, there is no reason why, if they're represented by a different lawyer, why the prior witness can't tell the other witness what they said in the grand jury. There's no oath of secrecy on witnesses.

Mr. SAWYER. They're under restrictions of telling other witnesses; they can tell their own lawyer.

Mr. REIN. No; they can tell everybody else.

Mr. SAWYER. That might be the difference between the Federal and the State grand jury.

Mr. REIN. The witness is not prevented from telling anybody what he said.

Mr. SAWYER. Well, of course, the great problem the witness has is that if he is going to go in and not testify truthfully, particularly in a grand jury trial, you can usually sit and watch it if they go into some kind of rule. But he's playing Russian roulette if he wants to try to falsify or fabricate. That's really one of the most effective parts of a grand jury in getting testimony.

And I just hate to see that destroyed by this. And I'm not talking about attorneys like you, but we all know that there are attorneys—that represent the Mafia, for example—that are almost lackeys of the group, if you want to say that. And I'm sure that there are also bad apples on the prosecution side. I want to make that point.

But if you're investigating that kind of conspiracy, it seems to me that you just are badly undermining the investigative ability of the grand jury if you're in that kind of context. And, of course, you have to apply these rules. You can't say that these rules don't apply when you're investigating the Mafia; they have to go across the board. And I just hate to see the efficiency——

Mr. REIN. I think that's what I tried to address myself to earlier. I don't think citizens, across the board, should be denied their rights because somebody says, "We're addressing ourselves to organized crime."

I would go further than that. If organized crime is really going to work at this kind of thing, the magistrates are not going to prevent it. On the other hand, there is an exaction against a lawyer supporting perjury, and I'm sure if the Government had a case against one, it would rap him with it, and I understand it has.

Mr. SAWYER. There's also another thing that bothers me; for example, on your statement, about barring the use of hearsay testimony. Now, as you are aware, under the Federal Constitution as opposed many of the State constitutions, everybody is entitled to presentment of indictment by a grand jury; and yet, in the big Federal jurisdictions, they're running through, literally, thousands of cases a week, 99.9 percent of which are just routine and normally end in State prosecution—and 90-odd percent are criminal anyway. They may have been done by the issuance of filing complaint, the issuance of a warrant, of filing of information—something similar.

I haven't run a Federal grand jury, I've run State ones; but I know in a Federal grand jury, just bring in a—they do what we do in a State practice and get a warrant, merely bring down one of the investigating detectives who rattles off about three sentences in front of a district judge—which is our lower clerk judge—and they sign a warrant. And that's, really, almost as a practical matter what the Federal prosecutors have to do with a grand jury to comply with the constitutional end.

Now, obviously, if you had that bar of inadmissible testimony which would just completely bankrupt the whole system you could not——

Mr. REIN. I think the remark was not addressed to inadmissible testimony, would be hearsay testimony. The testimony that would be inadmissible to trial—for trial purposes—and the fact that we're talking, really, about cases where they would be barred by an exclusionary rule. In other words——

Mr. SAWYER. But hearsay was expressly mentioned, too.

Mr. REIN. I'm addressing that, say, of use of illegally obtaining evidence.

Mr. SAWYER. How would you propose to distinguish those cases where it might be important, namely the investigative grand jury which might be less than one percent of the grand juries, and yet not bog down the system by applying those kinds of rules to what is 90-odd percent of the grand juries functions—literally rubberstamping just to comply with the provision. Because there is no way you can conduct a main trial on each of these routine cases.

How do you cope with that?

Ms. HIXSON. Mr. Sawyer, it's just that rubberstamping that we object to, and it is our firm position that grand juries should only hear hard evidence—the real thing—not inadmissible evidence, not illegally obtained evidence, not evidence that—They should hear the same evidence that would be used at a trial.

Mr. SAWYER. When you recognize——

Mr. REIN. I just want to make one comment. Your Federal Rules of Evidence does permit the admissibility of a good deal of hearsay.

Mr. SAWYER. Some, but when you recognize and say that somewhat over 90 percent of all criminal prosecutions in the United States are handled in the State courts and are strictly under State jurisdiction, the Federal is less than 10 percent—in all the States 90-odd percent of the cases—or most all of the States—operating strictly with the complaint warrant information system unless they have investigation to conduct—why would it be worth while bogging down the Federal system with these trials on rubberstamp kind of noninvestigative case by requiring a production of, you know, say, hard evidence, witnesses, and so forth. That bothers me.

And I'm not being argumentative, it just bothers me about the problem.

Mr. REIN. I think that is greatly exaggerated in a sense, because I think if that is the case, I think hard evidence is easily available and, you know, we go through a lot of preliminary hearings. I don't know why it's that much more difficult for a prosecutor to cross-examine a witness to an event than putting on the detective.

Ms. HIXSON. It's a case of——

Mr. REIN. It's really the major difference in the sense of the grand jury thinking they have a function. And here is a witness and some detective who took a statement.

Ms. HIXSON. I think it's a case of lazy prosecutors in many instances, and I also think we can't overemphasize the fact that the grand jury was written into the fifth amendment of the Constitution for just that purpose, to review the evidence against a person and see if there was a basis for indictment—not simply to hear a police officer tell them a third-hand story.

Mr. SAWYER. Now, one other thing is there seems to be some concern expressed by a number of witnesses, now just you; prosecutors, in effect use—you know—unethical, illegitimate tactics, if you will, with the grand jury to get indictments. But what profits the prosecutor to get indictments since he has gotten stuck for going and trying this thing in front of a judge and jury and defense counsel and everything. And if he "bombs" on very many of his indictments, it's much better from his point of view that he never got the indictment.

What is his inducement to get a bad indictment that he can't convict?

Ms. HIXSON. I think in many of these——

Mr. REIN. He can get by very often. I can only give you an example of a case I read in the fifth circuit just the other day that came down with—there was a prosecution in Alabama where there was a conviction on a death sentence with two eyewitnesses who had a phoney identification and suppression of another eyewitness who identified somebody else. And he got a conviction that was affirmed in the court of Alabama. He brought a habeas corpus in the Federal

district court that was denied. And it took the fifth circuit in a very good opinion say, "This whole prosecution was an outrage from beginning to end, and should never have been brought." They didn't understand why they had brought this prosecution.

Now, I think the answer is that people get by with a great deal. Not everybody can go this whole route of appeals—to the court of appeals, special district court, and then get habeas corpus in the fifth circuit. And the immediate thing with many prosecutors, unfortunately, even if the case isn't going to stand up eventually, they feel that there is publicity involved—there's too much involved—their names in the paper, and the prominent role they're playing. It seems to be the meaning——

Ms. HIXSON. I think, in a number of these cases, there's an enormous amount of pressure on the prosecutor to get an indictment in a case. There is a great deal of pressure on him, and he feels like he has to act and act fast; and, so, they will get, basically, what amounts to a trumped-up indictment. And there are, in fact, dozens of persons who were indicted in the early 1970's by one rather notorious prosecutor, and all of these people were acquitted—I mean trial after trial.

Mr. SAWYER. Well, if you look at the national percentage of convictions and/or pleas that resulted in indictments, or even complaints, or warrants—it's up in the high 90's, middle 90 percent—which would indicate that that is a very widespread——

Mr. REIN. On the contrary; what I would say is that the things that we are suggesting would not have this tremendous impact that the proponents of your legislation feel. It would only affect a small percentage, and you would still have the 90-percent prosecutions, you'd have the 90-percent plea bargain, and you would just go by the way it is. But we're talking about—in all this reform legislation—we're talking about would be the areas where there are abuses, where there are political considerations that overstep the mark.

And when I say it's a small percentage, I agree with you. I don't mean that makes it any less significant, because those are the cases that attract attention, and most people——

Mr. SAWYER. I agree with you. My sole concern in this area is not to emasculate an effective investigator, too, in certain kinds of cases, like conspiracy-type cases. They're not any good for individual crime.

For the sake of a couple of abuses, you know, there is the question of stripping a President of his power because a President in the immediate abused those powers. That's what you have to be careful of.

Mr. REIN. But I go back to my earlier statement, that I made this comment with regard to immunity, the Department of Justice's answer. I think we've reached the stage where I don't think we should simply make a cliche of that kind; I think we've reached the stage where people who say this will emasculate the investigatory process, or prevent the prosecution of organized crime, would do this—I think it's about time Congress should ask the Department of Justice, which has had this experience, to give some hard evidence of how these tools have helped them.

Mr. SAWYER. I might say that there are test cases in—price-fixing cases are almost always out of grand juries, too, because——

Mr. REIN. But they don't involve these problems, not really. No one gives immunity in an antitrust case.

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Mr. SAWYER. Well, I don't have anything further. Thank you very much.

I guess we'll stand in recess until 2 o'clock.

Mr. REIN. We'd like to express our appreciation to the committee. We certainly enjoyed it.

Mr. SAWYER. Enjoyed having you here.

[Whereupon, at 12:55 p.m., the hearing was recessed, to reconvene at 2 p.m., this same day.]

[The responses of the Coalition to End Grand Jury Abuse to supplemental questions of the subcommittee follow:]

COALITION TO END GRAND JURY ABUSE ANSWERS TO SUPPLEMENTAL QUESTIONS

Q. As you know, the American Bar Association has recently introduced a series of 25 principles for grand jury reform legislation. Could you tell us with which of these principles you disagree, if any, and why?

A. First, we would say that the principles passed by the American Bar Association are remarkably good when one considers the intensive lobbying effort against them launched by the Department of Justice. Those principles with which we disagree reflect the Department's influence on the ABA. In fact some proposals passed by the ABA Section of Criminal Justice, based on its extensive research and discussions between both prosecutors and defense attorneys, were modified even before the ABA House of Delegates had an opportunity to vote on them. In its desire to avoid a major floor fight with the Department of Justice, the ABA unfortunately overcompromised some of its excellent work.

Proposal number one would admit witness counsel to the grand jury room. We welcome this long overdue reform. However, we object to the limitations placed on the role of this counsel. We believe that the grand jury foreperson, representing the grand jury, should control the role of counsel, and prosecutor, for that matter.

We object to proposal 12 which states that prosecutors should not have to obtain approval of the grand jury for a grand jury subpoena. The subpoena power belongs to the grand jury as a creature of the court. In actual practice today, grand jurors rarely know who has been subpoenaed until they actually see the witness. In addition, they may never see a subpoenaed witness. This is because many witnesses are taken directly before the prosecutor, and answer questions in his office, unaware of their rights. The prosecutor may then decide not to take this witness before the grand jury, perhaps because it would indicate to the grand jury that the prosecutor had subpoenaed someone unnecessarily, perhaps because the witness statements would not fit in with the prosecutor's version of events.

We believe that the record should reflect a vote of at least twelve grand jurors in favor of a specific subpoena. The prosecutor should give the grand jurors a list of persons he would like subpoenaed and briefly explain to the grand jury why he feels they should order a subpoena. The grand jurors, as ordinary citizens, can then decide whether the possible evidence the witness might offer would justify the inconvenience of a common appearance. This is in keeping with the historical view of the grand jury as a shield between the citizens and the government's powers.

Proposal 17 makes the excellent suggestion that the current "use" immunity statute be replaced with the fairer form of "transactional" immunity. We concur with this proposal, but it does not reach the major issue of "consensual" immunity. The Department of Justice has not established the efficacy of forcing witnesses to testify or go to jail. The elimination of the Fifth Amendment right to silence has caused the totally unjustified jailings of many recalcitrant grand jury witnesses who did not wish to answer questions about their friends, their political activities, or their private lives, questions that should never have been asked in the first place. This power to force testimony is at odds with American principles of justice and is a cancer that we have lived with since the anti-communist hysteria of the 50's. Forced immunity is an enormous power in the hands of prosecutors, one might say a totalitarian power. We call for a return to the original concept of immunity as a trade of protection from prosecution for testimony. No witness before a grand jury should be forced to testify over her/his Fifth Amendment objections or go to jail.

Proposal number 20 is well-intentioned, but potentially dangerous. While lawyers should not represent multiple witnesses when there is a conflict of interest, allowing a court to separate a lawyer from his or her clients is not the solution. Such actions would violate the witness's right to counsel or his or her own choosing and give the government a weapon with which especially low-income defendants could be pressured into behaving as the government wants them to behave.

The 24th proposal which advocates limiting contempt confinement to a maximum of twelve months is an unfortunate result of the Department of Justice lobbying. The original recommendation by the Criminal Justice Section of six months is the better proposal, clearly the more human.

It is highly regrettable that the Department of Justice was able to dissuade the ABA from the original proposals number 13 and 15 as follows:

(13) In any case in which a subpoenaed witness moves on proper grounds to quash a grand jury subpoena, the prosecutor should be required to make a reasonable showing *in camera* (which may be *ex parte* at the court's discretion) and on the record before the court convening the grand jury that the evidence being sought is:

(*a*) likely to be relevant to the grand jury investigation;

(*b*) not sought primarily for an improper purpose.

(15) When the circumstances place a hardship on the witness, motions to quash or modify subpoenas may be brought at the place where the witness resides, the documents sought are maintained, or before the court which issued the subpoena at the election of the witness. Such motion should be heard *in camera* and on the record.

These thoughtful recommendations were made by the Criminal Justice Section in an attempt to create some guidelines for the court to follow in determining whether the prosecutor has abused the grand jury's subpoena power. They offer a rational and not overly burdensome procedure to reach this determination. Proposal 15 speaks directly to one of the most notorious abuses of the grand jury system—the situation where the helpless witness in California is subpoenaed for an appearance the day after in New York. To challenge this unreasonable demand, the witness has to go to New York anyway.

Q. Your organization has expressed continuing concern about the use of the grand jury by federal prosecutors for "political purposes". This problem was especially highlighted to the subcommittee and the committee during the "Watergate years." What has been the recent experience of the Coalition as to the use by federal prosecutors of the grand jury for political purposes?

A. There are many ways prosecutors can manipulate a grand jury for political purposes, and, unfortunately, examples of each are readily available in recent, "post-Watergate" days.

Prosecutors can and have targeted grand jury investigations against their partisan political enemies and rivals. In 1975, Michigan State Supreme Court Justice John Swainson, a leading Democratic Party contender to succeed Phillip Hart in the U.S. Senate, was driven out of office and ruined after a three-year campaign to implicate him on a bribery charge. That charge was based on the word of an easily discreditable small-time hoodlum, and a trial jury eventually threw it out completely, but along the way the government prosecutor was able to trap Swainson into alleged perjury for his testimony before the grand jury.

Justice Swainson was convicted on that shaky charge, perhaps because the jurors felt that anyone the government investigates for three years must be guilty of something. It strains credibility to believe that the mammoth grand jury effort to "get" Swainson would have been mounted if Justice Swainson had been either of the same party as the national administration then in power, or a retiring personality whose prosecution wouldn't generate any newspaper headlines sure to advance an ambitious prosecutor's career.

This sort of grand jury political manipulation to ruin a rival is sometimes matched by grand juries manipulated to whitewash a political "friend". The recent Richard Helms affair is a notorious example of this phenomenon. A federal grand jury in the spring of 1976 reached the decision to indict Helms, the former CIA director, for lying to a Congressional committeee investigating U.S. intervention in Chile. The U.S. Attorney involved, on instructions from higher-ups who feared that an indicted Helms might make good his threat to embarrass other government officials, blocked the grand jurors' attempt to indict Helms for perjury. Eventually, after a deal between high Justice Department officials and

Helms, the suspected perjurer pled to a lesser, almost non-existent charge. The entire case was clearly "political" from beginning to end.

Finally, there is the largest area of political abuse, the area of subpoena by political association. We have found that in the last seven years, both before and after Watergate, the FBI and federal prosecutors have used crimes like bombings to cast subpoena nets over broad numbers of political dissidents about whom they have absolutely no evidence of complicity in the crime in question. The resulting subpoenees are, in this manner, smeared into effective political limbo. When they protest their subpoenas, they are immunized and jailed.

We see this political manipulation especially in the recent contempt confinements of Hispanic Americans who have been connected with the Hispanic Commission of the Episcopal Church. Because a one-time volunteer for that commission, now a fugitive, has been linked to various bombings, every member of the Commission has come under suspicion as an accomplice. Many have been subpoenaed and jailed. As a result, the Commission's work to help alleviate poverty in Spanish-American communities has been irreparably damaged. Yet many observers still do not realize why the Hispanic community has been upset by the grand jury activity.

Perhaps an analogy would help explain the anger of the Hispanic activist community. If, after the Watergate burglary had been discovered, a Democratic prosecutor had called every member of the Republican National Committee behind the grand jury's closed doors while leaking to the press that there were disturbing organizational links between Gordon Liddy and National Committee members, Republicans everywhere would be aghast. This is the same situation that Hispanic activists now find themselves in.

Q. You have suggested that each grand jury have "independent counsel". Recently, Attorney General Bell has supported this concept of independent counsel. Have you had an opportunity to review the Attorney General's proposal and what are the similarities and differences between your idea and his concept?

A. It is not clear to us if Attorney General Bell is proposing an Office of Independent Counsel within the Department of Justice structure or a completely independent agency. We seek a totally objective non-prosecutorial advisor to the grand jury that has no conflicting relationship to the Department of Justice or the United States Attorney General's office. This attorney could be a completely independent agent or perhaps an arm of the court. The role of such counsel would be to present evidence impartially before the grand jury and in no way influence their deliberations or decisions vis a vis indictment. Unfortunately, we do not believe that this is the definition of "independent counsel" that the Attorney General had in mind when he broached the subject.

Q. One complaint made by many about proposals to reform the Federal Grand Jury System is that such reforms will limit the investigative power of the jury and result in more drastic alternatives. Specifically, if the investigatory power of the grand jury is reduced, would this not lead to direct investigatory power being granted to the FBI or prosecutors and is this not a much more dangerous procedure?

A. We, of course, do not favor the granting of more direct investigatory power to either the FBI or federal prosecutors. Indeed, the reason we want the investigative prerogatives of the grand jury limited is that the FBI and prosecutors have used the grand jury's broad powers to obtain the powers that society has expressly and wisely forbidden them. Our society has decided, for instance, that prosecutors cannot interrogate their suspects out of the presence of their lawyers. By forcing their suspects before grand juries, prosecutors neatly sidestep this limitation on their conduct. FBI agents do not have the power to force people to answer their questions. Yet by having their targets subpoenaed before the grand jury and immunized, they can have their targets jailed for asserting their right not to talk to FBI agents. The grand jury reforms proposed will not and should not result in drastic alternatives. What they will do is close loopholes for prosecutorial and FBI misconduct and make sure that basic concepts of fairplay like the assistance of counsel apply *everywhere*. No doubt prosecutors and FBI agents will use the passage of these reforms as an opportunity to demand more power to make up for the grand jury power they have lost. Let us remember, however, that the grand jury's power was *never* theirs to begin with. Let us remember also that law enforcement officials always cry "wolf" whenever due process safeguards are debated. Their "wolf"—the breakdown of the criminal justice system—did not materialize when the exclusionary rule was extended to all criminal cases. It will not materialize after the grand jury reform is enacted either.

Q. It has been recommended that we provide the ability of the court to remove an attorney when he represents multiple witnesses in the same investigation. Would you comment on this proposal?

A. We *totally* opposed this proposal. We must *not* allow repressive suggestions like this one to be enacted under the rubric of reform. This is really a matter for bar association regulation, not legislation. A rule like this, aimed at organized crime, cannot be made without seriously damaging the rights of union workers or political activists who wish to present a united "defense" to a grand jury investigation. This is a basic constitutional right. Surely we have learned through the horrendous abuse of the immunity powers that when we make a rule for organized crime cases, it is all too apt to be used against persons for whom it was never intended.

Again, we emphasize in the strongest terms possible: this is a proposal that will further grand jury *abuse*, not reform. It deserves a sudden death.

Q. I believe that providing for a right to counsel in the grand jury room is one of the most essential reforms we can enact. However, I am also concerned that such a right be limited—to giving advice only. You oppose this limited right to counsel. Would not the granting of additional power to a lawyer in the grand jury room really lead to dilatory actions?

A. We opposed any limitation on the role of counsel that is not imposed by the grand jurors themselves, acting through their foreperson. There are good defense attorneys and unscrupulous ones, as there are good and rotten prosecutors. This limitation on the role of counsel assumes the worst of witness attorneys, an unrealistic perspective to say the least. Furthermore, the limitation is unnecessarily chilling on the defense bar. The courts, remember, have the power to discipline errant attorneys.

Q. You argue for consensual immunity. The Department of Justice has stated that they have detailed guidelines for authorizing immunity grants. Have you had an opportunity to review these guidelines and why do you believe that these are insufficient?

A. Whether or not the Department of Justice guidelines are sufficient is not really the issue. In the first place, these guidelines are not mandatory. In the second place, the only "guidelines" that would be sufficient would be guidelines that assume, first and fundamentally, that the consent of the witness is necessary to the immunity deal. When this assumption is made, then and only then should questions be raised of whether *offering* immunity to a witness would be in the public interest.

AFTERNOON SESSION

Mr. EILBERG. The subcommittee will come to order.

We have as our final witness today the gentleman who is the author of a very fine textbook, "The Grand Jury: An Institution on Trial," which he wrote together with Marvin M. Frankel—Mr. Naftalis.

Mr. Naftalis, we welcome you and ask you to proceed in your own way.

TESTIMONY OF GARY P. NAFTALIS, COAUTHOR OF "THE GRAND JURY: AN INSTITUTION ON TRIAL"

Mr. NAFTALIS. Thank you very much, Mr. Chairman. I appreciate very much your kind invitation to testify before this committee on the subject of reform of the Federal grand jury.

Mr. EILBERG. May I ask that if you do not intend to read your statement—which many witnesses do not, it's entirely up to you—I would like to include it in the record at this point.

What would you like to do?

Mr. NAFTALIS. Well, with the chairman's permission, I would prefer not to read from the statement in its entirety, have it included, and just make a few brief remarks and answer questions.

Mr. EILBERG. Without objection, the statement will be made part of the record, and proceed in your own way. If you wish to summarize the statement, that's all right.

Mr. NAFTALIS. Thank you, sir.

[The prepared statement of Mr. Naftalis follows:]

STATEMENT OF GARY P. NAFTALIS

Mr. Chairman, I appreciate your kind invitation to testify before this Committee on the subject of reform of the federal grand jury. I have followed this Committee's hearings with great interest and believe that you have performed a major public service in focusing attention on and devising thoughtful and constructive solutions for the problems that beset the grand jury.

As your hearings have demonstrated, the grand jury has been utilized too often by self-righteous or cynical prosecutors to harass the unorthodox and the unpopular. There have been too many instances where witnesses have been badgered, subjected to sudden appearances in distant places or defamed by purposeful leaks. Clearly, the present system is in need of reform to make certain that the rights of citizens summoned before or investigated by grand juries are fully protected.

To that end, I believe that several changes must be adopted if we are to have meaningful reform. They are as follows:[1]

(1) RIGHT TO COUNSEL

A witness should be permitted to have his lawyer accompany him inside the grand jury room to advise him as to his legal rights. If a witness lacks funds, counsel should be appointed for him.

The current practice that counsel may be available to the witness only in an adjoining room is one that produces potentially wasteful or prejudical consequences. If the witness feels he needs legal assistance in answering a particular question, he must interrupt the proceedings and leave the room to consult with his counsel. If the witness is very cautious, he might sensibly choose to be excused after every question, thereby making the proceeding a tedious and exasperating one. On the other hand, the present system tends to inhibit witnesses from asking to be excused and receiving proper legal advice. The witness may then be careless and do himself injury that a lawyer could have prevented. For example, the careless or intimidated uncounseled witness may unwittingly delay or forget to invoke a privilege, thus prejudicing his position before he is aware of the significance of his testimony. If counsel were present, both of these consequences would be avoided. Moreover, the mere fact that an attorney is present would deter the occasional over-zealous prosecutor from attempting to cross the line.

To be sure, the claim that the presence of counsel would delay and obstruct the grand jury's work is not weightless. The remedy, however, is to limit counsel's role (as H.R. 94 does) to advising the witness and to prohibit counsel from objecting to questions and arguing to the grand jury. And should an occasional attorney prove disruptive, judicial intervention is readily available.

More quickly disposed of is the argument of proponents of the *status quo* that the presence of counsel would violate the grand jury's secrecy. Simply put, there is no restriction on a witness giving a complete account of his testimony to his attorney. Hence, there can be no claim that it is wrong for the attorney to hear it first-hand unless we intend him to be ineffective—a position not expressly defended by anyone.

In sum, there is no public benefit to excluding counsel from the grand jury room. At most, the exclusion of the lawyer preserves the atmosphere of isolation and immediate friendlessness in which the witness is questioned. However, that is not an objective to be served in the public interest.

(2) DECENT NOTICE

Except in rare conditions of emergency, a witness should be given some minimal notice before being compelled to testify. Absent very unusual circumstances, there seems to be no good reason for the use of "forthwith" subpoenas

[1] Much of the material that follows is excerpted or adapted from Frankel and Naftalis, *The Grand Jury: An Institution on Trial* (Hill & Wang, 1977) Copyright 1975, 1977 by American Labor Conference on International Affairs, Inc.

requiring the immediate appearances of a witness before the grand jury. H.R. 94's requirement of 7 days' notice absent "special need" or the witness' consent seems to be a sound one and should be adopted.

(3) ADVICE OF RIGHTS

The theoretical possession of rights is no boon to the ignorant. A grand jury witness should be advised of his basic rights including (1) his right to counsel, (2) his privilege against self-incrimination, (3) the subject matter of the inquiry, and (4) whether the witness is a target of the grand jury investigation. Granted the recent decisions of the Supreme Court indicate that such a "target" warning is not constitutionally mandated. It is merely fair and decent. It imposes no serious burden on the prosecution and enables the prospective defendant to make an important decision (whether to testify or not) with a full understanding of the consequences. I might add that for several years, the United States Attorney for the Southern District of New York has given such warning without any adverse effect on law enforcement.

Of course, the question when or whether the prosecution "knows" someone is a target should not become a new source of tangential disputation. At the outset of a broad investigation in a complicated field (securities fraud or other kinds of possibly complex wrongdoing), prosecutors are likely to be unaware of some or all who may come to be accused. People may be called as witnesses who only later are perceived to be active participants in the alleged crimes. In general, the grand jury's own records should show when a particular witness has become a probable defendant. Once that identification is made, there is much to be said for informing the witness of his status.

(4) RIGHT OF A PROSPECTIVE DEFENDANT TO TESTIFY OR NOT

A prospective defendant should not be summoned to testify if the prosecutor is forewarned that he will invoke his privilege against self-incrimination, thereby illicitly inviting the grand jury to draw an adverse inference that the Constitution forbids. Interestingly, this was the policy followed by the Watergate Special Prosecutor's Office. And I would add that the grand jury should not be told a target hasn't been called because he would exercise his Fifth Amendment privilege. This would have the same effect as his actually claiming the privilege before the panel. Only in those extremely rare instances where the grand jury specifically insists upon a target's appearance should the prosecution inform it of the reason for his non-appearance.

For the prospective defendant who is not called, there should be a right, in the absence of some good reason for disallowance, to appear voluntarily on request and present his version of the affair under inquiry. While it is doubtful that in most cases the target's testimony would be sufficiently persuasive to halt his indictment, there may be instances where it does make a difference. Obviously, there is no public interest in saving indictments returned that prove—and might have proved in advance—to be unwarranted. While I would not support a further right of a prospective defendant to all witnesses other than himself before the grand jury, his suggestions of people to be heard ought to be conveyed to, and given careful and sympathetic consideration by, the grand jurors.

(5) PLUGGING GRAND JURY LEAKS

Grand jury "leaks" are a recurrent and steadily nagging concern. It should be clear on principle that these violations of the rules are evil. The casual assassination of character or impairment of status through the illicit breach of grand jury secrecy ought to be seen always as a wrong, to be prevented when possible nation of character or impairment of status through th eillicit breach of grand jury leaks have been remarkably feeble. The federal contempt power has seldom been applied agaist such illict disclosures. H.R. 94's provision making it a specific crime to leak grand jury materials is a needed improvement. But more is probably needed. One additional remedy would be a statutory provision allowing victims of leaks to collect substantial money damages without proof of actual damages. An exception could be made for leaks later found to be justified in the interests of ferreting out corruption or other forms of official misconduct. The thrust of liability, even as thus qualified, might deter members of prosecution staffs who now find it agreeable to leak information with effective impunity. As things stand now, there is no question that people inside the courthouse are frequently

responsible for deliberate, often malicious, always lawless breaches of the grand jury secrecy they are enjoined to help enforce.

(6) KEEPING RECORDS

I support H.R. 94's provision that a transcript be kept of all that goes on in the grand jury room except the "grand jury's secret deliberations and consultations between witnesses and their counsel." This would include not only the testimony of witnesses but instructions and directions by the prosecutor before and after the taking of testimony. The knowledge that a record is being kept is a sobering prophylactic against casual, slipshod, or malevolent behavior. There is no inconsistency with the interest in grand jury secrecy. The transcript would remain sealed, as it commonly is in current practice, until a legitimate need arose to consult its contents.

(7) FREER DISCOVERY OF GRAND JURY MINUTES

Grand jury secrecy, as the Supreme Court has noted, serves valid purposes. Like other useful ideas, however, it has been the subject both of undue extension and of frequent subversion. The overextensions include, in the federal courts and elsewhere, the withholding of grand jury transcripts from defendants on trial except that, after direct examination at trial, the grand jury testimony of a prosecution witness must be given to the defense for use in cross-examination. As a main justification for this restriction, secrecy is generally inapposite. Once a defendant is brought to trial, the reasons for secrecy are usually gone. Subject to safeguards of scope and timing—for example, to limit fabrication of evidence and tampering with witnesses—it seems desirable that grand jury transcripts be far more freely available to defendants.

So too, every grand jury witness should be entitled to have a transcript of his grand jury testimony. The supposed interest in secrecy is no argument against this. The witness is free to record and tell his lawyer, for his own protection, what he said to the grand jury. If he had a perfect memory, he could have and use a perfect record. Lacking that miraculous benefit, he faces a variety of dangers and disadvantages. If he has meant to be truthful, he may lose opportunities to correct innocent errors. If he means to stay truthful, he may nevertheless be led to later contradictions by lapses of memory that could be avoided if the transcript were available for reference. If he must come one day to contend with the prosecutor, his adversary will have the transcript. The embattled witness should not be without it.

(8) INSTRUCTIONS BY JUDGES

There is a large gap between the powers actually possessed by grand juries and the jurors' knowledge and use of them. Generally, the judge's "charge" to the grand jury as to its rights and duties tends to be brief, formal and instructive H.R. 94 would require that new grand jurors be more effectively advised of their broad authority, and of their duties to their fellow citizens for which the authority is conferred. The judge would be required to inform the grand jurors in some detail about their powers over witnesses, documents, and other evidence, as well as about powers to be administered by the panel. The main objective would be to give the citizens being impaneled some sense of their independence under law—not to incite unguided adventurism, but to underscore the necessity for positive judgment rather than supine obedience to the prosecution. This proposal is a sound and desirable one.

(9) PROSECUTORIAL REPORTING

H.R. 94 would require the Attorney General to report annually to Congress and the Administrative Office of the United States Courts on the work of federal grand juries. The statements would contain statistical information on investigations, requests for immunity, contempt citations, arrests, indictments, no-true bills, etc. Presumably these data would be available for future grand jury reform.

The reporting idea should be adopted and arguably extended. The grand jury is officially an arm of the court, but judicial supervision has been minimal. United States attorneys should be required to inform the court regularly about the grand jury's work. The practice might produce effective guidance and supervision, and might allow judges to make the grand jury a more meaningful agency of the court concerned with interests beyond prosecution. It would make for better understanding by the judges of current complaints and dissatis-

factions, whether to attempt remedies or, in proper cases, to sustain the prosecutor against his critics. Possibly of greater importance, it might give pause to the occasional prosecutor tempted to act in ways that would not sound attractive in his required report.

I have not attempted to discuss all the provisions of H.R. 94. As my statement makes plain, I am in agreement in principle with many of its major reforms. With the improvements I have proposed and possibly some others now being considered by Congress, the grand jury can be a worthy means of investigation, prosecution and protection.

I appreciate the opportunity to be of some assistance to this Committee's important work and would be pleased to answer any questions that you may have.

Mr. NAFTALIS. As the Chairman knows, I have followed this committee's hearings with great interest. I know this committee's interest in grand jury reform, and particularly the chairman's interest in the subject. I believe that this committee has performed a major public service in focusing attention on, and devising thoughtful and constructive solutions for, the problems that beset the Federal grand jury system as it operates today.

I think that H.R. 94—although the chairman knows I do not agree with every provision in it—is a thoughtful, constructive attempt to deal with problems besetting the grand jury, and I endorse, at least in principle, many of the major reforms it proposes. I outline them in my statement, and I will review them briefly for the record and then open myself up to whatever questions the chairman and other members may have.

My own view, of the grand jury, is based on, the experiences I've had.

For half-a-dozen years, I was a Federal prosecutor, an assistant U.S. attorney in the southern district of New York where for some portion of that time I was Deputy Chief of the Criminal Division.

Mr. EILBERG. From what year to what year?

Mr. NAFTALIS. From September 1968—I went on active service, and I resigned February 1, 1974.

For the year before that, I was a law clerk for one of the Federal District judges in the Southern District of New York, Judge William Herlands.

Subsequent to my resignation from the U.S. attorney's office, I have been in the private practice of law as a litigator doing criminal defense work as well as commercial and corporate litigation.

So, I bring to bear my own experience as a prosecutor, and my own experiences doing some defense work.

I think what is primarily wanting today in the grand jury, is a codification and recognition of the procedural rights of the witnesses who appear before the grand jury as well as the members of the public who happen to be the targets or the subjects of the grand jury's investigation.

As the chairman himself has written what is lacking in the grand jury today, and what is almost singular about the grand jury today in our criminal justice system, is that there is no recognition of such procedural rights as exist in almost every other part of our criminal justice system.

And I would like to speak to a few of the things that H.R. 94 calls for, and that I favor.

First and foremost, I favor the right of every witness summoned before a grand jury to be accompanied inside the grand jury room by his attorney.

I also favor the provision of H.R. 94 which provides that if a witness lacks funds to retain an attorney, one should be appointed for him at public expense, just as an attorney is appointed for an accused in a criminal case at public expense if he lacks funds.

It seems to me that there is much to be gained and very little to lose by having counsel in the grand jury. In the first place, just from the standpoint of efficiency it makes little sense to have a lawyer outside the grand jury room, thereby forcing the witness to shuttle back and forth, sometimes after every question if he's really hyper-cautious, to obtain counseling and advice from his own attorney. That kind of delay is highly wasteful and it's hardly in the public interest.

At the same time the potential for prejudice does exist, because there are many witnesses who, obviously, are somewhat intimidated, either directly or indirectly, explicitly or implicitly, from asking to be excused too often to go outside and talk to their lawyers. As a result, the witness who is uncounseled—and no matter how sophisticated the uncounseled witness is, he is, obviously, no match on the law for the prosecutor—does not have a full understanding of what his rights are as a lawyer could give him, if he were sitting at the witness' side. He may well prejudice his own position by answering inaccurately, failing to invoke a privilege—I don't mean simply the fifth amendment privilege, but any one of the many privileges that people have, such at attorney-client, husband-wife, and the like.

I think there is much to be said for allowing witnesses to have counsel, and that the arguments made by those who oppose this reform are wide of the mark. The major argument aganist it has been that it will disrupt and delay proceedings of the grand jury. All of us who are lawyers know that there is always some potentiality for disruption in any situation in which a lawyer is present. On the other hand, no one, however, has called for the abolition of lawyers in the trial court room or other places where they have potentiality for disruption.

You can evolve rules and regulations to regulate that kind of conduct; indeed, H.R. 94 does, and I favor that. I favor a situation where lawyers cannot come into a grand jury and turn it into a mini trial, arguing to the jury and summing up, and the like. I think that their role should be limited simply to advising their clients. And I should add that judicial intervention is a quick and necessary remedy if there is a lawyer who tends to obstruct.

The fear of obstructional factors is a little over done, and if you properly modulate or regulate the role of counsel in the grand jury, such obstruction can be avoided.

The second criticism, that is generally made, is one which can be very easily disposed of. It is the claim that if lawyers are allowed inside the grand jury room this will violate grand jury secrecy. Of course, in the first instance, the witness is never under any constrictions as to grand jury secrecy. He can and should, in fact, tell his lawyer everything that goes on in the grand jury room if he wants to be properly counseled and advised.

So, the witness can tell his lawyer, and, indeed, if he had a photographic memory, give him a verbatim transcript of all the question-

ing that was done in a grand jury room. Thus there's no particular secrecy impediment to the lawyer himself hearing the testimony first-hand, unless—as we point out in our book—we want the lawyer to be less effective or ineffective, and I don't think anyone advocates that.

The right to counsel in the grand jury room is a vital and necessary reform; indeed, it is the most important reform in the grand jury reform legislation you have introduced and this committee is considering. I endorse it subject to the restrictions and limitations put on it in H.R. 94.

In addition, I would endorse a number of the other procedural safeguards that H.R. 94 provides. In principle, certainly, I can see no reason why decent notice ought not to be given to a witness who is summoned to appear before a grand jury in the absence of a showing of some special need. Obviously, if the statute of limitations was running, or someone was about to flee the country, that would be a situation of special need where the notice provision should be done away with.

But absent those kinds of situations, it's not much of an imposition to require a 7-day notice requirement before a witness is called to testify, thereby giving him an opportunity to consult with his lawyer and be prepared.

Second, I see no reason why witnesses who are summoned are not informed of their rights—informed of the fact that they do have a right to counsel—assuming that they are given one inside the given grand jury room—informed of what the subject matter of the investigation is, informed of the fifth amendment privilege, and, importantly, informed whether or not they themselves are the targets of an investigation.

Now I know that the Supreme Court has recently said, either by way of holding or by very persuasive dictum, that giving a so-called target warning to a witness who is a prospective defendant is not constitutionally required.

However, I would think that it should be given and I base this on my experience in the southern district of New York as assistant U.S. attorney. For years we routinely gave target warnings to prospective defendants, and I never noticed—nor did my colleagues ever tell me—that this created any problem, that any criminals escaped, or that we weren't able to function effectively as law enforcement officials.

It's a very small burden to put on the Government, to advise a prospective defendant of the true picture of what his status is. He can make important judgments such as: Should he testify or should he claim his fifth amendment privilege with his eyes open. A witness should not make this decision thinking he's just being summoned as some ordinary witness off the street when, in fact, he is the central figure in the investigation.

I also endorse H.R. 94's provisions for stronger sanctions against grand jury leaks. That is an area of law where there has been a fair amount of abuse. Those of us who have practiced law in New York City are aware that the former special State anticorruption prosecutor has been widely criticized for leaking information to the press. And I think that the law certainly needs the teeth in this.

Finally, I would say that the bill's provision for mandatory recordation of everything that goes on inside a grand jury room is also needed. That, like counsel, is a necessary and desirable prophylactic against abuse by the occasional prosecutor who would tend to overreach at the expense of the witness. Just simply knowing that whatever you say, whether it's charging the grand jury or questioning the witness, is being recorded, may, at minimum, serve to deter a prosecutor from stepping over the line.

Mr. Chairman, I, obviously, haven't spoken to everything. I welcome the opportunity to answer any questions you or anyone may have.

Mr. EILBERG. Thank you, Mr. Naftalis, for your contribution, and for your remarkable book. We have made copies available to every member of this subcommittee because of its extensive and comprehensive review of the history, purposes, functions, and problems of the grand jury system.

Now, some questions. In your book, you note that there is a "national consensus" that a person may have his lawyer outside the grand jury room. You make it clear that this is not constitutionally guaranteed. Does your research indicate any jurisdictions, State or Federal, where the policy of the prosecutor is to not allow a lawyer to wait outside a grand jury room?

Mr. NAFTALIS. There may be, Mr. Chairman. I haven't found them, but on the other hand there may well be. I'm not entirely sure that I am familiar with every single State's practice. I think it is fair to say that the general rule, if not the unanimous rule, is that counsel may be outside the grand jury room. However, there are instances where there are restrictions on witnesses leaving to consult with counsel.

Now, in the Federal system that generally doesn't exist, but in New York State practice, one may not, under State law, leave the grand jury room to consult with your lawyer for what the cases call "strategic advice" as opposed to legal advice. And, therefore, there have been cases where people have been denied the right to go outside the grand jury room, by the courts on that ground.

But, in going back to your general question, I am not aware of any States that prohibit it.

Mr. EILBERG. In your book, you support the provision providing limited right to counsel in the grand jury room. You particularly note that the presence of a lawyer may deter prosecutorial excesses. Some have argued that providing for a transcript of all proceedings would eliminate such excesses without requiring counsel to be present. Would you comment?

Mr. NAFTALIS. I favor recordation. I think that counsel would be a useful addition to help prevent those kinds of excesses, for the simple reason, simple fact, that there is a live human being present with legal skills and training and the ability to know what to do if he sees something happening that is wrong. This obviously is a greater deterrent to misconduct than a cold record—although a cold record, I think, is a very helpful thing to have.

But above and beyond that, there are other useful things that lawyers can accomplish in terms of properly advising their clients and cutting down on wasted time and delay in the grand jury system, which would not be accomplished simply by recordation.

Mr. EILBERG. I agree with you that counsel can be provided for grand jury witnesses in a grand jury room. I think the presence of such counsel will reduce obstructions and delays. However, one problem does concern me, that of multiple representation.

Do you believe better standards can be established to allow a court to remove an attorney in conflict or multiple-representation situations? And what should be those standards?

Mr. NAFTALIS. I would think that standards can and should be established. As a general proposition multiple representation, both before grand juries and in courtrooms ought to be done away with. There ought to be something approaching a per se rule prohibiting a lawyer from representing more than one person before a grand jury.

Now, when I say approaching a per se rule, I would sort of leave it to the Government to object, simply because there may be situations where it is of no particular consequence or harm that one lawyer represents more than one witness. For example, a lawyer may represent a number of witnesses, say from a particular corporation, or a union, who are being summoned to give helpful testimony, and there is no indication of collusion, or protecting a target, or the like. Unless the Government objected, there probably would be no particular harm in having the same lawyer represent them. On the other hand, if, under the same hypothetical situation, the Government thought that the multiple representation was in any way impeding or improperly interfering with the search for the truth, I think the Government could properly object, and the rule could be invoked—one lawyer one witness.

But I would be very strict on the multiple representation question.

Mr. EILBERG. In your book, you support our provision providing for the right of the target to testify. In most cases, the grand jury is solely a rubberstamp, doing very little investigation, and merely indicting a person based on a prior police or other investigative agency report. Do you believe that in those cases, as well, prospective defendants should have a right to testify?

Mr. NAFTALIS. Yes. The basis for someone having the right to testify is that if the witness feels that by testifying he may be able to persuade the jury and/or the prosecutor not to proceed, then he ought to have a right to do it. And whether the case is a cut-and-dried counterfeiting, or bank-robbery case, or a complex securities fraud case, from his standpoint I don't see a particular difference.

Now, I do agree that, in terms of the realities of life, there are very few instances where a witness going before a grand jury in which the prosecutor puts substantial evidence tending to show that he committed an offense, is going to be able to talk the grand jury, or actually talk the prosecutor, into changing his recommendations to the grand jury, or talk the grand jury directly into saying no to the prosecutor. On the other hand, people ought to have that right.

The problem which you implicitly refer to in your question is one of notice, because there may be a problem of creating an intolerable notice requirement if in every case the prosecutor is required to give notice to every potential defendant in every case. I would be somewhat reluctant to impose such a notice requirement on the Government. In most instances where people want to testify, they know of the existence of the investigation very well, and it wouldn't be very diffi-

cult for them to make a request. So, I would, to that extent, be very wary of putting a notice requirement on the Government.

Mr. EILBERG. Mr. Naftalis, we have several questions we would like to ask you, but we have other pressing business at the moment. How much time do you have?

Mr. NAFTALIS. If I can cancel my train I can remain awhile. What is the chairman's schedule? What is your pleasure?

Mr. EILBERG. We are very anxious to recess the hearing for a few minutes—maybe 15 or 20 minutes, half and hour, I don't know—and then come back to you again.

Mr. NAFTALIS. That will be fine. I can do that.

Mr. EILBERG. The subcommittee will temporarily recess the grand jury reform hearing and will call upon you a little later, Mr. Naftalis.

Mr. NAFTALIS. Thank you.

[Recess.]

Mr. EILBERG. Mr. Naftalis, in your book you oppose requiring a prosecutor to make disclosure of exculpatory evidence to the grand jury but believe it should be done voluntarily "as a matter of State practice." How can we allow the whim of the prosecutor to determine whether or not a grand jury is to hear all the evidence? Why should not standards be established?

Mr. NAFTALIS. I think that anyone that deals with the criminal justice system feels that the prosecutors ought to disclose exculpatory materials to the grand jury, to the defense of the trial, and elsewhere when appropriate. I think that there are a number of problems that I see in the area of exculpatory evidence, one of which is defining what is or is not exculpatory. In cases where, say, there is an eyewitness who says that somebody else committed the offense, or there is a confession from somebody else; those are easy cases. And, again, a prosecutor who claims to have ignored that testimony is probably, at minimum, very negligent and, perhaps, intentionally acting in a wrongful manner.

On the other hand, there are other matters which courts have felt to be exculpatory, which might have escaped the notice of a prosecutor. And I do have some problems in putting the prosector under the kind of obligation where he has to divine what may or may not be determined to be exculpatory at some future stage down the road. On the other hand, obviously, it seems to me good practice and it's good sense.

Mr. EILBERG. You don't think requiring disclosure might minimize the difficulties?

Mr. NAFTALIS. Well, I think if you lay down a general standard, that a prosecutor disclose to a grand jury matters that he knows or even presumably should know to be obviously exculpatory I could agree to that.

The problem of making it a requirement as opposed to a rule of practice is, one of having too many pretrial hearings—postindictment pretrail hearings—to slow down the criminal justice process.

Mr. EILBERG. We're not talking about a hearing. We're talking about disclosure, which is something outside the court room, outside the jury room, and, perhaps, in the district attorney's office, the assistant's office.

Mr. NAFTALIS. No. I believe this disclosure should occur. My problem is, what happens if you don't do it, what should be the remedy; and if the remedy is dismissal of an indictment for failure to disclose some exculpatory material, which the prosector, perhaps in good faith, did not realize, that might be too strong a dose.

Second, we may have all sorts of hearings as to what someone knew, and why didn't you tell them what you knew, and so on and so forth. That is what gives me a problem. The obvious case of exculpatory evidence, the true *Brady* against *Maryland* situation, where the prosecutor had evidence that someone other than Brady who confessed to the crime. It was obviously outrageous that the prosecutor never disclosed that fact. And if the prosecutor didn't make such a disclosure there ought to be very severe sanctions.

But the question of something that may affect the credibility of a witness who the Government intends to use, is much more difficult. I would favor requiring the prosecutor to disclose evidence that he clearly knows to be exculpatory and still makes a deliberate decision not to disclose it. But once you get beyond that, I get a little edgy.

Mr. EILBERG. I understand that the southern district of New York has long provided for "target warnings." How did you determine when one was a "target?"

Mr. NAFTALIS. Obviously, from the evidence that you had I can only speak from my own practice as to when target warnings should be given.

I gave target warnings very freely. When in doubt, I gave someone a target warning because it seemed to me to be that people ought to know that there is a possibility that they may be accused of a crime as a result of the investigation. I think it is a question of your own judgment based on the evidence, and I think that if you act in good faith you know very well when someone is a target and when they are not.

Mr. EILBERG. Mr. Naftalis, you support our position providing that a witness who states he will invoke privilege against self-incrimination should not be called before a grand jury. Some prosecutors have stated that they cannot know for a fact, until a witness is in a grand jury room, that he will refuse to testify. To require them not to introduce such witnesses would, in their opinion, eliminate this valuable source of evidence. Would you comment?

Mr. NAFTALIS. I support H.R. 94's provision, which would excuse people from testifying who give sufficient notice in writing that they will claim their privilege under the fifth amendment. It seems to me what the critics are saying, whom you are quoting, is that even though a lawyer will tell his client, "It's against your interest to testify, you should claim your constitutional privilege," when the witness goes in along to the grand jury room he may, against his lawyer's advice, be afraid to claim the privilege and, therefore, testify.

It is not in the public interest that witnesses should be forced not to claim a privilege. I cannot see any legitimate purpose for that at all. If someone wants to claim the fifth amendment privilege they ought to be permitted to do it. There shouldn't be erected a Great Wall of China, and a witness should not be forced to leap over it before he can assert his constitutional rights.

Mr. EILBERG. In your book, you indicated that you believe the "tide" is moving toward disclosure of grand jury information to a grand jury witness and defendant. With specific reference to H.R. 94, do you believe our provisions are adequate?

Mr. NAFTALIS. I support your provisions, subject to empowering the courts to issue protective orders limiting the timing and extent of disclosure where showing actually can be made that a witness may be harmed, or someone will flee, or the like. There should be free disclosure of grand jury minutes in advance of trials, to a defendant so that he can adequately prepare. There should be disclosure to the witness himself so that he can be adequately informed of his testimony and be prepared if he's ever called again or see if he has to make corrections or the like.

I subscribe to the provisions of H.R. 94.

Mr. EILBERG. You propose all of the resolution I have introduced to eliminate the constitutional requirement of an indictment in every case involving an infamous crime. You seem to oppose them only because they would "change the Bill of Rights." Is this a sufficient reason to allow a very often abusive and costly rubberstamp process to continue—that of the indicting grand jury?

Mr. NAFTALIS. No; I don't oppose abolishing this grand jury, simply because it would involve an amendment to the Bill of Rights. This is not a sufficient reason not to have a constitutional amendment to do away with the grand jury if it were warranted.

Mr. EILBERG. You are just saying it would not be helpful to amend the Bill of Rights in any circumstances.

Mr. NAFTALIS. I think there are a couple of reasons which are more valid as to why the grand jury should not be abolished. With full respect to the chairman, I do not believe we should abolish investigating and indicting grand juries.

If you eliminate the grand jury, you're going to have to have some vehicle for investigation, even in small cases, for the prosecutor. He's going to have to have either subpena power or some other means of compelling or producing witnesses and evidence. I'm not entirely sure that if what we're all concerned about is abusive and intimidating treatment of witnesses, that this alternative would be an improvement over a vehicle whereby when you have 23 citizens who at least should and probably can act as a check on Government. I think it is also of some value in a democratic society, to have citizen participation in the law enforcement criminal justice machinery. When people participate in the grand jury system, they are performng a public service, and I think it is a valuable public service in a country as large and diverse as ours.

Mr. EILBERG. You have serious reservations about allowing challenges to grand jury venue in districts outside the grand jury area. Our investigation—this subcommittee's investigation—of the *Fort Worth Five* case—you're somewhat familiar with that——

Mr. NAFTALIS. Yes.

Mr. EILBERG [continuing]. Indicates that prosecutors can convene investigations often far away from the locus of evidence. Witnesses are then subpenaed and have to go long distances, often without their lawyers, and unable to see their families, and can see them only at

great cost. What limitation do you see as being available other than providing for the right to challenge in the district where the witness resides?

Mr. NAFTALIS. In general I do not support changes of venue in grand jury proceedings. Granted—as your hearings demonstrated—the *Fort Worth Five* incident is not a proud chapter in this Nation's history. On the other hand, I think that the incidence of that kind of forum shopping is not large—or not so large—as to justify such strong medicine as venue change.

Mr. EILBERG. And yet this practice was somewhat widespread during the Nixon administration.

Mr. NAFTALIS. It probably was, and you had testimony this morning about one of the people who was involved in that practice. One suggestion that we made was that there ought to be some clear justification as to why witnesses are being forced to go long distances across the United States to testify, and why their testimony could not be procured in some other way, such as before a local grand jury and in an appropriate case, even by affidavit. I would put the burden on the Government to show why the personal appearance, or the physical appearance, of a witness who had to travel a long distance—and we suggested an arbitrary figure of 1,000 to 1,500 miles—was necessary.

I prefer that approach to one where you could change the focus of investigation simply because it may inconvenience a witness, which may cause greater inconvenience to the work of the Government, to grand jurors and other public interests. So, I propose that as an alternative suggestion for this committee to consider to deal with the kinds of problems that the *Forth Worth Five* case exemplifies.

Mr. EILBERG. You oppose, in your book, a return to transactional immunity. We have been told of the following situation: the witness "X" is granted immunity to testify against "Y." "Y" is then granted immunity to testify against "X." Because both are only given use immunity, both are then indicted, based on the other's testimony. Do you believe that this is proper?

Mr. NAFTALIS. Well, as hypothetically put, I obviously don't like that kind of a situation.

My own judgment on use as opposed to transactional immunity situation is that I don't discern any difference in practice, whether you have use or whether you have transactional immunity. By that I mean the burden of proving the absence of taint, that is the absence of the use of the immunized testimony, or that clues and leads derived therefrom, is so great that there have been very few instances where immunized witnesses have been prosecuted for the transactions about which they have been given use immunity.

Now, if, in fact, the practice is very widespread, and there are lots and lots of cases of people who are given use immunity, testify and still get indicted, then I might rethink my position.

But I think, in fact, there are only a very small handful of such cases. And I think the issue that most people are concerned about in the immunity area is really whether or not people ought to be immunized and then compelled to testify, and then if they don't, get locked up in prison for contempt—and, perhaps, get locked up again, and again, and again. That your bill speaks to.

I'm not sure that in those cases whether it is "use" or "transactional" immunity if it would make any difference. I know the Department of Justice says, in fact, that use immunity is better for compelling people to testify truthfully; and I think the chairman believes that transactional immunity would compel people to testify in a more forthright manner. I don't know which one would or wouldn't.

If the issue is abuse of people through contempt proceedings and the like, I don't think it matters whether its use or transactional immunity. I think that if first amendment rights are being violated, the problem ought to be approached in first amendment terms, not in immunity terms. That is, if there are violations of people's rights of speech, association, and religion, and the like, they ought to be dealt with because they're violations of first amendment rights. They should not be dealt with by laying down broader notions of immunity which may be useful and helpful in areas involving political dissidents, but may not be as useful and helpful in areas involving organized crime, white-collar crime and the like.

So, absent a showing that use immunity is being improperly or unfairly used, and that people who are given use immunity still get prosecuted, and that the taint burden is not sufficient to protect people's rights, I would say that the change back to transactional immunity is not needed.

My own view, based on the little emperical data I've seen, is that whether it's use or transactional immunity it does not make a difference in dealing with grand jury problems.

Mr. EILBERG. In your book, you seem to suggest an exception to that provision prohibiting disclosures of grand jury information where "leaks are found to be justified in the interest of ferreting out corruption or other forms of official misconduct."

Mr. NAFTALIS. That's the problem with writing books.

Mr. EILBERG. By the way, I have written a book review of your book; you are aware of that?

Mr. NAFTALIS. I was aware it was going to be out soon, and your counsel, Mr. Belsky, thought it was going to be in the Federal Bar Association Journal.

Mr. EILBERG. Mr. Belsky has something to do with that.

Go ahead.

Mr. NAFTALIS. In our book, we subscribe to H.R. 94's view that leaks ought to be firmly dealt with from the criminal point of view; that is, leaking grand jury minutes should be made a specific crime. The contempt power has been woefully inadequate to deter reckless, indifferent, lawless people from leaking information.

At the same time, we went on to say that we even wanted an additional sanction which was the right to have damage suits brought by people who were the victims of leaks. We were willing even to go so far as to say that it wouldn't be necessary to show actual damages and, that the victims of a leak could get a statutory damage award even without proving actual monetary loss.

It was in that context that we said maybe that civil damage awards might be limited in areas where a leak had to do with ferreting out corruption or other forms of misconduct.

Mr. EILBERG. How would that—could you give me a hypothetical case?

Mr. NAFTALIS. Let's suppose you have a situation where there is some kind of corruption inside the grand jury room—the prosecutor is on the take, or the prosecutor is covering up for someone, not permitting the grand jury to go forward. If the grand jurors, or stenographer, or another member of the prosecution staff, leaked that information, I think it would be wrong—I think it would be lawless. On the other hand, in that kind of very rare case—and it is sort of a rare case, isn't it?—that somehow you'd like that information to get out somehow. I guess it's the exception that proves the rule and we were trying to put in some kind of saving clause when you're making a very general suggestion on damage awards, that there may be certain rare cases where we might not want to have a damage remedy for that kind of leak—I think it's a very exceptional case and it happens very seldom. If in fact, an important investigation involving high members of Government was being covered up by the Government lawyers, and if a grand juror leaked that information, I doubt we would want to throw the book at the leaker.

And I think the danger of leaking really isn't in that narrow situation; it's in a situation that you've spoken of, the situation where people are just smeared indiscriminantly as being publicly identified as being under investigation or a target of a grand jury probe, and nothing comes of it. We had very bad experiences with the State Special Prosecutor on Corruption in New York City, Mr. Nadjari, who, it was alleged, and a State Commission of Investigation found, that he had been very, very indifferent to people's rights through leaking. That was the conclusion of that Commission. And I think that kind of practice has to stop, and I think your bill goes a long way toward stopping it.

Mr. EILBERG. Mr. Naftalis, we thank you very much. We thank you for coming to Washington for this special purpose. And we think you're clear testimony has been valuable and you've been very helpful to us even though all members of the subcommittee are not here. It will be part of the record—part of a very important record—and our thanks to Mr. Frankel as well.

Mr. NAFTALIS. Thank you, Mr. Chairman. I appreciate the opportunity to be of some help to the committee.

Mr. EILBERG. Thank you so much. The subcommittee is adjourned.

[Whereupon, at 3:40 p.m., the hearing was adjourned.]

GRAND JURY REFORM

HEARINGS

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, AND INTERNATIONAL LAW

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

H.R. 94

GRAND JURY REFORM

MARCH 17, APRIL 27, JUNE 1 AND 29, 1977

Part 2

Serial No. 22

46863 2 of 2

Printed for the use of the Committee on the Judiciary

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Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

91-400 O WASHINGTON : 1977

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95TH CONGRESS
1ST SESSION

H. R. 94

IN THE HOUSE OF REPRESENTATIVES

JANUARY 4, 1977

Mr. EILBERG introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To establish certain rules with respect to the appearance of witnesses before grand juries in order to better protect the rights and liberties of such witnesses, to require notice to a grand jury of its rights and duties, to provide for independent inquiries by grand juries, to require periodic reports to Congress, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Grand Jury Reform Act of 1977".

RECALCITRANT WITNESSES

SEC. 2. (a) Section 1826 of title 28, United States Code, is amended to read as follows:

"§ 1826. Recalcitrant witnesses

"(a) (1) 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 attorney for the Government may apply to the court for an order directing the witness to show cause why the witness should not be held in contempt.

"(2) After submission of such application, and a hearing, at which the witness is entitled to be represented by counsel, the court may, upon a finding that such refusal was without just cause, hold the witness in contempt and order the witness to be confined.

"(3) No hearing under this subsection shall be held unless seventy-two hours' notice is given to the witness who has refused to comply with the court order, except that a witness may be given a shorter notice if the court, upon a showing of special need, so orders.

"(b) (1) Any confinement shall be at a suitable Federal correctional institution, if one is located within fifty miles of the court ordering confinement, unless the witness waives

this right. Upon a showing of need or hardship, the court ordering confinement may grant a request by the witness to be imprisoned at a suitable correctional institution near the place of residence or employment of the witness, or the witness' family or relatives or the attorney of the witness.

"(2) Any confinement for refusal to comply with an order to testify or produce other information shall continue 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 the court proceeding, or the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, and in no event shall such confinement exceed six months.

"(3) No person confined under this section for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events, may be again confined under this section, or under section 401 of title 18, United States Code, for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events.

"(c) Any person confined pursuant to this section shall be admitted to bail or released in accordance with the provisions of chapter 27 of title 18, United States Code, pending the determination of an appeal taken by him from the order of his confinement unless it affirmatively appears that

the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, pursuant to an expedited schedule, and in no event more than thirty days from the filing of such appeal.

"(d) In any proceeding conducted under this section, including all necessary appeals, counsel shall be appointed as provided in section 3006A of title 18, United States Code, for any person unable to obtain adequate representation.".

(b) Section 2515 of title 18, United States Code is amended by adding at the end thereof the following new sentence: "Any violation of this chapter shall be a defense in any action brought against a witness under section 401 of title 18, United States Code, or section 1826 of title 28, United States Code, if the interrogation or other request for information is based on or is directly or indirectly derived from such violation".

(c) Chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 403. Grand jury proceedings

"No person who has been imprisoned or fined by a court of the United States under section 401 of this title for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events in a

proceeding before a grand jury (including a special grand jury summoned under section 3331 of this title) impaneled before any district court of the United States may again be imprisoned or fined under section 401 of this title or under section 1826 of title 28, United States Code, for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events.".

WITNESS IMMUNITY

SEC. 3. (a) Section 6002 and 6003, title 18, United States Code, are amended to read as follows:

"**§ 6002. Immunity generally**

"(a) Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) a court or grand jury of the United States,

"(2) an agency of the United States, or

"(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but the witness shall not be prosecuted or subject to any penalty or forfeiture for

or on account of any transaction, matter, or thing concerning which he is compelled under the order to testify or produce evidence, except that he shall not be exempt from prosecution and punishment for perjury committed in so testifying, for giving a false statement, or for otherwise failing to comply with the order.

"(b) No order under this part shall require any witness to testify or provide other information prior to the day one week after the day on which such order was communicated to the witness, except that a witness may be required to testify or produce such information prior to such day if the court, upon a showing of special need, so orders.

"(c) Upon communication to the witness of any order under this part, the person presiding over the inquiry shall give the witness reasonable and adequate notice of the nature and scope of the immunity from criminal prosecution provided by this section, and of the right of the witness to be represented by counsel in any proceeding challenging such order or confinement or fines pursuant to such order, and that, if he is unable to obtain adequate representation, counsel will be furnished for him as provided in section 3006A, title 18, United States Code.

"§6003. Court and grand jury proceedings

"(a) In the case of any individual who has been or may be called to testify or provide other information at any pro-

ceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsections (b) to (d) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

"(b) In any proceeding under this section, the court shall not order any person to testify or provide information, if it finds that an individual is in danger of prosecution, or may be subjected to any penalty or forfeiture, by the government of any other country on account of any transaction, matter, or thing concerning which he may be ordered to testify or provide other information pursuant to an order under this part, unless the court also finds that such individual has been provided adequate safeguards to minimize such danger.

"(c) A United States district court may, at the request of the Attorney General, the Deputy Attorney General, any designated Assistant Attorney General, or a special attorney appointed under section 3330, issue an order under

subsection (a) of this section when it is established to the satisfaction of the court that—

"(1) in accordance with subsection (b) of this section, there is no danger of foreign prosecution or that adequate safeguards have been provided to minimize such danger;

"(2) the testimony or other information from such individual may be necessary to the public interest;

"(3) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination; and

"(4) with respect to an individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a grand jury—

"(A) the investigation being conducted by the grand jury is authorized by law and the application for the order is in accord with existing guidelines or other practice of the Department of Justice;

"(B) the testimony or other information sought to be obtained is within the scope of the investigation and is relevant thereto;

"(C) the testimony or other information sought to be obtained is relevant to the subject matter of the immunity order;

"(D) a grant of immunity under this part

would be adequate for the purposes of the investigation; and

"(E) a summary of the evidence relating to the witness has been certified and submitted to the court.

"(d) Any individual required to give testimony or provide other information pursuant to an order issued under subsection (a) may not be indicted for any offense by the grand jury before which such individual testifies pursuant to such order.".

(b) Subsection (c) of section 6005 of such title is hereby repealed.

(c) No amendment or repeal of any provision of law made by this section shall affect any immunity, or the scope of any immunity, to which any individual is entitled under such provision by reason of any testimony or other information given before the sixtieth day following the date of the enactment of this Act.

SIZE OF GRAND JURIES

SEC. 4. Section 3321, title 18, United States Code, is amended to read as follows:

"**§ 3321. Number of grand jurors; summoning additional jurors; return of indictment**

"(a) Every grand jury impaneled before any district court shall consist of not less than nine nor more than fifteen persons. If less than nine of the persons summoned attend,

they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. Whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose.

"(b) An indictment may be found only if at least nine jurors are present and two-thirds of those present concur."

UNAUTHORIZED DISCLOSURE OF GRAND JURY INFORMATION

SEC. 5. Chapter 73 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 1512. Violations of grand jury secrecy

"(a) Whoever knowingly discloses any evidence introduced, statement made, or other matter occurring before, any grand jury summoned or impaneled by a court of the United States shall be fined not more than $500 or imprisoned not more than six months or both.

"(b) Whoever knowingly discloses any evidence introduced, statement made, or other matter occurring before, any grand jury summoned or impaneled by a court of the

United States, with the intent to secure compensation therefore, to effect the actions of or any decisions by that jury, to effect further legal proceedings against any witness, or to effect further legal proceedings as to the subject matter of any investigation by that jury, shall be fined not more than $20,000 or imprisoned not more than five years, or both,

"(c) This section shall not apply to—

"(1) disclosure to or by an attorney for the Government in the performance of his duties;

"(2) disclosure directed or permitted by a court; or

"(3) disclosure by a witness who has appeared before such grand jury, or by his attorney, of any matter concerning which the witness has testified, or produced other information, before the grand jury.

"(d) Subsection (a) shall not apply to disclosure by any person other than a person present at the grand jury proceeding.

"(e) Subsection (b) shall not apply to any representative of the press, broadcasting, or information media, acting in his professional capacity.

"(f) As used in this section—

"(1) 'attorney for the Government' includes the Attorney General, an authorized assistant of the Attorney General, a United States attorney, an authorized assistant of a United States attorney, and such other

Government personnel as are necessary to assist the attorneys for the Government in the performance of their duties.

"(2) 'disclosure by a witness' includes disclosure by others of matter the witness has previously disclosed when made as a consequence of such disclosure by the witness.

"(g) Nothing contained in this section shall be construed to affect the power of the court to punish any person for contempt for violation of any rule or order of the court.".

RIGHTS AND DUTIES OF GRAND JURORS; INDEPENDENT INQUIRY

SEC. 6. (a) Chapter 215 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"**§ 3329. Rights and duties of grand jury and attorney for Government**

"(a) Upon impanelment of each grand jury before a district court of the United States, the court shall give adequate and reasonable notice to the grand jury, and shall assure that the grand jury reasonably understands—

"(1) its duty to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district;

"(2) its rights, authority, and powers with respect

to an independent inquiry under section 3330 of this title;

"(3) its right to call and interrogate witnesses;

"(4) its right to request the production of documents or other evidence;

"(5) the subject matter of the investigation;

"(6) the criminal statute or statutes involved, if these are known at the time the grand jury is impaneled;

"(7) the necessity of sufficient evidence to form the basis of any indictment;

"(8) the obligation of secrecy and that it is a criminal offense to disclose to any person any information concerning any grand jury proceeding; and

"(9) such other duties and rights as the court deems advisable.

"(b) (1) Any person, including a witness who has previously testified or produced books, records, or documents, may make a written request to the attorney for the Government, or a special attorney appointed pursuant to this title, and request to testify in an inquiry before a grand jury, or to produce books, records, or documents, or to appear before a grand jury and request that the grand jury proceed in accordance with its powers under section 3330 of this title.

"(2) The attorney for the Government, or the special attorney—

"(A) shall forward any request under this subsection to the grand jury and may make a recommendation as to such request;

"(B) shall take reasonable steps to notify any person of his intention to present evidence against the person and request a presentment or indictment and of the person's right to testify or present evidence under this subsection and such notice shall be given a reasonable time in advance of any request for such presentment or indictment unless the attorney for the Government or the special attorney can prove to the satisfaction of the court that notice would result in the flight of the person, would endanger other witnesses, or would unduly delay the investigation and prosecution;

"(C) shall establish a public record of all requests and the action taken on each such request.

"(3) The grand jury shall not be required to hear any witness, or consider any book, record, or document, but shall consider all requests forwarded to it by the attorney for the Government or the special attorney. Unless the grand jury, upon an affirmative vote of a majority of its members, refuses to hear the testimony, or consider the documents offered by, a person, under this subsection, the attorney

for the Government or the special attorney shall subpena the evidence or witness offered. If the grand jury refuses to hear the testimony or consider the documents offered, the attorney for the Government or the special attorney shall notify the person making such request, in writing, of the refusal.

"(4) Upon appearing pursuant to a subpena, such person shall be permitted to testify, only upon submission of a waiver of immunity, as to relevant and competent matters under consideration by the jury and shall be subject to examination by the attorney for the Government or the special attorney.

"(c) The attorney for the Government and the special attorney shall periodically advise the grand jury of the nature and existence of evidence, as yet not received, which might tend to materially affect the credibility of any witness or tend to negate the guilt of any prospective defendant.

"(d) The attorney for the Government and the special attorney shall not bring before the grand jury any witness who has given written notice in advance of the witness' appearance that such witness intends to exercise his privilege against self-incrimination, nor bring to the attention of the jurors, in any way, the invocation of the privilege by such witness, unless such witness has been given a grant of immunity.

"(e) The attorney for the Government or a special at-

torney shall not initiate, and a grand jury shall not conduct, an inquiry into a transaction or transactions, event or events, if another jury has failed to return an indictment based on the same transaction or transactions, event or events, unless the court finds, upon a proper showing, that additional evidence relevant to such inquiry has been discovered.

"§ 3330. Independent grand jury inquiry

"(a) (1) Any grand jury impaneled before any district court (including a special grand jury summoned under section 3331) may, after giving notice to the court, inquire upon its own initiative into offenses against the criminal laws of the United States alleged to have been committed within that district. Such grand jury shall, except as provided in this section, request the attorney for the Government to assist such grand jury in such inquiry.

"(2) The grand jury shall serve for a term of eighteen months after giving notice to the court under paragraph (1) unless an order for its discharge is entered earlier by the court. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No grand jury term so extended shall exceed thirty-six months from the date on which notice to the court was given under paragraph (1).

"(3) If a district court within any judicial circuit fails to extend the term of a grand jury engaged upon an independent inquiry under this section or enters an order for the discharge of such grand jury, the grand jury, upon an affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the grand jury. Upon the making of such an application by the grand jury, the grand jury shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order. No grand jury term so extended shall exceed thirty-six months.

"(b) (1) In the event that the attorney for the Government is unable to impartially assist, refuses to assist, or hinders or impedes the grand jury in the conduct of any inquiry under subsection (a), the grand jury may, upon the affirmative vote of a majority of its members, request at any point in such inquiry that the court appoint a special attorney, in lieu of the attorney for the Government, to assist the jury in the conduct of any independent inquiry referred to in subsection (a).

"(2) The special attorney appointed under this section may, with the approval of the court, appoint and fix the compensation of such assistants, investigators, and other personnel as he deems necessary. The special attorney and his appointees shall be appointed without regard to the provi-

sions of title 5 governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that the special attorney and any appointee shall be paid at a reasonable rate to be determined by the court. The special attorney shall be reimbursed for actual expenses incurred by him and his appointees in the performance of duties pursuant to this section.

"(3) Notwithstanding sections 516, 518, and 519 of title 28 or any other provision of law, a special attorney appointed under this section shall carry out the functions of an attorney for the Government and shall have the exclusive authority to—

"(A) assist in the conduct of independent grand jury investigations under this section,

"(B) prepare and sign any indictment returned by a grand jury pursuant to such inquiry in lieu of any attorney for the Government, and

"(C) conduct all other phases of any criminal prosecution arising out of such inquiry (including the argument of appeals in the United States courts of appeals and the United States Supreme Court).

"(4) A special attorney appointed under this section is authorized to obtain from any department or agency of the

United States any files, records, documents, or other materials which he deems necessary or appropriate in the carrying out of his functions under this section.".

(b) The Administrator of General Services shall furnish offices, equipment, supplies, and services to a special attorney appointed under section 3330 of title 18, United States Code, in the same manner as such items are furnished to agencies and departments of the United States.

(c) Section 524 of chapter 31 of title 28, United States Code (relating to appropriations for administrative expenses), is amended by adding at the end thereof the following new sentence: "Such appropriations shall also be available for payment of the compensation and other expenses of the special attorney appointed under section 3329 of title 18 to assist a grand jury in the conduct of an independent investigation.".

RIGHTS OF GRAND JURY WITNESSES

SEC. 7. (a) Chapter 215 of title 18, United States Code, is further amended by adding at the end thereof, the following new sections:

"§ 3330A. Counsel

"(a) Every witness subpenaed to appear and testify before a grand jury impaneled before a district court or to produce books, papers, documents, or other objects before such grand jury shall be entitled to the assistance of counsel,

including assistance during such time as the witness is questioned in the grand jury room.

"(b) Such counsel may be retained by the witness or shall be appointed as provided in section 3006A of this title in the case of any person financially unable to obtain legal representation. Notwithstanding any rule contained in the Federal Rules of Criminal Procedure, such witness' counsel is authorized to disclose matters which occur before the grand jury while such counsel is in the grand jury room.

"(c) Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in proceedings before the grand jury.

"(d) The court shall have the power to remove such attorney, and order the witness to obtain new counsel, when it finds that the attorney has violated subsection (c) of this section or that such removal and replacement is necessary to insure that the activities of a grand jury are not unduly delayed or impeded. Nothing in this subsection shall affect the power of the court to punish for contempt or impose other appropriate sanctions.

"§ 3330B. Subpenas

"(a) In the case of any proceeding before a grand jury impaneled before a district court, except where the court

finds special need upon a showing by the attorney for the Government or a special attorney appointed under this title, or the consent of the witness, no subpena may require any witness to testify or produce other information at such proceeding at any time before the expiration of the one-week period beginning on the date of service of the subpena.

"(b) Upon the service of any subpena requiring any witness to testify or produce other information at any proceeding before a grand jury impaneled before a district court, the witness shall be given adequate and reasonable notice of—

"(1) his right to counsel as provided in section 3330A of this title;

"(2) his privilege against self-incrimination;

"(3) the subject matter of the grand jury investigation;

"(4) whether his own conduct is under investigation by the grand jury;

"(5) the substantive criminal statute or statutes, violation of which is under consideration by the grand jury, if these are known at the time of issuance of the subpena; and

"(6) any other rights and privileges which the court deems necessary or appropriate.

"(c) (1) The district court which issued a subpena, or the district court for the district in which the person resides or is served shall have concurrent jurisdiction to hear, and take appropriate action with respect to any motion relating to, including any motion to quash, such subpena.

"(2) A motion relating to a subpena may be made at any time prior to, during, or when appropriate, subsequent to the appearance of any witness before a grand jury. Any motion made during or subsequent to the appearance of the witness before the grand jury may be made only in the district in which the grand jury is impaneled.

"(3) If a motion is made under this section before the day on which the person subpenaed has been ordered to appear or books, records, or documents have been ordered to be produced, the appearance of such person, or the production of such documents, shall, upon appropriate application, be stayed until the court has ruled on such motion.

"(d) (1) Upon proper motion, the attorney for the Government, or a special attorney appointed under this title, shall make a showing that—

"(A) a primary purpose or effect of requiring such person to so testify or to produce such objects to the grand jury is not or will not be to secure for trial testimony or to secure other information regarding the activities of any person who is already under indictment by

the United States, a State, or any subdivision thereof for such activities; or of any person who is under formal accusation for such activities by any State or any subdivision thereof, where the accusation is by some form other than indictment;

"(B) the witness has been advised of his rights, as specified in subsection (b);

"(C) the evidence sought is relevant to the grand jury investigation properly conducted within the grand jury's jurisdiction;

"(D) compliance with the subpena would not be unreasonable or oppressive, as such subpena would not require unnecessary appearances by the witness, would not lead to testimony or other information that is cumulative, unnecessary or privileged, would not be primarily for punitive purposes or would not involve other like circumstances; and

"(E) such other information as the court deems advisable.

"(2) The court may impose appropriate sanctions, including the quashing of such subpena to secure compliance with this subsection.

"(e) Upon proper motion, the court shall quash a subpena and take other appropriate sanctions when it finds that—

"(1) the witness has already been confined, imprisoned, or fined under section 1826 of title 28, United States Code, or section 401 of this title for his refusal to testify before any grand jury investigating the same transaction, set of transactions, event, or events;

"(2) the witness has given written notice that such witness intends to exercise his privilege against self-incrimination, unless a grant of immunity has been obtained; or

"(3) the grand jury is inquiring into the same transaction or transactions, event or events, that was under consideration by another grand jury which failed to return an indictment based on such transaction or event and there is no additional, newly discovered evidence relevant to such inquiry.

"(f) (1) A grand jury impaneled to conduct an inquiry into offenses against the criminal laws of the United States may be convened only in a district, or districts, in which it is believed criminal conduct may have occurred which are elements of such offenses.

"(2) The district court may quash a subpena or transfer any grand jury proceedings or investigation into any other district where it might properly have been convened if the court finds that a witness' appearance would impose a substantial and unnecessary hardship on such witness or his

family because of the location of the proceeding. In considering whether such hardship exists, the court shall take into consideration all the relevant circumstances, including the distance of the grand jury investigation from the places of residence of witnesses who have been subpenaed, financial and other burdens placed upon the witnesses, and the existence and nature of any related investigations and court proceedings.".

(b) Section 3006A (a) of title 18, United States Code (relating to appointment of attorneys), is amended—

(1) by striking out "or," before "(4)" in the first sentence thereof; and

(2) by inserting before the period at the end of the first sentence thereof: ", or (5) who is a witness before a grand jury impaneled before the district court".

RECORDING, TRANSCRIBING AND AVAILABILITY OF GRAND JURY PROCEEDINGS

SEC. 8. (a) Chapter 215 of title 18, United States Code, is further amended by adding at the end thereof the following new sections:

"§ 3333. Recording of grand jury proceedings

"A complete and accurate stenographic or electronic record of all grand jury proceedings shall be kept, except that the grand jury's secret deliberations and consultations between witnesses and their counsel shall not be recorded.

Such record shall include the court's notice to the grand jury of its rights and duties and all other comments or charges by the court to the jury at any time; all introductory comment, or other comments, directives, and other utterances made by attorneys for the government or special attorneys to the grand jury, witnesses and their counsels; all questioning of and testimony of witnesses; all interchanges between the grand jury and attorneys.

"§ 3334. Availability of grand jury transcripts and other statements

"(a) Any person summoned to testify or provide other information before a grand jury impaneled before a district court shall be entitled, prior to testifying or providing other information, to examine and copy any statement in the possession of the United States which he has made and which relates to the subject matter under inquiry by the grand jury. Such examination and copying may be made by the attorney for such person if such person gives his written approval. As used in this subsection, the term 'statement' has the meaning provided by section 3500 (e).

"(b) Any witness who testifies before a grand jury, or his attorney with such witness' written approval, shall, upon request, and under such conditions as the court deems reasonable, be entitled to examine and copy a transcript or electronic recording of the record for the period of such

witness' own appearance before the grand jury, and if a witness is proceeding in forma pauperis, he shall be furnished, upon request, a copy of such transcript.

"(c) A reasonable time prior to trial, and after the return of an indictment or the filing of an information, a defendant shall, upon request and under such conditions and limitations as the court deems reasonable, be entitled to examine and copy a transcript or electronic recording of—

"(1) the grand jury testimony of all witnesses to be called at trial;

"(2) all statements to the grand jury by the court and the attorney for the Government or special attorney, relating to the defendant's case;

"(3) all grand jury testimony or evidence which in any manner could be considered exculpatory; and

"(4) all other grand jury testimony or evidence which the court may deem material to the defense.

"(d) Upon a showing of good cause, the court may, at any time, order that the disclosure of the recorded proceedings of a grand jury be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government, the court shall permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a

showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant."

(b) Section 3500, title 18, United States Code, is amended—

(1) by inserting "or" before subsection (c) (2) thereof;

(2) by deleting "; or" and inserting "." at the end of subsection (e) (2) thereof; and

(3) by deleting subsection (e) (3) thereof.

PRELIMINARY EXAMINATION

SEC. 9. Chapter 217 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 3368. **Preliminary examination**

"(a) A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court.

"(b) Such preliminary examination may be held prior to, or within a reasonable time following, the filing of an indictment or information in the district court.".

REPORTS CONCERNING GRAND JURY INVESTIGATIONS

SEC. 9. Section 522 of title 28, United States Code (relating to reports of business and statistics), is amended by striking out "The Attorney General" and inserting in lieu thereof "(a) The Attorney General" and by adding at the end thereof the following new subsection:

"(b) The Attorney General, at the beginning of each regular session of Congress, shall report to the Congress and to the Administrative Office of the United States Courts with respect to the last preceding fiscal year on—

"(1) the number of investigations undertaken in which a grand jury or a special grand jury was utilized together with a description of the nature of each investigation undertaken;

"(2) the number of requests by United States grand juries to the Attorney General for approval to apply to the court for an order compelling testimony under section 2003 of title 18, and the number of such requests approved by the Attorney General;

"(3) the number of applications to district courts for orders granting immunity under title 18;

"(4) the number of applications to district courts

for orders granting immunity under title 18 that were approved and the nature of the investigations for which the orders were sought;

"(5) the number of instances in which witnesses in the investigations enumerated in paragraph (1) were held in contempt and confined, and the dates and lengths of such confinement;

"(6) the number of arrests, indictments, no-bills, trials, and convictions resulting from testimony obtained under orders granting immunity, the offenses for which the convictions were obtained, and a general assessment of the importance of the immunity;

"(7) a description of data banks and other procedures by which grand jury information is processed, stored, and used by the Department of Justice; and

"(8) other appropriate information concerning grand jury activity during such year.

The matters contained in the report required to be made by this section shall be set forth according to judicial district.".

EFFECT ON OTHER LAWS AND RULES

SEC. 11. (a) The enumeration in this Act of any rights and privileges of grand jury witnesses shall not affect any other rights and privileges to which such witnesses may be entitled under any law or rule of law.

(b) Notwithstanding section 3771, no rule contained in the Federal Rules of Criminal Procedure shall apply to the extent that such rule is inconsistent with the provisions of this Act.

95TH CONGRESS
1ST SESSION

H. J. RES. 59

IN THE HOUSE OF REPRESENTATIVES

JANUARY 4, 1977

Mr. EILBERG introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States with respect to grand juries.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, to be valid only if ratified by the legislatures of three-fourths of the several States within seven years after the date of final passage of this joint resolution:

"ARTICLE —

"SECTION. 1. No presentment or indictment of a grand jury shall be required in order to hold any person to answer for any crime against the United States but no person may

be so held except pursuant to an information signed by the attorney for the Government and stating the essential facts of the crime charged.

"SEC. 2. This article shall not affect the power of Congress to enact appropriate legislation to require a presentment or indictment of a grand jury to hold a person to answer for enumerated offenses, including classes of offenses, against the United States, or to enact appropriate legislation to authorize the attorney for the Government to seek indictments, or use an information, at his election.

"SEC. 3. This article shall not affect the power of Congress to enact appropriate legislation to provide for the impaneling of, and procedures with respect to, any grand jury whose function shall be to investigate any crime against the United States.".

95TH CONGRESS
1ST SESSION

H. J. RES. 60

IN THE HOUSE OF REPRESENTATIVES

JANUARY 4, 1977

Mr. EILBERG introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States with respect to grand juries.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, to be valid only if ratified by the legislatures of three-fourths of the several States within seven years after the date of final passage of this joint resolution.

"ARTICLE —

"SECTION 1. No person shall be held to answer for a capital or otherwise infamous crime against the United States, unless upon an information or indictment of a grand

jury, as Congress, by appropriate legislation, may prescribe, but no person may be held pursuant to an information unless such information is signed by the attorney for the Government and states the essential facts of the crime charged.

"SEC. 2. This article shall not affect the power of Congress to enact appropriate legislation to provide for the impaneling of, and procedures with respect to, any grand jury whose function shall be to investigate any crime against the United States.".

95TH CONGRESS
1ST SESSION

H. J. RES. 61

IN THE HOUSE OF REPRESENTATIVES

JANUARY 4, 1977

Mr. EILBERG introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States with respect to grand juries.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, to be valid only if ratified by the legislatures of three-fourths of the several States within seven years after the date of final passage of this joint resolution:

"ARTICLE—

"SECTION 1. No grand jury may present or indict or otherwise hold any person to answer for any crime against the United States. No presentment or indictment of a

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grand jury shall be required in order to hold any person to answer for any crime against the United States but no person may be so held except pursuant to an information signed by the attorney for the Government and stating the essential facts of the crime charged.

"SEC. 2. This article shall not affect the power of Congress to enact appropriate legislation to provide for the impaneling of, and procedures with respect to, any grand jury whose sole function shall be to investigate any crime against the United States.".

95TH CONGRESS
1ST SESSION

H. J. RES. 62

IN THE HOUSE OF REPRESENTATIVES

JANUARY 4, 1977

Mr. EILBERG introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States with respect to grand juries.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, to be valid only if ratified by the legislatures of three-fourths of the several States within seven years after the date of final passage of this joint resolution.

"ARTICLE —

"SECTION 1. No presentment or indictment of a grand jury shall be required in order to hold any person to answer for any crime against the United States but no person may

be so held except pursuant to an information signed by the attorney for the Government and stating the essential facts of the crime charged.

"SEC. 2. This article shall not affect the power of Congress to enact appropriate legislation to require a presentment or indictment of a grand jury to hold a person to answer for enumerated offenses, including classes of offenses, against the United States.

"SEC. 3. This article shall not affect the power of Congress to enact appropriate legislation to provide for the impaneling of, and procedures with respect to, any grand jury whose function shall be to investigate any crime against the United States.".

SUMMARY OF GRAND JURY BILLS, INTRODUCED BY THE HONORABLE JOSHUA EILBERG IN THE 95TH CONGRESS

A. CONSTITUTIONAL AMENDMENTS

1. *H. Res. 59.*—would eliminate the constitutional requirement of an indictment, but specifically states that Congress has the authority to enact appropriate legislation to require an indictment for certain classes of offenses or to enact appropriate legislation to authorize the attorney for the government to seek indictments or use an information at his election; and that Congress would have the power to continue to authorize investigating grand juries.

2. *H. Res. 60.*—would simply eliminate the Constitutional requirement of an indictment in any case, and thereby allow Congress to enact appropriate legislation to require an indictment for certain types of offenses, or to allow a prosecutor to use the indictment in certain types of situations; or to authorize and provide procedures for investigative grand juries.

3. *H. Res. 61.*—would totally eliminate the indicting grand jury, but allows the continuation of the investigating grand jury. This is the exact same amendment as H.J. Res. 46, introduced in the 94th Congress. Procedures for the reform of the investigative grand jury, under this amendment, could be enacted by Congress.

4. *H. Res. 62.*—would eliminate the constitutional requirement of the grand jury but specifically allows the Congress to enact legislation to require an indictment in certain cases, and to authorize investigating grand juries.

B. PROPOSED GRAND JURY STATUTE—H.R. 94—REINTRODUCED AS H.R. 3150 WITH 11 COSPONSORS

Section 1. Title.—The Act is to be called the Grand Jury Reform Act of 1977.

Section 2. Recalcitrance.—provides for procedures for an individual held in contempt for refusal to answer questions before a grand jury. A witness would have at least 72 hours to prepare for a contempt hearing, unless the attorney for the Government can demonstrate a need to dispense with such a period.

Confinement for contempt would be for a period of the life of the grand jury, until the witness testified, or a maximum of six months. Confinement is to be at a suitable federal correctional institution, if located within 50 miles of the court. Upon a special showing of hardship, the court could allow imprisonment at a suitable correctional institution near the place of residence or employment of the witness or his family.

This section would specifically preclude reiterative contempt—that is, holding someone in contempt for refusal to answer; imprisoning that person; and then subpoenaing the person again and holding him in contempt again. It would preclude such repeated contempt and imprisonment whether the first or the second proceeding was for civil or criminal contempt.

Bail emphasis is changed so as to provide that bail is to be allowed unless it affirmatively appears that the appeal is frivolous or taken for delay; and that the appellate courts have to act within 30 days.

This section also specifically allows for counsel to be appointed, if necessary, to represent the witness at a contempt hearing. Illegal wiretap useage is made a defense to contempt.

Section 3. Immunity.—makes changes in the witness immunity law. Section 3 mandates a return to transactional immunity, and discontinues the use of "use immunity."

A witness is to receive at least one week's notice of the intent to grant him immunity, unless the court, upon a showing of special needs, reduces the period of time.

The witness is to be specifically given reasonable and adequate notice of the nature and scope of the immunity; and his right to be represented by counsel at a hearing on the immunity.

The attorney for the government is to request immunity and the court can grant immunity, in its discretion, only when the court finds that the information is necessary to the public interest and the individual has refused or is likely to refuse to testify. Thus, unlike the present situation, where immunity is solely a prosecutor's decision, the court is to weigh benefits to law enforcement against the dangers to a witness, in determining whether the public interest is served by a grant of immunity.

The court is also to make certain findings in regards to a request of immunity, before the request can be granted. These findings include: that the grand jury investigation is authorized by law and that the application is in accordance with Justice Department procedures; that the testimony and information sought is within the scope of the investigation and is relevant; and that a summary of the evidence relating to the witness, and relating the need for immunity has been submitted to the court.

The court can consider as a possible defense to an immunity request, or a prosecution for contempt, a real threat of foreign prosecution if the witness testified. If the U.S. Attorney or the attorney for the government can demonstrate that adequate safeguards are made to minimize danger of foreign prosecution, immunity can nevertheless be ordered.

In order to protect the witness, and insure transactional immunity, the grand jury which considers the immunized witness' testimony cannot indict him under any circumstances.

This section also eliminates the 20-day waiting period for Congressional immunity and provides for an effective date of 60 days after enactment of the act.

Section 4. Size of Grand Juries.—This section changes requirements as to the size of the grand juries, as requested by the Judicial Conference of the United States. A grand jury, under this section, can be constituted by membership of between nine and fifteen persons and only nine persons are necessary to conduct business. Six of the nine are necessary for an indictment.

Section 5. Secrecy.—This section deals with unauthorized disclosure of grand jury information. Violations of grand jury secrecy are made an offense, divided in two parts. First, for knowing disclosure of evidence or a statement made, there is a fine of $500 or six months in jail. The crime is not applicable to a disclosure by the attorney for the Government in performance of his duties; disclosure directed and permitted by the court, disclosure by a witness or his counsel, or disclosure by a third party, not present at the grand jury proceeding.

Knowing disclosure of grand jury activities, in order to obtain money, to effect the actions or decisions of the jury, or to effect further legal proceedings is made a more serious offense punishable by a fine of $20,000 or imprisonment up to five years. This section does not apply to disclosures by the attorney for the Government in performance of his duties; disclosure directed and permitted by the court; or disclosure by a witness or his counsel. However, because this is the more serious offense, where it is demonstrated that there was a direct effect on the legal machiery, this provision does apply to third parties. The section makes it specific, however, that this more serious felony of obtaining or granting grand jury information for payment of compensation does not apply to a newspaper or television representative, acting in his professional capacity.

Section 6. Independent Grand Jury.—details the rights and duties of grand jurors and allows an independent inquiry.

(a) *Rights and Duties.*—Grand jurors are to be given adequate and reasonable notice of their various duties to inquire into the criminal law, to call and interrogate witnesses, to request a production of documents and are to be told of the subject matter of the investigation, criminal satutes known, the necessity of sufficient evidence to form an indictment, the obligation of secrecy, and other rights and duties as the court suggests.

An individual is given the right to make a written request to the attorney for the Government to appear before the grand jury and request to testify or present documents. The grand jury does not have to hear a witness, but the attorney of the Government is to forward the request, with a possible recommendation, to the jury, and the jury itself votes on whether or not to allow the person to testify. The attorney for the Government is to notify, unless special circumstances are shown, a potential defendant of the likelihood of indictment and tell him of his right to make a request to the jury to testify. Any person testifying would have to waive immunity and testify only as to relevant and competent matters, and would be subject to cross-examination by the attorney for the Government.

The attorney for the Government is required to advise the grand jury of the existence of exculpatory evidence against any potential defendant. The attorney for the Government is not permitted to bring before the grand jury any witness who has given written notice in advance of his intention to invoke the Fifth Amendment if he is called to testify, unless that person has been granted immunity.

(b). *Independent Inquiry.*—The grand jury is given the power to conduct an independent inquiry into violations of the criminal law. The grand jury is to generally utilize the attorney for the government in such an investigation; but when it finds a conflict of interest, or dilatory or improper activities, by the attorney for the Government, it can request the court to appoint a special attorney. Requests for a special inquiry, for a special attorney, and for the payment and compensation of special attorney and his staff, require the approval of the court. The grand jury can appeal to the circuit court of the district court disapproves any of their requests. The special attorney for the grand jury is given all the authority of a prosecutor.

Section 7. Rights of Witnesses.—This section deals the rights of grand jury witnesses.

(a) *Counsel.*—The witnesses are specifically granted the right to have counsel with them in the grand jury room; free if necessary. The role of counsel is only to advise and he is not permitted to address the grand jurors or otherwise take part. The court is given the power to remove an attorney for improprieties and to appoint a new attorney.

(b) *Subpoenas.*—Specific procedures are provided for subpoenas. Generally, unless a special showing is made, a witness is to have seven days' notice, through subpoena, of his requirement to testify or produce evidence. The subpoena is to include information advising a witness of his rights, including counsel, his privilege against self-incrimination; the subject matter of the investigation; whether he is a potential defendant; the substance of criminal statute or statutes; and other rights or privileges.

Challenges to a subpoena can be held either in the district which issues the subpoena, or in the district in which the person resides or is served, at any time up until the day of the appearance. A motion relating to a subpoena on the day of appearance can only be made in the district which issued the subpoena. The court is given the power to stay an appearance, if a motion is made prior to the day of appearance, until it has ruled on any motion to quash.

Upon proper motion, the attorney for the Government has to make a showing that the subpoena is not to obtain evidence for a case already scheduled for trial; that the witness has been told of his rights; that the evidence sought is relevant to the grand jury investigation and is properly within the grand jury's jurisdiction; that compliance with the subpoena would not be unreasonable or oppressive. The court can change the venue of the proceeding, quash the subpoena, or take other appropriate action.

The court is to quash a subpoena if it finds that this is an attempt at reiterative contempt, despite the preclusion; that the witness has indicated in writing that he is going to exercise his privilege against self-incrimination and no immunity order has been obtained; or the grand jury is inquiring into a similar transaction as it earlier inquired into, and there is no additional newly discovered evidence relevant to such inquiry.

This section also provides that grand jury venue is limited to where there is substantial conduct in a district and the district court is given the power to quash a subpoena or transfer any grand jury proceedings or investigation into another district where the grand jury's appearance in a particular district would cause unnecessary hardship. Standards are elaborated as to what might constitute hardship.

Section 8. Recording and Disclosure.—This section details procedures for recording of grand jury proceedings and for the availability of grand jury transcripts.

(a) *Transcribing.*—All grand jury proceedings, except for secret deliberations and consultations between witnesses and counsels, are required to be transcribed, either stenographically or electronically.

(b) *Disclosure/Discovery.*—Any person summoned to testify or provide information is to receive a copy of any prior statement in the possession of the government which he has made, before he is required to testify.

In addition, a witness is ordinarily entitled to a copy of his own testimony, after he testifies.

The court would have the power, under appropriate circumstances, to limit or condition such release.

This section also makes appropriate changes in the Jencks Act, and adds a new provision, providing that within a reasonable time prior to trial and after the return of the indictment or the filing of an information, a defendant should be entitled to get the grand jury testimony of all witnesses that are going to

testify against him; all statements to the grand jury by the court and the attorney for the Government relating to the defendant's case, any other grand jury evidence relating to the defendant's case; and all other material which the court finds material to the defense. The court is given the power, upon a showing of good cause, to limit such disclosure, and the government's showing of good cause can be made, if necessary, in camera.

Section 9. Requirement of Preliminary Hearing.—Appropriate amendments require a preliminary examination, or a preliminary hearing, for every case whether or not there is an indictment. The attorney for the Government has the option to provide the preliminary examination before or after an indictment. Thus, the defendant would not be able to challenge evidence in front of the grand jury; cross-examine witnesses in front of the grand jury; nor interfere with the deliberative function of the grand jury. However, he would have the opportunity, as in most states, to determine the nature of the evidence against him, whether it involves hearsay, whether it involves constitutional problems, and its strength, through a preliminary examination prior to his trial.

Section 10. Reports.—Would provide for periodic grand jury reports to be made to Congress as to the number of grand jury investigations; the number of immunity requests, the number of imprisonments for contempt; the number of no-bills; description of data banks and other information as necessary.

Section 11. Savings Clause.—Provides that enumeration of any rights or guarantees in this act should not take away rights or privileges guaranteed by other laws. Moreover, as changes are made, for example, in the number of grand jurors, the right to counsel and the requirement of a preliminary examination, this statute would overrule contrary provisions in the Federal Rules of Criminal Procedure.

COMPARATIVE SUMMARY OF DIFFERENCES BETWEEN H.R. 94 (95TH CONG.) AND H.R. 1277 (94TH CONG.)

	H.R. 94	H.R. 1277
I. RECALCITRANT WITNESS		
A. Application	Federal court and grand jury witnesses	Same.
B. Initiation	Prosecutor	No provision.
C. Procedure	(1) Show cause hearing	No provision.
	(2) With counsel	No provision.
	(3) 72-hr notice	No provision.
D. Place of confinement	Federal correctional institution within 50 mi unless witness requests other suitable institution.	At a suitable place.
E. Period of confinement	Lesser of time before compliance, life of proceedings, or 6 mo.	Same.
F. Reiterated contempt	Bars use of 28 U.S.C. 1826 or 18 U.S.C. 401 for same witness and same transaction after 1 use of either.	Bars consecutive use of 28 U.S.C. 1826 against the same witness for the same transaction.
G. Bail	Applies 18 U.S.C. ch. 207 unless appeal is frivolous or taken for delay.	Same.
H. Expedited appeal	Within 30 days	Same.
I. Applicability of sec. 3006A	Yes	No provision.
J. Defenses	Questions may not be based on violations of Federal wiretap law.	Same.
II. IMMUNITY		
A. Type	Replaces use with transactional	Same.
B. Prosecution permitted	Perjury, false statements, or failure to comply	Same.
C. Procedure:		
1. Notice	(1) 1 week except in case of special need	(1) 1 week.
	(2) Scope and nature of immunity	(2) Same.
	(3) Right to counsel and availability of sec. 3006A	(3) No provisions.
2. Authorized to request order	U.S. Attorney with Attorney General's approval	Same.
3. Witness consent	No	No.
4. Conditions for issuance	(1) Court determines order is in the public interest.	Same.
	(2) No danger of foreign prosecution	No provision.
	(3) Witness will or has claimed his 5th amendment privilege.	Same.
	(4) Grand jury cases: (a) evidence sought is relevant to scope of immunity and inquiry, (b) investigation is authorized, (c) summary of evidence is proved the court.	No provisions.
5. Indictment of immunized witness.	Barred in case of same grand jury before the witness testifies.	No provisions.
D. Congressional immunity	Attorney General notification repealed	Same.

COMPARATIVE SUMMARY OF DIFFERENCES BETWEEN H.R. 94 (95TH CONG.) AND H.R. 1277 (94TH CONG.)—Con.

	H.R. 94	H.R. 1277
III. SIZE OF GRAND JURY		
A. Reduced	9 to 15 members	No provision.
B. Selection after failure of sufficient number to appear.	Not from bystanders	No provision.
C. Number required for indictment	⅔ of 9 or more	No provision.
IV. DISCLOSURE CRIMES		
A. Unlawful disclosure by those present.	Matters occurring before the grand jury	Same.
	$500 and/or 6 mo	Same.
B. Unlawful disclosure for profit or to obstruct justice.	Matters occurring before the grand jury	No provision.
	$20,000 and/or 5 yr	
C. Exceptions	Disclosures ordered by the court, to or by attorney for the Government, and by witness or his attorney.	Same.
	Press exempt from B	No provision.
V. RIGHTS AND DUTIES		
A. Notice to grand jury	Duty to inquire into alleged Federal crimes committed within the district.	Same.
	Right of independent inquiry	Same.
	Right to call and question witnesses	Same.
	Right to require production of evidence	Same.
	Subject matter of inquiry	No provision.
	Statues involved	No provision.
	Basis for indictment	No provision.
	Obligation of secrecy	No provision.
	Other matters in the descretion of the court	Same.
B. Requests to testify	Anyone may request attorney for the Government which is forwarded to the grand jury.	No provision.
	Grand jury may refuse to receive evidence	No provision.
	Targets must be notified of right to request to appear.	No provision.
	Public record of requests maintained	No provision.
	Witness appearing under request waives his 5th amendment privilege.	No provision.
C. Duties of attorneys for the Government.	Advise jury of impeachment or exculpatory evidence.	No provision.
	Avoid calling witnesses who intend to assert the 5th amendment.	No provision.
	May not initiate inquiry without additional evidence after earlier grand jury has failed to return indictments.	No provision.
IV. INDEPENDENT GRAND JURY INQUIRY		
A. Scope	Alleged violations of Federal law within their district.	Same.
B. Term	18 mo with 6 mo extensions not to exceed 36 mo	Same.
C. Special attorney to assist grand jury	Appointed by court upon request of majority of grand jury.	Same.
	Special attorney may appoint assistants	Same.
	Special attorney may assist in conduct of inquiry, prepare and sign indictments, conduct all other phases of related criminal prosecution, obtain material from other agencies, be supplied by GSA, be funded out of Department of Justice appropriations.	Same.
VII. RIGHTS OF GRAND JURY WITNESSES		
A. Counsel	Witnesses have right to have attorney present to assist them.	Same.
	Application of sec. 3006A	Same.
	Attorney may be present in grand jury room with his client but may not address the grand jury.	Same.
	Attorneys may be removed for addressing the grand jury or to prevent delays and impediments.	No provision.

COMPARATIVE SUMMARY OF DIFFERENCES BETWEEN H.R. 94 (95TH CONG.) AND H.R. 1277 (94TH CONG.)—Con.

	H.R. 94	H.R. 1277
VII. RIGHTS OF GRAND JURY WITNESSES—Continued		
B. Subpena:		
1. Delay between issuance and appearance.	1 week except for special need or consent of the witness.	1 week except for special need.
2. Information in subpena	Right to counsel	Same.
	5th amendment privilege	Same.
	Subject matter of inquiry	Same.
	Whether witness is target	Same.
	Statutes involved	No provision.
	Other matters in court's discretion	Same.
3. Motions concerning subpenas.	Venue in district where issued or served or where the witness resides.	Same.
	Motion may be made at any time but one not made before appearance must be made where the grand jury is sitting.	No provision.
	Motion stays requirement for appearance	Same.
4. Grounds for quashing or modifying subpena.	Evidence sought against one who is already formerly accused.	No provision.
	Witness has previously been held in contempt concerning the same transaction.	No provision.
	Written notice that the witness intends to claim 5th amendment privilege.	No provision.
	Witness was not advised of his rights	No provision.
	Compliance would be unreasonable, oppressive and require unnecessary appearance.	Same.
	Purpose is punitive	No provision.
	Evidence sought is not relevant or is not within the grand jury's jurisdiction.	No provision.
5. Jurisdictional limitation	Grand jury may only investigate where violation of a substantive criminal law may have occured.	No provision.
VIII. RECORDING, TRANSCRIBING, AND AVAILABILITY OF GRAND JURY PROCEEDINGS		
A. Recording	Stenographic or electronic recording or notice of grand jury perogatives, charges and comments of the court, statements of attorney for the Government, questioning and testimony of witnesses, interchanges between witnesses and attorneys, but not grand jury deliberations.	Recording of all testimony.
B. Witness access	Examine and copy any of witness's statements in possession of the Government prior to grand jury testimony.	No provision.
	Examine and copy own grand jury testimony.	Same.
C. Defendant access	Examine and copy after formal accusation: grand jury testimony of all witnesses to be called at trial, statement to grand jury by attorneys for Government relating to case, other exculpatory or material grand jury evidence.	No provision.
D. Restricted access	Court may deny or restrict disclosure and must preserve record.	No provision.
IX. PRELIMINARY EXAMINATION		
A. Right	Defendant entitled to after formal accusation except on petty offenses or unless waived.	No provision.
X. REPORTS CONCERNING GRAND JURY INVESTIGATIONS		
A. To Congress and Administrative Office of U.S. Courts.	By Attorney General at the beginning of each session of Congress.	No provision.
B. Content	By judicial district: (1) the number of description of grand jury investigations, (2) number of requests and approvals for immunity applications, (3) number of immunity applications, (4) number of immunity applications granted, (5) number, date, and duration of grand jury contempts, (6) number of arrests, convictions, indictments, no-bills resulting from immunity, (7) descritpion of Justice Department use and storage of grand jury information and (8) other information concerning grand juries.	No provision.
XI. EFFECT ON OTHER LAWS		
A. Other Rights	Any other rights or privileges not affected by bill.	Same.
B. Federal rules	Inconsistent provisions of Federal Rules of Criminal Procedure inapplicable.	Same.

95TH CONGRESS
1ST SESSION

H. R. 406

IN THE HOUSE OF REPRESENTATIVES

JANUARY 4, 1977

Ms. HOLTZMAN introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend titles 18 and 28 of the United States Code to provide that an individual appearing before certain grand juries can be imprisoned for contempt for no more than 6 months, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Contempt Reform Act of 1977".

SEC. 2. Section 1826 of title 28, United States Code, is amended to read as follows:

"§ 1826. Recalcitrant witnesses

"(a) (1) 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 and after a hearing at which the witness may be represented by counsel, may, if the court finds that such refusal was without just cause, hold the witness in contempt and order the witness to be imprisoned.

"(2) Any imprisonment for refusal to give testimony or provide information pursuant to this subsection shall be at a Federal correctional institution unless the witness agrees to confinement at a non-Federal institution designated by the Attorney General.

"(3) Upon a showing of need or hardship, the court ordering such imprisonment may grant a request by the witness to be imprisoned at a suitable correctional institution near the place of residence or employment of the witness or the witness' family or relatives or the attorney of the witness.

"(4) Any imprisonment for refusal to give testimony or provide information pursuant to this subsection shall continue until such time as the witness is willing to give such testimony or provide such information except that no period of such imprisonment shall exceed the lesser of—

"(A) (i) in the case of a court proceeding, the life of the court proceeding before which such refusal to comply with the court order occurred, or

"(ii) in the case of a grand jury, the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred; or

"(B) six months.

"(5) No hearing shall be held under this subsection unless ten days' notice is given to the witness who has refused to comply with the court order under this subsection, except that a witness subpenaed for a trial may be given a shorter notice of not less than five days if the court, upon a showing of special need, so orders.

"(b) No person imprisoned under this section for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events may be again imprisoned under this section or under section 401 of title 18, United States Code, for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events.

"(c) Any person confined pursuant to subsection (a) of this section shall be admitted to bail or released in accordance with the provisions of chapter 207 of title 18, United States Code, pending the determination of an appeal taken by such person from the order of imprisonment, unless the appeal is patently frivolous. If the person has not been released on bail or otherwise released, any appeal from an order of imprisonment under this section shall be disposed

of as soon as practicable, pursuant to an expedited schedule, and in no event more than thirty days from the filing of such appeal. If the appellate court shall fail to dispose of the appeal of a person who remains confined within thirty days, the person shall automatically be released on his or her personal recognizance pending disposition of the appeal.

"(d) In any proceeding conducted under this section, counsel may be appointed in the same manner as provided in section 3006A of title 18, United States Code, for any person financially unable to obtain adequate assistance.

"(e) A refusal to answer a question or provide other information before a grand jury of the United States shall not be punishable under this section or under section 401 of title 18, United States Code, if the question asked or the request for other information is based in whole or in part upon evidence obtained by an unlawful act or in violation of the witness' constitutional rights or of rights established or protected by any statute of the United States.".

SEC. 3. (a) Chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 403. Refusal of a witness to testify in a grand jury proceeding

"No person who has been imprisoned or fined by a court of the United States under section 401 of this title for refusal

to testify or provide other information concerning any transaction, set of transactions, event, or events in a proceeding before a grand jury (including a special grand jury summoned under section 3331 of this title) impaneled before any district court of the United States may again be imprisoned or fined under section 401 of this title or under section 1826 of title 28, United States Code, for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events.".

(b) The table of sections for chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"403. Refusal of a witness to testify in a grand jury proceeding.".

95TH CONGRESS
1ST SESSION

H. R. 1830

IN THE HOUSE OF REPRESENTATIVES

JANUARY 13, 1977

MS. JORDAN introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To authorize in certain cases the appointment of a special judicial prosecutor and investigators to assist grand juries in the exercise of their powers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the table of the sections of chapter 215 of title 18, United States Code, is amended by inserting immediately after the item relating to section 3328, the following new item:

"3329. Powers of grand jury; special judicial prosecutor and investigators.".

SEC. 2. Title 18, United States Code, is amended by inserting immediately following section 3328 a new section as follows:

"§ 3329. Powers of grand jury; special judicial prosecutor and investigators

"(a) Any grand jury impaneled before a United States district court may give notice to the court that it wishes to be assisted by a special judicial prosecutor in an inquiry into any activities of an officer in the executive branch. Any such notice shall be given in writing signed by twelve or more members of the grand jury. Such grand jury shall not be discharged by the court prior to the receipt by the court of written notice from the grand jury that such inquiry has been completed.

"(b) Upon receipt of notice pursuant to subsection (a), the United States district court shall appoint a special judicial prosecutor for the purposes and with the powers set forth in this section, and shall not remove or replace said officer except for extraordinary improprieties as an officer of the court.

"(c) Any judge of the United States district court, after making an appointment or reappointment pursuant to subsection (b) shall excuse himself from presiding over or otherwise participating in any prosecution or other judicial proceeding arising out of the exercise of responsibilities by a special judicial prosecutor appointed by him.

"(d) The United States district court having jurisdiction over any inquiry into the activities of an officer in the

executive branch is vested with supervisory jurisdiction to issue and enforce all orders necessary and appropriate to insure the integrity and inviolability of all files, notes, correspondence, memorandums, documents, physical evidence, and other records and work product compiled, obtained, or otherwise produced and maintained by the United States district attorney or any other officer of the Justice Department from the date of impanelment of the grand jury until the appointment of a special judicial prosecutor pursuant to subsection (b).

"(e) The special judicial prosecutor appointed pursuant to this section may without regard to the laws relating to the competitive service, appoint or reappoint such permanent or temporary staff at such salaries (not to exceed the rate of $36,000 per annum) as may be necessary to assist in the exercise of his responsibilities, and may for that same purpose make use of necessary support services and facilities at Government expense. The United States Department of Justice is authorized and directed to pay the salaries and expenses of the office of special judicial prosecutor hereunder, all from its general funds including contingency funds. Notwithstanding any other provision of law, any impounding or withholding or other impediment to the provision of such funds shall be unlawful.

"(f) Anything in the laws of the United States regarding the authority and responsibilities of the Attorney General or of the several United States attorneys to the contrary notwithstanding, the special judicial prosecutor shall have exclusive authority and responsibility on behalf of the United States of America to conduct all grand jury presentments and all other criminal proceedings, including without limitation the initiation and conduct of prosecutions, the framing and signing of indictments, and the filing of informations, and all pretrial and posttrial motions, orders, trials, appeals, petitions, and other processes (whether initiated before or after his assumption of duties) in all Federal courts including the Supreme Court of the United States, arising out of the grand jury's inquiry into the activities of any officer in the executive branch.

"(g) The special judicial prosecutor shall have full access to and use of the material described in subsection (d) and shall have power throughout the territory of the United States to compel the production of testimonial and documentary or physical evidence relating to any or all of the subject matter described in subsection (f) of this section. In particular, and without limiting the generality of the foregoing, the special judicial prosecutor shall have full power to—

"(1) determine whether and how far to contest the

assertion of Executive Privilege or any other testimonial or evidentiary privilege;

"(2) determine whether or not application should be made to any Federal court for a grant of total or partial immunity to any witness, consistently with applicable statutory standards, or for other warrants, subpenas, or other court orders including an order of contempt of court;

"(3) issue instructions to the Federal Bureau of Investigation and other domestic investigative agencies for the collection and delivery solely to the special judicial prosecutor of information and evidence bearing on matters within the jursidiction of the special judicial prosecutor, and for safeguarding the integrity and inviolability of all files, notes, correspondence, memorandums, documents, physical evidence, and other records and work product compiled, obtained, or otherwise produced and maintained by the Office of Special Judicial Prosecutor; and

"(4) decide whether or not to prosecute any person and how to conduct and argue any appeals or petitions arising out of his prosecutorial activities.

"(h) All offices, departments, and agencies of the Federal Government shall cooperate fully with requests by the special judicial prosecutor for information and assistance.

In particular, the Department of Justice shall assign to the temporary supervision and control of the special judicial prosecutor such personnel as he may reasonably require.

"(i) The special judicial prosecutor shall have the authority and responsibility to deal with and appear before congressional committees having jurisdiction over any aspect of the matters covered by this Act, and to provide such information, documents, and other evidence as may be necessary and appropriate to enable any such committee to exercise its authorized responsibilities.

"(j) The special judicial prosecutor may from time to time make public such statements or reports, not inconsistent with the rights of any accused or convicted persons, as he deems appropriate; and he shall upon completion of his assignment submit a final report to the United States district court which empanelled the grand jury in connection with which the special judicial prosecutor was appointed.

"(k) The special judicial prosecutor shall carry out his responsibilities under this section until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the United States district court judge who appointed the special judicial prosecutor pursuant to subsection (b) and himself.

"(l) Any judge of the United States district court, on empanelment of a grand jury, shall charge and inform the grand jury of its rights and duties under this section.".

95TH CONGRESS
1ST SESSION

H. R. 2620

IN THE HOUSE OF REPRESENTATIVES

JANUARY 27, 1977

Mr. PATTERSON of California introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To establish certain rules with respect to the appearance of witnesses before grand juries in order better to protect the constitutional rights and liberties of such witnesses under the fourth, fifth, and sixth amendments to the Constitution; to provide for independent inquiries by grand juries, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Grand Jury Reform Act of 1975."

SEC. 2. Section 1826 of title 28, United States Code, is amended to read as follows:

"§ 1826. Recalcitrant witnesses

"(a) (1) Whenever a witness in any proceeding before any Federal 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 grand jury, upon affirmative vote of twelve or more members, may apply to the court for an order directing the witness to show why he should not be held in contempt. When such application is brought to its attention, the court may, after a hearing at which such witness may be represented by counsel, find such witness in criminal contempt and order such witness to be confined, if the court finds that the refusal was without just cause. Any such confinement shall be at a suitable Federal correctional institution, unless the witness waives this right. Such confinement shall continue until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed 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 six months.

"(2) Whenever a witness in any criminal proceeding before or ancillary to any Federal court of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, the court,

upon such refusail, may, after a hearing at which such witness may be represented by counsel, find such witness in criminal contempt and order such witness to be confined, if the court finds that the refusal was without just cause. Any such confinement shall be at a suitable Federal correctional institution, unless the witness waives this right. Such confinement shall continue 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 the court proceeding before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed six months.

"(3) No hearing shall be held under this subsection except upon ten days notice to the witness, except that in the case of a witness subpenaed for a trial, a shorter notice, but not less than five days may be ordered by the court upon a showing of special need.

"(b) No person who has been confined under this section for refusal to testify or provide other information concerning any transaction, set of transactions, event or events may be again confined under this section for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events.

"(c) Any person confined pursuant to subsection (a) of this section shall be admitted to bail or released in ac-

cord with the provisions of chapter 207 of title 18, United States Code, pending the determination of an appeal taken by him from the order of his confinement, unless the appeal is patently frivolous and taken for purposes of delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, pursuant to an expedited schedule ordered by the appelate court upon application by a party.

"(d) In any proceeding conducted under this section, counsel shall be furnished as provided in section 3006A of title 18, United States Code, for any person financially unable to obtain adequate representation.

"(e) A refusal to answer a question or provide other information before a Federal court or grand jury shall not be punishable under this section if the question asked or the request for other information is based on any violation of the witness' constitutional rights, or of rights protected by any statute of the United States."

SEC. 3. Section 2514 of title 18, United States Code, is amended to read as follows:

"§ 2514. Immunity of witnesses

"(a) Upon an affirmative finding by twelve or more members of a grand jury impaneled before a United States district court that the testimony of any witness, or the production of books, papers, or other evidence by any witness,

in the case or proceeding before such grand jury, is necessary to the public interest, with the written consent of the witness, and upon the approval of the Attorney General, the grand jury shall make application to the court for an order that the witness shall testify or produce evidence subject to the provisions of this section.

"(b) Whenever in the judgment of a United States attorney, the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any court of the United States, is necessary to the public interest, such United States attorney, with the written consent of the witness, and upon the approval of the Attorney General, shall make application to the court for an order that the witness shall testify or produce evidence subject to the provisions of this section.

"(c) Pursuant to subsections (a) and (b) of this section, upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, and upon further order of the court, such witness shall not be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce

evidence; nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."

SEC. 4. (a) Chapter 215 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"§ 3329. Notice to grand jury of its rights and duties

"Upon impanelment of each grand jury before a United States district court, the court shall give adequate and reasonable notice to the grand jury of—

"(1) its duty to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district;

"(2) its rights, authority, and powers with respect to an independent inquiry under section 3330;

"(3) its right to call and interrogate witnesses;

"(4) its right to request the production of documents or other evidence;

"(5) (A) the subject matter of the investigation, and

CONTINUED

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"(B) the criminal statute or statutes involved, if these are known at the time the grand jury is impaneled;

"(6) the requirement that a subpena summoning a witness to appear and testify before a grand jury or to produce books, papers, documents or other objects before the grand jury may be issued only upon an affirmative vote of twelve or more members of the grand jury to which the subpena is returnable;

"(7) the authority of the grand jury to ask the court to grant immunity to a witness only upon an affirmative vote of twelve or more members of the grand jury;

"(8) the authority of the grand jury to apply to the court for an order directing a witness to show cause why he should not be held in contempt, under title 28, section 1826, only upon an affirmative vote of twelve or more members of the grand jury;

"(9) the necessity of legally sufficient evidence to form the basis of any indictment as provided under section 3330A (1) of this title;

"(10) the duty of the grand jury by an affirmative vote of twelve or more members of the grand jury, to determine, based on the evidence presented before it, whether or not there are sufficient grounds for issuing

indictments and shall determine the violations to be included in any such indictments; and

"(11) such other duties and rights as the court deems advisable.

"The court's failure to instruct the grand jury as directed in this section shall be just cause for a witness's refusal to testify or provide other information before such grand jury. Any person indicted by a grand jury that has not been instructed in accordance with these provisions shall be entitled to a dismissal of any indictment by such grand jury and of any indictment issued by any other grand jury, if such other indictment is based on the same transaction, set of transactions, event, or events.

"**§ 3330. Independent grand jury inquiry**

"(a) (1) Any grand jury impaneled before any district court (including a special grand jury summoned under sections 3331 and 3333) may, after giving notice to the court, inquire upon its own initiative into offenses against the criminal laws of the United States alleged to have been committed within that district by any officer or agent of the United States or any State or municipal government; or by any person who, at the time of the alleged commission of the offense, was an officer or agent of the United States or of any State or municipal government.

"(2) The grand jury shall serve for a term of twelve months after giving notice to the court under paragraph (1) unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by an affirmative vote of twelve or more members that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No grand jury term so extended shall exceed twenty-four months from the date on which notice to the court was given under paragraph (1).

"(3) If a district court within any judicial circuit fails to extend the term of a grand jury engaged upon an independent inquiry under this section or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury by an affirmative vote of twelve or more members may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry by the chief judge of the circuit of an appropriate order upon such application. No grand jury term so extended shall exceed twenty-four months.

"(b) (1) Upon the request of any grand jury impaneled before any district court, pursuant to the affirmative vote of twelve or more members, the court shall appoint a special attorney to assist the jury in the conduct of any independent inquiry referred to in subsection (a). Such special attorney shall serve in lieu of any attorney for the Government and shall be paid at the rate of $100 per day. Such special attorney, with the approval of the court, may appoint and fix the compensation of such assistants, investigators, and other personnel as he deems necessary. The special attorney and his appointees shall be appointed without regard to the provisions of title 5 of the United States Code governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates. Any appointee under this subsection shall receive pay at a rate not to exceed $100 per day for each day during which he is engaged in the performance of his duties under this section. The special attorney shall be reimbursed for actual expenses incurred by him and his appointees in the performance of duties pursuant to this section.

(2) Notwithstanding sections 516 and 519 of title 28 of the United States Code or any other provisions of law, a special attorney appointed under this section shall have the exclusive authority to assist in the conduct of an independent

grand jury investigation under this section, and any indictment returned by a grand jury pursuant to such inquiry shall be signed by the special attorney in lieu of any attorney for the Government.

"§ 3330A. Certain rights of grand jury witnesses

"(a) A subpena summoning a witness to appear and testify before a grand jury or to produce books, papers, documents, or other objects before such grand jury shall be issued only upon an affirmative vote of twelve or more members of the grand jury, and such subpena may not be returnable on less than seven days' notice, except with the consent of the witness.

"(b) Any subpena summoning a witness to appear before a grand jury shall advise the witness of (1) his right to counsel as provided in subsection (c) of this section; (2) his right against self-incrimination; (3) whether his own conduct is under investigation by the grand jury; (4) the subject matter of the grand jury investigation; (5) the substantive criminal statute or statutes, violation of which is under consideration by the grand jury; and (6) any other rights and privileges which the court deems necessary and appropriate.

"(c) Any witness who is not advised of his rights pursuant to subsection (b) hereof shall not be prosecuted or subjected to any penalty or forfeiture for or on account of

any transaction, matter, or thing concerning which he testifies or any evidence he produces, nor shall any such testimony or evidence be used as evidence in any criminal proceeding against him in any court.

"(d) Every witness subpenaed to appear and testify before a grand jury or to produce books, papers, documents, or other objects before such grand jury shall be entitled to representation by counsel in the grand jury room, during such time as the witness is questioned in the grand jury room; such counsel may be retained by the witness or appointed pursuant to section 3006A of this title. Notwithstanding any rule contained in the Federal Rules of Criminal Procedure, the witness' counsel is authorized to disclose matters which occur before the grand jury while such counsel is in the grand jury room.

"(e) A grand jury impaneled to conduct an inquiry into offenses against the criminal laws of the United States may be convened only in a district in which it is believed substantive criminal conduct may have occurred as elements of such offenses; except that when a grand jury is to be convened to conduct an inquiry into both violations of substantive criminal statutes and violations of statutes forbidding conspiracy to violate substantive criminal statutes, the grand jury may not be convened before a district court in a district in which the only criminal conduct alleged to have

occurred is conspiracy to commit the substantive criminal act.

"(f) (1) For the convenience of witnesses and where the interests of justice so require, a district court shall, on motion of a witness, transfer any grand jury proceedings or investigation into any other district where it might properly have been convened under subsection (e). In considering an application for such transfer, the court shall take into consideration all the relevant circumstances, including the distance of the grand jury investigation from the places of residence of witnesses who have been subpenaed to testify before the grand jury, financial and other burdens placed upon the witnesses, and the existence and nature of related investigations and court proceedings, if any.

"(2) Once a grand jury has failed to return an indictment based on a transaction, set of transactions, event, or events, a grand jury inquiry into the same transactions or events shall not be initiated unless the court finds, upon a proper showing by the attorney for the Government, that the Government has discovered additional evidence relevant to such inquiry.

"(g) (1) A complete and accurate stenographic record of all grand jury proceedings shall be kept, except that the grand jury's secret deliberations shall not be recorded. Such record shall include the court's notice to the grand jury of

its rights and duties including but not limited to those set forth in section 3329 of this title; all introductory comments, directives, and other utterances made by attorneys for the Government to the grand jury, witnesses, and counsel for witnesses; all testimony; and all interchanges between the grand jury and attorneys and those between attorneys for the Government and counsel for witnesses. Consultations between witnesses and their counsel shall not be recorded.

"(2) Any witness who testifies before a grand jury, or his attorney with such witness' written approval, shall, upon request, be entitled to examine and copy a transcript of the record for the period of such witness' own appearance before the grand jury, and if a witness is proceeding in forma pauperis, he shall be furnished, upon request, a copy of such transcript. Such transcript of such proceedings shall be available for inspection and copying not later than forty-eight hours following conclusion of such testimony.

"(h) Any witness summoned to testify before a grand jury, or the attorney for such witness with the witness' written approval, shall be entitled, prior to testifying, to examine and copy any statement in the possession of the United States which such said witness had made and which relates to the subject matter under inquiry by the grand jury. The term 'statement' as used in this subsection shall be defined as in section 3500(e) of this title.

"(i) No person subpenaed to testify or to produce books papers, documents, or other objects in any proceeding before any grand jury of the United States shall be required to testify or to produce such objects, or be confined pursuant to section 1826 of title 28, United States Code, for his failure to so testify or produce such objects, if, upon an evidentiary hearing before the court which issued such subpena or a court having jurisdiction under subsection (k) of this section, the court finds that—

"(1) a primary purpose or effect in requiring such person to so testify or to produce such objects to the grand jury is or will be to secure for trial testimony or other information regarding the activities of any person who is already under indictment by the United States, a State, or any subdivision thereof for such activities; or of any person who is under formal accusation for such activities by any State or any subdivision thereof, where the accusation is by some form other than indictment. When a witness refuses to so testify or to produce such objects before the grand jury on the ground that the purpose of requiring his testimony or the production of papers, documents, or other objects or questions put to him is in violation of this subsection, the Government must establish by a preponderance of the

evidence that its inquiry is independent of such pre-existing indictment or accusation,

"(2) compliance with the subpena would be unreasonable or oppressive because (i) such compliance would involve unnecessary appearances by the witness; (ii) the only testimony that can reasonably be expected from the witness is cumulative, unnecessary, or privileged; (iii) other like circumstances,

"(3) a primary purpose of the issuance of the subpena is punitive,

"(4) the witness has already been confined pursuant to section 1826 of title 28, United States Code, for his refusal to testify before any grand jury investigating the same transaction, set of transactions, event, or events, or

"(5) the witness has not been advised of his rights as specified in subsection (b).

"(j) The district court out of which a subpena to appear before a grand jury has been issued, the court in which the subpena was served, and the district court in the district in which a witness resides shall have concurrent jurisdiction over any motion made by a witness to quash a subpena or for other relief under provisions of this section.

A motion under this section may be made at any time prior to, during, or when appropriate, subsequent to the appearance of any witness before the grand jury. Any motion made during or subsequent to the appearance of the witness before the grand jury may be made only in the district in which the grand jury is impaneled. If the motion is made before or during the appearance of the moving party before a grand jury, the appearance before the grand jury shall be stayed by the making of the motion until the court before which the motion is pending rules on the motion.

"(k) A grand jury may indict a person for an offense when (1) the evidence before it is legally sufficient to establish that such offense was committed, and (2) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense.

"(l) Any person may approach the court and request permission to testify in an inquiry before a grand jury, or to appear before a grand jury and request that it proceed in accordance with its powers under section 3330 of this chapter. Such person shall be permitted to testify in such inquiry being conducted by, or appear before, a grand jury, unless the court finds that such testimony or appearance would serve no relevant purpose."

(b) The table of sections for chapter 215 of title 18 of the United States Code is amended by adding at the end thereof the following new items:

"3329. Notice to grand jury of its rights and duties.
"3330. Independent grand jury inquiry.
"3330A. Certain rights of grand jury witnesses.".

SEC. 5. (a) Section 3361 of title 18, United States Code, is amended to read as follows:

"§ 3361. Requirements for indictment

"The district court before which a grand jury is impaneled shall dismiss any indictment of the grand jury if it finds that—

"(1) the evidence before the grand jury was insufficient to establish that such offense was committed;

"(2) there was not competent and admissible evidence introduced before the grand jury such as provides reasonable cause to believe that the person indicted committed such offense; or

"(3) the attorney for the Government has not presented to the grand jury all exculpatory evidence in his possession with respect to the person indicted."

(b) The item relating to section 3361 in the table of sections for chapter 217 of title 18 is amended to read as follows:

"3361. Requirements for indictment.".

SEC. 6. Section 6001 of title 18, United States Code,

is amended by striking out paragraph (4), and by striking out "; and" at the end of paragraph (3) and inserting in lieu thereof a period.

SEC. 7. Section 6002 of title 18, United States Code, is amended to read as follows:

"§ 6002. Immunity generally

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) an agency of the United States, or

"(2) either House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; and such witness shall not be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) be used against the witness in any criminal case, except a prosecu-

tion for perjury, giving a false statement, or otherwise failing to comply with the order."

SEC. 8. Section 6003 of title 18, United States Code, is repealed.

SEC. 9. (a) Part V of title 18, United States Code, is amended by adding at the end of such part the following new section:

"§ 6006. Reports concerning grand jury investigations

"In January of each year, the Attorney General or an Assistant Attorney General specially designated by the Attorney General shall report to the Congress and to the Administrative Office of the United States Courts—

"(1) the number of investigations undertaken during the preceding year in which a grand jury or a special grand jury was utilized together with a description of the nature of each investigation undertaken;

"(2) the number of requests by United States grand juries to the Department of Justice and witnesses for approval to make application to the court for an order compelling testimony under section 2514 of this title, and the number of such requests approved by the Department of Justice;

"(3) the number of applications to district courts for orders granting immunity under this title;

"(4) the number of applications to district courts for orders granting immunity under this title that were approved and the nature of the investigations for which the orders were sought;

"(5) the number of instances in which witnesses in such investigations were held in contempt and confined, and the dates and lengths of such confinement;

"(6) the number of arrests, indictments, no-bills, trials, and convictions resulting from testimony obtained under orders granting immunity; the offenses for which the convictions were obtained; and a general assessment of the importance of the immunity;

"(7) a description of data banks and other procedures by which grand jury information is processed, stored, and used by the Department of Justice; and

"(8) other appropriate indicia and information concerning grand jury activity during such year.

The matter contained in the report required to be made by this section shall be set forth according to judicial district.".

(b) The table of sections for part V of title 18 of the United States Code is amended by adding at the end the following new item:

"6006. Reports concerning grand jury investigations.".

95TH CONGRESS
1ST SESSION

H. R. 3150

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 7, 1977

Mr. EILBERG (for himself, Mr. BURKE of Florida, Mr. CLAY, Mr. HAWKINS, Mr. BADILLO, Mr. MICHAEL O. MYERS, Mr. ROSENTHAL, Mr. WEISS, Mr. CONTE, Mr. RYAN, Mr. LEDERER, and Mr. FISH) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To establish certain rules with respect to the appearance of witnesses before grand juries in order to better protect the rights and liberties of such witnesses, to require notice to a grand jury of its rights and duties, to provide for independent inquiries by grand juries, to require periodic reports to Congress, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Grand Jury Reform Act of 1977".

RECALCITRANT WITNESSES

SEC. 2. (a) Section 1826 of title 28, United States Code, is amended to read as follows:

"§ 1826. Recalcitrant witnesses

"(a) (1) 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 attorney for the Government may apply to the court for an order directing the witness to show cause why the witness should not be held in contempt.

"(2) After submission of such application, and a hearing, at which the witness is entitled to be represented by counsel, the court may, upon a finding that such refusal was without just cause, hold the witness in contempt and order the witness to be confined.

"(3) No hearing under this subsection shall be held unless seventy-two hours' notice is given to the witness who has refused to comply with the court order, except that a witness may be given a shorter notice if the court, upon a showing of special need, so orders.

"(b) (1) Any confinement shall be at a suitable Federal correctional institution, if one is located within fifty miles of the court ordering confinement, unless the witness waives

this right. Upon a showing of need or hardship, the court ordering confinement may grant a request by the witness to be imprisoned at a suitable correctional institution near the place of residence or employment of the witness, or the witness' family or relatives or the attorney of the witness.

"(2) Any confinement for refusal to comply with an order to testify or produce other information shall continue 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 the court proceeding, or the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, and in no event shall such confinement exceed six months.

"(3) No person confined under this section for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events, may be again confined under this section, or under section 401 of title 18, United States Code, for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events.

"(c) Any person confined pursuant to this section shall be admitted to bail or released in accordance with the provisions of chapter 27 of title 18, United States Code, pending the determination of an appeal taken by him from the order of his confinement unless it affirmatively appears that

the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, pursuant to an expedited schedule, and in no event more than thirty days from the filing of such appeal.

"(d) In any proceeding conducted under this section, including all necessary appeals, counsel shall be appointed as provided in section 3006A of title 18, United States Code, for any person unable to obtain adequate representation.".

(b) Section 2515 of title 18, United States Code is amended by adding at the end thereof the following new sentence: "Any violation of this chapter shall be a defense in any action brought against a witness under section 401 of title 18, United States Code, or section 1826 of title 28, United States Code, if the interrogation or other request for information is based on or is directly or indirectly derived from such violation".

(c) Chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"**§ 403. Grand jury proceedings**

"No person who has been imprisoned or fined by a court of the United States under section 401 of this title for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events in a

proceeding before a grand jury (including a special grand jury summoned under section 3331 of this title) impaneled before any district court of the United States may again be imprisoned or fined under section 401 of this title or under section 1826 of title 28, United States Code, for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events."

WITNESS IMMUNITY

SEC. 3. (a) Section 6002 and 6003, title 18, United States Code, are amended to read as follows:

"§ 6002. **Immunity generally**

"(a) Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) a court or grand jury of the United States,

"(2) an agency of the United States, or

"(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but the witness shall not be prosecuted or subject to any penalty or forfeiture for

or on account of any transaction, matter, or thing concerning which he is compelled under the order to testify or produce evidence, except that he shall not be exempt from prosecution and punishment for perjury committed in so testifying, for giving a false statement, or for otherwise failing to comply with the order.

"(b) No order under this part shall require any witness to testify or provide other information prior to the day one week after the day on which such order was communicated to the witness, except that a witness may be required to testify or produce such information prior to such day if the court, upon a showing of special need, so orders.

"(c) Upon communication to the witness of any order under this part, the person presiding over the inquiry shall give the witness reasonable and adequate notice of the nature and scope of the immunity from criminal prosecution provided by this section, and of the right of the witness to be represented by counsel in any proceeding challenging such order or confinement or fines pursuant to such order, and that, if he is unable to obtain adequate representation, counsel will be furnished for him as provided in section 3006A, title 18, United States Code.

"§6003. Court and grand jury proceedings

"(a) In the case of any individual who has been or may be called to testify or provide other information at any pro-

ceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsections (b) to (d) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

"(b) In any proceeding under this section, the court shall not order any person to testify or provide information, if it finds that an individual is in danger of prosecution, or may be subjected to any penalty or forfeiture, by the government of any other country on account of any transaction, matter, or thing concerning which he may be ordered to testify or provide other information pursuant to an order under this part, unless the court also finds that such individual has been provided adequate safeguards to minimize such danger.

"(c) A United States district court may, at the request of the Attorney General, the Deputy Attorney General, any designated Assistant Attorney General, or a special attorney appointed under section 3330, issue an order under

subsection (a) of this section when it is established to the satisfaction of the court that—

"(1) in accordance with subsection (b) of this section, there is no danger of foreign prosecution or that adequate safeguards have been provided to minimize such danger;

"(2) the testimony or other information from such individual may be necessary to the public interest;

"(3) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination; and

"(4) with respect to an individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a grand jury—

"(A) the investigation being conducted by the grand jury is authorized by law and the application for the order is in accord with existing guidelines or other practice of the Department of Justice;

"(B) the testimony or other information sought to be obtained is within the scope of the investigation and is relevant thereto;

"(C) the testimony or other information sought to be obtained is relevant to the subject matter of the immunity order;

"(D) a grant of immunity under this part

would be adequate for the purposes of the investigation; and

"(E) a summary of the evidence relating to the witness has been certified and submitted to the court.

"(d) Any individual required to give testimony or provide other information pursuant to an order issued under subsection (a) may not be indicted for any offense by the grand jury before which such individual testifies pursuant to such order.".

(b) Subsection (c) of section 6005 of such title is hereby repealed.

(c) No amendment or repeal of any provision of law made by this section shall affect any immunity, or the scope of any immunity, to which any individual is entitled under such provision by reason of any testimony or other information given before the sixtieth day following the date of the enactment of this Act.

SIZE OF GRAND JURIES

SEC. 4. Section 3321, title 18, United States Code, is amended to read as follows:

"**§ 3321. Number of grand jurors; summoning additional jurors; return of indictment**

"(a) Every grand jury impaneled before any district court shall consist of not less than nine nor more than fifteen persons. If less than nine of the persons summoned attend,

they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. Whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose.

"(b) An indictment may be found only if at least nine jurors are present and two-thirds of those present concur."

UNAUTHORIZED DISCLOSURE OF GRAND JURY INFORMATION

SEC. 5. Chapter 73 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 1512. Violations of grand jury secrecy

"(a) Whoever knowingly discloses any evidence introduced, statement made, or other matter occurring before, any grand jury summoned or impaneled by a court of the United States shall be fined not more than $500 or imprisoned not more than six months or both.

"(b) Whoever knowingly discloses any evidence introduced, statement made, or other matter occurring before, any grand jury summoned or impaneled by a court of the

United States, with the intent to secure compensation therefore, to effect the actions of or any decisions by that jury, to effect further legal proceedings against any witness, or to effect further legal proceedings as to the subject matter of any investigation by that jury, shall be fined not more than $20,000 or imprisoned not more than five years, or both,

"(c) This section shall not apply to—

"(1) disclosure to or by an attorney for the Government in the performance of his duties;

"(2) disclosure directed or permitted by a court; or

"(3) disclosure by a witness who has appeared before such grand jury, or by his attorney, of any matter concerning which the witness has testified, or produced other information, before the grand jury.

"(d) Subsection (a) shall not apply to disclosure by any person other than a person present at the grand jury proceeding.

"(e) Subsection (b) shall not apply to any representative of the press, broadcasting, or information media, acting in his professional capacity.

"(f) As used in this section—

"(1) 'attorney for the Government' includes the Attorney General, an authorized assistant of the Attorney General, a United States attorney, an authorized assistant of a United States attorney, and such other

Government personnel as are necessary to assist the attorneys for the Government in the performance of their duties.

"(2) 'disclosure by a witness' includes disclosure by others of matter the witness has previously disclosed when made as a consequence of such disclosure by the witness.

"(g) Nothing contained in this section shall be construed to affect the power of the court to punish any person for contempt for violation of any rule or order of the court.".

RIGHTS AND DUTIES OF GRAND JURORS; INDEPENDENT INQUIRY

SEC. 6. (a) Chapter 215 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"§ 3329. Rights and duties of grand jury and attorney for Government

"(a) Upon impanelment of each grand jury before a district court of the United States, the court shall give adequate and reasonable notice to the grand jury, and shall assure that the grand jury reasonably understands—

"(1) its duty to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district;

"(2) its rights, authority, and powers with respect

to an independent inquiry under section 3330 of this title;

"(3) its right to call and interrogate witnesses;

"(4) its right to request the production of documents or other evidence;

"(5) the subject matter of the investigation;

"(6) the criminal statute or statutes involved, if these are known at the time the grand jury is impaneled;

"(7) the necessity of sufficient evidence to form the basis of any indictment;

"(8) the obligation of secrecy and that it is a criminal offense to disclose to any person any information concerning any grand jury proceeding; and

"(9) such other duties and rights as the court deems advisable.

"(b) (1) Any person, including a witness who has previously testified or produced books, records, or documents, may make a written request to the attorney for the Government, or a special attorney appointed pursuant to this title, and request to testify in an inquiry before a grand jury, or to produce books, records, or documents, or to appear before a grand jury and request that the grand jury proceed in accordance with its powers under section 3330 of this title.

"(2) The attorney for the Government, or the special attorney—

"(A) shall forward any request under this subsection to the grand jury and may make a recommendation as to such request;

"(B) shall take reasonable steps to notify any person of his intention to present evidence against the person and request a presentment or indictment and of the person's right to testify or present evidence under this subsection and such notice shall be given a reasonable time in advance of any request for such presentment or indictment unless the attorney for the Government or the special attorney can prove to the satisfaction of the court that notice would result in the flight of the person, would endanger other witnesses, or would unduly delay the investigation and prosecution;

"(C) shall establish a public record of all requests and the action taken on each such request.

"(3) The grand jury shall not be required to hear any witness, or consider any book, record, or document, but shall consider all requests forwarded to it by the attorney for the Government or the special attorney. Unless the grand jury, upon an affirmative vote of a majority of its members, refuses to hear the testimony, or consider the documents offered by, a person, under this subsection, the attorney

for the Government or the special attorney shall subpena the evidence or witness offered. If the grand jury refuses to hear the testimony or consider the documents offered, the attorney for the Government or the special attorney shall notify the person making such request, in writing, of the refusal.

"(4) Upon appearing pursuant to a subpena, such person shall be permitted to testify, only upon submission of a waiver of immunity, as to relevant and competent matters under consideration by the jury and shall be subject to examination by the attorney for the Government or the special attorney.

"(c) The attorney for the Government and the special attorney shall periodically advise the grand jury of the nature and existence of evidence, as yet not received, which might tend to materially affect the credibility of any witness or tend to negate the guilt of any prospective defendant.

"(d) The attorney for the Government and the special attorney shall not bring before the grand jury any witness who has given written notice in advance of the witness' appearance that such witness intends to exercise his privilege against self-incrimination, nor bring to the attention of the jurors, in any way, the invocation of the privilege by such witness, unless such witness has been given a grant of immunity.

"(e) The attorney for the Government or a special at-

torney shall not initiate, and a grand jury shall not conduct, an inquiry into a transaction or transactions, event or events, if another jury has failed to return an indictment based on the same transaction or transactions, event or events, unless the court finds, upon a proper showing, that additional evidence relevant to such inquiry has been discovered.

"**§ 3330. Independent grand jury inquiry**

"(a) (1) Any grand jury impaneled before any district court (including a special grand jury summoned under section 3331) may, after giving notice to the court, inquire upon its own initiative into offenses against the criminal laws of the United States alleged to have been committed within that district. Such grand jury shall, except as provided in this section, request the attorney for the Government to assist such grand jury in such inquiry.

"(2) The grand jury shall serve for a term of eighteen months after giving notice to the court under paragraph (1) unless an order for its discharge is entered earlier by the court. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No grand jury term so extended shall exceed thirty-six months from the date on which notice to the court was given under paragraph (1).

"(3) If a district court within any judicial circuit fails to extend the term of a grand jury engaged upon an independent inquiry under this section or enters an order for the discharge of such grand jury, the grand jury, upon an affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the grand jury. Upon the making of such an application by the grand jury, the grand jury shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order. No grand jury term so extended shall exceed thirty-six months.

"(b) (1) In the event that the attorney for the Government is unable to impartially assist, refuses to assist, or hinders or impedes the grand jury in the conduct of any inquiry under subsection (a), the grand jury may, upon the affirmative vote of a majority of its members, request at any point in such inquiry that the court appoint a special attorney, in lieu of the attorney for the Government, to assist the jury in the conduct of any independent inquiry referred to in subsection (a).

"(2) The special attorney appointed under this section may, with the approval of the court, appoint and fix the compensation of such assistants, investigators, and other personnel as he deems necessary. The special attorney and his appointees shall be appointed without regard to the provi-

sions of title 5 governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that the special attorney and any appointee shall be paid at a reasonable rate to be determined by the court. The special attorney shall be reimbursed for actual expenses incurred by him and his appointees in the performance of duties pursuant to this section.

"(3) Notwithstanding sections 516, 518, and 519 of title 28 or any other provision of law, a special attorney appointed under this section shall carry out the functions of an attorney for the Government and shall have the exclusive authority to—

"(A) assist in the conduct of independent grand jury investigations under this section,

"(B) prepare and sign any indictment returned by a grand jury pursuant to such inquiry in lieu of any attorney for the Government, and

"(C) conduct all other phases of any criminal prosecution arising out of such inquiry (including the argument of appeals in the United States courts of appeals and the United States Supreme Court).

"(4) A special attorney appointed under this section is authorized to obtain from any department or agency of the

United States any files, records, documents, or other materials which he deems necessary or appropriate in the carrying out of his functions under this section.".

(b) The Administrator of General Services shall furnish offices, equipment, supplies, and services to a special attorney appointed under section 3330 of title 18, United States Code, in the same manner as such items are furnished to agencies and departments of the United States.

(c) Section 524 of chapter 31 of title 28, United States Code (relating to appropriations for administrative expenses), is amended by adding at the end thereof the following new sentence: "Such appropriations shall also be available for payment of the compensation and other expenses of the special attorney appointed under section 3329 of title 18 to assist a grand jury in the conduct of an independent investigation.".

RIGHTS OF GRAND JURY WITNESSES

SEC. 7. (a) Chapter 215 of title 18, United States Code, is further amended by adding at the end thereof, the following new sections:

"§ 3330A. Counsel

"(a) Every witness subpenaed to appear and testify before a grand jury impaneled before a district court or to produce books, papers, documents, or other objects before such grand jury shall be entitled to the assistance of counsel,

including assistance during such time as the witness is questioned in the grand jury room.

"(b) Such counsel may be retained by the witness or shall be appointed as provided in section 3006A of this title in the case of any person financially unable to obtain legal representation. Notwithstanding any rule contained in the Federal Rules of Criminal Procedure, such witness' counsel is authorized to disclose matters which occur before the grand jury while such counsel is in the grand jury room.

"(c) Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in proceedings before the grand jury.

"(d) The court shall have the power to remove such attorney, and order the witness to obtain new counsel, when it finds that the attorney has violated subsection (c) of this section or that such removal and replacement is necessary to insure that the activities of a grand jury are not unduly delayed or impeded. Nothing in this subsection shall affect the power of the court to punish for contempt or impose other appropriate sanctions.

"§ 3330B. Subpenas

"(a) In the case of any proceeding before a grand jury impaneled before a district court, except where the court

finds special need upon a showing by the attorney for the Government or a special attorney appointed under this title, or the consent of the witness, no subpena may require any witness to testify or produce other information at such proceeding at any time before the expiration of the one-week period beginning on the date of service of the subpena.

"(b) Upon the service of any subpena requiring any witness to testify or produce other information at any proceeding before a grand jury impaneled before a district court, the witness shall be given adequate and reasonable notice of—

"(1) his right to counsel as provided in section 3330A of this title;

"(2) his privilege against self-incrimination;

"(3) the subject matter of the grand jury investigation;

"(4) whether his own conduct is under investigation by the grand jury;

"(5) the substantive criminal statute or statutes, violation of which is under consideration by the grand jury, if these are known at the time of issuance of the subpena; and

"(6) any other rights and privileges which the court deems necessary or appropriate.

"(c) (1) The district court which issued a subpena, or the district court for the district in which the person resides or is served shall have concurrent jurisdiction to hear, and take appropriate action with respect to any motion relating to, including any motion to quash, such subpena.

"(2) A motion relating to a subpena may be made at any time prior to, during, or when appropriate, subsequent to the appearance of any witness before a grand jury. Any motion made during or subsequent to the appearance of the witness before the grand jury may be made only in the district in which the grand jury is impaneled.

"(3) If a motion is made under this section before the day on which the person subpenaed has been ordered to appear or books, records, or documents have been ordered to be produced, the appearance of such person, or the production of such documents, shall, upon appropriate application, be stayed until the court has ruled on such motion.

"(d) (1) Upon proper motion, the attorney for the Government, or a special attorney appointed under this title, shall make a showing that—

"(A) a primary purpose or effect of requiring such person to so testify or to produce such objects to the grand jury is not or will not be to secure for trial testimony or to secure other information regarding the activities of any person who is already under indictment by

the United States, a State, or any subdivision thereof for such activities; or of any person who is under formal accusation for such activities by any State or any subdivision thereof, where the accusation is by some form other than indictment;

"(B) the witness has been advised of his rights, as specified in subsection (b);

"(C) the evidence sought is relevant to the grand jury investigation properly conducted within the grand jury's jurisdiction;

"(D) compliance with the subpena would not be unreasonable or oppressive, as such subpena would not require unnecessary appearances by the witness, would not lead to testimony or other information that is cumulative, unnecessary or privileged, would not be primarily for punitive purposes or would not involve other like circumstances; and

"(E) such other information as the court deems advisable.

"(2) The court may impose appropriate sanctions, including the quashing of such subpena to secure compliance with this subsection.

"(e) Upon proper motion, the court shall quash a subpena and take other appropriate sanctions when it finds that—

"(1) the witness has already been confined, imprisoned, or fined under section 1826 of title 28, United States Code, or section 401 of this title for his refusal to testify before any grand jury investigating the same transaction, set of transactions, event, or events;

"(2) the witness has given written notice that such witness intends to exercise his privilege against self-incrimination, unless a grant of immunity has been obtained; or

"(3) the grand jury is inquiring into the same transaction or transactions, event or events, that was under consideration by another grand jury which failed to return an indictment based on such transaction or event and there is no additional, newly discovered evidence relevant to such inquiry.

"(f) (1) A grand jury impaneled to conduct an inquiry into offenses against the criminal laws of the United States may be convened only in a district, or districts, in which it is believed criminal conduct may have occurred which are elements of such offenses.

"(2) The district court may quash a subpena or transfer any grand jury proceedings or investigation into any other district where it might properly have been convened if the court finds that a witness' appearance would impose a substantial and unnecessary hardship on such witness or his

family because of the location of the proceeding. In considering whether such hardship exists, the court shall take into consideration all the relevant circumstances, including the distance of the grand jury investigation from the places of residence of witnesses who have been subpenaed, financial and other burdens placed upon the witnesses, and the existence and nature of any related investigations and court proceedings.".

(b) Section 3006A (a) of title 18, United States Code (relating to appointment of attorneys), is amended—

(1) by striking out "or," before "(4)" in the first sentence thereof; and

(2) by inserting before the period at the end of the first sentence thereof: ", or (5) who is a witness before a grand jury impaneled before the district court".

RECORDING, TRANSCRIBING AND AVAILABILITY OF GRAND JURY PROCEEDINGS

SEC. 8. (a) Chapter 215 of title 18, United States Code, is further amended by adding at the end thereof the following new sections:

"**§ 3333. Recording of grand jury proceedings**

"A complete and accurate stenographic or electronic record of all grand jury proceedings shall be kept, except that the grand jury's secret deliberations and consultations between witnesses and their counsel shall not be recorded.

Such record shall include the court's notice to the grand jury of its rights and duties and all other comments or charges by the court to the jury at any time; all introductory comment, or other comments, directives, and other utterances made by attorneys for the government or special attorneys to the grand jury, witnesses and their counsels; all questioning of and testimony of witnesses; all interchanges between the grand jury and attorneys.

"§ 3334. Availability of grand jury transcripts and other statements

"(a) Any person summoned to testify or provide other information before a grand jury impaneled before a district court shall be entitled, prior to testifying or providing other information, to examine and copy any statement in the possession of the United States which he has made and which relates to the subject matter under inquiry by the grand jury. Such examination and copying may be made by the attorney for such person if such person gives his written approval. As used in this subsection, the term 'statement' has the meaning provided by section 3500 (e).

"(b) Any witness who testifies before a grand jury, or his attorney with such witness' written approval, shall, upon request, and under such conditions as the court deems reasonable, be entitled to examine and copy a transcript or electronic recording of the record for the period of such

witness' own appearance before the grand jury, and if a witness is proceeding in forma pauperis, he shall be furnished, upon request, a copy of such transcript.

"(c) A reasonable time prior to trial, and after the return of an indictment or the filing of an information; a defendant shall, upon request and under such conditions and limitations as the court deems reasonable, be entitled to examine and copy a transcript or electronic recording of—

"(1) the grand jury testimony of all witnesses to be called at trial;

"(2) all statements to the grand jury by the court and the attorney for the Government or special attorney, relating to the defendant's case;

"(3) all grand jury testimony or evidence which in any manner could be considered exculpatory; and

"(4) all other grand jury testimony or evidence which the court may deem material to the defense.

"(d) Upon a showing of good cause, the court may, at any time, order that the disclosure of the recorded proceedings of a grand jury be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government, the court shall permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a

showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant."

(b) Section 3500, title 18, United States Code, is amended—

(1) by inserting "or" before subsection (e) (2) thereof;

(2) by deleting "; or" and inserting "." at the end of subsection (e) (2) thereof; and

(3) by deleting subsection (e) (3) thereof.

PRELIMINARY EXAMINATION

SEC. 9. Chapter 217 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 3368. **Preliminary examination**

"(a) A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court.

"(b) Such preliminary examination may be held prior to, or within a reasonable time following, the filing of an indictment or information in the district court.".

REPORTS CONCERNING GRAND JURY INVESTIGATIONS

SEC. 9. Section 522 of title 28, United States Code (relating to reports of business and statistics), is amended by striking out "The Attorney General" and inserting in lieu thereof "(a) The Attorney General" and by adding at the end thereof the following new subsection:

"(b) The Attorney General, at the beginning of each regular session of Congress, shall report to the Congress and to the Administrative Office of the United States Courts with respect to the last preceding fiscal year on—

"(1) the number of investigations undertaken in which a grand jury or a special grand jury was utilized together with a description of the nature of each investigation undertaken;

"(2) the number of requests by United States grand juries to the Attorney General for approval to apply to the court for an order compelling testimony under section 2003 of title 18, and the number of such requests approved by the Attorney General;

"(3) the number of applications to district courts for orders granting immunity under title 18;

"(4) the number of applications to district courts

for orders granting immunity under title 18 that were approved and the nature of the investigations for which the orders were sought;

"(5) the number of instances in which witnesses in the investigations enumerated in paragraph (1) were held in contempt and confined, and the dates and lengths of such confinement;

"(6) the number of arrests, indictments, no-bills, trials, and convictions resulting from testimony obtained under orders granting immunity, the offenses for which the convictions were obtained, and a general assessment of the importance of the immunity;

"(7) a description of data banks and other procedures by which grand jury information is processed, stored, and used by the Department of Justice; and

"(8) other appropriate information concerning grand jury activity during such year.

The matters contained in the report required to be made by this section shall be set forth according to judicial district.".

EFFECT ON OTHER LAWS AND RULES

SEC. 11. (a) The enumeration in this Act of any rights and privileges of grand jury witnesses shall not affect any other rights and privileges to which such witnesses may be entitled under any law or rule of law.

(b) Notwithstanding section 3771, no rule contained in the Federal Rules of Criminal Procedure shall apply to the extent that such rule is inconsistent with the provisions of this Act.

95TH CONGRESS
1ST SESSION

H. R. 3736

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 22, 1977

Mr. CONYERS (for himself, Mr. BROWN of California, Mr. ECKHARDT, Mr. MITCHELL of Maryland, Mr. STARK, Mr. ROSENTHAL, Mr. EDWARDS of California, Mr. CARR, Mr. BADILLO, Mr. FORD of Tennessee, Mr. STOKES, Mr. DOWNEY, Mr. HAWKINS, and Mr. MOAKLEY) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To establish certain rules with respect to the appearance of witnesses before grand juries in order better to protect the constitutional rights and liberties of such witnesses under the fourth, fifth, and sixth amendments to the Constitution, to provide for independent inquiries by grand juries, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Grand Jury Reform Act of 1977".

SEC. 2. Section 1826 of title 28, United States Code, is amended to read as follows:

"§ 1826. Recalcitrant witnesses

"(a) (1) Whenever a witness in any proceeding before any grand jury of the United States refuses without just cause shown to comply with an order of the court of the United States to testify or provide other information, including any book, paper, document, record, recording, or other material, the attorney for the Government may, only upon an affirmative vote of twelve or more members of the grand jury that such refusal was without just cause, submit an application to the court for an order directing the witness to show why the witness should not be held in contempt. After submission of such application and a hearing at which the witness may be represented by counsel, the court may, if the court finds that such refusal was without just cause, hold the witness in criminal contempt and order the witness to be imprisoned.

"(2) Any imprisonment for refusal to give testimony or provide information pursuant to this subsection shall be at a Federal correctional institution unless the witness agrees to confinement at a non-Federal institution designated by the Attorney General.

"(3) Upon a showing of need or hardship, the court ordering such imprisonment may grant a request by the witness to be imprisoned at a suitable correctional institution

near the place of residence or employment of the witness or the witness' family or relatives or the attorney of the witness,

"(4) Any imprisonment for refusal to give testimony or provide information pursuant to this subsection shall continue until such time as the witness is willing to give such testimony or provide such information except that no period of such imprisonment shall exceed the lesser of—

"(A) (i) in the case of a court proceeding, the life of the court proceeding before which such refusal to comply with the court order occurred, or

"(ii) in the case of a grand jury, the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred; or

"(B) six months.

"(5) No hearing shall be held under this subsection unless ten days' notice is given to the witness who has refused to comply with the court order under this subsection, except that a witness subpenaed for a trial may be given a shorter notice of not less than five days if the court, upon a showing of special need, so orders.

"(b) No person imprisoned under this section for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events may be again imprisoned under this section or under section 401

of title 18, United States Code, for a subsequent refusal to testify or provide other information concerning the same or any related transaction, set of transactions, event, or events.

"(c) Any person imprisoned pursuant to subsection (a) of this section shall be admitted to bail or released in accordance with the provisions of chapter 207 of title 18, United States Code, pending the determination of an appeal taken by such person from the order of imprisonment, unless the appeal is patently frivolous. If the person has not been released on bail or otherwise released, any appeal from an order of imprisonment under this section shall be disposed of as soon as practicable, pursuant to an expedited schedule, and in no event more than thirty days from the filing of such appeal. If the appellate court shall fail to dispose of the appeal of a person who remains imprisoned within thirty days, the person shall automatically be released on her or his personal recognizance pending disposition of the appeal.

"(d) In any proceeding conducted under this section, counsel may be appointed in the same manner as provided in section 3006A of title 18, United States Code, for any person financially unable to obtain adequate assistance.

"(e) A refusal to answer a question or provide other information before a grand jury of the United States shall not be punishable under this section or under section 401 of title 18, United States Code, if the question asked or the

request for other information is based in whole or in part upon evidence obtained by an unlawful act or in violation of the witness' constitutional rights or of rights established or protected by any statute of the United States.".

SEC. 3. (a) Chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 403. Refusal of a witness to testify in a grand jury proceeding

"No person who has been imprisoned or fined by a court of the United States under section 401 of this title for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events in a proceeding before a grand jury (including a special grand jury summoned under section 3331 of this title) impaneled before any district court of the United States may again be imprisoned or fined under section 401 of this title or under section 1826 of title 28, United States Code, for a subsequent refusal to testify or provide other information concerning the same or any related transaction, set of transactions, event, or events.".

(b) The table of sections for chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"403. Refusal of a witness to testify in a grand jury proceeding.".

SEC. 4. That portion of title 18, United States Code, following section 2513 and preceding section 2515 of such title is amended to read as follows:

"§ 2514. Immunity of witnesses

"(a) In any proceeding before a grand jury impaneled before a district court of the United States, the attorney for the Government may submit an application to the court for an order that a witness shall testify or produce books, papers, or other evidence subject to the provisions of this section only if—

"(1) there is an affirmative finding by twelve or more of the members of the grand jury that such testimony or the production of books, papers, or other evidence by the witness is necessary to the public interest;

"(2) the witness gives her or his written consent to such application; and

"(3) the Attorney General approves such application.

"(b) Whenever in the judgment of an attorney for the Government the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any court of the United States, is necessary to the public interest, such attorney for the Government, with the written consent of the witness, and upon

the approval of the Attorney General, shall make application to the court for an order granting the witness immunity so that the witness shall testify or produce evidence subject to the provisions of this section.

"(c) Pursuant to subsections (a) and (b) of this section, upon the court's order granting immunity, such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of such witness may tend to incriminate her or him or subject her or him to a penalty or forfeiture, and no such witness shall be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, or thing concerning which she or he is compelled, after having claimed her or his privilege against self-incrimination, to testify or produce evidence; nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against such witness in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.".

SEC. 5. (a) Chapter 215 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"§ 3229. Notice to grand jury of its rights and duties

"Upon impanelment of each grand jury before a district court of the United States, the court shall give adequate and reasonable written notice to the grand jury of, and shall assure that the grand jury reasonably understands the nature of—

"(1) its duty to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district;

"(2) its rights, authority, and powers with respect to an independent inquiry under section 3330 of this title;

"(3) its right to call and interrogate witnesses;

"(4) its right to request the production of documents or other evidence;

"(5) (A) the subject matter of the investigation, and

"(B) the criminal statute or statutes involved, if these are known at the time the grand jury is impaneled;

"(6) the requirement of section 3330A of this title that a subpena summoning a witness to appear and testify before a grand jury or to produce books, papers, documents, or other objects before the grand jury may be issued only upon an affirmative vote of twelve or

more members of the grand jury to which the subpena is returnable;

"(7) the authority of the grand jury under section 2514 of this title to determine by an affirmative vote of twelve or more of its members that the attorney for the Government may submit an application to the court for a grant of immunity to a witness;

"(8) the authority of the grand jury to determine by an affirmative vote of twelve or more of its members that the attorney for the Government may submit an application to the court for an order directing a witness to show cause why she or he should not be held in contempt under section 1826 of title 28, United States Code;

"(9) the necessity of legally sufficient evidence to form the basis of any indictment as provided under section 3330A (1) of this title;

"(10) the duty of the grand jury by an affirmative vote of twelve or more members of the grand jury to determine, based on the evidence presented before it, whether or not there are sufficient grounds for issuing indictments and to determine the violations to be included in any such indictments; and

"(11) such other duties and rights as the court deems advisable.

The court's failure to instruct the grand jury as directed in this section shall be just cause within the meaning of section 1826 of title 28, United States Code, for a witness' refusal to testify or provide other information before such grand jury. Any person indicted by a grand jury that has not been instructed in accordance with these provisions shall be entitled to a dismissal of any indictment by such grand jury, and of any indictment issued by any other grand jury if such other indictment is based on the same or any related transactions, set of transactions, event, or events.

"§ 3329A. Certain duties of the attorney for the Government or the special attorney

"(a) The attorney for the Government, or the special attorney—

"(1) shall forward any request under this subsection to the grand jury and may make a recommendation as to such request;

"(2) shall take reasonable steps to notify any person of her or his intention to present evidence against the person and request a presentment or indictment and of the person's right to testify or present evidence under this subsection and such notice shall be given a reasonable time in advance of any request for such presentment

or indictment unless the attorney for the Government or the special attorney can prove to the satisfaction of the court that notice would result in the flight of the person, would endanger other witnesses, or would unduly delay the investigation and prosecution;

"(3) shall establish a public record of all requests and the action taken on each such request.

"(b) The grand jury shall not be required to hear any witness, or consider any book, record, or document, but shall consider all requests forwarded to it by the attorney for the Government or the special attorney. Unless the grand jury, upon an affirmative vote of a majority of its members, refuses to hear the testimony of, or consider the documents offered by, a person, under this subsection, the attorney for the Government or the special attorney shall subpena the evidence or witness offered. If the grand jury refuses to hear the testimony or consider the documents offered, the attorney for the Government or the special attorney shall notify the person making such request, in writing, of the refusal.

"(c) Upon appearing pursuant to a subpena, such person shall be permitted to testify, only upon submission of a waiver of immunity, as to relevant and competent matters under consideration by the jury and shall be subject to examination by the attorney for the Government or the special attorney.

"(d) The attorney for the Government and the special attorney shall periodically advise the grand jury of the nature and existence of evidence, as yet not received, which might tend to materially affect the credibility of any witness or tend to negate the guilt of any prospective defendant.

"(e) The attorney for the Government and the special attorney shall not bring before the grand jury any witness who has given written notice in advance of the witness appearance that such witness intends to exercise her or his privilege against self-incrimination, nor bring to the attention of the jurors, in any way, the invocation of the privilege by such witness, unless such witness has been given a grant of immunity.

"(f) The attorney for the Government or a special attorney shall not initiate, and a grand jury shall not conduct an inquiry into a transaction or transactions, events or events, if another jury has failed to return an indictment based on the same or any related transaction or transactions, event or events, unless the court finds, upon a proper showing, that additional evidence relevant to such inquiry has been discovered.

"**§ 3330. Independent grand jury inquiry**

"(a) (1) Any grand jury (including a special grand jury summoned under section 3331 of this title) impaneled before any district court of the United States may, upon its

own initiative and after giving notice to the court, inquire into offenses against the criminal laws of the United States alleged to have been committed within that district by any officer or agent of the United States or of any State or municipal government or by a person who, at the time of the alleged commission of the offense, was an officer or agent of the United States or of any State or municipal government. Such grand jury may request the attorney for the Government to assist such grand jury in such inquiry.

"(2) The grand jury shall serve for a term of twelve months after giving notice to the court under paragraph (1) unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by an affirmative vote of twelve or more members that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No grand jury term so extended shall exceed twenty-four months from the date on which notice to the court was given under paragraph (1).

"(3) If a district court within any judicial circuit fails to extend the term of a grand jury engaged upon an independent inquiry under this section or enters an order for the discharge of such grand jury before such grand jury

determines that it has completed its business, the grand jury by an affirmative vote of twelve or more members may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry by the chief judge of the circuit of an appropriate order upon such application. No grand jury term so extended shall exceed twenty-four months. The grand jury may, upon the affirmative vote of twelve or more of its members, request at any point in such inquiry that the court appoint a special attorney to assist the grand jury in such inquiry. Such special attorney shall serve in lieu of any attorney for the Government and shall be paid at the rate of $100 per day. Such special attorney, with the approval of the court, may appoint and fix the compensation of such assistants, investigators, and other personnel as she or he deems necessary. The special attorney and her or his appointees shall be appointed without regard to the provisions of title 5 of the United States Code, governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and general schedule pay rates. Any appointee under this subsection shall receive pay at a rate not to exceed $100 per day for each day during which she or he is engaged in the performance of her

or his duties under this section. The special attorney shall be reimbursed for actual expenses incurred by her or him and her or his appointees in the performance of duties pursuant to this section.

"(2) Notwithstanding sections 516 and 519 of title 28 of the United States Code or any other provisions of law, a special attorney appointed under this section shall have the exclusive authority to assist in the conduct of an independent grand jury investigation under this section, and any indictment returned by a grand jury pursuant to such inquiry shall be signed by the special attorney in lieu of any attorney for the Government.

"§ 3330A. Certain rights of grand jury witnesses

"(a) A subpena summoning a witness to appear and testify before a grand jury of the United States, or to produce books, papers, documents, or other objects before such grand jury, shall be issued only upon an affirmative vote of twelve or more members of the grand jury, and such subpena may not be returnable on less than seven days' notice, except with the express consent of the witness or upon a showing to the court by the attorney for the Government that good cause exists why the subpena should be returned in less than seven days.

"(b) Any subpena summoning a witness to appear before a grand jury shall advise the witness of (1) her or

his right to counsel as provided in subsection (c) of this section; (2) her or his privilege against self-incrimination; (3) whether such witness' own conduct is under investigation by the grand jury; (4) the subject matter of the grand jury investigation; (5) the substantive criminal statute or statutes, violation of which is under consideration by the grand jury; and (6) any other rights and privileges which the court deems necessary and appropriate.

"(c) Any witness who is not advised of her or his rights pursuant to subsection (b) shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which she or he testifies or any evidence she or he produces, nor shall any such testimony or evidence be used as evidence in any criminal proceeding against her or him in any court.

"(d) In any proceeding before the grand jury, if the attorney for the Government has written notice in advance of the appearance of a witness that such witness intends to exercise her or his privilege against self-incrimination, such witness shall not be compelled to appear before the grand jury unless a grant of immunity has been obtained.

"(e) Any witness subpenaed to appear and testify before a grand jury or to produce books, papers, documents, or other objects before such grand jury shall be entitled to assistance of counsel during any time that such witness is being

questioned in the presence of such grand jury; such counsel may be retained by the witness or, may, for any person financially unable to obtain adequate assistance, be appointed in the same manner as if that person were eligible for appointed counsel under section 3006A of this title. Notwithstanding any rule contained in the Federal Rules of Criminal Procedure, such witness' counsel is authorized to disclose matters which occur before the grand jury while such counsel is in the grand jury room.

"(f) A grand jury impaneled to conduct an inquiry into offenses against the criminal laws of the United States may be convened only in a district in which substantive criminal conduct may have occurred as elements of such offenses; except that when a grand jury is to be convened to conduct an inquiry into both violations of substantive criminal statutes and violations of statutes forbidding conspiracy to violate substantive criminal statutes, the grand jury may not be convened before a district court in a district in which the only criminal conduct alleged to have occurred is conspiracy to commit the substantive criminal act.

"(g) For the convenience of witnesses and where the interests of justice so require, a district court may, on motion of a witness, transfer any grand jury proceedings or investigation into any other district where it might properly have been convened under subsection (f). In considering

an application for such transfer, the court shall take into consideration all the relevant circumstances, including the distance of the grand jury investigation from the places of residence of witnesses who have been subpenaed to testify before the grand jury, financial and other burdens placed upon the witnesses, and the existence and nature of related investigations and court proceedings, if any.

"(h) Once a grand jury has failed to return an indictment based on a transaction, set of transactions, event, or events, a grand jury inquiry into the same or any related transactions or events shall not be initiated unless the court finds, upon a proper showing by the attorney for the Government, that the Government has discovered additional evidence relevant to such inquiry.

"(i) (1) A complete and accurate stenographic record of all grand jury proceedings shall be kept, except that the grand jury's secret deliberations shall not be recorded. Such record shall include the court's notice to the grand jury of its rights and duties including but not limited to those set forth in section 3329 of this title; all introductory comments, directives, and other utterances made by attorneys for the Government to the grand jury, witnesses, and counsel for witnesses; all testimony; and all interchanges between the grand jury and attorneys and those between attorneys for the Gov-

ernment and counsel for witnesses. Consultations between witnesses and their counsel shall not be recorded.

"(2) Any witness who testifies before a grand jury, or his or her attorney with such witness' written approval, shall, upon request, be entitled to examine and copy a transcript of the record for the period of such witness' own appearance before the grand jury, and if a witness is proceeding in forma pauperis, she or he shall be furnished, upon request, a copy of such transcript. Such transcript shall be available for inspection and copying not later than forty-eight hours after the conclusion of such witness' testimony, unless, for cause shown, more time is required to prepare such transcript. After examination of such transcript, a witness may request permission to appear before the grand jury again to explain his testimony. Additional testimony given under this subsection shall become part of the official transcript and shall be shown to the members of the grand jury.

"(j) Any witness summoned to testify before a grand jury or the attorney for such witness with the witness' written approval shall be entitled, prior to testifying, to examine and copy any statement in the possession of the United States which such witness has made and which relates to the subject matter under inquiry by the grand jury. The term 'statement'

as used in this subsection shall be defined as in section 3500 (e) of this title.

"(k) No person subpenaed to testify or to produce books, papers, documents, or other objects in any proceeding before any grand jury of the United States shall be required to testify or to produce such objects, or be confined pursuant to section 1826 of title 28, United States Code, for her or his failure to so testify or produce such objects, if, upon the evidentiary hearing before the court which issued such subpena or a court having jurisdiction under subsection (l) of this section, the court finds that—

"(1) a primary purpose or effect of requiring such person to so testify or to produce such objects to the grand jury is or will be to secure for trial testimony or to secure other information regarding the activities of any person who is already under indictment by the United States, a State, or any subdivision thereof for such activities; or of any person who is under formal accusation for such activities by any State or any subdivision thereof, where the accusation is by some form other than indictment; unless, after a witness refuses to so testify or to produce such objects before the grand jury on the ground that the purpose or effect of requiring his testimony or the production of such objects is in violation of this clause, the Government establishes by a

preponderance of the evidence that its inquiry is independent of such preexisting indictment or accusation,

"(2) compliance with the subpena would be unreasonable or oppressive because (i) such compliance would involve unnecessary appearances by the witness; (ii) the only testimony that can reasonably be expected from the witness is cumulative, unnecessary or privileged; (iii) the impairment or disparagement of the right of any person to counsel of her or his choice or of other lawful confidential relationship which would result from compelling the witness' testimony would outweigh the value of that testimony, even though no privilege exists; or (iv) other like circumstances,

"(3) a primary purpose of the issuance of the subpena is to harass the witness,

"(4) the witness has already been confined, imprisoned, or fined under section 1826 of title 28, United States Code, or section 401 of this title for her or his refusal to testify concerning the same or any related transaction, set of transactions, event, or events,

"(5) the witness has given written notice that such witness intends to exercise her or his privilege against self-incrimination, unless a grant of immunity has been obtained, or

"(6) the witness has not been advised of her or his rights as specified in subsection (b).

"(l) The district court out of which a subpena to appear before a grand jury has been issued, the court in which the subpena was served, and the district court in the district in which the witness who was served such subpena resides shall have concurrent jurisdiction over any motion made by such witness to quash the subpena or for other relief under this section. A motion under this section may be made at any time prior to, during, or when appropriate, subsequent to the appearance of any witness before the grand jury. Any motion made during or subsequent to the appearance of the witness before the grand jury may be made only in the district court in which the grand jury is impaneled. If the motion is made before or during the appearance of the witness before the grand jury, the appearance before the grand jury shall be stayed by the making of the motion until the court before which the motion is pending rules on the motion.

"(m) The attorney for the Government shall be limited to asking questions or requesting the production of books, papers, documents, or other objects relevant to the subject matter under investigation. He or she shall not in any way express to any witness or to the grand jury a coercive statement or threat or an opinion that the witness' testimony is untrue.

"(n) The attorney for the Government shall not be permitted to submit before the grand jury any evidence seized or otherwise obtained by an unlawful act or in violation of the witness' constitutional rights or of rights established or protected by any statute of the United States.

"(o) A grand jury may indict a person for an offense when (1) the evidence before such grand jury is legally sufficient to establish that such offense was committed, and (2) competent and admissible evidence before such grand jury provides reasonable cause to believe that such person committed such offense. An indictment may be based on summarized or hearsay evidence alone only upon a showing of good cause to the court. An attorney for the Government shall present to the grand jury all evidence in such attorney's possession which she or he knows will tend to negate the guilt of the person or persons under investigation.

"(p) The district court before which a grand jury is impaneled shall dismiss any indictment of the grand jury if such district finds that—

"(1) the evidence before the grand jury was legally insufficient to establish that the offense for which the indictment was rendered was committed;

"(2) there was not competent and admissible evidence, or summarized or hearsay allowed by the court upon a showing of good cause, before the grand jury to

provide reasonable cause to believe that the person indicted committed such offense;

"(3) the attorney for the Government has not presented to the grand jury all evidence in her or his possession which the attorney knows will tend to negate the guilt of the person indicted; or

"(4) the attorney for the Government has submitted to the grand jury evidence seized or otherwise obtained by an unlawful act or in violation of the witness' constitutional rights or of rights established or protected by any statute of the United States.

(b) The table of sections for chapter 215 of title 18, United States Code, is amended by adding at the end thereof the following new items:

"3329. Notice to grand jury of its rights and duties.
"3329A. Certain duties of the attorney for the Government or the special attorney.
"3330. Independent grand jury inquiry.
"3330A. Certain rights of grand jury witnesses.".

SEC. 6. Section 6001 of title 18, United States Code, is amended by striking out paragraph (4), and by striking out "; and" at the end of paragraph (3) and inserting in lieu thereof a period.

SEC. 7. Section 6002 of title 18, United States Code, is amended to read as follows:

"**§ 6002. Immunity generally**

"Whenever a witness refuses, on the basis of his privi-

lege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) an agency of the United States, or

"(2) either House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; and such witness shall not be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.".

SEC. 8. (a) Part V of title 18, United States Code, is amended by striking out section 6003.

(b) The table of sections of part V of title 18, United States Code, is amended by striking out item 6003.

SEC. 9. (a) Part V of title 18, United States Code, is

amended by adding at the end of such part the following new section:

"§ 6006. **Reports to Congress on grand jury investigations**

"The Attorney General, at the beginning of each regular session of Congress, shall report to the Congress and to the Administrative Office of the United States Courts with respect to the last preceding fiscal year on—

"(1) the number of investigations undertaken in which a grand jury or a special grand jury was utilized together with a description of the nature of each investigation undertaken;

"(2) the number of requests by United States grand juries to the Attorney General for approval to apply to the court for an order compelling testimony under section 2003 of title 18, and the number of such requests approved by the Attorney General;

"(3) the number of applications to district courts for orders granting immunity under title 18;

"(4) the number of applications to district courts for orders granting immunity under title 18 that were approved and the nature of the investigations for which the orders were sought;

"(5) the number of instances in which witnesses in the investigations enumerated in paragraph (1) were

held in contempt and confined, and the dates and lengths of such confinement;

"(6) the number of arrests, indictments, no-bills, trials, and convictions resulting from testimony obtained under orders granting immunity, the offenses for which the convictions were obtained;

"(7) a description of data banks and other procedures by which grand jury information is processed, stored, and used by the Department of Justice; and

"(8) other appropriate information concerning grand jury activity during such year.

"The matters contained in the report required to be made by this section shall be set forth according to judicial district.".

SEC. 11. (a) The enumeration in this Act of any rights and privileges of grand jury witnesses shall not affect any other rights and privileges to which such witnesses may be entitled under any law or rule of law.

(b) Notwithstanding section 3771, no rule contained in the Federal Rules of Criminal Procedure shall apply to the extent that such rule is inconsistent with the provisions of this Act.

95TH CONGRESS
1ST SESSION

H. R. 4908

IN THE HOUSE OF REPRESENTATIVES

MARCH 14, 1977

Mr. DUNCAN of Tennessee introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To establish certain rules for the appearance of witnesses before grand juries in order to better protect the rights of such witnesses, to provide for independent inquiries by grand juries, to require periodic reports to Congress, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Grand Jury Reform Act of 1977".

WITNESS IMMUNITY

SEC. 2. (a) That portion of title 18, United States Code, which follows section 6001 and precedes section 6004 is amended to read as follows:

"§ 6002. Immunity generally

"(a) Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) a court or grand jury of the United States,

"(2) an agency of the United States, or

"(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but the witness shall not be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled under the order to testify or produce evidence, except that he shall not be exempt from prosecution and punishment for perjury committed in so testifying, for giving a false statement, or for otherwise failing to comply with the order.

"(b) No order under this part shall require any witness to testify or provide other information prior to the day one week after the day on which such order was communicated to the witness, except that a witness may be required to

testify or produce such information prior to such day if the court, upon a showing of special need, so orders.

"(c) Upon communication to the witness of any order under this part, the person presiding over the proceeding shall give the witness reasonable and adequate notice of the nature and scope of the immunity from criminal prosecution provided by this section, and of the right of the witness to be represented by counsel in any proceeding challenging such order or confinement or fines pursuant to such order, and that, if he is unable to obtain adequate representation, counsel will be furnished for him as provided in section 3006A, of this title.

"§ 6003. Court and grand jury proceedings

"(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsections (b) to (d) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege

against self-incrimination, such order to become effective as provided in section 6002 of this part.

"(b) In any proceeding under this section, the court shall not order any person to testify or provide information, if it finds that an individual is in danger of prosecution, or may be subjected to any penalty or forfeiture, by the government of any other country on account of any transaction, matter, or thing concerning which he may be ordered to testify or provide other information pursuant to an order under this part, unless the court also finds that such individual has been provided adequate safeguards to minimize such danger.

"(c) A United States district court may, at the request of the Attorney General, the Deputy Attorney General, any designated Assistant Attorney General, or a special attorney appointed under section 3330 of this title, issue an order under subsection (a) of this section when it is established to the satisfaction of the court that—

"(1) in accordance with subsection (b) of this section, there is no danger of foreign prosecution or that adequate safeguards have been provided to minimize such danger;

"(2) the testimony or other information from such individual may be necessary to the public interest;

"(3) such individual has refused or is likely to re-

fuse to testify or provide other information on the basis of his privilege against self-incrimination; and

"(4) with respect to an individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a grand jury—

"(A) the investigation being conducted by the grand jury is authorized by law and the application for the order is in accord with existing guidelines or other practice of the Department of Justice;

"(B) the testimony or other information sought to be obtained is within the scope of the investigation and is relevant thereto;

"(C) the testimony or other information sought to be obtained is relevant to the subject matter of the immunity order;

"(D) a grant of immunity under this part would be adequate for the purposes of the investigation; and

"(E) a summary of the evidence relating to the witness has been certified and submitted to the court.

"(d) Any individual required to give testimony or provide other information pursuant to an order issued under subsection (a) may not be indicted for any offense by the grand jury before which such individual testifies pursuant to such order.".

(b) Subsection (c) of section 6005 of such title is hereby repealed.

(c) No amendment or repeal of any provision of law made by this section shall affect any immunity, or the scope of any immunity, to which any individual is entitled under such provision by reason of any testimony or other information given before the sixtieth day following the date of the enactment of this Act.

UNAUTHORIZED DISCLOSURE OF GRAND JURY INFORMATION

SEC. 3. (a) Chapter 73 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 1512. Violations of grand jury secrecy

"(a) Whoever knowingly discloses any evidence introduced, statement made, or other matter occurring before, any grand jury summoned or impaneled by a court of the United States shall be fined not more than $500 or imprisoned not more than six months or both.

"(b) Whoever knowingly discloses any evidence introduced, statement made, or other matter occurring before, any grand jury summoned or impaneled by a court of the United States, with the intent to secure compensation therefore, to effect the actions of or any decisions by that jury, to effect further legal proceedings against any witness, or to

effect further legal proceedings as to the subject matter of any investigation by that jury, shall be fined not more than $20,000 or imprisoned not more than five years, or both;

"(c) This section shall not apply to—

"(1) disclosure to or by an attorney for the Government in the performance of his duties;

"(2) disclosure directed or permitted by a court; or

"(3) disclosure by a witness who has appeared before such grand jury, or by his attorney, of any matter concerning which the witness has testified, or produced other information, before the grand jury.

"(d) Subsection (a) shall not apply to disclosure by any person other than a person present at the grand jury proceeding.

"(e) Subsection (b) shall not apply to any representative of the press, broadcasting, or information media, acting in his professional capacity.

"(f) As used in this section—

"(1) 'attorney for the Government' includes the Attorney General, an authorized assistant of the Attorney General, a United States attorney, an authorized assistant of a United States attorney, and such other Government personnel as are necessary to assist the attorneys for the Government in the performance of their duties.

"(2) 'disclosure by a witness' includes disclosure by others of matter the witness has previously disclosed when made as a consequence of such disclosure by the witness.

"(g) Nothing contained in this section shall be construed to affect the power of the court to punish any person for contempt for violation of any rule or order of the court.".

(b) The table of sections for such chapter 73 is amended by adding at the end of the following new item:

"1512. Violations of grand jury secrecy.".

INDEPENDENT INQUIRY; RIGHTS OF GRAND JURY WITNESSES

SEC. 4. (a) Chapter 215 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"**§ 3329. Independent grand jury inquiry**

"(a) (1) Any grand jury impaneled before any district court (including a special grand jury summoned under section 3331) may, after giving notice to the court, inquire upon its own initiative into offenses against the criminal laws of the United States alleged to have been committed within that district. Such grand jury shall, except as provided in this section, request the attorney for the Government to assist such grand jury in such inquiry.

"(2) The grand jury shall serve for a term of eighteen months after giving notice to the court under paragraph (1)

unless an order for its discharge is entered earlier by the court. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No grand jury term so extended shall exceed thirty-six months from the date on which notice to the court was given under paragraph (1).

"(3) If a district court within any judicial circuit fails to extend the term of a grand jury engaged upon an independent inquiry under this section or enters an order for the discharge of such grand jury, the grand jury, upon an affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the grand jury. Upon the making of such an application by the grand jury, the grand jury shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order. No grand jury term so extended shall exceed thirty-six months.

"(b) (1) In the event that the attorney for the Government is unable to impartially assist, refuses to assist, or hinders or impedes the grand jury in the conduct of any inquiry under subsection (a), the grand jury may, upon the affirmative vote of a majority of its members, request at any point in such inquiry that the court appoint a special at-

torney, in lieu of the attorney for the Government, to assist the jury in the conduct of any independent inquiry referred to in subsection (a).

"(2) The special attorney appointed under this section may, with the approval of the court, appoint and fix the compensation of such assistants, investigators, and other personnel as he deems necessary. The special attorney and his appointees shall be appointed without regard to the provisions of title 5 governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that the special attorney and any appointee shall be paid at a reasonable rate to be determined by the court. The special attorney shall be reimbursed for actual expenses incurred by him and his appointees in the performance of duties pursuant to this section.

"(3) Notwithstanding sections 516, 518, and 519 of title 28 or any other provision of law, a special attorney appointed under this section shall carry out the functions of an attorney for the Government and shall have the exclusive authority to—

"(A) assist in the conduct of independent grand jury investigations under this section,

"(B) prepare and sign any indictment returned by

a grand jury pursuant to such inquiry in lieu of any attorney for the Government, and

"(C) conduct all other phases of any criminal prosecution arising out of such inquiry (including the argument of appeals in the United States courts of appeals and the United States Supreme Court).

"(4) A special attorney appointed under this section is authorized to obtain from any department or agency of the United States any files, records, documents, or other materials which he deems necessary or appropriate in the carrying out of his functions under this section.

"§ 3330. Counsel

"(a) Every witness subpenaed to appear and testify before a grand jury impaneled before a district court or to produce books, papers, documents, or other objects before such grand jury shall be entitle to the assistance of counsel, including assistance during such time as the witness is questioned in the grand jury room.

"(b) Such counsel may be retained by the witness or shall be appointed as provided in section 3006A of this title in the case of any person financially unable to obtain legal representation. Notwithstanding any rule contained in the Federal Rules of Criminal Procedure, such witness' counsel is authorized to disclose matters which occur before the grand jury while such counsel is in the grand jury room.

"(c) Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in proceedings before the grand jury.

"(d) The court shall have the power to remove such attorney, and order the witness to obtain new counsel, when it finds that the attorney has violated subsection (c) of this section or that such removal and replacement is necessary to insure that the activities of a grand jury are not unduly delayed or impeded. Nothing in this subsection shall affect the power of the court to punish for contempt or impose other appropriate sanctions.".

(b) The Administrator of General Services shall furnish offices, equipment, supplies, and services to a special attorney appointed under section 3329 of title 18, United States Code, in the same manner as such items are furnished to agencies and departments of the United States.

(c) Section 524 of chapter 31 of title 28, United States Code (relating to appropriations for administrative expenses), is amended by adding at the end thereof the following new sentence: "Such appropriations shall also be available for payment of the compensation and other expenses of the special attorney appointed under section 3329

of title 18 to assist a grand jury in the conduct of an independent investigation.".

(d) The table of sections of chapter 215 of title 18, United States Code, is amended by adding at the end the following new items:

"3329. Independent grand jury inquiry.
"3330. Counsel.".

RECORDING, TRANSCRIBING AND AVAILABILITY OF GRAND JURY PROCEEDINGS

SEC. 5. (a) Chapter 215 of title 18, United States Code, as amended by section 4 of this Act, is further amended by adding at the end thereof the following new sections:

"§ 3330A. Recording of grand jury proceedings

"A complete and accurate stenographic or electronic record of all grand jury proceedings shall be kept, except that the grand jury's secret deliberations and consultations between witnesses and their counsel shall not be recorded. Such record shall include the court's notice to the grand jury of its rights and duties and all other comments or charges by the court to the jury at any time; all introductory comment, or other comments, directives, and other utterances made by attorneys for the government or special attorneys to the grand jury, witnesses and their counsels; all questioning of and testimony of witnesses; all interchanges between the grand jury and attorneys.

"§ 3330B. Availability of grand jury transcripts and other statements

"(a) Any person summoned to testify or provide other information before a grand jury impaneled before a district court shall be entitled, prior to testifying or providing other information, to examine and copy any statement in the possession of the United States which he has made and which relates to the subject matter under inquiry by the grand jury. Such examination and copying may be made by the attorney for such person if such person gives his written approval. As used in this subsection, the term 'statement' has the meaning provided by section 3500 (e).

"(b) Any witness who testifies before a grand jury, or his attorney with such witness' written approval, shall, upon request, and under such conditions as the court deems reasonable, be entitled to examine and copy a transcript or electronic recording of the record for the period of such witness' own appearance before the grand jury, and if a witness is proceeding in forma pauperis, he shall be furnished, upon request, a copy of such transcript.

"(c) A reasonable time prior to trial, and after the return of an indictment or the filing of an information, a defendant shall, upon request and under such conditions and limitations as the court deems reasonable, be entitled to examine and copy a transcript or electronic recording of—

"(1) the grand jury testimony of all witnesses to be called at trial;

"(2) all statements to the grand jury by the court and the attorney for the Government or special attorney, relating to the defendant's case;

"(3) all grand jury testimony or evidence which in any manner could be considered exculpatory; and

"(4) all other grand jury testimony or evidence which the court may deem material to the defense.

"(d) Upon a showing of good cause, the court may, at any time, order that the disclosure of the recorded proceedings of a grand jury be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government, the court shall permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant."

(b) Section 3500, title 18, United States Code, is amended—

(1) by inserting "or" before subsection (e) (2) thereof;

(2) by deleting "; or " and inserting "." at the end of subsection (e) (2) thereof; and

(3) by deleting subsection (e) (3) thereof.

(c) The table of sections for chapter 215 of such title, as amended by section 4, is further amended by adding at the end the following new items:

"3330A. Recording of grand jury proceedings.
"3330B. Availability of grand jury transcripts and other statements.".

REPORTS CONCERNING GRAND JURY INVESTIGATIONS

SEC. 6. Section 522 of title 28, United States Code (relating to reports of business and statistics), is amended by striking out "The Attorney General" and inserting in lieu thereof "(a) The Attorney General" and by adding at the end thereof the following new subsection:

"(b) The Attorney General, at the beginning of each regular session of Congress, shall report to the Congress and to the Administrative Office of the United States Courts with respect to the last preceding fiscal year on—

"(1) the number of investigations undertaken in which a grand jury or a special grand jury was utilized together with a description of the nature of each investigation undertaken;

"(2) the number of requests by United States grand juries to the Attorney General for approval to apply to the court for an order compelling testimony under sec-

tion 2003 of title 18, and the number of such requests approved by the Attorney General;

"(3) the number of applications to district courts for orders granting immunity under title 18;

"(4) the number of applications to district courts for orders granting immunity under title 18 that were approved and the nature of the investigations for which the orders were sought;

"(5) the number of instances in which witnesses in the investigations enumerated in paragraph (1) were held in contempt and confined, and the dates and lengths of such confinement;

"(6) the number of arrests, indictments, no-bills, trials, and convictions resulting from testimony obtained under orders granting immunity, the offenses for which the convictions were obtained, and a general assessment of the importance of the immunity;

"(7) a description of data banks and other procedures by which grand jury information is processed, stored, and used by the Department of Justice; and

"(8) other appropriate information concerning grand jury activity during such year.

The matters contained in the report required to be made by this section shall be set forth according to judicial district."

EFFECT ON OTHER LAWS AND RULES

SEC. 7. The enumeration in this Act and amendments made under this Act of any rights and privileges of grand jury witnesses shall not affect any other rights and privileges to which such witnesses may be entitled under any law or rule of law.

[From the Congressional Record, Extensions of Remarks, Feb. 22, 1977, p. E858]

THE GRAND JURY REFORM ACT OF 1977

(By Hon. John Conyers, Jr., of Michigan)

Mr. CONYERS. Mr. Speaker, I am pleased to introduce, with 13 of my colleagues, the Grand Jury Reform Act of 1977.

Grand jury reform was long overdue when I introduced my first bill to restore decency and due process into the grand jury chamber in 1974. It is even more so today. The panel that the authors of the Bill of Rights wrote into the fifth amendment for our protection has become a vehicle for our persecution.

Indeed, stepping into the grand jury chamber is like stepping back through time—way back, back past the two centuries of struggles Americans have waged to defend and extend our constitutional guarantees of liberty and freedom, back past the centuries of sacrifice that built our English heritage of individual rights, back to those medieval times when justice meant trial by "ordeal."

For that is just what the modern grand jury process can be: an ordeal. Under current grand jury procedures, for instance, any person in the United States can be subpenaed before any Federal grand jury, even if that grand jury is 3,000 miles away. A person can be ordered to appear at a moment's notice and never be told why he or she has been called or what the grand jury is supposed to be investigating.

The grand jury chamber itself is off limits to basic constitutional guarantees and rules of courtroom fairplay. Prosecutors may ask grand jury witnesses any questions they wish. They may badger witnesses, who are not allowed to have the assistance of counsel inside the grand jury room, with abusive threats and unfounded charges. They may bias grand juries against witnesses by introducing irrelevant or hearsay evidence that would not be admissible during a trial.

Should a witness object to this kind of treatment by invoking the fifth amendment right to silence, the prosecutor may have the witness immunized. Once immunized, the witness must either tell the Government what it wants to know or go to jail for contempt. Witnesses jailed for civil contempt in this manner are not entitled to a jury trial. Their confinement can theoretically last indefinitely because while a witness can only be jailed for as long as a sitting grand jury wants his or her testimony, there is nothing to stop the government from resubpenaing a silent witness before a second grand jury once the term of the first expires.

"The grand jury witness," summed up Prof. Melvin Lewis of Chicago's John Marshall School of Law last fall, "is the least favored person known to the Constitution."

With grand jury prerogatives like these to work with, prosecutors can wreak almost limitless havoc. They can destroy hard-earned reputations, stigmatize dissenters and disrupt their activities, handcuff—both literally and figuratively—journalists, strikers, and defense attorneys. In short, under the grand jury's umbrella, prosecutors can engage in the very sorts of behavior the grand jury was originally meant to prevent.

This turn of grand jury events was certainly not foreseen by James Madison and his contemporaries when they wrote into the Bill of Rights the provision that "no person shall be held to answer for a capital, or otherwise infamous crime" unless a panel of his or her fellow citizens—the grand jury—decided that there was enough evidence to warrant further prosecution. The generation of 1976 saw the grand jury as an independent body that would prevent criminal activity from either being trumpted up or covered over, the former by thoroughly scrutinizing the government's case against an accused, the latter by investigating alleged instances of government wrongdoing that government officials could not be trusted to investigate themselves.

Modern Federal grand juries, at least one of which is in operation in every Federal district at all times, function in a way that bears little resemblance to this Bill of Rights ideal. The 23 members of the grand jury, who normally meet once a week or less for several hours at a time, play an essentially passive role. The U.S. attorney in charge of each grand jury panel selects the cases the grand jury will consider, the witnesses the grand jury will hear, and the evidence the grand jury will see.

Upon the completion of the prosecutor's presentation, the grand jurors, without the prosecutor present, decide whether or not to indict. Predictably, grand jurors almost always vote to indict. Why shouldn't they? All grand jurors know about the cases they are deliberating is what the Government wants them to know.

For the conscientious grand juror who really wants to make a contribution to justice, grand jury service can only be, as one grand juror noted last December, frustrating. That grand juror, Robert Pitzer, was the foreman of a Federal grand jury in Atlanta. When his panel's term ended, it analyzed its experience in a fascinating report.

"There have been times," the report noted, "when the members of the Pitzer grand jury have felt that they were simply there to be used at the whim or desire of whatever attorney in the U.S. attorney's office needed a 'warm-bodied grand jury' to hear testimony.

Given this depressing and demeaning grand jury reality, it is perfectly understandable why some observers have called for the grand jury's abolition. I have not, for two chief reasons. Since the grand jury indictment is required by the Constitution, abolishing the grand jury as a method of charging would mean amending the Constitution, a long, wearying process. Specifically, abolishing the grand jury would mean amending a part of the Constitution that has never been amended before, the Bill of Rights. Dare we risk setting such a precedent? I think not.

Moreover, the grand jury is one of only two institutions in our criminal justice system—the trial jury the other—where citizens have decisionmaking authority. I believe it would be a mistake to eliminate the grand jury at a time when popular participation in our political and legal institutions needs to be encouraged, not discouraged.

I also believe it would be a mistake to tolerate the sorry grand jury status quo a moment longer, and the impetus for the changes we need must come from Congress. It was the Congress, after all, that institutionalized the grand jury into our criminal justice system when it drafted the fifth amendment in 1789. Now it must be the Congress that puts an end to the pratices that have distorted the grand jury intended by the Bill of Rights almost beyond recognition.

This is the purpose of the Grand Jury Reform Act of 1977. This legislation would break the lockgrip prosecutors now hold over the grand jury process and give grand jurors an active and vital role to play in the charging process. It would safeguard the rights of all those called to appear before grand juries and cripple the manipulation of grand jury proceedings for improper ends. It would help the Federal grand jury finally function as the democratic institution it was designed to be.

While the reforms embodied in this legislation touch many aspects of grand jury procedure, the heart of the bill is its proposal for an overhaul of current immunity law.

Immunity can be a very useful juridical device. By promising safety from future prosecution, the Government can elicit valuable testimony from a low-level criminal conspirator against a higher-up, testimony that the Government would not otherwise be able to obtain.

But immunity can also be a very dangerous device. Witnesses who refuse to answer questions inside the grand jury chamber can be immunized against their will and forced to choose between testifying or going to jail for contempt.

"This," a spokesman for the International Longshoremen's and Warehousemen's Union, Pat Tobin, said last September, "is the kind of choice that faces citizens of lands ruled by juntas. It should not be a choice confronted by Americans."

When we give prosecutors the power to force people to answer their questions, the result is predictable. Some prosecutors will use their power to demand the answers to questions they should not be asking, and that is exactly what has happened. Since the passage of the Organized Crime Control Act of 1970, that abominable document that broadened the immunization powers of Federal prosecutors, U.S. attorneys have compelled lawyers to testify about their clients, reporters about their sources, strikers about their unions, dissidents about their politics and scholars about their research.

Immunity has also made many grand jury panels little more than unwitting partners of FBI misconduct. FBI agents do not have subpena power. No police agent in the United States can yank people off the streets and force them to answer questions. Thus, it is perfectly legal for a person approached by FBI agents to refuse to answer their questions. Many people, especially political activists who suspect the motives behind FBI questions, have decided to take

this course. They see FBI inquiries as attempts to gather intelligence on legitimate political dissent, intelligence that will later be manipulated to harass and discredit their activities. These fears are not paranoid delusions. They spring directly from the three-plus decades of FBI illegality examined in detail over recent years by congressional and media investigations.

What do FBI agents do when faced with people who exercise their legal right not to answer Bureau questions? Over and over again during the past 7 years, they have responded by obtaining a grand jury subpena from the nearest U.S. attorney's office. The silent person, who, remember, is charged with no crime, is hauled before a grand jury and asked the same questions the FBI wanted answered. Once immunized inside the grand jury chamber, the person has no right to refuse to answer. At this point, continued silence means a contempt confinement.

What this adds up to has been starkly described by the president of the National Organization for Women—NOW—Karen DeCrow:

"Through the grand jury process, the Bureau has gained the ability to maneuver its targets behind bars without having to go through the bother of proving them guilty in a court of law."

The Grand Jury Reform Act of 1977 would prevent incarcerations like these by making every grant of immunity consensual. If enacted, no person could be brought before a grand jury and immunized unless he or she consented.

Making immunity consensual is not the precedent-shattering step it may seem. Though prosecutors are presently under no legal compulsion to obtain a witness' consent before proceeding with an immunity order, wise prosecutors—that is, Government attorneys looking for evidence, not headlines—do anyway. These prosecutors already use immunity consensually. They treat it as a bargaining tool and trade immunity for a witness' testimony. They do not force immunity onto witnesses who have made it clear that they will not testify.

Why do they not? Peter Richards, an experienced Federal and New Jersey prosecutor and an expert on immunity, put it plainly at a Cornell University Institute on Organized Crime conference last August. Forcing a witness "to testify by court order over his clear objections," he said, "we don't like to do it because we have found that it normally does not work. The situation where a witness refuses to cooperate in the first place, then comes into the grand jury and changes his mind and cooperates and tells you the truth and gives you something valuable is extremely, very, very, very rare. I don't think I've ever seen it happen, as a matter of fact."

The enactment of consensual immunity would not hamper the work of fair-minded prosecutors. It would, however, end the mainipulation of immunity to punish witnesses for the "crime of silence."

Like my proposal for consensual immunity, other provisions in the Grand Jury Reform Act of 1977 are designed to facilitate proper grand jury functioning.

To function properly, a grand jury needs, above all, information, solid evidence untainted by either unfair innuendo or illegality. This legislation would require that prosecutors let grand jurors know of any evidence in their possession that would tend to show an accused's innocence. It would enable defense attorneys to challenge indictments based on hearsay or other evidence that would be inadmissible at trial. By permitting defense attorneys to accompany their clients inside the grand jury room. It would discourage prosecutorial interrogations designed to turn a grand jury against a witness.

The Grand Jury Reform Act of 1977 would alo insure that grand jurors be kept up-to-date on what the prosecutor plans to do and why. It would require a grand jury majority vote before any subpena could be issued by a prosecutor, immunity offered or contempt pursued.

Most importantly, the act would facilitate proper grand jury functioning by taking grand juries out of the witness harassment buiness. Under its provisions, strict limits are set on prosecutors' ability to disrupt people's lives with grand jury subpenas. A 6-month lid is placed on contempt confinements. Contempt confinements based on questions that violate a witness' constitutional or statutory rights are prohibited all together.

These provisions have considerable public backing behind them. The nearly two dozen national bar, church, labor, women's, and civil liberties groups that comprise the Washington-based Coalition to End Grand Jury Abuse have testified in favor of similar reforms I have proposed in earlier grand jury reform legislation. Many of the provisions of the Grand Jury Reform Act have also been endorsed by leading figures in the American Bar Association.

In fact, there are precious few students of the modern grand jury system who have not concluded that this institution desperately needs a sweeping

overhaul. Unfortunately, in recent years, most of them have been concentrated in the Department of Justice. Last year, then Attorney General Edward Levi, in testimony before Representative JOSHUA EILBERG's Judiciary Subcommittee investigating the grand jury issue, opposed every significant check on prosecutorial conduct that grand jury reformers have put forth.

Past Justice Department leadership, however, has not always been as insensitive to the dangers posed by prosecutorial misconduct. I would hope that our new Attorney General, the Honorable Griffin Bell, will heed closely the warning of one of his most thoughtful predecessors, Robert Jackson.

"The prosecutor has more control over life, liberty, and reputation than any other person in America," Attorney General Jackson said in 1940, a year before he was to become a Supreme Court justice. "While the prosecutor at his best is one of the most beneficient forces in our society, when he acts from malice or other base motives, he is one of the worst."

The grand jury was supposed to shield us from prosecutors who act from "malice or other base motives." It is time to fashion the framework that can allow the grand jury to fulfill this noble goal.

A summary of the Grand Jury Reform Act of 1977 follows:

SUMMARY OF THE GRAND JURY REFORM ACT OF 1977

RECALCITRANT WITNESSES

Requires 12 or more grand jurors to vote that the refusal of a witness to testify is without just cause before government attorney may apply for a show-cause hearing order.

Gives the witness 10 days notice of a contempt hearing. Upon showing of special need, a notice of not less than five days may be given to a trial witness.

Guarantees right of counsel at a contempt hearing and for such counsel to be appointed for those unable to afford one.

Provides that imprisonment shall be in a federal institution, unless the witness waives this right. Upon showing of hardship, witness may be imprisoned at institution near family, work or attorney.

Reduces the period of contempt confinement to six months and prohibits reiterative contempt by making the six months cumulative, applying it against any confinement resulting from prior, subsequent or related grand jury investigations.

Requires that a witness found in contempt be allowed bail pending appeal unless it affirmatively appears appeal is frivolous. Appellate court must act within 30 days or the witness will be released pending determination of the appeal.

Prohibits imprisonment for civil or criminal contempt after a witness has once been imprisoned for criminal contempt for refusing to answer the same questions.

Provides that a refusal to answer questions or provide other information shall not be punished if the question or request is based on any violation of the witness' constitutional or statutory rights.

Applies all of the above protections to witnesses subpoenaed to trial as well as grand jury witnesses, with the exception of grand jury voting, where in trial the determination is made by the court.

NOTICE TO THE JURY OF ITS RIGHTS AND DUTIES

Requires that the district court judge who empanels the grand jury give instructions to the grand jurors at the beginning of their term, including: grand jury powers with respect to independent investigations, its right to call and interrogate witnesses, its right to request documents and evidence, the subject matter of the investigation, the necessity of legally sufficient evidence to indict and the power of the grand jury to vote before a witness may be subpoenaed, granted immunity, be given a contempt hearing or indicted.

Proscribes that failure to so instruct the grand jury is just cause for a refusal to testify or for dismissal of an indictment by that or by a subsequent grand jury on the same matter.

INDEPENDENT INQUIRY

Allows the grand jury, upon notice to the court, to inquire on its own initiative into offenses committed by government or former government officials.

Authorizes the grand jury to ask the court to appoint a special attorney to assist its investigation upon a vote of at least 12 grand jurors. The special attorney would sign any indictments.

RIGHTS OF GRAND JURY WITNESSES

Requires an affirmative vote of 12 or more grand jurors to issue a subpoena. The subpoena would not be returnable on less than seven days' notice without the witness' express consent.

Requires each subpoena to inform the witness of the right to counsel, the right against self-incrimination, whether the witness' own conduct is under investigation, the criminal statutes involved and any other rights and privileges which the court deems necessary and appropriate.

Bars the prosecution from calling a witness who has given the prosecutor advanced written notice the s/he intends to claim the Fifth Amendment unless a grant of immunity has been obtained.

Permits representation by counsel inside the grand jury room. Frees witness' counsel from the secrecy rule.

Gives the court in the district out of which the subpoena was issued, the court in the district where the subpoena was served and the court in whose district the witness resides concurrent jurisdiction over motions to quash and other relief.

Limits permissible venue of a grand jury investigation to only where the grand jury is investigating both substantive criminal offenses and conspiracies to commit such offenses. In such cases, only a grand jury sitting in a district where the substantive crime took place would be permitted to question witnesses.

Forbids a second grand jury investigation into a matter which has led one grand jury, after considering the evidence, not to return an indictment, unless there is a showing that additional relevant evidence has been discovered.

Requires complete recordation of grand jury proceedings. Allows the witness or counsel to obtain a copy of the witness' testimony before the grand jury and thereafter submit clarifying statements.

Requires the government to turn over to the witness before questioning copies of any statements made by the witness related to the subject matter of the grand jury investigation.

Provides that no person shall be required to testify or be confined if the court, upon evidentiary hearing, finds: (1) the primary purpose of the subpoena is to secure testimony for trial evidence for a person already under indictment, (2) the testimony of the witness would be unreasonable, oppressive, cumulative or privileged, (3) the testimony would have a disparaging effect on a confidential or privileged relationship which would outweigh the value of the testimony, (4) the primary purpose is to harass the witness.

Requires that all questions and requests or other objects be relevant to the matter under investigation by the grand jury. Prohibits coercive threats or statements, or opinions as to the truthfulness of a witness' testimony from being made by an attorney for the government to the witness or the grand jury.

IMMUNTIY OF WITNESSES

Abolishes all forced and use immunity before grand juries and courts. Transactional immunity is allowed with the written consent of the witness, and by affirmative vote of 12 grand jurors; or, in the case of a trial proceeding, with the consent of the witness and the application of the U.S. attorney.

Provides transaction immunity for witnesses before Congressional committees and agency hearings.

REPORTS CONCERNING GRAND JURY INVESTIGATIONS

Requires the Department of Justice to submit to Congress and the Administrative Office of the United States courts annual reports concerning grand jury investigations and the use of immunity orders. Requires reports in eight specified areas, set forth according to judicial district.

EVIDENCE

Requires the government to introduce all evidence in its possession tending to prove the innocence of a potential defendant.

Prohibits the grand jury from returning an indictment on the basis of hearsay evidence alone.

CONTINUED

12 OF 17

95TH CONGRESS
1ST SESSION

H. R. 4908

IN THE HOUSE OF REPRESENTATIVES

MARCH 14, 1977

Mr. DUNCAN of Tennessee introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To establish certain rules for the appearance of witnesses before grand juries in order to better protect the rights of such witnesses, to provide for independent inquiries by grand juries, to require periodic reports to Congress, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Grand Jury Reform Act of 1977".

WITNESS IMMUNITY

SEC. 2. (a) That portion of title 18, United States Code, which follows section 6001 and precedes section 6004 is amended to read as follows:

"§ 6002. Immunity generally

"(a) Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) a court or grand jury of the United States,

"(2) an agency of the United States, or

"(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but the witness shall not be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled under the order to testify or produce evidence, except that he shall not be exempt from prosecution and punishment for perjury committed in so testifying, for giving a false statement, or for otherwise failing to comply with the order.

"(b) No order under this part shall require any witness to testify or provide other information prior to the day one week after the day on which such order was communicated to the witness, except that a witness may be required to

testify or produce such information prior to such day if the court, upon a showing of special need, so orders.

"(c) Upon communication to the witness of any order under this part, the person presiding over the proceeding shall give the witness reasonable and adequate notice of the nature and scope of the immunity from criminal prosecution provided by this section, and of the right of the witness to be represented by counsel in any proceeding challenging such order or confinement or fines pursuant to such order, and that, if he is unable to obtain adequate representation, counsel will be furnished for him as provided in section 3006A, of this title.

"§ 6003. Court and grand jury proceedings

"(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsections (b) to (d) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege

against self-incrimination, such order to become effective as provided in section 6002 of this part.

"(b) In any proceeding under this section, the court shall not order any person to testify or provide information, if it finds that an individual is in danger of prosecution, or may be subjected to any penalty or forfeiture, by the government of any other country on account of any transaction, matter, or thing concerning which he may be ordered to testify or provide other information pursuant to an order under this part, unless the court also finds that such individual has been provided adequate safeguards to minimize such danger.

"(c) A United States district court may, at the request of the Attorney General, the Deputy Attorney General, any designated Assistant Attorney General, or a special attorney appointed under section 3330 of this title, issue an order under subsection (a) of this section when it is established to the satisfaction of the court that—

"(1) in accordance with subsection (b) of this section, there is no danger of foreign prosecution or that adequate safeguards have been provided to minimize such danger;

"(2) the testimony or other information from such individual may be necessary to the public interest;

"(3) such individual has refused or is likely to re-

fuse to testify or provide other information on the basis of his privilege against self-incrimination; and

"(4) with respect to an individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a grand jury—

"(A) the investigation being conducted by the grand jury is authorized by law and the application for the order is in accord with existing guidelines or other practice of the Department of Justice;

"(B) the testimony or other information sought to be obtained is within the scope of the investigation and is relevant thereto;

"(C) the testimony or other information sought to be obtained is relevant to the subject matter of the immunity order;

"(D) a grant of immunity under this part would be adequate for the purposes of the investigation; and

"(E) a summary of the evidence relating to the witness has been certified and submitted to the court.

"(d) Any individual required to give testimony or provide other information pursuant to an order issued under subsection (a) may not be indicted for any offense by the grand jury before which such individual testifies pursuant to such order.".

(b) Subsection (c) of section 6005 of such title is hereby repealed.

(c) No amendment or repeal of any provision of law made by this section shall affect any immunity, or the scope of any immunity, to which any individual is entitled under such provision by reason of any testimony or other information given before the sixtieth day following the date of the enactment of this Act.

UNAUTHORIZED DISCLOSURE OF GRAND JURY INFORMATION

SEC. 3. (a) Chapter 73 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"**§ 1512. Violations of grand jury secrecy**

"(a) Whoever knowingly discloses any evidence introduced, statement made, or other matter occurring before, any grand jury summoned or impaneled by a court of the United States shall be fined not more than $500 or imprisoned not more than six months or both.

"(b) Whoever knowingly discloses any evidence introduced, statement made, or other matter occurring before, any grand jury summoned or impaneled by a court of the United States, with the intent to secure compensation therefore, to effect the actions of or any decisions by that jury, to effect further legal proceedings against any witness, or to

effect further legal proceedings as to the subject matter of any investigation by that jury, shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(c) This section shall not apply to—

"(1) disclosure to or by an attorney for the Government in the performance of his duties;

"(2) disclosure directed or permitted by a court; or

"(3) disclosure by a witness who has appeared before such grand jury, or by his attorney, of any matter concerning which the witness has testified, or produced other information, before the grand jury.

"(d) Subsection (a) shall not apply to disclosure by any person other than a person present at the grand jury proceeding.

"(e) Subsection (b) shall not apply to any representative of the press, broadcasting, or information media, acting in his professional capacity.

"(f) As used in this section—

"(1) 'attorney for the Government' includes the Attorney General, an authorized assistant of the Attorney General, a United States attorney, an authorized assistant of a United States attorney, and such other Government personnel as are necessary to assist the attorneys for the Government in the performance of their duties.

"(2) 'disclosure by a witness' includes disclosure by others of matter the witness has previously disclosed when made as a consequence of such disclosure by the witness.

"(g) Nothing contained in this section shall be construed to affect the power of the court to punish any person for contempt for violation of any rule or order of the court.".

(b) The table of sections for such chapter 73 is amended by adding at the end of the following new item:

"1512. Violations of grand jury secrecy.".

INDEPENDENT INQUIRY; RIGHTS OF GRAND JURY WITNESSES

SEC. 4. (a) Chapter 215 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"§ 3329. Independent grand jury inquiry

"(a) (1) Any grand jury impaneled before any district court (including a special grand jury summoned under section 3331) may, after giving notice to the court, inquire upon its own initiative into offenses against the criminal laws of the United States alleged to have been committed within that district. Such grand jury shall, except as provided in this section, request the attorney for the Government to assist such grand jury in such inquiry.

"(2) The grand jury shall serve for a term of eighteen months after giving notice to the court under paragraph (1)

unless an order for its discharge is entered earlier by the court. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No grand jury term so extended shall exceed thirty-six months from the date on which notice to the court was given under paragraph (1).

"(3) If a district court within any judicial circuit fails to extend the term of a grand jury engaged upon an independent inquiry under this section or enters an order for the discharge of such grand jury, the grand jury, upon an affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the grand jury. Upon the making of such an application by the grand jury, the grand jury shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order. No grand jury term so extended shall exceed thirty-six months.

"(b) (1) In the event that the attorney for the Government is unable to impartially assist, refuses to assist, or hinders or impedes the grand jury in the conduct of any inquiry under subsection (a), the grand jury may, upon the affirmative vote of a majority of its members, request at any point in such inquiry that the court appoint a special at-

torney, in lieu of the attorney for the Government, to assist the jury in the conduct of any independent inquiry referred to in subsection (a).

"(2) The special attorney appointed under this section may, with the approval of the court, appoint and fix the compensation of such assistants, investigators, and other personnel as he deems necessary. The special attorney and his appointees shall be appointed without regard to the provisions of title 5 governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that the special attorney and any appointee shall be paid at a reasonable rate to be determined by the court. The special attorney shall be reimbursed for actual expenses incurred by him and his appointees in the performance of duties pursuant to this section.

"(3) Notwithstanding sections 516, 518, and 519 of title 28 or any other provision of law, a special attorney appointed under this section shall carry out the functions of an attorney for the Government and shall have the exclusive authority to—

"(A) assist in the conduct of independent grand jury investigations under this section,

"(B) prepare and sign any indictment returned by

a grand jury pursuant to such inquiry in lieu of any attorney for the Government, and

"(C) conduct all other phases of any criminal prosecution arising out of such inquiry (including the argument of appeals in the United States courts of appeals and the United States Supreme Court).

"(4) A special attorney appointed under this section is authorized to obtain from any department or agency of the United States any files, records, documents, or other materials which he deems necessary or appropriate in the carrying out of his functions under this section.

"§ 3330. Counsel

"(a) Every witness subpenaed to appear and testify before a grand jury impaneled before a district court or to produce books, papers, documents, or other objects before such grand jury shall be entitle to the assistance of counsel, including assistance during such time as the witness is questioned in the grand jury room.

"(b) Such counsel may be retained by the witness or shall be appointed as provided in section 3006A of this title in the case of any person financially unable to obtain legal representation. Notwithstanding any rule contained in the Federal Rules of Criminal Procedure, such witness' counsel is authorized to disclose matters which occur before the grand jury while such counsel is in the grand jury room.

"(c) Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in proceedings before the grand jury.

"(d) The court shall have the power to remove such attorney, and order the witness to obtain new counsel, when it finds that the attorney has violated subsection (c) of this section or that such removal and replacement is necessary to insure that the activities of a grand jury are not unduly delayed or impeded. Nothing in this subsection shall affect the power of the court to punish for contempt or impose other appropriate sanctions.".

(b) The Administrator of General Services shall furnish offices, equipment, supplies, and services to a special attorney appointed under section 3329 of title 18, United States Code, in the same manner as such items are furnished to agencies and departments of the United States.

(c) Section 524 of chapter 31 of title 28, United States Code (relating to appropriations for administrative expenses), is amended by adding at the end thereof the following new sentence: "Such appropriations shall also be available for payment of the compensation and other expenses of the special attorney appointed under section 3329

of title 18 to assist a grand jury in the conduct of an independent investigation.".

(d) The table of sections of chapter 215 of title 18, United States Code, is amended by adding at the end the following new items:

"3329. Independent grand jury inquiry.
"3330. Counsel.".

RECORDING, TRANSCRIBING AND AVAILABILITY OF GRAND JURY PROCEEDINGS

SEC. 5. (a) Chapter 215 of title 18, United States Code, as amended by section 4 of this Act, is further amended by adding at the end thereof the following new sections:

"§ 3330A. Recording of grand jury proceedings

"A complete and accurate stenographic or electronic record of all grand jury proceedings shall be kept, except that the grand jury's secret deliberations and consultations between witnesses and their counsel shall not be recorded. Such record shall include the court's notice to the grand jury of its rights and duties and all other comments or charges by the court to the jury at any time; all introductory comment, or other comments, directives, and other utterances made by attorneys for the government or special attorneys to the grand jury, witnesses and their counsels; all questioning of and testimony of witnesses; all interchanges between the grand jury and attorneys.

"§ 3330B. Availability of grand jury transcripts and other statements

"(a) Any person summoned to testify or provide other information before a grand jury impaneled before a district court shall be entitled, prior to testifying or providing other information, to examine and copy any statement in the possession of the United States which he has made and which relates to the subject matter under inquiry by the grand jury. Such examination and copying may be made by the attorney for such person if such person gives his written approval. As used in this subsection, the term 'statement' has the meaning provided by section 3500 (e).

"(b) Any witness who testifies before a grand jury, or his attorney with such witness' written approval, shall, upon request, and under such conditions as the court deems reasonable, be entitled to examine and copy a transcript or electronic recording of the record for the period of such witness' own appearance before the grand jury, and if a witness is proceeding in forma pauperis, he shall be furnished, upon request, a copy of such transcript.

"(c) A reasonable time prior to trial, and after the return of an indictment or the filing of an information, a defendant shall, upon request and under such conditions and limitations as the court deems reasonable, be entitled to examine and copy a transcript or electronic recording of—

"(1) the grand jury testimony of all witnesses to be called at trial;

"(2) all statements to the grand jury by the court and the attorney for the Government or special attorney, relating to the defendant's case;

"(3) all grand jury testimony or evidence which in any manner could be considered exculpatory; and

"(4) all other grand jury testimony or evidence which the court may deem material to the defense.

"(d) Upon a showing of good cause, the court may, at any time, order that the disclosure of the recorded proceedings of a grand jury be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government, the court shall permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant."

(b) Section 3500, title 18, United States Code, is amended—

(1) by inserting "or" before subsection (e) (2) thereof;

(2) by deleting "; or " and inserting "." at the end of subsection (e) (2) thereof; and

(3) by deleting subsection (e) (3) thereof.

(c) The table of sections for chapter 215 of such title, as amended by section 4, is further amended by adding at the end the following new items:

"3330A. Recording of grand jury proceedings.
"3330B. Availability of grand jury transcripts and other statements.".

REPORTS CONCERNING GRAND JURY INVESTIGATIONS

SEC. 6. Section 522 of title 28, United States Code (relating to reports of business and statistics), is amended by striking out "The Attorney General" and inserting in lieu thereof "(a) The Attorney General" and by adding at the end thereof the following new subsection:

"(b) The Attorney General, at the beginning of each regular session of Congress, shall report to the Congress and to the Administrative Office of the United States Courts with respect to the last preceding fiscal year on—

"(1) the number of investigations undertaken in which a grand jury or a special grand jury was utilized together with a description of the nature of each investigation undertaken;

"(2) the number of requests by United States grand juries to the Attorney General for approval to apply to the court for an order compelling testimony under sec-

tion 2003 of title 18, and the number of such requests approved by the Attorney General;

"(3) the number of applications to district courts for orders granting immunity under title 18;

"(4) the number of applications to district courts for orders granting immunity under title 18 that were approved and the nature of the investigations for which the orders were sought;

"(5) the number of instances in which witnesses in the investigations enumerated in paragraph (1) were held in contempt and confined, and the dates and lengths of such confinement;

"(6) the number of arrests, indictments, no-bills, trials, and convictions resulting from testimony obtained under orders granting immunity, the offenses for which the convictions were obtained, and a general assessment of the importance of the immunity;

"(7) a description of data banks and other procedures by which grand jury information is processed, stored, and used by the Department of Justice; and

"(8) other appropriate information concerning grand jury activity during such year.

The matters contained in the report required to be made by this section shall be set forth according to judicial district.".

EFFECT ON OTHER LAWS AND RULES

SEC. 7. The enumeration in this Act and amendments made under this Act of any rights and privileges of grand jury witnesses shall not affect any other rights and privileges to which such witnesses may be entitled under any law or rule of law.

COMPARATIVE SUMMARY OF DIFFERENCES IN GRAND JURY REFORM BILLS INTRODUCED IN THE 95TH CONGRESS

	H.R. 94 (Eilberg)	H.R. 3736 (Conyers)	H.R. 2620 (Patterson)	H.R. 4908 (Duncan)	H.R. 406 (Holtzman)	H.R. 1830 (Jordan)
I. RECALCITRANT WITNESS						
A. Application	Federal court and grand jury witnesses.	Federal grand jury witnesses.	Federal grand jury and criminal court witnesses.	No provision	Federal court and grand jury witnesses.	No provision.
B. Initiation	Prosecutor	Prosecutor with 12 or more grand jury votes.	12 or more grand jurors (grand jury witness) court (criminal court witness).	No provision	No provision	No provision.
C. Procedure	(1) Show cause hearing (2) With counsel (3) 72 hr notice	(1) Show cause hearing (2) With counsel (3) 10 days notice reduced 5 days under special need.	(1) Show cause hearing (2) With counsel (3) 10 days notice reduced 5 days under special need.	No provision	(1) Show cause hearing (2) With counsel (3) 10 days notice reduced 5 days under special need.	No provision.
D. Place of confinement	Federal correctional institutional within 50 mi unless witness requests other suitable institution.	Federal correctional institutional unless witness requests other suitable institution.	Federal correctional institution unless witness requests other suitable institution.	No provision	Federal correctional institution unless witness requests other suitable institution.	No provision.
E. Period of confinement	Lesser of time before compliance, life of proceedings, or 6 mo.	Lesser of time before compliance, life of proceedings, or 6 mo.	Lesser of time before compliance, life of proceedings, or 6 mo.	No provision	Lesser of time before compliance, life of proceedings, or 6 mo.	No provision.
F. Reiterated contempt	Bars use of 28 U.S.C. 1826 or 18 U.S.C. 401 for same witnesses and same transaction after 1 use of either.	Same as H.R. 94	Bars 2d use of 28 U.S.C. 1826 for the same witness.	No provision	Same as H.R. 94	No provision.
G. Bail	Applies 18 U.S.C. ch. 207 unless appeal is frivolous or for delay.	Applies 18 U.S.C. ch. 207 unless appeal is patently frivolous.	Applies 18 U.S.C. ch. 207 unless appeal is patently frivolous and for delay.	No provision	Same as H.R. 3736	No provision.
H. Expedited appeal	Within 30 days	Within 30 days right to release thereafter.	Calls for expedited appeal, no specific time mentioned.	No provision	Same as H.R. 3736	No provision.
I. Applicability of sec. 3006A.	Yes	Yes	Yes	No provision	Yes	No provision.
J. Defenses	Questions may not be based on violations of Federal wiretap law.	Questions may not be based on violations of constitutional or statutory rights.	Same as H.R. 3736	No provision	Same as H.R. 3736	No provision.
II. IMMUNITY						
A. Type	Replaces use with transactional.	Replaces use with transactional	Replaces use with transactional.	Replaces use with transactional.	No provision	No provision.

B. Prosecution permitted	Perjury, false statements, or failure to comply.	Perjury, contempt or failure to comply (grand jury) perjury, false statements, or failure to comply (courts).	Same as H.R. 3736	Same as H.R. 94	No provision	No provision.
C. Procedure:						
1. Notice	(1) 1 week except in case of special need.	No provision	No provision	Same as H.R. 94	No provision	No provision.
	(2) Scope and nature of immunity.	----------	----------	----------	----------	
	(3) Right to counsel and availability of sec. 3006A.	----------	----------	----------	----------	
2. Authorized to request order.	U.S. attorney with Attorney General's approval.	12 or more grand jurors wih Attorney General's approval.	Same as H.R. 3736	Same as H.R. 94	No provision	No. provision.
3. Witness consent required.	No	Yes	Yes	No	No provision	No provision.
4. Conditions for issuance.	(1) Court determines order in the public interest.	(1) Attorney for Government determines order in public interest.	(1) U.S. attorney determines order in public interest.	Same as H.R. 94	No provision	No provision.
	(2) No danger of foreign prosecution.	No provision	No provision	Same as H.R. 94	No provision	No provision.
	(3) Witness will or has claimed his 5th amendment privilege.	No provision	No provision	Same as H.R. 94	No provision	No provision.
	(4) Grand jury cases: (a) Evidence sought is relevant to scope of immunity and (b) investigation is authorized, (c) Summary of evidence is provided court.	No provision	No provision	Same as H.R. 94	No provision	No provision.
5. Indictment of immunized witness.	Barred in case of same grand jury before whom the witness testifies.	No provision	No provision	Same as H.R. 94	No provision	No provision.
D. Congressional immunity	Attorney General notification repealed.	No provision	No provision	Same as H.R. 94	No provision	No provision.
III. SIZE OF GRAND JURY						
A. Reduced	9 to 15 members	No provision	No provision	No provision	No provision	No provision.
B. Selection after failure to appear.	Not from bystanders	No provision	No provision	No provision	No provision	No provision.
C. Number required for indictment.	¾ of 9 or more	No provision	No provision	No provision	No provision	No provision.

COMPARATIVE SUMMARY OF DIFFERENCES IN GRAND JURY REFORM BILLT INTRODUCED IN THE 95TH CONGRESS—Continued

	H.R. 94 (Eilberg)	H.R. 3736 (Conyers)	H.R. 2620 (Patterson)	H.R. 4908 (Duncan)	H.R. 406 (Holtzman)	H.R. 1830 (Jordan)
IV. DISCLOSURE CRIMES						
A. Unlawful disclsoure by those present.	Matters occurring before the grand jury.	No provision	No provision	Same as H.R. 94	No provision	No provision.
	$500 and/or 6 mo	No provision	No provision	Same as H.R. 94	No provision	No provision.
B. Unlawful disclosure for profit or to obstruct justice.	Matters occurring before the grand jury.	No provision	No provision	Same as H.R. 94	No provision	No provision.
	$20,000 and/or 5 yr	No provision	No provision	Same as H.R. 94	No provision	No provision.
Exceptions from A and B	Disclosures ordered by court, disclosures to or by attorney for the Government, and disclosures by witness or his attorney.	No provision	No provision	Same as H.R. 94	No provision	No provision.
V. RIGHTS AND DUTIES						
A. Notice to grand jury	(1) Duty to inquire into alleged Federal crimes committed within the district,	Same as H.R. 94	Same as H.R. 94	No provision	No provision	No provision.
	(2) Right of independent inquiry.	Same as H.R. 94	Same as H.R. 94	No provision	No provision	No provision.
	(3) Right to call and question witnesses.	Same as H.R 94	Same as H.R. 94	No provision	No provision	No provision
	(4) Right to require production of evidence.	Same as H.R. 94	Same as H.R. 94	No provision	No provision	No provision.
	(5) Subject of investigation.	Same as H.R. 94	Same as H.R. 94	No provision	No provision	No provision.
	(6) Other matters at the discretion of the court.	Same as H.R. 94	Same as H.R. 94	No provision	No provision	No provision.
	No provision	(7) 12 or more grand jurors required for immunity request.	Same as H.R. 3736	No provision	No provision	No provision.
	No provision	(8) Subpenas issued only by 12 or more grand jurors initiate contempt under 28 U.S.C. 1826 by 12 or more jurors.	Same as H.R. 3736	No provision	No provision	No provision.
	No provision	(9) Initiate contempt under 28 U.S.C. 1826 by 12 or more jurors.	Same as H.R. 3736	No provision	No provision	No provision.
	(10) Evidence for indictment.	Same as H.R. 94	Same as H.R. 94	No provision	No provision	No provision.
	No provision	(11) Duty to decide votei n dictments by 12 or mero votes,	Same as H.R. 3736	No provision	No provision	No provision.

B. Consequences of failure to notify.	No provision	Defense to contempt, dismissal of indictments with prejudice.	Same as H.R. 3736	No provision	No provision	No provision.
C. Requests to testify	Anyone may request attorney for the Government which is forwarded to the grand jury.	No provision	Anyone may request the court.	No provision	No provision	No provision.
	Grand jury may refuse to receive evidence.	Same as H.R. 94	Request is honored unless court finds it would serve no relevant purpose.	No provision	No provision	No provision.
	Targets must be notified of right to request to appear.	Same as H.R. 94	No provision	No provision	No provision	No provision.
	Public record of requests maintained.	Same as H.R. 94	No provision	No provision	No provision	No provision.
	Witness appearing under requests waives 5th amendment privilege.	Same as H.R. 94	No provision	No provision	No provision	No provision.
D. Duties of attorneys for the Government.	Advise jury of impeachment or exculpatory evidence.	Same as H.R. 94	No provision	No provision	No provision	No provision.
	Avoid calling witnesses who intend to assert the 5th amendment.	Same as H.R. 94	No provision	No provision	No provision	No provision.
	Initiate inquiry without additional evidence after earlier grand jury has failed to return indictments.	Same as H.R. 94	Same as H.R. 94	No provision	No provision	No provision.
VI. INDEPENDENT GRAND JURY INQUIRY						
A. Scope	Alleged violations of Federal law within their district.	Alleged violations of Federal law within their district by Government officials.	Same as H.R. 3736	Same as H.R. 94	No provision	Alleged violations of Federal law within their district by Federal Government officials.
B. Term	18 mo with 6 mo extensions not to exceed 36 mo.	12 mo with 6 mo extensions not to exceed 24 mo.	Same as H.R. 3736	Same as H.R. 94	No provision	No provision.
C. Special attorney to assist grand jury.	Appointed by court upon request of majority of grand jury.	Appointed by court upon request of 12 or more grand jurors.	Same as H.R. 3736	Same as H.R. 94	No provision	Same as H.R. 3736.
	Special attorney may appoint assistants.	Same as H.R. 94	Same as H.R. 94	Same as H.R. 94	No provision	Same as H.R. 94.
	Special attorney may assist in conduct of inquiry.	Same as H.R. 94	Same as H.R. 94	Same as H.R. 94	No provision	Same as H.R. 94.
	Prepare and sign indictments.	Same as H.R. 94	Same as H.R. 94	Same as H.R. 94	No provision	Same as H.R. 94.
	Prosecute and conduct appeals.	No provision	No provision	Same as H.R. 94	No provision	Same as H.R. 94.
	Cooperation of other Federal agencies required.	No provision	No provision	Same as H.R. 94	No provision	Same as H.R. 94.

COMPARATIVE SUMMARY OF DIFFERENCES IN GRAND JURY REFORM BILLS INTRODUCED IN THE 95TH CONGRESS—Continued

	H.R. 94 (Eilberg)	H.R. 3736 (Conyers)	H.R. 2609 (Patterson)	H.R. 4908 (Duncan)	H.R. 406 (Holtzman)	H.R. 1830 (Jordan)
VI. INDEPENDENT GRAND JURY INQUIRY—Con.						
C. Special attorney to assist grand jury—Con.						
	Supplies from GSA	No provision	No provision	Same as H.R. 94	No provision	Same as H.R. 94.
	Salaries and expenses out of Justice Department authorizations and appropriations.	No provision	No provision	Same as H.R. 94	No provision	Same as H.R. 94.
	No provision	No provision	No provision	No provision	No provision	Special attorney has authority to contest claims of executive privilege.
	No provision	No provision	No provision	No provision	No provision	To request immunity.
	No provision	No provision	No provision	No provision	No provision	Utilize the FBI.
	No provision	No provision	No provision	No provision	No provision	Appear before Congress.
	No provision	No provision	No provision	No provision	No provision	Make public statements.
VII. RIGHTS OF GRAND JURY WITNESSES						
A. Counsel	Witnesses have right to to have attorney present to assist them.	Same as H.R. 94	Same as H.R. 94	Same as H.R. 94	No provision	No provision.
	Application of sec. 3006A	Same as H.R. 94	Same as H.R. 94	Same as H.R. 94	No provision	No provision.
	Attorney may be present in grand jury room when client testifies and disclose.	Same as H.R. 94	Same as H.R. 94	Same as H.R. 94	No provision	No provision.
	Attorney not permitted to address the grand jury.	No provision	No provision	Same as H.R. 94	No provision	No provision.
	Attorney may be removed for addressing the grand jury or to prevent delays and impediment.	No provision	No provision	Same as H.R. 94	No provision	No provision.
B. Subpena:						
1. Issuance	No provision	Only upon vote of 12 or more grand jurors.	Same as H.R. 3736	No provision	No provision	No provision.
2. Delay between issuance and appearance.	7 days	7 days	7 days	No provision	No provision	No provision.

3. Information in subpena.	Right to counsel	Same as H.R. 94	Same as H.R. 94	No provision	No provision	No provision.
	5th amendment privilege					
	Subject matter of inquiry					
	Whether witness is a target, criminal statutes involved.					
	Other rights and privileges in court's discretion.					
	Subpena may be quashed if the witness is not advised of these.					
4. Motions concerning subpena.	Venue in district where issued or served or where the witness resides.	Same as H.R. 94	Same as H.R. 94	No provision	No provision	No provision.
	Motion may be made at any time but one not made before appearance must be made where the grand jury is sitting.	Same as H.R. 94	Same as H.R. 94	No provision	No provision	No provision.
	Motion stays requirement for appearance.	Same as H.R. 94	Same as H.R. 94	No provision	No provision	No provision.
5. Grounds for quashing or modifying subpena.	Evidence sought against one who is already formerly accused.	Same as H.R. 94	Same as H.R. 94	No provision	No provision	No provision.
	Witness has previously been held in contempt concerning the same transaction.	Same as H.R. 94	Same as H.R. 94	No provision	No provision	No provision.
	Written notice that the witness intends to claim his 5th amendment privilege.	Same as H.R. 94				
	Witness was not advised of his rights.	Same sa H.R. 94	Same as H.R. 94	No provision	No provision	No provision.
	Compliance would be unreasonable, oppressive, require unnecessary appearance.	Same as H.R. 94	Same as H.R. 94	No provision	No provision	No provision.
	Purpose is punitive	Same as H.R. 94	Same as H.R. 94	No provision	No provision	No provision.
	Evidence sought is not relevant or within the grand jury's jurisdiction.	No provision	No provision	No provision	No provision	No provision.
6. Jurisdiction limitation.	Grand jury may only investigate where violation of a substantive criminal law may have occurred within the district.	Same as H.R. 94	Same as H.R. 94	No provision	No provision	No provision.

COMPARATIVE SUMMARY OF DIFFERENCES IN GRAND JURY REFORM BILLS INTRODUCED IN THE 95TH CONGRESS—Continued

	H.R. 94 (Eilberg)	H.R. 3736 (Conyers)	H.R. 2620 (Patterson)	H.R. 4908 (Duncan)	H.R. 406 (Holtzman)	H.R. 1830 (Jordan)
VII. RIGHTS OF GRAND JURY WITNESSES—Con.						
B. Subpena—Continued						
7. Hardship	Court may quash subpena or transfer inquiry to a permissible district where appearance would impose a substantial and unnecessary hardship.	Court may transfer for the convenience of the witness and the interest of justice.	Same as H.R. 3736	No provision	No provision	No provision.
8. Interrogation restriction.	No provision	Attorney for Government may ask only relevant questions, make threatening, coercive comments prohibited.	No provision	No provision	No provision	No provision.
9. Indictment standard	No provision	Reasonable cause on legally sufficient competent admissible evidence.	Same as H.R. 3736	No provision	No provision	No provision.
VIII. RECORDING TRANSCRIBING AND AVAILABILITY OF GRAND JURY PROCEEDINGS						
A. Recording	Stenographic or electronic of.	Stenographic of	Same as H.R. 3736	Same as H.R. 94	No provision	No provision.
	Notice of grand jury rights	Same as H.R. 94	Same as H.R. 94	Same as H.R. 94	No provision	No provision.
	Charges and comments by the court.	No provision	No provision	Same as H.R. 94	No provision	No provision.
	Statements of attorney for the Government.	Same as H.R. 94	Same as H.R. 94	Same as H.R. 94	No provision	No provision.
	Questioning and testimony of witnesses.	Same as H.R. 94	Same as H.R. 94	Same as H.R. 94	No provision	No provision.
	Interchanges between witnesses and attorneys.	All statements by attorneys and witness.	Same as H.R. 3736	Same as H.R. 94	No provision	No provision.
	But not grand jury deliberations and consultations.	But not deliberations	Same as H.R. 3736	Same as H.R. 94	No provision	No provision.
	No provision	And not consultations between witness and his attorney.	Same as H.R. 3736	No provision	No provision	No provision.

B. Witness acess	Examine and copy any witness's statements in Government possession prior to testimony.	Same as H.R. 94	Same as H.R. 94	Same as H.R. 94	No provision	No provision.
	Examine and copy own grand jury testimony.	Same as H.R. 94	Same as H.R. 94	Same as H.R. 94	No provision	No provision.
	No provision	Witness furnished testimony within 48 hr.	Same as H.R. 3736	No provision	No provision	No provision.
	No provision	Witness afforded change to explain to grand jury after examination which shall be recorded and shown to grand jury.	No provision	No provision	No provision	No provision.
C. Defendant access	Examine and copy after formal accusation; grand jury testimony of all witnesses to be called at trial; statement to grand jury by attorneys for the Government relating to case and other exculpatory or material grand jury evidence.	No provision	No provision	Same a H.R. 94	No provision	No provision.
D. Restricted access	Court may deny or restrict disclosure and must preserve record.	No provision	No provision	Same as H.R. 94	No provision	No provision.
IX. PRELIMINARY EXAMINATION						
A. Right	Defendant entitled to after formal accusation except on petty offenses or unless waived.	No provision	No provision	No provision	No provision	No provision.
X. REPORTS CONCERNING GRAND JURY INVESTIGATIONS						
A. To Congress and Administive Office of U.S. Courts.	By Attorney General beginning of each session.	Same as H.R. 94	By Attorney General or designated Assistant Attorney General every January.	Same as H.R. 94	No provision	No provision.

COMPARATIVE SUMMARY OF DIFFERENCES IN GRAND JURY REFORM BILLS INTRODUCED IN THE 95TH CONGRESS—Continued

	H.R. 94 (Eilberg)	H.R. 3736 (Conyers)	H.R. 2620 (Patterson)	H.R. 4908 (Duncan)	H.R. 406 (Holtzman)	H.R. 1830 (Jordan)
X. REPORTS CONCERNING GRAND JURY INVESTIGATIONS—Continued						
B. Contents	By judicial district; (1) number and description of grand jury investigations, (2) number of requests and approval for immunity applications, (3) number of immunity applications, (4) number of immunity applications approved and nature of inquiry where used, (5) number, dates and duration of grand jury contempts, (6) number of arrests, convictions, indictments, no bills resulting from immunity, (7) description of Justice Department use and storage of grand jury information, (8) other information concerning grand juries.	Same as H.R. 94	Same as H.R. 94	Same as H.R. 94	No provision	No provision.
XI. EFFECT ON OTHER LAWS						
A. Other rights	Any other rights or privileges not affected by bill.	Same as H.R. 94	No provision	Same as H.R. 94	No provision	No provision.
B. Federal rules	Inconsistent provisions of Federal Rules of Criminal Procedure inapplicable.	Same as H.R. 94	No provision	No provision	No provision	No provision.

95TH CONGRESS
1ST SESSION

S. 1449

IN THE SENATE OF THE UNITED STATES

MAY 4 (legislative day, APRIL 28), 1977

Mr. ABOUREZK introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To establish certain rules with respect to the appearance of witnesses before grand juries in order better to protect the constitutional rights and liberties of such witnesses under the fourth, fifth, and sixth amendments to the Constitution, to provide for independent inquiries by grand juries, to require periodic reports to Congress, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Grand Jury Reform Act of 1977."

SEC. 2. Section 1826 of title 28, United States Code, is amended to read as follows:

"§ 1826. Recalcitrant witnesses

"(a) (1) 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 attorney for the Government may apply to the court for an order directing the witness to show cause why the witness should not be held in contempt.

"(2) After submission of such application and a hearing at which the witness is entitled to be represented by counsel, the court may, upon a finding that such refusal was without just cause, hold the witness in contempt and order the witness to be confined. Such confinement shall be at a suitable Federal correctional institution, if one is located within fifty miles of the court ordering confinement, unless the witness waives this right. Upon a showing of need or hardship, the court ordering confinement may grant a request by the witness to be imprisoned at a suitable correctional institution near the place of residence or employment of the witness, or the witness' family or relatives or the attorney of the witness.

"(3) Confinement under this section shall continue until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the term of the grand jury, including extensions, before which such refusal to comply with the court order oc-

curred, and in no event shall such confinement exceed six months.

"(4) No hearing shall be held under this subsection unless five days' notice is given to the witness who has refused to comply with the court order, except that a witness may be given a shorter notice of not less than forty-eight hours if the court, upon a showing of special need, so orders.

"(b) No person who has been confined under this section for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events may be again confined under this section or under section 401 of title 18, United States Code, for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events.

"(c) Any person confined pursuant to this section of this section shall be admitted to bail or released in accordance with the provisions of chapter 207 of title 18, United States Code, pending the determination of an appeal taken by him from the order of his confinement, unless it affirmatively appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, pursuant to an expedited schedule, and in no event more than thirty days from the filing of such appeal.

"(d) In any proceeding conducted under this section, including all necessary appeals, counsel may be appointed in the same manner as provided in section 3006A of title 18, United States Code, for any person financially unable to obtain adequate representation.

"(e) A refusal to answer a question or provide other information before a grand jury of the United States shall not be punishable under this section or under section 401 of title 18, United States Code, if the question asked or the request for other information is based in whole or in part upon evidence seized or otherwise obtained by an unlawful act or in violation of the witness' constitutional rights or of rights established or protected by any statute of the United States.".

SEC. 3. (a) Chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"**§ 403. Refusal of a witness to testify in a grand jury proceeding**

"No person who has been imprisoned or fined by a court of the United States under section 401 of this title for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events in a proceeding before a grand jury (including a special grand jury summoned under section 3331 of this title) impaneled before any district court of the United States may again be imprisoned

or fined under section 401 of this title or under section 1826 of title 28, United States Code, for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events.".

(b) The table of sections for chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"403. Refusal of a witness to testify in a grand jury proceeding.".

UNAUTHORIZED DISCLOSURE OF GRAND JURY INFORMATION

SEC. 4. (a) Chapter 73 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 1512. Violations of grand jury secrecy

"(a) Whoever knowingly discloses any evidence introduced, statement made, or other matter occurring before, any grand jury summoned or impaneled by a court of the United States shall be fined not more than $500 or imprisoned not more than six months or both.

"(b) Whoever knowingly discloses any evidence introduced, statement made, or other matter occurring before, any grand jury summoned or impaneled by a court of the United States, with the intent to secure compensation therefore, to effect the actions of or any decisions by that jury, to effect further legal proceedings against any witness, or to effect further legal proceedings as to the subject matter of

any investigation by that jury, shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(c) This section shall not apply to—

"(1) disclosure to or by an attorney for the Government in the performance of his duties;

"(2) disclosure directed or permitted by a court;

"(3) disclosure by a witness who has appeared before such grand jury, or by his attorney, of any matter concerning which the witness has testified, or produced other information, before the grand jury; or

"(4) any representative of the press, broadcasting, or information media, acting in his professional capacity.

"(d) Subsection (a) shall not apply to disclosure by any person other than a person present at the grand jury proceeding.

"(e) As used in this section—

"(1) 'attorney for the Government' includes the Attorney General, an authorized assistant of the Attorney General, a United States attorney, and an authorized assistant of a United States attorney;

"(2) 'disclosure by a witness' includes disclosure by others of matter the witness has previously disclosed when made as a consequence of such disclosure by the witness.

"(f) Nothing contained in this section shall be construed

to affect the power of the court to punish any person for contempt for violation of any rule or order of the court.".

(e) The table of sections for chapter 73 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"1512. Violations of grand jury secrecy.".

RIGHTS AND DUTIES OF GRAND JURORS; INDEPENDENT INQUIRY

SEC. 5. (a) Chapter 215 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"§ 3329. Rights and duties of grand jury and attorney for Government

"(a) Upon impanelment of each grand jury before a district court of the United States, the court shall give adequate and reasonable notice to the grand jury of, and shall assure that the grand jury reasonably understands—

"(1) its duty to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district;

"(2) its rights, authority, and powers with respect to an independent inquiry under section 3330 of this title;

"(3) its right to call and interrogate witnesses;

"(4) its right to request the production of documents or other evidence;

"(5) the subject matter of the investigation;

"(6) the criminal statute or statutes involved, if these are known at the time the grand jury is impaneled;

"(7) the necessity of legally sufficient evidence to form the basis of any indictment as provided under section 3330A(1) of this title;

"(8) the duty of the grand jury by an affirmative vote of twelve or more members of the grand jury to determine, based on the evidence presented before it, whether or not there are sufficient grounds for issuing indictments and to determine the violations to be included in any such indictments;

"(9) the obligation of secrecy and that it is a criminal offense to disclose to any person any information concerning any grand jury proceeding; and

"(10) such other duties and rights as the court deems advisable.

The court's failure to instruct the grand jury as directed in this section shall be just cause within the meaning of section 1826 of title 28, United States Code, for a witness' refusal to testify or provide other information before such grand jury, until such time as the court instructs the grand jury in accordance with this section.

"(b) (1) Any person, including a witness who has previously testified or produced books, records, or documents, may make a written request to the attorney for the Government, or a special attorney appointed pursuant to this title, and request to testify in an inquiry before a grand jury, or to produce books, records, or documents, or to appear before a grand jury and request that the grand jury proceed in accordance with its powers under section 3330 of this title.

"(2) The attorney for the Government, or the special attorney—

"(A) shall forward any request under this subsection to the grand jury and may make a recommendation as to such request;

"(B) shall take reasonable steps to notify any person of his intention to present evidence against the person and request a presentment or indictment and of the person's right to testify or present evidence under this subsection and such notice shall be given a reasonable time in advance of any request for such presentment or indictment unless the attorney for the Government or the special attorney can prove to the satisfaction of the court that notice would result in the flight of the person, would endanger other witnesses, or would unduly delay the investigation and prosecution; and

"(C) shall establish a public record of all requests and the action taken on each such request.

"(3) The grand jury shall not be required to hear any witness, or consider any book, record, or document, but shall consider all requests forwarded to it by the attorney for the Government or the special attorney. Unless the grand jury, upon an affirmative vote of a majority of its members, refuses to hear the testimony, or consider the documents offered by, a person, under this subsection, the attorney for the Government or the special attorney shall subpena the evidence or witness offered. If the grand jury refuses to hear the testimony or consider the documents offered, the attorney for the Government or the special attorney shall notify the person making such request, in writing, of the refusal.

"(4) Upon appearing pursuant to a subpena, such person shall be permitted to testify, only upon submission of a waiver of immunity, as to relevant and competent matters under consideration by the jury and shall be subject to examination by the attorney for the Government or the special attorney.

"(c) The attorney for the Government and the special attorney shall not bring before the grand jury any witness who has given written notice in advance of the witness' appearance that such witness intends to exercise his privilege against self-incrimination, nor bring to the attention of the

jurors, in any way, the invocation of the privilege by such witness, unless such witness has been given a grant of immunity.

"(d) The attorney for the Government or a special attorney shall not initiate, and a grand jury shall not conduct, an inquiry into a transaction or transactions, event or events, if another jury has failed to return an indictment based on the same transaction or transactions, event, or events, unless the court finds, upon a proper showing, that additional evidence relevant to such inquiry has been discovered.

"§ 3330. Independent grand jury inquiry

"(a) (1) Any grand jury impaneled before any district court (including a special grand jury summoned under section 3331) may, after giving notice to the court, inquire upon its own initiative into offenses against the criminal laws of the United States alleged to have been committed within that district by any officer or agent of the United States or of any State or municipal government or by any person who, at the time of the alleged commission of the offense, was an officer or agent of the United States or of any State or municipal government. Such grand jury may request the attorney for the Government to assist the grand jury in such inquiry.

"(2) The grand jury shall serve for a term of eighteen

months after giving notice to the court under paragraph (1) unless an order for its discharge is entered earlier by the court or upon a determination of the grand jury by an affirmative vote of twelve or more members that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No grand jury term so extended shall exceed thirty-six months from the date on which notice to the court was given under paragraph (1).

"(3) If a district court within any judicial circuit fails to extend the term of a grand jury engaged upon an independent inquiry under this section or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury by an affirmative vote of twelve or more members may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry by the chief judge of the circuit of an appropriate order upon such application. No grand jury term so extended shall exceed twenty-four months.

"(b) (1) In the event that the attorney for the Government is unable to impartially assist, refuses to assist or hin-

ders or impedes the grand jury in the conduct of any inquiry under subsection (a), the grand jury may, upon the affirmative vote of twelve or more of its members, request at any point in such inquiry that the court appoint a special attorney in lieu of the attorney for the Government, to assist the grand jury in the conduct of any independent inquiry referred to in subsection (a). Such special attorney, with the approval of the court, may appoint and fix the compensation of such assistants, investigators, and other personnel as he deems necessary. The special attorney and his appointees shall be appointed without regard to the provisions of title 5 of the United States Code, governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that the special attorney and any appointees shall be paid at a reasonable rate to be determined by the court. The special attorney shall be reimbursed for actual expenses incurred by him and his appointees in the performance of duties pursuant to this section.

"(2) Notwithstanding sections 516, 518, and 519 of title 28 or any other provision of law, a special attorney appointed under this section shall carry out the functions of an attorney for the Government and shall have the exclusive authority to—

"(A) assist in the conduct of independent grand jury investigations under this section,

"(B) prepare and sign any indictment returned by a grand jury pursuant to such inquiry in lieu of any attorney for the Government, and

"(C) conduct all other phases of any criminal prosecution arising out of such inquiry (including the argument of appeals in the United States courts of appeals and the United States Supreme Court).

"(3) A special attorney appointed under this section is authorized to obtain from any department or agency of the United States any files, records, documents, or other materials which he deems necessary or appropriate in the carrying out of his functions under this section.".

(c) The Administrator of General Services shall furnish offices, equipment, supplies, and services to a special attorney appointed under section 3330 of title 18, United States Code, in the same manner as such items are furnished to agencies and departments of the United States.

(d) Section 524 of chapter 31 of title 28, United States Code (relating to appropriations for administrative expenses), is amended by adding at the end thereof the following new sentence: "Such appropriations shall also be available for payment of the compensation and other expenses of the special attorney appointed under section 3329

of title 18 to assist a grand jury in the conduct of an independent investigation.".

RIGHTS OF GRAND JURY WITNESSES

SEC. 6. (a) Chapter 215 of title 18, United States Code, is further amended by adding at the end thereof the following new sections:

"§ 3330A. Counsel

"(a) Every witness subpenaed to appear and testify before a grand jury impaneled before a district court or to produce books, papers, documents, or other objects before such grand jury shall be entitled to the assistance of counsel, including assistance during such time as the witness is questioned in presence of the grand jury.

"(b) Such counsel may be retained by the witness or shall be appointed as provided in section 3006A of this title in the case of any person financially unable to obtain legal representation. Notwithstanding any rule contained in the Federal Rules of Criminal Procedure, such witness' counsel is authorized to disclose matters which occur before the grand jury while such counsel is in the grand jury room.

"(c) Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in proceedings before the grand jury.

"(e) The court shall have the power to remove such attorney, and order the witness to obtain new counsel, when it finds that the attorney has violated subsection (c) or (d) of this section or that such removal and replacement is necessary to insure that the activities of a grand jury are not unduly delayed or impeded. Nothing in this subsection shall affect the power of the court to punish for contempt or impose other appropriate sanctions.

"§ 3330B. Subpenas

"(a) In the case of any proceeding before a grand jury impaneled before a district court, except where the court finds special need upon a showing by the attorney for the Government or a special attorney appointed under this title, or the consent of the witness, no subpena may require any witness to testify or produce other information at such proceeding at any time before the expiration of the one-week period beginning on the date of service of the subpena.

"(b) Upon the service of any subpena requiring any witness to testify or produce other information at any proceeding before a grand jury impaneled before a district court, the witness shall be given adequate and reasonable notice of—

"(1) his right to counsel as provided in section 3330A of this title;

"(2) his privilege against self-incrimination;

"(3) the subject matter of the grand jury investigation;

"(4) whether his own conduct is under investigation by the grand jury;

"(5) the substantive criminal statute or statutes, violation of which is under consideration by the grand jury, if these are known at the time of issuance of the subpena; and

"(6) any other rights and privileges which the court deems necessary or appropriate.

"(c) (1) The district court which issued a subpena, or the district court for the district in which the person resides or is served shall have concurrent jurisdiction to hear, and take appropriate action with respect to any motion relating to, including any motion to quash, such subpena.

"(2) A motion relating to a subpena may be made at any time prior to, during, or when appropriate, subsequent to the appearance of any witness before a grand jury. Any motion made during or subsequent to the appearance of the witness before the grand jury may be made only in the district in which the grand jury is impaneled.

"(3) If a motion is made under this section before the day on which the person subpenaed has been ordered to appear or books, records, or documents have been ordered to be produced, the appearance of such person, or the pro-

duction of such documents, shall, upon appropriate application, be stayed until the court has ruled on such motion.

"(d) (1) Upon proper motion, the court may quash a subpena and take other appropriate sanctions when it finds that—

"(A) a primary purpose or effect of requiring such person to so testify or to produce such objects to the grand jury is or will be to secure for trial testimony or to secure other information regarding the activities of any person who is already under indictment by the United States, a State, or any subdivision thereof for such activities; or of any person who is under formal accusation for such activities by any State or any subdivision thereof, where the accusation is by some form other than indictment;

"(B) the witness has not been advised of his rights, as specified in subsection (b);

"(C) the evidence sought is not relevant to the grand jury investigation properly conducted within the grand jury's jurisdiction;

"(D) compliance with the subpena would be unreasonable or oppressive, as such subpena would require unnecessary appearances by the witness, would lead to testimony or other information that is cumulative, unnecessary or privileged, would be primarily for puni-

tive purposes or would not involve other like circumstances; or

"(E) a primary purpose of the issuance of the subpena is to harass the witness.

"(e) Upon proper motion, the court shall quash a subpena and take other appropriate sanctions when it finds that—

"(1) the witness has already been confined, imprisoned, or fined under section 1826 of title 28, United States Code, or section 401 of this title for his refusal to testify before any grand jury investigating the same transaction, set of transactions, event, or events;

"(2) the witness has given written notice that such witness intends to exercise his privilege against self-incrimination, unless a grant of immunity has been obtained; or

"(3) the grand jury is inquiring into the same transaction or transactions, event or events, that was under consideration by another grand jury which failed to return an indictment based on such transaction or event and there is no additional, newly discovered evidence relevant to such inquiry.

"(f) (1) A grand jury impaneled to conduct an inquiry into offenses against the criminal laws of the United States may be convened only in a district, or districts, in

which it is believed criminal conduct may have occurred which are elements of such offenses; except that when a grand jury is to be convened to conduct an inquiry into both violations of substantive criminal statutes and violations of statutes forbidding conspiracy to violate substantive criminal statutes, the grand jury may not be convened before a district court in a district in which the only criminal conduct alleged to have occurred in that district is conspiracy to commit the substantive criminal act.

"(2) The district court may quash a subpena or transfer any grand jury proceedings or investigation into any other district where it might properly have been convened if the court finds that a witness' appearance would impose a substantial and unnecessary hardship on such witness or his family because of the location of the proceeding. In considering whether such hardship exists, the court shall take into consideration all the relevant circumstances, including the distance of the grand jury investigation from the places of residence of witnesses who have been subpenaed, financial and other burdens placed upon the witnesses, and the existence and nature of any related investigations and court proceedings.".

"§ 3330C. Evidence presented to the grand jury

"(a) The attorney for the Government shall not be permitted to submit before the grand jury any evidence seized

or otherwise obtained by an unlawful act or in violation of the witness' constitutional rights or of rights established or protected by any statute of the United States.

"(b) An attorney for the Government shall present to the grand jury all evidence in such attorney's possession which he knows will tend to negate the guilt of the person or persons under investigation.

"(c) A grand jury may indict a person for an offense when (1) the evidence before such grand jury is legally sufficient to establish that such offense was committed, and (2) competent and admissible evidence before such grand jury provides reasonable cause to believe that such person committed such offense. An indictment may be based on summarized or hearsay evidence alone only upon showing of good cause to the court which impaneled the grand jury.

"(d) The district court before which a grand jury is impaneled shall dismiss any indictment of the grand jury if such district court finds that—

"(1) the evidence before the grand jury was legally insufficient to establish that the offense for which the indictment was rendered was committed;

"(2) there was not competent and admissible evidence, or summarized or hearsay allowed by the court upon a showing of good cause, before the grand jury to

provide reasonable cause to believe that the person indicted committed such offense;

"(3) the attorney for the Government has not presented to the grand jury all evidence in his or her possession which the attorney knows will tend to negate the guilt of the person indicted; or

"(4) the attorney for the Government has submitted to the grand jury evidence seized or otherwise obtained by an unlawful act or in violation of the witness' constitutional rights or of rights established or protected by any statute of the United States.".

(b) Section 3006A of title 18, United States Code (relating to appointment of attorneys), is amended—

(1) by striking out "or," before "(4)" in the first sentence thereof; and

(2) by inserting before the period at the end of the first sentence thereof: ", or (5) who is a witness before a grand jury impaneled before the district court".

RECORDING, TRANSCRIBING, AND AVAILABILITY OF GRAND JURY PROCEEDINGS

SEC. 7. (a) Chapter 215 of title 18, United States Code, is further amended by adding at the end thereof the following new sections:

"§ 3333. **Recording of grand jury proceedings**

"A complete and accurate stenographic or electronic

record of all grand jury proceedings shall be kept, except that the grand jury's secret deliberations and consultations between witnesses and their counsel shall not be recorded. Such record shall include the court's notice to the grand jury of its rights and duties and all other comments or charges by the court to the jury at any time; all introductory comment, or other comments, directives, and other utterances made by attorneys for the Government or special attorneys to the grand jury, witnesses and their counsels; all questioning of and testimony of witnesses; all interchanges between the grand jury and attorneys.

"§ 3334. Availability of grand jury transcripts and other statements

"(a) Any person summoned to testify or provide other information before a grand jury impaneled before a district court shall be entitled, prior to testifying or providing other information, to examine and copy any statement in the possession of the United States which he has made and which relates to the subject matter under inquiry by the grand jury. Such examination and copying may be made by the attorney for such person if such person gives his written approval. As used in this subsection, the term 'statement' has the meaning provided by section 3500 (e).

"(b) Any witness who testifies before a grand jury, or his attorney with such witness' written approval, shall,

upon request, and under such conditions as the court deems reasonable, be entitled to examine and copy a transcript or electronic recording of the record for the period of such witness' own appearance before the grand jury, and if a witness is proceeding in forma pauperis, he shall be furnished, upon request, a copy of such transcript. Such transcript shall be made available for inspection and copying not later than forty-eight hours after the conclusion of such witness' testimony, unless, for cause shown, more time is required to prepare such transcript. After examination of such transcript, a witness may request permission to appear before the grand jury again to explain his testimony. Additional testimony given under this subsection shall become part of the official transcript and shall be shown to the members of the grand jury.

"(c) Upon a showing of good cause, the court may, at any time, order that the disclosure of the recorded proceedings of a grand jury be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the Government, the court shall permit the Govrnment to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be

sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

"(d) A reasonable time prior to trial, and after the return of an indictment or the filing of an information, a defendant shall, upon request and under such conditions and limitations as the court deems reasonable, be entitled to examine and copy a transcript or electronic recording of—

"(1) the grand jury testimony of all witnesses to be called at trial;

"(2) all statements to the grand jury by the court and the attorney for the Government or special attorney, relating to the defendant's case;

"(3) all grand jury testimony or evidence which in any manner could be considered exculpatory; and

"(4) all other grand jury testimony or evidence which the court may deem material to the defense.".

(b) Section 3500, title 18, United States Code, is amended—

(1) by inserting "or" before subsection (e) (2) thereof;

(2) by deleting "; or" and inserting a period at the end of subsection (e) (2) thereof; and

(3) by deleting subsection (e) (3) thereof.

(b) The table of sections for chapter 215 of title 18, United States Code, is amended by adding at the end thereof the following new items:

"3329. Notice to grand jury of its rights and duties.
"3330. Independent grand jury inquiry.
"3330A. Certain rights of grand jury witnesses.
"3330B. Subpoenas.
"3330C. Evidence presented to the grand jury.
"3333. Recording of grand jury proceedings.
"3334. Availability of grand jury transcripts and other statements".

PRELIMINARY EXAMINATION

SEC. 8. (a) Chapter 217 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 3368. **Preliminary examination**

"(a) A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court.

"(b) Such preliminary examination may be held prior to, or within a reasonable time following, the filing of an indictment or information in the district court.".

(b) The table of sections for chapter 217 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"3368. Preliminary examination.".

REPORTS CONCERNING GRAND JURY INVESTIGATIONS

SEC. 9. (a) Section 522 of title 28, United States Code (relating to reports of business and statistics), is amended

by striking out "The Attorney General" and inserting in lieu thereof "(a) The Attorney General" and by adding at the end thereof the following new subsection:

"(b) The Attorney General, at the beginning of each regular session of Congress, shall report to the Congress and to the Administrative Office of the United States Courts with respect to the last preceding fiscal year on—

"(1) the number of investigations undertaken in which a grand jury or a special grand jury was utilized together with a description of the nature of each investigation undertaken;

"(2) the number of requests by United States grand juries to the Attorney General for approval to apply to the court for an order compelling testimony under section 2003 of title 18, and the number of such requests approved by the Attorney General;

"(3) the number of applications to district courts for orders granting immunity under title 18;

"(4) the number of applications to district courts for orders granting immunity under title 18 that were approved and the nature of the investigations for which the orders were sought;

"(5) the number of instances in which witnesses in the investigations enumerated in paragraph (1) were

held in contempt and confined, and the dates and lengths of such confinement;

"(6) the number of arrests, indictments, no-bills, trials, and convictions resulting from testimony obtained under orders granting immunity, the offenses for which the convictions were obtained, and a general assessment of the importance of the immunity;

"(7) a description of data banks and other procedures by which grand jury information is processed, stored, and used by the Department of Justice; and

"(8) other appropriate information concerning grand jury activity during such year.

The matters contained in the report required to be made by this section shall be set forth according to judicial district.".

EFFECT ON OTHER LAWS AND RULES

SEC. 10. (a) The enumeration in this Act of any rights and privileges of grand jury witnesses shall not affect any other rights and privileges to which such witnesses may be entitled under any law or rule of law.

(b) Notwithstanding section 3771, no rule contained in the Federal Rules of Criminal Procedure shall apply to the extent that such rule is inconsistent with the provisions of this Act.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

(By Mr. Abourezk)

S. 1449. A bill to establish certain rules with respect to the appearance of witnesses before grand juries in order better to protect the constitutional rights and liberties of such witnesses under the fourth, fifth, and sixth amendments to the Constitution, to provide for independent inquiries by grand juries, to require periodic reports to Congress, and for other purposes; to the Committee on the Judiciary.

Mr. ABOUREZK. Mr. President, during the 94th Congress the Subcommittee on Constitutional Rights held hearings on legislation I introduced to correct abuses in the Federal grand jury system. I am today introducing the Grand Jury Reform Act of 1977. This bill incorporates most features of the legislation submitted last session, with several improvements adopted as a result of the testimony and comments received during hearings last year. I would urge early consideration this session. With the passage of this legislation Congress will finally restore to the "citizen's jury" its historical role as an independent body which shields the accused from a hasty, malicious, or oppressive prosecution.

In addition to increasing grand jury independence, the Grand Jury Reform Act will insure that the constitutional rights of witnesses are fully protected. The following provisions of the bill are significant in this regard:

First. The grand jury is given the power to conduct investigations into official misconduct and corruption. If the regular Government attorney is not helpful in such an inquiry, the grand jury may request the court to appoint a special prosecutor to assist its investigation.

Second. Witnesses will be permitted to have counsel accompany them inside the grand jury room. In order to prevent the proceeding from becoming a minitrial, counsel will be able to advise the witness, but not be allowed to address the grand jury directly. This provision gives statutory recognition to the fact that a grand jury appearance is indeed a "critical stage" in an inquiry into criminal conduct.

Third. The maximum period of confinement for contempt would be reduced to 6 months from the current 18. In addition, the practice of reiterative contempt would be abolished. This would end the possibility that citizens could be jailed indefinitely without ever being charged with a crime.

Fourth. All proceedings before the grand jury, with the exception of the grand jury's secret deliberations, must be recorded. A witness is given the right to obtain a copy of all statements he makes to the grand jury. [Safeguards are provided to insure that a witness is not coerced into obtaining copies of his testimony by persons he may have implicated to the grand jury.]

Fifth. A new provision has been added to protect the secrecy of grand jury deliberations. The knowing disclosure of grand jury proceedings in order to obtain money or to influence the grand jury or any other legal proceeding is made subject to a maximum fine of $20,000 and a prison sentence of 5 years. Exceptions to disclosure are provided for the witness, his lawyer, the Government attorney, or a news person, acting in his or her professional capacity.

Sixth. A person subpenaed by the grand jury must be advised of his or her constitutional rights, including the right to counsel. If the U.S. attorney has determined that the person's own conduct is under investigation, this "target" information must be provided.

Seventh. A defendant is given the right to a preliminary hearing in all cases, including those in which the prosecutor proceeds by way of indictment. This protection is not provided under current law.

Regrettably, our recent history has shown that some protection must be built into the system itself if the rights of the poor, minorities, or those with unpopular political views are to be protected. The reforms I am proposing today will help provide that protection, but not at the expense of this valued and important institution, or any diligent and scrupulous prosecution. This legislation seeks to restore to the grand jury its original role, shield as well as sword.

I urge my colleagues to join me in this effort to revitalize one of the basic protections guaranteed by our Constitution.

I ask unanimous consent that the text of the Grand Jury Reform Act be printed in the Record.

There being no objection, the bill was ordered to be printed in the Record, as follows:

S. 1449

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the * * *.

SEC. 2. Section 1826 of title 28, United States Code, is amended to read as follows:

"§ *1826. Recalcitrant witnesses*

"(a)(1) 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 attorney for the Government may apply to the court for an order directing the witness to show cause why the witness should not be held in contempt.

"(2) After submission of such application and a hearing at which the witness is entitled to be represented by counsel, the court may, upon finding that such refusal was without just cause, hold the witness in contempt and order the witness to be confined. Such confinement shall be at a suitable Federal correctional institution, if one is located within miles of the court ordering confinement, unless the witness waives this right. Upon a showing of need or hardship, the court ordering confinement may grant a request by the witness to be imprisoned at a suitable correctional institution near the place of residence or employment of the witness, or the witness' family or relatives or the attorney of the witness.

"(3) Confinement under this section shall continue until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, and in no event shall such confinement exceed six months.

"(4) No hearing shall be held under this subsection unless five days' notice is given to the witness who has refused to comply with the court order, except that a witness may be given a shorter notice of not less than forty-eight hours if the court, upon a showing of special need, so orders.

"(b) No person who has been confined under this section for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events may be again confined under this section or under section 401 of title 18, United States Code, for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events.

"(c) Any person confined pursuant to this section of this section shall be admitted to bail or released in accordance with the provisions of chapter 207 of title 18, United States Code, pending the determination of an appeal taken by him from the order of his confinement, unless it affirmatively appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, pursuant to an expedited schedule, and in no event more than thirty days from the filing of such appeal.

"(d) In any proceeding conducted under this section, including all necessary appeals, counsel may be appointed in the same manner as provided in section 3006A of title 18 United States Code, for any person financially unable to obtain adequate representation.

"(e) A refusal to answer a question or provide other information before a grand jury of the United States shall not be punishable under this section or under section 401 of title 18, United States Code, if the question asked or the request for other information is based in whole or in part upon evidence seized or otherwise obtained by an unlawful act or in violation of the witness' constitutional rights or of rights established or protected by any statute of the United States.".

SEC. 3. (a) Chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ *403. Refusal of a witness to testify in a grand jury proceeding*

"No person who has been imprisoned or fined by a court of the United States under section 401 of this title for refusal to testify or provide other information

concerning any transaction, set of transactions, event, or events in a proceeding before a grand jury (including a special grand jury summoned under section 3331 of this title) impaneled before any district court of the United States may again be imprisoned or fined under section 401 of this title or under section 1826 of title 28, United States Code, for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events.".

(b) The table of sections for chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new items:

"403. Refusal of a witness to testify in a grand jury proceeding.".

UNAUTHORIZED DISCLOSURE OF GRAND JURY INFORMATION

SEC. 4 (a) Chapter 73 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ *1515. Violations of grand jury secrecy*

"(a) Whoever knowingly discloses any evidence introduced, statement made, or other matter occurring before, any grand jury summoned or impaneled by a court of the United States shall be fined not more than $500 or imprisoned not more than six months or both.

"(b) Whoever knowingly discloses any evidence introduced, statement made, or other matter occurring before, any grand jury summoned or impaneled by a court of the United States, with the intent to secure compensation therefore, to effect the actions of or any decisions by that jury, to effect further legal proceedings against any witness, or to effect further legal proceedings as to the subject matter of any investigation by that jury, shall be fined not more than $20,000 or imprisoned not more than five years, or both,

"(c) This section shall not apply to—

"(1) disclosure to or by an attorney for the Government in the performance of his duties;

"(2) disclosure directed or permitted by a court; or

"(3) disclosure by a witness who has appeared before such grand jury, or by his attorney, or any matter concerning which the witness has testified, or produced other information, before the grand jury.

"(4) Any representative of the press, broadcasting, or information media, acting in his professional capacity.

"(d) Subsection (a) shall not apply to disclosure by any person other than a person present at the grand jury proceeding.

"(e) As used in this section—

"(1) 'attorney for the Government' includes the Attorney General, an authorized assistant of the Attorney General, a United States attorney, and an authorized assistant of a United States attorney.

"(2) 'disclosure by a witness' includes disclosure by others of matter the witness has previously disclosed when made as a consequence of such disclosure by the witness.

"(f) Nothing contained in this section shall be construed to affect the power of the court to punish any person for contempt for violation of any rule or order of the court.".

(e) The table of sections for chapter 73 of title 18, United States Code is amended by adding at the end thereof the following new item: "1512. Violations of Grand Jury Secrecy.".

RIGHTS AND DUTIES OF GRAND JURORS: INDEPENDENT INQUIRY

SEC. 5 (a) Chapter 215 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"§ *3329. Rights and duties of grand jury and attorney for Government*

"(a) Upon impanelment of each grand jury before a district court of the United States, the court shall give adequate and reasonable notice to the grand jury of, and shall assure that the grand jury reasonably understands—

"(1) its duty to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district;

"(2) its rights, authority, and powers with respect to an independent inquiry under section 3330 of this title;

"(3) its right to call and interrogate witnesses;

"(4) its right to request the production of documents or other evidence;

"(5) the subject matter of the investigation, and

"(6) the criminal statute or statutes involved, if these are known at the time the grand jury is impaneled;

"(7) the necessity of legally sufficient evidence to form the basis of any indictment as provided under section 3330A (1) of this title;

"(8) the duty of the grand jury by an affirmative vote of twelve or more members of the grand jury to determine, based on the evidence presented before it, whether or not there are sufficent grounds for issuing indictments and to determine the violations to be included in any such indictments;

"(9) the obligation of secrecy and that it is a criminal offense to disclose to any person any information concerning any grand jury proceeding; and

"(10) such other duties and rights as the court deems advisable. The court's failure to instruct the grand jury as directed in this section shall be just cause within the meaning of section 1826 of title 28, United States Code, for a witness' refusal to testify or provide other information before such grand jury, until such time as the court instructs the grand jury in accordance with this section.

"(b) (1) Any person, including a witness who has previously testified or produced books, records, or documents, may make a written request to the attorney for the Government, or a special attorney appointed pursuant to this title, and request to testify in an inquiry before a grand jury, or to produce books, records, or documents, or to appear before a grand jury and request that the grand jury proceed in accordance with its powers under section 3330 of this title.

"(2) The attorney for the Government, or the special attorney—

"(A) shall forward any request under this subsection to the grand jury and may make a recommendation as to such request;

"(B) shall take reasonable steps to notify any person of his intention to present evidence against the person and request a presentment or indictment and of the person's right to testify or present evidence under this subsection and such notice shall be given a reasonable time in advance of any request for such presentment or indictment unless the attorney for the Government or the special attorney can prove to the satisfaction of the court that notice would result in the flight of the person, would endanger other witnesses, or would unduly delay the investigation and prosecution;

"(C) shall establish a public record of all requests and the action taken on each such request.

"(3) The grand jury shall not be required to hear any witness, or consider any book, record, or document, but shall consider all requests forwarded to it by the attorney for the Government or the special attorney. Unless the grand jury, upon an affirmative vote of a majority of its members, refuses to hear the testimony, or consider the documents offered by a person, under this subsection, the attorney for the Government or the special attorney shall subpena the evidence or witness offered. If the grand jury refuses to hear the testimony or consider the documents offered, the attorney for the Government or the special attorney shall notify the person making such request, in writing, of the refusal.

"(4) Upon appearing pursuant to a subpena, such person shall be permitted to testify, only upon submission of a waiver of immunity, as to relevant and competent matters under consideration by the jury and shall be subject to examination by the attorney for the Government or the special attorney.

"(c) The attorney for the Government and the special attorney shall not bring before the grand jury any witness who has given written notice in advance of the witness' appearance that such witness intends to exercise his privilege against self-incrimination, nor bring to the attention of the jurors, in any way, the invocation of the privilege by such witness, unless such witness has been given a grant of immunity.

"(d) The attorney for the Government or a special attorney shall not initiate, and a grand jury shall not conduct, an inquiry into a transaction or transactions, event or events, if another jury has failed to return an indictment based on the same transaction or transactions, event or events, unless the court finds, upon a proper showing, that additional evidence relevant to such inquiry has been discovered.

"§ *3330. Independent grand jury inquiry*

"(a) (1) Any grand jury impaneled before any district court (including a special grand jury summoned under section 3331) may, after giving notice to the court, inquire upon its own initiative into offenses against the criminal laws of

the United States alleged to have been committed within that district by any officer or agent of the United States or of any State or municipal government or by any person who, at the time of the alleged commission of the offense, was an officer or agent of the United States or of any State or municipal government. Such grand jury may request the attorney for the Government to assist the grand jury in such inquiry.

"(2) The grand jury shall serve for a term of eighteen months after giving notice to the court under paragraph (1) unless an order for its discharge is entered earlier by the court or upon a determination of the grand jury by an affirmative vote of twelve or more members that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No grand jury term so extended shall exceed thirty-six months from the date on which notice to the court was given under paragraph (1).

"(3) If a district court within any judicial circuit fails to extend the term of a grand jury engaged upon an independent inquiry under this section or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury by an affirmative vote of twelve or more members may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry by the chief judge of the circuit of an appropriate order upon such application. No grand jury term so extended shall exceed twenty-four months.

"(b)(1) In the event that the attorney for the Government is unable to impartially assist, refuses to assist or hinders or impedes the grand jury in the conduct of any inquiry under subsection (a), the grand jury may, upon the affirmative vote of twelve or more of its members, request at any point in such inquiry that the court appoint a special attorney in lieu of the attorney for the Government, to assist the grand jury in the conduct of any independent inquiry referred to in subsection (a). Such special attorney with the approval of the court, may appoint and fix the compensation of such assistants, investigators, and other personnel as he deems necessary. The special attorney and his appointees shall be appointed without regard to the provisions of title 5 of the United States Code, governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that the special attorney and any appointees shall be paid at a reasonable rate to be determined by the court. The special attorney shall be reimbursed for actual expenses incurred by him and his appointees in the performance of duties pursuant to this section.

"(2) Notwithstanding sections 516, 518, and 519 of title 28 or any other provision of law, a special attorney appointed under this section shall carry out the functions of an attorney for the Government and shall have the exclusive authority to—

"(A) assist the conduct of independent grand jury investigations under this section,

"(B) prepare and sign any indictment returned by a grand jury pursuant to such inquiry in lieu of any attorney for the Government and

"(C) conduct all other phases of any criminal prosecution arising out of such inquiry (including the argument of appeals in the United States courts of appeals and the United States Supreme Court).

"(3) A special attorney appointed under this section is authorized to obtain from any department or agency of the United States any files, records, document, or other materials which he deems necessary or appropriate in the carrying out of his functions under this section.".

(c) The Administrator of General Services shall furnish offices, equipment, supplies, and services to a special attorney appointed under section 3330 of title 18, United States Code, in the same manner as such items are furnished to agencies and departments of the United States.

(d) Section 524 of chapter 31 of title 28, United States Code (relating to appropriations for administrative expenses), is amended by adding at the end thereof the following new sentence: "Such appropriations shall also be available for payment of the compensation and other expenses of the special attorney appointed under section 3329 of title 18 to assist a grand jury in the conduct of an independent investigation."

RIGHTS OF GRAND JURY WITNESSES

SEC. 6. (a) Chapter 215 of title 18, United States Code, is further amended by adding at the end thereof, the following new sections:

"§ *3330A. Counsel*

"(a) Every witness subpenaed to appear and testify before a grand jury impaneled before a district court or to produce books, papers, documents, or other objects before such grand jury shall be entitled to the assistance of counsel, including assistance during such time as the witness is questioned in presence of the grand jury.

"(b) Such counsel may be retained by the witness or shall be appointed as provided in section 3006A of this title in the case of any person financially unable to obtain legal representation. Notwithstanding any rule contained in the Federal Rules of Criminal Procedure, such witness' counsel is authorized to discuss matters which occur before the grand jury while such counsel is in the grand jury room.

"(c) Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in proceedings before the grand jury.

"(e) The court shall have the power to remove such attorney, and order the witness to obtain new counsel, when it finds that the attorney has violated subsection (c) or (d) of this section or that such removal and replacement is necessary to insure that the activities of a grand jury are not unduly delayed or impeded. Nothing in this subsection shall affect the power of the court to punish for contempt or impose other appropriate sanctions.

"§ *3330B. Subpenas*

"(a) In the case of any proceeding before a grand jury impaneled before a district court, except where the court finds special need upon a showing by the attorney for the Government or a special attorney appointed under this title or the consent of the witness, no subpena may require any witness to testify or produce other information at such proceeding (at any time before the expiration of the one-week period beginning on the date of service of the subpena).

"(b) Upon the service of any subpena requiring any witness to testify or produce other information at any proceeding before a grand jury impaneled before a district court, the witness shall be given adequate and reasonable notice of—

"(1) his right to counsel as provided in section 3330A of this title;

"(2) his privilege against self-incrimination;

"(3) the subject matter of the grand jury investigation;

"(4) whether his own conduct is under investigation by the grand jury;

"(5) the substantive criminal statute or statutes, violation of which is under consideration by the grand jury, if these are known at the time of issuance of the subpena; and

"(6) any other rights and privileges which the court deems necessary or appropriate.

"(c) (1) The district court which issued a subpena, or the district court for the district in which the person resides or is served shall have concurrent jurisdiction to hear, and take appropriate action with respect to any motion relating to, including any motion to quash, such subpena.

"(2) A motion relating to a subpena may be made at any time prior to, during, or when appropriate, subsequent to the appearance of any witness before a grand jury. Any motion made during or subsequent to the appearance of the witness before the grand jury may be made only in the district in which the grand jury is impaneled.

"(3) If a motion is made under this section before the day on which the person subpenaed has been ordered to appear or books, records. or documents have been ordered to be produced, the appearance of such person, or the production of such documents, shall, upon appropriate application, be stayed until the court has ruled on such motion.

"(d) (1) Upon proper motion, the court may quash a subpena and take other appropriate sanctions when it finds that—

"(A) a primary purpose or effect of requiring such person to so testify or to produce such objects to the grand jury is or will be to secure for trial testimony or to secure other information regarding the activities of any per-

son who is already under indictment by the United States, a State, or any subdivision thereof for such activities; or of any person who is under formal accusation for such activities by any State or any subdivision thereof, where the accusation is by some form other than indictment;

"(B) the witness has not been advised of his rights, as specified in subsection (b);

"(C) the evidence sought is not relevant to the grand jury investigation properly conducted within the grand jury's jurisdiction;

"(D) compliance with the subpena would be unreasonable or oppressive, as such subpena would require unnecessary appearances by the witness, would lead to testimony or other information that is cumulative, unnecessary or privileged, would be primarily for punitive purposes or would not involve other like circumstances; or

"(E) a primary purpose of the issuance of the subpena is to harass the witness.

"(e) Upon proper motion, the court shall quash a subpena and take other appropriate sanctions when it finds that—

"(1) the witness has already been confined, imprisoned, or fined under section 1826 of title 28, United States Code, or section 401 of this title for his refusal to testify before any grand jury investigating the same transaction, set of transactions, event, or events;

"(2) the witness has given written notice that such witness intends to exercise his privilege against self-incrimination, unless a grant of immunity has been obtained; or

"(3) the grand jury is inquiring into the same transaction or transactions, event or events, that was under consideration by another grand jury which failed to return an indictment based on such transaction or event and there is no additional, newly discovered evidence relevant to such inquiry.

"(f) (1) A grand jury impaneled to conduct an inquiry into offenses against the criminal laws of the United States may be convened only in a district, or districts, in which it is believed criminal conduct may have occurred which are elements of such offense; except that when a grand jury is to be convened to conduct an inquiry into both violations of substantive criminal statutes and violations of statutes forbidding conspiracy to violate substantive criminal statutes, the grand jury may not be convened before a district court in a district in which the only criminal conduct alleged to have occurred in that district is conspiracy to commit the substantive criminal act.

"(2) The district court may quash a subpena or transfer any grand jury proceedings or investigation into any other district where it might properly have been convened if the court finds that a witness' appearance would impose a substantial and unnecessary hardship on such witness or his family because of the location of the proceeding. In considering whether such hardship exists, the court shall take into consideration all the relevant circumstances, including the distance of the grand jury investigation from the places of residence of witnesses who have been subpenaed, financial and other burdens placed upon the witnesses, and the existence and nature of any related investigations and court proceedings.".

"§ *3330C. Evidence Presented to the Grand Jury*

"(a) The attorney for the Government shall not be permitted to submit before the grand jury any evidence seized or otherwise obtained by an unlawful act or in violation of the witness' constitutional rights or of rights established or protected by any statute of the United States.

"(b) An attorney for the Government shall present to the grand jury all evidence in such attorney's possession which he knows will tend to negate the guilt of the person or persons under investigation.

"(c) A grand jury may indict a person for an offense when (1) the evidence before such grand jury is legally sufficient to establish that such offense was committed, and (2) competent and admissible evidence before such grand jury provides reasonable cause to believe that such person committed such offense. An indictment may be based on summarized or hearsay evidence alone only upon showing of good cause to the court which impaneled the grand jury.

"(d) The district court before which a grand jury is impaneled shall dismiss an indictment of the grand jury if such district court finds that—

"(1) the evidence before the grand jury was legally insufficient to establish that the offense for which the indictment was rendered was committed;

"(2) there was not competent and admissible evidence, or summarized or hearsay allowed by the court upon a showing of good cause, before the grand jury to provide reasonable cause to believe that the person indicted committed such offense;

"(3) the attorney for the Government has not presented to the grand jury all evidence in his or her possession which the attorney knows will lead to negate the guilt of the person indicated; or

"(4) the attorney for the Government has submitted to the grand jury evidence seized or otherwise obtained by an unlawful act or in violation of the witness' constitutional rights or of rights established or protected by any statute of the United States."

(b) Section 3006A(a) of title 18, United States Code (relating to appointment of attorneys), is amended—

(1) by striking out "or," before "(4)" in the first sentence thereof; and

(2) by inserting before the period at the end of the first sentence thereof; ", or (5) who is a witness before a grand jury impaneled before the district court".

RECORDING, TRANSCRIBING AND AVAILABILITY OF GRAND JURY PROCEEDINGS

SEC. 7 (a) Chapter 215 of title 18, United States Code, is further amended by adding at the end thereof the following new section:

"*§ 3333. Recordings of grand jury proceedings*

"A complete and accurate stenographic or electronic record of all grand jury proceedings shall be kept, except that the grand jury's secret deliberations and consultations between witnesses and their counsel shall not be recorded. Such record shall include the court's notice to the grand jury of its rights and duties and all other comments or charges by the court to the jury, at any time; all introductory comment, or other comments, directives, and other utterances made by attorneys for the government or special attorneys to the grand jury, witnesses and their counsels; all questioning of and testimony of witnesses; all interchanges between the grand jury and attorneys.

"*§ 3334. Availability of grand jury transcripts and other statements*

"(a) Any person summoned to testify or provide other information before a grand jury impaneled before a district court shall be entitled, prior to testifying or providing other information, to examine and copy any statement in the possession of the United States which he has made and which relates to the subject matter under inquiry by the grand jury. Such examination and copying may be made by the attorney for such person if such person gives his written approval. As used in this subsection, the term 'statement' has the meaning provided by section 3500(e).

"(b) Any witness who testifies before a grand jury, or his attorney with such witness' written approval, shall, upon request, and under such conditions as the court deems reasonable, be entitled to examine and copy a transcript or electronic recording of the record for the period of such witness' own appearance before the grand jury, and if a witness is proceeding in forma pauperis, he shall be furnished, upon request, a copy of such transcript.

"Such transcript shall be made available for inspection and copying not later than forty-eight hours after the conclusion of such witness' testimony, unless, for cause shown, more time is required to prepare such transcript. After examination of such transcript a witness may request permission to appear before the grand jury again to explain his testimony. Additional testimony given under this subsection shall become part of the official transcript and shall be shown to the members of the grand jury.

"(c) Upon a showing of good cause, the court may, at any time, order that the disclosure of the recorded proceedings of a grand jury be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government, the court shall permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant."

"(d) A reasonable time prior to trial, and after the return of an indictment or the filing of an information, a defendant shall, upon request and under such

conditions and limitations as the court deems reasonable, be entitled to examine and copy a transcript or electronic recording of—

"(1) the grand jury testimony of all witnesses to be called at trial;

"(2) all statements to the grand jury by the court and the attorney for the Government or special attorney, relating to the defendant's case;

"(3) all grand jury testimony or evidence which in any manner could be considered exculpatory; and

"(4) all other grand jury testimony or evidence which the court may deem material to the defense.

(b) Section 3500, title 18, United States Code, is amended

(1) by inserting "or" before subsection (e)(2) thereof:

(2) by deleting "; or" and inserting "." at the end of subsection (e)(2) thereof; and

(3) by deleting subsection (e)(3) thereof.

(c) The table of sections for chapter 215 of title 18, United States Code is amended by adding at the end thereof the following new items:

"3329. Notice to grand jury of its rights and duties.
"3330. Independent grand jury inquiry.
"3330A. Certain rights of grand jury witnesses.
"3330B. Subpoenas.
"3300C. Evidence presented to the grand jury.
"3333. Recording of grand jury porceedings.
"3334. Availability of grand jury transcripts and other statements."

PRELIMINARY EXAMINATION

SEC. 8. (a) Chapter 217 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ *3368. Preliminary examination*

"(a) A defendant is entitled to a preliminary examination, unless waived, when charged with an offense, other than a petty offense, which is to be tried by a judge of the district court.

"(b) Such preliminary examination may be held prior to, or within a reasonable time following, the filing of an indictment or information in the district court.".

(b) The table of sections for chapter 217 of title 18. United States Code, is amended by adding at the end thereof the following new item:

"§ *3368. Preliminary Examination.*"

REPORTS CONCERNING GRAND JURY INVESTIGATIONS

SEC. 9. (a) Section 522 of title 28, United States Code (relating to reports of business and statistics), is amended by striking out "The Attorney General" and inserting in lieu thereof "(a) The Attorney General" and by adding at the end thereof the following new subsection:

"(b) The Attorney General, at the beginning of each regular session of Congress, shall report to the Congress and to the Administrative Office of the United States Courts with respect to the last preceding fiscal year on—

"(1) the number of investigations undertaken in which a grand jury or a special grand jury was utilized together with a description of the nature of each investigation undertaken;

"(2) the number of requests by United States grand juries to the Attorney General for approval to apply to the court for an order compelling testimony under section 2003 of title 18, and the number of such requests approved by the Attorney General;

"(3) the number of applications to district courts for orders granting immunity under title 18;

"(4) the number of applications to district courts for orders granting immunity under title 18 that were approved and the nature of the investigations for which the orders were sought;

"(5) the number of instances in which witnesses in the investigations enumerated in paragraph (1) were held in contempt and confined, and the dates and lengths of such confinement;

"(6) the number of arrests, indictments, no-bills, trials, and convictions resulting from testimony obtained under orders granting immunity, the

offenses for which the convictions were obtained, and a general assessment of the importance of the immunity;

"(7) a description of data banks and other procedure by which grand jury information is processed, stored, and used by the Department of Justice; and

"(8) other appropriate information concerning grand jury activity during such year.

The matters contained in the report required to be made by this section shall be set forth according to judicial district.".

EFFECT ON OTHER LAWS AND RULES

SEC. 10. (a) The enumeration in this Act of any rights and privileges of grand jury witnesses shall not affect any other rights and privileges to which such witnesses may be entitled under any law or rule of law.

(b) Notwithstanding section 3771, no rule contained in the Federal Rules of Criminal Procedure shall apply to the extent that such rule is inconsistent with the provisions of this Act.

COMPARATIVE SUMMARY OF DIFFERENCES BETWEEN S. 1449 AND H.R. 94

	S. 1449	H.R. 94
I. RECALCITRANT WITNESS		
A. Application	Federal court and grand jury witnesses	Same.
B. Initiation	Prosecutor	Same.
C. Procedure	(1) Show cause hearing	(1) Same.
	(2) With counsel	(2) Same.
	(3) 5 days notice, 48 hr in cases of special need.	(3) 72 hr notice, shorter in cases of special need.
D. Place of confinement	Federal correctional institution within — miles unless waived.	Federal correctional institution within 50 mi unless waived.
E. Period of confinement	Lesser of time before compliance, life of proceedings, or 6 mo.	Same.
F. Reiterated contempt	Bars use of 28 U.S.C. 1826 or 18 U.S.C. 401 for same witness and same event after 1 use of either.	Same.
G. Bail	Applies 18 U.S.C. ch. 207 unless appeal is frivolous or taken for delay.	Same.
H. Expedited appeal	Within 30 days	Same.
I. Applicability of 18 U.S.C. 3006A	Yes	Same.
J. Defenses	Questions may not be based on information obtained in violation of statutory or constitutional right of witness.	Questions may not be based on information obtained in violation of Federal wiretap law.
II. IMMUNITY		
A. Type	No provision	Replaces use with transactional.
B. Prosecution permitted	No provision	Perjury, false statements, or failure to comply.
C. Procedure:		
1. Notice	No provision	(1) 1 week except in case of special need.
		(2) Scope and nature of immunity.
		(3) Right to counsel and availability of 18 U.S.C. 3006A.
2. Authorized to request order	No provision	U.S. Attorney with Attorney General's approval.
3. Witness consent	No provision	Not needed.
4. Conditions for issuance	No provision	(1) Court determines order is in the public interest.
		(2) No danger of foreign prosecution.
		(3) Witness will or has claimed his 5th amendment privilege.
		(4) Grand jury cases: (a) evidence sought is relevant to scope of immunity and inquiry, (b) investigation is authorized, (c) summary of evidence is provided to court.
5. Indictment of immunized witness.	No provision	Barred in case of same grand jury before whom the witness testifies.
D. Congressional immunity	No provision	Attorney General notification repealed
III. SIZE OF GRAND JURY		
A. Reduced	No provision	9 to 15 members.
B. Selection after failure of sufficient number to appear.	No provision	Not from bystanders.
C. Number required for indictment	No provision	⅔ of 9 or more.

COMPARATIVE SUMMARY OF DIFFERENCES BETWEEN S. 1449 AND H.R. 94

	S. 1449	H.R. 94
IV. DISCLOSURE CRIMES		
A. Unlawful disclosure by those present.	Matters occurring before the grand jury—$500 and/or 6-mo imprisonment.	Same.
B. Unlawful disclosure for profit or to obstruct justice.	Matters occurring before the grand jury—$20,000 and/or 5-yr imprisonment.	Same.
C. Exceptions	Disclosures ordered by the court, to or by attorney for the Government, and by witness or his attorney.	Same.
D. Definitions	"Attorney for the Government" does not include those assisting attorney for the Government.	"Attorney for the Government" includes those assisting attorney for the Government.
V. RIGHTS AND DUTIES		
A. Notice to grand jury	Duty to inquire into alleged Federal crimes committed within the district.	Same.
	Right to independent inquiry	Same.
	Right to call and question witnesses	Same.
	Right to require production of evidence.	Same.
	Subject matter of inquiry	Same.
	Statutes involved	Same.
	Basis for indictment	Same.
	Right and duty to determine whether to indict and on what charges upon the evidence by 12 or more jurors.	No provision.
	Obligation of secrecy	Same.
	Other matters in the discretion of the court.	Same.
B. Requests to testify	Anyone may request attorney for the Government; request forwarded to grand jury.	Same.
	Grand jury may refuse to receive evidence.	Same.
	Targets must be notified of right to request to appear.	Same.
	Public record of requests maintained	Same.
	Witness appearing under requests waives his 5th amendment privilege.	Same.
C. Duties of attorney for Government	No provision	Advise jury of impeachment or exculpatory evidence.
	Avoid calling witnesses who intend to to assert the 5th amendment.	Same.
	May not initiate inquiry without additional evidence after earlier grand jury has failed to return indictments.	Same.
VI. INDEPENDENT GRAND JURY INQUIRY		
A. Scope	Alleged violations of Federal law within their district by Government officers or agents.	Alleged violations of Federal law within their district.
B. Term	18 mo. with 6 mo. extensions not to exceed either 24 mo. if extended after failure of the district court to extend or 36 mo. otherwise.	18 mo. with 6 mo. extensions not to exceed 36 mo.
C. Special attorney to assist	Appointed by court upon request of 12 or more jurors.	Appointed by court upon request of a majority of the grand jury.
	Special attorney may appoint assistants.	Same.
	Special attorney may assist in conduct of inquiry, prepared indictments, conduct all other phases of related criminal proceedings, obtain material from other agencies, be supplied by GSA, be funded out of Department of Justice appropriations.	Same.
VII. RIGHTS OF GRAND JURY WITNESSES		
A. Counsel	Witnesses have right to have attorney present to assist them.	Same.
	Application of 3006A	Same.
	Attorney may be present in grand jury room with his client but may not address the grand jury.	Same.
	(3330A(d) ??)	No provision.
	Attorneys may be removed for addressing the grand jury, ?, or to prevent delays.	Attorneys may be removed for addressing the grand jury or to prevent delays.

COMPARATIVE SUMMARY OF DIFFERENCES BETWEEN S. 1449 AND H.R. 94

	S. 1449	H.R. 94
VII. RIGHTS OF GRAND JURY WITNESSES—CONTINUED		
B. Subpena:		
1. Delay between issuance and appearance.	1 week except for special need or consent of the witness.	Same.
2. Information in subpena	Right to counsel	Same.
	5th amendment privilege	Same.
	Subject matter of inquiry	Same.
	Whether witness is target	Same.
	Statutes involved	Same.
	Other matters in court's discretion	Same.
3. Motions concerning subpenas.	Venue in district were issued, served, or where witness resides.	Same.
	Motion may be made at any time but 1 not made before appearance must be made where the grand jury is sitting.	
	Motion stays requirement for appearance.	Same.
4. Grounds for quashing or modifying subpenas.	Evidence sought against one who is already formerly accused.	Same.
	Witness has previously been held in contempt concerning the same transaction.	Same.
	Written notice that the witness intends to claim 5th amendment.	Same.
	Witness was not advised of his rights as grand jury witness.	Same.
	Compliance would be unreasonable oppressive and require unnecessary appearance.	Same.
	Purpose is punitive	Same.
	Evidence sought is not relevant or is not within the grand jury's jurisdiction.	Same.
5. Jurisdictional limitation	Grand jury may only investigate where conduct constituting an element of a Federal criminal offense may have occurred within their district but not where the only conduct is to conspire to commit a substantive offense.	Grand jury may only investigate where conduct constituting an element of a Federal criminal offense may have occurred within their district.
C. Evidence:		
1. Inadmissible	Evidence obtained in violation of statutory or constitutional rights of the witness.	No provision.
2. Required	Exculpatory evidence	No provision.
3. Indictment standard	Indictment only after evidence establishes that a crime has been committed and there is probable cause to believe the accused committed it.	No provision.
4. Hearsay	Indictments may be based on hearsay alone only a showing of good cause.	No provision.
5. Indictment dismissal	Insufficient evidence that the charged offense was committed.	No provision.
	Insufficient competent evidence for reasonable cause to believe accused committed the offense charged.	No provision.
	Government's failure to present exculpatory evidence.	No provision.
	Evidence obtained in violation of statutory or constitutional rights was introduced.	No provision.
VIII. RECORDING, TRANSCRIBING, AND AVAILABILITY OF GRAND JURY PROCEEDINGS		
A. Recording	Stenographic or electronic recording of notice of grand jury perogatives, charges and comments of the court, statements of attorney for the Government, questions and testimony of witnesses, interchanges between witnesses and attorneys, but not grand jury deliberations.	Same.
B. Witness access	Witness may examine and copy any of his statements in possession of the Government prior to testimony.	Same.
	Witness may examine and copy his grand jury testimony within 8 hours and may return before the grand jury to explain himself for the record.	Witness may examine and copy his grand jury testimony.

COMPARATIVE SUMMARY OF DIFFERENCES BETWEEN S. 1449 AND H.R. 94

	S. 1449	H.R. 94
VIII. RECORDING, TRANSCRIBING, AND AVAILABILITY OF GRAND JURY PROCEEDINGS—CONTINUED		
C. Defendant access	A defendant may examine and copy grand jury testimony of all witnesses to be called at trial, statement to grand jury by attorneys for the Government relating to case, and other exculpatory or material grand jury evidence.	Same.
D. Restricted access	Court may deny or restrict disclosure and must preserve record.	Same.
IX. PRELIMINARY EXAMINATION		
A. Right	A defendant is entitled to preliminary examination after formal accusation except on petty offenses or unless waived.	Same.
X. REPORTS CONCERNING GRAND JURY INVESTIGATIONS		
A. Requirement	Attorney General must report at the beginning of each session of Congress to the Administrative Offices of U.S. Courts and Congress.	Same.
B. Content	Number and description of grand jury investigations.	Same.
	Number of requests, approvals, applications and issuance of immunity orders.	Same.
	Information of contempt before the grand jury.	Same.
	Results of using immunity	Same.
	Handling of grand jury information	Same.
	Other appropriate information	Same.
X. EFFECT ON OTHER LAWS		
A. Other rights	Any other rights or privileges not affected by bill.	Same.
B. Federal rules	Inconsistent provisions of Federal Rules of Criminal Procedure inapplicable.	Same.

APPENDIX 2

CONGRESSIONAL INSERTS

Date and title	*Page*
1. January 19, 1977—Newspaper article	E-208
2. January 31, 1977—American Bar Association committee supports reform	E-446
3. February 2, 1977—CRS study—Weiner and Shinnick	E-837
4. February 23, 1977—Christian Science editorial	E-914
5. March 15, 1977—Philadelphia Bulletin article	E-1494
6. March 29, 1977—Colorado Senate proposals parallel H.R. 94	E-1889
7. April 27, 1977—Testimony of William P. Gloege	E-2539
8. May 23, 1977—Statement of Hon. William J. Campbell	E-3193
9. May 23, 1977—National Council of Churches criticizes grand jury system	E-3199
10. June 15, 1977—Litton case	E-3793
11. June 22, 1977—Appeals Court cites abuse of grand jury—Groh case	E-3980
12. June 23, 1977—Business community joins effort to reform	E-4043
13. June 29, 1977—New York Times reviews grand jury reform	E-4207
14. July 12, 1977—Colorado passes major bill on grand jury reform	E-4366
15. July 15, 1977—Boston Globe commends Ellberg's bill	E-4543
16. July 21, 1977—ABA section recommends grand jury reform	E-4708
17. September 15, 1977—ABA Urges Grand Jury Reform	------
18. November 4, 1977—Reforming the Grand Jury	------

FEDERAL GRAND JURY REFORM. (CONGRESSIONAL RECORD, JANUARY 19, 1977)

(By Hon. Joshua Eilberg, of Pennsylvania)

Mr. EILBERG. Mr. Speaker, last year my subcommittee on Immigration, Citizenship and International Law conducted hearings and received testimony on alleged abuses of the Federal grand jury system, and obtained a study of such abuses from the Library of Congress for inclusion in the hearing record.

I have recently introduced H.R. 1614 proposing extensive reforms in the Federal grand jury system to eliminate or lessen these abuses. I expect to hold further hearings on this and on other related bills this session and report out comprehensive legislation.

I would like to include in the Record a series of articles detailing alleged abuses and particularly in the cases of Phil Shinnick and Jay Weiner:

[From the New York Times, Dec. 26, 1976]

HOW WELL DO GRAND JURIES WORK?

(By Dena Kleiman)

On any weekday in New York City, as many as two dozen grand juries meet with prosecutors in secret to consider whether suspected criminals should be indicted and brought to trial.

In recent months, procedures used by prosecutors in questioning witnesses, presenting evidence and drawing indictments have been criticized as a number of indictments by Maurice H. Nadjari, the former Special State Prosecutor, and others have been dismissed because of prosecutorial misconduct.

These dismissals underscore what an increasing number of legislators, lawyers and judges believe is a need to revise the grand jury system and institute new safeguards to curb prosecutorial abuse.

In the last month, indictments brought by Mr. Nadjari against Justices Joseph A. Brust, Carmine De Sapio and Patrick J. Cunningham have been dismissed.

In addition, a State Supreme Court Jutice has indicated he would dismiss a perjury and bribery indictment against Justice Irving H. Saypol and the Appellate Division has upheld the dismissal of an indictment brought by Charles J. Hynes, now the Special Prosecutor, against Albert H. Blumenthal, the outgoing State Assembly Majority Leader.

In each case, judges said that prosecutors relied on insufficient evidence or that they mislead witnesses into perjury charges when nothing more substantive could be established.

What is there about a grand jury proceeding that lends itself to prosecutorial abuse? How have critics said the system should be changed?

The grand jury, composed of 23 persons, is said to date from 1181 in England, the time of King Henry II, when it was [illegible]med to protest the power of the monarch. Over the years its purpose evol[illegible] into a safeguard against arbitrary prosecution. England abandoned the system in 1933 as outmoded and too costly. Charges now are made by prosecutors.

In the United States, the grand jury has come to serve two functions. One type of grand jury hears evidence after an arrest. The grand jurors must decide, by a vote of at least 12, if there is sufficient cause for an indictment. If the suspect is indicted, he faces trial.

A second type of grand jury investigates criminal wrong-doing and accordingly is vested with great power. It can subpoena and question anyone who may help its inquiry. Those who refuse to testify can be held in contempt and sent to jail.

In both, the prosecutor stands before the grand jurors as a legal adviser. Theoretically, he may not attempt to influence them. But in practice, there is often little doubt how a prosecutor feels about a case, and because grand jurors often look to prosecutors for guidance, much as petit jurors look to a judge during a trial, prosecutors can influence the outcome of an inquiry.

Critics contend that investigatory grand juries invite prosecutorial abuse—which can result in phony perjury indictments based on misleading questions—and that safeguards are needed to insure the system's integrity. They say that indicting grand juries have become archaic, more rubber stamps for a prosecutor, and should be abolished.

"Prosecutorial abuse is real," said Assemblyman Stanley Fink, Democrat of Brooklyn, Chairman of the State Assembly's Codes Committee, which issued a report on such abuse last May and plans hearings this session on revising the investigatory grand jury. "Our feeling is that the grand jury was originally designed to serve as a buffer between the governent and the people. It no longer does."

Mr. Fink's committee and one in Washington, a subcommittee of the House Judiciary Committee chaired by Joshua Eilberg, Democrat of Pennsylvania, are considering these proposals:

Permitting witnesses to have a lawyer inside the grand jury room. In 41 states, including New York, New Jersey and Connecticut, a lawyer must remain outside the room, so there is no one present to object to a misleading question. In 1974, the New York Legislature passed a bill providing for counsel inside the room, but it was vetoed by Governor Carey who said there was insufficient evidence that such a change was needed.

Informing witnesses of the line of inquiry before they appear so that they are better prepared.

Informing a witness of his rights, including the right to counsel and the right to remain silent if an answer would tend to incriminate him, before he is called inside the grand jury room.

Restricting rules of evidence and procedure to those that apply during a trial. A prosecutor is under less restrictions during a grand jury proceeding than he is at trial.

Those opposed to changing the investigatory grand jury system argue that it is not designed to be an adversary proceeding but rather a search for the truth. They say that the presence of a witness' lawyer might make for objections that could bog down the proceeding, and that a grand jury should operate with vast latitude and not be inhibited by the same restrictions imposed at criminal trials.

Critics of change also argue that historically the grand jury has worked well, that it is one of the rare institutions that provide for community participation in the administration of justice and that most prosecutors are responsible lawyers who conduct the proceedings accordingly.

With respect to the indicting grand jury, long considered a rubber stamp, twenty-nine states have allowed the prosecutor to bypass this panel and file charges in open court. In these states, including Connecticut, after a suspect has been arrested and probable cause has been established by the police, a prosecutor may file the charges by means of an "information." These states have retained the investigatory grand jury.

[From the Washington Star, Jan. 11, 1977]

PHIL SHINNICK GOES TO PRISON—PATTY HEARST GOES FREE

(By William Taaffe)

Before the student uprisings of the late 1960s, Phil Shinnick was a jock. The title wasn't as disparaging as it later would become, and Shinnick didn't mind being described that way. He was a winner and proud of it, forever demonstrating on the athletic field the kind of excellence so appreciated and rewarded in the America of the Kennedy years.

In his way, Shinnick was a kind of Renaissance athlete. He was a marvel of stamina and grace, competing in several track and field events within minutes of each other in a single meet.

In 1964, when he was 22, he set an unofficial world's record in the long jump and held Canada's record in the decathlon. That fall he flew to Tokyo to compete in the 18th Olympiad.

Twelve years later, Shinnick appeared before the gates of a federal prison in a place called Allenwood, Pa. No longer was he considered a model American by this nation's sports establishment, much less by those who enforce the country's laws.

Shinnick will never forget the date: Nov. 30, 1976. Before his two daughters, aged eight and 10, he was handcuffed and escorted into the prison to begin serving a sentence of indefinite length.

Phil Shinnick's voyage through the late 1960s and middle 1970s has been replete with irony. In the late sixties he tried to reform the very sports establishment that one year named him Athlete of the Year at the University of Washington.

He was sent to prison by the very country he served as a captain in the Air Force, and as a kind of goodwill sports ambassador in Africa and Latin America. And not least of all, he was jailed exactly one week after Patricia Hearst went free on $500,000 bond.

The Shinnick-Hearst connection is a tenuous one at best, an amalgam of allegations leaked by the FBI to the news media over the last 2½ years and the uncorroborated trial testimony of Hearst, who said Shinnock transported Symbionese Liberation Army member Emily Harris from San Francisco to Scranton, Pa., in the summer of 1974.

Federal prosecutors investigating the alleged harboring of Hearst at a farmhouse in South Canaan, Pa., have obtained no indictment of Shinnick and admit that he is not even a target of the investigation at this time.

Yet Shinnick now is in prison while Hearst is free. That fact may say something about the state of the so-called "athletic revolution" he and several other athletes tried to begin around the time of the Olympic Games in 1968. It is a circumstance that does say something about the administration of justice in America is 1977.

Shinnick was sent to prison on civil contempt charges stemming from his appearance before the federal grand jury in Scranton last August. U.S. Atty. S. John Cottone has said that Jack Scott and his wife, Micki, close friends of Shinnick and also radicals in the athletic movement, are the focus of the probe.

Cottone apparently called Shinnick before the jury because he believes the former athlete was involved in harboring Hearst or has knowledge the government could use in obtaining an indictment against others.

Shinnick was sent to jail not because he refused to testify before the grand jury under a grant of immunity (he was willing to answer all its questions), but because he refused to comply with a certain demand of Cottone, the prosecutor.

At the August session, Cottone handed the jury foreman instructions that Shinnick should be forced to supply the FBI with his fingerprints and samples of his handwriting and hair in a room near the jury chamber.

It so happens under the American system that the FBI itself has no power to subpoena evidence from a person who has not been convicted of a crime. The right to such protection from indiscriminate police power is a right guaranteed to all Americans, whether they be mafia dons, alleged murderers or the most peaceful of grandmothers.

Shinnick refused to comply with the jury's (initially Cottone's) request, arguing that the FBI could easily obtain his fingerprints and handwriting samples from the Air Force, where his job involved the preparation of hand-written reports.

Shinnick offered to provide the jury a sample of his hair that would be kept under the control of the U.S. District Court for comparison with any independent samples the FBI may have. Such procedure would guard against any mix-up of hair samples, he felt.

Nevertheless, Shinnick was cited for contempt and sent to jail, where he will remain until the end of the jury's term July 31 or until he agrees to provide the FBI with his hair.

"Once a witness states the conditions under which the grand jury can receive evidence that it is entitled to, then the grand jury becomes less independent to that extent," said Cottone's assistant, Lawrence Kelly.

Also cited for contempt and sent to Allenwood was Jay Weiner, a 23-year-old sportswriter and friend of Scott and Shinnick. According to Hearst's testimony at her trial for bank robbery last year, Weiner once appeared at the Pennsylvania farmhouse where she was hiding from authorities. He refused to testify under a grant of "use immunity," which prohibits the government from using the words of his testimony against him at a later date.

The imprisonment of Shinnick, especially at a time when Hearst is free to return to her pre-revolutionary life and grant interviews on national television, has angered civil libertarians in this country as few other grand jury cases have in recent months.

Cottone and the FBI have served as judge and jury, they argue. For more than two years the government has been unable to indict Shinnick. His imprisonment for civil contempt is mere vindictiveness, the only way prosecutors can "convict" him, the government's opponents insist.

A group called the Coalition for Grand Jury Abuse, supported by former Atty. Gen. Ramsey Clark and dozens of other well-known lawyers, has denounced Shinnick's jailing.

"In our view," a spokesman for the coalition told Congress recently, "there is no process or institution in America today more potentially destructive than the unregulated, unchecked, unbalanced grand jury inquisition. With it prosecutors and police agencies have the power to compel the appearance of any person anywhere at any time, to introduce illegal evidence, to grill witnesses about *anything* in the absence of constitutional restraints and to jail without trial."

When Shinnick said goodby to his daughters and friends on that gray day in November, he entered a minimum security institution. The handcuffs, really just a brutish ceremony, came off once Shinnick got inside the front door. He began to adjust; friends brought him running shoes for laps around Allenwood's track.

But the prosecutor wasn't quite through with Shinnick. On Dec. 16, the Philadelphia Daily News published an interview with Shinnick and Weiner. Although convicted prisoners have a basic right to speak to the press, Cottone promptly prohibited both men from talking to reporters.

Cottone was able to deny their First Amendment rights because of a loophole in the law. Felons fall under the jurisdiction of the U.S. Bureau of Prisons. Those cited for civil contempt technically are subject to the court and U.S. marshals, who take orders from the prosecutor. Several lawyers last week said they thought Cottone's order was unprecedented.

"It's an appalling procedure," said Richard Gerstein, a prosecutor for 23 years in Miami and chairman of the American Bar Association's grand jury committee. "There is no legitimate basis for it whatsoever. If you're conducting a prosecutor's office and conducting it fairly, you have nothing to fear by those cited for contempt talking to the press. I don't care if they're Mafia. It's still appalling."

"It's outrageous," Clark said. "These two men haven't even been convicted of a crime. I don't see how you can deny them access to the press."

Cottone defended his action by arguing that Shinnick and Weiner are involved in a case still under investigation and that if indictments are issued, any news stories could allow defendants to move for a mistrial on grounds of prejudicial publicity. But yesterday, Judge William J. Nealon overruled Cottone and ended the ban after it had been enforced for three weeks.

Friends of Shinnick and Weiner say they were greeted as heroes by Allenwood inmates (among them Bernard Bergman, the New York nursing home bandit, and G. Gordon Liddy of Watergate notoriety) because they had not been charged with any crime. Outside of prison, the lionizing of Shinnick and Weiner also has begun.

College students in New York have staged fund-raising races for the two men. Faculty and students at Rutgers University's Livingston College, where Shinnick is an assistant professor in a sports-sociology program, have demonstrated for his release.

New York Times columnist Tom Wicker recently featured Shinnick on the paper's op-ed page. There are reports that CBS is preparing a segment on Shinnick's plight for "Sixty Minutes." And finally, outgoing Atty. Gen. Edward Levi has decided to review the entire Shinnick-Weiner case—to determine, an aide said, "If the necessary evidence can be obtained any other way."

Shinnick has said from prison that he believes the government is "out to get" the critics of the sports establishment, not simply to build a case against Scott. But why the sudden attention surrounding Shinnick?

Part of it may involve the public's appetite for all things relating to Hearst. Some of it may stem from the arguable tactics the government has used against him. And much of it may be based on the metamorphosis of American Olympian into U.S. prisoner.

If you had written the story of the quintessential All-American youth in the early sixties, you would have written the story of Phil Shinnick. At Washington, he married a beauty queen who served as the head baton twirler. Amazingly, he won the school's best athlete award at a time when only football players were used to getting it. He belonged to the local Newman Center, a Catholic lay organization, and once spent an entire summer's vacation building a church in Alaska.

He loved Seattle and the city returned his affections. Just after College he went to work in the mayor's office and Seattle gave Shinnick its annual "distinguished citizen" award. At one time, he worked in the middle levels of Sen. Henry (Scoop) Jackson's campaign. Then he entered the Air Force, working behind a desk in Los Angeles and participating in State Department tours by athletes to what then were called the emerging nations.

Perhaps it was these trips that transformed his ideas about the way sports were administered and athletes were treated in the United States. When the Olympic Games were held in Mexico City in 1968, Shinnick, as an alternate member of the U.S. team, was one of few white athletes in this country who endorsed the black power salute of John Carlos and Tommie Smith on the reviewing stand.

After those games, Shinnick enrolled at Berkeley to pursue a doctoral degree in education psychology. It was now the late 1960's, the antiwar movement was consuming the nation, the feminists were crusading and Berkeley offered such a ferment of ideas and radical politics that there seemed to be a campus chapter for every cause exposed in America.

It happened in Berkeley, 1969, that Shinnick crossed paths with Jack Scott. Scott has organized and grandiloquently named the Institute for the Study of Sport and Society, and he and Shinnick became close friends, both of them working towards one end—to stop the glorifying and the dehumanization they professed to see of amateur and professional athletes.

A few years later Scott accepted a job as athletic director at Oberlin College in Ohio, where he put some of his radical concepts of sport into effect. Shinnick went to Livingston. One of his first actions was to open the gymnasium to the local community and urge inner-city residents to participate in athletics.

"Phil always thought through his commitments," Scott says. "He came to identify with the type of commitment Phil and Dan Berrigan (the activist priests) had. He never identified with Che Guevara, for example, or the Yippies or the crazies."

Nevertheless, Shinnick had come full circle by last November. Marie Coles, a friend of Shinnick from Livingston, was one of several people who visited him just before Christmas. She recalls that Quincy Shinnick, his eight-year-old, was there to say hello.

"Daddy, you're going to be home for Christmas," she assured him.

Shinnick, who eventually was granted a five-day furlough for the holidays, "just was silent for a moment, not knowing what to say," Coles recalls. "Then he said, "Well, I might not be." His daughter was just sitting there. Maybe it takes a parent to feel that. But it was sad."

[From the New York Times, Dec. 31, 1976]

A MODERN INQUISITION

(By Tom Wicker)

Patty Hearst is out of prison and Phil Shinnick is in, and thereby hangs a tale of American justice.

Mr. Shinnick, 34, once held the world record for the long-jump and twice represented the United States in the Olympic Games. In 1972, he became the athletic director at Livingston College of Rutgers University. But he is now off the university's payroll and in the Allenwood Federal Penitentiary in Pennsylvania.

No one contends that Mr. Shinnick is being punished for a crime. He is not even charged with a crime. He has been imprisoned on civil contempt charges growing out of his appearance before a grand jury in Scranton, Pa., last Aug. 13.

At that grand jury hearing, Mr. Shinnick did not refuse to answer questions. He did not refuse to give the grand jury any evidence that it required for its own deliberations. He refused, instead to give the Federal Bureau of Investigation his fingerprints, samples of his handwriting and clippings of his hair.

When Mr. Shinnick appeared in the grand jury room—without a lawyer, as all witnesses must—a United States Attorney gave the foreman a statement to read. The statement instructed Mr. Shinnick to give fingerprints, writing samples and hair clippings to the F.B.I. in a room adjacent to that of the grand jury.

Now it happens that the F.B.I. does not have subpoena power. Outside the grand jury room, the bureau would have no legal way to get such exemplars from Mr. Shinnick or any other unconvicted citizen who did not want to provide them.

It happens, further, that the fingerprints of Mr. Shinnick, a former Air Force captain, are easily available to the F.B.I. through Air Force records. So are samples of his handwriting, since his Air Force job involved writing reports. And he offered to give the grand jury—not the F.B.I.—a hair sample, which would be sealed in an envelope and held in custody of the Scranton district court. If the Government had hair samples it wanted to match against his, he said, the Government's hair samples could be held in the same fashion, to guard against mix-up or misuse.

Upon Mr. Shinnick's inquiry, moreover, the grand jury could give him no reason why these exemplars were necessary to its investigation. He had not been given "use immunity," a prosecutorial device that effectively removes the Fifth Amendments rights against self-incrimination of the person granted such immunity.

But Mr. Shinnick's refusal, not to answer grand jury questions but to give the F.B.I. materials it otherwise could not legally have obtained, has resulted in his imprisonment for civil contempt. His incarceration, which began Nov. 30, could last for the life of the grand jury—until next July—and could be resumed if the same drama is played out before a successor grand jury. Meanwhile Rutgers has announced that it "will stop payment of his salary for as long as he remains unable to meet his classes."

What is this Kafkaesque nightmare all about, and how could it happen in a country where, supposedly, grand juries are provided to protect citizens from the arbitrary use of government power?

Apparently, the F.B.I. suspects Mr. Shinnick of having been involved in, or at least of knowing something about, the alleged harboring of Patricia Hearst in a Pennsylvania farmhouse in 1974. The Government told his attorney that the Air Force fingerprints and handwriting samples would not be "good enough" to use in a trial—which makes it clear that the grand jury was being used to force Mr. Shinnick to provide evidence that might be used against him in court.

Mr. Shinnick, who is more radical politically than the F.B.I. thinks proper, in turn suspects that the F.B.I. wants the hair clippings and other exemplars in order to concoct a frameup linking him criminally to Patty Hearst or those who

protected her. He contends also that the subpoena summoning him to the grand jury was based on a wiretap put on his telephone and another on his attorney's telephone.

However that may be, the Shinnick case is one more in a lengthening pattern of blatant government use of grand juries for inquisitorial rather than accusatory purposes. The late Senator Philip Hart once said that grand juries now were being commonly used "to conduct political surveillances and build dossiers in the guise of investigating specific offenses" and it seems clear that that is about what the Government tried to do in the Shinnick case.

Attorney General Levi nevertheless strongly resisted reform legislation debated in Congress last session. That legislation will be introduced again next year and the Shinnick case may give it new urgency—but hardly enough to get him out of prison before July.

Olympic Spirit, FBI-Style—Two Face Jail for Resisting Harassment

For star athletes the world over, summer '76 meant the glory of the Olympics. But for Phil Shinnick, a 1964 U.S. Olympian and one-time world record holder in the long jump, summer '76 marked the climax of a grand jury inquisition.

As this Report goes to press, Shinnick and a 22-year-old friend, sportwriter Jay Weiner, are headed for jail. Officially, Shinnick and Weiner are going to jail because in August they refused to supply evidence to a Scranton, Pa. federal grand jury that is supposed to be investigating the harboring of one-time fugitive Patty Hearst.

Actually, Shinnick and Weiner are going to jail because silence and non-cooperation are their only ways of saying "no" to the FBI harassment which has, for the past 18 months, left their lives and careers in a shambles. The FBI suspects that Shinnick and Weiner were involved in the Pennsylvania farmhouse where Patty Hearst took refuge in 1974. Instead of indicting the two for their alleged role, however, and giving them a chance to defend themselves, the government has, in effect, already decided to punish them—with the grand jury.

The FBI first broke into Jay Weiner's life in February, 1975. Weiner was staying at his parents' Philadelphia home when agents approached and began questioning him about Patty Hearst. Weiner, who felt the FBI was trying to set his friends up for an indictment, exercised his legal right not to answer.

"We have other ways of getting it out of you," one of the agents then threatened, and the first "other way" came two weeks earlier. FBI agents forced Weiner's car off the road, threatened him with their guns and closeted him in a nearby office the rest of the evening for interrogation, all the while ignoring Weiner's repeated requests to see a lawyer. Two days later a thoroughly intimidated Weiner was hauled before a Harrisburg, Pa. federal grand jury where he answered questions.

Meanwhile, Shinnick got his first FBI visit March 4, the day after he had had a phone conversation with Weiner. Shinnick also refused to talk, but the FBI agents came back again—and again—to try to get him to change his mind.

"I was not merely visited," he remembers, "I was stalked."

The stalking wasn't enough to break Shinnick's silence, so the Bureau started leaking Shinnick's name to reporters covering the Hearst affair. That generated newspaper reports around the country linking Shinnick to Patty Hearst. The newspaper articles, coupled with FBI visits to the Rutgers University campus where Shinnick taught, cost the former Olympian his job as Rutger's director of sport studies.

The FBI wasn't through. Shinnick learned that his friends had been contacted by FBI agents and told he was involved in the Hearst case. Other friends said that letters Shinnick had mailed to them arrived apparently already opened. On numerous occasions, clicks and other tell-tale signs of wire-tapping disrupted Shinnick's phone conversations.

As a crowning blow, the FBI had Shinnick subpoenaed before a federal grand jury. He refused to testify, and the FBI backed off—momentarily.

But a year later, in May, 1976, the Bureau renewed the subpoena pressure. Weiner, who hadn't been able to find a journalism job because of the adverse publicity, was called before a Scranton grand jury which had six more months to run than the Harrisburg panel that had been investigating the Hearst case. The switch to Scranton added six months to the contempt confinement hanging over Weiner's head if he refused to testify.

Shinnick, informed he was a target of the investigation, was ordered to provide the same grand jury with his fingerprints as well as samples of his handwriting and hair.

The two immediately challenged the subpoenas. Shinnick was an Air Force veteran, and the government already had his fingerprints and handwriting on record. Since hair samples are notoriously poor indices of personal identification, Shinnick's subpoena struck observers as retaliation for his earlier silence.

In Weiner's case, the government looked as if it was out to dress rehearse testimony from Weiner for use in the prosecution of his friends, Jack and Micki Scott. The Scotts, well-known sports activists, have not yet been indicted for their widely alleged role in harboring fugitive Patty Hearst, even though the government, judging from its leaks to the press, has had enough evidence to indict them for months. But grand juries are not permitted to investigate cases where an indictment has already been handed down—the government, if they were, could use the grand jury subpoena power to discover a defense's trial strategy—and the government's delay in indicting the Scotts seems clearly a move to sidestep this prohibition.

The supervisory court, however, refused to quash the subpoenas in September. It ignored the evidence of FBI misconduct and manipulation of the grand jury process—as have most courts in similar circumstances over recent years—and, by doing so, helped to encourage further abusive FBI behavior.

That's because FBI agents lack subpoena power of their own. In theory, at least, they must rely on persuasion to gain a witness' cooperation. In reality, however, FBI agents do control subpoena authority—the grand jury's. As long as courts permit the FBI to exercise this authority, agents can be as heavy-handed as they choose with witnesses. Should a witness object to "third-degree" treatment by refusing to answer questions, FBI agents need merely have the witness subpoenaed before a grand jury where he or she must testify or go to jail.

And so long as the FBI retains this access to the grand jury's subpoena power, there won't be much meaningful reform of the grand jury—or the Bureau.

American Bar Association Committee Supports Federal Grand Jury Reform
(Congressional Record, Jan. 31, 1977)

(By Hon. Joshua Eilberg, of Pennsylvania)

Mr. Eilberg. Mr. Speaker, during the hearings of my Judiciary Subcommittee in the 94th Congress, representatives of the American Bar Association testified as to the need for grand jury reform and supported our efforts to make those reforms.

The Criminal Justice Section of the American Bar Association recently passed a series of standards relating to the grand jury, which will be submitted to the full membership of the American Bar Association in a few weeks. The report which accompanied the proposed standards indicates that they closely parallel the provisions of my bill, H.R. 1614, the Grand Jury Reform Act of 1977, which I recently introduced.

At this time I insert in the Record the report of the Criminal Justice Section of the ABA and the summary of the "Proposed ABA Grand Jury Principles":

House of Delegates To Receive Section Reports on Grand Jury Reform, Changes to F.R.Cr.P.

The Criminal Justice Section will ask the ABA's policy-making House of Delegates to place the Association in favor of major reforms in the operation of grand juries at both the federal and state levels. The request will be made in the form of a general resolution (similar to the one printed in the right-hand column of this page) which the House of Delegates will debate at its Midyear Meeting, February 9–15 in Seattle, Washington.

Based upon a report prepared by the Section's Grand Jury Committee, chaired by State's Attorney Richard E. Gerstein of Miami, Florida, the Section's resolution may well be among the most controversial—and potentially most far-reaching—subjects to be considered at the Midyear Meeting.

The report is phrased in terms of legislative principles in order that specific wording of grand jury reform bills introduced in the 95th Congress can be supported or opposed as appropriate, Gerstein said.

As amended the report was approved unanimously by the Section's Governing Council at its fall meeting in Scottsdale, Arizona, in November, capping two years of intense Section study of grand jury reform. During that period. Gerstein testified twice on behalf of the Section on grand jury reform proposals before Congress, and the Section won limited support from the Association on the issue.

The Section's Grand Jury Committee is composed primarily of persons with substantial prosecutorial experience. In addition to Gerstein, they include: Seymour Glanzer of Washington, D.C.; Richard H. Kuh of New York City; George D. Crowley of Chicago; Judge Jack Rosenberg of New York City; David Austern of Washington; Charles Ruff of Washington; Professor George Pugh of the Louisiana State University Law School, Baton Rouge; Brian P. Gettings of Arlington, Virginia; Judge Paul Baker of Miami; Peter F. Langrock of Middlebury, Vermont; Paul B. Johnson of Tampa; Professor Melvin B. Lewis of John Marshall Law School, Chicago; and Sol Rosen of Washington. The law student member of the committee is Peter R. Wubbenhorst of Birmingham.

Capitol Hill Roundup

When *Criminal Justice* went to press, Washington was filled with speculation about what the 95th Congress would be doing. Here are some "best bets" as perceived by Herbert Hoffman, Staff Director of the ABA's Governmental Relations Office.

Grand Jury Reform—Early February hearings are expected by Rep. Joshua Eilberg's (D.-Pa.) Judiciary Subcommittee. His bill (HR 1277) is much less comprehensive than HR 2986 (proposed by Rep. John Conyers, (D.-Mi.) but is thought to have the best chance of passage. It includes provisions for a grand jury of 15 and indictments by 9 votes. Changes on the role of counsel and challenges to subpoenas are also expected.

Proposed ABA Grand Jury Principles

Be it resolved. That the American Bar Association support in principle grand jury reform legislation which adheres to the following priniciples:

1. A grand jury witness shall have the right to be accompanied by counsel in his appearance before the grand jury; the role of such counsel should be the same as that before a Congressional committee.

2. A subject of a grand jury investigation shall be given the right to testify before the grand jury, provided he/she signs a waiver of immunity. Prosecutors shall notify such subjects of their opportunity to testify unless notification may result in flight or endanger other persons; or the prosecutor is unable with reasonable diligence to notify said persons.

3. The grand jury shall not consider unconstitutionally obtained evidence.

4. The grand jury shall not name a person in an indictment as an unindicted coconspirator to a criminal conspiracy.

5. A grand jury should not issue any report which singles out persons to impugn their motives, hold them up to scorn or criticism or speaks of their qualifications or moral fitness to hold an office or position. No grand jury report shall be accepted for filing and publication until the presiding judge submits *in camera* a copy thereof to all persons named or identifiable and such persons are given the opportunity to move to expunge any objectionable portion of said report and have a final judicial determination prior to the report's being published or made public. Such motion to expunge shall be made within ten days of receipt of notice of such report. Hearings on such motions shall be held *in camera*.

6. The grand jury should not be used by the prosecutor in order to obtain tangible documentary or testimonial evidence to assist the prosecutor in preparation for trial of a defendant who has already been charged by indictment or information. However, the grand jury should not be restricted in investigating other potential offenses of the same or other defendants.

7. The grand jury should not be used by the prosecutor for the purpose of aiding or assisting in any noncriminal inquiry.

8. Witnesses who have been summoned to appear before a grand jury to testify or to produce tangible or documentary evidence should not be subjected to unreasonable delay before appearing or unnecessarily repeated appearances or harassment.

9. It shall not be necessary for the prosecutor to obtain approval of the grand jury for a grand jury subpoena.

10. A grand jury subpoena should indicate the statute or general subject area that is the concern of the grand jury inquiry.

11. In any case in which a subpoenaed witness or a person directly affected thereby moves on proper grounds to quash a grand jury subpoena, the prosecutor should be required to make a reasonable showing in camera and on the record before the court convening the grand jury that the evidence being sought is:

(a) relevant to the grand jury investigation;
(b) properly within the grand jury's investigation; and
(c) not sought primarily for another purpose.

12. A subpoena should be returnable only when the grand jury is sitting.

13. When the circumstances make it reasonable, motions to quash or modify subpoenas may be brought at the place where the witness resides, the documents sought are maintained, or before the court which issued the subpoena at the election of the witness. Such motions should be heard in camera and on the record.

14. All matters before a grand jury, including the charge by the impaneling judge, if any; any comments or charges by any jurist to the grand jury at any time; any and all comments to the grand jury by the prosecutor; and the questioning of and testimony by any witness, shall be recorded either stenographically or electronically. However, the deliberations of the grand jury shall not be recorded.

15. Expanding on the already-established ABA position favoring transactional immunity, immunity should be granted only when the testimony sought is in the public interest; there is no other reasonable way to elicit such testimony; and the witness has refused to testify or indicated an intent to invoke the privilege against self-incrimination.

16. Immunity shall be granted on prosecution motion in camera by the trial court which convened the grand jury, under standards expressed in Principle No. 15.

17. The granting of immunity in grand jury proceedings should not be a matter of public record prior to the issuance of an indictment or testimony in any case.

18. If the court determines that there is multiple representation of witnesses in a grand jury proceeding, it shall advise the witnesses that they have the right to be separately represented by counsel, and explain that conflicts of interest may otherwise arise.

19. The confidential nature of the grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny.

20. It is the duty of the court which impanels a grand jury fully to charge the jurors by means of a written charge completely explaining their duties and limitations.

21. All stages of the grand jury proceedings should be conducted with proper consideration for the preservation of press freedom, attorney-client relationships, and comparable values.

22. The period of confinement for a witness who refuses to testify before a grand jury and is found in contempt should not exceed 6 months.

23. The court shall impose appropriate sanctions whenever any of the foregoing principles have been violated.

FEDERAL GRAND JURY REFORM (CONGRESSIONAL RECORD, FEB. 2, 1977)

Mr. EILBERG. Mr. Speaker, as chairman of the Judiciary Subcommittee considering proposals to reform the Federal Grand Jury, and as the author of H.R. 94, a bill to make those reforms, I have been receiving numerous letters and cards concerning the cases of Phillip Shinnick and Jay Weiner. Most of these communications request an investigation of these cases. It is the policy of the Judiciary Committee not to get involved in pending cases. However, an analysis

of complaints concerning alleged grand jury abuses provide information about specific reforms.

Therefore, I asked the Library of Congress to analyze these cases and my staff to collect press articles on them.

I would like to include in the Record, the Library of Congress study and newspaper articles:

CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., January 19, 1977.

To: Honorable Joshua Eilberg.
Attn: David Umansky.
From: American Law Division.
Subject: Examination of cases of Jay Weiner and Phillip Shinnick.

This is in response to your inquiry and our subsequent telephone conversation in which you requested an examination of the case of Jay Weiner and Phillip Shinnick to determine whether the facts may suggest areas where the powers available in connection with federal grand jury investigations are subject to abuse.

Jay Weiner and Phillip Shinnick were granted immunity and subpoenaed to appear as witnesses before a federal grand jury in the Middle District of Pennsylvania investigating the possibility that Patricia Hearst and William and Emily Harris were harbored within the district in violation of 18 U.S.C. § 1071. Mr. Weiner and Mr. Shinnick were ultimately incarcerated for failure to comply with the grand jury subpoenas, see 28 U.S.C. § 1826. They had previously tried unsuccessfully to have the subpoenas quashed, *United States* v. *Weiner*, 418 F. Supp. 941 (W.D.Pa. 1967), aff'd without opinion sub nom. *In re Grand Jury Proceedings*, No. 76-2286 (3d Cir. Oct. 27, 1976).

Mr. Weiner and Mr. Shinnick were among those whom Patricia Hearst named in testimony at her bank robbery trial as having been present while she was a fugitive and staying near South Canaan, Pennsylvania, within the Middle District of Pennsylvania.

Mr. Weiner's testimony was sought as part of the grand jury's investigation into the possible harboring of Miss Hearst within the Middle District and the grand jury sought to obtain Mr. Shinnick's fingerprints, samples of his handwriting and clippings of his hair to compare with evidence found during the course of the investigation.

Mr. Weiner and Mr. Shinnick sought to have the subpoenas quashed on several grounds. They contended that the subpoenas should be quashed because of prosecution misconduct and because the subpoenas were returnable to an improper situs. They also filed a motion for disclosure of any wire or oral interception of their communications.

The court ordered the government to submit affidavits affirming or denying the instances of wire or oral interceptions of the communications of Mr. Weiner and Mr. Shinnick. The court found the affidavits submitted in response sufficient to meet the witness' allegations of illegal electronic surveillance.

The witnesses argued that the subpoenas were returnable to an improper situs because they instructed the witnesses to appear before the grand jury sitting in Scranton while the investigation had been originated by a federal grand jury in Harrisburg. The witnesses felt that the second grand jury investigation had been convened to "avoid the possibility that the Harrisburg grand jury . . . would decide that [their] testimony was not necessary" 418 F. Supp. at 951, and because the Scranton grand jury had a longer unexpired term so that the amount of time the witnesses could be incarcerated under 28 U.S.C. § 1826 would be longer. The court accepted the government's response that the witnesses had been subpoenaed to appear in Scranton rather than Harrisburg because the possible criminal violations under investigation were alleged to have occurred within the Scranton division of the district and as a result the Scranton panel would have been selected from a group of potential jurors which would have included residences of the county where the harboring was believed to have occurred while the Harrisburg panel would not.

Mr. Weiner also contended that he had been subjected to governmental misconduct in that he had been subpoenaed four times to appear before the grand jury investigating Patty Hearst. The court rejected this pointing out that two of the subpoenas had been quashed and one of those had been issued in connection with a federal grand jury investigation in California and that the final subpoena involved an appearance before Patty Hearst testified.

Mr. Weiner also moved to have the government instructed to affirm or deny whether he was a target of the investigation and for a transcript of his testimony. The court denied the latter as premature and held that the government was under no obligation to inform him whether he was a target of the investigation.

Mr. Shinnick also sought to quash on the grounds that his fingerprints and examples of his handwriting were already in the government's possession because of his service in the armed forces and that the cuttings of his hair would be inadmissible evidence. The court responded that the grand jury was entitled to fresh evidence if it chose; that the government should not be forced to undergo the burdens of establishing chain of possession and other problems in using the evidence from Shinnick's service record, and that the hair was not necessarily inadmissible.

Those who feel that present federal law permits abuse of the power associated with grand jury investigations might point to any of a number of features in the Weiner and Shinnick cases to document their contentions.

For example, many may feel that use of grand jury subpoenas reenforced by 28 U.S.C. § 1826 to secure physical evidence such as fingerprints and handwriting samples that could be secured in other ways far more convenient for the witness and yet no less effective is repressive.

Others may feel that the issuance of four subpoenas to appear before the grand jury is harassment even if two of the subpoenas are ultimately quashed.

It might also be argued that the government's investigation could not be substantially impaired by providing the witness with a copy of his grand jury testimony or with indicating whether or not the witness was the target of the grand jury's investigation. Of course, many would feel that prosecution of Weiner and/or Shinnick after their appearances before the grand jury would be in violation of the spirit of the Fifth Amendment in that they will have been made to participate in the preparation of the case again themselves.

Finally, there may be those who feel that the cases exemplify instances where the government has used the grand jury and 18 U.S.C. § 1826 as a shortcut for prosecution; thereby bypassing the rights that would ordinarily be afforded a criminally accused.

A copy of *United States* v. *Weiner* 418 F. Supp. 941 (M.D. Pa. 1976) is enclosed.

CHARLES DOYLE,
Legislative Attorney.

Nos. 4636 MCD, 4643 MCD

The United States v. *In re Grand Jury Proceedings: Subpoena of Jay Weiner.*
The United States v. *In re Grand Jury Proceedings: Phillip Kent Shinnick.*
United States District Court, M.D. Pennsylvania, July 13, 1976.

Opinion on the Merits Aug. 6, 1976.

On filing of various motions by witnesses subpoenaed by grand jury investigating the possible harboring of federal fugitives, the District Court Nealon, J., held inter alia, that an initial government denial that the witnesses had been subjects of electronic surveillance was insufficient to satisfy the requirements of applicable statute, but that supplemental affidavits later filed by the Government were sufficient in such regard.

Witnesses' motions denied.

1. Grand Jury—36.

If questions posed to grand jury witness or requests for other information or materials have been based on information derived from illegal electronic surveillance, "just cause" for witness not to answer or respond exists. 18 U.S.A. §§ 3504, 3504(b); 28 U.S.C.A. § 1826(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Grand Jury—36.

Where potential grand jury witnesses claimed that they had been subjected to illegal electronic surveillance, United States did not satisfy requirements of statute requiring it to affirm or deny occurrence of such surveillance by filing affidavits which obviated possibility of any nexus between such surveillance and grand jury proceedings and contained statement by United States Attorney who caused issuance of subpoenas in question that he was unaware of any electronic surveillance of witnesses. Fed.Rules Civ.Proc. rule 6(e), 28 U.S.C.A.

3. Grand jury—36.

Under statute requiring that, on claim by grand jury witness that evidence is product of illegal electronic surveillance, government should affirm or deny occurrence of such surveillance, adequancy of Government's response depends upon sufficiency of its denial of existence of electronic surveillance of witness, not on relationship of affiant to proceedings and whether he is in position to conclude that there could be no nexus between those proceedings and any unlawful activity Fed.Rules Civ.Proc. rule 6(e), 28 U.S.C.A.

4. Grand Jury—36.

Affidavits filed by United States Government in response to charge by grand jury witnesses that they had been subjected to illegal surveillance did not satisfy requirements of statute providing that Government should admit or deny such surveillance where, although affidavits purported to be based in part on check of federal agencies, results of such check were out of date and there was no affidavit from person making or supervising such check or explanation of mechanic's utilized or record-keeping systems of agencies involved. 18 U.S.C.A. § 3504.

5. Grand Jury—36.

Where grand jury witness claims that he has been subjected to illegal wiretap, it is appropriate for governmental agency closest to investigation to scrupulously search its files and submit affidavits affirming or denying validity of such claims and indicating which agencies had been checked. 18 U.S.C.A. § 3504.

ON THE MERITS

6. Grand Jury—36.

Affidavits filed by United States denying that grand jury witnesses had been subjected to illegal wiretaps were sufficient to satisfy requirements of applicable statute. 18 U.S.C.A. §§ 3504, 3504(b); 28 U.S.C.A. § 1826(a).

7. Grand Jury—36

Only those grand jury witnesses who claim their own conversations were illegally monitored or against whom such monitoring was directed have standing to require Government to respond under statute requiring Government to affirm or deny claims of illegal wiretapping. 18 U.S.C.A. § 3504.

8. Grand Jury—1.

United States acted properly in removing grand jury investigation into possible harboring of federal fugitives to another division in order to have investigation conducted by grand jury selected from division in which activity most prominently connected with alleged harboring occurred. 28 U.S.C.A. § 1826 (a) (2); U.S.C.A. Const., Amend. 6.

9. Grand Jury—36.

Affidavits submitted by United States in support of subpoenas ordering witnesses to testify before grand jury investigating into possible harboring of federal fugitives were sufficient to make preliminary showing that witnesses' fingerprints and hair and handwriting exemplars sought from such witnesses were relevant to grand jury investigation and properly within its jurisdiction, and not sought primarily for another purpose. 18 U.S.C.A. § 1071.

10. Grand Jury—36.

Quashing of subpoenas requiring grand jury witnesses to furnish fingerprints, handwriting exemplar and hair sample was not required by witnesses' contentions as to governmental misconduct.

11. Grand Jury—36.

Alleged abusive behavior by Federal Bureau of Investigation agents was not necessarily grounds for quashing grand jury witness subpoenas.

12. Grand Jury—36.

Fact that Government may already have requested materials in its possession will not ordinarily prevent grand jury from obtaining them in connection with its own independent investigation; thus, subpoena to require grand jury witness to furnish fingerprints and samples of his handwriting was not subject to being quashed because Government already had in its possession witness' fingerprints and samples of his handwriting from military records.

13. Grand Jury—36.

Witness may not interfere with course of grand jury's inquiry by urging objections of incompetency or irrelevancy; thus, grand jury witness was not excused from furnishing subpoenaed hair samples because of samples' alleged inadmissibility in evidence on grounds of incompetency and irrelevancy.

14. Grand Jury—36.

Grand jury witness, subpoenaed to provide hair samples, fingerprints and handwriting exemplars in proceeding in which grand jury was investigating possible

harboring of federal fugitives, was not entitled to protective order requiring Government to file affidavit stating whether or not he was target of investigation.

15. Grand Jury—36.

Government is under no obligation to inform witness before grand jury whether he is target of jury's investigation.

16. Criminal Law—42.

In event that immunized grand jury witness is subsequently indicted, prosecution has affirmative duty to prove that evidence it proposes to use is derived from legitimate source wholly independent of compelled testimony.

17. Criminal Law—42, 627.9(1).

Subpoenaed grand jury witness was not entitled to protective order certifying existing evidence that jury had regarding witness in order that witness might be certain that Government did not violate immunity afforded him before grand jury by using that testimony in prosecution at later date, and to furnish transcript of grand jury testimony; request for transcript was premature, inasmuch as witness had not been indicted in connection with instant investigation; in event that witness was so indicted in future, propriety and necessity of his obtaining copy of grand jury testimony would then materialize. Fed. Rules Crim. Proc. rule 16(a)(1)(A), 18 U.S.C.A.

Laurence M. Kelly, Asst. U.S. Atty., Scranton, Pa., for plaintiff.

Holly Maguigan, Kairys & Rudovsky, Philadelphia, Pa., Morton Stavis, Newark, N.J., for defendants.

MEMORANDUM AND ORDER

Nealon, District Judge.

These are matters arising out of an investigation by a grand jury from this district into the possible harboring of federal fugitives Patricia Hearst and William and Emily Harris within this district during the summer of 1974, in violation of 18 U.S.C. § 1071. In connection with the investigation, grand jury subpoenas have been served on Jay Weiner and Phillip Kent Shinnick, ordering them to testify before the grand jury [1]. Both prospective witnesses have submitted numerous motions in connection with the subpoenas. Each has filed a motion to quash the subpoena on the grounds of governmental misconduct and improper purpose, a motion to quash the subpoena as returnable to an improper situs, and a motion for disclosure of electronic or other surveillance. In addition, Weiner has filed a motion for protective orders and a motion requesting instructions to the grand jury. The issues raised by the motions have been briefed by the witnesses's attorneys and the attorney for the government, and oral argument was held before this Court on July 8, 1976. This memorandum will address only the motions for disclosure of electronic or other surveillance. The other matters will be considered in a subsequent opinion.

[1] In order to isolate the issues raised by the motions in question, their statutory framework must first set forth. 28 U.S.C. § 1826(a) authorizes a court to confine a witness who refuses "without just cause" to testify before or provide other information or materials to a grand jury when ordered by the court to do so. If the questions posed to the witness or the requests for other information or materials have been based on information derived from illegal electronic surveillance, then "just cause" not to answer or respond exists. *Gelbard* v. *United States*, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972). To facilitate the determination of whether information was derived from illegal electronic surveillance when a witness claims that such surveillance has occurred, 18 U.S.C. 3504 provides in pertinent part:

"(a) In any . . . proceeding in or before any grand jury . . .

"(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act."

Section 3504(b) defines an "unlawful act" as one involving illegal wiretapping or electronic surveillance. In the instant case, the witnesses have asserted that the subpoenas were based on information obtained from illegal electronic surveillance, and the government has denied any connection between the subpoenas and electronic surveillance of any kind. The dispositive questions here are whether the parties have satisfied the requirements of section 3504(a)(1).

At the outset, before analyzing the particular contentions and representations of the parties, it would be well to put this case in proper perspective. This is not

a normal case of limited interest involving routine investigative efforts. The "Patty Hearst case" aroused unusual and nationwide interest and concern that exerted an undue amount of public pressure on the government to apprehend Miss Hearst and her Symbionese Liberation Army captors. This pressure undoubtedly stimulated special law enforcement efforts to locate her, including the possible participation of agencies in addition to the F.B.I. Under these circumstances, the possibility that extraordinary measures such as electronic surveillance were used in the investigation seems greater than in most cases. Mindful of the nature and scope of this case, as well as of the court's responsibility under section 3504 to determine whether proceedings have been tainted by illegal electronic surveillance, see *infra*, it would seem that the government's response should be as unambiguous, unequivocal, and reliable as reasonably possible, and should be more dispositive of the possibility of electronic surveillance than in a less extraordinary case. In the usual case which does not have any significance extending beyond this district, the affidavit of the U.S. Attorney and the F.B.I. agent in charge of the case may suffice, but this is not such a case.

It should also be pointed out that this case does not present the situation of an interruption of proceedings of a grand jury that is presently in session and awaiting the appearance of the witnesses who have filed motions resisting an appearance. The grand jury is not currently in session and no date has been fixed for the appearance of the witnesses involved. While the factor of grand jury delay is, nevertheless, still important, it is not as crucial as it might be were the circumstances different from what they are here.

In support of their assertions of illegal electronic surveillance, both Weiner and Shinnick have filed affidavits describing clicking, hollow and banging sounds and other audio interference during conversations on their telephones and on telephones that they customarily use, especially, in the case of Weiner, during conversations with other persons who were questioned or sought for questioning by the F.B.I. in connection with the Patricia Hearst case. In addition, Weiner describes two coincidences that may be explainable only by wiretapping: on one occasion, he received a telephone call from Jack Scott, warning him that the F.B.I. may question him, and the next day Weiner was visited by F.B.I. agents who asked him about Jack Scott; on another occasion, soon after Weiner's mother told someone over the telephone that Weiner was on his way to Oberlin, Ohio, from Philadelphia, Weiner was apprehended by F.B.I. agents shortly after his arrival in Oberlin. Shinnick alleges no such coincidences, but does state that information was relayed to him from an acquaintance that ". . . the States Police and the F.B.I. had been doing wiretaps the weekend of my visit on Nantucket." Affidavit of Phillip Kent Shinnick, attached to Motion to Quash Subpoena, para. 15. On the basis of these assertions, both witnesses have asked that the government disclose the records of any electronic or other surveillance of any conversations to which they were parties as well as of any communications at several locations and over several telephones, including the residences and telephones of their attorneys and several other telephones whose numbers the witnesses have listed in connection with the motion.

The government conceded at oral argument that the witnesses' assertions of illegal electronic surveillance amount to "claims" under section 3504, and thus have triggered its obligation under the statute to "affirm or deny the occurrence of the alleged unlawful conduct." The government denies the existence of such surveillance, and, therefore, the critical question here is whether in the context of this case, that denial is sufficient to satisfy the statute. The government's response to both witnesses is an affidavit by Laurence M. Kelly, an Assistant United States Attorney for the Middle District of Pennsylvania, who is participating in the investigations and who caused the subpoenas at issue to be served [2]. With respect to both witnesses, Mr. Kelly states that the source of information leading to the subpoena, and upon which any questions or requests will be based, is the "testimony of Patricia Hearst given at her bank robbery trial between February 9, 1976 through February 20, 1976, in the U.S. District Court for the Northern District of California, No. 74-364 OJC.", Affidavit Denying Electronic Surveillance, para. 4; that the subpoenas are not based on any electronic surveillance at any location; and that he is unaware of any electronic surveillance of the witnesses. In addition, with respect to Weiner, the affidavit states that a check was made with seven federal agencies that customarily conduct electronic surveillance, and that, based on the results of that check, as of the summer of 1975, "there has been no electronic surveillance occurring on premises known to have been owned, leased or licensed by Jay Weiner . . ." Affidavit Denying Electronic

Surveillance, para. 10.[3]. The affidavit concerning Shinnick makes reference to no agency check whatsoever.

[2] The government makes a two-pronged argument that its affidavits here are sufficient. It argues first that, regardless of whether there has in fact been any electronic surveillance of the witnesses in this case, the affidavits have obviated the possibility of any nexus between such surveillance and the grand jury proceedings, in that the affiant, the Assistant United States Attorney in charge of the investigations who caused the issuance of the subpoenas in question, and who will determine what questions are addressed to the witnesses, has stated that he is unaware of any electronic surveillance of the witnesses. Moreover, the government points out, Mr. Kelley has affirmatively identified the source of the present grand jury proceedings—the trial testimony of Patricia Hearst. Because Section 3504 is only concerned with whether something is the "product" of unlawful surveillance, rather than with the unlawful act itself, the government concludes, its affidavits in this case are sufficient. The government's position is contrary to the plain meaning of the statute's language, is inconsistent with the cases construing section 3504, and fails to satisfy the court that the subpoenas in question are not the product of unlawful activity.

[3] Upon a claim that evidence is the product of illegal electronic surveillance, section 3504 requires the government to "affirm or deny the occurence of the unlawful act." It is clear from the plain meaning of the language of the statute that the government's response should go to the existence of the unlawful activity itself, and should not be concerned with the connection such activity may have with the proceedings at issue. The latter is for the court to determine, once the government has completed its function under the statute. In re Testa, 486 F. 2d 1013, 1016 (3d Cir. 1973). Thus the language of the statute suggests that the adequacy of the government's response depends on the sufficiency of its denial of the existence of electronic surveillance of the witnesses, and not on the relationship of the affiant to the proceedings and whether he is in a position to conclude that there could be no nexus between those proceedings and any unlawful activity.

If the government's position were correct, then all that would be required in every case where a "claim of illegal electronic surveillance has been made would be a denial by the prosecutor that the proceedings have been tainted by unlawful activity, regardless of whether he is in a competent position to know whether unlawful activity has in fact occurred. The cases which have evaluated the sufficiency of a denial under section 3504, however, have almost all involved affidavits or other documents by persons in a position to know about the existence of electronic surveillance. Most often, the denials contain the results of a so-called "agency check" of the federal agencies that customarily conduct electronic surveillance. *See, e.g., In re Freedman*, 529 F. 2d 543 (3d Cir. 1976); *In re Horn*, 458 F. 2d 468 (3d Cir. 1972). The courts have frowned upon "to my knowledge" affidavits by persons not in a position to have complete knowledge regarding the existence of electronic surveillance. *See, e.g., In re Quinn*, 525 F. 2d 222, 225 n. 5 (1st Cir. 1975); *United States* v. *Vielguth*, 502 F. 2d 1257, 1261 (9th Cir. 1974) (Chambers, J., dissenting).

Finally, in spite of the good faith of the Assistant United States Attorney in this case, which this court has no reason to question, if there has been illegal electronic surveillance of these witnesses, the instant proceedings could be tainted in a manner of which he might be unaware. The investigation of the possible harboring of Patricia Hearst within this district predates her trial by more than a year. Mr. Weiner, for example, testified before a grand jury in Harrisburg investigating the same activity more than a year ago, in March, 1975. Mr. Kelly acknowledged at oral argument that he was not involved in the previous grand jury investigation in this district, and thus a good portion of his knowledge of the pertinent facts of the investigation was presumably acquired by his reading of the government file. There could be some information concerning these witnesses in the file, with its source unknown to Mr. Kelley, [4] that is the product of electronic surveillance. Unless a reliable record of such surveillance is disclosed, it will be impossible to determine whether it has tainted the instant proceedings. With respect to Mr. Shinnick, his counsel stated at oral argument, and the government did not deny, that Patricia Hearst's trial testimony identified other persons besides Mr. Shinnick and Mr. Weiner who may have been involved in the harboring of herself and the Harrises in this district. That information would seem to call into question the accuracy of the government's assertion that the sole basis of the grand jury's current interest in the witnesses is Miss

Hearst's testimony. If that assertion were correct, then it would seem that the other persons identified by Miss Hearst would have been subpoenaed. Since they were not, it may well be that the source of the current interest in the witnesses is more than simply Miss Hearst's testimony. Because the other sources could be tainted by the illegal electronic surveillance alleged by the witnesses in this case, it is incumbent upon the government to direct its response to the existence of illegal electronic surveillance *vel non*.

[4] The government argue alternatively that its response is sufficient, under the facts of this case and under the law of this Circuit, to satisfy the requirements of section 3504. An analysis of the government's affidavits leads to the contrary conclusion. With respect to Weiner, several inadequacies are evident. Although the affidavit purports to be based in part on an agency check, the results are out of date, inasmuch as they only cover a period of up to a year ago. In addition, without regard to its date, the report of the agency check leaves much to be desired. There is no affidavit from the person making or supervising it, nor is there an explanation, by one in a position to know, of the mechanics utilized, or of the record-keeping systems of the agencies involved, so that it is impossible to independently assess the reliability of the checks. As to Shinnick, the response is even more deficient. There is no reference to an agency check in the response, nor even an affidavit from the investigating agent. The government simply relies on the "to my knowledge" affidavit of the prosecutor handling the case. These responses fall far short of the comprehensiveness of the denials which have been held to be sufficient by the Court of Appeals for the Third Circuit, see, e.g., *In re Horn* 458 F.2d 468, 469 n. 3 (3d Cir. 1972); *In re Freedman*, 529 F.2d 543, 549–550 (3d. Cir. 1976). Moreover, none of the Third Circuit cases have involved the national overtones and unusual public attention that are present here. In addition, the Court of Appeals has been critical of several of the responses which it has considered. *See, e.g., In re Horn*, supra at 471; *United States* v. *D'Andrea*, 495 F.2d 1170, 1174 n. 12 (3d Cir. 1974). Such criticism is consistent with the concern that has recently been expressed by other courts about the reliability of affidavits in support of section 3504 denials. *See, e.g., In re Quinn*, 525 F. 2d 222, 225 n. 5 (1st Cir. 1975); *In re Turgeon*, 402 F. Supp. 1239, 1240–1241 (D. Conn. 1975). In view of these considerations, as well as of the court's task under section 3504, it seems only fair and proper to require a meaningful and authoritative response by someone who is in a position to attest to the *modus operandi* and dependability of the check.

[5] It would appear to be appropriate for the governmental agency ". . . closest to the investigation [to] scrupulously search [its] files and submit affidavits affirming or denying the validity of the aggrieved party's claims and indicating which agencies have been checked." *In re Millow*, 529 F.2d 770, 774 (2d Cir. 1976). [5] In that regard, government counsel stated at oral argument that he believes the F.B.I. has an index card file identifying by name any person whose telephonic conversation had been intercepted, whether or not it was such person's phone that was tapped. In other words, if A, using an outside phone, engaged in a telephone conversation with B, whose phone was under electronic surveillance by the F.B.I., and A was identified during the conversation, then this fact would be placed on an index card bearing A's name even though he was not the immediate subject of the surveillance. Consequently, a reference to an index card bearing A's name would disclose whether there had been any electronic surveillance of *any conversation* in which A was a participant. It would be helpful for the court to have this information as to the procedure utilized, in as precise a form as reasonably possible, in order to confidently decide whether the government's response is adequate under section 3504. In addition, such information would also provide a basis for evaluating the argument advanced by government counsel at oral argument that an agency check is a burdensome process. It is all too easy to state in conclusory fashion that the undertaking is onerous. The project could conceivably turn out to be a relatively simple assignment. See in this regard Judge Newman's observation in *In re Turgeon*, 402 F. Supp. 1289, 1242 (D. Conn. 1975), with respect to a file check by the F.B.I. similar to the check ordered here, that "(i)t is hard to understand why the task . . . could possibly entail more than one hour's work by a file clerk." Be that as it may, it is impossible to evaluate the merits of the government's claim of burden without some information about the mechanics of the process.

With respect to any delay that might be caused by the procedure ordered here, while any unnecessary delay in grand jury proceedings must be avoided, in circumstances such as those presently before this court we cannot assume that a

file check and preparation of affidavits would consume so much time as to cause an inordinate delay. If there is to be an intolerable delay, we should know specifically why a delay is inevitable, the reasons for it, and what can be done to shorten or eliminate it. The issue of electronic surveillance is a volatile one and has caused considerable concern and, indeed, alarm, in our society. Nothing should be left to assumption or speculation. If a responsible check is made and the government has no record of any electronic surveillance, then the denial is official and ". . . the matter is at an end . . . " *Gelbard* v. *United States*, 408 U.S. 41, 71, 92 S.Ct. 2357, 2373, 33, L.Ed.2d 179 (1972) (White, J., concurring).

In order to insure a fair and appropriate disposition of the motions to quash the subpoenas, the government will be allowed ten days from the date of this order to file a supplemental affidavit or affidavits in accordance with the views expressed in this memorandum. In the meantime, the witnesses' motions will remain under advisement.

ON THE MERITS

In a memorandum and order dated July 13, 1976, this Court ordered the government, pursuant to 18 U.S.C. § 3504, to file supplemental affidavits affirming or denying the occurrence of illegal electronic surveillance which has been claimed in a motion filed by the two witnesses, Jay Weiner and Phillip Kent Shinnick, who had been subpoenaed in these two cases to appear before a grand jury in this district that is investigating the possible harboring of federal fugitives Patricia Hearst and William and Emily Harris within this district during the summer of 1974. In addition, motions to quash on the grounds of improper purpose and the fact that the subpoenas are returnable to an improper situs were filed by both witnesses, and Jay Weiner alone submitted a motion for a protective order and a motion requesting supplemental instruction to the grand jury. In the July 13 memorandum, I deferred ruling on the other motions pending resolution of the electronic surveillance issue. The government has now submitted supplemental affidavits denying electronic surveillance in these cases, and the electronic surveillance issue is ripe for decision. Accordingly, I now turn to the issue, as well as to the other motions filed by the witnesses.

(6) Upon analysis, the affidavits appear to fulfill the conditions imposed by the July 13 memorandum and, therefore, to constitute satisfactory denials of unlawful activities under 18 U.S.C. § 3504. The filings with respect to both witnesses are identical. In each instance, the primary document is an affidavit by John J. Smythe, an F.B.I. agent in Washington, D.C., who is "responsible for maintaining the records containing the names of individuals who have been identified as being participants in conversations monitored by electronic surveillances conducted by the Federal Bureau of Investigation from 1960 to the present." The Weiner affidavit states that Smythe searched the records in Washington and caused a search to be made of the appropriate field offices of the F.B.I., and that as a result of those searches, the affiant has determined that "Jay Weiner was never the subject of electronic surveillance coverage nor were any of his conversations ever monitored by the Federal Bureau of Investigation." In addition, Smythe states that he has determined that the F.B.I. "did not maintain any electronic surveillance on premises which were known to have been owned, leased, or licensed by Jay Weiner." The Shinnick affidavit is identical in all material respects.

Accompanying the Smythe affidavits are two affidavits by Brandon Alvey, an attorney in the Criminal Division of the United States Department of Justice, one concerning Weiner and one with respect to Shinnick. The Weiner affidavit states that Alvey caused an inquiry to be made of the following six agencies to determine if there has been any electronic surveillance of the witnesses: Drug Enforcement Administration, United States Secret Service, Internal Revenue Service, United States Customs Service, Bureau of Alcohol, Tobacco and Firearms, and the United States Postal Service; and that, as a result of those inquiries, the affiant states that "there has been no electronic surveillances occurring on premises known to have been owned, leased or licensed by Jay Weiner . . ., that there was no electronic surveillance directed against Jay Weiner . . . [and] that there have been no overhearings by electronic surveillance of conversations, at any location, to which Jay Weiner was a party." Alvey's Shinnick affidavit is identical in all material respects. In addition, Gary L. Penrith, Bureau Supervisor at the F.B.I. headquarters, Washington, D.C., submitted an affidavit to the effect that he has been involved in all aspects of the Hearst investigation since the kidnapping February 4, 1974, and that the original source

of information concerning the alleged activities of Weiner and Shinnick in connection with this investigation was an individual to whom one of the alleged participants made statements and admissions, all of which was corroborated by the testimony of Patricia Hearst during the course of her trial on bank robbery charges in San Francisco, California, November 10, 1975, through March 20, 1976.

[7] The Smythe affidavit is a denial, by one in a position to know, of electronic overhearing by the F.B.I., the governmental agency closest to the investigation in this case, of any conversations of the witnesses. Together with the Alvey affidavit, which sufficiently obviates the possibility that other federal agencies authorized to conduct wiretapping have overheard conversations of the witnesses, the Smythe affidavit conclusively and unequivocally denies the claim of the witnesses, under 18 U.S.C. § 3504, that the subpoenas were the product of unlawful electronic surveillance of their conversations. Moreover, the Penrith affidavit identifies the original source of information concerning the two witnesses. As such, the denial is official, and ". . . the matter is at an end . . ." *Gelbard* v. *United States*, 408 U.S. 41, 71, 92 S.Ct. 2357, 2373, 33 L.Ed.2d. 179 (1972) (White, J., concurring). [6]

[8] Turning to the other motions, both witnesses argue that the instant subpoenas should be quashed as returnable to an improper situs, in that they are returnable to the current grand jury sitting in Scranton rather than to the Harrisburg grand jury which had previously begun to investigate the alleged unlawful harboring of federal fugitives that is being inquired into here. The witnesses argue in their briefs that this transfer deprives the Harrisburg grand jury of its historic function of deciding for itself what evidence will be produced before it, and is designed "to avoid the possibility that the Harrisburg grand jury, if he were subpoenaed there, would decide that his testimony were not necessary." Weiner's Motion to Quash the Subpoena as Returnable to an Improper Situs, para. 5. At oral argument counsel also maintained that the government's unstated motive in transferring the investigation to the Scranton grand jury is to gain greater leverage over the witnesses by having a grand jury with a longer unexpired term conduct the investigation—under 28 U.S.C. § 1826(a)(2), a witness who refuses "without just cause" to comply with a court order requiring him to testify before a grand jury may be confined for the duration of the term of the grand jury.

The government's response is that it has transferred the investigation to the Scranton grand jury in order to have the investigation conducted by a grand jury selected from the division in which the activity most prominently connected with the alleged harboring occurred—Wayne County, one of the nine counties from which members of the Scranton grand jury are selected. Grand juries in this district are selected on a sectional basis, and thus the Harrisburg grand jury, being selected from a section that does not include Wayne County, could not possibly contain any members who reside in the community where the alleged crime under investigation occurred. Government counsel represented to the court that the investigation has been transferred to the Scranton grand jury out of an abundance of caution in light of the Third Circuit's holding in *Zicarelli* v. *Gray*, Civ. No. 75-1473 (3d Cir., Nov. 18, 1975), *vacated and rehearing en banc ordered* (January 19, 1976), which held that the exclusion from a petit jury of residents from the county in which the crime allegedly occurred denied the defendant his Sixth Amendment right to the fair possibility for obtaining a jury composed of a representative cross-section of the community.

The government's stated purpose in removing the investigation to Scranton is reasonable, and the court declines to draw the inference offered by the witnesses that the government's motive is underhanded and unlawful, an inference for which the witnesses offer no support other than their own speculation. That the government's concern in light of the *Zicarelli holding* is legitimate and may be well-founded is reflected by the "tentative view" of the Committee on the Operation of the Jury System of the Judicial Conference of the United States "that the indictment for a crime alleged in one division of a judicial district by a grand jury sitting in and selected exclusively from a different division of the district raises some doubt as to whether the rights of the defendant to indictment by a grand jury drawn from a 'fair cross section of the community' are being realized." Memorandum to all Chief Judges, United States District Courts, from William E. Foley, Deputy Director, Administration Office of the United States Courts, March 24, 1976, p. 2. Moreover, the Scranton grand jury would be just as free as the Harrisburg grand jury to decide that the testimony of these

two witnesses is not necessary. The motions to quash the subpoenas as returnable to an improper situs will be denied.

[9] To the witnesses' argument that the subpoenas should be quashed because of misconduct and improper purpose, the government has responded in the form of affidavits by Mr. Laurence Kelly, the Assistant United States Attorney in charge of the instant investigation, that set forth the scope and purpose of the investigation, as well as the relevance to that investigation of the testimony and materials sought by the subpoenas at issue, and disavow any improper purpose on the part of the government. With respect to Weiner, the affidavit sets forth that the investigation seeks to determine whether Patricia Hearst and William and Emily Harris were unlawfully harbored within this district, that there is reasonable cause to believe that Jay Weiner knows the identity and role of the participants in the alleged harboring effort, and that the purpose of the present subpoena is to elicit Weiner's knowledge regarding the alleged harboring.[7] The government's affidavit regarding Shinnick sets forth the same investigation, states that fingerprints, hair strands, and handwriting samples were recovered from the location in this district where the harboring is suspected to have occurred, and says that the purpose of the subpoena is to obtain fingerprints, handwriting and hair samples from Shinnick for comparison with the items recovered from the harboring location.[6] These affidavits are sufficient to satisfy the government's obligation "to make some preliminary showing by affidavit that each item is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose." *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85, 93 (3d Cir. 1973).

[10] The witnesses' contentions as to governmental misconduct are not persuasive. Weiner alleges that he has been harassed by being subpoenaed four itmes in connection with the Hearst case and by having the grand jury situs changed from Harrisburg to Scranton; that he has been victimized by illegal electronic surveillance; and that he has been subjected to a pattern of abusive behavior by government agents investigating this case. It has already been determined, *supra*, that the subpoena is not the product of illegal electronic surveillance, and that the government's purpose in moving the grand jury investigation to Scranton is proper. The argument concerning the number of times the witness has been subpoenaed is unpersuasive. As the government points out in its brief, the instant subpoena seeks to compel only the second appearance of Weiner before a grand jury investigating the unlawful harboring within this district, and is intended to elicit information from him in light of a development that has occurred since his initial appearance in March, 1975—the trial testimony of Patricia Hearst in February, 1976. One other subpoena of Weiner to testify before a grand jury in this district was withdrawn after he filed a motion to quash in April, 1975. The fourth subpoena referred to by the witness sought to compel his testimony at the trial of Patricia Hearst in the Northern District of California, and thus has no bearing on possible harassment caused by the number of subpoenas issued in this district. In any event, the Northern District of California subpoena was also withdrawn without Weiner testifying after Weiner again moved to quash.

[11] The witnesses do not draw any direct connection between the alleged abusive behavior by government agents, particularly F.B.I. agents, and the grand jury process at issue here. For example, they do not claim that any physical evidence pertinent to the grand jury investigation was obtained as a result of the agents' allegedly unlawful actions, a claim which, incidentally, would not necessarily be grounds for quashing the subpoenas. (*See United States* v. *Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), where the Court held that a witness summoned to testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. They simply maintain that the subpoenas should be quashed, or at least that an evidentiary hearing should be held, because of the alleged abusive behavior of the agents. Such allegations do not constitute grounds for quashing a valid grand jury subpoena. *Cf.* the unreported opinion of Judge Herman in *In re Grand Jury Proceedings* (Scott and Miller), MCD Nos. 4541 and 4542, filed August 22, 1975, at pp. 8–9. As Judge Herman points out in his opinion, a person allegedly victimized by such misconduct may consider an action against the agents themselves, *see Bivens* v. *Six Unknown Named Agents of Federal Bureau of Investigation*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), but may not attempt to thwart a grand jury investigation that has been demonstrated by government affidavit to be proper. Furthermore, to require the ventilation by hear-

ing of every allegation of government misconduct before a witness would be required to respond to a grand jury subpoena ". . . would saddle a grand jury with minitrials and preliminary showings [which] would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. 1, 17, 93 S.Ct. 76, 773, 35 L.Ed.2d 67 (1973).

[12] Many of Shinnick's arguments concerning misconduct and improper purpose are similar to Weiner's and are unpersuasive for the reasons described, *supra*. Shinnick argues in addition that the subpoena, by which the grand jury seeks to have him produce fingerprints and handwriting and hair samples, should be quashed because the government already has in its possession two of the items sought—his fingerprints and samples of his handwriting from the military records of his service in the United States Air Force from 1967 to 1971—and because the third item, the hair sample, is irrelevant as it would not be competent evidence against him during a criminal trial. These arguments are also unconvincing. With respect to the fingerprints and handwriting samples, which Shinnick does not deny may be obtained under ordinary circumstances by a grand jury subpoena, see *In re Grand Jury Proceedings* (*Schofield II*), 507 F.2d 963 (3d Cir. 1975), the government is entitled to "competent fresh evidence," *In re Grand Jury Subpoena Duces Tecum* (*Southern Motor Carriers Rate Conference, Inc.*), 405 F.Supp, 1192, 1198 (N.D. Ga. 1975), and the fact the government may already have the requested materials in its possession will not ordinarily prevent a grand jury from obtaining them in connection with its own independent investigation. This is particularly so in the case of fingerprints and handwriting samples, since even assuming the government does have military records with fingerprints and handwriting samples that purport to be Shinnick's, it would have a difficult time at trial establishing that those prints and samples are in fact the witness's. The government does not have to be confronted with such a potential chain of possession problem, and may obtain new fingerprints and writing samples from the witness via the instant subpoena.

[13] Shinnick's argument regarding the hair samples requires little comment. Without deciding whether or for what purpose hair strands may be admitted against a defendant during a criminal trial, although it should be noted that Shinnick's contention that they are *inadmissible* as incompetent and irrelevant would not appear to be correct, *cf. United States* v. *D'Amico*, 408 F.2d 331 (2d Cir. 1969), it is sufficient to note that a witness may not interfere with the course of the grand jury's inquiry by urging " 'objections of incompetency or irrelevancy, such as a party may raise, for this is no concern of his,' " *United States* v. *Calandra*, 414 U.S. 338, 345, 94 S.Ct. 613, 619, 38 L.Ed.2d 561 (1974), quoting *Blair* v. *United States*, 250 U.S. 273, 282, 39 S.Ct. 468, 63 L.Ed. 979 (1919). The motions to quash on the grounds of governmental misconduct and improper purpose will be denied.

[14–17] Weiner has moved for a protective order requiring the government to file an affidavit stating whether or not he is a target of the investigation, to certify existing evidence that it has regarding Weiner in order that the witness may be certain that the government does not violate the immunity afforded him before the grand jury by using that testimony to prosecute him at a later date, and to furnish him a transcript of his grand jury testimony. This motion will be denied. The government is under no obligation to so inform a witness before a grand jury whether he is a target of the investigation. With respect to protection against a possible violation of the witness's immunity, he is sufficiently protected by the holding of *Kastigar* v. *United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972) that, in the event that an immunized witness is subsequently indicted, the prosecution has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.* at 460, 92 S.Ct at 1665. The request for a transcript of the witness's grand jury testimony is also made with an eye to protecting the witness's rights following a grant of immunity. Weiner argues that he should have a copy of the transcript of his testimony in order that he can more easily determine whether that testimony was used by the government against him in the event that he is indicted in the future. This request is premature, however, inasmuch as Weiner has not been indicted in connection with the instant investigation. In the event that he is so indicted in the future, the propriety and necessity of his obtaining a copy of his grand jury testimony will materialize. Indeed, under those circumstances, Weiner would be able to obtain by discovery from the gov-

ernment a copy of his grand jury testimony. *See* Rule 16(e)(1)(A), Federal Rules of Criminal Procedure.

Weiner's motion for supplemental instructions to the grand jury will remain under advisement.

FOOTNOTES

(1) Although the subpoena of Shinnick commands him to appear to testify before the grand jury, the government has acknowledged, in its brief in opposition to Shinnick's motion to quash and at oral argument on the motion, that it only intends to have Shinnick produce fingerprints, a handwriting exemplar and a hair sample for the grand jury, and that it does not intend to request his testimony.

(2) With reference to Weiner, the affidavit provides:

"Laurence M. Kelly, being duly sworn according to law deposes and says:

"1. He is an Assistant United States Attorney for the Middle District of Pennsylvania.

"2. In such position he is participating in an investigation relating to alleged violations of 18 U.S.C. 1071—the Federal 'Harboring' Statute—within the Middle District of Pennsylvania.

"3. He caused a subpoena to be served upon Jay Weiner, through his counsel, on May 19, 1976, requiring his presence before the Federal Grand Jury, Scranton, Pennsylvania.

"4. He knows that the source of information upon which the questioning of Jay Weiner will be based is the testimony of Patricia Hearst given at her bank robbery trial between February 9, 1976 through February 20, 1976, in the U.S. District Court for the Northern District of California, No. 74-364 OJC.

"5. None of the information upon which the questioning of Jay Weiner will be based is the result, directly or indirectly, of any electronic surveillance of Jay Weiner.

"6. The undersigned is unaware of any electronic surveillance of Jay Weiner, directly or indirectly, at any time.

"7. That inquiry was made of the appropriate Agencies of the Federal Government to determine if there had been any electronic surveillance of the conversations of the witness Jay Weiner.

"8. These Agencies were selected as appropriate for inquiry because at the time the requests were made they were the only Agencies that had requested authority to conduct and had conducted electronic surveillance pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Public Law 90-351. All national security electronic surveillances authorized by the Attorney General have been conducted solely by, and all records of such surveillances have been maintained by the Federal Bureau of Investigation.

"9. The Federal Agencies to whom this inquiry was directed are listed as follows, together with the most recent date that a response was received to the inquiries made by the Department of Justice.

"a. Federal Bureau of Investigation—July 16, 1975.
"b. Drug Enforcement Administration—June 25, 1975.
"c. United States Secret Service—June 26, 1975.
"d. Internal Revenue Service—June 27, 1975.
"e. United States Customs Service—June 8, 1975.
"f. Bureau of Alcohol, Tobacco and Firearms—June 24, 1975.
"g. United States Postal Service—June 23, 1975.

"10. Based upon the results of such inquiry the deponent hereby states that there has been no electronic surveillance occurring on premises known to have been owned, leased or licensed by Jay Weiner, as of the dates set forth above."

With reference to Shinnick, the affidavit provides:

"Laurence M. Kelly, being duly sworn according to law deposes and says:

"1. He is an Assistant United States Attorney for the Middle District of Pennsylvania.

"2. In such position, he is participating in an investigation relating to alleged violations of 18 U.S.C. 1071—the Federal 'Harboring' Statute—within the Middle District of Pennsylvania.

"3. He caused a subpoena to be served upon Phillip Kent Shinnick on May 24, 1976, requiring his presence before the Federal Grand Jury, Scranton, Pennsylvania.

"4. The purposes of this subpoena are as set forth in another 'Affidavit' of the undersigned filed herewith, and made a part hereof by reference.

"5. The undersigned is the person who issued the instant subpoena, and knows the source of the information upon which this subpoena is based.

"6. The source of the information leading to this subpoena is the testimony of Patricia Hearst at her Bank Robbery Trial as set forth in the other Affidavit of the undersigned filed herewith, paragraphs 6 and 7, together with the items of physical evidence obtained from locations relevant to the investigation.

"7. The undersigned has no knowledge of any electronic surveillance of Phillip Kent Shinnick at any location at any time.

"8. This subpoena is not based upon any information obtained through any electronic surveillance of Phillip Kent Shinnick at any location."

(3) Mr. Kelly stated at oral argument that he had reviewed his materials and could now state that as a result of the check, as of the summer of 1975 there had been no electronic surveillance at any situs of any conversations involving Jay Weiner. He stated that he would submit a supplemental affidavit and the court will assume for the purposes of this discussion that the affidavit is to that effect.

(4) The inquiry may have been based ". . . in some part, on information or leads furnished by other agencies about whose sources and activities neither [the U.S. Attorney nor the F.B.I. agent in charge of the investigation] may know." *In re Quinn*, 525 F.2d 222, 225 (1st Cir. 1975). Furthermore, for the § 3504 response to be adequate ". . . there must be included an explicit assurance indicating that all agencies providing information relevant to the inquiry were canvassed." *Id.*, at 226.

(5) ". . . courts have interpreted the statute to require the Government to make it reasonably clear that its denial is based on sufficient knowledge to be meaningful." *In re Quinn*, 525 F.2d 222, 225 (1st Cir. 1975).

FOOTNOTES—Continued

(6) It could be argued that the government's response does not constitute a denial of all possible means by which information concerning the witnesses could have been gathered by illegal wiretapping, in that it does not deny the possibility that information concerning the witnesses was learned by overhearing the conversation of two other individuals who may have been discussing the witnesses. The short answer to such a contention is that section 3504 does not require the government to respond to such a claim. The statute requires the government to respond "upon a claim by a *person aggrieved* . . ." (emphasis supplied). Although section 3504 itself does not define the term "person aggrieved," Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*, to which section 3504 expressly relates and in light of which section 3504 should be construed, defines an "aggrieved person" as "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." 18 U.S.C. § 2510(11). Applying that definition to section 3504, it appears that only those who claim their own conversations were illegally monitored or against whom it was directed have standing to require the government to respond under section 3504. This conclusion is supported by the legislative history of section 3504, which indicates that the government is required to affirm or deny unlawful electronic surveillance only upon a claim "by the defendant *with standing to challenge the alleged unlawful conduct.*" H.R. No. 91-1549, 91st Cong., 2d Sess. (1970), 2 U.S. Code Congressional and Administrative News 4027 (1970) (emphasis supplied).

(7) The Weiner affidavit provides:

"Laurence M. Kelly, being duly sworn according to law deposes and says:

"1. That he is an Assistant United States Attorney for the Middle District of Pennsylvania.

"2. In such position, he is participating in an investigation relating to alleged violations of 18 U.S.C. 1071—the Federal 'Harboring' Statute—within the Middle District of Pennsylvania.

"3. The investigation seeks to determine if during the Summer of 1974, Patricia Hearst, William Harris and Emily Harris, who were Federal fugitives at the time were harbored near South Canaan, Wayne County, Pennsylvania, within the Middle District of Pennsylvania; and if so, whether any person or persons may have violated 18 U.S.C. 1071.

"4. The investigation seeks to identify all those persons who may have participated in such efforts to harbor and conceal the persons named in paragraph three (3) above, and determine the extent of their respective roles therein.

"5. On September 22, 1975, the fugitives named in paragraph three (3) were captured in San Francisco, California.

"6. Subsequently, Patricia Campbell Hearst was tried on charges of Bank Robbery in the U.S. District Court for the Northern District of California, Cir. No. 74-364 OJC. Between February 9, 1976, and February 20, 1976, she gave testimony at said trial.

"7. Said testimony reflects that several persons may have been involved in the effort to harbor her and the Harris' at a farmhouse in Pennsylvania near Scranton.

"8. Patricia Hearst, as aforesaid, testified that this witness, Jay Weiner, was brought to the farmhouse by two persons where he met Patricia Hearst and the other fugitives names in paragraph three (3) above.

"9. On the basis of this testimony it appears that this witness, Jay Weiner, may have been made privy to the scope of the effort to harbor and conceal the fugitives, including the identity and role of each of the participants.

"10. It is the purpose of the present subpoena to seek information from Jay Weiner before the Grand Jury relating to those persons who may have participated in the efforts to harbor the fugitives named in paragraph three (3).

"11. While some duplication is inevitable, this subpoena is in quest of information different from any previously given by this witness to either Federal Agents or to any other Grand Jury.

"12. This subpoena is not intended to harass the witness in anyway, but is being issued in quest for information relevant to the inquiry.

"13. No prior testimony of this witness has been divulged by the Government to any person not authorized to obtain such testimony under Rule 6(e) F.R.C.P. to the best of the undersigner's knowledge, information and belief.

"14. It is not the purpose of this subpoena to induce the witness to commit perjury. To the contrary, it is hoped that Mr. Weiner will testify fully and honestly in all respects.

"15. It is not the purpose of this subpoena to 'freeze' the prior testimony of the witness. In the first place, such prior testimony is already 'frozen'; in the second place, as stated in paragraph ten (10) above, new and difference testimony is sought here.

"16. It is not the purpose of this subpoena to 'rehearse' the witness for any future trials."

(8) The Shinnick' affidavit provides:

"Laurence M. Kelly, being duly sworn according to law deposes and says:

"1. That he is an Assistant United States Attorney for the Middle District of Pennsylvania.

"2. In such position, he is participating in an investigation relating to alleged violations of 18 U.S.C. 1071—the Federal 'Harboring' Statute—within the Middle District of Pennsylvania.

"3. The investigation seeks to determine if during the Summer of 1974, Patricia Campbell Hearst, William Harris and Emily Harris, who were Federal fugitives at the time, were harbored near South Canaan, Wayne County, Pennsylvania, within the Middle District of Pennsylvania; and if so, whether any person or persons may have violated 18 U.S.C. 1071.

"4. The investigation seeks to identify all those persons who may have participated in such efforts to harbor and conceal the persons named in paragraph three above, and determine the extent of their respective roles therein.

"5. On September 22, 1975, the fugitives named in paragraph three were captured in San Francisco, California.

"6. Subsequently, Patricia Campbell Hearst was tried on charges of Bank Robbery in the U.S. District Court for the Northern District of California. Cir. No. 74-364 OJC. Between February 9, 1976, and February 20, 1976, she gave testimony at said trial.

FOOTNOTES—Continued

"7. Said testimony reflects that several persons may have been involved in the effort to harbor her and the Harris' at a farmhouse in Pennsylvania near Scranton.
"8. Said testimony mentioned several persons in connection with the three fugitives being brought to the Wayne County premises.
"9. In connection with the investigation several fingerprints were obtained from locations relevant to the inquiry.
"10. In connection with the investigation, several strands of human hair were obtained from locations relevant to the investigation.
"11. In connection with the investigation, items of handwriting were obtained from locations relevant to the investigation.
"12. The purpose of this subpoena is to obtain known fingerprints, handwriting and hair samples of this witness for comparison with the above items that have been recovered during the investigation.
"13. This subpoena is being issued for no purposes other than described above.
"14. No information obtained through the production of the items requested of this witness will be divulged by the Government to any person not authorized to obtain it under Rule 6(e) F.R.C.P.
"15. It is not the purpose of this subpoena to harass the witness in any way.
"16. It is not the purpose of the subpoena to interfer with the employment opportunities available to this witness in any way or to otherwise reduce his opportunities for employment."

[From the Philadelphia Evening Bulletin, Jan. 19, 1977]

U.S. Drops Action in Hearst Case

Scranton.—The Federal Government said yesterday it no longer needs hair and handwriting samples or fingerprints from Phillip Shinnick, jailed for contempt since Nov. 30 in the Patricia Hearst case. The U.S. attorney's office said recent developments in its investigation of the harboring of the kidnaped California heiress in a farmhouse near here in the summer of 1974, no longer requires such evidence.

Shinnick, 34, of Livingston, N.J., was jailed along with Jay Weiner, 22, of Philadelphia, for refusing to cooperate with a federal grand jury investigating the case.

Weiner had been given immunity from prosecution and was cited for contempt when he continued to refuse to testify. Shinnick declined to give hair and handwriting samples or his fingerprints to investigators.

Chief Judge William J. Nealon, of the U.S. District Court here, was informed of the government's petition while hearing a case in Harrisburg. An aide said he probably would sign an order to release Shinnick later today.

However, a source in the U.S. attorney's office said the grand jury might now seek Shinnick's verbal testimony in the case, in which case he, too, would be granted immunity and would face contempt charges if he continues to refuse cooperation.

Both men have been held in the Allenwood, Pa., federal prison.

[From the Washington Star, Jan. 21, 1977]

Shinnick Is Free After Government Reviews Case

(By William Taaffe)

Phil Shinnick, the former Olympic athlete imprisoned last month for refusing to comply with demands of a federal prosecutor and grand jury investigating the harboring of Patricia Hearst in 1974, has been freed at the request of the government.

Shinnick gained his release four weeks after he was charged with civil contempt and sentenced to an indeterminate term at Allenwood, Pa. His release also came one week after The Star published stories of his plight and former Atty. Gen. Edward Levi ordered the case reviewed.

In a telephone interview from Scranton yesterday, Asst. U.S. Atty. Lawrence Kelly insisted that the publicity surrounding Shinnick's and Levi's interest in the case had nothing to do with the prosecution's sudden about-face.

Shinnick's imprisonment stemmed from his refusal to comply with a jury request last August that he supply the FBI with his fingerprints and samples of his hair and handwriting in a room just outside the grand jury chamber.

Shinnick argued that it was the chief prosecutor, S. John Cottone, who instructed the jury foreman to demand these samples for the FBI and that such

instructions were improper. Police agencies have no power to subpoena evidence. Shinnick offered to submit the samples directly to the courts, but Cottone refused.

Cottone was unavailable for comment. But Kelly, his assistant, said "further field investigation" of the Hearst case made unnecessary the comparison of Shinnick's fingerprints, hair and handwriting with other samples the FBI apparently possesses.

Shinnick, 32, was released from Allenwood Wednesday after U.S. Judge William J. Nealon approved Cottone's request. Kelly refused to disclose what discovery led to Shinnick's release, or when new information came to light.

Cottone and Kelly have been investigating the harboring of Hearst for 2½ years. They believe that sports activist Jack Scott and his wife, Micki, rented a farm house for her in South Canaan, Pa., and that Shinnick, a close friend of the Scotts, appeared at the house on occasion.

Jay Weiner, a 23-year-old sportswriter who also was sent to Allenwood last month on civil contempt charges, was not released with Shinnick this week. However, Weiner had refused to answer all grand jury questions while Shinnick merely refused to furnish the FBI potential evidence.

Shinnick said yesterday that he feels publicity surrounding his case (New York Times columnist Tom Wicker also wrote about Shinnick) may have influenced his release.

Shinnick competed in the long jump at the Tokyo Olympics in 1964 and later became part of the so-called "athletic revolution" which tried to reform establishment sports in this country. He now is an assistant professor of sports sociology at Rutgers University's Livingston College.

Despite his release, Shinnick's problems may be far from over. Kelly said it is "possible" Shinnick may be subpoenaed before the grand jury again.

[From the Philadelphia Inquirer, Jan. 22, 1977]

U.S. ASKS RELEASE OF HEARST PROBE FIGURE

SCRANTON.—The U.S. Justice Department has asked that Phillip Shinnick, a former Olympic track athlete jailed since Nov. 30 for refusing to cooperate with an investigation of the Patrica Hearst case, be released from Allenwood Federal Penitentiary.

"I'll be very surprised if he's not out of jail by the end of the day Wednesday," said Laurence Kelley, assistant U.S. attorney for the Middle District of Pennsylvania.

Kelly said that his office had not petitioned the court for the release of Jay Weiner, 23, a restaurant employee from Philadelphia, also jailed at Allenwood for contempt.

Shinnick, 34, an athletic director at the Livingston, N.J., campus of Rutgers University, was cited for civil contempt after he refused to obey a grand jury order that he give his fingerprints and samples of his hair and handwriting to the FBI.

Kelly said he had petitioned the court for Shinnick's release "because further investigation has made the comparison of his fingerprints, handwriting and hair sample no longer necessary to the case.

Shinnick was asked to turn over the samples last August by a grand jury in Harrisburg. He claimed that the jury had no power to ask for them and that investigators were attempting to link him with the harboring of Miss Hearst at a farmhouse in South Canaan, Pa., during the summer of 1974. She was being sought in connection with a San Francisco bank robbery.

Shinnick has denied that he ever visited the farmhouse, or ever knew Miss Hearst.

[From the Philadelphia Bulletin, Jan. 23, 1977]

LET A JURY DECIDE, JAY WEINER SAYS IN PRISON INTERVIEW

(By Robert W. Kotzbauer)

"I'm fine. I'm angry about still being here, but I will never again be coerced into testifying."

It is 2 o'clock and Jay Weiner, 22, of Philadelphia, is speaking in the noisy visiting room at Allenwood Federal Prison near Williamsport.

Outside, the central Pennsylvania countryside is crackling with hard snow. It is a vast patchwork of white fields and black forests unbroken by walls or fences, and the cold is visibly etched on the red-brick buildings of the complex.

But inside this busy room, people are embracing, clinging to a few desperate moments of inner peace.

Despite his own turmoil, Weiner is smiling, pleasant, appearing relaxed in khaki fatigues, as he explains his frustrations and determination.

For almost two months Weiner, a former Temple University student, has been in jail for refusing to testify in the Patricia Hearst investigation.

He is a lonely among the nearly 500 inmates. His best friend, Phillip Shinnick, was set free Wednesday, and 24 hours later, Weiner feels that is no one with whom he can confide. Except a reporter. And, he is cautious.

"I hope you don't make me out to be crazy," he says.

"I want to be out. I can't get back the time I'm here. I don't want to chisel myself into martyrdom, but I will fight everything they do to intensify my punishment.

"My testifying could hurt other people, and would make me an accomplice of the government's cruelty. My feeling is there's a basic human right to be silent, to be left alone.

"They can't immunize me against the wrath of my conscience, or the scorn of my friends. I am guilty of contempt of court, as that is defined, but every day I spend here I have more contempt."

HE COULDN'T EXPLAIN

"If I have committed some crime, I should be charged and have a trial. I didn't have a chance to explain to people what I was doing.

"I feel that a jury might nullify the contempt. I feel I could explain my reason.

"Also, I and my family and friends have been treated horribly. To testify would be to endorse that. The grand jury is being used illegally, in my opinion, and I won't be part of that."

Jay Weiner is being held at Allenwood by order of U.S. Judge William J. Nealon of the Middle District of Pennsylvania, until he agrees to tell a grand jury in Scranton more about what he knows of Patty Hearst's 1974 hiding in a South Canaan, Wayne County, Pa. farmhouse.

Or, until the current session of this grand jury expires in July. Whichever comes first.

Authorities want to question Weiner about reports that Miss Hearst and her kidnapers in the radical Symbionese Liberation Army were harbored in the Northeastern Pennsylvania farm house during their flight from law enforcement officials in 1974.

He has testified about much of this before another grand jury in Harrisburg on March 13, 1975.

"I talked about Patty," he said, "and the Scotts," (former Oberlin College athletic director Jack Scott and his wife Micki who are suspected of harboring Miss Hearst during her long flight from the law.)

"I think it was a horrible mistake to testify then, but I was frightened. Had I not made the mistake, and learned from it, I wouldn't be so strongly determined not to testify now. The Jay Weiner of then was not the Jay Weiner of today.

DENIED FURLOUGHS

"The government," he continued, "had enough information from me to indict people for harboring. Patty herself gave far more explicit information in her trial (at which she was convicted of a California bank robbery). Yet no one has been indicted for harboring. I think the government is using the grand jury for some other reason.

"The only new questions I've refused to answer are, do I know Phil (Shinnick), and did I see him during the Summer of '74? But the FBI had stacks of pictures they didn't show me in Harrisburg. God knows who they would have asked me about."

Under law, which holds that a federal grand jury is entitled to every man's evidence, a person who refuses to testify, on grounds of his Fifth Amendment privilege not to incriminate himself, may be granted immunity from prosecution for his own actions and ordered to testify.

Failing to do so, he may be ordered to prison until he recants or the term of the grand jury expires. But, as in Weiner's case, he remains the responsibility of the federal marshal.

Thus, Weiner is denied the freedom of other Allenwood prisoners to leave the grounds for weekend furloughs. For a time, he was not permitted to speak with reporters, but Judge Nealon lifted this restriction.

Weiner said he is not being badly treated or harassed by prison staff or other inmates.

HE FEELS SAFE

"I'm not being beat up," he said, "I don't feel unsafe. I was exercising a lot until the cold weather. I don't eat the meat. It looks like doormats. My weight has dropped about 10 pounds."

He and Shinnick entered Allenwood last November. Shinnick had refused to give authorities samples of his hair, handwriting and fingerprints which, the FBI hoped, might tie him to the South Canaan farmhouse where Patty Hearst stayed. U.S. Attorney S. John Cottone decided last week that these materials were no longer needed, and the former Olympic athlete from New Jersey was released.

As for Weiner, he says he is reading a lot and tutoring three other inmates as part of his assignment in Allenwood's educational department.

Superintendent Eldron Jensen said Weiner is causing no problems, and because of his indefinite status, he isn't assigned to any specific rehabilitative programs.

Weiner said that he gets along well with other inmates, but doesn't talk with them.

"Most of the guys are here because some one testified against them. They're supportive," he said. "Also, they recognize they made a mistake, and can see the contradiction in my being jailed without any crime."

Weiner indicated G. Gordon Liddy, who was talking with a visitor in another corner of the room. Liddy, too, was jailed for refusing to tell all he knew and for crimes he committed in the Watergate scandal. He has been imprisoned for four years.

"That's wrong, in relation to how (former President) Nixon was treated," said Weiner. "Four years is long enough. Liddy's life has been ruined. He shouldn't be here."

"SLA IS NOT ME"

But what about Jay Weiner's life? Is it being ruined by his refusal to cooperate with the law? And how does he equate his professed non-violence with his involvement, however limited it may have been, with the Symbionese Liberation Army?

"This Scranton thing is about harboring," he said, "and not about bank robberies and other violence. I'm not here for the alleged crimes of the SLA. I've never held a gun. I've never done anything wrong.

"The SLA is not me, it never was me. When the government began hitting me, I said to myself. 'I'm on the SLA side.' But then I went to China (on a tour with Shinnick and other athletes, last year), and it became important to me to be critical of the SLA. Not just for its acts, but their clearly mistaken notion that things were going to change through kidnaping and such.

"There is certainly a need to change fundamental relationships in the United States. I've been thinking a lot about the power of the central government over the individual.

"If I were in the Soviet Union or China," he went on, "I would maintain there, too, that I have a right to be silent, and I know they would also jail me.

"William Penn was in jail four times. He too confronted this central question. I want to change things. I think it is everyone's responsibility.

"When I get out, I'd still like to get into sportswriting, although I realize I may be too hot an item to handle. I will always be identified as the Temple University graduate who refused to testify in the Patty Hearst case.

"I believe the job of a journalist," he said, "is to construct reality, not just observe it. Am I being too idealistic?

"I don't mind that as much as being considered naive," he said, and walked back out to the cold.

CHRISTIAN SCIENCE MONITOR SUPPORTS FEDERAL GRAND JURY REFORM
(CONGRESSIONAL RECORD, FEB. 23, 1977)

(By Hon. Joshua Eilberg, of Pennsylvania)

Mr. EILBERG. Mr. Speaker, the Subcommittee on Immigration, Citizenship, and International Law is about to commence its hearings on proposals to reform the Federal grand jury system. I have introduced H.R. 94 suggesting such extensive, yet balanced, reforms.

After careful review of my proposals, the Christian Science Monitor, I am pleased to say, has come out in strong support of my bill. I am inserting in the Record the editorial, dated February 16, 1977;

GRAND JURY REFORM AT LAST?

Attorney General Bell has stepped into the urgent question of grand jury reform by recognizing the general need for it while opposing such a specific key element of reform as permitting a witness to have counsel present. Mr. Bell promises study of the matter, which was also undertaken by his predecessor. The happiest outcome would be for him to lend his support to the new refinement of reform legislation perennially and persistently introduced by Rep. Joshua Eilberg of Pennsylvania.

Subcommittee hearings on this legislation are expected the middle of next month. Representative of the American Bar Association (ABA) have long backed efforts for reform. Passage of reform at long last would be a good way to begin the third century of a nation dedicated to liberty and justice for all.

Manifest abuses of the grand jury system have worked against justice. In his confirmation hearings Mr. Bell said it had become a tool of the prosecutor. But as the ABA convention considered adopting a slate of strong grand jury standards this week, Mr. Bell expressed reservations.

On the matter of permitting a witness to have counsel, the Attorney General, like his predecessor, makes the valuable point the grand jury should not be turned into a minitrial. The secret proceedings of the grand jury were never meant to be an adversary procedure but an investigative process to protect the innocent while bringing wrongdoing to the surface.

The new proposed legislation aims to keep it from becoming an adversary procedure by limiting the counsel's role to that of advising the witness—and not, for example, challenging evidence. Also, it would allow the court to remove or replace counsel in certain circumstances, while seeing that free counsel, if necessary, is available in general. Evidence could be challenged at a required preliminary, pretrial hearing such as most states already have.

There are also other refinements to provide some flexibility in the application of the reforms as evaluated by the courts. But the thrust remains to combat abuses by assuring the rights of the witnesses and the independence of the grand jury.

Thus not only must the witness be fully informed of his rights and other matters such as whether he is a potential defendant, but the jurors must be informed of their powers and duties—that they, not the prosecutor, are in control. Regulations on contempt and immunity would be tightened.

Beyond the legislation there are such proposals as a constitutional amendment to continue the investigative power but end the indicting power of grand juries. This has been proposed by high-level studies in the past. There are also proposals to eliminate the grand jury, as happened more than four decades ago in Britain, where the grand jury began.

Certainly, unless the United States is to follow Britain's lead in this manner, it must reform the grand jury system that has served it well in many ways but has been subject to too much misuse.

GRAND JURY REFORM (CONGRESSIONAL RECORD, MARCH 15, 1977)

(By Hon. Raymond F. Lederer, of Pennsylvania)

Mr. LEDERER. Mr. Speaker, I appreciate this opportunity today to bring to the attention of my colleagues an important article written by our colleagues from Pennsylvania the Honorable Joshua Eilberg.

Congressman Eilberg has worked diligently over the past years to bring to our attention the need for reform of our present grand jury system. This article, which appeared in the March 10 edition of the Evening Bulletin in Philadelphia, reviews the past and present actions in the area. I commend Congressman Eilberg's article to my colleagues of the House:

THE "EILBERG BILL": GRAND JURY REFORM

(By Joshua Eilberg)

The grand jury system has long been considered an integral part of our judicial heritage. Based on experiences with the British monarchy, our Found-

CONTINUED

13 OF 17

ing Fathers considered grand juries such an important protection for the individual against possible Government persecution that they incorporated them into the Bill of Rights.

Unfortunately, the grand jury system has recently become the focus of controversy and misunderstanding. Defenders of grand juries view them as an essential prosecutorial tool and as a buffer between the state and the citizen. Critics fear them as uncontrolled "star chambers" and as "rubber stamps" for prosecutors.

Recent history has demonstrated that grand juries are valuable tools to ferret out official corruption. But the historic function of grand juries is also being perverted to serve partisan politica lends. Their historic purpose as a "legal shield" is being disregarded by prosecutors who totally dominate the proceedings.

As a result of these developments, for the first time since the adoption of the Bill of Rights in 1789, Congress is conducting a comprehensive examination of the federal grand jury system—its operations, its problems, its abuses, and its reform.

In March 1973, as chairman of the subcommittee on Immigration, Citizenship and International Law of the House Judiciary Committee, I convened hearings regarding the so-called "Fort Worth Five"—controversy in which five Irish-Americans were subpoenaed by a grand jury in Fort Worth, Texas, for crimes allegedly committed in New York City. When they refused to testify, they were granted immunity without their consent, then held in contempt and imprisoned.

During the hearings, witnesses described the use of the grand jury to investigate "political crimes" and the ability of the prosecutor to open inquiries, often for political purposes, far from the site of an alleged offense. The witnesses also explained how the grand jury system is used to obtain information that is often unrelated to criminal activity.

Following this hearing, both in the 93d and 94th Congress. I introduced comprehensive bills to reform the federal grand jury system and held hearings on them.

Unfortunately, while almost all the witnesses supported some form of legislative change to grand jury procedures, the then attorney general and the Ford Administration totally opposed any reform. The new attorney general has publicly and privately stated his concern about prior abuses and about maintaining the independence of the grand jury. He has agreed to cooperate with my subcommittee in developing appropriate reforms. Hearings will be resumed this session on a new grand jury bill, H.R. 94, which I introduced on January 4, and I expect comprehensive legislation to be adopted by the 95th Congress.

H.R. 94 would insure independent and informed federal grand juries. Jurors, not the prosecutor, would determine and review all the evidence.

To insure secrecy, and avoid trial by newspaper, grand jury leaks would be made a crime with the punishment depending on the purpose of the leak.

To provide a proper balance between the Fifth Amendment privilege against self-incrimination and the right to obtain evidence, under H.R. 94 a witness could be immunized from prosecution, but only with strict judicial safeguards.

To establish a proper balance between the rights of a witness and the need for thorough investigations, H.R. 94 mandates new procedures. Witnesses would receive one week's notice, unless the government can justify a shorter period.

Witnesses could have counsel with them in the grand jury room—not to ask questions or challenge evidence but only to advise their clients and counsel could be removed for improprieties.

The need for grand jury reform is real. More and more states are providing increased rights and protections. But if the grand jury is to return to its historic role as a "bulwark against oppression," reform of our federal laws to provide for equitable procedures must be enacted.

Grand Jury Reform—Colorado Senate Proposals Parallel H.R. 94 Reforms
(Congressional Record, March 29, 1977)

(By Hon. Joshua Eilberg, of Pennsylvania)

Mr. Eilberg. Mr. Speaker, Dale Tooley, the district attorney of Denver, Colo., has recently forwarded to me Colorado Senate bill 186 proposing reforms in that State's grand jury procedures. These reforms are almost identical to those I have proposed in H.R. 94 for our Federal grand jury system. Specifically, the provisions of the Colorado bill, which match my bill—

Would provide for a right to counsel in the grand jury room, free if the witness is indigent. Counsel would only advise, and could not make objections, arguments, or addresses to the grand jury. The court would maintain the power to remove any disruptive counsel;

Would require the grand jury to be informed of its duties, rights, and responsibilities prior to hearing the testimony of witnesses or reviewing documentary evidence;

Would permit any person to request to testify before the grand jury and allow denial of such a request to testify only for good reasons;

Would require witnesses to be informed of their rights before the grand jury and prohibit calling any witness if they indicate that they will exercise their privilege against self-incrimination;

Would allow subpenas to be challenged if they are unreasonable, oppressive, or for harassment purposes;

Would require all grand jury proceedings to be recorded and permit transcripts of a witness' testimony to then be made available to the witness prior to trial;

Would grant witnesses the right to review any prior statements in the prosecutor's possession prior to his testimony before the grand jury;

Would allow witnesses to be held in contempt only after a hearing with counsel and allow confinement only for the term of the grand jury or 6 months, whichever is less;

Would prohibit reiterative contempt, that is, prohibit witnesses imprisoned or fined for refusal to testify from being subsequently imprisoned or fined for refusal to testify as to the same matter;

Would prohibit repeated jeopardy, that is, once a grand jury has refused to issue an indictment, prohibit a new inquiry on the same matter from being initiated unless there is a finding that additional evidence has been discovered.

As District Attorney Tooley and others have indicated, the reforms proposed by H.R. 94—and the Colorado Senate bill—would not in any way interfere with legitimate investigations by grand juries. Rather, they would insure that such investigations are fair, thorough, and productive.

I would like at this point to insert in the Record the forwarding letter of District Attorney Tooley and the full text of Colorado Senate bill 186:

STATE OF COLORADO,
Denver, March 16, 1977.

Hon. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship and International Law, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN EILBERG: Thank you for your letter of January 25, 1977, and for the information which you enclosed.

I thought you might be interested in S.B. 186 concerning grand jury reform, pending before the Colorado legislature. Enclosed is a copy of this legislation, in the form in which it was approved by the Senate Judiciary Committee. It was approved on second reading, and we expect it will clear the Senate within the next two weeks. There will be two amendments to it, [one which will leave to the discretion of the prosecutor the form of the subpoena and any required notice thereon, and the other restricting grand jury reports]. That restriction will probably require that a subject of a report have an opportunity to appear and to testify and that in no event could a report be issued without the approval of a judge who determines that public release of a report is important to the public interest.

Because so many of these changes encompass elements of the legislation which you are proposing, and which Dade County State's Attorney Richard Gerstein advocates, I am sending this information to you and to Mr. Gerstein.

Yours truly,

DALE TOOLEY.

The committee recommends that S.B. No. 186 be amended as follows and, as so amended, be referred to the Committee of the Whole with favorable recommendation:

Amend printed bill, page 1, strike everything below the enacting clause, and substitute the following:

"Section 1. 16-5-204, Colorado Revised Statutes 1973, is repealed and reenacted, with amendments, to read:

16-5-204. Witnesses before a grand jury—procedure (1)(a) Whenever a witness in any proceeding before any grand jury 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 prosecuting attorney may submit an application to the court for an order directing the witness to show why the witness should not be held in contempt. After submission of such application and (a hearing at which the witness may be represented by counsel, the court may, if the court finds that such refusal was without just cause, hold the witness in contempt and order the witness to be confined). Such confinement shall continue until such time as the witness is willing to give such testimony or provide such information; however, (the court may release the witness from confinement if the court determines that further confinement will not cause the witness) to give such testimony or provide such information. No period of such confinement shall exceed the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, and in no event shall such confinement exceed six months.

(b) If a witness has been confined in accordance with paragraph (a) of this subsection (1), he may, upon petition filed with the court, request a hearing to be held within ten days to review the contempt order at which hearing he shall have the right to be represented by counsel. The court, at the hearing, may rescind, modify, or affirm the order.

(c) In any proceeding, conducted under this section, counsel may be appointed for a person financially unable to obtain adequate assistance.

(2) No person who has been imprisoned or fined by a court for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events in any proceeding before a grand jury impaneled before any district court shall again be imprisoned or fined for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events before any grand jury.

(3) Upon impanelment of each grand jury, the court shall give to such grand jury adequate and reasonable written notice of and shall assure that the grand jury reasonably understands the nature of:

(a) Its duty to inquire into offenses against the criminal laws of the state of Colorado alleged to have been committed;

(b) Its right to call and interrogate witnesses;

(c) Its right to request the production of documents or other evidence;

(d) The subject matter of the investigation and the criminal statutes or other statutes involved, if these are known at the time the grand jury is impaneled;

(e) The duty of the grand jury by an affirmative vote of nine or more members of the grand jury to determine, based on the evidence presented before it, whether or not there is probable cause for finding indictments and to determine the violations to be included in any such indictments; and

(f) The requirement that the grand jury may not find an indictment in cases of perjury unless at least two witnesses to the same fact present evidence establishing probable cause to find such an indictment.

(4)(a) Each grand jury subpoena shall contain the following advisement prominently displayed on the front of the subpoena:

NOTICE

(I) You have the right to retain an attorney to represent you and to advise you regarding your grand jury appearance.

(II) Anything you say to the grand jury may be used against you in a court of law.

(III) You have the right to refuse to answer questions if you feel the answers would tend to incriminate you or to implicate you in any illegal activity.

(IV) If you cannot afford or obtain an attorney, you may consult with the public defenders office, or request the court to appoint an attorney to represent you.

(b) Any witness who is not advised of his rights pursuant to paragraph (a) of this subsection (4) shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he testifies or any evidence he produces, nor shall any such testimony or evidence

be used as evidence in any criminal proceeding, except for perjury, against him in any court.

(c) In any proceeding before the grand jury, if the prosecuting attorney has written notice in advance of the appearance of a witness that such witness intends to exercise his privilege against self-incrimination, such witness shall not be compelled to appear before the grand jury unless a grant of immunity has been obtained.

(d) Any witness subpoenaed to appear and testify before a grand jury or to produce books, papers, documents, or other objects before such grand jury shall be entitled to assistance of counsel during any time that such witness is being questioned in the presence of such grand jury, and counsel may be present, in the grand jury room with his client during such questioning. However, counsel for the witness shall be permitted only to counsel with the witness and shall not make objections, arguments, or address the grand jury. Such counsel may be retained by the witness or may, for any person financially unable to obtain adequate assistance, be appointed in the same manner as if that person were eligible for appointed counsel. An attorney present in the grand jury room shall take an oath of secrecy. If the court, at an in camera hearing, determines that counsel was disruptive, then the court may order counsel to remain outside the court-room when advising his client.

(e) Once a grand jury has returned a no true bill based upon a transaction, set of transactions, event, or events, a grand jury inquiry into same transaction or events shall not be initiated unless the court finds, upon a proper showing by the prosecuting attorney, that the prosecuting attorney has discovered additional evidence relevant to such inquiry.

(f) A certified or authorized reporter shall be present at all grand jury sessions. All grand jury proceedings and testimony from commencement to adjournment shall be reported. The reporter's notes and any transcripts which may be prepared shall be preserved, sealed, and filed with the court. No release or destruction of the notes or transscripts shall occur without prior court approval.

(g) Upon application by the prosecutor, or by any witness after notice to the prosecutor, the court, for good cause, may enter an order to furnish to that witness a transcript of his own grand jury testimony, or minutes, reports, or exhibits relating to them.

(h) Any witness summoned to testify before a grand jury, or an attorney for such witness with the witness's written approval, shall be entitled, prior to testifying, to examine and copy at the witness's expense any statement in the possession of the prosecuting attorney or the grand jury which such witness has made that relates to the subject matter under inquiry by the grand jury. If a witness is proceeding in forma pauperis, he shall be furnished, upon request, a copy of such transcript and shall not pay a fee.

(i) No person subpoenaed to testify or to produce books, papers, documents, or other objects in any proceeding before any grand jury shall be required to testify or to produce such objects, or be confined as provided in this section, for his failure to so testify or produce such objects, if upon filing a motion and, upon an evidentiary hearing before the court which issued such subpoena or a court having jurisdiction under this section, the court finds that:

(I) A primary purpose or effect of requiring such a person to so testify or to produce such objects before the grand jury is or will be to secure testimony for trial for which the defendant has already been charged by information, indictment, or criminal complaint.

(II) Compliance with a subpoena would be unreasonable or oppressive;

(III) A primary purpose of the issuance of the subpoena is to harass the witness;

(IV) The witness has already been confined, imprisoned, or fined under this section for his refusal to testify before any grand jury investigating the same transaction, set of transactions, event, or events; or

(V) The witness has not been advised of his rights as specified in paragraph (a) of this subsection (4).

(j) Any grand jury may indict a person for an offense when the evidence before such grand jury provides probable cause to believe that such person committed such offense.

(k) The district court before which the indicted defendant is to be tried shall dismiss any indictment of the grand jury if such district court finds, upon the filing of a motion by the indicted defendant based upon the grand jury record

without argument or further evidence, that the grand jury finding of probable cause is not supported by the record.

(l) Any person may approach the prosecuting attorney or the grand jury and request to testify or retestify in an inquiry before a grand jury or to appear before a grand jury. The prosecuting attorney or the grand jury shall keep a record of all denials of such requests to that prosecuting attorney or grand jury, including the reasons for not allowing such person to testify or appear. If the person making such request is dissatisfied with the decision of the prosecuting attorney or the grand jury, such person may petition the court for hearing on the denial by the prosecuting attorney or the grand jury. If the court grants the hearing, then the court may permit the person to testify or appear before the grand jury, if the court finds that such testimony or appearance would serve the interests of justice.

(m) The foreman, or acting foreman when designated by the court, of the grand jury may swear or affirm all witnesses who come before the grand jury

(n) Any other motions testing the validity of the indictment may be heard by the court based only on the record and argument of counsel, unless there is cause shown for the need for additional evidence.

Section 2. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety."

FORMER GRAND JUROR NOTES ABUSES OF GRAND JURY SYSTEM (CONGRESSIONAL RECORD, APRIL 27, 1977)

(By Hon. Joshua Eilberg, of Pennsylvania)

Mr. EILBERG. Mr. Speaker, today my Subcommittee on Immigration, Citizenship, and International Law continued its hearings on grand jury reform. We heard the testimony of prosecutors and former prosecutors and a district court judge, representing the Judicial Conference of the United States. In addition, we received the testimony of former grand jurors.

I would like to call to the attention of the Members the testimony of William P. Gloege, who was a Federal grand juror in 1975 in California. Mr. Gloege forcefully demonstrated that the Federal grand jury system has become merely an extension of prosecutorial power, with little input and decisionmaking by the grand jurors themselves.

His description of his actual grand jury experience, as presented to the subcommittee, clearly demonstrates the need for the reforms I have proposed in H.R. 94.

The testimony follows:

TESTIMONY OF WILLIAM P. GLOEGE, VICE PRESIDENT, ASSOCIATION FOR EFFECTIVE GRAND JURIES, BEFORE THE HOUSE SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP AND INTERNATIONAL LAW

[The submitted statement of Mr. Gloege may be found in the hearings of April 27, 1977, at p. 517.]

FEDERAL JUDGE WILLIAM CAMPBELL DISCUSSES GRAND JURY REFORM (CONGRESSINAL RECORD, MAY 23, 1977)

(By Hon. Joshua Eilberg, of Pennsylvania)

Mr. EILBERG. Mr. Speaker, recently the Honorable William J. Campbell, U.S. district judge for the northern district of Illinois, testified before the Senate Judiciary Subcommittee on Antitrust and Monopoly, Specifically, Judge Campbell discussed some of the problems involved in the present Federal grand jury system, in an antitrust context.

Judge Campbell noted that the grand jury has effectively abandoned its function as a "protective bulwark—against arbitrary and overzealous prosecutors." He recommends the abolishment of the grand jury and the use of an "information." I have introduced four resolutions, House Resolution 59, House Resolution,

60, House Resolution 61 and House Resolution 62, each of which would eliminate the constitutional requirement of an indictment for infamous crimes. In hearings by the House Subcommittee on Immigration, Citizenship and International Law, we have explored and will continue to explore the continuing vitality of the grand jury as an indicting body.

Judge Campbell's testimony also supports my belief that whether or not the constitutional requirement of an indictment is eliminated, there is a clear need for reforms of investigatory grand jury procedures. Judge Campbell notes that the present grand jury system allows abuses, such as those involving immunity, notification of witnesses, and prosecutorial discretion. He indicates that one solution would be to reduce some offenses, here—antitrust offenses, to misdemeanors and thereby require preliminary hearings. H.R. 94 would accomplish the same result, but in a slightly different manner. To insure, as Judge Campbell recommends, preservation of testimony, review of charges by the judiciary, and accountability by the prosecutor, H.R. 94 would require a preliminary hearing in every case whether or not there is an indictment. Prosecutors, knowing there is an indictment. Prosecutors, knowing that they would have to present their evidence at a preliminary examination, would be less likely to present hearsay or inadmissible evidence to the grand jurors to secure an indictment. In addition, they would be more likely to conduct preliminary examinations prior to indictment and thus increase the number of waivers by defendants of indictments.

I commend to my colleagues the very scholarly and knowledgeable presentation by Judge Campbell, excerpts of which follow:

STATEMENT OF HON. WILLIAM J. CAMPBELL

Mr. Chairman, I appreciate your kind invitation to appear today to testify regarding the trial of major antitrust litigation in the United States district courts. The federal courts are, and indeed have been, experiencing problems in processing these major antitrust cases for some time. Cases involving complex issues, virtually endless discovery, and the examination of thousands—and even millions—of documents result frequently in interminable delay and sap the resources of the courts to the detriment of other cases on the docket. I would like to commend you, Mr. Chairman, and the members of your subcommittee for your willingness to undertake the demanding task of seeking to improve the judicial handling of these major antitrust cases and the dedication you obviously are bringing to this effort. I can promise you that it will not be easy.

Let me say first of all that my remarks are my own and not necessarily those of the Judicial Conference of the United States or federal judges generally. . . .

Education of judges in the use of techniques to control, expedite and minimize expense in these types of cases—a continuing part of the work of the Federal Judicial Center—has in my judgment been the most effective means of aiding the judiciary in the trial of major antitrust cases. Yet a great many problems remain to be solved that cannot be solved by education alone. I would like to mention a few.

(1) extended and protracted grand jury proceedings in criminal antitrust cases frequently lasting a year or more. . . .

As to the function of the grand jury in antitrust criminal prosecutions, my experience has led me to the conclusion that this ancient and honorable institution has long outlived its usefulness and should be abolished. I have long advocated the abolition of the grand jury as a means of improving, economizing, and expediting the federal administration of criminal justice. Several years ago I corresponded at some length with your distinguished Chairman, Senator Kennedy, on this subject. I also respectfully direct your attention to my published views which will be found in 55 F.R.D. 229–253 and in Volume 64, No. 2, *Journal of Criminal Law and Criminology* (Northwestern University School of Law) at pp. 174 to 182. In considered judgment the grand jury as it is now being used in complex antitrust criminal cases is the principal cause of the delay, expense, confusion, and unfairness about which so much public complaint is heard today. Although the grand jury still performs in a cumbersome and dilatory fashion its traditional investigative function, it has completely abandoned its more important necessary and historical function of providing a protective bulwark to the citizenry against arbitrary and overzealous prosecutors. Its proceedings continuing to be *ex parte;* the complexity of the issues in antitrust cases continuing to cause the grand jurors always to follow the prosecutor's recommendations;

the abuse of immunity still being practiced by prosecutors before it, and the continuing failure to inform witnesses who are themselves "targeted" for prosecution, as well as the corporation in whose investigation they are testifying, all add up to a complete abuse of this ancient protective duty of the grand jury.

Although, as the Chairman well knows, I still adhere to my recommendation that the federal government follow the lead of so many states and of England and abolish the grand jury. This would of course require the time consuming process of Constitutional amendment. The same result could however be immediately achieved in antitrust criminal proceedings, which this Committee is considering, by statutory amendment reducing all antitrust crimes from felonies to misdemeanors and proceeding in each case hereafter by information rather than indictment and reducing the penalty to fines and imprisonment of not more than one year under the following plan.

I favor a system which would bring theory into line with reality by placing the responsibility for initiating criminal prosecutions where it in fact already exists—with the prosecuting attorney. Prosecutions should be commenced upon the filing of an information signed by the prosecutor, and be followed by a probably cause hearing before a judicial officer who would determine whether there is sufficient evidence to allow the prosecution to continue to trial. A most salutary result of such a process would be the removal of the anonymity which presently enshrouds the exercise of prosecutorial discretion through the vehicle of the grand jury.

My suggestion would encompass the transfer to the prosecutor all powers which currently belong to the grand jury. Thus, for example, the subpoena power would be lodged with the prosecuting officer. The Department of Justice under the Antitrust Civil Process Act already possesses subpoena powers. Witnesses could be examined under oath as well as in secret, their testimony being recorded by an official court reporter. Testimony would thus be preserved for use at trial, if necessary. Authority to extend immunity for prosecution in exchange for testimony would also be given the prosecuting attorney. Indeed, federal prosecutors already enjoy such authority under the Omnibus Crime Act.

Upon reaching a determination that a prosecution should be initiated, the prosecutor would then file a criminal information with the court in much the same fashion as indictments are now presented. A hearing to determine whether there is probable cause to proceed with the prosecution would then be scheduled. The hearing would be conducted before a judicial officer such as a magistrate. I suggest that the hearing be adversary in nature, with the accused given the right to appear with counsel, cross-examine the prosecution's witnesses and present evidence in his own behalf.

The benefits which would accrue from the system which I have described seem to me to be unlimited. The determination of whether a citizen would be required to answer criminal charges brought against him would be made by a member of the judiciary. The sham of the "autonomous" grand jury would be discarded in favor of a judgment made by one trained and skilled in the law, and more importantly not subject to the direction and control of the prosecuting agency. True independence would be restored, thereby revitalizing the concept that a citizen should be protected against unfounded accusation of crime, whatever its source.

Investigative powers so necessary to orderly enforcement of the antitrust laws would not be curtailed. They would simply be lodged with the prosecuting authority, where their *de facto* exercise has already come to reside. Constitutional guarantees would not be diluted in the slightest. Judges would remain available to entertain motions seeking to prevent any over-reaching by prosecutors. The civil analogue to such a procedure would be the protective order issued in the context of discovery disputes. Also, a transcript of the prosecutor's investigative proceedings would always be available for review by the judge.

The advantages which some contend flow from the secret nature of grand jury proceedings would also be preserved under the system I propose. Although this secrecy has been the subject of well-intended criticism in recent years, no one can question that in some cases it has its benefits during the investigatory phase of a prosecution. It is said to encourage disclosure by witnesses who have information concerning the commission of a crime, to prevent outside influences from contaminating the investigation, to prevent the accused from fleeing prior to being charged, to limit subornation of perjury, and to protect the innocent from the harm that might be visited upon them by disclosure of an investigation

not leading to a formal charge. An example would be the exposure to class action suits predicated solely upon the appearance of innocent corporate executives as witnesses before the grand jury.

Perhaps the most significant by-product of my suggestion will be the focusing of responsibility of concomitant accountability for the initiation of a criminal prosecution with the prosecuting authority. No longer will the prosecutor be able to hide anonymously behind the shield of the grand jury. His decision to prosecute will be reviewable by a trained and independent legal officer. As with the conduct of our other institutions of government, public scrutiny will follow his actions. In my considered judgment, such a scheme cannot help but have a sobering impact upon the so-called "overzealous" prosecutor. Furthermore, our courts would be relieved of many cases now returned by grand juries at the urging of such prosecutors despite woefully insufficient evidence to convict.

Another important contribution which would result from the system I advocate would be a substantial increase in the efficiency and economy of our system of antitrust enforcement. It cannot be doubted that the operation of grand juries constitutes a very expensive and time consuming process in complex antitrust cases. Antitrust grand juries seem always to be held for the full statutorily permissible 18 months. Nor can we underestimate the unnecessary waste in the energies of our law enforcement and prosecuting personnel generated by the totally repetitious task of making presentations before the grand jury. The elimination of this needless squandering of resources would be a great boon to the administration of justice.

The foregoing procedure would in my opinion, should this Committee recommend it and it becomes law, do more to expedite the prosecution and punishment of price fixers and restore public confidence in our system of justice than anything else this Committee could do. Furthermore nothing would be lost in sanction or deterrence since the one-year imprisonment it provides would in practice exceed the average now imposed under felony charges and is well within the present suggested sentences less parole as outlined in the Department of Justice suggestions filed with this Committee. (See Guidelines for Sentencing, Department of Justice, February 24, 1977.)

National Council of Churches Calls for Grand Jury Reform
(Congressional Record, May 23, 1977)

(By Hon. Joshua Eilberg, of Pennsylvania)

Mr. Eilberg. Mr. Speaker, I would like to call to the attention of my colleagues a most thoughtful and comprehensive statement adopted on May 5, 1977, by the National Council of the Churches of Christ Governing Board, concerning the need for Federal grand jury reform.

The NCC resolution recognizes the need for church and ecumenical agencies to support this reform, which is now under study by the House Judiciary Subcommittee which I chair.

I commend to my colleagues' attention a Washington Post news account on May 7, 1977, of this NCC statement, along with the text of the resolution:

National Council of Churches Criticizes Grand Jury System

(By Janis Johnson)

The National Council of Churches governing board has attacked the grand jury system as riddled with abuses and urged its 31 member denominations to resist efforts by governmental investigators to obtain confidential information from church files.

The unanimous action by the 150 delegates to the semi-annual meeting of the board in Cincinnati, completed yesterday, stemmed from a grand jury probe into purported links between a military Puerto Rican independence group and a controversial Hispanic social activist organization funded by the Episcopal church.

The federal investigation of bombings believed to be the work of the military FALN has led to the imprisonment on contempt charges of two women lay ministers of the Episcopal church's National Commission on Hispanic Affairs. They went to jail rather than testify before the grand jury. They have denied

knowledge of the FALN or its members but said their resistance was "on principle."

In January Presiding Bishop John M. Allin voluntarily allowed the FBI into the Episcopal Church Center's office in New York for a week to look at nonconfidential Hispanic commission files. He took this action after a subpoena served first on Bishop Milton Wood, church executive for administration, was withdrawn.

Officials of other churches have conceded they are uninformed on the implications that similar actions against their files would raise about religious liberty and separation of church and state.

In one resolution passed without dissent the governing board expressed "deep concern" over the jailing of the women "as a matter of great significance to all member churches of the National Council." It directed council president William P. Thompson to appoint a commission to meet with Bishop Allin and "aid him in securing the early release of the two women, to restore their salaries and to pay their legal expenses."

In a resolution on grand juries, pending development of a more thorough policy statement, the council declared that "the use of the grand jury's powers to harass and pursue political dissidents is a departure from its proper constitutional function (to protect citizens from unwarranted prosecutions) and is a great threat to public order, lawful government and true domestic security."

The statement listed a binding procedure for council agencies and urged member churches, which have about 40 million members, to adopt the same course of action.

RESOLUTION ON GRAND JURY ABUSE ADOPTED BY THE NCCC GOVERNING BOARD, MAY 5, 1977

[The text of the Resolutions may be found in the hearing of June 1, 1977, at p. 686.]

LITTON CASE SHOWS NEED FOR GRAND JURY REFORM (CONGRESSIONAL RECORD, JUNE 15, 1977)

(By Hon. Joshua Eilberg, of Pennsylvania)

Mr. EILBERG. Mr. Speaker, I would like to call to the attention of my colleagues two recent court cases which point up the need for reform of the Federal grand jury system.

Both cases demonstrate how grand juries and grand jury procedures can be totally dominated by prosecutors. I will present the details on one case, United States against Litton, today, and information on the second case, involving the indictment of a New York City judge, on a subsequent day.

In United States against Litton, a Federal District Court in Alexandria, Va., noted the use by the prosecutor of the grand jury to improperly secure a civil remedy against a company. Specifically, the court stated that:

"This (case) is further evidence of a cynical view that . . . the grand jury . . . (is) a mere echo of the Office of the United States Attorney."

The House Judiciary Subcommittee which I chair, Mr. Speaker, is in the process of holding hearing on H.R. 94, which would provide badly needed reform in the Federal grand jury system. I commend to the attention of my colleagues the following materials regarding one case I have cited:

[From the Washington Post, May 26, 1977]

FRAUD CHARGE AGAINST LITTON DISMISSED BY FEDERAL JUDGE

(By Jane Seaberry)

A federal judge in Alexandria yesterday dismissed an indictment charging fraud againt Litton Industries, ruling that U.S. prosecutors abused the grand jury system in threatening Litton with the indictment if the company did not agree to government proposals.

The order of U.S. District Court Judge Albert V. Bryan Jr. also prohibits prosecutors from reindicting Litton on the charge because "prosecutorial discretion" [was] abused.

Litton, a major defense contractor, was indicted April 6 on a charge of fraudulently overcharging the Navy $37 million for building three nuclear attack submarines between 1968 and 1971.

This indictment came after an attempt to indict Litton in 1975 failed when the term of the special grand jury called in March of that year solely to investigate Litton expired.

But in April, 1976, the Armed Services Board of Contract Appeals awarded a $17.5 million judgment to Litton from the Navy in connection with the contract.

Bryan said in his opinion that after the 1975 attempt to indict Litton failed, prosecutors, in an attempt to get the award revised, continued to threaten to indict Litton if it did not agree to reopen the appeals board proceedings.

"What is reprehensible is the threat to use, as well as the actual use of, the grand jury as a bargaining tool in an effort to upset the final civil award to which Litton was entitled," Bryan said.

Prosecutors also had two FBI agents summarize evidence to the April 6 grand jury rather than formally present information and witnesses as in the previous grand jury, which did not indict Litton, Bryan said.

"This is further evidence of the cynical view that has been taken of the grand jury in this case, namely, as a mere echo of the voice of the U.S. Attorney," Bryan said.

"I think the court misread our action," said U.S. Attorney William B. Cummings, who, with the Justice Department, headed the two-year investigation of Litton.

Bryan "assumed that there were motivation, a desire on our part to get this thing back to the [appeals] board and use the grand jury to bludgeon them. Nothing could be further from the truth," Cummings said.

[In the United States District Court for the Eastern District of Virginia, Alexandria Division—Criminal No. 77-70-A]

UNITED STATES OF AMERICA VERSUS LITTON SYSTEMS, INC. d/b/a INGALLS NUCEAR SHIPBUILDING DIVISION, DEFENDANT

MEMORANDUM OPINION AND ORDER

On April 6, 1977 a grand jury of this district, Alexandria Division, returned a one-count indictment charging the defendant with presenting a false and fradulent claim to the United States Navy on or about May 26, 1972, in violation of 18 U.S.C. § 287.[1] That claim arose from a contract awarded the defendant, Litton Systems, Inc., d/b/a Ingalls Nuclear Shipbuilding Division (Litton) by the United States Navy in June, 1968, for the construction of three nuclear attack submarines. The defendant has filed, among others, a motion to dismiss the indictment on the ground of governmental misconduct in connection with the grand jury proceedings preceding the indictment.

During the course of performance of the contract there were certain delays which resulted in increased costs of construction. After some preliminaries, on May 26, 1972, Litton forwarded to the Navy data supporting a previously submitted price proposal (the claim) to recover that portion of the cost increase attributable to the government. When no resolution of the matter could be reached, Litton appealed to the Armed Services Board of Contract Appeals (ASBCA) claiming a total reimbursement of approximately $30,000,000. The hearing before the ASBCA began in October 30, 1973, and concluded on March 7, 1974. On April 16, 1976, the ASBCA issued it decision awarding Litton over $16,000,000 on its claim. It is the May 26, 1972 claim which was the subject ultimately of the proceedings before the ASBCA and which the present indictment charges violated 18 U.S.C. § 287.

On March 17, 1975, after the conclusion of the hearing before the ASBCA but over a year prior to the time that body issued its decision a grand jury was impanelled by this Court to investigate whether a crime had been committed by Litton in the subcommitting of the claim. After eighteen months this grand jury expired by operation of law [Fed. R. Crim. P. 6(g)] on September 17, 1976,

[1] § 287. *False, fictitious or fraudulent claims.*
Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

without having returned an indictment against Litton. The decision of the ASBCA in the meantime had been filed on April 16, 1976, and Litton and the government on or about May 14, 1976 jointly agreed not to file motions for reconsideration of that decision.

On September 9, 1976, just prior to the expiration of the grand jury's term, at a meeting between the Assistant United States Attorney in charge of the case and attorneys for Litton, the former offered to terminate the investigation and not seek an indictment if Litton would agree to allow the proceedings before the ASBCA to be reopened and to permit evidence gathered by the grand jury to be presented to the ASBCA. A similar offer was made on September 14, 1976. Litton rejected the offer on both occasions and subsequently by letter dated November 1, 1976.

The government characterizes the overtures in this way:

On September 7, 1976, AUSA Dunham initiated contact with Vincent Fuller, then representing Litton, and suggested a meeting which occurred on September 9, 1976 in the offices of the United States Attorney. At this meeting, Fuller was advised that the Grand Jury investigation indicated that the claim had been premised on an erroneous basis and decided by the ASBCA without benefit of all the facts. Fuller was further advised that, although the Grand Jury was expiring, further investigation would be required to determine whether Litton or any officer or employee of the company had deliberately allowed the claim to be premised on a factually erroneous basis, that is, it was made clear to Fuller that the primary open avenue of inquiry was the issue of criminal intent.

Dunham explained to Fuller that he saw a possible way to resolve the intent issue in Litton's favor and thus eliminate further expenditure of resources by both Litton and the Government. Dunham stated he was reluctant to discuss it without assurances first being made that the discussions would not be taken as a threat or treated as other than a good faith attempt to resolve the intent question. Fuller agreed with the ground rules laid out and encouraged the dialogue to ensue. He said he would terminate the talks at any time he deemed them inappropriate or improper. The suggestion was then made by the Assistant United States Attorneys that, assuming all the details could be worked out, the ASBCA hearing be reopened with both sides having access to the investigation materials.

* * * * * * *

The suggested meeting commenced on September 14, 1976. Present were Lintz, Fuller, and Wilson, another retained crimnial counsel, and Dunham, Fisher and Kirby, Assistant United States Attorneys. It was again unequivocably stated at the meeting's outset that before any discussion could ensue, there had to be assurances from Litton's side of the table that, at some later point in time, the discussions would not be used as a basis for an allegation of duress, threat, intimidation or other intimidation of improper conduct on the part of the prosecution. Fuller, Wilson and Lintz all indicated they understood that the discussions were being had only with this mutual understanding. The Government then fully outlined the evidence developed during the Grand Jury investigation establishing that Litton's claim was false. This was followed by an indepth discussion participated in by all persons present on the mechanics that would be utilized to get a 6(a) Order and reopen the ASBCA proceedings. The meeting terminated on a cordial note.—Government's Response, pp. 4–6.

Following the expiration of the grand jury's term, the United States continued its own investigation of the matter and it asserts that this investigation revealed evidence of criminal intent which had been unavailable to the eighteen-month grand jury. Consequently, according to the government, it presented evidence to an existing grand jury which had been impanelled on July 19, 1976 in connection with inquiries of other matters. This evidence was presented at various times during the period February 28, 1977 through March 10, 1977.

On March 11, 1977, perhaps sensing an impending indictments, Litton offered by letter to do what had been suggested the previous September by government counsel. By then, however, the matter had progressed too far. Deputy Attorney General Thornburg had requested on January 17, 1977, that the matter be presented to a new grand jury for the purpose of seeking an indictment, and on February 7, 1977 the Attorney General personally approved prosecution of the case. Before the grand jury two special agents of the FBI summarized the matters that had been presented to the previous grand jury. Counsel represented at argument on this motion that the summary and presentation of additional evidence took approximately six days. The previous grand jury, during its eighteen

month tenure, had considered the matter for a total of approximately twenty-five days.

It appears from the uncontroverted affidavit of defense counsel that at a meeting held on April 19, 1977, the Assistant United States Attorneys stated that there had been no requirements of the two agents:

1. To read and review all of the matters occurring before the eighteen month investigating grand jury;

2. To restrict their summary presentations to those matters occurring before the eighteen month grand jury;

3. To distinguish between hearsay and personal knowledge; and

4. To distinguish between matters occurring and not occurring before the eighteen month investigating grand jury.

At the same meeting, one of the Assistant United States Attorneys involved in the case stated to counsel for the defendant that "Litton bought this indictment."

* * * * * * *

No matter how benign a view of the matter is urged by the government, the truth of it is that the government wanted a "second bite at the apple" in its controversy with Litton over the issue of reimbursement; that it used the implied threat of indictment in an effort to obtain reconsideration of what Litton, presumptively innocent, was otherwise entitled to; and that when Litton, as was its right, refused to forego that entitlement, namely the finality of the civil award, the government retaliated—made good its threat—by producing an indictment. This is a serious abuse of prosecutorial power.

The government's position is that during the investigation before the first grand jury incriminating evidence was uncovered which led the prosecutors to believe that the claim as submitted to the ASBCA was false, although there was no evidence before the grand jury of criminal intent; that their attempt to resolve the matter without an indictment was motivated by a desire to see that the ASBCA had the entire picture—to let Litton prove its innocence if it had nothing to hide; and that the deal had many attractive features from Litton's point of view.[2] This misses the point of its misconduct. Had the bargain been proposed *after* indictment it arguably could be justified, but what is reprehensible here is the *threat* to use, as *well* as the actual use of, the grand jury as a bargaining tool in an effort to upset the final civil award to which Litton was entitled.[3] Rather than ". . . security against hasty, malicious and oppressive prosecution; . . . standing between the accuser and the accused . . . ," *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962), the grand jury here was used to formulate a ". . . charge . . . dictated by an intimidating power . . ." *ibid.*

The government's analogy of the procedure followed here to that followed in a Pretrial Diversion Program is misplaced. The Pretrial Diversion Program is a judicially sanctioned plan designed for rehabilitation of persons *who admit their guilt*, without formal charges brought. Here, not only at a time when the defendant was protesting its innocence, but at a time when the government, according to its brief,[4] had no evidence of criminal intent, the investigating grand jury was used as a bargaining tool to effect a reopening of the matter before the ASBCA.

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[2] The government points out that the bargain as offered could possibly have resulted in Litton's obtaining a higher award and the government could not assert fraud as a defense to the claim before the Court of Claims. The "bargaining," however, was hardly at arm's-length. With a grand jury investigation in the background, the United States enjoyed substantial leverage in making its proposal.

[3] The perception of the grand jury as an intimidatory device was implicit in the Assistant United States Attorney's statement at the April 19, 1977 meeting. In his opinion, by refusing to agree to a reconsideration of the award it had gained through the ASBCA, Litton had brought the indictment upon itself.

[4] "The investigation had established beyond peradventure of a doubt that the claim was false. The only remaining issue was the presence or absence of criminal intent. Although the net effect of what was done in the company's name was egregious, the evidence of wrongdoing by particular individuals was not then of a character to convince the Department of Justice that any *individuals* should be indicted, although certain individuals were being considered as possible targets. The individuals considered as potential defendants with the exception of shipyard president, Ned Marandino, were low to middle management, people in positions sufficiently significant enough to bind the corporation with their conduct but as to whom no direct benefit could be discerned as having been derived from participating in the assembly of a false claim. The only direct beneficiaries of the wrongful conduct, assuming intent could be established, was the company and the highest echelons of its management. But there was no evidence that these individuals had ever read what had been submitted in Litton's name. After review of the matter in the Department of Justice, the company itself appeared to be the foremost criminal target assuming that additional evidence on willfulness could be developed and obtained through further investigation." Government's Response, pp. 3, 4.

Nor does the claim of waiver by the United States validate its conduct in this case. One need only put himself in the shoes of counsel for a putative defendant being investigated by a grand jury to recognize how little choice such counsel would have when approached by an Assistant United States Attorney with a proposition contemplating termination of the investigation. What prudent lawyer would not have acceded readily to the stipulation that any discussion would not be considered fraud or coercion? But the exaction of such a condition does not make the circumstances less coercive, and it is no comfort to the government here.

At least one circuit court of appeals, in the exercise of its supervisory power, has directed a dismissal of an indictment returned solely on hearsay testimony in an extreme case. e.g., *United States* v. *Estepa*, 471 F. 2d 1132 (2nd Cir. 1972). This Court, however, is unwilling to dismiss the indictment on that ground in view of the unequivocal and as yet unrepudiated language in *Costello* v. *United States*, 350 U.S. 359 (1956), especially since here there was evidence other than the summary presented to the indicting grand jury. In the case of *In re Grand Jury Investigation of Banana*, 214 F. Supp. 856 (D. Md. 1963), cited by the defendant, the Court condemned the practice followed here, but the action there was the prohibition of future conduct rather than a dismissal of the indictment.

The appearance and summation testimony before the grand jury of the two agents is relevant, however, to the issue of the misconduct of the United States Attorney's Office. One need not be a skeptic to question the impartiality of a presentation which persuaded a grand jury that neither had heard nor seen the previous witnesses or documents to do within ten days what the prior grand jury had not seen fit to do after twenty-five days of evidentiary hearing over an eighteen month period. This is further evidence of the cynical view that has been taken of the grand jury in this case, namely, as a mere echo of the office of the United States Attorney.

The government's suggestion to *reopen* the matter before the ASBCA ominous when considered with the fact that after the Board's decision was rendered but while the first grand jury was still in existence and prior to the September overtures to the defendant by the United States Attorney's Office, the government caused subpoenas to be served on the judge who presided at the ASBCA hearing, and the Chairman of the ASBCA (who was one of the four concurring judges in the ASBCA decision). They did not actually testify before the grand jury, but on or about May 21, 1976, a Special Assistant United States Attorney, and on or about July 21, 1976 two FBI agents interviewed the presiding judge relative to whether and to what extent matters disclosed before the grand jury had been considered by the ASBCA in its decision. The extent to which such matters were revealed in the interview is not shown by the record; however no order allowing disclosure was obtained as provided for by Fed. R. Cr. P. 6(e). Such activity could only carry the potential for depreciation of the ASBCA's impartiality and vitiation of its decisions in any reopened claim or in future claims involving the defendant.[5]

It is entirely possible that upon trial Litton would be found guilty of presenting a false or fraudulent claim; however, when prosecutorial discretion is abused, as here, dismissal of the indictment as a prophylaxis is warranted. *Cf. United States* v. *DeMarco*, 550 F.2d 1224 (9th Cir. 1977). While the circumstances here do not carry the procedural "due process implications" found to support the dismissal in *DeMarco*, the Court has no difficulty discerning abridgement of the defendant's substantive due process rights in permitting the government's conduct. The determination and review of civil disputes such as the one at the core of this prosecution is governed by an established statutory and regulatory scheme. Allowing the government to circumvent the finality otherwise accorded the administrative resolution of contract disputes by threatening criminal prosecution in substance abrogates the private party's right to hold the government to its own rules. At the very least the Court is warranted in exercising its supervisory power over federal prosecutors where there is present deliberate and disingenuous conduct.

The foregoing resolution of the matter renders it unnecessary to face the issue presented by the other motion on which the Court reserved decision, namely, the defendant's motion for a change of venue under Fed. R. Cr. P. 21(b). Should the

[5] It is represented that Litton has pending before the ASBCA claims totaling in excess of $900,000,000.

Court now or in the future be required to face the issue it would be inclined to grant the motion. The indictment was presented in this district because the allegedly false claim was presented to the contracting officer whose office by mere happenstance is located here. The failure of Litton to request an onsite hearing in the civil administrative appeal proceeding which it initiated ought not to foreclose it from asserting its right to be tried criminally elsewhere if the requirements for a 21(b) transfer otherwise exist. And they do. *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240 (1964). The defendant's offices and shipyard, where the work which formed the basis of the claim was performed, are located, in Mississippi. The numerous (approximately 60 according to the defendant) defense witnesses for the most part are located there, and the inconvenience inherent in requiring them to come to Virginia for what may be a lengthy trial is readily apparent. The events likely to be in issue also occurred in Mississippi and the documents and record involved in the case are there. Some disruption of Litton's business is bound to take place if its witnesses have to be this far from its place of business. While the Court cannot at this time determine whether a view of the location is necessary, this has been done in ASBCA proceedings other than those involved here and that body apparently found it helpful in its resolution of the matters in controversy. The expense of the trial for the defendant undoubtedly would be greater if the trial was conducted in Virginia rather than Mississippi; such expense would include, among other things, the employment of local counsel as well as payment for travel and maintenance for defendant's Mississippi counsel[6] and witnesses. The only factor weighing in favor of retaining the case in this district and division is convenience for the Department of Justice. This is not entitled to a great deal of weight. The presumption that the proper location for trial is the place of indictment and of the technical commission of the alleged fraud has been overcome. The above discussion illustrates that for the convenience of the parties and witnesses and in the interest of justice, the case most appropriately should be prosecuted in the Southern District Mississippi. The latest statistics from the Director of the Administrative Office of the United States Courts show that district as having a much lighter criminal docket than this district, an expeditious handling of its criminal docket and a docket no more congested than the one here.

Since argument on May 20, 1977 of the motions discussed in this Memorandum, the Court has received daily and sometimes twice daily communications from counsel on both sides in the form of letters and affidavits. The Court has examined and considered the matters raised in these addenda and believes them to be irrelevant to its decision. They do not alter the Court's judgment.

For the foregoing reasons the indictment is dismissed; and it is so ordered.

Alexandria, Va., May 25th, 1977.

Appeals Court Cites Abuse of Grand Jury (Congressional Record, June 22, 1977)

(By Hon. Joshua Eilberg, of Pennsylvania)

Mr. Eilberg. Mr. Speaker, just recently the appellate division of the Supreme Court of New York reviewed a case in which it found that a special State prosecutor used what it called coercive methods to indict a judge in Queens County.

This case, Mr. Speaker, is another example of why the Judiciary Subcommittee which I chair has been conducting hearings on H.R. 94, which would provide for the first comprehensive reform of the Federal grand jury system since the birth of our Nation.

In the case at hand, the five appellate judges ruled unanimously that the prosecutor was responsible for "procedural irregularities going to the very heart and integrity of the grand jury system."

In this case, the prosecutor went back to the grand jury again and again to secure an indictment. The judges noted that this was a serious breach of the historic role of the grand jury "to remain truly free and independent of outside influence."

I commend to the attention of my colleagues the following materials describing this case:

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[6] A transfer would not decrease all expenses for counsel in view of the appearance of attorneys from Philadelphia, but it would eliminate some publication of travel expenses.

[From the New York Times, June 1, 1977]

JUSTICE, PROSECUTOR CRITICIZED BY COURT IN GROH INDICTMENT

(By Max H. Seigel)

The Appellate Division in Brooklyn yesterday accused Justice Leonard H. Sandler of State Supreme Court and the Special state anticorruption prosecutor, John F. Keenan, of having used "coercive" methods to get a Queens County grand jury to indict Judge Robert T. Groh of Civil Court last November on charges of bribery and grand larcency.

The appellate justices said that if they could, they would throw out the indictments, but that they could not do so because the lawyers for Judge Groh still had recourse to State Supreme Court.

It was the first time Mr. Keenan had been accused of using the kind of overzealous tactics that had led to the dismissal of charges against many persons indicted by Maurice H. Nadjari, Mr. Keenan's predecessor as special prosecutor for corruption in the criminal justice system.

"Had the motion been submitted to us from the start," the five appellate justices said in a unanimous opinion on the Groh case, "we would have granted the application and ordered that the indictment be dismissed, as the papers submitted by both sides reveal the presence of procedural irregularities going to the very heart and integrity of the grand jury system."

Mr. Keenan and an assistant, Stephen Sawyer, had brought before the Queens grand jury charges that Mr. Groh, while deputy borough president of Queens in 1972, had sought a political campaign contribution of more than $10,000 from a law firm representing the Sheraton Corporation to help it get a zoning variance to expand its inn at La Guardia Airport.

GRATUITOUS DISCUSSION

After hearing the evidence, the grand jury voted not to indict Mr. Groh. Afterward, according to the Appellate Division "the special prosecutor, having learned of the result re-entered the grand jury room, where he gratuitously discussed with the grand jurors their failure to indict."

"And without any request from the grand jury," the ruling went on, "he then suggested to it that the justice presiding at the extraordinary special and trial term would be willing to come before it and provide it with a further charge on the law, if it so desired."

According to the court records, one grand juror questioned the usefulness of such a gesture on the ground that a vote already had been taken and the matter disposed of, but the special prosecutor insisted that additional instructions from the judge might enable the grand jury "to adequately reach a judgment on the matter, adequately and finally reach a judgment on the matter."

This was done, the Appellate Division said, notwithstanding the fact that the grand jury had done just that—"reached, voted on and recorded its determination."

[The special prosecutor then retired from the jury room and a vote was taken. "Only three of the grand jurors voted to receive further instructions," the appellate justices said, and "despite the fact that there was no request by the grand jury as a body to receive any further instructions, both the special prosecutor and the justice presiding at the extraordinary special and trial term appeared before the grand jury on a subsequent date and delivered a further charge."]

NARROW VOTE TO INDICT

The grand jury then took another vote and decided to indict Mr. Groh by the minimum margin—12 to 7.

The appellate justice said: "Aside from the fact that we view these further instruction to have been incorrect on the law, as they seemed to indicate to the grand jurors that they have no alternative except to indict, we believe that the methods employed, although no doubt well-motivated, were coercive in fact and, if permitted to go unchecked, would tend to destroy both the value and purpose of our grand jury system."

The justices added that "under the facts of this case, it was improper for either the special prosecutor or the court to have interceded in the proceedings once

the grand jury had voted to dismiss." And, they said, "to sanction such a procedure" would "permit prosecutors in the future to coerce or badger grand jurors to change their solemnly-arrived-at determinations."

The Justices suggested that Mr. Groh apply again to Justice Howard A. Jones of State Supreme Court, who had twice previously refused to dismiss the charges.

"In the light of the views here expressed," the Appellate Division said, the learned justice at the extraordinary special and trial term may wish to reconsider his determination should an application be made therefor."

In denying motions for dismissal on March 4 and March 15, Justice Jones had made it clear he would welcome submittal of the controversy to the Appellate Division, "there apparently being no precedent" on which he "might rely in resolving these questions."

KEENAN'S REACTION

Commenting on the decision, Mr. Keenan said yesterday: "I certainly agree that the grand jury should not be badgered, and obviously, I don't think we did. What we did was well-intentioned and well-motivated and I'm not going to quarrel with the decision.

The special prosecutor added that he might try now to present the case again before another grand jury, he might apply to Justice Jones for permission to present the case again, or he might intervene when Judge Groh moves again for dismissal before Justice Jones.

Marvin B. Segal, Judge Groh's lawyer, said yesterday he would promptly submit another application for dismissal to Justice Jones.

"The Appellate Division decision," he said, "is a strong suggestion, if not a directive, to dismiss. To try the case now would be a useless procedure since the Appellate Justices have made it clear that any conviction after trial in a lower court would be reversed."

Mr. Segal said that he had not gone directly to the Appellate Division because he had not seen the grand jury's minutes and so had been unaware of the actions of the special prosecutor and Justice Sandler. "It was an extraordinary procedure by two very able men," he said. "It's impermissible for a judge to go into a grand jury room."

Justice Sandler said yesterday that he had gone to the grand jury purely for the convenience of the jurors. "It was easier for me to go to them in Queens," he said, "than to have all of them come to my courtroom in Manhattan."

In welcoming the appellate decision, Judge Groh—who was elected a judge of the Civil Court shortly before his indictment—said yesterday he was "proud to be a member of the system that treats defendants equitably."

[From the New York Journal, June 2, 1977]

APELLATE DIVISION

Second Department

(People vs. Groh)

After a full presentation of the evidence, a charge on the law by the Special Prosecutor and a spirited discussion among the grand jurors, they voted to dismiss the proposed charges. The Special Prosecutor reentered the room and suggested that the Justice presiding at the Extraordinary Special and Trial Term would be willing to provide a further charge on the law. The utility of such a gesture was questioned by a grand juror. The Special Prosecutor retired and a vote was taken. Only three jurors voted to receive further instructions. Nevertheless, the Special Prosecutor and the Justice appeared on a later day and delivered a further charge. The grand jurors voted the indictment by the narrowest permissible margin. Defendant's application to dismiss the indictment or, pursuant to article 78, to prohibit further proceedings, was denied at the Extraordinary Term. The Appellate Division, for lack of jurisdiction to overturn the prior decision, denied this motion for identical relief. It advised defendant to renew his application before the same justice at the Extraordinary Term. Both the Special Prosecutor and the court, ex parte, acted improperly by interceding in the grand jury proceedings.

THE PEOPLE, etc., plaintiff, v. ROBERT T. GROH, defendant.
IN THE MATTER OF ROBERT T. GROH, petitioner, v. HOWARD A. JONES, as Justice of the Extraordinary Special and Trial Term of the Supreme Court of the State of New York, County of Queens, et al., respondent.

Decided May 31, 1977

Before *Gulotta, P. J.; Martuscello, Cohalan, Daminani and Shapiro, JJ.*

Motion pursuant to Section 149 (subd. 2) of the Judiciary Law by Robert T. Groh for an order dismissing an indictment filed against him or, in the alternative, for judgment pursuant to CPLR article 78 prohibiting further proceedings with respect to the said indictment.

Segal & Hundley, New York, N.Y., for defendant-petitioner.

John F. Keenan, Deputy Attorney General, New York, N.Y. (George F. Bradlau of counsel), respondent *pro se* and for plaintiff.

Per Curiam—This is a motion pursuant to Section 149 (subd. 2) of the Judiciary Law by Robert T. Groh, a defendant in a pending criminal action, for an order dismissing the indictment filed against him by the Extraordinary Special Grand Jury for the County of Queens, or, in the alternative, for judgment pursuant to CPLR article 78 prohibiting the Trial Justice assigned to the Extraordinary Special and Trial Term, and the Special Prosecutor, from proceeding with respect to the said indictment.

Motion denied and proceeding dismissed, without costs or disbursements.

Consideration by this court of the prayer for relief pursuant to Section 149 (subd. 2) of the Judiciary Law is barred by the fact that an identical motion had been made before the Extraordinary Special and Trial term and was denied by it on March 4, 1977; that determination was adhered to upon reconsideration on March 15, 1977. The availability of relief by motion to this court pursuant to Section 149 (subd. 2) is an alternative to proceeding before the Extraordinary Special and Trial Term and, having elected to proceed before Acting Supreme Court Justice Jones in the first instance, defendant is now precluded from attempting to overturn his decision by a *de novo* application to this court (see *Matter of Dondi v. Jones*, 40 NY 2d 8, 15).

So far as the application for relief in the nature of prohibition is concerned, we must take cognizance of the holding of the Court of Appeals in *Matter of State of New York v. King* (36 NY 2d 59, 62):

"The extraordinary remedy either of prohibition or mandamus lies only where there is a clear legal right, and in the case of prohibition only when a court (if a court is involved) acts or threatens to act without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction (see, e.g., *Proskin v. County Ct. of Albany County*, 30 NY 2d 15, 18; *Matter of Lee v. County Ct. of Erie County*, 27 NY 2d 432, 436–437; *Matter of Hogan v. Culkin*, 18 NY 2d 330, 335–336)." (Accord *Matter of Nigrone v. Murtagh*, 36 NY 2d 421, 423–424.)

While the question is not entirely free of doubt, we have concluded that the allegations proffered by the defendant Groh fail to raise a jurisdictional issue (see *Matter of Paciona v. Marshall*, 35 NY 2d 289; *Matter of Wroblewski v. Ricotta*, 35 NY 2d 745; cm. Matter of *Dondi* v. *Jones, supra; La Rocca* v. *Lane*, 37 NY 2d 575).

We should indicate, however, that had the motion under Section 149 (subd. 2) of the Judiciary Law been submitted to us *ab initio*, we would have granted the application and ordered that the indictment be dismissed, as the papers submitted by both sides reveal the presence of procedural irregularities going to the very heart and integrity of the grand jury system. Here, after a full presentation of the evidence, a charge on the law by the Special Prosecutor, and an apparently spirited discussion among the grand jurors themselves, they voted to dismiss the proposed charges in their entirety, and recorded that determination in their minute book. Thereafter, and this appears without contradiction on the record, the Special Prosecutor, having learned of the result, re-entered the Grand Jury room, where he gratuitously discussed with the grand jurors their failure to indict. Without any request from the Grand Jury, he then suggested to it that the justice presiding at the Extraordinary Special and Trial Term would be willing to come before it and provide it with a further charge on the law, if it so desired.

The utility of such a gesture was questioned by a grand juror, who told the Special Prosecutor that a vote had already been taken and the matter disposed of, but the latter insisted that a further charge might enable the Grand Jury to

"adequately reach a judgment on the matter, adequately and finally reach a judgment on the matter", this notwithstanding the fact that the Grand Jury had done just that—reached, voted on and recorded its determination.

The Special Prosecutor then retired from the Grand Jury room and a vote was taken. Only three of the grand jurors voted to receive further instructions. Despite the fact that there was no request by the Grand Jury as a body to receive any further instructions, both the Special Prosecutor and the justice presiding at the Extraordinary Special and Trial Term appeared before the Grand Jury on a subsequent date and delivered a further charge. The grand jurors then retired to deliberate and voted the instant indictment by the narrowest permissible margin (see CPL 190.25 subd. 1).

Aside from the fact that we view these "further instructions" to have been incorrect on the law, as they seemed to indicate to the grand jurors that they had no alternative except to indict, we believe that the methods employed, although no doubt well motivated, were coercive in fact and, if permitted to go unchecked, would tend to destroy both the value and purpose of our grand jury system. That system, which has its origins in antiquity and enjoys no lesser protection than that afforded by the Federal and State Constitutions (U.S. Const., 5th Amdt: N.Y. Const., art I, Section 6), performs a vital function in our jurisprudence—that of protecting the private citizen from unjust prosecution. As Justice Foster stated in *Matter of Gardiner* (31 Misc. 364, 366-367, 375, cited with approval in *People v. Minet*, 296 NY 315, 322):

"The grand Jury had its origin at a time when there raged a fierce conflict between the rights of the subject and the power of the crown. It was established to secure to the subject a right of appeal to his peers, under the immunity of secrecy and irresponsibility, before the government could bring him to trial. It was a right wrung from the government to secure the subject against oppression.

* * * * * * *

"[As] was rightly said by Judge King, in the case of Lloyd and Carpenter, 5 Penn. L.J. 62: 'Grand Juries are high public functionaries, * * * They are the great security to the citizen against vindictive persecutions, either by government, or by political partisans, or by private enemies. In their independent action, the persecuted have found the most fearless protectors; and in the records of their doings are to be discovered the noblest stands against the oppression of power, the virulence of malice, and the intemperance or prejudice.'

* * * * * * *

"It is as important to a person that he be fairly and justly accused of crime as that he be fairly and impartially tried therefor" (emphasis supplied).

However, this historical function can only be carried out if the grand jury remains truly free and independent of outside influences. As was stated by Justice Callagahan in People v. Both (118 Misc. 414, 423):

"The life and liberty of the individual depend largely upon the citizens who are called from all walks of life to act as jurors. They are in every instance the sole judges of the facts, and, when called as grand jurors, they are the judges of the law as well as of the facts. The administration of the criminal law lies largely with grand and petit juries. It is through the jury system alone that the people have a part in the administration of the law. It is important, therefore, that no undue influence or coercion be exerted at any stage of a prosecution to influence unduly the judgment of a juror." (See, also, People v. Cunningham, NYLJ, April 28, 1977, p. 10, col. 4; People v. Benin, 186 Misc. 548; United States v. Rintelen, 235 F. 787.)

Clearly, this is not a case in which the Grand Jury has voted to reconsider the charges sua sponte (see People v. Stecker, 141 Mis. 417; 42 CJS, Indictments and Informations, Section 25), nor is it a case in which the court having charge of the grand jury, upon an appropriate showing, has directed that the charges be resubmitted following a failure to indict (CPL 190.75, subd. 3; see People ex rel. Flinn v. Barr 259 NY 104; People v. Potter, 50 AD 2d 410). Under the facts of this case it was improper for either the Special Prosecutor or the court, ex parte, to have interceded in the proceedings once the Grand July had voted to dismiss. To sanction such a procedure, no matter how well intentioned it may have been in this case, would permit prosecutors in the future to coerce or badger grand jurors to change their solemnly arrived at determinations. Nevertheless, while firmly convinced of the grave impropriety underlying the present indictment, this court is without jurisdiction to deal with it at this juncture. However, in the light of the views here expressed, the learned Justice at the Extraordinary Special

and Trial Term may wish to reconsider his determination should an application be made therefor.

Gulotta, P. J. Martuscello, Cohalan and Shapiro, J. J., concur. Damiani, J., concurs in the result.

BUSINESS COMMUNITY JOINS EFFORT TO REFORM GRAND JURIES (CONGRESSIONAL RECORD, JUNE 23, 1977)

(By Hon. Joshua Eilberg, of Pennsylvania)

Mr. EILBERG. Mr. Speaker, in the June 23, 1977, issue of the Wall Street Journal we read of the growing number of businessmen, attorneys, and politicians who have urged reform of the Federal grand jury system.

This article, I believe, is a valuable contribution to the discussion now centering on H.R. 94. The House Judiciary Subcommittee which I chair is now considering this legislation to make the first comprehensive reform of Federal grand juries in our Nation's history.

I commend today's article from the Wall Street Journal to the attention of my colleagues:

[From the Wall Street Journal, June 23, 1977]

UNDER INDICTMENT: GM, OTHER UNLIKELY CRITICS ACCUSE GRAND JURIES OF ABUSING RIGHTS THEY ARE SUPPOSED TO PROTECT

(By Carol H. Falk)

WASHINGTON.—For years, complaints of abuse by grand juries came mostly from antiwar activists or other dissenters. Now some unlikely and powerful allies are joining this "minority" cause.

Businessmen, attorneys and politicians who have had personal experience as grand jury witnesses in the post-Watergate era are throwing their influential weight behind legislation that would provide more protection for potential defendants called before grand juries. With this backing sponsors are optimistic that such a bill can be adopted by the current Congress.

The old and the new critics contend that a grand jury seldom, in practice, serves its historic function as an independent shield to protect citizens against unjustified prosecutions by the government. Rather, they say, it usually does the prosecutor's bidding and, in the hands of a ruthless or ambitious government attorney, can be a sword to harass, intimidate or indict for political or publicity reasons.

SOME RECENT RECRUITS

The latest recruits to the cause range from the American Bar Association, which has endorsed a number of legislative restraints on grand juries and is due in August to vote on further recommendations, to General Motors Corp., which is resisting subpoenas from a grand jury investigating its taxes. A GM lawyer complained this week that the government was treating the matter like a "gangster case."

"Now we hear the hue and cry we should have heard when poor folks were objecting to grand jury tactics," says Oscar Goodman, a Las Vegas defense attorney. The lesson that is hitting home, in effect, is one cited by Irving Younger, a professor at Cornell University Law School and himself a former federal prosecutor: "You protect the rights of the miserable and friendless precisely so that you have rights when it's your turn."

This doesn't mean, of course, that support for protective legislation is unanimous. Attorney General Griffin Bell says he is opposed to one key change: a provision that would permit grand-jury witnesses to be accompanied by their attorneys. He says he worries about creating a system of "two trials" because lawyers could raise or get their clients to raise the same kind of objections that can be raised in a courtroom.

MANY RIGHTS DON'T APPLY

The Fifth Amendment to the Constitution provides that a suspect can't be "held to answer" for a serious federal crime unless he is first indicted by a grand jury. The grand jury, a panel of citizens to whom the prosecutor presents evidence, operates in secret, theoretically for the protection of those who testify but who aren't themselves charged with any crime. Yet over the years, courts have held that many of the protections guaranteed a suspect by the Bill of Rights don't apply when he is called before a grand jury.

For example, besides having to face the grand jury without his lawyer present, a grand-jury witness can be forced to testify in exchange for a grant of immunity—a guarantee that his testimony won't be used to prosecute him. If he rejects immunity and insists on his Fifth Amendment right to remain silent, a witness can be cited for contempt and jailed. Plainly, abuses by grand juries can cost individual witnesses heavily in time, money and reputation.

While complaints about overreaching by grand juries have been raised for years, the outcry from dissidents intensified after passage of the 1970 Crime Control Act, which gave federal prosecutors additional power to use grand juries against organized crime, as well as against political leftists. Ironically, some of the law-and-order Nixon administration officials who were accused of encouraging the use of grand juries against dissenters in the early 1970s found they don't like the system much when they themselves had to face grand juries on Watergate-related charges.

ISSUE CONCERNING ATTORNEYS

Former Nixon Treasury Secretary John Connally has urged that grand-jury witnesses be given the right to be accompanied by their attorneys. He and other high officials who were accused of wrongdoing have also complained that promises of lenient treatment can be used to coerce a potential defendant into false implication of higherups. Mr. Connally was acquitted in a 1975 trial of charges that he accepted bribes from a giant dairy co-op. The trial jury apparently didn't believe the story of his chief accuser, Jack Jacobsen, who had been allowed to plead guilty to reduced charges in return for the testimony on which the Connally indictment was based.

General Motors is raising an increasingly discussed issue: the extent to which supposedly secret grand-jury material can be shared with Executive Branch agencies, such as the Internal Revenue Service, that provide technical assistance to the grand jury. GM contends, in court papers filed in April, that the IRS is using a grand jury's subpoena powers to conduct a tax investigation that the agency should be handling on its own.

In moving to quash the subpoenas or else to restrict the use of the data, GM cited a ruling last November by a federal appeals court in San Francisco. The appeals court found that a lower court had gone too far in granting 24 IRS employes access to materials turned over to a grand jury by J. R. Simplot Co. and Simplot Industries Inc. of Boise, Idaho; John Simplot, who controls the companies, made headlines last year with a huge default on potato futures.

Noting that the grand jury has powers justified by its function "in accusing individuals of criminal acts," the court said that justification doesn't apply "when grand-jury material is used for civil tax liability."

The government, for its part, says it hasn't any intention of using the information sought from GM for civil tax purposes. Rather, the Justice Department maintains it is investigating allegations of criminal activity and needs the tax agency's expertise. As for the Simplot case, the government has asked the appeals court to withdraw its opinion, suggesting that the issue is moot because Mr. Simplot and his two companies last month pleaded "no contest" to charges of criminal tax violations.

Antitrust cases also are providing recruits for the cause of grand-jury restraint. William Lurie, general counsel of International Paper Co., which has been a target in several industry-wide grand-jury investigations, complains of "extremely vague and broad" subpoenas covering as much as 15 years of company records. A particular frustration, he adds, is that "there is no mechanism to insure that anything . . . that would tend to negate guilt is brought to the attention of the grand jury."

Mr. Lurie asserts that "you need due-process protections in grand-jury proceedings just as much as in a trial—or more," because "sometimes the economic risks are so great you can't afford to go to trial and bet your company."

He explains that "unless your case is 100% pure," there is a strong incentive to settle a broad antitrust indictment with a "no-contest" plea. That's because, if the company risks a trial and is convicted on government antitrust charges, the verdict can be used as the basis for costly treble-damage claims by private plaintiffs.

UNHAPPY ATTORNEYS

Attorneys, as well as their clients, have been complaining of grand-jury harassments. Mr. Goodman of Las Vegas heads a committee of criminal defense lawyers that aids attorneys subpoenaed by grand juries seeking information about their

clients. An attorney who himself is being pressured by a grand jury isn't likely to be effective in representing his client, Mr. Goodman asserts.

He cites examples of defense attorneys subpoenaed to testify about relations with their clients, including the amount and the source of their fees. Federal appeals courts have differed on whether this is a proper area of inquiry, but at least some lawyers have been cited for contempt and jailed for refusing to provide the information.

Charles Berry, an Albuquerque attorney, was subpoenaed to deliver five years' worth of his law firm's financial records to a grand jury looking into allegations of illegal campaign contributions and bribery of former state officials. He explains that records of over 5,000 clients were involved and that some of the records dealt with cases not yet resolved. The financial records included the names of clients and, in certain instances, references to witnesses interviewed.

A LAWYER JAILED

Mr. Berry refused to yield the documents, was cited for contempt and "sat in jail six months." After losing all his appeals, he turned over the records and was released last December. A government attorney says that Mr. Berry himself was never a target of the inquiry and that the grand jury wasn't interested in the names of his clients. Rather, the law firm was thought to have had "some business relationships" with a former state official who was being investigated. The man was indicted but was acquitted in a trial.

Some critics, contending that grand juries don't serve their constitutional "shield" role and are a waste of taxpayers' money, argue that they should be abolished. Most critics, however, are willing to settle for changes intended to protect witnesses better. They note that many prosecutors, including Richard Gerstein, the state attorney in Miami who is leading the ABA drive for grand-jury legislation, have operated successfully for years with self-imposed restraints.

In Congress, several lawmakers are promoting legislative treatments for the most common complaints. Rep. Joshua Eilberg, a Pennsylvania Democrat, has introduced a measure that would allow lawyers in grand jury rooms to advise witnesses, though it wouldn't let them raise formal objections or address the jury.

"USE" IMMUNITY PROVISION

The Eilberg bill, cosponsored by Rep. Hamilton Fish, a New York Republican, would also eliminate the so-called use immunity permitted by the 1970 crime law. A grand-jury witness granted use immunity can't be prosecuted on the basis of his own testimony but can be charged if prosecutors show they are relying on evidence from other sources. The Eilberg bill would provide that someone testifying under immunity couldn't be prosecuted under any circumstances for the action involved.

The bill also provides that a witness who refused to testify after being granted immunity couldn't be jailed for contempt for more than six months. Currently a balky witness can be jailed for the full 18-month life of a federal grand jury and then can be called before new grand juries and jailed repeatedly.

The Eilberg bill would also give the grand jurors more independence from the prosecutor by empowering them to hire their own lawyer. Attorney General Bell says he might go along with the idea of having a judge appoint such a lawyer for the grand jury, if the judge felt it necessary.

A somewhat similar measure has been introduced in the Senate by James Abourezk, a South Dakota Democrat, and a bill sponsored by Rep. John Conyers, a Michigan Democrat, would go further—letting a witness remain silent without being cited for contempt.

Thus far, a House Judiciary subcommittee led by Mr. Eilberg has held several days of hearings on grand-jury legislation, and it has scheduled more this month. The aim is to get a bill set for floor action by year-end.

NEW YORK TIMES REVIEWS MR. EILBERG'S GRAND JURY REFORM ACT
(CONGRESSIONAL RECORD, JUNE 27, 1977)

(By Hon. Benjamin S. Rosenthal, of New York)

Mr. ROSENTHAL. Mr. Speaker, on Sunday, June 26, the New York Times provided a comprehensive review of efforts underway in Congress to reform the Federal grand jury system.

The Times focused on three areas: The provisions of a bill introduced by our colleague from Pennsylvania (Mr. Eilberg), the Grand Jury Reform Act of 1977, H.R. 94; the control of grand juries by prosecutors; and current activity in California, one of 29 States which proceeds in criminal cases without using a grand jury.

Because I believe this article is a thoughtful analysis, I commend it to the attention of my colleagues:

THE GRAND JURY UNDER EXAMINATION; IT HAS FALLEN ON HARD TIMES

NOTE.—The grand jury—a panel of citizens empowered, and in Federal law and that of 21 states solely empowered, to bring criminal indictments—has recently fallen if not into disrepute at least into controversy. In New York, for example, a number of indictments voted by grand juries advised by former special prosecutor Maurice H. Nadjari have been dismissed for causes including insufficient or illegally obtained evidence and improperly presented cases. Federal prosecutors have allegedly used grand juries to harass radical causes.

A bill introduced in Congress by Representative Joshua Eilberg, Democrat of Pennsylvania, is due for subcommittee hearings this week. The bill would reform Federal practice in several ways—for example, by permitting witnesses to have lawyers in the grand jury room and by providing review of indictments by a judge before trial. Similar reforms are proposed in New York, where a new law that went into effect last week now requires grand jurors, who were formerly volunteers, to be picked from the same pool as trial jurors.

The articles on this page examine three areas of current concern; the more or less complete prosecutorial control of the grand jury; a number of the reforms now contemplated by state and Federal legislators; and the manner of bringing criminal charges in California, one of the 29 states that have found it possible to proceed in criminal cases without using the grand jury.

MR. EILBERG'S BILL CALLS FOR REFORM IN THE FEDERAL PRACTICE

(By Tom Goldstein)

Since the grand jury was imported to this country from England during the Colonial era, an intricate and sophisticated body of law has developed that attempts to balance the interest of individual freedom with the interest of the state in uncovering criminal activity. In the last few years, critics of the grand jury contend that the balance has tipped against the individual, and dozens of proposals to change the grand jury have been made. The following represents some of the issues presented in Congressman Eilberg's bill and in other legislation introduced in Congress and state legislatures:

Protecting the witness

At the urging of the Nixon Administration, Congress in 1970 narrowed the Federal immunity law. That law, which was immediately copied by half the states, grants a grand jury witness "use" immunity—the witness may be compelled to testify but his compelled testimony may not be used against him in a criminal proceeding.

A year later, New York enacted a "transactional" immunity statute that is broader than the Federal one. Efforts to adopt a similar law on the Federal level are now under way. Under "transactional" immunity, a witness who is compelled to testify may not subsequently be prosecuted—even upon totally independent evidence—for any transaction mentioned in his testimony.

Many prosecutors feel that "transactional" immunity leaves open the possibility that a heinous crime could go unpunished because, during grand jury testimony, a witness who was the perpetrator gave peripheral evidence concerning it. Opponents of "use" immunity argue that it leaves a witness excessively exposed to further prosecution. New witnesses may be found and new information may be gathered as a result of the witness's own testimony before the grand jury.

Allowing lawyers inside

In Federal courts and in most states, lawyers are excluded from the grand jury room. But a lawyer can remain outside the door, and his client can excuse himself from the proceeding to confer with him. Most prosecutors want it that way. Otherwise, they argue, there would be too much opportunity for obstruction and delay.

Defense lawyers want in. They feel it makes little sense to have a witness traveling in and out of the grand jury room. The mere presence of a lawyer, they say, would curb improper questioning by a prosecutor.

Replacing the prosecutor

A variety of proposals would replace or supplement the prosecutor as legal adviser to a grand jury. Instead, there would be an independent office of the grand jury counsel to instruct the grand jury on the law and pass on the admissibility of evidence and competency of witnesses.

Proponents of such an office say that it is unfair to allow the prosecutor to control all the legal information received by a grand jury, especially since the grand jury should be at liberty to disobey a prosecutor's wishes. Opponents say there is no guarantee that the advice of this impartial counsel will be any better than a prosecutor's or that he will be any less likely to abuse his office.

Guarding against leaks

Grand jury proceeding are secret, but periodically there have been unauthorized disclosures. The news that someone is a traget of a grand jury investigation—especially if he is never indicted—can be devastating to his reputation.

Some states make it unlawful for anyone but witnesses and lawyers to reveal what has taken place in the grand jury; in Federal court, leaking of information by prosecutors, stenographers of grand jurors is punishable by contempt of court.

Only rarely has anyone been punished for grand jury leaks, and in order to deter them there have been several proposals to stiffen the penalties. But many prosecutors say that the difficulty in investigating and prosecuting violations of secrecy is unrelated to the severity of the penalties imposed. The principal reason, they say, is that the investigation inevitably collides with the protection of a free press guaranteed by the First Amendment.

Since it is not unknown for an errant prosecutor to do the leaking himself, there have been proposals to empower the court to appoint special independent prosecutors to investigate the leaks.

Screening indictments

With the current emphasis on prosecutorial abuse, proposals for greater judicial oversight of grand juries have emerged. One suggestion would have a judge—but not the judge who empaneled the grand jury—screen all indictments before they are filed. If the judge found insufficient evidence or improper procedures used in the grand jury, the indictment would be dismissed before it was made public, thus sparing the defendant publicity that might damage his reputation.

But most prosecutors feel this would unnecessarily encumber the proceedings. There are not enough grand jury reporters and typists to transcribe all the minutes and not enough judges to review all the proceedings, they say. Moreover, they argue, only a minuscule—though highly publicized—number of indictments are dismissed for legal insufficiency.

Changing the grand jury size

No one is quite sure how the number developed, but from its origins in England a grand jury has consisted of 23 citizens. That number has been carried over to Federal courts and to many state courts. Twelve votes are required to return an indictment, and 16 jurors make up a quorum.

There are those who argue that the current size is more a matter of historic precedent than necessity. They feel that reducing a grand jury's size would be economical and would focus greater responsibility on individual grand jurors. Opponents of this change feel it would make it harder to obtain a quorum and inhibit the expression of divergent views on the jury.

The Prosecutor Seems To Have Taken Over

(By Marvin E. Frankel and Gary P. Naftalis)

The notion of the grand jury as a shield for the innocent—presumably at the heart of the reasons for its inclusion in the Bill of Rights—is continually echoed in judicial opinions. Relatively recently the Supreme Court stated:

"Historically [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the in-

valuable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."

Apt as that description may have seemed for the People's Panel in the 18th century, it certainly is not much realized in practice in the 20th. Day in and day out, the grand jury affirms what the prosecutor calls upon it to affirm—investigating as it is led, ignoring what it is never advised to notice, failing to indict or indicting as the prosecutor "submits" that it should. Not surprisingly, the somewhat technical, somewhat complex, occasionally arcane language of indictments is drafted by the prosecutor and handed to the grand jury foreman or forelady for the necessary signature, which is almost invariably affixed. As Federal judge William J. Campbell points out: "Today, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury."

It could not more than rarely be otherwise. In a busy, densely populated, elaborately organized society—where crime is rife, criminals are tough, many wrongs are mysterious and concealed from laymen—law enforcement is inescapably for professionals. The very notion of the grand jury as beneficent for a free society would be subverted by a band of amateurs engaged in sleuthing, summoning, indicting, or not indicting as their "independent" and untutored judgment might dictate. Privacy, security, and reputation would be in steady jeopardy. Sophisticated criminals would be safe; innocent citizens would be less safe.

Those the grand jury "refuses" to indict are likely to be people the prosecution does not want indicted. Many of the cases ending with "no true bill" are actually instances where a prosecutor feels the need for such backing to support his own view that further proceedings should not be held.

There is nothing necessarily sinister in this. On the contrary, some cases in which a "crime" has literally been committed—the youthful seducer of a female legally too young to consent; the impulsive, seemingly one-time shoplifter—are for one reason or another difficult for the law-trained official to overlook. The grand jury's dispensing power, kin to the power of a trial jury to acquit the technically "guilty," supplies some needed play in the joints that a system does not always supply. But saving graces of this sort do not alter the fact that the grand jury rarely stands in the path of a prosecutor determined to indict. Perhaps it is not realistic to hope for anything sharply different. Indeed, few reformers urge the serious pursuit of this theoretical function.

On the other hand, there is active dissatisfaction that the grand jury seldom does *more* than the prosecutor asks. It is possible that Watergate, at least temporarily, has added impetus to this sentiment. Rightly or wrongly, it was thought that the Washington grand jury was not being led to sweep broadly or dig deeply in the months before the first trial at which Judge John J. Sirica presided. It appeared to at least some observers that if not for unusual circumstances of the judge himself insisting upon more intensive inquiries, profound misdeeds might never have come to be prosecuted.

Though they seldom occur, perplexing and dramatic cases sometimes arise when the several main participants—prosecutor, grand jury, and judge—disagree about whether a prosecution should properly be instituted or dropped. The grand jury has an absolute veto over whether to indict. Does the same apply to the prosecutor? So-called runaway grand juries in state courts have succeeded from time to time in bringing prosecutions without the aid, or even over the opposition, of the regularly designated prosecutor.

So, too, special prosecutors have been appointed where the regularly elected or appointed officials have failed to act. The corrupt political machine of Boss Tweed in New York City was successfully pursued by a grand jury that acted independently of, and in spite of, the district attorney. Some 50 years later, Thomas E. Dewey was appointed special prosecutor in New York City because of the seeming nonfeasance of the regularly elected district attorney.

Such unusual cases characteristically involve matters of bitter conflict in the community. Like most "hard" or "great" cases, they tend to make somewhat special, unique, or possibly "bad" law. In any event, state courts remain unclear, and perhaps are shifting even now, on whether judges have the power to appoint special prosecutors to pursue cases the grand jury, but not the regular prosecutor, deems appropriate.

In the Federal picture, the court-appointed special prosecutor has been substantially unknown. In recent times, a Federal rule of criminal procedure has required that an indictment be "signed by the attorney for the government." This

sounds like an inescapable and unambiguous barrier to the grand jury's proceeding without that attorney. But people learned in the law have seen means of escaping and possibly overriding barriers that appear insurmountable at first. While the barriers here still stand, the debate may not be over.

On occasion, judges have tried to intervene and prevent prosecutors from dropping cases. But the practical upshot of recent Federal court decisions seems to be that prosecutors can end prosecutions substantially without judicial interference—unless some plain impropriety or dereliction is discovered. The reservation stand as a cautionary sign, a warning that there may always be a demand for an explanation and an exposure of the prosecutorial decision to public view. But the usual response of a judge to a prosecutor's decision to withdraw an indictment is likely to be relatively unquestioning acquiescence.

In the foreseeable future there will probably be few run-away grand juries and few instances of interference by judges with the prosecutor's plenary control over decisions to begin or withdraw criminal cases. The exceptions will probably arise in situations of uncommonly deep and bitter conflict—where alignments are not predictable and it is not possible to know in advance whose will be the voices of the good or bad guys.

For that among a host of reasons, the precise lines of grand jury and prosecutor authority may never be drawn with finality. The uncertainty has to date been reasonably tolerable. It may even be healthful for the pertinent law to stay a little loose and incomplete, rather than try to freeze an unknown future too hard too far in advance.

California Has Learned to Sidestep the System

(By Robert Lindsey)

Los Angeles.—Almost 20,000 felony cases will be prosecuted in the Superior Court of Los Angeles County this year. But only 50—one in 400—will be heard by a grand jury. For the vast majority, this is the procedure followed in Los Angeles County and the 57 other counties in California:

Within 48 hours of a defendant's arrest on a felony, he must be arraigned before a municipal judge, who will schedule what is called a "preliminary hearing" for him, usually within a week of his arrest. The defendant may or may not be released on bail.

At the preliminary hearing, the defendant's lawyer is present. The district attorney is required to bring a complaint against the defendant, producing evidence sufficient to convince a municipal court judge that a crime has been committed, and that there is reason to believe the accused person committed it and should stand trial in superior court.

At the hearing, the defendant may question witnesses and challenge the substance and legality of the evidence—whether it was seized unlawfully, for example. On occasion, judges dismiss cases as too weak during these preliminary hearings. But in practice, most prosecutors present enough evidence to persuade a judge. And most judges appear to give the prosecution the benefit of the doubt in determining whether there is sufficient cause to believe the accused should stand trial.

Nevertheless, defendants under this system appear to have an edge over those processed by grand jury. "There are tremendous advantages," Kenneth Kahn, a Los Angeles criminal lawyer observed. "It lets the defense in on the ground floor. You can cross-examine witnesses, you see the evidence they have against you, and only legally admissible evidence is permitted. In a grand jury, they can use all kinds of garbage as evidence, and the grand jury becomes simply a rubber stamp for the prosecution."

Once the accused person has been bound over to face trial in the Superior Court, which handles felony trials, the district attorney must file a document that legally is the equivalent of a bill of indictment—a list of allegations called an "information." Based on these allegations, the defendant is arraigned in Superior Court, enters a plea, and the trial process begins.

What about the other 50 cases a year? In California, because of statutes and tradition reaching back to the Gold Rush era more than a century ago, grand juries spend most of their time not as prosecutorial organs indicting accused criminals, but as community watchdogs to review the operations of county gov-

ernment and attempt to uncover inefficiency, waste and corruption. Only in a small fraction of felony cases do they indict the alleged criminals.

But the district attorney has the option to bring cases to trial through a grand jury if he chooses. According to Joseph Siler, the legal adviser to the Los Angeles County grand jury, the jury here generally becomes involved in criminal cases only in the following categories:

Major frauds and other complex white collar crimes involving expensive documents or bookkeeping records, many suspects and many lawyers, or other complicating factors that make presentation of allegations difficult or cumbersome at a preliminary hearing;

Crimes alleged to have been committed by public officials or policemen.

Cases in which the prosecution wants to keep an investigation secret, usually to protect witnesses who might be fearful of their safety, where there are still some suspects at large and it is deemed necessary to keep the prosecution secret. Major organized crime cases usually fall in this category.

Cases involving prominent people or those in which the district attorney has other reasons to believe extensive publicity from a preliminary hearing might make it difficult to find an impartial jury. Many of Southern California's most famous defendants of the recent past—Sirhan Sirhan, the murderer of Robert Kennedy; Charles Manson and his crime clan; Patricia Hearst, and other celebrities and those involved in highly publicized cases—have been processed through the grand jury rather than in the "information" procedure.

Because many cases that go before the grand jury are complex financial frauds, jurors can spend up to 40 percent of the time hearing criminal cases, Mr. Siler said. But he said most effort goes into local government. "California has a reputation for extremely honest local government, and I think one of the reasons for this is our grand jury systems," he said.

COLORADO PASSES MAJOR BILL ON GRAND JURY REFORM (CONGRESSIONAL RECORD, JULY 12, 1977)

(By Hon. Joshua Eilberg, of Pennsylvania)

Mr. EILBERG. Mr. Speaker, on March 29 I informed my colleagues that the Colorado Legislature was considering an extensive reform of that State's grand jury system.

Many of the proposals I outlined then have now been approved by the Colorado Legislature. They are similar to the provisions of H.R. 94, the Grand Jury Reform Act of 1977, which is now being considered by the House Judiciary Subcommittee which I chair.

The Colorado measure, I believe, illustrates the moderateness and practicality of the reforms under study in Congress.

Like H.R. 94, the Colorado statute:

Provides for the right to counsel in the grand jury room but limits counsel's role to advice only and allows the court to remove disruptive attorneys;

Provides for detailed instructions to be given by the court to all grand jurors;

Provides for hearings on contempt orders and limits incarceration for contempt to no more than 6 months total;

Provides for witnesses to be advised of their rights prior to their testimony;

Precludes calling any witness who indicates he will invoke his privilege against self-incrimination, unless immunity is granted;

Allows a witness to request the grand jury for an opportunity to testify or retestify;

Provides for recording of all grand jury proceedings and furnishing of transcripts, with appropriate safeguards, to witnesses;

Provides for review of subpoenas by the court of their reasonableness and purpose; and

Precludes repeated grand jury investigations of the same transaction unless based on additional evidence.

Mr. Speaker, I would like to insert Colorado Senate Bill No. 186 into the Record for consideration by the House and comparison with our proposed reforms:

COLORADO SENATE BILL No. 186

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 16-5-204, Colorado Revised Statutes 1973, is repealed and reenacted, with amendments, to read:

16-5-204. Witness before a grand jury—procedure. (1) (a) Whenever a witness in any proceeding before any grand jury 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 prosecuting attorney may submit an application to the court for an order directing the witness to show why the witness should not be held in contempt. After submission of such application and a hearing at which the witness may be represented by counsel, the court may, if the court finds that such refusal was without just cause, hold the witness in contempt and order the witness to be confined. Such confinement shall continue until such time as the witness is willing to give such testimony or provide such information; however, the court may release the witness from confinement if the court determines that further confinement will not cause the witness to give such testimony or provide such information. No period of such confinement shall exceed the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, and in no event shall such confinement exceed six months.

(b) If a witness has been confined in accordance with paragraph (a) of this subsection (1), he may, upon petition filed with the court, request a hearing to be held within ten days to review the contempt order at which hearing he shall have the right to be represented by counsel. The court, at the hearing, may rescind, modify, or affirm the order.

(c) In any proceeding conducted under this section, counsel may be appointed for a person financially unable to obtain adequate assistance.

(2) No person who has been imprisoned or fined by a court for refusal to testify or provide other information concerning any criminal incident or incidents in any proceeding before a grand jury impaneled before any district court shall again be imprisoned or fined for a subsequent refusal to testify or provide other information concerning the same criminal incident or incidents before any grand jury.

(3) Upon impanelment of each grand jury, the court shall give to such grand jury adequate and reasonable written notice of and shall assure that the grand jury reasonably understands the nature of:

(a) Its duty to inquire into offenses against the criminal laws of the state of Colorado alleged to have been committed;

(b) Its right to call and interrogate witnesses;

(c) Its right to request the production of documents or other evidence;

(d) The subject matter of the investigation and the criminal statutes or other statutes involved, if these are known at the time the grand jury is impaneled;

(e) The duty of the grand jury by an affirmative vote of nine or more members of the grand jury to determine, based on the evidence presented before it, whether or not there is probable cause for finding indictments and to determine the violations to be included in any such indictments; and

(f) The requirement that the grand jury may not find an indictment in cases of perjury unless at least two witnesses to the same fact present evidence establishing probable cause to find such an indictment.

(4) (a) At the option of the prosecuting attorney, a grand jury subpena may contain an advisement of rights. If the prosecuting attorney determines that an advisement is necessary, the grand jury subpoena shall contain the following advisement prominently displayed on the front of the subpoena:

NOTICE

(I) You have the right to retain an attorney to represent you and to advise you regarding your grand jury appearance.

(II) Anything you say to the grand jury may be used against you in a court of law.

(III) You have the right to refuse to answer questions if you feel the answers would tend to incriminate you or to implicate you in any illegal activity.

(IV) If you cannot afford to obtain an attorney, you may consult with the public defender's office, or request the court to appoint an attorney to represent you.

(b) Any witness who is not advised of his rights pursuant to paragraph (a) of this section (4) shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he testifies or any evidence he produces, nor shall any such testimony or evidence be used as evidence in any criminal proceeding, except for perjury, against him in any court.

(c) In any proceeding before the grand jury, if the prosecuting attorney has written notice in advance of the appearance of a witness that such witness intends to exercise his privilege against self-incrimination, such witness shall not be compelled to appear before the grand jury unless a grant of immunity has been obtained.

(d) Any witness subpoenaed to appear and testify before a grand jury or to produce books, papers, documents, or other objects before such grand jury shall be entitled to assistance of counsel during any time that such witness is being questioned in the presence of such grand jury, and counsel may be present in the grand jury room with his client during such questioning. However, counsel for the witness shall be permitted only to counsel with the witness and shall not make objections, arguments, or address the grand jury. Such counsel may be retained by the witness or may, for any person financially unable to obtain adequate assistance, be appointed in the same manner as if that person were eligible for appointed counsel. An attorney present in the grand jury room shall take an oath of secrecy. If the court, at an *in camera* hearing, determines that counsel was disruptive, then the court may order counsel to remain outside the courtroom when advising his client. No attorney shall be permitted to provide counsel in the grand jury room to more than one witness in the same criminal investigation, except with the permission of the grand jury.

(e) Once a grand jury has returned a no true bill based upon a transaction, set of transactions, event, or events, a grand jury inquiry into the same transaction or events shall not be initiated unless the court finds, upon a proper showing by the prosecuting attorney, that the prosecuting attorney has discovered additional evidence relevant to such inquiry.

(f) A certified or authorized reporter shall be present at all grand jury sessions. All grand jury proceedings and testimony from commencement to adjournment shall be reported. The reporter's notes and any transcripts which may be prepared shall be preserved, sealed, and filed with the court. No release or destruction of the notes or transcripts shall occur without prior court approval.

(g) Upon application by the prosecutor, or by any witness after notice to the prosecutor, the court, for good cause, may enter an order to furnish to that witness a transcript of his own grand jury testimony, or minutes, reports or exhibits relating to them.

(h) Any witness summoned to testify before a grand jury or an attorney for such witness with the witness' written approval, shall be entitled, prior to testifying, to examine and copy at the witness' expense any statement in the possession of the prosecuting attorney or the grand jury which such witness has made that relates to the subject matter under inquiry by the grand jury. If a witness is proceeding in forma pauperis, he shall be furnished, upon request, a copy of such transcript and shall not pay a fee.

(i) No person subpoenaed to testify or to produce books, papers, documents, or other objects in any proceeding before any grand jury shall be required to testify or to produce such objects, or be confined as provided in this section, for his failure to so testify or produce such objects, if upon filing a motion and, upon an evidentiary hearing before the court which issued such subpoena or a court having jurisdiction under this section, the court finds that:

(I) A primary purpose or effect of requiring such person to so testify or to produce such objects before the grand jury is or will be to secure testimony for trial for which the defendant has already been charged by information, indictment, or criminal complaint;

(II) Compliance with a subpoena would be unreasonable or oppressive;

(III) A primary purpose of the issuance of the subpoena is to harass the the witness;

(IV) The witness has already been confined, imprisoned, or fined under this section for his refusal to testify before any grand jury investigating the same transaction, set of transactions, event, or events; or

(V) The witness has not been advised of his rights as specified in paragraph (a) of this subsection (4).

(j) Any grand jury may indict a person for an offense when the evidence before such grand jury provides probable cause to believe that such person committed such offense.

(k) The district court before which the indicted defendant is to be tried shall dismiss any indictment of the grand jury if such district court finds, upon the filing of a motion by the indicted defendant based upon the grand jury record without argument or further evidence, that the grand jury finding of probable cause is not supported by the record.

(l) Any person may approach the prosecuting attorney or the grand jury and request to testify or retestify in an inquiry before a grand jury or to appear before a grand jury. The prosecuting attorney or the grand jury shall keep a record of all denials of such requests to that prosecuting attorney or grand jury, including the reasons for not allowing such person to testify or appear. If the person making such request is dissatisfied with the decision of the prosecuting attorney or the grand jury, such person may petition the court for hearing on the denial by the prosecuting attorney or the grand jury. If the court grants the hearing, then the court may permit the person to testify or appear before the grand jury, if the court finds that such testimony or appearance would serve the interests of justice.

(m) The foreman, or acting foreman when designated by the court, of the grand jury may swear or affirm all witnesses who come before the grand jury.

(n) Any other motions testing the validity of the indictment may be heard by the court based only on the record and argument of counsel, unless there is cause shown for the need for additional evidence.

SEC. 2. 16-5-205, Colorado Revised Statutes 1973, is amended by the addition of a new subsection to read:

16-5-205. *Information--authority to file--indictments--warrants and summons.* (4) The report of the grand jury shall not be made public except when required by statute or except that all of the report or a portion thereof may be released if the chief judge of the district court finds such a release will exonerate a person or persons who have requested such a release.

SEC. 3. *Appropriation.* There is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, for the fiscal year commencing July 1, 1977, to the judicial department, trial courts, the sum of thirty-five thousand two hundred thirty-four dollars ($35,234), or so much thereof as may be necessary, for the implementation of this act.

SEC. 4. *Safety clause.* The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

BOSTON GLOBE COMMENDS CONGRESSMAN EILBERG'S BILL TO REFORM GRAND JURIES (CONGRESSIONAL RECORD, JULY 18, 1977)

(By Hon. Robert F. Drinan, of Massachusetts)

Mr. DRINAN. Mr. Speaker, for many months now, Congressman Eilberg, chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, has been working assiduously to reform the Federal grand jury system. He and his subcommittee members have spent much energy and time in hearings and markups to develop a bill which will truly bring needed change to this ancient institution.

The Boston Globe recently recognized the magnitude and importance of the work of the Eilberg subcommittee. On its editorial page, the Globe noted that the legislation being developed "could well serve as a model for similar State actions," where reform of the grand jury is also needed. It is unfortunate that the Carter administration is not giving the effort more support.

The Globe editorial is a fine tribute to our distinguished colleague and it is inserted into the Record here for all to see:

GRAND JURY REFORM

There were undoubtedly those who saw a certain irony in the complaints by General Motors last month that the Federal government was abusing the grand jury process by hauling in GM officials to testify under oath about corporate tax matters. In recent times, at least, complaints about grand jury abuses have come most frequently not from the offices of the nation's corporate executives but from political radicals charging grand juries have been employed to quash their activities.

In theory, the grand jury serves a laudable purpose. It allows possible criminal charges against an individual to be screened in secrecy by an independent panel of the accused's peers before they are publicly lodged.

In fact, however, the grand jury has become a tool of the prosecutor. By both establishing the grand jury's agenda and orchestrating the quality and quantity of the evidence presented, the prosecutor almost invariably determines who is and is not indicted.

But the grand jury can still provide valuable protection to individuals and the most prudent course now is to increase those safeguards. At the Federal level, legislation to do this—which could well serve as a model for similar state actions—has been introduced by Rep. Joshua Eilberg (D-Pa.). It received a cool reception from the Carter Administration at a hearing last week but it points in the right direction.

It would repeal the "use" immunity law enacted at the urging of the Nixon Administration under which witnesses can be compelled to testify before a Federal grand jury and then, despite the constitutional guarantees against self-incrimination, be tried for activities about which they testified as long as the specific testimony is not used. The Eilberg legislation would return the Federal system to "transactional" immunity under which a witness compelled to testify could not later be tried for crimes detailed in that testimony.

The Eilberg legislation would also allow defense attorneys into the grand jury room to advise their clients (now they wait outside the room and their clients can go out to them) and, not incidentally, to monitor the process. A similar proposal for Massachusetts grand juries was recently approved by the state Senate.

Another meritorious provision of the Eilberg legislation would require that a judge screen Federal grand jury indictments prior to their issuance to make sure that they are based upon sufficient admissible evidence and that the procedures were appropriate. The proposal is designed to avoid needless damage to reputations arising from improper indictments.

None of these proposals has won the general approval of prosecutors. Yet none should generally impair prosecutors' work. Whatever the grand jury's original function, in a complex industrial society, where crime is commonplace and crime fighting sophisticated, the professionals—the prosecutors—will play the dominant role. But it is in exactly such a society that sufficient measures must be taken to protect the rights of individuals.

American Bar Association Section Recommends Grand Jury Reform
(Congressional Record, July 21, 1977)

(By Hon. Joshua Eilberg, of Pennsylvania)

Mr. Eilberg. Mr. Speaker, I have recently obtained a copy of recommendations by the American Bar Association's Section of Criminal Justice regarding grand jury reform.

This report will be presented to the ABA House of Delegates next month.

As the following indicates, these recommendations are similar to the provisions of H.R. 94, the Federal grand jury reform bill of 1977. This bill is now under consideration by the House Judiciary Subcommittee which I chair.

Because of the importance of this issue, I commend the report to the attention of my colleagues:

[The attached presently represents only the policy of the ABA Section of Criminal Justice, and not the position of the American Bar Association. This report will be presented to the ABA House of Delegates in August 1977]

American Bar Association, Report to the House of Delegates, Section of Criminal Justice

Recommendation

The Section of Criminal Justice recommends adoption of the following resolution:

Be it resolved, That the American Bar Association support in principle grand jury reform legislation which adheres to the following principles:

1. Expanding on the already-established ABA policy, a witness before the grand jury shall have the right to be accompanied by counsel in his or her appear-

ance before the grand jury. Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in proceedings before the grand jury. The court shall have the power to remove such counsel from the grand jury room for conduct inconsistent with this principle.

2. No prosecutor shall knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt.

3. A prosecutor should recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing law.

4. A target of a grand jury investigation shall be given the right to testify before the grand jury, provided he/she signs a waiver of immunity. Prosecutors shall notify such targets of their opportunity to testify unless notification may result in flight or endanger other persons or obstruct justice; or the prosecutor is unable with reasonable diligence to notify said persons.

5. The prosecutor shall not present to the grand jury evidences which he or she knows to be constitutionally inadmissible at trial.

6. The grand jury shall not name a person in an indictment as an unindicted coconspirator to a criminal conspiracy. Nothing herein shall prevent supplying such names in a bill of particulars.

7. A grand jury should not issue any report which singles out persons to impugn their motives, hold them up to scorn or criticism or speaks of their qualifications or moral fitness to hold an office or position. No grand jury report shall be accepted for filing and publication until the presiding judge submits *in camera* copy thereof to all persons named or identifiable and such persons are given the opportunity to move to expunge any objectionable portion of said report and have a final judicial determination prior to the report's being published or made public. Such motion to expunge shall be made within ten days of receipt of notice of such report. Hearings on such motions shall be held *in camera*.

8. The grand jury should not be used by the prosecutor in order to obtain tangible, documentary or testimonial evidence to assist the prosecutor in preparation for trial of a defendant who has already been charged by indictment or information. However, the grand jury should not be restricted in investigating other potential offenses of the same or other defendants.

9. The grand jury should not be used by the prosecutor for the purpose of aiding or assisting in any administrative inquiry.

10. Witnesses who have been summoned to appear before a grand jury to testify or to produce tangible or documentary evidence should not be subjected to unreasonable delay before appearing or unnecessarily repeated appearances or harassment.

11. It shall not be necessary for the prosecutor to obtain approval of the grand jury for a grand jury subpoena.

12. A grand jury subpoena should indicate the statute or general area that is the concern of the grand jury inquiry. The return of an indictment in a subject area not disclosed by the grand jury subpoena shall not be a basis for dismissal.

13. In any case in which a subpoeaned witness moves on proper grounds to quash a grand jury subpoena, the prosecutor should be required to make a reasonable showing *in camera* (which may be *ex parte* at the court's discretion) and on the record before the court convening the grand jury that the evidence being sought is:

(a) likely to be relevant to the grand jury investigation;

(b) not sought primarily for an improper purpose.

14. A subpoena should be returnable only when the grand jury is sitting.

15. When the circumstances place a hardship on the witness, motions to quash or modify subpoenas may be brought at the place where the witness resides, the documents sought are maintained, or before the court which issued the subpoena at the election of the witness. Such motion should be heard *in camera* and on the record.

16. All matters before a grand jury, including the charge by the impaneling judge, if any; any comments or charges by any jurist to the grand jury at any time; any and all comments to the grand jury by the prosecutor; and the questioning of and testimony by any witness, shall be recorded either stenographically or electronically. However, the deliberations of the grand jury shall not be recorded.

17. The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

18. Expanding on the already-established ABA position favoring transactional immunity, immunity should be granted only when the testimony sought is in the public interest; there is no other reasonable way to elicit such testimony; and the witness has refused to testify or indicated an intent to invoke the privilege against self-incrimination.

19. Immunity shall be granted on prosecution motion *in camera* by the trial court which convened the grand jury, under standards expressed in Principle No. 18.

20. The granting of immunity in grand jury proceedings should not be a matter of public record prior to the issuance of an indictment or testimony in any cause.

21. A lawyer or lawyers who are associated in practice should not continue multiple representation of clients in a grand jury proceeding if the exercise of the lawyer's independent professional judgment on behalf of one of the clients will be or is likely to be adversely affected by his or her representation of another client. If the court determines that this principle is violated, it may order separate representation of witnesses, giving appropriate weight to an individual's right to counsel of his or her own choosing.

22. The confidential nature of the grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny.

23. It is the duty of the court which impanels a grand jury fully to charge the jurors by means of a written charge completely explaining their duies and limitations.

24. All stages of the grand jury proceedings should be conducted with proper consideration for the preservation of press freedom, attorney-client relationships, and comparable values.

25. The period of confinement for a witness who refuses to testify before a grand jury is found in contempt should not exceed 6 months.

26. The court shall impose appropriate sanctions whenever any of the foregoing principles have been violated.

REPORT

Background

The Section of Criminal Justice urges House of Delegates approval for 26 legislative Principles to which it believes grand jury reform legislation should adhere. The Section has spent more than three years studying the grand jury. In August 1975—at Section urging—the House of Delegates approved a policy addressing one grand jury bill (H.R. 1277) in the 94th Congress. That policy is a limited one, but includes Association support for such key elements of grand jury reform as allowing counsel in the grand jury room, transactional immunity, and strengthened penalties for unauthorized disclosure of grand jury information. Since 1975, the Section's Grand Jury Committee has analyzed a number of pending bills, including H.R. 2986 and S. 3274 (94th Congress), both with a broader focus than H.R. 1277, on which the current ABA policy was formulated. New legislation, including H.R. 94, H.R. 3736, and S. 1449, has been introduced in the 95th Congress; hearings are already being held on these proposals.

Based on its continued study of this issue since 1975, the Criminal Justice Section now asks House of Delegates adoption of Association policy addressing a broader range of grand jury issues. This is timely not only because of the increasing public, press and professional attention being focused on this issue, but also because action is anticipated in the 95th Congress on the pending legislation. Further, a number of states are now considering—and some have already enacted into law—similar bills.

In February, 1977, the Section asked the House of Delegates to approve a package of 23 legislative principles. At the personal request of Attorney General Bell, the Section asked the House to defer action until the August Annual Meeting. Since February, the Section has revised several Principles to clarify intent; has added 3 new Principles concerning prosecutorial conduct; and has met with Honorable Benjamin Civilett, Assistant Attorney General in charge of the Criminal Division, U.S. Department of Justice, and other Department representatives to discuss the Principles. Mr. Civiletti has expressed support for some 15 of the Principles, and noted that the Department would take no position on an addi-

tional five. On several additional Principles, Mr. Civiletti said that some rephrasing might moot Department objections. In an attempt to reach compromise in as many areas as possible, the Section's Grand Jury Committee held a special meeting in early June, made additional amendments to a number of the Principles, and gained Council approval for these changes via a special mail ballot.

It should be noted that proposed Principles were drafted by a Committee composed almost entirely of present and former prosecutors. It is chaired by Richard E. Gerstein, State Attorney for the greater Miami area for more than 20 years, and former President of the National District Attorneys Association. The Committee also included members with state and federal prosecutorial experience (including the last Watergate Special Prosecutor, Charles Ruff), judges, law professors and members of the defense bar. The Principles further represent a consensus of the Criminal Justice Section Council, which includes a similar mix of persons from all parts of the criminal justice system. Most of the Principles were approved by the Council unanimously.

In recent years, the grand jury as an institution has come under increasing criticism for a number of reasons and from a number of sources. It has been accused of an absence of procedural safeguards. Reflecting these and other concerns, England—where the grand jury originated—abolished the institution in 1933; the majority of states in our country allow prosecution either by indictment or by information. However, it remains a part of the federal system and in many state systems because of constitutional provisions. The ABA House of Delegates in 1975 went on record opposing amendment of the United States Constitution to eliminate the requirement for indictment by a grand jury. That position of the ABA should not be changed, but a comprehensive effort is needed to correct existing abuses. The Section believes that its proposed legislative Principles will go a long way towards remedying the ills of the grand jury as an institution.

CONCLUSION

When the grand jury was created in 12th Century England, it was intended to serve as a shield between the citizen and the Crown. In recent years, the grand jury has come under increasing attack: observers charge that the grand jury system is riddled with abuse, and is no longer a shield for the citizen but a shield for the government. Critics declare that it has departed from its proper Constitutional function of protecting citizens from unwarranted prosecutions.

The Section of Criminal Justice, based on the work of its Grand Jury Committee, chaired by an experienced prosecutor Richard E. Gerstein, believes that reforms are needed to insure fairness—but without undercutting the grand jury's legitimate functions or destroying it as an institution. While legitimate objections to these Principles have been raised, resistance to change from those within the criminal justice system cannot in itself be sufficient reason to reject well-considered—and needed—proposals.

The Section urges the House of Delegates to support the 26 legislative Principles. The Congress and many states legislatures are now acting on grand jury reform proposals; professional, media and public focus on this subject cannot be expected to abate. The Association—as in its landmark Standards for Criminal Justice project—has long been in the forefront of criminal justice improvement.

ABA leadership is now needed to help fashion well-reasoned workable and effective grand jury reform legislation.

Respectfully submitted.

B. JAMES GEORGE, JR.,
Acting-Chairperson.

ABA URGES GRAND JURY REFORM (Congressional Record, Sept. 15, 1977)

Mr. EILBERG. Mr. Speaker, on August 9, 1977, the American Bar Association officially endorsed a series of proposals to reform the grand jury system. As I have indicated on prior occasions, these recommendations parallel the provisions of H.R. 94, the Federal Grand Jury Reform Act of 1977, which I have introduced.

The Subcommittee on Immigration, Citizenship and International Law, which I chair, has already conducted 5 days of hearings on Federal grand jury

reform, and we expect to proceed promptly to marking up this essential legislation. The action of the ABA in strongly urging legislative action should add impetus to our efforts.

For the use of the Members, I would like to insert into the Records at this point the full text of the recommendations if the American Bar Association, passed overwhelmingly on August 9, 1977:

CHICAGO, ILL., *August 29, 1977.*

Re Grand Jury Reform.

HON. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship and International Law, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: At the meeting of the House of Delegates of the American Bar Association held August 8–10, 1977 the attached resolution was adopted upon recommendation of the Section of Criminal Justice.

This resolution is being transmitted for your information and whatever action you may deem appropriate. If hearings are scheduled on the subject of this resolution, we would appreciate your advising Herbert E. Hoffman, Director of the American Bar Association Governmental Relations Office, 1800 M Street, NW., Washington, D.C. 20036, (202) 231–2210.

Please do not hesitate to let us know if you need any further information, have any questions or whether we can be of any assistance.

Sincerely yours,

HERBERT D. SLEDD.

[As approved by the ABA House of Delegates, August 9, 1977]

[Only the Resolution Set Forth Herein Represents Official ABA Policy; the Accompanying Report Is for Background Purposes Only]

AMERICAN BAR ASSOCIATION: REPORT TO THE HOUSE OF DELEGATES, SECTION OF CRIMINAL JUSTICE

RECOMMENDATION

The Section of Criminal Justice recommends adoption of the following resolution:

Be it resolved, That the American Bar Association supports in principle grand jury reform legislation which adheres to the following principles:

1. Expanding on the already-established ABA policy, a witness before the grand jury shall have the right to be accompanied by counsel in his or her appearance before the grand jury. Such counsel shall be allowed to be present in the grand jury room only during the questions of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in proceedings before the grand jury. The court shall have the power to remove such counsel from the grand jury room for conduct inconsistent with this principle.

2. Every witness before a grand jury shall be informed of his privilege against self-incrimination and right to counsel and shall be advised that false answers may result in his being charged with perjury. Target witnesses shall be told that they are possible indicatees.

3. No prosecutor shall knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt.

4. A prosecutor should recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing law.

5. A target of a grand jury investigation shall be given the right to testify before the grand jury, provided he/she sins a waiver of immunity. Prosecutors shall notify such targets of their opportunity to testify unless notification may result in flight or endanger other persons of obstruct justice; or the prosecutor is unable with reasonable diligence to notify said persons.

6. The prosecutor shall not present to the grand jury evidence which he or she knows to be constitutionally inadmissible at trial.

7. The grand jury shall not name a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. Nothing herein shall prevent supplying such names in a bill of particulars.

8. A grand jury should not issue any report which singles out persons to impugn their motives, hold them up to scorn or criticism or speaks of their qualifications or moral fitness to hold an office or position. No grand jury report shall be accepted for filing and publication until the presiding judge submits *in camera* a copy thereof to all persons named or identifiable and such persons are given the opportunity to move to expunge any objectionable portion of said report and have a final judicial determination prior to the report's being published or made public. Such motion to expunge shall be made within ten days of receipt of notice of such report. Hearings on such motions shall be held *in camera*.

9. The grand jury should not be used by the prosecutor in order to obtain tangible, documentary or testimonial evidence to assist the prosecutor in preparation for trial of a defendant who has already been charged by indictment or information. However, the grand jury should not be restricted in investigating other potential offenses of the same or other defendants.

10. The grand jury should not be used by the prosecutor for the purpose of aiding or assisting in any administrative inquiry.

11. Witnesses who have been summoned to appear before a grand jury to testify or to produce tangible or documentary evidence should not be subjected to unreasonable delay before appearing or unnecessarily repeated appearances or harassment.

12. It shall not be necessary for the prosecutor to obtain approval of the grand jury for a grand jury subpoena.

13. A grand jury subpoena should indicate the statute or general subject area that is the concern of the grand jury inquiry. The return of an indictment in a subject area not disclosed by the grand jury subpoena shall not be a basis for dismissal.

14. A subpoena should be returnable only when the grand jury is sitting.

15. All matters before a grand jury, including the charge by the impaneling judge, if any; any comments or charges by any jurist to the grand jury at any time; any and all comments to the grand jury by the prosecutor; and the questioning of and testimony by any witness, shall be recorded either stenographically or electronically. However, the deliberations of the grand jury shall not be recorded.

16. The prosecutor should not make statements of arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

17. Expanding on the already-established ABA position favoring transactional immunity, immunity should be granted only when the testimony sought is in the public interest; there is no other reasonable way to elict such testimony; and the witness has refused to testify or indicated an intent to invoke the privilege against self-incrimination.

18. Immunity shall be granted on prosecution motion *in camera* by the trial court which convened the grand jury, under standards expressed in Principle No. 17.

19. The granting of immunity in grand jury proceedings should not be a matter of public record prior to the issuance of an indictment or testimony in any cause.

20. A lawyer or lawyers who are associated in practice should not continue multiple representation of clients in a grand jury proceeding if the exercise of the lawyer's independent professional judgment on behalf of one of the clients will be or is likely to be adversely affected by his or her representative of another client. If the court determines that this principle is violated, it may order separate representation of witnesses, giving appropriate weight to an individual's right to counsel of his or her own choosing.

21. The confidential nature of the grand jury proceeding requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny.

22. It is the duty of the court which impanels a grand jury fully to charge the juors by means of a written charge completely explaining their duties and limitations.

23. All stages of the grand jury proceedings should be conducted with proper consideration for the preservation of press freedom, attorney-client relationships, and comparable values.

24. The period of confinement for a witness who refuses to testify before a grand jury is found in contempt should not exceed 12 months.

25. The court shall impose appropriate sanctions whenever any of the foregoing principles have been violated.

REPORT

Background

The Section of Criminal Justice urges House of Delegates approval for 25 legislative Principles to which it believes grand jury reform legislation should adhere. The Section has spent more than three years studying the grand jury. In August 1975—at Section urging—the House of Delegates approved a policy addressing one grand jury bill (H.R. 1277) in the 94th Congress. That policy is a limited one, but includes Association support for such key elements of grand jury reform as allowing counsel in the grand jury room, transactional immunity, and strengthened penalities for unauthorized disclosure of grand jury information. Since 1975, the Section's Grand Jury Committee has analyzed a number of pending bills, including H.R. 2986 and S. 3274 (94th Congress), both with a broader focus than H.R. 1277, on which the current ABA policy was formulated. New legislation, including H.R. 94, H.R. 3736, and S. 1449, has been introduced in the 95th Congress; hearings are already being held on these proposals.

Based on its continued study of this issue since 1975, the Criminal Justice Section now asks House of Delegates adoption of Association policy addressing a broader range of grand jury issues. This is timely not only because of the increasing public, press and professional attention being focused on this issue, but also because action is anticipated in the 95th Congress on the pending legislation. Further, a number of states are now considering—and some have already enacted into law—similar bills.

In February 1977, the Section asked the House of Delegates to approve a package of 23 legislative principles. At the personal request of Attorney General Bell, the Section asked the House to defer action until the August Annual Meeting. Since February, the Section has revised several Principles to clarify intent; has added 3 new Principles concerning prosecutorial conduct; and has met with Honorable Benjamin Civiletti, Assistant Attorney General in charge of the Criminal Division, U.S. Department of Justice, and other Department representatives to discuss the Principles. Mr. Civiletti has expressed support for some 15 of the Principles, and noted that the Department would take no position on an additional five. On several additional Principles. Mr. Civiletti said that some rephrasing might moot Department objections. In an attempt to reach compromise in as many areas as possible, the Section's Grand Jury Committee held a special meeting in early June, made additional amendments to a number of the Principles, and gained Council approval for these changes via a special mail ballot.

It should be noted that the proposed Principles were drafted by a Committee composed almost entirely of present and former prosecutors. It is chaired by Richard E. Gerstein, State Attorney for the greater Miami area for more than 20 years, and former President of the National District Attorneys Association. The Committee also included members with state and federal prosecutorial experience (including the last Watergate Special Prosecutor, Charles Ruff), judges, law professors and members of the defense bar. The Principles further represent a consensus of the Criminal Justice Section Council, which includes a similar mix of persons from all parts of the criminal justice system. Most of the Principles were approved by the Council unanimously.

In recent years, the grand jury as an institution has come under increasing criticism for a number of reasons and from a number of sources. It has been accused of an absence of procedural safeguards. Reflecting these and other concerns, England—where the grand jury originated—abolished the institution in 1933; the majority of states in our country allow prosecution either by indictment or by information. However, it remains a part of the federal system and in many state systems because of constitutional provisions. The ABA House of Delegates in 1975 went on record opposing amendment of the Unitel States Constitution to eliminate the requirement for indictment by a grand jury. That position of the ABA should not be changed, but a comprehensive effort is needed to correct existing abuses. The Section believes that its proposed legislative Principles will go a long way towards remedying the ills of the grand jury as an institution.

Principles

Following are comments on each of the 25 proposed Principles:

1. The American Bar Association has already gone on record (in August, 1975) supporting the right of a witness to have counsel present in the grand jury room. Principle No. 1 represents a reaffirmative of that position. Since this report was first presented to the House of Delegates in February, the Section has rewritten Principle No. 1 to spell out more specifically what role counsel should play in the grand jury room. That role is now carefully defined in the Principle to make it clear that it is *strictly* limited to advising the witness. This limited role will preclude the grand jury's becoming a "mini-trial"— as some have feared—and will not impair expeditious investigations. Under the proposed Principle, counsel is not allowed to address the grand jurors or in any other way take part in the proceedings. Further, the Section had added a provision to allow removal of counsel who are disruptive or do not otherwise stay within the prescribed boundaries laid down by the Principle. Clarification of the attorney's limited role, coupled with the mechanism for removing disruptive counsel, should meet the objections raised by those who have feared creation of a "mini-trial."

Almost nowhere else in the criminal justice process—except before the grand jury—is a person who desires a lawyer denied that right. Requiring a witness who needs advice of counsel to consult his attorney outside the grand jury room door is awkward and prejudical. It unnecessarily prolongs the grand jury proceeding and places the witness in an unfavorable light before the grand jurors. The American Law Institute has called it a "degrading and irrational" procedure. It is extremely damaging to the witness to continually get up, go outside, and consult with counsel. A recent Seventh Circuit decision (*U.S. v. Kopel*, 552 F. 2d 1265 1977) points to additional problems with the procedure of consulting counsel outside the grand jury room. In that case, the Seventh Circuit said the U.S. Attorney, who had granted the witness permission to leave the grand jury room, was free at trial to bring up this fact as relevant to the perjury charges against the defendant. Dissenting, Judge Swygert decried the fact that the government was "permitted to 'sandbag' him [the defendant] by using the fact that he consulted his attorney against him." Nor is the right to leave the grand jury room to consult counsel absolute. (See *In re Tierney*, 465 F. 2d 806 (5th Cir. 1972), in which the court said a limit could be placed on how frequently the witness could leave the room to consult his lawyer.)

The prestigious American Law Institute, in its Model Code of Pre-Arraignment Procedure adopted in 1975, supports counsel in the grand jury room. "While this is a break with tradition and prevailing practice," the ALI notes, "it is consistent with the provisions of some recent state procelure codes . . . it seems *unfair and inefficient* to require a witness to leave the grand jury room each time he wishes to consult with counsel." [at 237; emphasis added] The ALI commentary goes on to state that "exclusion of counsel . . . is closely related to the traditional view that proceedings should be secret, and concern lest the presence of counsel hamper the freedom of the grand jury and the prosecutor in their investigation . . . The difficulty with this view . . . is that complex and important legal issues face a witness before a grand jury. An appearance before that body may subject an individual to the grave danger of self-incrimination or imprisonment for contempt . . . The witness may also inadvertently lose his right to claim the privilege by operation of the doctrine of waiver . . . And the inherent pressure and accompanying nervousness of a grand jury appearance upon an individual may make it very difficult for him to remember his attorney's instructions. . . . For effective implementation of this right, an attorney should be present to follow the flow of the interrogation." [at 601]

Some nine states now have statutes allowing counsel to be present in the grand jury room—Arizona (for target witnesses), Illinois (for target witnesses), Kansas, Michigan (one-man grand juries), Oklahoma, South Dakota, Minnesota, Virginia and Washington State. The Section has contacted practicing attorneys and prosecutors in these states; none has reported problems. In fact, some prosecutors who said they initially fought the procedure now support it as a means of insuring fairness in the system. Congressman Joshua Eilberg (D-Pa.), writing in a recent issue of *Judicature* (Vol. 60, No. 8), similarly reported that those states which have implemented the practice have not reported any serious problems. Further, a number of additional states are now considering such legislation—including Colorado (where it has passed both houses of the legislature), New York, Massachusetts, and California (where it has the support of the state's Attorney General).

Several arguments are raised by opponents. First, it is argued that allowing counsel in the grand jury room will be a breach of the secrecy rule. In fact, grand jury secrecy is not served by keeping the lawyer outside the grand jury room, since the witness is free to tell his attorney anything that occurred inside (Federal Rule of Criminal Procedure 6(e)). Secondly, it is argued that the presence of the witness' lawyer will restrict free testimony in cases of organized crime, corporate and political corruption investigations. The Section notes that the states which allow counsel in the grand jury room have retained the grand jury in most instances as an investigatory body for precisely these kinds of investigations, and have no record of negative results. Further, there are alternative ways of securing a cooperative witness' statement, and this evidence can be summarized for the grand jury in the form of hearsay, *Costello* v. *United States*, 350 U.S. 359 (1956). When a witness is called to testify before a grand jury, the witness' attorney, sitting outside the grand jury room, can easily conclude from the time spent with the jury whether the witness takes the Fifth Amendment or testifies in full. Experienced prosecutors, further, have noted that very few witnesses indicate a desire to cooperate without the knowledge of their counsel; if the witness' testimony is helpful to the government, that fact will become evident to the attorney fairly quickly.

Recognizing that problems arising from multiple representation of witnesses could be exacerbated by allowing counsel in the grand jury room, the Section has strengthened Principle No. 20, which addresses that subject.

The presence of the attorney will not only reduce unfair speculation about the prosecutor's conduct, but will also serve to inhibit the prosecutor from possible improper conduct. Analogous to having counsel present to witness a line-up, the presence of the attorney in the grand jury room will help to insure the fairness of the proceedings. Watergate Special Prosecutor Charles Ruff—in supporting this proposal in recent Congressional testimony—declared that ". . . the mere possibility of occasional disruption simply cannot overcome the right of the individual witness to consult his attorney without going through the mildly absurd process of leaving the grand jury room every time. Indeed, most prosecutors would admit, I think, that they count on the burden of leaving the room to dissuade the witness from asserting his right to counsel." (Testimony before House Judiciary Subcommittee, April 2, 1977, at 3.)

The American Bar Association has traditionally been a leader in asserting the right to assistance of counsel in the criminal justice process. As the *ABA Standards on Providing Defense Services* (§ 1.1) declare, "The objective of the bar should be to ensure the provision of competent counsel to all persons who need representation in criminal proceedings. . . ." Enactment of Principle No. 1 will more meaningfully effectuate the Sixth Amendment right to assistance of counsel; but the limitations on the role of counsel will forestall the grand jury's being turned into an adversary proceeding.

[2. Principle number two was added by the ABA House of Delegates at the August, 1977 Annual meeting in Chicago as a proposed amendment to the Criminal Justice Section Principles offered by the Judicial Administration Division.]

3. Principle No. 3 states that the prosecutor shall not knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt. The Section believes this to be a key element in bringing fairness to the grand jury process, and essential to prevent indictment of innocent persons. The Association has already gone on record in the *ABA Standards for Criminal Justice Relating to the Prosecution Function* (§ 3.6(b)) supporting this, declaring that, "The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt." The National District Attorneys Association (NDAA) Prosecution Standard 14.2D is also similar to Principle No. 3. As the commentary to the ABA Standard states, "Such a procedure tends to insure public confidence in the ultimate decision as to prosecution. The obligation to present evidence which tends to negate the guilt of the accused flows from the basic duty of the prosecutor to seek a just result." The NDAA Standards note that such a standard "provides for a greater accuracy in the indictment determination by providing that the grand jury be allowed to consider—as the trial fact finder would—any facts tending to negate the defendant's guilt." Indictments have been overturned on the grounds of due process when a court has ascertained that the prosecutor *knowingly* used perjured evidence or failed to present evidence that squarely negated guilt. *U.S.* v. *Basurto*, 497 F. 2d 781 (9th Cir., 1974); *Johnson* v. *Superior Court of California*, 15 Cal. 3d 248, 124 Cal. Rptr. 32, 539 P. 2d 792 (1975). This is a new Principle, added by the Section since the Principles were presented to the

House of Delegates in February. At the suggestion of U.S. Department of Justice representatives, who questioned the mechanics of the Principle as first drafted, the Section has written it so as to clarify its coverage and intent, since this is a legislative Principle, and not simply a more general standard for prosecutorial conduct.

4. The fourth Principle is also a new one, added since the report was presented to the House of Delegates in February. This would require the prosecutor to recommend that the grand jury not indict if he believes the evidence presented does not warrant an indictment under governing law. This language is *identical* to that of both *ABA Standards on the Prosecution Function* 3.6(c) and the National District Attorneys Association Standard (14.2E). The NDAA Standards commentary notes that this standard "recognizes the prosecutor's right and duty as legal advisor to the grand jury to recommend action to the grand jury. The prosecutor has a great deal more experience than the grand jurors in the strength and likely credibility of the evidence before a trial court. Since it will be his office's duty to prosecute the case, the prosecutor has a direct interest in assuring that resources are not squandered on unwinnable or otherwise improper cases." The Section agrees with this rationale. Adoption of the Principle will help to insure substantial justice within the grand jury room. The U.S. Department of Justice had indicated support for this Principle, which is, as noted above, already ABA policy.

5. Principle No. 5 would require that the target of a grand jury investigation be given the right to testify and present his side of the facts before an indictment is returned—provided such person signs a waiver of immunity. Under this proposal, the prosecutor would be required to take all reasonable steps to notify such prospective defendants—but recognizes that in some instances the prosecutor will truly be unable to locate such persons; or that, under some circumstances, notification may result in the person's fleeing, or his endangering witnesses or other persons, or obstructing justice. In such instances, notification would not be required. The Section has made two changes in this Principle since its initial presentation in February: First, at the suggestion of the Justice Department, the term "subject" was replaced by "target." The Department suggested this as more appropriate wording, since "target" is the term generally used in federal law enforcement. Secondly, Justice Department representatives suggested addition of the phrase "or obstruct justice" as an additional condition under which the prosecutor need not notify a target. The Section also made this amendment, believing it to be inherent in the original Principle. Principle No. 5 is intended to insure that fair and just opportunity is given individuals to testify in their own behalf prior to being indicted. Such groups as the Association of the Bar of the City of New York have supported such a right. This is an essential ingredient, the Section believes, in a fairly functioning grand jury—and criminal justice—system. Without it, the grand jury's essential function of arriving at an accurate indictment is undermined.

6. The sixth Principle has been rewritten since presentation of the report in February. As originally phrased, it stated that the grand jury "shall not consider unconstitutionally obtained evidence." In the light of concerns raised by the Justice Department, the Section has rewritten Principle No. 6 to put the affirmative burden on the prosecutor not to present evidence which he *knows* to be constitutionally inadmissible at trial. It thus makes the burden more specific. The Section believes that the integrity of the grand jury will best be served by prohibiting presentation of unconstitutionally-obtained evidence by the prosecutor. Already-approved Association policy in the *ABA Standards on the Prosecution Function* (§ 3.6(a)) declares that "a prosecutor should present to the grand jury only evidence which he believes would be admissible at trial." Notwithstanding the U.S. Supreme Court's decision in *U.S.* v. *Calandra*, 414 U.S. 338 (1974), the Section believes that this Principle is needed to insure the integrity of the grand jury process; indeed, the Court in *Calandra* noted that "for the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained" because of use of illegally-seized evidence. The Principle is thus not totally inconsistent with the thrust of *Calandra*.

7. Principle No. 7 would prohibit naming a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. The Section believes that naming of persons as unindicted co-conspirators visits opprobrium upon them—by charging the named persons with the commission of a crime but denying them

a forum in which to seek acquittal or vindication. This stains the reputation of the person without providing any means for the person to show his innocence. This is an instance in which reforms are needed to insure the fair functioning of the grand jury. The United States Court of Appeals for the Fifth Circuit has already held in accordance with this principle in *U.S.* v. *Briggs*, 514 F.2d 794 (1975). The Section has added a second sentence to the Principle since its original presentation. This states that supplying such names in a bill of particulars would not be prohibited. This would permit the prosecutor to respond to a request by the defense to reveal the names of co-conspirators who were not indicted. The Section felt the addition of this sentence is needed to spell this out to avoid potential confusion in interpretation of this Principle.

8. The issuance and publication of grand jury reports which single out persons for scorn or criticism, impugn their motives, or denigrate their moral fitness to hold office have the effect of charging such persons with misconduct or unfitness—without affording them any forum in which to refute the charges or to seek vindication. The proper purpose of grand jury reports is to inform the public of situations requiring administrative, judicial or legislative corrective action—not the castigation of individuals when the fact-finding forum insured by the finding of an indictment is absent. The Section is not proposing that such grand jury reports be proscribed from commenting on the job that an office holder is performing; but such reports should not condemn character alone. Grand jury reports which do single out persons in the manner described tend to undercut the fairness of the grand jury. Such misuse of the grand jury can, in fact, affect the political process. Judicial scrutiny of the report is essential to prevent spurious attacks on individuals when no forum of trial is available. The states that have recently considered this issue have reinforced control over the reporting process. *People* v. *Superior Court of Santa Barbara County*, 531 P. 2d 761 (Cal. 1975); Del. Rules, R. 6 (1975); Fla. Stat. Ann. § 905.28 (1975). The procedures proposed in Principle No. 8 will assist in insuring that such abuses do not occur. See *U.S.* v. *Briggs*, 514 F.2d. 794 (1975) and *Report of Grand Jury Proceedings*, U.S. Court of Appeals for the Fifth Circuit, 479 F.2d 458 (1973). The National District Attorneys Association Prosecution Standards commentary (discussing an NDAA proposed standard on this subject, modeled on recent New York legislation) notes that, ". . . an unfavorable report may stand as a severe form of extrajudicial punishment, from which there is no appeal . . . the quasi-judicial nature of the grand jury gives it an apparent reliability which may not be justified . . . grand jurors are accountable to no one . . . grand jurors may impose a personal standard of morality on persons, rather than an abstract and neutral conception of right and wrong."

9. The Section opposes the practice of a prosecutor's using the grand jury to obtain tangible, documentary or testimonial evidence to assist in his preparation for trial of a defendant *already* charged by indictment or information. This is an abuse of the grand jury, and transforms it into a mere tool and arm of the prosecutor's office—a role which is contrary to the grand jury's historical purpose and function. The Department of Justice supports this Principle; in a Department Office of Policy and Planning statement filed in 1976 with the House Judiciary Subcommittee examining grand jury legislation, the Department states that, "It is well-established under federal case law that a grand jury should act only with a view toward returning an indictment or to satisfy itself that no crime has occurred . . . It would be an abuse of legal process for a government attorney to use a grand jury to discover or build up evidence for trial of an existing indictment. Courts would discipline attorneys who did so and the Department would not countenance such action by its representatives." This principle is in accord with well-settled case law. *United States* v. *Dardi*, 330 F2d 316 (2d Cir. 1964); *United States* v. *Doss*, 545 F.2d 548 (6th Cir. 1976). In the *Doss* decision, the Court declared that, "We find no constitutional, statutory or case authority for employment of the grand jury as a discovery instrument to help the government prepare evidence to convict an already-indicted defendant. Such a use of the grand jury would pervert its constitutional and historical function . . ." The Court called it "a possible revival of a version of the Star Chamber of 18th Century England . . ."

10. The Section strongly opposes prosecutorial use of the grand jury to assist in administrative investigations—e.g., Internal Revenue income tax investigations. Such improper utilization of the grand jury warps its true function and leads to abuses such as those described in No. 9 *supra*. The ABA House of Dele-

gates in February, 1977—in addressing a proposed amendment to Federal Rule of Criminal Procedure 6(e)—expressed concern regarding dissemination of grand jury information to government experts for use in unrelated civil proceedings. The Section report accompanying the House-approved resolution declared that disclosure of grand jury information to a broad group of governmental personnel might be used as "subterfuge by some agencies to obtain information through the grand jury process which was not legitimately required for the purposes of the pending grand jury investigation . . . The dissemination of information to serve particularized departmental or agency needs would not be a legitimate one." (House of Delegates Report Book, 2/77 Mid-year Meeting, at 138–9). A U.S. Department of Justice paper submitted to the House Congressional hearings echoes this concern: "[o]ne of the primary abuse of the grand jury which must be avoided . . . is the attempted use of its broad investigative powers by governmental agencies in pursuit of investigations that are solely their own rather than the grand jury's." (U.S. Department of Justice Office of Policy and Planning, *Memorandum on the Grand Jury*, p. 106; printed in record of House Judiciary Subcommittee Hearings.) In the case of *United States* v. *Doe*, 72 Crim. Misc. 1 (S.D.N.Y. 1972), the court in denying a government motion to examine special grand jury minutes to determine violations of Titles 18 and 28 *and* "to determine civil tax liability," declared that, "The grand jury's role is properly confined . . . when it is held empowered to conduct investigations that are in their inception exclusively criminal." It should be noted that the Attorney General's Advisory Committee of U.S. Attorneys has expressed its support for this proposed Principle.

11. Principle No. 11 provides that witnesses summoned before grand juries should not be subjected to unreasonable delays or unnecessarily repeated appearances or harassment. The Section supports legislation which would forbid such practices. In some instances, these abuses have occurred and grand jury witnesses have been repeatedly called to appear; or have been subjected to unreasonable delays or other forms of harassment. An indifference to the convenience of a grand jury witness is as objectionable as the use of a grand jury subpoena to harass a witness, and is a subtle means of intimidating the witness before his appearance. The *ABA Standards for the Prosecution Function* (§ 5.7a)) recognize the prosecutor's obligation to handle witnesses "fairly, objectively and . . . without seeking to intimidate or humiliate the witness . . ." The U.S. Department of Justice supports this Principle, as does the Advisory Committee of U.S. Attorneys.

12. Several of the grand jury reform bills before the 95th Congress (e.g., H.R. 3736) would require grand jury approval of any subpoenas issued. The section opposes such a procedure. It believes this requirement would not only be cumbersome, but would cause unncessary delay. The prosecutor, the Section believes, is much better suited to make determinations regarding issuance of subpoenas than are lay grand jurors. The Section thus does not support these provisions in pending legislation. The Advisory Committee of U.S. Attorneys supports this Principle.

13. Principle No. 13 would require that a grand jury subpoena indicate the statute or general subject that is the focus of the grand jury inquiry. This requirement is intended to enable the recipient and the court to determine more accurately questions of relevancy. It would also enable the witness to prepare himself more adequately for his appearance, and would insure more effective and efficient use of counsel, court and grand jury time. The Principle does *not* intend that a detailed description of the statutory *and* subject areas be required; but that a broad statutory citation or general description of the subject be included. Justice Department representatives have expressed support for this Principle; but indicated concern that, as initially written, the Principle would leave open the question of later challenges to the indictment based on the fact that the defendant was charged under statutes not named in the subpoena. To meet this concern and clarify the Principle's original intent, the Section has added the second sentence; this makes it clear that the indictment cannot be vitiated if the person is indicted under a statute or in a subject area not mentioned in the subpoena. The Advisory Committee of U.S. Attorneys supports this Principle.

14. A grand jury subpoena should not be returnable except when the grand jury is sitting. This proposal is intended to avoid potential abuse of the subpoena power by the prosecutor's office. It will help to insure the integrity of the grand jury function. Both the Justice Department and the Attorney General's Advisory Committee of U.S. Attorneys support this Principle.

15. Principle No. 15 would mandate stenographic or electronic recording of all matters before the grand jury—except the deliberations of the grand jury

itself. This would represent a logical step in grand jury reform, and is not inconsistent with the necessity of maintaining grand jury secrecy. The judge's charge to the grand jury would be recorded, as would the prosecutor's introductory remarks and testimony and questioning of all witnesses. Some 31 states already require recording of all grand jury proceedings other than votes and deliberations, and an additional 6 states permit it, according to a Library of Congress study (printed in 1976 Hearings record, House Judiciary Subcommittee on Immigration, Citizenship International Law, p. 714). Several federal district courts already record all grand jury proceedings—including the District of Rhode Island, the Eastern District of Washington, and the Northern District of Illinois. The Ninth Circuit has ruled that a prospective defendant who makes a timely request cannot be arbitrarily denied recordation of grand jury proceedings, *United States* v. *Thorenson*, 428 F. 2d 654 (1970); *United States* v. *Price*, 474 F. 2d 1223 (1973).

Major groups have supported this requirement. The American Law Institute, in its Model Code of Pre-Arraignment Procedure, urges that a record be made of all proceedings before the grand jury. The *ABA Standards for Criminal Justice on the Prosecution Function* (§ 3.5(b))—already ABA policy—provide that, "The prosecutor's communications and presentations to the grand jury should be on the record." The accompanying commentary points out that "since grand jury proceedings are generally secret and *ex parte*, it is particularly desirable that a record be made of the prosecutor's communications and representations to the jury." The recently-issued Prosecution Standards of the National District Attorneys Association (§ 14.2(F)) also urge that "all testimony before the grand jury should be recorded." Recording will aid the prosecution—by insuring that perjured testimony does not go unpunished. Recording would also act as a restraint on the prosecutor not to exercise undue or improper influence on the grand jury.

The Department supports this Principle to the extent that it would require recordation of the judge's charge and the questioning and testimony of witnesses, but opposes recording the prosecutor's comments to the jury. The U.S. Attorneys' Advisor Committee argues that this would "formalize what should be an informal working relationship between grand jurors and government attorneys." (From position paper submitted to Section Council, May 14, 1977, p. 7.) It is exactly that "informal" relationship which invites subtle abuses of the grand jury, the Section believes; that is itself a cogent argument in favor of recordation. The Advisory Committee further argues that a recordation requirement would "impose severe and undue administrative burdens" (p. 7 position paper, *supra*); and the Justice Department points to "unavailability of court reporters in many areas" (p. 103 of House Judiciary Subcommittee hearings record, *supra*). There are real benefits to be gained by recording matters before the grand jury—for the prosecution, as well as for the defense. Raising administrative hurdles is *not* sufficient argument against this proposal, which truly goes to the integrity of the grand jury process.

16. This Principle—which has been added since February—is identical to National District Attorneys Association Prosecution Standard (§ 14.4B) and the *ABA Standard for Criminal Justice Relating to the Prosecution Function* (§ 3.5(b)). It thus already is Association policy. It would prohibit the prosecutor from making statements or arguments to influence the grand jury action in a manner which would not be permitted before the trial jury. This is essential because of the prosecutor's role as the only legally-trained person before the lay grand jurors. As the commentary to the ABA Standards notes, "A prosecutor should not take advantage of his role as the *ex parte* representative of the state before the grand jury to unduly or unfairly influence it in voting upon charges brought before it. In general, he should be guided by the standards governing and defining the proper presentation of the state's case in an adversary trial before a petit jury." Because of the secret nature of the grand jury proceedings, the lack of direct court supervision, and the fact that the prosecutor's is a unilateral presentation, he must avoid unduly influencing the grand jurors by means which would not be appropriate in the public courtroom before a petit jury. This is essential to prevent the grand jury's becoming a mere echo of the prosecution. As one writer has noted, "[G]rand jurors must place enormous trust in the prosecutor's guidance. It is he, after all, who tells them what the charge is, who selects the facts for them to hear, *who shapes the tone and feel of the entire case . . .*" [emphasis added] (Antell, "The Modern Grand Jury: Benighted Super-government," 51 A.B.A.J. 153, 154 (1965). The Justice Department has expressed its support for this Principle.

17. Principle No. 17 calls on the ABA to broaden its previously-adopted policy concerning immunity to specify proper instances in which immunity should be issued: *when it is in the public interest*; when there is no other reasonable way to elicit the testimony; and when the witness has refused to testify, or stated he will invoke the Fifth Amendment. This is intended to insure that grants of immunity are carefully considered prior to issuance and that they are not issued when other means could be used to obtain the needed information. The ABA House of Delegates (at the 1975 Annual Meeting) has already supported amendment of 18 U.S.C. 6002 to provide "transactional" immunity, rather than "use" immunity provided under present federal law. Under transactional immunity, a witness may be statutorily compelled to give testimony which might otherwise violate the privilege concerning self-incrimination, provided the witness is given immunity from prosecution for any crime referred to in the testimony. Under 18 U.S.C. 1525(b), Part V of the Organized Crime Control Act of 1970, and under *Kastigar* v. *U.S.*, 406 U.S. 441 (1972), only "use" immunity need be offered. This merely prevents the prosecution from using the actual testimony (or leads derived therefrom) in any subsequent criminal prosecution. Some 31 states currently provide transactional immunity, according to the House Judiciary Subcommittee Hearings record (*supra*). The National Conference of Commissioners on Uniform State Laws has supported it, in the Uniform Rules of Criminal Procedure (Rule 732(b)). "Use" immunity, while Constitutional (see *Kastigar*, *supra*), should be rejected for several practical reasons. It is not only susceptible for prosecutorial abuse, but can be subtle invitation to perjury on the part of the witness. Since the witness knows what he says can be used to impeach him, it can be encouragement to slant his testimony in a manner most favorable to him. Testimony thus obtained is not accurate. Witness cooperation is essential to an effective grand jury investigation, yet the uncertainly generated by "use" immunity, and the difficulties in determining the scope of the protection afforded the witness, can chill and inhibit his cooperation. Transactional immunity better encourages accurate testimony and minimizes witness resistance to questioning. The small number of actual successful prosecutions of immunized witnesses with "use" immunity indicates that a return to transactional immunity will not remove a significant weapon against organized crime (see 14 *American Criminal Law Review* 275, 282, wherein U.S. Department of Justice reports that, in practice, few witnesses granted "use" immunity described in their immunized testimony). "Use" immunity represents the most grudging interpretation of the Constitutional right against self-incrimination, the Section believes.

18. Several of the grand jury bills pending before the 94th Congress include a provision requiring approval of immunity grants by a majority vote of the grand jury. While many supporters of this provision believe that it would help to insure the independence of that body, the Section does not support such a requirement. Indeed, Principle No. 18 would provide that immunity be granted on prosecution motion *in camera* by the trial court which convened the grand jury; the standards outlined in Principle No. 17 would be followed in determining whether such a grant should be made. Lay grand jurors are not adequately oriented to make determinations regarding immunity grants, the Section believes. This is properly an executive function with court overview.

19. Principle No. 19 would forbid making the granting of immunity in grand jury proceedings a matter of public record before the issuance of an indictment or testimony in any cause. To make public such grants undercuts the function of the grand jury by selectively publicizing its investigations—and has the define potential of harm to those to whom immunity is alleged to have been granted. The U.S. Department of Justice had indicated its agreement with this Principle.

20. The question of multiple representation of witness in grand jury proceedings has recently received increasing attention both from members of the private bar and from government attorneys. (See e.g., Cole, "Time for a Change: Multiple Representation Should be Stopped," 2 *Journal of Criminal Defense* 149 (1976); and Speech May 3, 1977 to Chicago Bar Association on "The Perils of Multiple Representation in Criminal Antitrust Proceedings." by Richard Favretto, Deputy Director of Operations, Antitrust Division, U.S. Department of Justice.) Recent Court opinions have also tried to grapple with this question (see, e.g., *In Re Investigation Before April, 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976)). Principle No. 20 has been substantially rewritten by the Section since February to strengthen its provisions, to meet concerns raised by critics of the proposal to allow counsel in the grand jury room. Opponents of that Principle have focused much of their objection on problems which could arise when one attorney represents more than one witness in a grand jury proceeding.

The Section has redrafted Principle No. 20 to spell out the professional responsibility of an attorney not to continue multiple representation of clients in a grand jury proceeding if conflicts can arise. As originally worded, the Principle provided that, "If the court determines that there is multiple representation of witnesses in grand jury proceeding, it shall advise the witnesses that they have the right to be separately represented by counsel, and explain that conflicts of interest may otherwise arise." Under the newly-redrafted Principle, the burden is initially placed on the defense attorney to assume responsibility for remedying situations when conflicts from multiple representation arise or are likely to arise. If the court finds that this principle is not being followed, however, it would have the authority to order separate representation. The phrase "giving appropriate weight to an individual's right to counsel of his or her own choosing" has been added to avoid a situation in which the court summarily excludes certain counsel from representing any witness in the proceeding. In adopting this Principle, the Section considered multiple representation to include the following: two or more witnesses in a grand jury proceeding who may have conflicting interests; a witness and a potential defendant in a grand jury proceeding; or a witness whose counsel fees are paid by a third party who is a witness or potential defendant in a grand jury proceeding. The significant ethical concerns involved in multiple representation when the clients have actual or potential conflicting interests; the potential compromises to the Constitutional guarantee to effective assistance of counsel; and the potential for inhibiting the public's right to an effective grand jury investigation require the private bar to deal seriously with this issue. As Alan Y. Cole noted in a recent article (*supra*), "To avoid the Scylla of conflict, the defense attorney with multiple clients will likely become engulfed in the Charybdis of ineffective assistance of counsel . . ." Benjamin Civiletti, head of the Justice Department's Criminal Division, has expressed his support for this Principle as now formulated.

21. Principle No. 21 provides that the confidential nature of grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny. Shielding their identity is necessary to prevent unjust harm to witnesses and potential defendants. The practice in some jurisdictions of having witnesses exposed to public and press as they emerge from the grand jury room is an unfair one—it taints the witnesses' reputations by the mere fact of their appearance. The importance of maintaining the secrecy of grand jury proceedings has already been recognized by the Association, when, in its 1975 policy, it urged strengthened penalties for unauthorized disclosure of grand jury information. The Justice Department supports this Principle.

22. The Section supports legislation which would mandate the court's charging grand jurors orally on impanelling as to their duties and responsibilities; written copies of the charge would then be distributed to the grand jurors for their continuing reference. Detailing to grand jurors their powers, responsibilities and rights will help to insure their comprehensive understanding of their proper role, and will thereby help to strengthen the independence and fair functioning of the grand jury. Several of the bills pending in the 95th Congress contain such provisions, as does pending legislation in several states. The Department of Justice has indicated its support for this Principle.

23. In adopting Principle No. 23, the Section urges the Association to go on record as recognizing potential abuses of newspersons who are called as witnesses before the grand jury and then claim a First Amendment privilege not to testify. In some prosecutors' office around the country, office policy already exists forbidding the calling of journalists before the grand jury. As the U.S. Supreme Court has noted, "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification . . . We do not expect courts will forget that grand juries must operate within the limits of the First Amendment, as well as the Fifth." *Branzburg* v. *Hayes*, 408 U.S. 665, at 707–708 (1972). Supporting the need for legislation in this area, a Newspaper Guild spokesperson declared in testimony before the House Judiciary Subcommittee hearings in June 1977, "The issuance of subpoenas to news gatherers has become a veritable contagion . . ." Principle No. 23 is further intended to express Section concern about the increasing number of instances nationally in which criminal defense lawyers are themselves being subpoenaed to testify before grand juries. Abuse of grand jury subpoenas used against persons having recognized confidential relationships appears to be increasing; this can drive a wedge of distrust between defense attorney and client, and has a chilling effect on 6th Amendment rights and confidential relationships. The Section purposely did not go into further detail in

this proposed Principle, believing that an expression of Association concern about present abuses of the grand jury vis-a-vis the press and the criminal defense bar would call attention to what appears to be a growing problem. The Justice Department has expressed its support for this Principle.

24. In August, 1975, the ABA House of Delegates opposed amendment of the Recalcitrant Witness Statute (28 U.S.S. 1826(a)) to reduce from 18 to 6 months the maximum period of confinement on a civil contempt order for refusal to testify before a grand jury. The Section is now seeking revision of the previously-adopted position. This Princple would support—as provided in several pending grand jury reform bills—a maximum of six months confinement. It is believed that this length of confinement should be sufficient to compel a witness to testify. (It should be noted that the ABA has previously gone on record supporting legislation to prohibit multiple confinement upon a subsequent refusal by a witness to testify about the same transaction.) The Section now believes that this is sufficient to compel a witness to testify, while avoiding the longer, more punitive confinement. This has been an area in which many abuses have allegedly occurred (*See* record of 1976 hearings before House Judiciary Subcommittee on Immigration, Citizenship and International Law). The Section thus urges ABA support for a 6-month maximum.

(Note: Amended from 6 to 12 months by the ABA House of Delegates, August, 1977.)

25. Rather than specifying proposed sanctions for violation of each proposed grand jury legislative Principle outlined herein, the Section simply notes that the court should exercise its power to impose appropriate sanctions when the proposed Principles are violated. Such sanctions will obviously be fashioned in any proposed legislation; but it is not the Section's intent, in proposing ABA policy on the grand jury, itself to suggest statutory language.

* * * * * * *

Conclusion

When the grand jury was created in 12th Century England, it was intended to serve as a shield between the citizen and the Crown. In recent years, the grand jury has come under increasing attack; observers charge that the grand jury system is riddled with abuse, and is no longer a shield for the citizen but a shield for the government. Critics declare that it has departed from its proper Constitutional function of protecting citizens from unwarranted prosecutions.

The Section of Criminal Justice, based on the work of its Grand Jury Committee, chaired by experienced prosecutor Richard E. Gerstein, believes that reforms are needed to insure fairness—but without undercutting the grand jury's legitimate functions or destroying it as an institution. While legitimate objections to these Principles have been raised, resistance to change from those within the criminal justice system cannot in itself be sufficient reason to reject well-considered—and needed—proposals.

The Section urges the House of Delegates to support the 25 legislative Principles. The Congress and many state legislatures are now acting on grand jury reform proposals; professional, media and public focus on this subject cannot be expected to abate. The Association—as in its landmark Standard for Criminal Justice project—has long been in the forefront of criminal justice improvement.

ABA leadership is now needed to help fashion well-reasoned, workable and effective grand jury reform legislation.

Respectfully submitted.

B. JAMES GEORGE, Jr.,
Acting Chairperson.

[From the Congressional Record, Nov. 4, 1977]

REFORMING THE GRAND JURY

(By Hon. John Conyers, Jr., of Michigan)

IN THE HOUSE OF REPRESENTATIVES

Thursday, November 3, 1977.

Mr. CONYERS. Mr. Speaker, it has frequently been observed that the grand jury is one of the most powerful yet least accountable institutions in the criminal justice system. A witness may be ordered to appear anywhere at a moment's

notice without being told the nature of the inquiry. Any and all questions may be asked, pertinent or not to the investigation at hand. Witnesses whom prosecutors consider uncooperative may be jailed for contempt without recourse to a jury trial. Rarely is the record of grand jury proceedings available to witnesses. Though proceedings in theory are secret, testimony is frequently leaked. Prosecutors enjoy virtually unchecked powers. Mr. Justice Black's observation more than 20 years ago that grand juries "are the breeding place for arbitrary misuse of official power" has been confirmed time and again by its practice in recent years.

The systematic abuse of the grand jury and the means to reform it are the subject of an extraordinarily lucid and intelligent book, "The Grand Jury: An Institution on Trial," written by Federal Judge Marvin E. Frankel and Gary P. Naftalis, former U.S. Attorney for the Southern District of New York. As the House Subcommittee on Immigration, Citizenship and International Law, chaired by Representative Joshua Eilberg, considers the first comprehensive reform of the grand jury system, the Frankel/Naftalis study should play an important role in our efforts at reform. For this reason I commend to my colleagues two excellent reviews of the book, one by Sidney L. Willens, appearing in the Kansas City Times, the other by Victor Navasky, appearing in the New York Times.

The articles follow:

REFORMING GRAND JURIES AN URGENT NEED

(By Sidney L. Willens)

Did you visit a cocktail lounge or country club recently? Do you travel? Do you play tennis or golf? With whom? By the way, who are your friends? What kind of people are they?

Imagine yourself being asked these questions under oath in a closed room. A federal prosecutor is quizzing you. Your audience is composed of 23 average citizens who don't know why the questions are being asked. Neither do you.

It's nobody's business who your friends are, you say. After all, you committed no crime. You want a lawyer. Sorry, you can't have one. Either you answer the prosecutor's questions or risk going to jail.

You finally answer the questions. But you are careful. You are nervous. Nobody told you what the grand jury is investigating. After all, there are thousands of federal crimes and regulations. You may innocently say something untrue. The prosecutor may believe you lied when you didn't intend to. You remind yourself perjury is a crime all by itself. You tell the prosecutor everything he wants to know the best way you know how. You leave the room, relieved that the ordeal is over.

Next morning a newspaper quotes the prosecutor as saying you are a part of an investigation into "criminal activity." You are hopping mad. You want to sue somebody. Your lawyer says a lawsuit is futile.

"But the prosecutor ruined my reputation," you say. "Don't I have any rights?"

"Not before a grand jury," your lawyer replies. "A grand jury is the only federal accusatory body recognized by the Constitution."

Your lawyer patiently explains that prosecutors tell a grand jury what they want it to hear. A grand jury witness appears without a lawyer to answer questions prosecutors want to ask. Everything is secret. At least it's supposed to be. But frequently prosecutors leak grand jury testimony inside courthouses and to the news media. The law permits a grand jury to hear everything, including gossip. Even hearsay evidence can trigger an indictment.

You've heard enough from your lawyer. But you still can't understand why American citizens are sitting ducks for hundreds of United States attorneys and their assistants across the nation. A grand jury, you learned from English history, is supposed to shield citizens against nasty prosecutors.

You are right. So say federal Judge Marvin E. Frankel and Gary P. Naftalis, a former assistant United States attorney. They are authors of "The Grand Jury," with a subtitle, "An American on Trial." Frankel is the judge who stirred law enforcement officials last year with another book, "Criminal Sentences: Law Without Order."

Judge Frankel and Naftalis concede that the 800-year-old grand jury system, abolished in England 44 years ago, is a "terrifying weapon" that "badgers, traps, scars and defames grand jury witnesses."

What can be done about it? The authors say those who want to do away with the grand jury system are wrong. To abolish the system requires changing the "indicting function" of the Fifth Amendment. Nobody has tinkered with the Bill of Rights ever. The authors don't want to start now. It's too dangerous a precedent.

Their book calls for an overhaul of the federal grand jury system. The authors remind us that a grand jury is really an arm of the court. So federal judges should tell grand jurors of their power over witnesses, documents and subjects to be investigated.

"The Grand Jury" calls for a lawyyer for every grand jury witness who wants one inside the grand jury room. But regulate the lawyer's role, the authors say. Don't let a defense lawyer turn a grand jury proceeding into a slugging match. Provide a lawyer at public cost to any grand jury witness who can't afford one.

What galls the authors of "The Grand Jury" is the way some federal prosecutors misuse a grand jury's subpoena power. A grand jury can yank you and me from one end of the nation to the other at a moment's notice. That's not fair, the authors say. Give a witness at least seven days' notice. And don't command a witness to walk into a grand jury room in ignorance. Tell witnesses the "subject matter" of a grand jury investigation.

Every witness deserves a transcript of his or her remarks inside the grand jury room. Recorded testimony might put a stop to the way some prosecutors manipulate jurors. "Supposed interest in secrecy is no argument against giving a witness a transcript," the authors write. "The embattled witness should have an opportunity to correct innocent errors in testimony."

When all is said and done, the authors add, there is too much secrecy and too little secrecy in grand jury proceedings. Prosecutors leak testimony often. The authors call for a law to permit a grand jury witness to sue prosecutors without proof of "actual damages" if it can be shown a prosecutor maliciously leaked testimony.

In Congress and across the nation movements are afloat to abolish or reform the grand jury system. After reading "The Grand Jury you will probably be persuaded to keep the grand jury system, but only if Congress follows the recommendations of Judge Frankel and Gary Naftalis. Meanwhile you can hope no federal marshal with a grand jury subpoena knocks on your door.

Not So Grand

(By Victor S. Navasky)

Back when New York City was believed to be on the brink of bankruptcy, I heard only one persuasive argument for default: That Marvin E. Frankel, United States District Court Judge, would by virtue of presiding over the proceedings replace Abe Beame as our de facto Mayor.

The last time out Frankel, one of our nation's most thoughtful jurists, gave us "Criminal Sentences: Law Without Order," a brief but compelling call for sentencing reform which quickly became the conventional wisdom. (He then outraged those who had praised his guidelines by following them—his sentence of Bernard Bergman, the nursing home miscreant, was informed by the evidence as presented in the court of the Southern District of New York rather than the court of public opinion.)

Now he has teamed up with Gary P. Naftalis, formerly an Assistant United States Attorney for the Southern District, to update an analysis of the grand jury which originally appeared as a special issue of The New Leader magazine. Written for rather than down to, what lawyers like to call The Layman, it is a model of its kind, i.e., concise, clear, fair and as logical as the life of the law permits.

First, there is a brief section tracing the origins and development of the grand jury, including some significant if unfamiliar information. Contrary to the cliche, it was originally conceived 800 years ago not as a shield to protect the innocent against arbitrary prosecution. Rather, the first grand juries were drawn from the neighborhoods in which they sat and the grand jurors themselves supplied their own "evidence." Frequently acting on rumors and gossip—a sort of trial by yenteh—the grand jurors would decide whose arm to dip in the scalding water under the prevailing "trial by ordeal." Not until 1681, when a grand jury refused

to obey King Charles II's wish that they indict the Earl of Shaftesbury (a Protestant who opposed the King's attempt to re-establish the Catholic Church in England), did it establish its theoretical role as a shield against oppression.

Next, there is a section contrasting "Theory and Practice." In theory, grand juries determine if there is "sufficient evidence to warrant putting the subject of an investigation to trial, where the question of guilt or innocence is determined." In fact, as constitutional lawyer Frank Donner (whom the authors curiously neglect) has pointed out, during the Nixon years the Justice Department tried to establish a "grand jury network" whose purpose was less to solve crimes than to compile dossiers. In theory, grand jury deliberations are secret, thereby protecting the innocent and also insuring maximum freedom and noninterference with grand jury deliberations. In fact, as Mario Biaggi and other victims of the process will attest, they can be about as secret as a Bella Abzug whisper, with the prosecutor leaking only that information he has not already announced in a press conference.

In theory, special grand jury reports can perform something of an ombudsman function (the authors cite the Watergate grand jury report with reference to President Nixon). In fact, grand jury reports, as the authors indicate, pose grave dangers of largely unanswerable character assassination and vigilantism.

After exploring the implication of grand jury selection, composition and procedures, the authors consider "Problems and Prescriptions." They carefully list the pros and cons for each proposed reform and then render their verdict: They would guarantee witnesses' rights by such devices as permitting counsel in the grand jury room, making transcripts available to grand jury witnesses, prohibiting prosecutor press briefings and imposing substantial fines on public officials convicted of leaking grand jury proceedings.

But suppose a prosecutor subpoenas a witness knowing that the witness—out of loyalty or fear—will refuse to cooperate. Should the witness be called, granted compulsory immunity and jailed for contempt? The authors say don't call him, but instead of considering the social policy implications of granting compulsory immunity they assume its inevitability and move on to discuss what ought to be its scope (and they favor cutting down penalties for noncooperation). On these and other issues, such as whether a grand jury's failure to indict ought to preclude subsequent grand juries from indicting on the same evidence, the authors are reluctant to go with the reformers. Should prosecutors be required to introduce exculpatory evidence in grand jury proceedings as a means of protecting defendants? "The cure may be worse than the disease."

The evidence of abuse—even as presented by the fair-minded Frankel and Naftalis—would seem to pose a greater danger than the reforms they endorse can correct. And yet they are content to reform rather than abolish. Their two main reasons: First, if the grand jury disappears, the indicting and investigative functions, including the power to compel testimony, will exist elsewhere, and who is to say any of the alternatives are better? A fair enough argument, but it makes one wish that the authors had included a comparative analysis of the experience of the English, who abolished the grand jury in 1933.

Second, they argue that one doesn't tinker with the Bill of Rights. (Grand jury abolitionists in the Congress would amend the Fifth Amendment, a revision which would be the first change ever made in the Bill of Rights.) For me this is the more persuasive argument. But that's because once our Congressional geniuses start to whittle away at the Fifth Amendment one suspects that they will not with the grand jury clause.

The grand jury, which does by compulsion what Woodward and Bernstein can only do by stealth, which can stigmatize by subpoena, harass with impunity, embarrass with publicity and entrap with abandon (via contempt proceedings for reluctant witnesses) demands systematic and sustained attention. In the absence of Robert Redford and Dustin Hoffman at our neighborhood theater in "The Grand Jury Story" we can be grateful for Frankel and Naftalis at our neighborhood bookstore.

APPENDIX 3

SUBMISSIONS

1. Letter from Carl L. Shipley, Esquire to Joshua Eilberg dated February 9, 1977.
2. Colorado Grand Jury Proposals:
   a. Letter from Dale Tooley to Joshua Eilberg dated March 16, 1977—with attachment—Colorado S.B. No. 186.
   b. Letter from Dale Tooley to Joshua Eilberg dated March 24, 1977.
   c. Letter from Dale Tooley to Joshua Eilberg dated July 1, 1977—with attachment—New Colorado Grand Jury Law.
3. California Attorneys for Criminal Justice Proposals:
   a. Letter from Donald C. Smaltz to Joshua Eilberg dated April 18, 1977.
   b. Letter from Donald C. Smaltz to Martin H. Belsky dated April 20, 1977—with attachment—Excerpts from California Penal Code.
4. Letter from Thomas W. McAliley, Esq., to Joshua Eilberg dated April 14, 1977.
5. New Jersey Proposals:
   a. Letter from Harvey Weissbard to Martin H. Belsky dated May 13, 1977.
   b. Summary of New Jersey Bar Association Report.
   c. Memorandum to the State Bar Association Grand Jury Study Committee from Edwin H. Stern dated April 22, 1977 with enclosure.
6. State Bar of Michigan Position:
   a. Letter from N. L. Smokler, Esq., and John W. Tapp, Esq., to Joshua Eilberg dated May 4, 1977.
7. Letter from Robert D. Powell, Esq., to Joshua Eilberg dated April 5, 1977.
8. Position of National Ministeries—Letter from Atha J. Baugh to Joshua Eilberg dated May 5, 1977.
9. Letters of Richard C. Schwartz, Esq.:
   a. Letter from Richard C. Schwartz to Joshua Eilberg dated May 3, 1977—with enclosures—*U.S.* v. *Tweel; U.S.* v. *Payner.*
   b. Letter from Richard C. Schwartz to Joshua Eilberg dated May 26, 1977.
   c. Letter from Richard C. Schwartz to Garner J. Cline dated May 26, 1977—with enclosures, IRS Manual and Memorandum to Members, Subcommittee on Standards of Practice Civil and Criminal Penalties Committee, ABA dated December 3, 1976.
10. Letter from Hon. William J. Campbell to Joshua Eilberg dated May 23, 1977—with attachment—Article—Eliminating the Grand Jury—and Prepared Statement of Honorable William J. Campbell, dated September 28, 1977.
11. Letter from William M. Brodsky, Esq., to Joshua Eilberg dated May 26, 1977.
12. Letter from Peter W. Rodino, Jr., to Dominic P. Gentile dated June 2, 1977, and Article by Dominic P. Gentile, The Grand Jury's Role in the Defense Arsenal.
13. Statement of Church of the Brethren by G. Wayne Glick dated June 9, 1977.
14. Position of Region 2, Sigma Delta Chi—Letter from Val Hymes to Joshua Eilberg dated June 29, 1977.
15. Letter from Hon. William S. Sessions to Joshua Eilberg dated July 1, 1977—Position of District Judges Association of Fifth Circuit.
16. Letter from John F. Keenan to Edward I. Koch, copy sent to Joshua Eilberg dated July 11, 1977—with enclosures—In re Groh.
17. Letter from Thomas E. Patton, Esq., to Joshua Eilberg dated July 26, 1977—with attachment—Statement of Thomas E. Patton.

18. Submission to Hearings on Grand Jury Abuse by Alliance for Preservation of Religious Liberty by Eugene N. Harley.
19. Position of Judges of Second Circuit Court of Appeals—Letter from Hon. Walter R. Mansfield, William H. Mulligan, William H. Timbers, Murray I. Gurfein, Ellsworth A. Van Graafeiland, and Thomas J. Meskill to Joshua Eilberg dated August 2, 1977—with attachment and Reponse of Honorable Joshua Eilberg.
20. Letter from Hon. Virgil Pittman to Joshua Eilberg dated August 16, 1977.
21. Letter from Hon. Daniel H. Thomas to Joshua Eilberg dated August 19, 1977.
22. Position of the Christian Church (Disciples of Christ) of Woodland, California—Letter from John R. Dewey to Joshua Eilberg dated August 25, 1977.
23. Statement of Abraham J. Multer.
24. Letter from Hon. John B. Breckinridge to Honorable Joshua Eilberg, dated October 12, 1977, with attachment—Position of Kentucky Bar Association.
25. Submission to Subcommittee on Immigration, Citizenship, and International Law by Committee for Grand Jury Reform, October 1977.
26. Letter from Richard A. Givens to Committee on the Judiciary, dated September 30, 1977—with Report of New York County Lawyers' Association on Grand Jury Reform Act of 1977.
27. Response to Statement of Benjamin R. Civiletti by Ad Hoc Committee to Investigate the Federal Grand Jury—dated November 14, 1977.
28. Submission—as to Arthur Maren case:
    (A) Leon Freedman and Phillip Hirschkop—Memorandum of Law
    (B) Letter of November 10, 1977, from Patrick Tobin, Washington Representative, International Longshoremen's and Warehousemen's Union.
    (C) Letter of November 25, 1977, from Benjamin R. Civiletti to Honorable Joshua Eilberg with attachments.

SHIPEY SMOAK & AKERMAN,
Washington, D.C., February 19, 1977.

Hon. JOSHUA EILBERG,
Committee on the Judiciary,
House Office Building, Washington, D.C.

DEAR CONGRESSMAN EILBERG: Thank you for January 26 letter concerning the above referred to Grand Jury Bill and the Congressional Record pages explaining the bill.

During the 30 years since I graduated from Harvard Law School, I have been in active private practice of the law, and while I do not deal primarily in criminal law, I have had occasion from time to time in handling of corporate and securities matters to encounter the grand jury problem, and believe me it is a real problem. You touch on most of the problems and would correct them, such as violations of grand jury secrecy, etc.

However, I question two provisions of the bill, and urge you to reconsider them. (I do not think a grand jury should be composed of less than 23 people—too many times in my life in the law I have seen how one person can dominate a small group.) The larger the group, the more opportunity for different minds to consider different aspects of the problem, and come to independent considered judgments. Nothing is more important than the reputation and freedom of our citizens, and so often there are the grossest trespasses against these basic civil rights by grand jury leaks, politically inspired presentations to grand juries, abuse of political power by U.S. attorneys, and similar types of deprivation of rights. A U.S. attorney absolutely dominates a grand jury, both in terms of what is presented to it and how it is presented. If he wants an indictment, he selects the witnesses and documents to get the indictment, regardless of the merits of the case. I would strongly urge that the size of the grand jury be kept at 23 people—the law is clear that it only takes 12 to indict, and every potential defendant is entitled to have 23 different Americans from different religious, geographic, economic, racial, and other segments of the community consider his case. As soon as you reduce the number, you deprive him of the protection of diversity.

The other matter which I think is terribly important is this business of giving a target notice and an opportunity to appear before a grand jury. (Everybody who has ever practiced law knows that the grand jury is simply a tool of the U.S. attorney and does exactly what he wants.) Indeed, a grand jury is handed a pretyped indictment and the foreman is asked to sign it, the work having been done by the U.S. attorney's office before the matter is even presented to a grand jury. From the standpoint of a target defendant, the most important step in the whole

chain of law enforcement is what happens before the grand jury. Once he is indicted, regardless of the presumption of innocence, there is a presumption of guilt on the part of the judge and the petit jury, and all the protestations to the contrary are sheer bunk. It is uphill all the way for anybody who has been indicted, and you must surely know from your own experience in life. I have tried many times to get witnesses before a grand jury, and the U.S. attorney answers me that he has fairly presented it to the foreman, which I know is an outright lie. By manner or implication, he manages to induce the foreman to refuse to hear a witness. Why in the world would a grand jury not hear both sides of a case before arriving at an indictment? Why in the world should anybody in any position in life who is called upon to make a decision involving the life or property of another person, should they not have before them all arguments and evidence each way before they come to a critical judgment? I simply cannot understand the willingness of judges and others to go along with the idea that a grand jury somehow is an instrument to protect the innocent. It is just the opposite—it is a tool used by U.S. attorneys to inflict their views on the community, sometimes they are right, and sometimes they are grossly wrong, and all the time they are subject to the human pressures and biases and prejudices which confound the thinking of us all.

I hope you can consider these two points very seriously and give some thought to striking a real blow for liberty and reconstituting the grand jury as a shield for the innocent as well as an instrument for catching the guilty.

You are doing a great job for America, and we all are in your debt.

Sincerely yours,

CARL L. SHIPLEY.

STATE OF COLORADO,
OFFICE OF THE DISTRICT ATTORNEY,
Denver, March 16, 1977.

HON. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship and International Law, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN EILBERG: Thank you for your letter of January 25, 1977, and for the information which you enclosed.

I thought you might be interested in Senate Bill 186 concerning grand jury reform, pending before the Colorado legislature. Enclosed is a copy of this legislaton, in the form in which it was approved by the Senate Judiciary Committee. It was approved on second reading, and we expect it will clear the Senate within the next two weeks. There will be two amendments to it, one which will leave to the discretion of the prosecutor the form of the subpoena and any required notice thereon, and the other restricting grand jury reports. That restriction will probably require that a subject of a report have an opportunity to appear and to testify and that in no event could a report be issued without the approval of a judge who determines that public release of a report is important to the public interest.

Because so many of these changes encompass elements of the legislation which you are proposing, and which Dade County State's Attorney Richard Gerstein advocates, I am sending this information to you and to Mr. Gerstein.

Yours truly,

DALE TOOLEY.

The committee recommends that Senate Bill No. 186 be amended as follows and, as so amended, be referred to the Committee of the Whole with favorable recommendation:

Amend printed bill, page 1, strike everything below the enacting clause, and substitute the following:

SECTION 1. 16-5-204, Colorado Revised Statutes 1973, is Repealed and Reenacted, With Amendments, to read:

16-5-204. *Witnesses before a grand jury procedure.* (1) (a) Whenever a witness in any proceeding before any grand jury 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 prosecuting attorney may submit an application to the court for an order directing the witness to show why the witness should not be held in contempt. After submission of such application and a hearing at which the witness may be represented by counsel, the court may, if the court finds that such refusal

was without just cause, hold the witness in contempt and order the witness to be confined. Such confinement shall continue until such time as the witness is willing to give such testimony or provide such information; however, the court may release the witness from confinement if the court determines that further confinement will not cause the witness to give such testimony or provide such information. No period of such confinement shall exceed the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, and in no event shall such confinement exceed six months.

(b) If a witness has been confined in accordance with paragraph (a) of this subsection (1), he may, upon petition filed with the court, request a hearing to be held within ten days to review the contempt order at which hearing he shall have the right to be represented by counsel. The court, at the hearing, may rescind, modify, or affirm the order.

(c) In any proceeding conducted under this section, counsel may be appointed for a person financially unable to obtain adequate assistance.

(2) No person who has been imprisoned or fined by a court for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events in any proceeding before a grand jury impaneled before any district court shall again be imprisoned or fined for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events before any grand jury.

(3) Upon impanelment of each grand jury, the court shall give to such grand jury adequate and reasonable written notice of and shall assure that the grand jury reasonably understands the nature of:

(a) Its duty to inquire into offenses against the criminal laws of the state of Colorado alleged to have been committed;

(b) Its right to call and interrogate witnesses;

(c) Its right to request the production of documents or other evidence;

(d) The subject matter of the investigation and the criminal statutes or other statutes involved, if these are known at the time the grand jury is impaneled;

(e) The duty of the grand jury by an affirmative vote of nine or more members of the grand jury to determine, based on the evidence presented before it, whether or not there is probable cause for finding indictments and to determine the violations to be included in any such indictments; and

(f) The requirement that the grand jury may not find an indictment in cases of perjury unless at least two witnesses to the same fact present evidence establishing probable cause to find such an indictment.

(4) (a) Each grand jury subpoena shall contain the following advisement prominently displayed on the front of the subpoena:

NOTICE

(I) You have the right to retain an attorney to represent you and to advise you regarding your grand jury appearance.

(II) Anything you say to the grand jury may be used against you in a court of law.

(III) You have the right to refuse to answer questions if you feel the answers would tend to incriminate you or to implicate you in any illegal activity.

(IV) If you cannot afford or obtain an attorney, you may consult with the public defender's office, or request the court to appoint an attorney to represent you.

(b) Any witness who is not advised of his rights pursuant to paragraph (a) of this subsection (4) shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he testifies or any evidence he produces, nor shall any such testimony or evidence be used as evidence in any criminal proceeding, except for perjury, against him in any court.

(c) In any proceeding before the grand jury, if the prosecuting attorney has written notice in advance of the appearance of a witness that such witness intends to exercise his privilege against self-incrimination, such witness shall not be compelled to appear before the grand jury unless a grant of immunity has been obtained.

(d) Any witness subpoenaed to appear and testify before a grand jury or to produce books, papers, documents, or other objects before such grand jury shall be entitled to assistance of counsel during any time that such witness is being

questioned in the presence of such grand jury, and counsel may be present in the grand jury room with his client during such questioning. However, counsel for the witness shall be permitted only to counsel with the witness and shall not make objections, arguments, or address the grand jury. Such counsel may be retained by the witness or may, for any person financially unable to obtain adequate assistance, be appointed in the same manner as if that person were eligible for appointed counsel. An attorney present in the grand jury room shall take an oath of secrecy. If the court, at an *in camera* hearing, determines that counsel was disruptive, then the court may order counsel to remain outside the courtroom when advising his client.

(e) Once a grand jury has returned a no true bill based upon a transaction, set of transactions, event, or events, a grand jury inquiry into the same transaction or events shall not be initiated unless the court finds, upon a proper showing by the prosecuting attorney, that the prosecuting attorney has discovered additional evidence relevant to such inquiry.

(f) A certified or authorized reporter shall be present at all grand jury sessions. All grand jury proceedings and testimony from commencement to adjournment shall be reported. The reporter's notes and any transcripts which may be prepared shall be preserved, sealed, and filed with the court. No release or destruction of the notes or transcripts shall occur without prior court approval.

(g) Upon application by the prosecutor, or by any witness after notice to the prosecutor, the court, for good cause, may enter an order to furnish to that witness a transcript of his own grand jury testimony, or minutes, reports, or exhibits relating to them.

(h) Any witness summoned to testify before a grand jury, or an attorney for such witness with the witness's written approval, shall be entitled, prior to testifying, to examine and copy at the witness's expense any statement in the possession of the prosecuting attorney or the grand jury which such witness has made that relates to the subject matter under inquiry by the grand jury. If a witness is proceeding in forma pauperis, he shall be furnished, upon request, a copy of such transcript and shall not pay a fee.

(i) No person subpoenaed to testify or to produce books, papers, documents, or other objects in any proceeding before any grand jury shall be required to testify or to produce such objects, or be confined as provided in this section, for his failure to so testify or produce such objects, if upon filing a motion and, upon an evidentiary hearing before the court which issued such subpoena or a court having jurisdiction under this section, the court finds that:

(I) A primary purpose or effect of requiring such person to so testify or to produce such objects before the grand jury is or will be to secure testimony for trial for which the defendant has already been charged by information, indictment, or criminal complaint.

(II) Compliance with a subpoena would be unreasonable or oppressive;

(III) A primary purpose of the issuance of the subpoena is to harass the witness;

(IV) The witness has already been confined, imprisoned, or fined under this section for his refusal to testify before any grand jury investigating the same transaction, set of transactions, event, or events; or

(V) The witness has not been advised of his rights as specified in paragraph (a) of this subsection (4).

(j) Any grand jury may indict a person for an offense when the evidence before such grand jury provides probable cause to believe that such person committed such offense.

(k) The district court before which the indicted defendant is to be tried shall dismiss any indictment of the grand jury if such district court finds, upon the filing of a motion by the indicted defendant based upon the grand jury record without argument or further evidence, that the grand jury finding of probable cause is not supported by the record.

(l) Any person may approach the prosecuting attorney or the grand jury and request to testify or retestify in an inquiry before a grand jury or to appear before a grand jury. The prosecuting attorney or the grand jury shall keep a record of all denials of such requests to that prosecuting attorney or grand jury, including the reasons for not allowing such person to testify or appear. If the person making such request is dissatisfied with the decision of the prosecuting attorney or the grand jury, such person may petition the court for hearing on the denial by the prosecuting attorney or the grand jury. If the court grants the hearing, then the court may permit the person to testify or appear before the

grand jury, if the court finds that such testimony or appearance would serve the interests of justice.

(m) The foreman, or acting foreman when designated by the court, of the grand jury may swear or affirm all witnesses who come before the grand jury.

(n) Any other motions testing the validity of the indictment may be heard by the court based only on the record and argument of counsel, unless there is cause shown for the need for additional evidence.

SECTION 2. *Safety clause.* The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

STATE OF COLORADO,
OFFICE OF THE DISTRICT ATTORNEY,
Denver, March 24, 1977.

Hon. JOSHUA EILBERG,
Chairman, House Subcommittee on Immigration, Citizenship and International Law, Washington, D.C.

DEAR CONGRESSMAN EILBERG: Recently, I had occasion to explain to a member of your staff the success our jurisdiction enjoyed in permitting witnesses before a grand jury to have their lawyers present in the grand jury room. Your staff representative asked that I send this letter outlining our experience with that system.

Before the Colorado Supreme Court rejected its Rules Committee recommendation that witnesses in a grand jury be permitted to have their attorney present, we felt authorized to grant admission, by consent of the grand jury and by court order, to lawyers for witnesses. Since December of 1974, because of the Colorado Supreme Court action, we have not felt at liberty to do so.

However, on numerous occasions attorneys for witnesses were permitted to be present. In each case, the lawyers for the witnesses accepted the usual oath of secrecy administered to the witness himself, and agreed not to be disruptive and only to counsel with the witness when necessary. It is my own conclusion that this system expedited the proceedings, because the witnesses were not constantly leaving the grand jury room to consult with counsel in the hallway. On only one occasion was there a lawyer who could be described as disruptive. That was an attorney for a witness in an investigation of alleged violence by certain militant factions. In that case, the judge called the lawyer into chambers and we were able to work out the problem with his ruling and instructions.

Even in that case, I think we would have had an even greater problem had the lawyer not been permitted to be present, since it appeared that the motivation of the witness was to delay the proceedings.

From these experiences, I have one other conclusion, and that is that the proceedings seemed to have a somewhat greater degree of fairness with the witness having counsel present in the grand jury room. It is not something on which I can put my finger, except to say that I spent many hours personally in grand jury proceedings with lawyers for witnesses present, and the tone simply seemed to be better and the search for the truth more professional. For these reasons, I find the proposal to permit witnesses to have their counsel present in the grand jury room to be an important reform, provided, of course, that the counsel is permitted only to advise the witness, not to interrupt or make statements, and provided that the court has the power to exclude a disruptive attorney.

Trusting that this information may be of some benefit, I am,

Yours truly,

DALE TOOLEY.

STATE OF COLORADO,
OFFICE OF THE DISTRICT ATTORNEY,
Denver, July 1, 1977.

Hon. RICHARD GERSTEIN,
Miami, Fla.

DEAR DICK: Colorado's grand jury reform law took effect June 20, 1977. Yesterday, the Denver grand jury conducted its first session under this new law, a copy of which is enclosed. I believe that you will find that virtually every proposal contained in the recommendations of the ABA Committee has been made a part of this statute. The only part of the new law which is still

controversial and which will be tested in the courts is Section 2, which proposes to prevent most grand jury reports from being issued.

Since Colorado is the first state in the nation, I believe, to have adopted such a proposal, I thought the final version might be of particular interest to the ABA Committee which you chair.

Yours truly,

DALE TOOLEY.

Senate Bill No. 186. By Senators Kogovesk, MacManus, Comer, Cooper, Gallagher, Groff, Hatcher, Hughes, D. Sandoval, P. Sandoval, Cole, and Woodard; also Representatives DeMoulin, Boley, Castro, DeHerrera, Eckelberry, Frank, Kirscht, Marks, Smith, Taylor, and Wayland

CONCERNING GRAND JURIES

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 16-5-204, Colorado Revised Statutes 1973, is Repealed and Reenacted, with amendments, to read:

16-5-204. *Witness before a grand jury—procedure.* (1) (a) Whenever a witness in any proceeding before any grand jury 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 prosecuting attorney may submit an application to the court for an order directing the witness to show why the witness should not be held in contempt. After submission of such application and a hearing at which the witness may be represented by counsel, the court may, if the court finds that such refusal was without just cause, hold the witness in contempt and order the witness to be confined. Such confinement shall continue until such time as the witness is willing to give such testimony or provide such information; however, the court may release the witness from confinement if the court determines that further confinement will not cause the witness to give such testimony or provide such information. No period of such confinement shall exceed the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, and in no event shall such confinement exceed six months.

(b) If a witness has been confined in accordance with paragraph (a) of this subsection (1), he may, upon petition filed with the court, request a hearing to be held within ten days to review the contempt order at which hearing he shall have the right to be represented by counsel. The court, at the hearing, may rescind, modify, or affirm the order.

(c) In any proceeding conducted under this section, counsel may be appointed for a person financially unable to obtain adequate assistance.

(2) No person who has been imprisoned or fined by a court for refusal to testify or provide other information concerning any criminal incident or incidents in any proceeding before a grand jury impaneled before any district court shall again be imprisoned or fined for a subsequent refusal to testify or provide other information concerning the same criminal incident or incidents before any grand jury.

(3) Upon impanelment of each grand jury, the court shall give to such grand jury adequate and reasonable written notice of and shall assure that the grand jury reasonably understands the nature of:

(a) Its duty to inquire into offenses against the criminal laws of the state of Colorado alleged to have been committed;

(b) Its right to call and interrogate witnesses;

(c) Its right to request the production of documents or other evidence;

(d) The subject matter of the investigation and the criminal statutes or other statutes involved, if these are known at the time the grand jury is impaneled;

(e) The duty of the grand jury by an affirmative vote of nine or more members of the grand jury to determine, based on the evidence presented before it, whether or not there is probable cause for finding indictments and to determine the violations to be included in any such indictments; and

(f) The requirement that the grand jury may not find an indictment in cases of perjury unless at least two witnesses to the same fact present evidence establishing probable cause to find such an indictment.

(4) (a) At the option of the prosecuting attorney, a grand jury subpoena may contain an advisement of rights. If the prosecuting attorney determines that an

advisement is necessary, the grand jury subpoena shall contain the following advisement prominently displayed on the front of the subpoena:

NOTICE

(I) You have the right to retain an attorney to represent you and to advise you regarding your grand jury appearance.

(II) Anything you say to the grand jury may be used against you in a court of law.

(III) You have the right to refuse to answer questions if you feel the answers would tend to incriminate you or to implicate you in any illegal activity.

(IV) If you cannot afford or obtain an attorney, you may consult with the public defender's office, or request the court to appoint an attorney to represent you.

(b) Any witness who is not advised of his rights pursuant to paragraph (a) of this subsection (4) shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he testifies or any evidence he produces, nor shall any such testimony or evidence be used as evidence in any criminal proceeding, except for perjury, against him in any court.

(c) In any proceeding before the grand jury, if the prosecuting attorney has written notice in advance of the appearance of a witness that such witness intends to exercise his privilege against self-incrimination, such witness shall not be compelled to appear before the grand jury unless a grant of immunity has been obtained.

(d) Any witness subpoenaed to appear and testify before a grand jury or to produce books, papers, documents, or other objects before such grand jury shall be entitled to assistance of counsel during any time that such witness is being questioned in the presence of such grand jury, and counsel may be present in the grand jury room with his client during such questioning. However, counsel for the witness shall be permitted only to counsel with the witness and shall not make objections, arguments, or address the grand jury. Such counsel may be retained by the witness or may, for any person financially unable to obtain adequate assistance, be appointed in the same manner as if that person were eligible for appointed counsel. An attorney present in the grand jury room shall take an oath of secrecy. If the court, at an *in camera* hearing, determines that counsel was disruptive, then the court may order counsel to remain outside the courtroom when advising his client. No attorney shall be permitted to provide counsel in the grand jury room to more than one witness in the same criminal investigation, except with the permission of the grand jury.

(e) Once a grand jury has returned a no true bill based upon a transaction, set of transactions, event, or events, a grand jury inquiry into the same transaction or events shall not be initiated unless the court finds, upon a proper showing by the prosecuting attorney, that the prosecuting attorney has discovered additional evidence relevant to such inquiry.

(f) A certified or authorized reporter shall be present at all grand jury sessions. All grand jury proceedings and testimony from commencement to adjournment shall be reported. The reporter's notes and any transcripts which may be prepared shall be preserved, sealed, and filed with the court. No release or destruction of the notes or transcripts shall occur without prior court approval.

(g) Upon application by the prosecutor, or by any witness after notice to the prosecutor, the court, for good cause, may enter an order to furnish to that witness a transcript of his own grand jury testimony, or minutes, reports, or exhibits relating to them.

(h) Any witness summoned to testify before a grand jury, or an attorney for such witness with the witness's written approval, shall be entitled, prior to testifying, to examine and copy at the witness's expense any statement in the possession of the prosecuting attorney or the grand jury which such witness has made that relates to the subject matter under inquiry by the grand jury. If a witness is proceeding in forma pauperis, he shall be furnished, upon request, a copy of such transcript and shall not pay a fee.

(i) No person suspoenaed to testify or to produce books, papers, documents, or other objects in any proceeding before any grand jury shall be required to testify or to produce such objects, or be confined as provided in this section, for his failure to so testify or produce such objects, if upon filing a motion and, upon

an evidentiary hearing before the court which issued such subpoena or a court having jurisdiction under this section, the court finds that:

(I) A primary purpose or effect of requiring such person to so testify or to produce such objects before the grand jury is or will be to secure testimony for trial for which the defendant has already been charged by information indictment, or criminal complaint;

(II) Compliance with a subpoena would be unreasonable or oppressive;

(III) A primary purpose of the issuance of the subpoena is to harass the witness;

(IV) The witness has already been confined, imprisoned, or fined under this section for his refusal to testify before any grand jury investigating the same transaction, set of transactions, event, or events; or

(V) The witness has not been advised of his rights as specified in paragraph (a) of this subsection (4).

(j) Any grand jury may indict a person for an offense when the evidence before such grand jury provides probable cause to believe that such person committed such offense.

(k) The district court before which the indicted defendant is to be tried shall dismiss any indictment of the grand jury if such district court finds, upon the filing of a motion by the indicated defendant based upon the grand jury record without argument or further evidence, that the grand jury finding of probable cause is not supported by the record.

(l) Any person may approach the prosecuting attorney or the grand jury and request to testify or retestify in an inquiry before a grand jury or to appear before a grand jury. The prosecuting attorney or the grand jury shall keep a record of all denials of such requests to that prosecuting attorney or grand jury, including the reasons for not allowing such person to testify or appear. If the person making such request is dissatisfied with the decision of the prosecuting attorney or the grand jury, such person may petition the court for hearing on the denial by the prosecuting attorney or the grand jury. If the court grants the hearing, then the court may permit the person to testify or appear before the grand jury, if the court finds that such testimony or appearance would serve the interests of justice.

(m) The foreman, or acting foreman when designated by the court, of the grand jury may swear or affirm all witnesses who come before the grand jury.

(n) Any other motions testing the validity of the indictment may be heard by the court based only on the record and argument of counsel, unless there is cause shown for the need for additional evidence.

SECTION 2. 16-5-205, Colorado Revised Statutes 1973, is amended by the addition of a new subsection to read:

16-5-205. *Informations—authority to file—indictments—warrants and summons.* (4) The report of the grand jury shall not be made public except when required by statute or except that all of the report or a portion thereof may be released if the chief judge of the district court finds such a release will exonerate a person or persons who have requested such a release.

SECTION 3. *Appropriation.* There is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, for the fiscal year commencing July 1, 1977, to the judicial department, trial courts, the sum of thirty-five thousand two hundred thirty-four dollars ($35,234), or so much thereof as may be necessary, for the implementation of this act.

SECTION 4. *Safety clause.* The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

FRED E. ANDERSON,
President of the Senate.
RONALD H. STRAHLE,
Speaker of the House of Representatives.
MARJORIE L. RUTENBECK,
Secretary of the Senate.
LORRAINE F. LOMBARDI,
Chief Clerk of the House of Representatives.

Approved:

RICHARD D. LAMM,
Governor of the State of Colorado.

SMALTZ & NEELLEY,
Los Angeles, Calif., April 18, 1977.

Hon. JOSHUA EILBERG,
Rayburn House Office Building,
Washington, D.C.

DEAR REPRESENTATIVE EILBERG: I am writing to you in my capacity as Chairman of the Federal Practice Committee of the California Attorneys for Criminal Justice ("CACJ"). CACJ, which is comprised of approximately 1,300 lawyers who specialize in criminal defense in the State of California, endorses the grand jury reforms set forth in your proposed legislation, H.R. 94.

Various members of our committee have been studying the matter for some time. I expect that by mid-June we will release our report on grand jury reform, which will endorse and enlarge upon the principles of grand jury reform proposed by the Criminal Justice Section of the ABA. I expect that our report will include additional principles which will be primarily based upon procedures which have been statutorily mandated in the California Penal Code governing the conduct of grand juries in California. In our collective experience, these procedures required in California do not and have not impeded the effective functioning of the government in its pursuit of organized crime and white collar criminals. California's experience will directly refute many of the contentions expressed by former Attorney General Levi and the various memoranda prepared and submitted by the Department of Justice, which opposed reforming the grand jury.

It would be extremely helpful if we could obtain five copies of the transcript of hearings before your Subcommittee, together with any additional testimony that has been taken in 1977 or submissions made by various organizations in support of or in opposition to the proposed legislation. Could you please arrange to have this information forwarded to me at your earliest convenience. Thank you for your cooperation.

Sincerely,

DONALD C. SMALTZ.

SMALTZ & NEELLEY,
Los Angeles, Calif., April 20, 1977.

MARTIN H. BELSKY, Esq.,
Counsel, Committee on the Judiciary, Subcommittee on Immigration, Citizenship, and International Law, House of Representatives, Washington, D.C.

DEAR MARTY: I appreciated the opportunity to meet with you last Wednesday, April 13. I have commenced reviewing portions of the testimony and other information submitted before the Senate Subcommittee on Constitutional Rights, and that submitted to the Subcommittee on Immigration, Citizenship and International Law. I have also spoken with various members of the board of California Attorneys for Criminal Justice ("CACJ") and informed them that instead of our organization taking a position on either one of the two Bills in the House, or the Bill in the Senate, that it would be more appropriate for us to endorse the proposed ABA Grand Jury principles from the Criminal Justice Section of the ABA.

We will be having a Committee meeting on May 14, and while there is no doubt that we will be able to unanimously endorse those principles, we will probably also add some additional principles. These will be based upon various statutes that we have in California regulating the conduct of county Grand Juries and include the principle that the Grand Jury should receive nor consider no evidence except that which would be admissible over objection at the trial of the criminal action. (P.C. 939.6); that the Grand Jury shall find an indictment when all the evidence is unexplained or uncontradicted and would in its judgment warrant a conviction by a trial jury (P.C. 939.8); that when a Grand Jury investigates a charge against a person and as a result thereof, does not return an indictment, it shall at the request of that person and upon approval of the court, declare that a charge against such person was investigated and the Grand Jury could not find an indictment (P.C. 939.91); and an indictment must be set aside by the court where the indictment is not found, endorsed and presented as required or where the defendant has been indicted on insufficient evidence (P.C. 995).

I am enclosing the relevant provisions of the California Penal Code so that you can observe the language of the specific provision governing the conduct of county Grand Juries. These procedures required in California have not impeded

the effective functioning of the District Attorney's officers in their pursuit of white collar and organized crime matters; and refute many of the contentions expressed by the former Attorney General Levi and the various memoranda prepared and submitted by the Department of Justice, which opposes reforming the Grand Jury.

If you have any thoughts on this matter, please contact me. I expect to be talking to you in some detail concerning your suggestions about the format that our written presentation expressing the position of CACJ should follow.

Sincerely,

DONALD C. SMALTZ.

ARTICLE 4

CONDUCT OF INVESTIGATIONS

§ 939. Right of persons to be present at grand jury session.
§ 939.1. Public sessions as to matter affecting general public welfare: Persons conducting investigation: Private deliberation: Indictments.
§ 939.2. Witnesses: Requiring attendance by subpoena.
§ 939.3. Same: Proceedings where privilege against self-incrimination claimed.
§ 939.5. Same: Oath.
§ 939.5. Statement by foreman: Retirement of prejudiced juror.
§ 939.6. Evidence: Admissibility.
§ 939.7. Same: Evidence for defendant: Duty to weigh evidence submitted: Obtaining evidence to explain away charge.
§ 939.8. Evidence warranting indictment.
§ 939.9. Requirement that jury's report, etc., be based on its own investigation.
§ 939.91. Declaration that evidence did not support indictment: Declaration that person was witness.

§ 939. [*Right of persons to be present at grand jury session.*] No person other than those specified in Article 3 (commencing with Session 934), Chapter 3 of this title and in section 939.1 is permitted to be present during the session of the grand jury except the members and witnesses actually under examination. No person shall be permitted to be present during the expression of the opinions of the grand jurors, or the giving of their votes upon any matter before them. [1959 ch. 501 § 2.] *17 Cal Jur 3d Criminal Law § 404. Witkin Criminal Procedure p 162.*

§ 939.1 [*Public sessions as to matter affecting general public welfare: Persons conducting investigation: Private deliberation: Indictments.*] The grand jury acting through its foreman and the attorney general or the district attorney may make a joint written request for public sessions of the grand jury. The request shall be filed with the superior court. If the court, or the judge thereof, finds that the subject matter of the investigation affects the general public welfare, involving the alleged corruption, misfeasance, or malfeasance in office or dereliction of duty of public officials or employees or of any person allegedly acting in conjunction or conspiracy with such officials or employees in such alleged acts, the court or judge may make an order directing the grand jury to conduct its investigation in a session or sessions open to the public. The order shall state the finding of the court. The grand jury shall comply with the order.

The conduct of such investigation and the examination of witnesses shall be by the members of the grand jury and the district attorney.

The deliberation of the grand jury and its voting upon such investigation shall be in private session. The grand jury may find indictments based wholly or partially upon the evidence introduced at such public session. [1959 ch. 501. § 2.)] *17 Cal Jur 3d Criminal Law § 405; Witkin Criminal Procedure p 164.*

§ 939.2. [*Witnesses: Requiring attendance by subpoena.*] A subpoena requiring the attendance of a witness before the grand jury may be signed and issued by the district attorney, his investigator or, upon request of the grand jury, by any judge of the superior court, for witnesses in the state, in support of the prosecution, for those witnesses whose testimony, in his opinion is material in an investigation before the grand jury, and for such other witnesses as the grand jury, upon an investigation pending before them, may direct. [1959 ch 501 § 2; 1971 ch 1196 § 1.] *17 Cal Jur 3d Criminal Law § 411; Witkin Criminal Procedure p 165.*

§ 939.3. [*Same: Proceedings where privilege against self-incrimination claimed.*] In any investigation or proceeding before a grand jury for any felony offense when a person refuses to answer a question or produce evidence of any kind on the ground that he may be incriminated thereby, proceedings may be had under Section 1324. [1959 ch. 501 § 2] *17 Cal Jur 3d Criminal Law § 411; Witkin Criminal Procedure, p. 165.*

§ *939.4.* [*Same: Oath.*] The foreman may administer an oath to any witness appearing before the grand jury. [1959 ch 501 § 2.] *17 Cal Jur 3d Criminal Law § 411: Witkin Criminal Procedure pp 13, 615.*

§ *939.5.* [*Statement by foreman: Retirement of prejudiced juror.*] Before considering a charge against any person, the foreman of the grand jury shall state to those present the matter to be considered and the person to be charged with an offense in connection therewith. He shall direct any member of the grand jury who has a state of mind in reference to the case or to either party which will prevent him from acting impartially and without prejudice to the substantial rights of the party to retire. Any violation of this section by the foreman or any member of the grand jury is punishable by the court as a contempt. [1959 ch 501 § 2.] *17 Cal Jur 3d Criminal Law §§ 393, 410; Witkin Criminal Procedure pp 13, 161.*

§ *939.6.* [*Evidence: Admissibility.*] (a) Subject to subdivision (b), in the investigation of a charge, the grand jury shall receive no other evidence than such as is:

(1) Given by witnesses produced and sworn before the grand jury;

(2) Furnished by writings, material objects, or other things presented to the senses; or

(3) Contained in a deposition that is admissible under subdivision 3 of Section 686.

(b) The grand jury shall receive none but evidence that would be admissible over objection at the trial of a criminal action, but the fact that evidence which would have been excluded at trial was received by the grand jury does not render the indictment void where sufficient competent evidence to support the indictment was received by the grand jury. [1959 ch 501 § 2; 1965 ch 299 § 141.] *17 Cal Jur 3d Criminal Law § 411; Witkin Criminal Procedure pp 165, 166; Evidence p. 18.*

§ *939.7.* [*Same: Evidence for defendant: Duty to weigh evidence submitted: Obtaining evidence to explain away charge.*] The grand jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it shall order the evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses. [1959 ch 501 § 2.] *17 Cal Jur 3d Criminal Law §§ 410, 411; Witkin Criminal Procedure pp 165, 166, 167, 169; Evidence p 17.*

§ *939.8.* [*Evidence warranting indictment.*] The grand jury shall find an indictment when all the evidence before it, taken together, if unexplained or uncontradicted, would, in its judgment, warrant a conviction by a trial jury. [1959 ch 501 § 2.] *Cal Jur 3d Criminal Law §§ 410, 557; Witkin Criminal Procedure pp 166, 169.*

§ *939.9.* [*Requirement that jury's report, etc., be based on its own investigation.*] A grand jury shall make no report, declaration, or recommendation on any matter except on the basis of its own investigation of the matter made by such grand jury. A grand jury shall not adopt as its own the recommendation of another grand jury unless the grand jury adopting such recommendation does so after its own investigation of the matter as to which the recommendation is made, as required by this section. [1959 ch 501 § 2.] *17 Cal Jur 3d Criminal Law § 399; Witkin Criminal Procedure p 16.*

§ *939.91.* [*Declaration that evidence did not support indictment; Declaration that person was witness.*] (a) A grand jury which investigates a charge against a person, and as a result thereof cannot find an indictment against such person, shall, at the request of such person and upon the approval of the court which impaneled the grand jury, report or declare that a charge against such person was investigated and that the grand jury could not as a result of the evidence presented find an indictment. The report or declaration shall be issued upon completion of the investigation of the suspected criminal conduct, or series of related suspected criminal conduct, and in no event beyond the end of the grand jury's term.

(b) A grand jury shall, at the request of the person called and upon the approval of the court which impaneled the grand jury, report or declare that any person called before the grand jury for a purpose, other than to investigate a charge against such person, was called only as a witness to an investigation which did not involve a charge against such person. The report or declaration shall be issued upon completion of the investigation of the suspected criminal conduct, or series of related suspected criminal conduct, and in no event beyond the end of the grand jury's term. [1975 ch 467 § 1.]

TITLE 5

THE PLEADINGS

Chapter
1. Finding and Presentment of the Indictment. §§ 940–945.
2. Rules of Pleading. §§ 948–973.

CHAPTER 1

FINDINGS AND PRESENTMENT OF THE INDICTMENT

§ 940. Requisite number of grand jurors concurring in indictment: Indorsement of indictment.
§ 943. Names of witnesses inserted or indorsed as foot of indictment.
§ 944. Indictment, how presented and filed: Grand jury recommendation to court on a dollar amount of bail prohibited.
§ 945. Proceedings when defendant is not in custody.

§ *940.* [*Requisite number of grand jurors concurring in indictment: Indorsement of indictment.*] An indictment cannot be found without concurrence of at least 14 grand jurors in a county in which the required number of members of the grand jury prescribed by Section 888.2 is 23, and at least 12 grand jurors in other counties. When so found it must be endorsed, "A true bill," and the endorsement must be signed by the foreman of the grand jury. [1872; 1963 ch 1520 § 1.] *Cal. Jur 3d Criminal Law §§ 392, 558, 563; Witkin Criminal Procedure p 167.*

§ *943. Names of witnesses inserted [or indorsed] at foot of indictment.* When an indictment is found, the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, must be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the court. [1872.] *18 Cal Jur 3d Criminal Law §§ 563, 695; Witkin Criminal Procedure pp 168, 170.*

§ *944.* [*Indictment, how presented and filed: Grand jury recommendation to court on a dollar amount of bail prohibited.*] An indictment, when found by the grand jury, must be presented by their foreman, in their presence, to the court, and must be filed with the clerk. No recommendation as to the dollar amount of bail to be fixed shall be made to any court by any grand jury. [1872; 1974 ch 695 § 1.] *Cal Jur 3d Criminal Law §§ 410, 558; Witkin Criminal Procedure p 168.*

§ *945. Proceedings when defendant is not in custody.* When an indictment is found against a defendant not in custody, the same proceedings must be had as are prescribed in sections nine hundred and seventy-nine to nine hundred and eighty-four, inclusive, against a defendant who fails to appear for arraignment. [1872.] *Witkin Criminal Procedure p 168.*

CHAPTER 2

SETTING ASIDE THE INDICTMENT OR INFORMATION

Chapter heading of Chapter 2, Title 6, Part 2, amended to read as above by Stats. 1951 ch 1674 § 71

§ 995. When indictment or information must be set aside.
§ 995a. Insertion or indorsement of witnesses' names: Subscription of information by attorney upon court order.
§ 996. Waiver of objections by failure to move to set aside indictment or information.
§ 997. Motion to set aside: Time for hearing: Proceedings when motion is denied or granted: Examination before magistrate after order or resubmission.
§ 998. Order of resubmission: Effect as to custody or bail: Order on failure to find new indictment or file information.
§ 999. Order setting aside indictment or information no bar to future prosecution.
§ 999a. Petition for writ of prohibition: When to be filed: Service upon district attorney: When alternative writ to issue.

§ *995.* [*When indictment or information must be set aside.*] The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

If it be an indictment:

1. Where it is not found, endorsed, and presented as prescribed in this code.
2. That the defendant has been indicted without reasonable or probable cause.

If it be an information:

1. That before the filing thereof the defendant had not been legally committed by a magistrate.
2. That the defendant had been committed without reasonable or probable cause. [1872; 1880 ch 118 § 1; 1911 ch 256 § 1; 1927 ch 854 § 1;1939 ch 457 § 1;

1949 ch 1311 § 1.] *Cal Jur 3d Criminal Law §§ 567, 602, 605–610, 615, 616, 659, 1342, 1433, 2957; Cal Jur 2d Hab C §§ 11, 28, Judgm § 400; Witkin Criminal Procedure pp 134, 138, 163, 166, 171, 206, 208, 209, 210, 214–217, 769; Evidence pp 62, 135; Evidence 2d, 1972 Supp pp 29, 34, 36, 39, 42, 43, 45, 64, 140, 436; Procedure 2d, p. 375: Summary (8th ed) pp 282, 2526.*

§ 995a. [Insertion or indorsement of witnesses' names: Subscription of information by district attorney upon court order.] If the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon, the court shall order them to be so inserted or indorsed; and if the information be not subscribed by the district attorney, the court may order it to be so subscribed. [1927 ch 854 § 2.] *Witkin Criminal Procedure pp 199, 208, 215.*

§ 996. [Waiver of objections by failure to move to set aside indictment or information.] If the motion to set aside the indictment or information is not made, the defendant is precluded from afterwards taking the objections mentioned in Section 995. [1872; 1880 ch 47 § 42; 1967 ch 138 § 5.] *18 Cal Jur 3d Criminal Law §§ 605, 615; Cal Jur 2d Hab C § vv; Witkin Criminal Procedure pp 215, 218.*

§ 997. [Motion to set aside: Time for hearing: Proceedings when motion is denied or granted: Examination before magistrate after order of resubmission.] The motion must be heard at the time it is made, unless for cause the court postpones the hearing to another time. The court may entertain such motion prior to trial whether or not a plea has been entered and such plea need not be set aside in order to consider the motion. If the motion is denied, and the accused has not previously answered the indictment or information, either by demurring or pleading thereto, he shall immediately do so. If the motion is granted, the court must order that the defendant, if in custody, be discharged therefrom; or, if admitted to bail, that his bail be exonerated; or, if he has deposited money, or if money has been deposited by another or others instead of bail for his appearance, that the same be refunded to him or to the person or persons found by the court to have deposited said money on behalf of said defendant, unless it directs that the case be resubmitted to the same or another grand jury, or that an information be filed by the district attorney; provided, that after such order of resubmission the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases, * * *

BECKHAM, MCALILEY & PROENZA, P.A.,
Miami, Fla., April 14, 1977.

Hon. JOSHUA EILBERG,
U.S. Representative, Cannon House Office Building, Washington, D.C.

DEAR MR. EILBERG: I read with great interest your article in *Judicature*. I would deeply appreciate receiving a copy of your Bill and copies of any testimony taken in regard thereto.

In your development of these types of issues, you might consider giving a witness the absolute right to have a copy of prior Grand Jury testimony before subsequent appearance. Under the present system this is largely left to the discretion of the trial judge and the decisions are split as to this right. Elementary fairness dictates that this right be afforded because of the existence of the perjury by conflicting statement statute. In many cases prior Grand Jury testimony and the availability of it to the witness is not important. In cases, however, where the Grand Jury is inquiring into mutiple transactions over a long period of time with the constant review of prior records and the process of having one's recollection refreshed, the availability of this testimony is vital.

It is hard for a young prosecutor with ambitions, either professional or political, to avoid the temptation of getting caught up in a mutual manipulation process with the media. We see witnesses paraded before Grand Juries at the state and federal level when everybody knows these witnesses are going to take the Fifth Amendment. Typical examples of this are organized crime figures who have never testified about anything anywhere without immunity backed up by the contempt power. Further, public figures are brought before Grand Juries with its inevitable taint in the minds of many, when they have little or no information about the subject matter. For these reasons, consideration might be given to allowing a witness to have the right to give a deposition with the Grand Jury having the ultimate right, after reviewing the deposition testimony, to insist upon a live appearance. This has several built-in checks and balances among which are that any lawyer worth his salt with a client in trouble wants to minimize the times his client is under oath. It strikes me that a lawyer would give long

and careful consideration to invoking the right of a deposition that the Government can later scrutinize and reflect upon and then bring the witness back or recommend to the Grand Jury that the witness be brought back for live testimony.

I don't pretend to know the answers to these problems, but I am very happy to see some thought be given to them. I would deeply appreciate the materials requested, as this has been an area of some concern to me.

Sincerely,

THOMAS W. MCALILEY.

ISLES, NEWMAN & WEISSBARD,
Montclair, N.J., May 13, 1977.

MARTIN BELSKY,
Counsel, Subcommittee on Immigration, Citizenship and International Law, Washington, D.C.

DEAR MR. BELSKY: For the past two years I have been serving as a member of the New Jersey State Bar Association Committee on Grand Jury Reform. Our committee recently concluded its work and our report was released a few days ago.

In view of the fact that your committee is currently working on legislative proposals for federal grand jury reform, I thought you might be interested in having a copy of our report. Of particular interest to you would be that section of the report from pages 32 to 58 dealing with proposed reforms in grand jury practice. The initial part of the report deals with our proposal to replace grand jury proceedings in most instances with adversarial preliminary hearings as is now the case in some states, notably California.

I think our report should be particularly important to your committee in light of the fact that our State Attorney General recently tesified before your committee, as I understand it, in opposition to many of the proposed grand jury reforms being considered by you.

I should point out to you that the membership of this committee was a diverse one, including two retired justices of our state Supreme court, several present and past prosecutors as well as several law school professors and defense counsel.

I trust that this report may be of some interest to you and I would hope that you would disseminate its contents to the members of your committee. If you have any further questions, please feel free to contact me.

Very truly yours,

HARVEY WEISSBARD.

SUMMARY OF REPORT OF THE NEW JERSEY STATE BAR ASSOCIATION COMMITTEE ON THE GRAND JURY, A DUAL SYSTEM OF INITIATING CRIMINAL CHARGES: PROSECUTION BY INFORMATION AND THE GRAND JURY'S RESIDUAL FUNCTION

After two years of intensive work a special New Jersey State Bar Association Committee on Grand Jury Reform has submitted a report proposing major and sweeping changes in the process by which criminal charges are instituted and in the presentation of evidence to grand juries in New Jersey.

The committee has recommended a constitutional amendment that would permit criminal charges to be instituted by an information filed by the Prosecutor in lieu of indictment where the information is preceded by a finding of sufficient cause made by a full time judge after an adversarial preliminary hearing. The report has recognized the need for retention of the grand jury for use in certain limited instances, primarily as an investigative tool. However, the report has also recommended substantial changes in present grand jury practices.

Under the proposed system, an individual would be brought before a judge for an initial appearance within 24 hours of arrest. If the defendant remains in custody he would receive a preliminary hearing within 7 days of his initial appearance; if he is free on bail the preliminary hearing would take place within 21 days. At the preliminary hearing the accused would have the right not only to cross-examine the prosecution witnesses but to present evidence, including his own testimony, in his behalf. The rules of evidence would apply at this hearing.

The heart of the committee's proposal is an amendment to the State Constitution which would read as follows:

"No person shall be held to answer for a criminal offense unless on indictment of a grand jury or on an information, as prescribed by law. No information shall be filed unless a judge finds sufficient cause following a preliminary hearing at which the accused shall have the right to cross-examine the State's witnesses and to present evidence in his own behalf."

The preliminary hearing would be an adversarial one and the phrase "sufficient cause", in lieu of probable cause, is intended to make clear that the judge would be duty-bound to consider all of the evidence adduced in the proceeding, including that presented by the accused. The committee concluded that such an adversarial preliminary hearing would afford the state an opportunity to evaluate the strengths and weaknesses of its case and, if the accused presents evidence, of the defense case as well. At the same time, such a hearing would afford maximum protection for the right of the accused. He would obtain early discovery of the prosecution's case and would be provided with a vehicle for terminating an unwarranted prosecution at the earliest possible time. The preliminary hearing would be conducted in open court, on the record, the defendant would have the right to counsel, to cross-examine the State's witnesses and to present evidence in his own behalf. Thus, each side would be given an opportunity to "dry run" their cases early in the criminal process. The committee has also concluded that such proceedings be held in a centrally located court manned by full-time judges, such as the County District Court, as opposed to the present municipal courts which, for a variety of reasons, the Committee found unsuited for the task.

The Committee has recommended that neither the prosecution nor the defense be permitted to appeal from the court's decision. Finally, the prosecution would be prohibited from either seeking an indictment or seeking another hearing based on the same evidence. If sufficient cause is found, the prosecutor would have 15 days within which to file an information. His failure to do so would result in an automatic dismissal with prejudice.

The Committee concluded that the "preliminary hearing procedure proposed here would incorporate the best attributes of grand jury deliberations and avoid the worst". While the proposed hearing resembles the trial, experience in California indicates that the overall expenditure of time with respect to each case will be decreased. The earlier disposition of questions that will inevitably arise at trial and the earlier opportunity for both sides to evaluate their cases will, it is believed, facilitate plea negotiations, thus resulting in fewer full scale trials.

It should be noted that only twenty-one states presently retain grand jury indictment as the only permissible mode of initiating felony prosecutions. Most jurisdictions permit accusation by criminal information. Thus, New Jersey would join the majority of states if this proposal were adopted. On the other hand, no jurisdiction has yet abolished the grand jury altogether. Similarly, the grand jury would be retained under the Committee's proposed reform.

The "grand jury's investigative powers, its ability to process multi-defendant cases, the need for secrecy in certain situations, all militate against abolition of the grand jury". In addtion, the grand jury serves a valuable role as a vehicle for citizen participation in our democratic society. While it is to be expected that the vast majority of routine cases will be handled by the preliminary hearing and information process, the selection of precisely which cases will be presented to the grand jury will, and must of necessity, be left to the sound discretion of the prosecutor. Since the grand jury will be retained, the Committee has recommended many changes so as to substantially improve and upgrade the indicting process.

The Committee has recommended that compensation of grand jurors be raised to a more realistic level of $25 per day, in place of the present $5 per day. Recognizing that the number of grand jurors (presently 23) is not a "magic number", it is recommended that the grand jury consist of only 15 members but with 10 being required to return an indictment in lieu of the bare majority which presently suffices.

Substantial upgrading of the assignment judge's instructions to new grand juries is also suggested. The grand jury, the Committee felt, should be more thoroughly informed of its rights and obligations, with special emphasis upon its independence from the prosecutor. The court would inform the grand jury of its right to request and interrogate additional witnesses and to production of documentary evidence. The availability of the court for additional instructions would also be made clear.

The most significant reform of present grand jury practices would come in the area of the type and quality of the evidence which a grand jury would hear.

Concluding that the serious consequences of an indictment mandate safeguards reasonably similar to those present at trial, the Committee has made eight major recommendations in this area.

First, as a general rule, a grand jury would be permitted to hear only "admissible" evidence. This would, for the most part, bar the presentation of hearsay evidence before the grand jury. However, the nature of the grand jury process also suggests that there be some exceptions to this rule. This would cover, for example, permitting the introduction of a chemist's report in lieu of his live testimony. The prosecutor, though, would have to clearly inform the grand jury of the availability of better or first-hand evidence so they can, if they desire, request such proof. The proposed rule would read as follows:

"The grand jury shall receive none but evidence that would be admissible over objection at the trial of a criminal action, absent justification for its introduction which justification shall be stated on the record at the time of its admission; but the fact that evidence which would have been excluded at trial was received by the grand jury does not render the indictment void where sufficient competent evidence to support the indictment was received by the grand jury. However, no indictment shall be based on inadmissible evidence alone."

Second, the Committee has proposed that a prospective defendant always be invited to testify before the grand jury which is considering his indictment, if his whereabouts are known, and provided he waives his Fifth Amendment privilege. He would also be permitted to suggest witnesses to the grand jury which they could hear in their discretion. The proposed rule would state:

"The prospective defendant shall have the right, on his request and upon an adequate waiver, to testify before the grand jury which is considering his indictment. The prosecutor shall so advise the defendant either personally, through counsel, or by mail, at his last known address and shall afford a reasonable opportunity for such appearance. Failure to so advise the prospective defendant shall require dismissal of the indictment.

"A prospective defendant shall have the right to give to the grand jury the names and addresses of witnesses and the grand jury may, in its discretion, require the production of such witnesses. The burden of producing such witnesses shall be upon the defendant requesting their production."

Third, a "target" defendant should never be unwillingly summoned before a grand jury which is considering his indictment, a practice which is likely to, and generally does, result in severe prejudice to the accused. The Committee's suggested rule is that:

"The prosecutor should not compel the appearance of a target witness if that witness states in advance that if called he will exercise his constitutional right not to testify. Such statement shall be made on the record out of the grand jury's presence and the individual shall have the right to have an attorney present at such proceeding. The grand jury shall not be informed about the witness' election not to testify. However, if the State signifies its intention to grant immunity to a target he may be required to assert his privilege before the grand jury.

"If the prosecutor believes that a witness is a target he should not seek to compel his testimony before the grand jury without informing him of his right to counsel, that he may have assigned counsel if he is indigent, that he has the right to remain silent if his answers might incriminate him, and that anything he says may be used against him.

"If a target is not so warned and does testify and is indicted, any testimony given by him cannot thereafter be used against him and the indictment shall be dismissed without prejudice to the matter being presented to a different grand jury.

"A prosecutor should recommend that the grand jury not indict if he believes the evidence presented does not warrant an indictment under governing law."

Fourth, simple fairness, as well as analogous trial precedent, suggest the following:

"The prosecutor shall disclose to the grand jury any evidence which the prosecutor knows will tend to negate guilt."

Fifth, is a recommendation designed to deal with the problem of the grand jury witness, not a target, who invokes his Fifth Amendment privilege against self-incrimination. Where the invocation of the privilege is challenged the witness must convince a judge of his justification. This procedure, often done in open court, has resulted in prejudice and embarrassment to witnesses as a result of publicity surrounding such a proceeding. Accordingly, the Committee has

recommended that all such hearings be conducted "in camera", and that such testimony give rise to a "use" immunity.

Three additional rules would require (1) that all grand jury witnesses be given reasonable advance notice of their appearance, (2) that everything that transpires before the grand jury, except its deliberations, be recorded, and that no one but grand jurors be present during during the deliberations, and (3) that all witnesses be informed, at the conclusion of their testimony, that they may add anything relevant to the subject matter of their testimony. The latter proposal would insure that no witness will be unfairly limited by the prosecutor's questioning.

With respect to pre-indictment or post-indictment publicity, the Committee noted many complaints in this area, concerning not only prosecutors, state and federal, but defense counsel as well. The Committee was of the view that the court rules, which have adopted DR 7-103 and DR 7-107, may not be adequate and should be revised. In the interim the present guidelines would be strictly followed. "The Bar is not helpless. Prejudicial publicity can be met by motions to hold offenders in contempt or by the filing of complaints with County Ethics Committees. Imposition of sanctions in a few such cases would go a long way toward stemming the tide."

The Committee concluded its report with a recommendation for greater use of prosecutorial discretion to administratively terimnate prosecutions before formal proceedings, where appropriate. The prosecutor has, and should use, the power to dismiss, reduce or change charges or refuse to accept complaints that do not warrant prosecution. The use of this power would, the Committee felt, cure a major deficiency in the criminal justice system and complement the reform proposed in the report.

ADMINISTRATIVE OFFICE OF THE COURTS,
STATE HOUSE ANNEX,
Trenton, N.J., April 22, 1977.

Memorandum to: The State Bar Association Grand Jury Study Committee.

I enclose herewith a copy of my separate statement regarding our Report. I very much enjoyed working with the Committee.

EDWIN H. STERN.

Enclosure.

I concur in the recommendation that an information process be permitted and, in fact, substituted for the Grand Jury procedure in complaint cases. I do so because I strongly feel that the present probable cause and Grand Jury systems are duplicative and wasteful; and I prefer to rely upon the former because of the mandated probable cause hearing in custody cases. See *Gerstein* v. *Pugh*, 420 *U.S.* 103 (1975). I would endeavor, where possible, to combine the *Gerstein* and probable cause hearings, and believe that our recommendations promote this concept.[1]

I stress that my concurrence is based upon the recommendation that the probable cause hearing be conducted in a centralized, full-time court. I frankly do not believe that a change in the charging process, without unification and consolidation of the present municipal court jurisdiction (at least with respect to matters falling within the scope of our report) and without the conduct of expeditious probable cause hearings in full-time courts, would constitute a step forward. The expanded probable cause hearings must be conducted before full-time judges in full-time courts,[2] and I emphasize that the proposed constitutional amendment to the charging process must be accompanied by simultaneous legislative action to

[1] I also agree with the recommendations to retain the investigative grand jury and the power of direct indictment.

[2] This concept would also permit full-time prosecutors (and full-time public defenders where the defendant is indigent) to appear at probable cause hearings. In turn, counsel could better evaluate the case at an early date, and more meaningful "pleas discussions" could result.

require municipal court consolidation or to provide additional judges and resources for our County District Courts in advance of unification.

I question the wisdom of permitting the prosecutor to bypass probable cause hearings in complaint cases (absent extraordinary circumstances)[3] and the need for post-indictment probable cause hearings (following direct indictment or indictment when such hearings are avoided in complaint cases), see *Gerstein* v. *Pugh, supra; Johnson* v. *Superior Court*, 15 *Cal.* 3rd 248 (1975); *State* v. *Ordog*, 45 *N.J.* 347, 363 (1965) *cert.* denied 354 *U.S.* 1022 (1965); *State* v. *Smith*, 32 *N.J.* 501, 536 (1960) *cert. denied* 364 *U.S.* 936 (1961); *State* v. *Cox*, 114 *N.J. Super.* 556 (App. Div. 1971), certif. den. 58 *N.J.* 93 (1971). Moreover, while I basically agree with same, I also recognize that some of the recommendations made with respect to the Grand Jury, where retained are debatable. However, these issues can be analyzed and discussed without adverse impact upon the fundamental recommendations embodied in the Committee's Report. The appropriate constitutional and legislative amendments can be made, where necessary, to support our basic recommendations, leaving the details of probable and grand jury procedures for development in Court rules which can be amended as experience dictates. *N.J. Const.* (1947), Art. 6, § 2, ¶ 3. (Note the Present *R.* 3:4–3 and *R.* 3:6–1 *et seq.*)[4]

Therefore, I concur in the Report, and do so gladly because, after two years of work with a very industrious and dedicated Committee, I am convinced of the need for adoption of the basic recommendations embodied therein.

EDWIN H. STERN.

STATEMENT OF HARVEY WEISSBARD

While I join wholeheartedly in what the Committee has proposed I must regretfully dissent from the Committee's failure to go further in the direction of much needed grand jury reform. Some of the comments which follow deal with items covered in the report while others involved changes which while discussed and proposed elsewhere, have not been touched upon here.

Commendably, The Committee has proposed that inadmissible evidence, such as hearsay, be banned from grand jury proceeding, "absent justification for its introduction". Unfortunately, however, the proposal goes on to state that the receipt of such evidence will not invalidate an indictment if there remains "sufficient competent evidence to support the indictment". The sole exception is that an indictment may not be based solely upon inadmissible evidence. In my view, the proposed rule does not provide a sufficient sanction. The suggested rule would still permit an indictment to stand where substantial amounts of prejudicial hearsay (or other inadmissible evidence is presented to the grand jury, whose lay members would not be in a position to discount the probative force of such evidence, as would a judge, for example. Indeed, such a grand jury might, particularly in a close case, be swayed by such evidence to return an indictment where none would otherwise have been found.

The Committee correctly notes the great harm that can result from an indictment, even when an acquittal follows, and finds that no legitimate purpose is served by having the grand jury hear evidence that they could not hear at trial. If that is so, then it is difficult to understand why the remedy at the indictment stage should not be as severe as it would be if the same improper evidence were received at trial. If improper evidence were admitted at trial and it was likely that such evidence influenced the jury, any guilty verdict would be set aside and a new trial ordered.

Similarly, if such evidence is presented to the grand jury a dismissal should result. Without such a sanction the best intentioned rule is of no value. *Note, Exclusion of Incompetent Evidence From Federal Grand Jury Proceedings*, 72 Yale L.J. 590, 597–598 (1963). Of course, it would not serve the ends of justice to require dismissal where a small bit of inadmissible evidence inadvertently came before the grand jury. The standard should be strict but not unbearable for the State. Compare the suggestion that any indictment based, in whole or in part, on unconstitutionally obtained evidence be subject to dismissal. *Note,*

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[3] I was also concerned about permitting the defendant to "present evidence in his own behalf" at the probable cause hearing, but on balance, feel that the choice should be the defendant's provided that our rules give the State an adequate opportunity to prepare rebuttal, where necessary.

[4] I do not mean to imply any disagreement about the Court's rule-making power. (The Report itself recommends rule changes). Rather, I mean to express why no dissent is necessary in the absence of agreement with all details embodied in the Report and why debate on the details need not necessarily delay appropriate action on the fundamental recommendations.

Unconstitutionally Obtained Evidence Before the Grand Jury as a Basis for Dismissing the Indictment, 27 Md. L. Rev. 168, 181–182 (1967) If a prosecutor is faced with a difficult evidentiary problem he could easily seek direction from the court before submitting the questionable proof to the grand jury. I would suggest that an indictment be dismissed if there is a "reasonable possibility" that the improper evidence contributed to the return of the indictment. Thus, the standard would be the same as that approved by our highest Federal and State Courts for reviewing trial errors. *State* v. *Macon*, 57 N.J. 325 (1971). See also, *Note, The Rules of Evidence as a Factor in Probable Cause in Grand Jury Proceedings and Preliminary Examination*, 1963 Wash. U. L. Q. 102, 113 n. 54. While I have substantial doubts as to the manner in which such a "harmless error" standard has been applied in practice, it at least appears to be a fair test and it is one with which our courts are already familiar. Since the representation of a case to the grand jury is less expensive and less time-consuming than a new trial, there is substantial justification for a rule at least as stringent as that applied to trial errors.

It his proposed reform is to have the desired effect, it must be given some teeth. To leave the matter largely up to the good faith of the prosecutor appears to me to seriously undervalue the rights involved.

It should be specifically noted that the Committee has not dealt with the highly controversial area of immunity grants to grand jury witnesses and the related problem of contempt punishment for recalcitrant witnesses. Much has been written in this area of late and I do not intend here to make any specific proposals. It is an area, in my view, much in need of reform and presently the subject matter of legislation pending in the Congress with respect to federal grand juries. Fortunately, however, the abuses in this area have not arisen, from what I can see, in the context of grand jury investigations by our state prosecuting authorities. The main impetus to reform has been the abusive practices of federal prosecutors and, in our state, the State Commission of Investigation. Nonetheless, the possibility for abuse under current law is always present and we must be vigilant to see that such potential never becomes realized.

I think it should be also noted that the Committee considered, but took no action upon, the controversial proposal to permit witnesses to be accompanied by counsel in the grand jury room. This is a proposal which has been advocated by the ABA Criminal Law Section in testimony recently given to a Congressional Committee considering federal grand jury reform legislation. It is also a right accorded to grand jury witnesses in some states, notably Illinois, and it is one that has a great deal of merit.

On the whole, the report is far-reaching and highly commendable. It should become the basis of immediate legislative action.

CIVIL LIBERTIES COMMITTEE,
STATE BAR OF MICHIGAN,
May 4, 1977.

MR. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship and International Law, House of Representatives, Washington, D.C.

DEAR SIR: We are writing to indicate our support for your long standing and continuing efforts to bring about reforms in the Federal Grand Jury system. Attorneys and citizens here in Detroit have witnessed and experienced (in some cases) abuses and unfairness resulting from the actions of Government attorneys and enforcement officers under the presently-existing law and practice.

The reforms advocated by you and embodied in your proposed bill are much needed and long overdue. Our only suggestion is that perhaps they do not go far enough. To be specific as to some additional reforms, it is imperative that "use" immunity be replaced with "transactional" immunity; however, any kind of immunity should be *consensual*, not *forced*. Good, experienced prosecutors acknowledge that forced immunity is only infrequently helpful to the Government anyway.

Further, it is very important that a witness have counsel in the Grand Jury room; however, counsel's role should not be limited to merely an advisory one.

Finally, Grand jurors themselves should be allowed to vote on such matters as subpoenas, applications for immunity and show cause hearings for contempt.

We realize that ultimately any reforms will be the result of legislative compromise, but we are hopeful that you will continue your strong efforts for comprehensive reform in this area.

If there is anything further our Committee can do to support your efforts, we would appreciate your advice.

If you would like to have a representative from our Committee testify before your Subcommittee, we would be more than glad to do so. In any case, we respectfully request your permission to file a memorandum of our views.

Finally, because much criticism has been generated in this area due to the method employed in obtaining indictments through the Grand Jury, we urge that hearings be held in Detroit. We believe that there is much material that the Committee could gather here which would assist in the final draft of a remedial bill.

Sincerely,

N. L. SMOKLER,
Chairperson, Civil Liberties Committee,
State Bar of Michigan.
JOHN W. TAPP,
Chairperson, Subcommittee on Grand Jury Reform.

WASHINGTON, D.C., *April 5, 1977.*

Hon. JOSHUA EILBERG,
Washington, D.C.

DEAR CONGRESSMAN EILBERG: I read with interest an article appearing in the March, 1977 issue of *Judicature*, entitled "A proposal for grand jury reform."

I am involved in a criminal case growing out of an indictment issued in Scranton, Pennsylvania. The grand jury proceedings were not recorded to any extent, and the indictment was returned, based purely and exclusively on hearsay evidence. There was no showing why witnesses with knowledge could not have appeared. Indeed, they could have. The case was not so complicated so as to have to rely on hearsay, as in *Costello* v. *U.S.*, 350 (1956).

By avoiding a transcription of the proceeding, the Assistant U.S. Attorney insured that my client would not have any witnesses' testimony for impeachment purposes at trial. In addition, we are unable to tell whether the Assistant U.S. Attorney acted properly before the grand jury; whether they knew that they were hearing exclusively hearsay, and whether they were hearing all of the evidence directly bearing on the proposed indictments.

I understand that H.R. 94 will require that all essential elements of grand jury proceedings be transcribed. This procedure is required in several circuits, and looked upon with favor. Had it been done in the case I am involved with, my client's constitutional position would be clearer.

Thank you for your attention.

Very truly yours,

ROBERT D. POWELL.

NATIONAL MINISTRIES,
AMERICAN BAPTIST CHURCHES,
Valley Forge, Pa., May 5, 1977.

Hon. JOSHUA EILBERG,
House of Representatives,
Washington, D.C.

DEAR MR. EILBERG: I am writing as Executive Secretary of National Ministries of the American Baptist Churches in the U.S.A. to express the concern of this organization to recently publicized abuses of the use of Federal Grand Juries. National Ministries is one of four principal agencies of the American Baptist Churches in the USA. A role of National Ministries is to speak for the American Baptist Churches on matters involving the misuse of governmental authority especially where such activity violates human rights.

We have recently received considerable information pertaining to the circumstances surrounding the imprisonment of two employees of the Episcopal Hispanic Commission for their refusal to testify before a Federal Grand Jury based on constitutional privileges which they asserted. We are also aware of the continuing interrogation of members of the Hispanic community as part of the same investigation. These and other incidents involving the use of Federal Grand Juries compels us to question the wisdom of permitting such wide prosecutorial

discretion in the use of this investigative tool. We believe that Congress should review the complaints of abuses with respect to the use of Grand Juries and enact legislation which sets forth clearly the rights and responsibilities of all parties involved. We deplore any attempt by government to pervert the grand jury system into a political tool to suppress dissent.

We believe that any individual subpoenaed before any grand jury should be represented by counsel. We feel that prosecutors should be compelled to disclose to a subpoenaed witness the purpose and scope of their inquiry and especially whether or not the witness is the target of possible criminal charges. We believe that all constitutional rights and privileges should be respected by prosecutors during grand jury proceedings.

We oppose any practice by government which is reminicent of the ancient form of inquisition.

We urge you to support the strongest possible legislation to remedy abuses now complained of and to restore the grand jury system to its rightful place as a shield against overzealous, arbitrary governmental action.

Very truly yours,

ATHA J. BAUGH.

SAN FRANCISCO, CALIF., *May 3, 1977.*

Hon. JOSHUA EILBERG,
U.S. Congress, House Office Building,
Washington, D.C.

DEAR CONGRESSMAN: The Congressional Record of April 19, 1977 at page H 3222 reports on H.R. 5804, and the deferral to your Subcommittee on Immigration, Citizenship, and International Law that provision which would have made agents of administrative agencies "attorneys for the government" if assigned to assist Federal Grand Juries.

For your consideration, I enclose copies of two recent cases dealing with indictments based (1) on irregular conduct by an IRS agent working silently under instructions from the Department of Justice, and (2) on evidence obtained by criminal conduct arranged for and participated in by agents of the IRS, These cases indicate to me the need for some statutory control over the use of evidence illegally obtained by Federal Agents engaged in fraud, deceit, trickery or, indeed, the hostile, bad faith violation of state or federal law by Feredal agents. Such conduct should vitiate resultant indictments short of the costly, time consuming efforts in suppress evidence after ruinous indictments. The average citizen cannot afford such litigation nor a defense to charges contained in indictments so obtained by the United States.

The statute should preclude the United States from presenting to grand juries evidence or the fruits of evidence known to have been obtained through fraud, deceit, trickery or criminal conduct engaged in by officers, agents and employees of the United States. Whereas, the supervisory authority of the Courts may be invoked after the fact, the citizen has no protection against the use of such evidence by government prosecutors who, with full knowledge of the irregular or illegal means exercised by the Internal Revenue Service proceed to obtain indictments based on such evidence.

It is respectfully requested that your Subcommittee address this matter in your consideration of grand jury reform. To that end I enclose copies of the decisions in *United States* v. *Twcel* 550 F2d 297 (C.A. 5, 4/8/77) 77-1 USTC 9330 and *United States* v. *Payner*, Case No. CR 76-305, Northern District of Ohio, filed April 28, 1977.

Sincerely yours,

RICHARD C. SOHWARTZ.

Enclosures.

[¶ 9330] United States of America, Plaintiff-Appellee v. Nicholas J. Tweel, Defendant-Appellant.

U.S. Court of Appeals, 5th Circuit, No. 76-2324, 4/8/77. Remanding unreported District Court decision.

[Code Secs. 7201 and 7206(1) and 18 U.S.C. § 371—result unchanged by 1976 Tax Reform Act]

Crimes: Tax evasion: False statements: Illegal search.—A conviction of conspiracy to obstruct the lawful functions of the IRS, tax evasion and making false statements was remanded for the trial court to determine what evidence at the

trial was tainted due to the government's violation of the defendant's Fourth Amendment rights. An IRS agent had obtained permission to microfilm the defendant's records without revealing to the defendant's accountant that the audit was being conducted at the request of the Organized Crime and Racketeering Section of the Department of Justice. Back references: ¶ 5709.1137 and 5714.06.

Robert W. Rust, United States Attorney, Miami, Fla. 33132, Scott P. Crampton, Assistant Attorney General, Gilbert E. Andrews, Robert E. Lindsay, Charles E. Brookhart, Department of Justice, Washington, D.C. 20530, for plaintiff-appellee. E. David Rosen, 19 W. Flagler St., Miami, Fla. 33130, Harold Ungar, Edward Bennett Williams, Williams, Connolly & Califano, 1000 Hill Bldg., 839 17th St., N.W., Washington, D.C. 20006, for defendant-appellant.

Before MORGAN and FAY, *Circuit Judges*, and HUNTER,* District Judge.

FAY, *Circuit Judge*: Appellant, Nicholas J. Tweel, was convicted of conspiring (with an unindicted co-conspirator, Charles Zemliak) to defraud the United States by obstructing the lawful functions of the Internal Revenue Service (IRS),[1] two counts of tax evasion for 1967 and 1969,[2] and two counts of making false statements in a tax return for those same years.[3] Two other co-defendants were named in one of the counts for tax evasion. Tweel was sentenced to four years on three counts and three years on each of the other two, all concurrent. He was also fined a total of $30,000.

The government's evidence showed to the jury's satisfaction that in the tax years, 1967 and 1969, Tweel "laundered" parts of his income to avoid paying taxes by passing sums on to persons who would owe little in taxes because they were in a lower tax bracket or had large losses which would offset the income.

The investigation leading up to appellant's indictment began on May 28, 1969. Don L. Miller, revenue agent for the Internal Revenue Service informed appellant and his wife by letter that he had been assigned to conduct an audit of their federal income tax returns for 1966 through 1968 and asked for an appointment. Appellant's accountant, Ben A. Bagby, telephoned the agent on June 10, 1969 to request a postponement of this audit because the IRS had just completed an audit of appellant's returns for 1958 through 1963. They did set an appointment for August 4, 1969.

During the earlier audit for 1958 through 1963, a special agent of the Intelligence Division of IRS became involved but eventually withdrew, with the audit remaining civil instead of criminal. To discover whether his client was again involved in a criminal inquiry, Bagby asked Miller whether a "special agent" was involved in the new investigation. Miller replied that no special agent was involved. This response led Bagby to believe that Miller was just conducting a civil audit. What Miller did not disclose was that this audit was not a routine audit to which any taxpayer may be subjected from time to time. This audit was conducted at the specific request of the Organized Crime and Racketeering Section of the Department of Justice.[4]

Bagby, who had his own records of appellant's tax affairs as well as some of Tweel's also allegedly obtained additional records from Tweel to voluntarily present to Miller for the new audit. Miller microfilmed all the records that were given to him.[5]

The theory on which the motion to suppress was based is that Miller's microfilming of appellant's records constituted an illegal search in violation of the Fourth Amendment because appellant's consent was obtained through deception. This Court agrees that appellant was grossly deceived and the motion should have been granted; as a matter of procedure we remand this case back to the district court for a hearing to determine what evidence admitted at the trial was tainted due to the government's violation of appellant's constitutional rights.

The district court findings were that the Justice Department requested the IRS to investigate the appellant, a revenue agent was assigned the task, and the accountant asked the agent whether or not a special agent was involved and received a negative response which was at that point a true statement. The trial judge subsequently stated:

"If it is deception not to advise at the outset that you were sent there or requested to be there by the Justice Department when asked the question whether there is a special agent involved, then the Court is wrong."

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*Senior District Judge of the Western District of Louisiana sitting by designation.

[1] 18 U.S.C. § 371.

[2] 26 U.S.C. § 7201 (Internal Revenue Code of 1954).

[3] 26 U.S.C. § 7206(1) (Internal Revenue Code of 1954).

[4] The Organized Crime and Racketeering Section of the Justice Department is only involved in criminal investigations and requested this audit in its own name.

[5] No summons of any sort was directed to appellant or his accountant by the IRS.

It is a well established rule that a consent search is unreasonable under the Fourth Amendment if the consent was induced by the deceit, trickery or misrepresentation of the Internal Revenue agent. *United States v. Rothstein* [76-1 USTC ¶ 9390], 530 F. 2d 1275 (5th Cir. 1976); *United States v. Dawson* [73-2 USTC ¶ 9759], 486 F. 2d 1326 (5th Cir. 1973); *United States v. Bland* [72-1 USTC ¶ 9336], 458 F. 2d 1 (5th Cir. 1972) cert. denied, 409 U. S. 843, 93 S. Ct. 53, 34 L. Ed. 2d 83 (1972); *United States* v. *Ponder* [71-2 USTC ¶ 9522], 444 F. 2d 816 (5th Cir. 1971) cert. denied, 405 U. S. 918, 92 S. Ct. 944, 30 L. Ed. 2d 788 (1972); *United States* v. *Tonahill* [70-2 USTC ¶ 9511], 430 F. 2d 1042 (5th Cir. 1970), cert. denied, 400 U.S. 943 91 S. Ct. 242, 27 L. Ed. 2d 247 (1970); *United States* v. *Prudden* [70-1 USTC ¶ 9336], 424 F. 2d 1021 (5th Cir. 1970), cert. denied, 400 U. S. 831, 91 S. Ct. 62, 27 L. Ed. 2d 62 (1970).

The burden for determining whether or not the government has resorted to a deception is on the moving party and this Court in each of the above cases set forth what that party must establish:

"We conclude that the mere failure of a revenue agent (be he regular or special) to warn the taxpayer that the investigation may result in criminal charges, absent any acts by the agent which materially misrepresent the nature of the inquiry, do not constitute fraud, deceit and trickery. Therefore, the record here must disclose some affirmative misrepresentation to establish the existence of fraud, and the showing must be clear and convincing. (Footnote omitted)

Prudden, supra, p. 1033.

The *Prudden* court also stated that:

"Silence can only be equated with fraud where there is legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading."

Supra, p. 1032.

From the facts we find that the agent's failure to apprise the appellant of the obvious criminal nature of this investigation was a sneaky deliberate deception by the agent under the above standard and a flagrant disregard for appellant's rights. The silent misrepresentation was both intentionally misleading and material. Any findings to the contrary under the facts of this case are clearly erroneous. *United States* v. *Reynolds*, 511 F.2d 603 (5th Cir. 1975); *United States* v. *Gunn*, 428 F.2d 1057 (5th Cir. 1970).[6]

Appellant showed Miller knew that the IRS was acting at the request of the Organized Crime and Racketeering Section of the Justice Department which is undeniably an instrument for criminal investigation. Miller obviously knew the accountant inquired whether a special agent was involved to determine whether he was conducting a criminal audit. Miller's response, although on the face of it true, misled appellant to such a degree that his consent to the "search" must be vitiated by the agent's silence concerning the origin of this investigation.

In this case, the agent testified he intended, if appellant had consented to an interview[7] to advise him of his rights. Because the IRS requires *only* special agents to warn taxpayers of their rights,[8] by assigning a revenue agent the IRS still succeeded in masking the undeniable criminal nature of this investigation and materially deceived this appellant.

We cannot condone this shocking conduct by the IRS. Our revenue system is based upon the good faith of the taxpayers and the taxpayers should be able to expect the same from the government in its enforcement and collection activities.[9]

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[6] The court below appears to have based its decision on *United States* v. *Cleveland Trust Co.* [73-1 USTC ¶ 9280], 474 F. 2d 1234 (6th Cir. 1973), cert. denied sub nom. *Micelli* v. *United States*, 414 U.S. 866, 94 S. Ct. 48, 38 L. Ed. 2d 118 (1973). We do not agree with its applicability. *Cleveland Trust* was a suit for enforcement of a summons which was allegedly not issued in good faith. Deception was not the issue in that case.

[7] Tweel did not agree to be interviewed.

[8] Under International Revenue guidelines promulgated in IRS News Release No. 897, 7 CCH 1967 Stand. Fed. Tax Rep. ¶ 6832, and IRS News Release IR-949, 1968 CCH Fed. Tax Rep. ¶ 6946, a special agent must advise the taxpayer before an interview of the following:

As a special agent, one of my functions is to investigate the possibility of criminal violations of the Internal Revenue Laws, and related offenses. In connection with my investigation of your tax liability (or other matter) I would like to ask you some questions. However, first I advise you that under the Fifth Amendment of the Constitution of the United States I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any information which you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of an attorney before responding. Do you understand—

[9] During oral argument counsel for the government stated that these procedures were "routine." If that is the case we hope our message is clear. This sort of deception will not be tolerated and if this is the "routine" it should be corrected immediately.

Since the consent given by appellant was obtained by deception, the microfilming of the documents constituted an unreasonable search in violation of the Fourth Amendment. *Gouled* v. *United States*, 255 U.S. 298, 41 S. Ct. 261, 65 L. Ed. 647 (1921). The evidence obtained here in violation of appellant's Fourth Amendment rights, as well as any evidence derived therefrom, should have been suppressed. *Alderman* v. *United States*, 394 U.S. 165, 171, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969). The burden of proving any evidence was untainted is on the government. *Nardone* v. *United States*, 308, U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939). Therefore, we remand for a hearing to make that determination. If any of the evidence was tainted, it must be suppressed and appellant afforded a new trial. The other issue raised on appeal is without merit.

In the United States District Court for the Northern District of Ohio, Eastern Division

Case No. CR76-305

UNITED STATES OF AMERICA, PLAINTIFF

v.

JACK PAYNER, DEFENDANT

ORDER

Pursuant to the Opinion filed in this case today, which Opinion is fully incorporated in this Order, the Court grants Defendant Payner's motion to suppress, and orders suppressed all evidence introduced in the trial by the Government with the exception of Jack Payner's 1972 tax return, Exhibit 1, and the testimony relating to that document. This exclusion order suppresses the testimony of all the Government's witnesses as it relates to information discovered as a result of the guarantee, notably the testimony of Robert Mintz, Mary Rhodenizer, Samuel Pierson, Carl Brownell, Jr., William Losner, and Susie Vrabel.

IT IS SO ORDERED.

JOHN M. MANOS,
U.S. District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

(Case No. CR76-305, Judge John M. Manos)

UNITED STATES OF AMERICA, PLAINTIFF,

v.

JACK PAYNER, DEFENDANT.

MEMORANDUM OF OPINION

Motion to suppress

On September 14, 1976 the defendant Jack Payner was indicted for knowingly and willfully making a false statement in a matter within the jurisdiction of an agency of the United States in violation of 18 U.S.C. § 1001. Specifically, the Government charged Payner with falsely stating on his 1972 Federal Income Tax Return that he did not have a foreign bank account when in fact he had an account of over $100,000 in the Castle Bank of the Bahamas.[1]

On January 6, 1977, the defendant filed a motion to suppress all evidence obtained by the Government from allegedly illegal searches conducted by government agents during January of 1973. In response the Government argued that the evidence it intended to introduce against Payner was neither the direct product,

[1] The question which Payner allegedly answered falsely read as follows: "Did you, at any time during the taxable year, have any interest in or signature or other authority over a bank, securities or other financial account in a foreign country (except in a U.S. military banking facility operated by a U.S. financial institution)?" See, Exhibit 1.

nor the fruit of the allegedly unconstitutional searches, but was evidence obtained from sources independent of the searches in issue. Also, the Government argued that even if the evidence against Payner was obtained from information arising out of the January, 1973 searches, the evidence should not be suppressed because Jack Payner has no standing to raise the issue of the constitutionality of the searches. On March 14, 1977, by agreement of the parties, the Court proceeded to try the defendant on the merits of the indictment together with the motion to suppress.[2] This opinion deals only with the issues raised by the motion to suppress.

I.

Findings of Fact

A. The Seizures of January 1973

In 1965 the Internal Revenue Service initiated Operation Trade Winds for the purpose of gathering information about the financial activities of American citizens in the Bahamas.[3] Special Agent Richard Jaffe of the Jacksonville, Florida Office of the Internal Revenue Service (IRS) supervised the investigation.[4] IRS agents gathered information pertinent to Operation Trade Winds by making numerous trips to the Bahamas and by the use of over 30 informants.[5]

In June, 1972 the IRS suspected that Castle Bank and Trust Company of the Bahamas functioned as an illegal tax haven for American taxpayers.[6] The IRS' suspicion was based on information about an alleged California narcotics dealer, Allan Palmer, who deposited a check in his bank account originally drawn on the Castle Bank of the Bahamas. Further investigation revealed that the Castle Bank had an account with the Bank of Perrine in Florida, and that Palmer had $25,000 in a Castle Bank account which he opened through the assistance of the Bank of Perrine.[7] In August, 1972 representatives of the IRS districts in San Francisco, Chicago, Miami, and Pittsburgh met in Jacksonville, Florida to discuss the involvement of the Castle Bank with respect to narcotic trafficking investigations pending in each district.[8]

In late October, 1972, Special Agent Jaffe met with one of his informants, Norman Casper, and asked him to obtain the names and addresses of the individuals holding accounts with the Castle Bank.[9] In the first week of November of 1972 Casper decided to secure the requested information[10] and in late November of 1972, as part of the scheme to get the names of the Castle Bank depositors, Casper introduced Sybol Kennedy to Michael Wolstencroft.[11] Wolstencroft was then an acquaintance of Casper's[12] and Vice-President and Trust Officer of Castle Bank. Sybol Kennedy was a private detective employed by Casper.[13] At the time Casper introduced Wolstencroft to Sybol Kennedy, Casper knew that Wolstencroft frequently traveled to the United States carrying a briefcase containing documents concerning the operation of the Castle Bank.[14] In early January, 1973 Casper learned that Wolstencroft planned a business trip to the United States on January 15, 1973, and would have records of the Castle Bank in his possession during the trip.[15]

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[2] The defendant waived his right to trial by jury. See, Jury Waiver Form. The Court consolidated the trial on the merits with consideration of the motion to suppress because it was necessary to know whether the Government's evidence was obtained from a source or sources independent of the search. See F. R. Crim. P. 12(e).

[3] See, Transcript of the Motion to Suppress [TRM] 9–10.

[4] TRM 24.

[5] TRM 133–135.

[6] TRM 138.

[7] TRM 5. See also footnote 55 *infra*.

[8] TRM 61.

[9] TRM 80–81.

[10] TRM 81.

[11] TRM 89.

[12] Transcript [Tr.] 286.

[14] TRM 91.

[13] TRM 88.

[15] TRM 84. On January 11, 1973 when Casper informed Jaffe of his plan, he simply advised Jaffe that he expected to obtain information from an apartment. Casper did not say that he had permission to enter the apartment or to take the briefcase containing Castle Bank information from the apartment. TRM 105–108. Contrast Jaffe's rendition of the events on the Thursday prior to the taking of the briefcase, at TRM 155, 172. The Court disbelieves Jaffe's assertion that Casper told him on January 11, 1973 that he received a key from the owner of the apartment from which he expected to obtain the information. See also, footnote 40, *infra*.

In the week preceding January 15, 1973 Casper and Special Agent Jaffe discussed a covert plan to intercept copies of the documents that Wolstencroft planned to bring into the United States. On Tuesday, January 9, 1973 Casper told Jaffe that he could get the documents from Wolstencroft but that he needed Jaffe to supply photographic services,[16] and on Thursday, January 11, 1973 Casper outlined to Jaffe his plan to get the documents from Wolstencroft.[17] Casper specifically told Jaffe that he planned to enter an apartment from which he expected to remove Wolstencroft's briefcase.[18] Jaffe told Casper that he would have to clear such an operation with his superior, Troy Register, Jr., Chief of the IRS Intelligence Division in Jacksonville.[19] After obtaining authorization from Register, Jaffe told Casper to proceed with the operation. On Friday, January 12 Casper phoned Jaffe and asked if the IRS could refer him to a locksmith who could be "trusted," [20] which Jaffe did.[21]

On January 15, 1973 Wolstencroft arrived in the United States and went to Sybol Kennedy's apartment. What occurred at her apartment, if anything, was not brought out at trial.[22] However, at 7:30 p.m. Sybol Kennedy and Wolstencroft left Kennedy's apartment to go to a restaurant on Key Biscayne, whereupon Casper entered the apartment with a key given him by Kennedy, and removed Wolstencroft's briefcase without permission.[23] Casper took the briefcase to a locksmith who had been recommended by the IRS, and who had previously refused to enter the apartment with him. Casper met the locksmith in a parking lot five blocks from Kennedy's apartment and instructed him to make a key for the briefcase,[24] Casper then took the briefcase to an IRS agent's private residence, selected by Jaffe as the rendezvous point, and opened it in Jaffe's presence. Over 400 documents were taken out of the briefcase and photographed.[25]

Jaffe, Casper, and an IRS photography expert used two cameras to photograph the documents, a "normal" camera and a microfilm camera.[26] The microfilm camera was used because it was faster [27] than a normal camera, and Agent Jaffe knew that the briefcase had to be returned to Sybol Kennedy's apartment before she and Wolstencroft got back from dinner.[28] To get the briefcase back timely Casper had Kennedy and Wolstencroft watched during their dinner. When Kennedy and Wolstencroft completed their dinner,[29] Casper's lookout [30] phoned him at the residence which the IRS used to photograph the documents. After all documents were copied, Casper closed the briefcase, accidently broke off the

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[16] TRM 87, 105, 146–147.
[17] TRM 105.
[18] TRM 105–106, 155.
[19] TRM 108, 155. See also, footnote 40, *infra*.
[20] The following testimony was given by Casper regarding the need for a locksmith who could be trusted:
"Question. Isn't it a fact, Mr. Casper, you knew you were committing an illegal act, and you wanted somebody who could be trusted to keep his mouth shut about it?
"Answer. There is that possibility, yes.
"Question. Isn't that the fact.
"Answer. Yes." TRM 112–113. See also, TRM 149–150.
[21] TRM 149–150.
[22] Although testimony from Sybol Kennedy would have been very helpful to the Court in resolving the factual issue of the propriety or impropriety of the Government's conduct, with respect to Wolstencroft, counsel for the Government never called her as a witness, and the record fails to indicate that she was unavailable. It appears to the Court that it is peculiarly within the power of the Government to produce her, since she worked for its agent and she is totally unknown to the defendant. Therefore, the Court infers from her unexplained failure to testify that her testimony would be unfavorable to the Government by further delineating the improprieties of what Casper himself characterized as the "briefcase caper." See, TRM 117.
[23] TRM 95.
[24] TRM 96. See also, TRM 111.
[25] TRM 97, 154, 157. Jaffe selected the home of an IRS agent which was located eight blocks away from where Casper met the locksmith. TRM 96. Jaffe selected this location because he knew that Casper needed to hurry and it was located close to the apartment from which the documents were purloined. TRM 155–157. For the number of documents photographed, see TRM 130.
[26] TRM 148–149, 154.
[27] Jaffe was asked, "What was the necessity for your being hurried?" He replied, "Mr. Casper had to get the documents and the briefcase back to the apartment prior to the return of the owner." TRM 154–155.
[28] TRM 154.
[29] TRM 158.
[30] Jaffe in answer to a question stated, "I don't know who the person was, but he [Casper] had arranged for somebody to observe the lady who owned the apartment and her date, and let them know when they were finished eating dinner, to give him some idea when they would be returning." Tr. 158.

key in the lock,[31] and returned the documents to Kennedy's apartment at approximately 9:00 p.m.

Within the next two weeks Jaffe again met with Casper and told him that additional information concerning Castle Bank's customers was needed.[32] Casper obtained the requested additional information by sending Sybol Kennedy to the Bahamas to visit Wolstencroft. While there she stole a rolodex file from his office as Casper directed her to do.[33] The stolen rolodex file was then turned over to Jaffe, who expressed no concern over the methods used to obtain it.[34]

Casper was paid $8,000 in cash by the IRS for obtaining the information relating to Castle Bank.[35] Sybol Kennedy was paid approximately $1,000 by Casper from funds he received from the IRS for her part in obtaining the briefcase and the olodex.[36]

This Court finds that the United States, through its agents, Richard Jaffe, and others, knowingly and willfully participated in the unlawful seizure of Michael Wolstencroft's briefcase,[37] and encouraged its informant, Norman Casper, to arrange the theft of a rolodex from the offices of Castle Bank.[38] The Court does not accept the Government's argument that Casper was an independent contractor who acted alone, without the knowledge and concurrence of Jaffe.[39] Jaffe knew that Casper had hired Kennedy to date Wolstencroft, knew that Wolstencroft's briefcase would be taken without permission, furnished the name of a locksmith who could be "trusted," knew that the locksmith was hired to break into the briefcase, and knew that he and another IRS agent had to copy the documents in a hurry in order to get the briefcase back to the apartment before Wolstencroft's return.

That the proposed activity was unusual and that Jaffe knew it was unusual was demonstrated by his clearing the scheme with his superior.[40] The Court con-

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[31] TRM 98–99, 157–158, 174–177.

[32] TRM 118, 126–129, 160.

[33] TRM 117–118.

[34] Jaffe was asked by defense counsel, "Did you care how he obtained it?" and he answered, "I don't recall thinking that at the time, no sir." Defense counsel then asked, "* * * all you wanted was the information, and you did not care how it was obtained?" To which Jaffe responded, "Well, I certainly didn't expect him to murder anybody for it." TRM 161. Casper testified that when he handed Jaffe the rolodex file stolen from Wolstencroft's desk Jaffe "was rather elated." TRM 119.

[35] TRM 116.

[36] TRM 115, 123.

[37] It is important to note that the seizure was conducted in order to obtain information about depositors in Castle Bank; it was not to gain information about Wolstencroft. Jaffe was asked, "So you had no interest in taking action against Mr. Wolstencroft." He answered, "Yes, sir." TRM 165.

[38] This conclusion is reached by weighing the demeanor and reliability of each witness who testified and then accepting all, part, or none of what the witness has asserted. See, *United States* v. *Gargotta*, 510 F. 2d 409, 411, fn. 1 (6th Cir., 1974).

[39] TRM 145.

[40] Jaffe testified, "Whatever I knew, he [Register] knew." TRM 172–173. See also, Casper's responses to questions put to him by defense counsel at TRM 106–110.

"*Question.* Did you testify, Mr. Casper, before the hearings of the Rosenthal Committee?
"Answer. Yes.
"*Question.* And were you under oath when you testified?
"Answer. Yes.
"*Question.* Do you recall making these statements:
'I think that the memorandum was January, 1973. The memo said in effect a banker coming through would be coming through the Miami area and there might be some provision that I might have a way of obtaining the information that Mr. Jaffe and I had previously discussed.
'Now, approximately two days prior to this it really began to jell as to what I might be able to do, and I did something which was inadvertent, and that was that I told Mr. Jaffe that I would be entering an apartment and taking the briefcase out at the time.'
Do you remember that?
"Answer. Yes, I do.
"*Question.* Do you remember further on testifying then that:
'After Mr. Jaffe told me that he had been in touch with his immediate supervisor or superior, and I assumed that to be Troy Register, and I asked him about it, and he said yes, and it was been cleared.'
Do you remember making that statement?
"Answer. Yes.
"*Question.* What was cleared?
"Answer. To the best of my knowledge, that it was permissible to go into the apartment and get a briefcase.
"* * *
"*Question.* Had he asked you how you were going to get into the apartment, Mr. Casper?
"Answer. At that time, no.
"*Question.* And you didn't tell him how you were going to get into the apartment?
"Answer. To the best of my recollection, no.
"* * *.

(Continued)

cludes that the United States was an active participant in the admittedly criminal conduct in which Casper engaged in order to procure the Castle Bank's documents in January of 1973.

B. THE PAYNER INVESTIGATION

In late 1971 and countinuing through the early part of 1972 the Internal Revenue Service investigated the financial dealings of an alleged narcotics trafficer, Allen Palmer.[41] Through their investigation of Palmer they discovered a connection between the Bank of Perrine, located in Perrine, Florida, and the Castle Bank and Trust Co.[42]

On January 15, 1973 documents indicating that Jack Payner held a bank account with Castle Bank and Trust Co. were taken from Michael Wolstencroft's briefcase and duplicated by the Government.[43] These same documents also indicated that the Perrine Bank was linked to the Castle Bank.[44] Within the next two weeks a rolodex was taken from the offices of the Castle Bank. The rolodex contained the name and address of Jack Payner.[45] On February 22, 1973 the Internal Revenue Service sent a letter to Jack Payner advising him that his 1968, 1969, 1970 and 1971 tax returns were being investigated.[46] On April 9, 1974 the investigation of Payner's 1968–1971 income tax returns was completed and his tax returns for those years were accepted as filed.[47] During April and May of 1974 subpoenas were issued to the Bank of Perrine requiring the production of all documents concerning Perrine's dealings with Castle Bank.[48] One of these subpoenas[49] uncovered a guarantee agreement, Exhibit 4, which pledged money in a Castle Bank account in the name of Jack Payner as security for a $100,000 loan by Castle Bank to Conel Development Inc. This guarantee was forwarded to the Cleveland Office of the IRS[50] and generated an IRS investigation of Jack Payner's 1972 tax return.[51] That investigation, commenced on October 10, 1974, led to the return of this indictment against the defendant.

The initial issue presented is whether the Government met its burden of proof to show that Exhibit 4 was not the fruit of the January 15, 1973 seizure. The Court finds that the Government did not meet its burden to show that Ex-

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(Continued)
"*Question.* Mr. Casper, you have indicated that what you stated in the Rosenthal hearings was correct, that Mr. Jaffe told you, 'Yes,' and, 'It has been cleared.' Is that correct?
"Answer. Yes.
"*Question.* Did he tell you what had been cleared?
"Answer. No.
"*Question.* Did you ask him what had been cleared?
"Answer. No.
"*Question.* Did you ask him to get something cleared?
"Answer. No.
"*Question.* Do you remember testifying in this manner, Mr. Casper? You were asked by Mr. Moffitt:
"*Question.* What was inadvertent about your statement?
'Answer. I blurted it out. He didn't need to know about this. All I am going to do is supply information. I kind of kicked the bucket anyway, but that was his reaction to this, because immediately he drew up the warning flag, the red flag, and wanted to get clearance on this obviously before anything was done.'
"* * *
"*Question.* You said he drew up the warning flag, the red flag. You stated that, did you not?
"Answer. Yes, I did.
"*Question.* What did you mean by that when you made that statement?
"Answer. Mr. Jaffe at that time said to me, 'I have to get clearance.'
"* * *
"*Question.* Did he tell you what he had to get cleared about?
"Answer. No.
"*Question.* Nor did you inquire?
"Answer. No.
"*Question.* And before he got the clearance, you didn't do anything; is that correct?
"Answer. That is correct." See also footnote 20 supra.

[41] TRM 3–4.
[42] TRM 5. See footnote 55 *infra.*
[43] TRM 26–27, 31.
[44] TRM 33.
[45] TRM 44.
[46] Tr. 221–222, 225.
[47] Tr. 232–233, and Exhibit D.
[48] TRM 19–20.
[49] The Government introduced Exhibit 300 as being the subpoena that produced Exhibit 4. However, the Government's witnesses were unable to confirm this. See, TRM 20.
[50] TRM 36.
[51] TRM 18–19, 56.

hibit 4 was the product of an investigation independent of the information taken from Wolstencroft's briefcase.

Special Agent Richard Jaffe was asked the following question, "Mr. Jaffe, do you know if the subpoena to the Bank of Perrine in 1974 was issued because of what was found in the briefcase." He answered, "I don't believe so." [52] This Court, viewing Richard Jaffe's testimony as a whole, including his demeanor while presenting his testimony, finds that Jaffe's testimony on this point was unconvincing. Jaffe admitted telling a committee of the United States Congress, under oath, "It [the briefcase] provided the leads as to where to serve the Grand Jury subpoenas." [53] Jaffe also admitted having said, "The information obtained from the informant was extremely valuable and was unavailable from any other source." [54] Further, the chronology of the events that led to the subpoena casts doubt upon Jaffe's assertion of the independent source of the subpoena. If the Allen Palmer investigation was the reason for the Perrine Bank subpoena, which produced Exhibit 4, why wasn't that subpoena issued in 1972? This Court finds that it was not coincidence that the Perrine Bank was served with subpoenas shortly after the information in the briefcase had been examined and discussed throughout the IRS districts in the United States.[55]

The Court finds that the briefcase seized on January 15, 1973 provided the leads which resulted in the issuance of subpoenas to the Bank of Perrine in April and May, 1974. Further the Court finds that Exhibit 4 is a product of the seizure of January 15, 1973, and that the subsequent investigation and indictment of Jack Payner stemmed from the January 15, 1973 seizure.

II.

Conclusions of Law

The sole question of law presented is whether relevant evidence, accumulated as a result of the information found in Wolstencroft's briefcase, must be excluded from consideration of the Government's case against Jack Payner.[56] The defense argues that the seizure of the briefcase was illegal and unconstitutional, and that any evidence which is the product of that seizure must be excluded. The United States argues that Payner has no standing under the Fourth Amendment to assert the alleged unconstitutionality of the seizure of the briefcase; that the seizure is not so heinous as to require exclusion of the evidence under the Due Process clause of the Fifth Amendment; and that the Court should not use its supervisory power over federal prosecutions as a basis for excluding the evidence.

The exclusionary rule

American jurisprudence recognizes numerous examples in which relevant, and otherwise admissible evidence is excluded from consideration in criminal prosecutions because of the procedure the Government used to obtain it.

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[52] TRM 22. See also, TRM 34.

[53] TRM 33–34.

[54] TRM 33–34.

[55] TRM 164–170. See also footnote 69 *infra*. This court specifically finds that the investigation of Allen Palmer produced information concerning a connection between the Castle Bank and the Bank of Perrine. The Palmer investigation, along with Casper's comment to Jaffe in June of 1972 that he (Casper) had once seen what might be a list of the Castle Bank clients, sharply intensified the I.R.S. interest in the Castle Bank. TRM 137–145. However, the Court finds that this information was insufficient to issue a subpoena to the Perrine Bank in 1972, and, for that obvious reason, the I.R.S. issued no such subpoena at that time. See F. R. Crim. P. 17(c); *United States* v. *Mitchell, et al.*, 377 F. Supp. 1326, 1329–1330 (D.D.C. 1974), aff'd in *United States* v. *Nixon, et al.*, 418 U.S. 683, 698–703 (1974) ["Good cause" required for issuance of a subpoena]. The interest generated by this information caused the August, 1972 meeting of representatives from four regional IRS districts, at which further intelligence gathering plans were made. TRM 144, 62–63, 80–81. However, the IRS still had insufficient data with which to obtain a subpoena from the Perrine Bank at the time of the August, 1972 meeting and therefore in late October, 1972, Jaffe asked Casper to obtain the names and addresses of individuals holding accounts with the Castle Bank. TRM 81. After October, 1972, Casper and Jaffe concocted the briefcase scheme which ultimately furnished the information used to issue the April or May, 1974 subpoena on the Perrine Bank.

[56] This Court shall not deal with the seizure of the rolodex. There is no evidence that the information contained on the rolodex has been used by the Government in any way in the presentation of its case against Jack Payner. As was made clear in the Court's Findings of Fact, it was the briefcase material that led to the subpoenas on the Bank of Perrine and thereby the discovery of Exhibit 4, the guarantee. It is the exclusion of the guarantee as the fruit of the unlawful seizure which is the gravamen of the defendant's motion to suppress. The rolodex was not shown to pay any part in uncovering the guarantee, since there was no evidence that the rolodex contained information showing a connection between the Castle Bank and the Bank of Perrine. See TRM 31.

The reasoning in support of the "exclusionary rule" is twofold. The first is the necessity to deter law enforcement officers from using illegal and unconstitutional procedures to obtain evidence of a crime. See, e.g., *Elkins* v. *United States*, 364 U.S. 206, 217 (1960); *United States* v. *Calandra*, 414 U.S. 338, 347–348 (1974); *United States* v. *Peltier*, 422 U.S. 531, 537–538, 95 S.Ct. 2313, 2317 (1975); *United States* v. *Janis*, —— U.S. ——, ——, 96 S.Ct. 3021, 3034 (1976).

Thus, the Supreme Court wrote: "The rule is calculated to prevent, not repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it." *Elkins*, *supra*, 364 U.S., at 217.

The Second reason for invoking the "exclusionary rule" is to maintain the integrity of the judicial process. See, e.g., *Elkins* v. *United States*, *supra*, 364 U.S., at 222; *Mapp* v. *Ohio*, 367 U.S. 643, 659 (1961); *Brown* v. *Illinois*, 422 U.S. 590, 599, 95 S.Ct. 2254, 2259 (1975). As the Supreme Court stated in *Mapp:* "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence." *Mapp*, *supra*, 367 U.S., at 659.

Although the exclusion of wrongfully gathered evidence preserves important social interests, judicial suppression of relevant and reliable evidence is never ordered lightly[57] because society has important and substantial interests which require the admission of all relevant and reliable evidence in a criminal prosecution. See, e.g., *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 411 (1971) (Burger, C. J., dissenting); *United States* v *Janis*, —— U.S. ——, ——, 96 S.Ct. 3021, 3029 (1976); *Brewer* v. *Williams*, —— U.S. ——, ——, 97 S.Ct. 1232, 1250 (Supreme Court, March 23, 1977) (Burger, C. J., dissenting). The most notable social interest which favors admission of evidence is the concept that the trier of fact performs a truth-seeking function for both society[58] and the accused. The truth seeker can perform its essential social function of issuing accurate adjudications of factual guilt or innocence only if the law insures the presentation of the fullest range of relevant evidence to the trier of the facts.[59] See, *Brewer* v. *Williams*, —— U.S. ——, ——, 97 S.Ct. 1232, 1251 (Supreme Court, March 23, 1977) (Burger, C. J., dissenting).

The decision whether or not to use the heavy hand of the exclusionary rule is determined by weighing the social interest in ascertaining accurately a particular defendant's factual guilt against the inconsistent competing social interest of deterring government officials from getting evidence in a manner that violates the Constitution. In *United States* v. *Janis*, *supra*, at ——, 96 S.Ct., at 3032, the Supreme Court stated that the exclusionary rule is to be invoked when the evidence shows "a sufficient likelihood of deterring the [unlawful] conduct of the state [federal] police so that it [the social benefit of exclusion] outweighs societial costs imposed by exclusion." See also, *Michigan* v. *Tucker*, 417 U.S. 433, 450–451 (1974); *Brown* v. *Illinois*, 422 U.S. 590 610–611, 95 S.Ct. 2254, 2264–2265 (1975) (Concurring Opinion of J. Powell); *United States* v. *Calandra*, 414 U.S. 338, 348 (1975); *United States* v. *Peltier*, 422 U.S. 531, 537–538 (1975); *United States* v. *Martinez-Fuerte*, —— U.S. ——, ——, 96 S.Ct. 3074, 3081–3087 (1976); *United States* v. *Perez*, —— F. Supp. ——, ——, fn. 33 (N.D. Ohio, 1977). Recently the Sixth Circuit stated: "The Supreme Court, however, has not proscribed the use of illegally seized evidence against all persons or in all proceedings. Rather, it has determined that there must in effect be a balancing of the benefits to defendants other than the victim of the search or seizure by containing police activities within the letter of the law against the encroachment upon

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[57] The result of the use of the exclusionary doctrine is often as Justice Cardozo puts it that "[t]he criminal is to go free because the Constable has blundered." *People* v. *DeFore*, 242 N.Y., at 21.

[58] It must be remembered that society has a considerable interest in the effective prosecution of criminals. See, *Michigan* v. *Tucker*, 417 U.S. 433, 451 (1974). As the Supreme Court stated in *Nardone* v. *United States:*

"Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land. In a problem such as that before us now, two opposing concerns must be harmonized: on the one hand, the stern enforcement of the criminal law; on the other, protection of the realm of privacy left free by Constitution and laws but capable of infringement either through zeal or design." *Nardone* v. *United States*, 308 U.S. 338, 340 (1939).

[59] Chief Justice Burger states, "In evaluating the exclusionary rule, it is important to bear in mind exactly what the rule accomplishes. Its function is simple—the exclusion of truth from the fact finding process." *Stone* v. *Powell*, —— U.S. ——, ——, 96 S.Ct. 3037, 3053 (1976) (C. J. Burger, concurring).

the public interest in having defendants acquitted or convicted on the basis of all the evidence which exposes the truth, in deciding whether the exclusionary rule has application, and, a fortiori, whether standing to invoke the rule exists." *United States* v. *Hunter*, —— F. 2d —— (6th Cir., March 4, 1977, No. 76–1631) Slip Op., pp. 14–15.

The Supreme Court points to three separate situations in which the balance of competing interests may justify the exclusion of reliable, probative evidence.[80]

First, the High Court firmly established the constitutional principle that evidence obtained by the Government in violation of the Fourth Amendment right to be free of unreasonable searches and seizures shall be excluded from consideration against the person whose privacy interest has been invaded. See, e.g., *Mapp* v. *Ohio*, 367 U.S. 643, 655 (1961); *Alderman* v. *United States*, 394 U.S. 165, 171–172 (1969). Second, the Supreme Court also established the constitutional principle that the Government violates the Due Process rights of an individual who is the target of a search procedure which is so *outrageous* that it shocks a court's conscience. Evidence obtained by such outrageous Due Process violations must be excluded. See, *Rochin* v. *California*, 342 U.S. 165, 169–174 (1952); *Jackson* v. *Denno*, 378 U.S. 368, 385–386 (1964); *Leo* v. *Twoney*, 404 U.S. 477, 485–486 (1972). Third, federal courts sustain supervisory power to exclude evidence which the Government obtained in a manner so inconsistent with American standards of justice that to allow admission of the evidence calls into question the integrity of the entire federal judicial system. See, *McNabb* v. *United States*, 318 U.S. 332, 340–344 (1943); *Elkins* v. *United States*, 364 U.S. 206, 216–223 (1960); *United States* v. *Valencia*, 541 F.2d 618, 621–622 (6th Cir., 1976).

This Court must analyze the facts of Payner's case and determine the admissibility, against him, of the materials derived from the briefcase by applying the balance of interest test appropriate to each of the three different legal theories under which evidence may be excluded.

The fourth amendment

In order for a court to suppress material under the Fourth Amendment, the evidence in question must be: (1) the product of an unconstitutional search or seizure, see, e.g., *Weeks* v. *United States*, 232 U.S. 383 (1914); (2) obtained in a search conducted by the Government, see, e.g., *Burdeau* v. *McDowell*, 256 U.S. 465 (1921); and (3) seized from a party who has standing to assert the unlawfulness of the search and seizure, i.e., the movant must be the person whose privacy interests were violated, see e.g., *Alderman* v. *United States*, 394 U.S. 165 (1969). In this case the Government admits that the search and seizure of Wolstencroft's briefcase violated his Fourth Amendment rights, and this Court expressly finds that the search was conducted at the Government's behest and with its concurrence. However, Jack Payner possessed no privacy interest in the Castle Bank documents that were seized from Wolstencroft. See, e.g., *California Bankers Association* v. *Shultz*, 416 U.S. 21, 49 (1974); *United Statacs* v. *Miller*, 425 U.S. 435, 440–441, 96 S. Ct. 1619, 1622–1623 (1976); *Couch* v. *United States*, 409 U.S. 322, 335–336 (1973). Therefore Payner has no standing under the Fourth Amendment to raise the illegality of the seizure of Wolstencroft's briefcase. As the Supreme Court stated: "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." *Alderman* v. *United States*, 394 U.S. 165, 171–172 (1969).

See, e.g., *Jones* v. *United States*, 362 U.S. 257, 261 (1960); *Brown* v. *United States*, 411 U.S. 223, 229–230 (1973); *United States* v. *Hunter, et al.*, —— F. 2d ——, ——, Case No. 76–1631, p. 11 (6th Cir., March 4, 1977).[81]

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[80] There are a number of other areas in which courts have excluded evidence. For example, see *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Brown* v. *Illinois*, 422 U.S. 590, 95 S.Ct. 2254 (1975) [Fifth Amendment right to remain silent]; *Gilbert* v. *California*, 388 U.S. 263 (1967) [Sixth Amendment].

[81] It has been argued that the Supreme Court in *Jones* v. *United States*, *supra* and *Alderman* v. *United States*, *supra* did not intend to preclude an accused *who was the target* of an illegal search but who, as here, was not the person who was actually searched, from having standing to raise the Fourth Amendment exclusionary rule. See, *United States* v. *Lisk*, 522 F. 2d 228, 231 (7th Cir., 1975) (Swygert, concurring); *United States* v. *Alewito*, 532 F. 2d 1165, 1167 (7th Cir., 1976); *United States* v. *Roger S. Boskes*, —— F. Supp. ——, Case No. 76CR585 (N.D. Ill., March 23, 1977). This Court is convinced from its reading of *Jones*, *Alderman*, and *Mancusi* v. *DeForte*, 392 U.S. 364, 367–372 (1968), as well as the more recent Supreme Court decisions of *United States* v. *Miller*, —— U.S. ——, ——, 96 S.Ct. 1619, 1622–1624 (1976), and *California Bankers Association* v. *Shultz*, 416 U.S. 21, 41 (1974), that only a party whose expectation of privacy has been violated may raise the unconstitutionality of a search and seizure under the Fourth Amendment.

The standing requirement of the Fourth Amendment demonstrates the Supreme Court's use of the *Janis, supra,* balancing test. The Court has decided that the police must be deterred from violating the central interest that the Fourth Amendment protects, an individuals expectation of privacy, when asserted personally. *United States* v. *Dionisio,* 410 U.S. 1, 8–9 (1973). However, when an expectation of privacy is asserted vicariously, the Court has found the deterrent interest served by exclusion less substantial and has struck a balance in favor of society's truth-seeking interest by allowing admittedly unconstitutionally gathered material into evidence. As the Supreme Court stated in *Alderman:* "The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman, supra,* 394 U.S., at 174–175. *See also, Brewer* v. *Williams,* —— U.S. ——, ——, 97 S. Ct. 1232, 1251, fn. 4 (1977) (Burger C. J., dissenting).

The fifth amendment

The Supreme Court has long recognized the principle that all criminal prosecutions must meet the bare minimum requirements of Due Process of Law. What this entails is best explained by reference to the words of Justice Frankfurter in *Rochin* v. *California:*

"Regard for the requirements of Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples even toward those charged with the most heinous offenses.' These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' or are 'implicit in the concept of ordered liberty'.

"* * *.

"Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague but the mode of their ascertainment is not self-willed. In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts, exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society" *Rochin* v. *California,* 342 U.S. 165, 169 and 172 (1952) [citations omitted].

In *Rochin* the defendant was charged and convicted of possession of morphine by the State of California. The key evidence against the defendant were two capsules of morphine, which the police had extracted from the defendant by force and against his will by using a "stomach pump." In overturning the conviction as violating Due Process, the court stated: "* * * We are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceedings by agents of government to obtain evidence is bound to offend even hardened sensibilities." *Rochin* v. *California, supra,* 342 U.S., at 172.

In a number of other cases the Supreme Court has likewise excluded relevant evidence because the procedures used to obtain it violated Due Process. In *Jackson* v. *Denno,* 378 U.S. 368, 386 (1964), the Supreme Court approved the exclusion of involuntary confessions stating: "because of 'the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.'" *Id.* at 386

[citations omitted]. See also, *Lego* v. *Twoney*, 404 U.S. 477, 485 (1972); *Brown* v. *Mississippi*, 279 U.S. 278, 286 (1936).[62]

On the other hand, a number of Supreme Court and other lower court opinions recognized the possibility of excluding evidence under the Due Process Clause, but have rejected exclusion because of the particular facts presented in the case. These cases illustrate factual patterns which the Court found insufficiently egregious to warrant exclusion under Due Process.

In *Hoffa* v. *United States*, 385 U.S. 293 (1966) the Supreme Court rejected the argument of the defendant that the evidence procured through the use of a paid informant should be excluded under the Due Process Clause. In that case an informant was paid by the Government to visit the defendant and report what Hoffa said and did. In rejecting the exclusion of the informant's testimony the court stated: "This is not to say that a secret government informer is the slightest degree more free from all relevant constitutional restrictions than is any other government agent. It *is* to say that the use of secret information is not *per se* unconstitutional." *Hoffa* v. *United States*, 385 U.S. at 311 [citations omitted].

The Supreme Court stated in *United States* v. *Russell*, 411 U.S. 423 (1973): "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed. The law enforcement conduct here stops far short of violating that 'fundamental fairness' shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." *United States* v. *Russell*, *supra*, 411 U.S., at 431–432.

In *Russell* a government agent supplied a chemical to the defendant which was used to manufacture an illicit drug. The Supreme Court found the Government had done nothing illegal and had not infringed Due Process.

Two recent circuit court decisions reviewed the arguments for excluding evidence based on Due Process violations. See, *United States* v. *Spivey*, 508 F.2d 146 (10th Cir., 1975), cert. denied, 95 S. Ct. 1682 (1975); *United States* v. *DeSapio*, 435 F.2d 272 (2nd Cir., 1970). In both cases the court looked at whether the Government itself actively participated in illegal conduct and, finding that it had not concluded that the Due Process was not violated. As the court in *Spivey* stated,[63]

"There is no evidence that the government in any way directed or controlled Redman's [the informant's] activities. On the contrary, there is evidence that on earlier occasions Redman had been cautioned not to break the law.

"Our review of this testimony confirms our conclusion, that the government's conduct here does not offend the 'sense of justice' referred to in *Rochin* v. *California*, *supra*, and *Brown* v. *Mississippi*, *supra*." *United States* v. *Spivey*, *supra*, 508 F.2d, at 151.

See also, *United States* v. *DeSapio*, *supra*, 435 F. 2d at 282; *Bradford* v. *Johnson*, 354 F.Supp. 1331, 1334–1337 (E.D. Michigan, S. D., 1972).

Synthesizing and distilling the case law discussed above, this Court concludes that Due Process requires exclusion of reliable evidence only in those cases in which government officials obtain the challenged materials in a grossly improper fashion, i.e., by engaging in illegal conduct which exhibits their knowing and purposeful bad faith hostility to any person's fundamental constitutional rights.[64] Therefore, under the *Janis* balance of interests test, society's interest in deterring Due Process violations outweighs society's interest in allowing the fact

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[62] The approval of the exclusion of coerced confessions in *Jackson* was not solely because of their unreliability but was also because the manner of obtaining the confessions violated principles of Due Process. See, *Jackson* v *.Denno*, *supra*, 378 U.S., at 385–386; *Lego* v. *Twoney*, *supra*, 404 U.S., at 485, fn. 13.

[63] There is one more case that bears reviewing. In *Irvine* v. *California*, 347 U.S. 128 (1954) the Supreme Court refused to extend the *Rochin* concept of a Due Process exclusionary rule to a fact situation in which evidence was introduced that the police had entered the defendant's home without permission on a number of occasions and planted microphones. The Supreme Court in *Irvine* was split, four Justices joining in an opinion rejecting the use of *Rochin*, one Justice, Justice Clark, concurring in the judgment only because he felt bound by the court's decision in *Wolf* v. *Colorado*, 338 U.S. 25 (1949), and four Justices dissenting on the basis that the evidence must be excluded because it violated Due Process. See, *Irvine* v. *California*, *supra*, 347 U.S., at 142–149. Since *Wolf* has been overruled by *Mapp* v. *Ohio*, 367 U.S. 643, 654, 644 (1961), the vitality of *Irvine* is questionable.

[64] Neither a technical violation of the law, nor police conduct which is entered into in good faith, but which in fact proves to be illegal would be basis for the exclusion of evidence on Due Process grounds. See, *Brown* v. *Illinois*, 422 U.S. 590, 607–612, 95 S.Ct. 2254, 2265 (1975) (J. Powell, concurring); *Brewer* v. *Williams*, —— U.S. ——, ——, 97 St.Ct. 1232, 1250–1251 (1977) (C. J. Burger, dissenting).

finder to view all relevant evidence only when an official's conduct demonstrates a bad faith hostility to the strictures imposed on him by the Constitution.[65]

The Court finds that the illegal conduct[66] of the government officials involved in this case compels the conclusion that they knowingly and purposefully ob-

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[65] There is no standing problem in this case in regard to the Fifth Amendment Due Process question. In the Fourth Amendment area, exclusion deters violations of the core Fourth Amendment interest, an individual's reasonable expectation of privacy. The Fourth Amendment expectation of privacy of a defendant such as Jack Payner was not violated by the IRS breaking and entering into Wolstencroft's briefcase and Kennedy's theft of Wolstencroft's rolodex file. In the normal case, where officers acting in good faith, technically violate an individual's reasonable expectation of privacy, third persons, such as Payner, are not accorded standing to exclude the fruits of the illegally obtained evidence because such third persons are not asserting an intrusion into their own expectation of privacy and the police conduct is not outrageous. In such a situation the *Janis* balance of interests test favors admissibility because no party's constitutional interest is vindicated by exclusion, and the character of the police behavior, i.e., unconscious, unintentional violation of the Fourth Amendment, cannot be deterred by exclusion. However, under the Due Process concept, the *Janis* balancing test shifts markedly in favor of extending standing to third parties, such as Payner, to raise the exclusionary rule because an element of the Due Process violation is outrageous official conduct which violates the constitutional rights of an individual, situated like Wolstencroft, in a fashion which is knowing, purposeful, and with a bad faith hostility toward the right violated. Such intentional bad faith conduct is as susceptible of deterrence as any crime committed purposefully by an ordinary civilian. Compare, the balancing approaches discussed in *Stone* v. *Powell*, —— U.S. ——, ——, 96 S.Ct. 3037, 3049–3052 (1976); *United States* v. *Martinez-Fuerte*, —— U.S. ——, ——, 96 S.Ct. 3074, 3081–3087 (1976); *United States* v. *Janis*, —— U.S. ——, ——, 96 S.Ct. 3021, 3031–3035 (1976); *United States* v. *Calandra*, 474 U.S. 338, 348 (1974); *United States* v. *Peltier*, 422 U.S. 531, 537–538 (1975). Furthermore, in a case such as this, where the Court finds that the person who is the object of the outrageous governmental conduct, was never himself the ultimate target of the governmental investigation, then the Court must furnish those persons who the ultimate targets with standing to raise the exclusionary rule in order to insure that some party is available to litigate the question of the Government's outrageously unconstitutional activity. Without such an expanded Due Process exclusionary rule standing theory, the Government could repeatedly commit outrageous constitutional violations with impunity against citizens, in order to obtain convictions of other citizens, so long as the government agents accept the speculative possibility of defending civil damage actions initiated by the few primary victims hardly and knowlegeable enough to file such an action. Thus, if the Court did not extend the Due Process exclusionary rule to persons situated in Payner's position, purposeful, bad faith constitutional violations by the Government might well be capable of repetition, and evade review. See, *Jones* v. *United States*, 362 U.S. 257, 261 (1960); *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 396–398 (1971); *Olmstead* v. *United States*, 277 U.S. 438, 485 (1927) (Mr. Justice Brandeis, dissenting); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Southern Pacific Terminal Company* v. *I.C.C.*, 219 U.S. 498, 515 (1911); *United States* v. *W. T. Grant Company*, 345 U.S. 629, 632–633 (1953); *Compare and contrast, McNea* v. *Garey, et al.*, —— F. Supp. ——, ——, fn. 7, Case No. C76–920, Slip Op., p. 7, fn. 7 (N.D. Ohio, September 30, 1976); *United States* v. *Perez*, —— F. Supp. ——, ——, fn. 32 (N.D. Ohio, 1977).

[66] The facts surrounding the NRS appropriation of the bank records from Wolstencroft's briefcase appear to satisfy a prima facie case of criminal larceny under Florida law. Section 812.011 of the Florida Statutes defines "property" as "anything of value, including, but not limited to—real estate, tangible and intangible personal property, * * *." Section 812.021(a) of the Florida Statutes states, "A person who, with intent unlawfully to * * * deprive the true owner of his property * * * or to appropriate the same to the use of the taker or of any other person: * * * takes from the possession of the true owner, or of any person . . . or appropriates to his own use, or that of any other than the true owner, any property "is guilty of either a misdemeanor or a felony. Significantly, the Florida courts hold that, "In order to convict a person under § 811.021, Fla. Stat., F.S.A., it is not necessary that the elements of common law larceny be proven * * *. It is enough to prove that the defendant secrets, withholds, or appropriates to his own use, or that of any other person, other than the true owner, * * * the property in question." *Thomas* v. *State*, 216 So. 2d 780, 781 (Fla. App., 1968); see also, F.S.A. § 812.021(5). Certainly the list of a foreign bank's customers, which list is secret under the law of a foreign state, constitutes intangible personal property which has value. In fact Casper was paid $8,000 for that list. TRM 116. The record also clearly shows that Casper took the Castle Bank's secret customer list, an item of intangible personal property from Wolstencroft and appropriated it to his "own use or that of any other than the true owner" by selling it to the Internal Revenue Service. See, fn. 20, *supra*.

Jaffe's active participation in Casper's crime, as evidenced by his arranging for a place in which to photograph the Wolstencroft documents, and his appropriation of the Wolstencroft materials for his own use as well as the use of the IRS, probably renders him guilty of a Section 812.021(a) violation as a principal in the first degree under F.S.A. § 777.011 which pertinently provides: "Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed, * * * is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commission of such offense."

The type of conduct which the government agents exhibited in connection with the "briefcase caper" was so outrageously improper that it probably satisfies the elements of F.S.A. § 812.081 criminalizing the unauthorized appropriation of trade secrets such as secret "lists of customers," by copying such lists without permission of the owner. See, § 812.081(1)(c),(3). Section 812.081 carries a different penalty than a larceny violation under Section 812.021(a). See, Sections 812.081(2), 775.082(4)(a), 775.083(1)(d) and contrast those provisions with the punishment proscribed under Section 812.021(2), (3), 775.082(3)(d), 775.083(1)(c). See also, fn. 75, *infra*.

(Continued)

tained the briefcase materials with bad faith hostility toward the strictures imposed on their activities by the Constitution.

The activities of the Government agents Jaffe and Casper[67] were outrageous. They plotted, schemed and ultimately acted in contravention of the United States Constitution and laws of Florida, knowing that their conduct was illegal.[68] It is inoperative to signal all likeminded individuals that purposeful criminal acts on behalf of the Government will not be tolerated in this country and that such acts shall never be allowed to bear fruit. As Mr. Justice Brandeis stated in *Olmstead* v. *United States:* "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. 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. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crime in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." *Olmstead* v. *United States*, 277 U.S. 438, 485 (1927).

The need to deter gross illegal activity on the part of the Government, such as occurred in this case, is clear. However, the utility of the exclusionary rule in actually deterring illegal activity is often in question. See, e.g., *United States* v. *Janis*, —— U.S. ——, ——, 96 S.Ct. 3021, 3027–3030 (1976); *Stone* v. *Powell*, —— U.S. ——, ——, 96 S.Ct. 3037, 3052, 3053 (1976) (C.J. Burger concurring); *Brewer* v. *Williams*, —— U.S. ——, ——, 97 S.Ct. 1232, 1250–1251 (1977) (C.J. Burger, dissenting).

The Court finds, from the testimony adduced at trial, that exclusion of the illegally obtained evidence in this case will have a deterrent effect. It is evident that the Government and its agents, including Richard Jaffe, were, and are, well aware that under the standing requirement of the Fouth Amendment, evidence obtained from a party pursuant to an unconstitutional search is admissible against third parties whose own privacy expectations are not subjected to the search, even though the cause for the unconstitutional search was to obtain evidence incriminating those third parties.[69]

(Continued)

The criminal activity by the government's agents is this case is particularly distressing because the briefcase information which they seized by means which were violative of Florida's criminal law, could probably have been obtained both constitutionally and without violating Florida criminal law, if the officers simply obtained a search warrant. From the record as currently constituted in this proceeding it certainly appears that the information which the IRS possessed regarding Allan Palmer's alleged use of the Castle Bank to hide illegal income from the IRS combined with the information from Casper, clearly a reliable informant, that Wolstencroft would enter the United States with Castle Bank depositors' records, might well have furnished the Government with probable cause to suspect that the records in Wolstencroft's possession constituted evidence of criminal tax evasion by some American depositors of the Castle Bank. See, *United States* v. *Manufacturers National Bank of Detroit*, 536 F. 2d 699, 702–703 (6th Cir., 1976). Thus it appears likely that government officers chose to do illegally that which they could have achieved through lawful, constitutionally recognized, processes. See TRM 168.

[67] As the Supreme Court has stated: "The Government cannot make such use of an informer and then claim dissociation through ignorance." *Sherman* v. *United States*, 356 U.S. 369, 375 (1958).

[68] Casper admitted on the witness stand that he knew he was "committing an illegal act, and [he] wanted somebody who could be trusted to keep his mouth shut about it * * *." TRM 112–113.

[69] At trial the following colloquy took place between Mr. Jaffee and an attorney for the defendant:

"*Question.* And didn't Mr. Hyatt [a Justice Department attorney] in a memorandum to you of April, 1974, indicate that no one had standing to object legally in court to the use of the briefcase matter except Mr. Wolstencroft?

"Answer. The memorandum was not directed to me, sir.

"*Question.* Who was it directed to?

"Answer. I believe it was directed to his superiors in the Department of Justice.

"*Question.* Well, you were familiar with the contents of the memorandum?

"Answer. Yes.

"*Question.* And isn't what I said substantially the contents of the memorandum?

"Answer. I believe that is substantially the position he took on the memorandum, yes, sir.

"*Question.* In fact, wasn't there some discussion, either by written memorandum or otherwise, indicating that they were not concerned with Mr. Wolstencroft because they were only after the other people that were named in the briefcase?

"Answer. I don't remember any such discussion.

"*Question.* Well, do you remember testifying before the Rosenthal Committee: do you remember?

(Continued)

This Court finds that, in its desire to apprehend tax evaders, a desire the Court fully shares,[70] the Government affirmatively counsels its agents that the

(Continued)
"Yes, sir.
"*Question.* You did testify?
"Answer. Yes, sir.
"*Question.* Do you remember in a discussion between you and Mr. Mezvinsky, in a question-and-answer session between you and Mr. Mezvinsky—and tell us whether or not this question was asked and whether this was your answer:
"*Question.* You have the Hyatt memo stating the activity would not be viewed as illegal or that it should not restrict your future activity, Mr. Jaffe?
'Answer. The context he put it was that none of the individuals on the list would have any standing to object legally in court to the use of our information.'
"Answer. Yes, sir.
"*Question.* And then do you recall this:
'The particular individual who had the briefcase might be able to assert that defense, but not the individuals themselves.'
"Do you remember that being said?
"Answer. Yes, sir.
"*Question.* And do you remember your saying this:
'That is right. We had no interest in taking action against him.'
"Answer. That is true.
"*Question.* So you had no interest in taking action against Mr. Wolstencroft?
"Answer. Yes, sir.
"*Question.* And from what Mr. Hyatt told you, Mr. Wolstencroft was the only person who had legal standing to object to the material being taken from his briefcase?
"Answer. I believe he mentioned the bank also had standing.
"*Question.* And the bank?
"Answer. Yes, sir." TRM 162–165.

[70] In the context of civil tax litigation this Court has recognized the need to permit the Internal Revenue Service wide latitude in order to thwart taxpayers from engaging in disengenuous practices that shelter income from taxation. See, *M.S.D. Incorporated, et al.* v. *United States of America*, —— F. Supp. ——, ——, Case No. C74-498, Slip Op., pp. 10–15 (N.D. Ohio, March 25, 1977). However the balance of interests shifts markedly when the Internal Revenue Service seeks judicial authorization to purposefully intrude upon the fundamental interests secured by the Constitution. In *G.M. Leasing Corporation* v. *United States*, —— U.S. ——, ——, 97 S.Ct. 619, 629–631 (1977), the Government asserted that its taxing interest in conducting warrantless probable cause entries into buildings to seize property subject to tax assessments outweighed the constitutional protections secured by the Fourth Amendment. The High Court expressly rejected the Government's assertion of a constitutionally recognized tax interest which outweighed the "core" Fourth Amendment interest in premises privacy. See, *Silverman* v. *United States*, 365 U.S. 505, 509–512, fn. 4 (1961). The *G.M. Leasing* court at ——, 97 S.Ct., at 629–630, wrote:
"Rather, the intrusion is claimed to be justified on the ground that petitioner's assets were seizable to satisfy tax assessments. This involves nothing more than the normal enforcement of the tax laws, and we find no justification for treating petitioner differently in these circumstances simply because it is a corporation.
"The respondents [the Government] argue that there is a broad exception to the Fourth Amendment that allows warrantless intrusions into privacy in the furtherance of enforcement of the tax laws. We recognize that the 'Power to lay and collect Taxes' is a specifically enunciated power of the Federal Government, Const., Art. I, § 8, cl. 1, and that the First Congress, which proposed the adoption of the Bill of Rights, also provided that certain taxes could be 'levied by distress and sale of goods of the person or persons refusing or neglecting to pay.' Act of March 3, 1791, c. 15, § 23, 1 Stat. 204. This, however, relates to warrantless seizures rather than to warrantless searches. It is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer.
"Indeed, one of the primary evils intended to be eliminated by the Fourth Amendment was the massive intrusion on privacy undertaken in the collection of taxes pursuant to general warrants and writs of assistance. As Madison argued, urging the adoption of a Bill of Rights to restrain the Federal Government: 'The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments for exercising this power, there is like reason for restraining the Federal Government.' 1 Annals of Congress 438 (1834 ed.).
"The respondents urge that the history of the common law in England and the laws in several States prior to the adoption of the Bill of Rights support the view that the Fourth Amendment was not intended to cover intrusions into privacy in the enforcement of the tax laws. We do not find in the cited materials anything approaching the clear evidence that would be required to create so great an exception to the Fourth Amendment's protections against warrantless intrusions into privacy."
The *G.M. Leasing* court are also noted at ——, 97 S.Ct., at 631, "* * * [W]e are unwilling to hold that the mere interest in the collection of taxes is sufficient to justify a statute declaring *per se* exempt from the warrant requirement every intrusion into privacy made in furtherance of any tax seizure."
The proposition upon which the Government acted in this case, i.e., that it could intentionally commit a flagrant Fourth Amendment violation against Wolstencroft in order to obtain convictions of third persons like Payner, is the type of purposeful evisceration of the fundamental privacy interests secured by the Constitution which, the *G.M. Leasing* court concluded, is not sufficiently justified by the Government's need to enforce the tax laws.

Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties, who are the real targets of the governmental intrusion, and that the IRS agents in this case acted, and will act in the future, according to that counsel.

Such governmental conduct compels the conclusion that Jaffe and Casper transacted the "briefcase caper" [71] with a purposeful, bad faith hostility toward the Fourth Amendment rights of Wolstencroft in order to obtain evidence against persons like Payner. That outrageous behavior on the part of the Government infringes Payner's Due Process rights, and can only be deterred by granting Payner's motion to suppress.

For this reason, the Court holds that the evidence against Payner, which is the fruit of the outrageously illegal seizure directed at Wolstencroft's briefcase, must be suppressed under the Due Process Clause of the Fifth Amendment to the United States Constitution.

Supervisory power [72]

Above and beyond the constitutional requirement of Due Process, the federal judiciary has the duty of supervising the administration of criminal justice in federal courts. This duty requires the federal judiciary to take actions and make decisions which will further the ends of justice. In this regard the Supreme Court wrote:

"It is true, as the petitioners assert, that a conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand. * * * Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force." *McNabb* v. *United States*, 318 U.S. 332, 339–340 (1943).

See also, *Upshaw* v. *United States*, 335 U.S. 410, 412–414 (1948); *Mallory* v. *United States*, 354 U.S. 449, 452–453 (1957); *Elkins* v. *United States*, 364 U.S. 206, 216 (1960); *Nardone* v. *United States*, 302 U.S. 379 (1937); *Benanti* v. *United States*, 355 U.S. 96, 99–103 (1957); *Mesarosh* v. *United States*, 352 U.S. 1, 9–14 (1956); *Lopez* v. *United States*, 373 U.S. 427, 440 (1963); *Ker* v. *California*, 374 U.S. 23, 31–32 (1963); *Communist Party* v. *Subversive Activities Con. Bd.*, 351 U.S. 115, 124 (1956); *United States* v. *Valencia*, 541 F.2d 618, 621–622 (6th Cir., 1976); *Williamson* v. *United States*, 311 F.2d 441, 444 (5th Cir., 1962).[73]

The Court concludes from a review of the cases cited above, that the federal courts' supervisory power over federal prosecutions should be invoked to exclude [74] evidence obtained by Governmental conduct which is either purposefully

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[71] Casper himself refers to the Wolstencroft incident on January 15, 1973, as the "briefcase caper." TRM 117 (emphasis added).

[72] The Court is well aware of the long established doctrine that constitutional questions will be avoided when an alternate means can be employed to the same effect. *Burton* v. *United States*, 196 U.S. 283, 295 (1904) ["It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."] See, e.g., *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936). In this case the court holds that exclusion is required under Due Process and supervisory powers. The court deals with Due Process because the Government might well argue that supervisory power to exclude is limited to these instances specified under the federal criminal rules. Therefore, the court sets forth the Due Process basis for exclusion.

[73] In *Communist Party* v. *Subversive Activities Con. Bd.*, the Supreme Court stated:

"The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our prudent boasts. This court is charged with supervisory functions in relation to proceedings in federal courts. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." *Communist Party, supra*, 351 U.S., at 124. See also, *Mesarosh, supra*, 352 U.S., at 14.

[74] As discussed in regard to the Due Process exclusionary rule, exclusion on the basis of supervisory power is only done as a last resort. "The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evident evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court." *Lopez* v. *United States*, 373 U.S. 427, 440.

illegal[75] or motivated by an intentional bad faith hostility to a constitutional right.[76] Put in terms of the *Janis* balancing test, only when the Government's

[75] See, e.g., *Nardone* v. *United States, supra,* 302 U.S. 379 (1939); *Benanti* v. *United States, supra,* 355 U.S. 99–103; *Williamson* v. *United States, supra,* 311 F. 2d, at 444 ["* * * It becomes the duty of the courts in federal criminal cases to require fair and lawful conduct from federal agents in the furnishing of evidence of crimes."]; *Rea* v. *United States,* 350 U.S., 350 U.S. 214, 216–218 (1956); *Wise* v. *Henkel,* 220 U.S. 556, 558 (1911).

Exclusion under the Fifth Amendment Due Process Clause and federal courts' supervisory power is particularly important where *federal* officers are counseled to gather evidence in a fashion which violates the criminal law of a state and they purposefully violate such criminal laws in reliance on the erroneous counsel that their conduct is authorized by federal power. If such officers can demonstrate a subjective belief that their "conduct was necessary and proper under the circumstances," then they are immune from state prosecution, regardless of how flagrantly their actions violate a state's criminal law. See, *Clifton* v. *Cox,* 549 F. 2d 722, 728 (9th Cir., 1977), a case in which, under the Supremacy Clause of the United States Constitution, a federal officer who shot and killed an unarmed fleeing suspect in the back during a raid on an illegal drug factory was granted a post indictment, pretrial, writ of habeas corpus blocking his prosecution in state court for second degree murder and involuntary manslaughter. *Compare, ExParte Neagle,* 135 U.S. 1, 75 (1890). In the case of In Re Lewis, 83 F. 159 (D. Wash., 1897) the court, applying the *Neagle* doctrine, granted a writ of habeas corpus blocking a state robbery prosecution of special employees of the United States Trasury Department and a United States Deputy Marshal who wrongfully seized private papers while executing a search warrant. The *Lewis* court observed at 160,

"In deciding this case, I do not mean to say that the warrant which Mr. Kiefer issued was a lawful warrant, nor that the proceedings under it were proper proceedings. I do not mean to say that the petitioners were lawfully discharging their official duties in what they did. In my opinion, the warrant itself was improvidently and erroneously issued, and the proceedings were all ill-advised, and conducted with bad judgment. But where an officer, from excess of zeal or misinformation, or lack of good judgment in the performance of what he conceives to be his duties as an officer, in fact transcends his authority, and invades the rights of individuals, he is answerable to the government or power under whose apopintment he is acting, and may also lay himself liable to answer to a private individual who is injured or oppressed by his action; yet where there is no criminal intent on his part he does not become liable to answer to the criminal process of a different government. With our complex system of government, state and national, we would be in an intolerable condition if the state could put in force its criminal laws to discipline United States officers for the manner in which they discharge their duties."

Evidently, the Supremacy Clause furnishes federal officers a broad, although perhaps not absolute, see, *United States ex rel. Drury* v. *Lewis,* 200 U.S. 1, 8 (1906), protection against state criminal prosecution when they violate state criminal laws while performing their federal duties. The existence of such official immunity for federal officers means that the deterrent effect of state criminal punishment for criminal conduct in their collection of evidence approaches zero. Absent the deterrent effect of state criminal prosecution, the only practical deterrent to federal officers adopting means of federal law enforcement which are criminal under state law, is often the deterrence generated by federal court suppression of the fruits of federal officials' criminal investigative techniques. The Fifth Amendment Due Process and Supervisory Power concepts, in conjunction with the speculative possibility of civil damage judgments, are certainly appropriate instruments for administering an adequate dose of deterrence, while at the same time preserving an adequate level of criminal immunity for federal officials.

Of course 18 U.S.C. § 2236(b) poses none of the deterrence effected by state criminal law against purposefully improper conduct by federal officials when they act on "reasonable grounds" to suspect the person searched committed a felony. Likewise 18 U.S.C. § 241 furnishes no deterrence to purposefully unconstitutional conduct by federal officers when the person who suffers an intrusion into his reasonable expectation of privacy is not a "citizen" (perhaps Wolstencroft is not a citizen) or the federal officers do not "go in disguise on the highway or on the premises of the person who's rights are violated."

Therefore, the deterrence rationale for exclusion under either the Fifth Amendment Due Process Clause or Federal Supervisory Power is uniquely compelling when a federal court is presented with evidence which federal officers clearly obtained through their active, affirmative participation in conduct which is criminal under state law, regardless of the Fourth Amendment standing considerations. As the Court discussed above, this is precisely such a case. See, fns. 65 and 66, *supra.*

[76] *Elkins* v. *United States,* supra, 369 U.S., at 216–217; *United States* v. *Valencia, supra,* 541 F. 2d, at 621–622. The need to deter government agents' purposeful hostility to individuals' constitutional rights is analogous to the policy rationale for excluding evidence seized in "pretext" searches. See, *South Dakota* v. *Opperman,* —— U.S. ——, —— 96 S.Ct. 3092, 3103 (1976) (Mr. Justice Powell, concurring); *Amador-Gonzales* v. *United States,* 391 F. 2d 308, 313–315 (5th Cir., 1968); *Taglavore* v. *United States,* 291 F. 2d 262, 265–267 (9th Cir., 1961); *McKnight* v. *United States,* 183 F. 2d 977, 978 (D.C. Cir., 1950); *Blazak* v. *Ryman,* 339 F. Supp. 40, 42–43 (D. Ariz., 1971); *United States* v. *Garriaer,* 541 F. 545, 553 (6th Cir., 1976); *United States* v. *Robinson,* 414 U.S. 218, 246–248 (1973) (Mr. Justice Marshall, *dissenting*); *United States* v. *Lefkowitz,* 285 U.S. 452, 467 (1932); *Abel* v. *United States,* 362 U.S. 217, 226, 230 (1960); *United States* v. *Perez,* —— F. Supp. ——, ——, fn. 40, Case No. CR76-346, Slip Op., p. 21, fn. 40 (N.D. Ohio, April 21, 1977); *City of Cleveland* v. *Tedor,* Case No. 34622, Slip Op., pp. 3–5 (Cuyahoga County Ohio Court of Appeals, March 4, 1976).

procedure in obtaining evidence is purposefully illegal or the procedure is a knowing and purposeful act, performed with a bad faith hostility to an individual's constitutional right,[77] does society's interest in deterring such conduct by exclusion outweigh society's interest in furnishing the trier of fact with all relevant evidence.

The Court finds the Government's action in this case was both purposefully illegal[78] and an intentional, bad faith act of hostility directed at Wolstencroft's reasonable expectation of privacy.[79] The Court therefore finds that the evidence obtained by the Government as a result of the seizure of Wolstencroft's briefcase must be excluded under this Court's supervisory function.

Evidence excluded

The remaining aspect of the case requires this Court to determine what evidence introduced by the Government against Jack Payner must be excluded. The question was phrased by the Supreme Court as follows: "Whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Alderman* v. *United States*, 394 U.S. 165, 180–181 (1969), citing *Wong Sun* v. *United States*, 371 U.S. 478, 488 (1963).

The Government has the burden to show that its evidence is untainted by the illegal search. See, *Alderman* v. *United States*, 394 U.S. 165, 183. It may do this in two ways: by proving that the evidence was obtained independent of the search, see, e.g., *Silverthorne Lumber* v. *United States*, 251 U.S. 385, 392 (1920); *Nardone* v. *United States*, 308 U.S. 338, 341 (1939); *Alderman* v. *United States*, *supra*, 394 U.S., at 183 (1969); or by demonstrating that the information which led to the discovery of the evidence is so far removed from the illegally seized evidence that the connection became "so attenuated as to dissipate the taint." *Nardone* v. *United States*, *supra*, 308 U.S., at 341; see also, *Wong Sun* v. *United States*, 371 U.S. 471, 487 (1963); *Brown* v. *Illinois*, 422 U.S. 590, 598, 85 S.Ct. 2254, 2259 (1975).

The Government argues that the guarantee, Exhibit 4, was the product of an independent investigation and that all information derived from the guarantee is free of taint.[80] However, this Court has concluded, see, page 8 of this opinion, that the discovery of the guarantee was directly related to the information obtained from Wolstencroft's briefcase. The Court holds that the guarantee and the evidence its discovery subsequently produced were "come at by the exploitation" of the Government's illegal action in searching and seizing Wolstencroft's briefcase.[81]

The Court therefore excludes[82] all evidence introduced in the case by the Government with the exception of Jack Payner's 1972 tax return, Exhibit 1, and the related testimony.[83]

It is so ordered.

JOHN M. MANOS,
United States District Judge.

(Continued)

[77] The standing problems associated with the Fourth Amendment exclusionary rule, see, fn. 65, *supra*, are not present in regard to exclusion under supervisory power. See, *United States* v. *Valencia*, *supra*, 541 F. 2d at 621–622. Exclusion under supervisory power maintains the integrity of the federal system and deters illegal and unconstitutional police activity. These interests are the directing issue in this case. This is not a case where exclusion is invoked solely to vindicate a technically invalid intrustion into Wolstencroft's expectation of privacy. The decision of whether to exclude or not is made by reference to the *Janis* balance of interests test, which test takes into account the standing question.

[78] See, fn. 66, *supra*.

[79] The Court made a finding that the government agents knew they were committing an unconstitutional search.

[80] See, Government Memorandum of March 15, 1977.

[81] The Court notes that the Government did not argue that the guarantee, or the information discovered after the guarantee was found, was "so attenuated as to dissipate the taint." Nevertheless, the Court holds that the taint is not attenuated. See, *Wong Sun* v. *United States*, *supra*, 371 U.S., at 487–488.

[82] As Justice Holmes stated: "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. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." *Silverthorne Lumber Co.* v. *United States*, *supra*, 251 U.S., at 392. See also, *Wong Sun* v. *United States*, *supra*, 371 U.S., at 416 (quoted with approval).

[83] The exclusion includes the testimony of all the Government's witnesses as it relates to information discovered as a result of the guarantee, notably the testimony of Robert Mintz, Mary Rhodenizer, Samuel Pierson, Carl Brownell, Jr., William Losner, and Susie Vrabel.

RICHARD C. SCHWARTZ,
San Francisco, Calif., May 26, 1977.

Hon. JOSHUA EILBERG,
U.S. Congress,
Washington, D.C.

DEAR CONGRESSMAN: Thank you for your letter of May 16, 1977, in response of mine of May 3 regarding the use of evidence illegally taken by the Internal Revenue Service and used to obtain indictments.

To further acquaint the membership of your Subcommittee and Committee Counsel with the facts, I have forwarded copies of the *Payner* decision to the other members and Counsel, together with a copy of the Internal Revenue Manual Supplement which provides for the use of the illegally obtained evidence to conduct further investigations under the sponsorship of a Federal Grand Jury. For your information, I enclose a copy of the IRS Manual Supplement and a copy of my letter to Committee Counsel Garner J. Cline.

Sincerely yours,

RICHARD C. SCHWARTZ.

RICHARD C. SCHWARTZ.,
San Francisco, Calif., May 26, 1977.

GARNER J. CLINE, Esquire,
Counsel, Committee on the Judiciary,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CLINE: The recent and widespread coverage by the press, radio and television given to the stand taken by former President Nixon that the Executive, right or wrong, cannot commit an illegal act, has produced an outcry of indignation against conduct which, if permitted, can destroy the Constitution. The Honorable Leon Jaworski, in his interview with David Hartman this morning, echoed the editorial shock waves against such attempted justification of the illegal burglaries sanctioned by Mr. Nixon and his co-conspirators.

Judge John M. Manos of the Northern District of Ohio, as recently as April 28, 1977, joined a long line of great American jurists who have decried unconstitutional, gross illegal activity on the part of officers and agents of the United States. The case before Judge Manos involved illegal acts carried out by an informant, pre-paid by the Internal Revenue Service, under the guidance of a Special Agent of that Service and with the prior approval of a Chief, Intelligence Division. I enclose a copy of Judge Manos' decision which supplements the disclosures made in the course of the hearings before the Rosenthal Committee of the House of Representatives.

At page 21 of the enclosed slip copy of Judge Manos' decision, I find a conclusion which may well join the expressions cited from opinions by Justices Cardoza, Brandeis and others. Judge Manos wrote: "The activities of the Government agents Jaffee and Casper were outrageous. They plotted, schemed and ultimately acted in controvention of the United States Constitution and laws of Florida, knowing that their conduct was illegal. It is imperative to signal all like-minded individuals that purposeful criminal acts on behalf of the Government will not be tolerated in this country and that such acts shall never be allowed to bear fruit."

On the following page Judge Manos quotes a colloquy from the trial which disclosed the April 10, 1974 attitude of the Justice Department that such conduct should not deter the Internal Revenue Service because those having standing to object were not the targets and that the targeted United States citizens would have no legal standing to object.

I served in the Internal Revenue Service from 1946 until my retirement in June of 1973. I was not privy to any of the Operations of the Service involved in this matter, either while Deputy Chief Counsel from 1966 to 1968, or as Regional Counsel, Western Region from 1968 to 1973. I have, since late 1974, represented clients who have been subjected to the Haven Grand Jury process as a result of the use of that Grand Jury to further the work initiated by the IRS break-in on January 15, 1973. In all such matters, my clients have been denied any conferences at the Internal Revenue Service level and have been deprived of any notice other than that they were targets of the grand jury investigation, i.e., investigation by the Internal Revenue Service agents assigned to assist the grand jury, armed with grand jury subpoenas for use in completing thier fact finding.

This is the so-called Open End Grand Jury process whereby the Revenue Service and the Department of Justice circumvent use of the powers given to the Commissioner by the Congress, including the use of summons with a right lodged in the taxpayer to notice and to intervene in enforcement proceedings, and the right to request conferences and be heard before the Service transfers jurisdiction to the Department of Justice and to grand juries. Also enclosed is a copy of the IRS procedure being used to accomplish these results.

I previously furnished the Honorable Joshua Eilberg with a copy of Judge Manos' opinion. His kind reply advised me that hearings were scheduled for June 1, 1977. I am sending the enclosed copy with the hope it will be helpful in giving you a complete picture of a specific situation involving the very agents who commit the burglaries and the attorneys for the government who acquiesce in their illegal conduct, and provide the power and authority of the United States and grand juries to sanction and return indictments which are the fruits of the criminal acts.

Sincerely yours,

RICHARD C. SCHWARTZ.

Enclosures: Copy of Judge Manos' Opinion.
Copy of IRS Manual Supplement 93G–175.

MANUAL SUPPLEMENT OF THE DEPARTMENT OF THE TREASURY

October 28, 1976

GUIDELINES FOR PROJECT HAVEN INVESTIGATIONS AND EXAMINATIONS

Section 1. Purpose

This Supplement provides general procedures relating to Project Haven investigations and examinations.

Section 2. Background

.01 This Supplement incorporates the instructions contained in memorandums sent on April 9, 1976, to all Regional Commissioners and the Director of International Operations from the Deputy Commissioner relating to the processing of all current and future information items containing Project Haven grand jury information.

.02 Project Haven originated from information developed which indicated that certain foreign financial institutions in the Caribbean area were being used by U.S. taxpayers for tax evasion and tax avoiding purposes. Based on an analysis of the information obtained, a number of civil and criminal cases were initiated. On November 19, 1975, the Internal Revenue Service referred all potential criminal features of Project Haven to the Department of Justice for grand jury investigation and, such further action as deemed necessary, including the securing of indictments where appropriate.

.03 The term "Project Haven" refers to a nationwide investigation of improper use of foreign banks and other entities, primarily in the Caribbean, by persons and entities subject to United States taxation. The Project has two distinct aspects: investigation of criminal violations of U.S. laws; and civil tax cases. The criminal aspects of Project Haven are currently being investigated by a grand jury in the Southern Judicial District of Florida (Miami). The Service is supporting and assisting this grand jury in its investigation. Project Haven civil cases are those which were initiated and designated as such prior to November 19, 1975 or cases so designated as Project Haven cases by the National Office. Project Haven civil cases are to be processed in accordance with normal Service procedures.

.04 On January 13, 1976, the Federal District Court, Southern Judicial District of Florida, issued an order which specifically indicates that the use of information obtained by a prior Miami grand jury and by the current grand jury empaneled in Miami relating to Project Haven may be used solely for the purpose of the said grand jury investigation.

.05 The Court also vacated a Federal Rules of Criminal Procedure Rule 6(e) Order which had been previously obtained relative to information obtained by the prior Miami grand jury. Therefore, all information items that were disseminated prior to January 13, 1976, which contained Project Haven grand jury information may be used only for criminal enforcement purposes. Each Regional Commissioner and the Director of International Operations received a list of such information items in their April 9, 1976 memorandum.

Section 3. Responsibilities

.01 *National office.*—Responsibility is placed on the Directors, Intelligence Division and Audit Division to designate indivduals to serve as Project Haven Coordinators. The coordinators will be responsible for coordinating and monitoring Project Haven activities for their respective divisions.

.02 *Regional office.*—the ARC's (Intelligence) and (Audit) will be responsible for designating individuals to serve as Project Haven coordinators who will be responsible for:

1. coordinating activities related to Project Haven with appropriate National Office, regional, district and service center personnel;
2. orienting appropriate regional, district and service center personnel;
3. ensuring that districts are promptly receiving Project Haven information and that they are taking appropriate action with regard to investigations or examinations of taxpayers;
4. monitoring and reporting on the progress of Project Haven investigations or examinations, identifying problem areas and advising appropriate field and National officials of feasible solutions; and
5. ensuring that issues in Project Haven civil cases, which are not included in the Coordinated Tax Shelter Program, are treated in a uniform and consistent manner.

.03 *District office.*—The District Director through the Chiefs, Intelligence and Audit will be responsible for:

1. ensuring that the Project Haven cases are closely coordinated between Audit and Intelligence Divisions;
2. maintaining control over Project Haven information items and cases to ensure expeditious treatment;
3. providing the regional office coordinators with information and findings developed which affect other districts and regions;
4. providing the region with information on the progress of Project Haven investigations and examinations; and
5. ensuring adequate security over Project Haven grand jury documents and material which may not be used for civil purposes unless a Fed. R. Crim. P. Rule 6(e) Order has been obtained.

Section 4. Procedures for the Preparation, Processing and Evaluation of Project Haven Information Items

01. Project Haven information items are limited to those generated as a result of information received in connection with on-going Project Haven cases.

02. The initiators of all future Project Haven information items containing grand jury information will indicate the presence of such information by the insertion of the following in Item 16, Form 3949, Intelligence Information Item: "IN THE ABSENCE OF A FED. R. CRIM. P. RULE 6(e) ORDER, INFORMATION INDICATED ON THIS DOCUMENT SHALL BE USED SOLELY FOR THE PURPOSES OF THE SAID GRAND JURY INVESTIGATION, THE INFORMATION WAS OBTAINED BY GRAND JURY NO. ——, SOUTHERN JUDICIAL DISTRICT OF FLORIDA."

03. All Project Haven information items will be evaluated by the Chief, Intelligence Division in the district where the taxpayer resides or place of business is located. Therefore, if an information item is on a taxpayer who resides or whose place of business is located within the district which initiated the item, the Chief, Intelligence should forward to the Chief, Intelligence Staff servicing his/her district, a copy of the Form 3949 and indicate that it is a Project Haven information item. The Chief, Intelligence Staff will forward appropriate returns (copies), research, and/or transcripts on the subject of the Form 3949 to the Chief, Intelligence Division to assist him/her in evaluating such items. The Chief, Intelligence Staff will show on his/her copy of the Form 3949 the district disposition in Item 20 and batch it for inclusion on the ADP Alpha Index and then file it in numerical order.

.04 If the subject of the Form 3949 does not reside or does not conduct a business in the district originating the Form 3949, the Chief in the originating district should forward direct to the Chief, Intelligence, in the district where the taxpayer resides or place of business is located, the original Form 3949, as well as any background material. The Chief in the originating district will also forward a copy of the Form 3949 to the Chief, Intelligence Staff, serving the district

where the subject resides or the business is located and indicate that it is a Project Haven information item. The Chief, Intelligence Staff, will follow the procedures in Section 4.03. Should the receiving Chief determine that the information item has been misdirected, he/she will take the following actions.

1. Transmit the Form 3949 to the appropriate Chief, Intelligence Division,
2. By memorandum inform the Director, Intelligence Division, Attn: Project Haven Coordinator of the disposition of the information item.
3. Inform the Chief, Intelligence Staff:

a. if only one service center is involved, by memorandum; and

b. if two service centers are involved: (1) by memorandum to the losing service center; and (2) by memorandum with a copy of the Form 3949 for processing to the receiving service center.

.05 The Chief, Intelligence Division, in the originating district will also forward a copy of the top half of Form 3949 to the Director, Intelligence Division, Attn: Project Haven Coordinator.

.06 The evaluating Chief will have thirty calendar days from the receipt of the information from the Chief, Intelligence Staff, to evaluate the item, except as stated in Section 5.01.

.07 All information items that are initiated by the Project Haven investigating team in Miami will also contain a statement in Item 16 on Form 3949 that their Project Haven index (see Section 12) has been checked and information relating to the subject is attached.

.08 For those information items which were not originated by the investigating team in Miami, the evaluating district should request a search of the Project Haven index. Such information should be requested on a Form 2275, Records Request, Charge and Recharge, and attached to a collateral request, see Section 12.04.

.09 To aid in the evaluation, the Chief, Intelligence Division, may authorize information gathering in accordance with MS 93G–152, CR 1(15)G–91, 41G–105, 42G–328, 45G–231, 51G–118, 5(12)G–25, 61G–3, 71G–9, and 94G–57, dated June 23, 1975.

.10 If the Chief Intelligence Division, after his/her evaluation, elects to reject a Project Haven item, the Chief should forward the item to the Chief, Intelligence Staff, and attach his/her comments on Form 1725. The Chief, Intelligence Division, will sign off as the evaluator of such information items. The Chief, Intelligence Division, will also send a copy of the completed Form 3949 to the Director, Intelligence Division, Attn: Project Haven Coordinator.

.11 If the Form 3949 contains Project Haven grand jury information and the Chief, Intelligence, feels that the item has civil potential, he/she should place the Form 3949 in suspense and a Fed. R. Crim. P. Rule 6(e) Order should be requested (see Sections 13 and 14). Extreme caution must be exercised to prevent the information from either being used for civil purposes or otherwise "tainting" any ongoing audit examination or collection matter until the Fed. R. Crim. P. Rule 6(e) Order has been obtained. The Chief, Intelligence will notify the Chief, Intelligence Staff whenever a Form 3949 is placed in suspense and will specify that a Fed. R. Crim. P. Rule 6(e) Order has been requested and the Form 3949 will be returned to the service center as soon as the outcome of the Fed. R. Crim. P. Rule 6(e) Order request is known.

.12 When a case file is put in suspense, the Chief, Intelligence will also advise the Director, Intelligence, Attn: Project Haven Coordinator, by memorandum. The memorandum should include the earliest civil statute expiration date, comprehensive details as to the civil potential of the information and an estimate of the potential tax recovery involved.

.13 If a Fed. R. Crim. P. Rule 6(e) Order is not obtained, Intelligence will close such information items and follow the procedures in Section 4.10.

.14 If the Form 3949 does not contain grand jury derived information and the Chief, Intelligence feels that the item has civil potential, he/she should discuss the Form 3949 with the district Chief, Audit or Chief, Collection. The Chief, Intelligence, as well as whomever he/she discusses the Form 3949 with, will sign-off as evaluators in Item 17 on Form 3949. If either Audit or Collection accepts the Form 3949, the Chief, Intelligence will indicate such in Item 20 of Form 3949 and transmit the original Form 3949 to the respective function. The Chief, Intelligence will forward a copy of the Form 3949 with the transfer to the other function noted to the Chief, Intelligence Staff who will update the information index.

Section 5. Priority information items

.01 The Director, Intelligence Division, in consultation with the District Director, Jacksonville District, the Assistant Regional Commissioner (Intelligence), Southeast Region, and the Department of Justice is authorized to designate certain information items "must work" criminal cases. Information items which are inextricably related to the investigation will be designated as "must work" cases. These information items along with any background material will be disseminated by the Director, Intelligence Division directly to the districts where the taxpayers reside or carry on their business activity. A copy of the information items will also be sent to the appropriate Chief, Intelligence Staff. The Chief, Intelligence Staff will follow the procedures in Section 4.03.

.02 Once the Chief, Intelligence receives the information from the service center, he/she will evaluate these information items within ten workdays. The Chief, Intelligence in making his/her evaluation, may consult with the Department of Justice attorneys assigned to Project Haven and with the regional and National Office Project Haven coordinators.

.03 The Chief, Intelligence will then initiate an immediate investigation and apply whatever resources are necessary to expeditiously complete the investigation. If the Chief, Intelligence Division feels that an investigation should not or cannot be initiated, he/she will, through normal channels, advise the Director, Intelligence Division, Attn: Project Haven Coordinator, of the reasons why the case should not or cannot be investigated.

.04 If the Chief, Intelligence initiates the investigation, he/she will notify the Chief, Audit Division if Audit resources are necessary to complete the investigation. The Chief, Audit will apply whatever resources are necessary to expeditiously complete the investigation.

.05 Each District Director, through normal channels, will be responsible for advising the Assistant Commissioner (Compliance) of any adverse effect the application of resources to Project Haven would have on other District Programs.

Section 6. Coordination between intelligence personnel and Department of Justice attorneys

.01 For each Project Haven grand jury case a Department of Justice attorney from the Tax Division will be assigned as an oversight attorney. The attorney will conduct grand jury proceedings relating to the investigation; provide legal assistance to the special agent; approve the issuance of grand jury subpoenas; and review recommended prosecution reports. In order that the attorney may be knowledgeable of the case, he/she must be kept apprised of all significant developments.

.02 Intelligence Group Managers have been designated as the point of contact for Department of Justice attorneys whenever legal questions or other significant developments concerning Project Haven investigations arise. Therefore, group managers are expected to be fully cognizant of Project Haven activities within their group.

.03 If the circumstances are such that it is necessary for a Department of Justice attorney to communicate directly with the special agent, the agent is responsible for notifying the group manager of such contacts and the nature of the contact.

.04 In Project Haven cases consents may be solicited by Audit upon approval of the Chief, Intelligence Division in accordance with IBM 4565.6 and 9325.2. In cases where it is necessary for the Chief, Intelligence Division to consider the issuance of a statutory notice, when consents are not forthcoming, the Chief will confer with the oversight attorney, in addition to the procedures as set out in IRM 9325.2.

Section 7. Case control

All investigations initiated as a result of Project Haven information items will be monitored as Project Haven cases by showing the National Office, Region and District Project Haven Code in Item 57 on Form 4929, Intelligence Case/Project Record. The National Office numerical code assigned to Project Haven is 09.

Section 8. Grand Jury Subpoenas

.01 Administrative summons will not be used in connection with any cited grand jury case (See Section 2.03). Each district initiating a collateral request relating to a Project Haven grand jury case will indicate on the collateral request that it is a Project Haven request, and an administrative summons will not be used in connection with securing the information requested.

.02 The Department of Justice attorneys are responsible for the control and issuance of all grand jury subpoenas. Special agents will assist the grand jury in serving the subpoenas.

.03 If it is found necessary to use compulsory legal process to properly obtain information to assist the grand jury in its investigation, the group manager should contact the oversight attorney who will coordinate the request for subpoenas with the grand jury. The group manager should forward his/her request through the normal channels to the oversight attorney at the following address: Department of Justice, Room 600, F.O.B. 51 SW First Avenue, Miami, Florida 33130.

.04 The special agent serving the subpoena should, through his/her group manager, coordinate with the oversight attorney the time and date for the witness to appear before the grand jury in Miami.

.05 With regard to a collateral request, if the special agent working the collateral needs to serve a subpoena to obtain information, he/she should contact the agent who made the collateral request. The requesting agent's group manager will follow the procedures in Section 8.03 in requesting the subpoena and will also be responsible for coordinating with the oversight attorney the time and date to be shown on the subpoena for the witness to appear before the grand jury in Miami.

.06 Internal Revenue Service document receipt, Form 2725, *will not* be used when securing documents pursuant to a grand jury subpoena. See the Attachment for the receipt format which should be used. This receipt can be reproduced locally. All documents obtained pursuant to a grand jury subpoena must be presented to the grand jury empaneled in Miami.

Section 9. Other investigative procedures

.01 If the subject of an investigation asks whether he/she is the subject of a Project Haven investigation, he/she will be so advised by the special agent.

.02 Prior to interviewing or otherwise contacting a taxpayer's representative or other third parties outside the district, the Chief, Intelligence in the other district must be contacted in accordance with IRM 9771. This will prevent an agent from compromising any investigation in the other district.

.03 Multi-agent assignment to Project Haven cases should be considered in order to expeditiously complete Project Haven investigations.

Section 10. Control of grand jury information

.01 In order to prevent the unauthorized use of Project Haven grand jury information, the following should be shown on each page of Service generated documents (memorandums, final reports, status reports, etc.) which contain such information: "IN THE ABSENCE OF A FED. R. CRIM. P. RULE 6(e) ORDER, INFORMATION INDICATED ON THIS PAGE SHALL BE USED SOLELY FOR THE PURPOSES OF THE SAID GRAND JURY INVESTIGATIONS. THE INFORMATION WAS OBTAINED BY GRAND JURY NO. ——, SOUTHERN JUDICIAL DISTRICT OF FLORIDA."

.02. It is recommended that the grand jury information be indicated by placing a line in the margin next to each line on the Service generated document containing such information. This should be done on the original as well as any copies of the document. However, original documents submitted to the grand jury will not be market or otherwise defaced. These documents will be maintained in their original form in Miami.

.03 In many cases there will be numerous documents containing grand jury information; therefore, it is recommended that the special agents obtain rubber stamps containing the statement in .01 above.

.04 The group manager should obtain from the oversight attorney the number assigned to the grand jury empaneled in Miami.

Section 11. Foreign travel

0.1 While requests for foreign travel will be processed in accordance with IRM 9265.4, any agent contemplating travel to the Bahamas should first contact the Project Haven group manager in Miami and advise him/her of the proposed travel, persons to be contacted and taxpayers involved for control purposes of the Project Haven investigation. The Project Haven group manager may, with the approval of the Office of International Operations (OIO), accompany special agents traveling to the Bahamas on Project Haven related matters.

.02 OIO maintains jurisdictional authority for tax administration matters in all areas outside the U.S. and also maintains final authority concerning the approval of foreign travel by IRS personnel. Agents traveling to the Bahamas will be guided by any instructions or guidance issued by OIO in addition to any instructions or guidance issued by the Project Haven group manager pertaining to investigative techniques.

.03 Those requests for foreign travel relating to cases still under investigation in the district should be submitted to the National Office far enough in advance to allow OIC thirty calendar days for the processing, if the traveler does not have a valid official passport. If the traveler does have a valid official passporty, twenty calendar days for OIO processing will be sufficient. Once the cases have been referred, with a recommendation by Chief Counsel either for or against prosecution, to the Department of Justice or the United States Attorney, those offices would have jurisdiction over the matter and the Service would have little control over the anticipated travel dates. However, as much lead time as possible should be given OIO for proper handling, and if possible, the same lead time as those cases still under district jurisdiction. Emergency request for foreign travel will be handled as expeditiously as possible.

.04 The Project Haven group manager in Miami is authorized to disclose to the American Ambassador in Nassau the names of persons to be contacted, the general nature of the questions to be asked, or evidence to be sought, and a general characterization of the results of the contacts. Any disclosure of specific tax information will be made only to the extent necessary to accomplish the assignment in the Bahamas.

Section 12. Project Haven Information Index

.01 The investigation team in Miami will maintain a Project Haven index which will be comprised of the names of investigative subjects and other individuals and organizations involved in Project Haven.

.02 Whenever a special agent receives records from a witness pursuant to a grand jury subpoena, the agent will bring the records to Miami to be presented to the grand jury. All the records will be microfilmed, with the originals being maintained in Miami and, the agent, using the microfilm copies. It will be the responsibility of the case agent to analyze the records, either in Miami or prior to going to Miami, to determine which records are relevant to the investigation. Those records which the agent deems relevant to any aspects of the investigation will be summarized and included as part of the index.

.03 It will be the responsibility of the investigating team in Miami to incorporate the material into the index.

.04 Whenever a Form 3949 is initiated by the investigating team in Miami, they will include in Item 16 of the form that the Project Haven index has been checked, and that all available information on the subject is attached to the Form 3949.

.05 In order to maintain the security of the Project Haven files and to limit access to authorized officials only, requests for file searches will only be made on a Form 2275 and forwarded to the Jacksonville District in the form of a collateral request. Telephone requests are authorized only in emergency situations and must be immediately followed up by a written collateral request.

Section 13. Final report and case review

.01 For those cases in which prosecution is being recommended, and the case has been worked jointly with Audit, the revenue agent will prepare an examination report (RAR) on the civil aspects of the case. To ensure that no civil use is inadvertently made of grand jury derived information prior to obtaining a Fed. R. Crim. P. Rule 6(e) Order, the examination report will be forwarded to the Chief, Intelligence, without Audit review. The RAR will be accompanied by a memorandum containing an opinion as to whether or not a Fed. R. Crim. P. Rule 6(e) Order should be requested. Audit will continue to maintain custody and responsibility for any tax returns. If at the conclusion of the criminal aspects of the case a Fed. R. Crim. P. Rule 6(e) Order is not obtained, the Chief, Intelligence Division will be responsible for reviewing the RAR and returning to the district, Chief, Audit Division any civil non-grand jury information which may be used for civil purposes or notice that a Fed. R. Crim. P. Rule 6(e) Order was not obtained and there is no information available for civil purposes.

.02 For those cases in which prosecution is not recommended, the special agent will prepare a withdrawal or non-prosecution report, including the infor-

mation obtained by the grand jury. If the case has Audit or Collection Activity potential, and the grand jury information is essential to the proper determination of the civil liability, the Chief, Intelligence Division will place the case in suspense and prepare a request for a Fed. R. Crim. P. Rule 6(e) Order, see Section 14.01. The Chief, Intelligence Division should also follow the procedures in Section 4.12 with regard to notifying the Director, Intelligence Division of a suspended case.

.03 For those cases which have civil potential, but a Fed. R. Crim. P. Rule 6(e) Order was not obtained, all grand jury information will be expunged from the case files and maintained in the Intelligence Division. The Chief, Intelligence Division will notify the Chief of the appropriate function, by memorandum, that Intelligence has withdrawn from the case; that the investigation was worked in conjunction with a grand jury; and a Fed. R. Crim. P. Rule 6(e) Order was not obtained, therefore, all grand jury information relating to the case will be maintained in Intelligence and is not available to Audit or Collection personnel; and non-grand jury information is being transmitted with the memorandum.

.04 If a Fed. R. Crim. P. Rule 6(e) Order is obtained, the forwarding of the special agent's withdrawal report with the documentary evidence should be done in accordance with IRM 9632 and 9633.

.05 Because of the nationwide scope of Project Haven, all cases in which prosecution is recommended will be reviewed by Chief Counsel, Criminal Tax Division. When the Chief, Intelligence Division concurs in a prosecution recommendation, he/she will prepare a transmittal memorandum to the Director, Criminal Tax Division, Room 4523, Internal Revenue Building, 1111 Constitution Avenue, N.W., Washington, D.C. 20224, for the signature of the District Director. All mailings to this address should specify "DO NOT OPEN IN MAILROOM." The memorandum should include a brief summary of the case, a specific recommendation as to further action and any unusual legal problem in the case. A copy of the memorandum should also be forwarded by the Chief, Intelligence to the Director, Intelligence Division, Attn: Project Haven Coordinator.

Section 14. Request for Fed. R. Crim. P. Rule 6(e) Order

.01. The Chief, Intelligence will forward the request for a Fed. R. Crim. P. Rule 6(e) Order through normal channels to the Director, Intelligence Division. The Director, Intelligence will, if he/she concurs, forward the request to Chief Counsel, Criminal Tax Division. If Chief Counsel concurs, he/she will coordinate the request with the Department of Justice, Tax Division.

.02 The request should include the information as stated in Section 4.12, as well as any other information the Chief, Intelligence deems appropriate to assist those officials named in .01 above in evaluating the request.

Section 15. District audit procedures

.01 Revenue agents assigned to work joint investigations concerning Project Haven cases will be responsible for assisting the grand jury in its investigation. These joint investigations will generally be conducted in accordance with IRM 4565 and 9324.

.02 The Audit Group Manager will be kept informed of the revenue agent's activities to the extent necessary to ensure the investigative techniques and approaches used are within IRS policies and guidelines. In discharging these responsibilites, the Audit Group Manager will exercise extreme caution to insure that the grand jury information is not disseminated unless a Fed. R. Crim. P. Rule 6(e) Order is obtained.

.03 The Chief, Audit Division will insure that the Project Haven grand jury information known by the cooperating revenue agent is not disseminated in any manner unless a Fed. R. Crim. P. Rule 6(e) Order is obtained.

.04 Since the grand jury investigations are solely criminal in nature, information should not be solicited by either the special agent or the revenue agent for any civil purpose.

.05 In the case of a joint investigation, the revenue agent will prepare an RAR at the conclusion of the investigation. Processing of the RAR will be in accordance with the procedures set out in Section 13.01 of this Supplement.

.06 In Project Haven joint investigations, Audit will follow the procedures as set out in IRM 4565.6 when soliciting consents and issuing statutory notices. Also see Section 6.04 of this Supplement.

CONTINUED

14 OF 17

Section 16. Audit reporting procedures

Audit reporting procedures will be issued at a later date.

Section 17. Summary Intelligence Reporting Requirements

.01 The following are required to be forwarded to officials in the National Office, as stated elsewhere in this Supplement:

1. Assistant Commissioner (Compliance):
   a. Memorandum advising of adverse effect of resources for other programs because of Project Haven cases (Section 5.05).
2. Director, Intelligence Division, Attn.: Project Haven Coordinator:
   a. Copy of the top half of form 3949 when it is initiated (Section 4.05);
   b. Copy of form 3949 if it is not accepted for investigation (Section 4.10);
   c. Memorandum advising that a case or information item has been put in suspense (Sections 4.12 and 13.02);
   d. Memorandum explaining why a "must work" case should not or cannot be investigated (Section 5.03); and
   e. Copy of transmittal memorandum (Section 13.05).

Section 18. Disclosure

.01 The districts and regions will handle FOIA Project Haven requests in accordance with the September 21, 1976, memorandum, "Disclosure of Project Haven Materials", from the Assistant Commissioner (Compliance) to all Regional Commissioners, District Directors, Service Center Directors, Regional Inspectors, and Director, National Computer Center. The procedures in this memorandum will be incorporated in a forthcoming Manual Supplement.

.02 Project Haven is considered a referred case to the Department of Justice which is conducting a grand jury investigation with the support of the Internal Revenue Service. Therefore, disclosure may be made to Department of Justice attorneys, who have been assigned to this case. The disclosure authority covers all tax matters, both civil and criminal, which relate directly or indirectly to Project Haven. However, the limitations in Paragraph 3 of Delegation Order No. 156, dated May 19, 1976, must be observed in those situations described and approval of the National Office obtained before releasing returns.

Section 19. Effect on other documents

.01 This amends and supplements Chapters (10)00 and (21)00 of IRM 1272, Disclosure of Official Information Handbook; IRM 4020; IRM 4175; IRM 4280; IRM 4410; IRM 4560; Chapter (13)00 of IRM 4810, Audit Reports Handbook; IRM 9265.4; IRM 9267; IRM 9390; and Manual Supplement 93G-164, CR 1(15)G-103, 41G-108, 45G-250, 51G-132, 5(11)G-65, 71G-14, 92G-35 and 95G-61, dated March 4, 1976. This also supplements Exhibit 400-3 of IRM 9570, Case Management and Time Reporting System Handbook.

.02 The "effect" in .01 above should be annotated by pen and ink beside the basic text, Handbook text and Exhibit, and on the Supplement cited, with a reference to this Supplement.

Attachment.

W. E. WILLIAMS,
Deputy Commissioner.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(Federal Grand Jury No. 76-)

In Re Grand Jury Proceedings.

DOCUMENT RECEIPT

1. I ——— of ——— have custody and control of the documents listed in paragraph 2, below. I have requested ——— to take custody of these documents and present them to the grand jury in lieu of actual appearance by myself before the grand jury. I understand that this is voluntary on my part and I have an absolute right to appear before the grand jury with all my expenses paid as provided by U.S. Statutes.

2. The documents submitted are as follows: Serial No. and description.

Signature of person submitting documents ———.

Signature of person receiving documents ———.

3. The preceding documents were presented to the grand jury on ——— 197-.

Foreman of the Grand Jury.

INFORMATION COPY

DECEMBER 3, 1976.

To: Members of the Subcommittee on Standards of Practice, Civil and Criminal Penalties Committee, ABA.

From: Richard C. Schwartz, subcommittee chairman.

Re Abuse of Grand Jury Process.

For the past two years we have had as a subcommittee project the end run procedures under which IRS transmits cases to the Department of Justice for grand jury investigation, denying taxpayers opportunity for conferences at the levels of the Chief of Intelligence and Regional Counsel. This process further involves avoidance of civil litigation which might result due to any challenge to the Commissioner's authority to use IRS summons power. Our study has also taken into account the proposed change in Rule 6(e) F.R.Cr.P. which would qualify agents as "attorneys for the government" for purposes of disclosure of grand jury material.

Please see Manual Supplement 93G–175, dated October 28, 1976 copy of which is attached. I will appreciate hearing from the membership regarding the provisions of this directive, including those providing for the transmittal of Project Haven information items to the Chief of Intelligence in the district where the taxpayer resides or whose place of business is located under cover of a Form 3949 with an insertion as follows: "In the absence of a Fed. R. Crim. P. rule 6(e) order, information indicated on this document shall be used solely for the purposes of said Grand Jury investigation. The information was obtained by Grand Jury No. —, Southern Judicial District of Florida."

The grand jury material thus disclosed, although under provisions stating it may not be used for civil purposes without a Rule 6(e) Order, is used to secure for evaluations appropriate returns (copies), research, and/or transcripts on the taxpayer and, if it has civil potential, to place such information in suspense pending the issuance of a 6(e) Order. The instructions further install Department of Justice attorneys as "oversight attorneys" for such purposes as determining whether grand jury subpoenas will be served by special agents and to be consulted whether statutory notices of deficiency will be issued.

You will find provisions in the Manual Supplement designed to sanitize any future civil case in event a 6(e) Order is not obtained. The procedure also contemplates that revenue agents will be assigned to work joint investigations concerning Project Haven cases and will be responsible for assisting the grand jury in its investigations. Such agents will keep Audit Group Managers informed and such managers "will exercise extreme caution to insure that the grand jury information is not disseminated unless a Fed. R. Crim. P. Rule 6(e) Order is obtained.

There does not appear to be any procedure for sanitizing the revenue agents' or the Group Manager's minds of grand jury material obtained by them without a 6(e) Order or to insure that they will not in the future use such information in the fashion now prescribed by the Internal Revenue Manual for special agents to follow-up each grand jury witness after his appearance to obtain from such witness volunteered information as to testimony given to the grand jury and documents furnished to the grand jury.

Your thoughts and comments will be appreciated in order that I may have the views of the Subcommittee members to report to the Committee Chairman along with such recommendations as we think appropriate.

In addition to any general comments you may wish considered, let me have your views on the following:

1. Should the Subcommittee recommend to the Committee that the ABA present its views to the appropriate Committees of the House and Senate in opposition to the Amendment of Rule 6(e) to constitute agents assigned to assist grand jurys as "attorneys for the government"? (Such Rule change becomes effective August 1, 1977 in the absence of Congressional action to the contrary.)

2. Should the membership of the Section of Taxation of the ABA be alerted in some appropriate fashion to the fact that evidence used in statutory notices of deficiency or sought to be introduced by the government in civil tax litigation may have been obtained by the IRS through disclosures of grand jury material in advance of or without a Rule 6(e) Order? (This assumes that deficiency notices generated or evidence submitted in support thereof might be challenged

if such notices or evidence are the fruit of unauthorized disclosures of grand jury material made by IRS agents in violation of the secrecy provisions of Rule 6(e).)

Information copies of this memorandum are being sent to other Committee members in view of their expressed interest in the subject matter.

RICHARD C. SCHWARTZ,
Chairman, Subcommittee on Standards of Practice.

Enclosure.

JUDGE WILLIAM J. CAMPBELL,
Chicago, Illinois, May 23, 1977.

Hon. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship and International Law, House of Representatives Judiciary Committee, Washington, D.C.

MY DEAR MR. CHAIRMAN: As requested in your recent letter, I have reviewed your currently pending proposed Bill, H.R. 94, directed at curing certain grand jury abuses. I have likewise read with interest the related testimony of Judge Frederick B. Lacey given before your Subcommittee on April 27, 1977. Although in the main I concur with Judge Lacey's observations as to the potential impractical results which might well obtain were H.R. 94 to become law, nevertheless, I wish here to express my own complete approval of the obvious motivation behind your Bill—that is, eradication of the frequent abuses now associated with the use of grand juries. You and I have corresponded on this subject in the past, Mr. Chairman, and once again I respectfully remind you that the only effective way you can accomplish your laudable motives is to abolish the Grand Jury. It has outlived its usefulness and is beyond redemption or restructuring.

Obviously, the grand jury is no longer performing its major historical function of protecting citizens against unfounded indictments and oppressive prosecutions. As now used, its only saving grace is its value as an additional investigatory tool for the prosecutor. However, this investigative function could be better and much easier performed without an antiquated and cumbersome grand jury, with far fewer intrusions on individual liberties and with a great saving of valuable court time.

When I published my views on this timely subject recently, you graciously wrote me a praiseworthy letter on my efforts. To the extent it would be helpful, I am now again submitting a copy of my article entitled "Eliminate The Grand Jury" which was published in Volume 64, No. 2, "Journal of Criminal Law and Criminology" (Northwestern University School of Law at pp. 174 to 182). I am flattered and gratified that your distinguished and able Chief Counsel, Mr. Martin Belsky, has requested for your record a copy of my more recent (May 3, 1977) testimony before the Subcommittee on Antitrust and Monopoly of the Judiciary Committee of the United States Senate, where I again spoke about and against the grand jury based upon the extensive research set forth in the above-mentioned article.

Mr. Chairman, your courageous attempt to correct present, past and potential abuses in the use of the grand jury is for the reasons so ably developed in Judge Lacey's testimony, ineffective and impractical. Indeed, it is my considered judgment based upon a lifetime of service that any partial attempt to correct and preserve this relic of our common law heritage, long since (1933) discarded by its founder Great Britain, will only complicate and increase the problem. Start now on the Constitutional Amendment to remove the grand jury requirement from the Fifth Amendment! Cutting off the dog's tail an inch at a time, or even trying to add to the length of the dog's tail, is not and cannot be the answer. The entire tail must go—now!

Mr. Chairman, I am ready and willing now, as I have been in the past, to assist you in any way that you care to use me in your outstanding efforts to improve on federal criminal justice administration. You have but to command me. With renewed assurances of highest esteem, and with kindest personal regards, I remain,

Sincerely yours,

WILLIAM J. CAMPBELL.

STATEMENT OF WILLIAM J. CAMPBELL, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

Mr. Chairman and Members of the Subcommittee, I am indeed pleased to be invited to testify on the subject of grand jury reform, or, more specifically in my case, grand jury elimination. As you know, I have previously submitted written comments on this subject to your distinguished Chairman. In a word this earlier submitted comprehensive statement of my views strongly urges the grand jury be abolished.

Recent developments, however, coupled with my admiration for the courageous work of this Subcommittee and my desire to assist the Committee's efforts in any way possible, suggest additional comments might be helpful and of assistance to your determinations.

Initially, as I am sure you are aware, it should be noted that the ABA's House of Delegates recently adopted 25 of 27 grand jury reform principles proposed by the ABA's Criminal Justice Section. Parenthetically, the ABA's concern with the grand jury and the reform nature of its suggestions buttresses the conclusion that something must be done with reference to the grand jury.

Two of the Criminal Justice Section's recommended principles, one permitting grand jury witnesses to be accompanied by counsel inside the grand jury room and the other restricting the occasions when immunity may properly be granted while concomitantly expanding the scope of that immunity, were adopted despite the opposition of the Attorney General and the Justice Department.

As mentioned two other suggested principles were rejected. The first of the two principles endorsed by the ABA's Criminal Justice Section but rejected by the House of Delegates, would have required prosecutors to make an in-camera, on the record showing that any evidence sought is "likely to be relevant to the jury investigation and not sought primarily for an improper purpose." The second principle would have permitted subpoenaed witnesses to challenge the subpoenas in their own district courts rather than in the district court where the grand jury was sitting.

I respectfully suggest that the defeat of the above principles by such an august body as the ABA House of Delegates is particularly regrettable in that, as is now the circumstance, all objections to a subpoena must be made in person, mere failure to comply could result in contempt charges. Thus, witnesses must often travel great distances to voice their objections to a subpoena, and may then find, as is often the case, that it is impossible convincingly to demonstrate that the subpoena was issued for an improper purpose. *See, Beverly v. U.S.*, 468 F.2d 732 (5th Cir. 1972); *U.S. v Doe*, 455 F.2d 1270 (1st Cir. 1972); C. Doyle, "Federal Grand Juries," *printed in Federal Grand Jury: Hearings on H.J. Res. 46, H.R. 1277 and Related Bills Before The Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 94th Cong., 2d Sess., Appendix 5, 671 at 689 (1976). Defeats of this sort, which appear inevitable, make the need for complete abolition of the grand jury system even more compelling.

Nonetheless, the ABA did adopt numerous reform principles, including requirements that witnesses be told whether they are "target" witnesses, that witnesses be given *Miranda*-type warnings, that prosecutors present evidence tending to negate guilt and that the naming of unindicted co-conspirators be prohibited.

The shocking number and type of grand jury abuses that caused the ABA to consider 27 different reform measures, have also caused other new voices to speak out in protest. A recent Wall Street Journal article, for example, discusses the work of this Subcommittee and chronicles the numerous criticisms made of the grand jury system. Interestingly, however, many of these abuses are now being articulated by the corporate lawyers of America, such as the counsel for General Motors and International Paper Co. (C. Falk, "GM, Other Unlikely Critics Accuse Grand Juries of Abusing Rights They Are Supposed to Protect," Wall St. J., June 23, 1977 at 40.) No longer are the critics of our archaic grand jury system confined to the poor or the politically oppressed; the abuses of the grand jury now reach across all color and class divisions.

Many of the far-reaching grand jury abuses are also discussed in a newly published book, *The Grand Jury: An Institution on Trial*, written by United States District Court Judge Marvin Frankel and Attorney Gary Naftalis. Notably, many of the reforms recommended by the authors also appear in H.R. 94.

Finally, in a recent meeting of the National Legal Aid & Defender Ass'n., it is my understanding that organization's National Defender Committee unanimously passed a resolution suggesting abolishing the entire grand jury system.

Much of the recent disenchantment of the business community with the grand jury is a result of the use of the grand jury in complex antitrust criminal prosecutions. In May of this year I was kindly invited to testify before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, at which time I was able more fully to articulate my views on the use of the grand jury in such cases. Because I believe the difficulties which obtain in the use of the grand jury in antitrust prosecutions are inherent in the grand jury system itself, I will briefly reiterate my earlier comments here.

It is my belief that much of the delay, expense and unfairness in criminal cases which is causing so much public outcry today, is directly due to the cumbersome and dilatory fashion in which the grand jury performs its traditional investigative function. Moreover, as I have repeatedly stated, the grand jury is no longer performing its major historical function of protecting citizens against unfounded indictments and oppressive prosecutions. And, as my distinguished colleague, Judge Marvin E. Frankel has noted, even this historical protection may have been more illusory than real; for it was during the Jefferson Administration that three consecutive grand juries were convened before a true bill was finally returned against Aaron Burr. (Frankel, M. and Naftalis, G., "The Grand Jury," The New Leader, Nov. 10, 1975 at 1,7.)

As now used, the grand jury's only saving grace is its value as an additional investigatory tool for the prosecutor. This investigative function could, however, be much better and easier performed without an antiquated and cumbersome grand jury, with far fewer intrusions on individual liberties and with a great saving of valuable court time by the prosecutor himself.

Moreover, it may well be that, tradition notwithstanding, the grand jury has no constitutional authority to issue arrest warrants. (See C. Thompson, "The Fourth Amendment Function of the Grand Jury,' 37 Ohio St. L.J. 727 (1976)). In a most scholarly article, Professor Thompson perceptively points out that a grand jury indictment often "operates as a fourth amendment probable cause determination to arrest or detain in custody; . . ." (*id.* at 729), and that such operation may be in violation of the Fourth Amendment requirement that probable cause be determined by a neutral and detached judicial officer. Deprived of its ability to bring indicted persons into custody, the grand jury becomes not only a cumbersome, but also a meaningless appendage to the then necessary preliminary hearing.

Even without this technical stumbling block, the preliminary hearing is much better suited for determining probable cause. It requires prosecutors publicly to assume responsibility for prosecutions which are, in fact, initiated by them. It further allows putative defendants to speak in their own behalf, which has the dual advantages of permitting the presiding judicial officer to dismiss at once those cases where the defendant is clearly not guilty and of permitting both parties to become familiar with each other's evidence, thus facilitating all further action, whether it be dismissal, plea or trial.

Unfortunately, neither these advantages nor the problems inherent in the grand jury system were addressed by the Assistant Attorney Geeneral in his comments before this Subcommittee in opposition to H.R. 94. His testimony, however, is deserving of comment as it represents the views of the Department of Justice.

After confirming the Justice Department's continuing interest in protecting civil rights, Assistant Attorney General Civiletti, interestingly states that the grand jury system "is a bulwark of our criminal justice system. . . ." (Statement at 1). Yet this claim has not been made by any of those persons or groups who ordinarily should or would so claim. Instead. civil libertarians and defense attorneys unanimously decry the present use of the grand jury system and advocate either its reform or its abolition.

As the "bulwark of our criminal justice system", Civiletti depicts the grand jury as "functioning under the sound superintendence of the federal courts, . . ." (Statement at 1). Although the grand jury is, in theory, an arm of the courts; in practice, the courts as we all know, unfortunately exercise little control over the grand jury. This lack of control has become deeply imbedded in the grand jury system as courts are reluctant to interfere with "prosecutorial" functions and, even when such interference is warratned, the covert and surreptitious nature of the grand jury system precludes effective investigation.

Similarly, although Civiletti alleges that the present grand jury system "continues to serve, as an effective, fair and essential institution . . ." (Statement at 2), the literature and case law belie his claim. (*See, e.g., U.S. v. Basurto*, 497 F.2d 781 (9th Cir. 1974); *Bursey v. U.S.*, 466 F.2d 1059 (9th Cir. 1972); *U.S. v Estepa*, 471 F2d 1132 (2d Cir 1972); *U.S. v. Gallo*, 394 F. Supp. 310 (D. Conn. 1975); *U.S. v. DeMarco*, 401 F Supp 505 (C.D. Cal. 1975); Fine, "Federal Grand Jury Investigation of Political Dissidents," 7 Harv. Civ. Rights-Civ. Lib. L. Rev. 432 (1972); Cowan, "The New Grand Jury," N.Y. Times Magazine, April 29, 1973.)

Ironically, Civiletti's conclusion that continued, albeit "occasional," abuse of the grand jury will inevitably continue at least partially comports with my thoughts and wholly supports my belief that the grand jury must be eliminated so that all such abuses may immediately cease. I must respectfully disagree, however, with Civiletti's characterization of the abuses as "occasional." As a former prosecutor and as a district court judge, I, myself, have been exposed to or told of more than "occasional" abuses. (*See also* National Lawyers Guild, *Representation of Witnesses Before Federal Grand Juries* (2d ed. 1976) and cases cited therein; *Federal Grand Jury, Hearings on H.J. Res. 46, H.R. 1277 & Related Bills Before the Subcomm. on Immigration, Citizenship & International Law of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 729–35 (1976) ("Report on Selected Cases Alleged To Have Been Examples of Grand Jury Abuse," to Hon. Joshua Eilberg, Chairman, from American Law Division, Library of Congress, Congressional Research Service, Oct. 7, 1976).)

Apparently in recognition of at least the potential for grand jury abuse, Civiletti commendably states that prosecutors should not knowingly present unconstitutionally obtained evidence to the grand jury. (Statement at 3) He also states, however, that prosecutors should not sign indictments where the evidence presented is "legally insufficient." In my experience, "legally insufficient" is a term impossible of definition. What does the Justice Department intend by this term? Hearsay? Illegally obtained evidence? And what standards are prosecutors to apply in determining when evidence which they themselves have presented in the hope of receiving an indictment is legally insufficient? I respectfully submit that, like most of the proposed reforms, the proposal is commendable in theory, but unworkable in practice. (*See United States v. Chanen*, 549 F.2d 1306 (9th Cir. 1977).)

Civiletti then explains that the Justice Department's opposition to many of the reform proposals stem from a fear of weakening the "purpose and duty [of the grand jury] to investigate criminal action without fear. . . ." (Statement at 3). He does not explain, however, why the investigative function of the grand jury cannot be performed by already existing investigative agencies and by the prosecutor himself.

In opposing specific sections of H.R. 94, Civiletti begins by endorsing a 12 month minimum confinement period for contempt, as opposed to the proposed 6 month term. (Statement at 4–5). As anyone who has ever served time will tell you, this type of line drawing has little practical effect. Furthermore, although Civiletti correctly notes that a court may release a recalcitrant witness whenever the court concludes that the witness will not relent, (Statement at 5 n. 1), he does not explain how a court is to determine this. Again, the theory is admirable, the practice is inoperable. Although I agree with the Justice Department that compelled testimony is an important and necessary part of government, I would respectfully point out that, though certainly of importance and significance, it is not the majority opinion of the Court but merely the concurring opinion of Justices White and Stewart in *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 93 (1964) that supports this proposition.

In regard to witness immunity, the Justice Department statement eschews transactional immunity because it encourages "incomplete and shallow testimony" and prohibits prosecutions of persons "subsequently and independently found to be more deserving of prosecution than originally thought." (Statement at 6). First, there is no reason for a person granted transaction immunity to be less candid than one granted use immunity. In fact, those persons granted use immunity would logically be more close-mouthed, for fear that their testimony may indirectly result in their own prosecution. Certainly the fear of subsequent prosecution is not conducive to candid testimony. Nor is the integrity of our system of justice furthered by prosecuting persons previously granted immunity.

Perhaps most importantly, it is implicit in the Justice Department's objections that transactional immunity would inevitably result in more carefully selected immunity grants since those persons later "found to be more deserving of prosecution than originally thought," (Statement at 6), would no longer be subject to prosecution. This result, although more time-consuming, is clearly desirable.

Permit me once again to hark back to impracticality. Although the Justice Department correctly states that use immunity permits subsequent prosecution only when independent evidence is discovered, I respectfully suggest that there is little chance for a defendant to rebut the government's proof of independent origin, even though the burden to show independent origin is on the government. This problem is particularly acute because it is often impossible for the government, or anyone else, to distinguish between leads resulting from some piece of seemingly innocuous grand jury testimony and those resulting from a wholly independent source. Common sense, no less the protection of individual rights, would strongly suggest these "independent origin" issues be eliminated from the criminal justice system, an elimination easily accomplished by returning to transactional immunity.

I would also suggest that the Justice Department's misgivings concerning involvement of the judiciary in prosecutorial functions, although well-founded, cannot be resolved by separating the judiciary from the grand jury since the grand jury is in fact and in law although unfortunately not in practice an arm of the court. The only workable solution is to abolish the grand jury, thus preserving the independence of both the prosecutor and the court.

Several other practical problems are raised by the Justice Department's statement. Mention is made of binding guidelines to be adopted instructing prosecutors to disclose "significant" exculpatory evidence to the grand jury. Such a proposal is of little help to defendants because the secrecy requirements surrounding the grand jury would often make it impossible for defendants to determine whether the prosecutor complied with this instruction. Moreover, "significant" is an ambiguous standard, which although I approve of the provision as a reform measure, can only serve to spawn irreconcilable and confusing decisions. Compare *U.S. v. Gallo*, 394 F. Supp. 310 (D. Conn. 1975) with *Lorraine v. U.S.*, 396 F. 2d 335 (9th Cir.), *cert. denied*, 393 U.S. 933 (1968).

The Justice Department is strongly opposed to permitting witnesses' attorneys to remain in the grand jury room. One of the reasons given for this opposition seems only to be that the guilty will benefit from the proposal. (Statement at 18 (Fourth point).) I would only point out that the presumption of innocence is still alive and well in our judicial system.

Another provision objected to by the Justice Department is the section that would permit transfer of grand jury proceedings when substantial hardship would otherwise result. It is the Justice Department's contention that this is a mere convenience of witnesses statute, and that convenience should not override the public's interest or the defendant's interest. Although these concerns are laudable, for purposes of the grand jury the defendant is just another witness. More importantly, in 1972, five New York Irish Americans, with no known connection to Texas, were subpoenaed before a Texas grand jury and subsequently imprisoned in Fort Worth for as long as the grand jury sat or was reconvened, for their refusal to testify after receiving grants of use immunity. Leaving aside the numerous injustices suggested by this case, there can be no excuse for compelling such persons to travel to Texas, where they had no family or friends, especially while there was a grand jury sitting in New York also investigating the Irish Republican Army. For a more comprehensive discussion of this case see Senator Edward M. Kennedy's testimony Before House Judiciary Subcommittee No. 1, (*Hearings on the Fort Worth Five and Grand Jury Abuse* (1973), *reprinted in Federal Grand Jury Hearings, supra* at 498–513.)

Whose interest was served by this travesty? Certainly the hardships to those involved were far more devastating than the "burdensome duty" noted by the Justice Department. (Statement at 24.) And yet, this is not an "exceptional happening." Even if it were, I strongly believe that once is too much.

In conclusion I once again respectfully urge this Subcommittee to start now on the Constitutional Amendment to remove the grand jury requirement from the Fifth Amendment as is done in H.R. 60, 61 and 62. Although I applaud your efforts and completely approve of the obvious motivation behind your Bill, H.R. 94, i.e., attempted eradication of the frequent abuses now associated with the use of grand juries, cutting off the dog's tail an inch at a time, or even trying to add to the length of the dog's tail, is not and canont be the answer. The entire tail

must go—now! For that matter my experience and my review of the pending legislation intended to cure grand jury abuses and for the most part the related ABA recommendations, suggests that imposing all or any of these various procedures on grand jury practice and administration can and will only lead to a legal circus. Will we not thereby be creating new issues and certainly more cumbersome procedures to accomplish a practically useless task? Though legally, by virtue of the Fifth Amendment, a grand jury must return indictments, there can be and in my judgment there are no substantial arguments supporting the continuation of this highly questionable and archaic common law procedure.

Respectfully submitted,

WILLIAM J. CAMPBELL.

WILLIAM M. BRODSKY,
New York, N.Y., May 26, 1977.

Hon. JOSHUA EILBERG,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN EILBERG: As an attorney whose practice primarily comprises so-called white-collar defense work, I am very interested in grand jury reform. I believe I am especially well-qualified to speak on the need for substantial reform in this area, since I have recently completed five and a half years as an Assistant United States Attorney both in the District of Columbia and more recently in the Eastern District of New York.

My experience on both the prosecution and the defense sides has convinced me that there are, unfortunately, almost no checks at present on the untrammeled power of the prosecutor. Indeed, the grand jury system functions fairly today only so long as the individual prosecutor is responsible and just. Thankfully, the vast majority of Assistant United States Attorneys throughout the country do exercise in a responsible manner their tremendous power to issue subpoenas; to interrogate uncounseled witnesses and potential defendants; and to seek indictments.

Not all such prosecutors are responsible, however, and a great risk of substantial harm to constitutionally protected rights results from any irresponsible, heavy-handed or overbearing abuse of power by a prosecutor anywhere in the United States. Thus it is, unfortunately, that the conductor of a few arrogant prosecutors who run roughshod over citizens' rights requires the institution of national procedures, supervised by the judiciary to act as a bulwark against such abuses.

Foremost among the abuses to which I refer, is the prohibition against any witness being accompanied by counsel inside the grand jury room. More than any other single palliative, a statute which permitted all persons brought before a grand jury, whether by subpoena or otherwise, to have their lawyers with them to provide immediate advice would ameliorate the unduly coercive atmosphere of the grand jury. It would transform the grand jury from an inquisition to an interrogation—as it should be.

I know that the American Bar Association House of Delegates has already endorsed such a proposal, and in spite of the unfortunate tabling of the endorsement of the grand jury reform principles by the House of Delegates in April in Seattle, it is still the policy of the Association.

Perhaps the second most pernicious practice abusive of the grand jury is the forthwith subpoena. It is the most intrusive summons, directing the recipient to drop all other activities and proceed immediately to the grand jury, without giving him time to consult with counsel. Indeed, as I have seen such process used, it is most often employed in situations in which the prosecutor wants to harass a witness or bring him to brook without having to deal with an attorney who would seek to protect the individual's rights.

The proper and responsible way for a prosecutor to issue process in the name of the grand jury is to make all subpoenas returnable not less than ten days after service. This would permit the witness to consult counsel, and counsel to file a motion to quash if appropriate.

Furthermore, all persons and entities maintaining any data concerning an individual such as banks, telephone companies, credit companies, doctors, insurance companies, etc., should be required to give the individual whose data are subpoenaed immediate notice of the receipt of the subpoena so that the individual may file a motion to quash the subpoena within the ten day period prior to compliance.

Finally, each witness should be given a copy of the transcript of his testimony before the grand jury as soon as it is typed. Of course, this assumes that all federal grand jury proceedings will be transcribed. Indeed, all proceedings before the grand jury should be conducted on the record, not just the actual testimony of witnesses. This will eliminate the off-the-record "briefings" which the prosecutor now gives the grand jury. It is in these unrecorded discussions that the prosecutor may undermine all the proper legal instructions he gives the grand jury on the record.

I understand that you have incorporated many of these reforms in legislation which you have introduced again this session. I would very much appreciate receiving a copy of all the grand jury reform bills now pending and a copy of the transcript of any hearings held last session.

I would also welcome the opportunity to testify at any new hearings to be held this session on grand jury reform.

Very truly yours,

WILLIAM M. BRODSKY.

JUNE 2, 1977.

Mr. DOMINIC P. GENTILE,
Associate Dean, National College of Criminal Defense Lawyers and Public Defenders, Bates College of Law, University of Houston, Houston, Tex.

DEAR DOMINIC: Thank you for your letter and its enclosures and in particular your calling my attention to the case *United States* v. *DiRusso*.

We are undertaking a study of the Criminal Code Reform Act of 1977 and as you know a most important part of that legislation deals with the subject of sentencing.

I am taking the liberty of forwarding a copy of your paper on the Grand Jury to one of our Subcommittees which is involved in grand jury reform legislation. I know they will find it helpful.

I am still grappling with my schedule in order to determine whether or not I will be able to be with you at your annual meeting in Williamsburg. I would like to do so and should be able to notify your organization shortly.

With kind regards,

Sincerely yours,

PETER W. RODINO, JR.,
Chairman.

GENTILE & DE PALMA,
Chicago, Ill., October 1976.

Re Investigation of Sam Spade, Enlistment into U.S. Army by Employment of a False Statement.

Mr. JOHN Q. PUBLIC,
Foreman, Federal Grand Jury,
Chicago, Ill.

DEAR MR. PUBLIC: It has come to my attention that you are the Foreman of the Federal Grand Jury which is investigating the alleged enlistment by Sam Spade into the United States Army on August 18, 1975, said enlistment allegedly being accomplished through the presentation of false identification and discharge papers.

I am hereby requesting an opportunity to appear before the Grand Jury and to inform its members, under oath, that Sam Spade was with me in Monterey, Mexico, continuously and uninterruptedly from August 1, 1975 through September 1, 1975.

I am communicating this request to you with full knowledge that I am under no duty to appear before the Grand Jury and that I needn't communicate this information to it. Furthermore, I have conferred with Dominic Gentile of the law firm of Gentile, De Palma & Spidale and he has advised me that I have no duty to present such testimony unless I am subpoenaed. Notwithstanding his advice, I persist in my request to appear and give testimony.

JOHN SMITH.

I hereby acknowledge that I have been retained by John Smith as his legal counsel, that I have advised him that he is under no duty to appear before the grand jury and give any testimony without having first been properly served with a subpoena, and that he nevertheless has informed me that it is his wish to do so.

DOMINIC P. GENTILE.

The Grand Jury's Role in the Defense Arsenal

(By Dominic P. Gentile, Associate Dean, National College of Criminal Defense Lawyers and Public Defenders, Houston, Tex., at the NACDL Grand Jury Seminar, October 1976, Chicago, Ill.

I. INTRODUCTION

This entire discussion presupposes that counsel has knowledge of the existence and scope of a grand jury investigation wherein his client is a target and that evidentiary materials exist which are exculpatory in nature. It further assumes that counsel's investigation has revealed to him the subject matter of the grand jury inquiry, the potential charges with which the client is confronted, and has determined that the client will not be prejudiced by a preindictment disclosure of favorable evidence.

With the Federal Rules of Evidence being a reality in the trial of cases in the United States District Courts and with the states adopting these rules in their original or modified versions, defense lawyers are confronted with motivating factors that did not exist under prior practice. It is the intention of this monograph to highlight the motivational factors involved and to provide the defense lawyer with some insight as to the methodology to be employed and the various problems that will be encountered in attempting to bring to the grand jury's attention the favorable evidence.

II. MOTIVATING FACTORS

A. Avoidance of indictment

While it is obvious to any person involved in the criminal justice system that the main goal of a defense lawyer representing a client who is the target of a grand jury investigation is to avoid indictment where possible, it must be recognized that nothwithstanding the classical theory that the grand jury is an independent body capable of functioning in and of itself, it has degenerated in recent years into the role of a tool of the prosecution. A prosecutor that has control of the grand jury can indict any person at any time for practically anything that he chooses. That the grand jury has become an investigative tool of the prosecutor has become so obvious that some courts have even ceased paying lip service to the "sword and shield" traditional theory of the grand jury's purpose. *Hawthorne, Inc.* v. *Director of Internal Revenue*, 406 F. Supp. 1098, 1119 (E.D.Pa. 1976).

B. Perpetuation of testimony for use at trial

While counsel and his client can regard the actual return of a No Bill by a grand jury as being tantamount to the parting of the Red Sea, a more certain beneficial result will obtain in the perpetuation of the favorable evidence for post-indictment consideration by the trier of fact. This consideration is most obvious in the following situation:

1. Weak sister witness.—Federal Rule of Evidence 801(d)(1)(A) relates to the substantive use of the contents of a prior inconsistent statement if the declarant testifies at trial, is subject to cross examination regarding the statement previously made, and the statement is inconsistent with his testimony at the trial and was given under oath and penalty of perjury at the previous trial, hearing or other proceedings. The rule as adopted covers statements before a grand jury. House of Representatives Report No. 93–1597, 93d Congress, second session. The first judicial interpretation of this rule is found in *United States* v. *Castro-Ayon*, 537 F. 2d 1055 9th Cir., 1976) Cf. 4 Weinstein, Evidence, par. 801(d)(1)(A) (01), P. 801–77, (1975).

Federal Rule of Evidence 607 allows impeachment of one's own witness. Reading this rule in conjunction with Rule 801(d)(1)(A) results in the use of the prior inconsistent statement for its substantive value by calling the witness who has since become a turn-coat and introducing the prior inconsistent statement. This becomes extraordinarily important where an affirmative defense is being used and where instructions and arguments depend upon the substantive use of this evidence. Here the Federal Rules are consistent with the common law theory that prior statements are superior in trustworthiness because the memory of the declarant was fresher, fuller and more accurate. McCormick, Evidence, Sec. 39, P. 75 (1954).

2. The integral witness.—Federal Rule of Evidence 801(d)(1)(B) allows the use of prior consistent statements to rebut the charge or inference of recent fabrication and, when proper, permits the defense to obtain an instruction in this regard. Where the prosecutor raises the issue of recent fabrication, the prior consistent statement is removed from the realm of hearsay. This prior consistent statement need not have been made under oath or have been recorded to fall within the rule. However, where the grand jury has heard the prior consistent statement the prosecutor is certainly aware of the fact that the declarant has not changed his testimony. It follows that the perpetuation of the testimony at the grand jury stage precludes the prosecutor from offering any evidence at the trial for the purpose of creating this inference. *Napue* v. *Illinois*, 360 U.S. 264, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959); *Giglio* v. *United States*, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S Ct. 763 (1972); *King* v. *United States*, 372 F. 2d 383, 394 (C.A.D.C., 1967); ABA Code of Professional Responsibility, CANON 7, Ethical Considerations EC 7-13, Disciplinary Rules DR 7-102(6) and DR 7-106(c)(1) This would hold true even where the testimony is not in fact given to the grand jury but is made known to the prosecutor with the intent that he relate it to the grand jury. However, it should be obvious to the experienced practitioner that the offer to the prosecutor should itself be memorialized.

3. The absent witness.—Federal Rule of Evidence 804(b)(1) recognizes a hearsay exception for testimony given by a witness who is unavailable to testify at the trial or hearing if the testimony was given at another hearing of the same or different proceedings and if the party against whom it is offered had an opportunity and similar motive to develop the testimony by direct, cross or re-direct examination. The witness is considered unavailable if he claims the lack of memory, asserts a testimonial privilege or a constitutional privilege, is dead or infirm, refuses to testify or is otherwise absent through no fault of the party seeking the introduction of the prior statement.

It must be noted that the defendant does not have an opportunity to cross-examine a witness in the grand jury. Therefore, the government cannot use this rule to admit grand jury testimony where the witness is unavailable at the trial, for to do so would defeat the defendant's right of confrontation. See generally, McCormick, Evidence, Section 255 (Second Edition, 1972). Perpetuation of testimony is essential where any of the above reasons for the defense witnesses' absence become apparent.

III. METHODOLOGY

A. Informing the Court or the Prosecutor

Having resolved the question of whether or not to seek the presentation of favorable evidence to the grand jury, counsel is now confronted with a second problem, that of determining the manner in which to bring this evidence before the grand jury. The law is well settled that there is no constitutional right to appear as a witness before the grand jury. As to whether the witness may apply to the court for an order directing the grand jury to permit his testimony or proffering of other evidence see *In Re Application of Iaconi*, 120 F. Supp. 589 (D. Mass., 1952) and *In Re Investigation by January, 1952 Grand Jury*, 102 F. Supp. 911 (W.D.P., 1952).

Counsel's strategy must be tailored to meet the rationale employed by the district court and the reviewing circuit as to the function of the grand jury. Where the grand jury is considered a "tool of the prosecutor" it has been held that the government need not present evidence to the grand jury which undermines its own. *United States* v. *Gardner*, 516 F. 2d 334 (7th Cir., 1975), *United States* v. *Eucker*, 532 F. 2d 249 (2d Cir., 1976), *Jack* v. *United States*, 409 F. 2d 522 (9th Cir., 1969). The irony of this is that on its recent occasions to define and limit the scope of grand jury investigations, the United States Supreme Court has consistently relied upon a "sword and shield" theory of the grand jury's existence. *United States* v. *Calandra*, 414 U.S. 338, 38 L. Ed. 2d 561, 94 S. Ct. 613 (1974); *United States* v. *Dionisio*, 410 U.S. 1, 35 L. Ed. 2d 67, 93 S. Ct. 764 (1973).

On the state level there seems to be a growing body of law supporting a grand jury target's right to have favorable evidence considered by the grand jury before deliberations commence on an indictment. In *Johnson* v. *Superior Court of San Joaquin County*, 15 Cal. 3d 248, 124 Cal. Rep. 32, 539 P. 2d 792 (1975), the Supreme Court of California decided en banc that a California statutory provision placed a duty upon the district attorney to inform the grand jury of the existence of favorable evidence which was known to him. The statute read as follows:

"Evidence for defendant, authority to exclude; weighing evidence; order for production of explanatory evidence.

"The grand jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it shall order the evidence to be produced, and for that purpose may require the district attorney to issue process for the witness (California Penal Code, Section 939.7)."

While the court in *Johnson* expressly based its opinion on statutory grounds, much of its rationale dealt with the protective role of the grand jury and the Fifth Amendment guarantee. It went on to hold that when a district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he has an obligation to inform the grand jury of its nature and existence so that the grand jury may exercise its power under the statute to order the evidence produced. The court expressly did not consider the alternative due process argument. In a concurring opinion by Justice Mosk, the due process argument was fully considered as well as other constitutional aspects of the problem.

The Supreme Court of Iowa in *State* v. *Hall*, 235 N.W. 2d 702 (Iowa, 1976) when confronted with the same issue as presented to the California Supreme Court in *Johnson*, held that due process of law requires that where the prosecutor has information that tends to explain away the charge being investigated, he is under a duty to both inform the grand jury of the existence of the evidence and to present it to the grand jury. Much of the language in *Hall* dealt with the rationale of the grand jury being a buffer standing between the state and the potential defendant.

While no court of review in the State of New York has ever considered the question directly, in *People* v. *Dumas*, 274 N.Y.S. 764, 51 Misc. 2d 921 (Supreme Court, St. Lawrence County, 1966) in a well reasoned opinion, held that the prosecutor has a duty to make the grand jury aware of evidence tending to negate the defendant's guilt prior to their deliberating on the return of an indictment.

It would seem that in jurisdictions which currently require the prosecutor to present or make known to the grand jury favorable evidence, the defendant looses nothing by memorializing and communicating to the prosecutor that evidence which he feels would negate or explain away the charge. This is especially true because courts have been historically reluctant to intercede in grand jury investigations, and as shall be demonstrated later, direct communications with the grand jury will present counsel with problems that needn't be confronted in these jurisdictions. Cf. *People* v. *Scars*, 49 Ill. 2d 14, 273 N.E. 2d 388 (1971).

B. Direct communication to the Grand Jury

Any recognition of the grand jury as a body functioning separate and apart from the executive, judicial or legislative branches of the government recognizes that the grand jury has intrinsic power to conduct investigations on its own and without the prosecutor's assistance or consent. *United States* v. *Thompson*, 251 U.S. 407, 413–415, 64 L. Ed. 333 (1920); *In Re Report and Recommendation of June 5, 1972, Grand Jury*, 370 F. Supp. 1219 (D.D.C., 1974) it follows then that the grand jury can also obtain its own leads and tips and carry out its investigation thereof. This proposition is lucidly and articulatly presented and developed in *United States* v. *Smyth*, 104 F. Supp. 283 (N.D. Cal., 1952), an authoritative exposition enhanced by 110 foot notes. In *Dolan* v. *United States*, 214 F. 2d 454 (8th Cir., 1955) it was held that whatever leads are received by the grand jury must be developed and run down to find as accurately as possible what the truth is.

The question as to whether to directly communicate with the grand jury is not so easily answered. Many pitfalls and obstacles line the path to direct communication and counsel must be extraordinarily cautious to consider each of them in making his decision.

The ultimate question which must be resolved in the light of the circumstances of the particular case is "does the First Amendment give a person with knowledge of the facts and occurrences which the grand jury is investigating the right to inform the grand jury of their existence?".

In *Wood* v. *Georgia*, 370 U.S. 375, 8 L. Ed. 2d 569, 82 S. Ct. 1364 (1962) the United States Supreme Court held that the "clear and present danger" standard applies to First Amendment protection of statements made out of court calculated to be communicated to the grand jury. This was a State case and came before the Court to review a conviction for criminal contempt. On the state-

level, the Georgia Appellate Court, while affirming the counts that ultimately went to the United States Supreme Court, reversed a count wherein the petitioner was convicted of contempt for directly communicating to the grand jury by means of a letter. *Wood* v. *State*, 103 Ga. App. 305, 119 S.E. 2d 261 (1961). The Court so held even though the letter contained the statement that the grand jury should investigate the democratic committee instead of the communicant.

The "clear and present danger" standard, when applied to communications to the grand jury, must focus on the question of whether the communication is calculated to obstruct the grand jury or intimidate its members. In *Thomas* v. *Crevasse*, 415 F. 2d 550 (5th Cir., 1969) a charge was made that a written communication passed out in the corridor leading to the grand jury's deliberation room presented a "veiled threat" to the grand jurors because the message contained in the communication was intended to intimidate. The United States Court of Appeals for the Fifth Circuit held that the First Amendment protected such communication and that the language in any communication directed to the grand jury must present an "extremely serious threat to the grand jury deliberations in order to justify a contempt conviction".

Not all courts have maintained this view of communication to the grand jury. In a somewhat different context the Illinois Supreme Court held in *People* v. *Parker*, 397 Ill. 305, 74 N.E. 2d 523 (1947) that a letter directed by the defendant to the grand jury charging the Chicago Tribune, the Cook County Regular Democratic Organization, the States Attorney, County Assessor, State Director of Revenue, and others, with illegally avoiding property taxes and conspiring to do so, was not protected by the First Amendment. The letter contained an offer to appear before the grand jury and produce evidence in support of the accusations. The Court held that this conduct tended to obstruct the administration of justice and that the defendant could not avail himself of the Constitution as a shield. This was the second time that *Parker* had directly communicated the charges to the grand jury. See also *People* v. *Parker*, 374 Ill. 524, 30 N.E. 2d 11 (1940). There are two points relating to *Parker II* that are noteable. First of all, it was decided some fifteen years before *Wood* v. *Georgia*. Second, the United States Supreme Court granted a Writ of Certiorari in *Parker II*. With Mr. Justice Jackson not participating in the question on the merits (First Amendment protection) the judgment was affirmed by an equally divided court. 334 U.S. 816, 92 L. Ed. 1747 (1948).

On a set of facts similar to the situation to which this discussion is directed, the Illinois Supreme Court followed its *Parker I* decision in *People* v. *Doss*, 382 Ill. 307, 46 N.E. 2d 984 (1943). In holding without discussion that *Parker I* established that the First Amendment did not protect communications to the grand jury, the court held that a target of the grand jury investigation who circularized to the grand jury copies of his newspaper articles, sought thereby to influence the grand jury in its deliberations concerning the criminal charges under investigation and therefor was guilty of contempt. Although the opinion does not contain a reproduction of the content of the articles, it indicates that the articles were argumentative and not intended to inform the grand jury of exculpatory evidence.

In addition to the problem presented by contempt proceedings, 18 U.S.C., Section 1504 provides a statutory prohibition of attempting to influence any grand juror upon any issue or matter pending before such juror by writing or sending to him any communication. In *Duke* v. *United States*, 90 F. 2d 840 (4th Cir., 1937) a conviction was upheld for violation of this statute's predecessor. Eleven years after *Duke* was decided this section was amended, adding the language "nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury". It would seem that this additional language, when construed in conjunction with *Wood* v. *Georgia*, would give First Amendment protection to a communication in writing to the grand jury requesting an opportunity to appear before it for the specific purpose of proferring specific, enunciated evidence. Since the grand jury can consider hearsay testimony there does not appear to be any requirement that the communication be made by the same witness that would be necessary to present the testimony to the trial jury. Therefore, consistent with the goal of avoiding indictment, any witness could communicate this request. However, in relation to the goal of perpetuation of testimony for later use at trial, the communication should be presented by the witness with direct knowledge of the facts to be adduced.

No matter what form the communication to the grand jury takes and regardless of from whom the communication is disseminated, counsel should be aware of the common law crime of embracery which has been embodied by many States into the statutory law. Embracery is defined as "the offense of attempting to corrupt, influence, or instruct a jury or juror or of inducing them in any way, such as by promises, persuasions, entreaties, money, entertainment, etc., except by the strength of evidence and the arguments of counsel in open court, to be more favorable to one side of a case than to the other". 26 Am. Jur. 2d, *Embracery*, Section 1. The key to the charge of embracery is the attempt to curry favor with the grand jury. All that need be proven is the attempt, and success is not a material element. *Osborn* v. *United States*, 385 U.S. 323, 17 L. Ed. 2d 394, 87 S. Ct. 429 (1966). Therefore, counsel should take every available precaution to insure that the communication, whatever its nature and regardless of its source, is couched in language which is clearly objective and non-argumentative.

CONCLUSION

No general rule can be established regarding the wisdom of volunteering information to the grand jury. Each case must turn on its own facts and profile. Where the decision has been made in favor of informing the grand jury as to the existence of exculpatory evidence, counsel should use the method that is calculated to succeed in having the grand jury hear the evidence but not without concern for the various ramifications of the method employed. Where counsel has decided to communicate directly to the grand jury by means of a writing, great care must be taken in drafting the communication. A suggested form accompanies this monograph. Regardless of the form employed, counsel should serve copies on the prosecutor and the court so as to preserve his record.

STATEMENT BY G. WAYNE GLICK, ON BEHALF OF THE CHURCH OF THE BRETHREN GENERAL BOARD

I am G. Wayne Glick, 713 Scott Lane, Wallingford, Pennsylvania, a minister of the Church of the Brethren. I have served on the National Council of Churches program committee on Education in the Society, a major concern of which has been the criminal justice system and its reform. I have also been personally concerned with this precise issue as a result of the activity of my son and others in opposing the Vietnam War and being subjected to the abuses of the grand jury system and later incarceration as a result. I speak for the Church of the Brethren General Board, which is the top administrative body of our denomination and represents approximately 1,000 congregations and 200,000 persons across the country.

Church of the Brethren position

At the June, 1975, meeting of our Annual Conference, a comprehensive statement on "Criminal Justice Reform" was approved. While the statement deals for the most part with treatment of criminal offenders in our society, it does include two statements regarding the grand jury. In a section entitled "Some Areas of Concern" there is included the following:

"Prosecutors often use grand juries as a rubber stamp to bring criminal charges, and on occasion to harass citizens, to abuse their rights and liberties, or to pursue political purposes."

The second section of the statement entitled "Acting Out God's Justice and Love" suggests some things that Brethren can do to express Christian concern in the area of criminal justice. In a subsection dealing with systemic change the statement encourages Brethren to work for the following:

"That the constitutional independence between grand juries and prosecutors be restored or alternate safeguards be provided in order to prevent prosecutors from using grand juries for political purposes, harassment and the curtailment of citizen rights and liberties."

The entire statement of the Annual Conference is appended for your information.

I turn now to the problem of grand jury abuse. I will review the historical purpose of the grand jury, discuss current problems and abuses, and make recommendations for legislative reforms that would restore the constitutional

independence between grand juries and prosecutors and provide safeguards against political abuse, as is called for in our Church of the Brethren statement.

Historical purpose of the grand jury

From the time of the Assize of Clarendon in the twelfth century the grand jury has been seen as a shield for the common citizen against unfair criminal accusations by those in power. Senator Edward Kennedy, in testimony before the House Judiciary Subcommitee Number 1 (March 13, 1973), pointed out that "By barring any indictment for a crime unless the charge was first approved by an independent body of impartial citizens, the grand jury interposed itself as a solid barrier of protection against unjust and unfounded prosecutions by the Crown."

In America the grand jury was instituted in 1634 in Massachusetts and in subsequent years was used as "an important shield for American patriots in the pre-Revolutionary period, a bulwark against the oppressive actions of George III and his colonial governors." In the constituting documents of the American republic the grand jury was established by the Fifth Amendment to the Constitution:

"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; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

Current problems and abuses

From an instrument of protection for the common citizen, the grand jury has become an instrument of harassment. In recent years the flexibility of the grand jury has been exploited for political purposes. One such purpose has been the gathering of information on citizens and groups, and a body of law has developed setting forth the casuistry by which such intelligence gathering can take place. This body of law centers around use immunity and transactional immunity, which in themselves presuppose that the grand jury is in alliance with the prosecutor against the witness. This presupposition is crucial and antithetical to constitutional guarantees.

The use of the grand jury in recent years makes clear the distortion of its constitutional intention to protect the innocent and instead places a witness in a star chamber setting. The witness cannot have counsel present when he appears before a grand jury; the prosecutor need make no showing that he has any reason to believe that the witness named on a subpoena has any information relevant to the investigation; since federal grand juries enjoy nationwide service of process, witnesses may be required to cross the continent to testify; there is no minimum notice required in issuance of a subpoena; no judge is present, nor is there any instruction by a judge as to the way in which to apply law to the facts.

In other words, the witness is at the mercy of the "good will and legal rectitude" of the prosecutor. Transcripts of grand jury proceedings make it clear that such dependence falls far short of constitutional guarantee. For example, on March 27, 1972, when Mr. Samuel Popkin appeared before a Boston grand jury, the following exchange took place:

"*Question.* Mr. Popkin, perhaps I should rephrase that question. What is your opinion as to persons you believe possessed the Pentagon Papers in Massachusetts prior to June 13, 1971?

"Answer. Is this grand jury really asking me to violate confidences necessary to my research, simply to discover my opinion?

"*Question.* The grand jury does not answer questions."

The abuses to which the grand jury has been put are legion and can be documented almost endlessly. To be sure, the United States Attorney is under obligation to "serve the law"; the question at issue, however, goes to a fundamental constitutional, and indeed human, crux: What is to prevent a distortion of the purpose of the law where secrecy is invoked and the balance of advocacy is denied?

Suggested reforms

Reforms clearly needed in the grand jury system include:

1. Providing venue to a witness in proximity to a citizen's residence;

2. Abolishing the whole system of immunities and punishment for contempt as a prosecutor's device;
3. Providing counsel for witnesses when they appear before the grand jury;
4. Providing the opportunity to challenge the composition of a grand jury to guarantee a true representation of peers;
5. Requiring instruction by a judge (a) as to the parameters legally binding on a prosecutor, and (b) declaring the independent buffer function of the grand jury;
6. Requiring minimum notice between the issuance of a subpoena and the witness' appearance;
7. Requiring the keeping of a complete transcript to be made available to the witness;
8. Forbidding the use of the grand jury to gather evidence for an indictment already returned;
9. Requiring the prosecutor to present any exculpatory evidence to a grand jury.

CONCLUSION

In sum, we argue on the basis of a biblical doctrine substantially recognized by the system of checks and balances incorporated into the Constitution, that no person charged with the service of the law should be implicitly trusted. Specifically, the Fifth Amendment to the Constitution seeks to guard against the abuse of power by public officials in its provision for grand jury indictment. We affirm the intent of the Constitution in providing for the grand jury and would therefore oppose any Constitutional amendments which would bypass or destroy that intent.

Trusting the people, and beyond that trusting the God of all peoples, is the ineluctable condition of freedom. We therefore call upon this subcommittee and upon Congress to excise from our national life those elements of harassment and of suspicion which have come to characterize the grand jury in recent years.

I would be pleased to have the Subcommittee contact me or the Washington Office of the Church of the Brethern, 100 Maryland Ave., NE., Washington, D.C. 20002, for further information or testimony.

(Statement of Annual Conference, June 1975)

CRIMINAL JUSTICE REFORM

The imprisoned are perhaps the most neglected and abused group in our society. Ironically, when these offenders are neglected and abused, not only they but society as well is victimized. The New Testament symbol of the towel impels Brethern to reach out to those who have been made outcasts and scapegoats. Whenever this effort is fruitful, society itself becomes healthier and more secure.

I. SOME AREAS OF CONCERN

The failures of our present criminal justice system are widely apparent. The rising crime rate is one evidence that the system neither deters nor rehabilitates.

There are many specific areas of concern.

1. The system tends to serve the powerful segments of the society and to protect property at the expense of persons.
2. The arbitrary use of discretionary power in dealing with offenders often punishes the poor and powerless, frees the rich and powerful, and allows the prejudices of society to run unchallenged.
3. Our social institutions, including families, schools, welfare agencies, and churches, share a responsibility for creating or permitting the conditions which result in criminal behavior.
4. Racial, ethnic, and sexual discrimination is prevalent, and damaging to persons.
5. The public has come to accept many misconceptions: That prisons protect us from crime; that reformatories reform, correctional centers correct, penitentiaries teach penitence; that incarceration rehabilitates; that most people in prison are dangerous; that one must be an expert in criminology to help a law offender; that poor people and minority groups are more inclined to commit crimes than others; that more money for police, police hardware, judges, and

itation; that most lawbreakers are in jail or prison; and that all persons in jail are guilty.

6. The education, training, and salaries of police, correctional officers, and keepers of the jail frequently are not commensurate with their job requirements.

7. Prosecutors often use grand juries as a rubber stamp to bring criminal charges, and on occasion to harass citizens, to abuse their rights and liberties, or to pursue political purposes.

8. Jails, prisons, and lockups are at best human warehouses and at worst brutal, unsanitary dens. Incarceration itself is dehumanizing and takes away from persons their economic base, breaks down their family ties, and separates them from helpful community resources.

9. The demoralizing homosexual assaults and abuse by inmates in the prison upon short or long sentenced individuals entering the correctional institution often leaves the individual with life long emotional and moral scars.

10. Many alleged offenders are kept in jail solely because of inability to pay bail money.

11. Too much money, effort, and time are spent on security and far too little on helping prisoners develop skills and attitudes for re-integration into society.

12. Offenders are limited to "doing time" as punishment rather than using time for personal growth or direct and meaningful restitution to the offended.

13. The carrot-stick philosophy in which the promise of release is conditional upon "model" prisoner behavior is one of the most cruel aspects of incarceration.

14. Parole boards often base their decisions about the amount of time to be served on insufficient and inaccurate information which is not subject to public scrutiny or due process.

15. In many areas young people are often incarcerated with adults for offenses which would not be considered offenses if they were adults.

II. ACTING OUT GOD'S JUSTICE AND LOVE

In offering guidance to Brethren who seek to express Christian concern in the area of criminal justice we see three general approaches: working with individual offenders, reforming the system, and living an alternative. We believe that each of these approaches has validity within the Christian context. We encourage Brethren to be challenged by all of these recommendations and to act upon that combination which is consistent with their convictions.

A. Working with individual offenders

Those who make direct contact with prisoners and their families touch one of the bitterest aspects of incarceration—isolation. This ministry can be a demonstration of agape love, and might be expressed in a variety of ways:

1. Visiting incarcerated persons as a friend and advocate. (Because of differences in social, economic, and religious backgrounds, Brethren need to avoid being judgmental, condescending, or paternalistic.)

2. Assisting prisoners in obtaining an attorney, in securing reading material, and in purchasing items from the commissary.

3. Helping to preserve family ties by bringing prisoners information about their families, assisting family members in obtaining transportation to and from the prison, and seeing that dependents are cared for.

4. Offering to teach academic subjects, crafts, music, drama, and to lead group counseling and recreation.

5. Providing worship opportunities and counseling where desired.

6. Helping ex-offenders find meaningful employment and, if necessary, suitable lodging. (According to authorities, the highest percentage of parole failures occur within the first six months after release, with the greater number occurring within the first sixty days.)

7. Helping to provide bail money, thus enabling prisoners to take a larger role in preparing for their own defense and to return to their families, jobs, and other supporting relationships.

8. Standing up with defendants in court, thus increasing their chances of avoiding incarceration.

B. Reforming the system

Some Brethren show an increasing interest in systemic change. A strength of this approach is that it can multiply the number of beneficiaries. These Brethren are encouraged to work for the following changes:

jails will make our society safer; that "model prison behavior" signifies rehabil-

1. That alternatives to incarceration and diversion programs (detoxification centers for the care of alcohol and drug abusers, halfway houses, release on recognizance, bail reform, trial diversion to allow for resolution before charges are filed, probation, work/study releases, and weekend sentences) be used whenever applicable.
2. That paying bail bond for release pending trial be replaced by a more just system which might include release to the supervision of a responsible person, a nonprofit agency, a probation or parole officer, or, as a last resort, detention with release during certain hours.
3. That prison populations be reduced instead of building new prisons.
4. That more community-based correctional centers be established in order to keep offenders close to home and utilize existing community resources for rehabilitation.
5. That offenders to be incarcerated be given a choice between a sentence which is automatically completed when contracted objectives are achieved and sentence which is completed at the end of a fixed period.
6. That more appropriate and helpful means be found to deal with offenses such as vagrancy, drug use, drunkenness, gambling, and prostitution. (At present, half of those arrested and half of those in local jails are charged with these offenses.)
7. That appropriate legislation be enacted and enforced to guarantee minimum standards for all jails and prisons and to safeguard the right of prisoners to due process.
8. That behavior modification methods such as shock and drug therapy never be administered unless freely chosen by a prisoner under no threat or coercion.
9. That the use of capital punishment be abolished.
10. That all incarcerated defendants be guaranteed the right to trial within sixty days.
11. That the constitutional independence between grand juries and prosecutors be restored or alternate safeguards be provided in order to prevent prosecutors from using grand juries for political purposes, harassment and the curtailment of citizen rights and liberties.
12. That youth offenders be housed only with their peer group.

C. Living an alternative

Some Brethren believe that Christians are especially called and uniquely enabled to offer a response wholly different from that of the criminal justice system. These members are encouraged to:

1. Actively seek relationships with offenders, and those in danger of becoming offenders, in an effort to provide a constructive and supportive influence.
2. Be open to accepting offenders into their communities, homes and businesses, and to inviting judges and probation authorities to place accused or convicted persons in their care rather than in prison.
3. Consider carefully whether it is in harmony with the teaching to overcome evil with good to report wrongs done against themselves to police authorities.
4. Avoid employment or direct participation in the operation of the criminal justice system, and urge others to consider their own participation in light of New Testament teaching.

III. IMPLEMENTATION

To affirm and implement the goals of this statement, the 1975 Annual Conference:

1. Asks the General Board to make criminal justice reform and ministry to offenders and to the victims of crimes a 1976–77 program priority with appropriate staffing and funding. This would include providing continuing motivation, guidance and assistance, and the use of a communications network.
2. Calls upon the church, especially districts, to initiate and develop creative ministries and constructive action, and to mobilize for an intensive effort in key areas where opportunity, resources, and need seem greatest.

THE SOCIETY OF PROFESSIONAL JOURNALISTS,
SIGMA DELTA CHI,
HOUSE RADIO-TV GALLERY,
June 29, 1977.

Hon. JOSHUA EILBERG,
Chairman, Immigration, Citizenship, and International Law Subcommittee, House Judiciary Committee, The U.S. House of Representatives

DEAR CONGRESSMAN EILBERG: Our national president, Dick Leonard, editor of the Milwaukee Journal, has asked me to inform you that the Society supports the position of the Coalition to End Grand Jury Abuse regarding your grand jury reform legislation.

That position is, of course, also supported by our national Freedom of Information Committee headed by Scott Aiken of the Cincinnati Enquirer, who conveyed the message to me.

We appreciate your efforts in this area, especially where the Fourth Estate may be endangered in its efforts to keep the public informed.

Sincerely,

VAL HYMES,
Director, Region 2.

THE DISTRICT JUDGES ASSOCIATION
OF THE FIFTH CIRCUIT,
July 1, 1977.

DEAR CONGRESSMAN: The District Judges Association of the Fifth Circuit passed the enclosed Resolutions at its annual meeting at the Fifth Circuit Judicial Conference at Birmingham, Alabama on the 4th day of May, 1977.

The District Judges Association consists of approximately 75 active and senior District Court Judges. The Association President, James Lawrence King, requested that I forward copies of the enclosed Resolutions to you.

Yours very truly,

WILLIAM S. SESSIONS,
U.S. District Judge,
Legislation Committee Chairman,
D.J.A., Fifth Circuit.

Enclosures.

Resolved, That the District Judges' Association of the Fifth Circuit expresses its disapproval of H.R. 94 and urges its rejection by the Congress.

STATE OF NEW YORK,
OFFICE OF THE SPECIAL PROSECUTOR,
New York, N.Y., July 11, 1977.

Hon. EDWARD I. KOCH,
Congress of the United States,
House of Representatives, Washington, D.C.

DEAR CONGRESSMAN KOCH: The enclosed excerpt from the Congressional Record of June 22, 1977 was brought to my attention last week. I am taking the liberty of sending you the following:

1. The opinion of Justice Howard Jones, dated March 4, 1977, in which he passed upon the propriety of the Grand Jury presentation.
2. An article from the June 1, 1977 edition of Newsday.
3. An article from the June 2, 1977 edition of The New York Times.
4. A column from the July 2, 1977 edition of the New York Post.
5. The minutes of the proceeding before Justice Jones on June 17, 1977, after this case had been remanded to him by the Appellate Division.

Congressman Eilberg of Pennsylvania brought to the attention of the House of Representatives the opinion of the Appellate Division as "another example of why the Judiciary Subcommittee . . . has been conducting hearings on H.R. 94 which would provide for the first comprehensive reform of the Federal Grand Jury system since the birth of our Nation."

In view of the fact that the Congressman unintentionally, but incorrectly, stated, "the prosecutor went back to the grand jury again and again to secure an indictment," we would hope that this enclosed information could be considered in order to complete the record. In my judgment it would be unfair if the Con-

gressional Record did not include all material made public concerning this matter. It is therefore my hope that the enclosed would be inserted into the Record.

I appreciate your attention to this matter.

Very truly yours,

JOHN F. KEENAN.

[From the Congressional Record, June 22, 1977]

APPEALS COURT CITES ABUSE OF GRAND JURY

(By Hon. Joshua Eilberg, of Pennsylvania in the House of Representatives, *Wednesday, June 22, 1977*)

Mr. EILBERG. Mr. Speaker, just recently the appellate division of the Supreme Court of New York reviewed a case in which it found that a special State prosecutor used what it called coercive methods to indicate a judge in Queens County.

This case, Mr. Speaker, is another example of why the Judiciary Subcommittee which I chair has been conducting hearings on H.R. 94, which would provide for the comprehensive reform of the Federal grand jury system since the birth of our Nation.

In the case at hand, the five appellate judges ruled unanimously that the prosecutor was responsible for "procedural irregularities going to the very heart and integrity of the grand jury system."

In this case, the prosecutor went back to the grand jury again and again to secure an indictment. The judges noted that this was a serious breach of the historic role of the grand jury "to remain truly free and independent of outside influence."

I commend to the attention of my colleagues the following materials describing this case:

[From the New York Times, June 1, 1977]

JUSTICE, PROSECUTOR CRITICIZED BY COURT IN GROH INDICTMENT

(By Max H. Seigel)

The Appellate Division in Brooklyn yesterday accused Justice Leonard H. Sandler of State Supreme Court and the Special state anticorruption prosecutor, John F. Keenan, of having used "coercive" methods to get a Queens County grand jury to indict Judge Robert T. Groh of Civil Court last November on charges of bribery and grand larceny.

The appellate justices said that if they could, they would throw out the indictments, but that they could not do so because the lawyers for Judge Groh still had recourse to State Supreme Court.

It was the first time Mr. Keenan had been accused of using the kind of overzealous tactics that had led to the dismissal of charges against many persons indicated by Maurice H. Nadjari, Mr. Keenan's predecessor as special prosecutor for corruption in the criminal justice system.

"Had the motion been submitted to us from the start," the five appellate justices said in a unanimous opinion on the Groh case, "we would have granted the application and ordered that the indictment be dismissed, as the papers submitted by both sides reveal the presence of procedural irregularities going to the very heart and integrity of the grand jury system."

Mr. Keenan and an assistant, Stephen Sawyer, had brought before the Queens grand jury charges that Mr. Groh, while deputy borough president of Queens in 1972, had sought a political campaign contribution of more than $10,000 from a law firm representing the Sheraton Corporation to help it get a zoning variance to expand its inn at La Guardia Airport.

GRATUITOUS DISCUSSION

After hearing the evidence, the grand jury voted not to indict Mr. Groh. Afterward, according to the Appellate Division "the special prosecutor, having learned of the result, re-entered the grand jury room, where he gratuitously discussed with the grand jurors their failure to indict."

"And without any request from the grand jury," the ruling went on, "he then suggested to it that the justice presiding at the extraordinary special and trial term would be willing to come before it and provide it with a further charge on the law, if it so desired."

According to the court records, one grand juror questioned the usefulness of such a gesture on the ground that a vote already had been taken and the matter disposed of, but the special prosecutor insisted that additional instructions from the judge might enable the grand jury "to adequately reach a judgment on the matter, adequately and finally reach a judgment on the matter."

This was done, the Appellate Division said, notwithstanding the fact that the grand jury had done just that—"reached, voted on and recorded its determination."

[The special prosecutor then retired from the jury room and a vote was taken. "Only three of the grand jurors voted to receive further instructions," the appellate justices said, and "despite the fact that there was no request by the grand jury as a body to receive any further instructions, both the special prosecutor and the justice presiding at the extraordinary special and trial term appeared before the grand jury on a subsequent date and delivered a further charge."]

NARROW VOTE TO INDICT

The grand jury then took another vote and decided to indict Mr. Groh by the minimum margin—12 to 7.

The appellate justice said: "Aside from the fact that we view these 'further instructions' to have been incorrect on the law, as they seemed to indicate to the grand jurors that they have no alternative except to indict, we believe that the methods employed, although no doubt well-motivated, were coercive in fact and, if permitted to go unchecked, would tend to destroy both the value and purpose of our grand jury system."

The justices added that "under the facts of this case, it was improper for either the special prosecutor of the court to have interceded in the proceedings once the grand jury had voted to dismiss." And, they said, "to sanction such a procedure" would "permit prosecutors in the future to coerce or badger grand jurors to change their solemnly-arrived-at determinations."

The justices suggested that Mr. Groh apply again to Justice Howard A. Jones of State Supreme Court, who had twice previously refused to dismiss the charges.

"In the light of the views here expressed," the Appellate Division said, the learned justice at the extraordinary special and trial term may wish to reconsider his determination should an application be made therefor."

In denying motions for dismissal on March 4 and March 15, Justice Jones had made it clear he would welcome submittal of the controversy to the Appellate Division, "there apparently being no precedent" on which he "might rely in resolving these questions."

KEENAN'S REACTION

Commenting on the decision, Mr. Keenan said yesterday: "I certainly agree that the grand jury should not be badgered, and obviously, I don't think we did. What we did was well-intentioned and well-motivated and I'm not going to quarrel with the decision."

The special prosecutor added that he might try now to present the case again before another grand jury, he might apply to Justice Jones for permission to present the case again, or he might intervene when Judge Groh moves again for dismissal before Justice Jones.

Marvin B. Segal, Judge Groh's lawyer, said yesterday he would promptly submit another application for dismissal to Justice Jones.

"The Appellate Division decision," he said "is a strong suggestion, of not a directive, to dismiss. To try the case now would be a useless procedure since the Appellate Justices have made it clear that any conviction after trial in a lower court would be reversed."

Mr. Segal said that he had not gone directly to the Appellate Division because he had not seen the grand jury's minutes and so had been unaware of the actions of the special prosecutor and Justice Sandler. "It was an extraordinary procedure by two very able men," he said. "It's impermissible for a judge to go into a grand jury room."

Justice Sandler said yesterday that he had gone to the grand jury purely for the convenience of the jurors. "It was easier for me to go to them in Queens," he said, "than to have all of them to come to my courtroom in Manhattan."

In welcoming the appellate decision, Judge Groh—who was elected a judge of the Civil Court shortly before his indictment—said yesterday he was "proud to be a member of the system that treats defendants equitably."

[From the New York Journal, June 2, 1977]

APPELLATE DIVISION

Second Department

(People vs. Groh)

After a full presentation of the evidence, a charge on the law by the Special Prosecutor and a spirited discussion among the grand jurors, they voted to dismiss the proposed charges. The Special Prosecutor reentered the room and suggested that the Justice presiding at the Extraordinary Special and Trial Term would be willing to provide a further charge on the law. The utility of such a gesture was questioned by a grand juror. The Special Prosecutor retired and a vote was taken. Only three jurors voted to receive further instructions. Nevertheless, the Special Prosecutor and the Justice appeared on a later day and delivered a further charge. The grand jurors voted the indictment by the narrowest permissible margin. Defendant's application to dismiss the indictment or, pursuant to article 78, to prohibit further proceedings, was denied at the Extraordinary Term. The Appellate Division, for lack of jurisdiction to overturn the prior decision, denied this motion for identical relief. It advised defendant to renew his application before the same justice at the Extraordinary Term. Both the Special Prosecutor and the court, ex parte, acted improperly by interceding in the grand jury proceedings.

THE PEOPLE, etc., PLAINTIFF, *v.* ROBERT T. GROH, DEFENDANT.

In the matter of Robert T. Groh, petitioner, *v.* Howard A. Jones, as Justice of the Extraordinary Special and Trial Term of the Supreme Court of the State of New York, County of Queens, et al., respondent.

Decided May 31, 1977

Before *Gulotta, P. J.; Martuscello, Cohalan, Damiani* and *Shapiro, J. J.*

Motion pursuant to Section 149 (subd. 2) of the Judiciary Law by Robert T. Groh for an order dismissing an indictment filed against him or, in the alternative, for judgment pursuant to CPLR article 78 prohibiting further proceedings with respect to the said indictment.

Segal & Hundley, New York, N.Y., for defendant-petitioner.

John F. Keenan, Deputy Attorney General, New York, N.Y. (George F. Bradlau of counsel), respondent *pro se* and for plaintiff.

Per Curiam—This is a motion pursuant to Section 149 (subd. 2) of the Judiciary Law by Robert T. Groh, a defendant in a pending criminal action, for an order dismissing the indictment filed against him by the Extraordinary Special Grand Jury for the County of Queens, or, in the alternative, for judgment pursuant to CPLR article 78 prohibiting the Trial Justice assigned to the Extraordinary Special and Trial Term, and the Special Prosecutor, from proceeding with respect to the said indictment.

Motion denied and proceeding dismissed, without costs or disbursements.

Consideration by this court of the prayer for relief pursuant to Section 149 (subd. 2) of the Judiciary Law is barred by the fact that an identical motion had been made before the Extraordinary Special and Trial Term and was denied by it on March 4, 1977; that determination was adhered to upon reconsideration on March 15, 1977. The availability of relief by motion to this court pursuant to Section 149 (subd. 2) is an alternative to proceeding before the Extraordinary Special and Trial Term and, having elected to proceed before Acting Supreme Court Justice Jones in the first instance, defendant is now precluded from attempting to overturn his decision by a *de novo* application to this court (see *Matter of Dondi v. Jones*, 40 NY 2d 8, 15).

So far as the application for relief in the nature of prohibition is concerned, we must take cognizance of the holding of the Court of Appeals in *Matter of State of New York v. King* (36 NY 2d 59, 62):

"The extraordinary remedy either of prohibition or mandamus lies only where there is a clear legal right, and in the case of prohibition only when a court (if a court is involved) acts or threatens to act without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction (see, e.g., *Proskin v. County*

Ct. of Albany County, 30 NY 2d 15, 18; *Matter of Lee v. County Ct. of Erie County*, 27 NY 2d 432, 436–437; *Matter of Hogan v. Oulkin*, 18 NY 2d 330, 335–336)." (Accord *Matter of Nigrone v. Murtagh*, 36 NY 2d 421, 423–424.)

While the question is not entirely free of doubt, we have concluded that the allegations proffered by the defendant Groh fail to raise a jurisdictional issue (see *Matter of Paciona v. Marshall*, 35 NY 2d 289; *Matter of Wroblewski v. Ricotta*, 35 NR 2d 745; cf *Matter of Dondi* v. *Jones*, supra; *La Rocca* v. *Lane*, 37 NY 2d 575).

We should indicate, however, that had the motion under Section 149 (subd. 2) of the Judiciary Law been submitted to us *ab initio*, we would have granted the application and ordered that the indictment be dismissed, as the papers submitted by both sides reveal the presence of procedural irregularities going to the very heart and integrity of the grand jury system. Here, after a full presentation of the evidence, a charge on the law by the Special Prosecutor, and an apparently spirited discussion among the grand jurors themselves, they voted to dismiss the proposed charges in their entirety, and recorded that determination in their minute book. Thereafter, and this appears without contradiction on the record, the Special Prosecutor, having learned of the result, re-entered the Grand Jury room, where he gratuitously discussed with the grand jurors their failure to indict. Without any request from the Grand Jury, he then suggested to it that the justice presiding at the Extraordinary Special and Trial Term would be willing to come before it and provide it with a further charge on the law, if it so desired.

The utility of such a gesture was questioned by a grand juror, who told the Special Prosecutor that a vote had already been taken and the matter disposed of, but the latter insisted that a further charge might enable the Grand Jury to "adequately reach a judgment on the matter, adequately and finally reach a judgment on the matter", this notwithstanding the fact that the Grand Jury had done just that—reached, voted on and recorded its determination.

The Special Prosecutor then retired from the Grand Jury room and a vote was taken. Only three of the grand jurors voted to receive further instructions. Despite the fact that there was no request by the Grand Jury as a body to receive any further instructions, both the Special Prosecutor and the justice presiding at the Extraordinary Special and Trial Term appeared before the Grand Jury on a subsequent date and delivered a further charge. The grand jurors then retired to deliberate and voted the instant indictment by the narrowest permissible margin (see CPL 190.25 subd. 1).

Aside from the fact that we view these "further instructions" to have been incorrect on the law, as they seemed to indicate to the grand jurors that they had no alternative except to indict, we believe that the methods employed, although no doubt well motivated, were coercive in fact and, if permitted to go unchecked, would tend to destroy both the value and purpose of our grand jury system. That system, which has its origins in antiquity and enjoys no lesser protection than that afforded by the Federal and State Constitutions (U.S. Const., 5th Amdt.; N.Y. Const., art I, Section 6), performs a vital function in our jurisprudence—that of protecting the private citizen from unjust prosecution. As Justice Foster stated in *Matter of Gardiner* (31 Misc. 364, 366–367, 375, cited with approval in *People v. Minet*, 296 NY 315, 322):

"The grand jury had its origin at a time when there raged a fierce conflict between the rights of the subject and the power of the crown. It was established to secure to the subject a right of appeal to his peers, under the immunity of secrecy and irresponsibility, before the government could bring him to trial. It was a right wrung from the government to secure the subject against oppression.

* * * * * * *

"[As] was rightly said by Judge King, in the case of Lloyd and Carpenter, 5 Penn. L.J. 62: 'Grand Juries are high public functionaries, * * * They are the great security to the citizen against vindictive persecutions, either by government, or by political partisans, or by private enemies. In their independent action, the persecuted have found the most fearless protectors; and in the records of their doings are to be discovered the noblest stands against the oppression of power, the virulence of malice, and the intemperance of prejudice.'

* * * * * * *

"It is as important to a person that he be fairly and justly accused of crime as that he be fairly and impartially tried therefor" (emphasis supplied).

However, this historical function can only be carried out if the grand jury remains truly free and independent of outside influences. As was stated by Justice Callagahan in People v. Both (118 Misc. 414, 423):

"The life and liberty of the individual depend largely upon the citizens who are called from all walks of life to act as jurors. They are in every instance the sole judges of the facts, and, when called as grand jurors, they are the judges of the law as well as of the facts. The administration of the criminal law lies largely with grand and petit juries. It is through the jury system alone that the people have a part in the administration of the law. It is important, therefore, that no undue influence or coercion be exerted at any stage of a prosecution to influence unduly the judgment of a juror." (See, also, People v. Cunningham, NYLJ, April 28, 1977, p. 10, col. 4; People v. Benin, 186 Misc. 548; United States v. Rintelen, 235 F. 787.)

Clearly, this is not a case in which the Grand Jury has voted to reconsider the charges sua sponte (see People v. Stecker, 141 Misc. 417; 42 CJS, Indictments and Informations, Section 25), nor is it a case in which the court having charge of the grand jury, upon an appropriate showing, has directed that the charges be resubmitted following a failure to indict (CPL 190.75, subd. 3; see People ex rel. Flinn v. Barr, 259 NY 104; People v. Potter, 50 AD 2d 410). Under the facts of this case it was improper for either the Special Prosecutor or the court, ex parte, to have interceded in the proceedings once the Grand Jury had voted to dismiss.

To sanction such a procedure, no matter how well intentioned it may have been in this case, would permit prosecutors in the future to coerce or badger grand jurors to change their solemnly arrived at determinations. Nevertheless, while firmly convinced of the grave impropriety underlying the present indictment, this court is without jurisdiction to deal with it at this juncture. However, in the light of the views here expressed, the learned Justice at the Extraordinary Special and Trial Term may wish to reconsider his determination should an application be made therefor.

Gulotta, P. J.; Martuscello, Cohalan and Shapiro, J. J., concur. Damiani, J., concurs in the result.

SUPREME COURT: STATE OF NEW YORK, SPECIAL ADDITIONAL TRIAL TERM, QUEENS COUNTY

(Decision and Order, Ind. No. 2477/76, S. P. No. Q92/76)

PEOPLE OF THE STATE OF NEW YORK
v.
ROBERT T. GROH, DEFENDANT

JONES, J.

The defendant is charged in this indictment with two crimes of felony allegedly committed while he was Deputy Borough President of Queens County, prior to September 1973.

The first count charges Grand Larceny First Degree [Penal Law § 155.40(c)] and reads as follows:

"The extraordinary and special Grand Jury of Queens County by this indictment, accuse the defendant of the crime of Grand Larceny in the First Degree (Extortion) in violation of § 155.40 of the Penal Law, committed in the County of Queens as follows:

"The defendant, between on or about February 25, 1972 and April 26, 1973, in the County of Queens, stole property, to wit, a sum of money owned by I.T.T. Sheraton Corporation of America and its agents, committed by instilling in them a fear that the defendant, then Deputy Borough President of Queens County, would use and abuse his position as a public servant by engaging in conduct within and related to his official duties and by failing and refusing to perform an official duty, in such a manner as to affect the I.T.T. Corporation of America adversely, to wit:

The defendant between on or about February 25, 1972 and on or about April 26, 1973, demanded from an agent of I.T.T. Sheraton Corporation of America a sum of $20,000, later reduced to $10,000, to be used for the purchase of "tables" at a political fund raising event for Queens Borough President Donald R. Manes. Defendant by this demand, instilled in the agent of I.T.T. Sheraton Corporation of America a fear that, unless defendant's demand was met, defendant would

use and abuse his position as Deputy Borough President to obstruct or defeat an application by I.T.T. Sheraton Corporation of America for a zone change to permit the expansion of a Sheraton Hotel located opposite LaGuardia Airport in Queens County.

Pursuant to this demand by defendant, on May 22, 1972, an agent of I.T.T. Sheraton Corporation of America, contributed $3,000 to the Citizens Committee for Donald Manes and on April 6, 1973 an additional $7,000 was earmarked by the agent of I.T.T. Sheraton Corporation of America for the Donald R. Manes Campaign Committee of which $4,000 was received by this Committee on or about April 26, 1973.

After the initial payment made by the agent of I.T.T. Sheraton Corporation of America, the zone change sought by Sheraton was approved. On June 28, 1972 the change was approved by the New York City Planning Commission and on July 20, 1972 it was approved by the New York City Board of Estimate."

The second count charges Bribe Receiving [Penal Law § 200.10] and reads in part as follows:

"Between on or about February 25, 1972 and on or about April 26, 1973, in the County of Queens, the defendant, a public servant, to wit, the then Deputy Borough President for the County of Queens, solicited, accepted and agreed to accept a benefit, to wit, a money contribution to a political fund raising event for Queens Borough President Donald R. Manes from an agent of I.T.T. Sheraton Corporation of America upon an agreement and understanding that his vote, opinion, judgment, action, decision and exercise of discretion as a public servant would hereby be influenced, to wit:

The defendant, between on or about February 25, 1972 and on or about April 26, 1973 solicited $20,000, later reduced to $10,000, to be used for the purchase of "tables" at a political fund raising event for Queens Borough President Donald R. Manes upon the agreement and understanding that defendant would use his position as Deputy Borough President to accommodate I.T.T. Sheraton Corporation of America in its application for a zone change to permit the expansion of a Sheraton Hotel located opposite LaGuardia Airport in Queens County. Pursuant to this solicitation by the defendant. . . ."

Defendant's various requests for relief on this motion will be treated, briefly, in the order presented.

A. MOTION TO DISMISS FIRST COUNT

It is claimed that the first count of the indictment, grand larceny first degree, should be dismissed in that the language of the indictment as stated, is insufficient to allege that crime, in three essential respects: a) there is no allegation of criminal intent, specifically, or generally, hence it fails to charge the needed mens rea; b) there is no allegation that the defendant's conduct "compelled or induced" delivery of money, hence no allegation that he acted knowingly, wrongfully, or unlawfully; and c) the count entirely omits any allegation that the property was obtained by extortion, contrary to Penal Law § 155.45 which requires that "where it is an element of the crime charged that property was . . . obtained by extortion, an indictment must so specify".

Even a cursory reading of the language of the indictment as to this first count, quoted above verbatim intentionally for this purpose, is sufficient to demonstrate the emptiness of the claim that the indictment fails to specify "extortion", there being no other way in which grand larceny first degree can be committed.

Whether defendant's alleged conduct unlawfully compelled or induced the payment of money is of course an evidentiary matter for trial. And, the element of necessary criminal intent in the doing of any act whether alleged in an indictment or not is always an item to be proven in any criminal case. Hence, the Court views as hypertechnical and frivolous, at best, any objections raised along these lines, especially in view of the extensive factual allegations set forth in the indictment. This aspect of defendant's motion is therefore denied.

B. MOTION TO DISMISS SECOND COUNT

Defendant similarly attacks the second count as insufficient on its face in that: (a) It fails to allege intent or mens rea; (b) it fails to allege whether or how the defendant was benefitted and/or (c) how the defendant, acting in his official capacity, was in a position to accommodate the I.T.T. Sheraton Corp.

Although defendant concedes that the pertinent statute, P.L. § 200.10, does not mention "intent", he nevertheless appears to be arguing that since the law requires proof of felonious intent, this allegation should be included in the indictment. No lengthy discussion is necessary to demonstrate the weakness of this argument. The law is clear that intent need not be alleged in an indictment even though it must be proved in every criminal case. The pleading here is therefore sufficient. Furthermore, exactly "how" defendant or some other person benefitted from the alleged activities is a matter of proof for trial even if it may not be obvious to any reasonable person from a reading of the charge. The Court therefore also denies this aspect of defendant's motion.

Defendant contends further, that even if this count of the indictment is found to be valid on its face, the grand jury evidence could not have established any benefit to the defendant himself by virtue of the two payments to the Manes Committee nor could that evidence have established defendant's official ability to accommodate the corporation. The Court has inspected the grand jury minutes and disagrees with counsel's speculations on these points. Vagueness, if any, in this regard may be cured through a bill of particulars. As to whether it is central that the benefit inured to defendant himself or another, the Court refers counsel to the statutory definition of "benefit" in Penal Law § 10.00(17); "benefit" need not flow to defendant.

C. MOTION TO PERMIT INSPECTION OR DISMISS ENTIRE INDICTMENT FOR LEGAL INSUFFICIENCY

The motion to permit defendant to inspect the entire transcript of grand jury testimony and proceedings in this matter or in the alternative, to dismiss the indictment for legal insufficiency, is, after the Court's own inspection, denied. The only reason offered to justify a departure from the usual rule of pre-trial secrecy, is that more highly informed advocacy may occur if this is granted. The Court notes that extensive discovery and inspection has already occurred during the pendency of these motions. These and any other valid, detectable contentions not specifically addressed by counsel have been considered by the Court; and upon consideration of all of the reasons now offered for dismissal, as well as the Court's own review of the grand jury minutes the Court concludes that the charges are based on legally sufficient evidence.

D. MOTION TO DISMISS ON THE GROUND THAT SPECIAL PROSECUTOR WAS AN UNAUTHORIZED PERSON BEFORE THE GRAND JURY

The defendant claims that under C.P.L. 210.20 subd. (1)(c) the grand jury proceedings in this matter were defective within the meaning of C.P.L. 210.35 subd. (5), in that they failed to conform to the requirements governing presentation of evidence to the grand jury to such a degree that the integrity of the proceeding itself was actually impaired and that prejudice to the defendant has resulted or may result.

The facts upon which this contention is based are as follows: The special Queens grand jury with the special prosecutor has its principal legal advisor formally began its investigation into this matter with the commencement of testimony on May 19 and 21, 1976. The Court of Appeals, in *Matter of Dondi v. Jones*, (40 N.Y. 2d 8), ruled in a 4 to 3 decision that a criminal matter of the type involved here (i.e. unrelated to the enforcement of law or the criminal justice system) was beyond the prosecutorial jurisdiction of the special prosecutor (although not beyond the jurisdiction of this Court or the special grand jury).

The *Dondi* decision was rendered on June 3 of that year. On September 20th, a letter from the special prosecutor was sent to the Governor requesting a superseding executive order permitting his office to contnue the investigaion and prosecute any resulting indictment. This letter of request also indicated to the Governor that there was no objection to this request on the part of the District Attorney of Queens County. On September 22 and 30, further grand jury sessions were conducted, even though the superseding order had not yet been issued. However, it appears that counsel to the Governor at some undetermined point on, during or after these dates, had advised the special prosecutor's office that the superseder would be forthcoming. Indeed, the superseding Executive Order (No. 57.08), clearly bringing this particular case within the prosecutorial jurisdiction

of the special prosecutor's office, *was* issued on October 6. The same grand jury continued its investigation over several subsequent sessions, without resubmission of any previous testimony, until an indictment was finally voted on November 10, 1976.

C.P.L. 190.25 subd. (3) provides that only certain specified persons, including the district attorney (or by definition, the appropriate prosecutor) may be present during parts of grand jury proceedings.

The defendant's position is that the special prosecutor was an unauthorized person before the grand jury *ab initio*, in violation of C.P.L. 190.25 (3), and that his status did not change until the new executive order was issued. Since that order was operative only prospectively and since this proceeding was continuous from May, 1976, defendant contends, the special prosecutor was not a proper person before the grand jury with respect to these charges and, as a result, the indictment is defective. Under the terms of C.P.L. Section 210.20 subd. (1) (c) and Section 210.35 subd. (5), defendant urges, the indictment must be dismissed. The Court reaches a different conclusion.

In rejecting this challenge to the validity of the proceeding that led to this indictment, the Court is not unmindful of the recent holding in *People* v. *DiFalco*, 54 A.D. 2d 219 (1s Dept. 1976), cited by defendant. There, the Appellate Division dismissed a *pre-Dondi* indictment of the type involved here (i.e., unrelated to the criminal justice system) and referred that matter to the local district attorney for possible future proceedings. The court dismissed, rather than transfer the indictment itself, because: "* * * the Special Prosecutor was not a proper person before this Grand Jury with respect to the charges contained in this indictment (C.P.L. 190.25 subd. 3); that the indictment must be dismissed (C.P.L. 210.20 subd. 1, par [c]; 210.35, subd. 5)." (at p. 221–2).

The *DiFalco* ruling is distinguishable from the case here in that nowhere in the history of that grand jury proceeding, or any subsequent court proceedings, was a superseding order ever sought and obtained as here. Moreover, this superseder was obtained well prior to the return of this indictment and upon consent of the District Attorney of Queens County,—circumstances which serve to still the fears envisioned by the Court in *DiFalco* as recited in language immediately above its ultimate ruling: "Finally, to fail to dismiss would enable the Special Prosecutor, although unauthorized by his gubernatorial warrant, to obtain indictments and hand them over for prosecution by the District Attorney, the only person authorized by law to investigate the matters in the first place. This procedure would deprive the District Attorney of the rights and obligations he and only he has and his office would be reduced to actual arm of a Special Prosecutor unfettered by limitations on his authority". (p. 221)

Here, again, a "gubernatorial warrant" authorizing the obtaining and prosecution of this indictment, and such prosecutorial jurisdiction was conferred by the Governor partly as a result of the consent of the local District Attorney.

The defendant's claim that since the Executive Order was issued half-way through the grand jury proceedings it could not validote preceding grand jury appearances by the special prosecutor, is similarly not persuasive.

The First Department, in *DiFalco*, apparently did not address the requirement under CPL Section 210.20 subd. 1(c) and Section 210.35 subd. 5, that the defect complained of be of such weight that it is likely that the integrity of the grand jury proceeding was impaired or that some prejudice to the defendant may result. Even if we assume, therefore, that that Court felt that the unauthorized appearance of the special prosecutor was a violation *per se* and might have such effect, the question before this Court is much narrower since the claimed "unauthorized appearances" were limited to the four sessions that occurred before the Executive Order was issued. Two of these appearances occurred prior to the *Dondi* limitations, imposed by a narrowly divided Court, and two occurred after *Dondi* but also after the consent of the Queens District Attorney was assured and at about the time that the Governor's office had assured the prosecutor that the Order would be forthcoming. Even if the apparent good faith thus demonstrated does not legally validate these earlier appearances, the Court feels nevertheless justified in requiring some strong showing by defendant that these "defects" violate lawful requirements to such a degree that the integrity of the proceeding itself, as a whole, was impaired and that prejudice to the defendant may in some way result. The Court's examination of the grand jury minutes does not reveal any possible prejudice resulting from these early appearances, nor has defendant demonstrated any.

Although it is not clear whether the Governor was aware at the time he issued the superseding order, that some testimony had already been presented to the grand jury, it is clear that he intended to transfer jurisdiction to the special prosecutor. To hold, now, that the clear intent of that order should be thwarted, despite absence of the kind of showing required by the statute, would be to place great importance on form over substance, in a context where no rights of defendant have been shown to have been violated and the only clear result would seem to be to further delay the trial of this important case. In this regard it should be noted here that defendant was recently elected to the Civil Court Bench of the City of New York. Although he has been sworn in he has not yet fully assumed his official duties. It would seem therefore that he too would be anxious to address these charges on their merits rather than on the basis of technical challenges addressed to merely procedural matters.

For all of the reasons above, this branch of defendant's motion is likewise denied.

E. MOTION TO DISMISS FOR PRE-INDICTMENT DELAY

Defendant also seeks dismissal pursuant to CPL Section 210.20 subd. 1(h), jurisdictional or legal impediment, and/or subd. 1(i), interest of justice, as well as the due process clauses of the United States and New York constitutions. Defendant alleges that he has been severely prejudiced by the 3- to 4-year delay between the date of the alleged crimes (February, 1972 to April, 1973) and the date he was notified he was a target of a grand jury investigation (August, 1976). He also complains of the 10½ month delay between the time the prosecutor first received information concerning the alleged crimes (September 22, 1975) and the same date of notice to defendant.

Defendant claims the following prejudice with respect to the delays: (1) Impaired recall on his part; (2) the death of Kisseloff's then law partner, whose testimony could conceivably have been crucial in regard to Kisseloff's writing partnership checks to the Manes Committee; (3) the death of one Andrew Mulrain, who "unofficially ran" the 1972 dinner affair for Manes and whose testimony would have substantiated defendant's testimony regarding the nature of his involvement in the organization of that affair; (4) the October 1975 loss of defendant's personal diaries covering the relevant time periods in the indictment which loss would not have occurred if defendant had been alerted earlier to the "ongoing" investigation. Defendant does not indicate when such earlier notification might have been accomplished.

Without any factual support of which the Court is aware, defendant rather curiously asserts that the prosecutor's delay, between September 1975 and notification to defendant in August 1976, was due to the prosecutor's desire to exploit illegal wiretaps and the desire of a former special prosecutor to schedule the production of indictments to suit his own needs. As indicated, in this instance, both claims are devoid of factual basis or support.

It seems clear that the prosecutor's office received its first inklings of possible charges against this defendant on September 22, 1975, from an interception of certain conversations, pursuant to a court-ordered eavesdropping warrant, to which the defendant was not a party. The eavesdropping continued by virtue of court-ordered extensions until April, 1976. The prosecutor asserts that it was therefore obviously impossible to begin any investigation in that matter by questioning either the target of the eavesdropping or others mentioned in those conversations, without jeopardizing that investigation itself. That eavesdropping terminated in April, 1976.

This investigation, growing out of the other, was formally commenced on May 19 of that year and continued until November 10 when an indictment was returned. Hence, the prosecutor points out, any preindictment delay here was necessitated by a valid law enforcement purpose—preservation of the secrecy of the court-ordered eavesdropping in the other investigation. The point is clearly well made.

As long as the requirements of the statute of limitations are met, the time period being calculated even without regard to the public office status of the defendant, [see CPL § 30.10 subd. 3(b),], defendant's claim of untimeliness is without merit, and again his claim of resultant prejudice cannot be sustained.

The claim of prejudice relating to faulty recall, viewed in the context of the legislative intent in extending the statutory period of limitation with respect to public officers, cannot be allowed, even if defendant's constant reliance on failure of recall before the grand jury can be credited.

Similarly, the claim of further prejudice, largely speculative, relating to the intervening deaths of Buckley and Mulrain cannot be sustained. An examination of the grand jury minutes indicates that Buckley had no discernible part in arranging or carrying out the payments; rather, this appears to have been done by another former partner who is alive and well. The minutes also indicate that a large number of other witnesses as well as documentary evidence is available relating to defendant's alleged role in the dinner organization and arrangements.

Finally, as to defendant's claimed loss of his diaries sometime in October, 1975, only one to five weeks after the critical intercept on September 22, it can hardly be said that this was brought about by the prosecutor's failure to inform him of his "target" status prior to October.

The Court is totally unconvinced of the existence of any prejudice due to prosecutorial delay, hence this branch of defendant's motion is also denied.

F. MOTION TO DISMISS TO AVOID INJUSTICE AND TO PROTECT GRAND JURY INTEGRITY

Defendant now asks the Court in its discretion to dismiss the indictment to avoid injustice and to protect the integrity of the grand jury proceedings from impairment, pointing to the aggregate and cumulative impact of the numerous factors involved herein, some of which have already been discussed. The underlying theme of this appeal seems to be that "justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954). The legal grounds cited for this relief are, again CPL Section 210.20 subd. 1(c) (defective grand jury proceeding), subd. 1(h), jurisdictional or legal impediment, subd. 1(i) interest of justice, and also CPL Sections 210.35 and 210.40, both of which are incorporated by reference.

Some of the reasons suggested for dismissal, such as the "unauthorized person" and "delay" arguments, have already been addressed individually. Other claims, such as: alleged prejudicial news publicity generated by the former special prosecutor in an effort to retain his position; presentation of incompetent and inadmissible evidence; presentation of evidence in an improper and prejudicial manner; failure to present evidence favorable to the accused so as to lessen the force of inculpatory evidence; failure to disclose all these (claimed) defects to defendant at the time of securing his waiver of immunity; * * * can be disposed of individually as being speculative, or unsupported by sworn allegations where applicable, or actually unsupported to any significant extent, based upon the Court's review of the grand jury minutes. In no sense is the Court convinced to any degree that dismissal of this indictment is required or would be appropriate, if the proper functions of the grand jury are kept in mind. The two remaining factual grounds deserve separate mention and discussion.

Defendant asserts that the initial investigatory lead in this case was picked up on a telephone eavesdrop between two other individuals and that that eavesdropping was later determined to be unlawful. This is not entirely accurate. The original order to intercept electronically, conversations between one Fitzgerald and others, authorized the placing of recording devices on Fitzgerald's home telephone, on his office phones and other devices within Fitzgerald's office itself. The investigatory lead herein, it is affirmed, was picked up by the device that was installed in Fitzgerald's office. The decision relied upon by defendant, *People* v. *Saypol*, N.Y.L.J. Sup. Ct., Bronx Co. January 18, 1977, reached only the question and struck the legality of the court order and its extensions only insofar as they affected Fitzgerald's home telephone. The Court there specifically found it unnecessary to reach the question of the general nature of the entire warrant or the prosecutor's authority to apply for it. Even if the particular source of the investigatory leads in this case were shown to have been derived from condemned interceptions, the Court has not been convinced of defendant's standing here to assert such claimed illegality. Nor is the Court convinced that the "poison tree" doctrine should be extended to leads concerning the criminal activities of other persons not directly affected by "interceptions" later found to have been tainted by some irregularity. This grand jury heard no evidence concerning any electronic interceptions, legal or otherwise, and these proceedings, therefore, were in no way impaired.

The other remaining point worthy of separate discussion relates to the claim of improper legal instructions to the grand jury. A review of the grand jury minutes in this regard reveals a sequence of events, apparently unknown to the defense, that the Court deems necessary to address.

On November 8, 1976, after the two prosecutors involved herein had given adequate legal instructions and definitions to the grand jury, one of them answered questions posed by the grand jurors concerning possible criminal liability of other persons whose names had come up in this matter. He had previously instructed them (and properly so) that as a matter of law on the state of the evidence before the grand jury at that time, an indictment could not legally be returned against one of the other named individuals on these or any related charges. Hence, he again told them that they were being asked to consider only the question whether or not an indictment should be returned as to this defendant, and no others, at this time. The prosecutors and stenographer left the grand jury room so as to permit deliberation.

Some time later, as reflected in the minutes, the prosecutor returned. It is not clear whether he did so upon request or not. Nor is it clear whether or not at that point, the prosecutor knew that the grand jury had voted not to indict the defendant. Nevertheless, he asked the grand jury if there was any further need for instructions, particularly with respect to the law as applicable to the involvement of persons other than defendant, and whether they thought it would be useful to ask the presiding Court, Honorable Leonard Sandler, to give further legal instructions in this regard.

As will later appear, the grand jury decided to reconsider its earlier vote and to accept the offer of further legal instructions by Justice Sandler. A time and place for Justice Sandler's appearance was then agreed upon.

Two days later, on November 10, Justice Sandler appeared and gave further legal instructions. He reminded the grand jury that their duty required them to indict or not indict (the defendant) without regard to the possible criminal liability of anyone else. After all of these instructions and answers to questions posed by them, the grand jury returned the instant indictment against this defendant.

An examination of the journal kept by the secretary of the grand jury was undertaken by this Court to test the propriety of the conduct of the prosecutor in apparently "interrupting" grand jury deliberations. The journal reveals that on November 8, contrary to any other possible misimpressions, the grand jury had voted "dismissal" of the proffered charges and the journal also reflects a request by three grand jurors for further enlightenment on the law by Justice Sandler. The Court is thoroughly dissatisfied with the failure of the official grand jury minutes to reflect these important intervening circumstances. If the Court thought it critical or even important to its consideration of the propriety of the grand jury proceedings on November 8, it would summon a hearing, sui generis, to resolve this question. The Court concludes, however, that such hearings is unnecessary. It is unquestioned that a grand jury has the right to reconsider any of its actions prior to the filing of indictments, certificates of dismissal, remittiturs or reports. And it should be unquestioned that such reconsideration should not be declared violative of due process as long as it was fully undertaken by the grand jury and was clearly free from prosecutorial coercion. The simple fact is that here, at least three grand jurors, apparently upset with the result of the initial deliberations and vote, requested additional instructions. This was consented to, tacitly or otherwise, by all of the members who convened on November 10 and the matter was then re-voted.

The Court finds that the prosecutor's instructions, comments and advice were proper, particularly as amplified by Justice Sandler, and that the grand jury's ultimate action was free of prosecutorial or judicial coercion. The entire tenor of the proceedings on November 8 and 10, indicates a concern, first by the prosecutor and later by Justice Sandler, to dissuade the grand jury from heatedly voting indictments that were not then legally permissible, particularly against at least one other individual. In the circumstances, Justice Sandler's intervention was timely and was wisely designed to prevent that result.

It seems clear that the basis for the initial grand jury vote was a feeling of rancor on the part of the majority over the limiting instructions they had received regarding other named individuals. In this contex, it can hardly be said that the request for reconsideration of the vote, as it turned out, was in any way prejudicial to this defendant or that it offended justice, in any sense.

This Court, as the record will confirm, has not hesitated on prior occasions to dismiss indictments or charges, in whole or in part, for procedural or evidentiary defects or for prosecutorial misconduct or overreaching. It would not hesitate to do so now, if it felt that in this instance such action was appropriate. On the

contrary any overreaching or impropriety that may have occurred herein must clearly be attributed to the grand jury majority, not the prosecutor; and considering all the circumstances, their overzealousness is understandable.

The Court is not convinced that the proceedings were defective or that the essential integrity of this grand jury was in any way impaired or compromised so as to warrant a dismissal of this indictment—either for procedural defectiveness or, cumulatively, in the interests of justice. Hence, this final branch of defendant's motion to dismiss is also denied.

G. Defendant's motion for an order directing divulgence of the identity of persons present in the grand jury room, other than grand jurors and witnesses (and presumably prosecutors) during these proceedings is denied as moot, in view of the prosecutor's affirmation that only those authorized pursuant to CPL § 190.25 were present.

H. Defendant next moves for an order directing disclosure of all comments, instructions or advice given to the grand jury by any court, prosecutor or other person regarding their general duties, applicable law, the facts of the investigation and the returning of the indictment and the identity of the person rendering same. The Court has examined all of the requested items of instruction and has found them to be legally sufficient and proper. There being no other need, stated or apparent, for these requested items, the motion is denied. The Court will however order the prosecutor to divulge the names and current occupation and status of the three assistant special prosecutors who presented this case to the grand jury.

I. DISCOVERY

Several items of discovery have been requested. The Court notes that during the pre-trial stage, the prosecutor has voluntarily turned over many of the items now requested. Hence, many of the requests are now moot for that reason. The motion is therefore disposed of as follows:

a, b, c, g, j, k, o: Denied as moot.

d, e, f, i: Denied. With respect to item i, the Court is aware that the prosecutor has already given copies of all exhibits introduced in evidence as well as many only marked for identification.

h, l: Granted to the extent already provided; denied as to the balance.

m: No order of the Court is necessary with respect to exculpatory evidence. Prior inconsistent statements of witnesses are not necessarily exculpatory and to the extent they are not, this portion of the request is denied; but see the concluding paragraph herein.

n: Denied in the mode requested; but see concluding paragraph.

p: (i) Granted, if any; (ii) granted to the extent now known to the prosecutor but limited only to criminal liability or jeopardy; (iii) and (iv) denied.

J. BILL OF PARTICULARS

Defendant has requested various items by way of a bill of particulars, all of which, it seems at present, may well depend upon circumstantial evidence, or upon inference, or upon the drawing of legal conclusions. As such, the Court deems them not susceptible of the precise definition required for a bill of particulars.

Defendant may be free to draw his own inferences and conclusions regarding some of these items upon receiving a factual summary of the substance of a conversation between the witness Kissseloff and defendant on April 26, 1972, in the defendant's office in Queens County. The Court therefore orders, as an additional item of discovery herein, to be designated item q, that a brief summary of this conversation be provided. The Court does so pursuant to defendant's general request for whatever other and further relief the Court may deem proper.

K. Denied. Wilful destruction of relevant evidence will, of course, never be tolerated by this Court. On the assumption that the request is intended to guard against careless handling or loss of such evidence, mere admonition by the Court at this point should suffice. It is hereby given.

In anticipation of a request for an order granting trial preference in this matter, and the granting of same, the Court hereby directs that full compliance with the limited discovery granted herein be completed by Wednesday, March 9, 1977. Pending completion of compliance the Court hereby directs all parties to appear for a final conference on Monday, March 7, 1977 to determine readiness. At such conference, the Court may entertain, reluctantly, any further pre-trial applications.

The prosecutor is hereby put on notice that all available *Rosario* material should be supplied to counsel at least 48 hours prior to the expected appearances of any witnesses.

So ordered.

Dated: March 4, 1977, *Queens County*.

(*Acting*) *J.S.C.*

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SUPREME COURT: QUEENS COUNTY

CRIMINAL TERM: SPECIAL EXTRAORDINARY TERM PART 98

(Indictment No. 2477–76: Motion)

PEOPLE OF THE STATE OF NEW YORK,
v.
ROBERT GROH, DEFENDANT.

25–10 Court Square, Long Island City, N.Y. 11101.

JUNE 17, 1977.

Before: THE HONORABLE HOWARD A. JONES, *Justice.*

Appearances: For the People: JOHN KEENAN, Esq., Office of the Special State Prosecutor, Two World Trade Building, New York, N.Y. By: RICHARD A. NACHMAN, Esq., of Counsel, GEORGE BRADLAU, Esq., of Counsel. For the Defendant: MESSRS. SEGAL & HUNDLEY, 745 Fifth Avenue, New York, N.Y. By: MARVIN B. SEGAL, Esq., of Counsel.

HAROLD GOLDSTEIN, R.P.R.
Official Court Reporter.

THE CLERK OF THE COURT. Indictment No. 2477–76 Robert Groh.

THE COURT. Will counsel note your appearance for the record?

Mr. SEGAL. Marvin B. Segal of Segal & Hundley, 745 Fifth Avenue, New York City.

THE CLERK OF THE COURT. Let the record show that Marvin B. Segal is present for the defendant Robert Groh.

THE COURT. For the People?

Mr. NACHMAN. For the People, Richard A. Nachman and——

Mr. BRADLAU. And George Bradlau.

THE COURT. Now, for the record.

For the record, this is on remitter from the Appellate Division pursuant to their order, the Appellate Division, Second Department, that is, pursuant to their order entered May 31st; is that correct, Mr. Segal?

Mr. SEGAL. I believe so.

THE COURT. 1977.

I will read for the record just the last paragraph of the order:

"To sanction such a procedure—and here I think it is fair to say they are referring to the procedure disclosed by me in connection with my motion to inspect the Grand Jury minutes as to the circumstances under which this indictment was filed—"to sanction such a procedure no matter how well intentioned it may have been in this case would permit prosecutors in the future to coerce or badger Grand Jurors to change their solemnly arrived at determinations; nevertheless while firmly convinced of the grave impropriety underlying the present indictment, this court is without jurisdiction to deal with it at this juncture.

"However, in the light of the views here expressed, the learned justice at the extraordinary special and trial term may wish to reconsider his determination should an application be made therefor."

I assume that they are referring to me as the learned justice, although I quarrel, among other things, with their designation of me as extraordinary special and trial term.

I am not that, and it is sad for me to have to make this observation on the record, Mr. Segal because that is precisely one of the reasons I sent this matter to the Appellate Division, namely, that there is only one extraordinary special and trial term, and that is Judge Sandler.

We sit, and by we I mean Judge Polsky and myself sit simply as additional trial terms; we are separately designated, we are quite differently designated, one by Executive Order, and the other simply by assignment by the appropriate Appellate Division.

And, I think that this is one of the underlying reasons which perhaps the Appellate Division may have overlooked why I sent the case there.

And, when I say I sent it there, I am sure you understand what I mean, and I join with you—with the suggestion that this matter be reviewed by them because to have granted your motion as I think I said, would have meant, among other things, overruling Judge Sandler, who sits separately and I think, it is fair to say that he sits somewhat at a level above the trial court here; and far be it for me to set myself up as an Appellate Division over Judge Sandler. It just may be that this nuance may have escaped their attention.

I want to say this for the record, in the hope obviously that they did overlook this, but just on the chance they might have, and before hearing you on your renewed motion, I am sure that is why we are here, I would like to address my remarks just a little bit further to one or two other important facts and circumstances, just for the record.

The decision here speaks in terms of not permitting prosecutors to badger or coerce Grand Jurors to change their solemnly arrived at determinations.

Now, I have two quarrels with that language:

First of all, assuming there was badgering or coercion here, in a real sense, I don't think it can be said in this case that it was the prosecutors who badgered or coerced, if anybody, it obviously was the presiding judge himself.

Now, to state as they apparently do here in this learned decision, that the presiding judge of that Grand Jury has no right to interfere in a determination once made by that Grand Jury, no matter how terribly wrong that determination may have seemed to him, I think is overkill, and I am groping as you can see with sufficiently delicate language here to state my position without offending the Appellate Division.

I think the mere suggestion that the judge presiding over a Grand Jury has no right to interfere with that Grand Jury; once they have voted I think bespeaks a caution that is certainly not warranted by these facts and circumstances.

While I might agree, that if the presiding judge had been properly convinced that that vote by that Grand Jury was a "solemnly arrived at determination," then in that circumstance, I think I can agree he had no right to interfere, but there again that the facts here seem to belie the conclusion that this was a solemnly arrived at determination on the part of that Grand Jury, and I am referring here to the entire context of the dialogue that took place between the prosecutor and the Grand Jury, and later between Judge Sandler and the Grand Jury.

It is clear to me this was not "a solemnly arrived at determination," and that is precisely the basis on which Judge Sandler sought to intervene.

I am disappointed that in its learned decision the Appellate Division made no mention of the sufficiency or insufficiency of the evidence before the Grand Jury, so that on remitter here before this court, at least, I could appreciate or understand exactly what their views were, suffice of evidence, vis-a-vis, harm or prejudice to the defendant.

If I might suggest most respectfully that still one unanswered question as I read that decision, the record should also reflect that this report entertains a continuing disagreement with the conclusion that the Appellate Division here lacked jurisdiction to rule on this motion, as it was presented to them, and I say that most advisedly for the following reasons:

In essence, the court here seems to be saying that Mr. Segal should have come to them first with this application, and that had he done so, they would have dismissed because of the faults and errors they have cited.

I think the chronology of events here reveal the total impossibility of that circumstances having occurred because it was not until this court rendered its decision, that Mr. Segal was even aware of what had happened in that Grand Jury.

How then could he have moved this as a ground originally before the Appellate Division?

If they are saying that once these disclosures were made by me in my decision then, having then been put on notice, Mr. Segal should not have come back to me on subsequent motion.

Now, I think I can understand the point, but I have a good answer for it, I think, and that is, as I recall Mr. Segal's motion the second time around was simply a motion for reargument of the initial motion in the course of which obviously having learned I hope thankfully of these disclosures and these events, he moved for reargument, reconsideration of the original motion, if for nothing else but to complete the record so that he could then go to the Appellate Division for a ruling.

I think to suggest threfore with this chronology and background that the Appellate Division had no jurisdiction in the matter is to unintentionally I am sure, avoid the issue.

The net effect it seems to me of what we undertook jointly to do here, was to preserve all these points for Appellate Review, so as to enable Mr. Segal to go to the Appellate Division for its ruling, and certainly none of us and I hope I speak for all of us, I know I speak for myself, had no intention deliberately or otherwise to preclude the Appellate Division from making a ruling and yet this is what they seem to think we have done.

I do not agree.

Finally, I have this other problem with the whole situation, Mr. Segal; the question of jurisdiction.

Now, I haven't read your memorandum, and I assume that this is the point that you are addressing here, namely, considering the limited grounds upon which jurisdiction had been assumed by the Prosecutor in the first instance; question, what effect will a dismissal now have on the continuation of that jurisdiction in the Special Prosecutor Office and—let me be more explicit.

As I recall, this investigation had been started prior to the Court of Appeals decision in Dondi against Jones. One of the main reasons as I recall, that were urged upon the Governor in this case, after the Dondi decision, in connection with the application then by the prosecutor to permit his jurisdiction to continue.

One of the principal arguments was at that time that despite the decision in Dondi, inasmuch as the prosecutor, the Special Prosecutor was then already involved in this investigation, some testimony concerning which had already been presented to a Grand Jury, and but for the decision now in Dondi they would have continued; for that ground, for that reason largely, the Governor was persuaded to sign the Executive Order, authorizing them to continue their investigation.

Now, my question is, and here again unfortunately the Appellate Division's decision does not answer this dilemma for me, but the question is, with that limited basis of jurisdiction in the first instance, what then becomes of it, if this indictment is now dismissed?

Certainly their main argument, their main rationale for requesting jurisdiction no longer exists, namely, we are already before the Grand Jury with this matter; therefore let's continue.

Now, I throw that out for discussion. It is a circumstance that is really troublesome to me.

Obviously I am the little man in the middle here, and far be it for me to go against the wishes, let alone the direction of the Appellate Division, but I think in fairness to both sides, not just both sides, all sides, because there are other two sides here, Judge Sandler and Judge Jones involved in this legal controversy—in fairness to all sides, I think these matters should be stated on the record.

I am glad that I had the courage to do it.

Mr. NACHMAN. May I respond to the last issue, Your Honor?

THE COURT. I saw a document before me, where is it?

All right, for the record, now Mr. Segal, I know that it is your motion, but do you mind if I hear Mr. Nachman first on the last point?

Mr. SEGAL. That's all right.

Mr. NACHMAN. Yes, sir.

First of all, the defendant hasn't even raised this issue. I don't think that he thought of it or wanted to rely on it.

The court thought of it, and I frankly think, Your Honor——

THE COURT. As I said, I haven't read the memorandum and——

Mr. NACHMAN. He doesn't even talk about it. I am trying to be as frank as the court, and the court is raising an issue which isn't an issue at all. I can't even conceive of it, frankly.

THE COURT. Well, I can.

Mr. NACHMAN. The Governor issued an order, saying that the Special Prosecutor had jurisdiction in this investigation and prosecution. Now, this investigation and prosecution is still in existence even if you should dismiss this indictment.

The People are requesting and recommending dismissal only if coupled with the direction to or permission to resubmit.

Therefore, it would still be a continuing investigation and prosecution, and I don't see how the superseding order is affected by that; there is no time limit on it, I don't think.

The only reason for that or even the major reason the superseding order was granted was not because the matter was already in the Grand Jury, and the main reason was the investigation and the information, and the evidence was derived as a result of our office investigation and——

THE COURT. So was Dondi, wasn't it?

Mr. NACHMAN. Yes, but at that point, we said we developed this, we derived this evidence.

The District Attorney of Queens County has consented to let us continue with the prosecution, therefore, Your Excellency, Mr. Governor, please supersede the order to give us clear and unquestioned jurisdiction in this case.

THE COURT. Yes, but if you had heard me carefully, all I was suggesting was, and I think that it is a good point in spite of the fact that you disagree, namely, that as I recall the submission is at that time, one of the reasons given, presented to the Governor, was the fact that you had initiated this, that the matter was already before a Grand Jury, at least partially, and that were it not for the occurrence of the Dondi decision, your jurisdiction might well have continued.

Perhaps there were other reasons as well, and I did not overlook the fact that the local District Attorney had consented; all I am suggesting to you is that, at least one of the main ingredients in the application is now missing.

The question therefore whether or not the Governor's Executive Order continued the point of dismissal of this indictment that he has authorized you to pursue.

Mr. NACHMAN. Well, Your Honor——

THE COURT. It was missing as soon as the indictment was filed, the case no longer before the Grand Jury.

Mr. NACHMAN. I don't follow that. The Executive Order says that we shall investigate and prosecute this case. Now, obviously——

THE COURT. All right, I think you understood my point.

I wouldn't pass it over so lightly, if I were you.

We will get back to it.

Mr. Segal, I will hear you.

Mr. SEGAL. Your Honor, I will address myself to what we have not raised in the papers that are before the court at the present time. It wouldn't have been appropriate to raise it, and that would be a consideration for the prosecutor, and not for the defense counsel.

It is also the proposition that we have considered in our office, and I viewed that proposition as seriously as the court apparently did, and am quite willing to allow that issue to remain in the case in the event there is a reapplication.

But, I do think that that is a matter of some interest that the Special Prosecutor has and is narrowly defined, and in fact is specifically laid out as each prosecutor or prosecution is undertaken, especially in these area which fall over into an area with which a local District Attorney has concurrent jurisdiction.

Now, the first issue that was raised by the court, that the court is not sitting as an extraordinary justice, I would view that language in the Appellate Division's opinion as surplussage.

I think that that may have been an extra apellation given to the court, but clearly that court was directing itself to this court itself in terms of the reconsideration of this motion.

However, we have raised in the papers that are before you, and I realize that these were handed up to your clerk at a time when you had been engaged all morning, but we do raise the point as to whether or not this court, namely yourself, is the appropriate court or whether or not that really should not go back to Justice Sandler, and we raise the accompanying problem as to whether Justice Sandler because—Justice Sandler himself because of the circumstances attending this case may be appropriate even under those circumstances.

So that the question of accusal may arise if this court determines that it is—and it is not the body that should but rather it is the extraordinary justice who should review it, and whose title is held by Justice Sandler, unless otherwise designated.

Now, I must say, and I will say this, Your Honor, whether it is to my benefit or not, I applaud what the court has done in terms of speaking out to the decision that has come down. This makes for the kind of healthy dialogue and it certainly raises the office that this court occupies to a place where it really ought to be.

I guess that we are all equally competent as to the different kinds of power, but it really doesn't mean very much. The court does hove the power and does speak out. It is refreshing and I think it can only be helpful and I say it is a marvelous thing.

THE COURT. Except to me personally, perhaps.

Mr. SEGAL. We are all in the middle, Your Honor, and I am at the bottom. I am even in a worse position, but I do feel that as the court pointed out, it was almost impossible, unless it had been pressing, of what I posess to know, but this issue would have arisen as the court did in stating it there initially; and that is true, because of the way this case was brought, and that would have meant that we would have brought a motion on which we decided as a matter of an actual choice, which we decided it would be better going to Supreme Court Justice, rather than to the Appellate Division, which would in effect give us a dual opportunity of having that question reviewed, because so far we knew that we had legal points, but they were neither extraordinary nor were they particularly unusual. We felt it was valid, but we also felt that the most valid point perhaps that the Apellate Review was a better way of going to them, without skipping one form but only when we knew we would get what was obviously an issue of some moment, an issue which we have indicated in the papers to the court, would not have been listed, but for your personal decision to make that clear to us.

It was then that we had to complete the record in order to find out what do we have, and to that effect we are and I understand the Appellate Division seems reluctant as perhaps they should be to cut off and interlocutory effect appeals and to clean the process to the point where a case does not bounce up and back prior to final resolution and final level, but I do feel that we will abide by the Appellate Division's decision as the court had suggested in its statement here, and that we might want to reapply to the Appellate Division for clarification.

At the moment of first impression now, I have no such intention, and as a result it is my feeling, one that because of the application and the suggestion which was made to this court; two, that perhaps it is the extraordinary justice before whom such an application should be made, that the Government may very well want to decide whether or not the arguments for resubmission here—be made here.

However, I have decided and will so move that this court reconsider the motion earlier to dismiss and would of course indicate that rationale which we urge is the rationale laid down in our original papers, plus of course the suggestion made by the Appellate Division in this case as to the application which it has anticipated the Government may make. As we do not know what grounds and what basis will be urged to the court for a resubmission and then we would give what our general thoughts are and hopefully if it is put in papers, we will have a short period of time to answer the arguments there, but I do want to say to the court that I would respectfully move for reconsideration for the motion to dismiss and do so move, as I felt because the Appellate Division's decision as related and you might not need additional papers from us, and I would be glad if the court would want to make that into formal motion in your office on Monday.

I have no further applications to make at this time.

THE COURT. All right. In case that I have not made myself clear, let me say this, that in view of the virtue of the mandate contained in the language of the Appellate Division decision, upon application for reconsideration, it would be almost suicidal of me, legally speaking to refuse.

Clearly, therefore, although reluctantly, I will grant the motion.

I am not doing so now because I do want to see if I can get clarification concerning the various points that I have raised, particularly the last one which virtually dovetails about the question of whether or not to resubmit, to order resubmission.

In other words, tied in with the appropriateness of resubmission is the unavoidable question who should make the resubmission, and I think it may be that perhaps upon my own application to the court, I will then get the clarification that I need.

I can understand you are not willing to do it, Mr. Segal, I wasn't suggesting that. I can understand your concern Mr. Nachman in pressing for resubmission.

I am simply indicating that there is a void here in their direction, if you will, that I think must be filled.

Now, do you wish to be heard further, Mr. Nachman?

Mr. NACHMAN. Yes, Your Honor.

There may have been some misunderstanding on my part in my conversation with Mr. Segal and others in his office. I was under the impression that they would submit formal papers, urging the court to reconsider, and that is why I have no papers for the court today.

I am perfectly willing, if the court is, to hear the motion on oral application. I would merely ask for time to submit memorandum, perhaps in a week and—

THE COURT. I see no need for formal papers.

The Appellate Division is formal enough for me. He has submitted this memorandum of law in opposition to resubmission, so that really joins the issue.

Of course I will give you time to answer, you see.

Mr. NACHMAN. All right, fine. I just wanted to make our position known on the record, on the motion itself that we would oppose the granting of the motion to dismiss the indictment unless it is coupled in the same order with permission for us to resubmit.

THE COURT. I can understand.

Mr. NACHMAN. In that event, we would consent to be perfectly frank, if the court saw fit to dismiss and not to give permission to resubmit, but would like to have the opportunity to appeal both branches of that decision.

THE COURT. All right, fair enough.

Is there anything further?

Mr. NACHMAN. How much time? Will a week from today be too much for time to submit a memorandum in opposition to this one?

THE COURT. Provided that Mr. Segal wouldn't raise any—what is the delicate words for it—speedy trial grounds—and I just don't want it to appear that May 31st to June 17th was time enough for us to have done this much and part of the reason, the record should show when I finally made inquiry of Mr. Segal, I heard that you were ill, and I can understand therefore why I haven't heard from you sooner, and I do hope that you are well.

Mr. SEGAL. I am, thank you.

THE COURT. All right, and under those circumstances, I don't think that you would object for additional time.

Mr. SEGAL. No, Your Honor.

THE COURT. To be given for an answer?

Mr. SEGAL. No.

May we approach the bench, Your Honor.

THE COURT. Yes, step up.

(Whereupon, at this time, the attorneys and the court held a side-bar conference.)

THE COURT. We will calendar this for June 30th, with People's answering memorandum expected to be received no later than June 24th.

Very well, thank you, gentlemen.

Certified to be true and correct.

HAROLD GOLDSTEIN, R.P.R.,
Official Court Reporter.

MAY 31, 1977.

SUPREME COURT: APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

GULOTTA, P. J., MARTUSCELLO, COHALAN, DAMIANI AND SHAPIRO, JJ.

THE PEOPLE, ETC., PLAINTIFF,
v.
ROBERT T. GROH, DEFENDANT.

IN THE MATTER OF ROBERT T. GROH, PETITIONER,
v.
HOWARD A. JONES, as Justice of the Extraordinary Special and Trial Term of the Supreme Court of the State of New York, County of Queens, et al., RESPONDENTS.

(Motion No. 2114)

Motion pursuant to section 149 (subd. 2) of the Judiciary Law by Robert T. Groh for an order dismissing an indictment filed against him or, in the alternative, for judgment pursuant to CPLR article 78 prohibiting further proceedings with respect to the said indictment.

SEGAL & HUNDLEY, New York, N.Y., *for defendant-petitioner.*

JOHN F. KEENAN, Deputy Attorney-General, New York, N.Y. (George F. Bradlau of counsel), respondent *pro se* and for plaintiff.

Per Curiam: This is a motion pursuant to section 149 (subd. 2) of the Judiciary Law by Robert T. Groh, a defendant in a pending criminal action, for an order dismissing the indictment filed against him by the Extraordinary Special Grand Jury for the County of Queens, or, in the alternative, for judgment pursuant to CPLR article 78 prohibiting the Trial Justice assigned to the Extraordinary Special and Trial Term, and the Special Prosecutor, from proceeding with respect to the said indictment.

Motion denied and proceeding dismissed, without costs or disbursements.

Consideration by this court of the prayer for relief pursuant to section 149 (subd. 2) of the Judiciary Law is barred by the fact that an identical motion had been made before the Extraordinary Special and Trial Term and was denied by it on March 4, 1977; that determination was adhered to upon reconsideration on March 15, 1977. The availability of relief by motion to this court pursuant to section 149 (subd. 2) is an alternative to proceeding before the Extraordinary Special and Trial Term and, having elected to proceed before Acting Supreme Court Justice JONES in the first instance, defendant is now precluded from attempting to overturn his decision by a *de novo* application to this court (see *Matter of Dondi* v. *Jones*, 40 NY2d 8, 15).

So far as the application for relief in the nature of prohibition is concerned, we must take cognizance of the holding of the Court of Appeals in *Matter of State of New York* v. *King* (36 NY2d 59, 62): "The extraordinary remedy either of prohibition or mandamus lies only where there is a clear legal right, and in the case of prohibition only when a court (if a court is involved) acts or threatens to act without jurisdiction in a matter of over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction (see, e.g., *Proskin* v. *County Ct. of Albany County*, 30 NY2d 15, 18; *Matter of Lee* v. *County Ct. of Erie County*, 27 NY2d 432, 436–437; *Matter of Hogan* v. *Culkin*, 18 NY2d 330, 335–336)." (Accord *Matter of Nigrone* v. *Murtagh*, 36 NY2d 421, 423–424.)

While the question is not entirely free of doubt, we have concluded that the allegations proffered by the defendant Groh fail to raise a jurisdictional issue (see *Matter of Paciona* v. *Marshall*, 35 NY2d 289; *Matter of Wroblewski* v. *Ricotta*, 35 NY2d 745; cf. *Matter of Dondi* v. *Jones*, *supra*; *La Rocca* v. *Lane*, 37 NY2d 575).

We should indicate, however, that had the motion under section 149 (subd. 2) of the Judiciary Law been submitted to us *ab initio*, we would have granted the application and ordered that the indictment be dismissed, as the papers submitted by both sides reveal the presence of procedural irregularities going to the very

heart and integrity of the grand jury system. Here, after a full presentation of the evidence, a charge on the law by the Special Prosecutor, and an apparently spirited discussion among the grand jurors themselves, they voted to dismiss the proposed charges in their entirety, and recorded that determination in their minute book. Thereafter, and this appears without contradiction on the record, the Special Prosecutor, having learned of the result, re-entered the Grand Jury room, where he gratuitously discussed with the grand jurors their failure to indict. Without any request from the Grand Jury, he then suggested to it that the Justice presiding at the Extraordinary Special and Trial Term would be willing to come before it and provide it with a further charge on the law, if it so desired. The utility of such a gesture was questioned by a grand juror, who told the Special Prosecutor that a vote had already been taken and the matter disposed of, but the latter insisted that a further charge might enable the Grand Jury to "adequately reach a judgment on the matter, adequately and finally reach a judgment on the matter", this notwithstanding the fact that the Grand Jury had done just that—reached, voted on and recorded its determination. The Special Prosecutor then retired from the Grand Jury room and a vote was taken. Only three of the grand jurors voted to receive further instructions.

Despite the fact that there was no request by the Grand Jury as a body to receive any further instructions, both the Special Prosecutor and the Justice presiding at the Extraordinary Special and Trial Term appeared before the Grand Jury on a subsequent date and delivered a further charge. The grand jurors then retired to deliberate and voted the instant indictment by the narrowest permissible margin (see CPL 190.25, subd. 1).

Aside from the fact that we view these "further instructions" to have been incorrect on the law, as they seemed to indicate to the grand jurors that they had no alternative except to indict, we believe that the methods employed, although no doubt well motivated, were coercive in fact and, if permitted to go unchecked, would tend to destroy both the value and purpose of our grand jury system. That system, which has its origins in antiquity and enjoys no lesser protection than that afforded by the Federal and State Constitutions (U.S. Const., 5th Amdt.; N.Y. Const., art. I § 6), performs a vital function in our jurisprudence—that of protecting the private citizen from unjust prosecution. As Mr. Justice Foster stated in *Matter of Gardiner* (31 Misc. 364, 366-367, 375, cited with approval in *People* v. *Minet*, 296 NY 315, 322) :

"The grand jury had its origin at a time when there raged a fierce conflict between the rights of the subject and the power of the crown. It was established to secure to the subject a right of appeal to his peers, under the immunity of secrecy and irresponsibility, before the government could bring him to trial. It was a right wrung from the government to secure the subject against oppression.

* * * * * * *

"[As] was rightly said by Judge King, in the case of Lloyd and Carpenter, 5 Penn. L.J. 62: 'Grand Juries are high public functionaries, * * * They are the great security to the citizen against vindictive persecutions, either by government or by political partisans, or by private enemies. In their independent action, the persecuted have found the most fearless protectors; and in the records of their doings are to be discovered the noblest stands against the oppression of power the virulence of malice, and the intemperance of prejudice."

* * * * * * *

"It is as important to a person that he be fairly and justly accused of crime as that he be fairly and impartially tried therefor."

However, this historical function can only be carried out if the grand jury remains truly free and independent of outside influences. As was stated by Mr. Justice CALLAGHAN in *People* v. *Both* (118 Misc 414, 423) : "The life and liberty of the individual depend largely upon the citizens who are called from all walks of life to act as jurors. They are in every instance the sole judges of the facts, and, when called as grand jurors, they are the judges of the law as well as of the facts. The administration of the criminal law lies largely with grand and petit juries. It is through the jury system alone that the people have a part in the administration of the law. It is important, therefore, that no undue influence or coercion be exerted at any stage of a prosecution to influence unduly the judgment of a juror." (See, also, *People* v. *Cunningham*, NYLJ, April 28, 1977, p. 10, col. 4; *People* v. *Benin*, 186 Misc 548; *United States* v. *Rintelen*, 235 F 787.)

Clearly, this is not a case in which the Grand Jury has voted to reconsider the charges *sua sponte* (see *People* v. *Stecker*, 141 Misc 417; 42 CJS, Indictments and Informations, § 25), nor is it a case in which the court having charge of the grand jury, upon an appropriate showing, has directed that the charges be resubmitted following a failure to indict (CPL 190.75, subd. 3; see *People ex rel. Flinn* v. *Barr*, 259 NY 104; *People* v. *Potter*, 50 AD2d 410). Under the facts of this case it was improper for either the Special Prosecutor or the court, ex parte, to have interceded in the proceedings once the Grand Jury had voted to dismiss.

To sanction such a procedure, no matter how well intentioned it may have been in this case, would permit prosecutors in the future to coerce or badger grand jurors to change their solemnly arrived at determinations. Nevertheless, while firmly convinced of the grave impropriety underlying the present indictment, this court is without jurisdiction to deal with it at this juncture. However, in the light of the views here expressed, the learned Justice at the Extraordinary Special and Trial Term may wish to reconsider his determination should an application be made therefor.

GULOTTA, P. J., MARTUSCELLO, COHALAN and SHAPIRO, J. J., concur.

DAMIANI, J., concurs in the result.

[From the New York Times, Thursday, June 2, 1977]

GROH JURY VOICED INTEREST IN MANES'S INVOLVEMENT IN BRIBERY CHARGES

(By Tom Goldstein)

A Queens County grand jury briefly held up action against Judge Robert T. Groh of Civil Court last November on charges of bribery and grand-larceny as some of the jurors were apparently more interested in the possible involvement of the judge's former superior, Donald R. Manes, the Queens Borough President, in the alleged bribery incident.

Just what happend in the grand jury room became an issue Tuesday when the Appellate Division in Brooklyn accused a prosecutor and a judge of having used "coercive" methods of getting the grand jury to indict Judge Groh. An examination of court papers yesterday portrays intricacies not hinted at in the appellate court's seven-page opinion.

Shortly before the grand jurors initially refused to indict Judge Groh, they were told by an assistant to John F. Keenan, the special state anticorruption prosecutor, that "as a matter of law at this point, there is insufficient evidence for you to consider a charge against Donald Manes in connection with this proceeding."

No charges were brought against Mr. Manes, who, a spokesman said yesterday, appeared voluntarily before the grand jury, waived immunity from prosecution and answered all questions put to him.

The grand jury indicted Judge Groh after receiving further instructions on the law from Mr. Keenan, Stephen P. Sawyer, his assistant, and Justice Leonard H. Sandler of State Supreme Court, who is assigned to supervise cases developed by the special prosecutor in charge of rooting out corruption in the city's criminal-justice system.

Mr. Keenan and Justice Sandler were castigated Tuesday by the Appellate Division for having improperly "interceded in the proceeding once the grand jury had noted" not to indict Judge Groh, who had been elected to the bench a few days before the grand jury voted again and indicted him.

He was charged with accepting $10,000 in contributions to Mr. Mane's 1973 campaign from the ITT-Sheraton motel chain to arrange for a zoning variance at a motel it owned. At the time, he was Mr. Manes's deputy.

Mr. Keenan and Justice Sandler are two of the most respected men in the city's criminal-justice system, and many judges and prosecutors said yesterday that they were shocked when the Appellate Division said that the two had acted improperly. But later in the day, as more background to the case became available, many of these same judges and prosecutors were not so sure that the prosecutor and the justice had misbehaved.

The appellate court made no mention of the background of the case, except that Mr. Keenan and Justice Sandler had been "well-intentioned" when they gave further instructions to the grand jury.

The court said that it could not dimsiss the indictment because of procedural technicalities, but it strongly suggested that Justice Howard A. Jones of State Supreme Court, who initially heard the case, do so.

In an opinion of March 4 in which he refused to dismiss the Groh indictment, Justice Jones said:

"It seems clear that the basis for the initial grand-jury vote was a feeling of rancor on the part of the majority over the limited instructions they had received regarding other named individuals. In this context, it can hardly be said that the request for reconsideration of the vote, as it turned out, was in any way prejudicial to this defendant or that it offended justice, in any sense."

At the request of Mr. Groh's lawyers, some of the grand-jury minutes—which ordinarily are secret—were released, and from these minutes and from affidavits by Mr. Keenan and members of his staff, a partial chronology of the grand-jury proceeding can be pieced together.

According to these documents, the investigation began under Mr. Keenan's predecessor, Maurice H. Nadjari, whose methods were a frequent target of criticism by the appellate court in Brooklyn. The "investigative lead" came from a wiretap on the telephone of Thomas I. Fitzgerald, the former public administrator in Manhattan. Overheard conversations on Mr. Fitzgerald's telephone led to many Nadjari indictments of judges and public figures that were later thrown out.

Since Judge Groh was not involved in the criminal-justice system—the area of Mr. Keenan's jurisdiction—the special prosecutor requested and was granted a superseding order from Governor Carey to carry on the investigation.

According to the grand-jury minutes, shortly before the grand jury voted not to indict Judge Groh, one juror asked Mr. Sawyer: "Is Mr. Groh responsible for his actions or is Mr. Manes, who he has been appointed to, from a viewpoint of responsibility versus delegated authority?"

Mr. Sawyer replied that Mr. Groh "is the individual before you at this point." Mr. Keenan was also in the grand-jury room, but spoke only briefly. The grand jury then voted not to indict Judge Groh.

Then, according to an affidavit of Mr. Sawyer and Mr. Keenan, they re-entered the grand-jury room where they "learned from certain members of the jury that some dissatisfaction existed concerning our charge on the law, particularly with regard to our legal instructions that they could not consider an indictment of a certain other public official."

ASKED ABOUT INSTRUCTION

They then left the room again and returned five minutes later when Mr. Sawyer asked the jurors if it would be "useful" if Justice Sandler instructed them on the law "as it relates to Mr. Manes and as it relates to Mr. Groh in this matter.

The two prosecutors again left the room. Their affidavit states: "After about five minutes, the warden notified us that the jury was again ready to see us and we re-entered. A juror clearly stated that they wished to have Justice Sandler instruct them. Unfortunately, and unknown to us at that time, this remark was not captured in the minutes."

Two days later, on Nov. 10, Justice Sandler appeared before the grand jury, and, according to the minutes, told the jurors:

"I would gather from the questions there was some concern—and understandably so—about Mr. Manes. I would urge you to separate that question entirely from your consideration of the evidence with regard to Mr. Groh.

"That clearly is not a dead issue. It is something which you have a right to take up with the prosecutors. But to say—if anyone said, 'I am not going to vote an indictment against A even though it is sufficient because I think I should be asked to vote an indictment against B,' would not be a responsible action on the part of any grand jury."

The grand jury then indicted Judge Groh by a 12-to-7 vote.

In its decision, a five-member panel of the Appellate Division said that "the papers submitted by both sides reveal the presence of procedural irregularities going to the very heart and integrity of the grand-jury system."

The court noted that "there was no request by the grand jury as a body to receive any further instructions." It also said that Justice Sandler's "further instructions" were "incorrect on the law, as they seemed to indicate to the grand jurors that they had no alternative except to indict."

The panel concluded that it was improper for "either the special prosecutor or the court, ex parte, to have interceded in the proceedings once the grand jury had voted to dismiss.

A Dividend for Nadjari

(By Murray Kempton)

A decent consideration for the dignity of the judiciary is plainly not enough to make Maurice Nadjari abate his abuse of the Appellate Division of the State Supreme Court; but simple gratitude ought to be.

If he is elected District Attorney of Queens, he can thank the Appellate Division; with the illest will possible toward him, it is the most powerful invisible adjunct of his campaign committee.

Nadjari's claim to be restored to the prosecutorial functions that he did so much to debase rests on his continual insistence that he was frustrated in his efforts to bring crooked judges to book because judges band together in mutual self-protection.

That sort of thing is very probably malignant nonsense operating upon the confusions of the prejudiced. But now comes the Appellate Division to dispose of the charges against Civil Court Judge Robert L. Groh; and with all deference to the black robe, the reasoning and argument of these judges is anything but an encouragement to the prejudiced to wonder whether they might be confused.

In 1972, Robert Groh was Deputy Borough President of Queens. One of his duties was to stand watch over the electorial destinies of Donald R. Manes, Borough President of Queens.

In pursuance of this holy obligation, persons acting for the Manes campaign allegedly approached counsel for the ITT Sheraton Hotels for a $20,000 contribution.

It was a moment of weakness for ITT Sheraton had pending a request for a zoning variance to expand its hotel near La Guardia Airport.

Politics is a division of the market economy to ITT, and it had a more modest but nonetheless as lively an interest in preserving Donald Manes as it had previously shown in advancing Richard Nixon's future and aborting Salvador Allende's.

The excess of its prior benevolences had however so strained its budget that the Manes campaign does not seek to have been worth more than $7,000. In due course, Sheraton had its zoning variance.

In 1976 this example of sanctified custom fell under the scrutiny of John J. Keenan, Nadjari's successor as special prosecutor; and Keenan proposed to a Queens grand jury that Robert Groh be indicted for the grand larceny of extorting $7000 from ITT Sheraton.

The grand jury's reaction seems to have been that Manes had been the major beneficiary of these dealings and ought to be indicted. Keenan's only difficulty with this Nadjarian proposition was that he lacked worthy evidence that Manes had been aware of the full range of the zeal of his agents. When he entered that demurrer, the grand jury in its outrage took the position that, if it couldn't have Manes, it wouldn't indict anybody.

Justice Leonard Sandler then took the bench to instruct the grand jury that it had a duty to indict anyone against whom there was evidence enough and to keep its hands off anyone against whom there wasn't.

Groh was indicted. He had been lately elevated to a civil court judgeship, and it might have been expected that he would come there with the minimal confidence in the system of justice, whose adornment he now was, to entrust his vindication to proof of a jury trial.

Instead he scuttled to the Appellate Division, and now he has his reward in its curious findings that Keenan and Justice Sandler had coerced the grand jury into indicting him.

With the same undiminished deference to the black robe, it is impossible to find in the Appellate Division's confusion from this set of facts anything except the very opposite of their actual import.

The only indisputable coercion that Sandler and Keenan exercised upon the grand jury was to force it not to indict someone they knew could not fairly be convicted. Their sin then was in protecting the rights of a slightly innocent party.

Keenan has leave to press for a new indictment of Groh, who says that the prosecutor has "already had two bites of the apple and . . . shouldn't have a third."

History affords us considerable reason to infer Groh's authority in the realm of bites into apples; and his assessment may well be correct, in which case we

are left with every reason to suspect that ITT paid a public official for a favor in Queens and no prospect that anything will be done about it.

The attendant ironies are as powerful as they are unpleasant. Nadjari would have indicted Donald Manes and pilloried him exuberantly in the prints up to the hour when the case against him was properly thrown out for want of evidence.

Nadjari's successor religiously abstained from any such enormity and now he is punished by a ruling from which no one seems to have profited except Groh, who sits in a place he may have helped himself earn by a corrupt transaction, and Maurice Nadjari, whose enemies have presented him with an undeserved appearance of substance for his outrageous implication that every tainted judge has a friend in court.

[From Newsday, June 1, 1977]

JURORS CURIOUS ABOUT MANES

STATE COURT CHARGES COULD THROW OUT GROH INDICTMENT

(By Edward Hershey and John Cummings)

Long Island City—Some members of the special grand jury that indicted former Queens Deputy Borough President Robert Groh on bribery and extortion charges in November wanted instead to consider voting on an indictment of Queens Borough President Donald Manes, according to court papers.

The information was obtained as the Appellate Division of the State Supreme Court dealt a death blow yesterday to the Groh indictment, charging Special State Prosecutor John F. Keenan and State Supreme Court Justice Leonard Sandler with improperly instructing the grand jury after it had initially refused to indict Groh. The reluctance of the grand jury to indict Groh, according to court papers, stemmed from the feeling on the part of a number of jurors that they should have been allowed to consider voting on an indictment of Manes, who was Groh's superior at the time the indictment alleges that Groh extorted contributions to Manes' campaign in exchange for a zoning variance. One juror, according to the court papers, asked: " 'Is Mr. Groh responsible for his actions or is Mr. Manes, who he has been appointed [by], from a viewpoint of responsibility vs. delegated authority?' " According to the grand jury minutes included in the case file, here was discussion between Sawyer and the jury and one of the jurors asked him "is Mr. Groh responsible for his actions or is Mr. Manes. .?"

Both Keenan's office and the judge told the jury that there was insufficient evidence to sustain an indictment of Manes. Sandler is also quoted in the minutes at telling the jurors: "I would gather from the questions that there was some concern—and understandably so—about Mr. Manes. I would urge you to separate that question entirely from your consideration of the evidence with regard to Mr. Groh."

In effect, the appeals court yesterday ordered the trial court to dismiss the Groh indictment. Groh's attorney, Marvin Segal, said he would move next week to dismiss the case. The five-member appellate court said that it lacked, for technical reasons, the power to dismiss the Groh case itself, or it would have done so. But it said the indictment should be dismissed by State Supreme Court Justice Howard Jones because the grand jury record revealed "procedural irregularities going to the very heart and integrity of the grand jury system." It noted that the grand jury had refused on Nov. 8 to vote an indictment against Groh and did so two days later only because Special Assistant Prosecutor Steven Sawyer and Sandler both went before the jury "without any request from the grand jury."

The appellate court, in a unanimous decision, then said the grand jurors indisted Groh because "they felt they had no alternative except to indict" after hearing Sawyer and Sandler. The jury cast only 12 votes, the minimum number required of the jury's 23 members, to indict Groh, according to the decision. Groh, a former city sanitation commissioner and deputy borough president, was elected to the Civil Court one week before his indictment last Nov. 10 on charges of accepting $7,000 in contributions to Manes' 1973 campaign from the ITT-Sheraton motel chain to arrange for a zoning variance at its motel near La Guardia Airport.

Groh, who resides in Little Neck, said yesterday when informed of the appellate court decision that he felt "pounds lighter * * * I would like to add that I'm proud to be part of a judicial system that protects the innocent * * *"

From papers on file with the special term of the State Supreme Court in Long Island City, where Groh was indicted, Keenan's office said in affidavits that Sawyer went into the grand jury with Sandler because the jury requested it, but this did not appear on the grand jury record. The reason, according to an affidavit filed by Keenan and Sawyer, was because "we learned from certain members of the jury that some dissatisfaction existed with regard to our legal instructions that they could not consider an indictment against a certain other public official." Kennan and Sawyer's affidavit did not identify Manes by name, although Sawyer, in excerpts from the grand jury proceeding in the same file, identified the public official he mentioned in the affidavit as Manes. Excerpts of the minutes were filed by both sides in briefs on Segal's motion to dismiss the Groh indictment. Normally, grand jury minutes are secret.

In the grand jury minutes, Sawyer told the jurors: "My impression is that in that particular area of the law, as it relates to the responsibility of Mr. Groh vis-a-vis Mr. Manes, or in relation to Mr. Manes, is an important one." He also said in the minutes: "It is my impression that there may be some lack of complete understanding or appreciation of the legal aspects of the law as it relates to Mr. Manes * * *"

In their affidavit, both Keenan and Sawyer said their discussion with the jury was informal "and not recorded by the grand jury reporter * * * (but) a juror clearly stated that he wanted Judge Sandler to instruct them."

The affidavit said that on Nov. 9, after the grand jury refused to indict Groh, Keenan and Sawyer went to Sandler and told him the grand jury wanted further instructions. On the 10th, when the grand jury resumed deliberations, the grand jury minutes on file quote Sawyer as telling them: "I charge you as a matter of law at this point is insufficient evidence for you to consider a charge against Donald Manes in connection with this proceeding. The only person before you at this time, upon the state of evidence at this time is Mr. Groh."

Sandler then is quoted in the minutes as saying, "In all fairness, the head of an agency does not necessarily know of the facts of criminality commited by anyone within his agency."

A spokesman for Manes would say only that Manes appeared before the grand jury, waived immunity, answered all questions put to him "and has made it his policy not to comment on the case."

KURRUS AND ASH,
Washington, D.C., July 26, 1977.

HON. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship and International Law, House Judiciary Committee, Washington, D.C.

DEAR CHAIRMAN EILBERG: I submit herewith my statement in support of your bill, H.R. 94, to reform the federal grand jury system.

I ask leave to have my statement on the bill included in the record of the hearings. I have previously communicated with your staff and was informed that my statement would be included.

I believe that this measure, with the exceptions noted in my comments, is a fundamentally sound and progressive step toward true reform of our archaic grand jury system.

Sincerely,

THOMAS E. PATTON.

STATEMENT OF THOMAS PATTON

Mr. Chairman and members of the committee: My name is Thomas Patton. I am an attorney practicing in Washington, D.C. I specialize in federal civil and criminal trials. I am also a part-time professor of law at Catholic University School of Law. I have represented defendants in numerous major complex federal criminal cases—particularly in business and financial cases, the so-called "white collar" cases. I submit this statement in support of HR 94, the bill introduced by Mr. Eilberg to reform our federal grand jury procedure.

OPENING REMARKS

In my experience, the federal grand jury as it functions today serves no useful purpose. It never operates independently, but rather it only responds to the direction of a U.S. Attorney. It is useful chiefly as a discovery vehicle so that prosecutors may issue subpoenas and make their case, with the putative defendant having no similar access to evidence and no opportunity to challenge the government's case. A grand jury also provides a forum for the government to add a new count to those already proposed; namely, perjury. A grand jury practically always responds to the prosecutor's directive on returning an indictment. It is literally true that a prosecutor may obtain an indictment whenever he so desires; examples of a grand jury refusing an indictment desired by a prosecutor are so rare that they are not worth mentioning. This historical tradition that grand juries protect the citizen from an oppressive executive is not viable today. Grand juries exist today only because the Constitution demands them. The reason for the irrelevance of the grand jury is clear: The absence of the adversarial system.

Grand jurors hear only the witnesses called by the prosecutor. They examine only the documents obtained by the prosecutors. It has been claimed that a U.S. Attorney will not bring a weak case, so that sufficient evidence of probable cause is presented. What more can we ask if evidence of probable cause is presented? This argument seriously begs the question and dangerously misses the point, especially in a complex case with voluminous documents. If only one side of a case is heard, then naturally the prosecutor's evidence will seem strong. But in our adversary system, another case can always be made. A complex document case requires the grand jurors to study voluminous difficult records: Financial statements, ledgers, prospectuses, memoranda and the like. Of course, the jurors cannot cope with such documents, for they are not trained accountants or financial analysts. So they accept without challenge the interpretations and significance placed on the records by the prosecutor. They never hear another side. It is argued, therefore, that after all an indictment is only a charge based on probable cause and that the accused will have his chance to present his side at the trial. This argument is a cruel joke. An indictment often goes far toward destroying a person, even if he is later acquitted. A reputation is usually irretrievably tarnished by an indictment. The emotional and financial ruin of a prolonged defense effort is often enormous. True fairness to the accused demands that his side be fairly represented and presented before the grand jury. I recognize that practical considerations and resources preclude turning a grand jury into a trial. But, as I believe my remarks which follow demonstrate, a target of the grand jury must be given greater rights than he now enjoys.[1]

I shall confine my comments to two sections of HR 94 which are especially crucial and dear to my heart as a defense attorney: Section 5 regarding grand jury secrecy and Section 7 governing rights of grand jury witnesses. As to these subjects, I believe stronger measures should be legislated. As to the other provisions of the bill, I simply want to register my full support, particularly for the measures insuring genuine grand jury independence and restoring full transactional immunity.

In illustrating my belief that Sections 5 and 7 should be strengthened, I shall draw upon my experience, in one particular major case in which I was co-counsel—the case of Otto Kerner, Jr., the late governor of Illinois from 1961 to 1968 who was a judge of the U.S. Court of Appeals at the time of his indictment.

VIOLATIONS OF GRAND JURY SECRECY

Section 5 of the bill would add a new Section 1512 to the Criminal Code imposing criminal sanctions upon persons who reveal anything occurring before the grand jury, with certain exceptions. It is these exceptions which I feel should be tightened to ensure that publicity about grand jury proceedings does not taint the case and destroy any chance of a fair trial.

During the Spring, Summer and Fall of 1971, a federal grand jury in Chicago sat to hear evidence of possible bribery and corruption of public officials by

[1] Every witness, whether or not a target, deserves greater protection before the grand jury, since perjury charges can be leveled at any witness.

racetrack interests. Judge Kerner was a target of this investigation because he had purchased and sold stock in the well-known Arlington Park Racetrack corporation during the time he was governor. Scores of witnesses were called before the grand jury during this nine-month period. During this time, the substance of the testimony of practically every major grand jury witness was reported in the Chicago newspapers on almost a daily basis. Large headlines contained highly inflammatory statements about politicians being favored with racetrack stock. The plans and strategies of the government lawyers were revealed in detail and discussed in these articles. Most of the articles contained phrases such as "government sources revealed * * *" and "Federal sources explained * * *". For almost nine months, until the indictment in December, 1971, a constant barrage of newspaper and television reporting in Chicago and other major Illinois cities inflamed the public and infected the integrity of the proceedings. On a few occasions, the press reported so-called possible "deals" between Republicans in the White House and Democrats in Illinois to stop the indictment. Obviously, the rumors of such "deals" were supplied by the person responsible for the leaks so as to help pressure an indictment. I have retained in my files a notebook containing a substantial number of the press clippings which prove my point, but I will not burden the record with copies of these clippings; they are available for the Committee's review if desired. The government prosecuting attorneys never disputed the fact that the leaks occurred. They could not dispute the leaks since the news reports clearly demonstrated that someone present in the grand jury room was leaking information. After the indictment, lawyers for Kerner and the other defendants made motions for an evidentiary hearing to discover the source of the leaks.

These motions were denied upon the representation of the U.S. Attorney that he would disclose the source of the leaks if he could find them. Needless to say, the U.S. Attorney never reported to the Court that he had uncovered the leaks and I frankly do not believe that much of an effort was made to discover the source. In its grand jury investigation, the government employed a battery of 10 or 12 lawyers and Internal Revenue Service investigators, all of whom had authority to enter the grand jury room. Any one of them could have been responsible for the leaks.

It is difficult for me to give this Committee a full picture of the enormous amount of saturation publicity given by the Chicago newspapers and television stations to the grand jury's investigation of Judge Kerner, a widely-known and respected public figure. He had been an extraordinarily popular governor with a reputation for complete honesty and integrity. Any information about him was highly newsworthy in the eyes of the several very competitive Chicago papers. All five Chicago newspapers competed to obtain exclusive stories and bigger headlines about the grand jury proceedings. Practically every report of evidence presented to the grand jury was front-page headline news, and the headlines were unquestionably written in inflammatory language designed to capture the attention of the reader. Phrases like "Kerner's Stock Bonanza", "Secret Racetrack Deals", "Racetrack Stock Scandals", and "Pay O[illegible]", were typical. There is no doubt whatsoever in my mind that the steady wave of scandalous reporting irrevocably prejudiced Judge Kerner by the time his indictment was returned.

I am also convinced that the disclosures affected the grand jurors and prejudiced them from coming to any kind of independent judgment. Such prejudicial publicity can ruin even the highest reputation of a man such as Judge Kerner and can so prejudice him in the eyes of prospective jurors that a fair trial is extremely difficult. In the Kerner case, the judge granted the prosecutor's motion to sequester the jury for the trial because of the great publicity. But the damage had already been done. Every juror had read the prior newspaper accounts of the case.

The press has the right to publish any facts known by it, of course, and this Constitutional right cannot and should not be circumscribed. But there is a way to avoid the publication of damaging evidence in scurrilous headlines before the indictment is even returned. The answer is to insure the strictest possible secrecy of jury proceedings. Based upon my experience in the Kerner case, I cannot support the exceptions to Section 5 of the proposed law. Section 5 would allow disclosure to or by an attorney for the government "in the performance of his duties". I believe that this is too vague because it permits a government lawyer who is interviewing any potential witness to disclose the testimony of another witness. Such information could be freely disclosed to the press by the

potential witness under subparagraph (c)(3). I do not believe that a witness should be allowed to disclose the substance of his grand jury testimony to anyone other than his attorney. I do not believe that a government lawyer should reveal the substance of grand jury proceedings to anyone other than government personnel.

Grand jury secrecy is a hallowed protection which is supposed to afford the potential defendant his rights to a fair and impartial trial. Secrecy is also important to assure the grand jury's impartial judgment free from the pressure of publicity. Independence is one of the principal goals of HR 94. Therefore, I would eliminate the exceptions contained in paragraphs (c)(1) and (c)(3), and allow disclosure by a government lawyer only to other government personnel and by witnesses only to his attorney. There is no reason why anyone else should learn the testimony of grand jury witnesses. Government lawyers should not prepare one witness by discussing the testimony of another in any event because the testimony of each witness should be his own best recollection. Needless to say, I feel very strongly about this protection as a result of the tragic experience in the Kerner case where the grand jury proceedings might as well have been conducted in Lincoln Park. I hope that the Committee will give every consideration to my suggestion.

RIGHT TO COUNSEL

I am delighted that Section 7 permits every witness before a grand jury to be accompanied by an attorney in the grand jury room. (I oppose the adoption of the last sentence of Section 7(b), however, for the reasons given above with respect to grand jury secrecy, since the witness' counsel should also be prohibited from making disclosures of grand jury testimony to anyone other than the witness). The heart of my comments on Section 7 relate to subclause (c) which prohibits the witness' counsel from addressing the grand jurors or otherwise taking part in the proceeding. In this respect, I believe that a distinction should be made between a witness who is a target of the grand jury investigation and a witness who is not. Naturally, the government cannot be certain of the identity of all persons who will be indicted; however, I believe that the government has a Constitutional obligation to inform a prospective witness if he is a target of the investigation. I believe that the attorney for a target of the proceedings should have the right to participate more fully than merely advising the witness. Of course, permitting an attorney to advise his client while testifying in the grand jury room is a remarkably enlightened advance in the archaic grand jury system and goes far toward allowing the grand jurors to hear evidence other than that presented by the prosecutor. But as a practical matter, the efforts of HR 94 to make the grand jury independent will not work in practice unless someone other than the prosecutor is allowed to present the proposed defendant's side of the case. I do not believe that in practice grand jurors will exercise their rights of independent inquiry under Section 3330 except in very rare instances. The government attorney has no obligation to present evidence to the grand jurors which exculpates prospective defendants. Proposed Section 3229(b)(4)(c) seems to impose such an obligation, but there is no substitute for the adversarial process in giving the jurors all of the facts.

It seems to me that very little extra time and disruption will occur if the new law allowed counsel for a prospective defendant to make a brief statement to the grand jurors at the time of his client's testimony. Such a statement could be limited in scope and time. To my mind, this is the only way truly to safeguard a grand jury's independence and ensure that it will vote on an indictment with all of the evidence at hand. I do not suggest that counsel be allowed to interrogate his client. Customarily, any witness can ask to make his own statement before the grand jury. All I suggest is the limited right of counsel to make a reasonably brief statement before the grand jury at the end of his client's testimony.

Let me give you an example, again from the Kerner case, of how a statement of counsel might well at least have clarified a very confusing area which resulted in a perjury count in the indictment. I use this example because I believe that a charge of perjury, when included in an indictment with other counts, is clearly the most difficult, if not impossible, charge to defend against. When a perjury count is included in a multicount indictment, I am convinced that the trial jury believes that the grand jurors found the defendant to be a liar and that such a charge, therefore, infects the entire case.

Based upon my experience, it is really rather easy for any witness before a grand jury to tell a falsehood in a complex case involving numerous details spanning several years. The falsehood may or may not be intentional; even if unintentional, it can be the subject of a perjury count in an indictment. It is only common sense that any witness, in the utmost good faith, cannot remember every detail of complex transactions and testify accurately as to all of them, even when he has been prepared by counsel. It is no exaggeration to say that a prosecutor is generally able by skillful questions to cause any witness to state a falsehood in a case of any complexity. No one but the witness ever knows for sure whether the falsehood was willful; quite often it is not.

Let me illustrate my point by again referring to the grand jury proceeding against Judge Kerner. Bear in mind that Judge Kerner himself was an experienced attorney and former prosecutor. During his grand jury testimony, Judge Kerner was asked a series of questions concerning detailed events that occurred eight years earlier. While governor, Mr. Kerner had many thousands of conversations about every conceivable subject. Anyone's recollection would be taxed if asked to recount conversations that occurred many years ago; all the more, the memory of a busy governor serving eight years in office would be taxed to remember particular conversations. The prosecutor posed a question which contained within it three separate questions; namely, (1) whether Kerner ever discussed racing dates with anyone, (2) whether he ever influenced racing dates, and (3) whether anyone ever asked him for favors concerning racing dates. Incredibly, this multiple question was perfectly allowable because no counsel was present to object to it. Mr. Kerner, in an effort to answer the question as he understood it, stated that he never influenced racing dates. He did not specifically say that he never had discussions about racing dates. His answer was quite natural, since he assumed that the question sought to elicit information about improper influencing of dates. Yet the indictment returned by the grand jury included a perjury count which contained the charge that Kerner lied to the grand jury because he in fact merely discussed racing dates. Thus, the government did not have to prove that he commited perjury. I view this kind of conduct as outrageous.

Prosecutors can ask lengthy convoluted questions and get away with it. The witness, no matter how experienced, is not in a position to parry with the prosecutor, but rather believes that he had better answer the question as posed. Therefore, it is simply not fair to prevent the witness' counsel from participating in the interrogation to a limited extent so as to avoid confusion and prejudice. I do not suggest that counsel be allowed to interrogate the witness, for this might well unduly prolong the proceeding. But counsel should be afforded two rights: the right to object to an improper question, and the right to make a brief statement to the grand jurors following his client's testimony. Surely, this limited right of participation would not prolong or obstruct the proceeding, and the benefits of fairness to the witness far outweigh any minimal inconvenience to the proceeding.

I believe that the example of the perjury charge, and specifically the tragic example in Mr. Kerner's case, amply illustrate the need for greater participation by counsel. I have always been very firmly of the opinion that the inclusion of the perjury count in the indictment against Otto Kerner made the critical difference and resulted in his conviction, because if a jury believes that a defendant has told an untruth, then it is very likely to convict him of all counts because it disbelieves his entire testimony.

I trust that my remarks will be of some help to the committee.

STATEMENT SUBMITTED BY EUGENE N. HARLEY IN BEHALF OF ALLIANCE FOR THE PRESERVATION OF RELIGIOUS LIBERTY

"* * * Under the present Administration, we have witnessed the birth of a new breed of political animal—the kangaroo grand jury—spawned in a dark corner of the Department of Justice, nourished by an Administration bent on twisting law enforcement to serve its own political ends, a dangerous modern form of Star Chamber secret inquisition that is trampling the rights of American citizens from coast to coast."—Senator Edward Kennedy, March 13, 1973.

"It would be a cruel twist of history to allow the institution of the grand jury that was designed at least in part to protect political dissent to become an institution of political suppression."—Judge Shirley Hufstedler of the Ninth Circuit Court of Appeals.

"Grand juries can and do listen to illegal evidence, and when my men were put through the federal grand juries in this city, it was the worst star chamber session you ever saw."—Los Angeles Police Chief Edward Davis, 1974.

The grand jury, traditionally expected to serve to protect the citizens of the United States from capricious justice, has eroded into an agency to be used for the suppression of civil rights. It has been used for the unintended purposes of harassing political dissidents, of "branding" unfriendly critics when no actual guilt exists, of forcing newspaper reporters to divulge sources of information, and to even prohibit the free exercise of religion.

The grand jury must once again become a shield for the protection of the innocent, and the debris of erosion cleared away to reclaim this "panel of the people" to its rightful position as laid out in the Bill of Rights.

A classic abuse of the grand jury system occurred recently in New York. On October 12, 1976, a New York Queens County Grand Jury handed up an unprecedented indictment of unlawful imprisonment in the First Degree against two leaders of the New York International Society for Krishna Consciousness, (Hare Krishna), a bona fide Hindu religious sect.

Two Hare Krishna devotees went before a Queens grand jury bringing charges against several persons allegedly guilty of abducting the devotees for the purpose of forceably changing their chosen religious beliefs. The grand jury, under the prosecution of Queens Assistant District Attorney, Michael Schwed, made a surprising and novel move and dismissed the charges against the alleged abductors (when their own statements admit to each and every element of the crime of kidnaping), and instead indicted the president of the New York temple of the religion and a supervisor, charging that the two leaders held the two devotees illegally, through the use of "brainwashing" and "mind control."

On March 17, 1977, New York State Supreme Court Justice John Leahy in Queens County threw out the indictments against the two Hare Krishna officials and summarily dismissed the case as a "direct and blatant violation" of constitutionally guaranteed religious freedom. Justice Leahy said, "The entire and basic issue before this court is whether or not the two alleged victims in this case and the defendants will be allowed to practice the religion of their choice—and this must be answered with a resounding affirmative."

"The Hare Krishna religion is a bona fide religion with roots in India that go back thousands of years . . . The separation of church and state must be maintained. We are, and must remain, a nation of laws, not of men. The presentment and indictment by the grand jury was in direct and blatant violation of defendents' constitutional rights," Justice Leahy stated, in his fourteen page decision.

This abusive indictment by the New York Queens County Grand Jury, under the prosecution of Michael Schwed, is a classic abuse by grand juries of constitutional guarantees and a further example of the misuse of this system to harass the unconventional, or the critic. Justice Leahy stressed in his decision, "The freedom of religion is not to be abridged because it is unconventional in its beliefs and practices or because it is approved or disapproved by the mainstream of society or more conventional religions."

Specific abuses in the Queens grand jury's unusual turn-about and surprise indictment of the two New York ISKCON (Hare Krishna) leaders are delineated in an affidavit here attached by Eugene N. Harley, an assistant defense attorney in the case, (see).

The actions of the Queens Assistant District Attorney, through the misuse of the grand jury system, is too reminiscent of actions which took place during the Salem Witch Trials and the Spanish Inquisition. Such abuses are an affront to the Constitution of the United States, particularly acute in a time when crime rates are rising and our court system is too heavily overloaded.

[From the New York Times, March 18, 1977]

JUDGE DISMISSES CHARGES IN HARE KRISHNA "BRAINWASHING" CASE

(By Murray Schumach)

The Hare Krishna movement was called a "bona fide religion" yesterday by a State Supreme Court justice in Queens who threw out two indictments against

officials of the movement. The indictments had charged them with illegal imprisonment of two members and attempted extortion from the father of one of the believers.

"The entire and basic issue before this court," said Justice John J. Leahy, "is whether or not the two alleged victims in this case and the defendants will be allowed to practice the religion of their choice—and this must be answered with a resounding affirmative."

The indictments, handed up last year, were the first of their kind against the Hare Krishna movement. They charged that Angus Murphy, the president of the New York temple of the religion, and Harold Conley, the supervisor of women at the temple, held Edward Shapiro and Merylee Kreshour in the temple illegally, by brainwashing them.

Mr. Murphy was also accused of joining Mr. Shapiro in an attempt to extort $20,000 from Mr. Shapiro's father. The allegations were denied by the younger Mr. Shapiro and by Miss Kreshour.

After determining that Miss Kreshour and the younger Mr. Shapiro had lived voluntarily in the temple at 340 West 55d Street and that there was no case for attempted extortion, Justice Leahy said:

"The Hare Krishna religion is a bona fide religion with roots in India that go back thousands of years. It behooved Merylee Kreshour and Edward Shapiro to follow the tenets of that faith and their inalienable right to do so will not be trammeled upon.

"The separation of church and state must be maintained. We are, and must remain, a nation of laws, not of men. The presentment and indictment by the grand jury was in direct and blatant violation of defendants' constitutional rights."

The judge pointed out that the prosecution, during the hearing last month, had conceded that no physical force had been used by the defendants against Miss Kreshour or the younger Mr. Shapiro, adding:

"The said two individuals entered the Hare Krishna movement voluntarily and submitted themselves voluntarily to the regimen, rules and regulations of said so-called Hare Krishna religion, and it is also conceded that the alleged victims were not in any way physically restrained from leaving the defendant organization."

On the allegation of brainwashing, he said:

"It appears to the court that the people rest their case on an erroneous minor premise to arrive at a fallacious conclusion. The record is devoid of one specific allegation of a misrepresentation or an act of deception on the part of any defendant."

Justice Leahy, who stressed that his decision was intended as a "dire caveat to prosecutional agencies throughout the length and breadth of the land," cited the constitutional guarantee of freedom of religion and said:

"The freedom of religion is not to be abridged because it is unconventional in its beliefs and practices or because it is approved or disapproved by the mainstream of society or more conventional religions.

"Without this proliferation and freedom to follow the dictates of one's own conscience in his search for and approach to God, the freedom of religion will be a meaningless right as provided for in the Constitution.

"Any attempt, be it circuitous, direct, well-intentioned or not, presents a clear and present danger to this most fundamental basic and eternally needed right of our citizens—freedom of religion."

Legal and ethical questions have arisen from intensive efforts to "deprogram" members of Hare Krishna and other movements. The main method is to separate the follower from the group and to subject him to long periods of counterpersuasion. Among the controversial and well known deprogrammers is Ted Patrick, a Californian who was released recently from prison on kidnapping charges resulting from a deprograming case.

The grand jury was drawn into the Hare Krishna case last September when Miss Kreshour alleged that she was kidnaped by her mother, Edith, and a private investigator in Queens and subjected to four days of a treatment called "deprograming."

SUPREME COURT OF THE STATE OF NEW YORK, QUEENS COUNTY

(Index No. 2012/76)

THE PEOPLE OF THE STATE OF NEW YORK
v.
ANGUS MURPHY, ET AL., DEFENDANTS.

AFFIDAVIT

(Index No. 2114/76)

THE PEOPLE OF THE STATE OF NEW YORK,
v.
HAROLD CONLEY a/k/a TRAI DAS, ET AL., DEFENDANTS.

STATE OF NEW YORK, *County of New York, ss.:*

EUGENE N. HARLEY, being duly sworn, deposes and says:

1. I am associated with the firm of Levy, Gutman, Goldberg and Kaplan, attorneys for defendants Murphy and the International Society for Krishna Conciousness, Inc., in the above indictments and make this affidavit in support of defendants' motion to dismiss the indictment and to inspect the minutes of the Grand Jury, for discovery and inspection, and for a Bill of Particulars.

2. The office of the District Attorney has no objection to the Court's inspection of the Grand Jury minutes and, at the first conference on this matter on October 26, 1976, the office of the District Attorney indicated that a transcript had been ordered. As appears below, however, such in camera inspection, unless it results in dismissal of the indictment, is insufficient. I spoke with Assistant District Attorney Schwed on October 15, 1976 and requested the names of all witnesses before the Grand Jury and the substance of their testimony. Mr. Schwed refused to supply such information. This affidavit is submitted in support of the defendants' request that defendants be granted the opportunity to inspect the minutes in order to prepare a detailed motion to dismiss the indictment.

3. The indictments charge defendants with unlawful imprisonment in the First Degree (P.L. § 135.10). No information is given as to how or where such alleged imprisonment took place, nor the nature of the risk of serious physical injury to which the victims were exposed. However, statements by Assistant District Attorney Schwed make it clear that the basis for the charge of Unlawful Imprisonment rests not upon a physical restraint or a threat thereof, but upon restraint through "brainwashing" and mind control [New York Post, October 12, 1976, annexed as Exhibit A]. The charge that the imprisonment was based on "mind control" has been repeated frequently by representative of the People quoted in print and electronic news media. Assistant District Attorney Schwed further admits that the concepts of "brainwashing" and "mind control" are not defined in the criminal law. [Long Island Press, October 16, 1976, annexed as Exhibit B].

4. Your deponent believes that the indictment must be dismissed, or defendants granted access to the Grand Jury minutes on several grounds. It is necessary to examine the minutes in order to allow defendants to prepare their defense. The grounds, each of which will be treated separately in detail, are as follows:

A. The only possible evidence which could have been before the Grand Jury with respect to unlawful restraint, is testimony that the alleged victims of the alleged crimes, Edward Shapiro and Merylee Kreshower, were abducted not by the defendants in this action but by their own relatives and other individuals. Upon information and belief, Assistant District Attorney Schwed urged the Grand Jury in violation of CPL §§ 190.25(6), 210.20(1)(c) and 210.35(5) to ignore clear evidence of the commission of Class A felonies by Galen Kelly, Eli Shapiro, Edythe Kreshower and others, and to ignore the testimony of an alleged victim, in order to return the indictments against the defendants.

B. Upon information and belief, the witnesses who testified before the Grand Jury can have no knowledge of alleged unlawful imprisonment of Ed Shapiro or Merylee Kreshower by the defendants through the use of brainwashing and mind control or otherwise.

C. Religious proselytizing and the recruitment and maintenance of adherence through communication of ideas and religious beliefs by the defendants is not brainwashing or mind control and cannot serve as a basis for an indictment. The concept is unknown in the law and violates basic principles of the First Amendment to the Constitution of the United States, and Article 1 Section 8 of the Constitution of the State of New York.

D. It is clear that the indictments have been pursued by the District Attorney not for the purpose of securing a conviction but for the unlawful purpose of assisting the parents of Ed Shapiro and Merylee Kreshower to obtain control over their adult children.

Merylee Kreshower and Ed Shapiro were kidnapped, not by the defendants but by their parents and agents of their parents

5. Based upon information received by your deponent, the only possible information with respect to any violation of PL Article 135 arose from the kidnapping of Merylee Kreshower by her parents, Galen Kelly and their associates. Ed Shapiro was also a kidnap victim outside of the State of New York. Merylee Kreshower is 24 years old. Ed Shapiro is 22 years old. The sources of deponent's beliefs are conversations with Ed Shapiro and Merylee Kreshower on October 12, 1976, testimony under oath by each of them in various proceedings concerning the status of each of them as material witnesses in this criminal proceeding, newspaper articles, interviews with members of defendant religious corporation, an affidavit submitted in the material witness proceedings by Galen Kelly, and the testimony of Thelma Stromwasser in the material witness proceeding.

6. Your deponent spoke with Merylee Kreshower and with Ed Shapiro on October 16, 1976 at the 107th Precinct Stationhouse in Queens County and again at Queens Criminal Court on the same day.

7. Ms. Kreshower told me that she had been physically and violently grabbed off the street in Queens County against her will, placed in a van and taken and physically held in a motel in Long Island, a house in the Bronx and finally to the home of Galen Kelly in Kingston, New York. For a period of approximately one week, Ms. Kreshower was held captive and prevented from moving about as she pleased. In order to escape, Ms. Kreshower agreed to cooperate with her abductors, including Kelly and her mother, and was taken to a police station in Kingston. Once there, Ms. Kreshower told the Kingston police that she had been kidnaped by Galen Kelly and her mother and wished to return to the Hare Krishna Temple. The same testimony was repeated by Ms. Kreshower under oath on October 21, 1976. One of the co-conspirators in the abduction of Ms. Kreshower also testified to the same story on October 25, 1976. Ms. Kreshower told me that she testified to the same facts before the Grand Jury.

8. Further information is supplied in an affidavit executed by Galen Kelly [annexed hereto as Exhibit C]. This affidavit, submitted in support of an application to have Ms. Kreshower held as a material witness, dated September 23, 1976, admits to each and every element of the crime of kidnapping in the first degree (PL § 135.25). Upon information and belief, Galen Kelly also testified before the Grand Jury to the same effect.

9. Ed Shapiro told me on October 12, 1976 that he had been similarly kidnaped by his father and stepmother with the assistance of one Ted Patrick approximately two years earlier in Massachusetts. He was subjected by Patrick to the forcible stress, restraints, deprivations, and threats we came to know of from the Korean War as "brainwashing." This ordeal lasted for a period of several weeks before he escaped and eventually returned to the Hare Krishna Temple. Upon information and belief, Eli Shapiro, M.D., father of Ed, testified before the Grand Jury about these facts. It is interesting to note that Ed Shapiro, the alleged victim of kidnaping by the defendants, was never called to give his story to the Grand Jury.

10. However, despite the testimony of Ms. Kreshower with respect to the kidnaping, and despite the testimony by Galen Kelly admitting to his role in the kidnaping, the Grand Jury, upon information and belief upon the prodding of Assistant District Attorney Schwed, failed to indict Galen Kelly for his clear violation of the law, but instead indicted the defendants herein for the crime of unlawful imprisonment on the novel theory that defendants held Ms. Kreshower and Ed Shapiro by a process of mind control.

The witnesses who testified before the Grand Jury can have no knowledge of brainwashing and mind control by defendants

11. It is difficult for deponent to imagine what kind of testimony and legal advice were presented to the Grand Jury in order to have it come out with such a novel interpretation during the Grand Jury presentation comes solely from accounts in the newspapers and from the alleged victim, Merylee Kreshower.

12. The New York Post, on October 13, 1976 [copy annexed as Exhibit D] reported that Edyth Kreshower, Galen Kelly and a 20 year old former Hare Krishna devotee were among two dozen witnesses heard by the Grand Jury. The News, on October 13, 1976, [copy annexed as Exhibit E] reported that dozens of parents of young Hare Krishnas testified. The Long Island Press, on October 14, 1976 [copy annexed as Exhibit F] reported that four former members of the sect testified before the Grand Jury. Finally, the New York Times, on October 21, 1976 [copy annexed as Exhibit G] reported that fifteen to eighteen persons testified, "about half of whom were parents whose children have been in various religious cults but who have since left them. The Grand Jury also heard testimony from a Harvard University Dean, a Chicago man whose 12 year old son is believed to be in a religious sect, a dean from Pace College, and two or three local physicians."

13. Your deponent believes that none of the above persons can possibly have relevant information which can support the indictment for unlawful imprisonment by means of brainwashing and mind control by these defendants of these two individual "victims" both of whom deny that the "crime" occurred.

14. Edyth Kreshower submitted an affidavit in support of the application to have her daughter Merylee held as a material witness and testified in a proceeding before Justice Agresta on October 21, 1976. One can only assume that her testimony before the Grand Jury followed similar lines. In her affidavit, she utters the bald conclusion that her daughter is under the mind control of the Hare Krishna leaders, and further states that her daughter underwent radical changes following her entry into the Hare Krishna temple. There are two reasons for this. First, as testified by Merylee Kreshower before Justice Agresta on October 21, 1976, Merylee Kreshower was thrown out of her own home by her mother merely because she contemplated joining a Buddhist Church. Second, just as there would inevitably be radical changes in an individual who enters a Trappist monastery or a Jesuit Seminary, so a young adult woman who freely chooses to enter the Hare Krishna religion and devotes herself to its activities and study would naturally exhibit such a change. That this is evidence of mind control is utter nonsense inconsistent with the Constitution.

15. The affidavit of Galen Kelly probably paralleled his affidavit. [Exhibit C] In that affidavit can be found the incredible statement, "although I have no formal training in psychiatry, it is my opinion that Merylee Kreshower manifested the symptoms of a schizophrenic personality." He observed Ms. Kreshower while she was being held hostage by him. Is it possible that such testimony by a hired mercenary and admitted kidnaper can serve as a basis for the indictment at issue herein, the indictment of those to whom she escaped from his admitted kidnaping of her?

16. The newspapers reported that parents of young Hare Krishnas testified, as well as parents "whose children have been in various religious cults" and "a Chicago man whose twelve year old son is believed to be in a religious sect." [Exhibit G]. None of the above could possibly have presented any information material to this indictment. This is especially true with respect to parents whose children are with other "cults". Although the Assistant District Attorney and the "deprogrammers" may believe that all religious sects are the same, such a view can only be classified as foolish and at odds with First Amendment principles.

17. Attorneys for defendants have had contact with the "Chicago man" referred to above. It is typical of the leaks to the press by the office of the District Attorney that the facts have been distorted in order to generate adverse pre-trial publicity against the defendants. Upon information and belief, the 12 year old son is in a Hare Krishna temple in the custody and company of his own mother who is involved in a marital dispute with the "Chicago man." The testimony of this man can have no conceivable bearing to the issues presented in these indictments.

18. With respect to the Pace College dean and local physicians, none of them are qualified to present information relevant to this indictment. Deponent has spoken to members of the Hare Krishna temple in New York and no person fitting those descriptions has had any first hand contact with the Temple nor conducted any study of any kind which would enable them to make a judgement with respect to mind control by the defendants. What studies did these individuals undertake? Defendants must know in order to prepare a defense to these novel indictments.

19. Upon information and belief, the Harvard Dean who was mentioned is Dr. John Clark. Deponent can only surmise that the testimony presented by Dr. Clark is similar to that set forth in his affidavit in support of the application to hold Ed Shapiro as a material witness. The only knowledge which Dr. Clark could have relevant to this indictment stems from his observation of Ed Shapiro during a conversion with his father. With no further interview or testing of any kind, Dr. Clark concluded that Ed Shapiro was under the mind control of the defendants. [copy of affidavit annexed as Exhibit H]. It is also interesting to note that, upon information and belief, this conversation took place after Ed Shapiro had been abducted by his parents and Ted Patrick and was being held against his will and subjected to the brutal "deprogramming" methods of Patrick as described below. During testimony on November 3, 1976 in the Probate Court of Middlesex County, Massachusetts, Dr. Clark testified on behalf of Ed Shapiro's father's unsuccessful attempt to have Ed declared incompetent, involuntarily retained in a mental hospital, and have Ed's father make his committee and conserontor. Dr. Clark testified that Ed's absence of symptoms of mental disorder was the strongest proof that Ed was a victim of mind control. Dr. Clark was unsuccessful, despite efforts by Assistant District Attorney Schwed to help, in having Ed kept in solitary confinement in a mental hospital so that Dr. Clark could conduct "stress interviews" which he described in his testimony in terms of the restraints and hardships and deprivations, of human contacts, books, and creative comforts, employed by the North Koreans against American war prisoners.

20. The most interesting and possibly relevant information may have been supplied by former Hare Krishna devotees who have left the movement. However, even their testimony must be considered suspect. Devotees leave the movement in one of three ways. First, and the largest category, comprises the approximately 3 of every 4 beginners who leave of their own free will. How can one credit voluntary departers' statements that they were restrained by mind control or any other means? If that were true, how could they have left of their own free will? The second and smaller category is those who do not abide by the strict rules of abstinence and moral behavior and are asked to leave. The smallest and final group is those who are kidnaped and subjected to deprogramming by a Ted Patrick or a Galen Kelly.

21. Deponent submits that the only brainwashing and mind control which exist in connection with these indictments are the actions of the Patricks and Kellys of this world who practice their lucrative and confessedly illegal business under the euphemism of "deprogramming". Annexed hereto as Exhibit I is an article from Liberty Magazine of March-April 1975 in which the deprogramming process is described.

22. Deponents submits that the testimony of former devotees who have remained away from the temple following kidnaping and working over by the deprogrammers is inherently suspect and cannot serve as a basis for an indictment. For these reasons, it is necessary that defendants be granted access to the Grand Jury minutes in order to prepare a defense to these indictments.

Religious proselytizing by defendants is not brainwashing or mind control

23. In contrast to the individuals who testified before the Grand Jury despite their lack of knowledge of any information which might be relevant to the indictment, there are annexed to this motion affidavits by scholars who have spent time studying the Hare Krishna movement, parents who have spent time examining the movement with an open mind, and ex-devotees who entered and left the movement of their own free will.

24. Dr. J. Stillson Judah is the author of the book "Hare Krishna and the Counterculture" (John Wiley and Sons, New York, 1974) which was written following a long period of study. Dr. Judah found no evidence of mind control of any kind. He did learn that the form of Vaisnavism practiced by the Hare

Krishnas is actually a purer form of that ancient and widespread religion than that practiced by most Hindus in India.

25. Dr. Allen Gerson, who studied the movement from the point of view of a psychiatrist, found, after thorough testing, that no member of the sect had been held against his or her will or was subject to the mind control of another person.

This information must be contrasted with that of Dr. Clark who concluded that Ed Shapiro was under mind control after observing him for a short period of time.

26. Dr. Thomas Hopkins, a professor of religion whose major field of study is the Hindu religion, has studied the International Society for Krishna Consciousness since its inception in this country. Dr. Hopkins' affidavit affirms that the Hare Krishna religion is a bona fide religion with roots in India before the birth of Christ. He has been a frequent visitor to Hare Krishna Temples and it has clearly been his experience that no devotee is held against his will or is under the mind control of any other devotee.

27. The affidavits of Mrs. Polly Perlmutter and Mrs. Jean Havens must be viewed in contrast to the testimony before the Grand Jury of parents whose children are in various cults. Each of them were at first surprised and upset when they were informed that their adult children wished to join the movement. In contrast to some parents, however, these two individuals did not view this choice as a rejection of everything they stood for but as a choice, freely entered into by young adults. In contrast to other parents who thereupon disowned their children and cut off all communication with them, these two parents determined to learn about the religion which their children had chosen to join. They visited the temples and read the literature. As their understanding grew, their attitudes changed, and they now fully support the decisions of their children. Upon information and belief, their affidavits are representative of the view of the majority of rational parents whose children have joined the movement.

28. Mrs. Polly Perlmutter states in her affidavit that she was particularly moved by the feeling of sadness expressed by those devotees whose parents had refused to accept their choice and had cut them off from their homes. None of the devotees expressed hatred for their parents, but only a sense of loss.

29. The affidavits of Janet Nicol and Joel Chalson set forth the typical experience of former devotees of the Hare Krishna religion. Each of them entered of his or her own free will in their search for a structure that would help provide them with a better way of life. Ms. Nicol is quite clear that no force was used of any kind, and in fact, no real interest was shown until she evidenced the desire to become a devotee. When she decided to leave the movement following her decision to become a nurse, no attempt was made to restrain her. She feels that the movement helped her to find herself and straighten out her life at a time when she needed help. When she had "found" herself she was free to go and did so.

30. These affidavits must be seen in contrast to the testimony of former devotees before the Grand Jury, who, upon information and belief, went through a kidnaping and forced brainwashing by the "deprogrammers." Each of the devotees whose affidavits are annexed, entered and left the movement of their own free will. One has remained away and one expects to return. Neither was recruited or restrained by any kind of coercion.

31. The affidavits submitted herewith are made by individuals who have actual knowledge of the Hare Krishna religion in contrast to those persons who testified before the Grand Jury, whose knowledge of the Hare Krishna religion is either non-existent or the product of ignorance and hysteria.

The indictments herein were brought not for the purpose of securing a conviction but for the ulterior purpose of forcing the witnesses to submit to forced deprograming by their parents

32. It is clear from the actions of Assistant District Attorney Schwed that the indictments in question herein were pursued not for the purpose of securing convictions but instead to coerce Edward Shapiro and Merylee Kreshower to submit to "deprogramming" against their wills. To this end, Mr. Schwed has abused the processes of this Court under Article 620 of the Criminal Procedure Law in a manner inconsistent with any other goal than to force the witnesses by means of physical restraint and intimidation to change their testimony at the ultimate trial of this issue.

33. In an affidavit submitted in support of the warrant to hold Merylee Kreshower Mr. Schwed stated, in paragraph 8, as follows: "That on August 18, 1976, said Merylee Kreshower told the deponent that any attempt to make her discredit the defendants would cause her to leave the United States or in the alternative, failing that, to take her own life."

34. This exercise in double-talk was used as a basis to hold Merylee Kreshower as a material witness. Ms. Kreshower had told your deponent several times on October 12, 1976 that her testimony would not weigh against defendants but would establish their defense because she participated in the Hare Krishna temple of her own free will. Ms. Kreshower repeated under oath that she was not restrained by the defendants but was kidnaped by Galen Kelly. It is incredible that an Assistant District Attorney should cooperate in an attempt to make a witness discredit the defendants when her true testimony would absolve them. [Transcript of October 21, 1976 hearing pp. 23 and 24 annexed as Exhibit J].

35. Mr. Schwed repeated this maneuver while attempting to hold Mr. Edward Shapiro as a material witness by repeating in paragraph 5 of his affidavit a statement by Dr. Eli Shapiro that: "Their son will not appear in court to testify against said defendants and will if forced to do so, attempt suicide or flee the jurisdiction of this court."

It is an incredible thesis that American jurisprudence in general and New York State law in particular could allow a District Attorney to force a witness to reverse her account of the truth and testify against a defendant. Mr. Shapiro told me on October 12, 1976 that his testimony would not weigh against the defendants, but that he was exercising his religion of his own free will.

36. Mr. Schwed thereafter continued in his attempts to force Mr. Shapiro into a captive situation where others would physically restrain and attempt to force him to change his testimony. On October 14, 1976, Mr. Schwed was pursuing this strategy when he moved to withdraw the material witness order holding Mr. Shapiro. Standing with Mr. Schwed were the attorneys for the parents who had obtained a physician's certificate to have Ed Shapiro committed to an institution.

37. Attorneys for Ed Shapiro agreed to the vacatur of the material witness order but argued that Ed Shapiro could not legally be taken against his will to the hospital in question, and that the order to commit him was invalid on its face. When Ed Shapiro and his attorneys tried to leave the Court, they were stopped by two ambulance attendants and detectives under Mr. Schwed's jurisdiction, direction and control. They tried to remove Ed Shapiro to the hospital against his will.

38. The attorneys for Ed Shapiro thereupon requested that the material witness order be restored so that bail could be fixed rather than have the witness delivered to the deprogrammers. Mr. Schwed stated that he could and would not assume that responsibility. [A transript of the October 14, 1976 hearing pp. 27–34 is annexed hereto as Exhibit K].

39. Thereafter, Mr. Shapiro and his attorneys left the Courtroom and were set upon by the two ambulance attendants and an unknown number of detectives from Mr. Schwed's office who saw to it that Ed Shapiro was forcibly taken against his will to the South Oaks Hospital in Amityville, New York but the hospital refused to admit him.

40. The following day, and despite the fact that Mr. Schwed had stated that he could not take the responsibility for holding Ed Shapiro, Mr. Schwed again applied to this Court for an order to hold Ed Shapiro as a material witness, and for a warrant for his arrest.

41. The attorneys for Ed Shapiro agreed to surrender him on Tuesday, October 19, 1976. On that date, when the attorneys appeared in Court preparatory to surrendering Ed Shapiro, they were served with a Writ of Habeas Corpus requiring them to produce Ed Shapiro so that he could be taken to Massachusetts pursuant to a Massachusetts court order naming Eli Shapiro as temporary guardian of Ed Shapiro. The following day, Ed Shapiro surrendered and, following an order of this Court that the Massachusetts judgment was entitled to full faith and credit, Ed Shapiro was taken to a hospital in Massachusetts, Schwed withdrawing the obstacle of his material witness arrest order.

42. It is clear that Ed Shapiro's attorneys did not have custody of Ed Shapiro in the sense that a writ of habeas corpus requires, and were forced to submit Ed Shapiro to his father's custody, agianst his will, only because of the coercion exercised by Schwed in securing a warrant for Ed Shapiro's arrest.

43. At the Middlesex County competency proceeding which Ed's Massachusetts attorneys later brought there, Ed's father's attorney advised the Court that the reason Assistant District Attorney Schwed in New York had withdrawn the material witness application and cooperated in having Ed removed by his temporary guardian to Massachusetts upon the understanding that the same Dr. Clark who had given an affidavit for Ed's father on the first material witness order would, as a staff doctor there, be allowed to keep Ed under "stress" conditions for "deprogramming." [See telegram of Assistant District Attorney Schwed annexed hereto as Exhibit L]. It is clear from the above recited events that Assistant District Attorney Schwed abused the material witness proceedings as a pretext to enforce the civil desires of Eli Shapiro and to coerce the witness into changing his account of events.

44. Assistant District Attorney Schwed made his unlawful actions even more clear when, on October 19, 1976, he stated to Lindsay Miller, a reporter for the New York Post that "he would be willing to dismiss all the charges against the Hare Krishnas on one condition—that Ed Shapiro be allowed to remain in the hands of an experienced deprogrammer for a specified period, such as 10 days." [A copy of New York Post Article, October 20, 1976 annexed hereto as Exhibit M].

45. Deponent spoke to Lindsay Miller who stated that Mr. Schwed did make this statement in the press room of the Queens Criminal Court. Ms. Miller told me that she was surprised by this statement and, later in the afternoon, asked Mr. Schwed if he was indeed making such an offer. Mr. Schwed repeated his offer unequivocally.

46. Thus it is clear that Mr. Schwed has acted in this matter for the purpose of enforcing an inter-family dispute, and assisting the family to kidnap their son for the purpose of deprogramming. The purpose behind these maneuvers is clear. The Assistant District Attorney hoped to force Ed Shapiro by threats, intimidation and other kinds of stress to change his testimony so that the witness would testify against the defendants herein. The Fifth and Fourteenth Amendments have outlawed the third degree as a method for securing testimony.

47. The actions of the Assistant District Attorney are reminiscent of the actions which took place during the Salem Witch Trials and the Spanish Inquisition. During those times, witnesses were tortured, whipped, pilloried, and dunked in the water in order to force them to change their stories. As a consequence of these methods, witnesses testified as to their possession by Satan or other evil spirits, and to the complicity of others in their possession.

48. The methods have changed from the days of Salem and the Spanish Inquisition. Physical torture is not used, although physical restraint, and denials of comforts and associations are necessary parts of the "deprogramming" process. Mental pressure and fatigue are the modern methods used to induce members of unorthodox religions to return to orthodoxy. This country was founded upon different principles. The First Amendment does not allow the establishment of religion. Neither Congress nor the states may establish an orthodoxy or force constituents to favor one religion over another. The Assistant District Attorney, in this case, is violating those basic principles. He has used the powers of his office in an attempt to destroy what he and others consider to be a heresy. It cannot be permitted.

49. Defendants have further moved for discovery and inspection, for a Bill of Particulars, for exculpatory evidence and to suppress any evidence obtained by illegally intercepted communications. Your deponent urges that pursuant to the various statutes involved, these reasonable requests must be granted in their entirety. Defendants have requested no more than the minimal information necessary to particularize the accusations against them and to enable them to prepare their defense for the trial of this action and prevent any possibility of double jeopardy in the future.

50. Defendants further seek a modification of the order of Justice Thomas A. Agresta, dated October 21, 1976 [a copy is annexed as Exhibit N] which order admonishes defendants and their counsel from associating with the witness Merylee Kreshower. A similar admonishment with respect to associating with Edward Shapiro was also promulgated by Justice Agresta.

51. It will be extremely difficult if not impossible to conduct the defense of this action if attorneys for defendants are unable to speak with the central figures in this action. Both Merylee Kreshower and Edward Shapiro have stated to deponent prior to the entry of this Order that they were each kidnapped by their parents and their agents and wished to tell the facts as they

know them which would inevitably help the defendants in the defense of these indictments.

52. The apparent bases for the admonition by Justice Agresta are the representations of Assistant District Attorney Schwed that Meryleo Kreshower and Ed Shapiro are under the mind control of defendants. The indictments charge that very thing so that the order is based on a presumption of guilt. It is unclear how the alleged mind control by the defendants is to be exercised through their attorneys. No testimony was offered to this effect. The Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States guarantee to all persons the right to a fair trial and due process of law. A fair trial cannot be held if attorneys for defendants are forbidden to speak to the major witnesses in this action.

53. No prior application for the relief requested herein has been made.

Wherefore, your deponent respectfully requests that defendants be granted the relief requested in this motion together with such other and further relief as may be just, including any relief granted to defendant Conley, a codefendant of ISKCON, Inc. in Indictment No. 2114/76.

EUGENE N. HARLEY.

Sworn to before me, this ninth day of December, 1976.

PAUL G. STACK,
Notary Public State of New York.

U.S. COURT OF APPEALS,
SECOND CIRCUIT,
New York, August 2, 1977.

Hon. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship and Naturalization Law, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN EILBERG: We take the liberty of expressing our deep concern about some of the proposals in H.R. 94, which is now under consideration by your Committee. Since federal judges are required as part of their duties to deal on a day-to-day basis with grand juries, which act under the supervision of the judiciary, and with problems raised by the grand jury system as it presently functions, your Committee may be interested in our views.

The grand jury is one of our oldest public institutions, dating back to pre-Colonial days. Although long ago it was sometimes used for political purposes, it has since limited itself for the most part to the imporant public function of investigating crime and to fulfillment of the public's interest in seeing that where there is probable cause to believe that a person has committed a crime that person will be accused and brought to trial. On the other hand, where no such probable cause is shown every federal grand jury is usually advised by the court that its duty is to protect persons under investigation against unwarranted injury to their reputation. The grand jury, operating with the aid of federal prosecutors, has accordingly conducted its proceedings in secret in order to protect the innocent, encourage full investigation, disclosure and deliberation, prevent persons from tampering with witnesses or suborning perjury, and preclude the escape of those likely to be indicted.

By and large the federal grand jury, despite some faults, has functioned satisfactorily under the guidance of prosecutors held to high standards. It has filed public accusations only when there has been probable cause to believe the accused guilty, as it attested to by the fact that almost all federal indictments result in guilty pleas or convictions after trial. The grand jury, moreover, has served as a moderating influence on any tendency on the part of prosecutors to be overzealous and has brought nonprofessionals into the decision-making process.

As with every public institution, there is undoubtedly room for improvement in the federal grand jury. However, where an institution such as a grand jury has functioned reasonably well in the past, it seems wise to scrutinize proposed "improvements" most carefully, particularly where the "abuses" against which they are purportedly aimed may have been minimal or nonexistent and the reforms pose a risk of harm or of unnecessary and costly burdens. Guided by this approach, we believe that some of the proposals advanced by H.R. 94 may well serve to improve the administration of justice. We refer, for instance, to the

proposal to criminalize unauthorized disclosure of evidence presented to a grand jury (proposed § 1512), which might serve to protect against leakages of the type that can cause harm to those under investigation as well as to the Government's investigation itself. Recording of all grand jury proceedings, including statements of the prosecutor and of grand jurors (as proposed in § 3333), might serve to protect against misstatements or misconduct in the grand jury room. Authorizing the court to disclose to a defendant prior to trial the grand jury testimony of witnesses to be called at trial and exculpatory testimony given before a grand jury could promote Congress' policy in favor of fairness and prompt disposition of criminal proceedings. Reduction in the size of the grand jury, while more debatable, could conceivably improve the process by leading to greater active participation by individual jurors.

As against these potentially helpful proposals, others—particularly those which would tend to turn the grand jury proceeding into an adversarial one—appear to pose great harm to the administration of justice by needlessly increasing the opportunity for obstructing, delaying, disrupting and prolonging the investigatory and accusatory process, with no showing of a counterbalancing gain to the public or to individual rights. If enacted, this legislation would, furthermore, impose an enormous and unconscionably disproportionate additional burden on an already overworked federal judiciary. If a Judicial Impact Statement (similar to an Environmental Impact Statement) were prepared with respect to these proposals, it would demonstrate that in exchange for benefits that are at best speculative the cost in terms of judicial hearings, examinations of evidence and findings would be excessive. For instance, the proposed legislation would almost certainly require the judiciary to resolve such issues as:

(1) whether a grant of transactional immunity to a witness would be "adequate for the purposes of the investigation,"

(2) whether the interrogation of a witness for whom immunity is sought could be attributed directly or indirectly to wiretapping in violation of 18 U.S.C. § 2515,

(3) whether such a witness' testimony is "necessary to the public interest,"

(4) whether a witness, if granted immunity would be exposed to the danger of foreign prosecution and, if so, whether he has been provided with "adequate safeguards,"

(5) whether a request for immunity complies with Department of Justice guidelines or other practice,

(6) whether the testimony of such a witness would fall "within the scope" of the grand jury's investigation and be "relevant" thereto as well as to the immunity order itself,

(7) whether the Government has reasonable grounds to believe that a witness would be an accused,

(8) whether the Government properly refrained from advising a witness that he was a target of a grand jury investigation on the ground that, if so advised, he might flee, tamper with witnesses or otherwise seek to delay the investigation,

(9) what information concerning a grand jury's investigation should have been imparted to a witness in order to enable him to prepare and seek permission to present rebuttal evidence to the grand jury,

(10) what sanctions should be imposed on the Government for failure to comply with its obligations under the proposed legislation,

(11) whether evidence not presented to a grand jury might be "exculpatory," see *Brady* v. *Maryland*, 373 U.S. 83 (1973), or might have "materially" affected the testimony of a witness who appeared before the grand jury, see *United States* v. *Agurs*, 427 U.S. 97 (1976),

(12) whether a witness is not "financially able" to retain his own counsel and thus entitled to an assigned counsel under the Criminal Justice Act,

(13) whether the conduct of a witness' counsel in the grand jury room in advising his client and in objecting to questions has been so disruptive as to require his removal from the grand jury room and the substitution of other counsel for the witness.

(14) whether the substitution of such counsel would violate a witness' statutory or constitutional right to counsel of his own choice,

(15) whether counsel for a possible target of a grand jury investigation may appear in the grand jury room as counsel for more than one witness without involving conflicts of interest,

(16) what relief may be granted retroactively with respect to a subpoena that is quashed after the witness has appeared and testified before the grand jury,

(17) whether a subpoena must be quashed because it is "oppressive," "punitive" or because the witness' appearance is "unnecessary" or his testimony would be "privileged" or "cumulative."

The foregoing examples of the issues that would be repeatedly faced by federal judges in administering the proposed legislation demonstrate that the court would be called upon to interpret many terms that are vague and general in their import and to review evidence, much of it complex in nature, to make the necessary rulings.

The proposed legislation, if enacted, may also prevent the federal courts from complying with the mandate of the Speedy Trial Act, 18 U.S.C. §§ 3161-3174, to the effect that, beginning in July 1979, they must dismiss indictments that were not filed within 30 days after the defendant had been arrested or served with a summons in connection with the charges against him, see 18 U.S.C. §§ 3161(b), 3162(a)(1). Although the Speedy Trial Act excludes certain periods of delay in computing the prescribed time limits, see 18 U.S.C. § 3161(h), the excluded periods are so limited in nature that delays of the type that will inevitably occur under the amendments proposed by H.R. 94 will create a possibly irreconcilable tension between these two statutes.

Since it would not be appropriate to attempt in this letter a detailed analysis of each of the omnibus provisions of H.R. 94, we attach hereto a memorandum setting forth some of the major provisions to which we are opposed and the grounds of our opposition. We believe that the views stated in this memorandum are generally in accord with those of the Committee on Administration of the Criminal Law of the Judicial Conference of the United States, which we are advised will be set forth in a report to be forwarded shortly to your committee.

We would appreciate your furnishing a copy of this letter and enclosure to the members of your Committee. We stand ready, should the Committee desire, to answer questions or to furnish such additional information as may be available.

Respectfully yours,

WALTER R. MANSFIELD, C.J.
WILLIAM H. MULLIGAN, C.J.
WILLIAM H. TIMBERS, C.J.
MURRAY I. GURFEIN, C.J.
ELLSWORTH A. VAN GRAAFEILAND, C.J.
THOMAS J. MESKILL, C.J.

MEMORANDUM RE: CERTAIN PROPOSALS IN H.R. 94, A BILL DEALING WITH GRAND JURY PROCEDURES AND THE RIGHTS AND LIBERTIES OF GRAND JURORS

The following is an analysis of certain sections of H.R. 94 to which various members of the Second Circuit Court of Appeals are opposed. The memorandum does not deal with proposals, some of which are mentioned in a letter dated August 2, 1977, signed by certain members of the court, that may be favored or unopposed.

1. Restrictions on the court's power to hold a recalcitrant witness in civil contempt under 28 U.S.C. § 1826

The bill would amend 28 U.S.C. § 1828 to limit the court's use of civil contempt power in dealing with recalcitrant witnesses before a grand jury by:

(1) Requiring that the witness be given 72 hours' notice of a contempt hearing, absent a showing of special need for speed;

(2) Placing a 6-month maximum on the period of confinement that might be imposed, or a period equal to the length of the court proceeding or of the grand jury, whichever is lesser;

(3) Barring further confinement of a grand jury witness for a subsequent refusal to testify concerning the same transaction or event;

(4) Requiring that a witness held in contempt be admitted to bail pending appeal unless the appeal is frivolous;

(5) Providing counsel under the Criminal Justice Act, 18 U.S.C. § 2006A, for any witness unable to obtain adequate representation;

(6) Prohibiting contempt proceedings against a witness interrogated on the basis of illegal wire intercepts in violation of 18 U.S.C. § 2515.

Comments.—A witness charged with civil contempt before a grand jury should, of course, be afforded reasonable notice and opportunity to defend. However, reasonable notice in a particular case ordinarily depends on such circumstances as the nature and complexity of the evidence to be obtained and presented, the extent of preparation needed to present it, and the amount of time remaining before the grand jury's term will expire.

Rather than fixing the required notice at a specific period (e.g., 72 hours), a better approach, which would recognize flexibility as essential, would be to provide that reasonable notice be given, since there would be many cases where less than 72 hours' notice would be consistent with due process and with the public interest in avoiding unnecessary delay in the investigation and prosecution of crimes, which Congress mandated in enacting the Speedy Trial Act, 18 U.S.C. §§ 3161, *et seq.*

Similarly, to limit confinement for civil contempt to a maximum of six months, regardless of the possibly longer remaining term of the grand jury, and to bar any further confinement for the witness' subsequent refusal to testify concerning the same transaction or event, unnecessarily weakens the court's power to require a recalcitrant witness to give testimony to which the grand jury is entitled in its search for the truth. The purpose of § 1826 is not to punish but to provide a weapon that can be used to require a witness to furnish material testimony which he is obligated to give in the public interest. The witness, of course, holds the key to his own release, which he normally obtains upon his testifying. The length of incarceration, however, that will induce a witness to fulfill this obligation will vary according to the witness and the circumstances of each case. Some witnesses would fulfill their legal obligation only if faced with the prospect of incarceration longer than six months, whereas others would be induced to act by the prospect of a much shorter commitment. The court should be vested with the flexible power to impose whatever term appears reasonably necessary under the circumstances of each case rather than be hobbled by a fixed maximum period that may be shorter than the remaining term of the grand jury.

Bail pending appeal from a civil contempt order issued under § 1826 should be fixed where the witness can demonstrate a likelihood of success on appeal from the district judge's order. The proposal that bail be granted except where the appeal is found to be frivolous places the burden on the wrong person—the prosecutor. After a district judge, following a hearing, has decided the merits against the witness, the burden should normally be on the witness. If it appears that there are close or difficult questions warranting review, the district court or the court of appeals, in the exercise of their discretion, would then normally admit the witness to bail pending the appeal. But a witness should not be presumptively entitled to bail after a hearing has gone against him.

To prohibit holding in contempt a witness who has been interrogated on the basis of illegally obtained wiretaps runs directly counter to the Supreme Court's sound reasoning in *United States* v. *Calandra*, 414 U.S. 338 at 349–50 (1974). Because a grand jury does not finally adjudicate the guilt or innocence of a person but merely determines whether there is probable cause to believe that the person has commited a crime, the grand jury has always been permitted to pursue its investigatory and accusatory functions unhampered by procedural and evidentiary restrictions applied in a criminal trial. Moreover, the Supreme Court concluded in *Calandra* that the incremental deterrence against police misconduct that would result from extending the exclusionary rule to grand jury proceedings would be speculative at best and not justify extension of the rule to grand jury proceedings even though it would be enforced at trial.

Regardless whether one agrees with the Supreme Court's reasoning, there can be no doubt that the proposed prohibition against interrogation of grand jury witnesses on the basis of illegally obtained intercepts would place a very heavy additional burden on already overworked federal courts. As the Supreme Court noted in *Calandra:* "Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings. 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 * * * In sum, we believe that allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties." 414 U.S. at 349–50.

As matters stand today, the demands of competent trial counsel for wiretap canvasses and checkouts on the part of the Government, each of which usually require weeks for a report and are often followed by court hearings to determine whether there was strict adherence to the procedures prescribed by 18 U.S.C. §§ 2516–19 frequently delay or prolong criminal trials. If this proposal were adopted and each witness provided with competent counsel, the prohibition against interrogation of grand jury witnesses on the basis of illegally obtained intercepts would enable counsel to stall grand jury investigations indefinitely and to raise issues that would involve the court in countless hearings.

2. Proposals to change the type of immunity that may be granted to recalcitrant witnesses under 18 U.S.C. §§ 6002–3 from "use" to "transactional" immunity and to change the conditions for granting immunity

Under 18 U.S.C. §§ 6002–3 as this statute presently stands a United States Attorney, when he believes it necessary to the public interest, may, with the approval of the Attorney General, Deputy Attorney General or any designated Assistant Attorney General, request the district court to issue an order compelling a grand jury witness who has invoked his Fifth Amendment privilege to testify in exchange for a grant of immunity under which no testimony or information provided by the witness may be used directly or indirectly against him in any criminal case except perjury. Upon the making of such a request the court is obligated to grant such "use" immunity to the witness.

H.R. 94 would shift from the United States Attorney to the federal court the duty of determining to its "satisfaction," upon a request by the Attorney General, Deputy Attorney General, or designated Assistant Attorney General, (1) whether the testimony of a witness is necessary in the public interest, (2) whether there is danger of foreign prosecution of the witness, (3) whether the grand jury investigation is legally authorized and the request for immunity complies with the Department of Justice guidelines, (4) whether the proposed testimony is within the scope of the grand jury's investigation and relevant thereto as well as relevant to the immunity order, and (5) whether a grant of immunity would be "adequate for the purposes of the investigation." Only if satisfied that these conditions have been met and if furnished with a certified "summary of the evidence relating to the witness," would the court be permitted to grant immunity. Even then the court might in its discretion refuse to grant immunity. The immunity granted, moreover, would not simply prohibit use of the witness' testimony against him (directly or indirectly) but would immunize him from prosecution on account of any "transaction, matter or thing" concerning which he was compelled to testify.

Comments.—This proposal is most unwise and would place an intolerable additional burden on already overtaxed federal courts. Except in extraordinary cases (e.g., Watergate), under the principle of separation of powers, which is an integral part of our Constitution, the Attorney General, not the federal court, is the party who determines whether an immunity grant would be in the public interest. It is the function and duty of the Attorney General, not that of the court, to investigate and prosecute those cases which will best insure that the federal laws will be carried out and to coordinate prosecutorial efforts toward that end.

Moreover under our system of government the Attorney General and his subordinates are far better equipped than a federal judge to make the necessary determination. The prosecutor is ordinarly the only person sufficiently familiar with the details of pending investigations and prosecutions to determine whether a grant of immunity is essential to obtain important evidence or to secure an indictment or conviction. In contrast, the court is not sufficiently acquainted with the general program for federal law enforcement in the community or the particular problems in each case to determine whether a witness' testimony would warrant a grant of immunity, much less to determine whether such a grant would be in the public interest.

The new duties placed by the new amendment on the federal judiciary would be staggering. To carry them out the court would have to play a role that has traditionally been exercised only by the Executive Branch, studying the background of the grand jury's proposed or pending investigation, acquainting itself with the relationship of the investigation to other federal law enforcement programs, and delving into the often complex evidence in each case to appraise the relevancy, adequacy and need for the testimony of the witness whose immunity is sought. Only after steeping himself in the background could the judge be satisfied that

the conditions imposed by the legislative proposal were met. This would require in many cases an enormous amount of time and effort to be invested by already overworked judges. It might also require judges in some cases later to recuse themselves from sitting as the trial judge because of inability to preside without being influenced by the background information acquired in the investigation to determine whether immunity should be granted.

The proposal that, where an immunity grant is necessary, it must be of "transactional" rather than "use" immunity is also unwise. A grant of immunity represents an accommodation between a witness' Fifth Amendment privilege and society's need for evidence essential to law enforcement. As the Supreme Court recognized in *Kastigar* v. *United States*, 406 U.S. 441 (1972), as long as a grant of immunity is "co-extensive with the scope" of the witness' Fifth Amendment privilege he receives all of the protection to which he is entitled under the Constitution, no more, no less, i.e., the right to be protected against the use of his testimony against him, with the government bearing the burden of proving that any later prosecution against him has not been based on or derived from his testimony. After some six years of experience under 18 U.S.C. §§ 6001–3 we know of no evidence that the broader transaction immunity is necessary to protect witnesses against prosecution derived from disclosures which they have been compelled to make through grants of "use" immunity. Since use immunity fully protects the witness' constitutional rights, transactional immunity is therefore unnecessary.

3. Imposition of various conditions upon the prosecutor's presentation of evidence to a grand jury (proposed § 3329)

H.R. 94 would add a new § 3329 to Title 18, U.S. Code, which, among other things, would require that the court, in giving preliminary instructions to each grand jury, "assure that the Grand Jury reasonably understands . . . (5) the subject matter of the investigation." The proposal would also permit any person to ask to testify or to produce records before the grand jury, whereupon the prosecutor would be required to notify the grand jury and, if he wished, make recommendations with respect to the handling of the request. Unless a majority of the grand jury voted to the contrary, the prosecutor would be required to subpoena the evidence or witness, who must then be permitted to testify upon waiving immunity.

The prosecutor would also (1) be required to notify a person against whom evidence is to be offered that he has a "right to testify and present evidence," unless the prosecutor can prove that the person would flee, endanger other witnesses, or unduly delay the investigation and prosecution; (2) be required to advise the grand jury periodically of the nature and existence of any evidence, not yet received, "which might tend to materially affect the credibility of any witness or tend to negate the guilt of any prospective defendant"; (3) be barred from representing a case to another grand jury after a grand jury has failed to return an indictment unless the court finds that additional relevant evidence has been discovered.

Comments.—This proposal would heap enormous and difficult burdens on the judiciary, precluding it from performance of other essential duties, including compliance with the Speedy Trial Act.

Turning first to the requirement that the judge assure that the grand jury understands the "subject matter of the investigation" of each case, this would be difficult enough to achieve in a district where grand jury investigations were few and far between. But in a large urban center such as New York the court would find it virtually impossible to comply. In the Southern District of New York, for instance, there may be as many as 25 grand juries functioning simultaneously, with a half dozen sitting at the same time, of which some are "regular" grand juries hearing a series of cases in one day's sitting, following each of which a vote is taken on whether to indict. To satisfy the proposed amendment several judges would be required daily to acquaint themselves with the background of each case and to instruct the jury accordingly. There simply would not be enough judicial time to meet this additional obligation unless new judgeships were created or existing judges abandoned important trials and hearings of other cases to perform this new duty.

The other proposed amendments, aside from policy considerations which might be debated at length, pose problems that could be resolved in specific cases only after evidentiary hearings. For instance, where a prosecutor fails to notify a person against whom evidence is offered because the Government did not become

aware that he was likely to be a target until all the evidence was in and an indictment filed against him, a motion to dismiss the indictment for failure to receive notification would be filed, which would require the court to unravel the background in order to make findings.

The proposed amendment also raises a question as to when a prosecutor is justified in concluding that a person need not be notified because he might flee, endanger other witnesses or unduly delay the investigation. The assumption that the Government can always come in with tangible proof on this issue seems unreal. In many cases knowledge that a grand jury investigation is pending may lead a person to flee or to start tampering with witnesses even though no tangible evidence could have been adduced that he would do so until the misconduct occurred.

Assuming that a prospective accused is given the opportunity to give rebuttal evidence to the grand jury, there arises the question of how much information must be furnished to him by the Government regarding the case in order to enable him to prepare and present his evidence. Must the Government make a detailed disclosure that would outline the evidence against him? If so, would this not turn the grand jury proceeding into a preliminary mini-trial on the merits? Assuming there is a failure on the part of the prosecutor to comply with these proposed requirements as construed by the courts, what sanctions could be imposed? Dismissal of an indictment? All of these questions would have to be resolved by the courts.

The proposed amendments further appear unnecessary. In most cases the evidence of probable cause is clear. The defense could at best raise issue for trial rather than be entitled to a "no true bill." A grand jury is instructed by the court at the outset, and the prosecutor recognizes, that its duty is not merely to indict but to protect the innocent against unwarranted indictment. Although the grand jury looks principally to the prosecutor for production of relevant evidence, it may in close or doubtful cases protect against arbitrary accusations by notifying the target of its investigation and permitting him to testify or to point to exculpatory evidence. Nor does anything prevent the grand jury from directing the prosecutor to subpoena witnesses or other evidence that may be relevant. However, to impose upon the prosecutor the statutory duty of converting the grand jury's investigation into an adversary proceeding goes too far. Moreover, it is impractical for the reason that it is frequently impossible for prosecutor or court to make the kind of decisions dictated by the proposed amendment, since the lines at the preliminary investigatory stage are often not as bright and sharp as they later become at trial, after the parties have the benefit of additional evidence that was not uncovered or available at the time when the indictment was filed.

For these reasons it is also inadvisable to require the prosecutor to advise the grand jury of all *Brady* or impeachment material. In many cases the Government simply is not in a position at the investigatory stage to determine what is or may be exculpatory. Nor can the court or prosecutor, before the facts are uncovered, determine whether evidence not presented to the grand jury would have "materially" affected a witness' credibility or negated guilt.

In short, these proposals, if adopted, could have the effect of delaying, obstructing and prolonging grand jury investigations by turning the grand jury proceeding into a preliminary mini-trial in which the Government, the grand jury and the court would be forced to devote a disproportionate amount of time to issues that should be saved for resolution at trial. Rather than expose the Government and the courts to such unconscionable burdens at the risk of having a resulting indictment dismissed, the better course would be to rely upon the integrity of the Government and the disposition of grand juries to act fairly and to hear both sides where there are doubts about the existence of probable cause. Ordinarily neither the grand jury nor the prosecutor has a motive to indict unless there is probable cause to believe that on the record as a whole the accused committed the crime. The prosecutor hardly desires an indictment unless he believes he will be able to obtain a conviction after trial.

4. Right of grand jury witness to have counsel (§ 3330A)

At present a grand jury witness may retain counsel whom he may consult outside of the jury room. H.R. 94 would add a § 3330A to Title 18 U.S.C. to the effect that (1) every witness should be entitled to the assistance of counsel, with counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A, for any person financially unable to obtain counsel, (2) counsel would have the right to

be present with the witness when interrogated in the grand jury room and to advise him but not to address the grand jurors, and (3) if counsel violated the limits on his function in the grand jury room, he could be removed by the court and the witness ordered to obtain new counsel.

Comments.—In theory the presence of counsel with the witness in the grand jury room instead of outside of the grand jury room seems reasonable enough, particularly if the witness is a possible target of the grand jury's investigation. Counsel, if present, might be more effective in improving his client's understanding of his constitutional rights and protecting him against violation of those rights or of statutory privileges and against harassment, misunderstandings and the like.

In practice, however, admitting counsel to the grand jury room poses the serious risk that the proceedings will be protracted and disrupted, with the court being forced to intervene repeatedly. Experience in criminal trials demonstrates that many lawyers simply would not adhere to the idealistic conception that they would limit themselves to advising their clients in *sotto voce*. Once in the grand jury room, many counsel, unimpeded by the presence of the court, would seek to influence the grand jury, using tactics of the type frequently employed in criminal trials, e.g., lengthy objections to question, in which counsel refers to irrelevant prejudicial material as the basis for an objection. Advice to a witness could be given in tones that would be overheard by every grand juror. A witness' answers would be those of the attorney rather than of the witness himself. Judges would inevitably be invoked to rule on preliminary objections as to the relevancy and materiality of questions, to discipline or remove counsel from the grand jury room and to substitute new counsel. Moreover, should a judge discipline or remove a witness' counsel, a serious question would then arise as to whether he had interfered with the witness' constitutional or statutory right to counsel of his own choice.

To provide counsel for every grand jury witness "financially unable to obtain legal representation," as would be mandated by the proposed § 3330A, would probably tax our limited pool of available lawyers versed in criminal matters beyond the breaking point, rendering them unavailable for the more important task of trying cases. To provide counsel for such witnesses would also increase enormously the appropriations required to finance appointments under the Criminal Justice Act, since the number of indigent witnesses called before grand juries would be far greater than the number of indigent accused.

On balance, the harm that would flow from the proposal to provide each witness with counsel in the grand jury room substantially outweighs the speculative benefits from such a procedure. The present federal grand jury system has worked reasonably well in protecting witnesses' rights. The only person normally desiring counsel at the grand jury's investigatory stage is a possible target of the investigation. Most, if not all, federal prosecutors advise such persons of their status if it is known to the prosecutor and of their *Miranda* rights, including the right to have counsel available for consultation. Indeed the giving of such a warning could well be mandated.

Under the existing system, moreover, the target of an investigation has the option of invoking his privilege. Although the witness may not be as competent to judge the significance of a question as would be his counsel, there is no reason to assume that the prosecutor or grand jurors would be unfair in questioning him. The risk that a witness would be improperly questioned is outweighed by the disruption, obstruction and delay that could be expected if each witness, regardless of whether the witness is or might be a target, were provided with counsel at his elbow.

5. Quashing of grand jury subpoenas (§3330B)

H.R. 94 would add a new § 3330B which, among other things, would require that a witness subpoenaed to appear before a grand jury be given notice of his right to counsel, including appointed counsel, his Fifth Amendment privilege, the "subject matter of the investigation" and statutes involved, and whether his own conduct is being investigated.

A motion to quash, which could be made in the district where the witness resides or in the district where the subpoena has been issued, would automatically stay compliance with the subpoena until the court had ruled on the motion. The Government would be obligated to show that the testimony was not sought to secure information for trial or regarding activities of a person already under

indictment, and that the evidence would be "relevant to the grand jury investigation properly conducted within the grand jury's jurisdiction." The Government would furthermore be required to show that compliance with the subpoena would not be "unreasonable or oppressive," would not require "unnecessary appearance" and would not lead to testimony or information that would be "cumulative, unnecessary or privileged, would not be primarily for punitive purposes or would not involve other like circumstances." The court could quash or impose sanctions upon findings that the witness had already been confined for civil contempt under § 1826 for refusal to testify, that the witness had given notice of intent to claim his privilege, or that a previous grand jury had failed to indict him on the same evidence.

Under the amendment a grand jury could be convened only in the district where "elements" of the criminal conduct under investigation occurred and the court could quash a subpoena upon finding that a witness' appearance would impose a serious hardship on him or his family because of the grand jury's location, or could transfer the grand jury proceedings to some other district.

Comments.—This proposal for the most part is contrary to the public interest. It would greatly increase the opportunities for obstruction and delay of grand jury proceedings without any apparent gain in the administration of justice. It would impose additional, unnecessary burdens on the prosecutor and would enormously and unnecessarily increase the work of overloaded federal judges.

If a prosecutor has reason to believe that a witness is a target of a grand jury investigation, he should advise the witness. This is the practice currently followed by most federal prosecutors. But to require the Government to advise every witness of the "subject matter" or purpose of a grand jury investigation and of the relevancy of the information sought from the subpoenaed witness would tend to destroy the objectives of grand jury secrecy, which are to prevent the escape of prospective accused, insure deliberation by the grand jury free from importuning or harassment, prevent subornation of perjury or tampering with witnesses, and encourage free disclosure and protection of the innocent from unwarranted accusations. Disclosure of subject matter and relevancy would in many instances be the equivalent of publicly broadcasting the grand jury's investigation rather than keeping it secret. The time for such disclosure is after the accusation, if any, is made, and at the ensuing trial rather than during the grand jury's investigation, which is not an adversary proceeding.

Usually it is inconvenient for most witnesses to be required by subpoena to attend any proceeding, whether it be a trial or a grand jury inquiry. Although witnesses should be protected against harassment or oppression, there is no reason to believe that such tactics are so common as to require the type of showing or sanction that would be imposed by § 3330[]. As against the witness' convenience, moreover, there is the public importance of the grand jury's investigation, which should come first. Where it investigates a crime believed to have been committed within its jurisdiction, there is no adequate substitute for the personal testimony of witnesses, whether they are nearby or must come from a distance. Their travel and living expenses are paid by the Government, and it is usually in the interest of all parties concerned to examine the witness promptly and to release him for return to the district of his residence. In these days when one can travel in a matter of hours by air to almost any point from which a witness might be subpoenaed the danger of oppression is minimal.

Whether a witness' testimony is "relevant," "necessary," and not "cumulative," "unreasonable," "privileged," "oppressive" or "excessively burdensome" is a matter of opinion which can be arrived at by a judge only after examination into the entire background and circumstances, which are often complex. For this purpose additional court hearings would be triggered by the inevitable motions to quash. The result would probably be a series of small trials on the merits to determine whether a witness, advised by counsel provided under the Criminal Justice Act, must appear in response to the subpoena. Moreover, if the witness chose to seek relief in the district of his residence rather than in the court which issued the subpoena, the prosecutor, although the balance of conveniences weighed in his favor against that of the witness, would have to leave the situs of the grand jury investigation to acquaint the non-issuing court with the essential facts. The prosecutor would thus be forced to suspend his supervision of the grand jury investigation in which other witnesses might be appearing. Similarly, the court's time would be unnecessarily absorbed in hearings to determine whether the venue of the grand jury should be changed to suit a witness' convenience.

The potential for abuse and prolongation of the investigatory procedure is substantial.

The provision obligating the Government to show that a witness' testimony is not sought for trial or that information is not sought regarding activities of a person held under indictment appears to be unnecessary. As federal decisional law now stands the grand jury may not be used to develop evidence for trial.

6. Encouragement of independent grand jury inquiries (§ 3330)

H.R. 94 would also add a new § 3330, which is designed to encourage grand juries to undertake independent inquiries of the "runaway" type. It would provide them with special counsel and investigators for the purpose, should the Government attorney refuse to cooperate. The grand jury's term would be extended at its request up to 36 months. The special counsel would have the powers and pay of a federal prosecutor, including staff, appropriations, reimbursement of expenses, etc.

Comments.—This proposal is unwise for several reasons. It would pose the risk of abuse of power by an inexperienced, rump body going off on its own, misguided by a special prosecutor who might be motivated by reasons inconsistent with sound administration of justice and unfamiliar with sensitive policies formulated over many years by the Department of Justice regarding such important matters as division of responsibility between state and federal governments and guidelines for exercise of prosecutorial discretion. The result could be not only confusion but the filing of indictments without adequate ground work.

Any accusatory system can become an instrument of oppression in the wrong hands. Although, under the existing system, there may have been occasions where federal prosecutors have failed in their duties or abused their power as the advisors depended upon by grand juries to guide them, the instances have been rare and do not warrant broad and sweeping authorizations of the type here proposed. A provision for runaway grand juries may occasionally be salutary in state practice or even in federal (e.g., Watergate) but it poses too great a risk of irresponsible encroachment upon the Executive Branch in our federal system to be encouraged without strict limitations of a type not found in the proposed § 3330.

7. Availability of grand jury transcripts of testimony of witness (§ 3333)

A separate provision, § 3333 would make available to any grand jury witness a copy of any earlier statement by him in the Government's possession and of the transcript of electronic recording of his testimony before the grand jury. Prior to trial a defendant would be entitled to the grand jury transcripts of all witnesses to be called by the Government at trial, all statements made to the grand jury by the prosecutor and all grand jury testimony or evidence "which in any manner could be considered exculpatory," or which the court might deem "material" to the defense. Upon a showing of good cause the court could deny or restrict such disclosures.

Comments.—To the extent that transcripts of grand jury testimony would aid a trial court and jury in its search for the truth, there should be no objection to disclosures of such transcripts. However, the initial determination of what constitutes exculpatory material should, as under Title 18 U.S.C. § 3500, rest upon the shoulders of the Government, with the court being called upon to rule only where the Government had doubts or there is reason to believe that the Government has not furnished all exculpatory material. No purpose would be served by adding a clause "in any manner" before the term "exculpatory." The standard should be whether, under the circumstances known to the Government, the testimony or evidence could reasonably be considered exculpatory.

Nor would any purpose be served by requiring disclosure to the accused of the prosecutor's statements to the grand jury, except to the extent that such statements might reasonably lead to exculpatory evidence. A prosecutor's statement is not evidence.

8. Defendant's right to a preliminary examination (§ 3368)

H.R. 94 would add § 3368 guaranteeing each defendant a preliminary examination, unless waived, which might be held before or after the filing of an indictment or information in the district court. A preliminary examination after the filing of an indictment would be a sheer waste of time since the indictment evidences the existence of probable cause. Defense could in such a case demand

a preliminary examination in order to seek discovery or protect themselves against possible later § 2255 applications or suits for malpractice. It would be an unnecessary burden on the court, particularly since most indictments result in pleas of guilty.

9. Reports concerning grand jury investigations

We live in an age when reports seem to have assumed a sacred character in themselves. Unnecessary statistics are being gathered by the trunkful. This bill requires a report by the Attorney General to the Administrative Office of the number of investigations undertaken by a grand jury with a description of the nature of each investigation undertaken. What this hopes to accomplish, we do not know. Reporting would also require a list of immunity requests by the Attorney General and orders granting immunity, the number of contempt cases, the number of arrests, indictments and convictions resulting from testimony obtained under orders granting immunity and a description of data banks by which grand jury information is processed by the Department of Justice. Some of this material is not in itself objectionable except that resources may be better used to a more appropriate purpose.

COMMITTEE ON THE JUDICIARY,
U.S. HOUSE OF REPRESENTATIVES,
Washington, D.C., September 7, 1977.

In Re: H.R. 94
Hon. WALTER R. MANSFIELD,
U.S. Court of Appeals, Second Circuit, New York, N.Y.

DEAR JUDGE MANSFIELD: Thank you very much for your letter of August 2, 1977. With your permission, we would like to include your letter and memorandum in the record of our Subcommittee.

As you indicate in your letter, my Subcommittee is presently considering comprehensive reforms to the Federal grand jury system. Particularly, we are considering H.R. 94, which is a moderate bill providing limited changes in the present system. Generally, the bill provides for increased court supervision over grand jury activities, so that the grand jury would return to its historic role as an arm of the court, rather than as a weapon of the prosecutor; for increased rights to witnesses so that the grand jury would return to its historic role as a shield against oppression and so that the potential for the numerous abuses that have been indicated to our Subcommittee would be decreased; and finally, for an increased voice and role of the grand jurors themselves, with adequate knowledge and information about their duties, in the grand jury proceedings.

In specific response to your letter, I would like to point out that the record of our Subcommittee indicates that the grand jury is still being used for political purposes—to investigate matters which are not really criminal and to "punish" dissidents for their views and not for illegal activities. If the grand jury was limited only to a determination of probable cause, as you indicate, there would be little concern with grand jury procedures. In fact, the indicting function of the grand jury is quite limited. In most situations, an indictment is only returned when the prosecutor requests it, and thus, in fact, the prosecutor is the "indicting" or "charging" body. Problems arise when the grand jury is used as an investigatory mechanism. In those situations, the grand jury is to be an independent seeker of the facts, but has become an appendage of the Government.

I, of course, agree that grand jury secrecy should be maintained and, I would stress, strengthened. For that reason, H.R. 94 contains proposals to punish unauthorized disclosures of grand jury proceedings. As you have indicated, this should generally improve the entire grand jury system.

Your comments and suggestions on H.R. 94 are quite helpful. Particularly, your support for the recording of all grand jury proceedings, for allowing the disclosure of testimony prior to trial, and for reducing the size of the grand jury to decrease the cost (as recommended by the Judicial Conference of the United States), will aid in securing the enactment of these provisions.

I must, unfortunately, respectfully disagree with some of your conclusions that other provisions of H.R. 94 would "pose great harm to the administration of justice." I have asked the staff of the Subcommittee to prepare an analysis, step

by step, of the present grand jury process and the changes that will be made in that process by H.R. 94. This study indicates that H.R. 94, rather than causing any delays, will speed up generally the entire grand jury procedure.

In specific response to some of your concerns:

(1) Requiring the court to be involved in the granting of immunity should lessen present challenges to immunity proceedings. Motions are presently filed in cases where immunity is given over the objections of a witness, and hearings are now regularly held. H.R. 94 would merely provide the standards for those hearings and give the court increased power to make sure that immunity grants are proper and in the public interest. The only possible additional burden would be on the prosecutor, in demonstrating to the court the propriety of a request for immunity. I would like to point out that this, in fact, should not cause any delay or problems as the local federal prosecutor is now required under Federal Justice Department regulations to prepare such an analysis and justification for submission to the Assistant Attorney in charge of the Criminal Division to obtain his approval.

(2) Requiring a determination as to whether a witness is "target" and whether or not warnings should be given to a particular witness should not cause any delays or any increase in judicial involvement. Presently, most Federal prosecutors, and most state prosecutors (as required by state statutes or case law), give "target warnings." In addition, numerous law suits have been, and will continue to be, filed as to the sufficiency or propriety of warnings or lack of warnings. State and Federal prosecutors have found little problem in determining who is a "a target" and in giving warnings. Only if prosecutors deliberately disregard a mandate, should judicial involvement be required.

(3) Providing for determination of "relevancy," for the review of the propriety of a subpoena, as you may be aware, is presently the law in at least one circuit, (the Third Circuit). The requirement for judicial involvement is minimal. Only a reasonable basis of relevancy need be shown. Similarly, requiring a reasonable basis or nexus for the location of a grand jury proceeding to be shown would not be a substantial burden. There are presently numerous cases challenging subpoenas and venue. H.R. 94 would merely provide the rules and standards for review by the court in evaluating the merits of those cases.

(4) Requiring the prosecutor to present exculpatory evidence is presently required by the Code of Professional Responsibility, and strongly recommended in the American Bar Association Standards, and the National Prosecution Standards. This is not a new requirement. As you might be aware, numerous pretrial discovery motions, numerous post-trial motions, and many appeals are based on a failure of a prosecutor to present exculpatory evidence. Detailing a machinery to have this matter considered and resolved at an early stage in the investigatory proceeding should eliminate many of these legal challenges later.

(5) Providing for counsel in the grand jury room to consult with a client and advise the client (and not otherwise participating), providing for counsel fees if a witness is indigent, and providing for the replacement of a counsel who is obstreperous or who has conflicting responsibilities, would also not involve new or delaying procedures. Presently, most Federal jurisdictions provide that a witness has a right to counsel outside the grand jury room. Many jurisdictions provide that a person is entitled to free representation, if he is indigent, either if he is a witness and almost always if he is a target. Finally, there have been a series of cases (particularly in Pennsylvania and in the District of Columbia) for removal of particular attorneys (representing clients although from outside the grand jury room) because of a conflict. Again, H.R. 94 sets up the standards for judicial involvement and should not necessarily increase judicial involvement.

(6) Finally, H.R. 94 specifically does not provide an automatic exclusionary rule for improper prosecutorial actions in front of a grand jury. While some proposals have suggested "mini trials" attacking the sufficiency of the evidence, the admissibility of evidence, and other issues, H.R. 94 leaves this to the court to determine and does not change the present rules relating to when or if challenges to evidence in the grand jury room can be made.

I would like to point out, in specific response to your concern that the Speedy Trial Act might be affected by the reforms in H.R. 94, that the bill generally affects only "investigatory" activities.

Almost all the reforms relate to the activities of the grand jury in its investigatory capacity, prior to lodging of an indictment and not in its "charging" capacity when it considers probable cause and either returns or refuses to return an indictment. When a summons, based on a probable cause is issued, followed by a preliminary hearing, and then an indictment, it is most unusual for an independent investigation to be undertaken by the grand jury. In fact, in that situation, the grand jury acts almost always as a "rubber stamp" of the prosecutor.

The grand jury's involvement in activities and the place where reforms are needed most are intended to be most substantial in the investigatory phase—prior to the lodging of an indictment. As these activities are before criminal action, through a summons, complaint, indictment or otherwise, has commenced, there should be no effect on the Speedy Trial Act.

Again, I thank you for your comments. I am attaching a memorandum responding to your memorandum as to the proposals in H.R. 94.

Please feel free to submit any additional comments as you wish for inclusion in our record.

Sincerely,

JOSHUA EILBERG, *Chairman.*

MEMORANDUM IN RESPONSE TO MEMORANDUM OF THE HONORABLE WALTER R. MANSFIELD

1. H.R. 94 provides a fixed period of notice of contempt proceedings. However, the prosecutor has the right, upon proper showing, to reduce the period. If unnecessary delay would result from a 72-hour notice, he, of course, could get a shortened period from the court. Limiting confinement to a maximum of six months, and prohibiting reiterative contempt, is an attempt to insure that civil contempt is coercive and not punitive. Under present procedure, a witness could be incarcerated for the life of the grand jury, subpoenaed again and incarcerated again, for refusing to testify. In fact, he is being punished—for his refusal to testify—and not being coerced to testify. After a certain period of time, confinement becomes punitive and no longer coercive. If, in fact, it is desired to punish an individual for his contempt, proceedings may be instituted under a criminal contempt statute, with all the due process rights involved in any punishment of more than six months. The American Bar Association and the Department of Justice have agreed that an outside period should be set on confinement (although they suggest 12 months).

Prohibiting a witness from being incarcerated for contempt when the contempt is based on an illegal wiretap is the law today. Under the Organized Crime Control Act, as interpreted by the Supreme Court in *United States* v. *Gelbard*, a witness may not be confined for contempt when the reason for his appearance is based on illegal wiretap evidence. Unlike other proposals, H.R. 94 is limited to this already granted statutory exception. It does not provide defenses because of illegal searches and seizures, illegal statements or other trial defenses.

2. H.R. 94 details responsibility for the court in reviewing immunity grants and provides for a return to transactional immunity. H.R. 94 provides that the Attorney General, or his delegates, are the ones who determine whether immunity should be granted. The court does not have the function of determining whether immunity should be granted but only whether the immunity grant is proper. This is intended to be an application of the court's proper role in all criminal proceedings, and especially in proceedings dealing with the grand jury, which is to be an arm of the court. The Attorney General would make the necessary determinations, and the court would merely review it to make sure that those determinations are proper. This is not a new function for the court—reviewing a prosecutor's activities to see if they are within lawful bounds. Present analogous situations occur when a court determines whether there is probable cause for arrest, probable cause for a search, compliance with requirements as to confession, a showing a relevancy for a subpoena, and a showing of propriety of a request for a *nolle prosse.*

Returning to transactional immunity should lessen lawsuits presently based on the fear of many that they are not adequately covered by an immunity grant. Such motions are frequently found in a situation where witness "A" is subpoenaed to testify against witness "B"; and witness "B" is supoenaed to testify against witness "A". Both are granted immunity and both are reluctant to testify be-

cause they believe each other's testimony would be used and they will both be prosecuted. In addition, a return to transactional immunity should eliminate lawsuits involved in the determination about whether a subsequent prosecution is based on the "use or derivative use" of testimony given in front of the grand jury.

3. H.R. 94 provides that adequate instructions should be given to the grand jurors of their role and responsibility. Numerous cases in the state and Federal courts have indicated that it is the *present* requirement that the grand jury be adequately instructed in its duties, role, and responsibilities. Throughout H.R. 94, it is explicit that the court can only give instructions to the degree it is able to. Thus, it is to describe the subject of the investigation to the degree it is capable at a particular point in time of describing the subject of an investigation. The grand jury is supposed to be an arm of the court, and the court is supposed to be involved in the activities of the grand jury and to supervise any investigation to make sure the investigation is being properly undertaken. Requiring the judge to properly instruct the grand jurors would carry out this function and lessen judicial involvement at a later stage because of confusion by the grand jurors themselves.

Requiring a witness to be told if he is a target, providing for exceptions to such notice, and providing for a right of a witness to give testimony if he is a target, should not involve a substantial increase in judicial time or responsibility. Presently, in most jurisdictions, "target witnesses" are given warnings. Determining who is or who is not a target is usually clear. In addition, numerous motions are filed at the present time, involving substantial time in the courts, as to whether or not a witness has the right to present his side of the story to the grand jury. Many prosecutors, including the Watergate Special Prosecutor, have required, as a matter of policy, that warnings be given, and that a witness be able to present his side of the story. Although recent cases, including *U.S. v. Washington*, indicate that there is no requirement *under the Constitution* of target warnings, many courts have provided, under the supervisory power, that such warnings are to be required. In any event, motions will be continued to be filed in particular cases by attorneys, and H.R. 94 would merely establish standards for consideration of those motions.

H.R. 94 does not in any way provide for a "mini-trial". A review of the evidence, an analysis of the admissibility of the evidence, and an analysis of the propriety of prosecutorial actions, are not required to be reviewed prior to or during grand jury proceedings under H.R. 94 (unlike other legislative proposals).

4. H.R. 94 provides for the right of a witness to have counsel with him in the grand jury room to advise his client only. It is patterned on present requirements involving Congressional hearings where a witness has counsel sitting next to him and counsel can only advise his client and not otherwise participate. It is expected that providing for right to counsel in the grand jury room should *lessen* disruptions, as a witness would not be forced to go in and out of the courtroom to discuss matters with his counsel. Any counsel who does not live up to his ethical responsibilities, or is otherwise in violation of the standards established for a lawyer in the grand jury room, could be handled by appropriate judicial action. In fact, such appropriate judicial action has already been undertaken as to counsel (presently outside the grand jury room) and especially on the issue of the relationship toward multiple clients, including potential conflicts of interests. It should be pointed out that in those nine states that have allowed a right to counsel in the grand jury room, prosecutors, defense counsel, and judges have indicated that this has lessened disruptions, increased confidence of all in grand jury proceedings, and has led to a more meaningful investigation.

Providing for a right to a free attorney if a witness is unable to afford counsel is considered by most to be a matter of basic fairness. In those cases, presently, where the witness is entitled to counsel outside the grand jury room, many courts provide, especially in cases where the witness might be a "target", that a witness is entitled to free counsel, if he is indigent.

Considerable evidence before the subcommittee has indicated that the grand jury is often merely an echo of the prosecutor. The prosecutor asks questions that sometimes harasses witnesses, and almost always gives his comments to the grand jury. Sometimes he takes improper advantages of a witness. Having counsel present to advise his client and to observe should lessen prosecutorial improprieties.

A witness is just not as competent as a lawyer to determine the significance of a question. Only allowing a witness to go out to talk to his attorney as to the ques-

tion, and his response, often causes prejudice in the grand jurors' eyes as they believe that the witness is trying to "hide something".

5. Substantial testimony before the subcommittee indicated that grand jury proceedings are often conducted in places unconnected with a particular offense, or the investigation of a particular offense. Motions challenging venue are now filed in such cases. H.R. 94 merely provides the standards by which the court is to resolve those motions. Providing that a witness' testimony has to be shown to be relevant for a subpoena is presently the law in some jurisdictions, including the Third Circuit. This has not caused any serious disruption in grand jury proceedings. Requiring the government to advise the witness of the subject matter of an investigation, if available, would allow a witness to be prepared at the time of his appearance. Testimony has indicated that often witnesses are called back repeatedly before grand juries because they are not familiar with the questions or issues to be discussed. Providing that a witness would know about the subject matter of the investigation, if available, should limit these repeated occurrences and appearances and thus reduce delay. Finally, requiring that the government show the witness' testimony is not sought for trial purposes is the present law. Motions are filed now, and the courts have consistently held, that if a subpoena supposedly for an investigation is really to secure trial evidence, it is improper and a subpoena for such testimony should be quashed.

6. H.R. 94 provides for an independent grand jury inquiry, and the right for a grand jury to have a special counsel and investigator. It should be pointed out that since the drafting of H.R. 94, Congress has considered, and will probably approve, a mechanism for special prosecutors and investigations. The subcommittee is considering proposals to delete the section relating to the capacity of a grand jury to conduct its own investigation, in light of these Congressional actions.

7. H.R. 94 requires all grand jury evidence, which may be considered exculpatory in any manner, to be turned over to a defendant or defense counsel. As indicated in the Code of Professional Responsibility, the ABA Standards on Prosecution Function, and the National Prosecutions Standards, this is presently the requirement ethically on a prosecutor. The court is only to get involved if the prosecutor does not live up to his responsibilities. Presently, motions are filed pretrial for discovery, during trial, and post-trial, and on appeal, relating to the failure to deliver exculpatory evidence. Making it clear what the responsibility of the prosecutor is, should lessen these motions, and the resulting hearings, at later stages in the criminal justice system.

Requiring disclosure of a prosecutor's statement to the grand jury is to insure that the grand jury's decisions are based on the evidence and facts presented to them and not based on the prosecutor's comments, characterizing of the evidence or characterizing of the witness. Witnesses before the subcommittee, and numerous law review articles and statements by former prosecutors, defense counsel, and judges, and others have indicated that the prosecutor, by his comments, statements and other actions can totally dominate the grand jury proceedings and therefore, eliminate any effective check by an "independent" grand jury so as to act as a buffer between the witness and the state.

8. H.R. 94, as a compromise proposal, provides for a preliminary examination in every case. Numerous grand jury bills have suggested "mini-trials" at which a defendant would have the right to object to the sufficiency of the evidence, the admissibility of the evidence, and other legal improprieties before the grand jury, prior to his appearance, during his appearance, or immediately after his appearance. H.R. 94 would not mandate such mini-trials but would rather provide application of the existing machinery, that is, use of a preliminary examination, to insure that a prosecutor has sufficient admissible evidence to proceed to trial. A prosecutor would know that he has to present his evidence to the court, even if the grand jury indicts. If the preliminary examination results in the finding of lack of probable cause, that would terminate prosecution. In addition, if it results in a showing of probable cause, a defendant would have been shown the probable cause basis for his prosecution and could no longer complain about improper activities before a grand jury. In those jurisdictions where preliminary examinations are required, it has resulted in a decreasing use of the indictment as a charging instrument. Defendants are more willing to waive indictment because they have seen the basis for probable cause at a preliminary examination. Prosecutors are more willing to conduct their investigations prior to a preliminary

examination, rather than going first to an indictment, so that they can see whether their investigation is fruitful. Finally, upon seeing the evidence at a preliminary examination, defendants are more likely to plead guilty.

JUDGE'S CHAMBERS,
U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF ALABAMA,
Mobile, Ala., August 16, 1977.

Re H.R. 94.

HON. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship and International Law of the House Judiciary Committee, Washington, D.C.

DEAR CHAIRMAN EILBERG: I am seriously concerned over some of the provisions in the above proposed legislation. I am in general agreement with the testimony of United States District Judge Frederick B. Lacey of New Jersey. The provision permitting witnesses to have an attorney appear with them in the Grand Jury opens an unnecessary can of worms.

Out of my fifteen years' experience on the State trial bench and eleven years on the Federal bench, the charges of "abuse" of the Grand Jury by the prosecutor have been over-exaggerated. The proposal to correct what possible abuses might arise is disproportionate to the actual dangers.

An indictment is but an accusation. I charge every jury that it is not evidence nor can any inference of guilt be inferred or made from the fact that an indictment has been returned. This is emphasized. They are advised that an indictment is but a vehicle or method used to bring a defendant into court. To permit attorneys to appear with witnesses would seriously impede the work of the Grand Jury. Not only the danger of the lawyer being able to speak to the Grand Jury by the nature of his objections and through his client, but, as pointed out by Judge Lacey, the proceedings would be slowed to a snail's pace.

If I understand correctly, one of the major purposes of the "Speedy Trial Act" is to indict, arraign, try, and, if convicted, promptly sentence an offender so that justice will be swift and sure. This provision of the proposed Bill would be at odds with the purpose of the "Speedy Trial Act."

I can anticipate a flood of motions and attacks on every indictment similar to the flood of prisoner petitions we now receive post-trial.

The "Miranda warning" should be given, and, according to my information in this district is given, in the appropriate cases.

Section 3334(c)(1) providing that the Grand Jury testimony of all witnesses called to trial be provided in advance of the witness taking the stand is in conflict with the Jencks Act. I agree that any exculpatory evidence should be provided.

It is my hope that the provisions I have referred to will be deleted from the Bill.

Sincerely yours,

VIRGIL PITTMAN.

U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF ALABAMA,
Mobile, Ala., August 19, 1977.

Re H.R. 94.

HON. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship and International Law of the House Judiciary Committee, Washington, D.C.

DEAR CHAIRMAN EILBERG: I am in receipt of copy of letter of August 16 to you from Chief Judge Virgil Pittman of this district.

I wish to concur wholeheartedly in the views expressed by Judge Pittman. I have had 26 years' experience in this position. The Grand Jury system may not be perfect, but the various proposals of the above Bill to correct possible abuses certainly is disproportionate to the actual dangers.

I am,

Very truly yours,

DANIEL H. THOMAS.

THE CHRISTIAN CHURCH,
(DISCIPLES OF CHRIST) OF WOODLAND, CALIFORNIA,
August 25, 1977.

Hon. JOSHUA EILBERG,
House of Representatives,
Washington, D.C.

DEAR SIR: I am very much in favor of our Grand Jury system, but I do feel, after doing some reading and research, that there is a need for some changes. There is, of course, a need for some secrecy and power to summon witnesses. However, in the past decade or more it seems that the great powers that the grand jury has have been misused to harass and intimidate persons who have taken a stand against the "status quo". Groups like the peace movement, the feminist movement, the Black movement, trade union movement and others have often been the target of our grand jury system.

I am very much in favor of H.R. 94 with the exception of two things: (1) I feel it should guarantee all grand jury witnesses rights, without exceptions; (2) I feel that the defense attorney dismissal clause should be left out.

I am in favor of legislation designed to enhance the right to due process of law, freedom of association, effective legal counsel, the presumption of innocence and the privilege against self-incrimination. I would want these things for myself and I am sure that you would want them for yourself. Therefore, I would urge the passage of H.R. 94, with the exceptions noted above.

Thank you.

JOHN R. DEWEY.

STATEMENT OF ABRAHAM J. MULTER, FORMER MEMBER OF CONGRESS AND RETIRED JUSTICE OF THE NEW YORK STATE SUPREME COURT

Mr. Chairman and distinguished members of this committee. I thank you for the opportunity to submit this statement.

You are all to be congratulated for giving these matters the attention they deserve. They have been too long neglected. With your permission I will divide this statement into two parts. First I will address myself to the constitutional question and then I will deal with my proposed amendments to the pending bills.

THE CONSTITUTIONAL AMENDMENT

H. Res. 59, 60, 61 and 62 all propose eliminating from the amendment (Part of the Bill of Rights) the requirement for indictment by a grand jury as a preliminary to a trial for a capital offense or an infamous crime.

The circumstances that brought the system into being are history, as is its development.

All of that is well documented in your hearings and need not be repeated.

We can and do learn from past experience. We should not be strangled by tradition. Because something has been done for a hundred or even a thousand years does not make it the best way nor does it mean it cannot be done in a better way.

The constant, even though slow, change in court-made law is the best proof of the validity of that concept.

Every system of jurisprudence from time immemorial evidences what the jurists and lawmakers of that particular time thought made for improvement of the practice and procedure, as well as the substance.

The fact that some rules were made part of the organic or constitutional law did not in any degree lessen the need for change in accordance with the mores of later eras.

That the Grand Jury system is imbedded in State and Federal Constitutions should not preclude a review of its operation. If improvement can be devised as a result of such study, then let us proceed to bring it about. Let us do it, even when it requires amendment of our Constitutions.

In some quarters it is more fashionable to protect the criminal than the victim. It is high time we gave more thought to changing the process by which delay and procrastination favor the criminal. The need is to expedite the indictment and trial, with a saving of time, energy, and money to the victim and to the governmental authorities charged with law enforcement.

Great Britain, whence this system came to us accomplished the change sometime ago.

English law did away partially with the Grand Jury system in 1933 and completely in 1948. There have been no Grand Jury indictments there since that time.

No good purpose will be served by attempting to set forth precisely the manner and detail of bringing a prospective defendant to trial in a court of criminal jurisdiction in Britain. Those interested are respectfully referred to the English statutes.

We are dealing solely with the need in all cases, emphasis on all, of a Grand Jury indictment.

My recommendation is not to do away with the Grand Jury completely.

Keep it for those matters in the broad sphere of governmental activities.

Keep it for those few cases where an alleged wrongdoer may want to testify before the Grand Jury in an effort to clear himself.

There is no need for it in the usual run-of-the-mill criminal case.

Witnesses, whether victims or police officers or others, should not be required to dance attendance in inferior or local courts, again before a Grand Jury, and then again in the trial court.

There is no constitutional right for an alleged criminal to be confronted by witnesses before a Grand Jury or at any time before actual trial. There is no right of cross-examination until trial.

Obviously, the indictment, information, or complaint should be certified by a designated public official either a judicial or prosecutorial officer as alleging facts sufficient to constitute a crime.

It should be sufficient to support, an indictment or criminal complaint, to attach affidavits of the witnesses identifying the defendant and the time and the place and stating sufficient details to meet the statutory requirements establishing the commission of the crime.

Such affidavits can be drawn and executed under the supervision of the District Attorney or other prosecuting officer, outside of the presence of the defendant or his attorney, and in the precinct house, a courthouse, or the office of the District Attorney or prosecuting officer.

The prosecuting officer's certification to the information, complaint, or indictment, call it what you will, is and should be as efficacious as the endorsement on an indictment by a lay foreman of a Grand Jury.

In those few cases where a proposed defendant wants to testify before a Grand Jury, let him make his demand therefore. If he makes the demand, provide that proceedings on the information be stayed until he so testifies. If the Grand Jury indicts, that action should supplant the information. If the Grand Jury refuses to indict, the information must be dismissed.

If we permit the foregoing procedure, several minimum safeguards must be enacted, to wit: (1) A time limit must be placed upon when the defendant and/or his witnesses will attend before a Grand Jury. (2) With the written demand for permission to testify before a Grand Jury, the defendant must file a written signed and acknowledged consent to waive immunity when he testifies, and he must so testify. Failure to do so shall automatically vacate the stay of proceedings pursuant to the earlier information. (3) The time between filing the information and vacatur of the stay may not be urged as a reason to dismiss an information because of delay in the trial thereof. (4) The Prosecuting Attorney shall be required to subpoena to attend before the Grand Jury, witnesses whose names and addresses are furnished in writing to the District Attorney by the defendant at the time of or within five days of filing his demand to be heard by the Grand Jury. The failure for any reason whatsoever of such witnesses to appear before the Grand Jury shall not delay the proceedings before it.

The suggestion put forth here is that we try, side by side with our instant Grand Jury System, the English method of indictment. If that alternative is used and works well, the Grand Jury system as now followed may become obsolete, and without harm to our judicial system. It may prove most beneficial.

PROPOSED AMENDMENTS TO PENDING RESOLUTIONS AND BILLS

I am fearful that if the proposed resolutions eliminating complethely the Grand Jury System are submitted for approval the hue and cry against them will be overwhelming.

The more satisfactory procedure in my opinion is to amend the constitutional guarantee to permit trial after information and arrest. The rights to a defendant to demand an indictment by a Grand Jury should be preserved provided he waives immunity and testifies before the Grand Jury.

There are many cases where the investigative process demands and requires the use of the Grand Jury.

More cases than not can proceed without it.

Incidentally, The New York State Constitution (Article 1, § 6) permits proceeding by information instead of Grand Jury indictment provided the defendant consents in writing thereto. My suggestion is that such proceeding be validated unless the defendant objects.

H.R. 94 AND SIMILAR BILLS

I respectfully suggest the following amendments:

1. Insert on page 7 line 15 after the word "any" and before the word "other" the words "state of the United States or any"

It is my considered opinion that no one should be required to testify if his testimony may be used to convict him of a crime in any state court.

2. Page 14 line 19 strike out the word "not" and on line 20 strike out the word "but" and insert the word "and" and on lines 22 to 25 strike out the words "unless the Grand Jury," up to and including the word "subsection," and on page 15 strike out the entire sentence beginning on line 2 to and including line 5.

It should not be discretionary but mandatory that a defendant be heard by a Grand Jury, if the defendant waives immunity and testifies.

3. Strike out the period on page 20 line 9 and insert a comma and the words "but only as a part of a relevant court proceeding."

There is too much danger in permitting a lawyer carte blanche to freely discuss what transpired in the Grand Jury room.

I would even go so far as to disqualify any lawyer appearing for a witness before a Grand Jury from representing any other witness before that Grand Jury or any defendant indicted by it.

4. On page 28 line 17 insert the word "not" after the word "is" and on line 18 strike out the words "unless waived" and strike out all of subdivision "(b)" on lines 21 to 23 on page 28.

With the full and complete pretrial discovery proceedings now available to defendants there is no need for preliminary examinations. They merely serve to delay and confuse.

Many thanks for permitting me to submit this statement which I hope will be helpful.

Respectfully submitted.

ABRAHAM J. MULTER.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., October 12, 1977.

Hon. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship and International Law, Committee on the Judiciary, Rayburn Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed please find a copy of a letter I received from Mr. Frank E. Haddad, Jr., President of the Kentucky Bar Association, regarding their support of a resolution adopted by the American Bar Association on grand jury reform at the ABA's annual meeting in August, 1977.

Please add Mr. Haddad's support to your already growing list of supporters for H.R. 94, the Federal Grand Jury Reform Act of 1977.

I am hopeful the full House will be able to vote on the bill before the end of this session.

With my best wishes, I am

Sincerely yours,

JOHN B. BRECKINRIDGE.

Enclosure.

KENTUCKY BAR ASSOCIATION,
Frankfort, Ky., September 27, 1977.

Hon. JOHN BRECKINRIDGE,
U.S. House of Representatives, House Office Building,
Washington, D.C.

DEAR CONGRESSMAN BRECKINRIDGE: Enclosed is a resolution from the Board of Governors of the Kentucky Bar Association in support of legislation to reform grand jury proceedings.

We urge your support for bills presented in the areas covered by the resolution.

Sincerely,

FRANK E. HADDAD, JR., *President.*

Enclosure.

KENTUCKY BAR ASSOCIATION BOARD OF GOVERNORS

RESOLUTION

Whereas, the Kentucky Bar Association is interested in and supports the concept of grand jury reform legislation; and

Whereas, it has agreed with and adopted a resolution passed by the American Bar Association's House of Delegates at its annual meeting in August, 1977.

Be it resolved, that the Kentucky Bar Association adopts the following concepts supported by the American Bar Association:

1. Expanding on the already-established ABA policy, a witness before the grand jury shall have the right to be accompanied by counsel in his or her appearance before the grand jury. Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in proceedings before the grand jury. The court shall have the power to remove such counsel from the grand jury room for conduct inconsistent with this principle.

2. Every witness before a grand jury shall be informed of his privilege against self-incrimination and right to counsel and shall be advised that false answers may result in his being charged with perjury. Target witnesses shall be told that they are possible indictees.

3. No prosecutor shall knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt.

4. A prosecutor should recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing law.

5. A target of a grand jury investigation shall be given the right to testify before the grand jury, provided he/she signs a waiver of immunity. Prosecutors shall notify such targets of their opportunity to testify unless notification may result in the flight or endanger other persons or obstruct justice; or the prosecutor is unable with reasonable diligence to notify said persons.

6. The prosecutor shall not present to the grand jury evidence which he or she knows to be constitutionally inadmissible at trial.

7. The grand jury shall not name a person in any indictment as an unindicted co-conspirator to a criminal conspiracy. Nothing herein shall prevent supplying such names in a bill of particulars.

8. A grand jury should not issue any report which singles out persons to impugn their motives, holds them up to scorn or criticism or speaks of their qualifications or moral fitness to hold an office or position. No grand jury report shall be accepted for filing and publication until the presiding judge submits *in camera* a copy thereof to all persons named or identifiable and such persons are given the opportunity to move to expunge any objectionable portion of said report and have a final judicial determination prior to the report's being published or made public. Such motion to expunge shall be made within ten days of receipt of such report. Hearings on such motions shall be held *in camera*.

9. The grand jury should not be used by the prosecutor in order to obtain tangible, documentary or testimonial evidence to assist the prosecutor in preparation for trial of a defendant who has already been charged by indictment or information. However, the grand jury should not be restricted in investigating other potential offenses of the same or other defendants.

10. The grand jury should not be used by the prosecutor for the purpose of aiding or assisting in any administrative inquiry.

11. Witnesses who have been summoned to appear before a grand jury to testify or to produce tangible or documentary evidence should not be subjected to unreasonable delay before appearing or unnecessarily repeated appearances or harassment.

12. It shall not be necessary for the prosecutor to obtain approval of the grand jury for a grand jury subpoena.

13. A grand jury subpoena should indicate the statute or general subject area that is the concern of the grand jury inquiry. The return of the indictment in a subject area not disclosed by the grand jury subpoena shall not be a basis for dismissal.

14. A subpoena should be returnable only when the grand jury is sitting.

15. All matters before a grand jury, including the charge by the impaneling judge, if any; any comments or charges by any jurist to the grand jury at any time; any and all comments to the grand jury by the prosecutor; and the questioning of and testimony by any witness, shall be recorded either stenographically or electronically. However, the deliberations of the grand jury shall not be recorded.

16. The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

17. Expanding on the already-established ABA position favoring transactional immunity, immunity should be granted only when the testimony sought is in the public interest; there is no other reasonable way to elicit such testimony; and the witness has refused to testify or indicated an intent to invoke the privilege against self-incrimination.

18. Immunity shall be granted on prosecution motion *in camera* by the trial court which convened the grand jury, under standards expressed in Principle No. 17.

19. The granting of immunity in grand jury proceedings should not be a matter of public record prior to the issuance of an indictment or testimony in any cause.

20. A lawyer or lawyers who are associated in practice should not continue multiple representation of clients in a grand jury proceeding if the exercise of the lawyer's independent professional judgment on behalf of one of the clients will be or is likely to be adversely affected by his or her representation of another client. If the court determines that this principle is violated, it may order separate representation of witnesses, giving appropriate weight to an individual's right to counsel of his or her own choosing.

21. The confidential nature of the grand jury proceedings requires that the identity of witnesses appearing before the grand jury be unavailable to public scrutiny.

22. It is the duty of the court which impanels a grand jury fully to charge the jurors by means of a written charge completely explaining their duties and limitations.

23. All stages of the grand jury proceedings should be conducted with proper consideration for the preservation of press freedom, attorney-client relationships, and comparable values.

24. The period of confinement for a witness who refuses to testify before a grand jury and is found in contempt should not exceed one year.

25. The court shall impose appropriate sanctions whenever any of the foregoing principles have been violated.

Dated this 17th day of September, 1977.

FRANK E. HADDAD, Jr., *President.*

Attest: Leslie G. Whitmer, director, Kentucky Bar Association.

THE MODERN GRAND JURY: A REPORT ON GRAND JURY VIOLATIONS OF THE U.S. CONSTITUTION AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Submission prepared by: Committee for Grand Jury Reform, 2125 S St. N.W., Washington, D.C. (202-797-3741).

For: Subcommittee on Immigration, Citizenship and International Law, Committee on the Judiciary, United States House of Representatives.

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INTRODUCTION

The modern grand jury system is a parody of justice. Originally established by the colonists and incorporated into the Bill of Rights to protect them from the tyranny and capriciousness of England, the grand jury has become instead a travesty of justice in a nation originally conceived with the ideal that every man is entitled to equal protection under the law.

Since October 1970, when Congress enacted the Organized Crime Control Act which tightened Justice Department regulation of the grand jury system, numerous abuses have been committed by grand juries across the country. These occur daily and are commonplace. Individuals routinely and callously deprived of their Constitutional guarantees. These violations are only rivalled by the injustices of the grand jury procedure itself; i.e., the witness need not be apprised of his rights; the proceedings are held in secret; there may not be a written record; the rules governing admission of evidence or testimony do not apply; and the witness's defense counsel is not permitted in the jury chamber.

The modern grand jury presents an illusion of justice. It is an instrument of fear wielded by government, the F.B.I., and lawless prosecutors to intimidate minority individuals and groups and political opponents. It has long ceased to exist as a protector of the people.

The scope of grand jury investigations reflect our nation's history, and their impact on our society varies as different pressures are forced on them. For example, "Indictments of early western grand juries revealed an attempt to bring order and decorum to boisterous frontier communities." [1] "Southern grand juries took seriously the task of maintaining control over slaves and free Negroes. Some were specifically directed by state legislatures to present 'all persons of color' who conducted themselves in a manner dangerous to the peace and order of the state." [2] At the turn of this century, grand juries handed down indictments exposing rampant political corruption in cities. Banking failures were also fruitful areas of grand jury inquiry. Later, "When decisions of the United States Supreme Court weakened the Sherman (Antitrust) Act, state grand juries gave increased attention to the problem of trusts." [3]

Today, the grand jury is dominated by U.S. attorneys and mimics a modern-day Star Chamber. A witness is stripped of his rights and is forced to give testimony for an investigation, the nature of which is often withheld. The Justice Department attorney, acting as prosecutor, is also the advisor to the grand jury. He may use the grand jury to gain evidence for his own case rather than present evidence to the grand jury for indictments. Nixon perfected this during his attack on the peace movement in the '60s when leaders of organizations from all parts of the country were jailed.

Senator Philip A. Hart aptly described the misuse of the present grand jury system, ". . . more sophisticated modern techniques now make the grand jury an equally dangerous tool for conducting political surveillance and building dossiers in the guise of investigating specific offenses. It can also be used simply to harass, intimidate, and disrupt organized political dissent." [4]

The Committee for Grand Jury Reform is a citizens group organized to safeguard the individual from abusive grand jury practices. The Committee advocates exposure of grand jury abuses, reform measures, and restoration of the grand jury to its original status as a protector of the people. We recognize that fear compels a man or society to slavery. The use of the grand jury as a weapon to produce fear or to suppress the freedoms granted to us in the Constitution cannot be sanctioned if a democratic society is to prevail.

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[1] Younger, Richard, The People's Panel: The Grand Jury in the United States, 1634–1941. Rhode Island, Brown University Press, 1963, p. 79.
[2] *Ibid.*, pp. 85–86.
[3] *Ibid.*, p. 219.
[4] Clark, Leroy D., The Grand Jury, the Use and Abuse of Political Power, New York, Quadrangle/The New York Times Book Co., 1975, p. x.

Based on our goal of preserving the individual's rights, this submission will detail with representative examples grand jury violations of the United States Constitution and the United Nations Universal Declaration of Human Rights. We will also suggest the reforms necessary to restore the grand jury to its ogirinal stature.

GRAND JURY VIOLATIONS OF THE UNITED STATES CONSTITUTION

A grand jury trial is guaranteed to us by our founding fathers who incorported it into the Bill of Rights. Prosecutors and judges routinely manipulate the grand jury molding it into a tool that deprives citizens of their basic Constitutional guarantees either individually or collectively.

In fact, there may be no Constitutional rights as far as many grand jury prosecutors or judges are concerned. A striking example of this abuse involves Maria Cueto, Executive Director of the Episcopal Church's National Commission on Hispanic Affairs who was subpoenaed before a New York Grand Jury regarding information she might have about FALN (Armed Forces of Puerto Rican National Liberation) activities. She was subpoenaed on Friday for an appearance on the following Monday. Since she was unable to retain a lawyer over the weekend, she appeared before the grand jury to request an adjournment. At that point, "The judge informed her that she had no constitutional rights and that if she did not swear in and answer the grand jury's questions, she would be held in contempt and sent to jail. She again appealed for time to consult with a lawyer, but her request was again refused and she was committed immediately to the Metropolitan Correctional Center." [5]

FIRST AMENDMENT VIOLATIONS

Article I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble; and to petition the Government for a redress of grievances.

The previously mentioned case of Maria Cueto strikes to the heart of religious fredom. Maria Cueto and Raisa Nemikin, a secretary of the Episcopal Church's National Commission on Hispanic Affairs were both incarcerated for refusal to answer the grand jury's questions regarding the FALN.

It was alleged that these women might produce testimony concerning a FALN member who had previously been a member of the Episcopal Church's Hispanic Commission. Ms. Cueto and Ms. Nemikin charged that the subpoenas violated their right to free association and free exercise of religion as stated in the First Amendment. They also indicated that the grand jury was illegally being used as an arm of the F.B.I. to track down fugitives.[6]

This case exemplifies a grand jury's interference with free exercise of religion. The government pressed their investigations on these women stating that their affiliation with an official organ of a well-established traditional religion, the Episcopal Church, was the primary, if not only the basis of its interest in the grand jury testimony of these women.[7]

The most widely publicized First Amendment abuses by the grand jury involved investigations into so-called activist political groups; i.e., the Vietnam War resisters, the Black liberation group, the Native Americans, and the women's movement. An example of a grand jury investigation continuing without restraint began in 1971 when a nineteen-year-old Washington, D.C., peace movement activist was arrested and brought before a Seattle grand jury where she was grilled for three days on antiwar politics. Over the next two years, subpoenas were served on 2,000–3,000 activists in what Representative Robert Kastenmeir called "a glorified witch hunt used to intimidate political groups and communities." [8]

Traditionally, the First Amendment has been interpreted to protect the individual's right to anonymous political association as well as to oral and written

[5] ———, "New York, The New Inquisition", QUASH, Newsletter of the Grand Jury Project, New York, March–April, 1977, p. 1.
[6] *Ibid.*, p. 1.
[7] ———, "FALN Case: Fingerprints, Voiceprints etc.,", QUASH, September–October 1977, p. 6.
[8] ———, "Grand Jury Abuse in the 1970's: A Chronology", Grand Jury Report, Newsletter of the Coalition to End Grand Jury Abuse, Washington, D.C., Summer 1977.

expressions of the most controversial position; it has meant that the government must show "compelling necessity" to obtain information concerning a person's political beliefs, activities, and association. Yet, the grand jury has probed relentlessly and has harassed untold numbers of individuals who may hold views that are unpopular or embarrassing to the government. It has threatened the First Amendment foundation of political democracy.

FOURTH AMENDMENT VIOLATIONS

Article IV. 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.

The Fourth Amendment protects the right of individuals to be free from unreasonable government intrusions on their privacy. When F.B.I. cannot secure a search warrant to obtain the materials they desire, a grand jury which does not have to show probable cause, may issue a subpoena to seize "all" books, papers, documents, etc. The following is a case in point:

"Charles Berry, an Albuquerque attorney, was subpoenaed to deliver five years' worth of his law firm's financial records to a grand jury looking into allegations of illegal campaign contributions and bribery of former state officials. He explains that records of over 5,000 clients were involved and that some of the records dealt with cases not yet resolved. The financial records included the names of clients and, in certain instances, references to witnesses interviewed.

Mr. Berry refused to yield the documents, was cited for contempt and "sat in jail six months". After losing all his appeals, he turned over the records and was released last December. A government attorney says that Mr. Berry himself was never a target of the inquiry and that the grand jury wasn't interested in the names of his clients. Rather, the law firm was thought to have had "some business relationships' with a former state official who was being investigated. The man was indicted but was acquitted in a trial." [9]

The grand pury proceedings leading up to Mr. Berry's incarceration demonstrate the government's flagrant use of the grand jury subpoena power to collect evidence it could never obtain otherwise regardless of the toll it takes on individual liberties.

FIFTH AMENDMENT VIOLATIONS:

Article V. 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; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Here, it is noteworthy that the beginning half of the Fifth Amendment speaks to the right of a grand jury trial and the second half addresses the right that a man has against self-incrimination. Fingerprints, voiceprints, handwriting and hair samples have all been demanded of witnesses to be used as testimony before a grand jury. Phil Shinnick, a former star athlete who once held Canada's record in the decathlon and participated in the 18th Olympiad in Tokyo, was also in advocate for reform in the athletic movement. He was called before a grand jury investigating an alleged Patricia Hearst-Phil Shinnick connection. Although it was questionable whether Shinnick himself was the target of the investigation, the government felt that he could give information leading to the indictment of others. He was ordered to jail for contempt of court one week after Patricia Hearst was free on $500,000 bond. Shinnick was cited for contempt of court not because he refused to give verbal testimony, but for different reasons. U.S. Attorney, John Cottone "handed the jury foreman instructions that Shinnick should be forced to supply the F.B.I. with his fingerprints and samples of his handwriting and hair in a room near the jury chamber." [10]

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[9] Falk, Carol H. "GM, Other Unlikely Critics Accuse Grand Juries of Abusing Rights They Are Supposed to Protect", The Wall Street Journal, June 23, 1977.

[10] Taaffe, William, "Phil Shinnick Goes to Prison—Patty Hearst Goes Free", the Washington Star, January 11, 1977.

The Phil Shinnick story is horrifying. It shows the use of indiscriminate police power and the ease with which a police state can be foisted on the people. The F.B.I. itself has no power to subpoena evidence from a person who has not been convicted of a crime, but a grand jury may try to subpoena this evidence. The proponents of such illegalities maintain that the Fifth Amendment was intended only to prohibit the use of torture to extract a verbal confession.

On the other extreme, prosecutors have tried to intimidate witnesses into surrendering their right not to testify by resorting to humiliating, high-pressured interrogation. Professor Samuel Popkin, a specialist in Vietnam from Harvard University, was called before a Boston grand jury in March 1972, ostensibly because he was acquainted with Daniel Ellsberg who had been charged with theft and release of the Pentagon Papers. He and the prosecutor engaged in the following:

Question. Mr. Popkin, more specifically, do you know if someone possessed what is now known as the Pentagon Papers in Massachusetts other than to the extent you have previously testified?

Answer. May I see my lawyers?

Question. Mr. Popkin, as you know, a witness has the right to see his lawyers only on serious questions. You have been out of the room twice already for periods as long as ten minutes. You are now asking permission to leave the room for a third time. Is this necessary?

Question. Mr. Popkin, do you recall an immediate reaction that was formed in your mind upon hearing about original stories in The New York Times about who may have been the source?

Answer. I request permission to see my counsel.

Question. Mr. Popkin, how can your counsel be of use in this case? We're asking you about your immediate reaction.

Answer. I request permission to see my counsel. . . .

Question. Mr. Popkin, you are stretching things for this grand jury. Your exits from the room have been ranging about five minutes. This is being an inconvenience for the grand jury."[11]

SIXTH AMENDMENT VIOLATIONS:

Article VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury by 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 defence.

Government officials who favor the current structure of the grand jury find no violations of the Sixth Amendment in grand jury proceedings. This is so, they say, because a grand jury is a civil proceeding, not a criminal one. However, in the cases highlighted earlier, the witnesses were jailed for contempt of court even though they were not convicted of a crime. Additionally, this unfair treatment greatly hinders their ability to obtain a fair and speedy trial if necessary.

An even more glaring abuse of the Sixth Amendment is the witness's inability to have defense counsel in the jury room. Mr. Popkin, as described earlier, was harassed when he asked to consult with his attorney. Maria Cueto was forced into a grand jury interrogation without being given sufficient time to secure an attorney.

These situations are not isolated examples. Every day witnesses are deprived of defense counsel and unwittingly fall into the traps set by government prosecutors.

GRAND JURY VIOLATIONS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on December 10, 1948. It is based on the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family. It proclaims a common standard of achievement for all peoples and all nations.

The following Articles of this document complement the United States Constitution and Bill of Rights and deserve our attention.

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[11] See 4, pp. 67–68.

Article 9. No one shall be subjected to arbitrary arrest, detention or exile.

Article 12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to protection of the law against such interference or attacks.

A central point in the Universal Declaration of Human Rights focuses on the word 'arbitrary':

"Arbitrary—1. Determined by whim or caprice. 2. Based on or subject to individual judgment or discretion. 3. Established by a court or judge, rather than by a specific law or statute. 4. Not limited by law; absolute; despotic." [13]

At the very least, reformers of our modern-day grand jury system are appalled by the arbitrary nature of grand jury prosecutions. Individuals and groups at variance with the government are subjected to lengthy grand jury probes and even incarcerations for contempt of court. John Stuart Mill, in an essay entitled "On Liberty" stated that the most important liberty of the individual is the ability to criticize his society and to persuade others that his criticisms are justified.[14] It was this liberty that the colonists employed when they incorporated the grand jury into the Bill of Rights and it is this liberty that is violated by the contemporary grand jury.

At the crux of any trial is the right of the witness to be presumed innocent.

Article 11. Everyone charged with a penal offense has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

Adherents of present grand jury methods of inquisition state that this right is not jeopardized as there is no guilt or innocence on trial; the grand jury is merely a civil proceeding which may or may not be followed by a trial. On the other hand, the examples described earlier in this Submission prove that an individual is presumed guilty before the grand jury with virtually no opportunity to assert his innocence.

CONCLUSION AND RECOMMENDATIONS

There is widespread evidence that the grand jury system in this country has been abused and desecrated. The Committee for Grand Jury Reform is concerned that all the abuses of the grand jury be exposed and remedied so that the grand jury can be restored to its original stature. Furthermore, we believe that the rights of every individual citizen must be safeguarded with no loopholes remaining for arbitrary and whimsical courts to usurp the individual citizen's rights. The grand jury is in desperate need of reform. Numerous groups, including members of religious, minority, and feminist groups are calling for reform. Lawyers, newsmen, and representatives of labor are also demanding reforms. Mary Emma Hixson, Co-director of the Coalition to End Grand Jury Abuse stated, "The idea of protecting an individual's rights through the grand jury has been perverted and needs to be shored up before the dam breaks. As it stands now, U.S. Attorneys use the grand jury to 'rubber stamp' indictments." [14]

In order to secure grand jury reform, we recommend

1. the abolition of "use immunity" now in effect where grand jury witnesses can be forced to answer questions over their Fifth Amendment objections and jailed for contempt if they refuse. We recommend its replacement by full immunity conditional upon the consent of the witness to be immunized.

2. that witnesses be given seven days between the service of a subpoena and their appearance date, the right to know what crimes are under investigation and the right to be told whether they are targets of the investigation.

3. that grand jury witnesses be allowed the assistance of counsel inside the grand jury chamber.

Thomas Jefferson once called the grand jury "the sacred palladium of liberty".[15] With the proper reform measures in effect, the grand jury can once again become a true protector of the people; it can assume the role for which it was conceived.

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[13] Morris, William, ed., The American Heritage Dictionary of the English Language, New York, 1971.

[14] Mill, John Stuart, Essay entitled "On Liberty" in Utilitarianism, Liberty, and Representative, London, Dent, 1910.

[14] Personal communication with Ms. Hixson, Coalition to End Grand Jury Abuse, September 1977.

[15] See 4, p. x.

SUPPORTING DOCUMENTS

I. The Bill of Rights of The Constitution of the United States.
II. The Universal Declaration of Human Rights.

[From the Constitution of the United States of America—1787]

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth In Witness whereof We have hereunto subscribed our Names.

G. WASHINGTON—*President and deputy from Virginia*

New Hampshire—John Langdon, Nicholas Gilman.
Massachusetts—Nathaniel Gorham, Rufus King.
Connecticut—Wm. Saml. Johnson, Roger Sherman.
New York—Alexander Hamilton.
New Jersey—Wil: Livingston, David Brearley, Wm. Paterson, Jona: Dayton.
Pennsylvania—B. Franklin, Thomas Mifflin, Robt. Morris, Geo. Clymer, Thos. FitzSimons, Jared Ingersoll, James Wilson, Gouv. Morris.
Delaware—Geo. Read, Gunning Bedford jun, John Dickinson, Richard Bassett, Jaco. Broom.
Maryland—James McHenry, Dan of St. Thos. Jenifer, Danl. Carroll.
Virginia—John Blair, James Madison Jr.
North Carolina—Wm. Blount, Rich'd Dobbs Spaight, Hu. Williamson.
South Carolina—J. Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler.
Georgia— William Few, Abr. Baldwin.
Attest: William Jackson, *Secretary.*

RATIFICATION OF THE CONSTITUTION

The Constitution was adopted by a convention of the States on September 17, 1787, and was subsequently ratified by the several States, on the following dates: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 2, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788.

Ratification was completed on June 21, 1788.

The Constitution was subsequently ratified by Virginia, June 25, 1788; New York, July 26, 1788; North Carolina, Novemer 21, 1789; Rhode Island, May 29, 1790; and Vermont, January 10, 1791.

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION

ARTICLE I*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE II

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

ARTICLE III

No Soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

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*Only the 13th, 14th, 15th, and 16th articles of amendment had numbers assigned to them at the time of ratification.

ARTICLE IV

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.

ARTICLE V

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; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

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 defence.

ARTICLE VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by a jury, shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The first 10 amendments to the Constitution, and 2 others that failed of ratification, were proposed by the Congress on September 25, 1789. They were ratified by the following States, and the notifications of the ratification by the Governors thereof were successively communicated by the President to the Congress: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1789; New Hampshire, January 25, 1790; Delaware, January 28, 1790; New York, February 24, 1790; Pennsylvania, March 10, 1790; Rhode Island, June 7, 1790; Vermont, November 3, 1791; and Virginia, December 15, 1791.

Ratification was completed on December 15, 1791.

The amendments were subsequently ratified by Massachusetts, March 2, 1939; Connecticut, April 19, 1939; and Georgia, March 18, 1939.

ARTICLE XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The 11th amendment to the Constitution was proposed by the Congress on March 4, 1794. It was declared, in a message from the President to Congress, dated

January 8, 1798 to have been ratified by the legislatures of 12 of the 15 States. The dates of ratification were: New York, March 27, 1794; Rhode Island, March 31, 1794; Connecticut, May 8, 1794; New Hampshire, June 16, 1794; Massachusetts, June 26, 1794; Vermont, between October 9, 1794 and November 9, 1794; Virginia, November 18, 1794; Georgia, November 29, 1794; Kentucky, December 7, 1794; Maryland, December 26, 1794; Delaware, January 23, 1795; North Carolina, February 7, 1795.

Ratification was completed on February 7, 1795.

The amendment was subsequently ratified by South Carolina on December 4, 1797. New Jersey and Pennsylvania did not take action on the amendment.

ARTICLE XII

The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. [And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.]* The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

The 12th amendment to the Constitution was proposed by the Congress on December 9, 1803. It was declared, in a proclamation of the Secretary of State, dated September 25, 1804, to have been ratified by the legislatures of 13 of the 17 States. The dates of ratification were: North Carolina, December 21, 1803; Maryland, December 24, 1803; Kentucky, December 27, 1803; Ohio, December 30, 1803; Pennsylvania, January 5, 1804; Vermont, January 30, 1804; Virginia, February 3, 1804; New York, February 10, 1804; New Jersey, February 22, 1804; Rhode Island, March 12, 1804; South Carolina, May 15, 1804; Georgia, May 19, 1804; New Hampshire, June 15, 1804.

Ratification was completed on June 15, 1804.

The amendment was subsequently ratified by Tennessee, July 27, 1804.

The amendment was rejected by Delaware, January 18, 1804; Massachusetts, February 2 or 3, 1804; Connecticut, at its session begun May 10, 1804.

ARTICLE XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

*The part included in heavy brackets has been superseded by section 3 of the twentieth amendment.

The 13th amendment to the Constitution was proposed by the Congress on January 31, 1865. It was declared, in a proclamation of the Secretary of State, dated December 18, 1865, to have been ratified by the legislatures of 27 of the 36 States. The dates of ratification were: Illinois, February 1, 1865; Rhode Island, February 2, 1865; Michigan, February 2, 1865; Maryland, February 3, 1865; New York, February 3, 1865; Pennsylvania, February 3, 1865; West Virginia, February 3, 1865; Missouri, February 6, 1865; Maine, February 7, 1865; Kansas, February 7, 1865; Massachusetts, February 7, 1865; Virginia, February 9, 1865; Ohio, February 10, 1865; Indiana, February 13, 1865; Nevada, February 16, 1865; Louisiana, February 17, 1865; Minnesota, February 23, 1865; Wisconsin, February 24, 1865; Vermont, March 9, 1865; Tennessee, April 7, 1965; Arkansas, April 14, 1865; Connecticut, May 4, 1865; New Hampshire, July 1, 1865; South Carolina, November 13, 1865; Alabama, December 2, 1865; North Carolina, December 4, 1865; Georgia, December 6, 1865.

Ratification was completed on December 6, 1865.

The amendment was subsequently ratified by Oregon, December 8, 1865; California, December 19, 1865; Florida, December 28, 1865 (Florida again ratified on June 9, 1868, upon its adoption of a new constitution); Iowa, January 15, 1866; New Jersey, January 23, 1866 (after having rejected the amendment on March 16, 1865); Texas, February 18, 1870; Delaware, February 12, 1901 (after having rejected the amendment on February 8, 1865).

The amendment was rejected by Kentucky, February 24, 1865, and by Mississippi, December 4, 1865.

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The 14th amendment to the Constitution was proposed by the Congress on June 13, 1866. It was declared, in a certificate by the Secretary of State dated July 28, 1868, to have been ratified by the legislatures of 28 of the 37 States. The dates of ratification were: Connecticut, June 25, 1866; New Hampshire, July 6, 1866; Tennessee, July 19, 1866; New Jersey, September 11, 1866 (subsequently the legislature rescinded its ratification, and on March 5, 1868, re-

adopted its resolution of rescission over the Governor's veto); Oregon, September 19, 1866 (and rescinded its ratification on October 15, 1868); Vermont, October 30, 1866; Ohio, January 4, 1867 (and rescinded its ratification on January 15, 1868); New York, January 10, 1867; Kansas, January 11, 1867; Illinois, January 15, 1867; West Virginia, January 16, 1867; Michigan, January 16, 1867; Minnesota, January 16, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Indiana, January 23, 1867; Missouri, January 25, 1867; Rhode Island, February 7, 1867; Wisconsin, February 7, 1867; Pennsylvania, February 12, 1867; Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa, March 16, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; North Carolina, July 4, 1868 (after having rejected it on December 14, 1866); Louisiana, July 9, 1868 (after having rejected it on February 6, 1867); South Carolina, July 9, 1868 (after having rejected it on December 20, 1866).

Ratification was completed on July 9, 1868.[1]

The amendment was subsequently ratified by Alabama, July 13, 1868; Georgia, July 21, 1868 (after having rejected it on November 9, 1866); Virginia, October 8, 1869 (after having rejected it on January 9, 1867); Mississippi, January 17, 1870; Texas, February 18, 1870 (after having rejected it on October 27, 1866); Delaware, February 12, 1901 (after having rejected it on February 8, 1867); Maryland, April 4, 1959 (after having rejected it on March 23, 1867); California, May 6, 1959.

ARTICLE XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

The 15th amendment to the Constitution was proposed by the Congress on February 26, 1869. It was declared, in a proclamation of the Secretary of State, dated March 30, 1870, to have been ratified by the legislatures of 29 of the 37 States. The dates of ratification were: Nevada, March 1, 1869; West Virginia, March 3, 1869; Illinois, March 5, 1869; Louisiana, March 5, 1870; North Carolina, March 5, 1869; Michigan, March 8, 1869; Wisconsin, March 9, 1869; Maine, March 11, 1869; Massachusetts, March 12, 1869; Arkansas, March 15, 1869; South Carolina, March 15, 1869; Pennsylvania, March 25, 1869; New York, April 14, 1869 (and the legislature of the same State passed a resolution January 5, 1870, to withdraw its consent to it); Indiana, May 14, 1869; Connecticut, May 19, 1869; Florida, June 14, 1869; New Hampshire, July 1, 1869; Virginia, October 8, 1869; Vermont, October 20, 1869; Missouri, January 7, 1870; Minnesota, January 13, 1870; Mississippi, January 17, 1870; Rhode Island, January 18, 1870; Kansas, January 19, 1870; Ohio, January 27, 1870 (after having rejected it on April 30, 1869); Georgia, February 2, 1870; Iowa, February 3, 1870.

Ratification was completed on February 3, 1870, unless the withdrawal of ratification by New York was effective; in which event ratification was completed on February 17, 1870, when Nebraska ratified.

The amendment was subsequently ratified by Texas, February 18, 1870; New Jersey, February 15, 1871 (after having rejected it on February 7, 1870); Delaware, February 12, 1901 (after having rejected it on March 18, 1869); Oregon, February 24, 1959; California, April 3, 1962 (after having rejected it on January 28, 1870).

ARTICLE XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

The 16th amendment to the Constitution was proposed by the Congress on July 12, 1909. It was declared, in a proclamation of the Secretary of State, dated February 25, 1913, to have been ratified by 36 of the 48 States. The dates of ratification were: Alabama, August 10, 1909; Kentucky, February 8, 1910; South

[1] The certificate of the Secretary of State, dated July 20, 1868, was based upon the assumption of invalidity of the rescission of ratification by Ohio and New Jersey. The following day, the Congress adopted a joint resolution declaring the amendment a part of the Constitution. The Secretary of State issued a proclamation of ratification without reservation.

Carolina, February 19, 1910; Illinois, March 1, 1910; Mississippi, March 7, 1910; Oklahoma, March 10, 1910; Maryland, April 18, 1910; Georgia, August 3, 1910; Texas, August 16, 1910; Ohio, January 19, 1911; Idaho, January 20, 1911; Oregon, January 23, 1911; Washington, January 26, 1911; Montana, January 30, 1911; Indiana, January 30, 1911; California, January 31, 1911; Nevada, January 31, 1911; South Dakota, February 3, 1911; Nebraska, February 9, 1911; North Carolina, February 11, 1911; Colorado, February 15, 1911; North Dakota, February 17, 1911; Kansas, February 18, 1911; Michigan, February 23, 1911; Iowa, February 24, 1911; Missouri, March 16, 1911; Maine, March 31, 1911; Tennessee, April 7, 1911; Arkansas, April 22, 1911 (after having rejected it earlier); Wisconsin, May 26, 1911; New York, July 12, 1911; Arizona, April 6, 1912; Louisiana, June 28, 1912; Minnesota, July 11, 1912; West Virginia, January 31, 1913; New Mexico, February 3, 1913.

Ratification was completed on February 3, 1913.

The amendment was subsequently ratified by Massachusetts, March 4, 1913; New Hampshire, March 7, 1913 (after having rejected it on March 2, 1911).

The amendment was rejected by Connecticut, Rhode Island, and Utah.

ARTICLE [XVII]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

The 17th amendment to the Constitution was proposed by the Congress on May 13, 1912. It was declared, in a proclamation by the Secretary of State, dated May 31, 1913, to have been ratified by the legislatures of 36 of the 48 States. The dates of ratification were: Massachusetts, May 22, 1912; Arizona, June 3, 1912; Minnesota, June 10, 1912; New York, January 15, 1913; Kansas, January 17, 1913; Oregon, January 23, 1913; North Carolina, January 25, 1913; California, January 28, 1913; Michigan, January 28, 1913; Iowa, January 30, 1913; Montana, January 30, 1913; Idaho, January 31, 1913; West Virginia, February 4, 1913; Colorado, February 5, 1913; Nevada, February 6, 1913; Texas, February 7, 1913; Washington, February 7, 1913; Wyoming, February 8, 1913; Arkansas, February 11, 1913; Maine, February 11, 1913; Illinois, February 13, 1913; North Dakota, February 14, 1913; Wisconsin, February 18, 1913; Indiana, February 19, 1913; New Hampshire, February 19, 1913; Vermont, February 19, 1913; South Dakota, February 19, 1913; Oklahoma, February 24, 1913; Ohio, February 25, 1913; Missouri, March 7, 1913; New Mexico, March 13, 1913; Nebraska, March 14, 1913; New Jersey, March 17, 1913; Tennessee, April 1, 1913; Pennsylvania, April 2, 1913; Connecticut, April 8, 1913.

Ratification was completed on April 8, 1913.

The amendment was subsequently ratified by Louisiana, June 11, 1914.

The amendment was rejected by Utah on February 26, 1913, and by Delaware on March 18, 1913.

[ARTICLE [XVIII]

[SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

[SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

[SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.]*

*Repealed by section 1 of the twenty-first amendment.

The 18th amendment to the Constitution was proposed by the Congress on December 18, 1917. It was declared, in a proclamation by the Acting Secretary of State, dated January 29, 1919, to have been ratified by the legislatures of 36 of the 48 States. The dates of ratification were: Mississippi, January 8, 1918; Virginia, January 11, 1918; Kentucky, January 14, 1918; North Dakota, January 25, 1918; South Carolina, January 29, 1918; Maryland, February 13, 1918; Montana, February 19, 1918; Texas, March 4, 1918; Delaware, March 18, 1918; South Dakota, March 20, 1918; Massachusetts, April 2, 1918; Arizona, May 24, 1918; Georgia, June 26, 1918; Louisiana, August 3, 1918; Florida, December 3, 1918; Michigan, January 2, 1919; Ohio, January 7, 1919; Oklahoma, January 7, 1919; Idaho, January 8, 1919; Maine, January 8, 1919; West Virginia, January 9, 1919; California, January 13, 1919; Tennessee, January 13, 1919; Washington, January 13, 1919; Arkansas, January 14, 1919; Kansas, January 14, 1919; Alabama, January 15, 1919; Colorado, January 15, 1919; Iowa, January 15, 1919; New Hampshire, January 15, 1919; Oregon, January 15, 1919; Nebraska, January 16, 1919; North Carolina, January 16, 1919; Utah, January 16, 1919; Missouri, January 16, 1919; Wyoming, January 16, 1919.

Universal Declaration of Human Rights

PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore, the General Assembly proclaims—

This Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood.

Article 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3. Everyone has the right to life, liberty and security of person.

Article 4. No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6. Everyone has the right to recognition everywhere as a person before the law.

Article 7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Artcle 8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9. No one shall be subjected to arbitrary arrest, detention or exile.

Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge aaginst him.

Article 11. (1) Everyone charged with a penal offense has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

(2) No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed.

Article 12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to protection of the law against such interference or attacks.

Article 13. (1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14. (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15. (1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16. (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17. (1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Article 18. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, workship and observance.

Article 19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20. (1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

Article 21. (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22. Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23. (1) Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24. Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25. (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26. (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27. (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28. Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29. (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercises of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30. Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Adopted by the General Assembly, on 10th December 1948.

NEW YORK COUNTY LAWYERS' ASSOCIATION,
New York, N.Y. September 30, 1977.

BOTEIN, HAYS, SKLAR & HERZBERG,
New York, N.Y.

MY DEAR SIR: Enclosed please find copy of report adopted by the Committee on Federal Legislation of the New York County Lawyers' Association on H.R. 94.

Very truly yours,

RICHARD A. GIVENS, *Chairman.*

[Report No. F–5]

NEW YORK COUNTY LAWYERS' ASSOCIATION,
New York, N.Y., September 1977.

COMMITTEE ON FEDERAL LEGISLATION

REPORT ON PROPOSED "GRAND JURY REFORM ACT OF 1977"

RECOMMENDATION: APPROVAL IN PART; DISAPPROVAL IN PARTS

The "Grand Jury Reform Act of 1977" introduced by Representative Eilberg on January 4, 1977, H.R. 94, 95th Cong., 1st Sess., would make changes in grand jury procedure in a wide variety of areas, described in conjunction with our comments on each. The bill contains a number of highly desirable reforms, but in our view goes much too far in a number of respects toward making the grand jury phase a litigated proceeding comparable to the trial. We recommend that the bill be limited to a smaller number of critical reforms and more far-reaching changes be eliminated.

Recalcitrant witnesses

Section 2 of H.R. 94 would make several changes in the procedures for imposing sanctions on witnesses who refuse to supply information to a grand jury, most importantly by providing that bail must be granted in all cases unless it affirmatively appears that the appeal is frivolous or taken for delay. Appeals are to be decided pursuant to an expedited schedule and in any event no more that 30 days from the filing of such appeal.

These provisions have the salutary purpose of preventing imprisonment of a witness who has a valid objection to the contempt proceeding later vindicated on appeal after the witness has already spent time in jail. At the same time this may delay important investigations.

Delay is involved both for the filing of the appeal and for decision of the appeal. Although the bill provides for a 30 day deadline for the latter, it is unclear what would happen if the record is not completed on time, the court is still considering the issue, or if other factors beyond anyone's control lead to additional delay, as often occurs in litigation.

Perhaps a provision might be made for an immediate oral argument of the appeal before a panel of three Court of Appeals judges in a manner similar to that of an argument of a motion before a District Judge, on typewritten paper plus any typewritten transcripts necessary, together with oral argument. This would protect the right of the witness to have appellate review and also the right of the grand jury to have its investigation pursued expeditiously. Of course, the defendant should be entitled to be heard in the usual way on request, but in that case normal standards for granting bail on appeal rather than the special more favorable standards established by H.R. 94 should apply.

Witness immunity

Section 3 of H.R. 94 does away with the so-called "use-immunity" created by existing law and substitutes "transactional immunity". This means that a witness would be immunized from prosecution for any conduct relating to any matters concerning which testimony is compelled under the grant, rather than merely being protected from the use of such testimony against the witness in a subsequent criminal case (other than perjury in the giving of the testimony). Before making this change, evidence should be presented showing serious abuses of the "use-immunity" concept.

Also, H.R. 94 would place the burden on the prosecutor to show a number of additional facts not now required for immunity to be granted. One such element is that the application for an immunity order "is in accordance with existing would be adequate for the purposes of the investigation . . .", H.R. 94, pp. 8–9, lines 17–18, proposed new 18 U.S. Sec. 6003(c)(4()A). This should be an internal matter for the Department of Justice. There seems to be no good reason for injecting the courts into such a matter, especially since only the Attorney General, Deputy Attorney General, or a designated Assistant Attorney General (and not an individual United States Attorney or Assistant United Staes Attorney) would be allowed to request immunity.

Another new element to be proved would be that "a grant of immunity . . . would be adequate for the purposes of the investigation . . .", H.R. 94, pp. 8-9, proposed new 18 U.S.C. Sec. 6003(c)(4)(D). This would appear to be of more concern to the prosecutor than to the court and would not seem to be an appropriate subject for judicial inquiry.

Still another new element would be that "a summary of the evidence relating to the witness has been certified and submitted to the court". H.R. 94, p. 9, lines 3-4, proposed new 18 U.S.C. 6003(c)(4)(E). This involves the danger that derogatory information will reach unnecessary hands, increasing the danger of leaks. It also opens the possibility of litigation over the adequacy of such a summary, surely a collateral issue in any further proceedings. It could lead to side issues regarding who may have disclosure of such a summary, when and for what purposes (the defendant? the witness if indicted? the witness in connection with a challenge to the immunity order? etc.). Also, the question arises as to what happens if the summary contains incorrect information or material subject to rebuttal.

Most importantly, the purpose of the summary is unclear. Supplying evidence is only relevant if there is some determination to be made based on this evidence This is not set forth in this portion of H.R. 94. Also, the information "relating to the witness" is indefinite and in the case of some witneses might involve multivolume tomes.

The additional requirements discussed, proposed new 18 U.S.C. Sec. 6003(c)(4)(A), (D) and (E), seem to serve no important legitimate purpose, and in our view should be deleted.

Size of grand juries

Section 4 of H.R. 94 prohibits recruiting grand jurors from bystanders and also requires that two thirds and grand jury members who are present concur in any indictment. The absolute number needed to indict would be nine, out of a potential number between nine and fifteen who may serve. These reforms appear salutary.

If a prosecutor cannot obtain a two-thirds vote within the grand jury on the question of probable cause sufficient to require a trial (without a defense having been put in), it seems unrealistic to expect a unanimous verdict of guilt beyond any reasonable doubt at a trial.

Reducing the number of grand jurors would also reduce the expense involved.

Unauthorized disclosure of grand jury information

Section 5 of H.R. 94 also contains provisions seeking to discourage leaks of grand jury information, but these restrictions "shall not apply to disclosure by any person other than a person present at the grand jury proceedings." H.R. 94, p. 11, lines 15-17, proposed new 18 U.S.C. Sec. 1512(d). This would immunize a great many leaks, such as where the prosecutor might give information to the Chief of a section who then provides it to the press. This restriction should be deleted.

We prefer the overall approach to this subject taken by three committees of the Association of the Bar of the City of New York in their report "Strengthening the Rule of the Federal Grand Jury", 29 Record of the Association of the Bar of the City of New York, 646, 472-79 (May-June 1974) which creates other remedies as well as criminal sanctions.

Rights and duties of grand jurors

Section 6 of H.R. 94 sets forth areas to be covered by instructions to grand jurors and also permits persons who testify or produce information, or others, to request to testify. We support these reforms. In addition, however, the prosecutor would be required to take reasonable steps to notify any person against whom evidence is to be presented so that they can request to testify, unless the prosecutor can "prove to the satisfaction of the court that notice would result in the flight of the person, would endanger other witnesses, or would unduly delay the investigation and prosecution." H.R. 94 Sec. 6(a), p. 14, lines 13-16, proposed new 19 U.S.C., Sec. 3329(b)(2)(B). It is almost impossible to prove in advance of the event that something "would" happen. Consequently, in all probability, such proof would be rarely successful and the adverse consequences mentioned would occur more frequently, with resulting detriment to the public interest. Ancillary litigation would also result as to the adequacy of proof

of the facts justifying lack of advance notice in such cases. To avoid these problems, a certificate of good faith belief on the part of the prosecutor that the adverse consequences mentioned were likely should be sufficient. If this is deemed too easy to furnish, so that the subsection would become meaningless, it would, in our view, be better to delete the provision in question completely. (H.R. 94, p. 14, lines 6–16). This would, of course, still permit a person knowing of an investigation to request to testify.

Where someone requests to testify and the grand jury approves the request, the prosecutor "shall subpena the evidence or witnesses offered". H.R. 94, p. 15, lines 1–2, proposed new 18 U.S.C. Sec. 3329(b)(3). This seems inappropriate. If the party is volunteering to appear, no subpoena should be necessary.

Upon appearance pursuant to the subpoena, H.R. 94 further provides that the party should be permitted to testify "only upon submission of a waiver of immunity . . .". H.R. 94, p. 15, lines 6–8, proposed U.S.C. Sec. 3329(b)(4). At present there is no waiver of immunity under federal practice, and H.R. 94 creates none; on the contrary, to acquire immunity the party must be specifically ordered to testify. The language as to a "waiver of immunity" seems to refer to practice in various state courts and is inappropriate to existing or contemplated federal law.

It is also provided that the prosecutor must "advise the grand jury of the nature and existence of evidence as yet not received", which might tend to materially affect the credibility of any witness or tend to negate the guilt of any prospective defendant. H.R. 94, p. 15, lines 12–16, proposed new 18 U.S.C. Sec. 3329(c). This can be prejudicial to defendants insofar as witnesses may testify in a manner favorable to them. Hearsay evidence as to the credibility of such witnesses would be permitted—indeed required—to be transmitted to the grand jury.

The procedure of advising the jury of evidence not yet received, prior to the time of any deliberations, is also troublesome. If such evidence is going to be introduced before the grand jury prior to its voting on a prospective indictment, there would seem to be no need to mention the matter ahead of time. The concept of a "prospective defendant" also creates difficulties in that many investigations are aimed at specified events or transactions and not at preconceived "targets". This is another reason why the provision should be triggered only by deliberations on an indictment. The provision should be amended to state that the prosecutor should advise the grand jury, before it deliberates on an indictment against a prospective defendant, of any material evidence not received by the grand jury tending substantially to negate the guilt of such party or to shed doubt on the credibility of any witness who testified against the party.

H.R. 94, p. 15, lines 17–24, proposed new 18 U.S.C. Sec. 3329(d), also bans the calling of a witness who has given advance written notice of intention to exercise the privilege against self-incrimination. This is subject to abuse, because it permits a privilege not to answer specific questions to be converted into a privilege not to appear at all. There are undoubtedly non-incriminating questions that can be asked of almost any witness.

Any investigation of transactions as to which another grand jury has failed to indict would be banned by H.R. 94, p. 16, lines 1–6, proposed new 18 U.S.C. Sec. 3329(e), unless the court finds upon a proper showing that additional relevant evidence has been discovered. This provision is unrealistic as applied to any complex or continuing investigation that may necessarily involve more that one grand jury. The section could be revised to provide that an indictment shall not be recommended to a grand jury where another grand jury has failed to indict the same defendant upon substantially the same evidence.

Rights of grand jury witnesses

Section 7 of H.R. 94 provides that counsel may assist witnesses in the grand jury room, a reform also recommemnded by the three committees of the Association of the Bar of the City of New York, in their report previously cited. Counsel would be prohibited from seeking to address the jurors, however. While endorsing this addition to the rights of witnesses, we recommend that the court be expressly empowered to prevent the same attorney from representing more than one witness where the prosecution believes that a conflict of interest may exist. Otherwise counsel not independently representing a single witness but actually paid by a corporation or other party having potentially different interests might be able to obstruct an investigation.

H.R. 94 also provides (p. 21, proposed new 18 U.S.C. Sec. 3330B(b)) that witnesses be given notice of various items, including "whether his own conduct is under investigation. . . ." This may be known in many cases, since the very purpose of the inquiry is to ascertain who may be involved in a potentially illegal course of conduct. To advise someone that they are under investigation may harm their reputation or be required to be disclosed by them to third parties under various circumstances, so it can hardly be treated as an act that is necessarily harmless. The provision proceeds upon the quite common but erroneous assumption that law enforcement investigations necessarily have preconceived "targets" or "subjects". In some cases, of course, such as where an arrest has already been made, this is true; but in those instances this is known to the party involved. Subsec. (b) (4) of proposed 18 U.S.C. Sec. 3330B; (H.R. 94, p. 21, lines 17–18), should be deleted in our view.

H.R. 94, p. 22, proposed new 18 U.S.C. Sec. 3330B(d)(1)(A) requires the prosecutor to show, when a subpoena is challenged, that a primary purpose or effect would not be to secure trial testimony regarding a person already under indictment. This is an unjustified restriction of legitimate investigation of other crimes by the grand jury, in our view. One who has been indicted for crime A is immunized from investigation of crime B, simply because the "effect" of the investigation of B would also provide information relevant to A. If the information is truthful and relevant, the only benefit of such a ban is to give a more equal "sporting chance" to both parties in the litigation over A, hardly a compelling social interest. Moreover, defendants' discovery has been substantially increased in recent years, so that the one-sidedness which this section seeks to overcome has been ameliorated to some degree in any event.

The bill, (p. 23, lines 11–17, proposed new 18 U.S.C. Sec. 3330B(d)(1)(D)), also puts the burden on the prosecutor to show that a challenged subpoena is not unreasonable or oppressive, etc. It would seem better to require the movant to demonstrate that a subpoena is oppressive than to require the prosecutor to prove a negative. This same subdivision also requires a showing that testimony is not cumulative or unnecessary, which would tend to lead to premature disclosure of grand jury testimony, contrary to the purpose of Sec. 5 of the bill to discourage leaks.

Recording and availiabity of grand jury proceedings

Section 8 of H.R. 94 provides for recording of all grand jury proceedings except deliberations, including the prosecutor's explanations and recommendations. This is a salutary reform to prevent overreaching by the prosecutor and we approve it.

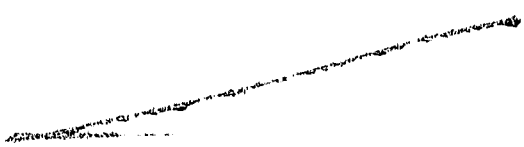
The bill goes further, however, and requires that any witness summoned to testify be entitled to inspect and copy any statement in the possession of the United States he has made relevant to the subject matter under inquiry. (p. 26, lines 11–20, proposed new 18 U.S.C. Sec. 3334). The burden of a Government-wide search of that kind as to every witness would be a major burden, and would tend to impede investigations substantially. The witness should be required to specify any particular statements to be inspected by reasonable identification, such as the agency to which made and the year or general subject, before such a search should be mandated.

Preliminary examination

Section 9 of H.R. 94 (p. 28, lines 17–23. proposed new 18 U.S.C. Sec. 3368) would require a preliminary hearing, unless waived, to be conducted in every case, even where an indictment has already been filed. This overlooks the purpose of preliminary hearings, namely to determine if the defendant should be held to answer a charge before the grand jury. What purpose the hearings after indictment, but before trial, would serve is not clear. Presumably it would act as an additional discovery device for the defense, an objective better served by other means if additional discovery not now available is necessary.

Conclusion

H.R. 94 contains a number of valuable reforms which we wholeheartedly support, including the requirement of a two-thirds vote for indictment, the right of a witness to have counsel present, the reduction of the minimum number of jurors, and provisions for additional advice to jurors as to their duties. In numerous other respects as discussed above, however, we believe that the bill as now



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drafted would impede important investigations and would further complicate and delay criminal procedure. We strongly recommend that the scope of the bill be limited to a few of the more crucial reforms and that other provisions discussed above be deleted or modified.

Respectfully submitted.

RICHARD A. GIVENS, *Chairman.*

AD HOC COMMITTEE TO INVESTIGATE THE FEDERAL GRAND JURY,
Houston, Tex., November 14, 1977.

RESPONSE TO STATEMENT OF BENJAMIN R. CIVILETTI, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Does the Grand Jury system exist for the benefit of the citizens of the United States, or does it exist as an instrument of the Department of Justice for the purpose of oppression? In answering this question, reference will be made to the statements of Mr. Civiletti by page number. His statement is attached hereto as an example of the bad faith with which the United States Department of Justice has heretofore impeded and obstructed Grand Jury Reform in the United States. I suggest that you stop here and before you continue, that you read Mr. Civiletti's comments.

1. On page 1, reference is made in the second paragraph to a concept of a system to "preserve balance." Mr. Civiletti should define that term in order to clarify his statement. Its rather ominous Orwellian tone is suspect.

2. Further on page 1, reference is made to "beyond clear constitutional rights." This phrase indicates another problem in systems of oppression. Constitutional rights have always been clear and easy to understand. The Department of Justice has over the years worked steadily to cloud constitutional doctrine by joining with a judiciary that assists in the prosecution of cases. At least, that is the case in the Southern District of Texas, Houston Division.

3. Further, on page 1, where the Grand Jury System is referred to as "a bulwark of our criminal justice system" Mr. Civiletti fails to point out that the system is to serve as a buffer between the executive and the people, not to serve as a concealed arm of the executive.

4. Mr. Civiletti on page 2 fails to mention that a citizen may take a complaint to a Grand Juror of criminal wrongdoing, and the Grand Jury may act upon that complaint. As a matter of fact, the Department of Justice in San Antonio, Texas has attempted in the past to totally obstruct that process with threats of criminal action.

5. The Grand Jury system in the Houston Division is a fraud, and since no investigation of the system has ever been done elsewhere, the Houston situation is probably the norm. Yet the Department of Justice has not commenced a criminal investigation of the judges that wrote the Houston Jury Plan, opting out for a "civil rights" investigation, so I have been told by the Department of Justice.

6. On page 3, Mr. Civiletti makes various affirmations that: (1) all testimony before the grand jury should be recorded—this translated means testimony of witnesses only, not the comments of the prosecutor; (2) all prosecutors should scrupulously preserve grand jury secrecy—which they do not.

7. On page 4, Mr. Civiletti should define "legally recognized privilege" because the Department of Justice attempts to relitigate ad infinitum these "privileges" working fervently to abolish by court decision the corresponding amendments to the U.S. Constitution, the Bill of Rights.

8. Mr. Civiletti refers to the "civic duty" of the witness (p. 4) to testify openly and freely, but on page 20, he reveals that all witnesses are potential defendants. Hence, he asserts sub silencio, that no witness should ever testify before a Grand Jury because he may incriminate himself.

9. On page 7, we discover, that the Department of Justice decides when a grant of immunity is appropriate. This is a judicial decision being made by the executive branch of the government with the complicity of the judiciary. It is totally impossible to obtain any semblance of a fair trial in such an atmosphere.

10. On page 8, in the footnote, reference is made to opposition to the witness having to consent to immunity, classifying the associates of accused wrongdoers as somehow being guilty of a crime. This is true, of course, in the exclusive

sense when one recalls the present residence of the ex attorney general of the U.S. John Mitchell; I suppose Mr. Civiletti was an associate and colleague of Mr. Mitchell, and in that sense he is correct. But in any other case, in case Mr. Civiletti is unaware, in our society, you are innocent until proven guilty. Mr. Civiletti is laboring under the misapprehension that an indictment means the party is guilty and that the trial is merely a technicality where the judge certifies the position of the Department of Justice.

11. It would not be surprising for Mr. Civiletti to be lobbying in favor of "successive Grand Jury investigations" or if you can't get him the first time, try, try again until you do. (See page 11)

12. On page 12, we discover that it is the duty of the prosecutor to present exculpatory evidence. How Nice! But we have already seen that Mr. Civiletti would not have any record of that portion of the proceeding, so we can just take his word for it. But if he was an associate of John Mitchell we couldn't do that either, by his own standards.

13. On page 12, we find the words of art "subject or target of an investigation." This language is a strong indication of what type of criminal justice system Mr. Civiletti endorses. If Mr. Civiletti were a Mafioso, he would no doubt have the same opinion that he does in this statement.

14. On page 13, he refers to the U.S. Attorneys Manual. The committee would do well to demand the 4 pages in that manual that deal with the grand jury and that are "secret" to ascertain why the Department of Justice has a "police statist" such as Mr. Civiletti lobbying against Grand Jury Reform.

15. On page 14, more of Mr. Civiletti's justice is seen where he believes it fair to have secret investigations of citizens without notifying them so that a knock on the door in the dark of night can be expected.

16. Mr. Civiletti is not the only villain in the section on allowing counsel for witnesses before the grand jury. Some fair minded bureaucrat has asserted in the proposed measure for the judge to be able to interfere with the witness' choice of counsel. Again, the Bill of Rights is ignored. However, Mr. Civiletti after stating on page 20, that every witness is a potential defendant, does not want the witness' rights to be protected when he appears before the grand jury. He then attempts to "soft-peddle" the indictment process; but he is well-aware, that the general public regards an indictment as a conviction, so why shouldn't a witness be able to invoke all of his rights? The issue in question is his liberty and that is important enough to warrant protection. However, "police-statists" down through the ages, just like Mr. Civiletti have similarly opposed fair procedures.

17. He mentions on page 18, that indigents will be appointed counsel, but middle class Americans will not have counsel because they can not afford it. That is true, but should be fully accepted by Mr. Civiletti, because through his efforts over the years, the middle class has had only one right since WWII, that is to pay for the fraudulent processes that have been promulgated by the bureaucracy.

18. On page 23, at the bottom of the page is found the following statement: the government does not "generally" have any motivation for causing witnesses any hardship. The committee should query Mr. Civiletti as when does the govern- have motivation for causing witnesses hardship.

19. On page 24, Mr. Civiletti whines about the inconvenience that would be caused by witnesses exercising their constitutional rights in a district other than that from which the grand jury processes emanates. With the massive resources of the federal government pitted against a citizen, it seems ludicrous for the government to whine about inconvenience. The problem again, is that the only inconvenience caused would be that created for the "police statists" by the Bill of Rights.

20. In law, speed does not denote justice. Arrest and immediate imprisonment without due process or any judicial process that protects the rights of the accused is not justice. On page 25, reference is made in the last line as follows: the convenience of witnesses must yield to a greater societal good. Did Mr. Civiletti study law in Moscow? Obviously, if one labors for the greater glorification of the state, the fate of the citizen, individually is irrelevant. As Mr. Civiletti lobbys against Grand Jury Reform, it is interesting to see his motivation.

21. The only way that the Grand Jury system can be protected for the people, not for the Department of Justice's police statism, is for the entire proceeding

to be recorded and transcribed. Otherwise, we only have the word of individuals who apparently are unhappy with our Bill of Rights, and whose legal beliefs do not conform to the Constitution they are sworn to uphold and defend.

22. On page 27, Mr. Civiletti fears increased litigation over the grand jury. With what I have uncovered and am uncovering in Texas, this litigation is virtually guaranteed whether Mr. Civiletti's efforts at police statism lobbying are successful or not. We the sovereign citizens do have the right to defend our constitutional rights.

23. In passing, one other benefit of total recording and transcription of the grand jury proceedings would be to determine if the grand jury knows, in fact, what it is doing while it is deliberating. After all, the typical grand juror in Houston Division is a white housewife, whose husband is a blue collar worker for a multinational corporation. It would engender in these individuals that they bear a responsibility for what they are doing. The system would be assisted positively thereby.

24. A preliminary examination after indictment would serve as a check on the grand jury as mentioned above, which is at best, unreliable.

25. In Appendix I, a special attorney for the Grand Jury is discussed. Mr. Civiletti fears this because, he does not want a citizen's grand jury to ever have the power of independent investigation of federal bureaucrats. It would be sound to have such a provision specifically spelled out in such a statute. In Houston Division, we have had and continue to have much difficulties with the court personnel and judges who do not want the people to exercise their rights in court. Even 28 USC 1654 is looked upon with disfavor in this district. There is the need of a careful investigation of the court system in this Division which, as I have stated is probably the norm in the US generally.

26. On page 6 of the Appendix I. Mr. Civiletti opposes an attorney representing more than one grand jury witness. This could mean greater expense and inconvenience to the witness. However, Mr. Civiletti is unconcerned with this aspect since he has a knowledge of the law and an increasing tax-funded salary, he does not have the problems that the middle class working man would have, and is hence oblivious to the problem. He also indicates on page 7, that the witness should fear his own attorney. I believe the real fear should grow out of a discovery by the people that the Department of Justice is lobbying in favor of police statism before congressional committees. Further, witnesses should always have counsel present when they deal with the Grand Jury because, all witnesses are potential defendants in the system as it stands now.

CONCLUSION

I strongly object to the Department of Justice obstructing the legislative process in a manner to impede Grand Jury Reform. I object to the Subcommittee herein addressed being intimidated by a mere bureaucrat allowing the people in the meantime to twist in the wind.

It seems to me, that you people on the committee as well as your staff should read the Bill of Rights, excluding from your readings your petty greedy interests that place in jeopardy the freedom of the people of the United States.

WILLIAM R. PABST, *Chairman.*

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MISC. NO. 77-0171

IN RE: POSSIBLE VIOLATIONS OF 18 U.S.C. §§ 371, 641, 1503

ARTHUR J. MAREN, WITNESS

MEMORANDUM OF LAW IN OPPOSITION TO GOVERNMENT'S REQUEST FOR ORDER OF CONFINEMENT PURSUANT TO 18 U.S.C. § 1826

PRELIMINARY STATEMENT

This memorandum and the accompany affidavits are submitted in opposition to the government's request for sanctions against Reverend Arthur Maren, pursuant to 18 U.S.C. § 1826. Reverend Maren, called as a witness before a grand jury on September 8, 1977, refused to answer three questions on the

grounds outlined below. The government sought an immediate order of confinement. This Court rejected the government's request and set a hearing on imposing sanctions for September 14, 1977 and requested briefing by September 12, 1977.

STATEMENT OF THE CASE

This motion for sanctions arises in the context of a continuous, acrimonious dispute between the Church of Scientology,[1] a recognized religious institution,[2] and the United States government. Among the points of contention between the Church and the government in the past have been: (1) an effort by the Food and Drug Administration (hereinafter referred to as "FDA") to seize books and other materials of the Church (Hubbard Electrometers or "E-meters") on the grounds that they constituted fraudulent medical devices, an effort eventually rejected by the Court of Appeals in *Founding Church of Scientology v. United States*, 133 App. D.C. 229, 409 F.2d 1146 (D.C. Cir. 1969) and by this Court in *United States v. Article of Device*, 333 F. Supp. 357 (D.D.C. 1971); (2) continuous contention at an earlier time concerning the religious and charitable character of the Church involving I.R.S., I.N.S., the Department of Labor and other federal agencies; (3) many hundreds of FOIA requests and suits brought by the Church to determine the extent of government surveillance of the Church and its members; and harrassment of the Church by the dissemination of false information; (4) an action against the U.S. Customs Service for illegal seizure of interoffice correspondence of the Church, including attorney-client communications, *Church of Scientology of California v. Simons*, Civil Action No. 76-2160 (C.D.Cal. 1976); and (5) a multi-million dollar damage suit brought by the Church against the F.B.I., the C.I.A., N.S.A. and others for unlawful infiltration, surveillance and harassment. See, *Founding Church of Scientology of Washington, D.C., Inc. v. Kelley, et al.*, Civil Action No. 77-0175 (D.D.C. 1977).

Prior proceedings in this action are described in the opinion of the Court of Appeals for the District of Columbia, *In re Possible Violations of 18 U.S.C. §§ 371, 641, 1503, Arthur Maren, Appellant*, Docket No. 77-1704, September 2, 1977. Also relevant is this Court's decision *In re Search Warrant dated July 4, 1977 for Premises at 2125 S Street, N.W.*, Misc. No. 77-0151, D.D.C. Memorandum and Order, dated July 27, 1977. This Court held that a warrant authorizing the search for all evidence of conspiracy in a predawn raid by F.B.I. agents on the Church of Scientology (using buzzsaws, sledgehammers and crowbars) was invalid since it constituted a general warrant.

Following the Court of Appeals decision on September 2, 1977, Reverend Maren sought release from the original order of confinement. He appeared before Judge John C. Pratt and testified that he would no longer rely on any First Amendment right to resist questioning before the grand jury, nor would he raise any separation of powers argument. But he would assert his Fifth Amendment right against self-incrimination. The government objected to his release and demanded that he be left in jail, claiming that only answering the questions would purge him of civil contempt. Judge Pratt refused to release Reverend Maren on bail, pending his reappearance before the grand jury. An application for bail to the Court of Appeals was also denied on September 6, 1977.

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[1] The Church of Scientology is a non-profit religious organization with six million practitioners world-wide and one million in the United States. Each individual Church of Scientology is individually incorporated under the laws of the state in which it is located. Each Church corporation has its own local set of Officers and Directors (Trustees) which are in charge of managing the Church, as stated in the By-laws. The individual Churches do, however, recognize the Church of Scientology of California as the "Mother" Church and accept advice on problems of administration and pastoral counselling. The Founding Church of Scientology of Washington, D.C. also has a pre-eminent position because it was the original church established by the founder of the Church, L. Ron Hubbard. The two "raids" described below were directed at the California and Washington headquarters of the Church. The basic tenets of Scientology are outlined in Hubbard, Modern Management Technology Defined (1976) at 461: "a religion in the oldest sense of the word, a study of wisdom . . . a study of man as a spirit in his relationship to life and the physical universe . . . a spiritual and religious guide intended to make persons more aware of themselves as spiritual beings restoring respect for self and others . . . [Scientology] assumes that every man can be more able than he is and then goes ahead with very precise techniques to make him so." See *Founding Church of Scientology v. United States*, 133 App. D.C. 229, 409 F.2d 1146, 1151-52 (D.C. Cir. 1969).

[2] This Court has held that the Founding Church of Scientology was "a bona fide religion" and that the auditing practice of Scientology and accounts of it are "religious doctrines." See *Founding Church of Scientology v. United States*, 133 App. D.C. 229, 409 F.2d 1146, 1162 (D.C. Cir. 1969). "The Church is a religious institution protected by the First Amendment." *United States v. Article of Device*, 333 F. Supp. 357, 363 (D.D.C. 1971).

On September 8, 1977 Reverend Maren reappeared before the grand jury. He was asked the same three questions previously put to him:

1. Do you know Gerald Wolfe?

2. Mr. Maren, between June of 1976 and June of 1977, did you at any time discuss with anyone plans for Gerald Wolfe to develop an untrue cover story with regard to his entry into the United States Courthouse on June 11th, 1976 for him to tell, under oath, before a Grand Jury of the United States District Court here in the District of Columbia?

3. At any time prior to November 1974 did you participate in discussions with anyone in the nature of plans to enter a conference room in the building occupied by the Internal Revenue Service here in Washington for the purpose of planting a listening device with which to monitor conversations of officials of the Internal Revenue Service pertaining to applications of the Church of Scientology for status as a tax-exempt organization?

Subsequent to November 1st, 1974 did you ever read or discuss a transcript of discussions of officials of the Internal Revenue Service come at by means of the bugging of a conference room in the building occupied by the Internal Revenue Service?

He refused to answer the questions on self-incrimination grounds under the Fifth Amendment. The government again took the position that invoking the Fifth Amendment did not purge Reverend Maren of his contempt and he must be left in jail. Counsel then went to this Court's chambers to argue the point.

When this Court indicated its belief that Reverend Maren still could assert his Fifth Amendment rights, the government at 12:30 P.M., September 8, 1977 told counsel and the Court for the first time that it would seek an immediate immunity order for Reverend Maren pursuant to 18 U.S.C. § 6002.

The immunity order was signed at 3:00 P.M. that same day, September 8, 1977. At 3:30 P.M. Reverend Maren was ordered to reappear before the grand jury. He reappeared before the grand jury, explained that he was not sure of the implications of the grant of immunity. He asked for additional time to consult with his lawyer. The government refused his request and urged the grand jury to press the questions again.

The three questions were again put to Reverend Maren. He refused to answer on three separate grounds:

1. the questions were based in part on illegal electronic surveillance of Reverend Maren or on premises in which he had a proprietary interest;

2. Reverend Maren's Sixth Amendment rights were violated since he did not have adequate time to consult with his attorneys following the sudden grant of immunity;

3. the subpoena requiring his appearance before the grand jury was served improperly since service followed an illegal entry.

The government sought an immediate hearing on civil contempt, requesting that Reverend Maren be returned forthwith to jail. This Court rejected their request, setting September 14, 1977 as the hearing date.

This memorandum will discuss the first and second grounds asserted by Reverend Maren as a basis for his refusal to testify.[3]

POINT I

THE GOVERNMENT MUST PROPERLY RESPOND TO A CLAIM OF ILLEGAL ELECTRONICS SURVEILLANCE

Reverend Maren has been called before the grand jury as a witness and has refused to answer certain questions he believes to be the fruit of illegal wiretaps carried on against him by the government. He has stated under oath before the grand jury that he believed the questions asked were based on illegal electronic surveillance. He has submitted affidavits outlining the specific factual grounds of his belief that he has been under surveillance.

In the Affidavit of Arthur Maren, Exhibit A, Reverend Maren lists various telephone and telex numbers believed by him to be the subject of electronic surveillance. In his affidavit, at paragraph 5, he states, "I am given to believe that said phone numbers have been subjected to illegal electronic surveillance

[3] The third ground, alleging the insufficiency of the subpoena served on Reverend Maren, is not discussed and has been dropped. See discussion at 11, *infra*.

from the abnormal noises, interruptions, and background voices that I have heard while engaged in conversations on these lines. My knowledge that the National Security Agency is withholding from the Church files requested under the Freedom of Information Act and pertaining to the Church, leads me to believe that the telex lines on which I send and receive communications may likewise be subjected to such surveillance."

In Exhibit B and C, the affidavits of Eunice Ford and William Carpenter, two Church staff members describe the activities of FBI agents who had broken into the "switchboard room," that office of the Church of Scientology Cedars complex which houses the telephone switching equipment for the entire complex of Church buildings. Further, the likelihood of misconduct by FBI agents with regard to electronic surveillance is demonstrated by the fact that the "switchboard room" in question was not within the scope of the search warrant.

The government has not affirmed or denied these allegations, yet persists with its challenged questioning, and seeks to impose sanctions upon the witness for failure to answer.

The right of a grand jury witness to refuse to answer questions based on illegal electronic surveillance is certain. Section 2515 of Title 18 states that

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communicaton 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 body, legislative committee or other authority of the United States, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

Under *Gelbard v. United States*, 408 U.S. 41 (1972), a grand jury witness may involke 18 U.S.C. § 2515 to refuse to answer questions put to him and to raise the provision as a defense to a contempt charge under 28 U.S.C. § 1826(a). In *In Re Evans*, 146 App. D.C. 310, 452 F. 2d 1239 (D.C. Cir. 1971), *cert. den.*, 408 U.S. 930 (1972), this Circuit held that such a witness need not wait to be held in contempt before challenging the legality of questioning and invoking the protection of § 2515.

§ 3504. Litigation concerning sources of evidence.

(*a*) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

If the government wishes to pursue its questioning following the witness' claim of illegal interception of communications, it must meet its burden under 18 U.S.C. § 3504(a)(1) of affirming or denying the allegations of wiretapping. As the Court of Appeals said in *Evans*, 452 F.2d at 1247:

"Section 3504(a)(1) of title 18 provides that when a party aggrieved by an unlawful wiretap moves for the suppression of evidence on the basis of the alleged interception, the opponent of the claim must affirm or deny the allegation. Since § 3504(a)(1) is triggered, in our view, by the mere assertion that unlawful wiretapping has been used against a party, the government must make the next move if it still wishes to interrogate these appellants."

The government's burden to come forward under 18 U.S.C. § 3504(a)(1) is triggered, by the terms of the statute, by the assertion of a "claim" that unlawful interception of communications has occurred. The claim can be asserted orally, as initially done here, see *In Re Grumbles*, 453 F.2d 119 (3d Cir. 1971). Its assertion can even be inferred from a simple request for disclosure of information regarding government wiretaps. *United States* v. *Lang*, 422 F. Supp. 400 (E. D. Wis. 1976). An assertion of illegal wiretapping need not be made with great specificity, for the very effectiveness of electronic surveillance depends on its object being unaware of its existence. *In re Evans*, 452 F.2d at 1249. *See United States* v. *Vielguth*, 502 F.2d 1257 (9th Cir. 1975). In the face of such a claim, the government must cease its interrogation if it does not meet its burden. *Evans*, 452 F.2d at 1247.

That burden cannot be met by a mere oral denial. The Second Circuit has recently stated: "the government has been held to a high standard of completeness in responding to such a request." *United States* v. *Yanagita*, 552 F.2d 940, 944 (2d Cir. 1977).

Reverend Maren's allegations here meet a more exacting standard than that articulated in *Evans*, and require more than a bald denial by the government. In *United States* v. *Alter*, 482 F.2d 1016 (9th Cir. 1973), cited in *United States* v. *McCord*, 509 F.2d 334, 340 n.5 (D.C. Cir. 1974), the Ninth Circuit held that affidavits showing good cause to believe illegal surveillance had occurred required the government to file a "responsive, factual, unambiguous, and unequivocal affidavit." 482 F.2d at 1027. The affidavit submitted by the government in *Alter* was held conclusory and insufficient to squarely "affirm or deny" the charges of surveillance because it supplied no information whatever regarding the inquiries made to determine whether surveillance had occurred, the persons interrogated, whether all sources of information were exhausted, or which of the several allegations had been investigated. 482 F.2d at 1027. In the *Evans* case, the Court of Appeals indicated that with the type of showing made here, the government "will have to search their records for evidence of a wiretap if they wish to pursue the interrogation of these witnesses." 452 F.2d at 1247. In *In Re Tierney*, 465 F.2d 806 (5th Cir. 1972) the government was required to present its testimony of denial under oath, subject to cross examination. Cf. *Beverly* v. *United States*, 468 F.2d 732 (5th Cir. 1972).

For these reasons, the witness demands that the government be required either to cease its questioning, or to come forward with information sufficiently specific to meet the witness' allegations, with the witness being afforded full opportunity to subject any denial by the government to cross examination.[4]

The government does not meet its burden by claiming there was an independent basis for the questioning. The statute, 18 U.S.C. § 3504 states that "Upon a claim by a party aggrieved . . . the opponent of the claim shall affirm or deny the occurrence of the unlawful acts." The Supreme Court said in *Gelbard:* "Upon such a claim by a grand jury witness, The Government, as the 'opponent of the claim', is required under § 3504(a)(1) to 'affirm or deny the occurrence of the alleged' illegal interception." 408 U.S. at 54–55. The Supreme Court quoted from the legislative history of the Act which made clear that the only appropriate response to the claim is " 'to affirm or deny the occurrence of the alleged invasion of the defendant's rights.' " *Ibid.* at 56. When a far stronger factual showing is made, such as here, the government's burden is far higher than a mere denial, as noted above. In none of the cases cited did the courts indicate that the government's statutory burden would be met by not answering the claim but only by showing another basis for the questioning. As this Circuit said in *Evans*, 452 F.2d at 1246–47, "If the government wishes to pursue the examination of these witnesses it must be prepared to follow the procedures prescribed by Congress for resolving disputes over the alleged use of unlawful wiretapping."

Finally it is only after the government has met its burdens that the questions may again be put to the witness. The Second Circuit has said that the grand jury "may recall a witness after his § 3504 request has been answered." *United States* v. *Yanagita* 552 F.2d 940, 943–44 (2d Cir. 1977).

POINT II

REVEREND MAREN'S SIXTH AMENDMENT RIGHTS WERE VIOLATED

The undisputed sequence of events which occurred on Thursday, September 8, 1977 shows that Reverend Maren's Sixth Amendment right to assistance of counsel was seriously jeopardized. As noted above, at 10:15 A.M. Revend Maren's counsel asked the Assistant United States Attorney whether there had been any request for a grant of immunity. The assistant refused to answer that question. The witness then went before the grand jury at 10:45 A.M. and pleaded the Fifth Amendment to the three questions put to him. It was Reverend Maren's claim that invoking the Fifth Amendment purged him of contempt and therefore triggered his release. The government attorney told Reverend Maren's counsel that he did not consider the Fifth Amendment claim sufficient. Counsel then went to this Court's chambers for a ruling. Due to a delay in bringing Reverend Maren to chambers, counsel did not begin to argue the point until 11:40 A.M. This Court immediately indicated its agreement with Reverend Maren's position. During the course of the argument, the government first disclosed that it was authorized to,

[4] If the government admits that it engaged in a court-ordered Title III wiretap, the procedures to be followed are outlined in *In re proceedings to Enforce Grand Jury Subpoenas*, 430 F. Supp. 1701 (E. D. Pa. 1977); *In re Lochiato*, 499 F.2d 803 (1st Cir. 1974).

and would, seek a grant of immunity for Reverend Maren pursuant to 18 U.S.C. § 6002 and § 6003. After lengthy discussion, counsel left this Court's chambers at 1:00 P.M. and was told to return to Court at 2:00 P.M. for a hearing on the grant of immunity. Counsel and the witness briefly discussed the implications of what had occurred. Counsel had to examine the immunity papers and briefly research their validity. At 2:00 P.M. counsel returned to Court to argue whether immunity should be granted. After some discussion and argument, this Court signed the immunity order at approximately 3:00 P.M.

Reverend Maren was then directed to appear before the grand jury at 3:30 P.M. Once again he was afforded only a brief opportunity to discuss the implications of the grant immunity. Shortly after 3:30 P.M. Reverend Maren was summoned to appear before the grand jury. He was asked the three questions noted above. He refused to answer them in part on the ground that he had not had an opportunity to consult adequately with his attorneys about the implications of what had occurred that day.[5]

The Sixth Amendment right to counsel is not an empty formalism, requiring only that a person be able to retain counsel and have him at his side. Counsel and his client must have a meaningful opportunity to discuss legal problems and sufficient time to discuss the basic principles of law involved and to plan alternative courses of action. As the Supreme Court said in the leading case of *Powell* v. *Alabama*, 287 U.S. 45, 59 (1932): "a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense." In the recent Supreme Court case of *Geders* v. *United States*, 425 U.S. 80 (1976) a conviction was reversed because the trial judge had ordered the defendant not to consult with his counsel about anything during a 17-hour overnight recess in the trial between his direct and cross-examination. The Supreme Court unanimously held that the order prohibiting consultation violated his Sixth Amendment rights.

Similarly in this case, a witness before a grand jury has the sixth Amendment right to consult with his attorney. *United States* v. *Capaldo*, 402 F.2d 821, 824 (2d Cir. 1968); *United States* v. *George*, 444 F.2d 310, 315 (6th Cir. 1971); *United States* v. *Duncan*, 456 F.2d 1401, 1407 (9th Cir. 1972); *United States* v. *De Sapio*, 299 F. Supp. 436, 440 (S.D.N.Y. 1969). That right must be meaningful one and there must be "sufficient time to advise with counsel," *Powell*, 278 U.S. at 59. For the government to mask the fact that it was seeking a grant of immunity, and then suddenly to spring immunity on the witness, without giving him an opportunity to discuss this new step with his counsel, is to violate the Sixth Amendment right. *Geders*, *supra*, *see* e.g. *United States* v. *Knight*, 443 F.2d 174 (6th Cir. 1971).

Point III

THE QUESTIONING OF REVEREND MAREN VIOLATED HIS FIRST AMENDMENT RIGHTS

Although the result is preordained, Reverend Maren again presses First Amendment claims rejected by the Court of Appeals in *In re Possible Violations of 18 U.S.C. § 371 etc.* He does so merely to preserve the point for possible later appeals.

CONCLUSION

For the reasons outlined above, the witness, Reverend Arthur Maren, respectfully requests that no sanctions be imposed upon him pursuant to 18 U.S.C. § 1826.

Respectfully submitted.

LEON FRIEDMAN,
Hofstra University School of Law,
Hempstead, N.Y.
PHILIP HIRSCHKOP.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was hand delivered to the Office of the U.S. Attorney, room 3800, U.S. Courthouse, Washington, D.C., this 12th day of September, 1977.

PHILIP J. HIRSCHKOP.

[5] In the confusion of the situation, Reverend Maren asserted a ground for refusing to answer which, on further reflection, he has decided to abandon.

EXHIBIT A

AFFIDAVIT OF ARTHUR MAREN

State of California, County of Los Angeles

Arthur J. Maren, being first duly sworn, deposes and states:

1. I am a member of the Church of Scientology. For the past five years I have been employed by the Church as a public relations chief.

2. I believe that I was an object of illegal electronic surveillance in that my conversations were unlawfully overheard, or telephones over which I had proprietary interests were subjected to illegal surveillance by electronic, mechanical, or other means.

3. The telephones include the following numbers, and each number has been in effect since July, 1976 or before: (213) 464–0873 (since Mar. 77, previous number (213) 386-1580), 464–4055, 464–0431, 464–5192, 464–3969, 662–7715, 464–0808.

I have further reason to believe that the following telex numbers used by myself and my staff have been subjected to unlawful electronic surveillance: 940297, 892691, 235768, 684459, 127812, 340667, 447623, 677352, 101–85195212, 52695, 52781.

4. I believe that lawyer-client conversations may also have been overheard as a result of such illegal electronic surveillance. My attorneys, and their phone numbers, have been: Daniel Sheehan, (202) 347–6100; Phillip Hirschkop, (703) 836–5555, (703) 836–6595; Leon Friedman, (212) 831–0548.

5. I am given to believe that said phone numbers have been subjected to illegal electronic surveillance from the abnormal noises, interruptions, and background voices that I have heard while engaged in conversation on these lines. My knowledge that the National Security Agency is withholding from the Church files requested under the Freedom Of Information Act and pertaining to the Church, leads me to believe that the telex lines on which I send and receive communications, may likewise be subjected to such surveillance.

I declare under penalty of perjury that the foregoing is true and correct.

ARTHUR D. MAREN.

Subscribed to and sworn to before me this 7th day of September, 1977.

ELLEN P. LANSKY,
Notary Public.

EXHIBIT B

AFFIDAVIT OF EUNICE FORD

State of California, County of Los Angeles, ss.

Eunice Ford, being first duly sworn, deposes and says the following:

1. I have personal knowledge of the facts stated herein, and if called as a witness to testify thereon, could do so of my own personal knowledge.

2. I am a member of the Church of Scientology and for the past 17 years have been employed by the Church of Scientology.

3. On July 8, 1977, I entered the building of my employ at 1404 North Catalina, an area of the Church of Scientology known as the Cedars-complex.

4. At the gate of the entranceway I was asked to identify myself and told that there was some "trouble". I did so identify myself and was told that there was a search going on for Government documents.

5. When I went to my office which is an adjoining office to the "switchboard room" of the Cedars complex I saw that both the entranceway door and the door leading to the switchboard were smashed up badly. Both doors had cracks and holes and both doors were open. I then asked another staff member of the Church who was also in the office what had happened. He informed me that the FBI agents had done the damage.

6. I then looked around the office and found that drawers were open in the file cabinets both in the main office and in the smaller adjoining office and in the switchboard room itself which houses the communications equipment of the Cedars-complex. Files, papers, books and plans were rearranged and some of the papers were still on the desks out of which these papers had come. One of the desks, which is usually very neat was now cluttered with papers which were messed around.

7. I then went to work and while I was working I would look out of the window every once in a while to see what was going on outside. At one point while

I was looking out the window, two FBI agents entered the room and I did not become aware of them until I turned around. The two men were wearing identifying badges which stated "FBI" and one man had a camera.

8. One of the agents started taking pictures while another agent was looking around. I asked why, if they were supposedly looking for government documents, were they looking in the phone room. The agent taking pictures told me that he had nothing to do with it, that he was just taking pictures.

9. The agent with the camera then entered the smaller office adjoining the phone room and closed the door.

10. After a while, another FBI agent entered the room and looked around for a while.

11. While I was in the office with two of the FBI agents I saw them go through and rifle papers in the main office.

I declare, under penalty of perjury, that the foregoing is true and correct.

EUNICE FORD,

Subscribed and sworn to before me this 7th day of September, 1977.

BONNIE M. GANG,
Notary Public.

EXHIBIT C

AFFIDAVIT OF WILLIAM CARPENTER

State of California, County of Los Angeles, ss.

William Carpenter, being first duly sworn, deposes and says the following:

1. I have personal knowledge of the facts stated herein, and if called as a witness to testify thereon, could do so of my own personal knowledge.

2. I am a member of the Church of Scientology and for the last month I have been responsible for the telephones, telexes and intercoms for the Cedars-complex location of the Church at 1404 North Catalina, Los Angeles.

3. On July 8, 1977, at approximately 7:15 A.M. I was informed that FBI agents had entered the building and that damage had been done. I was told that I was needed to help clean up the area. I then went downstairs to get a broom from my office which is located in the switchboard room of the complex. I noticed at that time that the doors in the phone room—one leading to the main office in the room and the other leading to the office housing the phone and intercom equipment—were ajar.

4. When I came back to the phone room I noticed also that the front door and the door leading to the phone equipment were both smashed up, that both doors had been struck with heavy blows and utensils. The entire door lock of the outside door was ripped loose and was laying on the floor inside the room. The second door which leads to the actual phone room where all the phone and intercom equipment is installed and stored was also smashed in with the door knob actually sitting inside the broken door.

5. The room which houses the equipment had been rifled in that phone boxes were opened and the tool cabinet doors were opened. Papers had also been shuffled on my Assistant's desk.

6. Another staff member of the Church of Scientology who was also present at the time the FBI agents were in the phone area told me that she had seen them going through papers on my desk.

I declare, under penalty of perjury, that the foregoing is true and correct.

WILLIAM CARPENTER.

Subscribed and sworn to before me this 11th day of September, 1977.

BONNIE M. GANG,
Notary Public.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION,
Washington, D.C., November 10, 1977.

President JIMMY CARTER,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: Except for a brief period during legal appeals, the Rev. Arthur Maren of the Church of Scientology has been in prison in Washington, D.C. since July 29. He has yet to be charged, tried or convicted of committing a crime.

Rev. Maren is the latest victim of our federal grand jury system. Because he refused to answer grand jury questions that he felt violated his religious confidentiality, he has been found in contempt and jailed, and because he has made it abundantly clear that he will never answer those questions, Rev. Maren faces the prospect of unlimited incarceration. We are hereby protesting this outrageous violation of Rev. Maren's Constitutional rights.

Our union is very familiar with the use and abuse of the grand jury system, and we have consistently opposed legislation which allows the U.S. Attorney General to "immunize" away Americans' fundamental Fifth Amendment right to silence. The immunity statute that has been used to maneuver Rev. Maren behind bars has always been justified as a weapon against organized crime since its 1970 passage. In practice, however, it has been those with unorthodox religious or political views against whom the practice of forcing immunity onto silent witnesses has been most "effective." Indeed, we have yet to see the government convict one prominent mobster on the basis of testimony forcibly immunized out of an otherwise uncooperative witness.

Rev. Maren's incarceration is all the more shocking because it is not unique. At least seven other political dissidents or religious workers are now in jail for refusing to answer grand jury questions or provide grand juries information. Like Rev. Maren, none of them has even been charged with a crime.

We consider the continued incarceration of Rev. Maren and his fellow prisoners of conscience an insult to the principles of due process and political and religious liberty that animated our nation 200 years ago.

We urge an end to such confinements and a thorough-going reform of the grand jury system that makes them possible.

Enclosed is testimony of our union delivered before the House Judiciary subcommittee studying grand jury reform. Asst. Atty. Gen. Benjamin Civiletti also testified before the members of this subcommittee. He assured them that the Department of Justice is constantly on the look-out for and eager to prevent abuses of the grand jury system.

The case of Rev. Maren demonstrates that this is clearly not the case.

Mr. President, we urge you to take appropriate action. People like Rev. Maren should not be made to suffer any longer.

Thank you for your consideration.

Sincerely,

PATRICK TOBIN,
WASHINGTON REPRESENTATIVE,
INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION.

Enclosure.

DEPARTMENT OF JUSTICE,
Washington, November 25, 1977.

Hon. JOSHUA EILBERG,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN EILBERG: I received a letter dated September 13, 1977, from Messrs. Leon Friedman and Philip Hirschkop, alleging "serious due process problems" and "questionable activities" with respect to procedures used by the United States Attorney for the District of Columbia in having their client, Arthur Maren, a grand jury witness, granted an immunity from prosecution. This letter carried a notation that a copy was being sent to you, evidently because of your interest in grand jury reform.

The United States Attorney, Mr. Silbert, has furnished the Criminal Division a comprehensive report on the Maren case, after a review of which I have concluded that there is no merit to the complaints of Mr. Friedman and Mr. Hirschkop. For your information, I am enclosing a copy of Mr. Silbert's letter which, in essential respects, refutes the version of the facts contained in Mr. Friedman's and Mr. Hirschkop's letter.

With respect to one of the matters complained of, special attention should be paid to the circumstances surrounding the exercise of discretion by Judge Bryant in granting Mr. Maren a requested delay. Mr. Maren's counsel had inaccurately represented to Judge Bryant that a certain outdated case held that an application for immunity under 18 U.S.C. 6002–6003 required notice and hearing,[1] and had

[1] That is now the law. *United States* v. *Leyva*, 531 F.2d 774 (C.A. 5, 1975).

furnished Judge Bryant a copy of the last page of the case. Judge Bryant took a short recess to read the entire case and returned to court to rebuke counsel, saying: "Now I know why you gave me just that one page instead of the whole case." Counsel, in apologizing, indicated he had exhausted his "bag of tricks." (See pp. 33–34, 37, of the memorandum accompanying Mr. Silbert's letter.) Notwithstanding, Judge Bryant eventually granted a delay out of an abundance of caution and solicitude for the interests of the witness [not, as represented by Messrs. Friedman and Hirschkop in their letter to me, because the Judge agreed with their legal position.]

As regards another of the incidents complained of, fully two months into the proceedings Mr. Maren's counsel asked for a continuance, assertedly to inquire into the scope of the use immunity statute and to determine whether there could be any defect in the impaneling of the grand jury. Judge Bryant properly refused to grant another continuance at this juncture (pp. 34–35 of Mr. Silbert's memorandum). By that time events had made plain, both to the court and to the government, that Mr. Maren's counsel were seeking, through dilatory tactics, to delay the grand jury proceedings for as long a period of time as the Judge would permit, when, in fact, despite former representations to the contrary, their witness had no intention of ever answering the grand jury's legitimate questions. Judge Bryant's comments in this regard—to the effect that the court did not want to be trifled with and that the grand jury had been interrupted "to the outer limits"—are set out at pages 42–43 of Mr. Silbert's memorandum.

Mr. Friedman and Mr. Hirschkop have also contended in their letter to me that a witness should be allowed to speak to the grand jury. The record on this score speaks for itself. Mr. Maren, in fact, was afforded three opportunities to address the grand jurors and did address them on one occasion.

Mr. Silbert's report also illustrates some important points in connection with your Subcommittee's consideration of H.R. 94.

You have expressed concern, as have we, about conflicts of interest in attorneys' representation of witnesses before grand juries. Note should be taken in this connection of the concern that Judge Bryant expressed about the conflict of interest on the part of counsel involved in Mr. Maren's case (pp. 29–30, 45, of the memorandum accompanying Mr. Silbert's letter).

Finally, it is appropriate to observe that Mr. Maren's case involved eight grand jury appearances, an equal number of district court hearings, and two appeals. Although his counsel have complained about a lack of due process, it is clear that Mr. Maren's rights were more than adequately safeguarded and that he had recourse to the judiciary throughout the proceedings. This underscores the point we have emphasized that the district courts exercise a very substantial measure of direction and control in regard to grand jury proceedings.

I hope that this letter will be helpful to you and will satisfy any concerns you may have had upon receipt of the copy of Mr. Friedman's and Mr. Hirschkop's letter to me.

Very truly yours,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,
Criminal Division.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE UNITED STATES ATTORNEY,
Washington, D.C., November 10, 1977.

Mr. ROGER A. PAULEY,
Legislation and Special Projects Section, Criminal Division, Department of Justice, Washington, D.C.

DEAR ROGER: As the attached memorandum reveals in detail, there is absolutely no basis in fact for the complaints of Mr. Philip Hirschkop and Mr. Leon Friedman concerning the treatment of their client, Arthur Maren, by Assistants of this office during Maren's eight grand jury appearances. From the time he was first subpoenaed to testify, Mr. Maren and his attorneys employed every dilatory tactic imaginable in their efforts to frustrate the grand jury proceeding. Despite this, each of Mr. Maren's requests and complaints was fully aired before the Court and eventually rejected. Mr. Maren is now incarcerated until such time as he is willing to provide the information sought, having been held in civil contempt for the second time, the only witness we know of to have been afforded two contempt hearings for failure to respond to the same questions.

A brief chronology of Mr. Maren's appearances before the grand jury reveals that prior to the grant of immunity on September 8, he had more than ample time to consult with his attorneys and to consider the consequences to himself of truthful testimony and that he had, in fact, done so.

On July 8, 1977, Mr. Maren was subpoenaed to appear before the Grand Jury on July 18, 1977. His appearance was continued until July 25 to give him additional time to consult with his attorney.

On July 25, Mr. Maren's attorney filed more than 100 pages of motions in an attempt to delay the grand jury appearances of Maren and other witnesses. Chief Judge William B. Bryant refused to grant the motions.

On July 26, Maren appeared before the grand jury twice and refused to answer any questions concerning specific criminal activities of members of the Guardian's Office of the Church of Scientology. He asserted various novel "privileges" for his refusal to respond, but specifically declined to raise the Fifth Amendment privilege against self-incrimination as a basis for his refusal.

On July 29, Mr. Maren appeared before the grand jury two more times and again refused to respond to the same questions. A contempt hearing was held at which Maren raised as a defense only a so-called "First Amendment privilege," knowingly declining to raise his Fifth Amendment privilege against self-incrimination and a previously mentioned claim that questions asked him in the grand jury were the product of an illegal wiretap. Maren was held in contempt and incarcerated until such time as he would provide the testimony sought. On August 4, he filed an appeal.

On September 2, the United States Court of Appeals affirmed the finding of contempt, rejecting the novel "privilege" claimed by Maren. Immediately thereafter, Acting Chief Judge John H. Pratt refused to release Maren from confinement pending a grand jury appearance scheduled for September 8, which Maren had requested in order to purge himself of contempt. Maren's appeal from this ruling was also rejected. In his September 2 pleadings filed both in the District Court and the Court of Appeals, Maren mentioned the possibility of a grant of immunity in the event he invoked the Fifth Amendment before the grand jury on September 8, indicating that he and his attorneys were already considering the consequences of such a grant.

On September 8 Maren appeared before the grand jury and invoked the Fifth Amendment, a privilege which the Court of Appeals had noted he had previously "disdained." Maren was immediately granted use immunity (pursuant to 18 U.S.C. § 6001 *et seq.*) over the objections of his attorneys who erroneously stated that the law requires notice and hearing prior to a grant of immunity. Maren's requests for a postponement of his reappearance before the grand jury were rejected by the Assistant United States Attorney, the United States Attorney, the Chief Judge of the District Court and, eventually, by the grand jurors themselves. Maren then refused to answer the same questions in the grand jury, claiming that the questions were the product of illegal surveillance, a claim he had raised on July 25 and subsequently abandoned. Chief Judge Bryant, out of an abundance of caution, agreed to give Maren a second contempt hearing for failure to answer the questions. He gave Maren until September 14 to prepare yet another defense to the same civil contempt charge, and released him from confinement on the first contempt citation.

On September 12, Maren filed a second affidavit alleging illegal electronic surveillance. The Assistant United States Attorney filed an opposing affidavit, denying knowledge of any electronic surveillance and stating that in any event there was an independent source for all questions asked in the grand jury.

On September 14, Maren claimed that the Government denial of electronic surveillance was inadequate. Judge Bryant agreed with the Government that the source of the questions which had been asked was clearly not electronic surveillance but, exercising extraordinary caution, ordered the Government to initiate the regular seven agency check.

On September 20, in an obvious ploy to delay the second contempt hearing, Maren's attorneys filed a motion demanding that inquiries be made of no less than twenty Government agencies to see if Maren or his attorneys had ever been the subject of electronic surveillance.

On September 27, Maren and his attorneys predictably claimed that the second emphatic Government denial of electronic surveillance, consisting of four affidavits and letters from eight Government agencies, was inadequate. Judge Bry-

ant disagreed and ordered Maren to appear before the grand jury and respond to the questions. Maren's attorneys then sought a stay of the ruling in order to appeal. When this failed, they announced that Maren would never answer the questions about the criminal activities of members of the Guardian's Office of the Church of Scientology "based on his ethical scruples."

On September 28, having been released from confinement for twenty days, Maren appeared before the grand jury and refused to answer the questions, reasserting the so-called "First Amendment privilege" which had been rejected by the Court of Appeals and which, on September 9, he had promised never again to assert. The attempts of Maren's attorneys to obtain a delay of his incarceration were rejected and Maren was jailed for the second time until such time as he agrees to provide the information sought.

The above chronology belies the claims of Maren's attorneys that this United States Attorney's Office is endeavoring to use grants of immunity "to send a grand jury witness to jail with the minimum [*sic*] of due process and as quickly as possible." Rather, the sequence of events demonstrates a clear, calculated attempt on the part of Mr. Maren and his attorneys to subvert the legitimate purpose of the grand jury—obtaining truthful testimony about specified criminal activities. Instead of raising at one contempt proceeding all possible defenses of which he was aware, Maren deliberately asserted his defenses, "privileges," and excuses one at a time, demanding that they be aired one by one, thus needlessly delaying the grand jury investigation and wasting the time of the grand jury, the District Court, and the Court of Appeals, not to mention that of the Assistants in this office.

During each of his eight appearances before the grand jury, Maren insisted on writing down each question and consulting with his attorney, regardless of how many times the same question had previously been asked of him. These consultations lasted as long as forty minutes, at the end of which Maren would read to the grand jury a written response, apparently prepared by his attorney. This tedious process, requiring as much as four hours per appearance, produced a total of three substantive answers: Maren's name, address, and employment.

Despite his abusive treatment of the grand jury, Mr. Maren was never denied an opportunity to personally address the grand jurors. On two occasions he requested permission to address the grand jury at the conclusion of a grand jury appearance. Permission was granted each time. On the first occasion, however, Maren unexplicably withdrew the request. On the second of these occasions, he did address the grand jurors as requested. On a third occasion Maren requested permission to address the grand jury at the beginning of his appearance, instead of responding to a question that had been asked him. He was informed that the procedure adopted by the grand jurors was to permit speeches by a witness only after the witness had responded to the questions. At the conclusion of this appearance, Maren did not renew his request.

Having raised every conceivable issue, regardless of how frivolous, Maren's attorneys announced only at the conclusion of eight grand jury appearances, eight District Court hearings, and two appeals, that Maren had no intention whatsoever of answering the questions.

This office does indeed believe that "the United States wins when justice is done." It is Mr. Maren and his attorneys who have made a mockery of justice by frustrating, delaying, and disrupting a legitimate grand jury proceeding. It is Mr. Maren who flagrantly abused the process that was accorded him, process far in excess of that which was his due and required by law. It is Mr. Maren who has flaunted the long-standing principle that the public, to vindicate its criminal laws, has a right to every man's evidence absent some recognized privilege.

Indeed, one of the attorneys who represented Mr. Maren, Mr. Hirschkop, had been retained by the Church of Scientology to represent it. Yet, Maren was subpoenaed as a witness before the grand jury to testify about his knowledge of the involvement of the church and certain of its high officials in the crimes under investigation. It is clear beyond any doubt, therefore, that Mr. Hirschkop had an irreconcilable conflict of interest. Yet, by insisting on representing Maren despite the fact that the obvious conflict was repeatedly brought to his specific attention, the goal of Mr. Maren and his attorneys was clear—to obstruct the grand jury investigation.

A copy of the letter to Mr. Civiletti was sent to Congressman Eilberg who has

conducted extensive hearings concerning the procedures and practices of federal grand juries. To avoid the Congress being misled by the inaccurate and distorted account by Messrs. Friedman and Hirschkop of the events described above, it is very important that Mr. Civiletti provide Congressman Eilberg with an accurate description of the events in question.

Sincerely,

EARL J. SILBERT,
U. S. Attorney.

Enclosure.

MEMORANDUM

REGARDING ARTHUR MAREN AND THE GRAND JURY INVESTIGATION IN RE: POSSIBLE VIOLATIONS OF 18 U.S.C. §§ 371, 641, 1503

On July 8, 1977, the Federal Bureau of Investigation (FBI) executed search warrants at three offices of the Church of Scientology in Washington and Los Angeles. These search warrants were prepared under the guidance of two Assistant United States Attorneys, sworn to by an agent of the FBI, and reviewed by the United States Attorney prior to their submission to United States Magistrates here and in Los Angeles. The Washington, D.C. warrant was approved by Magistrate Henry H. Kennedy, Jr., and the two Los Angeles warrants were approved by Magistrate James Penne of the Central District of California. These excruciatingly detailed warrants were based upon statements given to this office by Michael Meisner—an official of the Guardian's Office of the Church of Scientology—as substantially corroborated by the FBI. During execution of the search warrants, a number of subpoenas were served. Arthur Maren, Deputy Guardian for Public Relations for the Church of Scientology in the United States, was one of the individuals served in Los Angeles by an Assistant from this office who had been appointed Special Assistant to the United States Attorney for the Central District of California.

During the next three months, as this memorandum sets out in detail, Maren refused to answer any questions in the Grand Jury other than his name, address, and occupation, invoking *seriatim* numerous "privileges" and excuses for his refusal to testify When all his "privileges" and excuses were rejected both by the United States District Court and the United States Court of Appeals, Maren finally invoked the Fifth Amendment privilege against self-incrimination, was granted use immunity, but still refused to testify, reasserting a "privilege" specifically rejected by the United States Court of Appeals Then, after a second contempt hearing, Maren was again cited for civil contempt for refusal to answer the same three questions and is now incarcerated until such time as he is willing to provide the relevant information he possesses, or for the duration of the Grand Jury, including any extensions, but in no event longer than eighteen months. He has, as yet, taken no appeal from that finding of contempt.

A. Background of the grand jury investigation

The Grand Jury before which Maren was summoned is investigating the crimes of burglary, theft of Government property, illegal electronic surveillance, obstruction of justice, subornation of perjury, and conspiracy to commit these crimes, all of which were committed by and on behalf of members of the Guardian's Office of the Church of Scientology. The initial Grand Jury investigation focused on surreptitious entries of the United States Courthouse in the District of Columbia in May and June, 1976, when two individuals, on three occasions, entered the Courthouse using false Internal Revenue Service (IRS) credentials. On the second occasion, these two individuals were confronted after normal working hours while making surreptitious use of the United States Attorney's Office xerox machines, located in an area which is off-limits to the general public. On the third occasion, June 11, 1976, they were confronted by FBI Agents on the third floor of the Courthouse, which houses the United States Attorney's Office and the District of Columbia Bar Library. One of the two individuals identified himself as "Thomas Blake" and the other as "John Foster." Both had IRS identification cards. When "Foster" was asked about his current employment, however, he stated that he was no longer working for IRS. The FBI Agents who stopped the two allowed them to leave without arresting them at that time. Subsequent investigation revealed that the IRS credentials both men carried were fraudulent. The individual who had identified himself as "Thomas Blake" was, in fact, Gerald Bennett Wolfe, an IRS clerk-typist.

Wolfe was arrested on June 30, 1976. The individual claiming to be "John Foster," who accompanied Wolfe in each of the Courthouse entries, was subsequently identified as Michael James Meisner. A warrant for Meisner's arrest was issued by a United States Magistrate in the District of Columbia on August 5, 1976, but he remained a fugitive for almost a year. On May 13, 1977, Wolfe entered a plea of guilty to false use of a Government seal (18 U.S.C. § 1017) in the United States District Court for the District of Columbia.[1] On June 10, 1977, Wolfe was sentenced and immediately thereafter was summoned to appear before the Grand Jury investigating the surreptitious entries of the Courthouse.

Ten days after Wolfe was sentenced, Michael Meisner, who was still a fugitive, telephoned the Assistant United States Attorney who was in charge of the Wolfe investigation and stated that he wished to return voluntarily to Washington and cooperate with the Government.[2] He arrived in the District of Columbia that same evening and, at his own request, was placed in protective custody by the United States Marshal's Service. During subsequent interviews, Meisner described the crimes of burglary, theft, illegal electronic surveillance, obstruction of justice, subornation of perjury, and conspiracy committed by himself and others on behalf of the Guardian's Office of the Church of Scientology. Mr. Meisner stated that he had been an active member of the Church of Scientology since 1970, eventually rising to a high level of responsibility within the Guardian's Office. He explained that the "Guardian's Office—U.S.," located in Los Angeles, California, receives its orders from the "Guardian World-Wide," located in East Grinstead, Sussex, England. The Guardian's Office is divided into five bureaus: Information, Public Relations, Legal, Finance, and Social Coordination. The Bureau of Public Relations in the United States, he revealed, was headed by Arthur Maren, Deputy Guardian for Public Relations.

From January 1974 until June 1976, Meisner had been the Assistant Guardian for Information in the District of Columbia and from mid-June until the end of August 1976, the National Secretary for the United States with an office in Los Angeles. In both positions, Meisner reported to the Deputy Guardian for Information in California, who handles all intelligence matters, including covert operations to acquire Government documents critical of Scientology, covert operations to discredit and remove from positions of power all persons whom the Church of Scientology considers to be its enemies, and internal security within the Church itself. From March 1975 until June 1976, Meisner supervised all covert Scientology agents within both Government agencies and private organizations in the District of Columbia. Meisner detailed numerous burglaries and surreptitious entries of the offices of the Internal Revenue Service, the Tax Division of the Justice Department, and the United States Attorney for the District of Columbia which he supervised or took part in during this period. The purposes of these burglaries were (1) to steal and copy internal memoranda of the various Government agencies or private organizations for use in litigation with the agencies or organizations, (2) to obtain false credentials to aid in other surreptitious entries, and, (3) on one occasion, to plant a listening device in a conference room at the Internal Revenue Service which was about to be used for a high-level IRS meeting on the tax-exempt status of the Church of Scientology.

Meisner explained that some time in 1974, the highest officials of the Guardian's Office of the Church in the United States and England mounted an offensive against the IRS which called for, *inter alia*, the infiltration of that agency to obtain all documents it possessed regarding Scientology. In November 1974, a member of the Guardian's Office of the Church planted a listening device in a conference room and overheard an IRS meeting concerning the Church. Also in November, Wolfe infiltrated the IRS by obtaining a job as a clerk-typist. Soon thereafter, Meisner and another Church member entered the IRS building, took a file relating to Scientology out of a filing cabinet, smuggled it out of the building, copied it, and returned it the next day. Between March and June of 1975, Wolfe, sometimes accompanied by others, periodically entered the office of an attorney in the IRS Chief Counsel's Office and copied various records which he turned over to the Church of Scientology. He continued to "monitor" and

[1] The United States Attorney's Office offered Wolfe a plea to a misdemeanor with a maximum six-month sentence in return for his cooperation. Wolfe rejected the offer and chose to plead guilty to the false use of a Government seal (18 U.S.C. § 1017), a felony carrying a 5-year maximum sentence.

[2] Meisner was not offered immunity from prosecution and has, in fact, agreed to plead guilty to a 5-year felony.

copy this attorney's files until June 1976, Wolfe also began and continued through June 1976 to examine and copy files of at least seven different officials in the IRS Exempt Organizations Office. Also in June 1975, Wolfe, on approximately four occasions, entered offices of the Tax Division of the Department of Justice to copy documents. All these documents were turned over to Meisner who, in turn, filed one copy in the District of Columbia and sent three copies to Los Angeles for distribution to the Guardian's Office in Los Angeles, the Guardian's Office in England, and to Mary Sue Hubbard, the wife of L. Ron Hubbard, the founder of Scientology.

In December 1975, officials of the Guardian's Office "World-Wide" and "U.S." began a program to obtain copies of Interpol documents relating to Scientology. Meisner recruited a Church member by the name of Sharon Thomas. Ms. Thomas eventually obtained employment as a personal secretary in the Department of Justice who was representing the Government in a Freedom of Information Act suit by appellee against Interpol. She removed materials from the attorney's files and turned them over to Meisner who distributed them in the same manner as he had distributed the documents stolen by Wolfe. By February 1976, it became obvious that most of the Interpol documents wanted by the officials of the Guardian's Office were in the custody of Nathan Dodell, an Assistant United States Attorney for the District of Columbia, who was handling various Freedom of Information Act suits filed by the Scientologists.

In March 1976, Meisner and Wolfe entered the IRS building after hours, broke into a room in which the equipment used to make identification cards was located, and made false identification cards bearing false names for their future use. During the first week in May, Meisner and Wolfe entered the United States Courthouse in the District of Columbia at about 4:00 p.m. on a weekday so that they would not have to sign in. They went to the District of Columbia Bar Library on the third floor which was also the floor where most of the United States Attorney's Offices, including Dodell's office, were located. The two men waited until after working hours and then located Dodell's office. They attempted without success to open his locked door with a metal device which they had used on other doors in the past, and left empty-handed.

Two or three days later, during his lunch hour, Wolfe returned to Dodell's office to try to ascertain some way of gaining entry after working hours. When he entered the Dodell suite of offices, he found that both Dodell and his secretary had gone to lunch and that the secretary had left her keys on top of her desk. Wolfe stole the keys and contacted Meisner. They took the keys to a locksmith and duplicated all those which looked like they might open Dodell's door. Then Wolfe and Meisner returned the complete set to the Courthouse and dropped it in a corridor near Dodell's office so that it would appear they had accidentally fallen out of the secretary's purse.

On May 21, Wolfe and Meisner returned to the Courthouse after working hours. Wolfe signed in using his real IRS identification card and Meisner used his false one. They obtained permission to use the Bar Association Library and went to the third floor. After signing in at the library, they proceeded through a back door to the United States Attorney's Office area and Dodell's office, which they entered using the key they had duplicated. The two men went through Dodell's files, removing ten or twelve of them, which they took down the hall to the United States Attorney's Office xerox machine. For the next two hours they proceeded to copy a five-inch stack of documents. They then returned Dodell's files and left the Courthouse with the copies at about 11:00 p.m. Over the next several days, Meisner reviewed the documents, filed them in his District of Columbia office, and sent copies to officials in the Guardian's Office of the Church as he had done before.

On May 28, Wolfe and Meisner again returned to the Courthouse, once again after working hours, and signed in using false names and IRS credentials. They again entered Dodell's office, this time without initially signing in at the Bar Library. They again removed files from his office, put them in briefcases, and carried them down the hall to the same xerox machine where they copied them for an hour and a half. They then sought to return the documents to Dodell's office, but the night librarian stopped them because they had failed to sign in at the library. While the librarian left to look for a building guard, Wolfe and Meisner returned the documents to Dodell's office. As they left the building, a building guard confronted them, told them that they were not authorized to use the United States Attorney's Office xerox machine, and made them print their

names on a piece of paper. The building guard later reported this incident to the United States Attorney's Office, which referred it to the FBI for investigation.

Meisner, after consultation with his superiors, determined that he and Wolfe would enter Dodell's office one more time. In addition to copying files similar to those they had previously copied, they were instructed by officials of the Guardian's Office of the Church to examine Dodell's personal files for information which the Guardian's Office might employ to remove Dodell from his position as an Assistant United States Attorney. Thus, on June 11, they returned to the Courthouse and signed in at the guard's desk using the false names on their false IRS credentials. When they displayed these fraudulent credentials, the building guard recognized them and called the FBI. Meanwhile, Wolfe and Meisner were compelled to wait some twenty minutes in the library while a cleaning lady completed her work in Dodell's office. In the meantime, two FBI Agents arrived and confronted Meisner and Wolfe. They seized Meisner's credentials because he stated that he was not employed at the IRS, but permitted Wolfe to keep his because, upon checking, the agents discovered the false name Wolfe had placed on the identification card to be the name of someone actually employed at the IRS. The agents then allowed both Wolfe and Meisner to leave the building.

Upon leaving the Courthouse, Wolfe and Meisner proceeded to a restaurant in Georgetown where Meisner telephoned Guardian's Office officials in Los Angeles to inform them of the situation. After several calls and personal consultation with Church officials in Washington and Los Angeles, Meisner was given some money, was told to check into a motel, and was instructed to fly to Los Angeles. He flew out of National Airport early on the next morning, June 12, using a fictitious name. In Los Angeles he went to Church offices where he discussed with Deputy Guardian—U.S.—Henning Heldt, Deputy Guardian for Information—Richard Weigand, and his deputy, Greg Willardson, three plans for dealing with the anticipated investigation into Meisner and Wolfe's entry into the courthouse. Each plan involved telling false stories to the authorities. The plan that was ultimately agreed upon by the Deputy Guardian for Information, with the explicit approval of the Deputy Guardian for the United States, was to fabricate a cover-up story for Meisner and Wolfe, to return Wolfe to Washington to face the authorities and, depending on the outcome of any investigation, to send Meisner back to the District of Columbia at an appropriate time. The cover-up story which was prepared involved a general denial by Meisner and Wolfe of any association with the Church as well as an assertion that they were in the Courthouse solely to use the D.C. Bar Library for personal research.

Wolfe was then summoned to Los Angeles to be prepared on the details of the cover-up story. Meisner, meanwhile, was aided in altering his appearance by shaving his moustache, cutting and dyeing his hair, and replacing his glasses with contact lenses. The cover-up story Meisner and Wolfe were given was as follows: Wolfe would claim that he had met Meisner in a bar and that he knew Meisner only under the false name of Foster which Meisner had placed on his IRS credentials. Wolfe would state that Meisner had promised to teach him legal research so that he could obtain a better job. They met on several occasions in bars, and one night, while drunk, had gone to the IRS building, found the credentials room unlocked, and as a lark, created false credentials for themselves. On later occasions they went to the D.C. Bar Library where Meisner taught Wolfe to do legal research. Meisner was to corroborate this story by appearing at a later date to tell a parallel story, claiming that he had never told Wolfe his true name, and that Wolfe was doing research with him on tax-exempt organizations.

After this story was devised, Wolfe was returned to Washington where Church officials obtained an attorney for him. Soon thereafter he was arrested. Wolfe subsequently followed the scenario and told the fabricated story in his June 10, 1977, grand jury testimony. Meisner remained in Los Angeles and was given the position of National Secretary for the United States within the Office of the Deputy Guardian for Information. He kept that position until Church officials heard that a warrant for his arrest had been issued in the District of Columbia. Even then he continued to function in the same capacity, albeit without an official title. In April 1977, however, Meisner became tired of remaining a fugitive and announced that he wished to return to Washington. To prevent him from doing this, officials of the Guardian's Office of the Church of Scientology placed him under 24-hour guard, repeatedly "audited" or indoctrinated him, and removed him from residence to residence, on one occasion gagged and in handcuffs. He

was still kept informed, however, of what was happening with the cover-up plan because Church officials still hoped to send him back to Washington at the propitious time. Finally on June 20, 1977, he escaped and contacted the United States Attorney's Office.

Thus, on July 4 and 7, 1977, on the basis of the above information provided by Meisner as well as corroborating information detailed in a lengthy 35-page affidavit, search warrants were issued by United States Magistrates in the District of Columbia and the Central District of California for the offices of the Information Bureau and the Deputy Guardian—U.S., Church of Scientology, located in those jurisdictions. These warrants were executed simultaneously on July 8, 1977.

The search warrant affidavit contained an organizational chart of the Guardian's Office of the Church of Scientology which indicated that Arthur Maren was the Deputy Guardian for Public Relations for the United States—the head of a branch of co-equal importance to the Bureau of Information of which Meisner was a member and which was the target of the search warrants. The Assistant United States Attorney who served the subpoena on Mr. Maren was intimately familiar with the search warrant affidavit, as well as with the pending Grand Jury investigation. In view of the position Maren held, it was reasonable to conclude that he would be aware of the actions of the Information Bureau, a fact later conceded by Maren's attorney during oral argument before the United States Court of Appeals.

B. Maren's refusal to answer questions on first amendment and other grounds during his initial appearances before the grand jury

Mr. Maren's subpoena called for him to appear before the Grand Jury in the District of Columbia on July 18, 1977.[3] Anxious to give Mr. Maren sufficient time to consult with his attorneys, the Assistant agreed to continue his Grand Jury appearance to July 25, 1977.

On July 25, Mr. Maren failed to appear before the Grand Jury. Instead, counsel appearing on behalf of thirteen persons, including Mr. Maren, subpoenaed to appear before the Grand Jury investigating the burglaries and obstruction of justice, filed five motions comprising more than 100 pages, seeking a temporary restraining order to prevent questioning by the Grand Jury of the subpoenaed witnesses, removal of this United States Attorney's Office from the conduct of the investigation, appointment of "an outside independent legal advisor" to the Grand Jury, "instruction of this Grand Jury on its rights and duties," and ten protective orders concerning the outstanding Grand Jury subpoenas. Chief Judge William B. Bryant rejected these claims and refused to restrain or interfere with the Grand Jury investigation. Among the claims raised by counsel for Mr. Maren and the other witnesses was an allegation that the Grand Jury investigation was the result of evidence gleaned from an illegal wiretap. In support of this claim, Mr. Maren submitted an affidavit listing five telephone numbers and claiming that he had heard strange noises when using those telephones.

On July 26, an Assistant United States Attorney sought enforcement of the duly-served subpoenas and the witnesses were directed by Chief Judge Bryant to appear before the Grand Jury. Immediately thereafter, Mr. Maren appeared in front of the Grand Jury. Maren was fully informed of his rights to counsel and against self-incrimination, pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). In response to questions, Mr. Maren provided his name, home and employment addresses, and stated his present employment to be "Director of Public Affairs for the Churches of Scientology in the United States." Mr. Maren refused to answer any questions thereafter, asserting various reasons for his refusal. Each time he was asked a question in the Grand Jury, Maren wrote down the question verbatim and asked to consult with his attorney. Maren then left the Grand Jury room to consult with his attorney for periods at times in excess of forty minutes. When he returned, in each instance he read a prepared, written statement to the Grand Jury, asserting several different reasons for his refusal to answer the questions, but never asserted the Fifth Amendment privilege against self-incrimination.

[3] Initially, discussions were held with Los Angeles Church of Scientology attorneys, Allan Streller and Robert Talcott, regarding the use of a Central District of California Grand Jury. However, this office, sensitive to any potential claim of Grand Jury abuse, felt that it would be improper to use a Grand Jury in Los Angeles since it was anticipated that any indictments would be returned in the District of Columbia.

Mr. Maren refused to answer questions as to whether he was presently a member of the Guardian's Office of the Church of Scientology and whether he had a staff as Director of Public Affairs on the grounds that:

[t]here are motions presently pending before Judge Bryant which would give us a protective order prohibiting questions of this nature on the grounds of invasion of freedom of religion. And I've been instructed that until such time as the Judge has ruled on these actions [*sic*], I would decline to answer on those grounds.[4]

Maren was asked whether he had ever knowingly employed, in the course of personal or business affairs, documents or summaries of documents which were obtained from agencies of the United States Government by unlawful means. He again refused to answer, claiming that the question concerned documents seized pursuant to the execution of the search warrants on July 8, and he was authorized by Judge Bryant to refuse to answer any question about the documents. Mr. Maren was then asked a series of questions specifically relating to criminal activities.

Mr. Maren, were you, in any way, involved in discussions which led or which resulted in the burglary or in the burglaries of the office of any official of the Internal Revenue Service by Gerald Wolfe?

Do you know a person by the name of Gerald Wolfe?

Did you have any dealings with a person by the name of Gerald Wolfe?

Did you participate in any form in the preparation of Gerald Wolfe for his Grand Jury testimony?

Did you receive any report authored by Gerald Wolfe concerning his Grand Jury testimony?

Do you know where Michael Meisner . . . was from June 11, 1976 to June 20, 1977?

Were you at any time informed by Michael Meisner of the results of any burglary of any government offices in the District of Columbia?

Did you participate in any discussions about plans to burglarize the office of Assistant United States Attorney Nathan Dodell in this U.S. Courthouse?

After consultation with his attorney, Maren refused to answer each of these questions on the same grounds, articulated by him from written notes as:

[Y]ou, as U.S. Attorney are now attempting to extract information from me to build your executive department prosecution. There are motions presently in front of Judge Bryant requesting a protective order, authorizing me not to answer that question until Judge Bryant has ruled on that motion, which is in the material I had before, and pertains to the violation of separation of powers.

At no time on July 26 did Maren assert a Fifth Amendment privilege not to answer the questions put to him in the Grand Jury. Upon questioning, he specifically rejected the Fifth Amendment as the grounds for his refusal to testify, stating that he was relying upon the grounds asserted. He also rejected the First Amendment as grounds for his refusal to answer the series of questions specifically relating to Gerald Wolfe and his criminal activities.

With lengthy delays during which Maren wrote down each question verbatim and consulted with his attorney in order to draft a response to be read to the Grand Jury, the entire Grand Jury proceeding on July 26 lasted in excess of four hours. During this period, Maren provided only his name, address, and occupation, and refused to answer any of the eleven other questions asked of him.[5]

On July 29, 1977, Mr. Maren, his attorney, and an Assistant United States Attorney appeared before Chief Judge Bryant on the Government's motion to compel Mr. Maren to answer the questions put to him in the Grand Jury, no cognizable privilege having been asserted. Counsel for Maren raised the same objections to the questions that his client had raised in the Grand Jury. Judge Bryant stated that Maren had asserted no cognizable reason for refusing to answer the questions and directed Maren to answer the questions "unless it presents some other privilege that the Court is prepared to recognize."

At the conclusion of the proceeding before Judge Bryant, Maren was again summoned before the Grand Jury, advised of his rights, and asked the same questions he had been asked in the Grand Jury on July 26. Reading a lengthy

[4] Maren, on the advice of counsel, continued to take this position even though Judge Bryant, as noted above, had refused to issue any of the requested protective orders.

[5] The appearances of the remaining witnesses had to be continued since Mr. Maren took more than four hours to deal with approximately a dozen questions.

written response, Maren refused to answer the questions as to whether he was a member of the staff of the Guardian Office of the United States Church of Scientology, asserting that the question inquired into the internal structure of the church and its religious tenets, and that the United States Attorney must make a showing of necessity and relevancy prior to requiring him to answer the question. With regard to all the other questions put to him in the Grand Jury inquiring into his knowledge of Gerald Wolfe, Michael Meisner, their burglaries of the IRS and the United States Courthouse, and the preparation of a cover-up story to be told to the Grand Jury, Maren, after consultation with his attorney, read a prepared statement asserting that the asking of the questions constituted an abuse of the Grand Jury and a violation of the separation of powers doctrine.

After this testimony before the Grand Jury, Maren and his attorney were again summoned before Chief Judge Bryant. The questions put and answers received in the Grand Jury were read to the Court. Chief Judge Bryant explicitly admonished Maren to respond to the questions, stating:

Sir, certain questions have been directed to you by the Assistant U.S. Attorney in the Grand Jury. You have refused to answer those questions on certain stated grounds. None of those grounds, I believe, is cognizable by the Court as a basis for not answering the questions.

So, very bluntly, I am ordering that you answer the questions, unless you have some basis for refusing to answer that is cognizable in the present state of the law. And, from a reading of the transcript, I have yet to hear any valid basis that the Courts have recognized up to this point as a valid one for refusing to answer.

Now, when you go back to the Grand Jury, if these questions are put to you and you still refuse to answer, as I say, except on some privilege that we have come to recognize, the Court has no alternative than to impose sanctions upon you.

After this proceeding, Maren again appeared before the Grand Jury and was asked two questions.

Do you know Gerald Wolfe?

Mr. Maren, between June of 1976 and June of 1977, did you at any time discuss with anyone plans for Gerald Wolfe to develop an untrue cover story with regard to his entry into the United States Courthouse on June 11th, 1976 for him to tell, under oath, before a Grand Jury of the United States District Court here in the District of Columbia?

After each of these questions, Maren consulted with his attorney and then read the same lengthy response to the Grand Jury, not claiming, as before, that the questions violated the separation of powers, but asserting, for the first time with respect to these questions, that they inquired into the internal structure of the Church and its religious tenets, in that they "would require that I discuss confidential matters relating to my performance of my duties as a minister and officer of the legally recognized Church of Scientology," and that the United States Attorney had not made a sufficient showing that the answers were required.

Finally, Maren was asked whether, prior to November, 1974, he had participated in discussion of plans to plant a listening device in a conference room at IRS for the purpose of monitoring conversations of IRS officials pertaining to applications of the Church of Scientology for status as a tax-exempt organization, and whether, subsequent to November 1, 1974, he had ever read or discussed a transcript of a discussion by IRS officials obtained through the bugging of the conference room. Maren refused to answer this question on the previously asserted ground that the asking of the question in the Grand Jury violated the separation of powers doctrine.

C. Maren's grounds for refusal to answer rejected: the first finding of civil contempt and affirmance on appeal

At this juncture, Maren was again brought before Judge Bryant for his refusal to answer the questions. Maren acknowledged that the representation made by the Assistant United States Attorney with regard to his refusal to answer the questions were true and asserted no defense other than the First Amendment, although he was clearly aware of the possibility of raising as defenses his Fifth Amendment privilege against self-incrimination and his previously asserted claim that the Grand Jury investigation was the product

of an illegal wiretap. His decision to rely solely on the First Amendment was an obvious tactical choice designed to secure an appellate decision on this claimed privilege, hopefully in his favor. He was then adjudged in civil contempt pursuant to 28 U.S.C. § 1826, and ordered to be incarcerated for a period not to exceed the term of the Grand Jury, and any extensions, but in no event longer than eighteen months. On August 4, 1977, Maren noted an appeal.

In his brief on appeal, Maren, represented by new counsel, Leon Friedman, claimed that there was no reason to believe that he possessed information relevant to the Grand Jury investigation. Maren further asserted that due to his status as a "minister" of the Church of Scientology, the First Amendment required that prior to asking any questions of him in the Grand Jury, the United States Attorney must make a showing that he possessed information relevant to the investigation, and that the information could not be obtained from any other source. At oral argument, Mr. Friedman retreated from that contention, admitting that because of his position as director of Public Relations, it was reasonable to assume that Maren possessed information relevant to the Grand Jury inquiry. Counsel also abandoned the previously asserted claim that the Grand Jury investigation constituted an abuse of the separation of powers doctrine. In its opinion of September 2, 1977, the United States Court of Appeals unanimously affirmed the finding of civil contempt, rejecting Maren's only remaining claim, that under the First Amendment his status as a "minister" of the Church of Scientology gave him an absolute privilege to refuse to respond to a Grand Jury subpoena, regardless of the nature of the investigation, until the United States Attorney established that the information could not be obtained from any other source. In its opinion, the Court of Appeals specifically noted: "At no time did [Maren] claim the privilege against self-incrimination; indeed, he disdains the privilege as a defense." *In Re: Possible Violations of 18 U.S.C. §§ 371, 641, 1503*, D.C. Cir. No. 77-1704, slip op. at 3 (Sept. 2, 1977)

D. Maren's unsuccessful post-appeal attempt to secure release from confinement prior to purging himself of contempt

On September 2, 1977, the same day the finding of civil contempt was upheld by the Court of Appeals, and prior to the mandate having been received by the District Court, Maren demanded to be brought before the Grand Jury immediately in order that he might purge himself of the contempt. Upon being informed that the Grand Jury would not be in session until September 8, 1977, Maren requested a hearing before the Acting Chief Judge, John H. Pratt. At that hearing Maren sought immediate release from confinement, representing, through counsel, that he would purge himself of civil contempt when called before the Grand Jury on September 8 and that he would no longer rely upon the "First Amendment privilege" which both Chief Judge Bryant and the Court of Appeals had rejected. Maren would not state that he would purge himself by providing the testimony of information sought, as the contempt statute (28 U.S.C. § 1826(a)) requires, but rather stated that he *might* rely upon the Fifth Amendment, among other privileges, which he had specifically declined to raise at his first contempt hearing.[6] With this ambiguous response, Judge Pratt refused to release Maren from confinement prior to his anticipated September 8 appearance before the Grand Jury.

Maren's counsel immediately filed in the United States Court of Appeals an "Application for Bail Pending Appeal." In that pleading, he represented that Maren "has agreed to appear before the Grand Jury at the earliest possible time and has agreed that he will no longer rely on any ground rejected by this Court." Maren's counsel also indicated to the Court that he was fully aware that Maren might be offered use immunity if he invoked the Fifth Amendment privilege against self-incrimination, but stated that it was premature for the Court to consider the effect of such a grant of immunity on Maren's contempt situation. On September 6, 1977, the Court of Appeals denied Maren's application for bail without even soliciting a response from the Government.

E. Maren's invocation of the fifth amendment and the grant of use immunity

On September 6, 1977, the United States Attorney's Office applied to the Criminal Division of the Department of Justice for authorization to seek a compul-

[6] During the hearing, the possibility of Mr. Maren being granted use immunity in the event he invoked the Fifth Amendment was specifically mentioned both by the Court and by Mr. Maren's attorney.

sion order pursuant to 18 U.S.C. § 6001 *et seq.*, in the event Mr. Maren invoked his Fifth Amendment privilege against self-incrimination during this scheduled September 8 Grand Jury appearance. The authorization was granted by John C. Keeney, Acting Assistant Attorney General, on the morning of September 8, 1977.

On September 8, two months to the day since he was first served with the Grand Jury subpoena, Maren appeared before the Grand Jury for the fifth time. Mr. Maren was represented at this time by Mr. Friedman, the same attorney who represented him on appeal, as well as by a fourth attorney, Mr. Phillip Hirschkop, who also represented the Church of Scientology in the same investigation.[7] Prior to Maren entering the Grand Jury room, Mr. Hirschkop inquired whether the United States Attorney's Office had secured approval from the Department of Justice to grant Maren use immunity in the event he invoked the Fifth Amendment. Mr. Hirschkop was informed that the United States Attorney's Office was prepared for any eventuality.

Mr. Maren then appeared before the Grand Jury and was asked the same three questions he had been asked during his previous Grand Jury appearances and concerning which the Court of Appeals had ruled he possessed no First Amendment privilege. As to these questions, he now invoked his Fifth Amendment privilege against self-incrimination, which he had previously refused to raise and which the Court of Appeals had noted he "disdained." Maren then sought permission to address the Grand Jury for two minutes. The Grand Jurors agreed to give Mr. Maren two minutes to address them. Mr. Maren, however, changed his mind and withdrew his request to address the Grand Jury.

The Assistant United States Attorney conducting the Grand Jury proceeding then sought an immediate hearing before the Chief Judge in order to secure judicial authorization for the compulsion order pursuant to 18 U.S.C. § 6001, *et. seq.* That hearing, held in the chambers of Chief Judge Bryant, commenced at approximately 11:30 a.m. Initially, Judge Bryant ruled that by invoking the Fifth Amendment privilege against self-incrimination, Mr. Maren had purged himself of the previous finding of civil contempt, and would be released from custody pending any further appearance before the Grand Jury. The Assistant United States Attorney then presented the Chief Judge and counsel for Mr. Maren with copies of the authorization to seek a compulsion order and requested Judge Bryant to issue such an order.

Mr. Maren's attorneys immediately protested the grant of use immunity, claiming, despite repeated references on September 2 to the possible grant of immunity to Maren (see note 6, *supra*), that the application came as a total surprise to them. They also claimed that there were various grounds on which Mr. Maren could oppose the grant of immunity, and that they needed additional time to explore these grounds. The Assistant United States Attorney pointed out that the signing of the compulsion order was essentially a ministerial act,[8] that the papers were in order, and that there was no ground on which Mr. Maren could oppose the grant of immunity. Judge Bryant expressed considerable incredulity that Mr. Maren and his attorneys had not considered the possibility and consequences of a grant of immunity, given the six weeks since his initial appearance before the Grand Jury and given Mr. Friedman's statement that he had discussed Mr. Maren's Grand Jury appearance with him the night before until midnight. At 12:45 p.m., Judge Bryant recessed the proceeding until 2:00 p.m., at which time he indicated he would sign the compulsion order in open court, there being no basis for Maren to oppose the grant of immunity, and thus no necessity for a hearing. Mr. Maren, he stated, would be able to consult with his lawyers from 12:45 until 3:30 p.m., at which time he was to appear before the Grand Jury. The Assistant United States Attorney indicated that initially Maren would be asked only the same questions which had already been asked him in the Grand Jury during his prior appearances.

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[7] By representing in the same investigation both Maren and the Church of Scientology, Mr. Hirschkop placed himself in a position involving a serious potential conflict of interest. *See In Re: Investigation Before the April 1975 Grand Jury (Sol Rosen)*, 174 U.S. App. D.C. 268, 271 n. 4, 531 F.2d 600, 603 n. 4 (1976). Maren was being asked to give testimony against various high officials in the Church of Scientology. As noted below, this very day Mr. Hirschkop first appeared to represent Maren, Maren was given use immunity in order to testify against these officials. In fact, after holding Maren in contempt for the second time for his refusal to testify, Chief Judge Bryant insisted that Mr. Friedman file a praecipe formally entering his appearance on Maren's behalf because, "[l]urking throughout this litigation is an indication that Mr. Hirschkop's primary interest is the church and not Mr. Maren." See page 45, *infra*.

[8] *E.g., United States v. Leyva*, 513 F.2d 774, 776 (5th Cir. 1975).

Instead of consulting with their client during the recess, Mr. Maren's attorneys sought and received a meeting with the United States Attorney. At this meeting, they attempted to convince the United States Attorney to postpone for five days Mr. Maren's 3:30 p.m. appearance. They assured the United States Attorney that Mr. Maren would undoubtedly provide responsive, truthful answers during his next Grand Jury appearance, but that he just needed additional time to think about the consequences of truthful testimony, the six weeks he spent in jail apparently not having been sufficient. The United States Attorney denied the request, expressing his feeling that Mr. Maren and his attorneys were only attempting to frustrate and delay the Grand Jury proceeding, which had been trying to secure Mr. Maren's testimony for two months.

At 2:00 p.m. on September 8 the proceedings before Judge Bryant reconvened in open court for the purpose of the official signing of the compulsion order. Mr. Maren's attorneys immediately began to quarrel with Judge Bryant's ruling that there was no basis for their opposition to the signing of the order and thus no need for a continuance. In support of his request for a delay, Mr. Friedman proffered to the Court a xerox copy of the last page of a case, *In re: Bart*, 304 F.2d 631, 637 (D.C. Cir. 1962), which, he maintained, stood for the proposition that an application for immunity must be served in accordance with the Federal Rules of Civil Procedure, requiring five days notice and a hearing. Somewhat uneasy at having only the final page of the case despite Mr. Friedman's assurances that "that's the only relevant one," Judge Bryant took a short recess in order to read the entire case.

Upon his return to court, Judge Bryan rebuked Mr. Friedman, saying, "Now I know you gave me just that one page instead of the whole case." By reading the entire case, Judge Bryant had discovered that, as Mr. Friedman well knew, the case had been decided under an old statute which had since been repealed, the new statute no longer envisioning notice and hearing upon a grant of use immunity.[9] Apologizing for his actions which had almost misled the Court, Mr. Friedman, in an extremely revealing comment, stated that the one page was "all I had in my bag of tricks here. . . ." At that point, Mr. Hirschkop, again referring to the old immunity statute no longer applicable, sought additional time to ascertain whether use immunity could be granted for the particular crimes being investigated by the Grand Jury,[10] to find out if the Grand Jury was properly impanelled, or to find some other way to prevent the calling before the Grand Jury of Mr. Maren, who was now no longer in custody. Recognizing that there was no legal basis for Maren and his attorneys to attack the grant of use immunity, that sound "policy considerations" demanded "interrupting grand jury proceedings as little as you can, consistent with the administration of justice," and considering "the time context of this case . . . and the development of the case to this point," two months having elapsed since service of the subpoena, Judge Bryant refused to grant Maren another continuance. He ordered Maren to appear before the Grand Jury at 3:30 p.m.

F. Maren's refusal to testify despite grant of use immunity

At 3:30 p.m. on September 8, Mr. Maren again appeared before the Grand Jury. He was read the order which Judge Bryant had signed, compelling Maren to give testimony. Mr. Maren was then asked the first of the three questions he had been asked during his numerous prior appearances before the Grand Jury. Instead of responding to the question, Maren renewed his request to address the Grand Jury, a request which had been granted earlier in the day but was subsequently withdrawn by Maren. The Foreperson stated that she would again take up with the Grand Jury his request. Mr. Maren, however, immediately launched into a speech, seeking a postponement of his appearance from the Grand Jurors themselves. Maren was then excused from the Grand Jury room as the Grand Jurors considered his requests. After their secret deliberations, the Grand Jurors, speaking through the foreperson, told Mr. Maren that they wanted to hear his answers to the questions before allowing him additional time to address them. The same three questions were again put to Mr. Maren and he again refused to answer them, this time claiming, among other things, that the questions were

[9] See *United States* v. *Leyva*, *supra* note 8.

[10] Under 18 U.S.C. § 3486, repealed by the Organized Crime Control Act of 1970, Pub. L. No. 91-452, Title II, § 228(a), 84 Stat. 930, testimony could be compelled and immunity given only in a proceeding involving interference with or endangering the national security or defense by specified criminal acts. The new statute, 18 U.S.C. § 6002, contains no such restriction.

the product of illegal electronic surveillance, that he had not had enough time to consult with his attorneys, and that his appearance before the Grand Jury was the result of an illegally served subpoena.[11]

Mr. Maren, accompanied by his attorneys, was again brought before the Chief Judge for his refusal to answer questions in the Grand Jury despite the grant of use immunity. The Assistant United States Attorney asked the Chief Judge to hold Maren in civil contempt, pursuant to 28 U.S.C. § 1826. Maren, no longer in custody, sought yet another contempt hearing for refusal to answer the same questions, and additional time to prepare a new defense to civil contempt.

The Assistant United States Attorney opposed the request for a postponement as a disingenuous effort to delay the proceedings of the Grand Jury and subvert the Grand Jury's process. He pointed out that at the time of his first contempt hearing, Maren was well aware of the alleged grounds he now proposed to raise as a defense to contempt, but that he had specifically elected not to raise them. He also noted that Mr. Maren's own pleadings of September 2 indicated that he had been considering the consequences of a grant of immunity for at least a week. Nonetheless, Judge Bryant, out of an abundance of caution, granted Maren a second contempt hearing and six days—until September 14—to prepare the defenses he had declined to raise at the first hearing.

G. *Maren's spurious claim of illegal electronic surveillance and the second contempt hearing*

Four days later, on September 12, Maren filed a second affidavit alleging that the questions being asked him in the Grand Jury were the product of illegal electronic surveillance.[12] In addition to the five telephone numbers listed in his first affidavit, the new affidavit listed three additional Church of Scientology telephone numbers, eleven telex numbers, and the names and telephone numbers of his three attorneys. The affidavit did not allege that any of the phones or telex machines listed had ever been used by Maren to transmit conversations or other matters relating to the subject of the Grand Jury inquiries, it did not allege the dates during which the named attorneys had represented Maren, and it did not allege that Maren had even discussed the case with his attorneys over any telephone. Furthermore, it was obvious from the very face of the affidavit that the questions put to Maren in the Grand Jury could not possibly have been the result of surveillance of any phone conversations he might have had with two of the three attorneys—Mr. Hirschkop and Mr. Friedman, since the questions had been asked of him before he had ever sought their services, when he was represented only by the third attorney.[13]

Having been given one day to respond to the witness' extremely general allegations, the Government submitted the affidavit of an Assistant United States Attorney involved in the Grand Jury investigation stating that he had no knowledge of any electronic surveillance of the witness and that the source of all the questions to be asked the witness was Michael Meisner, not electronic surveillance. At the September 14 hearing, Judge Bryant agreed that as to the three questions which had been asked Maren, it was clear that the source was conversations with Meisner. Judge Bryant, however, felt that it would be better to initiate the regular agency check for electric surveillance, lest additional questions, not originating from conversations with Meisner, might be asked of Maren in a subsequent Grand Jury appearance. The Court set an additional hearing in the matter for September 23, 1977, and directed the Government to initiate the regular agency check.

On September 14, the same day as the Court's ruling, the Government caused the Department of Justice to initiate the standard check of the seven agencies that had been authorized to conduct electronic surveillance pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.* See, *e.g.*, *In re: Harris*, 383 F. Supp. 1036 (N.D. Cal. 1974). A check for electronic surveillance of Maren and his attorneys by the National Security Agency was also initiated, even though Maren's claim that his telex machine might be tapped by that agency was general and highly conjectural.

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[11] At the conclusion of his responses, Mr. Maren did not seek to address the Grand Jurors.

[12] As noted at page 18 *supra*, the first such affidavit was filed on July 25, 1977, prior to Maren's first appearance. Thereafter, Maren abandoned his claim until all other avenues of avoiding questioning before the Grand Jury had failed.

[13] That attorney, Daniel P. Sheehan, represented Mr. Maren through July 29, 1977, and the first contempt citation.

On September 20, eight days after the submission of his *second* claim of electronic surveillance, two months after his first claim of such surveillance, and just three days prior to the next scheduled court appearance, Maren, through his attorney, filed a so-called "Request for Complete Wiretap Search." In that document, Maren claimed that nothing less than a twenty agency check would suffice to answer his claim that the questions to be asked him in the Grand Jury were the product of electronic surveillance. Also on September 20, Maren moved for a continuance of the September 23 court appearance on the ground that Mr. Hirschkop could not appear on that date, despite Mr. Hirschkop's previous statement that Mr. Friedman alone would represent Mr. Maren at the hearing.

In response to Maren's untimely, generalized, highly speculative claim of electronic surveillance, the Government submitted an extremely detailed response, including four affidavits and letters from eight Government agencies, which revealed that Mr. Maren himself, and any conversations he might have had with his attorneys, had not been the subject of any electronic surveillance by the Government, legal or illegal. Anticipating that Maren would attack the sufficiency of the response, the Government filed with the affidavits and letters denying surveillance an exhaustive twelve-page memorandum of law which demonstrated that no court of law had ever required a more complete denial of a witness' claim of illegal electronic surveillance.

The hearing on Maren's wiretap claim was held on September 27, having been postponed from September 23 at Mr. Hirschkop's request. This was the seventh time the parties had appeared before the Chief Judge on the Government's motion to compel answers to the questions. As expected, Maren's attorneys claimed that despite the lack of substance to Maren's claims of electronic surveillance, the Government denial was inadequate, and that a hearing at which they could cross-examine the affiants was necessary. Judge Bryant rejected their contentions and held that the Government response was indeed an adequate denial of electronic surveillance, and that no bona fide reason for controverting it had been offered. He directed Mr. Maren to appear before the Grand Jury at 10:00 a.m. the following morning and to respond to the questions asked him.

Mr. Hirschkop, again seeking a delay, asked the Court to stay the ruling so that Maren might take an expedited appeal. Judge Bryant emphatically denied the request. Then, without any hesitation, Mr. Hirschkop announced to the Court that Mr. Maren had no intention whatsoever of answering the questions put to him in the Grand Jury, "based on his ethical scruples and beliefs and legal advice, but even just on his personal, ethical scruples and beliefs and his conscience." Therefore, he asserted, there would need to be another hearing after Mr. Maren's next appearance before the Grand Jury. He sought to postpone Mr. Maren's Grand Jury appearance until the afternoon of the following day on the grounds that Mr. Friedman had a class to teach in the morning. Disturbed by Mr. Hirschkop's representations, and apparently realizing that all the objections Maren had raised to his Grand Jury appearance were simply dilatory tactics and not genuine, Judge Bryant immediately called Mr. Hirschkop to the bench and informed him that there would be no more hearings and no more delays:

> Let's get one thing straight. You have run the gauntlet completely. . . . I don't want him trifling with me. If he isn't going to answer the questions on account of some reasons, he can say, "I am not going to answer the questions, I don't care what you do," and have it over with. But you raise these issues, and I ventilate them. You tell me now that he is coming back tomorrow and not going to answer the questions. Then you want another hearing, and you want it sometime in the future. . . . I have accommodated you . . . but it seems to me I have interrupted the Grand Jury business to the outer limits in this case.

At this point, the Assistant United States Attorney pointed out that the Grand Jury was presently in session and that Mr. Maren could appear before the Grand Jury at once, thus avoiding the necessity of returning the next day. Hearing this, Mr. Friedman immediately announced that he would cancel his class and appear with Mr. Maren the following day. Judge Bryant then directed Maren to appear before the Grand Jury the next morning and answer the questions, specifically advising him that he had thus far asserted no privilege that would insulate him from a finding of contempt.

On September 28, Maren reappeared before the Grand Jury and again refused to answer any questions, reasserting the so-called "First Amendment privilege." This was the same "privilege" which was unanimously rejected by the United States Court of Appeals on September 2, and on which, that same day, Maren and his attorney, in an attempt to secure his immediate release from confinement, had assured both the District Court and the Court of Appeals he would never

again rely as an excuse for failing to respond to questions in the Grand Jury.[14]

Shortly after this, his eighth refusal to respond to questions concerning particular criminal acts put to him in the Grand Jury, Maren and his attorneys again appeared before the Chief Judge. Maren's attorneys immediately filed with the Court a motion requesting five days to prepare for what they called "sentencing" on Maren's civil contempt. They maintained that they wanted an opportunity to show that Maren was not the type of person who would change his mind and testify on account of incarceration. Therefore, they reasoned, there was no point in incarcerating Maren at all—under no circumstances would he ever answer the questions about criminal activities of himself or his associates in the Guardian's Office of the Church of Scientology. When the request for a five day delay was denied, Maren's attorney sought a stay pending appeal of the contempt finding. This too was denied, as was a subsequent request for bail pending appeal. Judge Bryant then ordered Maren incarcerated for the length of the Grand Jury or any extensions thereof, but in no event longer than eighteen months, or until such time as he agrees to provide the information or testimony sought by the Grand Jury.

Then, *sua sponte*, Judge Bryant directed Mr. Friedman to submit a praecipe formally entering his appearance on behalf of Maren, noting that:

Lurking throughout this litigation is an indication that Mr. Hirschkop's primary interest is the church and not Mr. Maren.... [E]ven in the Court of Appeals he filed a brief amicus curiae for the church. And I think that the record ought to be clear that somebody represents just Mr. Maren, and that is you [Mr. Friedman].

As of November 3, Maren has taken no appeal from his second citation for civil contempt.

Appendix 4

Articles

1. Christian Science Monitor, June 14, 1976—Reforming Resurgent Grand Juries.
2. Denver Post, June 23, 1976—Grand Jury Reform Merits Public Support.
3. Louisville Times, November 15, 1976—Congress Can Check Grand Jury Abuses.
4. Evansville Press, November 18, 1976—Grand Jury Reform.
5. Columbia Journalism Review, November/December 1976—Grand Jury Reform—Alternative to Shield Laws.
6. New York Times, December 26, 1976—How Well Do Grand Juries Work?
7. Pueblo Chieftain, January 12, 1977—Pueblo Bar Endorses Grand Jury Reform Bill.
8. Judicature/Volume 60, March, 1977—A Proposal for Grand Jury Reform.
9. New York Times, March 2, 1977—Woman Surrenders To Federal Officers in Terrorism Case.
10. New York Times, March 6, 1977—Witness on F.A.L.N. Ruled in Contempt.
11. Evening Bulletin, March 10, 1977—Grand Jury Reform.
12. Philadelphia Inquirer, March 15, 1977—Cleared, 2 Find Grand Jury Guilty.
13. Philadelphia Inquirer, March 21, 1977—Push Resumes to Reform Grand Juries.
14. Philadelphia Inquirer, March 30, 1977—He Continues Defiance of Grand Jury System.
15. Courier-Post, April 4, 1977—Jersey P.M. Report—Congress Studies Reform of Grand Jury.
16. St. Louis Post—Dispatch, April 6, 1977—Grand Jury Role.
17. New York Times, April 8, 1977—Nadjari Subpoenaed by Assembly Panel.
18. New York Times, April 16, 1977—Inside the Grand Jury Room.
19. Scranton Times, April 18, 1977—End Seen In Probe Of Patty.
20. Palm Beach Post, April 27, 1977—Beating the System.
21. New York Times, April 28, 1977—The Last of Nadjari's Indictments Against Cunningham Is Dismissed.
22. New York Times, April 28, 1977—Nadjari Is Sued on Behalf of U.S. By Law Partner of Cunningham.

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[14] At the conclusion of his appearance before the Grand Jury, Mr. Maren sought and was granted an opportunity to address the Grand Jurors. His remarks were not responsive to any questions he had been asked.

23. Wisconsin State Journal, May 3, 1977—Grand Jury Reform.
24. Congressional Quarterly, May 7, 1977—Another Chance for Revising Grand Juries.
25. Washington Post, May 9, 1977—Reform of Virginia Jury System Sought.
26. Lawscope, American Bar Association Journal, Vol. 63, (June, 1977)—Grand Juries go on Trial.
27. New York Times, June 1, 1977—Justice, Prosecutor Criticized by Court in Groh Indictment.
28. Wall Street Journal, June 23, 1977—Under Indictment—GM, Other Unlikely Critics Accuse Grand Juries of Abusing Rights They Are Supposed to Protect.
29. Washington Post, June 26, 1977—Federal Judge Dismisses Litton Fraud Indictment.
30. New York Times, June 26, 1977—California Has Learned To Sidestep the System.
31. New York Times, June 26, 1977—The Prosecutor Seems to Have Taken Over.
32. New York Times, June 26, 1977—Mr. Eilberg's Bill Calls for Reform in the Federal Practice.
33. New York Times, June 26, 1977—The Grand Jury Under Examination; It Has Fallen on Hard Times.
34. Washington Post, June 29, 1977—Tax Probe Of GM Given Court Okay.
35. Philadelphia Bulletin, June 30, 1977—Bell Ignoring Reform Of Juries, Eilberg Says.
36. New York Times, July 1, 1977—Judge Voids Indictment of Groh; Sets Strict Rules for Any New One.
37. Time Magazine, July 4, 1977—Reforming Grand Juries.
38. Washington Post, July 6, 1977—Corporate Complaints of Grand Jury Abuses.
39. Boston Globe, July 8, 1977—Grand Jury Reform.
40. Charlotte Observer, July 11, 1977—Leaky Shield—Grand Juries Need Repair.
41. News Release (Congressman William Clay), July 11, 1977—Grand Juries: It's Time to Reform or Abolish Them.
42. New York Times, July 13, 1977—The Answer to Grand Jury Abuse.
43. Austin American Statesman, July 30, 1977—Grand Jury Reform Needed.
44. Chicago Tribune, August 7, 1977—Lawyers Warned of Grand Jury Abuse.
45. Washington Star, August 7, 1977—Lawyers Fighting Over Grand Jury Reforms.
46. Washington Post, August 9, 1977—How To Make Grand Juries Work.
47. New York Times, August 10, 1977—Bar Group Proposes Help For Witnesses Before Grand Juries.
48. Wall Street Journal, August 10, 1977—Grand Jury System Reform was Endorsed by the Bar Association.
49. Washington Post, August 10, 1977—ABA Delegates Urge Revisions In Grand Juries.
50. Chicago Sun-Times, August 10, 1977—ABA Backs Grand Jury Witness Right To Counsel.
51. Chicago Tribune, August 10, 1977—Bar Endorses Grand Jury Reforms.
52. Salt Lake Tribune, August 12, 1977—Grand Jury System Would Gain From ABA Reform Package.
53. Dayton Daily News, August 13, 1977—Not-so-grand Juries.
54. New York Times, August 14, 1977—A.B.A. Takes Its Stand on Grand Jury Reforms.
55. Milwaukee Journal, August 21, 1977—The Not-So-Grand Jury System.
56. Wilmington News Journal, August 21, 1977—Grand Juries in our Times.
57. Newsweek, August 22, 1977—Reforming the Grand Jury.
58. Bulletin, August 23, 1977—The ABA calls for . . . Grand Jury Reforms.
59. Newsday, August 24, 1977—Getting Back to Basics With the Grand Jury.
60. Christian Science Monitor, August 24, 1977—Grand Jury Reform.
61. Washington Star, August 12, 1977—Jesuit Lawyer Hits Acts of Grand Jury.
62. New York Times, September 3, 1977—Priest and Penitent: Legal Challenges May Alter Ancient Tradition of Confidentiality.
63. Federal Bar Association News, October, 1977—Book Review by Honorable Joshua Eilberg on "The Grand Jury: An Institution on Trial."
64. Sunday Bulletin, November 27, 1977—Eilberg Immunity Bill Under Attack.

[From the Christian Science Monitor, June 14, 1976]

REFORMING RESURGENT GRAND JURIES

(By Peter C. Stuart, Staff correspondent of The Christian Science Monitor)

WASHINGTON.—In courthouses across the country, groups of 23 citizens are sending Americans to trial on federal felony charges made in secret sessions, unimpeded by normal Bill of Rights protections—and sometimes witnesses are jailed for not cooperating.

Enshrined in the American Bill of Rights since 1971, grand juries—once in danger of becoming a legal relic—have in recent years undergone a renaissance in power and popularity which has propelled them into growing controversy.

Is the institution "a valuable tool in combatting crime" or "a dangerous modern form of secret Star Chamber inquisition?"

Congress, which in 185 years had never before held hearings on grand juries, began late last week examining possible reforms.

REFORMS PREDICTED

House Judiciary Committee Chairman Peter W. Rodino, Jr. (D) of New Jersey predicts the House of Representatives will enact reform legislation this year.

At the opening hearing, however, Attorney General Edward H. Levi argued that most proposed reforms raise the threat of "increasing the potential for time-consuming litigation and delay . . . and decreasing the necessary flexibility of the grand jury's investigative authority."

Subcommittee Chairman Joshua Eilberg (D) of Pennsylvania charged that "the historic function of the grand jury has been perverted" by converting it into "an instrument of oppression to harass and intimidate . . . a convenient tool for surveillance, intelligence-gathering, and pre-trial discovery of evidence . . . a rubber-stamp for decisions by the prosecutor."

TWENTY-THREE CITIZENS

Grand juries—created as an independent body of citizens to shield accused persons from overzealous or misguided prosecutors—consist of 23 men and women chosen at random from voter registration lists. They decide if a prosecutor's evidence is sufficient to bring a person to trial, and they conduct their own investigations of wrong-doing by public officials.

Every serious federal prosecution begins with a grand jury indictment, and at least one such jury is always active in every busy federal court district.

Until recently, however, the grand jury was fading into disuse. More than one-half of the states have abandoned grand-jury indictments for initiating criminal charges. A presidential commission in 1933 went so far as to recommend its abolition—as already has happened in its country of origin, Britain.

The institution was revised by a law—passed in the heat of the law-and-order election campaign of 1970—which empowered the Justice Department to convene special grand juries virtually at will; provided limited immunity to force witnesses to testify; narrowed judicial scrutiny of prosecutors' conduct.

DOMINATION CHARGED

The results: increased use of grand juries and, critics claim, increased domination of them by prosecutors.

"Any experienced prosecutor," says Chicago federal Judge William Campbell, "will admit that he can indict anybody at any time for almost anything before any grand jury."

CHANGES SOUGHT

A series of congressional bills seek to restore the independence of grand juries and bolster the rights of witnesses through four basic "reforms":

Replace limited ("use") immunity—under which witnesses can be compelled to testify, but still be prosecuted—with immunity requiring consent from witness, prosecutor, and judge.

Shorten confinement of witnesses for contempt—under which dozens of witnesses have been jailed summarily for refusing to testify—from a maximum of 18 months to six months.

Guarantee witnesses the right, now denied, to have a lawyer at their side.

Require that witnesses (as well as grand jurors) be informed of their legal rights.

[From the Denver Post, June 23, 1976]

GRAND JURY REFORM MERITS PUBLIC SUPPORT

The decision by Congress to move ahead during the current legislative session on reform of the grand jury system is both hopeful and significant.

It is hopeful in that House Judiciary Committee Chairman Peter Rodino Jr., D-N.J., senses a mood in Congress favorable to reform.

It is significant in that the move comes at a time when Congress is concerned about ending the abuses of the Watergate era—a period when the grand jury was widely misused at the federal level.

A series of legislative proposals has been drawn up aimed at four basic areas of grand jury reform. The proposals would—

Require that witnesses, as well as jurors, be told of their legal rights.

Give a witness the right, now denied, of having a lawyer with him during grand jury proceedings.

Replace "use" immunity—under which a witness can be required to testify, yet still be prosecuted—with immunity requiring consent from the witness, prosecutor and judge.

Shorten the maximum length of time a witness can be jailed under a contempt of court citation—for refusing to testify—from a maximum of 18 months to six months.

As this newspaper pointed out in a series of editorials on the grand jury system, the main thrust of reform of the system must be to bring it into greater harmony with the Bill of Rights, which spells out the use of the grand jury in the Fifth Amendment.

In that regard, we would also like to see Congress reduce the grand jury's dependence on secrecy—a dependence which is at variance with justice goals in an open, democratic society.

The public's right to know under the First Amendment can be furthered by a congressional stipulation that in certain cases of wide public concern transcripts of completed grand jury proceedings can be made available by the courts for public release.

The courts, of course, must be fully mindful of the rights of defendants and witnesses, but that option should be available for careful use in the public interest.

The fact that such transcripts might be available for release might also serve as a deterrent to intimidation of witnesses in grand jury proceedings.

Overall, we believe that Congress is on the right track in its current efforts to "democratize" the grand jury system.

The House Judiciary Committee merits—and should get—full public support for its reform labors.

[From the Louisville Times, Nov. 15, 1976]

CONGRESS CAN CHECK GRAND-JURY ABUSES

When Jill Raymond was released after 14 months in the Madison County, Ky., jail, she said she hoped her experience would call attention to the misuse of federal grand juries.

Her case, and the cases of about 50 other persons who have been jailed for refusing to answer grand jury questions, have had just that result. Congress will be considering reforms in the grand jury system during its next session.

Ms. Raymond was locked up without a trial and without benefit of procedural safeguards that protect citizens from the abuse of state power.

What she wouldn't do was give the jury whatever information she may have had about two fugitives sought by the FBI. The penalty was a contempt citation and a jail term that lasted as long as the jury was in session.

More recently, four Fresno, Calif., newsmen went to jail for refusing to reveal the source of secret grand jury testimony that had been published in their newspaper. Again they were neither charged with nor convicted of a crime. A county rather than a federal grand jury was involved, but the principle is the same.

It is legitimate to argue that there must be some punishment for persons who won't cooperate in a grand jury investigation of a crime. What is abhorrent in a democratic society is that a judge can order recalcitrant witnesses imprisoned without due processes and with no real time limit on their loss of freedom.

So if Congress is serious about reform, it will start off by requiring a procedure for determining the guilt or innocence of persons accused of contempt and set minimum and maximum penalties.

Critics charge, with justification, that federal grand jury powers have been isused in other ways, especially during the turbulent Vietnam-Watergate era.

There is considerable evidence that grand juries have been used to harass persons who could not be convicted in regular court proceedings, to gather information about dissident political groups, and to serve as an investigatory arm of the FBI.

The immunity laws, which have been responsible for a number of witnesses being jailed for contempt, are a particularly potent weapon in the hands of overzealous prosecutors.

Many of these practices have distorted the original purpose of the grand jury, which was to shield citizens from state power. Although they once had considerable independence and could steer investigations in whatever direction they wanted, grand juries now tend to be rubber stamps for prosecutors.

Some of the reformers want grand juries to return to what Rep. Joshua Eilberg of Pennsylvania calls their "historic purpose as a protector of innocent people . . ."

Not surprisingly, the Justice Department has a different viewpoint, and its concept of the present system as an invaluable tool in solving crimes must be considered as well.

Congress, however, must act to check those abuses that have occurred or that may occur in the name of justice.

[From the Evansville Press, Nov. 18, 1976]

GRAND JURY REFORM

The grand jury system, a basic component of the American legal system established by the U.S. Constitution, is due for a rough going-over by the new Congress early next year.

In recent times, many judges and lawyers have cast increasingly jaundiced eyes on the functioning of grand juries—especially federal grand juries.

A provision of the Bill of Rights states that no person can be brought to trial on a felony charge unless a grand jury first determines there is sufficient evidence to suspect a crime has been committed. The aim was to protect citizens against harassment and persecution by the state.

However, as many see it, it hasn't worked out that way. Instead, too often, they think, the grand jury has become the tool of overly ardent prosecutors, permitting them to obtain evidence by highly questionable and harassing means.

The harshest criticism of federal grand juries has centered on the new "use-immunity" doctrine established by law in 1970. It permits prosecutors to grant immunity from prosecution to an unco-operative witness in return for a promise not to use the specifically immunized evidence against him later.

The 1970 law threw out the traditional "transactional" immunity which protected a witness from any prosecution except for perjury. It also took away from the courts the right to approve immunity agreements. The result has been that a federal prosecutor can now force a witness to testify against himself or others under threat of spending up to 18 months in jail.

The bill before Congress would prohibit involuntary immunity and would permit the granting of immunity only if a majority of the grand jury and judge approve. It would eliminate "use immunity" altogether.

And it would require that transcripts of grand jury proceedings be kept and made available to witnesses' attorneys on request. There is no requirement to keep such transcripts under present law.

Certainly, the grand jury system is due for reform.

The Ford administration has opposed any change in the grand jury system. If President-elect Jimmy Carter were to take the opposite view, long-needed changes designed to fulfill the original aim of the Founding Fathers may indeed come to pass.

[From the Columbia Journalism Review, November/December 1976]

GRAND-JURY REFORM—ALTERNATIVE TO SHIELD LAWS

[By Sam Pizzigati[1]]

The fifteen days the *Fresno Bee* Four spent behind bars in September for refusing to reveal their source for a *Bee* exposé were, on one level, a courageous example of journalistic integrity. But on another equally valid and far more depressing level, their incarceration was no inspiration. It was a sorry reminder of how far the drive for an effective press shield *hasn't* come. Nearly fifty years after the push for press shield laws began, journalists can still be jailed for engaging in their profession.

The sacrifice of the *Bee* Four is not likely to change things. It will not, for instance, spark the enactment of a new California press shield law. When the four Fresno reporters and editors were initially subpoenaed, California already had a solid shield statute, but it didn't do the *Bee* Four much good. The judge in the case simply shrugged the state press shield off as unconstitutional. Nor will the Fresno horror prod Congress into action. The pending federal press shield bills are bogged down in legitimate problems with definitions: what is a "journalist" anyway?

All this leaves reporters where they have always been: at the mercy of criminal-justice officials. If a prosecutor or judge wants the name of a reporter's source badly enough, the journalist is in for a draining ordeal. Simply put, the drive to protect journalistic confidentiality has stalled. Perhaps it is time, then, to step back and rethink the press shield law movement's single-minded concern for who is being subpoenaed and start asking questions about who is doing the subpoenaing—and in most of the controversial press subpoena cases that means the grand jury.

By and large, journalists have not asked these questions yet. They have accepted the standard law-enforcement contention that grand juries are bulwarks against crime entitled "to every man's evidence" while trying to argue, without much success, that the importance of an unfettered press makes the journalist an *exception* to the grand jury obligations of ordinary citizens.

Others, however, have challenged the government's conception of the grand-jury process. Lawyers subpoenaed before grand juries to testify about their clients, political activists grilled about their politics, and strikers questioned about their unions have pointed out that the grand jury was incorporated into the Bill of Rights in 1791 to check, not facilitate, prosecutorial power. They have shown that the grand jury has become exempt from due process and will do anything a prosecutor wants, and they have taken the case for fundamental grand-jury reform before Congress—and found a favorable reception. More than thirty representatives and senators have sponsored reform bills and, while none of these bills specifically mentions "journalists," all would profoundly affect the ability of journalists to protect the confidentiality of their sources. They offer, in effect, an alternative to what may be a dead end.

An example. Each major reform bill now before Congress would entitle every grand-jury witness to a copy of his or her testimony. Under current federal rules, this grand-jury transcript need not even be kept, let alone be accessible to witnesses. Without a transcript of their testimony, there is no way subpoenaed journalists can prove they have not violated a source's confidence short of total silence inside the grand-jury chamber. With a transcript guaranteed, journalists could conceivably testify before a grand jury and maintain credibility with their sources at the same time.

The omnibus grand-jury reform bills introduced by Representative Joshua Eilberg, a Democrat from Pennsylvania, and John Conyers, Jr., a Democrat from Michigan, among others, include dozens of such procedural changes that should make prosecutors think twice before embarking on headline-hunting expeditions or mad scrambles to fill the holes in hastily drawn indictments.

Conyers's H.R. 11660, for instance, spells out a legal foundation for subpoena challenges. The bill authorizes the bench to quash a subpoena whenever the subpoenaed journalist (the bills, remember, cover all witnesses) can show that the subpoena would impose an unreasonable burden, that the purpose of the subpoena is punitive, or that the subpoena represents an attempt to build the case against someone who has already been indicted.

[1] Sam Pizzigati is co-director of the Coalition to End Grand Jury Abuse, in Washington.

Should none of these categories be found appropriate by the court, confinement would still not be automatic for journalists who refused to betray their sources. Eilberg's H.R. 1277 says that no witness can be found in contempt if the questions he or she refuses to answer are based on a violation of the federal wiretap statute. Under Conyers's bill, no witness could be confined for refusing to answer questions based on any violation of the witness's constitutional or statutory rights—which means that the First Amendment would become a defense at a contempt hearing.

Should a judge refuse to recognize these contempt caveats, no journalist, in any case, could be confined for more than six months, according to the reform bills. Reducing the current threat of indefinite contempt confinement to six months should bolster the resolve of journalists to resist subpoena pressure, and prosecutors, faced with journalists willing and able to hold out for six months, might not choose to bother with them in the first place.

In most cases, moreover, an additional key provision in Conyers's reform package would do away with the threat of even this six-month incarceration. Conyers proposes the abolition of "forced" immunity, the government's ability to overcome witnesses' Fifth Amendment objections to questions by immunizing them against their will. Under the Conyers bill, witnesses would have to consent before a grant of immunity could be ordered. Subpoenaed journalists, then, could invoke the Fifth Amendment.

But is a journalist justified in taking the Fifth Amendment? Certainly the usual newspaper shorthand for the Fifth "the privilege against self-incrimination," ignores the long philosophical tradition which holds, as Justice William Douglas said two decades ago, that the right not to bear witness against oneself is "a right to silence."

"Reporters," explains Representative Conyers, "should not be placed in a position where they must either go to jail for contempt or 'incriminate' themselves in the eyes of their sources and colleagues."

The Justice Department, predictably, opposes any tinkering with the grand-jury system. Testifying before Representative Eilberg's House Judiciary Subcommittee last June, Attorney General Levi said reformers should trust the government to police its own grand-jury conduct, and, ironically, cited his department's internal guidelines on press subpoenas as an example of effective self-policing.

Levi's remarks should have been ripped apart by the press, but they weren't. With a few exceptions, the media have been indifferent to the grand-jury issue, slow to grasp the shield potential of grand-jury reform, and that is unfortunate. At a time of widespread distrust of the media, the drive to protect the confidentiality of the news-gathering process could profit by emphasizing the rights journalists share with their fellow citizens, not the privileges that set them apart.

[From the New York Times, Dec. 26, 1976]

How Well Do Grand Juries Work?

(By Dena Kleiman)

On any weekday in New York City, as many as two dozen grand juries meet with prosecutors in secret to consider whether suspected criminals should be indicted and brought to trial.

In recent months, procedures used by prosecutors in questioning witnesses, presenting evidence and drawing indictments have been criticized as a number of indictments by Maurice H. Nadjari, the former Special State Prosecutor, and others have been dismissed because of prosecutorial misconduct.

These dismissals underscore what an increasing number of legislators, lawyers and judges believe is a need to revise the grand jury system and institute new safeguards to curb prosecutorial abuse.

In the last month, indictments brought by Mr. Nadjari against Justice Joseph A. Brust, Carmine De Sapio and Patrick J. Cunningham have been dismissed. In addition, a State Supreme Court Justice has indicated he would dismiss a perjury and bribery indictment against Justice Irving H. Saypol and the Appellate Division has upheld the dismissal of an indictment brought by Charles J. Hynes, now the Special Prosecutor, against Albert H. Blumenthal, the outgoing State Assembly Majority Leader.

In each case, judges said that prosecutors relied on insufficient evidence or that they misled witnesses into perjury charges when nothing more substantive could be established.

What is there about a grand jury proceeding that lends itself to prosecutorial abuse? How have critics said the system should be changed?

The grand jury, composed of 23 persons, is said to date from 1161 in England, the time of King Henry II, when it was formed to protect the power of the monarch. Over the years its purpose evolved into a safeguard against arbitrary prosecution. England abandoned the system in 1933 as outmoded and too costly. Charges now are made by prosecutors.

In the United States, the grand jury has come to serve two functions. One type of grand jury hears evidence after an arrest. The grand jurors must decide, by a vote of at least 12, if there is sufficient cause for an indictment. If the suspect is indicted, he faces trial.

A second type of grand jury investigates criminal wrongdoing and accordingly is vested with great power. It can subpoena and question anyone who may help its inquiry. Those who refuse to testify can be held in contempt and sent to jail.

In both, the prosecutor stands before the grand jurors as legal adviser. Theoretically, he may not attempt to influence them. But in practice, there is often little doubt how a prosecutor feels about a case, and because grand jurors often look to prosecutors for guidance, much as petit jurors look to a judge during a trial, prosecutors can influence the outcome of an inquiry.

Critics contend that investigatory grand juries invite prosecutorial abuse—which can result in phony perjury indictments based on misleading questions—and that safeguards are needed to insure the system's integrity. They say that indicting grand juries have become archaic, mere rubber stamps for a prosecutor, and should be abolished.

"Prosecutorial abuse is real," said Assemblyman Stanley Fink, Democrat of Brooklyn, Chairman of the State Assembly's Codes Committee, which issued a report on such abuse last May and plans hearings this session on revising the investigatory grand jury. "Our feeling is that the grand jury was originally designed to serve as a buffer between the government and the people. It no longer does."

Mr. Fink's committee and one in Washington, a subcommittee of the House Judiciary Committee chaired by Joshua Eilberg, Democrat of Pennsylvania, are considering these proposals:

Permitting witnesses to have a lawyer inside the grand jury room. In 41 states, including New York, New Jersey and Connecticut, a lawyer must remain outside the room, so there is no one present to object to a misleading question. In 1974, the New York Legislature passed a bill providing for counsel inside the room, but it was vetoed by Governor Carey who said there was insufficient evidence that such a charge was needed.

Informing witnesses of the line of inquiry before they appear so that they are better prepared.

Informing a witness of his rights, including the right to counsel and the right to remain silent if an answer would tend to incriminate him, before he is called inside the grand jury room.

Restricting rules of evidence and procedure to those that apply during a trial. A prosecutor is under less restrictions during a grand jury proceeding than he is at trial.

Those opposed to changing the investigatory grand jury system argue that it is not designed to be an adversary proceeding but rather a search for the truth. They say that the presence of a witness' lawyer might make for objections that could bog down the proceeding, and that a grand jury should operate with vast latitude and not be inhibited by the same restrictions imposed at criminal trials.

Critics of change also argue that historically the grand jury has worked well, that it is one of the rare institutions that provide for community participation in the administration of justice and that most prosecutors are responsible lawyers who conduct the proceedings accordingly.

With respect to the indicting grand jury, long considered a rubber stamp, twenty-nine states have allowed the prosecutor to bypass this panel and file charges in open court. In these states, including Connecticut, after a suspect has been arrested and probable cause has been established by the police, a prosecutor may file the charges by means of an "information." These states have retained the investigatory grand jury.

[From the Pueblo Chieftain, Pueblo, Colo., Jan. 12, 1977]

PUEBLO BAR ENDORSES GRAND JURY REFORM BILL

(By Margie Wood)

Two local attorneys who helped draft a "grand jury reform" bill now before the Legislature say the proposal is an answer to complaints heard not only in Pueblo or Colorado but nationwide.

The bill was endorsed Tuesday by the Pueblo County Bar Association on a 30-10 vote. One of the prime sponsors of the bill is Sen. Ray Kogovsek, who is employed by a local law firm.

Key provisions of the proposed legislation, according to Randall Jorgensen and Kirk Brown, are protection of witnesses and allowing witnesses to have their attorneys present during questioning by the grand jury.

A witness would receive at least seven days' notice of a subpoena, and would have extended opportunities to challenge a subpoena under the bill. Dist. Atty. Joseph Losavio says this provision could delay a grand jury investigation to the extent of destroying its effectiveness.

"If it's operated as it should be, the prosecutor shouldn't have that problem," Brown said. "In fact, if both sides know a little bit about what's going on, it should reduce some of the time. And if a specious motion (to quash subpoenas) is filed, it can be dealt with fairly quickly by a judge."

"One of the problems has been that a witness gets a subpoena and he doesn't know what for or whether he's a suspect. Then he may be confronted with a document that's three years old, and he looks like he's trying to hide something if he can't remember it."

He added that the bill would not limit a legitimate inquiry by the grand jury, but would restrict harassment of witnesses.

"If someone is truly a witness and not a suspect he's not going to have the incentive to hire a lawyer and have motions to quash the subpoena," Brown said.

Another provision of the bill would prevent the district attorney from forcing a witness to claim the Fifth Amendment before the grand jury if the prosecutor knows in advance of the witness' intention. This has been the practice of some prosecutors already, the attorneys said.

Preliminary hearings on grand jury indictments should be allowed because "DAs have a tendency to take a case to the grand jury if they think it wouldn't get past a judge in a preliminary hearing," Jorgensen charged.

Because courts have held that an indictment cannot be dismissed because of evidentiary matters during the grand jury process, weak cases frequently must go to trial stage before they can be dismissed by the judge. Assuming the evidence is not sufficient to go to a trial jury, dismissal at a preliminary hearing would relieve a defendant of considerable expense.

"The state constitution gives the Legislature the authority to create, restrict or abolish the grand jury system," Brown said.

"The Legislature has created the grand jury procedure; it should regulate grand juries. There is very little statutory authority for grand jury procedures, so juries have been regulated primarily by Supreme Court rules.

Should the grand jury system be abolished? Is the reform legislation, as Losavio charged, really an attempt to destroy grand juries' investigative power?

"I'm a liberal who thinks police and prosecutors should be kept on very short leash," Jorgensen said.

"There is a question whether we need a grand jury in an open society. But in certain areas, the grand jury does serve a legitimate purpose—that's the point of (this) reform legislation, rather than trying to abolish it."

"What happens is that the grand jury can become the pawn of the prosecution" rather than a buffer between the individual and the state, Brown said.

"I think laymen have a part in judicial proceedings but, in a unilateral setting such as the grand jury, I don't think they have the legal background to maintain objectivity from the district attorney's point of view."

[From the Judicature, March 1977]

A Proposal for Grand Jury Reform

(By Joshua Eilberg*)

I would like to thank Martin H. Belsky Counsel to the Subcommittee on Immigration, Citizenship and International Law of the Judiciary Committee, for his assistance on this article.

The grand jury was created to be a "bulwark against oppression"—standing between the government and the citizen as a protection against unfounded charges and unwarranted prosecutions. It was intended to be an "arm of the court," acting under the close supervision of the judge, to assure that offenses would be investigated without bias and accusations would be screened to determine their validity.

Recently, however, critics have charged that the grand jury has been misused to serve partisan political ends, to harass philosophic enemies, and to punish distasteful but noncriminal activities.[1] The common complaint is that the prosecutor uses grand jurors and grand juries to do his own bidding with little or no interference or control by the court and with few guidelines from Congress. Critics cite the cases of Patty Hearst, Daniel Ellsberg, the Harrisburg Eight, the Gainesville Seven and the Camden Twenty-eight.[2]

For the first time since the adoption of the Bill of Rights in 1789, Congress has undertaken a comprehensive review of the federal grand jury system—its history, operations. problems and reform. During the 94th Congress, the House Judiciary Subcommittee on Immigration, Citizenship and International Law heard complaints and suggestions about the present federal grand jury system from judges, prosecutors, defense counsel, citizens and reform groups. It reviewed H.R. 1277, the proposed Grand Jury Reform Act which I introduced, and other grand jury reform proposals.

Because of the demands of other legislative business, the Subcommittee did not report out such legislation last year. Hearings will be resumed this session on a new grand jury bill, H.R. 94, which I introduced on January 4, 1977.[3] I believe that the new Congress will adopt comprehensive grand jury legislation. H.R. 94 provides a useful framework for review of grand jury issues and possible reforms.

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*Joshua Eilberg is a U.S. Representative from Pennsylvania (northeast Philadelphia) and a member of the House Committee on the Judiciary.

[1] *See generally*, Clark, The Grand Jury—The Use and Abuse of Political Power (1976); Antell, *The Modern Grand Jury; Benighted Supergovernment*, 51 A.B.A.J. 153 (1965); Boudin, *The Federal Grand Jury*, 61 Geo. L. J. 1 (1973); Comment, *Federal Grand Jury Investigation of Political Dissidents*, 7 Harv. Civ. Rights-Civ. Lib. Rev. 432 (1972).

[2] *See* Cowan, *The New Grand Jury*, New York Times Magazine, April 20, 1975; Donner and Cerrutti, *The Grand Jury Network: How the Nixon Administration has Secretly Perverted a Traditional Safeguard of Individual Rights*, The Nation, January 3, 1972.

Recently, at my request the Congressional Research Service of the Library of Congress prepared a report on examples of grand jury abuse. It discusses:

(1) the "Leslie Bacon" case, involving a Seattle, Washington, grand jury investigation of a bombing in the United States Capitol in Washington, D.C.

(2) the "Patty Hearst" case, involving a nationwide investigation involving at least three grand juries, of the actions of Ms. Hearst as part of a "revolutionary army" to commit terrorist crimes;

(3) the "Daniel Ellsberg" case involving grand juries in Los Angeles and Boston to investigate the dissemination of the Pentagon Papers.

(4) the "Harrisburg Eight" case involving a Harrisburg, Pennsylvania, grand jury investigation of an alleged plot to blow up public facilities in Washington, D.C.

(5) the "Tucson grand jury case" involving a grand jury investigation in Tucson Arizona, of five residents of Los Angeles, California, for alleged "radical-revolutionary activity."

(6) the "Vietnam Veterans Against the War" case, involving a grand jury investigation of twenty-three members of an anti-war group in Tallahassee, Florida, during the 1972 Republican Convention in Miami;

(7) the "Camden Twenty-Eight" case involving a grand jury investigation of an attempted raid on a draft board office.

See Report on Selected Cases Alleged to Have Been Examples of Grand Jury Abuse in Committee on the Judiciary, House of Representatives, *Hearings on Federal Grand Jury*, 94th Congress, 2nd Session, at 729–35 (1976).

[3] The bill and a summary of its provisions can be found in the Congressional Record on Jan. 11, 1977, at H–314 to H–319.

INDEPENDENT JURIES

If grand jurors are to make rational and independent decisions, they must be fully informed of their duties and rights. All too often, the prosecutor undertakes an investigation without advising or even consulting the jurors.

H.R. 94 requires the court to give "adequate and reasonable notice" to the grand jurors of their duty to inquire into offenses fully and fairly and to indict offenders. The jurors must also be clearly informed of their right to call and interrogate witnesses and not merely rely on the prosecutor, and of their right to secure documents and other evidence and not merely depend on the selections of the prosecutor. To guarantee such independence, the bill would also authorize a grand jury to conduct an independent inquiry into any federal offense, with a special attorney independent of the Department of Justice if necessary.

H.R. 94 gives any individual the right to make a written request to the attorney for the government to appear before the grand jury to testify or present documents. The grand jury does not have to hear a witness, but the attorney for the government must forward the request, with a possible recommendation, to the jury.

Unless special circumstances are shown, the attorney for the government must notify a potential defendant of the likelihood of indictment and tell him of his right to make a request to the jury to testify. Any person requesting permission to testify would have to waive immunity, testify only on relevant and competent matters, and be subject to cross examination by the attorney for the government.

The attorney for the government must advise the grand jury of the existence of exculpatory evidence for any potential defendant. He may not bring before the grand jury any witness who has given written notice in advance of his intention to invoke the Fifth Amendment, unless that person has been granted immunity.

IMMUNITY

One common complaint of abuse concerns the prosecutor's ability to immunize any witness without any judicial review and the limited protections to a witness granted such immunity.[4] Under present federal law, the witness is entitled only to "use and derivative use immunity" and not transactional immunity.[5] This means that evidence supplied directly or indirectly by a witness in his grand jury testimony may not be used against him. Any subsequent prosecution must be based on "independent evidence."

Many have questioned whether use immunity provides the proper balance between the Fifth Amendment privilege against self-incrimination and the need of the government for testimony. It is extremely difficult for a witness to overcome or challenge a statement by the government attorney that a prosecution is untainted by the witness' testimony, especially since the witness has no access to the government file. Moreover, even assuming the good faith of the prosecutor, he may derive leads from such testimony without realizing it.

Only by assuring that no prosecution can occur once immunity is granted will the individual feel adequately protected. In fact, in light of all the court challenges to immunity grants, a return to transactional immunity may lead to more confidence by immunized witnesses, and thus fewer challenges to the grant of immunity and fewer refusals to testify.

Juries are supposed to operate under the supervision of the court, but the calling and immunizing of witnesses now receives automatic court approval and it is excluded from court review. Moreover, courts are not required to review the question of whether a witness will testify even if he receives immunity or whether the grant is really only an attempt to punish him.

H.R. 94 would ensure that the courts review immunity grants and make such grants only when it has decided that the benefit to law enforcement and the likelihood of securing testimony outweigh the witness's loss of his right to refuse to testify. In addition, H.R. 94 would return immunity to "transactional immunity," protecting a witness from prosecution for any transaction he mentions when he testifies pursuant to a grant of immunity.

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[4] *See generally,* Committee on the Judiciary, House of Representatives, *Hearings before Subcommittee No. 1 on H. Res. 220, H. Res. 281 and Similar Resolutions of Inquiry—Grand Jury Venue—Northern District of Texas,* 93d Congress, 1st Session (1973) ("Fort Worth Five" Case).

[5] Organized Crime Control Act, 18 U.S.C. §§ 6001–02; Kastigar v. United States, 406 U.S. 441 (1972).

The court must also make certain findings in regard to a request for immunity before the request can be granted. The court must find that the grand jury investigation is authorized by law and that the application is in accordance with Justice Department procedures; that the testimony and information sought is within the scope of the investigation and is relevant; and that a summary of the evidence relating to the witness and relating to the need for immunity has been submitted to the court.

The court can consider as a possible defense to an immunity request, or a prosecution for contempt, a real threat of foreign prosecution if the witness testified. If the U.S. attorney or the attorney for the government can demonstrate that adequate safeguards are made to minimize danger of foreign prosecution, immunity can nevertheless be ordered.

In order to protect the witness and ensure transactional immunity, H.R. 94 would not allow the grand jury which considers the immunized witness' testimony to indict him under any circumstances.

THE CONTEMPT POWER

Grand juries possess contempt power so they can obtain compulsory testimony from witnesses in a criminal investigation. Critics contend, however, that some prosecutors call political dissidents to find out information unrelated to criminal activity and to punish such individuals without any proof of criminal activities. Knowing they will refuse to testify and so may be jailed for contempt, the prosecutor has, in effect, misused the contempt power to punish them, rather than to secure evidence of crimes.

Under present law, a witness who refuses to testify can be confined for indefinite periods without the right to jury trial and without any of the other due process requirements of specificity and particularity attached to prosecution and punishment for defined offenses.[6] Confinement for civil contempt is intended to be "coercive"—to secure testimony or documents—and not punitive—to deter others or punish for an offense. Often, however, the effect is punitive when the witness has clearly indicated that he or she will never be compelled to testify by confinement. A prosecutor can select individuals for punishment, then subpoena, immunize, and imprison them, when no offense has been proven.

To limit this potential abuse, H.R. 94 would set the maximum term of confinement for recalcitrance at six months and would prohibit repeated confinements for refusal to testify about the same transaction or event.

SECRECY

Another continuing complaint about grand juries is the possibility of "trial by newspaper." Pretrial publicity could affect a potential defendant's ability to obtain an unbiased jury and a fair trial and could allow individuals to be convicted of a crime in the public's mind because of grand jury leaks, without ever coming to trial. The inherent power of the court to punish violations of contempt is insufficient. H.R. 94 would revitalize the protective function of grand jury secrecy by making a leak a criminal offense.

For knowing disclosure of evidence or a statement made in the jury room, there is a fine of $500 or six months in jail. The crime is not applicable to a disclosure by the attorney for the government in performance of his duties, disclosure directed and permitted by the court, disclosure by a witness or his counsel, or disclosure by a third party not present at the grand jury proceeding.

Knowing disclosure of grand jury activities in order to obtain money, to affect the actions or decisions of the jury, or to affect further legal proceedings is made a more serious offense punishable by a $20,000 fine or imprisonment up to five years. Again, this section does not apply to disclosures by the attorney for the government in performance of his duties, disclosure directed and permitted by the court, or disclosure by a witness or his counsel.

But because this kind of disclosure represents a more serious offense, this section *does* apply to third parties if the government can demonstrate that their disclosure directly affected the legal machinery. The section specifies, however, that this more serious felony of obtaining or providing grand jury information for the payment or compensation does not apply to a newspaper or television representative acting in his professional capacity.

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[6] *See* 28 U.S.C. § 1826; Shillitani v. United States, 384 U.S. 364, 372, n. 8 (1966).

PROCEDURAL RIGHTS

Unlike almost every other stage of the criminal process, a witness or a potential defendant brought before the grand jury has almost no procedural safeguards. He has not absolute right to notice,[7] no right to counsel,[8] and very little right to challenge even a tenuous venue.[9]

Notice: H.R. 94 would provide that a witness receive at least a week's notice that he must appear before a grand jury, unless the court allows a shorter period; that a witness be given "adequate and reasonable" notice of his rights; that he be told the subject matter of his investigation and be informed if he is a potential defendant.

Counsel: Most federal districts today allow a witness to leave the grand jury room to consult his attorney, who can wait outside the room. They are not required, however, to allow him to leave or to provide counsel if he is indigent. No district allows a witness to have his counsel with him in the grand jury room, and the recent Supreme Court opinion in *U.S.* v. *Mandujano* indicated that four justices do not believe there is a constitutional right to counsel in the grand jury room.[10]

Fundamental fairness and due process strongly suggest that we ought to guarantee that right by statute. H.R. 94 contains that guarantee. To avoid obstruction or dilatory tactics, counsel would not be able to ask questions or challenge evidence. He would be present, as in a congressional hearing or lineup only to observe and advise.

Nine states presently allow attorneys for a witness to be present while a witness is testifying. None of them have reported any serious problems.[11]

Venue: In March 1973, the subcommittee convened hearings regarding the so-called "Fort Worth Five" controversy in which which five Irish-Americans were subpoenaed by a grand jury in Fort Worth, Texas, for crimes allegedly committed in New York City. When they refused to testify, they were granted immunity without their consent, then held in contempt and imprisoned.

That case showed the potential abuses that can occur when the federal prosecutor is given the discretion, on the slimmest claims of nexus, to convene a grand jury investigation anywhere in the United States, and when witnesses can challenge the subpoena only in the district where it was issued.

H.R. 94 would allow challenges to a subpoena either where it was issued or served or where the witness resides. The subpoena could be quashed if the witness shows it would cause a substantial and unnecessary hardship. Courts, not prosecutors, would decide the propriety of venue.

CONCLUSION

More and more states are providing by statutes and court rules many of these rights, privileges and protections as part of their grand jury system. Nothing indicates that they interfere with the proper investigatory role of the grand jury. And there is a national precedent. The inquiry by the Judiciary Committee of the House of Representatives into the possible impeachment of President Nixon proved that rights can be granted in the grand jury without interfering with its processes.

Acting as the investigative tribunal of the nation, analogous to a grand jury, the Judiciary Committee required all proceedings to be transcribed; allowed counsel to be present with the witness while he testified; allowed witnesses to review their statements; required decisions to be made by the Committee, rather than the counsel; and established detailed guidelines before the inquiry began. Secrecy was maintained; rights were respected; and the inquiry was completed without delay.

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[7] *See* FED. R. CRIM. P. 17; FED. R. CIV. P. 45(a); *see* United States v. Polizzi, 323 F. Supp. 111 (C.D. Cal. 1971), rev'd on other grounds, 450 F. 2d 880 (9th Cir. 1971). One glaring example of lack of notice involved the Pentagon Papers case where Daniel Ellsberg's fifteen-year-old son was served with a subpoena only two hours before he was required to appear before a Los Angeles grand jury. *See* Donner and Cerrutti, *supra* n. 2.

[8] *See* United States v. Mandujano, 425 U.S. 564 (1976).

[9] *See* Blair v. United States, 250 U.S. 273 (1919); Brown v. United States, 245 F. 2d 549, 554 (8th Cir. 1957); United States v. Girgenti, 197 F. 2d 216 (3d Cir. 1952); United States v. Neff, 212 F. 2d 207 (3d Cir. 1954); United States v. Segelman, 86 F. Supp. 114 (W.D. Pa. 1949). *See also* Fort Worth Five Hearing, *supra* n. 4.

[10] United States v. Mandujano, *supra* n. 8.

[11] *See Hearings on Federal Grand Jury*, 94th Congress, 2d Session, at 716, 721–722.

The need for grand jury reform is apparent. Many groups, including the American Bar Association, have indicated that certain fundamental rights and protections should be incorporated into grand jury procedure in order to return the grand jury to its role as a "shield against oppression."

Establishing and maintaining a fair grand jury system cannot depend on Congress alone, however. Congress can reform laws to provide for equitable procedures, but such reforms will not be effective unless people make them work. Competent, ethical and aggressive attorneys for both prosecution and defense must ensure that information is obtained and rights are preserved, and cautious and diligent judges, exercising thoughtful supervision over the grand jury, must ensure that our laws are enforced, that attorneys for both sides do not overstep their bounds, and that witnesses, potential defendants, and the public are protected.

[From The New York Times, March 2, 1977]

Woman Surrenders To Federal Officers In Terrorism Case

(By Mary Breasted)

With one last smile to a friend, Raisa Nemikin, a 27-year-old secretary who works for the Episcopal Church, walked toward the glass doors of the Metropolitan Correctional Center here yesterday afternoon and surrendered herself to Federal marshals.

It was the beginning of what may be a 14-month period of incarceration for her refusal to testify before a grand jury that is investigating terrorist bombings.

Yesterday the United States Court of Appeals for the Second Circuit decided not to allow Miss Nemikin to remain at liberty as the panel considers the merits of her appeal of the contempt ruling, which was ordered on Saturday by Judge Marvin Frankel of Federal District Court.

If she loses the appeal and remains firm in her stand, she will have to stay in jail for the term of the grand jury that wants to question her, or until May 1978.

Miss Nemikin, who is not the only reluctant witness to have been called before the grand jury that is investigating the self-styled F.A.L.N. terrorist group, attracted much public attention because she is an employee of the Episcopal Church and because she had argued that the grand jury's attempts to question her were invasions of her constitutional right to religious freedom.

Her former superior at the church, Maria Cueto, has also been subpoenaed by the grand jury and also said she will resist on the same grounds.

ANOTHER WOMAN HELD AND RELEASED

Last June, another young woman, Lureida Torres, a member of the Puerto Rican Socialist Party and an employee of the newspaper Claidad, was incarcerated on a contempt-of-court order for her refusal to testify in connection with the same case. Miss Torres was released in October, when the term of the grand jury then sitting ran out. The current grand jury was empaneled in November.

In addition, there are government petitions to have two other grand-jury witnesses held in contempt of court in Chicago for their refusal to supply fingerprints, palmprints and photographs of themselves to the Chicago grand jury that is also investigating the F.A.L.N. terrorist group.

CHICAGOAN, 24, IS SOUGHT

The two grand juries are investigating the bombings for which the terrorist group, Fuerzas Armadas Liberation Nacional (Armed forces of National Liberation), has asserted responsibility. The New York grand jury is especially interested in the bombing of the Fraunces Tavern, which took place Jan. 24, 1975, and killed four people and injured 55 others.

Federal prosecutors in both cities are trying to locate the only publicly identified member of the F.A.L.N., Carlos Albert Torres, a 24-year-old Chicagoan who disappeared last fall around the time that Chicago police say they discovered a large amount of dynamite in his apartment there.

Mr. Torres was, at the time of his disappearance, a member of the Protestant Episcopal Church's National Commission on Hispanic Affairs, a group that tried to help the church grants to community programs it deemed worthy in Hispanic communities.

From 1973 through 1975, the National Commission on Hispanic Affairs gave a total of $58,688 to a Chicago private school founded by Mr. Torre's father, the Rev. Jose Torres.

The school, called La Escuela Superior Puertorriquena Rafael Cancel Miranda, was described in its financing proposal to the church's Hispanic commission as an "alternative" to the "public and private systems of education whose role is to perpetuate the status quo and represent the ruling classes." The curriculum was aimed, the proposal said, at Puerto Rican students who were to receive instruction from 22 volunteer teachers.

Mr. Torres, who is now wanted on a Federal fugitive warrant, taught at the school as did his friend, Oscar Lopez-Rivera, age 32, who was a member of the church's National Commission on Hispanic Affairs from 1972 to 1975. Mr. Torres became a member of that commission in 1976.

[From The New York Times, March 6, 1977]

WITNESS ON F.A.L.N. RULED IN CONTEMPT

WOMAN WHO REFUSED TO TESTIFY BEFORE FEDERAL GRAND JURY DUE IN JAIL TOMORROW

(By Mary Breasted)

Maria T. Cueto, the former director of the Protestant Episcopal Church's National Commission on Hispanic Affairs, was ruled in contempt of court yesterday for her refusal to testify before a Federal grand jury that is looking into terrorist bombings claimed by the F.A.L.N.

Judge Marvin Frankel of Federal District Court in Manhattan, who last week held another church employee in contempt of court on similar grounds, declared Miss Cueto in contempt yesterday morning but delayed the deadline for her jailing until 2 P.M. tomorrow to give her lawyers a chance to seek a stay in the Court of Appeals.

Raisa Nemikin, the 27-year-old secretary who worked for Miss Cueto and the church's Hispanic commission, went to jail last Tuesday after the Court of Appeals decided not to let her remain free as they considered her appeal of Judge Frankel's contempt ruling.

The same lawyers, Elizabeth Fink, Margaret L. Ratner and Daniel L. Meyers, represent both witnesses, and the lawyers have used the same arguments in both cases, contending that Miss Nemikin and Miss Cueto are "lay ministers" who have the privilege to refuse to answer the grand jury's questions under the First Amendment right of religious freedom.

But Judge Frankel has held, in both cases, that religious freedom is not being violated by the grand jury. He said the situation was analogous to the case of a murder in a cathedral, after which, he maintained, it would be quite proper and no violation of the Constitution for law enforcement officials to ask the priest what he had seen.

Young attorneys have frequently joined the spectators during the hearings to listen to Judge Frankel, who is considered one of the most authoritative jurists in the Southern District. The judge has often used a professional manner in speaking to defense lawyers, not merely ruling on arguments, but also trying to instruct them in law.

Yesterday, at one point, Judge Frankel said to the defense lawyers, "You can disagree about what the law ought to be, but not about what the law is."

Some of Judge Frankel's admonishments to the defense attorneys have been more barbed. A reference to himself last week as "an elderly judge" was especially appreciated by the young lawyers, who regularly sit in on his sessions.

He was talking to the Federal prosecutor, Thomas E. Engel, who had been arguing that after two hearings, a contempt ruling and a warning from the judge that she would probably be sent to jail, Miss Nemikin should be imprisoned immediately on Feb. 26, a Saturday.

But Judge Frankel decided to wait until Monday when she would be able to approach the Court of Appeals. He put it thusly: "An elderly judge is entitled to give two warnings."

During the arguments yesterday, it was disclosed that one piece of evidence that led the Government to want to question Miss Cueto was a letter addressed to her found in the Chicago apartment of a young man who is now being sought by Federal authorities and is a suspected member of the F.A.L.N.

The suspect, Carlos Alberto Torres, has not been seen by the authorities since early last November when the Chicago police searched his apartment and reported the discovery of a large amount of dynamite and other incendiary materials there.

The Chicago police said they also found in Mr. Torres's apartment literature with the letterhead of the F.A.L.N. (Fuerzas Armadas Liberacion Nacional, or National Forces of Armed Liberation), the group that has claimed responsibility for 43 bombings over the last three years in Chicago, Newark, Washington and New York. The most serious bombing was the Fraunces Tavern explosion on Jan. 24, 1975, which killed four persons and injured 55.

Mr. Torres, who is 24, was a member of the church's National Commission on Hispanic Affairs last year, and in that capacity, voted on the awarding of church grants to community groups. The letter addressed to Miss Cueto that was found in his apartment was a request for church funds sent by a priest at the Santa Fe Episcopal Church in San Antonio, Tex., according to the Chicago police, who said the request was for money for The Committee for Mexican-American Action.

A Chicago private school founded by Mr. Torres's father received over $53,000 from the church commission between 1973 and 1976, and other groups at the same address received additional money from the commission.

Miss Cueto, who was born in 1943 in Phoenix, Arizona, of Mexican-American parents, has worked for 11 years in anti-poverty programs sponsored by the Episcopal church in Arizona, Los Angeles and New York. She came to work for the National Commission on Hispanic Affairs in August 1972. Last Feb. 1, she was promoted to the position of assistant to the executive officer of the church's Coalition for Human Needs, the office that now handles all the grant money for the various ethnic commissions working with the church.

Miss Cueto's attorneys have repeatedly said she knows nothing about the F.A.L.N. and that she has told the Federal Bureau of Investigation that she knows nothing about the group. She will not submit to press interviews. The questions she has refused to answer before the grand jury are: When was your last contact with Carlos Alberto Torres? Can you identify any commission monies that might have gone to the F.A.L.N.? Can you identify anyone who has taken credit for the Fraunces Tavern bombing?

[From The Evening Bulletin, March 10, 1977]

THE 'EILBERG BILL'—GRAND JURY REFORM

(By Joshua Eilberg[1])

The grand jury system has long been considered an integral part of our judicial heritage. Based on experiences with the British monarchy, our Founding Fathers considered grand juries such an important protection for the individual against possible Government persecution that they incorporated them into the Bill of Rights.

Unfortunately, the grand jury system has recently become the focus of controversy and misunderstanding. Defenders of grand juries view them as an essential prosecutorial tool and as a buffer between the state and the citizen. Critics fear them as uncontrolled "star chambers" and as "rubber stamps" for prosecutors.

Recent history has demonstrated that grand juries are valuable tools to ferret out official corruption. But the historic function of grand juries is also being perverted to serve partisan political ends. Their historic purpose as a "legal shield" is being disregarded by prosecutors who totally dominate the proceedings.

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[1] Representative Joshua Eilberg represents Philadelphia's 4th Congressional District.

As a result of these developments, for the first time since the adoption of the Bill of Rights in 1789, Congress is conducting a comprehensive examination of the federal grand jury system—its operations, its problems, its abuses, and its reform.

In March 1973, as chairman of the subcommittee on Immigration, Citizenship and International Law of the House Judiciary Committee, I convened hearings regarding the so-called "Fort Worth Five" controversy in which five Irish-Americans were subpoenaed by a grand jury in Fort Worth, Texas, for crimes allegedly committed in New York City. When they refused to testify, they were granted immunity without their consent, then held in contempt and imprisoned.

During the hearings, witnesses described the use of the grand jury to investigate "political crimes" and the ability of the prosecutor to open inquiries, often for political purposes, far from the site of an alleged offense. The witnesses also explained how the grand jury system is used to obtain information that is often unrelated to criminal activity.

Following this hearing, both in the 93d and 94th Congress, I introduced comprehensive bills to reform the federal grand jury system and held hearings on them.

Unfortunately, while almost all the witnesses supported some form of legislative change to grand jury procedures, the then attorney general and the Ford Administration totally opposed any reform. The new attorney general has publicly and privately stated his concern about prior abuses and about maintaining the independence of the grand jury. He has agreed to cooperate with my subcommittee in developing appropriate reforms. Hearings will be resumed this session on a new grand jury bill, H.R. 94, which I introduced on January 4, and I expect comprehensive legislation to be adopted by the 95th Congress.

H.R. 94 would insure independent and informed federal grand juries. Jurors, not the prosecutor, would determine and review all the evidence.

To insure secrecy, and avoid trial by newspaper, grand jury leaks would be made a crime, with the punishment depending on the purpose of the leak.

To provide a proper balance between the Fifth Amendment privilege against self-incrimination and the right to obtain evidence, under H.R. 94 a witness could be immunized from prosecution, but only with strict judicial safeguards.

To establish a proper balance between the rights of a witness and the need for thorough investigations, H.R. 94 mandates new procedures. Witnesses would receive one week's notice, unless the government can justify a shorter period.

Witnesses could have counsel with them in the grand jury room—not to ask questions or challenge evidence but only to advise their clients and counsel could be removed for improprieties.

The need for grand jury reform is real. More and more states are providing increased rights and protections. But if the grand jury is to return to its historic role as a "bulkward against oppression," reform of our federal laws to provide for equitable procedures must be enacted.

[From the Philadelphia Inquirer, March 15, 1977]

CLEARED, 2 FIND GRAND JURY GUILTY

(By John F. Clancy)

Former Penn Central executives David C. Bevan and William R. Gerstnecker, vindicated Friday of embezzlement charges connected with the railroad's demise, called yesterday for elimination of the grand jury system.

"I think our judiciary system needs great overhauling," Bevan, once the railroad's chief financial officer, said at his home in Gladwyne. "The grand jury is antiquated. It does not protect the rights of the individual unless you have a very high ethical standard on the part of the prosecutor involved. A prosecutor can get an indictment any day in the week if he wants to and the individual is without proper protection."

Gerstnecker, former Penn Central vice president, echoed Bevan's sentiments at his home in Boca Raton, Fla.

"I'm very happy it's over," Gerstnecker said. "I'm not bitter but I think grand jury proceedings are harassment. The (federal) court has restored my faith in our court system."

Last Friday, U.S. District Judge William Ditter dismissed charges of fraudulent misuse of railroad funds that had been filed against Bevan and Gerstnecker, citing a lack of evidence against them.

Bevan, 70, and Gerstnecker, 63, were indicted in 1974 along with Virginia lawyers Joseph and Francis Rosenbaum, and Fidel Goetz, a German financier, on charges of conspiring to funnel $4.2 million from a $10 million loan into a dummy corporation Goetz set up in Liechtenstein.

The $10 million loan was made in 1969, the year before the railroad went bankrupt. It was made by a syndicate of West German banks to finance the refurbishing. The prosecution charged that Goetz took the money because he claimed Penn Central owed it to him. Neither Bevan nor Gerstnecker was accused of getting any of the money.

"I was a scapegoat," Bevan said. "Rep. Wright Patman, (D., Tex., chairman of the House Banking Committee at the time) was looking for someone to get him off the hook of the biggest bankruptcy that ever occurred. A couple of officers of the railroad used him and his staff to make me the scapegoat, but I will have more to say about that later."

Bevan said he had spent a fortune fighting the charges. "There was no case whatsoever against me and Mr. Gerstnecker," he said. "We didn't have to put on a case in our defense. The prosecution had not put a single bit of evidence against us.

"It's only lawyers like the one I had, Mr. Edward Germann, who was so conscientious and dedicated, and judges who ignore politics, like Judge Ditter, who was serious enough to see there was no evidence, that keep this judicial system going.

"They talk about the golden years of retirement," Bevan said. "I've spent seven of them fighting my own government for justice. There should be some recourse against irresponsible action by public officials who bring cases without any justification. I'm fearful for the future of America."

[From the Philadelphia Inquirer, March 21, 1977]

PUSH RESUMES TO REFORM GRAND JURIES

(By Aaron Epstein)

WASHINGTON.—"A witness stands before a grand jury alone, without notice of questions to be asked, without instruction as to his or her rights, without an attorney.

"If he or she invokes a Fifth Amendment right to remain silent, involuntary immunity can force the solitary figure back before the panel. . . .

"The prosecutor can effectively offer a citizen the choice of secretly informing against his other colleagues—or the public disgrace of incarceration for contempt."

That bleak description, presented to a House subcommittee last week, expresses much of the rationale behind a four-year movement to eliminate the alleged abuses of those secret, investigative bodies known as federal grand juries.

Up to now the campaign for reform has gone nowhere. Last year, for the first time, Congress conducted hearings on the subject but proposed legislation never got out of subcommittee.

Now, Rep. Joshua Eilberg, a Philadelphia lawyer who has been pressing for fundamental grand jury safeguards, thinks that his modified bill—titled the Federal Grand Jury Reform Act of 1977—has a chance.

Several influential prosecutors are sympathetic to Eilberg's bill. Most of the reforms it proposes have also been endorsed by the American Bar Association.

Most important, Eilberg and a top aide, Martin Belsky, a former prosecutor in the Philadelphia district attorney's office, think they can convince the Justice Department that the bill will protect witnesses without hurting the government's grand jury investigations of organized crime and of corruption in local government.

"Unlike former Attorney General (Edward) Levi, Attorney General (Griffin) Bell, at his confirmation hearings and in private conversations with me, has indicated that he supports legislation to provide additional safeguards in the grand jury system and to eliminate abuses," Eilberg said.

Strong opposition is expected from prosecutors, including a group of U.S. attorneys worried that their ability to root out organized crime and political corruption would be damaged if Eilberg's bill becomes law.

The supporters of grand jury reform include a Coalition to End Grand Jury Abuse, consisting of civil rights groups, religious organizations, defense lawyers, women's groups and several labor unions.

These groups argue that the grand juries, originally designed to protect individuals against the government, has become, in recent years, a tool used by the government to harass political dissenters—particularly Vietnam war dissenters, the Black Panthers, the Catholic left, the Puerto Rican independence movement, the Los Angeles anti-draft campaign, the women's movement and supporters of the unification of Ireland.

Grand Juries were written into the Bill of Rights so that the government, on its own, could not bring charges arbitrarily. The government first has to present its evidence to the grand jury—a panel of ordinary citizens—which then determines if there is sufficient reason to bring a person to trial.

Grand juries have since acquired power to investigate certain illegal activities, such as racketering. In this capacity, the grand jury hears witnesses and obtains documentary evidence in order to determine whether certain individuals should be indicted.

The "abuses" most often cited by present day critics are that the grand jury system:

- Forces a recalcitrant witness to testify by granting immunity that only partly protects him for prosecution. The witness could still be accused of a crime if evidence against him is gathered from other sources.
- Punishes recalcitrant witnesses too severely.
- Is a "rubber stamp" for federal prosecutors, in that it sees and hears only the evidence the prosecutor presents and indicts at the prosecutor's recommendation.
- Unjustly damages reputations because jury members are not always as secretive as they are sworn to be.
- Fails to give witnesses access to legal advice in the grand jury room.
- Allows witnesses to be subpoenaed too easily.

Following is a description of what the Eilberg bill would do about these complaints and the position of the American Bar Association, as explained by Richard E. Gerstein, state attorney in the Miami area for more than 20 years and chairman of the ABA's grand jury committee:

IMMUNITY

The bill would discontinue the partial immunity known as "use immunity" and would assure that a silent witness could never be charged with a crime connected with his testimony, even if evidence is obtained elsewhere. The power to grant immunity would be taken away from the prosecutor, and a judge would have to rule that the information being sought from the balky witness is of vital public interest.

Gerstein agreed that "use immunity" can lead to abuses by the prosecutor and can be "a subtle invitation to perjury."

CONTEMPT

Witnesses who are offered "use immunity" and still refuse to testify may now be jailed for 18 months. The bill would reduce the maximum penalty to six months. Also, a witness may now be called to testify when his prison term runs out, and if he refuses again he can be jailed again. Under Eilberg's bill, a witness could be imprisoned only once for refusing to talk about a specific subject.

The ABA opposes the sentence reduction, but agrees that the prohibition of multiple confinements "is needed to limit potential abuse."

"RUBBER STAMP"

The bill would allow a grand jury, with court approval, to break free of the government prosecutor and get its own attorney in instances of conflict of interests, partiality or improper conduct by the prosecutor.

Gerstein agreed with this provision.

COUNSEL

The bill would give witnesses the right to legal counsel in the grand jury room. Gerstein agreed that this was a desirable reform.

Several states allow the lawyer for the witness inside the grand jury room, Gerstein said, and prosecutors in those states report their investigations are not impaired.

SECRECY

The Bill provides that persons violating grand jury secrecy would be subject to a $20,000 fine or five years in prison for disclosing jury activities in exchange for money. A government attorney performing his duties, a witness or his lawyer would be immune from such punishment. Gerstein supported the stronger penalty.

SUBPOENAS

The bill would require seven days' notice before a witness would have to testify or produce evidence. The subpoena must advise him of all his rights, and the subpoena must be killed if a judge finds that no new evidence is likely to be produced.

Gerstein preferred a delay of 72 hours to one of seven days.

[From the Philadelphia Inquirer, March 30, 1977]

HE CONTINUES DEFIANCE OF GRAND-JURY SYSTEM

(By Murray Dubin)

Jay Weiner, just 20 hours out of a federal prison term imposed by refusing to talk to a grand jury, denounced the grand jury system yesterday.

Weiner, 22, a former sports writer and restaurant worker who lives in West Philadelphia, was sent to the Allenwood Federal Prison Camp Nov. 30 for refusing to testify before a federal grand jury investigating Patricia Hearst's stay in northeastern Pennsylvania in 1974.

On Monday, U.S. District Judge William J. Nealon freed Weiner without explanation. Weiner had expected to remain jailed until July when the grand jury's term expired.

"My release, after four months of pointless imprisonment, ends another chapter in the ugly history of grand juries in the United States," Weiner said at a mid-afternoon press conference. "My jailing is not an isolated event, but part of a larger picture."

Referring to two women imprisoned in New York for refusing to cooperate with a government investigation of the Puerto Rican independence movement, Weiner said, "The three of us, unfortunately, are part of a growing union of people forced to pay high prices for refusing to aid grand juries—people like anti-war, gay, labor activists, native Americans, Irish Americans, radical feminists, progressive attorneys and Puerto Rican independents.

"We are a union of people who refuse to become informants, who are therefore jailed without trial, without even being charged with a crime. We are jailed for asserting our basic human right to silence.

"My release has legal significance. I convinced a judge that I would never testify. I convinced a judge, over the government's opposition, that my jailing was senseless."

Weiner, with his older brother, Edward, and his father, Samuel, looking on, suggested that he could be subpoenaed before the grand jury again, but he added, "I don't expect to be subpoenaed again. Nealon's intervention undercut the prosecutor's ability to call me back."

Weiner said that he intended to continue working in a restaurant, writing about sports "but not be a sports writer" and speaking out against grand juries.

[From the Courier-Post (Jersey P.M. Report), Apr. 4, 1977]

Congress Studies Reform of Grand Jury

(By Tony Mauro)

For the first time since the Bill of Rights was adopted, the U.S. Congress is taking a long hard look at one of the country's oldest institutions—the federal grand jury.

Leading the investigation is Rep. Joshua Eilberg of Philadelphia, the chairman of a subcommittee of the House Judiciary Committee.

In hearings that started last year and resumed again two weeks ago, Eilberg's committee has heard a litany of legal horror stories about the abuse of grand juries. The hearings have left Eilberg, a Democrat, more certain than ever that the system is long overdue for reform.

"The grand jury is clearly the rubber stamp for the prosecutor," Eilberg said in an interview at his North Philadelphia office last week. "The system has been abused, there is no doubt about it. I know we're right."

He has introduced legislation that, if passed, would restore the grand jury's ability to make "independent and rational decisions," in Eilberg's view.

He also hopes the legislation would spur reform action in individual states, where state and county grand juries would not be affected by the bill. Legislative sources indicate there has been little grand jury reform activity in New Jersey.

Grand juries were traditionally seen as the buffer between zealous prosecutors and the public, sifting evidence in private to see if the prosecutor had enough of a case to go forward with a public trial.

But over the years, critics say, the grand jury has become a tool of the prosecutor, doing his bidding and issuing indictments almost automatically.

The abuses peaked during the Nixon years, according to Eilberg, who first saw the problem when his committee conducted a hearing in 1973 into the case of the so-called Fort Worth Five.

In that case, five sympathizers of the Irish Republican Army from New York were called to testify before a grand jury that was investigating possible gun-running to Northern Ireland. But the grand jury was called in Fort Worth, Tex., not in New York where their families were and where they might have had a more sympathetic environment.

The five refused to testify and spent nearly a year in jail, without trial. Those hearings sparked Eilberg's bill and the more recent airing of the problem.

There the Nixon abuses came to fuller light, according to Eilberg's aide Martin Belsky.

Grand juries—which have broader subpoena powers than the FBI—were convened across the country, to do the "fishing" for information the FBI could not do, Belsky said.

Abuses were found in the investigations of Daniel Ellsberg and the leaking of the Pentagon Papers, in the probes of those accused of harboring Patty Hearst, in the Camden 28 case, and others.

Even when not abused, the current grand jury system offers little protection of individual rights, Eilberg feels.

An individual called before a grand jury has no absolute right to advance notice—Daniel Ellsberg's 15-year-old son was once called at 7 a.m. to appear two hours later—and has no right to counsel. Witnesses are allowed to have their lawyers sit outside the grand jury room, but cannot have them in the room with them.

Eilberg's bill would change these practices.

"We've got to increase protection for the rights of witnesses before the grand jury," said Eilberg. The American Bar Association, which has studied the grand jury problem, has stressed the right of witnesses to have attorneys by their sides as the key grand jury reform.

Some, including U.S. Atty. Gen. Griffin Bell, have worried this might turn the grand jury proceeding into a mini-trial, but Eilberg dismisses the problem. His bill would allow the lawyer to advise his client, but not to interfere with the proceeding.

To increase the grand jury's independence, Eilberg's bill would require informing the jurors that they can call witnesses and seek evidence independent of the prosecutor and that they can hire their own lawyer.

Issues of immunity and secrecy are also dealt with in the bill.

Eilberg plans another set of hearings on the bill, and wants to hear Bell's views about it—a key factor in the legislation's future.

[From the St. Louis Post-Dispatch, Apr. 6, 1977]

GRAND JURY ROLE

The criminal justice section of the American Bar Association has added its voice to those of other critics in favor of legislative safeguards against abuse of the grand jury. The ABA group has recommended that Congress, among other things, allow witnesses before grand juries to have legal counsel, ban the repeated imprisonment of witnesses for refusing to testify before grand juries, and allow grand jury witnesses to use a violation of the federal wire-tapping law as a defense.

Such protections are needed because of the evolution of the grand jury from what originally was its role as a shield against unjust prosecution to its present role as a tool of the prosecution. The abuse of the grand jury reached a peak under the Nixon Administration, which used the grand jury as an investigative lever to force delivery of evidence in violation of the spirit of the Fifth Amendment's guarantee against self-incrimination.

Legislative reforms, such as the ABA group is proposing, are designed to return the grand jury to its intended constitutional purpose as a shield for the people against the government rather than a sword for the government against the people.

[From the New York Times, Apr. 8, 1977]

NADJARI SUPOENAED BY ASSEMBLY PANEL

WILL TESTIFY AT INQUIRY NEXT WEEK ON PROSECUTORIAL PRACTICES

(By Tom Goldstein)

Maurice H. Nadjari, the former special state prosecutor, has been subpoenaed to testify next week before a State Assembly subcommittee that is looking into grand jury and prosecutorial practices.

The city's five District Attorneys and three special prosecutors have agreed to testify voluntarily at the three-day hearings beginning Tuesday and Mr. Nadjari said he too had volunteered to testify about proposed legislation to alter the grand jury process.

Mr. Nadjari said he had sent a letter to Richard Gottfried, the Manhattan Democrat who is chairman of the Assembly's Committee on codes and its subcommittee on Criminal Justice, a few hours before he was subpoenaed Wednesday night.

THE NADJARI VIEW

Mr. Gottfried, who received the letter yesterday, said it really did not amount to a voluntary offer to appear.

Mr. Nadjari and Mr. Gottfried have never met, nor have they ever spoken on the telephone. Before the subpoena was served, Mr. Gottfried said that he had tried to reach Mr. Nadjari several times, but was unsuccessful. On Tuesday, Mr. Gottfried said, an aide to Mr. Nadjari said Mr. Nadjari would be unable to appear next week because of a full campaign schedule.

Mr. Nadjari, whose methods and record as special prosecutor in charge of rooting out corruption in New York City's criminal-justice system were frequently criticized, is now running as a Republican for the Queens District Attorney's job.

Mr. Nadjari says Mr. Gottfried is "confused." Mr. Gottfried says he is "mystified" by Mr. Nadjari's conduct.

Mr. Nadjari said yesterday that he was willing to appear voluntarily but had refused to set a definite date until he reviewed the proposed legislation. He said several Queens Republicans in the Assembly had told him that Mr. Gottfried had said the hearing had been designed to "get Nadjari."

"That's utterly untrue," Mr. Gottfried said. "I never said that. The hearings are not focusing on any particular prosecutor. We are studying certain practices and Mr. Nadjari is an extremely important witness."

The proposed legislation deals with a variety of ways in which the prosecutor's influence over a grand jury could be curbed. One bill would give witnesses before a grand jury the right to have a lawyer inside the grand jury room. Another would establish a "grand jury counsel" to replace the prosecutor in advising grand jurors. A third bill would establish statutory standards for prosecutorial conduct.

[From the New York Times, Apr. 16, 1977]

INSIDE THE GRAND JURY ROOM

PROSECUTORS MOVING TOWARD VIEW THAT WITNESS SHOULD BE ABLE TO HAVE HIS LAWYER AT HIS SIDE

(By Tom Goldstein)

Of all the issues relating to the grand jury—how big it should be, how the jurors should be selected, what type of immunity witnesses should be given, how unlawful disclosures can be stopped, whether it should survive at all—none is more the subject of debate among lawyers and legislators these days than this one: Which side of the grand jury door should the witnesses' lawyer be on?

NEWS ANALYSIS

It is the current practice in Federal courts and in most states for a lawyer to be excluded from the grand jury room but to be permitted to stand outside, where he can confer with his client. Most prosecutors want it that way. Otherwise, they argue, there would be too great an opportunity for obstruction and delay, turning grand jury proceedings into miniature trials. But there are indications, at least in New York, that prosecutors are relaxing their opposition to allowing certain witnesses to have their lawyers by their side in the grand jury room.

The grand jury is a far different institution now from what it was when it was founded in England in 1166. Its function is to determine if there is enough evidence to hold the subject of an investigation for trial, where his guilt or innocence can be decided. Under the penalty of contempt it can compel the testimony of witnesses and the production of evidence without observing all the procedural rules of a trial.

With the power of the prosecutor against him, "no matter how sophisticated, the witness is at a disadvantage in the grand jury room," Gary P. Naftalis, a New York City lawyer, and Federal Judge Marvin E. Frankel wrote in a forthcoming book on the grand jury.

EFFORT TO CHANGE THE SITUATION

Legislation is pending in Congress that would permit witnesses to have lawyers inside the grand jury room to advise them of their rights and liabilities. The American Bar Association supports this, as do Mr. Naftalis and Judge Frankel.

In New York State, which already affords grand jury witnesses more protections than most other jurisdictions, this proposal has been debated for several years.

During hearings of the Assembly Subcommittee in Criminal Justice this week, New York City's five District Attorneys and the three special prosecutors were united in opposing the proposal. But during the hearings and in interviews afterward, most of them said they were not opposed to a more limited proposal in which the target of an investigation, rather than all witnesses, could have his lawyer accompany him.

The prosecutors said the broader proposal would hamper their investigations into organized crime, official corruption and large-scale fraud.

PROBABLE CONFLICT CITED

"We have found that the very same attorney may simultaneously represent the owner of a nursing home and the employees of the very same facility," said Charles J. Hynes, the special nursing-home prosecutor. Candor, he said, cannot always be expected when the lawyer for the employer whom the employee may be implicating is "sitting within earshot."

The proposal allowing witnesses' lawyers to be present was supported by the New York Civil Liberties Union and the Legal Aid Society. "It simply makes no sense to have the witness traveling back and forth between the grand jury room and his counsel waiting outside," said Stephen Gillers, a lawyer who testified at the hearings on behalf of the civil-liberties group.

William J. Gallagher, who heads the Legal Aid society's criminal division, said: "The mere presence of counsel would do much to curb improper questioning of his client."

Two years ago a similar proposal was introduced in the Legislature, but it failed to make headway, particularly after prosecutors lobbied against it. Finally, the Assembly and Senate passed a bill that would permit a witness who waived immunity from prosecution to be accompanied by his lawyer in the grand jury room. But Governor Carey vetoed it.

QUESTION OF IMMUNITY

Under New York law, the decision to call a witness before a grand jury can often be a decision to forgo instituting criminal charges against him because he receives "automatic immunity" and can never be prosecuted for any crime concerning which he gives evidence.

But sometimes witnesses waive this immunity, and some prosecutors asked Governor Carey to veto that 1975 bill because politicians who might be targets of investigation often appear with a waiver of immunity. Thus, the prosecutors argued, the bill was a special-interest measure for politicians.

[From the Scranton Times, Apr. 18, 1977]

END SEEN IN PROBE OF PATTY

(By Bill Halpin)

The government may be ready to give up efforts to prove Patty Hearst was illegally harbored in a Wayne County farmhouse during the summer of 1974 while still a fugitive from justice, The Times has learned.

Justice Department officials, both locally and in Washington, have declined to comment on the case, other than to say it is still active.

However, The Times has learned prosecutors now believe it may be impossible to prove harboring charges.

This belief, it has been learned, may have been strengthened by a previously undisclosed trip to California by Asst. U.S. Atty. Laurence Kelly, this city, and an agent from the local office of the Federal Bureau of Investigation.

According to information obtained by The Times, the two men flew to the West Coast in January and interviewed Miss Hearst, daughter of newspaper magnate Randolph Hearst.

The government had planned to bring Miss Hearst to testify before a grand jury, but those plans were scrapped when they became public knowledge.

Reported targets of the federal probe are Jack Scott, a former Scrantonian, and his wife, Micki.

Miss Hearst testified at her bank robbery trial in California that the Scotts had transported her from the West Coast to a farmhouse near Lake Quinn, South Canaan.

The last public development in the case was the release last month of Jay Weiner, Philadelphia, a free-lance sportswriter, from the Allenwood Federal Prison Camp where he had been sent after being found in contempt of court for refusing to provide information to a grand jury.

Chief Federal Judge William J. Nealon set him free without explanation.

Earlier, Phil Shinnick, a one-time Olympic star who also had been found in contempt of court, was released from Allenwood after prosecutors said they no longer needed hair and handwriting samples and fingerprints which he had refused to provide the grand jury.

The Times has learned the final decision on whether to press the grand jury probe rests with the Justice Department in Washington.

Officially, the department had no comment when asked about the matter by The Times. However, it was determined that while the case reportedly is considered "still active," there is no schedule for future activities.

Several weeks ago, U.S. Atty. S. John Cottone, who is in charge of the investigation on the local level, said the case was "continuing." He declined comment when asked whether he still planned to bring Miss Hearst here to testify before the grand jury.

Subsequently, The Times learned of Atty. Kelly's trip to California.

Although officials, including Atty. Kelly, refused to confirm the information, it has been substantiated by several other sources.

The Hearst case swirled into local headlines in March 1975 when it was disclosed that federal agents allegedly had traced the missing newspaper heiress to the hilltop farmhouse on a secluded dirt road between Cortez and South Canaan.

On the same day, Weiner appeared before a grand jury in Harrisburg in connection with the Hearst matter. He was described as a close friend of Jack Scott.

From what later developed, it appears that William and Emily Harris and Wendy Yashimura, who also were fugitives at the time, also spent time at the farmhouse which had been rented from a New York City fireman.

The Scotts have never been charged with anything involving the Hearst case. For the government to prove harboring charges, it would be necessary to show that the Scotts knew Miss Hearst was a fugitive when they allegedly transported her from the West Coast to South Canaan.

[From the Palm Beach Post (Fla.), Apr. 27, 1977]

BEATING THE SYSTEM

It is indicative of the way the Florida Legislature operates that an issue as important as permitting attorneys to accompany their clients before grand juries would be caught up in a Senate power struggle without ever being studied through the "committee system" which many legislators profess to revere.

A veteran legislator is defined as one who is able to talk about the sancity of the committee system without giggling. Those who know the ropes favor the committee system only when it's on their side.

Sen. Dempsey Barron (D-Panama City) knows all about the committee system. When he was the Senate president, he was able to work it to his advantage through the simple means of arranging the various committees' memberships to his liking. Once, he even appointed 31 of the 40 senators (including himself) to a special committee.

But Demsepy Barron isn't president of the Senate anymore. so his devotion to the committee system has waned appreciably. When the committee system won't do his bidding, he does his thing on the Senate floor.

And, in this care, at least, Florida citizens should be glad he did.

Florida's grand jury system is one of those things that cries for reform but never seems to get any. Consequently, when the Senate's committee system ignored the need for reform but produced a bill tightening the immunity statutes relating to grand jury testimony, Sen. Barron saw his chance.

After holding up the bill—which, by the way, is a good one—for several days through skillful maneuvering, Sen. Barron worked up enough support to push through an amendment giving persons under grand jury investigation the right to take their attorneys with them when they are called to give secret testimony.

We don't know what the senator's motives might have been for pushing his amendment, but the end result is good—despite the rather silly complaints from opponents like Sen. Edgar Dunn (D-Daytona Beach) and Rep. Ralph Habin (D-Palmetto) that important grand jury functions will be disrupted.

"This virtually guts the grand jury system as we know it," said Sen. Dunn.

That's fine with us. "The grand jury system as we know it" is a rubber stamp for prosecutors and generally is used for whitewashing offenders or for violating the rights of witnesses. Anyone who thinks state grand juries are effective in fighting organized crime and official corruption is kiding himself.

If the legislature is serious about fighting organized crime, it will give top priority to establishing a nonpolitical statewide prosecutor whose main efforts will be cracking down on the official corruption which protects the organized criminals. Corrupt officials are at the heart of the crime problem.

Crime won't be halted by perpetuating a grand jury system which deprives citizens of the rights they enjoy everywhere else in American society, and "law and order" legislators ought to quit pretending it will.

[From the New York Times, Apr. 28, 1077]

THE LAST OF NADJARI'S INDICTMENTS AGAINST CUNNINGHAM IS DISMISSED

(By Leslie Maitland)

The last of four indictments brought by Maurice H. Nadjari against Patrick J. Cunningham was dismissed yesterday by Justice Leonard H. Sandler of the New York State Supreme Court. The judge criticized the case for an insufficiency of evidence and the "shockingly improper and prejudicial manner" in which it was presented to a grand jury.

A second corruption case initiated by Mr. Nadjari, the former special state prosecutor for corruption in the criminal-justice system, was also rebuffed yesterday. In that case, another State Supreme Court justice failed to find any corroborative evidence to uphold the indictment of Ludwig G. Glowa, a former supervising judge of Brooklyn's Criminal Court.

The dismissal of the Glowa indictment—a charge of accepting a brief to impose an easy sentence—is being sought by John F. Keenan, who succeeded Mr. Nadjari at the end of June.

The indictment against Mr. Cunningham, the Bronx Democratic chairman, charged him and his law partner, Joseph S. Kaming, with conspiracy in the third degree, tampering with physical evidence and tampering with a witness. The latter count was dismissed with the consent of the special prosecutor.

The case focused on their alleged attempt to conceal the reason for the payment to them of a 2,000-a-month retainer by a bank that wanted them to help generate additional public and private deposits. They were charged with concocting a phony bill for legal services they did not perform in order to mask the reason for the payments.

INSUPPORTABLE PROPOSITION

In a 42-page decision dismissing the indictment, Justice Sandler, who sits in Manhattan, maintained that the case rested on a proposition that would not be sufficient to sustain the charges. He said that because "specific items on the bill were not shown to be untrue" the indictment depended largely on the theory that the bill as a whole was meant to be misleading.

It was the theory of the prosecution, Justice Sandler said, that a bill and subsequent correspondence related to it "were intended to conceal from an anticipated grand jury investigation that Mr. Cunningham had derived income by using the power of his political position to secure government deposits" for the bank, the American Bank & Trust Company.

The justice pointed out, however, that "it is not presently a violation of law" for high party officials to exploit their influence for personal profit, so that even had the grand jury uncovered an unethical reason for the payments, Mr. Cunningham and Mr. Kaming could not have been charged with any crime related to them. Justice Sandler added that the practice "might well be an appropriate subject for legislative action."

Rejecting as speculation the theory that the defendants had fabricated evidence, the justice suggested as more probable that "the defendants were moved by the anticipated investigation to make a written record of the unquestionable, if fortuitous, fact that they had performed a substantial service for their client," the bank.

The service performed by the defendants' law firm, Justice Sandler found, consisted of helping to save the Aldus Green housing project in the South Bronx, in which the bank had a financial stake of more than $1 million—largely the result of a construction loan to the developer, Kraus Enterprises Inc.

The justice said that after state financing for the project fell through, Kraus applied for Federal mortgage aid, but the application was "severely jeopardized" by the vigorous opposition of a community group.

According to grand jury testimony by Herman I. Kraus, the developer, Mr. Cunningham and Mr. Kaming helped dispel that opposition so that the financing was obtained, and the project went ahead as planned.

Stanley Kreitman, then president of the bank, testified that he did not understand the defendants' involvement as having constituted a legal service, a view that Justice Sandler termed "a singular misconception." Mr. Kreitman said that he had been asked by Mr. Cunningham to prepare a bill for $50,000 worth of legal services that the bank president said had not been provided.

As he has in decisions relating to previous Nadjari indictments, Justice Sandler sharply criticized the presentation of the case to the grand jury, attacking "the [assistant] prosecutor's intemperate and overbearing reaction to testimony from witnesses that did not coincide with his opinion of the underlying events."

SOUGHT TO STIR PREJUDICE

The justice said the assistant special prosecutor—he did not name the man who handled the case, Joseph Phillips—had sought "systematically to arouse prejudice against the defendants."

In dismissing the indictment, Justis Sandler said that he would consider a written application by the special prosecutor to present the case to a grand jury again, but added that more evidence would have to be introduced.

Mr. Keenan said that he had not yet reviewed Justice Sandler's opinion and did not know if he would represent the case again. He has already filed a notice of appeal on two dismissed indictments that charged Mr. Cunningham with arranging a judicial nomination for Judge Anthony J. Mercorella of the Bronx in return for a payoff.

The special prosecutor has not yet decided whether he will appeal the dismissal last month of another Nadjari indictment that accused Mr. Cunningham and two other men of trying to intimidate a weekly newspaper in the Bronx by threatening to cut off legal advertisements.

The case brought by Mr. Nadjari—who is now the Republican candidate for District Attorney of Queens—against former Judge Glowa will formally be dismissed today or tomorrow by Justice Leon B. Polsky, who announced his intention from his Brooklyn bench yesterday.

In accepting Mr. Kieran's motion for dismissal, Justice Polsky said he would turn over the grand jury minutes to the Appellate Division for submission to the appropriate bar associations.

"From the minutes I've read," Justice Polsky said, "there's apparent reason to believe there was unprofessional conduct by several members of the bar in their testimony before the Grand Jury."

While Justice Polsky mentioned no names, the special prosecutor's papers mentioned former Criminal Court Judge Michael Saytanides as the "accomplice" in the case who was representing the two defendants. Other members of Mr. Saytanides' law firm also testified before the grand jury.

It was presumably on the basis of their testimony that Mr. Nadjari obtained the indictment of Judge Glowa on Jan. 26, 1976, on charges of conspiracy, bribe receiving, obstructing governmental administration and official misconduct.

In the indictment, Judge Glowa was accused of having received $500 on June 23, 1971, in return for giving nonjail sentences to Alex Diaz and Louis Nestres, who, along with two other men, had been arrested on April 5 that year, and had been charged with possession of heroin.

Mr. Saytanides testified before the grand jury that as the lawyer for the two defendants, he approached Judge Glowa and offered him $500 in return for keeping his clients out of jail.

Minutes of the sentencing disclosed that Judge Glowa had determined that the defendants were not addicts, discussed their prior arrests, received information about the crime, and inquired about the marital status of the defendants. He sentenced each to a conditional discharge.

[From the New York Times, Apr. 28, 1977]

NADJARI IS SUED ON BEHALF OF U.S. BY LAW PARTNER OF CUNNINGHAM

(By Max H. Seigel)

An $8.6 million lawsuit charging the former special state anticorruption prosecutor, Maurice H. Nadjari, with unlawfully using Federal funds in what is called "corrupt and illegal" activity of his office was filed yesterday in Federal District Court in Brooklyn.

The charges were brought on behalf of the United States Government by Joseph S. Kaming, law partner of Patrick J. Cunningham, former Democratic state chairman, only a day after a court's dismissal of the last outstanding indictments against the two men.

Mr. Kaming is seeking to recover for the Government $4.3 million in Law Enforcement Assistance Administration funds spent by Mr. Nadjari and an

equal amount in punitive damages. The court papers name the United States Government as the plaintiff—a procedure allowed under the Federal False Claims Act.

At a news conference in his law offices at 800 Third Avenue, Mr. Cunningham charged yesterday that Mr. Nadjari was "an abuser of power whose real goal was self-aggrandizement."

He added that through the former special prosecutor the criminal-justice system had been "smeared and intimidated" in a manner reminiscent of Nazism and McCarthyism."

Mr. Cunningham also said he was considering a civil suit against Mr. Nadjari.

3 OPTIONS FOR GOVERNMENT

David G. Trager, the United States Attorney for the Eastern District, said yesterday that the Government had three options: It could take over prosecution of the case, itself; it could allow Mr. Kaming to press the action in its behalf, or, if it already had in its possession the information contained in the complaint and it felt prosecution was not warranted, it could cancel the lawsuit.

"The final decision," Mr. Trager said, "will be made by Attorney General (Griffin B.) Bell." Mr. Trager disclosed that he had designated Christopher J. Jensen, deputy chief of his civil division, to study the case and to make a recommendation.

In the 182-page complaint filed yesterday, Mr. Nadjari was accused of the following violations of the Federal guidelines governing the use of Law Enforcement Assistance Administration funds:

¶Operating in areas outside his authorized jurisdiction. Among the examples cited in the court papers were the prosecution of Irving Goldman, the city's Commissioner of Cultural Affairs, and the prosecution of Surrogate S. Samuel DiFalco. In both cases, courts dismissed the charges.

¶Using false surveillance, as typified in the case against two lawyers, Theodore Rosenberg and Leonard Fusfield, in which Justice Leon B. Polsky of State Supreme Court rejected as inadmissible up to 52,000 intercepted conversations.

¶Perverting the criminal-justice system by suborning perjury before a grand jury and offering a false instrument for filing. The complaint cites the case against Judge Paul P. Rao, among many others.

¶Unauthorized spending of funds to discredit the judiciary, as in the so-called "20 judges" case, in which Mr. Nadjari said he was investigating more than 20 State Supreme Court and Criminal Court judges to determine if they gave preferential treatment to organized-crime figures.

¶Using "deception, deceit and perjury" to justify expenditures of Federal funds as well as the use of these funds for prosecutions outside his jurisdiction. The papers cited, among others, the case against Mr. Cunningham and Judge Anthony Mercorella.

HARASSMENT TACTICS CHARGED

The court papers also charged Mr. Nadjari with using physical and psychological terror through "police state detention, "with threatening economic and professional destruction to get witnesses to lie and with using his office for personal objectives as in his announcement that Governor Carey was dismissing him because he was about to investigate Mr. Carey.

Mr. Cunningham said yesterday that he agreed with the thrust of the Kaming suit although he was not taking part in it.

"The special prosecutor injected into the public consciousness the poisonous concept that all public officials are corrupt," he said.

The former Democratic State Party leader said the Nadjari investigation, had cost him more than $100,000 in legal fees. "But my reputation is much more important," he said.

[From Opinion, Wisconsin State Journal, May 5, 1977]

GRAND JURY REFORM

The grand jury system in this country needs reform.

The system, devised under English law to provide a more democratic way of bringing charges against persons suspected of crimes, has been perverted into a prosecutors' tool to get around constitutional guarantees.

Almost nowhere else in the criminal justice system is a person who wants a lawyer denied that right. Someone hailed before a grand jury must submit to questioning under oath with no professional legal help at his side. He can receive advice from counsel outside the jury room but must ask for and be granted permission to leave the room when he wants it.

Richard F. Gerstein, chairman of the American Bar Assn.'s (ABA) criminal justice section's grand jury committee, said this not only unnecessarily prolongs the proceedings but also places the witness in an unfavorable light before the jury.

"It is extremely damaging to the witness to continually get up, go outside, and consult with counsel," Gerstein, a prosecutor for more than 20 years, said.

What would be wrong with permitting someone testifying before a grand jury to have legal counsel at hand? He's allowed it outside the room. Why go through the clumsey motions of leaving the room to talk to a lawyer?

Other reforms are needed. The following changes have been recommended by the ABA:

Witnesses forced by law to give testimony that might violate the guarantee against self-incrimination should be given immunity from prosecution for any crime referred to in the testimony.

Witnesses who refuse on several occasions to testify about the same event.

Increased penalties for unauthorized disclosure of grand jury information.

The Sixth Amendment to the United States Constitution says:

"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 crimes shall have been committed . . . to be confronted with the witnesses against him; to have compulsary process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The rights spelled out in that amendment should not stop at the door to the grand jury room.

[From the Congressional Quarterly Inc., May 7, 1977]

ANOTHER CHANCE FOR REVISING GRAND JURIES

(By Barry M. Hager)

After years of hearings and debate, prospects in Congress for legislation revising the nation's grand jury system appear to be growing stronger.

Charges of abuse of the system by the Justice Department and FBI have been widespread since 1970. Hearings first were conducted on the subject in 1973. Now they are being held again.

"Each time there has been publicity we have learned more about the grand jury and its problems," according to Rep. Joshua Eilberg (D Pa.), a long-time backer of grand jury legislation. He feels now that enough is known to move to "the first reform of the grand jury in the history of the country."

Proponents of grand jury reform in Congress concede that the peak of alleged abuse of the system already may have passed, but they warn that that does not lessen the need for reform.

"There is no fading of this need at all," Eilberg said. "Those of us who have lived through Watergate, through this period of abuse, know the potential for abuse that is still there. This has made a searing impression on me."

The principal reform bills under consideration in the 95th Congress are HR 94, introduced by Eilberg; HR 3736, sponsored by John Conyers Jr. (D Mich.), and S 1449, introduced by Sen. James Abourezk (D S.D.).

Eilberg also has introduced four proposed constitutional amendments "for the purpose of discussion" which would eliminate or significantly restrict the use of grand juries in the criminal system. In addition, at least five other bills to revise the grand jury system have been introduced in the House.

Eilberg's bill, HR 94, is the primary vehicle for the current hearings before his Immigration, Citizenship and International Law Subcommittee of the Judiciary Committee.

PAST COMPLAINTS

The central accusation made by those seeking revision in the grand jury system is that the executive branch, particularly the FBI and the U.S. Attorneys around the country, have used grand juries in recent years in dragnet fashion,

resulting in a chilling effect on First Amendment rights of political association, free speech and a free press.

Abuse is possible because the grand jury lies at the heart of the national criminal justice system, even though it remains a mystery to most citizens. The Fifth Amendment to the Constitution, which confers such familiar rights as the one against self-incrimination ("to plead the Fifth"), also contains a less familiar guarantee that "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 wartime military]."

That provision, part of the Bill of Rights, was seen at the time as a protective measure against prosecutorial excesses by the government. The idea was that a panel of private citizens—23 has long been the number of grand jurors on a panel—would first sit in judgment on a prosecutor's case against an individual. Only if the grand jury were convinced of the indictability of the citizen could the charges be brought against that individual.

At the time of the adoption of the Bill of Rights, the grand jury was perceived as a bulwark against oppression by the British crown. Massachusetts had been the first to institute the grand jury, in 1634, and most other colonies utilized the protective device.

But proponents of grand jury revision claim the harsh irony is that this historically libertarian device has been transformed into a highly effective tool of the government's prosecutors.

In the strong language of Sen. Edward M. Kennedy (D-Mass.) as he testified before the Eilberg subcommittee during its first hearings in 1973, "Over the past four years under the present [Nixon] administration, we have witnessed the birth of a new breed of political animal—the kangaroo grand jury—spawned in a dark corner of the Department of Justice, nourished by an administration bent on twisting law enforcement to serve its own political ends, a dangerous modern form of star chamber secret inquisition that is trampling the rights of citizens from coast to coast."

Secrecy

That star chamber reference points to a central feature of the grand jury system that disturbs reformers—secrecy. While secrecy of grand jury proceedings can serve to protect those targeted from premature revelation of damaging testimony, it also can serve as a screen for wideranging prosecutorial activities which might be curbed by a judge if pursued in an open court setting.

An example of that possibility was the "Fort Worth Five" case which prompted the original Eilberg hearings. In that case, according to Sen. Kennedy's testimony, five Irish New Yorkers were subpoenaed to testify before a Texas grand jury despite no apparent evidence that there was any connection between them and the gun-running activities the Justice Department claimed to be investigating.

A more current example, according to the Coalition to End Grand Jury Abuse, a private activist group supporting grand jury legislation at the federal and state level, is the case of two women who were staffers of the Episcopal Church's National Commission on Hispanic Affairs in New York. Since November 1976, the FBI has sought their testimony and extensive records in an effort to find links to the Puerto Rican nationalist terrorist group allegedly responsible for several New York-area bombings.

The two women refused to testify and moved to quash the subpoena which had been issued to compel their grand jury testimony. New York Bishop Paul Moore was quoted as calling the subpoena "an invasion of the confidentiality necessary to the effective working of a religious body."

Both women were jailed in March 1977 for contempt, where they remained as of May 5. Under existing law, they could stay in jail for contempt until the end of the life of the grand jury, in this case May 1978. Even then, under existing law, a new grand jury could be empaneled and the process repeated. And the two witnesses could remain in jail.

Venue, Subpoena Powers

An additional complaint of grand jury reformers was pointed up by the Fort Worth example. That is the current lack of any requirement for a geographical nexus between the activities investigated by the grand jury and the venue, or place where the grand jury is empaneled and sits.

This type of abuse allegedly was prevalent during the Nixon administration's most intensive efforts to combat what they perceived as politically inspired terrorism. For example, in 1971 the investigation into the bombing of the U.S. Capitol building was pursued by a grand jury in Seattle.

Prior to that, in 1970, a Tucson, Arizona, grand jury had subpoenaed five Los Angeles residents to testify despite the lack of clear connections between the five and the Tucson investigation. Likewise, on July 10, 1972, the day the Democratic Convention was scheduled to open in Miami, Fla., 25 members of Vietnam Veterans Against the War were subpoenaed to testify 500 miles away before a grand jury in Tallahassee. The veterans had planned to demonstrate in Miami, but were detained through the entire week. On July 13, the convention voted to condemn the Nixon administration for trying to intimidate the veterans.

The concern of reformers is that such wide-ranging subpoena powers in the hands of federal prosecutors create hardships on those who must disrupt their lives to respond to the subpoenas and also strip away many of the protective mechanisms familiar in the open court setting. There the venue of a trial and the selection of the jurors is intended to guarantee that individuals are judged by their peers rather than people from distant communities.

First Amendment Rights

A larger concern of reformers is the fact that many of the most controversial grand juries were investigating political activities. Individuals subpoenaed to testify were being asked to divulge information about their personal political associations and actions.

Those hoping to change the system are worried by possible abridgements of First Amendment political freedoms. They argue that going behind the closed door of the grand jury room inevitably breeds suspicions among political and personal associates, since no one can be sure what was divulged to the grand jury, in contrast to open court testimony.

Reporters also have raised this argument in contesting subpoenaes which require them even to appear before a grand jury regarding their sources. The Supreme Court has ruled against the press argument that journalists ought to be exempt even from responding to a subpoena to appear before a grand jury.

Immunity, Contempt

Once in the grand jury room, even a witness who wishes to resist discussing what he considers to be activities protected by the First Amendment may have trouble doing so. The existing grand jury setting is largely under the control of the prosecutor. A witness is not permitted to have his own counsel in the grand jury room, and the questions put to the witness are dictated almost entirely by the prosecutor.

The witness can only invoke the Fifth Amendment, refusing to testify on the grounds that his testimony might incriminate him, if he can convince a judge that self-incrimination is a real possibility. Even then, the prosecutor may decide to grant the witness "use" immunity, which means that the government agrees not to use the specific testimony or its fruits against the witness in any future prosecution. If granted this immunity, even against his will, the witness must testify.

A witness who refuses to testify after being given immunity can be cited for contempt and jailed for the life of one or more grand juries.

PROPOSALS FOR CHANGE

Given all of these complaints about the potential of the grand jury for abuse, some observers would favor its outright abolition.

But Emmy Hixson, an attorney with the Coalition to End Grand Jury Abuse, points out that there have never been any amendments to the Bill of Rights. "To amend the Bill of Rights could be a horrible precedent. Who knows what might be amended next?"

Other witnesses at the current hearings before the Eilberg subcommittee also have noted that a reformed grand jury might again be a positive force in the criminal system. Eilberg himself has expressed the belief that grand juries could be especially useful in pursuing official misconduct.

HR 94 thus attempts to address the abuses of past grand juries without suggesting abolition of the Fifth Amendment requirement of grand jury involvement in the indictment process.

One key provision of the bill would restructure the procedures surrounding the subpoenaing and compulsion of testimony. The broad venue and subpoena powers of current grand juries would be restricted, with venue limited to where there is "substantial conduct" in the district of the grand jury, and new safeguards provided for the issuance of subpoenas.

If a witness desires to resist testifying, he would have 72 hours to prepare for a court hearing on the question of a possible contempt citation, and he would be represented by counsel. Should a contempt finding be made by the court against the recalcitrant witness, the confinement could be for no more than six months. HR 94 would specifically preclude "reiterative contempt," or repeated confinements of the same witness regarding the same testimony.

Once in the grand jury room, the witness for the first time would have the right to counsel for the purpose of advice, but not for cross-examination, argument or other purposes. This provision has been resisted by many district attorneys around the nation. Attorney General Griffin B. Bell asked a February meeting of the American Bar Association to withhold its anticipated support for grand jury reform along the lines of HR 94 until its August meeting to let the Justice Department review the proposals and take a position. Bell expressed concern lest the grand jury inquiry become a slow-moving "mini-trial."

Eilberg argues "it's just unfair to have a one-sided lawyer with a fixed point of view in the grand jury room."

A former Philadelphia prosecutor himself, Eilberg compares what he wants with the use of counsel by witnesses in congressional hearings. Counsel there is available for consultation by the witness, but is not generally allowed to interrupt or impede the proceedings. HR 94 even has a safety valve for prosecutors which allows "disruptive" counsel to be removed from the grand jury room, a concession which disturbs some civil libertarians.

If a witness pleads possible self-incrimination as a bar to testifying, the immunity procedures would be substantially altered. First of all, HR 94 and several other bills would replace "use" immunity with transactional immunity, which means that the prosecutor, in order to compel potentially incriminating testimony, must agree not to prosecute the witness on the whole transaction about which he is being compelled to testify.

Support for a return to transactional immunity goes beyond the grand jury context. It was the historical form of immunity. Use immunity only came into existence in 1970, at the behest of the John Mitchell Justice Department, and it has been highly controversial from the outset.

A number of supporters of grand jury reform wish to go even further than a return to transactional immunity. The Conyers bill (HR 3736) is supported by the Coalition to End Grand Jury Abuse and others largely because it provides for "consensual immunity" as well as transactional. That is, a witness would have to be insulated against the whole transaction about which he was testifying, but the immunity could only be granted if the witness consented. At present, the witness' choice in the matter is irrelevant.

HR 94 does not go as far as consensual immunity, but does specify guidelines which must be followed by a court in deciding to grant immunity, including a determination that the evidence sought by the grant is relevant to an authorized inquiry.

Eilberg emphasized that, while the bulk of HR 94 and the other grand jury proposals are aimed at curbing alleged prosecutorial abuses by restoring protections to witnesses and targets of grand jury inquiries, some provisions of his bill "may improve enforcement of the law since we are trying to restore vigorous, independent grand juries" in place of what Eilberg feels are excessively prosecutor-controlled grand juries.

H.R. 94 also deals with the double-edged sword of grand jury secrecy by stiffening penalties for disclosures of grand jury activity which are aimed at affecting the outcome of a grand jury's work. Journalists, grand jury witnesses and their lawyers are all protected from the $20,000 or five-year imprisonment contemplated for such revelation of grand jury proceedings.

OUTLOOK

The House subcommittee will follow its March and April hearings with additional hearings in June. Eilberg anticipates that the Justice Department will

testify at that time and announce their position. The department's position will be influential; former Attorney General Edward Levi's firm opposition to grand jury revision proposals was a significant hindrance to action by the 94th Congress.

In announcing the introduction of his bill on May 4, Sen. James Abourezk said he would call for early hearings. The bill is expected to be referred to the Judiciary Committee's constitution subcommittee, headed by Birch Bayh (D-Ind.). Hearings could be held in early summer.

Favorable action by the ABA in August also could add momentum to the grand jury measures pending. Eilberg is optimistic about the ultimate prospects.

[From the Washington Post, May 9, 1977]

REFORM OF VIRGINIA JURY SYSTEM SOUGHT

(By Jane Seaberry)

After Alvin Lee Carter, Jr. was arrested in late 1972 and charged with the $47 robbery of a man at a High's store in Vienna, he wrote a Fairfax County judge several times asking that he be sent to a rehabilitative institution so he could learn a trade while he awaited his trial.

The judge refused Carter's request and he sat in the Fairfax jail, which has few facilities for learning a trade. A month passed until Carter had a preliminary hearing, where a judge determined there was probable cause to believe he committed the robbery, and another two months until a grand jury considered his case and indicted him. He eventually pleaded guilty and served a total of two years and eight months.

Carter, who was unable to post $20,000 bond to gain his release, says he believes the time spent waiting in the county jail could have been put to better use learning a trade, like carpentry, which eventually he was taught at a state prison.

"I felt very bitter" about the wait in the jail, Carter said. "I wanted to get (my time in prison) over with."

In an era when law enforcement officials are seeking ways to speed up court procedures, many legal experts are beginning to agree with Carter that the two- or three-month wait for a routine felony grand jury indictment has become an unnecessary trial delay and merely a "rubber stamp" of action taken at the preliminary hearing.

It's been long observed by people in law enforcement that cases sent on to the grand jury from the preliminary hearing are merely rubber stamped," said Lewis W. Hurst, executive director of the Virginia State Crime Commission. "It does slow up the system a bit, too. That's two, three or sometimes four months waiting for a ruuber stamp indictment."

The Criminal Justice Coordinating Council of Fairfax County recently released a report that showed that Fairfax grand juries in the last four years have concurred with preliminary hearing findings in between 99 and 100 per cent of the felony cases presented to them.

Fairfax County Commonwealth's Attorney Robert F. Horan Jr. said consideration of cases by grand juries should be eliminated in felony cases such as Carter's, where preliminary hearing has been held.

Horan said the grand jury is important in some cases, such as investigations but it is unnecessary to present evidence at a preliminary hearing "and then go to a grand jury with the same information." Without the grand jury "you could greatly speed up the process," Horan said.

Although no state has completely eliminated grand juries, five states permit modification or abolition of the grand jury system by the state legislature. Pennsylvania permits abolition of the grand jury as a local option.

But 39 states, including Maryland, authorize prosecution by one of two methods: a grand jury indictment or information presented by the local prosecutor to judges.

Twenty-one states, including Virginia and the District, authorize prosecution by the combination preliminary hearings and grand jury indictment procedure.

In 16 States, including Virginia, the accused may waive his right to a grand jury indictment, but, according to the Fairfax Council's report, less than 11 per

cent in Fairfax County do so. Carter said he was not aware of this right when he was charged.

The grand jury was established more than 700 years ago in England during the reign of King Henry II, to protect the innocent from malicious prosecution, a function the American Bar Association said is still needed today.

"It's a protective body between government and the people," said Laurie Robinson, an ABA spokesman. "The basic reasoning is still sound. Abuses can be corrected."

Some defense attorneys also said the grand jury system should remain because they believe the can benefit by its delays. The longer the time between arrest and trial, the worse prosecution witnesses' memories of the crime may become and some witnesses may change their minds about testifying or move from the area, increasing their client's chance of acquittal.

Groups such as the Fairfax criminal justice council, the Virginia State Crime Commission, the Judicial Council of Virginia, the National Advisory Commission on Criminal Justice Standards and Goals, and the Federal Law Enforcement Assistance Administration have urged that localities seek alternatives to the grand jury system in routine felony cases and reserve the procedure for special cases, such as investigations.

A law to give the accused a choice between a preliminary hearing or grand jury indictment was defeated last year in the Virginia General Assembly's House Courts of Justice Committee because committee members at that legislative session were "tough on criminals," according to the bill's sponsor, Sen. Frederick T. Gray (D-Chesterfield), who is a former Virginia attorney general.

The bill "came about from a desire to speed up the judicial process," Gray said, but the House committee defeated almost every recommendation toward that end made by Gray's speedy trial study group, he said.

According to the Fairfax council report, doing away with routine grand jury indictments could cut at least 30 days from the average period of 135 days from the time a person is charged in Fairfax to the time he is tried. This probably would lessen increasing felony case backlogs.

Carter's case is fairly typical of most defendants' experiences, according to the report.

Carter was arrested Dec. 16, 1972, the day after the High's robbery was committed. He had a preliminary hearing Jan. 17, 1973. At such hearings, a General District Court judge hears evidence presented by a commonwealth's attorney (prosecutor) and the defense and determines if the charge should be reduced, dropped or taken to the grand jury.

If the judge decides there is probable cause that the accused committed the crime, the defendant must wait for the grand jury to meet, which is once every two months in Fairfax. The average time from arrest to preliminary hearing in Fairfax is 45 days, according to the Fairfax Council report.

Another 62 days elapsed from the time of Carter's preliminary hearing to his grand jury indictment, which is higher than the average time of 38 days.

The cases of about 35 per cent of the accused, the largest single group, were considered by the grand jury between 75 and 100 days after arrests were made. Carter's time was 93 days. Without the grand jury consideration of the case, Carter might have had a trial date set within a month of his arrest.

Virginia grand juries meet four to 12 times a year in most jurisdictions. The juries, composed of from five to seven people, are selected each year by the chief circuit court judge. They alone informally question witnesses called by prosecutors. The grand jury does not determine whether the accused is guilty or innocent, but whether it is possible the person could have committed the crime, the same function performed at preliminary hearings.

At least four jurors have to agree to an indictment before a person can be indicted in Virginia. A week after indictments are handed down in the state, trial dates are set.

Carter finally pleaded guilty to the robbery charge Oct. 3, 1973. He remained in the Fairfax jail until he was sentenced Dec. 11, almost 12 months after he was arrested. The 357 days he waited in jail due to trial date continuations, case backlogs and clerical mistakes counted toward serving his sentence.

Fairfax Circuit Court Judge Burch Millsap sentenced Carter to serve 12 years in prison but suspended four years. A month later Millsap suspended another four years. Carter was released in August 1975.

"I'm working hard every day. Working for my family," Carter said. "I paid my price. I learned my lesson."

[From the Lawscope—American Bar Association Journal, Vol. 63, June 1977]

Grand Juries Go On Trial

Grand juries are in trouble.

Charges that the grand jury has become a Grand Inquisition, sitting in a chamber that lacks only a star on the door, are coming from persons both in and out of the legal system. Civil libertarians are allied with at least a few of the Fortune 500 corporations in their crusade against alleged abuse.

Many are calling grand juries the most significant criminal-justice issue of this century.

The bill of particulars against the grand-jury system as it functions today hits at most fundamental Constitutional issues—those enumerated in the Fifth Amendment.

Indictments still are delivered in the name of the grand jury, and testimony only can be compelled under a limited grant of immunity. But the critics charge there is only cosmetic recognition of the Constitution. They assert that the grand-jury system, particularly in federal courts, has become the very instrument of oppressive government that it was designed to check.

The grand jury is "a vehicle for our persecution," says Rep. John Conyers, (D-Mich.), sponsor of the broadest of two reform bills now pending in the House. It is a "legal loophole in the Bill of Rights," according to the Washington-based Coalition to End Grand Jury Abuse. The group, an amalgam of legal and civil libertarian groups, unions, and churches, gets high marks for competence and professionalism among legislative aides on Capitol Hill.

Critics claim many abuses, but several are cited most often:

Prosecutors use the jurors to obtain evidence for trial against persons they already have investigated and are ready to indict. Grand juries are not permitted to gather evidence once an indictment is returned.

Prosecutors issue subpoenas to aid investigators for such agencies as the Federal Bureau of Investigation or the Internal Revenue Service, in gathering information the agencies may not legally demand on their own.

Prosecutors subpoena witnesses they know will rely on the Fifth Amendment—thus forcing them to repeatedly cite the amendment, creating suspicion among jurors.

If one grand jury refuses to indict, prosecutors bring the issues to subsequent juries until they find a receptive one.

Witnesses may be hauled before an unlimited number of successive grand juries, refuse to testify before each one and potentially be jailed for life on successive charges of contempt—with the motive being punishment rather than compulsion of testimony.

Witnesses are questioned about activities unrelated to an investigation and charged with perjury in that unrelated testimony, even if the substantive offense is not proved.

Broad venue provisions mean witnesses can be forced to testify anywhere in the nation and be indicted for conspiracy in cities they never even visit.

Under a 1972 Supreme Court ruling, validating a 1971 federal statute, witnesses can be forced to testify with only "use" immunity protection and still be subject to prosecution for the transaction under investigation.

Not all complaints about grand juries are at the federal level. At least eight states now are considering some form of grand-jury reform. Though the Coalition to End Grand Jury Abuse feels the fact that state prosecutors are elected has held them in check, it says state prosecutors often abuse the system by leaking information to the news media to discredit investigation targets. They also "trump up" indictments to improve their plea bargaining position, says the coalition.

It now is commonplace for federal prosecutors to call the target of an investigation before the grand jury and compel his testimony, says Morton Stavis, president of the Center for Constitutional Rights, a New York-based network of civil liberties lawyers. The practice signals a change in Department of Justice policy, says Stavis, adding "it used to be considered kind of gauche, because they would plead the Fifth Amendment, and whammo" the witness would be excused.

The criticisms are not all new. In 1931 the Wickersham Committee (the National Commission on Law Observance and Enforcement) commented, "the grand jury usually degenerates into a rubber stamp wielded by the prosecuting officer."

But Stavis also sees a correlation between the expansion of power of prosecutors before grand juries and a series of Supreme Court decisions starting in the early 1970s restricting the scope of the Fifth Amendment. He says neither can be fully appreciated without considering the other. While the court was "foster-[ing] grand jury abuse." the Nixon Administration already had "massively expanded both the dimension and repressive impact of grand juries," argues Stavis.

Generally, legislative proposals to restrict grand juries would:

Require at least transactional immunity before a witness could be compelled to testify.

Permit a witness to have an attorney with him in the grand-jury room, and under some plans allow the lawyer to address the jury.

Require advance notice to a subpoenaed witness, including the subject of the investigation and whether or not he is a target.

Require the prosecutor to present exculpatory evidence, or allow the witness to do so.

Set a six-month maximum on contempt sentences for refusing to testify and prohibit the calling of recalcitrant witnesses before successive grand juries.

Insist the grand jury be told of its own powers and responsibilities and allow it to request independent legal advice.

Restrict venue.

Not permit the subpoenaing of witnesses who file written statements that they will rely on the Fifth Amendment.

Prohibit prosecutors from presenting a case to more than one grand jury, unless there is new evidence.

Require transcripts of all proceedings.

Prohibit use of illegally obtained evidence in grand-jury presentations.

Opponents of the measures argue the changes would immobilize both the grand juries and the courts by forcing defense attorneys to seek judicial hearings at a multitude of stages in the grand-jury process, or risk malpractice.

Judge Frederick B. Lacey of U.S. District Court in Newark, feels the bills would result in forcing judges to preside over all grand-jury activity, ruling on defense objections and motions, in order to preserve the jury's ability to function.

Lacey represented the Judicial Conference of the United States before the House Judiciary Subcomittee on Immigration, Citizenship, and International Law, which is conducting hearings on grand-jury reform.

Although the conference has not taken a position on any of the proposed measures, its Advisory Committee on Federal Rules of Criminal Procedures has reviewed some. It opposes provisions for recalitrant witnesses, transactional immunity, defense counsel in the grand-jury room, immunity hearings, independent counsel for the jury, advance notice to subpoenaed witnesses, Miranda-type warnings for subpoenaed witnesses, and notice to targeted witnesses. The committee has not reviewed all provisions, but does favor cutting the size of the jury and employing criminal sanctions for leaking secret information.

Many of the proposed proceedings would require judicial hearings. Lacey said the courts already are so burdened with criminal matters, especially since passage of the Speedy Trial Act, that many judges rarely hear civil trials. These judges have few occasions now to be involved in grand-jury matters, but their criminal calendars would double under the proposal, he said. "Civil trials will be virtually non-existent," he said.

Many of the same views were offered by Edwin L. Miller of San Diego, testifying for the National District Attorneys Association. He said any abuses that occur could better be remedied by tighter discipline in the Department of Justice than by expansive legislation.

Attorney General Griffin B. Bell has not yet reacted to the proposals, though he is slated to testify late this month. Legislative aides generally concede his response could determine if any reforms pass this year. Bell quashed American Bar Association consideration of reform proposals in February, when he asked the House of Delegates to defer voting on a twenty-three point plan, which included many of the same measures pending in Congress. In fact, the delegates already had endorsed some of the points in 1975, including the right of a witness to counsel, and Richard F. Gerstein, state attorney for the Eleventh Judicial Circuit of Florida and chairman of the A.B.A. Criminal Justice Section Committee on the Grand Jury, has testified in favor of reforms.

The Conyers bill (H.R. 2986) is the strongest of the three proposals. Two bills are pending in the House and one in the Senate. H.R. 94, submitted by

Rep. Joshua Eilberg, (D-Pa.), chairman of the hearing committee, appears to have the best chance of passage. Conyers' plan is viewed by some Capitol Hill staffers as providing a position from which to fall back to reach a compromise at Eilberg's stance. The version offered by Sen. James Abourezk (D-S. Dak.), is S. 1449, and it coincides most closely with the Eilberg bill.

But it appears reform in any form is headed for a tough congressional battle.

[From the New York Times, June 1, 1977]

JUSTICE, PROSECUTOR CRITICIZED BY COURT IN GROH INDICTMENT

(By Max H. Seigel)

The Appellate Division in Brooklyn yesterday accused Justice Leonard H. Sandler of State Supreme Court and the special state anticorruption prosecutor, John F. Keenan, of having used "coercive" methods to get a Queens County grand jury to indict Judge Robert T. Groh of Civil Court last November on charges of bribery and grand larceny.

The appellate justices said that if they could, they would throw out the indictments, but that they could not do so because the lawyers for Judge Groh still had recourse to State Supreme Court.

It was the first time Mr. Keenan had been accused of using the kind of overzealous tactics that had led to the dismissal of charges against many persons indicted by Maurice H. Nadjari, Mr. Keenan's predecessor as special prosecutor for corruption in the criminal justice system.

"Had the motion been submitted to us from the start," the five appellate justices said in a unanimous opinion on the Groh case, "we would have granted the application and order that the indictment be dismissed, as the papers submitted by both sides reveal the presence of procedural irregularities going to the very heart and integrity of the grand jury system."

Mr. Keenan and an assistant, Stephen Sawyer, had brought before the Queens grand jury charges that Mr. Groh, while deputy borough president of Queens in 1972, had sought a political campaign contribution of more than $10,000 from a law firm representing the Sheraton Corporation to help it get a zoning variance to expand its inn at La Guardia Airport.

'GRATUITOUS' DISCUSSION

After hearing the evidence, the grand jury voted not to indict Mr. Groh. Afterward, according to the Appellate Division, "the special prosecutor, having learned of the results, re-entered the grand jury room, where he gratuitously discussed with the grand jurors their failure to indict."

"And without any request from the grand jury," the ruling went on, "he then suggested to it that the justice presiding at the extraordinary special and trial term would be willing to come before it and provide it with a further charge on the law, if it so desired."

According to the court records, one grand juror questioned the usefulness of such a gesture on the ground that a vote already had been taken and the matter disposed of, but the special prosecutor insisted that additional instructions from the judge might enable the grand jury "to adequately reach a judgment on the matter, adequately and finally reach a judgment on the matter."

This was done, the Appellate Division said, notwithstanding the fact that the grand jury had done just that—"reached, voted on and recorded its determination."

The special prosecutor then retired from the jury room and a vote was taken. "Only three of the grand jurors voted to receive further instructions," the appellate justices said, and "despite the fact that there was no request by the grand jury as a body to receive any further instructions, both the special prosecutor and the justice presiding at the extraordinary special and trial term appeared before the grand jury on a subsequent date and delivered a further charge."

NARROW VOTE TO INDICT

The grand jury then took another vote and decided to indict Mr. Groh by the minimum margin—12 to 7.

The appellate justice said: "Aside from the fact that we view these 'further instructions' to have been incorrect on the law, as they seemed to indicate to the grand jurors that they have no alternative except to indict, we believe that the methods employed, although no doubt well-motivated, were coercive in fact and, if permitted to go unchecked, would tend to destroy both the value and purpose of our grand jury system."

The justices added that "under the facts of this case, it was improper for either the special prosecutor of the court to have interceded in the proceedings once the grand jury had voted to dismiss." And, they said, "to sanction such a procedure" would "permit prosecutors in the future to coerce or badger grand jurors to change their solemnly-arrived-at determinations."

The justices suggested that Mr. Groh apply again to Justice Howard A. Jones of State Supreme Court, who had twice previously refused to dismiss the charges.

"In the light of the views here expressed," the Appellate Division said, "the learned justice at the extraordinary special and trial term may wish to reconsider his determination should an application be made therefor."

In denying motions for dismissal on March 4 and March 15, Justice Jones had made it clear he would welcome submittal of the controversy to the Appellate Division, "there apparently being no precedent" on which he "might rely in resolving these questions."

KEENAN'S REACTION

Commenting on the decision, Mr. Keenan said yesterday: "I certainly agree that the grand jury should not be badgered, and obviously, I don't think we did. What we did was well-intentioned and well-motivated and I'm not going to quarrel with the decision."

The special prosecutor added that he might try now to present the case again before another grand jury, he might apply to Justice Jones for permission to present the case again, or he might intervene when Judge Groh moves again for dismissal before Justice Jones.

Marvin B. Segal, Judge Groh's lawyer, said yesterday he would promptly submit another application for dismissal to Justice Jones.

"The Appellate Division decision," he said "is a strong suggestion, if not a directive, to dismiss. To try the case now would be a useless procedure since the Appellate Justices have made it clear that any conviction after trial in a lower court would be reversed."

Mr. Segal said that he had not gone directly to the Appellate Division because he had not seen the grand jury's minutes and so had been unaware of the actions of the special prosecutor and Justice Sandler. "It was an extraordinary procedure by two very able men" he said. "It's impermissible for a judge to go into a grand jury room."

Justice Sandler said yesterday that he had gone to the grand jury purely for the convenience of the jurors. "It was easier for me to go to them in Queens," he said, "than to have all of them to come to my courtroom in Manhattan."

In welcoming the appellate decision, Judge Groh—who was elected a judge of the Civil Court shortly before his indictment—said yesterday he was "proud to be a member of the system that treats defendants equitably."

[From the Wall Street Journal, June 23, 1977]

UNDER INDICTMENT

GM, OTHER UNLIKELY CRITICS ACCUSE GRAND JURIES OF ABUSING RIGHTS THEY ARE SUPPOSED TO PROTECT

(By Carol H. Falk)

WASHINGTON.—For years, complaints of abuse by grand juries came mostly from antiwar activists or other dissenters. Now some unlikely and powerful allies are joining this "minority" cause.

Businessmen, attorneys and politicians who have had personal experience as grand jury witnesses in the post-Watergate era are throwing their influential weight behind legislation that would provide more protection for potential defendants called before grand juries. With this backing, sponsors are optimistic that such a bill can be adopted by the current Congress.

The old and the new critics contend that a grand jury seldom, in practice, serves its historic function as an independent shield to protect citizens against unjustified prosecutions by the government. Rather, they say, it usually does the prosecutor's bidding and, in the hands of a ruthless or ambitious government attorney, can be a sword to harass, intimidate or indict for political or publicity reasons.

SOME RECENT RECRUITS

The latest recruits to the cause range from the American Bar Association, which has endorsed a number of legislative restraints on grand juries and is due in August to vote on further recommendations, to General Motors Corp., which is resisting subpoenas from a grand jury investigating its taxes. A GM lawyer complained this week that the government was treating the matter like a "gangster case."

"Now we hear the hue and cry we should have heard when poor folks were objecting to grand-jury tactics," says Oscar Goodman, a Las Vegas defense attorney. The lesson that is hitting home, in effect, is one cited by Irving Younger a professor at Cornell University Law School and himself a former federal prosecutor: "You protect the rights of the miserable and friends precisely so that you have rights when it's your turn."

This doesn't mean, of course, that support for protective legislation is unanimous. Attorney General Griffin Bell says he is opposed to one key change: a provision that would permit grand-jury witnesses to be accompanied by their attorneys. He says he worries about creating a system of "two trials" because lawyers could raise or get their clients to raise the same kind of objections that can be raised in a courtroom.

MANY RIGHTS DON'T APPLY

The Fifth Amendment to the Constitution provides that a suspect can't be "held to answer" for a serious federal crime unless he is first indicted by a grand jury. The grand jury, a panel of citizens to whom the prosecutor presents evidence, operates in secret, theoretically for the protection of those who testify but who aren't themselves charged with any crime. Yet over the years, courts have held that many of the protections guaranteed a suspect by the Bill of Rights don't apply when he is called before a grand jury.

For example, besides having to face the grand jury without his lawyer present, a grand-jury witness can be forced to testify in exchange for a grant of immunity—a guarantee that his testimony won't be used to prosecute him. If he rejects immunity and insists on his Fifth Amendment right to remain silent, a witness can be cited for contempt and jailed. Plainly, abuses by grand juries can cost individual witnesses heavily in time, money and reputation.

While complaints about overreaching by grand juries have been raised for years, the outcry from dissidents intensified after passage of the 1970 Crime Control Act, which gave federal prosecutors additional power to use grand juries against organized crime, as well as against political leftists. Ironically, some of the law-and-order Nixon administration officials who were accused of encouraging the use of grand juries against dissenters in the early 1970s found they didn't like the system much when they themselves had to face grand juries on Watergate-related charges.

ISSUE CONCERNING ATTORNEYS

Former Nixon Treasury Secretary John Connally has urged that grand-jury witnesses be given the right to be accompanied by their attorneys. He and other high officials who were accused of wrongdoing have also complained that promises of lenient treatment can be used to coerce a potential defendant into false implication of higherups. Mr. Connally was acquitted in a 1975 trial of charges that he accepted bribes from a giant dairy co-op. The trial jury apparently didn't believe the story of his chief accuser, Jake Jacobsen, who had been allowed to plead guilty to reduced charges in return for the testimony on which the Connally indictment was based.

General Motors is raising an increasingly discussed issue: the extent to which supposedly secret grand-jury material can be shared with Executive Branch agencies, such as the Internal Revenue Service, that provide technical assistance to the grand jury. GM contends, in court papers filed in April, that the IRS is using a grand jury's subpœna powers to conduct a tax investigation that the agency should be handling on its own.

In moving to quash the subpœnas or else to restrict the use of the data, GM cited a ruling last November by a federal appeals court in San Francisco. The appeals court found that a lower court had gone too far in granting 24 IRS employees access to materials turned over to a grand jury by J. R. Simplot Co. and Simplot Industries Inc. of Boise, Idaho; John Simplot, who controls the companies, made headlines last year with a huge default on potato futures.

Noting that the grand jury has powers justified by its function "in accusing individuals of criminal acts," the court said that justification doesn't apply "when grand-jury material is used for civil tax liability."

The government, for its part, says it hasn't any intention of using the information sought from GM for civil tax purposes. Rather, the Justice Department maintains it is investigating allegations of criminal activity and needs the tax agency's expertise. As for the Simplot case, the government has asked the appeals court to withdraw its opinion, suggesting that the issue is moot because Mr. Simplot and his two companies last month pleaded "no contest" to charges of criminal tax violations.

Antitrust cases also are providing recruits for the cause of grand-jury restraint. William Lurie, general counsel of International Paper Co., which has been a target in several industry-wide grand-jury investigations, complains of "extremely vague and broad" subpœnas covering as much as 15 years of company records. A particular frustration, he adds, is that "there is no mechanism to insure that anything . . . that would tend to negate guilt is brought to the attention of the grand jury."

Mr. Lurie asserts that "you need due-process protection in grand-jury proceedings just as much as in a trial—or more," because "sometimes the economic risks are so great you can't afford to go to trial and bet your company."

He explains that "unless your case is 100% pure," there is a strong incentive to settle a broad antitrust indictment with a "no-contest" plea. That's because, if the company risks a trial and is convicted on government antitrust charges, the verdict can be used as the basis for costly treble-damage claims by private plaintiffs.

UNHAPPY ATTORNEYS

Attorneys, as well as their clients, have been complaining of grand-jury harassments. Mr. Goodman of Las Vegas heads a committee of criminal defense lawyers that aids attorneys subpoenaed by grand juries seeking information about their clients. An attorney who himself is being pressured by a grand jury isn't likely to be effective in representing his client, Mr. Goodman asserts.

He cites examples of defense attorneys subpoenaed to testify about relations with their clients, including the amount and the source of their fees. Federal appeals courts have differed on whether this is a proper area of inquiry, but at least some lawyers have been cited for contempt and jailed for refusing to provide the information.

Charles Berry, an Albuquerque attorney, was subpoenaed to deliver five years' worth of his law firm's financial records to a grand jury looking into allegations of illegal campaign contributions and bribery of former state officials. He explains that records of over 5,000 clients were involved and that some of the records dealt with cases not yet resolved. The financial records included the names of clients and, in certain instances, references to witnesses interviewed.

A LAWYER JAILED

Mr. Berry refused to yield the documents, was cited for contempt and "sat in jail six months." After losing all his appeals, he turned over the records and was released last December. A government attorney says that Mr. Berry himself was never a target of the inquiry and that the grand jury wasn't interested in the names of his clients. Rather, the law firm was thought to have had "some business relationships" with a former state official who was being investigated. The man was indicated but was acquitted in a trial.

Some critics, contending that grand juries don't serve their constitutional "shield" role and are a waste of taxpayers' money, argue that they should be abolished. Most critics, however, are willing to settle for changes intended to protect witnesses better. They note that many prosecutors, including Richard Gerstein, the state attorney in Miami who is leading the ABA drive for grand-jury legislation, have operated successfully for years with self-imposed restraints.

In Congress, several lawmakers are promoting legislative treatments for the

most common complaints. Rep. Joshua Eilberg, a Pennsylvania Democrat, has introduced a measure that would allow lawyers in grand-jury rooms to advise witnesses, though it wouldn't let them raise formal objections or address the jury.

"USE" IMMUNITY PROVISION

The Eilberg bill, cosponsored by Rep. Hamilton Fish, a New York Republican, would also eliminate the so-called use immunity permitted by the 1970 crime law. A grand-jury witness granted use immunity can't be prosecuted on the basis of his own testimony but can be charged if prosecutors show they are relying on evidence from other sources. The Eilberg bill would provide that someone testifying under immunity couldn't be prosecuted under any circumstances for the action involved.

The bill also provides that a witness who refused to testify after being granted immunity couldn't be jailed for contempt for more than six months. Currently a balky witness can be jailed for the full 18-month life of a federal grand jury and then can be called before new grand juries and jailed repeatedly.

The Eilberg bill would also give the grand jurors more independence from the prosecutor by empowering them to hire their own lawyer. Attorney General Bell says he might go along with the idea of having a judge appoint such a lawyer for the grand jury, if the judge felt it necessary.

A somewhat similar measure has been introduced in the Senate by James Abourezk, a South Dakota Democrat, and a bill sponsored by Rep. John Conyers, a Michigan Democrat, would go further—letting a witness remain silent without being cited for contempt.

Thus far, a House Judiciary subcommittee led by Mr. Eilberg has held several days of hearings on grand-jury legislation, and it has scheduled more this month. The aim is to get a bill set for floor action by year-end.

[From the Washington Post, June 26, 1977]

FEDERAL JUDGE DISMISSES LITTON FRAUD INDICTMENT

(By Jane Seaberry)

A federal judge in Alexandria yesterday dismissed an indictment charging fraud against Litton Industries, ruling that U.S. prosecuors abused the grand jury system in threatening Litton with the indictment if the company did not agree to government proposals.

The order of U.S. District Court Judge Albert V. Bryan, Jr. also prohibits prosecutors from reindicting Litton on the charge because "prosecutorial discretion (was) abused.

Litton, a major defense contractor, was indicated April 6 on a charge of fraudulently overcharging the Navy $37 million for building three nuclear attack submarines between 1968 and 1971.

This indictment came after an attempt to indict Litton in 1975 failed when the term of the special grand jury called in March of that year solely to investigate Litton expired.

But in April, 1976, the Armed Services Board of Contract Appeals awarded a $17.3 million judgement to Litton from the Navy in connection with the contract.

Bryan said in his opinion that after the 1975 attempt to indict Litton failed, prosecutors, in an attempt to get the award revised, continued to threaten to indict Litton if it did not agree to reopen the appeals board proceedings.

"What is reprehensible here is the threat to use, as well as the actual use of, the grand jury as a bargaining tool in an effort to upset the final civil award to which Litton was entitled," Bryan said.

Prosecutors also had two FBI agents summarize evidence to the April 6 grand jury rather than formally present information and witnesses as in the previous grand jury, which did not indict Litton, Bryan said.

"This is further evidence of the cynical view that has been taken of the grand jury in this case, namely, as a mere echo of the office of the U.S. attorney," Bryan said.

"I think the court misread our action," said U.S. Attorney William B. Cummings, who, with the Justice Department, headed the two-year investigation of Litton.

Bryan "assumed that there were motivations, a desire on our part to get this thing back to the [appeals] board and use the grand jury to bludgeon them. Nothing could be further from the truth," Cummings said.

[From the New York Times, June 26, 1977]

CALIFORNIA HAS LEARNED TO SIDESTEP THE SYSTEM

(By Robert Lindsey)

LOS ANGELES—Almost 20,000 felony cases will be prosecuted in the Superior Court of Los Angeles County this year. But only about 50—one in 400—will be heard by a grand jury. For the vast majority, this is the procedure followed in Los Angeles County and the 57 other counties in California:

Within 48 hours of a defendant's arrest on a felony, he must be arraigned before a municipal court judge who will schedule what is called a "preliminary hearing" for him, usually within a week of his arrest. The defendant may or may not be released on bail.

At the preliminary hearing, the defendant's lawyer is present. The district attorney is required to bring a complaint against the defendant, producing evidence sufficient to convince a municipal judge that a crime has been committed, and that there is reason to believe the accused person committed it and should stand trial in superior court.

At the hearing, the defendant may question witnesses and challenge the substance and legality of the evidence—whether it was seized lawfully, for example. On occasion judges dismiss cases as too weak during these preliminary hearings. But in practice, most prosecutors present enough evidence to persuade a judge. And most judges appear to give the prosecution the benefit of the doubt in determining whether there is sufficient cause to believe the accused should stand trial.

Nevertheless, defendants under this system appear to have an edge over those processed by grand jury. "There are tremendous advantages," Kenneth Kahn, a Los Angeles criminal lawyer, observed. "It lets the defense in on the ground floor. You can cross-examine witnesses, you see the evidence they have against you, and only legally admissible evidence is permitted. In a grand jury, they can use all kinds of garbage as evidence, and the grand jury becomes simply a rubber stamp for the prosecution."

Once the accused person has been bound over to face trial in the Superior Court, which handles felony trials, the district attorney must file a document that legally is the equivalent of a bill of indictment—a list of allegations called an "information." Based on these allegations, the defendant is arraigned in Superior Court, enters a plea, and the trial process begins.

What about the other 50 cases a year? In California, because of statutes and tradition reaching back to the Gold Rush era more than a century ago, grand juries spend most of their time not as prosecutorial organs indicting accused criminals, but as community watchdogs to review the operations of county government and attempt to uncover inefficiency, waste and corruption. Only in a small fraction of felony cases do they indict the alleged criminals.

But the district attorney has the option to bring cases to trial through a grand jury if he chooses. According to Joseph Siler, the legal adviser to the Los Angeles County grand jury, the jury here generally becomes involved in criminal cases only in the following categories:

Major frauds and other complex white-collar crimes involving expensive documents or bookeeping records, many suspects and many lawyers, or other complicating factors that make presentation of allegations difficult or cumbersome at a preliminary hearing.

Crimes alleged to have been committed by public officials or policemen.

Cases in which the prosecution wants to keep an investigation secret, usually to protect witnesses who might be fearful of their safety, where there are still some suspects at large and it is deemed necessary to keep the prosecution secret. Major organized crime cases usually fall in this category.

Cases involving prominent people or those in which the district attorney has other reasons to believe extensive publicity from a preliminary hearing might make it difficult to find an impartial jury. Many of Southern California's most

famous defendants of the recent past—Sirhan Sirhan, the murderer of Robert Kennedy; Charles Manson and his crime clan; Patricia Hearst, and other celebrities and those involved in highly publicized cases—have been processed through the grand jury rather than in the "information" procedure.

Because many cases that go before the grand jury are complex financial frauds, jurors can spend up to 40 percent of the time hearing criminal cases, Mr. Siler said. But he said most effort goes into local government. "California has a reputation for extremely honest local government, and I think one of the reasons for this is our grand jury system," he said.

[From the New York Times, June 26, 1977]

THE PROSECUTORS SEEMS TO HAVE TAKEN OVER

(By Marvin E. Frankel and Gary P. Naftalis)

The notion of the grand jury as a shield for the innocent—presumably at the heart of the reasons for its inclusion in the Bill of Rights—is continually echoed in judicial opinions. Relatively recently the Supreme Court stated:

"Historically [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."

Apt as that description may have seemed for the People's Panel in the 18th century, it certainly is not much realized in practice in the 20th. Day in and day out, the grand jury affirms what the prosecutor calls upon it to affirm—investigating as it is led, ignoring what it is never advised to notice, failing to indict or indicting as the prosecutor "submits" that it should. Not surprisingly, the somewhat technical, somewhat complex, occasionally arcane language of indictments is drafted by the prosecutor and handed to the grand jury foreman or forelady for the necessary signature, which is almost invariably affixed. As Federal judge William J. Campbell points out: "Today, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury."

It could not more than rarely be otherwise. In a busy, densely populated, elaborately organized society—where crime is rife, criminals are tough, many wrongs are mysterious and concealed from laymen—law enforcement is inescapably for professionals. The very notion of the grand jury as beneficient for a free society would be subverted by a band of amateurs engaged in sleuthing, summoning, indicting, or not indicting as their "independent" and untutored judgment might dictate. Privacy, security, and reputation would be in steady jeopardy. Sophisticated criminals would be safe; innocent citizens would be less safe.

Those the grand jury "refuses" to indict are likely to be people the prosecution does not want indicted. Many of the cases ending with a "no true bill" are actually instances where a prosecutor feels the need for such backing to support his own view that further proceedings should not be held.

On the other hand, there is active dissatisfaction that the grand jury seldom does *more* than the prosecutor asks. It is possible that Watergate, at least temporarily, has added impetus to this sentiment. Rightly or wrongly, it was thought that the Washington grand jury was not being led to sweep broadly or dig deeply in the months before the first trial at which Judge John J. Sirica presided. It appeared to at least some observers that if not for the unusual circumstance of the judge himself insisting upon more intensive inquiries, profound misdeeds might never have come to be prosecuted.

There is nothing necessarily sinister in this. On the contrary, some cases in which a "crime" has literally been committed—the youthful seducer of a female legally too young to consent; the impulsive, seemingly one-time shoplifter—are for one reason or another difficult for the law-trained official to overlook. The grand jury's dispensing power, kin to the power of a trial jury to acquit the technically "guilty," supplies some needed play in the joints of a system not always supple. But saving graces of this sort do not alter the fact that the grand jury rarely stands in the path of a prosecutor determined to indict. Perhaps it is not realistic to hope for anything sharply different. Indeed, few reformers urge the serious pursuit of this theoretical function.

Though they seldom occur, perplexing and dramatic cases sometimes arise when the several main participants—prosecutor, grand jury, and judge—disagree about whether a prosecution should properly be instituted or dropped. The grand jury has an absolute veto over whether to indict. Does the same apply to the prosecutor? So-called runaway grand juries in state courts have succeeded from time to time in bringing prosecutions without the aid, or even over the opposition, of the regularly designated prosecutor.

So, too, special prosecutors have been appointed where the regularly elected or appointed officials have failed to act. The corrupt political machine of Boss Tweed in New York City was successfully pursued by a grand jury that acted independently of, and in spite of, the district attorney. Some 50 years later, Thomas E. Dewey was appointed special prosecutor of New York City because of the seeming nonfeasance of the regularly elected district attorney.

Such unusual cases characteristically involve matters of bitter conflict in the community. Like most "hard" or "great" cases, they tend to make somewhat special, unique, or possibly "bad" law. In any event, state courts remain unclear, and perhaps are shifting even now, on whether judges have the power to appoint special prosecutors to pursue cases the grand jury, but not the regular prosecutor, deems appropriate.

In the Federal picture, the court-appointed special prosecutor has been substantially unknown. In recent times, a Federal rule of criminal procedure has required that an indictment be "signed by the attorney for the government." This sounds like an inescapable and unambiguous barrier to the grand jury's proceeding without that attorney. But people learned in the law have seen means of escaping and possibly overriding barriers that appear insurmountable at first. While the barriers here still stand, the debate may not be over.

On occasion, judges have tried to intervene and prevent prosecutors from dropping cases. But the practical upshot of recent Federal court decisions seems to be that prosecutors can end prosecutions substantially without judicial interference—unless some plain impropriety or dereliction is discovered. The reservation stands as a cautionary sign, a warning that there may always be a demand for an explanation and an exposure of the prosecutorial decision to public view. But the usual response of a judge to a prosecutor's decision to withdraw an indictment is likely to be relatively unquestioning acquiescence.

In the foreseeable future there will probably be few runaway grand juries and few instances of interference by judges with the prosecutor's plenary control over decisions to begin or withdraw criminal cases. The exceptions will probably arise in situations of uncommonly deep and bitter conflict—where alignments are not predictable and it is not possible to know in advance whose will be the voices of the good or bad guys.

For that among a host of reasons, the precise lines of grand jury and prosecutor authority may never be drawn with finality. The uncertainty has to date been reasonably tolerable. It may even be healthful for the pertinent law to stay a little loose and incomplete, rather than try to freeze an unknown future too hard too far in advance.

[From the New York Times, June 26, 1977]

MR. EILBERG'S BILL CALLS FOR REFORM IN THE FEDERAL PRACTICE

(By Tom Goldstein)

Since the grand jury was imported to this country from England during the Colonial era, an intricate and sophisticated body of law has developed that attempts to balance the interest of individual freedom with the interest of the state in uncovering criminal activity. In the last few years, critics of the grand jury contend that the balance has tipped against the individual, and dozens of proposals to change the grand jury have been made. The following represents some of the issues presented in Congressman Eilberg's bill and in other legislation introduced in Congress and state legislatures:

Protecting the witness. At the urging of the Nixon Administration, Congress in 1970 narrowed the Federal immunity law. That law, which was immediately copied by half the states, grants a grand jury witness "use" immunity—the witness may be compelled to testify but this compelled testimony may not be used against him in a criminal proceeding.

A year later, New York enacted a "transactional" immunity statute that is broader than the Federal one. Efforts to adopt a similar law on the Federal level are now under way. Under "transactional" immunity, a witness who is compelled to testify may not subsequently be prosecuted—even upon totally independent evidence—for any transaction mentioned in his testimony.

Many prosecutors feel that "transactional" immunity leaves open the possibility that a heinous crime could go unpunished because, during grand jury testimony, a witness who was the perpetrator gave peripheral evidence concerning it. Opponents of "use" immunity argue that it leaves a witness excessively exposed to further prosecution. New witnesses may be found and new information may be gathered as a result of the witness's own testimony before the grand jury.

Allowing lawyers inside. In Federal courts and in most states, lawyers are excluded from the grand jury room. But a lawyer can remain outside the door, and his client can excuse himself from the proceeding to confer with him. Most prosecutors want it that way. Otherwise, they argue, there would be too much opportunity for obstruction and delay.

Defense lawyers want in. They feel it makes little sense to have a witness traveling in and out of the grand jury room. The mere presence of a lawyer, they say, would curb improper questioning by a prosecutor.

Replacing the prosecutor. A variety of proposals would replace or supplement the prosecutor as legal adviser to a grand jury. Instead, there would be an independent office of the grand jury counsel to instruct the grand jury on the law and pass on the admissibility of evidence and competency of witnesses.

Proponents of such an office say that it is unfair to allow the prosecutor to control all the legal information received by a grand jury, especially since the grand jury should be at liberty to disobey a prosecutor's wishes. Opponents say there is no guarantee that the advise of this impartial counsel will be any better than a prosecutor's or that he will be any less likely to abuse his office.

Guarding against leaks. Grand jury proceedings are secret, but periodically there have been unauthorized disclosures. The news that someone is a target of a grand jury investigation—especially if he is never indicted—can be devastating to his reputation.

Some states make it unlawful for anyone but witnesses and lawyers to reveal what has taken place in the grand jury; in Federal court, leaking of information by prosecutors, stenographers or grand jurors is punishable by contempt of court.

Only rarely has anyone been punished for grand jury leaks, and in order to deter them there have been several proposals to stiffen the penalties. But many prosecutors say that the difficulty in investigating and prosecuting violations of secrecy is unrelated to the severity of the penalties imposed. The principal reason, they say, is that the investigation inevitably collides with the protection of a free press guaranteed by the First Amendment.

Since it is not unknown for an errant prosecutor to do the leaking himself, there have been proposals to empower the court to appoint special independent prosecutors to investigate the leaks.

Screening indictments. With the current emphasis on prosecutorial abuse, proposals for greater judicial oversight of grand juries have emerged. One suggestion would have a judge—but not the judge who empaneled the grand Jury—screen all indictments before they are filed. If the judge found insufficient evidence or improper procedures used in the grand jury, the indictment would be dismissed before it was made public, thus sparing the defendant publicity that might damage his reputation.

But most prosecutors feel this would unnecessarily encumber the proceedings. There are not enough grand jury reporters and typists to transcribe all the minutes and not enough judges to review all the proceedings, they say. Moreover, they argue, only a minuscule—though highly publicized—number of indictments are dismissed for legal insufficiency.

Changing the grand jury size. No one is quite sure how the number developed, but from its origins in England a grand jury has consisted of 23 citizens. That number has been carried over to Federal courts and to many state courts. Twelve votes are required to return an indictment, and 16 jurors make up a quorum.

There are those who argue that the current size is more a matter of historic precedent than necessity. They feel that reducing a grand jury's size would be economical and would focus greater responsibility on individual grand jurors. Opponents of this change feel it would make it harder to obtain a quorum and inhibit the expression of divergent views on the jury.

[From the New York Times, June 26, 1977]

THE GRAND JURY UNDER EXAMINATION; IT HAS FALLEN ON HARD TIMES

The grand jury—a panel of citizens empowered, and in Federal law and that of 21 states solely empowered, to bring criminal indictments—has recently fallen if not into disrepute at least into controversy. In New York, for example, a number of indictments voted by grand juries advised by former special prosecutor Maurice H. Nadjari have been dismissed for causes including insufficient or illegally obtained evidence and improperly presented cases. Federal prosecutors have allegedly used grand juries to harass radical causes.

A bill introduced in Congress by Representative Joshua Eilberg, Democrat of Pennsylvania, is due for subcommittee hearings this week. The bill would reform Federal practice in several ways—for example, by permitting witnesses to have lawyers in the grand jury room and by providing review of indictments by a judge before trial. Similar reforms are proposed in New York, where a new law that went into effect last week now requires grand jurors, who were formerly volunteers, to be picked from the same pool as trial jurors.

The articles on this page examine three areas of current concern: the more or less complete prosecutorial control of the grand jury; a number of the reforms now contemplated by state and Federal legislators; and the manner of bringing criminal charges in California, one of the 29 states that have found it possible to proceed in criminal cases without using the grand jury.

[From the Washington Post, June 29, 1977]

TAX PROBE OF GM GIVEN COURT OKAY

DETROIT—A federal judge ruled today that a grand jury may investigate the possibility that General Motors Corp. tried to cheat the federal government out of millions of dollars in taxes.

But U.S. District Court Judge James P. Churchill also ordered federal prosecutors not to turn over any grand jury evidence to the Internal Revenue Service.

Churchill made the ruling on motions by the world's largest auto maker to throw out subpoenas and, failing that, to limit the investigation.

GM said the grand jury proceeding was an unlawful attempt by the IRS to collect money in what should be a civil proceeding.

The government had accused GM of trying to block the IRS investigation and had said the grand jury was needed for a criminal probe.

The decision, delivered orally from the bench, was a half-victory for GM. The firm had asked the court to prevent grand jury evidence from being used by the IRS if its motion to throw out the subpoenas were denied.

Churchill said information obtained by the grand jury through its subpoenas may not be given to the IRS except where the grand jury itself needs the technical help of IRS employees. Such disclosures may only be made with his approval in advance, he said.

The judge also said that none of the information may be given to top IRS employees in order to help the grand jury return an indictment. He ruled further that a special government attorney on loan from the IRS may participate in the grand jury proceedings. But Churchill warned the attorney not to disclose any evidence to the IRS. General Motors had asked that the attorney be barred from the jury room.

U.S. Atty. Philip Van Dam said he was satisfied with the court's decision and would reconvene the proceedings within a few days.

Attorneys for GM said they were pleased with the restrictions the court placed on jury disclosure but would review the full decision before deciding whether to appeal.

The government turned an audit of GM's income taxes for 1972–1975 into a criminal investigation last year while accusing GM of trying to "stymie" IRS agents in their work. The word "stymie" appears in IRS manuals as a condition for using a grand jury.

GM, maintaining its innocence of criminal wrongdoing, charged the government with demanding impossibly large numbers of documents in an impossibly short time.

The dispute concerns the tax treatment of parts used in production but not part of a finished automobile. An example would be a tool bit for which spares are kept on hand.

GM has taken deductions for such parts when it bought them, regardless of when the part was used or if it ever was used. The company said the IRS approved that method in 1944 and 1971.

The IRS now wants GM to take the deductions in the year the parts are used.

The government has not said how much it believes GM might owe. GM paid more than $4.5 billion in income taxes for the years in question.

[From the Philadelphia Bulletin, June 30, 1977]

BELL IGNORING REFORM OF JURIES, EILBERG SAYS

(By L. Stuart Ditzen)

WASHINGTON.—Rep. Joshua Eilberg (D-Pa) yesterday fired off a new volley in what now has become an open war on the Carter Administration by Philadelphia's congressmen.

The target yesterday was Attorney General Griffin Bell.

Eilberg accused Bell of reneging on a pledge to support grand jury reform and sharply criticized Bell for sending an assistant to discuss that subject before Congress, rather than appearing in person.

"I must express my sense of outrage that Attorney General Bell is not here today," Eilberg said at the opening of a hearing on grand jury reform. The fact that he has deliberately absented himself from these hearings is discourtesy . . . an affront to the Congress . . . and an abdication of his responsibility as the chief law enforcement officer of the land.

Eilberg accused Bell of taking a position of "total opposition" to grand jury reform, a contradiction, Eilberg said, of the public position taken by Bell at his confirmation hearing in the Senate.

A spokesman for Bell said Eilberg's criticism was "unwarranted," but declined further comment.

OTHER FRONTS

Philadelphia's four Democratic Congressmen, with Eilberg generally acting as spokesman, already are engaged in battle with the Carter Administration on other fronts.

Their most pronounced grievance is the closing of the Frankford Arsenal in Philadelphia by the Army. Vice President Walter Mondale made a promise late in the campaign last year to keep the arsenal open. After the election, the Carter Administration said it was too late to make good on Mondale's promise—the closing of the arsenal was too far along.

The Philadelphia congressmen—Eilberg, Robert N.C. Nix Sr., Michael O. Myers and Raymond Lederer—sent a letter to Carter early this month accusing him of "idle promises" and doing "absolutely nothing" for Frankford Arsenal.

Carter responded with an itemized list of things he said his Administration had done to help Philadephia.

The congressman immediately issued a point-by-point rebuttal.

A separate battle concerns the Carter Administration failure—to date to remove David W. Marston, a Republican, as U.S. attorney in Philadelphia.

The Philadelphia congressmen have urged that Marston be ousted in favor of Philadelphia Municipal Court President Judge Joseph R. Glancey, a Democrat. The Administration has not acted.

At one point several weeks ago, Attorney General Bell publicly expressed irritation at the pressure he was getting on the U.S. attorney appointment in Philadelphia. Eilberg, a high-ranking member of the House Judiciary Committee, has been offended at what he considers rude handling by Bell on the matter.

EILBERG IS IRRITATED

Eilberg made no attempt to conceal his pique yesterday when Bell failed to show up before Eilberg's subcommittee on immigration, citizenship and international law.

The subcommittee is considering proposals for grand jury reform, a subject near to Eilberg's heart. Eilberg has been shaping reform legislation in this area for several years.

Eilberg is seeking the right for grand jury witnesses to have attorneys with them in the grand jury room. He also wants grand juries to be able to hire their own attorneys if they are dissatisfied with the U.S. attorneys bringing evidence before them. He also wants a six-month limit on jailing of witnesses who refuse to testify before grand juries.

All these concepts were opposed yesterday by Bell's stand-in, Assistant Attorney General Benjamin R. Civiletti.

Eilberg told him: "Mr. Civiletti, it is now understandable to me why the Attorney General has not appeared here . . . All my fears and apprehensions have been confirmed. Your statement is a virtual restatement of prior positions of the Justice Department—total opposition to all reform, despite repeated public statements by (Bell) for reform . . . From early statements by the attorney general, we were all encouraged that a cooperative effort would be made for reform. We were wrong. For that I am deeply disappointed."

[From the New York Times, July 1, 1977]

JUDGE VOIDS INDICTMENT OF GROH; SETS STRICT RULES FOR ANY NEW ONE

(by Judith Cummings)

A State Supreme Court justice in Queens yesterday threw out a bribery and grand-larceny indictment against Judge Robert T. Groh of Civil Court and required the special state anti-corruption prosecutor to follow strict conditions in seeking a new indictment.

The prosecutor, John F. Keenan, said he would move within days, in accordance with the instructions of Justice Howard A. Jones, to place the case before a new grand jury.

The seven conditions laid down by Justice Jones included:

That prospective grand jurors be screened for possible prejudice—a routine procedure with trial juries, but unusual for a grand jury.

That in the event of a new indictment there be full disclosure in advance of trial of grand-jury minutes arising from any omnibus or pretrial motions.

That the defendant be given the opportunity to appear and testify on any evidence presented to a new jury.

Justice Jones granted the dismissal of the Groh indictment on a procedural technicality. He acted virtually on the orders of the Appelate Division, which earlier this month sharply criticized Mr. Keenan and Justice Leonard H. Sandler of State Supreme court as having used "coercive" methods in getting the grand jury to indict Judge Groh.

It was the first case prosecuted by Mr. Keenan to raise the questions of overzealous prosecution that dogged his predecessor, Maurice H. Nadjari.

The charges against Mr. Groh, the 61-year-old former Sanitation Commissioner, involved an incident that took place when he was deputy to Borough President Donald R. Manes of Queens. He was charged, in an indictment returned last November, with accepting $10,000 in contributions to Mr. Manes's 1973 campaign from the ITT-Sheraton Corporation in return for arranging for a zoning variance for a motel owned by the company.

"They've already had two bites of the apple and they shouldn't have a third," Judge Groh said following the dismissal, in reference to the prosecution's efforts to get a new indictment. He said that with the charges now dropped, he would assume his elected seat on the Civil Court bench today.

Judge Groh was referring to the fact that the grand jury originally had voted not to indict him on the charges, but reversed itself on the minimum margin of 12 to 7 after Mr. Keenan, without their having asked him to, personally discussed with them their failure to indict.

This action, coupled with Justice Sandler's giving them additional instructions, gave rise to the Appellate Division accusation that the two men had "improperly interfered" with the grand jury's decision.

"The papers submitted by both sides," the five-member appellate panel said in its decision, "reveal the presence of procedural irregularities going to the very heart and integrity of the grand jury system."

At the same time, however, the panel noted that Mr. Keenan and Justice Sandler had apparently been "well-intentioned."

Disclosure of grand-jury minutes in the case had shown that jurors were angered at being told by the prosecutor that, because of "insufficient evidence," they could not consider a charge against Mr. Manes in connection with the same alleged bribery incident—suggesting that the jury felt if it could not produce indictments in its own way, it would produce no indictments at all.

Judge Groh's lawyer, Marvin B. Segal, said he would not rule out the possibility of an appeal of Justice Jone's decision allowing the case to be resubmitted. It is considered likely, however, that the case will be permitted to run its course before any appeal would be sought.

Justice Jones required among his other instructions that the actual taking of testimony in a resubmittal of the case be started no later than July 29.

[From Time, July 4, 1977]

THE LAW

REFORMING GRAND JURIES

Every so often, like an air bubble from a sunken ship, a new bit of law reform arises out of the hulk of the Nixon Administration. A U.S. House judiciary subcommittee is currently taking expert testimony on the venerable and awesome grand jury system, which Nixon's Justice Department had used to intimidate its New Left opponents, and many legal authorities are calling for change. Another alteration in the 800-year evolution of the grand jury, which once served to protect the innocent from overzealous prosecutors, appears imminent.

From 1970 to 1973, agents of the Justice Department's Internal Security Division (since abolished) convened an estimated 100 grand juries in 80 cities in pursuit of assorted radicals, including associates of Daniel Ellsberg, Phillip Berrigan and Abbie Hoffman. Actual convictions were rare—but jail terms for contempt of the grand jury (refusal to answer questions) were not. Complaints about federal grand jury abuse have not been confined to the left, however. Last week General Motors Corp. Attorney George Moscarino accused IRS agents of abusing the system by summoning GM employees before a Detroit grand jury on what he considers to be a civil tax matter, presumably so they could be forced to testify without the aid of an attorney. In general, says U.S. Judge William J. Campbell, "the grand jury is the total captive of the prosecutor, who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury."

In a book published last week, *The Grand Jury: An Institution on Trial*, U.S. Judge Marvin Frankel and Attorney Gary Naftalis conclude: "The Grand Jury has served too often to harass the unorthodox and the unpopular. "Several reforms suggested by Frankel and Naftalis appear in a bill submitted by U.S. Representative Joshua Eilberg. The proposed law would:

(1) Allow a witness to bring his attorney into the grand jury room.

(2) Limit incarceration for refusal to answer to six months (theoretically, there is no limit now).

(3) Completely immunize a witness from prosecution for any offense discussed during his appearance. (Under a 1970 law, federal attorneys can force a suspect to talk and then prosecute for admitted crimes if they can find independent proof elsewhere).

Attorney General Griffin Bell is opposed to the section permitting a witness to bring a lawyer, arguing that this "would mean two trials instead of one," but he is on record as favoring grand jury reform in principle. So are the American Bar Association and American Law Institute. Indeed, some trial lawyers have called for the abolition of grand juries as outmoded and superfluous. That would involve repealing the Fifth Amendment's guarantee of a grand jury's consideration before indictment, however, and no one has dared to tamper with the Bill of Rights in nearly 200 years.

[From the Washington Post, July 6, 1977]

Corporate Complaints of Grand Jury Abuses

(By Nicholas von Hoffman)

It's almost inspirational to read that corporations like General Motors and International Paper are taking a belated but certainly welcome interest in civil liberties. It appears that the giant automobile manufacturer is getting the same kind of federal grand jury abuse which so many politically and socially unorthodox people have been getting for many years.

A federal grand jury investgiating G.M. for taxes has treated the world's largest manufacturing company with such rudeness that one of its lawyers complained the matter was being handled like a "gangster case." Evidently G.M. still hasn't gotten it through the corporate skull bone that when you allow gangsters to be mistreated you set yourself up for the same kind of kicking around. Irving Younger, a Cornell University law prof. tried to explain the principle by saying, "You project the rights of the miserable and the friendless precisely so that you have rights when it's your turn." (The Wall Street Journal, June 23.) Perhaps now some of those G.M. executives with the slow brain muscles will understand that being a stickler for constitutional rights and due process isn't motivated by a desire to be soft on crooks but to protect one's self against the eventualities which an all-powerful centralized state can bring down on the head of the guilty and the innocent alike.

The two companies are complaining about different but overlapping grand jury abuses. G.M. objects to evidence collected through the grand jury's subpoena power for one purpose being turned over to a government agency to be used against the company for a different purpose. This goes to the question of how secret grand jury testimony and evidence should be in general.

One of the reasons the grand jury exists at all is to protect the citizenry against promiscuous, frivolous, reckless and vengeful prosecution by the government. It is supposed to act as a screen or a filter to stop the government from taking to trial people against whom there obviously isn't enough evidence to convict. A trial is, after all, a terrible thing for a defendant, both to his purse and his reputation. Thus one of the major functions of a grand jury is defeated if somebody's reputation is ruined by the release and leaking of evidence or testimony either to a government agency or a newspaper. As G. M. found out, in the hands of Justice Department attorneys the sacred seal of grand jury secrecy is an on-and-off again thing observed to suit the government's convenience, not the citizen's rights.

The International Paper Co. is indignant over the use of "extremely vague and broad" subpoenas, or what the radicals used to call a fishing expedition. This is hard enough for a large corporation but it can be devastating for the impecunious individual. In recent years there have been several shocking cases of lesbian women being asked about the private lives of their friends or acquaintances under pain of going to jail for contempt of court. Several have chosen the slammer.

This goes to the controversy over the Justice Department using grand juries as an investigatory tool. The juries allow a district attorney to do what he ordinarily can't constitutionally do . . . grill witnesses under oath about anything that suits the D.A.'s prosecutorial fancy without a defense lawyer present. Moreover as the law now reads many a potential defendant can be stripped of his Fifth Amendment rights against self-incrimination by a ruthless D.A.

Various bills have been introduced in Congress to make it somewhat more difficult to use the grand jury as an instrument of government policy rather than justice. There are proposals to limit incursions against the Fifth Amendment and to facilitate grand juries kicking federal prosecutors out of their hearing rooms and hiring their own lawyers. Whether grand jurors can be taught not to be stooges for the D.A. remains to be seen, but it at least ought to be tried.

The likes of General Motors would like to see witnesses have the right to bring counsel into the grand jury room. That might be a good idea if everyone had unlimited funds, like G.M., to pay lawyers. For others it would be a tremendous expense akin to enduring the cost of two trials. We already have enough

people in the country shooting themselves because they can't afford to get well and face the doctor's bills. At this rate we'll replicate the same situation in law; we will be having people pleading guilty because it's too costly to defend themselves.

We should be grateful, I suppose, to General Motors et al for getting interested in grand jury reform. We were getting nowhere with the idea without them and their power, but there's a price. In order to protect individuals in their rights we may have to extend protection to the non-human, non-citizen corporation for which the Bill of Rights was never intended.

[From the Boston Globe, July 8, 1977]

GRAND JURY REFORM

There were undoubtedly those who saw a certain irony in the complaints by General Motors last month that the Federal government was abusing the grand jury process by hauling in GM officials to testify under oath about corporate tax matters. In recent times, at least, complaints about grand jury abuses have come most frequently not from the offices of the nation's corporate executives but from political radicals charging grand juries have been employed to quash their activities.

In theory, the grand jury serves a laudable purpose. It allows possible criminal charges against an individual to be screened in secrecy by an independent panel of the accused's peers before they are publicly lodged.

In fact, however, the grand jury has become a tool of the prosecutor. By both establishing the grand jury's agenda and orchestrating the quality and quantity of the evidence presented, the prosecutor almost invariably determines who is and is not indicted.

But the grand jury can still provide valuable protection to individuals and the most prudent course now is to increase those safeguards. At the Federal level, legislation to do this—which could well serve as a model for similar state actions—has been introduced by Rep. Joshua Eilberg (D-Pa.). It received a cool reception from the Carter Administration at a hearing last week but it points in the right direction.

It would repeal the "use" of immunity law enacted at the urging of the Nixon Administration under which witnesses can be compelled to testify before a Federal grand jury and then, despite the constitutional guarantees against self-incrimination, be tried for activities about which they testified as long as the specific testimony is not used. The Eilberg legislation would return the Federal system to "transactional" immunity under which a witness compelled to testify could not later be tried for crimes detailed in that testimony.

The Eilberg legislation would also allow defense attorneys into the grand jury room to advise their clients (now they wait outside the room and their clients can go out to them) and, not incidentally, to monitor the process. A similar proposal for Massachusetts grand juries was recently approved by the state Senate.

Another meritorious provision of the Eilberg legislation would require that a judge screen Federal grand jury indictments prior to their issuance to make sure that they are based upon sufficient admissible evidence and that the procedures were appropriate. The propsal is designed to avoid needless damage to reputations arising from improper indictments.

None of these proposals has won the general approval of prosecutors. Yet none should generally impair prosecutors' work. Whatever the grand jury's original function, in a complex industrial society, where crime is commonplace and crime fighting sophisticated, the professionals—the prosecutors—will play the dominant role. But it is in exactly such a society that sufficient measures must be taken to protect the rights of individuals.

[From the Charlotte Observer, July 11, 1977]

LEAKY SHIELD—GRAND JURIES NEED REPAIR

The constitutional provision for grand juries was intended to protect citizens from repressive government, to place a shield between the prosecutor and the accused.

That function has become obscured, however. It's time for Congress and the states to tackle grand jury reform.

Hearings on one such bill for the federal judicial systems before a House Judiciary subcommittee are about to end. The bill will go before the full House this fall. The Carter administration has announced its opposition to some of the bill's key provisions, contending that grand jury abuse is rare. There is evidence that it may be more common than the administration thinks.

Grand jury witnesses do not enjoy the constitutional protections they'd get in a trial. And the grand jury can become a tool of the government whose power it was meant to check. That became clear during the early '70s, when the U.S. Justice Department used grand juries to harass antiwar activists.

Among the questions Congress must answer are these:

Should witnesses be denied the constitutional privilege against self-incrimination because a judge grants them immunity from prosecution for anything they might tell a grand jury? Under federal law, a grand jury witness can be forced to testify if the judge promises immunity.

Two Charlotte police officers faced that situation recently in a grand jury investigation of alleged illegal police wiretapping. U.S. District Judge James McMillan expressed his disagreement with the law, though he saw no alternative to enforcing it.

"Given a free choice in the matter, I would refuse (to do so)," the judge said. ". . . Locking a person up for not talking is . . . only a small degree removed from other traditional types of torture used to make men talk, such as the rack, the saw, the screw, the water treatment. . . ." We share the judge's distaste for forced testimony.

Should witnesses be denied the presence of an attorney inside the grand jury room?

Presently, witnesses must leave their lawyers outside the hearing room. They must face questioning by the jurors and district attorney on their own, traipsing back and forth to the hallway to seek legal advice. Prosecutors argue that allowing lawyers in would delay things and cause more breaches in grand jury secrecy. We need to hear more arguments pro and con before we take a position on that issue.

Should grand juries be allowed to seek help from independent lawyers and investigators?

Grand juries must rely for impartial legal counsel primarily on the same person who wants them to return indictments: the prosecutor. The availability of advice from an independent attorney would help prevent charges of collusion and make the grand jury system work as it's supposed to.

It's hard to say how widespread grand jury abuses may be. But the present system leaves too much room for them to occur.

[From the Boston Globe, July 11, 1977]

Grand Juries: It's Time To Reform or Abolish Them

(By William L. Clay [1])

If grand juries are not abolished, they ought to be altered to curtail the prosecutorial abuses inherent in the present system. The original intent of the grand jury was to protect the innocent who had been accused falsely. It supposedly was conceived as a group of peers deliberating in secrecy to determine if sufficient evidence existed to bring criminal charges against a neighbor.

The idea was transported to this country from England and developed as an intricate and prudent body of law to balance the interest of individual freedom with the interest of the state in protecting society against criminals.

However, in recent years grand juries have been composed almost exclusively of society's elite. The interest of the individual has been totally disregarded as prosecutors use the juries as a personal tool to harass, intimidate and frame those who espouse radical causes or differing political opinions.

Citizens who are targets of grand jury investigations, or more precisely the targets of prosecutors, are denied "due process" of law and most assuredly are

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[1] William L. Clay is a Democratic member of Congress from Missouri.

not guaranteed the secrecy of the proceedings. In fact, most prosecutors have arrangements with the media to leak derogatory, unsubstantiated testimony to discredit and destroy the accused. In addition, the accused is not permitted legal counsel while appearing before the grand jury, not afforded the basic right to be confronted by his accusers nor is he allowed to cross-examine.

The argument that the proceedings are not adversary is groundless. In this age of "Kojak," investigative reporters hell bent on over-dramatizing, over-exploiting, over-sensationalizing every accusation of crime, a grand jury indictment becomes synonomous with guilt. In my opinion, the present system constitutes a blatant disregard of rights of the individual. Most grand jurors are pawns in the hands of many unscrupulous prosecutors who select what evidence will be considered, which witnesses will be called to testify, who will be granted immunity and which charges will be leveled.

Most indictments are written by the prosecutor independent of consultation with the jurors and then automatically signed by them. In effect, grand juries are no more than rubber stamps placing the onus of guilt on the accused.

There is a real need for the Congress to either reform the system drastically or abolish it. If evidence exists that indicates a person committed a crime, why not take that evidence before the court in a preliminary hearing and give the accused the right to cross-examine?

Why go through the sham, the charade of pretending to be judged by an impartial panel of one's peers? The only justification I see for the continued use of a grand jury would be in the most extreme cases dealing with fraud and other complex white-collar crimes where extensive documents and bookkeeping, suspects, witnesses and lawyers make public presentation difficult and cumbersome; crimes alleged to have been committeed by public officials or policemen; and cases where the protection of witnesses is essential or where some suspects are still at large.

[From the New York Times, July 13, 1977]

"THE ANSWER TO GRAND JURY ABUSE"

To the Editor:

The Grand Jury has indeed come upon hard times. Critics have ignored its fundamental strength to criticize it for failing to perform a task long since taken up by other bodies. Its historic role of protecting the innocent from oppression has been largely supplanted by procedural safeguards at the trial level created by several decades of Supreme Court decisions.

The real significance of the modern Grand Jury is its investigative subpoena. The Grand Jury has one indispensable power generally denied to both police and prosecutors—the power to subpoena witnesses and compel testimony for investigations. This subpoena power is increasingly important for the successful prosecution of complex cases involving organized crime and massive frauds.

The proposals by Representative Joshua Eilberg to separate the Grand Jury from the prosecutor are naive, especially coming from a former prosecutor. Displacing the prosecutor with a separate staff answerable to the Grand Jury will only create yet another source for potential abuse. It would also complicate Grand Jury investigations to the point of rendering them ineffective.

The answer to Grand Jury abuse is not new institutions, but more accountability. The best method of providing accountability is increased judicial supervision.

Representative Eilberg's proposals include one simple and little-noticed reform that will encourage accountability—a requirement that all Grand Jury proceedings be transcribed and available for judicial review.

At present, Federal prosecutors are not required to make a written transcript of Grand Jury proceedings. Therefore, prosecutors are potentially free to engage in excesses behind closed doors without fear of effective judicial review.

The written transcript procedure is presently the law in Arizona and several other states. In our experience the transcript requirement and the corresponding potential for judicial review constitute an effective deterrent to prosecutor misconduct.

BRUCE E. BABBITT,
Attorney General, Arizona, Phoenix, June 30, 1977.

[From the Austin American : Statesman, July 30, 1977]

GRAND JURY REFORM NEEDED

When the Bill of Rights was adopted, the grand jury was seen as a libertarian device against oppression by the British crown. The grand jury system has become, through the Fifth Amendment, central to the national criminal justice system.

Yet there is a growing sentiment that the grand jury is too much abused, too much a tool of the government's prosecutors. So much so that the Congress is considering reform legislation designed to protect the citizen against heavy-handed prosecutorial use of the grand jury.

A good bill, H.R. 94, introduced by Rep. Joshua Eilberg, D-Pa., takes a middle-of-the-road approach to the reformation of the grand jury. It should be enacted.

The bill would do several things:

It would allow a witness to have counsel to advise him during grand jury proceedings, a practice not now permitted.

It would limit to six months the time a recalcitrant witness could be jailed for contempt. Currently, a witness in contempt can be held through the term of the grand jury and when a new grand jury is empaneled the process can be repeated ad infinitum.

It would allow grand jurors to hire their own investigators if they don't trust the ones provided by the prosecutor.

It would provide stiff penalties for leaking grand jury information, though it would protect witnesses and their lawyers and journalists from the $20,000 fine or five-year imprisonment contemplated.

There are other provisions, but those are the important ones. They would help to prevent the sort of kangaroo grand jury witnessed during the Nixon administration.

The American Bar Association's policy-making House of Delegates next month will consider a resolution supporting grand jury reform. The proposal envisions allowing a witness the right to counsel, and would keep prosecutors from using a grand jury to aid administrative inquiries.

When the administration took its position on grand jury reform before the Immigration, Citizenship and International Law Subcommittee of the Judiciary Committee a couple of weeks ago, Rep. Eilberg was disappointed. The administration "didn't think much of" the Eilberg bill, one of his aides reported. Eilberg had thought a Democratic administration would be more inclined to grand jury reform.

Nevertheless, the bill still is said to have the best chance of all those proffered to succeed. And it should. If the grand jury system is to become what it was envisioned to be, vigorous, independent, and a hedge against oppression, reforms are necessary. The Carter administration should be pushing the reforms, not opposing them.

[From the Chicago Tribune, Aug. 7, 1977]

LAWYERS WARNED OF GRAND JURY ABUSE

(By Lee Strobel)

Grand juries are in danger of being abolished or having their power cut severely unless major changes are made to curtail abuses by over-ambitious prosecutors, the chairman of an American Bar Association committee said Saturday.

Richard E. Gerstein, state's attorney in Dade County, Fla., for more than 20 years, said state and federal grand jury systems must be revamped to prevent them from being what critics have called "a rubber stamp of prosecutors."

The ABA's Grand Jury Committee, headed by Gerstein, is proposing a 26-point plan to overhaul grand juries, to help expand the rights of witnesses, and to try to protect reputations of innocent persons.

The proposal, brought after three years of study, is among the more controversial issues under debate at the weeklong ABA convention in the Palmer House.

The 360-member House of Delegates, the policy-making arm of the 218,000-member association, will decide early next week whether to adopt the proposals as official ABA policy.

"Unless changes are made soon, the grand jury will be in danger of being bypassed or abolished around the country," Gerstein said in an interview.

"We want to preserve the system because, when it functions as it was intended, it can be an effective buffer between innocent people and the state and it gives citizens a chance to participate in the criminal justice system."

Under major provisions of the plan grand juries would:

Permit witnesses to have a lawyer present during questioning, although the attorney could only act as an adviser and not address the jurors.

Be barred from issuing reports criticizing the qualifications or moral fitness of a person to hold a public office.

Allow anyone mentioned in a grand jury report to ask a judge in secret to have his name removed before the report is made public.

Give targets of grand jury investigations the right to tell their side of the story to the panel if they wish.

Require prosecutors to disclose to the jurors any evidence tending to negate the guilt of a target of an investigation.

Block prosecutors from making statements or arguments to influence grand jury action in a manner that would not be permissible in a courtroom trial.

Although the ABA cannot implement such changes, adoption of the plan as ABA policy would be a potent lobbying force in seeking new grand jury legislation, Gerstein said.

He said laws setting up safeguards as proposed by his committee are needed even though some proposals are part of the standards of the ABA or the National District Attorneys Association, of which Gerstein is a former president.

Gerstein's committee proposed several changes at the ABA midyear meeting in February, but the group decided to put off the plan at the request of Atty. Gen. Griffin Bell, who objected to some of the proposals.

Since then, several of the proposals have been reworded to eliminate most of Bell's objections, Gerstein said.

"The calls for reform started because of abuses under the Nixon administration and they've been increasing, not only from individual witnesses but from major corporations such as General Motors," Gerstein said.

He noted that, although the grand jury system was created in the 12th Century in England to serve as a shield between citizens and the crown, England abolished the institution in 1933.

[From the Washington Star, Aug. 7, 1977]

LAWYERS FIGHTING OVER GRAND JURY REFORMS

(By David Pike)

CHICAGO.—Noting that the grand jury system is under increasing attack as being "riddled with abuse" and a "shield for the government" rather than for the citizen, the Criminal Justice Section of the American Bar Association is urging the organization to approve 26 proposals for reform.

While everyone here at the ABA's 100th annual convention agrees that abuses must be prevented, the proposals are drawing strong opposition from federal prosecutors.

Most controversial are recommendations that grand jury witnesses be allowed to have their lawyers join them during questioning instead of sitting outside the grand jury, that courts supervise the granting of immunity from prosecution, that only the broader form of immunity be allowed and that everything said before the grand jury, including comments to jurors by prosecutors, be recorded.

Such changes have been advocated by such diverse groups as the National Council of Churches, the American Law Institute and corporate officials called recently to testify in federal antitrust cases. Most recently the Founding Church of Scientology in Washington charged that the federal government's grand jury investigation into allegations of illegal actions by church members is merely an attempt to harass the church, and one minister has decided to go to jail rather than testify.

The issues being discussed are important mainly for the federal court system, where most charges are brought through grand juries. In most state and local systems, prosecutors merely file charges themselves and only occasionally use a grand jury for investigative purposes. However, the positions adopted by the

ABA are certain to have a wide impact nationally and could influence grand jury reform bills pending before Congress.

ABA President Justin Stanley said Friday that grand jury reform is one of the top issues confronting the 8,000 laywers meeting here, and the issue certainly has drawn top-level attention from the Justice Department and the National District Attorneys Association.

The ABA had been scheduled to act on 23 reform proposals at its winter meeting last February in Seattle, but action was delayed at the request of Atty. Gen. Griffin Bell. Since then, the Justice Department and federal prosecutors have had considerable impact in modifying the proposals and increasing them to 26, the criminal justice section's report noted.

But the changes have not totally satisfied some federal prosecutors, and the heated lobbying and debate are expected to continue up to the time the ABA's House of Delegates votes on the proposals Tuesday. Bell is scheduled to address the convention tomorrow, but it is unknown whether he will comment on the grand jury issue to gain support for the Justice Department positions.

Most attention is being focussed on whether grand jury witnesses could bring their lawyers with them into the grand jury room to advise them on how to answer questions. The ABA two years ago supported such a move, but that position could be reversed if the current batch of reform proposals runs into trouble, sources said.

The issue is the one that reportedly most concerns Bell because the presence of defense lawyers within the sanctuary of the grand jury is seen as delaying and possibly obstructing a grand jury's investigation into criminal conduct, especially in organized crime and conspiracy cases.

Once lawyers are permitted inside the grand jury, the opponents contend, they will be able to repeatedly raise objections that will have to be taken before judges for a resolution, which could result in a "minitrial." And in conspiracy cases where one lawyer may represent several witnesses, the attorney would be able to see which witnesses are cooperating with the grand jury and even learn the identities of grand jury members, opponents argue.

The report notes that the grand jury process is the only part of the criminal justice system in which defendants do not have a right to have counsel present. And it argues that forcing a witness to go outside the grand jury room to consult with an attorney merely delays the process and "places the witness in an unfavorable light before grand jurors."

The report also points out that nine states including Virginia allow lawyers inside the grand jury and that none have reported any serious problems.

Another proposal that has brought strong opposition from prosecutors would provide that witnesses who are given immunity from prosecution in return for their testimony should only be granted "transactional immunity." Such protection covers any crime referred to in the testimony unlike "use immunity," which only protects the witness from use of his testimony in a future criminal prosecution.

The proposal is linked to another that would provide a further check on the granting of immunity by requiring a judge to determine that immunity is necessary, rather than the current practice of allowing prosecutors to determine whether immunity is in the public interest.

Opponents, in a statement that has been circulated to the 94 U.S. attorneys around the country, contended that: "The commentary by the ABA that use immunity encourages perjury and chills cooperation is totally unpersuasive. To the contrary, it is transactional immunity that discourages detailed truth telling since the individual is fully protected only by superficial testimony. The more detail a person (with use immunity) provides, however, the greater is his protection."

As to giving the court a broad role in determining who can be granted immunity, the statement argues that it would "usurp the function of the executive (branch). It is not a proper judicial function to determine who should be prosecuted. It is equally not a proper judicial function to determine who should NOT be prosecuted, whether as a result of being granted immunity or otherwise."

Among the other controversial proposals is one requiring the recording of all matters before the grand jury, except their deliberations. Such a requirement, which is now in effect in only a few federal courts and not in the Washington area, is aimed at restraining prosecutors from exercising "undue or improper influence on the grand jury," the ABA report said.

[From the Washington Post, Aug. 9, 1977]

How To Make Grand Juries Work

Legislation pending in Congress to change the rules under which federal grand juries operate got a helping hand Wednesday when the American Bar Association approved a set of principles for grand-jury reform. Chief among them is a recommendation that a witness be allowed to have a lawyer present when being questioned in the grand-jury room. This recommendation, if accepted by Congress—and we hope it will be—should go a long way toward eliminating the abuses by prosecutors that have made the grand-jury system suspect. In doing so, it may save the grand jury from extinction.

Originally created in England as a mechanism for protecting citizens against an overbearing government, the grand jury has been used instead by many prosecutors as an instrument for harassing witnesses and browbeating defendants before they are indicted. The Nixon administration was especially skillful at using grand juries for political rather than law-enforcement purposes.

While the Department of Justice has recognized the need for new rules to end such abuses, it is not prepared to go as far as the Bar Association in fundamental reform. Attorney General Griffin Bell, in fact, argued before the lawyers against giving witnesses the right to have a lawyer with them—at present, witnesses' lawyers are required to wait outside the grand-jury room. His fear, and that of many prosecutors, is that grand-jury proceedings will come to resemble those of a trial, thus making the task of law-enforcement officials even more formidable than it is now. We think such fear is exaggerated. But even if it were not, this basic change in the law would be needed to preserve the grand jury's intended function.

Grand juries have been much criticized in the past few decades. They were abolished in England in 1933 and have been eliminated in several states. Their life expectancy in the remaining states and in the federal system was not considered great a few years ago because of the ways in which the juries had been abused. But that has changed. The Watergate affair provided a striking example of their usefulness in investigating and bringing indictments in situations where no other technique could have enjoyed public confidence. They are worth saving—but only if they are restored to the function intended by the Bill of Rights. The best way to do that would be for Congress to pass legislation along the lines suggested this week by the nation's lawyers.

[From the New York Times, Aug. 10, 1977]

Bar Group Proposes Help for Witnesses Before Grand Juries—Congress and States Are Urged by A.B.A. To Adopt 24-Point Code Curbing Prosecutor Abuses

(By Warren Weaver Jr.)

Chicago.—The American Bar Association urged Congress and the states today to adopt a broad program of grand jury changes aimed at curbing abuses by prosecutors and providing more protection for witnesses.

Over objections by the Department of Justice in two instances, the association's House of Delegates approved a 24-point program that would permit witnesses to have their attorneys in the grand jury room and require the government to inform witnesses who are possible targets of the inquiry of that fact.

The proposed code for criminal investigation would also limit the circumstances under which grand juries can grant a witness immunity, while broadening the area of such immunity once granted. It would strongly uphold the principle of grand jury secrecy but attempt to prevent the use of grand juries for political purposes.

DEBATE OVER LEGAL ADS

The House of Delegates, policy-making body for the 218,000 lawyers in the association, passed a watered-down resolution on President Carter's institution of a merit system in appointing Federal judges but deferred decisions on the question of whether winners in civil lawsuits should recover their legal costs from losers as a matter of general policy.

The A.B.A., the single most powerful force in the legal profession, is holding its 99th annual meeting here. The convention is scheduled to close tomorrow with a debate over restrictions on legal advertising and the installation of William B. Spann Jr. of Atlanta as president.

At present, there is no requirement that Federal or state grand juries provide any legal information to witnesses subpoenaed to testify. Under the code adopted by the A.B.A. today, the witnesses would be told of their privilege against self-incrimination, their right to counsel and the possibility that any false testimony could lead to a perjury indictment.

Under current practice in all but nine states, witnesses may not have lawyers with them in the grand jury room, although they can go outside after a question and consult their lawyers in the corridor.

Richard E. Gerstein of Miami, a veteran prosecutor, called this "a ludicrous situation that can cast doubt on a witness's veracity" when he may be telling the truth but is uncertain of his legal rights at the moment.

Under the A.B.A. proposal, an attorney could advise his client in the grand jury room but could not address the grand jury or participate otherwise in the proceedings. If he violated these rules, the prosecutor could ask the court to remove him.

Appearing briefly, Attorney General Griffin B. Bell argued that this was "overkill" a move that would either make the grand jury system unworkable or else constitute a "lawyers' relief act" providing "plenty of work" for the profession.

The Department of Justice won two victories on grand jury reform, however, persuading the House of Delegates to vote down proposals that would have made it easier for witnesses summoned before a grand jury to challenge and perhaps invalidate their subpoenas.

One supporter of legal representation within the grand jury room, Gilbert S. Rosenthal of New York, told the association that a number of indictments obtained by Maurice H. Nadjari, the former New York special prosecutor, had later been dismissed because of his "badgering of potential defendants" before the grand jury.

A proposed resolution "commending" President Carter for establishing nonpartisan commissions to propose candidates for the United States Court of Appeals was amended to say that the A.B.A. "recommends" that the President establish this kind of commission in the future.

The move was made after complaints that the commission established for the 10th Circuit of the Court of Appeals included a number of political appointees and apparently unqualified members. That circuit is composed of Colorado, Wyoming, Utah, Kansas, Oklahoma and New Mexico.

By a vote of 142 to 141, the House of Delegates voted to postpone action indefinitely on a proposal to add 14 lawyers under 36 years old, one from each A.B.A.

[From the Wall Street Journal, Aug. 10, 1977]

GRAND JURY SYSTEM REFORM WAS ENDORSED BY THE BAR ASSOCIATION

Over opposition from Attorney General Bell, the nation's largest lawyers' group voted to support bills pending in Congress that would allow witnesses to bring attorneys to the jury room and broaden criminal immunity. Backers of the measures argued the changes were necessary to stem abuses of power by prosecutors, charging the grand jury system had failed to shield the innocent. The group's stance is expected to carry considerable weight in Congress.

Bell had warned the lawyers: "You are proposing a remedy that is much broader than the wrong you have found."

[From the Washington Post, Aug. 10, 1977]

ABA DELEGATES URGE REVISIONS IN GRAND JURIES

(By Stuart Auerbach)

CHICAGO.—The American Bar Association's policy-making House of Delegates today recommended sweeping changes in the grand jury system—including allowing defense lawyers in the jury room—that the Justice Department strongly opposed.

The proposals are aimed at ending what an ABA committee called "abusive" elements of the 800-year-old grand jury system which developed under English common law to protect citizens from the king but which has now become a tool of the nation's prosecutors.

While the ABA's action has no force of law, it has influence with Congress and state legislatures, which can pass measures revising the system.

An aide of Rep. Joshua Eilberg (D-Pa.) who has introduced a bill in Congress to revise the federal grand jury system along the lines recommended today by the ABA, said the measure would have no chance of passing without the support of the organized bar.

Attorney General Griffin Bell, who led a Justice Department team opposing parts of the recommendations before the ABA delegates, promised that the next battle would be in testimony to Senate and House committees considering changes in the federal grand jury system.

Bell especially opposed the provision that would allow witnesses to have their lawyers in the grand jury room. He called it "a lawyer's relief act" that would "generate plenty of business for lawyers."

Most grand juries, including those in federal courts, now allow witnesses to consult with their attorneys in an anteroom after every question.

Allowing a lawyer in the grand jury room with his client would fundamentally change the system, and federal prosecutors who lobbied ABA House of delegate members here all week said it would hamper their investigations of white-collar organized crime.

"Putting a lawyer in the grand jury room will invariably lead to impeding the investigation," Benjamin R. Civiletti, head of the Justice Department's Criminal Division told the delegates.

Richard E. Gerstein, however, who has had experience on both sides of the grand jury in his 21 years as chief prosecutor in Dade County (Miami), Florida, replied, "It's the only stage of the criminal proceeding where a person does not have a right to counsel."

Gerstein, who headed the ABA effort for grand jury revision against the opposition of most of his fellow state and federal prosecutors, gets much of his political support from an association of grand jury members. But he was also the subject of a corruption investigation by a special grand jury called by former Florida Gov. Claude Kirk. He was cleared.

Gerstein said the grand jury needs to be changed if it is to remain a vital part of the criminal justice system. He said it was especially misused during the Nixon administration when grand juries were set up in cities far from the scene of a crime and used to harass antiwar dissidents. He noted that a Seattle grand jury, for example, investigated the bombing of the Capitol in Washington, D.C.

The ABA also took another action opposed by the Justice Department: The legal organization recommended that prosecutors be barred from invoking a device called "use immunity." That device allows witnesses to be given immunity from prosecution for answers they give to a grand jury, but they still can be prosecuted on the basis of other evidence.

The ABA recommended that prosecutors instead be allowed to grant only a broad immunity, called "transactional immunity," under which a witness could not be prosecuted under any circumstances for the crime being investigated. Under the ABA proposal, prosecutors would be required to prove to a judge that such broad immunity is necessary before it could be granted.

[From the Chicago Sun-Times, Aug. 10, 1977]

ABA Backs Grand Jury Witness Right to Counsel

(By Michael Zielenziger)

Witnesses before a grand jury should have the right to be accompanied by an attorney, the policy-making arm of the American Bar Assn. decided here Tuesday.

Over the dissent of U.S. Atty. Gen. Griffin B. Bell, who spoke against the proposal, members of the ABA House of Delegates voted 186 to 93 to recommend that grand jury witnesses be given the right to counsel.

The recommendation, part of an over-all package of grand jury "reforms" approved by the ABA, would allow attorneys to advise their clients privately during any grand jury appearances, but would prohibit lawyers from addressing the jurors or from "otherwise taking part" in the proceedings.

Bell told the delegates attending the ABA's annual meeting at the Palmer House that the "remedy proposed is much broader than the wrong you have found" and said the recommendation amounted to "overkill" that would damage the grand jury process.

Under current practice in most states, a witness appears alone before a prosecutor and the grand jury. Should he desire to consult with his lawyer, he must leave the grand jury room. But, as pointed out at the delegates' session, the shuffling in and out of the grand jury chamber tends to make a witness look less honest, and can increase the likelihood of his indictment if he is a target of investigation.

The ABA recommendations do not carry the force of law. To become effective, states must revise their legal codes to reflect the new proposals.

Benjamin Civiletti, chief of the U.S. Justice Department's criminal division, told the delegates the proposal would make prosecution of drug abusers, white-collar and organized criminals more difficult. "Putting a lawyer in the grand jury room as a counsel to witnesses will impede fact-finding by the grand jury," he said, adding that it also would create potential new sources for grand jury leaks.

But the ABA delegates sided with Miami prosecutor Richard Gerstein, chairman of the grand jury reform committee, who asked: "If the courts have ruled that suspects must have a right to counsel when being quizzed by police in the stationhouse, why not before the grand jury?"

The reform package was proposed after mounting criticism that grand juries, designed to protect citizens from needless harassment, had become "rubber stamps" of zealous prosecutors.

The delegates also voted, after lengthy debate, to recommend that prosecutors use "transactional immunity" rather than "use immunity" when seeking to get witnesses to testify before grand juries.

Under transactional immunity," witnesses are granted a blanket guarantee they will not be prosecuted for any crimes they may have committed. Under "use immunity," however, a witness can still be prosecuted for his offense if the prosecutor independently learns of incriminating evidence against him. Civil liberatians consider the concept of "use immunity" and infringement of the Fifth Amendment, which protects against self-incrimination.

The 26-point reform package approved Tuesday included these other features:

Prosecutors should not present evidence to the grand jury that would be inadmissable at trial.

They should recommend a grand jury not indict if they believe the evidence is not strong enough.

Every witness before a grand jury should be informed of his right to counsel, protection against self-incrimination, and that if he answers questions falsely he can be charged with perjury.

Targets of a grand jury investigation should be told they are potential indictees.

[From the Chicago Tribune, Aug. 10, 1977]

BAR ENDORSES GRAND JURY REFORMS

(By Lee Strobel)

A package of grand-jury reforms was endorsed Tuesday by the American Bar Association despite U.S. Atty. Gen. Griffin Bell's strong objections to a provision allowing defense lawyers inside grand-jury chambers.

Bell and his criminal division chief, Benjamin Civiletti, warned that allowing defense lawyers to advise witnesses during grand-jury questioning would both shackle and lengthen the juries' investigations.

Civiletti said the proposal "will inevitably lead to impeding the fact finding" by grand juries and would generate more hearings to take up the already limited time of judges.

Bell said the idea "would generate plenty of business for lawyers" but is an unnecessarily strong action to take.

The ABA's House of Delegates, which sets policy for the 218,000-member association, voted 186 to 93 to endorse the plan, which would let lawyers advise witnesses but would give them no other role inside grand-jury chambers.

An ABA committee on grand juries proposed letting defense lawyers into the chambers after a three-year study of federal and state grand-jury systems.

Richard E. Gerstein, committee chairman and state's attorney for 21 years in Dade County, Fla., told delegates that grand-jury reforms are urgently needed if abuses like those under the Nixon administration are to be prevented.

He likened letting lawyers into grand-jury rooms to letting attorneys advise arrested persons during questioning at police stations. He contended proceedings would be shortened by the change.

Bell and Civiletti objected to four proposals in the 26-point package on grounds that, taken together, they would hamper grand juries, lengthen proceeding, and make investigations of organized and white-collar crime more difficult.

The delegates went along with the Justice Department by rejecting two points but insisted on endorsing another provision that reasserts the ABA's endorsement of the broader of two kinds of immunity.

Although the ABA has no power to enact grand-jury changes, its endorsement of reform is expected to be a potent force for congressional action in that area.

At Bell's suggestion, the delegates rewrote a committee proposal that witnesses who refuse to testify before a grand jury and are held in contempt should be jailed for not more than six months. This was amended to call for a maximum of one year in jail. Current law provides up to three years in jail.

As part of the package, the ABA endorsed new laws prohibiting prosecutors from knowingly failing to disclose to the grand jury any evidence that would tend to substantially negate the guilt of a person under investigation.

[From the Salt Lake Tribune, Aug. 12, 1977]

GRAND JURY SYSTEM WOULD GAIN FROM ABA REFORM PACKAGE

If American Bar Assn. (ABA) policy is eventually reflected in law, and it often is, the grand jury system is in for some long overdue change.

The association's House of Delegates took the position this week that witnesses before grand juries should be allowed to have an attorney at their side to advise them. Some two dozen other changes designed to provide greater protection for individuals in grand jury proceedings were also approved, sometimes over the protest of Atty. Gen. Griffin Bell.

On too many occasions grand jurors have been reduced to little more than a rubber stamp for the prosecutor, the only lawyer permitted to address and advise them. There also have been frequent charges that grand juries used a new limited immunity grant weapon as an instrument of intimidation. And some critics believe grand juries have been employed as an investigative arm of established law enforcement agencies.

The ABA acted to stem these and other flaws in the face of a warning from Mr. Bell that the lawyers were destroying the grand jury and making law enforcement in some fields impossible. The attorney general's objections smacked of regret over the prospect of losing the government's overwhelming advantages under present grand jury procedures.

If the ABA recommendations become law an overly zealous prosecutor would no longer find it easy to browbeat a witness into possibly inadvertently incriminating himself or associates. Instead of having to leave the jury room to consult with a lawyer after each question put to him, a witness would have counsel with him.

Proposed limitations on grants of use-immunity would force prosecutors to develop evidence through investigation rather than extract it from an unwilling possible suspect under threat of contempt sentences.

The ABA recommendations came about because the grand jury system is being subverted and individual rights ignored or circumvented much too often. If, as Mr. Bell predicted, adoption of the reforms destroys the grand jury, then it deserves destruction.

If a cog in the criminal justice machine must rely on infringement of the very rights the system is designed to uphold, then the machine would run better without that cog. But it won't come to that.

If the ABA reforms are enacted into law the grand jury will survive and be better for them. Prosecutors may even find rewards in the return to traditional methods of case building sans questionable grand jury shortcuts.

[From the Dayton Daily News, Aug. 13, 1977]

NOT-SO-GRAND JURIES

It's too bad Attorney General Griffin Bell does not like the idea of letting witness take lawyers with them when they testify before a grand jury. But that ought not deter those who believe the grand jury system is in need of serious reform.

The proposal comes from a committee of the American Bar Association that also recommended 25 other changes in the system to make it more just.

Mr. Bell calls the idea "the lawyers relief act" because it would mean more business for the pinstriped folks with briefcases. He has a point, but virtually every governmental change these days means more business for lawyers. Before the century is out everyone may be a lawyer because we won't be able to sneeze without filling out a form or getting sued.

But that is not sufficient reason to avoid correcting a situation that has gotten out of hand. The federal government itself is one of the biggest abusers of the grand jury system, using it in the 1960s and early 1970s to badger dissidents and investigate their doings even when there was little likelihood of obtaining convictions or even indictments.

Witnesses before a grand jury are thrust into an unfamiliar and threatening situation and questioned by trained prosecutors who can spring evidence on them without warning. If they don't answer they can be held in contempt and jailed.

Mr. Bell says lawyers to help the witnesses could prolong matters and slow down the judicial process. But that risk, and it is real, is not as important as preventing miscarriages of justice.

[From the New York Times, Aug. 14, 1977]

IDEAS AND TRENDS—A.B.A. TAKES ITS STAND ON GRAND JURY REFORMS

The right to the presence of counsel during legal proceedings is widely viewed as basic to the American criminal justice system, yet at one stage in the criminal process, before a grand jury, that right and others equally basic are generally denied. For that reason, many thoughtful persons have long been considering ways to remedy the situation.

Last week, the American Bar Association's policy-making House of Delegates proposed several reforms, including recommendations that witnesses be allowed to have their lawyers beside them in the jury room and that they be informed of their privilege against self-incrimination.

The ultimate fate of the proposals is in doubt. A bill incorporating some of them is before Congress, and the views of the House of Delegates carry considerable weight because more than half of the country's lawyers belong to the bar association. However, there is a second powerful voice, that of Attorney General Griffin B. Bell. He opposes most of the suggested changes on the ground that they could make the grand jury system unworkable.

Historically, the grand jury has been considered a safeguard against arbitrary prosecution. Today, in the opinion of Federal Judge William J. Campbell and others, "the grand jury is the captive of the prosecutor, who can indict anybody, at any time, for almost anything before any grand jury."

Another issue taken up by the lawyers last week at their 99th annual meeting was legal advertising.

In June, the Supreme Court struck down prohibitions against such advertising without ruling on questions of "time, place and manner." To fill the gap, the association adopted a set of nonbinding guidelines for its members. They may advertise their education and military records, the code provides, along with their legal specialty, bank references, fees and willingness to accept credit cards.

Although the guidelines have no legal force, they are expected to serve as models for codes promulgated by state bar associations and by courts that oversee the activities of lawyers. Members of the profession disciplined for violating such codes could challenge them in court.

[From the Milwaukee Journal, Aug. 21, 1977]

THE NOT-SO-GRAND JURY SYSTEM

Americans may yet win the same legal protection in the grand jury room that they properly enjoy in the courtroom.

Recently the American Bar Association voted to support legislation pending in Congress that would allow witnesses in grand jury proceedings to be accompanied by attorneys in grand jury rooms.

The past decade has seen shocking abuse of the grand jury system, with investigations turning into political persecutions. Having an attorney present to advise a witness could help stem such government high handedness.

Moreover, the present practice of allowing witnesses to consult their attorneys only outside the grand jury room is a silly inefficiency. This time-consuming consultation procedure should be eliminated.

Ignorance of legal rights and complexities could never be to the advantage of a witness whose liberty may be threatened. Passage of the grand jury bill would help clear the legal air for all concerned.

[From the Wilmington News Journal, Aug. 21, 1977]

GRAND JURIES IN OUR TIMES

> No person shall be held for a capital, or otherwise infamous crime, except on a presentment or indictment of a Grand Jury . . . U.S. Constitution, amendment V.

Despite that constitutional injunction, the grand jury is in danger of becoming the vermiform appendix of the criminal justice system, a useless or abused organ that constantly presents the danger of infection to the body politic.

Abandoned by many states, accused of being a rubber stamp of federal prosecutors, and generally misunderstood by the public, there is good reason to believe that the grand jury, as an institution, is going to be excised from the system unless it is seriously reformed.

That's a historical irony. The institution dates back to medieval England, where the grand (or large) jury of freemen was established as a control on the tendency of the royal courts to push other freemen around. The grand jury, as it developed in English common law (and was transferred to the United States) was to be a protection for citizens against malicious or frivolous prosecution, in that authorities or prosecutors had to convince the grand jury that they had a sufficient case against a citizen to cause his indictment and trial.

Today, the most serious charge being brought against grand juries is that they do exactly the opposite, that they are a tool and device of prosecutors, who control the grand juries and can get anything out of them they wish.

The reform proposals have now come from no less a body than the American Bar Association which, at its recent convention in Chicago, made two proposals affecting federal grand juries: that witnesses before the grand jury be allowed counsel inside the jury room, and that the rules governing grand juries be modified so that it would be more difficult for the jury to grant a witness immunity to force him to testify—that is, giving him the choice of accepting immunity or going to jail for contempt.

The ABA also made some secondary suggestions that would halt the growing trend of abuse of grand jury powers to put news reporters and lawyers in danger of contempt if they refuse to testify on matters they consider confidential.

These reforms should be considered minimal. They would afford at least a thin coat of protection for witnesses (who are very liable to end up as the accused or indicted) in the federal jurisdiction. It is only speculative whether they would accomplish any substantial reform. And, note well, even these reforms are opposed by the U.S. Department of Justice, which uses the grand juries to its best advantage in prosecutorial roles, and sees itself in an adversary role with the private lawyers in this argument.

More practically, the federal government could minimize or even eliminate the role of the grand jury and proceed on the "information" of a prosecutor to a court that a crime has been committed and that a certain person could have committed it. It could, that is, if it were not for the italicized quotation that heads this column.

As for the states, those who do not have constitutional inhibitions have long since taken end runs afound grand juries, usually by proceeding on information and skipping the *pro forma* indictments. Some states keep the institution of a grand jury on standby, for use in special investigations of corruption or wrong doing in government. In those instances, the mere convening of a special grand jury can have a chilling effect on official hanky-panky.

Delaware, alas, is among the states which require by constitution the grand jury process. A footnote on the Delaware Code in the state's 1897 constitution says that the grand jury is "enshrined" in our legal process, and the word is apt. Over the years, there has been a constant drumbeat of criticism to and from the grand juries, which are convened by counties, but constitutional reform would be necessary to operate in a less clumsy fashion, and constitutional reform is not a politically popular cause in Delaware today.

[From Newsweek, Aug. 22, 1977]

REFORMING THE GRAND JURY

(By Jerrold K. Footlick with Diane Camper)

In all of the U.S. legal system, no person stands more alone than a witness before a grand jury: in a secret hearing he faces an often hostile prosecutor and 23 strangers with no judge present to guard his rights, no lawyer present to counsel him and sometimes no indication of why he is being questioned. Enshrined in the Bill of Rights as a protection against unfounded prosecutions, the grand jury has instead become a powerful tool for government investigators. But last week at its annual meeting in Chicago, the American Bar Association, resisting opposition from the U.S. Department of Justice, approved a set of principles that could help reform the grand-jury system.

For years, antiwar activitists and other political dissenters have argued that the Federal government used grand juries to stifle protest. Then businessmen and high government officials found that they, too, could be trapped. General Motors lawyers charged recently that they were being 'treated like gangsters" in a tax investigation by the Internal Revenue Service, which was using the "grand jury as its sword." Former Treasury Secretary John Connally, acquitted after a bribery trial, complained that his indictment resulted from pressure applied against a former associate in a grand-jury hearing. Richard Gerstein, the prosecuting attorney in Miami for 21 years and chairman of the ABA reform panel, compares grand-jury change to decriminalization of marijuana. "When it becomes a problem for the middle class and not just the poor, everyone wants to do something about it," Gerstein says.

CAPTIVE

The fundamental change recommended by the ABA is to allow a witness to have counsel with him in the grand-jury room. As the official legal adviser to the grand jury, and usually the only lawyer in the chamber, a prosecutor now has almost complete control of the hearings. U.S. District Judge William J. Campbell says, "Today, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at anytime, for almost anything, before any grand jury." Under present rules, a witness may leave the room to consult his lawyer, but that leaves a bad impression with a grand jury. Most lawyers contend that if they are allowed in, they can not only protect their clients from a prosecutor's bullying, but also keep the prosecutor from manipulating the jurors.

Attorney General Griffin Bell, who argue against admitting lawyers to grand-jury chambers, said the change in practice would turn the proceedings into a mini-trial and further slow the already molasses pace of criminal justice. "You'll make it unworkable," he predicted. The final ABA version compromised by recommending that a witness's lawyer not be allowed to speak to the jurors; but delegates stuck to the proposal by Gerstein's panel to let the lawyer sit with his client.

The Justice Department also objected to another proposal that the ABA adopted, this one to change the rules governing immunity granted grand-jury witnesses to force them to testify. Under a Nixon-era law, the government can

require a witness to surrender his privilege against self-incrimination by giving him "use" immunity—that is, he can be prosecuted only if investigators could find evidence against him independent of his own testimony. But the ABA recommended that a witness receive "transactional" immunity—meaning that he could not be prosecuted for any possible crime he mentioned in his testimony.

The ABA wants to change several other grand-jury practices that most Americans don't even know exist. For instance, it recommended that all proceedings be stenographically recorded except the jurors' actual deliberations; currently, in many districts a prosecutor can tell a grand jury almost anything without anyone outside the room every learning what he said. The association also suggested that grand juries stop a "growing" trend toward infringement on freedom of the press and the attorney-client privilege. Now, almost always at the urging of prosecutors, reporters can be forced to testify about their confidential news sources and defense lawyers can be forced to surrender clients' business records—or face contempt charges.

GO TO JAIL

A recalcitrant witness has the option, of course, of going to jail for as long as the grand jury sits, up to eighteen months. If he then refuses to answer questions from a new grand jury, he can be sent to jail again. 1972, five Irish-Americans from New York were ordered to tell a Federal grand jury in Fort Worth, Texas, about their alleged ties to the Irish Republican Army. The Nixon Administration never explained why it chose Fort Worth, and the grand jury took no action. But when the five refused to testify, they all served two terms totaling ten months for contempt. The ABA has recommended a single maximum term of one year.

The proposals of the bar association bind no one, but as the leading force in the legal profession its action will influence every state as well as the Federal government.[1] Seven bills are now pending in Congress to reform grand-jury procedures. The measure introduced by Democratic Rep. Joshua Eilberg of Pennsylvania, which follows the ABA plan closely, is considered most likely to pass, although the Justice Department will continue to oppose such provisions as allowing counsel in the jury chambers. "The whole point of grand-jury reform," says lawyer Gary Naftalis, who recently co-authored a book on the subject, "is to ensure that the proceedings are as fair as possible to the witness—while allowing the institution to function."

[From the Bulletin, Aug. 23, 1977]

THE ABA CALLS FOR GRAND JURY REFORMS

The American Bar Association has called for some major changes in the grand jury system. In the interest of justice, Congress and state legislatures would do well to see that the ABA recommendations become reality.

At a recent meeting in Chicago, the ABA recommended, among other things, that witnesses be allowed to have a lawyer with them when they appear before a grand jury and that witnesses who are possible targets of a grand jury investigation be warned.

The proposal to allow lawyers in the grand jury room is opposed by the Justice Department. Prosecutors maintain that allowing a lawyer into the grand jury room would hamper investigations, particularly of organized crime. Most grand juries, including federal ones, now allow witnesses to consult lawyers outside the room after every question.

Certainly no one wants to make it overly difficult for prosecutors to build legitimate cases against criminals. But the fact is that the grand jury system has at times been abused, with witnesses brow-beaten by aggressive prosecutors.

It certainly makes sense for lawyers to sit in with clients before a grand jury to maintain on-the-spot vigilance in protection of clients' rights. Under the

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[1] Many states have largely abandoned the use of grand juries. In Los Angeles County, Calif., for instance, only about 40 of 21,000 criminal cases last year went to a grand jury. Ordinarily, a prosecutor will charge a defendant by a process known as "information," the equivalent of an indictment, bringing an official complaint to a judge with the defendant present.

ABA proposal the grand jury proceedings would not become a minitrial because witnesses' lawyers would be allowed only to advise their clients, not to address the grand jurors or otherwise participate.

Grand juries were set up in England to protect citizens from capricious monarchs. Unfortunately, some prosecutors have twisted the system and used it for political gain.

Our system of criminal justice requires that the rights of witnesses or potential defendants constantly be weighed against the right of the state to obtain evidence and build a case. Under the present grand jury rules, that balance has been tilted; some individuals' rights have been infringed upon. The ABA's ideas for changing the grand jury system seem reasonable and fair.

[From the Newsday, Long Island, N.Y., Aug. 24, 1977]

GETTING BACK TO BASICS WITH THE GRAND JURY

The grand jury, conceived as a protective shield between citizens and the awesome powers of their government, has increasingly evolved into a prosecutor's tool. The use of grand juries to obtain indictments for routine offenses in New York and 20 other states adds little by way of safeguards for defendants even as it makes the process of bringing criminals to justice unnecessarily cumbersome.

The latest step in the evolution was the passage in 1970 of the Organized Crime Control Act, which rewrote the rules governing witness immunity and came dangerously close to nullifying Fifth Amendment rights against self-incrimination. As predicted by critics at the time, the act has been used not only to combat organized crime but to harass and intimidate potential witnesses and suspects in a wide variety of cases.

Demands for reform have been fueled by the fact that witnesses must appear before grand juries without legal representation. Even though the American Bar Association could be accused of trying to get more work for its members, it makes a good case for allowing a lawyer to be present in the grand jury room.

The Bill of Rights says, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," with some exceptions involving military service or public danger. But the Supreme Court has ruled the states exempt from the provision, and 29 states now allow indictments on the basis of prosecutors' information and preliminary hearings—a system that seems to work well for all parties. New York would do well to follow that example, reserving grand juries for special investigations or cases where a witness might be endangered if his or her identity became known.

The problem is more complicated on the federal level; Congress is wary of tampering with the Bill of Rights. An attempt by Representative Joshua Eilberg (D-Pa.) to reform the system stands a far better chance. In essence, Eilberg would reverse the tilt toward the prosecution by allowing the presence of lawyers and restoring the immunity rules employed before 1970. His bill would also make grand juries more independent of prosecutors and attempt to prevent leaks of grand jury proceedings, which are supposed to be kept secret.

Attorney General Griffin Bell opposes the two key provisions on the ground that they may hamper the grand jury's work. But the safeguards in the Bill of Rights weren't intended to make the law enforcement system more efficient. And when those safeguards become largely meaningless, as has happened with the grand jury system, it's time to search for alternatives.

[From the Christian Science Monitor, Aug. 24, 1977]

GRAND JURY REFORM

The grand jury system in the United States is in dire need of reform. The American Bar Association's adoption of 25 proposed changes in grand jury procedures reflects a growing recognition within and outside the legal profession that the current system has become rife with abuses. The grand jury no longer adheres to its original intent—to be an impartial search for truth, carefully

balancing the rights of the individual against the state's duty to uncover criminal activity.

Instead of serving as a buffer against undue prosecution, the grand jury in practice has often become the captor of overzealous prosecutors anxious to secure an indictment for political or other reasons. Under the current system, a witness called to testify before a grand jury appears alone, without a lawyer, to encounter a hostile prosecutor and 23 jurors. He does not know if he is the target of the investigation, nor even the scope of the probe. There is no impartial judge to serve as referee. The session is conducted in secret, and many states do not even require that records be kept. However, a witness's testimony can be used against him in a later trial. He may leave the jury room to consult an attorney, but in doing so he is apt to leave the impression on the jurors that he has something to hide.

In short, a grand jury witness is virtually defenseless. And many experienced lawyers say that a prosecutor can indict anybody, at any time, on almost any charge—so complete is his control in the grand jury room.

The ABA's proposals—most of which are included in seven bills that will be before Congress when it reconvenes next month—would provide greater protection for witnesses. One major proposal would allow a witness to have an attorney with him in the grand jury room; the lawyer could not address the jurors but only advise his client. He would also serve as a witness to the questioning, and his mere presence would restrain prosecutors from badgering witnesses.

Other proposed reforms would provide limited immunity to a witness, would require that he be told if he is the target of the investigation and the general scope of the probe, and would require that a record of the proceedings be kept.

Attorney General Bell has objected to the ABA recommendations as "overkill," moves he feels might make the system unworkable. The U.S. Justice Department in recognition of the problem is revising the manuals for U.S. attorneys to spell out what is and is not proper conduct. Among encouraging changes, the manual will state that prosecutors should present exculpatory evidence that might bear on a witness's innocence as well as incriminating evidence. The manual will also require a prosecutor to recommend that a jury not indict if he thinks the evidence so warrants.

Some law enforcement officials understandably are wary of reforms which they fear will further obstruct their efforts to bring criminals to justice; the criminal justice system already is too cumbersome and time-consuming, they rightly argue.

However, too many innocent victims of ambitious and sometimes unscrupulous prosecutors have had their reputations and lives irreparably damaged under the current system. A number of top prosecutors across the U.S. helped formulate the proposed reforms, attorneys strongly committed to the grand jury system—but all too familiar with its abuses.

We heartily concur with these prosecutors and the ABA's House of Delegates and urge that Congress and the states not delay in returning fairness and justice to the grand jury room.

[From the Washington Star, Friday, Aug. 12, 1977]

Q AND A

JESUIT LAWYER HITS ACTS OF GRAND JURY

Jesuit attorney Daniel Sheehan successfully defended the New York Times' right to publish the Pentagon Papers during the Nixon administration. With the imprisonment of at least three church workers and officials because they refused to divulge information when summoned before a grand jury, he discussed an analagous situation with Washington Star Staff Writer William F. Willoughby.

Question. The churches now seem to be quite distraught over what they feel is an abuse of the grand jury procedure. What's going on?

Sheehan. The crux of the matter is that in 1970 Richard Nixon and John Mitchell drafted the "Omnibus Safe Streets Act" and it was passed by Congress. This has established a procedure that is being followed by the federal prosecutors, which is virtually identical to the old Star Chamber or inquisition procedure which was developed by the Catholic church and finally taken over by the British government just before the pilgrims left England because of the violations of

their religious rights. In various parts of the country they are attempting to use the power of subpoena to draw in law-abiding citizens and to demand from them all information they might have that is of value to the federal prosecutors. The federal prosecutors are taking this information and putting it into their computer banks and they are keeping dossiers on everybody from the civil rights movement to any other type of movement that the federal prosecutors feel they want to have information about.

Question. How is this particularly applicable to the church?

Answer. The latest move on the part of the federal prosecutors is to move into the church communities and to attempt to extract from high church officials any and all information they have that might be of value to the federal prosecutors. Some of these areas are specific attempts to find out about the internal structure of the Hispanic community. Early this year a number of people who worked up in the National Council of Church's offices and also in the national Episcopal offices were contacted by FBI agents and ordered to divulge confidential information that was in the church files. These people declined to do so. And the FBI immediately swung into place the federal grand jury system.

Question. What kind of information were they after?

Answer. The demands were for all the people on their mailing lists, all the contributors to the church efforts in the area of civil rights. They demanded to have copies of the minutes of the meetings of the church groups for the last five years and copies of all of the travel vouchers and lists of all of the places any of the church members had gone in the last five years. Now this was viewed as absolute anathema by the church people and they refused to go along with this. So the federal prosecutors had them thrown into prison. This is the rebirth of the Inquisition.

Question. Don't the prosecutors have a need for information to prosecute criminals?

Answer. Actually, we're talking about people who have mere suspicion that a case might exist. They do not have probable cause to believe that any particular crime has been committed. The 4th Amendment to the United States Constitution states that people cannot be arrested, they cannot have their homes searched, they cannot forcefully be required to divulge confidential information about their papers until such time as the federal prosecutors have probable cause to believe that a crime has been committed. Now that's an extraordinarily important safeguard that has been put into the Constitution. What is happening now is that the federal prosecutors are starting to arrest people and drag them in front of federal grand juries on mere suspicion that some type of offense may have been committed. Now that is a total violation of the most fundamental standards of fairness that have been enshrined in the United States Constitution. That's the real nature of the problem. It's not that they believe a crime has been committed with any legitimate basis and are just trying to investigate it, rather they're trying to find crimes.

Question. Why is it churches are now becoming a particular target?

Answer. The reason is that the churches—over the last decade or more, since the civil rights movement and since Vatican II, especially under Pope John XXIII—have become much, much more active in attempting to reach out to the poor and the oppressed people, in attempts to assist these people in obtaining justice. Because of this new effort on the part of the church in the areas of social justice, the federal prosecutors have come to believe that we have now established confidential relationships with a number of these people who are the outcasts of the established society. And it is these people that the federal prosecutors want to know about. And they believe that the churches will act as an intermediary and will be willing to give up this confidential information that has been obtained about these outcasts to the federal prosecutors who represent the established powers in the country.

Question. What can or what are the churches doing?

Answer. One of the most important things that is going on right now is that there is a case being argued in front of the U.S. Court of Appeals for the District of Columbia involving a minister by the name of Rev. Arthur Maren. He was thrown into federal prison by the U.S. prosecutor's office here in the District of Columbia for refusing to give information about the internal workings of a legally recognized church (the Founding Church of Scientology) here in the United States. The National Council of Churches in May of 1977 passed a unanimous resolution absolutely authorizing any member of a recognized church

in the United States to refuse to answer questions probing into the internal workings of the church and the private and personal relationships that had been established in working with the church. There is a high degree of cooperation in matters of public policy amongst all of the church groups. The National Council of Churches understands that Maren has a right to refuse to do this just as any Catholic priest or Jewish rabbi would have. And the National Council of Churches, in a very very positive manner, has come forth aggressively to defend the right of this recognized church minister to refuse to answer these questions.

Question. Could this lead to the abuse by churches?

Answer. That problem arises, of course, with any one of the constitutional rights. If the citizens have a right of privacy in their homes, it's always possible that that could be abused, that people could do illegal things in the internal rooms of their own homes. And it might be very difficult for federal prosecutors to find that out. The same thing is true with respect to priest-penitent relationships in the Catholic church. If, in fact, a priest chose to abuse that right, he could misuse it. The real question is, when the Founding Fathers of the United States Constitution put these rights into the Constitution, what did they expect? It is my opinion, and that of a number of other constitutional attorneys that the decision was made at that time to pay whatever the minimal price had to be in order to safeguard these areas of privacy for United States citizens. The history in England made it perfectly clear to these people that the dangers inherent in allowing the governmental powers to invade these areas was a far, far greater danger than the minimal dangers that churches are somehow going to be illegally housing subversives.

Question. In effect, though, you are saying that one of the only alternatives left for the church is, in this matter, a question of civil disobedience?

Answer. Actually, the status that we're in right now is that the churches have stated quite specifically that they do not intend to answer these questions. They have undertaken all legal means of having this position vindicated. If, in fact, the federal prosecution staff insists upon bringing church officials in front of these grand juries and asking them totally improper questions about the confidential workings of the internal matters of the church, I can assure you that the church people will not answer those questions. The federal courts are being requested to support that position so as not to require that the churches defy the federal prosecutors in this case. It is not good for law enforcement, it is not good for respect of government, and it is not good all the way around. But we can assure you that these questions will not be answered by American church officials.

[From the New York Times, Saturday, Sept. 3, 1977]

PRIEST AND PENITENT: LEGAL CHALLENGES MAY ALTER ANCIENT TRADITION OF CONFIDENTIALITY

(By Kenneth A. Briggs)

The traditional right of religious leaders to withhold confidential information from courts of law is facing new tests that could extend the concept. Some religious figures are calling for a revised definition of the priest-and-penitent safeguard to cover a variety of situations in which the clergyman, in the conduct of his ministry, becomes privy to the inner workings of activist groups. Others are seeking to promote an interpretation of the guarantees of freedom of religion of the First Amendment to protect members of religious groups from testifying against one another if the welfare of the group is involved.

The most unprecedented situation involved a charge of contempt against Arthur Maren, the national director of the Church of Scientology. Mr. Maren refused to answer a grand jury's questions concerning reported thefts of government files by the church on the ground that the inquiry amounted to unwarranted interference in the church's internal affairs.

THE BURDEN OF PROOF

The National Council of Churches filed a friend-of-the-court brief with the United States Court of Appeals in Washington, which is to rule on the contempt charge. The council said it took no position whether Mr. Maren's group was a

legitimate church, but accepted a previous ruling by the court in favor of the right of the Church of Scientology in the protection of the First Amendment.

The National Council, arguing that Mr. Maren's refusal to answer certain questions was a "constitutional right," asserted that church workers should be exempt from testifying before grand juries unless the Government can prove that the worker has personal knowledge of a particular "probable" crime, that such information is obtainable only from church workers and that the testimony would serve a "compelling and overriding societal interest."

Similar arguments have been used to defend two former employees of the Hispanic Commission of the Episcopal Church who would not answer certain questions before a Federal grand jury that was looking into the activities of what was reported to be a Puerto Rican terrorist group.

The former employees, Marlo Cueto and Raisa Nemikin, were jailed last spring on contempt citations and remain imprisoned.

They were members of a social-outreach program, and were describing in their defense as lay ministers whose effectiveness with disadvantaged groups depended on their ability to respect confidences.

This week the Rev. Louis R. Gigante, the Bronx City Councilman, refused to answer certain questions put to him by a special grand jury investigating corruption in the New York City Correction Department and influence-buying by prisoners. Father Gigante cited the priest-and-penitent privilege in resisting a line inquiry into his conversations with a man who was serving a prison sentence in 1974, and was upheld by a judge.

The case, while it seemed a conventional example, was unusual historically. Father Gigante never said that the conversations had a "penitential" aspect. Also, the priest-and-penitent privilege had been construed so restrictedly in the past that information gathered in the course of priestly rounds was considered legally shaky, at best.

The concept has evolved over the centuries on the basis that an individual's right to confess sins to a priest for the sake of divine forgiveness was inviolate. By 1215, the time of the Fourth Lateran Council, the priest's obligation to keep information to himself was codified: Expretation left many issues unclear.

STATE'S LAWS BEG QUESTIONS

Before the Protestant Reformation, Roman Catholic judges in England generally supported this "seal of the confession," except in cases of high treason.

In this country, most states have enacted into laws the right of clerical confidentiality, but these laws' wording and interpretation left many issues unclear.

Among the continuing problems: Who should be entitled to protection? How far beyond the strict definition of the priest-penitent relationship can the standards be stretched?

Clergymen and lay persons alike hear and see things in their religious work that could become objects of criminal investigations. Some clergymen insist that new standards of privilege must protect them from all but the most flagrant abuses.

More and more church groups are attempting to help the poor, the alienated and the outcasts of society. Church activists say that since the ties between these people and the churches' establishments are so tenuous, every effort must be made to sustain trust.

A minister, the activists hold, have a special responsibility to whole groups or subcultures. There has been little indication that courts are ready to go along.

Four years ago a variety of church groups joined to support the Rev. Paul A. Boe, a Lutheran pastor who invoked the shield of confidentiality to withhold information about the uprising against the Government by Indians at Wounded Knee, S.D. Mr. Boe had visited the reservation and refused to answer the questions of a Federal grand jury that was inquiring into the incident. He was charged with contempt, but the charge was dismissed by a Federal Appeals Court in St. Louis—on grounds other than confidentiality.

"In our day," said the brief that the church groups filed in behalf of Mr. Boe, "churches are finding that troubled persons in groups are in need of pastoral counseling together, rather than singly."

Not only must a pastor guard the content of "confessions," the brief said, but in the context of his pastoral relationships, he must guard every other "communication."

CONTINUED

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The National Council of Churches said in its brief supporting the Church of Scientology:

"Once church workers are used by the Government as an easy source of community information, those to whom church missions are directed—people already in large part disaffected from society—will distrust and shun them as they do others they believe to be part of the establishment."

[From the Federal Bar Association News—October 1977]

BOOK REVIEW—THE GRAND JURY: AN INSTITUTION ON TRIAL BY THE HONORABLE MARVIN E. FRANKEL AND GARY P. NAFTALIS

(By Joshua Eilberg)*

Last year, for the first time in the history of our nation, Congress began a comprehensive review of the Federal grand jury system and proposed reforms of that system.[1] This year, Congress is again considering reforms, particularly those contained in H.R. 94, the Federal Grand Jury Reform Act of 1977.[2]

Considerable public interest has been recently focused on the grand jury system, both state and Federal, and criticisms of that system have been lodged by attorneys, judges, citizens, editorial writers, and others.[3] "The Grand Jury: An Institution on Trial" is a comprehensive review of the history, purpose, problems, and proposed reforms of the grand jury system. It is essential reading for anyone who wishes to have a basic understanding of the proper and improper functions of the grand jury and of the role of the grand jury in the criminal justice system as a whole.

Judge Frankel and Mr. Naftalis review the origins and development of the grand jury system. As those authors indicate, the grand jury was intended to be a "bulwark against oppression"—standing between the government and the citizen as a protection against unfounded charges and unwarranted prosecutions. In colonial days, grand juries also became a means of protesting abuses by the Crown. Despite the contrary beliefs of many, the grand jury has always been a political creature, often used by the government to investigate and prosecute political enemies. It has also been a valuable anti-corruption tool, ferreting out official impropriety and securing the punishment of governmental wrongdoers.

As detailed in this book, the grand jury is supposed to be an "arm of the court," acting under the close supervision of a judge, to assure that offenses are investigated without bias and accusations are based on probable cause. Recently, however, critics have charged that the grand jury has been misused for partisan ends, for harassment of political enemies, and for punishment of distasteful but non-criminal activities.[4] The common thread to almost all of these complaints is that the prosecutor uses the grand jury to do his own bidding with little or no interference by the court and with few guidelines. In fact, the grand jury, it is argued, has become a rubber stamp of the prosecutor. In addition, as detailed in the book, increasing evidence has mounted that the grand jury is used not as a screening device to protect innocent victims, but rather as a publicity device to create victims.

These complaints, and legitimate concerns, are thoroughly and fairly described in this book. As Chairman of the Subcommittee responsible for considering proposals to reform the Federal grand jury system, and as author of H.R. 94, a comprehensive bill to provide certain basic guarantees and rights to witnesses called before the grand jury, and to insure the independence of the grand jury

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*Member of Congress, Fourth District of Philadelphia; Chairman of the Subcommittee on Immigration, Citizenship and International Law, Committee on the Judiciary. Congressman Eilberg has introduced H.R. 94 to make reforms to the Federal grand jury system and has been conducting hearings on this and other pieces of legislation relating to grand jury reform.

[1] For a description of the history, background, and content of this review, see J. Eilberg, A Proposal for Grand Jury Reform, 6 Judicature 300 (1976).

[2] The text of the provisions of H.R. 94, and a summary of its main provisions, can be found in the Congressional Record, H-314 (daily edition—January 11, 1977).

[3] Much of this interest and criticism has been collected in the hearings held by my Subcommittee. See Federal Grand Jury, Hearings before the Subcommittee on Immigration, Citizenship and International Law of the Committee on the Judiciary, House of Representatives, Serial No. 52, 94th Cong., 2nd Sess. (1976) [hereinafter cited as 1976 Grand Jury Hearings]. The hearings conducted this year are presently in the process of being published.

[4] A bibliography of books, articles, and cases reflecting these criticisms can be found in 1976 Grand Jury Hearings at 661–71.

from the prosecutor, this book has been of special value to me. It is based, in substantial part, on a New Leader article, published in 1976. At the time of its original publication, I forwarded the article to the members of my Subcommittee in the belief that they would find it of extreme value in considering many of the proposed reforms. This book is a valuable expansion of the original material. It is well written, well researched, well planned, informative and comprehensive. While I, of course, do not agree with all of the opinions expressed, the author's comments and suggestions are thoughtful and carefully considered. Of particular value is the discussion of proposed reforms.

Paralleling the requirements that can be found in H.R. 94, Judge Frankel and Mr. Neftalis recommend that detailed instructions be given to grand jurors of their rights, responsibility and role; that a total transcription be made of all grand jury proceedings; that basic fundamental rights, such as a right to counsel, adequate notice, advice on rights, and careful control of the contempt power be provided; that prosecutors be made responsible to the court, and ultimately to the Legislature for the propriety of their actions in dealing with the grand jury; and that adequate safeguards be included to provide that the grand jury proceedings are in fact, and not just in theory, secret. My only criticism of the discussion in this book of grand jury problems and reform is the failure to specifically analyze the various legislative proposals, both in the states[5] and in the Congress, that attempt to resolve the conflicting positions and alternatives.

The authors strongly recommend reform of the grand jury system. I agree. The authors also recommend that we do not eliminate the Constitutional requirement of an indictment for a major Federal offense. With this, I must disagree. The grand jury operates in two ways: as an investigatory body and as an indicting body. Reform is needed in the procedures by which investigations are undertaken and with those reforms, the grand jury can continue to operate as a valuable tool to ferret out, for example, official corruption. The value of the grand jury as an indicting body is a different matter. Most states have eliminated the requirement of a grand jury indictment as a charging basis,[6] and Great Britain, upon which our Federal grand jury system is based, has not had, since 1930, the grand jury as an indicting institution.[7] This is only an acceptance that, in fact, the decision whether or not to prosecute, and on what charges to prosecute, is a traditional prosecutorial function. An information or other legal document is used instead of an indictment.

When a prosecutor recommends an indictment, after a showing of probable cause, his recommendation is almost always accepted. Similarly, when he does not recommend an indictment, his recommendation is almost always accepted. Even if the grand jury decides to indict over the recommendations of a prosecutor, the prosecutor maintains the full power to drop charges at a later point, or bargain them out in pleas. At our hearings, no one has been able to justify the continuation of a grand jury as a charging body. Arguments against abolition by a Constitutional Amendment have been focused on fears that we should "not tamper" with the Fifth Amendment or any part of the Bill of Rights. The authors of this book base their opposition to abolition on the same bases. They fail to recognize that, as a charging body, the grand jury, at least on the Federal level, has served only as a means to avoid a preliminary examination, where the prosecutor has to put out his case and prove probable cause before the court. Justifying the cost of proceeding by way of indictment, the inconvenience to those grand jurors who must sit and act almost as puppets in reviewing accusations, and the challenge to candor to increase public confidence in our basic institutions by maintaining the fiction of grand jurors' screening, only on the basis of a nebulous fear against "tampering" with the Constitution, seems insufficient, at best.

Because of my feelings in this matter, I have introduced a number of proposed constitutional amendments that would eliminate the constitutional requirement of a grand jury indictment but maintain the role of a grand jury as an investigatory body, with proper controls.[8]

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[5] More and more states are adopting new grand jury laws, for example, Colorado. An analysis of the new Colorado grand jury law can be found in Congressional Record, E-4366 (daily edition, July 12, 1977). An analysis of state grand jury laws can be found in 1976 Grand Jury Hearings at 716-29.

[6] See Library of Congress Study—State Grand Jury Practices in 1976 Grand Jury Hearing at 716-17.

[7] Administration of Justice Act of 1933, 8 Halsbury's Statutes at 307 (3d Ed 1969). See Heyting, Abolition of Grand Juries in England, 19 ABA J 648 (1933).

[8] These proposals and an analysis of them can be found in Congressional Record at H-314 (daily edition, January 11, 1977).

Grand jury reform is essential. Recently the American Bar Association, by a vote of almost two to one, endorsed the proposals recommended by the authors in this volume, and contained in H.R. 94. Congress is about to act on these various legislative proposals to reform the Federal grand jury system. However, establishing and maintaining a fair grand jury system cannot depend on Congress alone or on state legislatures. Legislators can reform laws to provide for equitable procedures but such reforms will not be effective unless people make them work. Congress can only reform laws when the public is interested and concerned and encourage the legislators to act expeditiously. By providing a concise historical background, by documenting grand jury abuses, by reviewing proposed grand jury reforms, and by recommending very strongly enactment of many of these reforms, "The Grand Jury: An Institution on Trial" should further increase public interest in the grand jury system and reform. In addition, this book is excellent reading for lawyers. Lawyers should study this book so as to understand a system that is totally different from the rest of our legal procedures—that is, inquisitorial vs. accusitorial. Lawyers should also study this book so that they can learn how easy it is for a system almost totally devoid of law to be utilized improperly. Finally, lawyers should study this book so they can advise their friends, and the general public, of the need to encourage prompt action for grand jury reform.

AUGUST 10, 1977.

[From the Sunday Bulletin, Nov. 27, 1977]

EILBERG IMMUNITY BILL UNDER ATTACK

SOME CRITICS SAY IT GOES TOO FAR; SOME NOT FAR ENOUGH

(By Lawrence M. O'Rourke)

WASHINGTON.—Jay Weiner of Philadelphia and Pedro Archulete of Tierra Amarilla, New Mexico, share a common experience: federal imprisonment for refusing to testify before grand juries.

Federal prosecutors last year wanted to quiz Weiner about harboring Patty Hearst, William and Emily Harris and Wendy Yoshimura.

When Weiner, 22, refused to testify before a grand jury in Scranton, he was sent to Allenwood prison in Pennsylvania. He stayed there for four months and now is promoting a book in Philadelphia.

Pedro Archuleta is a community organizer among Chicanos in Rio Arriba County. When he refused to testify before a grand jury investigating bombings in New York and Chicago by a Puerto Rican independence group, he was jailed, and remains behind bars.

The cases of Weiner, Archuleta and eight others, currently in prison for refusal to testify, are involved in a grand jury reform bill sponsored by Rep. Joshua Eilberg (D-Phila).

The bill will be "marked up"—or redrafted—by Eilberg's Judiciary subcommittee in January.

House leaders expect the Eilberg bill to pass in their chamber, but to die—next year at least—in the Senate.

BILL UNDER ATTACK

Eilberg's bill is being attacked from several directions.

Attorney General Griffin B. Bell has called for its defeat on the grounds it would strip federal prosecutors of their power to probe into terrorist acts, organized crime, and political corruption.

A coalition of civil liberties, church, newspaper, criminal justice, and union groups supports grand jury reform but thinks that the Eilberg version is not strong enough.

The Eilberg compromise, for that is what it is, lacks one provision that the coalition argues is essential to true reform.

That would be to give persons called before grand juries a yes or no say to offers by prosecutors to grant them immunity from prosecution.

The present law was passed by the Nixon Administration and was used primarily against anti-war groups.

It says that when a witness balks at answering questions before a grand jury, the prosecutor may grant the witness "use" immunity—whether the witness wants it or not.

"Use" immunity provides that nothing the witness says before the grand jury can be used against him, but he can still be indicted for offenses about which he testifies—if other evidence is available.

DRASTIC REFORM

Eilberg would drop "use" immunity for "transactional" immunity, which says that the witness cannot be prosecuted for any transaction about which he testifies. But his testimony could be used against others.

A more drastic reform has been proposed by Rep. John Conyers (D-Mich), but it is given little chance of passing the House.

It would require that a witness give consent before any form of immunity is granted.

The refusal to testify after immunity is given can lead to a prison term, as it did in the cases of Weiner and Archuleta.

The law now provides imprisonment for the life of the grand jury or up to 18 months. The government tells the witness in courthouse parlance, "You have the keys to your cell door in your mouth."

The Nixon law allows the witness to be called and asked the same questions before successive grand juries; theoretically, imprisonment for grand jury contempt could be a life term.

Eilberg and Conyers would cut the maximum for a single incident to six months and would not allow a replay.

The Carter Administration objects to another common Eilberg-Conyers provision dealing with lawyers inside the grand jury room.

Present law does not admit them, and the Justice Department wants it kept that way. Both House bills would give witnesses the right to have lawyers inside the hearing room.

Eilberg would allow lawyers only to advise their clients' not to cross-examine other witnesses, object to questions, or offer legal argument.

Conyer's bill does not specify the lawyer's role. Many see this as turning the grand jury hearing into a closed adversary proceeding.

Eilberg would change the present law in other ways. He would give witnesses the right to a transcript of their testimony, he would enlarge the statutory grounds for challenging subpenas, he would try to limit the government's right to subpena a witness to any federal district, he would impose restrictions on the government's right to imprison balky witnesses wherever it desires, including local jails for from home.

"Grand jury reform illustrates congressional compromise.

The bill is given no chance in the Senate despite considerable support for it from leading liberals on the Judiciary Committee, Edward M. Kennedy (Mass.) and Birch Bayh (Ind).

Kennedy has worked out an arrangement with Sen. John McClellan (D-Ark) to get a criminal law recodification through Congress next year. Kennedy fears that attaching a grand jury reform to the recodification would jeopardize the large bill.

So Kennedy has rejected a move by Sen. James G. Abourezk (D-SD) to add a grand jury provision to the Kennedy-McClellan bill.

Weiner, the Philadelphian who refused to testify in the Heart case and spent four months at Allenwood, said that the Eilberg bill is "no doubt an improvement" over present law.

"I object to Eilberg's claim that his bill would end all the evils of grand juries," Weiner said.

APPENDIX 5

FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 6(E)—GRAND JURY SECRECY AND DISCLOSURE

1. Proposed Amendment to Rule 6(e)—Recommended by Judicial Conference of the United States.
2. Memorandum—Alfred M. Nittle, Counsel—Proposed Amendment to Rule 6(e).
3. Excerpts from Report of the House Committee on the Judiciary, Report No. 95-195—April 11, 1977—Amendments to Federal Rules of Criminal Procedure.
4. Excerpts From Report of the Senate Committee on the Judiciary, Report No. 95-354—July 20, 1977—Amendments to Federal Rules of Criminal Procedure.
5. Excerpts from Statement of the Honorable James R. Mann, on passage of Amendments to Rule 6(e)—Congressional Record H-7865 to H-7867 (daily edition July 27, 1977).
6. Excerpts from Public Law 95-78, 91 Stat. 320.

Excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6. The Grand Jury

* * *

(e) SECRECY OF PROCEEDINGS AND DISCLOSURE. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. *For purposes of this subdivision, "attorneys for the government" includes those enumerated in rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties.* Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment becaue of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The *federal magistrate to whom an indictment is returned* [court] may direct that [an indictment] *it* shall be kept secret until the defendant is in custody or has [given bail,] *been released pending trial. Thereupon* the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(f) FINDING AND RETURN OF INDICTMENT. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a [judge] *federal magistrate* in open court. If [the defendant is in custody or has given bail] *a complaint or information is pending against the defendant* and 12 jurors do not concur in finding an indictment, the foreman shall so report to [the court] *a federal magistrate* in writing forthwith.

ADVISORY COMMITTEE NOTE

(Rule 6)

The proposed definition of "attorneys for the government" in subdivision (e) is designed to facilitate an increasing need, on the part of government attorneys, to make use of outside expertise in complex litigation. The phrase "other government personnel" includes, but is not limited to, employees of administrative agencies and government departments.

Present subdivision (e) provides for disclosure "to the attorneys for the government for use in the performance of their duties." This limitation is designed to further "the long established policy that maintains the secrecy of the grand jury in federal courts." *United States* v. *Procter and Gamble Co.*, 356 U.S. 677 (1958).

As defined in rule 54(c), "'Attorney for the government' means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam * * *." The limited nature of this definition is pointed out in *In re Grand Jury Proceedings*, 309 F. 2d 440 (3d Cir. 1962) at 443:

"The term attorneys for the government is restrictive in its application. * * * If it had been intended that the attorneys for the administrative agencies were to have free access to matters occurring before a grand jury, the rule would have so provided."

The proposed amendment reflects the fact that there is often government personnel assisting the Justice Department in grand jury proceedings. In *In re Grand Jury Investigation of William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971), the opinion quoted the United States Attorney:

"It is absolutely necessary in grand jury investigations involving analysis of books and records, for the government attorneys to rely upon investigative personnel (from government agencies) for assistance."

See also 8 J. Moore, Federal Practice ¶ 6.05 at 6–28 (2d ed. Cipes, 1969):

"The rule [6(e)] has presented a problem, however, with respect to attorneys and nonattorneys who are assisting in preparation of a case for the grand jury. * * * These assistants often cannot properly perform their work without having access to grand jury minutes."

Although case law is limited, the trend seems to be in the direction of allowing disclosure to government personnel who assist attorneys for the government in situations where their expertise is required. This is subject to the qualification that the matters disclosed be used only for the purposes of the grand jury investigation. The court may inquire as to the good faith of the assisting personnel, to ensure that access to material is not merely a subterfuge to gather evidence unattainable by means other than the grand jury. This approach was taken in *In re Grand Jury Investigation of William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971); *In re April 1956 Term Grand Jury*, 239 F. 2d 263 (7th Cir. 1956); *United States* v. *Anzelmo*, 319 F. Supp. 1106 (D.C. La. 1970). Another case, *Application of Kelly*, 19 F.R.D. 269 (S.D.N.Y. 1956), assumed, without deciding, that assistance given the attorney for the government by IRS and FBI agents was authorized.

The change at line 27 reflects the fact that under the Bail Reform Act of 1966 some persons will be released without requiring bail. See 18 U.S.C. §§ 3146, 3148.

Under the proposed amendment to rule 6(f), an indictment may be returned to a federal magistrate. ("Federal magistrate" is defined in rule 54(c) as including a United States magistrate as defined in 28 U.S.C. § 631–639 and a judge of the United States.) This change will foreclose the possibility of noncompliance with the Speedy Trial Act timetable because of the nonavailability of a judge. Upon the effective date of certain provisions of the Speedy Trial Act of 1974, the timely return of indictments will become a matter of critical importance; for the year commencing July 1, 1976, indictments must be returned within 60 days of arrest or summons, for the year following within 45 days, and thereafter within 30 days. 18 U.S.C. §§ 3161(b) and (f), 3163(a). The problem is acute in a one-judge district where, if the judge is holding court in another part of the district, or is otherwise absent, the return of the indictment must await the later reappearance of the judge at the place where the grand jury is sitting.

A corresponding change has been made to that part of subdivision (f) which concerns the reporting of a "no bill," and to that part of subdivision (e) which concerns keeping an indictment secret.

The change in the third sentence of rule 6(f) is made so as to cover all situations in which by virtue of a pending complaint or information the defendant is in custody or released under some form of conditional release.

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Memorandum from: Alfred M. Nittle, Counsel
Subject: Proposed amendment to Rule 6(e), Supreme Court Rules of Criminal Procedure for United States District Courts.

PROPOSAL

Rule 6(e), which deals with maintenance of secrecy of grand jury proceedings, provides that "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties."

Rule 54(c) defines the term "attorney for the government" to mean "the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam means the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein."

The proposed amendment to subdivision (e) of Rule 6 would add the following language: "For purposes of this subdivision, "attorneys for the government" includes those enumerated in Rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties."

POINTS PRO

(1) This proposal is a "clarifying" rather than "substantive" nature. It is nothing more than an authority already possessed by attorneys for the government.

[This is a point made by Thornburgh, Acting Deputy Attorney General, who said: "It has long been the Department of Justice's interpretation of the existing provision, supported by decisions of Federal appellate courts, that an attorney for the Government, upon his own authority and without an order from the court, may make certain disclosures to investigatory personnel for the purpose of discharging his duties as a Government attorney." Hearings, p. 55.]

(2) This proposal will "facilitate an increasing need, on the part of government attorneys, to make use of outside expertise in complex litigation."

[Advisory Committee's Note. Also a point made by Mr. Thornburgh.]

(3) Disclosure of grand jury evidence to investigative agents is often necessary to permit the agents to conduct interviews and otherwise pursue leads suggested by such evidence.

[Mr. Thornburgh, Hearings, p. 56.]

(4) To require a court order in each instance in which a disclosure is sought to be made for the foregoing purposes would unnecessarily burden the courts with thousands of applications each year.

[The imposition of any such burden, said Mr. Thornburgh, Hearings, p. 56, is not justified by the record which shows "very few occasions" in which this power has been misused. In those few instances in which abuse occurs, he claimed, there are adequate means of redress in the contempt power, criminal charges, and suppression of the evidence.]

(5) It unlikely that the limited access to grand jury evidence given to such other governmental personnel as are necessary to assist the attorneys for the government in the performance of their duties would materially increase the risks of an improper exposure of the evidence or would increase the risk of violation of the protections sought to be given by the policy of secrecy.[1] These disclosures are made under the guidance and direction of the attorneys for the government to other government personnel, all of whom are accountable for any miscarriages that may result.

(6) Even assuming that an incidental effect of the disclosure of grand jury evidence to "other government personnel" is to provide them with information or evidence which is material and relevant to the performance of their duties or investigations, and which would require a duplication of effort otherwise to acquire, it would be wasteful and unreasonable to prohibit such disclosures.

[This is a point suggested in the colloquy between Mr. Evans and Attorney Segal. Hearings, p. 25.]

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[1] See Judge Becker's summary of reasons for policy of secrecy, Hearings, p. 49.

(7) To prohibit all disclosures or communication of evidence by attorneys for the government to other government personnel except to the extent that the court may direct or authorize, which may be the effect of the existing Rule 6(e), must be regarded as an unwarranted interference with the exercise of an executive function and a trespass against the doctrine of the separation of powers.

[Although this argument was not developed at the Hearings before the Subcommittee on Criminal Justice, I think that there are such doctrinal or policy issues involved. The prosecution of crime is largely an executive function. To what extent is judicial interposition appropriate in the exercise of the grand jury's "independent" functions as well as those of the executive's officers? While these issues may prove to be only of theoretical interest under the language of the proposal, there is, I believe, a potential violation of constitutional provisions when the due functioning of the grand jury is impaired. In view of its protection by the Bill of Rights, I would not believe that the Congress or the courts can properly impair or restrain its functioning to such degree that the grand jury cannot efficiently pursue its investigations in the exercise of its mandated indicting or "protective" function. The question, then, to what extent can the courts or the Congress deny to the grand jury the power or privilege of enlisting the aid of witnesses, albeit testimonial experts drawn from other governmental personnel, may raise a constitutional issue.]

POINTS CONTRA

(1) The amendment would permit disclosure of grand jury proceedings to administrative or executive agencies to assist them in the conduct of their own administrative investigations. This is highly objectionable not only in its effect as a "breach" of the policy of secrecy, but because it permits a diversion and perversion of the grand jury process (a) for civil purposes, and (b) in defiance and evasion of Congressional policy which has severely restricted the investigative power of the administrative agencies (for example, requirements of relevancy and materiality, notice, rights to counsel, remedies).

[The danger that such disclosures may become "routine" was made clear in the testimony of several witnesses, particularly Attorney Nussbaum whose citations from the Internal Revenue Service Manual, Hearings, p. 163, provided a dramatic illustration.]

(2) The amendment does not require the institution and maintenance by the attorneys for the government of internal procedures or safeguards for the segregation and protection of grand jury materials or information against unauthorized or improper use by other agencies, department, or persons.

[This was at the core of Judge Becker's testimony. Hearings, p. 31–36.]

(3) While authorizing the disclosure of grand jury evidence or information to other agency or departmental personnel, the amendment does not restrict its use to criminal proceedings only.

[A particular point of concern of the American Civil Liberties Union, Hearings, p. 194.]

(4) While the amendment increases the risks of disclosure of grand jury proceedings, no provision is made to preserve the privacy of grand jury evidence or information against disclosure in ancillary proceedings for protective orders or on motions to quash, limit, or modify subpoenas.

[Judge Becker, Hearings, p. 38f. Such actions are ordinarily docketed publicly and become a source of information for the news media.]

(5) The amendment is too vaguely and ineffectually phrased ("to assist . . . in the performance of their duties") if it is the intention of the proponents to limit use of the disclosures for grand jury purposes only.

[See colloquy between Mr. Mann and Prof. LaFave, Hearings, p. 93–94, and comments of Prof. Lewis, Hearings, p. 222.]

(6) Assuming the necessity for use of and disclosure to other government personnel, the attorneys for the government cannot be relied on to refrain from abusing this privilege unless they are subjected to judicial control by which they are required, before making any such disclosure, to make some "showing" to the court that the assistance of personnel which they seek is necessary in fact, and to provide the court with an opportunity to impose safeguards and protective orders. The amendment makes no provision on this subject.

[Emphasized by Attorney Segal, Hearings, p. 21, and suggested as a possibility by Judge Becker, Hearings, p. 34f. Attorney Nussbaum, Hearings, p. 154f.,

pointed out that there is a serious question of "necessity", for the Department of Justice possessed its own experts in a variety of fields, such as taxation (Tax Division), handwriting (FBI), etc.]

(7) In giving other government personnel access to grand jury materials or information, the amendment would further unequally tilt the awsome balance of grand jury power toward the government and against the witness or "target" of the investigation.

[Attorney Nussbaum, Hearings, p. 162. Mr. Justice Whittaker, concurring in *United States* v. *Proctor & Gamble*, 356 U.S. 677, at 685 (1958), also adverted to the "fundamental unfairness and inequality by permitting the Government's attorneys, agents and investigators to possess such materials while denying like possession and use by attorneys for the defendants . . . ."

(8) The amendment confers a broad authority of disclosure without countervailing safeguards, or without discrimination between pre-indictment or post-indictment or other significant stages or results of the investigation, without regard to the nature and type of investigation conducted, without provision respecting notice to persons whose evidence or records or liabilities are affected, and without provision respecting hearings, ex parte or adversary, as may be appropriate at particular times or on particular issues.

[See discussion of Judge Becker, Hearings, pp. 34–36. Also see concurring opinion, Mr. Justice Whittaker, supra.]

95TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 95-195

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

APRIL 11, 1977.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MANN, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 5864]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5864) to approve with modifications certain proposed amendments to the Federal Rules of Criminal Procedure, to disapprove other such proposed amendments, and for other related purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of the legislation is to approve with modifications certain amendments to the Federal Rules of Criminal Procedure that were proposed by the Supreme Court and to disapprove other such amendments.

BACKGROUND

The Federal Rules of Criminal Procedure prescribe the procedures to be followed in criminal proceedings in federal courts. They are usually amended by a process established by statutes known as the "Rules Enabling Acts." These Acts empower the Supreme Court to propose new rules of "pleading, practice, and procedure" and amendments to existing rules. The Acts require that all such rules and amendments must be reported to Congress after the start of a regular

session but no later than May 1. A proposed new rule or amendment takes effect 90 days after it is reported to Congress.[1]

On April 26, 1976, the Supreme Court, pursuant to the Enabling Acts, promulgated several amendments to the Federal Rules of Criminal Procedure.[2] The Court, at the same time, also promulgated sets of procedural rules to govern proceedings under 28 U.S.C. sections 2254 and 2255 (sometimes referred to as habeas corpus proceedings) and sets of procedural rules to govern bankruptcy proceedings.

All of those amendments and rules were to have taken effect on August 1, 1976. However, Congress enacted legislation that delayed the effective date of some of the proposed amendments and rules.[3] The effective date of all but two of the proposed amendments to the Federal Rules of Criminal Procedure was delayed until August 1, 1977, and the effective date of the proposed habeas corps rules was delayed until 30 days after the 94th Congress adjourned sine die.[4]

The proposed amendments to the Federal Rules of Criminal Procedure, whose effective date was delayed made changes in four existing rules: Rule 6, dealing with grand juries; Rule 23, dealing with trials by juries of less than 12 persons and trials where juries have been waived; Rule 24, dealing with peremptory challenges to jurors; and Rule 41, dealing with procedures for obtaining search warrants. In addition, those proposed amendments added a new rule (40.1) dealing with removal of criminal cases from State to Federal court.

All of those proposed amendments are presently pending before Congress. If Congress does not act on them by August 1, 1977, they will take effect in the form proposed by the Supreme Court, without any congressional input. Thus, if the Congress is to have an effective role in shaping the policy of the proposed amendments, it must enact legislation by August 1, 1977.

With that time deadline in mind, the committee's Subcommittee on Criminal Justice began working on the proposed amendments early in the session. It held 3 days of hearings and took testimony and received statements from a wide range of persons and organizations. It heard from the Judicial Conference, the Justice Department, a Member of Congress, a Federal district judge, several Federal public defenders, and several private practitioners and law professors. It also heard from representatives of several groups and organizations, including the American Bar Association, the American Civil Liberties Union, the National Association of Manufacturers, the National Association

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[1] The Supreme Court itself does not actually draft the proposed rule or amendment; that work is done by a committee of the Judicial Conference of the United States. In the case of the Federal Rules of Criminal Procedure, that committee is the Advisory Committee on Criminal Rules. The Advisory Committee's draft of a proposed rule or amendment is reviewed by the Standing Committee on Rules of Practice and Procedure, which must give its approval to the draft. Any draft that it approves is forwarded to the Judicial Conference of the United States. If the Judicial Conference approves the draft, it forwards the proposed rule or amendment to the Supreme Court. The Judicial Conference's role in the rulemaking process is defined by 28 U.S.C. sec. 331.

For background information on how the Judicial Conference committees operate, see statement of Judge Roszel C. Thomsen, in Hearings on Proposed Amendments to Federal Rules of Criminal Procedure before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93d Cong. 2d sess., serial 61, at 2–5 (1974); statement of Judge J. Edward Lumbard, id. at 8–11. See also statement of Prof. Howard Lesnick, id. at 203; J. B. Weinstein, "Reform of Federal Court Rulemaking Procedures," 76 Columbia Law Review 905 (1976).

[2] The particular Enabling Acts involved were 18 U.S.C. secs. 3771 and 3772.

[3] Public Law 94–349.

[4] Congress acted upon the habeas corpus rules before the 94th Congress adjourned. Public Law 94–426 approved most of those rules as proposed and approved the rest of them with modifications.

of Criminal Defense Lawyers, the Motor Vehicle Manufacturers Association, the National Jury Project, the Legal Aid Society of New York City, the National Conference of Black Lawyers, the New York Criminal Bar Association, and the Association of Defense Lawyers.

H.R. 5864 is the product of the information and testimony gathered during this study of the proposed amendments.

SECTION-BY-SECTION ANALYSIS

Section 1

Section 1 of H.R. 5864 provides that the proposed amendments to Rules 6(e), 23, 24 and 41(c)(2) and proposed new Rule 40.1 of the Federal Rules of Criminal Procedure, whose effective date was postponed to August 1, 1977, by Public Law 94–349, shall take effect only as provided by the legislation.

Section 2

Section 2 of H.R. 5864 takes action on each of the proposed amendments. It approves some of them, either as proposed or with modifications, and it disapproves the others.

Rule 6. The Grand Jury

A. Proposed Amendment

Rule 6(e) deals with the secrecy of grand jury proceedings. The proposed amendment makes both substantive and technical changes in the rule.

Substantive change.—Rule 6(e) currently provides that "disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties." Rule 54(c) defines attorneys for the government to include "the Attorney General, an authorized assistant of the Attorney General, a United States attorney, an authorized assistant of a United States attorney, and when applicable to cases arising under the laws of Guam, means the Attorney General of Guam . . . ."

The substantive change to Rule 6(e) would add the following new language:

> For purposes of this subdivision, "attorneys for the government" includes those enumerated in Rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties.

The Advisory Committee note asserts that the proposed amendment restates the trend in the case law. "Although case law is limited, the trend seems to be in the direction of allowing disclosure to Government personnel who assist attorneys for the Government in situations where their expertise is required."[5] The note states that the proposed amendment is intended "to facilitate an increasing need, on the part

[5] Advisory Committee note to proposed amendment to Rule 6, in communication from the Chief Justice of the United States, H. Doc. No. 94–464, at 9.

of Government attorneys to make use of outside expertise in complex litigation." [6] The example usually cited is the need to utilize the expertise of IRS and SEC agents and accountants in complex tax or stock fraud cases.

Technical changes.—The proposed amendment to Rule 6(e) makes a series of changes in the rule designed to make its provisions consistent with other provisions in the Rules and in the Bail Reform Act of 1966. For example, the rule presently speaks of a "court" keeping an indictment secret until the defendant is in custody. The proposed amendment would change "court" to "federal magistrate" in order to make Rule 6(e) consistent with Rule 6(f).[7]

B. Legislative Action

Section 2(a) of H.R. 5864 approves with modifications the proposed amendment to Rule 6(e). It approves the technical changes as they have been proposed and disapproves the substantive change.

The substantive change to Rule 6(e) has been much criticized. There was concern that it would permit too broad an exception to the rule of keeping grand jury proceedings secret. It was feared that the proposed change would allow Government agency personnel to obtain grand jury information which they could later use in connection with an unrelated civil or criminal case. This would enable those agencies to circumvent statutes that specifically circumscribe the investigative procedure otherwise available to them.[8]

The Advisory Committee's claim that the proposed substantive change is consistent with the trend in the case law is open to question. In *J. R. Simplot Co.* v. *U.S. District Court for the District of Idaho*, Nos. 76–1893, 76–1995, slip opinion at 7–8 (9th Cir., filed November 12, 1976), the court observed

> Two main points stand out: First, agency assistance to the prosecutor or the grand jury should never be allowed except upon an adversary hearing resulting in a finding that assistance is necessary. Second, the court's duty to safeguard the independence of the grand jury lives beyond that hearing and requires close supervision of the agency's civil use of the information acquired from grand jury materials.

The Subcommittee on Criminal Justice conducted a brief survey of several U.S. attorneys' offices with respect to their current policies about disclosure of grand jury information. That survey revealed that there is no consistent practice concerning what things can be disclosed, to whom they can be disclosed, and under what circumstances they can be disclosed. For example, the persons contacted were asked whether they would disclose to a Federal investigative agency grand jury information about criminal conduct unrelated to the matter before the grand jury. There was a wide range of answers. Some persons said they would disclose the information only if the investigative

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[6] Id. at 8.

[7] The rule as amended would not preclude a judge from receiving an indictment and keeping it secret. Rule 54(c) defines "federal magistrate" to include U.S. judges as well as U.S. magistrates.

[8] See statement of Phyllis Skloot Bamberger on behalf of the Legal Aid Society of New York; statement of Representative Steven D. Symms; statement of the National Association of Manufacturers. See also note, "Administrative Agency Access to Grand Jury Materials," 75 Columbia Law Review 162, 175–84 (1975).

agency were a part of the Justice Department (such as the FBI). One person who responded this way also said that he would not disclose the information if the matter involved was "highly sensitive." Some persons said they would disclose such information to any investigative agency, but only if that agency had assisted in the investigation of the matter before the grand jury that developed the information. One person suggested that he would disclose the information but would not indicate its source to the investigative agency.

In short, the present state of the law and practice under Rule 6(e) is unclear. Present Rule 6(e) does not clearly spell out when, under what circumstances, and to whom grand jury information can be disclosed. It ought to be rewritten entirely.[9]

The questions concerning grand jury secrecy presented by the proposed substantive change are basic to the function and operation of the grand jury. The committee's Subcommittee on Immigration, Citizenship, and International Law has begun work on comprehensive grand jury reform legislation that takes up basic questions about the function and operation of the grand jury.[10] That subcommittee has already held one hearing on the legislation and additional hearings are planned. The issues surrounding Rule 6(e) and the proposed substantive change will be taken up by that subcommittee during its work on the grand jury reform legislation.

* * * * * * *

[9] There are indications that the proposed substantive change will not clarify the present situation and may even lead to further unclarity. The Judicial Conference and the Justice Department assert that the proposed rule would give an attorney for the Government sole and unfettered discretion to determine when and to whom to disclose grand jury information for the purpose of obtaining assistance in the performance of his duties as a Government attorney. Two courts seem to disagree with that assertion.

The requirement for a showing of need would remain under the pending amendments to Rule 6(e) which expand "attorneys for the government" to include "such other Government personnel as are *necessary* to assist the attorneys for the government in the performance of their duties." 44 U.S.L.W. 4540 (emphasis added). Because of the United States Attorney's involvement in the prosecution of the case, he or she cannot be entrusted with passing on the necessity of assistance. Cf. Coolidge v. New Hampshire (1971) 403 U.S. 443.

J. R. Simplot Co. v. U.S. District Court for the District of Idaho, Nos. 76-1893, 76-1995, slip opinion at 8 n.15 (9th Cir., filed November 12, 1976). See also *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1008, 1126 (E.D.Pa. 1976).

[10] See H.R. 94 and related bills.

note suggests that present Rule 23(b) may authorize this result, "but there has been some doubt as to whether the pretrial stipulation is effective unless again agreed to by a defendant at the time a juror or jurors have to be excused." [12] The proposed amendment resolves this doubt in favor of the effectiveness of the pretrial stipulation.

Rule 23(c).—Rule 23(c) currently provides that, in a case tried without a jury, the court must make a general finding ("guilty" or "not guilty") and, on request, must find the facts specially. The proposed amendment would make two changes in the rule. It would change the rule so that a request for a special finding would have to be made "before the general finding." In addition, it would add a provision that the findings could be made orally.

The Advisory Committee note indicate that the proposed amendment is designed to resolve an ambiguity in the present rule by clarifying the deadline for requesting a special finding of the facts. The note also suggests that findings of fact need not be made in writing, since oral findings would become a part of the record of the case and be available to an appellate court in the event of an appeal.

B. Legislative Action

Section 2(b)(1) of H.R. 5864 approves the proposed amendment to Rule 23(b). The committee received no adverse comment on that amendment.[13]

Section 2(b)(2) of the bill approves with substantive and technical modifications the amendment to Rule 23(c). The substantive modification changes the rule's policy concerning when a special finding must be made. The current policy of the rule requires a special finding of the facts only when requested, and the proposed amendment would leave that policy intact. H.R. 5864 changes the policy of the rule to require a special finding of the facts whenever there is a guilty verdict, unless the defendant waives the special finding.

The committee believes that to require a defendant to request special findings before the court makes its general finding, puts defense counsel in the awkward position of indicating a lack of confidence in the defendant's case. Further, the committee found no compelling reason why special findings should be made only upon request. Requiring a special finding unless waived should not impose a burden on the court. The court knows the reasons for its action at the time it makes the general finding, and it can easily set forth these reasons, either orally or in writing, at that time.

In civil cases, the court is required to make special findings of fact "in *all* actions tried upon the facts without a jury." Rule 52(a), Federal Rules of Civil Procedure (emphasis added). H.R. 5864 makes the practice in criminal cases consistent with the practice in civil cases.

Rule 24. Trial Jurors

A. Proposed Amendment

Rule 24(b) deals with peremptory challenges to prospective jurors. (A peremptory challenge permits a party to excuse a prospective

[12] Id.

[13] The committee interprets Rule 23(b), as changed by the proposed amendment, to permit a stipulation to be conditional. For example, the parties may stipulate that the trial can continue with a jury of less than 12 persons, but only if the jury is not reduced below a certain size. See Advisory Committee note to proposed amendment to Rule 23, H. Doc. 94-349, at 12.

ADDITIONAL VIEWS OF MR. WIGGINS TO H.R. 5864

Although supporting H.R. 5864, I must disagree with its approach to Rule 6(e) in section 2(a)(1). By disapproving the Supreme Court's proposed amendment the bill preserves a certain measure of uncertainty of application which has arisen regarding it.

The Supreme Court, in the amendment proposed, attempted to make it clear that Attorneys for the Government in the performance of their duties with a grand jury, possess the authority to utilize the services of other government employees. Indeed, it can be no other way.

Federal crimes are "investigated" by the FBI, the IRS, or by Treasury agents, and not by government prosecutors or the citizens who sit on grand juries. Federal agents gather and present information relating to criminal behavior to prosecutors who analyze and evaluate it and present it to grand juries. Often the prosecutors need the assistance of the agents in evaluating evidence. Also, if further investigation is required during or after grand jury proceedings, or even during the course of criminal trials, the Federal agents must do it. There is no reason for a barrier of secrecy to exist between the facets of the criminal justice system which we all depend on to enforce the criminal laws.

The parameters of the authority of an attorney for the government to disclose grand jury information in the course of performing his own duties is not defined by Rule 6. However, a commonsense interpretation prevails, permitting "Representatives of other government agencies actively assisting United States Attorneys in a grand jury investigation . . . access to grand jury material in the performance of their duties." *U.S.* v. *Evans*, 526 F. 2d 701 (5th Cir. 1976). See also *U.S.* v. *Hoffa*, 349 F. 2d 20, 43 (6th Cir. 1965); *U.S.* v. *U.S. District Court*, 238 F 2d 713 (4th Cir. 1975) *cert. den., sub nom. Valley Bell Dairy Co.* v. *U.S.*, 352 U.S. 981; *U.S.* v. *Culver*, 224 F. Supp. 419, 432 (D. Md. 1963); *U.S.* v. *Anzelmo*, 319 F. Supp. 1106, 1116 (E.D. La. 1970).

In the course of considering H.R. 5864, U.S. Attorneys and the Justice Department were surveyed as to their perception of current practice regarding grand jury disclosures. Although the view was not strictly uniform, there was general agreement that disclosures at least to criminal investigative agents and other divisions within the Justice Department were permissible without court order. Yet projected against this current practice, and the weight of case law, is the anomalous language of Rule 6(e) itself.

Considering whether a motion to quash a grand jury subpoena was appealable, Mr. Justice Frankfurter applied a rationale particularly relevant to any discussion of proper grand jury functioning.

> The duration of its [the grand jury's] life, frequently short, is limited by statute. It is no less important to safeguard

> against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the 'orderly progress' of investigation should no more be encouraged in one case than in the other", *Cobbledick* v. *U.S.*, 309 U.S. 323, 327 (1940).

Clarifying Rule 6(e) without "obstructing the 'orderly progress' of investigation" requires examination of the justification for the policy of grand jury secrecy, since this policy has been urged against investigative disclosures. *J.R. Simplot Co.* v. *U.S. District Court for the District of Idaho*, Nos. 76–1893, 76–1995, decided November 12, 1976, (9th Circuit).

The traditional reasons for grand jury secrecy were stated in *U.S.* v. *Amazon Industrial Chemical Corporation*, 55 F.2d 254, 261 (D. Md. 1931):

> (1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standarding trial where there was no probability of guilt.

Nevertheless it is recognized that secrecy yields "when its strict application would defeat the ends of justice". *U.S.* v. *Rose*, 215 F.2d 617 (3d Cir. 1954). Is not the "orderly progress of investigation" one of the "ends of justice" apt to be defeated by strict application of secrecy against criminal investigative disclosures? How would public policy or any traditional reasons for secrecy be thus served?

Grand juries, of course, may not be used to directly promote or investigate civil or administrative actions. However, it neither prevents that abuse nor allows from any of the above articulated reasons for grand jury secrecy, to inhibit disclosures to *federal criminal investigative* personnel assisting the grand jury. Nor does it serve these goals to interpose the court as a referee between the grand jury and its criminal investigative support. As has been pointed out, the court's proper role comes only at a later stage to prevent civil misuse:

> While we hold that the district court cannot properly interfere with the action of the grand jury in turning over to third persons, including treasury agents, voluminous records and accounts for the sole purpose of examination and report to the grand jury, as an assistance to it, we also hold that persons, nonmembers of the grand jury thus having access to said records, and documents, have no right to use them for any purpose whatsoever except to assist the grand jury in its

work. *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956).

Therefore, we propose that the existing language of Rule 6(e) be amended by deleting its first sentence and inserting in its place the following two:

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties, and to such other government personnel as are necessary to assist attorneys for the government in the performance of such duties. For the purposes of this subdivision, "other government personnel" means employees of the Department of Justice, or employees of other governmental agencies who, by law, investigate violations of the Federal criminal law.

This would limit the assistance available as a matter of course to the grand jury to Federal criminal investigative personnel. It would not prevent the jury from seeking further assistance from purely civil investigative or administrative personnel pursuant to the court order required in the second sentence of the existing rule.

The danger in leaving Rule 6(e) in its present state of uncertainty was demonsrated by a recent Ninth Circuit decision, which asserts ". . . the Government must show the necessity [to the Court] for each particular person's aid rather than showing merely a general necessity for assistance, expert or otherwise." *Simplot*, supra, (slip opinion, p. 9). Relying in great part upon an article entitled *Administrative Agency Access to Grand Jury Materials* (75 Columbia Law Review 162 (1975)) the court in *Simplot* spreads this required showing with such a broad and dripping brush as to reach beyond the borders of the problem. However salutary this may seem when applied to administrative agencies and civil investigative personel, it is a prophylaxis both unwarranted and disruptive when grand jury disclosure is made to criminal investigative personnel since it impedes the grand jury's very purpose.

No useful purpose is served by foregoing this opportunity to clarify a rule so temptingly vague. Leaving the matter for courts to "flush out" at their individual will or whim merely deepens the uncertainty.

CHARLES E. WIGGINS.

SENATE REPORT No. 95-354

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Mr. Robert C. Byrd (for Mr. McClellan), from the Committee on the Judiciary, submitted the following

[To accompany H.R. 5864]

The Committee on the Judiciary to which was referred the Act (H.R. 5864) to approve with modifications certain proposed amendments to the Federal Rules of Criminal Procedure, to disapprove other such proposed amendments, and for other related purposes, having considered the same, reports favorably thereon, with an amendment in the nature of a substitute, and recommends that the bill as amended do pass.

AMENDMENT

The Committee proposes an amendment to the bill as follows:

Strike all after the enacting clause and insert in lieu thereof the following: That notwithstanding the first section of the Act entitled "An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court" (Public Law 94-349, approved July 8, 1976) the amendments to rules 6(e), 23, 24, 40.1, and 41(c)(2) of the Rules of Criminal Procedure for the United States district courts which are embraced by the order entered by the United States Supreme Court on April 26, 1976, shall take effect only as provided in this Act.

SEC. 2. (a) The amendment proposed by the Supreme Court to subdivision (e) of rule 6 of such Rules of Criminal Procedure is approved in a modified form as follows: Such subdivision (e) is amended to read as follows:

"(e) SECRECY OF PROCEEDINGS AND DISCLOSURE.

"(1) GENERAL RULE.—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these Rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

"(2) EXCEPTIONS.—

"(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

"(i) an attorney for the government for use in the performance of such attorney's duty; and

"(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

"(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

"(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

"(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

"(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

"(3) SEALED INDICTMENTS. The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons."

PURPOSE

The purpose of the legislation is to approve, or approve with modifications, certain amendments to the Federal Rules of Criminal Procedure that were proposed by the Supreme Court, and to disapprove other such amendments.

BACKGROUND

The Federal Rules of Criminal Procedure prescribe the procedures to be followed in criminal proceedings in Federal courts. They are usually amended by a process established by statutes known as the "Rules Enabling Act." These Acts empower the Supreme Court to propose new rules of "pleading, practice, and procedure" and amendments to existing rules. The Acts require that all such rules and amendments must be reported to Congress after the start of a regular session but no later than May 1. A proposed new rule or amendment takes effect 90 days after it is reported to Congress, unless a public law is enacted within that time which delays, modifies, or disapproves the proposed rule.[1]

On April 26, 1976, the Supreme Court, pursuant to the Enabling Acts, promulgated several amendments to the Federal Rules of Criminal Procedure.[2] The Court, at the same time, also promulgated sets of procedural rules to govern proceedings under 28 U.S.C. 2254 and 2255 (sometimes referred to as habeas corpus proceedings) and sets of procedural rules to govern bankruptcy proceedings.

All of those amendments and rules were to have taken effect on August 1, 1976. However, Congress enacted legislation that delayed the effective date of some of the proposed amendments and rules.[3]

The effective date of all but two of the proposed amendments to the Federal Rules of Criminal Procedure was delayed until August 1, 1977, and the effective date of the proposed habeas corpus rules was delayed until 30 days after the 94th Congress adjourned sine die.[4]

The proposed amendments to the Federal Rules of Criminal Procedure, whose effective date was delayed, made changes in four existing rules: Rule 6, dealing with grand juries; Rule 23, dealing with trials by juries of less than 12 persons and trials where juries have been waived; Rule 24, dealing with peremptory challenges to jurors; and Rule 41, dealing with procedures for obtaining search warrants. In addition, those proposed amendments added a new rule 40.1 dealing with removal of criminal cases from State to Federal court.

All of those proposed amendments are presently pending before Congress. If Congress does not act on them by August 1, 1977, they will take effect in the form proposed by the Supreme Court.

With that time deadline in mind, the House Subcommittee on Criminal Justice of the Committee on the Judiciary began working on the proposed amendments early in the session. It held 3 days of hearings and took testimony and received statements from a wide range of persons and organizations, including the Judicial

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[1] The Supreme Court itself does not actually draft the proposed rule or amendment: that work is done by a committee of the Judicial Conference of the United States. In the case of the Federal Rules of Criminal Procedure, that committee is the Advisory Committee on Criminal Rules. The Advisory Committee's draft of a proposed rule or amendment is reviewed by the Standing Committee on Rules of Practice and Procedure, which must give its approval to the draft. Any draft that it approves is forwarded to the Judicial Conference of the United States. If the Judicial Conference approves the draft, it forwards the proposed rule or amendment to the Supreme Court. The Judicial Conference's role in the rulemaking process is defined by 28 U.S.C. 331.

For background information on how the Judicial Conference committees operate, see statement of Judge Roszel C. Thomsen, in Hearings on Proposed Amendments to Federal Rules of Criminal Procedure before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93d Cong., 2d sess., serial 61, at 2–5 (1974); statement of Judge J. Edward Lumbard, id. at 8–11. See also statement of Prof. Howard Lesnick, id. at 203; J. B. Weinstein, "Reform of Federal Court Rulemaking Procedures," 76 Columbia Law Review 905 (1976).

[2] The particular Enabling Acts involved were 18 U.S.C. 3771 and 3772.

[3] Public Law 94–349.

[4] Congress acted upon the habeas corpus rules before the 94th Congress adjourned. Public Law 94–426 approved most of those rules as proposed and approved the rest of them with modifications.

Conference, the Department of Justice, the American Bar Association, the American Civil Liberties Union, the National Association of Manufacturers, the National Association of Criminal Defense Lawyers, the Motor Vehicle Manufacturers Association, the National Jury Project, the Legal Aid Society of New York City, the National Conference of Black Lawyers, the New York Criminal Bar Association, the Association of Defense Lawyers, members of the judicial branch, private practitioners, and law professors.

H.R. 5864 passed the House on April 19, 1977, by a vote of 376 yeas to 3 nays.

In light of the comprehensive hearings held by the House Subcommittee on Criminal Justice and the short deadline for enactment of legislation, the Senate Committee on the Judiciary elected to rely upon the House hearings in considering the measure rather than conduct largely duplicative hearings.

Section-by Section Analysis

SECTION 1

Section 1 provides that the proposed amendments to Rules 6, 23, 24, and 41, and proposed new Rule 40.1 of the Federal Rules of Criminal Procedure, whose effective date was postponed to August 1, 1977, by Public Law 94–349, shall take effective only as provided by the legislation.

SECTION 2

Section 2 takes action on each of the proposed amendments. It approves some of them, either as proposed or with modifications, and it disapproves the others.

Rule 6(e)

Subsection (A) of section 2 concerns rule 6(e) which deals with the secrecy of grand jury procedings.

Rule 6(c) currently provides that "disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties." Rule 54(c) defines attorneys for the government to mean "the Attorney General, an authorized assistant to the Attorney General, a United States attorney, and an authorized assistant of the United States attorney, and when applicable to cases arising under the laws of Guam, means the Attorney General of Guam. . . ."

The Supreme Court proposal would change Rule 6(e) by adding the following new language:

> "For purposes of this subdivision, 'attorneys for the government' includes those enumerated in Rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties."

It would also make a series of changes in the rule designed to make its provisions consistent with other provisions in the Rules and the Bail Reform Act of 1966.[5]

The Advisory Committee note states that the proposed amendment is intended "to facilitate an increasing need, on the part of Government attorneys to make use of outside expertise in complex litigation".[6] The note indicated that:[7]

> "Although case law is limited, the trend seems to be in the direction of allowing disclosure to Government personnel who assist attorneys for the Government in situations where their expertise is required. This is subject to the qualification that the matter disclosed be used only for the purposes of the grand jury investigation."

It is past history at this point that the Supreme Court proposal attracted substantial criticism, which seemed to stem more from the lack of precision in defining, and consequent confusion and uncertainty concerning, the intended scope of the proposed change than from a fundametal disagreement with the objective.[8]

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[5] For example, the rule presently speaks of a "court" keeping an indictment secret until the defendant is in custody. The proposed amendment would change "court" to "federal magistrate" in order to make Rule 6(e) consistent with Rule 6(f). The Rule as amended would not preclude a judge from receiving an indictment and keeping it secret. Rule 54(e) defines "federal magistrate" to include U.S. judges as well as U.S. magistrates.

[6] Advisory Committee note to proposed amendment to Rule 6, in communication from the Chief Justice of the United States, H. Doc. 94–464, at 8.

[7] *Id.* at 9.

[8] Federal Rules of Criminal Procedure Amendments. Hearings before the Subcommittee on Crimnal Justice. Committee on the Judiciary. U.S. House of Representatives. 95th Cong., 1st sess. (1977) (hereinafter cited as House Hearings), pp. 19–56, 66–71, 85–95, 105–106, 111–114, 124, 147–166, 181, 204, 229–230, and 246–247.

Attorneys for the Government in the performance of their duties with a grand jury must possess the authority to utilize the services of other government employees. Federal crimes are "investigated" by the FBI, the IRS, or by Treasury agents and not by government prosecutors or the citizens who sit on grand juries. Federal agents gather and present information relating to criminal behavior to prosecutors who analyze and evaluate it and present it to grand juries. Often the prosecutors need the assistance of the agents in evaluating evidence. Also, if further investigation is required during or after grand jury proceedings, or even during the course of criminal trials, the Federal agents must do it. There is no reason for a barrier of secrecy to exist between the facets of the criminal justice system upon which we all depend to enforce the criminal laws.

The parameters of the authority of an attorney for the government to disclose grand jury information in the course of performing his own duties is not defined by Rule 6. However, a commonsense interpretation prevails, permitting "Representatives of other government agencies actively assisting United States attorneys in a grand jury investigation . . . access to grand jury material in the performance of their duties." [9] Yet projected against this current practice, and the weight of case law, is the anomalous language of Rule 6(e) itself, which, in its present state of uncertainty,[10] is spawning some judicial decisions highly restrictive of the use of government experts that require the government to "show the necessity (to the Court) for each particular person's aid rather than showing merely a general necessity for assistance, expert or otherwise" [11] and that make Rule 6(e) orders subject to interlocutory appeal.[12]

In this state of uncertainty, the Committee believes it is timely to redraft subdivision (e) of Rule 6 to make it clear.

Paragraph (1) as proposed by the Committee states the general rule that a grand jury, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or government personnel to whom disclosure is made under paragraph (2)(A)(ii) shall not disclose matters occurring before the grand jury, except as otherwise provided in these rules. It also expressly provides that a knowing violation of Rule 6 may be punished as a contempt of court. In addition, it carries forward the current provision that no obligation of secrecy may be imposed on any person except in accordance with this Rule.

Having stated the general rule of nondisclosure, paragraph (2) sets forth exemptions from nondisclosure. Subparagraph (A) of paragraph (2) provides that disclosure otherwise prohibited, other than the grand jury deliberations and the vote of any grand juror, may be made to an attorney for the government for use in the performance of his duty and to such personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in

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[9] *United States* v. *Evans*, 526 F. 2d 701 (5th Cir. 1976). See also *United States* v. *Hoffa*, 349 F. 2d 20, 43 (6th Cir. 1965); *United States* v. *United States District Court*, 238 F. 2d 713 (4th Cir. 1975), cert. denied, *sub nom. Valley Bell Dairy Co.* v. *United States*, 352 U.S. 981; *United States* v. *Culver*, 224 F. Supp. 419, 432 (D. Md. 1963); *United States* v. *Anzelmo*, 319 F. Supp. 1106, 1116 (E.D. La. 1970).

[10] There are indications that the Supreme Court's proposed change will not clarify the present situation and may even lead to further unclarity. As observed by the Ninth Circuit:

"The requirement for a showing of need would remain under the pending amendments to Rule 6(e) which expand "attorneys for the government" to include "such other Government personnel as are *necessary* to assist the attorneys for the government in the performance of their duties." 44 U.S.L.W. 4549 (emphasis added). Because of the United States Attorney's involvement in the prosecution of the case, he or she cannot be entrusted with passing on the necessity of assistance. Cf. *Coolidge* v. *New Hampshire* (1971), 403 U.S. 443."

J. R. Simplot Co. v. *United States Court for the District of Idaho*, Nos. 76–1893, 76–1995, slip opinion at 8 n. 15 (9th Cir. filed November 12, 1976, petition for rehearing enbanc dismissed as moot on ————. See also *Robert Hawthorne, Inc.* v. *Director of Internal Revenue*, 406 F. Supp. 1098, 1126 (E.D. Pa. 1976); *In re April 1977 Grand Jury Subpoenas (General Motors Corporation)*, Misc. No. 77–144 (E.D. Mich., June 28, 1977).

[11] *J. R. Simplot Co.* v. *U.S. District Court of the District of Idaho*, *supra* note 10, at 9.

[12] Interlocutory appeal of issues disruptive of a grand jury investigation are not favored. As observed by Justice Frankfurter in considering the appealability of a motion to quash a grand jury subpena:

"The duration of its (the grand jury's) life, frequently short, is limited by statute. It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the 'orderly progress' of investigation should no more be encouraged in one case than in the other." *Cobbledick* v. *United States*, 309 U.S. 323, 327 (1940)."

In light of the burden on the government and the disruption of the grand jury process, there is substantial doubt about the wisdom of interposing the court as a referee between the grand jury and its criminal investigative support. Civil misuse can be raised in subsequent civil proceedings.

the performance of such attorney's duty to enforce Federal criminal law. In order to facilitate resolution of subsequent claims of improper disclosure, subparagraph (B) further provides that the names of government personnel designated to assist the attorney for the government shall be promptly provided to the district court and such personnel shall not utilize grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. Although not expressly required by the rule, the Committee contemplates that the names of such personnel will generally be furnished to the court before disclosure is made to them. Subparagraph (C) permits disclosure as directed by a court preliminarily to or in connection with a judicial proceeding or, at the request of the defendant, upon a showing that grounds may exist for dismissing the indictment because of matters occurring before the grand jury. Paragraph (3) carries forward the last sentence of current Rule 6(e) with the technical changes recommended by the Supreme Court.

The Rule as redrafted is designed to accommodate the belief on the one hand that Federal prosecutors should be able, without the time-consuming requirement of prior judicial interposition, to make such disclosures of grand jury information to other government personnel as they deem necessary to facilitate the performance of their duties relating to criminal law enforcement. On the other hand, the Rule seeks to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws by (1) providing a clear prohibition, subject to the penalty of contempt and (2) requiring that a court order under paragraph (C) be obtained to authorize such a disclosure. There is, however, no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation. Accordingly, the Committee believes and intends that the basis for a court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive than is the case today under prevailing court decisions.[13] It is contemplated that the judicial hearing in connection with an application for a court order by the government under subparagraph (3)(C)(i) should be *ex parte* so as to preserve, to the maximum extent possible, grand jury secrecy.[14]

Changes in Existing Law

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

Rules of Criminal Procedure for the United States District Courts

* * * * * * *

III. INDICTMENT AND INFORMATION

Rule 6. The Grand Jury

* * * * * * *

[(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before

[13] *United States v. Procter & Gamble*, 356 U.S. 677, 683–684 (1958); *Robert Hawthorne, Inc. v. Director of Internal Revenue Service*, *supra* note 10.

[14] But see *J. R. Simplot Co.*, *supra* note 11.

the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.]

(e) Secrecy of Proceedings and Disclosure.

(1) General rule. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these Rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(2) EXCEPTIONS

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

(3) SEALED INDICTMENTS. The Federal magistrate to whom an indictment is returned may direct that the indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

[From the Congressional Record, House of Representatives, July 27, 1977]

FEDERAL RULES OF CRIMINAL PROCEDURE AMENDMENTS

Mr. MANN. Mr. Speaker, I ask unanimous consent to take from the Speaker's table the bill (H.R. 5864) to approve with modifications certain proposed amendments to the Federal Rules of Criminal Procedure, to disapprove other such proposed amendments, and for other related purposes, with a Senate amendment thereto, and concur in the Senate amendment.

The Clerk read the title of the bill.

The Clerk read the Senate amendment, as follows:

"Strike out all after the enacting clause and insert: That notwithstanding the first section of the Act entitled "An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court" (Public Law 94-349, approved July 8, 1976) the amendments to rules 6(e), 23, 24, 40.1, and 41(c)(2) of the Rules of Criminal Procedure for the United States district courts which are embraced by the order entered by the United States Supreme Court on April 26, 1976, shall take effect only as provided in this Act.

"SEC. 2. (a) The amendment proposed by the Supreme Court to subdivision (e) of rule 6 of such Rules of Criminal Procedure is approved in a modified form as follows: Such subdivision (e) is amended to read as follows:

"(e) SECRETARY OF PROCEEDINGS AND DISCLOSURE.—

"(1) GENERAL RULE.—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2) (A) (ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

"(2) EXCEPTIONS.—

"(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

"(i) an attorney for the government for use in the performance of such attorney's duty; and

"(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

"(B) Any person to whom matters are disclosed under subparagraph (A) (ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

"(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

"(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

"(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

"(3) SEALED INDICTMENTS.—The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.".

Mr. MANN (during the reading). Mr. Speaker, I ask unanimous consent that the Senate amendment be considered as read and printed in the RECORD.

The SPEAKER pro tempore (Mr. MURPHY of New York). Is there objection to the request of the gentleman from South Carolina that the Senate amendment be considered as read and printed in the RECORD?

Mr. WIGGINS. Mr. Speaker, I reserve the right to object. I make this reservation and yield to the gentleman from South Carolina (Mr. MANN) for the purpose of explaining the Senate amendment.

Mr. MANN. Mr. Speaker, H.R. 5864 is a bill dealing with certain proposed amendments to the Federal Rules of Criminal Procedure. We passed the bill last April 19 by a vote of 376 to 3.

In April 1976, the Supreme Court promulgated certain proposed amendments to the Federal Rules of Criminal Procedure. These amendments made changes in four existing rules—6, 23, 24, and 41—and added a new rule, 40.1. The effective date of the proposed amendments was to have been August 1, 1976. However, Public Law 94-349 postponed the effective date until August 1, 1977, so that Congress could have additional time to review the proposals.

The Subcommittee on Criminal Justice took up the proposed amendments early this session. It held 3 days of hearings and received testimony from a wide range of persons and organizations. As a result of the hearings, the subcommittee drafted H.R. 5864.

As passed by the House, the bill disapproved the proposed amendments to rules 6, 24, and 41 as well as proposed rule 40.1. The bill approved the proposed amendment to rule 23 in a modified form.

In the other body, the bill was referred to the Subcommittee on Criminal Laws and Procedures. That subcommittee seemed to prefer to let the proposed amendments take effect as promulgated, and it appeared that there would be no action on our bill by the other body.

Discussions ensued, and the other body was persuaded to act on the legislation. It completed action on Monday, July 25, by passing an amended version of H.R. 5864. Because the amendments will take effect on August 1 in the form in which they were promulgated, it will be impossible to arrange for a conference to resolve the differences in the bills passed by the two Houses. In anticipation of such a possibility, the Subcommittee on Criminal Justice maintained a close liasion with the other body's Subcommittee on Criminal Laws and Procedures. Our concerns were made known to that subcommittee, and the other side, in fashioning its version of the bill, attempted to meet those concerns. I believe that the other body's version of H.R. 5864 makes improvements in the amendments as proposed by the Supreme Court. Enactment of it is much preferable to permitting the Supreme Court's proposals to take effect.

RULE 6

Rule 6(e) which deals with secrecy of grand jury proceedings, presently permits disclosure of grand jury information to "attorneys for the Government for use in the performance of their duties." The Supreme Court proposed to revise rule 6(e) by expanding the definition of "attorneys for the Government" to include "such other Government personnel as are necessary to assist the attorneys for the Government in the performance of their duties."

Our version of H.R. 5864 disapproves the proposed amendment, preferring to have the issue resolved in the context of the comprehensive grand jury reform legislation now pending before the Judiciary Committee's Subcommittee on Immigration, Citizenship and International Law. See House Report No. 95-195, at 5. In addition, there was some question as to whether the Supreme Court's proposal fully and accurately restated present law—as it purported to do. See the same at 4-5.

The other body's version of H.R. 5864 approves the proposed amendment to rule 6(e), but with modifications. For the most part, rule 6(e) as modified by the other body's version of the bill merely restates current practice under that rule. Many of the changes are organizational. There is no intent on our part to alter the present practice with respect to parts of the rule not involved in the Supreme Court's proposed amendment.

As modified by the other body, rule 6(e) establishes a general rule of secrecy for grand jury proceedings and provides that a knowing violation of the rule of secrecy is punishable as a contempt of court. The rule then sets forth several exceptions to the rule of secrecy.

The first exception continues a policy of present rule 6(e). Disclosure of grand jury information may be made to "an attorney for the Government for use in the performance of such attorney's duty." This language, which is similar to language presently in the rule, is not intended to change any current practice.

The second exception permits disclosure to "such Government personnel as are deemed necessary by an attorney for the Government to assist an attorney for the Government in the performance of such attorney's duty to enforce Federal criminal law." The attorney for the Government is required promptly to notify the district court of those persons to whom grand jury information is disclosed under this exception.

Recent cases have indicated that an attorney for the Government may utilize the assistance of other Government personnel and provide them with access to grand jury material in connection with the investigation of that grand jury—but may not allow such personnel to have access to such material in connection with solely civil investigations or in connection with criminal investigations unrelated to that grand jury's inquiry. See *Robert Hawthorne Inc.* v. *Director of Internal Revenue*, 406 F. Supp. 1098 (E.D. Pa. 1976); *In re Pflaumer*, 53 F.R.D. 464 (E.D. 1971); *In re April 1956 Grand Jury*, 239 F. 2d 263 (7th Cir. 1956); *U.S.* v. *Anzelmo*, 319 F. Supp. 1106 (E.D. La. 1970). See generally 8 J. Moore, Federal Practice section 605 (1975). This second exception in rule 6(e) is not intended to alter that case law development, but rather to codify it.

Rule 6(e), as modified by the other body's version of H.R. 5864, also continues two additional exceptions to grand jury secrecy that are contained in present rule 6(e). One permits disclosure of information when "Directed by a

court preliminary to or in connection with a judicial proceeding," and the other permits disclosure when permitted by a court "at the request of a defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

Neither of these exceptions were questioned or criticized by any witness in any of the testimony on rule 6(e) before the Subcommittee on Criminal Justice. It should be noted that the other body did not hold any hearings on the proposed amendments, but relied upon our hearings. As I indicated before, there is no intention to change the current practice with regard to those parts of rule 6(e) not directly involved in the Supreme Court's proposed amendments. Thus, it is not intended to change any current practice with regard to these two exceptions, nor is it intended to state a preference for how a court application should be made, whether ex parte or by notice to an adversary party.

Public Law 95-78, 95th Congress

AN ACT To approve with modifications certain proposed amendments to the Federal Rules of Criminal Procedure, to disapprove other such proposed amendments, and for other related purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That notwithstanding the first section of the Act entitled "An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court" (Public Law 94-349, approved July 8, 1976) the amendments to rules 6(e), 23, 24, 40.1 and 41(c)(2) of the Rules of Criminal Procedure for the United States district courts which are embraced by the order entered by the United States Supreme Court on April 26, 1976, shall take effect only as provided in this Act.

SEC. 2. (a) The amendment proposed by the Supreme Court to subdivision (e) of rule 6 of such Rules of Criminal Procedure is approved in a modified form as follows: Such subdivision (e) is amended to read as follows:

"(e) SECRECY OF PROCEEDINGS AND DISCLOSURE.—

"(1) GENERAL RULE.—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosures is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

"(2) EXCEPTIONS.—

"(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

"(i) an attorney for the government for use in the performance of such attorney's duty; and

"(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

"(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

"(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

"(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

"(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

"(3) SEALED INDICTMENTS.—The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.".

APPENDIX 6

MEMORANDA

1. Robert J. Degostin, Library of Congress, Congressional Research Service—*Report on Selected Cases Alleged to Have Been Examples of Grand Jury Abuse.*
2. Laurie J. McManns, Library of Congress, Congressional Research Service—*Grand Jury Reform Issue Brief.*
3. Martin H. Belsky and Alfred M. Nittle, Counsel, Committee on the Judiciary, *Federal Grand Jury Issues.*
4. Martin H. Belsky and Alfred M. Nittle, Counsel, Committee on the Judiciary, *Alleged Grand Jury Abuses.*
5. Alfred M. Nittle, Counsel, Committee on the Judiciary—*Disruptions in Grand Jury Room Due to Presence of Counsel for the Witness—A Summary on State Experiences.*
6. Alfred M. Nittle and Martin H. Belsky—*Grand Juries, Indictments, and Investigations—The British Experience.*
7. Alfred M. Nittle and Martin H. Belsky, Counsel, Committee on the Judiciary—*Analyses of Time Periods—Present Federal Grand Jury Procedure and H.R. 94 Procedures.*

THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., October 7, 1976.

To: Subcommittee on Immigration, Citizenship, and International Law. Attn: Martin H. Belsky.
From: American Law Division.
Subject: Report on Selected Cases Alleged to Have Been Examples of Grand Jury Abuse.

This is in response to your request for a report on the various cases alleged to have been examples of grand jury abuse.

The enclosed report does not claim to be an exhaustive coverage of all cases that have been cited as examples of abuse of the grand jury process. What we have attempted to do is cover a number of the better examples and to exclude cases that have been adequately covered in other articles or Congressional Hearings, e.g., Fort Worth Five (Hearings were held March 13, 1973, before Subcommittee No. 1 of the House of Representatives).

In addition to the report we have prepared a bibliography of articles that has as its subject grand jury abuse.

ROBERT J. DEGOSTIN,
Legislative Attorney.

REPORT ON SELECTED CASES ALLEGED TO HAVE BEEN EXAMPLES OF GRAND JURY ABUSE*

SEATTLE, WASH.—On the first of March 1971 a bomb exploded in the United States Capitol. As a result of the investigation into the bombing, Leslie Bacon was arrested. The arrest occurred on the evening of April 27 when a number of F.B.I. agents went to a house in Washington, D.C., where Bacon was staying and, with warrant in hand, made the arrest.[1] Two days after her arrest Bacon was flown to Seattle, Wash., to testify before a Federal grand jury that was sitting there.

[1] Arrest of Leslie Bacon on April 27, 1971 was held to be invalid because there was no showing of probable cause when warrant was issued for the arrest of Leslie Bacon as a material witness in a grand jury proceeding. *Bacon* v. *United States*, 449 F. 2d 933 (1971).

*See statement of limitations on covering memo.

It has been alleged that the real reason why Leslie Bacon was arrested and questioned before the grand jury was to determine what she knew about the upcoming antiwar demonstrations planned for May 1, 1971, in Washington, D.C. The allegation goes as follows: the government knew that Bacon was a radical who had attended a number of left-wing conferences from coast to coast in 1970 and at the time of her arrest was working on the Mayday protests. Thus she was seen as the source of much useful information concerning the antiwar demonstrations scheduled for May.

On April 30, 1971, Leslie Bacon began to testify before the Seattle grand jury. After testifying for three and one-half days, Bacon made a motion for a hearing to determine if her interrogation was tainted by illegal electronic surveillance of her prior conversations. If such information did exist it would clearly be inadmissible in court. However, if the same information could be obtained from a witness testifying before a grand jury, such testimony would be admissible. The motion was denied, and because of the denial Bacon refused to testify further and on May 19 was adjudged to be in civil contempt. In considering an appeal made by Bacon, the United States Court of Appeals, for the Ninth Circuit stated in *Bacon* v. *United States*, 446 F. 2d 667, 668 (1971):

"After three and one-half days of testifying before the grand jury, appellant filed a motion to compel the disclosure of electronic surveillance by the Government and to obtain a hearing thereon. She contended that both her subpoena and the questions asked of her by the grand jury were 'tainted' by illegally seized evidence, in that the information obtained by illegal wiretaps led to her being subpoenaed and was used in framing questions put to her. Appellant argues that the district court erred in denying this motion.

"A similar contention has recently been rejected by this court, and we adhere to that determination. See *United States* v. *Gelbard* (*United States* v. *Barnas*), 443 F. 2d 837 (9th Cir. 1971, pet. for rehearing denied June 23, 1971)."

The United States Supreme Court vacated and remanded, 408 U.S. 915 (1972). On remand the Court of Appeals in reversing, stated:

"We rejected [the] argument [of] Miss Bacon on the Authority of *United States* v. *Gelbard*, 443 F. 2d 837 * * *

"The Supreme Court thereafter reversed *Gelbard* * * *

"The Supreme Court decision in *Gelbard* and *Egan* established the proposition that a grand jury witness has standing to challenge the propriety of grand jury interrogation on the ground that such interrogation is based upon the prior illegal interception of the witness' communications. The Supreme Court there made it clear that such a witness may invoke the procedure prescribed in 18 U.S.C. § 3504(a)(1), by claiming that the witness' testimony is inadmissible because it is the primary product of an unlawful act, namely an illegal interception, or because it was obtained by the exploitation of such an unlawful act. As provided in section 3504(a)(1), where a witness invokes such procedure, it becomes the duty if the opponent of the claim (here the Government) to affirm or deny the occurrence of the alleged unlawful act.

"Miss Bacon substantially followed this procedure . . .

"Instead of responding to this claim by affirming or denying the occurrence of the alleged unlawful act, as required by section 3504(a)(1), the Government opposed Miss Bacon's motion, and it was denied . . .

"Since the Government did not follow the procedure prescribed . . ., Miss Bacon was entitled to refuse to give further grand jury testimony.

. . . It follows that Miss Bacon should not have been adjudged to be in civil contempt, and we accordingly set aside that adjudication. *Bacon* v. *United States*, 466 F. 2d 1196, 1197–1198 (1972)."

It has been suggested by lawyers representing left-wing clients that the practice of using information obtained from unauthorized wire taps to formulate questions to be asked of grand jury witnesses is common place today.

In an article in the March 1976 issue of *Juris Doctor* ("The Grand Jury-Making Trouble for Movement Lawyers") Fred Solowey, wrote the following about the Seattle grand jury of 1971: (at p. 41)

"Though the Justice Department seeks additional latitude in its use of grand juries, its powers over them already are considerable. Recent disclosures about a 1971 Seattle grand jury investigation reinforce that point. Defense lawyers at the time charged that the probe, ostensibly called to look into a bombing incident at the U.S. Capitol, was a cover for an anti-left offensive, an allegation rejected in the Justice Department's "Movement Obstructionism" memo of 1972. But last October in the *Washington Post* a former F.B.I. official close to the investigation

called it "a fishing expedition. We didn't know a damn thing. Leslie Bacon was the only thing we had . . . She was called before a grand jury in Seattle (instead of D.C.) because we were more likely to get an indictment out there." The Seattle location was, according to the former FBI official, "deliberately rigged . . . to get an indictment."

San Francisco, California—In a three-part article on the grand jury that appeared in the April 5–12–19, 1976 issues of *The New Yorker* magazine, author Richard Harris stated: "Of all the abuses that are still going on, perhaps the most serious one is the abuse of the grand-jury system to help the F.B.I. do the jobs that it has failed to do on its own." (p. 43 of April 19, 1976) In explaining how the grand jury is abused in this way he cites the Patty Hearst case and writes:

"Having failed to turn up any dependable informers in the Hearst case in its early stages, the F.B.I. desperately resorted to a relatively new law-enforcement technique—the use of compliant federal grand juries to help the Bureau do the job that it couldn't do on its own. Although under law grand juries are supposed to determine only whether crimes have been committed and to indict those who seem to have committed them, and are not supposed to serve as investigative tools for prosecutors or law-enforcement agencies, nowadays grand juries are frequently, and improperly, used to amass evidence against people who have already been indicted, to obtain leads on fugitives or even find missing persons like Jimmy Hoffa. The F.B.I. merely persuades a cooperative United States Attorney to instruct the federal grand jury, he in effect runs to subpoena relatives, friends, and acquaintances of the person being sought, and then the prosecutor forces these witnesses, under threat of imprisonment for contempt of court, to divulge whatever they may know about the fugitive—or, for that matter, about anything under the sun that the prosecutor (or the F.B.I.) feels like asking, however irrelevant and personal. In short, if the government can't find informers it creates them. (pp. 43–44 of April 5, 1976)."

In an article explaining the investigative powers of the federal grand jury, Robert D. Sharp, an attorney with the Internal Security Division of the Department of Justice in an attempt to justify actions like that described above stated:

"Although grand juries are not empanelled for mere groundless snooping, it must be remembered that the investigative powers of the federal grand jury are virtually unlimited. . . .

"Unquestionably, the need for utilizing the investigative grand jury has increased. This is principally true because of the reluctance of some citizens to cooperate with the investigative . . . authorities."[1]

However, it should be pointed out that no one is legally obliged to cooperate with or answer questions asked by the F.B.I. or other government officials.

Los Angeles and Boston.—The New York Times in 1971 published sections of the Pentagon Papers. On June 28 of the same year Daniel Ellsberg was indicted by a Los Angeles grand jury.

In the indictment, Dr. Ellsberg was charged with having violated two sections of title 18 of the United States Code—§ 3651 (Embezzlement of Money, or Theft of Public Property or Records) and § 793(c) (Gathering, Transmitting, or Losing Defense Information).

The indictment of Daniel Ellsberg by the Los Angeles grand jury was not the end of the investigation into the dissemination of the Pentagon Papers but just the beginning. Another grand jury was convened in Boston to investigate the same matter, while the Los Angeles grand jury was continued.

In discussing the practice of calling witnesses before a grand jury that has already handed down an indictment, David J. Fine writes:

"On several occasions, the United States Attorney, continues to call witnesses in connection with a crime after the grand jury handed down an indictment, that is, after the prosecutor obtained what he purportedly sought. The standard explanation for this procedure was that it was directed to the procurement of additional or superseding indictments. . . .

"Some credibility is lent to this justification by the fact that superseding indictments were in fact handed down in several instances. . . . It is, nevertheless, impossible to tell when the justification is used in good faith and when as a cover for improper interrogation. The court must simply accept the prosecutor's word."[2]

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[1] Grand Juries. An Investigative Force. *Trial*. Jan./Feb. 1973, p. 11.

[2] Federal Grand Jury Investigation of Political Dissidents, 7 *Harvard Civil Rights—Civil Liberties Law Rev.* 433, 435–436 (1972).

The issue of being asked questions by a grand jury concerning a person who has already been indicted was raised by Anthony J. Russo, Jr. a friend of Ellsberg, who had been called before the Los Angeles grand jury, in *In Re Russo*, 448 F. 2d 369, 374 (1971) where the court held:

". . . The grand jury is still in session. We cannot assume that no further information appropriate to their inquiry will be obtained from appellant upon the answering of the questions proposed. There may well be involved additional defendants, or additional criminal acts shown to have been committed by Ellsberg. The effective functioning of a grand jury would be seriously affected if it was required to delay its return of an indictment to await an attempt to obtain evidence from a recalcitrant witness. The contention is without merit."

Russo, still refusing to testify was held in civil contempt and spent forty-seven days in jail. He was finally released when the government refused to comply with a condition (set by Russo and agreed to by the court) that the government provide him with a transcript of his testimony.

Also heard by the Los Angeles grand jury was Robert Ellsberg, the 15-year-old son of Daniel Ellsberg. The young Ellsberg was subpoenaed at 7:30 A.M. for appearance two hours later. It has also been reported that Ellsberg's ex-wife was persuaded to testify by being told that if she testified Robert wouldn't have to.

The following persons were subpoenaed before the Boston grand jury: Richard A. Falk, a Princeton professor of international law; Noam Chomsky, of M.I.T. an influential writer on the Vietnam War; Ralph Stavins of the Institute of Policy Studies; David Halberstam, a former New York Times reporter who covered the war in Vietnam and Samuel Popkin, a professor from Harvard and a scholar of Vietnamese village life, just to name a few.

Professor Popkin appeared before the Boston grand jury on August 19, 1971 (after the date of the indictment of Daniel Ellsberg) and testified concerning Ellsberg and the Pentagon Papers. However, when asked "What is the opinion as to persons you believe possessed a copy of the Pentagon Papers in Massachusetts prior to June 13, 1971?" he refused to answer. As a result of refusing to answer this and a number of other questions he was adjudge to be in civil contempt. In May of 1972 the Court of Appeals in Boston in considering Popkin's refusal to answer the question quoted above, stated:

"The generality of the opinion question here, the apparent basis for the opinion being pursued, and the idea of using one scholar to speculate about the sources of others' work, without any showing of strong need therefor, are repugnant to me. In my view, even apart from constitutional claims, we should exercise our supervisory power to state that in this circuit scholars ought not to go to prison for refusing to give their opinions or beliefs based on casual and retrospective reflections on similarities of content. But while my brothers agree that the opinion questions were improper, their objection is a narrower formal one. Accordingly, . . . we simply disapprove the questions as asked. *United States* v. *Doe*, 460 F. 2d 328, 335 (1972)."

However, due to the fact that Popkin had also refused to answer what were later found to be legitimate questions he was still held to be in contempt. So on November 10, 1972 the Supreme Court in *Popkin* v. *United States*, 409 U.S. 1002 (1972) refused to stay the execution of his contempt judgment. Professor Popkin entered jail the morning of November 21, 1972, his imprisonment only lasted one week because the government decided to dismiss the grand jury even though it was expected to run for another six weeks.

During the life of the Los Angeles and Boston grand juries it was widely believed that the evidence developed at the Boston grand jury was to be used in prosecution of Ellsberg who had been indicted by the Los Angeles grand jury. The Justice Department vigorously denied such use of the grand jury.

Harrisburg, Pennsylvania.—J. Edgar Hoover appeared before a subcommittee of the Senate Appropriations Committee on November 27, 1970. Hoover had a prepared statement with him that basically said that the F.B.I. had information that indicated that the East Coast Conspiracy to Save Lives (a group of Catholic priests and nuns, teachers and students) was plotting to blow up underground electrical conduits and steam pipes serving the Washington, D.C. area in order to disrupt government operations. Further, it was alleged that the East Coast Conspiracy was planning to kidnap a highly-placed government official.

It has been said that in an effort to support Hoover's charges, a grand jury was convened in Harrisburg, Pennsylvania. On the 12th of January, 1971 the Harrisburg grand jury indicted Eqbal Ahmad, Philip Berrigan, Elizabeth McAlister, Neil McLughlin, Anthony Scoblick and Joseph Wenderoth in the bombing and kidnapping plot. After the indictment eleven witnesses were subpoenaed to appear before the grand jury. It has been reported that the reason behind these subpoenas was to develop evidence against the indicted persons.

One of the witnesses, Jogues Egan refused to testify even after receiving transactional immunity. Egan was cited for civil contempt. She refused to answer questions on the ground (among others) that the questions were based upon information overheard from respondents by means of the government's illegal wiretapping and electronic surveillance. After a hearing, Egan was found to be in contempt by the United States District Court for the Middle District of Pennsylvania. The decision was appealed and the Third Circuit Court of Appeals reversed holding that a witness summonded before a grand jury may not be examined with questions based on information obtained from illegal wiretaps. *In re Grand Jury Proceedings, Harrisburg, Pennsylvania* 450 F. 2d 199 (1971). This decision was affirmed by the Supreme Court in *Gelbert et al.* v. *United States*, 408 U.S. 31 (1972).

In criticizing the Harrisburg grand jury, a lawyer for National Lawyers Guild was quoted as saying:

". . . the government . . . tries to isolate its Left opposition from otherwise sympathetic supporters. Because the questions asked before grand juries are often made public during immunity or contempt hearings, prosecutors are able to ask "red herring" questions—bring up bombs, dynamite and other subjects, regardless of whether there is any reason to believe the witness questioned has any information.

The government may use such tactics to taint legal, aboveground organizing with the image of an underground terrorist conspiracy.[1]

Tucson, Arizona.—In the fall of 1970 a federal grand jury was convened in Tucson, Arizona to investigate the purchase of dynamite by a young man. The salesman was suspicious of the purchaser so he wrote down the license plate number of the car the man was driving and called the F.B.I. The F.B.I. traced the car to a women who lived with four other people in Los Angeles. For months the house was under surveillance by the F.B.I. In the interim the salesman identified the dynamite purchaser from photographs at the F.B.I. office.

It has been stated that much of the Tucson grand jury's deliberations took place after John Fuerst was indicted for transporting explosives in interstate commerce.

A number of authors point to Tucson as the first attempt by the government to use the grand jury to help create a "sociogram." A sociogram . . . "is a construction designed to reproduce graphically the Left's patterns of living; a framework of facts and assumptions, not only on a political level but on a personal and private level, to facilitate the pursuit of the new radical quarry."[2]

The type of questions that are asked in order to create a "sociogram" and that reportably were asked of witnesses before the Tucson grand jury are:

"Tell the grand jury every place you went after you returned to your apartment from Cuba, every city you visited, with whom and by what means of transportation you traveled and who you visited at all the places you went during the times of your travels after you left . . . Ann Arbor . . ."[3]

The abuse of the grand jury process in Tucson, Arizona in the Fall of 1970 was stated as follows:

"The testimony before the . . . grand jury makes it quite clear that it was primarily concerned with Fuerst, but that did not prevent it from developing a detailed and comprehensive picture of West Coast radical activities. The "cover" use of Fuerst for fishing purposes was emphasized by the fact that no additional indictments were issued after Fuerst's original indictment, despite the subsequent testimony of five witnesses."[4]

Tallahasee & Camden.—Two grand juries should be mentioned by way of passing. One being the case of the Vietnam Veterans Against the War—twenty three high ranking members were subpoenaed before a Tallahassee, Florida grand

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[1] Fassler, M. and Winograd, B.; The Political Question, *Trial*, Jan./Feb. 1973, pp. 16, 18.
[2] Cerruti, E & Donner, F. The Grand Jury Network *The Nation*, Jan. 3, 1972 p. 5, 7.
[3] *Id.* p. 6
[4] Donner, F. and Lavine, Richard, Kangaroo Grand Juries, *The Nation*, Nov. 19, 1973, p. 519, 526.

jury and were kept there during the entire 1972 Republican Convention that was going on in Miami. It is contended that this group was subpoenaed when they were to prevent them from demonstrating at the Convention. Six of the twenty-three were indicted and all six of those indicted were acquitted.

The second grand jury worthy of mention is the one convened in Camden, New Jersey in September of 1971. In the Summer of 1971 twenty-eight persons were arrested by the F.B.I. as they were attempting a raid on a local draft board. A grand jury was called notwithstanding the fact that the twenty-eight were caught red-handed. Two of the witnesses called before the grand jury were Pat and Bruce Grumbles who refused to testify and spent fourteen months in jail for civil contempt. It is believed that the reason the grand jury was convened was not to obtain information in the instant case (they had plenty of that) but to develop leads to an unsolved case of a similar nature a year earlier. It is interesting to note that all twenty-eight were acquitted of all charges (due the acceptance of the trial jury of the defense of entrapment).

Grand Jury Abuse in the Past.—It should not be thought that the abuse of the grand jury is something new. In the 1790's Federalist judges encouraged the return of indictments against supporters of Thomas Jefferson. This type of abuse did not change with the election of Jefferson as President. It was under the Jefferson Administration that Aaron Burr was indicted by a third grand jury after the first two refused to return a true bill. Such grand jury abuses continued, as is pointed out by Marvin E. Frankel when he writes:

"In the ante-bellum period, grand juries in the South, acting vigorously to uphold the practice of slavery, returned indictments against abolitionist leaders and newspapers. In the North, grand juries were rarely concerned with the slavery question until 1850, when passage of the Fugitive Law made assisting runaway slaves a criminal offense. After that, the impact of local political sentiment could be seen in the spotty enforcement of the Law, persistently denounced by abolitionist leaders and the press.

"During the Reconstruction period, the grand jury served as a principal weapon of Southern whites in their struggle against Radical Republicans and Negro rights. The whites gained control of state grand juries which returned scores of indictments against the so-called "scalawags" and "carpetbagger" public officials. . .

"At the same time, Southern white grand juries refused to indict members of the Ku Klux Klan. . ."[1]

Along this same line Richard Harris states:

". . . on the federal level grand juries have almost always been rubber stamps in criminal prosecutions and in political persecutions. During periods of national strife or popular hysteria, even the most liberal Administrations have allowed. . . grand juries to be used in the most nakedly oppressive ways—the Lincoln Administration to silence critics of the Union cause, the Wilson Administration to illegally imprison and deport several hundred innocent radicals to Russia after the Bolshevik Revolution, the Franklin Roosevelt Administration to harass Nazi sympathizers, and the Truman Administration to permit the anti-liberal vendetta waged by Representatives Richard M. Nixon and Senator Joseph H. McCarthy."[2]

The above is not to suggest that the abuse of the grand jury system today is not more serious than it was in the past but is only pointed out to indicate that abuse of the system has been with us for some time.

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GRAND JURY REFORM ISSUE BRIEF NUMBER IB76042

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MAJOR ISSUES SYSTEM

Date originated August 10, 1977.
Dated updated August 20, 1977.

ISSUE DEFINITION

Transplanted from England and incorporated into the Fifth Amendment of the Constitution, the grand jury was seen by the Founders as a shield for the individual against malicious prosecution. It was also value as a people's watchdog to search out and disclose corruption in government. Recently, however, charges have been made that the grand jury has lost its independence, that it does little more than rubber stamp the prosecutor's actions, and that, in fact, the grand jury has become an instrument of political harassment. Reform proposals range from abolishing the grand jury to according witnesses an array of procedural protections not presently available.

BACKGROUND AND POLICY ANALYSIS

The protection of a grand jury indictment derives from the Fifth Amendment, which provides in 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 . . . ."

The grand jury is said to have originated in England in 1116, with the promulgation of the Assize of Clarendon. Significantly, the early grand jury (Assize) was entirely an instrument of the prosecution. It consisted of a group of men called together from each township to report to the King from their own knowledge what crimes had been committed and by whom. Not until 500 years later did the grand jury's function as a shield against malicious prosecution emerge. In 1681, Charles II ordered the grand jury to indict the Earl of Shaftesbury for treason for opposing his effort to reestablish the Catholic Church in England. The grand jury resisted the King, deliberated in private, and refused to return an indictment. This incident marked the birth of the grand jury.

The modern federal grand jury is a body of 23 citizens randomly selected from their districts who are empowered to act with a quorum of 16. Its primary duty is to examine accusations against persons charged with crime within the district in which it is impaneled to determine whether there is probable cause to indict. The grand jury also has the authority to forward reports to the court on matters that it has investigated. The vote of 12 jurors is required to return an indictment, but the indictment is fatal unless it also is signed

by the United States Attorney. The legal standard for returning an indictment is probable cause to believe that a crime has been committed and that the person under investigation committed it. Proceedings are conducted in strict secrecy with rules prohibiting disclosure of what occurred in the grand jury room. The life of a grand jury is eighteen months but, in certain cases, it may be extended for another term. Moreover, a new grand jury may inquire into the same matters a prior grand jury investigated. Perhaps the greatest difference between the ancestral grand jury and the modern federal grand jury is that the ancient grand jury returned indictments based on the jurors' personal knowledge of criminal activity, while the modern grand jury indicts on the basis of information learned during the course of its investigation.

Criticism of the grand jury takes two directions. One avenue of criticism focuses on the grand jury's incapacity to function independently and the other focuses on the lack of procedural protections for grand jury witnesses. Both analyses proceed, however, from a growing perception of a common problem; namely, that the grand jury's power to investigate alleged crimes is being used as a pretext to delve into a witness' beliefs and associations. Advocates of the grand jury system maintain that the grand jury acts as a needed buffer between a powerful government and unpopular political and social minorities.

The controversy surrounding the grand jury system covers a variety of practices and procedures. The power of the government attorney to control the proceedings is questioned. Critics maintain that the government attorney, armed with a superior knowledge of the law, completely dominates the investigation, not only deciding what witnesses to call and what questions to ask, but also characterizing the sufficiency of the evidence. The grand jury's subpoena power is another subject of debate. Presently, the grand jury has the power to summon a witness from anywhere across the country, at anytime, night or day, and require the individual to appear before the grand jury, either immediately or in the future, without any showing that there is some connection between the witness called and the subject under investigation. If a witness wants to challenge a subpoena, he must travel to the district in which the grand jury is sitting. The grand jury's power to discipline recalcitrant witnesses is also questioned. Presently, a witness who refuses to obey a court order in connection with a grand jury can be imprisoned pursuant to the court's contempt power for the duration of the life of the grand jury or 18 months, whichever comes first, unless the witness relents and cooperates. Furthermore, if a new grand jury is convened and the witness again refuses to cooperate, a new period of confinement may be imposed. The sufficiency of the evidence which will support an indictment is yet another subject on criticism. Under the present rules and laws, a defendant may not challenge an indictment that is based on hearsay, irrelevant, incompetent, or illegally obtained evidence. The rights of witnesses in the grand jury room are also a topic of increasing controversy. Presently, a lawyer may not accompany a witness in the grand jury room, although a witness may leave the room at appropriate intervals to consult with his attorney outside the door. Additionally, a witness' privilege against self-incrimination may be neutralized by a grant of immunity. Failure to testify, once immunity has been granted, is punishable by contempt. Finally, the rights of such witnesses to target warnings (notice that they are possible defendants), to present exculpatory evidence, and to be informed of the specific nature of the investigation are being debated.

Several reform measures have been proposed. It has been suggested that the grand jury system should be abolished in favor of prosecution by information. An information is a formal written complaint charging an accused with the commission of specific criminal acts, which is required to be verified in some manner by the prosecutor. England abolished the grand jury system in 1933. Furthermore, since the right to a grand jury indictment is one of the few guarantees not made applicable to the states by the Fourteenth Amendment, *Hurtado* v. *California*, 110 U.S. 516 (1884), many states allow the prosecution of a felony to be initiated either by indictment or by information. Several states that permit prosecution of felonies by information also require some form of preliminary hearing to determine probable cause. Abolition of the federal grand jury system would require a constitutional amendment which might prove difficult, if not impossible, because of the reverence with which the Bill of Rights is regarded.

A second reform proposal is directed at reducing the period of confinement for contempt and prohibiting confinement for subsequent refusals to provide

information concerning the same transaction. The merit of this proposal is that it reduces the government's power to oppress witnesses by imposing long periods of incarceration. The difficulty is that it weakens the government's power to secure the testimony of persons who refuse for other than a legally recognized privilege to provide the grand jury with information. It is argued that once the legal process has determined the protected areas of individual privacy and silence, each person has a civic duty to promote law and order by cooperating with a grand jury investigation. Most commentators agree, however, that prolonged incarceration bears diminishing returns. They believe that once a witness has refused to cooperate for a sustained period of time, it is very unlikely that additional confinement will produce witness cooperation.

Several reform measures concerning immunity have emerged from the controversy surrounding the grand jury system. These proposals are designed to increase protections against intrusions into a witness' privacy. One such proposal would eliminate immunity unless a witness consents to it. Another proposal would prohibit "use immunity" in favor of "transactional immunity." Transactional immunity completely immunizes a witness from prosecution for every offense touched upon by his testimony, while "use immunity" only prohibits the direct or indirect use of a witness' testimony in a subsequent prosecution. The disadvantage of transactional immunity is that it prevents the prosecution of a witness who is subsequently and independently found to be more deserving of prosecution than originally thought. It is also felt that transactional immunity encourages shallow testimony, and even fabrication, since it provides absolution for every offense touched on, however lightly. Consensual immunity also poses problems since it places access to needed evidence within a witness' control.

Giving the grand jury the power to appoint a special attorney is another measure which has been proposed to strengthen the grand jury's independence. The special attorney would have the authority to sign an indictment and conduct all phases of the investigation as well as any subsequent criminal prosecution. Since an indictment is fatal unless it is signed by the United States Attorney, this proposal protects the grand jury's indictment power, as well as facilitates its investigative independence. On the other hand, it is felt that such a measure would substantially interfere with the ideal of equal justice in that the special counsel's prosecutorial judgments would not be standardized by the unifying supervision of the Justice Department.

Permitting witnesses or targets, or both, to have their attorneys present in the grand jury room is yet another proposed approach to grand jury reform. Some of the possible benefits to be derived from the presence of an attorney for the witness are the reduction of grand jury impropriety, greater protection of witness testimonial privileges and increased grand jury independence. The primary disadvantage of such a measure is that it would convert what is now an inquisitorial proceeding into an adversarial proceeding with increased delays and cost, while disputed matters are brought before a judge for resolution.

Other reform proposals include the following:

(1) Authorizing criminal sanctions to protect grand jury proceedings from improper disclosures.

(2) Excusing witnesses who plan to invoke the privilege against self-incrimination.

(3) Prohibiting subsequent grand jury investigations of the same subject matter unless newly discovered evidence is found.

(4) Requiring the attorney for the government to present exculpatory evidence to the grand jury.

(5) Providing traget warnings and allowing potential targets an opportunity to appear before the grand jury to present a defense.

(6) Providing grand jury witnesses with notice of the right to counsel and the privilege against self-incrimination.

(7) Requiring subpoenas to state with specificity the nature of the offense under investigation.

(8) Giving district courts in which the witness resides concurrent jurisdiction to hear and determine motions to quash a subpoena.

(9) Requiring mandatory recording of grand jury proceedings.

(10) Providing witnesses with transcripts of their grand jury testimony.

(11) Providing defendants with pretrial discovery of the grand jury testimony with the witnesses to be called by the prosecution at trial.

(12) Decreasing the size of grand juries.

LEGISLATION

P.L. 95-78 (H.R. 5864).

Amends rule 6(e) of the Federal Rules of Criminal Procedure dealing with the secrecy of grand jury proceedings. The amendment authorizes government attorneys to disclose matters occurring before the grand jury to government personnel for the limited purpose of assisting the attorney in the performance of his duty to enforce federal criminal law. Non-attorney personnel may not utilize the material for any other purpose. Signed into law on July 30, 1977.

Several general reform bills are pending before the present Congress. They include measures for strengthening the independence of the grand jury, for increasing the procedural and substantive rights available to grand jury witnesses, and for requiring periodic reports to Congress. The pending reform legislation is as follows: H.R. 94, H.R. 3150 (Eilberg), H.R. 2020 (Patterson), H.R. 3736 (Conyers et al.), H.R. 4908 (Duncan), and S. 1449 (Abourezk).

A few bills have also been introduced which address specific grand jury procedures and practices:

H.R. 406 (Holtzman): Sets a six-month limit on imprisonment for contempt and establishes other protections and rights in connection with a contempt proceeding. Introduced on January 4, 1977, and referred to the House Judiciary Committee.

H.R. 844 (Drinan): Prohibits the granting of "use immunity" to neutralize a witness' privilege against self-incrimination in connection with any proceeding before Congress, a federal court, a federal grand jury, or a federal agency. Introduced on January 4, 1977, and referred to the House Judiciary Committee.

H.R. 1330 (Jordan): Authorizes the appointment of a special judicial prosecutor to assist grand juries in conducting an investigation into the activities of an office in the executive branch and stipulates that the special prosecutor shall have exclusive authority and responsibility on behalf of the United States to conduct all grand jury and other criminal proceedings arising out of such an inquiry. Introduced on January 13, 1977, and referred to the House Judiciary Committee.

Four proposals introduced by Rep. Eilberg to amend the Constitution are pending before Congress. These proposals would abolish the constitutional requirement of prosecution by indictment and substitute prosecution by information or allow Congress to enact legislation regulating the initiation of criminal prosecutions. These proposals would also permit Congress to enact legislation to provide for investigatory, as distinguished from accusatory, grand juries. The proposals are: H.J. Res. 59, H.J. Res. 60, H.J. Res. 61, and H.J. Res. 62.

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CHRONOLOGY OF EVENTS

07/09/77—The American Bar Association passed a second grand jury resolution calling for additional reform measures, including limitations on confinement for civil contempt, target warnings, recordation of grand jury proceedings, guidelines for prosecutorial conduct, and consideration for freedom of the press and the attorney-client privilege.

05/23/77—The Supreme Court decided *United States* v. *Washington*, No. 74–1106, holding that a grand jury witness is not entitled to target warnings.

The Supreme Court decided *United States* v. *Wong*, No. 76–635, holding that a grand jury witness is not entitled to warnings of the fifth amendment privilege against self-incrimination.

06/10/76—The first congressional hearings on grand jury reform began.

07/01/75—The American Bar Association passed a resolution calling for grand jury reform to allow counsel in the grand jury room, prohibit use immunity and strengthen penalties for unauthorized disclosure of grand jury information.

03/05/75—Ellen Grussi and Terri Turgeen were jailed for refusing to testify before a federal grand jury convened in New Haven, Conn., to investigate the harboring of student fugitives alleged to have participated in a Boston bank robbery. (They were released nine months later when the grand jury term expired.)

03/08/75—Joe Raymond was jailed for contempt for refusing to testify before a federal grand jury in Lexington, Kentucky, investigating the same matters as the New Haven grand jury. (He was released almost 14 months later on May 4, 1976, when the grand jury expired.)

10/11/73—The Supreme Court decided *United States* v. *Calandra*, 414 U.S. 338, holding that a grand jury can present questions to witnesses based on illegally seized evidence.

06/08/73—Rep. Joshua Eilberg introduced H.R. 8461, the first grand jury reform legislation in American history.

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[Memorandum by Alfred M. Nittle and Martin H. Belsky]

FEDERAL GRAND JURY ISSUES

1. USE OF INDICTMENT

The Fifth Amendment to the Constitution requires use of an indictment for a federal prosecution of any "infamous crime". Rule 7 of the Federal Rules of Criminal Procedures specifically provides that an indictment is necessary for prosecution of any offense punishable by imprisonment of one year or more. Prosecution for an offense punishable by no imprisonment or by imprisonment of less than one year may be undertaken on either an indictment or information.[1]

Under the Federal Rules of Criminal Procedure (Rules 3 to 5), a criminal case can proceed on the basis of a complaint, followed by an initial appearance before a magistrate, and then by a preliminary hearing, where a showing of probable cause must be made. The prosecutor is free to use this procedure before securing an indictment. He is also free under Rule 7 to proceed immediately to an indict-

[1] The Constitution does not require the states to initiate all serious prosecutions by grand jury indictment. *Hurtado* v. *California*, 110 U.S. 516 (1884). States are free to proceed by use of indictment or information.

ment, without the need for a complaint, or a probable cause hearing, and then to trial. Use of either procedure is solely in the discretion of the prosecutor.

The indicting function of a grand jury is separate from, though related to, its investigative function. A grand jury has the power to investigate any and all federal offenses, by securing the attendance of witnesses, and under the Court's supervision and direction, and at the prosecutor's request, immunizing witnesses, punishing recalcitrant witnesses, and subpoenaing records and documents. Such investigations can, but need not, result in an indictment. Most offenses that result in an indictment do not result from such grand jury investigations, but rather from investigations by the police, FBI, or other law enforcement agencies. A few witnesses are called to describe the incident and the investigation, and an indictment is then returned. Whether, in serious cases, a probable cause hearing prior to an indictment, is held or not held, is solely within the discretion of the prosecutor.

Recently, judges, educators, and lawyers have suggested that the indicting grand jury is nothing more than a "rubber stamp" for the prosecutor. Whatever the government attorney recommends is adopted without change by the grand jurors. Thus, it is argued that it is no longer necessary to continue the requirement of an indictment for all serious offenses. Grant the prosecutor the discretion to proceed without an indictment. Elimination of the indictment would mean, of course, that a complaint, probable cause hearing, and information would be required. The probable cause hearing would be a sufficient safeguard for an accused. See e.g. (Judge) Campbell *Eliminate the Grand Jury* 64 J. Crim. Law and Crimin 174 (1973); see also H.J. Res. 774, 52, 855, (93rd Cong), H.J. Res. 46 (94th Congress) and H.J. Res. 59, 60, 61, 62 (95th Congress)—proposing Constitutional amendments to eliminate the requirement of a grand jury indictment in any case.

Others have resisted a Constitutional amendment to eliminate the requirement of a grand jury indictment. Their argument is not that the indicting grand jury really continues to provide any protection from unwarranted prosecutions, but rather that no one should tamper with any of the Bill of Rights. To amend any of the first ten amendments (Bill of Rights) might open a "Pandora's Box" to changes in other guarantees.

2. RIGHT TO COUNSEL

The Sixth Amendment to the U.S. Constitution says, in part, "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense." Recent cases have applied this right to trials, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), to preliminary hearings, *Coleman* v. *Alabama*, 399 U.S. 1 (1970), and even earlier to post-arrest confrontations, *United States* v. *Wade*, 388 U.S. 218 (1967), and interrogations, *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

During the early 20th Century, it had been declared that there was no right to counsel at trial for a person accused of a crime. Judge Augustus Hand in *In Re Black*, 37 F. 2d 542 (1931), stated that a criminal defendant was not entitled to have the aid of counsel at trial *nor* before a grand jury. Despite the fact that Judge Hand based his decision on the then prevailing theory denying a right to counsel at *any* stage of a criminal proceeding, later decisions continually cited *Black* as a basis to deny counsel to a grand jury witness, see *United States* v. *Blanton* 77 F. Supp. 812 (1948). The proposition was accepted with no precedent needed or cited. See *United States* v. *Scully* 225 F. 2d 113 (1955), *United States* v. *Smyth* 104 F. Supp. 283 (1952), and *Constitution of the USA—Analysis and Interpretation*, Doc. 92–82, 92d Congress, 1972, p. 1090, footnote 5. Today one still finds decisions which affirmatively state that there is no constitutional right to counsel before grand juries, see *United States* v. *Daniels* 461 F. 2d 1076 (CA5 1972). Recent decisions and memoranda prepared by the U.S. Department of Justice cite for this axiom *In Re Groban*, 352 U.S. 330 (1957).

In 1957, prior to its more recent cases mandating a Sixth Amendment right to counsel at all stages of criminal proceeding, the United States Supreme Court in *In Re Groban*, 352 U.S. 330 (1957) deciding that there was no right to counsel in a Fire Marshall investigation, based its holding on an assumption that there was no right to counsel before a grand jury.

Notwithstanding *In Re Groban*, the U.S. Supreme Court has not directly decided the issue of the right to counsel before the grand jury, although recent dictum implied there is no such right.

Historically, the basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed serious crimes. Like its American counterpart, the inquiry was two-fold: (1) is there probable cause to believe a crime has been committed, and (2) is there probable cause to believe that this person committed it.

In the development of an absolute right to counsel at trial, absent a valid waiver, the Supreme Court first addressed the issue in dictum in *Powell* v. *Alabama* 287 U.S. 45 (1932). It was stated that there is a pre-trial right to counsel from the time of arraignment. However, *Powell* stood for the proposition that, in capital cases, where the defendant was unable to employ counsel, *and* was incapable of adequately making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process. Later, in *Johnson* v. *Zerbst* 304 U.S. 458 (1938), the Court stated an absolute rule requiring the appointment of counsel for indigent defendants in the Federal courts.

In *Hamilton* v. *Alabama* 368 U.S. 52 (1961), the Court first enunciated the "critical stage" test, and further decided that an arraignment was indeed a critical proceeding requiring counsel, citing *Powell* as authority. Then came *Gideon* v. *Wainwright* 372 U.S. 335 (1963) for right to counsel at trial and *White* v. *Maryland* 373 U.S. 59 (1963) for preliminary hearing. Also, see *In Re Gault* 387 U.S. 1 (1967) and *Argersinger* v. *Hamlin* 407 U.S. 25 (1972).

In the area of custodial interrogation, the Court in *Escobedo* v. *Illinois*, 378 US 478 (1964) ruled that pre-indictment interrogation is a "critical stage" requiring counsel. The minority opinion stated that no right to counsel attached until the institution of formal proceedings by way of indictment, information, or arraignment. Two years later, in *Miranda* v. *Arizona*, 384 US 436 (1966), the Court switched from the 6th Amendment grounds in *Escobedo* and relied instead on 5th Amendment grounds, setting the stage for the dissent in *Escobedo* to become the majority opinion in *Kirby* v. *Illinois*, 406 US 682 (1972). In *Kirby*, the Supreme Court concluded that a pre-indictment showup after arrest, but before the initiation of any adversary criminal proceedings (whether by way of formal charge, preliminary hearing, indictment, information, or arraignment), unlike the post-indictment confrontation in *Wade* and *Gilbert*, is not a criminal prosecution or "critical stage" at which the accused, as a matter of absolute right, is entitled to counsel. This 5–4 decision overruled every Circuit Court of Appeals on this matter.

United States v. *Wade*, 388 US 218 (1967) and *Gilbert* v. *California*, 388 US 263 (1967) ruled that a post-indictment lineup is a "critical stage" entitling the accused of counsel or substitute counsel as observer for fairness and to preserve evidence as to a suggestive lineup. The Court in *Wade* said: "It is central to (*Powell* v. *Alabama*) that, in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." Generally, the courts must scrutinize any pre-trial confrontation of the accused to determine whether the presence of counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right to meaningfully cross-examine witnesses and to have the effective assistance of counsel at the trial itself.

Finally, against a vigorous dissent by the Chief Justice, the Supreme Court in *Coleman* v. *Alabama*, 399 US 1 (1970) ruled that a preliminary hearing was a "critical stage" necessitating counsel even though the only function of the hearing was to determine probable cause to warrant presenting the case to a grand jury and to fix bail (akin to felony arrangement or presentment). The dissent likened this hearing to a grand jury.

In Re Groban 352 US 330 (1957) and *Anonymous Nos. 6 and 7* v. *Baker* 360 US 287 (1959), both 5–4 decisions occurred prior to these cases expanding the right of an individual to counsel at any stage of a criminal proceeding.

In *Groban*, a state administrative investigation by a fire marshall empowered by statute to inquire into the causes of any fire was held by the High Court to not be a criminal proceeding and hence no counsel was required even though the individuals had been committed to jail for noncooperation.

In *Anonymous*, state-licensed private detectives and investigators were convicted of contempt for refusing to testify in a preceeding in which a judge, acting as a one-man inquiry body, analogous to a grand jury, refused the right to counsel inside the hearing room, but permitted counsel outside and permitted detectives to consult with counsel when desired. The N.Y. State Bar had been

investigating unethical practices by attorneys for ambulance-chasing, among other items. The Court declared that this did not violate 14th Amendment due process and cited *Groban*.

Recently, the Supreme Court has indicated in dictum, that there is no right to counsel before Federal grand juries. In *United States* v. *Mandujano*, 425 U.S. 564 (1976), the Court unanimously held (Justice Stevens not participating) that a witness who lies before a federal grand jury may be prosecuted for perjury whether or not he is entitled to, or has received, adequate warnings of his rights. Four justices went further, however, indicating that there is no right to be warned of a right to counsel, Free if necessary, and no right to counsel in a grand jury room even if the witness is a putative or virtual defendant. Two Justices stated that there was a right to counsel and two others concurred on the limited perjury basis.

However, all Justices did note that whether or not warnings are required, witnesses may continue to retain counsel outside the grand jury room and leave the room to consult with counsel when necessary. See also *United States* v. *Daniels*, 461 F.2d 1076 (CA 5 1972).

On May 23, 1977, the Supreme Court further indicated, in dictum, that there is no constitutional right to counsel before grand juries. In *United States* v. *Washington*, —U.S. —, 97 S. Ct. 1814 (1977), Chief Justice Burger, speaking for seven Justices held that a witness was adequately informed of his rights prior to his testimony before a grand jury and, in dictum, indicated that no special warnings were necessary for "targets" of grand jury injuries. Implied in that decision was that a witness need not be told of his right to counsel in the grand jury room as there is no such right.

3. IMMUNITY

Present Federal law allows the prosecutor to secure immunity for a witnesss, against his will if necessary, and thereby require him to testify. Until recently, only transactional immunity, that is a total preclusion of prosecution for any event, offense or activity about which a witness testifies under a grant of immunity, was permissable. Now "use" immunity, allowing prosecution, but prohibiting the use, directly or indirectly, of any evidence obtained as a result of immunized testimony, is allowed.

The Fifth Amendment to the U.S. Constitution says, in 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 . . .; nor shall be compelled in any criminal case to be a witness against himself . . .".

The U.S. Supreme Court has decided that the Self-Incrimination Clause of the Fifth Amendment permits compulsory immunization of a witness, as authorized by Federal legislation, as the immunity would then mean that the witness is no longer to be considered a witness against himself.

The first Federal statute granting immunity was enacted in 1857 and was applicable only to congressional hearings. Later, an immunity statute was enacted providing witnesses with transactional immunity as to certain offenses and for a more limited "use" immunity for other specific criminal offenses. In 1892, the U.S. Supreme Court ruled that any limited application of use immunity was unconstitutional as it did not protect an individual from derivative use of the testimony. "Once immunity is granted, a witness is protected against prosecution not only for a crime that related to the precise testimony given but also for the fruits of such testimony," *Counselman* v. *Hitchcock* 142 US 547 (1892). The Court stressed its approval of transactional immunity . . . "A statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

One year later, Congress mandated transactional immunity as the only way to compel testimony after assertion of Fifth Amendment Constitutional privilege, see 27 Stat. 443 (1893). This transactional immunity was found constitutional by a 5–4 vote of the U.S. Supreme Court in *Brown* v. *Walker* 161 US 591 (1896), (stating that this type of immunity was coterminous with the privilege against self-incrimination), and then again in *McCarthy* v. *Arndstein* 266 US 34 (1924) and *Shapiro* v. *US* 335 US 1 (1948), by a wider margin, (asserting that the constitutional minimum was transactional immunity).

In 1954, Congress enacted a new statute providing immunity as to testimony relating to certain offenses given before courts and grand juries, 18 USC 3486.

This new statute was upheld that year in *Adams* v. *Maryland* 347 US 179 (1954), and, in dictum in *Ullman* v. *US* 350 US 422 (1956). *Ullman* re-affirmed the holding in *Brown* that transactional immunity supplied by the 1954 statute was valid and further stated, in dictum, that the immunity statute reviewed also mandated immunity from any state prosecution for the crime involved.

In 1964, in *Murphy* v. *Waterfront Commission of New York Harbor* 378 US (1964), (a civil and criminal contempt case), the Court ruled that a state witness granted immunity from prosecution under state law may not be compelled to give testimony which may incriminate him under Federal law, unless such testimony and its fruits cannot be used in connection with a Federal prosecution against him; therefore, use of such compelled testimony or its fruits, as distinguished from independent evidence, by the Federal government was proscribed once a state granted immunity. However, with the removal of the fear of Federal use of such testimony, the witness can be compelled to answer. The Court's reasoning that the State is therefore able to obtain information, requisite for effective law enforcement, and the witness and the Federal government are left in the same position as if the witness claimed his privilege in the absence of a state grant of immunity.

In 1968, the Congress also passed a limited compulsory transactional immunity statute, embodied in 18 USC 2514 (since repealed by 18 USC 6001–6004). Thereafter, in 1970, the Congress upon prodding by the Administration, enacted 18 USC 6001–6004 (the original Crime Control Act) in which 18 USC 6002 and 6003 mandated only use and derivative use, and not transactional, immunity as to organized crime, and required the repeal of 18 USC 2524 at the end of four years.

In 1972, the Supreme Court ruled as to whether use (and derivative use) immunity would be accepted as constitutional. Overruling 80 years of precedent, the U.S. Supreme Court ruled that use and derivative immunity, as espoused in 18 USC 6001–6004, gave sufficient Fifth Amendment protection to individuals in all state and Federal proceedings, see *Kastigar* v. *US* 406 US 441 (1972) and *Zicarelli* v. *New Jersey* 406 US 472 (1972).

Most of the grand jury reform bills propose a return to transactional immunity. One of the arguments for retaining use and derivative use immunity is that it has a similar effect to transactional immunity. Once granted, the authorities would have to find wholly independent evidence relating to the crime before a prosecution would be permissible, and finding wholly independent evidence with the absence of taint or a sufficiently-attenuated taint is most difficult, if not impossible.

In fact, the Justice Department has indicated that there have been few prosecutions where use immunity under Section 6002 has been granted. In addition, use immunity is a better balance between the needs of law enforcement to prosecute the guilty and to obtain every man's evidence and the right of a witness not to have his own words used against him.

The arguments for a return to transactional immunity are essentially the same arguments upholding transactional immunity in *Counselman*. Sufficient protection means absolute immunity, especially since any form of compulsory immunity runs counter to the absolute intent of the Framers in the Self-Incrimination Clause, which was to preclude any compelled testimony. If law enforcement needs an individual's evidence, it must balance, as it does with plea bargains or other exercises of discretion, such interest against the prosecution of or penalty for this individual.

Several other proposals have been made as to a grant of immunity to witnesses before Federal courts and Federal grand juries: (1) allowing only non-compulsory or consensual immunity; that is the granting of immunity, only with the consent of the witness, and (2) allowing court-ordered immunity for defense witnesses at the request of defendants, so they can obtain evidence otherwise unavailable because of the invocation of the privilege by such witnesses.

Supporters of these proposals suggest that consensual immunity comports more with the intent of the Framers, as it is less of an intrusion on the unqualified command of the Self-Incrimination Clause of the Fifth Amendment. Any grant of immunity should require the voluntary consent of the witness. The drafters of the Fifth Amendment discussed not only use of evidence and prosecution but also the loss of integrity, prestige, and possible loss of a job that could result if one is required to testify. The Self-Incrimination Clause should thus be made an absolute protection. The witnesses should be able to refuse immunity

and preclude testifying, or even refuse to testify even after a grant of immunity. Some middle positions are that use immunity should require consent; whereas, transactional immunity, an absolute bar, need not; that immunity, without consent, would be sufficient for testimony before grand juries if the testimony is truly confidential forever, but consent would be required for testimony at trial.

The argument for permitting immunity for defense witnesses is that it will achieve two objectives: (1) it would allow a more meaningful challenge to probable cause in a grand jury, thereby assisting in precluding unwarranted indictments and trials; and (2) it would lead to a fairer trial, where the jury can receive all relevant testimony in determining guilt or reasonable doubt. The argument against such a proposal focuses upon collusion and subordination of perjury, especially in cases of multiple co-defendants to the same case.

4. RECALCITRANT WITNESS

If a witness improperly refuses to testify before a grand jury, he may be held in contempt. Generally, contempt, whether civil or criminal, would only attach after a witness has invoked his Fifth Amendment right to remain silent, has been given immunity, and still refuses to testify or produce documents. Occasionally, the contempt power has been invoked when a witness has no Fifth Amendment right, or has waived his right, and nevertheless refuses to testify or produce documents.

28 U.S.C. 1826 provides that the length of confinement for civil contempt be for a period not to exceed the term of the grand jury, including extensions, but not to exceed 18 months. 18 U.S.C. 401 authorizes fine or imprisonment for criminal contempt, without stating an amount or term.

A witness held in civil contempt for refusal to testify for the length of a grand jury or 18 months may be resubpoenaed after release by the same jury or a new grand jury, and if he or she still refuses to testify, may be reconfined up to the length of that new jury or 18 months. Confinement for such repeated recalcitrance, called "reiterative contempt" is presently legal. *Shillitane v. United States*, 384 U.S. 364 (1966). Confinement for civil contempt does not bar confinement for criminal contempt.

The purpose of confinement for civil contempt is "coercive", rather than punitive. The intent is to secure testimony on documents and thus confinement is to last until the witness complies. The purpose is not remedial, so as to be deterrent to others or a punishment for an offense. Criminal contempt, with a trial, can be used for punishment.

Some have complained that use of the civil contempt power has been abused. Witnesses who have not committed a crime, but who for personal or other reasons, refuse to testify can be imprisoned indefinitely without a trial. The effect, it is argued, is punitive in fact, if not in law, as these witnesses will never be compelled to testify by their confinement and thus the coercive effect is lacking. Some courts have adopted this argument and have released witnesses prior to termination of a grand jury when, in their opinion, confinement stopped being coercive, and became merely punitive. Others argue that such indefinite confinement has led to productive testimony and documentary evidence. To reduce the maximum term of confinement and to preclude reiterative contempt would merely lead to increased recalcitrance and thus the loss of important evidence in grand jury investigations.

Other complaints about confinement for recalcitrance have focused on the procedures leading to a contempt order. Some have argued that reasonable notice, allowing adequate preparation, counsel, and the necessity of findings, should be required by law. Others have indicated that setting fixed time periods for notice and requiring detailed findings would merely be dilatory, would result in fleeing witnesses, and would clearly interfere with the securing of evidence. The courts, following constitutional procedures, they continue, do provide reasonable notice and a due process hearing. Summary proceedings are essential to assure compliance with a grand jury's need for evidence. Counsel is ordinarily available or provided.

A federal judge may imprison a witness at a federal institution or an available state institution. Some have argued that with grand jury hearings often miles away from the residence of a witness, confinement in a local jail often cuts off the individual from friends, relatives and counsel. Some have also argued that confinement in state or county jails, with convicted violent offenders,

and under severe conditions, is unfair and improper. Others have opposed legislation as to place of confinement. Discretion should continue to be granted to the trial court as to locus. Often, a witness should be kept close to the grand jury, and its investigation, so as to encourage compliance. The inconvenience to the witness is outweighed by the need to secure prompt compliance and thus needed information.

Presently, requests for contempt for refusal to testify or produce documents are made by the prosecutor to the court. Some have urged that contempt should only be authorized by a majority vote of the grand jurors. They, rather than the prosecutor or the court, can weigh the need for the evidence against the claim of the witness. Finally, to ask laymen on a grand jury to approve a request for contempt would allow emotion, bias, and prejudice, rather than law to be determinative.

A witness who refuses to testify after immunity or a waiver of Fifth Amendment rights has limited defenses. Under *Gelbard* v. *United States*, 408 U.S. 41 (1972), a witness can invoke a defense when his subpoena was served as a result of illegally intercepted wire or oral communications. Some have argued that in addition to this protection, a witness should not be held in contempt when his appearance or records are sought as the result of are illegally obtained evidence or information. Otherwise, police, prosecutors, and investigators can insulate themselves from improper activities merely by calling the violated person before the grand jury. This position has been impliedly rejected by the Supreme Court in *U.S.* v. *Calandra*, 414 U.S. 338 (1974). Such a defense would lead to suppression hearings and thus delay. Moreover, opponents argue, the exclusionary rule should not be extended, in general, and certainly not to independent investigations by an independent grand jury.

Finally, some have argued a change in procedures relating to bail on appeal from a contempt order. Presently 28 U.S.C. 1826 (b) precludes bail if the appeal is frivolous or taken for delay. Some urge that this unduly interferes with appellate remedies. A witness is immediately imprisoned unless he can demonstrate the validity of his claims. He is thus cut off from counsel and friends. The burden should be on the government to demonstrate the need for immediate confinement and the dilatoriousness of the appeal. In response, others have urged that changing the burden would lead to more delays, would encourage meritless appeals, and would result in more recalcitrance.

5. INDEPENDENT INQUIRY WITH AND INDEPENDENT PROSECUTOR

It is established doctrine that a properly-constituted Federal grand jury may conduct an inquiry on its own into possible violations of Federal criminal law. See *Hale* v. *Henkel* 201 U.S. 43 (1906), *Blair* v. *United States* 250 U.S. 273 (1919), and *Sullivan* v. *United States* 348 U.S. 170 (1954). However, commentators have suggested that, in the absence of substantial guidance by the Federal courts and without the able assistance of Federal prosecutors, a Federal grand jury cannot function efficiently. Federal grand juries have remained an instrument primarily utilized by the Justice Department, the local U.S. Attorney, and assistants, to investigate alleged violations of the U.S. Code and then to indict or not indict based on that investigation.

While the Fifth Amendment to the U.S. Constitution contains the sole reference to the use of a grand jury in the Federal criminal justice system, no mention is made as to control of the grand jury by either the Federal Judiciary or the Federal Executive. However, historically, English and American jurisprudence considered independent inquiry by grand juries as indispensable and inherent elements of the criminal justice system, in order to seek out criminal misconduct and in order to protect individuals from unfounded accusations by the government. See *Blair* v. *United States* 250 U.S. 273 (1919) and *Sullivan* v. *United States* 348 U.S. 170 (1954).

While some have suggested that the accusatorial function of the Federal grand jury should be abolished by constitutional amendment, because evidence presented to the grand jurors by the prosecutor merely receives a "rubber stamp" of acquiescence, most agree the investigatory function of the Federal grand jury remains a crucial tool for effective law enforcement. It is felt that laymen, as grand jurors, are able to be independent and critical in an investigation, especially of political or governmental corruption. Yet, laymen are, for the most part, uneducated in the complexities and subtleties of the legal profession and are-

unfamiliar with the discretionary policies of the Justice Department in determining whether or not to prosecute an individual. Laymen selected as grand jurors need the assistance of trained counsel to subpoena witnesses and otherwise obtain testimony and documentary evidence without infringing on personal liberties. Consequently, the notion of the appointed special or independent prosecutor has recently come to be viewed as a solution, as it has been a common practice within many States' systems for many years. Watergate and its aftermath have popularized the concept of a specially appointed independent prosecutor, subject to no governmental allegiance, to guide both grand and petit juries in ferreting out crime in "high places" while still providing a protective shield for citizens against unwarranted and unfounded criminal prosecutions.

The Federal grand juries are to determine "probable cause" that: (1) a Federal crime has been committed, and (2) a particular individual or individuals is or are responsible. To date, Federal legislation has not been enacted to specifically establish a procedure in which a deliberating grand jury may dismiss the Justice Department Attorney and seek out the services of an independent prosecutor for valid reasons. Specific authority for this procedure may already exist, however.

Some commentators dispute these decisions and point to the "blended" nature of power exercised by our three branches of government and to recent cases in the administrative law area which limit the discretionary powers of the Federal Executive. See *"The Special Prosecutor in the Federal System:* A Proposal," *11 Am. Crim. L. Rev. 577 (1973)*. Discretion to enforce a Federal statute does not encompass discretion to thwart its purpose by improper inaction or misfeasance. The Federal Executive may not abuse his discretion by arbitrary and capricious conduct in order to negate the purpose and intent of an Act of Congress. See *Devito* v. *Schultz* 300 F. Supp. 381, 382–384 (D.D.C. 1969) and *Adams* v. *Richardson* Civ. No. 3095–70 (D.D.C. Nov. 16, 1972).

An official of one body of government does have the authority to confer a role upon an individual for another body of government, see *Ex Parte Siebold* 100 US 378 (1879), *United States* v. *Solomon* 216 F. Supp. 835 (S.D.N.Y. 1963), 28 USC 516 (1970), 28 USC 546 (1970), and Article II, Section 2 of the U.S. Constitution. Thus, as long as an appointing judge or legislature does not demand the allegiance of a special prosecutor, conferring such authority would seem to be constitutional. As the Attorney General may issue rules and regulations establishing an in-house special prosecutor for a specific purpose and, be bound by this pronouncement until changed, see *Nixon* v. *United States* 418 US 682 (1974), according to Article, Section 2 of the U.S. Constitution, Congress may at least confer the same power to "the President alone, in the Courts of law, or in the Heads of Departments." Article III, §2.

The Appointments Clause of the U.S. Constitution states that ". . . [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Furthermore, 28 USC 516 (1970) states that "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."

Despite these provisions, in 1972 Judge Richey denied an application in the U.S. District Court for the District of Columbia to appoint an independent special prosecutor for the purpose of investigating the Watergate burglary. He cited the lack of statutory authority and case law authorizing such appointment power in the courts. Moreover, Judge Richey stated traditional arguments to condemn such power as possibly unconstitutional: (1) a violation of prosecutorial discretion within the Federal Executive, and (2) a violation of the Separation of Powers doctrine. Similarly, *United States* v. *Cox* 342 F. 2d 167 (CA5) cert. denied 381 US 935 (1965) stated: ". . . as an incident of the constitutional separation of powers . . . courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."

In 1976, U.S. Supreme Court interpreted the Appointments Clause of the U.S. Constitution with respect to the Federal Elections Commission, see *Buckley* v.

Valeo 424 U.S. 1 (1976). This decision is instructive in that the investigative and informative powers of the FEC, as originally contemplated, did not violate the Appointments Clause even with the unconstitutional makeup of the FEC. The Court stated that the original members of the FEC had the constitutional power "to investigate and be informed."

Congress may under Article III § 2 itself, by legislation, establish a "special prosecutor", or by legislation delegate such power to the Judicial Branch.

6. STANDARD OF PROOF

Prosecution for any serious federal offense is required, by the Constitution, to proceed only on an indictment returned by a grand jury. While historically a grand jury could consider evidence from any source, including facts on statements by the grand jurors themselves, today the grand jury considers only the evidence presented to it through testimony, documents, or hearsay, and evaluates and votes upon the recommendations of the prosecuting attorney.

Generally, an indictment is unassailable. It may not be challenged because of consideration by jurors of hearsay, *Costello* v. *United States*, 350 U.S. 359 (1956), because of consideration by jurors of inadmissible, illegal or unconstitutional evidence, *Lawn* v. *United States* 355 U.S. 339 (1958) because of the insufficiency of evidence to support an indictment; or because exculpatory evidence was withheld from juror consideration.

Some have agreed that indictments should be reviewable so as to determine whether there was legally sufficient evidence to justify indictment, whether the evidence considered was admissable, and whether all exculpatory evidence, including the testimony of the witness-defendant if he requests, was provided. Dismissal would be authorized, under these proposals, if these standards and requirements are not met. Opponents of these proposals state that such new requirements would result in overextended grand jury hearings, in mini-suppression hearings prior to a trail, in interference with grand jury secrecy requirements, and certainly in delay and thus less speedy trials.

Federal law is unclear as to the burden of proof on a federal prosecutor to secure an indictment from a grand jury. To secure an arrest warrant, it is clear that there must be "*probable cause*"—that is facts and circumstances, based on reasonably trustworthy information, sufficient to warrant a man of reasonable caution to believe that the suspect had committed or was committing an offense. See *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). To support a conviction, the fact-finder must be convinced of the defendant's guilt "*beyond a reasonable doubt*"—that is evidence not eliminating every possible doubt, but establishing guilt to a reasonable and moral certainty. *In re Winship*, 397 U.S. 358 (1970).

Until recently, it was assumed that an indictment had to be supported by "*prima facie*" evidence—that is, assuming all reasonable inferences in favor of the government, there is sufficient evidence to support a verdict of guilty. See *Hale* v. *Henkel*, 201 U.S. 43 (1906) citing Addison's Reports of Cases (Phila. 1800). Recently, however, the Supreme Court has indicated that a reasonable belief of "probability of guilt" is all that is required, *U.S.* v. *Calandra* 414 U.S. 338 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665 (1975) (both dictum) as compared to the more stringent "prima facie" standard.

While various scholarly groups, such as the American Law Institute, have suggested that an indictment should be based only on competent and admissible evidence, and not hearsay or excludable evidence (such as illegally seized evidence or illegally obtained admissions), the Supreme Court has held that hearsay evidence can be properly used in the grand jury room, *Costello* v. *United States*, 350 U.S. 359 (1956) and that illegally obtained evidence presented to the grand jury could not be challenged, *United States* v. *Blue*, 384 U.S. 251 (1968) and *Lawn* v. *United States*, 355 U.S. 339 (1958). More recently, some courts, particularly in the Second Circuit, have held that deliberate use of hearsay or inadmissible evidence, where other valid evidence is available, is unlawful and may result in dismissal of an indictment. *United States* v. *Arcuri* 282 F. Supp 347 (EDNY 1968), aff'd 405 F2d 691 (2d Cir 1968) *cert denied* 395 U.S. 913 (1968); *United States* v. *Gramolini*, 301 F. Supp 39 (D.R.I. 1969).

In response, some have suggested that "reliable" hearsay should be admissible before the grand jury (as hearsay rules are becoming less stringent in any event as a result of the new Federal Rules of Evidence) but that unconstitutional evidence should be inadmissible. In any event, it is argued pre-trial review should be limited not to what was or was not introduced but only to an inquiry as to whether, considering only the properly admissible evidence, there was sufficient proof to support return of an indictment.

While the Constitution presently requires exculpatory evidence to be made available to a defendant on trial, *Brady* v. *Maryland*, 373 U.S. 83 (1963), there is no such requirement on a prosecution as to presentation of evidence to a grand jury. The American Law Institute, among others, has recommended that such evidence, including evidence from the defendant, be presented to the grand jury. Opponents argue that only a prima facie case, and not an adversary case, is involved in grand jury deliberations. Exculpation is for trial. In response, proponents argue that allowance of such evidence would eliminate fruitless trials and that a criminal trial is not truly adversary. A prosecutor is not to be a blind proponent for conviction but rather an impartial seeker of justice. Requiring him to present such exculpatory evidence more truly conforms to his "government agent" impartial function.

Memorandum from : Martin H. Belsky and Alfred M. Nittle

Alleged Grand Jury Abuses

I. GRAND JURY PROCESS AND THE RIGHTS OF FREE SPEECH, PRESS, ASSOCIATION, AND ASSEMBLY

The freedoms of speech and press, and the rights of the people peaceably to assemble and to petition the Government for a redress of grievances, are fundamental constitutional rights[1] preserved to maintain the opportunity for free political discussion, so that government is responsive to the will of the people and so that changes to our political system are obtained by peaceful means.[2]

Not all speech is "protected," but prior restraint upon even speech unlawful or punishable after utterance, is presumptively invalid.[3]

The grand jury subpoena is not intended to serve a punitive function, or be an instrument designed to prevent or forestall the commission of crime.

Rather, the subpoena is a notice that the attendance of a particular witness or the production of documents is required by the grand jury to assist the jury in its function of determining whether a crime has been committed and to ascertain the identity of the offender. Within recent years, however, a number of persons have expressed fears that grand jury processes are being misemployed not to investigate crimes but rather to suppress "political dissent." [4]

A. The 53 Vietnam Veterans Against the War (VVAW)

In *Beverly* v. *United States*[5] four grand jury witnesses, members of the *VVAW*, claimed they had been placed under subpoena to prevent their participation in a demonstration at Miami Beach on July 10–13, 1972, during the Democratic National Convention. Donner and Lavine,[6] commentators, writing for *The Nation*, suggest that the prosecution was a GOP plot to associate McGovern with more radical opponents of the war.

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[1] *De Jonge* v. *Oregon*, 299 U.S. 353, 364 (1927).
[2] Id., at 365. See also *Buckley* v. *Valeo*, 424 U.S. 1 (1976).
[3] *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963). See also *Carroll* v. *Princess Anne*, 393 U.S. 175 (1968).
[4] See, for example, American Civil Liberties Union, *Annual Report 7/71–6/72*, at 6; Boudin, *The Federal Grand Jury*, 61 Geo. L.J. 1 (1972); Conyers, *Grand Jury: The American Inquisition*, Ramparts, August–September 1975; Cowan, *The New Grand Jury*, N.Y. Times (Magazine), Apr. 29, 1973, at 17; Donner and Cerruti, *The Grand Jury Network*, The Nation, Jan. 3, 1972, at 5; Donner and Lavine, *From the Watergate Perspective: Kangaroo Grand Jury*, The Nation, Nov. 10, 1973, at 519; Elberg, *Federal Grand Jury: A Misunderstanding*, The Retainer (Phila. Bar A.), Oct. 8, 1976, at 2; *Fine Federal Grand Jury Investigation of Political Dissent*, 7 Harv. Civil Rights-Civil Liberties L. Rev. 432 (1972); Frankel and *Naftalis, The Grand Jury, The New Leader* (Special Issue), Nov. 10, 1975, at 19; Goodell, *Where Did the Grand Jury Go?*, Harper's, May 1975, at 14; Harris, *Taking the Fifth*, New Yorker, Apr. 5, 12, 19, 1976; Popkin, *The Scholar Invokes His "Privilege,"* Trial, January–February 1973, at 21; Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 Amer. Crim. L. Rev. 701 (1972); Silver, *Not So Grand Jury?*, Commonweal, Dec. 14, 1973, at 288; Solowey, *The Grand Jury and Post-Watergate America*, Trial, November–December 1974, at 32; Tiger and Levy, *The Grand Jury as the New Inquisition*, 1971; Weisman and Postal, *The First Amendment as a Restraint on the Grand Jury Process*, 10 Am. Crim. L. Rev. 1671 (1972); Winograd and Fassler, *The Political Question*, Trial, January–February 1973, at 16.
[5] *Beverly* v. *United States*, 468 F. 2d 732 (5th Cir. 1972).
[6] Donner and Lavine, *From the Watergate Perspective: Kangaroo Grand Jury*, The Nation, Nov. 19, 1973, at 530.

The VVAW obtained parade permits to conduct "anti-war" demonstrations at Miami Beach in July, during the Democratic National Convention. Thereafter, the United States Attorney, giving short notice, issued subpenas, on July 7, 1972, requiring 23 members of the VVAW to appear before a grand jury in Tallahassee on July 10, the opening date of the Democratic National Convention.

The reason for the issuance of subpoenas was that the Government had been made aware of meetings of members or associates of the VVAW in May of 1972 at Gainesville, Florida, where plans were allegedly laid for disrupting the *Republican* National Convention, to be held in Miami Beach during the week of August 21.

Four of these witnesses (the appellants in *Beverly*, hereinafter referred to as appellants) requested an adjournment of their July 10 appearance before the grand jury so that they could take part in the scheduled demonstrations, at the Democratic Convention. Their request was refused by the United States Attorney; and the U.S. District Court denied a request for a temporary restraining order on July 10 in an unreported opinion.[7]

This denial of an extension for a brief period, July 10 to 13, was despite the fact that the VVAW did not intend to disrupt the Democratic National Convention. The alleged plan to disrupt the Republican National Convention, the subject of the grand jury investigation, was not scheduled until August 21.

When called, the appellants refused to testify on Fifth Amendment grounds. They persisted in their refusal, even after grant of immunity on July 13, alleging illegal electronic surveillance by the Government. The Government made no response, on the ground that no sufficient showing had been made by the witnesses to warrant a response, and was sustained by the District Court. Accordingly, the witnesses were held in contempt for their refusal and were committed to confinement for the remaining life of the grand jury (about 12 months) or until each testified.

On July 13, the grand jury returned an indictment against six other of the 23 subpenaed witnesses. Dubbed by the news media "The Gainesville Six," they were charged with conspiring to attack police stations, police cars, and stores in Miami Beach with automatic weapons, firearms, and incendiary devices, to fire lead weights, "fried" marbles, ball bearings, "cherry" and smoke bombs at police by means of wrist rocket sling-shots and cross-bows, all to take place at Miami Beach, Florida, on various dates between August 21 and 24, 1972, during which the Republic National Convention was scheduled to take place. Two of the original four VVAW appellants were named as "coconspirators."

Pending their appeal from the contempt indictment, the four original VVAW appellants were released on bail by Mr. Justice Douglas, after the Court of Appeals denied an appeal as frivolous.

The Court of Appeals rejected the First Amendment claims of the appellants. The return of indictments against the Gainesville Six, the court said, was evidence that the grand jury was called together for the investigation of "serious offenses" and not simply to keep the appellants and witnesses idly waiting around. The court's First Amendment holding, however, was mooted by the court's reversal and vacation of the contempt order on the ground that the United States had erroneously failed to affirm or deny the appellants' allegation of unlawful electronic surveillance of counsel.

The six were later acquitted on all counts by a trial jury in September. Many of the VVAW witnesses who had been subpoenaed to appear during the period of the Democratic National Convention were never called before the grand jury.

B. Inquiry into the Black Panther, a News Weekly

In *Bursey* v. *United States*[8] the Ninth Circuit distinguished the Supreme Court's contemporaneous decision in *Branzburg* v. *Hayes*[9] and on First Amendment grounds, reversed the criminal contempt conviction of two grand jury witnesses. The court remarked: "Today, courts across this country are faced

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[7] *VVAW* v. *Kleindienst*, TCA–1843 N.D.Fla., July 10, 1972.

[8] *Bursey* v. *United States*, 466 F. 2d 1059 (9th Cir. 1972), *rehearing denied*, 1972.

[9] 408 U.S. 665 (1972). *Bursey* was declared consistent with *Branzburg* in the circuit's opinion on a petition for rehearing of the case, 466 F. 2d at 1090. See also *In re Lewis*, 377 F. Supp. 297 (C.D.Cal. 1974). See also, *Farr* v. *Pritchess*, 522 F. 2d 464 (9th Cir. 1975), *rehearing denied*, 1975, and *United States* v. *Liddy*, 478 F. 2d 586 (D.C. Cir. 1972) (refusals at trial); *Carey* v. *Hume*, 492 F. 2d 631 (D.C. Cir. 1974), *rehearing denied*, 1974, *petition for cert. dismissed*, 94 S. Ct. 2654 (1974).

with an increasing flow of cases arising out of grand jury proceedings concerned with the possible punishment of political dissent. It would be a cruel twist of history to allow the institution of the grand jury that was designed at least partially to protect political dissent to become an instrument of political suppression." [10]

Bursey involved a grand jury investigation initiated following a speech given by David Hilliard, Chief of Staff of the Black Panther Party, during a "Moratorium Day" demonstration in November of 1969 in the course of which he said, "We will kill Richard Nixon." Following its delivery, the speech was printed and reprinted in November and December issues of *The Black Panther*, a weekly publication and official organ of the *Black Panther Party*. Hilliard's statement about killing the President was also quoted in another article published in a December issue of the weekly. The investigation began with an effort to determine the identity of the persons, if any, to whom Hilliard referred when he said, "We" will kill the President.

Although the grand jury inquiries began with matters involving a potential presidential assassination and assaults and threats to assassinate, it expanded to include an exploration of potential interference with the Armed Forces and a general probe of the affairs of the Black Panther Party.

In the course of the inquiry, Bursey and Presley, members of the staff of *The Black Panther*, were held in contempt for their refusal, after grants of immunity, to answer a number of questions, most of which related generally to the publication and distribution of the Party's newspaper. They sought to reverse their convictions on the ground that the inquiries violated their First Amendment rights.

On appeal, the Government contended that the First Amendment was not available to witnesses as a basis for avoiding an answer to the grand jury's questions. The Court of Appeals disagreed. Where First Amendment interests are involved, it is not enough, said the court, that the questions have some vague [11] relevance to the criminal conduct under investigation. The court, in its opinion on petition for rehearing, said, "the grand jury [is] to establish that there was a 'substantial connection' between the information sought and the criminal conduct which the Government was investigating before the witnesses could be held in contempt for refusing to answer questions that cut deeply into First Amendment rights." [12]

In applying this reasoning, the court analysed the four categories of questions which the defendants had refused to answer and for which they had been held in contempt, and upheld the rulings of the District Court only as to the first set of questions.

The first category of questions concerned the identity of members of the Party's Central Committee and contacts between Panthers and foreign governments. These questions were held to be proper on the theory that the Government was seeking to determine whether, in saying "We will kill Richard Nixon," Hilliard may have used the word "we" editorially, or in reference to specific persons, including those who may have been members of the Party. The Court observed that the Government had not sought to identify all Party members but only the higher echelon of the Party with whom Hilliard would have been likely to have had close communication. This limitation made the questions reasonable, for the Government had not established that the Party possessed such a binding hierarchical structure as would support the conclusion that the words of the leader necessarily reflected the views of its members.

On the other hand, the court took the position that no sufficient foundation had been laid to establish the materiality of questions seeking the identity of persons generally involved in the publication and distribution of the Panthers' newspaper and pamphlets; of those concerning the identity of persons whose photographs were published in LIFE magazine, present in the shop in which the Panther paper was printed. Almost all of the persons in the photographs were members of the Party, although their names had not been revealed. Finally, the court found that the Government had not justified inquiry into the financing of funds for national or international journeys of Party members. "When First Amendment interests are at stake," the court concluded, "the Government must use a scalpel, not an axe." [13]

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[10] *Bursey* v. *United States*, supra at 1089.

[11] Concurring in *Branzburg* v. *Hayes*, 408 U.S. at 710. Mr. Justice Powell spoke of a "remote and tenuous" relationship to the subject of investigation.

[12] 466 F. 2d., at 1091.

[13] 466 F. 2d, at 1088.

C. The International Committee to Defend Eldridge Cleaver

While in *Bursey* the court dealt with the issue whether, when First Amendment rights are at stake, questions asked of a grand jury witness must have some degree of relevance to the subject under investigation, or, as the court held, a "substantial connection" with that subject, *Levinson* v. *Attorney General*[14] raised the question whether, as a precondition of inquiry into speech or speech-related activities lawful on their face, it is required that, on demand, the Government show the court that there is a basis for believing that there is some *potential, or some possibility*, that criminal activity may be exposed—not necessarily a preliminary showing of sufficient grounds for believing a crime has been committed or that there is a basis for indictment, but only whether the prosecution is possessed of some information, allegation, or evidence which reasonably suggests that if investigation is made on the subject there is a *possibility* criminal activity may be found.

Levinson and Schwerner were, respectively, the chairman and treasurer of an organization entitled the *International Committee to Defend Eldridge Cleaver*, a widely known leader of the Black Panther Party. An advertisement, by the organization in a November 1968 issue of the New York Times, alleged that certain invalid and unconstitutional proceedings were being taken against Cleaver, and the organization sought support and financial contributions for his legal defense.

Approximately one year following publication of the advertisement, Levinson and Schwerner were served with subpoena *duces tecum* ordering them to appear before a federal grand jury sitting in Philadelphia to investigate possible mail fraud violations.

Following service of the subpoenas, Levinson and Schwerner sought declaratory and injunctive relief, opposing the production of evidence which would tend to reveal the names of contributors, associates, or collaborators, other than employees of the organization. They also urged that, in view of the involvement of First Amendment rights, the Government had to make some showing of "probable cause of mail fraud" before requiring their appearance or the production of records.

They sought to restrain the grand jury investigation during the pendancy of their challenge and a final judgment declaring that they need not appear or produce records, or, in the alternative, that they need not do so until the Government had made a showing of probable cause to the court.

In rejecting the plaintiffs' claim that, as a precondition of inquiry, the Government is required to make a showing of "probable cause" when First Amendment rights are at issue, the court agreed that the plaintiffs were entitled to have the scope of the grand jury questioning limited to some extent, but only to the extent that the plaintiffs were not to be questioned concerning the truth or falsity of any statements or representations made in the advertisement.

The question raised by *Levinson* is whether the court should have required some showing (even if *in camera*[15]) of a reasonable basis for this incursion upon the liberties of the plaintiffs.

On the service of a subpoena *duces tecum*, as in *Levinson*, there is a potential collision with the citizens freedom of movement, protected by the Fifth Amendment,[16] as well as the protections of the First and Fourth Amendments.[17]

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[14] *Levinson* v. *Attorney General*, 321 F. Supp. 984 (E.D. Pa. 1970).

[15] In justification of the prosecution's effort to obtain handwriting exemplars of a grand jury witness, one court suggested that an affidavit of relevance might be presented to the court *in camera*, even though Rule 6(e) of the Fed. R. Crim. Proc. does not require *in camera* presentation. *In re Grand Jury Proceedings*, 486 F. 2d 85 (3d Cir., 1973) (commonly described as *Schofield I*).

[16] See *Kent* v. *Dulles*, 357 U.S. 116, 125 (1958); *Edwards* v. *California*, 314 U.S. 160, 163 (1941); *Williams* v. *Fears*, 179 U.S. 270, 274 (1900); and *Allgeyer* v. *Louisiana*, 165 U.S. 578, 589 (1897).

[17] The First Amendment involvement in the compulsions of a grand jury subpoena was a subject of discussion in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). Fourth and Fifth Amendment involvements were the subject of discussion in *United States* v. *Dionisio*, 410 U.S. 1 (1973), *United States* v. *Mara*, 410 U.S. 19 (1973) (which respectively involved directions to grand jury witnesses to produce voice and handwriting exemplars). There is *dicta* in the three decisions which would seem to support the propriety of the type of demands made by the plaintiffs in *Levinson*. In cases subsequent to Levinson, the Third Circuit relaxed the rigidity of attitude which the District Court in that case displayed toward the imposition of preliminary restraints on the compulsions of grand jury subpoenas. See *Schofield I*, supra note 15, and *Schofield II*, *In re Grand Jury Proceedings*, 507 F. 2d 963 (3d Cir. 1975). See also *Robert Hawthorne, Inc.* v. *Director*, 406 F. Supp. 1098 (E.D. Pa. 1975). As a matter of practice before those courts which have not required an affidavit of relevance, U.S. Attorneys in some cases are voluntarily submitting affidavits showing the reasonableness of the prosecution's demand upon grand jury witnesses. See, for example, *United States* v. *Doe*, 457 2d 895 (2d Cir. 1972).

At the conclusion of its labors, the grand jury before which Levinson and Schwerner had been subpoenaed to appear, returned no indictment against them or the Committee.[18]

II. USE OF GRAND JURY TO GATHER EVIDENCE IN PREPARATION FOR TRIAL OF A PENDING INDICTMENT

It is improper to use grand jury process[1] for the sole or "dominating" purpose of preparing an already pending indictment for trial.[2]

It is often difficult, if not impossible, to determine what is the precise purpose of motivation of the prosecution in particular instances.[3]

Illustrative of the dilemma in which the court and the defendant frequently find themselves is the case of Daniel Ellsberg.[4]

Under indictment in California for unlawful possession and conversion of classified documents, and for conspiring with Anthony Russo and others unknown "to defraud the United States" in the unlawful dissemination of classified studies (the Pentagon papers), Ellsberg was scheduled to go to trial in 6 to 10 weeks, when the Government convened another grand jury, this time in Boston. Ellsberg charged this new jury was convened to gather evidence relevant to his trial in California. He sought a protective order to bar the Boston grand jury from acting.

The Government candidly admitted that the investigation in Boston might turn up some evidence relevant to the California proceedings, but claimed that its "principal purpose" was to ascertain whether other offenses were committed and affirmed that its purpose was not to extract testimony from witnesses for use in Los Angeles. It also declared that the Boston grand jury was not foreclosed from inquiring into events which "suggest other aspects" of the conspiracy alleged in the California indictment or "separate conspiracies involving Daniel Ellsberg as a central figure."

Ellsberg's claim, said the court, could be tested only by a comprehensive review of the Boston grand jury minutes, but rules regulating grand jury secrecy, particularly Rule 6(e) of the Federal Rules of Criminal Procedure, gave him no right to disclosure except upon a showing of grounds for dismissal of the indictment. The Jencks Act (18 USC 3500) made clear that a defendant had no right

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[18] Information received by telephone from the Clerk's office, U.S. District Court, E.D.Pa. (Record check for period 1969–1975).

[1] Present federal rules of criminal procedure place no restraint upon the prosecutor's authority to issue a "grand jury subpoena." See Fed. R. Crim., p. 17. The subpoena process which the prosecutor utilizes is that of the court. *In re National Window Glass Workers*, 287 F. 219, 225 (N.D. Ohio 1922). It is not the process of the prosecuting attorney nor is it the process of the grand jury. The subpoena commands that witness to come, not before the grand jury, but before the court to give evidence to the grand jury. *Camarota v. United States*, 111 F. 2d 243, 245 n. 5 (3d Cir. 1940). See also *In re Grand Jury Proceedings*, 486 F. 2d 85, 90 (3d Cir. 1973).

[2] The Supreme Court has not expressly and squarely ruled upon this point. Cf. *United States v. Procter and Gamble Co.*, 356 U.S. 677 (1958) (use of grand jury transcript to prepare civil case for trial). Generally, lower federal courts have followed. *In re National Window Glass Workers*, 287 F. 219 (N.D. Ohio 1922). See also, *In re Santiago*, 533 F. 2d 727 (1st Cir. 1976); *United States v. Sellaro*, 514 F. 2d 114 (8th Cir. 1975), cert. denied, 95 S. Ct. 241 (1975); *United States v. Del Toro*, 513 F. 2d 656 (2d Cir. 1975); *United States v. Bransch*, 505 F. 2d 139 (7th Cir. 1974); *Beverly v. United States*, 468 F. 2d 732 (5th Cir. 1972); *United States v. George*, 444 F. 2d 310 (6th Cir. 1971); *In re Russo*, 448 F. 2d 369 (9th Cir. 1971); *United States v. Sweig*, 441 F. 2d 114 (2d Cir. 1971), *cert. denied*, 403 U.S. 932 (1971); *United States v. Dardi*, 330 F. 2d 316 (2d Cir. 1964), *cert. denied*, 379 U.S. 845 (1964); *In re April 1956 Term of Grand Jury*, 239 F. 2d 263 (7th Cir. 1956) (use of documents subpoenaed by a grant jury for preparation of civil tax cases); *United States v. Finazzo*, 407 F. Supp. 1127 (E.D.Mich. 1975); *Hawthorne, Inc. v. Director*, 405 F. Supp. 1098 (E.D.Pa. 1976) (use of grand jury in aid of civil investigation); *United States v. Kovaleski*, 406 F. Supp. 267 (E.D. Mich. 1976); *United States v. American Radiator*, 272 F. Supp. 691 (W.D.Pa. 1967) (Use of civil process in anti-trust action to give discovery in criminal case); *In re Grand Jury Investigation (General Motors Corp.)*, 32 FRD 175 (S.D.N.Y. 1963), *appeal dismissed*, 318 F. 2d 533 (2d Cir. 1963), *cert. dismissed*, 375 U.S. 802 (1963); *United States v. General Electric Co.*, 209 F. Supp. 197 (E.D.Pa. 1962) (use of grand jury testimony to prepare civil damage action); *United States v. Pack*, 150 F. Supp. 262 (D.Del. 1957); *Application of Iaconi*, 120 F. Supp. 589 (D. Mass. 1954); *United States v. O'Connor*, 118 F. Supp. 248 (D.Mass. 1953) (use of administrative subpoena in aid of criminal prosecution); *Application of Texas Co.*, 27 F. Supp. 847 (E.D.Ill. 1939); *In re Grand Jury Proceedings*, 4F. Supp. 283 (E.D.Pa. 1933).

[3] Generally, see 8 Moore's Federal Practice 6.04 at 6–50, 6–51 (2d ed. 1972); and *Abuse of Power*, Staff Report of the Code Committee of the New York State Assembly, May 1976, at 26.

[4] *United States v. Doe*, 455 F. 2d 1270 (1st Cir. 1972).

to compel pre-trial disclosure of grand jury minutes. Under the circumstances, the most that the court could do, it said, was to make the transcript available to the court in California for such action as it may take.

This case demonstrates that the Government has process, available to obtain pre-trial discovery, including that of defendant's witnesses and of their testimony, and the defendant in a criminal case is not accorded an equal and similar privilege for the discovery of evidence.

That the employment of the grand jury subpoena power may result in the unconscionable oppression and harassment of a defendant and his witnesses as should be "is" *In re National Window Glass Workers*, 287 F. 219 (N.D.Ohio 1922), a Sherman Act prosecution instituted in the Southern District of New York involving some 90 defendants charged with price fixing in violation of the Sherman Act.

In *Glass Workers*, after the indictment was returned, after a grand jury investigation, the prosecutor began another grand jury investigation in New York for the admitted purpose of examining witnesses in advance of and in preparation for the trial of this indictment, to obtain evidence to be used on the trial, and to comply with a prior order of the court for a bill of particulars. The District Court quashed the subpoenas on motion of the defendants. The prosecutors then instituted a grand jury investigation in Ohio, issuing subpoenas requiring the attendance of substantially the same witnesses, and with subpoenas *duces tecum* requiring the production of substantially the same documents as were involved in the New York investigation.

Although it accepted the 'good faith" assertion of Government counsel that it was their purpose to ask for an indictment in Ohio as a result of this grand jury investigation, the Ohio court nevertheless found upon all the facts that 'the dominating purpose" of the investigation was to examine witnesses in advance of trial and to obtain documents and evidence for use in the trial of the New York indictment, and vacated the subpoenas until the Government either tried the defendants on the New York indictment, or stipulated their intention to try the defendants first in Ohio upon any new indictment that may be obtained.

III. GRAND JURY ABUSES—PREJUDICIAL REPORTS

"Grand jury reports" are generally defined as statements of a grand jury on matters within its jurisdiction, but not necessarily including the recommendation of indictments.[1] Reports which arouse particular concern are those containing allegations which defame particular persons or defame persons with an identifiable class. Such reports often involve charges of noncriminal or of criminal misconduct. They may be issued simultaneously with the return of indictments or independently.

Grand jury reports which defame individuals, groups, or classes of persons adversely affect the rights of privacy and reputation. Moreover, reports which do recommend charges may prejudice the trial of an accused as they comment upon events that are the subjects of an indictment.

As a product of a non-adversary proceeding, grand jury reports have a very limited degree of reliability. The grand jury's conclusions, declarations, state-

[1] In some instances a grand jury "report" is also described as a "presentment." This confusion in terminology was a subject of comment in the case of *Application of United Electrical Radio and Machine Workers*, 111 F. Supp. 858, 863 (S.D.N.Y. 1953) (hereinafter referred to as the UE case) which noted that a document handed up by the grand jury in that case was, "strictly speaking," not a presentment, "since it did not accuse with the intent that anyone should be put to trial." But see *In re Grand Jury, January 1969*, 315 F. Supp. 662 (D.Md. 1970). Both presentments and indictments have been said to include accusation of crime which are presented to the court. Thus, to some, all presentments are reports, but not all reports are presentments. However, the terms "presentment" and "indictment" are often regarded as synonymous. In its broader sense, the term "presentment" has been employed to include an indictment. See *Bouvier's Law Dictionary* at 2674 (3d rev.), and Circuit Judge Wisdom's comprehensive exposition in *United States v. Cox*, 342 F. 2d 167, 185–190 (5th Cir. 1965) (concurring especially), *cert. denied*, 381 U.S. 935 (1965). More precisely, a presentment is said to differ from an indictment in that it lacks the necessary technical form. It is notice taken b ythe grand jury of an offense on their own knowledge or upon the evidence before them without having any bill of indictment laid before them by the public prosecutor. An indictment, on the other hand, is a formal accusation in writing delivered to the grand jury by the public prosecutor upon which the grand jury is called to act and upon which it may endorse its findings of a true bill," "or" "reject it as not found," "or" "not a true bill." "or" "ignoramus." See Mr. Justice Fields' *Charge to Grand Jury*, 2 Sawy. 667, 30 Fed. cas. 992 (1872). [Portions of this charge have been quoted with approval in *Ex parte Bain*, 121 U.S. 1, 10–11 (1887), and *Hale v. Henkel*, 201 U.S. 43, 63 (1906).]

ments, or "findings" have the appearance, but not the reality, of being the product of a judicial proceeding with all of the due process safeguards normally associated with it, when, in fact, they do not!

The reliability of a grand jury report is questionable not only because of its *ex parte* nature, but also because the report is not necessarily the grand jury's own. The report may be of political origin and overtones, and almost always expresses the personal preferences of the public prosecutor, or of the court.

Hammond v. *Brown*

The misapplication of the reporting power to the deprivation of constitutional rights, is illustrated in *Hammond* v. *Brown*,[2] involving the tragic events occurring on the weekend of May 1–4, 1970, at Kent State University, where four students were shot and killed and nine wounded by Ohio National Guardsmen.

In 1970, a special grand jury was convened under Ohio law, pursuant to a direction of the Governor to the State's Attorney General to conduct an investigation of acts illegal or criminal in themselves or leading to or inducing illegal or criminal acts associated with the "campus unrest" that then took place. This grand jury returned 30 true bills of indictment against 25 persons. 43 offenses were covered in the bills, including charges of riot, incitation to riot, arson, assault, and malicious injury to property. These indictments were returned against persons who appear in some way to have participated in the riots, but did not include persons acting in any official capacity with the State or Federal Governments.

Together with the indictments, the grand jury made a report in writing to the court, headed "Report of the Special Grand Jury," although in his charge to the grand jury, the judge had not authorized or directed the filing of any such report. Testimony revealed, however, that in a discussion between the judge and the grand jury's foreman, which took place in chambers early in the sessions, the judge had indicated that the issuance of reports by grand juries was a common practice in the State of Ohio, and had suggested that, in view of the seriousness of what had occurred, a report should be filed with the grand jury indictment. The report was filed and made public, evidently with the consent and approval of the state court, and received widespread publicity.

Following the grand jury's return, two actions were instituted in the United States District Court which sought to bar the prosecution of those indicted and to expunge the written report which accompanied the indictments. The two cases, *Hammond* and *Adamek*, were consolidated for trial and decision.

The plaintiffs in *Hammond* included six of the indicted defendants, and others described as "concerned members" of the Kent State community. The plaintiffs in *Adamek* were 32 professors of the federal university, one of whom had been indicted for inciting to riot. In both federal actions the complaints were founded on an alleged deprivation of civil rights under color of state law (42 U.S.C. 1983).

A principal contention of the plaintiffs in both cases was that in the "making" of indictments, together with the report, the state's legal machinery had been employed in bad faith with the purpose of inhibiting free speech. It was also claimed that in issuing its report, which incorporated findings and conclusions of fact and law with respect to events in charges set forth in the indictment, the grand jury had violated the Fifth (and Fourteenth) Amendment rights of the indicted persons to a fair trial.

Indeed, the court found that the findings and conclusions in the grand jury report coincided with essential elements of the offenses charged in the indictments. Although in the performance of its role as the accusing body the grand jury makes findings of indictments based on "probable cause," it was apparent, the court indicated, that in returning the report the special grand jury had also assumed the role of the trier of fact. This was evident, for example, in the report's finding that the events of each of the four days of the campus disturbances constituted a riot, a basic and essential element of at least 27 of the 43 offenses charged. The report likewise made a specific finding of arson, which was the subject of five offenses charged. In addition, words connoting guilt of participants in the described incidents occurred throughout the findings.

It was the court's opinion that, in rendering written findings, the special grand jury took over the duty of a petty jury. The continued existence of the

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[2] See *Hammond* v. *Brown*, 323 F. Supp. 326, 330 (N.D.Ohio 1971), aff'd 450 F. 2d 480 (6th Cir. 1971).

report in court files and in the court's journal, it was said, irreparably injured the right of each of the indicted accused to a fair trial, a right protected by the due process clause. The court therefore held that the continued vitality and official status of the grand jury report deprived indicted plaintiffs of rights arising under the Constitution in violation of 41 U.S.C. 1983.

A constitutional infringement was also found present with respect to non-indicted plaintiffs. Faculty members had been charged by the report with complicity in producing the tragic consequences of the shootings in May, in that they intended to inflame an already tense situation. While not identified by name, they were identified as a group of 23 who had disseminated a circular on campus dated May 3, 1970, and signed, "23 Concerned Faculty, Kent State University." Their names, however, were known to the University administration. The court concluded that such charges, bordering on criminal accusations against 23 persons identifiable as members of a class, impaired and injured their protected right of free expression.

The First Amendment rights of other faculty members, also plaintiffs in the actions, but not within the identifiable class of 23, were also found to be violated. condemnatory passages in the report such as those which spoke of a "small minority of the total faculty" who overemphasized dissent and who departed from "all normal behavior and expression," were held to impair academic freedom of expression.

Failing, however, to find bad faith on the part of the state or its agents in bringing about the prosecutions, and finding no showing of facts in the pre-trial stage of the prosecution that would clearly prove an immediate injury to the right of a fair trial, the District Court held that it lacked jurisdiction to stay the state court prosecutions. It also determined that there was irreparable injury and, in the exercise of its "pendent jurisdiction," that the report was issued illegally and without authority under Ohio law. Accordingly, the court ordered the report to be expunged.

Application of United Electrical, Radio and Machine Workers, et al. (UE)

While *Hammond* involved the expungement of a state grand jury's report which had been returned together with indictments, the *UE* case involves the expungement of a federal grand jury's report which had been returned without indictments.

In this case, two unions, the UE and the American Communications Associations (the ACA), and their principal officers, sought expungement of a federal grand jury report, principally on two grounds: (1) that the report disclosed matters occurring before the grand jury in violation of its oath of secrecy and in violation of the secrecy provisions of Section 6(e) of the Federal Rules of Criminal Procedure, and (2) that the report was on a subject over which the grand jury had no jurisdiction.

In 1952, a federal grand jury was investigating possible violations of the conspiracy and perjury laws "by various leaders of unaffiliated unions" because of possible improper filing of non-communist affidavits with the National Labor Relations Board (NLRB). No indictment resulted from these deliberations, but the grand jury did return a report, which was described as a "presentment."[3]

The report declared that, the grand jury had received evidence that a number of responsible officials of some unaffiliated unions had long histories of communist membership and activity. Thereafter, the grand jury subpoenaed 13 officials (not naming them) of the UE, ACA, and two other unions, but these unnamed officials invoked their privilege against self-incrimination when asked about the non-communist affidavits which they had filed with the NLRB.

The report concluded that the filing of the affidavits was a subterfuge to circumvent the requirements of the Labor-Management Relations Act. Further, the grand jury recommended that the NLRB revoke the certification of the unions involved, and suggested that the Congress consider an amendment of the Act which would require union officials to waive their constitutional protection against self-incrimination when taking the oath.

This report received widespread publicity, affecting specific individuals. Although the names of the 13 union officials who had testified before the grand jury had not been specifically identified in the report, their names appeared in articles published in newspapers throughout the country and it was undenied

[3] Judge Weinfeld declared that the document was not, strictly speaking, a "presentment," since it did not accuse with the intent that anyone should be put to trial. 111 F. Supp. at 863.

that this information was furnished to the press by the foreman of the grand jury, the Special Assistant to the Attorney General, and the United States Attorney. The court stated that, in practical terms, the result achieved was the same as if the report had identified each of them:

"And the accusation, coming as it does, from a quasi-judicial body which occupies a position of respect and dignity in the community, carries greater weight than a similar charge from a private person. The widespread publication of the charges and the identification of petitioners as the offenders subjected them to public censure to the same degree as if they had formally been accused of perjury or conspiracy. At the same time it deprived them of the right to defend themselves and to have their day in a Court of Justice—their absolute right had the Grand Jury returned an indictment." [4]

It was District Judge Weinfeld's explicit holding that the issuance of the report in question was (1) beyond "the power" of the grand jury and (2) in violation of the secrecy requirement. Accordingly, he ordered its expungement.

The court evidently made no ruling on whether or not the constitutional rights of the plaintiffs had been violated. The court reached its result not because the Bill of Rights required it, but because the grand jury lacked "authority" to exercise the reporting power. Yet, the court said it was led to hold as it had on the basis of "constitutional considerations, the Federal Rules of Criminal Procedure, persuasive state authority, public and private interests." [5]

The "constitutional considerations" was the doctrine of separation of powers and not the Bill of Rights. The court took the position that, in seeking to advise the NLRB and the Congress, the grand jury was trespassing upon the executive and legislative "powers."

The Federal Grand Jury is an appendage of the court, within whose jurisdiction it sits. As such its jurisdiction is coextensive with the court's and cannot exceed it. And if the court is without power to advise the legislative and executive branches, so is the Grand Jury.

It may be said that the Grand Jury's function is to determine whether there is enough evidence before it to support the charge of crime and so to create a "case or controversy" which then must be turned over to the court for trial and final determination. If there is, the Grand Jury returns an indictment; if there is not, it remains silent. Once having determined that the evidence is insufficient, its function ends. It may not then issue a report based upon information derived during the course of its secret inquiry, directed to the executive and legislative branches, which touches upon matters within their exclusive authority. The Grand Jurors, like the members of the judiciary, are not accountable to an electorate. Their hearings, being secret, are not amenable to informed evaluation by the public and are unsuited to make the determination which our Constitution has allotted to the executive and the legislature.

Judge Weinfeld continued that as it came to us in colonial days and as understood at the time of the adoption of the federal Constitution, the grand jury served two essential functions: (1) to accuse those believed to have violated the laws and to bring them to trial; and (2) to protect the citizen against unfounded accusations of crime, whether by public officials or by private citizens. The issuance of such reports as were rendered in this case would run counter to these historic functions.[6]

The purposes of the oath and of the secrecy rule are manifold. But in the context of this case the paramount purpose is the protection of those who are under investigation from irreparable damage if no indictment is found; conversely, if an indictment is returned, from possible prejudice upon the trial. Protection of those against whom the prosecution cannot in *ex parte* proceedings make out a sufficient case to warrant indictment is defeated when the fact of suspicion and the proceedings had thereon before the Grand Jury are given widespread publicity in a report.[7]

In his examining of the precedents, Judge Weinfeld found no Supreme Court decision on point [8] but did find many state court decisions. By the "great weight

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[4] 111 F. Supp. at 861.
[5] 111 F. Supp. at 869.
[6] 111 F. Supp. at 864–5.
[7] 111 F. Supp. at 866.
[8] 111 F. Supp at 868. But, as Judge Weinfeld noted, he had discovered (as of the time he wrote) one Supreme Court decision in which a reference to grand jury reports had been made. That was the case of *In re Oliver*, 333 U.S. 257, 264 (1948), in which Mr. Justice Black, author of the majority opinion, had said by way of *obiter dicta*, "Grand juries investigate, and the usual end of their investigation is either a report, a 'no-bill' or an indictment." Nevertheless, it was Judge Weinfeld's view that the "policy grounds behind" this decision gave support to his holding in the UE case.

of authority," he found, those grand jury reports which condemned, but did not indict, were held to exceed the power of the grand jury and may be expunged. While the courts had given special reasons, varying with the jurisdiction, for expunging reports of a specific nature, the main ground relied on, he said, was one of "policy." "Broadly stated," he concluded, "that ground is that a man should not be subject to a quasi-judicial accusation of misconduct which he cannot answer in an authoritative forum." [9]

Federal Statutory Reporting Authority—Special Grand Juries and Regular Grand Juries

In any discussion of the reporting power of a federal grand jury, a distinction must be drawn between the regular grand jury and the special grand jury. The former, as we know, has had a longer existence in the federal system. The latter was not established until 1970, on the enactment of P.L. 91–452, now Chapter 216 of Title 18, U.S. Code. By that enactment the special grand jury was specifically granted a reporting power.[10] But it was provided that a special grand jury may submit a report on two subjects only, official misconduct and organized crime conditions.

First, as a basis for a recommendation of removal or disciplinary action, the special grand jury was authorized to submit a report "concerning nonciminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity" by an appointed public officer or employee. Moreover, the special grand jury was expressly authorized to name persons. It was provided, however, that prior to the filing of the report each person named, and any reasonable number of witnesses in his behalf as designated by him, were to be afforded an opportunity to testify before the grand jury.

Secondly, the special grand jury was authorized to make reports of a general nature regarding "organized crime conditions in the district." The term "organized crime" was not defined. But with regard to reports of this character, it was provided that they were not to be "critical of an identified person."

The legislative history sought to make clear that the reporting power thus expressly authorized was not intended to restrict or in any way to interfere with "the right" of regular grand juries to issue reports "as recognized by judicial custom and tradition." [11] But what reporting authority was thus "recognized" has never been made wholly clear. Congressman Poff, a sponsor of the bill, had acknowledged in the course of debate that "the precise boundaries of the reporting power have not been judicially delineated. . . ." [12]

CONCLUSION

Neither Congress nor the Supreme Court have concerned themselves with the reporting power, if any, possessed by the regular grand jury.

While there are federal courts which deny that the grand jury possesses "authority" to render a report, either of any kind or of certain types,[13] most federal jurisdictions that have considered the issue admit a reporting "power" or "authority" of some sort, but concern themselves principally with the question of the nature and extent of any disclosure that may be made in a particular case.[14]

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[9] 111 F. Supp. 867.

[10] 18 U.S.C. 3332.

[11] See Congressional Record, Vol. 116, Part 20, 91st Cong., 2d sess., Oct. 7, 1970, at 35291.

[12] Id. See also Senate Report No. 91–617, 91st Cong., 1st sess., "Organized Crime Control Act of 1969," at 47–51.

[13] See discussion on UE case, supra. There is some indication that the Southern District's position in the UE case would be followed in the Eastern District of New York. See *United States* v. *Fein*, 370 F. Supp. 463 (E.D.N.Y. 1974). See also *In the Matter of Petition for Disclosure of Evidence*, 184 F. Supp. 38 (E.D.Va. 1960). Differing panels of the 5th Circuit, while not deciding the issue, appear to be tending toward opposite views on the question. Compare *dicta* in *United States* v. *Briggs*, 514 F. 2d 794, 802 (5th Cir. 1975), with that in *In re Report of Grand Jury Proceedings*, 479 F. 2d 458, 460 (5th Cir. 1973). The former must be regarded as a decision of extraordinary significance. The Court of Appeals ordered that the names of unindicted co-conspirators be expunged from an indictment.

[14] See, for example, *Application of Johnson*, 484 F. 2d 791 (7th Cir. 1973); *In re Report of June 5, 1972 Grand Jury*, 370 F. Supp. 1219 (D.C. 1974); *In re Grand Jury, January 1969*, 315 F. Supp. 662 (D.Md. 1970). It is also suggested that cases and references cited in Sabella, *Administrative Agency Access to Grand Jury Materials*, 73 Col. L. Rev. 162 (January 1975), be reviewed, particularly those cited to text, at 163–164, and 173–175. See also Comment, *The Grand Jury: Its Present Day Function and Correlative Powers*, 29 *Fordham L. Rev.* 152 (1960).

IV. GRAND JURY ABUSES—NAMING OF UNINDICTED CONSPIRATORS

There has evolved a practice of naming persons as "unindicted conspirators" in conspiracy indictments, frequently in connection with cases having widespread publicity.

The impact of this practice upon due process rights can be summed up: "The incidents of due process afforded an unindicted conspirator are more limited than those available to one named as a defendant. The unindicted conspirator is not a party to the criminal trial where names and facts come to light, and he has no right under the Federal Rules of Criminal Procedure to intervene. If he is a witness at the trial, which is at least a possibility, he may be excluded from the courtroom except when testifying. And finally, of course, a decision in the trial that the defendants were not guilty of criminal conduct neither vindicates him nor bars his subsequently being indicted and tried as a defendant." [1]

The precise origin of the practice is unclear.[2] In applying it, precedents are seldom cited and history or reasons for the practice are seldom given.[3]

Within recent years, the practice of naming unindicted coconspirators has been applied with increasing frequency in the prosecution of antiwar activists. It is in this period and as a result of such prosecutions that the practice first became a subject of decision in any reported case at any appellate level. In *United States* v. *Briggs* a panel of the court of appeals for the fifth circuit ordered the expungement from an indictment of all references to antiwar activists who had been named as unindicted conspirators by a federal grand jury following inquiry into disruptions at the Republican Party's 1972 National Convention at Miami Beach. That there was, or was not, probable cause for naming a conspirator was held to be immaterial on the question whether the grand jury may accuse such a person without naming him a defendant.

"There is at least a strong suspicion that the stigmatization of appellants was part of an overall governmental tactic directed against disfavored persons and groups. Visiting opprobrium on persons by officially charging them with crimes while denying them a forum to vindicate their names, undertaken as extrajudicial punishment or to chill their expressions and associations, is not a governmental interest that we can accept or consider. It would circumvent the adversary process which is at the heart of our criminal justice system. It would be intolerable to our society." [4]

Scholars [5] have cited, and the Court noted, the number of instances where this practice had been applied.[6] In several of these instances the prosecutions were later abandoned or dismissed.

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[1] *United States* v. *Briggs*, 514 F. 2d 794, 804 (5th Cir. 1975). In the omitted fn. 16, the court qualified the last quoted sentence by reserving decision where cooperative grand jury witnesses giving self-incriminating testimony are named as unindicted conspirators.

[2] In *Briggs*, 514 F. 2d at 801, the Government represented that the practice "has long been in effect."

[3] *Application of American Society for T. and M.*, 231 F. Supp. 686 (E.D.Pa. 1964), and *Application of Turner and Newall, Ltd.*, 231 F .Supp. 728 (E.D.Pa. 1964). In these cases, unindicted coconspirators charged with offenses against the antitrust laws sought to expunge from the indictments allegations pertaining to them. Limited post-trial relief was granted on he basis that there was insufficient evidence adduced at the trial to support the allegations. More recently, a federal court refused to expunge the name of President Nixon from an indictment to which his name as an unindicted coconspirator had been added by action of the grand jury. This case was, of course, exceptional. The proceedings to expunge were *in camera* and no explanation of the judgment appears in the report of the opinion, *United States* v. *Mitchell*, 377 F. Supp. 1326 (D.D.C. 1974). See commentary on this case in *United States* v. *Nixon*, 418 U.S. 683, 687–688 (1974).

[4] 514 F. 2d at 806.

[5] See for example, Fine, *Federal Grand Jury Investigation of Political Dissent*, 7 Harv. Civil Rights-Civil Liberties L. Rev. 432 (1972); Boudin, *The Federal Grand Jury*, 61 Geo. L. J. 1, 19 (1972).

[6] These instances are cited at n. 18 of Briggs, 514 F. 2d at 805:

U.S. v. *Dellinger*, No. 69 Cr. 180 (N.D.Ill., indictment filed Mar. 20, 1969). "Chicago Seven" trial of anti-war activists charged with substantive violations of federal statutes and conspiracy to disrupt 1968 Democratic national convention; 20 named as alleged co-conspirators, of whom 8 were made defendants and 12 unindicted. Seven defendants were acquitted of conspiracy. Two defendants were acquitted and five convicted of substantive violations Feb. 14, 1970; on appeal, reversed and remanded for new trial, 472 F. 2d 340 (CA7), cert. denied, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed. 2d 706 (1973). Indictment dismissed Jan. 18, 1973.

United States v. *Marshall*, No. 51942 (W.D.Wash.., indictment filed April 16, 1970). Anti-war activists charged with conspiracy; 16 named as alleged co-conspirators of whom 8 were made defendants and 8 unindicted. The trial of the eight defendants ended in mistrial Dec. 14, 1970, and there have been no further proceedings.

United States v. *Ahmed*, No. 14950 (M.D.Pa., indictment filed April 30, 1971. Catholic anti-war activists charged with conspiracy and other federal offenses; 12 named as alleged

(Continued)

Certainly an unindicted conspirator, as the court had noted, may be anonymously designated as an "other person" or as "John Doe." Even if such person is unmasked in a bill of particulars or at trial, this effect does not carry, as the court said, the imprimatur of credibility that official grand jury aciton does, and its probable impact may be tempered by protective orders entered by the court.

In Briggs, the court observed the prosecution tendered no reason for failing to include the appellants among those who were made defendants. If there was no probable cause for indicting them they should not have been named as conspirators, whether indicted or unindicted. "The grand jury that returns an indictment," said the court, "naming a person as an unindicted conspirator does not perform its shielding function but does exactly the reverse. If the charges are baseless, the named person should not be subjected to public branding, and if supported by probable cause he should not be denied a forum." [7]

The court did not charge the grand jury with the responsibility for this miscarriage, but rather charged it to the prosecution where it belonged. "Failure of the grand jury to perform its shielding function where appropriate," said the court, "may be explained by the tendency of the body, with its members not learned in the law, to follow the lead of the prosecutor, who is its legal advisor. We are told that in this instance the origin for the grand jury's action was the prosecutor." [8]

The court found no reported opinion which gave support to the contention that a federal grand jury was empowered in an indictment to accuse a named private person of crimes and not make him a defendant. Nor did it find in its examination of an analogous practice—the issuing of grand jury reports—any "substantial authority" permitting a federal grand jury to issue a report accusing named private persons of criminal conduct. The court concluded that this practice of naming unindicted conspirators was not only historically unauthorized but also a deprivation of rights without due process and found support for this conclusion in a number of Supreme Court opinions that found defamation of persons without affording them an adequate opportunity for contesting the injury to be a denial of due process. [9]

If there is a sound basis (or "probable cause") for the exposure of a person's alleged involvement in a criminal conspiracy, such person could be named as a defendant, if he is named at all.

Any failure to name him in the indictment does not preclude naming him in a bill of particulars, or introducing evidence of his participation in the conspiracy, and would not prohibit the attributon of his conduct or statements to defendants charged with the conspiracy. If there is no probable cause for naming him as a conspirator, many believe that he should not be named at all.

The prosecutor may well accrue certain benefits for himself or the administration he represents as a consequence of widespread publication of the conspiracy or of the identity of individuals allegedly participating in it. The issue becomes whether such benefits permissibly outweigh the potential risks of unjust damage to the unindicted conspirator's reputation. Moreover institutional damage may be suffered when public confidence in a system of justice is shaken by an unequal application of laws to persons allegedly equally guilty.

(Continued)

co-conspirators of whom 8 were made defendants and 4 unindicted. Conspiracy charges dismissed March 27, 1972. Two defendants were, however, convicted of other substantive violations; on appeal the convictions were affirmed in part, reversed in part sub nom. *United States* v. *Berrigan*, 462 F. 2d 271 (CA3, 1973).

United States v. *Russo*, No. 9373 (C.D.Cal., indictment filed Dec. 29, 1971). "Pentagon Papers" case; four named as alleged co-conspirators, of whom two were made defendants and two unindicted. Proceedings terminated in dismissal May 11, 1973.

United States v. *Rudd*, No. 70 Cr. 195. (N.D.Ill., indictment filed April 7, 1972). S.D.S. "Weathermen"; 40 named as alleged co-conspirators of whom 12 were made defendants and 28 unindicted. Indictment dismissed January 3, 1974.

United States v. *Ayres*, No. 48104 (E.D.Mich., indictment filed Dec. 7, 1972). S.D.S. "Weathermen"; 39 named as alleged co-conspirators, of whom 15 were made defendants and 24 unindicted. Indictment dismissed Oct. 15, 1973.

[7] 514 F. 2 at 803.

[8] Id.

[9] See, for example, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951); *Jenkins* v. *McKeithen*, 395 U.S. 411 (1969); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971).

V. GRAND JURY ABUSES—"ENTRAPMENT"

Recently, allegations are being made that federal prosecutors utilize the grand jury to "entrap" political dissenters and criminal suspects.[1] The critics complain that individuals are convicted of contempt or perjury because of their refusals or failures to testify before or produce evidence to the grand jury, when the purpose is to punish political or unpopular beliefs without having to prove criminal acts.[2]

Presently, there are no restrictions on the ability of the prosecutor to subpoena, on the grand jury's behalf, a potential target or defendant. Individuals, known or regarded by the prosecutor as virtual or potential accused[3] are called as witnesses, rather than parties, to maintain the fiction that the grand jury proceeding is non-adversarial. Thus, witnesses who are actually parties, are often forced into the commission of perjury or contempt to avoid prosecution, or the retribution that may be visited upon them by their associates, or to protect their reputation against the disastrous consequences that attend the invocation of the fifth amendment. If they seek refuge in the fifth amendment, they are then led into the same trap of perjury or contempt after a grant of immunity that almost inevitably follows.

HISTORY

The practice of calling the accused or the suspected before the grand jury and there examining him under oath regarding matters of which he is suspected was *not* a practice in England at the time of the grand jury's importation into America.

This inquisitional oath procedure, known as the oath *ex officio*, had been introduced into England by the ecclesiastical authorities as early as 1236, in the reign of Henry II. Utilized by the Bishops for inquiries into the conduct and morals of the English, it became a source of bitter complaint. The particularly offensive character of the procedure was its requirement that a person who has not been charged with a formal presentment or accusation was nevertheless compelled to answer all questions put to him.

Responding to the complaints of his subjects, the King in 1247 banned its use, noting that many of his subjects were "shamefully defamed" by the oath procedure and might incur "the dangers of perjury." Nonetheless, the attitude of subsequent kings on use of such oaths varied and alternated until utimately the Crown, Henry VII, in 1487, adopted oath taking as its own criminal procedure, vested in the Courts of Star Chamber and High Commission.

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[1] See for example: Avner and Johnson, *Use Immunity: Jail for Those Who Refuse to Play*, Trial. Vol. 12, No. 1, January 1976; Cowan, *The New Grand Jury*, N.Y. Times (Magazine), Apr. 20, 1973, at 17; Donner and Gerruti, *The Grand Jury Network*, The Nation, Jan. 3, 1972, at 5; Pizzagati, *The Perverted Grand Juries*, The Nation, June 19, 1976.

[2] In, for example, *United States* v. *Nickels*, 502 F. 2d 1173 (7th Cir. 1974) (perjury), the court rejected the argument that the defendant was called before the grand jury solely for the purpose of procuring perjured testimony. The court said it would not inquire into "motivation" for asking questions material to the grand jury's investigation; would not treat the facts as amounting to a technical entrapment, as the Government did not "solicit" or "encourage" perjury but "at most created a situation in which perjury appeared expedient"; and also rejected defendant's claim of "duress," holding that there was no evidence offered to show that the defendant reasonably feared immediate death or severe bodily injury which could be avoided only by committing the criminal act charged.

On the general law of entrapment, see *Hampton aka Byers* v. *United States*, 425 U.S. 484 (1976). See also the following perjury prosecution cases: *United States* v. *Lazaros*, 480 F. 2d 174 (6th Cir. 1973); *Massinia* v. *United States*, 296 F. 2d 871 (8th Cir. 1961); *Brown* v. *United States*, 245 F. 2d 549 (8th Cir. 1957). Cf. *United States* v. *Cross*, 70 F. Supp. 303 (D.C. 1950) and *United States* v. *Icardi*, 140 F. Supp. 383 (D.C. 1956) (perjury before congressional committees).

Also see the following contempt actions: *Hooley* v. *United States*, 209 F. 2d 234 (1st Cir. 1954); *United States* v. *Handler*, 476 F. 2d 709 (2d Cir. 1973); *United States* v. *George*, 444 F. 2d 310 (6th Cir. 1971); *United States* v. *Pepe*, 367 F. Supp. 1365 (D. Conn. 1973).

[3] See *United States* v. *Mandujano*, 425 U.S. 564, 594f. (1976) (Brennan, J. concurring), in which a justice of the Supreme Court acknowledged that—

"It cannot be gainsaid that prosecutors often do call before grand juries persons suspected of criminal activity to testify concerning that activity, e.g., *Grunewald* v. *United States*, 353 U.S. 391, 423 (1957), and the availability of this device has often been fatally tempting to those aware of its potential for abuse. There can be no doubt that sanctioning unfettered discretion in prosecutors to delay the seeking of criminal indictments pending the calling of criminal suspects before grand juries to be interrogated under conditions of judicial compulsion runs the grave risk of allowing 'the prosecution [to] evade its own constitutional restrictions on its powers by turning the grand jury into its agent.'" [Footnote omitted]

The power exercised pursuant to the oath *ex officio* was never granted to the English grand jury, nor to the common law courts.

Not until the late 1500's and in the 1600's, did the ordinary witness become the chief source of a jury's information and compulsory process become more regularly issued by common law courts.

The fall of the inquisitional oath can be laid to John Lilburn's encounter with it in the Court of Star Chamber. Committed to prison in 1637 by the Council of the Star Chamber on a charge of printing or importing certain heretical books, John Lilburn refused to respond to examination before the Chamber, because ". . . I perceived the oath to be an oath of inquiry, and of the same nature as the High Commission oath." This, he alleged, was against the law of the land, the Petition of Right, and the law of God as shown in Christ's and Paul's trials. Yet, he said, ". . . if I had been proceeded against by bill, I would have answered." The Council then condemned him to be whipped and pilloried, for his "boldness in refusing to take a legal oath," but adding, very much in the tenor of present day defenders, "without which many offenses might go undiscovered and unpunished."

When the Courts of Star Chamber and High Commission were abolished by Parliament in 1641, the House of Commons declared the sentence of John Lilburn to be "illegal and against the liberty of the subject" and ordered that he be compensated. The House of Lords followed in 1645 by ordering his sentence to be totally vacated. In 1648, he was awarded 3,000 pounds in reparation.

RECENT CASES

The Tucson Five Case

In the fall of 1970 a federal grand jury was convened in Tucson, Arizona, ostensibly to inquire into violations of certain federal statutes, when alleged members of a radical set (the Weathermen) bought dynamite in Tucson and then drove away in a car found to be registered to a woman in Los Angeles.

After the buyer was indicted in October for the offense of illegal transportation of explosives, the investigation was continued by subpoenaing the owner of the car and four young people who lived communally at the address identified in the car's registration. Upon their refusal to answer most of the questions put to them by the grand jury, they were granted immunity. Persisting in their refusal, they were confined for civil contempt. Two of them who had been committed in November, and the remainder committed in early December, remained imprisoned until the expiration of the term of the grand pury on March 31, 1971.[4]

Immediately following their release from prison, the five were again subpoenaed to appear before a new grand jury in April. Granted immunity, three of the group now testified rather than face prison for a more extended stay. Two still refused to testify, but avoided contempt charges and additional confinement because of the prosecution's involvement with wiretapping. No indictment was obtained against any of the five on any charge.

The Leslie Bacon Case

Following the March 1, 1971 bombing of the United States Capitol, Leslie Bacon, age 19, was arrested in April by the FBI in Washington, D.C. pursuant to a material witness warrant. The warant directed federal authorities to transport her to Seattle, Washington, to testify before a grand jury there. Although the warrant and arrest were ultimately ruled invalid,[5] this did not prevent her seizure and transportation across the continent to testify as to subjects that were never revealed, either in the complaint on which the warrant issued, or in the three reported opinions on her case.[6]

Press accounts, indicate that there was thought to be "a link" between her and the organizers of the May Day Demonstrations scheduled to take place in the District of Columbia in 1971.[7] A recent report quotes an unidentified FBI official as saying, "We didn't know a damn thing. Leslie Bacon was the only thing we had and that was just a fishing expedition." He is said to have described the Seattle location as "deliberately rigged . . . to get an indictment."[8]

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[4] The adjudication was sustained in *United States* v. *Weinberg*, 439 F. 2d 743 (9th Cir. 1971).

[5] *Bacon* v. *United States*, 449 F. 2d 933 (9th Cir. 1971).

[6] *Id.*, and also at 446 F. 2d 667 (1971), and 466 F. 2d 1196.

[7] See Goodell, *Where Did the Grand Jury Go?*, Harper's, May 1975, at 14.

[8] See Robinson, "Arrest in Capitol Bombing Called 'Fishing Expedition'," Washington Post, October 17, 1975, reprinted in *Federal Grand Jury*, Hearings on H.J. Res. 46, H.R. 1277 and Related Bills Before the Subcommittee on Immigration, Citizenship, and International Law of the Committee on the Judiciary, House of Representatives, 94th Cong., 2d Sess., 1976, at 419.

Having been examined in Seattle for three days about a vast range of radical activities, Bacon refused to testify further. Persisting in her refusal after grant of immunity, she was committed to prison for civil contempt and remained in confinement for close to a month until released on bail appending appeal and certiorari.[9] The contempt order was affirmed on appeal,[10] but the judgment was vacated and remanded by the Supreme Court in light of *Gelbard* v. *United States*, 408 U.S. 41 (1972) and Bacon's claim of use of illegal electronic surveillance.[11] On remand, the contempt order was reversed, but no inquiry was made on the issue of electronic surveillance since the term of the grand jury had expired.[12] No indictment was ever returned against her for the Capitol bombing.

Leslie Bacon was subsequently indicted by a New York federal grand jury in June of 1971 for conspiracy in connection with the New York "Townhouse Bombing," although previously, a New York State grand jury had refused to indict her for matters in connection with that offense. The federal authorities did not proceed with this indictment, however, because they did not wish to disclose wiretap evidence.

CONCLUSION

Those who support the form of entrapment typified in the cases of the Tucson Five and Leslie Bacon, argue that "justice" is being meted out to those who would otherwise escape the punishment they are thought richly to deserve. Others note that such judgments are arrived at without benefit of the victim's prior conviction of guilt after formal accusation and trial. They argue that this is contrary to the premise of our constitutional system of "justice," as the investigation is said to be undertaken for one purpose but the punishment is imposed for another.

It can be forcefully argued that the calling of the accused or the suspected before the grand jury for compulsory examination must be regarded as a distortion of the grand jury's role and function. Although the calling of "targeted" individuals is occasionally also justified on the basis of the maxim that "the public has a right to every man's evidence",[13] this proposition has never been taken as absolute, as the Fifth Amendment privilege against self incrimination illustrates.

In *United States* v. *Mandujano*, none of the justices took exception to the general proposition that a "virtual or putative" defendant might with propriety be called and examined by a grand jury.[14]

Under our constitutional system, "no man shall be held to answer" for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, and he shall not be compelled in a criminal case to be "a witness against himself."

The issue then is whether compulsory attendance of parties," through use of a "witness" label, squares with this constitutional doctrine.

VI. IRRELEVANT INQUIRIES

Like a defendant challenging an indictment because of the presentation of irrelevant evidence to the investigating or indicting grand jury,[1] a witness before a grand jury has little legal basis to challenge any particular question on the basis that it is irrelevant to the grand jury inquiry. In fact, it is the

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[9] 446 F. 2d 667.

[10] *Id.*

[11] *Bacon* v. *United States*, 408 U.S. 915 (1972).

[12] 466 F. 2d 1196, supra.

[13] *United States* v. *Mandujano*, 425 U.S. 564, 594 (1976).

[14] In the plurality opinion, the Court was even anxious to point out that, "This is not to suggest that the questioning would have been improper if the principal aim of the grand jury's investigation had centered upon respondent's activities, rather than a general investigation. . . . As previously indicated, no impropriety results from summoning the target of its inquiry, *United States* v. *Dionisio*, 410 U.S. 1, 10 n. 8 (1973). . . ."

Recently, in the case of a grand jury witness, suspected of harboring federal fugitives Patricia Hearst and William and Emily Harris, the third circuit expressly rejected his motion for a protective order which sought a statement whether or not a witness was the "target" of the investigation, *United States* v. *Weiner*, 418 F. Supp. 941 (M.D.Pa. 1967), aff'd without opinion, sub nom. *In re Grand Jury Proceedings*, No. 76–2286 (3d Cir. Oct. 27, 1976).

[1] See, for example, Cowan, *The New Grand Jury*, N.Y. Times (Magazine), Apr. 29, 1973, at 17; Donner and Cerruti, *The Grand Jury Network*, The Nation, Jan. 3, 1972, at 5; Donner and Lavine, *From the Watergate Perspective: Kangaroo Grand Jury*, The Nation, Nov. 19, 1973, at 519; Fine, *Federal Grand Jury Investigation of Political Dissent*, 7 Harv. Civil Rights-Civil Liberties L. Rev. 432 (1972); Goodell, *Where Did the Grand Jury Go?*, Harper's, May 1975, at 14.

present law that a grand jury inquiry need not be defined or limited to any particular charge or criminal act.[2]

The ability of the prosecution to broadly question any witness before a grand jury has been much criticized and much feared.[3] A recent case, illustrates the bases for these concerns. A witness, subpoenaed with a simple notice of a grand jury investigation, captioned "United States of America v. Grand Jury Investigations," was required to provide samples of handwriting, a set of fingerprints, and a photograph. A request that the prosecution state the purpose and necessity of these demands was denied, and upon refusal to comply, without such an explanation, the witness was summarily adjudged in contempt and confined.[4]

Present Federal Law

For many years, federal district and circuit courts have assumed that a grand jury witness cannot object to questions as being irrelevant. The basis for this assumption is dicta in several cases. The Supreme Court has never *expressly ruled* on the question whether, or under what circumstances, a grand jury witness may object to irrelevant inquiries either at the time of his testimony or as a defense to a later contempt hearing for refusal to testify.

In *Blair* v. *United States*,[5] a witness challenged a citation for contempt on the basis that the court and the grand jury had no *jurisdiction* to undertake a particular inquiry and thus he was justified in refusing to answer any questions. The Supreme Court held that a grand jury witness had no "standing" to object to jurisdiction because of the alleged unconstitutionality of the statutes under which the investigation was conducted. However, the Court did go further in dicta. Despite the fact that the witness never challenged the pertinency or relevancy of any particular question, the Supreme Court noted as a supporting corollary to its holding, that a grand jury witness "is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise for this is no concern of his * * *."[6] The legal underpinning of this dicta was that a mere witness is not a "party" to the proceeding.

More recently, this dicta was reiterated in *United States* v. *Calandra*.[7] In refusing to apply the exclusionary rule to grand jury inquiries, the Supreme Court stressed that interruptions to allow objections to questions would unduly interfere with the effective and expeditious discharge of the grand jury's duties."

Bases for Irrelevancy Challenge

The Supreme Court has detailed some standards for grand jury subpoenas especially as to requests for physical evidence. Specifically, such a grand jury subpoena *duces tecum* cannot be "too sweeping" to justify an order for the prosecution of papers. Some "necessity" should be shown, or at least evidence of "materiality" produced.[8] Lower federal courts have followed this standard of relevancy, but in differing ways, especially as to the burden of proof or the duty to come forward with evidence.[9]

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[2] *Hale* v. *Henkel*, 201 U.S. 43 (1906).

[3] In addition to a possibly undue imposition on time and energy from an irrelevant inquiry, an innocent witness, perhaps even a mere bystander to an event, could fear embarrassment, perjury because of a faulty memory, loss of friends or patrons, retribution by the guilty or their associates.

[4] See In re Grand Jury Proceedings (Schofield I), 486 F. 2d 85 (3d Cir. 1973) (Court required showing of "relevancy" but only as part of its supervisory powers).

[5] *Blair* v. *United States*, 250 U.S. 273 (1919).

[6] As authority for its above-quoted dicta, the *Blair* Court cited *Nelson* v. *United States*, 201 U.S., an anti-trust proceeding, where witnesses appearing before a court-appointed examiner and *not* a grand jury refused to testify or submit books on the ground of immateriality. In sustaining the contempt orders, the Court ruled alternatively that the evidence, both documentary and oral, *was* in fact *material*, and that in any event the appellants were not entitled to raise objections to the testimony. The witnesses were denied "standing" on the ground, as the Court has said, These writs of error are not prosecuted by the parties in the original suit, but by witnesses. . . . Being witnesses merely, it is not open to them to make objections to the testimony."

[7] *United States* v. *Calandra*, 414 U.S. 338 (1974).

[8] *Hale* v. *Henkel*, 201 U.S. 43, 77 (1906); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208–09, 217 (1946).

[9] See, for example, *Universal Mfg. Co.* v. *United States*, 508 F. 2d 684 (8th Cir. 1975); *Schwimmer* v. *United States*, 232 F. 2d 855 (8th Cir. 1956), cert. den. 352 U.S. 833 (1956); *United States* v. *Grand Jury Investigation*, 417 F. Supp. 389 (E.D. Pa. 1976); *In re Grand Jury Subpoenas D.T.* (M.G. Allen & Assoc., Inc.), 391 F. Supp. 991 (D. R.I. 1975); *In re Grand Jury Investigation* (Local 542, Int. U. of Op. Eng.), 381 F. Supp. 1295 (E.D. Pa. 1974); *In re Morgan*, 377 F. Supp. 281 (S.D. N.Y. 1975); *In re Grand Jury Subpoenas D.T.* (Corrado Bros.), 367 F. Supp. 1126 (D. Del. 1973); *In re Grand Jury Subpoena D.T.*, 342 F. Supp. 709 (D. Md. 1972); *In re Grand Jury Subpoena D.T.* (Local 627, P.S. & D. Union, AFL–CIO), 208 F. Supp. 575 (S.D. N.Y. 1961).

While the courts have applied the Fourth Amendment to grand jury subpoenas *duces tecum*, to compel the production of physical evidence, they have been unwilling to extend protection to the compulsory production of the subpoenaed person's physical characteristics (voice and handwriting exemplars) pursuant to a subpoena *ad testificandum*.[10] The Supreme Court has specifically held that (a) the subpoena (to testify) is neither a "seizure" nor an "unreasonable seizure" of the person, for there is a "duty" to testify, and (b) the subsequent command that the witness exhibit his physical characteristics is not an "unreasonable seizure", because the witness has no "reasonable expectation of privacy" in those physical characteristics which he constantly exposes to the public.

However, distinguishing these cases as dealing only with constitutional claims, the Third Circuit, in a landmark decision, has required a showing of relevancy as to a subpoena to testify. It did so on nonconstitutional grounds, in the exercise of its "supervisory powers".[11]

Popkin's Case[12]

Popkin, an assistant professor of government at Harvard, who had written extensively on subjects involving the Viet Nam conflict, was subpoenaed to testify before a federal grand jury in Massachusetts which had been convened to inquire into possible criminal conduct in the release and publication of the classified Department of Defense study popularly known as the "Pentagon Papers".[13]

As a scholar, Popkin admittedly exchanged information with others relating to his field, believing such sources confidential. Wishing to protect these sources of information, he at first refused to testify. But following a grant of immunity, he responded to several questions, to make it clear that he had never seen a copy of the Pentagon Papers other than those in mass distribution, that he had not discussed with Daniel Ellsberg the possibility of releasing a copy to Neil Sheehan of the New York Times, and that he had no knowledge other than from public sources as to how various newspapers had obtained copies of the study. He did note that he had formed an "opinion" as to who possessed the papers based on the availability of others similar in content to those found in the Pentagon Papers.

Having thus explicitly denied that he possessed any knowledge on this subject, Popkin then refused to answer other questions put to him. The purpose of the additional questioning (and hence its relevancy and its materiality) was not readily apparent to the witness, particularly in view of his forthright denial of any knowledge on the subject other than what appeared in the public records. For his refusals to respond to the additional lines of questioning, Popkin was adjudged in contempt, from which he appealed.

Popkin claimed that the grand jury inquiry "impinged" on his First Amendment rights and he should not be required to respond without a demonstration of its relevancy. Popkin had also made the related claim of a "scholar's First Amendment privilege" not to divulge his sources of information, so far as those sources are confidential and supply him with information relating to his field.

In rejecting both claims, the district court held that "even if the questions put to appellant have not been demonstrated to be relevant to the grand jury's inquiry, this would not justify his refusals to answer." "His invocation of the First Amendment," the court continued, "adds nothing to his relevancy claim in the context of a grand jury proceeding."

The first circuit, while affirming the district court's contempt order with respect to most questions reversed in part the contempt order relating to refusals to respond to questions as to Popkin's opinion. Judge Coffin, writing for the court, declared—

"The generality of the opinion questions here, the apparent basis for the opinion being pursued, and the idea of using one scholar to speculate about the

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[10] *United States* v. *Dionisio*, 410 U.S. 1 (1973), and *United States* v. *Mara*, 410 U.S. 19 (1973).

[11] *In re Grand Jury Proceedings* (Schofield I), 486 F. 2d 85 (3d Cir. 1973).

[12] *United States* v. *Doe*, 460 F. 2d 328, 331–332 (1st Cir. 1972), stay den. 409 U.S. 1002 (1972), cert. den. 411 U.S. 909 (1973).

[13] He was only one of several persons subpoenaed in the course of an extensive investigation conducted by the Department of Justice through grand juries on both the east and west coasts. The inquiry was said to be directed to alleged violations of the statutes relating to espionage, and the transportation, sale, and receipt of stolen goods.

sources of others' work, without any showing of strong need therefor, are repugnant to me. In my view, even apart from constitutional claims, we should exercise our supervisory power to state that in this circuit scholars ought not to go to prison for refusing to give their opinions or beliefs based on casual and retrospective reflections on similarities of content."

The court of appeals supported its rejection on the basis of relevancy by noting that in seeking to identify the crime and the criminal, the relevance of one fact may become apparent only after another fact is uncovered.

The grand jury's success in inquiring into criminal activity, the court stressed, "may often" depend on its ability to offer to witnesses a guarantee of secrecy and to suspects the protection of secrecy unless there is probable cause to indict. Accordingly, any "meaningful" statement of relevance would entail the naming of suspects and the description of prior testimony in direct opposition to this secrecy policy.

Conclusion

It would appear that, except for the third circuit, must federal courts categorically reject any challenge to grand jury questions on the basis of relevancy. The support for this rule has been the need to explore leads, protect the secrecy of grand jury proceedings, and avoid delays and obstructions.

At a trial proceeding, objections based on relevancy are often handled case-by-case. As noted by the court in *Popkin*, there may be cases where relevancy can not be shown as to one question or fact, until other questions or facts are revealed. The court supervising grand jury proceedings can, as at a trial, ask for an offer of proof, or require *in camera* showings by the prosecutor, or otherwise condition its orders.

Grand jury secrecy can similarly be protected by appropriate court orders. Often, a showing of relevancy can be based on information, already public; or can be given *in camera;* or can be derived from information previously received by the jury and available without source.

Allowing relevancy challenges need not involve unnecessary delays. The ordinary witness will not often raise it; the targets could raise it once and the court can prevent bad faith requests or undue obstructions.

VII. NOTICE OF APPEARANCE

No minimum time period has been fixed, either by statute or by the Federal Rules of Criminal Procedure, between the time of the service of a subpoena and the time set for the attendance of the witness.[1] Although it is supposed to be the general rule of the common law that service shall be made "a reasonable time" in advance of the day specified for the attendance of the witness,[2] in practice, a reasonable time is not always given. Subpoenas have frequently been issued on short notice, in many instances requiring the witness to attend "forthwith" or on the following day.[3] In the absence of exceptional circumstances, a court ordinarily would grant a continuance request if notice is short.[4] However, most aggrieved witnesses without counsel or the opportunity to consult one, and ignorant of his rights on procedures to assert them, simply do not make the necessary request.

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[1] See Fed. R. Crim., p. 17.

[2] 8 *Wigmore* § 2199 (1961 ed.) ("Common fairness prescribes that, before the witness be enforced to perform his testimonial duty, adequate and express notice be given him that the testimony is likely to be needed. . . . The service should be made a reasonable time before the day specified for attendance . . .) ; 4 *Jones on Evidence* § 23:2 (6th ed. 1972) ("The subpoena should be served in such manner that the witness may have a reasonable time in which to prepare to attend court; and he is entitled to use the ordinary modes of conveyance.") ; *Hammond* v. *Stewart*, 1 Strange (Eng.) 510 (2d ed. 1782) (subpoena served at 2 p.m. in the city of London requiring witness to appear same day in adjoining county, held not a reasonable time) ; *Barber* v. *Wood*, 2 Moody & Robinson (Eng.) 172 (1838) (subpoena served at 11:30 a.m. on witness at his place of business requiring him to appear at 2 p.m. in Westminster Hall, which was within a five-minute walk of his place of business, held not a reasonable time).

[3] For examples of "forthwith" grand jury subpoenas, see *United States* v. *Hilton*, 534 F. 2d 556 (3d Cir. 1976) ; *United States* v. *Dicillo et al.*, 533 F. 2d 972 (3d Cir. 1976) (Harry Lupo's petition for cert. den., Jan. 10, 1977). For examples of grand jury subpoenas to appear on day following date of service, see *In re Stolar*, 397 F. Supp. 520 (S.D. N.Y. 1975) ; *Application of Certain Chinese Associations*, 19 F.R.D. 97 (N.D. Cal. ; 956) ; *Durkin* v. *United States*, 221 F. 2d 520 (D.C. 1954).

[4] See *United States* v. *Polizzi*, 329 F. Supp. 222, 225–226 (C.D. Cal. 1971), *reversed on other grounds*, 450 F. 2d 880 (9th Cir. 1971). In this case the witness was served in Michigan requiring him to appear three days later before a grand jury in California.

Even for the ordinary witness, neither the victim not the potential accused, the service of the subpoena is an unsettling experience. This is especially true for the grand jury witness, because he need not be informed of the parties to the inquiry,[5] of the charge,[6] or if he is the target,[7] of the investigation:

"It is quite clear that the ordinary citizen called upon to testify in the strange environment of the grand jury room under the interrogation of the United States attorney will be quite unable to assert his rights even if he knows what they are. He ought to have an opportunity to consult counsel and be advised of the extent of his right to refuse to testify, and of the way in which to protect himself against giving testimony that might incriminate him." [7]

The grand jury witness, like the ordinary trial witness, needs time for travel, to put his affairs in order, an to provide for his absence from home or business.[8]

While in the trial of an action, criminal or civil, the presence of some witnesses may be essential to a party to the action on short notice only, there are ordinarily no such imperatives in the context of the *ex parte*, and more relaxed, grand jury proceeding.[9]

The Cases of Lupo and Szwandrak

Lupo and Szwandrak were served with "forthwith" subpoenas to testify before a grand jury inquiring into an alleged misappropriation of FBI files that occurred two years prior to the date of service.[10] Following their indictment and conviction for offenses arising out of the misappropriation, they moved to suppress statements obtained from them following service.

At the time of service both Lupo and Szwandrak were virtual defendants. Service of the subpoenas had been made upon them at a time when the United States attorney was admittedly already in possession of information, including the statement of one of the subsequently indicted defendants, Kuczynski, adequate to establish "probable cause" for arresting both Lupo and Szwandrak. They therefore contended that the "forthwith" subpoenas had been used as a substitute for an arrest warrant, so the prosecution could undertake a custodial interrogation without being required to make any disclosure of its case at any hearing which would necessarily follow an arrest. The motion was denied and Lupo, and Szwandrak were both tried and convicted.

In seeking to reverse their convictions, Lupo and Szwandrak urged that a portion of the prosecution's case leading to their conviction consisted of statements made to various FBI agents on service of the "forthwith" subpoenas.

It was stipulated that Lupo was approached by FBI agents at 8 A.M. at his place of employment. Having indicated that they wished to question him, Lupo was given the *Miranda* warning and he signed a *Miranda* waiver.[11] The agents drove Lupo from his place of employment to conduct an "interview," which was fruitless. The agents then handed him a previously issued subpoena commanding Lupo to appear before a federal grand jury "forthwith", and advised him to go to the Newark federal courthouse "at once". As might have been anticipated under such circumstances, Lupo "elected" to accompany the agents in their car.

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[5] See for example, *In re Grand Jury Proceedings*, 486 F. 2d 85 (3d Cir. 1973).

[6] *Hale* v. *Henkel*, 201 U.S. 43 (1906).

[7] *In re Shaw*, 172 F. 520, 521 (S.D. N.Y. 1909).

[8] See *Hammond* v. *Stewart*, *supra* n. 2 Where a witness served at 2 p.m. in the city of London to testify the same day at a trial in Middlesex adjoining, who had been attached for his refusal to appear, was discharged on the ground that "witnesses ought to have a reasonable time to put their affairs in such order that their attendance upon the court may be as little prejudice to themselves as possible."

[9] Some have raised the question of necessity when, for example, in the course of the government's investigation of the publication of the Pentagon Papers, it served a subpoena at 7:30 a.m. upon Robert, the 15-year-old son of Daniel Ellsberg, requiring his appearance two hours later before a Los Angeles grand jury At the time of Robert's service, his father was a virtual accused, and later indicted for offenses in connection with the unlawful dissemination of the Papers. The matter was under investigation by east as well as west coast grand juries. See *United States* v. *Doe*, 455 F. 2d 1270 (1st Cir. 1970).

[10] *United States* v. *DiGillo et al.*, 538 F. 2d 972 (3d Cir. 1976) (Harry Lupo's petition for *cert. den.* Jan. 10, 1977).

[11] It was the holding in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation unless it demonstrates that the following safeguards have been taken: prior to any questioning the person must be warned that he has a right to remain silent, that any statement he does make may be used in evidence against him, and that he has a right to the presence of an attorney, whether retained or appointed. These rights may be waived, provided the waiver is made "voluntarily, knowingly and intelligently." The question of the necessity for giving any such warning to a grand jury witness has not yet been decided by the Supreme Court, although the issue was raised in *United States* v. *Mandujano*, 452 U.S. 564 (1976), and a subject of discussion in the opinions.

Lupo was not brought before the grand jury but was delivered instead to the office of FBI in whose care he remained from 9 A.M. to 2 P.M. During this five-hour period, incriminating statements were obtained. He was then taken to the office of the "Organized Crime Strike Force" at which the agents interrogated him for an additional two hours. They then proceeded to the office of the United States attorney, who questioned Lupo for 15 minutes. Finally, at 4:30 P.M., he was taken to the office of the United States Marshal to await his appearance before the grand jury which was then in session. It does not appear from the court's recital of the facts that he actually testified. He requested an opportunity to talk with his wife, and his appearance before the grand jury was "postponed". He was driven to his home by FBI agents, and conversed with his wife in their presence.

Three days later the agents of the FBI visited Szwandrak at his home and promptly served him with a "forthwith" subpoena. Then, as in Lupo's case, the agents gave him the *Miranda* warnings, and he executed the waiver, following which they questioned him for a period of one and one-half hours. He was then driven to the office of the "Organized Crime Strike Force," later to the office of the United States attorney, and interrogated an additional three times, in each instance after being warned of his *Miranda* rights. At 4:30 P.M. he was taken before the grand jury and gave testimony.

Both Lupo and Szwandrak contended that these statements and confessions admitted at their trials had been obtained in violation of their rights under the due process and self-incrimination clauses of the Fifth Amendment; more particularly, that their confessions had been procured as the result of (a) an illegal arrest and (b) an abuse of process, and were, in any event, (c) involuntary. The court dismissed, each of these objections.

Even if the service of the "forthwith" subpoenas was a "constructive" arrest, the court suggested that the arrest was not illegal. Possession of an alleged co-conspiration's statement was sufficient to establish probable cause for arrest without a warant. The court, however, chose not to rest its holding on that ground. It found as a fact that neither Lupo nor Szwandrak were placed under any restraint "whatsoever" at the time their incriminating statements were made to the FBI. There had simply been no arrests, legal or illegal.

Although agreeing that the subpoenas had been misused—that Rule 17 did not authorize their use as a "ploy" for the facilitation of office interrogation—the court nevertheless said that this abuse of process could not afford ground for suppressing the evidence.[12] Congress had prohibited only the suppression of confessions that were "involuntary". Szwandrak had not contended that his statements were involuntary and the court would not disturb the trial court's finding that Lupo's confession was "voluntarly" given.

Conclusion

The witness, whether he be a mere bystander to the offenses under inquiry or culpably involved, should be entitled to a reasonable time to set his affairs in order and to prepare himself for the examination.

The enactment into law of such provision as those of H.R. 94 which would require a minimum period of notice, would insure this protection.[13]

MAY 18, 1977.

MEMORANDUM

To: Martin Belsky, Counsel.
From: Alfred M. Nittle, Counsel.
Subject: Disruptions in grand jury room due to presence of counsel for the witness—summary report on state experiences.

(1) ARIZONA

Statute.—A "person under investigation" has the right to the "advice of counsel" while giving testimony before the grand jury.[1]

[12] On the general subject of office interviewing or interrogation of witness following service of subpoena, see *United States* v. *Swaig*, 441 F. 2d 114 (2d Cir. 1971), cert. den., 403 U.S. 932 (1971); *Durkin* v. *United States*, supra n.3; *United States* v. *Mandel*, 415 F. Supp. 1033 (D. Md. 1976); *United States* v. *Gurney*, 393 F. Supp. 683 (M.D. Fla. 1974); *United States* v. *Kleen Laundry*, 381 F. Supp. 519 (E.D.N.Y. 1974); *United States* v. *Johns-Manville Corp.*, 213 F. Supp. 65 (E.D. Pa. 1962).

[13] The bill (at p. 20–21) provides that, except in cases where the court finds special need upon a showing by the Government or the consent of the witness, "no subpoena may require any witness to testify or produce other information" at any proceeding before a grand jury" at any time before the expiration of the one-week period beginning on the date of the service of the subpoena."

[1] Ariz. Rev. Stat. Ann. § 21–412 (Act of 1971); Ariz. R. Crim., pp. 12.5 and 12.6.

Disruptions.—In this state which has a dual grand jury system, state-wide and county, neither the Attorney General nor the County Attorney for Maricopa County reports any disruptions.[3] Prosecution of offenses by indictment is discretionary. Prosecutors emphasize that they generally refrain from calling persons who would refuse to give evidence by resorting to the privilege against self-incrimination.

(2) ILLINOIS

Statute.—A person "already charged with an offense" or against whom a bill of indictment is sought has the right "to be accompanied by counsel who shall advise him of his rights" during the grand jury proceedings.[3]

Disruptions.—None reported by the office of the State's Attorney for Cook County.[4] It is required by this state's constitution that all felonies be prosecuted by indictment. About 7 to 10 thousand indictments are processed annually in Cook County. Much of the success in holding down disruptions is attributed to a "strong" court which has made known to members of the bar that disruptions will not be tolerated.

(3) KANSAS

Statute.—"Counsel for any witness may be present while the witness is testifying and may interpose objections on behalf of the witness. He shall not be permitted to examine or cross-examine his client or other witness. . . ."[5]

Disruptions.—None reported by prosecutor's office for 18th Judicial District (co-extensive with Sedgwick County, whose seat is at Wichita).[6]

They report some slight delays in some instances in disposing of objections requiring court rulings, but these have not been found burdensome. Prosecution by indictment is not mandatory. The grand jury is not employed extensively.

(4) MICHIGAN

Statute.—This state has two types of "grand juries". In proceedings before the "one-man" or "judge-grand jury", all witnesses are entitled to have legal counsel present "not involving delay".[7] However, a witness appearing before the regular or "citizens' grand jury" is given the right "to have counsel by his side" only if he has been granted immunity.[8]

Disruptions.—None reported by the Wayne County prosecutor's office, at the county seat in Detroit.[9] The "judge-grand jury" is now obsolete, while the citizens' grand jury is used principally for extraordinary investigations. Prosecution by indictment is not mandatory. Prosecutors in this state are said to prefer proceeding by way of "warrant, complaint, and preliminary hearing". In Wayne County, for example, although about 12,000 felony warrants were issued last year, the citizens' grand jury had only 50–100 indictments before it.

(5) MINNESOTA

Supreme court rule.—Attorney may be present with any witness who "waived his immunity from self-incrimination", but such attorney shall not participate in the grand jury proceeding "except to advise and consult with the witness while he is testifying".[10]

Disruptions.—None reported by County Attorney for Hennepin County.[11] No extensive use is made of the grand jury in this county or generally throughout the state. Proceeding by indictment is not constitutionally required. Nor is it required by statute except in the prosecution of capital offenses (first degree murder and "treason"). In Hennepin County, over 95% of the prosecutorial ac-

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[3] Telephone interviews: April 12, Bruce Babbitt, Attorney General, State of Arizona; April 13, Charles F. Hyder, County Attorney for Maricopa County, whose seat is at Phoenix, Ariz.

[3] Smith-Hurd Ill. Ann. Stat. ch. 38, § 112–4 (Act of 1975).

[4] Telephone interview April 13, Nicholas Navarone, Special Prosecution's Unit, Office of State's Attorney, Cook County, seat at Chicago.

[5] Vernon's Kan. Stat. Ann., Code of Crim., p. 22–3009 (Act of 1970).

[6] Telephone interview April 12, Paul Connolly, Chief Deputy Assistant District Attorney for the 18th Judicial District.

[7] Mich. Comp. Laws Ann. § 767.3.

[8] Id., § 769.19c.

[9] Telephone interview April 20, Patrick Foley, Director, Wayne County Organized Crime Task Force, Office of the Wayne County Prosecutor.

[10] Minn. R. Crim., p. 18.04 (effective July 1, 1975), adopted as authorized at a 1971 session of the state legislature.

[11] Telephone interview May 3, Gary W. Flakne, County Attorney for Hennepin County. The county seat is at Minneapolis.

tivity is by way of complaint, followed by what is known in Minnesota as the "omnibus hearing" before a law judge at which "probable cause" is determined and pre-trial objections disposed of. Moreover, the County Attorney in this county prefers not to call witnesses who refuse to waive their "immunity" from self-incrimination.

(6) OKLAHOMA

Statute.—One (1) attorney "representing" the witness may be present during the time the witness is "actually under examination".[12]

Disruptions.—None reported by the District Attorney for Oklahoma County.[13] The grand jury is seldom utilized in this county or in the state generally. Prosecution by indictment is not required by the state's constitution except that grand juries may be summoned by the court or on petition of a percentage of the electors. Grand juries are said to be "distrusted" in this state. They have been used for "political" cases. Only two grand juries have been summoned in Oklahoma County since 1974, the year of the enactment of the present right-to-counsel statute, and none of the witnesses called were represented by, or requested the presence of, counsel.

(7) SOUTH DAKOTA

Statute.—"Counsel for the witness" may be "present when the grand jury is in session", but all persons other than grand jurors are excluded while the grand jury is deliberating or voting.[14]

Disruptions.—No problems or disruptions have been reported by the State's Attorney for Minnehaha County.[15] Yet he construes the above statute as authorizing counsel to engage in a "full representation" of the witness before the grand jury. The grand jury is used frequently in this county, but perhaps infrequently in others. There is no constitutional mandate on the use of the grand jury. The State's Attorney may prosecute by information or indictment. Nevertheless, of the two grand juries sitting each year in Minnehaha County since 1972, the year of the enactment of the above right-to-counsel statute, the State's Attorney recalls only four instances in which witnesses requested the presence of counsel, although about 25 persons were called who were thought to have had culpable involvement in matters under inquiry. The local bar is said to be small, neighborly, and disciplined.

(8) UTAH

Statutes.—There is a caveat here on the question whether the state's statutes authorize the presence of counsel in the grand jury room. The question has not been litigated or resolved and county prosecutors take contrary views.

One section of law, enacted in 1967, provides: "Any person called to testify before a grand jury must be advised of his constitutional right to be represented by counsel and his right not to say anything that may incriminate him. Upon a demand for such person for representation for [sic] counsel the proceedings must be delayed until counsel is present."[16]

A paragraph of another and earlier section, and not since amended or repealed, provides that "no person other than as in this section prescribed [counsel for the witness is not expressly prescribed] shall be permitted to be present during the sessions of the grand jury. . . ."[17]

The Salt Lake County Attorney's office takes the position that the foregoing statutes do not authorize the presence of counsel in the grand jury room.[18] The Utah County Attorney takes a contrary position.[19]

Disruptions.—The Utah County Attorney advises that no grand jury has sat in his county for 20 years past. The Salt Lake County Attorney informs us that the grand jury is not often used in his county or in the state as a whole. While the state constitution authorizes the prosecution of offenses by information or indictment, the state's implementing statutes discourage the latter. A

[12] Okl. Stat. Ann., Tit. 22, § 340 (Act of 1974).
[13] Telephone interview April 29, Andrew M. Coats, District Attorney for Oklahoma County. The county seat is at Oklahoma City.
[14] S.D. Comp. Laws Ann. § 23-30-7 (Act of 1972).
[15] Telephone interview April 27, Gene Kean, State's Attorney for the County of Minnehaha. The county seat is at Sioux Falls.
[16] Utah Code Ann., section 77-19-3 (Act of 1967).
[17] Utah Code Ann., section 77-19-9.
[18] Telephone interview May 2, Jerry Kinghorn, Assistant County Attorney for Salt Lake County, which has its seat at Salt Lake City.
[19] Telephone interview May 3, Noall T. Wooton, County Attorney for Utah County, which has its seat at Provo.

grand jury may be called into use only when it is made to appear to the court, after hearing, that "law enforcement has failed or that in the interest of justice a grand jury should be called." [20] Since January 1975, when the term of the present Salt Lake County Attorney began, one grand jury has been called into session.

(9) VIRGINIA

Statute.—The presence of counsel is authorized only for a witness appearing before the "special" grand jury when he testifies. "Such counsel shall have the right to consult with and advise the witness during his examination, but shall not have the right to conduct an examination of his own witness." The witness, moreover, must procure his own counsel.[21]

The "special grand jury", first created in 1975, is restricted to the function of investigating and reporting "concerning any condition which tends to promote criminal activity in the community or which indicates misfeasance of governmental authority by government agencies or the officials thereof." A regular grand jury is authorized to act on indictments prepared by the Commonwealth's Attorney as well as perform the function of the special grand jury.

Disruptions.—None reported by Commonwealth Attorneys for the cities of Norfolk and Virginia Beach of whom inquiries were made.[22] Since the 1975 enactment, no special grand jury has been convened for Norfolk. Only one, now in session, was recently convened for Virginia Beach. Several witnesses, with counsel present, have been heard by this jury. No disruptions have thus far been experienced. None are anticipated for the future, although about 50% of the witnesses to be called are thought to be culpably involved in matters under inquiry and are expected to appear with counsel. (It is said to be the practice in Virginia to call only prosecution witnesses before regular grand juries, which are confined to their indicting function and not ordinarily employed for investigating purposes.)

(10) WASHINGTON

Statute.—A witness has a right to the presence of counsel during his appearance before a grand jury or "special inquiry judge". But when immunity is granted to the witness, the attorney is excluded from the grand jury room, although the witness may leave the grand jury room "to confer" with his attorney. While present in the grand jury room the attorney is limited to advising such witness "concerning his right to answer any questions and the form of his answer and shall not otherwise engage in the proceedings".[23]

Disruptions.—These statutory rights, so far as grand juries are concerned, appear to be of theoretical interest only. Since their enactment no grand jury has been convened in King County, the state's most populous.[24] In the second most populous county, Pierce, only one grand jury was convened many years ago, the date being forgotten by the present Public Attorney.[25] While the "special inquiry judge" is frequently utilized for the conduct of inquisitorial investigations, offenses are, throughout the state, generally prosecuted by information. The state's constitution authorizes prosecution by information or indictment, but the statutes authorize the court to convene a grand jury only "where the public interest so demands" or whenever so requested by a public attorney, corporation counsel or city attorney "upon showing of good cause".

GENERAL CONCLUSION

Whether in a particular district the grand jury is used frequently or infrequently, whether counsel is allowed for all witnesses or only for some or under restricted circumstances, no public prosecutor of any of the more populous districts of those states which to any extent authorize the presence of counsel, and of whom inquiry was made, has reported any actual disruption of the grand jury's proceedings by reason of the presence of counsel for the witness.

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[20] Utah Code Ann., section 77–18–1.1 (Act of 1967).
[21] Va. Code Ann. § 19.2–209 (Act of 1975).
[22] Telephone interviews April 26 with Commonwealth Attorneys Joseph H. Campbell, for the City of Norfolk, and Andre Evans, for the City of Virginia Beach.
[23] RCW 10.27.080 and RCW 10.27.120 (Act of 1971).
[24] Telephone interview May 10, Carl Hultman, Senior Felony Attorney, Public Defender's Office for King County, with seat at Seattle.
[25] Telephone interview May 12, Don Herron, Public Attorney for Pierce County, with seat at Tacoma.

Memorandum by: Alfred M. Nittle, Counsel, and Martin H. Belsky, Counsel.
Subject: Grand Juries, Indictments, and Investigations—The British Experience.

Accusation by a grand jury indictment was required in Great Britain from 1352 until grand juries were effectively abolished in 1933.[1] However ever since the mid 1800's, grand juries had ceased to perform any significant investigative role. Ever since the 1840's, charges were prepared and presented to justices of the peace or magistrates, who reviewed the evidence at public preliminary hearings[2] and then either discharged the accused or committed him for trial.[3] Grand juries *then* reviewed these charges, now formulated in a bill of indictment.[4] As charges had been already reviewed by courts, and no investigations were undertaken by grand juries, the usefulness of the grand jury system became increasingly questionable,[5] even to the jurors themselves.[6]

A. English Investigatory Procedures

1. Mechanisms

Even prior to the abolition of the grand jury, England did not use grand juries to conduct open-ended investigations as commonly undertaken by numerous Federal grand juries. Opposition to such investigative juries was based on their "inquisitional nature" and as such "alien to the concept of justice generally accepted in the United Kingdom. Only in exceptional cases, of nationwide concern, when those "rare cases of public confidence occur" are analogous procedures involved.[7] Thus, in the ordinary case,[8] investigations were conducted by the police or private persons and then formal proceedings are instituted by the police, or less frequently by a private person,[9] who may need the approval of the court or the consent of some official, person or body.[10]

The exceptional cases, where special investigatory power is allowed are specifically described in statutes.

First, in an extraordinary case, the Secretary of State may appoint "a person" to conduct, with power of subpoena, inquisitorial-type "local inquiries" into

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[1] Under the Administration of Justice Act (Miscellaneous Provisions) of 1933, 8 Halsbury's Statutes of England at 307 (3d Ed 1969), the requirement for indictments was abolished except for certain offenses in London and Middlesex Counties. By the Criminal Justice Act of 1948, 18 Halsbury's Statutes at 32 (3rd Ed 1970), these exceptions were removed and the requirement of a grand jury indictment was totally eliminated.

[2] At these hearings, the prosecution was required to show its case through witnesses and evidence; the accused had the right to confront the evidence and examine it, to present his own case, and make arguments. See Lieck, *Abolition of the Grand Jury in England*, 25 J. Crim. L. & C 623 (1934); Phillips. CONSTITUTIONAL AND ADMINISTRATIVE LAW (England) at 377 (3d Ed. 1963).

[3] See Elliff, *Notes on the Abolition of the English Grand Jury*, 29 J. Crim. L & C 36 (May–June 1938).

[4] See Heyting, *Abolition of Grand Juries in England*, 19 A.B.A. J. 648 (1933).

[5] While the successful use of the "preliminary hearing" to exercise the "protective function" and screen charges was the major factor leading to ultimate abolition of the grand jury, other factions contributed. Among them were the establishment, 1829, of a police system in London by Sir Robert Peel, followed by its extension to other parts of the country in succeeding years; the establishment of salaried magistrates in London in 1792 and the extension of the system in 1835; and the creation of a director of public prosecutions in 1879 and of the office in 1908. Some credit has also been given to reforms in the criminal law and concepts of punishment initiated in the early part of the last century, and the increased protection afforded the accused at trials before the petit jury, including the allowance to defendant of witnesses on his behalf (1702), of counsel (1758), of his counsel's right to address the jury (1836), and making the defendant and spouse competent witnesses (1898). See Elliff, *supra* note 3 at 3–7.

[6] For example, a Middlesex grand jury, as early as 1846, repeatedly urged abolition. The British press commented:

"Any philosopher who wished for an example of the emptiness of grandeur, and its unsatisfactory effect upon the grand themselves, need look no further than the Grand Jury of Middlesex. This venerable body never assembles without being lectured on its "extreme antiquity" and is "utter uselessness," its "respectability," and its "superfluousness;" in fine upon its having attained to such good old age, as to be no good at all."

See Elliff, *supra*, note 3 at 12.

[7] See Report, Royal Commission on Tribunals of Inquiry, Nov. 1966, Cmnd. 3121, at 16.

[8] Coroner's courts are used in homicide cases. The Coroner, who must be an attorney or medical practitioner must hold an inquest if there is "reasonable cause to suspect an unnatural or violent death." A coroner's jury may be convened in any case and must be convened when there is reason to suspect death by murder, manslaughter, infanticide, poisoning, etc. See Harvard, The Detectors of Secret Homicide, at 172 (London 1900); 9 Halsbury's Law, § 1034 et seq. (4th Ed. 1977).

[9] 11 Halsbury's Laws, § 138 (4th Ed. 1976); Edwards, The Law Officers of the Crown, at 395–402 (London 1964).

[10] Certain criminal proceedings may be undertaken only by order of a judge, or by the direction or with the consent of the Attorney General, the Director of Public Prosecutions, or some other official, person, or body. Common law rights of persons to arrest without a warrant are now limited to instances in which a "breach of the peace" has been committed or is reasonably apprehended, although there are statutory powers of arrest without warrant respecting certain offenses that are granted to all persons. 11 Halsbury Laws, § 97 (4th Ed. 1976).

"any matter connected with the policing of an area."[11] The person appointed may summon witnesses and documents and hold the inquiry in public or private, as the Secretary of State may direct. The report of the inquiry is not published but a summary of findings and conclusions may be released by the Secretary of State, in the "public interest."

Second, a coroner's inquest into possible homicides, may compel the presence of witnesses and the giving of evidence.[12] However, the inquests are more like preliminary examinations than grand jury investigations. Rules of evidence are usually observed; all persons have a right to request and then present evidence, witnesses are subject to examination by any interested person or his counsel; notice of the inquest must be given to any person whose conduct is likely to be called into question.[13]

Third, a series of special statutes allow extraordinary investigations. For example, the Attorney General may require an examination by a justice of the peace of "malicious explosions", likely to cause or actually causing harm to life or property. Such investigations may compel the presence of witnesses and the production of evidence and a witness is not excused from presenting evidence because of risk of self-incrimination (although answers are not admissible in any civil or criminal proceeding).[14]

Fourth, under the Tribunals of Inquiry (Evidence) Act, 1921,[15] both Houses of Parliament may establish a tribunal to inquire into a "definite matter described in the Resolution as of urgent public importance."[16] These tribunals have all powers rights and privileges as a court, as to securing evidence; must conduct proceedings in public, unless it is in the public interest not to do so. Witnesses may still invoke the privilege against self-incrimination and the tribunals are not authorized to grant immunity. Although not statutorily required, certain procedures have been uniformly applied in practice. The chairman of the tribunal is a judge; the tribunal is represented by the Attorney General and allows representation to any person who may be adversely affected.[17]

Fifth, Great Britain has developed a type of informal, non-binding investigatory mechanism—similar to a Congressional probe or a government fact-finding mission—generally used to investigate official corruption. They usually do not have subpoena power and are temporary or special in nature.[18]

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[11] Police Act of 1964, 25 Halsbury's Statutes, 330, 353 (3d Ed.).

[12] The witness is *not* bound to answer any incriminating question and the coroner has no authority to grant immunity.

[13] See 9 Halsbury's Statutes, § 1034 *et seq.* (4th Ed. 1974). Harvard, The Detectors of Secret Homicide, at 172 (London 1964).

[14] The resulting verdict, called an "inquisition" has the effect of an indictment, and may lead to arrest and trial. The "inquisition" is, however, subject to review by a court, prior to the lodging of formal charges.

[15] 12 Halsbury's Statutes 873 (3d ed.).

[16] Such tribunals are *not* common. Between 1921 and 1966, only 16 inquiries were conducted under the Act. See Report, Royal Commission on Tribunals of Inquiry, Nov. 1966, Cmmd. 3121, p. 16.

[17] These procedures are not rights but discretionary privileges. The Royal Commission in Tribunals of Inquiry, in its 1966 Report, Cmmd. 3121, at 17, 44, has recommended six principles for tribunal inquiries:

1. Before any person becomes involved in an inquiry, Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.
2. Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them.
3. (a) He should be given an adequate opportunity of preparing his case and of being assisted by legal advisers.
(b) His legal expenses should normally be met out of public funds.
4. He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.
5. Any material witnesses he wishes called at the inquiry should, if reasonably practicable, be heard.
6. He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence that may affect him.

[18] These informal methods of investigation include:

(1) *The Royal Commission*—used in modern times to formulate recommendations on matters of broad policy and not for inquiry into the facts of particular cases. The Commission has no subpoena power.

(2) *A Select Parliamentary Committee of Inquiry*—formerly used extensively in the investigation of public misconduct, but in disuse recently. Constituted of members representing the relative strength of parties in the House of Commons, their record has been described as "unfortunate" and lacking in public confidence. Such committees do not hear counsel, and their members often will have no experience in taking evidence or cross-examining witnesses.

(3) *Privately conducted inquiries*—of the type carried out by Lord Denning in the Profumo case. The Secrecy in the receipt of evidence often makes the report of the inquiry subject to challenge.

(Continued)

Self-Incrimination and Immunity

Generally, an individual is granted more of a right *not* to testify, because of possible self-incrimination, under English law than under American law. In *civil or criminal proceedings*, a person may refuse to answer any question or produce any document if to do so might expose that person *or his spouse* to prosecution for an offense or *proceedings to recover any penalty*.[19]

Moreover, statutory exceptions to the privilege not to testify or produce evidence are much more limited than those granted federal prosecutors in the United States by the Immunity Act, 18 U.S.C. §§ 6001–6004. Generally, some statutes authorize the compulsion of evidence, despite a claim of privilege, in regulatory type proceedings or inquiries. The witness, in these special inquiries, must testify and in return receives a form of "use" immunity, called "indemnity", providing that statements or answers are not admissible against the witness in other proceedings.[20] Statutory immunity or indemnity is not available in more general investigatory proceedings, such as a coroner's inquiry, special Tribunals of Inquiry, preliminary examinations or hearings and trials.

Evidentiary Restrictions

England has a limited "exclusionary rule" barring use of evidence, in certain situations,[21] in any criminal proceeding,[22] taken in violation of six "Judges Rules".[23] Although the rules provide a number of general safeguards to assure fairness in investigation, they provide two principal restrictions:

(1) As soon as it appears that there is evidence which affords reasonable ground for suspecting the person being questioned, the interrogator, prior to further questioning, must "caution him" that he is not obliged to say anything and that what he says may be put into writing and given in evidence;

(2) If the person is charged with or informed that he may be prosecuted for the offense, he ordinarily should not be questioned at all, except that, again after similar cautioning, questions may be put where necessary "for the purpose of preventing or minimizing harm or loss to some other person or the public or to clear up an ambiguity in a previous answer or statement." [24]

(Continued)

(4) *The Departmental Inquiry*—usually appointed by the responsible Minister (Cabinet Member) to be conducted by an eminent lawyer alone or as chairman with others, without subpoena power.

(5) *Accident inquiries*—such as are carried out under civil aviation and shipping regulations. They are technical in nature and largely for regulatory purposes.

(6) *Security Commission*—reports to and advises the Prime Minister on security arrangements within the public service. Conducts inquiries often unknown to the general public, and which, by reason of their nature, should be privately conducted.

See generally Report, Royal Commission on Tribunals of Inquiry, November 1966, Cmmd. 3121.

[19] The privilege in criminal proceedings bars also inquiries that might expose a witness to a forfeiture. Of course, this protection applies only to offenses, practices, and forfeitures under the law of any part of the United Kingdom. Thus, a) under American law, threat of foreign prosecution does not give a basis to refuse to testify or produce evidence. See 17 Halsbury's Laws, § 240 (4th Ed. 1976).

[20] Among such statutory exceptions are the Explosive Substances Act 1883, s. 12; Bankruptcy Act 1914, s. 166; 1948, s. 167, as amended by the Companies Act 1967, s. 50; Representation of the People Act 1949, s. 123 (7), as amended; Army Act 1955, s. 135; Air Force Act 1955, s. 135; Road Traffic Regulation Act 1967, s. 85, as amended; Road Traffic Act 1972, ss. 167, 168 (2), as amended; Theft Act 1968, s. 31 (1)(a); Civil Evidence Act 1968, s. 17 Schedule (listing 10 statutes in addition to those included in this paragraph); and the Criminal Damage Act 1971, s. 9(a).

[21] These rules are not, per se, laws, and the failure to abide by them only render answers and statements excludable and not automatically excluded. See 11 Halsbury's Laws, paras. 419–425 (4th Ed. 1976).

[22] Originally promulgated for the guidance of police officers, the rules now apply to all persons "charged with the duty of investigating offenses or charging offenders . . ." See (1964) 1 All E. Rep. 237, (1964) 1 WLR 152.

[23] The rules had their origin in 1912 and was first limited to police actions only. They came into force for all England and Wales and all investigations in 1964, upon approval of the Queen's Rules Division of the High Court. See Williams, Police Interrogation Procedures and Limitations Under Foreign Law—England, 52 J. Crim. L., Crim, & Pol. Sci. at 50 (May–June 1961); See preamble to rules as published by the court in Practice Note, (1964) 1 All E. Rep. 237, (1964) 1 WLR 152.

[24] Halsbury's Laws, paras. 419–424 (4th Ed. 1976). These rules do not affect other principles of English practice, that (a) citizens have a duty to help a police officer to discover and apprehend offenders; (b) police officers, otherwise than by arrest, cannot compel any person against his will to come to or remain in any police station; (c) at any stage of the investigation any person should be able to communicate and to consult privately with counsel (solicitor), even if in custody; (d) when a police officer making inquiries of any person has enough evidence to prefer charges against him for the offense, the officer should, without delay, cause that person to be charged or informed that he may be prosecuted; and (e) all answers and statements given to police shall have been given "voluntarily".

In addition to the judge's rules, the procedures of investigation vary depending on the formality or informality of the mechanism used. Thus, as noted earlier, at preliminary examinations, the case must be presented by witnesses, subject to cross-examination and the potential accused may testify and have counsel present.[25] At a coroner's inquiry, rules of evidence are usually followed and a potential defendant must be invited to present evidence, allowed to cross-examine and have counsel present.[26] At Tribunals of Inquiry, a potential accused is generally granted counsel, given notice of charges, able to call witnesses, and able to cross-examine witnesses.[27]

B. ENGLISH CHARGING PROCEDURES

Although arrests without a warrant are permissible, prosecution of a case is commenced by the issuance of a summons or warrant, issued by a justice of the peace for an articular borough or county.[28] If the crime[29] is one defined as "summary" either by statute or common law, it is tried in the Magistrate's Court. Other offenses are still termed "indictable," even though the grand jury has been abolished.[30]

An "indictable" offense ordinarily[31] proceeds to go, on a "bill of indictment," to Magistrate's Court. The examining justice conducts a hearing, in public unless "the ends of justice would not be served," at which the defendant and counsel is present and able to question prosecution witnesses and present his own evidence. If the examining justice "on consideration of the evidence and any statement of the accused" is of the opinion that "there is sufficient evidence," the court commits the defendant to trial. If insufficient evidence is presented, the court is to discharge the defendant.[32] If the defendant is held for court, the indictment is "signed," and then the case proceeds to trial in the Crown Court, known when sitting in London as the Central Criminal Court.[33]

English law attempts to preserve the concept of pre-trial secrecy, long used as a basis for grand jury procedures in the United States. Although preliminary examinations are generally required to be "in open session," it is unlawful to "publish or broadcast" any report on the examination prior to discharge, or completion of a future trial, unless, on application of the defendant, the court orders otherwise. However, general non-prejudicial facts may be reported.[34]

SUMMARY

While crimes may be privately prosecuted in England, and to that extent privately investigated, such private actions do not allow compulsory process to secure testimony or evidence. Thus, most criminal prosecutions are instituted by the police, and the investigations are normally conducted by them. In the conduct of criminal investigations, the police are bound by the Judges' Rules

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[25] See Phillips, Constitutional and Administrative Law (England), at 377 (3d Ed. 1963).
[26] See 9 Halsbury's Laws, para. 1034, et seq. (4th Ed. 1974).
[27] Report, Royal Commission on Tribunals of Inquiry, Nov. 1966, Cmmd. 3121 at 17, 44.
[28] The only exceptions to this procedural rule involve coroner's courts, which can return an "inquisition", leading to indictment; court's marshall in military cases; ecclesiastical courts for certain limited church crimes; and special courts of the Vice Chancellors of the University of Oxford and Cambridge.
[29] The Courts exercise original criminal jurisdiction in England and Wales. English courts exercise criminal jurisdiction in respect of acts done or omissions made by all British subjects or aliens within the territory of England and Wales. They also exercise an extraterritorial jurisdiction over all British subjects, and some aliens, for acts or omissions done (a) on the open seas within the territorial waters of Her Majesty's dominations, (b) on British ships on the high seas or in foreign rivers, and (c) on British-controlled aircraft, as well as in respect to some acts done abroad. 11 Halsbury's Laws, para. 97 (4th Ed. 1976).
[30] Only the necessity of a "finding" of an indictment by a grand jury has been eliminated.
[31] Occasionally a "voluntary bill," without a preliminary examination, may be returned at the direction or with the consent of the judge of the High Court. Perjury is an example of such an exceptional case.
[32] 21 Halsbury's Statutes, p. 110, 181, 370, 394 (3d Ed. 1970).
[33] 41 Halsbury's Statutes, 235 (3d Ed., cont'n volume 1971).
[34] These facts include:
(a) the identity of the court and the names of the examining justices;
(b) the names, addresses and occupations of the parties and witnesses and the ages of the defendants and witnesses;
(c) the offenses charged;
(d) the names of counsel;
(e) the decision of the court on disposal of the case;
(f) if the defendant is committed for trial, the charges on which he is committed;
(g) adjournment—date and place;
(h) arrangements as to bail; and
(i) whether legal aid was granted.

establishing restrictions on the taking of evidence. And they have no power of compulsory process, with the exception of inquiries pursued in the Coroners' Courts in homicide cases.

In exceptional instances, however, the inquisitorial process (compulsory examination of witnesses and production of evidence) may be applied on motion of the Attorney General or Secretary of State. There are also extraordinary inquisitorial procedures available in matters of "urgent public importance" and of nation-wide concern. Most notably among them, particularly for inquiry into public misconduct, are tribunals of inquiry appointed pursuant to Resolution of both Houses of Parliament under the Tribunals of Inquiry (Evidence) Act 1921.

As a general rule, witnesses involved in criminal investigations are entitled to open hearings, counsel to assist them, and may assert a privilege against incrimination as a bar to the compulsion of testimony. No generally applicable system of immunity has been established in England. There are statutes of this type applicable to particular administrative agency or civil proceedings, but with perhaps one exception—the Explosive Substances Act 1883—no statute applies the compulsory immunity concept to criminal proceedings.

MEMORANDUM BY: ALFRED M. NITTLE AND MARTIN H. BELSKY

ANALYSIS OF TIME PERIODS—PRESENT FEDERAL GRAND JURY PROCEDURE AND H.R. 94 PROCEDURES

H.R. 94 establishes certain procedures for federal grand juries and grants certain rights to persons involved in federal grand jury proceedings. This memorandum analyses each section of the bill to determine (1) whether the procedures required entail more time than existing procedures and (2) if more time is involved whether it is substantial or negligible.

Section 2—Recalcitrant witnesses

Section Two provides procedures for holding a witness in civil contempt for refusal to testify without just cause. As indicated by the testimony of representatives of the Judicial Conference, H.R. 94's requirement of a hearing prior to a contempt order is present law.[1] Similarly, H.R. 94's requirement of three day's notice in most cases is present law. In fact, most courts have set a general standard of five day's notice.[2] As indicated by case law, and as included in H.R. 94, this period is not inflexible. If special problems are shown or undue delay feared, the court can shorten the notice period.

Prosecutors are free now, and under H.R. 94, to call other witnesses in the pending or other cases, while the contempt order is being litigated. If a delay in proceedings is anticipated, the prosecutor is free, now and under H.R. 94, upon a reasonable basis to obtain permission for shortened notice. In short, *no* delays are caused by Section Two's provisions.

Section 3—Immunity

This section revises existing sections of the code to provide procedures for the granting of immunity to a witness.[3]

Notice.—Subsection (b) provides that:

"(b) No order under this part shall require any witness to testify or provide other information prior to the day one week after the day on which such order

[1] Testimony of Carl Imlay, General Counsel, Administrative Office of the U.S. Courts: Hearings are already being held on civil contempt in such situations, and attorneys do appear. Where the charged witness is without funds, it is the policy of the Judicial Conference that an attorney shall be appointed for him and compensated pursuant to 18 U.S.C. § 3006A.

[2] See *United States* v. *Alter*, 482 F. 2d 1016 (9th Cir. 1973), cited with approval in: In re Lochiatto, 497 F. 2d 803, at 807 n. 9 (1st Cir. 1974); in re Mintzer, 511 F. 2d 471, 472 (1st Cir. 1974); in re Bianchi, 542 F. 2d 98, 101 (1st Cir. 1976); in re Sadin, 509 F. 2d 1252, 1255 (2d Cir. 1975); in re Grand Jury Investigation (Hartzell), 542 F. 2d 166, 168 (3d Cir. 1976); in re Grand Jury Investigation (Bruno), 545 F. 2d 385, 388 (3d Cir. 1976); in re Lewis, 501 F. 2d 418, 421 (9th Cir. 1974); in the Matter of the Grand Jury (Vigil), 542 F. 2d 209, 218f. (10th Cir. 1975).

[3] The substantive change of requiring transactional and not just use immunity does not in and of itself cause any time period additions. It only changes the nature of the immunity order.

was communicated to the witness, except that a witness may be required to testify or produce such information prior to such day if the court, upon a showing of special need, so orders."[2]

As with contempt orders, H.R. 94's requirement of notice prior to an order of immunity is present law. Courts have consistently held that "adequate notice" is required of the grant of an immunity order[3] and many have looked to Federal Rules of Civil Procedure 5(a), 5(b) and 6(d), which requires at least five days notice.[4] Finally, under present law and under H.R. 94, the time period is not inflexible. If special problems arise, or undue delay feared, the court can shorten the notice period.

H.R. 94 thus at most could cause a two day delay in the ordering of immunity—that is, it provides for seven days as compared to the general rule of five days today, absent exigent circumstances. But neither the five day nor seven day period need cause any delay in an investigation or in grand jury activities. Prosecutors are free, under present law, and under H.R. 94, to call other witnesses in the pending or other cases, while immunity is being sought. If such is not possible, the prosecutor is free, now and under H.R. 94, upon a reasonable basis to obtain permission for shortened notice. In short, no delays are necessarily caused by Section 3's provision on notice.

HEARING

Section 3 provides for judicial review of immunity orders to determine that it is in accord with established standards, and gives discretion to the court to refuse an immunity grant.

Under the 1954 immunity law, the courts had the power to review immunity orders and permit or deny a request for such an order.[5] Such a review is precluded by the 1970 Act and the court's granting of an immunity request is ordinarily[6] considered ministerial.[7]

A new hearing procedure is required by Section 3 but it is most unlikely to cause undue, if any, delays. As noted earlier, the prosecutor is free to call witnesses in the pending case or other cases while the immunity order is being litigated. Second, the determination to be made often involve simple, direct factual issues that can be disposed of quickly. Third, if an immunity order is being contested under the procedure of Section 3, it would be contested by those individuals who litigate the issue under existing procedures, if not at the time of the order granting immunity then at the later contempt procedure. Fourth, orders granting immunity are not appealable under H.R. 94 and thus the hearing is the only timfie period affected.[8] Finally, as indicated by the testimony of the Justice Department, immunity requests are supposedly thoroughly reviewed by Justice Department personnel, based on detailed standards and guidelines. The time delays involved in such a review should be reduced by the fact that a court will review an immunity order for its propriety.

ONGOING INVESTIGATIONS

Few, if any, federal grand juries investigate one isolated incident involving a few witnesses. Most investigate complex cases, often more than one, involving

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[2] Subsection (c) provides the contents of the notice and therefore does not involve any time requirements.

[3] See In re Tierney, 465 F. 2d 806 (5th Cir. 1972).

[4] See In re Bart, 304 F. 2d 631 (D.C. Cir. 1963), where a panel of the court of appeals determined that a proceeding to grant immunity under the Act of 1954 to a grand jury witness was not to be regarded as ex parte although it was, by its nature, "preliminary and summary". Normally, said the court, the application and supporting documents should be served in accordance with the Federal Rules of Civil Procedure, Rules 5(a), (b) and 6(d) now requiring five days notice unless otherwise ordered. A leading case, this decision has been cited with approval and its principles applied within other jurisdictions. See, for example, *United States v. Weinberg*, 439 F. 2d 743 (9th Cir. 1971), involving the Immunity Act of 1968 (18 U.S.C. 2514), and In re Grand Jury Investigation (Frank a witness), 317 F. Supp. 792 (E.D. Pa. 1970), involving the aforesaid Act of 1954.
See also *United States v. Faulkee*, 476 F. 2d 804 (9th Cir. 1973) (involving 1970 Immunity Act.)

[5] See In re McElrath, 248 F. 2d 612 (D.C. Cir. 1957 (en banc).

[6] But see *United States v Doe*, 461 F. Supp 226 (E. D. Pa. 1973).

[7] See *Urasaki v. U. S. District Court*, 504 F. 2d 513 (9th Cir. 1974) ; *United States v Leyva*, 513 F. 2d 774 (5th Cir. 1975).

[8] See *United States* v. *Di Mauro*, 441 F. 2d 428 (8th Cir. 1971), and In re Grand Jury Investigation, 427 F. 2d 714 (3d Cir. 1970), citing *Cobbledick* v. *United States*, 309 U.S. 323 (1940), and holding the order not to be "final". But an order denying a grant of immunity has been held to be appealable ; *United States* v. *Neiberger*, 460 F. 2d 290 (3d Cir. 1972). A defendant has no "standing" to challenge a grant of immunity to a grand jury witness ; *United States* v. *Braasch*, 505 F. 2d 139 (7th Cir. 1974), cert. den. 95 S. Ct. 1561, 1562 ; *United States* v. *Rauhoff*, 525 F. 2d 1170 (7th Cir. 1975).

numerous witnesses. Thus, the prosecutor can call other witnesses before a grand jury while immunity orders are being contested. No delays need be caused by a hearing on immunity.

TRANSACTIONAL IMMUNITY

As indicated by the testimony of numerous witnesses, and the cases they cited, many orders of immunity are presently being contested or opposed because of fears of future prosecution. A return to transactional immunity would eliminate these legal challenges, which all involve hearings even if unsuccessful, and thus H.R. 94 would reduce delays.

PRESENT LEGAL CHALLENGES

Most immunity orders are for voluntary witnesses who wish to cooperate but want immunity protection. Those that are involuntary witnesses will oppose the immunity grant today, refuse to testify, and then fight contempt orders. They file legal actions, secure hearings, and then appeal contempt orders. Even if unsuccessful, these challenges and appeals involve the same time periods provided for judicial review under H.R. 94.[9]

Section 4—Size of grand juries

Section 4 would reduce the size of the grand jury to not less than nine nor more than 15 persons, and would authorize the finding of an indictment if at least nine jurors are present and two-thirds of those present concur.[10]

The enactment of this provision clearly would not delay grand jury or court proceedings. On the contrary, the provision would expedite the selection, summoning and qualifying of grand jurors and would expedite proceedings on indictments. Under existing law, the panel of 23 persons (with a concurrence of 12 being required for indictment) has been regarded as "administratively unwieldy, costly, and unnecessary." [11]

Section 5—Unauthorized disclosure of grand jury information

Section 5 would provide criminal sanctions for violations of grand jury secrecy.[12]

Secrecy of grand jury proceedings is now required, with limited exceptions[13] pursuant to a rule of the Supreme Court, Rule 6(e) of the Federal Rules of Criminal Procedure.[14] For its enforcement reliance is now explicity placed on the contempt power, which has been regarded as inadequate for the purposes.[15]

Section 5 neither requires nor authorizes action that would result in delay of grand jury or court proceedings. On the contrary, the provision should tend to

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[9] For example, see In re Cardassi, 351 F. Supp 1080 (D. Conn. 1972) (challenge to use immunity); In re Morahan, 359 F. Supp 858 (N.D. Tex 1972) (foreign prosecution); In re Weir, 377 F. Supp 919 (S. D. Cal 1974) (Foreign prosecution); In re Parker, 411 F. 2d 1062 (10th Cir. 1969); In re Tierney, 465 F. 2d 806 (5th Cir. 1972), cert. denied 410 U. S. 914 (1973) (foreign prosecution; wiretape defense; use immunity); *In re Long Visitor*, 523 F. 2d 443 (8th Cir. 1975) (fear of tribal prosecution);
United States v. *Yanagita*, 418 F. Supp. 214 (E.D. N.Y. 1976) (foreign prosecution); In re Kilgo, 484 F. 2d 1215 (4th Cir. 1973) (necessity and public interest); In re Lewis, 384 F. Supp. 133 (C.D. Cal. 1974), affirmed, 517 F. 2d 236 (9th Cir. 1975) (necessity); In re Bonk, 527 F. 2d 120 (7th Cir. 1975) (stay den., see 96 S. Ct. 350) ("necessary in the public interest"); *Branzburg* v. *Hayes*, 408 U.S. 665 (1972) (necessity); *DeGregory* v. *Attorney General State of New Hampshire*, 383 U. S. 825 (1966) (necessity); *In re Maury Santiago*, 533 F. 2d 727 (1st Cir. 1976) (subject-matter jurisdiction); *Beverley* v. *United States*, 468 F. 2d 732 (5th Cir. 1972) (Department of Justice guidelines); In re Lewis, supra (Department of Justice guidelines); In re Grand Jury Proceedings (Schofield I), 486 F. 2d 85 (3d Cir. 1973) (relevancy); *United States* v. *Dionisio*, 410 U.S. 1 (1973) and *United States* v. *Mara*, 410 U.S. 19 (1973) (relevancy).

[10] This proposal was recommended by the Judicial Conference of the United States.

[11] See testimony of Carl H. Imlay, General Counsel of the Administrative Office of the United States Courts, April 27, 1977. He also said: "A grand jury of not less than nine nor more than 15 would be easier to assemble and therefore could go about its business more expeditiously. This would ease some of the problems imposed by the Speedy Trial Act. . . ."

[12] This provision is in accordance with the recommendation of the Supreme Court's Advisory Committee on Criminal Rules. See Report, at 37–47.

[13] Rule 6(e) was recently amended pursuant to Public Law 95–78, July 30, 1977. Exceptions to the secrecy requirement are granted to attorneys for the government, for use in their duties, for government personnel assisting such attorney, a witness, or to others when directed or authorized by the court.

[14] Rule 6(e) now states: "A knowing violation . . . may be punished as a contempt of court."

[15] See the Advisory Committee's Report, at 37.

expedite such proceedings by its contribution to the attainment of the secrecy objective.[16]

Section 6—Rights and duties of grand juries; independent inquiry

Section 6 provides for increased independence and decision-making by grand jurors themselves.

CHARGE TO GRAND JURY

Subsection (a) of a proposed new section 3329 to Title 18, Chapter 215, of the U.S. Code, requires the court to instruct the grand jury, following its impanelment, on specified subjects relating to its powers and duties, including (1) its duty to inquire into federal offenses committed within the district, (2) its right to conduct independent inquiry, (3) its right to call and interrogate witnesses, (4) its right to require the production of documentary and other evidence, (5) the subject-matter of the investigation, (6) the criminal statutes involved, if known, (7) the necessity of sufficient evidence to form the basis for an indictment, and (8) the obligation of secrecy.

This provision, in substance, imposes no additional duties upon the court and should not delay its proceedings. Presently most cases have indicated that the court should instruct the jury on their rights, duties, role, and responsibilities, although court's charge has ordinarily been a matter within its discretion, and such charges have varied in length and content. It is customary for the courts to charge the jurors in relation to their duties, powers, and matters concerning their investigations.[17]

The proposed subsection would not alter this practice but it does give assurance that jurors shall be instructed upon basic and specified subjects. A measure of uniformity is thus introduced into the practice. Moreover, by assuring that the grand jury, in the words of the subsection, "reasonably understands" its powers and duties, the provision should tend to expedite the performance of the grand jury's functions, lessen judicial involvement at later stages presently caused by confusion of the jurors.

H.R. 94's requirement of "adequate and reasonable notice," by definition, means that instructions can only give instructions to the degree it is able to. Thus, H.R. 94 requires instructions only as to statues involved "if these are known at the time the grand jury is impaneled." H.R. 94 does require the court to describe the subject matter of the investigation. "Adequate and reasonable notice" would therefore mean that such description would be to the degree the court is able, at a particular point in time, to describe the subject.

Requests to testify

Subsection (b) of the proposed new section 3329 would authorize "any person" to make a written request to the government's attorney to appear before the grand jury to testify, or to request that the grand jury proceed to exercise its powers of independent inquiry under the new section 3330. The government's attorney is additionally placed under a duty to notify those persons against whom he seeks a presentment or indictment of their privileges to appear before the grand jury to testify or present evidence, unless the government's attorney can satisfy the court that such notice would result in the flight of the person, would endanger the witnesses, or would unduly delay the investigation and prosecution. The grand jury is not bound to hear any witness, but such witnesses as it agrees

[16] Grand jury proceedings are maintained in secrecy "(1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; and (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt." *United States v. Procter and Gamble Co.*, 356 U.S. 677, 681, n. 6 (1958).

[17] See George J. Edwards, THE GRAND JURY, Part IV, at 124 (Phila. 1906); 38 C.J.S. *Grand Juries* § 21. The following charges are illustrative; 17 F.R.D. 331 (S.D. N.Y. 1955) (District Judge Kaufman); 12 F.R.D. 495 (N.D. Cal. 1952) (District Judge Goodman); 30 Fed. Cas. 991 (D. Ore. 1873) (District Judge Deady); 30 Fed. Cas. 992 (D. Cal. 1872) (Mr. Justice Field); 30 Fed. Cas. 980 (D. W. Va. 1868) (Mr. Chief Justice Chase); 30 Fed. Cas. 1036 (D. Ohio 1861) (District Judge Leavitt); 30 Fed. Cas. 983 (D. Mass. 1854) (Mr. Justice Curtis); 30 Fed. Cas. 1021 (D. Ohio 1851) (Mr. Justice McLean); 30 Fed. Cas. 998 (D. Md. 836) (Mr. Chief Justice Taney).

to hear shall be permitted to testify only upon a submission of a "waiver of immunity."

Under existing law, in general, most courts have stated that witnesses "should" be heard by the grand jury, but a witness has no "absolute right" to be heard by it.[18] Specifically neither the person whose conduct is under examination by the grand jury nor any witness on his behalf has a "right" to appear as a witness before the grand jury,[19] but any person may make a request to appear.[20]

Under present practice, as a matter of policy, prosecutors do tell witnesses if they are a target and a person desiring to testify is generally permitted to do so.[21]

H.R. 94 would not change present policy or cause delays. First, a specific exception to the allowance of a request to testify is provided for any "undue delay." Second, present policy of allowing an individual to be told that he is a target would merely be codified. It is only in the event that the prosecution desires to escape from this obligation to give notice that any burden is laid upon the judicial system. The court must rule on the government's ex parte application for relief from the obligation. Ordinarily, this would require nothing more than a brief representation to the court by the government's attorney, and could not result in any appreciable delay of the proceedings. Finally, a witness would have to waive immunity, would be limited to relevant and competent matters, and would be subject to cross-examination. This would limit frivolous requests and could expedite trial proceedings by making the then defendants "version" available pre-trial to the prosecutor and thus avoiding surprise.[22]

EXCULPATORY EVIDENCE

Subsection (c) of this proposed section 3329 would require the attorney for the government to "periodically advise" the grand jury of the "nature and existence" of evidence, as yet not received which might tend materially to affect the credibility of any witness or trend to negate the guilt of a prospective defendant.

This provision does not require the production or reception of witnesses or evidence to that effect. It requires only that the attorney for the government should apprise the grand jury of the nature and existence of such evidence.

Presentation of such evidence is presently an ethical responsibility, on the prosecutor. The Code of Professional Responsibility,[23] the American Bar Association Standards,[24] and the National District Attorneys Association Standards[25] all require it.

As a matter of practice, federal prosecutors "uniformly" present exculpatory evidence of which they are "personally" aware for the grand jury's consideration.[26]

The requirement of proposed subsection (c) would thus not substantially increase the time frame of grand jury and court proceedings. The court is only to get involved if the prosecutor does not live up to his responsibilities. There should be no increase in litigation. Presently, numerous motions are filed pretestimony, pre-trial for discovery, during trial, post-trial and on appeal relating

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[18] See *United States* v. *Gardner*, 516 F. 2d 334, 338 (7th Cir. 1975), *cert. den.* 96 S. Ct. 118 (1975); *United States* v. *Smyth*, 104 F. Supp. 283, 293 (N.D. Cal. 1952).

[19] *United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604 (2d Cir. 1944), *cert den.* 323 U.S. 790 (1944); *United States* v. *Bolles*, 209 Fed. 682 (W.D. Mo. 1913); *United States* v. *Morse*, 292 Fed. 273 (S.D. N.Y. 1922); *United States* v. *Kernodle*, 367 F. Supp. 344 (M.D. N.C. 1973).

[20] Cf. 18 U.S. Code § 1504. See Judge Kaufman's Charge to Grand Jury, 17 F.R.D. 331, 336 (S.D. N.Y. 1955).

[21] Testimony Judge Lacey, April 27, 1977; also Report, Advisory Committee, at 51 f.

[22] At a recent American Bar Association meeting, the Department of Justice suggested a Grand Jury Standard almost identical to this provision. It was incorporated by the ABA as Standard #5: "5. A target of a grand jury investigation shall be given the right to testify before the grand jury, provided he/she signs a waiver of immunity. Prosecutors shall notify such targets of their opportunity to testify unless notification may result in flight or endanger other persons or obstruct justice; or the prosecutor is unable with reasonable diligence to notify said persons."

[23] Code of Professional Responsibility, Canon 7—Ethical Consideration 7-13; Disciplinary Rule 7-103(B).

[24] ABA, Standards on the Prosecution Function, § 3.6(b).

[25] NDAA, National Prosecution Standards, § 14.2D. At the ABA meeting, the Department of Justice supported a legislative principle analogous to this section's provision.

[26] See testimony Benjamin R. Civiletti, Assistant Attorney General, Criminal Division, June 29, 1977.

to the failure to deliver exculpatory evidence.[27] Making it clear what the responsibilities of the prosecutor are should lessen these motions and the resulting hearings at later stages in the criminal process.

Moreover, it may well be that the system would be expedited by an increase in the number of "no true bills" resulting from the enforcement of the provision.

BAN ON WITNESS INVOKING PRIVILEGE AGAINST SELF-INCRIMINATION

Subsection (d) of the new section 3329 prohibits the government's attorney from bringing a witness before the grand jury who has given prior notice that he intends to exercise his privilege against self-incrimination, and prohibits bringing the fact of the invocation of the privilege to the attention of the grand jury, unless the witness has been granted immunity.

The effect of this provision is simply to permit the witness to invoke the privilege against self-incrimination in advance of his appearance. Adoption of this provision could not result in any substantial delay in grand jury or court proceedings. On the contrary, it would seem to have the opposite effect. In having advance notice of the course the witness has chosen, the prosecutor could avoid the time consumed by an unproductive and unnecessary appearance of the witness. Should he desire to do so, he may then immediately apply for a grant of immunity.

The provision would also serve to improve the efficiency of the grand jury's proceedings by avoiding the prejudice to a potential defendant which is likely to attend his invocation of the privilege on his appearance before the grand jury. This has been a subject of litigation which, under present law, has in itself increased the burdens sustained by the judicial system.[28]

BAN ON REPETITIVE INQUIRIES BY SUCCESSOR GRAND JURIES

Subsection (e) of the proposed section 3329 provides that if a grand jury "has failed to return an indictment", no subsequent grand jury inquiry on the same subject matter could be initiated unless a court found that new evidence had been discovered.

It is clear that this provision must, by its nature, eliminate time sometimes spent today in repeatingly introducing evidence to grand juries to obtain indictments. It is not likely that the government's attorney would deliberately disregard the prohibition spelled out in the proposed subsection. Public prosecutors may be expected to heed the statutory injunction. Thus, following adoption of the provision, the court would not ordinarily be confronted with any necessity of making the review and determination about whether a prior grand jury considered the matter. If faced with this unlikely or rare necessity, it is doubtful that the court would be required to exhaust much time on the subject or make any extensive review of the record. As H.R. 94 requires transcription of grand jury proceedings, a speedy review can be made as to prior actions, certainly without the need for an evidentiary hearing. The provision would therefore not delay or hinder the proceedings of the court or the grand jury in any significant degree. On the contrary, the prohibition may well serve to expedite the work of successor grand juries by keep repetitious and normally unfruitful inquiries from their agendas.

INDEPENDENT GRAND JURY INQUIRIES[29]

The proposed new section 3330 would authorize a grand jury (regular and special), after notice to the court, to undertake inquiries into offenses on its own initiative, with the assistance of the United States attorney or a special

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[27] See for example, *United States* v. *Gardner*, 516 F. 2d 334 (7th Cir. 1975), *cert. den.* 96 S. Ct. 118 (1975); *United States, ex rel. Almeida* v. *Rundle*, 383 F. 2d 421 (3d Cir. 1967), *cert. den.* 393 U.S. 868; *Loraine* v. *United States*, 396 F. 2d 335 (9th Cir. 1968), *cert. den.* 89 S. Ct. 252 (1968); *United States* v. *Ruple*, 525 F. 2d 1133 (6th Cir. 1975); *United States* v. *Addonizio*, 313 F. Supp. 486 (D. N.J. 1970); cf. *United States* v. *Del Tauro*, 513 F. 2d 656, 666 (2d Cir. 1975). Also see *United States* v. *Terry*, 39 Fed. 355 (N.D. Cal. 1889), and cases cited supra n. 9, at 4. But see Mr. Justice Field, Charge to Grand Jury, 30 Fed. Cas. 992, 993–4 (N.D. Cal. 1872); however, Judge Goodman follows *Terry*, 17 F.R.D. 495 (N.D. Cal. 1952).

[28] See, for example, *United States* v. *Dingle*, 546 F. 2d 1378 (10th Cir. 1976); *United States* v. *Fortunato*, 402 F. 2d 79 (2d Cir. 1968), *cert. den.* 394 U.S. 933); *United States* v. *DiSapio*, 299 F. Supp. 436 (S.D. N.Y. 1969); *United States* v. *Messittee*, 324 F. Supp. 334 (S.D. N.Y. 1971); *United States* v. *DiGrazia*, 213 F. Supp. 232 (N. D. Ill. 1963).

[29] It should be pointed out that since the drafting of H.R. 94, Congress has considered, and will probably approve, a mechanism for special prosecutors and investigations. The Subcommittee is considering proposals to delete the section relating to the capacity of a grand jury to conduct its own investigation, in light of these Congressional actions.

attorney. The power is expressly reserved to the court to discharge the grand jury prior to the time fixed for its termination.

In authorizing a federal grand jury, whether regular or special, to undertake inquiries on its own initiative, the proposed section merely codifies settled law that a federal grand jury may, on its own initiative, inquire to determine whether a crime cognizable by the court which has impaneled it has been committed and who committed it.[30]

The appointment of a special prosecutor does grant new authority and is intended to strengthen the capacity of the grand jury to exercise its authority to conduct inquiries that it may itself initiate and to exercise this authority more efficiently. In any event, courts, state and local have in appropriate circumstances authorized special prosecutions. Once appointed, the jury acts with that prosecutor as would any other jury. No time additions are involved.

Section 7—Rights of grand jury witnesses

Section 7 confers alditional rights on witnesses, which are discussed under the following subheadings:

PRESENCE OF COUNSEL IN THE GRAND JURY ROOM

A new proposed section 3330A, to Title 18, Chapter 215 of title 18, of the U.S. Code, would assure to a grand jury witness the right to counsel, including counsel's assistance during the time the witness is questioned in the grand jury room. Any witness financially unable to obtain representation may have counsel appointed for him as provided in section 3006A of Title 18. Counsel may be present in the grand jury room only during the questioning of the witness. While present, counsel shall be allowed only to advise the witness and is not permitted to address the grand jurors or otherwise take part in the proceedings. The court may remove counsel violating this injunction, or for other good cause, such as a conflict and require the witness to obtain new counsel.

Recent cases have indicated that a grand jury witness, against whom no criminal proceedings have been instituted, cannot insist, as a matter of constitutional right, on being represented by counsel.[31] A witness may not today insist upon the presence of his attorney in the grand jury room. However, it is present practice in the federal system[32] and required in many states,[33] to permit a grand jury witness to leave the grand jury room during questioning in order to consult with his attorney.[34]

The bill would alter this present practice only to the extent that the witness need not now leave the grand jury room to consult with counsel but may receive the advise of his attorney within the grand jury room, and if indigent the witness may have counsel appointed for him. The provision is based on present requirements involving Congressional hearings where a witness has counsel sitting next to him and counsel can only advise his client and not otherwise participate. It is expected that providing for right to counsel in the grand jury room should lessen disruptions, as a witness would not be forced to go in and out of the courtroom to discuss matters with his counsel.

Providing for a right to a free attorney if a witness is unable to afford counsel is considered by most to be a matter of basic fairness. In those cases, presently, when the witness is entitled to counsel outside the grand jury room, many courts provide, especially in cases where the witness might be a "target," that a witness is entitled to free counsel, if he is indigent.

The appointment of counsel for indigents should not seriously intrude upon the time of the court of grand jury. The few witnesses who would seek free counsel can be sorted out by the prosecuting attorney or clerical help. Ordinarily the court's workload on this score would be limited to signing an order previously prepared for him. It should be pointed out that in those nine states that have allowed a right to counsel in the grand jury room, prosecutors, defense counsel, and judges have indicated that this has lessened disruptions, increased confidence of all in grand jury proceedings, and has led to a more meaningful investigation.

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[30] *Hale* v. *Henkel*, 201 U.S. 43 (1906). See also *Charge to Grand Jury* (Mr. Justice Field), 2 Sawy. 667, 30 Fed. Cas. 992 (1872); and *Branzburg* v. *Hayes*, 408 U.S. 665, 701–2 (1972).

[31] *United States* v. *Mandujano*, 425 U.S. 564, 580 (1976), see In re Groban, 352 U.S. 330, 333 (1957).

[32] Fed. Rule Crim. Proc., Rule 6(d).

[33] *United States* v. *Mandujano*, *id.*; *Report* of the Advisory Committee, at 53.

[34] See e.g. Commonwealth v. McCloskey, 443 Pa 117 (1971).

ONE WEEK'S NOTICE TO SUBPOENAED WITNESSES

Subsection (a) of the proposed section 3330B would provide that no witness shall be required to testify or produce information before the expiration of one week from the date of service of the subpoena, except in those instances where the court finds special need upon a showing by the government's attorney or with the consent of the witness.

Under present procedures no explicit period of notice is specified by the Federal Rules of Criminal Procedure or by statute. It is a principle of the common law that the service of the subpoena must be made a reasonable time before the day specified for the attendance of the witness.[35]

Subpoenas today are frequently served on short notice, in many instances requiring the witness to attend "forthwith" and on the following day.[36] This has bred litigation. In the absence of exceptional circumstances, a court would ordinarily grant a continuance on request of the witness if notice is short.[37]

Establishing a week's notice, as the presumptive reasonable period should reduce litigation, and occasion no delay in the grand jury's proceedings. The United States attorney is ordinarily fully aware of matters upon which he will act and the witnesses he will call at a term of the grand jury, and knows this at a time so far in advance of the period of notice required as should give him no difficulty. Already involved with litigation springing from the government's service of short-notice subpoenas, the court's workload may very well be reduced as a consequence of the adoption of the new subsection. If the work of the grand jury necessitates a shorter period for notice, the prosecutor may obtain it and thus eliminate any possible delay. All H.R. 94 does is provide that the burden of making application to the court for relief is very properly shifted from the witness to the government.

NOTICE OF RIGHTS UPON SERVICE OF SUBPOENA

Subsection (b) of the proposed new section 3330B requires that, upon service of the subpoena to testify or produce information, the witness shall be given "adequate and reasonable" notice of (1) his right to counsel, (2) his privilege against self-incrimination, (3) the subject-matter of the investigation, (4) whether his own conduct is under investigation by the grand jury, (5) the statutes under consideration if known at the time of the issuance of the subpoena, and (6) any other rights and privileges which the court deems necessary or appropriate.

The preparation and giving of the required notice would not result in any delay nor increase the burdens on the judicial system. A simple printed form could be readily prepared and adapted by the United States Attorney, as the notice requirements are neither complex nor extensive. The notice would be served with the subpoenas and thus not involve any delay.

Rather than delaying the proceedings or increasing the judicial burden, the requirement should expedite proceedings. While it has been the practice in several jurisdictions to give notice of one or more of the facts required by the subsection, such notice has ordinarily been given to the witness at the time of his appearance for questioning.[37a] This failure to give prior notice of the rights of the witness has often deprived him of the opportunity to prepare for his appearance, as for example in the acquisition of counsel and in refreshing his recollection on events under investigation.[38] Requests for continuances, and the obvious incidental delays are often the result.

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[35] See 8 Wigmore § 2199 (1961 ed.), and 4 Jones On Evidence § 23:2 (1972 ed.).

[36] See, for example, *United States* v. *Hilton*, 534 F. 2d 556 (3d Cir. 1976); *United States* v. *DiGilio et al.*, 533 F. 2d 972 (3d Cir. 1976) (Harry Lupo's petition for cert. denied, Jan. 10, 1977); In re Stolar, 397 F. Supp. 520 (S.D. N.Y. k975); Application of Certain Chinese Associations, 19 F.R.D. 97 (N.D. Cal. k956); *Durkin* v. *United States*, 221 F. 2d 520 (D.C. Cir. 1954).

[37] See *United States* v. *Polizzi*, 323 F. Supp. 222, 225–6 (C.D. Cal. 1971), reversed on other grounds, 450 F. 2d 880 (9th Cir. 1971). In this case the witness was served in Michigan requiring him to appear three days later before a grand jury in California.

[37a] See, for example, *United States* v. *Manduiano*, 425 U.S. 564 (1976) and *United States* v. *Washington*, — U.S. —, decided May 23, 1977.

[38] Mr. Civiletti, testifying on behalf of the Department of Justice on June 29, said: "With respect to the first three items, the Department of Justice supports the proposal. . . . With respect to the duty to advise a witness of the subject matter of the investigation, so long as the notice is sufficiently general, there is little basis for concern that the proposal will lead to unlimited litigation. And such notification, which most witnesses receive today in any event, is useful in that it may enable the witness to refresh his memory as the events being investigated in preparation for his appearance, thus aiding the grand jury in its inquiry."

H.R. 94 provides that notice must be "adequate and reasonable." This is intended to allow flexibility and to avoid possible delays. Thus, while subsection (b) requires notice on the subject matter of the investigation, whether one is a "target," and the criminal statutes involved, the "adequate and reasonable" notice standard would insure that the prosecutor is only bound to give notice to the extent he is capable of doing so—that is, to the extent a subject matter has been established, the criminal statutes involved are known, and the determination of a focus on a particular person's conduct has been made.

The question whether the notice is given is "adequate and reasonable" may be a subject of litigation in particular instances, prior to or during the appearance of the witness, on a motion to comply, or following his appearance should the witness be indicted for an offense or charged with contempt. Only the witness would have "standing" to contest the failure.

Such actions would not be brought with any disturbing frequency. The prosecutor would ordinarily comply with the statutory mandate, and deficiencies could be speedily resolved without litigation or by agreement of counsel.

If litigation were to result, it could be easily disposed of by the court. In fact, such motions are filed today in the federal courts, and in many state courts. All H.R. 94 provides are the standards for consideration of such motions and flexibility for determinations of the motions.

Specifically, items one and two providing for a notice of the right to counsel and of the privilege against self-incrimination are self-executing and could not involve delay or litigation. Item three, providing for notice of the subject matter of the investigation, is similarly straightforward. The subject matter can be broad or narrow and "reasonable and adequate notice" would mean that the court is to have flexibility in reviewing compliance. Moreover, a challenge based on non-compliance with this provision would only arise if contempt is sought for refusal to testify on a subject matter different from that included in the notice. Such contempt proceedings presently occur, with a hearing and all H.R. 94 would provide is the general standard for consideration in that proceeding.

Item four requires notice to an individual that he is a target. Requiring a witness to be told if he is a target, providing for exceptions to such notice, and providing for a right of a witness to give testimony if he is a target, should not involve a substantial increase in judicial time or responsibility. Presently, in most jurisdictions, "target witnesses" are given warnings. Determining who is or who is not a target is usually clear. In addition, numerous motions are filed at the present time, involving substantial time in the courts, as to whether warnings should be given or should not be given, as to whether or not a witness has the right to present his side of the story to the grand jury. Many prosecutors, including the Watergate Special Prosecutor, have required, as a matter of policy, that warnings be given, and that a witness be able to present his side of the story. Although recent cases, including *U.S.* v. *Washington*, indicate that there is no requirement under the Constitution of target warnings, many courts have provided, under the supervisory power, that such warnings are to be required. In any event, motions will be continued to be filed in particular cases by attorneys, and H.R. 94 would merely establish standards for consideration of those motions.

Item five requires notice of the criminal statutes involved "if these are known at the time of issuance. . . ." Ordinarily, the United States Attorney conducts an investigation based on an outline of possible improprieties—which should be based on criminal law violations—and would know the statute or statutes involved. If he does not know, notice is not issued. Item six provides notice of other rights and privileges "which the court deems necessary or appropriate." This could be easily determined by rules of court or communication with the presiding supervising judge.

The requirements of this subsection would thus not result in any increase of litigation over that now experienced in the absence of the subsection. Present litigation on the subject, which appears extensive and repetitious, seems to be directed toward establishing as a judicially created rule a requirement for giving notice on such subjects as the subsection would statutorily require.

VENUE FOR MOTIONS RELATING TO SUBPOENAS

Subsection (c) of the proposed new section 3330B gives concurrent jurisdiction to the district courts (1) from which the subpoena issued, (2) in which the witness resides, and (3) in which he is served, to hear and act on motions to quash and other motions relating to subpoenas, subject to the limitation that any motion made during or subsequent to the appearance of the witness may be made only in

the district in which the grand jury is impaneled. It is further provided that if any such motion is made prior to the day on which the person has been subpoenaed to appear or to produce documents, such appearance or production must, on appropriate motion, be stayed until the court has ruled on the motion. Substantial testimony before the subcomittee indicated that grand jury proceedings are often conducted in places unconnected with a particular offense, or the investigation of a particular offense. Motions challenging venue are now filed in such cases, and delays often secured to allow counsel from the witness's home area to arrive.

In itself, this subsection neither enlarges nor restricts any present legal grounds for the motion. It does not form the basis for any substantial increase in those instances in which the authority of the court is exercised to allow stays pending disposition of such motions. Under present procedures, objections to subpoenas which are made prior to the time set for compliance are heard and disposed of by the court under whose authority they were issued, ordinarily on motions to quash, vacate, or modify. The commands of the subpoena are usually stayed pending disposition of the motions. Objections are otherwise heard on rules to show cause, prefacing contempt proceedings.[39] Stays authorized by the subsection would thus not alter present practice, although the authority conferred would assure to those courts, newly granted jurisdiction and venue of the motions, the undoubted power to control proceedings in the court from which the subpoena issued.[40]

The question answered by this section is who should have the burden of securing the forum. A witness under present law can be required to leave his home, residence, or situs, to go to the forum where the subpoena issued. He often would desire to have his counsel. This involves costs, and transportation delay. The prosecution, on the other hand, is commonly called to work with his fellow prosecutors and supply information or personnel (as for example in extradition or removal proceedings). The government bears the cost if it seeks to remove an individual a distance away, over his objection. Of course, while jurisdiction is given to courts to resolve motions, the courts in other district than that of the investigation may decide that it would be inappropriate to hear the matter.

Delays are minimized by this subsection because a motion in a district other than the site of the investigation can only be made prior to appearance. Otherwise, it must be made in the district of the investigation, avoiding any delays during an appearance.

The convenience of the witness is better served under the allowances of the subsection, and, as a practical matter, the total number of motions that might be made, whether in the district in which the grand jury is impaneled or in those districts to be accorded jurisdiction, would not be substantially increased beyond the total that would otherwise be made in the district only from which the subpoenas issued. It is the hostile or suspect witness who would most likely contest the subpoena. It may be expected that he would undertake the contest wherever the necessary forum may be.

Absence of records of the grand jury's proceedings and difficulties in judicial assignments are questions of organization efficiency. There is no reason to suppose that the judicial system cannot, by the adoption of appropriate rules, cope expeditiously with such matters of relative insignificance.[41] Motions relating to subpoenas do not ordinarily raise complex issues of fact or law and are ordinarily quickly resolved.

SHOWINGS REQUIRED ON PROPRIETY OF SUBPOENA

Subsection (d) of the proposed section 3330B requires the attorney for the government to make certain showings on motion of the witness, to establish the validity or enforceability of the subpoena. These include showings that (A) the

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[39] See cases cited in In re Grand Jury Proceedings, 486 F. 2d 85, at 91 (3d Cir. 1973).

[40] This should avoid the fiasco occurring in *United States* v. *Polizzi*, 323 F. Supp. 222 (C.D. Cal. 1971), reversed, 450 F. 2d 880 (9th Cir. 1971). (The district court judge in this case subsequently recused himself, in *United States* v. *Zerilli* et al., 328 F. Supp. 706 (C.D. Cal. 1971).

[41] See *Abney* v. *United States* — U.S. —, — n. 9 (decided June 9, 1977). In holding the district court's rejection of a double jeopardy claim appealable, the court has occasion to say: "Admittedly, our holding may encourage some defendants to engage in dilatory appeals as the Solicitor General fears. However, we believe that such problems of delay can be obviated by rules or policies giving such appeals expedited treatment. It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy."

purpose is not to secure trial information or testimony of any person already under Federal or State indictment or accusation, (B) the witness has been advised of his rights as specified in subsection (b) [supra page 1], (C) the evidence sought is relevant to an investigation within the jurisdiction of the grand jury, and (D) compliance with the subpoena would not be unreasonable or oppressive, in that it would not require unnecessary appearances by the witness, would not lead to testimony or information that is cumulative, unnecessary or privileged, and would not be primarily for punitive purposes.

Motions are commonly filed today to quash a subpoena and courts do grant relief to witnesses and quash subpoenas.[42] H.R. 94 merely provides the standards by which the court is to resolve those motions.

Providing that a witness' testimony has to be shown to be relevant for a subpoena is presently the law in some jurisdictions, including the Third Circuit.[43] This has not caused any serious disruption in grand jury proceedings. Requiring the government to advise the witness of the subject matter of an investigation, if available, would allow a witness to be prepared at the time of his appearance. Testimony has indicated that often witnesses are called back repeatedly before grand juries because they are not familiar with the questions or issues to be discussed. Providing that a witness would know about the subject matter of the investigation, if available, should limit these repeated occurrences and appearances and thus reduce delay. Finally, requiring that the government show the witness' testimony is not sought for trial purposes is the present law. Motions are filed now, and the courts have consistently held, that if a subpoena supposedly for an investigation is really to secure trial evidence, it is improper and a subpoena for such testimony should be quashed."

The information needed to avoid litigation on a subpoena is of such character as to be at the finger-tips of the United States attorney, and often in his exclusive possession. Thus showings can be made expeditiously. In many instances they might be made without occupying the time of the court at all. Most motions could be disposed of by agreement between the prosecutor and counsel for the witness. An efficient United States attorney would render the making of such motions largely unnecessary by voluntarily providing hostile witnesses with a statement of matters required by the showings at the time the witness is subpoenaed. H.R. 94 does not in any way provide for a "mini-trial". A review of the evidence, an analysis of the admissibility of the evidence, and an analysis of the propriety of prosecutorial actions, are not required to be reviewed prior to or during grand jury proceedings under H.R. 94 (unlike other legislative proposals).

In requiring that "showings" be made, the subsection does not authorize the conduct of "mini-trials" in which the court is asked to make determinations on motions for compliance. Formal rules of evidence or the full panoply of an "adversary hearing" are not involved. The provision adopts procedures of the summary sort followed by the courts in present cases whose principles have been embraced by the language of the subsection. The court may act on the affidavit or representations of the United States attorney.

Rather than serving to stimulate delays in proceedings, the requirements of this subsection may serve to expedite the grand jury's proceedings and to lessen the burdens laid on the judicial system under present practices. Generally, today witnesses often refuse to testify and object to subpoenas or seek and secure continuances on the basis of insufficient information in a subpoena or on the basis that a legal challenge will be successful under developing cases.

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[42] For example, as to clause (d) (A), see In re National Window Glass Workers, 287 F. 219 (N.D. Ohio 1922), a leading case on the subject generally followed in federal jurisdictions. As to clause (d) (C), see *Hale* v. *Henkel*, 201 U.S. 43, 77 (1906) and *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208–9 (1946), involving subpoenas ad testificandum, in which the Court's orders were conditioned on the relevancy and pertinency of the probable testimony. Cf. *Watkins* v. *United States*, 354 U.S. 178 (congressional inquiry). For decision resting on court's supervisory powers, see In re Grand Jury Proceedings (Schofield I), 486 F. 2d 85 (3d Cir. 1973). As to clause (d) (D), see Rule 17, Fed. Rules Crim. P. (subpoenas duces tecum); and see *United States* v. *Dionisio*, 410 U.S. 1, 12 (1973) (". . . the Constitution could not tolerate the transformation of the grand jury into an instrument of oppression"), citing *Branzburg* v. *Hayes*, supra at 707–8 and 710. Also see cases cited at page 91, *Schofield I*, *supra*.

[43] See *Schofield I*, supra n. 42, and In re Grand Jury Proceedings (*Schofield II*), 507 F. 2d 963 (3d Cir. 1975); also In re Dionisio, 442 F. 2d 276 (7th Cir. 1971) and In re September 1971 Grand Jury (Richard J. Mara), 454 F. 2d 580 (7th Cir. 1971, reversed and remanded respectively by *United States* v. *Dionisio*, 410 U.S. 1 (1973) and *United States* v. *Mara*, 410 U.S. 19 (1973); and *Caldwell* v. *United States*, 434 F. 2d 1081 (9th Cir. 1970), reversed by *Branzburg* v. *Hayes*, 408 U.S. 665 (1972).

[44] See In re National Glass Workers, supra note 42.

The grand jury is thus not likely to obtain the evidence it seeks from a hostile witness if the witness is not convinced that a proper showing can be made. In the absence of such showings the witness is more likely to resist the interrogation and would resort to a test of the issues, ordinarily on a rule to show cause in the contempt proceedings that almost inevitably follow. Providing standards should reduce these refusals.

PEREMPTORY GROUNDS FOR QUASHING SUBPOENAS

Subsection (e) of the proposed section 3330B would require the court to quash the subpoena of any witness (1) who has already been confined, imprisoned, or fined for a refusal to testify before any grand jury investigating the same subject-matter or transaction, or (2) who has given notice of his intent to exercise his privilege against self-incrimination, and has not been granted immunity, or (3) if the grand jury is inquiring into the same transaction under consideration by another grand jury which failed to indict and there is no additional or newly discovered evidence relevant to such inquiry.

The effect of the subsection is to provide sanctions against activities prohibited by other provisions of the bill [item (1), prohibited by the amendment to sec. 1826 para. (3); and items (2) and (3), which are prohibited by the addition of the new sec. 3329, subsections (d) and (e) respectively]. In thus providing a remedy to forestall prohibited inquiries, the provision serves in fact to conserve the time of the grand jury and court. In addition, duplicitous investigations, and possibly trials, should thus be eliminated. Repeated contempt hearings for the same transaction are precluded and repeated investigations and trials for the same transaction are precluded.

A motion made on the specified bases should ordinarily be disposed of by agreement between the public prosecutor and counsel for the witness, without the necessity of court intervention. If the motion is heard, the grounds for quashing a subpoena under the subsection allow for summary and direct proof, and thus the disposition of the motion should not be expected to delay the grand jury's proceedings in any material degree.

VENUE OF GRAND JURY INQUIRIES INTO OFFENSES

Subsection (f) of the proposed section 3330B allows the convening of grand juries only in those districts in which it is believed that elements of the criminal conduct under inquiry may have occurred. The district court may quash a subpoena or transfer any grand jury proceedings or investigation to another district where it might properly be convened if the court finds that a substantial and unnecessary hardship would be imposed upon the witness or his family because of the location of the proceeding.

This requirement is not new—venue is today supposed to be based on a sufficient nexus and courts have the power to determine if the forum is appropriate. Motions for change of venue, involving hearings and orders, are common today. All H.R. 94 provides are the standards for those hearings.

Section 8—Recording of grand jury proceedings and availability of transcripts and other statements

This section of the bill would amend Chapter 215 of title 18, U.S. Code, by adding at the end thereof new sections.

RECORDING OF GRAND JURY PROCEEDINGS

A new section 3333 would require that a complete and accurate stenographic or electronic record be kept of all grand jury proceedings, excepting the grand jury's secret deliberations and consultations between witnesses and counsel.

This is simply a housekeeping requirement. In itself it creates no delay in the work of the grand jury and imposes no burden on the court. Some district courts have already, by rule, adopted a recording requirement, and a number of states have made the practice mandatory by statute.[45] A district judge who has had considerable experience with the requirement, and had served formerly as both a state and federal prosecutor, has strongly affirmed that the recordation of the proceedings would not interfere with the proper functioning of the grand jury.[46]

[45] See the Advisory Committee's Report, at 23.
[46] Judge Pettine, in United States v. Gramolini, 301 F. Supp. 39, 41 (D.R.I. 1969).

A proposed new section 3334 would: (a) authorize a grand jury witness, prior to testifying or providing other information, to examine and copy any statement that he has made (including any statement he has made to a grand jury) which is in the possession of the United States and relates to the subject under inquiry; (b) authorize the witness to examine and copy a recordation of his own appearance before the grand jury; and (c) entitle a defendant at a reasonable time prior to trial to examine and copy a recordation of (1) the grand jury testimony of all witnesses to be called at trial, (2) all statements to the grand jury by the court and prosecuting attorneys relating to the defendant's case, (3) all grand jury testimony or evidence that could be considered exculpatory, and (4) all other grand jury testimony or evidence which the court may deem material to the defense. Any of the foregoing disclosures of the recorded proceedings may be denied, deferred, or restricted by the court upon good cause shown.

Under the Jencks Act a defendant in a criminal prosecution is entitled to delivery of the recorded testimony of any grand jury witness who is called and has testified as a government witness at defendant's trial. Thus, in view of the foregoing changes made by the proposed section 3334, section 8(b) of the bill also amends the Jencks Act (18 U.S.C. 3500) by deleting all references in it to transcripts of a witness' grand jury testimony.

The mere process of supplying a grand jury witness with a copy of his statements or recorded testimony, as would be required by subsections (a) and (b) of the proposed section 3334, could not result in any delay or obstruction of the grand jury's proceedings, nor increase the burdens of the court. The witness is not now covered by secrecy requirements with respect to matters occurring before the grand jury.[47]

By virtue of Rule 16(a) a grand jury witness who is later indicted and becomes a defendant is entitled as a matter of right to inspect and copy so much of his recorded grand jury testimony as relates to the offense charged.[48] Otherwise a grand jury witness may seek disclosure of his recorded testimony in accordance with the discretionary authority of Rule 6(e) on direction of the court "preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of a defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." A grand jury proceeding has been held to be "a judicial proceeding" within the meaning of the rule.[49]

Several courts, consistently with the bill's proposals, have granted grand jury witnesses access to their testimony on motion made.[50] They have done so without any problems of delay or obstruction, on the grand jury's operations or on the judicial system. Faced with persistent litigation on the subject, under present rules and practices which do not clearly delineate the rights of witnesses, H.R. 94 should reduce litigation as to what can or should be disclosed.

The present right to the recorded grand jury testimony of government witnesses as it exists under decisional and statutory law is not affected by the

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[47] Neither at common law, see *United States* v. *Central Supply Ass'n*, 34 F. Supp. 241, 245 (N.D. Ohio 1940), nor under the present Federal Rules of Criminal Procedure Rule 6(e) are grand jury witnesses under an obligation of secrecy. In re Proceedings Before the Grand Jury Summoned October 12, 1970, 321 F. Supp. 238 (N.D. Ohio 1970); In re Matter of Petition For Disclosure of Evidence Before Grand Jury, 184 F. Supp. 38 (E.D. Va. 1960). Rule 16, governing discovery and inspection in preparation for trial provides that, upon request of a defendant, the government is required to permit the defendant to inspect and copy is recorded testimony before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association, or labor union, the defendant may obtain discovery of relevant recorded grand jury testimony of any of its employees or officers who are legally able to bind the defendant in respect to the conduct or offense involved.

[48] Prior to the effective date of Rule 16(a), that is, July 1, 1966, the weight of authority appeared to be otherwise. See cases cited to n. 3, at 553 of *United States* v. *Pojunsky*, 44 F.R.D. 550 (S.D. N.Y. 1968); *United States* v. *DiSalvo*, 251 F. Supp. 740 (S.D. N.Y. 1966). *Contra, United States* v. *Schooneman*, 203 F. Supp. 840 (D. D.C. 1962), and see *United States* v. *Remington*, 191 F. 2d 246 (2d Cir. 1951).

[49] In re Minkoff, 340 F. Supp. 154 (D. R.I. 1972).

[50] See, for example, In re Weir, 377 F. Supp. 919 (S.D. Cal. 1974), cert. den. 95 S. Ct. 525 (grand jury contempt proceeding, grand jury witness allowed to peruse copy of his testimony to refresh his recollection before reappearance); In re Minkoff, supra n. 49 (grand jury proceeding, witness sought copy of his testimony which was made available at termination of grand jury); In re Russo, 53 F.R.D. 564 (C.D. Cal. 1971) (contempt, court offered grand jury witness copy of his testimony if he would agree to testify). Cf. In re Biaggi, 478 F. 2d 489 (2d Cir. 1973) (witness' grand jury testimony, as redacted, supplied to refute libelous publication). But see In re Alvarez, 351 F. Supp. 1089 (S.D. Cal. 1972) (request of grand jury witness denied).

provisions of the bill except to the extent that the bill section 3334(c)(1) makes the transcript of the witness' grand jury testimony available at a reasonable time before trial. Some courts have made such transcripts available not less than 24 hours before trial,[51] other courts have denied such pre-trial discovery.[52] Transcripts become available under the Jencks Act only after the witness has been called by the government and has testified on direct examination. Under the Jencks Act, moreover, the proceedings at trial may be recessed for such time as may be necessary for the defense to examine the transcript and prepare for its use at trial. Any such delay would be rendered unnecessary by the pretrial discovery which the bill authorizes.

Under item (2) of subsection (c), the defendant is entitled to "all statements to the grand jury by the court and the attorney for the government or special attorney, relating to the defendant's case."

Under existing law, such statements are not freely made available to the defendant. Transcripts, minutes, or recordings of such statements are not made available except on a showing of "particularized need," as is required of other disclosures of grand jury proceedings under Rule 6(e).[53] Courts have taken the position that the disclosure of statements of this kind cannot be predicated on the basis of unsworn statements or unsupported and conclusory allegations.[54] In many or even in most cases of this category this strict standard prohibits any review of prosecutorial action, for the misconduct or irregularity may be wholly unknown to the defendant, or perhaps only "surmised," thus the opportunity to vindicate rights is denied unless access to the transcript or minutes is made available to him largely as a matter of right, which is essentially what the bill's provision would do.[55]

Requiring disclosure of a prosecutor's statements to the grand jury is to insure that the grand jury's decisions are based on the evidence and facts presented to them and not based on the prosecutor's comments, characterizing of the evidence or characterizing of the witness. Witnesses before the subcommittee, and numerous law review articles and statements by former prosecutors, defense counsel, and judges, and others have indicated that the prosecutor, by his comments, statements, and other actions can totally dominate the grand jury proceedings and therefore, eliminate any effective check by an "independent" grand jury so as to act as a buffer between the witness and the state.

It may well be that this provision would "promote increased litigation over the conduct of grand jury procedings." [56] However, if such occurs, it would not be because of the recording and disclosure requirement but because of the improprieties seen after review of the transcript.

The provision itself neither enlarges nor diminishes the causes of action that the defendant may otherwise possess under the existing law.

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[51] See e.g., *United States* v. *Cullen*, 305 F. Supp. 695 (E.D. Wis. 1969), and *United States* v. *Buschman*, 386 F. Supp. 822 (E.D. Wis. 1975).

[52] See *United States* v. *Catto*, 533 F. 2d 264 (5th Cir. 1976); *United States* v. *Frumento*, 405 F. Supp. 23 (E.D. Pa. 1975); *United States* v. *Harris*, 458 F. 2d 670 (5th Cir. 1972); *United States* v. *Birrell*, 276 F. Supp. 798 (S.D.N.Y. 1967). However, pre-trial discovery of the identity of government witnesses to be produced on the trial for proving the indictment in the case of other persons charged with treason and other capital offenses is required by statute. 18 U.S.C. 3432. Curiously, the rule is otherwise with respect to the identity of witnesses in noncapital cases. *United States* v. *Van Duzee*, 140 U.S. 169 (1891); *United States* v. *Brown*, 535 F. 2d 424 (8th Cir. 1976); *United States* v. *Hearst*, 412 F. Supp. 863 (N.D. Cal. 1975); *United States* v. *Baggett*, 455 F. 2d 476 (5th Cir. 1972); *United States* v. *Conder*, 426 F. 2d 904 (6th Cir. 1970), cert. den. 400 U.S. 958 (1970).

[53] *Beatrice Foods Co.* v. *United States*, 312 F. 2d 29, 39 (8th Cir. 1963).

[54] *United States* v. *Schack*, 165 F. Supp. 371 (S.D. N.Y. 1958); *United States* v. *Sugarman*, 139 F. Supp. 878 (D. R.I. 1956).

[55] *United States* v. *Schack*, supra n. 54, is perhaps illustrative of the difficulties encountered by the defendant. In this "income tax evasion case", the grand jury had returned a "no true bill" against the defendant. Federal prosecutors then presented the same case before a second grand jury which indicted. On his pre-trial motion to dismiss the indictment, the defendant sought to inspect the grand jury minutes, claiming that insufficient evidence had been presented to the grand jury to indict him at all, and that the indictment was returned as a result of undue pressure exerted on the grand jury by prosecuting attorneys. In denying the defendant access to the minutes, the court declared that there is a "presumption" that additional evidence adequate to sustain the indictment was presented to the second grand jury; and that the latter claim could not be grounded on the "unsupported" statement of defense counsel, whose allegations were described as an assertion of "unsupported suspicions", particularly in light of the "unequivocal denial" by the prosecuting officers that no such pressure was exerted. According to dicta in *Costello* v. *United States*, 350 U.S. 359, 363 (1956), the defendant is entitled to be indicted by an "unbiased" grand jury.

[56] Testimony of Assistant Attorney General Civiletti, June 29, 1977.

If the furnishing of access to the statements as a matter of right under item (2), as distinguished from a matter of discretion under existing law, results in "increasing" litigation, it is because of the facts that may be disclosed by the record to which access is given and that would otherwise remain unknown to, or unprovable by, the defendant, that is, a denial of rights, which would otherwise be foreclosed. In other words, deny the remedy for the right to avoid delays.

There is an equal possibility that this provision will reduce delays. Improper indictments and litigation and subsequent trials on those indictments, will be eliminated. The provisions of items (3) and (4) of subsection (c) entitle the defendant to examine and copy a recording of grand jury testimony or evidence which is exculpatory or which the court may deem material to the defense. The provisions are obviously in aid of well-recognized constitutional principles. Repeatedly it has been said that the government has an obligation to supply evidence to a defendant not otherwise known to him which is material to disproving his guilt, reducing his punishment, or impeaching witnesses against him.[57] As indicated in the Code of Professional Responsibility, the ABA Standards on Prosecution Function, and the National Prosecutions Standards, this is presently the requirement ethically on a prosecutor. The court is only to get involved if the prosecutor does not live up to his responsibilities. Presently, motions are filed pre-trial for discovery, during trial, and post-trial, and on appeal, relating to the failure to deliver exculpatory evidence.[58] Making it clear what the responsibility of the prosecutor is, should lessen these motions, and the resulting hearings, at later stages in the criminal justice system.

The supplying of so much of the transcript as relates to item (3) and (4) should not result in any delay in the conduct of grand jury or court proceedings. Under other provisions of the bill, a transcript of the proceedings would be maintained as a matter of course. The prosecutor, who would be familiar with the testimony and evidence adduced before the grand jury, can readily extract that which is to be supplied by item (3) and should be prepared to make his recommendations upon which the court may take its order relating to item (4), without any necessity for a page-by-page perusal of the whole of the record. Finally, there should be adequate time between the indictment of the defendant and the actual commencement of his trial to afford an opportunity to review so much of the transcript as is supplied under the provision.

Section 9—Preliminary examination

Section 9 of the bill would entitle a defendant to a preliminary examination when charged with any offense other than a petty offense, which is to be tried a judge of the district court. This examination may be held prior to or following the filing of an indictment or information. H.R. 94, as a compromise proposal, provides for a preliminary examination in every case. Numerous grand jury bills have suggested "mini-trials" at which a defendant would have the right to object to the sufficiency of the evidence, the admissibility of the evidence and other legal improprieties before the grand jury, prior to his appearance, during his appearance, or immediately after his appearance. H.R. 94 would not mandate such mini-trials but would rather provide application of the existing machinery, that is, use of a preliminary examination, to insure that a prosecutor has sufficient admissible evidence to proceed to trial. A prosecutor would know that he has to present his evidence to the court, even if the grand jury indicts. If the preliminary examination results in the finding of lack of probable cause, that would terminate prosecution. In addition, if it results in a showing of probable cause, a defendant would have been shown the probable cause basis for his prosecution and could no longer complain about improper activities before a grand jury. In those jurisdictions where preliminary examinations are required, it has resulted

[57] *United States* v. *Cullen*, 305 F. Supp. 695, 700 (E.D. Wis. 1972), citing *Giles* v. *Maryland*, 386 U.S. 66 (1966) and *Brady* v. *Maryland*, 373 U.S. 83 (1962).

[58] In *Brady* v. *Maryland*, ibid. at 87, the Court had expressly held, as it said, that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Most recently, in *United States* v. *Agurs*, 427 U.S. 97, 112 (1976), the Court made clear that this constitutional duty was not limited to cases in which the defense makes a request for such evidence, and that the "proper standard of materiality" was whether the evidence creates a reasonable doubt of guilt. The Court emphasized that these decisions bore only on the question whether the prosecutor has discharged his constitutional and ethical duties, and not whether a broader discovery might be desirable under procedural rules authorizing it. Ibid, at 109.

in a decreasing use of the indictment as a charging instrument. Defendants are more willing to waive indictment because they have seen the basis for probable cause at a preliminary examination. Prosecutors are more willing to conduct their investigations prior to a preliminary examination, rather than going first to an indictment, so that they can see whether their investigation is fruitful. Finally, upon seeing the evidence at a preliminary examination, defendants are more likely to plead guilty.

The language of the provision precisely follows the existing Rule 5(c), by which a defendant is entitled to a preliminary examination (unless waived), with the exception that, by the terms of the rule, no such examination shall be held if the defendant is indicted or if any information is filed before the date set for the preliminary examination.[59]

Mr. Civiletti [60] and Mr. Imlay [61] oppose the provision as a "duplication" of the role of the grand jury, asserting that both the preliminary examination and the grand jury are to determine "probable cause."

Some prosecutors are said to prefer proceeding by way of indictment to avoid the burden of time and preparation involved in a preliminary examination, and to avoid the exposure of their witnesses to examination or the discovery of evidence. In recent survey several active state prosecutors stated that they prefer proceeding by way of preliminary hearing, rather than by indictment alone, because by thus making known the strength of their case the result has frequently been that defendants have waived indictment and entered guilty pleas.

The charge of "duplication" also overlooks those important features which distinguish a preliminary examination from a grand jury proceeding. The magistrate or court conducting a preliminary hearing is obliged to discharge the defendant unless there has been sufficient evidence adduced to establish reasonable cause to believe that an offense has been committed and that the defendant committed it. If there is a failure in this respect the record is open and available, and the defendant may litigate the issue. The record and evidence before the grand jury are, in contrast, more of a closed book. It is, moreover, the doctrine of *Costello* v. *United States* [62] that no inquiry is permissible for the purpose of determining whether or not a judgment of the grand jury was founded upon sufficient proof.[63] Secondly, the proceedings differ markedly with respect to rights of defending against the accusation. At a preliminary examination the defendant is confronted by the witnesses against him, and he has the assistance of counsel. The defendant may cross-examine witnesses who testify against him and he may present witnesses in his defense. He and his counsel may engage in appropriate argument. These important procedures are not accorded before the grand jury.

As a consequence of the requirements of section 9, United States attorneys will be impelled inevitably to proceed initially by way of preliminary examination prior to indictment, in those instances where the accused may be apprehended and subjected to process. The probable consequence is that the time and energy of the courts may be conserved and perhaps lessened to an appreciable degree by the practice. By proceeding initially by way of preliminary examination, there will be an increase in waivers of indictments together with guilty pleas. As a consequence of the provision, there will be a probable overall decrease in pretrial litigation. The reduction in motions under the rule, relating to defenses and objections based on defects in the institution of the prosecution, defects in the indictment, and requests for discovery, should off-set any imposition on the time of the court as may be occasioned by the new provision.

Section 10—Reports concerning grand jury investigations

This section has no direct or immediate impact upon the conduct of grand jury or court proceedings. It requires the Attorney General to maintain statistics and report to the Congress and to the Administrative Office of the United States Courts on grand jury operations and related matters. The collected statistics may serve as a basis for a continuing improvement of the system of criminal justice.

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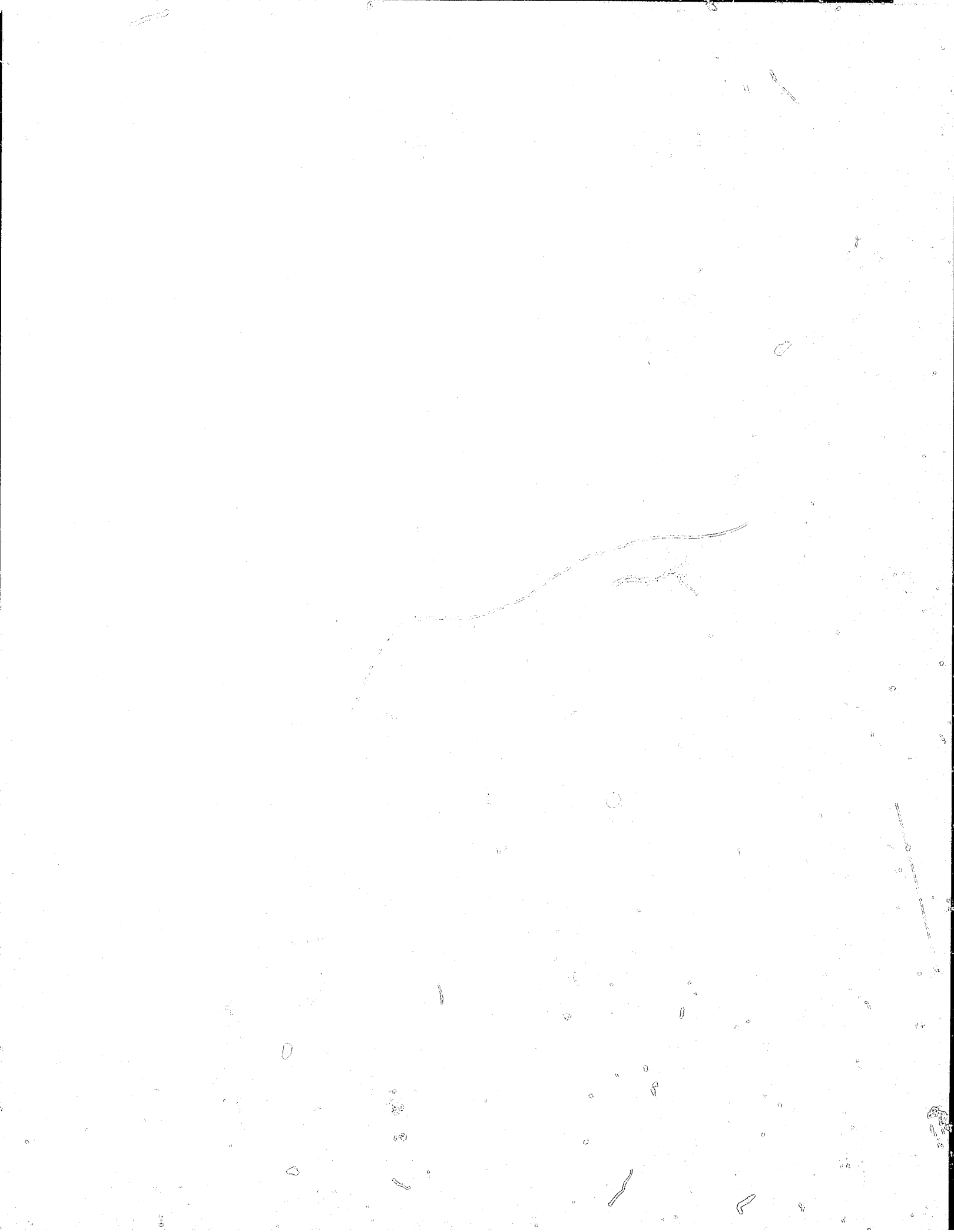
[59] Compare 18 U.S.C. 3060(e).
[60] Testimony of June 29, 1977.
[61] Testimony of April 28, 1977.
[62] 350 U.S. 359 (1956).
[63] This doctrine has been narrowed in some jurisdictions by more recent decisions of the lower federal courts. See *United States* v. *Gramolini*, 301 F. Supp. 39, 42 (D. R.I. 1969); *United States* v. *Ramirez*, 482 F. 2d 807, 811–13 (2d Cir. 1973).



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