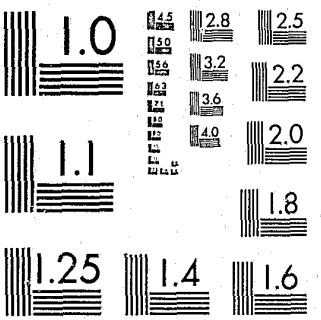

THE GRAND JURY REFORM ACT OF 1978

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

S. 3405

TO ESTABLISH CERTAIN RULES WITH RESPECT TO THE APPEARANCE OF WITNESSES BEFORE A GRAND JURY, IN ORDER TO PROTECT THE CONSTITUTIONAL RIGHTS 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

AUGUST 17, 22, AND 24, 1978

PART 1

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PART 1

Printed for the use of the Committee on the Judiciary

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THE GRAND JURY REFORM ACT OF 1978

THURSDAY, AUGUST 17, 1978

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 2228, Dirksen Senate Office Building, Senator James Abourezk (chairman of the subcommittee) presiding.

Staff present: Irene R. Emsellem, chief counsel and staff director; Jessica J. Josephson, counsel; and Al Regnery, minority counsel.

Senator ABOUREZK. The subcommittee will come to order.

OPENING STATEMENT OF SENATOR ABOUREZK

Senator ABOUREZK. This is the first of a series of hearings on the Grand Jury Reform Act of 1978, S. 3405.

Today the Administrative Practice and Procedure Subcommittee begins a series of hearings which will address the need for grand jury reform. The grand jury has historically been regarded as functioning as an independent body between the Government, represented by the prosecutor, and the citizen, as a target of the Government's suspicions that a crime has been committed. The responsibility of grand jurors is to ascertain whether the charges brought against an individual are founded upon just cause rather than malice, and to make an independent judgment to indict based on the evidence presented to them. But rather than exercising independence in this process, and preforming as a shield between the accuser and the accused, the grand jury is, in most cases, a rubber stamp for prosecutorial decisions. And as such, the institution is, and has been, subject to manipulation by Government officials responsive to politics, not justice.

As we learned through bitter experience during the Vietnam war era and the Watergate period, the grand jury was used as a powerful weapon against political dissenters.

Grand juries were used for fishing expeditions, to develop "intelligence" on groups or associations which held beliefs different from those of the executive branch. Such Government use of the grand jury has undermined the people's faith in the ability of their Government to be just.

Today little has changed. The grand jury is still a captive of the Government. Proceedings in Federal grand jury room are controlled solely by the prosecutor. There are still no countervailing checks and balances to abuse of prosecutorial discretion. And thereon lies the danger, a danger which past experience has shown is not illusory, but very real.

Enactment of proposed S. 3405 would right these wrongs and bring this institution back to its intended purpose. Specifically:

1. It would increase grand jury independence by requiring that the grand jury be given adequate instruction about its powers, rights and responsibilities; by requiring that the grand jury vote on subpenas and requests for contempt hearings; and by prohibiting prosecutors from engaging in fishing expeditions for intelligence gathering.

2. The bill would establish standards for investigations. It provides for a minimum notice requirement of 7 days for subpenas.

It provides that when an investigation includes violations of substantive criminal statutes as well as conspiracy, the grand jury may not be convened in the district where only the conspiracy occurred.

It also requires that the scope of the investigation be stated by the prosecutor, and that the witness be so notified in his/her subpena. All questions asked or documents subpenaed must be relevant to that inquiry.

And, it abolishes reiterative contempt—when the prosecutor subpenas a witness after she or he has already been imprisoned for contempt knowing that he or she will go to jail again rather than testify—a position also endorsed by the American Bar Association, and would limit imprisonment for contempt to 6 months.

3. The proposed Grand Jury Reform Act also addresses the right-to-counsel issue by permitting the witness to have a lawyer in the grand jury room. A witness is not presently entitled to the advice of counsel inside the grand jury—a practice the American Bar Association has suggested be ended.

4. Under current practice, a witness before a grand jury may be confronted with evidence seized in violation of his/her constitutional rights, and the Supreme Court has recently held that an ensuing indictment can be totally based on such illegally seized evidence. This bill will remedy this erosion of our fourth amendment rights by preventing the use of illegally seized evidence.

5. The bill establishes a mechanism for independent grand jury inquiry. The bill provides that the grand jury may initiate such inquiry itself. It also provides for an independent court-appointed prosecutor to assist the jury and sign any indictment in lieu of the U.S. attorney in certain investigations.

6. The bill provides for consensual immunity, whereby the witness consents to this grant of immunity and the only type of immunity that may be granted is transactional immunity. That is, when a witness testifies in front of the grand jury, none of the evidence elicited as a result of any testimony may be used to develop a case against him or her.

The specific provisions of my proposed legislation, which were designed to address substantive areas of reform follow:

1. With respect to the issue of recalcitrant witnesses

Twelve or more members of the grand jury must vote to make application to the court for an order directing a recalcitrant witness to show cause in a hearing why he/she should not be held in contempt.

The bill gives the witness 5 days' notice of a contempt hearing. Upon a showing of special need after a hearing, shorter notice may be given, but not less than 48 hours.

The witness has the right to appointed counsel in contempt proceedings, if the witness is unable to afford it.

Imprisonment shall be in a Federal institution, if one is located within 50 miles of the court.

The bill reduces the period of imprisonment from a maximum of 18 to 6 months for civil contempt, and prohibits reiterative contempt, by making the 6 months cumulative, and applying it against any confinement resulting from prior, subsequent, or related grand jury investigations.

The bill provides that the confined person shall be admitted to bail, pending appeal unless the appeal is patently frivolous and taken for delay. Appeals shall be disposed of pursuant to an expedited schedule, eliminating the unique "30-day rule," which requires that appeals be decided within 30 days.

The bill provides that a refusal to answer questions or provide other information shall not be punished if the question or the request is based on any violation of the witness' constitutional or statutory rights.

2. With respect to the issue of notice to the grand jury of its rights and duties, the bill:

Requires that the district court judge who empanels the grand jury give instructions in writing to the grand jurors at the beginning of their term and insure that the grand jury reasonably understands them. These instructions shall include: the grand jury's powers with respect to independent investigation, the necessity of legally sufficient evidence to indict, and the power of the grand jury to vote before a witness may be subpenaed, given a contempt hearing or indicted.

Prescribes that failure to so instruct the grand jury is just cause for a refusal to testify.

3. With respect to the issue of independent inquiry, the bill:

Allows the grand jury, upon notice to the court, to request the attorney for the Government to assist it in an inquiry into offenses committed by Government or former Government officials. The grand jury shall serve for 12 months with no more than two extensions for a maximum of 24 months.

Provides that the court, upon a vote of the grand jury, may appoint a special attorney to assist the grand jury in such an investigation, if the attorney for the Government is found to have refused to assist in, or to have hindered or impeded the investigation. Such attorney will be paid a reasonable rate and may fix compensation for such assistants as is deemed necessary, with the approval of the court. Such attorney shall sign any indictment in lieu of a Government attorney.

4. With respect to the issue of the rights of grand jury witnesses: the bill:

Requires that subpenas are not returnable on less than 7 days notice, unless a special need has been determined after a hearing; and then they are not returnable on less than 2 days notice. The subpena must advise the witness of the right to counsel, whether his/her conduct is under investigation, the subject matter of the inquiry, and the substantive statutes involved. Any witness not advised of these rights cannot be prosecuted, subjected to penalty, or have the evidence used against him/her in court.

Gives witnesses the right to have counsel in the grand jury room, such counsel to be court appointed where appropriate. Counsel shall not be bound by secrecy and shall take part in the grand jury proceeding.

Prescribes that when an investigation includes violations of substantive criminal statutes as well as conspiracy, the grand jury may not be convened in the district where only the conspiracy is alleged. On the motion of the witness the court shall transfer the investigation to another district in which the proceedings may be properly convened. The court shall take into account the distance of the proceedings from the residence of the witness, other burdens on the witness, and the existence and nature of any related proceedings.

Provides that once a grand jury has considered a matter, the same matter may not be presented to another grand jury unless the Government shows and the court finds that the Government has discovered additional relevant evidence.

Provides that a transcript shall be made of the proceedings and be available to the witness and counsel within 48 hours or within a reasonable time if 48 hours is not possible. After examination of such transcript a witness may request permission to appear before the grand jury again to clarify his testimony which shall become part of the official transcript and be circulated to the jury.

Stipulates that if the attorney for the Government is given written notice in advance that a person subpenaed intends to claim his fifth amendment privilege against self-incrimination, the witness shall not be compelled to appear before the grand jury. The witness must consent to immunity. There will be no compelled testimony.

Gives the witness and his/her counsel the right to examine and copy any statement of the witness in the possession of the United States which relates to the matter under investigation.

Provides that no person shall be required to testify or be confined if, upon evidentiary hearing, the court finds: (a) a primary purpose or effect of the subpena is to secure for trial evidence against a person already under indictment, or formal accusation; (b) compliance with the subpena is unreasonable or oppressive and involves unnecessary appearances; or the only testimony that can reasonably be expected is cumulative, unnecessary, or privileged; (c) the primary purpose of the subpena is punitive; to harass the witness, to induce the witness to commit perjury or false utterance or to place the witness in contempt.

Gives the court in the district out of which the subpena was issued, the court in the district in which the subpena was served, and the court in the district in which a witness resides concurrent jurisdiction over motions to quash and other relief. It allows such motions at any time. If a motion is made prior to or during an appearance, the appearance is stayed, pending ruling. If the motion is made during or subsequent to the appearance, the motion must be made in the district of the empaneled grand jury.

Provides that any person may approach the attorney for the Government to request permission to testify on a matter before a grand jury or to request that an inquiry be initiated. The attorney for the

Government shall keep a public record of all denials of such requests. Any individual dissatisfied with the disposition of his request may appear before the grand jury if the court finds that such appearance would serve a relevant purpose.

5. With respect to the issue of reports concerning grand jury investigations, the bill:

Requires the Attorney General to file detailed annual grand jury reports, describing: (a) the number and nature of investigations in which grand juries were utilized; (b) the number of reports for orders requesting testimony, and the number granted; (c) the number of immunity grants requested, the number consented to, and the nature of the investigations; (d) the number of witnesses imprisoned for contempt, and the dates of their confinement; (e) an assessment of the effectiveness of immunity, including the number of arrests, indictments, no-bills, etc., resulting from immunity; and (f) a description of the data banks, etc., by which grand jury data is processed and used by the Justice Department.

6. With respect to the issue of evidence taking during the grand jury process, the bill:

Requires the Government to introduce all evidence in its possession which it knows will tend to negate the guilt of a potential defendant.

Prohibits the grant jury from returning an indictment on the basis of summarized or hearsay evidence alone, except for good cause shown.

Requires that questioning of witnesses and subpenas for documents be relevant to the subject matter under investigation.

Requires that the only evidence that can be presented to a grand jury is evidence properly seized and legally obtained.

7. With respect to the issue of immunity, the bill:

Provides that a witness must consent to immunity, thereby preserving his or her fifth amendment rights. If the witness consents to the immunity, the sort of immunity granted would be transactional, as I discussed earlier.

Today we will focus on the legislative efforts for reform, especially those in the House of Representatives. I am pleased to have with us Representative Joshua Eilberg, author of H.R. 94 and Representative John Conyers, author of H.R. 3736.

In addition, we will hear from a panel of men and women who have dedicated their talents and energies to try to right the wrongs and aid those who have been victimized by grand jury abuse. They will discuss the specific legislative needs in light of their experience.

Representing the Grand Jury Project in New York is Ms. Linda Backiel; Mr. Morton Stavis is here from the Center for Constitutional Rights in New York; and Ms. Judy Meade is representing the National Lawyer's Guild.

I would like to ask the first witness to begin his testimony.

I would like to welcome first of all Congressman Joshua Eilberg. I appreciate your work on the House side and look forward to your testimony.

TESTIMONY OF HON. JOSHUA EILBERG, PENNSYLVANIA, ACCOMPANIED BY MARTIN H. BELSKY, COUNSEL, HOUSE COMMITTEE ON THE JUDICIARY

Mr. EILBERG. Before I begin my statement, I would like to apologize in advance for having to leave this hearing almost immediately after I make my oral presentation. A special meeting was recently arranged for me with some key people in the administration about an issue that is of concern to me and my subcommittee as well as the full House Judiciary Committee.

I, of course, would welcome any questions that you or other members of the committee or staff would like to raise. However, I must ask your indulgence that if there are any questions that these be submitted so that I can make response to them for inclusion in the record. I thank you in advance for your courtesy.

Senator ABOUREZK. That will be fine.

Mr. EILBERG. It is indeed a great pleasure to be here today as the first witness of your set of hearings for the Senate Judiciary Committee on grand jury reform for the 95th Congress.

First, let me congratulate you, Senator Abourezk, on convening these hearings. As you might know, my subcommittee has completed hearings on my bill, H. R. 94, and other bills that have been introduced in the House. We have been urging Senate action for almost 2 years. Delay on further action on our side has resulted, in part, from the failure of the Senate, up to now, to act.

Because of the heavy schedule of legislative activities and concerns, the members of the subcommittee, the members of the House Judiciary Committee, and the leadership of the full House have been reluctant to expedite the process for final consideration of grand jury reform legislation, when there seemed little likelihood of any action by the Senate and thus no possibility of final approval of comprehensive legislation.

With the convening of these hearings by you, we hope that we can now make some additional efforts at continuing, and perhaps even completing, legislative action on our side.

Let me also congratulate you on your personal interest in grand jury reform. During the 94th Congress you introduced a bill, S. 3274, and 1 day of hearings was held on your bill and my bill. You again acted early this Congress by introducing another bill, S. 1449. You now have introduced a new bill, S. 3405, which makes certain changes in your original proposals.

I know for a fact that during the 94th Congress and now the 95th Congress your staff has been working closely with my staff in collecting information on grand jury reform and in seeking to encourage individuals, groups, and government officials to support grand jury reform not only at the Federal level, but in the States.

Let me take a few minutes to go back into the history of grand jury reform in the Congress, and my personal interest.

As a former prosecutor in the Philadelphia district attorney's office, I had first-hand experience with the grand jury system—its potential, its use, and its possible abuses. I quickly learned that a diligent prosecutor could use a grand jury to ferret out crime and determine the likelihood of convictions. I also learned that an unscrupulous prosecutor

could use the grand jury as a tool for selective prosecution and conviction without trial.

Almost immediately after I became chairman of my subcommittee, I was asked to, and did in fact, convene hearings on the so-called *Fort Worth Five* case. As you may recall, this case involved a grand jury investigation of five Irish Americans for alleged gunrunning from New York City to Ireland. The investigation was held in Fort Worth, Tex. Grand jury witnesses were compelled to come to Texas from New York and when they refused to testify were imprisoned in Texas, far from family, friends, and counsel.

The use of the grand jury, and the convening of the grand jury, in this manner, led to expressions of concern by citizens, legislators, and legal scholars. During our hearings, Senator Kennedy expressed his concern about a "new breed of political animal, the kangaroo grand jury—a dangerous modern form of star chamber secret inquisition that is trampling the rights of American citizens from coast to coast."

After this hearing, the House Judiciary Committee became itself a kind of grand jury. Sitting as a panel to review and consider evidence on the then President, I believe our committee proved that rights can be granted in grand jury-type proceedings without interfering in its processes. Our committee also learned of the grand jury abuses committed during the Nixon administration. The sad tale of political grand juries, and grand juries convened for harassment and information-intelligence gathering I am sure will be related to you during the 3 days of hearings.

Let me state now, however, that our impeachment inquiry convinced me that grand jury reform is not only possible, but practicable and not only proper, but essential.

In the 94th Congress, we held 4 days of hearings where representatives of all interests presented their viewpoints. Most called for reform; some objected to any change.

During the 95th Congress we have had 5 additional days of hearings. Again, most called for reform, including many prosecutors, but some objected to even modest attempts at limiting potential abuses.

Many of these individuals will present their points of view to you during the next 3 days, so I will not go into any further detail on their positions. However, I feel it necessary to point out some significant effects of our hearings on the House side.

First, there is a continuing movement by reputable law groups in support of grand jury reform. Specifically, the American Bar Association in August 1977 adopted a comprehensive set of standards which almost duplicate the provisions in my bill, H.R. 94, and many of the provisions in your bill, S. 3405. Other groups, including State and local bar associations, have similarly adopted positions in favor of these reforms.

A second trend is the growing movement in the States to adopt provisions analogous to those in our bills. Colorado, Massachusetts, and most recently New York have adopted provisions making essential changes in their State grand jury system. Other States—including Pennsylvania, New Jersey, and California—are considering similar reforms. Action by the Congress has, therefore, led to action by State legislators throughout the country.

While I firmly hope and believe that we can and must adopt comprehensive grand jury reform proposals at the Federal level, it is still heartening to recognize that we have had significant impact nationally, both among attorneys and State legislatures.

I must, however, at this point note one problem and concern which I am sure you will have to face during your hearing—the continued opposition of the Department of Justice to legislative reforms. Again, I do not believe it appropriate to go into detail into the Department of Justice opposition to statutory charge. I understand that the Assistant Attorney General for the Criminal Division, Philip Heymann, will be presenting you the Department of Justice position next week.

I would just merely like to point out at this time that I believe you should question the Assistant Attorney General Haymann thoroughly as to his concerns about delays, interference, and investigatory disruption—especially in light of the practice in the States with similar reforms.

Let me take a few minutes now to review some of the differences between H.R. 94 and S. 3405 and to give my opinions on these differences.

As I indicated earlier, many of the provisions are the same in both bills. Some of the differences are minor. However, a few are significant.

First, as to immunity and contempt. S. 3405 contains a provision that would allow only consensual immunity. H.R. 94 provides for transactional immunity but allows immunity to be conferred without a witness' consent with strict judicial safeguards.

I believe "coercive" immunity is a valuable investigatory tool. Individuals who really might want to testify, but because of outside pressures would not do so without coercive immunity, can contribute to an investigation. Strict rules on periods of confinement and on prevention of punitive contempt can limit abuses.

Consensual immunity has, of course, many potential benefits. Individuals who would not testify under any circumstances should ordinarily not be compelled to serve long sentences upon refusal. However, without coercive immunity, I am concerned that many witnesses who really wish to testify would not do so because of outside pressures.

Next, both bills provide for counsel in the grand jury room. However, H.R. 94 limits the role of counsel to advise only. Such a limited role for counsel, in my opinion, is essential to avoid arguments made by many that counsel in the grand jury room would otherwise cause delays and obstructions. To provide for a total adversary role of counsel, as provided in your bill would, in my opinion, give credence to the arguments of some that we are creating a "minitrial" in the grand jury room.

As to "minitrials," another provision of S. 3405 particularly concerns me. Your bill provides that any evidence obtained in violation of statutory or constitutional rights, or on hearsay without good cause, is inadmissible. Such a provision must necessarily result in challenges to evidence. Such a provision, therefore, could only result in suppression hearings prior to or during grand jury proceedings, and thus obviously delays. As a practical matter, such a requirement raises fears of interference in the investigatory machinery of the grand jury and plays into the hands of those who raise the specter of "minitrials."

S. 3405 would also provide that no indictment could be returned unless shown to be based on probable cause and admissible evidence. Again, such a provision would necessarily lead to a challenge based on sufficiency of the evidence. Such a challenge would be before indictment or immediately thereafter. Such a provision would necessarily lead to a "mini-trial" and again play into the hands of those who speak of reforms as causing delays and interference in investigations.

I share your concerns that led to the inclusion of these two provisions. Case after case has been reported during my subcommittee hearings about prosecutors using whatever information they see fit to secure indictments and prosecutors "whitewashing" illegally obtained evidence by filtering it through a grand jury.

However, every effort must be made to retain the grand jury as a valuable investigatory tool. Providing for challenges before, during, or immediately after grand jury proceedings would, in fact, cause delays and "minitrials."

The solution I propose is that adopted in many States—mandatory use of a preliminary hearing. Prosecutors will not use inadmissible evidence, nor will they seek to secure indictments without sufficient competent evidence, when they know they have to promptly present their case to a magistrate and demonstrate a prima facie basis for charges.

Moreover, the requirement of a preliminary hearing will, in my opinion, lead to a fairer trial and probably less use of rubber-stamped indictments. Defendants would be put on notice of the case against them; would have the case presented to them in an open forum; and if evidence is sufficient, would therefore be more inclined to waive formal presentment of indictment and possibly also to plead guilty to charges.

Rather than cause delays, mandatory use of preliminary examination would more likely lead to fewer indictments, fewer trials, and speedier justice.

In any event, even without these benefits, it seems only fair that a defendant—if he is to be put to trial—should be fully informed of the nature of the charges and the factual support for those charges in an open proceeding and not in a cold written document.

Again, please accept these last comments only as suggestions for your consideration. Our bills are 90 percent identical, and I know that your staff and my staff have been meeting on a regular basis both in drafting our bills and considering recommendations made by various groups.

I thank you for your courtesy in inviting me today. I hope and believe that you will gain a great deal of information and insight from your 3 days of hearings. Hopefully, your hearings and our hearings will lead to final congressional action, if not this session, early in the next Congress.

If I or my staff can in any way help you or your staff, please feel free to call us at any time. I strongly support your efforts to secure Federal grand jury reform in the Senate, and I pledge to you that I will continue my efforts to secure such reforms in the House.

Senator ABOUREZK. Thank you very much for an excellent statement.

Congressman Conyers is scheduled next, but he is not here. So I will ask our panel of witnesses to come forward with the stipulation that if Congressman Conyers comes in we will interrupt the testimony and

ask him to testify so that he can get in and out rather quickly as he requested.

We will ask Ms. Linda Backiel of the grand jury project; Mr. Morton Stavis, Center for Constitutional Rights; and Ms. Judy Mead of the National Lawyers Guild to come foreword.

Please identify yourselves for my purposes and for the reporter, please.

TESTIMONY OF LINDA BACKIEL, ESQ., GRAND JURY PROJECT

Ms. BACKIEL. Good morning. I am Linda Backiel, testifying on behalf of the Grand Jury Project, an organization of legal workers and attorneys dedicated to the defense of political activists subpenaed to Federal grand juries.

We appreciate the opportunity to speak in support of what we believe are the most important provisions of S. 3405—the abolition of coerced immunity and the restoration of decisionmaking powers to the grand jurors.

Andrew Young has been criticized for saying that America had political prisoners. In the past 3 years, approximately 30 political activists from the native American, black liberation, Chicano, Puerto Rican independence, women's movements and trade unions have been jailed in this country for refusing to cooperate in governmental "investigations" of their political and personal associations.

These people have never been accused of any crime and have had no trials. They are jailed for exercising their constitutional rights, and insisting on giving those rights—especially the first and the fifth amendment rights—a broader meaning than Federal law enforcement officials see fit.

We submit that every one of these people has been a political prisoner of the American legal system.

The modern grand jury is a relatively new—and so far perfectly legal—device for converting political activists into political prisoners. As such, it is the perfect replacement for the FBI's illegal and allegedly "discontinued" CoIntelPro which openly sought to make "positive effort(s), not only to curtail, but to disrupt" the activities of the Puerto Rican independence and other movements. The grand jury has provided the legal means with which the investigative agencies may—quoting again from a 1961 CoIntelPro document—"Delve deeply into that part of (the activists) lives which does not show on the surface."

The illegal CoIntelPro may be discontinued—at least in part—because such a satisfactory replacement has been found in the grand jury.

During the last 2½ years, Federal grand jury investigations have served as a pretext for harassment and disruption of the Puerto Rican independence movement, among others, on a scale beyond the wildest expectations of the FBI personnel who concocted CoIntelPro. Thousands of independence supporters, their relatives and associates have been interrogated, some at gunpoint, others in front of employers and coworkers. Others have merely been followed, surveilled, threatened and bribed.

From among those who refuse to be intimidated, candidates for grand jury subpenas are chosen. The government need not even have

any reasonable suspicion that the witness can provide relevant or valuable information prior to issuing the subpena. Activists are invariably subpenaed to grand juries allegedly concerned with serious crimes.

In one case, a witness was jailed for refusing to give information about the theft of some explosives. He was ultimately released when the Government was forced to admit it could not even prove the explosives were ever stolen.

Another Puerto Rican activist was notified that his credit card account records had been subpenaed. For a period of 18 months prior to this, the FBI had questioned his estranged wife, his employers, coworkers and landlord in great detail about his political beliefs, activities and associations. The FBI agents often misrepresented the nature of their investigation, at some times indicating that they were doing a routine check in connection with his—nonexistent—Federal job application, and at others implying that he was involved in bombings.

When this man challenged the subpena for his records, the prosecutor maintained he had no legal right to do so. He informed the court that he wished to challenge the subpena because he believed it was part of a concerted effort to discredit him and the independence movement by linking it to a sensationalized "bombing investigation."

"The FBI didn't find out anything about any bombings, as there was nothing to find out," this man said, "but they certainly caused the people I work with and my relatives and neighbors to look at me with suspicion and fear."

His legal challenge to the subpena failed and the records were turned over. He was not, of course, indicted, but serious damage was done.

He had told the court, "I believe that if I participate in this, I may as well personally take a sledge hammer to the entire Bill of Rights. That is something I am unwilling to do." His plea fell on deaf ears, and the Bill of Rights is the worse for wear.

In the course of these continuing investigations, the chief weapon in the hands of the FBI is the Federal grand jury subpena. "Talk to me and you won't have to go before a grand jury," potential witnesses are constantly told. The threat of jail is never far behind a refusal to tell the agents what they want to hear.

To date at least 12 witnesses have gone to jail for an aggregate of well over 5 years for resisting interrogations about the Puerto Rican independence movement. Families have been punished and political and human service activities disrupted.

The only indictments have been issued against persons not subpenaed and have been accomplished without the aid of the jailed witnesses or any other political activists. The grand juries clearly did not need their evidence—why were they subpenaed?

The Grand Jury Project believes that a fundamental misinterpretation of the historic role and constitutional function of the grand jury has permitted the Department of Justice—working in close concert with the investigative agencies including, but not uniquely, the FBI—to adopt the grand jury as a powerful instrument in the self-appointed task of protecting certain government policies and programs from significant criticism and challenge.

Activists are subpenaed not because there is any objective reason to believe they have information relevant to a specific crime, but because the investigative agent has not been able to "solve" a crime.

Assistant A. G. Civiletti admitted as much in response to questions posed during hearings on H.R. 94, the Grand Jury Reform Act, introduced by Representative Eilberg in 1977. Mr. Civiletti told the House subcommittee considering the bill that "Although most Federal cases are not investigated by grand juries but by trained investigative agents, if an investigative agency cannot complete an investigation, because it lacks compulsory process, the plainly appropriate Government course is for the grand jury to use its process to complete the investigation."

The Federal investigative agencies do not lack compulsory process because of a mere oversight. They have frequently requested this power, and have repeatedly been denied it.

Compulsory process is an attribute of a judicial body performing judicial functions in an adversary and accusatory system of justice. To further sanction the "borrowing" of this power by investigators is to diminish our constitutional commitment to that system of justice.

In political cases, investigators and prosecutors alike have every reason to know that compulsory process is not going to produce evidence to aid their investigation. The disruptive effect of a subpena—a quick grant of immunity or a demand for physical exemplars—was noted with satisfaction many years ago when two assistant U.S. attorneys remarked that the 1965 civil contempt jailing of a reputed organized crime figure had "created a state of chaos and fear in the minds of (his) associates."

They learned nothing about organized crime and furthered the grand jury's purposes not one whit, but they had discovered something even more valuable. They had, as they exclaimed, "found a way to put the head of the whole show in jail."

Prosecutors are quite aware of this feature of the grand jury process today, and have made the process of putting people in jail even easier by obtaining the much narrower and procedurally less exacting "use" immunity rather than the broader "transactional" immunity required in 1965.

The business of justice is not to put people in jail, and the purpose of grand juries is not to provide an easy way to put strategic people behind bars without trials as an object lesson for their associates.

Again, Assistant A. G. Civiletti revealed the position of the Justice Department when he claimed that the interests of justice would not be served by giving more scrupulous attention to the rights of witnesses and potential defendants because "the emphasis of an investigative grand jury is often on speed in ascertaining the leads and subpenaing the essential evidence before the defendants act to defeat justice or before something dangerous occurs."

This statement is extremely significant because it betrays the terms in which the Department of Justice thinks about grand juries. They do not consider them a "primary security to the innocent against hasty, malicious and oppressive prosecutions" serving the "invaluable function of standing between the accuser and the accused." They consider them an arm of the executive law enforcement function.

Mr. Civiletti's casual use of the word "defendant" reverses centuries of constitutional law and bitter struggles to restrain an imperious executive from using the criminal law and the judicial process to throttle dissent.

The whole purpose of grand juries is to determine whether or not to indict. At the grand jury stage, there should never be any "defendant," as the Department of Justice acknowledges when it argues that witnesses are not entitled to the assistance of counsel or any of the other rudiments of due process guaranteed to criminal defendants.

Nor are grand juries constitutionally permitted to act as guardians of some nebulous "national security" or general law enforcement agencies responsible for "preventing" crimes. This is the business of local police and Federal investigative agencies.

Grand juries cannot retain their constitutional function if they are considered appendages of those executive agencies. They are to perform an exclusively judicial function, with the limited role of "determining whether the people have in their possession sufficient evidence to present a prima facie case."

The Department of Justice will insist that grand jury abuse is a rare pre-Watergate aberration. We wish this were true.

The experience of the Grand Jury Project and the other organizations on this panel indicates that grand jury abuse has not been curbed, but is growing, despite the new Attorneys General, three new Directors of the FBI, and numerous new and entirely unenforceable "internal guidelines."

Between 1970 and 1973 approximately 30 people were jailed for civil contempt of Federal grand juries conducted under the auspices of the Internal Security Division of the Department of Justice. These 30 charged that the power of the grand jury was being improperly used to punish and disrupt their antiwar and other protest activities. Many of the CoIntelPro documents bear out this accusation.

Our own figures—the Department of Justice declines to keep records of "political contempt prisoners"—indicate that in a similar 3-year period between 1975 and the present, the same number of people—30—have been jailed for civil contempt after asserting political, legal and moral reasons for refusing to cooperate with what they believe to be politically motivated subpenas.

The fact is that grand jury abuse is worse today than it was in 1973 when Senator Kennedy condemned the "unprecedented" and "insidious" abuses of political grand juries.

Today it is more sophisticated and more widely accepted by courts with the duty to supervise grand juries as well as by the press and the public.

In 1973 Guy Goodwin never dared subpena one witness to two different grand juries simultaneously investigating what prosecutors described as a "single nationwide conspiracy."

John Mitchell's Department of Justice never insisted on imposing immunity in one jurisdiction upon a witness identified as the target of the same investigation in another. In that case, Federal district and circuit courts refused to recognize the danger that immunized testimony in such a situation might lead to a prosecution. This was despite the fact that the two prosecutors had already exchanged portions of jury transcripts and "confidential information"—which was an inaccurate as it was inflammatory—had been leaked from "Federal law enforcement sources" to the front page of the New York Times.

Guy Goodwin never dared obtain evidence from a witness by permitting her to be overpowered by six Federal and local marshals and choked until she lost consciousness.

Such a procedure was carried out against Michelle Witnak under an ex parte order permitting the use of "reasonable force" to obtain exemplars she had gone to jail rather than surrender. Such a procedure has recently been tacitly approved by the first circuit.

Nor were Department of Justice attorneys so bold as to admit in 1973 what they freely admit today—that grand juries are not the independent body of citizens standing between the innocent accused and the prosecutor, but lukewarm bodies manipulated to serve the needs of prosecutors to gather evidence against persons they refer to as "defendants."

In response to questions about the propriety of disclosing grand jury proceedings to investigative agents, Mr. Civiletti pointed out that rule 6(e) of the Federal Rules of Criminal Procedure had been amended, effective October 1, 1977. This was at the request of the Department of Justice, to legitimize this longstanding practice heretofore considered a violation of grand jury secrecy. He notes that this amendment is based upon a recognition of the fact 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 the trial."

The amendment rests upon a conclusion that "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."

These indeed are the facts, but they are hardly compatible with the constitutional mission of grand juries upon which their extraordinary powers depend. Nothing short of the comprehensive reforms proposed in S. 3405 can begin to restore the grand jury to its constitutional mission.

Failure to enact such legislation will only guarantee the continued erosion of the Bill of Rights.

Senator ABOUREZK. Thank you.

Congressman Conyers is here. At this point we will take his testimony.

I would like to welcome you to the subcommittee, Congressman Conyers. Please proceed.

TESTIMONY OF HON. JOHN CONYERS, JR., MICHIGAN, MEMBER OF CONGRESS

Mr. CONYERS. Thank you very much. I apologize for interrupting this excellent presentation. I do not think I will take too long, Mr. Chairman. Most of my comments are contained in the prepared statement I have submitted for the record.

First of all, I want to compliment you, Mr. Chairman, on convening these hearings on grand jury reform, a matter which you have demonstrated a significant and sustained interest. I can only hope that somewhere in this distinguished body that there will be Members sufficently concerned to continue the important hearing that you have begun and the efforts you have made to reform our grand jury laws. I have been working on this matter since about 1974, and I am more

concerned than ever that we have the vision and appreciate the significance of the work that is the subject matter of this subcommittee hearing today.

I congratulate and applaud you for all that you have done in this area. We in the Judiciary Committee in the House of Representatives have also been struggling with this matter, as you know, and I am pleased to note that there has been marked improvement in terms of the receptivity of Members for what I think will be important changes in grand jury law. I am pleased also to note that your latest bill, S. 3405, moves in an important direction: It embraces the concept of transactional, consensual immunity.

We need to eradicate use immunity from the law, and substitute for it the combination of transactional and consensual immunity. In a democratic and free society we should require a witness' consent to elicit his testimony, and once his consent is given, complete transactional immunity should be afforded him. This is the proper interpretation of the Constitution, what the fifth amendment provides, and the way that hopefully the majority of the Congress will ultimately decide to proceed in enacting a new law.

The subject of grand jury reform is a troubling one because so little is known about it. I am thinking now of cases in the Detroit area in which people's lives were wrecked, in which public careers were destroyed, and in which there was a casual leaking of information from grand jury proceedings. This has a terrible effect on those persons who are caught up in the clutches of the law, and it does something else that I think you are well aware of: It destroys and erodes any confidence and belief in our system of law and justice.

In light of this, I wonder why many of us continue to tolerate these conditions that are more and more well known and that are still, as these witnesses have testified to, part of the operation of the justice system. I do not understand why these abuses continue.

The time has come to end grand jury abuse, and these hearings will serve as a vehicle for us to increase the level of awareness in the Congress and ultimately in the citizenry itself. Clearly what we do here will affect the attitudes of legislators and law enforcement officials in the several States, and, therefore, it is absolutely critical that we move forward as fast as we can in the second session of the 95th Congress. Hopefully, we can pass reform legislation in the 96th Congress.

Senator ABOUREZK. I do not expect that we're going to pass any of these pieces of legislation this year in the Senate, but before the end of the session I wanted to try to establish as sound a record as we possibly could. That is why we're having these hearings and this testimony today.

Let me express my thanks to you for the long years of work that you have put into this particular reform. I hope that you are successful and I hope we're all successful at it. I think it is desperately needed.

I appreciate very much your testimony and your appearance and the work you have done.

Mr. CONYERS. Thank you very much. Again, my apologies to the panel for interrupting them.

[The prepared statement of Congressman Conyers follows:]

PREPARED STATEMENT OF HON. JOHN CONYERS, JR.

Mr. Chairman and members of the subcommittee, I am pleased to have the opportunity to testify concerning the pressing need for grand jury reform. The grand jury, in one form or another, has been a part of the Anglo-American legal system for 800 years, but despite its long history, it is perhaps the least understood of our legal institutions.

We like to think of the grand jury, at its best, functioning as a restraining force on prosecutorial excesses, by requiring that a panel of citizens consider evidence against an accused and return a bill of indictment before a trial on the charges can take place. This principle is embodied in our Constitution's Fifth Amendment provision that "No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury." However, this was not the principle which gave birth to the grand jury, and, unfortunately, it has not been the governing principle for most of the life of the grand jury. To the contrary, the grand jury has for the most part played an essentially passive role.

The way the grand jury system operates today, it is the U.S. attorney in charge of the grand jury panel who selects the cases the grand jury will consider, the witnesses it will hear, and the evidence it will examine. Then, upon completion of his presentation, the grand jurors, without the prosecutor present, decide whether to indict the accused. Usually, the grand jurors vote to indict, since all they know about the case brought before them is what the Government has chosen to tell them. In brief, the grand jury has increasingly come under the domination of the Federal prosecutor. Instead of functioning as a shield to protect the innocent and as a sword against official misconduct, the way it was intended to operate, the grand jury has come to function as a powerful weapon in the Government's prosecutorial arsenal.

We all know what prompted recent Congressional concern with grand jury abuse: It was the campaign of grand jury terror unleashed against Richard Nixon's political enemies between 1970 and 1973 that vividly displayed the grand jury's potential as a weapon of repression. Since then, grand jury misuses have continued. For example, in 1976, feminist activists Cynthia Garvey and Lureida Torres were imprisoned for committing no crime other than exercising the right to remain silent before the grand jury.

Recently, both Congress and the Executive Branch of the Government have taken steps to curb grand jury abuses. In 1977, Representative Joshua Eilberg of the House of Representatives held hearings in his Subcommittee on Immigration, Citizenship and International Law on several bills designed to curb grand jury abuse. In addition, in that same year, Senator Abourezk introduced S. 1449, the predecessor of S. 3405, the subject of today's hearings; I introduced my most recent grand jury reform bill, H.R. 3736; and Assistant Attorney General Benjamin R. Civiletti issued grand jury guidelines for Assistant United States Attorneys.

Despite these developments, no law has been enacted to address the abuses of our grand jury system, and only a statute, and not a set of guidelines, will suffice. To be effective, the legislation must achieve two principal objectives: (1) guarantee democratic rights for witnesses and grand jurors throughout the grand jury process; and (2) disarm the grand jury as a potential device for political harassment.

Each of the bills introduced in the House, as well as S. 1449 and S. 3405, seeks to attain these goals. However, in doing so, some fall short of the full range of reforms that I feel are essential.

To be complete, a grand jury reform bill should initiate the following reforms that are provided for in both S. 3405 and H.R. 3736:

The right to counsel inside the grand jury chamber for grand jury witwitnesses;

The right to adequate time to prepare for grand jury appearances;

The right to a copy of one's own grand jury testimony;

The right not to be indicted on evidence inadmissible at trial;

The right of a witness not to testify, and not to be prosecuted on a charge arising from transactions about which he does testify, (consensual, transactional immunity);

The requirement that prosecutors present exculpatory evidence as well as evidence that indicates guilt;

The requirement that prosecutors inform witnesses (1) whether they are targets of investigation; and (2) of the nature of the crime under investigation; and (3) of their rights to silence and to counsel; and

A limitation on confinement for contempt of the grand jury to not more than six months.

Only by the enactment of these rights can we insure the proper functioning of the grand jury.

Although each of these rights is important in its own way, the heart of these reforms is the concept of consensual, transactional immunity. This concept would do two things. First, it would prevent a person from being brought before a grand jury and immunized unless he or she consented. Secondly, for those who do consent to testify it would prevent their prosecution on charges that arise from those transactions about which they are testifying.

One of the significant drawbacks of the compulsory testimony system is the fact that many prosecutors find it to be a less than satisfactory method of proceeding. They find it preferable to employ immunity as a bargaining tool which they may exchange for the witness' testimony. Under this procedure, they argue, those witnesses who do testify do so more truthfully. As one experienced prosecutor put it:

"We don't like to . . . (compel testimony) 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."

Because of the problems with the compulsory testimony system, I have included the concept of consensual, transactional immunity in H.R. 3736, and I am pleased to note that Senator Abourezk has included it in S. 3405 as well. As the foregoing suggests, it will not hamper the work of fair-minded prosecutors, although it will end the manipulation of immunity to punish witnesses for remaining silent.

Finally, we need consensual, transactional immunity and the other above-mentioned reforms in the law as soon as possible. Our citizen should not be forced to rely upon Department of Justice guidelines to guarantee their rights in the grand jury chamber. It is not too much to ask that prosecutors present all of the relevant evidence at their disposal so that grand jurors will have a fair picture of the individual they are being asked to indict. Nor is it too much to ask that witnesses be permitted the advice and counsel of an attorney in the grand jury chamber.

These reforms do not represent sharp departures from our legal traditions and many of them are endorsed by the American Bar Association. I hope that in the near future we can secure these rights for all federal grand jurors and witnesses through the passage of a meaningful grand jury reform bill.

Senator ABOUREZK: Our next witness will be Mr. Morton Stavis.

TESTIMONY OF MORTON STAVIS, ESQ., CENTER FOR CONSTITUTIONAL RIGHTS

Mr. STAVIS. I am president of the Center for Constitutional Rights, an organization which engages in educational and litigation work on cases raising critical constitutional questions.

We have for some years been actively engaged in litigation in the grand jury area. Attorneys affiliated with our organization handled the *Fort Worth Five* case, which, of course, triggered much of the interest in questions of grand jury abuse.

One of the more recent cases that we handled was the *Shinnick* case in Pennsylvania which received nationwide attention and was featured on the "60 Minutes" hour of the Columbia Broadcasting System.

We have submitted a detailed written statement together with the grand jury project, and I would like to have that placed in the record.

Senator ABOUREZK. Without objection, the material you have referred to will be placed in the record at this point.

[The prepared statement of Mr. Stavis follows:]

PREPARED STATEMENT OF MORTON STAVIS ON BEHALF OF THE GRAND JURY PROJECT AND THE CENTER FOR CONSTITUTIONAL RIGHTS

The Grand Jury Project and the Center for Constitutional Rights are pleased to submit testimony documenting abuses of the grand jury system and supporting the reforms proposed by S. 3405. Together, these two organizations have been representing witnesses subpoenaed to federal grand juries and conducting campaigns of public education about grand jury abuse since the beginning of the "use-immunity" inspired chain of grand jury abuses beginning in the early 1970's. Attorneys from the Center for Constitutional Rights have represented most of the political activists called before grand juries conducted by Guy Goodwin, including the "Fort Worth Five" and the more than twenty members of the Vietnam Veterans Against the War subpoenaed to a grand jury in Tallahassee in order to prevent their staging a successful demonstration during the 1972 Democratic National Convention. More recently, the Center for Constitutional Rights and the Grand Jury Project have worked together assisting lawyers and witnesses like Phillip Shinnick, Olympic athlete jailed for refusing to turn over a piece of his hair to the FBI, and Pedro Archuleta, a community health worker from rural New Mexico jailed for over 8 months in both Chicago and New York. The Grand Jury Project has been especially active in monitoring harassment of political dissidents by the FBI, with a particular concern for the effects of these activities on the women's movement and gay communities.

We are especially pleased to give testimony on S. 3405 because we believe that this legislation goes to the heart of the major sources of grand jury abuse: the availability of forced immunity. And it is particularly appropriate that this Subcommittee hold hearings on grand jury reform at the same time it holds hearings on abuses of power by the FBI and considers a legislative charter defining the function of that agency. Unauthorized collaboration between the FBI and the Department of Justice attorneys conducting grand juries is currently a major source of grand jury abuse. Many of the abuses documented in this testimony would be curbed by the enactment of legislation abolishing all coerced immunity and restricting the power of the FBI to gather political intelligence in the United States. I must say that given the long and parrallel histories of abuse by the FBI and prosecutors conducting grand juries, I am convinced that reforming one without the other is likely to have little or no real effect on the problem with which we are most concerned: the abuse of power by executive agencies to stifle, punish and chill dissent. Our testimony will therefore emphasize one of many abuses of the grand jury system: its use as an aid to executive agencies engaged in intelligence and counter-intelligence activities.

The use of the grand jury to assist in carrying out intelligence and counter-intelligence functions of any kind by any agency—including the Department of Justice—is contrary to the Constitutional and historic functions of the grand jury and a violation of the Constitutional scheme establishing separate and complementary powers for the judicial, executive and legislative branches of government. It is because of the failure of the judicial branch to curb abuses by the executive that we must look to the legislative branch to re-establish the balance without which the rights of individuals may as well be hawked on the street corners.

WHAT IS "INTELLIGENCE?"—AND WHAT IS ITS FUNCTION IN A POLITICAL DEMOCRACY?

Americans were shocked to learn of the break-ins, secret wire-taps and other items in the large black bag of "dirty tricks" now collectively referred to as "Watergate." While disgust was an entirely appropriate reaction to these revelations, we should not have been surprised. The operations were all part of long-standing intelligence and counter-intelligence procedure, many of them carried out by intelligence "professionals." What was surprising about Watergate was not the panoply of dirty tricks revealed, but the stature and identity of the victims. Political dissidents belonging to much smaller and more controversial causes and parties have long been the targets of similar activities, as recent

suits brought under the Freedom of Information Act on behalf of groups like the Socialist Workers Party, the National Lawyers Guild and the Puerto Rican Socialist Party demonstrate.

The very use of the word "intelligence" to describe domestic political spying is symptomatic of the obstacles to recognition and correction of abuses of information gathering powers for political ends. "Intelligence" has nothing to do with the human acts of thinking and judging. All too often it serves as a four-syllable excuse for an almost random scramble for information to feed a voracious "security" bureaucracy. Department of Justice experts on "intelligence" have characterized it as an activity which "attempts to paint this broad, overall picture" of the "activities" of a person or group which has aroused suspicions.[1] A former U.S. Attorney General describes it as a "wide-ranging collection of facts—employment records, bank statements, tax returns, telephone bills," and "reports of personal associations" which, in the case of political intelligence, are the "product of . . . investigation of . . . persons whose conduct threatens national security."[2] Raw and often unreliable "information" is swept into the vast vacuum of fears about "national security" on the apparent theory that some computer somewhere will someday correlate two apparently unrelated pieces of information, thereby averting some national or international disaster. While ordinary criminal investigation proceeds from a specific criminal act committed at some definite time in the past and seeks to identify a particular individual or individuals responsible for those specific acts, "intelligence" investigations seek to provide law-enforcement agencies with predictions about possible future crimes and perpetrators. In the context of political intelligence gathering, investigators need not even suspect criminal violations; mere dissent beyond a certain spectrum of acceptable opinion is sufficient to warrant monitoring. The purpose of "intelligence" gathering is not law enforcement but the "prevention of unlawful activity or the enhancement of the government's preparedness for some possible future crisis or emergency."[3]

In 1972 a unanimous Supreme Court condemned warrantless electronic surveillance of dissidents as a method of domestic intelligence gathering, warning that "the vagueness of the domestic security concept" and the "necessarily broad and continuing nature of intelligence gathering and the temptation to utilize such surveillances to oversee political dissent" could erode Fourth Amendment and other Constitutional guarantees.[4] The warning went unheeded and the temptation succumbed to. The 1978 "espionage" trial of David Truong and Ronald Humphries reveals that the Department of Justice remains convinced that the executive possesses an "inherent power" to conduct warrantless electronic and other forms of surveillance in the interest of "national security." The fact that it is now arguing that it may do so in cases of "foreign" rather than "domestic" threats indicates no acceptance of Constitutional limitations on the intelligence gathering power, as many cases may be classified as either "domestic" or "foreign" security cases, at the discretion of the investigating agency.

Stripped of the doublespeak which attempts to "launder" murder by calling it "neutralizing" an enemy or burglaries committed by agents on the governmental payroll by coding them as "black bag jobs," "intelligence" is nothing more than a term of art borrowed from the military. Domestic intelligence is a wargame through which the government hopes to defeat its enemies on the ideological battlefield. The concept of a democracy resting upon the consent of the government is entirely incompatible with this military metaphor which implies a rigid obedience to strict hierarchical command. Intelligence activities (as well as the more obviously illegal counterintelligence programs) conducted against people or groups considered potential threats to national security are part of a war against dissent; the "enemy" is a sector of the population theoretically represented by the government. These concepts, and the programs under which they are carried out, pose serious threats to the Constitutional scheme of a political democracy rooted in First Amendment freedoms—speech, assembly, petition, press and religion.

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[1] G. Robert Blakey, one of the drafters of the 1968 Wiretap Act, testifying in 1967 "Hearings on Controlling Crime Through More Effective Law Enforcement," Subcommittee on Criminal Laws and Procedures of Senate Judiciary Committee, 90th Cong., 2d Sess. pp. 957–958.

[2] Tome and Katzenbach, "Crime Data Centers, the Use of Computers in Crime Detection and Prevention," 4 "Col. Human Rights Review" 49, at 55–56.

[3] *United States* v. *United States District Court*, 407 U.S. 297 (1972) at 322.

[4] *Id* at 320.

"We are an intelligence agency," one FBI memorandum blandly admitted.[5] The investigative authority of the FBI is spelled out at 18 U.S.C. Section 533. Neither this nor any other federal statute authorizes the FBI to use its investigative power, which is supposed to assist in the enforcement of federal statutes, to gather, compile, consume or disseminate "intelligence." Domestic intelligence gathering has always been a secret the Bureau sought to keep from the American public and legislators, relying on its own sense of "national security" rather than popular mandate or legislative authority. J. Edgar Hoover once had to persuade Franklin D. Roosevelt not to seek Congressional authorization for the FBI's intelligence activities, lest it "draw attention to the fact that it was proposed to develop a special counterespionage drive of any great magnitude."[6]

The use of investigative powers ostensibly granted for criminal law enforcement purposes to monitor and censure dissent has always troubled conscientious prosecutors as well as others who learned of the secret "intelligence" operations. As early as 1924 U.S. Attorney General Harlan Fiske Stone attempted to extricate the FBI from political spying. He abolished the General Intelligence Division which had waged war on the First Amendment as well as aliens, labor organizers and socialists during World War I, warning that political spying was "dangerous to the proper administration of justice and to human liberty."[7] But by the beginning of the next war, the man he appointed to reform the Bureau—J. E. Hoover—was happily acceding to Presidential requests for a surveillance program which would monitor "subversive activities in the United States," and provide the executive branch with a "broad picture" of political movements and activities which might "affect the economic and political life of the country as a whole."[8]

The concept of national security is subject to particularly expansive definition during periods of actual military conflict when there is an objective risk of military defeat and a threat to a nation's political and economic autonomy. War creates both a military intelligence apparatus and a public psychology of emulation of military organization and values. The threat to free speech and other Constitutional rights may appear pale when compared to the threat of military defeat, and many find it easy to legitimize spying on opinions and activities at home as well as abroad.

Every war has given the FBI a new occasion to expand its intelligence-gathering and counter-intelligence programs with the tacit approval of a large segment of the public. Many would agree that the advocate for peace could be a threat to national security, if not a traitor; possible connections with enemy governments should be closely investigated. However, the end of military conflicts has rarely spelled the end of the domestic surveillance. Instead, it leaves a legacy of trained intelligence specialists and a certain "intelligence" mentality among citizens and government alike.

At the end of World War II, a "cold" war created a new demand for intelligence. During the early 1950's persons suspected of being members, sympathizers, associates or acquaintances of Communist organizations were the targets of a veritable investigation industry. While legislative investigating committees were the most publicized and perhaps the most avid consumers of intelligence data from the FBI and other agencies, many of those suspected of posing some threat to the national security were also subpoenaed to testify before federal grand juries. Their refusal to cooperate with these investigations led to the denunciation of "Fifth Amendment Communists" and the enactment of the Immunity Act of 1954. That Act, which was the predecessor to the transactional immunity statutes, 18 U.S.C. 2514, sought to compel those suspected of being involved with any plans, conspiracies or attempts to violate federal laws regulating internal security, immigration, atomic energy or any other plan to endanger the national security or defense (18 U.S.C. Supp. II Section 3486) to produce testimony, books, papers or other evidence before a federal grand jury.

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[5] See, "Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities," U.S. Senate, 94h Cong., 2d. Session, Book II, p. 70. Hereinafter cited as "Final Report, Book—."

[6] *Final Report*, Book III, 392.

[7] *Id.*, 390.

[8] *Id.*, 394.

That Immunity Act of 1954 is significant because it furnishes explicit documentation of the relationship between the "national security" mission of the FBI and the use of immunity in connection with federal grand jury proceedings to investigate—and harass, intimidate and punish individuals and groups engaging in First Amendment activities. The Immunity Act of 1954 is significant for another reason as well. It documents the limits of the power of the FBI to compel citizens to incriminate themselves, open up their diaries and bank records or submit to physical examinations for identification purposes. When the FBI reaches the limit of its legal powers, it may seek to "borrow" those of judicial agencies which are not burdened by limitations on the executive power. For this reason, it is important to remember Professor Thomas Emerson's observation concerning the FBI in connection with any analysis of the grand jury:

"In essence the FBI conceives of itself as an instrument to prevent radical social change in America . . . Throughout most of its history the FBI has taken on the task not only of investigating specific violations of federal laws, but gathering general intelligence in the national security field . . . The Bureau's view of its function leads it beyond data collection and into political warfare." [9]

LEGAL LIMITATIONS ON THE POWER OF THE FBI

The lack of authority to conduct intelligence investigations does not limit the FBI's capacity to do so. There are, however, several explicit and practical limits on the intelligence-gathering power. These include the right of citizens to refuse to answer questions or produce financial records, diaries, membership lists, physical exemplars or anything else. The Fourth and Fifth Amendments stand between the citizen and the FBI. The invocation of those rights has often led the FBI and other investigative agencies to rely on clandestine and more questionable investigative techniques, including infiltration and wiretapping. Often these techniques are illegal, or at least highly distasteful. A device which would free investigators from the constraints of the Fourth and Fifth Amendments without tainting the investigators or the information would provide them with almost unlimited power. In structure, the federal grand jury is just such a device. In purpose, the grand jury is the antithesis of an intelligence-gathering instrument. The story of the political abuse of federal grand juries is the story of attempts by federal intelligence agencies to "borrow" some of the structural features of the modern grand jury, unconstrained by their constitutional purpose of protection for the innocent accused.

The Fourth Amendment protects persons, their houses, offices and belongings from "unreasonable" search and seizure. In most cases this means that a person cannot be subjected to any kind of search without a warrant, and cannot be forced to turn over any records, documents or physical evidence without a judicial determination that probably cause exists to believe that specific information or evidence delevant to a specific crime already committed will be revealed thereby. Once such a judicial finding is made, the items described in the warrant may be seized. The only other legal way the government can inspect a person's possessions or physical characteristics is pursuant to a subpoena. In this case, judicial review comes after, rather than before the issuance of the subpoena, and since there is technically no "seizure" of the material, the government need not prove probable cause. Obviously, the subpoena power is much broader than that of the search warrant.

Federal investigators—including the FBI—do not have the power to issue subpoenas. That power belongs exclusively to the judicial branch, to be used as an aid to the parties in a judicially-supervised proceedings. "Apparently," wrote former Supreme Court Justice Black, "Congress has never attempted to vest the FBI with . . . private inquisitorial powers." *United States* v. *Minker*, 350 U.S. 179, 191 (1956) (concurring).

Congress may never have attempted to vest private inquisitorial powers, but Senator McClellan once attempted something like it. In 1969 he sponsored a bill, S. 2990, which would have authorized the Department of Justice to order an individual to appear and give physical evidence before a federal magistrate. At the time he introduced this proposal, he referred to it as a "new and novel approach" to the process of gathering evidence for criminal trials. He found some encouragement for this new attack on the Fourth Amendment in some dictum

[9] Quoted in David Wise, "The American Police State" (Random House, 1976; Vintage ed. 1978. All page references to Vintage ed.), 311.

in the Supreme Court's 1969 opinion in *Davis* v. *Mississippi* (394 U.S. 721) to the effect that "detention to secure identifying data might be Constitutionally permissible even though there is no probably cause in the traditional sense." 115 Cong. Record 28896, 97. The bill was never reported out of committee. Thus, it remains true that "Congress has never in criminal matters vested the executive with an unrestricted subpoena power to uncover information which might aid in the enforcement of criminal statutes and the preparation of criminal cases." *United States* v. *O'Connor*, 118 F.Supp. 248, 250 (D.Mass. 1953). It should be noted that even McClellan's bill would not have given the subpoena power directly to the FBI for its own use outside a formal judicial proceeding.

The FBI does not have the subpoena power; it does not have the power to compel testimony or to punish the refusal of any person to aid in its investigation. At least since 1970 the extraordinarily close cooperation between the Department of Justice attorneys conducting grand jury investigations and the FBI has led to that agency's being able to circumvent the technical prohibitions against its issuing subpoena or coercing waivers of the Fifth Amendment right to silence. FBI agents so frequently misrepresent their authority in this regard that some may actually misapprehend it. Although they are technically not authorized to issue, modify or withdraw subpoenas, FBI agents do so in practice, if not in theory, in most of the cases of which we have direct knowledge.

Easy access to the subpoena power and coerced immunity through the grand jury process lends a great deal of legitimacy to many FBI activities of very doubtful legality. The arrangement is essential to contemporary political intelligence gathering by all the executive intelligence gathering agencies. Agents who seek to have more information about a political activist need do nothing more than establish, by means of "intelligence" from any source whatever, the possibility that an activist may have some information relevant to a crime. A suggestion to this effect to the local U.S. Attorney produces a subpoena to be "served" by the FBI agent, who frequently threatens an uncooperative person with the choice between waiving his or her Fifth Amendment rights and talking to the agent "informally" or going to jail. The activists' friends, relatives and immediate family members as well as employers, landlords and professional or political associates then become the targets of FBI questioning and, possibly, more subpoenas. The information leading to the issuance of the subpoena is furnished entirely by the FBI or other investigative agent, and the circumstances surrounding its service are likewise entirely determined by him.

In recent years, courts have thus frequently been asked to determine whether the FBI was not merely attempting to "do indirectly what it may not do directly." *In re Stolar*, 397 F. Supp. 520 (S.D.N.Y. 1975), 523. At times, although much too rarely, courts have been able to recognize the subterfuge, finding that "it would circumvent the legislative judgment for the FBI to be allowed to make use of the grand jury process," and ruling that the grand jury "should not be allowed to become an arm of the FBI." *In re Stolar, supra.*

Precisely the same principles apply to the use of coerced immunity, with the additional factor of the Constitutional question regarding the validity of any form of coerced immunity, especially in the form of "use" which is immunity imposed on most grand jury witnesses today. Because the issues concerning the coerced waiver of Fifth Amendment rights are inextricably involved with the history of the grand jury itself, we reserve discussion of this issue for analysis of the function of the grand jury. It should be obvious that if the FBI cannot make use of the subpoena power to compel a person to produce physical or documentary evidence, it cannot force a waiver of a person's right to remain silent.

"COUNTERINTELLIGENCE": THE ILLEGAL ALTERNATIVE

The FBI's traditional concern with "national security" has led to an almost fanatical appetite for "intelligence." While legal restraints have been studiously ignored or boldly circumvented, only practical limitations have really hindered the investigative capacity. When these become too burdensome, the intelligence agencies proceed to blatantly illegal techniques seeking legitimacy under yet another military metaphor: "counterintelligence." The term is meaningless (dissidents rarely spend their resources spying on intelligence agencies) unless interpreted to mean "illegal" intelligence gathering techniques and techniques which go beyond passive intelligence to positive disruption.

Information recently available under the Freedom of Information Act and various Congressional investigations reveals that the FBI's intelligence activities were far more broad and sinister than was previously suspected. In the 1960's

and 1970's a major component of these activities was geared toward not merely gathering and disseminating information about the political views and activities of citizens, but toward actively counteracting and disrupting the political processes of many minority, labor, left-wing, religious and civil rights groups under the rubric of CoIntelPro.

Virtually no movement for social change has escaped the effects of this program in the last two decades. The same groups—coincidentally?—have been the targets of numerous and extensive federal grand jury investigations which resulted in the jailing of one or more—sometimes as many as a dozen—activists. The victims of grand juries and CoIntelPro have all been subjected to a wide variety of legal and illegal tactics all aimed at disrupting and discrediting their protest or movement towards autonomy. But even more chilling than the catalogue of these tactics—electronic surveillance, mail opening, infiltration, burglaries and worse—is the premise upon which the "counter" intelligence programs are based: that dissent poses a threat to "national security." A 1954 Hoover Commission Report articulated the curious code of domestic intelligence and "counter" intelligence when it warned that traditional concepts of "fair play" would have to give way to harsher measures. "There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply." [10]

THE CONSTITUTIONAL FUNCTION OF THE GRAND JURY

The grand jury has always held an exalted role in the criminal justice system. The Supreme Court's classic description betrays a reverence bestowed on no other aspect of that system:

"Historically, this body 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 accussed . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill-will." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962).

The close cooperation of the FBI and other executive agencies engaged in intelligence and counterintelligence activities with Department of Justice attorneys who have free access to the subpoena and immunity powers have all but destroyed the ability of the grand jury to continue serving that historic function.

The Supreme Court's view in *Wood* v. *Georgia* represents the ideal; the real is reflected in the weary observation of one District Court judge who ruled that "contrary to what seems to be the prevailing general belief," the grand jury "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." *In re Grand Jury Subpoena to Central States*, 225 F.Supp. 923, 925 (N.D. Ill. 1964).

Another Court, faced with a similar and not at all uncommon problem condemned a similar short-cut to the subpoena power used by prosecutors and FBI agents. In *Durbin* v. *United States*, 221 F.2d 520 (D.C. Cir. 1954), a U.S. Attorney compelled the appearance of a witness through issuance of a grand jury subpoena then assisted FBI agents in questioning the witness in his office. The D.C. Circuit Court of Appeals reminded them:

"The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people . . . do not recognize the use of a grand jury subpoena, a process of the District Court, as a compulsory administrative process of the United States Attorney's office.

"It was clearly an improper use of the District Court's process for the Assistant United States Attorney to issue a grand jury subpoena for the purpose of conducting his own inquisition." 221 F.2d at 522.

As early as 1839 courts were having to remind prosecutors and investigators that grand juries were judicial bodies performing judicial functions rather than appendages of the executive. See, e.g., *Luther* v. *Borden*, 7 How. 1, 12 L.Ed. 581 (1839). A study of Constitutional history convinces us that the long-standing and apparently almost irresistible temptation on the part of the executive agencies to arrogate to themselves the extraordinary power of the federal grand jury

[10] *Id.* 403.

has been the source of a major violation of the separation and allocation of powers among the three branches of government.

The grand jury as defined by the Assize of Clarendon promulgated by Henry II in 1166 consisted of one major innovation: it did not give the King wider investigative powers, but provided a means of formally accusing an already suspected party. This function was further refined in the Thirteenth and Fourteenth centuries, the purpose remaining a public accusation of a particular individual charged with a specific crime. This process protected against unlimited general investigations and unilateral decisions to force a person to answer for a crime. By the Sixteenth century, investigating magistrates had acquired the power to subpoena witnesses. The grand jury ordinarily reviewed the evidence of criminal activity only after an accused had been arrested. Its job was to decide whether to send the case to trial on the basis of information already gathered by a prosecutor. At no stage of the investigation did governmental authorities have the power to compel testimony or other evidence. There was no penalty for exercising one's right to stand mute.

So strong were the prohibitions against general inquisitions by the grand jury that the Tudor monarchs had to turn elsewhere to crank out political prosecutions. They evaded the process of indictment by grand jury although by proceeding by way of "information" in many political cases. This process was developed as a civil parallel to the power of eccelesiastical courts to require their subjects to take an oath to answer truly any and all questions concerning doctrinal errors and heresy. In both inquisitorial processes, witnesses—who were often suspects—were stripped of their right to stand mute, and could be tortured or punished for refusing to provide whatever was demanded by the prosecuting officials.

In colonial America, a refusal to give evidence under oath before a grand jury could result in contempt, as could a refusal to appear. But those who wished to stand mute could not be forced to take an oath. Refusal to take an oath could not be penalized, as this was recognized as an essential right of all citizens.

Prosecutors have always sought to circumvent such strong limitations on their powers. When a colonial grand jury refused to indict John Peter Zenger, the Attorney General had to obtain an extraordinary warrant from the Governor's Council and accuse him by way of "information"—a process which permitted the prosecution to exercise complete discretion in whom to accuse. Such abuses of the prosecutorial power to punish political opposition inspired the colonists to include the right to indictment by the grand jury, along with the right to be free from self-incrimination in the Fifth Amendment of the Constitution.

THE NATURE AND LIMITS OF THE GRAND JURY'S BROAD POWERS OF INVESTIGATION

The federal grand jury is a mechanism with extraordinary broad investigative potential. It enables prosecutors to require any person to appear and give evidence in any jurisdiction in the country, with almost no notice, often with no counsel and outside the presence of a judge or any other impartial witness trained in law. The rules of evidence do not; nor do most of the rights incorporated into the phrase "fundamental fairness" or due process of law. Prosecutors invariably cite and contemporary judges are loathe to question the language of Supreme Court cases decided long before grand juries possessed the ultimate inquisitorial weapon—coerced use immunity. These cases extol the values of the "inquisitorial power of the grand jury" *Hale* v. *Henkel*, 201 U.S. 43 (1906), and describe it as "a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be narrowly limited. . . . *"Blair* v. *United States*, 250 U.S. 273 (1919).

What has been lost sight of since the enactment of the Immunity Act of 1954 is the unprecedented grant of truly inquisitorial powers to a body virtually immune from judicial supervision. Prior to the enactment of immunity statutes, interrogation before a grand jury ended with a witness' invocation of the Fifth Amendment. With the enactment of broader and broader immunity statutes and recent decisions excluding the grand jury from many of the constraints of the Fourth Amendment (e.g., *United States* v. *Calandra*, 414 U.S. 338 (1974), *United States* v. *Dionisio*, 410 U.S. 1 (1973)), the grand jury's inquisitorial powers are virtually unlimited and usually unchecked. Justice Douglas, dissenting in the companion case to *United States* v. *Dionisio*, *supra* (which held that grand jury witnesses could not raise Fourth Amendment objections to subpoenas for fingerprints and other physical exemplars) condemned what he termed "the

executive appetite to manipulate grand juries." *United States* v. *Mara*, *supra*, at 19.

Justice Douglas' concern about executive manipulation of grand juries has ample historic justification. Richard Harris found that,

"During periods of national strife or popular hysteria, even the most liberal Administrations have allowed or encouraged grand juries to be used in the most markedly 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 and 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 R. McCarthy." [11]

"In the end," he concluded, "the Supreme Court's view of the grand jury as 'a primary security for the innocent' is wholly unrealistic." [12]

Two recent cases illustrate the usurpation of the grand jury's power by executive agencies. In these cases, there was no need to make emotional appeals to "national security" interests threatened. The precedents had been established in such cases, and the investigative powers of the grand jury were made available to investigators and prosecutors conducting routine criminal cases. In the first, a federal district judge strongly condemned the use of a forthwith subpoena served by FBI agents as a substitute for a search warrant. In that case, FBI agents threatened a business employee with contempt for failing to turn over subpoenaed materials to the agent who appeared in the business office with a "forthwith" subpoena. The subpoenaed materials were all taken directly to the FBI office rather than the grand jury. What is unusual about this case is not the FBI behavior, but the judicial criticism of it. Judge MacMahon wrote:

"Even if we accept the government's contention that a grand jury has power to compel a witness to appear before it and produce certain documents and things 'forthwith' upon the return of the subpoena, it by no means follows that an agent of the FBI has the power, when armed with such a subpoena, either to seize the items sought or to demand their immediate surrender to him on the spot under threats of contempt." *In Re Nwama*, (S.D.N.Y. Nov. 4, 1976, No. M11–188).

The limitations on this case-by-case method of attempting to control executive usurpation of the grand jury powers is illustrated by two consecutive decisions concerning the power of prosecutors to order suspects to appear in line-ups ostensibly conducted to "aid the grand jury in its investigation." In the first decision, the practice of compelling a suspect to appear in a line-up was condemned because the U.S. Attorney had used an *ex parte* order to compel the suspect's appearance rather than a grand jury subpoena. The First Circuit was emphatic about the evil being the abuse of the *grand jury's* power, holding:

"This was no mere technical error, as the Government asserts, but an error affecting the proper roles of the prosecutor and the grand jury, since to endorse such a procedure would be to allow the United States Attorney to assume the powers of a grand jury so long as he merely adds the talismanic verbiage that what he seeks is 'necessary' in furtherance of its investigations." *In re James Francis Melvin*, No. 76–8077, November 22, 1976 (1st Cir.).

However, the same evidence subsequently secured by way of a subpoena was later considered untainted by abuse. *In re Melvin*, 550 F. 2d 674 (1st Cir. 1977). Thus, the observation that "the broadcast delegation of a power of this magnitude to the United States Attorney cannot be accepted if the grand jury's own role is to remain at all meaningful" (*In re Melvin*, No. 76–8077) is a truth without teeth. The delegation has been made incrementally and informally, and extended from the U.S. Attorney to include the FBI and other investigative agencies as well.

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[11] Richard Harris, "Annals of Law: Taking the Fifth," The New Yorker Magazine, reprinted in Hearings Before the Subcommittee on Immigration, Citizenship and International Law of the Committee on the Judiciary, House of Representatives, 94th Cong., 2d. Session, 464.

[12] See, generally, Harris, *supra*; Donner and Ceruti, "The Grand Jury Network," The Nation, January 2, 1972; Cowan, "The New Grand Jury," The New York Times Magazine, March 12, 1973; Donner and Levine, "Kangaroo Grand Juries," The Nation, November 19, 1973; Pizzigati, "The Perverted Grand Juries. The Nation. June 19. 1976; Mead, "Grand Juries," in Halperin et al, "The Lawless State," Penguin 1978. See also *Quash:* The Newsletter of the Grand Jury Project, for bi-monthly reports of this and other forms of grand jury abuse.

A. To accomplish tasks which may be legitimately performed by the FBI

Among the legitimate functions of the FBI commonly performed with the aid of grand jury subpoenas are the following:

Identifying and locating people who might have information relevant to an ongoing criminal investigation and questioning them to determine what information, if any, they have;

Obtaining and analysing physical evidence including exemplars (fingerprints, handwriting, voice and other physical samples) and documents to determine their evidentiary value in a criminal prosecution, or to further "investigative leads" prior to indictment;

Obtaining information concerning possible violations of criminal law from paid or unpaid informants;

Interviewing potential trial witnesses to evaluate their usefulness to the prosecution at trial.

Numerous articles in the last decade have documented the increasingly common practice of coercing citizens to speak to FBI agents by using the threat of the grand jury subpoena and imprisonment for contempt. With increasing frequency, FBI and other investigative agents are being given discretion to serve, withhold, withdraw or modify subpoenas, depending upon the degree of cooperation obtained from prospective witnesses and the nature of his or her information. Many of those interviewed have no idea this practice is not entirely legitimate; most people believe that they have an obligation to answer any and all questions posed by the FBI—an illusion the Bureau has sought to maintain.[13] A few recent examples will serve to illustrate the virtually unchecked and entirely unauthorized discretion now vested in the FBI with respect to subpoenas to federal grand juries.

In the first case, the subpoena was served upon an individual at a social service organization for the personnel file of an employee. The organization named on the subpoena did not exist. The name of the subpoenaed organization was changed and initialled by the special agent whose only legitimate function was *delivery* of the subpoena. At the bottom of the subpoena appeared the typed notation:

"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." (See Exhibit A, attached as Appendix to this testimony.)

Such "Notes" are commonly found on subpoenas served in the Southern District of New York. A subpoena for testimony and physical evidence had a similar notation attached:

"Note: The above information can be supplied to S.A. _____ U.S. Secret Service. in lieu of the above."

Perhaps most shocking is the subpoena stamped "Confidential" served upon Milton L. Wood, Bishop, Episcopal Church Center, New York. The subpoena, purportedly issued pursuant to a federal grand jury investigating an alleged violation of "Title 18, United States Code, Section 371" (the federal conspiracy statute), demands:

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 Episcopal 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 (two employees later subpoenaed and jailed for refusing to cooperate with an investigation they charged was aimed at discrediting their work within the Church in support of Puerto Rican independence).

4. Any and all financial records within your care, custody, control or possession for the years 1974–1976 showing disbursements paid by the

[13] FBI Memoranda released to both the National Lawyers Guild and the American Civil Liberties Union under the Freedom of Information Act reveal that the FBI sought to prevent and/or counteract efforts by both groups to circulate pamphlets and otherwise inform the public of their rights with respect to interviews by agents of the FBI.

Episcopal Church Center, (here a few words have been marked over and initiated) . . . for the reimbursement of travel expenses.

The familiar "Note" appears at the bottom of this subpoena:

"The requirements of this subpoena may be satisfied by delivery of the material called for by the subpoena to a Special Agent of the [here words have been marked over] at or before the time required herein for its production." (See Exhibit A.)

Clearly, delivery of such a volume of materials, including typewriter samples and financial records to "a Special Agent" circumvents the grand jury entirely, and accomplishes no legitimate purpose of that body. The FBI is merely using its access to the subpoena power to marshal evidence which, after evaluation and further investigation, may lead to a request for an indictment from a grand jury.

Another function of the FBI commonly performed with the aid of the grand jury powers is the location of persons suspected of being federal fugitives in violation of 18 U.S.C. 1073—Interstate Flight to Avoid Prosecution. The apprehension of federal fugitives is a function assigned exclusively to the Executive branch of the government. See, e.g., Rules 4(c) and 9(c) of the Federal Rules of Criminal Procedure and 18 U.S.C. 3502. Use of the subpoena power of the grand jury, a creature of the judicial process, to further this mission violates the Constitutional scheme of separate executive and judicial powers. Cases in which this abuse is recognized and repudiated are rare (See *In re Stolar*, 397 F. Supp. 520 (S.D.N.Y. 1975)). Cases in which this abuse goes unchallenged are frequent and those in which it is specifically approved by courts are increasing.

The search for federal fugitives was the basis of many of the federal grand juries which jailed political activists between 1975 and 1978. Approximately 20 activists have been jailed in the last three years for refusing to cooperate with investigations the avowed or thinly masked purpose of which is to aid the FBI in its frustrating search for dissidents identified as federal fugitives. At the beginning of this period, U.S. Attorneys tacitly admitted that locating fugitives was not a proper purpose of federal grand jury investigations. For example, when attorneys for Puerto Rican Socialist Party member Lureida Torres argued that the grand jury was being used to do the work of the FBI and punishing political association and speech, the U.S. Attorney amended the subpoena which identified the purpose of the investigation as inquiring into violation of 18 U.S.C. 1073 (Interstate Flight to Avoid Prosecution) to include investigations of 18 U.S.C. 1071 (Harboring Fugitives).

The distinction between investigations seeking to locate fugitives and those seeking to identify those who might have harbored fugitives is not easily maintained. The foreman of a grand jury ostensibly investigating "harboring" stated, "We want to find out where these two girls [the alleged fugitives] are . . ." *In re Junkin, Raymond, et al* v. *United States* (6th Cir. No. 75–8045, cited in Reply Brief for Appellants). In another case, also ostensibly investigating "harboring," an FBI agent told the attorney for one of the witnesses that "his primary interest was in locating the fugitives . . ." and agreed that prosecutions for harboring were, for all practical purposes, futile. See *In re Grand Jury Subpoena . . . Scott*, MCD 4541 and 4542, M.D. Pa., Memorandum and Order filed August 22, 1975.

However, the most recent decisions in this area cast doubt on whether even lip service will continue to be paid to the distinction between the executive functions of the FBI and the judicial ones of the grand jury. Although District Judge William B. Parsons found that "merely locating known bombers and co-conspirators could exceed the Grand Jury's traditional duty of determining and bringing formal charges," (*In re . . . Special February 1975 Grand Jury*, 76GF 1128, N.D. Ill., Memorandum and Order, June 30, 1977), the Seventh Circuit specifically approved an investigation whose purpose was defined as the government as "to identify, locate, produce evidence against and charge the perpetrators" of bombings. (*In re . . . Special Febraury 1975 Grand Jury, Nos.* 77–1885, 77–1895, 7th Cir.).

B. Grand juries are used by the FBI to accomplish its illegal as well as legal objectives

"Certainly we use grand juries for investigative purposes," admitted Robert C. Mardian when he was head of the Internal Security Division of John Mitchell's Department of Justice. "We wouldn't have to if we could simply send out an FBI agent and start asking questions," he told New York Times reporter Ronald J.

Ostrow.[13a] An illustration of how this was done is furnished by the facts of one of the many grand juries "investigating" the "Catholic left" during the height of the anti-war movement. Assistant U.S. Attorney Cubbage would periodically leave the grand jury room to consult with an FBI agent waiting outside in the hallway. The agent would provide the prosecutor with questions written down on index cards; the U.S. Attorney would then return to the grand jury room and read the questions to the witness.

The legal and political issue raised by this practice is twofold: on the one hand, is the grand jury being used to compel individuals to give the FBI information it does not have the power to compel in its own right; and on the other, is the FBI's investigation part of a bona fide criminal investigation or is it part of a program to harass, intimidate, neutralize and disrupt effective opposition to government policies? Both practices are illegal; one is merely more sinister and inconsistent with a democratic ideal than the other. It is clear that the history of grand jury abuse is the history of both kinds of violation.

There is ample evidence to support the charge that the FBI has used the power of federal grand juries to assist in its own entirely unauthorized domestic intelligence gathering mission. U.S. Attorney Guy Goodwin, who is often portrayed as the arch-villain of grand jury abuse, was merely more candid than many prosecutors today. When Sylvia Brown was questioned about "every place you have lived for the last two years . . . with whom . . . and what employment you had during each period" in the course of an investigation of anti-war movement activities, Guy Goodwin insisted that this information was necessary and relevant to an investigation jointly entered into by himself and the FBI. (He did not, of course, admit that this inquiry sought to add to information files on dissenters.) Mr. Goodwin's answer deserves remembering:

"Miss Brown was—well, I should say agents of the Federal Bureau of Investigation attempted to interview Miss Brown some time in the past. She refused in emphatic terms to consent to any interview whatever. Therefore, obviously, the only remaining course of action . . . was to do precisely what has been done in this case, that is, subpoena her before a quasi-judicial body under supervision of the United States District Court and attempt to have her testify about the information which she may possess." *In Re Sylvia Brown*, No. 14–72–H–2 (W.D. Wash. May 17, 1972).

After Robert Mardian and other top-level officials of the Department of Justice were indicted in connection with the counter-intelligence efforts against the Democratic National Party at the Watergate, the Internal Security Division of the Department of Justice—the Division which had conducted most of the wide-ranging (and widely criticised) grand jury investigations against political activists, journalists, scholars opposed to the war in Southeast Asia—was dismantled. However, Maridan's successor, A. William Olson, continued to defend the use of grand juries to extract information the FBI could not obtain from the dissidents.[14]

The grand jury has for many years been used to obtain information the FBI had no legal way to obtain. The high esteem in which the grand jury was held and the fact that it operated in secret, away from judges, attorneys and the public, made it a perfect substitute for illegal or unsavory alternative methods of gathering political intelligence. Against relatively large organizations with high public visibility and a strong commitment to electoral politics, grand juries may not be effective. The crucial element in the substitution of grand juries for informers and other forms of covert investigation is the government's ability to convince the public that the group poses a threat to national security and is likely to have immediate knowledge about criminal activities. Against an organization like the Socialist Workers Party, the FBI was forced to pay more than 1,300 informers to infiltrate meetings, steal lists of membership and contributors and report on legal political activities. Again a much smaller and less well-known group like the Puerto Rican Socialist Party, the same information could be sought by means of grand jury subpoenas to members and their associates and relatives.

The more closely we consider federal grand jury investigations conducted between 1975 and the present, the more they resemble the now "discontinued" FBI "counterintelligence" program against dissidents (COINTELPRO). Documents released on that program include evidence that the Bureau used the courts

[13a] New York Times, August 1, 1971.
[14] Cowan, "the New Grand Jury," New York Times Magazine, April 29, 1973.

"as unwitting agents to accomplish [the FBI's] purpose of political disruption."[15] In the case of the grand jury the parallels between the illegal COINTELPRO tactics and the power of the grand jury are significant: the subpoena duces tecum can demand the production of books and documents containing names, addresses and contributions to a political organization that might otherwise have to be obtained by "black bag jobs." The forced immunity imposed by the prosecutor can turn appearance before a grand jury into a "snitch jacket," by implying that a cooperative witness may deliberately or unwillingly implicate associates in the investigation. The COINTELPRO objective of discrediting an organization by suggesting its leaders are involved in criminal activity can be conveniently accomplished through grand jury "leaks" to the press, such as the one which identified former members and staff persons of the National Commission on Hispanic Affairs of the Episcopal Church as having been identified with a "nationwide Hispanic terrorist conspiracy."

Under the COINTELPRO, "Derogatory information, whether true or false, whether about private lives or about politics, was systematically provided to friendly reporters and fed as 'fact' to the public."[16] In the 1977–1978 grand jury investigation of the National Commission on Hispanic Affairs, U.S. Attorneys admitted that "The government is not in a position to deny that some of" the highly inflammatory and inaccurate information printed in the Sunday edition of the New York *Times* (April 17, 1977) "may have come from federal sources somewhere in the United States." (*In the Matter of . . Archuleta*, M11–188, Hearing Transcript at 26.) In this case, there was no need to "cultivate" friendly reporters." The information was alleged to have come from federal investigators whose cooperation with a federal grand jury extended to them to cloak of grand jury secrecy.

The use of grand jury subpoenas to investigations of bombing incidents in connection with highly controversial groups or causes and "leaks" or "secret" information to the press is entirely consistent with a policy established in 1960 and renewed periodically directing FBI agents to make "more positive efforts" to not only curtail, but "to disrupt the activities of the Puerto Rican Nationalists."[17] One of these "positive efforts" has been the use of the federal grand jury.

THE CLOAK OF GRAND JURY SECRECY AND JUDICIAL BLINDERS

"In a democracy, official amorality and law breaking take place in secrecy. The intelligence abuses have been able to flourish because of a pervasive system of official secrecy that has permitted the lawbreakers to conceal their official acts by stamping them 'Top Secret.' "[18]

By law and centuries-old tradition, virtually everything that transpires behind the closed doors of the grand jury room is stamped "Top Secret." The Department of Justice has even argued that permitting legal counsel for the witness in the grand jury room would violate grand jury secrecy. Although the witness is legally free to disclose his or her experience in the grand jury room, prosecutors may attempt to prevent witnesses from doing so. Much of what transpires before a federal grand jury need not, under present law, be recorded, so there is no way of determining whether a prosecutor has made prejudicial or improper remarks to the grand jury when the witness was out of the room.

At one time the Department of Justice obtained judicial orders binding witnesses to refuse to discuss their testimony with family, friends, fellow-union members or attorneys.[19] Although judges are no longer likely to approve such orders, grand jury secrecy continues to handicap witnesses who are denied access to information which would help them prove that their subpoenas are part of a

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[15] Ryter, "CointelPro: Disrupting American Institutions," First Principles, a publication of the Center for National Security Studies, May, 1978, 5.

[16] The communication media were viewed as major factors in the FBI's propaganda war against liberals and radicals on the left, national liberation groups nd other dissenters. See Halperin, "Cointelpro Revisited," First Principles, December 1977; Berlet, "Cointelpro: What the (Deleted) Was it?" The Public Eye, a publication of the Repression Information Project, August 1978, Vol. 1 No. 2.

[17] Documents released under the Freedom of Information Act indicate an extensive program, dating from the quoted 1960 memorandum, designed to "not merely harass" but positively "disrupt" the movement for independence of Puerto Rico.

[18] Wise, "The American Police State," *supra*, 403.

[19] This occurred in the case of Harry Bridges, International Longshoremen's and Warehousemen's Union President targeted for deportation because of his strength as a union leader and his leftist political views. See testimony of Patrick Tobin in Hearings Before the Subcommittee on Immigration, Citizenship, etc., *supra*, 665, 666.

pattern of illegal use of grand jury powers to achieve intelligence or counter-intelligence objectives of the FBI. Charges that a subpoena is part of an illegal counterintelligence effort may be rebutted by sealed affidavits executed by the very FBI agents charged with illegal conduct.

Witnesses who wish to challenge their subpoenas and prove they are part of an illegal request by the FBI to use the grand jury's powers for its own ends are stymied by rulings to the effect that a "witness has no right to require the government to expose the hand of the grand jury by stating the purpose of the grand jury." (*In re Junkin, Raymond*, et al., supra. at 22). Counsel for the witness in that case, as in every other of which we are aware, was not permitted to question FBI agents about conversations with the U.S. Attorney about who should be subpoenaed and what questions asked. While FBI agents were permitted to give unsworn "background" information to the grand jurors, counsel for the witness was denied the opportunity to learn whether the FBI had asked the grand jury or the U.S. Attorney to subpoena the witnesses on the theory that they might have met the fugitives or might know their present whereabouts.

The grand jury is all too often indeed a powerful shield—not for the innocent accused, but for the guilty accuser. Grand jury secrecy is an ancient tradition designed to protect the independence of the grand jury and the freedom of its members to act according to their own consciences. It was never intended to serve as a cover-up for law breaking by government investigators or prosecutors. The very history of the grand jury as a constitutional creature is often used to mask its corruption by executive agencies. Judges are reluctant to inquire into the conduct of those bodies, which are, in theory, independent arms of the judiciary. One judge ruled in a case charging that the grand jury was being used to locate fugitives that he could not imagine that the FBI would be able to use a grand jury to elicit answers to questions it had or to use the grand jury "in any manner as an adjunct of the FBI." (*In re . . . Scott, supra.*)

The *Scott* case illustrates how grand jury secrecy has become a shield behind which the FBI can hide its illegal borrowing of grand jury powers as well as more sinister COINTELPRO operations. In a long series of affidavits from a large number of parents, friends and relatives of the witnesses subpoenaed to the grand jury a large number of intimidating and harassing tactics used by the FBI were described in considerable detail. These affidavits were submitted in support of a motion to quash the subpoena, but the witnesses were not even allowed to present evidence at a judicial hearing in support of their claim that the subpoena was issued for improper purposes—harassment and locating fugitives. The judge ruled that despite "outright police-state tactics" described in the affidavits "which * * * go far beyond proper investigation," he was convinced "that representations or opinions of FBI agents" are not "necessarily attributable to a grand jury investigation: "* * * the mere fact that the FBI and the federal grand jury have concurrent inter * * * does not subvert the legitimate purpose of the grand jury subpoena." (*In re * * * Scott, supra* at 6–7.)

The net result is judicial abdication of all responsibility to supervise grand jury proceedings, at least in the critical area of use of the grand jury's powers by executive agencies.

ONLY FAR-REACHING LEGISLATION CAN RESTORE GRAND JURIES TO THEIR CONSTITUTIONAL FUNCTION

Almost two years ago Senator John Tunney told the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary that "because of judicial neglect of grand jury abuse the responsibility for reform now rests squarely on the Congress." [20] This statement is true today as it was then. Grand jury abuse has continued apace in the intervening period, and threatens to continue to do so until the Constitutional function of this institution is entirely destroyed. The Grand Jury Project and the Center for Constitutional Rights believe that it is not too late for meaningful legislative reform of the grand jury system. We believe that the grand jury was incorporated into the Fifth Amendment of the Constitution in order to protect the rights of citizens against malicious and politically motivated prosecutions, and that a truly independent grand jury could still serve this function.

A great many major reforms would have to be enacted before the grand jury could reliably serve its Constitutional function. Recent Supreme Court decisions

[20] Statement of Sen. John Tunney, Hearings on S. 3274, etc. before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, September 28, 1976.

have paid lipservice to history and the Constitution while undermining the historical function of the grand jury. In one landmark case substantially reducing the Fourth Amendment rights of grand jury witnesses, it expressed the belief that "the Constitution could not tolerate the transformation of the grand jury into an instrument of oppression." *United States* v. *Dionisio*, 410 U.S. at 12. The question raised by the decision in that case and a subsequent avalanche of subpoenas for physical exemplars, is "Who is to protect the Constitution?" In the last six years the Courts have all but abdicated that responsibility when it comes to grand jury proceedings, with the result that grand juries look more like "instruments of oppression" every month. A case which held that:

> It would be an abuse of the grand jury process for the government to impose on that body to perform investigative work that can be successfully accomplished by the regular investigative agencies of the Government.

and which condemned "a general fishing expedition under grand jury sponsorship" was overturned on appeal by the United States Supreme Court. *In re September, 1971 Grand Jury (Mara)*, 454 F. 2d 580, 585 (9th Cir. 1971), rev'd., *United States* v. *Mara*, 410 U.S. 19 (1973), In *United States* v. *Dionisio*, 410 U.S. 1 (1973), the United States Supreme Court held that since a grand jury subpoena did not constitute a seizure of subpoenaed materials, no showing of reasonableness need be made either prior to or after the issuance of a subpoena. The practice of subpoenaing a target of the investigation to testify before a grand jury without warning her or him of either her or his status as a target or the rights to silence and counsel has been institutionalized by the Department of Justice and approved by the Supreme Court. *United States* v. *Washington*, U.S. (1978).

Among the reforms most urgently needed to combat these abuses of the grand jury power are the following:

> Abolition of all coerced immunity;
>
> Guarantee of a witness' right to counsel (including the right to free appointed counsel for indigents), including the right of counsel to accompany the witness into the grand jury room;
>
> Adequate notice of a witness' status and of all rights printed on form served with the subpoena; adequate time to prepare for grand jury appearance and legal argument thereon;
>
> Making the violation of any Constitutional or statutory right of the witness a defense to contempt;
>
> Explicit provision for the appointment of a truly independent legal advisor to the grand jury;
>
> Provision for evidentiary hearings at the stage of a Motion to Show Cause why a witness should not be held in contempt upon submission of factual affidavits supporting a claim of abuse of the grand jury's powers;
>
> A requirement that the Department of Justice submit to the General Accounting Office detailed reports describing the number of subpoenas issued, the number of witnesses held in contempt, the numbers of indictments and convictions obtained both with and without immunity, and the number of targets subpoenaed to provide testimony and exemplars.

It is urgent that Congress act immediately to institute these reforms lest the grand jury be permanently transformed into a powerful sword of oppression.

U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

To:
MILTON L. WOOD,
Bishop, Episcopal Church Center, 815 Second Avenue, New York, N.Y.

GREETINGS: 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 Episcopal 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 Hemikin, 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.

ROBERT B. FISKE, Jr.,
United States 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.

U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

To:

GREETING: We command you that all and singular business and excuses being laid aside, you and each of you appear and attend 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 1401 in the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, in and for the said Southern District of New York, on the 3rd day of April 1978, at ten o'clock in the forenoon, to testify and give evidence in regard to an alleged violation of Section 495, Title 18, United States Code, on the part of the United States, and not to depart the Court without leave thereof, or of the United States Attorney.

And for failure to attend you will be deemed guilty of contempt of Court and liable to penalties of the law.

Dated: New York, N.Y., March 15, 1978.

RAYMOND F. BURGHARDT, *Clerk.*

ROBERT B. FISKE, Jr.,
United States Attorney for the
Southern District of New York

Note: Report at Room 767. 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 767 upon each day on which you attend Court as a witness.

Note: The above information can be supplied to S.A. ———, U.S. Secret Service, in lieu of the above. Tel.: (212) 791————

U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

To: Jewish Family Services of New York,
West 60th Street,
Manhattan, N.Y.

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 forenoon, 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 ——— employee at the ——— Center, ———nd 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.,
United States 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.

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, WESTERN DISTRICT OF WASHINGTON

Magistrates Docket 76 Case 4307

In Re: Fingerprint exemplars of Nancy Whitnack.

Upon *ex parte* motion of the United States of America for an Order of Court requiring Nancy Whitnack to submit to the taking of fingerprint exemplars and the Court having considered the representations set forth in the accompanying affidavits of Richard Smith, Special Agent of the Bureau of Alcohol, Tobacco and Firearms, and Charles E. Robinson, United States Marshal, it is

ORDERED that Nancy Whitnack submit to the taking of fingerprint exemplars and the booking procedures of the United States Marshal of the Western District of Washington, and FURTHER ORDERED, that Special Agents of the Bureau of Alcohol, Tobacco and Firearms, Deputy United States Marshals and such other authorized law enforcement officials as are needed shall use such reasonable force as is necessary to effectuate this ORDER.

DATED this 20th day of December, 1976.

ROBERT E. COOPER,
United States Magistrate.

Mr. STAVIS. I'd like to make a few points by way of summary of the material that we have submitted.

First, it should be recognized that the problem of overwhelming grand jury abuse is a relatively recent problem. It is in fact one of the relics of the Nixon era. I am not suggesting that there were no cases of grand jury abuse before 1970, but the reality is that the critical problem that we face today is roughly about 8 years old.

Secondly, while we have suggested that this is a relic of the Nixon era, I would not want to indicate that the executive branch of the Government is alone responsible for the kind of grand jury abuses that we now have.

Unfortunately, I must tell you, the Congress of the United States provided a substantial input into the matter of grand jury abuse when it enacted the Immunity Act of 1970.

Also, the judicial branch of the Government has made its own very significant contributions to the kind of grand jury abuse which I am about to discuss.

Grand jury abuse by the executive branch of the Government has been able to flourish because of a series of major decisions by the new Supreme Court of the United States, beginning roughly around 1972. These have changed the whole character of the fifth amendment and

have permitted the development of the inquisitorial system of criminal justice, functioning through the grand jury, instead of the traditional accusatorial system of criminal justice.

I suggest that the vast majority of lawyers do not quite realize what the Supreme Court of the United States has done to the fifth amendment in the last few years. Most lawyers still remember that when they went to law school they read that landmark decision called the *Boyd* case, which said that in the light of the fifth amendment, you could not compel the production of a person's papers. That is not so anymore.

The Supreme Court of the United States under the *Fisher* case now permits the compulsory production of personal papers, and the fifth amendment has been held not to apply to private papers. That is the law since 1976.

The Supreme Court of the United States has sustained and compelled production of exemplars, such as fingerprints, voiceprints, and handwriting samples.

The Supreme Court of the United States in one of its most fundamental recent decisions sustained the practice of calling targets before the grand jury and not even disclosing that fact to the witness.

There was always some indication that targets could, under limited circumstances, be called before the grand jury, but in practice it was rarely done. It was almost never done.

However, since the recent decision of the Supreme Court of the United States, the practice of calling targets before Federal grand juries has become standard operating procedure. It does not matter that the individual has not been told he or she is a target. And if the witness is told of target status and objects to testifying and pleads the fifth amendment, the witness may nevertheless be forced through the process before that grand jury to plead the fifth amendment time and time again, opening up the possibility of being tripped up into waiver of the privilege.

It is this series of decisions by the Supreme Court of the United States, together with, if you please, the Immunity Act of 1970 passed by Congress, which has in the past 8 years brought about a dramatic change in the role of the grand jury.

It is ludicrous at this particular point to refer to the grand jury in the lofty words of the Supreme Court in the *Wood* case as a shield which protects the citizen against the prosecutor.

The grand jury is now the weapon of the prosecutor. It is the sword of the prosecutor against any victim who may be designated by a vigorous prosecutor.

Some of you are accustomed to hearing about all the cases of political dissidents who are called before grand juries, but I would like to suggest to you a slightly different case from my own recent experience which may cut much closer to your own role as Senators. It happens that I am handling the case I am about to discuss as private counsel and not through the Center for Constitutional Rights.

I have seen grand jury abuse in my representation of a former Congressman of the United States who was booted out of his position as a consequence of the dogged determination of a local U.S. attorney, using the grand jury.

I saw in that case the absurdity of the grand jury system where this former Congressman was compelled to appear 10 times before 9 different grand juries. And the material before the grand jury was leaked to the press. Then the U.S. attorney brought out an indictment 1 week before a primary election.

My client won the primary, but the impact of persistent leaks as to the grand jury proceedings finally defeated my client in the following election despite 12 years of outstanding service to his constituents as a Member of Congress. That case, now more than 2½ years old, has still not come to trial. However, the political objective of the U.S. attorney was achieved through the outrageous use of the grand jury.

I have said to you that the impact of the Supreme Court decisions as well as the Immunity Act of 1970 have effectively removed the bedrock of our accusatorial system of justice and have substituted for it the inquisitorial system.

It is often argued that there's really nothing wrong with an inquisitorial system. There are indeed many civilized countries, such as France and other West European nations, which employ it. Why cannot that work here?

It is also often argued that, after all, England, from which we derive the grand jury system beginning in the 12th century, has rid itself of the grand juries. Why can't we do that in this country?

I have recently been exposed to some fascinating information that I would like to share with you. Only last week a British judge stayed at my home while attending a convention of the American Bar Association. He was sitting as what we would call a county judge and at evening discussions I pursued with him some questions as to the British prosecutorial system.

I asked him, "Why did you eliminate the grand jury system?" What he began to unfold for me was a fascinating series of devices that have developed in England to protect the individual against a prosecutor who may be on the warpath against a target.

I am not for a moment suggesting that the British experience is appropriate to ours, but I shall relate one of the devices that he mentioned. They do not have professional prosecutors. If the government or the police wish to prosecute an individual, they go out and hire a lawyer, a barrister who yesterday might have been a defense attorney and today is functioning as a prosecuting attorney. The barrister performs a completely independent role and will not go ahead with a prosecution if on independent review it appears to be inappropriate.

I am not suggesting for a moment that this could be applicable to the United States. There are vast differences between our countries.

However, the point I'm making is that no civilized country can proceed unless there is some protection, some buffer, some institution, which stands between the individual and a prosecutor and shields the target from the awesome prosecutive powers of a State.

We had that in the grand jury, but we do not have it any more. We do not have a shield, we now have a weapon.

Then the question is: What to do about it?

I would suggest that of all the changes that have been talked about—and there are many, each important—three in our view stand out as critical.

First, that the grand jury have independent counsel. There is no way that the grand jury can perform a protective function if it is guided, advised, and receives its legal opinion from the prosecutor who is appearing before it and trying to persuade it to vote for an indictment.

In connection with the idea of independent counsel, I suggest to you and your staff that you might look into the role of the barrister in England and the independent role that he performs in reviewing what the police and the government want to do.

Second, there is absolutely no reason why counsel for a witness should not be in the grand jury room. The precise role of counsel may be a matter of legal argument, but he should be there. His presence, even if he does not talk, prevents abuse of the grand jury. We think this is critical. Certainly the Congress of the United States over the years has had experience with counsel performing a limited role in committee hearings, and the contention that counsel's presence would obstruct the grand jury is a chimera. It would only obstruct abuse of the grand jury.

Third, is the use of compelled immunity. I want to congratulate you, Senator, on your own bill which is being considered in which you make absolutely clear that the Congress should do away with compelled immunity and get back to the bedrock of the fifth amendment.

I hope that in due course the Congress will begin to pay attention to some of the other features of recent Supreme Court decisions which I mentioned above and which have unraveled the fifth amendment.

I hope that Congress will learn from the experience of one of its own Members what it means to be required to produce every scrap of paper in their home or office, every bank account, every fundraising letter or record, every piece of correspondence with every one of their constituents. It would be a shocking experience for you or any of your colleagues to be served with a subpena asking that your office and your home be substantially emptied of papers, all to be delivered to the U.S. attorney, and then to consult with your lawyer and be told that under recent Supreme Court decisions this is permissible. And then after all your papers are delivered and poured over, you could be called repeatedly before a grand jury—and without the presence of your lawyer—questioned in the hope of tripping you. In due course, I hope the Congress will give its attention to that.

I want to thank you for the privilege of expressing some of these thoughts to you. I would be pleased to try to answer any questions that you may have when our testimony is complete.

Senator ABOUREZK. Thank you very much.

Ms. Mead, we will ask you to testify at this point, and then I'll ask questions of the panel.

TESTIMONY OF JUDY MEAD, NATIONAL LAWYERS GUILD

Ms. MEAD. I am testifying for the National Lawyers Guild. The National Lawyers Guild is a professional organization founded in 1937 and consisting of 5,500 lawyers, law students and legal workers, which seeks to assist those in the movement for social change who endeavor to defend their own civil liberties and the liberties and rights of others under our Constitution.

For the past 41 years, the National Lawyers Guild has been a primary resource for those who have been the victims and targets of unconstitutional governmental activity. Members of the National Lawyers Guild have represented most of those subpenaed before political grand juries. I would define political grand juries by their intent, which is to collect information on activitists targeted by the grand jury and to disrupt legitimate political activity. To defend witnesses subpenaed before political grand juries, NLG formed a network of lawyers in 1971, which evolved into the Grand Jury Defense Office. The Grand Jury Defense Office published a booklet for prospective grand jury witnesses in 1972 and taught seminars in grand jury law and procedure. It authored the "Representation of Witnesses Before Federal Grand Juries" in 1974—the only legal manual on grand jury law—and closed when the political grand juries subsided because of Watergate.

With the resurgence of political grand jury investigations in 1975, guild members affiliated with the grand jury project. The project continues to publish educational materials and act as the clearinghouse for developments in grand jury law. The National Lawyers Guild has been active since 1973 in calling for legislated grand jury reform and is pleased to give testimony on this topic here today.

Since 1975, political grand juries have been slightly different from the Nixonian grand juries of the early 1970's. The focus is less on the collection of "intelligence" and more on discrediting activists and gathering evidence for trials in cases where law enforcement agencies had been unable to gather proof. Another unusual twist which has occurred in recent political grand juries is the use of the subpena to infringe upon attorney-client privilege, attempting to force political defense attorneys to disclose information obtained in the course of their representation of their clients, frequently derived from the clients themselves. In April of 1975, the Department of Justice released a report entitled, "Disruption in the Courtroom and the Publicly Controversial Defendant." It suggested that the National Lawyers Guild and the Center for Constitutional Rights were responsible for the inability to obtain guilty verdicts in a number of highly publicized, emotionally charged trials—the Harrisburg Seven, the Chicago Eight, Angela Davis—as a result of their vigorous and effective defense work. Shortly thereafter, subpenas to attorneys in both organizations rose dramatically. Increasingly, our clients in grand jury proceedings have been our own members.

In April 1975, Marty Stolar was summoned in New York City and ordered to disclose his client's address, phone number and workplace. The subpena was issued even though he offered to set up a meeting between his client and Government agents. A Federal judge quashed the subpena.

A few months later, three NLG attorneys and nine spectators at a sentencing of three Black Liberation Army members were subpenaed to a grand jury investigating contraband found near the three BLA members. The lawyers subpenaed and the defense attorneys, also NLG members and the apparent targets of the investigation, had worked closely together and represented a number of clients in the community where the BLA was active. They fought the subpenas, but facing a possible 4-year prison term for criminal contempt and possible disbarment

proceedings, one lawyer went before the grand jury, and two agreed to answer questions only about events in the courtroom in the D.A.'s office with their counsel present.

In the same year before the mutilated body of Anna Mae Aquash was found, lawyers from the Wounded Knee Legal Defense/Offense Committee were subpenaed to a Sioux Falls, S. Dak. grand jury regarding the whereabouts of their client, Anna Mae. A few months later in Des Moines, Iowa, Marti Copelman was subpenaed for questioning regarding the disappearance of her native American client, Frank Blackhorse. These subpenas were only one facet of many varied efforts to disrupt the functioning of the defense team for the American Indian movement, efforts which included FBI infiltration and warrantless searches of the attorney's office by armed FBI agents. The subpena was dropped only a few weeks ago.

In the spring of 1976, Mike Withey was subpenaed before a grand jury in Seattle to reveal the identities of his clients. Based on inquiries made by Withey about a bank robbery by the George Jackson Brigade, the prosecutor assumed he had a client with knowledge of the crime. Withey was forced to enter the grand jury room three times and was threatened with contempt, but the subpena was eventually dropped. He was supported by the Washington State Bar Association, which passed a resolution condemning subpenas which invaded attorney-client privilege.

The National Lawyers Guild sees these events as a concerted strategy to harass the defense bar, particularly the political defense bar, and to impair its ability to provide effective, vigorous, and independent representation. The thousands of clients for whom the guild has provided counsel over the years have one fundamental aspect in common: that they have relied on the absolute confidentiality of their relationships with their attorneys. Similarly, it has been a basic precept of NLG attorneys to adhere to the principle that the confidentiality of the lawyer-client relationship is inviolate.

The attempt to compel by subpena the contents of a private conversation with a client flies in the face of the canons of ethics of the legal profession, the ABA Code of Professional Responsibility, the time-honored attorney-client privilege, and the sixth amendment guarantee to the right of effective assistance of counsel. On page 201 of the "ABA Standards Relating to the Prosecutive Function and the Defense Function" it states that there is "nothing more fundamental to the attorney-client relationship that the establishment of trust and confidence."

The ABA Committee on Professional Ethics and Grievances has held—referring to opinion 150 in 1936 quoting E. Thornton in "Attorneys at Law," page 911, published in 1914—that the "sacred trust" of confidentiality must "upon all occasions be inviolable." Again in the "ABA Standards Relating to the Prosecutive Function and the Defense Function," on page 119, it states that an attorney is expected "to act for the protection of—the client's—interest even at the expense of his own."

The threat that the attorney subpena poses to the independence of the bar is twofold: First, it casts defense attorneys in the role of informers, thereby undermining the willingness of the public to turn to lawyers for assistance; second, it serves to intimidate the bar from the

vigorous defense of its clients, thereby depriving the public of lawyers to whom it can turn with confidence.

Attorney subpenas to NLG lawyers, who are predominantly white representing minority activists, pose even greater problems. Years of institutionalized abuse and discrimination against blacks, native Americans, and other minorities have made our clients wary, not only of white people claiming to be friends, but of the judicial process itself.

Guild member Matt Zwerling writes in an article entitled, "Making Trouble for Movement Lawyers?"—published in Juris Doctor in March 1976—

> We face a potentially troubled time in which lawyers may be attacked for their politics, or simply for their zealous defense of their clients. * * * If prosecutors are allowed to use grand juries to break up (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.

Historically, the grand jury was to be a "people's panel" that would protect suspects against overreaching prosecutors and unwarranted prosecutions. Contrary to the role intended by the framers of the Constitution, the grand jury today is but a pliant instrument of the prosecutor. Fundamental reform is necessary in order to restore it to its original role. Our experience has shown that the denial of the right to counsel in the grand jury room remains a major defect in the system of justice. Thrusting minority activists alone into a room filled with people who are rarely, if ever, their peers with respect to race and class is an intimidating experience. Many of our clients differ also from the grand jurors in that English is not their primary language. In such a hostile environment, the denial of counsel in the grand jury room cannot be seen as serving any interests of justice, but is a violation of the sixth amendment right to effective assistance of counsel.

The National Lawyers Guild is pleased that S. 3405 addresses this injustice and permits counsel's presence in the grand jury room, allowing counsel to advise the witness during the questioning.

Another important reform still needed is an independent counsel to advise the grand jury. As a former grand juror, I would like to offer some personal observations about the need for independent counsel before the grand jury. There were no political cases before the grand jury on which I sat—only the normal array of criminal cases—burglary, armed robbery, murder, et cetera. Although I was a fledgling legal worker and another grand juror had completed 1 year of law school, our expertise, such as it was, was inadequate to the situation. We were not instructed on the specific laws and had no way to decide whether the prosecutor was overcharging in any case or whether he presented sufficient evidence for the indictment. In frustration, we asked one prosecutor to tell us who was the attorney for the grand jurors who could advise on such matters. The prosecutor replied, "I am your attorney." We were given conflicting advice on how certain we had to be in order to return indictments, depending on the case. In some instances we were told that if we believed the person guilty, based on prosecutorial evidence only, that we should return an indictment.

Often the same prosecutor would instruct us that we should return the indictment if we thought the person probably committed the crime, despite misgivings and doubts; pointing out that the person would later be tried by a jury who would weigh all of the evidence. That was hardly reassuring because many petit juries regard the indictment as an indication that the defendant is guilty. In some instances, we were the experimental playground to see if the prosecutor could make the case stick, and in those instances, we were asked to weigh the credibility of the witnesses. We were asked if we believed a drunk could identify who robbed him or whether we believed a prostitute who said she had been raped. If we indicted, the prosecutor thought a petit jury might also convict and would proceed. Otherwise, he would drop the case. In other instances, we were not told to consider the credibility of the witness. In one case, we were chastized for questioning what the witness said. We muddled through over 100 cases, often not knowing whether we were doing the right thing or not. An attorney who didn't have a stake in the case and who could have advised us objectively would have been invaluable in our deliberations. Although I differed significantly from most of the other grand jurors in my distrust of prosecutors generally, I feel confident in relaying that all would agree with the amount of confusion and ignorance I felt and that we all felt the need for an independent attorney to advise us.

To date, no restraints have been imposed upon the use of grand juries as a weapon against political dissent. Shirley Hufstedler, a judge on the ninth circuit court of appeals, observed:

> Today, courts across the 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.

This quotation can be found in the January/February 1973 issue of Trial, in an article written by Barry Winograd and Martin Fassler entitled "The Political Question." In the absence of legislated grand jury reform, the "cruel twist" continues as yet unchecked.

Senator ABOUREZK. Thank you very much. Let me ask questions of the panel at this point. Either of you may answer.

One of the many arguments made against grand jury reform in general is that abuses are the result of improper use of the system and not of the system itself. For example, former Attorney General Levi stated that "grand jury problems can be minimized by the selection of honest, qualified prosecutors and that no legislative reforms could provide adequate protections if abusive government attorneys are in power." Could you comment on this?

Ms. BACKIEL. My first response is that I think the availability of coerced immunity is something that creates a loophole in the Constitution in terms of the fifth amendment and that this is not something that can be corrected by honest prosecutors. They are not going to forego using immunity if there is a statute on the books that they can use.

I think this puts a serious hole in the Bill of Rights; that is to be able to force immunity.

Senator ABOUREZK. In an adversary system, how can you ask one side to withhold or restrain themselves from going all out? Is not

that the nature of an adversary system; that is that both sides go to the full extent of what the law allows and the rules are made with that in mind?

Ms. BACKIEL. The fifth amendment says how far you can go and no further.

Mr. STAVIS. I guess that was the debate at the time of the adoption of the Constitution. Why do we need any restrictions on government? Some argued we are all such beautiful people who put this country together. We know that we have such good intentions, so there's no necessity for putting restrictions upon government.

Fortunately, enough of the States insisted that we have a Bill of Rights and that is what we have.

The answer is as you suggested, Senator. Power, if given, is used. Oftentimes it corrupts. It would be absurd to think that the Department of Justice would have all of this power and simply not use it. They have reached for it, they have had it and they are abusing it.

Senator ABOUREZK. It has been suggested that the Supreme Court has by a series of recent decisions fostered grand jury abuse. Because of this perception, by yourselves and other lawyers, have fewer cases of abuse been appealed? Are State appellate courts more liberal in their decisions as to rights and the protections surrounding the grand jury?

Ms. BACKIEL. One quick answer to that is that Justice Brennan's concurring opinion in the case of the *United States* v. *Mandujano* guides attorneys representing grand jury witnesses to State cases saying that States have been more solicitous and that State judges have protected the fifth amendment better than the Federal judiciary. Yes; I have been personally involved in some very difficult decisions not to appeal some cases of grand jury abuse to the Supreme Court lest we lose the few protections that remain.

Senator ABOUREZK. There has been some suggestion that there is little possibility that the grand jury will ever be able to properly act as a shield.

If the investigatory power of the grand jury is ever eliminated, would this not lead to direct investigatory power being granted to the FBI or to the prosecutors, and would not this be a more dangerous procedure?

Mr. STAVIS. I cannot believe that it would be a more dangerous procedure than what goes on now which is that the FBI and U.S. attorney use the grand jury as their own instrumentality with the court saying that it will simply not interfere because it considers its grand jury as theoretically independent.

However, the really important point is that if the issue is put squarely on the table: "Shall U.S. attorneys or the FBI have the power to compel people to come before them and testify and give up their papers, and give their fingerprints and their exemplars?" then that issue can be discussed directly without the myth that the powers we have been discussing are being exercised by the grand jury instead of the prosecutor.

I would doubt that the Congress of the United States would allow that to happen. If it did, it would impose stringent restrictions upon the employment of any such power and give the individuals a right to clear judicial relief.

The point is, that is exactly what is going on now with no restrictions whatsoever and the courts taking a hands-off attitude.

So the Department of Justice has achieved what the Congress has never been willing to give, namely, unlimited subpena power, and it has achieved it without any restrictions whatever.

Senator ABOUREZK. You have suggested that grand jury subpenas are used improperly to get around the fourth and fifth amendments. Do you indicate that the exclusionary rule, as drafted into S. 3405, should apply to grand jury proceedings?

If you know, please tell the committee what the arguments are that are made by the critics of that position, and how does one answer them?

Ms. BACKIEL. I think the chief argument is delay. There is the argument that having an exclusionary rule that applies to grand jury proceedings will result in minitrials which will delay the grand jury process.

Delay is the primary argument that is raised with regard to any kind of grand jury reform by the Department of Justice, and I think that the argument is simple—that delay and the time that it takes to afford a defendant due process is not considered too high a price to pay when we're dealing with someone who has been formally accused of the most serious crimes.

If we can afford to take that amount of time with someone who has already been accused, then we can certainly afford to take that amount of time to respect the rights of someone who is simply called as a witness.

Senator ABOUREZK. What has your experience been in practice, and how serious an abuse do you think a lack of the exclusionary rule promotes? Discuss some examples, if you will.

Mr. STAVIS. In the case to which I referred which involved a now ex-Congressman of the United States, a major constitutional issue has arisen because the main basis for the action of that grand jury had to do with the consideration of legislative acts of the Congressman. Of course, we have a speech or debate clause in the Constitution of the United States. Grand juries and prosecutors are not supposed to deal with legislative acts.

Nevertheless, we do not have a clear rule which says that the exclusionary rule which applies at trial—everybody knows that you cannot prove legislative acts at a trial—also applies in the grand jury. And this was the basis upon which this important political career of a valued Member of the House of Representatives has been destroyed.

Ms. BACKIEL. Also many of the objections of grand jury witnesses would raise to their subpena are considered irrelevant. There is the fact that the subpena may have flowed from a violation of the fourth amendment because of searches and because of infiltration or other kinds of illegal conduct on the part of FBI agents. This is considered irrelevant and not even a question to litigate at the stage of a motion to quash.

Senator ABOUREZK. The Department of Justice opposes the provision which gives a witness the right to obtain a copy of his grand jury testimony. Apparently, the Department feels that in an organized crime investigation, the witness could be coerced by his fellow criminals to reveal to them his otherwise secret testimony.

Would you please comment on this provision of the bill and the Department's criticism?

Mr. STAVIS. Whenever the Department of Justice is confronted on a question of abuse of the grand jury process, it always talks about organized crime.

Our experience has been that the grand jury process is abused in the political context.

As to the problems and concerns that the Department always raises in the organized crime context, they are, in our opinion, merely a device to make a reasoned discussion impossible. You understand, I am sure, that if a witness is indicted by the grand jury that person is clearly entitled to his own grand jury testimony. There is no question about that.

Senator ABOUREZK. What is that?

Mr. STAVIS. A defendant is entitled to any grand jury testimony he or she gave. Additionally if any witness testifies at a trial, the defense counsel is entitled to the testimony of that witness given before the grand jury, provided it was recorded.

So, the notion that there is some reason to prevent dissemination of grand jury testimony for fear that somebody may be coerced does not apply after the grand jury has completed its work. We believe that realistically it does not apply before that.

Senator ABOUREZK. The bill that we are considering requires that the grand jury be given instructions to explain its rights and duties including the right to call witnesses to initiate an independent investigation. Do you believe that giving these instructions will increase grand jury independence in any way that means anything?

Ms. MEAD. My experience was that it may increase it to some extent, but not seriously in large cities and communities. A grand juror has a fairly limited knowledge of what goes on and what should be investigated in large urban areas. However, anything that would make it clearer to the grand jurors what their role is would be helpful.

Mr. STAVIS. May I add to that?

Senator ABOUREZK. Certainly.

Mr. STAVIS. I think it is helpful, but not enough. There is no hope of making grand juries independent unless the grand jury has independent counsel.

Senator ABOUREZK. How do you propose to limit the flow of information from grand juries to other investigative agencies, such as the FBI or the IRS, to prevent such agencies from using the grand jury for their own investigations to obtain the information they could not obtain without procedural or constitutional safeguards for the subjects of the investigations?

Mr. STAVIS. I think the answer will be found in the institution of an independent counsel who will be advising the grand jury as to its role and the extent to which it should or should not cooperate with other agencies.

Unless you have independent counsel, there is no way of preventing the grand jury from being used by any other agency of the Government that the U.S. attorney may choose to cooperate with, whether it's the IRS or the FBI or the FCC—whatever agency the U.S. attorney chooses to cooperate with and for whatever purpose.

Senator ABOUREZK. I think it would be helpful to put this on the record. I would like to discuss this for a moment. I wonder if you could discuss the basis for the requirement in the Constitution that criminal case be preceded by grand jury action and how that has been bastardized to what we have today. I think it is essential to have that in the record.

Ms. BACKIEL. The theory of the grand jury is that it provides an independent body of lay persons who pass a preliminary judgment as to the worthiness of bringing a person that a prosecutor would prefer charges against into the formal criminal process.

Senator ABOUREZK. It was lay review of what the prosecutor wanted to do?

Ms. BACKIEL. Exactly.

Senator ABOUREZK. Have you read the legislative history of the Constitution? Is that there?

Ms. BACKIEL. I rely largely on the work done by constitutional historian, Tony Scott, who has researched the grand jury from its origins to the present time. He talks about the evolution of a body of people who were intended to act as a curb on the executive and its discretion to accuse individuals of crimes.

Senator ABOUREZK. In other words, is this where the term "shield" comes from?

Ms. BACKIEL. Correct.

Senator ABOUREZK. From that original concept, it has been transformed over the years largely since 1973, is that right?

Ms. BACKIEL. Primarily since 1970, since the enactment of the general use immunity statute—18 U.S.C. 6001 et seq.

Senator ABOUREZK. It has then been transformed from a shield into a tool of sorts for the prosecutor to rubberstamp or ratify his decision to prosecute whomever he pleases. Is that right?

Ms. MEAD. Basically, yes.

The grand jury has always represented the political sentiments of the times. In the 1950's grand juries sought indictments against the Rosenbergs and a number of accused Communist Party members. Similarly, during the American Revolution, grand juries refused to indict colonial demonstrators against the Stamp Act.

However, without the use of coerced immunity, earlier grand juries could not imprison people simply for refusing to testify.

Mr. STAVIS. Senator, may I add to that?

Senator ABOUREZK. Yes.

Mr. STAVIS. The original concept of the grand jury was that it was a shield, as you pointed out. It then moved unhappily to the rubberstamp.

The grand juries have been a rubberstamp longer ago than since 1970. They have been a rubberstamp for some time, although every now and then you had what was called a runaway grand jury in which the grand jury expressed its independence.

The change since 1970 is that the grand jury is now far beyond the rubberstamp. It is now the weapon of the prosecutor. So, it is a complete reversal of the role of the grand jury. It is now the inquisitorial arm of the prosecutor through which he has obtained powers which the Congress would never give.

Senator ABOUREZK. The Department of Justice, among others, has proposed an amendment to the Federal rules to allow Government investigators from other agencies such as the FBI and the Internal Revenue Service to be present in the grand jury room.

Would you comment on that proposal specifically with respect to the possible violations to civil liberties in such procedures?

Ms. BACKIEL. I believe that amendment is in effect the amendment to rule 6(e). I believe it was effective October 1, 1977 and permits attorneys for the Government to make their own judgments about what investigative agents should assist them in the grand jury proceeding.

I see little difference between that agent being inside the grand jury room and outside the grand jury room if the prosecutor is able to freely share information. Mr. Civiletti has admitted in his responses to questions from Representative Eilberg's subcommittee that it is standard operating procedure for agents from various investigative agencies to assist in the investigation from the beginning of the trial. I believe that this creates an aura of legitimacy to many violations of civil rights and makes it impossible to maintain grand jury secrecy itself.

It also makes it impossible for the witness and later the defendant to ascertain what use has been made of information presented in secret to the grand jury.

I would suggest that one provision which ought to be included in the grand jury reform bill at this point is a provision requiring a prosecutor to identify all of those persons who seek access to any grand jury materials and that a written record be kept of what access was granted, to whom, at what time, and for what purposes.

So, then someone who has been a victim of abuses or violations of grand jury secrecy might be able to have some redress.

Senator ABOUREZK. You indicate that cases have been reported or subpenas were issued in the absence of a sitting grand jury returnable directly to the prosecutor. You have also stated that FBI agents on occasion have filled in subpenas when an individual has refused to cooperate with him in a particular investigation. Has your organization maintained any statistics concerning this subject, or can you document for the subcommittee instances in which these practices have occurred?

Ms. BACKIEL. In the corrected version of the testimony of the Center for Constitutional Rights and the Grand Jury Project, we have appended several copies of several subpenas which have been altered by the FBI. We do not have statistics. This is something we have run into in our personal experience often enough to know it is commonplace.

Senator ABOUREZK. Do you think the grounds for quashing or modifying of a subpena as set forth in this legislation are too extensive or places too much of a burden on the prosecutor insofar as he or she must attest to the validity of a subpena?

Ms. BACKIEL. I would say that they are not at all too extensive, and I would suggest further that a violation of a witness' constitutional rights ought to be included as the grounds for quashing or modifying a subpena.

The fact that the subpena itself is intended to chill or disrupt first amendment activity at the very least, I believe, ought to be included as a grounds for quashing the subpena.

Once again, the Department of Justice is simply opposed to litigation of these issues. It is because without litigation it conducts the investigation in secret and unsupervised.

Senator ABOUREZK. Would you talk about cases in which incarceration for contempt has induced any witness to testify or where incarceration for longer than 6 months altered the witness' determination to remain silent?

Ms. BACKIEL. We do not know of any in which a witness has been jailed for 6 months and then decided to testify.

Our experience has been that some witnesses have decided to testify within the first month after being incarcerated and none beyond that point.

Senator ABOUREZK. Do you know of any situations, or in your view are there situations which imprisonment for contempt would be justified?

Mr. STAVIS. I do not know whether you are wondering as to whether the Attorney General of the United States might be induced to testify by imprisonment. [Laughter.] I don't know whether it would work in that case.

However, I have a serious question as to the whole concept of compulsory testimony before a grand jury after a plea of the fifth amendment. That is why we so strongly support your view, Mr. Chairman, with respect to the elimination of compelled immunity before such bodies.

This is again a subject matter that I explored with my guest, the British judge, only last week. His emphasis to me was that they relied exclusively on voluntary testimony.

This is a wholly different approach to the investigatory process, the trial preparation process, and the trial itself. It is voluntary testimony which perhaps means that the British police have learned to use their own investigatory tools much better than have ours. They have avoided apparently the whole concept of compelled testimony.

I gather that even though they do not have a written constitution that the fifth amendment is alive and well in England and doing much better than it is over here.

Senator ABOUREZK. Some indicate that use immunity can be used by playing off one witness against another. For example, you could have witness A compelled to give testimony against witness B and then later on be against A. Then each is then prosecuted for their own part using the other person's testimony.

Do you agree with that possibility?

Ms. BACKIEL. That is certainly possible. I cannot tell you of cases that I know of where it has happened because we end up representing people who, as a matter of principle, are not testifying in political cases.

I can tell you that I was involved in the representation of a witness who was identified as the target of an investigation in one jurdisdiction and had immunity imposed in another. The prosecutors in both jurisdictions agreed that it was a single nationwide conspiracy investigation.

Certainly, if a person can't be identified as the target of an investigation in one jurisdiction and compelled to testify against himself in another, then the situation where A's testimony can be used against B is quite easy to imagine.

Senator ABOUREZK. Some indicate that compulsory immunity does not, in fact, secure any evidence that consentual immunity would not also obtain and that it has marginal efficiency. It's quite obvious that many judges and prosecutors disagree with that. Do you have any evidence on the effectiveness or ineffectiveness of immunity to secure evidence?

Mr. STAVIS. We have no specific evidence or specifics on that and the Department of Justice has failed to provide statistics. I would like to suggest, however, that that compelled immunity necessarily undercuts the fifth amendment to the Constitution. Those who insist on pressing for that and who have persuaded the Congress of the United States to permit it, and who have persuaded the Supreme Court of the United States to sustain it, have the responsibility to prove by solid evidence that they really need it and that they would not be able to get testimony voluntarily by adequate investigatory means. In our experience, it is ineffective in securing evidence. The only effect of coerced immunity is incarceration and punishment or recalcitrant witnesses without trial.

Ms. MEAD. It is my understanding that in the Watergate investigation and in the New York FBI grand jury investigation, all who testified had voluntary immunity. Both situations produced indictments. There was no coerced immunity in either one.

Senator ABOUREZK. One important provision that we have discussed earlier today would permit counsel to accompany a witness inside the grand jury room. Current law requires counsel to remain outside the grand jury room and permits the witness to consult him only by leaving the room.

How does this procedure affect grand jurors who are sitting, particularly in their perception of the witness?

Ms. BACKIEL. If you have to talk to a lawyer before you answer a question, then you're trying to hide something. If you invoke the fifth amendment, you must be guilty. That's the way it's looked at.

Also, grand jurors tend to resent the time it takes for a witness getting up and leaving the room.

It taints the witness in the eyes of the grand jurors.

Senator ABOUREZK. The critics of that proposal to allow counsel inside the grand jury room claim that such a procedure would turn the grand jury deliberations into a minitrial. It would make the process much too adversarial. Would you comment on that criticism of the suggested change?

Mr. STAVIS. The American Bar Association had a committee on this matter of grand jury abuse. That committee was headed up by a man named Gerstein who is a well-known prosecutor in Florida. Most of the members of his committee, or a good many of the members of his committee, were prosecutors and judges. They explored that question thoroughly. They explored it in reality, that is, in the reality of the experience of a number of States, which as of now do permit attorneys to be in the grand jury room.

Their position as sustained by actual experience is that it has not obstructed the grand jury process in any of those States.

The fact that the American Bar Association sustained the report of its committee is ample demonstration of the fact that the obstruction argument is without merit.

Senator ABOUREZK. I have no more questions. Minority counsel wants to ask some questions.

Mr. REGNERY. I wonder if any of you have an opinion as to whether or not the inclusion of the exclusionary rule would have an impact on indictments returned by grand juries regarding numbers of indictments and subsequently to criminal convictions in trials later on.

Ms. BACKIEL. I do not believe it would. One of the overwhelming problems that is created by the kind of grand jury abuse today is that there is a great deal of time and energy expended in dealing with witnesses who do not have information to contribute and whose participation does not lead to indictment.

I believe what the exclusionary rule would accomplish is less abuse of the investigative power of the investigative agents assisting the prosecutor.

Mr. REGNERY. Are you saying by your answer that the use of illegally obtained evidence does not, in fact, lead to indictments by grand juries?

Ms. BACKIEL. I'm saying that I believe the most significant impact of the exclusionary rule would be in curbing abuses by the investigative agents themselves. I do not believe it would be decreasing the number of indictments that are actually returned. It might to some extent, but I hink the overwhelming impact would be some accountability on the part of the investigative agents who would simply have to do their work more carefully.

Mr. REGNERY. What about the other provisions of the bill? Would they have any insignificant effect on indictments being returned?

Mr. STAVIS. I didn't hear the question.

Mr. REGNERY. Would the other provisions of the bill other than the exclusionary rule have any significant impact on indictments returned by grand juries? Would it inhibit or help indictments, numbers of indictments being returned?

Mr. STAVIS. Of course it is hard to say, but I would presume that if grand juries began to have independent counsel, conceivably they would be more wary about issuing indictments which had no serious foundation.

Mr. REGNERY. This bill does not provide for it.

Mr. STAVIS. I understand that, but the important part of our proposal is this. If grand juries have independent counsel, then it is quite possible that the grand juries would learn a good deal more about some of the erroneous or abusive efforts that are being made by the prosecutor and might get into questioning that.

There's no way of predicting what the consequences of grand jury reform would in terms of the number of indictments. That, after all is related to the amount of crime that might be committed.

All we can address is the question of whether or not it would curb abuses of the grand jury. If it curbed abuses of the grand jury, then it would be fine. Whether reform produces more or less indictments is not the standard for testing the soundness of the bill.

Mr. REGNERY. Is it your opinion that the abuses that you are discussing of the grand jury system do not, in fact, lead to any additional indictments for criminal convictions? In other words, is there a trade-off between the abuses which might take place for additional convictions or indictments?

Mr. STAVIS. I don't think that there's a necessary trade-off between those two. I am not at all sure that because we've allowed abuses to proceed that we have more indictments, or that if we corrected abuses that we would have fewer indictments.

I think that there is an independent system of abuses going on. There are many people who are put in jail by reason of abuses of the grand jury who are never indicted.

We believe that in fact is one of the most serious abuses of the grand jury. The grand jury becomes a method by which the prosecution can put people away in jail and deny that person the whole system of due process of law of indictment and of trial before a jury and achieve what they want—punishment—without any indictment at all.

So, the trade-off is extremely obscure, if it exists at all.

Mr. REGNERY. Are you saying that you think there is an independent system of abuses from the use of the grand jury for indictments and ultimate convictions? In other words, the powers that be, use the grand jury for something other than obtaining indictments. Is that right?

Mr. STAVIS. Yes; that's our point. The function of the grand jury was to weigh the evidence and provide for a lay review to see whether or not there should be an indictment.

In addressing the question of grand jury abuse, we have not suggested that there's anything wrong with that function of the grand jury. We insist that it should be performed and that it can be only if grand juries are made independent bodies with independent counsel. We would not want the grand jury eliminated. We believe there should be lay review as to whether or not there should be an indictment. That is not a matter which we are addressing.

We are addressing entirely independently the matter of grand jury abuse unrelated to whether there is or is not an indictment.

Mr. REGNERY. Do you support this bill?

Mr. STAVIS. Oh, yes.

Mr. REGNERY. Do the rest of you?

Ms. MEAD. Yes.

Ms. BACKIEL. Yes.

Mr. REGNERY. Does the National Lawyers Guild support it.

Ms. MEAD. Yes; it does.

Senator ABOUREZK. Before we finish, I wonder if you would discuss what you believe are some of the items of impact that the abuse of the grand jury system results in? For example, there's the right to free association, and so on.

I think it was an excellent point that was made. This doesn't have much to do with indictments or convictions. If the evidence is there a defendant will be indicted and if the evidence is there he will be convicted.

But, we are talking about hauling people up in front of a grand jury without respect to an indictment.

Ms. BACKIEL. Or even threatening to do so.

We have seen many cases in the last 2 or 3 years in which human service organizations, political organizations, women's movement groups, self-help centers, all sorts of activities have been chilled to the point of being frozen out of existence because there had been a grand jury investigation or an FBI investigation with the threat of grand jury subpenas.

People have had to take energy away from running a medical clinic for poor people in rural New Mexico in order to support one of their ambulance drivers and one of the mainstays of the clinic who was subpenaed to the grand juries in New York and Chicago.

It has an independent effect of chilling and punishing association, speech, and other rights protected by the first amendment.

Senator ABOUREZK. If there are no other questions, I want to express my thanks to you and all of the witnesses today. I think the testimony and the discussion has been excellent. We are very grateful for it.

Our next hearing will be next Tuesday, August 22 in this committee room.

[Whereupon at 11:30 a.m. the committee was adjourned.]

THE GRAND JURY REFORM ACT OF 1978

TUESDAY, AUGUST 22, 1978

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:35 a.m., in room 2228, Dirksen Senate Office Building, Senator James Abourezk (chairman of the subcommittee) presiding.

Staff present: Irene R. Emsellem, chief counsel and staff director; Jessica J. Josephson, counsel; Stephen Klitzman, counsel; and Al Regnery, minority counsel.

Senator ABOUREZK. The committee will come to order.

Our first witness this morning is Mr. Philip Heymann, Assistant Attorney General, Criminal Division, Department of Justice.

Mr. Heymann, you may proceed.

I noticed that your statement is some 54 pages long.

Mr. HEYMANN. Yes; Mr. Chairman, I have been advised—though I didn't need to be advised—that it might be wise not to read it word for word. I have no intention of doing that.

Senator ABOUREZK. If you did, the snoring up here might outdo your statement.

As a matter of setting an example for the witnesses, let me say that all statements will be inserted in the record as though read in full.

I would be grateful if the witnesses would all summarize in their own words.

TESTIMONY OF PHILIP B. HEYMANN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY ROGER A. PAULEY, DEPUTY CHIEF, LEGISLATION AND SPECIAL PROJECTS SECTION, DEPARTMENT OF JUSTICE

Mr. HEYMANN. Mr. Chairman, I have with me Mr. Roger Pauley of the Criminal Division. With your permission, I would like for him to respond to some questions.

Senator ABOUREZK. We welcome him.

Mr. HEYMANN. I understand that my statement will be inserted in the record, and I will speak for about 5 minutes.

Senator ABOUREZK. Without objection, your statement will be included in the hearing record.[1]

[1] See p. 91.

Mr. HEYMANN. I am pleased to be here today to present for your consideration of the views of the Department of Justice on S. 1449 and on the bill more recently introduced, S. 3405.

At the outset, let me confirm the Department of Justice's overriding interest in preserving and protecting the fundamental rights of all citizens in the administration and delivery of criminal justice.

Our most important government institutions and systems are designed and have evolved to guarantee constitutional rights and to maintain a free and independent society.

We welcome and support efforts to improve any aspect of the Federal system of criminal justice that will permit it to perform its vital functions more effectively and equitably and more responsively. Particularly, we welcome and support improvement to the grand jury which has been an integral and indispensable part of that system for the past 200 years.

The Department of Justice is committed to many of the principles for improvement of the grand jury system which underlie provisions of your bill, Mr. Chairman, and which have been suggested by others such as the American Bar Association, which adopted in August 1977, some 25 principles for grand jury legislation.

In December 1977, the Department of Justice after thorough consideration promulgated guidelines in the U.S. Attorneys' Manual setting forth principles to be followed by Federal prosecutors in the conduct of grand jury proceedings.

I would like to summarize what these guidelines do, because they will form an important part of my answers to questions. These guidelines include a recommendation that, No. 1, as a general rule witnesses should receive a notice of their basic rights simultaneously with their receipt of a subpena requiring their appearance before the grand jury.

Two, generally targets of an investigation should not be subpenaed before the grand jury, but those who wish voluntarily to appear should be permitted to do so and where appropriate should be notified of their target status.

Three, generally a target of investigation who states in writing that he will refuse to testify on fifth amendment grounds should be excused from testifying unless the grand jury insists upon his appearance. There are special additional protections built in there.

Four, a prosecutor should not present evidence against a person to the grand jury which he knows was obtained as a result of a clear violation of the person's constitutional rights.

Five, a prosecutor should present evidence to the grand jury which directly negates the guilt of a person under investigation before seeking an indictment against such a person.

Six, among the new guidelines, the use of forthwith subpenas should be limited to situations in which swift action is important and utilized only with prior approval of the U.S. attorney.

Seven, once a grand jury has returned a no-bill or otherwise acted on the merits in declining to return an indictment, the same matter should not be presented to another grand jury in the absence of additional or newly discovered evidence.

Senator ABOUREZK. When were those drafted and adopted by the Justice Department?

Mr. HEYMANN. They were first drafted, that is promulgated, Mr. Chairman, in December of 1977. I suppose they were drafted sometime between August of 1977 and December of last year.

Senator ABOUREZK. They were adopted last year by the Justice Department?

Mr. HEYMANN. They were sent to all U.S. attorneys as guidelines binding on them in December of last year. The form that such guidelines takes is that initially they are sent out in a binding but tentative fashion. They are about to be made now final and formal as part of the U.S. Attorneys' Manual.

The Department has a continuing interest in improving grand jury practices. Our review of the grand jury system that resulted in the issuance of the December 1977 guidelines is a reflection of our ongoing concern. A further indication of our continuing interest in the fairness of the grand jury process is the recent promulgation of an additional guideline generally discouraging the practice of naming persons and indictments as unindicted coconspirators on the grounds that they have no opportunity to rebut the accusation.

Senator ABOUREZK. The last unindicted coconspirator that I heard of had an opportunity but he declined.

Mr. HEYMANN. We may be thinking of the same person.

Senator ABOUREZK. Probably.

Mr. HEYMANN. In addition to the foregoing principles embodied in our guidelines, we agree that a prosecutor should not recommend to the grand jury nor sign an indictment returned by the grand jury if he believes the evidence presented is legally insufficient. A prosecutor should not use a grand jury to procure evidence for preparation of a pending trial. The prosecutor should not harass or unreasonably delay witnesses. Arguments impermissible at a trial should not be made before 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.

In saying all of this, Mr. Chairman, we do not intend to suggest that we share the views of some that the Federal grand jury system is in need of a thorough overhaul and or drastic revision.

On the contrary, it is our position that the Federal grand jury system is fundamentally sound. It has served well throughout the history of our Republic and continues to serve as an effective, fair, and essential institution both for the investigation of criminal activity and the initiation of criminal charges.

The Department is committed to maintaining the traditional role of the grand jury as an investigative body that initiates the criminal process and vigorously opposes changes that would transform the grand jury process into a pretrial adversary proceeding.

The notion that we believe the grand jury should be and properly is an investigative tool as well as a protection at the end of an investigation for the suspect is going to be crucial in the positions that we take.

The investigative function of the grand jury is firmly rooted as a matter of history and well established as a matter of practice. The grand jury originated in England in 1166 as an accusatory body.

Initially it functioned exclusively as an instrument of the Crown serving as the King's investigative arm. Centuries later the second function of the grand jury, that of protecting innocents against malicious or unfounded prosecutions, emerged.

As the Supreme Court has noted, the grand jury's historic function has survived to this day. Its responsibilities continue to include both the determination where there is probable cause to believe that a crime has been committed and the protection of citizens against unfounded criminal charges.

In discharging its dual responsibilities, the grand jury serves both as an essential adjunct to the executive in the performance of its law enforcement function and as a check on executive ability to commence criminal prosecutions.

The importance of the investigative function of the grand jury has long been noted. More than half a century ago the Supreme Court characterized the grand jury as:

> A grand inquest, a body with powers of investigation the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable results of the investigation or by doubt whether any particular individual will be found properly subject to an accusation of crime.

That is from a case called *Blair* v. *United States*, 250 U.S. 273 (1919).

More recently, the court has underscored the important contribution of the grand jury to the law-enforcement process in *Branzburg* v. *Hayes*. The court emphasized that:

> The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it.

The constraints and limitations of the adversary system that apply to the adjudication of guilt or innocence are thus frequently ill suited to the dual investigatory and protective functions of the grand jury.

As Justice Powell observed in writing for the Supreme Court in *United States* v. *Calandra*, and I quote:

> The scope of the grand jury's powers reflect 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. The grand jury's investigative power must be broad if its responsibility is to be adequately discharged.

I draw to a close here, Mr. Chairman. The Department's primary objections to S. 1449 and S. 3405 stem from those aspects of the bill that to our mind would serve to transform the grand jury into an adversary or adjudicatory proceeding similar to the trial or the appellate stages of the criminal justice process. Although the Department agrees with many of the reforms contained in the bill, it firmly opposes their implementation through statutory provisions that would necessarily or likely spawn destructive litigation.

As the Supreme Court has noted:

> Any holding that would saddle the grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public interest in the fair and expeditious administration of the criminal laws.

That comes from a case called the *United States* v. *Dionizio* 410 U.S. 1. The quote is on page 17.

Similarly, the introduction of counsel for witnesses into the grand jury room—perhaps the hardest issue—would to our mind add a disruptive adversarial aspect to the grand jury proceeding. In sum, the Department is committed to improving the grand jury system so that it more fairly and efficiently discharge traditional dual responsibility to investigate criminal conduct and to block the initiation of unfounded prosecutions.

The Department, however, rejects the notion that such improvements can be accomplished by transforming the grand jury into yet another adversarial proceeding in the already delayed and often overburdened criminal justice process.

I have provided the subcommitee with a lengthy prepared statement discussing particular provisions of S. 1449. I understand that that statement has been included in the record, Mr. Chairman. Although this statement does not discuss S. 3405, we will be happy to answer questions regarding that bill. Or if the subcommittee desires to submit written views on any aspects of S. 3405 that differ from the provisions of S. 1449, we will be happy to furnish that.

Thank you, Mr. Chairman.

Senator ABOUREZK. Thank you, Mr. Heymann. S. 3405 incorporates all of the substance of S. 1449 and adds additional sections. Your testimony will be conformed for the record to refer to S. 3405. I will continue my comments.

The guidelines have been in effect nearly a year according to your testimony.

Mr. HEYMANN. Seven or eight months, Mr. Chairman.

Senator ABOUREZK. What kind of followup have you had on those guidelines to determine whether prosecutors are following the guidelines or violating them? What can you tell the subcommittee about that?

Mr. HEYMANN. The followup, Mr. Chairman, has been most informal. In other words, we have not systematically gone out and asked the prosecutors whether they are following them. I would predict with close to 100-percent confidence that they would answer that they are indeed following them.

I would believe myself that that will turn out to be a truthful statement. They are following them.

Senator ABOUREZK. Mr. Heymann, in South Dakota when someone applies for a liquor license out there to the State liquor control agency, there is a question on the application form that says, "Are you of good moral character?" One hundred percent of the respondents said, "yes," over the past 40 years. I would expect the same thing to be true of the prosecutor. If you said, "Are you following these guidelines?", of course he would say, "yes." What else is he going to say?

Mr. HEYMANN. Mr. Chairman, let me attempt to give a fuller and more responsive answer. I agree with you 100 percent. If you asked the worse set of prosecutors in the world whether they were following a set of guidelines presumptively binding on them, then they would answer, "yes."

I have met, however, with perhaps half of the U.S. attorneys now in a pair of conferences that have taken place. I will meet with the other half in early September. I hear some grumbling about the guidelines from them, not rebellion but some grumbling.

However, my feeling from meeting with them is that they are complying. What's more there is not a sense that the guidelines are other than justified and proper.

But let me take it one step further, Mr. Chairman. We have 2,000 Federal prosecutors roughly. It is hard to keep track of 2,000 of any category of people exercising discretion.

It could be a little bit less hard in this case. I am not the least bit concerned about whether the guidelines are the official promulgated policy of each of our 94 U.S. attorneys' offices, as well as the Department of Justice. I would be very much surprised if they were not.

Abuses can, however, take place in any of the 94 U.S. attorneys' offices, as they can take place in my Criminal Division, and these are large operations.

It seems to me that there are several handy ways to check on abuses, but they require complaints. Each of them requires complaints. A complaint could go to a U.S. attorney, it could go to the judge sitting on the grand jury, the judge who impaneled the grand jury, a complaint could go to me. I would like to receive complaints about unfairness at a grand jury, particularly if it is in conflict with guidelines for law.

But, in general, I would like to receive complaints about unfairness at a grand jury. It is part of my responsibility to see to it that American citizens are treated fairly.

Eventually I think the only way we will be able to know of unfairness will be in the form of complaints. That is not a bad check on any system.

Senator ABOUREZK. I would like to pursue this point. We are still operating under the adversary system. I am a lawyer. You are a lawyer. Every lawyer that I know of who is worth his salt and worth being called a lawyer will use the adversary system to its fullest extent. Lawyers by nature, if they remain lawyers, are combative and competitive and will go to the full limits of the rules as the rules allow. Some, of course, go beyond the rules as we all know.

In all honesty and in all bluntness and in all fairness, how can you say that a prosecutor who conceives of his job as that of prosecuting people as hard as he can will restrain himself within guidelines that nobody checks on? I would be quite interested to hear your explanation of such a situation.

Mr. HEYMANN. There is a substantial self-interest in restraining himself within the guidelines, Senator.

Senator ABOUREZK. What would that be?

Mr. HEYMANN. It is practically unknown for a prosecutor to want an indictment that does not result in a conviction after a trial and a conviction beyond a reasonable doubt.

Our prosecutors feel no benefit from getting an indictment that does not end up in a conviction after trial.

In short, to impress on a witness or to mislead the grand jury in such a way as to get the grand jury to indict someone on a standard of probable cause to believe they committed the crime and only to have the result be a trial where we have a relatively low chance of conviction is nothing we seek.

Senator ABOUREZK. With how many political cases are you familiar? Those people who have been indicted by a grand jury in recent years, since 1970, let's say. I am talking about trials of antiwar dissidents and others similarly situated. How many have been acquitted?

Every time I pick up the newspaper, there is another acquittal like the Pittsburgh Seven and the Chicago Whatever and the Delaware Eight. Have you kept a record of those?

Mr. HEYMANN. I have in the back of my own mind the same notion that there were six or seven, which seems to be a great deal of indictments of people labeled by numbers, "the Such-and-such 7, 8, 9."

Senator ABOUREZK. They were big cases with a great deal of publicity.

Mr. HEYMANN. To the best of my knowledge, all of those resulted in acquittals.

To be absolutely honest with you, Senator, I think those seven—if there are seven—are tiny exceptions. We are talking about since 1970. I think they are notable and tiny exceptions in what is probably 320,000 Federal cases.

Senator ABOUREZK. The ones I am referring to are the ones that made the newspapers. How many trials resulted in acquittals that did not make the newspapers and did not make big headlines? Do you know? I don't know.

Mr. HEYMANN. I know of none, but it is possible that I would not have known of them.

Senator ABOUREZK. It blows your theory wide open, I think. You say a prosecutor would not do it on the chance there would be an acquittal.

Mr. HEYMANN. It is not that we object to a chance that there might be an acquittal. There is always a chance of that. What I am saying, Mr. Chairman, is that we do not have the resources to bring cases where there is a 60-percent chance of conviction, except under special circumstances. We throw away strong cases because we only have the resources to try the strongest.

We have no desire to press a grand jury to help us bring a weak case.

I am not saying, Mr. Chairman, that there cannot be circumstances where the executive branch is so anxious—and we are talking about a period in the early 1970's, probably 1970 to 1973 or 1974—to get a conviction that it will proceed even with a case that it thinks there is a 30-percent chance of winning. It is possible for the executive branch to do that. It is a highly exceptional situation, however.

Senator ABOUREZK. Let's talk about just how exceptional it is. You are familiar with a lawyer by the name of Guy Goodwin; are you not?

Mr. HEYMANN. Yes; I have met with Goodwin in the Criminal Division. I have read accounts critical of Mr. Goodwin before I came to the Criminal Division.

Senator ABOUREZK. Is he still an employee of the Justice Department?

Mr. HEYMANN. Yes, he is.

Senator ABOUREZK. How many grand juries did he run? Do you know? During the time he was doing the antiwar stuff?

Mr. HEYMANN. I do not know.

Senator ABOUREZK. It is about a hundred. That is the information my staff has come up with. There were at least 100 grand juries con-

vened all over the country by Mr. Goodwin. Do you know how many indictments came out of those grand juries that he ran?

Mr. HEYMANN. All these figures are new to me.

Senator ABOUREZK. I am talking about convictions.

I am advised by my staff that Mr. Goodwin ran about 100 grand juries and had at least that many indictments and no convictions whatsoever. In fact, they were all political grand juries, and were probably directed out of Washington. That says nothing about the individual prosecutors around the country who, on their own, have taken off after somebody they have disliked and used the grand jury to spear somebody, whether for political or personal purposes.

We have come across a number of horror stories which have been given to this subcommittee. We have other people who will testify in the future with more such stories. But we do not have any statistics on those around the country, unfortunately.

You can protest all day long, in my view, but it does not erase the tremendous abuses that have been brought about as a result of the blatant way in which prosecutors use a grand jury.

Mr. HEYMANN. I think it would be helpful to divide the questions of potential abuse into two categories. One potential abuse or one type of potential abuse, Mr. Chairman, is indictments that are brought where there is little chance of conviction. Or let me say, charges that are brought that should not be brought. It may be that the reason that they be brought is that they border too closely on first amendment rights. It may be a series—it may be the case is weak. It may be that the person is being pursued unfairly.

One category is charges that are brought that should not be brought.

A second category is witnesses who are treated unfairly in some way. At the moment, you and I are talking about charges that are brought that should not be brought.

I would like to make a couple of comments on that because it is an interesting problem. The first thing that I think is worth noting as a setting for that, Mr. Chairman, is that we are talking about the charging decision. The charging decision has to be taken very seriously. It results in financial costs and it results in emotional results and it results in costs to reputations when you simply charge.

But, at the same time, we are talking about a charging decision. The grand jury as a charging instrument, as something that has to agree before a prosecutor can file a charge, is no longer in existence in Great Britain. It has been abolished in 26 or 28 States in the United States.

In each of those places, the charge has been thought to be a matter for the prosecution. I am not urging that. I think it is good that we have in our Federal system and in our Constitution a check on the Federal charging decision.

However, let's remember that it is a decision to bring someone to trial. It is not a trial. It is a decision to bring someone to trial. It is a decision to bring someone to a trial that will be followed by appeals.

It will inevitably take place with a grand jury or without one. That the charging decision can be made erroneously, in cases where there was an acquittal and there was obviously going to be an acquittal, and can be made maliciously or in cases that it should not be made. How-

ever, that would take place with the grand jury or without the grand jury.

Senator ABOUREZK. Under this system, yes. That is right.

However, may I discuss that for a moment. You were saying that it is a decision to bring someone to trial. You do not disagree, do you, with the original concept of the grand jury in that it forms a protective shield against malicious prosecution by the Government?

Mr. HEYMANN. I think it is one of the two crucial functions of the grand jury.

Senator ABOUREZK. Aside from being also an investigative arm, is that right?

Mr. HEYMANN. That is right.

Senator ABOUREZK. If you do not disagree with that, do you disagree that by and large in the overwhelming majority of grand juries the prosecutor tells them what to do and that the function of a shield has been lost and destroyed permanently in virtually all Federal grand juries? Do you disagree with that?

Mr. HEYMANN. I am not at all sure that that is right, Mr. Chairman, nor am I sure that it is wrong.

I would suspect that in most grand juries the fact that the prosecutor is presenting evidence to them and is presenting evidence that goes largely to guilt, even though our guidelines require giving exculpritary evidence also, and the fact that the prosecutor is a person who knows the law and is familiar with the setting and the fact that the grand jurors are not—all convey the message that the prosecutor is to be the leader and believes there ought to be an indictment.

However. I am not at all sure that the prosecutors more often than not strongly urge a particular result on a grand jury. I am told by a number of prosecutors, including most recently in the District of Columbia, that frequently they want to know how the grand jury reacts to the evidence that is presented. They present the evidence. They say to the grand jury, "Here is the law."

What they want out of the grand jury is not so much an indictment because we have plenty of cases to try without this particular one, but a reading from the grand jury as to whether this case looks like one that a jury is likely to accept and convict upon.

We have made that decision when we presented it to the grand jury. However, we do not know how jurors will react.

In short——

Senator ABOUREZK. What does it mean that you do not know how they will react?

Mr. HEYMANN. We do not know on a particular case whether a jury will take the matter seriously or not.

Senator ABOUREZK. A grand jury?

Mr. HEYMANN. A grand jury and the jury at trial.

Senator ABOUREZK. I am talking about grand juries now.

Mr. HEYMANN. Frequently one of the important functions from the prosecutorial point of view of a grand jury is the grand jury is the first place where we see jurors just like the trial jurors and expose them to the same evidence that the trial jurors will be exposed to. We are interested in knowing whether they look at that evidence and they say, "What is this? This is nothing." Or whether they look at it and

say, "This is a serious moral outrage that ought to be prosecuted by the Federal Government." We are interested in that reaction.

We don't want to prejudice it by saying to them that they should indict.

Senator ABOUREZK. Aside from the fact that you are interested in their reaction, let's get back to the original issue. Does not the overwhelming majority—99 percent of virtually all the grand juries do exactly what the prosecutor tells them to do. Isn't that right?

Mr. HEYMANN. Yes; that is true. They do.

Senator ABOUREZK. You don't disagree with that, do you?

Mr. HEYMANN. I do not disagree with that.

Senator ABOUREZK. All right. So, we are approaching a frank discussion here which is revealing that there is the potential for a tremendous amount of abuse and, in fact, there is real abuse of the grand jury system by virtue of the prosecutor having that kind of control and power over the grand jury.

Is that a fair statement?

Mr. HEYMANN. I hesitate to call it abuse, Mr. Chairman, when I have not yet agreed that the prosecutor regularly makes any effort to overwhelm the grand jury with his view of what it ought to do. I am not at all sure that that happens with any regularity.

What I have agreed to is that the prosecutor has a status as a lawyer and is a familiar hand which must be very influential with grand jurors and in a large number of cases where we think there should be an indictment, there is a very high percentage where an indictment results. I have agreed with all of that.

However, I cannot call that set of facts an abuse yet.

Senator ABOUREZK. Then how would you describe it?

Mr. HEYMANN. I would describe it as an almost inevitable consequence of a professional prosecutor presenting evidence to a group of lay individuals.

Senator ABOUREZK. A prosecutor's job is to prosecute. He has no other job except to prosecute.

Mr. HEYMANN. His job is to eventually bring and win cases at trial and through the appellate system, not to throw cases into the trial stage in large numbers that we are likely to lose. He doesn't want to do that. We don't want him to do it.

Senator ABOUREZK. Is that a general rule that you are expanding? What about Guy Goodwin? He would seem to be an exception to the rule.

Mr. HEYMANN. Mr. Chairman, I honestly do not know the situation with regard to the Goodwin trials. Years ago I read the Harris account in the New Yorker. I am extremely reluctant, as I am sure you will understand, to comment as if I know about them and to be critical without knowing anything about them, which I do not.

Senator ABOUREZK. Can we also try to arrive at an agreement on this particular point, Mr. Heymann? The Justice Department is extremely reluctant to give up the power it has over grand juries, isn't it?

Mr. HEYMANN. May I take one step back, Mr. Chairman?

Mr. Pauley has reminded me of a figure that I think is very revealing here. We win more than 80 percent of our cases at trial in an adver-

sary setting with a judge there on a "beyond a reasonable doubt" standard.

It is not surprising then that grand juries—that is, several things follow from that. One is that we are not anxious to bring cases that we only have a 40 percent chance of winning. We are winning 80 percent, and we only have enough resources to bring ones that we are fairly sure of winning.

The second is that it is not too surprising that in those 80-percent cases the grand jury went along and indicted. The fact of the matter is that those cases were cases that were provable beyond a reasonable doubt.

Senator ABOUREZK. Is that a particular year that you are giving those figures for?

Mr. PAULEY. It is my understanding that has been the approximate conviction rate on a nationwide basis. That is 80 percent plus.

Senator ABOUREZK. Every year?

Mr. PAULEY. For the last several years.

Senator ABOUREZK. You say that it is your understanding. Does that mean you are not entirely sure?

Mr. PAULEY. I do not know what the precise percentage is. I am sure that it does vary from year to year, but I have read articles and statistical complications that indicate that somewhere in the 80-percent-plus range are the facts.

Senator ABOUREZK. The figures were furnished by whom?

Mr. PAULEY. Either the Department of Justice or the Administrative Office of the U.S. Courts.

Senator ABOUREZK. You are not sure about that?

Mr. PAULEY. Possibly both. I can check.

Senator ABOUREZK. If you have some statistics, would you please provide us the source and the statistics.

Mr. PAULEY. Sure.

Senator ABOUREZK. Without objection, those figures will be placed in the hearing record at this point.

[The following statistics cited do not distinguish between cases which involve grand jury proceedings and those which proceeded on information, without any grand jury involvement. In addition, it would be noted that the U.S. attorney for the District of Columbia has responsibilities which differ significantly from those of other offices. In particular, the U.S. attorney for D.C. prosecutes a large number of essentially local crimes, because of the unique nature of the District under the Federal system.]

U.S. DEPARTMENT OF JUSTICE,
OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE,
Washington, D.C., October 12, 1978.

To: Paul Nejelski.
From: Charles Wellford.
Re: Conviction rates for U.S. attorneys.

As you requested I have calculated the conviction rates for each of the U.S. Attorney's offices. These rates are based on the United States Attorney's Statistical Report for fiscal year 1977. The data are taken from Table 2 of that report which contains: (1) the total number of cases and defendants terminated

for each district for the fiscal year ending September 30, 1977; and (2) the number of the terminated cases and defendants found guilty for the same period. The following rates are the result of dividing, for each district, the number of guilty terminations by total terminations and relating that result to a base of 100.

District	Case conviction rates	Defendant conviction rates
Alabama Northern	81.1	82.1
Alabama Middle	70.0	66.9
Alabama Southern	69.2	67.1
Alaska	76.7	76.2
Arizona	65.3	57.3
Arkansas Eastern	66.3	65.3
Arkansas Western	77.1	73.1
California Northern	75.8	74.3
California Central	63.0	61.9
California Eastern	66.8	63.8
California Southern	63.4	56.4
Colorado	55.0	53.7
Connecticut	53.3	51.5
Delaware	71.9	68.7
District of Columbia	40.9	42.1
Florida Northern	56.3	48.2
Florida Middle	68.2	65.2
Florida Southern	65.3	63.2
Georgia Northern	68.8	69.4
Georgia Middle	90.9	89.5
Georgia Southern	81.7	81.8
Hawaii	65.4	67.9
Idaho	60.0	59.2
Illinois Northern	74.7	70.1
Illinois Eastern	54.7	54.3
Illinois Southern	52.1	51.9
Indiana Northern	54.7	55.4
Indiana Southern	73.4	74.6
Iowa Northern	62.2	68.1
Iowa Southern	65.8	63.1
Kansas	64.9	61.7
Kentucky Eastern	71.1	67.3
Kentucky Western	79.8	80.1
Louisiana Eastern	81.8	77.9
Louisiana Middle	85.1	74.5
Louisiana Western	81.7	80.6
Maine	62.2	61.9
Maryland	64.2	63.7
Massachusetts	74.7	73.0
Michigan Eastern	61.4	59.5
Michigan Western	56.8	56.6
Minnesota	65.7	65.1
Mississippi Northern	70.0	66.1
Mississippi Southern	75.8	74.8
Missouri Eastern	61.7	63.9
Missouri Western	62.5	62.3
Montana	55.1	54.6
Nebraska	64.4	64.5
Nevada	53.2	49.3
New Hampshire	54.6	52.5
New Jersey	68.9	65.8
New Mexico	62.2	61.8
New York Northern	56.9	62.3
New York Eastern	62.3	59.2
New York Southern	58.8	57.5
New York Western	57.6	58.8
North Carolina Eastern	72.4	73.6
North Carolina Middle	76.9	78.0
North Carolina Western	70.4	71.7
North Dakota	73.8	76.0
Ohio Northern	71.4	73.1
Ohio Southern	72.1	70.5
Oklahoma Northern	73.2	70.4
Oklahoma Eastern	69.6	67.1
Oklahoma Western	72.0	73.5

District	Case conviction rates	Defendant conviction rates
Oregon	53.5	52.5
Pennsylvania Eastern	68.0	69.9
Pennsylvania Middle	68.1	68.2
Pennsylvania Western	51.6	45.5
Puerto Rico	69.1	68.2
Rhode Island	75.5	68.8
South Carolina	63.5	61.7
South Dakota	64.0	59.1
Tennessee Eastern	70.6	70.3
Tennessee Middle	71.5	71.8
Tennessee Western	63.0	63.6
Texas Northern	75.1	73.3
Texas Eastern	80.9	81.1
Texas Southern	71.9	69.1
Texas Western	69.1	65.4
Utah	40.7	35.9
Vermont	64.1	62.5
Virginia Eastern	58.7	58.8
Virginia Western	75.1	75.1
Washington Eastern	63.5	63.8
Washington Western	59.8	55.6
West Virginia Northern	74.5	75.5
West Virginia Southern	66.8	71.3
Wisconsin Eastern	64.0	62.0
Wisconsin Western	65.5	64.0
Wyoming	56.8	57.1
Canal Zone	81.0	81.8
Guam	75.0	77.1
Virgin Islands	64.6	61.8
All offices	66.4	64.5

Excerpt From 1978 Annual Report of the Director of the Administrative Office of the United States Courts

DISPOSITION OF CRIMINAL CASES

During the twelve month period ended June 30, 1978, 49,727 defendants were terminated in 37,286 criminal cases. The number of cases terminated is down 15.7 percent from 44,233. The number of defendants terminated is down 14.1 percent from last year's 57,876. The termination figures include defendants who were counted in the system more than once (duplicates) based on separately docketed prosecutions. The disposition rate (total terminations divided by beginning pending caseload plus filings) decreased to 70.2 percent this year, a decline over the June 30, 1977 disposition rate of 75.4 percent. (See Table D-1 Cases and Defendants in Appendix)

DISPOSITION OF CRIMINAL DEFENDANTS

Defendants disposed of during the twelve month period ended June 30, 1978, totaled 45,922, 13.7 percent fewer than last year's total of 53,188. Of the total 45,922 defendants disposed of in the district courts, 31,105 or 67.8 percent plead guilty or nolo contendere and 7,801 or 17 percent had their charge dismissed, while the remainder were either acquitted by court of jury (1,627 or 3.5 percent) or convicted by court or jury (5,389 or 11.7 percent).

The conviction rate for all defendants as well as felony defendants only was 79.5 percent. Of the 28,255 felony defendants convicted, 16,457 or 58.2 percent were sentenced to an imprisonment term. For the 11,689 sentenced to regular imprisonment terms the average sentence was 36 months. Only 568 or 2 percent received fine only sentences while 11,125 or 39.4 percent received probation sentences (See Table 50).

TABLE 50.—SUMMARY OF CRIMINAL DEFENDANT DISPOSITIONS IN THE U.S. DISTRICT COURTS FOR THE 12-MO. PERIOD ENDING JUNE 30, 1977 AND 1978

Disposition	1977		1978	
	All offenses reported	Felonies only	All offenses reported	Felonies only
Total defendants	53,188	41,660	45,922	35,523
Not convicted	11,732	9,724	9,428	7,268
Convicted and sentenced	41,456	31,936	36,494	28,255
Regular imprisonment [1]	13,772	13,222	12,285	11,689
(Average in months)	(34.7)	(36.0)	(34.3)	(36.05)
Special sentencing statutes [2]	5,780	5,487	5,166	4,768
Probation	16,135	12,453	14,475	11,125
(Average in months)	(32.8)	(37.0)	(32.4)	(36.1)
Fine	5,409	676	4,282	568
Other	360	98	286	105
Percent of total	100.0	100.0	100.0	100.0
Not convicted	22.1	23.3	20.5	20.5
Convicted and sentenced	77.9	76.7	79.5	79.5
Percent of convicted	100.0	100.0	100.0	100.0
Regular imprisonment [1]	33.3	41.4	33.7	41.4
Special sentencing statutes [2]	13.9	17.2	14.2	16.9
Probation	38.9	39.0	39.7	39.4
Fine	13.1	2.1	11.7	2.0
Other	.9	.3	.8	.4

[1] Includes Federal Juvenile Delinquency Act sentences.
[2] Includes split sentences, indeterminate sentences and Youth Corrections Act sentences.

TABLE 51.—SUMMARY OF CRIMINAL DEFENDANTS CONVICTED AND NOT CONVICTED DURING THE 12-MO. PERIODS ENDED JUNE 30, 1977–78

Defendants disposed of	1977	1978	Percent change 1978 over 1977
Total defendants	53,188	45,922	−13.7
Total not convicted	11,732	9,428	−19.6
Dismissed	9,952	7,801	−21.6
Acquitted by:			
Court	398	311	−21.9
Jury	1,382	1,316	−4.8
Total convicted	41,456	36,494	−12.0
By plea and nolo contendere	35,323	31,105	−11.9
By court	1,629	1,428	−12.3
By jury	4,504	3,961	−12.1
Type sentence:			
Fine only	5,409	4,282	−20.8
Other	360	286	−20.6
Imprisonment	19,552	17,451	−10.7
Regular [1]	13,772	12,285	−10.8
Sentence (months):			
1–12	4,016	3,296	−17.9
13–35	2,938	2,813	−4.3
36–59	2,953	2,798	−5.2
60 and over	3,865	3,378	−12.6
Average sentence	34.7	34.3	−1.2
Split sentence	3,217	3,278	1.9
Indeterminate	1,604	1,099	−31.5
YCA or YO [2]	959	789	−17.7
Probation	16,135	14,475	−10.3
Sentence (months):			
1–12	3,733	2,964	−20.6
13–24	4,125	3,737	−9.4
25–36	4,727	4,477	−5.3
37 and over	3,550	3,297	−7.1
Average sentence	32.8	32.4	−1.2

[1] Includes Federal Juvenile Delinquency Act sentences.
[2] Youth Correction Act and youth offenders.

TABLE 52.—CRIMINAL CASES TERMINATED DURING THE 12-MO. PERIODS ENDED JUNE 30, 1977 AND 1978

Circuit and districts	1977	1978	Percent change
Total all districts	42,540	35,892	−15.6
District of Columbia	1,017	864	−15.0
1st circuit	1,079	805	−25.4
Maine	93	75	−19.4
Massachusetts	602	427	−29.1
New Hampshire	45	30	−33.3
Rhode Island	116	78	−32.8
Puerto Rico	223	195	−12.6
2d circuit	3,305	2,364	−28.5
Connecticut	339	185	−45.4
New York:			
Northern	174	129	−25.9
Eastern	963	681	−29.3
Southern	1,355	1,072	−20.9
Western	378	228	−39.7
Vermont	96	69	−28.1
3d circuit	2,893	2,436	−15.8
Delaware	145	89	−38.6
New Jersey	1,098	1,024	−6.7
Pennsylvania:			
Eastern	621	544	−12.4
Middle	204	137	−32.8
Western	335	284	−15.2
Virgin Islands	490	358	−26.9
4th circuit	4,545	4,232	−6.9
Maryland	1,427	1,258	−11.8
North Carolina:			
Eastern	251	198	−21.1
Middle	292	268	−8.2
Western	232	198	−14.7
South Carolina	322	314	−2.5
Virginia:			
Eastern	1,508	1,578	4.6
Western	203	163	−19.7
West Virginia:			
Northern	92	65	−29.4
Southern	218	190	−12.8
5th circuit	10,408	8,396	−19.3
Alabama:			
Northern	565	665	17.7
Middle	234	274	17.1
Southern	144	125	−13.2
Florida:			
Northern	138	111	−19.6
Middle	478	556	16.3
Southern	673	589	−12.5
Georgia:			
Northern	487	416	−14.6
Middle	832	1,035	24.4
Southern	1,790	541	−69.8
Louisiana:			
Eastern	676	410	−39.4
Middle	148	81	−45.3
Western	647	241	−62.8
Mississippi:			
Northern	105	64	−39.1
Southern	125	118	−5.6
Texas:			
Northern	618	592	−4.2
Eastern	161	149	−7.5
Southern	1,288	1,112	−13.7
Western	1,017	1,042	2.5
Canal Zone	282	275	−2.5
6th circuit	4,347	3,486	−19.8
Kentucky:			
Eastern	298	260	−12.8
Western	408	552	35.3
Michigan:			
Eastern	1,511	989	−34.6
Western	302	189	−37.4
Ohio:			
Northern	787	510	−35.2
Southern	313	349	11.5
Tennessee:			
Eastern	202	139	−31.2
Middle	376	294	−21.8
Western	150	204	36.0
7th circuit	1,951	1,593	−18.4
Illinois:			
Northern	1,779	677	−13.1
Eastern	146	172	17.8
Southern	119	116	−2.5
Indiana:			
Northern	338	195	−42.3
Southern	252	180	−28.6
Wisconsin:			
Eastern	225	181	−19.6
Western	92	72	−21.7
8th circuit	2,683	2,152	−19.8
Arkansas:			
Eastern	246	245	−0.4
Western	70	68	−2.9
Iowa:			
Northern	118	80	−32.2
Southern	117	98	−16.2
Minnesota	341	250	−26.7
Missouri:			
Eastern	349	254	−27.2
Western	715	678	−5.2
Nebraska	204	122	−40.2
North Dakota	141	112	−20.6
South Dakota	382	245	−35.9
9th circuit	8,338	7,686	−7.8
Alaska	170	347	−13.5
Arizona	1,047	901	−13.9
California:			
Northern	678	584	−13.9
Eastern	568	487	−14.3
Central	2,013	1,518	−24.6
Southern	1,092	890	−18.5
Hawaii	811	1,139	40.4
Idaho	133	158	18.8
Montana	228	241	5.7
Nevada	177	174	−1.7
Oregon	277	282	1.8
Washington:			
Eastern	178	156	−12.4
Western	942	980	4.0
Guam	24	29	
Northern Mariana Islands			
10th circuit	1,974	1,878	−4.9
Colorado	480	366	−23.8
Kansas	444	360	−18.9
New Mexico	242	282	16.5
Oklahoma:			
Northern	170	113	−33.5
Eastern	74	109	47.3
Western	336	329	−2.1
Utah	94	189	101.1
Wyoming	134	130	−3.0

Note: Percent change computed on 25 or more.

EXCERPT FROM THE 1977 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

TYPE OF CRIMINAL PROCEEDING

The proportion of criminal cases commenced by indictment comprised 62.8 percent of the 39,786 criminal filings in the twelve-month period ended June 30, 1977, down from 66.8 percent noted in 1976. Cases commenced by indictment decreased 4.4 percent to 24,991 and cases commenced after waiver of indictment dropped 11.8 percent to 2,278. Under Rule 7(b) of the Federal Rules of Criminal Procedure a defendant may waive indictment in open court and be charged by information.

There was a 20.5 percent increase in the filing of "other informations" for cases where the maximum penalty of imprisonment is not more than one year. These 11,543 cases commenced by the filing of informations comprised 29.0 percent of the criminal cases filed compared to 24.5 percent during the last reporting period ended June 30, 1976. Also, of the 11,543 "other informations" cases filed, over one-fourth (3,395) were reported as felonies and misdemeanors.

TABLE 37.—CRIMINAL CASES COMMENCED SHOWING NATURE OF ORIGINAL PROCEEDINGS DURING THE STATISTICAL YEARS 1975-77 (EXCLUDES TRANSFERS)

Nature of proceedings	1976		1977	
	All offenses reported	Felonies and misdemeanors only	All offenses reported	Felonies and misdemeanors only
Total	39,147	34,213	39,786	31,288
Proceedings commenced by:				
Indictment	26,150	26,031	24,991	24,854
Information-indictment waived	2,583	2,572	2,278	2,274
Information-other	9,577	4,861	11,543	3,395
Remanded from Appellate court	114	112	119	116
Removed from State court	95	65	154	122
Reopened/Reinstated	220	216	333	325
Appeal from U.S. magistrates decisions	108	69	148	12
Juvenile delinquency proceedings	300	287	220	190

Cases removed from state courts showed a gain of 62 percent from 95 in 1976 to 154 in 1977. Of such cases in 1977, 79 percent were felonies and misdemeanors. Appeals to the district court from U.S. Magistrate decisions increased from 108 in 1976 to 148 in 1977, a 37-percent gain.

Filings under the Federal Juvenile Delinquency Act continued to decrease from 300 in 1976 to 220 in 1977, a loss of 26.7 percent. Compared to 1974 when 727 cases were filed, the 1977 figure of 220 filings represented a 69.7-percent drop.

CASES FILED BY DISTRICT

Although the overall increase in original filings is 1.6 percent, five districts experienced increases greater than 40 percent: the District of New Jersey, the Western District of Texas, the Middle District of Tennessee, the Western District of Washington and the District of Colorado. The District of New Jersey saw an increase of 486 cases filed, 77 percent over the previous year. The increase of 341 cases in the offense category of "fraud" and gains in the offense categories of larceny, embezzlement, "other general offenses" and immigration were responsible for most of the increase in New Jersey. The District of Western Texas saw the majority of its 42 percent or 316 cases gain in the larceny offense category, from 46 in 1976 to 269 in 1977, a gain of 484.8 percent. The majority of these cases, 83.6 percent, were filed as minor offenses. The Middle District of Tennessee showed an increase of 126 cases in the "other general offenses" category from 15 in 1976 to 141 in 1977. This one offense category accounted for the entire increase in cases filed for 1977. Of the 141 cases filed, only 9.2 percent were filed as felonies and misdemeanors. The Western District of Washington had an upswing of

105.2 percent in cases filed. The swell in "other general offenses" from 70 in 1976 to 466 in 1977 contributed largely to the increase noted.

Filings for the fifth district, the District of Colorado, rose by 74.1 percent from 274 in 1976 to 477 in 1977. The major portion of the increase can be attributed to the rise in the offense category "other general offenses" which includes minor offense violations of drunk driving and other traffic violations.

Similar analyses can be made by comparing Appendix Table D–3AC with previous years. Care should be exercised in making any comparisons of Appendix Table D–3FMC with any other tables as data for felony and misdemeanor cases only is not available prior to 1976.

DISPOSITION OF CRIMINAL DEFENDANTS

During the 12-month period ended June 30, 1977, there were 44,111 cases (all offenses) terminated in the 94 district courts, involving 53,188 defendants—counting those defendants in more than one case only once. These 53,188 defendants represent a rise of 3 percent in termination over 1976.

FIG. 14.—SUMMARY OF CRIMINAL DEFENDANT DISPOSITIONS IN THE U.S. DISTRICT COURTS, STATISTICAL YEARS 1975-77 (EXCLUDES TERRITORIES)

Disposition	1975	1976		1977	
		All offenses reported	Felonies and misdemeanors only	All offenses reported	Felonies and misdemeanors only
Total defendants	49,212	51,612	47,256	53,188	44,854
Defendants convicted and sentenced	37,433	40,112	36,491	41,468	34,619
Percent of total	76.1	77.7	77.2	78.0	77.2
Imprisonment	17,301	18,478	18,068	19,613	19,169
Percent of convicted	46.2	46.1	49.5	47.3	55.4
Average sentence of imprisonment in months	45.5	47.2	48.1	45.1	46.0
Probation	17,913	18,208	16,694	16,134	13,781
Percent of convicted	47.9	45.4	45.7	38.9	39.8
Fine	1,876	3,198	1,545	5,409	1,486
Percent of convicted	5.0	8.0	4.2	13.0	4.3
Other	343	228	184	312	183
Percent of convicted	0.9	0.6	0.5	0.8	0.5

The territorial courts of the Canal Zone, Guam and the Virgin Islands are included in this report for the first time, therefore, care should be taken when attempting comparisons of this data with previously published reports. These three courts accounted for 856 of the total 53,188 defendants whose cases were terminated.

Figure 14 provides a summary of defendant disposition data for statistical year 1975 (all offenses), and for 1976 and 1977 (all offenses and felonies and misdemeanors).

The conviction rate continues to rise, from 76.1 percent in 1975 to 77.7 in 1976 to 78.0 percent in 1977 for all offenses. The number of convicted defendants receiving a "fine only" sentence increased substantially from 3,199 in 1976 to 5,409 in 1977, for an increase of 69.1 percent. The majority of this increase occurred in the minor offense categories of traffic violations and migratory bird laws. (See Appendix Table D–5AD and D–5FMD.)

The number of defendants charged with contempt violations increased from 105 in 1976 to 461 in 1977 or 339.0 percent and the convictions rose from 55 to 106, a 92.7 percent increase. For the third consecutive year, defendant dispositions for drunk driving and traffic offenses have increased substantially. In the last reporting year, an additional 2,453 defendants were disposed of, from 2,270 in 1976 to 4,723 in 1977. Of these 4,723 dispositions 3,863, or 81.8 percent, were convicted. Since 1974, there has been an increase of 4,353 defendant dispositions from 370 in 1974 to 4,723 in 1977 with 246 convicted in 1974 and 3,863 convicted in 1977 resulting in a conviction rate of 66.5 percent in 1974 and 81.8 percent in 1977 for this offense category.

TABLE D4AD.—U.S. DISTRICT COURTS CRIMINAL DEFENDANTS DISPOSED OF BY NATURE OF OFFENSE AND TYPE OF DISPOSITION (ALL OFFENSES REPORTED), FOR THE 12-MO. PERIOD ENDED JUNE 30, 1977

Nature of offense	Total defendants	Not convicted				Convicted and sentenced			
		Total	Dismissed[1]	Acquitted by Court	Acquitted by Jury	Total	Plea of guilty or nolo contendere	Convicted by Court	Convicted by Jury
Total	53,189	11,721	9,941	398	1,382	41,468	35,336	1,629	4,503
Civil rights removed from State court[2]	21	21	21						
Total (excluding civil rights)	53,168	11,700	9,920	398	1,382	41,468	35,336	1,629	4,503
General offenses:									
Homicide (total)	153	36	20	1	15	117	69	4	44
Murder:									
1st degree	83	24	13	1	10	59	23	2	34
2d degree	29	3	1		2	26	19		7
Manslaughter	41	9	6		3	32	27	2	3
Robbery (total)	2,340	295	223	2	70	2,045	1,608	24	413
Bank	2,182	272	207	2	63	1,910	1,499	20	391
Postal	91	9	4		5	82	65	1	16
Other	67	14	12		2	53	44	3	6
Assault	768	220	160	5	55	548	405	34	109
Burglary—Breaking and entering (total)	517	117	107	3	7	400	362	12	26
Bank	90	11	8		3	99	70		9
Postal	91	11	10		1	80	69	3	8
Interstate shipments	3					3	3		
Other	333	95	89	3	3	238	220	9	9
Larceny and theft (total)	5,667	926	736	53	137	4,741	4,231	203	307
Bank	172	27	21	1	5	145	133	3	9
Postal	2,018	223	189	4	30	1,795	1,702	21	72
Interstate shipments	969	176	116	4	56	793	657	23	113
Other U.S. property	1,084	123	104	5	14	961	852	71	38
Transportation, etc. of stolen property	439	87	60	7	20	352	291	8	53
Other	985	290	246	32	12	695	596	77	22
Embezzlement (total)	2,151	230	166	10	54	1,921	1,794	42	85
Bank	1,146	121	85	4	32	1,025	964	16	45
Postal	361	28	25		3	333	312	3	18
Other	644	81	56	6	19	563	518	23	22
Fraud (total)	5,782	973	763	28	182	4,809	4,112	107	590
Income tax	1,693	204	147	7	50	1,489	1,273	30	186
Lending institutions	548	110	85	1	24	438	372	8	55
Postal	1,293	271	217	3	51	1,022	820	17	188
Veterans and allotments	58	15	15			43	42		1
Securities and exchange	104	33	28		5	71	56	3	12
Social security	133	32	31	1		101	95	3	3
Nationality laws	162	16	13		3	146	142	2	2
False claims and statements	652	134	104	5	25	518	424	12	82
Other	1,139	158	123	11	24	981	888	32	61
Auto theft	1,599	228	194	1	33	1,371	1,183	21	167
Forgery and counterfeiting (total)	4,704	589	510	4	75	4,115	3,749	35	331
Transportation of forged securities	886	139	122		17	747	653	3	91
Postal forgery	135	19	19			116	96	1	19
Other forgery	2,878	303	262	3	38	2,575	2,406	24	145
Counterfeiting	805	128	107	1	20	677	594	7	76
Sex offenses (total)	200	62	38	4	20	138	86	9	43
Rape	115	34	23		11	81	63	2	16
White slave traffic	57	17	9		8	40	13	4	23
Other	28	11	6	4	1	17	10	3	4
Narcotics (total)	9,741	2,106	1,754	53	299	7,635	5,970	387	1,278
Marihuana Tax Act	23	21	20		1	2	2		
Border registrations	2	2	2						
Other	123	64	60		4	59	43	6	10
Drug Abuse Prevention and Control Act (total)	9,593	2,019	1,672	53	294	7,574	5,925	381	1,268
Marihuana	2,744	607	524	18	65	2,137	1,703	151	283
Narcotics	5,553	1,127	906	27	194	4,426	3,424	186	816
Controlled substance	1,296	285	242	8	35	1,011	798	44	169

TABLE D4AD.—U.S. DISTRICT COURTS CRIMINAL DEFENDANTS DISPOSED OF BY NATURE OF OFFENSE AND TYPE OF DISPOSITION (ALL OFFENSES REPORTED), FOR THE 12-MO. PERIOD ENDED JUNE 30, 1977—Continued

Nature of offense	Total defendants	Not convicted				Convicted and sentenced			
		Total	Dismissed[1]	Acquitted by		Total	Plea of guilty or nolo contendere	Convicted by	
				Court	Jury			Court	Jury
Miscellaneous general offenses (total)	11,092	2,378	1,938	135	305	8,714	7,408	484	822
Bribery	297	52	32	2	18	245	212	3	30
Drunk driving and traffic	4,723	860	742	97	21	3,863	3,496	292	75
Escape (total)	1,161	214	188	2	24	947	855	14	78
Escape from custody	654	96	87	2	7	558	519	4	35
Bail jumping	369	82	78	----	4	287	265	8	14
Other	138	36	23	----	13	102	71	2	29
Extortion, racketeering and threats	669	292	221	3	68	377	260	9	108
Gambling and lottery	622	221	172	8	41	401	252	42	107
Kidnapping	151	29	27	----	2	122	68	1	53
Purjury	209	72	47	3	22	137	76	4	57
Weapons and firearms	3,118	583	463	11	109	2,535	2,130	96	309
Other	142	55	46	9	----	87	59	23	5
Special offenses:									
Immigration laws	1,610	214	185	13	16	1,396	1,295	50	51
Liquor, internal revenue	188	23	18	----	5	165	148	6	11
Federal statutes (total)	6,656	3,303	3,108	86	109	3,353	2,916	211	226
Agricultural acts	369	100	81	8	11	269	247	8	14
Antitrust violations	188	27	5	----	22	161	158	2	1
Civil rights	83	33	18	1	14	50	27	1	22
Contempt	461	355	346	6	3	106	80	20	6
Fair Labor Standards Act	1	----	----	----	----	1	1	----	----
Food and Drug Act	163	36	29	----	7	127	116	2	9
Customs laws	215	54	43	2	9	161	133	9	19
Migratory bird laws	786	119	73	43	3	667	570	90	7
Motor Carrier Act	116	12	12	----	----	104	101	3	----
Selective Service Act	2,175	1,146	2,142	2	2	29	22	5	2
Other national defense laws	129	50	40	6	4	79	50	17	12
Mail, transport obscene material	85	32	25	----	7	53	23	1	29
Postal laws	877	54	53	----	1	823	788	19	16
Other	1,008	285	241	18	26	723	600	34	89

[1] Included in this column are defendants who were committed pursuant to 28 U.S.C. 2902, of the Narcotic Addict Rehabilitation Act of 1966.

[2] Removed under provisions of the Civil Rights Act, 28 U.S.C. 0443.

Mr. PAULEY. My point was not just that it is not surprising that grand juries in those 80 percent of cases that we won returned indictments, but it is not surprising that in the other 20 percent of cases that they also returned indictments because presumably in almost all of those cases, the exceptions being the very rare ones in which some sort of malicious action may have occurred, there was a reasonable prospect of conviction and certainly evidence somewhere between probable cause and reasonable doubt.

Senator ABOUREZK. I would submit to both of you that that is not really the point. I think we have gone beyond that point.

The point is this. The way a prosecutor uses a grand jury is described, in my view and in the view of many people, as an abuse. The point is not how many convictions you get or what your percentage of convictions is. The point is: how does the prosecutor use and control the grand jury and how does such use pervert the grand jury's traditional role? In a large percentage of cases, there are times when the prosecutor or the government itself will have the prosecutor bring a case and indict somebody even when they know they do not have a chance to convict him. Who knows what the percentage is of that? I don't know. Neither do you. I don't think anybody knows. However, we know it happens.

Also, there is an abuse that goes beyond that and defies statistics. This is the abuse that may not result in an indictment but does create a chilling effect on citizens of this country for the political views they hold.

A grand jury will examine, at the direction of the prosecutor, witnesses (which? who?) the prosecutor knows he cannot indict, and take the grand jurors on what would be termed a "fishing expedition." We have heard testimony on that practice of prosecutors. We have heard testimony about pure harassment ofpeople; individuals being harassed by calling them before a grand jury and forcing them to testify about their friendships, their associations, their activities, when there is no idea on the part of the prosecutor or anybody else that they have committed a crime.

Do you deny that that sort of thing goes on? I am talking about the use of the grand jury simply to make individuals afraid—this aside from the fact that somebody might be indicted or convicted or acquitted.

Mr. HEYMANN. I appreciate the last statement, Mr. Chairman, because I think we are moving from the question of is there a problem that people are being indicted who shouldn't to the question of abuse of witnesses and any other misuse.

Senator ABOUREZK. I think there are people being indicted who should not be.

Mr. HEYMANN. I honestly must say this. I would like to tell you exactly what is in mind.

Senator ABOUREZK. Please do.

Mr. HEYMANN. I honestly picture 40,000 Federal felony trials a year. I do not imagine that in ordinary times, like the year 1978, that there are even a handful—meaning five—political abuse cases in the 40,000.

I recognize that there is a real possibility of abuse of grand jury as there is of trial and other occasions, including this. Mr. Chairman, I know you agree with this and I mean to include an abuse of legislative

hearing in difficult times or times where groups are extremely unpopular. I don't mean that to be a funny remark.

Senator ABOUREZK. I agree with you.

Mr. HEYMANN. I am sure you do. I wanted it to be clear that I was not throwing that out as a wisecrack.

There is a real problem on any occasion where you can call somebody who represents an unpopular cause and require the person to describe other membership in the cause, his or her beliefs, and that kind be done in a grand jury or a legislative setting. It can be done, probably in some administrative agencies.

Senator ABOUREZK. I will not try to excuse the Congress if you will not try to excuse the Justice Department. I'll make a deal with you.

Mr. HEYMANN. That would be a good trade with you, but I can't make it today. [Laughter.]

You asked about the Justice Department being reluctant to give up use of the grand jury. The answer is yes. I think without too much oversimplification the reason is that at the investigating stage, we feel that we need the power to compel testimony and other evidence in an informal setting. That seems to me to be the heart or the nub of the investigative need of the grand jury.

There is the separate function of protecting that the grand jury furnishes at the end or does not furnish at the end. We have been discussing that.

But in investigative terms, the nub of what is going on, I believe, is the power to compel testimony or documents or physical evidence in an informal setting.

Senator ABOUREZK. Would that be from witnesses or targets, potential defendants?

Mr. HEYMANN. It ought to be just from witnesses. We are trying to set up a system and we are trying to move with our guidelines into a system where it would not be from targets under any circumstances.

Senator ABOUREZK. What if you compel testimony or the production of documents from just a witness, as you say, who might later become a target? What do you do in that case?

Mr. HEYMANN. We would want to go ahead. I believe this is proper, Mr. Chairman. We would want to go ahead and use it. We would have——

Senator ABOUREZK. What does that say about the fifth amendment?

Mr. HEYMANN. We would have advised the witness under our guidelines for the witness—at the same time the witness was served with a subpena—that the witness had a fifth amendment privilege not to answer and had a right to have a lawyer out there just outside the grand jury room and what the general subject matter of the hearing was and so on. We would advise the witness of that.

Senator ABOUREZK. Does not that conflict with the statement that you just made about your desire to compel that person to testify? Isn't that a conflicting wish?

Mr. HEYMANN. No.

Most witnesses presumably do not endanger themselves in terms of incrimination in criminal prosecution by testifying, but many of them do not want to testify even though they would not incriminate themselves.

For example, the Federal Government uses grand juries overwhelmingly in cases of white collar crime. A lower level employee of a large corporation may not want to testify because he or she is endangering his job, but there is no fifth amendment privilege.

We feel we need the ability to serve a subpena and require that midlevel or lower level employee to give testimony. We think that is the duty of citizens like the draft and like taxes, that is to give testimony.

Senator ABOUREZK. Let me ask about your statement on page 33 of your written testimony:

> The Department of Justice is, however, opposed to that part of the bill mandating advance warning as to whether a witness's "own conduct is under investigation."

Isn't that contradictory to what you were just saying?

Mr. HEYMANN. It goes on, Mr. Chairman, to say: "Our objection is not total but rather based on the breadth of the proposal." We believe and want to advise "targets," that means somebody whom we think is likely to be indicted, and that is, that their own conduct is under investigation.

As to "targets" is says: "the Department of Justice's guidelines . . . generally discourage the subpenaing of such persons," and they encourage our advising them so that they can, if they wish, appear before a grand jury and tell their side of their case.

Our problem is not in terms of not calling "targets" and not getting evidence from targets, which we agree with; we believe we should not get evidence from targets. Our problem is of the sort you describe.

Frequently, a witness was not a target at all. Let's say he was a lower level employee and we want the witness to testify. We do want to call that witness.

On a certain number of cases, that witness will turn out to have been involved. In that case, the witness is likely to be charged.

Senator ABOUREZK. After the witness has been compelled to testify or produce documents?

Mr. HEYMANN. Yes; compelled to testify and the witness who knew that he or she was involved had a fifth amendment privilege and was advised before appearing that he or she had a fifth amendment privilege not to answer any question that might incriminate them. They will have ignored that warning.

Senator ABOUREZK. They will have ignored it in the grand jury room?

Mr. HEYMANN. They will have ignored it in the grand jury room; yes.

Senator ABOUREZK. If that witness had his or her attorney accompanying them in the grand jury room, would it not be likely that if that witness might be a target and if the witness knew it and if the lawyer knew it, then would not the lawyer be able to advise that witness about his fifth amendment right against self-incrimination?

Mr. HEYMANN. If I were a witness who might incriminate myself, I would rather have a lawyer there with me. I agree with that.

Senator ABOUREZK. That is not my question.

Mr. HEYMANN. I was trying to be responsive.

Yes; the witness might do that. Just as a trial where a witness

does not have a lawyer, when the case goes to trial, witnesses do not have lawyers——

Senator ABOUREZK. If that witness is vulnerable on some criminal charge, obviously a lawyer is in the room to advise that witness about his situation at that time. Isn't that correct in the courtroom?

Mr. HEYMANN. Yes; but I believe in the somewhat cumbersor e way not unlike the present grand jury system where the witness, if disturbed or worried, goes out and asks the lawyer. It is not the handy way that we generally associate with targets or defendant's having lawyers.

Senator ABOUREZK. That brings us, then, to this issue of whether or not the Justice Department opposes the presence of lawyers in the grand jury room on the basis that it is disruptive. Is that a correct expression of your position? Or is there another basis on which you oppose counsel's presence?

Mr. HEYMANN. There are about three reasons. After I have said the three, I might want to add a fourth as the time goes on.

One problem is certainly the fear of disruption. You said earlier, Mr. Chairman, that in an adversary system, lawyers are expected to behave in a somewhat adversarial way. If you did not say it, I certainly would say it.

Senator ABOUREZK. I said it.

Mr. HEYMANN. We certainly fear that a lawyer, trained to be an adversary, will be likely to object both, that is not only when the objection has merit but when it does not have merit and to push the limits of plausible legal arguments to disrupt what is otherwise an informal proceeding. That is one objection.

Senator ABOUREZK. Let me stop you there.

What if the legislation provided that the attorney only be authorized to advise his client? I am talking about the attorney performing an advisory role only without being able to interpose objections or to cross-examine. What would your view of that be?

Mr. HEYMANN. We would still oppose it.

Senator ABOUREZK. Why?

Mr. HEYMANN. One way of saying it is that we would fear that the lawyer would become the witness rather than the advisor to the witness. Or, that they would switch roles, if you like, that is that the lawyer would say to the witness, "You should not answer this on the grounds that it is based on hearsay," which would be a ridiculous objection under our present rules. The witness would say, "I refuse to answer that on grounds that it is just based on hearsay."

Senator ABOUREZK. What's wrong with that?

Mr. HEYMANN. What's wrong with it, Mr. Chairman, is that we would picture the charging process, the process of developing and investigating and leading up to a charge, turning into an occasion where the prosecutor and maybe the foreman of the grand jury, and the defense attorney and the witness would be running back and forth to a judge with no prospect of ever advancing at a reasonable speed to a decision that is a matter that ought to be tried.

In other words, we regard the grand jury process as one that justly leads to a decision that a matter ought to be tried. We would think that we would have a huge consumption of energy, judicial time, prosecu-

tor's time, grand jury time, which is an imposition on grand jurors already, running back and forth to judges.

Senator ABOUREZK. Let me stop you here.

Basically, what you are saying is that it is going to be a lot of trouble and it will perhaps inconvenience the prosecutor. Isn't that right? Isn't that the basic argument you are using right now?

Mr. HEYMANN. I am certainly saying that it is going to be a lot of trouble. I am certainly saying that it is going to inconvenience the prosecutor.

However, I am saying moreover that there will be fewer cases brought and that it will inconvenience the grand jury and that it will inconvenience the court which will be able to handle fewer cases.

All of that is at a stage where what we are talking about is whether somebody ought to be brought to trial.

Senator ABOUREZK. That's not the only issue we are dealing with; I thought that we had agreed upon that earlier in our discussion.

We are also talking about their prosecutor probing at random—on a fishing expedition—without even intending to bring the case to trial.

Mr. HEYMANN. Or perhaps abusing the witness; yes.

Senator ABOUREZK. Yes. That is part of it also, don't you agree?

Mr. HEYMANN. That is part of it also.

Senator ABOUREZK. Part of what we are talking about is witness abuse by the prosecutor and part of it is whether we are going to bring the case to trial or not. And you have brought up the issue of inconvenience to the prosecutor. If that were to be any kind of an important factor in determining whether we bring someone to trial, then why don't we just then have a prosecutor without a grand jury and say, "All right, this fellow is charged, and this fellow is guilty."? Why can't we just say that? Wouldn't that make it a lot more convenient for the prosecutor?

That way you would not inconvenience the Federal judge nor would you inconvenience the jury.

Mr. HEYMANN. Mr. Chairman, I am not making convenience an overriding concern that ought to reduce to nothing considerations of fairness. For example, it is quite clear that the witness who feels she is being badly treated can simply refuse to answer the question and walk out a door 20 feet away and consult her lawyer and refuse to answer until the matter is litigated with lawyers today before a judge. Nobody is held in contempt until they have litigated with lawyers before a judge.

Senator ABOUREZK. Would you say that what you just described is less disruptive than having an attorney in the room where the witness does not have to get up every time?

Mr. HEYMANN. I would think that when the attorney is in the room, each of those occasions where a matter is not litigated before a judge on whether the witness should be ordered to testify, plus many more such occasions will be litigated and taken to judges.

Senator ABOUREZK. You would not say the fact that counsel is present to advise the witness is less disruptive, would you?

Mr. HEYMANN. It is less disruptive in the sense that it is easier to talk to your lawyer who is right next to you. It is more disruptive, however, in the sense that a good lawyer in an adversary system will

bring up frivolous as well as substantial claims and everything in between, and will try to protect the witness whether the witness has a privilege or not.

Senator ABOUREZK. You state that a good lawyer will bring up frivolous as well as substantial things. That would include the prosecution as well as the defense, would it not? You are not implying that the prosecutor doesn't bring up frivolous claims, are you?

Mr. HEYMANN. I am talking about objections to questions. In the grand jury setting it is hard to imagine the prosecutor objecting to a question because he is asking the questions.

Senator ABOUREZK. I am not talking about objections. I am talking about being frivolous.

Mr. HEYMANN. I honestly believe, Mr. Chairman, that prosecutors, at least in the Federal system, behave according to a substantially different set of rules than defense attorneys. I was a public defender for 6 months. I think that is everybody's understanding.

But certainly prosecutors bring up stuff like that. Whatever the rules are, they bring up frivolous claims also.

Senator ABOUREZK. I was hoping you wouldn't say that they never do.

Mr. HEYMANN. They do work by a separate set of rules. Defense attorneys' rules, that is the rules for a defense attorney—and I've lived with them and I imagine you have lived with them, Mr. Chairman—are highly adversarial.

Senator ABOUREZK. That is correct. Every prosecutor I have ever been up against has been as mean as I have been. I've never met a kindly prosecutor in my life. [Laughter.] Maybe there are some, but I've never met one yet.

Mr. HEYMANN. We don't let them try cases, Mr. Chairman.

Senator ABOUREZK. I don't blame you. [Laughter.]

In Massachusetts the attorney can sit in the grand jury room with the witness. We are going to have the attorney general from the State of Massachusetts come to testify. Advance discussions with him indicate that his experience has revealed no problem with disruption and that all the fears that you have raised simply do not exist in real practice.

I am curious to know if you have any information that we do not have that would show otherwise. Do you have a study or actual evidence to show that there is something wrong with an attorney sitting in the grand jury room in an advisory capacity?

Mr. HEYMANN. Since the Federal rules forbid, as presently written, an attorney being present, we cannot even do an experiment. By mistake, we have tried to set up an experiment and then discovered that it is forbidden by the law. By the way, we are about to go ahead with an experiment making counsel available outside the grand jury room to everybody, but we cannot even do an experiment inside the grand jury room with counsel.

The Federal rule of criminal procedure No. 6, passed by the House and Senate, forbids specifically any outsiders, including an attorney for the witness, from attending. So, I have no evidence on that.

I do have evidence on another objection that we have to an attorney in the grand jury room.

Senator ABOUREZK. Before we get to that, let me pursue this. I hate to keep interrupting, but if you take up two or three issues at one time, we will never get back to the other ones.

You state then, affirmatively, that you do not have any evidence then to support your statement that counsel in the grand jury room would be disruptive. Is that correct?

Mr. HEYMANN. I have no evidence in the sense of any testing of it, Mr. Chairman. We would generalize from 40,000 trials a year. We would generalize from close to 40,000 preliminary hearings a year, or something like that.

Senator ABOUREZK. But you are not able to generalize or even be specific about actual grand jury experience, is that not correct?

Mr. HEYMANN. We cannot do it on the basis of actual grand jury experience. We do have in our prepared testimony quotations from five judges in the second circuit drawing the same predictions as to what the results would be.

Senator ABOUREZK. Since the Federal rules prohibit lawyers being in a grand jury room, how could those judges have any supporting evidence if they are not able to experiment?

Mr. HEYMANN. They have the same preliminary hearings and trials we have.

Senator ABOUREZK. They have the same trouble you do, then. That is no evidence. Am I right?

Mr. HEYMANN. I have the feeling sometimes that a closely related experience multiplied 40,000 times ought to have some validity.

Senator ABOUREZK. What experience are you actually talking about? You're mixing apples and oranges.

Mr. HEYMANN. We have pretrial hearings in every criminal case.

In a sense, Mr. Chairman, the argument that we have no experience depends upon an assumption that defense attorneys would behave differently in a grand jury setting than they behave on motions, in preliminary examinations, or at trials.

Senator ABOUREZK. There is no evidence at all in the States which allow lawyers in the grand jury rooms that such a practice is disruptive. How can you come out in total opposition and in total contradiction to all known existing practice? How can you say that?

You admit you have had no experience and that you are just extrapolating from something you don't have. How can you say that? How can you keep a straight face and say that?

Mr. HEYMANN. We question whether the State experience has been looked at hard enough. Our prepared testimony talks about that.

We question whether that really provides a valid basis.

Senator ABOUREZK. If that does not, then what does provide a valid basis?

Mr. HEYMANN. We want this evidence too, Mr. Chairman. We would like to know.

If we could have lawyers present without the unfavorable consequences of having lawyers present in a grand jury room before witnesses, then we would want it also.

We do not have the evidence one way or the other. We are making a prediction and you are making a prediction.

Senator ABOUREZK. No, no. I am not making predictions. I am speaking from what I have been told is the experience in States which allow lawyers in the grand jury room.

Mr. HEYMANN. That there is no problem there?

Senator ABOUREZK. That is absolutely right. In fact, I am told it works extremely well.

Mr. HEYMANN. Which are those States?

Senator ABOUREZK. Massachusetts for one. We can provide a list. The Massachusetts experience is the State with which we have had the most contact because the attorney general is coming to testify, and we have had discussions with his staff about their practices and experience.

Mr. HEYMANN. The Massachusetts law, I believe, is very recent.

Senator ABOUREZK. What year was it passed?

Mr. HEYMANN. I think it's only been several months that it has been operating.

Senator ABOUREZK. It's about 1 year I am told.

That's about 1 year more experience than the Federal courts have had. Wouldn't you agree?

Mr. HEYMANN. Well, we have not had experience. I would like to see experiments. We would like to have experiments.

Senator ABOUREZK. That's what we hope to offer you in this bill.

Mr. HEYMANN. But not such massive ones, Mr. Chairman, but relatively manageable which don't disrupt an entire criminal system.

May I mention a couple of others? I am not sure that we are talking about things that would disrupt an entire criminal system, but I do think——

Senator ABOUREZK. That is a rather sweeping statement. I hope you can support that.

Mr. HEYMANN. I would rather not try to support that. [Laughter.]

But it is a matter we take seriously.

Let me mention a couple of the other reasons. I am sure that I am right that your bill provides for providing assistance to anyone who cannot afford an attorney. We also think that it would be very questionable to allow attorneys in the grand jury for only those who could afford it. I know that your bill handles that. But that is a serious matter that we have to think about.

Senator ABOUREZK. I have a memorandum to the House legislative counsel for the House subcommittee from the Library of Congress. This is a listing of the States that allow lawyers in the grand jury room.

Without objection, we will insert this memorandum at this point in the hearing record.

[The memorandum referred to follows:]

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]

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

[1] Ariz. Rev. Stat. Ann. § 21–412 (Act of 1971); Ariz. R. Crim., pp. 12.5 and 12.6.

County reports any disruptions.[2] 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 activity is by way of complaint, followed by what is known in Minnesota as the

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[2] 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 of 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., § 769.19e.

[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.

"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 states' implementing statutes discourage the latter. A grand jury may be called into use only when it is made to appear to the court,

[12] Okl. Stat. Ann., Title 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.

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. 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.

Senator ABOUREZK. In Arizona, the statute says: "A 'person under investigation' has the right to the 'advice of counsel' while giving testimony before the grand jury."

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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).
[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.

As for disruptions the memorandum states that:

In this State which has a dual grand jury system, statewide and county, neither the attorney general nor the county attorney for Maricopa County report any disruptions. 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.

As for Illinois, the statute says:

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.

As for disruptions in Illinois:

None reported by the office of the State's attorney for Cook County. It is required by this State's constitution that all felonies be prosecuted by indictment.

As for Kansas: no disruptions reported.

In Michigan, there were none reported.

In Minnesota, there were none reported.

Three States, since May 18, 1977, when this was furnished by the Library of Congress—Massachusetts, New York, and Colorado—have passed laws which permit a lawyer in the grand jury room.

In addition, Oklahoma, South Dakota, Utah, Virginia, and Washington allow attorneys. That is the extent of the memorandum.

Have we given you a copy of that?

Mr. HEYMANN. Yes, I have it.

Senator ABOUREZK. That is more evidence than you have been able to give the committee on whether there could be disruptions in a Federal grand jury or not. Do you want to follow up on that?

Mr. HEYMANN. I want to add some of the other things that worry us, Mr. Chairman. One of our largest worries in the Federal system with regard to providing counsel to witnesses is the fear. I think rather frequently realized, that counsel for a witness is likely to in fact represent the president of the corporation or the leader of the organized crime group.

This is in many ways the first objection that our Federal prosecutors bring up. The law is by no means clear that we can disqualify a counsel for a witness on the grounds that that counsel is too closely related to the target who is often higher up in an organization, legal or illegal.

The effect of having counsel for the middle-level employee of a large organization, who was provided by the president of the organization, is to substantially guarantee that the middle-level employee will not enjoy the rights of providing private testimony that a grand jury is intended to furnish.

Whatever the inclination of the middle-level employee to tell the truth about a corporate swindle, it cannot be assumed that the middle-level employee will do that if the president's counsel or a counsel selected by the president is nearby.

It looks like this is an easy problem to remedy at first. It turns out to be an extremely difficult one to remedy without depriving all witnesses to their right of a choice of counsel. To some it would seem to require that the witness say: "I do not want counsel provided for free by the president of the corporation or by the leader of the organized crime group."

The witness has to step out and identify himself or herself as wanting to deal separately and not wanting to be provided with counsel who

would advise the witness to invoke the fifth amendment, whether appropriately or not, but who would advise the witness to protect the principle.

It is a very troublesome problem to us, because most of our investigations ought to be of large organizations. They require the taking of testimony in a grand jury from midlevel and lower level people in a large organization.

Senator ABOUREZK. I think you raise a reasonably good point about that.

However, I would personally disagree with the concept or the idea that it could not be remedied. I think quite easily it could be remedied by prohibiting multiple representation of clients or witnesses by one lawyer in situations where there is a clear conflict of interest.

It could also be remedied by a rule prohibiting a lawyer from representing the witness who is closely associated in any way with a target or another subject of the investigation, where there is a clear conflict of interest.

If that situation is adequately dealt with and if there is a way that the witness or the president of the corporation is going to get around that rule in any event, I do not think that it would do you much good to call that witness if they are that tough about getting around it.

I think you would not lose a thing, but in fact you would gain a great deal by allowing lawyers in the grand jury room. Nothing would be lost by promulgating such a rule.

I think it is a good amendment. We will examine the legislation for possible amendments.

Mr. HEYMANN. I certainly think that it is an important matter that has to be dealt with in legislation which takes your form, Mr. Chairman.

There are a variety of courts of appeal cases waltzing around this issue in a way that is interesting, and they are having great difficulty in handling them.

Senator ABOUREZK. I have been handed the ABA's recommendation on this subject. Perhaps you have read this:

> 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 lawyers' 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.

So, if there is a suspicion on the part of anyone that it is going to be a setup lawyer, then certainly the prosecutor can go to the court and have it taken care of in that regard. Don't you think?

Mr. HEYMANN. I happened by chance to be handed yesterday a brief we are filing in the Supreme Court in opposition to certiorari where it says the third circuit divided right down the middle in a case on whether they have the power to disqualify an attorney in what seems to me to be the clearest case of conflict of interest. I approve of what the bar association is recommending, Mr. Chairman, but it is not easy to handle as a matter of law.

Senator ABOUREZK. How about if we put it in statutory language?

Mr. HEYMANN. You will still have constitutional problems.

Senator ABOUREZK. How?

Mr. HEYMANN. Because the sixth amendment and seventh amendment give witnesses a right to counsel. It means, to a large extent, the counsel of their choice.

I have never looked hard at the constitutional issue to know whether it can be done or cannot be done. I do not think that my statement that it is a difficult problem is a good enough reason for excluding lawyers from grand jury rooms, but it is a difficult problem and one that has to be addressed before one can comfortably proceed on the assumption that the lawyer will be a lawyer for the witness and not for the target.

Senator ABOUREZK. I do not understand. You are worried about this constitutional problem, but you are not worried about compelling testimony as though that did not pose a constitutional problem. You don't seem to be consistent.

Mr. HEYMANN. I don't believe compelling testimony does present a constitutional problem.

Senator ABOUREZK. From a target or potential target? That does not present a problem?

Mr. HEYMANN. You mean after granting immunity or without granting immunity?

Senator ABOUREZK. Without granting immunity. You were speaking eariler about bringing somebody up as a witness and compelling him to testify, and you said that one of the major purposes of the grand jury is to compel testimony.

Mr. HEYMANN. After giving a warning about the fifth amendment in a situation where the person is free to refuse to answer on grounds of the fifth amendment.

Senator ABOUREZK. Let's talk about the reality. You have a witness in the grand jury room who is not entitled to his or her lawyer in the room with them. That witness is afraid. The lawyer may be right outside the room, but that witness is afraid of tainting himself or herself by walking out to get advice. There is a strong impression in the mind of that witness that if he or she gets up and goes outside and asks the lawyer a question that the grand jury is going to think they have done something wrong. It scares them to death and most likely they will try to tough it out and not get the counsel they need.

Is that a fair statement or am I being inaccurate?

Mr. HEYMANN. I think that is basically a fair statement, yes.

Senator ABOUREZK. Mr. Regnery?

Mr. REGNERY. Isn't simply the intimidation that is obviously present for the witness who is in the grand jury room without a lawyer as important a reason why he would not go out to seek the advice of his counsel as the fear of tainting his testimony? If somebody is called before a grand jury, he has probably never been there before and he is scared and intimidated by the whole process, and he would simply answer the questions as asked, wouldn't he?

Mr. HEYMANN. I think your explanation is as good as Senator Abourezk's. Basically what we are doing is this. To be absolutely accurate and honest, what we are dealing with is the bar to access to a lawyer that comes from having to assert oneself in a setting where it is not readily invited to get up and leave the room. You might say it is fear of tainting the grand jury, and they would think you were guilty. But you might say it is simply the social pressure that one feels in that setting in leaving the room.

It is that relatively subtle social pressures that remains even after the witness has been given a card saying: "Look, you are free to leave the room whenever you want to see your attorney who is outside." There is still a little social pressure that remains.

However, that social pressure, after you have been told of the fifth amendment rights and after you have been told that you can leave the room, is not coercion of the sort that raises a constitutional problem.

Mr. PAULEY. What you call intimidation, to the Supreme Court is called "the truth-engendering atmosphere of the grand jury." That sort of social pressure that does exist where you have 23 citizens who are exerting some sort of intangible pressure on the witness to tell all he knows about the incident in question rather than invoke the fifth amendment privilege is what we have.

We do not view that as an evil but rather as indeed exemplifying what the proper function of the grand jury is.

Mr. REGNERY. Don't you think though that to some extent there is a conflict with what you are saying between that function of the grand jury in the whole due process system which is really the foundation of all American justice. It seems to me that the same argument could be made in trials or discovery proceedings in civil matters, or any number of other places.

But, because of the strong adherence to the whole due process and constitutional rights system that we have in our whole system, it seems to me that the argument can strongly be made that an attorney is the right of a witness before a grand jury.

I wonder if in fact this is the case. The basis of your objection is having attorneys there because of the disruption potential. But the Senator pointed out that there are disruptions in every part of the criminal justice system.

I wonder if those disruptions are not worth the small amount of protection given the witness as a trade-off.

Mr. PAULEY. It is not the disruption alone that we are concerned about. It is the loss of spontaneity in response and the fear that the witnesses' responses will take the form suggested to them by their attorney rather than representing their own more spontaneous answer to the question. Thus, there will be a loss of accurate and reliable information received by the grand jury as a result of intervention by counsel in the process. There is that aspect as well.

As Mr. Heymann stated earlier, this is an institution which under the Constitution is simply not designed to be an adversarial process. It is designed to be an inquisitorial process.

Senator ABOUREZK. I would disagree with that contention. I don't think it was ever designed to be inquisitorial. There is a difference between an investigative and an inquisitorial function. I think the grand jury as it is structured now is inquisitorial but I don't think that is what it was designed to be.

Would it not work in the converse as well? Would not a lawyer and a witness be afraid of antagonizing a grand jury as well? I am talking about the situation where they object frivolously or object too often. A lawyer who is interested in the interest of his client—would he not tell his client not to answer in the most critical of areas and the most critical of questions?

Mr. PAULEY. If the client were someone as to whom the lawyer believed no firm decision had been made yet by the prosecutor to indict him or not, then I think that concern that you mentioned would exist. If the person were someone whom the lawyer believed was going to be indicted, then it would become in his interest and therefore that of his lawyer to delay, and procrastinate, and to throw a monkey wrench into the proceedings as much as possible.

Senator ABOUREZK. In essence what is wrong with that? I don't use the terms you do about throwing a monkey wrench in, but in protecting a client whom he thinks might be charged. Is there anything wrong with a lawyer trying to put a stop to that?

Mr. HEYMANN. I would have taken Mr. Pauley's point in a general way to make the same answer, Mr. Chairman.

Tactically sometimes it will obviously be desirable to try to appeal to the grand jury as an extremely reasonable person. Sometimes it is going to be desirable to prevent the grand jury from hearing any evidence and getting any spontaneous responses from the witness.

In some cases there will be no thought from the beginning that the witness could possibly be prosecuted. In those cases the lawyer may very well want to help the witness protect an employer, an associate, and do the protecting by making a series of unreasonable objections.

However, tactically I think a lawyer could go either of the two ways.

Senator ABOUREZK. I agree. I also think that what we are talking about is are procedural safeguards included in rules of procedure and under the Constitution. The theory is that it is better to let 100 guilty people go free than to convict 1 innocent one.

I do not think the balance is even that imbalanced. In fact, I think that if you allowed an attorney in the grand jury room, that would not be the case. It seems to me that if you did prevent the conviction of 1 guilty person or 10 guilty people by having a lawyer in the grand jury room, then would it not be worth it? Honestly, wouldn't it be worth it to protect the rights of many, many more innocent people? These people get shafted and speared by unreasonable prosecutors and politically motivated prosecutors. No one is present to protect them now.

Mr. HEYMANN. Mr. Chairman, the lawyer for a witness in the grand jury room will have no obvious impact on whether somebody else about whom the witness is testifying is going to be charged. It is even less obvious whether any impact there might be would be toward releasing and making sure the innocent are not charged.

Senator ABOUREZK. I am not even worried about whether somebody is charged or not. That sort of thing balances out. If there is an honest investigation going on, then I do not think the ordinary citizen will try to obstruct that. If the witness was a person involved in the crime himself, then certainly he would try to protect himself. I think that situation would exist no matter what.

However, we are not talking about convictions or indictments. We are talking about abuse of a person's constitutional due process rights by prosecutors who are out on fishing expeditions and who are out for malevolent purposes of some sort.

Is not the protection of the witness worth something?

Mr. HEYMANN. But the witness is already protected. Yes, the protection of the witness is worth a great deal, Mr. Chairman, but we are talking about this difference. You and I are talking about this difference. That is the difference between the present protection which is the right to walk 13 or 15 feet out a door and pick up the attorney and walk to the judge and say, "Get that guy off my back." Or your system which is the right to turn to the person next to you and say, "Should we not get up," or have the lawyer next to you say, "let's get up, go out here, and see the judge."

Senator ABOUREZK. Isn't that a psychological barrier that most witnesses cannot breach?

Mr. HEYMANN. It is a psychological barrier, but it is not a huge one. It is a small one. As Mr. Pauley said, Mr. Chairman, you may consider it a barrier in one sense, but from another sense, it is what the Supreme Court has described as "the truth-inducing atmosphere" of the grand jury. By that little difference that there is between us—which is 13 feet plus the psychological pressure and the social pressure of walking those feet—by that little distance you are either encouraging people to testify a little bit more or you are encouraging them to object to testifying a little bit more.

It is important that both of us see that we are talking about a little bit.

Senator ABOUREZK. I would take issue with that characterization of a truth-inducing atmosphere. Would it be less truth inducing if a lawyer were present in the grand jury room? Is it less truth inducing in a courtroom that a lawyer is present?

Mr. HEYMANN. The courtroom example is a perfect one. We would never—you, I believe, or I or anyone else—dream of having a trial with the witnesses represented by counsel at their arm.

Senator ABOUREZK. I have represented witnesses in trials. That is, somebody who is not a target but is charged with a crime. I have represented a witness who was charged with one crime on another separate charge, and who was a witness, and I sat there and advised that witness of his right not to incriminate himself.

Mr. HEYMANN. Where the witness is in obvious danger of self-incrimination, yes, I agree. In any other circumstance, no.

Senator ABOUREZK. Second, in any other circumstance in a trial, that witness knows he or she is not a target of that trial. The defendant is named in the indictment. Right? So when the witness is called, that is it.

Mr. HEYMANN. We will advise targets. The trouble with the grand jury setting is that it is an investigative setting. We will advise targets. Our regulations require us or our guidelines require us to alert targets to their target status. We do that.

Was the witness in the case where you were representing that witness in danger of being charged or had he been charged?

Senator ABOUREZK. He had been charged.

Mr. HEYMANN. Certainly you would discourage that witness from testifying loosely, freely, spontaneously. You would want yourself to have some control as to what the answers are going to be and the questions that might involve your client. In other words, certainly it was a desirable but, nevertheless, significant impediment to the

witness' full testimony. Is that correct in that case? I would suppose that that witness did not look like other witnesses to the members of the jury.

Senator ABOUREZK. That is true.

Mr. HEYMANN. The price of that is worth paying in a situation where the witness is in obvious danger, and we have to do it with regard to targets in a grand jury.

However, if we did it in regard to every witness at a trial or in a grand jury, then that is something else.

Senator ABOUREZK. There is another bit of protection which you have not talked about with respect to a grand jury as opposed to a regular court trial.

In the grand jury the witness is there all by himself. He is absolutely alone. They can, of course, walk out the 13 feet, but it happens to be 13,000 miles psychologically. It's not just exactly 13 feet I would say.

I don't think you would deny that. It is a long distance psychologically for a witness to get up and walk out, saying that he has to talk to his lawyer before he answers that question.

Mr. HEYMANN. It certainly can be, depending on the witness.

Senator ABOUREZK. Absolutely.

Mr. HEYMANN. It certainly can be, depending on when the witness——

Senator ABOUREZK. Absolutely.

But in a court there is a judge presiding. There is a defense counsel who is able to get up and object in case the judge does not see fit to try to protect a witness' rights. There is not that protection in the grand jury room.

The witness in a grand jury room is highly vulnerable and can become a target at any time. He has no procedural safeguards of any kind as he sits in the grand jury chamber. Would you comment on that?

Mr. HEYMANN. I will offer you, Mr. Chairman, the same type of arrangement you were offering me earlier. I will agree with that because it is right. If you will also agree that it has a reverse side which is also important.

The judge is there in the courtroom in a trial where he can protect the witness against abusive questioning. This also means that a judge is there to rule immediately and promptly on any question or any objection on any matter like that.

In a grand jury nobody is proposing having a judge in the room. Giving the witness an attorney who is likely to make a large number of objections has the problem that it will cause us not to simply resolve things on the spot with the judge there where you make the objection to the judge, and the judge rules, but you will disturb the grand jury room and you will have to find a judge who is sitting on something else and you will have to wait until the judge is ready. Then you will argue the matter before the judge and go back to the grand jury room and maybe start all over again.

The absence of the judge is important, as you point out, because the witness is less protected. It is important, as I point out, because it means every dispute between defense attorney, and the prosecutor, and the grand jury is likely to consume one-half hour or 1 hour rather than seconds.

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Senator ABOUREZK. You already have admitted that everything you have said about the potential disruption caused by an attorney in the grand jury room is supposition on your part because you have no practical experience. Is that not right?

Mr. HEYMANN. I would not have used the word "supposition," but we have no experience.

Senator ABOUREZK. What would you say? Speculation? What term would you use?

Mr. PAULEY. "Extrapolation."

Senator ABOUREZK. That is speculation. It is exactly the same thing as speculation.

Mr. HEYMANN. The question as to whether it is speculation or not depends upon whether there is any reason to believe that the normal rules of advocacy and defense representation are likely to not apply in a grand jury room in the same way that they apply elsewhere.

Senator ABOUREZK. We do not now know the final shape of this legislation. We are discussing many different aspects of grand jury problems. On one hand, we are discussing the normal rules of advocacy. On the other hand we are discussing the existence and the right to advice to the witness of counsel. Nobody knows how this thing will eventually come out when it is passed, if it is passed.

So, I want to say that.

Mr. HEYMANN. I agree that we cannot point to experience of attorneys in a grand jury room which has been disruptive and impossible to deal with.

Senator ABOUREZK. As for "extrapolation," its actual definition is the assumption of a certain set of facts based on known and existing facts. I don't think you could call that even extrapolation, because you have no known or existing facts upon which to base an extrapolation.

I would have to say that all you are doing is speculating. Let me ask you one question. Mr. Regnery has a few questions, but let me ask you this.

If we could show by the experience of the States which have had this system with the right to counsel in the grand jury room, that is if we could show that it worked well, would you change your position on this legislation?

Mr. HEYMANN. We would certainly be influenced by that. I have mentioned this. I take seriously each of the three major objections: The possibility of simple disruption—and I would be influenced by evidence on that—the difference in spontaneity that takes place which is close to disruption where a witness talks himself rather than consulting on an immediate basis with the lawyer—and I think that is an important reason why we don't have lawyers for witnesses at trials—and the conflict of interest of attorneys. But evidence on the first would influence me.

Senator ABOUREZK. How about evidence on the other two?

Mr. HEYMANN. Evidence on all three would influence me.

Senator ABOUREZK. Do you think you would change your position on the legislation if you could be shown that evidence on all three of those?

Mr. HEYMANN. I think I would. Yes.

Senator ABOUREZK. I believe that you would also.

Mr. Regnery?

Mr. REGNERY. The purpose of the grand jury is to get indictments. We are talking about disruptions. I wonder if there is any evidence or studies that you know of that might shed some light on the question as to whether or not having attorneys in the room would make any difference as to indictments.

Mr. PAULEY. I think for the same reasons that Mr. Heymann mentioned, there is no experience as such.

I do not think that the purpose of grand juries is to obtain indictments. It is a purpose.

Mr. REGNERY. You know of no studies or evidence that would indicate the difference between the percentage of indictments, if you can measure it that way, if the attorney were there or not?

Mr. PAULEY. You are talking about extrapolating or speculating from existing experience to reach a conclusion as to the impact of some new factor being inserted into the existing grand jury process.

I think our belief is that it would tend to delay the course of grand jury proceedings and that on a nationwide basis that delay would mean that grand juries were able to handle fewer cases. What dimension that is I don't know.

Mr. REGNERY. The experience of States who have instituted that would be crucial. Right?

Mr. HEYMANN. I think our problem would be more qualitative than quantitative. I have no idea what would happen in terms of numbers.

What I am afraid would happen would be that the cases that we now see which rely on somewhat hesitant witnesses, witnesses who do not really want to cooperate but do not have a fifth amendment privilege, let us say, that those cases would no longer be brought to a grand jury. This is because we would see that the witness who did not want to cooperate would be able to disrupt that particular grand jury proceeding with help of an attorney.

We might have the same numbers, but there would be cases where you had witnesses with no privilege and they can now be compelled to testify. They would not longer be brought.

Senator ABOUREZK. That is speculation again. You have no studies to show that that has happened anywhere in the States.

Mr. HEYMANN. The last statement was complete speculation. Yes, that is correct, Mr. Chairman.

I live in a world where we have to decide things all the time on the basis of speculation, Mr. Chairman.

In the absence of evidence, I have to do that. I like evidence, of course.

Senator ABOUREZK. That kind of thing is all right up here in the Congress, but it worries me in the Justice Department. [Laughter.]

What we do up here is not all that important. What you do is quite important.

Mr. HEYMANN. It is frightening to think we have been relying on you and you have been relying on us. [Laughter.]

Senator ABOUREZK. That is frightening if you have been relying on us.

We have a lot of other questions. We have other witnesses, so I think we had better move on.

This has been a very interesting discussion. I wonder if we might be able to arrange for a return engagement for you. We have some other areas like immunity and things like that about which we would very

much like to talk to you. They cannot be handled in written questions and answers.

Mr. HEYMANN. That will be fine.

Senator ABOUREZK. It is enlightening to have this on the record. I sincerely appreciate your attempt at forthrightness in your answers. I understand how difficult it is for you. You are looking at it from the prosecutor's standpoint, and you don't want to give up anything. I think that is precisely what is happening here.

However, I think if you were sitting not as prosecutors but as judges or objective observers that you would have to agree with us that there are some changes that desperately need to be made in the grand jury system.

If you want to answer yes to that, go ahead. [Laughter.]

Mr. HEYMANN. I do not want to answer yes to it, Mr. Chairman. It has been such a gracious and pleasant hearing that I think we ought to leave it at that.

Senator ABOUREZK. Thank you. We will try to have another morning. We will ask only the Justice Department to testify, because it would give us more time to explore these issues. It has been interesting. Thank you.

[The prepared statement of Mr. Heymann follows:]

PREPARED STATEMENT OF PHILIP B. HEYMANN

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 S. 3405, a bill to "reform" the federal grand jury.

At the outset, let me confirm the Department of Justice's overriding interest in preserving and protecting the fundamental rights of all citizens in the administration and delivery of criminal justice. Our most important government institutions and systems are designed and have evolved to guarantee constitutional rights and maintain a free and independent society.

We welcome and support efforts to improve any aspect of the federal system of criminal justice that will permit it to perform its vital functions more effectively, more equitably, and more responsibly. In particular, we welcome and support improvements to the grand jury, which has been an integral and indispensable part of that system for the past two hundred years.

The Department of Justice is committed to many of the principles for improvement of the grand jury system which underlie provisions of S. 1449 and which have been suggested by others, such as the American Bar Association which adopted in August of 1977 some twenty-five principles for grand jury legislation. In December of 1977, the Department of Justice, after thorough consideration, promulgated guidelines in the United States Attorneys' Manual setting forth principles to be followed by federal prosecutors in the conduct of grand jury proceedings.

These guidelines (a copy of which is appended to my Statement) include a recognition that: (1) as a general rule, witnesses should receive a notice of their basic rights simultaneously with their receipt of a subpoena requiring their appearance before the grand jury; (2) generally "targets" of an investigation should not be subpoenaed before the grand jury but those who wish voluntarily to appear should be permitted to do so and, where appropriate, should be notified of their target status; (3) generally a target of an investigation who states in writing that he will refuse to testify on Fifth Amendment grounds should be excused from testifying unless the grand jury insists upon his appearance; (4) a prosecutor should not present evidence against a person to the grand jury which he knows was obtained as a result of a clear violation of the person's constitutional rights; (5) a prosecutor should present evidence to the grand jury which directly negates the guilt of a person under investigation, before seeking an indictment against such a person; (6) the use of "forthwith" subpoenas should be limited to situations in which swift action is important and utilized only with prior approval of the United States Attorney; and (7) once a grand jury has returned a no-bill or otherwise acted on the merits in declining to return an

indictment, the same matter should not be presented to another grand jury in the absence of additional or newly discovered evidence, and then only with the prior approval of the appropriate Assistant Attorney General.

The Department has a continuing interest in improving grand jury practices. Our review of grand jury system that resulted in the issuance of the December 1977 guidelines is a reflection of our ongoing concern. A further indication of our continuing interest in the fairness of the grand jury process is the recent promulgation of an additional guideline generally discouraging the practice of naming persons in indictments as unindicted co-conspirators.

In addition to the foregoing principles embodied in our guidelines, we agree that 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 use a grand jury to procure evidence for preparation for a pending trial; prosecutors should not harass or unreasonably delay witnesses; arguments impermissible at trial should not be made to a grand jury; prosecutors should scrupulously preserve grand jury secrecy; and the court's charge to the grand jury should be full and complete and available to the grand jury in writing.

By striving to improve the fair and efficient performance of the grand jury through review of procedures and the promulgation of guidelines, we do not intend to suggest that we share the views of some that the federal grand jury system is in need of thorough overhauling or drastic revision. On the contrary, we believe the federal grand jury system is fundamentally 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 initation of criminal charges.

We are committed to join and cooperate with Congress and this Subcommittee in pursuit of our mutual goals to provide the public with the best criminal justice system obtainable as well as with fair and just persons to serve it.

Let me now advise you in greater particularity of the Department of Justice position with respect to some of the more significant provisions in S. 3405.

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; 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; and so that a refusal to provide information before a grand jury could not be punishable if the request for information was based upon evidence obtained by an unlawful act or in violation of the witnesses's constitutional or federal statutory rights.

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*, 373 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]

[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.

We are, however, opposed to the bill's proposal for restrictions on confinement for criminal or civil 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. Furthermore, the proposal would prevent repeated confinements for civil contempt even in those instances where there is every reason to believe a repeated order of confinement would not be futile or merely punitive, and indeed, may be necessary to prevent a miscarriage of justice.

For example, as the proposal is drafted, a witness confined for civil contempt might yield and answer the questions posed up to that time, and then refuse on the next day of the trial or grand jury proceeding to answer any further questions or provide any additional information concerning the same transaction. The witness's refusal to testify could cause an innocent person needlessly to be charged, or a guilty person to be acquitted or not charged. Moreover, with some new or different light shed upon the basic transaction, the witness's testimony at a subsequent point in time could have a greater significance than previously imagined. As a result, the need for the witness's testimony in the second instance might be distinct from and more compelling than the need on an earlier occasion. Even if the importance of the testimony is essentially the same in both instances, the initial confinement may have been only for a brief period at the end of the grand jury's term, or have been abbreviated for other reasons. In short, the public interest cannot be served by legislating a total judicial inability to deal with repeatedly contumacious witnesses. In our view, the existing laws relating to the use of civil and 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]

We also strongly disagree with the proposal to create a defense for grand jury witnesses who decline to respond to requests for relevant information based upon the illegal source of the request. Under current law, a witness is often protected at trial from answering questions based upon a violation of a right.[3]

But the situation before a grand jury is different. There the courts have consistently held that there is no bar to compelling a witness to respond to questions derived from improper activity, since (1) the exclusionary rule as it operates at trial is deterrent enough to prevent deliberate invasions of rights, (2) 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, and (3) the need of the grand jury for the witness' evidence in its investigation is paramount. See *United States* v. *Calandra*, 441 U.S. 338, 350 (1974); and cases cited therein. Of course, a grand jury witness may invoke any applicable privilege not to testify (e.g. Fifth Amendment or attorney-client privilege) and may quash an overly broad subpoena to produce evidence, but he may not refuse to testify merely because of the alleged illegal source of the question. The only apparent exception to this principle arises under 18 U.S.C. 2515, part of a comprehensive scheme enacted by Congress to protect the privacy of oral and wire communications against the threat of wiretapping and electronic surveillance. The Supreme Court has construed this legislation, in light of its special purposes, as affording a defense to witnesses who refuse to answer questions based upon lawfully intercepted communications. *Gelbard* v. *United States*, 408 U.S. 41 (1972).

The proposal in S. 1449 is evidently designed to extend the *Gelbard* precedent in the grand jury setting across the gamut of an individual's rights and privileges, and indeed, would provide a defense for a witness' refusal to answer a question based upon any unlawful act, not only violations of his own rights. Such a measure would be unjustified. For one thing, it would enable a fully immunized witness, not himself in any jeopardy, to decline to testify because the questions were derived from a violation of someone else's rights.

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[2] *Shillitani* v. *United States*, 384 U.S. 364 (1966).

[3] An exception is made when the evidence is admitted for impeachment purposes, since the courts have held that the incremental deterrence which might be gained from extending the exclusionary rule to this situation is outweighed by the need to guard against a person's committing perjury. See *e.g.*, *Harris* v. *New York*, 401 U.S. 222.

The possibility that justice will be defeated and the grand jury's investigation thwarted in these circumstances outweighs any conceivable need to further shield the witness from giving testimony. Moreover, the creation of such a defense would afford an opportunity for witnesses so inclined to delay a grand jury's proceedings by challenging the source of questions even in instances where there is no reason to believe they are based upon illegal conduct. The defense would also have the undesirable effect of precipitating the litigation of issues presently reserved for trial on the merits. Saddling 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. *Calandra, supra,* 414 U.S. at 350, quoting *United States* v. *Dionisio,* 410 U.S. 1, 17 (1973). The courts, we believe, have generally drawn the proper balance in this area. The *Gelbard* case stems from legislation dealing with an unusually sensitive and acute problem, and should not be extended to all other situations or to the wholly novel length of permitting a grand jury witness to refuse to answer questions not based upon any violation of his own legal rights.

UNAUTHORIZED DISCLOSURE OF GRAND JURY INFORMATION

Section 4 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 offense, 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 to or by an attorney for the government in the performance of his duties, judicially authorized disclosures, and disclosures by witnesses [4] and their counsel [5] of matters concerning the witness' appearance before the grand jury.

Subsection (d) exempts from the petty offense provisions disclosure by any person other than a person present at the grand jury proceeding.

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 of the legal problems associated with contempt actions, the Department of Justice supports the concept of enacting legislation specifically to punish the unauthorized disclosure of grand jury information.

In our judgment, however, the approach taken in S. 3405 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 are, on balance, not justified. While acting with bad intent is often a basis in criminal law for imposing or increasing 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 motivated by a desire to learn the identity of a government informant. 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. Knowing breaches of grand jury secrecy, for whatever motive or intent, tend to discourage witnesses from cooperating with the government.

We recommend, therefore, that a unitary offense be created which would eliminate the element of specific intent associated with the improper disclosure. Any knowing disclosure in violation of the secrecy prohibtion should be punishable. Because the offense would be new and there is no showing as yet of the

[4] The bill defines "disclosure by a witness" to allow any other person to disclose matter that was learned from a witness.

[5] Under Section 6 of this bill counsel for a witness would be permitted inside the grand jury room, and counsel would be authorized to make disclosure of what transpired before the grand jury. The Department is opposed to both of these provisions, for the reasons to be given in discussing Section 6 of the bill.

need for felony treatment, we thing it should be graded as a serious misdemeanor, puishable by up to one year in prison and a suitable fine.[6]

NOTICE TO GRAND JURY OF ITS RIGHTS AND DUTIES

Under section 5(a), it would be required that the district court, upon empaneling a grand jury, give it adequate and reasonable notice of, and assure that it reasonably understands, its rights and duties as enumerated. Failure to instruct a grand jury as required would be "just cause" within the meaning of 28 U.S.C. 1826 (as revised in section 2 of the bill) for a witness' refusal to testify or provide other information before that grand jury.

We have no objection to and indeed support the principle of requiring that district courts notify grand juries of their rights and duties. In our experience this is a good practice and one which at present is widely, though not uniformly, followed by district judges.

We do, however, differ with the bill in respect to certain of the rights and duties enumerated. In two cases—the necessity of legally sufficient evidence to form the basis of an indictment, and the grand jury's rights and powers to conduct an "independent inquiry"—our differences are fundamenal since we object to the creation, elsewhere in the bill, of the substantive rights alluded to here. Our objections in these regards are set forth, later on, in the discussion of the underlying proposals themselves.

We also question the workability of the bill's requirement that a grand jury be notified, at the time it is empaneled, of the "subject matter of the investigation". The majority of grand juries are not empaneled to undertake any specific investigation, but rather to hear many diverse kinds of cases, and to take on such investigations, not previously planned, as might arise during their term. This practical difficulty might be overcome if the phrase "if known at the time the grand jury is empaneled" were added at the end of this paragraph, as is done in the one following which refers to the criminal statute or statutes involved.

A more central objection of the Department is to the proposal's provision which would prevent a witness from being held in civil contempt for refusing to testify or to provide information to a grand jury if the grand jury had not been properly instructed at the time it was empaneled. In the first place, as drafted this provision would make no allowance for the possibility that the grand jury received proper instructions subsequent to its empanelment but prior to the date of the witness' appearance. But more basic is the point that this provision can be expected to give rise to litigation in virtually every contempt proceeding over whether the grand jury had been adequately instructed. Moreover, the kinds of rights and duties involved in this proposal—for example, the grand jurors' obligation of secrecy and to inquire into offenses committed in the district—have no relationship to the witness's duty to testify or provide information if so ordered by the court. They are not of such basic character that a failure to notify the grand jury concerning them should automatically vest the witness with an immunity from the consequences of his own contempt, at least absent a showing of some prejudicial effect upon the witness.

NOTIFYING POTENTIAL TARGETS OF INVESTIGATIONS

Section 5(b) 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.

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[6] In addition, subsection (c) dealing with exemptions should be redrafted. The evident intent of the subsection is to exclude disclosures authorized by law. The three categories of persons enumerated, however, do not exhaust the various types of authorized disclosures. For example, Rule 6(e) of the Federal Rules of Criminal Procedure permits disclosure of grand jury matters by government personnel, to whom an initial disclosure was made by an attorney for the goverment, if authorized by such attorney for the purpose of assisting him in the performance of his duties to enforce Federal criminal law. Accordingly, subsection (c) should simply exempt any disclosures otherwise authorized by law, or should refer to disclosures authorized by Rule 6(e), F.R.Crim.P.

We support the basic principle underlying this proposal and have incorporated that principle in our December 1977 guidelines. We are concerned, however, with some of the specifics, and we believe, most fundamentally, that the matter is better suited for handling by administrative regulation. If the requirement to notify all potential targets were made a general statutory rule, we foresee the prospect of substantial litigation revolving around the exercise by the government 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 litigation by the target following the return of the indictment.

Second, we believe that the standard in S. 3405 for an exception to the notification requirement is too strict. It would seldom be possible in a particular case for the government to prove that notification "would result" in such harmful action, yet experience teaches that notification to a suspect of the existence of a grand jury invesigation 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.[7] 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 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 the legislation, 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 or guidelines of the Department. As previously noted, the Department of Justice adopted last December guidelines for inclusion in the United States Attorneys' Manual to allow the opportunity for such notification and possible appearance of the individual.[8]

EXCUSING WITNESSES WHO PLAN TO INVOKE THE FIFTH AMENDMENT

Section 5(c) 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 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. denied, 400 U.S. 828, and cases cited therein.[9]

The provision in the bill assumes that the witness knows the precise questions to be asked of him, and also is an accurate judge as to the availability, as to those questions, of a Fifth Amendment privilege. Neither assumption is warranted. Accordingly, as a general matter, we oppose the proposal to exempt witnesses from their obligation to appear before the grand jury based upon

[7] We note that the bill 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.

[8] Obviously, such an appearance would as S. 3405 requires, have to be pursuant to a waiver of the target's Fifth Amendment rights. The target would not be compelled to appear.

[9] If a witness refuses to answer a question on the basis of 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); *Enrichi* v. *United States*, 212 F. 2d 702 (C.A. 10, 1954).

their prior written assertion of an intent to invoke the Fifth Amendment privilege. As indicated earlier, however, the Department has adopted a guideline for the United States Attorneys' Manual which provides that, if a "target" (as defined in the Manual) and his attorney indicate in writing that the target will refuse to testify on Fifth Amendment grounds, such a witness ordinarily ought to be excused form testifying unless the grand jury insists on his appearance. Although, under the Department's guidelines, it is unusual for a "target" to be subpoenaed before a grand jury, the position of such witnesses is so susceptible to being prejudiced by having to invoke the Fifth Amendment before the grand jurors that the Department believes that such a witness, upon a written assertion signed by both him and his attorney of an intention to invoke the Fifth Amendment, ought normally not to be forced to appear. However, if the grand jury, having analyzed with the United States Attorney the importance of the testimony and the applicability of the Fifth Amendment privilege to the likely areas of inquiry, wishes to call the witness even after receipt of such an avowed intention, its right to do so would remain unimpaired. In our view, this is a fair and proper resolution of the competing interests at stake.

SUCCESSIVE GRAND JURY INVESTIGATIONS

Section 5(d) 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 view favorably 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. As previously noted, the Department already has adopted such a principle in its guidelines.

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 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.

SPECIAL ATTORNEY FOR THE GRAND JURY

Section 5 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 of violations of federal criminal law committed by an officer or agent of the United States or of a state or municipal government. 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 and to conduct all phases of a criminal prosecution arising from the grand jury's inquiry.

We are strongly opposed to this aspect of S. 3405. In our view, the creation of a non-executive branch prosecutor would pose a serious threat to equal treatment and protection of individual defendants and would violate the Constitution.

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 undertsanding 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's or the courts' to give.

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 to 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 IN THE GRAND JURY ROOM

Section 6 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 and witness" but not to "address the grand jurors or 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 Department of Justice is firmly of the view that this rule is necessary to preserve the grand jury as an effective investigatory institution.

1. 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 fact finding 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. See Silbert, *Defense Counsel in the Grand Jury—The Answer to the White Collar Criminal's Prayers*, 15 Amer. Cr. L. Rev. 293, 302 (1978). 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.[10]

[10] A witness may be permitted to confer with counsel with regard to whether or not to invoke to Fifth Amendment. The infrequent instances in which such advice is needed as to a grand jury witness are met by the universal practice of permitting the witness, without prejudice, to leave the room for a brief period for that purpose.

We recognize that some advocates for the proposal rely on the experience of certain States; we believe that reliance is misplaced.[11]

2. The fundamental change proposed would transform the federal grand jury process into a proceeding 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, overbroad, or in some way technically defective. While the bill attempts to limit counsel's role by precluding him from addressing the grand jurors or the prosecutor, 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.

In contrast to a court proceeding or a congressional committee hearing, 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. We are concerned 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.

We also 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 fact 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 may be, 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.

A number of judges have echoed our concerns about the practical effects of admitting defense counsel into the grand jury. Thus, for example, five judges of the United States Court of Appeals for the Second Circuit, in a memorandum accompanying their letter to the Chairman of the House Judiciary Subcommittee considering similar grand jury reform legislation, observed that:

"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,

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[11] As one of the reasons given for favoring a proposal for witness's counsel in the grand jury room, Mr. Richard E. Gerstein, appearing before a House Judiciary Subcommittee on March 17, 1977, on behalf of the ABA Criminal Justice Section, noted the allegedly problem-free experience of eight States—Arizona, Illinois, Kansas, Michigan, Minnesota, Oklahoma, South Dakota, and Washington—with the practice. Following this representation (which Mr. Gerstein acknowledged was not based upon "any large sampling or empirical research") the Department of Justice surveyed the United States Attorneys in these States. (Since that time two other states—Colorado and Massachusetts—have adopted counsel-in-the-grand-jury laws; but there has been as yet little experience with them.)

The survey 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 when 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. Gerstein is no predicate for concluding that the practice could be successfully adopted by the federal criminal justice system.

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 overhead 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."

In short, the delays inevitably occasioned by permitting defense counsel inside the grand jury promise to be lengthy and to spawn an entire new wave of costly litigation. These effects are inconsistent with the goal adopted by the Congress in the Speedy Trial Act of 1974 of reducing crime and the danger of recidivism by requiring speedy trials. In our view the marginal benefits to witnesses which this proposal might involve are far outweighed by the disadvantages to society or causing the wheels of the federal criminal justice system to grind even more slowly.

3. 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 under-estimated. 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—operated "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 expressed by several other commentators.[12] 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.[13]

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.[14]

Absent such a solution being adopted, the point to be made with respect to S. 3405 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 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

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[12] See e.g., Silbert, *Defense Counsel in the Grand Jury—The Answer to the White Collar Criminal's Prayers, supra*, 15 Amer. Cr. L. Rev., at 296–300, 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."

[13] 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 1009 (3rd Cir. 1976).

[14] Significantly, the recently passed Colorado statute allowing counsel in the grand jury room prohibits multiple representation of grand jury witnesses except with the permission of the grand jury—See section 16-5-204(4)(d), Col. Rev. Stat. 1973 (1977 Supp.).

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.

4. 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.

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's counsel should be under an obligation of secrecy.[15] 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.

5. We note, finally, that the proposal to permit counsel for any grand jury witness into the grand jury room will have as its greatest beneficiaries those persons most closely associated with the most serious and most profitable criminal violations, who will have counsel provided by their confederates or who can afford their own. But the vast bulk of honest Americans will not undergo the expense of counsel simply to be a fact witness before the grand jury. It is this point which presumably is sought to be underscored by the title of United States Attorney Silbert's recent law review article: *Defense Counsel in the Grand Jury—The Answer to the White Collar Criminal's Prayers.*

6. The foregoing arguments are, we believe, persuasive reasons for opposing a general proposal to allow any witness before a federal grand jury to bring counsel into the grand jury room. Some of the arguments, however, are less telling with respect to a limited class of witnesses—"targets" of an investigation—and a few commentators have urged (and a few States have restricted their statutes accordingly) that a right to counsel in the grand jury room should be created only for "targets". The main argument on behalf of this proposal is, in brief, that a "target", or person anticipating imminent indictment, is in a position comparable to the subject of a preliminary hearing, which has been held to be a "critical stage" of a prosecution entitling the person to counsel. While this argument has some force, it is not legally compelling.

Consideration of fairness to persons who are targets weigh in favor of affording this special class of potential witnesses a right to have counsel present during their testimony. While the Department has not yet determined whether such a proposal would be appropriate or acceptable, we point out that it would present certain problems. First and foremost is the difficulty of defining the class of persons—"targets"—to whom the right to counsel in the grand jury room would attach.

The Department of Justice's guidelines define a "target" in one reasonable manner, that is, "a person as to whom the prosecutor or the grand jury has substantial evidence linking him to the commision of a crime and who, in the judgment of the prosecutor, is a putative defendant."[16] However, a number of reasonable variations of this definition can be devised, and any definition is bound to produce litigation. The problem is made worse by the fact that some individuals who are not "targets" when called to testify may later be indicted after unexpected evidence appears. Moreover, confining the right to counsel in the grand jury room to "target" witnesses may be seen by some as a hollow proposal, in light of the fact that very few targets actually appear and testify

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[15] The recent Colorado law allowing counsel to accompany a witness in the grand jury requires such counsel to "take an oath of secrecy". This provision was sustained by the Colorado Supreme Court against constitutional challenge. See *People* v. *J.L.*, 580 P. 2d 23, decided June 5, 1978.

[16] This is in contrast to a "subject", who is defined as a "person whose conduct is within the scope of the grand jury's investigation."

before the grand jury. This is because (a) of the general reluctance of targets to appear voluntarily before the grand jury, and (b) of the policy of the Department of Justice generally disfavoring the exercise of the grand jury's lawful power to compel their appearance by subpoena.[17] Thus it may be questioned whether legislation for this small group of grand jury witnesses, with the attendant problems of definition such a task would entail, would produce truly worthwhile results, by comparison to maintaining the present practice, uniformly for all grand jury witnesses, of allowing such witnesses a reasonable opportunity to leave the grand jury to consult with counsel.

NOTICE OF RIGHTS IN GRAND JURY SUBPENAS

Section 6 of S. 3405 would require, in part, that in serving a grand jury subpoena 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 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.

We agree with parts of this proposal, but object strongly to others. As previously noted, the Department recently adopted guidelines that require generally that grand jury witnesses receive with their subpoenas advice or warnings of the following matters: (1) the general subject 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 would tend to incriminate him, (3) that anything the witness does say may be used against him, and (4) that the grand jury will permit the witness the reasonable opportunity to step outside the grand jury room to consult with counsel if he desires.

In accordance with these guidelines, we support in principle the bill's proposal with respect to its first three items. There is no difficulty in advising witnesses of their oportunity to have counsel available for consultation. And, as to most witnesses, an adequate warning of their privilege against self-incrimination is a reasonable added protection.[18] Similarly, we have no objection to a requirement that witnesses be advised of the general subject of the grand jury's inquiry, although we think exceptions must be recognized for situations where to do so could jeopardize the grand jury's investigation.

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. Our only concern with this proposal is that it may lead to unintended litigation. But we assume 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 one or another of the warnings was omitted, and so long as the notification requirement is sufficiently general, there is little basis for concern that it in particular will engender litigation.

The Department of Justice is, however, opposed to that part of the bill mandating advance warning as to whether a witness's "own conduct is under investigation."

Our objection is not total, but rather is based on the breadth of the proposal. The category of persons "whose own conduct is under investigation" extends both to "targets" and "subjects" of an investigation. As to "targets," the Department of Justice's guidelines, as previuosly noted, generally discourage the subpoenaing of such persons, but do encourage advising them of their status for the purpose of affording them an opportunity to testify before the grand jury prior to its deliberations. In those instances when a "target" is subpoenaed or

[17] A subpoena for a target requires the prior approval of the grand jury and the United States Attorney or responsible Assistant Attorney General.

[18] As the Supreme Court recently observed in *United States* v. *Washington*, 431 U.S. 181 (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, under the holding of *Washington, supra*, would also serve wholly to meet any contention by a witness, barring extraordinary circumstances, that his Fifth Amendment rights were overborne by the grand jury.

appears voluntarily to give testimony, we see no difficulty in requiring (indeed, our guidelines already require) that the person be advised on the record of his "target" status.

The situation is, however, different with respect to "subjects," i.e., persons whose conduct is within the scope of the grand jury's investigation, but as to whom no substantial evidence exists linking them to the crime. Notifying all such persons that their "conduct is under investigation" would have a decidedly chilling effect and would inhibit the grand jury in its inquiry. It must be remembered that, at the outset of an investigation, the grand jury often has no clear idea of who the ultimate "targets" will be; in many corruption cases, for example, it is not evident whether a payment was made under the duress of extortion or whether it was tendered voluntarily as a bribe. Thus, who is the victim and who the culprit may not be known until late in the investigation. In these kinds of cases, as well as many others, the grand jury needs to obtain information and evidence from any persons—including the person ultimately determined to have been the victim—who, at an early stage, may be regarded as "subjects."

Indeed, many or most persons necessarily deemed "subjects" when subpoenaed to testify will turn out merely to be fact witnesses, or persons whose culpability is so minor as not ever to make them a serious candidate for indictment. Yet having to warn such persons that their "conduct is under investigation" by the grand jury will cause many of these persons to misconstrue the circumstances and to invoke the Fifth Amendment privilege when they might not otherwise have done so, or to be less forthcoming than they would otherwise be in telling the grand jury what they know about the transaction at issue.

In either event, the grand jury's investigation may be thwarted or hindered as a result of the witness's decision not to cooperate fully. Moreover, a requirement that all "subjects" be warned of their status will lead to litigation when the warning is omitted. It could frequently happen, for instance, that a person not thought to be within the scope of the investigation, at the time he is called as a witness, would later become a subject or target of the grand jury's investigation on the basis of some new or hitherto unappreciated information. Questions about when such information was acquired, or when its significance was first realized, would require expensive and time-consuming judicial proceedings to resolve. Of course, in an effort to avoid this result, prosecutors would be influenced to take the broadest conceivable view of the requirement to administer the warnings, and this in turn would exacerbate the "chilling effect" phenomenon alluded to earlier.

In sum, we believe that fairness requires only that true "targets" of an investigation be warned of their status prior to testifying as witnesses before a grand jury,[19] and that to extend the requirement to any larger category of persons, as S. 3405 proposes, would (1) have a substantial inhibitory effect upon many witnesses and thereby prevent the grand jury from successfully investigating many crimes, and (2) lead to extensive litigation about a collateral matter.

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 the 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. 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. Moreover, indicating the precise statutes under consideration might fall afoul of the secrecy inhibitions with respect to matters occurring before the grand jury.

VENUE RIGHTS OF GRAND JURY WITNESSES

Section 6 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 substantial

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[19] Under the Department's guidelines, as well as under S. 3405, all witnesses who are subjects or targets will receive advice as to their right to assert the Fifth Amendment privilege. In this context, the issue of a further warning concerning their "status" before the grand jury does not rise to the level of a fundamental right. See *United States* v. *Washington, supra.*

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. In our view, however, 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.Cr.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; rather, 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 6(c) 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, we are concerned that the proposal to alleviate the burden placed on witnesses residing in distant districts would impose undue costs 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 significant proportions that could seriously impede a grand jury's investigation. The proposal, in our view, is simply unworkable. Here, as elsewhere in our criminal justice system, the convenience of witnesses must yield to a greater societal good.[20]

EVIDENTIARY MATTERS

Section 6 of S. 3405 contains provisions for restrictions on the kind of evidence that can be presented to a grand jury, as well as a provision for certain evidence (of an exculpatory nature) that must be presented. The proposals to restrict the type of evidence that grand juries may consider for the purpose

[20] 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 subpoenaed by a grand jury. In our view this is a matter meriting remedial action by the Subcommittee.

of determining whether to return indictments would radically alter the institution of the grand jury and would be inconsistent with its important but limited mission as a charging (and not an adversarial guilt determining) body. Accordingly, we strongly oppose these proposals. By contrast, we support the principle that the attorney for the government should be under an obligation to present certain basic exculpatory evidence to the grand jury. We believe, however, that the matter is one better suited for administrative regulation than for inclusion in a statute.

(*a*) *Applying the exclusionary rule to grand jury proceedings*

As we have already dealt with this subject to some extent in commenting upon the proposal, in section 2 of the bill, to create a defense to contempt for a witness if the grand jury's request for information was derived from any unconstitutional search and seizure or act in violation of federal law, we shall discuss the matter only briefly here. In our view, the Supreme Court in *United States* v. *Calandra*, 414 U.S. 338 (1974), correctly balanced the competing interests in holding that a person may not suppress or exclude relevant evidence sought to be presented to a federal grand jury, on the basis that the evidence was obtained by a violation of his Fourth Amendment rights.

The Court reasoned that to apply an exclusionary rule to the grand jury would add little if any deterrence to unlawful conduct beyond that presently provided by the application of the exclusionary rule at trial; would "precipitate the adjudication of issues hitherto reserved for the trial on the merits"; and "might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective." Given the grand jury's limited function of determining whether or not to bring a formal accusation of a criminal violation against a person, based upon a standard of probable cause, we believe that any statutory prohibition on the kind of reliable evidence that may be considered by the grand jury is unwarranted.

Moreover, the bill's proposal as drafted does away with the traditional requirements of "standing" and would permit any defendant to have an indictment against him dismissed based upon a finding that the government submitted evidence to the grand jury in violation of *any* person's or witness's (it is not clear which) constitutional or federal statutory rights.

Since the Supreme Court has held (properly in our view) that only the "victim" or person "aggrieved" by an unlawful obtaining of evidence has standing to move its suppression or exclusion even at trial, adoption of the proposal in S. 1449 would lead to the anomalous and indefensible result that a defendant could move to dismiss an indictment returned against him on the basis that evidence obtained in violation of someone else's federal rights was presented to the grand jury, but could not move to prevent the use of the same evidence at his trial.

We stress that our opposition to the extension of the exclusionary rule to grand jury proceedings is not based on any notion that the use of illegally seized or obtained evidence is a laudatory practice. On the contrary, as the Supreme Court has noted, it would ordinarily be against the prosecutor's own interests to obtain an indictment when the available evidence could not be used to obtain a conviction. However, in our view, the submission of highly probative and reliable evidence to a grand jury ought not, in itself, to be grounds for dismissing an indictment. Frequently, the issue of the validity of a search and seizure or an interrogation will not be clear; or the prosecutor may be unaware of the original source of the evidence presented. Finally, we point out that the Department is in agreement with the principle, adopted in similar form by the American Bar Association, that a prosecutor should not present to the grand jury for use against a person whose constitutional rights clearly have been violated evidence which the prosecutor knows was obtained as a direct result of the violation. This principle is included in the current guidelines set forth in the United States Attorneys' Manual.

(*b*) *Authorizing a grand jury to indict only on the basis of competent and legally sufficient evidence, or summarized or hearsay evidence if good cause is shown to the court*

The prevailing rule, several times reaffirmed by the Supreme Court, is that "[a]n indictment returned by a legally constituted and unbiased grand jury, like any information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charges on the merits." *Costello* v. *United States*, 350 U.S. 359, 363 (1956); see also, e.g., *Lawn* v. *United States*, 355 U.S. 339, 349 (1958). We believe this rule is based on sound policy, and we are therefore opposed to the bill's pro-

posal to require that indictments be dismissed for reasons relating to the kind of evidence submitted to the grand jury.

The Court in *Costello, supra,* not only rejected a constitutional challenge to the sufficiency of an indictment based solely on hearsay evidence, but also rejected the defendant's invitation to establish a supervisory rule for the federal courts permitting defendants to challenge indictments on the same ground. Hence, the Court's reasons in *Costello,* not being limited to constitutional considerations, are particularly apposite with respect to the legislative proposal in S. 3405. The *Costello* Court observed that (350 U.S., at 363–364):

"If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits, a defendant could always insist upon a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. * * * No persuasive reasons are advanced for establishing such a rule. It would run counter, to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable relay but add nothing to the assurance of a fair trial."

The proposal to require generally that evidence before the grand juries be of the same quality as evidence submitted at trial, in short, is misguided because it fundamentally misperceives the role and nature of the grand jury institution. Being a charging rather than a guilt-determining body, the grand jury ought not to be bound by the strict rules of evidence applicable at a trial on the merits. Significantly, hearsay may be introduced at a preliminary hearing, which has a similar function of determining whether there is probable cause to hold a person for trial. Moreover, unlike a trial, or even a preliminary hearing, a grand jury is an inquisitorical, not an adversarial, proceeding. Thus, there is even less reason to burden grand jury proceedings with rules of evidence designed for the different milieu of a trial involving confrontation and cross-examination of witnesses.

In addition, prohibiting the use of summarized or hearsay evidence except when allowed by the court upon a showing of good cause would lead to delay. At times, the requirements for prior court authorization of the use of hearsay evidence might prevent an indictment from being returned before the statute of limitations had expired; and there would be numerous other occasions in which an indictment would be appreciably delayed. In our view the matter is best left to existing case low. There has been no showing of excessive use by federal prosecutors of incompetent or unreliable evidence before grand juries; and the creation of the rule proposed in the bill would lead to extensive litigation and unwarranted dismissals of indictments.[21]

(c) Duty of prosecutor to present exculpatory evidence

Under S. 3405 an indictment could be dismissed if the attorney for the government had not presented 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."

Basic considerations of fairness to persons under investigation by the grand jury require that any decision to go forward with the prosecution should be made by the grand jury with full awareness of significant exculpatory evidence known to the attorney for the government. The Department recognizes that public confidence in the criminal justice system will be undermined if such basic notions of fairness are not adhered to by federal prosecutors. Moreover, there is simply no purpose or government interest in obtaining an indictment if an acquittal is likely at trial as a result of exculpatory evidence known to the prosecutors. Accordingly, the Department has recently adopted a formal policy governing the pres-

[21] We point out too that federal judicial supervision over the type of evidence presented to grand juries is not lax. Despite the failure of Supreme Court to create a general supervisory rule barring the use of hearsay or summarized evidence, some federal courts of appeals have adopted more limited regulatory principles. Thus, the Second Circuit counsels against the use of hearsay unless direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify from personal knowledge. *United States* v. *Umans,* 368 F.2d 725, 730–731 (1966). The same court also requires that prosecutors not present hearsay evidence to grand juries in a manner that could mislead the jurors into thinking that the evidence was based on firsthand observation or knowledge. *United States* v. *Estepa,* 471 F.2d 1132, 1136–1137 (2d Cir. 1972).

entation of exculpatory evidence to the grand jury. The relevant provision of the U.S. Attorneys' Manual provides in pertinent part as follows: "When 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."

In our view this standard (which is somewhat less broad than the proposal in S. 3405 "evidence * * * which [the prosecutor] knows will tend to negate * * * guilt") strikes the proper balance between the public's interest in efficient grand jury proceedings and fairness to the subjects thereof.[22] To require more would begin to convert a grand jury investigation into a proceeding more like a trial than the probable cause-determining inquiry it is intended to be.

Most importantly, moreover, we believe that the matter is one far better suited for administrative regulation than a statute. There is at present no requirement that exculpatory evidence be brought to the attention of the grand jury. Legislative adoption of any such obligation, however phrased, would assuredly lead to a plethora of defense motions to dismiss the indictment or to suppress the testimony of a particular witness, on the ground that the prosecutor had not sufficiently complied with his duty to disclose required information. There would be extensive litigation revolving about such questions as whether the prosecutor "knew" of the evidence and whether it would have "tend[ed] to negate the guilt of the person or persons under investigation." In our view the grand jury stage is not the proper focal point for judicial resolution of these kinds of challenges. We are not aware of any significant problem of prosecutors deliberately withholding substantial exculpatory evidence from grand juries which would warrant the creation of a new statutory right with its inevitable concomitant of a large new layer of pretrial litigation. Accordingly, we suggest that the matter should be left to administrative governance by the Department, pursuant to the guideline previously mentioned.

GRAND JURY RECORDING AND TRANSCRIPTS

Section 7 of S. 3405 would, among other things, require recording of all grand jury proceedings except the secret deliberations of the grand jury, would entitle a witness to obtain a copy of his own grand jury testimony prior to trial, and would, unless good cause were found by the court, entitle the defendant a reasonable time before trial to obtain a copy of the testimony of all witnesses before the grand jury to be called at trial.

With respect to the principal proposal of requiring the recordation of all grand jury proceedings, we are aware of the considerable benefits that may flow from adoption of such a provision. On the other hand, while not objecting to the proposal, we foresee certain countervailing difficulties associated with it, primarily in terms of increased expense and litigation and a potental chilling effect on grand jury jurors. The competing considerations, as we perceive them, are as follows.

Currently, recording of grand jury proceedings is permitted but not required by the Federal Rules of Criminal Procedure. In favor of a mandatory recording requirement is the fact that recordation, in varying degrees, is the practice in many districts today by virtue of local rules of court, and no major inhibitions to successful investigations or prosecutions appear to have arisen in those districts where recording has been implemented.

Recordation also provides a measure of protection against unduly coercive or other improper interrogational tactics. And it preserves testimony for defense impeachment purposes at trial. Under the Jencks Act, 18 U.S.C. 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 their testimony will be available for either of these purposes.

We can see no reasonable argument against requiring that the testimony of all witnesses before the grand jury be recorded, and we support such a require-

[22] The bill's proposal, for example, might be interpreted as mandating the prosecutor to apprise the grand jury of every prior conviction and prior inconsistent statement of a witness of which he was aware that could affect a witness's credibility. Such a requirement would be extremely onerous and 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).

ment. On the other hand, the bill's proposal recordation requirement would extend to all interchanges between the attorney for the government and the grand jurors even when no witness is present. Recordation of such portions of the proceeding raises additional considerations. As noted above, the primary purpose of such recording is to guard against improper actions of prosecutors. But 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, the additional 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. The occurrence of deliberate prosecutorial misconduct warranting dismissal of an indictment or the suppression of evidence 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. Such litigation, as well as the delay and expenditure of judicial resources it would engender would be a not inconsiderable price to pay for the improved quality of justice that recordation might engender.

Lastly, we note the potential adverse impact of a "blanket" recording requirement, such as that proposed in S. 3405, 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 operate to inhibit communications by members of the grand jury and thus could have an undesirable chilling effect on proper inquiry and discussion.

For the foregoing reasons, the Department of Justice strongly supports a recording requirement insofar as it applies to witnesses' testimony and to attendant comments during the presence of a witness before the grand jury. With regard to extending a recording requirement to include all other proceedings of the grand jury, the Department regards the competing arguments as more balanced and hence at this time neither supports nor opposes the proposal.

The Department is 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 need 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 for the safety of the government's witnesses in certain cases, by prematurely notifying the defendant of their identity.[23] The Congress in 1975 specifically rejected a proposal, which would have had a similar impact, to require the government in advance to trial to disclose the names of its witnesses to defendants, subject to a "good cause" exception. We believe that rejection was wise.

Finally, we are not opposed to the proposal in S. 3405 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. However, as S. 3405 recognizes, such a right should not be absolute. We consider it essential, for example, that the government have the right to prevent or delay 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 focused 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.

[23] Frequently, the government may correctly fear that witness intimidation will result from premature disclosure, yet be unable to meet a statutory standard of "good cause," based upon actual evidence, to believe that such a consequence will occur.

PRELIMINARY EXAMINATION AFTER INDICTMENT

Section 8 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(e), enacted in 1970. Moreover, it is, in our view, 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, § 5.1.02. 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,[24] it is difficult to perceive the rationale underlying the proposal that an accused person be entitled to a preliminary hearing after being indicted. If the purpose is to afford the defendant an opportunity for greater pretrial discovery than current law permits, this issue should be addressed forthrightly by a proposed amendment to Rule 16, F.R.Crim.P., rather than by the indirect and ineffective method of creating another cumbersome layer of pretrial proceedings in criminal cases. 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."

SIZE OF GRAND JURY

In addition to the preceding discussion which concerns proposals in S. 3405 for modifying grand jury practice, we have a suggestion for reform of the grand jury that is not now contained in the bill, but which is included in the counterpart measure introduced in the House, H.R. 94. The suggestion involves reducing the size of the 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 Department favors such a reduction in the size of the grand jury. Apart from the financial savings to be realized, compare *Ballew* v. *Georgia*, — U.S. — (decided March 21, 1978) (slip op. 20–21), 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. To be sure 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. We therefore support the enactment of this proposal, through amendments to the pertinent parts of Rules 6 (a) and (f), F.R.Crim.P., as well as 18 U.S.C. 3321.

[24] See Rule 5.1, F.R.Crim.P.

Senator ABOUREZK. Our next witness is Mr. Edwin L. Miller, Jr., of the National District Attorney's Association.

Mr. Miller, I want to welcome you to the committee hearing.

TESTIMONY OF EDWIN L. MILLER, JR., NATIONAL DISTRICT ATTORNEY'S ASSOCIATION

Mr. MILLER. Mr. Chairman, I would like for my written testimony to be incorporated into the record.

Senator ABOUREZK. Without objection, your written statement will be made a part of the record.[1]

Mr. MILLER. In listening to your questioning concerning attorneys in a grand jury room, I would like to point out to you that my major concern is expressed in my prepared testimony, and it has to do with the prosecution of white collar crime and organized crime, especially under Federal laws.

I do not think there is any direct comparison between handling of those types of cases under the Federal system as compared to the State system.

In your analysis of whatever studies are available, I would ask you to give special attention to the experience which might have been gained through the States in the persecution of those particular cases. In my view, being both the district attorney and formerly a U.S. attorney, there is a great difference in the handling of the prosecution of cases in which we have witnesses who are considered as citizens with a duty to come forward and testify to the truth, as compared to the situation in which we have a highly complex fraud or an organized crime matter with many witnesses, often represented by house counsel, an attorney who in effect represents the target.

It is in that area that I have the deepest concern with respect to attendance within the grand jury room by attorneys for witnesses.

I was a member of the criminal defense function of the American Bar Association and was the leading exponent of the rule adopted by the American Bar Association with respect to the prohibition of multiple representation. I think that your suggestion, Mr. Chairman, that some rule provide for the prohibition of multiple representation is excellent.

However, I would venture to say that upon enactment of such a rule the chances are there will be extensive litigation in that area before it is resolved. But at least it is a partial answer.

What I fear happening in these particular areas is that the testimony of the witness represented in effect by an attorney representing the target will not be testimony of the truth but testimony geared through the advice of an attorney who really reflects a representation not of the witness but of another person.

For that reason, that particular reason, I would at this time at least object to the permission of attorneys to be present in the grand jury room.

There is one other point.

Senator ABOUREZK. Unless that particular part were changed, is that correct?

[1] See p. 121.

Mr. MILLER. I would have to see that kind of a rule and analyze it before I would be willing to change my position.

Senator ABOUREZK. But what about the concept of a rule to prevent house counsel, for example, of a corporation from representing a middle-level executive? In concept, you can agree to that, right?

Mr. MILLER. Yes, as to the concept. Yes.

Senator ABOUREZK. We couldn't work out the language now, but if that concept were in effect, would that meet with your approval or disapproval?

Mr. MILLER. As I say, I would conceptually see it going a long way toward curing the problem. However, I would at least want to reanalyze my position upon seeing what is actually proposed.

Senator ABOUREZK. The attorney general from Massachusetts has talked to the staff, and he will testify here this week. He has said that in Massachusetts as a result of a law that they put into effect allowing counsel in the grand jury room, they are continuing to prosecute white collar crime without any problems.

Mr. MILLER. If possible, I would be delighted to have some understanding of the number of white collar crimes and organized crime cases that have been prosecuted by use of attorneys representing witnesses within the grand jury room.

This is new to me. For the most part, many of these rules which may on paper seem possible of application often are not so in practical terms. Bear in mind that in many jurisdictions, such as California, from where I come, we have the alternative of taking matters to a preliminary hearing.

It seems to me that some of the provisions that you have placed in this bill in effect stem from experiences in California.

Senator ABOUREZK. In what respect?

Mr. MILLER. I would like to dwell on one area. That has to do with the explicit rule that a prosecutor is required to make available to the grand jury any evidence which is in his possession and which he knows about which may tend to negate guilt; that is exculpatory evidence. At first blush, of course, it seems like a fairly reasonable requirement. I think it is a requirement that most—or not a requirement, but I think it is a policy of most prosecutors.

Prosecutors are interested in prosecuting cases that are viable and that have a chance of conviction. For the most part, I think they fulfill that particular requirement as a matter of integrity. In fact, it is part of the prosecutor's standard.

However, let me describe to you what happened in California to the grand jury system as the result of a case which was rendered by the California Supreme Court in 1975 and which set forth the requirement of that rule by virtue of case opinion.

From that point forward, prosecutors in California were apt to face what is known as the Johnson motion. The Johnson motion is a motion which is brought following indictment and which makes the claim, after establishing a foundation during the investigation, that the prosecutor has failed to present exculpatory evidence to the grand jury.

It usually comes in the form of a letter by defense counsel, at a point where the investigation is culminating and in which the defense

attorney, either by letter or phone call, states that the prosecutor has within his possession exculpatory evidence which he requests that it be presented to the grand jury.

When the prosecutor makes inquiry as to what that exculpatory evidence is, especially applicable in a white-collar crime case, then the defense attorney declines to give leads to the information.

After the indictment, a series of hearings are then held under the Johnson motion in which all prosecutors who have had anything to do with that particular case are brought to the hearing and are questioned extensively concerning their involvement with the case.

Review is made of thousands of documents for the purpose of determining whether in fact that prosecutor had within his possession exculpatory evidence.

In many instances, we have seen by virtue of the Johnson motion pretrial hearings which have taken considerably longer than the trial itself.

Not that any motions have been granted, because only in very limited fashions have they been, but as a result of this change in the California law and because prosecutors in California do have an alternative which is the preliminary hearing, we have virtually discontinued the use of the grand jury in California.

In fact, I would say that its demise is predictable.

Senator ABOUREZK. You have worked under both systems. How do you compare the preliminary hearing system with the grand jury system? Which would you rather work under?

Mr. MILLER. A vast majority of cases that are brought in the State system are brought by way of preliminary hearing. Less than 3 percent of cases—and it is even less than that today—are taken by way of the grand jury.

Senator ABOUREZK. What is your preference? As a prosecutor?

Mr. MILLER. I would take all street crimes by way of preliminary hearings. There are a few cases which lend themselves, especially lengthy investigations, to the grand jury system. I am talking about massive fraud cases which take considerable time to develop, and organized crime cases, and cases in which you do have an informant whose identity you wish to protect. And in some instances, cases in which the witnesses are of a tender age, and you wish to protect them.

For the most part, the preliminary hearing is the use that prosecutors choose within the system.

Senator ABOUREZK. Do you think you have lost any convictions as a result of the changeover from grand jury to the preliminary system?

Mr. MILLER. Yes.

Senator ABOUREZK. How many have you lost, do you think?

Mr. MILLER. I would say that there are a lot of cases that we have not brought to preliminary hearing.

Senator ABOUREZK. My question is, How many convictions have you lost as a result of that? Not how many cases. That is not really important.

Mr. MILLER. For those fraud cases in which we have taken the matters to preliminary hearing, I can get you the figures on that——

Senator ABOUREZK. Would you provide those for us? The question is this. I will have the staff type it out and give it to you. This question is how many convictions have you lost in your tenure as prosecutor as

a result of not using the grand jury system vis-a-vis the preliminary hearing system.

Mr. MILLER. I would be more than happy to supply that.

Senator ABOUREZK. Without objection, that material will become part of the hearing record at this point.

[Material referred to follows:]

The cases listed below resulted in convictions following a grand jury indictment but would not have resulted in convictions had the cases been taken through preliminary examination. The cases involved several millions of dollars.

1. *Mark V*—trial time: approximately 6 months. (Fraudulent real estate investment and securities scheme.)

2. *Ryan Group West*—trial time: approximately 8 months. (Fraudulent real estate investment and securities scheme.)

3. *Dr. Privitera*, et al.—trial time: approximately 5 months. (Medical health fraud selling unproven cancer cures.)

The first two cases are examples of fraudulent investment securities schemes which involved, among other charges:

1. Maintaining a scheme to defraud by the use of securities;

2. Fraudulent sale of securities; and

3. Selling unqualified and/or unregistered securities.

There is an absolute three-year statute of limitations involving schemes concerning the sale of fraudulent securities. In most instances, the fraudulent nature of these schemes does not immediately come to light. The *Ryan Group West* prosecution should serve as an illustrative example of the impossibility of proceeding by way of preliminary hearing rather than grand jury indictment.

In *Ryan Group West*, the scheme had been in operation for a number of years prior to December of 1974 when the entire venture became insolvent and ceased its operation. The majority of investors in this scheme were individuals who had invested pre-December 1973, more than one year before the end of the scheme. Most of the investors were unaware that they had been victims of a fraudulent land fraud/securities scheme in that they had been receiving financial payments according to the schedules which had been set up by the defendants. These continued payments were possible because, in essence, the operation was a Ponzi scheme; i.e., a portion of the money taken in by an investor today is used to keep current the payments which were received by an investor who paid his money yesterday. In effect, the scheme robs Peter to pay contractual payments to Paul.

The case first came to light within several months of December of 1974, following which voluminous documents and records were acquired by the District Attorney's office. The records which were acquired comprised approximately 80 cartons of various types of business records, documents and papers as well as between 30 and 40 separate ledgers. The investigation, examination, compilation and analyis of these business records took approximately one year's time for an attorney and an investigator, as well as staff auditors and accountants. The case went to the grand jury about April of 1976 and took approximately one to two weeks of grand jury testimony. The trial began approximately one year later and the actual trial time was eight months.

The impossibility of taking this case to preliminary examination results from the following:

After the complaint would have been filed, it would, of course, be subject, as any complaint, to demurrer and the time involved in preparation and hearing of the demurrer. Then, defense counsel would naturally be entitled to discovery which, in this case, consisted of copying and/or the examination of the 80-odd boxes of business records. In addition to the actual discovery, we can expect numerous motions to be brought for discovery: in essence, under these circumstances the defense would be entitled to open-ended discovery. At the time of the preliminary hearing, the defendants would, of course, be entitled to bring a motion to suppress evidence which had been acquired. This motion in the Superior Court in the instant case took approximately two weeks of court time, not counting preparation time. This results from existing law which provides that defendants are given wide latitude for cross-examination of prosecution's witnesses for discovery purposes. The actual preliminary hearing itself could reasonably be expected to be at least one-half, if not longer, than the actual time that the case was tried in the Superior Court. Therefore, we could have expected the preliminary hearing itself to take approximately four months.

Following the preliminary hearing, the case would be bound over to the Superior Court and it is at that time that the three year statute of limitations on the securities fraud violations is tolled. Thus, any victims of this scheme who paid their money more than three years prior to the filing of the charges in the Superior Court could not be included as victims. It can easily be seen that the delay in lengthy white collar criminal prosecutions brought about by the extended discovery proceedings and extended preliminary hearings works to the great detriment of the prosecution because there are many victims who can no longer serve as the basis for substantive charges upon which the defendants may be tried.

In the Superior Court given the motions to set aside and the extraordinary writ procedures which are available to the defendants following the hearing on that motion, the prosecution is faced with further delays. These delays in and of themselves provide a great impediment to the prosecution of this type of white collar activity and, when combined with an eight month jury trial would make the successful prosecution of this type of crime extremely difficult, if not impossible, primarily because of the nature and type of individuals who are by and large the victims of a scheme such as the one involved in *Ryan Group West*.

Delay works to the benefit of the defense. In *Ryan Group West*, the majority of the victims were middle class, middle aged and older people who had invested their life savings in this fraudulent scheme. Many of the investors were widows and many were retired people. Even with the use of a grand jury to expedite and bring about a speedy trial of this case, the prosecution lost count over and above those that were lost because of the statute of limitations having run because of the deaths of the elderly victims and witnesses. If *Ryan Group West* had proceeded by way of preliminary examination, it is easy to see that the trial of the matter would have been delayed as much as a year or more, thereby resulting in the loss of additional counts because of the deaths of elderly people who were preyed upon by the defendants in this scheme. Further, with the passage of time, it becomes increasingly difficult to locate witnesses because of their tendency to move from the jurisdiction.

A similar scenario could be related for the *Mark V* case which also went by way of grand jury indictment instead of preliminary hearing. The same problem existed concerning elderly witnesses who are by and large the victims of many of these schemes and who, unfortunately, became unavailable to testify against those who devised and maintained this scheme to defraud.

In the case where Dr. Privitera and others were charged with conspiracy to sell unproven cancer nostrums, even with using the grand jury, at least one count was lost because of the death of an elderly cancer victim. It would be speculative to say for certain that this particular case would not have been won had the case been delayed in the same manner and fashion because of a lengthy preliminary hearing because of the use of certain undercover law enforcement operatives, but it is fair and accurate to say that in cases involving health frauds where the defendants prey upon those who are the victims of catastrophic diseases, the delay most certainly works to the benefit of the defendants. In this type of prosecution, time, of course, is of the essence.

Since the advent of the *Johnson* case and "The Right of Financial Privacy Act" (effective January 1, 1977), with one exception, no major fraud cases have been taken to the grand jury after January 1, 1977. The provisions of the "Privacy Act" adopted a standard of "probable cause" for the issuance of a grand jury subpoena which is the same standard for the issuance of a search warrant. Obviously, this change coupled with the *Johnson* case foreclosed further use of the grand jury in fraud matters and brought our prosecution of major fraud cases as described above to an end. Instead, we have taken fraud cases of a lesser magnitude to preliminary hearing, primarily after the issuance of search warrants. Since Jaunary 1, 1977, 42 fraud cases have proceeded by preliminary hearing. In the meantime the California legislature has recognized the damage caused by adopting the inane "probable cause" standard and has recently adopted a new "reasonable inference" standard to become effective January 1, 1979. Thus, future use of the grand jury in fraud cases is now at the crossroad. Currently, two major fraud investigations are in limbo until January 1, 1979, because probable cause does not exist to permit the matters to be taken to preliminary hearing and because the current restrictions for issuance of grand jury subpoenas do not allow us to establish probable cause. These investigations involve several millions of dollars.

Senator ABOUREZK. Also, if you have the statistics, cite the source and the basics for the statistics. If you will, that will be helpful to the committee.

Mr. MILLER. Right.

This brings me, Mr. Chairman, to a thought that I have expressed in a portion of my prepared testimony. It is clear to me, Mr. Chairman, that the grand jury system, as we know it on the Federal side and historically which we have known to be a nonadversary system, by virtue of this bill will become I think an adversary system.

What you have provided for—and perhaps it is just a transition—is a postindictment preliminary hearing. I am not sure exactly what the purpose of that is except to say that inasmuch as that hearing would be held before a magistrate who has no authority to dismiss an indictment, I can only conclude that the purpose is to provide postindictment discovery by way of cross-examination.

It seems to me that the course that you are taking here in providing more and more of an adversary situation within the grand jury system perhaps should lead you to seriously consider a constitutional amendment which would provide for a preliminary hearing.

Senator ABOUREZK. May I ask this? You do not really seem to object to a preliminary hearing system. Am I understanding that you don't object to it, but you prefer a grand jury system without the Johnson motion?

Mr. MILLER. For certain kinds of crimes. There are certain crimes under the State's system that lend themselves to the grand jury system.

On the Federal side, of course, you are bound by the fifth amendment. So, consequently, a great many crimes which otherwise would be handled in much the same fashion as they are handled on the State side simply cannot be handled in that manner because of the fifth amendment restrictions.

Senator ABOUREZK. Let me ask you this question. If the grand jury were changed from its present function—and I would have to define what I see as its present function as a kind of spear for the prosecutor to do with what he pleases. I don't know if you agree, but perhaps you would—but is that not what happens now at the Federal level? Do you disagree with the notion that the grand jury does exactly what the prosecutor tells it to do?

Mr. MILLER. Well, I would say that of the matters, typical matters that are presented to the Federal grand jury, that the overwhelming number of cases presented result in the return of an indictment.

There are very few no bills, I think, statistically on the Federal side.

Senator ABOUREZK. Would not that tend to bear out the statement I just made?

Mr. MILLER. Except for this, Mr. Chairman. It is a practice of mine on the State side that my prosecutors do not argue or debate with the grand jury about the return of an indictment. That is a decision left to the grand jurors.

On the other hand, obviously if the presentation is made and if no negative comments are made by the prosecutor or if no request is

made to no bill then the chances are in most instances—except in rare cases—that an indictment will be returned.

This does not mean that the prosecutor is actively within the grand jury arguing, and debating, and attempting to influence grand jurors to return an indictment. That is part of their function. But it stems from hearing the testimony that is presented to them. It is their obligation to return an indictment if probable cause is found.

Senator ABOUREZK. If the grand jury were made somewhat independent of the prosecutor and if there were procedural protections for the witness, would not that be a better system than the preliminary hearing system?

In South Dakota we have a preliminary hearing exclusively. We are entitled to use the grand jury there, but it is very seldom used. It is occasionally used by the attorney general, but county prosecutors hardly ever convene a grand jury.

It would seem to me that under a preliminary hearing, I have seen in most charges that are brought against a defendant, he is bound over by the judge in a preliminary hearing.

Mr. MILLER. That is right.

Senator ABOUREZK. For trial in the circuit court.

Mr. MILLER. That is right.

Senator ABOUREZK. At least you have the protection that the judge knows what the law is and he understands what a prima facie case is, whereas most grand jurors do not understand that and that have to rely upon the prosecutor.

When I say make the grand jury independent, I mean independent counsel advising the grand jury as to what the law is and the relationship between facts as presented to the grand jury and the law, in addition to procedural protections for the witness.

In a nutshell, that is basically what the legislation is that we are discussing.

Would not that be a much better system under those conditions than a preliminary hearing system.

Mr. MILLER. Not necessarily. It depends upon the kinds of cases that are being presented. I think that if you are talking about a bank robbery case in which you have four or five witnesses who have observed someone, then that is the kind of case, much the same on the State side as a theft or burglary or robbery, or the kind of case in which you have primarily percipient witnesses to a crime.

In that situation a preliminary hearing is the most logical way to bring the case forward. But when you have the kinds of cases that I made reference to earlier and when you are talking about an investigation that is complex and involves sometimes hundreds of thousands of documents and sometimes in the neighborhood even on the State side of witnesses numbering 50, or 60, or 100, and the investigation takes a protracted period of time, and the crime is a complicated one, then I think that is something to be looked at by a grand jury.

It is especially true if you have informants who testify. I think that lends itself to the grand jury. I think the grand jury system is by far the more preferable.

Philosophically and from a cost standpoint, I think it is preferable. I think it would be better in those terms as compared to a protracted preliminary hearing.

Senator ABOUREZK. Even in that situation, would it not be better to have an independent grand jury with procedural protections for witnesses?

Mr. MILLER. We have considered this in California on the States side. Currently the law provides that the district attorney is the adviser to the grand jury.

From my own personal experience, I do not believe that system has shown any abuses. I think the advice that has been given to the grand jury is in good faith and is sound advice. I would really hesitate to change that system.

Senator ABOUREZK. Perhaps in your county that would be true, but I think you will have to concede that perhaps other prosecutors are not as fair as you are.

Mr. MILLER. I would not want to comment on that.

Senator ABOUREZK. There is a chance. Let me say it that way. There is a chance they are not as fair as you are.

Mr. MILLER. My experience in advising the grand jury through the district attorney's office has been a satisfactory one.

Senator ABOUREZK. I will accept your word on that. I am just asking this—Don't you think there are abuses by the prosecutors on the Federal level?

Mr. MILLER. I left as U.S. attorney in 1969. So, I would hesitate to pass judgment on present Federal prosecutors. I think that at least within our district in San Diego and in adjoining districts I have seen no evidence of abuse.

Senator ABOUREZK. I understand your position. When people ask me if anybody in South Dakota is a good person. I always say, "Yes, even those who voted against me."

Mr. MILLER. Right.

Senator ABOUREZK. We have the same sort of requirements on us here now.

Mr. MILLER. Right.

Senator ABOUREZK. Mr. Miller, are you representing the National District Attorneys Association?

Mr. MILLER. Yes, I am.

Senator ABOUREZK. Do I understand correctly that the executive committee supports the ABA's grand jury reform position?

Mr. MILLER. I am not sure about that. Perhaps you should ask Mr. Gerstein.

Senator ABOUREZK. I think it is correct. The National District Attorneys Association does support the ABA's proposal. That puts your personal testimony in a bit of conflict with that of the organization, doesn't it?

Mr. MILLER. Our position at the executive board meeting when this matter was discussed in Chicago was to oppose the rule that would permit attorneys to appear in the grand jury room.

Senator ABOUREZK. Was that a vote of the executive committee in Chicago?

Mr. MILLER. Right. Bear in mind, Mr. Chairman, that I appeared before the House Judiciary Committee on H.R. 94 and testified in that matter representing the National District Attorneys Association. The matter was thereafter considered by the executive board follow-

ing that testimony. Copies of that testimony were provided to the board of the National District Attorneys Association. They supported the position that I took there which is similar to the position I have taken here.

Senator ABOUREZK. I wonder if you would clarify your position on exculpatory evidence without regard to the California procedure but solely on the Federal level. What do you believe should be the case there?

Mr. MILLER. I believe it should not be handled by way of a rule. I am talking about a statutory rule. This is because of the problems that I encountered and the experience that I had under the *Johnson* motion in California.

If it is to be handled in any way, I would rather have it handled in a nonstatutory fashion because of this experience. I have not described in great detail some of the unique situations that arose under the *Johnson* case.

Senator ABOUREZK. Disregarding the so-called *Johnson* motion, if that were not available on the Federal level, but if the prosecutor were required——

Mr. MILLER. As a matter of policy?

Senator ABOUREZK. Yes, as a matter of policy under law, you would agree or disagree with that?

Mr. MILLER. I would agree that he present exculpatory evidence. I would not want it to be incorporated into a rule which would then result in the kind of motions that I have experienced. I would rather have it handled in a manner internally by way of policy because otherwise the same thing is going to happen on the Federal side that happened on the State side.

Senator ABOUREZK. I do not think you can handle it by guidelines, to be very honest with you. As we saw this morning in talking with Mr. Heymann, there is no interest or requirement in fact that the guidelines be followed, so it is useless.

Let me ask you this. What about a minor modification in how the possibility of exculpatory evidence is brought up? Would it not be much better if the burden would be on the defense attorney, if he said that the prosecutor had neglected or failed to introduce exculpatory evidence, but that the burden should be on the defense attorney to show what it is if he knows?

Mr. MILLER. That would be helpful. Of course, I am sure that you are aware of the fact that exculpatory evidence must be handed over to the defense attorney anyway, postindictment under *Brady* v. *Maryland*.

It seems to me that is a rule that is in existence now and one that could be maintained.

Senator ABOUREZK. I'm looking at your written testimony on page 9, about the middle of the page, you say, "such information is, in fact, best saved for trial," You are talking about exculpatory information. You say, "best saved for trial and will be made available to the defendant under the normal discovery process."

Mr. MILLER. That is right. The provisions of section 3330C relating to exculpatory evidence will wreak havoc in the Federal criminal justice system.

Senator ABOUREZK. Let me ask you this. Since when does evidence showing someone's innocence wreak havoc, unless your definition of criminal justice is different from mine?

Mr. MILLER. What you are doing here is subjecting the Federal grand jury system to the same attacks which prosecutors in California have generally experienced now for the last 3 years. The same types of motions are going to be made. In fact, this could be handled in a much better fashion, if you wish to, by way of normal discovery postindictment.

Senator ABOUREZK. Let's talk about that. If a defendant is innocent and shown to be innocent and if there is evidence available to show him innocent, why would you want to put that defendant through the expense of a trial and extensive discovery? Why would you want to do that?

I understand how prosecutors think, but surely don't you have some sympathy for people who are not guilty?

Mr. MILLER. Yes, but when we are talking about exculpatory evidence, we are talking, in many instances, about evidence which may tend to but which may not necessarily show that the person is innocent.

Senator ABOUREZK. Is that not best left to the grand jury to decide instead of the prosecutor?

Mr. MILLER. No, that is best left for the trial. As a matter of fact, it is best left for the trial by virtue of discovery postindictment and in pretrial.

I am talking about the motions themselves because what I am describing to you is the use of these motions when prosecutors do not have exculpatory evidence or, if they do, they do not recognize it in one document out of 100,000 and where interminable motions are brought which require each and every prosecutor to become a witness in his own case.

Senator ABOUREZK. What about the simple change that I suggested that the burden be upon the defendant's attorney to describe which exculpatory evidence it is and where it is? Certainly you should not be allowed to level a shotgun blast and say, "I know he has got some somewhere."

Mr. MILLER. I do not want to rule that out, but let me give you a good example of what I am talking about.

You have a person who is a target and through his attorney he contacts the district attorney prior to indictment and informs him that that individual has exculpatory evidence. I am talking about the target, the defendant. That defendant wishes to present that evidence to the grand jury.

Upon that request, we agree that the defendant may come into the grand jury and testify as to the exculpatory evidence. At that point, the defense attorney says:

> We have the exculpatory evidence and he is willing to testify, but only under the condition that he not be asked any questions by the prosecutor.

This resulted in a monthlong postindictment exculpatory hearing under the *Johnson* motion.

Senator ABOUREZK. How can a witness come in and lay that kind of condition down?

Mr. MILLER. He can't.

Senator ABOUREZK. That's an impossible situation.

Mr. MILLER. Prosecutors would not permit a person to do that.

Senator ABOUREZK. Mr. Miller, may I interrupt you. What you just described is a situation which could not exist. How can that exist in the Federal grand jury system under anybody's rules?

Mr. MILLER. It could not exist.

Senator ABOUREZK. Why do you bring it up then?

Mr. MILLER. Because the only reason that it would be done in the first place would be to give that person some foundation by which to bring a postindictment hearing on exculpatory evidence.

Senator ABOUREZK. You keep disregarding the presumption that I am making which is that if a defense attorney believes that if exculpatory evidence exists, he should reveal it or describe it.

In reality if the defense attorney says there is exculpatory evidence, then he must know something about it. If he does not, then how can you allow him to make a shotgun charge?

Mr. MILLER. That is the point that I am making.

Senator ABOUREZK. But that is in California. I am taking your word for what happens in California. That is not necessarily what has to happen anywhere else.

Mr. MILLER. It would happen under the terms or provisions that have been delineated in this bill.

Senator ABOUREZK. If they are delineated wrongly, then we can change it.

Mr. MILLER. That is why I am here.

Senator ABOUREZK. The language is not final in this bill, not by a long way.

But when I ask you to suggest a change, you insist on saying that there is no possibility of change.

Mr. MILLER. I am looking at the provisions of this bill as they exist today. I am more than happy to take a look at whatever amendments or revisions are made in order to clear up the problems that I am describing.

Senator ABOUREZK. That is the purpose of hearings, which is to refine and improve upon legislation that is introduced. Nobody pretends that this bill or any other bill is perfect.

So what we are asking for are suggestions for improvements. But though we talk about improvements, you refuse to talk about them.

Mr. MILLER. No; I am not refusing. I will be more than happy to look at something of that nature to see whether there is a problem. I don't know that it would. I hope it might go toward curing the problem, but I don't like to foreclose myself by saying that if you put in some provision here that I would not have the opportunity to examine it to see whether it cured whatever problem is raised.

Senator ABOUREZK. I am asking you this question conceptually without regard to the language. If the burden of showing the existence of exculpatory evidence rests upon the defense attorney or the defendant, then would that solve your problem with regard to exculpatory evidence?

Mr. MILLER. It would go a long way toward solving it.

Senator ABOUREZK. What more would be needed?

Mr. MILLER. It would have to be spelled out in detail as to what that defense attorney would have to do in order to adhere to that particular rule.

Senator ABOUREZK. That is fair.

Mr. MILLER. To the extent of making that material available.

Senator ABOUREZK. So, if that were corrected, then do you believe that you could support the legislation?

Mr. MILLER. That would go a long way toward it; yes.

Senator ABOUREZK. I want to express my thanks to you. You have come a long way. I certainly appreciate that testimony. This has been helpful and beneficial to the committee.

Let me express my deep thanks to you, Mr. Miller, for that.

The record will be open if you have anything else you would like to submit, and we would appreciate your sending it in.

Mr. MILLER. Fine.

[The prepared statement of Mr. Miller follows:]

PREPARED STATEMENT OF EDWIN L. MILLER, JR.

Members of the committee: I am honored to have the opportunity to discuss with you the ramification of S. 3405.

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, the President of the California District Attorneys Association, Vice-president of the National District Attorneys Association and a former member of the American Bar Association Committee on the Defense Function. I would hope to give you a view of S. 1449 which you might not otherwise receive.

I was called upon last year to testify before a House Committee with regard to similar legislation, H.R. 94. Following that testimony, I received a number of questions from the Committee which I answered in writing. I am enclosing a copy of the questions and answers I submitted because I believe the issues may be of concern to members of this Committee and may, therefore, be of assistance. I have attached the questions and answers as Appendix A to this statement.

The Grand Jury is one of the oldest institutions of Anglo-American civilization with a history of more than 900 years from its origins in the common law until 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 of 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 a presentment or indictment of a grand jury * * *."

The federal grand jury as part of our system has the responsibility to investigate alleged criminal activity and to accuse those persons suspected of crimes.

S. 1449 radically modifies the conceptual function and actual operation of the federal criminal justice system. Some of the individual proposals in the Bill do have merit. In reality, however, most are either already incorporated in federal statutory or decisional law or are generally observed by federal prosecutors. These are measures which limit grand jury investigation 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 and will institute myriad procedural requirements which will serve only to delay and hinder operation of the criminal justice system.

The grand jury as the accusatory and investigative mechanism of the federal criminal justice system stands at the initiation and not at 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 action, 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. The witness is not being proceeded against and probably will not be; however, if the witness becomes the accused—as opposed to one who's aid is sought to uncover the facts—he will be accorded his full panoply of rights in the adversary stage of the system.

A major thrust of the Bill as it relates to the role of the witness is a concern with providing protections for the witness and to set up numerous procedural devices to insulate the witness from the government and the grand jury. I submit the elaborate and obstructive procedures contained within the Bill will not significantly impact the average citizen-witness who will appear and testify under such procedures as a person would do in any other case. The procedures, however, will provide a grant of protection for the sophisticated witness and will be particularly beneficial to the subordinate of organized crime figures or of corrupt officials or corporate entities. In such instances the witness, acting in fact as the agent of the potential defendant, will use those procedures to obstruct and frustrate the grand jury's investigation of the real target.

It is important to remember that the grand jury inquiry is not itself an adversary proceeding and, therefore, 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 accusatory responsibility. Restrictions on litigation of issues involving conduct of gand 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 upon a policy of discouraging the "litigation of issues only tangentally related to the grand jury's primary objective." *United States* v. *Calandra*, 414 U.S. 338, 343–344, 38 L. Ed. 2d 561, 94 Sup. Ct. 613 (1974).

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.

While there are a number of problem areas within the Bill, I will limit my comments to those areas of major concern, the first of which is contained in the language of Section 3330C(b) and 3330C(d)(3) which I believe will result in most if not all indictments handed down by a grand jury being later challenged by lengthy and costly legal motions.

Section 3330C(b) of the bill provides:

"(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."

Section 3330C(d)(3) of the bill provides authority to dismiss for a violation of the former Section as follows:

"(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—

"* * * (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 * * * ."

Those provisions will, if the California experience is representative, 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 integrity and legal abilities of the United States Attorney.

Motions will be heard to determine if United States Attorneys have been responsible in their efforts to identify and present favorable defense material and damaging evidence against the credibility of prosecution witnesses which would "tend to negate guilt". It will be necessary to determine exactly what was in the possession of the prosecutor at the time the grand jury was hearing evidence, the prosecutor's state of mind concerning that information and his diligence or lack thereof in the review of the material available to him.

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 decision entitled *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 besieged by defense attorneys bringing so-called "Johnson motions" alleging the prosecution failed to seek out and find any item which would tend to explain 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 is required to start again with the attendant incurrence of additional costs.

It would seem clear from an insurance carriers' point of view that the failure of a defense attorney to attack an indictment under this provision would border on malpractice. This provision would also require the attorney to go behind the indictment and obtain 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 provisions of Section 3330C(d)(3) of the Bill provide that it is the duty of the district court to dismiss a grand jury indictment where the attorney for the government has not presented all of the evidence in his or her possession which the attorney knows will tend to negate the guilt of the person indicted. In order to determine whether such circumstances exist, a lengthy evidentiary hearing will be necessary. The attorney for the defense, of course, would have an appeal from an adverse ruling by the district court and delays caused in the prosecution of criminal cases will become real, not just 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 the choice of either presenting evidence to a grand jury or to a magistrate at a preliminary hearing. Federal prosecutors do not have that choice; the United States Constitution mandates that they proceed by grand jury indictment.

As an interesting side note, California provides broad discovery rights to defendants, and in cases of preliminary examinations it is extremely rare to see defense counsel present exculpatory evidence before the magistrate. Thus, we see the irony of the presentation of exculpatory evidence by prosecutors before grand juries and the absence of such evidence in preliminary hearings where the defendant and counsel are present.

In many cases, the prosecutor is in the possession of hundreds of thousands of documents. This is not uncommon in federal prosecutions involving fraud and complex conspiratorial schemes. Potentially, each document may have some germ of information which a reviewing court at a later time will deem exculpatory. Thus, at the earliest stage of presentation the prosecutor will be required under this bill to comb each document searching for some piece of exculpatory information which must be produced under pain of dismissal of the grand jury indictment when such information is, in fact, best saved for trial and will be made available to the defendant under the normal discovery process. The provisions of Section 3330C relating to exculpatory evidence will wreak havoc in the federal criminal justice system.

A second concept contained in this Bill which is taken from the *Johnson* case is the idea of a post-indictment preliminary hearing. This idea has its roots in a procedure recommended in a concurring opinion in the *Johnson* case by Justice Stanley Mosk of the California Supreme Court.

In that opinion Justice Mosk somewhat cavalierly dismisses the key argument against the post-indictment preliminary hearing to the effect that such hearings are superfluous.

The primary purpose of the presentation to a grand jury or to a magistrate at a preliminary hearing 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. The reasonable doubt standard applicable to the question of guilt and innocence is not

relevant at either a grand jury hearing or a preliminary hearing. Jeopardy does not attach.

Therefore, the constitutional requirement of the showing of probable cause is completed when an indictment is returned. If the indictment is invalid, then that question is the subject of procedures before the district court to test the validity of the indictment. I do not believe, however, that the purpose of the Bill is to give a preliminary hearing magistrate the power to overturn an indictment by a grand jury. In fact, the preliminary hearing sections of the Bill under Section 3368 do not give the power to the judicial officer conducting such hearing to set aside the grand jury indictment. What, then, is the purpose of a post-indictment preliminary hearing?

I submit the only purpose under the Bill of a post-indictment preliminary hearing is to provide a discovery vehicle for defense counsel to cross examine prosecution witnesses. If that is the true purpose of the Section and, in fact, Congress desires to broaden the discovery rights of persons accused of crime in the federal system, then a modification of federal Rule of Criminal Procedure 16, is in order, but discovery should not be expanded through the guise of a second superfluous probable cause hearing.

If, however, the Committee believes that every defendant in a criminal case should be entitled to a determination of probable cause by a judicial officer, 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 the two provisions taken from California's *Johnson* case effectively frustrate the indictment function of the grand jury and should not become law.

In the federal system the grand jury has the responsibility to investigate criminal activity. Many of the proposals contained in S. 3405 will be detrimental or will 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, the requirements of an arbitrary time period for notice to all witnesses and the creation of of an excuse by witnesses not to testify upon the technical failure of the court to recite a litany of findings at the impanelment of the grand jury.

Both proposals will create new grounds for dismissal of criminal charges and provide the basis for legal motions and hearings which do not now exist in the federal system and which 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 S. 3405 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 objections 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 a significant ramification of this legislative door-opening: The Sixth Amendment of the Constitution requires counsel. The courts have toyed and struggled through the decades in determining which legal proceedings should provide a person with a constitutional guarantee of counsel. If the legislative branch decides a grand jury proceeding is such a hearing, the courts would have to find that any limitation—such as that written in S. 3405—on the *effective* representation of those clients before a grand jury 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 proposed change in procedure also raises the question of the purposes of the grand jury. Isn't it to seek the truth? Surely it is clear that when a witness is being advised as to how to answer questions by this 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 asked by the prosecutor, this provision raises the question of pretestimony discovery of the prosecutor's files. An attorney would be effectively blocked from competently advising his client during testimony unless he is 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 for 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 coverups when the attorney representing the "small fry" is being paid and controlled by the president of the corporation or the chieftain of organized crime?

How do you deal with investigation of 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—a 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 as to how to respond to it, can request permission to be excused in order to consult with counsel. Counsel remains outside the grand jury room. The permission to consult with counsel, if not abused, is routinely granted. In addition, 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 room 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.

To compound the problems, Section 3334(a) and (b) permit the delivery to the witness or to the witness' counsel, any statement made by the witness prior to testimony and the transcript of the witness' testimony before the grand jury within 48 hours of the conclusion of that testimony. In those cases in which "house counsel" retained for the true target of the investigation is permitted to have such information, fabrication of testimony, loss of evidence, and intimidation of witnesses will be a virtual certainty.

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 expiditious administration of the criminal laws." *United States* v. *Dionisio*, 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 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 of 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 Appeal 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

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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, 607–608 (D.C. Cir. 1976) (per curiam).

[3] Id. at 609. 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 Impaneled 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 "8 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, "8 More Pressmen Are Indicted," id., July 22, 1976; "Seven Pressmen Are Indicted For Rioting, Damage at Post," id., July 15, 1976.

[6] See, "2 Post Pressmen Plead Guilty, Will Testify in Damage Probe," id., June 2, 1976.

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 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 Goppman,[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 that 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 interest 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 these 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 enhance 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 nonexistent. 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

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[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.).

[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.

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 court.[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:

"Not infrequently, particularly in investigations of organized crime and of business frauds and other white-collar 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 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 his attorney represents or with 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."

The 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 next concern when it comes to the investigative function of the grand jury is the numerous attacks which will be brought against grand jury subpoenaes as a result of this Bill. In fact, if the wording of Sections 3329(a) and Section 3330B become law, a lawyer representing a witness would once again 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 Loparto*, 511 F. 2d 1150 (1st Cir. 1975); *Universal Manufacturing Company* v. *U.S.*, 508 F. 2d 684 (8th Cir 1975); *In Re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 991, 994–995 (DC., R.I. 1975); *In Re Morgan*, 377 F. Supp. 281 (Southern District, N.Y. 1974).

Under the Bill the provisions of Section 3329(a), particularly commencing at Line 20 of Page 8, provide:

"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."

By this provision, Congress has given to a witness before the grand jury, standing to challenge the impanelment process of the grand jury including the litany to be provided the grand jury by the District Judge. This will be a fertile field from which imaginative counsel will develop challenges to procedures which

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[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."

[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 (Feb. 1976); id. at 25 (Aug. 1975).

[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 on Immigration, Citizenship, and International Law), pp. 55–56.

have no relevance to the witness' appearance or the protection of any legitimate rights of a witness appearing before the jury.

Under Section 3330B, the Bill requires a one week notice period as well as notification of certain rights to the witness.

With regard to a period of one week notice, I submit such statutory period is neither necessary nor desirable. In many instances, witnesses actively seek to avoid service and are often located on the spur of the moment. A grand jury subpoena may have to be issued within less than a week of the appearance and without time to prepare a necessary motion and appropriate showing to a district court to shorten the notice time period. Again, it must be remembered that the persons who are the subject of the subpoena are not defendants but rather witnesses who should not be placed in the position of adversaries to the grand jury.

Section 3330B continues on in subsection (d)(1) and authorizes the court to quash the subpoena where it finds that,

"(A) a primary purpose or effect of requiring such persons 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 subpoena would be unreasonable or oppressive as such subpoena 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 subpoena is to harass the witness." (Emphasis added.)

The requirements contained in these Sections requiring the prosecutor to demonstrate the evidence sought is: relevant to the investigation, properly within the grand jury's investigative authority 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 1)*, 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 matter of relevance is particularly difficult to demonstrate at early stages of a grand jury investigation when the degree of involvement of a witness or the total ramifications of the scheme under investigations are not always clear.

"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. 833 (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 results 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 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).

Moreover, a requirement that the prosecutor establish the evidence is not cumulative requires probing by the district court and the witness into the material previously furnished the grand jury and an exploration of the testimony to

be elicited from the witness. In short, an adversary proceeding would be necessary. The grand jury being a body called upon to inquire as to whether crime has been committed and to investigate the crime cannot be compelled to litigate with each witness before it the scope of the witness' testimony and objections to the cumulative nature of such testimony and ever hope to complete its investigation or to maintain any semblance of grand jury secrecy. Such proceedings will not only serve the purpose of delay but will serve the purpose of permitting again the "house counsel" ostensibly representing the witness, but in truth loyal to the target defendant, not only to obstruct but to probe for disclosure of information which will aid his principal in avoiding apprehension or successful prosecution.

The provisions of Section 3330C of the Bill are of concern in that they will dramatically change the role of the grand jury and the prosecutor in the federal criminal justice system. I have previously addressed the issues dealing with Section 3330C(b). The provisions of subsection (a) of that Section provide:

"(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."

This provision applies an exclusionary rule to a non-adversary hearing. Very often the determination of whether or not an act is "unlawful" or "in violation of constitutional rights" can only be determined after lengthy litigation in an evidentiary hearing. The grand jury system has never contemplated such evidentiary hearings. Moreover, an evidentiary hearing at that stage is unnecessary for the reason that existing rules permit the litigation of such alleged unlawful acts of alleged constitutional violations prior to trial of a criminal case.

In addition to establishing the normal exclusionary rule that would be applicable to a trial, this provision coupled with Section 3330C(d)(4) provides a right by the defendant to obtain dismissal of the indictment for the introduction of such "unlawfully" obtained information. This right has not heretofore existed and will institute a new level of litigation in criminal cases. The above Section apparently provides standing on the part of the defendant to challenge the indictment and to raise alleged violations of a witness' constitutional rights. Ordinarily, the Fifth and Sixth Amendment rights of an individual are deemed personal and no standing exists in a third party (in this case the defendant) to raise those rights. In order to raise Fourth Amendment rights the person seeking standing must show some connection with the property or the premises. This Bill would provide a form of vicarious standing beyond that existing to our knowledge in any jurisdiction in the United States. This will cause another level of interminable pretrial litigation.

In summary, the federal system as opposed to a system such as California's, 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 both defendants and witnesses will wreak havoc with literally thousands of federal prosecutions. Even the so-called routine cases which heretofore have not presented appreciable procedural problems, either for the Government or in the nature of significant claims of violation of substantive rights of individuals, will be affected by these new procedural requirements.

In the special cases in which witnesses are likely to seek the assistance of counsel or in which the issues of exculpatory evidence are 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 depredations of sophisticated white collar criminals and the ever increasing activities 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 places unnecessary restrictions on the ability of the Government to deal with these 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 including persons called as witnesses before the grand jury and those persons who are the subject of the grand jury investigation.

Ironically, the intended reforms in this legislation offer protection to those who need it the least, the sophisticated witnesses, the associates of corrupt

officials and organized crime leaders. It will provide an insulation from prosecution for those leaders of crime who should be the targets.

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.

APPENDIX "A"—QUESTIONS DIRECTED TO EDWIN L. MILLER, JR., DISTRICT ATTORNEY, SAN DIEGO, CALIF. (REPRESENTING THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION) WITH REGARD TO H.R. 94

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 2. 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 3. 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 4. 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 of 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 of only 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 5. 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 by modification of Rule 16 of the Federal Rules of Criminal Procedure. Discovery should not be the purpose of a preliminary examination.

Question 6. 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 their privilege against self-incrimination runs the risk of creating a false aura of consciousness of guilt before the grand jury.

Question 7. 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 paticular benefit nor any particular detriment. The cases simply were not good test cases. Allowing a witness to exit 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 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 corrruption 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 8. Why can't 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 this 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/clien 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.

Senator ABOUREZK. Our next witness is Mr. Richard Gerstein of the American Bar Association.

TESTIMONY OF RICHARD E. GERSTEIN, CHAIRPERSON, COMMITTEE ON THE GRAND JURY, CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY LAURIE ROBINSON, ASSISTANT DIRECTOR, SECTION OF CRIMINAL JUSTICE

Mr. GERSTEIN. Good morning, Senator. Senator, this morning I have with me Ms. Laurie Robinson, who is the assistant director of the criminal justice section of the American Bar Association. We appreciate the opportunity to appear here this morning to present the views of the American Bar Association.

I have submitted a prepared statement, which I do not intend to read to you.

Senator ABOUREZK. Without objection, your prepared statement will be made a part of the hearing record.[1]

Mr. GERSTEIN. Suffice it to say that I have been a prosecutor for 25 years, and for 21 of those years I served as the elected State attorney

[1] See p. 139.

of the 11th Judicial Circuit of Florida, which is the greater Miami area. I resigned in January of this year, and I am now engaged in the private practice of law. I have been chairman of the criminal justice section of the American Bar Association Grand Jury Committee for the past 4 years, and I am the chairman-elect of that section of the American Bar Association.

I was interested to listen to the testimony of prior witnesses, especially the witnesses of the Department of Justice, who evidenced considerable interest in a study that would show the efficacy of permitting witnesses before grand juries to have counsel present in the grand jury room with them and who expressed an interest in those States that permitted this.

Interestingly enough, we in recent months made a request—and by we, I am referring to the criminal justice section of the American Bar Association and its Grand Jury Committee—of the U.S. Department of Justice Office for Improvements in the Administration of Justice headed by Assistant Attorney General Daniel Meador for a grant of some $40,000 to conduct just such a study in the States that permit witnesses to have counsel, so that we could determine whether there have been any problems in those States and what the experience has been.

In recent days, a request for that grant was turned down. Thus, if this interest on the part of the Justice Department exists, I would certainly appreciate the grants being reconsidered so that we could conduct the study that they say they want to have.

Senator ABOUREZK. I wish you would have jumped up while he was here. [Laughter.] I did not know about that.

Mr. GERSTEIN. I wish I would have had the opportunity to testify earlier.

Senator ABOUREZK. We will have him back. We will ask him about that. And if we don't have another day, we will make a request to review your application in a letter to Mr. Heymann.

Mr. GERSTEIN. I want to commend the Department of Justice for the guidelines which they have sent to the various U.S. attorneys. Immodestly, I do think that the proposals of the American Bar Association and the principles adopted by the American Bar Association played a great part in having those guidelines promulgated to the U.S. attorneys, since their promulgation came within 6 months of the adoption of the principles drafted by my ABA grand jury committee.

We have found the Department to be interested in reaching an accord with us on most issues. We have found them cooperative. Their promulgation of these guidelines is evidence of their cooperation.

I have gone through my prepared testimony, Mr. Chairman. There are certain areas in which the bill you have submitted, Senator, differs from the principles adopted by the American Bar Association. I will make reference to those and then be pleased to respond to any questions you might have.

Senator ABOUREZK. That is an excellent way to proceed.

Mr. GERSTEIN. As for recalcitrant witnesses, section 3 of the bill would amend the recalcitrant witness statute 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 association has opposed a reduction to 6 months, believing a reduction to 12 months more suitable.

We understand the Department of Justice agrees with a reduction to 12 months as well.

Senator ABOUREZK. Ever since the Attorney General was threatened with imprisonment, they have shown a great interest in reducing the term. [Laughter.]

Mr. GERSTEIN. The 12-month maximum will help to avoid long, punitive confiement and should be considered in concert with the ABA's previously adopted policy supporting legislation to prohibit multiple confinement upon a subsequent refusal by a witness to testify about the same transaction.

In light of this policy, we do support in section 3 of the bill provisions to amend the recalcitrant witness statute and the newly proposed 18 U.S.C. 403 prohibiting reiterative contempt. The ABA believes such measures are needed to limit potential abuse, which is possible if issuance of continuing subpenas is linked with multiple confinements.

Section 3 of the bill would amend 28 U.S.C. 1826(c) 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 such an amendment, believing that the intent of the existing law is appropriately to limit frivolous appeals.

As to immunity, the American Bar Association strongly favors transactional immunity, but it does not support consensual immunity, which as an experienced prosecutor I do not believe to be totally realistic.

I feel very strongly about this issue of censual immunity as a former prosecutor and as a trial lawyer. I think you can appreciate my concerns, Mr. Chairman, since evidently you have had considerable trial experience.

The ABA does not support S. 3405's provision for consensual immunity. The members of my grand jury committee, persons with substantial prosecutorial experience, believe consensual immunity to be unrealistic and unworkable.

Let me offer several practical examples. For instance, suppose there is but one witness to a murder, and that witness refuses to testify. Or suppose a high-ranking public official—for example, the Vice President of the United States—has been accepting bribes, and the sole proof lies with the persons who have paid the bribes. Should we allow the murderer to go free or the Vice President to go unprosecuted and remain in office, because the only witnesses to the crimes invoke their fifth amendment protection against self-incrimination and refuse to accept immunity?

Our goal in supporting needed reforms is not to strip the grand jury of its ability to pursue investigations vigorously and effectively. Other rights guaranteed the grand jury witness by this legislation, coupled with a return to transactional immunity, should adequately safeguard against abuses.

To require the consent of every witness to whom immunity is to be granted will render the grand jury impotent and totally hamstring its work.

A further area of difference would be this.

Senator ABOUREZK. Have you yet discussed the one difference? The bill requires that immunity grants be approved by 12 or more grand jurors, whereas I think the ABA says by the prosecution motion.

Mr. GERSTEIN. We considered that at some considerable length. I have had 25 years' experience dealing with grand juries all over the State of Florida—not only in my own jurisdiction, but I served on assignment for several Governors in other sections of Florida.

Lay grand jurors have neither the background, the experience, nor the knowledge to determine whether witnesses should be granted immunity. They must rely totally upon the advice of the prosecutor, who is their sworn legal adviser.

They cannot make those decisions. They have neither the understanding of the administration of justice nor the understanding of the complexities of effective law enforcement.

To place that burden and role on them is unrealistic, unworkable, and will not achieve results from either the standpoint of effective law enforcement or from the standpoint of protecting witnesses.

Senator ABOUREZK. Would your view be any different if there were an independent counsel appointed, not the prosecutor, but an independent counsel appointed?

Mr. GERSTEIN. I am glad you asked me that question. I would like to address myself to that. I don't believe Mr. Edwin Miller of NDAA addressed it.

There is a provision in the county in which I was the State attorney for grand jurors to hire their own independent counsel. That provision has been a total disaster for these reasons:

Grand juries tend to seek outside counsel in highly publicized situations or frequently in situations in which the media has urged retention of outside counsel.

The experience in my jurisdiction has been that when outside counsel would be retained by grand juries, frequently the counsel had little background in criminal matters and little background in grand jury matters.

The grand jury is a highly specialized branch of the criminal law. There are very few lawyers who engage in the practice of criminal law who adequately or thoroughly understand the grand jury and its operations.

To permit grand jurors to hire outside counsel, or to give them outside counsel, is to give them a person who has no checks and balances upon him such as are placed upon an elected prosecutor—particularly in the States system—or, to a lesser degree, upon an appointed prosecutor in the Federal system.

Senator ABOUREZK. Let me stop you there. There are no checks and balances that I know of on the Federal prosecutors.

Mr. GERSTEIN. Checks and balances exist because of the prosecutor's superiors in the Department of Justice. The prosecutor is responsible to them and, in turn, to the Attorney General.

There are fewer checks and balances in the Federal system than exist upon an elected prosector—who must face the electorate and submit his decisions to it. That is why I think the State system of electing prosectors has resulted in far fewer instances of grand jury abuse than you have seen in the Federal system, where prosectors are appointed.

Senator ABOUREZK. Whatever the reason, I think you are right. There are fewer at the State level.

Mr. GERSTEIN. I submit to you that is the reason.

To allow the grand jurors to have a special attorney—who has no checks and balances placed on him, does not submit himself to the electorate, does not serve on a permanent basis, and, in fact, is not subjected to the greatest check and balance on a prosecutor, which is the requirement that he try the indictments which he obtains—is not the way to do it.

If you do have a special prosecutor, unless you put in the caveat that he must try the case of any person indicted, then you have absolutely no check and balance.

What we found in Dade County, Fla., was that a special prosecutor would obtain indictments—and then he would say that he had done his job and walk away from the cases. This would allow the cases to be prosecuted by the elected State attorney or his assistants or by someone else, and the special prosecutor would return to his private practice. He would be comparable to a hired gun.

There are far greater dangers in having a special prosecutor who can be called upon at any time than there are in having a permanent prosecutor who is responsible for the trial of the indictments which he obtains. That is the single greatest check and balance that you have under our system.

The person who obtains the indictment ought to be the person who has to go into court and defend that indictment. He is prosecuting it, but really he is defending his judgment in signing his name to the indictment.

Senator ABOUREZK. S. 3405 has a section which states:

> The special attorney appointed under this section shall carry out the functions of an attorney for the government and among other things shall have the exclusive authority to conduct all other phases of any criminal prosecution arising out of such inquiry, including the argument of appeals.

Mr. GERSTEIN. Would you require that he prosecute the cases in which he obtains indictments? Do you require that?

Senator ABOUREZK. He shall have the authority.

Mr. GERSTEIN. You don't require it.

Senator ABOUREZK. Would it satisfy your concerns if the grand jury did not hire an outside lawyer, but if the court perhaps hired or appointed one?

Mr. GERSTEIN. Before American Bar Association, I favored the ability for grand jurors, upon a vote of a majority, to seek to have the court appoint an outside prosecutor. But I favored that only if that prosecutor were required to prosecute any indictments which he obtains.

If there is a vote of a majority of the grand jurors for good cause to have the court appoint an outside prosecutor, then I would support that provided that he were required to try any indictments which he obtained.

Turning to the question of counsel in the grand jury room, your bill suggests allowing the attorney for witnesses to participate in some way in the grand jury proceedings. We strongly urge you to amend section 3330A(c) to limit the attorney's role rather than allowing the full participation presently provided for in the bill.

I also note that this section is ambiguous as to the full extent of the lawyer's participation. This will magnify potential problems.

The role which S. 3405 envisions for defense counsel is unrealistic. A private lawyer has no sworn duty to aid the jurors in pursuing the

effective administration of justice. His duty is to his client—not to the prosecution of wrongdoers.

The ABA believes the role of counsel should be a limited one. The lawyer should be present in the grand jury only during the questioning of his client. He should only be allowed to advise the witness.

He should not, we believe, be permitted to address the grand jurors or in any other way take part in the grand jury proceedings. Further—in order to enforce this limited role—the court should be empowered to remove disruptive counsel.

I think your bill is either ambiguous as to the role of the lawyer or it provides for him to have an active role, which we strongly disagree with.

Based on my own experience, I am convinced that would be unrealistic and unworkable. Then you would truly have what the Attorney General of the United States complained about before the American Bar Association—a minitrial taking place in a grand jury room.

Senator ABOUREZK. The purpose of the hearings, of course, is to try to make the bill the best possible. We want suggestions from everybody.

Mr. GERSTEIN. I recommend that to you, most strongly, based upon my experience and based upon the views of the American Bar Association.

As for subpenas, section 7 would add a new section 3330B of title 18 concerning subpenas. With respect to the provision in subsection (a) requiring a 1-week delay for the appearance of a subpenaed witness or production of subpenaed information, the ABA has urged that this be amended to provide a 72-hour period unless special need is shown by the government attorney.

We believe a longer period would unduly prolong grand jury proceedings and reduce the effectiveness of investigations. We thus urge you to consider carefully amendment of this section.

I believe, Senator, those comprise the major differences that we have with the suggested legislation. I would be pleased to answer any questions you might have.

I might say to you parenthetically that the present attorney general of California, the Honorable Evelle Younger who was the former district attorney of Los Angeles County, supports the ABA concept of counsel for witnesses in the grand jury room.

Senator ABOUREZK. I want to express my thanks to you for the general support of the concept of this legislation, even though we differ on a couple of items that I think could be worked out one way or the other.

Would you agree that there are extensive abuses in the grand jury system on the Federal level to your knowledge?

Mr. GERSTEIN. I believe there have been, yes.

Senator AROUREZK. I believe that too often prosecutors use the grand jury as a sort of spear to either intimidate, to say nothing of indicting, or use it as a fishing expedition to intimidate the people's right of association, et cetera?

Mr. GERSTEIN. I think those abuses have been documented in the Federal system. I do not think that they have existed at all to an appreciable degree in the State system.

I think one of the reasons for that is what I cited earlier that State prosecutors are elected and are subject to much greater scrutiny by the

news media and by the electorate than are Federal prosecutors, who are appointed.

Senator ABOUREZK. I don't know if you are familiar with the Guy Goodwin example that I brought up earlier.

Mr. GERSTEIN. I am.

Senator ABOUREZK. It seems to me that there were 100 or so grand juries with that many more indictments that he brought out of which arose virtually no convictions that I know of in any of those cases.

Mr. GERSTEIN. I am also familiar with his substantial abuse of witnesses by transporting them thousands of miles from their homes to appear before grand juries in other areas of the country and the abuses which flowed therefrom.

Senator ABOUREZK. In essence then, you think there ought to be some sort of dramatic change and we only differ on the extent of that change. Is that right?

Mr. GERSTEIN. If you regard the principles adopted by the American Bar Association as a dramatic change, then I think the change should be dramatic. If you characterize them as dramatic, then I would say so.

I would favor those changes that I have advocated by the principles which have been adopted by the American Bar Association, whether they be characterized as "dramatic" or "slight."

Senator ABOUREZK. I see.

Mr. GERSTEIN. Senator, I think there is a real need for a study in those States that have permitted witnesses to have counsel in the grand jury room. There is a real need for a study of results in those States.

In my prepared testimony, I have quoted from the New York Law Journal, which interviewed persons in Massachusetts where counsel in the grand jury room has been the law for 7 months. They found that the results have not been disruptive but, on the contrary, have been helpful.

Senator ABOUREZK. In effect, I will instruct staff to write a letter to the Justice Department about that grant that the ABA requested. I think it is time at this point.

Mr. GERSTEIN. We would appreciate that.

Senator ABOUREZK. I have no other questions. We have had a good discussion on this issue. I appreciate your testimony. I am grateful for your appearance.

Mr. GERSTEIN. Thank you.

[The prepared statement of Mr. Gerstein follows:].

PREPARED STATEMENT OF RICHARD E. GERSTEIN

Mr. Chairman and Members of the Subcommittee: My name is Richard E. Gerstein. I am pleased to appear here today on behalf of the American Bar Association. I served as State Attorney of the 11th Judicial Circuit of Florida (the greater Miami area) for more than 20 years until my resignation from that office last January. This is my fourth year as Chairperson of the American Bar Association Section of Criminal Justice Committee on the Grand Jury, and I also serve as Chairperson-Elect of that Section of the ABA. I am a former President of the National District Attorneys Association.

The American Bar Association welcomes the opportunity to appear before this subcommittee. Grand jury reform is an issue to which the ABA has given careful

attention in policy adopted in 1975 and broadened last year. It is an area of deep concern to the Section of Criminal Justice.

I will briefly review the background of ABA efforts to promote grand jury reform before giving you our specific comments on Sen. Abourezk's bill, S. 3405. The ABA Section of Criminal Justice created a Committee on the Grand Jury in September 1974. The committee's mandate was to examine pending legislation to revise grand jury procedure and to offer comments and proposed changes for Association approval. In August 1975, the committee successfully obtained ABA House of Delegates backing for a policy addressing H.R. 1277 (94th Congress), a grand jury reform bill. Many key aspects of grand jury reform were covered in our 1975 policy—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, however, that the Association's policy should be broadened, my Committee presented a comprehensive report with recommendations in 1976 to the Criminal Justice Section's governing Council, where it received unanimous backing. It was then brought to the House of Delegates at the August 1977 ABA Annual Meeting. The result—following spirited debate—was adoption by an overwhelming vote of a package of 25 legislative principles.

I should note that the U.S. Department of Justice, which fiercely opposed some aspects of our proposed policy, did support 20 of our principles as finally drafted. This in part resulted from our Committee's efforts to work closely with the Department in hammering out compromises, and in many areas these efforts were successful.

Before proceeding to comment on S. 3405, it is perhaps significant to note that the 11,000 members of the ABA Section of Criminal Justice—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. The Section's Grand Jury Committee is also composed of persons with extensive prosecutorial experience. The committee includes Charles Ruff, the last Watergate Special Prosecutor; Seymour Glanzer, one of the original Watergate prosecutors; former Manhattan district attorney Richard Kuh; and Paul Johnson, who served as State Attorney in Tampa, Florida for many years. Additionally, San Jose, California District Attorney Louis Bergna is a committee member, as is Denver, Colorado District Attorney Dale Tooley.

The American Bar Association believes the grand jury—at both state and federal levels—is badly in need of attention. Many attacks have been leveled at the grand jury in recent years. Critics have charged that it has substantially departed from its traditional role as a shield for the citizenry against unwarranted prosecution—and has become instead a prosecutorial tool lacking in appropriate due process.

We do not believe, however, that the grand jury is obsolete. It is an institution deeply rooted in our common law tradition. It can perform an important function in investigating complex crimes. The key role which the grand jury played during Watergate is testament to its vitality. With proper revamping and careful attention, the grand jury can continue to perform an important function in our system—but a corrective dose of due process is needed to bring this 12th Century institution fully into the 20th Century.

Let me turn now to specific comments on Senator Abourezk's legislation.

RECALCITRANT WITNESSES

Section 3 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 Association has opposed a reduction to 6 months, believing a reduction to 12 months more suitable. We understand the U.S. Department of Justice agrees with a reduction to 12 months, as well. The 12-month maximum will help to avoid long, punitive confinement, and should be considered in concert with the ABA's previously-adopted policy supporting legislation to prohibit multiple confinement upon a subsequent refusal by a witness to testify about the same transaction. In light of this policy, we do support (in Section 3 of the bill) provisions to amend the Recalcitrant Witness Statute (28 U.S.C. 1826(b) and the newly-proposed 18 U.S.C. 403), prohibiting reiterative contempt. The ABA believes such measures are

needed to limit potential abuse, which is possible if issuance of continuing subpoenas is linked with multiple confinements.

Section 3 of the bill would amend 28 U.S.C. 1826(c) 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 such an amendment, believing that the intent of the existing law is appropriately to limit frivolous appeals. Under this bill, the prosecutor would have to show affirmatively that an appeal is frivolous; this is inconsistent with established policy of the ABA in its Standards Relating to Criminal Appeals (21–2.4), which were reaffirmed by the ABA at its Annual Meetings earlier this month.

Section 3 of S. 3405 would also amend Section 1826 of Title 28 to provide that a grand jury witness may refuse to answer a question or provide information if the question or request is based in whole or in part on illegally seized evidence or obtained in violation of the witness' constitutional or statutorily-protected rights. The Association has supported this principle to the limited extent that witnesses before a grand jury should be able to 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 the witness under the Recalcitrant Witness Statute. We have no policy, however, addressing the broader proposed Section 1826(e) as contained in S. 3405.

GRAND JURY SECRECY

S. 3405's Section 4 addresses the serious problem of violations of grand jury secrecy. Secrecy is fundamental to the grand jury if it is to function fairly and effectively.

The ABA in 1975 supported similar legislative proposals (in H.R. 1277 in the 94th Congress)—but urged increased penalties for unauthorized disclosure of grand jury information.

We note that Section 4 of S. 3405 does provide strengthened penalties—a fine of not more than $20,000 or imprisonment of not more than five years for disclosure motivated by monetary gain or by an attempt to affect the actions or decisions of that grand jury to influence further legal proceedings. (We also note the exception stating that this provision would not apply to a member of the media acting in a professional capacity.)

Courts have articulated a number of fundamental reasons necessitating grand jury secrecy. In *United States* v. *Amazon Industrial Chemical Corporation*, 55 F. 2d 254 (D. Md. 1931), the court noted the following reasons:

"(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 suborination of perjury or tampering with the witness who may testify before 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."

It is essential—if the grand jury is to function fairly—that its deliberations and proceedings not be made available to public scrutiny. Grand jury secrecy is fundamental to the operation of the sytem.

Selective leaking of information from within the grand jury can seriously damage reputations and jeopardize the fair and effective administration of justice. It must be dealt with severely.

RIGHTS AND DUTIES OF GRAND JURORS AND PROSECUTORS

Section 5 of the legislation contains a proposed new § 3329 of Title 18, spelling out rights and duties of the grand jury and prosecutor. Many provisions of this new section are consistent with ABA-approved policies, and together can contribute to increased fairness in the grand jury room.

Proposed § 3329(a) provides that the court shall notify the grand jury of its rights and duties. This is consistent with Principle No. 22 of the Association's Grand Jury Principles endorsed in August 1977: "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." In adopting this principle, the ABA expressed its support for legislation mandating that the court

orally charge grand jurors on impanelling as to their duties and responsibilities. Written copies of the charge should be distributed to the jurors for their continuing reference.

Detailing to grand jurors their powers, responsibilities and rights will help to insure a meaningful understanding of their proper role. This will help to strengthen the independence and fair functioning of the grand jury.

Proposed § 3329(b) covers requests by a person to testify before a grand jury or to present documents to it. Section (b) (2) (B) would require the prosecutor to notify target witnesses as to their right to testify or present evidence. Exceptions would be provided when the prosecutor can prove to the court's satisfaction that notice would result in the person's flight; would endanger other witnesses; or would unduly delay the investigation and prosecution. Such person would be allowed to testify upon submission of a waiver of immunity.

The ABA's policy is consistent with this section of the bill, but broader in terms of exceptions to the notification:

"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."

The broader exceptions in our Principle are based on our recognition that in some instances the prosecutor will truly be unable to locate the person; or that, under some circumstances, notification will cause the person to flee, harm or intimidate a witness or other person, or obstruct justice. This Principle is intended to insure, however, that fair and just opportunity is given individuals in as many instances as is feasible to testify in their own behalf prior to being indicted. The legislation appears to meet that desired goal.

Proposed § 3329(c) is also supported by the Association. This forbids the prosecutor from calling before the grand jury a witness who has given written notice in advance of his/her intention to exercise the privilege against self-incrimination, or from bringing this fact to the attention of the jurors, unless the witness has been granted immunity.

The ABA Standards for Criminal Justice Relating to the Prosecution Function (3.6(e)), approved by the Association seven years ago, provide as follows:

"The prosecutor should not compel the appearance of a witness before the grand jury whose activities are the subject of the inquiry if the witness states in advance that if called he will exercise his constitutional privilege not to testify, unless the prosecution intends to seek a grant of immunity, according to law."

This is consistent with the thrust of § 3329(c), which is thus supported by the ABA.

INDEPENDENT GRAND JURY INQUIRY

Section 5(a) of the bill provides that a grand jury may conduct an independent inquiry, and may request the attorney for the government to assist it in its inquiry. If, however, 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 legislation pending 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 requiring the court to appoint a special prosecutor. We prefer a more discretionary provision, as in S. 3405, which provides that "the grand jury may . . . request at any point in such inquiry that the court appoint a special attorney in lieu of the attorney for the government * * *".

IMMUNITY

Section 6 of S. 3405 provides that immunity granted in grand jury or court proceedings shall be consensual and transactional.

The American Bar Association strongly favors transaction immunity, but does not support consensual immunity, which, as an experienced prosecutor, I do not believe to be totally realistic.

Let me set forth our views on these questions.

The American Bar Association went on record in 1975 supporting transactional immunity. This policy was reaffirmed in August 1977, despite articulate opposi-

tion from the U.S. Department of Justice. We have carefully considered the question of immunity, and do not lightly urge a restoration of transactional immunity. (I should point out here that the Criminal Justice Section's governing Council, which reflects the "umbrella" make-up of the Section with representation from all segments of the criminal justice system, backs transactional immunity unanimously.)

Three of the 25 legislative principles endorsed by the ABA last summer relate to immunity:

"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."

Principle No. 17 spells out the proper instances when immunity should be issued. 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 utilized to obtain the needed information.

We are thus in full agreement with S. 3405's provision of 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. As you know, 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 government attorney from using in any subsequent prosecution the actual grand jury testimony (or leads derived therefrom).

Some 31 states currently provide transactional immunity. It has won the support of the National Conference of Commissioners on Uniform State Laws, in the Uniform Rules of Criminal Procedure (Rule 732 [b]). "Use" immunity, while constitutional (*see Kastigar, supra*), should be rejected for a number of practical reasons, we believe. Most fundamentally, it is susceptible of prosecutorial abuse. 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 minimizes witness resistance to questioning and encourages a cooperative witness. From a prosecutorial standpoint, the difficulties of pursuing successful prosecution of a witness given "use" immunity are slim, since careful steps must be taken to insure use of only untainted evidence in any subsequent prosecution. This point is underscored by a look at the available data.

The number of actual successful prosecutions of witnesses granted "use" immunity is small. The clear inference is that a return to transactional immunity will *not* remove a significant weapon against organized crime. (See 14 American Criminal Law Review 275, 282 (1977); the U.S. Department of Justice reported that, in practice, few witnesses granted "use" immunity are subsequently prosecuted for crimes described in their immunized testimony.)

In debating the question of transactional immunity on the floor of the ABA House of Delegates in August, 1977, Deputy Attorney General Benjamin Civiletti confirmed the fact that it is rare when a witness who has been immunized with "use" immunity is subsequently prosecuted. In considering this issue, members of our Section's governing Council (who have much practical experience in both the prosecutorial and defense arenas) felt that in the long run transactional immunity is much easier to handle than "use" immunity. Under "use" immunity, the burden is on the attorney for the government to show that it has not obtained any of its evidence to support the prosecution from the witness' grand jury testimony.

In sum, the ABA supports a return to transactional immunity. If the theoretical goal of "use" immunity is more prosecutions, this has not been the actual result.

"Use" immunity represents the most grudging interpretation of the Fifth Amendment right against self-incrimination.

S. 3405 provides a requirement that immunity grants be approved by 12 or more members of the grand jury. While many supporters of this provision assert that it would help to insure the grand jury's independence, the ABA does not support this requirement. Instead, we urge that immunity be granted on prosecution motion in camera by the trial court which convened the grand jury; the standards outlined in our Principle No. 17 could be followed to determine whether such a grant should be made. Lay grand jurors are *not* adequately oriented to make determinations regarding immunity grants, we believe.

The ABA does not support S. 3405's provision for consensual immunity. The members of my Grand Jury Committee, persons with substantial prosecutorial experience, believe consensual immunity to be unrealistic and unworkable. Let me offer several practical examples. For instance, suppose there is but one witness to a murder, and that witness refuses to testify. Or suppose a high-ranking public official—for example, the Vice President of the United States—has been accepting bribes, and the sole proof lies with the persons who have paid the bribes. Should we allow the murderer to go free, or the Vice President to go unprosecuted and remain in office, because the only witnesses to the crimes invoke their Fifth Amendment protection against self-incrimination and refuse to accept immunity?

Our goal in supporting needed reforms is not to strip the grand jury of its ability to pursue investigations vigorously and effectively. Other rights guaranteed the grand jury witness by this legislation, coupled with a return to transactional immunity, should adequately safeguard against abuses. To require the consent of every witness to whom immunity is to be granted will render the grand jury impotent and totally hamstring its work.

COUNSEL IN THE GRAND JURY ROOM

The American Bar Association strongly favors legislation allowing a lawyer to accompany his or her client in the appearance before the grand jury. This policy was adopted in 1975 and reaffirmed by the ABA House of Delegates by a two-to-one margin last summer. The grand jury principle endorsed by the ABA reads 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 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."

Our reasons for advocating this position are several. Not having a lawyer present leaves a grand jury witness poorly protected. The lay witness is at a considerable disadvantage, having to make judgments even the most experienced attorney would find difficult. He or she is forced to make decisions, even while testifying, that are legally binding. His or her testimony can later be used at trial for impeachment purposes. The witness unwittingly can waive the privilege against self-incrimination. If the witness refuses to testify after receiving immunity, he subjects himself to imprisonment without trial.

Under present practice, a grand jury witness who needs to consult counsel is put in an awkward position. The witness must ask permission, get up, go outside the grand jury room, repeat the question to counsel, and then return. The process is inefficient and ineffective, as well as prejudicial to the witness. It annoys grand jurors and raises speculation in their minds as to the purposes of the consultation.

There is another "catch-22" in the right to counsel. The Court of Appeals for the Seventh Circuit has held that a prosecutor who grants a witness permission to leave the grand jury room to confer with counsel may later raise this fact as relevant to the perjury charges against the defendant. A dissenting judge decried the government's being "permitted to 'sandbag' him [the defendant] by using the fact that he consulted his attorney against him." *United States* v. *Kopel*, 552 F. 2d 1265 (1977). Other courts—the Fifth Circuit, for example—have said a limit can be placed on how frequently the witness leaves the room to consult counsel. In re *Tierney*, 465 F. 2d 806 (1972).

The grand jury is the last critical stage of a criminal proceeding in which the presence of counsel is not guaranteed. The right to assistance of counsel, embodied in the Sixth and Fourteenth Amendments, now requires the government to guarantee the presence of counsel at every other key step in the criminal justice process—except the grand jury. I have attached, in Appendix A, a review we have made of relevant case law. The inference is clear—the grand jury is the only remaining critical stage during the criminal justice process at which a person who desires a lawyer to be present is denied that constitutional right.

Some 12 states already allow a lawyer to accompany a witness before the grand jury. Last summer Colorado passed a comprehensive grand jury reform bill—with the backing of the Denver district attorney Dale Tooley. The Colorado Supreme Court (in *Losavio* v. *J.L.*, 23 Cr.L. 2329, decided June 5, 1978) recently upheld the constitutionality of that statute's provision allowing counsel inside the grand jury room. Massachusetts in late 1977 passed legislation allowing a lawyer in the grand jury room.

In New York, Governor Hugh Carey signed legislation in June which permits lawyers to appear with witnesses at grand jury proceedings if the client has waived immunity. That law takes effect September 1. In explaining why he signed the bill—similar to legislation he vetoed three years ago—Carey said he was influenced by the fact that a witness repeatedly leaving the grand jury room to consult counsel might leave an unfair impression with the grand jurors. (From New York Times, June 22, 1978.)

When I testified on legislation similar to S. 3405 before the House Judiciary Subcommittee on Immigration, Citizenship and International Law in March, 1977, I pointed out that our Section had talked with attorneys in those states allowing counsel in the grand jury room, and, while we had not undertaken any large sampling or empirical research, we found no one who reported disruptions, delays or other problems as a result of the practice. A number of prosecutors with whom we spoke told us that while they had initially opposed the practice they now favor it. Since that statement was made last year, and published subsequently in several articles, the Section has heard from no additional practitioners or prosecutors refuting the accuracy of the statement based on their own experiences. Clearly, the evidence to date does not indicate a problem.

A recent article in the New York Law Journal—resulting from interviews with a number of prosecutors and defense attorneys in Massachusetts—also reinforces this point. ("Lawyers Inside Grand Jury Rooms—The Massachusetts Experience," New York Law Journal, June 23, 1978.) The article concluded that "if Massachusetts is any guide, prosecutors in New York can relax about the possible negative impact" of the new law. It quoted Stephen R. Delinsky, an attorney in the Massachusetts Attorney General's office who supervises grand jury investigators, as stating that, "Prior to the passage of the bill I was worried about the effect it would have on the secrecy of the proceedings and the overall willingness of witnesses to talk. Those fears have not come to fruition."

The presence of the attorney can actually speed up the proceedings, since the witness no longer has to hop up and down to go outside the room to talk with counsel. Perhaps most important—if we are truly concerned about effective assistance of counsel—the presence of the attorney provides support to the client in what is almost always an intimidating situation. The very presence of a lawyer can forestall badgering or bullying of a witness. While we certainly do not contend that most prosecutors indulge in such unprofessional conduct, the potential for subtle abuse and coercion is always present in a secret proceeding.

The American Law Institute has supported counsel for witnesses in its Model Code of Pre-Arraignment Procedure. In commentary to the code, the A.L.I pointed out that "complex and important legal issues face a witness before the 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."

I have set out at some length the ABA's rationale for allowing a lawyer into the grand jury room because we consider this the crux of pending grand jury reform proposals.

We are very troubled, however, by the form in which this concept has been included in S. 3405. We strongly urge you to amend § 3330A(c) to limit the at-

torney's role—rather than allowing the full participation presently provided in the bill. (I also note that this section is ambiguous as to the full extent of the lawyer's participation. This will magnify potential problems.)

The role which S. 3405 envisions for defense counsel is unrealistic. A private lawyer has no sworn duty to aid the jurors in pursuing the effective administration of justice. His duty is to his client—not to the prosecution of wrongdoers.

The ABA believes the role of counsel should be a limited one. The lawyer should be present in the grand jury only during the questioning of his client and should only be allowed to advise the witness. He *should not*, we believe, be permitted to address the grand jurors or in any other way take part in the grand jury proceeding. Further—in order to enforce this limited role—the court should be empowered to remove disruptive counsel.

Critics of our position have contended that, once inside the grand jury room, lawyers would inevitably disrupt the proceedings. For that reason we carefully defined the attorney's role and provided means to remove lawyers who overstep the bounds. We think this model will work, as evidenced, for example, by the experience to date in Massachusetts.

Critics have also contended that allowing a lawyer into the grand jury room will result in "minitrials." Our proposal—because of the limitations on the attorney's role—would not cause that result. S. 3405's provision, however, would result in something far closer to a jury trial than a grand jury proceeding. We think S. 3405's provision is unrealistic, as well as unworkable. In advocating counsel in the grand jury room, the ABA does not support undercutting of the primary and traditional role of the grand jury. Yet that is what this proposal would do. Having a lawyer at the witness' side during questioning, coupled with a host of other reforms which are included in your legislation, should provide ample due process protections. We are unalterably opposed to this provision's breadth. It is impractical and would destroy the grand jury systems as it was envisioned by the drafters of the Constitution.

SUBPOENAS

Section 7 would add a new § 3330B of Title 18 concerning subpoenas. With respect to the provision in subsection (a) requiring a 1-week delay for the appearance of a subpoenaed witness or production of subpoenaed information, the ABA has urged that this be amended to provide a 72-hour period unless special need is shown by the government attorney. We believe a longer period would unduly prolong grand jury proceedings and reduce the effectiveness of investigations. We thus urge you to consider carefully amendment of this Section.

Proposed subsection (b) of § 3330B requires the subpoenaed witness to be informed of his right to counsel; privilege against self-incrimination; the subject matter of the grand jury investigation; whether his own conduct is under investigation; the substantive criminal statutes violation which is under consideration by the grand jury (if these are known when the subpoena is issued); and the witness' rights relating to immunity. Several aspects of this provision are backed by specific ABA policies.

One of the Principles endorsed by the ABA last summer (#2) asserts that,

"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 they are possible indictees."

Another provides that

"A grand jury subpoena should indicate the statute or general subject area that is the concern of the grand jury inquiry." (This Principle also specifies, however, that the return of an indictment in a subject area not disclosed by the subpoena should not be basis for dismissal of the indictment.)

We support these requirements, as they are elemental to insuring fairness in a grand jury proceeding. They will enable the witness to prepare himself more adequately for his appearance and will help to insure more effective and efficient use of counsel, court, and grand jury time. The Association does not believe a detailed description of the statutory and subject areas are required, however; a broad statutory citation or general description of the subject area should suffice.

Proposed subsection (d) of § 3330B outlines a number of bases on which a court may rely to quash a subpoena. Several touch on areas of deep concern to the Association—one deals with the practice of subpoenaing a person to testify or produce material in order to secure information for trial of a person already

indicted. This is clearly an improper practice. One of our Grand Jury Principles specifically addresses this question:

"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."

We strongly oppose the practice of a prosecutor's using the grand jury in this fashion. This represents an abuse of the grand jury, transforming it into a mere tool and arm of the prosecutor's office—a role contrary to its historic function. This principle is also in accord with case law. *United States* v. *Dardi*, 330 F. 2d 316 (2d Circuit 1964); *United States* v. *Doss*, 545 F. 2d 548 (6th Circuit 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 * * *."

Other provisions of this section also relate in principle to our policy—to prevent the prosecutor's requiring unnecessary appearances by the witness or issuing subpoenas for harassment purposes. Unfortunately, such 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 witness' convenience is as objectionable as use of a subpoena to harass a witness; it is a subtle means of intimidation.

EVIDENCE BEFORE THE GRAND JURY

Evidence presented to the grand jury is covered by a proposed § 3330C S. 3405. Several portions of this section are consistent with pertinent American Bar Association policies.

§ 3330C(a) would prohibit the prosecutor from presenting evidence "seized, derived from, or otherwise obtained by any unlawful act" or in violation of the witness' constitutional or statutorily-established rights. Principle #6 of the ABA grand jury reform package—"The prosecutor shall not present to the grand jury evidence which he or she knows to be constitutionally inadmissible at trial"—is somewhat parallel.

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 adopted in 1971 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 implementation of 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.

We deliberately inserted in our Principle the phrase "which he or she knows to be constitutionally inadmissible" to meet concerns expressed by the Justice Department and other prosecutors as the workability of such a concept in the context of the grand jury setting. An affirmative burden is placed on the prosecutor under our proposal not to present evidence known by him or her to be constitutionally inadmissible. In order for the grand jury to function effectively, its proceedings cannot be constantly interrupted to litigate questions of constitutionality.

The Association strongly backs a requirement that exculpatory evidence known to the prosecution be presented by him or her to the grand jury. Proposed § 3330(b) is fully consistent with our policy stated in Principle #3:

"No prosecutor shall 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. It is highly unlikely that a grand jury will learn of exculpatory evidence unless its existence is brought to the grand jury's attention by the prosecutor. The uncomfortable result could well be that a person is forced to undergo a criminal trial based upon a proceeding from which all evidence favorable to him was excluded. The Associ-

ation went on record in 1971 in the ABA Standards for Criminal Justice Relating to the Prosecution Function (§ 3.6[b]) supporting this concept, declaring that "The prosecutor should disclose to the grand jury any evidence which he know . will tend to negate guilt." The National District Attorneys Association (ND ') Prosecution Standard 14.2D also backs this principle. As the commentary ' 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 requirement "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. Reporter 32, 539 P. 2d 792 (1975).

The Association also would put several additional burdens on the prosecutor with respect to evidence before the grand jury. Our Principle #4 states that,

"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."

Further, the ABA Prosecution Function Standards 3.6(a), while noting that "a prosecutor should present * * * only evidence which he believes would be admissible at trial" goes on to note that, "in appropriate cases the prosecution may present witnesses to summarize admissible evidence available to him which he believes he will be able to present at trial." But unnecessary use of hearsay testimony can serve as the basis for dismissal of the indictment. *U.S.* v. *Provenzano*, 440 F. Supp. 561 (S.D. N.Y., 1977).

We have no policy specifically addressing the question of dismissal of an indictment because of insufficiency of evidence, etc., as contained in proposed § 3330C(d) of S. 3405.

RECORDING AND AVAILABILITY OF GRAND JURY PROCEEDINGS

The American Bar Association fully endorses the need for recordation of all grand jury proceedings except the body's deliberations and votes. Principle No. 15 of our 1977 package addresses this question:

"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."

This would represent a logical step forward in grand jury reform, and is not inconsistent with the necessity of maintaining grand jury secrecy. 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. Several federal district courts record all 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 (9th Cir., 1970); *United States* v. *Price*, 474 F. 2d 1223 (9th Cir., 1973).

Many 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]) provide that, "The prosecutor's communications and presentations to the grand jury should be on 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 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 also 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 Attorney General's Advisory Committee of U.S. Attorneys 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 ABA Criminal Justice Section Council, May 14, 1977, at 7.) It is exactly that "informal" relationship which invites subtle abuses of the grand jury. 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). 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.

Proposed § 3330E covers availability of grand jury transcripts. Existing Association policy relates to only certain provisions in this section. Section 11-2.1(a)(iii) of the ABA Standards Relating to Discovery and Procedure Before Trial provides that the prosecutor shall in advance of trial disclose to the defense "those portions of grand jury minutes containing testimony of the accused and relevant testimony of witnesses." In adopting this standard the ABA carefully considered its effect on grand jury secrecy—but concluded that it was fully consistent with the investigative purposes for which such secrecy should otherwise be retained. This policy was recently reaffirmed by the ABA at its Annual Meeting earlier this month.

The pretrial discovery of grand jury testimony of the defendant and any prosecution witnesses has been endorsed by the NDAA National Prosecution Standards (13.2(A)(3)), National Advisory Commission Standards and Goals on the Courts (4.9(2)), and the Uniform Rules of Criminal Procedure (421(a)).

Such pretrial disclosure serves a number of purposes: it facilitates realistic plea negotiations, informed pleas, and careful trial preparation. The Jencks Act's (18 U.S.C. 3500) bar on pretrial discovery of witness statements does not help to promote orderly trials. My own State of Florida (in Fla. R. Crim. P. 3.220(a)) allows total pretrial discovery of the state's witness' testimony in criminal cases similar to that available to both parties in civil cases. Despite my initial misgivings as a prosecutor, it has worked well for more than a decade.

No ABA policy addresses the portions of the bill which would provide a witness with relevant statements he has made prior to his grand jury appearance; nor on allowing a witness, once having reviewed his grand jury testimony transcript, to appear again to clarify his statement.

CONCLUSION

The grand jury is an integral part of our system of justice. It should not be abolished, for it plays a legitimate role in investigating crime. Further, it is part of our constitutional heritage and has traditionally enjoyed public confidence. It provides one of the few remaining opportunities for lay persons to participate in our system of justice.

The grand jury should be retained—but with safeguards to prevent its improper use.

The American Bar Association has put the backing of its 230,000 members behind a policy of comprehensive reforms for the grand jury. We are encouraged to see an increasing number of states giving attention to badly-needed reforms. We also note the attention which has now been given this subject by the U.S. Department of Justice through its issuance last December of revisions in the Manual for U.S. Attorneys concerning handling of the grand jury. This was an encouraging step by the Department, evidently a recognition that questions of due process have not been given sufficient attention in the context of the grand jury. It should also be noted that the Justice Department has indicated its support for 20 of the principles finally adopted by the ABA.

While there are some portions of S. 3405 with which we disagree, the ABA is pleased to see that the issue of grand jury reform is the subject of Congressional scrutiny, and we hope to see prompt action in this area.

I thank you for the opportunity to appear here today on behalf of the American Bar Association. I will be happy to answer any questions you may have.

Appendix A

THE GRAND JURY—THE LAST CRITICAL STAGE OF A CRIMINAL PROCEEDING NECESSITATING THE PRESENCE OF COUNSEL

The right to the assistance of counsel, embodied in the Sixth and Fourteenth Amendments, presently requires the government, whether federal or state, to guarantee the presence of counsel at these critical stages of a criminal proceeding;

1. Custodial interrogation—*Miranda* v. *Arizona*, 384 U.S. 436 (1966).

2. Post-presentment pre-indictment interrogation—*Brewer* v. *Williams*, 97 S. Ct. 1232 (1977).

3. Preliminary hearings—*Coleman* v. *Ala.* 399 U.S. 1 (1970).

4. Pre-trial arraignment where certain defenses are plead or lost—*Hamilton* v. *Ala.* 368 U.S. 52 (1961). *White* v. *Md.*, 373 U.S. 59 (1963).

5. Post-indictment interrogation—*Massiah* v. *U.S.*, 377 U.S. 201 (1964); *McLeod* v. *Ohio*, 381 U.S. 356 (1965).

6. Post-indictment line-up—*U.S.* v. *Wade*, 388 U.S. 218 (1967); *Gilbert* v. *Cal.*, 388 U.S. 263 (1967).

7. Entering a plea of guilty at any time—*Moore* v. *Mich.*, 355 U.S. 155 (1957).

8. Trial—*Powell* v. *Ala.*, 287 U.S. 45 (1932) (death penalty); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938) (federal felony) *Gibdean* v. *Wainwright*, 372 U.S. 335 (1963) (serious crime) *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972) (imprisonable offense).

9. Sentencing—*Mempa* v. *Rhay*, 389 U.S. 128 (1967).

10. Initial appeal of right—*Douglas* v. *Cal.*, 372 U.S. 353 (1963).

The grand jury is the last critical stage in the criminal justice process at which a person who desires a lawyer to be present is denied that constitutional right. The present procedure of having a witness leave the room repeatedly to consult with counsel is awkward and prejudicial. Such legislation would more meaningfully effectuate the Sixth Amendment right to assistance of counsel.

Senator ABOUREZK. I have had the staff check with the remaining panel of witnesses. All of the, while they would come back this afternoon, would prefer to complete their testimony now. So, we will take a short recess of about 5 minutes and continue with that panel, which is the last panel of witnesses.

[Recess taken.]

Senator ABOUREZK. The subcommittee will come back to order.

Mr. Clark, we welcome you to the committee. Please proceed with your testimony.

TESTIMONY OF LEROY D. CLARK, NEW YORK UNIVERSITY SCHOOL OF LAW

Mr. CLARK. I have submitted a statement to the committee which essentially summarizes the content of my book "The Grand Jury: The Use and Abuse of Political Power."

I have listened to testimony earlier today. I believe it is very clear that that institution has been abused and that it is without proper guidelines and controls. It is clearly not satisfactory to leave such a powerful tool and instrument solely to the good graces and discretion of the U.S. attorney's office.

I was happy to see the bill adopt 80 percent of the suggestions that I made in the book. The notion that a party should not be held in contempt twice for refusal to testify about the same transaction is there. The legislation also bars the use of unconstitutionally seized evidence.

I note only a couple of points of disagreement, and one which may simply be a possibility for improvement.

In my book I suggest not only that counsel be appointed for those who are indigent and that those who can retain counsel be permitted to have them inside the grand jury room, but I suggested that because a gentleman such as Guy Goodwin had used the grand jury system not even to secure indictments in some instances but merely to harass witnesses, that an attorney who is retained should be compensated by the government in those instances where an inquiry did not result in an indictment.

It would operate as another kind of break on the misuse of the grand jury and would also deter the draining of financial resources of the witnesses or organizations that may be in support of the witnesses.

I also note that the bill exempts members of the press from the injunction that the grand jury proceeding be kept in secret. Perhaps the Senator was concerned about the constitutional implications of gagging the press.

However, in my book I suggest that the constitutional problems are not that severe, because the press is not barred totally from access to the operation of the grand jury.

If an indictment is returned, then clearly the press, it seems to me, can publish information about that indictment. However, if an indictment is not returned, then you simply have had an investigation which turns in no bill. Then I am not sure why the press ought to have access to that information.

We have had a couple of instances of public officials being embarrassed by a leak through the press of investigations which did not result in a return of an indictment.

I do not see why the press should have access to that information.

Outside of that, I think the bill seems excellent and carefully drafted. It meets many of the abuses that I tried to address myself to in the book.

Senator ABOUREZK. Without objection, Mr. Clark, your prepared testimony will be inserted into the hearing record.

Thank you.

[The prepared statement of Mr. Clark follows:]

PREPARED STATEMENT OF PROF. LEROY D. CLARK

This paper attempts to summarize the major points in my book on the grand jury system.[1] The thrust here is two-fold: (1) to identify the problem areas, and (2) to make recommendations as to how these problems can be solved or their consequences ameliorated.

One general problem, which underlies the functioning of the grand jury, but which is beyond the scope of this paper, is how to engender principled law enforcement. The chief law enforcement officer (Attorney General) is chosen by the President, and must in a general sense be responsible to the President—the problem comes when the President wishes to set priorities for the utilization of scarce law enforcement resources so as to enhance his own political position, via a vis his legitimate opposition. The problem has been more palpable of late because four recent Presidents (both Democrats and Republicans) have chosen their campaign managers as Attorney General. The proper articulation of the relationship between the President and the Attorney General, should be explored as a preliminary question to be settled before focusing on one facet of the Attorney General's power (the grand jury).

[1] "The Grand Jury: The Use and Abuse of Political Power," (Quadrangle, N.Y. 1975).

In the past, the Justice Department has employed various illegal devices in order to obtain evidence. Warrantless wiretaps are just one such device. When, however, these wiretaps could not be used directly as evidence, the Justice Department resorted to the grand jury to use the illegal wiretaps indirectly. The indirect use of illegal wiretaps is possible because of the laws which govern this area. A defendant cannot object to evidence because it was seized in violation of the constitutional rights of another person. The defendant can only object to evidence seized in violation of his own constitutional rights. To capitalize on this state of the law, the government had to find a way to get witnesses, whose privacy had been invaded by an illegal tap, to testify and give it evidence against another target-defendant. The grand jury was used to accomplish this end.

The historical, yet erroneous, presumption that the grand jury system operates to protect the innocent has fostered a dangerous environment. This presumption has stripped the defendant of many of his constitutional safeguards. For example, most rules of evidence that normally protect a defendant in a criminal trial, such as the barring of hearsay or irrelevant and prejudicial evidence, need not be observed in a grand jury proceeding. Hence, the government has often used the grand jury as a tool with which it could gather information and not just win indictments. This situation is further exacerbated by the fact that witnesses cannot object to the materiality or relevance of any questions. In fact, such objections are virtually impossible because nothing has to be disclosed to a witness or the prime target, not even the nature of the charges being investigated.

The grand jury has been used to disrupt, if not in fact destroy, the cohesiveness of groups under investigation. This was done in several ways: subpoening lawyers who represent political activists in an attempt to intimidate them and their clients, coercion of financial supporters, by leaking information that a particular group is being "investigated", and attempting to create diversiveness among political associations by making one of them a witness (sometimes with the hope that the witness will resist testifying out of loyalty to the group, and be subject to jailing for contempt).

The grand jury operates in total disregard of the Bill of Rights. A list of these violations would contain the following:

A. Evidence that would be inadmissible at a trial as a seizure in violation of the Fourth Amendment is permitted in a grand jury proceeding.

B. Persons who are imprisoned for contempt with the grand jury are denied a trial by jury.

C. Potentially, a witness jailed for contempt in a grand jury proceeding can be incarcerated on subsequent occasions for his continued failure to comply—this in contrast to the prohibition, in an ordinary criminal case, of placing a defendant in double jeopardy.

D. *Miranda* warnings are not given to grand jury witnesses—not even the prime suspect if he or she is called as a witness. The prime suspect could not be made to take the stand at his trial and invoke the fifth amendment—but he can be made to do so at the grand jury.

E. The witness is not allowed to have his counsel present in the grand jury room, as he would at trial, and there is no provision for appointment of counsel for indigents called before the grand jury, even where an indictment is being sought against him.

Free speech guaranteed by the first amendment has been abridged in the grand jury. Some scholars and news persons, writing on issues important to the public have claimed their sources of information are jeopardized by compelling them to disclose these sources under grand jury subpoena.

Likewise, the people's right to know was further abridged when the grand jury was used to obtain information from public officials. (Note: *Gravel* v. *United States*, 408 U.S. 606 (1972)). the Court limited the meaning of a federal constistitutional provision which directly protected the freedom of speech of members of Congress. The Court stated that Senator Gravel and his aides were immune from grand jury questioning under the constitutional provision only regarding activities strictly pertinent to carrying out the subcommittee's function. This did not include arranging for subsequent publication in the general press; thus those activities were subjects to grand jury inquiry. Insofar as possession of the documents may have been a criminal offense, the Court would also have permitted inquiry into how the senator or his aides obtained the Pentagon Papers.)

The grand jury has been used as an effective weapon for jeopardizing the

careers of public officials. If a public official is being investigated by the grand jury and if and when that information becomes public, that individual's chances for future office are absolutely nil, no matter what the outcome of the investigation.

RECOMMENDATIONS

I. Develop standards for instituting grand jury investigations to prevent the abuses of civil liberties that have recently characterized its operation.

A. U.S. attorney could be required to show to a court, in order to subpoena witnesses that there was a reason for conducting the investigation.

1. He should explain the kind of investigation intended, the kind of criminal activity prompting it and the reasons for believing that the people and material he wishes to subpoena will aid that investigation.

B. When the information supplied to the court indicates that the investigation would substantially intrude into First Amendment areas of political association and political beliefs, a higher standard would be required of the prosecution.

1. The prosecution might then be required to demonstrate "probable cause" for believing that a crime has been committed in order to establish that there is a sufficiently important governmental interest justifying the intrusion on first amendment rights.

2. This procedure would protect the witness in two respects: First, the court could examine questions that potentially violate first amendment rights, and second, the witness could not be compelled to answer questions irrelevant to the investigation as the U.S. attorney had outlined it.

II. The coercive power of the grand jury could be diminished by abolishing compulsory process.

A. Compulsory process is ineffective against organized crime. Potential witnesses would rather risk jail for perjury or contempt than suffer the consequences of testifying against members of organized crime.

B. Compulsory process is minimally effective as per other criminal activity. It may be effective in cutting down on citizen indifference when they witness attacks on others. Compulsory process may be a vehicle to insure citizen cooperation.

C. Given, however, its limited effectiveness at the grand jury stage, there is very little justification for allowing compulsory process in a secret proceeding which has little judicial control.

III. Witnesses before a grand jury should be given a full transcript of their testimony, which they could then share with others. This would not constitute a breach of any rule about secrecy with respect to grand jury hearings now in effect.

IV. The Attorney General should be required to submit an annual report. Said report should describe the number and nature of all grand jury investigations and all proceedings collateral thereto, such as contempts, grants of immunity, and dismissal of prosecution. Moreover, the attorney general should be required to disclose whether or not information received from the grand jury is being fed into data banks.

V. Witnesses before the grand jury should be informed of their constitutional rights.

A. Witnesses should be given adequate and reasonable notice of their rights against self-incrimination, the nature of the grand jury investigation, whether they are a potential defendant, and most important, that they have a right to counsel. Further, the witnesses' attorneys should be present in the grand jury room for the express purpose of advising them with respect to questions addressed to them.

B. The government should be required to pay attorney's fees to witnesses who have retained counsel (or the organizations that have supplied counsel gratis) when no prosecution results.

C. Advance notice should be given to all witnesses so that they can consult with their attorney(s). The prosecutor should be required to show that there is an emergency if he wants someone on less notice.

VI. Scholars, news gatherers, and government officials should be immune from grand jury subpoenas except in very limited circumstances. For example, if the prosecutor can validly assert that the information is needed to prevent a threat to human life or espionage and foreign aggression, and if the witness has made the information and its source public, then that individual might be compelled to testify (assuming that compulsory process is not abolished). But if the news gatherers obtained the information in his professional capacity, has not made it

public, and has not disclosed the source, there should be an absolute privilege not to testify before the grand jury. Nor should news gatherer be compelled to disclose an unidentified source of any information, whether published or not. The privilege should essentially be that of the source. If a newsperson testifies, he should be required to state that this source has consented.

VII. Counsel should be made available to all indigents called to the grand jury, even when they are only witnesses and not suspects.

VIII. The present grand jury practice of introducing hearsay material seized in violation of the fourth amendment, and other incompetent evidence not admissible at trial should be prohibited.

IX. An entire transcript of the grand jury proceeding should an indictment occur, should be provided for the defendant prior to trial. If the defendant is indigent, it should be provided at no cost.

X. We should enact legislation that adopts the spirit of the double jeopardy provisions, in contempt proceedings, concerning refusals to testify.

XI. The prosecutor should not be allowed to choose the situs of a grand jury proceeding in a manipulative fashion. Needed: a mechanism whereby a witness could object in a court located in the district of his residence, to being required to travel a long distance to another district if this would impose unnecessary hardship on him or his family. Derivatively, the court would have the power to order a transfer of the grand jury proceedings to the district best suited for investigation, depending on where most of the criminal activity is alleged to have occurred and in the residence of most of the parties to be called before the grand jury.

XII. The grand jury should not be dominated by the prosecution; it should become a more independent body.

A. The issuance of subpoenas, the request that a witness be granted immunity or held in contempt could all be voted upon by some portion of the grand jury.

B. The court should inform the grand jury of its historic role as a protector of innocent people, including those against whom the government may have some special aminus.

C. The grand jury should take more seriously their screening and protective function. The indicting and investigatory functions should be separated.

1. The prosecutor should be given authority to subpoena witnesses outside the presence of the grand jury, so that he alone would conduct the initial exploratory investigation to see if there was a case.

2. Only when he had developed sufficient information to warrant indictment would he bring the matter before the grand jury for consideration.

3. Certainly, *Miranda* warnings would be given to individuals subpoenaed by the prosecution in these circumstances. But given the kind of prosecutor interrogation here envisioned, the witness could be required to answer all non-self-incriminating questions.

In sum, I have enumerated the major areas of concern and some possibilities for ameliorating the situation. It is my hope that these suggestions will be useful to the committee and its efforts to reform the grand jury system.

Senator ABOUREZK. Mr. Lewis?

TESTIMONY OF PROF. MELVIN LEWIS, JOHN MARSHALL LAW SCHOOL

Professor LEWIS. Senator, I have considerable difference in appearing before this body as an academician, because in the field of grand jury work as in few others it is only experience which confers the entitlement to an opinion. The notion that one can somehow sit back and examine documents and read decisions and intuitively understand what is likely to result from the infusion of a new element into the system seems to me untenable.

I do not commend myself to this body as an academician. I have done some writing in this field; I have conducted national seminars in this field; but very much more to the point, I have represented an inordinately large number of the victims of grand jury procedures.

I use the term "victim" advisedly. I state to you, sir, that in my judgment the grand jury system has passed out of control and is beyond reforming or reclaiming. I would feel quite as confident of meaningful attainment today if the subject for discussion were earthquake reform.

The simple fact is that after 200 years of experience with the grand jury in this Republic, predicated upon centuries of prior experience in the English common law, we are unable to decide whether the grand jury, is part of the executive or the judicial branch of government. Who has the responsibility for it?

It sits by itself off in left field somewhere hurling thunderbolts and defying any attempt to ascribe the responsibility for the resulting shocks.

All morning I have heard testimony predicated upon the notion that the grand jury serves a meaningful and useful function. I challenge it. I challenge the proposition that the grand jury, as such, functions at all.

It is rather the prosecutors who function in the presence of a grand jury. There is no other function.

The most superficial consideration of a picture of 23 people brought together from all walks of life, stuck into an imposing and unfamiliar environment and lacking even the vaguest idea of how to obtain and issue a subpena, will belie the idea of grand jury independence. The notion that a group of that sort is somehow going to contrive to embark upon a meaningful investigation in a complex legal environment, I suggest, barely rises to the dignity of nonsense.

I think our problem here is that we have uniformly, in our discussions of the grand jury, sacrificed fact for fiction, realism for slogans, truth for some kind of unrealistic and idealized concept with which we have been saturated. I think it is about time that we brought it to a halt.

I pray that we will.

Mr. Chairman, the formulation of answers to the problems with which we are confronted here, I believe, defies any single legislative undertaking. I suggest that it is a measure of the futility of such an undertaking that even during the pendency of this and similar bills, while we have been talking grand jury reform, the Senate has twice enacted quantum leaps in enhancement of the powers of the persons who control the grand jury. Once this was done deliberately and once probably on a basis very much more than deliberate.

Let me take a couple of your minutes, Mr. Chairman, to review those two developments.

One of these developments was rule 801 of the Federal rules of evidence. That rule provides essentially that if before a grand jury a witness can be browbeaten into saying something accusatory of a fellow citizen, then, even though in a more reflective and less pressured situation he decides that he has misspoken himself, his original statement before that grand jury will stand as truth.

In short, it is simply beyond rectification. It can be disavowed, but it will always stand as evidence while that witness breathes. Under some decisions denigrating the constitutional right on confrontation since the enactment of rule 801, the testimony can sometimes be used

after the death of that witness, or even if the witness simply refuses to testify at trial.

You have been addressed today, Mr. Chairman, in terms which would imply that the purpose of calling a witness before a grand jury is always to get information from that witness. No, Mr. Chairman, in many cases that is simply not the purpose for which a witness is called.

A witness may be called before a grand jury for the purpose of persuading him that the information which he is prepared to disclose, is unacceptable to the prosecutor. That has happened many times within my experience. Thankfully, the experiences have been vicarious up to this time.

A witness may be called before a grand jury because a story he is about to tell at trial, whether as defendant or as witness for defendant, is something which contradicts the government's theory of the facts of the case.

In that posture of things, the witness' coerced grand jury testimony results in his indictment for perjury. A Pascente-type perjury count is joined with the substantive charge, so that the witness comes before the trial jury in the capacity of defendant with the story he is about to tell prebranded as perjury by the grand jury.

In the alternative, as a noninvolved witness who might otherwise testify for the defense, either he has his story substantially modified in the coercive atmosphere of the grand jury chamber or he stands an excellent chance, as in the case of one person whom I represent now, of being indicted for perjury himself.

In any event, that goes to the outer limits of the applicability of rule 801. I will now turn to the second recent and oppressive development, a feature of S. 1437, which the Senate approved earlier this year. S. 1437, the criminal Code Reform Act of 1977, contained a provision for a special grand jury, as cited in my written report to this body, which I understand is part of the record.

Senator ABOUREZK. Without objection, your written testimony shall be inserted into the hearing record.[1]

Professor LEWIS. As cited in my written statement, S. 1437 contains an immodest little proposal to the effect that special grand juries should henceforth be privileged to report on noncriminal conduct on the part of State, Federal, and local officials and should be free to recommend legislation in the public interest.

That provision creates the disturbing possibility of a State legislator being called before a grand jury for the purpose of explaining why he did or did not vote for a certain bill in which the Federal police agencies have a favorable interest.

The provision as enacted by the Senate would literally place the tenure of every State and local public official at the mercy of the functionary in control of the special Federal grand jury. Such a person could easily persuade his grand jury to render a report condemnatory of any public official, and the supposed authoritative quality of that denunciation will be something which that official could never overcome.

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[1] See p. 158.

To me, however, the legislative history of the proposal is even more frightening than is the provision itself. The section recently approved by the Senate was first proposed in connection with the organized crime control bill of 1969. It was considered then. The implications were realized. People thought the matter over, and they saw the dangers.

So, while it was enacted as part of title 18 U.S.C., section 3333, it was modified and sharply limited so that jurisdiction of the Federal special grand jury extended only to conduct involving organized crime. Other restrictions prohibited narrative reports concerning elected public officials, and so forth. There were a number of safeguards enacted.

In the course of enacting S. 1437, all of those safeguards were swept by the boards. The committee comments say essentially that the special grand jury sections of S. 1437 are nothing more than a restatement of current law with a few minor changes of substance. Those supposedly minor changes of substance deleted, without explanation, the product of many months of consideration of serious changes and attempts to palliate those dangers. In fact, S. 1437 reinstates the very language which was deleted in 1969. If I were a Senator, I would feel betrayed.

The ability of repressive grand jury legislation to thrive and proliferate in arid soil is really impressive, Mr. Chairman. Equally impressive is the resistance of grand jury process to any kind of ameliorative action.

All morning, except for the testimony of Mr. Gerstein, we have been told two things. We have been told, first, that many, if not most, of the reforms suggested within the proposed legislation are untenable because of the fact that to introduce the defense bar into the grand jury picture will not only threaten security, but will generate subornations of perjury felonies, and general irresponsibility of behavior on a scale transcending the conduct of Godzilla in Tokeyo Bay.

I would apologize, sir, for the hyperbole, but I am not certain that it is hyperbole. We are told, on the other hand, that many of the other reforms proposed are unnecessary because the sense of responsibility of the prosecutor and his personal worth are such as to preclude the likelihood that abuses will result.

To quote the prosecutors' written presentation to this body: "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 the State and an employee of the Department of Justice." Presumably that is an ascending order of significance.

"For any misconduct in office," I continue reading, "he (the prosecutor) is accountable to the court, the State bar association, and this Department." That is a little bit hard to square with the picture of defense lawyers running riot and rampant, mischievously sanding the judicial gears with frivolous motions and constantly interrupting the proceedings of the grand jury, while a Federal judge stands by helpless, impotent, weeping inside at the lack of dignity which has corrupted the grand jury proceeding, but knowing in his heart that if he were to do anything to halt the defense misconduct an unsympathetic reviewing court would find fault with him.

I really find considerable trouble in ascribing any realism to that picture, except in one dimension. I think it does realistically point u' the proposition that we tend to employ a sinister double stand' 'd in considering criminal legislation. There is a notion that there is a difference in worth between a lawyer who prosecutes and a lawyer who represents an individual citizen impacted adversely by the machinery of justice.

I suggest to you, Mr. Chairman, that as long as we persist in that point of view, just that long it is going to be not only impossible to enact meaningful grand jury reform, but it is going to be impossible meaningfully to arrest what may be an irreversible slide toward that which may perhaps in a very short period of time come accurately to be described as a police state.

The grand jury is presented to this committee—and I think I now quote accurately as "a bulwark between the overreaching prosecutor and the individual citizen." It is just exactly that. Unfortunately, however, it is a bulwark which protects the prosecutor and which impedes the progress of the cause of individual rights. It has passed, I think, beyond the bottom.

The program I recommend to this body is essentially that its function be denigrated rather than venerated.

I think we are going to be a great deal better off if we confront the basic facts. Give to the prosecutor the same power of subpena which is presently enjoyed by a revenue agent. Effectively, grand jury procedure already gives him that power in fact. We may as well legitimize the exercise of that power by express provision of law.

Let him undertake his own investigations, examine his own witnesses, and take the responsibility for what he does.

Under the fifth amendment, the grand jury does indeed have an irreducible role. It should be limited to that role, and the role itself acknowledged as ministerial. That is to say, in accordance with a number of decisions, let the prosecutor, after finishing his investigation, go before the grand jury and say, "Here is the indictment I want and here is a transcript of the witness statements upon which I base my request."

At least then the ensuing indictment will be recognized for what it is—a complaint by a prosecutor against an individual citizen.

If the witness who gives the information is to be charged with perjury, it will be nothing more than in fact it is—an expression of belief on the part of the prosecutor that that witness has perjured himself. An accusation will no longer serve as a tactical ploy, nor will it be unduly dignified as a predetermination of guilt.

I think in short, sir, that it is just about time that we begin to abandon our persistence in the veneration of this dangerous and useless anachronism, and to do something constructive toward restoring a sense of the balance of things and a regard for basic civil liberties.

Thank you for the opportunity to appear.

[The prepared statement of Professor Lewis follows:]

PREPARED STATEMENT OF PROF. MELVIN B. LEWIS

Mr. Chairman and Members of the Committee: Two years ago, testifying in support of proposals for grand jury reform, I expressed to a Senate Committee my opinion that the enactment of such a Bill was "a matter of transcendent importance".

In the light of the fate of that Bill and of subsequent developments, I no longer hold to that view. I now believe and urge that it is imperative to dispense with the grand jury to the greatest degree permitted by the Fifth Amendment.

I propose, in short, that federal prosecutors be given subpoena powers similar to those now exercised by revenue agents. I further propose that prosecutors present their cases to grand juries, only through encapsulated summaries of the results of their investigations.

The resulting procedures will almost certainly be less oppressive than the present ones. We will honestly face the fact that a victim of those proceedures has not run afoul of a functioning committee of his neighbors convened to protect the citizenry from both criminal and official extravagance; instead, we will acknowledge that he has simply offended an opposing litigant.

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I doubt that reform of grand jury procedures is still possible. Our present problems, which may well defy solution, derive in large measure from our persistence in embracing slogans which are refuted by obvious facts, and from an endemic lack of candor on the part of those officials whose powers are expanded and whose tasks are simplified by present grand jury procedures.

The only possibility for meaningful reform lies in a program of plain-spoken frankness. I start by consuming a heady dose of my own medicine:

1. I should be pleased if the Grand Jury Reform Act of 1977 were adopted. I should have been even more pleased if the Grand Jury Reform Act of 1976 had been adopted.

2. I rather doubt that the Bill will be enacted. As in the past, the high priests of law enforcement will mobilize their vast resources to thwart every heretical hint of denigration of their icon. The present effort at grand jury reform probably will will blocked, just as all prior efforts of that type have been thwarted.

3. Even if the Bill were to be adopted, it would make little functional difference. The Bill would serve a useful purpose as official acknowledgement of the existence of a problem. It would not, however, solve the problem in any meaningful degree.

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Almost two years ago I was privileged to appear before the Senate Judiciary Subcommittee on Constitutional Rights, which was then considering the Grand Jury Reform Act of 1976 (S. 3274, 94th Congress). My written submission to that Committee included a general discussion of the problems generated by abusive practices associated with grand jury proceedings. A copy of that portion of the statement then tendered by me is here appended for purposes of reference.[1]

Arguing for the inclusion of additional safeguards within the ill-fated Grand Jury Reform Act of 1976, I felt free to characterize the grand jury witness as the least-favored person known to the Constitution. In the intervening two years, there has been no slightest improvement in the lot of those unfortunates. Every change has moved in an authoritarian direction.

It is a measure of the futility of our undertaking, that the intensified virulence of the epidemic is met with a proposal for a weakened remedy. The 1977 Bill seems in many respects a blunted version of its predecessor. For example, § 1826. (a) (1) of the 1976 Bill would have required a majority vote of the grand jury as a condition precedent to a contempt citation against a recalcitrant witness. That highly important safeguard, tending to elevate the grand jury from rubber stamp to meaningful participant, has been deleted from the present proposal. Section 3330A(c) of the 1976 proposal would have prohibited the use against any witness of testimony extracted without advising him of his rights. That proposal likewise has no counterpart in the present Bill. The present Bill would provide for a normal grand jury term of twenty-four months and a maximum term of thirty-six months, a fifty per cent increase over the 1976 proposal.

It seems highly probable that such concessions were dictated by harsh political reality. If so, the most significant contribution of S. 1449 is its demonstration of the power of the apologists for the grand jury system—a power which exends

[1] That presentation was made on behalf of the National Association of Criminal Defense Lawyers. The writer, however, is not a member of that organization. The views presently expressed have not been submitted to or considered by that organization. The writer submits only his personal views, in response to an invitation from the Chairman dated August 3, 1978. Similarly, these views are not necessarily shared by any other person affiliated with the John Marshall Law School of Chicago, Illinois of whose faculty the writer is a member.

to weakening proposals for reform even while exacerbating the abuses which provoked the attempt at reform.

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Reflections on the hopelessness at efforts for reform are rendered even more poignant by a realization that the Senate has recently enacted a substantial expansion of the powers of federal grand juries, even while purporting to consider grand jury reform. The Senate recently approved S. 1437, the so-called "Criminal Code Reform Act of 1978". Buried within that Bill was an amendment to the Federal Rules of Criminal Procedure which added a new Rule 6.1. That Rule would permit special federal grand juries to investigate and to report on "non-criminal misconduct" of any state or local official; to render reports approving the conduct of favored officials; and to propose legislative or other governmental "action in the public interest". That proposal would immensely expand the power of the special federal grand jury, and would effectively place the tenure of every state and local official at the mercy of the federal officer controlling the grand jury.

It contemplates a subpoena to a state legislator inquiring why he voted as he did. It authorizes the publicizing of federal grand jury "recommendations" to state executive officers, pressuring them to behave in a manner consistent with federal policy.

Rule 6.1 was first proposed as a part of the Organized Crime Control Act of 1969 (S. 30, 91st Congress). See Hearings, House Judiciary Subcommittee, S. 30 (1970) Serial No. 27, p. 7. On consideration, the dangers of the proposal were recognized and substantial safeguards were introduced. The grand jury was authorized to render a report only on matters "involving organized criminal activity by an appointed public officer". The proposal for authority to recommend legislative changes was entirely eliminated. 18 USC § 3333.

Rule 6.1, however, restores the proposal to its original form. The same augmented powers which were expressly deleted from § 3333 of the 1970 crime bill, somehow found their way into S. 1437. The very size of S. 1437 precluded detailed consideration of each provision, and the sponsors of Rule 6.1 deflected scrutiny by saying, quite inaccurately, that 6.1 was essentially a restatement of current law. Although acknowledging "a few changes of substance", the proponents represented that "in the main, existing provisions have simply been rewritten * * *" (Senate Report No. 95-605, Part 1, p. 1127). In fact, the changes were numerous and substantial, and consisted in a grant of additional power which on previous consideration had been withheld expressly and deliberately. Sponsors of additional grand jury powers exhibit little diffidence and encounter little resistance. That does not suggest a hospitable forum for proposals to curtail those powers.

I now offer a brief updating of my 1976 submission. It is an almost unrelieved demonstration of the growth of authoritarian practices and attitudes.

My basic call is for candor. In general, we are candid to the extend that we are unguarded. Accordingly, I know of no development which more accurately encapsulates the present developmental trend than does the 9th Circuit opinion in *United States* v. *Castro-Ayon*, 537 F. 2d 1055, 1058. *Castro-Ayon* was a case which theoretically had nothing to do with the grand jury. Accordingly, there was no concern with the preservation of polite fictions. In *Castro-Ayon* an illegal immigrant was seized and interrogated by a border patrolman. The question was whether his statement to the border patrolman could be used as evidence against the persons named in that statement. The Ninth Circuit noted that under the same circumstances, grand jury testimony by the illegal immigrant would be admissible. With a commendable absence of guile, the Court stated that an interrogation of an illegal immigrant by a border policeman "bears many similarities to a grand jury proceeding", and provides "more legal rights for the witnesses than does a grand jury". It would be unfair to assume that this characterization reflects a naive view of border patrol interrogations as models of dignity and consideration. *Castro-Ayon* obviously tells a great deal more about grand jury proceedings than about police interrogations.

Two years ago, I reported the actions of a government agent as recorded in *United States* v. *Rollins* (DC ND I11 75 CR 717). That agent served a grand jury subpoena on an indigent female target and told her that she could come to his office instead of appearing before the grand jury. She did so, and was held for an entire day in a locked room, subjected to lengthy grilling and permitted to go to the toilet only under guard. Ultimately, she confessed to the crime under investigation. The prosecutor defended the procedure as both routine and proper.

I can now advise this body that the trial judge suppressed the confession in *Rollins*. A subsequent development, however, robs that decision of all of its force.

In suppressing the confession, the trial judge ruled that if Mrs. Rollins had appeared before a grand jury, she would have been advised of her target status and of her rights in respect to counsel and to self-incrimination. Since these had not been accorded by the interrogating agent who exploited the grand jury subpoena, the *Rollins* confession was suppressed.

Today, such a ruling would be most unlikely. The subsequent decision in *United States* v. *Washington*, 431 U.S. 181, 186, strongly infers that a grand jury witness need not be given warnings of his privilege against self-incrimination and of his right to counsel, and expressly holds that he not be told of his target status.[2]

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During the past two years, the grand jury's coercive process has reached far outside its own chamber. It now appears generally agreed that a grand jury "directive" may be used to force any citizen to undergo the indignity of a police station line-up or to appear before police authorities for the purpose of giving handwriting exemplars or other exhibitions. *In re Melvin*, (1 Cir. 1976) 550 F. 2d 674; *In re Grand Jury Investigation* (*McLean*) (5 Cir. 1978) 565 F. 2d 318; *In re Toon* (DC Cir 1976) 364 A. 2d 1177; *In re Maguire* (1 Cir. 1978) 571 F. 2d 675. *Toon* is particularly impressive as a demonstration of the force of the tidal flow of grand jury doctrine. By order of five judges of the District of Columbia circuit, the *Toon order* was summarily affirmed without argument, although four judges of that court believed the case of sufficient importance to be heard *en banc*. As viewed by the majority, the 1973 decisions in *U.S.* v. *Dionisio*, 410 U.S. 1 and *U.S.* v. *Mara*, 410 U.S. 19 authorize a "grand jury directive" to any citizen commanding his presence at a police station for purposes of line-up or similar investigation. In the words of the dissenting judges, "it was historically inevitable that *Dionisio* and *Mara* would soon be taken to their outermost limits by the government."

The Fifth Circuit's *McLean* decision rejected the so-called "Schofield" doctrine and held that the government is not required to make any preliminary showing as a condition of such obtrusive process unless the witness first shows prosecutive misconduct—a virtual impossibility, given the impermeability of the grand jury's iron curtain of secrecy. The First Circuit *Maguire* decision holds that submission to such directives may be compelled by physical force where the witness is unwilling to comply. It seems quite likely that the target citizen will soon be denied the right to challenge such intrusions through contempt process; instead, he will simply be dragged through the desired exhibition.

* * * * * * *

When the Senate last dealt with grand jury reform it was considered to be obvious that the grand jury could not be used to search for evidence to support a pending indictment. Theoretically, that is still the law; but the crumbling of the barrier is apparent. In *United States* v. *Doss* (8 Cir. 1977) 563 F. 2d 265, the perjury conviction of a witness called before the grand jury after having been secretly indicted, was reversed. The dissent, however, was vigorous, and even the majority conceded that there would be no objection to calling an indicted defendant before a grand jury to testify concerning a different offense. It seems inevitable that *Doss* will soon be employed in tandem with *U.S.* v. *Woods* (6 Cir. 1977) 544 F. 2d, holding that a grand jury may properly search for evidence relevant to a pending indictment as long as that is not the "sole or dominant" purpose of the inquiry. The problem with these theoretical limitations is that the doctrine of grand jury secrecy preclude all meaningful inquiry into the reason for the prosecutor's questions. At most, he may be required to file an affidavit disclaiming any improper purpose. I suggest that there would be few burglary convictions if the defendant were permitted to file a conclusory written statement disavowing all felonious intention at the time of his entry on the forbidden

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[2] In February of this year, the Department of Justice proclaimed its intention to continue the "long standing internal practice" of notifying suspect witnesses "where appropriate" of their target status and of advising grand jury witnesses of their rights in respect to self-incrimination and assistance of counsel. 22 Cr. L. 2423. Only one month later, the Department vigorously argued to the Supreme Court that its failure to follow those "internal guidelines" should confer no rights upon the witness thus victimized. *United States* v. *Jacobs*, Report of Argument, 23 Cr. L. 4015 (On May 1, 1978 the Court ruled that the Petition for Certiorari in *Jacobs* had been granted improvidently, thereby declining to rule on the issue. 46 LW 4406.)

premises, and if the prosecutor were forbidden to inquire into the truth of that statement.

We could go on and on. The use by government agents of grand jury subpoenas to obtain records which are then taken to the agent's offices, is widespread. The grand jury remains blissfully unaware of both the subpoena and the records. The practice is challenged only where the records are sought to be used against the party from whom they were seized, and then only if the victim is sufficiently knowledgeable and resourceful to mount such a challenge. See *In re Nwamu*, (DC NY 1976) 421 F. Supp. 1361. The lawyer still retains his unwanted status as a favored target for inquiries by grand juries investigating his clients. *In re Grand Jury Investigation* (*Sturgis*), 412 F. Supp. 943, 945 (D.C. Pa. 1976), and the courts generally decline to intervene, although professing sensitivity "to the grave dangers posed" by the practice. *U.S.* v. *Wolfson* (2 Cir. 1977) 558 F. 2d 59, 65–66. The cited decisions assuredly do not approve these practices; but the matter seems to have passed beyond judicial control. The courts have effectively abdicated most of their responsibility for meaningful supervision of grand jury procedures. *U.S.* v. *Chanen* (9 Cir. 1977) 549 F.2d 1306, 1312–1313.

We now consider a Bill which is designed to grant protection by legislative action. There is no reason to believe that such protection is possible, or that it would be effective.

For example, S. 3405 undertakes to grant protection against reiterative contempt proceedings. It does this by prohibiting a second confinement for "refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events." It is quite predictable that under the quoted language a witness once confined for refusal to testify concerning a January meeting of a dissident group may then be confined in consequence of a second proceeding in which he refuses to testify concerning a February meeting of that same group. Since he was questioned about only one "transaction" or "event" in his first recalcitrant appearance, the Court could be assured that the second questioning session related to a totally different "transaction" and "event". Cases such as *Doss* and *Woods*, supra, show a predisposition to make fine distinctions where doing so will validate a grand jury proceeding which the law facially prohibits. Those cases carry their own predictive message for a rule which prohibits reiterative contempt in terms even slightly equivocal. An unequivocal prohibition, on the other hand, would almost certainly be unacceptable politically.

The Bill also contains a pallid provision for an independent inquiry by the grand jury into official misconduct, with respect to which the grand jury "may request the attorney for the government to assist". The grand jury would be entitled to independent counsel only if it contrived, prior to the appointment of such counsel, to prove to the satisfaction of the judge that the district attorney had "hindered or impeded" that inquiry. It should further be noted that the grand jury may embark on such an inquiry only "after giving notice to the court".

Section 3330 of the Bill give to the grand jury no power which that body does not already possess in theory. The only functional effect of § 3330 is to place restrictions on the exercise of that power, rendering the independent grand jury even more improbable than at present. Stringent safeguards such as those were almost certainly not necessary for the purpose of hobbling the theoretical runaway grand jury. No such thing has happened in modern times, and it may be questioned whether an independent inquiry under § 3330 is even a theoretical possibility.

"The quaint concept of the English common law that a grand jury can, of itself, proceed with an investigation is not valid in this stage of our history. In *Watts* v. *Indiana*, 338 U.S. 49, 69 Ct. 1347, 1349, 93 L. Ed. 1801, 1805, Mr. Justice Frankfurter said "And there comes a point where this Court should not be ignorant as judges of what we know as men." As men and lawyers we know that a grand jury cannot proceed with an investigation without the investigatory staff of the State's Attorney, the police or the sheriff, and that it cannot prepare subpoenas or indictments without assistance of counsel." *People* v. *Sears*, (111 1971) 273 N.S. 2d 380, 389.

The foregoing discussion adumbrates the considerations which have led me to conclude that grand jury proceedings are not susceptible to meaningful reform. Oppressive grand jury practices are tolerated because we have been conditioned to believe that the acts are those of a benevolent and protective committee of neighbors rather than despotically oriented officials. It is acclaimed as the "grand inquest" *U.S.* v. *Calandra*, 414 U.S. 338, 343 (1974). It supposedly "serves the invaluable function in our society of standing between accuser and accused

* * *" *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962). Its "ancient role" is "protecting citizens against unfounded criminal prosecution" *Branzburg* v. *Hayes*, 408 U.S. 665, 687 (1972). We obtusely persist in the profession of such meaningless slogans, notwithstanding that praise of grand jury procedures comes only from prosecutors, while defense lawyers and civil libertarians are uniform in their denunciation and rejection of their supposed protector. When the beneficiaries of the grand jury's protection express a preference for basic freedoms, they are rebuffed with pious cant and self-contradictory hyperbole:

"The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it." *United States* v. *Dionisio*, 410 U.S. 17–18 (1973).

During my 1976 appearance, I was charmed to observe that the Department of Justice had favored the Committee with its customary defense of the grand jury: a suggestion that the grand jury was needed as protection against over-zealous prosecutors. Understandably lacking any reasonably current example of such protection, the Department cited the action of a British grand jury which refused to indict the Earl of Shaftesbury in 1681. Given the grand jury's present role as an instrument of governmental oppression, it would not seem entirely inappropriate to inquire, "What have you done for me lately?", no matter how well the institution may have served the Earl of Shaftesbury in 1681.

Shaftesbury has considerable modern relevance, however, quite apart from the exquisite appropriateness of his title. Upon the grand jury's refusal to indict, the crown simply convened a different grand jury which returned the desired indictment. The failure of the Department to include this fact in its discussion of the Shaftesbury case should not be construed as a lack of awareness of the precedent. It has been a common procedure in this country since the prosecution of Aaron Burr: after two grand juries had refused to charge him, he was finally indicted by a Virginia grand jury sympathetic to Jefferson.

The grand jury's "historic role as a protective bulwark" is an almost total myth.

Under present law, a prosecutor is free to use transcripts or agent summary testimony rather than live witnesses in his grand jury presentations. See, e.g., *U.S.* v. *Chanen* (9 Cir. 1977) 549 F. 2d 1306.

It is frequently argued that such practice is a misuse of grand jury procedure. S. 3405 seems to adopt that position. See § 3330 C(c).

Very much to the contrary, I suggest that such is the only role that the grand jury should be given. At this stage, and given the present oppressive quality of grand jury practices, it seems clear that preservation of basic freedoms depends upon the denigration rather than veneration of the grand jury as an institution. Let the prosecutor conduct his own inquiries—and let him take the responsibility for them. Prayerfully, courts will be more willing to curb abuses in a prosecutor's office than to curb abuses before a grand jury. Certainly, the witness will not be treated any more harshly than at present, as the *Castro-Ayon* court appears inadvertently to acknowledge.

If it is deemed constitutionally indispensable to permit the grand jury to retain its power of investigation, by all means permit it so to do. For the reasons stated by the *Sears* court, *supra*, the grand jury will be unable to abuse that power, and will almost certainly be unable even to use it effectively. There can, however, be no possible constitutional objection to curbing the power of a prosecutor. Accordingly, we may properly preclude the prosecutor from issuing grand jury subpoenas; from recommending such issuance to the grand jury; and from interrogating witnesses before the grand jury.

Under that program, the prosecutor will retain all the power that he has at present, except for the power to dissemble as to the responsibility for the actions taken in the course of his investigations.

It may well be that the grand jury served a useful purpose in the bucolic and loosely-organized societies of earlier times. It is now a useless and dangerous anachronism, at least at the federal level. It has been abolished in Great Britain and in almost half of the States of this Union. Its constitutional status under the Fifth Amendment precludes abolition. But it should not be suffered to assume any role beyond that constitutionally mandated.

By arresting the expansive march of grand jury proceedings, we will not disturb any legitimate right of any person, whether private citizen or police

official. We may, however, retard the dreary and ponderous erosion of individual liberties in which the grand jury has played a dominant part.

The *Dionisio* court was quite correct in stating that the grand jury serves as a "protective bulwark standing solidly between the ordinary citizen and an over-zealous prosecutor". Unfortunately, it is only the over-zealous prosecutor who is protected; it is the ordinary citizen in the path of whose progress the bulwark has been constructed.

APPENDIX.—GENERAL COMMENTS DESCRIBING ABUSIVE GRAND JURY PRACTICES, SUBMITTED TO THE SENATE JUDICIARY SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS AT ITS HEARING ON THE OPERATION OF THE GRAND JURY SYSTEM ON SEPTEMBER 28, 1976

The concern reflected by the introduction of S. 3274 is amply warranted. The problems, both theoretical and practical, are very real. They reach to the heart of the structure of our society and the fundamentals of the relationship between citizen and sovereign. The fate of this Bill and its counterpart measures in the House seems to me a matter of transcendent importance.

A review of the current state of grand jury law is badly needed. Unfortunately, the same artificial inscrutability which has insulated the institution from meaningful regulation, also tends to frustrate any attempt to analyze the impact of its operation. Consideration of statutes and case law will serve almost as effectively to deflect as to guide the inquiry. Grand jury statutes tend more to nurture than to regulate. Judicial decisions also possess a "tip of the iceberg" quality, because grand jury proceedings are in many respects effectively exempt from judicial scrutiny. The analysis presents a unique challenge.

We are confronted at the outset with a substantial anomaly. The grand jury is theoretically and practically the most significant force in our criminal justice system. Intrinsically, however, it is almost completely impotent. It cannot even return an indictment without the acquiescence of the prosecutor. *U.S.* v. *Cox* (5 Cir. 1965) 342 F. 2d 167; *Peck* v. *Mitchell* (6 Cir. 1970) 419 F. 2d 575, 577. The tenure of each group of grand jurors is sharply limited, and they are disbanded at the prosecutor's will. It hears those witnesses whom the prosecutor produces, entrusts its process to him, and meets and adjorns at his discretion. It relies on him for its raw material and for its finished product. It does not know what he does in its name outside the courthouse. It is essentially a validating agency, possessed of little more than a ministerial function. Conceive of any group of laymen, selected at random and thrown into the midst of a complex judicial system, with no idea of what to look for or even how to issue a subpoena. The shortest of reflections on that picture will generate a realistic view of the grand jury as a rubber stamp.

The judicial role is minimal. The influence of the press and other agencies of scrutiny is almost non-existent. Even the grand jurors themselves see only that portion of the process which takes place in their presence. Accordingly, any legislative officer who would seek reliable information concerning the function of the grand jury, can turn only to two sources: The prosecutor and the target witness. The latter group is both presumptively discreditable and essentially inarticulate. Its members possess no institutional voice; and in view of their prior experiences as witnesses, they are unlikely to volunteer to resume the role for any purpose. It is not surprising that present legislation reflects an uncritical acceptance of the prosecutor's notion of the public interest.

I am here to present the group experience of those who have represented the citizens victimized in the name of grand jury investigation. We have been excluded from the grand jury chamber. With that one limitation, we have observed at first hand the functioning of the system. We have done so repeatedly, in every part of this nation, and have thereby achieved a breadth of view which enables us to offer a composite group experience. We pray your consideration of that experience in your formulation of this vital area of national policy.

COERCIVE INTERROGATION: STREET, HOMES AND OFFICES

Every interrogating policeman—whether he seeks information or demands confirmation of preconception—can give authoritative voice to a very meaningful threat: "If you won't talk to me, you will talk to a grand jury". This is a big brother with a vengeance. If the recipient of the threat is knowledgeable, he

must concede what his less sophisticated counterpart merely suspects: The policeman is not bluffing. He may even have a grand jury subpoena in his pocket. The citizen will be told that the subpoena will be withheld if the policeman is satisfied with the interrogation; otherwise it will be enforced.

This procedure is exemplified in a prosecution presently pending in the United States District Court for the Northern District of Illinois, captioned *United States* v. *Rollins*, Docket No. 75 CR 717. From the admitted facts, an indigent mother of several children was suspected of forging government checks. A postal inspector came to her home and served a grand jury subpoena, but told her that she could elect to come to his office instead, where her rights would be better protected. When she reported to his office, she was restrained in a locked room for the greater portion of the day. She was fingerprinted, directed to give numerous handwriting exemplars, and interrogated extensively. Ultimately, she gave a confession.

The subpoena was furnished to the inspector by the prosecutor. While the source of the inspector's authority to offer an interview in his office as an alternative to the grand jury appearance has not been disclosed, the government in *Rollins* has vigorously defended the inspector's exercise of that authority.

On the hearing of the motion to suppress the confession, the prosecutor stated that nothing had been done in the policeman's office which could not have been done before the grand jury; that he was sure that members of his office had succeeded in extracting confessions from grand jury witnesses; and that invalidation of the inspector's procedure would draw into question the validity of confessions taken in a hundred similar cases.

The pandemic employment of this procedure by federal investigators points up the proposition that the grand jury is no longer even arguably a citizen's investigation. Instead, it is merely a tool of the police agencies. Federal police, characteristically represent themselves as agents of the grand jury, using the grand jury subpoena as a bludgeon. The notion that a grand jury witness should have fewer rights than an arrestee (*United States* v. *Mandujano*, 5/19/76, 19 Cr. L. 3087, 3093) is not only unrealistic, but has effectively led to the use of the grand jury subpoena as a substitute for a warrant.

COERCIVE INTERROGATION: THE PROSECUTOR'S OFFICE

When the witness appears in response to a grand jury subpoena, he generally reports to the prosecutor's reception area. There he awaits the pleasure of his political superiors. The wait can be a protracted one indeed. The witness who responds to a 9:00 a.m. subpoena has no forum for redress of grievance if he has not been called by 3:00 p.m. that afternoon or even if he is directed to return the following day. A court would be unlikely to intercede unless the harassment became truly obvious and oppressive—and even then, access to judicial machinery would require the services of counsel. In the case of an indigent grand jury witness, such services are available only at the contempt stage.

Meanwhile, in many cases, the witness is directed to a prosecutor's office where he is requested to give information privately. In short: The grand jury subpoena is used as a means of compelling a witness to appear in a lawyer's office and disgorge such informaation as he may have. In many applications, if the witness is not an ultimate target—if his contemplated role is unindicted co-conspirator or minor defendant—such an interview is more desirable to a prosecutor than a formal interrogation before the grand jury. No transcript will survive the interrogation as a source of potential defense impeachment of the witness. Expressed threats and offers can be voiced more freely. Even if the witness is represented by a lawyer, that lawyer is likely to agree to interrogation by the prosecutor rather than waste an unpredictably long portion of a day awaiting the performance of his sterile role outside the grand jury chamber, where he can only respond to the periodic visits of his client with the advice that few if any rights exist.

If a civil lawyer were to behave in a comparable manner—if he were to serve deposition subpoenas upon uncommunicative citizens as a means of compelling office conferences as an alternative to greater inconvenience—he would be disbarred and perhaps prosecuted criminally for abuse of process. The prosecutor who does the same thing merely makes imaginative use of the tools which you have furnished him.

Most of the witnesses who actually enter the grand jury chamber will fit within one of the following categories:

1. *The willing witness.*—This is relatively seldom the victim seeking redress. His story, by and large, is given to a policeman and related to the grand jury through hearsay, economically and with a diminished potential for subsequent impeachment. (The Bill would correct this impropriety. § 3330 A (o), page 17, lines 18–20.) Instead, this is likely to be the formalistic witness, such as the banker delivering records, who is perfectly willing to cooperate but who requests the protection of compulsory process as a matter of policy. We need not be disturbed by the likelihood of abuse of such a person.

2. *The uncooperative witness who does not occupy full target status.*—Typically, this is a minor participant in criminal activity whose potential worth as a witness is deemed by the prosecutor to transcend the importance of full prosecution of his misdeed. Another and more disturbing example is the convicted defendant whose punishment is extended at the sacrifice of all rehabilitative effort by being brought back before the grand jury and held until he has answered all the prosecutor's questions. His contempt sentence suspends the sentence imposed for his earlier offense.

Witnesses in this category are not simply faced with the option of talking or going to jail. The choice, for all practical purposes, is to say what the prosecutor wants to hear, or to go to jail. The witness is told, in effect, that unless his testimony accords with the prosecution theory, he will be charged with perjury. Faced with that choice, it is not surprising that the testimony elicited is fundamentally unreliable. The witness knows that he will be penalized if his testimony does not fit the theory embraced by his inquisitors. There is no more efficient method than this for the manufacture of perjury.

A typical vignette is related by a Chicago lawyer who represented a policeman accused of extortion. One grand jury witness in the case was a tavern owner who was believed to be a victim. (The police were later prosecuted *sub nomine United States* v. *Thanasouras, et al,* docket No. 73 CR 633, N.D. Ill., E.D.) The witness denied that he had been shaken down. He was then warned that the prosecutor was aware that the witness was operating an unlicensed "jitney" taxicab and that his income tax returns were questionable. By such pressures, the prosecutor attempted to force the witness to incriminate the target policeman.

The ultimate importance of the availability of these bludgeoning tactics derives from the provisions of Federal Rule of Evidence 801(d)(1)(A). That rule provides that if a witness makes a statement before a grand jury, that statement becomes primary evidence against subsequent criminal defendants even if the witness disavows the story at trial. Thus, a prosecutor has every incentive to use every pressure tactic available to him in order to achieve a grand jury transcript with bears out his theory of guilt. Once he obtains that result—by whatever method—he has effectively proven his case against the defendant, no matter what may happen later. *California* v. *Green* (1970) 399 U.S. 149.

3. *The target witness.*—This is the person at whom the grand jury's investigation is aimed. In this application, the procedure will often represent the ultimate in opportunistic exploitation of loopholes in constitutional guarantees.

United States v. *Dionisio* (1973) 410 U.S. 1 held that there is no constitutional prohibition against the use of a grand jury subpoena to compel the appearance of a person "who may himself be the subject of the grand jury inquiry". 410 U.S. at 10. This license was very recently broadened and reinformed by the decision in *United States* v. *Mandujano*, 5/19/76, 10 Cr. L. 3087. Any limitation on the practice can come only through legislative action.

There are five discrete aspects to the use of the grand jury subpoena as directed to the prosecutive target. In their applications, they range from unfortunate to grotesque.

A. The confinement objective

The greatest surprise to the prosecution within the capability of some grand jury witness would be to testify at all. The primary purpose of calling such witnesses before the grand jury is to confine them for contempt, and not to obtain information.

I do not suggest that such witnesses lack information of value to law enforcement. The status of such a witness may range from reputed crime overlord to mere confidant of the person under investigation. The subpoena, however, is issued

less in the hope that the witness will provide information, than as a means of removing him from society.

It is probably true that many of the persons subjected to such handling are not themselves appropriate objects of public solicitude, but this procedure crosses the line which separates the accusatorial and the inquisitorial systems of criminal justice.

B. Induced perjury

In June of 1972, a month after the Supreme Court's *Kastigar* decision, Mr. Michael Marrs, a prosecutor with the Drug Abuse Office of the Department of Justice, addressed the Illinois State Bar Association convention. He stated that law enforcement was about to achieve new heights of efficiency. In the past, he stated, his agency had frequently been stymied by inability to prove that a suspect was engaged in narcotics traffic. Thenceforth, however, things would be different: "If we can't make a buy from him, we will bring him before the grand jury, and maybe we can get him to commit perjury or something like that".

The "use" immunity order makes of the grand jury an ideal environment for the manufacture of perjury. The prior "transactional" immunity sometimes served very legitimate purposes: The formalizing of a bargain with the witness, and the freeing of the witness from all constraints against truthful testimony.

Given use immunity, however, the witness has every incentive to be less than candid concerning his activities. He knows that he may yet be prosecuted; that the government is in effect receiving an ex parte discovery deposition; and that any admission could arise to haunt him later as a criminal defendant.

The perjury defendant who attempts to prove that he was called before the grand jury for the purpose of enticing him into the commission of perjury, is flatly rebuffed by the courts on the rationale that he had no constitutional privilege to lie. *United States* v. *Nickels* (7 Cir. 1974) 502 F. 2d 1173; *United States* v. *Devitt* (7 Cir. 1974) 499 F. 2d 135; *United States* v. *Lazaros* (6 Cir. 1973) 480 F. 2d 174. These cases effectively reverse prior contrary doctrine expressed in *Brown* v. *U.S.* (8 Cir. 1957) 245 F. 2d 549, and *U.S.* v. *Cross* (D.D.C. 1959) 170 F. Supp. 303.

C. The Secondary Perjury Dimension—The Discrediting of the Defense

The fact-finding process in a criminal case very often consists in a decision by the trial jury whether it will accept the prosecution version of the facts, or that of the defense. Grand jury process against a prospective defendant, frequently coupled with use immunity, renders available to the prosecution a dramatic ploy which sometimes represents an opportunistic abuse of power.

If the prosecution believes that a defendant will claim innocence or exonerating circumstances, it can always force upon that defendant the choice between providing a preview of his defense in the form of grand jury testimony, or going to jail. That is what use immunity is all about.

If the prospective defendant maintains his innocence before the grand jury, the prosecutor can have a perjury indictment for the asking. It is no accident that the same statute which created use immunity, also changed the law of perjury to abolish the two-witness requirement. 18 USC Sec. 1623. If the prosecutor has a prima facie case of criminality, he must necessarily also have a prima facie case of perjury as to any denial of that criminality. Accordingly, having compelled the exonerative testimony, the prosecutor returns an indictment which charges both substantive guilt and perjury in the denial of guilt. The defendant faces his trial jury with his defense testimony pre-branded as perjury in the opinion of the grand jury. This tactic has received judicial sanction on the customary rationales: The trial jury believed that the defendant was guilty, and that his denials of guilt were false. Since he had no right to commit perjury, the conviction does not violate his rights. See *United States* v. *Pacente* (7 Cir. 1974) 503 F. 2d 543. The tactic (minus immunity) was employed with deadly effect in the prosecution of Judge Otto Kerner of the Seventh Circuit Court of Appeals. He denied guilt before the grand jury, and stood trial for bribery and for perjury in denying his guilt of bribery. The resulting conviction was affirmed. *U.S.* v. *Isaacs* (7 Cir. 1974) 493 F. 2d 1124, 1159.

A comparable performance in the thaumaturgical realm would be called levitation. The prosecutor calls the defendant before the grand jury, brands his denials as perjury, and then uses the perjury charge to obtain a finding of guilt on the original accusation. It is impossible to discount the probability that the trial jury's verdict was influenced by the grand jury's view of the defense testimony

as perjurious. If the perjury charge were tried at a later time, it would be the gravest and most obvious of improprieties to advise the jury hearing the substantive charge that the grand jury believed the defense evidence would be perjury. Yet, that precise tactic is rendered possible through resort to the grand jury weapon; and its effectiveness assures its increasing popularity.

D. The discovery deposition

Once he has obtained evidence of criminality, even the most sincere of prosecutors may feel himself not only privileged, but duty-bound to call the intended defendant before the grand jury. His right to do this has recently been confirmed. *United States* v. *Mandujano*, 5/19/76, 19 Cr. L. 3087. If the witness declines to testify, the formalistic use immunity grant is routine and automatic. The prosecutor receives a preview of the defendant's story. If it consists in a denial of guilt, he may opportunistically add a *Pacente*-type perjury count to his indictment. But even if gifted with commendable self-restraint, he has learned the details of the defense and may properly commence the preparation of his rebuttal to that defense, using grand jury process to preview the testimony of defense witnesses. Although in other contexts the Supreme Court has held that prosecution discovery without reciprocity is a denial of due process (*Wardius* v. *Oregon* (1973) 412 U.S. 470), use of the grand jury appears inexplicably exempt from that rule.

If the prosecutor admits criminality under an immunity grant, the prosecutor can proceed with assurance that his case, however weak, cannot be contradicted. (*Harris* v. *New York* (1971) 401 U.S. 222)

E. Counsel and confidant

When a prosecutor learns the identity of a possible defense witness, he has nothing to lose and everything to gain by calling that witness before the grand jury. The defense witness may well provide the prosecutor with the requested information at the lesser level of the agent interview by procedures short of the grand jury appearance; but his willingness to do so cannot be divorced from his ultimate vulnerability to the grand jury subpoena. The course of such interrogations is dictated much too frequently by the prosecutor's unwillingness to ease his pressures on the witness at any stage short of total neutralization. The technique was discussed earlier.

Perhaps the most ominous variant of this practice is the exploitation of the defense lawyer as a grand jury witness. This is a practice which has gained in currency over the past two years, burgeoning in every part of the country in such manner that it is impossible to discount the possibility that it reflects federal policy.

In case after case, defense lawyers have been subjected to federal process, whose effect has been to constitute the defense lawyer as a witness for the prosecution; to drive a wedge between attorney and client; to deprive criminal defendants of all confidence in the efficacy of their right to counsel; and even to deprive the accused of counsel of his choice, through reconstitution of that counsel as a witness for the prosecution.

In the past, most such incursions have taken the form of IRS subpoenas designed to determine the amount of attorney's fees paid by a client as an indication of that client's tax liability. An example of that practice is reflected by the decision in *United States* v. *Haddad* (6 Cir. 1975) 527 F. 2d 537. On two prior occasions, the government had undertaken proceedings against Haddad's client. With those proceedings completed, the IRS demanded information concerning the fees which the client had paid to Haddad in resisting the government. The purpose was to show that the client's persistent use of counsel to defend against the government's claims, indicated an income greater than he had reported. It was held that Haddad could be compelled to provide the information.

On April 21, 1976, the Supreme Court held in *Fisher* v. *U.S.*, 19 Cr. L. 3018, that lawyers could be compelled to hand over documents which their clients had entrusted to them to assist in the rendition of legal services incident to an IRS investigation. The Supreme Court had previously reached the same conclusion with respect to accountants. *Couch* v. *United States* (1973) 409 U.S. 322. The *Fisher* opinion substantially narrows the scope of the attorney-client privilege, holding that it is unavailable as to matters which the client himself could be forced to

disclose (and thus, potentially, unavailable in any use immunity situation) and that it is available only with respect to any disclosures "which might not have been made absent the privilege". The latter is at best a nebulous guide in determining what disclosures are in fact privileged.

The fear that grand jury process might be used for the purpose of inquiring into the attorney-client relationship, was realized through *In re Michaelson* (9 Cir. 1975) 511 F. 2d 882. That opinion approves the use of grand jury process to compel a lawyer's disclosure of the identity of any person who paid him any part of his fees for the representation of his client.

One articulated purpose of the disclosure was to tie the payor to the defendant in a conspiratorial relationship. The other was to test, and possibly prosecute as perjurious, the grand jury testimony of the client which had been coerced under a grant of use immunity.

In re Jones (5 Cir. 1975) 517 F. 2d 666 reversed a contempt citation against lawyers who had declined to provide the type of information whose production was compelled in *Michaelson*. The lawyers were required to spend several days in jail until the court of appeals acted. They are acclaimed as heroes by the criminal defense bar of Texas, where the case arose. However, the language of the Supreme Court's decision in *Fisher* tends strongly to weaken the force of the holding in *Jones*.

Recent developments include the calling of the defense trial lawyer as a prosecution witness to testify to matters which he had learned in his private capacity. The reviewing court found a substantial impropriety here: The defense lawyer's "failure to withdraw from the case when he realized that he was to be a prosecution witness". *United States* v. *Crockett* (5 Cir. 1975) 506 F. 2d 759, 761. Thus, it is clear that the prosecution may terminate the attorney-client relationship on any occasion on which it may tenably claim that the defense lawyer is needed as a prosecution witness.

The grand jury subpoena directed against the defense lawyer is a relatively new weapon. Yet, its very effectiveness tends to diminish the likelihood that it will be used with restraint. The number of such cases at the trial level has reached such alarming proportions that in 1975 the National Association of Criminal Defense Lawyers formed a special committee to provide representation to lawyers subjected to subpoena, contempt and comparable processes deriving from their representation of their clients. That committee is now in active operation, and the demand for its services extends its resources to their very limits.

The grand jury's potential as a means by which the prosecutor may intrue himself on the defense selection of counsel, is at least adumbrated by a District of Columbia case, *In re April 1975 Grand Jury*. The appellate decision (2/11/76, 18 Cr. L. 2401) reversed the trial court's determination that the economies effected through the retention by several grand jury witnesses of a single lawyer, must give way to the prosecution's interest in discouraging witnesses from "invok(ing) the privilege against self-incrimination". The problem was that the government was unable to "determine which witnesses would be granted immunity from prosecution (because) all witnesses refuse(d) to give any indication of the extent of their participation * * *" 18 Cr. L. 2183. As noted, the district court determination was reversed; but only because the district court had not conducted a sufficiently searching inquiry to determine such issues as whether the witnesses could really be incriminated by their testimony and whether some of them might be persuaded to disclaim the group representation (18 Cr. L. 2402). The contrary view—that trial court may forbid joint representation of grand jury witnesses whenever the defense lawyer fails "to raise the subject of cooperation" with the prosecutor rather than waiting for his clients to suggest it—was adopted in *Pirillo* v. *Takiff* (Pa. 1975) 341 A. 2d 896, 17 Cr. L. 2381.

Proceedings such as these clearly portend an increasing role of the grand jury in the disqualification—and thus, selection—of counsel for the witnesses before it. The notion, as expressed in *Pirillo* and the district court decision cited above, that the lawyer for a grand jury witness has a duty to suggest "cooperation" leading to an immunity grant—and that if he fails in that duty he can be replaced, regardless of the wishes of the witness, by a lawyer who can be counted on to give such advice—shows how many fundamental values we are prepared to sacrifice in the interest of grand jury proceedings. This would be bad enough

in the case of an independent agency. It becomes completely intolerable when it is remembered that the grand jury is only an instrumentality manipulated by the witness' adversary.

EXPLOITATION OF ILLEGALITY

It is trite to observe that the normal rules of evidence do not apply in grand jury proceedings. Federal Rule of Evidence 1101(d)(2). Constitutional constraints are also lacking: The grand jury, which is viewed for many purposes as an arm of the court, is free to exploit any governmental violation of the constitution in its search for information as surrogate for the government. *United States* v. *Calandra* (1973) 414 U.S. 337.

One result of that unfortunate doctrine is that a policeman is given a significant incentive to violate the law: Even though his product may not be useful in direct support of the prosecution of the victim of his illegality, it can be used under *Calandra* as the basis for the interrogation of the victim before a grand jury. The inevitable result will be either that the victim will be jailed for contempt or for perjury, or that the victim will make disclosures which will render other people vulnerable to prosecution. Accordingly, the policeman is rewarded directly for breaking the law.

Another, and potentially even more damaging implication is that the grand jury may exploit the illegality of others. *United States* v. *Weir* (9 Cr. 1974) 495 F. 2d 879 is instructive here. In that case, an American citizen was arrested by Mexican police, who obtained incriminating statements through outright torture. It was uncontested that Weir's head was held under water repeatedly until he was rendered unconscious; that knives were stuck into his legs, buttocks and neck; and that he was hanged by the neck from a tree until he passed out. Inevitably, he confessed to certain crimes. Thereupon, he was deported to the United States where he was met by a federal agent who brandished a copy of his recent Mexican confession and a grand jury subpoena. He refused to answer the grand jury questions, contended that they were predicated upon and exploitive of the torture which he had received from the Mexican authorities. A court majority held that *Calandra* authorizes such exploitation of coerced confessions in grand jury interrogation.

No activity, no matter how inhumane or indecent, is deemed unworthy of acceptance as grist for the grand jury's mill. The ultimate policy decision with which this body is faced is whether an instrumentality which thus feeds, is to to be accorded a position of special veneration by the American legal system.

THE IMMUNITY PROCEEDING

If the witness claims his Fifth Amendment privilege against self-incrimination, his ordeal is extended by approximately fifteen minutes. Within that time, the prosecutor files a formalistic petition which asserts nothing more than that the witness' testimony "is necessary to the public interest" and that a designated representative of the Attorney General has approved the immunity grant. 18 USC § 6003. The witness must then testify on pain of indefinite imprisonment. He is assured that his testimony will not be used to convict him, except for purposes of impeachment at his subsequent prosecution or as a predicate for the joinder of a perjury count, as previous discussed.

The statutory scheme is generally considered to have removed such proceedings from judicial control. If the petition is in proper form, the court can do nothing but grant it. The role of the judge is "ministerial". *In re Kilgo* (4 Cir. 1973) 484 F. 2d 1215, 1221; *United States* v. *Levya* (5 Cir. 1975) 513 F. 2d 774, 776.

In many cases, the "immunity" is totally ephemeral. An immunized witness whose truthful testimony would admit an earlier offense, has as his only choices perjury, self-accusation, or contempt. Cf. *U.S.* v. *Chevoor* (1 Cir. 1975) 526 F. 2d 178, 182. Until 1954, immunity proceedings were not authorized in any felony case. Since that time, we have moved, step by step, to the present plan, which grants a shadowy and hypertechnical immunity whenever the prosecution thinks it useful. The ultimate step was taken almost without discussion (1970 U.S. Code Cong. & Admin. News 4008, 4017) as part of the consideration of an immensely complex and diverse legislative package. Reconsideration is long overdue. At the very least, such constitutional incursions should not be tolerated on a routine and wholesale basis.

It is very much to be doubted that this body ever intended the kind of mindless, automatic, and uncontrolled procedure which characterizes present-day immunity practices. Immunity procedures require no justification and impose almost no burden on the prosecutor. It is hardly surprising that they are employed wherever convenient, with almost total lack of discrimination.

The statutory safeguards are almost totally ephemeral. 18 USC § 6003 requires only that a designated official must believe that the testimony may be necessary to the public interest. Given no guidance as to what constitutes "public interest", it is hardly surprising that prosecutors should come to equate the term "public interest" with "personal convenience".

The opinion in *United States* v. *Mandujano* (5/19/76, 19 Cr. L. 3087) presents an idealized picture of American immunity proceedings. As pictured in *Mandujano*, if a witness claims his self-incrimination privilege:

"The grand jury has two choices. If the desired testimony is of marginal value, the grand jury can pursue other advantages of inquiry; if the testimony is thought sufficiently important, the grand jury can seek a judicial determination as to the bonafides of the witness' Fifth Amendment claim * * *. If in fact there is reasonable ground (for the self-incrimination claim), the prosecutor must then determine whether the answer is of such overriding importance as to justify a grant of immunity to the witness." 19 Cr. L. at 3091.

That description bears no resemblance to the manner in which such things happen in real life. If a man becomes thirsty, he does not pause to inquire whether his thirst "is of such overriding importance as to justify" drawing a cup of water from the office fountain. Instead, he simply takes a drink and goes on with his work.

Similarly, if a witness refuses to testify—"or is likely to refuse to testify", 18 U.S.C. §6003(b)(2)—the prosecutor routinely seeks a use immunity grant which the court has no right to withhold. Effectively, the prosecutor awards himself the immunity grant.

In the thought that it may be useful to this body, we append a request from a local prosecutor to the Attorney General, requesting authority for such a grant. The Committee will note that the form does not lend itself to thoughtful evaluation of considerations of public interest. The available space for disclosure of the reasons why the testimony is of "such overriding importance as to justify a grant of immunity" is large enough to accommodate only two terse sentences.

The appended sample form is, we believe, fairly representative. The form discloses that the government proposes to prosecute one Challe Oda for a violation of 18 USC § 1955 (gambling). The "overriding importance" of the target witness, one Neal Black, Jr., is presumably disclosed by his name, address, place and date of birth and the following statement: "The witness is a participant of minor importance, although possessing knowledge of how numbers operates."

The request was routinely approved—as, we believe, are all such requests. Based on that performance, it is difficult to imagine that a request would be rejected.

It is hard to believe that anyone could look at that document and believe that an immunity award is the product of a thoughtful evaluation of public interest or of considerations of "overriding importance". A more accurate analysis might be that the constitutional privilege against self-incrimination has been abrogated on grounds of inconvenience, in order to assure that a prosecutor's mildest curiosity will never lack gratification.

As a matter of fundamental policy, we must decide whether the punishing of every malefactor, no matter how minor, is a more important objective than the preservation of such fundamental values as the privilege against self-incrimination, the right of privacy, and a general ambience of freedom.

THE CONTEMPT PROCEEDING

The contempt proceeding is frequently consummated on the same day on which the witness claims his self-incrimination privilege. The witness is called before the grand jury in the morning, claims his self-incrimination privilege, is taken promptly before the judge, immunized and ordered to answer. He is returned to the grand jury and, if he persists in his refusal, taken before the judge where

a contempt petition is filed. On the presumption—largely true—that there can be no defense, the contempt hearing follows immediately, with pro forma appointment of counsel if necessary. The witness is in jail that afternoon. He has no right to challenge the purpose or relevancy of the questions put to him (*Marcus* v. *U.S.* (3 Cir. 1962) 210 F. 2d 143) or the documents demanded of him (*Matter of Berry* (10 Cir. 1975) 521 F. 2d 179, 184). It is enough that the grand jury is inquisitive. That curiosity is conclusive, and sufficient in itself to burden the witness with "the cruel trilemma of self-accusation, perjury or contempt" which is foreign to "our fundamental values and most noble aspirations". *Murphy* v. *Waterfront Commission* (1964) 378 U.S. 52, 55.

The grand jury witness is the least favored person known to the Constitution. When his reliance on our "fundamental values and most noble aspirations" is weighed against the investigator's convenience, it is simply no contest.

APPEAL OF CONTEMPT PROCEEDINGS

Perhaps the least justifiable of all the statutes governing grand jury procedures, is 28 USC § 1826(b). That statute provides, in essence, that bail pending appeal should be granted a contemnor only in unusual cases, and that the appeal must be decided within thirty days.

The thirty-day requirement assures that the appeal will not receive deliberate consideration. The period includes preparation and transmission of the record, opening brief, answer, reply, argument, deliberation and judgment. Thoughtful presentation and resolution of the issues is virtually impossible.

Reviewing courts are not hesitant to confess that this statute precludes giving to attempt appeals the same consideration that can be granted in other cases.

Thus, in *United States* v. *Berry* (10 Cir. 1975) 521 F. 2d 179, 181, the appellant requested that the relevant documents be examined to determine the validity of his claim of privilege. The court refused to consider that aspect of the case because of the thirty-day rule, stating: "Within that period * * * we can do no more than hurriedly review the transcript and the complex briefs." In *Reed* v. *United States* (9 Cir. 1971) 448 F. 2d 1276, 1277, the appellant asked for reconsideration of prior holdings in the light of their application to his case. The court refused that request, stating: "We decline to reexamine (prior) decisions for the reason that this could only be done en banc, and the time allowed us under 28 USC § 1826 to decide this appeal will not permit this to be done."

It is not only en banc consideration of serious cases which is rendered impossible by Section 1826. Fundamental safeguards such as petitions for rehearing are precluded. *Charleston* v. *U.S.* (9 Cir. 1971) 444 F. 2d 504, 506. Opinions are frequently hasty and submitted on a per curiam basis or by unpublished order. The most significant area of modern jurisprudence is required to develop in an atmosphere of default by the thirty-day limitation.

The provision serves no honest purpose. If it is intended to prevent unjust incarceration, it clearly should be waivable by the defendant. If it is designed to prevent dilatory appeals, it certainly should not apply where the defendant is denied bail pending appeal. Every legitimate purpose of the thirty-day limitation could be served by a rule which would entitle either party to appellate review of the bail order within thirty days. The rulings on such motions would necessarily screen the frivolous appeals. With that accomplished, appeals presenting serious issues could receive deliberate consideration.

CONCLUSION

No aspect of criminal justice, from street investigation to appellate review, has avoided the contamination generated by immoderate use of the grand jury and its process against a backdrop of totally inadequate safeguards.

No concept of individual freedom has emerged from the process with its virtually unsapped. Every authoritarian practice, from arrogance to barbaric torture, is validated and rendered acceptable in furtherance of its more efficient operation.

We pray that the corrective action proposed through S. 3274 will find favor with you, the policy-makers of our nation. We earnestly believe that your attention has seldom been sought in a better or more compelling cause.

REQUEST FOR IMMUNITY AUTHORIZATION

Date: 4/30/75

TO: Immunity and Records Unit, Room 1618, Criminal Division	FROM: Peter F. Vaira, Attorney in Charge
PART A	
(1-2) Name of Witness (Last name first): BLACK, UREAL, JR.	(9) Address of Witness: 732 N. Hardin Court Chicago, Illinois
(6) FBI Identification No. _____ (7) Local Police No. _____ (8) Local Police Zip Code	(10) Birthplace: Chicago, Illinois (11) Birthdate: June 10, 1937
(38) Alias: None	(20) Immunity Statute: 18 U.S.C. 6002-6003
(17) Nature of Proceeding: Trial ___ Grand Jury XX Administrative ___	(12) District: Northern District of Illinois
(19) Name or Description of Case/Matter: United States v. Challe Oda	(19) Docket No. (if any): (16) D.J. File No. (if known): (18) Violation: (Title and Section): 18 U.S.C. 1955
This box for Immunity Unit use only: (3) IRU # (4) Index # (5) Type of Request: (21) Ref. to:	

PART B (if more space is needed, attach additional sheets)

Relative importance of the witness in criminal activity in the area:

The witness is a participant of minor importance, although possessing knowledge of how numbers operates.

2. Pertinent Federal and local offices have been notified. ___ (Check Box)

3. Are any current Federal or local charges pending against witness? If so, give details:

No

4. If witness is presently incarcerated, state circumstances:

No

GOVERNMENT EXHIBIT A

INSTRUCTIONS: 1. Please be accurate in completing Part A since data will be transferred directly to Data Retrieval System.
2. If other individuals have been authorized immunity in this case or matter, list names on separate pageand attach as supplement.
3. All submissions should be in triplicate.

DOJ-1973 USA-167 11-6-73

Senator ABOUREZK. Mr. Naftalis?

TESTIMONY OF GARY NAFTALIS, OF ORANS, ELSEN, POLSTEIN & NAFTALIS

Mr. NAFTALIS. Mr. Chairman, my name is Gary Naftalis. I appreciate the invitation to testify before this committee on the subject of grand jury reform. I apologize to the committee for not having submitted a prepared statement in advance.

I hope my oral testimony will be satisfactory.

Senator ABOUREZK. I'm sure it will be fine. Please proceed.

Mr. NAFTALIS. Mr. Chairman, I note time is getting on, but let me briefly comment on the legislation, with which for the most part I am in sympathy. There are, however, some provisions with which I disagree.

In the main, my views are somewhat similar, although not precisely the same as Mr. Gerstein's on this legislation.

My background is as follows: I served as a public prosecutor for close to 6 years as an assistant U.S. attorney in the southern district of New York. For some period of that time I was deputy chief of the criminal division.

Over the last 4½ years I have been in the private practice of law, handling the defense of people accused of crimes as well as civil litigation.

I have also served as special counsel to a State legislative investigative committee, as well as for a brief period of time, as special counsel to a Senate subcommittee conducting certain hearings in New York City.

So, like any witness who appears before this distinguished committee, I bring my own experiences to bear and my own opinions.

I think the problem has been accurately stated by the questioning of the chairman to Mr. Heymann of the Department of Justice. The mythology, of course, is that the grand jury is thought of as a shield for the innocent against the overzealous and the malicious prosecutor. That was obviously the basis historically for its inclusion by the Founders in the Bill of Rights. Today it is more mythology than actuality.

As a result, there has been growing criticism from responsible sources, including the legislative bodies of this country, that some reform of this institution is needed.

In my view, the most important reform that is needed is to change the grand jury from the one institution in the criminal justice system which lacks a codification and recognition of procedural rights for the witnesses who appear before it. I think in that respect legislation is needed, not simply guidelines, to recognize and codify such procedural rights.

But at the same time, in determining what rights are needed and what legislation is needed, the value of the reforms ought to be weighed against the actual need as opposed to an imagined need which may not exist. Also, it must be remembered that there is a genuine societal interest in the enforcement of the criminal laws.

I think both of those things—the rights of American citizens and the rights of the public in general—have to be weighed in a delicate balancing process to determine with a kind of scalpel-like precision what reforms are actually needed.

The reform which I think is most needed and which is called for in the bill—although not precisely in the form that I would favor—is the right to counsel for witneses before the grand jury. I think it is an absolutely essential reform. I think as Mr. Heymann—and I think he

is a reasonable and thoughtful person—indicated in his own testimony, there is a great deal of difficulty in defending the absence of counsel from the grand jury room.

I think that as the chairman pointed out, the opposition to this measure is based for the most part on "speculation" as to what will happen if lawyers are allowed inside the grand jury room.

I think there is an absence of any kind of material or data which would indicate that the whole criminal justice system would come tumbling down into ruins if this reform was enacted.

I think moving a lawyer from outside into the grand jury room so that he can advise his client properly and make sure witness is at ease is the way to go.

When witnesses appear before a grand jury, they don't know anythink about it. Obviously, the normal reaction of any citizen unless he is a highly sophisticated person is to have some trepidation about this institution. It would be much easier if he had his lawyer sitting next to him and he could turn to him for advice, and guidance, and counsel.

I do believe, as Mr. Gerstein urged, that the role of counsel should be limited. I think there is a fear which I do not think is totally groundless. It is a fear of possible disruption of proceedings. I do not think that the grand jury proceedings should be turned into an adversary proceeding with lawyers getting up and objecting with no judge to rule on these objections. If counsel's role were not limited, delays and disruptions could take place. As a result, there must be limitations placed on counsel.

The more important role that counsel can perform is not to serve as an arguer of legal or factual points or as an objector, but as a counselor to make sure his client is protected and counseled on answering questions and the like. I do not think the grand jury should be turned into an adversary proceeding.

Other procedural rights are necessary. The second most important in my judgment, next to counsel, is also provided for in your legislation. That is the mandatory recordation of everything that goes on inside the grand jury room with the exception of the grand jury's deliberation, the vote, and the like. I firmly endorse this.

The keeping of a record serves as a check the same way that counsel does on overzealous prosecutors, whatever number they are—and I think for the most part they are a minority, but they are a significant enough minority to give us pause and reason to want to construct rules to deal with them.

It will give them pause knowing that a record is being kept of what they are saying—including all their interchanges with the jury. I don't think just simply the testimony of witnesses, as the Department of Justice urges, should be recorded. The pathological prosecutor, can exert improper influences when he exhorts the grand jury to indict or makes comments on people's credibility or absence of credibiliy.

If somebody wants to do that, then he ought to be prepared to have that transcribed and written down and be subject to whatever sanctions or remedies should flow therefrom.

I know the legislation calls for advising the people of their rights, including targets. I endorse that. It seems to me people ought to be informed of their rights and ought to be able to make decisions as to whether they want to testify or not with their eyes open. A citizen should know whether or not he is simply being summoned as a witness who has no fear of exposure or whether he is being summoned because his conduct may be under scrutiny and he may be subjected to criminal charges.

Senator ABOUREZK. Let me interrupt. Mr. Heymann from the Justice Department seemed to fuzz over that quite a bit when I asked him about warning a potential target and about the compulsion of testimony from a witness.

As I recall, what he said was that he first of all thought that there ought to be compulsion of testimony. He said that was one of the purposes of the grand jury: To compel someone to testify.

Second, if I recall correctly, when I asked him about a potential target he said, "Well, they would have their fifth amendment warning against self-incrimination." However, he never reached the issue of what happens if a subject turns into a target and what happens to that testimony.

Excuse me, I think he said it ought to be used against him at that point.

Go ahead and comment if you would like.

Mr. NAFTALIS. If a prosecutor knows that someone is under investigation, I do not think it is any particular burden on him to so inform that person if he wants to question him about his conduct. The person can then make an informed choice.

When I was assistant U.S. attorney in the southern district of New York, which was a rather aggressive and active prosecutorial office, we gave target warnings uniformly as a matter of practice when someone was a target.

I did not think our law enforcement machinery fell apart. I don't think any responsible critic ever said that we were soft on crime or that we were opening the jailhouse doors by giving people target warnings.

Senator ABOUREZK. Did you give warnings to subjects?

Mr. NAFTALIS. That is a new concept to me. I have been out of the Department of Justice for almost 5 years. I used to use the terms subject and target interchangeably. Maybe I phrased the warning on Mondays, "you are a subject of the investigation," and on Wednesdays, "you are a target." They always meant the same thing to me.

The Department's guidelines have drawn a distinction. Unless there has been something around that I was not aware of, I think this is a new distinction.

Senator ABOUREZK. Let me ask you this question before I forget this. If you had a subject or a target—let's use it interchangeably now—testifying before a grand jury, then you would warn them that anything they said might be used against them at a later time. You would say, "You are going to be a defendant perhaps later on, so watch what you say." You have said that in essence. Right?

Mr. NAFTALIS. We would give the equivalent of a *Miranda* warning plus telling him also that he was a target. We would also give them

a perjury warning, that if they testified falsely under oath, they may be indicted for perjury. We gave a long list of warnings. I don't think our law enforcement machinery fell apart in any way.

Senator ABOUREZK. The requirements for any defendant were to give them the *Miranda* warning. But what about a witness that you would call before the grand jury that you had no intention of targeting and you wanted testimony from that person? What kind of procedure did you have for that?

Mr. NAFTALIS. I think it varied from assistant to assistant. My own practice generally was to give them the equivalent of a *Miranda*-type warning just to be safe. After all, what harm did it do to tell someone that they had a right to refuse to testify if they honestly and truly believed the answers might tend to incriminate them under the fifth amendment and that they had the right to consult an attorney. We told them the attorney could be outside only.

We said to them that anything they said could be used against them.

I generally gave that warning to everyone with the possible exception of a fellow who came from a bank or brokerage firm delivering a bunch of records pursuant to a subpena. With the possible exceptions of those kinds of witnesses my general practice was to give everybody a warning.

Senator ABOUREZK. You heard Mr. Heymann say that you couldn't possibly do that sort of thing and that you cannot warn everybody because that would make everybody clam up.

In your experience then, that fear of his is really not justified. Is that correct?

Mr. NAFTALIS. I do not think it is. Also, it seems to me that if someone does possess a right and they are informed of the existence of that right, and knowing that right causes them not to want to say something, then I do not know how to criticize them for that.

In other words, if somebody has a right and they exercise it, and whether that is a wrongheaded decision or a rightheaded decision in terms of their own self-interest—generally, it is in someone's self-interest to testify if they don't have a risk—I don't know how you can criticize them for exercising the right that belongs to them or informing them of those rights.

I think that for the most part informing people of those rights would not cause them to refuse to testify.

Senator ABOUREZK. Mr. Clark, you wanted to say something?

Mr. CLARK. One of the things I tried to do in my book was to contrast the pressures that we put on ordinary policemen who are not lawyers, often in emergency circumstances, to give warnings to parties as to what their constitutional rights are. We contrasted that with a prosecutor who is making a fairly settled, carefully considered decision to institute a grand jury proceeding and to call parties before it.

Suddenly, he is not aware of what the connection of what this witness may be to the subject of an investigation. Is he surprised by his potential involvement?

I don't think that is the position that they were taking at all. I think that what they were really saying was that we ought to have

maximum circumstances to induce a waiver out of the witness against his perhaps best interest. I think that is their view of the grand jury system.

In some way or another the fifth amendment should not be as vibrant or as operative there.

Senator ABOUREZK. Yes, that seemed to be what they were saying.

Mr. LEWIS. I wonder about the equivocal nature of some of the statements made to you earlier, Mr. Chairman. It is one thing to say that it is our policy to give warnings. As a matter of fact, I think the precise wording is that it is our policy to do it "where appropriate." Appropriateness, like beauty, is sometimes in the eye of the beholder.

It is a different thing, however, to say that if those warnings are not given, some meaningful corrective privilege should be conferred upon the witness.

During March of this year, the Department of Justice was before the U.S. Supreme Court in the *Jacobs* case arguing vigorously that a failure to give warnings in conformity with its internal guidelines should confer no right whatever upon the witness who was impacted by the failure to have given those warnings.

They raised again the specter of the minitrial and similar arguments.

The *Jacobs* case in which those arguments were made will not be decided. The court has decided that certiorari was improperly granted for reasons totally unrelated to the merits of the argument.

The significant thing is this. I suggest that the equivocal nature of the response received this morning is predicated upon the proposition that, "well, it would be nice in principle, but if we don't do it, then that is just the witness's tough luck." I really think that is essentially what you were hearing.

The witness who can retain counsel would know his rights. We are concerned about the witness who cannot or who does not retain counsel. Clearly he should be placed in a position of parity.

Mr. NAFTALIS. Mr. Chairman, I would like to add one thing. You asked Mr. Heymann a question. I found him to be, by the way, forthcoming and generous of spirit.

Senator ABOUREZK. Better than most Government witnesses.

Mr. NAFTALIS. You asked him whether or not he had learned from any kind of survey, formal or informal, that the guidelines of the Department of Justice were being implemented or to what extent they were being implemented and the like.

Although he did not pretend to take a statistical poll, he did not seem to indicate that these guidelines were causing any havoc within the Department of Justice or in the criminal justice system. That was clear. He did not indicate any particular problem existed.

The guidelines allow you to warn subjects or require you to warn subjects and if they are not causing havoc, then I don't see how the Department can oppose their enactment as legislation.

Senator ABOUREZK. I wish I had thought of that when he was here. I will ask him the next time he comes up. He says they are following the guidelines. If they are following them, then what is wrong with them? What is wrong with those procedures?

Mr. LEWIS. The guidelines say you should do something if you think it is appropriate, so it is an easy guideline to follow.

Senator ABOUREZK. Yes.

If you would like to make a brief closing remark, I think we had better wind this up. I have a meeting that I am late for now.

Mr. NAFTALIS. Mr. Chairman, let me indicate two things with which I take some minor issue that are in the bill. I also, like Mr. Gerstein, oppose the notion of consenual immunity. It has been my experience in the criminal justice system over the past 11 years that there are often situations where important witnesses would not testify voluntarily. For example, in white collar investigations where you are talking about middle-level officers, who do not want to testify at all and there is enormous pressure on them not to testify. It may not even be a direct kind of pressure, but it is the pressure of the situation.

This does not even mention the organized crime situations. I think that the societal need for effective prosecution of the criminal laws in my opinion should outweigh a citizen's desire not to have to testify.

Senator ABOUREZK. Between use and transactional immunity, which do you prefer?

Mr. NAFTALIS. In terms of grand jury problems, the use versus transactional immunity issue is really not too relevant. There have been only a few instances where people have been given use immunity and have been prosecuted.

It seems to me that the people who have been concerned about the immunity issue, whether it is use or transactional, tie it in generally somehow with taking advantage of dissidents, which is a real concern. We are all concerned about that.

It seems to me that harassment of dissidents has very little to do with the scope of the immunity granted. If that is what the perceived problem is, then whether it is use or transactional is not the issue. It is whether or not there ought to be protections built in through legislation or otherwise to protect people's first amendment rights.

Therefore, my own view—I know there are arguments on both sides—but from the standpiont of the grand jury problem based on the realities of life, I don't think there has been a sufficient showing that one is any better or worse than the other. This is if your interest is protecting first amendment associational rights or first amendment speech rights.

Senator ABOUREZK. I tried to amend S. 1437 with a transactional immunity amendment, and the Justice Department fought like tigers to keep it out. They seem to think that the distinction is very important.

Mr. LEWIS. It influences the testimony. It is not a question, really, of vulnerability to prosecution later. That's secondary.

The point is this. Use immunity is a vehicle for coercing the witness to testify in a desired direction; transactional immunity is not. Under use immunity, a witness knows that he can be charged with the crime concerning which he is forced to testify. It, therefore, becomes important to him to curry favor with the prosecutor, and to say the things the prosecutor wants to hear.

In short, it is a way of flavoring the story that actually comes out, because of the fact that the witness does retain very serious jeopardy notwithstanding his privilege against self-incrimination.

It is for that reason, sir, that the ABA favors a reversion to transactional immunity. So do I. It is the only kind of immunity that will give reliable testimony in exchange for immunity granted.

Senator ABOUREZK. Mr. Clark, do you have a closing statement?

Mr. CLARK. I have nothing further to say, Mr. Chairman.

Senator ABOUREZK. Is there anything else?

Let me express my gratitude to all three of you. It has been excellent testimony. I think this has been a great contribution to these hearings.

I want to thank you all very much.

The subcommittee is adjourned.

[Whereupon, at 1:10 p.m., the subcommittee was adjourned.]

THE GRAND JURY REFORM ACT OF 1978

THURSDAY, AUGUST 24, 1978

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:45 a.m., in room 2228, Dirksen Senate Office Building, Senator James Abourezk (chairman of the subcommittee) presiding.

Present: Senators Abourezk and Thurmond.

Staff present: Irene R. Emsellem, chief counsel and staff director; Jessica J. Josephson, counsel; Richard Velde, minority counsel; and Al Regnery, minority counsel.

Senator ABOUREZK. The committee will come to order.

Our first witness this morning is the Honorable Francis X. Bellotti, attorney general, State of Massachusetts.

Mr. Bellotti, we want to welcome you.

Please proceed.

Excuse me, I would like to suggest to all witnesses that we will take whatever written statements you have and insert them in full in the record, and we would urge all witnesses to summarize their testimony as briefly as possible so that we can do a better job of questioning.

You may proceed.

TESTIMONY OF FRANCIS X. BELLOTTI, ATTORNEY GENERAL, STATE OF MASSACHUSETTS

Mr. BELLOTTI. Mr. Chairman, I would first like to express my appreciation for your invitation to appear, but I would like to point two things out before I testify.

One is that I have a revised version of my original statement which I would like to have considered as my testimony.

Second, I have not seen S. 3405 until this morning and most of my testimony will be based on S. 1449, which has maybe two or three different changes, one having to do with the participation of counsel fully, and the other having to do with immunity, so I will not address myself to immunity at the moment.

I welcome the opportunity, not so much because S. 3405 or S. 1449 affect me directly as attorney general, but because my experiences might be of some assistance.

I have probably tried 1,000 criminal cases as a defense lawyer in the private bar. I am the chief law officer in my State also and have original

jurisdiction with the district attorneys of my State and can take over any criminal case in any stage of the criminal proceedings.

Rather than going through the bill section by section, I would like to impart some of this experience to you on particular sections with which I have had experience.

The Massachusetts legislature has recently passed a statute which I supported allowing a witness the assistance of counsel while testifying before a grand jury. That was enacted in November 1977 and became effective in February 1978, so it's been in effect that long.

Your bill, I think is better in a few ways. It is better, for example, because it makes explicit the right to appointed counsel if a witness is indigent. That was not addressed in the other bill.

The power of the court in the original bill to deal with improper conduct or activity by counsel is also spelled out although it is not in S. 3405, and I will later address myself a little bit to that.

On the basis of our brief experience in Massachusetts, the presence of counsel has not in any way hindered or impeded the effective prosecution of crime.

While most of the prosecutors in our State initially had reservations that grand jury inquiries would be delayed because of problems concerning a lawyer's availability, these fears have not materialized at all.

In this regard, our statute—General Law, chapter 277, section 14a—does state that: "No witness may refuse to appear for reasons of unavailability of counsel for that witness."

You might wish to consider that language. One of the great objections to the prosecutors—and you may have some legislative resistance as well—was that you could not conduct any sophisticated investigation, particularly white collar crime type of investigation, with a substantial number of witnesses because the people, that is the lawyers who would represent those people, were experienced people with heavy dockets of their own and you would always be getting continuances. There would be no continuity.

So, we inserted as a compromise provision to get the bill enacted, that you had a right to counsel, but that you could not not appear because of the unavailability of counsel and it puts a slight burden on the potential target or the witness to make sure that he or she has counsel; but it also eliminates the substantial objection and any resistance you might get in ruining the continuity of any investigation.

We have no problems with attorneys' objections to questions they're trying to address the grand jurors directly.

Senator ABOUREZK. In Massachusetts, are the attorneys allowed to object?

Mr. BELLOTTI. They are not allowed to participate.

Senator ABOUREZK. Only to advise?

Mr. BELLOTTI. They are allowed to advise and sit by the witness, but not allowed to address the grand jury or participate or object in any way. That's the case in Massachusetts.

Based on these facts, I continue to support the concept of counsel for grand jury witnesses. I do not mean to suggest that the presence of counsel will cure all abuses. That's generally the parameters of our particular statute.

But it is a genuine reform without in any way being an overreaction. Overall section 3330A as the Massachusetts statute will avoid the unnecessary and often ludicrous spectacle of witnesses running back and forth from the grand jury to confer with counsel that may not be sensitive to precisely what's happening in the grand jury room, so it is a good reform that I think should be supported every place.

I think that New York either passed or is about to pass it which will give us 11 other States which have it already.

I would welcome any questions about our statute.

I want, however, to touch briefly on some of the other provisions.

I think you should take a close look at the advisability of providing for an independent grand jury inquiry. I am troubled, to some degree, by any effort to inject yet another level of government bureaucracy into the law enforcement area. I do not set, unlss it can be pointed out to me, that this would be the case. In saying that I have to tell you that I do not have a strong proclivity for special prosecutors unless the normal institutions of government have broken down. I do not feel that they are responsible to a high enough authority in our State or in a State to the electorate, and here you would have a special prosecutor appointed by a vote of 12 of a grand jury that would have as much power as a U.S. attorney appointed by the President. I do not see that unless you have a real reason to indicate that normal traditional institutions of government have broken down, as for example in the Watergate situation it was indicated they had.

I don't think you can carry that Watergate experience as an overreaction to all other areas. I think it's one of the things that require some resistance. That happens to be a particular feeling that I have about special prosecutors. I do not believe that it should be institutionalized in legislation.

I would suppose that in a less philosophical, more practical way I would like to comment on section 3330C which deals with the evidence presented to the grand jury. There is a need obviously to insure that the evidence presented to the grand jury establishes probable cause and will stand up at trial. Reputations can be permanently damaged by the fact of indictment alone and such damage may not be rectified by an ultimate acquittal. However, I have some problems with section 3330C as previously written.

As I understand it, under that section a prosecutor cannot submit to the grand jury evidence illegally seized or obtained. If he does, the indictment will be dismissed.

Similarly, there is a burden on the prosecutor to submit all evidence he possesses which would tend to negate the guilt of the person under investigation or exculpatory evidence. If he does not, the indictment will be dismissed.

These provisions are well intended. They are important. The prosecutors certainly should not cavalierly present evidence illegally obtained although it does happen. A sense of fairness would seem to require that the grand jury hear all of the evidence—favorable and unfavorable—but, it is not quite that simple.

Whether evidence is illegally obtained is more often than not a cloudy issue. I have tried innumerable cases where it has been precisely that issue.

Several legal problems could be presented. There's a police search incident to arrest: Was a warrant based on probable cause? Was an informant shown to be reliable? Were the technical requirements of a certain statute complied with?

These may be very close questions in certain cases. All lawyers who practice in the criminal courts know that on the same fact situation, one judge may rule that the evidence was properly obtained, and yet on the very same facts, another judge would suppress that evidence.

The appellate courts are in disarray from district to district.

The Federal circuit courts will often conflict on many search and seizure issues. One need not search very long to find close decisions from the U.S. Supreme Court where there would be strong disagreements as to what was illegally obtained and what was not.

Yet under this section the government prosecutor is somehow supposed to define in advance how the court will rule.

Under section 3330C the evidence need not even be crucial to the case. There are many instances, particularly drug cases which will stand or fall on the legality of search and seizure. There are many others where such evidence is merely one facet of the prosecution.

If the prosecution guesses wrong as to such evidence then the whole prosecution would be undermined.

What I would suggest, based on my experience on both sides of the defense, is a rule which would not result in automatic dismissals whenever evidence has been ultimately found to have been legally obtained was presented to a grand jury. But instead courts should be left free to determine on a properly brought motion to dismiss whether or not the indictment returned was supported by independent, properly obtained evidence.

Similarly, in the case of exculpatory evidence, the bill may impose an unwarranted burden on the prosecutor when there are already adequate protections for the defendant.

As in the search and seizure cases, reasonable people can disagree as to what is exculpatory. Must the evidence relate solely to guilt or innocence? Suppose it merely affects credibility. What if it is relevant merely to a collateral issue of his trial? What does possession mean?

Is evidence known to the police but not known to the prosecutor encompassed? Again, one small mistake, oversight, or misinterpretation can completely cancel out a prosecution.

Moreover, the defendant is protected in other ways. He can obtain such evidence through pretrial discovery; if a discovery order is not satisfied, the evidence can be suppressed at trial; and if the matter is discovered after trial, various postconviction remedies are available.

Again, I suggest that any per se rule requiring the dismissal of indictments if all exculpatory evidence is not presented would be inappropriate.

Federal courts should be left free to balance the impact of the failure to produce exculpatory evidence against the totality of the evidence presented.

Dismissal may be appropriate in some cases, but certainly not all of them. Thus I recommend some modification to section 3330C—to eliminate mandatory dismissals in all cases.

I support the provisions of section 3330C dealing with summarized or hearsay evidence. I also support the concept of dismissing any

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indictments when the transcript reveals that the evidence introduced before the grand jury does not provide reasonable cause to believe that the person charged committed the offense.

That provision can prevent the abuse inherent in prosecutors developing their cases after indictment and insures the proper function of the grand jury.

These last comments are closely related to section 3333, since one can only judge the adequacy of the grand jury proceedings on the basis of the transcript. Essentially section 3333 requires the recording of everything which transpires in the grand jury room other than the jurors' secret deliberations and consultations between witnesses and counsel.

The 13 lines in this section are among the most meaningful of the reform measures proposed in the bill. I support the concept and would welcome similar legislation in my State.

In a more general way, as to many of the other provisions of S. 3405 or S. 1449, I would ask you to consider whether you may be adding in some instances vehicles for delay and layers of unnecessary litigation and streamline the system, and assure defendants speedy trials should be one of our prime concerns.

It's safe to assume that many times resourceful defense counsel will always come up with, I guess, minitrials before you arrive at the indictment stage, and I think you have to consider this in balance. The rights of a defendant which are of ultimate importance under our system, particularly in the grand jury where they are the least protected than any other stage in the criminal process with the need for efficient trials and speedily bringing things to justice.

To be sure, instances of grand jury abuse may come to the attention of this subcommittee as they have come to mine. There are bound to be imperfections, improprieties, and irregularities in any system devised and administered by human beings, and I have been a strong advocate of grand jury reform for a long time.

The question becomes whether in trying to avoid such isolated instances from ever occurring again, do you create a completely unworkable process?

I think you have to look at this when you are considering what is happening with the legislation.

We have to remember that every case is not a Watergate trial or a *Patty Hearst* case. The statute that you will approve will be applied not just to those more celebrated kinds of cases, but also the thousands and thousands of other cases—tax cases, bank robberies, and so forth—that go through our criminal justice system on a daily basis.

In conclusion, although I have expressed certain reservations and caveats, I vigorously support the concept of grand jury reform. As the Supreme Court has noted historically the most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony.

Many of the provisions of S. 1449 or 3405 will insure that the grand jury will continue to be just that kind of buffer.

Thank you, Mr. Chairman.

Senator ABOUREZK. Thank you very much.

I would like to say that we are very grateful for the comments you have made on the legislation. As you know, the purpose of the hearing is to try to refine and improve any bill that has been introduced and the same is true of this one.

I want to assure you and everybody else that our purpose is not to prevent the valid and sincere efforts of law enforcement. It is to prevent the flagrant abuses that have occurred which have politically, in many cases, speared people and ruined their reputations, as well as silencing dissenters and critics. We have found that sort of thing has happened a great deal without regard to whether or not there is a valid case against the defendant in question.

In most of those cases, in fact, there is not a valid case. The prosecutor has used the grand jury not to investigate or to shield the witness, but as a spear or a tool, as has been said, to impale someone with whom the prosecutor disagrees politically.

Mr. BELLOTTI. Mr. Chairman, I have had a great deal of experience on both sides of this having tried criminal defense cases and also prosecuted.

One of the times that I am convinced the greatest abuses happen is after both counsel and witness have left the grand jury room.

Defendants have minimal rights under our grand jury system. I like the grand jury system because it is clothed in secrecy. People are brought before it and not ultimately charged, so their reputations are not damaged.

One of the great problems with it, I think, is that a prosecutor over a fairly extended period of time gets to know the grand jurors very well and they get to rely upon him. He allows them to go home early, he allows them to have coffee at 10:30 or 11 in the morning and he has tremendous influence on a grand jury. Many times, as a result of this, the attitudes of the prosecutor come through and many times the grand jury is guided in their vote either for no bill of for a true bill as to what they feel the prosecutor might believe or think. He wears a white hat, in other words. Everybody else is bad.

He can destroy the credibility of a witness after he has left the grand jury room. I think it is of fantastic importance if the grand jury system is to be maintained that the rights of the defendant be paramount.

I have lived with my prosecution with a very simple concept that if it cannot be done by credible evidence whatever I believe, the indictment should never issue. The only other caveat that I would have is this. I notice that in S. 3405 you allow for the full participation of counsel. I think in a pragmatic sense, more than a philosophical sense you might have some problems with that because you have no judge sitting to rule on evidence or objections. If counsel says that this is not material that should be asked and he says it should be there is no arbitrator sitting in the grand jury room. I think it would be cumbersome. I do not believe it would be workable in the pragmatic sense.

In conclusion, Mr. Chairman——

Senator ABOUREZK. What about an independent counsel representing the grand jury?

Mr. BELLOTTI. We have talked about that in our State before we did it. Again, I have some reservations about that. I don't know whether he or she is a permanent counsel. Are they temporarily appointed?

How about the competency? How about the adversary situation possibly in the grand jury room? I do not know. I think it's something to think about, but I'm not prepared at the moment without exploring it more fully than I have up to now to say whether I would either favor or oppose that.

Senator ABOUREZK. The Department of Justice complains that counsel should not be permitted in the grand jury room to advise a witness because it would be disruptive. In your view, is it any more disruptive or any less disruptive than the existing system where at times perhaps the witness will go outside and ask the lawyer sitting outside questions?

Mr. BELLOTTI. It's less disruptive in the first place.

Senator ABOUREZK. And that's from your experience in Massachusetts?

Mr. BELLOTTI. I conduct my grand juries in a very sensitive manner in regard to people's rights. I have no problems with anything you have in the bill from my own point of view.

If you conduct the grand jury properly in the sense of not only prosecution of crimes but the rights of individuals, you can live with almost anything. You may slow things down. You may impede them.

I think the system now, where you have to go outside—much more important than having to go outside—means that people are not aware that they have the right to counsel. They have to overcome some inertia to bring someone with them to stand outside the grand jury room and counsel frequently doesn't like to do that.

To bring the counsel in is not at all disruptive. It does not at all disrupt. Many of our prosecutors in our State—and I think I and one district attorney out of 11 were the only ones that favor the bill—were saying all kinds of things about you couldn't prosecute organized crime, it would disrupt and hold back investigations. None of this happened.

Organized crime people probably know more about the law than the lawyers that go in and represent them. So, they're the least of your worries.

The people that get hurt are the people generally in the white collar crime situation, the corruption situation, the citizen where it is his first affair and he doesn't know.

The professional criminal does not get hurt. He understands the name of the game. He knows how to handle himself in these things. He knows more about sentencing and putting in time than all the lawyers put together.

The people who get hurt under this system as it presently exists are the poor people, uneducated people, and people that do not have the kind of clout that they should have. That's what you're trying to protect.

Senator ABOUREZK. Another argument that the Department of Justice advances, especially in organized crime cases, is that regarding company counsel and corporation counsel. It is argued that they will represent many, many different witnesses and that this would impede the process of the grand jury.

Mr. BELLOTTI. That was one of the arguments in our State, Mr. Chairman. I'd say it's not inconceivable that that could have some chilling effect when one lawyer represents the whole group of wit-

nesses. I think you've got to balance that against all of the other things in this bill. We talked about saying that a lawyer could only represent one witness in a case, and I don't know if you believe that's too cumbersome or not.

But I know that in my practice of law, and I had a large criminal practice besides other practices, I refused to represent two witnesses in any case in any event at any stage of the criminal proceedings if I felt at some point inherent conflict would arise. I just have never believed ethically that a lawyer should represent two witnesses in a case.

Senator ABOUREZK. Isn't that one of the canons of ethics in almost every State?

Mr. BELLOTTI. But they do it. Lawyers do it all the time. I see them pick up, particularly in narcotics cases, four, or five, or six defendants. You cannot do that without at some point during the proceedings maybe giving away one to save the other or packaging them.

When you represent a client, it has to be you and that client against the world. You cannot do that with more than one client. So I would not see any real problem at least from a personal point of view of saying you could only handle one client before one sitting of a grand jury to deal with one matter.

And that gets rid of that other big objection that you have. What they talk about is the counsel being able to tell everybody what happened in there and keeping everybody under control. You could at least think about that kind of language that the lawyer could only represent one defendant or one witness on a particular matter before that grand jury.

Senator ABOUREZK. We talked about not only that—allowing only one witness per counsel, or vice versa—but also about allowing the court in that situation, if, for example in a white collar crime or organized crime investigation, a higher up hired a counsel and provided it to the middle level witness and prevented the court from knowing of that association. What about that?

Mr. BELLOTTI. There are a lot of statutes that categorize cases of organized crime. For example, our immunity statutes in our State had to do with organized crime cases. It means that at least to some degree you have to make a threshold determination that this is an organized crime case. It's done all the time. You might be able to do something of that nature.

Senator ABOUREZK. You don't see any problem with that kind of a provision in the law, do you?

Mr. BELLOTTI. I don't.

Senator ABOUREZK. The Assistant Attorney General, Mr. Heymann, who testified vehemently against this bill said that he had constitutional problems with it.

Mr. BELLOTTI. No. I don't have constitutional problems. You probably can't take my view as representative of all prosecutors. I understand and have pride in an awful lot of cases, and I've seen these things not only from having read about them, but having experienced them. I know what you can live with and what you cannot live with.

I think that prosecutors generally guard very jealously the prosecution and rightfully so for it's very difficult for them to be objective about any erosion of their power. I suppose it is an inherent insecurity

in all people in this world that erosion of the power that we have either institutionalized or not, is something you resist whatever the substantive nature of that erosion is.

Senator ABOUREZK. That was the feeling I had about the Department of Justice's testimony that while they tried very hard to convince the committee that law enforcement would break down if this bill would pass or anything like it were passed.

Mr. BELLOTTI. No way will that happen. You have to understand where they're coming from.

Senator ABOUREZK. They have promulgated guidelines that describe how prosecutors—Federal prosecutors—behave themselves, that they should not go too far in their prosecution.

Mr. BELLOTTI. What does that mean?

Senator ABOUREZK. Well, that's what I tried to find out, and I wanted to ask you about it. The Justice Department said the prosecutors should be fair. My question to the assistant attorney general was in the adversary system under which we live, is it possible to ask a prosecutor who has no restraint upon him from any outside source in a grand jury setting, to restrain himself voluntarily? What do you think?

Mr. BELLOTTI. No. You could ask him. You could ask him anything in this world.

Senator ABOUREZK. Would he do it?

Mr. BELLOTTI. There's a chilling effect even among lawyers appearing in Federal courts—I think much more than even in State courts. There's a much more formal proceeding. It's not the Commonwealth, but the United States. That is big. That's heavy. Even the chairs, the seats that you sit in in the jury box in the Federal courts are bigger and more impressive than they are in State courts.

So there's a whole feeling of chilling and a great many criminal lawyers have been investigated because of too vehemently opposing Federal prosecutors. That is somewhere between the subconscious and the conscious of a great many lawyers. I don't think you really have to worry about protecting the Federal prosecutors. They can take care of themselves.

Senator ABOUREZK. The minority counsel would like to ask a question.

Mr. VELDE. Mr. Attorney General, first of all has the National Association of Attorney Generals taken a position on this issue? Is yours a majority or minority view?

Mr. BELLOTTI. I would guess that it's probably a minority view. I just hosted the eastern attorney generals in Massachusetts last week, and we started to get into this. We didn't get into a heavy discussion, but I would say that they would probably—although it is awfully difficult for me to make this judgment—be not in favor of a great deal of it. Understand, Mr. Velde, that a great many of these people do not have criminal jurisdictions. The ones that do, I think, might be a little more conservative than I am in that particular area, and I'm just guessing. If I were to give an informed guess, I would say they would not go as far as I went and they would probably not favor out of hand this bill because again it's an erosion of the particular prosecutor's power.

Mr. VELDE. How long has the Massachusetts law been in effect?

Mr. BELLOTTI. Since February 1978. It was enacted in November 1977 and became effective in 1978.

Mr. VELDE. Is there an attempt to evaluate this law?

Mr. BELLOTTI. There has not been any attempt that I know of, any institutionalized or structured attempt. We have talked to the prosecutor in Suffolk County, Garrett Byrne, the second biggest county in the State, and they have had no problems with it. They objected to it in the beginning. We have had none. I have heard no grumblings of any problems. Our bill does not go as far as yours, it just allows counsel in a grand jury.

Mr. VELDE. Did Massachusetts consider abolition of the grand jury when this legislation was pending?

Mr. BELLOTTI. Massachusetts considered many many things. It considered total abolition, considered not allowing hearsay evidence in, transcripts. The counsel of the grand jury was felt to be almost a compromise for both groups, the pro-grand-jury people and the abolition-grand-jury people. That was kind of a compromise.

Mr. VELDE. The British, of course, have abolished the grand jury for quite some time. There the police as well as prosecutors are able to present——

Mr. BELLOTTI. Get an information you mean?

Mr. VELDE. Yes.

Mr. BELLOTTI. I would not favor that, because that gives the prosecutor tremendous power to just go out and get information.

Mr. VELDE. There's no such authority in Massachusetts?

Mr. BELLOTTI. Not in Massachusetts. You can get a complaint on a misdemeanor, but you cannot do that in the superior court. You cannot get information except in the Federal court.

But in the district court you can get a complaint without a grand jury by going in and signing it. If the defendant is not under arrest, he can request a hearing.

Mr. VELDE. Does Massachusetts provide transcripts?

Mr. BELLOTTI. I assume you're referring to felonies?

Mr. VELDE. Yes.

Mr. BELLOTTI. They would provide to the defendant his testimony and the testimony of any witness appearing at the trial. There's no time that it's required, a week in advance, a day in advance, an hour in advance. But for the purposes of cross-examination you can get it.

Mr. VELDE. Thank you, Mr. Chairman.

Senator ABOUREZK. With respect to counsel's question about the National Association of Attorney Generals, do you know, in other States which instituted reforms similar to Massachusetts; how their attorney generals feel about such reforms? Wouldn't there be a difference?

Mr. BELLOTTI. There's a difference in the kinds of bills that they have too. Some of them allow participation. Some don't. Some you have to waive your immunity to go before a grand jury and have counsel, and I don't believe in that. So they vary from State to State. I do not know or have specific knowledge of their experience.

Senator ABOUREZK. I want to express the thanks of the committee and my personal thanks for your appearance. It's been a very good contribution and excellent testimony.

Mr. BELLOTTI. Thank you very much, Mr. Chairman.

Senator ABOUREZK. Our next witness is Mr. Jack Anderson, who's a journalist, and we all up here have waited a long time to question Mr. Anderson for a change.

Go right ahead.

TESTIMONY OF JACK ANDERSON, COLUMNIST

Mr. ANDERSON. Mr. Chairman, I am pleased to accept the opening suggestion of the chairman and submit my prepared statement for the record.

Senator ABOUREZK. Without objection, Mr. Anderson's written testimony will be inserted in the record.[1]

Mr. ANDERSON. I had a few off-the-cuff remarks that I would appreciate being able to make.

I offer these remarks as a reporter.

Our Founding Fathers understood that government, by its nature, would tend to oppress those who had had power over it.

In their wisdom they gave us a free press. The role of the press down through the past two centuries has been to be a watchdog on government.

Every government, including ours, would prefer not to be watched. Every government, including ours, resists that kind of scrutiny. Every government, including ours, would like to control the flow of the information to the people.

Every government, including ours, tries in one way or the other to suppress information that it does not want the people to have.

One of the most insidious ways that this is now being done on an alarming scale is to compel newsmen, contrary to their sworn oaths, to reveal the sources of their information.

Grand juries are being empaneled throughout the country and are calling newsmen in and demanding to know the source of their news.

Any newsman who reveals his news sources, unless they agree to it, will lose his news sources. He will thereafter have to rely upon official government sources.

So, in effect, this campaign that is now going on is a real threat to freedom of the press.

We have had instance after instance. We have had Peter Bridge serving time in the Essex County Jail in New Jersey for refusing to divulge his news sources. We have had Samuel Popkin serving time in the Norfolk County Jail in Massachusetts for refusing to divulge his news sources. We have Harry Thornton serving time in the Hamilton County Jail in Tennessee for refusing to divulge his news sources. We have Mark Knops in Madison, Wisc. called before the court for refusing to divulge news sources.

A man named Lewis in Los Angeles, for refusing to give the original tapes to a grand jury.

And in Fresno, Calif. four men; Joe Rosato, George Gruner, William Patterson, and Jim Bort are involved. I know about those cases because those four men had invited me to come to Fresno to appear at a hearing on their behalf. They are four of the city's most prominent people. The editor of the Fresno Bee and an associate editor—two of the finest reporters—are there. They have committed no crime. They

[1] See p. 195.

are unlikely to commit a crime, yet they have been thrown in the slammer there in Fresno without a trial.

They have offended a judge by refusing to tell the judge where they got their news.

Freedom of the press is imperiled in this country if we're going to be compelled to divulge our news sources.

Only this month a New York Times reporter named Myron Farber has been sent to jail for refusing to divulge his news sources. I think it is probably interesting that during the same timeframe that the Attorney General of the United States, Griffin Bell also refused to divulge to the court his confidential sources.

Griffin Bell, to the best of my knowledge, is still sitting ensconced in his leather chair in the Justice Department. He is not imprisoned. Only newsmen go to jail for this.

Senator ABOUREZK. Certainly not attorney generals. [Laughter.]

Mr. ANDERSON. I have something for the record.

There is nothing in the Constitution to support Griffin Bell's right to withhold information from a grand jury. There is nothing in the Constitution upholding Griffin Bell or the Attorney General. There is something in the Constitution about freedom of the press.

But, they are sending newsmen to jail for refusing to divulge confidential sources.

There is nothing in the Constitution to protect the FBI. There is nothing in the Constitution to protect the CIA.

But, there are judgments after judgments for protecting their right to withhold confidential information.

I had a case that I was personally involved in where I had the CIA conducting illegal surveillance of me. At one time they had 18 radio cars following me around.

This was against the law. The statutes that set up the CIA forbid the CIA from conducting investigations or surveillance within the United States, except their own employees.

Yet, in violation of the law they had these 18 radio cars following my reporters and me wherever we went trying to find out where we were getting our information.

Because the Justice Department refused to prosecute these law violators in the CIA, I at least tried to find out what they were up to by filing a lawsuit.

We held depositions. The CIA refused to divulge who the people are who were following me around. The CIA refused to divulge who the people were who had made the decisions. The CIA refused to divulge most of the information that we tried to get.

We went before a judge and asked the judge to compel the CIA to do this. The judge refused. The judge said, "Well, let's take the depositions first. Let's complete the depositions first."

My turn came. In contrast to the CIA, I told in my deposition the free, frank, and open answers to every question asked me, including sources, because I had the permission of the sources to do so, with two exceptions—only two.

There were two of my sources who had said "I do not release you from your obligation to keep our identity confidential."

The judge threw the case out because I refused to divulge the identities of two sources.

The judge did not say when the CIA—I did not even finish my deposition—went to the judge the next day and said "Compel Mr. Anderson to divulge his information."

And the same judge who would not compel the CIA earlier to divulge the information that we requested and said "Wait until the depositions are over" was the same judge who ruled immediately that I either had to divulge information or forfeit the lawsuit.

This is the kind of repression that the press faces today.

Perhaps it is a backlash to the Watergate years. Perhaps it is judges and prosecutors who were appointed or in other ways identified themselves with the Nixon administration.

Possibly they are seeking their revenge.

I feel competent to defend myself. I have not been harassed out of business and I don't expect to be, but there are newsmen in this country who do not have the same resources I do.

The attack upon the press should be understood for what it is—an attack upon the rights of the people to know.

This is off the cuff, Mr. Chairman. If you have any questions, I would be glad to answer.

Senator ABOUREZK. Mr. Anderson, you have had personal experiences with the grand juries; is that correct? Have you ever been called as a witness for a grand jury?

Mr. ANDERSON. Yes, I have.

Senator ABOUREZK. You have heard the discussions this morning between members of the staff of the committee and the attorney general of Massachusetts on this legislation. May we have your views on whether or not you believe that counsel should be permitted in the grand jury room at least to advise a witness, or, if not, to participate in the proceeding?

Mr. ANDERSON. That is a minimum reform.

Senator ABOUREZK. What about the requirement that the prosecution be required to submit exculpatory evidence, evidence which would show the innocence of the defendant as well as the guilt of the target or the witness? What about a crime that that be brought out before the grand jury as well as evidence that might tend to convict.

Mr. ANDERSON. That was the original purpose of the grand jury. The Founding Fathers intended that the grand jury be set up as a board between overzealous prosecutors and the rights of the citizens.

Senator ABOUREZK. You are aware at this point in our history that virtually all grand juries which have ever been impaneled, mostly on the Federal level, are not really shields between the prosecutor and the public, but are tools—a weapon—used by the prosecutor for whatever purpose he might want to use it in the event that prosecutor becomes somewhat political himself. Is that right?

Mr. ANDERSON. It's a battering ram.

Senator ABOUREZK. Yes, I think that's a better word.

Do you support the concept of an independent grand jury system where the grand jury might have its own attorney to advise the grand jurors rather than relying on the prosecutor for advice?

Mr. ANDERSON. I think the grand jury system, as set up by our Founding Fathers was intended to protect the citizen. I think that any independent grand jury, subject to the will of the populace, would be a great improvement.

Senator ABOUREZK. It has been suggested that the press should not be allowed to have access to grand jury information when the grand jury decides not to indict an individual. What is your opinion on this?

Mr. ANDERSON. I think that there are times when a person's reputation has to be protected and when information laid before a grand jury should not be made public if the grand jury did not find it adequate for an indictment.

However, there are other times when grand juries are used to cover up crimes. I was involved in such an incident during the Watergate years.

I had learned that Richard Nixon was attempting to cover up the whole Watergate scandal. There was a limit on how much you could cover up. He was aware that the public knew some of the facts. It was his original strategy, according to White House sources, to persuade the public that he would follow the judicial processes, and he believed he had the power as President to control those judicial processes.

His Attorney General at the time was Mr. Kleindienst, who was subsequently convicted.

He felt that he had a kind of control over Kleindienst in order to control the grand jury.

If you can recall back to those times, this was at a time when Richard Nixon was refusing to allow his aide to testify before the Senate Watergate Committee. He had directed them not to appear. He had announced that he did not want to interfere with the judicial process.

He had intended to offer a lesser scapegoat. I had heard the name "John Mitchell" as the man responsible for the Watergate crime. To allow him to be punished and to cut it off at that point was the strategy.

The evidence was being developed beyond closed doors by a grand jury.

So, I sought to get that evidence. I was able to get it. I got the grand jury transcript. I began publishing in column after column quotes from this grand jury transcript.

That caused a great deal of discomfort, and I cannot be sure what the real effect was.

I can tell you that members of Nixon's cabinet told me that it was after I began publishing these that Nixon announced to his cabinet in closed session that he had abandoned his former plan to withhold evidence from the Senate, and that he had two reasons for that.

One, he said, was that he was getting a great deal of pressure from Senator Barry Goldwater up here on the Hill, and, second, he said that Jack Anderson was publishing the grand jury transcripts in any case so that the information was available to the public and his aides might as well, therefore, testify on Capitol Hill.

I hope that that is the reason that he did it. It would please me, and I think that it would answer your question.

Senator ABOUREZK. We have been cautioned by more than one person that attempts to reform the grand jury system is a reaction, an overreaction, to Watergate and the experiences that the country had at that period of time.

Do you believe that the abuses of the grand jury began with Watergate or ended with Watergate? Do you believe that reform still is needed?

Mr. ANDERSON. I certainly do. Long before Watergate I appeared before grand juries. I thought that they were improperly conducted.

Senator ABOUREZK. Mr. Velde?

Mr. VELDE. Mr. Anderson, referring to your prepared statement for a moment, you suggest that perhaps that one of the ways for reform is to let a little sunshine into the proceedings. I guess your primary recommendation there is to make transcripts available.

You do not go so far as to make proceedings public themselves, do you?

Mr. ANDERSON. I believe that the innocent should be protected and that people whose reputations have been smeared before a grand jury but who have been found by the grand jury to be innocent of any crime should not be subjected to this because it would be a miscarriage of justice to publish those transcripts.

I believe that the witnesses themselves, that is the targets of the investigations themselves, should certainly be free to have copies of the transcripts and to make those copies available.

If they felt that their rights had been abused inside the grand jury room; and if they felt that the prosecuting attorney had been overzealous; and if they felt that the public should see and know and hear what went on then they ought to at least have the right to the transcripts.

Mr. VELDE. But the transcripts would not be made public otherwise, is that right?

Mr. ANDERSON. I think eventually they should be. That is in the case of those who have been indicted. I suppose that there would be a good argument for withholding that information until after the trial. After then, I do not see why they ought not to be made public.

Mr. VELDE. Thank you. Thank you, Mr. Chairman.

Senator ABOUREZK. Mr. Anderson, we want to thank you very much for an excellent statement and for a good contribution to this hearing. We appreciate it.

[The prepared statement of Mr. Anderson follows:]

PREPARED STATEMENT OF JACK ANDERSON

Mr. Chairman: Thank you for the chance to share with you my concern about the abuses that in recent years have made the grand jury system a runaway horse desperately in need of reining in.

These abuses threaten to trample the rights of every American, the innocent as well as the guilty, unless reforms such as those offered in your bill are speedily enacted. The grand jury system, originally intended as a bulwark between the accused and an overzealous or politically ambitious prosecutor, has been transformed into a battering ram aimed directly at the individual rights and liberties protected under the Fourth, Fifth and Sixth Amendments to the Constitution.

The irony of this perversion of justice is small comfort to those who have been victimized by it.

A Justice Department attorney, James H. Jeffries, once, with obvious approval, told a group of prosecutors that the federal system is "a veritable Christmas shopping catalog of bad things to do to bad people."

The trouble is that law enforcement officials like Jeffries are playing Saint Nicholas and deciding who among us is "bad" and deserves a lump of coal in his stocking. Indeed, it is no exaggeration to suggest that some prosecutors are playing God. Sanctified by the Watergate scandals and heedless of the rights guaranteed to all Americans by the Constitution, these zealots sit in judgment on all of us. Using the grand jury system as a net, they go off on fishing expeditions intended to catch the sharks of organized crime and corporate corruption, but which, if unchecked, can sweep up every fish in the sea as well. The post-Water-

gate era has become the Golden Age of the Prosecutor, and the checks on prosecutorial power set forth in the Grand Jury Reform Act will go far to redress the balance in favor of our traditional liberties.

Harassment of suspects, intimidation of witnesses, jailing of those who are uncooperative—all done without the safeguards of a trial in open court—have become part of what one prosecutor described frankly as "investigation by terrorism."

As Rodney Sager, a former assistant United States attorney for Virginia, has noted, "The simple fact is today our system clothes the prosecutor with virtually unbridled powers. The person protected by the modern-day grand jury is the prosecutor."

In the present lopsided situation we have today, one of the most elementary reforms, I believe, is an individual's right to counsel when called before a grand jury. I am pleased to see that provision in your bill.

Of equal importance—and I say this not from the self-interest of a reporter alone—are the provisions for letting the public know what has gone on inside a grand jury room. Requiring a complete and accurate transcript of the proceedings, and permitting a witness to disclose his testimony without fear of reprisal, should have a salutary effect on overzealous prosecutors.

One of the most pernicious abuses permitted under the present grand jury system is the prosecutor's authority to go "off the record" whenever he chooses. Rodney Sager described how this works in practice: "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. 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."

Letting a little sunshine into grand jury proceedings will go far, I think, to prevent an overzealous, overambitious or inexperienced prosecutor from turning the grand jury room into a star chamber.

Other abuses that would be corrected by S. 1449 as written are the possibility of repeated harassment for the same suspected offense, and the use of the vague conspiracy statutes to juggle venue to the advantage of the prosecutor and the disadvantage of the suspect.

Your bill is carefully drawn and comprehensive, and I wish you success with it. The importance of grand jury reform is obvious, but can stand repetition: while it is undoubtedly true that most of those who are targets of a grand jury probe deserve the attention they get, it is also true that the rights of law-abiding citizens are in jeopardy whenever the rights of the law-breakers are ignored.

Thank you.

Senator ABOUREZK. We have a panel of witnesses who have been victims of grand jury abuse, which is the reason we have invited them to testify. They are Mr. Rodney Sager, Ms. Jill Raymond, and Mr. Jay Weiner. If they are here, would they please come up to the witness table?

I'd like to welcome all three of you here to the hearings.

You may go in whatever order you may wish.

TESTIMONY OF JAY WEINER, VICTIM

Mr. WEINER. My name is Jay Weiner. The last time I was asked to testify before any official forum I refused the invitation because things were not the same as they are here today.

Then I was not as politely asked, as I was by you people, and I didn't have any option to accept or reject that call. In fact, I was told that if I didn't appear to testify, I'd face jail.

My questioners treated me with contempt, and their audience—people known as grand jurors—either sat idly by or joined in in the attack. So I hope this isn't that.

I presented the written statement to you, which is a chronology of my entire case, and so all I want to do here is to make extra points that are especially important to me. I think they are important.

Senator ABOUREZK. Without objection, I will have your written statement inserted in the record.[1]

Mr. WEINER. One significant problem that I see in the battle for grand jury reform—and maybe it's an obvious one, but it is one that if you are an average person talking to people about grand juries you face—is that there is really a lack of understanding of the issues involved in a grand jury by just about everybody out there.

These are average citizens, and they do not know anything about the process. It is an interesting thing for people who don't know anything about the process to see what happened as it did in my case.

If they know anything at all it is that criminals are subpenaed, and if you don't say anything, you're trying to hide something.

There is an interconnection between the grand jury and the entire criminal procedure, with FBI activity and with the continuing attack on the first amendment. This is not known by a lot of our citizens. It is very complicated to understand and explain.

Attorneys themselves often do not know much about a grand jury or the terminology used.

If I can say so, perhaps even Senate subcommittee members might be confused, because when I was invited, the note from Senator Abourezk said that because of my experiences as "the subject of a grand jury investigation," I was asked here today. But I was never the subject of an investigation.

I was a witness, and that's a lot different from being a subject because witnesses have less rights than suspects. The inherent mythology and the terminology in the whole cumbersome process tends to militate against understanding what goes on. Explaining what goes on leads to reforming what goes on now.

Second, when I was subpenaed in May of 1976, which was my third grand jury subpena, I did not decide to go to jail. People always ask "How did you decide to go to jail?"

I did not say "You subpenaed me, and so I'm going to go to jail." I did not want to go to jail. I never wanted to be subpenaed. My decision was not that I was going to go to jail to show so and so, but it was that I was not going to answer the questions about my friends and my friends' activities.

I thought I might wind up in jail, and, of course, that was the predominant worry. I was concerned about that.

However, from my own experiences and other talks I had with people who reach that threshold, the choice is made independent of the prospect of jail. But that is why I feel that the Department of Justice's contention that jail time is coercive time is very transparent because, in my case for instance, I was in jail for a few months. People in the prison said that I had gotten a call from the U.S. attorney. They said that he wanted to know if I would like to cooperate with him.

My feeling was: How can I assist a guy who put me in jail for a few months? It's worse, it doesn't get better, you get more angry

[1] See p. 219.

and more hostile. There was absolutely no coercive feeling mostly because prisoners, whom I lived with during the 4 months I was in jail, take care of people who do not testify before grand juries. You are the most popular person in jail if you're not answering questions. Because everyone in jail got there because somebody talked.

So, they like people who don't. Coercion is a fallacy.

Senator ABOUREZK. Would you briefly describe what this was all about? I don't think you've got that on the record yet. Why were you first called?

Mr. WEINER. I was called to answer questions in the investigation of the harboring of Patricia Hearst and other Federal fugitives, first in Harrisburg, then in Scranton, Pa.

Senator ABOUREZK. When were you first called, and what happened then?

Mr. WEINER. I was first called on March 13, 1975 and I did testify before that first grand jury. I was subpenaed again in April 1975 and I fought that subpena. I was then subpenaed in December 1975 to the Hearst trial, and I fought that subpena. I was then subpenaed in May 1976 to a Scranton grand jury, which I refused to testify before and was sent to jail for 4 months.

I was released from jail in March 1977.

Senator ABOUREZK. What questions did they ask you that you refused to testify about?

Mr. WEINER. They asked me: "Do you know Philip Kent Shinnick, and did you see Philip Kent Shinnick during the summer of 1974?"

Senator ABOUREZK. That was the question you refused to answer?

Mr. WEINER. Yes.

Senator ABOUREZK. And you spent 4 months in jail because of your refusal to answer that?

Mr. WEINER. Yes, but Phil was there with me.

Senator ABOUREZK. Was he in the grand jury room?

Mr. WEINER. No, Phil was in jail with me.

Senator ABOUREZK. In jail with you. Oh.

Mr. WEINER. Because he refused to turn over his hair, his fingerprints, his handwriting samples.

Senator ABOUREZK. When did you first meet Philip Kent Shinnick? Before or after you went to prison?

Mr. WEINER. I had met him a couple of years before, but I didn't know his address until we were both subpenaed together, to tell the truth.

Senator ABOUREZK. And he was put in prison for refusing to testify before the grand jury?

Mr. WEINER. No, he wasn't even asked to testify. He was asked to turn over his hair, his fingerprints, and his handwriting. Therefore, he couldn't even assert the fifth in the grand jury room. He just walked in and said——

Senator ABOUREZK. But that's why he was put in prison because he refused that.

Mr. WEINER. Yes.

Senator ABOUREZK. So, in other words, they knew where Philip Kent Shinnick was. The grand jury knew where he was at the time that they asked if you knew him?

Mr. WEINER. Oh, yes.

Senator ABOUREZK. They could have asked him to testify for whatever it was that they wanted to find out couldn't they?

Mr. WEINER. Yes.

Senator ABOUREZK. At the time that you were called before the grand jury, did you know anything about grand juries? Are you an attorney, first of all?

Mr. WEINER. No.

Senator ABOUREZK. Did you know anything about grand juries at the time?

Mr. WEINER. No.

Senator ABOUREZK. Were you represented by an attorney?

Mr. WEINER. I met the first attorney I had ever met in my life an hour before I was to appear before the grand jury.

Senator ABOUREZK. This was a Federal grand jury?

Mr. WEINER. A Federal grand jury in Harrisburg, Pa.

Senator ABOUREZK. Had you been questioned by the FBI?

Mr. WEINER. Yes, I had been, a number of times.

Senator ABOUREZK. Did you know anything about the questioning process during grand jury hearings?

Mr. WEINER. No, I didn't know anything about grand juries. I didn't know how many people there were, or what happens. I was ignorant.

Senator ABOUREZK. Were you given a lawyer by the court?

Mr. WEINER. No, a friend suggested this person in Harrisburg. I don't live in Harrisburg, and there weren't that many attorneys in Harrisburg who do this kind of thing and his name was given to me. He did an adequate job in protecting my rights except that it was a pretty hot case. The U.S. attorney in Harrisburg wanted witnesses, and they saw me as an ignorant, isolated, scared young person who they knew had done nothing wrong, and they threatened me with jail if I didn't answer their questions.

Senator ABOUREZK. What effect did all of this—the imprisonment—with all of its publicity have on you and your family?

Mr. WEINER. I changed a lot. That's a big question—what effect did it have on me?

My life was altered a lot and I learned a lot about grand juries, and I've become an ardent grand jury reform person. I have had problems obtaining jobs.

Senator ABOUREZK. Since then?

Mr. WEINER. Yes.

Senator ABOUREZK. Did you have a job at the time you were in prison?

Mr. WEINER. I was a college student and was in the process of trying to obtain a job. I got out of school in May 1975 which was 2 months after my first subpena. I wanted to be a sportswriter and was not able to find work. It's hard to be a sportswriter sometimes with the way that some sports editors think. If they think you have been subpenaed, then you are possibly guilty of something because you have been called.

Senator ABOUREZK. Is there anything you wanted to add before we go on to our next witness?

Mr. WEINER. I have two points. One is that I think that it's important that the FBI be fully accountable. That's a whole other issue,

I know, but it is connected a whole lot to sufficient notice that you receive when you are subpenaed—in other words, from the time you are subpenaed to the time that you appear.

If you are harassed, or asked lots of questions, or if your family and friends are harassed by the FBI, there's no need for you to be forced to testify. Because you have been forced to testify by the conditions that FBI agents might have set up prior to the grand jury hearing. There needs to be an FBI that's accountable for its actions.

Senator ABOUREZK. We all agree with that up here, we just don't know how to make them accountable.

Mr. WEINER. The one reform that I didn't see in your bill that I just noticed today for the first time was that I had to travel a great distance to go to the courtroom where my grand jury was happening. This is even while I was trying to quash the subpena. It's even before I had to appear before the grand jury.

It takes tremendous expense and time. You have to have an attorney with you all the time. I know that in earlier reform bills there were sections that would have allowed a witness to quash his or her subpena in the home district where they live or work. I think this would be a good reform for people who just can't afford to be traveling and picking up hotel expenses in some distant city from where they live. It costs a lot for people to assert their rights.

Senator ABOUREZK. May I ask, Mr. Weiner, what the status of the *Hearst* case was at the time you were put in jail for refusing to testify?

Mr. WEINER. I was in jail on November 30, 1976 and Patricia was out of jail at that point.

Senator ABOUREZK. She'd been found?

Mr. WEINER. She had been captured.

Senator ABOUREZK. Let me back up. I'm sorry about this. The purpose of the inquiry with respect to you was to try to find Patty Hearst.

Mr. WEINER. Well it was supposed to be investigating the alleged harboring of her. It was being used to find her. By the time they got around to putting me in jail, she had already been found, and in fact had testified at her trial about significant parts of her time when she was a fugitive.

Senator ABOUREZK. You testified?

Mr. WEINER. She did.

Senator ABOUREZK. Had your name ever come up in the trial in connection with harboring any fugitives?

Mr. WEINER. My name was mentioned.

Senator ABOUREZK. As one who harbored a fugitive?

Mr. WEINER. No, as just a person whose name she did mention.

Senator ABOUREZK. You were never charged with harboring a fugitive?

Mr. WEINER. Nobody has ever charged that. The alleged targets of the grand jury have never been in jail. The person who I was questioned about who theoretically was some sort of target was released some 2 months before I was for his contempt because the Government said they no longer needed the information they were trying to get.

Senator ABOUREZK. And they just kind of forgot about you?

Mr. WEINER. It was them and the judge.

Senator ABOUREZK. Thank you. We may have more questions.

Who would like to speak next? Ms. Raymond?

TESTIMONY OF JILL RAYMOND, VICTIM

Ms. RAYMOND. I am Jill Raymond. I am 26 years old. Stamped throughout my FBI file are the words "armed and dangerous." But the fact is that I have never in my life been armed, and I have never had cause to think of myself as "dangerous."

Apparently though, the FBI felt strongly enough about me at one time to begin a process of subpenas and civil court proceedings that resulted in my being jailed for 14 months continuously in small, rural county jails in Kentucky, without ever being accused of a crime.

I wasn't the lone victim of that process though. Ultimately eight people—six of us in Kentucky and two in Connecticut—spent time imprisoned for their refusal to talk to FBI agents in this single investigation in the winter of 1974 and 1975.

It wasn't until May 1976 that all of us were free and on the outside again. Since that time we have been repairing our lives so to speak, but I wanted to say to this panel that as I began preparing this testimony last week, I was notified by some of the others who have been through that jail experience with me 3½ years ago, that once again FBI agents had appeared at their door last week and at the doors of their friends in Kentucky, Connecticut, and elsewhere, again asking questions about the whereabouts of friends and acquaintances.

Senator ABOUREZK. Just last week?

Ms. RAYMOND. Yes, last week. A week ago today.

Again they were threatening some of those people with the grand jury if they didn't cooperate.

One day in January 1975, two agents from the local FBI office in Lexington, Ky. where I was living, appeared at my door. They said they wanted to ask me questions about two women they believed I had known.

I politely declined to talk to them. I felt that I had no reason to trust the FBI, to believe that what they told me that the investigation was necessarily true, or that they would not manipulate something I said in perfect innocence to be used against me in some way.

They told me that because of my lack of cooperation, I could be in serious trouble, and as they were walking down a walk away from my doorway they said: "You might find yourself sitting outside the door to the grand jury room next week."

The first entry in my FBI file, however, is dated some time before that. It's dated in July 1972 and it documents that I was an officer in an antiwar group at the University of Kentucky. It notes a couple of peaceful demonstrations related to the Vietnam war in which I participated.

I wish to state here that I am guilty of all these acts. In fact, I've been politically active since the time I arrived in Lexington to go to school.

I had joined the Lexington Peace Council and picketed the local draft boards. I joined the Kentucky Women's Political Caucus, and I had helped to organize the socialist subcaucus of that group. I was an officer of the Kentucky chapter of a national third-party group called the "People's Party."

I petitioned on street corners to place Dr. Benjamin Spock on the ballot for Kentucky and drove him and other candidates around the State campaigning.

I had helped to form and I participated in a socialist-feminist study group. I had helped leaflet the support of the United Farmworkers group to promote the UFW boycott of Gallo wines.

Finally, as a member of the UK student group and also as a self-acknowledged lesbian, I had helped a fledgling gay rights group on campus to get access to university meeting rooms as they were negotiating to be an approved student organization.

The judge who later scornfully denied the gay group's legal appeal to be an approved university group was to send myself, the 18-year-old president of the gay group, and four other gay people off to county jails in chains and handcuffs for not complying with grand jury subpenas.

Some of us had mistrusted the FBI enough to refuse to talk to its agents, at least without the presence of a lawyer. We obtained the help of Prof. Robert Sedler who was general counsel for the Kentucky Civil Liberties Union at that time.

He was a very well-known lawyer, but all of us were very confused about the process that was going on. We were not familiar with grand juries. We were not familiar with the process by which someone, merely by saying they don't wish to speak to someone, can ultimately end up in jail.

Dozens of other people in Lexington were visited by agents a second, third, or fourth time and were told that if they did not cooperate with the FBI, they would also get subpenaed as did the six of us.

Then I began to hear from friends and relatives that I have all over the country. They told me that the FBI had visited them and asked them questions about my political beliefs, my associations, my sexual habits. They offered some people money to travel to Lexington to convince me to testify.

They told my sister that I was already in jail at that time and that she should use her influence to help or convince me to testify. They told another sister of mine that she'd be subpenaed if she didn't cooperate.

They traveled to Cleveland to visit my 81-year-old grandmother there and ask her questions about me. She told them that she trusted my integrity.

In 1970 I have learned, when the FBI had added about 1,200 agents to do campus work to infiltrate the antiwar movement, there was an internal memo that went out to the Bureau and it suggested that one primary goal was to: "enhance the paranoia endemic in these circles and get the point across that there is an FBI agent behind every mailbox."

In 1975, the war was over, but there were still antiwar activists around. The women's movement by now was gaining a lot of attention. While not endemic to the community exactly, there was no little paranoia in Lexington in 1975 and 1976.

Newcomers to town who gravitated toward women's groups were received very coldly and sometimes with suspicion. The UK gay rights group folded.

Indeed, having heard of and seen FBI agents actually following their friends around town in cars that were marked "Fayette County School Board," it wasn't any longer impossible to imagine FBI agents behind every mailbox.

It started to be clear to me that there was a horrifying abrogation of civil liberties going on there and it seemed like it was crucial to raise those issues in as public a manner as possible.

Immediately following our contempt hearing, my cowitnesses and I were led to the U.S. marshal's office in the district court house. We were strip searched, handcuffed, and chained together at the waist. Then we were taken to three different county jails around the State of Kentucky. I went to Pinesville down in the mountains near the Tennessee border. The jail had facilities for eight women in two cells that were 5½ feet by 6½ feet wide, each with four bunk beds.

Outside of the cells there was a very small dayroom that was closed off by a steel door that had a screen in it with a flap over it. Through it visitors could come peer at us for 15 minutes at a time, after they had driven 2½ hours from Lexington to see us.

Then I was moved to Frankfort, Ky., which was 30 miles from Lexington. It was a little closer, easier on visitors.

I spent the next 3 months in a six-bed cell that measured about 12 by 18 feet. I left that cell one time—to appear in court. There were no female employees at either of these jails, even though that's against Kentucky law. It's also against Federal regulations for jails that hold Federal prisoners like we were—to hold women prisoners without female employees. There was absolutely no privacy from male jailers.

I was permitted fewer visitors than other prisoners because the jailers told me of the publicity surrounding my case.

After I had given an interview about the conditions of the jail to the Lexington paper, I was suddenly moved to a jail in Richmond. It had a "poor" rating according to State jail authorities. U.S. marshals had told me that they had periodically pulled the Richmond jail's Federal contract because its conditions and operating procedures were so substandard.

The women's cell was on the top floor of the three-story jailhouse which had been built before the Civil War. The jailer couldn't read or write, and his wife read documents to him that he needed to understand, and she also read to him prison incoming mail. There was no mechanism for communicating between the women's cell and downstairs to the jailers office.

When prisoners were sick, or in delirium, or having epileptic seizures there was absolutely no way to communicate that to the jailers other than banging objects on the floor and hoping they would get aroused enough to come up and see what was going on.

The sum total of the activities available to me were reading, card playing, watching TV, and writing. During a lot of that time I was the only woman in those cells, since in these small counties often there is very little jail traffic in the women's cells. There are few women being locked up at any one time.

One night I didn't get dinner because they just forgot I was there.

The judge in our case, however, that had cited us for contempt had not forgotten that I was there, and when my attorney attempted

at one point to get me transferred to a Federal prison that we thought would be more livable for me for the duration period, the judge intervened with negotiations with the Bureau of Prisons and he said: "I want her where she is." He also referred to the Bureau of Prisons as the "dupe of the ACLU," which had helped to negotiate for my transfer.

On May 4, 1976 the grand jury that had issued my subpena had expired, or was due to expire, and Judge Moynahan signed the order that I could be released at midnight that night. That's when I walked out of the jail.

Congress has got to absolutely curtail the mechanisms that have allowed 18 people in this case and lots of others before and since then, to go to jail as a result as what I see as their faith in the first, fourth, fifth, sixth, and ninth amendments to the Constitution.

It certainly has got to curtail the indefinite time period and the conditions under which people can be incarcerated for "civil order." And I have to add, given what I have learned about the events of the last week, that it's got to act quickly. Because I sit before you today with the knowledge that last Thursday morning FBI agent Wayne McDonald in Lexington, Ky. knocked on the door of my friend, former cowitness, and former cellmate and asked her where I was.

The day before that another agent in New Haven, Conn. went again to one of the women there who had been in jail twice for her refusal to talk to agents in 1975, and again threatened her with the grand jury if she didn't talk. It was obviously too soon for us to conclude that our ordeal was over, and it's too soon, I guess, to conclude that the Department of Justice is going to restrain and correct itself. Thank you.

Senator ABOUREZK. You mean they asked just last Thursday about your whereabouts?

Ms. RAYMOND. Yes, sir.

Senator ABOUREZK. And if your friends didn't tell of your whereabouts, they were threatened with the grand jury?

Ms. RAYMOND. A different woman on the same day was approached and threatened with the grand jury when she wouldn't talk to them. It was two different people.

Senator ABOUREZK. What was the one that was threatened with the grand jury asked about?

Ms. RAYMOND. She was asked if she would talk with them. This was a woman who had been jailed in Connecticut.

Senator ABOUREZK. Did they state the purpose of this new investigation last week?

Ms. RAYMOND. I really don't know. But it's not inconceivable that they just assumed that she would know what they were there to talk about since she had had such an ordeal with the FBI 3 years ago. It's very possible that they just assumed she would know what they were there for and they asked if she would talk with them. She said no she would rather not, and they said something to the effect of: "There's always the grand jury."

Senator ABOUREZK. So they never got to the specific question?

Ms. RAYMOND. Right. It was another woman who had been asked my whereabouts.

Senator ABOUREZK. With respect to your own case you were asked that the purpose of that investigation was, if I am correct, the FBI

was questioning the whereabouts of Katherine Ann Power and Susan Saxe, is that correct?

Ms. RAYMOND. Right, that was one of the purposes.

Senator ABOUREZK. And you were asked questions by the FBI and then by the grand jury. What were those questions?

Ms. RAYMOND. The grand jury asked me very few questions beyond what was my name, and what was my address, what was my lawyer's name. By the time I had stated to them my objections to the procedure and declined to answer those first few questions other than my name, they dismissed me. They didn't go on, in other words, to let me know what kinds of questions they were going to ask.

The FBI, however, said they wanted to ask me about two women I knew. And when I told them I didn't have anything to say to them, they began to ask me very intensive questions about why I was refusing that. What political ideology is causing me to not cooperate with them. They even asked, facetiously I guess, if the name of that ideology began with an "S." But that's about it.

Senator ABOUREZK. He just wanted the initials?

Ms. RAYMOND. Apparently.

Senator ABOUREZK. What were the names of the women the FBI asked you about?

Ms. RAYMOND. I don't even know.

Senator ABOUREZK. It wasn't either the Katherine Power or Susan Saxe, was it? Did they ask you their whereabouts or if you knew them?

Ms. RAYMOND. They asked me in the grand jury room——

Senator ABOUREZK. No, I mean the FBI.

Ms. RAYMOND. Yes; I think they got that far. They said these two women who are wanted for something or other—I don't know whether they used their names or not.

Senator ABOUREZK. Thank you very much, Ms. Raymond, for your testimony.

Without objection, a copy of your written statement will be inserted in the record.[1]

At this time we will hear from Mr. Sager.

TESTIMONY OF G. RODNEY SAGER, FORMER SENIOR ASSISTANT U.S. ATTORNEY, EASTERN DISTRICT OF VIRGINIA

Mr. SAGER. Thank you sir. My name is Rodney Sager. With the descriptions by the last two witnesses, I hope that I haven't been too upstaged with respect to my presentation.

Regarding a comparison of terminology, I might say that I have been a witness; exposed to an attempt to make me a victim; and even more so, treated as a subject, if we can draw a distinction between those terms.

I would add that I have never refused to testify with respect to a grand jury or criminal investigation. Nevertheless, I have been exposed to harassment as to the workings of the system itself.

As the other witnesses, I was active on campus, but as president of the Student Bar Association at American University Law School and as a national vice president of the student division of the American

[1] See p. 223.

Bar Association. But that did not make me immune from harassment by certain departmental officials.

I bring to this committee some background as to all points of the grand jury. I was a former law clerk to a Federal judge, I guess which is a position of neutrality. For 7 years I was an assistant U.S. attorney for the eastern district of Virginia, which was one of the most active offices with respect to criminal matters in the entire United States. Two of those years I served as a senior assistant in charge of the Richmond, Va. office. My primary responsibility, of course, was criminal prosecution of all matters and, in fact, I served on a major fraud committee and supervised major fraud grand juries.

Personally, I supervised over 100 separate grand jury sessions which returned approximately 1,000 criminal indictments over the period of time I was with the U.S. attorney's office.

Since leaving that office I have been in private practice and participated as defense attorney in the criminal system both in Virginia as well as in the Federal system.

Very briefly, I have reviewed your S. 1449 and have been advised of two provisions in your newer revised bill, which provisions I have not actually read, I'll just touch on some of these provisions as I might be able to give some assistance with respect to them.

As to 1512, being the violation of grand jury secrecy, you indicate there that an attorney may also divulge what he has heard from the grand jury. I would suggest two things: One, that the attorney can only do so upon written permission of the witness because I'm concerned about the attorney/client position, and I'm also concerned about an attorney that might seek headlines with respect to a criminal matter at the expense of his particular client.

I might also suggest to protect the integrity of the investigation itself that such disclosures by an attorney, and perhaps by the witness, might not take place for at least a period of 90 days or until the grand jury ends, whichever is sooner.

Presence of counsel in the grand jury is one of the two most important provisions of your bill as far as I'm concerned. I was one of those assistant U.S. attorneys that sat in with grand jurors as a particular target defendant would jump up and down to exit the room.

I can advise this committee that that exercise of a so-called right was, in fact, a detriment to that particular witness. Grand jurors became outraged with having to sit there over a period of time while an individual exited the room on numerous occasions. Many times the witness was jokingly referred to as a jack-in-the-box by grand jurors and assistant U.S. attorneys.

The State of Virginia has recently—approximately 2 years ago—passed legislation as to special grand jury sessions—known as investigative grand jury sessions. Now an attorney is allowed in a grand jury room to confer with his client. I have had occasion to see that work as I have represented a client in such an investigative grand jury.

Prosecutors within the State of Virginia—who perhaps are some of the most conservative individuals in this country—have reluctantly admitted that the system works, quite contrary to the opinions they expressed some time ago. In fact, the clearest example would be a situation where I recently represented a target defendant in the grand jury room.

I was able to confer with him on several questions. He answered most of the questions. In one instance the prosecutor began joking with him because of the nature of the crime, that of defrauding a shrimp company, wherein my client was supposed to have posed as an admiral in order to get the shrimp. [Laughter.]

Nevertheless, the prosecutor started joking about it, and I asked him to please calm down, which he did and we returned to the seriousness of the particular felony which was under investigation. We were there about 45 minutes and left.

Had this been a Federal proceeding, I would have been faced with three options: One, to suggest to my client that he take the fifth amendment to all questions in light of the fact that I would not be in the grand jury to confer with him.

Two, advise him to leave the room on each question and come outside to attempt to relate to me what was the question so I could attempt to give him legal advice.

Or three, for him, to just try and guess at which questions he should try to answer.

I have made some comment in my written remarks, which I won't go over here, regarding the current jurisdiction of various district courts. I have concern about a foreign district court quashing a subpena in certain instances.

Senator ABOUREZK. Mr. Sager, might I ask you, you've been on both sides. You've been a prosecutor and a defense attorney, and you've seen the system work in Virginia. You say that attorneys are allowed now in a grand jury room to accompany a witness.

Mr. SAGER. In special grand jury sessions. There's a two-tier grand jury system in Virginia. But to answer your question, yes they are allowed within the investigative grand jury room.

Senator ABOUREZK. And you've participated in that new system. How long has that been in effect in Virginia?

Mr. SAGER. Approximately 2 years, maybe 3.

Senator ABOUREZK. And your statement to the committee is that it works very well, and it's not disruptive?

Mr. SAGER. Yes, sir. It's absolutely superior to the Federal system. I might add, sir, that there's one caveat which I think can be cured very easily about an attorney representing more than one defendant.

Federal law, where an attorney is appointed for an indigent, does not allow an attorney to represent more than one defendant in those circumstances. Federal appeals courts have ruled that an attorney, in many instances where he represents two or more defendants in a trial, is bordering on being ineffective with respect to his assistance as counsel, and a number of cases have been reversed on that specific point. I would think that the safeguard here would be that no attorney could represent more than one client with regard to the same investigative session. That would take the steam out of the Justice Department's claim.

Senator ABOUREZK. Do you agree with the charges that have been made against the existing grand jury system, that it is nothing more than a weapon used by many prosecutors in the Federal level at least?

Mr. SAGER. I agree that it could well be nothing more than a weapon depending upon the prosecutor that's working within that system. I think you have to understand that I was part of the system for a

number of years, and what we're speaking of is the fraternal organization.

Senator ABOUREZK. What's that? What organization?

Mr. SAGER. The Department of Justice and prosecutors in general. And you're led to believe that you're in the castle and that anyone suggesting any change on the opposite side of the moat does so with a battering ram to get inside, and you've got to keep them out at all costs. This is because I think that when you join the Justice Department or the U.S. attorneys office and you begin prosecuting cases, and indeed there are many individuals that deserve prosecution—strong prosecution—you see but one side of the issue. And I think you tend to mold your personality with that side of the issue.

In fact, there's very little training.

Someone spoke of guidelines. We didn't have time to read guidelines. We had so many pages of guidelines that by the time you got through reading them you would have spent 3 years in the U.S. attorney's office.

It's on-the-job training. And when you go into that grand jury room and you take sides with 23 grand jurors, you begin to experience an awesome feeling of power. Depending upon the personality of the prosecutor involved, the system can be abused and it has been abused. I think that allowing an attorney in the grand jury room is helpful with the court reporter taking down every single word that is said in that grand jury—other than the deliberations of the grand jurors—and this, in and of itself, will do more than anything else in this legislation to bring meaningful reform to the system, along with making those transcripts available.

For 2 years, I have been trying to get my transcripts from the Federal grand jury probe in Richmond, in order to document complaints against a certain grand jury prosecutor, and to date I have still been refused the opportunity to review those transcripts.

Senator ABOUREZK. I wonder if you might talk just 1 minute about the personal experience that you had and start with your job as a U.S. attorney and the activities that you have discovered down there that you tried to get the Justice Department to do something about?

Mr. SAGER. For background, the U.S. attorney's office functions somewhat differently depending upon what State and what district you're in.

In New York, for instance, a particular assistant U.S. attorney will have responsibility in one area of criminal law.

In Richmond, or the eastern district of Virginia, we were not so specialized as we had full responsibility in virtually all law enforcement areas.

The primary responsibility for Federal investigative agencies, including the FBI, is to be the eyes and ears of the U.S. attorney. They were to report to us the facts that they see, and we are to make determinations as to whether someone will be indicted. But we do have awesome power. We make the decisions who will be indicted and who will not. Make no mistake about that.

Senator ABOUREZK. Not the grand jury?

Mr. SAGER. Not the grand jury.

U.S. attorneys and assistant U.S. attorneys throughout this country make that decision. We decline prosecution on numerous cases, just as

a matter of discretion. And we single out those that we think should get prosecuted.

In fact, in the Federal system, if the grand jury wants to indict someone, they could not do so without the signature of an assistant U.S. attorney.

Responding directly to your question, I would take you back in June of 1975 when we received an alleged report of a wiretap in the Richmond area. Some FBI agents were dispatched by their office to investigate the alleged violation. A report was called back to me personally by the agents that there was no violation and there was no subject, which they referred to as an "unsub" case, a term that has magic meaning in our case. Once we have an "unsub" case where there is no substantial crime, we usually decline prosecution without any in-depth investigation.

There are many minor crimes in this category, such as the example of a local trucking firm broken into where a case of Coca-Cola is taken off of an interstate shipment; here the agent has to go make a preliminary investigation. They call up and say it's an "unsub," there's no value involved, it's meaningless to pursue it. We say, "Fine," and we decline prosecution.

I was advised that this was an "unsub" case, that there were some wires and a broken tape recorder in a vacant apartment, and that there would be no use in pursuing the matter. At that time I said, "Fine; based on that I will decline prosecution."

Senator ABOUREZK. If I can back up to clarify, the report that you had received was that somebody was wiretapping somebody else. Who was the party doing the wiretapping?

Mr. SAGER. We did not know at that time. The initial report came from a maintenance man in an apartment complex, and he did not know. He just apparently told the FBI. I never spoke with him at that time.

Senator ABOUREZK. OK.

Mr. SAGER. Apparently the FBI had a guideline on wiretapping. They were supposed to call our office at the beginning, which was unusual. We never usually heard from them until after they started an investigation. On this one they had to call me before they started, just because of some administrative guideline they had. I didn't understand that particular procedure, but it was one of a dozen phone calls I normally got during the day, and it was handled in a routine manner.

About a week later I learned from news sources that a local police officer had been responsible for this particular wiretap. They wanted to know what was happening to the police officer. Well, I might add, so did I. It was rather shocking news to me at the time. I had never had any reason to doubt the agents—some of whom were personal friends of mine—for giving me anything but accurate information.

I think it's important to note that I immediately contacted the U.S. attorney for the district and advised him that I felt that something was wrong in the Richmond area. I was instructed to find out what was wrong and report that.

Senator ABOUREZK. What did you think was wrong?

Mr. SAGER. My best recollection is that another Watergate had happened. I guess with the paranoia at the time, I kept envisioning cover-

up swirling around the Richmond area in light of this new information that I had.

Senator ABOUREZK. The coverup of what by whom?

Mr. SAGER. The coverup of a criminal activity by agents of the FBI.

Senator ABOUREZK. All right. You reported this to the——

Mr. SAGER. U.S. attorney and at least two other senior assistant U.S. attorneys before I ever spoke to the agents.

To make a long story short, I spoke to the agents the same day I found out about this additional information—1 week after the offense. I had a second assistant U.S. attorney sit in with me to document the meeting, although we didn't record anything because I really didn't know what was going on, and we wanted to give these individuals an opportunity to explain whether the news media was correct or not in their statements.

They advised me that they had in fact found much more than they had told me about earlier, but that they had determined by their own guidelines that there was no violation and, therefore, saw no reason to report all the facts to my office.

After bouncing off the ceiling several times and showing how outraged I was, I advised the agents that they were going to put the case back together, and if there was meaningful evidence that the local police officer would be prosecuted. I thought at the time that this would be severe punishment for the agents.

I again reported all the facts to the U.S. attorney who advised me to handle the wiretap matter, and he would think over any other situation concerning the FBI.

Some days later, after consulting with the U.S. attorney, several assistants, and a couple of individuals in the Justice Department, word came down that they felt that the agent should be investigated. There was at least one individual in the Justice Department that had previous problems with the FBI and felt that this was an opportunity to take advantage of the situation and to once and for all show that conduct such as this would not be tolerated.

I tried to disqualify myself from any such decision because I knew some of the agents involved.

To make a long story short, an initial probe was done, conducted and completed by the U.S. attorney in our district, and recommendations were forwarded to Washington. I might add that I was one of those that asked that the probe results be forwarded to Washington because I felt that the decision should be made in Justice because we were having difficulty in working with many of the Federal agents in our area at that time. They all thought the U.S. attorney's office was out to get them and make headlines.

For reasons that are still not certain to me, an individual named Guy Goodwin showed up on the scene in Richmond.

Senator ABOUREZK. Who is Guy Goodwin? Who does he work for?

Mr. SAGER. Believe it or not, I didn't know who he was at the time.

Senator ABOUREZK. Do you know now?

Mr. SAGER. I certainly do. He works in the general crimes section.

Senator ABOUREZK. Of what,

Mr. SAGER. The Justice Department Criminal Division. Prior to that he was Chief of the Special Litigation Section under Mardian during the Richard Nixon years, during the time of the massive in-

crease in grand jury activity around the country. Mr. Goodwin had the responsibility of traveling all over the United States investigating certain political groups.

After Mr. Goodwin was in Richmond for a short period of time, we had an extreme personality conflict. I advised him that I did not appreciate his attitude, nor did I concur with the way he was conducting himself in our office.

Senator ABOUREZK. What was he doing down there? What was he sent down to accomplish?

Mr. SAGER. He was supposedly sent down to speak with us and get sort of an informal background view of this matter and advise Justice as to whether or not certain agents should be indicted.

After I criticized Mr. Goodwin, the so-called friendly atmosphere that existed between us soon disintegrated, and he made it known in no uncertain terms that he didn't trust anybody in the Richmond U.S. attorney's office. He did not appreciate the criticisms that I had made to Washington.

Senator ABOUREZK. About what?

Mr. SAGER. Him, his conduct, the way he was behaving in the Richmond office.

Within 24 hours after I called Washington, D.C., and complained about Guy Goodwin, I was first advised of my constitutional rights by Guy Goodwin.

Senator ABOUREZK. Wait a minute. You called the Justice Department in Washington and complained about Guy Goodwin, and less than 24 hours later he came and advised you of your constitutional rights? Why?

Mr. SAGER. That's correct. He never told me and never has to this day told me why, other than the fact that he wanted to protect the U.S. attorney's office, and therefore, according to him, by advising us of our rights he could show the FBI that he was being neutral. I suggested to him that you don't protect people by advising them of their rights in this type of situation.

Senator ABOUREZK. What happened then after he had advised you of your constitutional rights?

Mr. SAGER. He interrogated me over a period of several weeks for numerous hours, both in the Richmond office and then in Washington when I said I wasn't going to answer any more of his question without some outsider being present or a recording made of the interviews.

Senator ABOUREZK. What was the issue that he was interrogating you about?

Mr. SAGER. He wanted to know everything that happened from June 17, 1975, until the date of the interrogation.

Senator ABOUREZK. With respect to the wiretap case?

Mr. SAGER. With respect to the wiretap, including every single word that was spoken on every single day of every single week. He would go over the same ridiculous thing again and again—even to the extent of where the second hand was on the clock on a particular day, as well as why couldn't I remember what the agent was wearing or said on a particular day.

This went on for a long period of time, and it's interesting to note that Mr. Goodwin kept telling me: "Now, Rod, we don't want any Jencks Act material." Jencks Act material is when you do testify in

a Federal grand jury and there is an ultimate trial where testimony is turned over to the defense counsel.

Mr. Goodwin said, "We want to interview you, because you are a witness, and we don't want any Jencks Act material. We don't want the defense to have anything." I said, "I don't care what the defense has. I've already signed written sworn affidavits."

Anyway, after many hours of this type of harassment, he informed me he wanted me to testify in front of a grand jury.

Senator ABOUREZK. He wanted you to testify as a witness or a target?

Mr. SAGER. Well, as a witness being advised of his rights. He would never say why I was being so advised.

Senator ABOUREZK. What was the grand jury investigating at that time, the wiretap case?

Mr. SAGER. The wiretap case.

I spent approximately 15 hours over several different days in the grand jury. I must have accumulated 1,000 pages of transcript wherein Goodwin went over the same points over and over and over again. It didn't stop with me.

He required the U.S. attorney himself to also testify in this same grand jury. He required another assistant U.S. attorney of my office to likewise testify in the same grand jury. He even brought a fellow comrade from the Justice Department down simply because I had indicated that I had had conversations with him. He, too, was required to testify in the grand jury.

In fact, somewhere in the neighborhood of 50 or 60 witnesses testified in his grand jury before the entire investigation was mysteriously terminated by the Department of Justice.

Senator ABOUREZK. You mean after all of the testimony and all the effort, it was just terminated and nothing came of it?

Mr. SAGER. Five agents were disciplined, not as a result of the grand jury investigation, but as a result of an internal investigation.

Senator ABOUREZK. In-house discipline?

Mr. SAGER. In-house discipline—10 to 30 days' suspension. Two were demoted; one has since been promoted.

Senator ABOUREZK. Now, with respect to the grand jury investigation conducted——

Mr. SAGER. I might add that the original wrongdoer was promoted on the Richmond police force and to this date has never been disciplined or prosecuted.

Senator ABOUREZK. That's on the Richmond police force?

Mr. SAGER. That's correct.

Senator ABOUREZK. In your experience as a prosecutor, how would you characterize Mr. Goodwin's use of the grand jury with respect to yourself?

Mr. SAGER. I think the system was abused.

Senator ABOUREZK. Was he trying to get information from you, or was he trying to harass you? You ought to know, because you've had a lot of experience with grand juries; which one was he going?

Mr. SAGER. There's no question in mind that he was there to harass myself and others. I had already given him the information he wanted in triplicate, long before ever going to the grand jury room.

Senator ABOUREZK. The facts are that Mr. Goodwin is still working in the Justice Department, isn't that correct?

Mr. SAGER. I'm advised that he's still there, that's correct.

Senator ABOUREZK. Is it accurate to say that he has convened in the past few years more than 100 grand juries around the country? He's kind of a traveling inquisitor?

Mr. SAGER. That's correct. He generally never tries a case.

Senator ABOUREZK. The information I have is that he has subpenaed at least 1,000 witnesses in those 100 grand juries. He's done it in some 40 States of the Union. His inquisition has resulted in about 400 indictments, of which 200 or so went to trial. He got convictions in 10 percent or less.

Mr. SAGER. The Justice Department says it was higher, but they skillfully avoid explaining how many were reduced to misdemeanors.

Senator ABOUREZK. Well, the Justice Department testified here the other day and they didn't know. Maybe they've told you, but they won't tell me.

Mr. SAGER. They had written subsequent to my testimony before the House committee on these same issues and sought to defend Goodwin's record to some extent. But it's my opinion that all such writings and responses to my complaints came from Mr. Goodwin himself, probably with the help of an immediate line supervisor with the rubber stamp of an assistant attorney general on the letter.

Senator ABOUREZK. You mean your complaints about Goodwin were answered by Goodwin?

Mr. SAGER. In my opinion, yes. I might add that one of the items that was finally sent to the Congress was that I supposedly gave conflicting testimony in that grand jury testimony as compared to Mr. Goodwin's personal notes from previous unsworn interviews.

Senator ABOUREZK. What action did the Justice Department take on your complaints about Mr. Goodwin and his activities, if any?

Mr. SAGER. For all practical purposes, they took no action whatsoever. If I could clarify—and I know it's running late—at that time the Office of Professional Responsibility had just been created by Attorney General Levy. I wrote to Mr. Shaheen, the new head of that so-called office. I met one time with Deputy Attorney General Tyler only after complaining so vigorously that it appeared that they wanted me up there to silence me.

During that hour session I was never advised as to what their concerns were. I was only given 1 hour to talk. So I was swinging at shadows for maybe an hour and a few extra minutes. I was never allowed to document anything.

Senator ABOUREZK. When was that? What year?

Mr. SAGER. Probably some time in early 1976. The Office of Professional Responsibility some time later wrote back that my complaint had been investigated and had been dismissed as being frivolous. I was never interviewed by the Office of Professional Responsibility. I never met any member of the Office of Professional Responsibility. I know for a fact that names of other U.S. attorneys that I submitted, who had previously asked that Goodwin be taken out of their circuits, were never contacted by the Office of Professional Responsibility.

Therefore, I think under those circumstances that nothing was ever done.

Senator ABOUREZK. We are running out of time. I'll yield to Senator Thurmond who might want to ask some questions before we call the final witness.

Senator THURMOND. Thank you, Mr. Chairman.

Do you favor the legislation that's been introduced here on this subject?

Mr. SAGER. I favor certain sections of it as being excellent. Primarily, the presence of an attorney in the grand jury room conferring with his client; the presence of a court reporter at all times taking down the testimony; and the availability of the transcripts for the witness himself for purposes of review and—this is important—to allow the witness to explain errors and ambiguities.

Court reporters are not perfect. Many times these transcripts come back, and if you said, "I did not do something" and they leave out the "not," you have in there that I "did" do something or something similar to that.

A skillful prosecutor can keep a witness in the grand jury long enough that you can draw conflicting testimony over any item. If he really wants to do something about it, he can badger that individual and perhaps even bring a criminal charge, although it probably later would be dismissed. I think witnesses should have a right to review those transcripts for correction and go back and explain to the grand jury what he meant by a given answer.

Senator THURMOND. Could you summarize for us in just about 3 or 4 minutes, maybe, the changes that you feel should be made in the functions and the operations of a grand jury? Do it briefly, if you will.

Mr. SAGER. I think we should allow counsel there with a witness, and he should not represent more than one witness.

I think a court reporter should be allowed in and should take down everything other than the deliberation, and that transcripts should be made available to the witness to review.

By the way, there is an error, I'm sure, in your legislation in 3368—"Preliminary Examination"—you have a defendant who is entitled to a preliminary examination, unless waived by a "judge" of a district court. I'm sure you mean "magistrate." If you had a judge conducting preliminary examinations, he'd have to disqualify himself in every trial, and in some districts you only have one judge.

Also, I might add, that I think if you give the individual his transcript and that of potential witnesses or agents' summary of these witnesses, then there's no need for those preliminary investigations because the transcripts can give him a good summary prior to trial of the evidence that's to be presented against him.

I have discussed other areas, Senator, before you came into the room. They are contained in my written presentation. I think these are the highlights of the several major points that I'm most interested in, such as counsel being in the grand jury room and the availability of the grand jury transcript.

Sentaor ABOUREZK. Without objection, we will insert Mr. Sager's written testimony.[1]

[1] See p. 228.

Senator THURMOND. Let me ask you this. If a transcript has to be made available to a defendant or to a witness, sometimes transcripts are rather voluminous and require some time to prepare. Do you feel that that would unduly delay a trial?

Mr. SAGER. The present system does not unduly delay a trial where court reporters are used. I think that you should understand that we as prosecutors, or when I was a prosecutor, made the decision as to whether we wanted a court reporter to begin with and that was my decision and no one else's. Then you decide what should be taken down.

Senator THURMOND. That was you decision?

Mr. SAGER. Yes; that was my decision. You could tell them what to take down and what not to take down, which was my decision. Under 18 U.S.C. 3500, which is your Jencks Act, if we do have a transcript of a witness' statement, you must give it to the defense attorney during the criminal trial. Those transcripts are impossible in most instances for the defense attorney to review during the trial.

We became very liberal in some major cases. We gave it to the defense attorneys 24 to 48 hours in advance.

In several instances, assistants thought it was humorous to give a 1-foot stack of transcripts to the defense attorney 24 hours prior to the trial. They envisioned him being up all night long trying to figure out what was in them after we have already had months to study it.

Also, Senator, I think it would expedite the system and I think it would make for a fairer defense for those individuals who might then be able to see something in writing that would refresh their recollection as to a witness or to a particular matter that needs to be explained. This gives them a fair opportunity to present a legitimate defense if they are so inclined to do so.

Senator THURMOND. What is your opinion of the use of the exclusionary rule in the grand jury system which this bill includes?

Mr. SAGER. When you refer to the use of the exclusionary rule, do you mean of the evidence?

Senator THURMOND. Yes.

Mr. SAGER. Illegally obtained evidence?

Senator THURMOND. Yes.

Mr. SAGER. I have some problems with that section. These would be similar problems to those that the attorney general from Massachusetts mentioned earlier this morning.

You would open the door for numerous motions to dismiss and suppress, which would turn the grand jury proceeding into a trial. I think there is a better forum for that.

Senator THURMOND. Do you feel that defendants should be allowed to go before a grand jury?

Mr. SAGER. Absolutely, yes. I think I failed to mention that. I think that they should be given the opportunity to go before a grand jury. He is not given that opportunity now.

Senator THURMOND. Sometimes people feel that when the grand jury hears only one side and does not hear anything from the other side at all that it gives an unfair advantages to the prosecutor.

Mr. SAGER. Senator, let me add one thing which I don't want to forget. Senator Abourezk asked about this.

After this entire fiasco was concluded in Richmond with Guy Goodwin, and after everything I was put through, I was still allowed

to supervise the largest investigative grand jury on the east coast at that time which was that returning indictments against Allied Corp. for the Kepone poisoning in the waters of the United States. I was the senior assistant in charge of that investigation and handled it all the way through the indictment stage.

So, I think that sort of speaks to the issue of whether I really was in trouble in Washington, or not.

Senator THURMOND. How much in depth do you feel a defendant should be allowed to go in a trial before the grand jury? As far as he wants to? You see the grand jury has just determined whether there is a probable case, and the petit jury tries the case. I wonder if you're advocating that the defendant be allowed to go before the grand jury and to what depths should he be allowed to go? Should he be allowed to bring in other witnesses? Or just himself and present his side of it?

Mr. SAGER. I would limit it to just himself. I would not allow it to be an adversary proceeding.

I might add also that with respect to the grand jurors and the probable cause situation, as the system now exists, the grand jurors indict whoever the U.S. attorney wants to indict. I had maybe five no true bills out of 1,000 presentments. We asked for those five no true bills. This was simply to get the agents off our backs.

Senator THURMOND. Does a grand jury somewhat feel inclined to go along with a prosecutor? That is, does he feel an obligation, and if so what can be done to remedy that?

Mr. SAGER. In the overwhelming number of situations they are inclined to not only go along with the prosecutor, but they have to fully rely on the prosecutor because they have no idea what the law is. We tell them. We tell them what he did and that that's a violation of the law.

In 7 years, the only grand jury that I can remember that ever gave me a problem was an early one on gun control where there were two men in there that liked to do a lot of hunting. We had brought somebody in for possession of a shotgun.

Senator THURMOND. In view of the grand jury, then as I understand what you say, it's more or less under the domination of the prosecutor and he follows the prosecutor to a great extent. Is that right?

Mr. SAGER. They follow him in 99 44/100 percent of the way.

Senator THURMOND. In view of that do you advocate maybe the grand jury having an unbiased attorney who is not for the government and not for the defendant in order to advise them on matters rather than having the prosecutor advise them?

Mr. SAGER. I think that is an interesting point. I believe that some investigation should be done with the possibility of a U.S. magistrate or someone of similar authority to supervise the grand jury proceeding.

I might add also that by requiring every single word to be written down by the court reporter will severely limit what the prosecutors say to those grand jurors which comments are never recorded and never made known to the court.

Prosecutors tell grand jurors who the bad guys are and who the good guys are. They tell them who is going to take the fifth amendment and who is going to jump up and down and see lawyers. They tell them that their lawyers are connected with this criminal activity.

They are programed as a computer to spit out indictments at the suggestion of the U.S. attorney.

Senator THURMOND. In other words, you are saying that they can and do prejudice grand juries they see fit to.

Mr. SAGER. I've seen it happen, yes.

I might say that the individual prosecutors felt that they were acting in good faith. In fact the evidence they had was sufficient to warrant an indictment for a particular criminal violation.

Senator THURMOND. I'm sorry, my time is up. I want to thank this witness very much for his testimony. Thank you, Mr. Chairman.

Senator ABOUREZK. Thank you, Senator.

Mr. Regnery?

Mr. REGNERY. Ms. Raymond, is there any circumstance which you can envision in which you think witnesses should be compelled to testify either at grand juries or at criminal trials?

Ms. RAYMOND. Maybe the recent situation with the attorney general would be an example.

Mr. REGNERY. Can you generalize that? Is there any general type of case or general-type situation?

Ms. RAYMOND. Perhaps law enforcement agents or Government officials who have a lot of power and have some privilege and access to information that comes across which in secret chambers like grand juries. That is perhaps there are occasions when they may need to be compelled to come forward for information that is essential for the public good.

Mr. REGNERY. So it is your testimony that you envision no circumstances where somebody from the private sector should be compelled to testify; is that right?

Ms. RAYMOND. I cannot think of any where it would be safe to have a statute that allowed that to happen with regard to private citizens.

Mr. REGNERY. Mr. Weiner, I wonder if you've ever been called to testify in a criminal trial?

Mr. WEINER. Yes.

Mr. REGNERY. Did you have the same objections regarding testimony there that you had at the grand jury?

Mr. WEINER. It never reached the stage where I was at the trial. We filed motions and their subpena was withdrawn.

But I did file the same objections to have the subpena quashed. I would not have testified.

Mr. REGNERY. Do you have the same conceptual problems with testifying at a criminal trial as you do at a grand jury proceeding?

Mr. WEINER. I was only subpenaed in one case. I have not been subpenaed in a whole bunch of cases.

In my limited experience, I too have the same problems, as I do not feel I should be forced to choose between answering questions or being jailed. That is what the charge seems to be.

Mr. REGNERY. Mr. Sager, you were here when Mr. Bellotti testified?

Mr. SAGER. Yes.

Mr. REGNERY. Could you comment briefly between the difference of the Virginia statute and the Massachusetts statute permitting attorneys into the grand jury room?

Mr. SAGER. As I understood his testimony—and I have not read it or reviewed the law—but I think there's probably little difference.

In Virginia you're not supposed to participate. What I did in the grand jury was that I advised the prosecutor that I did not think that his comment was warranted. That was apparently proper because he changed his line of questioning.

Other than that I think that the two States allow the attorney to confer with the client as to specific questions.

Mr. REGNERY. Regarding the bill before this committee today, do you think that that is the proper procedure for an attorney? In other words, should he not be permitted to participate in the Federal grand jury, or should he be permitted?

Mr. SAGER. I do not think—let me talk about participation. I am limiting his participation to appearing and advising his client within the grand jury room, but not in any other function within the grand jury room. I think you would bog the system down at that stage and I think—by the way, let me add this before I forget this particular thought, if I might deviate for a moment.

You have a section that says in 330(c) "an indictment may be based on summarized or hearsay evidence only upon showing of good cause to the court." That's unworkable as 95 percent of your indictments are other than investigative grand juries and are all based on the testimony of a single summarizing agent. This would stop the system completely if you had to go to the judge on every single agent that went in.

I do suggest that you pass the transcript provisions and with that witness under oath, there's obviously enough determent at that time to make him testify accurately. He can give a summary of the evidence.

We would return 20 indictments in 2 hours by summarization. You can imagine what would happen if you would require us to go to court or, in the alternative, to subpena witnesses.

Under those circumstances, that would not have taken 2 hours, it would have taken 2 weeks, and it would not have served any purpose really, because if the agent's testimony is on record under oath when he has summarized it, it would then be more valuable to the defense at a later time as a condensed version of the Government's case.

Senator ABOUREZK. Mr. Velde?

Mr. VELDE. I'd like to pursue for a moment the question that Senator Thurmond asked earlier with respect to the availability of transcripts.

In your experience, is not there a considerable time delay in the physical preparation of these transcripts? You mentioned the problem of inaccuraries, but would not this really act as a substantial break in the whole grand jury process to have to rely on transcripts which might not be available for weeks or months afterwards?

Mr. SAGER. We found that the court reporters in our area had our transcripts back within a week. In certain instances, if you wanted to pay a little extra, you could have 24-hour service.

Senator ABOUREZK. May I interrupt? What is wrong with providing them at roughly the same time the prosecution gets them?

Mr. SAGER. I think that we're talking about two different things. There are two phases of this; one is to give the witness in an investigative grand jury his transcript to review so that he can make correc-

tions or explain ambiguities if he would like. That can be done within a relatively short period of time—within a week to 10 days.

The second phase as I understand it, may be where you have a number of transcripts, or a summarization transcript at which point in time when there is an indictment. Now I'm not talking about giving a target all of the transcripts prior to an indictment. I'm only speaking in terms of him getting his testimony.

After an indictment and a reasonable time prior to the trial—and we're talking a month to 2 months later—he should be allowed to see whatever other transcripts are available with respect to evidence that will be presented—actually I think he should have it all. I don't think the government should weed out what they're going to present and what they're not going to present.

I don't think there's a problem if you understand the distinction that I'm drawing between the two siuations.

Mr. VELDE. Thank you. Thank you, Mr. Chairman.

Senator ABOUREZK. We have no more questions. I am very grateful to the panel for the testimony. I think it has been very reliable and very good. We appreciate it. The committee is grateful.

[The prepared statements of Mr. Weiner, Ms. Raymond, and Mr. Sager follow:]

PREPARED STATEMENT OF JAY WEINER

From February 25, 1975, to March 28, 1977, I was a victim of grand jury abuse. What follows is a description of what happened during that two-year-long period, how I felt as it happened, why I acted as I did and how I feel the grand jury experience should be different for people who are subpoenaed in the future to federal grand juries.

It should be understood that during this two-year period, I was never charged, tried or convicted of any crime. I was neither the subject nor target of any investigation. I was a grand jury witness.

My story begins on February 25, 1975, when, according to Freedom of Information Act files I've obtained, FBI agents first had my house under surveillance. The next morning I met FBI agents for the first time. They came at 8:30 in the morning. My father let them in. They told me they had information that I knew the whereabouts of federal fugitives Patricia Hearst, William Harris and Emily Harris. While at that time I knew little else about my legal rights, I did know that I was not legally required to talk to FBI agents. I told these two agents, David Rack and Bryan Carroll, to leave. Before they did leave, however, they turned to my father and said, "You know what this can do to your family. You know what this can do to Jay's career." They then suggested that my father call them and find out more about their investigation.

(By the way, all of the FBI conduct that I will detail here was described in court affidavits submitted during my grand jury case, and the cases of others. One judge wrote that, if true, our allegations described "police state tactics." The FBI and Justice Department never rebutted any of our allegations.)

After the FBI agents left, my father and I discussed their visit and, after some thought, I decided I should meet with them. I knew I had done nothing wrong. I felt that my silence might look suspicious. I was already nervous.

I arranged to meet with the same agents the following afternoon at their downtown Philadelphia office. The agents were very friendly to me. After some introductory questions, they asked me some that I didn't want to answer. It was then that the spectre of a grand jury subpoena was first mentioned, although I didn't realize it until weeks later.

"Have you heard about those people in Kentucky who aren't answering questions?" agent Carroll asked me. (I hadn't.) Carroll explained that a number of people had been called before a grand jury. I was also told that a person that I knew had been subpoenaed in connection with the Hearst investigation in California.

At that time I didn't think twice about a grand jury subpoena. I figured only "criminals" got them. I was upset that I was being asked about friends who the FBI thought had done something wrong. That was my concern.

When I cut the questioning short, the agents said that since I was under 21 years old they needed to talk with my parents. I didn't object, and a few days later, March 3, 1975, agents Rack and Carroll came back to our house. The agents requested that they meet with my parents separately, then me. My mother objected.

Things then got serious. I was accused of having either "harbored, transported or aided and abetted" the flight of federal fugitives. Pictures were flashed. Farmhouse hideouts were mentioned. I answered their questions. The agents said they hoped they'd never see me again. The feeling was mutual.

It should be understood that neither my parents nor I had ever met a lawyer. We never considered contacting one. We thought to do so would be suspicious. We didn't understand that FBI agents, allowed to act unfettered, would use "police state tactics."

One week later, we'd be less naive. Between March 3 and March 11, friends of mine (and some of their parents) were interviewed by FBI agents in Oberlin, Ohio, Boulder, Colorado, Albuquerque, New Mexico, and Memphis, Tennessee. On March 8, I drove to Oberlin, Ohio, where I'd previously attended college. When I arrived in town I was told that the FBI had been interviewing many people on campus.

During the late night hours of March 11 things came to a head. As I was pulling my Volkswagen out of the Oberlin College Student Union parking lot, I was cut-off—in Hollywood fashion—by a Plymouth Fury. Three men hopped out of the car. Two took positions at each end of their car. The other approached me. This scene took place in the middle of Ohio Route 10. It was about 10 p.m.

I was told to pull my car back into the parking lot. The three men identified themselves as FBI agents. I was given a subpoena to a federal grand jury. The subpoena ordered me to be in Harrisburg, Pennsylvania, about 500 miles away, just 36 hours later. But there was more.

"Why don't you have a sandwich with us, Jay? Just have a cup of coffee. We know you didn't do anything. Don't worry about it. If you talk with us, maybe we can get the subpoena withdrawn. Come on, let's talk." The agents spoke at once. Flashlights shined on me. I repeatedly said that this seemed like a pretty serious matter. Perhaps I'd better get a lawyer now. I had to be in Harrisburg real soon. I tried to indicate I wanted to leave.

Before I knew it, in the confusion, one of the agents entered my car on the passenger side. He instructed me to follow the FBI car. I was led about 100 yards south on Route 10 to Oberlin College's security office. I was not under arrest. But I was captive.

I was led into the office of the head of the campus police. One of the agents left to make a phone call. Minutes later he returned. "It's sealed off," he said. I was silent. I was scared. I sat as far away from those three men as I could get in the 10 foot by 15 foot office. I honestly didn't know what to do. I knew I wanted it over.

Then, one of the agents stood up. He removed his sports jacket. As he did, his shoulder holster became visible. He pointed to it. "Does this intimidate you, Jay?" he asked. Another agent removed his coat, too. His gun showed, too. I knew I wanted it over now. I started to answer questions.

In retrospect, I don't think the FBI agents would have shot me or pistol-whipped me or physically assaulted me. But at that moment, under those conditions, with so much going through my mind, it was hard to tell.

I knew I'd committed no crime. I knew that the FBI and now, apparently, a grand jury—whatever that was—were after my friends. I didn't want to talk about the activities of my friends. But I was scared and isolated. And worst of all, ignorant. I knew nothing of grand juries, of squashing subpoenas, of motions for disclosure of electronic surveillance, of circuit courts, of contempt of court. I learned a lot.

This questioning in Oberlin lasted close to three hours. The subpoena was not withdrawn. As ordered, I was in Harrisburg on the morning of March 13. I was to appear before the grand jury at 10. I met my lawyer—the first I'd ever met, recommended by a friend—at 9.

As you might suspect, the Hearst case was a big deal, but even bigger in Harrisburg where not much happens and where a U.S. Attorney's career can

be made on one sensational conviction. The authorities were rubbing their palms with glee. They knew they had a young, inexperienced, frightened, isolated, innocent, pliant witness, seemingly on their side.

My actions indicated as much. But the predominant thought in my head was, "Let's get this thing over with." For two years I kept saying that. It was soon after my first grand jury appearance that I learned "this thing" was not going to end soon.

Before I even entered the grand jury room I had been granted immunity. I had no hearing. Soon after I got into the room, I began to learn that while I was subpoenaed to testify about the alleged harboring of fugitives, the U.S. Attorneys were instead trying to beef up indictments against the fugitives, a classic grand jury abuse. I was questioned about the FBI interrogation two nights before in Oberlin. The U.S. Attorneys relied on a teletype sent by the FBI agents. But I was asked to confirm things that I'd never said. I went out of the grand jury room and told my lawyer. He instructed me to tell the prosecutor that the FBI notes did not accurately reflect what I said to the FBI. As soon as I said that, I was dismissed from the grand jury room.

Minutes later, I was in the U.S. Attorney's office attempting to pick up my travel expenses. All of the U.S. Attorney's staff was furious. I was accused of perjury. My lawyer was asked if I would go over the FBI notes. A trip to a farmhouse hideaway was proposed. The FBI agent who smiled at me before my appearance now stared in anger, and he wasn't even supposed to know what went on in the "secret" grand jury room! That first appearance was over. Its effects were not.

Newspaper reports circulated that I might be charged with perjury or having made false statements to FBI agents. I was threatened with another subpoena. The government floated news stories alleging this and that. I was here or I was there. I had red hair. I was Patty Hearst's boyfriend.

I felt betrayed. I'd done what they wanted from me. I'd done the only thing that I thought I could, and now the government was after me. In addition, the reality of having been terrorized into testifying about friends, people who meant a lot to me, began to sink in. I felt horrible.

After the initial media barrage I had a chance to think. I decided I'd better learn a little bit about the grand jury and its history. I spoke with people who knew more about it. I read about it. I read about the people who refused to cooperate with unjust congressional committees during the 50's. I realized I'd made a horrible mistake by testifying. I'd done wrong. But I also felt that I could have done nothing else. I was a prime target for FBI harassment and grand jury abuse. The government authorities knew that. I decided that I would cooperate no more.

This decision making process took about two weeks. On April 1, FBI agent Rack called my father. He told my father that I was in serious trouble, that I could be charged with having made false statements and that the FBI "wants to get back inside Jay's head." My father told the agent to call my lawyer. On April 3, I received my second subpoena.

By then I was ready to fight back. I'd read that subpoenas could be quashed. I'd learned about filing motions to disclose electronic surveillance and to allege FBI misconduct. I also knew that if I fought in court and lost and then decided not to talk anymore I could face jail for contempt of court. I was not ready for jail. But it couldn't hurt to at least fight the subpoena, I thought. I instructed my lawyer to file motions to quash the subpoena. On April 14, that second subpoena was withdrawn by the government without explanation.

I now had time to breathe and think. My life had been changed. I had plans to be a sportswriter after my college graduation. But potential employers were scared away. Besides, my future was so tentative that I couldn't even think of getting a full-time job. I accepted an invitation from my former college roommates to spend the summer in Colorado, to rest, relax and reflect.

The summer was quiet. I read more and wrote about my grand jury experience. My articles appeared in alternative papers in Boulder, Los Angeles, Philadelphia and Portland, Oregon.

In late summer, the people about whom I was questioned, were subpoenaed to the same grand jury in Harrisburg. Newspaper reports hinted that I'd be subpoenaed again, but nothing happened. This second grand jury go-round taught me more about courtroom procedure. I saw the entire process up to the government's request for a show-cause hearing. It was frightening. It looked like the government attorneys held all the right cards.

Through the fall I held part-time jobs and did some freelance sportswriting. I retained an attorney associated with the National Lawyers Guild and Emergency Civil Liberties Committee. I kept my ears and eyes open to any grand jury or Hearst-related news.

On December 1, 1975, I was subpoenaed by the government to be a witness at the Patty Hearst bank robbery trial in San Francisco. From the outset, through my attorney, I expressed to the U.S. Attorney in California that I had no intention of ever again cooperating with the government in this case. Cooperation had meant more trouble for me, not less.

Despite this, I was forced to travel to San Francisco in late February. After I arrived, I again reiterated my refusal to testify. Again, the government voluntarily withdrew the subpoena.

My one year anniversary passed, one year since the FBI first came. What a difference a year made. The FBI and U.S. Attorney had turned me into a professional witness. My biggest test was still to come.

On May 19, 1976, I was subpoenaed to another federal grand jury, this one in Scranton, Pennsylvania. Even though Patricia Hearst had already been found, tried and convicted, and even though she had testified extensively about her life as a fugitive, I was subpoenaed to a grand jury that was still "looking into the harboring of Patty Hearst."

The legal work associated with my fourth subpoena was complex, voluminous and often very original. We filed various motions to quash the subpoena. We asked for disclosure of electronic surveillance. We argued that the site of the grand jury—Scranton—had been selected purposely to punish me further for my refusal to testify.

Indeed, Scranton was farther from Philadelphia than Harrisburg and the Scranton grand jury had many more months to run than the Harrisburg panel. My refusal to testify in Scranton would mean a longer jail term should I be found in contempt. We would subsequently argue that my grant of immunity was the result of a "stale," 18 month-old letter of authorization, that my attorney's phones had been tapped, that the U.S. Attorney had flagrantly planted false stories in the Scranton papers to influence the grand jurors during the day I appeared before them, and we subpoenaed the FBI Director to get some answers of our own.

In the end, after six months of hearings, written briefs, appeals, stays (including one from Supreme Court Justice Brennan) and hundreds of anxious hours, I was jailed for refusing to answer two questions about a man I didn't even know before we were both subpoenaed to the same grand jury.

By the time I was jailed with that man, Dr. Phillip Kent Shinnick of Rutgers University, I was more firm than ever in my position that I wouldn't testify. Legally, I understood and believed that I was protected by the First Amendment, my right to associate freely and my right to privacy. I also felt that I was protected by the Fifth Amendment. Not only should I have been protected from possibly incriminating myself, but I should be protected from shaming myself by testifying about a friend or acquaintance. To me, testifying about Phil Shinnick—who had become a friend—would have been to incriminate myself in the eyes of my friends and community. No one took this position more seriously than I, a grand jury witness who had testified and then learned that was wrong.

As I hope you can see, the legal framework allows for moral and political content.

So, I was in jail to be coerced, or so the U.S. Attorney said. Believe me, it was total punishment, because by November 30, 1976, when I surrendered to U.S. Marshals, my commitment to silence, to privacy and to self-respect, and my opposition to legal coercion was solid. I testified under oath at my contempt hearing that I would never testify. I went through four months of litigation and two months of temporary stays of the contempt order, not knowing if tomorrow I'd be in jail. I was not going to be coerced. I faced a maximum of eight months in jail.

Soon after I was jailed, I worked to get out. With the aid of my lawyer, we asked that the contempt order be vacated. We conceded that I'd been jailed legally—that part of the process was over and done with—but we now argued that my continued jailing was illegal because I was being punished, not coerced.

I was doing time, punished, jailed without being charged, tried or convicted of any crime. I was a "civil contemnor," a prisoner in a judicial "no-person's land."

The Bureau of Prison's called me "an unsentenced holdover." The U.S. Attorney contended—until we convinced a judge otherwise—that as a civil contemnor I didn't have the same rights as convicted prisoners at my jail, namely the right to talk with the press. My friends and family wondered why in hell I was still in jail.

Patty Hearst was out of jail. The targets of the grand jury had never been served a day in jail. Phil Shinnick, the man who I was asked about, was released from jail after six weeks when the government said it no longer needed information from him. But I spent four months in jail before a judge released me by way of a one sentence, very un-opinionated order.

On March 28, 1977, my career as a grand jury witness ended. I haven't heard from an FBI agent or U.S. Attorney since. No one was ever indicted in connection with the alleged harboring of the fugutives. The innocent, naive, vulnerable kid did four months in the name of grand jury abuse. And my life has never been the same since.

For the purposes of this subcommittee, the question is: Given my experiences, how do I feel the grand jury experience should be different.

For me, there are three major categories of required reform. The first is a well-regulated, totally accountable FBI. This major reform, which falls outside the specific scope of grand jury reform, is very closely connected to the needed change of sufficient notice for a grand jury witness.

As is illustrated by my case, a U.S. Attorney does not need forced immunity if FBI agents with guns and subpoenas returnable within hours can terrorize witnesses into testifying. I believe a witness should have one week between the time of being served with a subpoena and his or her grand jury appearance.

Secondly, forced immunity should be abolished. We all should be entitled to a human right of silence. Protection from prosecution does not substitute for protection from self-incrimination, especially in the eyes of one's community. A trustworthy police force should attract citizens willing to cooperate. Any system based on coercion is repulsive to me.

Thirdly, grand jury witnesses should be allowed to have legal representation with them in the grand jury room, should they decide to go inside the grand jury room.

I have supplied to the committee various legal papers that were filed during the course of my case and a number of transcripts that document my grand jury appearance and my reasons for refusing to testify. I hope that these documents will be included in the official record of these hearings.

PREPARED STATEMENT OF JILL RAYMOND

I am Jill Raymond. I am 26 years old. Stamped throughout my FBI file are the words "armed and dangerous." The fact is that I have never in my life been armed, and I have never conceived of myself as "dangerous". But the FBI apparently felt strongly enough about me at one time to initiate a process of subpoenas and civil court proceedings which resulted in my being jailed for fourteen continuous months in small, rural county jails in Kentucky, without ever being accused of a criminal act.

I was not the lone victim of this process. Ultimately eight people—six in Kentucky and two in Connecticut—spent time imprisoned for their refusal to talk to FBI agents in this single investigation in the winter of 1974-75. It was not until May of 1976 that all of us were again free. Since that time, we have repaired and continued with our lives and work as best we have been able.

But I want to say to this panel that last week, as I began preparing this testimony, I was notified by some of the others who went through the jail experience with me three and a half years ago that once again FBI agents had appeared at their door, and at the doors of their friends in Kentucky, Connecticut, and elsewhere, again asking questions about the whereabouts of friends and acquaintences, including myself, and again threatening to use the grand jury against those who asserted their right not to talk to the FBI. All this, in the supposed search for one young woman fugitive, Katherine Ann Power, sought three and a half years ago in Kentucky and Connecticut, missing since September, 1970. These recent events demonstrate that the story I am about to tell you—the story of my own harassment and incarceration through the manipulation of the grand jury

process by intelligence agencies—may be about to repeat itself. It may be that our Justice Department defies the rule lightning may not strike twice in the same place.

One day in January of 1975, at about noontime, two agents from the local FBI office, Wayne McDonald and John Gill, appeared at the door to my apartment in Lexington, Kentucky. I was 22 years old at the time, and I had just completed four years of study at the University of Kentucky, earning a degree in social sciences. I was seeking employment. The agents said they wanted to ask me questions about two women they believed I had known, Susan Saxe and Katherine Power, fugitives on the FBI's "10 Most Wanted" list wanted for crimes supposedly committed in connection with an underground anti-war group in Boston in 1970. I politely declined to talk to the agents. I felt that I had no reason to trust the FBI, to believe that what they told me was necessarily true, or that they would not manipulate something I might say in perfect innocence to use against me in some way. They persisted in asking me what political persuasion was motivating me not to answer their questions.

They asked if the name for my ideological beliefs "began with an S". One week later the same agents again came to question me, but this time their manner was threatening. They told me I could be in serious trouble. And as they were leaving my door, one agent remarked that "you may find yourself sitting outside the door to the grand jury room next week".

I did not know very specifically at that time what all the functions of a grand jury were. I had never known anyone who had served on one or who had been before one. I know that grand juries screen evidence of crimes, and decide whether or not a person should be criminally charged and brought to trial. I knew that I had not committed any crime, and I knew that I did not have any knowledge of crimes committed by others.

The first entry in my FBI file (the portion of which I have gained access to) is dated July 26, 1972, and documents my officer status in an anti-war group at the University, and notes two peaceful demonstrations related to the Vietnam war in which I participated. The file entry goes on to state that I "attended one meeting of the UKYSA (University of Kentucky Young Socialist Alliance chapter) on March 28, 1972." I wish to state to this Subcommittee that I am guilty of all of these acts. In fact, though I never did join YSA, I was active politically from the time I arrived in Lexington in 1970 to attend college to the day I was threatened with a subpoena before the grand jury by an FBI agent.

I had joined the Lexington Peace Council and picketed local draft boards. I joined the Kentucky Women's Political Caucus, and helped to organize the socialist sub-caucus of that organization. I was an officer of the Kentucky chapter of a national third party group, called the "People's Party"; I petitioned on street corners to place Dr. Benjamin Spock on the ballot for president in Kentucky, and drove him and our state candidates around Kentucky on speaking engagements during the 1972 campaign.

I helped to form, and participated in, a socialist-feminist study group. During the year prior to the time I was jailed, I spent every Friday night with others leafletting, as members of the United Farmworkers Union Support Committee, to promote the UFW boycott of Gallo wines. And I had, once as a member of a UK student group, and later as an individual acknowledged lesbian, helped a fledgling gay rights group gain access to university meeting rooms, while they negotiated with the UK administration for approved student organization status. The judge who later scornfully denied the gay group's legal appeal against the university was the same judge who was to send myself, the 18-year old president of the gay group, and four other gay people off to county jails in chains and handcuffs for not complying with grand jury subpoenas.

During that month of January, 1975, I began to hear of other people in Lexington, Louisville, and Connecticut who were being approached by the FBI in the same manner as I. Some were people I'd known and liked, some were not. The only thing all seemed to have in common appeared to be a past and/or continuing interest in progressing causes or alternative communities. Some people sought legal advice, some did not. Those of us who had mistrusted the FBI enough to refuse to talk to its agents, at least without the presence of a lawyer, obtained the help of Professor Robert Sedler, UK law professor and general counsel for the Kentucky Civil Liberties Union. He assured us that we had the right not to answer questions before the FBI. He couldn't believe there was any substance behind their threats to have us subpeonaed. Besides, he reasoned, the FBI does not have control over the issuance of grand jury sub-

poenas. We were all terribly confused. But we began to understand the process when we received materials published by the National Lawyer's Guild Grand Jury Project describing how grand jury subpoenas had been used against activists in earlier years by the Internal Security Division of the Department of Justice.

We obtained information about how people had been harassed and ultimately jailed as a result of their refusal to testify before grand juries. We knew that Congress has consistently denied subpoena power to the FBI, but it was clear that if the FBI could manipulate the subpoenaing of witnesses before the grand jury, arrange for the questions it was interested in to be put to the witnesses, and obtain their testimony, then it effectively had subpoena power already.

The subpoenas did come down, to each of the six of us who had refused to talk to FBI agents. Dozens of others in Lexington were visited by agents a second, third, or fourth time, and told that the same thing would happen to them if they did not cooperate. Soon after, I began to hear from friends and relatives of mine all over the country, in Seattle, Albuquerque, Detroit, Cleveland, Springfield, Ohio, Washington, D.C., and Quartzite, Ariz., that FBI agents had visited them, in their homes and places of work. They had asked these people questions about my activities, my political beliefs, associations, and sexual habits. Some were offered money to travel to Lexington to convince me to testify. My sister in Springfield was told, at the time the subpoena had been issued, that I was already in jail and that she should use her influence to convince me to cooperate. Another sister of mine was threatened with a subpoena herself, when she told the agents to leave her house.[1] When I traveled to Cleveland, my home town, to see my 91-year-old grandmother, I found that she had also had a visit from the FBI, and in fact, Cleveland agents came again to her apartment the day I was there.

I still refused to answer their questions. My grandmother did not want me to wind up in jail, but she told the agents, as she was later to tell the U.S. Attorney General in a letter, that she trusted my integrity and believed that I had the right to refuse to be interrogated by the FBI without punishment.

By the time the six of us appeared before the regular federal grand jury in Lexington for the final time, on March 6, 1975, a great deal of our confusion had been clarified. We were clearly not suspected of any crime. The words of those who were attempting to coerce our testimony confirmed that fact. In response to a question put to him by one witness, who merely asked what the purpose of the grand jury's inquiry was, the grand jury foreman replied: "We want to find out where those two girls (allegedly Saxe and Power) are, or who they were with."[2] U.S. Attorney Eugene Siler (later appointed to a federal judgship) stated in open court "what we have here is more and more time in which two women . . . have time to change their identity and take off or hide out further. . . ."[3] ". . . these two girls are wanted on most serious charges . . ." said Judge Bernard Moynahan, as a rationale for denying the six of us bail pending the appeal of our contempt citation.[4] Obviously, not an investigation into crimes committed in the eastern District of Kentucky at all, but rather, on one level, a probing into the case of two already-indicted fugitives, who had set longevity records on the "10 Most Wanted" listed and who, along with Patty Hearst and recent revelations about J. Edgar Hoover were showing the FBI in an extraordinarily bad light.

On another level, it seemed to be an information-gathering fishing expedition, evidenced by the massive, far flung questioning of even the parents and grandparents of those who had refused to answer questions. On still another level, it was an intimidation campaign. "Tell those people" one agent instructed a willing talker in Lexington who was acquainted with the six of us, "that we know they are going to commit perjury, because we have some letters, and they will get five years for it." We got the message, but we did not commit perjury. When asked by defense counsel under oath about the "letters," the FBI agent in charge of the investigation admitted they had no such letters.[5]

In 1970, when the FBI had added about 1200 agents to its ranks, primarily to investigate the anti-war movement on the campuses, an internal Bureau memo suggested that one primary goal was to "enhance the paranoia endemic in these

[1] N.Y. Times, Feb. 23, 1978, p. 37 "FBI Misuse of Grand Jury Alleged in Fugitive Case."
[2] In re: Raymond, No. 75-8045.
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*

circles and . . . get the point across that there is an FBI agent behind every mailbox." [6] In 1975, the war was over, but anti war activists were still around and the women's movement was gaining national attention. Going on the assumption that Saxe and Power had moved from anti-war politics to feminism, the FBI seized the opportunity to attack and probe what could only be—compared with rigid and hierarchical male left groups—a foreign and confusing lesbian feminist community, on which there was a dearth of information or understanding among male FBI agents. One entry in my file states: "It was established that both subjects (Saxe and Power) associated with . . . the women's liberation movement, *as a result of which, several individuals connected with various women's groups were subpoenaed before federal grand juries in Kentucky and Connecticut.*" (Emphasis supplied.)

While not "endemic" to the community, there was no little paranoia in Lexington in 1975 and 1976. Newcomers to town who gravitated towards women's groups were received coldly and with some suspicion. The UK gay rights group folded. Indeed: having seen or heard of FBI agents following friends around town in cars marked "Fayette County School Board," it was no longer impossible, nor all that out of touch with reality, to imagine "an FBI agent behind every mailbox."

It was clear to me that a horrifying abrogation of what I had been raised to believe were American freedoms was taking place. Yet, there was no response, initially, from the public to it—no response, because there was no knowledge. Grand juries are semi-obscure institutions. Most people know little about them. They operate in secrecy. Most people, when they learn about the Fifth Amendment to the Constitution, take it on faith that their right to remain silent is absolute. Most people, including at that time, our highly respected attorney, know little or nothing about the process through which a person might be questioned, subpoenaed and jailed merely for asserting their right to remain silent. It appeared to me that it was crucial to raise the issue in as public a manner possible. Unfortunately, few aspects of common people's lives are capable of attracting media attention and public concern without extenuating circumstances. Forcing the issue into public discussion seemed to require my willingness to go to jail. Choosing to testify, on the other hand, even had I been willing to do so, offered no guarantee that I would really be left alone by the FBI.

Immediately following our contempt hearing, my co-witnesses and I were led into the U.S. Marshal's office in the District Courthouse, strip searched, handcuffed, and chained together at the waist. We were then taken, in twos, to three different county jails around the state of Kentucky. I was taken to the Bell Co. Jail in Pineville, in the mountains near the Tennessee border. The jail had facilities for eight women; that is, there were two cells for women, about 5½' x 6½', each with four bunk beds, and a combination sink and toilet. Outside the cells was a small dayroom, closed off by a solid steel door, with a screen in it, through which our visitors were allowed to peer at us for 15 minutes at a time. They had to drive 2½ hours from Lexington to see us. All of the guards at this jail were male. Male trustees, other prisoners, served us our meals. We were never allowed beyond this small area in the two months we were there.

I was moved to the Franklin Co. Jail in Frankfort, Ky., 30 miles from Lexington. I spent the next three months in a 6-bed cell measuring about 12' x 18'. I left the cell only one time in those three months, for an appearance in court. Again, there were no female employees at this jail, although it is against Kentucky law for jails that house women not to have matrons, and against federal regulation for jails with contracts for federal prisoners to house federal women prisoners if they do not employ matrons. There was no privacy from male jailers.[7]

I was permitted fewer visits than other prisoners there, because of the publicity surrounding my case. As a result of the interview I gave to a reporter from the Lexington Herald about my conditions of confinement, I was moved suddenly to the Madison Co. Jail, in Richmond, Ky., also 30 miles from Lexington. While the jail in Frankfort had been rated "good" by state jail authorities, the jail in Richmond had a "poor" rating, and I was told by U.S. Marshals that it periodically lost its contract to house federal prisoners because of its substandard conditions and operating practices. The women's cell was the top floor of the three

[6] Kirkpatrick Sale, *SDS*, Random House, p. 643.
[7] Lexington Herald July 28, 1975, p. 16 "Jails Made To Hold Men Are Problem For Women."

story jailhouse which was built before the civil war. The jailer could not read or write, and his wife or sons—deputies at the jail—would read documents for him, including prisoners' incoming mail. My visiting privileges were cut down to one per week after the jailer found that one of my visitors had written a paper for a college class describing and criticizing conditions at the jail. There was no mechanism for communication between the women's cell and the jailer's office on the first floor. If there was a fire, or if a prisoner was ill, in delirium tremens, or having epileptic seizures, we had to call out the window to people outside to alert the jailer, or try to gain attention by banging objects on the floor. I never went outside for exercise, nor did any other woman prisoner held there, during the nine months I was held in Madison County.

The activities available in any of the jails consisted of card playing, watching television, reading or writing. During portions of the 14 months I was locked up, I was the only woman in the women's cells, which had little business compared with the male jail traffic. One night I did not get dinner, because they had simply forgotten I was up there.

But Judge Moynahan had not forgotten I was there. My attorney attempted at one point to have me transferred, as a federal prisoner, into a federal prison. There was a federal prison which housed women right in Lexington, and another six hours away in West Virginia. The Bureau of Prisons, which must approve such transfers, agreed that I could be placed in one of its facilities. But Judge Moynahan, who had continuing jurisdiction over my case due to my "civil" status, intervened and stated that he wanted me where I was, in the 120-odd year old Madison County Jail. I learned that he also referred to the Bureau of Prisons as a "dupe of the ACLU" (which had assisted in negotiating for my transfer).

On May 4, 1976, the grand jury that had issued my subpoena had served 18 months, and was due to expire by statute. Judge Moynahan signed the order that I could be released at midnight that night, and so that is when I left the Madison County Jail after fourteen months of incarceration.

American jurisprudence says that the government has a right to "every man's evidence." Very well. I fully believe that in Lexington, Kentucky, 1975 there was no "evidence" of any crime or criminal's whereabouts that the government did not have knowledge of by the time we were all jailed. No, the investigation had taken on a rather different purpose, which was to set an example for others who might be inclined to refuse intelligence agencies' demands, demonstrating that those agencies do have the power to disrupt people's lives and wreak havoc on a community and the willingness to use that power. This allegation is supported by the fact that no one was ever indicted for any crime related to the Saxe-Power investigation. Susan Saxe was arrested in March of 1975, and still no one was released from jail.

My co-witness/defendants who eventually testified under the pressure of gross jail conditions were asked meaningless questions, such as where they did their grocery shopping and then dismissed; by that time too much media and public attention had been focused on the fishing-expedition aspects of the case for the U.S. attorney to pursue the original wide-scoped questioning the FBI had begun with. Besides, it was unnecessary. Many people in Lexington had talked—albeit resentfully—about what they knew. "Every man's evidence" was in hand. My testimony could not have been used, by itself, to indict me, after I had been immunized. No indictments came down. Some evidence.

Congress must absolutely curtail the mechanisms that allowed eight people in this case, and many others before and since then, to be imprisoned as a result of their naive faith in the First, Fourth, Fifth, Sixth, and Ninth Amendments to the U.S. Constitution. It must certainly curtail or restrict the indefinite time period, and awful conditions under which people can be incarcerated by a "civil" order. And I must add, given the events I have learned of this past week, it must act quickly. I sit before you with the knowledge that last Thursday morning an FBI agent in Lexington, Kentucky, knocked on the door of my friend, co-witness, and former cellmate and asked her where I was. The day before that, another agent in New Haven, Connecticut went again to one of the women there who was jailed twice for her refusal to talk to FBI agents in 1975, and again threatened her with the grand jury if she did not talk to him. Clearly, it is too soon for us to assume that our ordeal of three and a half years ago is over. It is too soon to conclude that the Department of Justice will correct itself and restrain itself without force from Congress.

PREPARED STATEMENT OF G. RODNEY SAGER

INTRODUCTION

The background giving rise to this submission includes my past experience as a Federal law clerk, a Federal prosecutor, a defense attorney, and perhaps most importantly of all, a witness before the same type of Federal Grand Jury investigation which is the target for this reform legislation. Part of my experience includes seven years service as an Assistant United States Attorney for the Eastern District of Virginia including my last two years in such service as a Senior Assistant in charge of the Richmond, Virginia office along with serving on a major fraud committee for the same district. During that time and incident to my responsibilities in that position, I personally supervised approximately 100 separate grand jury sessions, which returned approximately 1000 criminal indictments. Additionally, I participated in and supervised numerous investigatory grand jury sessions giving rise to major fraud and other related indictments. In such capacity, I was responsible for the direct questioning and examination of literally hundreds of individual witnesses before the grand jury. The last major grand jury for which I had supervisory responsibilities was that leading to the nationally publicized indictment of Allied Chemical Corporation regarding Kepone poisoning within the waters of the State of Virginia.

Even more important than the above is the sobering experience of my having been a witness before a Federal grand jury and having been subjected to over 15 hours of interrogation and harassment by one of the Department's most notorious prosecutors, that being Guy Goodwin. The experience alone, primarily caused by my protestations and complaints to the Department about that individual, enables me to speak to the workings of our system with an insight that is totally lacking in the presentments of current Departmental officials opposing grand jury reform. Upon this background, my comments are hereby submitted, some favorable and some not so favorable as to your pending legislation, with the fervent hope that my experiences and background can in some way justify my remarks as being pertinent and meaningful to the proposed legislation at hand.

It is my privilege at this time to comment on your Senate Bill Number 1449 in regard to what I feel to be certain select provisions thereof. Any absence of specific comments should be construed as a position of neutrality as to such non referenced portions, my feelings being neither particularly for or against such sections. With that qualification, I hereby offer the following for your consideration.

S-1449

Section 1512: Violations of Grand Jury Secrecy

Section (c) (3) refers to disclosure of matters before a grand jury by a witness or by his attorney with respect to matters testified to by that witness. Because of the attorney/client privilege and also to avoid an attorney seeking headlines at the expense of his client, I would strongly propose that such disclosure by an attorney be done only with "the written permission" of the client. Furthermore, to preserve the integrity of the grand jury session and its investigation, I would suggest that such a disclosure could not be made prior to a period such as 90 days following the appearance of the particular witness or at the conclusion of the grand jury investigation, whichever is sooner in point and time. This observation is self-explanatory and I believe will be useful to this legislation.

Section 3329: Rights and Duties of Grand Jury and Attorneys for Government

Provision (b) (1) speaks of the prosecutor not being allowed to advise the grand jury of a witness who has indicated a desire to take the fifth amendment. Such a provision is impractical inasmuch as it does not answer the questions many times asked by a grand jury as to why an individual is not appearing. Since other provisions of this Bill offer substantial protection and as the law provides for an instruction even at trial that a person not be penalized for refusing to testify then such an explanation should be sufficient with the proper comment by the prosecutor that it cannot be used in any way against the witness. As mentioned later in this presentment, the provision allowing the court reporter's presence and transcription at all times will more than cure any problems that might be addressed in this particular section.

Section 3330; Counsel (Rights of Grand Jury Witnesses)

Section (a) addresses what I consider to be one of the two most important needed reforms of your pending legislation, being that which grants every witness the right to have the assistance of counsel during this presence and questioning before the grand jury. This, along with your Section mandating the presence of a court reporter at all times except deliberations, will do more than any other provision in providing significant and needed safeguards to prevent abuse of the system. Criticisms of this provision were likewise raised within the State of Virginia prior to the passage there of a similar provision for special investigative grand juries. An almost identical provision has now been in existence for over two years with virtually all prosecutors and defense attorneys agreeing that the system is not only working extremely well but in fact has accelerated the investigative process.

A simple review of the current Federal system shows that a witness needing to confer with an attorney must leave the grand jury session each and every time he seeks advice as to a certain question. Not only does this prolong the particular session but in fact serves to outrage the grand jurors as well as allowing the prosecutor to ridicule the witness both during and subsequent to his apperance. I have been present during many sessions where prosecutors and grand jurors joked and laughed about how often a particular witness jumped up and down like a "jack-in-the-box" to see his attorney. This so-called "right" to leave the grand jury session for consultation is in fact a detriment to the best interest of the witness and, unfortunately, has become a tool and sword of the prosecutor.

Recently, I attended a special investigative session of a Virginia grand jury representing a target defendant. I was able to consult with my client and in turn he was able to respond to questions faster and I believe more beneficially to all concerned as opposed to the above mentioned method. In fact, had I not been allowed in the grand jury room, we might have had no other choice but to invoke the fifth amendment rather than to allow him to guess at which questions needed clarification by and consultation with his attorney. On one occasion, the prosecutor attempted to jokingly criticize my client at which time I was able to remind that prosecutor of his unfortunate remarks causing him to return to serious and pertinent questions. My client was protected, the session was expedited, and all concerned had a far more meaningful experience as a result of counsels presence therein.

Your section (b) speaks as did a prior section to the right of an attorney to disclose matters occurring in the grand jury room. I would refer back to my prior comments in this paper as also governing my position herein to the extent that written permission of the client should be obtained along with a certain time limit before such disclosures could be made.

Your subsections (c) through (d) allow for court removal of an attorney 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, along with the need to safeguard the integrity of an investigation, additional language should be added that the attorney shall not represent more than one client in the same general investigation.

Section 3330 B: Subpoenas

I must express some concern at this provision granting concurrent jurisdiction to certain district courts as to motions to quash a subpoena or transfer an investigation into another district. 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 may give rise to an abuse that would allow the granting of such a motion. The only exceptions might be a severe medical condition wherein such a procedure would have meaning in addition to that of a subpoena giving very short notice for appearance. Similarly, allowing a Court outside of the investi-

gative area to transfer a grand jury proceeding might subject the system to chaos and is not, in my opinion, warranted in light of the other safeguards contained in your measure. In fact, such a provision, along with others that I will make reference to, may provide a defense attorney the ability to file numerous motions not only to delay the investigation but to disrupt the stability of the system itself. Therefore, I cannot agree with this recommendation.

Section 3330 C: Evidence presented to the Grand Jury

Your proposed Section (c) herein requires the approval of the Court prior to the submission of heresay evidence (summary evidence) to the grand jury. You should fully understand that in the present system, approximately 95% of all indictments are based on the single testimony of a summarizing law enforcement official. An example might be the F.B.I. agent who takes but several minutes to testify about a criminal activity advising the grand jury on such evidence as a defendant's confession or his identification by some reliable means such as a line-up or implication by a co-defendant with other corroborating evidence. As this witness is under oath and, hopefully, with his remarks transcribed as provided elsewhere in your measure, I would submit that your safeguards would be more than appropriate without the necessity of this particular section. Frankly, the system would bog down to an unworkable nature as the prosecutor would either diluge the district court with these requests, or in the alternative, would lengthen the grand jury process to an unworkable point by subpoening all the witnesses needed to support a given indictment. I must suggest that this proposed reform is totally unworkable.

Your sections (d) (1) (2) deal with the dismissal of an indictment by a Federal court if same was based upon legally insufficient evidence. A close reading of these two sections indicates that they are repetitious. Furthermore, such provisions would be detrimental to the speedy trial of a defendant inasmuch as numerous motions and hearings as to grand jury matters would be presented in an effort to dismiss a particular indictment. Once again I would make reference to the term "mini trials" as a result of this type of legislation. Furthermore, a district judge already has the power to strike the evidence in a jury trial should same be legally insufficient to establish the guilt of a defendant. You are actually turning a motion to dismiss into a full blown evidentiary hearing which would be self-defeating to the entire process. The purpose of grand jury reform is to protect the individual, and that is sufficiently accomplished by an attorney's presence in the grand jury along with a transcription of all matters testified to therein. Each witness is under oath and would be subjecting himself to criminal prosecution should he present inaccurate testimony. This, in and of itself, is a safeguard once such testimony is preserved on the record. Therefore, I am unable to concur with these reference provisions.

Number 3334: Availability of Grand Jury Transcripts and Other Statements

Other than the presence of counsel within the grand jury room, this section is perhaps the single most important provision of your pending legislation as the current system is plagued with numerous abuses. Transcription under prevailing law is not required, and where requested, the prosecutor has the authority at will to tell a court reporter when to cease such transcription. It is the rule rather than the exception that prosecutors give detailed background information to grand juries regarding certain witnesses with such comments never being recorded. These comments may include references that a witness will be hostile, a known criminal, a con-man, or various other such vivid descriptions. Grand jurors are captive audiences to such dialogue from their legal advisor and so programmed, are stripped of their individuality and impartiality. It is no wonder that they may greet the witness with hostility and with 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 improper actions of some prosecutors as well as allowing a witness to calmly review his testimony, to refresh his recollection and perhaps even correct the record as to errors by the court reporter and/or as to misunderstood questions and related responses. Can anyone deny the fairness of such a procedure?

Your related provision allowing for disclosure of grand jury testimony a reasonable time prior to trial is likewise long over due. Congress previously enacted the Jencks Act in response to a court decision requiring such disclosure. This Act however does not allow such disclosure until such time as a witness takes the stand at a trial which may cause unnecessary delays during the trial

while the defense counsel attempts to review hundreds of pages of testimony in an effort to examine the witness properly. Many judges have voiced displeasure with this process and in Virginia some have required these transcripts to be turned over one or two days prior to the actual trial. Even that system can be oppressive to the defendant whose attorney must review within hours of the pending trial hundreds if not thousands of pages of such testimony. It is an in-house joke of prosecutors as to how humorous it is when they turn over numerous volumes of transcripts to a defense attorney twenty-four hours prior to a trial, knowing full well the impossibility of the task confronting that attorney. Your suggested provision is badly needed.

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. 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 as numerous complaints from my office were literally ignored and given only surface treatment by them.

During and after the reference grand jury investigation by Goodwin, 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 or to allow me the opportunity to explain any ambiguities. 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 needed 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" of protection historically reserved to the people was exclusively that of Guy Goodwin, the prosecutor.

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 administration 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 and of themselves will bring back to our system the stability which the original founders of the grand jury concept had envisioned.

Section 3358: Preliminary Examination

Section (a) entitles a defendant to a preliminary examination by a Judge of the district court after the return of an indictment. First and foremost, I believe the intent of your Committee was to provide for such a preliminary examination by a magistrate rather than a district judge as many districts have only one or two such Federal district judges which, under your proposal, would disqualify them from presiding over the actual trial. Currently, preliminary examinations are in fact 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 judge or magistrate find a lack of probable cause. If it is contemplated that such an individual 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 a higher court for a second hearing on this point. Furthermore, I would suggest that the protections afforded elsewhere in your measure would negate the necessity of such a preliminary examination inasmuch as a review of a grand jury transcript would in and of itself supply the thrust of the government's case against the accused. With the many protections already afforded by your resolution, and with the obvious fact that harmful publicity has already been generated by an indictment, then I would

observe that little merit would be gained in the requirement of a preliminary hearing at this point of the proceedings.

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 "minitrial" 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.

I highly commend all 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.

ADDENDUM

Consensual Transactional Immunity and Counsel Participation in Grand Jury

I have not had the opportunity to review your revised legislation being S-3405 which I understand contains two new provisions allowing consentual immunity and counsel participation in the grand jury other than advising his client. I strongly oppose these two items and again emphasize my concern that we not lose perspective regarding the needed investigatory responsibility of the grand jury. In its simplest sense, consensual immunity allows a wrongdoer to forever conceal his knowledge of a crime which is in direct conflict with the basic responsibility of a citizen to come forward with such information. A simple immunity provision is all that is needed as to safeguard for a potential defendant or co-conspirator.

I strongly believe in the right of an individual to have counsel with him in the grand jury and to allow that counsel to confer with him on the given subject matter. Any additional participation by counsel during this phase is unwarranted and would again turn the grand jury investigation into an adversary proceeding which I feel would be detrimental to the entire process.

I trust these above remarks will be beneficial to your Committee.

Senator ABOUREZK. Our final witness today is Catherine Tinker from the Coalition To End Grand Jury Abuse. Welcome to the committee. You may proceed.

TESTIMONY OF CATHERINE TINKER, EXECUTIVE DIRECTOR, COALITION TO END GRAND JURY ABUSE

Ms. TINKER. Senator, and members of the subcommittee and staff, my name is Catherine Tinker. I am the executive director of the Coalition to End Grand Jury Abuse.

This is an organization that is composed of 22 national membership organizations that represent a broad spectrum of groups from professional bar and lawyers associations to labor unions to women's groups, to church groups. My remarks will be representative of the views of these groups that make up our membership, and in addition, certain members will be submitting their own comments. I understand the record will be open.

Senator ABOUREZK. It will be.

Ms. TINKER. Fine. They'll be groups like the International Longshoreman's & Warehouseman's Union. The Newspaper Guild has comments in today as well.

We've heard very eloquently about the nature of the abuses, particularly from witnesses this morning. I would just like to emphasize the two main reforms we feel are essential and which I hope we will be

able to discuss in detail; namely, the right to counsel in the grand jury room and the restoration of consensual transactional immunity for witnesses who are subpenaed to testify before a Federal grand jury.

We were very encouraged last Tuesday to hear the Justice Department acknowledge that there are abuses of the grand jury system. This is a major step in the 5 years in which the coalition has been working for Federal reform. We feel that legislation is the only answer to the problem.

The guidelines within the Department of Justice have been proven to be a failure because there is no enforcement mechanism, as we've seen from the case of Rodney Sager himself. There is no set complaint procedure. In fact the Office of Professional Responsibility within the Department of Justice has no enforceability mechanism. There are no sanctions, and the Office of Professional Responsibility is not able to take any disciplinary action even if they find a violation of standards.

We urge the guidelines be developed more fully, be made broader, but be enforceable. As they are, they're useless.

Furthermore, mere policy or any kind of internal guideline is not enough to protect the basic constitutional rights of witnesses that are at issue here: (1) the first amendment rights of freedom of speech and freedom of association; (2) the fourth amendment right to be free from unlawful searches and seizures; (3) the fifth amendment right to remain silent; and (4) the sixth amendment right to the effective assistance of counsel. These are the provisions addressed in S. 3405, and which we endorse very fully.

To give a historical perspective on the grand jury, please refer to my written testimony. For the last 800 years there has been the right of a citizen to remain silent. When the oath ex officio was required in medieval Tudor and Stuart England there was also the right for a person to refuse to take the oath whatsoever.

It is this tradition that we urge be restored. It is only in the last few years since the Nixon era and the enactment of the 1970 Organized Crime Control Act, that coerced use immunity—as distinguished from consensual transactional immunity, which was in effect earlier—has been a feature of the American criminal justice system.

It is our position that the most critical distinction lies between forced immunity—whether transactional or use—and consensual immunity. Consent of the witness is the most important constitutional principle at issue in the area of the immunity. The witness must choose to waive the fifth amendment right to remain silent, rather than allowing the Justice Department to substitute a grant of immunity for the fifth amendment right against the will of the witness.

As far as counsel in the grand jury room goes, I think that the earlier testimony has pointed out very well the psychological barriers created by forcing a witness to get up and go outside into a crowded, noisy corridor to consult counsel. We feel that the mere presence of counsel would be a very important step toward remedying the basic inequalities of the situation, which is inherently coercive. The question is open as to whatever further role counsel might play.

I would like to draw the analogy to the situation of a lineup, where counsel is present to observe. By merely being there, she or he restrains certain prosecutorial excesses that might occur otherwise.

I would like to discuss one case which illustrates a number of the

problems you've addressed in your bill and that we've been talking about in the last 3 days of hearings.

This was a case involving the Hispanic Commission of the Episcopal Church in New York City, a minority commission established to address Hispanic concerns several years ago. In 1975 and 1976 the FBI in New York City began an investigation into Puerto Rican independence movements and concurrently targeted this particular church group's minority commission for specific questions.

In discussing subpena power and the misuse of subpenas, you've heard a great deal about overbroadness and problems in venue. I'd just like to illustrate by reading a statement about what was involved in that subpena for the church records:

> All books, records, documents, and other things pertaining to the church's Hispanic Commission including names and addresses of every contributor and every person who had ever attended a conference or meeting sponsored by the commission as well as the personnel files and travel vouchers of the commission members, former members and staff.

That's the nature of the problem we're addressing here, the breadth of the inquiry. Ten people went to jail as a result of this cluster of investigations and subpenas, including two of the staff people in the Episcopal Church's Hispanic Commission, Raisa Nemikin and Maria Cueto who went to jail in New York for refusing to testify before a Federal grand jury.

In addition, commission members from remote areas of the country were subpenaed. One member who is in a rural area of New Mexico was subpenaed to appear in Chicago and New York, where he had never been in his life. He was taken away from his job as an ambulance driver for a clinic in his rural Chicano community. In fact, this particular person has just been released from jail on May 8, 1978.

Senator ABOUREZK. What was he put in jail for, not testifying?

Ms. TINKER. Yes. He was subpenaed before a Federal grand jury in both places, in Chicago and New York.

Senator ABOUREZK. But why was he in jail?

Ms. TINKER. He refused to testify and was given a grant of immunity from the Justice Department. When he refused to testify in the immunized condition imposed by the Justice Department, the contempt order was entered against him and he went to jail for the civil contempt. That's the normal procedure. He was incarcerated since last summer—from August to May of this year. That's just one of the most recent cases which shows how broad the abuses of the grand jury system are.

As far as the specific provisions of the bill go, I think one other very important area is the grounds for quashing subpenas. If the Justice Department guidelines were enforceable, perhaps failure to follow these guidelines would be grounds for quashing a subpena.

Another situation that you've addressed specifically in S. 3405 is where a primary purpose of a subpena is to harass or to induce the witness to commit perjury or to force the witness into contempt—which would mean incarceration. Such a subpena should be quashed on those grounds alone, which I think is a very important step.

You've also addressed questions of venue that would eliminate seesawing witnesses back and forth across the country. One other case on point is that of Joanna Ledeaux, a native American woman who

was subpenaed before a Federal grand jury in your State, Senator Abourezk, and ended up in Terminal Island, Calif., in a Federal prison where she gave birth to a child—1,500 miles away from her friends and family.

Senator ABOUREZK. You might say that the only beneficial effect of that *Joanna Ledeaux* case, which happened in South Dakota, was that her brother-in-law was a former rightwing politician in South Dakota. He was president of the Young Americans for Freedom. I was in law school with him, in fact. He's turned into a flaming radical [laughter] ever since that time. So if there is a silver lining so to speak——

Ms. TINKER. That does seem to be the effect of the current grand jury system.

Senator ABOUREZK. We can't do it one at a time.

Ms. TINKER. Exactly.

Well, I can only repeat that I wish for sweeping reforms as proposed in your legislaton and speedy passage of S. 3405.

Senator ABOUREZK. Thank you.

You have addressed pretty much everything that we would have any questions on and I want to express my thanks to you for your testimony and your cooperation and your appearance here today.

Without objection, at this time I would like to insert Ms. Tinker's written testimony for the record.

This is the last hearing planned at this point on this legislation. I want to thank all witnesses and all participants in the hearings.

I am hopeful that we will get some kind of change as soon as possible in this respect.

Ms. TINKER. I appreciate your suggestion earlier about recalling the Justice Department for further questions and more reporting requirements. The infomation is there.

Senator ABOUREZK. Yes. I think we have some additional questions to ask of them.

Thank you.

[The prepared statement of Ms. Tinker follows:]

PREPARED STATEMENT OF CATHERINE TINKER

Mr. Chairperson and distinguished members of this subcommittee, on behalf of the 22 national labor, bar, civil liberties, religious and women's groups that comprise the Coalition to End Grand Jury Abuse, I thank you for the opportunity to testify before you this morning. My name is Catherine Tinker, Executive Director of the Coalition. We are pleased to be discussing a bill today, S. 3405, which significantly addresses the rights of witnesses subpoenaed before the Federal grand juries, and applaud your continuing concern about current abuses of the grand jury system, Senator Abourezk.

In five years of legislative efforts and public education, the Coalition to End Grand Jury Abuse has monitored the controversial grand jury proceedings of recent years since the drastic changes in grand jury law and practice of the Nixon era. We have spoken with critics and defenders of the present grand jury system all across the country; written and read scores of articles, depositions, and briefs on grand jury abuse; and explored a number of solutions to the potential—and actual—deprivation of Constitutional rights of witnesses subpoenaed before grand juries and faced with the threat or actuality of imprisonment for exercise of rights guaranteed by the Bill of Rights. We have seen a number of states enact their own reform legislation and experience the positive practical effects of such measures as counsel in the grand jury room and restoration of rights of grand jury witnesses. On the Hill, we have seen over 25 bills introduced in the House and Senate over the last 5 years proposing grand jury reform.

An impressive record has been built up in the House, and now in the Senate, through a series of hearings; and numerous organizations like the American Bar Association and labor unions, church groups, journalists, and legal organizations which are members of the Coalition have passed resolutions or approved principles urging grand jury reform.

After all these years, we have learned that reforms in two basic areas are the most critical: the right to counsel in the grand jury room and consensual transactional immunity. My testimony will examine these two propositions in detail, analyze the appropriate sections of S. 3405 which provide for these reforms, and demonstrate why legislation must be passed to restore Constitutional rights of American citizens, rather than relying on the good character of an individual prosecutor or temporary policy statements of the Department of Justice where such fundamental rights are concerned.

Should Congress decide not to reform the grand jury or allow the issue to wither through inaction, society will pay a heavy price as more and more citizens are exposed to the Star Chamber techniques of the grand jury and find themselves stripped of basic Constitutional protections such as freedom of speech and association, a free press, the right to remain silent, and the right to adequate assistance of counsel. The consequences are staggering for those who believe in a free, participatory democracy: breeding contempt for the law when prosecutors can ignore the concepts of due process and justice guaranteed all citizens of this country, and forcing citizens into civil disobedience and jail rather than cooperate in a process which infringes upon their rights. As more and more citizens become aware of the awesome abuse of power within the grand jury room, the demand for legislative reform increases and more citizens go to jail without being charged with or convicted of any crime, determined only to uphold their moral and political beliefs in our basic Constitutional rights.

As Mary Emma Hixson, former Director of the Coalition to End Grand Jury Abuse, told the House Subcommittee on Immigration, Citizenship and International Law last October:

> This feeling [of the necessity for civil disobedience before the grand jury] 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.

The misuse of the grand jury to stifle political dissent is a grave danger to the free exchange of ideas. We are also seeing today the application of the same techniques to broader and broader groups of Americans. Churches, journalists, lawyers, labor organizers, corporations, and even the Attorney General of the United States have resisted attempts to subpoena their records, files, or notes on a variety of Constitutional grounds.

It is clearly time to restore the grand jury to its original purpose of protecting the rights of a person suspected of wrongdoing by establishing the sufficiency of the evidence against him before an independent body of the local community. It is only in the last 80 years compared to 800 years of the existence of grand juries that the individual witness has been faced with the loss of the right to remain silent, right to privacy, and other attendant liberties. Only Congressional action now can eliminate the abuses of the current grand jury system.

I. COERCED IMMUNITY MUST BE ABOLISHED AND CONSENSUAL TRANSACTIONAL IMMUNITY BE RESTORED AS MANDATED BY THE HISTORY OF THE 5TH AMENDMENT AND THE LACK OF JUSTIFICATION FOR USE OF FORCED IMMUNITY

The power to compel testimony and then punish recalcitrance is a very recent addition to the long and fascinating history of the grand jury. First used in 12th century England by Henry II as a way to initiate the prosecution of suspect individuals through the accusation by the local community represented by a twelve-person grand jury, the system also worked to establish the power of the royal courts and sheriffs at a time when the Norman kings were attempting to control and reduce the power of the Anglo-Saxon barons.

The original grand jury had no investigatory function. This ad hoc group of freeholders set up by the sheriff before the circuit-riding royal judge arrived, were required to accuse from their own knowledge of local people and their reputation whenever a crime had been committed. Anyone so charged by the grand jury had to stand trial by ordeal, or, after the 13th century, trial by jury.

The independence of the original grand jury was clearly established in that even the king could not punish someone absent the accusation of a grand jury. The application of the principle that accusation must come from an outside source was that no person could be required to accuse himself. By 1215, when Magna Carta and clause No. 39 were enacted, these guarantees were firmly established in law and the grand jury was viewed as a protector of the rights of the community against the power of the king.

Grand jurors did not summon witnesses during the middle ages, but rather went out into the community to learn what they could from what people were willing to tell them. During this time the grand jury began to indict as well as present, based on a specific accusation against an individual rather than naming people suspected of crime in general.

The Justices of the Peace in the 16th century had the power to summon witnesses by compulsory process and to administer oaths, both part of the growth of prosecutorial power of the Tudor state. According to Professor John Anthony Scott, Legal Historian, Rutgers University School of Law:

> 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.*[1] [Emphasis added.]

The roles of the grand jury and officers of the crown reversed in the 16th century so that the grand jury began examining cases and information on suspects presented to it by the magistrate. Also in the Tudor era, trial by information was available to circumvent the grand jury and to harass enemies of the reign without the requirement of prior indictment by the grand jury.

Certain techniques of the English eccesiastical courts, like the oath ex officio, were adopted by the royal courts when Henry VIII defied the Pope in the 16th century. The oath ex officio, or "Star Chamber oath," meant that suspects charged with no specific offense against the law were forced to swear to tell the truth and answer any questions asked them. A witness who lied could be convicted of the heinous offense of perjury, and refusal to take the oath itself was punishable. The parallel to the recent American version of forced immunity, penalties for perjury, and jail for contempt for refusal to testify is frighteningly exact. In Tudor England, the use of these techniques in the Star Chamber and the High Commission consolidated absolute power in the Crown and suppressed any dissent, known then as "treason" or "heresy." The initial justification by the Tudor dynasty for abrogating the rights of individuals and usurping the power of the grand jury as a screen for accusations lacking factual bases was that strong action by the state was necessary to control crime and the violence in the countryside. Today, we hear official opposition to grand jury reform legislation from prosecutors like Robert Del Tufo, on the grounds 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.[2]

Thus the legacy of the Star Chamber methods of inquisition have been revived in America since 1954 with the practice of forced immunity, with similar rationalizations from the state about the necessity for these techniques. Neither then nor now has there been any proof of the efficacy of such techniques except in chilling free expression, speech, and association.

The English people revolted against the royal tyranny and abolished both the Star Chamber and the High Commission at the opening of the Long Parliament in 1641. However, indictment by information remained firmly entrenched in common law alongside indictment by the grand jury. The restoration of the monarchy

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[1] Professor John Anthony Scott, written testimony before the House Subcommittee on Immigration, Citizenship, and International Law, March 17, 1977, p. 63.

[2] Robert J. Del Tufo, written testimony before House Judiciary Subcommittee on Immigration, Citizenship, and International Law, April 27, 1977, p. 7.

of Charles II in 1660 meant a century and a half of rule by a small landowning and commercial class threatened by the least expression of dissent. Consequently, the libel and sedition acts were applied totally at government discretion, proceeding on information. As Professor Scott writes:

> This bypassing of the grand jury process greatly increased the ease with which the government could harrass its opponents by illegal search and seizure of materials, by arrest and jailing without warning.[3]

Today in America the government may proceed by information, the act so odious to English libertarians and the press in the 18th century. However, contemporary American prosecutors have another tool at their disposal: proceeding through a "rubber-stamp" grand jury which returns whatever indictments the prosecutor urges. It is this distortion of the traditional protections of the people provided by grand jury indictment that we protest, and urge a return to the historical value of the grand jury outlined herein.

The importance of the grand jury indictment as a shield to common citizens, publishers, printers, and any who dared speak out against the government is nowhere more forcefully demonstrated than by the role the grand jury played in colonial America. Citizens here were quick to understand the importance of a grand jury which would refuse to indict patriots the British colonial government was trying to punish. Each colony empanelled its own grand juries, which called and examined witnesses on indictments drawn by the attorney general. The function of the grand jury was clearly to accuse, not to investigate. Refusal to testify under oath was contempt of court and punishable, but witnesses could refuse to take the oath.

> 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 constitution as the right of grand jury indictment itself.[4]

The historical perspective afforded by these facts and the necessity for preserving freedom of expression and robust debate illustrates why we urge a return to consensual immunity in place of the morally and historically repugnant coerced immunity.

> The American 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.[5]

The colonial emphasis on local responsibility and independent action by the grand juries, coupled with an abhorrence for proceeding by information rather than by grand jury indictment, led to several infamous cases confronting the British colonial authority, such as that of John Peter Zenger. In fact, it has been claimed that the bypassing of the grand jury system was even a cause of the American Revolution, specifically in the British government's attempt to use special admiralty courts which proceeded by information for all cases arising under the acts of trade.[6] Small wonder, then, that the grand jury was an essential protection specifically written into the Bill of Rights, in the 5th Amendment:

> *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 he compelled in any criminal case to be a witness against himself.* [Emphasis added.]

Through the centuries since the framing of the Constitution, the grand jury has occasionally been misused to suppress political opponents or unpopular views. But until modern times, with the reign of terror begun by McCarthy and the House Un-American Activities Committee and finally codified during the Nixon Administration, the 5th Amendment was still alive in America. Transactional immunity, providing that a witness could not be prosecuted for anything she/he or any other witness said about the particular transaction that was the subject of the grand jury proceeding, existed (except before administrative or Congressional hearings like the House Un-American Activities Committee) until 1970. With the passage of Nixon's Organized Crime Control Act, transactional immunity was replaced by forced use immunity, a limited protection for a wit-

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[3] Scott, *op. cit.*, p. 67.
[4] Scott, *op. cit.*, p. 69.
[5] Julius Goebel, Jr. and T. Raymond Naughton, "Law Enforcement in Colonial New York: A Study in Criminal Procedure 1664–1776" (New York, 1944), 355–6.
[6] Scott, *op. cit.*, p. 77.

ness who chooses to testify and may still be prosecuted on the basis of "independent evidence." This independent evidence may be the testimony of other witnesses called after being named by the original witness.

The Coalition to End Grand Jury Abuse supports the fuller protections for the rights of witnesses provided by transactional immunity and urges a speedy return to transactional, rather than use, immunity. However, the even more critical distinction is between forced and consensual immunity, whether use or transactional. In light of the extensive historical emphasis on the precious right of an accused person not to incriminate himself "out of his own mouth" and the protective purpose of the grand jury itself, only consensual immunity is justifiable and Constitutionally sound.

The drafters of the Bill of Rights would be shocked indeed to find the Attorney General able to take away a witness' Fifth Amendment right to be free from self-incrimination—and substitute the very limited use immunity against the will of the witness.

Of course, once immunized, the Court reasons that a witness has no reason to refuse to testify (totally ignoring reasons of a political, ethical, moral, or religious nature); and therefore finds the witness in contempt for failure to testify. The consequences of finding the witness in contempt are that the witness is jailed, without charges or conviction of any crime, for the life of the grand jury (a maximum of 18 months) or until the witness decides to testify. To make matters worse, this "grant" of immunity against the will of the witness wishing instead to rest on the Constitutional guarantees of the 1st, 4th, 5th, 6th, and 9th Amendments, is imposed at the discretion of the Justice Department and the prosecutor.

Nor has the Justice Department ever proven the need for coerced immunity, either statistically or in specific cases. Witnesses who object to testifying before a grand jury on Constitutional or moral grounds, or for fear of retaliation or rejection by others in their organizations, are going to—and have, in case after case—go to jail rather than testify. The citizen seeking redress of these grievances has no avenue of appeal, no remedy for prosecutorial abuse of the grand jury proceeding or for restoration of the Bill of Rights. It is up to Congress to reform the process and restore our Constitutional and historical birthright, the very task begun in S. 3405 with the restoration of consensual transactional immunity. As Justice William O. Douglas recognized:

> The Fifth Amendment is an old friend and a good friend. It is one of the landmarks in man's struggle to be free of tyranny, to be decent and civilized. It is our way to escape from the use of torture.

II. THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL REQUIRES COUNSEL PRESENT IN THE GRAND JURY ROOM

Appearing before a grand jury is an inherently coercive situation, one in which a single witness faces twenty-three people about whose views, biases, or background the witness knows nothing, yet who have the power to ask the most intimate details of the witness' life. Then there is the prosecutor, an officer of the government in control of the proceedings who has the power to comment to the grand jury on anything the witness says or doesn't say, interpret or advise the grand jurors on any point of law or question of sufficiency of the evidence, and direct the questioning in any direction.

How is this different from a normal courtroom situation? Significant due process safeguards for the witness called to testify at trial are totally missing in the grand jury room, including basic evidentiary rules that exclude hearsay or evidence based upon a violation of the witness' statutory or Constitutional rights. But the most significant difference is that no judge, outside observer, or defense counsel is present in the grand jury room to check excesses by the prosecutor or even to note any impermissible conduct by a prosecutor that directly affects the witness' rights or may lead the witness into perjury or contempt.

A primary reason to permit witnesses to be accompanied by counsel is to ensure that the witness does not incriminate herself/himself in responding to questions, or inadvertently waive the Fifth Amendment protection by answering seemingly innocuous questions which later may be determined by a court to have constituted a waiver. If the witness is testifying under a grant of immunity, there are many close questions which may require the advice of counsel to avoid unintentional perjury or which raise questions of privilege, illegally obtained evidence from electronic surveillance or unlawful search and seizure, or opinion testimony.[7]

[7] Mary Emma Hixson, "Bringing Down the Curtain on the Absurd Drama of Entrances and Exits—Witness Representation in the Grand Jury Room," American Criminal Law Review, Spring, 1978, p. 307.

By being present in the grand jury room, therefore, counsel for the witness could more fully advise the witness of potentially damaging questions, warn the witness against inadvertent perjury of waiver of rights, and note any improper line of questioning or inferences by the prosecutor that could damage the witness before the grand jurors. None of these advantages can be achieved as long as counsel for the witness must wait outside in the corridor, until the witness breaks the prejudicial effect of asking for permission to consult counsel and walking out of the room. In the process, the witness risks whatever comments the prosecutor chooses to make to the grand jury during the witness' absence and risks the anger or impatience of the grand jurors at the delays involved in leaving the room each time.

In addition to these advantages, the presence of counsel in the grand jury room would also serve to restrain any improper line of questioning by the prosecutor or abusive treatment of the witness, and inhibit gratuitous remarks to the grand jurors. If the witness lacks complete facility with the English language, counsel present in the grand jury room could ensure that the witness fully understands the import of each question. Finally, in a psychological sense the mere presence of counsel for the witness would redress the imbalance of the situation, currently weighted totally in favor of the prosecutor who is conducting the proceeding. Any prosecutor proceeding in a non-abusive manner in the interests of justice cannot protest the presence of counsel for the witness or fear any impairment of her/his ability to proceed with the grand jury inquiry.

The right of a grand jury witness to consult with counsel is firmly established; the question is where the consultation will take place. See *U.S. v. Mandujano*, 425 U.S. 564 (1976); Fed. R. Crim. P., Rule 6(e); and *U.S. v. Daniels*, 401 F. 2d 1076 (5th Cir. 1972). Currently the Federal practice is for counsel for the witness to wait outside in a noisy, crowded corridor until the witness emerges for a quick, whispered conversation. This is hardly the optimal situation to ensure adequate assistance of counsel. At present, only those witnesses able to afford counsel are entitled to such assistance; indigent persons cannot request a court-appointed attorney.

S. 3405 addresses these problems by providing for appointment of counsel for indigent witnesses and by allowing counsel inside the grand jury room with no limitation on the role of counsel. See S. 3405, Sec. 3(d) and Sec. 7(a) (§ 3330 A). Rather than provide unnecessary restrictions on counsel or elaborate methods for evicting counsel the moment she or he begins to effectively defend the witness, S. 3405 relies upon the time-honored remedies of contempt and disciplinary action by the bar association to restrain attorneys from improper or excessive actions on behalf of their clients. The approach of S. 3405 goes beyond Constitutionally questionable restrictions and limitations proposed by other reform measures.

The question of the actual scope of counsel's role in the grand jury room is open to debate. The A.B.A. and other reform bills like H.R. 94 endorse the very limited role for counsel of advising the client and being present during questioning of the witness only, specifically excluding counsel from addressing the grand jurors or "otherwise taking part in the proceedings." Other suggestions for reform envision a larger role for counsel, such as making objections to particular lines of questioning by the prosecutor, or to prejudicial remarks made by the prosecutor; addressing the grand jurors; and repeating the instructions of the judge to the grand jurors or otherwise advising them on the law to ensure independent decision-making by the grand jurors without the sole advice of the prosecutor. Another suggestion for the role of counsel is the model of counsel for a witnss before a committee of Congress, where members of the Congressional committee control the witness' attorney. To totally prohibit defense counsel from addressing grand jurors is not the way to foster the spirit of grand jury independence.

Experience in a number of states which have passed reform legislation in the last several years indicates that presence of counsel in the grand jury room is the first change made by most states and is successful in practice.[8]

[8] Twelve states, including Colorado, Massachusetts, Minnesota, South Dakota, Virginia, Kansas, Michigan, Connecticut, Oklahoma, Arizona, Illinois, and, most recently, New York have passed grand jury reform legislation. Other states like Nevada, Ohio, California, Wisconsin, and Florida are considering such reforms. Every state proposal includes the right to counsel in the grand jury room, and 12 states currently allow counsel in the grand jury room.

The secrecy of grand jury proceedings is a serious matter, but would not be violated by the presence of counsel for the witness in the grand jury room any more than under the current system of client consultation in the public hallway of the courthouse. The witness may presently authorize her/his counsel to disclose anything the witness tells counsel about proceedings in the grand jury room. Of much more serious concern in practice is the leaking of unsubstantiated information prejudicial to the witness to the press by prosecutors, court officials, members of the grand jury, or investigative agents from the F.B.I., I.R.S., or other agencies "assisting" the prosecutor. S. 3405 addresses these problems by providing that penalties for disclosure of matters occurring before grand juries do not apply to witnesses or witnesses' counsel, the press or media, or prosecutors in the performance of their duties. However, grand jury information may not be turned over to agents from other agencies like the F.B.I. or I.R.S. unless "a record is presented to the court of the date and purpose of each disclosure and of the name of the person to whom the disclosure is made." See. S. 3405, Sec. 4(a) (§ 1512).

This new section is crucial for terminating manipulation of the grand jury by outside investigatory agencies like the F.B.I. who currently use the grand jury and a compliant prosecutor to elicit information not otherwise obtainable from a witness, or in place of the authorized type of F.B.I. investigation where a citizen may refuse to cooperate without jeopardizing her/his freedom or security. The differences between grand juries and F.B.I. investigations cannot be overstated: historically and Constitutionally, the grand jury's purpose is to accuse, not investigate or conduct broad "fishing expeditions." The separate functions of the F.B.I. are controlled by entirely different rules, as this same subcommittee is investigating in another set of hearings this month on the F.B.I. charter. The grand jury is no substitute F.B.I. and cannot be misused as a tool for delivering information to the F.B.I. that its own agents could not legally have obtained. The reality of our concerns over the flow of grand jury information to other agencies and the apparently current misapprehension that the grand jury is an arm of the F.B.I. is illustrated by several recent cases which have come to our attention where F.B.I. agents have threatened citizens who refused to talk with the agents with grand jury subpoenas to compel cooperation. One case involves a woman who spent 7 months in jail in 1975 rather than testify before a grand jury on the same subject as the present F.B.I. investigation. Clearly, threats of grand jury subpoenas to Ellen Grusse in Connecticut or women's communities in Kentucky or elsewhere where people are painfully aware of grand juries and imprisonment for civil contempt is an unnecessary and impermissible scare tactic. The F.B.I. must not be permitted to make good on any such threat: the grand jury is an independent body established to protect the rights of citizens and to accuse those suspected of crime, not an inquisitorial tool of any government agency.

Our concern about the misuse and appropriation of the grand jury is shared by other citizens as well. We have received a number of inquiries on this problem from law students, legal practitioners, members of the public, and even a tax commissioner concerned about prosecutors improperly subpoenaing tax records via the grand jury. We are glad that S. 3405 addresses this problem. The issue deserves much more attention and concern to halt this type of abuse immediately.

III. ONLY FEDERAL LEGISLATION IS ADEQUATE PROTECTION FOR THE CONSTITUTIONAL RIGHTS OF WITNESSES SUBPOENAED BEFORE GRAND JURIES: MERE INTERNAL POLICIES OR GUIDELINES OF THE JUSTICE DEPARTMENT ARE UNENFORCEABLE, SUBJECT TO FREQUENT CHANGE, AND NARROWLY DRAWN

The position of the Coalition to End Grand Jury Abuse and its member organizations has consistently been that Federal legislation is required to adequately protect the Constitutional rights of citizens subpoenaed as witnesses before Federal grand juries. Growing numbers of individuals and groups have become aware of grand jury abuse in the past several years, and the ranks of reformers are swelling to encompass groups as diverse as labor unions and corporations, defense lawyers and prosecutors, political radicals and church groups, civil libertarians and police. Reform of state grand juries is progressing rapidly, with reform measures passed in twelve states and several more pending. Against this growing tide stands the Department of Justice alone, opposed to the most basic attempts to restore due process rights within the grand jury room.

In this context, then, we should examine the Justice Department's claims of self-examination and control of potential abuses through such mechanisms as internal guidelines for U.S. Attorneys. Obviously, whatever mechanisms exist are not working, since grand jury abuse continues today. Equally obvious is the need for Federal legislation and agency accountability when something as critical and as fragile as Constitutional rights of individuals need protection against the powers of the state. It is naive to believe that the legal arm of the state itself, the Attorney General and the Justice Department, can dispassionately balance the state's needs or expediencies against the rights of individuals to be free from government intrusion and to exercise all the liberties guaranteed in the Bill of Rights.

Nor can we allow important Constitutional rights to depend on the goodness of an individual prosecutor, particularly when the proceedings are cloaked in grand jury secrecy and counsel for the witness is excluded from the grand jury room. There is no check on the legality of the prosecutor's words or actions under the present system.

The Department of Justice holds up its own guidelines as an example of its policy and intent. (See attachment A.) Whenever efforts to enact reform legislation seem ready to bear fruit, the Justice Department is there claiming its guidelines obviate the need for reform legislation. To expose this sham argument takes two steps: one is that the guidelines do not reflect many of the concerns of reform groups, and actually do very little to reduce the opportunities for abuse of the grand jury by a zealous prosecutor with outside motivations or interests; the second is that mere guidelines or policy statements can and do change quickly. Therefore the validity of such guidelines is suspect as protection for citizens' rights.

The perfect example of the unreliability of these guidelines occurred during this past winter. Rep. Joshua Eilberg had to prod the Justice Department to appear before his House Judiciary Subcommittee on Immigration, Citizenship and International Law and take a position on grand jury reform relating to H.R. 94. After much stalling, Benjamin Civiletti, then Assistant Attorney General, Criminal Division, Department of Justice, testified on June 29, 1977. Several months later, the American Bar Association passed 25 principles at its annual meeting (August, 1977), including recommendations for grand jury reform ranging from presence of counsel in the grand jury room to transactional immunity. (See attachment B.) Momentum build for reform and H.R. 94 appeared to be moving steadily ahead to markup in the Subcommittee. Then, on December 16, 1977, the Executive Office for U.S. Attorneys issued guidelines regarding grand jury practice to be incorporated into the U.S. Attorneys' Manual. A detailed examination of the content of these guidelines follows, but in general the guidelines address (in a limited or negative fashion) a number of reform proposals contained in H.R. 94.

The Department of Justice was reluctant to formulate a position on grand jury reform, initially denying any abuse existed, and Rep. Eilberg had to postpone hearings in order to include the Department of Justice. Finally in October, 1977, Benjamin R. Civiletti (not the Attorney General, whom Eilberg expected to testify on such an important issue in criminal justice), appeared again before the Subcommittee. At the conclusion of those hearings, the prospects for H.R. 94 looked quite good, with veteran Congress-watchers predicting the steady progress of H.R. 94 through mark-up that winter or spring of 1978. At this point, the Department of Justice issued its guidelines on grand juries. Then it became clear that H.R. 94 would not make it through mark-up at any time soon. At that point, the Department of Justice apparently felt safe enough to curtail certain rights contained in the guidelines by issuing an addendum to the U.S. Attorneys' Manual on February 28, 1978. (Attachment C.) This sequence of events illustrates why we need legislation, not mere Department of Justice policy which is easily altered, to restore the Constitutional rights of grand jury witnesses.

Even if the guidelines were complete, accurate, and permanent reform measures, which they are not at present, internal guidelines are not adequate substitutes for legislation because they are not enforceable. According to Mr. Civiletti:

> 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.[9]

While Mr. Civiletti does not cite his legal authority for that statement, its impact and the intent of the Department of Justice are quite plain. One wonders how the Justice Department can argue that such guidelines are as adequate substitute for Federal legislation which *would* create a judicially enforceable right in third parties suffering from grand jury abuse. Exploring this statement further, Mr. Civiletti claims disciplinary action is available against any departmental employee disregarding these instructions. However, once again the reality is something other than the promise.

A perfect example of the problem of internal discipline for U.S. Attorneys is the case of Rodney Sager, who testified before this Subcommittee today, on August 24, 1978. When Mr. Sager was U.S. Attorney in Richmond, Guy Goodwin arrived from Washington to pursue some radicals in his inimical manner. In the process, he also subpoenaed Mr. Sager! Understandably upset at the many violations of due process and of Justice Department procedures Mr. Sager observed first-hand in Guy Goodwin's conduct of the grand jury, Mr. Sager filed a lengthy and detailed complaint with the Justice Department. Nothing ever came of the complaint, and Guy Goodwin is reportedly still working in the Criminal Division of the Justice Department. Sagar, in disgust, quit his job as a United States Attorney.

What procedures exist for internal discipline of Justice Department employees? While it is difficult for an outsider to tell, the Executive Office of the U.S. Attorneys apparently has no real oversight function. The Sager case, for example, was referred to the Office of Professional Responsibility, a small 4-attorney office which determines the outcome of cases from its office in Washington, D.C., rather than through on-site investigations of allegations. There is no set procedure for handling complaints, no control over review by anyone outside the Office of Professional Responsibility, and no way to know what happened in the course of the investigation or at its conclusion. The Office of Professional Responsibility does not have the authority to take disciplinary action on its own, but can only recommend to the Attorney General or agency involved that action be taken. Small wonder then that a citizen cannot expect to file a complaint and get action. Even a U.S. Attorney's complaint against a notorious Federal prosecutor fails to result in discipline or reprimand. See "The Toothless Watchdog: The Justice Department's Office of Professional Responsibility," in *Justice Department Watch*, Vol. 1, No. 4, February, 1978, p. 2. (Attachment D.)

The guidelines cannot be an adequate substitute for legislation if the goal is to protect the rights of witnesses before grand juries. As the court found in *In re Tierney*, 465 F.2d 806 at 813:

> guidelines . . . are directed to the handling of requests by U.S. Attorneys within the Department of Justice for permission to seek orders granting immunity. They are not directed to the procedural or substantive rights of prospective witnesses.

Furthermore, the nonenforceability of the guidelines makes them eminently unsuitable as protection of Constitutional rights of witnesses. We have seen how the internal Office of Professional Responsibility has no power to discipline even in cases of abuse by Department of Justice personnel. nor does the Internal Ethics Bureau of the Criminal Division investigate or punish cases of grand jury abuse. The remedy in the courts is inadequate, although the courts have the power to prevent oppression of individuals by the government. The last three Supreme Court cases on grand juries[10] reversed lower court rulings which sustained the rights of grand jury victims. Finally, even where the Department of Justice guidelines are violated, as in the case of Will Lewis, general manager of KPFK-FM, Los Angeles, it is not sufficient grounds for quashing a subpoena.

An analysis of the Department of Justice guidelines reveals their inadequacy as reform measures in that significant issues addressed in S. 3405 as well as in other reform bills and the A.B.A. principles are omitted from the guidelines.

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[9] Benjamin R. Civiletti, response to request of Subcommittee Staff for comments on H.R. 94 for the House Subcommittee on Immigration, Citizenship, and International Law, November 23, 1977.

[10] *United States* v. *Wong*, 431 U.S. 174 (1977) *reversing* 553 F.2d 576 (9th Cir. 1974); *United States* v. *Washington*, 431 U.S. 181 (1977) *reversing* 328 A.2d 98 (Ct. App. D.C. 1974); *United States* v. *Mandujano*, 425 U.S. 564 (1976) *reversing* 496 F.2d 1050 (5th Cir. 1974).

Specifically missing are the provisions relating to conditions of incarceration for contempt, grounds for quashing subpoenas based on prosecutorial misconduct, and a number of other important omissions.

To illustrate the difficulties of assessing current practice and claims of abuse of the grand jury process, data such as the frequency of resort to immunity or contempt proceedings to compel testimony, cases in which testimony resulted from such orders, the nature of the investigation, and any subsequent indictments or convictions, it is necessary to record such information at the Department of Justice and make the data available in a meaningful report form. Such a need could easily be met by the Department of Justice. In fact, such a form already exists, appended to the testimony of Benjamin R. Civiletti before the House of Representatives.[11] This form is the Witness Follow-Up Report, Form CRM–167. (Attachment E.). Apparently this form is never used, or no one collects or interprets the crucial data asked for on this form, which would reveal significant facts about actual grand jury practice and document cases of abuse where the grand jury (and coerced testimony under grants of immunity) is worthless to any actual investigation or indictment. We strongly suggest that use of this form and reporting the information contained therein would be a significant step the Department of Justice could take immediately while this Federal legislation is pending and S. 3405 is passed.

There are no substitutes for Federal legislation to protect the Constitutional rights of witnesses subpoenaed before Federal grand juries, we cannot emphasize enough. However, we would like to close our testimony with a list of suggestions the Department of Justice could implement immediately. Even these minor steps would help monitor and discipline abuse of the grand jury system and restore some due process rights of witnesses in the grand jury room.

IV. PROPOSALS IN ADDITION TO PASSAGE OF THE GRAND JURY REFORM ACT OF 1978 RELATING TO THE DEPARTMENT OF JUSTICE

1. Accountability

A. Promulgated guidelines under APA so third party has right to enforce.

B. Institute a citizen complaint procedure.

C. Hold public hearing on the above.

D. Institute reporting requirements and forms regarding grand jury practice, including statistics and information on nature of investigation; grants of immunity; witnesses testifying after grants of immunity and those refusing to testify even after incarceration for contempt; and numbers of indictments, trials, and convictions resulting from coerced grand jury testimony.

E. Make this information available to the public and include in DOJ annual report.

2. Internal monitoring

A. Set uniform policies for conduct of grand juries.

B. Create disciplinary sanctions to be imposed for failure to follow guidelines (i.e., control over review process, enforcement powers, and requisite budget and staff should be given Office of Professional Responsibility).

3. External input

A. Citizen participation in review board or similar mechanism for developing review or complaint procedure.

B. Formulation of new guidelines which include specific protections for witnesses subpoenaed before grand juries, provisions for those incarcerated for contempt, and other proposals advocated by reform groups, who should be invited to participate in drafting new guidelines.

C. Studies of current practice, including statistical analyses of data and generation of reports from forms like Form CRM–167, Witness Follow-Up Report, commissioned from outside groups where appropriate.

COALITION TO END GRAND JURY ABUSE MEMBER ORGANIZATIONS AS OF AUGUST 1978

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

[11] Benjamin R. Civiletti, written answers to questions submitted to the House Subcommittee on Immigration, Citizenship, and International Law, November 23, 1977, p. 786.

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; United Church of Christ Office of Church and Society; and Oil, Chemical and Atomic Workers Union.

[ATTACHMENT A]

U S. DEPARTMENT OF JUSTICE,
Washington, D.C., December 16, 1977.

To: Holders of U.S. Attorneys' Manual Title 9.
From: U.S. Attorneys' Manual Staff Executive Office for U.S. Attorneys—
Benjamin R. Civiletti, Assistant Attorney General, Criminal Division.
Re: Grand Jury Practice.

(NOTE. 1. This is issued pursuant to and expires unless reissued or incorporated pursuant to USAM 1–1.550.
2. Distribute to Holders of Title 9.
3. Insert in front of USAM 9–11.000.
(Affects: USAM 9–11.000.)

The Attorney General has approved the following regarding grand jury practice. Please make sure that all Assistant United States Attorneys are aware of the changes in policy which effect improvements to eliminate the appearance of unfairness in some procedures. In brief summary the changes are:

1. (Section 9–11.015) General statement that the prosecutor must at all times conduct himself fairly before the grand jury.

2. (9–11.250) A requirement that all witnesses receive a notice of four rights or opportunities in a form attached to the grand jury subpoena at the time they receive the subpoena.

3. (Section 9–11.251) A statement of policy that generally targets should not be subpoenaed to a grand jury except where it is essential to the investigation.

4. (Section 9–11.252) A general policy that targets or subjects who wish to voluntarily appear before the grand jury should be permitted to do so.

* * * * * * *

6. (Section 9–11.254) If a written communication from a target signed by him and his attorney states that they will assert the Fifth Amendment, the witness should generally be excused from testifying unless there are reasons which strongly compel his personal assertion of that right before the grand jury.

7. (Section 9–11.331) A general direction that a prosecutor should not present to the Grand Jury evidence which the prosecutor knows was obtained as a direct result of a clear constitutional violation.

8. (Section 9–11.334) A prosecutor should present evidence to the grand jury of which he is personally aware where such evidence directly negates the guilt of the subject of the investigation.

9. (Section 9–11.220) Once a grand jury returns a no true bill or otherwise acts on the merits to decline to return an indictment, the same matter (same transaction and the same defendant) should not be presented to another grand jury without first securing the approval of the responsible Assistant Attorney General and then such approval will only be given where there is a clear circumstance of a miscarriage of justice.

10. (Section 9–11.230) Forthwith, subpoenas should be used sparingly.

(The following new section is to be inserted at USAM 9–11.000, Grand Jury:)

9–11.015 The role of the prosecutor

In his dealings with the grand jury, the prosecutor must always conduct himself as an officer of the court whose functions is to insure that justice is done and that guilt shall not escape or innocence suffer. He must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecution but also the protection of the citizenry from unfounded criminal charges. The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for

its consideration. In discharging these responsibilities, he must be scrupulously fair to all witnesses and must do nothing to inflame ir otherwise improperly influence the grand jurors.

(Delete the existing 9–11.250 and insert the following:

9–11.250 Advice of "rights"

The Supreme Court recently declined to decide whether a grand jury witness must be warned of his Fifth Amendment privilege against compulsory self-incrimination before his grand jury testimony can be used against him. See *United States* v. *Washington*, Sup. Ct. No. 74–1106 (May 23, 1977) at 5 & 10; *United States* v. *Wong*, Sup. Ct. No. 74–635 (May 23, 1977); *United States* v. *Mandujano*, 425 U.S. 564, 582 n.7. (1976). It is important to note, however, that in *Mandujano* the Court took cognizance of the fact that federal prosecutors customarily warn "targets" of their Fifth Amendment rights before grand jury questioning begins. *United States* v. *Mandujano*, *supra*. Similarly, in *Washington* the Court pointed to the fact that Fifth Amendment warnings were administered as negating "any possible compulsion to self-incrimination which might otherwise exist" in the grand jury setting. *United States* v. *Washington*, *supra*, at 7.

Notwithstanding the lack of a clear constitutional imperative, it is the internal policy of the Department to advise grand jury witnesses of the following matters: (1) the general 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; and (4) that the grand jury will permit the witness the reasonable opportunity to step outside the grand jury room to consult with counsel if he desires. This notification will be contained on a printed form (to be provided by the Department) which will be appended to all grand jury subpoenas. In addition, these "warnings" should be given by the prosecutor on the record before the grand jury when necessary and appropriate (e.g., when witness has not been subpoenaed), and the witness should be asked to affirm that the witness understands them.

Moreover, although the Court in *United States* v. *Washington*, supra, held that "targets" of the grand jury's investigation are entitled to no special warnings relative to their status as "potential defendant(s) in danger of indictment," we will continue the long-standing internal practice of the Department to advise witnesses who are known "targets" of the investigation (as defined in 9–11.250, *supra*) that their conduct is being investigated for possible violation of federal criminal law. This supplemental "warning" will be administered on the record when the target witness is advised of the matters discussed in the preceeding paragraph.

A "subject" of an investigation is a person whose conduct is within the scope of the grand jury's investigation. A "target" is 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 judgment of the prosecutor, is a putative defendant.

9–11.251 Subpoenaing targets of the investigation

A grand jury may properly subpoena a subject or a target of the investigation and question him about his involvement in the crime under investigation. (*United States* v. *Wong*, Sup. Ct. No. 74–635 at 6 n.8 (slip opinion) (May 23, 1977); *United States* v. *Washington*, Sup. Ct. No. 74–1106 at 9 n.6 (slip opinion) (May 23, 1977); *United States* v. *Mandujano*, 425 U.S. 564, 573–75 & 584 n.9 (1976); *United States* v. *Dionisio*, 410 U.S. 1, 10 n.8 (1973); *Kastigar* v. *United States*, 406 U.S. 441, 446 (1972); *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52, 102 (1964) (concurring opinion); *Brown* v. *Walker*, 161 U.S. 591, 610 (1896); *United States* v. *Friedman*, 445 F.2d 1076 (9th Cir. 1971) *United States* v. *Capoldo*, 402 F.2d 821 (2d Cir. 1968); *United States* v. *Scully*, 225 F.2d 113 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955)). However, in the context of particular cases such a subpoena may carry the appearance of unfairness. Because the potential for misunderstanding is great, before a known "target" (as defined in 9–11.250, *supra*) is subpoenaed to testify before the grand jury about his involvement in the crime under investigation, an effort should be made to secure his voluntary appearance. If his voluntary appearance cannot be obtained, he should be subpoenaed only after the grand jury and U.S. Attorney or the responsible Assistant Attorney General have approved the subpoena. In determining whether to approve a subpoena for a "target," careful attention will be paid to the following considerations: (1) the importance to the successful

conduct of the grand jury's (sic) (2) whether the substance of his testimony or other information sought could be provided by other witnesses; (3) whether the questions the prosecutor and the grand jurors intend to ask or the other information sought would be protected by a valid claim of privilege.

9–11.252 Requests by subjects and targets to testify before the grand jury

It is not altogether uncommon for subjects or targets of the grand jury's investigation, particularly in white-collar cases, to request or demand the opportunity to tell the grand jury their side of the story. While the prosecutor has no legal obligation to permit such witnesses to testify (*United States* v. *Gardner*, 516 F.2d 334 (7th Cir. 1975), *cert denied*, 423 U.S. 861 (1976)), a refusal to do so can create the appearance of unfairness. Accordingly, under normal circumstances, where no burden upon the grand jury or delay of its proceedings is involved, reasonable requests by a "subject" or "target" of an investigation (as defined in 9–11.250, *supra*) personally to testify before the grand jury ordinarily should be given favorable consideration, provided that such witness explicitly waives his privilege against self-incrimination and is represented by counsel or voluntarily and knowingly appears without counsel and consents to full examination under oath.

Some such witnesses undoubtedly will wish to supplement their testimony with the testimony of others. The decision whether to accommodate such requests, reject them after listening to the testimony of the target or the subject, or to seek statements from the suggested witnesses is a matter which is left to the sound discretion of the grand jury. When passing on such requests, it must be kept in mind that the grand jury was never intended to be and is not properly either an adversary proceedings or the arbiter of guilt or innocence. See., e.g., *United States* v. *Calandra*, 414 U.S. 338, 343 (1974).

9–11.253 Notification of targets

Where a target is not called to testify pursuant to 9–11.251, *supra*, and does not request to testify on his own motion (see 9–11.252, *supra*), the prosecutor, in appropriate cases, is encouraged to notify such person a reasonable time before seeking an indictment in order to afford him an opportunity to testify (subject to the conditions set forth in 9–11.252, *supra*) before the grand jury. Of course, notification would not be appropriate in routine clear cases nor where such action might jeopardize the investigation or prosecution because of the likelihood of flight, destruction or fabrication of evidence, endangerment of other witnesses, undue delay or otherwise would be inconsistent with the ends of justice.

9–11.254 Advance assertions of an intention to claim the fifth amendment privilege against compulsory self-incrimination

A question frequently faced by federal prosecutors is how to respond to an assertion by a prospective grand jury witness that if called to testify he will refuse to testify on Fifth Amendment grounds. Some argue that unless the prosecutor is prepared to seek an order pursuant to 18 U.S.C. § 6003, the witness should be excused from testifying. However, such a broad rule would be improper and too convenient for witnesses to avoid testifying truthfully to their knowledge of relevant facts. Moreover, once compelled to appear, the witness may be willing and able to answer some or all of the grand jury's questions without incriminating himself. However, if a "target" of the investigation (as defined in 9–11.250, *supra*) and his attorney state in a writing signed by both that the "target" will refuse to testify on Fifth Amendment grounds, the witness ordinarily should be excused from testifying unless the grand jury and the U.S. Attorney agree to insist on the 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*).

* * * * * * *

All grand jury witnesses should be accorded reasonable advance notice of their appearance before the grand jury. "Forthwith" or "*ea instanter*" subpeonas should be used only when swift action is important and then only with the prior approval of the United States Attorney. Considerations, among others, which bear upon the desirability of using such subpoenas include the following: 1) the risk of flight; 2) the risk of destruction or fabrication of evidence; 3) the need

for the orderly presentation of evidence; and 4) the degree of inconvenience to the witness.

(Amend Section 9–11.331 by inserting the following sentence after the citation on line 17 of page 21:)

It is in recognition of this principle that the Department has formulated the following internal policy of self-restraint regarding presentation to the grand jury of unconstitutionally obtained evidence: A prosecutor should not present to the grand jury for use against a person whose constitutional rights clearly have been violated evidence which the prosecutor personally knows was obtained as a direct result of the constitutional violation.

[ATTACHMENT B]

AMERICAN BAR ASSOCIATION PRINCIPLES

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 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 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 reltionships, 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.

[ATTACHMENT C]

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., February 28, 1978.

To: Holders of U.S. Attorneys' Manual Title No. 9.
From: U.S. Attorneys' Manual Staff Executive Office for U.S. Attorneys—Benjamin R. Civiletti, Assistant Attorney General, Criminal Division.
Re Addendum to the U.S. Attorneys' Manual re Grand Jury Practice Dated December 16, 1977.

(NOTE. 1. This is issued and expires unless reissued or incorporated pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 9 (Crim. Div.).
3. Insert after USAM 9-11.250.
(Affects: USAM 9-11.250.)

DEPARTMENT OF JUSTICE,
Washington, D.C., February 28, 1978.

To: All U.S. Attorneys.
Subject: Addendum to the United States Attorneys' Manual—re Grand Jury Practice dated December 16, 1977.

I have approved the following Addendum to the recent Amendments to the United States Attorneys' Manual on Grand Jury Practice dated December 16, 1977:

1. At the end of Section 9-11.250, Advice of "Rights," add the following:

While it is the general policy of the Department of Justice to use the advice of rights form as a routine method of insuring that subpoenaed grand jury witnesses are aware of their rights, it is recognized that there are limited situations in which an advice of rights form would be clearly superfluous because of the nature of the witness. These situations are where the subpoenaed witness is: (a) a clear victim of a crime; (b) a federal or state law enforcement or investigative agent whose testimony is limited to establishing the details of his investigation of criminal activity; (c) a holder or custodian of records and the subpoena calls for the production of records only and does not require any substantive testimony; and (d) a person (including a target) from whom is sought a handwriting or other exemplar, or physical evidence such as a blood or hair sample, which is not subject to the privilege against self-incrimination, and the subpoena calls for the production of such exemplar or physical evidence only and does not require any substantive testimony. Accordingly, in these limited situations United States Attorneys may exercise their discretion not to use the advice of rights form.

United States Attorneys may also exercise their discretion in determining whether to add a preamble to the advice of rights form to the effect that the advice of rights is given as a general practice to all grand jury witnesses without regard to culpability.

Where a local district court insists that the notice of rights may not be appended to a grand jury subpoena, the advice of rights may be set forth in a separate letter and mailed or handed to the witness when the subpoena is served.

2. The Amendments to the U.S. Attorneys' Manual Re Grand Jury Practice dated December 16, 1977, and this Addendum, are effective immediately.

BENJAMIN R. CIVILETTI,
Assistant Attorney General,
Criminal Division.

ATTACHMENT D

THE TOOTHLESS WATCHDOG: THE JUSTICE DEPARTMENT'S OFFICE OF PROFESSIONAL RESPONSIBILITY

Background

The Justice Department's Office of Professional Responsibility was created by Attorney General Edward Levi in December 1975 to oversee internal inspection within the Department and to investigate allegations of abuse. Yet the Office of Professional Responsibility has proved to be a toothless watchdog, incapable of policing Justice effectively.

A minuscule unit within the Department, dependent on the Attorney General for its direction and resources, the Office of Professional Responsibility does not even have the authority to prosecute wrongdoing when it finds it. The Department's Criminal Division can, of course, prosecute Justice employees for criminal misconduct. The fact that the Office of Professional Responsibility lacks this same authority, however, relegates the Office to the status of a referral agency, unable to take strong measures on its own.

The Office of Professional Responsibility is further limited by its inability to take disciplinary action against Department employees for misconduct which, while serious, does not warrant criminal prosecution, or such prosecution is barred by the statute of limitations. The Office of Professional Responsibility can only *recommend* to the Attorney General or the agency involved that disciplinary steps be taken.

The Levi directive establishing the Office of Professional Responsibility mandates that the Office "review any information or allegation presented . . . concerning conduct by a Department employee that may be in violation of law, of Department regulation or orders, or of applicable standards of conduct." But under the Levi directive, which is the basis for the Office of Professional Responsibility's operations, "primary responsibility" for investigation of unprofessional conduct continues to be largely a responsiblity of each of the some 25 agencies and divisions within the Justice Department.

This scattering of authority throughout the Department to investigate allegations of misconduct and then to follow up on Office of Professional Responsibility recommendations does not seem to be the system most conducive to effective oversight.

Informal Relationships

Levi's directive, which takes up scarcely a page in the *Federal Register*, never defines how the Office of Professional Responsibility is to work with the rest of the Department. As a result, the Office of Professional Responsibility has developed informal working relationships with the other agencies and departments within Justice.

These informal relationships make it difficult, if not impossible, for the Office of Professional Responsibility to review and evaluate the internal inspection carried on by agencies within the Justice Department, as it is mandated to do by Levi's directive. The Office of Professional Responsibility has little control over the information it receives to review. The Office's dependent relationship with the rest of the Department provides little incentive for full disclosure.

Limited Resources

The Office of Professional Responsibility is also handicapped by its limited resources. Michael Shaheen, head of the Office of Professional Responsibility for the past two years, has a fulltime staff or just three attorneys—Steven Blackhurst, Joseph Gross, and Ralph Hornblower—and one researcher. This core staff of five, working with an annual budget of $152,000, is supposed to police the 50,000 employees of the Justice Department.

Generally speaking, the Office of Professional Responsibility is told about serious allegations made against Justice employees, is kept abreast of the agency's or division's internal inspection, but is *not* likely to conduct a thorough investigation of the allegations on its own.

Michael Shaheen points to the inability to conduct thorough preliminary investigations in his first *Annual Report*, which covers the Office of Professional Responsibility's activities from January until November 1976. Shaheen says that the Office of Professional Responsibility "lacks the manpower to conduct the necessary preliminary inquiry" and, consequently, must rely on "collective judgment and experience in deciding whether to refer the matter for criminal or administrative action."

Fifty-three of the 152 allegations "reviewed and acted upon" by the Office of Professional Responsibility during its first 10 months were referred—usually to the Public Integrity Section of the Criminal Division—for possible prosecution. Only eight of these 53 led to prosecution, or if the Criminal Division declined to prosecute, administrative action. None of the referrals to the Criminal Division concerned allegations of investigative or prosecutorial abuse, even though cases of this kind accounted for about one-third of Shaheen's caseload. Only five of these allegations resulted in disciplinary action.

More recently, Michael Shaheen told *Justice Department Watch* that the Office of Professional Responsibility looks into between 20 and 35 allegations each month, that the largest number of allegations concern misconduct by the FBI, U.S. Attorneys, and Organized Crime Section of the Criminal Division, and that the caseload of the Office of Professional Responsibility continues to increase.

[ATTACHMENT E]

(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)—Witness'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 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' 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:_____

Senator ABOUREZK. Before adjourning the hearing, however, I would like to insert one more piece of written testimony into the record, that of Charles A. Perlik, Jr., president of the Newspaper Guild of the AFL–CIO, who could not be here with us this morning.

[Material follows:]

STATEMENT BY CHARLES A. PERLIK, JR., PRESIDENT, THE NEWSPAPER GUILD, AFL–CIO, CLC

The Newspaper Guild, 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 gathers 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 over-eager 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 six years from 1971 to 1977 indicates that there are few so eager as an invesigating 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's ability to unearth the very information being sought.

Our research has logged no less than 60 subpoenas in those 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 convention 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 held 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 Sen. Abourezk's bill, S. 1449, 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 he 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 inquiry.

We would also like to see enacted a provision 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 three 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 proceding 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 Sen. Abourezk'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, who 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.

S. 1449 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 to 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 Sen. Abourezk'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 terms—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 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, pleadng 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 at our first anual convention in 1934. The code stated that it was "the newsmen's duty" not to "reveal confidence or disclosure 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 unable 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 both 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 spectulative. 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 for 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 Florida 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 intended to prevent.

Incorporating news gatherers' privilege into the grand-jury legislation being fashioned by this Subcommitte 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 in-

corporate similar language, in relation to grand-jury testimony, in the legislation you are considering.

S. 1449 contains a provision that could be construed to protect news gatherers from being forced to testify on their information or sources. Subsection (d)(1)(D) would allow a witness to refuse to tesify 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, introduced in the House, 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 gatherers 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 S. 1449 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 on one or another of the grounds set forth in the bill, or on some other basis.

We also endorse, without reservation, the provision of S. 1449 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 (e) 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's 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 Elliot 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 three 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 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 been 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 county 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 S. 1449 in addition to reducing the maximum penalty to six months, seek to eliminate the possibility of this sort of double jeopardy. It provides that "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." H.R. 3736, in the House, has similar language except that it covers refusal to testify concerning "the same *or any related* transaction, set or 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 differences 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. S. 1449 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 over-zealous 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 early in 1977 in Baltimore. In January, Baltimore Sun reporter Robert 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 a House 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, 1977, 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 disposal of the federal government to catch wrongdoers. 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 grand 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 of 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 of 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 faucet. 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 an even riskier procedure than it already is; only leaks with the prosecutor's imprimatur would be safe.

S. 1449, as we read it, respects our fears about the possible manipulation of secrecy penalties against journalists. Section 1515, the new wording on un-

authorized disclosure that S. 1449 would add to the U.S. Code, would not subject journalists to criminal penalties.

S. 1449 stipulates two levels of penalty. The more serious is for disclosure motivated by financial compensation, but Subsection (c) 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 gathers 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 (c), 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 this is a matter for individual news gatherers, not public officials, who are so often interested parties, to resolve.

Grand-Jury Reform and Newspersons' 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 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 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 controversy 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 gathers absolute and unqualified privilege before grand juries.

(Adopted by the 44th Convention of The Newspaper Guild, AFL–CIO, June 30, 1977, Honolulu, Hawaii.)

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., 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, Part 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 athorization.

(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 religous 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 disclosure 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 carry 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 publcity 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.

Senator ABOUREZK. At this time then, the hearings are adjourned.

[Whereupon, at 12:10 p.m., the committee was adjourned.]

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END