# REFORM OF THE GRAND JURY SYSTEM



## HEARING

BEFORE THE

## SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

OF THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

## S. 3274, H.R. 1277, H.R. 6006, H.R. 6207, H.R. 10947, H.R. 11660, H.R. 11870, H.R. 14146, and H.J. Res. 46

SEPTEMBER 28, 1976

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# REFORM OF THE GRAND JURY SYSTEM

TUESDAY, SEPTEMBER 28, 1976

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2228, Dirksen Senate Office Building, Hon. Charles McC. Mathias, Jr., presiding.

Present: Senator Mathias.

Staff present: Jane L. Frank, chief counsel and staff director, and Martin Levine, general counsel to the Subcommittee on Constitutional Rights; William Wilka, counsel to the Subcommittee on Separation of Powers, of the Committee on the Judiciary.

Senator MATHIAS. The committee will come to order.

## OPENING STATEMENT OF HON. CHARLES McC. MATHIAS, JR., A U.S. SENATOR FROM THE STATE OF MARYLAND

I regret to report that our chairman, Senator Tunney of California, is necessarily absent. He has instructed me to preside in his absence.

This morning, the subcommittee will open hearings on the operation of the grand jury system in the Federal courts. These are the first hearings to be held by the Senate on this topic in the entire history of the grand jury. Therefore, these hearings will have a significant potential for the future of our court system.

Before proceeding further, I would like to submit for the record a statement by Senator Tunney, chairman of the Subcommittee on Constitutional Rights.

[The statement referred to follows:]

## OPENING STATEMENT OF HON. JOHN V. TUNNEY, A U.S. SENATOR FROM THE STATE OF CALIFORNIA; CHAIRMAN, SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

This morning's hearing marks the first time the U.S. Senate has examined the grand jury system since the grand jury's inclusion in the Bill of Rights some 185 years ago. This long-overdue examination is a logical extension of the hearings on "The Causes of Popular Dissatisfaction with the Administration of Justice" that I conducted this summer.

Continuing revelation of Government lawlessness has led to a breakdown in public trust in the integrity of our institutions. The Federal grand jury has not escaped this skepticism.

The grand jury was included in the fifth amendment to serve as the citizen's shield against overzealous or politically motivated prosecutions, and as the people's sword against corruption in high places. However, the grand jury has become a rubber stamp for prosecutors and all too often has infringed upon basic constitutional rights. The grand jury has harassed people for exercising their constitutional right to dissent, or for conscientiously performing their duties as professional journalists or attorneys.

Grand jurors themselves are often the "innocent bystanders" in this abusive process. Grand jurors are even frequently unaware that prosecutors are their servants, not their masters.

A further problem with the current grand jury system is its unaccountability. Confronted by instance after instance of grand jury abuse, the courts have repeatedly failed to exercise their supervisory responsibilities over the grand jury process. Because of this judicial neglect of grand jury abuse the responsibility for reform now rests squarely on the Congress. These hearings represent the beginning of the reform process in the Senate. This subcommittee will, in the course of its deliberations, receive the views of judges, prosecutors, defense attorneys, and ordinary citizens.

We will continue our study into the next session to help us formulate legislative remedies to restore the grand jury to the vital protection of our rights our Founders meant it to be.

Reforms have been suggested in four major areas:

(1) To enhance due process for the accused, by requiring that percipient witnesses testify, and that hearsay and summary evidence be used only for good cause; that illegal evidence not be relied on; that evidence favorable to the accused be revealed by the prosecutor; and that a transcript of the grand jury proceedings be made and disclosed to the defendant;

(2) To protect the rights of witnesses before grand juries, including allowing right to counsel in the hearing room, and appointing counsel for the indigent, giving witnesses notification of the scope of the inquiry, limiting the penalties for recalcitrant witnesses, and reconsidering the "immunity" statutes used to coerce testimony;

(3) To strengthen the independence of the grand jury, such as by providing for special counsel when Government crimes are being investigated;

(4) To guarantee the defendant at least one adversary pretrial review, either a postindictment preliminary hearing, or a judge's review of the grand jury transcript for legal sufficiency, or a new form of hearing before an "indicting grand jury" utilizing the procedures of a preliminary hearing, with magistrate presiding and defendant present in person and by counsel.

I support reform in all four of these areas.

The facts revealed by the subcommittee's preliminary studies paint a devastating critique of the grand jury system. First, the defendant is guaranteed by the Federal rules a right to a preliminary examination before an impartial magistrate, where he will be present with his lawyer, can confront and cross-examine witnesses against him and can present evidence in his own behalf. Yet, in the great majority of Federal cases, the defendant is denied that right by the

prosecutor's "race to indict" him before the scheduled date of the preliminary examination. Once the grand jury has handed up the indictment, the preliminary examination is canceled.

Second the grand jury gives the defendant none of those rights. There is no magistrate presiding, no defense lawyer is present, the defendant is not present to hear the witnesses against him.

Third, in the great majority of cases, the grand jury does not even hear the live witnesses to the crime, but only hears a Federal agent summarize the interviews with those witnesses.

I believe that our present grand jury system is constitutionally inadequate. If the accused is not given the rights of a preliminary hearing either in front of the grand jury, or in a postindictment hearing, I believe that he is being denied procedural due process at a critical stage of the proceedings. Moreover, I believe that there is a violation of the equal protection aspect of due process when the rights accorded an indicted defendant who has not had the opportunity for a preliminary examination are compared with those of an individual who has had one.

We have several distinguished witnesses who will testify this morning: The first is the Honorable John Van de Kamp, district attorney of Los Angeles County, whose 7 million people make it the largest county in the Nation.

Mr. Van de Kamp has been chief of a Federal prosecutor's office, a local prosecutor's office, and a Federal defender's office. He has served as the U.S. attorney and the Federal Public Defender in the Central District of California, and is now district attorney of Los Angeles County. He has also been the Director of the Executive Office of U.S. Attorneys in the Justice Department.

The second witness will be the Honorable Richard E. Gerstein, chairman of the grand jury committee of the criminal justice section of the American Bar Association, former president of the National District Attorneys Association, and representative of the NDAA on the ABA House of Delegates. Mr. Gerstein is State's attorney for the 11th Judicial Circuit, Dade County, Fla.

The final witness this morning will be Prof. Melvin B. Lewis, chairman of the legislative committee of the National Association of Criminal Defense Lawyers and a professor at John Marshall Law School in Chicago, Ill.

The Honorable Stanley Mosk, Associate Justice of the Supreme Court of California, was to have testified at this hearing, but judicial business has made it impossible for him to be here. His very scholarly prepared statement will nevertheless be included in the record of the hearing.

The subcommittee has also invited a number of persons to submit written statements on the need for reform of the grand jury system, and on S. 3274. The statements which will be included in the record of this hearing are those of the Honorable Harold Leventhal, Judge of the U.S. Court of Appeals, District of Columbia Circuit; Charles F. C. Ruff, Special Prosecutor, Watergate Special Prosecution Force, U.S. Department of Justice; and Brian J. O'Neill, Esq., formerly Chief of Special Prosecutions and assistant U.S. Attorney, Central District of California.

The U.S. Department of Justice has offered a detailed commentary on S. 3274, by Michael M. Uhlmann, Assistant Attorney General, Office of Legislative Affairs. The Honorable Stanley J. Reiben, chief counsel of the Codes Committee of the Assembly of the State of New York, has made available to the subcommittee a staff report entitled "Abuse of Power," dealing in part with grand jury abuses, and Prof. Samuel Dash, of the Institute of Criminal Law and Procedure of Georgetown University Law Center, formerly Chief Counsel of the Senate Watergate investigation and former chairman of the ABA's criminal law section, was good enough to call to the committee's attention an article by him on "The Indicting Grand Jury." Excerpts from these materials will be included in the record. Also reprinted will be a series of articles by Richard Harris on the grand jury which appeared in "The New Yorker" which has attracted wide attention.

This material will assist the subcommittee in fulfilling its responsibility to recommend appropriate legislation to the Congress.

Senator MATHIAS. We will hear three distinguished witnesses this morning and we expect to hear additional witnesses in further hearings during the next session.

While the hearings this morning concern the whole range of problems regarding the operation of the Federal grand jury, we expect that our witnesses will comment in particular on a bill which has been referred to this subcommittee, S. 3274, the Grand Jury Reform Act of 1976, introduced by Senator Abourezk, for himself, Senator Gravel and Senator McGovern.

Without objection, I would like at this time to insert Senator Abourezk's prepared statement along with S. 3274 into the hearing record.

[The prepared statement of Senator James Abourezk and the bill S. 3274 follow:]

PREPARED STATEMENT OF HON. JAMES ABOUREZK, A U.S. SENATOR FROM SOUTH DAKOTA

I am very pleased that the Subcommittee on Constitutional Rights is about to embark on a comprehensive study of the federal grand jury system. The grand jury has come under increasing criticism in recent years. Much of this criticism stems from the way in which the Nixon administration used the grand jury as a tool of political repression in its effort to silence the anti-war movement. Those weaknesses in the grand jury system which permitted such abuses are still present today. In order to discuss openly the possible avenues of reform I introduced S. 3274, the first grand jury reform act ever introduced in the Senate.

It is no secret that the grand jury is no longer the independent body originally intended by the Constitution. Statistics show that grand juries rarely refuse to return the indictments prosecutors want. Baltimore Judge Charles Moylan, Jr. has described this situation by stating that: "The prosecutor can violate or burn the Bill of Rights seven days out of seven, and bring the fruits of unconstitutional activity to a grand jury." District Court Judge William Campbell has written that: "This great institution of the past has long ceased to be a guardian of the people. Today any experienced prosecutor will admit that he can indict anybody, at any time, for almost anything before a grand jury."

Grand juries have become, in effect, little more than rubber stamps for prosecutorial decisions.

The implications of ignoring this grand jury abuse are profound. Besides denying potential defendants the independent review of the government's case against them that the Constitution demands, the modern grand jury has become a frightening but "legal" means to chill the exercise of fundamental First Amendment freedoms. Prosecutors have used the grand jury's subpoena power to grill political

activists about their politics in an effort to discredit their causes. The many witnesses who have resisted these subpoena attacks, witnesses who have never been charged, tried or convicted of a crime, have found that, far from protecting them against prosecutorial harassment, the grand jury is little more than a trap-door to prison.

We can, and we must, end these abuses by insuring grand juror independence. And by extending due process into the grand jury chamber, Congress can halt the continuing erosion of basic constitutional protections.

As we begin the work of grand jury reform, let us keep foremost in our minds that it is constitutional guarantees such as impartial, independent-thinking grand juries which have set this nation apart and enabled us to live 200 years in liberty.

94TH CONGRESS
2D SESSION

# S. 3274

IN THE SENATE OF THE UNITED STATES

APRIL 8, 1976

Mr. ABOUREZK (for himself, Mr. GRAVEL, and Mr. MCGOVERN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

# A BILL

To establish certain rules with respect to the appearance of witnesses before grand juries in order better to protect the constitutional rights and liberties of such witnesses under the fourth, fifth, and sixth amendments to the Constitution, to provide for independent inquiries by grand juries, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Grand Jury Reform Act of 1976".

SEC. 2. Section 1826 of title 28, United States Code, is amended to read as follows:

**"§ 1826. Recalcitrant witnesses**

"(a) (1) Whenever a witness in any proceeding before

any grand jury of the United States refuses without just cause shown to comply with an order of the court of the United States to testify or provide other information, including any book, paper, document, record, recording, or other material, the attorney for the Government may, only upon an affirmative vote of twelve or more members of the grand jury that such refusal was without just cause, submit an application to the court for an order directing the witness to show why the witness should not be held in contempt. After submission of such application and a hearing at which the witness may be represented by counsel, the court may, if the court finds that such refusal was without just cause, hold the witness in contempt and order the witness to be confined. Such confinement shall be at a suitable Federal correctional institution, if one is located within fifty miles of the court ordering confinement, unless the witness waives this right. Such confinement shall continue until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed six months.

"(2) Whenever a witness in any proceeding before or ancillary to any district court of the United States refuses without just cause shown to comply with an order of the

court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal may summarily order his confinement at a suitable Federal correctional institution, if one is located within fifty miles of the court ordering confinement, unless the witness waives this right. Such confinement shall continue until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of the court proceeding before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed six months.

"(3) No hearing shall be held under subsection (a) (1) unless five days' notice is given to the witness who has refused to comply with the court order under this subsection, except that a witness may be given a shorter notice of not less than forty-eight hours if the court, upon a showing of special need, so orders.

"(b) No person who has been confined under this section for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events may be again confined under this section or under section 401 of title 18, United States Code, for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events.

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"(c) Any person confined pursuant to subsection (a) of this section shall be admitted to bail or released in accordance with the provisions of chapter 207 of title 18, United States Code, pending the determination of an appeal taken by him from the order of his confinement, unless the appeal is frivolous or taken for purposes of delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, pursuant to an expedited schedule ordered by the appellate court upon application by a party.

"(d) In any proceeding conducted under this section, counsel may be appointed in the same manner as provided in section 3006A of title 18, United States Code, for any person financially unable to obtain adequate assistance.

"(e) A refusal to answer a question or provide other information before a grand jury of the United States shall not be punishable under this section or under section 401 of title 18, United States Code, if the question asked or the request for other information is based in whole or in part upon evidence obtained by an unlawful act or in violation of the witness' constitutional rights or of rights established or protected by any statute of the United States.".

SEC. 3. (a) Chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 403. **Refusal of a witness to testify in a grand jury proceeding**

"No person who has been imprisoned or fined by a court of the United States under section 401 of this title for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events in a proceeding before a grand jury (including a special grand jury summoned under section 3331 of this title) impaneled before any district court of the United States may again be imprisoned or fined under section 401 of this title or under section 1826 of title 28, United States Code, for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events.".

(b) The table of sections for chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"403. Refusal of a witness to testify in a grand jury proceeding.".

SEC. 4. (a) Chapter 215 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"§ 3329. **Notice to grand jury of its rights and duties**

"Upon impanelment of each grand jury before a district court of the United States, the court shall give adequate and reasonable written notice to the grand jury of, and shall

assure that the grand jury reasonably understands the nature of—

"(1) its duty to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district;

"(2) its rights, authority, and powers with respect to an independent inquiry under section 3330 of this title;

"(3) its right to call and interrogate witnesses;

"(4) its right to request the production of documents or other evidence;

"(5) (A) the subject matter of the investigation, and

"(B) the criminal statute or statutes involved, if these are known at the time the grand jury is impaneled;

"(6) the requirement of the section 3330A of this title that a subpena summoning a witness to appear and testify before a grand jury or to produce books, papers, documents, or other objects before the grand jury may be issued only upon an affirmative vote of twelve or more members of the grand jury to which the subpena is returnable;

"(7) the authority of the grand jury to determine by an affirmative vote of twelve or more of its members

that the attorney for the Government may submit an application to the court for an order directing a witness to show cause why he should not be held in contempt under section 1826 of title 28, United States Code;

"(8) the necessity of legally sufficient evidence to form the basis of any indictment as provided under section 3330A (1) of this title;

"(9) the duty of the grand jury by an affirmative vote of twelve or more members of the grand jury to determine, based on the evidence presented before it, whether or not there are sufficient grounds for issuing indictments and to determine the violations to be included in any such indictments; and

"(10) such other duties and rights as the court deems advisable.

The court's failure to instruct the grand jury as directed in this section shall be just cause within the meaning of section 1826 of title 28, United States Code, for a witness' refusal to testify or provide other information before such grand jury.

"§ 3330. **Independent grand jury inquiry**

"(a) (1) Any grand jury (including a special grand jury summoned under section 3331 of this title) impaneled before any district court of the United States may, upon its own initiative and after giving notice to the court, inquire into offenses against the criminal laws of the United States

alleged to have been committed within that district by any officer or agent of the United States or of any State or municipal government or by any person who, at the time of the alleged commission of the offense, was an officer or agent of the United States or of any State or municipal government. Such grand jury may request the attorney for the Government to assist such grand jury in such inquiry.

"(2) The grand jury shall serve for a term of twelve months after giving notice to the court under paragraph (1) unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by an affirmative vote of twelve or more members that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No grand jury term so extended shall exceed twenty-four months from the date on which notice to the court was given under paragraph (1).

"(3) If a district court within any judicial circuit fails to extend the term of a grand jury engaged upon an independent inquiry under this section or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury by an affirmative vote of twelve or more members may ap-

ply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry by the chief judge of the circuit of an appropriate order upon such application. No grand jury term so extended shall exceed twenty-four months.

"(b) (1) In the event that the attorney for the Government refuses to assist or hinders or impedes the grand jury in the conduct of any inquiry under subsection (a), the grand jury may, upon the affirmative vote of twelve or more of its members, request at any point in such inquiry that the court appoint a special attorney to assist the grand jury in such inquiry. Such special attorney shall serve in lieu of any attorney for the Government and shall be paid at a reasonable rate to be determined by the court. Such special attorney, with the approval of the court, may appoint and fix the compensation of such assistants, investigators, and other personnel as he deems necessary. The special attorney and his appointees shall be appropriated without regard to the provisions of title 5 of the United States Code, governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates. The special attorney shall be reimbursed for actual expenses incurred by him and

his appointees in the performance of duties pursuant to this section.

"(2) Notwithstanding sections 516 and 519 of title 28 of the United States Code or any other provision of law, a special attorney appointed under this section shall have the exclusive authority to assist in the conduct of an independent grand jury investigation under this section, and any indictment returned by a grand jury pursuant to such inquiry shall be signed by the special attorney in lieu of any attorney for the Government.

**"§ 3330A. Certain rights of grand jury witnesses**

"(a) A subpena summoning a witness to appear and testify before a grand jury of the United States or to produce books, papers, documents, or other objects before such grand jury shall be issued only upon an affirmative vote of twelve or more members of the grand jury, and such subpena may not be returnable on less than seven days' notice, except with the consent of the witness or upon a showing to the court by the attorney for the Government that good cause exists why the subpena should be returned in less than seven days.

"(b) Any subpena summoning a witness to appear before a grand jury shall advise the witness of (1) his right to counsel as provided in subsection (e) of this section; (2) his privilege against self-incrimination; (3) whether his

own conduct is under investigation by the grand jury; (4) the subject matter of the grand jury investigation; (5) the substantive criminal statute or statutes, violation of which is under consideration by the grand jury; and (6) any other rights and privileges which the court deems necessary and appropriate.

"(c) Any witness who is not advised of his rights pursuant to subsection (b) shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he testifies or any evidence he produces, nor shall any such testimony or evidence be used as evidence in any criminal proceeding against him in any court.

"(d) In any proceeding before the grand jury, if the attorney for the Government has written notice in advance of the appearance of a witness that such witness intends to exercise his privilege against self-incrimination, such witness shall not be compelled to appear before the grand jury unless a grant of immunity has been obtained.

"(e) Any witness subpenaed to appear and testify before a grand jury or to produce books, papers, documents, or other objects before such grand jury shall be entitled to assistance of counsel during any time that such witness is being questioned in the presence of such grand jury; such counsel may be retained by the witness or, may, for any person

financially unable to obtain adequate assistance, be appointed in the same manner as if that person were eligible for appointed counsel under section 3006A of this title. Notwithstanding any rule contained in the Federal Rules of Criminal Procedure, such witness' counsel is authorized to disclose matters which occur before the grand jury while such counsel is in the grand jury room.

"(f) A grand jury impaneled to conduct an inquiry into offenses against the criminal laws of the United States may be convened only in a district in which substantive criminal conduct may have occurred as elements of such offenses; except that when a grand jury is to be convened to conduct an inquiry into both violations of substantive criminal statutes and violations of statutes forbidding conspiracy to violate substantive criminal statutes, the grand jury may not be convened before a district court in a district in which the only criminal conduct alleged to have occurred is conspiracy to commit the substantive criminal act.

"(g) For the convenience of witnesses and where the interests of justice so require, a district court may, on motion of a witness, transfer any grand jury proceedings or investigation into any other district where it might properly have been convened under subsection (f). In considering an application for such transfer, the court shall take into consideration all the relevant circumstances, including the

distance of the grand jury investigation from the places of residence of witnesses who have been subpenaed to testify before the grand jury, financial and other burdens placed upon the witnesses, and the existence and nature of related investigations and court proceedings, if any.

"(h) Once a grand jury has failed to return an indictment based on a transaction, set of transactions, event, or events, a grand jury inquiry into the same transactions or events shall not be initiated unless the court finds, upon a proper showing by the attorney for the Government, that the Government has discovered additional evidence relevant to such inquiry.

"(i) (1) A complete and accurate stenographic record of all grand jury proceedings shall be kept, except that the grand jury's secret deliberations shall not be recorded. Such record shall include the court's notice to the grand jury of its rights and duties including but not limited to those set forth in section 3329 of this title; all introductory comments, directives, and other utterances made by attorneys for the Government to the grand jury, witnesses, and counsel for witnesses; all testimony; and all interchanges between the grand jury and attorneys and those between attorneys for the Government and counsel for witnesses. Consultations between witnesses and their counsel shall not be recorded.

"(2) Any witness who testifies before a grand jury,

or his attorney with such witness' written approval, shall, upon request, be entitled to examine and copy a transcript of the record for the period of such witness' own appearance before the grand jury, and if a witness is proceeding in forma pauperis, he shall be furnished, upon request, a copy of such transcript. Such transcript shall be available for inspection and copying not later than forty-eight hours after the conclusion of such witness' testimony, unless, for cause shown, more time is required to prepare such transcript. After examination of such transcript, a witness may request permission to appear before the grand jury again to explain his testimony. Additional testimony given under this subsection shall become part of the official transcript and shall be shown to the members of the grand jury.

"(j) Any witness summoned to testify before a grand jury or the attorney for such witness with the witness' written approval shall be entitled, prior to testifying, to examine and copy any statement in the possession of the United States which such witness has made and which relates to the subject matter under inquiry by the grand jury. The term 'statement' as used in this subsection shall be defined as in section 3500 (e) of this title.

"(k) No person subpenaed to testify or to produce books, papers, documents, or other objects in any proceeding before any grand jury of the United States shall be required to

testify or to produce such objects, or be confined pursuant to section 1826 of title 28, United States Code, for his failure to so testify or produce such objects, if, upon the evidentiary hearing before the court which issued such subpena or a court having jurisdiction under subsection (1) of this section, the court finds that—

"(1) a primary purpose or effect of requiring such person to so testify or to produce such objects to the grand jury is or will be to secure for trial testimony or to secure other information regarding the activities of any person who is already under indictment by the United States, a State, or any subdivision thereof for such activities; or of any person who is under formal accusation for such activities by any State or any subdivision thereof, where the accusation is by some form other than indictment; unless, after a witness refuses to so testify or to produce such objects before the grand jury on the ground that the purpose or effect of requiring his testimony or the production of such objects is in violation of this clause, the Government establishes by a preponderance of the evidence that its inquiry is independent of such preexisting indictment or accusation,

"(2) compliance with the subpena would be unreasonable or oppressive because (i) such compliance would involve unnecessary appearances by the witness;

(ii) the only testimony that can reasonably be expected from the witness is cumulative, unnecessary, or privileged; or (iii) other like circumstances,

"(3) a primary purpose of the issuance of the subpena is to harass the witness,

"(4) the witness has already been confined, imprisoned, or fined under section 1826 of title 28, United States Code, or section 401 of this title for his refusal to testify before any grand jury investigating the same transaction, set of transactions, event, or events, or

"(5) the witness has not been advised of his rights as specified in subsection (b).

"(l) The district court out of which a subpena to appear before a grand jury has been issued, the court in which the subpena was served, and the district court in the district in which the witness who was served such subpena resides shall have concurrent jurisdiction over any motion made by such witness to quash the subpena or for other relief under this section. A motion under this section may be made at any time prior to, during, or when appropriate, subsequent to the appearance of any witness before the grand jury. Any motion made during or subsequent to the appearance of the witness before the grand jury may be made only in the district court in which the grand jury is impaneled. If the motion is made before or during the appearance of the witness

before the grand jury, the appearance before the grand jury shall be stayed by the making of the motion until the court before which the motion is pending rules on the motion.

"(m) The attorney for the Government shall be limited to asking questions or requesting the production of books, papers, documents, or other objects relevant to the subject matter under investigation.

"(n) The attorney for the Government shall not be permitted to submit before the grand jury any evidence seized or otherwise obtained by an unlawful act or in violation of the witness' constitutional rights or of rights established or protected by any statute of the United States.

"(o) A grand jury may indict a person for an offense when (1) the evidence before such grand jury is legally sufficient to establish that such offense was committed, and (2) competent and admissible evidence before such grand jury provides reasonable cause to believe that such person committed such offense. An indictment may be based on summarized or hearsay evidence alone only upon a showing of good cause to the court. An attorney for the Government shall present to the grand jury all evidence in such attorney's possession which he knows will tend to negate the guilt of the person or persons under investigation.

"(p) The district court before which a grand jury is

impaneled shall dismiss any indictment of the grand jury if such district finds that—

"(1) the evidence before the grand jury was legally insufficient to establish that the offense for which the indictment was rendered was committed;

"(2) there was not competent and admissible evidence, or summarized or hearsay allowed by the court upon a showing of good cause, before the grand jury to provide reasonable cause to believe that the person indicted committed such offense;

"(3) the attorney for the Government has not presented to the grand jury all evidence in his or her possession which the attorney knows will tend to negate the guilt of the person indicted; or

"(4) the attorney for the Government has submitted to the grand jury evidence seized or otherwise obtained by an unlawful act or in violation of the witness' constitutional rights or of rights established or protected by any statute of the United States.

"(q) Any person may approach the attorney for the Government and request to testify in an inquiry before a grand jury or to appear before a grand jury and request that the grand jury proceed in accordance with its powers under section 3330 of this title. An attorney for the Government shall keep a public record of all denials of such requests

to that attorney for the Government, including the reasons for not allowing such person to testify or appear. If the person making such request is dissatisfied with the Government's decision, such person may petition the court for a hearing on the denial by the attorney for the Government. If the court grants the hearing, then the court may permit the person to testify or appear before the grand jury, if the court finds that such testimony or appearance would serve the interests of justice.".

(b) The table of sections for chapter 215 of title 18, United States Code, is amended by adding at the end thereof the following new items:

"3329. Notice to grand jury of its rights and duties.
"3330. Independent grand jury inquiry.
"3330A. Certain rights of grand jury witnesses.".

SEC. 5. (a) Part V of title 18, United States Code, is amended by adding at the end of such part the following new section:

**"§ 6006. Reports concerning grand jury investigations**

"In January of each year, the Attorney General or an Assistant Attorney General specially designated by the Attorney General shall report to the Congress and to the Administrative Office of the United States Courts—

"(1) the number of investigations undertaken during the preceding year in which a grand jury or a special

grand jury was utilized together with a description of the nature of each investigation undertaken;

"(2) the number of requests by United States grand juries to the Attorney General for approval and to witnesses for written consent to make application to the court for an order compelling testimony under section 2514 of this title, and the number of such requests approved by the Attorney General;

"(3) the number of applications to district courts for orders granting immunity under this title;

"(4) the number of applications to district courts for orders granting immunity under this title that were approved and the nature of the investigation for which the orders were sought;

"(5) the number of instances in which witnesses in such investigations were held in contempt and confined, and the dates and length of such confinement;

"(6) the number of arrests, indictments, no-bills, trials, and convictions resulting from testimony obtained under orders granting immunity; the offenses for which the convictions were obtained; and a general assessment of the importance of the immunity;

"(7) a description of data banks and other procedures by which grand jury information is processed, stored, and used by the Department of Justice; and

"(8) other appropriate indicia and information concerning grand jury activity during such year.

The matter contained in the report required to be made by this section shall be set forth according to judicial district.".

(b) The table of sections for part V of title 18, United States Code, is amended by adding at the end thereof the following new item:

"6006. Reports concerning grand jury investigations.".

## Summary of S. 3274

### 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.

Gives the witness five days notice of a contempt hearing. Upon a showing of special need, shorter notice may be given.

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 located within 50 miles of court.

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, applying it against any confinement resulting from prior, subsequent, or related grand jury investigations.

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.

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

### NOTICE TO THE GRAND JURY OF ITS RIGHTS AND DUTIES

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, its right to call and interrogate witnesses, its right to request documents and evidence, the subject matter of the investigation, the necessity of legally sufficient evidence to indict, and the power of the grand jury to vote before a witness may be subpenaed, be given a contempt hearing or indicted.

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

### INDEPENDENT INQUIRY

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.

### RIGHT OF GRAND JURY WITNESSES

Provides that subpenas be issued only on an affirmative vote of 12 or more members of the grand jury. Subpenas are not returnable on less than seven days notice, unless for good cause shown. The subpena must advise the witness of the right to counsel, whether his/her conduct is under inevstigation, 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 uesd 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.

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.

Once a grand jury has considered a matter, the government shall not bring the same matter 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 unless a grant of immunity has been obtained.

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.

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.

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.

REPORTS CONCERNING GRAND JURY INVESTIGATION

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 compelling testimony, and the number granted; (c) the number of immunity grants requested, the number approved, 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 compelled testimony; and (f) a description of the data banks, etc., by which grand jury data is processed and used by the Justice Department.

EVIDENCE

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 grand 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.

Senator MATHIAS. The witnesses this morning are John Van de Kamp, the District Attorney for Los Angeles County; Richard E. Gerstein, State Attorney of Dade County, Fla., representing the American Bar Association; and Prof. Melvin B. Lewis, representing the National Association of Criminal Defense Lawyers.

It is sort of a paradox that when we are indulging in the custom of unlimited debate on the floor of the Senate that we ask witnesses to limit debate. Perhaps it is a necessary step because of the pressure arising from the floor.

So we are going to ask each witness to limit himself to a 10-minute opening statement.

Senator Tunney is particularly sorry that he is not here to introduce Mr. Van de Kamp and he has asked me to say a few words on his behalf.

Within the federal system in Los Angeles, the Central District of California, Mr. Van de Kamp has been both the chief prosecutor and the chief defender, the U.S. attorney and first Federal Public Defender.

He has also served in the U.S. Department of Justice in Washington as the Director of the Executive Office of U.S. Attorneys, with nationwide responsibilities.

In addition to Mr. Van de Kamp's experience as chief Federal prosecutor, he has been a chief local prosecutor.

As the District Attorney for Los Angeles County, he serves Los Angeles County's 7 million people, and has the largest jurisdiction of any district attorney in the country.

So on behalf of the committee, it is a privilege to introduce Mr. Van de Kamp.

## TESTIMONY OF HON. JOHN K. VAN de KAMP, DISTRICT ATTORNEY, LOS ANGELES COUNTY, CALIF.; ACCOMPANIED BY CAROL WELCH, DISTRICT ATTORNEY'S OFFICE, LOS ANGELES COUNTY, CALIF.

Mr. VAN DE KAMP. Thank you, Mr. Chairman.

With me this morning is Carol Welch, from the District Attorney's Office in Los Angeles.

Senator MATHIAS. We are glad to have her here today.

Mr. VAN DE KAMP. You have already given me a very ample introduction. The question still remains as to why I am here.

I am serving as the District Attorney of Los Angeles County; but up until last year most of my criminal justice experience comes from within the federal system where I served as Federal Public Defender from 1971 to 1975, and as an assistant U.S. attorney and U.S. attorney in Los Angeles from 1960 to 1976.

During the time I was in the U.S. Attorney's Office, I took more than a thousand cases to Federal grand juries starting in the early sixties; as the Federal Public Defender I represented nearly 500 defendants, most of them charged by way of grand jury indictment.

So I have seen the workings of the Federal grand jury system both as a prosecutor and as a defender.

From that experience I have drawn several conclusions which I would like to summarize.

First, in my view, the constitutional right to indictment by grand jury should be abolished. In lieu thereof, I believe that a defendant should have the right to a preliminary hearing.

Second, short of constitutional amendment, which will be very difficult, I believe that this committee can produce substantial reforms

in the grand jury system to promote the integrity of the grand jury, to promote the rights of witnesses appearing pursuant to its process, and to protect the rights of defendants charged with violations of Federal law.

To that end, the chief recommendations that I have made are as follows:

First, that all grand jury proceedings should be recorded and, when necessary, transcribed.

Second, that an indicted defendant should, as a general rule, obtain full disclosure of all testimony before the grand jury relating to the indictment.

Third, a witness should be entitled to the presence of his counsel, either retained or appointed, when he testifies before the grand jury.

Federal rule changes should also be sought which would give to a defendant the sole power to determine whether an indictment should be waived; if waived he would be entitled to a preliminary hearing, followed by the filing of an information rather than an indictment.

If the case were initiated by indictment, as is sometimes the case, the defendant would be unable to file such a waiver. When this occurs the Federal rules should provide for complete disclosure to the defendant of all evidence presented to the grand jury.

These recommendations are based on several conclusions that I have drawn based on my own experience.

First, the grand jury today is little more than a rubber stamp for assistant U.S. attorneys.

I do not say that in derogation of assistant U.S. attorneys or to disparage them; as a matter of fact, Federal cases are screened carefully at an early stage. I know. I ran the complaint unit in Los Angeles for over 2 years, where cases were thrown out if they did not pass evidentiary muster. The result was that very few cases were lost either at trial or by way of dismissal.

In the 7 years I served as an assistant U.S. attorney in Los Angeles, I can recall only one or two cases where the grand jury returned what is known as a "no bill," and a small handful of cases where the grand jury actively solicited the U.S. attorney's office to take another look at the case, to reinvestigate, or to call in additional witnesses.

Second, the grand jury, which was introduced into our Constitution to act as a charging body, that is as the sword, and to act as a shield, a shield for the accused against unjust prosecution, no longer performs that second function.

I say that because it is commonplace for a case agent to go before a grand jury and, in the typical run-of-the-mill case, make a 5-minute summary narrative presentation to the grand jury and then leave the room with the prosecutor, leaving the grand jury to deliberate for all of a minute before voting for an indictment.

In Los Angeles, it is not unusual for a grand jury to indict somewhere between 25 and 30 cases in a morning's sitting.

Now, this kind of procedure is not apt to protect anybody. It is clear that the Federal grand jury system today does not act as the so-called shield that it was originally intended to provide.

Third, since most grand jury hearings are unreported, there is no opportunity presented to the defense for discovery of the Government's case as presented there. As a result, the relationship between

prosecutor and grand jury is often free and easy; it is easy for the prosecutor to provide irrelevant prejudicial information about the accused to the grand jury to sway their deliberations. Since there is no reporting, no one finds out about it.

Fourth, use of the grand jury today, in fact, shields the prosecutor from defense discovery since there is no reporting. Ironically it also shields him from better discovery of his own case because of the common practice of calling the case agent to present the case in summary form rather than percipient witnesses whose credibility he—and the grand jury—might do well to evaluate.

So the conclusions which I have drawn today are relatively simple. They are presented more fully in the form of a long written statement, which I understand will go into the record.

There is real irony in the fact that this institution which had a real purpose years ago no longer serves that purpose today; that has gone relatively unnoticed.

The public criticism of the grand jury as an institution in recent years has been primarily aimed at its use to go after political dissidents in such a way as to chill and inhibit first amendment rights.

I suggest today that there may be a stronger and less controversial basis upon which to levy criticism; primarily that in its mundane day-to-day operations the grand jury no longer serves the purpose for which it was established.

So I support the thrust of this committee; but I would also respectfully suggest that the Abourezk bill, one of the bills which brings us here today, should be broadened extensively to include the provisions I just mentioned.

I would add this: Even though I support elimination of the grand jury indictment as a constitutional right, the grand jury should continue to exist and serve to perform important functions.

There are certain types of investigations which can be investigated thoroughly and properly through the grand jury mechanism—for example, organized crime investigations, governmental misconduct investigations, and white-collar crime investigations of a complex nature.

In my view, a prosecutor should have the opportunity to take these cases to the grand jury. Overzealousness would be guarded against by requiring complete recordation and full disclosure to the defense.

I base these recommendations not only on my own experience in the federal system, but on the California experience with grand juries.

Our California constitutional system does not require indictment by grand jury as a constitutional right. During this last year we had somewhere near 20,000 felony prosecutions initiated in Los Angeles County. All but 81 defendants had their cases initiated by complaint and went the preliminary hearing route. We indicted 81 defendants. So, by and large, we've done away with the grand jury as the principal charging body. We have a system which has worked well.

Our experience indicates that we can make the kind of reforms I suggest without unduly interfering with the criminal justice process.

Senator MATHIAS. Thank you very much, Mr. Van de Kamp.

Let me direct that the full text of your prepared statement be included in the record after your oral testimony.

Mr. VAN DE KAMP. Thank you.

Senator MATHIAS. Implicit in the recommendations you have given the committee, it seems to me, is the recognition that what we might call run-of-the-mill cases get perfunctory treatment. You note that as many as 20 or 30 indictments are handed down in one morning in your jurisdiction. But we know that when there is a full-scale investigation the case is given a very different kind of treatment. The actual witnesses do come in. They are subpenaed, if necessary, and in some cases, their answers are recorded.

So we have two standards of operation: one standard for the run-of-the-mill cases, one for the special, full-scale investigation.

The Supreme Court has upheld indictments on the basis of hearsay evidence.

Do I understand you to say that looking statistically at all of the indictments it is a relatively rare occurrence for the grand jury to hear actual witnesses and would I be correct in assuming that you favor a rule requiring the grand jury to hear the witnesses unless there is some overwhelming reason why the hearsay evidence should suffice?

Mr. VAN DE KAMP. Yes. That is right.

As a ball park figure at least 90 to 95 percent of the Federal cases in Los Angeles are handled in the perfunctory way that you describe; and about 5 percent are handled through more thorough and appropriate procedures, where percipient witnesses are called and reporters record what is said. Percipient witnesses should be called.

Of course, I much prefer the preliminary hearing route. That way, the defendant has a chance to see and hear the witnesses against him at a very early stage and to make a judgment very early as to whether or not the case will be contested. An early decision can be expected to speed up the system.

Senator MATHIAS. As I recall your testimony, you said that a large percentage of the cases in your jurisdiction did go the preliminary hearing route.

Mr. VAN DE KAMP. In California?

Senator MATHIAS. Right.

Mr. VAN DE KAMP. Yes: in 99 percent of the cases.

Senator MATHIAS. But you are talking about State jurisdiction?

Mr. VAN DE KAMP. That's right.

Senator MATHIAS. There is a similiar procedure authorized under Federal law.

Mr. VAN DE KAMP. It is, but it is defeated by the so-called race to indict. It is typical for a U.S. attorney to schedule a grand jury the day before the preliminary hearing is to be heard. The grand jury returns the indictment; the preliminary hearing is then obviated.

One of the main reasons they seek an early indictment is to eliminate the need for the preliminary hearing.

Senator MATHIAS. So the race to indict in effect renders the preliminary hearing a dead letter in Federal practice?

Mr. VAN DE KAMP. That's right.

The only place in the country where the preliminary hearing presently has value is in some of the outlying areas where grand juries meet very rarely.

In the 16 or so years that I have practiced in and around the Federal court system in Los Angeles, I can count no more than a handful of

actual preliminary hearings that I either prosecuted or defended against or witnessed or heard of.

Senator MATHIAS. There would seem to be three possible means of insuring the defendant a right to a pretrial hearing.

One would be to guarantee the defendant's right to a preliminary hearing under any circumstances; secondly, to give the defendant an option to obtain a preliminary hearing if he were to first waive grand jury proceedings; third, to give the defendant the right to what would be a novel procedure, an indicting grand jury or a combination of grand jury and preliminary hearing in which he got his hearing in front of the grand jury, which would, in effect, become the committing magistrate or the deciding tribunal.

Now, do I take your recommendations to mean that there ought to be a preliminary hearing as a matter of right?

Mr. VAN DE KAMP. I do not quite come that far. I suggest that a defendant should have the power to waive indictment and obtain a preliminary hearing in lieu thereof; but if the Government decides to initiate prosecution by way of indictment, we should at the very least require full recordation, full disclosure to the indicted defendant, and provide the defendant with the right to attack those proceedings for legal insufficiency in the district court.

I do not support the concept that you combine the preliminary hearing with the indicting grand jury. It is time consuming; it is costly. If the grand jury is conducting an investigation of a wide-ranging nature, it is very difficult to confine that investigation and conduct an efficient preliminary hearing.

Senator MATHIAS. It is very duplicative of the trial itself.

Mr. VAN DE KAMP. Yes, a preliminary hearing is somewhat duplicative, whenever you conduct it. What I suggest is that on occasion a grand jury does accept a routine presentation of evidence in what is similar to a probable cause hearing. However, when it assumes its investigative and indicting role, peripheral matters may be looked at which may be irrelevant to the target of the investigation and which may be none of the defendant's business.

So all things considered, I believe that the most important thing we can do with respect to an indicting grand jury is to protect the accused through recordation and disclosure, and to permit his review of the basis of the grand jury indictment. That would include the opportunity to attack the indictment on the basis that inadmissible evidence provided the basis for the indictment. It should be required that only admissible evidence be considered when evaluating probable cause. Inadmissible evidence should not be considered.

Senator MATHIAS. What about a defendant's right to discovery of the evidence presented?

Mr. VAN DE KAMP. To the grand jury?

Senator MATHIAS. To the grand jury.

Mr. VAN DE KAMP. I support complete disclosure of all relevant evidence that is presented with respect to his case.

I can see some broad investigations which get into tangents, in peripheral areas, where rights to privacy of other persons might be jeopardized by complete disclosure. There, a balancing test should be employed.

To answer this problem I would establish a procedure where disclosure would be presumed, but give to the Government the opportunity to go to the judge and obtain a protective order limiting disclosure in appropriate cases.

Senator MATHIAS. Implicit in that is the necessity for a record in the grand jury; and if we had that record, what sort of change would this make?

Mr. VAN DE KAMP. It would be a rule change. There would also be cost factors involved.

Senator MATHIAS. A time factor would probably also be involved.

Mr. VAN DE KAMP. Time for transcription. That's right. However, in our State system, we make these transcripts available very promptly after indictment.

The cost for recording and transcription would be new. I'm sure the Department of Justice could give you a decent estimate on that.

Senator MATHIAS. Would the defendant's right of discovery have any impact on the theoretical secrecy of the grand jury proceedings, in your judgment?

Mr. VAN DE KAMP. It would, because the secrecy ultimately would be breached; but only after the indictment is returned.

Again, the California experience is helpful: on rare occasions disclosure is limited by protective order where the need for secrecy is real. Of course, the reporter is not present during deliberations; so there is no disclosure of deliberations. Secrecy to protect the inviolability of grand jury deliberations thus remains intact.

If there is a need for secrecy relating to the testimony, the government should have the opportunity to seek an appropriate protective order.

Senator MATHIAS. We are very conscious in Washington of leaks in the grand jury operation.

What impact would the defendant's right of discovery have on the relationship of the grand jury to the press, to the whole process, in your judgment?

What is your experience in California?

Mr. VAN DE KAMP. My experience in California has been that there are very few leaks emanating from the grand jury. Leaks usually come from other places. Members of the grand jury itself have been fairly closemouthed about what goes on.

One recommendation that I have made is the subject of some controversy; that is, that you permit lawyers to appear with their witness-client in the grand jury room. Some will say that is an attack on the secrecy of the grand jury. But the fact of the matter is that today we let the witness run in and out of the grand jury room to consult with a lawyer between questions; there is nothing that prohibits the witness from disclosing to the lawyer or the public at large what went on in the grand jury room. So to simply permit the lawyer to come in and advise his witness-client while testifying should have little impact on the present secrecy situation.

Senator MATHIAS. It would be consistent with the greater concern we have been showing for the right of representation in all kinds of proceedings before administrative agencies of the Government as well as in the classic criminal confrontation in criminal court.

Mr. VAN DE KAMP. That's right.

I think the presence of that lawyer in the grand jury room would tend to inhibit the prosecution from out-of-line tactics that it might otherwise consider. Most prosecutors act quite properly, but the presence of the witness' lawyer would not only inhibit dubious tactics, but reduce unfair speculation about the prosecutor's conduct.

Senator MATHIAS. What about the dual role of the prosecutor as prosecutor and as the legal adviser for the grand jury?

New York State, for example, has come up with a concept that there ought to be an office of grand jury counsel so that the grand jury can get objective legal advice.

Mr. VAN DE KAMP. Well, that has been debated in California. My answer to that is that that office would have to be responsible to someone, that it would have to be appointed by someone, that it could not be completely neutral. There is a simple way out of what appears to be a dilemma. A grand jury should be instructed that when it feels the prosecutor is not objective and/or is trying to unfairly prejudice it, it may go directly to the district court judge who empaneled it, and seek its advice and its help.

In California, the grand jury may do that and seek the advice of other counsel, for example, the county counsel or the attorney general.

I don't think that it makes much practical sense to set up a special office to handle matters before the grand jury.

Indeed, I don't think there is a record of abuse which would justify it.

Senator MATHIAS. Do you see any constitutional problems?

Mr. VAN DE KAMP. As far as going to special grand jury counsel?

Senator MATHIAS. Yes.

Mr. VAN DE KAMP. No. I do not think so.

Senator MATHIAS. We labored with that question in this very room in connection with the establishment of the Watergate prosecutor. It is not the easiest proposition. But as the record shows, we came to the conclusion it was not unconstitutional to create that kind of a separate legal function.

Mr. VAN DE KAMP. Thus far the courts have sustained you.

Senator MATHIAS. We understand that in California the grand jury, in addition to finding indictments, has certain other roles, those of studying the activity of Government and recommending needed reforms.

Do you think it would be constitutional or desirable to have Federal grand juries perform similar functions in reviewing the activities of the Federal agencies?

This is a practice in my own State of Maryland, for example, where the grand jury investigates conditions in a given county.

How do you think that might apply?

Mr. VAN DE KAMP. I think it would be impractical in the Federal system. I think that we should stick to the reform of the present system, with its existing functions.

In our county the grand jury does perform watchdog functions. In fact, at least 75 percent of its time is devoted to its watchdog role. Every year it presents a report to our board of supervisors with recommendations for governmental reform.

Unfortunately, because of the short duration of our grand juries—1 year—there is little opportunity for followup. As a result, we often have grand juries making the same findings made by their predecessors. It's as if they invent the wheel each year. Because of their short duration, they have an inadequate opportunity to mobilize public opinion effectively.

I should observe, too, that in California we have a "blue ribbon" type of grand jury, where many of its members have been nominated by superior court judges based on their education and background, so that they'll be able to better fulfill their watchdog function.

On the Federal side, the Federal Jury Selection Act would bar that kind of selection process; yet if you are to have a grand jury to serve this watchdog function it appears necessary to have men and women serve who have a broad understanding of government and who will not be intimidated by it. As a result, if a watchdog function were to be considered, I'd suggest a selection process different from that required in criminal cases.

But more important, I don't think Federal grand juries would be very effective. Who would they watchdog? The Federal Government in their district, in all likelihood. That of course would be but a small piece of the national picture.

Senator MATHIAS. In your system, is that oversight function limited to areas related to the administration of courts, jails, and similar institutions, or is it widespread, throughout?

Mr. VAN DE KAMP. It runs throughout the county.

It deals with the criminal justice system, the health department, the welfare system, every aspect of county government and its administration.

Senator MATHIAS. One last question, Mr. Van de Kamp.

Could you give the committee some examples of specific cases of the abuses of the grand jury system?

I am thinking specifically of cases of harassment or cases in which the citizens have been denied their rights by employing the grand jury as an instrument of abuse of authority.

Mr. VAN DE KAMP. I can recall but a very small number of cases where there have been actual abuses in our Federal grand jury system.

I can recall some cases in the sixties where witnesses were called in during investigations, and because their counsel were not present, the prosecutors running the investigation were able to bully and harass in a way they would have avoided had their counsel been present.

In one case, I remember finally persuading a witness to turn his testimony around. He finally said, "Do I have to tell the truth," after spending an hour under heavy grilling before the grand jury. It was one of those remarkable, Perry Mason-like moments. But I only got him to that point because I was forced to lean on him through heavy and repetitive cross-examination, because I was forced to appeal to his sense of honesty and integrity, and by noting to him the applicability of the laws of perjury. Only after all of this did he come around and provide valuable evidence which broke the case.

We had a case recently in our Los Angeles Federal court that was more in the political line. A young woman was called before the grand jury with respect to some college bombings. Apparently the Justice Department prosecutors considered her a target of the investigation or

as a possible fount of information. In any event, the grand jury took a liking to her and indicated they wanted to hear more evidence; that they were averse to indictment.

As a result, the prosecutor took the case away from that grand jury, presented it to another grand jury and then tried to hold her in contempt for failing to respond after immunity had been granted.

The case ultimately fell out of the system—in re Baldinger. But some things become evident: One, the first grand jury was bypassed because it appeared to side with the witness or, in any event, was not playing ball with the prosecutor. Second, the Government's lawyer had actually told the grand jury things about her political past in a way that could only be construed as intended to cause prejudice against her.

But I must say, and I want to make this point clear, in the overwhelming majority of cases, the lawyers for the Government act quite properly.

The thrust of my comments is not so much aimed at dramatic abuses, but at the fact that the grand jury—at least in its constitutional sense—is a useless appendage and does not fulfill its traditional function.

Senator MATHIAS. Mr. Van de Kamp, we thank you very much for your testimony this morning. The long journey you made in order to be here helped to highlight the importance of these hearings.

Your prepared statement will be of great value to the committee as it studies this problem.

Thank you very much.

[The prepared statement of John K. Van de Kamp follows:]

PREPARED STATEMENT OF HON. JOHN K. VAN DE KAMP, DISTRICT ATTORNEY, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

I. THE BACKDROP FOR REFORM

*A. Historical developments*

The Federal Grand Jury, in its present form, descends directly from early English history. While it has undergone some changes, its structure and essential attributes of plenary power to investigate and secrecy of deliberations have been preserved in our Constitution and characterize its function today.

The history of the grand jury can be traced back to the Assize of Clarendon, issued by King Henry II of England in 1166. The "grand inquest" was then essentially a device whereby the Norman kings of England were able to require answers to questions about royal property and franchises from representatives of local units of government, and to enforce communal responsibility for the acts of criminals.

Although the grand jury was originally part of the petit jury system, by the middle of the 14th century, the two had evolved into the separate and distinct institutions which they are today. Then as now, the grand jury served as a charging body, designed to "give voice to common repute" and charge those whom the community believed to be responsible for wrong-doing, rather than to make a final determination of criminal responsibility.[1]

The principle of secrecy which characterizes the grand jury's operation is most commonly believed to have developed in this period to prevent offenders from learning of the proceedings against them and attempting to escape[2] and to permit prosecutors to have influence with the grand jury.[3]

By the 17th century, the grand jury had evolved to such an extent that secrecy had become a right of the grand jurors themselves, enabling them to resist the tyranny of the Stuart kings and to protect citizens from prosecution based on their political beliefs. The grand jury's right of secrecy and their developing

[1] W. Holdsworth, "A History of English Law" (7th ed. 1956).
[2] G. Edwards, The Grand Jury 27 (1906).
[3] *United States* v. *Smyth*, 104 F. Supp. 283, 289 (N.D. Cal. 1952).

powers and independent investigation thus served to protect the grand jurors as well as their witnesses from intimidation by the state and thereby protected the accused from unjust prosecution.[4] It was during this period of political turmoil in England that the grand jury developed its historical reputation of being both "a sword and shield" in the administration of justice.

*B. The development of the grand jury in America*

When the English colonists came to America, they brought the institution of the grand jury with them, and the guaranty of indictment by grand jury was among the individual rights enumerated in the Constitution. By including this right within the Fifth Amendment, the framers intended that the grand jury would continue to fulfill its traditional role of protecting the individual from oppression by the state.[5] To that end, they endowed it with the same broad investigating abilities and privileges which characterized the English grand jury, including the right to secrecy in its proceedings and deliberations.

At that time it was widely recognized that the primary goal of preserving the secrecy of the grand jury was to protect the rights of the accused:

"In the secrecy of the investigations by grand juries, the weak and helpless—proscribed, perhaps, because of their race, or pursued by an unreasoning public clamor—have found, and will continue to find, security against official oppression, the cruelty of mobs, the machinations of falsehood, and the malevolence of private persons who would use the machinery of the law to bring ruin upon their personal enemies." [6]

Because the grand jury entered the American system as a method of protecting the rights of the individual, its transition in modern times to an arm of the state is all the more striking.

Here, as in England, as fear of government coercion lessened, a prosecutor for the state (or the crown) was permitted to be present during the taking of testimony. By the late 19th and early 20th century, the prosecutor's involvement in the grand jury's proceedings had so greatly increased that today it is accepted without question that it is proper for the United States Attorney's office in each district to organize, manage, and direct the grand jury's investigations. The end result is that in large measure the secrecy which surrounds the work of the grand jury no longer operates to protect the rights of the accused but works to the advantage of the prosecutor, because it shields him against pre-trial discovery by the accused of much of the evidence presented to the grand jury.

*C. Present Federal grand jury practice*

Technically, the grand jury is an agency of the court by which it is appointed. The grand jurors, generally selected at random from voter registration rolls, are sworn as officers of the court during their term. However, once impaneled, grand jurors are thereafter convened by the United States Attorney's office to hear cases selected and presented by the government's lawyers.[7]

Historically, the grand jury has had the right to implement its investigations by issuing subpoenas in its name summoning witnesses to appear before it. But the practice is now different. Today in grand jury investigations, an Assistant U.S. Attorney will usually decide which witnesses to call, and will initiate the process of issuing and drafting subpoenas to compel the attendance of witnesses or the production of documents before the grand jury. It is rare for the grand jury itself to issue or request the service of subpoenas. Its powers have atrophied.

Grand jury subpoenas (or those issued in its name) will be served by a federal law enforcement agent at the direction of the U.S. Attorney. It is not required that the grand jury be notified of the issuance of the subpoena, or even that it be sitting at the time the subpoena is issued.[8]

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[4] In 1681 an attempt was made to indict the Earl of Shaftesbury for high treason. After hearing the witnesses, the grand jury returned the bill "ignoramus." This case (8 How. ST. TR. 759) is often cited as an instance of the independent action of the grand jury.

[5] Cf. J. Storey, III "Commentaries on the Constitution of the United States", section 1785.

[6] Mr. Justice Harlan, dissenting in *Hurtado* v. *California*, 110 U.S. 516, 554 (1884).

[7] Under the federal constitution, a grand jury may either present or indict. The word "presentment" technically refers to an accusation brought forth by the grand jury acting as prosecutors initiating an independent investigation and asking that a charge be drawn to cover the facts, should they be found to constitute a crime. An "indictment" on the other hand, is a particular charge brought before the grand jury by the prosecutor and found by it to be true. While the presentment is no longer used in the federal courts, most grand juries continue to bring charges by way of an indictment presented to them by the government prosecutor.

[8] However, the subpoena must be returnable on a date that the grand jury is actually sitting.

There is so little connection, in fact, between the issuance of subpoenas and the grand jury, that evidence obtained pursuant to a grand jury subpoena may be turned over to federal agents, for their review and examination before they are shown to the grand jury.[9]

Because the grand jury operates behind a cloak of secrecy intended to protect suspects from public condemnation, until it acts through indictment, the gradual usurpation of its atrophied powers by the prosecution has gone largely unnoticed.

*D. Arguments in favor of retaining the present grand jury practice*

Those commentators who favor retention of the grand jury point to the fact that the grand jury can serve as a check on the prosecution, particularly in those few cases where special factors such as bias and hostility on the part of the prosecution, are likely to result in unjust accusations.

One of the strongest of the arguments for retention of the grand jury system is raised by federal prosecutors who claim they would be unable to enforce the laws against antitrust offenses, major white collar crimes, police corruption, narcotics smuggling and organized crime if they could not subpoena books and records, and compel, in secret, the sworn testimony of witnesses. Federal prosecutors do not possess administrative-type subpoena power.

It is also said that the preliminary hearing is a far less effective screening agency and lacks citizen participation, an aspect of the grand jury system which fosters a sense of confidence in the criminal justice system.[10]

Proponents of the grand jury system maintain further that delay caused by the grand jury system occurs only in rural areas where grand juries are convened less often, and argue that appropriate provisions for waiver would eliminate this difficulty while still affording grand jury consideration of the "exceptional situation."

Policy reasons aside, its retention is required until the Constitution is amended, for the Fifth Amendment to the U.S. Constitution provides that ". . . (N)o person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury . . ."[11]

The primary purpose of incorporating that mandate into the Constitution was to shield the individual from the state:

"(T)he 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* . . ." (*Hale* v. *Henkel*, 201 U.S. 43, 59 (1888). (Emphasis added.)

*E. Criticism of grand jury practice*

Those who criticize the grand jury offer the following argument:

The grand jury no longer stands between the prosecutor and the accused; in the main, it serves as a rubber stamp for the prosecution.

In a criminal system that relies on the courts and public scrutiny to safeguard the individual's rights and protect the integrity of the system, the grand jury has always been something anomalous, but justified as a check and balance. Today it is argued the earlier justifications do not exist, and that its real and potential abuses outweigh its value.[12]

Persons ordered to appear before the grand jury have no right to be told what crime, if any, is being investigated, or whether they are themselves potential defendants.

There are no rules of evidence to restrict the scope of the prosecutor's questions.

Unprotected by the presence of either court or counsel, it is said that witnesses may face intimidation, harassment, and interrogation into virtually any aspect of their lives. If the witness brings a lawyer to the grand jury session to advise him/her, that lawyer is required to remain outside of the hearing room while the witness is being questioned by the prosecutor. If the witness wishes to consult with counsel before answering a particular question, he must ask to be ex-

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[9] "In re April 1956 Term of the Grand Jury", 239 F. 2d 263 (7th Cir. 1956).

[10] See Antell, "The Modern Grand Jury: Benighted Supergovernment," 51 A.B.A.J. 153 (1965).

[11] The term "otherwise infamous crime" has been defined as including any offense punishable by "imprisonment at hard labor in a state prison or penitentiary or other similar institution." *Ex Parte Wilson*, 114 U.S. 417 (1885). Under federal law, imprisonment in a penitentiary is permitted for any offense carrying a term in excess of one year.

[12] These and other arguments against retention of the grand jury are discussed in Whyte, "Is the Grand Jury Necessary?" 45 Va. L. Rev. 461 (1959); Antell, "The Modern Grand Jury: Benighted Supergovernment" 51 A.B.A.J. 153, (1965).

cused and then leave the room, walk out, relate what happened to his counsel as best as he is able, seek advice, and then return to the room to face the jury.

Because there is no magistrate or judge presiding, and no lawyer present to represent either the putative defendant or the witness, critics argue that there is no one to object to or rule on the introduction of evidence that would ordinarily be inadmissible at a preliminary hearing.

Under the present system, the federal agent assigned to the case (the "case agent") will typically present the evidence against the accused in a narrative and summary fashion thus eliminating the need for the government to bring any "live witnesses" before the grand jury. In this way, the grand jury is deprived of an opportunity to see and hear percipient witnesses, or to evaluate their credibility and demeanor. Instead, the grand jury will vote to return an indictment based on the strength of the agent's summary presentation, an agent who usually has concluded that the accused is responsible and is quite naturally (and sometimes competitively) predisposed toward the obtaining of an indictment.

Commentators have long cited the failure to record federal grand jury proceedings as one of the chief abuses of the present system, and have urged the adoption of a recording and disclosure requirement. The Supreme Court has long recognized that, "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940).

The Ninth Circuit has ruled that a defendant's motion to compel recordation of grand jury proceedings against him, pursuant to Rule 6(d) of the Federal Rules of Criminal Procedure, ordinarily should be granted. *United States* v. *Thoreson*, 428 F. 2d 654 (9th Cir. 1970).

In *United States* v. *Price*, 474 F. 2d 1223 (9th Cir. 1973) the Ninth Circuit further held that although Rule 6(d) is permissive, the denial of a motion to record, in the absence of a showing of legitimate governmental interest served by non-recordation, is an abuse of discretion.

In light of these rulings, the U.S. Attorney's Office in the Central District of California, which as a general rule does not record grand jury presentations, has adopted the practice of recording the testimony of grand jury witnesses when requested to do so by the counsel. It should be emphasized, however, that recording does not extend to any comments made by the government's attorneys to the grand jurors during the course of the proceedings, or to any non-deliberative comments of the grand jurors themselves. Moreover, because there is really no notice given to a defendant who is the subject of a grand jury investigation, he has little opportunity to request recordation until after his indictment. Only where there is an arrest followed by the convening of the so-called "indictment" grand jury does defense counsel under the present system have an opportunity to request recordation, and then he must agree to pay the cost of the transcript. And even when recordation occurs, there is no automatic disclosure of the grand jury's transcript to the defense. Indeed, it is rarely ordered.

Rule 6(e) of the Federal Rules of Criminal Procedure provides that disclosure of grand jury proceedings may occur "only when so directed by the court, preliminaryily to, or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant, upon a showing that grounds exist for a motion to dismiss the indictment because of matters occurring before the grand jury." While at the time of its adoption in 1946 this rule was strongly believed to permit the exercise of broad discretion by the trial judge, the absence of any standards for the exercise of that discretion and the generally restrictive view taken by most judges towards criminal discovery has placed a heavy burden upon the defendant. Specifically, the defendant has the burden of showing a "particularized need" far outweighing the usual policy of secrecy in any case where he seeks to examine grand jury transcripts. Cf. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959).

*F. Conclusion*

In light of the present practice I favor the abolition of the constitutional right to a grand jury indictment, and in its stead, support the discretionary use of the grand jury by the prosecution as an investigative and indicting instrument, subject to the stringent requirements of complete recordation and ultimately complete disclosure of that record to an indicted defendant.

Repeal of a portion of the Bill of Rights, namely this portion of the Fifth Amendment, is a long and arduous task.

For this reason, I believe that abolishing the grand jury as a constitutional requirement will take years, if not decades. In the meantime, I suggest we direct our energies towards reforming the present practice through the legislative process and eliminating as many of the abuses as possible which characterize its present operation.

II. REFORMING THE FEDERAL GRAND JURY—REPORT AND RECOMMENDATIONS OF THE LOS ANGELES COUNTY BAR ON RECORDING AND DISCLOSURE OF GRAND JURY PROCEEDINGS

In light of the questions raised concerning grand jury practices, the Federal Courts and Practice Committee of the Los Angeles County Bar Association last year appointed a special committee to draft a report and recommendations on the recording and discovery procedures of Federal Grand Juries.[13]

The Committee's report which was completed in February 1975, was subsequently adopted by the Trustees of the Bar Association and presented to the U.S. District Court for the Central District of California.

*A. Recordation*

In its report, the Committee recommended that both the Local Rules of the District Court and the Federal Rules of Criminal Procedure be amended to mandate recording of all proceedings before the grand jury as follows:

"All proceedings before a federal grand jury except the deliberations of the grand jury shall be recorded by a court reporter, including but not limited to all testimony of witnesses and all statements made by attorneys for the government in the presence of the grand jury. Such record shall be deposited under seal with the Clerk of the court. The record shall be transcribed and the transcription released to the court upon order, or to the United States Attorney upon request. Upon authorization of the court, electronic recording devices may be substituted for the court reporter."

Some federal district courts have already adopted rules requiring the recording of all grand jury proceedings. The District of Rhode Island has a local rule requiring that all proceedings before a federal grand jury shall be reported, "in the same fashion as trial proceedings in open court are reported." [14] Other districts such as the Eastern District of Washington follow the practice of recording all grand jury proceedings without benefit of a rule.

An important aspect of the proposed rule is that it does not require recordation by an official reporter of the court, so that recordation could be done either by an independent court reporter paid through the U.S. Attorney's office (the current practice) or by an electronic recording device which would make implementation of this rule relatively inexpensive.

It is important to note that like S. 3274, Senator Abourezk's bill, this proposed rule explicitly requires *all* proceedings to be recorded including all comments made to the grand jury by the government's attorney.

In its comment to the rule, the Committee discussed the rationale for this: "While this is not intended to discourage discourse between grand jurors and the attorneys for the government, the possible dangers of prejudice are believed to be too great to permit such discourse to be unrecorded. While the Committee is confident that there are currently no flagrant abuses by government attorneys, it is felt that the presence of a court reporter will be a wholesome prophylactic to insure that abuses do not occur in the future." [15]

Making a recordation requirement part of the Federal Rules (Rule 6), would be a meaningful reform if coupled with a liberalized disclosure rule.

*B. Disclosure of grand jury proceedings*

Nonrecordation and nondisclosure of federal grand jury transcripts is probably the single most oppressive element of federal grand jury practice today. Although the trend among the states has been towards a substantial liberalization of discovery for the defendant in criminal proceedings, there is a marked disparity between the very liberal discovery procedures permitted in many states and the very limited discovery allowed under the Federal Rules of Criminal Procedure.

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[13] A copy of this report in its entirety is attached hereto as Appendix A.

[14] Rule 34, D.R.I.

[15] In order to preserve the secrecy of the grand jury proceedings, an additional proposed amendment to the local rules would provide that any person involved in the recording or transcribing of grand jury testimony would be forbidden to disclose any portion of that testimony except upon court order.

*C. Disclosure of the defendant's testimony*

Disclosure must be mandated in two separate areas—first with regard to the defendant's own testimony before the grand jury, and secondly, with regard to disclosure of the testimony of all witnesses before the grand jury.

At the present time, Rule 16(a)(3) provides that upon motion of the defendant, the court may order inspection of the defendant's testimony before the grand jury. Because this provision is included within the general discovery section, it has been interpreted as providing that if the defendant's motion is granted, he is entitled to pre-trial inspection of his statements. Unfortunately, this rule does not permit the defendant access to his own testimony as a matter of right. Because disclosure is subject to the discretion of the trial court, judicial interpretation has varied dramatically between districts and even among judges of the same district court. Although Wright and other commentators have concluded that Rule 16(a)(3) should be interpreted as giving the defendant an absolute right to his own testimony subject only to the government's seeking and receiving a protective order, the matter should be laid to rest. I urge the adoption of an amendment to Rule 6 of the Federal Rules which specifically gives the defendant the right to a transcript of his own grand jury testimony, well before the trial begins.

*D. Disclosure of witnesses' statements*

At the present time disclosure of transcripts of witnesses statements is governed by the Jencks Act, 18 U.S.C. § 3500. This permits disclosure only after a witness has testified at trial. The prejudice to the defendant and the delays at trial occasioned by suddenly dumping many pages or even volumes of testimony in front of the defense counsel as he/she stands up to cross-examine the witness has caused many courts to ignore this prohibition and require the prosecutor to turn over the transcripts several days before the witness is called.

The Jencks Act provisions limiting disclosure should be repealed; the arguments in favor of disclosure are more persuasive. Any justifiable concerns about possible abuses can be alleviated by providing for protective orders upon application and suitable showing by the prosecutor.

The preferred alternative to present law would be to make disclosure of defendant's and witnesses statements automatic, as it is in California practice, unless the prosecutor obtains a protective order. This could be accomplished by amending Rule 6 of the Federal Rules of Criminal Procedure as has been suggested by the Los Angeles Bar Federal Practice Committee.

"At the time of the defendant's arraignment pursuant to Rule 10, or within 10 days after indictment, whichever occurs first, the attorney for the government shall deliver to the defendant a copy of all recorded proceedings of a grand jury which relates to the offense charged.

"Upon a sufficient showing the court may at any time order that the disclosure of the recorded proceedings of a grand jury be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government the court shall permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant."

These simple reforms, requiring recordation and mandating disclosure to the accused of all grand jury testimony pertaining to the case at bar would do much to restore the integrity in the grand jury process and to notify the accused of the evidence against which (and with which in the case of exculpatory evidence) he may choose to defend.

### III. REFORM OF FEDERAL GRAND JURY SYSTEM IN LIGHT OF THE CALIFORNIA EXPERIENCE

It may be useful to describe the California grand jury system so that comparisons can be made with the federal system and the reforms proposed in S. 3274.

*A. Structure of the California grand jury system*

In California, a felony can be prosecuted either by indictment or, after examination and commitment by a magistrate, by information. (Cal. Const., Art. I,

Sec. 14.) The overwhelming majority of felonies are prosecuted by information rather than by indictment.[16]

By statute, the grand jury in a county having a population exceeding four million must have 23 members; in all other counties it must have 19 members. (Cal. Pen. Code, Sec. 888.2.) An indictment cannot be found without the concurrence of at least 14 grand jurors in which the required number of members of the grand jury is 23, and at least 12 grand jurors in other counties. (Cal. Pen. Code, Sec. 940.)

The district attorney of the county may appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by the grand jury, and may interrogate witnesses before the grand jury whenever he thinks it is necessary. However, when the grand jury is investigating a charge against the district attorney or against a person connected with his office, he or his assistants may be present only as witnesses. (Cal. Pen. Code, Sec. 935.)

The Attorney General of the State of California may, with or without the concurrence of the district attorney, direct the grand jury to convene for the investigation and consideration of such matters of a criminal nature as he desires to submit to it. He may take full charge of the presentation of such matters to the grand jury, issue subpoenas, prepare indictments, and do all other things incident thereto to the same extent as the district attorney. (Cal. Pen. Code, Sec. 923.)

It is worth noting however, that while the Attorney General has supervision over the district attorneys of the several counties of the state (Cal. Const., Art. V, Sec. 13; Cal. Govt. Code, Sec. 12550), the offices of the Attorney General and a district attorney are otherwise independent and both are elected officials.

Except for those public sessions of the grand jury which are requested by it and authorized by the court which has found that the subject matter of the investigation affects the general public welfare or involves the alleged misconduct of public officials or employees or any person allegedly acting in conjunction or conspiracy with such officials or employees in such alleged acts, the examination of witnesses and the presentation of evidence is conducted in secrecy. (Cal. Pen. Code, Secs. 915, 939, 939.1.)

Except for those private sessions during which grand jurors deliberate and vote, certain persons, such as the district attorney, the reporter and an interpreter (if needed) are permitted at those secret sessions during which evidence is presented. (Cal. Pen. Code, Secs. 935–939.1.)

A subpoena for a witness may be issued by the district attorney or his investigator or by a judge of the superior court upon the request of the grand jury. (Cal. Pen. Code, Sec. 939.2.)

*B. Recordation and disclosure of grand jury proceedings*

In all criminal cases being investigated by the grand jury, it is required that a competent stenographic reporter report the testimony given in such cases and transcribe the same in all cases where an indictment is returned or an accusation presented. (Cal. Pen. Code, Sec. 938.) If the indictment has been found or accusation presented against a defendant, a copy of the transcribed testimony relative to the case shall be given to the defendant or his counsel. (Cal. Pen. Code, Sec. 938.1.) If no indictment is returned, the court that impaneled the grand jury shall, upon application of either party, order disclosure of all or part of the testimony of a witness before the grand jury to a defendant and the prosecutor related to any pending or subsequent criminal procedure before any court if the court finds, following an in camera hearing (which shall include the court's review of the grand jury's testimony) that the testimony is relevant and appears to be admissible. (Cal. Pen. Code, Sec. 924.6.)

California appellate courts and the Legislature have for many years followed a policy of liberal discovery for defendants. Even prosecutors who think that California appellate courts have gone too far in requiring discovery of evidence which may be of remote value to a defendant find it anomalous that in the federal system a defendant is not automatically entitled to the discovery of relevant testimony given before a grand jury.

Of all the proposed reforms of the federal grand jury system, that which would provide for discovery of relevant evidence presented before the grand jury (subject to protective orders designed to insure the personal safety of a witness) is

[16] In 1975–76, over 20,000 felony prosecutions were initiated in Los Angeles County; 31 indictments were returned charging 86 defendants.

the most desirable. And to that end, the stenographic or electronic recording of evidence presented to a grand jury is a necessity. California law requires no less and indeed requires more. It has not proven an embarrassment to the efficient administration of criminal justice.

*C. Rights of witnesses—receipt of evidence*

A witness appearing before a secret session of the grand jury is not entitled to the presence of his counsel. (Cal. Pen. Code, Sec. 939.) While the putative defendant called as a witness before the grand jury cannot assert a constitutional right not to be called as a witness, he does have the privilege not to testify as to matters which might tend to incriminate him unless he is given immunity. (Cal. Pen. Code, Sec. 939.3, 1324.) As a matter of practice, putative defendants are rarely called, and if called, the practice is to notify them of their status and to provide reasonable opportunities to consult with retained counsel when they desire to be excused for that purpose.

If a grand jury investigates a charge against a person, and cannot find an indictment against him, at his request and upon the approval of the court which impaneled the grand jury, it shall report or declare that a charge against such person was investigated and the grand jury could not as a result of the evidence presented find an indictment. A grand jury shall, at the request of the person called and upon the approval of the court which impaneled the grand jury, report or declare that any person called before the grand jury for a purpose other than to investigate a charge against such person was called only as a witness.

In either case, the report or declaration shall be issued upon completion of the investigation of the suspected criminal conduct or series of related suspected criminal conduct, and in no event beyond the end of the grand jury's term. (Cal. Pen. Code, Sec. 939.91.)

There are other safeguards provided by California law. While a grand jury shall not receive any evidence but that which would be admissible over objection at the trial of a criminal action, the fact that evidence which would have been excluded at trial was received by the grand jury does not render the indictment void provided that sufficient competent evidence to support the indictment was received by the grand jury. (Cal. Pen. Code, Sec. 939.6.)

By contrast, under federal law, an indictment by a federal grand jury valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, or even on the basis of evidence illegally obtained. (See, *Costello* v. *United States*, 350 U.S. 359 (1956); *Lawn* v. *United States*, 355 U.S. 339 (1958); *United States* v. *Calandra*, 414 U.S. 338 (1974).)

California law is quite different. A defendant prosecuted by indictment has the right to move to set aside the indictment if he has been indicted without reasonable or probable cause. (Cal. Pen. Code, Sec. 995.) He has the same right with respect to prosecution by information. The only difference is that in a prosecution by information, otherwise admissible evidence presented at a preliminary hearing can be considered in support of the information, even if it has been illegally obtained, in the absence of an appropriate objection by the defendant. It is noteworthy that under Rule 5.1(a), Federal Rules of Criminal Procedure, "(o)bjections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12."

In the event that a California trial court erroneously denies a motion to set aside an indictment or information, the defendant has the right to seek an extraordinary writ in the appellate courts. (Cal. Pen. Code, Sec. 999a.) The erroneous denial of such a motion can be set forth as a ground for appeal from a judgment of conviction. (*People* v. *Triggs*, 8 Cal. 3d 884, 888, 506 P. 2d 232 (1973).)

Therefore, a defendant prosecuted by indictment in a California state case has the right to set aside the indictment if it is not based upon evidence which would be admissible over objection at trial. Even a defendant who is prosecuted by information can move to set aside the information if it was based upon evidence which was admitted over objection at the preliminary hearing and there was no other evidence to support a finding of probable cause. (Compare Rule 5.1(a), Federal Rules of Criminal Procedure, whereby a defendant in a federal prosecution can be held to answer at a preliminary hearing based upon evidence which would be inadmissible over objection at a trial.)

There is another safeguard worth mentioning. Under California law, while the grand jury is not required to hear evidence for the defendant, it is required

to weigh all the evidence submitted to it and, when it has reason to believe that other evidence within its reach will explain away the charge, it must order the evidence to be produced and, for that purpose, may require the district attorney to issue process for the witness. (Cal. Pen. Code, Sec. 939.7.) The California Supreme Court has held that "when a district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obligated under Section 939.7 to inform the grand jury of its nature and existence, so that the grand jury may exercise its power under the statute to order the evidence produced." (*Johnson* v. *Superior Court*, 15 Cal. 3d 248, 255, 539 P. 2d 792 (1975).)

Finally, while not judicially reviewable, except as to the question of whether the indictment is supported by sufficient admissible evidence to sustain a finding of probable cause, the California grand jury has the statutory obligation to find an indictment only when all the evidence before it, taken together, if unexplained or uncontradicted, would in its judgment, warrant a conviction by a trial jury. (Cal. Pen. Code, Sec. 939.9.) This standard is higher than that of the judicially reviewable determination by the grand jury that there is probable cause to indict.

*D. General evaluation of the California system*

The California grand jury system differs substantially from that of the federal system. First, it is little used. Second, while there are some who urge that even in cases of prosecution by indictment that a defendant should have the right to a preliminary hearing, the likelihood of abuse of the system by California prosecutors is small when compared to that of the federal system.

Generally speaking, the grand jury provision of the California Constitution has more advantages for prosecutors than for defendants, for prosecution by indictment or information is ordinarily at the prosecutor's option.

The prosecutor is likely to exercise that option in cases involving: (1) official misconduct by important government officials; (2) investigations of widespread conspiracies or narcotic undercover buy programs, to insure secrecy when it is desirable that many arrests be contemporaneously made; (3) alleged police misconduct; (4) children who are the alleged victims of sexual abuse, where it is desirable to limit their subjection to cross-examination to trial; (5) major fraud cases where documentary evidence can be obtained through grand jury powers; (6) exceedingly complicated cases which would require an extremely time-consuming preliminary hearing, but which can be disposed of by the grand jury in much less time; (7) extraordinary situations requiring delicate handling, such as cases involving well-known personalities where grand jury secrecy is useful to shield against widespread publicity until such time as the grand jury decides to charge; and (8) to forestall a repetitive preliminary hearing where one of several defendants would be unavailable for the preliminary hearing.

While the California grand jury system serves the interest of the prosecutor, adequate safeguards have been created by statutory or decisional law to insure against unwarranted indictments, and that the indicted defendant obtains complete disclosure of the proceedings in order to prepare for and defend at trial.

*E. Proposals based upon the California experience*

Based upon experience with both the federal and California grand jury systems, it is submitted that the conclusions reached in the first part of this report are appropriate:

(1) The proceedings of the grand jury, except its secret deliberations, should be recorded, electronically or stenographically:[17]

(2) An indicted defendant should have the right to obtain a transcript of relevant proceedings before the grand jury which indicted;[18]

(3) A defendant in *any* criminal case should have the right to discover relevant evidence presented to a grand jury, subject to protective orders in extraordinary situations;[19]

(4) (a) An indictment should not be conclusively presumed to have been based upon probable cause. The government should be required to present evidence to the grand jury which would be admissible over objection at a trial in support

[17] This reform is essentially embodied in proposed subsec. 3330A(i) of S. 3274.

[18] This reform is not contained in S. 3274 except to the extent that subsec. 3330A(i)(2) permits a witness to examine or obtain a transcript of his testimony before a grand jury.

[19] This reform is not contained in S. 3274 except to the extent that subsec. 3330A(i)(2) permits a witness to examine or obtain a transcript of his testimony before a grand jury.

of a finding of probable cause. However, the exception recognized in S. 3274 which provides that summarized or hearsay evidence may alone be sufficient upon a showing of good cause, is appropriate with respect to matters of fact not likely to be disputed.[20]

(b) The grand jury, on the other hand, should not be forbidden to receive or consider evidence which would be inadmissible, provided it has sufficient competent and independent evidence to indict. The strictures provided in Section 3330A(p) requiring dismissal of indictment when the grand jury has received evidence obtained by an unlawful act are excessive in that it would tend to impede major and complex investigations as a result of what could be minor technical irregularities having little or no effect on much of the evidence developed. It would be more fair to use the pre-trial suppression sanction following indictment than to jeopardize the prosecution's entire case through a minor irregularity.

(5) Provision should be made that at some time a witness appearing before a grand jury can secure at his request a declaration that he was not the subject of the investigation, or that, if he was the putative defendant, that there was insufficient evidence presented to indict;

(6) The prosecutor should be required to present to the grand jury evidence which tends to negate guilt or to inform the grand jury of the nature and existence of such evidence so that it may order the evidence produced;[21]

(7) Provision should be expressly made that, in determining whether there is probable cause to indict, no reliance can be made upon evidence which was illegally obtained or which was derived from such evidence. This should provide an adequate sanction.[22]

## IV. CRITIQUE OF PROVISIONS OF S. 3274

### *A. Summoning grand jury witnesses*

Subsection 3330A(a) provides that a subpoena summoning a witness to appear and testify or to produce papers or objects before a grand jury can be issued only upon an affirmative vote of twelve or more members of the grand jury.

This provision is undesirable, as a practical matter, because it will tend to undermine the objectivity of the grand jury. If this section becomes the rule, all evidence will have to be submitted to the grand jury so that its members would determine whether or not to issue process. This would tend to expose the jurors to evidence, both admissible and inadmissible, and to create partisanship prior to the hearing of the evidence. It would be far better to permit the prosecutor to issue subpoenas subject to the grand jury's internal constraints than to give the grand jury, itself, sole power to issue process.

Of course, the grand jury should retain its independent authority to subpoena witnesses.

The seven-day limitation on the returnability of a subpoena is too long a period, especially with respect to witnesses served within the district of the court that impaneled the grand jury and before which they have been ordered to appear. A three-day limitation reasonably accommodates the needs of witnesses who reside or are present in the district at the time of service.

### *B. Advising witnesses of rights*

Subsection 3330A(b) provides that a subpoena advise a witness of certain rights. Such advice specified in items 1, 2, 3 and 6 should be given. However, provision for advising a witness of the subject matter of the investigation and the criminal statute or statutes, violation of which is under consideration by the grand jury, is unnecessary. It is not the concern of the witness, provided the witness is not a putative defendant. This requirement is also objectionable since the subject matter and legal theory of a grand jury investigation often broadens and/or is changed.

### *C. Sanctions for failure to advise of rights*

Subsection 3330A(c) provides that a witness not advised of his rights pursuant to subsection 3330A(b) shall not be prosecuted or subjected to penalty, on

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[20] The reforms urged in this paragraph are essentially embodied in subsecs. 3330A(o) and (p) of S. 3274.

[21] See S. 3274, S. 3330p(3).

[22] See S. 3274 (Sec. 4, Secs. 3330a(p)(4)), which would require dismissal of an indictment if the court finds that the attorney for the government has submitted to the grand jury evidence seized or otherwise obtained by an unlawful act or in violation of the witnesses' constitutional rights.

account of anything concerning which he testifies or any evidence he produces, nor shall such evidence be used as evidence in any criminal proceeding against him in any court.

The proposed sanction for non-compliance is excessive. It provides transactional as well as use immunity for the witness merely because the subpoena did not contain a required statement of a right although the witness was aware of it. That is an unnecessarily harsh sanction.

An adequate sanction would be to provide that evidence involuntarily obtained in violation of a specific right or because of a failure to advise the witness of the specific right in the subpoena is inadmissible against the witness over objection in another proceeding. Thus, failure to advise a witness in the subpoena of the right to counsel, retained or appointed, should not result in the inadmissibility of evidence if, as a matter of fact, the witness had obtained the assistance of counsel or had been fully advised or aware of the right before testimony was elicited and the witness had a reasonable opportunity to obtain the assistance of counsel. In short, before the sanction should be available there should be a claim and showing of prejudice.

*D. Written notice of claim of privilege against self-incrimination*

Subsection 3330A(d) provides that if the attorney for the government has written notice that a witness intends to exercise his privilege against self-incrimination, such witness shall not be compelled to appear before the grand jury unless a grant of immunity has been obtained. This provision is objectionable upon several grounds.

First, it is overly broad. It assumes that all claims of privilege will be well taken and offers no recourse to the prosecution when claims of privilege are without foundation. The provision, if adopted, will tend to encourage witnesses who wish to avoid testifying on other than fifth amendment grounds to make unjustified claims of the privilege against self-incrimination.

Second, it fails to provide in what form and by whom the written notice is to be given. Preferably, the provision should require that the written notice be made in the form of a verified affidavit executed by the witness.

Third, the provision fails to provide a mechanism by which the prosecution can litigate whether and when the witness is justified in claiming the privilege against self-incrimination. For example, there are situations when a witness would be justified in taking the privilege as to some matters under inquiry but could provide relevant and needed testimony as to other matters which could not properly be withheld under the claim of privilege. To determine that, the defendant should exercise his privilege under recorded interrogation and place the matter under judicial scrutiny.

*E. Right to assistance of counsel*

Subsection 3330A(e) provides a witness before a grand jury with the right to assistance of counsel, retained or appointed. A statutory provision for the right of an indigent witness to have appointed counsel upon request constitutes recognition of a practice which is already widespread.

This is the most valuable right of a grand jury witness provided by S. 3274.

The presence of counsel for a witness in the grand jury room would impose de facto limitations on the potential for badgering, harassment and other abuse by the prosecution.

The efficient functioning of the grand jury would not be impaired by the appearance of counsel in the grand jury room provided that the counsel's role in the grand jury room would be limited to advising his client whether or not to claim a privilege. Counsel should not be permitted to object to questions or argue the client's case to the grand jury unless invited. To that end, subsection 3330A(e) should be amended to define the role of a counsel for a witness so that there will be no misunderstanding as to his rights or duties in a grand jury room.

Some will express concern that the provision authorizes counsel to disclose matters which occur before the grand jury, and that by so doing the secrecy of the proceeding will be breached. This should not cause great concern since the witness presently may publicly disclose what transpired before the grand jury, and if represented, will in all likelihood disclose it to his attorney who is free to make whatever disclosure is found to be warranted.

*F. Resubmission of case to the grand jury*

Subsection 3330A(h) provides that once a grand jury has failed to return an indictment based on a transaction or set of transactions, event or events, a

grand jury inquiry into the same transactions or events shall not be initiated unless the court finds, upon a proper showing by the attorney for the government, that the government has discovered additional evidence relevant to such inquiry.

The chief purpose of the fifth amendment grand jury provision is to protect a person against unfounded accusations. That purpose is subverted by the practice of re-submitting a case, at the sole discretion of the government, to a grand jury after a failure to indict.

However, the proposed provision is too restrictive. It fails to take into account that a grand jury may fail to indict because its term, including any extension, has ended. (Cf. S. 3274, SEC. 4, Secs. 3330A(a) (2) and (3). If there has been a failure to indict for that reason, then the successor grand jury should be permitted to investigate the same matter investigated by its predecessor. Evidence presented to the prior grand jury should be made available to the succeeding grand jury upon its request and upon the court's approval. (See Cal. Pen. Code Sec. 924.4.)

Additionally, upon motion of the attorney of the government or a special prosecutor, a court should have the discretion to authorize a grand jury to investigate a matter previously investigated by another grand jury when the court is satisfied that there has been an unwarranted failure on the part of the government to present available evidence to the grand jury which has failed to indict and the public interest necessitates re-submission of the case. It is important to include such a provision because an attorney for the government may improperly or negligently fail to present to a grand jury available evidence which would support an indictment in a serious case. A requirement that any re-submission be authorized by the court would constitute an adequate safeguard against the abuses contemplated by subsection 3330A(h).

*G. Recordation of proceedings*

Subsection 3330A(i)(1) provides that a complete and accurate stenographic record of all grand jury proceedings (except the grand jury's secret deliberations) shall be kept. As stated previously, this is an important reform, compliance with which will tend to diminish abuses relating to the grand jury.

*H. Right of a witness to a transcript of his testimony*

Subsection 3330A(i)(2) provides that a witness before a grand jury shall be entitled upon request to examine and to copy, or, if indigent, to obtain a copy of the transcript of his testimony before a grand jury. After an examination of such transcript, he may request permission to appear before the grand jury again to explain his testimony. Subsection (j) provides that a witness summoned to testify before a grand jury or his attorney shall be entitled, prior to testifying, to examine and to copy any statement in the possession of the United States which such witness has made and which relates to the subject matter under inquiry by the grand jury.

The provisions relate not to a defendant's rights of discovery, but to the interests of witnesses in obtaining copies of their statements.

The provisions in question are objectionable because they are likely to jeopardize the discovery of the truth. If a witness who has testified before a grand jury has as a matter of right the opportunity to examine a transcript of his testimony before a grand jury, then he has an opportunity to tailor his testimony at any subsequent trial to fit his testimony before a grand jury. The "tailoring" of testimony can, of course, be an unconscious process. It is generally agreed by most trial counsel that a witness who has examined prior statements before testifying is subject to impeachment on the basis that he is not testifying from actual memory but from his review of his prior statement.

*I. Disclosure of grand jury material to an indicted defendant*

Section 3330A(i)(1) provides for a complete and accurate record of all grand jury proceedings. Yet at no point does S. 3274 indicate what is to be done with this record.

Provisions should be prepared which give the indicted defendant a transcript of all relevant proceedings.

Additionally, provision should be made that any defendant may obtain a transcript of relevant evidence presented to a grand jury if a prosecution is based upon a transaction or event which was a subject matter of investigation by that grand jury, even though the particular grand jury before whom the

testimony was taken did not indict. These provisions could be modeled on relevant provisions in the California Penal Code.

*J. Procedures respecting recalcitrant witnesses*

Subsection 3330A(k)(1) provides that a witness should not be required to testify or to produce papers or objects if a primary purpose or effect of the subpoena is to secure for trial evidence against a person already under indictment or formal accusation. The practice which it would forbid is generally thought to be inconsistent with the adversary nature of a criminal prosecution. Yet the provision does not run to the real party in interest, the defendant, but to the witness, a marked departure from existing practice. Since it is the defendant who has the real objection to the use of the procedure sanctioned, the defendant, rather than the witness, should have the standing to object to and seek suppression of the evidence obtained in such proceedings. The section should be redrafted to so provide.

Rule 17(c) of the Federal Rules of Criminal Procedure, already provides that "(t)he court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive." The incorporation of this rule into S. 3274 may therefore be redundant. Nevertheless, the addition in subsection 3330A(k)(2) of a "laundry list" of what is deemed to be unreasonable or oppressive is subject to objections of overbreadth. Thus, for example, compliance with a subpoena is deemed to be unreasonable or oppressive because the only testimony that reasonably can be expected from a witness is "cumulative" or "unnecessary." Those are extremely difficult standards to apply to a grand jury investigation with a broad and sometimes hazy focus. Neither the judge nor the complaining witness or his attorney will have heard the testimony which preceded it, as is normally the case when objection is made in the course of a trial. Such a ruling is normally one resting in a trial judge's discretion. Here, there is little upon which that discretion can be exercised. The conclusions that the testimony of a witness is not "necessary" can seldom be made without a consideration of what other evidence has been presented to a grand jury. It is the grand jury who can best determine what it views as "necessary" for its deliberations. It should not be unduly restricted in this area; to do so could result in incomplete investigations into serious matters.

In sum, the words "cumulative" and "unnecessary" should be dropped from 3330A(k)(2)(ii). To retain them would result in needless consumption of judicial time with little payoff.

Omission from the provision of a list of items each of which is deemed to be unreasonable or oppressive avoids the problem of including an overinclusive or redundant item without impairing the supervisory authority of the courts with respect to subpoenas summoning persons to appear before a grand jury. (See *United States* v. *Calandra*, 414 U.S. 338, 346 n. 4).

*K. Jurisdiction as to motions to quash*

Subsection 3330A(1) provides which courts will have jurisdiction over a motion made by a witness to quash a subpoena or for other relief, i.e., the districts of issuance, place of service, and residence of the witness.

Preferably, the primary jurisdiction over such a motion should be in the district in which the grand jury is impaneled, provided that such court has the discretion to transfer the matter to another court. The court that supervises the grand jury before which the witness is required to appear should have the first opportunity to expeditiously rule upon such motions based upon its own knowledge and available grand jury records which are immediately available. The proposal as written encourages forum shopping by the witness.

*L. Requests to present evidence*

Subsection 3330A(q) 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 is required to make a public record of all denials of such requests, including the reasons for not allowing such person to testify or to appear. The court is authorized to grant the person a hearing and to authorize him to testify or to appear before the grand jury.

This provision ignores the grand jury itself.

The subsection should be re-drafted so that the prosecutor will be required to transmit to the grand jury the request to present evidence following his denial of the request so that its members can independently determine whether to honor the

request. Such a provision would strengthen the independence of the grand jury and would obviate the need for the court to hold a hearing. The grand jury, not the court, should be the arbiter as to what evidence it decides to hear. To give the court the power to order that the grand jury hear certain witnesses undermines the independence of the grand jury and would place the court in the role of an adversary.

### V. OTHER SUGGESTED REFORMS OF THE GRAND JURY SYSTEM

*A. The problem of the race to indict*

Much concern exists about current rules which, in effect, allow a race to indict. In my experience a prosecutor will invariably try to beat the preliminary hearing by indicting first. The upshot is that the defendant's discovery of the government case is limited to that provided by the federal rules: he has no chance to see for himself what kind of a "live" case the government can present through a preliminary adversary hearing, or through a review of a grand jury transcript.

Most critics agree that the present practice has serious shortcomings. A number of suggestions, both long-term and short-term have been suggested.

*B. Using the grand jury proceeding as a forum for a preliminary hearing*

One proposed reform would provide for holding the functional equivalent of a preliminary hearing in the presence of the so-called indicting jury. To make a grand jury proceeding equivalent to a preliminary hearing and to afford the putative defendant the same rights as a formally accused person who is entitled to a preliminary hearing would require that the putative defendant have the right to a public hearing before a grand jury. This would eliminate much of the secrecy which the framers of the Constitution saw as one of the hallmarks of the grand jury system.

The advantage of the proposal, assuming its constitutionality, is that it would accomplish two purposes: (1) fulfill constitutional requirements; and (2) give the defendant a preliminary hearing with better notice of the evidence against him than he now has.

Weaknesses are found in the cost of the proceedings, i.e., 23 grand jurors versus one magistrate; in the elimination of the secrecy rules; and in the necessity for bifurcation of the grand jury's charging and investigative roles. That bifurcation could have some undesirable consequences. An "indicting grand jury" may desire to enlarge the scope of its investigation as to potential defendants and charges because of evidence presented to it. Yet, the exploration of the new matter by the indicting grand jury might be precluded because of its irrelevancy to the issue whether the putative defendant should be indicted. As a result it might be necessary to take an inquiry to both an "investigating jury" and an "indicting grand jury."

Another hallmark of grand jury practice is apt to be lost in the process. Participation of grand jurors in the examination of witnesses is apt to become inhibited by the transformation of the "indicting grand jury" process into a preliminary hearing, as a result of the more formal procedures necessitated by the change which would require that a magistrate preside, with counsel for the prosecution and the putative defendant playing their typical adversarial roles.

*C. Granting a right to a preliminary hearing whether or not a grand jury indictment is first secured*

Another proposed reform would grant a right to a preliminary hearing whether or not an indictment is first secured. This "reform" would entail repetition of the same evidence to the magistrate or to the grand jury and prove to be costly and time consuming.

One method of eliminating some of this repetition could come through amendments to Rule 7(a) of the Federal Rules of Criminal Procedure which would give the defendant the sole power to waive indictment and take away the prosecutor's power to override the defendant's waiver.[23] The defendant who so waived would be entitled to the preliminary hearing afforded by Rule 5 of the Federal Rules of Criminal Procedure. The effectiveness of this reform would be somewhat limited, since it would not apply to defendants who were first charged by indictments. This would be consistent with the theory underlying the Fifth Amend-

[23] The Supreme Court has stated that the right to be prosecuted by indictment may be waived. (*Smith* v. *United States*, 360 U.S. 1, 9 (1959).) However, under existing rules, the waiver of the right to prosecution by indictment is not binding upon the government.

ment requirement for a grand jury indictment which was aimed at protecting the accused rather than accommodating the interests of the government.

The race to indict would be discouraged if prosecution by indictment could be waived in cases initiated by means other than indictment and such waiver were made binding upon the government. The constitutional right to prosecution by indictment would not be violated; nor would the waiver be invalid since the defendant would not be placed in the position of giving up one constitutional right to gain a right since there is no constitutional right to a preliminary hearing.

Where an indicted person has not had the opportunity to waive indictment, the federal rules changes should at a minimum provide the defendant with a right to disclosure of all evidence presented to the grand jury, and at a maximum, the right to a preliminary hearing.

### VI. CONCLUSION

A. The constitutional right to indictment by grand jury should be abolished. In lieu thereof, a defendant should have the right to a preliminary hearing.

B. Short of constitutional amendment, substantial reforms should be worked into the federal grand jury to promote its integrity, the rights of witnesses appearing pursuant to its process, and the rights of defendants charged with violation of federal laws.

Among the chief recommendations:

(1) All grand jury proceedings should be recorded and, when necessary, transcribed.

(2) An indicted defendant should as a general rule obtain full disclosure of all testimony before the grand jury relating to the indictment.

(3) A witness should be entitled to the presence of his counsel, retained or appointed, before the grand jury.

Federal rule changes should also be sought which will give to a defendant the sole power to determine whether indictment should be waived and to proceed by way of preliminary hearing and information. When the case is initiated by indictment and the defendant has been unable to file such a waiver, the federal rules should provide for complete disclosure of all evidence presented to the grand jury.

## Appendix A.—Federal Courts Committee, Los Angeles County Bar Association

*Report and Recommendations: Recording and Disclosing Proceedings of Federal Grand Juries*

### RECOMMENDATIONS

It is recommended that the Los Angeles County Bar Association take the following action:

1. Urge the Judges of the United States District Court for the Central District of California to immediately adopt the following addition to the Rules of the United States District Court for the Central District of California:

"All proceedings before a federal grand jury except the deliberations of the grand jury shall be recorded by a court reporter, including but not limited to all testimony of witnesses and all statements made by attorneys for the government in the presence of the grand jury. Such record shall be deposited under seal with the Clerk of the Court. The record shall be transcribed and the transcription released to the Court upon order or to the United States Attorney upon request. Upon authorization of the Court, electronic recording devices may be substituted for the court reporter."

2. Urge the Advisory Committee on Criminal Rules of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States to recommend the following amendments to the Federal Rules of Criminal Procedure:

A. Amend Rule 6 of the Federal Rules of Criminal Procedure as follows:

(1) Add the bracketed language to Section 6(e):

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may

disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury [or when delivered in compliance with subdivision (h) of this rule]. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(2) Add a new section (h), as follows:

"(h) At the time of the defendant's arraignment pursuant to Rule 10, or within 10 days after indictment, whichever occurs first, the attorney for the government shall deliver to the defendant a copy of all recorded proceedings of a grand jury which relate to the offense charged.

Upon a sufficient showing the court may at any time order that the disclosure of the recorded proceedings of a grand jury be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government the court shall permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant."

(3) Add a new section (i), as follows:

"(i) All proceedings before a federal grand jury except the deliberations of the grand jury shall be recorded by a court reporter, including but not limited to all testimony of witnesses and all statements made by attorneys for the government in the presence of the grand jury. Such record shall be deposited under seal with the Clerk of the Court. The record shall be transcribed and the transcription released to the Court upon order or to the United States Attorney upon request. Upon authorization of the Court, electronic recording devices may be substituted for the court reporter."

3. Urge the Congress of the United States to repeal 18 U.S.C. § 3500(e)(3), which now provides:

"(e) The term 'statement' as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States means

(1) A written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral argument.

(3) A statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."

ALTERNATIVE RECOMMENDATIONS

4. As an alternative, in the event recommendations 2A (1) and (2) are not adopted by the Advisory Committee, it is recommended we urge the Advisory Committee to recommend the following amendments to Rule 16 of the Federal Rules of Criminal Procedure:

(1) Add a new section (a)(1)(F), as follows:

"(F) *Grant Jury Transcripts.*—Upon request of the defendant the government shall furnish to the defendant the recorded testimony before a grand jury which relates to the offense charged of all witnesses which the attorney for the government intends to call in the presentation of the case in chief."

(2) Delete section (a)(3), and renumber section (a)(4) as (a)(3).

5. As a further alternative, in the event the Advisory Committee does not adopt either the proposed amendments to Rule 6 or the proposed amendments to Rule 16, it is recommended we urge the Congress of the United States to amend 18 U.S.C. § 3500 as follows:

(1) Section (a), which now provides:

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Govern-

ment witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, or inspection until said witness has testified on direct examination in the trial of the case."

Shall be amended to provide:

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery or inspection until three entire business days before the commencement of the trial."

(2) Section (b), which now provides:

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered to the defendant for his examination and use."

Shall be amended to provide:

"(b) At least three entire business days before the commencement of the trial, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of any Government witness or prospective Government witness in the possession. . . ."

(3) Section (d), which now provides:

"(d) If the United States elects not to comply with an order of the court under Paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared."

Shall be amended to provide:

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall not permit the witness to be called to testify."

DISCUSSION

*1. Introduction*

Upon publication of an article in the Los Angeles Bar Bulletin of March, 1974, entitled "Pre-Trial Discovery of Federal Grand Jury Minutes," a subcommittee of the Federal Courts Committee was formed to investigate current practices regarding the recordation and disclosure of proceedings before federal grand juries, and to make recommendations to the Committee. The subcommittee included Joel Bennet, B. Boyd Hight, Anthony Murray (who co-authored the Bar Bulletin article), Assistant U.S. Attorney Eric A. Nobles, Federal Public Defender John K. Van de Kamp, and Robert Wyshak. Professor Gerald F. Uelmen of Loyola University School of Law served as chairman of the subcommittee. At its meeting of February 6, 1975, the Federal Courts Committee approved the recommendations of this subcommittee for submission to the Board of Trustees.

*2. Recording of Grand Jury Proceedings*

The Committee recommends that both the local Rules of the United States District Court for the Central District of California, and the Federal Rules of Criminal Procedure, be amended to mandate the recording of all grand jury proceedings.

The current practice in the Central District of California leaves the recording of grand jury proceedings to the discretion of the United States Attorney. It is the policy of that office to record only the testimony of percipient witnesses. No record is kept of routine testimony by government agents who are describing, in hearsay fashion, the results of their investigation. Nor is any record kept of comments made to the grand jurors by attorneys for the government before or after the testimony of witnesses.

In *United States* v. *Thorcson*, 428 F. 2d 654 (9th Cir. 1970) and *United States* v. *Price*, 474 F. 2d 1223 (9th Cir. 1973), the Ninth Circuit Court of Appeals ruled that a prospective defendant who makes a timely request may compel the recordation of grand jury proceedings. In conformity with these opinions, the U.S. Attorney for the Central District of California honors all such requests where

the prospective defendant agrees to pay the cost of the transcript. This practice, of course, is of no advantage to those who are unaware they are prospective defendants, or who lack the funds to pay for a transcript.

Some federal district courts have already adopted rules requiring the recording of all grand jury proceedings. The District of Rhode Island has local rules requiring that all proceedings before a federal grand jury shall be reported "in the same fashion as trial proceedings in open court are reported." (Rule 34, D.R.I.). Other districts, such as the Eastern District of Washington, follow a policy of recording all grand jury proceedings without benefit of a rule. Rule 1.04(e) of the U.S. District Court for the Northern District of Illinois provides:

"An Official Reporter of this Court shall attend and record all testimony of witnesses appearing before every Grand Jury. Such record shall be filed with the Clerk of the Court and transcribed and released to the Court upon order or to the United States Attorney upon request and payment of the appropriate fees to the Official Reporter."

While the Committee adopted some features of the Illinois rule, it will be noticed that our recommendation differs in three important respects. (1) It is not required that the proceedings be recorded by an Official Reporter of the Court. The current practice in the Central District of California is to contract for independent court reporters to record these proceedings. The reporters are evidently paid through the auspices of the U.S. Attorney's Office, rather than the U.S. District Court. It is not the intention of the Committee to disturb this arrangement. (2) Authorization is included in the Committee's recommendation for use of electronic recording devices. Such devices are currently being used in the Magistrate's Courts in this District. Their use in grand jury rooms would be even easier, since identification of the party speaking would be a simple matter. This method could make the implementation of the proposed rule relatively inexpensive. (3) The Committee's recommendation requires all proceedings be recorded, not just the testimony of witnesses. The recommended rule is quite explicit in including all comments made by attorneys for the government to the grand jury. While this is not intended to discourage discourse between grand jurors and the attorneys for the government, the possible dangers of prejudice are believed to be too great to permit such discourse to be unrecorded. While the committee is confident that there are currently no flagrant abuses by government attorneys, it is felt that the presence of a court reporter will be a wholesome prophylactic to insure that abuses do not occur in the future.

The question of recording grand jury proceedings was presented to the Ninth Circuit Judicial Conference in 1972. In a Report to the Committee on Federal Rules of Criminal Procedure of the Conference, Professor William J. Knudsen, Jr. recommended an amendment to Rule 6 to require that all testimony presented before the grand jury in the investigation of criminal causes shall be recorded. A similar recommendation, that a reporter transcribe the minutes of all proceedings of a grand jury which are accusatorial in nature, was proposed in 1965 by the Committee on the Federal rules of Criminal Procedure of the American Bar Association's Section of Criminal Law. (38 F.R.D. 106). The sentiment expressed at both the 1971 and 1972 Ninth Circuit Judicial Conferences was overwhelmingly in favor of compelling the recordation of all grand jury proceedings. At the 1971 conference, those in attendance were asked, "Should all grand jury proceedings be reported?" The results were as follows:

| | Yes | No |
|---|---|---|
| Judges | 41 | 18 |
| U.S. attorneys | 4 | 2 |
| Delegates | 74 | 11 |
| Law schools | 8 | 0 |
| Guests | 30 | 6 |
| Others | 1 | 1 |
| Total | 158 | 38 |

Again, at the 1972 Conference, the question was posed, "Should all testimony before a Federal Grand Jury be recorded?" The results were as follows:

| | Yes | No |
|---|---|---|
| Judges | 27 | 7 |
| U.S. attorneys | 2 | 2 |
| Delegates | 26 | 3 |
| Law schools | 1 | 0 |
| Guests | 3 | 0 |
| Others | 4 | 1 |
| Total | 63 | 13 |

*3. Disclosure of Grand Jury Transcripts*

The merits and demerits of disclosure of transcripts of federal grand jury proceedings has been fully debated elsewhere, and it is not the purpose of this report to rehash these arguments. An excellent discussion is contained in Mr. Murray's article in the March, 1974 Los Angeles Bar Bulletin, as well as in the comprehensive report to the Committee on Federal Rules of Criminal Procedure of the Ninth Circuit Judicial Conference by Professor William J. Knudsen, Jr., which has been published at 60 F.R.D. 237. The Committee concluded that the arguments in favor of disclosure are most persuasive, and any justifiable concerns about possible abuses can be alleviated by providing for protective orders upon application and suitable showing by the prosecutor.

Presently, disclosure of grand jury transcripts is governed by the Jencks Act, 18 U.S.C. § 3500, which permits disclosure only after a witness has testified at trial. Present practice in many courts is to ignore this prohibition, and ask the prosecutor to turn over the transcripts several days before the witness is called, to avoid the delays in the trial which full compliance with the Jencks Act requires.

The Committee recommends repeal of these Jencks Act provisions, and their replacement with three different alternatives, stated in order of preference.

The first alternative, and most preferable, would be to make disclosure automatic, just as it is in California practice, unless the prosecutor obtains a protective order. This would be accomplished by the Amendments to Rule 6 of the Federal Rules of Criminal Procedure contained in Recommendation No. 2A. The procedure for protective orders is couched in language borrowed from Rule 16(d)(1).

The second alternative would place disclosure of grand jury transcripts in the context of Rule 16 of the Federal Rules of Criminal Procedure, which governs discovery in criminal cases. Disclosure would not be automatic, but would require a request of the defendant. Upon such request, however, disclosure would be required unless the government obtained a protective order pursuant to the present provisions of Rule 16(d)(1). The amendments to Rule 16 necessary to achieve this alternative are contained in Recommendation No. 4.

The final alternative would be to simply amend the Jencks Act to conform to the present practice of many courts, by requiring delivery of Jencks statements three days in advance of trial. The three day limit is in conformity with the three day disclosure of witnesses rule for capital cases established in 18 U.S.C. § 3432. These amendments are contained in Recommendation No. 5.

Senator MATHIAS. The committee will call on the distinguished Senator from Florida, Senator Stone, who has very kindly agreed to introduce the next witness.

## STATEMENT OF HON. RICHARD STONE, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator STONE. Thank you, Mr. Chairman.

I would like to present to this committee the longtime and well-

respected State attorney of Dade County, State of Florida, who among all of our State attorneys has the most experience and the most skillful knowledge of the grand jury system and all of its ramifications.

Dade County is a cosmopolitan, urban county. It also has rural elements. It has tremendous pressures from transients, not only from our own country, but from the Western Hemisphere and really all over the world.

The grand jury has played a very major central role in our criminal prosecution and criminal justice system. I think that this committee is fortunate to have the expert advice and testimony of Richard Gerstein, State attorney from Dade County, State of Florida.

I would like to present him to you.

Senator MATHIAS. Thank you very much, Senator Stone.

Mr. Gerstein, we appreciate very much your being here and giving the committee the benefit of your experience and your great knowledge. Do you have a prepared statement?

## TESTIMONY OF HON. RICHARD E. GERSTEIN, CHAIRMAN, COMMITTEE ON THE GRAND JURY, CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION

Mr. GERSTEIN. I have a prepared statement, Senator.

First I would like to express my appreciation to Senator Stone for his kind introduction.

I am here, I think, in a twofold capacity. I am here representing the American Bar Association as chairman of the Grand Jury Committee of the Criminal Justice Section of the American Bar, and also in my individual capacity as State attorney in the 11th judicial circuit of Florida, which is the Greater Miami area.

I have a prepared statement which I believe has been made a part of the record.

Senator MATHIAS. We will make your prepared statement a part of the record after your oral testimony.

The clock behind you indicates that Senator Stone and I are due on the floor for a rollcall vote.

If you have no objection, Mr. Gerstein, it would be an economy of your time if you would proceed—I will ask counsel to conduct the hearing until I can get back—in the delivery of your summary and in answering some of the questions that I will propound to you. I will be back as quickly as possible.

Mr. GERSTEIN. That will be fine.

Senator MATHIAS. It would not delay you in the meantime then.

Mr. GERSTEIN. The American Bar Association has gone on record advocating certain grand jury reforms.

I would like to stress at the outset that the American Bar Association and the committee of which I am chairman strongly favors the retention of the grand jury system, but we see the need for reform.

Among other things, the American Bar Association has endorsed certain amendments to titles 18 and 28 of the United States Code, and opposes in principle, certain other amendments.

The ABA supports in principle, section 2(a) of H.R. 1277, which would amend the recalcitrant witness statute to prohibit multiple con-

finements of a witness upon subsequent refusals of the witness to testify about the same transaction.

The association also supports in principle the provision which would permit a witness before a Federal grand jury who is being interrogated in connection with wiretapping, to raise as a defense that there were violations of the wiretapping statute in obtaining the information upon which he is being interrogated.

The association further supports in principle an amendment to the Federal Rules of Criminal Procedure which would entitle every witness called to testify before a grand jury to have counsel present in the grand jury room in order to advise the witness of his or her rights in connection with that appearance.

Finally, the American Bar Association supports the amendment which would permit the granting of "transactional" immunity from prosecution to a witness, rather than "use" immunity, as presently provided for in Federal law.

There are several other matters which my Committee of the Criminal Justice Section of the American Bar Association has addressed itself to, but I want to stress the caveat that the recommendations of the committee have not yet been approved by the ABA and thus are mere recommendations until such approval is forthcoming.

The Committee on the Grand Jury of the Criminal Justice Section of the American Bar has considered the Abourezk bill and again—with the caveat that the action of the committee has not been approved by the full ABA or by the Criminal Justice Section—the committee has made a number of recommendations.

We would amend section (c), page 11, by inserting the words "except perjury" following the phrase "in any criminal proceeding," on line 12.

The committee specifically approved the provision which would prevent calling a witness before the grand jury if the attorney for the Government has been notified in writing that the witness will invoke the fifth amendment.

Turning to other provisions in Senator Abourezk's bill, some of which mirror sections of Congressman Eilberg's proposal, we support provisions which would prohibit multiple confinements of a witness upon a subsequent refusal of the witness to testify about the same transaction.

While the American Bar Association has adopted a policy opposing the reduction from a maximum of 18 months to 6 months for civil contempt, I would like to point out that my committee has recommended a maximum of 12 months and will be asking the ABA to reconsider its current position on that matter.

My committee also has a number of other recommendations, including, of course, a provision which would require advising a witness of his right to counsel before his appearance and immunizing a witness from prosecution who may be indicted and has not been so advised.

We also would recommend a complete stenographic record of all grand jury proceedings and require that a transcript of such record be promptly furnished to a witness after his or her appearance; and we would provide that any witness, before testifying, may examine and copy any statements which the witness has made and which relate to the subject matter under inquiry.

The committee strongly recommends a prohibition against the attorney for the Government, if he or she has received written notice in advance of the witness' appearance, that the witness intends to exercise the privilege against self-incrimination, from compelling the appearance of that witness before the grand jury unless a grant of immunity has been obtained.

Our committee's standards also provide that the grand jury subpena should indicate generally the statutory and subject areas of the grand jury's inquiry, which is consistent with Senator Abourezk's bill.

Those are some of the highlights of the recommendations of my committee on the grand jury and I have also attempted to recite for you matters which the American Bar Association, through its House of Delegates, has previously gone on record approving.

There are several reforms of the grand jury operation that I have instituted voluntarily in my jurisdiction.

I cannot permit counsel in the grand jury room, since there is a statutory prohibition in Florida against that.

But in the 20 years that I have been State's Attorney I have permitted prospective defendants, and offered all prospective defendants the right, to appear and testify before the grand jury, provided they sign a waiver of immunity and also provided prospective defendants with the opportunity to present witnesses to the grand jury in their behalf, provided the witnesses sign a waiver of immunity.

I have always advised the jurors of any exculpatory evidence which pertains to the matter under investigation.

We have limited and attempted to prohibit the use of any illegally obtained evidence or, in fact, any evidence which would not be admissible at trial. The only hearsay evidence which we permit before the grand jury would be what you might term "reliable hearsay," such as medical evidence or medical examiners' reports, an autopsy report, that kind of hearsay, rather than requiring the witness himself to appear.

We have always insisted upon the production of witnesses before the grand jury so that the jurors could observe them and interrogate them—rather than presenting a summary of what a witness will testify to, as is done in many, if not most, jurisdictions.

In short, we have attempted to do voluntarily many things which the legislation proposed by Senator Abourezk and by several Congressmen would require the Government to do under the law.

All this is in an effort to prevent some of the abuses that tend to undermine and render ineffectual the grand jury system.

Mr. Levine. Thank you very much, Mr. Gerstein.

Senator Tunney, who is necessarily absent today, has left a number of questions on which he would appreciate your answer.

You have a vast experience in these matters through your 20 years as a prosecutor. In addition you have had extensive opportunity to learn of the practice of other prosecutors through your service as president of the National District Attorneys Association, and as chairman of the grand jury committee of the American Bar Association. As to some of our questions, if the American Bar Association has not taken a position itself, perhaps you could give us the benefit of your own views.

The Congress is now considering provisions for appointment of future Watergate-style Special Prosecutors, either by establishing a permanent Special Prosecutor or by setting up a mechanism to appoint temporary Special Prosecutors when needed.

This problem, of course, concerns the grand jury, because the grand jury may sometimes wish independent counsel—for example, if it were investigating a U.S. attorney or his assistants, or law enforcement agencies with whom he works closely, or high officials in the Justice Department.

Could you please tell this committee your views on whether or not the grand jury should have the right to request the appointment of an independent prosecutor?

Mr. GERSTEIN. Yes.

The American Bar Association is on record at present opposing this right. I personally strongly favor it.

The grand jury in my jurisdiction has always had the right to independent counsel. There are three vehicles through which the grand jury in my jurisdiction can obtain independent counsel.

One is a statutory right which allows them to hire counsel of their own choosing.

The second is by a petition to the court which has impaneled them asking the court to appoint counsel.

The third provision is by a request to the Governor of the State for the assignment of a State attorney from another jurisdiction. All three methods have at times been used.

I think that it is imperative that grand jurors retain the right to independent counsel for the very purposes outlined in your question. However, I feel there should be a strong caveat. There should be a commitment that goes with that right—requiring the independent counsel to prosecute all cases in which he or she obtains an indictment. Otherwise, the right is meaningless. I have seen repeated instances in which special counsel obtain indictments from grand juries and then walk away from prosecution; and I think there is a great temptation on the part of special counsel, particularly if that counsel is not experienced in the criminal law, to obtain indictments where the evidence is insufficient, and then to leave those indictments to be prosecuted by the regular prosecutor.

Certainly, if you are going to give grand juries the right to have independent counsel—and I personally believe they should have that right—then there must be with that right the requirement that the independent counsel prosecute the case.

That is why I strongly oppose the establishment of an Office of Grand Jury Counsel, which, as the Senator pointed out, has been recommended in New York State. To me, that would be counterproductive and meaningless unless the Office of Grand Jury Counsel was required to prosecute all indictments which they obtain.

One of the great protections in our system is that the prosecutor prosecutes grand jury indictments. That in itself is a bar to a reckless prosecutor or to one who would obtain indictments for political advantage with insufficient evidence.

Mr. LEVINE. Thank you.

The second question on which Senator Tunney wished your views concerns the topic of multiple representation, where one defense

lawyer represents a number of witnesses appearing before the same grand jury.

The Justice Department is concerned with this problem, and I believe the Judicial Conference of the United States is also.

Apparently there is a fear that a lawyer who is paid by a third party, or who represents more than one witness before a grand jury, might insist that all the witnesses take the fifth amendment, or that otherwise the lawyer might interfere with what some consider proper representation.

I believe that one of the proposed standards studied by your committee deals with this problem of multiple representation.

Mr. GERSTEIN. That is correct, sir.

We have adopted a proposed standard—and I stress that it is only a proposed standard—which is not yet the position of the American bar unless approved by it.

I will read this into the record.

This is the proposed Standard for Representation of Multiple Witnesses Before a Grand Jury.

(1) In cases of multiple representations, as hereinafter defined, the following factors should be considered by counsel in determining whether multiple representation is appropriate:

(*a*) whether the multiple representation will work to the disadvantage of one of the clients;

(*b*) whether full disclosure has been made to all clients of any potential conflict of interest and all clients have consented to multiple representation;

(*c*) whether the multiple representation would diminish the quality of legal representation received by any of the clients; and

(*d*) whether multiple representation would inhibit witnesses from testifying truthfully because of the lawyer's relationship to the other clients or any other person affiliated with the other client.

(2) The lawyer should fully advise his clients of the possible effects of the multiple representation. If each consents to the representation, after full disclosure of the possible effects of such representation, the lawyer may continue with the multiple representation, provided that this representation is consistent with the other standards set forth herein and consistent with the code of professional responsibility.

(3) A lawyer should not continue multiple representation of clients in a grand jury proceeding if the exercise of his independent professional judgment on behalf of one of the clients will be or is likely to be adversely affected by his representation of another client.

(4) If a lawyer is requested to undertake or to continue the representation of multiple clients having potentially different interests he should weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation.

(5) Multiple representation is defined as:

(*a*) two or more witnesses in a grand jury proceeding;

(*b*) a witness and a potential defendant in a grand jury proceeding; and

(*c*) where the fee for the representation of a witness is paid by a third party who is a witness or potential defendant in a grand jury proceeding.

Mr. LEVINE. Mr. Gerstein, am I correct that under this proposed standard, the decision is up to the defense lawyer himself, and is not made by the prosecutor or by the court?

Mr. GERSTEIN. Yes.

We think that to do anything less than that would inhibit a basic right to be represented by counsel.

Mr. LEVINE. Mr. Gerstein, Senator Mathias' last question to Mr. Van de Kamp asked for examples of specific instances of abuse or specific instances of harassment of witnesses on the part of the grand jury.

Could you tell the committee of any such examples that you know of?

Mr. GERSTEIN. The examples of abuse that I have seen, have in the overwhelming majority of instances, been abuses by Federal grand juries. I think there is far less abuse in the State system.

One reason for that may be that most prosecutors in the State system are elected officials, rather than appointed officials; perhaps they are far more sensitive to public opinion and to news media reaction in the handling of grand juries in sensitive matters.

But the examples I have seen of unfairness, of abuse of witnesses, of improper grand jury activity, of leaks from grand juries, and of leaks concerning investigations, have occurred far more frequently in the federal system than in the State system.

Mr. LEVINE. Are there any specific examples that you might mention?

Mr. GERSTEIN. At the moment, Mr. Levine, I cannot think of any examples.

Mr. LEVINE. Mr. Gerstein, the bill introduced by Senator Abourezk, together with Senators Gravel and McGovern, differs in certain respects from those introduced in the other body.

I wonder if I could raise some of the specific points where these bills differ to see if you have an opinion as to these items.

For example, several of the proposed bills require that a person subpenaed to appear before a grand jury be warned whether or not he is a target of the investigation, a potential defendant. Other bills do not.

Do you think this requirement is desirable?

Mr. GERSTEIN. Yes. I personally think it is desirable. It should be a requisite of any legislation considered by the Congress.

Mr. LEVINE. Could you give us your reason for this?

Mr. GERSTEIN. It is a matter of basic fairness, I personally believe, to advise a witness and the witness' counsel that he or she is a potential target, so that the witness can avail himself of any constitutional protections to which he may be entitled and which he may otherwise be willing to waive, so that he can make a complete, independent judgment concerning his own willingness to waive immunity and any other constitutional protections that he may desire to waive or not to waive; so he can make an independent judgment based upon knowledge of all the circumstances.

If he is a target, the decision on that waiver may be completely different from the decision if he is merely a witness.

Mr. LEVINE. Several of the bills also differ as to the role of the members of the grand jury themselves. In certain of the bills, the provision is made that the grand jury members must vote on the issuance of a subpena. Others leave that up to the prosecutor.

Some of the bills require also that the grand juries vote on a grant of immunity. Others leave that decision up to the prosecutor.

Mr. GERSTEIN. I am a prosecutor in the jurisdiction where the grand jury has a tradition of independence that is perhaps unrivalled in the United States; and yet I recognize, as does my committee on the grand jury, that there are certain practicalities involved.

I do not personally deem it practical to have juries vote upon subpenas. They do not have the necessary background nor the day-to-day contact with the investigation which would enable them to make a meaningful judgment.

My committee considered that proposal and rejected it.

I think it worthwhile to have jurors vote on immunity and, as a matter of fact, the jurors in my jurisdiction do vote on the question of immunity.

Here again, I think you will find as a matter of practicality that in most jurisdictions the juries are going to vote on that question in whichever direction the prosecutor recommends, and that is just the practical basis of the votes.

Mr. LEVINE. Mr. Gerstein, in your testimony, if I understood it properly, you told us that in your jurisdiction hearsay is not presented to the grand jury except under special circumstances, such as medical records.

Mr. GERSTEIN. Something that you might call reliable hearsay.

Mr. LEVINE. And that matters which would be inadmissible at trial, for example, evidence which has been seized in violation of the fourth amendment, are not presented to the grand jury.

On the other hand, material favorable to the target which is known to the prosecutor would be exposed to the grand jury.

Mr. GERSTEIN. That is right.

We do all these things that you outlined on a voluntary basis in my jurisdiction, and have done them during the entire time that I have been the prosecutor.

Mr. LEVINE. Do you believe these should be made a requirement of law for the Federal grand jury?

Mr. GERSTEIN. Yes; I do.

I think all of those things—and my committee believes that all of those things—are inherent in the fair and effective administration of justice and are matters which every prospective defendant or defendants are entitled to.

Mr. LEVINE. You have had practical experience running grand juries under the system.

Do these rules raise any practical problems?

Mr. GERSTEIN. No. They do not.

What they do is not only insure the constitutional and statutory rights of persons who are under investigation, but it seems to me that they produce better cases, cases which are more likely to be successful and which are less likely to receive attacks in the trial courts.

Mr. LEVINE. Mr. Gerstein, I have one last question on Senator Tunney's behalf, and then perhaps other counsel may have questions.

This concerns a matter which you raised in your testimony about the witness who refuses to answer grand jury questions, even if granted immunity.

Some of those who refuse to answer are seriously motivated by first amendment principles. The committee has been told of examples of the use of this coercion of testimony as a means of harassing such persons who, based on sincere beliefs, choose not to give information. But we have also been told that persons connected with organized crime, or criminal elements, may also refuse to give testimony, even if given immunity.

You mention a suggested change in current law. As I understand it, under current law, such a person may be imprisoned sometimes up to 18 months. You said that your committee favored a 12-month limitation. Senator Abourezk's bill suggests 6 months limitation.

Now, as I understand it, in other situations, a person is not imprisoned for more than 6 months unless he had had a right to a jury trial.

Why do you believe there is opposition to a similar rule that a recalcitrant witness not be incarcerated for more than 6 months?

Mr. GERSTEIN. I personally have some substantial problems with this whole issue; and I think the membership of my committee had many of the same problems.

Almost any length of time that you seize upon here can be criticized as being arbitrary and too punitive, or can be criticized as too lenient.

Probably the point you make is a valid one; if there is going to be any punishment for longer than 6 months, there ought to be a jury proceeding.

On the other question—which is the area with which I have difficulty—I know of many persons who may refuse to testify, but do so on the basis of legitimate considerations of conscience.

Insofar as the first amendment right of newspersons is concerned, I have some strong personal positions. I have an office policy which prohibits the subpenaing of any newsperson by any of my assistants.

I have the right of subpena without the use of a grand jury; we have office subpena power under the law in Florida. My policy prohibits an assistant subpenaing a newsperson to obtain a source, to obtain information as to a source. That is just an absolute prohibition I have instituted because I feel this is so strongly violative of the first amendment rights of newspersons.

You can get into a more difficult area when other witnesses who may be involved in organized crime activity or other criminal activities are refusing to testify after having been granted immunity, allegedly as a matter of conscience but actually in order to protect their coconspirators.

This is an area that has given us a lot of difficulty, but we have resolved it as far as newspersons are concerned.

Mr. WILKA. Senator Abourezk has requested met to ask several questions, particularly with reference to S. 3274.

I note that the ABA favors permitting counsel inside the grand jury room. What role should counsel play during the grand jury proceedings; and can you recommend any statutory language to the Congress which would help define the limits of counsel's participation in the grand jury room?

Mr. GERSTEIN. My committee addressed itself to these questions in drafting our proposed standards; what we suggest is this: That the role of counsel will be much the same as the role of counsel to a witness

before congressional committees that he or she would be in the grand jury room in an advisory capacity to the witness. He or she would not have a speaking role in the grand jury; would be permitted to be present with the witness in the grand jury room, but should be allowed to be there to advise the witness; should not be permitted to address the grand jurors; and should not be allowed to be present at any time other than when his or her client is present or otherwise be allowed to take part in the proceedings.

The counsel's capacity there would thus be very similar to counsel's capacity before congressional and senatorial committees.

But it would make it an impossible situation to give counsel a speaking role.

The present situation, in which witnesses are permitted to leave the grand jury room and consult with counsel, is not only cumbersome, but—in my opinion—it is highly damaging to the cause of the person who is before the grand jury, in the eyes of the grand jurors. Witnesses are undeniably severely damaged when jurors see the witness continually getting up to leave and counsel with his or her lawyer; there is an assumption, I think, on the part of the jurors that the answers that then are forthcoming are less than totally truthful.

Mr. WILKA. Even within the guidelines that you have recommended, the criticism has still been made that permitting counsel within the grand jury room would eventually make the process too adversarial.

Do you see any problems along those lines?

Mr. GERSTEIN. I can certainly see that that criticism could be legitimately raised. What would be needed, I think, would be a strong position taken by the court to limit any counsel who attempted to inject himself into the proceeding. If the courts are willing to take such a strong position and to punish any counsel who violates his status in the grand jury room, then that kind of violation would end in short order.

One of the things that impressed me when I first sat down to chair the Grand Jury Committee of the ABA Criminal Justice Section was that the committee was composed almost entirely of people with extensive prosecutorial experience. While there were only two active prosecutors on the committee, every member had extensive prosecution experience. Every committee member was in accord that they had seen substantial abuse of the grand jury process and everyone of the committee members was in accord that there was a need for substantial reform.

Everyone there had a prosecution background.

Mr. WILKA. You referred before to the fact that you personally favor the right of the grand jury to have a special prosecutor or special attorney assist in its deliberations.

Do you believe that the grand jury should be permitted to request the appointment of a special prosecutor whenever it chooses, or do you think a showing of some prosecutorial bias or foot dragging should first be required, or is there some other standard you would suggest?

Mr. GERSTEIN. I personally think the grand jury should be permitted to request a special prosecutor only upon a vote of a minimum of 12 of the jurors. This is the same vote that would be required for indictment in my jurisdiction. That is a majority of the grand jury.

If you are going to talk about things like foot dragging, you are going to allow a lot of room for difference of opinion and for subjective judgment.

But I think that on a showing of good cause to the court and a vote of a majority of the jury, that special counsel should be permitted.

I think that there would be few situations in which a majority of the jury would become so disillusioned that they would request special counsel, unless they were receiving some sort of outside pressure. I do want to say that jurors and juries are not immune from those kinds of pressures. There have been instances in the history of the United States and the history of all the States where grand juries have been used for political purposes. I have witnessed that firsthand. I think any prosecutor has.

Mr. WILKA. Do you think that the jurisdiction of such a special prosecutor should be limited to investigating cases of official misconduct, or should the grand jury have the power to investigate any crime?

Mr. GERSTEIN. I would not limit it. I would give special counsel an unlimited right to invesigate anything that is within the purview of the grand jury to investigate. In my State that means almost anything.

Mr. WILKA. I note that the Department of Justice opposes the provision of our bill which would give the witness a right to obtain a copy of the transcript of his or her grand jury testimony.

In the testimony before the House, the Department explained that they felt that in an organized-crime situation the witness could be coerced by fellow criminals to reveal to them otherwise secret testimony.

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

Mr. GERSTEIN. I think that is a legitimate concern.

I would recommend that upon a proper showing by the Government that such a danger exists to the witness, or upon the witness' representation that such a danger exists, that in those situations the court could negate that requirement.

In other situations, I would favor giving the witness a copy of his testimony only if he is being recalled by the grand jury on the same subject matter.

Mr. WILKA. During those same hearings on the House side, Mr. David Austern of the American Bar Association, who accompanied you at that time, suggested that Congress could statutorily define "infamous crime" in such a way as to speed up grand jury proceedings and free the grand jury to pursue other investigations.

Could you comment on that suggestion and, if you support such a procedure, could you recommend to the subcommittee what statutory change would be required to produce that result?

Mr. GERSTEIN. I personally favor that suggestion. I think it can be done. I believe the American Bar Association is on record opposing that. But I as an individual favor it.

In my State, a prosecutor can prosecute by information all crimes except those punishable by death. These must be presented to the grand jury.

As a matter of practice, virtually all prosecutors in my State present matters involving allegations of official corruption to a grand jury as a safeguard both to the State and to the accused.

I believe that—without endangering the rights of any person—one could trust to responsible U.S. attorneys the right to file a direct information in a great class of felonies. This would make it unnecessary to take up the time of grand jurors with the presentation of routine felonies such as interstate theft of automobiles and routine narcotics cases, which are presently presented to Federal jurors and are extremely time consuming and expensive. There would be no deprivation of any substantial right enjoyed by a witness or by any other citizen, since they are not enjoying any substantial rights today in the presentation of those cases.

Mr. WILKA. Can you recommend any statutory guidelines which the Congress might keep in mind in trying to determine which felonies would be "infamous crimes" and which would not in such a statutory change?

Mr. GERSTEIN. One could draw the line in almost any fashion. You might exclude felonies involving the death penalty. You might exclude cases involving treason against the United States. You might exclude, if you desire, situations involving official corruption.

It could be drawn in any fashion, arbitrary or otherwise; and I do not see that it would minimize an individual's rights because, as I said earlier, I cannot see where those rights are being protected under present Federal grand jury procedures.

Mr. WILKA. I only have one further question.

This relates to that section of the bill intending to increase the independence of the grand jury.

Senator ABOUREZK's bill would require that the grand jury be given instructions explaining its rights and duties, including the right to call witnesses and to initiate an independent investigation.

Do you think that giving these instructions will really increase grand jury independence in a meaningful fashion and, if not, would you recommend another approach to the committee?

Mr. GERSTEIN. I think such instructions are necessary.

In my jurisdiction, the grand jury is charged by the court at the time of its empaneling and each juror is given a copy of that charge. They are fully advised as to their rights.

I do not, however, think that in itself is sufficient—you have laypersons who are not well versed in the law and not totally cognizant of the rights they have as jurors. I believe many of these rights must be enacted into legislation for them to be meaningful.

I do not think the mere charge of the court is sufficient, even if the charge were to be repeated several times during the term. I do not feel that would be as effective or could be as effective as the enactment of these rights into legislation.

Mr. WILKA. Thank you.

Mr. LEVINE. Thank you, Mr. Gerstein.

[The prepared statement of Richard E. Gerstein follows:]

PREPARED STATEMENT OF RICHARD E. GERSTEIN, CHAIRMAN, COMMITTEE ON THE GRAND JURY, CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION

Mr. Chairman and members of the Subcommittee: My name is Richard E. Gerstein and I am State Attorney of the 11th Judicial Circuit of Florida, which is the greater Miami area. I have held this office for 20 years, and have just been elected without opposition to a sixth term. I have served as the President of the National District Attorneys Association and I am also serving my second year as

Chairman of the Grand Jury Committee of the Criminal Justice Section of the American Bar Association.

I appear before you today to present the views of the American Bar Association with respect to proposed changes in grand jury procedures.

The Committee on the Grand Jury was created by the Criminal Justice Section in September, 1974. Our mandate is to examine proposed legislation to revise grand jury procedure, and to offer proposed changes for American Bar Association approval.

It is significant to note that the membership of the Criminal Justice Section of the American Bar Association represents 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, law school professors and students, and others. We number over 12,000 attorney and law student members.

The Committee on the Grand Jury is equally representative of the profession, and consists of federal and state prosecutors, practicing defense attorneys, public defenders, judges, law professors, and law students. During the past two years the Committee has met on some nine occasions to consider and study grand jury procedures and practices.

From September, 1974 to June, 1975 the Section Committee on the Grand Jury studied legislation pending in the Congress with respect to the grand jury. The Committee issued a report, parts of which were subsequently approved by both the Council of the Criminal Justice Section and the House of Delegates of the American Bar Association. Since September 1975, the Committee has pursued a different tack. Rather than studying and issuing a report with respect to pending legislation, the Committee through the work of six subcommittees has proposed changes of its own in grand jury procedure. These Committee grand jury proposals were presented to the governing Council of the Criminal Justice Section in May. These proposals have not been approved by either the Section Council or the House of Delegates of the American Bar Association, and consequently are not the approved policy of the American Bar Association *or* the Section.

The ABA has taken several positions in connection with proposed Congressional legislation which may be of interest to your committee. They are as follows:

### I. H.J. RESOLUTION 46

The American Bar Association opposes, in principle, House Joint Resolution 46, which would amend the 5th Amendment to the United States Constitution, to eliminate the requirement that a defendant to be charged for any "capital or otherwise infamous crime" against the United States be proceeded against by way of indictment. Although we are mindful of the expense and time consumed in presenting many federal offenses to a grand jury which might more efficiently be prosecuted by way of information (forgery and uttering, interstate transportation of a stolen motor vehicle, etc.), we are unable to propose a satisfactory resolution to this problem which would be short of Constitutional amendment.

We note that the difficulty of presenting every felony case to a federal grand jury may take on added importance in the future in light of the recently enacted Speedy Trial Act, which will place a substantially increased burden on both the prosecutor and the grand jury process itself.

### II. H.R. 1277

The American Bar Association endorses in principle certain amendments to Titles 18 and 28 of the United States Code as proposed by H.R. 1277, and opposes in principle certain other amendments.

We support in principle Section 2(a) of H.R. 1277, to the extent that it would amend the extant recalcitrant witness statute (28 U.S.C. 1826(a)) to prohibit multiple confinements of a witness upon subsequent refusals of the witness to testify about the same transaction.

The Association also supports in principle Section 2(c) of H.R. 1277. This would permit a witness before a federal grand jury to allege a violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 251, commonly referred to as the "Federal Wiretapping Act") as a defense to an action brought against him or her under the recalcitrant witness statute of which I just spoke, 18 U.S.C. 1826 (a).

In addition, the Association supports in principle Section 4(a) of H.R. 1277, which, by the addition of 18 U.S.C. 3330A(c) and by an amendment to Rule 6(d) of the Federal Rules of Criminal Procedure, would entitle every witness called to testify before a grand jury to have counsel present in the grand jury room in order to advise the witness of his or her rights in connection with that appearance.

Finally, with respect to Section 5 of H.R. 1277, the American Bar Association supports in principle the amendment to 18 U.S.C. 6002, which would permit the granting of "transactional" immunity from prosecution to a witness, rather than "use" immunity as presently provided for in federal law, and in Section 3111 of the proposed revision of the Federal Criminal Code (S. 1, 94th Congress).

Two subsections of H.R. 1277 are supported in principle by the American Bar Association, subject to suggested revisions.

Section 2(c) of H.R. 1277 would proscribe the unauthorized disclosure of grand jury information, and the solicitation or attempt to obtain unauthorized disclosure. The Association would support this section if it were amended to provide an *increase* in the penalties for such disclosure. Section 4(a) of H.R. 1277 would add 18 U.S.C. 3330A(c) with respect to delaying the appearance of an immunized witness upon service of a subpoena. The bill would provide a one-week period between service of subpoena and the witness' scheduled appearance unless the government shows special need for a shorter period. The Association would support this provision in principle if it were amended to provide a 72-hour period—instead of one week—unless special need is shown by counsel for the government. The ABA's rationale in urging the 72-hour period is that the longer period would unduly prolong grand jury proceedings and would reduce the effectiveness of grand jury investigations.

The American Bar Association opposes in principle Section 2(a) of H.R. 1277, which 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. The Association also opposes in principle Section 2(b) of H.R. 1277, which would amend 28 U.S.C. 1826(b) to place the burden of opposing bail pending appeal upon the government, following confinement of a witness for a refusal to testify before a grand jury. The Association opposes in principle Section 4(a), which would add a new section (18 U.S.C. 3330) to permit a grand jury to require the Court to appoint a special prosecutor to assist the grand jury in the conduct of an independent inquiry.

### III. OTHER GRAND JURY LEGISLATION

As I have previously noted, additional legislation affecting the grand jury was introduced in the 94th Congress—specifically, H.R. 2986 and H.R. 4604, introduced by Congressman John Conyers; and H.R. 6006, introduced by Congressman Robert Kastenmeier. The official ABA policy is confined to H.R. 1277 and H.J. Res. 46, since the Section's 1975 review of pending legislation focused on those bills.

This Subcommittee should note that the ABA-approved recommendations are confined to these two measures.

The Committee on the Grand Jury of the Section has since considered the Abourezk bill, S. 3274, and again with the caveat that the action of our Committee has not been approved by either the Criminal Justice Section Council or the ABA House of Delegates, and represents only the views of our Committee members, made the following recommendations:

The Committee approved the provisions of the Abourezk bill except that it would amend ¶ (c), page 11, by inserting the words "except perjury," following the phrase "in any criminal proceeding" on line 12. The Committee specifically approved the provision which would prevent calling a witness before the grand jury if the attorney for the government has been notified in writing that the witness will invoke the Fifth Amendment.

Turning to other provisions in Sen. Abourezk's bill, some of which mirror sections of Congressman Eilberg's H.R. 1277, the ABA supports provisions of Sec. 3(a) of S. 3274 which would prohibit multiple confinements of a witness upon subsequent refusal of the witness to testify about the same transaction. With respect to Sec. 2(a)(1) of S. 3274, the Association has adopted policy opposing the reduction from a maximum of 18 months to 6 months for civil contempt; I should point out, however, that my Committee has urged a maximum of 12 months—and will be asking the ABA to reconsider its current position on this. As in the Eilberg bill, the ABA opposes the portion of Sec. 4(a) in S. 3274

which authorizes a special independent inquiry and appointment of a special prosecutor.

The Association strongly favors allowing counsel for a witness to be present in the grand jury room during his/her appearance; this is included in Sec. 4(a) of the Abourezk legislation.

Going beyond the currently-approved ABA policy and its applicability to S. 3274, our Committee's proposed standards address a number of additional provisions in the Abourezk bill. I will enumerate several of these. I must reiterate that these do *not* at present represent ABA-approved policies; our Committee will be seeking Criminal Justice Section and Association clearance of these positions, however, in the near future.

Our Committee's standards comport in numerous respects with portions of Sec. 4(a) of S. 3274—those provisions advising witnesses of their right to counsel before their appearance (proposed § 3330A(b)(1)); immunizing from prosecution any witness not so advised (proposed § 3330A(c)); requiring a complete stenographic record of all grand jury proceedings (proposed § 3330A(i)(1); requiring that such transcript be promptly furnished to the witness after his/her appearance (proposed § 3330A(i)(2)); providing that any witness—before testifying—may examine and copy any statements which the witness has made, and which relate to the subject matter under inquiry (proposed § 3330A(j)); and forbidding the attorney for the Government, if he/she has received written notice in advance of the witness' appearance that the witness intends to exercise the privilege against self-incrimination, from compelling the appearanec of that witness before the grand jury unless a grant of immunity has been obtained. Our Committee's standards further provide that the grand jury subpoena should indicate generally the statutory and subject areas of the grand jury's inquiry; this is consistent with the Abourezk bill (Sec. 4(a), proposed § 3330A(b)(4) and (5)).

Our Committee further applauds Sen. Abourezk for including in his legislation the provision which would require the attorney for the Government to present any exculpatory evidence in his/her possession to the grand jury (Sec. 4(a), proposed § 3330A(o)).

The Section's Committee on the Grand Jury is continuing its work and will be making further recommendations this fall to the governing Council of the Criminal Justice Section. I am pleased to report that Section Chairman Alan Y. Cole has decided to continue our Committee on the Grand Jury for another year. The Section is committed to a continuing study of grand jury reform. We believe this is important work and a task which deserves our continuing attention.

We are mindful of the duty of the members of this Subcommittee to report to the full Congress as to these hearings and grand jury reform generally. I would, nonetheless, respectfully ask you to permit us to return in the next Congress if further hearings are scheduled, when additional positions concerning the grand jury have been formally approved by the ABA House of Delegates.

I would be happy to answer any questions you may have with respect to our position on the grand jury.

Mr. LEVINE. Our last witness for this morning's hearing is Prof. Melvin B. Lewis.

Professor Lewis is a professor of law at the John Marshall Law School, Chicago, Ill. He is an official of the National Association of Criminal Defense Lawyers, serving that association as chairman of its Legislative Committee.

## TESTIMONY OF MELVIN B. LEWIS, PROFESSOR OF LAW, JOHN MARSHALL LAW SCHOOL, CHICAGO, ILL.; AND CHAIRMAN, NATIONAL LEGISLATIVE COMMITTEE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. LEVINE. Professor Lewis, the committee is grateful that you have come all this way to join us this morning. We thank you.

Mr. LEWIS. Well, for my part, sir, I am very grateful for the opportunity to be here and very deeply encouraged, sir, as is my association.

by the apparent willingness of the Congress to consider the various serious problems that have been generated by the grand jury procedures as presently practiced.

I have prepared, as you are aware, sir, a written statement on behalf of the association and would ask, if I may, that that be made part of the record here.

Mr. LEVINE. Your written statement will be made a part of the record and inserted at the end of your testimony. Could you give the committee, perhaps, a summary of its contents?

Mr. LEWIS. Well, sir, as you are aware, I represent the National Association of Criminal Defense Lawyers. It is customary to commence any apologia for present grand jury practices, with a recitation of the historical significance of the grand jury as a meaningful protection to persons who might be accused of crime. And in fact, it is an expressly articulated constitutional safeguard. Given that repeated acclaim of the grand jury system as a protection for the innocent, it might be assumed, at least by a visitor from Mars, that as a representative of the criminal defense bar I would be here to utter praise for that system.

In fact, nothing could be a greater shock to any knowledgeable person than to hear praise of grand jury procedures emanating from a lawyer engaged in the defense of citizens accused by their government. That is a shock, sir, which will not be felt here this morning.

A special poignancy, I think, attaches when any criminal defense lawyer discusses the subject of grand jury problems. My claim to your attention today derives less from my professional state, which is a relatively recent one, than from a period of better than 23 years as a practicing lawyer.

I can recall, in fact, a happier day when the term "jailhouse lawyer" referred to a jail inmate who, by force of his occupation, had become engrossed in the law. This meaning today, alas, is vastly different indeed—almost the converse of that. We as lawyers have in recent times become quite literally a principal target of grand jury procedures, not in consequence of our personal activity, but rather in consequence of the knowledge which we vicariously derive from our clients.

I might commence by expressing an area of very substantial agreement with the witness who just testified—Mr. Gerstein. As a newly appointed member of his committee, I suppose it devolves upon me to express some agreement with him as chairman, and I will therefore agree with him wholeheartedly in his comment that the problem is Federal rather than State.

I would add this caveat—it is a Federal problem for the present. We can feel all across this country an impatience among the less thoughtful segments of the press and public based on the proposition that State prosecutors do not seem to be handling the grand jury weapon with the same effectiveness as do Federal prosecutors.

The Federal judicial system is, in this context, the teacher, the example for its State counterparts and it will not be long before this problem can no longer be isolated as a Federal phenomenon.

It is easy to become strident, I think, in one's discussion of grand jury problems. It may, however, be that restraint would necessarily reflect an absence of candor.

This committee has expressed this morning an interest in specific instances of abuse of grand jury procedure. This is an area in which I believe that my association is almost uniquely equipped to comment.

There are only two meaningful sources of information as to what really goes on. A grand juror is not one of those two sources, for the grand juror knows only what takes place in the grand jury room. A sophisticated view of the impact of the grand jury system can be derived only from a prosecutor or from a grand jury witness. The latter group is not only inarticulate and presumptively discredited by reason of this status, but quite beyond that, predicated upon their earlier experiences as witnesses, the members of that group really are very unlikely to volunteer to resume that role for any cause whatever.

That second view, therefore, I suggest, must be presented by the defense bar, and this is the only such opportunity which we have had to this time. We very much welcome it.

Our only reservation is that the problem is of such scope, such dimensions, that within the period of 10 minutes it really is not possible, meaningfully, to scratch the surface.

Grand jury subpoenas can and frequently do become a very expedient police substitute for an arrest warrant. The forthwith grand jury subpena in Federal practice can literally be used in the absence of probable cause as a basis upon which to barge in on a citizen, quite literally, sir, take him into custody for all meaningful purposes, bring him before a grand jury, and there, in the absence of any warning as to his rights, in the absence of any advice as to his status, in the absence of counsel, bring him into a chamber where he is interrogated in an atmosphere of consummate hostility, and exploit him in a manner which we would regard as completely intolerable if done in a police station. Yet, this is accepted as a feature of the grand jury process because of the fact that the grand jury historically was once something other than what it is now. It is tolerated because of the fact that the very words "grand jury" brings to our minds a nebulous notion of an institution worthy of real veneration. Historical it may be, but historically, sir, it is very much in the position of a proverbial ax that belonged to George Washington which had four new heads and seven new handles, but is still claimed to be the same ax.

Fundamentally, it has changed beyond recognition and the situation may well be irretrievable.

In that latter context, let me mention one very specific illustration of an all-night grand jury which sent agents roaming through the Chicago area with John Doe subpenas.

They were used to pull in for coercive and unanticipated questioning, to be polite, people found on the streets who were thought to be participating in gambling, in prostitution, what have you. Those persons were served forthwith subpenas, taken by armed and badged agents into a car, and hustled to the grand jury chamber. Such arrestee-witnesses are released only when the grand jury is done with them.

In almost any setting, however, it is quite routine to see a policeman of any type assigned, to any agency place in a position to say to a citizen gifted with the theoretical right to tell a policeman that he would rather not be bothered in such terms as may fit within his lexicon—the policeman can say to that citizen, "If you will not talk to me

you will talk to a grand jury." He is not bluffing. He may very well have a grand jury subpena in his pocket.

That grand jury subpena may or may not have the name of the person thus addressed inscribed thereon, but this is a defect that can be remedied very quickly.

When responding to a grand jury subpena it is quite common for the witness to be directed to the prosecutor's office as the vestibule to the grand jury before which he is required to appear.

He will then almost uniformly be subjected to importuning by agents or by prosecutors on the premise, "Would you not rather talk to us than to the grand jury, your supposed protector?"

This, likewise, sir, has happened and has happened very vividly in one case with which I am familiar and which involved a welfare mother who was suspected of having received unauthorized welfare checks.

The implications of that offense in terms of the survival of the Republic was really quite patent to those persons charged with collection of whatever overpayments may have been made. I believe, however, to be fair, there was also some suggestion that some checks had been taken which had been intended for other people.

In any event, a postal inspector visited her, served her with the grand jury subpena and said, "You have your choice. You can go to the grand jury or you can come to my office where your rights will be better protected."

She came to his office. She was then locked into a room virtually for the entirety of the day, interrogated repeatedly, and told that it had not yet been decided when or whether she might go home. Ultimately she confessed, resulting in her indictment. When the method of interrogation was brought to the attention of the judge, the prosecutor defended this practice on the ground that the postal inspector had really done nothing more than that which could have been done anyway before a grand jury, and that grand jury subpenas are thus employed as a matter of routine and of right.

My point ultimately is this—it is all well and good to say that the grand jury is no longer a meaningful force for the protection of individual citizens, but that does not begin to approach the problem.

The fact is that a grand jury is really nothing more than a police instrumenality and cannot be judged by any standards different from those which we would employ in the case of any other police agency. There are many more dimensions to the problem. I will try to limit myself to the most significant of these.

The grand jury problem, of course, cannot be divorced from the problem generated by the concept of "use" immunity, 18 U.S.C. 6002, and the *Kastigar* decision. The upshot of all of this is that any citizen can be brought before a grand jury, given "use" immunity, which means nothing more than the prosecutor promises that his testimony and the fruits derived therefrom will not be used in the event the witness is prosecuted for any purpose other than impeaching the witness if he later says something different; and given that rather meager consolation he is then faced with what has been very aptly described as the cruel trilemma of contempt, perjury, or self-accusation.

Now, several members of the Supreme Court as presently constituted—and I emphasize as presently constituted—have recently

recognized the proposition that the problem with fifth amendment violations is that the information thus derived becomes unreliable. But what do we say then of the information derived from a grand jury witness who is told fundamentally, "Either you are going to go to jail or if you testify in a manner at variance with the prosecutor's theory of the case, as to which he already has some evidence, you will be charged with perjury." The perjury charge presents no special challenge to the prosecutor because of the fact that the *Kastigar* statute was enacted as part of a very broad legislative package which also repealed the "two-witness" rule in Federal perjury prosecutions. Alternatively, if the witness indulges in self-accusation, he has advised the prosecution that he will have no defense if he is indicted.

A witness placed in that position has abolutely every incentive in the world to ask himself, in response to any given question, whether his primary consideration ought to be not what is true, but what is in his self-interest. This is a problem which is exacerbated if he is told also that if he tells "the truth", that is, that which corresponds with the prosecutor's view of the facts of this case, then he will not be charged with anything. Under those circumstances, the obvious way out is to say what the prosecutor wants to hear, and almost inevitably he will say that.

Of the many other serious problems, I would give special emphasis to the impact of the *Calandra* line of cases, *Calandra* facially says nothing more than that a fourth amendment violation does not preclude the questioning of witnesses before the grand jury with regard to matters derived from that fourth amendment violation.

Implicitly, *Calandra* means that a policeman has every incentive to violate the fourth amendment because, even though he may not be able to use the matter which he thus seizes in direct prosecution of the person from whom it is seized, he can nonetheless use it before a grand jury as a means of coercing the person from whom it is seized into telling everything he knows about it.

But very much more sinister than that, I think, are the implications of *United States* v. *Weir*, which is cited in my written presentation.

In *Weir*, a suspect was taken into custody by Mexican authorities and, according to the uncontradicted evidence, he was interrogated by the following methods: his head was held under water until he passed into unconsciousness; he was hanged from a tree until he passed into unconsciousness; knives were stuck into his buttocks and legs; he was pummeled physically, and this went on for a protracted period of time, following which he confessed even, sir, as would you or I, given that type of stimulus.

The Mexican authorities then deported him. He was met at the border by a Federal agent who handed him a grand jury subpena and took him before a grand jury where he was interrogated concerning the matters which he had disclosed to the Mexican police in consequence of torture; and I use the word "torture" advisedly.

He objected on the premise that the grand jury inquiries could not be predicated upon outright torture. The court majority responded that *Calandra* compels the opposite view, and that torture is indeed an acceptable basis for grand jury inquiries to a witness, and if the victimized witness refused to answer the question, having been

granted "use" immunity, he may then be sent to jail—under the present state of law, for quite literally as long as they choose to hold him.

I cannot see how, other than as a matter of basic repugnance—if we as a people are still capable of that—I cannot see how but for that if it exists, the rule would be different if it had been an American policeman who had committed those barbarities upon that same witness.

I say to you, sir, that if the time comes when our form of government, as we now know it, is rendered totally unrecognizable; if the time comes when the relationship between citizens and sovereign will have become so totally realined that our Constitution itself becomes ephemeral; that time will come largely in consequence of the veneration that we display toward the institution known as the grand jury, whose very name, sir, I suggest is no longer to be justified.

Thank you.

Mr. LEVINE. Thank you, Mr. Lewis.

In the few minutes we have remaining this morning, Chairman Tunney has asked me to ask you some questions.

Mr. LEWIS. Yes, sir.

Mr. LEVINE. There was one topic covered in your prepared statement which you did not touch on this morning—grand jury subpenas issued against attorneys——

Mr. LEWIS Yes, sir.

Mr. LEVINE [continuing.] To discuss aspects of their relationships with their clients.

In your prepared statement, you suggest that the bounds of normal attorney-client privilege——

Mr. LEWIS. I suggested what?

Mr. LEVINE. That the bounds of normal attorney-client privilege are not sufficient to deal with this problem.

Do you have any examples of this problem? What legislative remedy do you suggest?

Mr. LEWIS. Well, yes, sir.

I have numerous examples. This is a phenomenon which has become really quite common over the course of the past couple of years; and again, sir, the recorded cases represent only the tip of the iceberg because of the fact that the availability of this remedy will very frequently cause a concession dispensing with the necessity for litigation; but examples—well, for the recorded cases, I might ask you to consider the *Stollar* case out of New York.

In that case, which was characteristically and aptly, I think, characterized by the court as a knee-jerk reaction; the prosecutor, lacking knowledge of the whereabouts of the defendant, simply subpenaed the defense lawyer before the grand jury and attempted to compel him to disclose it. This same thing is going on right now in the *Coppleman* case, an outgrowth of the Wounded Knee prosecution in South Dakota.

The *Michaelson* case, out of the ninth circuit—and I am sure you are familiar with that. I am also sure the *Fisher* and the *Kasmir* cases, decided by our Supreme Court only late last June, must likewise have come to your attention. Those latter cases go to the proposition that where a person under investigation turns over documents to his attorney to prepare his defense—those cases involved income tax viola-

tion charges, but the principle extends to any charge and to almost any preexisting documents, especially in the light of *Couch* and *Andresen*, the attorney can be forced by grand jury subpenas to divulge or to turn over those records to the prosecutor.

There are many other illustrations available, and I do not say this lightly, I suggest to you that this constitutes a meaningful wedge between attorney and client.

Any client must be concerned at the possibility that what he discloses to his lawyer may ultimately wind up being exposed before a grand jury if in fact it can be contended that it is not protected by the privilege. And the bounds of that privilege as normally perceived have been contracted quite drastically over the past few years.

In the light of the Supreme Court's proposed rule, which was abrogated by Congress, concerning the attorney-client privilege as a part of the Federal Rules of Evidence, and in consequence of recent court decisions, although the layman is under the impression that whatever he tells his lawyer is sacred, in point of fact that is less and less the case with every passing day. Even beyond that, are the implications of the *Crockett* case out of the fifth circuit, which says when a defense lawyer finds that he is desired as a prosecution witness he should then cease all defense activity. This literally enables the prosecutor to intrude himself into the selection of counsel.

Mr. LEVINE. Mr. Lewis, just a very few minutes remain; I have one last question.

On the subject of forms of hearing prior to trial, Senator Mathias asked Mr. Van de Kamp about three suggested methods.

One suggested reform would guarantee to the Federal defendant the absolute right to a preliminary hearing, whether or not he has been indicted.

The second reform proposal would give the defendant the option to obtain a preliminary hearing by waiving the grand jury indictment.

The third would give the defendant the right to a new form of procedure, a so-called indicting grand jury or combined grand jury-preliminary hearing where the grand jury would be presided over by a magistrate; when it sat for the purpose of indictment rather than investigation, it would run as a preliminary hearing is now run.

Do you have any comments on any of these three suggested reforms?

Mr. LEWIS. Yes, sir.

I would think that the right to a preliminary hearing, while not necessarily rectification of any of the more serious grand jury abuses, is a very meaningful safeguard in itself.

There is a case which elegantly discusses this proposition—*Washington* versus *Clemmer*, back some 15 years ago.

Fundamentally, it would extend to a prospective defendant the right, at least, an attempt to demonstrate the unreliability, if he can, unreliability of the witnesses upon whom the Government plans to rely in subsequently indicting him.

I strongly favor these proposals. The notion of a presiding magistrate in the grand jury proceedings, well, this would necessarily depend upon what his function might be and what his authority might be.

I have read only this morning a presentation which suggests to this committee, for example, that counsel have no place in the grand jury

room because there really are no rights of which they can advise their clients. I suggest that a comfortable performance in the thaumaturgical realm would be called levitation. Having denied the rights, we now say there is no need for him to have counsel, because he has no rights of which counsel might advise him, it has quite literally come to that. The idea itself is eloquent.

As to the proposal giving a defendant the right to waive grand jury indictment in favor of a preliminary hearing, I suggest almost all of them would elect the preliminary hearing; however, that would not solve any of the serious abuse problems presently associated with grand jury proceedings.

Mr. LEVINE. Thank you.

You mentioned the case of *Washington* v. *Clemmer*, with which the committee is quite familiar. In that case the distinguished jurist J. Skelly Wright of the U.S. Court of Appeals, District of Columbia, rendered a highly significant opinion on the rights of defendants prior to trial.

Does counsel have any further questions?

Mr. WILKA. I have a couple of questions.

Mr. Lewis, there has been legislation introduced by Senator Abourezk which would allow a witness to have counsel inside the grand jury chamber. I know that you agree with this.

Mr. LEWIS. Strongly.

Mr. WILKA. What role do you think counsel should play, and what limits, if any, should be placed upon counsel's participation before the grand jury?

Mr. LEWIS. Well, minimally—minimally, the lawyer should be allowed to sit and consult with his client as Mr. Gerstein I think very eloquently analogized in the same manner as would be permitted of a witness at a legislative hearing.

One such piece of advice that such a lawyer might give is that the atmosphere has become so hostile and coercive that this might be an appropriate time for the witness to simply announce that he desires to excuse himself and to apply to the judge for a protective order.

The very availability of that kind of remedy would, I suggest, strongly tend to diminish the likelihood of many of the types of abusive practices of which we hear now within the grand jury chambers. There is only so far, I would suggest, that a prosecutor or a grand juror might go in an attempt to intimidate or harass or insult a witness in the presence of that witness' attorney.

As to whether counsel should be permitted to go beyond that function and articulate anything directly to the grand jury or to the prosecutor, I should like to see it, but I would advise against attempting it because I would suggest that such a reform might much more readily become palatable to those who have a blind veneration for the grand jury system, if in fact there were a prohibition against the lawyer transcending those boundaries. Accordingly, although I would like to see it, I would think from a practical standpoint, such legislation ought not to extend any rights beyond those which I have just expressed.

Mr. WILKA. Do you think that there is any merit in the assertion by the Department of Justice that multiple representation represents a conflict of interest for the attorney before the grand jury?

Mr. LEWIS. Well, sir, it represents the potential, of course, just as a single representation presents the potential.

I am delighted, of course, to see that the Department of Justice adopted this posture of recognition of the relationship between the potential for abuse and the likelihood of abuse. I think that within the context of discussion of grand jury problems such a recognition is really quite heartwarming and very healthy. I suppose that really, any witness appearing before a grand jury might consult and retain a lawyer whose primary allegiance conceivably could be to higher ups in some chain of criminality.

The multiple representation problem considered in *In re Grand Jury* versus *Pirillo* case in Pennsylvania, generally reflects that approach: that the problem with multiple representation is that the witness' lawyer is unlikely to initiate a discussion with the prosecutor on the subject of amnesty for the less involved because of his duty to the more heavily involved, whom he also represents. The Department urges the adoption of a presumption of chicanery against the defense bar.

I suggest to you that this puts the cart quite far in front of the horse—so far, in fact, that I believe the horse has a little bit of difficulty exerting any meaningful pressure on the wheels. I can't imagine that we are prepared to say that it has somehow become the duty of the defense lawyer to advocate to an implicated grand jury witness the desirability of cooperation where the prosecutor has not himself raised that point. The prosecutor is not injured when he does not get that which he has not requested.

Now, at the posture at which a prosecutor might announce that he is prepared to give immunity to those who would testify, that they themselves were lightly involved, and that others were heavily involved, at the point at which he made that announcement, thereby articulating a policy which many people believe to exist in almost all situations, and at the point at which he demonstrates an uncritical prospective willingness to accept the reliability of any testimony thus induced, then I suggest that the problem of conflicting representation might well arise; but I do not believe that it is there in advance of that. And at that point, we would have a frank acknowledgement that the purpose of the multiple-witness grand jury investigating is to precipitate a race to the prosecutor's office, with the prize going to the most opportunistic of the suspects thus subpenaed.

Mr. WILKA. You have raised the problem of the use of the grand jury subpena as a coercive device to require a witness to appear in the prosecutor's office.

Mr. LEWIS. Yes, sir.

Mr. WILKA. You told us that the threat of formal grand jury proceedings may be held over the witness to induce him to or to induce her to cooperate informally in questioning.

What specific legislation could you suggest to the Congress to deal with that problem?

Mr. LEWIS. First of all, sir, I suggest that there should be a flat prohibition against any person representing himself as the agent of the grand jury. He may be authorized to serve a subpena, but beyond that he should have no authority whatsoever, should not represent himself as having any authority whatsoever, and should not represent himself as an agent acting on behalf of the grand jury, particularly

given the virtual certainty the grand jury never heard of him. He ought to be required simply to serve the subpena and depart without offering comment or advice.

In terms of coercive questioning on the part of a prosecutor, I believe, sir, that a grand jury subpena should not be used to get people to talk to prosecutors. That is simply not its purpose. The purpose, if we can see any validity to this grand jury procedure, is to get people to talk to grand jurors. The prosecutor as such has no power to issue a subpena or to compel disclosures. I believe, therefore, that it should be likewise a codified impropriety for a person responding to a grand jury subpena to be told that he might have a conversation with someone else as an alternative to that.

Mr. WILKA. I just have a few further questions, Mr. Lewis, and that relates to the legislative effort to increase the independence of grand jurors.

I assume that you would favor moving in that direction; am I correct?

Mr. LEWIS. Strongly, sir.

I question the practicability, but I would strongly favor it.

Mr. WILKA. That is the point to which I am directing my question.

Senator Abourezk's bill sets forth various instructions that the court must give to the grand jury to insure that the grand jury understands their rights and their responsibilities.

What specific, additional steps, beyond those instructions, would you recommend to increase the grand jury's independence?

Mr. LEWIS. Yes, sir.

The instructions, of course, are indispensable to the achievement of that objective, but I think the grand jury can also become substantially more independent in a meaningful way if among those instructions are included certain caveats relative to immunity grants and contempt citations. If the grand jury is furnished a clearly defined standard by which they must judge a prosecutor's requests for such actions, and if the votes on such actions are taken outside the prosecutor's presence, just like votes on indictments, it might help.

I would also think that it might add to the independence of the grand jury if the grand jury composition were perhaps to include one or more lawyers from private practice. I don't know how well, in practicality, that would work. I do not really know how realistic it is to conceive of an independent Federal grand jury in the Federal system today.

Mr. WILKA. So there is nothing which you can recommend legislatively beyond the instructions can see the Congress do?

Mr. LEWIS. No; I really do not think that the idea of an independent grand jury is feasible.

I ask you to consider, sir, you have got a group of laymen drawn pretty much at random, thrown into an extremely complex environment, and they are told to be independent. It is an impossibility. They do not know what a subpena is, let alone how to issue one.

They do not know what their rights are and how to go about implementing those rights. They do not know how to prepare an indictment, and they are totally dependent upon the prosecution legal staff which appears before them. I cannot see how, conceivably, meaningful independence for such a group is a reasonable anticipation.

Mr. WILKA. Thank you, Mr. Lewis.
I have no further questions.
Mr. LEVINE. Thank you, Mr. Lewis.
[The prepared statement of Melvin B. Lewis follows:]

PREPARED STATEMENT OF MELVIN B. LEWIS, LEGISLATIVE CHAIRMAN, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

SUMMARY OF THE POSITION OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS WITH RESPECT TO S. 3274

The Association strongly approves the captioned bill. Like all citizens, we are indebted to the authors and sponsors of this legislation for pointing up with dramatic emphasis an area of serious concern in the administration of criminal justice.

We would respectfully suggest, however, that the following closely-related problems should be taken into consideration:

1. The use of the grand jury subpoena as a coercive device to compel disclosures to investigators, and as a subterfuge to obtain office interviews of prospective witnesses by government officials.
2. The use of the grand jury to subvert relationships of confidentiality, including the attorney-client relationship.
3. The implications of routine resort to "use" immunity procedure in the absence of genuine need for such drastic remedy.
4. The problems which derive from directing grand jury process to prospective criminal defendants.
5. The need for safeguards against serious inconvenience to grand jury witnesses deriving from the setting of the time and place of their appearances.

*Suggested additional provisions*

The Association would respectfully suggest that consideration be given to modification of S. 3274 in the following particulars:

A. prohibiting all persons from representing themselves as agents of the grand jury for any purpose other than the ministerial service of process; from interrogating any witness in the course of service of a grand jury subpoena; and from suggesting or offering to any person named in a grand jury subpoena an interrogation or conference as an alternative to or limitation of the scope of the questioning of that witness before the grand jury.

B. Adding, after the word "privileged" on line 3 of page 16: "(iii) The impairment or disparagement of the right of any person to counsel of his choice or of other lawful confidential relationship which would result from compelling the witness' testimony, would outweigh the value of that testimony, even though no privilege exists; or (iv) . . ."

C. Limiting immunity proceedings for grand jury witnesses in accordance with the concepts expressed within *United States* v. *Mandujano*, May 19, 1976, 44 L.W. 4629, 4633 and 19 Cr. L. 3087, 3091—i.e., to matters "of such overriding importance as to justify a grant of immunity to the witness". To implement that concept, we suggest that the phrase "and that the testimony or information thus sought is of such overriding importance as to justify a grant of immunity to the witness" be inserted following the word "cause" at lines 7 and 12 of page 2. We further suggest that at page 7, line 5, the paragraph presently numbered (8) be renumbered (9); that each subsequent subparagraph be renumbered by one higher digit; and that a new paragraph (8) be inserted as follows: "The fact that a grant of immunity to a witness is the exception and not the rule; that if the desired testimony is of marginal value, the grand jury should normally pursue other avenues of inquiry; and that immunity should be sought only where the information is of such overriding importance as to justify that procedure."

D. Providing that the indictment of any grand jury witness by the grand jury before which he appeared, or in relation to any matter concerning which he was questioned before any grand jury, shall operate to purge any contempt predicated upon his refusal to testify or produce evidence before a grand jury.

E. Adding a clause which would entitle any defendant charged with perjury before a grand jury to:

(1) Severance of the trial of the perjury charge from the trial of the substantive offense; and

(2) Dismissal of the perjury charge if it can be shown that a primary purpose of calling him before the grand jury was to charge him with perjury incident to his testimony before that grand jury.

F. Prohibiting the service of any grand jury subpoena returnable outside the district in which it is served unless, on motion of the grand jury, a court shall have found that the information desired from the witness cannot be obtained in substance from any reasonably available source within or closer to the district in which the subpoena is returnable. Further, provision should be made for simplified procedure and relief within the district of service where a witness desires postponement of his extra-district appearance.

*Suggested stylistic modifications*

1. We suggest that the phrase "or any related" be inserted following the word "same" at page 3, line 24; page 5, line 13; and page 16, line 9. We further suggest adding the phrase "or any matter concerning which the prosecutor might with reasonable diligence have known at the time of the first contempt adjudication that the testimony of that witness might be material". We further suggest that at p. 16, line 9, the words "before any grand jury investigating" be deleted and replaced by the word "concerning".

2. We suggest that line 19, page 4, be changed to accord with line 10, page 17, so that within line 19 of page 4 the phrase "seized or otherwise" will be inserted following the word "evidence".

3. We suggest that that portion of Section 3330(b)(1) preceding the words "the grand jury" be deleted (p. 9, lines 7–9).

4. We suggest that at line 7 of page 20 the numbers "2514" be changed to "6003".

5. We suggest that provision be made for production and disclosure of the stenographic record required by § 3330A(i)(1) (lines 13–24, page 13) whenever relevant to a contempt proceeding, a motion to dismiss an indictment, or a trial.

6. We suggest that the following sentence be added immediately after the word "investigation" at line 7 of page 17: "He shall not in any way express to any witness a coercive statement or threat, or an opinion that the witness' testimony is untrue."

7. Revising Section 3330A (o) and (p)(3) to make it explicit that those provisions do not require the production of testimony or evidence from the prospective defendant under investigation.

8. Clarifying whether the illegality contemplated by Section 3330A (n) and (p)(4) must be one as to which standing to object is possessed by the witness under interrogation or the person indicted or both.

COMMENTS OF PROFESSOR MELVIN B. LEWIS ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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; *Peek* 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 adjourns 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 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 information 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.

*Coercive questioning: The grand jury chamber*

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 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 misdeeds. 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 policemen.

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 which bears out his theory of guilt. Once he obtains that result—by whatever

method—he has effectively proved 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 reinforced by the decision in *United States* v. *Mandujano*, 5/19/76, 19 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 confidante 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 U.S.C. 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 prebranded 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 prospective defendant 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 de-

fendants 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 were 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 intrude 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 determina-

tion 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 Cir. 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 be accorded a position of special veneration by the American legal system.

*The immunity proceeding*

If a 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 previously 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 immensly 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 USC § 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 consideration 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 Ureal 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 of 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 contempt 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 vitality 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: 4/16/75

| | |
|---|---|
| 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.<br>(7) Local Police No.<br>(8) Local Police Zip Code | (10) Birthplace: Chicago, Illinois<br>(11) Birthdate: June 10, 1937 |
| (38) Alias: None | (20) Immunity Statute: 18 U.S.C. 6002-6003 |
| (17) Nature of Proceeding: Trial[ ] Grand Jury[X] Adm. Intake: [ ] | (12) District: Northern District of Illinois |
| (19) Name or Description of Case/Matter: United States v. Challe Otis | (13) Docket No. (if any):<br>(14) U.S. File No. (if known):<br>(18) Violation:(Title and Section): 18 U.S.C. 1955 |
| This box for Immunity Unit use only<br>(3) IRU # (4) Index # (5) Type of Request: (21) Ref. to: | |

PART B (if more space is needed, attach additional sheets)

1. 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 paper and attach as supplement.
3. All submissions should be in triplicate.

DOJ-1973 USA-167 11-6-73

Mr. LEVINE. One of the committee's invited witnesses, Justice Stanley Mosk of the Supreme Court of California, could not attend today because he is engaged in his judicial duties. Justice Mosk has submitted a detailed statement, however, which will be included in the record of these hearings at this point.

[The prepared statement of Hon. Stanley Mosk, associate justice, California Supreme Court, follows:]

PREPARED STATEMENT OF HON. STANLEY MOSK, ASSOCIATE JUSTICE, CALIFORNIA SUPREME COURT

Mr. CHAIRMAN: I am in favor of S. 3274 because it is a significant step in the right direction. However, in all candor, it does not perform on the grand jury

system the major corrective surgery which I believe is necessary to cure the constitutional infirmities tolerated by both federal and state courts.

Two preliminary matters need detain me but a moment. First, I am concerned here only with the grand jury's indicting process and not its investigative function, nor with questions relating to selection of its membership (see Mar. *California Grand Jury: Vestige of Aristocracy* (1970) 1 Pacific L.J. 36). The grand jury serves a valuable and productive role in the area of investigation, particularly with respect to government corruption or ineptitude. Its public reports to the citizenry serve a salutary governmental and educational purpose. (See my dissent in People v. Superior Court (1973 Grand Jury) (1975) 13 Cal. 3d 430, 442.) With regard to selection practices, there may lurk constitutional issues to be confronted in the future, but they are not relevant to this hearing.

Second, the traditional response that the grand jury is per se constitutional because of its express inclusion in the Fifth Amendment is unpersuasive. It should be obvious that the Constitution recognizes the grand jury as an institution; it does not delineate how the system is to be administered. It is not the existence of the grand jury which is at issue; it is the procedure, undefined in the Constitution, which is questionable.

To give you my bottom line at the outset, I favor legislation which would guarantee to the accused his right to a preliminary hearing, whether or not a grand jury indictment is secured first.

There are differences between federal and state grand jury procedures, on which I shall touch later in my statement.

In most states there are two widely disparate methods of initiating a felony prosecution: indictment and information. The choice, with no guiding standards in either statute or case law, is subject to the uninhibited strategy or whims of the prosecuting attorney. Both prosecutorial methods are ostensibly designed to insure there is probable cause to believe that a felony has been committed and that the accused is guilty of it before he is subjected to the rigors, the expense, the jeopardy, and the obloquy of a trial. But here the similarity ends. If prosecution is begun by information the accused immediately becomes entitled to an impressive array of procedural rights, including a preliminary hearing before a neutral and legally knowledgeable magistrate, representation by retained or appointed counsel, the confrontation and cross-examination of hostile witnesses, and the opportunity to personally appear and affirmatively present exculpatory evidence.

By contrast, the indictment procedure is distinctive because of its deliberate omission of even minimal safeguards. California Penal Code section 939.7 captures the spirit of the proceeding by declaring forthrightly that "The grand jury is not required to hear evidence for the defendant . . ." Far from being allowed to be represented by counsel or to confront and cross-examine witnesses, the accused himself has no right to appear unless called by the prosecution and if he is called he is denied the presence of counsel. The proceedings are conducted in absolute secrecy, and and in many cases the prospective indictee may not even be aware he is the subject of an inquiry. The members of the grand jury, constitutionally organized to provide a bulwark of objectivity between the citizen and the zealous prosecutor, are reduced to total reliance on the very public official whose potential excesses they are designed to check. In its raw state, the proceeding raises the spectre of the Star Chamber: the prosecution is able to "dry run" its case in secrecy, and the jurors are able to do little more than rubber stamp the recommendation of the district attorney. As I shall demonstrate, this disparity between the rights accorded defendants whose prosecutions are begun by indictment and those who are proceeded against by information raises grave issues of constitutional magnitude. Indeed, much recent commentary on the grand jury has been strongly critical. (See, e.g., Antell, *The Modern Grand Jury: Benighted Supergovernment* (1965) 51 A.B.A.J. 153; Comment, *Grand Jury Proceedings: The Prosecutor, The Trial Judge and Undue Influence* (1972) 39 U.Chi.L.Rev. 761; Comment, Federal *Grand Jury Investigation of Political Dissidents* (1972) 7 Harv. Civ. Rights-Civ. Lib. L. Rev. 432; see generally Lubbers, Annotated Bibliography on the Grand Jury (1974).)

The history of the various modes of initiating prosecutions reveals that analogy to early discredited English practice is not mere hyperbole; it appears we have now come full circle and returned to the pre-Runnymede era when "le graunde inquest" was merely an agency of the crown. Most authorities date the origin of the grand jury to the Assize of Clarendon (1166) in the reign of Henry II. (2 Pollock & Maitland, The History of English Law (2d ed. 1909) p. 642 (herein-

after Pollock & Maitland) ; 1 Holdsworth, A History of English Law (1903) pp. 147–148 (hereinafter Holdsworth) ; 4 Blackstone, Commentaries, p. 301). It was there provided that 12 knights or "good and lawful men" of every hundred and four were to declare under oath the identities of those in the community suspected of public offenses. All persons thus "presented" were then tried by ordeals (Edwards, The Grand Jury (1906) p. 7 (hereinafter Edwards)), a method undeniably more barbaric than the present ordeal of trial. Failure to demonstrate innocence at the ordeal resulted in banishment and the loss of a hand and a foot; success at the ordeal was rewarded by mere banishment. (*Id.* at p. 9.)

Incidentally, there is a technical difference between an indictment and a presentment. A presentment is an accusation made by the grand jury itself, flowing from the knowledge and personal observation of the members. An indictment comes to the grand jury as a charge from without, usually from a prosecutor or the king's officer, to which the grand jury either returns a true bill or a bill of "ignoramus."

"Slowly the character of the institution changed. Originally an important instrument of the Crown, it gradually became instead a strong independent power guarding the rights of the English people." (Younger, The People's Panel: The Grand Jury in the United States, 1634–1941 (1963) p. 2 (hereinafter Younger).). By 1352 the panel that accused no longer assumed responsibility for the trial itself, and the first seeds of the present bifurcated system of grand and petit jury were sown. (2 Pollock & Maitland, p. 649.) As the age of royal absolutism developed, this body of freemen became a singularly effective deterrent to politically motivated prosecution by the crown. The return by one famous grand jury of a bill of "ignoramus" in the attempted prosecution of the Earl of Shaftesbury in 1681 is frequently cited as demonstrating the evolution of the institution from a prosecutorial arm into an agency responsible for protecting the individual from officially sanctioned oppression.

Thus Edwards states: "So far as we have considered it, we have found it to be an arm of the government, acting as a public prosecutor for the purpose of ferreting out all crime, the members of the inquest being at all times bound to inform the court either singly or collectively their reasons for arriving at their verdict and the evidence upon which it was based. The seed, however, had been sown in Bracton's time, which was destined to change the grand jury from a mere instrument of the crown to a strong independent power which stood steadfast between the crown and the people in the defence of the liberty of the citizen." (Edwards, p. 27.)

The establishment of British hegemony in the American colonies resulted in the exportation to our shores of British legal institutions, including the grand jury. While certain of the colonies, particularly the theocracies, altered the institution to conform to religious or social predilections, the colonists themselves continued to regard the grand jury as a fundamental feature of a civilized state. Thus when in 1683 the inhabitants of New York forced the Duke of York to permit the colonial assembly to pass a "Charter of Libertyes and Priviledges," there was included the protection "That in all Cases Capitall or Criminall there shall be a grand Inquest who shall first present the offence and then twelve men of the neighborhood to try the Offender who after his plea to the Indictment shall be allowed his reasonable Challenges." (1 Schwartz, The Bill of Rights: A Documentary History (1971) p. 383.)

"By the end of the Colonial period the grand jury had become an indispensable part of government in each of the American colonies. Grand juries served as more than panels of public accusers. They acted as local representative assemblies ready to make known the wishes of the people. They proposed new laws, protested against abuses in government, and performed many administrative tasks. They wielded tremendous authority in their power to determine who should and who should not face trial. They enforced or refused to enforce laws as they saw fit and stood guard against indiscriminate prosecution by royal officials." (Younger, p. 26.)

It is thus clear that a functional revolution in the grand jury occurred in the six centuries between the Assize of Clarendon and the adoption of the Fifth Amendment to the United States Constitution. By the time of the latter, the institution had evolved to its purest form: a citizen's tribunal, set resolutely between the state and the individual. Unhappily, the contemporary grand jury no longer serves that historic role and has regressed to little more than a convenient prosecutorial tool. On those isolated occasions when grand jurors assert their independence, they are disparagingly referred to as "a runaway grand jury."

In order to appreciate the change that has taken place since 1791 it is necessary to review the development of the parallel method of accusation: the criminal information.

Accusation by information was historically viewed with distrust, because originally it represented simply the prosecutor's naked charge which only in the last century has been checked by the development of the preliminary examination. This method of accusation is at least as old as the indictment and "came very naturally to the centralized royal justice of the thirteenth century." (Orfield, Criminal Procedure From Arrest to Appeal (1947) p. 194 (hereinafer Orfield).) Ironically, unlike the situation today, the criminal information was first seen as antagonistic to the right to indictment. Indeed even in the late 19th century this was still an open question in the United States. However, in *Hurtado* v. *California* (1884) 110 U.S. 516, the Supreme Court, over the vigorous dissent of Justice Harlan, held that the due process clause of the Fourteenth Amendment did not require an indictment as a condition precedent to a state felony prosecution.

By the end of the medieval period the unrestricted use of accusation without indictment had become so intolerable that it in practice became restricted to misdemeanors. (9 Holdsworth, p. 238; Orfield, p. 195.) But even this limitation proved inadequate, because it still enabled "all private persons to prosecute criminally any person who had offended them by any act which could be treated as a misdemeanor without the sanction of a grand jury." (1 Stephen, A History of the Criminal Law of England (1883) p. 296 (hereinafter Stephen).) In the 17th century numerous attempts were made to abolish the information entirely; although these efforts were unsuccessful, they did result in further procedural curbs. (Orfield, pp. 196–197.)

Today it is common knowledge that the vast majority of felony prosecutions in most states are initiated by information rather than indictment. (See, e.g., Judicial Council of Cal., Annual Rep. (1974) p. 45.) This results, however, in no diminution of the rights of the accused because of the development of a procedural outgrowth of the information, the preliminary hearing.

The development of the preliminary hearing led to a movement to abolish the grand jury in the 1920's and early 1930's. A commission was established by President Hoover to inquire into the matter and its report, known as the "Wickersham Report," recommended that the grand jury be abolished. The basis for the report was two empirical surveys conducted by Professor Moley of Columbia University and Dean Wayne Morse of the University of Oregon. One of the principal findings of the surveys was that grand juries tend merely to rubber stamp the recommendation of the district attorney. (Moley, *The Initiation of Criminal Prosecutions by Indictment or Information* (1931) 29 Mich. L. Rev. 402; Morse, *A Survey of the Grand Jury System* (1931) 10 Ore. L. Rev. 101; but see Dession, *From Indictment to Information—Implications of the Shift* (1932) 42 Yale L. J. 163.)

In its earliest form the preliminary examination, like the indictment and information, was an oppressive tool of the crown. Most authorities date the origin of the proceeding to the inquest made by the coroner after the discovery of a crime. (1 Stephen, p. 217; 4 Holdsworth, p. 529.) The proceeding was codified during the reign of Philip and Mary to give justices of the peace the power to conduct what amounted to a British form of inquisition. (1 & 2 Phil. & M., ch. 13 (1554); 2 & 3 Phil. & M., ch. 10 (1555).) Holdsworth condemned these statutes as permitting "an inquisitorial examination of the prisoner, not a judicial enquiry into the facts of the case. They gave, as they were designed to give, the executive some of the advantages against prisoners which were conferred by the inquisitorial procedure of foreign states; and it is not till the reforms of the last century that the examination lost its original character, and became an enquiry of a judicial nature. Such a procedure may seem strange to our modern ideas. But in the sixteenth century, it was necessary in order to secure the observance of the law and to protect the state against its enemies." (4 Holdsworth, p. 529.)

The reforms Holdsworth spoke of occurred in 1848, when Parliament decreed that defendants at preliminary examinations have the right to counsel, the right to have witnesses examined in their presence, and the right to make statements and present exculpatory witnesses. (11 & 12 Vict., ch. 42.) The enactment of these and further safeguards created the anomalous situation that accusation by information, once the bane of English civil libertarians, became imbued with far

more procedural safeguards than were available when prosecution began by indictment.

This anomaly persists to the present day, due primarily to the fact that the indicting function of the grand jury has not changed in character or procedure in centuries. By contrast, in England, the country of its origin, there is no longer a need to consider reforming the grand jury to comport with modern notions of justice and due process, because the British deemed the shortcomings of the whole grand jury system compelling enough to abolish the institution in 1933.

To get down to modern times: there is a certain folklore and mystique about the grand jury. It inspires confidence as it launches investigations and calls its fellow citizens to account for their alleged misdeeds. The underlying theory is that the institution is impervious to all coercive influences.

Unfortunately the grand jury is not totally independent in actuality. Though free to take part in the interrogation the grand jurors must place trust in the prosecutor's guidance. It is he who tells them what the charge is, selects the facts for them to hear, shapes the tone and feel of the entire case. It is the prosecutor alone who has the technical training to understand the legal principles upon which the prosecution rests, where individual liberty begins and ends, the evidential value of available facts and the weight to be given proposed evidence.

In short, the only person who has a clear concept of what is happening in the grand jury room is the public official whom these 23 laymen are expected to check. So that even if a grand jury were disposed to assert its historic independence in the interest of an individual's liberty, it must, paradoxically, look to the very person whose misconduct they are supposed to guard against for guidance as to when he is acting oppressively.

The frustrations to law enforcement under constitutional government are formidable, and one can hardly expect lay citizens to observe the kind of restraint acquired by professionals through training and bitter experience. But their frequent lack of concern with the sufficiency of legal evidence places in doubt any claim that may be made for them as guardians of individual liberty.

Moreover, because they are unable to comprehend the distinction between civil and criminal wrongdoing they are sometimes adamant about calling for criminal sanctions in cases which are essentially based upon disputes between individuals and in which the state has no legitimate interest.

Nor are grand jurors overly impressed by constitutional guarantees, such as those against unreasonable search and seizure, self-incrimination and the countless inhibitions upon the state which go into the making of due process of law, where these impede the progress of a prosecution or investigation.

Secrecy is deemed the inviolate characteristic of the grand jury. Justice Brennan, in his dissent in Pittsburgh Plate Glass Co. v. U.S. (1959) 360 U.S. 395, 405, described the purposes of grand jury secrecy:

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

But he added that "Grand jury secrecy is, of course, not an end in itself. Grand jury secrecy is maintained to serve particular ends. But when secrecy will not serve those ends or when the advantages gained by secrecy are outweighed by a countervailing interest in disclosure, secrecy may and should be lifted, for to do so in such a circumstance would further the fair administration of criminal justice." (*Id.* at p. 403.)

It is not difficult to take each of the four traditional arguments, as enumerated by Justice Brennan, and demonstrate their invalidity. (Dash, *The Indicting Grand Jury: A Critical Stage* (1972) 10 Amer. Crim. L. Rev. 807, 819–824.)

The first justification fails because when the prosecutor has probable cause, an escape of the suspect can be prevented by an arrest prior to the commencement of the grand jury proceeding. Probable cause requirements for an arrest are certainly far less demanding than they are for a grand jury presentation. The fear that the accused may tamper with witnesses lacks substance when we realize that no such protection is afforded witnesses at trial where the issue is

guilt or innocence rather than mere probable cause. Thus, grand jury secrecy provides only theoretical rather than real protection against this alleged evil.

The second argument for secrecy—to protect the innocent accused—clearly is suspect in light of the fact that, in many instances, he already has been subjected to a public session before a magistrate and bound over to the grand jury.

The third reason—to encourage witnesses and complainants to come before the grand jury and speak freely—provides little actual assistance to the prosecutor. If these witnesses are willing to come forward only in a secret proceeding, their testimony is valueless if they are unavailable at a subsequent trial. This rationale also loses sight of the fact that secrecy is designed primarily for the protection of the grand jury itself as a direct, independent representative of the public as a whole, rather than those brought before the grand jury. A witness is not a confidential informant; he must consider his testimony subject to all the obligations of oath required in any judicial proceeding.

The final reason given for maintaining grand jury secrecy—to provide for uninhibited investigation and deliberation by the jurors—merits examination. As noted previously I am not concerned here with the investigating grand jury—a body which is justified in operating secretively. Indeed, a real and practical benefit is arguably achieved by providing for uninhibited inquiry, particularly where governmental functions are involved. Such is not the case, however, with the indicting grand jury which has passed the investigating stage and has begun to focus on the accused.

With regard to the grand jurors' "deliberations," it is imperative that secrecy be preserved. As the deliberations of a petit jury shall remain private and secret in every case, so too should similar sessions of the grand jury. The protection of the juror's subjective freedom of expression in deliberation must be preserved. Deliberations, however, are but a part of the grand jury process. Just as there is no protective secrecy for the jurors hearing evidence on guilt or innocence at trial, so too it is unnecessary for a grand jury to proceed in secrecy when it hears the evidence on the issue of probable cause.

Nevertheless, most jurisdictions cling steadfastly to secrecy in all aspects of grand jury functions and maintain the other anachronistic rules of the discarded English past. When the current grand jury procedure is followed, the overwhelming probability is that an individual may be compelled to undergo the trauma of a felony trial based on an ex parte proceeding from which he and all his evidence are statutorily excluded. Indeed only a few jurisdictions have arrived at the point of recognizing that the prosecutor is under the modest duty to disclose to the grand jury the existence of exculpatory evidence of which he is aware.

In my view the indictment procedure remains constitutionally inadequate. Until the accused is given the right to demand a post-indictment preliminary hearing there is no question but that he is being denied due process at a critical stage of the proceedings, and also that there is a violation of equal protection when the rights accorded an indicted defendant are compared with those of an individual whose prosecution is initiated by information.

In Coleman v. Alabama (1969) 399 U.S. 1, the United States Supreme Court concluded that the preliminary hearing is a critical stage of the criminal process "at which the accused is 'as much entitled to such aid [of counsel] . . . as at the trial itself.'" (*Id.* at p. 10, quoting Powell v. Alabama (1932) 287 U.S. 45, 57.) The Alabama preliminary hearing was far less "critical" than its counterpart in most states, because its sole purpose was to determine if there was sufficient evidence against the accused to justify bringing the case *before a grand jury.* Nevertheless the Supreme Court held the "guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution." (*Id.* at p. 9.)

The court took pains to elaborate the reasons why counsel was necessary: "First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the

necessity for an early psychiatric examination or bail." (*Ibid.*) These same factors, of course, also dictate that indicted defendants receive a post-indictment preliminary hearing, because at present these advantages are not granted to indicted defendants.

The conclusion is inescapable that if a *pre*indictment proceeding is a critical stage of the criminal justice process requiring due process safeguards, a fortiori the indictment proceeding itself is a critical stage. Indeed Chief Justice Burger, dissenting in *Coleman*, pointed out the "anomaly" of requiring counsel at a preliminary hearing when "counsel cannot attend a subsequent grand jury inquiry, even though witnesses, including the person eventually charged, may be interrogated in secret session." (*Id.* at p. 25.) The chief justice openly wondered (*ibid.*) "how can this be reconciled" with the fact that "at the decidedly more 'critical' grand jury inquiry" there was no assistance of counsel.

The bald disparity between the rights afforded an accused at a preliminary hearing and those refused a defendant charged with an identical offense before the grand jury has led one writer to characterize the holding in *Coleman* as a "tantalizing tease": "One can imagine a prosecutor piously explaining to an accused: 'Yes, indeed, if you have a preliminary hearing, it is a critical stage of the prosecution and you are entitled to counsel. You will be able to cross-examine witnesses against you, present any testimony you wish to give, challenge whether probable cause has been established and obtain some discovery of the case against you—but, of course, that is if I permit you to have a preliminary hearing. If I choose to go directly to the grand jury, on the other hand, all these precious rights I just outlined for you are not available since you are not exposed to a critical stage of the prosecution but only to the grand jury which indicts you.' If the accused is a reader of Dickens, he will be compelled to reply: 'If the law (says) that . . . then the law is a ass. . . . ' " (Dash, *The Indicting Grand Jury: A Critical Stage?* (1972) 10 Am. Crim. L. Rev. 807, 814–815.)

The term "anomaly" tends to become overworked when the grand jury's indicting function is under discussion, but one is continually struck by the fact that this proceeding remains untouched by the safeguards which have become firmly attached to points in the criminal process of far less significance. For example, it was the law at least until recently that a casual suspect at a lineup has more rights than an accused before a grand jury. (United States v. Wade (1967) 388 U.S. 218.) Similarly, a parolee charged simply with violation of conditions of his parole has the opportunity to personally appear, cross-examine hostile witnesses, and be conditionally represented by counsel at the revocation hearing (Morrissey v. Brewer (1972) 408 U.S. 471; Gagnon v. Scarpelli (1973) 411 U.S. 778), yet none of these protections is accorded to the potential indictee. Indeed, far more safeguards protect prison inmates at disciplinary hearings (Wolff v. McDonnell (1974) 418 U.S. 539) and parole rescission hearings (Gee v. Brown (1975) 14 Cal. 3d 571) than are permitted free and presumptively innocent persons before the grand jury.

The traditional counterargument that the grand jury merely inquires into whether there is probable cause to bind the defendant over for trial, thus avoiding any need for due process safeguards, can no longer be considered valid after *Coleman*, *Morrissey* and their progeny. As noted, in *Coleman* the Alabama preliminary hearing determined only whether there was probable cause to present the case to the grand jury—not even whether there was probable cause to bind the defendant over for trial. Nevertheless the Supreme Court held that the potential jeopardy to the defendant was significant enough to trigger the demands of due process.

An even more vivid illustration of the point is the recent recognition of the due process rights of parolees at the *pre*revocation hearing. Morrissey mandates two separate hearings prior to parole revocation, the first of which, the prerevocation hearing, is designed to determine only whether there is probable cause to believe the parolee has violated a condition of parole. (*Morrissey*, at pp. 484–487 of 408 U.S.) Yet in order to terminate the "conditional liberty" of the parolee the authorities must give notice of the time, place, and purpose of the prerevocation hearing and afford the parolee the opportunity "to appear and speak personally in his own behalf, and bring and present letters, documents and other persons who can give relevant information to the hearing officer. Adverse witnesses are to be made available for questioning by the parolee except when the hearing officer determines that an informant would be subject to risk of harm if his identity were disclosed. The hearing officer must make a summary or digest of the proceedings and must determine if there exists probable cause to hold the parolee for

revocation proceedings against him." (People v. Vickers (1972) 8 Cal. 3d 451, 456–457.)

It is therefore manifest that if due process requires these various procedural protections in order to determine probable cause to terminate conditional liberties, equal or greater safeguards must be observed in order to protect the absolute liberty of the prospective indictee. Here again we see the incongruous circumstance of a proceeding which is deemed constitutionally sufficient to indict but is inadequate to serve as a substitute for the prerevocation hearing: either the preliminary hearing or the trial itself may serve as the prerevocation hearing if a parolee charged with a new offense is given notice of the dual purpose of the proceeding (In re Law (1973) 10 Cal. 3d 21); but the grand jury proceeding, because of its complete lack of the procedural rights mandated by *Morrissey*, may not be so substituted (In re Valrie (1974) 12 Cal. 3d 139). In short, the present grand jury system does not even rise to the constitutional standards of parole prerevocation hearings.

In Powell v. Alabama (1932) 287 U.S. 45, 69, the Supreme Court declared that a person accused of crime "required the guiding hand of counsel at every stage in the proceedings against him." If this were in fact the recognized law this hearing would be unnecessary, because it is irrefutable that the grand jury proceeding is a "stage," and indeed a critical stage, of the criminal justice process. Unfortunately, to date courts have been loathe to shine the revealing light of due process analysis into the secret recesses of the grand jury room. Because of this reticence, the state is permitted to subject an individual to the trauma of a felony trial without even cursory consideration of his side of the story. This, I submit, is a patent violation of the due process clauses of the Constitution, rivaled only in most states by an equally blatant violation of equal protection of the law.

Under traditional equal protection analysis it has now become axiomatic that persons similarly situated must receive like treatment under the law. (In re Antazo (1970) 3 Cal. 3d 100, 110.) If "fundamental rights" are not involved the state may justify classifications if they are reasonably related to a legitimate state goal. If fundamental rights or "suspect classifications" are involved the state bears the heavy burden of demonstrating a "compelling" interest. As stated in Serrano v. Priest (1971) 5 Cal. 3d 584, "in cases involving "suspect classifications" or touching on "fundamental interests," . . . the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. [Citations.] Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purposes.' " (*Id.* at p. 597, quoting Westbrook v. Mihaly (1970) 2 Cal. 3d 765, 784–785.)

In all state criminal cases the prosecuting attorney, and by extension the state, makes a distinction between those defendants who will be prosecuted by indictment and those who will be prosecuted by information. One class of defendants receives a preliminary hearing with the attendant rights heretofore enumerated, while the other class receives no preliminary hearing and no procedural protections. The two classes are in all other respects identical and indeed, as in many cases, embrace not only the same crimes but occasionally the same individual. The classification is not based on any state objective which may be considered legitimate, but rather is grounded on the arbitrary goal of vesting in the People vast prosecutorial advantages which the grand jury system affords.

People v. Uhlemann (1973) supra, 9 Cal. 3d 662, is illustrative of the advantage. At the preliminary hearing the defendant, through counsel, was able to discredit the prosecution witnesses as he confronted them. The experienced magistrate refused to hold the defendant for trial. Undaunted, the prosecutor went forum shopping and took the case before the grand jury, where, such matters being uncontested, it was readily predictable that an indictment would be returned. It was.

Moreover, these classifications are not mere economic discriminations to which the rational relation test may be applied, but rather involve such fundamental rights as counsel, confrontation, the right to personally appear, the right to a hearing before a judicial officer, and the right to be free from unwarranted prosecution. These guarantees are expressly or impliedly grounded in both the state and federal Constitutions and must by any test be deemed "fundamental." Accordingly, in order to justify such a selective denial of fundamental guarantees the state must show not only a compelling interest but also that the classifications are necessary to that end.

The goal of prosecutorial advantage could not, of course, be deemed "compelling." Indeed this goal could not even be termed "legitimate." But even assuming arguendo there is some heretofore unperceived purpose for initiating certain prosecutions by grand jury indictment which would satisfy the compelling interest test—an assumption that is extravagantly generous—it is nevertheless clear that the denial to these defendants of a post-indictment preliminary hearing could not possibly be "necessary" to achieve that hypothetical goal.

It may be argued, for example, that in certain cases there is an overwhelming need for the secrecy which can be obtained only through the grand jury, either for the protection of witnesses or, in rare instances, for the protection of the defendant himself. (See People v. Sirhan (1972), 7 Cal. 3d 710.) However, once an indictment is returned these considerations can no longer be considered operative, because whatever secrecy was achieved through the grand jury will be forsaken when the defendant is brought to trial. Thus there would appear to be no reason, post-indictment, why the defendant could not be accorded a preliminary hearing.

For the foregoing reasons I am of the view that equal protection requires that all criminal defendants have the same opportunity to prove to a magistrate that there is no probable cause to bind them over for trial. "The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and the expense of a criminal trial. Many an unjustifiable prosecution is stopped at that point, where the lack of probable cause is clearly disclosed." (Jaffe v. Stone (1941), 18 Cal. 2d 146, 150.) A proceeding of such significance cannot, consistent with the constitutional mandate of equal protection, be selectively denied.

It may be argued that to afford an indicted defendant the right to demand a postindictment preliminary hearing would be a superfluous formalism because the issue of probable cause had already been decided by the grand jury. However, it must be borne in mind that the prosecutor elects to initiate a prosecution in a forum that would preclude petitioner from testifying in his own behalf. If this tactic would be unavailing because of the defendant's right to a subsequent preliminary hearing, a prosecutor would have no incentive to engage in such devious gamesmanship. The safeguard of an available preliminary hearing would dissuade prosecutors from taking unfair advantage in their unilateral presentation to the grand jury, and would encourage them to present available exculpatory evidence.

My suggestion is not unprecedented. Recently the Supreme Court of Michigan, exercising the inherent power of the court over matters of criminal procedure, held that all indicted defendants are entitled to such examinations as a matter of right. By relying on inherent power the Michigan court avoided what was characterized as "serious questions of equal protection and due process . . . since [the present system] denies to an accused indicted by a multiple-man grand jury what has become recognized as a fundamental right in most criminal cases—the right to a preliminary examination." (People v. Duncan (1972), 201 N.W. 2d 629, 635.)

While the pragmatic result obtained by the Michigan Supreme Court is sound, I would face the constitutional issues and require that all indicted defendants receive a post-indictment preliminary examination. Unless this very minimal safeguard is interposed between the state and the accused individual I fear the current grand jury procedure is constitutionally infirm and one day a perceptive court will so hold.

I have spoken principally about state proceedings because I am most familiar with them. Federal and state grand jury proceedings are similar in most respects. The sessions are held in total secrecy, no one may attend other than the witness under examination and a stenographer or operator of a recording device. During deliberations no one may remain in the room except the grand jurors themselves. Under federal rules defendants are not entitled to a copy of grand jury minutes as a matter of right, or to read the testimony of witnesses. In most state courts a complete transcript is provided to every defendant, and in my state 10 days after defendant has his copy, the transcript is made public.

Finally, the preliminary examination provided in Rule 5c of the Federal Rules of Criminal Procedure is comparable to the preliminary hearing held in most states after an information is filed. In the federal system the preliminary examination is conducted by a magistrate whereas in state courts the preliminary hearing is held by a judge of the court of first instance.

On the specific procedural sections of S. 3274 I have few useful comments. As to the evidence requirements, I heartily agree that only evidence legally obtained

should be admitted. If we are to retain the exclusionary rule in trial courts, as a means of deterring improper law enforcement practices, it would seem anomalous to permit the fruits of illegal searches and seizures to be used in the early stages of the criminal prosecutorial system. If the evidence will be barred at trial, it should be barred before the indicting body.

I also approve the requirement that the government produce for the grand jury evidence in its possession that might tend to exculpate the potential defendant. Certainly the government has no obligation to affirmatively seek exculpatory evidence on behalf of a suspect. But if it has such evidence at hand, elementary fair play commands that the matters be revealed to the deliberative body that has the grave responsibility of charging a fellow citizen with commission of a serious crime.

One additional matter. I have the same apprehension expressed by Justice Brennan in his dissent in United States v. Mandujano (1976) — U.S. — (May 19, 1976) over prosecutors who deliberately delay proceedings before the grand jury in order to call putative defendants before that body for interrogation about transactions and events for which an indictment is to be sought. That process is, as Justice Brennan put it, "a blatant subversion of the fundamental adversary principle," that the State establish its case not through the defendant but by independent investigation. (Watts v. Indiana, 338 U.S. at p. 54.)

I would adopt Justice Brennan's suggested rule, holding "that, in the absence of an intentional and intelligent waiver by the individual of his known right to be free from compulsory self-incrimination, the Government may not call before a grand jury one whom it has probable cause—as measured by an objective standard—to suspect committed a crime, and by use of judicial compulsion compel him to testify with regard to that crime. In the absence of such a waiver, the Fifth Amendment requires that any testimony obtained in this fashion be unavailable to the Government for use at trial. Such a waiver could readily be demonstrated by proof that the individual was warned prior to questioning that he is currently subject to possible criminal prosecution for the commission of a stated crime, that he has a constitutional right to refuse to answer any and all questions that may tend to incriminate him, and by record evidence that the individual understood the nature of his situation and privilege prior to give testimony." (Fns. omitted.)

In conclusion: if I can be of any help to your committee I shall be pleased to do so. The grand jury needs reformation, or perhaps more literally, modernization. Over 800 years of usage give a very striking respectability to any entity; and grand juries existed before the feudal law and have survived its extinction. They are perhaps the oldest of existing institutions; but if they are to survive, they must rest on their utility under constitutional limitations, not on their antiquity, for future acceptance.

Mr. LEVINE. On behalf of Chairman Tunney and on behalf of the committee, I thank you, Mr. Lewis, Mr. Van de Kamp and Mr. Gerstein for appearing this morning.

Mr. Gerstein, do you have something to add?

## TESTIMONY OF RICHARD E. GERSTEIN—Resumed

Mr. GERSTEIN. You asked me for a specific instance of grand jury abuse and I told you that I could not recall a specific instance. Since then, I have recalled a very specific instance of a very grave abuse.

Mr. LEVINE. Yes, sir.

Mr. GERSTEIN. Several years ago in Miami, a Federal prosecutor on two occasions presented to a Federal grand jury evidence which he hoped would lead to the indictment of a group of prominent bankers. Twice the Miami grand jury refused to return the indictment, so the prosecutor traveled to Tampa, Fla., some 250 miles distant, which was within the Federal circuit and obtained the indictment from a Tampa grand jury, who did not know the accused persons, and did not know their reputation in the community and, thus, was able to act without considering any of those matters.

Mr. LEVINE. Thank you very much, Mr. Gerstein.

Mr. LEWIS. I might in that context remind the committee of the well-known situation of the suspected IRA sympathizers in New York who were subpenaed before a grand jury—a grand jury in Fort Worth, I believe it was. That procedure resulted in bringing those persons from their homes, from their confidants and their lawyers, subjecting them to immense inconvenience, jeopardy, and vulnerability as witnesses. It is not only defendants who are victimized.

This is something that cries for reform, as well.

Mr. LEVINE. Thank you.

The record of the hearing will include the written statements of the witnesses as submitted.

The record will include also the statements of members of the committee. At this point, also, the record will include some of the current constitutional, rule, and statutory provisions relevant to this morning's hearing.

The fifth amendment provides that:

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

In the Federal Rules of Criminal Procedure, rule 5(c) provides a right to a preliminary examination before a magistrate, unless there is a prior indictment and unless there is a waiver by the defendant. Rule 5.1 spells out that the preliminary examination is an adversary proceeding where the defendant is present in person, may confront and cross-examine witnesses against him and may introduce evidence in his own behalf. Rule 6 details the procedures before the grand jury. Rule 7 (a) and (b) provide for a waiver of indictment. The former provisions of title 18, United States Code, dealing with grand juries have been superseded by these rules, but there is a recently added provision, chapter 216, on the special grand jury. Title 28 has provisions on recalcitrant witnesses, and Title 18 has provisions on the grant of immunity. All these items will be inserted in the hearing record at this point.

[The material referred to follows:]

[Excerpts From the Federal Rules of Criminal Procedure]

RULE 5(C) INITIAL APPEARANCE BEFORE THE MAGISTRATE

* * * * * * *

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. * * *

RULE 5.1 PRELIMINARY EXAMINATION

(a) Probable Cause Finding. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the

defendant committed it, the federal magistrate shall forthwith hold him to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

(b) Discharge of Defendant. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.

(c) Records. After concluding the proceeding the federal magistrate shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate shall promptly make or cause to be made a record or summary of such proceeding.

(d) On timely application to a federal magistrate, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available for his information in connection with any further hearing or in connection with his preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.

(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that he is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.

### RULE 6. THE GRAND JURY

(a) Summoning Grand Juries. The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(b) Objections to Grand Jury and to Grand Jurors.

(1) Challenges. The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) Motion to Dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. § 1867(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(c) Foreman and Deputy Foreman. The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

(d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(f) Finding and Return of Indictment. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a judge in open court. If the defendant is in custody or has given bail and 12 jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith.

(g) Discharge and Excuse. A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

RULE 7. THE INDICTMENT AND THE INFORMATION

(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

(b) Waiver of Indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

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[Excerpts From Title 18, U.S. Code]

## CHAPTER 216—SPECIAL GRAND JURY



### § 3331. Summoning and term

(a) In addition to such other grand juries as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving. The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may

enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

(b) If a district court within any judicial circuit fails to extend the term of a special grand jury or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

§ 3332. Powers and duties

(a) It shall be the duty of each such grand jury impaneled within any judicial district to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district. Such alleged offenses may be brought to the attention of the grand jury by the court or by any attorney appearing on behalf of the United States for the presentation of evidence. Any such attorney receiving information concerning such an alleged offense from any other person shall, if requested by such other person, inform the grand jury of such alleged offense, the identity of such other person, and such attorney's action or recommendation.

(b) Whenever the district court determines that the volume of business of the special grand jury exceeds the capacity of the grand jury to discharge its obligations, the district court may order an additional special grand jury for that district to be impaneled.

§ 3333. Reports

(a) A special grand jury impaneled by any district court, with the concurrence of a majority of its members, may, upon completion of its original term, or each extension thereof, submit to the court a report—

(1) concerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity, by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action; or

(2) regarding organized crime conditions in the district.

(b) The court to which such report is submitted shall examine it and the minutes of the special grand jury and, except as otherwise provided in subsections (c) and (d) of this section, shall make an order accepting and filing such report as a public record only if the court is satisfied that it complies with the provisions of subsection (a) of this section and that—

(1) the report is based upon facts revealed in the course of an investigation authorized by subsection (a) of section 3332 and is supported by the preponderance of the evidence; and

(2) when the report is submitted pursuant to paragraph (1) of subsection (a) of this section, each person named therein and any reasonable number of witnesses in his behalf as designated by him to the foreman of the grand jury were afforded an opportunity to testify before the grand jury prior to the filing of such report, and when the report is submitted pursuant to paragraph (2) of subsection (a) of this section, it is not critical of an identified person.

(c)(1) An order accepting a report pursuant to paragraph (1) of subsection (a) of this section and the report shall be sealed by the court and shall not be filed as a public record or be subject to subpena or otherwise made public (i) until at least thirty-one days after a copy of the order and report are served upon each public officer or employee named therein and an answer has been filed or the time for filing an answer has expired, or (ii) if an appeal is taken, until all rights of review of the public officer or employee named therein have expired or terminated in an order accepting the report. No order accepting a report pursuant to paragraph (1) of subsection (a) of this section shall be entered until thirty days after the delivery of such report to the public officer or body pursuant to paragraph (3) of subsection (c) of this section. The court may issue such orders as it shall deem appropriate to prevent unauthorized publication of a report. Unauthorized publication may be punished as contempt of the court.

(2) Such public officer or employee may file with the clerk a verified answer to such a report not later than twenty days after service of the order and report upon him. Upon a showing of good cause, the court may grant such public officer or employee an extension of time within which to file such answer and may authorize such limited publication of the report as may be necessary to prepare such answer. Such an answer shall plainly and concisely state the facts and law constituting the defense of the public officer or employee to the charges in said report, and, except for those parts thereof which the court determines to have been inserted scandalously, prejudiciously, or unnecessarily, such answer shall become an appendix to the report.

(3) Upon the expiration of the time set forth in paragraph (1) of subsection (c) of this section, the United States attorney shall deliver a true copy of such report, and the appendix, if any, for appropriate action to each public officer or body having jurisdiction, responsibility, or authority over each public officer or employee named in the report.

(d) Upon the submission of a report pursuant to subsection (a) of this section, if the court finds that the filing of such report as a public record may prejudice fair consideration of a pending criminal matter, it shall order such report sealed and such report shall not be subject to subpena or public inspection during the pendency of such criminal matter, except upon order of the court.

(e) Whenever the court to which a report is submitted pursuant to paragraph (1) of subsection (a) of this section is not satisfied that the report complies with the provisions of subsection (b) of this section, it may direct that additional testimony be taken before the same grand jury, or it shall make an order sealing such report, and it shall not be filed as a public record or be subject to subpena or otherwise made public until the provisions of subsection (b) of this section are met. A special grand jury term may be extended by the district court beyond thirty-six months in order that such additional testimony may be taken or the provisions of subsection (b) of this section may be met.

(f) As used in this section, "public officer or employee" means any officer or employee of the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any political subdivision, or any department, agency, or instrumentality thereof.

§ 3334. General provisions

The provisions of chapter 215, title 18, United States Code, and the Federal Rules of Criminal Procedure applicable to regular grand juries shall apply to special grand juries to the extent not inconsistent with sections 3331, 3332, or 3333 of this chapter.

* * * * * * *

**§ 6002. Immunity generally**

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other infomation) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

* * * * * * *

**§ 6003. Court and grand jury proceedings**

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or

provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

* * * * * * *

[Excerpt From Title 28, U.S. Code]

§ 1826. Recalcitrant witnesses.

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

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

* * * * * * *

Mr. Levine. The record will remain open for 2 weeks. Additional material submitted to the subcommittee will be included in an appendix to the record.

The subcommittee stands adjourned.

[Whereupon, at 12 o'clock noon, the subcommittee adjourned, to reconvene at the call of the Chair.]

# APPENDIX

COALITION TO END GRAND JURY ABUSE,
*Washington, D.C., October 8, 1976.*

Hon. JOHN V. TUNNEY,
*Chairman, Senate Judiciary Subcommittee on Constitutional Rights, Russell Senate Office Building, Washington, D.C.*

DEAR SENATOR TUNNEY: We are pleased to present the enclosed statement, which represents a summary of the views of the Coalition to End Grand Jury Abuse, as per your request.

For the past three and one-half years, the Coalition, which now consists of 21 national bar, civil liberties, labor, women's and religious groups, has been researching instances of grand jury abuse and proposals for grand jury reform. We feel our experience has given us a unique and valuable perspective from which to consider the grand jury problem, and we welcome this opportunity to share our views with you.

The Coalition stands ready to provide additional information on the grand jury question at any time the Subcommittee may so request.

Thank you.

Sincerely,

JUDITH AVNER,
SAM PIZZIGATI,
*Co-Directors, Coalition to End Grand Jury Abuse.*

Enclosure.

PREPARED STATEMENT OF JUDITH AVNER AND SAM PIZZIGATI, CO-DIRECTORS, COALITION TO END GRAND JURY ABUSE

It is fitting indeed that the Senate's first examination of the grand jury system be conducted by the Judiciary Subcommittee on Constitutional Rights. The right to a grand jury indictment *is* a fundamental constitutional right.

Most people don't realize that. We normally do not associate the right to a grand jury indictment with celebrated liberties like "freedom of speech," but America's first generation did. Fresh from their bout with English tyranny, these eighteenth century citizens were determined to limit governmental control over the charging process. In their new nation, prosecutors would not be free to bring their enemies or rivals to trial on trumped-up charges or cover up the crimes of the administrations they served, and to prevent such prosecutorial misconduct, our colonial forebears incorporated the grand jury into the Bill of Rights in 1791.

The grand jury, the authors of that document felt, would shield defenseless individuals against overzealous or malicious government prosecutors. No person would be put through the ordeal of a trial unless an independent community panel—the grand jury—decided that there was enough evidence to warrant further prosecution. The grand jury would also protect the citizenry as a whole by making sure that offenses by government officials were investigated and prosecuted.

In other words, the grand jury would be "a shield for the innocent and a sword against corruption in high places." How often down through the years have courts invoked these words or similar rhetoric to justify the grand jury's powers! But how seldom have these noble words borne any resemblance to the reality of the grand jury's actual role in our criminal justice system!

Today we have a situation where less than half of our states are sufficiently impressed with the grand jury's importance to require an indictment before trial. We have a situation where 21 national bar, civil liberties, religious, women's and labor groups have become so outraged by the perversion of the grand jury's original intent that they have formed an organization, the Coalition to End

Grand Jury Abuse, to work for grand jury reform.* We have a situation where political activists see the grand jury as a weapon of political inquisition, journalists as a threat to the freedom of the press, trade unionists as a strike-breaking tool and defense lawyers as an assault on the attorney-client privilege. We have a situation where an American jurist can accurately assert that "(t)he prosecutor can violate or burn the Bill of Rights seven days out of seven and bring the fruits of unconstitutional activity to the grand jury. No court in the country has the power to look behind what the grand jury considers or why it acts as it does." [1]

What went wrong with the grand jury? Is the situation beyond repair? These are questions that this Subcommittee will have to consider carefully in the months ahead.

## THE GRAND JURY: BULWARK OF LIBERTY TO RUBBER STAMP

The key word in any description of the grand jury that the authors of the Bill of Rights so valued is *independent*. The grand jury was originally intended to stand *between* the people and their government, buffer the citizenry from its officials. Indeed, independence was—and still is—a prerequisite for effective grand jury functioning. Can a grand jury controlled by the government be expected to fairly evaluate the government's case against an accused? Can a grand jury dominated by the government thoroughly ferret out government corruption?

Grand jury independence was, moreover, the reason why grand juries were and have been given such wide latitude to operate. The founders of the republic did not bother to attach statutory limits to the grand jury's subpoena power or restrict the evidence a grand jury could hear because they saw the grand jury as an agent of the community, not an arm of the prosecution. There was no need to protect the people from the people.

Before too many years passed, however, the logic behind this rationale began to unravel. The broad and vague powers of the grand jury proved too inviting for the government to resist, and various officials moved to bend the grand jury to their own purposes. One of the first prominent Americans to speak out against this abuse of grand juries was none other than Thomas Jefferson. When his political opponents on the federal bench guided grand jury harassment against Jeffersonians, Jefferson protested that "(t)he charges of the federal judges have for a considerable time been inviting the grand juries to become inquisitors on the freedom of speech, or writing and of principle of their fellow-citizens." [2] Unfortunately, Jefferson's concern was short-lived. Several years later, after Jefferson became president, he targeted grand juries against his own enemies.

Early on, then, the practice of the "Founding Fathers" belied their rhetoric, and as the grand jury evolved, grand jurors played less and less of an independent role. The democratic notions that had spurred the grand jury's constitutional birth in the new republic came to exist only in the overblown prose of court decisions, and observors began to note with increasing frequency that grand juries did nothing more than routinely rubber stamp prosecutorial decisions. The situation has deteriorated to the point where today it is commonly acknowledged that a grand jury will do whatever a prosecutor wants it to do. If a prosecutor wants an indictment, there will be one, and if a prosecutor wants a grand jury to get the government off the hook in a sensitive situation by not indicting, the grand jury will do that, too.

As we complete our Bicentennial year, we do it without the grand jury shield America's founders envisioned.

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*These 21 groups are: American Civil Liberties Union, National Lawyers Guild, National Emergency Civil Liberties Committee, National Conference of Black Lawyers, National Bar Association, National Legal Aid and Defender Association, Association of Trial Lawyers of America (Criminal Section), Unitarian Universalist Church, United Methodist Board of Church and Society (Department of Law, Justice and Community Relations), United Methodist Board of Global Ministries (National Women's Divisions), Church of the Brethren, Jesuit Conference Office of Social Ministry, Southern Christian Leadership Conference, Amalgamated Meat Cutters and Butcher Workmen of North America, International Longshoremen's and Warehousemen's Union, American Friends Service Committee, National Student Association, National Organization for Women, Women's International League for Peace and Freedom, International Printing and Graphic Communications Union.

[1] Statement by Baltimore Judge Charles E. Moylan Jr., *Newsweek*, 1 December 1975.

[2] Leon Friedman, "The Grand Jury: Shield or Sword" (unpublished paper), see Committee for Public Justice, A.C.L.U. Foundation, Inc., 1972, p. 26.

If the grand jury had only lapsed into an anachronistic panel that affords an accused little protection from the government, that would be reason enough to subject the institution to intense scrutiny. But there is another reason. The grand jury, which was intended to protect the innocent from the government, has evolved into a frightening instrument the government can manipulate against the innocent. Over the past decade, the judicial misinterpretation of traditional grand jury powers and the legislative addition of new ones have handed law enforcement agencies the ability to maneuver as if the Bill of Rights did not exist.

"I suggest," Watergate Special Prosecutor Charles Ruff has said, "that virtually the only restraints imposed on the prosecutor's use of the grand jury are those which he imposes on himself (sic) as a matter of personal or professional morality or which are imposed on him as a matter of policy by his superiors."[3]

Ruff does not exaggerate. Ponder, if you will, the entirely legal prerogatives currently enjoyed by prosecutors before Federal grand juries. A prosecutor may subpoena anyone from anywhere at any time with whatever notice deemed fit. A prosecutor does not have to inform witnesses why they have been subpoenaed or if they are under suspicion. No grand jury witness is permitted to have an attorney present inside the grand jury chamber during questioning, and that questioning can touch on anything the prosecutor chooses: the witness' private conversations, political activities, personal relationships, even the attorney-client privilege. The prosecutor can badger a witness with leading questions and snide asides and never worry about a court censuring this conduct—since a complete transcript of a grand jury proceeding need not be kept. Once witnesses claim their Fifth Amendment right to silence, prosecutors can immunize them with limited "use" immunity, under which the witnesses must testify or face confinement for contempt. But even witnesses who do testify under the use immunity threat can go to jail. Use immunity does not save a witness from criminal charges. It merely bans the use of what the witness may say in a future prosecution of the acts described in the witness' testimony.

Taken as a whole, the package of powers the modern grand jury offers prosecutors amounts to a blank check for due process atrocities, and that is not surprising. If we let prosecutors for instance, issue grand jury subpoenas to whatever witnesses they want, should we be surprised when prosecutors stage disruptive fishing expeditions into the activities of their political opponents? If we allow prosecutors to ask any questions they please, should we be surprised when they manipulate the grand jury to intimidate with unorthodox or unpopular opinions? If we allow prosecutors to force immunity onto witnesses, should be be surprised when prosecutors trap people into jail by asking questions they know the immunized witness cannot in good conscience answer?

In recent years, especially since 1970, fishing expeditions have been staged, dissenters have been intimidated, people have been trapped into jail. Naturally, we are not maintaining that such horrors accompany every grand jury proceeding. Most grand jury deliberations are, on the contrary, perfunctory affairs in which the prosecutor briefly presents the government's case and the grand jury just as briefly disposes of it. We are maintaining, however, that in those instances where a buffer between the government and the individual is most needed—situations where a prosecutor is "out to get" someone or some group for personal, political or ideological reasons—the grand jury can be manipulated to facilitate the "getting."

Stripping prosecutors of their complete control of grand jury power, in and of itself, will not magically transform the grand jury into a shield for the innocent. We remain convinced, though, that the introduction of sweeping procedural and evidentiary safeguards can help the grand jury regain its respected position as a fair arbiter of whether the government has produced enough evidence to bring an accused to trial.

Against this backdrop, we would like to move now to a consideration of the specific proposals embodied in S. 3274, the only omnibus grand jury reform bill now pending in the Senate.

## ANALYSIS OF S. 3274

The Coalition to End Grand Jury Abuse strongly supports the principles that underlie S. 3274 and considers the bill a significant contribution to the effort to reform the Federal grand jury system.

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[3] Remarks before the Judicial Conference of the District of Columbia, 2 June 1975.

We believe that S. 3274's provisions which require grand juror approval before a subpoena can be issued or, in the case of a recalcitrant witness, before contempt proceedings can be begun, coupled with the bill's insistence that newly impaneled grand jurors be fully instructed about their rights and duties, are fundamental steps in the fight for grand jury independence. Only when members of the panel know and understand their functions can the grand jury even begin to operate as a citizen's shield. Grand juror input in grand jury proceedings is essential to the integrity of the grand jury process.

S. 3274's reduction of the maximum period an individual can be confined for contempt to six months and its corresponding abolition of reiterative criminal and civil contempt are also critically important. Admittedly, setting any time limit on a contempt confinement means making a somewhat arbitrary decision. However, in light of Supreme Court rulings that give defendants who face a minimum penalty of six months in prison the right to a jury trial, allowing a person to spend more than six months in jail without the benefit of a jury trial strikes us as unjustifiable. As the testimony this subcommittee has heard and will hear in the future indicates, one of the most insidious abuses of the grand jury is its use to put and keep individuals behind bars for excessive periods of time for contempt when the prosecution cannot prove a substantive violation of the law. As concerned citizens, we cannot allow this situation to continue, and a six-month limit on contempt confinements would help to prevent this practice. In this regard, we also support the S. 3274 provision providing for a presumption of bail pending appeal of a contempt citation.

Over the past few years we have witnessed a veritable Supreme Court flip-flop on the rights of defendants. Judicial insensitivity to violations of citizens' rights has been particularly glaring in the grand jury field. Most recently, the Supreme Court has refused to require that *Miranda*-type warnings be given to grand jury witnesses who are potential defendants. Attorney General Edward Levi, in his testimony before the House Judiciary Subcommittee on Immigration, Citizenship and International Law June 10, 1976, justified this decision by asserting that if witnesses are warned they are targets and advised of their rights, they may be reluctant to cooperate with the investigation. In other words, citizens should only exercise their rights when the situation is convenient for the government. This position, in our minds, is untenable and especially frightening coming from our highest law enforcement official.

There are several provisions in S. 3274 that address the absence of basic rights inside the grand jury chamber, and we fully support them. They include requiring that:

a complete transcript be made of grand jury proceedings;

a witness be permitted, upon request, to examine and copy their own testimony;

every witness be entitled to the advice of counsel inside the grand jury chamber;

that subpoenas must advise witnesses of the right to counsel, whether their conduct is under investigation, the substantive statutes involved and the right against self-incrimination.

Furthermore, S. 3274 prohibits the use of illegally seized evidence before the grand jury, and that should serve as notice that an individual's constitutional rights must be respected in the preparation of a criminal case. The S. 3274 provision which provides that a refusal to answer questions or give other information shall not be punished if the question or request is based on any violation of the witness' constitutional or statutory rights is equally important.

Abuse of the grand jury's subpoena power is, unfortunately, no longer an aberration. Cases have been reported where subpoenas have been served merely because an individual has declined to speak with agents of the Federal Bureau of Investigation. In fact, rarely does the grand jury know who has been subpoenaed in its name until the subpoenaed individual actually appears. The section of S. 3274 requiring an affirmative vote of at least 12 grand jurors for a subpoena to issue would help eliminate this situation. We also enthusiastically support S. 3274's position that no person shall be required to testify or be confined if, upon evidentiary hearing, the court finds that a primary purpose or effect of the subpoena is to secure evidence for the trial of a person already under indictment or formal accusation; that compliance with the subpoena is unreasonable or oppressive and involves unnecessary appearances, or the testimony reasonably expected is cumulative, unnecessary or privileged; or that the primary purpose of the subpoena is punitive.

The passage of serious grand jury reform legislation should mark the beginning, not the end, of Congressional concern over the handling of grand jury matters by the executive branch. Ongoing Congressional oversight is most difficult when the only records compiled on the Department of Justice's grand jury conduct are sparse and incomplete, as they now are. Therefore, we support S. 3274's requirement that the Justice Department regularly report to Congress on its grand jury conduct.

Since we agree with the founders of our nation that standing trial is a traumatic experience which should not occur unless there is sufficient probable cause, we favor provisions of S. 3274 that would require the government to introduce all evidence in its possession tending to negate the guilt of a potential defendant. In addition, indictments should only be based on legally admissible evidence.

### OTHER NEEDED GRAND JURY REFORMS

As fine a set of proposals as S. 3274 is, it does lack several reforms which our study of grand jury abuse has led us to believe are necessary. Moreover, some sections of S. 3274 should be strengthened to protect the reappearance of the grand jury horrors that have plagued us over recent years.

First, although we support the establishment of a minimum time period between service of a subpoena and the appearance and notice of a contempt hearing and the hearing, we feel that in both cases a seven-day minimum is too short. Subpoenaed witnesses need time to retain counsel, become familiar with the conduct of grand jury proceedings and evaluate their situation. Witnesses facing contempt hearings—with the looming threat of contempt confinement—need time to discuss their position with counsel. Counsel needs time to complete extensive legal research, papers and arguments, time difficult to find for a typical lawyer who has more than just one witness as a client. We would suggest increasing the time stipulated by S. 3274 to 10 days.

Second, we feel the initial judicial charge to incoming grand jurors is so important that the court's failure to instruct the grand jury properly should be, in addition to just cause for a witness' refusal to testify, just cause for the dismissal of an indictment. We submit that without the instructions for grand jurors detailed by S. 3274, an accused citizen has not received, in a very fundamental sense, the benefit of an independent grand jury assessment of his or her case.

S. 3274's most crucial omission, however, is its silence on the subject of immunity. The Coalition feels that the power of the Department of Justice to unilaterally strip witnesses of their Fifth Amendment right to silence is at the very heart of grand jury abuse today. We have noted, with much dismay, the absence of any provision in S. 3274 that proposes to reform current immunity laws and procedures. While we agree that in some situations immunity may be an effective tool of law enforcement, we also believe that an individual's constitutional rights are personal and should only be waived, if at all, by that person. When we allow the state to forcibly strip witnesses of their rights, we do so at the cost of continuing peril to our freedom.

The government rationalizes the current coercive immunity statute by stating that the ability to forcibly immunize witnesses is absolutely essential to the investigation and prosecution of organized crime. In our opinion, this position ignores the reality of the organized crime world. If the underworld code of silence is such that a witness fears for his or her life if he or she testifies, then the prospect of incarceration for contempt will hardly be sufficient incentive to get the witness' cooperation.

In addition, in a speech before the Cornell Institute on Organized Crime's 1976 summer seminar, Mr. Peter Richards, a former special attorney in the Organized Crime and Racketeering Section of the Justice Department, completely contradicted the Department claim that coercive immunity is indispensable to successful organized crime prosecutions. He told an audience of prosecutors that forcing immunity is "a very bad thing for a prosecutor to do" because it does not work. It does not elicit the cooperation of otherwise silent witnesses. What forced immunity *does* do is give prosecutors an effective tool that can be manipulated to harass and imprison many innocent people who have made a principled decision to remain silent. A series of articles by Richard Harris that appeared in the New Yorker Magazine and were later inserted into the Congressional Record by Sen. Abourezk provide a compelling case study of just how this immunity power has been abused.

Any legitimate investigation—that is, a probe based on evidence, not a fishing expedition—can well be served by consensual immunity. In reality, consensual immunity is the form of immunity currently used by serious and conscientious prosecutors. Witnesses like John Dean did not have to be forcibly immunized in the Watergate case in order to obtain their testimony. They, like countless others, welcomed immunity. We submit that the abolition of forced immunity, perhaps more than any other single reform, would reduce the fear of the grand jury process shared by many without hurting law enforcement efforts.

There are several immunity-related issues that effective grand jury reform should also address. The Organized Crime Control Act of 1970 replaced the long-standing transactional immunity statute with "use" immunity. We feel that limited "use" immunity does not provide a witness with full constitutional protection, especially when immunity is coercive. We support, therefore, a return to transactional immunity, as has been proposed by several bills now pending before the House of Representatives (including H.R.s 11660, 1277 and 6006).

Another provision of the 1970 Organized Crime Control Act removed court discretion over the signing of immunity orders. Government prosecutors and Justice Department officials now alone decide whether immunity should be ordered. We believe there must be additional checks on the granting of immunity to prevent "immunity baths" or the utilization of unreliable testimony. We suggest that both the court and the grand jury be given the authority to approve or reject all proposed immunity grants.

Prior to 1970, immunity could only be used in the investigation of certain, specific offenses. Under the current immunity statute, immunity may be granted in the course of an investigation into any offense in the Criminal Code. Historically, the dangers of immunization have led to strong limitations on the availability of immunity. We see no justification for continuing the current unlimited immunity availabilty.

CONCLUSION

Again we thank you for inviting us to comment on S. 3274. We feel that is an extremely valuable piece of legislation and would be glad to provide the subcommittee with any information we might have that would assist you in your deliberations. We look forward to working with the members at this panel, the full Judiciary Committee and the Congress in an effort to restore the grand jury to the honored place it once had.

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[Excerpt From "Abuse of Power," a staff report of the Codes Committee of the New York State Assembly, May 1976]

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Numerous courts have protested against the use of grand juries by prosecutors in an unfair manner.

In *United States* v. *Dionisio*, 93 S. Ct. 764, 770 (1975), the Supreme Court stated that the Constitution could not tolerate the transformation of the grand jury into an instrument of oppression," and in 1972 our own Second Circuit Court of Appeals held that ". . . the grand jury is not meant to be the private tool of the prosecutor." *United States* v. *Fisher*, 455 F. 2d 1101, 1105 (2nd Cir. 1972).

Unfortunately, neither of these judicial mandates has ever been given sufficient teeth to properly deal with the abuses daily occurring by grand juries and their prosecutorial managing directors.

Among these abuses are:

1. ABUSE OF SUBPENA POWER

Abuse of subpena power stems from the fact that the prosecutor has virtually unchecked power to issue grand jury subpenas without prior judicial permission or review. After issuance, a subpena is subject to review by a motion to quash, but such an order often obtains only after the subpenaed individual has suffered irreparable harm, and the time and expense involved in obtaining such an order may be considerable.

### 2. GATHERING EVIDENCE ON INDICTED DEFENDANTS

Prosecutors on occasion improperly use a grand jury to gather evidence on an already pending indictment. This technique has been condemned. In *Re National Window Glass Workers*, 287 F. 219 (N.D. Ohio 1967), the court quashed subpenas issued by an Ohio grand jury because the Court concluded that the witnesses, who were defendants in a New York action, had been brought before the Grand Jury in Ohio to aid the government in preparing its case in New York. See also, 8 Moore's Federal Practice S. 6.04 at 6–50 (2nd Edition, 1972).

Such abuses are difficult to prove, however. It is clear that none will be found unless it can be demonstrated that the sole purpose of convening the second panel is to gather evidence for a pending trial. *United States* v. *Dardi*, 330 F. 2d 316 (2nd Cir. 1964), *cert. denied*, 379 U.S. 845 (1964). Often the government will use the excuse that additional defendants or indictments are being sought. See, e.g., *United States* v. *John Doe*, 455 F. 2d 1270 (1st Cir. 1972).

### 3. FREEZING TESTIMONY

Prosecutors also force grand jury appearances to freeze testimony. In *United States* v. *Fisher*, 455 F. 2d 1101 (2nd Cir. 1972), the Second Circuit found that the testimony before the Grand Jury was taken for this purpose. Although the Court condemned the practice, it did not dismiss the indictment.

### 4. INTERROGATING THE PERSON SUBPOENAED OUTSIDE THE PRESENCE OF THE GRAND JURY

Prosecutors improperly use grand jury subpoenas as a device to force both potential defendants and witnesses to discuss a case outside the presence of the grand jury. Subpoenas have been issued to witnesses with no intent of placing them before a grand jury on the date the subpoena is returnable. Typically, the witness reports to the designated grand jury room and waits. When the witness becomes anxious, a "sympathetic" assistant district attorney assigned to that grand jury will suggest that the witness contact the assistant district attorney whose name and phone number appear on the subpoena.

The United States Court of Appeals for the District of Columbia condemned the practice of using the subpoena to inveigle a witness to the United States Attorney's office for private questioning in *Durbin* v. *United States*, 221 F. 2d 520 (D.C. Cir. 1952). The Court noted that the grand jury subpoena is compulsory process of the district court issued for the benefit of the grand jury:

"They (the people of the United States) do not recognize the United States Attorney's Office as a proper substitute for the grand jury room and they 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. *Id.* at 522.

Notwithstanding the language of *Durbin*, absent a showing of additional coercive tactics, this practice will bring about no greater sanction than chastisement of the prosecutor. *United States* v. *Johns Manville Corp.*, 213 F. Supp. 65 (E.D. Pa. 1962).

### 5. IMPROPER EXAMINATION OF WITNESSES—QUESTIONING A WITNESS IN A MANNER CALCULATED TO BIAS THE JURORS AGAINST HIM

Indictments *may* be set aside in cases where defendants are questioned in a manner calculated to discredit or impugn their integrity in the eyes of the grand jurors. This practice has been held to violate the due process clause of the 14th Amendment to the United States Constitution. *United States* v. *DiGuanzia*, 213 F. Supp. 232, 235 (E.D. III. 1973) ; *United States* v. *W. T. Ted*, 325 F. Supp. 520, 521 (D. Nebr. 1971).

In *United States* v. *DiGuanzia*, *supra*, the witness, a target of the grand jury inquiry, was asked a series of embarrassing and improper questions:

"Are you married?

"To whom are you married?

"You have a son, don't you?

"Do you love your son?

"Why are you ashamed to answer questions about your son?
"Who is the father of your child?
"What right have you to refuse my questions?
"I'll bring you before the judge and require you to answer my questions.
"What is the Fifth Amendment? Do you know what it means?
"Are you an American citizen?" *Id.* at 234–235.

The Court found that such questions could serve no purpose other than to prejudice the grand jurors against the witness, and it ordered the dismissal of the indictment.

#### 6. QUESTIONING A PERSON IN A MANNER CALCULATED TO TRICK HIM INTO COMMITTING PERJURY

Questioning with this motive is, of course, improper. However, the abuse is difficult to prove. If a witness is called back several times to answer similar questions before a Grand Jury, the Court may more readily order prompt transcription of earlier testimony, but it will rarely halt the process. *Bursey* v. *United States*, 466 F. 2d 1059, 1080 *n.* 10 (9th Cir. 1972).

#### 7. USE OF GRAND JURY TO INTIMIDATE OR HARASS A WITNESS

The Courts have held that it is an abuse of grand jury process to convene a grand jury for the express purpose of intimidation. *United States* v. *Remington*, 191 F. 2d 246 (2nd Cir. 1951), *cert. denied*, 343 U.S. 907 (1952). Similarly, convening several grand juries to investigate one party concerning the same matter has been condemned. *United States* v. *Am. Honda Motor, Inc.*, 273 F. Supp. 810 (N.D. Ill. 1967) (Same witness, subpoenas, questions, short notice).

#### 8. UNAUTHORIZED DISCLOSURES OF GRAND JURY PROCEEDINGS

The dangers and injustices which result from unauthorized disclosure of grand jury proceedings have been summarized as follows:

a. The reputation of the innocent often is ruined by disclosure of grand jury testimony, even when no wrongdoing took place and no indictments are returned.

b. Erroeous information in grand jury leaks is extremely difficult to rebut because the sources are not stated, and because erroneous assertions often can only be contradicted by revealing the very investigative information which is supposed to be secret.

c. When indictments are returned, defendants may be deprived of a fair trial because of the previous notoriety of the publicized version of the pre-indictment investigation.

d. Trial of defendants who are in fact guilty is rendered difficult because of the problem of finding an impartial jury.

e. Premature disclosure of investigations may make witnesses more difficult to obtain and may lead to the destruction of evidence. *Strengthening the Role of the Federal Grand Jury: Analysis and Recommendations*, 29 Record of the Association of the Bar of the City of New York 464 (May/June 1974) (hereinafter New York City Bar Report).

The courts have criticized prosecutors for improperly disclosing grand jury testimony. As one court noted, "the generation of public animus against a prospective defendant . . . is not part of the prosecution's legitimate business." *United States* v. *Sweig*, 316 F. Supp. 1148, 1153 (E.D.N.Y. 1970), *aff'd*, 441 F. 2d 114 (2nd Cir.), *cert. denied*, 403 U.S. 932 (1971). The Court, quoting *Hoffman* v. *United States*, 341 U.S. 479, 485 (1951) indicated that where necessary to protect the integrity of the criminal process indictments would fall. However, in *Sweig*, *supra*, the Court accepted the prosecution's position that the disclosures had not been leaked from the United States Attorney's office.

However, the law is clear that unlawful disclosures will not result in the dismissal of an indictment except in the most extreme circumstances. *United States* v. *Hoffa*, 349 F. 2d 20, 43 (6th Cir. 1965), *aff'd*, 385 U.S. 397 (1966); *United States* v. *United States District Court for the Southern District of West Virginia*, 238 F. 2d 713, 721–22 (4th Cir. 1956), *cert. denied*, 352 U.S. 981 (1956).

Federal courts can punish unauthorized disclosures as a contempt; however, this sanction is almost never used. Section 215.70 of New York's Penal Law makes improper disclosures a class B. misdemeanor. Unfortunately, these provisions are similarly ignored.

A recognized classic "conviction by grand jury leaks" in recent years concerned a prominent public official. It was the massive assault by press indictment based upon grand jury leaks of former Vice President Spiro Agnew. Agnew was convicted over and over and over by the leaks resulting from the actions of a Baltimore Grand Jury. What must be broadly understood by the citizenry is that it made no difference whether the allegations against Agnew were *true* or *not true*. If this system is to protect the innocent as well as convict the accused, the only place for that determination is in a court room and never by grand jury and/or prosecutorial leak.

Similarly, it must be understood and accepted that Agnew's prominence, or his being in favor or disfavor politically, has absolutely no bearing in this example or in the principle it represents.

It is easy to man the barricades for those we love. It is our duty and our responsibility to man those same barricades so that all, including those we don't love, are assured the same protections.

* * * * * * *

SUMMARIES

The following summarize the purposes of this proposed New York legislation and the relationship of one proposed bill to another:

A major obstacle to a completely fair and impartial trial in the administration of criminal justice is that it is founded on the adversary system. There is nothing inherently wrong with the system. However, when one adversary gets a substantial edge, the objective of impartiality is destroyed or at least impaired. If the prosecutor conducts the investigation, a natural tendency to ignore or minimize evidence favorable to a defendant often results while prosecution testimony is maximized.

* * * * * * *

Another major breakdown resulting from the adversary system by prosecutors' improper action is that the prosecutor can present evidence before a grand jury in such a manner as to permanently abuse the rights of individuals. Since the prosecutor or his colleague will eventually try the case, the temptation is to utilize the grand jury presentation in such a way as to get an edge during the in camera or star chamber proceedings.

Our proposal is to create the Office of Grand Jury Counsel whose job would be solely to present all relevant evidence and since they would not try the case or have a stake in its outcome, the hope is that the agency would present the relevant evidence in a purely professional impartial manner .

Another obstacle to fairness in the Grand Jury is the lack of counsel to a witness even though a Grand Jury proceeding is a critical stage in criminal proceedings.

Since grand juries often erroneously return indictments, the publicizing of which is sufficient to permanently destroy a reputation, even when the mistake is later discovered, every effort should be made to find the errors before the indictment. Therefore as is the law now with grand jury reports, all indictments should be subject to judicial review before filing.

No evidence should be allowed before a grand jury which would not be admissible before a petit jury at a trial. Otherwise we could destroy our enemies by indictment without being able to prove guilt at a trial. (Hearsay evidence, procured illegally, etc.)

There are no present sanctions for prosecutors nor is there a formal code to insure their ethical conduct. This bill specifically spells out responsible prosecutorial conduct and sets up sanctions therefor including actions in tort.

It is accompanied by a companion bill giving the Office of Counsel to the Grand Jury the obligation to prosecute these violations.

The DA must present evidence negating guilt on the part of the defendant (exculpatory evidence; Brady v. Md.—prosecutor must reveal to defense before trial).

The DA must inform all witnesses of their rights relative to a grand jury appearance.

Grand jury leak penalties are increased to a Class A Misdemeanor (one year in jail).

U.S. Court of Appeals,
District of Columbia Circuit,
*Washington, D.C., September 30, 1976.*

Hon. John V. Tunney,
*Chairman, Senate Subcommittee on Constitutional Rights, Room 102B, Russell Office Bldg., Washington, D.C.*

Dear Senator Tunney: This refers to your request for my views on the subject of improvement of grand jury procedure, a subject addressed by S. 3274. One major purpose of S. 3274 seems to be to overcome abuses by which the unwary person who is the target of a government probe may be induced to provide evidence against himself without awareness of his rights and minimum safeguards. Another laudable purpose is to structure the orderly presentation of contentions by witnesses claiming fundamental rights.

In the broad, the conversion of the grand jury to a more open system would correct some present abuses. The approach of S. 3274 seems wholesome overall, subject to such modifications as may prove to be desirable in the light of hearings, and comments. I have a few thoughts for consideration:

1. I see merit in the innovative proposal of a witness' right to have counsel present in the grand jury room. But I suggest some caution, particularly as to the role counsel would play. As it stands, the proposed § 3330(e) may open the way to abuse by attorneys bent on thwarting the grand jury inquiry through obstructionist tactics, such as facile irrelevancy and incompetency objections. There is no judge present to keep a firm hand. I would give serious consideration to ensuring counsel play a passive, advisory role rather than the full-scale adversary advocacy expected of them at trial. This is easier to say than do. A minimum might be a provision that only the witness may make statements or objections (albeit after consultation with his attorney).

2. Also, the measure provides that a person subpoenaed shall not be compelled to appear in the absence of a grant of immunity if he gives written advance notice that he will claim the privilege. In my view, there is advantage to compelling appearance and particularized interposition of the privilege and little basis for prejudice, given the other safeguards of the proposed measure, *e.g.*, notice that the witness is a putative defendant, right to counsel in the grand jury room, etc. This is not like the situation where a witness is called before a petit jury charged with finding the facts, notwithstanding intention of the witness to claim the privilege, in which event our court has said that the danger of an erroneous inference by petit jury makes this course prejudicial error. Bowles v. United States, 142 U.S. App. D.C. 26, 31–32, 439 F. 2d 563, 541–42 (en banc, 1970), *cert. denied*, 401 U.S. 995 (1971).

3. I am not clear concerning the intention of § 3330A(o), which requires a showing of good cause made in order to permit an indictment based on summarized or hearsay evidence. Does this permit an indicted defendant to gain dismissal of an indictment based on insufficient evidence? To have the whole transcript, prior to trial, for the purpose of exploring such a motion? Does the government make its "good cause" showing to the grand jury? Or to the court impaneling the grand jury? Or to the trial court in the event defendant moves to dismiss?

4. An important problem is dealt with in the proposed § 3330, relating to the independent grand jury inquiry. It is useful in structuring a citizen's voice in cases like corruption, without opening the door to abuses. May I suggest that since the function of the Government attorney in such cases is to act as counsel to, and amanuensis for, the grand jury, it would be appropriate to permit the grand jury to ask the court to select a special attorney not only, as is now provided in (b), in cases where the Government attorney refuses to assist or hinders or impedes the grand jury in the conduct of an investigation under (a), but in any case where the grand jury certifies to the court that it does not have confidence in the Government attorney. The present wording of (b)(1) requires an almost impossible threshold showing to invoke the court's discretion.

Perhaps, too, § 3330 should also specifically address the problem of the independent grand jury that does not render an indictment, clarifying the present decision law that it may present a "report." by itself, or with the assistance of the special attorney if one is appointed; that it may take a recommendation to the court that the report be open to the public, or that it be distributed to certain officials including the Congress; and that the court shall have the authority to make such disposition as it deems in the interest of justice.

Sincerely yours,

Harold Leventhal.

DECEMBER 9, 1976.

Hon. JOHN V. TUNNEY,
*U.S. Senate, Committee on the Judiciary, Subcommittee on Constitutional Rights, Washington, D.C.*

DEAR SENATOR TUNNEY: Enclosed is a memorandum incorporating my suggestions as to grand jury reform.

By way of background, I was an Assistant U.S. Attorney in Los Angeles for more than four years. During that period I was in charge of the Indictment Process in the Central District of California, as a result of which I had responsibility for the operations of from ten to fourteen grand juries concurrently. I also served as the Chief of Special Prosecutions in that same Judicial District. During the course of that service, I was responsible for the major investigations conducted both with and without the assistance of the Grand Jury. Presently I am engaged in civil and criminal litigation and in that connection represent witnesses and potential defendants in Grand Jury investigations. It is as a result of my experience, both as a prosecutor and as defense counsel, that I have suggested those reforms described in the attached memorandum.

Very truly yours,

BRIAN J. O'NEILL.

MEMORANDUM

To: Honorable James Abourezk
From: Brian J. O'Neill
Date: July 30, 1976

The critical distinction which should be borne in mind during any evaluation of grand jury reform should be the distinction between the functions of an investigatory grand jury and an indicting grand jury. Since, under the Constitution, all felonies must be prosecuted by indictment, it is required that a high volume of cases be presented to a grand jury. That is, even the most run-of-the-mill cases, such as bank robberies, mail theft and other one-shot transactions must be prosecuted by way of indictment. Since it would be a practical impossibility to conduct full grand jury hearings relative to all those cases, the practice in most large federal districts is that the investigative agent who is charged with the responsibility for conducting the investigation leading to the proposed indictment appears at the grand jury and presents hearsay testimony relative to the case. That is, the investigative agent will testify to the effect that Witness A identified the putative defendant as the person who robbed her at the bank. The agent will then testify that Witness B, the handwriting expert, has made a statement to the effect that the handwriting on the note presented to the bank teller was the handwriting of the putative defendant. The agent will also testify that Witness C, a fingerprint expert, has examined the bank robber's note and has concluded that the fingerprints found thereon are the fingerprints of the putative defendant.

In large districts, such as the Central District of California, the greater majority of cases which are indicted are presented in that manner by the investigative agent. In that District, there are grand juries which sit on a regular weekly basis and listen to presentations such as the one described above. Those are referred to as indicting grand juries. There are also grand juries whose principal function is investigatory. That is, grand juries which work in conjunction with the United States Attorney's Office and the various federal investigative agencies in taking the testimony of witnesses, subpoenaing documentary and other physical evidence and evaluating the same prior to making a determination of whether or not to indict. These are commonly referred to as investigatory grand juries.

Inasmuch as the investigatory grand jury amasses evidence which may later be used in a criminal prosecution, most of the proceedings before investigatory grand juries are recorded by stenographic reporters. On the other hand, the proceedings before the so-called regular indicting grand juries are not recorded since the evidence which is being presented to the grand jury by way of an agent's summary has already been gathered. The determination of whether or not to record grand jury proceedings is almost always made unilaterally by the United States Attorney's office. Under the Federal Rules of Criminal Procedure, the proceedings before the grand jury are subject to discovery. However, the discovery of the investigative reports of investigative agencies is not permitted under the Federal Rules of Criminal Procedure, with limited exceptions. Thus, to the extent that the prosecution would wish to limit the discovery of its case in chief, it would be to its advantage not to have the grand jury proceedings recorded. That is the principal policy reason underlying the practice of non-recordation.

It is my opinion that the single most important reform which could be effected relative to grand jury proceedings and practice would be to require that all proceedings before all grand juries be recorded. There are numerous federal cases in which the District and Appellate Courts have urged that the practice of recording all grand jury proceedings be adopted. To date, that has not been effected.

The need for such recordation is critical. In some instances, there is a great deal of off-the-record colloquy before the grand jury wherein the Assistant United States Attorney describes his version of the facts, even though all those facts have not been presented to the grand jury. Similarly, the Assistant U. S. Attorneys often describe to the grand jury their version of the applicable law involved and can often make remarks about the character of the defendants or witnesses before the grand jury, which cannot help but have an impact upon the grand jury's deliberations. Nonetheless, because these are off the record, there is no recourse or remedy available to someone who could later be the subject of action by the grand jury.

To protect against that sort of activity, some defense lawyers adopted the practice of filing a motion requesting that all proceedings be recorded. However, the Courts can, in their discretion, deny such a motion and, in fact, often do. That potential for grand jury abuse would be almost certainly eliminated if all proceedings were recorded. In connection with the recommended reform of the grand jury concerning notice to the grand jury of its rights and duties, I would also recommend that whenever the grand jury is instructed at the inception of its service those proceedings should themselves be recorded in order to insure that the Court satisfy its statutory obligation to advise the grand jury of its rights and responsibilities. It is the practice in some District Courts that the orientation of the grand jury is provided in part by representatives of the United States Attorney's Office. Even under circumstances where the United States Attorney's Office is acting in good faith, which is ordinarily the case, there cannot help but be some bias reflected in the United States Attorney's presentation. Thus, it is recommended that whatever orientation or presentation is made to the grand jury of its rights and responsibilities should be made exclusively by the Court rather than the United States Attorney and that it be recorded.

With respect to the proposed reform providing that subpoenaes be issued only on an affirmative vote of twelve (12) or more members of the grand jury, it is my recommendation that that would create an unwieldy burden. Many investigations develop information which is highly complex in nature or involves a sophisticated legal question and the need for a particular witness may not be easily understood by a grand jury. At present, the attorney for the government generally directs the issuance of subpoenaes. That seems to work in a satisfactory manner in those instances where the attorney for the government is acting responsibly. As noted above, the best insurance that the attorney for the government acts responsibly is that all proceedings before the grand jury, from the moment the attorney for the government enters the grand jury room until after he leaves, be recorded.

The provision that a grand jury may not be convened in the District unless substantive violations occurred therein, is not a realistic one under circumstances where crimes are committed outside the United States as part of a conspiracy which is hatched in the United States. That is, as proposed, the reform bill would provide that a grand jury may not be convened in a District where only a conspiracy offense is alleged. That would be a reasonable restriction on grand jury activity if provisions were made where investigations of criminal activity outside the boundaries of the United States is involved.

Similarly, the provision in the proposed reform bill to the effect that once a grand jury has considered a matter the government shall not bring the matter to another grand jury without the presentation of additional relevant evidence to the Court, would not be necessary in my judgment if all proceedings were recorded. The fact of the matter is that the United States Attorney can generally secure an indictment in more than 99% of all cases if he wishes one and that the grand juries do not hold up the United States Attorney for want of evidence.

I am in agreement with the provision in the reform act that where a person subpoenaed has given written notice of his intent to assert his Fifth Amendment privilege against self incrimination, he should not be compelled to attend a grand jury proceeding unless for purposes of being immunized by the Court. Too often an Assistant United States Attorney is well aware, in advance, of a person's intention to assert his Fifth Amendment privilege and, nonetheless, the person is subpoenaed—for no obvious reason other than to harass or intimidate the person.

With respect to the provision in the reform bill which would give a witness or his counsel the right to examine and copy any statement of the witness in the possession of the government relating to the matter of investigation, it would appear that such a provision could be subject to abuse. Much of what occurs during the investigatory stages of the case is confidential. Such information often does not lead to cases and many investigations die for the reason that no violations have occurred or there is not sufficient evidence to sustain the continued investigative interest of the government. For that reason, making available witness statements to other witnesses would have the unhealthy effect of creating disputes or hostility between persons who, at present, would be unaware of the statement or testimony of others. That is to say, as this is proposed in the reform bill, there is a possibility of invading existing business, social or personal relationships for no apparent end.

The reform bill's proposal whereby a grand jury subpoena may be challenged in any District to which the subpoenaed witness has access is a good proposal. At present, the only District in which such a subpoena can effectively be challenged is the district out of which it issues. Since a grand jury subpoena has nationwide power to compel, circumstances can and do occur where a person from across the country, having been subpoenaed, has no means of challenging that subpoena short of appearing at the grand jury hearing. Often this can occasion a loss of employment time, great personal inconvenience and hardship on persons who have little or no stake in the matter under investigation.

With respect to the reform bill's requirement that the Attorney General file detailed annual grand jury reports describing the number and nature of investigations undertaken by various grand juries, this proposal does not seem calculated to achieve that end sought. Presumably, the end sought by this provision would be to achieve some accountability as to grand jury performance and utilization. At present there are similar reports prepared respecting wiretap applications and organized crime investigations. They consist, in large measure, of exaggerated reports of questionable results and justifications for activity based upon something less than hard facts.

There are two alternative proposals designed to protect an accused's rights to the equivalent of a preliminary hearing. The first of those consists of a statement of the right to a preliminary hearing; the second of those guarantees representation by counsel before the grand jury. Both of those proposals have some merit. It seemed that the more practicable proposal would be the guarantee of a right to counsel before an "indicting grand jury." Under the circumstances where all proceedings before the grand jury are on record and there is no possibility that the prosecutor, whether acting in bad faith or good faith, could poison the atmosphere against the putative defendant, and, where the statement of applicable law is presented to the grand jury on the record, the fact that an accused had an attorney who could present his version of the case to the grand jury would seem to guarantee the ferreting out at an early stage of weak or unfounded cases. It would seem that this could be achieved with considerably greater efficiency than would the creation of a procedure whereby numerous preliminary hearings were held with the requirement that court personnel be utilized to hear prosecution and defense presentations.

In summary, that characteristic of grand jury proceedings designed to protect the rights of citizens—i.e., grand jury secrecy—is the very same characteristic which can, if not controlled, lead to the greatest abuse of the rights of citizens. That secrecy is occasioned by reason of the existing Federal Rules of Criminal Proceedings respecting discovery of grand jury proceedings and the fact that

with respect to indicting grand juries, all of what transpires is "off the record" and much of what occurs in investigatory grand juries is "off the record." Under those circumstances, an objective review of grand jury proceedings is not possible. The recordation of all proceedings from the moment the prosecutor enters the room until the grand jury is dismissed at the close of the day would insure: (1) the making of a record of all statements by grand jurors, prosecutors, witnesses and agents; (2) the fair characterization and summary of evidence by prosecutors' investigatory agents; (3) that off the record statements relative to inadmissible or non-existent evidence as to a putative defendant's background, associations, etc., would probably be obviated in their entirety; and (4) a record would be available to a witness or a putative defendant which would guarantee at least some form of review of the grand jury proceedings.

Such a requirement of recordation would not be a major reform in that it would be consistent with the growing trend in government to avoid secrecy in government to the extent reasonably possible. The proceedings before a grand jury are generally conducted by responsible prosecutors, responsible and honest law enforcement agents and are heard by conscientious and responsible citizens That is the ideal. The fact of recordation of all proceedings would help to insure that ideal without in any way interfering with or frustrating the lawful functions of all those concerned in the process.

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DEPARTMENT OF JUSTICE,
*Washington, D.C.*

Hon. JAMES EASTLAND,
*Chairman, Committee on the Judiciary,*
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN:

This is in response to your request for the views of the Department of Justice on S. 3274, 94th Congress, 2nd Session, a bill "to establish certain rules with respect to the appearance of witnesses before grand juries in order to better protect the constitutional rights and liberties of such witnesses under the Fourth, and Sixth Amendments to the Constitution, to provide for independent inquiries by grand juries, and for other purposes."

S. 3274 consists of five sections. Two of the five sections (Sections 2 and 3) concern recalcitrant witnesses. In the interest of clarity, this letter discusses particular parts of the bill under headings comparable to those used in the bill and with citation to the appropriate section and pages of the bill. The two sections on recalcitrant witnesses will be discussed together. The purely introductory section (Section 1) and the section on making reports concerning grand jury investigations (Section 5) will not be discussed.

I. RECALCITRANT WITNESSES (SECS. 2 AND 5, PP. 1–5)

*The Proposal.* Section 1826 of title 28, the civil contempt statute enacted as part of the Organized Crime Control Act of 1970, provides, in brief, that a federal grand jury or trial witness who refuses to comply with an order to testify or produce evidence may be summarily confined until such time as he is willing to obey the court's order. A witness so confined must be released when the pertinent proceeding is terminated, and in no event may his confinement exceed eighteen months. The section also provides that a contemptuous witness may not be admitted to bail pending appeal if it appears that his appeal is frivolous or taken for delay, and that any appeal shall be disposed of as soon as practicable, but no later than thirty days from the time it is filed.

Section 2 of S. 3274 would amend 28 U.S.C. 1826 to make the following significant changes: (1) a grand jury witness, unlike a trial witness, could only be confined for refusing to comply with a court order following a hearing after a notice of five days (a hearing could be held on shorter notice of not less than 48 hours upon a showing of special need): (2) if a Federal correctional institution were located within fifty miles of the court ordering confinement, a contemptuous witness could be confined only at such an institution unless he agreed otherwise; (3) the maximum period of confinement for civil contempt would be six months; (4) confined once for civil contempt, a witness could not again be confined for refusing to testify or provide other information concerning the same transaction, set of transactions, event or events; (5) a court could not punish a grand jury witness' refusal to answer a question or provide information under

either § 1826 or 18 U.S.C. 401 if the question or request was based upon evidence obtained by an unlawful act or in violation of the witness' rights under the Constitution or a federal statute; (6) a court would be authorized to appoint counsel, in the same manner as provided in 18 U.S.C. 3006A, for any person financially unable to obtain adequate assistance; (7) an appeal from an order of confinement would be expedited only "upon application by a party" and would not have to be determined within thirty days.

In addition, Section 2 of S. 3274 would rewrite 28 U.S.C. 1826 in a way that is clearly not intended; i.e., to make no provision for confinement of a contemptuous trial witness in those instances where there is no federal correctional institution within fifty miles of the court. The provision would be properly drafted if the portion of line 4 of page 3 of the bill which reads "at a suitable Federal correctional institution" were changed to "at a suitable place. Such confinement shall be at a suitable federal correctional institution . . ." Similarly, to avoid confusion in the provisions concerning grand jury witnesses, the words "at a suitable place" should be added after "confined" in line 14 of page 2 of the bill.

Section 3 of S. 3274 would add a new section to chapter 21 of title 18 of the United States Code, providing that a person who had once been imprisoned or fined for criminal contempt under 18 U.S.C. 401 in a proceeding before a federal grand jury could not again be imprisoned or fined under § 401, or under 28 U.S.C. 1826, for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events.

DISCUSSION

(A) *Preventing summary punishment of a grand jury witness for civil contempt.* To require that a contemptuous grand jury witness be given five days notice ordinarily, and no less than forty-eight hours notice upon a showing of special need, before he can possibly be confined upon a hearing would both seriously undermine the civil contempt statute, and hamstring the civil contempt remedy as it has been developed and used in the grand jury context for many years.

The legislative history of 28 U.S.C. 1826 shows that the statute was intended essentially to codify established law and practice on civil contempts. H. Rep. 91–1549, 91st Cong., 2d Sess. 46 (1970); S. Rep. 91–617, 91st Cong., 1st Sess. 56–57, 148–149 (1969). The theory underlying civil contempt is that the recalcitrant witness must be subjected immediately and constantly to discomfiture, not for punitive purposes, but to induce him to obey the court's command to testify before some miscarriage of justice has resulted or a work of public business has been put to waste. The power is an historic and absolutely vital one.

The power to compel citizens to testify is itself one of the most important and necessary powers of government in an ordered society. *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 93 (1964). "[T]he longstanding principle that the public has a right to every man's evidence" is "particularly applicable to grand jury proceedings." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972). A judicial power to proceed summarily against recalcitrant witnesses is "essential to preserve the authority of courts and to prevent the administration of justice from falling into disrepute." 15 *Cyclopedia of Federal Procedure*, 628 (3rd ed. 964). While there are due process considerations courts must honor in civil contempt proceedings, the nature of civil contempt is such that indictment and jury trial are not required, and a reasonable expedition of the proceedings, including appeals, is entirely warranted. See *United States* v. *Weinberg*, 439 F. 2d 743, 746 (9th Cir. 1971).

Summary punishment for civil contempt is sometimes justified—and should be especially so when the witness has been immunized—on the basis that the issues are very simple and that the witness is being required to perform no uncommon duty. Doubtlessly, the primary justification for civil contempt powers is the "conditional nature of the imprisonment—based entirely upon the contemnor's continued defiance." *Shillitani* v. *United States*, 382 U.S. 364, 371 (1966). All the witness need do is discharge his duty of testifying, as other citizens must do, and he is entitled immediately to go free.

It must be emphasized that 28 U.S.C. 1826 permits—but does not require—a court to confine the contemptuous witness summarily. In administering this statute, the courts have generally ruled that before a grand jury witness may be held in civil contempt, he is entitled to certain procedural regularities, including the time needed to adequately prepare a defense; the reasonable time needed to

prepare a defense varies, however, according to the circumstances of each case. See, *e.g.*, *In re Sadin*, 509 F. 2d 1252 (2d Cir. 1975). Moreover, under 28 U.S.C. 1826 the witness who is held in summary contempt can be admitted to bail pending appeal unless his appeal is frivolous or taken for delay. Thus, the present statute allows for results similar to those that the proposed legislation would mandate. Under current law, however, while there is latitude for courts to deal with the rare situation where the witness's refusal to comply with the court's order raises some genuine issue, there is also the necessary flexibility to deal speedily with the more frequent situation—particularly in the case of immunized witnesses—where no genuine issue exists.

By depriving the courts of their traditional power to deal quickly and effectivly with contemptuous witnesses, this bill would exacerbate one of the most serious problems in the criminal justice system—the problem of delay. By leaving unchanged the courts' power under 28 U.S.C. 1826 to deal summarily with contemptuous trial witnesses, this bill recognizes the imperative need to act quickly to prevent the delay and disruption of trials. But as important as it is to prevent breaks in the progress of a trial, "it is no less important to safeguard against undue interruptions of the inquiry instituted by a grand jury." *Cobbledick* v. *United States*, 309 U.S. 323, 327 (1940). Especially in complex cases a grand jury investigation cannot be run effectively by fits and starts. The testimony of a key witness can determine who else will be subpoenaed, which questions will be asked, and what physical evidence will be demanded. Grand jury investigations must often be pressed vigorously so as to minimize risks that the witnesses will flee or be intimidated, or join in fabricating testimony, or tamper with physical evidence. The damage one witness can do by stalling matters five days is magnified if succeeding witnesses do the same, and a prolongation of the proceedings will often work personal hardship upon the grand jurors. Even under current law a witness is sometimes able to delay the resolution of contempt proceedings until after the expiration of the grand jury's term, requiring that a new grand jury be empanelled to recommence the investigation. See, *e.g.*, *In re Weir*, 520 F. 2d 662 (9th Cir. 1975) (fifteen months expired between the time the witness was first held in contempt and the order of confinement). There is simply no justification for allowing every balking grand jury witness two days delay as a matter of course (five days absent a showing of special need) when such a delay might disrupt the orderly presentation of evidence or necessitate a complete break in the investigation; in the end, the witness might profess to have no pertinent informatino. Particularly in view of the fact that the courts presently possess and exercise the power to delay a contempt hearing so long as is reasonably necessary to permit the witness to prepare an adequate defense, any sympathetic claim which a contumacious witness might have to an automatic two or five day respite must surely yield to the public interest in the expeditious administration of criminal justice and to the personal concerns of those who are performing jury duty. The proposal for automatic delay, unrelated to the legitimate needs of the contumacious witness, would drain off much of the vitality of the civil contempt remedy, and in turn, the vitality of the investigative type of grand jury.

(B) *Requiring that a contemptuous witness be confined at a Federal correctional institution if one is located within fifty miles of the court ordering confinement.* It would be inconsistent with the tradition of recognizing a summary power in the courts for the contemptuous witness to be confined at any unnecessary distance from the situs of the proceeding. Such a witness is properly detained nearby, to induce him to testify fully as the court orders, and to permit the proceeding to be resumed as expeditiously as possible upon his decision to testify. Moreover, unlike the person who has been adjudged in criminal contempt under 18 U.S.C. 401–402, or Rule 42 of the Federal Rules of Criminal Procedure, a person confined for civil contempt is not to be regarded as a criminal to be corrected. The witness held in civil contempt is properly detained with those held to answer to charges, rather than with convicted felons.

(C) *Limiting confinement for civil contempt to six months.* The Department of Justice is firmly convinced that softening the force of civil contempt procedures would be inimical to the public interest. We recognize that a loose analogy may be drawn to the criminal contempt situation in which a court is unable, without a jury trial, to sentence a witness to a term in excess of six months. *Bloom* v. *United States*, 391 U.S. 194 (1968). But likening the civil contempt power to any sort of criminal law situation is only to invite confusion. There is simply no crime being punished; confinement for civil contempt is remedial in purpose, not punitive; and the person held in civil contempt has the unique power of ending his

confinement by obeying the order. See *Shillitani* v. *United States*, *supra*, 384 U.S. 371; *Gompers* v. *Bucks Stove Co.*, 221 U.S. 418 (1911). By contrast, the person confined for criminal contempt cannot terminate or shorten his sentence by any act of his own. *Ducll* v. *Ducll*, 178 F. 2d 683 (D.C. Cir. 1949).

The ability to punish the contemptuous witness for criminal contempt is no substitute for the ability to confine him in civil contempt. In general, the contumacious witness should be pressed to discharge his testimonial duty for as long as the proceeding is pending that his contempt may pervert or abort. See *Shillitani* v. *United States*, *supra*, 384 U.S. 364. The general rule should admit of only one exception.

Until relatively recently grand juries could not exist for longer than eighteen months. See Rule 6(g) of the Federal Rules of Criminal Procedure. In 1970 the Congress provided for special grand juries in populous areas, primarily (but not entirely) to conduct organized crime investigations. To insure that the juries would be able to conduct thorough investigations, it was provided that their terms could be extended for up to thirty-six months. 18 U.S.C. 3331. The civil contempt statute enacted at the same time prohibited the confinement of a recalcitrant witness for longer than eighteen months under any circumstances. 28 U.S.C. 1826(a). Such an absolute limit is justified, we agree, in order that civil contempt may retain its distinct, non-punitive character. See *Shillitani* v. *United States*, *supra*, 384 U.S. at 368–372. It remains, however, that in order to make sure that the civil contempt mechanism will have ample time in which to work its purpose of inducing the witness to obey the order of the court, the witness should face more than a possible six months in confinement. The Department strongly urges that the maximum period of confinement available to the courts for civil contempt not be reduced below eighteen months.

(D) *Preventing repeated confinements for successive contempts.* The Department is opposed to the proposal. We recognize that a loose analogy may be drawn to the constitutional provision against double jeopardy, but any such attempted analogy does not withstand analysis. In the first place, the double jeopardy clause does not itself bar successive prosecution for separate and successive acts; the fact that a defendant has once been convicted of bank robbery does not preclude his conviction for a later robbery of even the same bank. Moreover, the double jeopardy provision applies to the imposition of criminal penalties; as has already been emphasized, the civil contempt power cannot be likened to any sort of criminal law situation.

We are also aware of the argument that once confinement has proven futile to induce a witness to testify, a repetition of the process might well be equally futile, and take on punitive aspects not in keeping with the purpose of the civil contempt power. But the proposed legislation is not necessary to prevent repeated confinements for contempt that could serve no purpose. Nothing in current law requires a court to confine a witness in civil contempt. Whatever legal rights a repeatedly contumacious witness may have, see *Shillitani* v. *United States*, *supra*, 384 U.S. at 371 n. 8, those rights can be secured in the courts. If a judge sees no useful purpose to be served by utilizing his civil contempt powers, he may refrain from doing so.

Furthermore, the proposed legislation 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, that it is necessary to prevent a miscarriage of justice. For example, as the proposed legislation 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 other information; or he might testify in the grand jury proceeding and refuse to testify at trial; or he might testify against one defendant and refuse to testify in a companion case—the court being in all such instances impotent to use the civil contempt statute. The witness's refusal to testify could cause an innocent person needlessly to be charged, or a guilty person to be acquitted, and, with some new or different light shed upon the basic transaction, it could gain a broader or greater significance than previously imagined; hence, the need for the witness's testimony in the second instance might be distinct from and greater than the earlier need. Even if the need 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.

Extreme caution must be exercised in legislating restrictions upon judicial discretion to deal with successive contempts. As was pointed out above, judicial

power to deal summarily with recalcitrant witnesses preserves the authority of the courts and prevents the administration of justice from falling into disrepute. Restrictions upon the courts' power to repeatedly hold a witness in civil contempt would in itself pose serious problems. But the proposed legislation would go even further and deprive the courts of any contempt power whatsoever—criminal as well as civil—over the repeatedly contumacious witness, so long as his contempts involved refusals to testify or provide information concerning the same transaction, set of transactions, event or events for which he was once, however briefly, confined. Confinement for civil and criminal contempt cannot readily be equated, as is done in the proposed legislation; the purpose of one is remedial—to induce the witness to comply with the court's order—while the purpose of the other is punitive—to punish defiance of the court. The fact that a witness was once confined to induce his testimony should have no necessary effect upon his subsequent exposure to criminal sanctions, should such become appropriate, and vice versa. Nor is there any reason for singling out the criminally contumacious grand jury witness for immunity from subsequent criminal or civil contempt sanctions, as proposed by Section 3 of S. 3274. The public interest cannot be served by legislating a total judicial inability to deal with repeatedly contumacious witnesses.

(E) *Authorizing a court to appoint counsel to represent an indigent contemptuous witness.* The Department has no objection to this proposal which would permit, but not require, a court to appoint counsel to represent an indigent contemptuous witness. Several courts have ruled that a witness has a right to counsel at a civil contempt proceeding, but it is highly doubtful that the present statutory authority for appointment of counsel, 18 U.S.C. 3006A, applies to such proceedings.

(F) *Justifying a grand jury witness's refusal to answer questions based upon an unlawful act or the violation of a legal right.* Under current law, a witness is often protected at trial from answering questions based upon a violation of a right or privilege. 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 (1971) ; cf. *Harrison* v. *United States*, 392 U.S. 219 (1968). But the situation before a grand jury is different. There the courts have consistently held that the Constitution imposes no bar to compelling a witness to respond to questions derived from improper activity, since the exclusionary rule as it operates at trial is deterrent enough to prevent deliberate invasions of rights, 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 the need of the grand jury for the witness's evidence in its investigation is paramount. See *United States* v. *Calandra*, 414 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 unlawfully intercepted communications. *Gelbard* v. *United States*, 408 U.S. 41 (1972).

The proposed legislation 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's 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. The possibility that justice will be defeated and the grand jury's investigation thwarted in these circumstances outweigh 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; it would also precipitate 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 is not to be extended across the board; it certainly should not be extended 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. The Department strongly objects to this proposal.

(G) *Expediting appeal only upon application of a party; not requiring decision within thirty days.* The summary contempt power is of such an exceptional nature, as indicated above, that we believe the existing requirement that appeals be disposed of within thirty days is fully warranted. Similarly, we do not see any justification for making expedition of an appeal depend upon any kind of application. The government would rarely, if ever, be content about delay in handling an appeal, and would, therefore, be filing an application in virtually every case.

### II. CERTAIN GRAND JURY MATTERS

Section 4 of S. 3274 is a relatively lengthy section which deals with three distinct subject matters. These three matters are: (1) notice to the grand jury of its rights and duties; (2) independent grand jury inquiry; and (3) certain rights of grand jury witnesses. We will discuss each of these three matters separately in turn.

(1) *Notice to the grand jury of its rights and duties* (pp. 5–7).

*The proposal.* Under Section 4 of S. 3274, a new section would be added to chapter 215 of title 18 of the United States Code to require that the district court, upon empaneling a grand jury, give it adequate and reasonable written notice of, and assure that it reasonably understands the nature of, its rights and duties, as enumerated. Failure to instruct a grand jury as required would be "just cause" within the meaning of 18 U.S.C. 1826 for a witness's refusal to testify or provide other information before that grand jury.

*Discussion. Notifying a grand jury of its rights and duties.* There is no objection in principle to requiring that district courts notify grand juries of their rights and duties. At present the courts give appropriate instructions to grand juries as a matter of practice. We do question the need for providing such instructions in written rather than oral form. There is no indication that grand jurors fail to understand the instructions as presently given, and the judge is always available to provide further instruction or clarification if such is desired.

Our central objection, however, is to the rights and duties enumerated in the proposal. For example, the requirement that a grand jury be notified, at the time it is empanelled of "the subject matter of the investigation" would create practical difficulties and be of highly dubious value. The majority of grand juries are not empanelled to undertake any specific investigation, but rather to hear many diverse kinds of cases, and take on such investigations, not previously planned or definitely scheduled, as might arise during their term. Our objections to other of the enumerated rights will be made evident in the discussion below.

Furthermore, we must also object to the provision in the proposal which would prevent a witness from being held in civil contempt for refusing to testify or provide information to a grand jury if the jury had not been properly instructed at the time it was empanelled. 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's appearance. This provision also could be expected to give rise to litigation in virtually every contempt proceeding over whether the grand jury had been adequately instructed, for example, as to the subject matter of the investigation or the criminal statutes involved. Finally, the kinds of rights involved in this proposal have no inherent relationship to the witness's obligation 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 of them should occasion remedial action absent some particular prejudicial effect upon the witness.

(2) *Independent grand jury inquiry* (pp. 7–10).

*The proposal.* Section 4 of S. 3274 would also add a section to chapter 215 of title 18 that would, in brief, give every grand jury the right, after giving notice to the court, to inquire upon its own initiative into Federal offenses alleged to have been committed by officers or agents of the United States or of any State

or local government. The grand jury would serve for twelve months thereafter, unless discharged sooner upon a determination by the members that the jury's business had been completed. If the court determined that the jury's business had not been completed after the end of the twelve months, or any extension thereof, the court could extend the jury's term further, six months at a time, but no jury could serve for more than twenty-four months after giving notice of its intent to conduct an independent inquiry. If the district court failed to extend the jury or ordered its discharge before the jury determined that its business was completed, the jury would be authorized, pursuant to a vote of twelve or more of its members, to apply to the chief judge of the circuit court for an extension of its term, which would continue automatically while the application was pending; but no grand jury term so extended could exceed twenty-four months.

The grand jury could request the attorney for the government to assist it in conducting its inquiry. If, however, the attorney for the government refused to assist, or hindered or impeded the grand jury in conducting an independent inquiry under this section, the grand jury (pursuant to a vote of twelve or more of its members) could request that the court appoint a special attorney to assist the grand jury in its inquiry. A special attorney appointed by the court would have certain broad authority to appoint and fix the compensation of assistants, investigators, and other personnel. Notwithstanding the provisions of 28 U.S.C. 516 and 519, the special attorney would possess the exclusive authority to assist the grand jury in its independent inquiry and to sign any resulting indictment.

(A) *Independent Grand Jury Inquiry.* The Fifth Amendment to the Constitution makes the grand jury an integral part of the Federal criminal justice system, and the law has traditionally accorded grand juries broad powers of inquiry. See, *e.g., United States* v. *Calandra*, 414 U.S. 338, 342–345 (1947); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642–643 (1950); *Blair* v. *United States*, 250 U.S. 273, 282 (1919). But this proposal goes well beyond traditional practice in making grand juries independent of the judicial branch of government.

It is difficult to express precisely the nature of the relationship between the courts and grand juries, but it is clear that grand juries are not fully independent of the courts. Grand juries have often been referred to as "arms" or "appendages" of the courts. Thus, in *Brown* v. *United States*, 359 U.S. 41, 49 (1959), for example, the Court noted that:

A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify, if, after appearing, he refused to do so.

It has also been observed that "a grand jury may so exceed its historic authority as to justify a court in interfering with its investigatorial power." *In re April 1956 Term Grand Jury*, 239 F.2d 269 (7th Cir. 1956).

As part of this relationship, the district courts have traditionally administered the empaneling and discharging of grand juries. Under the proposed legislation, however, a regular grand jury had sat for nearly eighteen months and a special grand jury that had sat for nearly thirty-six months could take on new business, by a vote of the members, and extend their terms of service, if necessary to complete the new business, for as long as twenty-four months more.

This could occur whether or not the planned subject of inquiry had already been, was being, or was going to be investigated by another grand jury, and whether or not the court felt that the extension was otherwise in the public interest. If many grand juries exercised this power to extend (which the courts would be obliged to call to the jurors' attention), serious administrative problems could develop.

This Department knows from past experience that courts do not like to have several grand juries empaneled at the same time, because that can lead to a sporadic, uneconomical, and otherwise disorderly use of grand juries. Since grand jury service often entails hardship or inconvenience for the jurors, the courts tend to avoid using one jury for a long time and prefer instead to empanel successive grand juries for relatively short periods if the workload allows. But the thrust of the proposed legislation is to authorize, if not invite, a majority of members of a grand jury to determine, without the benefit of any overview of

the system, their own length of service and to preempt the work other juries might do, no matter how much the court might wish to order its business differently, and in the face of the overriding fact that the court (not the grand jury) controls the subpoena process. While we recognize that the proposed legislation is patterned after 18 U.S.C. 3331, the purpose of 3331 was "to make available a sufficient number of grand juries in each judicial district to accommodate the general needs of the district and the special needs of the typically lengthy organized crime case." H. Rep. 91–1549, 91st Cong., 2d Sess. 39 (1970). The instant proposal goes unnecessarily far in expanding the basic idea of 18 U.S.C. 3331 and would interfere unwisely with the judiciary in its handling of the grand jury system.

This proposal would probably not create as much administrative difficulty as certain other proposals pending in the Congress to authorize independent grand jury inquiry, since it would apply only when Federal, state, or local governmental officials are alleged to have committed Federal violations. We do not, however, see any appropriate reason for treating such investigations as unique. We infer that the intention is to foster independent grand jury inquiry principally when questions arise about the conduct of a governmental official in his public office. But even so limited, the proposal cannot be justified in our view; it simply breaks too sharply with longstanding practice which has, in fact, worked well. It should be noted that grand juries have never lost the power to determine which matters they wish to investigate, what witnesses they would like to hear, and which questions to ask. The maintenance of this traditional independent investigatory power, however, has never and does not now require that the historic relationship between the courts and grand juries be diminished. Furthermore, the proposal is undermined by its reliance upon a special court-appointed attorney outside the executive branch of government.

(B) *Special attorney for the grand jury.* This Department opposes, as a matter of fundamental principle, any legislation that would authorize courts to appoint attorneys to do the job of this Department. We think it clear that, as the agency of the executive branch of government charged with the responsibility of taking care that the law be enforced, his Department is entitled to provide counsel for grand juries. It is an executive function to do so since it is an executive function to approve indictments, and determine whether prosecutions should be initiated.

At the outset, it should be noted that the signing of an indictment by a special court-appointed attorney in lieu of a government attorney, pursuant to the provisions of S. 3274, would probably not operate to create a valid indictment. It has been held that the signature of a government attorney is essential to the validity of an indictment and that the signing is an executive act not to be compelled by the judiciary, the relevant provisions of Rule 7 of the Federal Criminal Rules reflecting simply a recognition of the power of Government counsel to permit or not to permit the bringing of an indictment. *United States* v. *Cox*, 342 F. 2d 167 (C.A. 5, 1965), *cert. den.*, 381 U.S. 935. The Court there said:

"The role of the grand jury is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed. The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. * * * It follows, an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions" (at 342 F.2d 171).

Moreover, although under the relevant provisions of S. 3274 the appointment of a special attorney would be limited to those instances where the attorney for the government refused to assist, or hindered or impeded the grand jury in conducting an independent inquiry, even the appointment of a special attorney in such limited circumstances would be an encroachment upon the free exercise of the Executive's discretionary prosecutorial authority. The courts have consistently ruled that they are without power to interfere with the government prosecutor's decision not to commence or initiate a prosecution, on the grounds that the determination is within the ambit of the Attorney General's and United States Attorney's executive discretionary power. See, *e.g. Peck* v. *Mitchell*, 419 F.2d 575 (6th Cir. 1970); *Moses* v. *Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965). In *Milliker* v. *Stone*, 7 F.2d 397, 399 (S.D.N.Y. 1925), the court stated that "federal courts are without power to compel the prosecuting officers to enforce

the penal laws, whatever the ground of their failure may be. The remedy for inactivity of that kind is with the executive and ultimately the people."

We recognize that a loose analogy may be drawn between the appointment of a special attorney contemplated by S. 3274 and the courts' present authority under 28 U.S.C. 546 to appoint a United States Attorney when that position is vacant until the vacancy is filled. However, crucial distinctions exist. 28 U.S.C. 546 is the present codification of a statute first enacted in the nineteenth century, at a time when transportation and communication facilities were such that absent temporary appointment authority in the local courts, the position of United States Attorney might have remained unoccupied for a substantial period of time following the resignation, death or inability to serve of the previous incumbent. It is not the intent or effect of this provision to enable a court to deprive the President of his power to appoint the United States Attorney, but rather to enable the court to fill a vacancy until such time as the President should act, and no longer. *United States* v. *Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963); *Matter of Farrow*, 3 F. 112 (C.C. Ga. 1880). The exercise of this appointive power in no way binds the executive; rather, the executive branch remains free to choose another United States Attorney at any time, regardless of the judicial appointment. On the other hand, under the current proposal, the specially appointed attorney would supplant the executive's authorized attorney, albeit temporarily.

The proposed legislation would also, we submit, be unsound as a matter of policy, and not only constitutional law. Enforcement of the criminal laws is no mechanical task. In discharging its responsibility of determining when to initiate a prosecution, this Department must construe statutes and legal precedents, make legal and factual judgments, formulate prosecutive policy, and exercise sound discretion. In all likelihood, it would be adherence to Departmental prosecutive standards and policies which would lead the attorney for the government not to assist a grand jury inquiry, the precise circumstance which would trigger appointment of a special attorney. Certainly no one should have to answer to criminal charges lodged by a grand jury upon the advice of an attorney not subject to the prosecutive policies of the Department of Justice, and, indeed, not apparently subject to any control at all. Criminal charges should not be brought against an individual when, under standards or policies employed by the Department, the case is not prosecutable. In short, the special attorney contemplated under this legislation might well obtain indictments (upon probable cause) in precisely those situations where existing, and legitimate, Departmental prosecutive policy mandates against prosecution. Since under this legislation the role of the special attorney would end with the signing of any indictments, the ultimate responsibility for pursuing the case through trial and appeals would revert to the Department's attorneys, who had determined in the first instance that it should not be maintained. Indictments should surely not be returned where the cases are not to be, as they probably would not be, pursued.

In those rare instances where the appointment of a special prosecutor has been deemed necessary to insure public confidence in the integrity and thoroughness of an investigation, the executive has done so. But there are compelling legal and practical reasons militating against this proposal, and the Department must oppose its enactment.

(3) *Certain Rights of Grand Jury Witnesses* (pp. 10–19).

*The Proposal.* Section 4 of S. 3274 would also add a section to chapter 215 of title 18 to grant certain rights to grand jury witnesses and to make certain other requirements. Under the section, a grand jury subpoena could be issued only upon the vote of the grand jurors. Grand jury subpoenas would not be returnable on less than seven days notice, unless the witness consented to earlier compliance, or the court found that good cause existed for requiring compliance in less than seven days. The witness would be advised in the subpoena of his right to council, his privilege against self-incrimination, the subject matter of the grand jury's inquiry, the Federal statutes involved, and whether his own conduct was under investigation. A witness not so advised would acquire, upon testifying, both a use immunity and a transactional immunity from prosecution. If a witness prior to his appearance gave written notice of his intention to assert the Fifth Amendment privilege, he could not be compelled to appear before the grand jury unless granted immunity. Upon his appearance before the grand jury, the witness would be entitled to the assistance of counsel, either retained or (as appropriate) appointed by the court; counsel could accompany the witness

into the grand jury room, and would not be under any duty to keep the proceedings secret.

A grand jury could conduct an inquiry only in a district in which it is believed substantive criminal conduct occurred. A grand jury convened to inquiry into both violations of substantive criminal statutes and violations of statutes forbidding conspiracy to violate substantive criminal statutes could not be convened in the district in which only the conspiracy occurred.

For the convenience of witnesses and where the interests of justice required, a district court could, on the motion of a witness, transfer a grand jury proceeding to any district where it might properly have been instituted. In considering an application for such a transfer, the court would consider all relevant circumstances, including the distance of the grand jury investigation from the places of residence of subpoenaed witnesses, financial and other burdens placed upon witnesses, and the existence and nature of related investigations and court proceedings, if any.

Once a grand jury failed to return an indictment, no grand jury inquiry could be initiated into the same transactions or events first considered, unless the government made a proper showing that it had discovered additional evidence relevant to the inquiry.

It would be required that a complete stenographic record be kept of all grand jury proceedings, including all introductory remarks and all interchanges between the attorney for the government and anyone participating in the proceeding, but not of any consultations between witnesses and their counsel or of the secret deliberations of the grand jurors. Each witness would be entitled, personally or by counsel, to examine and copy a transcript of his own testimony; a witness proceeding in forma pauperis would be given a copy of the transcript upon request. The transcript would have to be available for inspection and copying not later than forty-eight hours after the conclusion of the witnesses's testimony, unless, for cause shown, more time was required to prepare the transcript. After examining the transcript, the witness could request permission to appear before the grand jury again to explain his testimony, and such additional testimony would become part of official transcript.

Before testifying under the grand jury subpoena, each witness would be entitled to examine and copy, personally or by counsel, any statement in the government's possession that the witness had made about the subject matter of the inquiry. The witness could not be confined for refusing to testify if he had not been fully advised of his rights; or if the court found that a primary purpose or effect of subpoenaing the witness was to prepare for a trial of Federal, State or local charges; or if compliance would be unreasonable or oppressive because it would involve unnecessary appearances by the witness, or because his testimony would be cumulative, unnecessary, or privileged; or if a primary purpose in subpoenaing the witness was for harassment; or if the witness had been confined for his refusal to testify before a grand jury investigating the same transaction or event.

If, before appearing under the grand jury subpoena, the witness wished to file a motion to quash the subpoena or for other relief, there would be concurrent jurisdiction to decide the matter in the district court issuing the subpoena and in any other district court for a district in which the witness resides or was served the subpoena. Once the witness appeared before the grand jury, any motion for relief could be made only in the district court that empaneled the grand jury. Filing a motion to quash or for other relief would stay the witness' appearance until the motion was decided.

The attorney for the government would be limited before the grand jury to asking questions or requesting the production of books, papers, documents or other objects relevant to the subject under inquiry. He would be prohibited from submitting any evidence to the grand jury which was obtained by an unlawful act or in violation of the witness' legal rights.

A grand jury would be authorized to indict when (1) the evidence before it was legally sufficient to establish that the offense was committed, and (2) competent and admissible evidence before it provided reasonable cause to believe that the person committed the offense. An indictment could be based solely upon summarized or hearsay evidence only if the court found there was good cause for doing so. The attorney for the government would be required to present to the grand jury all evidence in his possession which he knows would tend to negate the guilt of those under investigation.

The district court would be required to dismiss any indictment returned in its district if it found that: (1) the evidence before the grand jury was legally insufficient to establish that the offense was committed; (2) there was not competent and admissible evidence, or summarized or hearsay evidence allowed by the court for good cause shown, before the grand jury to provide reasonable cause to believe that the indicted person committed the offense; (3) the attorney for the Government had not presented to the grand jury all evidence in his possession which he knew would tend to negate the guilt of the indicted person; or (4) the attorney for the Government had submitted to the grand jury evidence obtained by an unlawful act or a violation of the witness' legal rights.

Any person would be authorized to approach the attorney for the Government and request to appear before the grand jury or to urge it to institute an independent inquiry as otherwise provided for in this legislation. The attorney for the Government would be required to keep a record of all denials of such requests and the reasons therefor. A person whose request to appear before the grand jury was denied could petition the court for a hearing on the denial, and the court could permit him to appear or testify if it found that his appearance or testimony would serve the interests of justice.

### Discussion

(A) *Requiring that all grand jury subpoenas be voted upon by the grand jurors.* This proposal would entail serious practical problems, as it would prevent the prosecutor from scheduling witnesses in advance of a grand jury session. Particularly in less populated districts, where grand juries are not continually in session and jurors must often travel considerable distances to attend grand jury sessions, effective use of the grand jurors' time requires that presentations be prepared before the grand jury convenes. To require that the jurors convene solely to vote upon the issuance of subpoenas, concerning which they would rarely have any basis for disagreement with the United States Attorney, would involve wholly unwarranted hardship upon the jurors and unnecessary public expense.

There is nothing untoward about the government attorney's marshaling the witnesses and the evidence for a grand jury presentation; in doing so he is simply employing his knowledge of the facts and the law concerning the case to aid in its orderly presentation. Indeed, the Supreme Court has explicitly noted that the government prosecutor has a participatory role in grand jury proceedings, and is "vested with a certain discretion with respect to . . . the number and character of the witnesses . . . and other details of the proceedings." *Hale* v. *Henkel*, 201 U.S. 43, 65 (1906). The proposal that grand jurors be required to vote upon all subpoenas would, we submit, unduly interfere with the efficient preparation of grand jury sessions and use of the grand jurors' time, while adding nothing to the grand jurors' present ability to request the summoning of those witnesses they particularly wish to hear.

(B) *Requiring that subpoenas not be returnable on less than seven days notice.* Giving a witness seven days notice before requiring his appearance before a grand jury is possibly justifiable as a general standard; in fact, the majority of witnesses subpoenaed to appear before grand juries presently receive such notice. As the proposal provides that the witness may agree to appear earlier, and that a subpoena may be returnable in less than seven days upon a showing to the court that "good cause exists" for requiring earlier compliance, it is considerably less rigid than other notification proposals pending in the Congress. Nonetheless, the Department is opposed to legislation which would automatically delay a witness's appearance for seven days, absent his consent or a judicial determination of "good cause" for expedition.

As indicated above, service on grand juries in certain districts requires the members to travel great distances, and United States Attorneys in such districts are particularly careful to be efficient in their presentations, so that the jurors can complete their work without undue delay and return as quickly as possible to their homes and occupations. If the jurors in such districts wished to hear a witness not previously subpoenaed (for want of information, foresight, or whatever) it might be possible to require the witness to appear promptly, for it is entirely unclear under this proposal whether the understandable interests of the jurors in expedition would suffice for the necessary showing of good cause. Nor, under this proposal, does it appear that any consideration could be given to the not unrealistic possibility that the witness would not be

noticeably inconvenienced by being required to appear on less than seven days notice; no provision is made for balancing the relative interests of the jurors and the witness in expedition.

Focusing particularly upon the investigative type of grand jury, this proposal could have disastrous consequences. One of the benefits of grand jury secrecy and of compulsory grand jury process is that the proof of criminal conduct can be developed in a case before the defendants and their allies have sufficient time or awareness to obstruct the investigation. Speed and vigor are often the decisive factors. Speed in investigation minimizes the risk of collusion among witnesses; of their being killed, intimidated or bribed; of their avoiding process or fleeing the jurisdiction and of records and other physical evidence being tampered with, hidden or destroyed, to name but the most prominent examples. It might be argued that the "good cause" exception in the proposal would provide latitude for dealing with those situations where there is a particular need for speed. But a specific showing, required to be based on facts supporting a finding of "good cause" applicable to a particular witness, may be difficult to make, especially at the outset of an investigation; a grand jury may, and often must, commence investigations upon suspicion that a crime has been committed. In *United States* v. *Dionisio*, 410 U.S. 1 (1973), the Court overturned a lower court holding that required a preliminary showing of reasonableness in order to comply with a grand jury subpoena noting (*id.* at 17):

> Any holding that would 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 law.

The Court's reasoning is particularly applicable to the proposed legislation.

Abstract thoughts for the possible convenience of witnesses must certainly yield to the greater public interest in the success of the investigative type of grand jury as an instrument for effective law enforcement. As a practical matter, it cannot generally be assumed that a grand jury appearance is inherently more inconvenient on less than seven days notice, or that witnesses will consent to an earlier appearance in those instances where no inconvenience is involved. What we have said in support of the preservation of the summary contempt powers of courts applies here as well: allowing witnesses automatically to delay grand jury proceedings would drain away much of the vitality of the investigative type of grand jury.

(C) *Requiring that every grand jury witness be advised of his rights and according a witness use and transactional immunity if he is not so advised.* A requirement that a person be advised of his rights, including his privileges against self-incrimination before he may be questioned, has been applied only in the context of custodial police interrogation. The rationale for this requirement is that the circumstances of such interrogation are so potentially compulsory as to require that the Fifth Amendment guarantee receive "practical reinforcement." *Michigan* v. *Tucker*, 417 U.S. 433, 444 (1974). The setting in which grand jury questioning occurs does not present equivalent risks of improper compulsion, however, and there is no need that all grand jury witnesses be informed of their rights prior to their appearance, as would be required by the proposed legislation. See *United States* v. *Mandujano*, ——— U.S. ———, No. 74–754, decided May 19, 1976 (slip op. at 14–15). The underlying rationale for the imposition of a general notification requirement appears to be that witnesses would be less likely to volunteer potentially incriminatory information if explicitly informed of their right not to do so, and this is hardly an improbable assumption. But it is highly unlikely that a conscious decision not to provide incriminatory information would be overborne in the grand jury, and we should not adopt a policy of affirmatively discouraging witnesses from providing evidence. The success of a grand jury investigation oftentimes depends upon securing information from those who are involved in or on the fringes of criminal activity, and who, therefore, possess particularly valuable knowledge of the conduct which is the subject of the inquiry. Providing such witnesses with an explicit notification of their Fifth Amendment right would do little in terms of preventing *compulsory* self-incrimination, but at the high cost of discouraging them from providing the grand jury with the information needed to perform its functions.

It should be noted that it is already the practice in many districts to inform the target of a grand jury investigation who is subpoenaed of his status as such, that he cannot be required to incriminate himself, and that his testimony may be used against him; witnesses are generally informed that they may consult

with counsel outside the grand jury room. The Department is opposed, however, to the broad notification requirements of the proposed legislation.

The related proposal that a witness who is not informed of his rights be accorded both use and transactional immunity is wholly unwarranted. It certainly ought not to happen that a witness could appear with counsel and testify before a grand jury and gain an immunity from prosecution because he had not been advised of his right to counsel, or because he had not been cited to the kidnapping statute in what was obviously a kidnapping investigation, or for any similarly insubstantial reason. Even in instances where it is found that a defendant's confession was improperly coerced, the only remedy afforded is the exclusion of that confession and its fruits from the prosecution's direct case at trial, not any general immunity from prosecution. Granting immunity from prosecution is much too important a matter to arise automatically from legislation of this kind, in total disregard of the circumstances of a particular case.

(D) *Requiring that a witness be afforded immunity if he serves advance written notice of an intention to claim the privilege against self-incrimination.* The Department must register its strongest opposition to this proposal, which would seriously interfere with the continued operation of the investigative type of grand jury. As a practical matter, this proposal would encourage a person subpoenaed to appear before the grand jury to affirm that he would assert the Fifth Amendment privilege, so as to secure immunity, or avoid appearing altogether. The Fifth Amendment privilege provides grounds for refusing to answer a question only when it is "evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure would result." *Hoffman* v. *United States*, 341 U.S. 479, 486–87 (1952). As a general proposition, any affirmance by a witness, prior to his appearance, that he would assert the Fifth Amendment privilege would be based upon rank speculation as to the questions which he might be asked. Nor can it be assumed that a witness who might be asked to testify concerning potentially privileged matters would be questioned solely on such matters. Indeed, under this proposal a witness who believed he would assert the privilege in response to a particular question could not be made to appear before the grand jury unless granted immunity, despite the fact that the particular question might never be asked.

As we noted above, granting immunity from prosecution is a serious matter and cannot lightly be considered. Particularly at the outset of an investigation, the government would oftentimes not be in possession of sufficient information to determine whether a witness should be afforded immunity or excused from appearing. The Supreme Court has expressly recognized that "[t]he obligation to appear is no different for a person who may himself be the subject of the grand jury inquiry." *United States* v. *Dionisio*, 410 U.S. 1, 10 n. 8 (1973). As "[i]t is entirely appropriate—indeed imperative—to summon individuals who may be able to illuminate the shadowy precincts of corruption and crime" (*United States* v. *Mandujano, supra*, slip op. at 8), and as the Fifth Amendment privilege itself affords the witness sufficient protection in the event that incriminating questions are asked, permitting a witness to avoid a grand jury appearance by speculating that he would claim the privilege in response to unknown questions is wholly inappropriate and objectionable.

(E) *Allowing witness's counsel inside the grand jury room.* It has been long-standing Federal practice that a witness may not have his counsel accompany him inside the grand jury room, but the witness may leave the room from time to time, as he likes, to consult with his counsel. It has also been long-standing Federal practice that the obligation to keep the proceedings secret, which is imposed upon the grand jurors, the stenographer, and government counsel, may not be imposed upon witnesses. See Rule 6 of the Federal Rules of Criminal Procedure. Since the witness may tell his counsel all about the proceedings anyway, the argument has been made that permitting counsel to accompany the witness into the grand jury room would both permit counsel to better advise the witness concerning his rights, and involve little more breach of grand jury secrecy than the current practice. There are, however, strong reasons why counsel should not be permitted in the grand jury room.

In the first place, the grand jury's continued ability to function as an informal non-adversarial proceeding would be deeply affected by the presence of witness counsel, even were he restricted solely on the role of advising the witness concerning his rights. Counsel so desiring could create substantial delay, objecting to the form of questions, engaging in colloquy over the relevance of a particular

line of inquiry, or raising spurious claims of privilege. Nor would delay result only as the product of intentional obstruction. Lawyers are trained in the technical rules of evidence which apply at trial, and, more generally, in the adversary process of raising every conceivable objection and argument which could be made on behalf of the client. In the courtroom, the judge is immediately on hand to quickly resolve objections or disputes. No judicial figure would be present in the grand jury room, however, and obtaining resolution of even frivolous claims would require suspension of the grand jury proceeding. In short, permitting counsel to accompany witnesses into the grand jury room would introduce aspects of the adversarial process into grand jury proceedings, but without the presence of the judicial figure necessary to prevent adversarial proceedings from becoming bogged down in interminable delay.

An equally important concern relates not to delay of the grand jury proceeding but to violation of its secrecy. Not infrequently, particularly in investigations of organized crime, 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 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. Even at present, the multiple representation of witnesses by a single attorney has occasioned problems in conducting complex investigations. While cognizant of these difficulties, courts have generally been fearful of interfering with a witness's right to counsel of his apparent choice and have not required separate representation. But under the present system, the witness, while able to disclose as much of his testimony as he chooses and secure whatever advice he deems necessary, 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 jury room, the witness 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.

In sum, permitting counsel to accompany witnesses into the grand jury room would have the potential effect of producing time consuming delays, interfering with the grand jury's ability to conduct an effective investigation, and discouraging witness cooperation. But even viewed solely from the witness's perspective, current practice has certain advantages. Rather than placing witnesses in potentially difficult situations, it is better that they be left with the slight inconvenience of having to leave the grand jury room to consult with counsel.

(F) *Limitations on grand jury venue.* The form of this provision would be considerably improved if it began with a statement that a grand jury investigation could be conducted only in a district in which the offense may have been committed, and then added the desired exception. Drafted solely in terms of "substantive criminal conduct," the provision may not allow for inquiry into a criminal conspiracy that never resulted in any substantive violation.

We do not see a justification for the provision for a special limitation on grand jury venue in conspiracy cases in which substantive offenses may also have been committed. Conspiracy under 18 U.S.C. 371 is, of course, a crime separate from any that may be committed in carrying out the object of the conspiracy. When a conspiracy results in the commission of another offense, venue for prosecution may possibly lie in a number of districts. Venue for conspiracy attaches in the district in which the conspiratorial agreement was reached and also in any district in which an overt act was done to effectuate the object of the conspiracy. *United States* v. *Overshon*, 494 F. 2d 894, 900 (8th Cir. 1974), and cases cited therein. Conspirators who are guilty of the resulting offense by reason of aiding and abetting it would be triable, along with the actual perpetrators of the offense, in the district of venue for that offense. *United States* v. *Jackson*, 482 F. 2d 1167 (10th Cir. 1973), *cert. denied*, 414 U.S. 1159. Certain Federal offenses, especially those involving the mails or interstate or foreign commerce, are continuing offenses and, under 18 U.S.C. 3237, are triable potentially in several districts.

The government would probably most often proceed against persons for conspiracy and a resulting offense in a district of venue for the resulting offense, since more of the defendants would be triable there than in any other district. This is in line with the proposal. The matter is not so simple, however, at the

investigative stage; information as to the possible substantive offenses committed in furtherance of the conspiracy may be indefinite when the grand jury begins its inquiry. Furthermore, it can be seen from the above that venue could lie for a conspiracy and resulting offense in a district in which only one of several conspirators was ever personally present (to commit the crime which is the object of the conspiracy), so that venue there would not necessarily be most convenient for the witnesses and potential defendants. Accordingly, the proposal seems to us to be arbitrary, and it could operate in a needlessly troublesome way. We would, therefore, oppose its adoption.

(G) *Authorizing a court to transfer a grand jury inquiry upon the motion of a witness.* There are several aspects of this proposal that we find objectionable. Although the proposal is patterned after Rule 21(b) of the Federal Rules of Criminal Procedure, it seems most improper nevertheless that a balancing of convenience of witnesses should allow for a disruption of grand jury proceedings. Under the proposal the issue of transfer would arise upon a motion of a single witness, but the other witnesses "who have been subpoenaed" might be unconcerned about the inconvenience, and they might not, in any event, be representative of all the witnesses to be called. A transfer could waste the work of one grand jury and cause considerable delay before another grand jury could take up the investigation. Our fundamental objection, however, lies elsewhere.

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 is predicted upon motion of the defendant, and while the convenience of the witnesses is an important consideration, the witnesses will not be heard 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. A transfer could also interfere with the intent of the attorney for the government to determine the reaction of the grand jurors in a particular district to a particular set of facts. While the proposal would allow a judge to consider a broad range of matters, the judge cannot properly or practicably be surrogate for prospective defendants, or, indeed, for those witnesses yet to be subpoenaed, whose convenience, under this proposal, might subsequently require that the grand jury's investigation be transferred to yet another district.

(H) *Preventing any subsequent grand jury inquiry in the absence of new evidence after one grand jury has failed to indict.* We emphasize, at the outset, that a grand jury which does not indict does not necessarily return a no bill (see Rule 6(f) of the Federal Rules of Criminal Procedure). 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 by a grand jury should not prevent subsequent grand jury investigation.

Even if a grand jury returned a no bill because of some oversight on the part of the attorney for the government in presenting the available evidence, or the presentation was otherwise poorly done, that would hardly be justification for giving the prospective defendant an effective immunity from prosecution, in the absence of new evidence. Purposeful violations of constitutional rights may not work such a result, which is an infliction of an injury upon society, and a failure of a grand jury to indict hardly injures the defendant. Indeed, it may never have come to the defendant's notice that one grand jury failed to indict him. The proposal would reverse longstanding principles. *United States* v. *Thompson*, 251 U.S. 407 (1920), and the Department is opposed to this legislation.

(I) *Requiring that a stenographic record and prompt transcription be made of all grand jury proceedings and that a witness be permitted to inspect and copy a transcript of his testimony within forty-eight hours after the conclusion of his appearance.* At the outset, we note that the requirement of a stenographic record and prompt transcription would be both very difficult to comply with and unnecessarily expensive. One of the major factors preventing the recordation of grand jury testimony at the present time is the unavailability of court reporters in many areas, and this proposal fails to take account of this very real practical difficulty. Providing for the sound recordation of grand jury testimony might overcome this obstacle; so much of the testimony could subsequently be tran-

scribed as is necessary for trial or other purposes. Even this measure would require that funds be provided to the districts to enable them to acquire sound recordation equipment, and in sufficient quantity, where such is not presently available.

Moreover, we submit that there is no cause for any recording requirement to be as broad as that of the proposed legislation, which would require not only the recordation of grand jury testimony, but also of all other grand jury proceedings including exchanges between prosecutor and jurors when no witness is present. The rationale for such a broad requirement appears to be that it would discourage improper prosecutorial comments, and decrease the risk that the grand jury might be influenced to return an indictment when probable cause did not in fact exist. But safeguards already exist for discouraging and controlling prosecutorial misconduct. As an attorney, the prosecutor is held to perform to the highest professional standards of an officer of the court, a member of the bar of a State and an employee of this Department. For any misconduct in office he is accountable to the court, the state bar association, and the Department. In addition, it is ordinarily against a prosecutor's own interest to obtain an unsound indictment, even assuming that the grand jurors would respond to improper conduct by returning a charge rather than rejecting inflammatory overtures. As the Supreme Court has noted "for the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained." *United States* v. *Calandra*, 414 U.S. 338, 351 (1974).

Requiring the recordation of all grand jury proceedings would have serious disadvantages. Chief among these is the likelihood that such a requirement would promote increased litigation over the conduct of grand jury proceedings. The underlying premise of this proposed requirement seems to be that the record would subsequently be available for review to determine if misconduct in fact occurred. While the occurrence of any misconduct would certainly be the rare exception and not the rule, it would be unrealistic to assume that frequent requests would not be made for the disclosure or for judicial review of the grand jury's proceedings upon the mere speculation that such may have been the case. Recordation of all grand jury proceedings might also give rise to requests that the prosecutor's informal advice to the grand jury concerning the elements of an offense be viewed with the same scrutiny as is given to the trial judge's closing charge to the jury.

The prevailing rule that "[a]n indictment returned by a legally constituted grand jury, 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) is based upon sound policy. Given the delay attending the pretrial stages of criminal proceedings, and the pressing need to secure a speedy determination of the defendant's guilt or innocence, the Department strongly opposes legislation that would lead to further time-consuming litigation over such a preliminary stage as the grand jury.

The proposal that every witness be provided, on request, with a transcript of his testimony for copying, or with a copy of the transcript if he is proceeding *in forma pauperis*, is also objectionable. Transcribing all grand jury testimony would be highly expensive. In general, a transcript could probably not be obtained within forty-eight hours of the witness' appearance, necessitating further litigation to demonstrate that the unavailability of the transcript was for "cause." But more importantly, permitting grand jury witnesses to obtain a copy of their testimony on request would be inconsistent with the policies underlying grand jury secrecy, and prejudicial to those witnesses who, sometimes in fear of physical violence or even threats upon their lives, wish their cooperation to remain secret. At present, in addition to those instances in which the production of grand jury transcripts is authorized or required by statute or rule, the courts possess the discretionary power to direct the disclosure of grand jury materials when some "particularized need" for doing so is shown. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959). Departure from this standard would be unwise. As a practical matter, it cannot be disregarded that if a transcript could be obtained as a matter of right, witnesses might be pressured into obtaining them so that those being investigated could see whether they had been implicated in the witness' testimony.

(J) *Entitling a witness to examine and copy any statements previously given by him.* The Department is opposed to this proposal. As a general matter, witnesses should not have discovery rights in preliminary proceedings prior to trial, and certainly not before grand juries. The proposal presages delays caused by litigation concerning whether a particular writing or recording is a "state-

ment" within the meaning of 18 U.S.C. 3500(e), or whether it is related to the subject of the grand jury's inquiry. Moreover, the proposal sweeps too broadly and would afford no basis for the government's withholding a prior recorded statement when to furnish it would reveal an ongoing, judicially authorized wiretap or the identity of an undercover agent or confidential informant with whom the witness had conversed.

(K) *Permitting a witness to resist questioning on various grounds.* The proposal has several aspects with which we agree. It is well established, for example, that a court may grant a motion to quash if a subpoena is unreasonable and oppressive, and that grand jury process may not properly be used for the dominating purpose of preparing a case pending trial. *United States* v. *Dardi*, 330 F. 2d 316, 336 (2d Cir. 1964), *cert. denied*, 379 N.S. 845; see also *United States* v. *Procter & Gamble Co.*, 356 U.S. 667 (1958). We have immediate difficulty, however, with the formulation of the proposal. It prevents a witness from being confined when it might more properly excuse an apparent contempt; and it seems to operate when the witness is already in appearance, perhaps under court order, in which event he should have complained earlier.

Furthermore, we have serious objections about other aspects of the proposal. The matter of multiple confinements for multiple contempts we discussed above. In addition, there should not be any blanket prohibition against compelling testimony because the person under investigation is under pending indictment for similar conduct by the Federal, State or local government. Such a prohibition would interfere, in the first place, with inquiries looking toward possible superseding indictments that would more properly charge the defendants; it should not be necessary to dismiss a pending indictment before ascertaining whether additional or more serious charges can be filed. Also, it should be emphasized that Federal and State charges may be based upon the same facts without being comparable charges. For example, the Federal charge could be for income tax evasion when the State charge is for bribery or another crime involving a receipt of monies. Federal and State charges may also be of similar kind for identical activity (*e.g.*, income tax violations). Under no event should this be of vital concern to a witness.

The grand jury's inquiry is "not to be easily thwarted or limited by witnesses." *United States* v. *George*, 444 F. 2d 310 (8th Cir. 1971). The proper objectives involved in this proposal are already well within judicial control, and there is no need for this legislation.

(L) *Empowering district courts other than courts of issuance to quash subpoenas, and permitting motions to quash to be made at any time and automatically to stay the witness's appearance.* To require courts of equal stature to review and pass upon each other's compulsory process at a distance raises serious practical difficulties. Motions to quash must frequently be resolved in the context of the issues raised by the particular grand jury investigation, and a court would have no knowledge of the course of an investigation being conducted by a grand jury in another district. Motions which might be speedily resolved by a court familiar with the grand jury investigation being conducted in its district would require far more time for disposition by a court totally unfamiliar with the inquiry, and removed from the situs of the proceedings. Under this proposal, the potential for delay and disruption of a grand jury's investigation would be enormous. Given the relative ease of modern travel, there is simply no justification for permitting a witness to move to quash a subpoena in any court order than that which issued the subpoena.

The delay and disruption which would be caused by conferring concurrent jurisdiction over motions to quash upon courts in several districts would be exacerbated by the related proposal to permit such motions to be made at any time and automatically to stay the witness' appearance. Ordinarily a witness is not compelled to testify or produce information pending the resolution of a motion to quash. But under this proposal, a witness could file a motion to quash in a distant jurisdiction at the last hour before his scheduled appearance, despite the fact that a grand jury session was scheduled primarily to hear that witness; there might be no way to warn the jurors in sufficient time to avoid their assembling unnecessarily. This proposal invites abuse by recalcitrant witnesses, would work hardship upon citizens serving as grand jurors, and would needlessly create havoc in grand jury proceedings.

(M) *Restricting the attorney for the Government to asking questions or requesting the production of documentary materials or other objects relevant to the matter under investigation.* We are uncertain of the precise intent of

this proposal. As drafted, it would have the wholly impractical effect of prohibiting the prosecutor from responding to juror inquiries—even as to such matters as the time or expected length of the next scheduled session—and from submitting proposd indictments, or explaining proposed indictments submitted to the jurors for their consideration and vote. The grand jury could not possibly continue to function under the restrictions of prosecutorial involvement apparently contemplated by this proposal.

It must be emphasized. as we have noted earlier, that the government prosecutor has a recognized participatory role in the grand jury proceedings, both as a matter of longstanding practice, and constitutional law. "As criminal prosecutions are instituted by the State through an officer selected for that purpose, he is vested with a certain discretion with respect to the cases he will call to [the grand jurors'] attention, the number and character of the witnesses, the form in which the indictment shall be drawn; and other details of the proceeding." *Hale* v. *Henkel, supra,* 201 U.S. at 65. Artificial, unnecessary, and unworkable restrictions should not be placed upon the prosecutor's participatory role, which serves to aid grand jurors in conducting their inquiries.

(N) *Applying the exclusionary rule to grand jury proceedings.* In United *States* v. *Calandra, supra,* 414 U.S. 338, the Supreme Court refused to extend the exclusionary rule to grand jury proceedings. The proposal to prohibit the prosecutor from submitting any evidence to the grand jury that was obtained by an uulawful act or in violation of a witness's legal rights appears designed to legislatively overrule the *Calandra* decision, and we strongly object.

The *Calandra* decision was based upon the sound reasoning that extending the exclusionary rule to grand jury proceedings "would unduly interfere with the effective and expeditious discharge of the grand jury's duties" (*id* at 350), and would add little additional deterrence to unlawful police conduct beyond that presently provided by the application of the exclusionary rule at trial. Our opposition to the extension of the exclusionary rule to grand jury proceedings is not based on any notions that the use of illegally obtained evidence should be sanctioned in this context. On the contrary, as we have noted earlier, it would be against the prosecutor's own interests to obtain an indictment when the available evidence could not be used to obtain a conviction. But to apply the exclusionary rule to the grand jury would "precipitate the adjudication of issues hitherto reserved for the trial on the merits;" "might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective" and would result in "protracted interruption of grand jury proceedings," at times causing delay "fatal to the enforcement of the criminal law." *United States* v. *Calandra, supra,* 414 U.S. at 349–50. The speculative and certainly minimal increased deterrence of police misconduct which might be achieved by this measure is wholly outweighed by the damage that would be done to the grand jury's ability effectively to perform its functions.

(O) *Authorizing a grand jury to indict only on the basis of competent, admissible and legally sufficient evidence, or summarized or hearsay evidence if good cause is shown; requiring the prosecutor to submit to the grand jury all evidence in his possession which he knows will tend to negate the guilt of those under investigation.* This provision correlates with the provision of S. 3274 concerning grounds for dismissal of an indictment. The entire matter is discussed below.

(P) *Requiring the dismissal of an indictment for certain reasons relating to the evidence before the grand jury.* As we noted earlier, the prevailing rule 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, supra,* 350 U.S. at 363. This rule is based upon sound policy, and we are totally opposed to any proposal to require that indictments be dismissed for reasons related to the evidence before the grand jury. As the Court stated in *Costello* (*id* at 363–64) :

> 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 . . . [Such a] rule . . . would result in interminable delay but add nothing to the assurance of a fair trial.

In addition to our general objection to requiring the dismissal of an indictment on the basis of the evidence that was before the grand jury, we must also register more particular objections to the specific features of this proposal. For example, the proposal would require that an indictment be dismissed if the evidence before the grand jury was legally insufficient to establish that the offense "was committed," or if there was not competent and admissible evidence, or summarized or hearsay evidence allowed by the court, to provide "reasonable cause" to believe that indicted person committed the offense. But the role of the grand jury is to determine whether *probable cause* exists to believe that a certain individual committed a certain offense. See, *e.g. United States* v. *Cox*, *supra*, 342 F.2d at 171.

Moreover, requiring that the grand jury act only on the basis of "competent and admissible" evidence would change the character of grand jury proceedings. The grand jury has historically functioned as an informed body of laymen, free from technical rules. "Because the grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentary and procedural restrictions applicable to a criminal trial." *United States* v. *Calandra*, *supra*, 414 U.S. at 349. Prohibiting the use of summarized or hearsay evidence except when allowed by the court upon a showing of good cause would be needlessly restrictive and would lead to delay. At times, the requirement for prior court authorization of the use of hearsay evidence might prevent an indictment from being returned before the statute of limitations had run. Evidence that is incompetent or inadmissible in a court of law may nonetheless be highly reliable, and the grand jury should be left to operate upon the good judgment of the laymen.

Requiring that an indictment be dismissed if the attorney for the government had not presented to the grand jury all evidence in his possession which he knew would tend to negate the guilt of the indicted person would also be inconsistent with the nature of a grand jury proceeding, and would certainly generate extensive pre-trial litigation over the extent of the information in the government's possession at the time of the indictment. As was mentioned earlier, there is, realistically, no motivation for a government attorney to seek an indictment that will not admit of successful prosecution; the prosecutor would be shortsighted in not presenting to the grand jury evidence that he recognized to be of an exculpatory nature. But his failure to do so would not necessarily be significant, or prejudicial to the defendant. "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*, 414 U.S. at 343–344. The grand jury makes a determination of whether there is probable cause to believe that a crime has been committed; as a general matter it does not, nor could it pass upon affirmative defenses. Dismissing indictments because of a failure to present exculpatory information would be a punitive measure unrelated to any actual prejudice to the accused, and, in all likelihood, even were an indictment to be dismissed—after extensive litigation and delay—a new one would be obtained. The current practice of proceeding toward trial with the government then being obliged to disclose any exculpatory information to the defense, as is required under *Brady* v. *Maryland*, 373 U.S. 83 (1963) and succeeding cases, is far preferable.

Our objections to the application of the exclusionary rule to grand jury proceedings have been discussed above. Requiring that an indictment be dismissed if the attorney for the government submitted evidence to the grand jury that was obtained by an unlawful act in violation of a witness's legal rights is wholly unwarranted. Under this proposal, an indictment would have to be dismissed if any evidence before the grand jury had been illegally obtained, regardless of whose rights had been violated, and regardless of whether the tainted evidence had had any bearing upon the accused's indictment. Even in the trial context, the Supreme Court has refused to permit the exclusionary rule to be invoked by one who was not himself the victim of the unlawful action. *Alderman* v. *United States*, 394 U.S. 165, 174–75 (1969). The present proposal would add little additional deterrent to improper police conduct, and at the high cost of encouraging every defendant to challenge his indictment on the mere speculation that some piece of tainted evidence may have been before the grand jury.

(Q) *Requiring that an attorney for the government maintain a public record of all denials of, and reasons for the denial of, requests to testify in a grand jury inquiry, and requests to appear before a grand jury to urge it to proceed with an*

*independent inquiry; authorizing a court to permit a person to testify or appear before a grand jury if, upon a hearing, it finds that such testimony or appearance would serve the interest of justice.* The United States Attorney's offices receive substantial numbers of citizen complaints, a large percentage of which do not warrant referral to federal investigative agencies or any other action. This proposal would impose an unnecessary administrative burden on United States Attorney's offices, which are already hard pressed for time to perform their duties. There are presently existing means by which a citizen can make his view known should he believe that federal prosecutors or investigative agencies are not acting with sufficient diligence in a particular matter, *e.g.*, informing the press or his congressman, or even, in appropriate circumstances, commencing a civil action. The prosecutor's discretion to determine which matters warrant presentation to the grand jury and which witnesses shall be called promotes the efficient use of the grand jurors' time. Given the checks which already exist to prevent abuses of this discretionary authority, the proposed procedures are unnecessary. Moreover, as we object to the proposed legislation's provision for independent grand jury inquiries, for the reasons discussed earlier, we similarly object to the proposal relating to a citizen's request to appear before the grand jury to urge it to conduct such an inquiry.

III. CLEARANCE FOR SUBMISSION OF THIS REPORT

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration program.

Sincerely,

MICHAEL M. UHLMANN,
*Assistant Attorney General, Office of Legislative Affairs.*

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WATERGATE SPECIAL PROSECUTION FORCE,
U.S. DEPARTMENT OF JUSTICE,
*Washington, D.C., September 30, 1976.*

Hon. JOHN V. TUNNEY,
*Chairman, Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is with reference to my conversation of September 29 with Martin Levine of your staff.

As I indicated to Mr. Levine, I am not in a position at this time to provide a formal statement concerning the grand jury matters under inquiry by the Senate. I did indicate, however, that if you felt it was useful, I would be glad to have the substance of my comments on S. 3274, which I had previously provided to Senator Abourezk, included in the Record. Accordingly, I am attaching a copy of my August 23, 1976, letter to Senator Abourezk.

If I can be of further assistance either now or during the next Session, please advise me.

Sincerely,

CHARLES F. C. RUFF,
*Special Prosecutor.*

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WATERGATE SPECIAL PROSECUTION FORCE,
U.S. DEPARTMENT OF JUSTICE,
*Washington, D.C., August 23, 1976.*

Hon. JAMES ABOUREZK,
*U.S. Senate,*
*Washington, D.C.*

DEAR SENATOR: This is in reply to your request for my comments on S. 3274, a bill which contains a number of proposed revisions in present grand jury procedure.

Although I do believe that there are a number of areas in which grand jury procedures might appropriately be amended to provide greater protection for both witnesses and defendants, I nonetheless believe it equally important that the role of the grand jury as the vehicle for investigation of sophisticated white collar and organized crime be maintained. The comments that I have set out below represent solely my personal views concerning the point at which the bal-

ance should be struck between the interests of witnesses and defendants, on the one hand, and the interests of the public on the other. My remarks are necessarily sketchy, but I would be glad to discuss them further with you or with members of your staff.

SECTION 2

By combining a maximum period of confinement not to exceed 6 months with a ban on repeated confinement for witnesses who refuse to testify about the same transaction, the bill would in essence give perpetual immunity to any witness who is willing to serve the relatively short term provided for. Although it is difficult of course to judge just how many months in jail will serve as a meaningful sanction in the case of a witness who does not wish to testify, it is safe to say that, in my experience, the threat of only six months' confinement is insufficient, particularly when the witness is on notice that at the end of those six months he will never again be obliged to give testimony concerning the same transaction. As a matter of policy, the Department of Justice does not, other than in exceptional cases, permit the repeated summoning of a witness who has once been held in civil contempt, and I would therefore support legislation which would make that policy mandatory, but I do not believe that such a bar against repeated civil contempt findings should go into effect until the witness has served a total of 18 months.

It is safe to say that two groups of people will make up the bulk of those for whose benefit this section would apply. First, there will be the witness sufficiently well-connected to an organized criminal operation to be willing to undergo confinement, knowing either that cooperation with the Government will mean risk of bodily injury or that he and his family will be well taken care of during and after his confinement. Second, there will be the witness who holds strong personal, moral or political views about the propriety of cooperating with the Government, and for such a witness it would seem that the 18-month maximum confinement would be an appropriate balance between concern for the Government's legitimate right to know and protection against official abuse of grand jury processes.

The suggested provision for confinement in a suitable Federal correction institution is, in my judgment, wholly appropriate.

I have some question about the provision that the bar against repeated confinement should apply whether the witness refuses to testify in the grand jury or in any other forum. It would seem to me that because of the different nature of the inquiry, refusal to testify at trial or, for example, in a congressional hearing could be subject to wholly separate sanction without there being any real risk of abuse.

The provision of subsection (e) to the effect that refusal to answer is not punishable if the question is based in whole or in part on evidence obtained by an unlawful act, or in violation of the witness' constitutional rights, or rights established by any statute of the United States, seems too broad and raises a number of troubling questions. Putting aside the present state of the law as set down in *United States* v. *Calandra* and *Gelbard* v. *United States*. I question whether it is an appropriate policy judgment to extend the exclusionary rule in this way. For example, the words "evidence obtained by an unlawful act" may encompass a wide variety of conduct—some of a very minor nature, some of greater substance but nonetheless not having a direct impact on the witness' rights. Similarly, the reference to rights established by any statute of the United States encompasses violations of statutes having no relationship whatsoever to the nature of the grand jury's inquiry. Further, the reference to evidence obtained by an unlawful act does not indicate that the unlawful act must have been committed by a Government agent, heretofore a prerequisite to application of the exclusionary rule. More importantly, however, subsection (e) does not address itself to the question of what procedure will be used to test the legitimacy of the witness' refusal to answer. The *Gelbard* opinion is instructive in its concern for the risk that grand jury proceedings will be disrupted by mini-trials, and I think it equally important here that if an exclusionary rule is enacted, provision be made for the type of abbreviated procedure suggested in *Gelbard*. In any event, I believe the exclusionary rule should be restricted to violation of the witness' constitutional rights and statutory rights similar to those created by the wiretapping statute.

SECTION 4

I would agree that it is important for the grand jury to be instructed fully concerning its rights, authority and power not only on empanelment but periodically thereafter. The list of such instructions proposed in Section 3329 seems, by and large, to be appropriate, but one or two comments are in order. First,

proposed Section 3329(2) refers to the conduct of an independent inquiry about which I will have more detailed comment below. Second, subsection (6) concerning the issuance of subpoenas only on the vote of 12 or more members of the grand jury will also be discussed below. Third, of more general concern is that the sanction provided—that is, permitting the witness to refuse to testify before an improperly instructed grand jury—seems irrelevant to the purpose to be served by the requirement for instructions. If this is the only sanction to be imposed, it would permit a witness to refuse to testify for no legitimate personal reason, but would permit a defendant to be indicted by a grand jury that was not fully aware of its rights and authority.

I find the provisions concerning independent grand jury inquiry (proposed Section 3330) extremely troubling in a number of respects:

First, it is not clear to me why the grand jury's power to conduct such an inquiry should extend to offenses committed by officers of state government. Whatever the legitimate function of a grand jury may be as the overseer of the conduct of government within its own jurisdiction, I question whether it has the same inherent right to inquire into the conduct of officers of any other sovereign.

Second, the most important difficulty presented by this section concerns the role of the attorney for the Government and/or the special attorney appointed by the court. Subsection (b)(1) seems to suggest that the grand jury is, in and of itself, a body with both investigative and prosecutorial functions. If an attorney for the United States exercises his legitimate judgment by advising the grand jury that they are going beyond the bounds of their legitimate powers and by refusing to sign an indictment, this subsection would permit the grand jury to request the appointment of a special attorney to "assist" them. Subsection (b)(2) provides that "any indictment returned by a grand jury . . . *shall* be signed by the special attorney in lieu of any attorney for the Government." Does this mean that the special attorney has no discretion whether or not to sign such an indictment? If it does, the provision is both ill-advised and, in all likelihood, unconstitutional. Similarly, does the court have any discretion as to whether to appoint a special attorney on the request of the grand jury, and once the special attorney is appointed, to whom is he responsible? I have substantial qualms about the propriety of any prosecutor's being appointed other than by the Executive Branch but even greater qualms about the appointment of such an attorney responsible to no one in the exercise of his discretion or perhaps, if my reading of the section is correct, possessing no discretion concerning the signing of an indictment.

Many of these issues may be resolved by passage of the pending bill to create a permanent special prosecutor, for a number of the cases that would fall within proposed Section 3330 will be within his jurisdiction, and perhaps provision could be made for assignment of an assistant special prosecutor to replace the Government attorney where the grand jury can make a substantial showing of misconduct.

Section 3330A would provide that subpoenas must issue on a vote of a majority of the grand jury and cannot be returnable in less than seven days except with the consent of the witness or on a showing of good cause. This provision is wholly impractical and would result in endless delays of even the most routine of grand jury investigations. But more importantly, the provision provides no real protection for the witness. If each subpoena issued had to be approved by the 12 members of the grand jury, it would be necessary to convene them for that purpose and then convene them a week later to hear the testimony. In the frequent situations where speed is of the essence, vital testimony might be lost. Beyond that, the requirement of the vote would quickly become nothing more than a procedural mechanism, for, given the broad investigative powers of the grand jury, the prosecutor's request for issuance of a subpoena will surely be tested only by the most liberal standards of relevance.

It is entirely appropriate that each witness be advised of his rights, but I question whether he should be granted transactional immunity if he is not so advised. Even now, if a witness is interrogated in a police station, he is not granted transactional immunity merely because the police failed to advise him of his *Miranda* rights, and I see no reason why any more stringent sanction should be applied in the case of a grand jury witness.

Section 3330A(d) provides that no witness should be compelled to appear if he has given written notice of his intention to exercise his privilege against self-incrimination. I favor the enactment of this provision, for, indeed, it represents the policy presently pursued by this Office.

Perhaps the most controversial subject of this bill and its companion bills is that grand jury witnesses should be entitled to the presence of counsel in the grand jury room (section 3330A(e)). Although a large number of my fellow prosecutors would probably disagree, I do not see that any substantial difficulties would be posed by such a requirement so long as two conditions are met: first, that counsel be restricted to rendering advice to his client concerning his constitutional and statutory rights, and second, that Congress provide the funds necessary to support the appointment of counsel for indigent witnesses. I would suggest that subsection (e) be amended to specify what role counsel may play.

I understand that it is the purpose of Section 3330A(f) to avoid the holding of grand jury investigations in jurisdictions remote from the homes of relevant witnesses and subjects; however, the language of subsection (f) is somewhat confused. In lines 10 and 11, for example, what is "substantive criminal conduct?" Does this mean that there must have been a complete substantive violation of the penal code in that district or only that one overt act or one portion of the substantive offense must have occurred there? Similarly, in lines 17 and 18, does the section mean that the grand jury may be convened where one overt act occurred even if that overt act did not in fact constitute a violation? In my judgment, the purposes of this subsection can best be served by liberalizing the standards for motions to quash subpoenas and perhaps by providing for transfer of grand jury proceedings where a clear showing is made of the Government's intent to abuse the process. As the subsection is written now, it would throw the whole question of criminal venue into a state of confusion.

Although I agree, as noted above, that there may be a need for liberalized standards for motions to quash, it would seem that subsection (g) opens the door to multiple transfers of grand jury proceedings at the whim of individual witnesses. The burden on those witnesses may be taken care of by delay in the return date of the subpoena and motions to quash based on undue financial and other difficulties or on a showing of harassment, but this kind of relief should be extraordinary and not routine.

The provision for prohibiting a new grand jury inquiry after a grand jury has failed to return an indictment seems reasonable, but I should note that the subsection provides no sanction.

I agree with the provision that all grand jury proceedings should be recorded, but I strenuously oppose the requirement that every witness be entitled to examine the transcript of his own appearance. I see no purpose to be served by such a provision from the point of view of the witness, and I believe its only result would be that grand jury transcripts containing confidential information and information potentially damaging to third parties would be in regular circulation. If the intent is to protect a witness against a perjury charge based on an inadvertent contradiction, I do think it would be appropriate to provide that any witness called for a second time before the grand jury may examine, together with his counsel, the transcript of his prior testimony. On this point I do not believe that it is necessary to extend the full protections of the Jencks Act to grand jury witnesses and would therefore oppose enactment of subsection (j). It seems to me to be an entirely legitimate technique of interrogation for a prosecutor to confront a witness with prior inconsistent statements made to an FBI agent, for example, in order to attempt to develop truthful testimony, and I do not think that the risks of abuse involved in that process are sufficient to warrant total elimination of that wholly legitimate cross-examination technique.

I would agree that it is appropriate to legislate against misuse of the grand jury for purposes of discovery in connection with pending indictments, but I question the need to include those under indictment by a State. It may well be wholly legitimate for the United States "to secure other information regarding the activities" of a defendant in a State case where potential violations of federal law are at issue. Further, I see no reason to give a witness standing to object to questions on that ground if the right at issue is that of the defendant. Here, too, I would suggest that there must be some concern over the risk of protracted evidentiary hearings in the midst of a grand jury investigation.

Clearly no sanction should be imposed on a witness if the purpose of calling him is simply harassment, but I have some difficulty with the use of the word "unnecessary" as a test for the legitimacy of the issuance of a subpoena. The use of that word opens up the possibility of extensive litigation, the purpose of which will be to substitute for the judgment of the prosecutor and the grand

jury the judgment of the court concerning what is or is not necessary to the development of an investigation, and concurrent with this litigation will occur broadscale discovery of the nature and scope of the grand jury's inquiry.

As a substitute for the provisions of subsection (i), I would suggest a provision permitting a motion to quash or to delay the return date of a subpoena in the district in which the witness resides only after a request has been made of the attorney for the Government and he has refused any relief. Such a provision would, I believe, appropriately balance the concern for expedited conduct of the grand jury's investigation and the concern for the rights of the individual witness. The provision of subsection (m) seems meaningless but raises again the question of how the issue of relevancy will be raised and litigated. Similar questions are raised by the provision of subsection (n), and, too, I would have some question about the necessity for extending the exclusionary rule to evidence obtained in violation of all statutory rights.

Subsection (o)(1) requires that the evidence be legally sufficient "to establish that such offense was committed." And subsection (i)(2) requires that the evidence give "reasonable cause to believe" that the person indicted committed the offense. Is it intended that there be two different standards of proof here? If so, I see no basis for the distinction. Further, again it must be asked how the indictment will be tested. Will there be a review of the grand jury transcript in every case and if so by whom? Must the defendant make a showing of some sort before he is entitled to have the transcript reviewed? Is it intended that a showing be made to the court before summarized or hearsay evidence is used, or is it intended that the Government may justify the use of such evidence after the fact?

If the last sentence of subsection (o) is intended to provide that knowing suppression of exculpatory evidence is prohibited, I would agree with the provision but ask again what procedure is contemplated for its enforcement. If the last sentence is intended to open up a full-blown retrospective examination of all the evidence which the Government might have presented to the grand jury to determine whether it might have led the grand jury to refuse to indict, I would suggest that the protections of *Brady* are difficult enough to apply at trial and ought not to be inserted into the investigative process. At this point, I think it is important to recognize that in those state jurisdictions where charging is by information, the prosecutorial decision to act is made with no controls whatsoever although some preliminary hearing may be required after the information is filed. If, the state prosecutor is able to put on enough evidence to establish probable cause, his conduct in exercising his discretion may never be tested or in any event will be subject only to the tests of his ability to persuade a judge and jury at trial. Since the federal prosecutor must convince 12 members of the grand jury to indict, I question whether it is really necessary to reach back into the grand jury process to apply those standards which we now normally reserve for the protection of the defendant at trial.

I would agree that provision should be made to permit individual witnesses to appear before the grand jury and would only question the provision of subsection (q) that would permit judicial hearings upon the Government's refusal to permit the citizen to testify. My concern is that any such hearing be held *in camera* to avoid the adverse publicity which would result from the disclosure of the nature of the proposed testimony.

I hope that these comments are helpful, and if I may be of any further assistance, please advise me.

Sincerely,

CHARLES F. C. RUFF,
*Special Prosecutor.*

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NOVEMBER 11, 1976.

HON. JOHN V. TUNNEY,
*Chairman, Subcommittee on Constitutional Rights,*
*U.S. Senate.*

DEAR SENATOR TUNNEY: The attached letter is sent for your information.

Yours very truly,

SAM NUNN,
*U.S. Senator.*

[Enclosure]

LAW OFFICES,
DENMARK GROOVER, JR.,
*Macon, Ga., October 13, 1976.*

Senator SAM NUNN,
*Senate Office Building,*
*Washington, D.C.*

DEAR SAM: There is developing in the Federal Judicial System a practice which has been authorized by Congress and approved by the Supreme Court which, in my opinion, completely ignores and is in danger of destroying the basic freedoms of American citizens as those freedoms were originally intended.

Since you are a member of the Senate and it seems apparent that any corrective action must be taken by the Congress, I would like to call those matters to your attention for your consideration and possible suggestion to your colleagues of some remedial action.

I have been practicing law for thirty years, during which time it has become firmly apparent that while the Grand Jury System is a protective device against false charges, in many instances it can, when improperly used, be as bad as a Spanish Inquisition.

I am sure you may have had experiences which have demonstrated to you that given three or four strong personalities on a grand jury, State or Federal, and particularly an aggressive and ambitious District Attorney, State or Federal, that the grand jury can be used as an instrument of destruction more cruelly than any "cruel and inhuman punishment" conceived of by others less subtle in their approach.

I have seen local political disagreements taken to the Grand Jury Room and indictments and inquisitions by the Grand Jury used for political purposes. I have seen the news media stampeding an ambitious prosecutor and publicity-minded grand jury into investigating and sometimes indicting persons in public life primarily because of their political differences.

The Congress of the United States has now authorized investigatory grand juries which are authorized to be in session for a period of eighteen months. This grand jury has become a substituted investigatory arm for the United States Attorney in many instances. For example, they will issue a subpoena to a witness to appear before a grand jury and when the witness appears at the appointed time and place, the United States Attorney or some member of the FBI will interrogate that individual and if his evidence is not what they desire he will not go before the grand jury. In other words, they are using Grand Jury Subpoenas to haul citizens away from their jobs for them to investigate in the comfort of their offices and are not in good faith subpoenaing persons primarily to appear before the grand jury.

When a witness goes before a grand jury, he does not have the benefit of counsel in the room. He does not have the immediate protection of a judge, and he is subject to harassment and intimidation in many, many instances.

The United States Attorneys have now, and this is what prompts this letter, adopted a practice when they suspect a person of a crime of subpoenaing him before the grand jury and interrogating him about that crime. This practice would not be so bad except for recent rulings of the Supreme Court of the United States.

As a lawyer you know that the United States or a State may not call as a witness a defendant and that the only way that that defendant can be subjected to examination is if he voluntarily gives evidence himself. The practice being followed by the United States Attorneys, however, and approved by the Supreme Court is that even though the United States Attorney knows that the person summoned is the "target" of the investigation or as sometimes called the "de facto defendant", still that person is required to appear and may not, as in an investigation by police officers, invoke his right to remain silent.

The Fifth Circuit Court of Appeals in the case of *United States v. Mandujano*, 496 F. 2d 1050 held that when the United States summoned a person under those circumstances that such person was entitled to remain silent and reversed a perjury conviction based on testimony given in such a proceeding. The Supreme Court of the United States without a majority held, relying on the completely spurious reasoning that a grand jury was always a bulwark of protection to citizens, that a person so summoned did not have the right to remain silent but must assert his privilege on each individual question, subject to his claim of privilege being denied by the trial judge.

I suggest that when the United States summons a person who is in fact the target of an investigation then pending before such a grand jury or reasonably believed to be the target that the United States should be prohibited from calling that witness or the witness should have the same right to absolute silence that he has when being interrogated by a member of the gendarme.

Congress has granted the government the right to grant immunity in order to get testimony it feels it needs. Congress should now intercede and prohibit by appropriate legislation the practice of:

(a) utilizing the grand jury subpoena from summoning witnesses to be interviewed by the United States Attorney or the FBI. Those witnesses are inconvenienced and in some cases financially punished. Let the government's agents go see them unless it is bona fide intended to put them before the grand jury;

(b) prohibiting the government from calling a person to appear before a grand jury when that person is the target or reasonably believed to be the target of the investigation, or in lieu of a prohibition against calling him, permit such a person who has reasonable cause to believe that he is the target to refuse to answer any questions whatsoever. In other words, give him what the Fifth Amendment contains—"the right not to be a witness against himself."

Adlai Stevenson once said "do not burn down the barn in order to get rid of the rats." The "law and order syndrome" and the "Watergate complex" has so infected American thinking that I am afraid that we are seriously infringing on the rights of American citizens.

What I am suggesting is not designed to make it easier for persons guilty of a crime to evade their apprehension or punishment, but what I am suggesting is that unless Congress steps in and remedies some of the wrongs that I see in my daily practice, our citizens are going to continue to be subject to tyrannical conduct. Believe me, it is not merely an isolated situation nor is it merely directed toward the outlaw element. It is used against all citizens and is currently being used without restraint.

Sincerely,

DENMARK GROOVER, Jr.

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[From the American Criminal Law Review (Vol. 10), Summer 1972]

## THE INDICTING GRAND JURY: A CRITICAL STAGE?

(By Samuel Dash *)

### INTRODUCTION

Not so many years ago few lawyers would have anticipated the series of Supreme Court decisions which put flesh on the bones of the fifth and sixth amendments. These decisions guaranteed the right of the accused to counsel during custodial interrogation, at the lineup, at the preliminary hearing, at trial and on appeal. Except for the confession area, the Court has utilized the concept of "critical stage of the prosecution" to produce this revolution in sixth amendment rights. Strangely, one important criminal procedure affecting the rights of the accused has been ignored by this sweep of Supreme Court rulings: the indicting grand jury inquiry. But, as with the emperor's clothes in the well-known fable, the transparency of the argument against the participation of counsel in the grand jury process is now apparent.

In his dissenting opinion in *Coleman v. Alabama*,[1] Chief Justice Burger challenged those members of the Court voting for the right to counsel at preliminary hearings: "If the current mode of constitutional analysis subscribed to by this Court in recent cases requires that counsel be present at preliminary hearings, how can this be reconciled with the fact that the Constitution itself does not permit the assistance of counsel at the decidedly more 'critical' grand jury inquiry?" [2] It becomes progressively more difficult to fault his conclusion that the indicting grand jury process is a more critical stage than the preliminary hearing. How-

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*B.A., 1947, Temple University; J.D., 1950, Harvard University; Chairman, Section of Criminal Law, A.B.A. 1970–71; Criminal Law Section Delegate, House of Delegates, A.B.A.; District Attorney of Philadelphia, Pennsylvania 1955–56; Professor of Law and Director, Institute of Criminal Law and Procedure, Georgetown University Law Center. Member of the Bar of Pennsylvania, Illinois and the Supreme Court of the United States.

[1] 399 U.S. 1, 21 (1969).

[2] *Id.* at 25.

ever, there does not appear to be any constitutional bar,[3] as he believed, to the assistance of counsel at the indicting grand jury inquiry.

Significantly, these two stages of the criminal process—the preliminary hearing and the indicting grand jury—perform the same function. They both lead to a determination of whether the prosecutor can establish a probable cause case against the accused.[4] Moreover, there is absolutely no difference in the applicable standard of probable cause.[5] It is at this point, however, that similarity ceases. Rooted in tradition,[6] the grand jury continues as a secret, ex parte inquiry guided by a predisposed prosecutor.[7] The accused is denied any opportunity to confront his accusers, to cross-examine them, or to have the assistance of counsel. The preliminary hearing, by contrast, is an open procedure where the accused, standing before an impartial magistrate and accompanied by counsel, may cross-examine government witnesses and introduce evidence of his own on the issue of probable cause.[8]

This discussion posits that the indicting grand jury inquiry is, as Chief Justice Burger said in *Coleman*, an even more critical stage than the preliminary hearing. In contrast to Chief Justice Burger's view, however, the present inquiry will explore whether there is any reason based on law, policy, tradition or logic why the *Coleman* ruling should not apply with equal force to the indicting grand jury.

It must be emphasized that the focus here is entirely upon the indicting grand jury as distinguished from investigating grand juries. In many jurisdictions, notably the federal, a lawfully convened grand jury can perform both functions. Yet in a number of states, as in Pennsylvania, for example, the investigating function is performed exclusively by a specially convened grand jury,[9] while the indicting function is the business of the regularly convened monthly grand

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[3] The relevant provisions of the Constitution provide:

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

U.S. Const. amend V.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend VI.

[4] Fed. R. Crim. P. 5(c); United States v. Heap, 345 F.2d 170 (2d Cir. 1965); *see* Sciortino v. Zampano, 385 F.2d 132 (2d Cir. 1967) (return of indictment eliminates need for preliminary hearing as probable cause has already been demonstrated); Weinberg & Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 Mich. L. Rev. 1361, 1372 (1969) [hereinafter cited as Weinberg & Weinberg]; *cf.* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1166–72 (1960) [hereinafter cited as Goldstein].

[5] *See* P. Weinberg, The Preliminary Hearing in the District of Columbia, 1969 (unpublished manuscript on file in Institute of Criminal Law and Procedure, Georgetown University Law Center, Washington, D.C.).

[6] W. Holdsworth, History of English Law 312–23 (1956); T. Plucknett, History of the Common Law 111–20 (1956); J. Stephen, A History of the Criminal Law in England 185–86, 252–54 (1883); Morse, *A Survey of the Grand Jury System*, 10 Ore. L. Rev. 101, 102–18 (1931); Whyte, *Is the Grand Jury Necessary?*, 45 Va. L. Rev. 461, 462–82 (1959).

[7] *Cf.* Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 425 (1959) (discussion of the accused's lack of rights before the federal grand jury, the U.S. Attorney's role, the constitutional right to a grand jury proceeding, and the grand jury before and after the advent of the Federal Rules of Criminal Procedure); Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153 (1965). *See generally*, L. Orfield Criminal Procedure from Arrest to Appeal 135–93 (1947) (discussion of the mechanics, powers, and secrecy of the grand jury process in the context of the entire criminal procedure); Dession & Cohen, *The Inquisitorial Function of the Grand Jury*, 41 Yale L.J. 687 (1932) (study of the power of and restraints on the grand jury as opposed to the prosecutor and magistrate in light of the Wickersham report); McClintock, *Indictment by a Grand Jury*, 26 Minn. L. Rev. 193 (1942) (a general survey of indictment procedures with suggestions for improving the speed and fairness of the results of grand jury findings).

[8] *See, e.g.*, Washington v. Clemmer, 339 F.2d 725 (D.C. Cir. 1964) (accused in rape case has right to subpoena prosecutrix and to introduce evidence and cross-examine prosecution witnesses); Fed. R. Crim. P. 5(c). *See also* E. Barrett Prettyman Fellows 1965–1966, The Preliminary Hearing in the District of Columbia 6–7 (1967); Weinberg & Weinberg, *supra* note 4, at 1382.

[9] *In re* Grace, 397 Pa. 254, 154 A.2d (1959) (prosecutor's allegations of the illegality of actions of union officials did not meet test of emergency conditions required before a special investigating grand jury can be called in Pennsylvania); *In re* Communication of the Grand Jury in the Case of Lloyd and Carpenter, 5 P.L.J. (Clark) 55 (1845) (the court refused to grant the grand jury's request for an order to produce certain records in a case involving charges brought before the entire grand jury by one grand juror).

jury. The two functions must be distinguished, however, because the argument here favoring participation by counsel in the grand jury proceedings is relevant primarily to the indicting grand jury.[10] Whatever the validity of the reasons traditionally given for grand jury secrecy, those arguments apply solely to the investigating grand jury.

The distinction between the two grand jury functions is a very real one. An investigating grand jury performs the function its name implies. It investigates whether any crime has occurred and, if so, which persons may have been involved in its commission. The indicting grand jury, in turn, passes on the evidence presented by a prosecutor against a specific person accused of committing a particular crime and determines whether that evidence meets the standard of probable cause.[11] Thus, no one has been accused when an investigating grand jury begins its work, whereas an accused individual is always the focus of an indicting grand jury. Indeed, an indicting grand jury usually has before it a bill of indictment prepared by the prosecutor which charges a specific person with a specific offense.[12]

There are instances, of course, where the same grand jury can perform both functions. If a grand jury begins as an investigating grand jury and reaches a point where the prosecutor believes there is sufficient evidence to obtain an indictment against a specific person, the grand jury is then transformed into an indicting grand jury which passes on the probable cause case offered against the accused by the prosecutor.[13] The point at which the function of the grand jury has changed is clearly visible to the grand jury and the prosecutor, since it is marked by the focus of the investigation specifically upon the accused.[14]

A common feature, nonetheless, of both the investigating and the indicting grand juries is secrecy. Both are ex parte proceedings with only the grand jurors, the witnesses and the prosecutor present. Yet the preliminary hearing, which performs the exact same function as the indicting grand jury, is an open proceeding at which the accused, with his counsel present, is permitted to cross-examine witnesses and to offer testimony. Seemingly inexplicable, the differences in procedures at the preliminary hearing and the indicting grand jury appear all the more unusual, if not intolerable, in light of the Supreme Court's ruling in *Coleman v. Alabama*.

### COLEMAN V. ALABAMA: ITS HOLDING AND IMPLICATIONS

Charged with assault with intent to murder, John Henry Coleman and two codefendants argued, *inter alia*, that Alabama's preliminary hearing prior to the issuance of an indictment was a "critical stage" of the prosecution, and that the failure of the state to provide them with an appointed attorney amounted to an unconstitutional denial of their sixth amendment right to counsel. The Court, in examining the Alabama procedure, noted that the preliminary hearing is not a prerequisite to a prosecution;[15] the primary purpose of the hearing is to determine if there is sufficient evidence to warrant presenting the defendants' case to the grand jury.[16] Recognizing that it previously had held that a person accused of crime requires "the guiding hand of counsel at every step in the proceedings against him. . . ." and that an accused is guaranteed "that he need not stand alone against the state at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial . . . ,"[17] the Court announced that the test for determining whether the presence of counsel is necessary requires that the Court "scrutinize any pretrial confrontation of the accused" to see if his basic rights have been affected.[18] Applying this test, the Court found that—

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[10] This article will not explore the right of a witness called before an investigating grand jury to have counsel with him in the grand jury room.

[11] *See, e.g.*, United States v. Heap, 345 F.2d 170 (2d Cir. 1965); Orfield, *The Federal Grand Jury*, 22 F.R.D. 343 (1959).

[12] L. Orfield, Criminal Procedure from Arrest to Appeal, 156–57 (1947).

[13] Although some of the evidence supporting probable cause may have been heard already during its fulfillment of the investigative function, the grand jury should be required to rehear this evidence in the presence of the accused and his counsel before returning an indictment. Additionally, counsel should be given the transcript of the witness' earlier testimony.

[14] This is the familiar test of the point of which an accused becomes entitled to counsel during a police interrogation. Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964).

[15] 399 U.S. 1, 8 (1969).

[16] *Id.* at 8.

[17] *Id.* at 7.

[18] *Id.* at 7.

> plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skillful examination and cross-examination of witnesses may expose fatal weaknesses in the state's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment for use in cross-examination of the state's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as necessity for an early psychiatric examination or bail.[19]

The prevailing opinion by Justice Brennan, insofar as it held that the defendant was entitled to an attorney at the preliminary hearing, was concurred in by Justices Black, Douglas, Harlan, White and Marshall. Dissenting, Mr. Justice Stewart, with whom the Chief Justice joined, explained that the thrust of the prevailing opinion was that the Constitution "required Alabama to provide a lawyer for the petitioners at their preliminary hearing, not so much, it seems, to assure a fair trial as to assure a fair preliminary hearing."[20] Based on the fact that cases relied upon by the majority were concerned with assuring the fairness of the trial itself, and that "in this case no evidence of anything said or done at the preliminary hearing was introduced at the petitioners' trial,"[21] Justice Stewart concluded that the defendants had not been "affirmatively prejudiced:"[22]

*Coleman* may appear at first glance to provide the accused with additional protection as he moves through the criminal process. But does it? Not unlike Alice in Wonderland's Cheshire cat, a preliminary hearing is sometimes there and sometimes not. The criminal procedures of the federal system[23] and of the majority of state jurisdictions,[24] are similar to those in Alabama: they do not

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[19] *Id.* at 9.
[20] *Id.* at 27.
[21] *Id.*
[22] *Id.* at 28.
[23] Fed. R. Crim. P. 5(c) provides:
(c) Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

[24] The following states provide that the prosecution of criminal cases may be commenced by the filing of an information or indictment at the option of the prosecutor.
Arizona—Ariz. Rev. Stat. Ann. R. Crim. P. 78 & 79 (1956); Arkansas—Ark. Const. amend. XXI (1947); California*—Cal. Penal Code §§ 737 & 738 (West 1970); Colorado—Colo. Rev. Stat. Ann. § 39–4–1 (1963); Connecticut—Conn. Gen. Stat. Ann. § 54–46 (1958); Florida—Fla. Stat. Ann. § 932.47 (1944); Idaho—Idaho Code § 19–1301 (1948); Indiana—Ind. Ann. Stat. § 9–908 (1956); Iowa—Iowa Code Ann. § 769.1 (1950); Kansas*—Kan. Stat. Ann. § 22–3201 (Supp. 1970); Louisiana†—La. Code Crim. Proc. Ann. § 382 (West 1967); Michigan*—Mich. Comp. Laws Ann., Code Crim. Proc. §§ 767.1 & 767.42 (1968); Minnesota*—Minn. Stat. Ann. §§ 628.29, 628.31 & 628.32 (1947); Missouri—Mo. Const. art. I, § 17; Mo. Rev. Stat. § 545.010 (1959); Montana*—Mont. Rev. Code Ann. § 95–1501—95–1502 (1969); Nebraska*—Neb. Rev. Stat. §§ 29–1601 & 29–1607 (1964); Nevada*—Nev. Rev. Stat. §§ 171.196 & 172.015 (1968); New Mexico*—N.M. Const. art. 2, § 14 (1953); North Dakota*—N.D. Cent. Code § 29–09–02 (1960); Oklahoma—Okla. Stat. § 22–301 (1969); South Dakota*—S.D. Comp. Laws Ann. §§ 23–2–5 & 23–36–1 (1967); Utah*—Utah Code Ann. §§ 77–6–1 & 77–17–1 (1953); Vermont†—Vt. Stat. Ann. tit. 13, § 5651 (1958), *as amended* (Supp. 1971); Washington—Rev. Code § 10.37.015 (1961); Wisconsin*—Wis. Stat. Ann. §§ 955.12 & 955.18 (1958); Wyoming—Wyo. Stat., 7–118 (1959).
*These states by statute specifically require a preliminary hearing as a prerequisite to prosecution by information rather than grand jury indictment.
†These states by statute allow the information to be substituted for indictment only in non-capital cases and life imprisonment.
The following states require a grand jury indictment in felony cases, but specifically provide by statute that a defendant may waive indictment. Most of these states allow a waiver only in non-capital cases and some of them require the presence of counsel,

require that the prosecutor provide a preliminary hearing for the accused. He may avoid the preliminary hearing and go directly to the grand jury,[25] thereby creating the anomalous situation in which basic sixth amendment rights given to the accused may, in effect, be snatched away by the simple prosecutorial maneuver of by-passing the preliminary hearing.[26]

One method used by the prosecutor in many jurisdictions to avoid a preliminary hearing is to present his probable cause case directly before a grand jury prior to making an arrest. It is also fairly common for the government to seek a continuance of the preliminary hearing date [27] until an indictment issued by the grand jury effectively eliminates the need for the preliminary hearing.[28] Under the provisions of the Federal Magistrates Act,[29] for example, an indictment moots the preliminary hearing. Some courts have contended that since the purpose of a preliminary hearing is only to afford the accused an opportunity to challenge the existence of probable cause, "a post indictment preliminary hearing would be an empty ritual as to the government's burden of showing probable cause." [30]

The reasoning of these cases may be suspect, however, in light of *Coleman's* acknowledgement of the importance of pretrial discovery.[31] Some judges, primarily in the District of Columbia, have recognized that a significant purpose of the preliminary hearing is to afford the accused "a chance to learn in advance of

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consent of the prosecuting official, or a waiver by the defendant in writing before the defendant will be allowed to waive the indictment by a grand jury.

Alabama—Ala. Code, tit. 15, §§ 227 & 260 (1958); Alaska—Alas. Stat. § 12.80.020 (1962); Delaware—Del. Code Ann., Rules Superior Court (Criminal No. 7) (1971); Georgia—Ga. Code Ann. § 27–704 (1953); Illinois—Ill. Ann. Stat. § 38–111–2 (1970); Maine—Me. Rev. Stat. Ann. tit. 15, § 701 (1964); New Hampshire—N.H. Rev. Stat. Ann. §§ 601:1 & 601:2 (1955); New Jersey—N.J. Stat. Ann. § 2A:152–3 (1971) & § 2A:7–25 (1952); North Carolina—N.C. Gen. Stat. §§ 15–137 & 15–140.1 (1965); Ohio—Ohio Rev. Code Ann. § 2941.021 (1971); Oregon—Ore. Rev. Stat. § 131–010 (1971); Pennsylvania—Pa. Const. art. 1, § 10 (1969) & Pa. Stat. Ann. tit. 19, § 241 (1964); Rhode Island—R.I. Gen. Laws Ann. 12–12–19 (1969); South Carolina—S.C. Code Ann. §§ 17–401 & 17–511 (1962); Virginia—Va. Code Ann. 19.1–462 (1969).

Statutes in the following states require a grand jury indictment in felony cases. Hawaii—Hawaii Rev. Stat. § 711–6 (1968); Kentucky—Ky. Rev. Stat. Ann. Rules Crim. Proc. 6.02 (1969); Maryland—Md. Rules of Procedure 708 (1971); Massachusetts—Mass. Gen. Laws Ann. ch. 277, § 15 (1959); Mississippi—Miss. Code Ann. § 2440 (1956), *see also* Miss. Const. art. 3, § 27; New York—N.Y. Code Crim. Proc. § 4 (McKinney 1958); Tennessee—Tenn. Code Ann. § 40–1703 (1955); Texas—Tex. Const. art. 1, § 10 (1955); West Virginia—W. Va. Code Ann. 62–2–1 (1966).

[25] When a person is first arrested after indictment, rather than on complaint, he is not entitled to a preliminary examination. *See, e.g.*, Crump v. Anderson, 352 F.2d 649 (D.C. Cir. 1965); Butler v. United States, 141 F.2d 433 (4th Cir. 1951) (no purpose to be served by preliminary hearing after indictment); E. Barrett Prettyman Fellows 1965–1966, The Preliminary Hearing in the District of Columbia 16 (1966). This type of indictment is called a "Grand Jury Original" and the accused is arrested under the indictment pursuant to Fed. R. Crim. P. 9.

[26] The primary reason the prosecutor engages in such a strategy is to prevent the defense from gaining any discovery of his case. Before the grand jury he can secretly obtain the assessment of laymen of the strength of his case without providing any advantage to the defendant. As Professor Goldstein has noted, the grand jury can be "used as a full fledged deposition procedure for the prosecution without the embarrassing presence of the defendant or his counsel." Goldstein, *supra* note 4, at 1191. *See also* Schmertz, The Indicting Grand Jury: A Field Survey of Evidentiary Problems, March 1972 (unpublished manuscript on file, Institute of Criminal Law and Procedure, Georgetown University Law Center, Washington, D.C.); Traynor, *Ground Lost and Won in Criminal Discovery*, 39 N.Y.U. L.J. 228, 231 (1964) (survey of the practice and procedure of discovery in America with a comparison of the restrictive measures of federal procedure and the extensions of discovery in California) [hereinafter cited as Traynor].

[27] Weinberg & Weinberg, *supra* note 4, at 1364.

[28] Responses to questions of a Senate Subcommittee holding hearings on the proposed Federal Magistrates Act offered striking evidence of this point. In answering a question as to why the preliminary hearings were not held, one U.S. Commissioner stated: "When appointed I was instructed by U.S. District Attorney to set hearings far enough in advance to allow for grand jury indictment." Another responded: "It is the policy of the U.S. Attorney not to have preliminary hearings." Report by Subcomm. Staff on U.S. Commissioners' Responses to Subcomm. Questionnaire, Appendix I, *Hearings on S. 3475 and S. 945 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966) 90th Cong., 1st Sess. (1967) at 483.

[29] 28 U.S.C. §§ 604, 631–639 (1970).

[30] Sciortino v. Zampano, 385 F.2d 132, 133 (2d Cir. 1967). *See* United States v. Chase, 372 F.2d 453 (4th Cir. 1967); United States v. Heap, 345 F.2d 170 (2d Cir. 1965). *See also* L. Orfield, Criminal Procedure Under the Federal Rules 274 (1966).

[31] 399 U.S. at 9.

trial the foundation of the charges and the evidence that will compose the government's case against him." [32]

The prosecutor's discretionary prerogative to avoid entirely the preliminary hearing makes the Supreme Court decision in *Coleman* a tantalizing tease. One can imagine a prosecutor piously explaining to an accused: "Yes, indeed, if you have a preliminary hearing, it is a critical stage of the prosecution and you are entitled to counsel. You will be able to cross-examine witnesses against you, present any testimony you wish to give, challenge whether probable cause has been established and obtain some discovery of the case against you—but, of course, that is if I permit you to have a preliminary hearing. If I choose to go directly to the grand jury, on the other hand, all these precious rights I just outlined for you are not available since you are not exposed to a critical stage of the prosecution but only to the grand jury which indicts you." If the accused is a reader of Dickens, he will be compelled to reply: "If the law (says) that . . . then the law is a ass. . . ." [33]

The present procedure which allows the prosecutor to engage in what must be characterized as the "game" of circumventing the procedural safeguards afforded by a preliminary hearing must be condemned as a method marred by logical inconsistency. The preliminary hearing determination of probable cause results only in the presentation of the case to the grand jury; [34] it is the latter body's indictment, based on yet another assessment of probable cause, which leads directly to the criminal trial itself.[35] Thus, not only can a stage which the Supreme Court has deemed "critical" be eliminated merely at the prosecutor's whim, but it can also be replaced by a stage which, while still thought too remote from trial to be termed "critical," resolves the identical issue and is, in practice, one step closer to the final determination of guilt or innocence.

The Court's opinion in *Coleman* must apply with equal if not greater force to the indicting grand jury. If the accused is in need of a lawyer to argue the probable cause issue before a judicial officer, the presence of counsel is even more indispensable when a body of laymen is called upon to apply this legal standard.[36] Moreover, the same need exists before a grand jury as at the preliminary hearing for a defense lawyer to freeze the testimony of prosecution witnesses for the purpose of impeachment at trial. Furthermore, since the Supreme Court concluded in *Coleman* that it is essential that the accused obtain through counsel some discovery of the prosecutor's case against him in a preliminary hearing, there is no possible rationalization for denying the accused his right to discovery at a probable cause grand jury proceeding where the prosecutor has denied him a preliminary hearing.[37]

The Supreme Court's opinion in *United States v. Wade* [38] adds additional weight to the compelling conclusion that the indicting grand jury inquiry is a critical stage of the prosecution requiring the implementation of sixth amendment rights. The Court there emphasized that, when left in the control of law enforcement officials, proceedings against an accused can "seriously, even crucially, derogate from a fair trial." [39] Quoting from its opinion in *Miranda v. Arizona*, the Court reiterated its admonition that "privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on . . . ." [40]

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[32] Blue v. United States, 342 F.2d 899, 90 (D.C. Cir.), *cert. denied*, 380 U.S. 944 (1965). In the *Blue* case the court enunciated the reasons for the preliminary hearing:

> It has generally been thought that the purpose of a preliminary hearing is to afford the accused (1) an opportunity to establish that there is no probable cause for his continued detention and thereby to regain his liberty and, possibly, escape prosecution, and (2) a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him.

*Id. See* United States *ex rel.* Wheeler v. Flood, 269 F. Supp. 194 (E.D.N.Y. 1967); *cf.* Ross v. Sirica, 380 F.2d 557 (D.C. Cir. 1968); Note, *The Preliminary Hearing in the District of Columbia—An Emerging Discovery Device*, 56 Geo. L.J. 191 (1967) (an analysis of recent law in the District of Columbia and the advantages and disadvantages of using the preliminary hearing as a vehicle for broader discovery).

[33] C. Dickens, Oliver Twist 398 (Reprinted ed. 1942).

[34] E. Barrett Prettyman Fellows 1965–1966, The Preliminary Hearing in the District of Columbia 6 (1966); Goldstein, *supra* note 4, at 1169.

[35] *See* United States v. Heap, 345 F.2d 170 (2d Cir. 1965); Goldstein, *supra* note 4, at 1169.

[36] The author has been unable to find a study which attempts to compare the abilities of the judge and grand jurors as they examine the existence of probable cause. The corresponding issue of the relative competency of petit jurors is far from resolved. *Cf.* H. Kalven & H. Zeisel, The American Jury 8 (1966).

[37] *See* note 32 *supra* and accompanying text.

[38] 388 U.S. 218 (1967).

[39] *Id.* at 228.

[40] *Id.* at 230, *quoting from* Miranda v. Arizona, 384 U.S. 436 (1966).

The Court in *Wade* focused on improper suggestions about the identification of the accused made by police at a line-up.[41] Similar improper and prejudicial acts on the part of a prosecutor can occur in the grand jury room. A recent study of the practices of federal prosecutors before indicting grand juries reveals that prosecutors often disclose to the grand jury the prior criminal records of those accused, or introduce as part of their probable cause case illegally obtained confessions which would not be admissible at trial.[42]

Any consideration of the application of *Coleman* to the indicting grand jury inquiry must not fail to recognize that the common law heritage of criminal justice demands that the prosecutor's allegations be scrutinized for probable cause by an impartial arbiter.[43] The safeguard of the preliminary hearing [44] or the grand jury [45] has been retained to serve as a bulwark against possible harassment of an accused. If a prosecutor's case is insufficient, the hearings will prevent the subjugation of an accused to the rigors of a criminal trial.[46] The presence of the accused, assisted by counsel, assures that this protection will be real and not illusory. Perhaps most importantly, the preliminary hearing provides the accused with an early opportunity to learn the nature of the charges against him. This point was emphatically articulated as early as 1845 by Judge Edward King in the landmark Pennsylvania case of *Lloyd and Carpenter*,[47] in which he elucidated the rationale of preliminary screening procedures in the American criminal justice system:

> By the opportunity given to the accused of hearing and examining the prosecutor and his witnesses, he ascertains the time, place, and circumstances of the crime charged against him, and thus is enabled, if he is an innocent man, to prepare his defense, a thing of hardest practicability if a preliminary hearing is not afforded to him. For how is an accused effectively to prepare his defense unless he is informed, not merely what is charged against him, but when, where, and how, he is said to have violated the public law? It is not true that a bill of indictment found, without a preliminary hearing, furnished him this vital information. Hence the inestimable value of preliminary, public

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[41] 388 U.S. 218, 227–39 (1967).

[42] Schmertz, The Indicting Federal Grand Jury: A Field Survey of Evidentiary Practices, March 1972 (unpublished manuscript on file, Georgetown University Law Center, Washington, D.C.) At this point it should be noted that while all Supreme Court "critical stage" cases have involved situations in which the accused was present, this is not necessary for a determination of "critical stage." *See* United States v. Zieler 427 F.2d 1305 (3d Cir. 1970).

[43] Goldstein, *supra* note 4, at 1163–72.

[44] The preliminary hearing appears to have developed from the early English coroner's inquest. Several statutes during the course of the 1550's gave justices of the peace jurisdiction over the preliminary examination for the purposes of setting bail and binding over witnesses against the defendant for trial. During the course of the seventeenth century the preliminary hearing assumed an inquisitorial character with justices closely examining the accused. *See* L. Orfield, Criminal Procedure from Arrest to Appeal 53–58 (1974). *Cf.* 4 Holdsworth, History of English Law 529 (1923); 1 Stephen, History of Criminal Law in England 217 (1883); Note *The Preliminary Hearing—An Interest Analysis* 51 Iowa L. Rev. 164 (1965).

[45] The origin of the grand jury has usually been traced by historians to the Assize of Clarendon issued by Henry II in 1166. Originally established "to discover and present facts in answer to inquiries addressed to them by the kings" (T. Plunkett, History of the Common Law 126 (1956) the grand jury has come to serve two great functions:

> One is to bring to trial persons accused of crime upon just grounds. The other is to protect persons against unfounded or malicious prosecutions by insuring that no criminal proceedings will be undertaken without a disinterested determination of probable guilt.

Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 394 (1959). Many other commentators have studied the history of the grand jury. Some of their works are cited in note 6 *supra*.

It is noteworthy that the grand jury was abandoned by England in 1933 (Administration of Justice Act of 1933, 23 & 24 Geo. 5, c. 36) and replaced by the preliminary hearing screening process. On its passage, one commentator noted:

> The grand jury has long lagged superfluous on a stage where it had once played a great part. Its performance had grown perfunctory, and its service a burden to reluctant actors. During its last years it was kept in being only by that strong sentiment among lawyers which resents change however salutory; but though the English people are patient there is a certain vein of common sense in its making, which in the long run prevails.

Luick, *Abolition of the Grand Jury in England*, 25 J. Crim. L. & C. 623 (1934).

[46] According to the Supreme Court, the grand jury continues to serve an invaluable function in our society "standing between the accuser and the accused, whether the latter be individual, minority group or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or malice. . . ." Wood v. Georgia, 370 U.S. 375, 390 (1962). *Contra*, Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153, 154 (1965) ("[i]t is simply not true that the grand jury system protects the individual from oppression; indeed, it has a far greater potentiality as an instrument of oppression.")

[47] 5 P.L.J. (Clar) 55 (1845).

> investigations, by which the accused can be truly informed, before he comes to trial, what is the offense he is called upon to respond to. It is by this system that criminal proceedings are ordinarily originated. Were it otherwise, and a system introduced in its place, by which the first intimation to an accused of the pendency of a proceeding against him, involving life or liberty, should be given, when arraigned for trial under an indictment; the keen sense of equal justice, and the innate detestation of official oppression which characterizes the American people, would make it of brief existence.[48]

Given this history of pretrial safeguards, and given the fact that in many jurisdictions a grand jury indictment is required by constitution or by statute before an accused may be tried,[49] it is strange, especially in light of *Coleman*, that the grand jury proceeding has not yet been held to be a "critical" stage under the sixth amendment.

If, indeed, the grand jury in determining probable cause serves the identical purpose as the preliminary hearing, why is the reasoning in *Coleman* not applicable to the grand jury? What arguments permit the indicting grand jury to remain a secret proceeding with only one side, the government, permitted to be present? Only two explanations are possible: (1) the historic secrecy of the grand jury; and (2) the tradition in criminal cases of denying the accused the right of discovery of the prosecution's case prior to trial. Each explanation requires analysis.

### GRAND JURY SECRECY

One of the weaknesses of the American criminal law is that legal fictions become so firmly entrenched that it is considered sacrilegious to disclose or dislodge them. A concept that is apparently antiquated will be retained solely because of the sacrosanct preeminence ascribed to it by tradition. As other legal institutions attempt to adjust to and grow with the times, the legal fiction, with remarkable resilience, continues unimpeded and unchanged.[50] Such is the case with the concept of grand jury secrecy.[51] Regarded with the unquestioning reverence that befits a policy "older than our nation itself," [52] secrecy at a grand jury session has come to be recognized as "indispensable." [53]

Originally conceived to prevent abuses by the Crown,[54] grand jury secrecy has been preserved for a number of reasons—all of which, according to the Court, are as "important for the protection of the innocent as for the pursuit of the guilty." [55] Mr. Justice Brennan has summarized the rationale as follows:

> Essentially four reasons have been advanced as justification for grand jury secrecy. (1) To prevent the accused from escaping before he is indicted and arrested or from tampering with the witnesses against him. (2) To prevent disclosure of derogatory information presented to the grand jury against an accused who has not been indicted. (3) To encourage complainants and witnesses to come before the grand jury and speak freely without fear that their testimony will be made public thereby subjecting them to possible discomfort or retaliation. (4) To encourage the grand jurors to engage in uninhibited investigation and deliberation by barring disclosure of their votes and comments during the proceedings.[56]

On close examination these traditional arguments, when applied to the indicting grand jury, are at best as substantial as gossimer. The first justification fails because when the prosecutor has probable cause, an escape of the suspect can be prevented by an arrest prior to the commencement of the grand jury proceeding.

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[48] *Id.* at 57.

[49] U.S. Const. amend. V. *But cf.* Hurtado v. California, 110 U.S. 516 (1884) (requirement of indictment by the grand jury has not been held applicable to the states under the fifth amendment). See note 24 *supra.*

[50] *Cf.* 3 R. Pound, Jurisprudence 449–466 (1959).

[51] The only persons who may be in the grand jury room other than grandjurors themselves are attorneys for the government, the witness under examination, interpretor when needed, and for the purpose of taking evidence, a stenographer or operator of a recording device. *Cf.* Fed. R. Crim. P. 6(e). *See also* Wright, Federal Practice and Procedure § 105 (1969).

[52] Pittsburgh Plate Glass Company v. United States, 360 U.S. 395, 399 (1959).

[53] United States v. Johnson, 319 U.S. 503, 513 (1943).

[54] *See* Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 456–457 (1965) [hereinafter cited as Calkins]. *See also* T. Edwards, The Grand Jury 28 (1906): "The independence which the institution had attained was soon to be put to the severest tests, but protected by the cloak of secrecy and free from the control of the court as to their findings, they successfully thwarted the unjust designs of the government."

[55] United States v. Johnson, 319 U.S. 503, 513 (1943).

[56] Pittsburgh Plate Glass Company v. United States, 360 U.S. 395, 405 (1959) (dissenting opinion).

Probable cause requirements for an arrest are certainly far less demanding than they are for a grand jury presentation.[57] The fear that the accused may tamper with witnesses is sufficiently answered by noting that no such protection is afforded witnesses at trial where the issue is guilt or innocence rather than mere probable cause. Of course, it is slightly inconsistent to suggest that protection is needed at this stage of the proceedings but unnecessary at trial. If an accused were determined to influence or intimidate witnesses, he would do so whenever he could—prior to or at trial. Thus, grand jury secrecy provides only theoretical rather than real protection against this alleged evil.[58]

The second argument for secrecy—to protect the innocent accused—clearly is suspect in light of the fact that, in many instances, he already has been subjected to a public session before a magistrate and "bound over" to the grand jury.[59] A further weakness of this thesis appears when it is recognized that the grand jury constitutes, according to the commentators, a mere "rubber stamp" for prosecutors.[60] Since most indicting grand jury proceedings are but perfunctory rituals leading to trial, the accused is seldom spared the ignominy of public disclosure. Finally, the argument to protect the accused becomes meaningless in light of the fact that the accused himself wants to know whether the grand jury is actually receiving evidence as the basis for a possible indictment. In fact, the presence of counsel is essential to conceal the investigation of an innocent person effectively. An attorney can challenge the existence of probable cause and prevent the accused from erroneously being subjected to a trial—a trial which would ultimately command greater notoriety than the simple return of a grand jury indictment.

The third reason—to encourage witnesses and complainants to come before the grand jury and speak freely—provides little actual assistance to the prosecutor. If these witnesses are willing to come forward only in a secret proceeding, their testimony is valueless if they are unavailable at trial.[61] This rationale also loses sight of the fact that secrecy is designed for "the protection of the grand jury itself as a direct, independent representative of the public as a whole, rather than those brought before the grand jury.[62] As one commentator has explained: "A witness is not a confidential informant, he must consider his testimony subject to all the obligations of oath required in any judicial proceeding." [63] While it is desirable that witnesses speak freely, a malicious witness before the grand jury may be more likely to fabricate a story implicating the accused, knowing that he will not be subject to cross examination. Fears of fake testimony are founded in the real and substantial consequences which, regardless of the outcome of the trial, flow from an indictment. It is against the backdrop of these

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[57] The requirement justifying an arrest warrant is "that enough information be presented to the Commissioner to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process." Jaben v. United States, 381 U.S. 214, 225 (1965). For an indictment to be found 12 or more jurors must concur. Fed. R. Crim. P. 6(f). Additionally, before returning an indictment a grand jury "ought to be thoroughly persuaded of the truth of the indictment, so far as the evidence goes; and not rest satisfied merely with remote possibilities." Beaver v. Henkel 194 U.S. 73, 84 (1904).

[58] *Cf.* Calkins, *supra* note 54, at 462. *See also* State v. Rothrock, 45 Nev. 214, 222, 200 P. 525, 527 (1921) (secrecy allows grand jurors to meet and deliberate without fear of retaliation).

[59] As explained earlier, the preliminary hearing is but a step preceding the grand jury. *Cf.* Washington v. Clemmer, 399 F.2d 715, 724–725 (D.C. Cir. 1964) (separate opinion of Burger, J.) (preliminary hearings serve the purpose of determining probable cause for holding the defendant for action by grand jury).

[60] The Wickersham Report concludes:

> Under modern conditions the grand jury is seldom better than a rubber stamp of the prosecuting attorney and has ceased to perform or be needed for the function for which it was established and for which it was retained throughout the centuries. . . . An unnecessary work burden should be lightened by eliminating the necessity of indictment and permitting prosecution to be instituted and accusation to be made through the simpler process of information.

National Commission of Law Observance and Enforcement, Report in the Prosecution 124 (1931). *See generally,* J. Bentham, Rationale of Judicial Evidence ¶ 2, at 15 (1918); R. Pound and F. Frankfurter, Criminal Justice in Cleveland, 176, 211–212, 248 (1922); Dession, *From Indictment to Information—Implications of the Shift,* 42 Yale L.J. 163 (1932); Morse, *A Survey of the Grand Jury System,* 10 Ore. L. Rev. 101 (1931); Younger, *The Grand Jury Under Attack,* 46 J. Crim. L.C. & P.S. 26, 214 (1955).

[61] Calkins, *supra* note 54, at 461. *But see* Pittsburgh Plate Glass Company v. United States, 360 U.S. 395, 400 (1959) (suggesting that secrecy is the state's inducement to the witness for coming forward with testimony).

[62] United States v. Amazon Industrial Chemical Corp., 55 F.2d 254, 261 (4th Cir. 1931).

[63] Calkins, *supra* note 54, at 451. *See also* Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 406–407 (1959) (dissenting opinion) (a witness called before grand jury cannot remain a secret informant).

fears that an opinion of United States Court of Appeals for the Sixth Circuit has examined the dangers and abuses of secrecy:

> It is a serious thing for any man to be indicted for an infamous crime. Whether innocent or guilty he cannot escape the ignominy of the accusation, the dangers of perjury and error at his trial, the torture of suspense and the pains of imprisonment, or the burden of bail. The secrecy of any judicial procedure is a tempting invitation to the malicious, the ambitious, and the reckless to try to use it to benefit themselves and their friends and to punish their enemies. If malicious, ambitious or over-zealous men, either in or out of office, may with impunity persuade grand juries without any legal evidence, either by hearsay testimony, undue influence, or worse means, to indict whom they will, and there is no way in which the courts may annul such illegal accusations, the grand jury, instead of that protection of "the citizen against unfounded accusations, whether it comes from government or be prompted by partisan passion, or private enmity" . . . which it was primarily designed to provide, may become an engine of oppression and a mockery of justice.[64]

The final reason given for maintaining grand jury secrecy—to provide for uninhibited investigation and deliberation by the jurors—merits examination with regard to both investigative and deliberative functions. As noted above, this article does not specifically consider the investigating grand jury—a body which, concededly, might be justified in operating secretively. Indeed, a real and practical benefit is arguably achieved by providing for "uninhibited *investigation*." Such is not the case, however, with the indicting grand jury which has passed the investigating stage and has begun to focus on the accused.

With regard to the grand jurors' "deliberations," it is imperative that secrecy be preserved. As the deliberations of a petit jury "shall remain private and secret in every case," [65] so too should the grand juror's. The protection of the juror's subjective freedom of expression in deliberation must be preserved. Deliberations, however, are but a part of the grand jury process. Just as there is no protective secrecy for the jurors hearing evidence on guilt or innocence at trial, so too it is unnecessary for a grand jury to proceed in secrecy when they hear the evidence on the issue of probable cause.

It is noteworthy that the cloak of secrecy [66] has been somewhat removed by a number of recent Supreme Court decisions. For the most part these cases have determined under what conditions a defendant may gain access to the transcript of grand jury testimony after the indictment. In *Pittsburgh Plate Glass Company v. United States*,[67] the Court recognized a limited right of the defendant to review grand jury testimony where he could establish a "particularized need" for disclosure to impeach a witness, to refresh his recollection or to test his credibility.[68] However, the Court rejected the petitioner's claim under the Jencks Act [69] that where a prosecutor calls a witness who has testified before the grand jury, the defendant is entitled as a matter of right to disclosure of that witness' grand jury testimony.[70] In so doing, the Court relied upon the history of grand jury secrecy. It pointed to the need for protecting grand jurors from outside intrusion and grand jury witnesses from the threat of the disclosure of their testimony.[71] The Court seemed oblivous to the fallacies of such ritualistic restatements of a legal myth. But why should the indicting grand jurors who are reviewing the prosecutor's evidence to determine probable cause be any more protected from public scrutiny than the magistrate who performs the same function at the preliminary hearing or the petit jurors who perform the even more serious function of determining guilt or innocence at the trial? Again, why must the prosecution witnesses who are needed to establish probable cause before the grand jury be hidden, when these same witnesses must, of necessity, come forward at trial, if an indictment has been returned?

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[64] Schmit v. United States, 115 F.2d 394, 397 (6th Cir. 1940), *quoting from* McKinney v. United States, 199 F. 25, 31 (8th Cir. 1912) (dissenting opinion). *See also* Herman Schwabe, Inc. v. United Shoe Mach. Corp., 194 F. Supp. 763 (D. Mass. 1958); United States v. Procter and Gamble Co., 19 F.R.D. 122, 126 (D. N.J. 1956).

[65] United States v. Virginia Erection Corp., 335 F.2d 868, 872 (4th Cir. 1964).

[66] United States v. Procter and Gamble Co., 356 U.S. 677 (1958) (long established policy supports the secrecy of the grand jury proceedings in a federal court).

[67] 360 U.S. 395 (1959).

[68] *Id.* at 400.

[69] 18 U.S.C. § 3500 (1970).

[70] 360 U.S. at 401.

[71] *Id.* at 399.

In his dissent in the *Pittsburgh Plate Glass Company* case,[72] Mr. Justice Brennan, while recognizing some basis for grand jury secrecy, explained that it is not above examination.

Grand jury secrecy is, of course, not an end in itself. Grand jury secrecy is maintained to serve particular ends. But when secrecy will not serve those ends or when the advantages gained by secrecy are outweighed by a countervailing interest in disclosure, secrecy may and should be lifted, for to do so in such a circumstance would further the fair administration of criminal justice.[73]

In *Dennis v. United States*,[74] the Court relaxed the strict rule of the majority in the *Pittsburgh Plate Glass Company* case and acknowledged "the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." [75] The Court held that in a complicated conspiracy case where considerable time had elapsed between the events of the crime charged, the date of the grand jury testimony and the trial of the case itself, the defendant has a right to examine the grand jury testimony of important witnesses produced against him at the trial by the government.[76] The Court further ruled that the defendant has the right to have his counsel examine the testimony and rejected the position of the United States Court of Appeals for the Tenth Circuit and the government that the trial judge should review the transcript *in camera* to determine whether there might be anything relevant which should be turned over to the defense for eventual impeachment purposes.[77] All federal cases subsequent to *Dennis* have applied this expanded rule of disclosure, but nevertheless limited their holdings to specific instances where a defendant was found to be entitled to examine portions of the transcript.[78] Significantly, these cases provide no encouragement for the presence of counsel at the grand jury, but rather, having assumed that grand juries will retain their secrecy, deal with the separate issue of how much of what transpired before the grand jury may be disclosed after the indictment or at trial.

To move from these cases to a judicial recognition of the right of counsel at the indicting grand jury is a great leap indeed. But the Supreme Court's decisions in *Coleman v. Alabama* appears to be a compelling springboard.

### DISCOVERY

A discernible pattern emerges from the *Pittsburgh Plate Glass—Dennis* line of cases, a trend toward admitting that secrecy is not the revered *sine qua non* that it had once been. Evidence of this appears from the fact that in *Dennis* even the government conceded that the importance of preserving secrecy is minimal and acknowledged the persuasiveness of the arguments advanced in favor of disclosure.[79] Consequently, it is likely that the underlying basis for the retention of grand jury secrecy is the government's unwillingness to disclose its case to the defendant in advance of trial.

Until recently the right of discovery by the defendant in a criminal case was practically nonexistent. Thus, as has been stated: "disclosures were limited to such documents and objects as were obtained from, or which belonged to, the defendant, or which were obtained from others by seizure or by process, upon a showing by the defendant that the items were material to the preparation of the defense and that the request was reasonable. Not even a written confession or transcript or statement made by the defendant himself was available." [80]

To compensate for the unavailability of pretrial disclosure, defense counsel would frequently approach the prosecutor and seek to obtain discovery infor-

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[72] *Id.* at 401 (dissenting opinion).
[73] *Id.* at 403 (dissenting opinion).
[74] 384 U.S. 855 (1966).
[75] *Id.* at 870.
[76] *Id.* at 872.
[77] In *Dennis*, the Court stated: "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Id.* at 873.
[78] *See, e.g.*, Nolan v. United States, 395 F.2d 283 (5th Cir. 1968) (granting of application to view grand jury minutes is within discretion of the trial judge based on a showing of particularized need); Allen v. United States, 390 F.2d 476 (D.C. Cir. 1968) (threshold requirement to show need should not be defined as "particularized need"—which is a term that might prevent useful discovery); Cargill v. United States, 381 F.2d 849 (10th Cir. 1967), *cert. denied*, 389 U.S. 855 (1968) (request for grand jury minutes and assertion "that such disclosure would serve the ends of justice or aid in the preparation for trial" is too general and broad to come within Dennis rule).
[79] Dennis v. United States, 384 U.S. 855, 872 (1966).
[80] ABA Standards. Discovery and Procedure Before Trial, § 1.2, at 34. (Approved Draft, 1970).

mally. If the prosecutor for any reason did not wish to cooperate, the attempts proved unavailing. Pretrial preparation was thus reduced to mere guesswork, for while many prosecutors acceded to the defense counsel's request, many others did not.[81] This has been evidenced by the concerted efforts of some prosecutors to resist attempts to formalize discovery proceedings.[82] Resistance is usually couched in the time-worn and unfounded scare argument that liberalization of discovery would endanger the lives and safety of witnesses,[83] or would enable the defendant to fabricate a defense.[84] The idea that discovery will either endanger witnesses, or lead to perjury has been all but abandoned.[85] There has been a growing recognition "that the dangers envisioned from broad discovery can reasonably be anticipated in only a small minority of cases." [86] Concomitantly, there has been a noticeable increase in the information in the possession of the government which has been made available to the accused. This liberalization is best manifested by the substantial change in the attitudes of prosecutors, courts, and legislatures, many of whom have apparently come to subscribe to the ABA Standards regarding the scope of discovery. They provide:

> in order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, the adversary system, and national security.[87]

The most noteworthy expansion of the defendant's discovery rights is found in the federal system under new Rule 16 of the *Federal Rules of Criminal Procedure*.[88] Enacted in 1966 by the Judicial Conference of the United States, the rules which are products "of a decade of trenchent and sustained criticism by judges, practitioners, and legal scholars, with respect to the sparse discovery heretofore available to criminal defendants, . . . vastly expand the scope of pretrial discovery." [89]

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[81] For examples of the hostility expressed by some prosecutors towards expanded criminal discovery see T. Flannery, *A Prosecutor's Case Against Liberal Discovery,* 33 F.R.D. 47 (1964) (government, not the defendant, is at a disadvantage in criminal cases in the District of Columbia); *Discovery in Criminal Cases—A Panel Discussion Before the Judicial Conference of the Second Judicial Circuit,* 44 F.R.D. 481 (1968) (statement by Stephen E. Kaufman) (liberalized discovery may lead to tailored testimony, subordination, perjury, falsification, and fabrication of documents).

[82] *See Discovery in Criminal Cases—A Panel Discussion Before the Judicial Conference of the Second Circuit, supra* note 81 at 483–89.

[83] *Id.* at 485.

[84] This has been articulated by one court as follows: "In Criminal proceeding long experience has taught the courts that often discovery will lead not to honest fact-finding but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the case against him will often procure perjured testimony in order to set up a false defense." State v. Tune, 13 N.J. 203, 210–11, 98 A.2d 881, 884 (1953).

[85] Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth,* 1963 Wash. U. L.Q. 279, 290.

[86] ABA Standards, Discovery and Procedure Before Trial, Commentary on § 1.2, at 37 (Approved Draft, 1970).

[87] *Id.* § 1.2, at 11–12.

[88] Fed. R. Crim. P. 16 provides in part:

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C., § 3500.

[89] Rezneck, *The New Rules of Criminal Procedure,* 54 Geo. L.J. 1276 (1966) (discussion of widened scope of discovery for both the prosecutor and accused under the Feb. 28, 1966 amendments to the Federal Rules).

In many state jurisdictions the availability of discovery is following a similar pattern. Several states have adopted rules which parallel those found in the *Federal Rules of Criminal Procedure*.[90] Perhaps the most liberal is the California rule[91] which provides that, following a motion to produce or inspect, discovery is to be granted if denial of the information would deprive the defendant of a fair trial. This order will also be issued if the information is material to the question of guilt or innocence or is needed to refresh the recollection of the accused or to prepare a defense.[92] Interpretation of these rules has led the California courts to hold that a defendant has an absolute right to pretrial discovery and that denial thereof would justify a reversal.[93] Other states have adopted rules moving in the direction of those promulgated by California.[94] Significantly, the relaxation of restrictions to discovery has been well received by prosecutors because it has greatly encouraged plea negotiations between the accused and the government.[95]

To date the ABA's proposed standards for criminal discovery provide the most liberal standards seriously suggested;[96] they do more to alleviate the existing imbalance than does other any code. Interestingly, the ABA was prompted not so much by ideological convictions as by pragmatic concern:

> The need for change in procedures appeared manifest in order to lend for finality to criminal dispositions, to speed up and simplify the process and to make more economic use of resources.[97]

From all appearances this trend in discovery is irreversible, and it can safely be predicted that very shortly, in both state and federal jurisdictions, criminal defendants will enjoy full discovery rights. This should thus remove the last obstacle to opening up the inquisitorial indicting grand jury to the participation of the accused and his counsel. The reasoning of the Supreme Court in *Coleman* ought to be employed in achieving that result.

## CONCLUSION

After *Miranda*,[98] *Wade*[99] and *Coleman*,[100] it would indeed be difficult for a prosecutor to argue that the indicting grand jury's determination of probable cause is not a critical stage of criminal prosecution. The underlying reasoning behind recent Supreme Court interpretations of an accused's sixth amendment rights compels the conclusion that an accused has a right to participate during

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[90] *See* Ariz. R. Crim. P. 195 (1956); Cal. Penal Codes §§ 869, 938.1 (1970); Del. Super. Ct. Rules—Criminal 16 (1971); Fla. Stat. Ann. § 925.05 (Supp. 1971); Idaho Code § R19–1530 (Supp. 1971); Ill. Ann. Stat. § 114–10 (Smith-Hurd 1970); Md. Rule of Proc. 728 (1971); Mo. R. Crim. P. 25.195 (1970); Pa. R. Crim. P. 310 (Supp. 1971); R.I. Gen. Laws Ann. § 12–17–16 (Supp. 1972); Tenn. Code Ann. § 40–2441 (Supp. 1971); Vt. Stat. Ann. §§ 6721, 6727 (Supp. 1971).

[91] Cal. Penal Code §§ 869, 938.1 (1970) and numerous cases expanding the right to discovery. *See* State v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956) and the cases collected in Jones v. Superior Court, 58 Cal. 2d 56, 58, 372 P.2d 919, 920, 22 Cal. Rptr. 879, 880 (1962).

[92] *See* Traynor, *supra* note 26, at 243–44.

[93] *Id.* at 244.

[94] See Pa. R. Crim. P. 310 (Supp. 1971); R.I. Gen. Laws Ann. § 12–17–16 (Supp. 1972); Vt. Stat. §§ 6721, 6727 (Supp. 1971).

[95] Vermont's experience with formal liberalization of discovery for criminal defendants is documented in Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732 (1967). Five years after the state supreme court held that the new discovery statute, Vt. Stat. Ann. tit. 12, § 1262 (1961), "granted a right of unlimited discovery to a respondent in a criminal case," Vermont v. Mahoney, 122 Vt. 456, 176 A.2d 747 (1961), the author surveyed the reactions of all prosecutors, judges and leading defense attorneys in the state. The survey disclosed that:

> Not a single prosecutor, judge or defense attorney indicated that the likelihood (of trial) increased. The great majority stated that depositions decrease the likelihood of trial.
>
> . . . There appears to be little doubt that the side effect of these statutes (increase of the open file policy) has also resulted in the reduction of the likelihood of trial in many cases.

*Id.* at 734–35.

Preliminary reports from the United States District Court for the Southern District of California also indicate that the use of the liberal A.B.A. criminal discovery standards on an experimental basis has increased the number of guilty pleas "without sacrificing the interests of the government or the defendant." ABA Standards, Discovery and Procedure Before Trial 9 (Approved Draft, 1970).

[96] *See supra* note 86.

[97] *Id.* at 2.

[98] Miranda v. Arizona, 384 U.S. 436 (1966) (right to counsel at custodial interrogation).

[99] United States v. Wade, 388 U.S. 218 (1967) (right to counsel at line-up).

[100] Coleman v. Alabama, 399 U.S. 1 (1969).

the grand jury's determination of probable cause and that he has a right to have the assistance of counsel with him in the grand jury room.

The implementation of these changes will, of course, drastically reduce the dominating influence of the prosecutor over the grand jury. But this is as it should be, since for too long indicting grand juries have been discredited as being mere rubber stamps of the district attorney.[101] Those rights guaranteed at the discretionary preliminary hearing must in no way be abridged at the constitutionally mandated indictment proceeding. In order that the grand jury effectively perform the vital function of independently determining probable cause, it is esential that an accused standing before it be afforded the procedural safeguards inherent in our American system of criminal justice.

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[From the Congressional Record—Tuesday, May 4, 1976]

GRAND JURY REFORM

Mr. ABOUREZK. Mr. President, on April 8 Senators McGOVERN, GRAVEL, and I introduced S. 3274, the first omnibus grand jury reform measure ever presented to this body. We introduced this bill because the grand jury, an institution that the founders of this country honored as a bulwark of liberty, has deteriorated into a powerful weapon which overzealous prosecutors can turn against our liberty.

One of the more incredible instances of this perversion of the grand jury process has been the case of Ellen Grusse and Terri Turgeon, two Connecticut feminists who were forced to spend most of 1975 behind bars because they dared to exercise their constitutional rights in the grand jury chamber. The ordeal these two women went through raises fundamental questions about the Federal grand jury's role in our criminal justice system.

These questions, I am happy to note, have been discussed thoroughly by author Richard Harris is a three part series in the New Yorker magazine. Mr. Harris' series, entitled "Annals of Law: Taking the Fifth," appeared in the April 5, 12 and 19 issues of the New Yorker. It is a fascinating—and chilling—examination of how the modern grand jury can be manipulated to short-circuit the Bill of Rights.

Mr. Harris' piece deserves a broad readership, and I am pleased to insert the first portion of it in the RECORD today. Parts II and III will appear over the next 2 days.

I ask unanimous consent that part I of Mr. Harris' New Yorker article be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

TAKING THE FIFTH

(By Richard Harris)

The informer—the Judas figure—has been an odious creature in the popular mind throughout history. Even so, governments have always used his services, and one measure of freedom in any society is the extent to which the informer flourishes. In a tyranny, the informer contributes a basic necessity to the tyrant's survival—the people's fear of him—by demonstrating that any deviant political expression or behavior may be reported to the state, and then punished. In a democracy, on the other hand, the sovereignty of the people is supposed to encourage diversity of thought and allow open dissent and outright opposition to the public policies of those who are elected to run things temporarily. But even the most democratically conceived government comes to behave as if its own survival, rather than the people's welfare, is the paramount good. This happens not because democracy inevitably degenerates into tyranny through repressive leadership at the top but because the government's ordinary day-to-day operations depend on entrenched "public servants"—the bureaucracy—who are always most concerned about protecting and expanding their own power. In time, bureaucrats transform government into a kind of private institution that exists for their sake, and this makes them deeply committed to preserving the system—their system—as it is. The deeper their commitment, the more alarmed they are likely to be by

[101] *Cf. supra* note 60.

anything that seems to threaten the system; and the more alarmed they become, the more likely they are to resort to extreme measures to meet the threat. One extreme measure that is being increasingly resorted to by government in the United States today is the official use of informers from the bottom to the top of our society.

On the local level, most police departments of any size in this country now have "intelligence units," which use electronic surveillance and undercover agents, or informers, to spy on citizens who are suspected of unlawful activity (and, all too frequently, on citizens who are not engaged in anything illegal but are up to something that might subject them to political or economic blackmail). On the national level, recent revelations about the federal government's spying on its citizens on an immense scale—by such bureaucratic institutions as the Federal Bureau of Investigation, the Central Intelligence Agency, the Army, the Secret Service, the National Security Agency, the Internal Revenue Service, the Postal Service, the Drug Enforcement Administration, and the Customs Service—raise the question whether this undemocratic and often unlawful practice does not imperil the Republic more than did the perilous episode known as Watergate.

While informers are of little use in controlling the kind of crime that Americans are most worried about—violent street crime—informers are the chief means of dealing with the kind of crime that the government is most worried about—group crime. The given group may be organized for the purpose of financial gain through crime, in the pattern of the Mafia, or it may be organized for political purposes, such as those proclaimed by the Communist Party, the Socialist Workers Party, the Black Panthers, the Symbionese Liberation Army or any of the various groups that loosely make up the New Left. It has often been said that half of the American Communist Party's ten thousand or so members are F.B.I. informers. That outfit is fairly easy to infiltrate, because it is a rigid bureaucratic structure of the sort that the F.B.I., itself a rigid bureaucratic structure, is familiar with. It has also often been said that the F.B.I. has failed to keep tabs on the activities of the New Left because the Bureau cannot comprehend that movement's character. The New Left is anything but bureaucratic, for the groups that comprise it are generally rather formless and undisciplined, and their members drift in and out of its many factions and schisms. Nor do most of these collections of radicals have clearly formulated policies and programs, being more likely to rely on inflammatory rhetoric than on direct action as an outlet for their social discontent. Then, too, members of the New Left often live and dress and speak in ways that the upstanding informer would find repugnantly inimitable.

Probably the clearest example of the bureaucratic inability to understand these rebels and revolutionaries is to be found in the government's grossly disproportionate reaction to the threat that they actually pose, given the size of the United States and the conservative character of its people. Those who tremble at the spectre of revolution here often cite the relatively few people who seized power in Russia during the First World War, but such a nervous comparison ignores the fact that Russian society had collapsed from internal corruption when it was taken over. Today, it would be argued, the principal danger from the far left in this country is that it has provided the far right with an excuse to crush it, in a manner that might be generally acceptable if the government goes on scaring the wits out of everybody about a handful of impotent left-wing radicals. And although the right wing is also diffuse and weak, there is one powerful group that could become its unifying ally at any time—the nation's thousands of police departments, which are becoming more and more paramilitary, well organized, interconnected, heavily armed, and political-minded. To an alarming extent, the only control over them is the control they maintain over themselves, and our personal freedom is largely at their sufferance. Yet the national government has ignored this peril altogether, and has concentrated its immense firepower on the few radical left-wing outfits still in business, like the "army" of Symbionese Liberators, who apparently never numbered more than a dozen people.

While the S.L.A.'s kidnapping of Patricia Hearst was surely a sensational event, her supposed conversion to active terrorism made her, legally speaking, merely another accused outlaw. But the publicity surrounding the case, the inflamed political statements issued by her and her confederates, and their embarrassing success in eluding thousands of pursuers apparently drove the F.B.I. to frenzied lengths to capture them. During the search for the Hearst woman, it was reported that the Bureau had questioned over twenty-seven thousand people about her in the San Francisco area alone. At the time, the Bureau, for all its

efforts, hadn't found her, because it hadn't found anyone who would inform on her. (When it finally captured her, its success was due to an informer.)

Having failed to turn up any dependable informers in the Hearst case in its early stages, the F.B.I. desperately resorted to a relatively new law-enforcement technique—the use of compliant federal grand juries to help the Bureau do the job that it couldn't do on its own. Although under law grand juries are supposed to determine only whether crimes have been committed and to indict those who seem to have committed them, and are not supposed to serve as investigative tools for prosecutors or law-enforcement agencies, nowadays grand juries are frequently, and improperly, used to amass evidence against people who have already been indicted, to obtain leads on fugitives, or even to find missing persons like Jimmy Hoffa. The F.B.I. merely persuades a cooperative United States Attorney to instruct the federal grand jury he in effect runs to subpoena relatives, friends, and acquaintances of the person being sought, and then the prosecutor forces these witnesses, under threat of imprisonment for contempt of court, to divulge whatever they may know about the fugitive—or, for that matter, about anything under the sun that the prosecutor (or the F.B.I.) feels like asking, however irrelevant and personal. In short, if the government cannot find informers it creates them.

On September 23, 1970, three white men and two white women held up a branch of the State Street Bank & Trust Company, a Boston bank, and escaped with twenty-six thousand dollars in cash. As they were making their getaway, a policeman tried to stop them, and one of the bandits cut him down with a burst from a machine gun. The policeman died, leaving a widow and nine children, and the greatest manhunt in New England history got under way. The search was led by the F.B.I., which had jurisdiction over the crime, since the bank was insured by the federal government, and by that night one of the wanted men had been captured. He turned out to be an ex-convict, recently paroled from a Massachusetts prison, and he quickly informed on his four partners. The other men were also ex-convicts, and all three had been studying at Brandeis and Northeastern Universities, in Massachusetts, after completing a college-preparatory course in the same prison. The women subsequently indicted for the crime were both twenty-one years old, from respectable middle-class families, and one was a senior at Brandeis, while the other had graduated there the previous June. According to the informer's story, the five bandits had formed a radical movement of their own called the Revolutionary Action Force to protest the American involvement in Vietnam and Cambodia, and had held up the bank to finance their movement, which, the informer told the F.B.I., was designed "to break down the military structure of the country." (One of the other men, who later described himself as commander-in-chief of the Revolutionary Action Force—East, said that they had held up the bank because the United States government had ignored their official declaration of war against it.)

The two remaining male fugitives were captured within a few days, but there was no sign of the two young women—Susan Edith Saxe and Katherine Ann Power, who soon became known simply as Saxe and Power—and they quickly made the F.B.I.'s "most wanted" list. Posters bearing their pictures and physical descriptions were circulated through F.B.I. offices, police stations, and post offices across the country, but for more than four years the authorities were unable to find a trace of them. Then, around the beginning of January, 1975, a young man in Lexington, Kentucky, happened to see one of the "wanted" posters, and thought that the fugitives closely resembled two women he had known as Lena Paley (Saxe) and May Kelly (Power), who had lived the previous summer and fall in a lesbian community on the fringes of the University of Kentucky campus, in Lexington. He mentioned his suspicion to a woman who lived in the community, and she notified the F.B.I. field office in Cincinnati. The fugitives' identity was quickly verified.

If the F.B.I. had difficulty understanding the New Left, it had far greater difficulty understanding a related development known as women's liberation or the women's movement, and could understand nothing at all about an outgrowth of that movement—the increasing number of women who had become, or admitted being, lesbians. In the Saxe-Power case, the Bureau's inability to cope with this particular pair of radical adversaries was illustrated at the top by its reaction to the news about the presence of Saxe and Power some months earlier in Lexington. The Bureau did not quietly send a few able women agents to the lesbian community in Lexington to see if they could unobstrusively pick up a

lead on the fugitives. Instead, it dispatched droves of male agents into the area, and thereby notified Saxe and Power that the government had picked up their trail and virtually suggested to them that they would do well to stop hanging around with lesbians while the F.B.I. wasted its time investigating lesbians. And, at the bottom, the F.B.I.'s attitude was illustrated by an agent in the field who interviewed a waitress in a Lexington restaurant that was frequented by lesbians; when she told them that although she was not a lesbian she had once had a drink with one of the fugitives, the agent said, "If I went out for a drink with a homosexual man who had no interest in women, I wouldn't know what to talk about."'

Saxe and Power were soon reported to have lived in several lesbian communities in the East, and the F.B.I. apparently concluded from this fact that such communities were havens for criminals of all sorts—especially left-wing political criminals. Homosexual acts are crimes in most jurisdictions in this country, even if the men and women who are homosexual are not often prosecuted for it, and their way of life is sufficiently despised by the heterosexual public to make official persecution of them generally acceptable. In short, the Bureau was free to harass homosexuals as ruthlessly as it could a nest of drug traffickers or Reds. And harass them it did. F.B.I. agents began questioning scores of people in the gay community in Lexington, many of whom were susceptible to pressure because they had hidden their private lives from their families and employers. Those who refused to talk discovered that F.B.I. agents went to their families, divulged their quarries' sexual habits, and forced the reluctant witnesses to talk—either because of the implicit threat that their employers would be the next to learn about them or because they were simply crushed by such revelations of their secret lives and caved in. Most of these members of the gay community had known Saxe and Power as Paley and Kelly, and some of them told the F.B.I. where the women had apparently gone after leaving Lexington—to Hartford, among other places.

Before long, though word went around the gay community that no one was legally obliged to answer questions put by F.B.I. men or any other government officials and, in fact, that it could be extremely dangerous to talk to them at all. A little-known federal statute, Title 18, Section 1001 for the Federal Criminal Code, makes it a federal crime, punishable by up to five years in prison and a ten-thousand-dollar fine, for a citizen to lie to *any* government agency. In legal terms, of course, what is a lie and what is not is up to a jury to decide. One may believe that one is telling the truth when being questioned, only to later recall events somewhat differently; if one then tells the revised version of those events before a grand jury or a court, one can be prosecuted for having lied in the first place. Even as seemingly small an untruth as telling a government official that one doesn't know any thing about what is being inquired into when one does know something about it is a criminal act. And while the F.B.I. ordinarily warns criminal suspects of their constitutional rights once they are taken into custody—mainly the right not to speak and the right to have a lawyer present—agents do not warn nonsuspects of any rights they have or of the danger of violating Section 1001 when they are questioned about someone else who is a criminal suspect. In other words, most of those who are questioned by the F.B.I. or by other government officials are not given the ordinary forms of due process of law, and some lawyers would argue that the only sensibly self-protective course for anyone, guilty or innocent of wrong-doing, is to refuse to speak to *any* government agent unless a lawyer is present—at least, until Congress takes Section 1001 off the books. In any event, when inhabitants of the Lexington community learned of their right to remain silent, more and more of them refused to say anything to the F.B.I.

In midmorning on January 24, 1975, two F.B.I. agents appeared at a silverware-manufacturing plant in Meriden, Connecticut, and asked to see the executive who worked there, Mrs. Alice Grusse. They were shown to her office, identified themselves and asked where they could find her daughter Ellen. Mrs. Grusse was alarmed, and asked what they wanted to see her for. The older of the agents, a rather grandfatherly sort of man, who conducted the interview, assured her that as far as they knew her daughter hadn't done anything wrong but that she might be able to tell them something about two women fugitives who were wanted for bank robbery and murder.

Mrs. Grusse was frightened by this news. She had never, to her knowledge, seen an F.B.I. man before. Also, she could not believe that her daughter, who

had been a quiet, generally obedient, though sometimes stubborn, child and seemed a quiet, orderly woman, could conceivably had had anything to do with bank robbers and murderers. Nervously, Mrs. Grusse asked the agents to wait, and telephoned Ellen at her apartment in New Haven, where she had moved from Hartford a month earlier. Mrs. Grusse's voice was shaking as she told Ellen that two F.B.I. men were in her office and wanted to know where she lived, so that they could speak to her about some women fugitives. As it happened, her daughter—a slender woman of twenty-eight with curly, light-brown hair, a thin, rather childlike face, and an intense manner—had heard about the F.B.I.'s search for Saxe and Power, and had read in the press that a number of people in Lexington had asserted their right to refuse to talk to the F.B.I. After a moment's hesitation, she told her mother that she didn't want to speak to the agents. Mrs. Grusse began to protest, saying that she *had* to talk to them, but Ellen quickly cut her short with the assurance that she didn't have to, and wouldn't, talk to them. Mrs. Grusse then asked if she should tell them where Ellen lived, and her daughter, after another pause, decided that it was her responsibility, not her mother's to handle the matter, and said yes.

When Ellen Grusse hung up the telephone, she quickly described the call to the person she lived with—Marie Theresa Turgeon, a quietly pleasant, thirty-one-year-old woman with short dark hair, known to her friends as Terri. Both of them recalled at the same moment that a few days earlier they had overheard a woman at the New Haven Women's Liberation Center asking about where she could get some legal advice on how to deal with a landlord who insisted that she get rid of her cat. The person in charge of the center's referral service had replied that a young woman named Diane Polan handled many legal problems for women associated with the center. Now Turgeon telephoned her, explained what had happened in Meriden, and asked what she should do to avoid talking to the F.B.I. agents. Polan turned out to be legal assistant to a lawyer named Michael Avery, and she transferred the call to him. Avery informed Turgeon that she could not be compelled to talk to them, and said that if she wanted to discuss the situation further she could come to his office. (Avery, though only thirty years old, had already had a good bit of experience with the F.B.I. because since graduating from the Yale Law School he had represented such clients as the Black Panthers, the Communist Party of Connecticut, and various other radicals in the course of his criminal-law practice.) The two women expected the F.B.I. men to drive directly over from Meriden, some twenty miles away, and wanted to be prepared for them, so they left for Avery's office at once. He was tied up, though, and it was a couple of hours before they got in to see him. "His advice was simply that we insist on having our lawyer present during any interview with the F.B.I.," Grusse said recently. "He didn't see the situation as being any problem, because in his experience whenever F.B.I. men hear someone say 'lawyer' they just go away."

Grusse and Turgeon got back home at a little before three o'clock that afternoon. Five minutes later, there was a knock at the door, and Turgeon went to answer it. Two men were waiting, and one of them—the elderly man who had spoken to Mrs. Grusse at her office—asked if she was Ellen Grusse. Turgeon introduced herself, and called Grusse. When she appeared, the older man demanded, "Where have you been? We drove all the way here from Meriden and had to wait three hours for you."

Assuming that F.B.I. agents probably spent much of their time waiting for people, Grusse ignored that point and said, "As a matter of fact, I want to talk to you about that. I went to see a lawyer, and his advice is that I not talk to you unless he is present." According to Grusse, the agents were clearly taken aback. "The older one literally gasped when I said 'lawyer,' " she said later. "He started in talking about bank robbers and murderers, and said I wasn't in any trouble, so why did I want to see a lawyer? I just handed him Avery's card and told him to set up an interview. He wanted to use my phone for that, but I said no, because I figured he was just trying to get into the apartment, and I wasn't going to allow that unless he had a warrant. Finally, I asked Terri to call Avery, but he wasn't at his office. Then the agent behaved as Avery had told us he would. First he tried the good-citizen approach: I wasn't suspected of any crime, so why wouldn't I, as a good citizen, help find these bank robbers and murderers? When I still refused to talk to him, he began threatening me, saying that I could get in a lot of trouble for harboring fugitives. Before that, he had said that I wasn't in any trouble, but now it seemed that I was, or at least could be, then it seemed that he was trying to trap me into incriminating

myself. So I said, 'I prefer to get my legal advice from a lawyer, not the F.B.I.' After that, they left."

The agents did not call Avery. Instead, they reported Grusse's refusal to cooperate with them to the agent in charge of the search for Saxe and Power in Connecticut, and he presented the matter to an Assistant United States Attorney, William Dow III, in New Haven, who presented it, in turn, before a federal grand jury sitting there. On January 27th, three days after the two agents attempted to question Grusse, the grand jury issued subpoenas for both her and Turgeon, stating, "You are hereby commanded to appear in the United States District Court for the District of Connecticut at P.O. Bldg. 141 Church Street—Rm. 208 in the City of New Haven on the 28th of January 1975 at 10:00 o'clock a.m. to testify before the Grand Jury." When a U.S. marshal arrived at the Grusse-Turgeon apartment on the afternoon of the twenty-seventh to serve the subpoenas, Grusse was out, working at a temporary job she had recently got, so he could serve only the subpoena for Turgeon. She telephoned Grusse and then Avery.

He was surprised by the news, and unsettled by the legal problems it presented, because he was unfamiliar with grand-jury procedures and had only a few hours to prepare some kind of plea to the District Court to quash or at least delay the subpoenas' order to gain time in which to prepare a legal defense for his clients. Avery got on the telephone at once to the National Lawyers Guild, in New York, a left-wing group he belonged to, which had prepared extensive research documents on the government's tactics in using grand juries to pursue suspects whom the F.B.I. couldn't find on its own. Late that afternoon, Grusse and Turgeon went to Avery's office for another conference, and during it Grusse thought about whether she should try to avoid being served the subpoena by fleeing. She soon gave up the idea. "I was convinced that the only reason they subpoenaed Terri was because she lived with me," Grusse said. "When the F.B.I came to talk to me, they didn't even know who she was. I decided that I couldn't let her go through it alone. I had to support her. Besides, I knew that I would have to face the thing sooner or later." At six-thirty the next morning, she was awakened by a loud pounding on the door of her apartment. She went to answer, and the same marshal asked if she was Ellen Grusse. She yawned and said that she was, and he handed her the subpoena commanding her to appear before the federal grand jury three and a half hours later.

Ellen Grusse was born in Meriden, Connecticut, in June, 1946, and grew up there and in Southington, Connecticut. There were six children in the Grusse family, and although both parents worked—the father as a salesman and the mother as a private secretary—the family was often rather poorly off financially. In 1964, Ellen enrolled at the University of Connecticut at Storrs, but after a couple of years there she quit and moved to San Francisco, where she lived for three and a half years. "It was the time of the hippies and the flower children and the youth rebellion at Berkeley," she has said. "But I was very apathetic and never got involved in any of that. I wasn't interested in civil rights or the Vietnam war or the kids' fight against authority. I was very square and worked for outfits like U.S. Steel and an import-export firm, and I remained untouched by all the upheaval going on out on the West Coast at the time." In 1969, she came back East and settled in Hartford, where she got a job as a clerk with the Travelers Insurance Company. After a few months, she was promoted to the position of budget analyst, a fairly high post that paid a decent salary and gave her a good bit of responsibility. But she was dissatisfied with her life, and decided to go back to college, at night, to study psychology. After two years of work and study, she concluded that she should do one or the other and do it properly, so she arranged to work part time and to go to college full time. In December, 1972, she graduated with a degree in psychology.

"During my last year in college. I began to get interested in the women's movement," she said. "It was a big thing in college then. All the male professors were trying to be nonsexist, and the talk about women was incessant. Then, after I left college and moved back to Hartford, I met some women who called themselves feminists. I was curious about what that meant, so I joined several feminist groups." In the fall of 1973, Grusse went to work for a farmers' milk cooperative, and before long she became a computer programmer. Her boss, a young man whom she got along with comfortably, was killed in an automobile accident, and his replacement was a much older man. "He was very stern and disagreeable and a gross sexist," Grusse recalled "He made terrible personal remarks to me, so I quit. I went on unemployment for a few months and worked

at part-time jobs, when I could find them. But I spent most of my time studying the women's movement, trying to find out what it was all about and where I might fit in. Up to then, I had never fit in anyplace."

Before long, Grusse became deeply absorbed by the movement. "It was something that I could identify with very strongly, in a way that I hadn't been able to with the civil-rights movement or the anti-war movement," she explained. "Those were basically political, and I'd never been interested in politics. I always got D in political science in school. But feminism was personal for me. When women talked about sexism, I could certainly identify with them, because I had been pushed around all my life—not always by men but by the human tug-of-war our social system creates. Ever since I was a teenager, I felt different. I wasn't interested in dating or clothes or makeup. I felt there was something the matter with me. But when I got involved in the movement, I met other women who had felt the same way once but no longer did, and I began to feel that maybe there wasn't anything wrong with me after all. I fit into the women's group very easily and naturally, and that was really good for me. I guess the biggest impact feminism has had on me began during a course I took in college called 'Women in Society.' The teacher was a woman and a Marxist. Her views—the economic and political reasons behind what had happened to women over the centuries—had never occurred to me. She presented an analysis that really made me think hard. My position had been that we should fight for equal rights for women within the system. But then she opened this door to a wider view. I didn't go through that door, though, because at the time I couldn't accept her analysis. Then, after I graduated, there was a Marxist-feminist rap at Storrs, and I met some women in Hartford who were going, so I went along. The result was that I got involved in that approach for about a year, mostly from just studying and thinking about it on my own. During that time, I met a lot of women with widely differing opinions about what feminism means.

At one end were those who feel that it means equal rights and equal pay for women—that is, equality with men. At the opposite end were the women who call themselves lesbian separatists and talk about building a lesbian nation. In between these extremes were women who see the basic structure of society as the problem and argue that society will allow some women to become equal with men but only at the cost of treading on other women to get that equality. To their way of thinking, the whole system has to be torn up and completely changed. Anyway, scattered between the equal-pay, equal-rights feminists and the lesbian separatists were Marxist feminists, Socialist feminists, lesbian feminists, and even feminist feminists. Some were for reform, some were for revolution. For myself, I fear even the word 'revolution.' It suggests violence, and any kind of violence freaks me right out."

Grusse finally settled for a Socialist-feminist group in Hartford, and as she attended its consciousness-raising sessions she found many of her lifelong assumptions about herself gradually changing. "At first, I talked about my background, and I insisted that I hadn't been hurt by it," she said. "I had been given a decent education, and had built the start of a decent career. There had been no pressure from my family to get married. Overall, I didn't see myself as being oppressed, and I believed I had a worthwhile future. But as we talked in the group, I began to see that oppression had been there all along, and was still there. I saw it in my personal relationships with men, and then I began to see it everywhere in our institutions—in the so-called power structure. While I was in the women's group in Hartford, we mostly just sat around and talked. We wanted to act, not just to affect our own lives but to reach outside ourselves and bring about social change. But we didn't know where to start. I had deep personal fears about confronting anything or anybody. During the late sixties and early seventies, I was to the right of most of my friends, who were generally liberal. My up-bringing had been very conservative, and I agreed with the people who said things like 'Sure, Socialism may be all right, but how about the individual?' 'I'd rather have an imperfect capitalist society with some freedom than an imperfect Socialist society without freedom.' When I met women in the movement who took politics very seriously and who sincerely wanted to change society, I saw that it was a very risky business. It meant that I would have to reject my family and all that I had been taught to believe in."

Grusse put off making any decision on the choice before her, and tried to translate her feminist beliefs into action by talking to the women she worked with, most of whom, she became convinced, were treated badly by the men they worked for, and all of whom seemed to her to be manipulated and underpaid by

their male employers. In time, though, Grusse realized that she, too, was abusing these women. "I used to think of men as being more perfect than women," she said. "All positives and privileges were identified with men in my mind. So I thought I had to depend on men to have identity. I got involved with a man who had an important job at one place where I worked, and I became very powerful there because of my association with him. When I suddenly realized what I was doing, I hated myself. So I left the man and the job. Using that man to get power, and then abusing the women who worked with and under me to show my power, was the worst kind of betrayal of feminism, because its most vital part is the bond between women. We really are all sisters."

In the fall of 1974, after Grusse quit that job, there was an anti-abortion, or "pro-life," convention in Hartford, and she and two other women in her group felt that they couldn't let it go by without opposing it in some public manner. Finally, they decided to hold a pro-abortion counterdemonstration at the convention. "That was really a terrifying prospect for me," Grusse recalled. "Making a public statement was frightening. Even doing nothing more than carrying a placard around was too much for me. But we organized a group of fifteen or twenty people, mostly women from our group and a couple of men, who came and carried placards and handed out leaflets at the convention hotel. The anti-abortion people came up to us and started to argue. They were very angry and abusive, and we tried to avoid a confrontation that would lead to violence. In the end, it was just a verbal confrontation. But I didn't participate in it. I was too scared to say anything. Finally, the anti-abortion people got the hotel management to call the police, who came and made us leave because we didn't have a permit. It was a Sunday, so we went over to St. Joseph's Cathedral and handed pro-abortion leaflets to the people coming out. I was brought up as a Catholic, and that act scared me, too. When it was all over, I realized that my efforts had been futile, and I knew that I had to plug in to something more lasting. But I still didn't know what or how. I didn't have any thought of doing anything political—the pro-abortion demonstration was the extent of my political activity. When the government came after me that day, I was still being tugged between where I was coming from and where I was going. As soon as I saw those F.B.I. men, I knew I had to make a commitment."

Terri Turgeon was born in June, 1943, in Lewiston, Maine where her father worked in a textile mill until the business moved to the South after the Second World War. Then he became a welder and took his family—his wife and five children—to Plainville, Connecticut, and after a few years there on to Southington, Connecticut. When Terri finished high school, she went to work as a clerk in the local Grant's department store and stayed there for two and a half years. From time to time, a travelling photographer who took baby pictures turned up at Grant's and she decided that she would like such a job. She finally got one, and spent a couple of years traveling around New England taking baby pictures in places like Grant's.

By the end of 1967, she was tired of moving around so much, and decided to settle down in Hartford, where she found work as a clerk at the Aetna Life Insurance Company. She stayed there for seven years, and ended up as a senior underwriter, one of the few women to attain such a position in that company. "By being in the right place at the right time and not being offensive to anyone, I finally got promoted to a job that had almost always been held by men," Turgeon said not long ago. "I could do the work, and did it very well—as well as any of the men there. I worked in a department with eleven men and thirty-eight other women who were all secretaries and clerks. The man in charge of the department was unbelievable. He kept making statements to the other women about my being in this high position and having privileges and responsibilities in order to suggest to the other women what they could do if they worked hard. This approach was used throughout the company then to make it look as if there were opportunities for women when there weren't. I had to put pressure on those women to make them work, and I knew full well that they couldn't go on to higher jobs in the company no matter how hard they worked. So I was forced to act like a man—except that I had to do a lot more work than the men to keep my job."

In 1974, Turgeon began to get interested in the women's movement. "I happened to meet some women who described themselves as feminists and explained to me what that meant to them," she said. "I really wanted to get involved in the movement. It would give me some dignity, I thought. These women were finally a disappointment to me personally, but I learned a lot from them. Ellen

and I had met a couple of times in women's groups, and when she held the pro-abortion demonstration I joined in. I'd had strong feelings about abortion for a long time—mostly about back-alley butchers—but I'd never done anything about it. In fact, I'd never done anything about anything. The demonstration was my first political act. And I was scared. I've always been very afraid of authority. If I got a speeding ticket, I'd thank the cop for giving it to me. Anyway, I told my mother about how I wanted to get involved in these things, and she was worried I'd get sent to jail for it. I thought there was a possibility of my going to jail, like in the anti-war and civil-rights protests but only for overnight or a day at the most. Still, I was scared. When I went along with Ellen to St. Joseph's Cathedral was when I was most afraid. I was brought up as a Catholic, and whenever my family drove past a Catholic church in our car my mother would always tell us to bow our heads."

By the fall of 1974, Turgeon had become increasingly unhappy about her job and dissatisfied with her life in general, and she decided to study the women's movement to see if it might be for her the emotional and social haven that it was for some other women. "I wanted to know what women had been through, and to really study the movement in and out, so it seemed that the best way to start was by getting out of the job where I was the token woman, the untrue example," she said. "I quit, and since then I've learned a lot about feminism and about myself. Feminism has given me a new sense of my dignity as an individual. It has let me accept myself as a person, and now I know that it's O.K. to be who I am. It has put me in touch with my personal strengths, and allows me to call them strengths for the first time. It provides a framework in which I can say 'I am a woman' without feeling there is something basically wrong with me. It's allowed me to express some weaknesses and not be completely ashamed of them, as I would have been before. It's helped me know that I can turn to someone else and expect understanding. It's allowed me to trust others, and to make myself vulnerable and not suffer for it."

After meeting in the fall of 1974, Turgeon and Grusse continued to see each other. They soon found the kind of companionship that neither of them had known before, and decided to live together. Hartford had come to seem dull to them, the women's movement there was weak and the city reminded them of the unhappy period before they had found each other. They looked around for a more congenial place to live and settled on New Haven, partly because Yale gave that city a feeling of greater vitality and freedom but largely because of the New Haven "women's community," which consisted of about a hundred militant feminists. It was not a community in a geographical sense, since its members were scattered through town but they had a common bond—women's liberation, which is the most fundamental and even revolutionary, movement going on in the United States today.

In the view of the New Haven community's members (and in the view of those in similar communities around the country), the F.B.I. was using the Saxe-Power search not merely to find two fugitives from justice but to investigate this new radical movement. "At some point during the F.B.I.'s search for Saxe and Power, the Bureau found somebody who talked about the radical feminist 'network,' as the F.B.I. calls it," Avery has said. "Anyway, when the men at the top of the F.B.I. learned more about the movement—just how radical and determined these women are—they must have said, 'Jesus, we didn't know *this* was going on!' Then they began using the Saxe-Power case to learn more. While they claim that this isn't a political case at all, that's obviously nonsense. There are a lot of bank robbers and murderers loose, but the F.B.I. doesn't go to these extraordinary lengths to catch *them*. Of course, the government's idea of who is a threat to society has been weird all along. Take its attempts to break up the Socialist Workers Party over the past twenty years. A glance at that party's history shows that, as decent and progressive as it has been, it was always totally ineffectual politically. But the F.B.I. spent tens of thousands of man-hours keeping it under surveillance, getting its members fired from their jobs, rifling its offices, opening and reading its members' mail. While the government has never understood the New Left, it has no comprehension at all of things like consciousness-raising—basically, an attempt to change relationships between people—which grew out of the New Left by way of feminism. The government seems to view any sizable group of people who don't want to live the way the ordinary government official thinks people should like as conspirators and revolutionaries. Anyway, when the F.B.I. learned that a couple of fugitives had hidden out in lesbian communities it went after the lesbians under the pretext

to looking for the fugitives. Naturally, F.B.I. men couldn't bear anyone who was *that* different. And when they saw that a lot of people with very different ideas and life styles were collected together in these feminist communities, they concluded, as they always have, that there must be a conspiracy to bring down the government. Actually, the women's movement is truly revolutionary, in a way that none of the movements of the nineteen-sixties were, because in time this movement is bound to change our political system and our society radically. Even so, there is nothing remotely illegal about feminism, so the government has no right to snoop around in it. But the government was badly frightened by all the social turmoil of the past decade, and is now determined to smash people who look dangerous before they can do any harm. That's why we have to oppose the government at every step of the way. If we don't it will smash all of us by destroying the freedom of the individual to be an individual. That's the conspiracy this country faces today."

During the Presidency of Richard Nixon, the Administration saw, or pretended to see, conspirators everywhere. To impose a tyrannical conformity on the nation, the Administration tried to destroy its political opponents by charging them with crimes, and conspiracy to commit crimes, against the state, and it prosecuted scores of people who had done little more than raise their voices in protest against the government's illicit use of its power. While the government lost almost every case that it took to court, it doubtless intimidated thousands of people who feared the same treatment if they spoke out. That result was as useful to the Administration as convictions and long prison sentences would have been, for it was conformity—subservience, in the end—that Nixon was after, so that he could do as he pleased with the nation. Although Nixon and his top confederates were run out of office, most of the hundreds of officials who carried out their orders—particularly, agents of the F.B.I., members of United States Attorney's offices around the country, and lawyers in the Department of Justice—remain at their posts. For instance, Guy Goodwin, who headed the special-litigation section of the Internal Security Division of the Justice Department under Nixon and directed the prosecutions of the Harrisburg Seven, the Gainesville Eight, the Camden Twenty-eight, and numerous other political cases, is still at work in the Department. And most of the U.S. Attorneys who tried such cases are also still in office. The methods used during the late sixties and early seventies to silence the opposition and the methods used in the searches for Patricia Hearst or Susan Saxe and Katherine Power are almost identical. The government claims that in its investigation of the more militant parts of the women's movement it has been solely concerned about a different kind of conspiracy—a conspiracy to conceal the whereabouts of two women charged with bank robbery and murder. Government spokesmen also contend that the women's movement has used the F.B.I.'s investigation to create a smoke screen to conceal its own divisions and shortcomings, as well as to get publicity and converts. And, finally, the government has stated that whatever it has done has been entirely legal, and that it has merely used, and will go on using, all the lawful means available to it in order to bring such fugitives to justice. If the only way of doing that is by questioning people about their personal lives, the government says, then it will question them, under the established legal principle that the state has a right to every person's evidence.

The primary question in the case—whether Turgeon and Grusse knew anything about Saxe and Power that might have helped the government in its search for them—can be answered only by the four women, perhaps their lawyers, and possibly some close friends. To the government, it has seemed that Grusse and Turgeon must have known something that could have been useful to the authorities. Otherwise, it has been said, the two women would undoubtedly have talked freely and demonstrated that they know nothing of any significance. This conclusion ignores a number of possibilities. It may seem unlikely that Grusse and Turgeon had not met Saxe and Power (at least as Paley and Kelly) or known others who knew them; if they knew nothing, the two women could simply have answered no to every question asked them before a grand jury and gone on their way. But the kind of knowledge they may have had could go far to explain their silence.

For instance, they may have unwittingly committed some kind of offense that they only later learned was a crime—say, that they had known someone who had put up two strange women for a night without knowing they were fugitives, that Grusse and Turgeon had subsequently learned who the strangers were and what

they were charged with and had not informed the police about the incident, as required by law. Or they may not have known the fugitives at all but simply knew someone else who knew them, who had nothing of value of reveal, and who would be irreparably damaged in some way by being dragged into the case; in that event, the only way for the two women to avoid going to prison, even though they were wholly innocent, would have been to betray someone else who was also innocent. Since grand-jury proceedings are not supposed to be made public—except that witnesses are free to report what was asked them and what they answered—if Grusse and Turgeon were to testify about anything, however unimportant, it might appear to outsiders that they had given the government information that ultimately led to the fugitives' capture. In other words, the only way for Grusse and Turgeon to prove that they hadn't become informers would be to go to prison to show that they had remained silent. Further, if they testified in seccret before the grand jury about anything of the slightest import, no matter how innocent they were personally of any wrongdoing, they could later be compelled, under another grant of immunity, to testify in public at a trial of Saxe, Power, or anyone who had been culpably involved with them. Given the intense loyalty in the women's movement, any act of this kind would surely have closed all doors to the sanctuary that Grusse and Turgeon had found at last. Or they may have known the fugutives only under their aliases, may have known nothing about their past or present whereabouts, and may have felt that they had to resist official intrusion into their private lives, since it could produce nothing of use to the government and might seem like a betrayal of two friends who, as far as Grusse and Turgeon knew at the time, were simply a couple of innocent women. Finally, of course, the two women may have known the fugitives by their true identity, may have known what they were accused of, and may have helped hide them. In that case, they would have been guilty of committing serious crimes, and could scarcely be expected to be informers against themselves. One of the most anicent principles of Anglo-Saxon law is "*Nemo tenetur prodere scipsum.*" or "No man is bound to betray himself."—a principle that is embodied in the Fifth Amendment to the Constitution, which states, among other things, that no one "shall be compelled in any criminal case to be a witness against himself."

For their own part, Turgeon and Grusse would say only that they had done nothing wrong. Apparently, the government believed that this claim was false—at the outset, anyway—for Dow, the Assistant U.S. Attorney in charge of the case, told Avery around the time the women were subpoenaed that he felt obliged, "in all fairness," to warn him that his clients were "targets" of the grand jury; in other words, they were likely to be prosecuted, although he would not say for what crime. Avery passed this news on to the women, and explained to them that the only way they could legally refuse to testify would be by pleading their Fifth Amendment right not to speak on the ground that whatever they said might incriminate them. (Assertion of that right seems to most laymen, to all too many lawyers, and even to some judges to be tantamount to an admission of criminal guilt of some kind, though there are often many reasons an innocent person might wish to remain silent.) But even a Fifth Amendment plea would not secure their right of silence for long. Avery went on, because the Department of Justice could ask the court to grant them immunity against any future prosecution based on their testimony.

Once a grant of immunity was offered them and the court ordered them to answer all questions asked by the prosecutor in the presence of the grand jury, he explained, their refusal to answer would amount to contempt of court. Moreover, it was up to the government to decide whether to prosecute for civil or criminal contempt. And under the law civil contempt may be more harshly punished than criminal contempt, for any criminal-contempt cases where the government asks for a sentence of more than six months defendants have a right to trial by jury, whereas in civil-contempt cases recalcitrant witnesses can be sent off to prison immediately, with no more than a judge's order, and can be kept locked up until either they agree to talk or the term of the grand jury expires. In the present case, the grand-jury term was to expire on April 1st—slightly more than two months away. Moreover, if the women refused to cooperate with the government and were found in contempt and imprisoned, once they were released they could be again subpoenaed to appear before a newly impanelled grand jury, and if they again refused to talk they could be sent back to prison for the life of the new grand jury—ordinarily eighteen months. The civil-contempt provision under current law is so unclear that conceivably the courts

could rule that recalcitrant witnesses must spend the rest of their lives in prison without ever having been charged, tried, or convicted of a crime. But Avery's interpretation of the law had convinced him that his clients couldn't be imprisoned for more than eighteen months altogether no matter how many grand juries they were granted immunity and refused to testify, would subpoena them again Dow had warned him he meant to have them cited for contempt and jailed if they were granted immunity and refused to testify, would subpoena them again to appear before the succeeding grand jury, and would send them back to jail once more.

Grusse and Turgeon decided to take their chances. "We have an absolute moral belief that the investigation the government is engaged in will violate our basic constitutional and human rights," they stated in a press release that they put out shortly afterward to explain their reasons for refusing to testify. "We believe that the right to privacy and confidentiality in human relationships goes beyond those traditionally recognized confidences such as attorney-client, spouse-to-spouse, doctor-patient, etc. We believe that every person has the right to keep her affairs private without interventions by government agents. . . . Although we fear the complete loss of freedom and dignity that [imprisonment] holds for us, we feel strongly that it is imperative to insist on our fundamental rights and to halt the chain of invasions that is perpetuated by cooperation with government abuse of power." As absolute as their moral belief was and as just as their cause may have seemed to them, they didn't have a scrap of law on their side.

Avery and Polan worked all afternoon and evening and far into the night preparing three motions on their clients' behalf. The first asked the presiding judge to quash the subpoenas. The second asked the judge to delay the witnesses' appearance before the grand jury in order to give them time to prepare a legal position on the issue. And the third asked the judge to instruct the grand jury that it "is not subservient to the United States Attorney but has its own independent responsibility for calling witnesses and issuing indictments; that witnesses have an absolute right to assert the Fifth Amendment prior to any grant of immunity to compel testimony, and the grand jurors are to draw no inference from the exercise of Fifth Amendment rights; that witnesses have the right to leave the room to consult with their attorneys, and the grand jurors are to draw no inference from such actions; [and] that the grand jury can decline to question a recalcitrant witness, and thereby not compel her to choose between violation of her conscience by testifying or sentence to jail."

Avery completed the motions just before Grusse and Turgeon arrived at nine o'clock on the morning of January 28th at his office—a small, plainly furnished suite of rooms that he shared with two partners in an old building a few blocks from the federal court. They walked with Avery to the post office—where the District Court, the U.S. Attorney's office, and the grand jury room were situated, on the second floor. He asked the women to wait in the anteroom of the U.S. Attorney's office while he had a talk with Dow to see if he had changed his mind about demanding their testimony. As Avery later stated in court, when he entered Dow's office he found him with David Miller, the F.B.I. agent in charge of the Saxe-Power investigation in Connecticut. Dow immediately told Avery that he had been wrong the day before when he said that Grusse and Turgeon were targets of the grand-jury investigation, and added, "I have had a further conversation with the F.B.I. agent, and all (he) really wanted to do is talk to these women, and if they will talk to Mr. Miller—and you can even be present—that will be the end of the matter." Avery replied that his clients refused to talk to any government official about their personal lives, and rejected the offer.

District Court Judge Jon O. Newman (who had served for five years as U.S. Attorney in Hartford before being appointed to the federal bench by President Nixon in 1972) agreed to hear Avery's motions and oral arguments from both sides on the issues raised. During the hearing, Judge Newman contemptuously dismissed Avery's arguments, formally denied his motions, and ordered the witnesses to be ready to testify before the grand jury at 2 p.m. It was then nearly twelve-thirty, and Avery pointed out that he had a trial before Judge Newman starting at two o'clock, and could not be both in court and outside the grand-jury room to advise his clients at the same time. The Judge brushed aside that argument, too, and ordered the trial to commence as scheduled and Grusse and Turgeon to be in the U.S. Attorney's office at two o'clock.

The only local lawyer Avery could think of to take his place outside the grand-jury room was a young man by the name of David Rosen, who was also a graduate of Yale Law School and had offices in Avery's building. As it turned out, Rosen

was off on business in Bridgeport, but when Avery finally tracked him down by telephone Rosen said he would drive back to New Haven immediately. He arrived at Avery's office at one-forty-five, which gave Avery only fifteen minutes in which to brief him on the case during the walk to the post office. "That is what we call 'due process of law,'" Avery said later. At two o'clock, Grusse, Turgeon, and Rosen were waiting outside the grand-jury room, in a marble-flowered hallway around the corner from the courtroom of the federal District Court.

Grusse was summoned before the grand jury first, and she entered the chamber—a large room with a T-shaped table—to find Dow seated at the head of the T and the grand jurors, twenty-three, as required by federal law, seated to his right and left and down both sides of the leg of the T, as well as in chairs along two walls of the room. Grusse was directed to the witness chair, at the foot of the T, next to a court stenotypist. "The atmosphere was very intimidating," Grusse said afterward. "The room was crowded and stuffy, and when I sat down and saw the stenotypist beside me ready to take down my every word and all those grand jurors staring at me I was scared—very scared. I had been able to build up some confidence and strength before I went in there, but the whole thing was so terrifying that I lost most of my nerve right away." To regain control of herself, Grusse began concentrating on Rosen's advice. He had warned the two women that if they answered any questions besides what their names were, they might thereby waive their Fifth Amendment right and have to answer all questions asked them. He had suggested that they not refuse to answer each question on Fifth Amendment grounds as soon as it was asked but that they write down each question, appear to hesitate over whether or not they should answer it, and then ask if they might go outside to confer with their lawyer. By this means, he explained, they would have a chance to learn what Dow's purpose and the scope of the grand jury's inquiry were. If they answered all the questions by immediately "taking the Fifth," Rosen warned them, Dow would probably stop after the second or third question and excuse them.

Grusse's voice shook when she gave her name, and then Dow asked his first question—her address. Grusse wrote down the question and asked if she could consult her lawyer before answering. Dow nodded, almost imperceptibly, to the foreman of the grand jury, who gave the permission, and Grusse rose and walked outside to where Rosen and Turgeon were waiting. She handed Rosen the piece of paper she had written the question on; he glanced at it and handed her another piece of paper, on which he had written the answer. She looked at it distractedly and said, "God, it's terrible in there—terrible." Turgeon put an arm around Grusse's shoulder and murmured a few words of encouragement to her.

Returning to the grand-jury room, Grusse sat down and read the answer. Rosen had prepared: "I decline to answer the question. I have been advised by my lawyer that if I answer this question I will have waived my right to refuse to answer other questions. I am basing my refusal to answer on my right not to give evidence which might tend to incriminate myself, which right is secured to me by the Fifth Amendment to the Constitution of the United States." There was a long silence, during which Dow and most of the grand jurors stared at her. She tried to return their looks firmly, but her courage failed her, and she looked down at the table. The silence—especially the silence of the stenotype machine, above which Grusse could see the court reporter's fingers poised—was nearly unendurable, and she gulped in relief when Dow finally went on to his next question: whether she knew Susan Edith Saxe, by name or alias. Again she went outside, and came back to give the same answer.

She was then asked the same question about Katherine Ann Power, and went through the same procedure. Dow asked her to identify photographs of the fugitives, which she declined to do. Then he asked whether she had ever met various women at a certain address in Hartford—women whom he identified only by their first names—and she again took the Fifth. Finally, Dow had a brief whispered conversation with the foreman, who nodded and then dismissed the witness. Turgeon was asked fewer questions, and was released after spending a dozen minutes in and out of the hearing room.

In the end, Rosen and Avery concluded that the questions asked the two women were based on nothing more than suspicion—especially since Dow cited only the first names of women the witnsses may have been associated with—and that the grand jury was being improperly used as an investigative body. Even so, had either witness answered any of the questions incorrectly she could have been prosecuted for perjury. And had she answered in the affirmative the key question put to her—whether she knew Saxe and Power—the next question undoubtedly would have been whether she knew that they were wanted for bank robbery and

murder; in answering that, she might have implicated herself and admitted that she had committed misprision of felony in not notifying the police. Of course, many ordinary citizens are probably unaware of the law on misprision or of various other obscure laws that can be used against them when they are, as far as they know, innocent of any crime. But since grand juries are not obliged to inform witnesses what the inquiry under way consists of and whether or not the witness is a suspect and subject to indictment, even the most guiltless person who is called before a grand jury may run afoul of the law by failing to claim the Fifth Amendment right to remain silent. The legal principle stating that ignorance of the law is no excuse may be essential to the support of our criminal-law system, for without it anyone could plead that he hadn't known a given act was legally a crime and get off. But ignorance of the law clearly is an excuse in many circumstances, because no one can know the millions of laws on the books in this country, and if one is denied the right to have a lawyer present, then one is intentionally being kept ignorant of the law and afterward is subject to its penalties.

Afterward, Avery and Rosen (who remained in the case as co-counsel from this point on) warned Grusse and Turgeon that Dow would probably ask the Department of Justice to request immunity against prosecution for the two women in exchange for their testimony and would recall them before the grand jury. Under the so-called use-immunity law—enacted by Congress during the Nixon Administration years and upheld soon afterward by the Burger Court—once prospective witnesses are given immunity they can't be prosecuted for anything they say under oath, except for perjury if they are subsequently shown to have lied, but they can still be prosecuted for the crimes they are questioned about, as long as the prosecution is wholly based on evidence obtained independently of their testimony. One flaw in the new use-immunity law, Avery explained, is that an unscrupulous prosecutor can easily make it appear that his evidence was uncovered independently of a witness's testimony. And a far more pernicious flaw exists when two witnesses are involved, as in the case at hand: while Grusse's testimony could not be used to incriminate Grusse and Turgeon's testimony could not be used to incriminate Turgeon, Grusse's testimony could be used to incriminate Turgeon and Turgeon's testimony could be used to incriminate Grusse—that is, if either had done anything incriminating to begin with. In other words, the lawyers explained, if the government granted the witnesses use immunity, their ordeal had only begun.

Late that afternoon, Turgeon and Grusse returned to their apartment in a state of exhaustion, bewilderment, and fear. "Everything was up in the air," Turgeon said later. "We had no idea what would happen or when it would happen. We didn't know whether the threats of immunity and contempt and jail were real or not. We didn't know anything, and had even thought we might be arrested that very day when we refused to talk. And that night, after our appearance before the grand jury, there was real terror for us. We thought maybe they'd come and drag us out of bed and throw us in jail. We were terrified. We called the lawyers, and they assured us that the government couldn't do anything like that, and promised us that they would protect our rights at each step of the way. But we didn't know what to believe. We couldn't see that we had any rights, and the government seemed so vicious and relentless that we thought it could do anything. That was the real horror—not knowing, trying to live hour by hour, day by day, and constantly fearing what would finally come."

The two women got little sleep that night, but by the next morning they felt somewhat more relaxed. They rose early, and Grusse went to peek through the curtains to see if anyone was outside guarding the place or keeping it under surveillance. There was no sign of anyone. They had breakfast, and they began discussing a suggestion that Avery had made the day before—that they create publicity about their case in order to deter the government from behaving as capriciously as it might if no one was aware of the case, and to gain public support and perhaps some financial help. "We were very worried about what it would do to our personal lives if we went public," Grusse said. "We are both very private people. For myself, just having my name known out there really frightens me. But we wanted people to understand what was happening to us and what the issues were—the people in the women's community here first and then people throughout the country. It was a hard decision to make. Finally, we decided we had to sacrifice ourselves in order to save ourselves and maybe help some others."

Once the two women decided to make their case known to the general public, they agreed to a proposal made by some of their supporters in the women's community—that a Grand Jury Defense Committee be set up to generate the pub-

licity they sought, to get people to attend their court appearances as a means of discouraging the kind of highhanded official behavior that often characterizes unpublished court proceedings, to educate local citizens about their rights, and to raise funds for the defense. In line with this overall strategy, Grusse and Turgeon put out their press release, which recounted the story of the F.B.I.'s search for Saxe and Power, presented the basic reasons for not talking to the F.B.I. about personal matters, accused the government of illegally invading their privacy and improperly using the grand jury as an investigative tool, and concluded:

What makes us most angry is that we have been forced into a position of playing the Man's games, the rules of which deny us our basic rights, dignity, and responsibility and control over our own lives. In reality, it is not very different from the everyday life of every woman living with the fear of rape, brutalization by men, defining herself through her "man," etc. We feel that giving information to the F.B.I. gives in to the power that they hold over us, a power that perpetuates women's position and the position of all oppressed peoples.

A couple of days later, Grusse and Turgeon distributed the release among members of the New Haven community and the press. "Before long, we were appalled by how public we had become," Grusse said later. "It had never occurred to us when we decided to go public that it would become known we were lesbians. That clearly had nothing to do with the case, and we felt that it was the worst imaginable invasion of our privacy. But within a matter of days everyone knew about us. Our lives were spread out in the papers, over radio, on television—everywhere."

At the same time that Grusse and Turgeon began trying to exert pressure on the government to leave them alone, the government began trying to exert more pressure on them to cooperate with it. Two days after the women appeared before the grand jury, an F.B.I. man turned up at the home of Turgeon's parents to question them about their daughter Terri. The elder Turgeons weren't at home, but one of their two other daughters, Madeleine, was, and once the agent learned that she was there alone he began questioning her intensively about her sister Terri. Madeleine was flustered and alarmed, and as she later recounted in an affidavit, "The F.B.I. agent did not say what he was looking for, except that he wanted to find two women about whom my sister might have information. . . . He asked me if I was close to my sister and if we confided in each other about our personal and private lives. He later told me that my sister was now living with another woman, named Ellen Grusse, and he said he knew a great deal about their personal and private lives together, implying that my sister was a lesbian. After he revealed this detail of my sister's personal life, he said that his visit to me would not have been necessary if my sister had cooperated with him. He also encouraged me to put pressure on my sister to cooperate with his investigation, and said to me, 'It would be good for someone to get her to cooperate with us.'" When the agent left, saying that he would come back to talk to her parents, the woman was so upset by what he had told her that she decided she had better tell her parents about Terri rather than have him spring the news on them unexpectedly. The Turgeons were hurt by the story about their daughter's life and stunned by her supposed involvement with criminals. As it happened, the F.B.I. man never returned to question the Turgeons, and the suspense of waiting for him increased their torment. Mr. Turgeon, in fact, was in such a state of anguish that he could not bear to speak to Terri about the case. Her sister telephoned her and begged her to stay out of trouble and to do whatever the government wanted. Terri promised to come over to see them in a few days to explain what had happened and why she was doing what she was. Then, she asked that the family stand by her. "I need help," she said, "I need help very badly."

A few days later, the same F.B.I. man appeared at the office where Turgeon's other sister, Judy, worked in a suburb of Hartford. He asked the girl about her sister's private life, friends, acquaintances, and habits. "My coworkers were present during the course of this thirty-minute interview," she stated in an affidavit. "At several times during the interview, the F.B.I. agent said in a loud voice, 'I wouldn't have to bother you if your sister wasn't so uncooperative.' After I answered one particular question, the agent indicated that he did not believe me, thus questioning my truthfulness in the presence of my co-workers." F.B.I. agents also questioned two uncles of Turgeon's in Lewiston, Maine, and a cousin in Baltimore. And four agents turned up just before midnight at the North Carolina home of a man and woman who were living together and whom Grusse and Turgeon had visited some months earlier on a holiday trip to the

South. The four agents—who were apparently under the impression that Grusse was Saxe, although there was no resemblance between the two women—split up into two-man teams and questioned the man and woman separately, simultaneously, and intensively for nearly an hour. "They were terrified," Grusse reported later. "It was the midnight knock on the door."

Before long, Turgeon's family rallied to her support, and stood by her throughout what was to be a long and increasingly harrowing ordeal. "My father didn't understand what was happening at first," Turgeon said. "But when our lawyer wasn't allowed into the grand-jury room to protect us, Dad thought that was unfair. After all, in America you're always supposed to have the right to a lawyer. Then my father met some of my friends, some of whom are professional people and very impressive, and he learned that long hair and beards and strange clothes don't matter. And the government's continuing persecution of me finally outraged him, and now he's radicalized by this case, just the way that I and many of my friends have been."

Grusse's family, on the other hand, were unable to understand or sympathize with her plight. "My parents didn't see the larger political picture or the basic issues involved, and they just wanted to protect me," she said. "They kept saying to me, 'Talk to the grand jury and stay out of jail.' That was a strong and constant pressure on me. It caused a temporary break in my relations with them. They tried to understand—they really wanted to help me—but they simply couldn't grasp it all. They think these things don't happen to good, honest people. And the fact that I am a lesbian was too much for them. It put them in a position where it was emotionally difficult for them to support me. Their view was that the United States government always acts in the best interests of the people. That is a view I don't share. For them, the law and the Constitution are there to protect us, Terri and me, and we are abusing both—not the other way around, as we believe. Anyway, the women's community here is also my family now. Its members have supported us strongly most of the way. At first, a few of them said to me that maybe this case—the hunt for two fugitives wanted for bank robbery and murder—wasn't the issue to take a stand on against the government. After all, they said, those are very serious crimes. I agree with that. But I answered that unfortunately I hadn't had any choice in the matter, that the government had handed me the issue. Since I hadn't done anything wrong, I had to stand up now, or I would never be able to stand up to anything or anybody in the future. Then they understood."

A few of Grusse and Turgeon's friends were so frightened by the F.B.I. and the publicity surrounding the case that they avoided the two women. "Some of them are terrified by the whole thing," Grusse said. "They're frightened by the stigma of being publicly known as lesbians, the way we are now, so they live very privately, even secretly, to hide their lives from their families and employers. And now they're afraid of the political stigma, too. It used to be that lesbians were thought of as merely being perverted, but now they're seen as bank robbers and murderers or, at best, as friends and abettors of bank robbers and murderers. We believe that this is the government's basic motive—to intimidate women in the movement, to create fear among us, to split us up, and finally to destroy the women's movement. The best way to do that is by making the innocent seem guilty."

On February 5, 1975, the Department of Justice formally granted the U.S. Attorney's office in Connecticut permission to apply to the court for an order giving Grusse and Turgeon immunity. The letter from the Department conveying official permission to seek the grant was received and filed in the U.S. Attorney's office in New Haven on February 10th, and at six-thirty on the morning of the twelfth the U.S. marshal reappeared at the apartment shared by Grusse and Turgeon and served them with a new set of subpoenas, which ordered them to appear before the grand jury at ten o'clock the following morning. When they telephoned Avery, he told them that Judge Newman would undoubtedly grant the immunity requested before they were questioned by the grand jury the next day, and added, "They are going to send you to jail." Then we went to have a talk with Dow, in the slim hope that he might persuade him to drop the case. Avery told him that as a matter of public policy the government, with its immense power, should yield to the minute power of the individual when the opposition was so passionate and principled, as it clearly was in this case. Avery had little hope that this argument would prevail, though, and said privately, "I don't think the government will do that. It won't back off until its losses exceed its gains. The people who run the government should try to relieve democratic ten-

sions when they can in order to preserve the system. But they don't see things that way, even though it's in their own self-interest. If the government is ever toppled, it will be its own officials who bring it down." Dow refused to listen to any suggestion that he alter his course. "A policeman was killed, and left nine kids," he said.

Grusse and Turgeon dreaded even the thought of going to prison, and kept hoping that the government would finally see that they were innocent and determined to remain silent. "Justice needn't be tempered with mercy—it should simply be fair," Grusse said. "If the government believes we are guilty of something, then it should charge us, take us to trial, and give us a chance to defend ourselves. That would be justice." And Turgeon added, "I don't think we've done anything wrong. We haven't committed any crime. Our stand is solely a matter of principle with us. We are two innocent women, and yet we have the whole United States government against us."

### Taking the Fifth—II

(By Richard Harris)

Late in 1637, an English Puritan by the name of John Lilburne was arrested for importing seditious books from Holland into England. From the government's viewpoint, the arrest was to prove a calamitous mistake, for Lilburne, who was then a twenty-three-year-old clothier's apprentice with little formal education, turned out to be one of the most effective revolutionaries in English history. A volatile, contentious, unyielding, self-righteous, and abrasive man, of whom a contemporary said, "If John Lilburne were the last man in the world, John would fight with Lilburne and Lilburne with John," he was also, as he described himself, "an honest, truebred freeborn Englishman that never in his life loved a tyrant nor feared an oppressor." By the time he died, twenty years later, Lilburne had brought the British government to its knees.

After his arrest, Lilburne was turned over to the Attorney General, who assigned an aide to question him. The aide told Lilburne what he was charged with and informed him that a confederate had sworn to an affidavit against him. Lilburne replied that he had indeed visited Holland and that he had talked to some people and looked at some books there, but he claimed that he was innocent of the charge against him, and refused to say more about the affair. "I see you go about by this examination to ensnare me, for seeing [that] the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination," he said. The aide finally gave up and passed Lilburne on to the Attorney General, who had no more luck and sent him back to jail. After a couple of weeks, Lilburne was taken before the Court of Star Chamber—an inquisitorial body that functioned as the sovereign's personal tribunal for trying matters of state. A clerk handed him a Bible and told him to answer by it.

"To what?" Lilburne asked.

"That you shall make true answer to all things that are asked of you," the clerk said.

"Must I so, sir? But before I swear, I will know to what I must swear."

"As soon as you have sworn, you shall, but not before."

Lilburne refused to take the oath, was sent back to prison, and a few weeks later was again brought before the Star Chamber, this time for trial, together with an alleged accomplice, an elderly bookseller named John Wharton. The Attorney General charged them with refusal to take the required oath, and then read the affidavit against them. Declaring that the charge was "a most false lie and untrue," Lilburne once more refused to take the oath, as did Wharton, and the two were returned to their cells. A week later, they were brought back for trial before the same court, and repeated their refusal to take the oath, which, Lilburne told his judges was "both against the law of God and the law of the land." This time, the Star Chamber found them guilty of contempt, and sentenced them to fines of five hundred pounds each, punishment in the pillory, and imprisonment until they took the oath and testified as ordered; Lilburne was additionally sentenced to be whipped through the streets on the way from Fleet prison to the pillory, a distance of two miles.

Tied to the back of a cart and stripped to the waist, Lilburne was lashed every few steps by an executioner wielding a three-thonged whip, and at the end the prisoner's shoulders "were swelled almost as big as a penny loaf," a contemporary reported, and the "wales on his back . . . were bigger than tobacco pipes." The streets along Lilburne's route were lined with spectators, who moaned at

his agony and shouted words of encouragement. Once in the pillory, Lilburne dumbfounded everyone by proceeding, despite his pain, to deliver a stirring half-hour oration to the crowd, which was spellbound by the account of his ordeal, including his trial, which, he told them, was "absolutely against the law of God, for that law requires no man to accuse himself."

The oath that Lilburne refused to take was known as the oath ex officio, which had an ancient lineage reaching back to the thirteenth-century oath *de veritate dicenda*—swearing to speak the truth in answer to all questions. This device, an invention of the Catholic Church in 1215, had quickly become one of the most feared instruments of the Inquisition's attempts to stamp out heresy, and was subsequently used by a long series of British clerics and British monarchs to suppress religious and political unorthodoxy. Suspects who were given the oath were not told the evidence of their misdeeds, the identity of their accusers, or the charges against them. If they refused to take the oath, they were considered guilty of the offenses being investigated; if they took the oath and lied, they were guilty of perjury, and swearing falsely was not only a grave sin against God but was taken as evidence of guilt in the offenses at issue; and, of course, if they told the truth they might condemn themselves.

In short, the oath had one purpose: to trap witnesses into betraying themselves and others. Official reliance on the oath—and the physical and mental torture often inflicted on those who resisted it—became so widespread and abusive in England that bitter opposition to it rose among members of Parliament and of the common-law bar, who saw the overweening power of royal and ecclesiastical courts as a threat to both the common law and all free Englishmen. Protests were mounted, petitions were signed, and early in the fourteenth century Parliament outlawed the oath. Both Crown and Church ignored the prohibition.

Throughout the remainder of that century, opponents of the inquisitorial system fought for its replacement by the common law's accusatorial system, through which the state had to prove an accused person's guilt without his assistance and under prescribed rules. To this end, they repeatedly invoked Magna Carta, then over a century old, and contended that its command to the sovereign to obey "the law of the land" guaranteed everyone accused of any crime the right to a formal accusation and to a trial by jury under common-law procedures. There was no justification whatever for the claim, but the myth that Magna Carta spoke for the freedom of all men of the realm and not, as it clearly had, solely for the rights of the barons who forced King John to sign the document at Runnymede was to survive and ultimately to be widely accepted as fact. And, of course, history has repeatedly demonstrated that myth is a far more powerful influence in human affairs than truth.

During the sixteenth century, resistance to use of the oath in the Court of Star Chamber and its ecclesiastical equivalent, the Court of High Commission, mounted. Sir Thomas More, who as Lord Chancellor had compelled many heretics to take the oath ex officio and had sent them to their deaths for what they revealed, refused to take the oath himself and reveal why he opposed Henry VIII's claim to be head of the Church of England. More argued that he was being forced to condemn either his soul (if he lied) or his body (if he told the truth); the dilemma was resolved when the King had him beheaded and the Church made him a saint. A few years later, Mary Tudor devoted most of her five years on the throne to wiping out all traces of Protestantism by killing Protestants.

Not long after her death, John Foxe wrote "The Book of Martyrs," which recounted the history of Christian martyrdom since the eleventh century, including the fate of Bloody Mary's victims. He described how innocent people in her reign were ordered to answer on oath all questions about their beliefs and associations, were tortured if they resisted, were forced to accuse themselves and their friends and relatives of crimes that often had not been committed, and then were burned alive at the stake. "The Book of Martyrs" went through many revised and expanded editions, and it became a sort of primer of the theory that there was an inherent personal right to freedom of religious conscience, and that there were also inviolable legal rights such as the guarantee of a formal accusation and a fair trial, and the right to refuse, as Lilburne was to refuse some eighty years later, to incriminate oneself. For over a century, "The Book of Martyrs" was, after the Bible, the most popular book in the English-speaking world.

Around the time that Foxe's book was first published, Chief Justice James Dyer ruled for a unanimous Court of Common Pleas that a witness who refused to take the oath ex officio was justified by the maximum "*Nemo tenetur prodere scipsum*," or "No man is bound to betray himself." This appears to have been the first com-

mon-law use of the principle that was to be embodied more than two centuries later in the Fifth Amendment to the United States Constitution: "No person shall be . . . compelled in any criminal case to be a witness against himself." According to Professor Leonard W. Levy's splendid book "Origins of the Fifth Amendment" (the basic work on the subject, winner of the Pulitzer Prize for history in 1969, and the source for this historical résumé), Chief Justice Dyer's ruling was apparently aimed at Queen Elizabeth, to discourage her from following Mary Tudor's oppressive example. As it turned out, Elizabeth's aims were somewhat different from her predecessor's, for under Good Queen Bess's rule subjects were persecuted for political rather than religious heresy when they persisted in clinging to religious beliefs that denied supremacy of the state in matters both mundane and religious. "Politics, rather than religion, had become the basis of government policy," Professor Levy explained, and added that while the distinction may have seemed slight to those who were executed, it contributed a small advance to the English legal system, for although they underwent inquisitorial examinations at the hands of the State Chamber or the High Commission, at least they were later tried under the common law's accusatorial system. More and more Catholics and Protestants responded to the Queen's determination to bring their God to his knees before the throne with the plea "*Nemo tenetur prodere scipsum*," which by now was probably believed to be a firm principle of Magna Carta, too. They still went to their gory deaths—not at the stake but at the gibbet, where they were hanged, cut down while alive, and disembowelled—and yet their claims that all subjects possessed a natural right against compulsory self-incrimination slowly began taking hold in the minds of lawyers and judges. Originally, resistance to forced self-betrayal had developed as an outgrowth of religious conscience, but as the use of the oath ex officio became secular so did the resistance to it, and gradually a belief emerged that to force a man to inform on himself not only violated the natural law of self-preservation but destroyed his diguity and self-respect and undermined justice itself. However, official acceptance of this view was still many years away.

Lilburne's bravery while being whipped through the streets and his dramatic speech while locked in the pillory made him famous throughout London overnight. In retaliation, the Star Chamber judges ordered that he be "laid alone with irons on his hands and legs . . . where the basest and meanest sort" of prisoners were kept, and that he be denied all books, writing materials, and visitors. His wardens went further by chaining him to the bare floor, without the usual pallet, and giving him no food for ten days. Suffering from his beating and a higher fever that followed it, Lilburne would probably have died if his fellow-prisoners hadn't slipped food to him through cracks in the floor. He recovered from his illness, and after four months in solitary confinement he was transferred to a more hospitable part of the prison, where he was confined for the next two and half years. During this period, he secretly wrote and smuggled out of prison nine pamphlets attacking the Star Chamber and demanding the natural rights due every Englishman. With the appearance of each pamphlet, which the authorities were unable to suppress, Lilburne's popularity soared anew.

Charles I was on the throne, and his inept policies were bringing England closer to civil war by the day. Desperately in need of money to raise an army and defend himself, he called Parliament into session in 1640—the first time he had allowed it to sit in eleven years—but when its members refused to appropriate funds until he agreed to their demands for reform, he dissolved the session, known as the Short Parliament, after three weeks. A little later, a Scottish force defeated a royalist army and occupied the north of England, and then a London mob of two thousand people broke into and sacked the hated Court of High Commission. A few days afterward, Charles called Parliament into session again—in the Long Parliament, which was to sit, with intermissions, for twenty years—as his only hope of getting money to save his crown. The Long Parliament was dominated by Puritans, one of whom was Oliver Cromwell, a newly elected member from Cambridge, whose maiden speech was a plea for the release of John Lilburne. A few days later, popular support forced the King to free Lilburne, who immediately began demanding an end to the Courts of Star Chamber and High Commission and abolition of the oath ex officio. Petitions in support of his stand poured into the House of Commons from around the country, and the following summer Parliament enacted a bill outlawing the two courts and the oath, which the King reluctantly signed on July 5, 1641. After four centuries of torment and bloodshed, the inquisitorial power of church and state seemed at an end.

In 1642, the outbreak of civil war—fought to determine whether England would be ruled by Parliament or the Crown—brought Lilburne into the Parliamentary army as a captain. He was fiercely devoted to the popular cause, and was as fearless a soldier as he had been a pamphleteer. During battle, he was captured and sentenced to death for treason, but when Parliament sent word that it would execute a batch of royalist prisoners if he was harmed, Lilburne was freed. He returned to London, where immense crowds greeted him, a contemporary reported, "with public joy, as a champion that had defied the King." Lilburne turned down Parliament's offer of a high post, saying of himself that he would "rather fight for eightpence a day, till he saw the liberties and peace of England settled, than set him down in a rich place for his own advantage."

Returning to the front, he soon became a lieutenant-colonel and a confidant of Cromwell's. In time, though, Lilburne grew alarmed by the anti-libertarian spirit that was overtaking the Puritan movement, which was becoming as tyranically repressive as any British monarch. Presbyterians controlled Parliament, and they began demanding that their faith replace the Anglican Church as the official state religion and that various other forms of Puritanism, which contained scores of factions and schisms, be suppressed.

These new demands for orthodoxy were too much for Lilburne, and after Parliament awarded itself the power to censor all publications in England, he quit the army and went back to pamphleteering. He was soon in trouble again—this time for attacking religious persecution in general and censorship in particular—and after one of his pamphlets appeared he was summoned before the House of Commons Committee on Investigation, which found the tract "scurrilous, libellous, and seditious." According to Professor Levy, Lilburne was let off because of his great popularity and his service to the Parliamentary cause, but he refused to remain silent, and was soon arrested and dragged back before the committee for libelling the Speaker of the House.

Determined to challenge the right of Parliament to inquire into his opinions or to force him to accuse himself, Lilburne refused to testify, and demanded that the legislature obey the rules of common-law courts. The committee rejected his demand, and when Lilburne persisted in refusing to testify and claimed "a right to all the privileges that do belong to a free man as [to] the greatest man in England," he was sent back to prison. Taking up his pen again, Lilburne wrote a furious tract accusing the committee of trying "criminal causes betwixt man and man concerning life, liberty, estate" without observing the ordinary rules of justice. The committee summoned him again, and again he refused to testify and was sent back to his cell. But the Parliamentary army considered Lilburne one of its own, and its mutinous mutterings about his treatment finally prompted Cromwell to persuade Parliament to let Lilburne go after he had served four months in jail.

The following year, Lilburne was arrested and taken before the House of Lords for criticizing one of its members in another pamphlet, and he refused to testify before that august body. He was thrown back in jail and then ordered to reappear before the Lords to be tried for his pamphlet. Lilburne refused to go, and had to be dragged there. Once before the assemblage, he not only refused to kneel but stopped up his ears so that he couldn't hear the charges against him. He was found guilty, fined two thousand pounds (more than most Englishmen could earn in a lifetime), disqualified for life from holding any public office, and imprisoned indefinitely in the Tower of London. "By its injudicious treatment of the most popular man in England," a historian of that period observed, "Parliament was arraying against itself a force which only awaited an opportunity to sweep it away." By the following spring, Cromwell's army was said to be "one Lilburne throughout," and its soldiers regarded his writings not as commentaries on the law but as the law itself. Under pressure from the army, Parliament, released Lilburne in 1648, and he immediately set about attacking Cromwell himself. After enduring the attacks for several months, Cromwell dispatched a force of two hundred armed men, who surrounded Lilburne's house, arrested him, and dragged him and three friends before the Council of State.

The prosecutor asked him whether he had written the defamatory pamphlet against Cromwell. Lilburne, retorting that he was amazed after all that had happened that such a question could even be asked, declined to answer. He and his friends were taken out of the room, and Cromwell pounded on the table and shouted at his colleagues, "I tell you, sirs, you have no other way to deal with these men but to break them in pieces. . . . If you do not break them, they will

break you!" Committed to the Tower on suspicion of high treason, Lilburne wrote and smuggled out one fiery pamphlet after another, and soon petitions with tens of thousands of signatures supporting him poured into Parliament, and the army threatened to revolt. In Cromwell's view, "the kingdom could never be settled so long as Lilburne was alive," and in the fall of 1649 he was charged with high treason and put on trial for his life.

The trial took place in London before an Extraordinary Commission of Oyer and Terminer, made up of eight common-law judges, four sergeants-at-law, the recorder of the city, twenty six special judges (including some city aldermen and members of Parliament), and the Lord Mayor. The trial was held in the great Guildhall, the streets around it were lined with troops to prevent demonstrations against the government, and Lilburne was kept under constant guard to prevent his rescue by the angry crowds that gathered throughout the city to protest what was being done to the man they knew as "Freeborn John."

Although Lilburne had no legal training, he soon demonstrated to the court his forensic abilities. "His great achievement at the trial was holding at bay the judges and . . . his prosecutor while he expounded to them and to his fellow citizens in the jury box and in the audience the fundamentals of fair criminal procedure from the time of arrest through trial," Professor Levy wrote. "He placed the right against self-incrimination in the context of what he called 'fair play,' 'fair trial,' 'the due process of the law,' and 'the good old laws of England.'" Lilburne railed on endlessly over the smallest points of law and legal procedure. He insisted on having a copy of the indictment and a lawyer to represent him (rights that were still half a century in the future), and when he was refused both he said, "Then order me to be knocked on the head immediately in the place where I stand, without any further trial, for I must needs be destroyed if you deny me all the means of my preservation." When the presiding judge begged him to be silent and promised, "Hear me one word, and you shall have two," Lilburne retorted that since he was on trial for his life he must be free to speak, and if they would neither let him speak nor allow a lawyer to speak for him they might as well murder him and get it over with. "O Lord!" he cried, "was there ever such a pack of unjust and unrighteous judges in the world?" The chief judge sternly told him that no one had ever been tried by "so many grave judges of the law," whereupon Lilburne denounced the proceedings for being extraordinary, and asserted that he would rather have been tried by one judge in an ordinary court of law.

The chief judge replied, "If you had not had this great presence of the court. you would have outtalked them, but you cannot do so here." Lilburne raised himself up indignantly and said, "Truly, sir, I am not daunted at the multitude of my judges, neither at the glittering of your scarlet robes, nor the majesty of your presence and harsh, austere deportment towards me. I bless my good God for it, who gives me courage and boldness." He defiantly refused to answer any questions about his authorship of the pamphlet at issue, on the ground that under the good old laws of England he could not be compelled to accuse himself. Then he triumphantly pointed out to the jury that his indictment was based partly on a pamphlet that had been published while he was in the Tower—that is, after his arrest—while the law making such statements as those in the pamphlet treasonous had been passed during his imprisonment, making it an illegal ex-post-facto use of the law.

When Lilburne finally rested for the defense, the audience broke out in loud shouts of "Amen! Amen!" and, a report on the event noted, these were followed by "an extraordinary great hum," which so alarmed the judges and the military commander in charge that three more companies of soldiers were dispatched to guard the hall. The chief judge then delivered a hanging charge, in which he accused Lilburne of fomenting a plot the likes of which "never . . . was seen in the world before." The jury was out for an hour and returned to find Lilburne not guilty. "The whole multitude of people in the hall, for joy of the prisoner's acquittal, gave such a loud and unanimous shout, as is believed was never heard in Guildhall, which lasted for about half an hour without intermission," the report said. When word of the verdict spread throughout the city, there were wild public celebrations and "the people caused that night abundance of bonfires to be made all up and down the streets."

In 1651, Lilburne wrote another pamphlet attacking an influential member of Parliament, was summoned before the bar of Commons, convicted without formal accusation or trial, and by means of a bill of attainder was fined seven thousand pounds, banished from England for life, and sentenced to death if he returned.

Helpless this time, he fled to Holland. But a year and a half later, when Cromwell dissolved the Rump Parliament that had convicted him, Lilburne assumed that there would be a freer mood at home, and returned to England. He was clapped into Newgate prison and again put on trial for his life.

There were countless demonstrations on his behalf, and petitions circulated around the country came back to London with thousands upon thousands of signatures demanding his release and pardon. The furore led a contemporary to remark, "It is not to be imagined how much esteem he hath got, only for vindicating the laws and liberties against the usurpations of this time." This response in turn, led Cromwell to clamp a virtual state of martial law on London. At the trial, held in the Old Bailey, Lilburne argued that the Rump Parliament had been illegally constituted, so the bill of attainder it had enacted must be illegal, too.

Then Lilburne solemnly warned the jurors that if he died on Monday, on Tuesday Parliament could pass sentence on every one of them, on their families, on all the people in London, and eventually on everyone in England. The jury found him not guilty. "Joy and acclamation" were said to have resounded for "an English mile," except among members of the Cromwellian party, whose leader was "infinitely enraged." At his direction, Parliament ordered the jurors examined on their verdict before the Council of State, but once there the jurors refused to speak, on the ground of conscience.

When all else failed, Cromwell had Lilburne secretly moved at night from Newgate to the Tower, rejected all writs of habeas corpus, and put the prisoner under such strict guard that he managed to write and smuggle out only one more pamphlet—his last. The government's refusal to free him after he had been found innocent by a jury of his peers provoked plots against the government and attempts on Cromwell's life. To remove the rebellious symbol from the center of unrest, Cromwell ordered Lilburne taken from the Tower and transported to a fortress on the island of Jersey. The following year, when the tumult over his case had subsided, he was moved to a house in Dover, where he was imprisoned until he died, two years later, at the age of forty-three.

"Lilburne had made the difference," wrote Professor Levy. "From his time on, the right against self-incrimination was an established, respected rule of the common law, or, more broadly, of English law generally." Of far greater importance, though, the fight that Lilburne had led sparked into a conflagration the movement that would ultimately overthrow tyranny—the people's growing belief that each of them possessed a personal right to be free under just laws that had to be obeyed by the highest as well as the lowest person in the realm. The concept of the individual as a being whose self-respect and dignity and privacy were inviolable had been born. According to the historian Margaret Atwood Judson, this movement was "the first great outburst of democratic thought in history, with John Lilburne . . . leading the way."

One of the basic causes of the American Revolution was England's failure to give colonists here the common-law rights that it professed to assure them. Although the common law was extremely reactionary in many ways—it severely restricted freedom of expression, for example, and its courts were used to punish criticisms of church and state long after the Courts of High Commission and Star Chamber were abolished—still the American colonists looked upon that legal system as a shield against official abuse of their basic rights. The slow, diverse, and uncertain growth of the legal protection of those rights under American colonial law is unclear, for, Samuel Eliot Morison has written, "legal development is probably the least known aspect of American colonial history." Records are fragmentary, and much of the evidence that was recorded is more confusing than enlightening.

By the late eighteenth century, however, the specific rights that were to be embodied in the Bill of Rights existed, in one form or another, in colonial laws. After the Declaration of Independence was issued, eight states adopted constitutions that included prohibitions against compulsory self-incrimination. When Representative James Madison, the "father of the Constitution," submitted a bill of rights to the First Congress, in 1789, his proposed guarantee against forced testimony stated "No person shall be . . . compelled to be a witness against himself." As far as written records show, Madison said nothing to explain this proposal, either then or later. In order to avoid conflict with a statute setting up the federal court system, a colleague in the House suggested that the proposal be changed to read, "No person shall be . . . compelled in any criminal case to be a witness against himself," and the alteration was adopted unanimously and, as far

as the record shows, without further debate in either house. In 1791, the amendment was approved, along with the rest of the Bill of Rights, and appended to the body of the Constitution.

With this monumental event, Levy—then Earl Warren Professor of Constitutional History at Brandeis University—concluded his account of the Fifth Amendment's origins:

"With good reason the Bill of Rights showed a preoccupation with the subject of criminal justice. The Framers understood that without fair and regularized procedures to protect the criminally accused, there could be no liberty. They knew that from time immemorial, the tyrant's first step was to use the criminal law to crush his opposition. Vicious and *ad hoc* procedures had always been used to victimize nonconformists and minorities of differing religious, racial, or political persuasion. The Fifth Amendment was part and parcel of the procedures that were so crucial, in the minds of the Framers, to the survival of the most treasured rights. One's home could not be his "castle," his property be his own, his right to express his opinions or to worship his God be secure, if he could be searched, arrested, tried, or imprisoned in some arbitrary or ignorable manner. . . . The Framers of the Bill if Rights saw their injunction, that no man should be a witness against himself in a criminal case, as a central feature of the accusatory system of criminal justice. While deeply committed to perpetuating a system that minimized the possibilities of convicting the innocent, they were not less concerned about the humanity that the fundamental law should show even to the offender. Above all, the Fifth Amendment reflected their judgment that in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction, was more important than punishing the guilty."

In 1803, Chief Justice John Marshall delivered the Supreme Court's opinion in the case of Marbury v. Madison, which made the Court the ultimate arbiter of what the Constitution means by giving the Court the authority to overrule acts of Congress and the executive branch that violate the nation's fundamental law. Along the way in that case, Marshall ruled for the Court that a witness did not have to answer a question if he felt that his reply might incriminate him. Four years later, Marshall was riding the circuit as justices then did, and presided over the trial of Aaron Burr for treason, in the Circuit Court for the District of Virginia. When a witness refused to answer a question on the ground of possible self-incrimination (or "crimination," in the usage of the time), the Chief Justice said, "If the question be of such a description that an answer to it may or may not criminate the witness . . . it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact. . . . While that [fact] remains concealed within his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the court can never know."

For half a century, Chief Justice Marshall's words were taken as the highest judicial support for a witness's absolute right to remain silent. But in 1857 Congress—in an inquiry into charges that some of its members had extorted money from special interests in exchange for favorable legislation—abrogated this right by passing an "immunity" statute that protected any witness who was compelled to testify "before either house of Congress or any committee of either house" from prosecution for "any fact or act touching which he shall have testified." The law uncovered more corruption and provided less opportunity for doing anything about it than anyone had anticipated, because members of Congress and those who had bribed them appeared before the investigating committee, confessed to innumerable crimes of all kinds that they had committed, and were automatically relieved under the new law of any liability for them. Recoiling at these "immunity baths," Congress repealed the law and replaced it in 1862 with a narrower "use immunity" statute, which provided not full immunity from prosecution for certain crimes revealed in compelled testimony before congressional committees but only immunity from use of the specific evidence thus extracted.

Criminal proceedings could still be brought against witnesses who testified against themselves, as long as the prosecution based its case on other evidence. Then, in 1868, Congress expanded this law to cover federal judicial proceedings in specific categories of criminal cases, and when the Interstate Commerce Com-

mission was set up, in 1887, Congress gave it the same power to compel testimony from witnesses who were granted use immunity. If witnesses refused to testify after being given immunity, they could be fined and imprisoned until they talked.

In November, 1890, a federal grand jury in Illinois that was looking into possible violations of the Interstate Commerce Act of 1887 summoned a grain dealer by the name of Charles Counselman and asked him about his dealings with several railroads that were suspected of giving illegally low freight rates to favored customers. Counselman, who had been granted immunity, asserted his Fifth Amendment right and refused to answer several questions; the grand jury reported his refusal to the presiding judge; he ordered Counselman to answer the questions; Counselman again refused; and the judge found him in contempt of court, fined him five hundred dollars plus the cost of the porceedings, and sent him to jail until he decided to talk. He decided, instead, to appeal the order. It was upheld by the Court of Appeals, so he took the case to the Supreme Court. Justice Samuel Blatchford, in a unanimous opinion of that Court, declared that the Fifth Amendment "privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard," and that "the liberal construction which must be placed upon constitutional provisions for the protection of personal rights" obliged the Court to find the use-immunity law unconstitutional, since it didn't protect witnesses from the later use of their testimony by way of its leads to other evidence, so prosecute them. "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States," the Court concluded, for the statute did not give witnesses "complete protection from all the perils against which the constitutional prohibition was designed to guard." That made it less than "a full substitute" for the amendment, and for such a law to be an adequate substitute it would have to provide "absolute immunity against future prosecution for the offense to which the question relates."

The notion that there could be a "substitute" for constitutional mandates was a curious one, since the primary purpose of the Framers in formulating a written constitution in the first place was to put its mandates beyond the reach of the national legislature. The only way in which the fundamental law of the nation could constitutionally be changed was by way of amendment, and the Framers had given Congress a limited role, which was shared with the people at large, in the amending process. Now, though, the Supreme Court's conclusion that the Fifth Amendment could be supplanted by a federal law effectively gave Congress the power to amend the Constitution on its own initiative and without public approval. Finally, since the Constitution flatly states, "No person shall be . . . compelled in any criminal case to be a witness against himself"—not that a person can be compelled to be a witness against himself as long as he isn't prosecuted for what he says—the Supreme Court failed to place even a literal, much less a liberal, construction on "constitutional provisions for the protection of personal rights." Rather than giving absolute protection to those rights, the Court actually limited them in the case of the Fifth Amendment by handing the state the power to compel what the Constitution said could not be compelled.

Congress wasted no time in rushing through the door that the Court had opened. Sixteen days after the decision in Counselman was handed down, a bill was introduced in Congress guaranteeing that after immunity was granted to witnesses before the Interstate Commerce Commission "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify." The bill—providing a form of absolute immunity that was to become known as transactional immunity—was soon enacted, and was judicially tested when the auditor of the Allegheny Valley Railway, a man named Brown, refused to answer questions put to him by a federal grand jury about low freight rates to good customers. Granted the new form of immunity, Brown pleaded the Fifth Amendment and remained silent, and the presiding judge found him in contempt of court, fined him five dollars, and sent him to jail until he agreed to testify. The Court of Appeals upheld this ruling, and the case—Brown v. Walker—went to the Supreme Court.

By a five-to-four vote, in 1896, the Court upheld the new immunity law. Justice Henry B. Brown delivered the majority's opinion, which was wholly based on the conclusion in Counselman that if absolute immunity was granted a prospective witness his Fifth Amendment right was fully protected. According to Justice Brown, that right could be looked at in one of two ways: it could be

interpreted literally, as "authorizing the witness to refuse to disclose any fact which might tend to incriminate, disgrace, or expose him to unfavorable comments," or it could be reviewed as an attempt "to secure the witness against a criminal prosecution."

The Court concluded that "the clause should be construed, as it was doubtless designed, to effect a practical and beneficent purpose—not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder, or obstruct the administration of criminal justice."

There was no historical justification whatever for the conclusion that this was the purpose for which the Fifth Amendment was "doubtless designed." Indeed, since the "practical and beneficent purpose" that Justice Brown mentioned entirely served the interests of the state rather than those of the individual citizen, that alone betrayed the intent of the Framers—to protect the individual against the state. To get around this point, Brown took refuge in an ancient judicial sanctuary—the tradition that courts should not overturn congressional acts unless they are flagrantly at odds with fundamental law. This tradition is based on the theory that since the members of Congress are democratically chosen and directly represent the citizenry, their decisions should not be overruled arbitrarily by the courts, which are essentially undemocratic in that their members are appointed rather than elected. In our system, the theory is absurd—even a cowardly abdication of judicial responsibility—for the Framers specifically designed our federal judicial system to serve as an undemocratic check on the democratic excesses that so often seize legislators. In any event, Justice Brown conceded that the colonists had so feared the inequities of the inquisitorial system of justice that they, "with one accord, made a denial of the right to question an accused person a part of their fundamental law." But then he went on to find ample justification for compelling one who was not formally accused of a crime—who was, in fact, given immunity against any such accusation—to tell of others' crimes. That power, he claimed, was "within the control of the legislature." And to contend, as the defendant had, that "he would incur personal odium and disgrace from answering these questions seems too much like an abuse of language to be worthy of serious consideration," the Justice said. Above all, though, the Court majority relied on the needs of government to justify transactional immunity on constitutional grounds. "Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others who are desirous of seeking shelter behind his privilege," Justice Brown declared, and thereby accused the defendant in the case of a crime that no one had charged him with—conspiracy to conceal a crime. (Although the Fifth Amendment says only that no one shall be compelled to testify against himself, testifying against others may involve admitting that one did not report a crime, and not reporting a crime is, of course, a crime.)

The Court majority's reliance on the principle of good citizenship was utterly untenable, for the duties of citizens are nowhere mentioned in the Constitution. The authors of the Fifth Amendment did not speak of good citizens or bad citizens, they merely said that no citizen could be forced to accuse himself. And, of course, the Bill of Rights was written not to help the government enforce its laws but to restrain it from abusing *any* citizen through unjust laws and unfair enforcement of them. But to the majority of the Court the needs of government were paramount, and since, Justice Brown stated, "enforcement of the Interstate Commerce law or other analogous acts . . . would become impossible" without compelled testimony, testimony must be compelled. In short, the Supreme Court declared that if legislative acts could not be enforced without violating the Constitution, then the Constitution would have to be violated to uphold those acts.

The four justices in the minority dissented vigorously, and at points bitterly, from the majority opinion. Justice George Shiras, Jr., for instance, pointed out that the immunity law specifically provided that a witness who was forced to testify was not given immunity from the crime of perjury when he testified, whereas if he were allowed to assert his constitutional right to remain silent he could not incur a charge of perjury for what he had not said. Beyond that, Shiras went on, "a moment's thought will show that a perfectly innocent person may expose himself to accusation, and even condemnation, by being compelled to disclose facts and circumstances known only to himself, but which, when once disclosed, he may be entirely unable to explain as consistent with innocence." Another dissenter in the case was Justice Stephen J. Field, who used the defense counsel's arguments verbatim in describing the rule against compulsory self-

incrimination as the "result of the long struggle between the opposing forces of the spirit of individual liberty on the one hand and the collective power of the state on the other." That power is absolutely limited under our form of government, he added, for "the proud sense of personal independence which is the basis of the most valued qualities of a free citizen is sustained and cultivated by the consciousness that there are limits which even the state cannot pass in tearing open the secrets of his bosom." Above all, Field argued in a long and passionate section of his dissenting opinion, there could be no assurance that the authors of the Fifth Amendment had not intended it to protect a witness against self-infamy as well as against self-incrimination. "Both the safeguard of the Constitution and the common-law rule spring alike from that sentiment of personal self-respect, liberty, independence, and dignity which has inhabited the breasts of English-speaking peoples for centuries, and to save which they have always been ready to sacrifice many governmental facilities and conveniences," the Justice said. "In scarcely anything has that sentiment been more manifest than in the abhorrence felt at the legal compulsion upon witnesses to make concessions which must cover the witness with lasting shame and leave him degraded both in his own eyes and those of others."

Legal scholarship of the time—especially on the Supreme Court—was so inadequate and slipshod that apparently Justice Field was unaware of an ancient sanction against compulsory self-infamy that strongly supported his argument. As far back as 1528, William Tyndale's "The Obedience of a Christian Man" had condemned the legal practice of forcing a man "to shame himself." By the late seventeenth century, this principle was embedded in English law, and in a notable case in 1679 a judge ruled that a witness could not be asked about his misdeeds even after being assured that he would not be prosecuted, because "neither his life nor name must suffer, and therefore such questions must not be asked him." And in 1696 Lord Chief Justice George Treby said, "Men have been asked whether they have been convicted and pardoned for felony, or whether they have been whipped for petty larceny; but they have not been obliged to answer, for though their answer in the affirmative will not make them criminal or subject them to a punishment, yet they are matters of infamy; and if it be an infamous thing, that is enough to preserve a man from being bound to answer." Sir William Blackstone's "Commentaries on the Laws of England," which was published in the mid-eighteenth century and was considered the leading text on the law by the Framers, stated that "no man is to be examined to prove his own infamy."

Two years before the Supreme Court upheld the immunity act in Brown v. Walker, a lower federal-court judge named Peter Grosscup had rejected the statute as unconstitutional. In his opinion, delivered in 1894, he addressed himself to the issue of self-infamy, among other matters, as making up an integral part of the Framers' design when they drew up the Fifth Amendment:

"Did they originate such privilege simply to safeguard themselves against the law-inflicted penalties and forfeitures? Did they take no thought of the pains of practical outlawry? The stated penalties and forfeitures of the law might be set aside, but was there no pain in disfavor and odium among neighbors, in excommunication from church or societies that might be governed by the prevailing views, in the private liabilities that the law might authorize, or in the unfathomable disgrace, not susceptible of formulation in language, which a known violation of law brings upon the offender? They, too, if the immunity was only against the law-inflicted pains and penalties, the government could probe the secrets of every conversation, or society, by extending compulsory pardon to one of its participants, and thus turn him into an involuntary informer. Did the Framers contemplate that this privilege of silence was exchangeable always, at the will of the government, for a remission of the participant's own penalties, upon a condition of disclosure, that would bring those to whom he had plighted his faith and loyalty within the grasp of the prosecutor? I cannot think so. . . .

"The oppression of crowns and principalities is unquestionably over, but the more frightful oppression of selfish, ruthless, and merciless majorities may yet constitute one of the chapters of future history. In my opinion, the privilege of silence against a criminal accusation, guaranteed by the Fifth Amendment, was meant to extend to all the consequences of disclosure."

Both the Supreme Court's narrow endorsement of transactional immunity and its rejection of the theory that the Fifth Amendment prohibited the government from forcing one to disgrace oneself were ultimately to abet the tyranny of the majority that Judge Grosscup foresaw. As a result of anti-Communist hysteria, which had spread throughout America from the time of the Bolshevik Revolution

in 1917 until it burst out into a national nightmare of repression in the late nineteen-forties and early nineteen-fifties, Congress, which had created most of the hysteria in the first place, responded to it by enacting some of the most repressive laws ever to be placed on this nation's books.

Armed with these laws, congressional committees and federal grand juries summoned their victims, who were forced to admit their radical political beliefs and associations and to inform on their friends or go to prison. In one of the most famous of these cases, which reached the Supreme Court in the mid-fifties—Ullman v. United States—the Court upheld a transactional-immunity statute that Congress had passed to implement one of the more far-reaching anti-radical laws. Since the statute provided absolute immunity, Justice Felix Frankfurter said for the seven-man majority, it was consonant with the decision in Brown v. Walker, which had "consistently and without question been treated as definitive by this court." Of the two dissenters, Justice Hugo L. Black opposed the decision on the ground that if the Constitution said, "No person shall be . . . compelled in any criminal case to be a witness against himself," that was what the Constitution meant. The other dissenter, Justice William O. Douglas, called upon the Court to overturn the five-man majority opinion in Brown and to raise the four-man minority opinion there to the status of constitutional doctrine by ruling "that the right of silence created by the Fifth Amendment is beyond the reach of Congress."

Above all, Douglas shared the concern expressed sixty-odd years earlier by Judge Grosscup and Justice Field about self-infamy, and he appealed to the Court to stand up for "conscience and human dignity and freedom of expression" by giving a person's reputation and his sense of independence and self-respect the full protection accorded it before the Supreme Court went to work on the Constitution. "The critical point is that the Constitution places the right of silence *beyond the reach of government*," he repeated. "The Fifth Amendment stands between the citizen and his government." But the Court's majority refused to listen.

After Brown v. Walker, the most important case concerning compulsory self-incrimination to be decided by the Supreme Court was Twining v. State of New Jersey, in 1908. In a state criminal trial, a judge had noted in his charge to the jury that the defendants had declined to take the stand in their own defense, and they appealed this act as a violation of their Fifth Amendment rights as interpreted by the Fourteenth Amendment. That amendment says, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fourteenth Amendment was adopted in 1868, and many legal scholars and judges believed that its purpose was to make the entire Bill of Rights binding on the states. But, in 1873, five years after the amendment was adopted, the Supreme Court decided that it guaranteed citizens of the states only those rights the states said they possessed—that is, the Fourteenth Amendment was meaningless. Four members of the Court led by Justice Field, bitterly contested the 1873 decision, for if the Fourteenth Amendment did no more than the majority held, he said, "it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."

In Twining v. New Jersey, the defendants reopened the argument by contending that the Fifth Amendment right against compulsory self-incrimination had been "incorporated" through the "privileges or immunities" clause of the Fourteenth Amendment to cover state criminal proceedings. But the Court rejected this view, and cited its 1873 decision as binding.

To buttress this conclusion, Justice William H. Moody, speaking for the Court in Twining, pointed out that the rights and privileges of national citizenship so far recognized by the Supreme Court were "the right to pass freely from state to state, the right to petition Congress for a redress of grievances, the right to vote for national officers, the right to enter the public lands, the right to be protected against violence while in the lawful custody of a United States marshal, and the right to inform the United States authorities of violation of its laws." The rights enumerated in the Bill of Rights, among them freedom of religion, speech, press, and assembly; the right to be secure against unreasonable searches and seizures, against indictment for felony except by grand jury, against double jeopardy and against involuntary self-incrimination; the right to a speedy and public trial by an impartial jury, to a public accusation describing its nature and

cause, to be confronted by one's accusers, to have the power to summon witnesses, on one's behalf, and to have a lawyer; and the right not to be subjected to excessive bail or fines or to cruel and unusual punishment—all these fundamental rights were the privileges and immunities of citizens only when they came up against the authority of the federal government.

Not one of these rights, the Court declared, was guaranteed to citizens against the authority of individual states unless specifically provided for under the laws of those states. In fact, the states could suspend or abolish any of the rights they had guaranteed their citizens, and no power, including that of the national government, could stop them. Accordingly, Justice Moody asserted, the right against compulsory self-incrimination was not a privilege or immunity of a citizen in a state criminal proceeding.

Going on to the defendants' further claim that compulsory self-incrimination also denied them due process of law, as guaranteed by both the Fifth and Fourteenth Amendments, Justice Moody stated that to constitute due process any legal principle had to be shown to be an intrinsic part of "the law of the land," as that phrase was meant by the authors of Magna Carta. He then asked rhetorically whether the prohibition against compulsory self-incrimination was "a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government." He answered that it was not, because a search through English and American history prior to the Revolution revealed "nothing to show that it was then thought to be other than a just and useful principle of law."

In England, he went on, the "privilege was not dreamed of for hundreds of years after Magna Carta (1215), and could not have been implied in the 'law of the land' there secured."

The test Moody proposed was faulty. For one thing, many of the principles that had been considered fundamental at the time the American Constitution was adopted had not been dreamed of for hundreds of years after Magna Carta. Indeed, if the founding of the United States was nothing more than a repetition of that document's principles, then six centuries had passed with no political progress to be shown for them. For instance, when King John signed the Great Charter even jury trials in criminal cases were unknown in England. In addition, Magna Carta contained almost no fundamental rights of ordinary people as we understand such rights today.

Those that were claimed so fervently—by men like Lilburne, among thousands of others—to be indelibly imprinted in it were actually imposed on it by myth in the centuries after it was written. The key sentence in Magna Carta that was later believed to contain the fundamental principles of democratic law reads, "No freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the umpired the battle or interpreted the reaction to the iron.

In thirteenth-century England, "the law of the land" meant trial by battle or by an ordeal such as being branded with a hot iron to see whether the burn healed quickly, which meant one was innocent, or became infected, which meant one was guilty, and "the lawful judgment of his peers" referred to those who umpired the battle or interpreted the reaction to the iron.

Continuing, Justice Moody pointed out that there was no reference to a guarantee against self-incrimination in the English Petition of Right, submitted to the king in 1628. Once again the Justice—that is, the Supreme Court—was wrong. As Professor Levy has pointed out, a crucial part of the Petition was designed to stop the sovereign from forcing subjects to lend money to the Crown, and from forcing those who declined to make such loans to take self-incriminatory oaths before a special royal commission. Moody also claimed that compulsory self-incrimination "was then a matter of common occurrence in all the courts of the realm."

While that was true, Moody ignored the fact that beginning a few years later and for more than two centuries afterward compulsory self-incrimination under oath was not permitted in common-law courts in England; in fact, during this period defendants were not even allowed to testify under oath, either for or against themselves, in such courts of the realm until only ten years before Moody delivered the Supreme Court's opinion in Twining. Moody claimed that the English Bill of Rights of 1689 was "likewise silent, though the practice of questioning the prisoner at his trial had not then ceased."

Actually, by that time the rule against allowing prisoners to be questioned under oath was already established. Moreover, the English Bill of Rights was

largely a fraud for it contained little to assure rights to the common man—aside from sanctions against excessive bail and fines and cruel and unusual punishment—but was mainly designed to protect the government's rights. One demonstration of this purpose emerged when Thomas Paine attacked that Bill of Rights in "The Rights of Man" by saying, "The act, called the Bill of Rights . . . what is it but a bargain, which the parts of the government made with each other to divide powers, profits, and privileges?" As if to prove his point, the British government charged Paine with treason, and he was convicted of committing, among other crimes, seditious libel against the Bill of Rights.

Justice Moody then moved on to America, and asserted that only four of the original thirteen states had asked that the Constitution be amended by adding a bill of rights that included the right against involuntary self-incrimination. He did say that six of the thirteen states had such a right written into their own constitutions, but he did not mention that every state having a separate bill of rights prohibited compulsory self-incrimination. He also ignored the broadest and most pertinent document of freedom up to that time, the Virginia Declaration of Rights, written by George Mason, which had greatly influenced all the state constitutions and the national Constitution; it, too, contained a sanction against forced self-incrimination.

And, finally, Justice Moody ignored the Supreme Court's own finding in Brown v. Walker that the American colonists "with one accord, made a denial of the right to question an accused person a part of their fundamental law." In conclusion, Justice Moody dismissed the prohibition against involuntary self-incrimination as being in any way fundamental by saying that "it is nowhere observed among our own people in the search for truth outside the administration of the law"—in other words, the rule has no counterpart in ordinary society.

This claim, which has repeatedly been made by such eminent jurists of today as Walter V. Schaefer, of the Illinois Supreme Court, and Henry J. Friendly, of the Court of Appeals for the Second Circuit, misses a couple of basic points. For one, "the search for truth" has nothing to do with the Fifth Amendment, which was obviously written with the express purpose of allowing people to conceal the truth. For another, the world outside the law is not like the world inside the law—most notably in the respect that in civil society one cannot be imprisoned for one's transgressions. Indeed, if the rules of civil society were the standard on which our criminal law were based, then no one would be forced to talk about others or go to prison, because scarcely anyone is regarded with more scorn in the ordinary world than the Judas figure—from the childish tattletale to the adult informer.

By the beginning of the eighteenth century, criminal-court judges in England generally concluded that compelled confessions were untrustworthy, and this realization became another reason for not allowing an accused person or a witness to be tortured. But in America the use of torture went on illegally for many years—and, in fact, still goes on. As it turned out, the Supreme Court was to have as much difficulty in facing this problem as it has had in facing the problem of coerced confessions in general.

In the mid-nineteen-thirties, three black men were arrested in Mississippi on a charge of murdering a white man. Five days after the crime, they were indicted, arraigned, given court-appointed counsel, and then were taken to trial the following morning. The trial lasted less than two days, and at its conclusion the three were found guilty and sentenced to death. Aside from their confessions, there was no evidence against them, and during the trial their story of how they had come to confess was laid before the jury. The story told how a deputy sheriff had led a mob to one of the defendants, hanged him by a rope from a tree outside the dead man's house for a time, let him down long enough to hear him proclaim his innocence, hauled him up again, let him down, heard him repeat his claim, then tied him to a tree trunk and whipped him until the mob tired of it and released him, without persuading him to confess.

A couple of days later, the deputy and a colleague went to the man's house and took him to jail—by way of nearby Alabama, where they stopped and beat him some more. They vowed to go on beating him until he confessed, and finally he did, whereupon they took him to jail. The deputy then picked up two other black men who had been implicated by the first suspect, took them to jail, made them strip and lie down over chairs, and whipped them with the buckle end of a leather belt until their backs were cut to pieces. In time, they confessed, too. During the trial, they displayed the fresh wounds on their backs to the jurors, and the defendant who had been hanged showed them the rope marks on his neck. The deputy sheriff

readily admitted while on the stand that he had beaten one of the men, but, he said, "not too much for a Negro." The judges of the Mississippi Supreme Court read the trial record and upheld the convictions and death sentences.

Brown v. Mississippi, unlike thousands of similar cases across the country, ended up in the United States Supreme Court. In the arguments there, counsel for the State of Mississippi contended that Twining controlled the issue and that, accordingly, the federal rule against involuntary self-incrimination didn't apply to a state case. In February, 1936, the Court announced its decision, which upheld the state's contention on this point. "The question of the right of the state to withdraw the privilege against self-incrimination is not here involved," announced Chief Justice Charles Evans Hughes for the Court. What was involved, though, he went on, was that "torture to extort a confession" was so "revolting to the sense of justice" that it constituted a denial of due process, which was a right that the state could *not* withdraw. On this ground, the Court reversed the convictions.

State courts apparently couldn't believe that the Supreme Court had been serious in finding such practices illegal, and they continued to uphold convictions based on third-degree confessions. After all, there were states' rights, and none of them was more jealously guarded than the right to assert the police power at will. And, as Sir James Fitzjames Stephen, a prominent Victorian jurist, observed, "It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence." To give the law some semblance of integrity, state courts went through what has been called "the swearing contest," in which policemen swore that defendants hadn't been beaten, defendants swore that they had, and judges and juries invariably took the word of the policemen. Time after time when such cases reached the Supreme Court, it repeated its insistence on due process and reversed the convictions. But, again, this had little effect on the states, whose law-enforcement officers seemed unmoved by such reversals.

In 1943, the Supreme Court ruled, in McNabb v. United States, that in federal criminal cases any protracted detention of a suspect violated a federal statute ordering that suspects be promptly taken before magistrates, and that confessions obtained during prolonged detention were inadmissible. This rule, the Court explained, was meant to check "resort to those reprehensible practices known as the third degree." Of course, the rule was binding only on federal courts, but it was expected that their behavior would serve as an example to the states.

However, judges on lower federal courts also apparently couldn't believe that the justices had been serious, and began ruling that before a defendant could claim coercion under the McNabb rule he had to demonstrate that there was a causal relationship between the length of time he had been detained and his confession. To deal with this circumvention, the Supreme Court ordered in 1957, by way of Mallory v. United States, that any unnecessary delay in taking a federal prisoner before a magistrate made a confession automatically inadmissible in court. Still, the prevailing abuse of the right against involuntary self-incrimination was the continuing use of the third degree in state cases, and the McNabb-Mallory rule didn't touch those at all.

Stymied by the intransigence of state officials, the Court went off in several different directions to stem these atrociously unjust practices. One of the chief means by which police often got evidence against suspects was by searching them without a warrant and using the evidence forcibly uncovered against them. Of course, this violated the Fourth Amendment's stricture against "unreasonable searches and seizures" and ignored the requirement that the police must have "probable cause" to believe a crime has been committed before they may seize evidence or arrest a person.

Moreover, this kind of practice also violated the Fifth Amendment, since it indirectly compelled a person to betray himself by giving up evidence of his culpability through force. Finally, in 1961, the Court decided, in Mapp v. Ohio, that the Fourth Amendment was binding on the states. In effect, this meant that state violations of the amendment could be taken into federal court. That ruling made the Amendment's most effective and intrinsic element—the exclusionary rule, which prohibits unreasonably seized evidence from being submitted in court—also binding on the states. In 1963, the Court also made the Sixth Amendment right to counsel binding on the states through Gideon v. Wainwright, and a year later expanded this ruling, in Escobedo v. Illinois, by holding that the right to have a lawyer commenced as soon as a suspect was taken to a police station.

Like the Court's ruling on the Fourth Amendment, the one on the Sixth Amendment had a salutary effect on the right against compelled testimony, since the first piece of advice that any lawyer will give to a client who is suspected or accused of a crime is to say nothing at all to the police. But law-enforcement officers who were temporarily dismayed by this limitation on them soon got around it—by torturing suspects before taking them to the station house. To prevent this recourse, the Court took the giant step of applying the Fifth Amendment to the states, by way of Malloy v. Hogan, in 1964.

Then, two years later, the Court expanded its protection by ordering, in Miranda v. Arizona, that every suspect in a criminal case must be warned of his constitutional rights from the moment he becomes a suspect—including the right to have a lawyer present at any stage of the proceedings against him, the right to remain silent, and the right to be warned that whatever he says may be used against him. In time, this order created a new form of the old swearing contest, in which policemen swore in court that they had given the Miranda warning, defendants swore that they hadn't, and judges and juries invariably believed the policemen. Even so, the Miranda decision made a compelling point: If the highest court in the land could not prevent injustice, at least it would not condone it. Speaking for the five-man majority in Miranda, Chief Justice Earl Warren said that "the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values."

He went on to explain, "All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a fair state-individual balance, to require the government to shoulder the entire load [in proving a person's guilt], to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."

On the same day that the Court applied the Fifth Amendment to state criminal cases, it also handed down its decision in Murphy et al v. Waterfront Commission of New York Harbor, which resolved a jurisdictional conflict that had previously existed among the states and between the states and the federal government in regard to grants of immunity. Before Murphy, when one state granted a witness immunity another state or the federal government could then prosecute him on the basis of his testimony, since no state could grant immunity from prosecution by another state or by the federal government.

In Murphy, the Court ruled that when a person was forced to testify in one jurisdiction his testimony could not be used to prosecute him in another jurisdiction. However, to interfere as little as possible with the federal system, the decision allowed an exception to the absolute-immunity standard laid down in Counselman and upheld in Brown, Ullmann, and other Supreme Court decisions: it permitted use immunity to be employed in a dual-sovereignty situation when only one jurisdiction has any sort of immunity provision. Although the Court thereby made use immunity constitutional in narrowly circumscribed cases, the overall effect of the Murphy decision was to broaden the coverage and scope of the Fifth Amendment privilege by making it far more difficult to prosecute a person for what he testified to in *any* jurisdiction.

That the Court meant to hold to the strict Counselman-Brown requirement of transactional immunity in all other circumstances was demonstrated a year after Murphy, when the Court struck down a congressionally authorized use-immunity statute. In that case, Albertson v. Subversive Activities Control Board, the Court unanimously found the statute unconstitutional, again cited the Counselman-Brown rule requiring absolute immunity in exchange for compelled testimony, and declared that any immunity statute must be measured by this standard.

In sum, almost everything done by the Warren Court to interpret and apply the Fifth Amendment to the whole range of criminal law in America did little more than assure everyone of the rights that most people believed they had possessed all along. Even so, the indignant outcry from police, prosecutors, judges, politicians, the press, and laymen against the Court was so immediate and so clamorous that one might have thought the Bill of Rights had been scrapped altogether rather than at last restored in one small part of the purpose that its authors had meant it to serve.

"The natural progress of things is for liberty to yield and government to gain ground," Jefferson wrote, and some years later he added, "Timid men . . .

prefer the calm of despotism to the boisterous sea of liberty." The rise in crime in the United States over the past dozen years has driven a lot of timid people to seek the calm of despotism by giving up their liberty to government on every level in the name of law and order. To the ignorant citizen and to the stupid judge, the Fifth Amendment right seems like a refuge for the guilty. On occasion, the Supreme Court has tried to correct this attitude. In 1956, for instance, the Court said in an opinion on a Fifth Amendment case, "At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment." But the following year President Eisenhower told a press conference, "I must say I probably share the common reaction: If a man has to go to the Fifth Amendment, there must be something he doesn't want to tell." The President's failure to see that such a man might have good and innocent reasons—and the right—not to tell something led Justice Hugo L. Black to observe a little later, "The value of these constitutional privileges is largely destroyed if people can be penalized for relying on them."

Few aspects of American law have distinguished the right wing from the left wing as clearly as their attitudes toward the Fifth Amendment. On the right, it has long been attacked as a refuge for the guilty, who, it is said, *should* be compelled to admit their crimes and be strictly punished for them. And on the left, it has long been defended as the essential bulwark against an inquisitorial government—in Jefferson's view, *all* governments—which may condemn and punish the innocent along with the guilty.

The leading spokesman for the right-wing viewpoint is Chief Justice Warren E. Burger. Long before he was appointed to the Supreme Court by President Nixon, Burger publicly attacked the Fifth Amendment sanction at every opportunity. As a judge on the Court of Appeals for the District of Columbia Circuit, he often criticized his liberal colleagues there for applying the sanction too strictly in their rulings. And at a law symposium that Burger attended the year before he became Chief Justice, he questioned the validity of such fundamental principles of our legal system as the presumption of innocence, trial by jury, and the right against compulsory self-incrimination.

On the last point, Burger said at the law symposium, "Certainly you have heard—and judges have said—that one should not convict a man out of his own mouth. The fact is that we establish responsibility and liability and we convict in all the areas of *civil* litigation out of the mouth of the defendant." To some legal scholars, it seemed astonishing that a man who made no distinction between the civil law and the criminal law—who failed to note, for instance, that their penalties are a loss of money on the one hand and a loss of freedom and perhaps life on the other—could have become Chief Justice of the United States.

Soon after the Nixon Administration took office, Attorney General John N. Mitchell ordered a secret study made of the feasibility of altering the Fifth Amendment, either by drafting a law that would weaken its stricture against compelled testimony or by abolishing its privilege altogether through a constitutional amendment. Apparently, the second course seemed too long and too uncertain, so the Department of Justice concentrated on the first approach.

A couple of years earlier, Congress had set up the National Commission on Reform of the Federal Criminal Laws, and it was still at work on its assignment when Nixon and Mitchell took over. Along the way in its deliberations, the Commission adopted a recommendation made by a consultant: that transactional immunity be replaced by use immunity across the board. In effect, the proposal endorsed a broader form of use immunity than the laws of the eighteen-sixties, which the Supreme Court first rejected in 1892 and again and again in later years.

The use-immunity proposal stated that anyone who was compelled to testify could not be prosecuted directly on the basis of that testimony or indirectly on the basis of leads from it to other evidence, but that one could be prosecuted after being compelled to testify as long as the evidence used against one was obtained independently of, and was untainted by, the coerced testimony. Early in 1970, the use-immunity proposal was drafted in a separate bill, which was introduced in the House by three representatives who had served on the Commission and were also members of the House subcommittee having jurisdiction over such legislation.

A single day was allotted for a hearing on the proposal to rewrite the Fifth Amendment. Of the six witnesses who testified on the subject, only one, a spokesman for the American Civil Liberties Union, opposed use immunity.

The Nixon Administration's principal legal defense for backing the innovation was that the Supreme Court's decision in *Murphy* v. *Waterfront Commission*—

that is, the narrow technical exception allowing use immunity in circumscribed cases—had made use immunity in general wholly constitutional. The witness from the A.C.L.U. and various critics who were not heard by the subcommittee complained that such a law would have many drawbacks.

Once a prosecutor could force a prospective defendant to testify about his crimes, for instance, the immense advantages that the government already had in manpower, money, and official intimidation would become gigantic, for then the prosecuter could immediately confine his search and concentrate all his resources on one person—the person who was granted use immunity and forced to testify against himself. And once the main target was sighted, a less than scrupulous prosecutor could easily fabricate a claim that the evidence used in court against the witness had been uncovered independently of the testimony elicited under compulsion.

Even if a prosecutor was scrupulously fair, anyone among the many employees in large United States Attorneys' offices or in even larger metropolitan district attorneys' offices might inadvertently follow up a lead that came originally from a witness' testimony, and someone else might unwittingly offer it in court as untainted evidence. Of course, prosecutors are often exceedingly ambitious, and the best way for them to get ahead is by building a record of crimebusting—even if that means, as it all too frequently does, using illegally acquired tips from wiretaps or bugs, covertly broadening court-imposed limits on search warrants in order to pick up unauthorized material evidence, or ignoring third-degree methods used by police to extort confessions.

Since the Bill of Rights was written to control such prosecutors, critics of the use-immunity bill pointed out, it was folly to encourage such men to legally force a man to talk and then to illegally use his words against him—the course that would almost certainly be taken by the incompetent, lazy, or vicious prosecutor. Moreover, when two or more suspects were involved in a case, use immunity could be employed to force each of them to testify against the other, which, in effect, would amount to their testifying against themselves, since the testimony of one could be used as independent evidence against the other.

Finally, federal immunity laws of the past had applied only to specific crimes that were difficult or impossible to solve without the help of a confession from someone who was involved. But the use-immunity proposal being considered by the House subcommittee provided that it would replace all transactional-immunity statutes and would be applicable to all crimes covered by the federal code four years after enactment by Congress.

The House subcommittee, which was controlled by a strong liberal majority, approved the use-immunity bill with only one vote being cast against it—by William Fitts Ryan, Democrat of New York, who said that it would destroy the Fifth Amendment. Afterward, the parent Judiciary Committee, which was also controlled by liberals, approved the measure with little discussion and sent it to the floor of the House as part of the Organized Crime Control Act of 1970.

That act, which was perhaps the most undemocratic and repressive piece of legislation to be seriously considered by Congress in a generation, passed with little debate and almost no opposition; when the final vote was tallied up, only twenty-six members of the House had voted against it. In the Senate, only one member—Lee Metcalf, Democrat of Montana—voted against the measure. It was an election year Nixon had made crime a basic issue of his Presidency, and, as fully expected on all sides, Congress was not of a mind to sacrifice itself on the altar of democracy.

In the legal community, though, it was widely believed that the use-immunity law was so flagrantly unconstitutional that not even a Supreme Court headed by Chief Justice Burger could uphold it. But few Court-watchers anticipated that Nixon would soon have four appointees on the Court. Their effect was rapidly made clear in at least one respect. "In no area of criminal justice was the Nixon Court's new departure so swift and veering as in cases arising under the Fifth Amendment's self-incrimination clause," wrote Professor Levy—now Mellon Professor at the Claremont Colleges, in California—in his recent book "Against the Law: The Nixon Court and Criminal Justice."

He went on, "The Court decided fourteen such cases during just the first two years of Burger's incumbency. . . . In all but one of the fourteen cases the right claimed under the Fifth Amendment lost." Of the thirteen assaults on the Amendment that succeeded, the most destructive was the decision in the case of *Harris* v. *New York*, which was handed down in 1971. The opinion of the Court was delivered by Chief Justice Burger, whose target was the Miranda ruling that a sus-

pect must be warned of the right to remain silent, of the right to have a lawyer, and of the right to be told that anything one says may be used against one in court. Although the Miranda rule made any statements obtained in violation of it inadmissible as evidence, Burger undercut this guarantee by announcing for the majority of the Court in Harris that self-incriminating statements taken in violation of Miranda *can* be used during a trial to test a defendant's truthfulness if he takes the stand.

That is, once a suspect says something self-incriminating to the police before he is warned of his rights, his words cannot be used against him at the time of his trial as evidence of his guilt but can be used against him "to impeach his credibility." Of course, the immediate, practical, and overwhelming result of the new rule was to prevent any person who had made such an incriminating statement, no matter how trivial, from speaking in his own defense at his trial, for no defense lawyer could allow a client to swallow the judicial fiction that jurors would ignore self-incriminating remarks when it came time for them to decide about overall guilt or innocence.

In effect, then, the Court wiped out under such circumstances an accused person's fundamental right to defend himself. And, perhaps worse, the decision indirectly encouraged policemen and prosecutors to ignore the Miranda rule long enough to obtain some kind of incriminating statement, even one that they knew was misleading, in order to prevent suspects from later defending themselves in court. "The opinion in Harris taught that government may commit crimes in order to secure the conviction of criminals," Professor Levy observed, and added, "It taught the odious doctrine that in the administration of the criminal law, the end justifies the means and the Constitution can be circumvented."

A few months after Congress passed the use-immunity law, several young men in California were subpoenaed by a federal grand jury investigating draft evasion in that area, and were asked questions about a dentist who was suspected of having provided them with unnecessary dental work to make them ineligible for military service. They refused to testify, were granted the newly enacted form of federal use immunity, again refused to testify, and were imprisoned for contempt of court.

The case—Kastigar et al v. United States—went to the Supreme Court, which handed down its decision in the spring of 1972. To the amazement of most constitutional scholars, the Court upheld the law without qualification by a vote of five to two, with two justices not participating. The same scholars were amazed by the majority opinion's lack of craftsmanship, logic, and awareness of legal history. The opinion, written by Justice Lewis Powell, so misinterpreted the Court's own precedents, Professor Levy said, that it "left them twisted like pretzels."

Powell's basic argument was that transactional immunity was actually too broad—broader in fact, than the Fifth Amendment right itself—and that use immunity was precisely "coextensive" with that right and thus a proper substitute for it. Since this view was flatly at odds with almost everything the Court had said on the subject over a period of eighty years, Powell was obliged to reject the entire line of Court rulings during that time without expressly saying so by overruling them. To this end, he began with the Counselman decision, the first of the line, and simply declared—erroneously—that it had upheld use immunity; its statement that only transactional immunity could replace the privilege itself, he said, was merely dictum and "cannot be considered binding authority."

To be sure, the Counselman opinion on this point could be described as dictum (a statement that is less than intrinsic to the order of the Court in a given case, and is meant to serve more as a future guide than as a present command), but it wasn't dictum after the Court made it the central point, four years later, in Brown v. Walker, and in a long series of decisions that subsequently reaffirmed the doctrine of absolute immunity. The only exception in that series was the Murphy decision's acceptance of use immunity in certain kinds of dual-sovereignty cases, and Powell squeezed through this loophole, even while denying that he was doing it, to justify the Court's ruling that use immunity is fully constitutional in all cases.

With the decision in Kastigar, the long struggle to stop government from forcing its way into the innermost privacy of people's thoughts, associations, and consciences largely came to an end. The right wing's final victory in this contest between the state and the individual was doubly remarkable in that the state itself had long felt restrained by tradition against using any form of immunity frivolously. The traditional reluctance of Congress, the courts, and the

executive branch to wield such a potent weapon carelessly grew out of several factors—among them the fear that corrupt prosecutors would give "immunity baths" to those guilty of serious crimes; the belief that grants of immunity constitute grave invasions of citizens' privacy and should be resorted to only when all other law enforcement methods have failed; and finally, the knowledge that compulsory immunity turns people into informers, a despised breed throughout American history.

The danger of ignoring these factors soon became clear. After the Court's decision in Kastigar, state legislatures enacted similar laws replacing transactional immunity, and local prosecutors began summoning thousands of witnesses before grand juries. There is no record of the number of people who have been compelled in state cases to testify against themselves and others or who have been subsequently prosecuted for what they revealed. Nor are the federal records complete. But one comparison is enough to reveal the extent of the new law's use: up to the mid-nineteen-sixties, the Department of Justice had granted immunity only a few dozen times; in the eighteen-month period following the Kastigar ruling, the Department was called upon to grant immunity to more than five thousand witnesses.

Hundreds of these grants were made in political cases prosecuted by the Nixon Administration, which devised the law chiefly for that purpose. Although the Administration's ostensible social justification for use immunity was that it was essential to the fight against organized crime, use immunity, or any other form of immunity, is largely valueless in such cases. The Mafia's *omertà* code, which can be roughly translated as "death to informers," makes a few months in jail for contempt of court a comparative slap on the wrist. In fact, a mobster's insistence on silence in order to receive such a sentence is the best way for him to prove his loyalty, and is doubtless a means to promotion within a grateful mob hierarchy. In addition to organized racketeering, the kinds of crimes that have been said to be controllable only by way of enforced immunity laws are bribery, extortion, gambling, consumer fraud, bootlegging, and commercial larceny—all but the last of which are most often committed by organized criminals, too.

For those crimes that aren't, probably the most effective and certainly the fairest kind of immunity would be voluntary immunity, which a prospective witness who wants to talk could accept as protection from prosecution; those who don't want to talk often lie anyway when they are forced to, and while they are sometimes convicted of perjury, that doesn't generate the information that immunity is supposed to produce.

In any event, before 1970 federal immunity statutes were specifically designed to be used only in those cases where little else would work. Now, with use immunity having replaced *all* federal immunity laws and covering *all* federal crimes, the government can, in Judge Grosscup's words, "probe the secrets of every conversation." Today, any person can be summoned before a grand jury, a court, or a legislative committee and forced to answer all questions that may be asked. The opportunities for political oppression that this opening provides are practically unlimited. Of course, political freedom was the primary goal of men like John Lilburne and the Framers of the Constitution, and political freedom was one of the basic reasons behind the adoption of the Fifth Amendment. But an even more fundamental goal of the amendment, like the rest of the Bill of Rights, was to preserve and nourish that fragile, necessary, and wondrous quality that gives meaning and purpose to human life—individuality.

### Taking the Fifth—III

(By Richard Harris)

"Let me assure you that as long as the F.B.I. has a legal mandate to protect the American people from terrorism we will use all the legal weapons at our command to accomplish this task." Clarence Kelley, Director of the Federal Bureau of Investigation, told the Veterans of Foreign Wars at a convention in the early spring of 1975. Subsequent revelations about the F.B.I.'s widespread use of illegal surveillance, its practices of burglarizing suspect's homes and offices and of opening and reading citizens' private mail, and its harassment of people who were not accused of any misdeed other than holding unpopular political views have made it clear that the F.B.I. has not always been faithful to the rule of law.

On the basis of the Bureau's own recent admissions of its lawless behavior, it appears that the arena in which it has been most culpably active is the political arena. It also appears that politics is the subject F.B.I. men know least about.

That is hardly surprising, for the Bureau's job is supposed to be law enforcement, and law-enforcement officers traditionally have a rather narrow, and often cynical, view of society in general. Their task is to find criminals. It has been said that a good cop sees everybody as a potential criminal, and Kelley, who is reportedly a very good cop, must keep tabs on every potential threat to society he sees if he is to be faithful to his duty as he conceives it.

The difficulty lies in the fact that the Bureau has been allowed by every Administration in the past several decades to determine, almost entirely on its own, who and what are threats to society. Given the Bureau's long-standing belief in the dire peril posed by left-wing conspiracies—a specialty of J. Edgar Hoover's—it is also not surprising that F.B.I. men are inclined to view anybody whose politics don't square with the average Rotarian's as a threat to the survival of the Republic. Since the executive and legislative branches have rarely stood in the F.B.I.'s way, only the judiciary remains as a check on the Bureau's abuses of its self-delegated authority. But the courts have done little to stop it from bending and breaking the law, because the courts cannot act fully until the agents who have broken the law are prosecuted.

So far, despite reports about many hundreds of illegal acts committed by F.B.I. agents, not one of them has been tried for any of these crimes. In the end, this multiple failure of all three branches of the government has given the Bureau not merely an implicit right but implicit encouragement to go on snooping into the private affairs of anyone whose political views, expressions, or associates seem unorthodox to F.B.I. men.

Hoover repeatedly tried to persuade Congress to give the F.B.I. the power to issue subpoenas, but Congress, which gave him just about everything else he asked for, turned him down on this score. Such power, it was felt in Congress, was too great to hand over to a national police agency; even the Bureau's bureaucratic parent, the Department of Justice, was denied subpoena power, because it was held that no executive department should possess what was essentially a judicial function. But when the Nixon Administration took over, Attorney General John N. Mitchell soon came up with a simple way of helping Hoover over this barricade—by instructing the Justice Department's ninety-three United States Attorney's offices around the country, most of which were headed by Nixon appointees, to cooperate with the F.B.I.

The specific way in which they cooperated was by directing the federal grand juries under their control to subpoena those who refused to talk to the F.B.I.—as anyone has the right to do—and to force them to divulge whatever the Bureau's men wanted to know or face prison for contempt of court. Then, less than two years after the Administration took office, it persuaded a compliant Democratic and largely liberal Congress to enact a new law providing for what is called "use immunity." Under the laws previously on the books, no one could be compelled to testify before a grand jury, a court, or a legislative body unless given total immunity against prosecution for the act or transaction testified about.

Only total immunity, the Supreme Court had held since 1892, could be a proper substitute for the Fifth Amendment stricture "No person shall be . . . compelled in any criminal case to be a witness against himself." Under the use-immunity law, however, people who were compelled to testify could later be prosecuted as long as the government did not base its case against them, directly or indirectly, on their own testimony. The new law was so obviously open to abuse by unscrupulous prosecutors—who could easily conceal tracks leading from compelled testimony to "independent" evidence, and could then concentrate their immense prosecutorial resources on targets whom they knew to be guilty—that most legal scholars assumed the Supreme Court would find use immunity flagrantly unconstitutional on the ground that it wiped out the Fifth Amendment. But no one anticipated at the time that President Nixon would end up with four appointees on the Court, including Chief Justice Warren E. Burger, who had frequently and publicly questioned the inviolability of the Fifth Amendment right against involuntary self-incrimination. A year and a half after the use-immunity law was enacted, the Burger Court upheld it.

The Internal Security Division of the Justice Department, which had been virtually moribund until Mitchell gave it the job of locating "enemies" of the Administration and helping the F.B.I. gather evidence against them by way of grand-jury investigations, began relying on the new law in thousands of cases. In fact, over the eighteen-month period following the Court's approval of this law, the Department of Justice received requests for grants of immunity for more than five thousand witnesses. In many of these cases, the Administration employed the

grand-jury technique and the use-immunity law to devastatingly repressive ends. Scores of people who were accused of no crime except refusing to testify about some political conspiracy concocted by the Nixon Administration went to jail.

With the end of the Nixon Administration, it was generally assumed that the repressive practices it had employed were at an end. But the use-immunity law is still on the books and is more widely employed than ever, since many states have copied the federal model; many of the officials in the Justice Department and the F.B.I. and U.S. Attorney's offices who abetted the Nixon Administration's attempts to destroy its political opposition are still in office; and grand juries are still being used, in effect, as instruments of government by inquisition. The Ford Administration may be unaware on the highest level that these practices are continuing, for today they seem to be used not to serve the political purposes of a particular Administration but to control the enemies of society as agencies like the F.B.I. define them.

Of all the abuses that are still going on, perhaps the most serious one is the abuse of the grand-jury system to help the F.B.I. do the jobs that it has failed to do on its own. When the F.B.I. couldn't find Patricia Hearst, for instance, it fell back on the old Mitchell tactic by getting U.S. Attorneys to subpoena various people who might have known something of her whereabouts (including her mother, who was compelled to tell what she knew, even though that could have endangered the life of her daughter). And when the F.B.I. couldn't find any trace of Jimmy Hoffa, it got a federal grand jury in Michigan to call scores of people on the off-chance that they might know something that the F.B.I. could use.

"Historically, [the grand jury] has been regarded as a primary security for the innocent against hasty, malicious, and oppressive prosecution," the Supreme Court declared a few years ago. Although this view has been shared by lawmen, lawyers, and judges alike for more than eight centuries, it is a myth. From the time that the earliest form of the grand jury was established in England, in 1164, until the system was abolished there, in 1948, there were only two significant occasions when "the people's panel," as it was called in ancient days, stood up for the people against the English government.

In the American Colonies, grand juries were widely admired, but only because they invariably absolved those who opposed the British (for instance, a number of colonists who burned British property, some of whom sat on the grand jury that considered their offense) and indicted those who sympathized with the British (including four innocent Tory civilians who were charged with murder after the Boston Massacre). By the time the Constitution was adopted, the myth of the grand jury as one of the individual's mightiest shields against tyranny was so embedded in the public mind that the grand-jury system was officially established under the Constitution by way of the Fifth Amendment, which states:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall property be taken for public use, without just compensation."

After adoption of the Bill of Rights, in 1791, the grand-jury system was much honored rhetorically and endlessly abused in practice. In the late nineteenth and early twentieth centuries, state grand juries occasionally asserted themselves to root out corrupt political machines. But on the federal level grand juries have almost always been rubber stamps in criminal prosecutions and in political persecutions.

During periods of national strife or popular hysteria, even the most liberal Administrations have allowed or encouraged grand juries to be used in the most nakedly oppressive ways—the Lincoln Administration to silence critics of the Union cause, the Wilson Administration to illegally imprison and deport several hundred innocent radicals to Russia after the Bolshevik Revolution, the Franklin Roosevelt Administration to harass Nazi sympathizers, and the Truman Administration to permit the anti-liberal vendetta waged by Representative Richard M. Nixon and Senator Joseph R. McCarthy. In the end, the Supreme Court's view of the grand jury as "a primary security for the innocent" is wholly unrealistic. A more accurate view was recently expressed by federal District Court Judge William Campbell, who said of the grand jury in general, "Today, it is but a convenient tool for the prosecutor. . . . Any experienced prosecutor will admit that he can indict anybody at any time for almost anything."

At a little after nine o'clock on the morning of February 13, 1975, Ellen Grusse and Terri Turgeon appeared before Judge Jon O. Newman of the federal District Court in New Haven, Connecticut, to be officially notified that the court had granted each of them use immunity, and that they were now obliged to answer all questions asked by a federal grand jury, which they had been subpoenaed to appear before at ten o'clock that morning. The two women had been subpoenaed by the same grand jury a couple of weeks earlier, after they had refused to talk to F.B.I. agents about two fugitives whom the Bureau had been looking for, with almost no success, for four and a half years. The fugitives were two young radicals named Susan Edith Saxe and Katherine Ann Power, who had been charged, together with three male confederates, with participating in a bank robbery in Massachusetts in September, 1970, during which a policeman had been killed; according to the authorities, the five had robbed the bank of twenty-six thousand dollars to finance an anti-war, anti-government terrorist campaign.

After the robbery, the three men had quickly been captured, and had been tried, convicted, and imprisoned. But the women had disappeared. At some stage in their flight, they had purportedly hidden out in several lesbian and heterosexual feminist communities, in one of which, the F.B.I. apparently believed, they had met and become friendly with Grusse and Turgeon. Grusse and Turgeon had refused to testify before the grand jury, and whether or not they had actually met the fugitives, whether they had known the fugitives as Saxe and Power or by the aliases they were said to have used, and whether or not Grusse and Turgeon had known that the fugitives were being sought for bank robbery and murder was, and still is, unclear to everyone outside the case.

Obviously, though, the F.B.I. officials in charge of the case and the government prosecutor who was directing the inquiry of the New Haven grand jury believed that the two women knew something that might help the government catch Saxe and Power. The prosecutor, Assistant U.S. Attorney William Dow III, vehemently denied that catching fugitives was the government's purpose in subpoenaing the women or in granting them use immunity, and insisted that the grand jury was looking into the question of whether any federal crimes had been committed by Saxe and Power if they had lived for a time in Connecticut, as reported, or by others who might have known them and helped them hide out there or escape to another state. If the fugitives had even entered Connecticut, that made them guilty of interstate flight to escape prosecution, a federal crime, and if others had knowingly assisted them, that made them guilty of harboring fugitives and of failing to notify the police of a known felony, which is misprision of felony, another federal crime under the circumstances.

Dow's denial that his purpose was to obtain information on the whereabouts of the two fugitives was essential for the government, because harboring fugitives and misprision were the only kinds of criminal acts in the case at hand that the New Haven grand jury had jurisdiction over, since under the law it could not investigate crimes committed in other jurisdictions than its own, which was limited to the federal judicial district encompassing Connecticut. Also, it could not legally investigate crimes simply to help the government capture or build a case against someone who had already been indicted, and Saxe and Power had been indicted by both state and federal grand juries in Massachusetts back in the fall of 1970. In a motion to quash the subpoenas, the lawyer representing Turgeon and Grusse in court that February morning charged that the grand jury had two improper purposes: to help the F.B.I. find the fugitives and to help the Department of Justice prepare for its prosecution of them when they were caught. Judge Newman, who had been U.S. Attorney in Hartford for five years before going on the bench in New Haven, dismissed the arguments on these points and denied the motion.

As the two women left the courtroom, their lawyer, a young man by the name of Michael Avery, told them that their situation looked nearly hopeless. He had warned them earlier that if they were granted immunity and still refused to testify, they would probably be found in contempt of court and imprisoned until they talked or the term of the current grand jury ran out, as provided under the use-immunity statute. Federal grand juries normally sit for eighteen months, and the one in New Haven had only a little over six weeks remaining in its term. However, Avery had told his clients, Dow had vowed to have the women subpoenaed again before a new grand jury when they got out of prison; if they refused to answer his questions once more, they could be sent back to prison for the full term of the second grand jury, and the procedure could be repeated until they had served the statutory maximum imprisonment under the use-im-

munity law. That part of the law is unclear, but Avery believed that under it his clients couldn't be imprisoned for more than eighteen months altogether.

"I had never been so frightened in my life," Grusse said later. "We had brought our suitcases, because we thought we'd be taken off to prison that very day. I was sure I was going to prison, and the mere thought of it terrified me almost beyond control." Turgeon was equally frightened. "I was near hysteria," she said later.

Despite the consequences facing them, the two women were determined to remain silent, for they believed that the only way they could preserve their personal integrity—the essence of their humanity and individuality, as they saw it—was by refusing to talk to anyone connected with the government about their private lives. In their public statements at the time, they said that they were basing their refusal to cooperate with the government on the right to "confidentiality in human relationships." While this suggested that they had indeed had some contact with the fugitives or at least with someone who had known them, Grusse and Turgeon contended that such confidentiality, where it existed, was as inviolable as the confidences exchanged between patient and doctor, penitent and priest, or spouse and spouse.

Unfortunately for their legal defense, this concept of confidentiality was not protected by law. The two women also stated that they were innocent of any criminal acts and possessed an inalienable right to be left alone. The government disagreed on all counts, and demanded *its* right—to be told what they knew about suspected crimes. There could be no doubt that the government had that right, legally speaking. Now that the Fifth Amendment right against involuntary self-incrimination, which had been originally designed to protect the individual's integrity, had been eliminated by the use-immunity law, the government possessed the kind of power it had never had before—the power to decide what the *size* of any individual's integrity would be.

When Avery was retained by Grusse and Turgeon, a couple of weeks earlier, he had known little about grand-jury procedures. "I had never done any grand-jury work before, so I had to do a crash study program," he said. "The first thing I learned was that the whole system is amazingly unjust. To begin with, it is based on the judicial fiction that grand-jury proceedings are not entirely criminal in nature until indictments are returned. The reason for this fiction appears to be that if the proceedings were criminal they would have to be governed by the ordinary due-process-of-law rules that govern trials—things like the right to confront one's accusers, to cross-examine witnesses, to summon witnesses on one's own behalf—and that would turn grand-jury hearings into miniature trials.

In other words, some people would have to be tried twice—once by a grand jury when it questions prospective defendants and once by a petit jury when it tries them. That would take a lot of time, and the courts seem far more interested in improving efficiency in our grossly inefficient legal system then they are in the quality of justice. Anyway, it's absurd to claim that grand-jury proceedings are not criminal proceedings, since witnesses may be indicted for crimes that the grand jury is investigating, and since they can be imprisoned if they refuse to talk after being granted immunity. While someone who has never been tried or convicted of any crime can spend as much as eighteen months in prison for civil contempt, someone who faces a criminal-contempt charge that could lead to imprisonment for six months or more has a right to a jury trial and can never be imprisoned again for the same contempt because of the double-jeopardy clause in the Fifth Amendment. So under our grand-jury system those who have been found guilty can be treated more fairly and leniently than those who are innocent under the law."

The denial of due process that troubled Avery the most that morning as he and his clients left Judge Newman's courtroom was that grand-jury witnesses are not allowed to have lawyers present when they are interrogated. Usually they are permitted to have lawyers waiting outside the grand-jury room and are permitted to go out and consult with them before answering questions. But that, too, has drawbacks. "The only justification for not giving grand-jury witnesses the Sixth Amendment right to have a lawyer at their side is that the lawyer may advise them in a way that the prosecutor doesn't want them to be advised," Avery has explained. "But the basis for the right to counsel is precisely to allow the individual to have that kind of advice when confronted by all the immense powers of government."

Moreover, he went on, the awkward and time-consuming practice of allowing witnesses to leave the grand-jury room to consult with their lawyers makes what

should be a *right* to counsel seem to grand jurors to be a *privilege*, and if that privilege is requested very often they are bound to become annoyed and perhaps prejudiced against the witness. And, of course, a frightened and ignorant witness may not even assert the privilege when asked a seemingly innocent question that is actually a legal trap. Among the other drawbacks of the system, Avery said, is that since a grand jury is under no obligation to tell witnesses what the subject of the inquiry is, they often don't know whether they are suspects, whether they have committed some crime that they were unaware of and now may inadvertently confess to, or whether they are being questioned about the activities of others. Under these uncertain circumstances, a witness who answers *anything* asked by a grand jury may be taking a grave risk.

Ordinarily, prosecutors don't tell witnesses whether or not they are "targets" of the grand jury's investigation, that whatever they say may be used against them, that they can remain silent unless they are given immunity, or that they may be prosecuted for perjury if they testify and lie. In addition, if one answers *any* question asked by a prosecutor (or, rarely, a grand juror) before a grand jury—apart from one's name—one may automatically waive the right to refuse to answer any other question. (Called "opening the door" by lawyers, this kind of waiver was established by only one federal-court case, and has not been fully tested judicially.) Witnesses who go before grand juries without consulting a lawyer, as many do, are unlikely to be aware of this rule—or snare—and may end up being forced to testify against themselves without having even the slender advantage of being given use immunity beforehand.

Grand jurors are themselves rarely aware that the elementary principles of fair play—or "fundamental fairness," which the Supreme Court requires of all government practice in criminal cases—are suspended during their hearings, because when new grand juries are convened judges rarely tell the members anything about their supposed "historic function," or much of anything beyond their duty to indict those who seem guilty. Accordingly, grand jurors are usually the uninformed assistants of the prosecutor rather than members of a people's panel, and he can manipulate them more or less as he pleases.

An unscrupulous prosecutor, for instance, can easily make a witness who tries to assert his exceedingly limited rights look guilty merely for asserting them. If a prosecutor asks a witness a seemingly innocuous leadoff question such as "What newspapers do you read?" or "What did you have for breakfast this morning?" and the witness refuses to answer on the ground that his response may tend to incriminate him—meaning, of course, that if he waives his right to silence by answering that harmless question he will have to answer a lot of possibly incriminating ones—the grand jurors are apt to conclude that the witness is simply obstructing justice. Also, prosecutors can easily browbeat witnesses by embarrassing them. Shortly after Turgeon and Grusse had been questioned by the New Haven grand jury the first time, a federal grand jury in Lexington, Kentucky, which was looking into reports that Saxe and Power had hidden out in a lesbian community there, allowed the U.S. Attorney in charge to ask several women who were subpoenaed and put under oath, "What is your sexual preference?" For refusing to answer this question, among others, the women were found in contempt and sent to prison. And, as Avery had warned his clients, once they were both given immunity each of them could be forced to testify against the other, and thereby provide the government with "independent" evidence—if such existed—against both of them.

Assistant U.S. Attorney Dow impressed Turgeon and Grusse as being anything but vindictive or ruthless in their case. When they first appeared before the grand jury, he went out of his way to warn them of various matters that he was under no obligation to reveal—that they were not targets of the grand jury's investigation, that they could still be prosecuted if they revealed any crimes they had committed, that they had the right to plead the Fifth Amendment and remain silent unless they were granted immunity, and that they could be prosecuted for perjury if they testified and lied.

Of course, he must have known that Avery had already told his clients about these matters. Even so, the women regarded Dow with sympathy and even fondness. "He's a decent man—very personable and affable," Grusse said. "I think he really believes that what he's doing is right. But what he believes is right is that he should do everything in his power to catch a couple of people who are accused of bank robbery and murder. And to do that he will close his eyes to the real problems in this case—the political and legal issues involved and the personal rights being sacrificed. Our individual rights, our sense of our own integrity, our duty to ourselves mean nothing to him. All he can talk about is that

dead policeman who left nine kids. I'm sorry about that, too, but I had nothing to do with it, and I have nothing to say now that Dow has any right to know."

Both she and Turgeon felt that although Dow was fair to them, he might as well have been unfair, since his purpose was to force them to betray themselves or go to prison. In Turgeon's view, Dow was also a victim of the F.B.I.'s frantic search for Saxe and Power. "I don't think he set out to do this to us," she explained. "In fact, I don't think the F.B.I. set out to do it, either. I think the Bureau was really embarrassed at not being able to catch two little women for all that time. The whole thing just got out of hand for the F.B.I. and in the end for Dow, too. Because we stood up to the system, they came to see us not as a couple of helpless individuals but as two tough radicals, maybe even criminals, who were nearly as bad as Saxe and Power. When the search for them began, the F.B.I. had no idea of how broad and deep the women's movement was. I don't mean the women's-libbers, the bra-burners, and the equal-pay advocates. I mean the serious revolutionaries who believe that society has to be turned upside down before there can be any true equality for women and any real justice. I think this discovery really scared the F.B.I., and then it saw the Saxe-Power investigation as a cover for finding out more about this radical 'network,' as they call it. So all we are—and maybe all Dow is—are tools in this investigation of the women's movement."

After Judge Newman gave Grusse and Turgeon immunity on February 13th, the two women, together with Avery and Diane Polan, his legal assistant who did most of the research for the case, left the courtroom—on the second floor of the New Haven post-office building—and headed down the broad, marble-floored corridor toward the grand-jury room around the corner. When they got there, Avery held Grusse and Turgeon in a huddle with his arms around their shoulders and whispered some last-minute instructions to them. He had little encouragement to offer, because he had been convinced by his study of the grand-jury system that his clients' chances of remaining both silent and free were slight. "I knew that I was legally helpless," he said afterward. "It was the most frustrating and discouraging experience I'd had so far in practicing law. It's terrible for a lawyer to have to stand there and not be able to do anything for a client—really nothing at all except go through the motions nad hope that the other side will make a mistake. A lawyer shouldn't get too emotionally involved with clients, because it destroys his objectivity and effectiveness, but I couldn't help being involved with these women. I really sympathized with them."

Dow summoned Turgeon before the grand jury first, put her under oath, and asked if she understood that the grant of immunity supplanted her Fifth Amendment right to remain silent, and that if she testified and lied she might be prosecuted for perjury. Turgeon nodded, and Dow put his first question to her: Had she appeared before this same grand jury on January 28th? At first, Turgeon assumed that this was one of those seemingly inoffensive questions designed to trap her into waiving her right to silence, but then she realized that the grant of use immunity had deprived her of that right.

Following the plan she and Grusse had drawn up with Avery, she wrote down the question, then asked if she could consult her lawyer. The foreman of the grand jury gave her permission—after a glance at Dow, who nodded, almost imperceptibly—and Turgeon left the room and returned in a few minutes carrying a slip of paper on which Avery had written her answer, which she read to the grand jury: "Upon the advice of counsel, I respectfully refuse to answer the question on the grounds that it and these proceedings violate my rights under the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution, and under the United States Code, and for the reason that I believe I have been the object of illegal electronic and personal surveillance by the government, and for the reason that this proceeding and this question constitute an abuse of the grand-jury process."

It was a constitutional mouthful, but it was largely irrelevant, since courts have generally treated grand-jury proceedings as being exempt from the ordinary constitutional protections. Still, the statement contained the two legal issues that were to end up being at the heart of the case: whether or not there had been illegal eavesdropping, and whether or not there had been abuse of the grand jury. The first point was a new one, and Avery raised it both because he and his associates in the case believes there was a strong possibility that the government had illegally kept them or their clients under surveillance and because the Supreme Court had ruled in 1972, by way of Gelbard v. United States, that when the government is asked by grand-jury witnesses about its use of illegal sur-

veillance as a basis for the questions asked them, the failure to deny the use of such eavesdropping relieves the witness of all obligation to testify. (This ruling, which was opposed by all four of Nixon's appointees to the Court, was based not on constitutional grounds but on statutory grounds—that is, on the intent of Congress as expressed in a 1968 act governing electronic surveillance.)

Dow then asked Turgeon if she knew Saxe and Power; she again requested permission to see her lawyer, went outside, came back into the room, and gave the same response. Dow went on to describe the crimes that Saxe and Power had been charged with, and said, "It is believed that either or both Power and Saxe lived for a period of time in Connecticut, and that you knew them, and that you may have information as to other people who knew them who might have assisted or aided them while they were in this state, and [who] might otherwise be guilty of some criminal involvement with them. That is the purpose of this grand-jury inquiry. I'd like to know when you last saw either [of them], where that was, when that was, who they were with." After going through the same routine, Turgeon gave the same answer. This time, Dow warned her that she faced contempt-of-court charges, and then asked several more questions that were slight variations of the main question, all of which Turgeon responded to with the same answer. Finally; she was dismissed.

Dow asked Grusse somewhat different questions about Saxe, Power, and anyone who might have known them in Connecticut. Grusse gave the same answers as Turgeon had, but then added a long statement at the end: "Furthermore, I firmly believe that I have been called before the grand jury because I have chosen to exercise my right not to speak with the F.B.I. My decision not to speak to them is based on the moral belief that the investigation the government is engaged in will violate my basic constitutional and human rights. . . . I believe that every person has the right to keep her affairs private without intervention by government agents. I am also aware that the government, acting through the F.B.I. and grand juries, has used inquiries such as this to harass and gather information on political persons in recent years, and I do not care to be a party to that process. It's also true that there is no basis for investigating any criminal activity in the state of Connecticut, and that the grand-jury system and you, the jurors, are being used as tools of the F.B.I. to further their investigation. This is not a legitimate use of the grand jury, and I respectfully request that you excuse me on those grounds."

Dow asked Grusse if she intended to refuse to answer all questions. Before he could finish, though, the foreman unexpectedly broke in and said, "Could I ask one question?" Looking surprised, Dow nodded, whereupon the foreman turned to Grusse. "Do you understand the description of the reason that you are being called here, that Attorney Dow just stated?" he asked her. "Do you understand that the purpose of this grand jury is to investigate a crime that was committed in Boston in 1970, and your possible knowledge of any of—of any of the facts concerning the whereabouts of the people, the perpetrators of the crime? Do you understand that is the reason why you are being asked to be here?"

Of course, the foreman's questions, or statement, about the grand jury's purpose was not only at odds with Dow's statement about that purpose, it was a clear admission that the grand jury was improperly seeking to help the government catch a couple of fugitives—unless the foreman had no understanding of what had been going on during the grand jury's investigation of the Saxe-Power case.

Dow hastily interrupted to say, "Let me amplify that to a degree, if I could, Mr. Foreman, to indicate that the scope of the inquiry goes beyond the crime itself that was committed in Boston, but activities of the individuals believed to have committed those crimes in the state of Connecticut, such as involving—such as possible assistance to those suspects by other individuals in the state. Is that your understanding?"

Although Dow's flapping syntax put the question beyond understanding, the foreman replied, "That's right."

Apparently, Dow had meant to say that the grand jury's inquiry included crimes committed in Connecticut, which put the witnesses under the jurisdiction of the grand jury. But his "amplification" did not diminish the significance of the foreman's statement, which had unmistakably made clear that in his view the purpose of the grand jury was to get information about a crime committed in another jurisdiction and about two people who had already been indicted for that crime—a doubly improper purpose. Of course, the foreman could have got this impression from only one source—Dow, who had decided what evidence was

to be presented to the grand jury. And yet no one who had dealt with Dow in the case from the witnesses' side doubted his decency, sincerity, or devotion to duty. "Dow spent several years working the other side of the street as a public defender in Washington, D.C.," one of the lawyers in the case said shortly after Grusse and Turgeon were granted use immunity. "He's an honorable fellow, and he doesn't like to think of himself as an oppressor. That's why he keeps talking about the nine kids that policeman left. He's trying to convince himself that he's behaving properly so he can uphold his liberal credentials. At the start of this case, we thought he would push it a little to satisfy his superiors and then would realize that he was doing something wrong and would drop it. But he didn't. He's pushed it all the way. His rationalization is that this is a local investigation of law-breaking in this district, but it's clearly not that. Whatever Dow's own goal is, the Feds are obviously intent not on just finding Saxe and Power but on uncovering nationwide radical connections in the women's movement."

Dow's reliance on the legal but fundamentally unfair instruments of official inquisition—use immunity and the unbridled power of the grand jury—to achieve the laudable goal of bringing to justice two people accused of vicious crimes reminded an observer of Justice Louis Brandeis's famous warning: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

After Grusse and Turgeon refused to testify, Dow filed a motion with the court asking that they be ordered to answer the grand jury's questions, and Judge Newman set a hearing on the motion for the next morning. At the hearing, Dow put on the stand the court reporter assigned to the grand jury, and he read his stenographic notes of the questions asked by Dow, the witnesses' refusals to answer, the foreman's statement about the grand jury's purpose, and Dow's attempt to "amplify" it. When Avery got his turn, he bore down on the foreman's remarks to prove that the grand jury was being improperly used by the government. It was clearly the prosecutor's intention, Avery said, to turn over to the F.B.I. any evidence presented to the grand jury about Saxe and Power, which would violate the strict secrecy imposed by law on grand-jury proceedings as far as any member of the jury or any official of the government was concerned.

Judge Newman regarded both arguments with indifference, and at the end of the hearing he said, "Essentially, when all is said and done, it seems to me as if the witnesses are really asserting what they conceive to be a constitutionally protected right of privacy. It's understandable they may have a personal preference not to assist a grand jury [in] uncovering evidence of the commission of federal crimes, but their preference must give way to the legitimate power of the grand jury to have their testimony. . . . There is no showing before me whatsoever of any harassing or unnecessarily personalized inquiry. The situation might be different if in a very extraordinary case intimate personal details were being probled for no apparent legitimate purpose. That's not this case at all." Newman then instructed Dow to write down the questions he had asked the two witnesses, and said that he would order the women to go back before the grand jury later that day and answer them or face contempt of court. At two o'clock that afternoon, Grusse and Turgeon appeared before the grand jury and refused to answer the questions on the same grounds. Afterward, Dow filed a motion asking the court to find them in contempt, and Judge Newman set February 18th, four days later, for a hearing on that motion.

Early on the morning of the eighteenth, Avery and David Rosen—another young New Haven lawyer who worked with him on the case—filed a forty-two-page brief setting down all the legal issues that they had not had time to present to the court formally. They also filed a motion claiming "unlawful electronic surveillance" and demanding that the government deny there had been taps on any of the telephones used by the principals, their lawyers, and a few associates who had been involved in the case. To support this motion, Avery and Rosen filed seven affidavits indicating why they thought there had been wiretapping of certain telephones by the government.

In reply, Dow the same day filed a half-page affidavit swearing that he had checked all the names listed on the affidavits, and adding, "I hereby state that there has been no electronic surveillance or interception of wire or oral communications of those individuals named." Just before the February 18 hearing, Avery subpoenaed an F.B.I. agent working on the Saxe-Power case in Connecticut, but at

the hearing Dow opposed the subpoena, and Judge Newman asked Avery to explain his reasons for wanting the agent to testify. Avery replied that he merely wanted to ask him why he had requested that Dow summon Grusse and Turgeon before the grand jury in the first place, and to find out whether the F.B.I. already had the information that it was seeking from the two women.

In other words, Avery hoped to show that the F.B.I. was more interested in harassing the witnesses than in getting their testimony. Moreover, Avery went on, he wanted to call Dow to the stand, to ask him whether he intended to pass on to the F.B.I. whatever might be learned from Grusse and Turgeon, despite the rule imposing secrecy on everyone involved in grand-jury hearings except the witnesses Judge Newman denied both requests. "I am satisfied that the representations concerning the inquiry of the grand jury as to possible violations of federal law in the District of Connecticut are sufficient to justify the grand jury asking the particular questions that were put to these witnesses," he said. Then he announced that he would deliver his finding on the contempt motion the following day.

In court the next day, Judge Newman informed Avery that the government had just submitted to him a sealed affidavit containing the evidence it possessed to demonstrate its reasons for asking Turgeon and Grusse the questions posed to them by Dow before the grand jury—reasons that included some evidence against Grusse and Turgeon themselves. (Although the judge in such a case can examine a sealed affidavit, neither the witnesses nor their lawyers are permitted to see it.) The government, Newman added, had promised the court that if it sought to indict the two witnesses for any crimes, the evidence it now had would be presented before a grand jury other than the one they had so far refused to testify before.

Then, ruling that Dow's denial of illegal surveillance was sufficient and that there was no reason to believe that the grand jury was being improperly used or that the witnesses were being harassed by the F.B.I., the Judge found Grusse and Turgeon in contempt of court. He ordered them "remanded to the custody of the United States marshal until such time as they elect to purge their contempt by testifying, but in no event for longer than the expiration of the term of the grand jury on April 1, 1975." Finally, he delayed execution of his order for five days, to allow the women time to appeal.

"Our feeling of helplessness is just incredible," Turgeon said afterward. "In a case of this sort, it's really hard to feel at all like a person. We can't express ourselves in any way. Everything that is said in court has to be said by our lawyers. They've been wonderful, but when the values we hold dear are translated into legal language they lose all personal meaning. They become so abstract that everyone forgets there are people involved—except those people. The frustration is awful, because the truth is lost in all the legalisms. The basic truth is that we have the right to silence. The issues of grand-jury abuse, wiretapping, harassment by the F.B.I. are beside the point. But the truth doesn't matter. What matters is power, and all the power is on the other side."

On February 20th, the day after Judge Newman's decision, Avery and Rosen filed a notice of intent to appeal it and another motion for a stay in carrying out the contempt citation until the appeal was ruled on. Then Dow filed a motion asking the Court of Appeals to deny any delay, on the ground that the contempt law prohibited this if an "appeal is frivolous or taken for the purposes of delay"—both of which, Dow contended, applied to the case at hand; moreover, he said, since the law requires the Court of Appeals to rule on such an appeal in not more than thirty days, if that court took its full allotment of time there would be only eleven more days until the term of the grand jury ran out, which "would render the adjudication of contempt meaningless." On February 21st, the Court of Appeals rejected Dow's arguments, and on the twenty-fifth the court gave the two women two days to prepare their appeals for oral argument before a panel of three judges.

Since Avery was occupied with other cases in New Haven, he decided to call in a specialist in appellate and constitutional law—a young woman named Kristin Booth Glen, whom he had known for years. Glen had got her early legal training in the law offices of Leonard Boudin, one of the most accomplished legal practitioners on the political left, and then she taught at New York University Law School and worked with the National Lawyers Guild, in New York, until she went into private practice.

The Guild, which was set up forty years ago, and played a major role in defending victims of congressional witch hunts against the left in the early nineteen-fifties, had responded to the Nixon Administration's misuse of the grand jury

system to persecute the President's political opponents by setting up a group to study the legal ins and outs of that system. By the time the Grusse-Turgeon case came along, the standard legal work on the subject was a thick Guild handbook, which was used by lawyers on both sides in such cases. Armed with the handbook and assisted by consultants at the Guild, Glen set up a legal command center in a friend's office in New York, and for two days and most of two nights—the extraordinarily short time allotted by the Court of Appeals—she worked on the crucial issue of electronic surveillance for her part of the appellate brief. Back in New Haven, Avery, Rosen, Polan, and a battery of students from Yale Law School worked on their part of the appeal—abuse of the grand-jury system. "It was an around-the-clock job," Polan said later. "We had to drop everything else at the office to work on the brief."

In the end, the brief ran to forty-seven pages, and ranged over a wide variety of complicated technical matters. Overall, though, it concentrated on Avery's two major points: that the government's denial of surveillance had been inadequate and that there had been flagrantly improper use of the grand-jury process. On the first issue, Glen pointed out that the government's "search" of its surveillance records had consisted of a few telephone conversations between Dow and the F.B.I. agent in charge of the Saxe-Power case in Connecticut, who had reported that his surveillance records showed no sign of any surveillance's having been conducted on Grusse, Turgeon, or any of the lawyers and legal assistants in the case.

Apparently, Dow had not asked the agent to check any records in the offices of the F.B.I. or other government agencies in Washington that commonly engage in electronic surveillance. Citing a 1974 decision of the same court she was appealing to—the Court of Appeals for the Second Circuit—Glen asserted that its own ruling then had required a government prosecutor who was challenged on the issue of illegal surveillance to show by affidavit each of the agencies that was checked and its specific written denials that any conversations of anyone using any of the telephones involved had been overheard. (Government wiretapping and bugging, both legal and illegal, have become so widespread that the Second Circuit often requires what is called an "eight-agency check"—of the F.B.I., the Secret Service, the Internal Revenue Service, the Customs Service, the Drug Enforcement Administration, the Postal Service, the Criminal Division of the Justice Department, and the Bureau of Alcohol, Tobacco, and Firearms. Actually, though, at least twenty-six Federal agencies conduct surveillance of private citizens.)

On the issue of improper use of the grand jury, Avery quoted the foreman's statement about the New Haven grand jury's purpose, which, he said, constituted "a prima-facie case of abuse of the grand-jury function." Quoting the Second Circuit's opinion in an eleven-year-old case on this issue, he reminded the court that it had said there, "It is improper to utilize a grand jury for the sole or dominating purpose of preparing an already pending indictment for trial." Once there was such evidence of abuse as the foreman's admission, Avery argued, Judge Newman had erred in depriving Grusse and Turgeon of their right to due process of law in the contempt hearings by refusing to let them call witnesses on their behalf—that is, the F.B.I. agent and Dow—to ask why they had been subpoenaed in the first place. Further, he said, the District Court had jurisdiction over the grand jury, and Newman had also erred by failing to halt the government's use of a grand jury in one federal district to investigate crimes committed in another district, as well as by failing to prohibit the government from violating grand-jury secrecy by passing on information obtained in secret proceedings to agencies like the Department of Justice.

In reply, Dow submitted a twenty-seven page brief, in which he declared his affidavit denying the use of electronic surveillance was sufficient under the rules laid down in that circuit. "[The witnesses'] claim that the grand jury is preparing an already indicted case for trial, even if true, does not constitute an abuse of the grand jury," he went on. "While it is often argued that a grand jury cannot continue to hear evidence in a case in which it has already returned an indictment, the cases most often cited to support that proposition do not do so." He then analyzed the cases most often cited, and concluded that as long as a grand jury's investigation of indicted suspects was not its "sole or dominant purpose," the courts could not interfere with the process. Nor, he said, could he find a "court decision which would prohibit a grand jury from investigating the whereabouts of fugitives for the sole purpose of achieving their apprehension."

And, finally, he contended that it was wholly proper for him to pass grand-jury evidence on to an agency like the F.B.I.

The issues were clearly drawn, and the Court of Appeals chose to ignore them altogether. At the end of the oral arguments, on the afternoon of February 27th, the three judges recessed for ten minutes and then reconvened to read their two-to-one decision upholding the government—a decision that had obviously been prepared before the oral arguments. In the formal opinion that was filed later, Judge William Timbers, formerly chief judge of the District Court in Connecticut and a Nixon appointee, spoke for himself and Judge J. Edward Lumbard, a former U.S. Attorney.

The opinion was based on three points. First, Timbers said, there was "the strong public policy reflected in the statute" enacting contempt-of-court penalties for refusing to testify after being granted use immunity and in the "congressional concern over disruption of smooth and efficient operation of the grand-jury system." Of course, "the strong public policy" was the Nixon policy of destroying his "enemies" by way of use immunity and the power of the grand jury. Federal courts traditionally examine what is known as the "intent" of Congress in interpreting its legislation, and Judge Timbers took the overwhelming congressional support for the bill that the contempt and use-immunity provisions were part of—the Organized Crime Control Act of 1970—as evidence of Congress's firm intent.

As it happened, though, neither use immunity nor any other part of that act received more than cursory attention by Congress, whose members knew that they risked defeat at the polls if they voted in an election year against anything called the Organized Crime Control Act when the public's fear of crime, which the Administration had largely created and had then relied on when it proposed the legislation, was at such a feverish height. Actually, many of the members who voted for the bill—only twenty-six representatives and one senator voted against it—trusted that the courts would undo the effects of their cowardice by overturning many parts of the law, which was the most malevolently repressive piece of legislation to be approved by Congress in a generation.

In short their intent was simply to stay in office. By endorsing Congress' timidity and carelessness, Judge Timbers failed to recognize the clear intent of the Framers of the Constitution in establishing an independent, nonelected federal judiciary—to serve as a check on demagogic excesses committed by the popularly elected legislature. And his argument about Congress' concern for the efficiency of the grand-jury system betrayed an ignorance of American history, for no one had ever conceived of any of the safeguards set forth in the Bill of Rights as an attempt to make our law-enforcement system more efficient.

Timbers' second point was that his court had already dealt with the issues raised in the Grusse-Turgeon case the year before through In re Persico. In that case, a grand-jury witness had refused to answer a question based on electronic surveillance that had been approved by a court before it was undertaken and had demanded a hearing, which was denied, on whether the admitted wiretapping violated the law. In Persico, the Second Circuit had ruled that in denying Persico's request for a hearing the District Court had acted properly, in line with "the traditional notion that the functioning of the grand-jury system should not be impeded or interrupted." Now Timbers cited Persico and said that "the present case is an even more compelling one for adhering to the strong public policy of this circuit of not permitting disruption of grand-jury proceedings absent compelling reasons." He added, "We find no such compelling reasons here." Glen had argued in her appeal that Persico was "entirely inapposite"—a point firmly upheld by the dissenting judge in the Grusse-Turgeon case, James Oakes, another Nixon appointee, who has turned out to be one of the most liberal judges of the federal bench today—because there had been no evaluation of allegedly illegal wiretapping by a "neutral and detached magistrate" in the case at bar, whereas in Persico the wiretapping had been approved beforehand by a judge.

Finally, Timbers found Judge Newman's decision that Grusse and Turgeon were in contempt and must go to prison "a striking example of the balancing by a conscientious and comprehending district judge of the interests of the appellants as witnesses before the grand jury, on the one hand, and, on the other of the public interest." Judge Newman's decision he added was "unassailable." There is probably no judicial device that is more assailable than the so-called balancing test in which the interests of the state and the interests on the individual are

weighed against each other. First used by the Supreme Court during the anti-Communist hysteria of the early nineteen-fifties to avoid facing the basic issue of whether speech was to be free in this country, the test is invariably resorted to by the most pro-state judges to justify whatever the government wishes to do. A striking example of judicial cowardice, the test might well be used in Russia or China today, for essentially it provides an opportunity to put a mask of fairness on tyranny. When a judge places all of society on one pan of the scales of justice and one person on the other pan there cannot be much doubt about the outcome. In fact, the only time that the test works in favor of the individual is when there is nothing at all to put on the government's pan.

It takes four justices of the Supreme Court to grant certiorari—that is, to agree to review a case—and ordinarily it takes the Court several months to get around to deciding whether a petition for certiorari should be granted, and then several more months may pass before the Court reviews and decides a case. But when a citizen stands in danger of suffering irreparable injury by the state, the justice assigned to the judicial circuit involved can grant a stay of any prosecution or imprisonment until the full Court has had a chance to consider a petition for certiorari. To give Grusse and Turgeon an opportunity to take advantage of this rule, the Court of Appeals allowed them six more days to appeal to the justice responsible for the Second Circuit, Thurgood Marshall, and Glen prepared an emergency appeal, which Polan filed at his chambers on March 4th. Glen's brief asking for a temporary stay was much the same as the appeal she had written except that now she pointed out the different rulings by different circuit courts on the issue of what was an "adequate" denial of illegal surveillance by the government in such cases, and asked the Supreme Court to resolve the question once and for all. Then she came up with a balancing test of her own on behalf of her clients. "Because their loss of liberty can never be justly compensated, petitioners will be irreparably and irrevocably injured if the stay is not extended while their serious constitutional claims are being litigated," she said. "If on the other hand, the stay is extended to avoid certain irreparable injury to the petitioners, the government will not suffer unduly." And if the government was serious in contending that its purpose in demanding testimony from the two witnesses was to uncover crimes committed in Connecticut rather than to capture two fugitives, Glen pointed out in conclusion, there was no great hurry, for "the only injury which can be justly claimed by the government is inconvenience." Justice Marshall rejected the application on the following day without comment.

At four o'clock on the afternoon of March 5th, Turgeon and Grusse turned themselves in to the U.S. marshal at his office down the hall from the grand-jury room in the New Haven post office. A matron searched the women for weapons, and then the marshal handcuffed each of them and chained them together at their waists. He apologized for the manacles, explaining that they were required by federal rules. "It's unbelievably stupid," Avery said later. "If they wanted to escape, they wouldn't have turned themselves in at all. They would have taken off when Justice Marshall turned down their application that morning. It's just another official attempt to humiliate and degrade people who stand up to the system."

When the prisoners were led out of the marshal's office, they saw heavily armed policemen in riot gear stationed along the corridor, and in the parking lot behind the post office there were several police cars and more riot police. "Obviously, they had come to view us as hardened, dangerous criminals," Grusse said. "And we were merely two women who had vowed not to discuss their personal lives with anyone."

On the way out of the building, the group passed Dow, and Grusse lifted her manacled arms to him and said, "Thanks a lot, Willie."

Dow looked stunned, *I* didn't do it," he said, It's not *my* fault."

The Connecticut Correctional Institution at Niantic, about fifty miles east of New Haven on the Connecticut coast, is a state prison for women that houses a few federal prisoners under contract with the U.S. Bureau of Prisons. During the ride to Niantic, the prisoners sat in the back of the marshal's car, a green sedan, while he drove and the matron sat beside him. "I was absolutely terrified," Turgeon recalled afterward. "All I knew about prison life was those old movies and the stories about Attica—bars and cells and sadistic guards and vicious criminals. There was nothing, absolutely nothing, in my past experience to prepare me for what lay ahead, and I was paralyzed by fear." Grusse was, too. "I knew that most of the other inmates would be black and poor," she said. "That really frightened me, because I had my own stereotyped idea of what such women

would be like—tough and contemptuous and ready to hurt anyone they didn't like. I feared that they would resent me because I'm white and educated—in short, privileged. And I was frightened most of all by what they might do to us when they found out that we were lesbians."

Their fears on all of these scores proved baseless. The prison turned out to be an "open facility." There was no fence around its spacious grounds, the "cell-blocks" consisted of five cottages, each housing twenty to thirty inmates, and the "cells" were private rooms for each inmate; the guards were generally decent; and the other inmates, most of whom were black women convicted of prostitution or narcotics-related violations, were friendly. "They helped us learn the ropes and settle into the place," Grusse said. "And while they were curious about our being gay, they gave us no trouble about that. In fact, they gave us no trouble at all. They even supported our refusing to talk, because somebody's talking was why most of them were in prison."

Turgeon and Grusse were assigned to tutor inmates in basic mathematics during mornings and to work in the prison library during afternoons. "Although prison life wasn't anywhere near as bad as I had expected, it was terrible," Turgeon said. "Worst of all, they treat you like a bad child who has to be controlled or helped all the time. You're considered to be incapable of making a decision on your own, and if you question anything, they tell you that you just don't understand the reasons behind it. Usually there isn't any reason—just bureaucratic rules that exist for their own sake. And, craziest of all, they never tell you what the rules are until you break one. They kept telling us to act like adults, but every time someone did—by taking responsibility of one kind or another, which is what adulthood means—they would say, 'You're causing problems.' The simplicity of their idea of 'correction' is unbelievable. When we arrived, they even taught us how to take showers. They said, 'You turn on this faucet for hot water, this faucet for cold water, and then adjust them until you get the temperature you want for your shower.' I thought we'd been taken to a madhouse. And when you get angry, they simply give you tranquilizers to control it.

"The whole system is aimed at control, but to no purpose. And the boredom is stupefying. Each cottage has a television and a stereo set, which are always on full blast. The inmates are mostly young, and they shout and talk a lot. You can go to your room for privacy, but you can never get away from the incessant noise, except at night, and then you're sleeping. You can take a walk, but only if a guard goes along. There's a pretty little lake on the prison grounds, and I longed to go sit by it alone. They wouldn't allow that. A guard had to go with me. In the end, I felt much the same at Niantic as I had in the courtroom—helpless. It's as if society's true purpose is to destroy every shred of individuality in anyone who stands up to it. And it was just that—my individuality—that had brought me there and that I was trying so hard to preserve."

On March 27th, after the women had been in prison for three weeks, Susan Saxe was captured while walking along a street in Philadelphia. Five days later, the term of the New Haven federal grand jury ran out, and that afternoon Grusse and Turgeon were released from prison. The marshal drove up from New Haven to deliver their release papers, but then, as the two women stepped out of the prison administration building into freedom, he handed each of them a subpoena to appear before a newly convened federal grand jury in New Haven on May 6th, five weeks away.

A Grand Jury Defense Committee, which had been set up in New Haven to publicize and create opposition to the government's pursuit of Grusse and Turgeon, kept public interest focussed on their case, and when they returned to New Haven they found that they had become celebrities among members of the women's community there. Once word of the new subpoenas and the threat of sixteen or seventeen months more in prison if the two again refused to testify got around, their fame spread more and more widely. The publicity made the two women uneasy, because they valued their privacy more than ever now, and they feared the damage that such publicity might do to them personally. "I had to look at myself very closely to make sure that what I was doing was for good reasons and wasn't an ego trip or the result of a desire to become a celebrity," Turgeon said. "I'd never been one to analyze myself, but this time I had to.

When I thought about it, I realized that the stand I was taking had nothing to do with my ego, because being a celebrity of any kind was the last thing I wanted. I just wanted, and want, to be left alone to live in peace in my own way. I decided then that I had to do what I was doing because it was right. When I realized that I would not willingly do anything that I considered wrong,

I knew that I was sincere in my decision to remain silent. Since I didn't think that anything I had done was wrong, how could I help the government prove that what I had done *was* wrong? If the government disagrees with something I've done, then it's up to the government to prove that something against me. But the government wants *me* to prove I was wrong. That is simply and fundamentally unjust."

To Grusse, the effects of being a celebrity were also distasteful. "Some people seem to see us simply as two women who refuse to talk, so we're not individuals at all," she explained. "Some others see us as superstrong celebrities. But that's not the way we see ourselves at any time. When we are invited to speak to women's groups in other cities, there are those who act as if we have perfectly formed views, clear politics, absolute strength. In other words, people try to make us into leaders. We aren't leaders, and we don't want to be. We're not allowed to be what we are—often confused and very frightened women. Also, a few people now seem to feel that they have a right to ask the kinds of personal questions that I never would have allowed anyone to ask me before. I guess that's because we're no longer private individuals.

We're public figures, and people feel we belong more to them than to ourselves. The effect has two sides. On the one, I'm more willing to express myself in terms of what's happened to me, because I feel that it's urgent to let people know that this kind of thing can happen to *them*. This has opened up my private space to others. But, on the other side, my experience has made me less willing to talk about myself, because all this limelight has destroyed my privacy, and I constantly try to pull back out of the publicity in order to be myself. Besides all this, people continually come up and ask me for advice. I find that frightening, because I'm not really a different person than I was before anyone asked me for advice. They seem to think that because I'm sure of *my* course I can help *them*. All this has made it very hard for me to be me—just an ordinary person, which is what I am and what I want to be."

At nine o'clock on the morning of May 6th, an hour before Turgeon and Grusse were scheduled to appear before the grand jury, their lawyers submitted three motions to Judge Newman. The first asked him to quash the subpoenas, on the ground that the government was improperly using the grand jury. The second asked that he issue "protective orders" instructing the government to submit to the court all the evidence it had against the two women up to that day. (As it happened, Dow submitted to the court that same morning another sealed affidavit containing the government's evidence up to that point.)

The purpose behind Avery's request was to make sure that the evidence the government had at that time would be separated from the evidence it might obtain if the women testified before the grand jury, so that if they were subsequently tried the defense would have a better chance of making sure that the prosecution was not using any evidence based on their coerced testimony, which would violate the use-immunity law's stipulation that trial evidence must be independent of such testimony. The protective orders that Avery asked for would also prohibit the government from seeking indictments against the witnesses by the same grand jury that they were shortly to appear before; would forbid the prosecutor to pass on any information he got from the witnesses to other government agencies, unless the government demonstrated that it was essential for the grand jury's deliberations, and then gave the witnesses a chance to oppose any transfer of such information; and would assure the witnesses of the right to have a transcript of their testimony.

Avery's third motion asked Judge Newman to compel the government to disclose any surveillance. Avery contended the government should be compelled to conduct a complete search of its records on a total of forty-four telephones, and to submit to the court detailed affidavits from those who conducted searches of records in various governmental agencies showing whether or not there had been any surveillance in the Grusse-Turgeon case. Avery attached to this motion several affidavits sworn to by his clients, himself, Polen, Rosen, Glen, and various other lawyers directly and indirectly working on the case who claimed that their telephones had been acting strangely. The most persuasive of the affidavits was the one signed by Glen, who reported that the office in New York that she used while preparing the Grusse-Turgeon appeal had been leased by a lawyer who was subsequently notified by a judge of the New York County Supreme Court, in a separate case, that he had been the subject of a national-security wiretap by the federal government. "This disclosure obviously raises a very substantial likelihood that calls with regard to these witnesses and my representation of

them were overheard," Glen stated in her affidavit. Judge Newman denied the motion to quash the subpoenas, and reserved decision on the other motions.

Shortly after ten o'clock that morning, Grusse and Turgeon went before the new grand jury. Each was asked the same list of nineteen questions—most of which pertained to what they might have known about others who might have known Saxe and Power in Connecticut—and each answered by refusing to testify, on the grounds they had cited before the previous grand jury. Prepared for this, the government asked the court for an order granting use immunity and compelling the witnesses to testify, and Judge Newman complied. The next day, May 7th, they went back before the grand jury and again refused to testify. Grusse added a new statement at the end of her final refusal: "This matter has been brought before the grand jury for the sole, dominant purpose of apprehending Katherine Power, an alleged fugitive, and of gathering evidence to use against Miss Power, and against Susan Saxe in the trials of indictments which have already been issued. My subpoena is also part of a coordinated campaign by the F.B.I. to punish people who legally refuse to talk with them by exposing such people to threat of contempt of court, and to harass and intimidate people, particularly women's groups, so they will cooperate with the F.B.I. and abandon their legal rights to privacy.

"I decline to answer the questions for the further reason that the Assistant United States Attorney has publicly stated he will breach the secrecy of your proceedings here and will transmit any evidence which I give [you] to the F.B.I. to assist in the capture of an alleged fugitive, although this is in clear violation of the law. I decline to answer for the reason that the immunity which has been granted to me . . . is not adequate to protect my Fifth Amendment rights. I also ask members of the grand jury to take control of your own proceedings and to refuse to be a party to the abuse of your historic function that the government is insisting on here. I also ask you to order the Assistant United States Attorney to dismiss my subpoena and put an end to this violation of my rights. And if you feel that these proceedings are legitimate, I would appreciate hearing the reasons for your position. Would anyone care to answer?"

"We don't have to respond to your questions," the foreman said. "It's our duty to ask you questions. Do you refuse to talk—so you took the Fifth to protect your rights?"

"Yes," Grusse answered.

"It is our job here as an investigating group to ask questions, not to answer your questions."

"O.K.," Grusse said wearily, and with that she was dismissed.

Afterward, Avery said, "The trouble with grand-jury cases like this one—and there are more and more of them now—is that no one besides the witnesses takes the historic function of the grand jury seriously. Jurors don't take their own function seriously because usually they don't know that it exists in the way it's supposed to. They aren't even aware that they have both rights and the duty to assert them to protect the individual against the power of the state. Prosecutors don't take the grand-jury function seriously because to do so would impede their attempts to get indictments and to use grand juries as investigative tools to help them prepare for trials or to catch suspects, as in this case.

"And judges don't take grand juries seriously because they almost never instruct newly convened grand juries about their rights. So there is no way to get to those twenty-three people and say, 'Look, you have these definite rights, and you can assert them to save the innocent and strike a blow for freedom.' What the government fails to see in all this is that it is needlessly creating its own enemies by the methods it uses. I know that every case like this one, in which the government treats its citizens so unjustly, deepens my radical feelings. But think what it has done to these two women and their friends. These women weren't even political before, but they are now—deeply political and defiant—and their friends are, too. So in attempting to control radicals the government has mindlessly created hundreds more of them."

Judge Newman set May 12th for a hearing on why Grusse and Turgeon should not be found in contempt of court. But he also ordered the government to respond specifically to the charges of illegal wiretapping by June 3rd, which effectively postponed at least until that day any final ruling on the contempt question. At the hearing on May 12th, Avery once again tried to put an F.B.I. man—the agent in charge of the Saxe-Power case in Connecticut—on the stand in order to prove that the Bureau and the U.S. Attorney's office were using the grand jury to find Power and to prepare a case against her and Saxe. But Judge Newman refused to let him pursue this line of questioning, and said of the

government, "They have filed their affidavit under seal indicating the basis on which they have reason to investigate crimes occurring in the District of Connecticut, and it's a very detailed affidavit. . . . The Court of Appeals affirmed this case the last time without even seeing that much [of] a detailed affidavit, so if they thought the case was right the last time, it's hard to see how it's any less right this time, when there is far more detail in support of the government's claim." Avery said that he would like to look at the affidavit, but Newman refused, saying, "This is not just a nice privacy device to keep the prosecutor happy. . . . That affidavit mentioned several people's names who are potential suspects of a federal crime.

I have no idea if they are guilty or innocent, but until they are properly indicted their names are not going to see the light of day, unless a higher court orders me to do it. So the rule of secrecy is not just for the benefit of the F.B.I. or the grand jury and U.S. Attorney. It's for the benefit, primarily, of those suspected of crime, but as to whom there may be no indictment and no prosecution, and we are just not going to get into names and places and dates that identify those people unless an indictment results. That's why that line of inquiry is just not going to be opened up."

While the Judge's explanation reflected the historic reasons for grand-jury secrecy, it was fundamentally misleading, and his decision was fundamentally unfair to the witnesses. Of course, "that line of inquiry"—whether or not the government was misusing the grand-jury system—was crucial to Avery's case, and it could have been opened up and closed without getting into any names and places and dates. All Judge Newman would have had to do was to allow Avery to ask the F.B.I. agent a simple yes-or-no question: Did you ask Dow to subpoena Grusse and Turgeon in order to help the government catch and prepare a case against Saxe and Power? The answer would have settled the issue once and for all, and would not have jeopardized the grand jury's secrecy.

Avery went on to point out that when there are two potential defendants whose compelled testimony can be used as "independent" evidence against each other, use immunity does not protect their Fifth Amendment right against involuntary self-incrimination. This argument lay at the heart of the use-immunity issue. Under the old form of transactional, or total, immunity, a witness who was forced to testify could not be prosecuted later on for anything to do with the transaction or act he or she was questioned about. Now, though, under use immunity two witnesses who were involved in the same transaction could be forced to testify against each other, thereby providing incriminating evidence that was independent of their own admissions of criminal activity and laying each other open to prosecution. Judge Newman was not interested in the argument.

Glen again handled the issue of illegal surveillance, and pointed out that the FBI's indexing system, according to a recent account in the *Times*, was faulty, and argued that a far more complete search of the Bureau's records would be necessary. Judge Newman wasn't interested in this point, either, and said that any ruling on the surveillance issue would have to wait until the government submitted its affidavits denying or affirming impropriety on June 3rd. "It's my honest belief that most of the claims that have been made are . . . a smoke screen," he said.

On the morning of the third, the National Council of Churches, which represents thirty-one religious denominations having a total membership of more than forty million people, filed an *amicus curiae* memorandum with the District Court in New Haven appealing for leniency in punishing Grusse and Turgeon if they were found in contempt of court. The Council said, in part:

"This court has the physical power to say, 'You will be put in jail and kept there until you talk.' In such a situation, the greater the witness's moral commitment to silence, to confidentiality in human relations, the greater the possibility of perpetual incarceration. And because of the principal nature of the witnesses' refusal, the major purpose for imposing a jail term—that of coercing the witnesses into testifying—would appear irrelevant. Only retribution remains, and we contend that the community does not demand or require retribution in this case.

"From the point of view of the National Council of Churches—and the community at large—the prospect of protracted imprisonment for civil contempt is horrifying. It is resoundingly offensive to the generally accepted sense of fairness of our society that a person who has committed no criminal act, has not been convicted by a jury of her peers nor even charged with any crime, can because of

a moral commitment be placed in jail and returned to jail by means of successive grand juries."

The support of the Council was considered by the principals in the case to be vital, for it was the culmination of all the efforts by Grusse and Turgeon, their friends, and, most of all, the Grand Jury Defense Committee to turn the spotlight on the affair as a means of discouraging the Judge from disposing of it hastily or capriciously. "It worked, too—at least to a degree," one of the lawyers in the case said that morning, after the *amicus* was filed and made public. "At the start, all the contempt here was on the court's part. Newman dismissed everything we said with utter contempt, and treated us like lepers. But as support in the community and publicity in the media increased, he got more and more judicious, and increasingly took pains to seem fair, even if he wasn't at some points.

"Now, with the huge support from the 'straight' community, he's got to be more careful than ever." In this lawyer's opinion, the stand taken by the Council prompted Judge Newman to make an unprecedented, and wholly unexpected, move to resolve the problem of grand-jury abuse—by summoning the grand jurors into the courtroom at the hearing that morning and formally asking them what they considered their purpose to be in the present inquiry. At a quarter past eleven, the grand jurors filed into the courtroom; nineteen of the twenty-three members were present, and they were roughly divided between the sexes and ranged in age from the early twenties to the late sixties. Once they were seated in and around the petit-jury box, Judge Newman explained that he had brought them into court so that he could describe to them the law governing their procedure.

While one purpose of any grand jury was to indict the guilty, he went on, another and equally important purpose was to protect the innocent. Pointing out that it was not permissible for a grand jury in one jurisdiction to ask witnesses questions about crimes committed in another jurisdiction, or to help the prosecutor prepare a case against someone who had already been indicted, or to get information that might lead to the capture of fugitives, Judge Newman asked the grand jurors to disregard whatever they thought their proper or desired purpose was supposed to be and to express only their personal opinion of what their actual purpose was in asking the two women the nineteen questions they had refused to answer. Then he gave them the list of the questions and posed the basic issue to be resolved: "Does the grand jury seek answers to these questions from these witnesses for the purpose of investigating possible violation of federal law that may have occurred in the District of Connecticut?" He asked nothing about whether this was their dominant purpose or whether they were trying to help the F.B.I. capture Power and prepare a case against her and Saxe.

Copies of the nineteen questions and the Judge's "interrogatory" were given to the grand jurors, but as they rose to leave Avery quickly got up and asked if he could approach the bench before they went out. Newman impatiently consented, the jurors sat down again, and Avery and the other lawyers in the case went to the side of the bench away from the jury box to confer with Newman out of the juror's hearing. Avery asked the Judge not to permit Dow to accompany the jurors, but Newman curtly dismissed the request, saying Avery knew full well that the prosecutor was always with "his" grand jury. At that, Avery said that if Dow was allowed to be with the grand jurors during their deliberations, then a lawyer from the witnesses' side should be allowed to be present, too, but Newman rejected this request as well. He didn't tell the grand jurors that they had the right to decide who would be present when they talked over their purpose in the case, that they could even fire the prosecutor and demand that a new one be appointed, or that they could refuse to take any orders from the court—in short, that they could use their broad powers as they deemed fit. In any event, they left the courtroom at eleven-thirty, and a recess was ordered until they returned.

When Newman left the bench, Grusse stared at the wall behind and above it where the word "Justice" was carved in relief on the oak paneling. Then she shook her head slowly and said, "This is the biggest farce I've ever seen put on. The Judge is covering himself on everything in case there's an appeal. First, he explained the grand jurors' duties to them, and then he asked their opinion, their personal opinion, about what their purpose is. Of course, they're going to say that their purpose conforms to their duties to investigate crime in the District of Connecticut. What else *can* they say? If they have any doubt about what they're supposed to say, Dow is in there to help them out." She shook her head again and fell silent.

A lawyer who followed the Grusse-Turgeon case but wasn't involved in it directly, and who had occasionally tried cases before Judge Newman, said that Newman's conduct throughout the affair had been typical of his and many other federal judges' approach to the law. "Newman is a decent sort of fellow and very smart," he said. "He's known as a liberal, because he always gives the appearance of being fair, but actually he's a tough law-enforcement guy. A balancing test always goes on in his mind, and the government always wins. He's not much different from other federal judges, except that he's more intelligent than the most of them. Basically, like them, he reflects the system. He has an interest in seeing it operate without such gross abuse that the people will rise up and throw it out.

That's the best way to preserve the system, of course. From what I've seen of him in action, I'd say that he really tries to apply the law. He knows that while the law itself isn't against the individual, the grand jury is against the individual. So he can go along strictly applying the law, because he's fairly certain that the grand jury will come out for law enforcement rather than the individual every time. That way, he looks great, and the government gets its way. It seems pretty clear that there was abuse of the grand-jury process and that there may have been illegal surveillance in the Grusse-Turgeon case. But Newman got around all that by putting a gloss of fairness on his decision to lock up these women."

An hour after the grand jurors went out, the foreman returned alone and handed the court clerk a piece of paper. The clerk gave it to Judge Newman, who read it and announced, to no one's surprise, that the grand jurors had unanimously agreed that their purpose was to investigate federal crimes committed in Connecticut. That settled the issue of grand-jury abuse. Then the Judge gave Dow three more days in which to collect affidavits from various government agencies on the question of surveillance, and set June 6th for a hearing on that issue. He was clearly irritated by the delay, and when he left the bench Grusse said to Avery, "You know, it's incredible the way everyone acts as if it's all right to tap people, even illegally. There's a federal judge, who's sore at a federal prosecutor for taking so much time, and who says, in effect, 'Haven't you got this dirty business computerized by now?' "

At ten o'clock on the morning of June 6th, Dow announced in court that the government had completed its search of surveillance records, and added, "That search was negative." Glen argued that, given the kind of radical and criminal clients she and Avery represented, it would be extremely unlikely that the two of them or people they talked to hadn't been tapped. Newman showed little interest in this argument. He had directed the government to examine its surveillance files not only in the F.B.I. office in Hartford and in the Washington offices of the various government agencies that commonly employ such surveillance but in the field offices of the F.B.I. and the Justice Department in places where Saxe and Power were believed to have lived, such as Lexington, Kentucky, and Philadelphia.

Now Glen pointed out that the government had failed to examine its records in these field offices as ordered by the court, and demanded that the subpoenas be quashed on that ground. As she sat down, the audience in the back half of the courtroom—about a hundred people, most of them women in their twenties and thirties—burst into applause. The Judge threatened them with expulsion or "other penalty," and when the tumult subsided he denied Glen's motion. Toward the end of the hearing, Newman paused for a long time, and then said that the witnesses' claims had already been largely, if not entirely, ruled on by the Court of Appeals, and that nothing new and significant had been offered to change his view of the issues. The claims about grand-jury abuse, he went on, were no different from those made in the previous contempt case, and this time he had taken the additional precaution of asking the grand jurors their personal opinion of their investigative purpose.

In the end, he added, the witnesses' overall attack was not on this grand jury's procedure but on the grand-jury system itself. The President of the United States wasn't above that process, he continued, so clearly these two witnesses were not above it. (Of course, President Nixon had refused to appear before a grand jury while in office, and he had not been found in contempt.) As for the claim about wire-tapping, Newman said that he was quite satisfied with the government's denials, which he found "more than adequate." Finally, he announced that he would issue a formal order later that day finding the two witnesses in contempt.

Avery got up to plead for leniency in sentencing, and suggested that the court might impose "something less than confinement" or might at least limit any confinement to a specific period. Pointing out that the women had already spent

twenty-eight days in prison, and that their lives had been "held in abeyance" since they were first subpoenaed more than four months before, he asked the Judge to consider "the constant strain, the constant demands, the travail" they had endured. Their refusal to testify, he went on, had been based from the start on principle, and because of that principle they would continue to refuse to testify, whatever "coercive penalty" was meted out to them, so any coercion would actually amount to punishment, which was a violation of the law in civil-contempt cases.

Finally, Avery cited the broad public support for the women, including that of the National Council of Churches. Judge Newman broke in to say that the case wasn't "a popularity contest," and that he wouldn't be influenced in any manner by publicity. At that, Grusse and Turgeon smiled at each other. Then Rosen got up and said, "No one should be compelled to choose between perishing or betraying a friend." The women had not been charged with any crime, he continued, but were being punished for refusing to betray their belief in the right to privacy. When Glen took her turn, she asked the Judge to allow a representative of the National Council of Churches to speak on behalf of the two women. Newman refused, saying that he had read the Council's *amicus curiae* memorandum and would leave it at that. "These witnesses are *women*," Glen said angrily. "They're here because they are women. . . . Letting me address you as a woman merely because I'm a lawyer and not letting women who represent this community, this state, this country address you is an outrage!" She stalked off to her seat, and Newman calmly turned to Grusse and Turgeon and asked if they had anything to say.

Turgeon went to the bench to speak for both of them. "We have refused to answer these questions on the basis of principle," she told the Judge. "Imprisonment is not coercion but punishment. We haven't done anything wrong, and I think we should either be charged and tried or let go." Finally, Dow got up and said that a robbery had been committed in Massachusetts in 1970 and that a policeman who had nine children had been killed. It wasn't true, he added, that the government was using the investigation of that crime and the search for those who were accused of committing it to find out more about the women's movement.

Judge Newman gave Grusse and Turgeon four days to settle their affairs, and ordered them to be taken into custody by the U.S. marshal at noon on Tuesday, June 10th, and to be imprisoned until they volunteered to testify or until the grand jury term ran out—in sixteen months' time.

The audience immediately began chanting. "Silence is our right, is our right, is our right! With our sisters we will fight!" The marshal, who had been standing at the door, moved toward them bellowing, "Silence!" They obeyed, except for a couple of men who cried out, "Fascist! Fascist!" Finally, they fell silent, too. Judge Newman threatened anyone who disrupted the proceedings again with contempt-of-court sentences, and then he adjourned the proceedings and left the bench.

Turgeon turned toward Grusse and shrugged helplessly. With a wan smile, Grusse nodded. Neither of them spoke until a dozen or so women and a couple of men from among the spectators came up and embraced each of them in turn. A young women with long brown hair and gold-rimmed glasses kissed each of them, then burst into tears and hurried out. Glen watched the group in silence. "God, I hate courtroom practice," she said. "It's so brutal."

Given the Court of Appeals' rejection of their appeal back in February, Grusse and Turgeon decided that another appeal would be a waste of everyone's time. The time spent on the case by the three lawyers had brought them little financial return—modest government pay for Rosen and Glen, who had been appointed by the court to represent the women as indigents, plus a relatively small contribution to the defense collected by the Grand Jury Defense Committee. The lawyers split the total, which came to about a tenth of what their fees would ordinarily have been. Despite their financial sacrifice, they were prepared to continue the legal battle, but in the end they agreed with their clients that an appeal would be futile.

That evening, Turgeon and Grusse left New Haven to spend the weekend at a women's retreat being held at a nearby camp in the woods. "That was what we needed most of all," Grusse said the following Monday. "We saw all our friends, but nobody talked about the case. We discussed *women's* problems, not ours, and that was just right. They know that there are real things at stake here—our personal integrity, our individuality, our independence, our sense of being ourselves—and they gave us both love and space. I've learned a lot from them. And

I've learned a lot more from our experience. It has confirmed for me what the radicals have been saying about our society all along. Still, I'd hesitate to call myself a revolutionary. That word means violence to me, and I hate and fear violence of any kind. All I know for certain now is that I don't feel responsible or accountable to the United States government, because it's not responsible or accountable to me. I don't know what the future will bring—I might finally be forced into becoming a revolutionary, just as I was forced into this resistance—but for now all I want to do is fight injustice."

Turgeon listened to her and nodded slowly. "One of the big surprises in all this for me was I found I could stand up for a principle," she said. "That brought out traits in me that I didn't know were there, both strengths and weaknesses. It showed me how much I need other people, like our friends and supporters on the retreat. I *really* need them. Without the people who stood by us, I never would have made it. Then I learned how far I will go for something I believe in and how stubborn I can be. I've also been surprised by how political this has made me. Before I got involved in this case, I wasn't interested in politics at all. But now I see that all politics are personal, because they affect each of us every minute of our lives. I've always been afraid of any kind of authority, and I'm no less intimidated by it now, but at least I know where I stand and that I can stick there if I have to for my own sake. From now on, I won't talk to anybody about anybody. What goes on between two people *belongs* to those people."

Turgeon paused thoughtfully for a few moments, then went on. "Of course, all this has had a bad side, too. I realize that my future is probably going to include some kind of government agent. The government knows who I am now, and it will probably keep an eye on me and come by and try to question me from time to time just to keep me in line. And whatever I get involved in in the future, I will always wonder in the back of my mind whether maybe the person I'm dealing with is an undercover agent. That's pretty frightening. And the threat of being watched hangs over my friends, simply because they are my friends. So in a way I feel less free, and people close to me feel less free. Someone even said to me the other day that I'm not free at all, that I'm being used by others for their own political ends. The idea that this is all some sort of power game really denies who I am—an individual acting on her own. Who I am is why I had to do what I've done. If I hadn't, I could never have been myself again."

After a week of cold, overcast, and rainy weather, June 10th turned out to be a perfect day, with a clear Caribbean sky and the temperature in the low seventies. At eleven o'clock that morning, Grusse and Turgeon attended a rally on their behalf held on the New Haven Green—a spacious, well-tended park opposite the post office. About a hundred people, again mostly young women, were there, and they milled about in small groups, talking and laughing together. Avery was on hand, and he watched his clients as they stood chatting animatedly with a group of friends. He looked off at the fresh spring green of the park and shook his head. "It's terrible for a lawyer the day a client is taken away," he said. "But to go to prison on an incredibly beautiful day like this is too much—too much."

A minute later, the group formed into ranks of six, with its members placing their arms around each others' shoulders or waists, and began walking at a leisurely pace toward a First World War monument—a flagpole atop a marble-and-bronze base—a few hundred yards away, near the center of the Green. As they marched, they sang, "Some of our sisters are subpoenaed./*Bella ciao, bell ciao, cido, ciao.*/ Their silence makes us speak out: We want our revolution now."

The group stopped at the monument, where several television and newspaper reporters were waiting, and Turgeon read a brief statement. "It is not out of respect for the courts, or for the unjust treatment we have received in those courts, but out of respect for ourselves and the people who have supported us that we are here," she said, and then repeated the charges about the government's persecution and its political motives.

Afterward, the group sang several women's-liberation songs, some of its members came up to say goodbye to the two women, and then the gathering formed into ranks again and headed off toward the post office. In the corridor on the second floor, the marshal looked out the window as the file moved toward and across Church Street. "I wish it had rained" he said to a deputy marshal. "Rain always keeps down the crowds." At that moment, the crowd reached the front door of the post office, and suddenly began chanting, "Silence is our right, is our right, is our right!" A couple of minutes later, the post-office elevator stopped at the second floor, the door slowly slid back, and Grusse, Turgeon, Polan, Avery, and Rosen stepped out.

"Are you ready to surrender, Mr. Avery?" the marshal asked. Avery nodded, and the two women stepped forward. The marshal took up a position at one side of them, the deputy took the other flank, and the group walked rapidly down the hallway to the marshal's office. This time, there was no special police guard on hand, but Turgeon and Grusse were again searched for weapons, handcuffed, chained together at the waist, and driven under guard to the Connecticut Correctional Institution at Niantic.

On September 26th, Avery filed a motion and a supporting brief with the District Court requesting a "revocation of order of confinement." Despite the court's decision that his clients' arguments "in defense of their silence are either legally insufficient or irrelevant," Avery wrote, "they have remained committed to the moral and ethical principles, and to their constitutional rights as they understand them, which underlie their decision not to respond to the questions of the government before the grand jury. They will continue to refuse to answer the questions of the government before the grand jury."

Accordingly, he concluded, "continued incarceration of the witnesses would be punitive rather than coercive." Seven weeks later, Judge Newman rejected the request. Speaking in general of witnesses who are found in contempt—"contemnors," in legalese—he said, "If a contemnor's own insistence that he will not answer could be used to hasten his release, the coercive purpose of the civil-contempt remedy would be turned upside down. The contemnor would secure his release as soon as he demonstrated the continuing contumacious nature of his conduct." And in response to Avery's contention that the grand-jury investigation of the case had not continued and was not "serious," Newman said, "Those who have thwarted its progress cannot realistically complain of its lack of success."

It seemed clear to the lawyers for Turgeon and Grusse that Judge Newman had no intention of releasing them before the grand jury's term expired, on September 19, 1976. In an attempt to make life somewhat easier for them in prison, Avery wrote the Judge a personal letter on their behalf. As it happened, they had been transferred in late summer to the Niantic prison's "honor cottage," which was reserved for prisoners who had been, Turgeon said later, "real, real good." The policy at the prison was to allow ordinary inmates a forty-eight-hour weekend furlough every sixty days, whereas residents of the honor cottage were allowed such furloughs, plus six extra hours, every thirty days.

Grusse and Turgeon had applied for a furlough soon after moving into the honor cottage, but so far had not been granted one—that it had to be approved by the District Court, since they were not, like the other inmates, "sentenced" prisoners but could obtain their release anytime they decided to cooperate with the government. Now Avery asked Judge Newman to allow the two women a furlough for Christmas, and said, "Whether or not they are released for brief periods of time [for] holiday or other furloughs is hardly likely to affect their decision not to testify.

Indeed, it seems to me that a brief visit outside the institution with family and friends, if it has any effect, might make long-term incarceration even more painful than it already is. In any event, it certainly will not make the lengthy confinement these women now face any less coercive." And, he added, "It would seem not only ironic but unfair if Ms. Grusse and Ms. Turgeon, who are the only women at Niantic who have not been convicted of any criminal offense, have less privileges than other prisoners."

A couple of weeks later, before Newman had replied, Rosen learned that Dow was disturbed about the Grusse-Turgeon case, and wanted to find some way of settling it other than by keeping the two women in prison indefinitely. Rosen immediately went to see Dow, who told him that he had formerly been convinced that such middle-class women as Turgeon and Grusse wouldn't be able to endure prison life, and sooner or later would agree to testify. Now, he said, he was convinced that they would never talk. While he thought their decision was foolish, he had come to accept it, but he was upset by the adverse publicity the government might get if it let them out of prison now. Rosen knew that there had been a lot of pressure on Dow—much of it generated by the Grand Jury Defense Committee—to release the women, so he quickly pointed out that the grand-jury investigation had obviously come to a standstill and couldn't proceed without the women's testimony, which would never be forthcoming. Dow heard him out, nodded, and, after a few minutes' thought, said that he would drop the case.

On December 18th, Dow wrote Judge Newman a letter outlining the facts in the case and concluding, "Although the grand jury's investigation remains in-

complete, the subpoenas for Grusse and Turgeon's testimony are withdrawn at this time and need no longer be enforced by adjudication of contempt. It should be noted, however, that the investigation may develop further information which may cause the witnesses to be subpoenaed again." The Judge had no choice but to order the two released from prison. His order was filed with the court at twelve minutes after ten o'clock on the morning of December 19th, Grusse and Turgeon were informed at ten-thirty, and they left Niantic—for good, they hoped—at a little after one-thirty that afternoon. They had served a total of seven months and one week.

The first move the two women intended to make, after enjoying the holiday festivities, was to do whatever they could to help a woman named Jill Raymond, who had been sent to jail for contempt of court, together with four other women and a man, in Lexington, Kentucky, for refusing to talk to a federal grand jury there about Saxe and Power shortly after Grusse and Turgeon had defied the District Court in New Haven back in early February. The six in Lexington remained silent for several weeks, but finally the intolerable conditions in the local jail where they were locked up persuaded all but Jill Raymond to cooperate with the authorities.

When Turgeon and Grusse got out of Niantic, Raymond was still in jail—and, in fact, is there today, after serving more than a year for her silence. In early January of this year, Grusse and Turgeon telephoned a friend of Raymond's in Lexington and said they wanted to visit her in jail, and perhaps attend some rallies in her support. The friend gave them detailed instructions on which highway routes to take, and on January 7th the two set out, in Turgeon's Volkswagen, for the trip to Lexington. "We were followed all the way," Grusse said afterward. "At each state line, a different car, always with two men in it, would pick us up and keep us under surveillance. They were very obvious about it at times. One car followed us for a long while and then it passed us very slowly, while the passenger carefully looked at both our rear and front license plates, and then he picked up a telephone and talked to someone. So we're not free even now."

In the view of one of the lawyers in the case, the authorities' continuing harassment of these women was further evidence that they were "just pawns in a great chess game being played by the government." He added, "They were never accused of any crime, yet they were treated worse than if they had been convicted felons. And, from beginning to end, their fate lay in the hands of Willie Dow. He tried to be a good man and to act justly, but he failed. In effect, he tried them, he sentenced them, and he let them out." In other words, ours is a government of men, not laws.

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## Chapter 9—The Grand Juries

The federal grand jury, a body of twenty-three citizens who decide whether there is sufficient evidence to hold another citizen for trial, seems an unlikely weapon for the executive branch to use against dissent. Yet its purported investigatory powers, its protected secrecy, its appearance of independence, and its legality have made the grand jury one of the most powerful instruments for intelligence gathering and political disruption in use today.

A sitting grand jury has enormous legal powers. A federal prosecutor can subpoena anyone to appear before a grand jury anywhere without explanation. Subpoenas can be issued for any records, correspondence, documents, fingerprints, hair samples, handwriting exemplars, or other items of interest.[1] There is no limit to the number of witnesses who can be called, and no restrictions on the nature or number of questions that can be put to them. There are no rules about the kinds of evidence that can be used—rumors, hearsay, results of illegal searches or warrantless wiretaps, irrelevant or prejudicial information—all inadmissible in open court.[2] The government may use informants without exposing their identity, for their cover is protected by the grand jury's secrecy. In theory, some of these powers are subject to review by the courts, but in practice,

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[1] *U.S.* v. *Dionesio*, 410 U.S. 1 (1973).

[2] Heasay: *Costello* v. *U.S.*, 350 U.S. 359 (1955). Illegal searches: *U.S.* v. *Calandra*, 94 S.Ct. 613 (1974). Warrantless wiretap: *U.S.* v. *Gelhard*, 408 U.S. 41 (1972).

the courts rubber stamp the prosecutor's whim. The witness enters the chamber alone, losing the right to remain silent and having no right to have a lawyer present—rights the witness would have even in a police interrogation. No witness need be informed of the purpose of the investigation, or even if he or she is its target; no witness has a right even to be warned that whatever he or she says could be used to bring charges against him or her.[3] A grant of partial immunity is often used to coerce testimony from a witness who invokes Fifth Amendment protection: a witness can be jailed without trial for contempt of court for up to eighteen months for continuing to assert that right after immunity is granted. Upon release, the same witness may be called before a new grand jury, asked the same questions and jailed again for an additional eighteen months. Witnesses have no right to a transcript of even their own testimony; in fact, the prosecutor controls what, if anything, is recorded.[4]

Historically, the grand jury was to be a "people's panel" that would protect suspects against overreaching prosecutors and unwarranted prosecutions. The grand jury's primary function was to determine whether an indictment should be brought against the accused; it sat in judgment on the evidence presented by a prosecutor and acted as a check on his discretion. The eminent British legal theorist John Somers once wrote, "Grand juries are our only security, inasmuch as our lives cannot be drawn into jeopardy by all the malicious crafts of the Devil unless such a number of our honest countrymen shall be satisfied with the truth of the accusation."[5] Thus the framers of the American Constitution included a grand jury indictment as a right guaranteed by the Fifth Amendment.

In addition to its charging function, the grand jury has been accruing an independent investigatory role. It constitutes, as the Supreme Court has said, "a grand inquest, the scope . . . [not limited narrowly] . . . by questions of propriety or forecasts of the probable results of the investigation."[6] Its investigatory function was designed to insure that criminal activities that the police might be reluctant to investigate—the misconduct of the rich or powerful—could be pursued by citizens meeting together. The Supreme Court has thus consistently refused to limit the grand jury's authority and powers, "because the task is to inquire into the existence of possible criminal conduct, . . . its investigative powers are necessarily broad."[7]

It was the Justice Department of the Nixon administration that first turned the powers of this people's tribunal against political dissent and transformed the grand jury into an intelligence agency. Its motivation was similar to that which led the FBI to begin COINTELPRO. HUAC congressional investigations were no longer useful instruments to discredit political dissenters. The search for a weapon led the FBI to COINTELPRO and the Justice Department to the grand jury. The Nixon Justice Department recognized what had been true for decades: in operation, the grand jury was not so much a proud and independent people's panel as a pliant instrument of the prosecutor. As federal district court judge William Campbell concluded, "Today, [the grand jury] is but a convenient tool for the prosecutor. . . . Any experienced prosecutor will admit that he can indict anybody at anytime for almost anything."[8] Indeed, if one jury panel refuses to indict, a prosecutor may present the same evidence to another and another, until one agrees to return an indictment.

In 1969 and 1970, the Nixon Justice Department assembled the other elements necessary for a political grand jury network. Robert Mardian was named head of a revitalized Internal Security Division (ISD) in the Justice Department, which had been inactive since the McCarthy era. Its staff was increased from seven to sixty lawyers, and Mardian appointed Guy Goodwin, a forty-four-year-old prosecutor, to serve as head of a special litigation section within the ISD. Goodwin would serve as the field marshal, organizing a network of grand juries throughout the nation to locate "enemies" and gather evidence against them using grand jury investigations.

The last pieces were supplied by the Organized Crime Control Act of 1970, the Nixon administration's draconian police legislation. The act expanded the powers

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[3] *U.S.* v. *Mandujano*, 44 U.S.L.W. 4629 (May 19, 1976).

[4] See generally *Memorandum on the Grand Jury*, prepared by the Office of Policy and Planning, U.S. Department of Justice, for the House Judiciary Committee, Subcommittee on Immigration, Citizenship and International Law, June 6, 1976 pp. 59–63.

[5] "A Kind of Immunity That Leads to Jail: The New Grand Jury", by Paul Cowan, *New York Times* magazine, April 29, 1973. (Hereafter cited as Cowan article.)

[6] *Blair* v. *U.S.*, 250 U.S. 273, 282 (1919).

[7] *Branzburg* v. *Hayes*, 408 U.S. 665, 668 (1972).

[8] "Annals of Law: Taking the Fifth," by Richard Harris, *New Yorker*, April 19, 1976.

of federal grand juries, empowering the Justice Department to convene special investigative grand juries for eighteen months (with an extension of an additional eighteen months if desired) and by creating a more limited form of immunity for witnesses, called "use immunity." [9] Under "forced immunity," which was first developed in 1954, if a witness refuses to testify, claiming his or her Fifth Amendment right against self-incrimination, a prosecutor can force immunity upon the witness, and thus "waive" any Fifth Amendment right to silence. Before 1970, only "transactional immunity" was available and limited to specified offenses, generally those associated with organized crime. ("Transactional immunity" meant that a witness could not be prosecuted for anything related to the transactions about which he was forced to testify.) The new use immunity was not limited to specific crimes and provided protection only from evidence gained from the testimony; if "independent sources" provided other evidence against the witness, a prosecution could still be brought for the same transaction. A recalcitrant witness could now be given immunity and jailed for contempt if he or she refused to testify. If he or she chose to testify, he or she might yet be prosecuted with "independent sources of evidence."

The Nixon administration argued that the use-immunity provision of the 1970 Organized Crime Control Act was needed to aid grand jury investigations of organized crime, but forced immunity has proved to be of little use in such cases. Informers in crime syndicates are killed; thus subpoenaed gangsters are often grateful for the opportunity to prove their loyalty by spending several months in jail for contempt. Use immunity is occasionally useful when forced upon peripheral movement people to gather intelligence, but its true value is as a weapon to put uncooperative witnesses in jail and to frighten others who are politically involved.

Using forced immunity to punish witnesses who refuse to cooperate is a fairly recent prosecutorial tool, and was first developed in an attempt to break up an organized crime syndicate. In 1965, two relatively unknown assistant U.S. attorneys in Chicago, Sam Betar and David Schippers subpoenaed Sam Giancana, later famed as the Mafia contact in the CIA's assassination plots against Castro. Giancana was granted forced immunity and jailed for contempt of court when he refused to testify. Betar said, "Giancana went to prison. And jailing him created a state of chaos and fear in the minds of associates. At first they had thought we were just trying to grab some headlines with the grand jury. But once the lesser lights learned that we'd found a way to put the head of the whole show in jail, they didn't know how to cope." [10] Later Betar said, "I don't want to brag but I know we laid the groundwork for the way immunity provisions have been used in the past few years." [11]

By 1970, all the pieces were in place; all that was required was a Justice Department willing to abuse its prosecutorial responsibility. The Nixon administration supplied that ingredient. From 1970 to 1973, the ISD conducted over 100 Guy Goodwin-supervised grand juries in eighty-four cities of thirty-six states, calling some 1,000 to 2,000 witnesses by subpoena, returning some 400 indictments.[12] The indictments were often merely *pro forma*, to cover the real investigative purposes of the grand juries. The normal conviction rate on grand jury indictments is 65 percent; less than 15 percent of the 400 ISD indictments were convictions or pleas to lesser charges.[13] Targets included the Back Panther party, Vietnam Veterans against the War, Daniel Ellsberg, the Los Angeles antidraft movement, the Catholic Left, Mayday, the Puerto Rican independence movement, the American Indian movement, the Movimiento Chicano, the women's movement, Irish unification supporters, labor unions, radical lawyers, and legal workers. Senator Edward Kennedy, reviewing the campaign in 1973, summarized the situation:

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

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[9] See generally *Kastigar* v. *U.S.*, 406 U.S. 44 (1972).
[10] Cowan article.
[11] Cowan article.
[12] Cowan article.
[13] Normal conviction rate: "The Organized Crime Control Act or Its Critics: Which Threatens Civil Liberties?" McClellan, 46 *Notre Dame Lawyer*, 55 60 (1970), cited in *The Grand Jury* by Leroy Clark (New York: Quadrangle 1975), p. 50. ISD conviction rate: "Who Is Guy Goodwin and Why Are They Saying Those Terrible Things About Him?" by Lacey Fosburgh, *Juris Doctor*, January 1973.

Joe McCarthy and the House Unamerican Activities Committee. But the abuses of power of the Department's overzealous prosecutors do not even know the bounds of a Joe McCarthy, because their insidious contemporary activities are carried out in the dark and secret corners of the grand jury, free from public scrutiny. . . ." [14]

The political grand juries used the pretense of investigating crimes to collect massive amounts of information on radicals throughout the country. One of the first major Guy Goodwin panels was convened in Tucson, Arizona, in October 1970. Goodwin subpoenaed five young activists from Venice, California, to testify about an alleged purchase of dynamite, *after* an indictment had already been returned against the man who allegedly bought the dynamite. The grand jury was used to develop in-depth information about radical activities in southern California. Goodwin asked questions such as: "Tell the grand jury every place you went after you returned to your apartment from Cuba, every city you visited, with whom and by what means of transportation and whom you visited during the time of your travels after you left your apartment in Ann Arbor, Michigan, in May of 1970." [15] The five witnesses at first refused to testify and spent five months in jail for contempt of court. As they left the jail, Goodwin subpoenaed them again before a new grand jury. At that point, three faltered and testified.

Since their purpose is to collect information, political grand jury investigations are characterized by the sweeping questions asked regarding memberships in political organizations, names of other members, and the activities of the groups. Guy Goodwin has become famous for asking such questions as:

Seattle—May, 1972: "Tell the grand jury every place you have lived for the last two years prior to this date, advising the grand jury the period of time you lived at each location, with whom, if anyone, you resided, and what occupation or employment you had during each period."

Tucson—November, 1970: "I would like to ask at this time if you have ever been a member of any of the following organizations, and if so, to tell the grand jury during what period of time you belonged to any of these organizations, with whom you associated in connection with your membership in any of these organizations, what activities you engaged in and what meetings you attended, giving the grand jury the dates and conversations which occurred: The Save Our Soldiers Association, the Coalition, the Los Angeles Reserve Association, the Peace and Freedom Party, the Humanistic and Educational Needs of the Academic Community Organization?"

Detroit—June, 1971: "I would like to know if you were in Ann Arbor in the early part of February, 1971, and if you met any people in Ann Arbor who lived in Washington, or who you later found out lived in Washington; and if so, who were they, where did you meet, and what conversations were had?" [16]

Goodwin subpoenaed Leslie Bacon from Washington, D.C., to testify before a Seattle grand jury as a material witness in the bombing of the nation's Capitol. Goodwin questioned her primarily about upcoming Mayday activities and her political activities in the previous two to three years. Ms. Bacon was later indicted on perjury and conspiracy in New York, but all charges were dropped by the government. Recently an FBI official, who had direct knowledge of the investigation, admitted, "We didn't know a damn thing. Leslie Bacon was the only thing we had and that was just a fishing expedition. She was called before a grand jury in Seattle because we thought we were more likely to get an indictment out there." [17]

Grand juries have also been used effectively to disrupt legitimate political activities, a sort of quasi-judicial COINTELPRO. For example, in 1972, the Vietnam Veterans against the War (VVAW) planned a series of demonstrations at the Democratic and Republican political conventions, scheduled to be held in Miami in July and August. Three days before the Democratic convention opened, Guy Goodwin issued a first batch of twenty-three subpoenas to members of the VVAW, almost all either national, regional, state, or chapter organizers throughout the South. They were called to a grand jury in Tallahassee, 500 miles from Miami, on the very day their demonstration was scheduled to take place in Miami.

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[14] The testimony of Senator Edward M. Kennedy, Hearings on the Fort Worth Five and Grand Jury Abuse before the House Judiciary Subcommittee No. 1, March 13, 1973.

[15] Clark, *The Grand Jury*, pp. 47–48.

[16] Grand Jury "Horror" Stories, compiled by Barry Winograd, March 15, 1973: Seattle, p. 6; Tucson, p. 4; Detroit p. 6. Available from Coalition to End Grand Jury Abuse, 105 2nd St., N.E., Washington, D.C. 20002.

[17] "Arrest in Capitol Bombing Called 'Fishing Expedition,'" by Timothy S. Robinson, *Washington Post,* Oct. 17, 1975.

Many were held a week, asked a few desultory questions and released. Five were jailed for up to forty days until their contempt citations were reversed. Eight veterans were ultimately indicted for conspiracy to engage in violence at the Republican convention in August. All defendants were acquitted by the trial jury on all counts. But VVAW's activities were totally disrupted, the organization severely weakened, and falsely branded as terrorist. On July 13, the Democratic convention passed a resolution condemning "this blatantly political abuse of the grand jury to intimidate and discredit a group whose opposition to the war has been particularly moving and effective." [18]

A recent Fifth Circuit Court decision in a related case said the VAW grand jury proceedings were "part of an overall governmental tactic directed against disfavored persons and groups . . . to chill their expressions and associations." [19]

The use of the grand jury for political purposes, perfected during the Nixon administration, is described by Moore's *Federal Practice:*

"[W]hen technical and theoretical distinctions are put aside, the true nature of the grand jury emerges—i.e., it is 'basically . . . a law enforcement agency.' Nowhere is this characterization more apt than in considering the use of grand jury proceedings by the Nixon Administration. In Nixon's war against the press, the intellectual community and the peace movement generally, the federal grand jury has become the battleground." [20]

The grand jury continues as a major battleground. Although the use of political grand juries temporarily ceased during the Watergate investigation, there has been a resurgence of grand jury abuse under Attorney General Edward Levi.

When the Watergate scandal broke, disclosing illegalities committed by the highest officials of the Justice Department (Mitchell, Kleindienst, and Mardian), the Internal Security Division was disbanded and subsumed into the Criminal Division of the Justice Department. However, spokesmen for the Justice Department assert that the shift indicates no change in policy, and the new head of the ISD, Kevin Maroney, has confirmed that the ISD will continue to investigate "politically motivated crimes" and to use grand juries as it has in the past.[21] Guy Goodwin remains an employee of the Criminal Division of the Justice Department.

The same pattern of abuse of grand juries as intelligence-gathering operations with COINTELPRO objectives has reemerged with the FBI giving more decisive direction. FBI agents increasingly threaten with grand jury subpoenas citizens who refuse to answer their questions. Subpoenas bear the signature of a U.S. attorney, but agents have filled in blank subpoenas when people would not talk freely, and in one known case, have subpoenaed a witness to appear before a nonexistent grand jury.[22] Ralph Guy, a U.S. attorney in Detroit, has admitted that FBI agents are often sent out to question witnesses with grand jury subpoenas in their pockets.[23] Congress has repeatedly refused to delegate subpoena power to the FBI, feeling that no executive agency should possess what was essentially a judicial power.

In 1975, FBI agents descended upon the women's community in Lexington, Kentucky, and New Haven, Connecticut, allegedly pursuing a tip about Susan Saxe and Katharine Powers, wanted for a bank robbery in Boston. Hundreds of people were interviewed and asked detailed personal questions. Six refused to talk to the FBI in Lexington and were promptly subpoenaed before a grand jury purportedly investigating the "harboring of fugitives." FBI agents visited the families of some of the witnesses, urging them to pressure their children to cooperate with the bureau. In one case an eighty-four-year-old grandmother was visited by agents and told that her granddaughter was a lesbian. Six people were jailed for contempt after refusing to testify in Lexington. Five ultimately testified. The investigation was never pursued further, although one witness, Jill Raymond, spent fourteen months in the county jail. The exact pattern was repeated in New Haven where Ellen Grusse and Terry Turgeon refused to testify and spent a month in prison. Both were then subpoenaed upon release and spent an additional six months in prison until the prosecutor withdrew their subpoenas. No

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[18] Frank J. Donner and Richard I. Lavine, "Kangaroo Grand Juries," *The Nation,* Nov. 19, 1973.
[19] *U.S.* v. *Briggs,* 514 F. 2nd 794, 805–806 (5th Circuit 1975).
[20] 8 Moore's Federal Practice 6.02[1][b].
[21] Cowan article.
[22] In re Grand Jury Investigation, Des Moines, Iowa, in the matter of Martha Copleman, U.S. District Court, Southern District of Iowa, M–1–59.
[23] "The FBI Connection," *Grand Jury Report,* published by Coalition to End Grand Jury Abuse (Winter 1976), p. 5.

indictments were handed down in either community; none of the women was charged or tried for any offense, except refusing to cooperate in the dragnet. For the witnesses the choices were all unpalatable. To cooperate was to assist the government's surveillance of the women's movement and protected political activity; to refuse was to face contempt-of-court citations and jail. In either case, the grand jury created suspicion and divisions among friends; it invaded individuals' privacy and disrupted their political activities.

In New York City and Puerto Rico, people identifiable in some way with the Puerto Rican independence movement, the Puerto Rican Socialist party or the Puerto Rican Nationalist party, have been subpoenaed to grand jury investigations under the guise of "bombing and explosives" investigations. In New York City, the FBI questioned the Puerto Rican community extensively, threatening to subpoena those who wouldn't answer questions about political activities and associates dating back many years. The court accepted the government's proposition that merely being associated in the Puerto Rican Socialist party was sufficient basis to justify a subpoena. Citizens attending court hearings were photographed and became objects of later FBI interrogations. Two witnesses, Lureida Torres of New York City and Edgar Maury Santiago in Puerto Rico, have already been jailed. The grand jury subpoena, receiving almost automatic judicial approval, served to brand Puerto Rican activists and organizations with a terrorist label without a shred of evidence, just as grand jury subpoenas had earlier stigmatized members of VVAW as violent in 1972.

To date, no restraints have been imposed upon the use of grand juries as a weapon against political dissent. In 1975, a second wave of "political" grand juries began, starting with the Lexington and New Haven probes mentioned above. Other political grand juries have recently been convened against labor unions in Washington, D.C., and Florida, the American Indian movement at Wounded Knee, South Dakota, Oklahoma, and Iowa, and the Chicano movement in Colorado. There have been grand jury proceedings in the Symbionese Liberation Army/Patty Hearst case in Pennsylvania and in California, and in the filming of a movie made on Weather Underground in Los Angeles. In addition, radical defense lawyers and legal workers are now being subpoenaed in political cases across the country and asked for their records and/or information about their clients.[24]

Shirley Hufstedler, a judge on the Ninth Circuit Court of Appeals, observed recently:

"Today, courts across this country are faced with an increasing flow of cases arising out of grand jury proceedings concerned with the possible punishment of political dissidents. It would be a cruel twist of history to allow the institution of the grand jury that was designed at least partially to protect political dissent to become an instrument of political suppression." [25]

The "cruel twist" continues as yet unchecked.

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[Chapter 12—Designing Effective Reforms]

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*The Grand Juries.*—The Justice Department has taken the grand jury, originally included in the Bill of Rights as a safeguard against harassing prosecution, and transmuted it into a technically legal intelligence arm of the government. Legislation should be passed to reestablish and safeguard the role that the framers intended for it. A number of bills for reforming grand jury abuse have been proposed; the most comprehensive take the following measures:

Witnesses should have a right to counsel in the grand jury room, a right against compelled self-incrimination, a right to be notified whether they are a potential defendant, and a right to know what the subject of the investigation is.

Witnesses should be given at least seven days' notice that they must appear, and should be notified of their newly established rights before the grand jury.

The witness should have a right to ask for a change of venue. "Use immunity" should be abolished, only "transactional immunity" should be permitted, and then only on a voluntary basis.

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[24] "Grand Juries: A History of Repression," *Quash*, published by Grand Jury Project, 853 Broadway, New York City 10003, January 1976, pp. 13, 15.

[25] Barry Winograd and Martin Tassler, "The Political Question," *Trial*, January/February 1973, p. 16.

The rules of evidence should be the same as in courts: no more use of hearsay, the fruits of illegal searches and warrantless wiretaps, or irrelevant and prejudicial evidence.

Contempt sentences for refusing to testify should be limited to six months; double jeopardy should be ended by making this six-month limit apply to all testimony on the same subject before later grand juries.

Indictments should be handed down only if the evidence on which they are based is legally sufficient, competent, and admissible in court, and if the government has presented all the exculpatory evidence in its possession.

Finally, a statute to reform grand jury proceedings should require that jurors be instructed of their rights, powers, and functions—that they are not a rubber stamp for the prosecutor but an independent body historically intended to safeguard people from government harassment.

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[Grand Jury omnibus reform bills introduced in the House of Representatives]

94TH CONGRESS
1ST SESSION

# H. R. 1277

IN THE HOUSE OF REPRESENTATIVES

JANUARY 14, 1975

Mr. EILBERG introduced the following bill; which was referred to the Committee on the Judiciary

# A BILL

To establish certain rules with respect to the appearance of witnesses before grand juries, to provide for independent inquiries by grand juries, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Grand Jury Reform Act of 1975".

RECALCITRANT WITNESSES

SEC. 2. (a) Subsection (a) of section 1826 of title 28, of the United States Code (relating to recalcitrant witnesses) is amended by striking out "eighteen" and inserting in lieu thereof "six" and by adding the following new sentence at the end thereof: "No person confined under this section for

refusal to testify or provide other information concerning any transaction or event may be again confined under this section for a subsequent refusal to testify or provide other information concerning the same transaction or event."

(b) The first sentence of subsection (b) of such section 1826 is amended to read as follows:

"(b) Any person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement unless it affirmatively appears that the appeal is frivolous or taken for delay."

(c) Section 2515 of title 18, United States Code (relating to prohibition of use as evidence of intercepted wire or oral communications), is amended by adding at the end thereof the following new sentence: "Any violation of this chapter shall be a defense in any action brought against a witness under section 1826 of title 28 of the United States Code (relating to recalcitrant witnesses) if the interrogation (or other request for information) is based on or (directly or indirectly) derived from such violation.".

(d) The amendment made by subsection (a) shall apply only to witnesses ordered to testify or provide other information after the date of enactment of this Act.

UNAUTHORIZED DISCLOSURE OF GRAND JURY INFORMATION

SEC. 3. (a) Chapter 73 of title 18, United States Code (relating to obstruction of justice), is amended by adding at the end thereof the following new section:

**"§ 1512. Violations of grand jury secrecy**

"(a) Whoever discloses any matter occurring before any grand jury impaneled before a court of the United States shall be fined not more than $500 or imprisoned not more than six months or both.

"(b) Subsection (a) shall not apply to—

"(1) disclosure by any person of any matter to an attorney for the Government for use in the performance of his duties;

"(2) disclosure of any matter by a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony when so directed by the court preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the

indictment because of matters occurring before the grand jury;

"(3) disclosure by a witness before such grand jury or by his attorney of any matter concerning which the witness has testified, or produced other information, before the grand jury; or

"(4) disclosure by any person other than a person present at the grand jury proceeding.

"(c) Nothing contained in this section shall be construed to affect the power of the court to punish any person for contempt."

(b) The table of sections for such chapter 73 is amended by adding at the end thereof the following new item:

"1512. Violation of grand jury secrecy.".

NOTICE OF CERTAIN RIGHTS AND DUTIES; INDEPENDENT INQUIRY; AND CERTAIN RIGHTS OF WITNESSES

SEC. 4. (a) Chapter 215 of title 18, United States Code (relating to grand juries), is amended by adding at the end thereof the following new sections:

**"§ 3329. Notice of certain rights and duties**

"Upon impanelment of every grand jury before a district court, the court shall give adequate and reasonable notice to the grand jury of:

"(1) its duty to inquire into offenses against the

criminal laws of the United States alleged to have been committed within that district;

"(2) its rights, authority, and powers with respect to an independent inquiry under section 3330;

"(3) its right to call and interrogate witnesses;

"(4) its right to request the production of documents or other evidence; and

"(5) such other duties and rights as the court deems advisable.

**"§ 3330. Independent grand jury inquiry**

"(a) (1) Any grand jury impaneled before any district court (including a special grand jury summoned under section 3331) may, after giving notice to the court, inquire upon its own initiative into offenses against the criminal laws of the United States alleged to have been committed within that district.

"(2) The grand jury shall serve for a term of eighteen months after giving notice to the court under paragraph (1) unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by a majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such

term for an additional period of six months. No grand jury term so extended shall exceed thirty-six months from the date on which notice to the court was given under paragraph (1).

"(3) If a district court within any judicial circuit fails to extend the term of a grand jury engaged upon an independent inquiry under this section or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury, upon an affirative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order. No grand jury term so extended shall exceed thirty-six months.

"(b) (1) Upon the request of any grand jury impaneled before any district court (pursuant to the affirmative vote of a majority of its members), the court shall appoint a special attorney, in lieu of the attorney for the Government, to assist the jury in the conduct of any independent inquiry referred to in subsection (a).

"(2) The special attorney appointed under this section may appoint and fix the compensation of such assistants, investigators, and other personnel as he deems necessary.

The special attorney and his appointees shall be appointed without regard to the provisions of title 5 governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that neither the special attorney nor any appointee may receive pay at a rate in excess of $100 for each day during which he is engaged in the performance of his duties under this section. The special attorney shall be reimbursed for actual expeneses incurred by him and his appointees in the performance of duties pursuant to this section.

"(3) Notwithstanding sections 516, 518, and 519 of title 28 or any other provision of law, a special attorney appointed under this section shall carry out the functions of an attorney for the government and shall have the exclusive authority to—

"(A) assist in the conduct of independent grand jury investigations under this section,

"(B) prepare and sign any indictment returned by a grand jury pursuant to such inquiry, and

"(C) conduct all other phases of any criminal prosecution arising out of such inquiry (including the argument of appeals in the United States Courts of Appeals and the United States Supreme Court).

"(4) A special attorney appointed under this section is authorized to obtain from any department or agency of the United States any files, records, documents, or other materials which he deems necessary or appropriate in the carrying out of his functions under this section.

**"§ 3330A. Certain rights of grand jury witnesses**

"(a) In the case of any proceeding before a grand jury impaneled before a district court, except where the court finds special need (upon a showing by the attorney for the government), no subpena may require any witness to testify or produce other information at such proceeding at any time before the expiration of the one-week period beginning on the date of service of the subpena.

"(b) Upon the service of any subpena requiring any witness to testify or produce other information at any proceeding before a grand jury impaneled before a district court, the witness shall be given adequate and reasonable notice of:

"(1) his right to counsel as provided in subsection (c) of this section;

"(2) his right against self-incrimination;

"(3) the subject matter of the grand jury investigation;

"(4) whether he is a potential defendant at the time of such service; and

"(5) any other rights and privileges which the court deems necessary or appropriate.

"(e) Every witness called to testify or produce other information before a grand jury impaneled before a district court shall be entitled to the advice of an attorney who may be present and provide such advice while testimony or other information is being elicited from the witness by who may not perform any other function at the proceeding before the grand jury. Such attorney shall be appointed as provided in section 3006A in the case of any person financially unable to obtain adequate representation.

"(d) (1) Any subpena requiring a person to appear at any proceeding before, or ancillary to, any grand jury impaneled before a district court shall be quashed and such person shall not be required to so appear if the court finds after hearing, that his appearance would impose a substantial and unnecessary hardship on such person or his family because of the location of the proceeding.

"(2) If a motion to quash a subpena is made under this subsection before the day on which the person subpenaed has been ordered to appear, the appearance of such person shall be stayed until the court has ruled on such motion.

"(3) The district court which issued a subpena to any person, or the district court for the district in which the person resides or is served, shall have jurisdiction to hear, and take appropriate action with respect to, any motion to quash such subpena under this subsection.

"(e) (1) The enumeration in this section of any rights and privileges of grand jury witnesses shall not affect any other rights and privileges to which such witnesses may be entitled under any law or rule of law.

"(2) Notwithstanding section 3771, no rule contained in the Federal Rules of Criminal Procedure shall apply to the extent that such rule is inconsistent with the provisions of this section.

**"§ 3330B. Recording of grand jury proceedings**

"A record shall be kept of all testimony before a grand jury impaneled before any district court, and under such conditions as the court deems reasonable any witness who has testified before such grand jury (or his attorney if such witness approves) may examine and copy the record of his own testimony. If a witness is proceeding in forma pauperis, he shall be furnished, upon request, a transcript of his testimony before the grand jury."

(b) Section 3006A (a) of title 18, United States Code (relating to appointment of attorneys), is amended—

(1) by striking out "or," before "(4)" in the first sentence thereof; and

(2) by inserting before the period at the end of the first sentence thereof: ", or (5) who is a witness before a grand jury impaneled before the district court".

(c) The table of sections for such chapter 215 is amended by adding at the end thereof the following new items:

"3329. Notice of certain rights and duties.
"3330. Independent grand jury inquiry.
"3330A. Certain rights of grand jury witnesses.
"330B. Recording of grand jury proceedings.".

(d) Section 524 of chapter 31 of title 28, United States Code (relating to appropriations for administrative expenses), is amended by adding at the end thereof the following new sentence: "Such appropriations shall also be available for payment of the compensation and other expenses of the special attorney appointed under section 3329 of title 18 to assist a grand jury in the conduct of an independent investigation."

(e) The Administrator of General Services shall furnish offices, equipment, supplies, and services to a special attorney appointed under section 3330 of title 18, United States Code, in the same manner as such items are furnished to agencies and departments of the United States.

WITNESS IMMUNITY

SEC. 5. (a) Section 6002 of title 18, United States Code (relating to immunity generally), is amended by striking out all after the semicolon in such section and inserting in lieu thereof the following: "but the witness shall not

be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled under the order to testify or produce evidence, except that he shall not be exempt from prosecution and punishment for perjury committed in so testifying, for giving a false statement, or for otherwise failing to comply with the order. No order issued under this part shall require any witness to testify or provide other information at any time prior to the day one week after the day on which such order was communicated to the witness. Upon communication to the witness of any order issued under this part, the person presiding over the inquiry shall give the witness reasonable and adequate notice of the nature and scope of the immunity from criminal prosecution provided by this section."

(b) Subsection (b) of section 6003 of such title (relating to court and grand jury proceedings) is amended to read as follows:

"(b) A United States district court may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, issue an order under subsection (a) of this section when the United States attorney establishes to the satisfaction of the court that—

"(1) the testimony or other information from such individual may be necessary to the public interest; and

"(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination. No approval shall be required under this subsection in the case of a request for an order made by a special attorney appointed under section 3330.".

(c) Subsection (c) of section 6005 of such title is hereby repealed.

(d) The amendments made by subsections (a), (b), and (c) of this section shall take effect on the sixtieth day following the date of the enactment of this Act. No amendment or repeal of any provision of law made by this section shall affect any immunity, or the scope of any immunity, to which any individual is entitled under such provision by reason of any testimony or other information given before such day.

94TH CONGRESS
1ST SESSION

# H. R. 6006

IN THE HOUSE OF REPRESENTATIVES

APRIL 15, 1975

MR. KASTENMEIER (for himself and MR. RAILSBACK) introduced the following bill; which was referred to the Committee on the Judiciary

# A BILL

To establish certain rules with respect to the appearance of witnesses before Federal grand juries in order better to protect the rights and liberties of such witnesses, to provide for independent inquiries by grand juries, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act, with the following table of contents, may be cited as the "Grand Jury Reform Act of 1975".

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IMMUNITY OF WITNESSES

SEC. 2. (a) Section 6002 of title 18, United States Code (relating to immunity generally), is amended by striking out the period at the end thereof and inserting in lieu thereof the following: ", and such witness shall not be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, or thing concerning which he is compelled, under such order, to testify or produce other information.".

(b) Section 6003 (a) of such title (relating to court and grand jury proceedings) is amended by inserting after "United States attorney for such district" the following: "or of a grand jury impaneled before such district court".

(c) Section 6003 (b) of such title is amended by striking out "the Deputy Attorney General, or any designated Assistant Attorney General," and by adding the following new sentence at the end thereof: "The authority of the Attorney General to approve a request under this subsection shall not be delegated to any other person.".

(d) Section 6003 of such title is amended by adding at the end thereof the following new subsection:

"(c) A grand jury impaneled before a United States district court may, with the approval of the Attorney General, request an order under subsection (a) of this section for the compelling of testimony or other information in any pro-

ceeding before such grand jury when twelve or more members determine that—

"(1) the testimony or other information from such individual may be necessary to the public interest; and

"(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

The authority of the Attorney General to approve a request under this subsection may not be delegated to any other person.".

RECALCITRANT WITNESSES

SEC. 3. Section 1826 of title 28, United States Code, (relating to recalcitrant witnesses), is amended to read as follows:

**"§ 1826. Recalcitrant witnesses**

"(a) (1) Whenever a witness in any proceeding (other than a grand jury proceeding) before or ancillary to any court of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recordings, or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may, after a hearing and upon finding that the refusal is without just cause, order such witness to be confined. Any

such confinement shall be at a suitable Federal correctional institution unless the witness voluntarily waives the right to have his confinement at such an institution. Such confinement shall continue until such time as the witness is willing to give such testimony or provide such information but shall not exceed the shorter of—

"(A) the life of the proceeding before which such refusal to comply with the court order occurred, or

"(B) six months.

"(2) Whenever a witness in any proceeding before any grand jury impaneled before a district court refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording, or other material, the grand jury, upon affirmative vote of twelve or more members, may apply to the court for an order directing the witness to comply. Upon such application, the court may, after a hearing and upon finding that such refusal is without just cause, order such witness to be confined. Any such confinement shall be at a suitable Federal correctional institution unless the witness voluntarily waives the right to have his confinement at such institution. Such confinement shall continue until such time as the witness is willing to give such testimony or provide such information but shall not exceed the shorter of—

"(A) the term of the grand jury (including extensions) before which such refusal to comply occurred, or

"(B) six months.

"(3) No hearing shall be held under this subsection without ten days' notice to the witness, except that in the case of a witness subpenaed for a trial, a shorter notice, but not less than five days, may be ordered by the court upon a showing of special need.

"(b) No person who has been confined under this section for refusal to testify or provide other information concerning any transaction or event may be again confined under this section for a subsequent refusal to testify or provide other information concerning the same transaction or event.

"(c) Any person confined pursuant to subsection (a) of this section shall be admitted to bail or released in accord with the Federal Rules of Criminal Procedure pending the determination of an appeal taken by him from the order of his confinement unless the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable pursuant to an expedited schedule ordered by the appellate court upon application by a party.

"(d) In any proceeding conducted under this section, for the confinement of a witness for refusal to testify or provide other information such witness shall be entitled to representa-

tion by counsel and in the case of any person financially unable to obtain adequate representation, such counsel shall be appointed as provided in section 3006A of title 18.

"(e) A refusal to answer a question or provide other information before a court or grand jury of the United States shall not be punishable under this section if the question asked or the request for other information violates any right or privilege of the witness or is (directly or indirectly) based on or derived from any violation of any right or privilege of the witness.".

CERTAIN GRAND JURY RIGHTS AND DUTIES

SEC. 4. Chapter 215 of title 18, United States Code (relating to grand juries), is amended by striking out section 3322 and all that follows down through section 3328 and inserting in lieu thereof the following new sections:

**"§ 3322. Notice to grand jury of its rights and duties**

"Upon impanelment of a grand jury before a United States district court, the court shall give adequate and reasonable notice to the grand jury of—

"(1) its duty to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district;

"(2) its rights, authority, and powers with respect to an independent inquiry under section 3323;

"(3) its right to call and interrogate witnesses;

"(4) its right to request the production of documents or other evidence;

"(5) the subject matter of the investigation;

"(6) the criminal statute or statutes involved, if these are known at the time the grand jury is impaneled;

"(7) the requirement that a subpena summoning a witness to appear and testify or to produce books, papers, documents, or other objects before the grand jury may be issued only upon an affirmative vote of twelve or more members of the grand jury;

"(8) the authority of the grand jury to ask the court to grant immunity to a witness only upon an affirmative vote of twelve or more members of the grand jury;

"(9) the authority of the grand jury to apply to the court for an order directing a witness to show cause why he should not be held in contempt, under section 1826 of title 28, only upon an affirmative vote of twelve or more members of the grand jury;

"(10) the necessity of sufficient evidence to form the basis of any indictment as provided under section 3361(1);

"(11) the duty of the grand jury, by an affirmative vote of twelve or more members, to determine, based on

the evidence presented before it, whether or not there are sufficient grounds for issuing indictments; and

"(12) such other duties and rights as the court deems advisable.

The court's failure to instruct the grand jury as directed in this section shall be just cause for a witness' refusal to testify or provide other information before such grand jury. Any person indicted by a grand jury that has not been instructed in accordance with these provisions shall be entitled to a dismissal of any indictment of such grand jury and of any indictment issued by any other grand jury if such other indictment is based on the same transaction or event.

**"§ 3323. Independent grand jury inquiry**

"(a) Any grand jury impaneled before any district court (including a special grand jury summoned under sections 3331) may, after giving notice to the court, inquire upon its own initiative into offenses against the criminal laws of the United States alleged to have been committed within that district by any officer or agent of the United States or of any State or local government or by any person who, at the time of the alleged commission of the offense, was an officer or agent of the United States or of any State or local government.

"(b) The grand jury shall serve for a term of twelve months after giving notice to the court under paragraph (1)

unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by an affirmative vote of twelve or more members that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No grand jury term so extended shall exceed twenty-four months from the date on which notice to the court was given under subsection (a).

"(c) If a district court within any judicial circuit fails to extend the term of a grand jury engaged upon an independent inquiry under this section or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury, upon an affirmative vote of twelve or more members, may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. The term of such grand jury shall not be terminated before the entry by the chief judge of the circuit of an appropriate order with respect to such application. No grand jury term extended under this paragraph shall exceed twenty-four months.".

CERTAIN RIGHTS OF GRAND JURY WITNESSES

SEC. 5. Chapter 215 of title 18, United States Code (relating to grand juries), as amended by section 4 of this

Act, is further amended by adding at the end thereof the following new section:

**"§ 3324. Certain rights of grand jury witnesses**

"(a) A subpena summoning a witness to appear and testify before or provide other information to a grand jury impaneled before a district court shall be issued only upon an affirmative vote of twelve or more members of the grand jury, and shall (except with the consent of the witness subpenaed) not be returnable on less than seven days' notice.

"(b) Any subpena summoning a witness to appear before such a grand jury shall advise the witness of—

"(1) his right to counsel provided under subsection (c);

"(2) his right against self-incrimination;

"(3) whether his own conduct is under investigation by the grand jury;

"(4) the subject matter of the grand jury investigation;

"(5) the substantive criminal statute or statutes, violation of which is under consideration by the grand jury;

"(6) any other rights and privileges which the court deems necessary and appropriate.

Any witness who is not advised of his rights pursuant to this subsection shall not be prosecuted or subjected to any

penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he testifies or produces other information, nor shall any such testimony or information be used as evidence in any criminal proceeding against him in any court.

"(c) Every witness subpenaed to appear and testify before a grand jury impaneled before a district court or to produce books, papers, documents, or other objects before such grand jury shall be entitled to representation by counsel, including representation during such time as the witness is questioned in the grand jury room. Such counsel shall be appointed as provided in section 3006A in the case of any person financially unable to obtain adequate representation.

"(d) (1) A complete and accurate stenographic record of all grand jury proceedings shall be kept, except that the grand jury's secret deliberations shall not be recorded. Such record shall include the court's notice to the grand jury of its rights and duties including but not limited to those set forth in section 3329 of this title; all introductory comments, directives, and other utterances made by attorneys for the Government to the grand jury, witnesses and counsel for witnesses; all testimony; and all interchanges between the grand jury and attorneys and those between attorneys for the Government and counsel for witnesses. Consultations between witnesses and their counsel shall not be recorded.

"(2) Any witness who testifies before a grand jury, or his attorney with such witness' written approval, shall, upon request, be entitled to examine and copy a transcript of the record for the period of such witness' own appearance before the grand jury, and if a witness is proceeding in forma pauperis, he shall be furnished, upon request, a copy of such transcript. Such transcript of such proceedings shall be available for inspection and copying not later than forty-eight hours following conclusion of such testimony.

"(e) Any person summoned to testify or provide other information before a grand jury impaneled before a district court shall be entitled, prior to testifying or providing other information, to examine and copy any statement in the possession of the United States which he has made and which relates to the subject matter under inquiry by the grand jury. Such examination and copying may be made by the attorney for such person if such person gives his written approval. As used in this subsection, the term 'statement' has the meaning provided by section 3500(e).

"(f) No person required to testify or provide other information before any grand jury impaneled before a district court shall be confined for his failure to so testify or provide such information if the court which subpenaed such person or which has jurisdiction under subsection (g) of this section finds that—

"(1) a primary purpose or effect of requiring such person to so testify or provide information is to secure information for trial testimony or other information regarding the activities of any person who is under indictment (or information or other form of formal accusation) for such activities by the United States, or by a State or any political subdivision thereof,

"(2) compliance with the subpena would be unreasonable or oppressive because—

"(A) such compliance would involve unnecessary appearances by the witness,

"(B) the only testimony or other information that can reasonably be expected from the witness is cumulative, unnecessary, or privileged,

"(C) other similar circumstances,

"(3) a primary purpose of the issuance of the subpena is punitive,

"(4) the witness has been confined for his refusal to testify before a grand jury investigating the same transaction or event, or

"(5) the witness has not been advised of his rights as specified in subsection (b).

No witness who claims a violation of this subsection shall be required to testify or provide other information if the court determines that this subsection is violated.

"(g) Before the appearance of a witness before a grand jury, the district court issuing the subpena to such witness, the district court in the district in which the subpena was served, and the district court in the district in which the witness resides shall have concurrent jurisdiction over any motion made by the witness to quash a subpena or for other relief under provisions of this section. The district court issuing such subpena shall have jurisdiction over any such motion made during or after the appearance of the witness before the grand jury. If the motion is made before or during the appearance of the moving party before a grand jury, the appearance before the grand jury shall be stayed until the court rules on the motion.

"(h) Any person may approach the court and request permission to testify in an inquiry before a grand jury, or to appear before a grand jury and request that it proceed in accordance with its powers under section 3322 of this chapter. Such person shall be permitted to testify in such inquiry being conducted by, or appear before, a grand jury, unless the court finds that such testimony or appearance would serve no relevant purpose.".

VENUE OF GRAND JURY INQUIRY

SEC. 6. Chapter 215 of title 18, United States Code (relating to grand juries), as amended by sections 4 and 5 of

this Act is further amended by adding at the end thereof the following new section:

**"§ 3325. Venue of grand jury inquiry**

"(a) Except as otherwise provided in this section, a grand jury impaneled to conduct an inquiry into offenses against the criminal laws of the United States may be convened only in a district in which it is believed criminal conduct may have occurred as elements of such offenses.

"(b) A grand jury convened to conduct an inquiry into both criminal acts and conspiracies to commit criminal acts may not be convened in a district in which the only conduct alleged to have occurred is a conspiracy to commit the criminal act.

"(c) For the convenience of witnesses and where the interests of justice so require, the district court shall, on motion of a witness, transfer any grand jury proceedings or investigation into any other district where it might properly have been convened under subsection (a) or (b). In considering an application for such transfer, the court shall take into consideration all the relevant circumstances, including the distance of the grand jury investigation from the places of residence of witnesses who have been subpenaed, financial and other burdens placed upon the witnesses, and the exist-

ence and nature of any related investigations and court proceedings.

"(d) Once a grand jury has failed to return an indictment based on a transaction or event, a grand jury inquiry into the same transactions or events shall not be initiated, unless the court finds, upon a proper showing by the attorney for the Government, that the Government has discovered additional evidence relevant to such inquiry.".

REQUIREMENTS FOR INDICTMENT

SEC. 7. Section 3361 of title 18, United States Code, is amended to read as follows:

**"§ 3361. Requirements for indictment**

"The district court before which a grand jury is impaneled shall dismiss any indictment of the grand jury if it finds that—

"(1) the evidence before the grand jury was insufficient to establish that such offense was committed,

"(2) there was not competent and admissible evidence introduced before the grand jury such as provides reasonable cause to believe that the person indicted committed such offense, or

"(3) the attorney for the Government has not presented to the grand jury all exculpatory evidence in his possession with respect to such person."

REPORTS CONCERNING GRAND JURY INVESTIGATIONS

SEC. 8. Section 522 of title 28, United States Code (relating to reports of business and statistics), is amended by striking out "The Attorney General" and inserting in lieu thereof "(a) The Attorney General" and by adding at the end thereof the following new subsection:

"(b) The Attorney General, at the beginning of each regular session of Congress, shall report to the Congress and to the Administrative Office of the United States Courts with respect to the last preceding fiscal year on—

"(1) the number of investigations undertaken in which a grand jury or a special grand jury was utilized together with a description of the nature of each investigation undertaken;

"(2) the number of requests by United States grand juries to the Attorney General for approval to apply to the court for an order compelling testimony under section 2003 of title 18, and the number of such requests approved by the Attorney General;

"(3) the number of applications to district courts for orders granting immunity under title 18;

"(4) the number of applications to district courts for orders granting immunity under title 18 that were

approved and the nature of the investigations for which the orders were sought;

"(5) the number of instances in which witnesses in the investigations enumerated in paragraph (1) were held in contempt and confined, and the dates and lengths of such confinement;

"(6) the number of arrests, indictments, no-bills, trials, and convictions resulting from testimony obtained under orders granting immunity, the offenses for which the convictions were obtained, and a general assessment of the importance of the immunity;

"(7) a description of data banks and other procedures by which grand jury information is processed, stored, and used by the Department of Justice; and

"(8) other appropriate information concerning grand jury activity during such year.

The matters contained in the report required to be made by this section shall be set forth according to judicial district.".

CONFORMING AMENDMENTS

SEC. 9. (a) The table of sections for chapter 215 of title 18 (relating to grand jury) is amended by striking out the items relating to sections 3322 and all that follows down

through the item relating to section 3328 and inserting in lieu thereof the following new items:

"3322. Notice to grand jury of its rights and duties.
"3323. Independent grand jury inquiry.
"3324. Certain rights of grand jury witnesses.
"3325. Venue of grand jury inquiry.".

(b) The item relating to section 3361 in the table of sections for chapter 217 of title 18 is amended to read as follows:

"3361. Requirements for indictment.".

94TH CONGRESS
1ST SESSION

# H. R. 6207

IN THE HOUSE OF REPRESENTATIVES

APRIL 21, 1975

Mr. RANGEL (for himself and Mr. ECKHARDT) introduced the following bill; which was referred to the Committee on the Judiciary

# A BILL

To amend title 18 and title 28 of the United States Code to remove the possibility of abuse from the grand jury system without removing the effectiveness of the grand jury as a tool for investigating and returning indictments, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Federal Grand Jury Reform Act of 1975".

RECALCITRANT WITNESSES

SEC. 2. Section 1826, chapter 119, title 28, United States Code, is amended to read as follows:

**"§ 1826. Recalcitrant witnesses**

"(a) Whenever a witness in any proceeding before or

ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording, or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may, after a hearing at which such witness may be represented by counsel, order such witness to be confined at a suitable Federal correctional institution until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

"(1) the court proceeding before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months, or

"(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed six months, including any period of confinement during the term of a prior, subsequent, or other grand jury in any related proceeding.

"Except upon a showing of special need, no hearing shall be held under this subsection until a period of ten days has passed from the date on which notice of such hearing was served upon the witness.

(b) No person confined pursuant to subsection (a) of

this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement unless the court finds that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

"(c) In any proceeding conducted under this section, counsel shall be furnished as provided in section 3006A, chapter 201, of title 18 for any person financially unable to obtain adequate representation.".

GRAND JURY PROCEDURE

SEC. 3. Section 3323, chapter 215, title 18, United States Code, is amended to read as follows:

"(a) The attorney for the Government, or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn, or summoned in accordance with the law, or that the grand jury is not representative of a fair cross section of the community from which it was drawn, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors or as soon as practicable thereafter and shall be tried by the court.

"(b) No person summoned to testify or provide other

information in any proceeding before or ancillary to any grand jury of the United States shall be required to testify or provide such information, or be confined pursuant to section 1826, chapter 119, title 28, United States Code, if, upon a hearing before the court which issued such summons or a court having jurisdiction under paragraph (2) of subsection (a) of this section, the court finds that—

"(1) the appearance of such person before the grand jury would impose a substantial and unnecessary hardship on such person or on his family because of the venue of the grand jury;

"(2) a primary purpose in requiring such person to testify or provide other information to the grand jury is to secure testimony or other information regarding the activities of a person who is already under indictment by the United States, a State, or any subdivision thereof for such activities;

"(3) compliance with the summons would be unreasonable or oppressive, such as, but not limited to, circumstances (i) which involve unnecessary repetitive appearances by the witness, (ii) where the only testimony that can reasonably be expected from the witness is cumulative and unnecessary; or

"(4) a primary purpose in imposing or continuing confinement is punitive.

"(c) (1) A motion made pursuant to subsection (b) of this section for relief from the order of any court requiring a person to testify or provide other information in any proceeding before or ancillary to any grand jury of the United States may be made at any time, except that no court shall entertain any additional motion from the same person regarding the same court order unless such person can first demonstrate that conditions in the case have changed sufficiently to warrant another hearing. When any legitimate motion is made prior to the day on which such person is ordered to appear in such proceeding, the motion shall stay the appearance of such person until the court having jurisdiction rules on the motion.

"(2) The district court for the district in which the person ordered to appear in any such proceeding resides, is served the subpena, or is ordered to appear shall have jurisdiction to entertain a motion made under subsection (b) of this section and provide appropriate relief.

"(3) The court in determining the issue in a hearing on a motion made for relief under paragraph (1) of subsection (b) of this section shall take into consideration all the circumstances of the grand jury investigation, including (a) the distance of the locale in which the grand jury is conducting the investigation from the witness' place of residence; (b) the burdens imposed on the witness; (c) the signif-

icance of the overt acts alleged to have taken place in the jurisdiction in which the grand jury is conducting its investigation; (d) the existence and nature of related investigations, indictments, and court proceedings, if any; (e) the practicality of obtaining the testimony or other information in a place more convenient to the witness; and (f) changed circumstances since the witness was summoned to testify or provide other information.

"(d) A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from records that any be required to be kept that twelve or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.".

SEC. 4. Sections 3325 and 3326, chapter 215, title 18, United States Code, are amended to read as follows:

**"§ 3325. Persons present at proceedings**

"Attorneys for the Government, the witness under examination, attorneys for the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but

no person other than the jurors may be present while the grand jury is deliberating or voting. Attorneys for the witness under examination may advise such person as to his legal rights before the grand jury, but in no case may such attorney participate in the proceedings.".

**"§ 3326. Secrecy of proceeding and disclosure**

"(a) Disclosure of matters occurring before the grand jury, other than its deliberations and the vote of any juror, may be made to the attorneys for the Government for use in the performance of their duties. Otherwise, a juror, Government attorney, attorney for the witness acting in a capacity other than as attorney for such witness, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment

except when necessary for the issuance and execution of a warrant or summons.

"(b) Notwithstanding the provisions of subsection (a), all grand jury proceedings shall be recorded, and any person who testifies before a grand jury, or the attorneys for such person with such person's written approval, shall, upon request, be entitled to examine and copy a transcript of such person's own testimony. If a person is proceeding in forma pauperis, he shall be furnished a copy of such testimony.".

SEC. 5. Chapter 215, title 18, United States Code, is further amended by adding at the end thereof the following new sections:

**"§ 3229. Appearance before the grand jury**

"(a) Whenever an attorney for the Government intends to seek an indictment of any person, such attorney shall so inform the grand jury, and also inform the grand jury of its right to subpena such person to appear if it so desires.

**"§ 3330. Use of subpenas**

"(a) Any individual subpenaed to appear and give testimony or provide other information before a grand jury shall not be required to so appear prior to seven days after service of such subpena, except that the notice required to be given by this section may be waived by the court before which the grand jury is impaneled upon a showing of special need by the attorney for the Government.

"(b) Any subpena issued for service on a named witness shall contain information sufficient to notify such witness of his right to counsel, including the appointment of counsel if the witness is proceeding in forma pauperis, and his right against self-incrimination.

SEC. 6. Any rule contained in the Federal Rules of Criminal Procedure shall not apply to any proceeding before or ancillary to a grand jury of the United States to the extent that such rule is inconsistent with the provisions of sections 3, 4, or 5.

SEC. 7. (a) The chapter analysis of chapter 215, title 18, United States Code, is amended by striking out "**—(Rule)**" in the items relating to sections 3323, 3325 and 3326.

(b) The chapter analysis of chapter 215, title 18, United States Code, is further amended by adding at the end thereof the following new items:

"3329. Appearance before the grand jury.
"3330. Use of subpenas.

WITNESS IMMUNITY IN GRAND JURY PROCEEDINGS

SEC. 8. (a) Section 6002, title 18, United States Code, is amended to read as follows:

"**§ 6002. Immunity generally**

"(a) Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) a court or grand jury of the United States,

"(2) an agency of the United States, or

"(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury or for giving a false statement while complying with the order, or otherwise failing to comply with the order.

"(b) In any proceeding under sections 6003–6006 of this part in which an order may be issued requiring an individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, the district court (or the agency under section 6004) shall, prior to issuing any such order, advise such individual that he may be represented by counsel in any such proceeding and that, if he is unable to obtain adequate representation, counsel will be furnished for him as provided in section 3006A of this title.

"(c) In any proceeding under sections 6003–6006 of this part in which the court (or the agency under section 6004) finds that an individual is in danger of prosecution, or may be subjected to any penalty or forfeiture, by the government of any other country on account of any transaction, matter, or thing concerning which he may be ordered to testify or provide other information pursuant to an order under this part, such individual shall not be ordered to testify or provide such information unless the court also finds that such individual has been provided adequate safeguards to minimize such danger."

SEC. 9. (a) Part V, title 18, United States Code, is amended—

(1) by striking out in section 6003 (a) thereof "or a grand jury of the United States"; and

(2) by adding at the end of such part the following new sections:

**"§ 6006. Grand jury proceedings**

"(a) In the case of any individual who has been called to testify or provide other information at any proceeding before or ancillary to a grand jury of the United States, the United States district court for the judicial district in which the grand jury is sitting may issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order

requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part, except that no such order shall be issued unless the court finds that—

"(1) the investigation being conducted by the grand jury is authorized by law and the application for the order is in accord with existing guidelines or other practice of the Department of Justice;

"(2) the investigation relates to an offense for which an immunity order may be sought under this section;

"(3) the testimony or other information sought to be obtained is within the scope of the investigation and is relevant thereto;

"(4) the testimony or other information sought to be obtained is relevant to the subject matter of the immunity order;

"(5) a grant of immunity under this part would be adequate for the purposes of the investigation; and

"(6) a summary of the evidence relating to the witness has been certified and submitted to the court.

"(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or

any designated Assistant Attorney General, apply for an order under subsection (a) of this section when in his judgment—

"(1) the testimony or other information from such individual may be necessary (A) to an investigation of a specific case involving an offense enumerated in subsection (1) of section 2516 of title 18, United States Code, and (B) to the public interest; and

"(2) such individual has refused to testify or provide other information on the basis of his privilege against self-incrimination.

"(c) Notwithstanding the provisions of section (a) of section 6002 of this title, no witness compelled under this section to testify or provide other information in an investigation of an offense not enumerated in subsection (1) of section 2516 of title 18, United States Code, shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify or provide information, nor shall testimony or information so compelled be used as evidence in any criminal case against him, except a prosecution for perjury or for giving a false statement committed while complying with such order, or otherwise failing to comply with such order.

"(d) Any individual required to give testimony or pro-

vide other information pursuant to an order issued under subsection (a) may not be indicted for any offense by the grand jury before which such individual testifies pursuant to such order.

"§ 6007. **Reports concerning grand jury investigations**

"In January of each year the Attorney General or an Assistant Attorney General specially designated by the Attorney General shall report to the Congress and to the Administrative Office of the United States Courts—

"(1) the number of investigations undertaken during the preceding year in which a grand jury or a special grand jury was utilized together with a description of the nature of each investigation undertaken;

"(2) the number of requests by United States attorneys to the Department of Justice for approval to make application to the court for an order compelling testimony under section 6006 of this part, and the number of such requests approved by the Department of Justice;

"(3) the number of applications to district courts for orders granting immunity under this title;

"(4) the number of applications to district courts for orders granting immunity under this title that were approved and the nature of the investigations for which the orders were sought;

"(5) the number of instances in which witnesses

in such investigations were held in contempt and confined, and the dates and lengths of such confinement;

"(6) the number of arrests, indictments, trials, and convictions resulting from testimony obtained under orders granting immunity, the offenses for which the convictions were obtained, and a general assessment of the importance of the immunity;

"(7) the number of instances in which witnesses granted immunity under this title were subsequently indicted for offenses relating to the subject matter of their testimony before the grand jury;

"(8) a description of data banks and other procedures by which grand jury information is processed, stored, and used by the Department of Justice; and

"(9) other appropriate indicia and information concerning grand jury activity during such year.

The matters contained in the report required to be made by this section shall be set forth according to judicial district.".

(b) The analysis at the beginning of part V, title 18, United States Code, is amended—

(1) by striking out "and grand jury" in the item relating to section 6003; and

(2) by adding at the end of such part analysis the following new items:

"6006. Grand jury proceedings.
"6007. Report concerning grand jury investigations.".

EFFECTIVE DATE; SAVINGS PROVISION

SEC. 10. The provisions of this Act shall take effect on the date of enactment of this Act. No amendment to any provision of law made by any provision of this Act shall affect any immunity to which any individual is entitled under such provision by reason of any testimony of other information given before such day.

94TH CONGRESS
2D SESSION

# H. R. 11660

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 3, 1976

Mr. CONYERS introduced the following bill; which was referred to the Committee on the Judiciary

# A BILL

To establish certain rules with respect to the appearance of witnesses before grand juries in order better to protect the constitutional rights and liberties of such witnesses under the fourth, fifth, and sixth amendments to the Constitution, to provide for independent inquiries by grand juries, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Grand Jury Reform Act of 1976".

SEC. 2. Section 1826 of title 28, United States Code, is amended to read as follows:

**"§ 1826. Recalcitrant witnesses.**

"(a) (1) Whenever a witness in any proceeding before any grand jury of the United States refuses without just cause shown to comply with an order of the court of the United States to testify or provide other information, including any book, paper, document, record, recording, or other material, the attorney for the Government may, only upon an affirmative vote of twelve or more members of the grand jury that such refusal was without just cause, submit an application to the court for an order directing the witness to show why the witness should not be held in contempt. After submission of such application and a hearing at which the witness may be represented by counsel, the court may, if the court finds that such refusal was without just cause, hold the witness in criminal contempt and order the witness to be confined. Such confinement shall be at a suitable Federal correctional institution, unless the witness waives this right. Such confinement shall continue until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed six months.

"(2) Whenever a witness in any criminal proceeding before or ancillary to any district court of the United States refuses without just cause shown to comply with an order

of the court to testify or provide other information, including any book, paper, document, record, recording, or other material, the court, upon such refusal and after a hearing at which the witness may be represented by counsel, may, if the court finds that such refusal was without just cause, hold the witness in criminal contempt and order the witness to be confined. Such confinement shall be at a suitable Federal correctional institution, unless the witness waives this right. Such confinement shall continue until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of the court proceeding before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed six months.

"(3) No hearing shall be held under this subsection unless ten days notice is given to the witness who has refused to comply with the court order under this subsection, except that a witness subpenaed for a trial may be given a shorter notice of not less than five days if the court, upon a showing of special need, so orders.

"(b) No person who has been confined under this section for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events may be again confined under this section or under section 401 of title 18, United States Code, for a subsequent refusal

to testify or provide other information concerning the same transaction, set of transactions, event, or events.

"(c) Any person confined pursuant to subsection (a) of this section shall be admitted to bail or released in accordance with the provisions of chapter 207 of title 18, United States Code, pending the determination of an appeal taken by him from the order of his confinement, unless the appeal is patently frivolous and taken for purposes of delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, pursuant to an expedited schedule ordered by the appellate court upon application by a party.

"(d) In any proceeding conducted under this section, counsel may be appointed in the same manner as provided in section 3006A of title 18, United States Code, for any person financially unable to obtain adequate assistance.

"(e) A refusal to answer a question or provide other information before a grand jury of the United States shall not be punishable under this section or under section 401 of title 18, United States Code, if the question asked or the request for other information is based in whole or in part upon evidence obtained by an unlawful act or in violation of the witness' Constitutional rights or of rights established or protected by any statute of the United States.".

SEC. 3. (a) Chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new section:

**"§ 403. Refusal of a witness to testify in a grand jury proceeding.**

"No person who has been imprisoned or fined by a court of the United States under section 401 of this title for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events in a proceeding before a grand jury (including a special grand jury summoned under section 3331 of this title) impaneled before any district court of the United States may again be imprisoned or fined under section 401 of this title or under section 1826 of title 28, United States Code, for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events.".

(b) The table of sections for chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"403. Refusal of a witness to testify in a grand jury proceeding.".

SEC. 4. That portion of title 18, United States Code, following section 2513 and preceding section 2515 of such title is amended to read as follows:

"§ 2514. **Immunity of witnesses.**

"(a) In any proceeding before a grand jury impaneled before a district court of the United States, the attorney for the Government may submit an application to the court for an order that a witness shall testify or produce books, papers, or other evidence subject to the provisions of this section only if—

"(1) there is an affirmative finding by twelve or more of the members of the grand jury that such testimony or the production of books, papers, or other evidence by the witness is necessary to the public interest;

"(2) the witness gives his written consent to such application; and

"(3) the Attorney General approves such application.

"(b) Whenever in the judgment of a United States attorney, the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any court of the United States, is necessary to the public interest, such United States attorney, with the written consent of the witness, and upon the approval of the Attorney General, shall make application to the court for an order granting the witness immunity so that the witness

shall testify or produce evidence subject to the provisions of this section.

"(c) Pursuant to subsections (a) and (b) of this section, upon the court's order granting immunity, such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, and no such witness shall be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence; nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.".

SEC. 5. (a) Chapter 215 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

**"§ 3328. Notice to grand jury of its rights and duties.**

"Upon impanelment of each grand jury before a district

court of the United States, the court shall give adequate and reasonable written notice to the grand jury of, and shall assure that the grand jury reasonably understands the nature of—

"(1) its duty to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district;

"(2) its rights, authority, and powers with respect to an independent inquiry under section 3330 of this title;

"(3) its right to call and interrogate witnesses;

"(4) its right to request the production of documents or other evidence;

"(5) (A) the subject matter of the investigation, and

"(B) the criminal statute or statutes involved, if these are known at the time the grand jury is impaneled;

"(6) the requirement of section 3330A of this title that a subpena summoning a witness to appear and testify before a grand jury or to produce books, papers, documents, or other objects before the grand jury may be issued only upon an affirmative vote of twelve or more members of the grand jury to which the subpena is returnable;

"(7) the authority of the grand jury under section

2514 of this title to determine by an affirmative vote of twelve or more of its members that the attorney for the Government may submit an application to the court for a grant of immunity to a witness;

"(8) the authority of the grand jury to determine by an affirmative vote of twelve or more of its members that the attorney for the Government may submit an application to the court for an order directing a witness to show cause why he should not be held in contempt under section 1826 of title 28, United States Code;

"(9) the necessity of legally sufficient evidence to form the basis of any indictment as provided under section 3330A (l) of this title;

"(10) the duty of the grand jury by an affirmative vote of twelve or more members of the grand jury to determine, based on the evidence presented before it, whether or not there are sufficient grounds for issuing indictments and to determine the violations to be included in any such indictments; and

"(11) such other duties and rights as the court deems advisable.

The court's failure to instruct the grand jury as directed in this section shall be just cause within the meaning of section 1826 of title 28, United States Code, for a witness' refusal

to testify or provide other information before such grand jury. Any person indicted by a grand jury that has not been instructed in accordance with these provisions shall be entitled to a dismissal of any indictment by such grand jury and of any indictment issued by any other grand jury, if such other indictment is based on the same transaction, set of transactions, event, or events.

**"§ 3330. Independent grand jury inquiry.**

"(a) (1) Any grand jury (including a special grand jury summoned under section 3331 of this title) impaneled before any district court of the United States may, upon its own initiative and after giving notice to the court, inquire into offenses against the criminal laws of the United States alleged to have been committed within that district by any officer or agent of the United States or of any State or municipal government or by a person who, at the time of the alleged commission of the offense, was an officer or agent of the United States or of any State or municipal government. Such grand jury may request the attorney for the Government to assist such grand jury in such inquiry.

"(2) The grand jury shall serve for a term of twelve months after giving notice to the court under paragraph (1) unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by an affirmative vote of twelve or more members that its business has

been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No grand jury term so extended shall exceed twenty-four months from the date on which notice to the court was given under paragraph (1).

"(3) If a district court within any judicial circuit fails to extend the term of a grand jury engaged upon an independent inquiry under this section or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury by an affirmative vote of twelve or more members may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry by the chief judge of the circuit of an appropriate order upon such application. No grand jury term so extended shall exceed twenty-four months.

"(b) (1) In the event that the attorney for the Government refuses to assist or hinders or impedes the grand jury in the conduct of any inquiry under subsection (a), the grand jury may, upon the affirmative vote of twelve or more of its members, request at any point in such inquiry that the court appoint a special attorney to assist the grand

jury in such inquiry. Such special attorney shall serve in lieu of any attorney for the Government and shall be paid at the rate of $100 per day. Such special attorney, with the approval of the court, may appoint and fix the compensation of such assistants, investigators, and other personnel as he deems necessary. The special attorney and his appointees shall be appointed without regard to the provisions of title 5 of the United States Code, governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates. Any appointee under this subsection shall receive pay at a rate not to exceed $100 per day for each day during which he is engaged in the performance of his duties under this section. The special attorney shall be reimbursed for actual expenses incurred by him and his appointees in the performance of duties pursuant to this section.

"(2) Notwithstanding sections 516 and 519 of title 28 of the United States Code or any other provisions of law, a special attorney appointed under this section shall have the exclusive authority to assist in the conduct of an independent grand jury investigation under this section, and any indictment returned by a grand jury pursuant to such inquiry shall be signed by the special attorney in lieu of any attorney for the Government.

"§ 3330A. Certain rights of grand jury witnesses.

"(a) A subpena summoning a witness to appear and testify before a grand jury of the United States or to produce books, papers, documents, or other objects before such grand jury, shall be issued only upon an affirmative vote of twelve or more members of the grand jury, and such subpena may not be returnable on less than seven days' notice, except with the consent of the witness.

"(b) Any subpena summoning a witness to appear before a grand jury shall advise the witness of (1) his right to counsel as provided in subsection (e) of this section; (2) his privilege against self-incrimination; (3) whether his own conduct is under investigation by the grand jury; (4) the subject matter of the grand jury investigation; (5) the substantive criminal statute or statutes, violation of which is under consideration by the grand jury; and (6) any other rights and privileges which the court deems necessary and appropriate.

"(c) Any witness who is not advised of his rights pursuant to subsection (b) shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he testifies or any evidence he produces, nor shall any such testi-

mony or evidence be used as evidence in any criminal proceeding against him in any court.

"(d) In any proceeding before the grand jury, if the attorney for the Government has written notice in advance of the appearance of a witness that such witness intends to exercise his privilege against self-incrimination, such witness shall not be compelled to appear before the grand jury unless a grant of immunity has been obtained.

"(e) Any witness subpenaed to appear and testify before a grand jury or to produce books, papers, documents, or other objects before such grand jury shall be entitled to assistance of and representation by counsel during any time that such witness is being questioned in the presence of such grand jury; such counsel may be retained by the witness or may, for any person financially unable to obtain adequate assistance, be appointed in the same manner as if that person were eligible for appointed counsel under section 3006A of this title. Notwithstanding any rule contained in the Federal Rules of Criminal Procedure, such witness' counsel is authorized to disclose matters which occur before the grand jury while such counsel is in the grand jury room.

"(f) A grand jury impaneled to conduct an inquiry into offenses against the criminal laws of the United States may be convened only in a district in which substantive criminal conduct may have occurred as elements

of such offenses; except that when a grand jury is to be convened to conduct an inquiry into both violations of substantive criminal statutes and violations of statutes forbidding conspiracy to violate substantive criminal statutes, the grand jury may not be convened before a district court in a district in which the only criminal conduct alleged to have occurred is conspiracy to commit the substantive criminal act.

"(g) For the convenience of witnesses and where the interests of justice so require, a district court may, on motion of a witness, transfer any grand jury proceedings or investigation into any other district where it might properly have been convened under subsection (f). In considering an application for such transfer, the court shall take into consideration all the relevant circumstances, including the distance of the grand jury investigation from the places of residence of witnesses who have been subpenaed to testify before the grand jury, financial and other burdens placed upon the witnesses, and the existence and nature of related investigations and court proceedings, if any.

"(h) Once a grand jury has failed to return an indictment based on a transaction, set of transactions, event, or events, a grand jury inquiry into the same transactions or events shall not be initiated unless the court finds, upon a proper showing by the attorney for the Government, that

the Government has discovered additional evidence relevant to such inquiry.

"(i) (1) A complete and accurate stenographic record of all grand jury proceedings shall be kept, except that the grand jury's secret deliberations shall not be recorded. Such record shall include the court's notice to the grand jury of its rights and duties including but not limited to those set forth in section 3329 of this title; all introductory comments, directives, and other utterances made by attorneys for the Government to the grand jury, witnesses, and counsel for witnesses; all testimony; and all interchanges between the grand jury and attorneys and those between attorneys for the Government and counsel for witnesses. Consultations between witnesses and their counsel shall not be recorded.

"(2) Any witness who testifies before a grand jury, or his attorney with such witness' written approval, shall, upon request, be entitled to examine and copy a transcript of the record for the period of such witness' own appearance before the grand jury, and if a witness is proceeding in forma pauperis, he shall be furnished, upon request, a copy of such transcript. Such transcript shall be available for inspection and copying not later than forty-eight hours after the conclusion of such witness' testimony. After examination of such transcript, a witness may submit additional statements to explain his testimony. Such additional statements shall be-

come part of the official transcript and shall be shown to the members of the grand jury.

"(j) Any witness summoned to testify before a grand jury or the attorney for such witness with the witness' written approval shall be entitled, prior to testifying, to examine and copy any statement in the possession of the United States which such witness has made and which relates to the subject matter under inquiry by the grand jury. The term 'statement' as used in this subsection shall be defined as in section 3500 (e) of this title.

"(k) No person subpenaed to testify or to produce books, papers, documents, or other objects in any proceeding before any grand jury of the United States shall be required to testify or to produce such objects, or be confined pursuant to section 1826 of title 28, United States Code, for his failure to so testify or produce such objects, if, upon an evidentiary hearing before the court which issued such subpena or a court having jurisdiction under subsection (l) of this section, the court finds that—

"(1) a primary purpose or effect of requiring such person to so testify or to produce such objects to the grand jury is or will be to secure for trial testimony or to secure other information regarding the activities of any person who is already under indictment by the United States, a State, or any subdivision thereof for

such activities; or of any person who is under formal accusation for such activities by any State or any subdivision thereof, where the accusation is by some form other than indictment; unless after a witness refuses to so testify or to produce such objects before the grand jury on the ground that the purpose or effect of requiring his testimony or the production of such objects is in violation of this clause, the Government establishes by a preponderance of the evidence that its inquiry is independent of such preexisting indictment or accusation,

"(2) compliance with the subpena would be unreasonable or oppressive because (i) such compliance would involve unnecessary appearances by the witness; (ii) the only testimony that can reasonably be expected from the witness is cumulative, unnecessary, or privileged; or (iii) other like circumstances,

"(3) a primary purpose of the issuance of the subpena is to harass the witness,

"(4) the witness has already been confined, imprisoned, or fined under section 1826 of title 28, United States Code, or section 401 of this title for his refusal to testify before any grand jury investigating the same transaction, set of transactions, event, or events, or

"(5) the witness has not been advised of his rights as specified in subsection (b).

"(l) The district court out of which a subpena to appear before a grand jury has been issued, the court in which the subpena was served, and the district court in the district in which the witness who was served such subpena resides shall have concurrent jurisdiction over any motion made by such witness to quash the subpena or for other relief under this section. A motion under this section may be made at any time prior to, during, or when appropriate, subsequent to the appearance of any witness before the grand jury. Any motion made during or subsequent to the appearance of the witness before the grand jury may be made only in the district court in which the grand jury is impaneled. If the motion is made before or during the appearance of the witness before the grand jury, the appearance before the grand jury shall be stayed by the making of the motion until the court before which the motion is pending rules on the motion.

"(m) The attorney for the Government shall be limited to asking questions or requesting the production of books, papers, documents, or other objects relevant to the subject matter under investigation. A relevant question or request is one having any tendency to make the existence of any fact that is of consequence to the matter under investigation more probable or less probable than such existence would be without the evidence.

"(n) A grand jury may indict a person for an offense when (1) the evidence before such grand jury is legally sufficient to establish that such offense was committed, and (2) competent and admissible evidence before such grand jury provides reasonable cause to believe that such person committed such offense. An attorney for the Government shall present to the grand jury all exculpatory evidence in such attorney's possession relating to the person or persons under investigation.

"(o) The district court before which a grand jury is impaneled shall dismiss any indictment of the grand jury if such district court finds that—

"(1) the evidence before the grand jury was legally insufficient to establish that the offense for which the indictment was rendered was committed;

"(2) there was not competent and admissible evidence before the grand jury to provide reasonable cause to believe that the person indicted committed such offense; or

"(3) the attorney for the Government has not presented to the grand jury all exculpatory evidence in his possession with respect to the person indicted.

"(p) Any person may approach the attorney for the Government and request to testify in an inquiry before a grand jury or to appear before a grand jury and request that

the grand jury proceed in accordance with its powers under section 3330 of this title. An attorney for the Government shall establish a public record of all such requests to that attorney for the Government and the action taken on each such request including the reasons for not allowing such person to testify or appear, if such person is not allowed to testify or appear. If the person making such request is dissatisfied with the Government's decision, the court shall review the decision, and may permit the person to testify or appear before the grand jury, if the court finds that such testimony or appearance would serve the interests of justice.".

(b) The table of sections for chapter 215 of title 18, United States Code, is amended by adding at the end thereof the following new items:

"3329. Notice to grand jury of its rights and duties.
"3330. Independent grand jury inquiry.
"3330A. Certain rights of grand jury witnesses.".

SEC. 6. Section 6001 of title 18, United States Code, is amended by striking out paragraph (4), and by striking out "; and" at the end of paragraph (3) and inserting in lieu thereof a period.

SEC. 7. Section 6002 of title 18, United States Code, is amended to read as follows:

"**§ 6002. Immunity generally.**

"Whenever a witness refuses, on the basis of his privi-

lege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) an agency of the United States, or

"(2) either House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; and such witness shall not be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.".

SEC. 8. (a) Part V of title 18, United States Code, is amended by striking out section 6003.

(b) The table of sections of part V of title 18, United States Code, is amended by striking out item 6003.

SEC. 9. (a) Part V of title 18, United States Code, is

amended by adding at the end of such part the following new section:

**"§ 6006. Reports concerning grand jury investigations.**

"In January of each year, the Attorney General or an Assistant Attorney General specially designated by the Attorney General shall report to the Congress and to the Administrative Office of the United States Courts—

"(1) the number of investigations undertaken during the preceding year in which a grand jury or a special grand jury was utilized together with a description of the nature of each investigation undertaken;

"(2) the number of requests by United States grand juries to the Attorney General for approval and to witnesses for written consent to make application to the court for an order compelling testimony under section 2514 of this title, and the number of such requests approved by the Attorney General;

"(3) the number of applications to district courts for orders granting immunity under this title;

"(4) the number of applications to district courts for orders granting immunity under this title that were approved and the nature of the investigations for which the orders were sought;

"(5) the number of instances in which witnesses in

such investigations were held in contempt and confined, and the dates and lengths of such confinements;

"(6) the number of arrests, indictments, no-bills, trials, and convictions resulting from testimony obtained under orders granting immunity; the offenses for which the convictions were obtained; and a general assessment of the importance of the immunity;

"(7) a description of data banks and other procedures by which grand jury information is processed, stored, and used by the Department of Justice; and

"(8) other appropriate indicia and information concerning grand jury activity during such year.

The matter contained in the report required to be made by this section shall be set forth according to judicial district.".

(b) The table of sections for part V of title 18, United States Code, is amended by adding at the end thereof the following new item:

"6006. Reports concerning grand jury investigations.".

[Related bills and resolutions introduced in the House of Representatives]

94TH CONGRESS
1ST SESSION

# H. R. 10947

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 2, 1975

Mr. BADILLO introduced the following bill; which was referred to the Committee on the Judiciary

# A BILL

To provide the right to counsel to grand jury witnesses in order to better protect the constitutional rights of such witnesses.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That chapter 215 of title 18, United States Code, is amended by adding immediately after section 3328 the following new section:

"SEC. 3329. Every witness subpenaed to appear and testify before a grand jury or to produce books, papers, documents, or other objects before such grand jury shall be entitled to have the assistance of counsel, including assistance during such time as the witness is questioned in the grand jury room; such counsel may be retained by the witness or,

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may, for any person financially unable to obtain adequate assistance, be appointed in the same manner as if that person were eligible for appointed counsel under section 3006A of this title. The witness' counsel is authorized to disclose, outside the grand jury room, matters which occur before the grand jury while such counsel is present in the grand jury room.".

94TH CONGRESS
2D SESSION

# H. R. 11870

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 11, 1976

Mr. DRINAN introduced the following bill; which was referred to the Committee on the Judiciary

# A BILL

To amend part V of title 18 of the United States Code to provide transactional immunity in certain cases in which the privilege against self-incrimination is asserted, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the portion of part V of title 18 of the United States Code which follows section 6001 is amended to read as follows:

**"§ 6002. Immunity generally**

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

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"(1) a court or grand jury of the United States,

"(2) an agency of the United States, or

"(3) either House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under section 6003 or 6004, the witness may not refuse to comply with the order on the basis of the privilege against self-incrimination. Such witness shall not be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, or thing concerning which the witness is compelled, after having claimed the privilege against self-incrimination, to testify or produce evidence, nor shall testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) be used against the witness in any criminal case, except a prosecution for perjury (section 1621), making a false declaration (section 1623), making a false statement (section 1001), or otherwise failing to comply with the order.

**"§ 6003. Court, grand jury, and agency proceedings**

"(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court, grand jury, or agency of the United States, the United States district court for the

judicial district in which the proceeding is or may be held, or in which the witness resides, may issue an order, in accordance with subsection (b), requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of the privilege against self-incrimination.

"(b) A United States attorney may, with the approval of the Attorney General, request an order under subsection (a) if—

"(1) the individual has refused to testify or provide other information on the basis of the privilege against self-incrimination;

"(2) such individual gives written consent to the request for the order;

"(3) the testimony or other information from such individual is necessary to the public interest; and

"(4) in the case of a proceeding before a grand jury, 12 grand jurors vote to request the order.

**"§ 6004. Congressional proceedings**

"(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House, the United States district court for the judicial district in which the proceeding is or may be held, or in which

the witness resides, may issue an order, in accordance with subsection (b), requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of the privilege against self-incrimination.

"(b) An authorized representative of the appropriate House or Committee of Congress may request an order under subsection (a) if—

"(1) the individual has refused to testify or provide other information on the basis of the privilege against self-incrimination;

"(2) such individual gives written consent to the request for the order;

"(3) the testimony or other information from such individual is necessary to the public interest;

"(4) in the case of a proceeding before either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that House; and

"(5) in the case of a proceeding before a committee or subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

"(6) at least ten days prior to the day on which the request for such an order was made, the Attorney General is served with notice of an intention to request the order.

"(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

"**§ 6005. Reports by Attorney General**

"(a) In January of each year, the Attorney General shall report to the Congress and to the Administrative Office of the United States Courts—

"(1) the number of requests for an order compelling testimony under section 6003—

"(A) made by United States attorneys;

"(B) approved by the Attorney General;

"(C) submitted to a United States district court;

"(D) approved by a United States district court; and

"(E) actually used in a court, grand jury, or agency proceeding; and

"(2) the number of arrests, indictments, informations, convictions (by plea or after trial), or other

enforcement actions resulting from testimony or other information obtained under immunity orders; and a general assessment of the value of immunity orders.

"(b) For each category of data required to be furnished under subsection (a) (1), the report shall indicate—

"(1) the source of the request (individual, grand jury, agency, other government entity or employee, or a combination of such sources);

"(2) the judicial district in which the request occurred;

"(3) the subject matter of the proceeding out of which the request arose; and

"(4) the number of times sanctions were imposed upon a witness who violated an immunity order.".

SEC. 2. The table of sections for part V of title 18, United States Code, is amended to read as follows:

"Sec.
"6001. Definitions.
"6002. Immunity generally.
"6003. Court, grand jury, and agency proceedings.
"6004. Congressional proceedings.
"6005. Reports by Attorney General.".

94TH CONGRESS
2D SESSION

# H. R. 14146

IN THE HOUSE OF REPRESENTATIVES

JUNE 2, 1976

Ms. HOLTZMAN introduced the following bill; which was referred to the Committee on the Judiciary

# A BILL

To amend titles 18 and 28 of the United States Code to limit the circumstances in which an individual appearing before certain grand juries can be held in contempt and to limit the imprisonment for such contempt.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Civil Contempt Reform Act of 1976".

SEC. 2. Section 1826 of title 28, United States Code, is amended to read as follows:

**"§ 1826. Recalcitrant witnesses**

"(a) (1) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States

refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording, or other material, the court, upon such refusal and after a hearing at which the witness may be represented by counsel, may, if the court finds that such refusal was without just cause, hold the witness in contempt and order the witness to be imprisoned.

"(2) Any imprisonment for refusal to give testimony or provide information pursuant to this subsection shall be at a Federal correctional institution unless the witness agrees to confinement at a non-Federal institution designated by the Attorney General.

"(3) Upon a showing of need or hardship, the court ordering such imprisonment may grant a request by the witness to be imprisoned at a suitable correctional institution near the place of residence or employment of the witness or the witness' family or relatives or the attorney of the witness.

"(4) Any imprisonment for refusal to give testimony or provide information pursuant to this subsection shall continue until such time as the witness is willing to give such testimony or provide such information except that no period of such imprisonment shall exceed the lesser of—

"(A) (i) in the case of a court proceeding, the life of the court proceeding before which such refusal to comply with the court order occurred, or

"(ii) in the case of a grand jury, the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred; or

"(B) six months.

"(5) No hearing shall be held under this subsection unless ten days' notice is given to the witness who has refused to comply with the court order under this subsection, except that a witness subpenaed for a trial may be given a shorter notice of not less than five days if the court, upon a showing of special need, so orders.

"(b) No person imprisoned under this section for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events may be again imprisoned under this section or under section 401 of title 18, United States Code, for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events.

"(c) Any person confined pursuant to subsection (a) of this section shall be admitted to bail or released in accordance with the provisions of chapter 207 of title 18, United States Code, pending the determination of an appeal taken by such person from the order of imprisonment, unless the appeal is patently frivolous. If the person has not been released on bail or otherwise released, any appeal from an order of imprisonment under this section shall be disposed

of as soon as practicable, pursuant to an expedited schedule, and in no event more than thirty days from the filing of such appeal. If the appellate court shall fail to dispose of the appeal of a person who remains confined within thirty days, the person shall automatically be released on his or her personal recognizance pending disposition of the appeal.

"(d) In any proceeding conducted under this section, counsel may be appointed in the same manner as provided in section 3006A of title 18, United States Code, for any person financially unable to obtain adequate assistance.

"(e) A refusal to answer a question or provide other information before a grand jury of the United States shall not be punishable under this section or under section 401 of title 18, United States Code, if the question asked or the request for other information is based in whole or in part upon evidence obtained by an unlawful act or in violation of the witness' constitutional rights or of rights established or protected by any statute of the United States.".

SEC. 3. (a) Chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new section:

**"§ 403. Refusal of a witness to testify in a grand jury proceeding**

"No person who has been imprisoned or fined by a court of the United States under section 401 of this title for refusal

to testify or provide other information concerning any transaction, set of transactions, event, or events in a proceeding before a grand jury (including a special grand jury summoned under section 3331 of this title) impaneled before any district court of the United States may again be imprisoned or fined under section 401 of this title or under section 1826 of title 28, United States Code, for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events.".

(b) The table of sections for chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"403. Refusal of a witness to testify in a grand jury proceeding.".

94TH CONGRESS
1ST SESSION

# H. J. RES. 46

IN THE HOUSE OF REPRESENTATIVES

JANUARY 14, 1975

Mr. EILBERG introduced the following joint resolution; which was referred to the Committee on the Judiciary

# JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States with respect to grand juries.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein)*, That the following article is proposed as an amendment to the Constitution of the United States, to be valid only if ratified by the legislatures of three-fourths of the several States within seven years after the date of final passage of this joint resolution.

"ARTICLE —

"SECTION 1. No grand jury may present or indict or otherwise hold any person to answer for any crime against the United States. No presentment or indictment of a grand

jury shall be required in order to hold any person to answer for any crime against the United States but no person may be so held except pursuant to an information signed by the attorney for the Government and stating the essential facts of the crime charged.

"SEC. 2. This article shall not affect the power of Congress to enact appropriate legislation to provide for the impaneling of, and procedures with respect to, any grand jury whose sole function shall be to investigate any organized criminal activity or any crime against the United States."

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