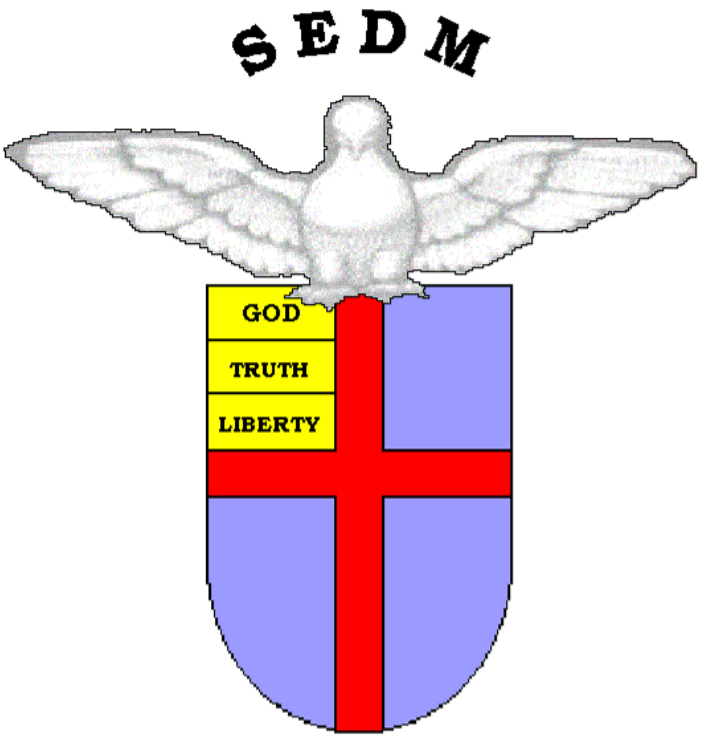

Department of Justice

MEMORANDUM

ON

THE GRAND JURY

PREPARED

BY

THE OFFICE OF POLICY AND PLANNING
UNITED STATES DEPARTMENT OF JUSTICE

FOR

THE HOUSE JUDICIARY COMMITTEE,
SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, AND INTERNATIONAL LAW

WEDNESDAY, JUNE 9, 1976
WASHINGTON, D.C.

MEMORANDUM

ON

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Introduction

The grand jury is one of the oldest institutions of Anglo-American civilization, with a history of over nine hundred years, from the origins of the common law to the present day. Indeed, the practice of summoning a body of citizens to investigate crime and to bring formal charges against an accused preceded even the development of trial by jury.

It is, in part, the very age of the grand jury and of many of its practices which gives rise to questions concerning its proper role in our current criminal justice system. While some observers conclude that the grand jury remains an essential institution, others contend that it is but an anachronism no longer performing an independent function. While some point to the recent success of grand jury investigations in uncovering governmental corruption, and urge that the grand jury's broad investigatorial powers are particularly necessary to combat the phenomena of increasingly complex organized and white collar crime, others point to alleged

abuses of these investigatorial powers, and urge that they are inconsistent with modern concepts of proper governmental action.

The proposals pending before the Subcommittee on Immigration, Citizenship and International Law reflect many of the current issues concerning federal grand jury practice. Before considering these issues, it would be appropriate to review briefly the evolution of the grand jury and its present structure and function. It is in this context of an appreciation of the grand jury's traditional role in the administration of criminal justice that the various proposals for change can best be evaluated.

A. History of the Grand Jury

Although the origins of the grand jury are somewhat obscure, historians are generally agreed that the grand jury began as an investigatory tool for the crown. 1/ The development of the grand jury is usually traced from the Assize of Clarendon, proclaimed by Henry II in 1166, which required periodic gatherings of twelve citizens from each "hundred" and four from each "vill" who were sworn on oath to tell what they knew of crimes committed in the vicinity. From this early accusatory body evolved the institution historically celebrated as the protector of the accused against unfounded charges.

By the mid-fourteenth century the accusing jury, known as "le grande inquest," consisted of twenty-three members drawn from the county at large. Whereas the grand jury system had originally been based on the expectation that its members would have personal knowledge of the crimes committed in the areas in which they lived, societal changes made exclusive reliance upon juror knowledge increasingly unfeasible. Thus, grand jurors gradually assumed the roles of hearing witnesses and investigating charges laid before them by others. In the case of accusations made by outsiders, or "indictments," the jurors heard only witnesses against the accused, and returned the indictment as "a true bill" or "not a true bill," depending upon whether a majority was convinced that there were grounds for trial. The jurors, however, never lost the power to investigate and return accusations, called "presentments," based upon their own knowledge. While it is unclear when the grand jury first used compulsory process to secure the attendance of witnesses in aid of its functions, the principle that testimony was a duty owed by all subjects appears to have been well established at least by the seventeenth century.

The protective role of the grand jury was, in some respects, a natural outgrowth of vesting the accusatorial and investigative functions of the criminal justice system in a body of ordinary citizens. As early as the fourteenth century, legislation

provided that no man could be held to answer for treason or any other capital crime except upon accusation of the grand jury. It was only some three hundred years later, however, during the growth of royal absolutism under the Stuarts, that the grand jury became highly prized as a safeguard against arbitrary prosecution; in two widely acclaimed cases, those of the Earl of Shaftsbury and Stephen Cooledge in 1681, grand juries refused to return treason indictments that had been sought by the crown. Moreover, the secrecy of grand jury proceedings, a practice which had developed gradually, became an important factor in establishing the independence of the institution, for grand jurors could not be required to divulge to anyone, including the courts, the evidence upon which they had acted or refused to act. By the end of the seventeenth century, the grand jury was firmly established as an important element among the rights and privileges of English citizens, and was among the institutions brought to this country by the colonists.

It was against this background that the fifth amendment to our Constitution was adopted, guaranteeing that "no person shall be held to answer for a capital, or otherwise infamous crime except on a presentment or indictment of a Grand Jury." From the outset, the American grand jury was viewed as

possessing the powers of its British prototype. As the Supreme Court has noted, "both the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States" at the foundation of our government.2/ Although the Constitution explicitly refers only to its protective function, the grand jury was incorporated into our criminal justice system in its historic dual role of inquisitor and protector, a role which has led it to be described as a sword and a shield.

B. Structure and Function of the Modern Grand Jury

The present federal grand jury retains many of the characteristic features of its English predecessors, operating in secrecy as an ex parte accusatory and investigative body, free from the rules of evidence which apply at trial. Under Rule 6 of the Federal Rules of Criminal Procedure, grand juries are summoned and discharged by the court, serving terms as long as eighteen months. The size of the grand jury is fixed at not less than 16 nor more than 23 members; 3/ the affirmative vote of twelve members is necessary to return an indictment. 4/ In order to preserve the secrecy of grand jury proceedings, only the attorney for the government, the witness, a reporter, and an interpreter if necessary, may be

themselves may be present during voting or deliberations. 5/ Absent a court order, matters occurring before the grand jury may not be disclosed except to government attorneys and other necessary personnel for use in performing their duties. This obligation of secrecy does not apply to the witness, however, who is free to discuss his testimony with whomever he chooses. 6/

In its accusatorial role, which is often viewed as the embodiment of its protective function, the grand jury is charged with returning indictments only upon a determination that probable cause exists to hold the accused for trial. In its investigatory role, the grand jury has been described as "a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable results of the investigation." 7/

The grand jury has traditionally been allowed to pursue its dual functions "unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial." 8/ No one may appear before the grand jury as an attorney representing the potential defendant or any other person. The breadth of its powers has been consistently reaffirmed by the Supreme Court in decisions holding that the grand jury is not restricted to investigations of specific charges; 9/ that its subject matter jurisdiction may not be challenged by a witness; 10/

that it may act on any evidence, including hearsay; 11/ that the exclusionary rule is inapplicable to its proceedings; 12/ that the first amendment does not relieve a reporter from the duty to testify if subpoenaed; 13/ and that a witness may be compelled to provide voice 14/ or handwriting exemplars, 15/ and even to testify despite a claim of fifth amendment privilege as long as his compelled testimony is not used against him. 16/

Upon first consideration, the continued possession of such broad authority by a body constitutionally enshrined as the protector of the accused may seem somewhat anomalous. But the rationale for the latitude accorded the grand jury in performing its functions derives from its special role in the criminal justice system. Although the grand jury determines whether there is probable cause to hold an accused for trial, it is not itself the trier of fact. Unlike a trial, "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." 17/ The dual investigative and protective roles of the grand jury are intertwined not only historically but also functionally. That relationship has been aptly expressed by the Supreme Court. "Because the [grand

criminal conduct, and to return only well founded indictments, its investigative powers are necessarily broad." 18/ Its powers "must be broad if its public responsibility is adequately to be discharged." 19/

Moreover, "the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen." 20/ The existence of the grand jury's plenary investigative powers cannot be separated from the fact that it alone possesses such powers. While police and prosecutors have the power to conduct general investigations into crime, their investigations are limited by their lack of authority to compel a witness's appearance or testimony. While magistrates possess this authority, they are confined to investigations into known crime -- a specific charge brought against a specified person. Similarly, administrative bodies and legislative committees have the power of compulsory process, but their investigative authority is limited to uncovering facts in aid of their own particular functions. 21/

Subpoenaing witnesses and documentary evidence, taking testimony under oath, and compelling testimony by providing immunity against its use in any subsequent proceeding are all basic steps in uncovering and prosecuting crime -- a proper function of government -- but all are available to the government prosecutor only in the context of a grand jury investigation.

Only recently, the importance of the grand jury's investigative role has been reaffirmed in legislation providing for special grand juries serving for terms as long as thirty-six months, and possessing explicit statutory authority to issue reports, features designed to make these bodies particularly capable of conducting lengthy and complex investigations into organized crime. 22/ That these important and necessary investigative powers have been lodged exclusively within the protective institution of the grand jury in itself provides some safeguard against their abuse. Indeed, when viewed in this light, the grand jury's protective role extends beyond insuring that probable cause exists to hold an accused for trial. As the Supreme Court has noted, "when the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation." 23/

The grand jury, as the accusatory and investigatory mechanism of the criminal justice system, stands at the initiation and not the conclusion of the criminal process. The position of a witness summoned to appear before the grand jury is not that of an accused, one whom society has determined should be called to account for his actions, but rather is that of one who has been called upon to fulfill a duty of citizenship by providing information to assist the grand jury

in performing its functions. He is not being proceeded against, and probably will not be; if, however, he becomes the accused as opposed to one whose aid is being sought to uncover the facts, he will be accorded his full panoply of rights in the adversarial stage of the system.

But because the grand jury inquiry is not itself an adversary proceeding, the procedural and evidentiary rules designed to bring about a fair verdict at trial are largely unnecessary and irrelevant to the proper discharge of its responsibilities. Restrictions on litigation of issues involving the conduct of grand jury proceedings -- such as arguments to extend the exclusionary rule to evidence examined by a grand jury or challenges to the sufficiency of the evidence upon which an indictment was based -- are designed to avoid precipitating the adjudication of issues properly reserved for trial on the merits. 24/ In large measure, the latitude accorded the grand jury in performing its functions is predicated on a policy of discouraging the "litigation of issues only tangentially related to the grand jury's primary objective." 25/ For, as the Supreme Court has stated, to "saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." 26/

C. Current Issues Concerning the Grand Jury

To say that the grand jury has historically performed a dual investigative and protective function does not, of course, answer the question of whether its functions might better be performed by some other body. Similarly, to state that the grand jury's broad investigatory powers fulfill a necessary function in the criminal justice system does not address the issue of whether its procedures should be reformed better to safeguard the rights of witnesses summoned to appear before it. An understanding of the present and historic functions of the grand jury provides, therefore, only the necessary context for considering the current issues concerning federal grand jury practices.

1. Change in the Institution of the Grand Jury

Perhaps the most frequently heard, and also the most basic, criticism of the grand jury is that it has ceased to perform an independent function and merely rubber stamps the actions of the prosecutor. Proposals for changing the operation of the grand jury are diverse, ranging from suggestions that the institution be abolished in its entirety, to proposals for eliminating the requirement of indictment, for reducing the size of the grand jury, or for adopting a variety of measures designed to increase its independence.

Ironically, it was soon after the grand jury had been incorporated as a feature of our criminal justice system that

questions as to its continuing vitality began to emerge. In England, the acclaimed nineteenth century legal reformer Jeremy Bentham charged that the grand jury was an inefficient and unrepresentative body, whose function of screening charges could be performed more effectively by a trained prosecutor than by a group of laymen. His criticisms initiated a century-long debate on the merits of the English grand jury, culminating in its abolition in 1933.

Although early state constitutions, like the federal Constitution, guaranteed freedom from criminal prosecution without indictment by a grand jury, the English debate was carried over to the United States. Proponents of grand jury reform argued primarily that the indictment process was less efficient and more expensive than proceeding by information. In 1884, the Supreme Court ruled that the fifth amendment's requirement of a grand jury indictment was not extended to the states by the fourteenth amendment, thereby freeing the states to develop alternative means of initiating criminal charges. 27/ While no state has entirely abolished the grand jury, fewer than half presently require grand jury indictment. The remainder permit charges to be brought by either indictment or information, at the prosecutor's option.

In considering proposals to reform the operation of the grand jury, it is necessary to distinguish between, on the one hand, proposals to eliminate the institution, and, on the other, proposals to eliminate the grand jury's indictment function or to make indictment optional rather than mandatory. All of these measures would require a constitutional amendment before they could be enacted, and, hence, are sometimes referred to interchangeably as proposals to abolish the grand jury. The questions which they raise, however, are quite distinct, and require separate consideration.

Any proposal to abolish the institution of the grand jury, for example, must be analyzed not only in terms of whether the jury's screening function could better be performed elsewhere, but also in terms of where its investigative powers would then be lodged. In this analysis, the English experience provides no ready answers, for the circumstances surrounding the abolition of the grand jury in England are not generally comparable to those which pertain in this country. Unlike this country, England never developed a system of public prosecutors. Even today, crimes are prosecuted by the local police, government agencies, and, occasionally, private citizens, with only a small office of Director of Public Prosecutions providing general coordination. 28/ By the nineteenth century, the investigative powers of the English grand jury had fallen into disuse, and appear to have devolved

upon various administrative agencies, all with power to investigate and prosecute crimes within their respective jurisdictions. The primary issue raised by the proposed abolition of the English grand jury was, therefore, who would perform its traditional screening function in its stead. With the growth of an investigative police force, and the consequent freeing of magistrates for purely judicial duties, the alternative of a preliminary hearing became increasingly practicable, and had largely replaced grand jury action even prior to the institution's formal abolition. In England, indictments are presently returned following a magistrate's determination of probable cause at a preliminary hearing, at which the accused may testify and present evidence. 29/

The investigative powers of our own grand juries have hardly fallen into such disuse, however, and the question of where else these powers might appropriately reside is at least as important as that of how charges would be initiated. The English system of vesting these powers in various administrative agencies would seem to be far less workable in our own much larger and more diffuse society. At best, it is highly doubtful that such a course would offer any advantages over current practice, while it would carry the disadvantages of difficulty of coordination, diffusion of responsibility, overlapping of investigations, and waste of resources.

There are, of course, other possible approaches. It has been suggested that the grand jury's investigative powers could

would have the advantage of visibly lodging these powers, and the responsibility for their use, where many contend they already exist. In this view, only the "illusion" of the grand jurors' involvement in the investigatory process would be lost.

Alternatively, magistrates could be empowered to conduct general criminal investigations, those not involving specified charges against a known accused. At present, several states statutorily provide for investigating magistrates, or so called "one man grand juries." 30/ While in many of these states this statutory authority is seldom invoked, Michigan, in particular, has utilized the one-man grand jury for many years, and has found it effective in investigating organized crime and governmental corruption.

Both of these alternatives, however, seem to possess the common disadvantage of lodging extraordinary powers in the hands of a single person. At a minimum, this aggregation of power in one person might occasionally give rise to political grandstanding, a charge which has frequently been made against one-man grand juries in Michigan. This is not to say that it is not worth exploring whether some of the grand jury's investigative powers could also be employed elsewhere. Several states have granted independent subpoena power to the prosecutor, 31/ and considerations of efficiency and effective use of the grand jury's time may well

make this power, under appropriate safeguards, equally desirable in the federal system. But although the independence of the grand jury has been questioned, one simply cannot disregard the fact that at present the prosecutor must interrogate witnesses in front of a body of ordinary citizens, a circumstance which in itself provides some measure of check against abuse of the investigative powers. Moreover, the grand jury has never lost the power to determine independently what witnesses to hear and what questions to ask, thereby adding a citizen voice to the investigative process.

Viewed solely in terms of its investigatory function, there would seem to be little reason for abolishing the grand jury, and to be some doubt as to whether this role should be transferred to another body. The arguments for abolishing the grand jury's role in the charging process, or at least its mandatory role, are more substantial, however. In the vast majority of indictments returned by the grand jury, the investigative work has been performed entirely by the law enforcement officers and prosecutors, and the grand jury's role

is limited to hearing the evidence laid before it, oftentimes by the investigating case agent, and to voting thereafter upon the proposed indictment. A study of state grand juries conducted by then Professor Wayne Morse in 1929 and 1930 showed that grand juries differed from prosecutors in barely five percent of all cases considered. 32/ Current estimates of juror-prosecutor differences are even smaller, and the return of a "no-bill" is rare. 33/ At the least, such statistics give rise to questions of whether grand jury action adds sufficiently to the indictment process to justify the time and expense necessary to secure it. Particularly in those large and relatively unpopulated districts where a grand jury is not continually in session, there may be substantial time lost in awaiting the grand jury's assembly and action. While federal law requires that an accused be affored a preliminary hearing if not indicted within ten days of his arrest, 34/ the potential delay in the criminal process attributable to the need for grand jury action on every felony

charge must nonetheless be considered, particularly in view of the more stringent requirements that will soon be imposed as a result of the passage of the Speedy Trial Act. 35/

More importantly, critics have charged that the disadvantages of the indictment process extend, beyond those of expense and time consumption, to an actual failure to protect the rights of the accused. In the ordinary case, the grand jurors are the only individuals, apart from the prosecutor determining whether probable cause exists to hold the accused for trial. Except for the ten-day rule noted above, an indicted defendant is not entitled to a preliminary hearing. Some contend that the low incidence of juror-prosecutor disagreement indicates that the grand jury does not actually make an independent determination of probable cause, and question its inherent ability to do so. Unlike the magistrate who conducts a preliminary hearing, grand jurors are themselves untrained in the law, and must rely upon instructions received from the court and the prosecutor. The preliminary hearing, on the other hand, is an

adversary proceeding, at which the accused, assisted by counsel, may cross-examine the witness against him and present evidence in his behalf.

It certainly cannot be denied that the determination of probable cause could be made at least as well by the judge or magistrate at a preliminary hearing as by the grand jury. Whether the full panoply of procedural rights accorded at the preliminary hearing is necessary to this determination, and whether the present indictment process prejudices any legitimate rights of the accused, are, however, two far different questions.

Only recently, the Supreme Court has ruled that, while the Constitution requires a judicial determination of probable cause to hold the accused in custody for trial in the case of a prosecution initiated by information, this determination may be made at an ex parte hearing after presentation of only the prosecutor's evidence. 36/ Thus, the Court has ruled, in effect, that probable cause can be adequately determined in a non-adversarial hearing such as the grand jury's. Moreover, the supposed advantage of the magistrate's legal

experience is dissipated somewhat by the limited nature of the probable cause determination. Indeed, it is ironic to belabor the proposition that the grand jury's ability to determine whether there is sufficient evidence to hold the accused to answer is hampered by a lack of legal training, when the far more important decision of whether the evidence conclusively establishes guilt is itself left to laymen. Finally, evidence that grand juries seldom disagree with prosecutors must be considered in light of the potentially small area for disagreement. By far the vast majority of cases voted upon by the jurors involve little if any room for doubting the existence of probable cause; indeed, as nation-wide court data discloses, an overwhelming majority of defendants admit their guilt, and a substantial number of those who go to trial are convicted. Unlike earlier times when the grand jury evaluated charges grounded only on rumor or suspicion, today there exists a public prosecutor who is charged with screening out the patently weak and frivolous cases before they reach the grand jurors' consideration.

The advantages afforded by the grand jury process must also be considered. While it is sometimes asserted that the return of an indictment prejudices the accused in the eyes of the community more than does the filing of an information -- at best an unsupported conclusion -- it must be remembered that under this system the fact that charges against an individual are being considered need not be made known until it has been determined that there are grounds to hold him to answer. In addition, grand juries oftentimes serve a role in the indictment process which goes beyond the mere determination of probable cause. On occasion, a prosecutor may be uncertain of a trial jury's possible reaction to the testimony of the witnesses or to the complexity of the evidence, or may be in need of lay guidance whether a particular practice is viewed as fraudulent activity or merely sharp business dealing. In each of these instances, although the evidence may be legally sufficient to indict, the grand jury can serve the additional function of providing some indication of whether a

similarly constituted trial jury would be disposed to convict, and thereby can cause the prosecutor either to reconsider or withdraw a proposed indictment or to seek further evidence to strengthen certain aspects of the case.

Another advantage may be perceived with regard to a particular case that has so aroused the passions of the community that the decision to prosecute or not to prosecute will be highly controversial. While the referral of such a case to the grand jury is sometimes viewed as an evasion of responsibility by the prosecutor, such action can serve to increase respect for the ultimate decision by demonstrating that the community's representatives were themselves involved in the decision-making process, and that public sentiment is not merely being frustrated by arbitrary government action. In short, the grand jury can and does add a community contribution to the charging decision, a contribution which is not only desirable but at times very necessary. Notably, although the majority of prosecutions in states which have made the indictment optional are begun by information, in many cases, the indictment is still used for reasons similar to those outlined above. 37/

Moreover, even the arguments whether the grand jury's action should remain mandatory in all felony cases are far from one-sided. For many citizens, particularly those in outlying areas, grand jury service may be the one tangible connection they will have with the otherwise remote activities of the federal government, and it can provide them with an increased understanding of the criminal laws and of the operation of the criminal process. In several areas, associations have been formed by former grand jurors, both to aid those newly called for jury service and to assist law enforcement efforts. Interestingly, these associations are among the most outspoken opponents of the abolition of the grand jury, and their very existence undercuts the claim that grand jurors are mere docile "rubber stamps." Finally, it should be remembered that jurors do on occasion refuse to return indictments, albeit in quieter fashion than was true in the Earl of Shaftesbury's case. In a survey of United States Attorneys recently conducted by the Department, for example, one prosecutor responded that jurors in his district had returned "no-bills"

in several selective service cases during the Viet Nam controversy.

As a general principle, any amendment of the Constitution should be undertaken only for the most compelling of reasons. Despite the vast differences between the conditions which gave rise to the constitutional guarantee of indictment by a grand jury and those which obtain today, it is not clear that we have reached the stage where it can be said that the fifth amendment's grand jury guarantee is so antiquated that it has ceased to serve any useful purpose.

As was mentioned earlier, there are other proposals for changing the grand jury which would not require a constitutional amendment. In particular, it has been suggested that the size of the grand jury should be reduced, perhaps to nine to twelve members, with a commensurate decrease in the number of jurors needed to return an indictment. The current size of grand juries, sixteen-to-twenty-three members, is more a matter of historic precedent than functional necessity. Reducing this size would more clearly focus responsibility upon the remaining grand jurors,

promoting active participation by all members and possibly improving the deliberative process.

Decreasing the size of the grand jury might also have certain disadvantages, however. Potentially, it could exacerbate the problem of obtaining a quorum of members at scheduled sessions. During the term of a grand jury, individual jurors frequently must be excused because of illness, employment problems, or other difficulties; with smaller juries, the inability of only a few members to attend could prevent assembling a quorum. Moreover, reducing the size of the grand jury would reduce the number of citizens exposed to the criminal process, and, in any given jury, would decrease the possible number of divergent views. On the other hand, these potential disadvantages are neither inevitable nor entirely one-sided. Although a smaller jury would increase the importance of each member's ability to attend, it is possible to structure the jury so that the same percentage of members as at present could be absent without losing a quorum. Reducing the requisite number of grand jurors would

decrease both the number of citizens who must absent themselves from employment or other activities during the periods required for jury duty, and the level of federal expenditures for grand jury attendance fees and travel and subsistence allowances, which amounted to almost four million dollars in 1975. 38/

Reducing the size of grand juries, which would require an amendment of Rule 6 of the Federal Rules of Criminal Procedure, does, therefore, merit serious consideration. The Judicial Conference is presently considering a proposal to reduce the size of grand juries to a minimum of nine and a maximum of fifteen members, with the concurrence of two-thirds of the members required for indictment.

Other proposals have been aimed at increasing the independence of grand jurors. They have ranged from suggestions that the majority vote of the jurors be made a necessary prerequisite to the issuance of any subpoena on their behalf, to proposals that special prosecutors routinely be appointed to assist grand jurors upon their request. That the grand jury possesses, and necessarily so, a fundamental independence with regard to the prosecutor and the executive branch, is a proposition beyond dispute.

As one court has stated: 39/

> While the grand jury is, in a sense, a part of our court system, when exercising its traditional functions it possesses an independence which is unique. Its authority is derived from none of the three branches of our government, but rather directly from the people themselves.

In considering what steps may be necessary to maintain and safeguard this traditional independence, however, one must be careful to distinguish between those matters which reflect encroachments upon the independence of the grand jury and those which simply reflect necessary cooperation between the prosecutor and the grand jurors in fulfilling their related functions in the criminal justice system. Thus, although in questioning witnesses before the grand jury the prosecutor employs his knowledge of the case to bring relevant facts to the juror's attention, the jurors have never lost the power to pose questions of their own -- a power of which they are informed by the court upon being empanelled, and, indeed, one which they frequently exercise.

Similarly, in issuing subpoenas on behalf of the grand jury to secure the attendance of witnesses at its sessions, the prosecutor again employs his knowledge of the facts of the case to aid in its

orderly presentation. Although it might be a desirable practice to inform grand jurors of all subpoenas issued on their behalf in order to insure that grand jurors remain knowledgeable of the actions being taken in their name, it is highly doubtful that requiring the grand jury to vote upon the issuance of each subpoena would add to its independence. Certainly such a requirement would have the detrimental effect of preventing the prosecutor from scheduling witnesses in advance of a grand jury session; in some districts, this would necessitate that additional sessions be called simply to issue subpoenas for subsequent dates.

The suggestion that special prosecutors routinely be appointed to assist the grand jury, either in any investigation in which the jurors request such assistance or solely in investigations of government officials, involves a different aspect of relative juror-prosecutor responsibilities. While broad investigative and protective powers have been vested in the grand jury, under our Constitution the prosecutorial function rests solely with the

executive branch of government. The grand jury's indictment is necessary, but not sufficient, for holding an accused for trial; its indictment must be signed by the prosecutor as the expression of the Executive's decision to bring the prosecution. 40/

Thus, although proposed as a measure designed to promote the independence of the grand jury and to prevent governmental thwarting of its investigative powers, the authorization of grand juries to demand the appointment of special prosecutors goes beyond insuring independence. It would permit the grand jury to encroach upon the powers reserved to the executive branch. In all probability such authorization would violate the separation of powers mandated by the Constitution. Equally important, however, such authorization would be unsound as a matter of policy.

The underlying rationale for the appointment of a special prosecutor is doubt as to the government's ability or desire effectively to investigate a particular situation, usually one involving governmental misconduct. Historically, several successful investigations of governmental corruption have been

conducted by grand juries acting in concert with special prosecutors. Examples of the use of special prosecutors are found in investigations of municipal corruption in the first half of this century, and, most recently, in the Watergate inquiry. In such instances the special prosecutor is appointed in response to a specific demonstrated or perceived need for outside intervention. One desired effect of such an appointment is to assure public confidence that misconduct in office is no more immune from prosecution than any other form of corruption.

But such appointment of special prosecutors has been the rare exception and not the rule. In the overwhelming majority of cases, there is no reason why the government cannot or will not investigate the misdeeds of its officers. Indeed, if public confidence in the integrity of government is to be maintained, that the regular machinery of government should prosecute the misdeeds of its officials is as vitally important as that its misdeeds should not go unprosecuted. Self-policing should be demanded of government, not mistakenly

dismissed as an unattainable goal. Institutionalizing the extraordinary remedy of the special prosecutor would diminish the primary responsibility of existing agencies for insuring the integrity of government. It would do so needlessly, and at the cost of promoting the very loss of confidence in the institutions of government it is proposed to prevent.

Notably, in those instances where special prosecutors have been appointed, the appointments have been made, with rare exceptions, by the executive branch itself. There is no reason to believe that the political process will prove less effective in causing the creation of special prosecutors as needed in the future than it has been in the past. For the present, however, it would seem that the grand jury, acting in cooperation with the government prosecutor, is fully as capable of investigating governmental corruption as it is of investigating any other form of criminal activity. Maintaining the necessary independence of the grand jury, and its consequent effectiveness as an investigative and protective body, does not require that this relationship be supplanted.

2. Rights of Grand Jury Witnesses

Until recent years, the only issues commonly raised concerning the grand jury were those discussed above, relating to the central question of whether the institution of the grand jury continued to perform a sufficiently useful role in the criminal justice system to warrant its retention. During the last twenty years, however, we have witnessed major developments in the law concerning the due process rights accorded to suspects and defendants. The requirement of so-called "Miranda warnings," the right to appointment of counsel, and the exclusionary rule, to list but a few of these significant developments, have sharply focused attention upon the question of what is to be considered appropriate governmental conduct in the investigation and prosecution of crime. This, in turn, has caused some attention to be directed to the plenary investigative powers of the grand jury, and has led some to question whether these powers are inconsistent with constitutional safeguards enforced in other areas of the criminal justice system. In short, questions have arisen whether modern concepts of due process require a reassessment of the rights accorded to grand jury witnesses.

An examination of the Supreme Court's holding in Miranda v. Arizona 41/ serves as a helpful introduction to this area, for it reveals both some of the issues which have been raised,

and some of the difficulties which are immediately encountered in attempting to apply to the grand jury concepts of procedural rights developed in other areas. In Miranda, the Court prescribed certain procedural safeguards -- which it announced would be required absent the development of other equally effective measures -- that have come to be known as "Miranda warnings." The Miranda decision was properly recognized as a significant step in protecting a suspect against improper forms of custodial interrogation. Whether similar warnings should be required in the grand jury context, however, requires more than mere consideration of whether a witness should be informed of his rights, for the very rights included in the Miranda warnings as applicable in the custodial situation are inapplicable in an official proceeding before a grand jury. A witness appearing before a grand jury has no general "right to remain silent" in response to any questions he does not wish to answer. He may claim his fifth amendment privilege against compulsory self-incrimination as a reason for refusing to answer, but may do so only if 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 could result." 42/ Even where he invokes the privilege, he may nonetheless be compelled to respond, under pain of a contempt citation, if granted immunity against the use, or

derivative use, of his testimony in any criminal proceeding against him. 43/ Nor is he totally free to invoke the privilege at any point he so chooses; once he has testified as to an incriminating matter, he cannot refuse to testify further regarding the details of that matter. 44/ The general right to the presence of counsel also referred to in the Miranda warnings is similarly inapplicable to the grand jury situation as it there is not required for its purpose of assuring protection of any right to remain silent; although a grand jury witness may consult with counsel during his appearance, his attorney may not accompany him into the grand jury room.

The question of whether the Constitution requires that "putative defendants" called as grand jury witnesses be advised of their fifth amendment privilege or be given full Miranda warnings was recently before the Supreme Court in the case of United States v. Mandujano. 45/ Although the case was decided upon other grounds, four members of the Court joined in an opinion concluding that Miranda warnings need not be given to a grand jury witness who is called to testify about criminal activities in which he was personally involved. This opinion pointed out, inter alia, that the potential for coercion which led the Court to require Miranda warnings in the context of custodial police interrogation is not similarly present in the setting of a grand jury's inquiry. As there was no opinion of

a majority of the Court on this issue, however, the question of what, if any, warnings the Constitution requires be given to a potential defendant called before the grand jury remains undecided, and questions also remain as to what rights should be accorded witnesses before the grand jury as a matter of policy, if not constitutional law. These questions, which arise in several areas, should be addressed separately, for the issues involved are related but nonetheless distinct.

a. Fifth Amendment Rights

The first, and perhaps most important, issue concerns the role of the fifth amendment in grand jury proceedings, or more accurately, whether a witness called before the grand jury should be granted rights to refuse to respond to its inquiry beyond those accorded by the fifth amendment privilege. At base, the privilege against compulsory self-incrimination embodies a fundamental principle of government-citizen relations developed against a background of attempts to secure confessions to crime by means of torture and inquisition. In guaranteeing that no one may be compelled to be a witness against himself, the Constitution reflects the judgment that the guilt of an accused is not to be proven by coercing admissions from his own mouth.

Traditionally, the fifth amendment privilege has had two component parts: the right of any witness to claim potential self-incrimination as a ground for refusing to answer a particular

question, and the right of a defendant at trial not to be called to testify. Apart from the right of a defendant not to be called as a witness at his trial, however, the fifth amendment privilege does not entail a general "right to remain silent" in any context. This broader concept of a "right to remain silent" has been developed only in the context of custodial police interrogation; it is simply a recognition of the general principle that in our legal system the police are not empowered to demand that citizens respond to their inquiries, and that, absent a police power to compel testimony, a witness may be said to have a "right" not to respond.

Other agencies, however, including the grand jury, are, and have traditionally been, vested with the power to compel testimony. Indeed, in a system which has eschewed the use of coerced confessions, the availability of other means for obtaining evidence to hold an offender to account is particularly important. Thus, the fifth amendment privilege stands as an exception to "the longstanding principle that the public has a right to every man's evidence," a principle which is "particularly applicable to grand jury proceedings." 46/ The "broad power to compel residents to testify in court or before grand juries or agencies" has been described as "among the necessary and most important powers of the States as well as the Federal Government to insure the effective functioning of government in an organized society .... Such testimony

information." 47/ The power of compulsory process exists in relationship to, not in contravention of, the fifth amendment privilege, and is itself referred to in the Bill of Rights.

Arguments for expanding the rights of a witness to refuse to respond to the inquiries of a grand jury are largely premised upon the assertion that the situation of the witness called to appear before the grand jury is analogous to that of the suspect held for custodial interrogation. But fundamental distinctions exist. Most basically, the suspect, unlike the grand jury witness, is involved in a process which has begun to focus upon the question of his guilt or innocence of a particular offense. Any questioning of the suspect is directed largely toward securing his confession to the crime. Moreover, this questioning occurs while the suspect is incommunicado and in a private setting which itself carries the potential for the improper use of psychologically, or even physically, coercive tactics designed to overcome the suspect's refusal to speak in a situation in which he has absolutely no legal obligation to make any statement at all.

In sharp contrast to the interrogation of a suspect held incommunicado in police custody, a witness before the grand jury is questioned in the presence of no fewer than sixteen private citizens 48/

> [who] bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law enforcement officer ferreting out crime.

Grand jury questioning, moreover, is under the supervision, although not within the presence, of a presiding judge, and a transcript of the proceedings is frequently made. For these reasons grand jury questioning plainly does not carry the same inherent potential for abuse as custodial police interrogation. As Justice Black noted "it would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury." 49/

Furthermore, the witness summoned to appear before the grand jury is not being compelled to respond in derogation of a general right to remain silent in face of an accusation against him, but rather is formally being called upon to perform a long recognized duty of citizenship. The duty of providing testimony, which is imposed upon all citizens alike, "may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet [it] has been regarded as 'so necessary to the administration of justice' that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure." 50/

There are, of course, limitations upon the citizen's obligation to provide information, the fifth amendment privilege chief among them. On occasion, however, it is necessary to achieve a balance between the individual's right not to provide information incriminatory of himself, and society's need for his information to pursue its investigation of the criminal activity of others. Certain offenses, such as bribery, are of such a character that the only persons possessing helpful knowledge thereof are oftentimes those who themselves are implicated in the offense. In the case of broad investigations into unknown crime, such as investigations of drug trafficking or organized criminal activity, the only persons known to law enforcement officials or to the grand jury may be those involved at the fringes of the suspect conduct. If the investigation of crime is not to be frustrated in such circumstances, there must be a means of both securing the citizen's privilege against compulsory self-incrimination, and obtaining the necessary information. Immunity provisions have traditionally filled this need.

The practice of providing immunity against the use of compelled testimony as a lawful means of accommodating the privilege against self-incrimination has occasionally been characterized as a modern encroachment upon the fifth amendment. In fact, it has an unquestioned tradition in English legal history. Immunity provisions can be traced at least to the

political bribery trial of Lord Chancellor Macclesfield in 1725, and may well have originated earlier. 51/ The first federal immunity statute was enacted to facilitate an investigation of political bribery and corruption. 52/ Today, virtually all of the state governments, as well as the federal government, have enacted statutes providing for the immunization of witnesses from their compelled testimony. Federal law provides that a witness who refuses, on the basis of his fifth amendment privilege, to testify in a proceeding before a court or grand jury, an agency, or a committee of Congress, may be compelled to testify, but that neither his testimony nor any information derived directly or indirectly therefrom may be used against him in any criminal case. 53/

The underlying rationale of the earliest immunity provisions and the current statutes is the same: once the witness has been afforded protection co-extensive with the privilege against self-incrimination, his legitimate interests have been safeguarded, and the public interest in securing his information becomes paramount. The criticism advanced against the earliest immunity provisions and current law has also remained the same: that the protection afforded by preventing the use of compelled testimony against the witness is not co-extensive with that provided by the privilege.

This criticism takes two forms. On the one hand, it is [illegible] not without some merit, that no form of immunity

actually places a witness in precisely the same situation he would be in had he remained silent. In particular, it is urged that a witness who is forced to admit to the facts of his conduct is thereby compelled to expose himself to possible opprobrium or disgrace, and that the fifth amendment privilege should be construed to provide protection against this type of damaging disclosure. But such an argument confuses the interests protected by the fifth amendment privilege with the effect of its assertion. Notably, there was historically a privilege against disclosing facts involving disgrace or infamy as opposed to those involving criminality. That privilege, however, was wholly independent of the privilege against self-incrimination and fell into disuse. The interests it safeguarded were not accorded constitutional protection. 54/ Rather, the fifth amendment privilege was designed to assure only that a citizen is not "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'" 55/

The current federal compulsion statute, which was enacted in 1970, has also been criticized on the ground that it affords so-called "use," rather than "transactional" immunity. In general, under a "use" immunity provision, a witness may be compelled to testify despite his assertion of his fifth amendment privilege, but the compelled testimony may not thereafter be used against him in any fashion in a criminal proceeding;

under a "transactional" immunity provision, a witness who is compelled to testify may not subsequently be prosecuted at all -- even upon totally independent evidence -- for any transaction mentioned in his testimony. Like most generalizations, however, the labels of "use" and "transactional" immunity are oversimplifications. The adequacy of an immunity provision cannot be judged by mere reference to whether it provides use or transactional immunity, but depends instead upon whether it affords the witness protection commensurate with that guaranteed by the fifth amendment. For example, the earliest federal compulsion statute, while purporting to provide use immunity, protected the witness only against the direct use of the specific compelled testimony, and did not prevent the use of that testimony to uncover other evidence against him. This statute was held unconstitutional on the ground that it did not protect the witness to the same extent as would a claim of the privilege. 56/ Subsequent statutes providing for transactional immunity, however, were held sufficient to satisfy the fifth amendment guarantee. In truth, such statutes afforded a witness "considerably broader protection than does the fifth amendment privilege," for "the privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted." 57/

The current federal statute, on the other hand, provides the witness who is compelled to testify with protection

against self-incrimination that is neither broader nor narrower than, but rather commensurate with, that of the fifth amendment privilege. It does so by providing for a total prohibition on the use of the witness' compelled testimony against him in any fashion, barring not only the use of the compelled testimony in evidence or as an investigatory lead, but also the use of "any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." 58/ Moreover, in the event of any subsequent prosecution of an immunized witness, the prosecution carries the heavy burden of proving that the evidence it will use is derived from legitimate sources wholly independent of the compelled testimony.

As a practical matter, it is extremely difficult to demonstrate that evidence against a once-immunized witness is in no way tainted by his compelled testimony. Consequently, during the relatively short time that the current law has been in effect, the Department has made few efforts to develop totally independent bases for prosecutions of witnesses whose testimony has been compelled. Nonetheless, this does not mean that the distinction between current law and transactional immunity is meaningless, nor that we should revert to a transactional immunity statute. Under transactional immunity, there is always the possibility that a particularly heinous crime could go unpunished because a witness gave the most peripheral

testimony concerning it, despite the availability of ample and wholly independent evidence of his guilt. More importantly, since the witness who receives transactional immunity may not be prosecuted for an offense merely touched upon in his compelled testimony, there is little incentive for him to testify fully. In contrast, under current law, such incentive exists, for the more fully developed and detailed the witness' testimony the smaller the possibility of the government's ability to secure wholly new and independent evidence upon which to prosecute him. As the very purpose of compulsion provisions is to accommodate both the witness' privilege against self-incrimination and society's need for his information, current law, which affords protection commensurate with the fifth amendment privilege while encouraging disclosure, strikes a true balance between these competing interests.

There is a further area in which a balance is required between the witness' self-incrimination privilege and the grand jury's need for information -- in instances where a witness voluntarily testifies as to one fact and then seeks to claim the privilege concerning a related question. Although it is sometimes said that such a witness, by testifying to an underlying fact, has waived the privilege as to details concerning the fact, the analysis applied to such situations extends beyond a mere concept of waiver. Rather, the witness may be compelled to testify despite a subsequent claim of privilege only upon a determination that the potential answer presents not a "real danger" but only an "imaginary possibility" of increasing the risk of prosecution. 59/ In other words, the so-called doctrine of waiver of the fifth amendment privilege is based upon the rationale that, because of the witness' prior voluntary admissions, no legitimate interest remains to be safeguarded by the privilege in that area of questioning. Against the witness' desire to say nothing further must be weighed the grand jury's need for information. When it is determined that disclosure of further details will be of little if any practical consequence to the witness's

position, the public interest in securing a full and complete account is recognized as having the greater weight.

Thus, the question whether grand jury witnesses should be granted rights to refuse to respond to interrogation beyond those provided by the fifth amendment must, in the final analysis, be viewed in light of the balance which has already been drawn between the witness's need for protection and society's need for information. One might wish that our society were so structured that the investigation of crime could rely entirely upon the wholly voluntary cooperation of citizens. But such is not, and has never been, the case. If the grand jury is to perform its historic function of investigating crime and returning only well-founded indictments, it must rely upon compulsory process and the testimony of witnesses who sometimes are themselves involved in the matters under inquiry. The extension of a general right to remain silent from the context of a police interrogation to the context of a grand jury proceeding is neither logically warranted, given the vast differences which exist between the two situations, nor functionally desirable. Absent compulsory process and immunity, the grand jury would be seriously hampered in its investigative efforts.

A somewhat closer question is whether the grand jury witness should affirmatively be informed of the fifth amendment right he possesses. Upon first consideration, there would seem to be little reason why he should not be. Indeed the failure to accord such a warning smacks of unfair trading upon the witness' potential ignorance of his rights, and may create a potential problem of an unintentional waiver.

On the other hand, it bears repeating that the fifth amendment privilege is one against compulsory self-incrimination. The witness who volunteers incriminating information is not thereby deprived of his rights. Any time a witness is subpoenaed to testify before a government agency, a congressional committee, or court he may, of course, incriminate himself; yet in none of these situations is an affirmative reminder of his right not to do so required. Rather, such a warning has been required only in the context of custodial police interrogation, again, on the rationale that the circumstances of such interrogation are so potentially compulsive as to require that the privilege receive "practical reinforcement." 60/ As noted earlier, the setting in which grand jury questioning occurs presents no comparable risks of improper compulsion.

The potential effect upon the grand jury's investigative process must also be evaluated in considering the creation of a requirement that witnesses receive explicit notification of their fifth amendment rights. Underlying the argument for the imposition of a general notification requirement is the premise that witnesses would be less likely to volunteer potentially incriminatory information if informed explicitly of their right not to do so. This is hardly an improbable assumption. But, particularly absent circumstances which render it likely that a conscious decision not to provide incriminatory information would be overborn in the grand jury, we should not adopt a policy of affirmatively discouraging witnesses from providing evidence. The success of a grand jury investigation as previously observed, oftentimes depends upon securing information from those who are involved in, or are on the fringes of, criminal activity, and who consequently have particularly valuable knowledge of the conduct which is the subject of inquiry. Insofar as the ordinary grand jury witness is concerned, therefore, the incremental protection of fifth amendment rights afforded by a warning requirement would seem to be outweighed by

the resulting detriment to the grand jury's investigative function.

With regard to testimony by "targets" -- those whose conduct is itself the object of the grand jury's investigation -- additional considerations come into play. Notably, the considerations are not different in terms of the degree of "compulsion" to which the individual is subject during his grand jury appearance. Rather, the differences stem more from notions of "fair play" relative to the target's peculiar situation. While not being compelled to testify as a witness against himself, he is, in effect, being asked if he will do so. Unlike the witness who is questioned primarily to secure information concerning others, there is a greater likelihood that the target's truthful responses would be incriminatory and would be used against him. Moreover, there is generally a countervailing decrease in the grand jury's need for the target's own testimony as a requisite to the successful completion of its investigation.

Such policy considerations would seem to argue in favor of informing such a witness that he is considered to be a target, that his testimony may be used against

him, and that he cannot be required to incriminate himself. Such warnings are already given in many districts as a matter of course. Even here, however, the dangers of imposing too rigid a requirement must be avoided. Chief among these dangers is the imposition of an exclusionary rule as an automatic penalty for failure to provide such warnings. As a general proposition, there is simply no reason to believe that prosecutors would fail to follow an announced policy that such warnings be provided. At the same time, the imposition of an automatic exclusionary rule would doubtlessly lead to time-consuming and frequent litigation concerning the furnishing of warnings, or the sufficiency of the warnings afforded, to any subsequently indicted grand jury witness. In this connection, it should also be noted that the targets of the grand jury's investigation, and therefore those who arguably should be provided warnings, cannot simply be defined as those subsequently indicted by the grand jury. It is not unusual for a grand jury to call as a witness a person against whom it has heard some evidence but as to whom there exists no present intention to indict. The notions of "fair play" mentioned above would be

inapplicable to such a witness at the time of his appearance; mechanically to require the exclusion of his testimony at a subsequent trial would serve no conceivable salutory purpose.

In addition, although in some instances a subpoenaed target who affirms that he would claim his fifth amendment privilege may not be required to appear before the grand jury, it would be undesirable to adopt such a rule as a matter of general policy. The target may himself be only one of a number of persons whose conduct is under investigation by the grand jury; his obligation to provide information about others, to the extent that he can do so without incriminating himself, is no less than that of any other subpoenaed witness. Moreover, such a general policy would encourage persons to assert that they would claim the privilege solely to avoid the necessity of a grand jury appearance, although, if compelled to appear, they might be both willing and able to respond to the grand jury's specific inquiries. In sum, it would seem that the target's situation can be handled with all fairness simply by requiring that he be informed that he is a suspect, that he is under no obligation to provide

any self-incriminatory answers, and that anything he does say may be used against him. It should be noted that the Supreme Court has recently agreed to hear two cases involving the question of whether such warnings are required as a matter of constitutional law. 61/

b. Right to Counsel

Closely related to these fifth amendment issues is the question whether counsel should be permitted to accompany the witness into the grand jury room. Advocates of such a position contend that the presence of counsel is crucial to alerting the witness to his rights. It is argued that a witness may be called upon to make close decisions as to when to claim his privilege, and that his right to assert the privilege as to a certain line of questions may be lost by answering some initial questions in that area. In addition, proponents point to the increasing awareness generally of the importance of counsel in criminal proceedings. That importance has led the Supreme Court to hold that an accused is entitled to the assistance of counsel at trial, at a preliminary hearing, at a custodial interrogation, and at other "critical stage[s]" of the prosecutorial process. Indeed, the presence of counsel is deemed so important in these proceedings that an attorney is appointed for the accused if he is financially unable to retain one.

In this context, it is urged that the flat prohibition against the presence of a witness's counsel in the grand jury room is an anachronism.

In considering this issue, the alleged detriments to the protection of witness rights stemming from the absence of counsel must first be placed in their proper perspective. Although it occasionally happens, unintentional waiver of fifth amendment rights is an infrequent occurrence. It is far more common for the witness who fears incrimination to "overclaim" the privilege, asserting it in response to questions which could not possibly be incriminatory. Moreover, the factors which have led courts to hold that a person is entitled to counsel in certain other proceedings are not equally applicable in the grand jury situation. Cases upholding a right to counsel uniformly have considered whether "the accused required aid in coping with legal problems or assistance in meeting his adversary." 62/ In the grand jury setting, there in no "accused" and no "adversary." The situation is rather one of a witness being asked to lend his knowledge to an ongoing investigation.

Equally important, it is only the presence of counsel in the jury room, and not the right of a witness

to be advised by counsel concerning his testimony, which is at issue. Under current federal practice, counsel may remain outside the grand jury room, and the witness is free to interrupt his testimony to consult with his attorney as he desires. Indeed, several districts already follow a practice of appointing counsel for indigent grand jury witnesses who request such assistance.

Given the witness's ability to consult with counsel concerning his testimony, barring counsel from the jury room itself may then be argued to be at best a meaningless formality, and at worst the product of an intention to isolate grand jury witnesses and dissuade them from asserting their rights. In truth, however, this restriction serves two important interests. In the first place, the grand jury inquiry's continued ability to function as an informal, non-adversarial proceeding would be deeply affected by the presence of witnesses' counsel, even were counsel restricted solely to the role of advising their clients of their rights. Counsel who desired to do so 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 that can be made on behalf of the client. In the courtroom, the judge is immediately on hand to resolve objections or disputes. No judicial figure would be present in the grand jury room, however, and obtaining resolution of even plainly 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 and of business frauds and other white-collar offenses, one attorney represents several potential witnesses. At times, counsel is retained --

by the very business, union, or other organization, the activities of which are under investigation -- to represent all persons connected with an organization. In such situations, the individual witness may possess relevant information and may be willing to cooperate with the investigation. Understandably, however, he may desire that his cooperation not become known to his employer, fellow union members, or others whom he knows his attorney represents or with whom he knows the attorney has been associated. Even at present, the multiple representation of witnesses by a single attorney has occasioned problems in conducting complex investigations. While cognizant of these difficulties, courts have generally been hesitant to interfere with a witness's access 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 to 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' perspective, current practice imposes upon witnesses only the slight inconvenience of having to leave the grand jury room to consult with counsel.

In this connection, however, it should be noted that although counsel is frequently appointed for indigent witnesses who so desire, it is doubtful that this practice is authorized by statute. A grand jury witness's need for the advice of counsel is ordinarily much less than that of persons in those situations for which the appointment of counsel is currently authorized. Nonetheless, such need may at times arise, and it may therefore be desirable to have some statutory authorization providing for the assistance of counsel to indigent witnesses desiring such aid.

3. Other Issues

It is, of course, impossible to detail all of the issues which have been raised concerning the scope of the grand jury's investigative powers and the rights of witnesses. It has been suggested, inter alia, that witnesses should be given greater rights to challenge the reasonableness of subpoenas or the relevance of requested information; that the exclusionary rule, although not constitutionally applicable, should be legislatively applied to grand jury proceedings, and that grand jurors should be restricted to acting upon legal and competent evidence. All of these proposals are designed to increase the rights of witnesses and defendants, and to restrict the possibilities of abuse of the grand jury's investigative powers.

But, as with questions concerning the role of the fifth amendment in grand jury proceedings and the presence of witness counsel in the jury room, any asserted benefits to witnesses or the accused must be balanced against the potential deleterious effect of the proposed change upon the proper functioning of the grand jury itself. A review of two proposed reforms -- requiring the recordation of grand jury proceedings and placing restrictions upon the issuance of subpoenas to witnesses -- serves to illustrate the kinds of competing considerations which must be taken into account.

a. Recordation of Grand Jury Proceedings

At present, although the recordation of grand jury testimony is permitted under the Federal Rules of Criminal Procedure, it is not required. As was mentioned earlier, the fact that grand jury testimony is frequently recorded is one of several features which distinguishes grand jury inquiries from custodial police interrogations. In addition to providing some further measure of protection against the use of unduly coercive or otherwise improper interrogational tactics, recording grand jury testimony often serves other purposes. By effectively preserving the ability to prosecute for perjury, it provides a circumstantial guarantee of the reliability of grand jury testimony and discourages witnesses from making wholly baseless accusations. Moreover, it preserves testimony for impeachment purposes. Under current law a defendant is entitled to receive a copy of the prior statements of the prosecution witnesses who testify against him at trial, as well as any exculpatory evidence within the possession of the government. Recording the testimony of grand jury witnesses ensures that this testimony will be available to the defendant for impeachment purposes at trial, in the event that any witness should give testimony inconsistent with that which he gave before the grand jury.

For these reasons, requiring that grand jury testimony be recorded would seem to be a desirable measure. Requiring the recordation of grand jury testimony, however, is frequently linked with more questionable proposals. In particular, it has been suggested that every grand jury witness should be permitted to receive a transcript of his testimony, and that the defendant should be furnished with a transcript of all testimony presented to the grand jury concerning his case. At present, in addition to those instances where the production of grand jury transcripts is authorized or required by statute or rule, courts possess the discretionary power to direct the disclosure of grand jury materials when some "particularized need" has been demonstrated. 63/ Departure from this standard would be unwise. For example, although it has been argued that a witness should be furnished with a transcript of his testimony to protect him from prejudicial inference from the fact that he was called to testify before the grand jury and to permit him to demonstrate to concerned friends or associates that he has accurately related his testimony, such a general rule would be inconsistent with the policies underlying grand jury secrecy. Moreover, it would be clearly prejudicial to those witnesses who, sometimes in fear of physical violence or even threats upon their lives, wish their cooperation to remain secret. 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's testimony.

It should also be noted that one of the major factors preventing recordation of grand jury testimony at the present time is the unavailability of court reporters in many areas. Proposals which would require the stenographic transcription of all grand jury testimony fail to take account of this very real, practical difficulty. Providing for the sound recordation of grand jury testimony would seem to overcome this obstacle while achieving the same purposes; so much of the testimony could subsequently be transcribed as is necessary for trial. Even this measure would require that funds be provided to the districts to enable them to acquire sufficient sound recording equipment where it is not presently available. In any event, proposals for requiring the recordation of grand jury testimony must take into account the surmountable, but nonetheless real, technical obstacles which stand in the way of achieving this goal.

It has also been proposed that all grand jury proceedings be recorded, including exchanges between prosecutor and jurors when no witness is present, and this proposal raises distinctly different considerations. The rationale advanced for such a requirement is 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 does not in fact exist. At the outset, it should be noted that safeguards already exist for discouraging and controlling prosecutorial misconduct. As an attorney, the prosecutor is held to conform to the highest professional standards of an officer of the court, a member of the bar of a state, and an employee of this Department. For any misconduct in office, he is accountable to the court, the state bar association, and the Department. Moreover, it is ordinarily against the 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 by 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." 64/

Any incremental protection which might be afforded the accused by requiring that all grand jury proceedings be recorded must be balanced against the possible disadvantages of a blanket recordation requirement. Chief among these is the likelihood that such a requirement would promote increased litigation over the conduct of grand jury proceedings. The underlying premise of a requirement that all proceedings be recorded seems to be that the record would subsequently be

available for review to determine if misconduct in fact occurred. While the occurrence of prosecutorial misconduct would certainly be the 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 misconduct may have taken place. 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 "an indictment returned by a legally constituted grand jury, if valid on its face, is enough to call for trial of the charges or the merits" 65/ is based upon sound policy. Given the delay attending the pretrial stage of criminal proceedings, and the pressing need to secure a speedy determination of the defendant's guilt or innocence, any proposal which would lead to further time-consuming litigation over such a preliminary stage as the grand jury proceeding must be viewed with disfavor.

b. Restrictions on the Issuance of Subpoenas

Another proposed revision of grand jury practice is to place restrictions upon the grand jury's ability to issue "forthwith" subpoenas -- subpoenas requiring immediate compliance. It has been suggested that any witness subpoenaed

by the grand jury should be afforded a certain minimum time period -- one week, for example -- for complying with or challenging the subpoena, and that the issuances of subpoenas demanding more immediate compliance should be prohibited. Like the proposal for requiring the recordation of grand jury testimony, proposals for providing witnesses with adequate advance notice of their appearance seek to obtain a desirable goal. The fact that ordinarily a witness has notice well in advance of the date he must testify, and has time to consider his testimony and to consult with friends or counsel, is another of the features distinguishing a grand jury appearance from police interrogation. A recent survey of United States Attorney's offices revealed that subpoenas are usually issued two weeks prior to a witness's appearance.

The general desirability of providing witnesses with adequate advance notice of their appearance cannot, however, be equated with the desirability of requiring a minimum notification period in all instances. Occasionally, particularly in less populous districts where a grand jury is not continually in session, the jury may learn of an important witness while it is sitting, it may desire to obtain the witness's testimony before closing the session, and the witness may be readily available and have no objection to

testifying. Indeed, subpoenas are frequently issued to so-called "friendly witnesses" who have no hesitation about testifying but wish the record to reflect that they were subpoenaed. Artificial barriers should not be erected to obstruct these totally voluntary appearances.

At the other end of the spectrum, the issuance of "forthwith" subpoenas may sometimes be necessary to prevent an obstruction of the grand jury's investigation. One of the benefits of grand jury secrecy, and of grand jury compulsory process, is that proof of criminal conduct can be developed in a case before the offenders or their confederates have sufficient awareness or time to obstruct the investigation. Speed and vigor may sometimes be the decisive factors in the success of a grand jury's inquiry. Speed in investigation can be necessary to minimize the risk of collusion among witnesses; of their being injured, intimidated, or bribed; or of their avoiding process or fleeing the jurisdiction. On occasion, a "forthwith" subpoena may be necessary to prevent documentary or other physical evidence from being tampered with, hidden, or destroyed. In each of these instances, interests involving the possible convenience of witnesses must be balanced against the overwhelming public interest in the success of the investigative grand jury as an instrument for effective law enforcement.

While it is, therefore, generally desirable to provide advance notice to the witness adequate to prevent his unnecessary inconvenience, attention must be paid the distinction between unnecessary inconveniences and instances where immediate compliance may be essential to the success of the grand jury's investigation. Any provisions designed to govern the advance notification which witnesses should be provided must be flexible enough not to prevent action in those circumstances where an immediate response may be indispensable to the interests of justice.

The above review of the competing considerations involved in evaluating proposals to require recordation of grand jury proceedings and to provide adequate advance notification to witnesses, illustrates the two primary disadvantages which must be avoided in attempting to revise grand jury procedures: increasing the potential for time-consuming litigation and delay in pretrial proceedings, and decreasing the necessary flexibility of the grand jury's investigative authority. In considering any proposal for augmenting the rights of grand jury witnesses and the accused, the central inquiry must be how the basic goal can best be obtained without unnecessarily impeding the functioning of the grand jury or burdening the criminal process with a series of mini-trials unrelated to the proper determination of guilt or innocence.

In all of this, the underlying role of the grand jury must also be remembered. If it is to perform its functions adequately, it must be preserved in its effectiveness as an investigative body, unhampered by the procedures and restraints which are appropriate to the adversarial process. As the Supreme Court has stated: 66/

> The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and the overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigation unhindered by external influence or supervision, so long as it does not trench upon the legitimate rights of any witness called before it.

D. Controlling Abuse of the Grand Jury

This discussion is not meant to suggest that the grand jury's powers are not subject to abuse, or that measures should not be taken to prevent such abuse. But in seeking to prevent abuse we must look primarily to those authorities which are responsible for the proper conduct of grand jury proceedings, that is, the courts and the prosecutors. It must not be forgotten that "grand juries are subject to judicial control and subpoenas to motions to quash." 67/ The courts have traditionally been

sensitive to potential abuses of the rights of citizens, as is evidenced by the procedural safeguards which have been promulgated to protect the rights of an accused. While, in view of the grand jury's particular function, many of these procedural safeguards have not been held applicable to grand jury proceedings, the Supreme Court has consistently reaffirmed that judicial supervision will be exercised over the conduct of these proceedings. 68/

While judicial supervision is available to correct such abuses as may arise, the exercise of prosecutorial restraint is needed to prevent abuses from occurring in the first instance. The Department of Justice is presently studying the entire area of prosecutorial discretion, with a view towards determining the appropriateness of guidelines for the exercise of prosecutorial authority. The use of guidelines would seem to be a particularly appropriate means of insuring that proper standards are adhered to in the area of witness notification, "target" warning, and the general conduct of a grand jury investigation. There is little reason to believe that prosecutors would fail to abide by the announced policy of the Department. This approach would have the advantage of preventing abuse of the grand jury process without incurring the dual disadvantages of promoting pretrial litigation and hamstringing the grand jury's historic flexibility.

The need for relying upon judicial and prosecutorial control to prevent abuses of the grand jury is illustrated by issues pertaining to the proper use of grand jury process and materials. As was discussed earlier, the broad investigative powers of the grand jury are related to its particular role in the criminal justice system. Similar powers have not been lodged in any governmental investigative or administrative agency. One of the primary abuses of the grand jury which must be avoided, therefore, is the attempted use of its broad investigative powers by government agencies in pursuit of investigations that are solely their own rather than the grand jury's.

However, such misuse of the grand jury process cannot be controlled by any flat prohibition upon disclosure of grand jury materials to government agents without seriously impeding the grand jury's own investigations. Particularly in cases of complex investigations involving complicated financial or other transactions and, oftentimes, massive documentary evidence, neither the grand jury nor the government prosecutor is likely to be capable of understanding or interpreting the evidence without the assistance and analysis of other experts. For example, in tax investigations it is sometimes necessary to obtain the assistance of Internal Revenue agents in order to assess the tax consequences of particular transactions so as to determine whether an indictment is warranted. In recognition of the increasingly frequent need for technical assistance,

an amendment of Rule 6(e) has recently been proposed by the Supreme Court to provide that grand jury materials may be disclosed, without court order, not only to the government attorneys but also to such other government personnel as are necessary to assist the attorneys in performing their duties.

The disclosure of grand jury materials thus authorized by Rule 6(e) is only for the purpose of assisting the government attorney in conducting the grand jury investigation and any litigation related to the grand jury's inquiry. It is not designed to make grand jury materials available to other government agencies for use in pursuing investigations that are solely their own. Similar distinctions must be drawn between the issuance of grand jury subpoenas to require the production of information for the initiation of a grand jury's own investigation occasioned by a preliminary investigation of some other agency, and the issuance of subpoenas solely to obtain information for that other investigation. The one is clearly proper, the other, a misdirection of the grand jury's process. But at times, only a fine line may divide the two situations, and it would be difficult if not impossible to draw a general rule adequately defining, for all cases, when material is properly being requested for the grand jury and when it is not.

The determination of the proper use of grand jury materials and process must be made, in light of all the circumstances surrounding a particular case, by the prosecutor in the first

instance and by the courts ultimately. The prosecutor must be charged with ascertaining that grand jury subpoenas are issued only in furtherance of an ongoing, or an incipient, grand jury investigation; that grand jury materials are disclosed to other government personnel only pursuant to Rule 6(e); and that such materials are disclosed, absent court order, only to assist in the grand jury's own investigation and related litigation. Several districts have already developed guidelines governing these matters. The courts, moreover, have been sensitive to abuse of the grand jury's process. Notably, in any instance where disclosure of grand jury materials to another government agency is sought for reasons unrelated to assisting in the grand jury's investigation, prior court approval must be obtained.

In sum, in the overwhelming majority of instances the prosecutors themselves are quick to safeguard against any misuse of the grand jury's powers, and, in any event, the courts possess the inherent power adequately to respond to any indication of abuse. It is, therefore, these two authorities to which we should turn to control abuse, rather than to any proposals involving diminution of the grand jury's powers. The broad investigative powers of the grand jury serve a necessary function, and to eliminate these powers or to restrict their flexibility in a quest for an unneeded remedy, would be fundamentally counterproductive to the safety and security of all citizens.

Conclusion

There is an additional, often-ignored safeguard against abuses of the grand jury's powers which should not be overlooked -- the citizens who themselves comprise the grand jury. Justice John Marshall Harlan explained his reluctance to impose judicial restraints upon legislative inquiry in terms which are particularly appropriate to the grand jury. He stated: 69/

> In the last analysis, it is the independence, alertness, and common sense of our people that are the final bulwark of our way of life, whether it be in protecting civil liberties, economic freedom and property rights, or in preventing erosion of our institutions.

For centuries, the grand jury has operated as the voice of the citizenry in the criminal justice system. It is this which has accounted for its historic vitality, and it is the "independence, alertness and common sense" of the grand jurors themselves which must ultimately be relied upon to prevent the erosion of this important institution.

FOOTNOTES

1. Edwards, The Grand Jury, 1-44 (1906); 1 Pollock and Maitland, The History of English Law 151 (2d ed. 1909); Holdsworth, History of English Law, 321-323 (7th rev. ed. 1956); Younger, The People's Panel 1-5 (1963).

2. Blair v. United States, 250 U.S. 273, 280 (1919).

3. Fed. R. Crim. P. 6 (a).

4. Fed. R. Crim. P. 6 (f).

5. Fed. R. Crim. P. 6 (d).

6. Fed. R. Crim. P. 6 (e).

7. Blair v. United States, supra, 250 U.S. at 282.

8. United States v. Calandra, 414 U.S. 338, 349 (1974).

9. Hale v. Henkel, 201 U.S. 43 (1906).

10. Blair v. United States, supra, 250 U.S. 273.

11. Costello v. United States, 350 U.S. 359 (1956).

12. United States v. Calandra, supra, 414 U.S. 338.

13. Branzburg v. Hayes, 408 U.S. 665 (1972).

14. United States v. Dionizio, 410 U.S. 1 (1973).

15. United States v. Mara, 410 U.S. 19 (1973).

16. Kastigar v. United States, 406 U.S. 44 (1972).

17. United States v. Calandra, supra, 414 U.S. at 343-44.

18. Branzburg v. Hayes, supra, 408 U.S. at 688.

19. United States v. Calandra, supra, 414 U.S. at 344.

20. Branzburg v. Hayes, supra, 408 U.S. at 700.

21. See, e.g., Dession and Cohen, The Inquisitorial Functions of Grand Juries, 41 Yale L.J. 687 (1932).

22. Pub. L. 91-452 (1970), Title 1, §101(a), enacted as 18 U.S.C. §3331 et seq.

23. Wood v. Georgia, 370 U.S. 375, 392 (1962).

24. But see Gelbard v. United States, 408 U.S. 41 (1972).

25. United States v. Calandra, supra, 414 U.S. at 349.

26. United States v. Dionizio, supra, 410 U.S. at 17.

27. Hurtado v. California, 110 U.S. 516 (1884).

28. See, e.g., The Prosecution Process in England and Wales, 10 Crim. L. Rev. 688 (1970).

29. Lieck, Abolition of the Grand Jury in England, 25 J. Crim. L.C. & P.S. 623 (1934); Elliff, Notes on the Abolition of the English Grand Jury, 29 J. Crim. L.C. & P.S. 3 (1938).

30. E.g., Conn. Gen. Stat., Ann §54-47 (Supp. 1973); Kan. Stat. Ann. §22-3009 (Supp. 1970); Mich. Comp. Laws Ann. §767. 3 (1968); Vt. Stat. Ann. Title 13 §5151 et. seq. (1958); Wash. Rev. Code Ann. §10.27.050 (Supp. 1972); Wisc. Stat. Ann. §928.26 (1971).

31. E.g., Ark. Stat. Ann. §43-801 (1964); Del. Code Ann. Tit. 29 §2502 (1953); Fla. Stat. §32.20; Iowa Code Ann. §22.3101; Kan. Stat. Ann. §22.3101; La. Code Crim. P. Art. 66.

32. Morse, A Survey of the Grand Jury System, 10 Ore. L. Rev. 217 and 295 (1931).

33. See, e.g., Campbell, Eliminate the Grand Jury, 64 J. Crim. L. and Criminology 174 (1973).

34. Fed. R. Crim. P. 5(c).

35. 18 U.S.C. §3161 et. seq.

36. Gerstein v. Pugh, 420 U.S. 103 (1975).

37. See, e.g., Note, Evaluating the Grand Jury's Role in A Dual System of Prosecution: An Iowa Case Study, 57 Iowa L. Rev. 1354 (1972).

38. Administrative Office of the United States Courts, 1975 Juror Utilization in United States District Courts, Table 16.

39. In re April 1956 Term Grand Jury, 239 F. 2d 263, 269 (7th Cir. 1956).

40. United States v. Cox, 342 F. 2d 167, cert. denied, 381 U.S. 935 (1965).

41. 384 U.S. 436 (1965).

42. Hoffman v. United States, 341 U.S. 479, 486-87 (1952).

43. Kastigar v. United States, supra, 406 U.S. 441.

44. Rogers v. United States, 340 U.S. 367, 373 (1951).

45. United States v. Mandujano, _____ U.S. _____, No. 74-754, decided May 19, 1976.

The Court unanimously overturned the suppression of a defendant's grand jury testimony in a perjury prosecution. The plurality opinion, written by the Chief Justice for himself and Justices White, Powell, and Rehnquist, concluded that Miranda warnings need not be given to a grand jury witness, and that the failure to give such warnings provided no basis for suppressing, in a subsequent perjury prosecution, false statements given by the witness.

Justice Brennan, in an opinion joined by Justice Marshall, concurred with the Court's judgment on the ground that even when the privilege against compulsory self-incrimination permits an individual to refuse to answer questions, he may nonetheless be prosecuted for perjury when false answers are given. Moreover, they observed that, in the circumstances of this case, the defendant's answers were not induced by governmental tactics so unfair as to render prosecution for perjury a violation of the fifth amendment's due process clause. However, the opinion also concluded that, absent a knowing waiver of the privilege against self-incrimination, the fifth amendment requires that testimony obtained by calling a putative defendant before a grand jury be unavailable as evidence in a later prosecution for the crime of which the defendant had been suspected and on which he had been questioned. In addition, the opinion concluded that, given the potential prejudice to a putative defendant's fifth amendment privilege when he is called to testify, some

guidance by counsel is required. The opinion suggested that a putative defendant's fifth amendment privilege might adequately be preserved by informing him that he is subject to prosecution for a stated crime, that he has a right to refuse to answer any questions that may tend to incriminate him, that he has a right to consult with an attorney prior to questioning and to have the attorney wait outside the grand jury room for consultation during his questioning, and that an attorney will be appointed if he cannot afford to retain one.

Justice Stewart, joined by Justice Blackmun, also concurred with the Court's judgment on the ground that the fifth amendment provides no protection for the commission of perjury. However, these justices did not reach the issue of warnings to grand jury witnesses which was addressed in the other two opinions.

46. Branzburg v. Hayes, supra, 408 U.S. at 688.

47. Murphy v. Waterfront Commission, 378 U.S. 52, 93-94 (1964) (White, J. concurring).

48. In re Groban, 352 U.S. 330, 346-47 (1958) (Black, J. dissenting).

49. Id.

50. United States v. Calandra, supra, 414 U.S. at 345.

51. 8 Wigmore, Evidence, §2281 (McNaughton rev. 1961).

52. Comment, The Federal Witness Immunity Acts in Theory and Practice, 72 Yale L.J. 1568, 1571 (1963).

53. 18 U.S.C. 6001 et. seq.

54. 8 Wigmore, supra, §§2255, 2281.

55. Ullman v. United States, 350 U.S. 422, 438-39 (1956), quoting Boyd v. United States, 116 U.S. 616, 634 (1886).

56. Counselman v. Hitchcock, 142 U.S. 547 (1892).

57. Kastigar v. United States, supra, 406 U.S. at 453.

58. Id. at 450.

59. Rogers v. United States, supra, 340 U.S. at 374-75.

60. Michigan v. Tucker, 417 U.S. 433, 444 (1974).

61. United States v. Wong, _____ F. 2d _____, (9th Cir. decided Sept. 23, 1974), petition for cert. granted June 1, 1976; United States v. Washington, 328 A. 2d 98 (D.C. Ct. App.), petition for cert. granted June 1, 1976.

62. United States v. Ash, 413 U.S. 300, 313 (1973).

63. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959).

64. United States v. Calandra, supra, 414 U.S. at 351.

65. Costello v. United States, supra, 350 U.S. at 363.

66. United States v. Dionizio, supra, 410 U.S. at 17-18.

67. Branzburg v. Hayes, supra, 408 U.S. at 708.

68. See, e.g., Hale v. Henkel, supra, 201 U.S. 45; Branzburg v. Hayes, supra, 408 U.S. at 707-708; United States v. Calandra, 414 U.S. at 346.

69. "Live and Let Live," address of Justice J.M. Harlan delivered at Brandeis University, Oct. 30, 1955. Reprinted in Freund, The Evolution of a Judicial Philosophy: Selected Opinions and Papers of Justice John Marshall Harlan, 285-89 (Shapiro ed. 1969).