

FEDERAL GRAND JURY REFORM: A LEGISLATIVE REVIEW

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INTRODUCTION

The right to a grand jury indictment for a federal crime is firmly established by the Fifth Amendment, which provides that, "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury" This constitutional guarantee rests in the Bill of Rights, which is traditionally viewed as securing the protection of personal freedoms against governmental intrusion. Yet, the grand jury has come under attack in recent years as an instrument which serves only as a device of oppression and a second voice of the federal prosecutor. In response to increasing criticism of the federal grand jury, suggested reforms are currently under scrutiny in the Congress.¹ This note presents a survey of the proposed reforms as viewed against the background of the current law of the federal grand jury and, in chart form, compares the various reactions and viewpoints of the Department of Justice, Civil Liberties organizations,² the American Bar Association, and legal scholars. The accompanying text highlights the most controversial areas of reform.

RIGHTS OF GRAND JURY WITNESSES

1. Right to Counsel

A witness before a grand jury has no right to counsel inside the grand jury room, on the theory that the right to confrontation does not attach at the grand jury stage.³ A witness, however, is permitted to consult with his attorney before responding to a question by meeting with the attorney outside the chamber room.⁴

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This note is an excerpt from a project report on grand jury reform by the Legislative Research Service, Notre Dame Law School, Judith McMorrow and Carl J. Pacini, project directors.

1. H.R. 94th Cong., 1st Sess. (1977), 123 Cong. Rec. H 316 (daily ed. Jan. 11, 1977); S. 1449, 95th Cong., 1st Sess. (1977), 123 Cong. Rec. S. 6972 (daily ed. May 4, 1977); H.R. 3736, 95th Cong., 1st Sess. (1977); H.R. 2620, 95th Cong., 1st Sess. (1977); H.R. 4908, 95th Cong., 1st Sess. (1977); H.R. 406, 95th Cong., 1st Sess. (1977); H.R. 1830, 95th Cong., 1st Sess. (1977).
2. The position of various civil liberties organizations is represented by the Coalition to End Grand Jury Abuse, an organization formed in 1973 and comprised of 21 national bar, civil liberties, labor, religious, and women's organizations. The Coalition includes the American Civil Liberties Union, National Lawyers' Guild, National Organization of Women, Southern Christian Leadership Conference, National Emergency Civil Liberties Committee, Legal Aid and Defender Association, National Conference of Black Lawyers, and National Bar Association.
3. *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *In Re Groban*, 352 U.S. 330 (1957); *Kirby v. Illinois*, 406 U.S. 682 (1972); *Fed.R.Cr.P.* 6(d).
4. *United States v. Capaldo*, 402 F.2d 821 (2d Cir. 1968), *cert. denied*, 394 U.S. 989 (1969); *United States v. DeSapio*, 229 F.Supp. 436 (S.D.N.Y. 1969).

Proposed reforms would entitle a witness to the presence of counsel, either retained or appointed, in the grand jury room.⁵ The attorney would not be permitted to address the grand jury, and could be removed if he attempts to take part in the proceedings before the grand jury.

Most reformers support the House and Senate proposals⁶ to permit an attorney to be present in the jury room with the witness on the view that counsel would protect the constitutional rights of witnesses as well as prevent abuse and harassment on the part of the prosecution. Objections that counsel would turn the grand jury into an adversary proceeding are countered by analogy to the role of counsel in congressional hearings⁷ as well as non-adversary proceedings.⁸ The argument that presence of an attorney would violate grand jury secrecy is countered by the fact that a witness currently is not restricted from disclosing to his attorney a complete report of the occurrences in the grand jury room.⁹

2. Right to Request Appearance Before a Grand Jury

Any person may ask to testify before a grand jury concerning the subject matter of its investigation, although the grand jury may refuse to receive this evidence. No set procedure exists to govern the decision to receive such testimony.¹⁰ The individual who is the target of the investigation has no right to notice of the investigation, or to appear before the grand jury.¹¹ A grand jury generally will not permit a witness to testify at his own request unless he waives the privilege against self-incrimination.

Suggested congressional reforms would permit any person to request to testify by written notice to the attorney for the government, who in turn will forward the request to the grand jury. The panel may refuse to receive the evidence by majority vote.¹² The target of an investigation must be notified by the government of the right to request an appearance, unless the court believes that dangers such as the possibility of flight, the endangering of other witnesses, or delay, would outweigh the right to notification. The witness must waive the right to immunity before appearing. There is no provision in the proposed legislation which would permit a prospective defendant to request that other relevant witnesses be called, although the witness himself may request an appearance.

5. H.R. 94, §7(a), *supra* note 1; S. 1449, §6(a), *supra* note 1; H.R. 3736, §5(a), *supra* note 1; H.R. 2620, §4(a), *supra* note 1.

6. ABA Policy on the Grand Jury, Principle 1 (1977); Leroy Clark, *The Grand Jury: The Use and Abuse of Political Power* 135 (1975); Marvin Frankel and Gary Naftalis, "The Grand Jury: An Institution on Trial," *The New Leader*, Nov. 10, 1975, at 33. The only vocal opposition appears to come from the Department of Justice, 1977 House Hearings, *infra* note 31, at 723 (statement of Department of Justice).

7. Bary Hager, "Another Chance for Revising the Grand Jury," 35 Cong. Quarterly Report 586 (1977), quoting Rep. Joshua Eilberg.

8. An example is the Securities and Exchange Commission. Frankel and Naftalis, *supra* note 6, at 21.

9. Frankel and Naftalis, *supra* note 6, at 21.

10. *United States v. Gardner*, 516 F.2d 334 (7th Cir. 1975), *cert. denied*, 423 U.S. 861 (1975).

11. *United States v. Mandujano*, 425 U.S. 564 (1976); *United States v. Dionisio*, 410 U.S. 1 (1973).

12. H.R. 2620, §4(a), *supra* note 1, calls for honoring the request unless it serves no relevant purpose.

3. Right to Invoke the Fifth Amendment

One who testifies or presents evidence before a federal grand jury has a right to invoke the Fifth Amendment privilege against self-incrimination. This right was firmly established in *Counselman v. Hitchcock*¹³ as applying to any "criminal case."

Although one appearing before a grand jury may invoke the privilege, the scope of this Fifth Amendment right has been a much-litigated issue.¹⁴ The confusion was dissipated in *Hoffman v. United States*,¹⁵ when the Supreme Court clearly defined the scope of the privilege:

The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime To sustain the privilege, it need only be 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.¹⁶

Although the privilege has been given a liberal construction by the federal courts¹⁷ a witness cannot make a blanket refusal to testify.¹⁸

Despite the right to invoke the Fifth Amendment privilege, a witness does not have a constitutional right to be given notice of the right to remain silent. The Supreme Court has stated that it has not "decided whether any Fifth Amendment warnings whatever are constitutionally required for grand jury witnesses."¹⁹ There is no clear rule regarding Fifth Amendment or *Miranda*²⁰ warnings which might be applicable to target witnesses or putative defendants.²¹

The reluctance of a witness to testify before a grand jury for fear of self-incrimination can be surmounted by a grant of immunity. Under present law, one who receives an immunity grant to testify has "use immunity". The Witness Immunity Act,²² enacted in 1970, centers on immunizing testimony rather than witnesses, and essentially prohibits direct use of compelled testimony

13. 142 U.S. 547 (1892).

14. *United States v. Greenberg*, 192 F.2d 201 (3rd Cir. 1952), *rev'd* 343 U.S. 918 (1952); *United States v. Trock*, 232 F.2d 839 (2nd Cir. 1956), *rev'd* 351 U.S. 976 (1956); *United States v. Singleton*, 193 F.2d 464 (2d Cir. 1952), *rev'd* 343 U.S. 944 (1952).

15. *Hoffman v. United States*, 341 U.S. 479 (1952).

16. 341 U.S. at 486-7 (1951).

17. National Lawyers' Guild, *Representation of Witnesses Before Federal Grand Juries*, §13.4, at 13-7 (1974).

18. Bruce Schneider, "The Grand Jury: Powers, Procedures, and Problems," 9 *Columbia Journal of Law and Social Problems* 681, 714 (1973), citing *Enrichi v. United States*, 212 F.2d 702 (10th Cir. 1954).

19. *United States v. Washington*, 431 U.S. at 186 (1977).

20. *Miranda v. Arizona*, 384 U.S. 436 (1966).

21. Note, "Recent Developments in the Law of the Federal Grand Jury," 1977 *Utah L. Rev.* 203-208 (1977).

22. Witness Immunity Act of 1970, 18 U.S.C. §§6001-6005 (1970). 18 U.S.C. §6002 provides that: "Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to -

(1) a court or grand jury of the United States, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

or other information as well as indirect or derivative use.²³ Prior to 1970, a grand jury witness was legislatively required to receive "transactional immunity", which meant that he could not be prosecuted for any offense related to testimony given.²⁴

In *Kastigar v. U.S.*, the Supreme Court laid to rest the concern that use immunity is unconstitutional by ruling that such grants of immunity were coextensive with the scope of the Fifth Amendment privilege.²⁵ However, the Court further stressed that the prosecution subsequently bears an affirmative duty to demonstrate "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."²⁶

H.R. 94, the principal House of Representatives bill, introduced by Rep. Joshua Eilberg,²⁷ would reintroduce transactional-nonconsensual immunity as the exclusive type available for grand jury witnesses. An immunized witness could only be prosecuted for perjury, for making a false statement, or for failure to comply with the conditions of the immunity grant. Presently, the Justice Department will approve a grant of immunity if the information is necessary to the public interest and the witness has indicated a refusal or is likely to refuse to testify by invoking the self-incrimination privilege.²⁸ The Eilberg bill would require a stricter set of standards to be satisfied before immunity could be granted. In contrast to the present statute, which requires a district court to issue an immunity order when the above two conditions have been fulfilled, a district court would have discretion to grant immunity. The proposed statute authorizes the court to issue an order when it is satisfied that the information sought is necessary to the public interest, the witness has invoked the Fifth Amendment, the testimony is relevant to the investigation, the immunity grant would be adequate for the investigation, a summary of evidence relating to the witness has been provided to the court, and there is no danger of foreign prosecution.²⁹

The Justice Department has taken the strongest stand against repealing use immunity. In testimony before Congress, Deputy Attorney General Benjamin A. Civiletti³⁰ claimed the following advantages of use over transactional immunity:

- (1) it eliminates the conferring of unnecessarily broad immunity against criminal liability;
- (2) it removes the incentive for a witness to give broad but incomplete and shallow testimony.³¹

23. David Sugar, "Federal Witness Immunity Problems and Practices Under 18 U.S.C. §§6002-03," 14 Am. Crim. L. Rev. 275, 279 (1977).

24. Omnibus Crime Control and Safe Streets Acts of 1968, §802, 82 Stat. 216 (1968), 18 U.S.C. §2514 (1970), repealed by the Organized Crime Control Act of 1970, Pub. L. No. 92-452, §§227(a), 260, 84 Stat. 930. The repeal did not become complete until December 15, 1974.

25. *Kastigar v. United States*, 406 U.S. 441 (1972).

26. 406 U.S. at 460.

27. H.R. 94, *supra* note 1. The same bill was later reintroduced with other co-sponsors as H.R. 3150.

28. 18 U.S.C. §6003(b) (1970).

29. H.R. 94, §3(a), *supra* note 1.

30. At the time he testified, Mr. Civiletti was Assistant Attorney General in charge of the Criminal Division, U.S. Department of Justice.

31. *Grand Jury Reform: Hearings on H.R. 94 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary, 95th Congress, 1st Session*, 713-14 (1977) (statement of Department of Justice). [Hereinafter referred to as 1977 House Hearings.]

The Department also opposes the provision requiring the court to be satisfied that the immunity grant meets all the enumerated conditions. It is claimed that this would involve the judiciary in prosecutorial policy and poses a potential separation of powers question.³²

A number of persons has responded that use immunity has not increased the investigative power of the grand jury. The Justice Department, for example, has not been able to identify a single case in which a member of organized crime has given testimony under an immunity grant that led to the conviction of a superior. Peter Richards, Deputy Attorney General of the New Jersey Division of Criminal Justice Special Prosecution Section, has also asserted that granting immunity to a member of organized crime simply does not work.³³ Professor Leroy Clark of New York University has also supported this position. He has theorized that organized crime has between 3,000 and 5,000 members. Between 1960-1969, only 235 indictments were returned against 328 alleged members of organized crime. This occurred while transactional, not use immunity, was in effect. This fact tends to underscore the point that use immunity does not serve as a better tool for eliciting testimony and prosecuting offenders. Obviously, a witness would be more willing to supply investigatory information under a grant of transactional rather than use immunity. In fact, the Justice Department has reported that in reality few witnesses granted use immunity are prosecuted for crimes described in their testimony.³⁴

4. Recalcitrant Witnesses—Contempt

Refusal to comply with a court order, including refusal to appear before the grand jury, testify, or produce documents may result in the issuance of a contempt order. Such an order usually is in the form of a citation for civil contempt, demanding compliance, rather than criminal contempt, which focuses on punishment.³⁵ When it appears that a witness will be cited for contempt, most courts permit a reasonable time for preparation for at least a cursory contempt hearing.³⁶ After the contempt order is issued, the court has authority to summarily confine the witness until testimony is forthcoming.³⁷ The witness must be confined "at a suitable place"³⁸ until he becomes cooperative. The period of confinement is not to exceed the life of the grand jury or 18 months.³⁹ A witness, once released from jail, may be called before a subsequent panel and again held in contempt.⁴⁰

Provisions for reform call for a "show cause" hearing from a contempt order, with 72 hours notice⁴¹ unless special need is demonstrated. The witness would have the right to counsel. Should the witness be held in contempt, he

32. 1977 House Hearings, *supra* note 31, at 714 (statement of Department of Justice).

33. 1977 House Hearings, *supra* note 31, at 881 (statement of Coalition to End Grand Jury Abuse).

34. Sugar, *supra* note 23, at 282.

35. U.S. Department of Justice, Antitrust Division, *Grand Jury Manual* 243 (1976).

36. *Harris v. United States*, 382 U.S. 162 (1965); *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973); F.R.Cr.P. 6 42(b).

37. *Giancana v. United States*, 352 F.2d 921 (7th Cir. 1965), *cert. denied* 382 U.S. 959 (1965).

38. 28 U.S.C. §1826(a) (1970).

39. 28 U.S.C. §1826(a) (2) (1970).

40. *Shillitani v. United States*, 384 U.S. 364 (1966); *In Re Maurey Santiago*, 533 F.2d 727 (1st Cir. 1976). For a detailed review of the procedure of a contempt hearing, see National Lawyers' Guild, *Representation of Witnesses Before Federal Grand Juries* (1974).

41. H.R. 94, §2(a), *supra* note 1; S. 1449, §2, *supra* note 1, would provide 5 days notice.

would be placed in a correctional institution within 50 miles of the court.⁴² Imprisonment would be for the life of the grand jury, or six months, whichever is shorter, and a witness would not be subject to repeated confinement for the same transaction.

INDEPENDENT INQUIRY

Congress has never systematically enumerated the powers and purposes of the grand jury. The only statutory provision which actually governs the powers of the grand jury is Federal Rule of Criminal Procedure 6.⁴³ The selection of grand jurors is also regulated by statute.⁴⁴ The wiretapping and immunity statutes are used in conjunction with the grand jury but are not specifically related to its powers. Its powers are outlined by case law and are subject to court supervision.⁴⁵

The powers and purposes of a special grand jury are set forth in the Organized Crime Control Act of 1970.⁴⁶ It has no powers different from those of a regular grand jury but serves as an additional grand jury in the district in which it sits.⁴⁷ The most notable power of the special grand jury is its ability to issue reports on the conduct of public officials.⁴⁸

Reform legislation in both the House⁴⁹ and the Senate⁵⁰ would provide that any grand jury "after giving notice to the court" may "inquire upon its own initiative" into alleged criminal offenses. However, the Senate version would only authorize independent inquiry into an alleged criminal offense by any officer or agent of the U.S. government or any state or municipal government. Under the Eilberg bill the grand jury would have a life of 18 months with the possibility of six month extensions up to a maximum of 36 months. In addition, if a grand jury is discharged by the court before it has completed its investigation, it may appeal to the chief judge of the circuit for an extension.

The most potent provision in both the House and Senate versions would authorize the grand jury to request the court to replace the government attorney with one specially appointed. This could be done upon a majority vote of the grand jury whenever the attorney for the government is "unable to impartially assist, refuses to assist, or hinders or impedes the grand jury in the conduct of any inquiry"⁵¹ Any special attorney appointed would have all the powers and resources of a government attorney to assist the grand jury in its investigation. He would sign indictments, obtain materials from other government agencies, conduct all other phases of any criminal prosecution arising out of an independent inquiry, and be funded by Justice Department appropriations. If enacted into law, this provision would, presumably, serve as a check on the power of the government attorney.

42. H.R. 94, §2(a), *supra* note 1; S. 1449, §2, *supra* note 1, unless the witness suggests a suitable alternative.

43. 18 U.S.C. §§3321-8 (1970), as amended by Amendments to the Federal Rules of Criminal Procedure of 1977, Pub. L. No. 95-78, §2(a), 91 Stat. 319.

44. 28 U.S.C. §§1861-1868 (1970).

45. *United States v. Morton Salt*, 338 U.S. 632 (1950); *United States v. Smyth*, 104 F.Supp. 283 (N.D. Cal. 1952).

46. 18 U.S.C. §§3331-3334 (1970).

47. 18 U.S.C. §3332(a) (1970); National Lawyers' Guild, *supra* note 17, §7.2(c) at 7-4.

48. 18 U.S.C. §3333 (1970).

49. H.R. 94, §6(a), *supra* note 1.

50. S. 1449, §5(a), *supra* note 1.

51. H.R. 94, §6(a), *supra* note 1.

GRAND JURY SECRECY, UNAUTHORIZED DISCLOSURE AND GRAND JURY REPORTS

The federal courts have typically advanced five reasons in support of grand jury secrecy:

1. to prevent the escape of individuals who may be indicted;
2. to guarantee the freedom of the grand jury in its deliberations and voting and to preclude potential defendants from influencing the proceedings;
3. to prevent tampering with the witnesses who may later testify at trial;
4. to promote complete disclosure by those called to testify; and
5. to protect the accused who has been exonerated from disclosure that he has been under investigation.⁵²

These reasons are valid with respect to some activities of the grand jury, but they are less convincing when advanced as justification for secrecy concerning all matters associated with proceedings of the "people's panel." For example, none of the above stated reasons serves to justify the present practice of making transcripts of grand jury testimony available to indicted defendants on a limited basis.⁵³

The present law concerning the secrecy of grand jury proceedings is contained in Federal Rule of Criminal Procedure 6(e), as amended.⁵⁴ The first paragraph of amended Rule 6(e) imposes a restriction against disclosure by a grand jury, an interpreter, a stenographer, an operator of a recording device, and other persons who have authorized access to grand jury proceedings, except as permitted by the rule itself.

Exceptions to the nondisclosure rule include an attorney for the government and such government personnel "as are deemed necessary by an attorney for the government" to assist that attorney in the enforcement of the criminal law.⁵⁵ Formerly, the attorney for the government involved in the prosecution of a case was not entrusted to pass on the necessity of assistance.⁵⁶ With such an ability provided by the amended 6(e), it seems that more frequent and liberal disclosure of grand jury proceedings will occur. Even these exceptions do not permit disclosure of grand jury deliberations and the vote of any grand jurors. Finally, disclosure is also permitted when directed by the court.

The provision in Section 5 of H.R. 94 on unauthorized disclosure differs from amended Rule 6(e), in that it prohibits disclosure by personnel assisting government attorneys except as directed by the court. Disclosure by a witness or by his attorney of matters to which the witness has testified is also exempted from the secrecy requirement.

Instead of punishment by contempt order, two different penalties for unauthorized disclosure are provided, with the particular penalty determined by the conditions surrounding the disclosure. Knowing disclosure of evidence with the intent either to secure compensation, to influence the actions of the grand jury, or to effect further legal proceedings against a witness or as to the subject matter of any investigation, may result in the imposition of a \$20,000 fine, a five-year prison sentence, or both. This penalty would not

52. *United States v. Amazon Industrial Chemical Corp.*, 55 F.2d at 261 (D., Md. 1931).

53. See text on Availability of Grand Jury Proceedings, *infra*.

54. See *supra* note 43.

55. Fed.R.Cr.P. 6(e), as amended. See *supra* note 43.

56. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

apply to members of the media acting in a professional capacity. The other penal provision sanctions a \$500 fine or six months in prison, or both, for knowingly making an unauthorized disclosure.

The grand jury itself breaks the shroud of secrecy surrounding its proceedings when it issues reports. The general argument in favor of grand jury reports is summarized in *In re Camden County Grand Jury*:⁵⁷

If presentments of matters of public concern were found necessary in the public interest in the relatively simple conditions of English and colonial life three centuries ago, how much more essential are they in these days when government at all levels has taken on a complexity of organization and of operation that defies the best intentions of the citizen to know and understand it . . . The maintenance of popular confidence in government requires that there be some body of laymen which may investigate any instances of public wrongdoing.⁵⁸

The grand jury report serves the public interest if only by disclosing situations requiring administrative, judicial, or legislative corrective action. Most such reports are concerned with the misconduct of public officials. Indeed, a provision of the Organized Crime Control Act⁵⁹ both authorizes reports concerning federal officials and permits the official to offer rebuttal.

Although courts have expunged reports on occasion, clear legislative guidelines are needed to prescribe the limits of issuing federal grand jury reports. Neither H.R. 94 nor S. 1449 contains a provision dealing with such reports. The ABA suggests that reports should be limited to discussing the conduct of public officials. This would strike the necessary balance between the protection of individuals from calumny without chance of redress and the public interest in being informed of governmental problems.⁶⁰

AVAILABILITY OF GRAND JURY PROCEEDINGS

While the recording of grand jury proceedings is desirable,⁶¹ there is no absolute requirement that testimony be taken and transcribed.⁶² Federal Rule of Criminal Procedure 6(d) authorizes the presence of a stenographer or operator of a recording device in the chambers. A witness is not absolutely entitled to a transcript of his own testimony, but may request that the proceedings be recorded and disclosed.⁶³ If a witness is to appear at trial, Federal Rule of Criminal Procedure 16(a)(1)(a) requires the government to provide a copy of the witness' statement made before the grand jury, if a recordation was made. After direct examination of a witness, the defendant is entitled to any statements by the witness which relate to the subject matter of the examination.⁶⁴ The court, after inspection, may deny access to defendants of statements which do not relate to the subject matter in question.⁶⁵

57. 10 N.J. 23, 89 A.2d 416 (1952).

58. 10 N.J. at 65 (1952).

59. 18 U.S.C. §3333 (1970).

60. As a model, see Fla. Stat. Ann. §905.28 (West - 1975).

61. *United States v. Ayers*, 426 F.2d 524 (2d Cir. 1970).

62. *United States v. Caruso*, 358 F.2d 184 (2d Cir. 1966); *United States v. Labate*, 270 F.2d 122 (3rd Cir. 1959), *cert. denied* 361 U.S. 900 (1959).

63. National Lawyers' Guild, *supra* note 17, §8.1 at 8-1.

64. 18 U.S.C. §3500(b) (1970).

65. 18 U.S.C. §3500(c) (1970).

A copy of a transcript may be of great importance to a witness who has been granted immunity, who may be subject to perjury due to inadvertent or clerical errors. For those who have been immunized, a record of the testimony would preserve tainted evidence and insure that the testimony has not produced leads which could later be used against the witness.⁶⁶ Alleged prosecutorial abuses, such as harassment or improper questioning, would also be preserved. The availability of a transcript may also aid the defendant in his preparation for trial.

H.R. 94 and S. 1449 would require the recording of all events at the proceedings except the deliberation and voting process of the jurors, with witnesses being entitled to examine and copy their own testimony.⁶⁷ A witness who will appear at trial would receive a copy of any statements made which are in the possession of the government. Under these proposals, a defendant could, before trial, obtain copies of the testimony of all witnesses to be called, all statements to the grand jury by the attorney for the government and court, all exculpatory evidence, and other materials the court deems proper.

CONCLUSION

Supporters of grand jury reform have indicated that changes in the process and procedure of this Fifth Amendment institution must come from the legislative branch. Former Senator John Tunney expressed the need for legislative action in his opening statement before the 1976 Senate hearings:

Confronted by instance after instance of grand jury abuse, the courts have repeatedly failed to exercise their supervisory responsibilities over the grand jury process. Because of this judicial neglect of grand jury abuse the responsibility for reform now rests squarely on the Congress.⁶⁸

However, Justice Department opposition to grand jury reform and the press of other, more urgent problems before Congress leaves the future of this legislation uncertain.

Rep. John Conyers, a sponsor of H.R. 3736, indicates that "[t]here is a good chance that the Subcommittee will report this year a bill partially addressing the issue but far short of the comprehensive reforms needed."⁶⁹ A more skeptical view is offered by Dennis J. Taylor, legislative counsel for House Minority Leader John Rhodes:

Many in the legal profession consider the bill [H.R. 94] to be tilted too far in favor of the defendants and initial indications are that the Justice Department does not favor the legislation. For those reasons, it is uncertain as to when action will be scheduled on the bill.⁷⁰

66. National Lawyers' Guild, *supra* note 17, §8.3(b) at 8-4.

67. H.R. 94, §8(a), *supra* note 1; S. 1449, §7(a), *supra* note 1. The Senate bill would have the transcript available within 48 hours after the appearance.

68. *Reform of the Grand Jury System: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Congress, 2nd Session 1* (1975-76).

69. Letter from John Conyers to the authors, on file with the *Journal of Legislation* (Jan. 26, 1978).

70. Letter from Dennis J. Taylor to the authors, on file with the *Journal of Legislation* (Feb. 6, 1978).

71. Letter from James Abourezk to the authors, on file with the *Journal of Legislation* (Feb. 20, 1978).

Senator James Abourezk, sponsor of S. 1449, also states that he has not found much support for his proposal in the Senate.⁷¹ Rep. Barbara Jordan suggested that the prospects of some grand jury reform are "very good."⁷²

In light of the less than resounding support of comprehensive grand jury reform, it appears that future sessions of Congress may again be addressing this problem. Comprehensive reform can be expected so long as the memory of grand jury abuse is still fresh in the minds of many supporters of such reforms.⁷³ The extensive hearings both in the 94th and 95th Congress provide a sound basis for future legislative action.

71. Letter from James Abourezk to the authors, on file with the *Journal of Legislation* (Feb. 20, 1978).

72. Letter from Barbara Jordan to the authors, on file with the *Journal of Legislation* (Jan. 26, 1978).

73. See David J. Fine, "Federal Grand Jury Investigation of Political Dissidents," 7 *Harvard Civil Rights & Civil Liberties Law Review* 432 (1972).

THE FEDERAL GRAND JURY:
A COMPARATIVE SUMMARY OF PRESENT LAW AND PROPOSED LEGISLATION

Compiled by Carl J. Pacini and Judith A. McMorrow

PRESENT LAW	H.R. 94 ¹	S. 1449 ²	U.S. DEPARTMENT OF JUSTICE	AMERICAN BAR ASSOCIATION	COALITION TO END GRAND JURY ABUSE	OTHER POSITIONS
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A. SIZE OF GRAND JURY

16 to 23 members (18 U.S.C. §3321) FRCrP 6(a))	9 to 15 members	No applicable provision	Supports reduction in size, citing possible economy, improved deliberation process, decreased number of citizens off work, more active participation of jurors.		Opposes reduction in the number of jurors required for a grand jury, claiming it would be less representative of the community with a greater chance of being a pliable tool in the hands of the prosecution.	
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B. NUMBER REQUIRED FOR INDICTMENT

2/3 of 16 or 12 or more (FRCrP 6(f))	At least 9 present and 2/3 must concur	No applicable provision	Supports - but notes that there may be a difficulty in obtaining a quorum.			
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1. H.R. 94, 95th Cong., 1st Sess. (1977), the proposed Grand Jury Reform Act, was introduced by Rep. Joshua Eilberg (D., Pa.).
2. S. 1449, 95th Cong., 1st Sess. (1977), was introduced by Sen. James Abourezk (D., S.D.).

PRESENT LAW H.R. 94¹ S. 1449² JUSTICE A.B.A. COALITION OTHERS

C. VENUE

Grand jury may investigate any offense which has a connection to district, including conspiracy. *U.S. v. Phillips*, 433 F.2d 1364 (8th Cir. 1970). *Hude v. U.S.* 225 U.S. 347 (1912); 18 U.S.C. §3237(a) (1970).

A grand jury may investigate only in a district in which it believed criminal conduct occurred which is an element of the offense. Witness can quash subpoena or transfer in case of hardship.

Same as H.R. 94 except no grand jury where only criminal conduct is conspiracy.

Opposes venue restrictions. Witness should not be controlling factor. To allow transfer would cause delay and expense.

Prof. Leroy D. Clark³ suggests permitting a witness to object if unnecessary hardship would be imposed. He also suggests permitting the court to order transfer of proceedings depending on where the alleged criminal conduct occurred.

D. RIGHTS AND DUTIES OF GRAND JURY AND U.S. ATTORNEY

1. Jurors Informed

No statutory provision - most courts give charge to grand jury. Scope of instructions and guidelines left to court. *U.S. v. Smyth* 104 F.Supp. 283 (N.D. Cal. 1952); *In Re Grand Jury Subpoena to Central States, Etc.* 225 F.Supp. 923 (N.D. Ill. 1964).

Court is to give reasonable notice of:
(1) duty of inquiry into alleged crimes
(2) right to independent inquiry
(3) right to call and question witnesses
(4) right to require evidence
(5) subject matter of inquiry
(6) obligation of secrecy
(7) statutes involved

Same as H.R. 94 plus duty of at least 12 to vote for indictment.

Supports provision that jurors be advised of rights and duties as follows:
(1) duty to inquire - supports
(2) independent inquiry - opposes
(3) right to call and interrogate witnesses - supports
(4) right to require evidence - supports
(5) subject matter of inquiry - opposes
(6) obligation of secrecy - supports

Grand jurors should be instructed on powers of independent inquiry

Court is to fully charge jurors by written charge - available to jurors completely explaining duties and responsibilities.

Judge Marvin Frankel and Gary Naftalis⁴ Support proposal for fuller instructions to grand jurors.

Prof. Clark: If the judge fails to give instructions a witness who refuses to testify should be free of contempt and indictment should be subject to dismissal.

3. Leroy D. Clark is a professor of law at New York University School of Law. He is the author of *The Grand Jury: Use and Abuse of Political Power* (1975), which was used in the preparation of this chart.
4. Judge Marvin Frankel is a United States District Judge for the Southern District of New York. He is the co-author, along with Gary Naftalis, of *The Grand Jury: An Institution on Trial* (1973), which was used in the preparation of this chart.

2. Requests to Testify

(a) Anyone may request to testify before a grand jury.

Anyone may request to testify by written notice to government attorney who then goes forward to grand jury.

Same as H.R. 94

Opposes provision requiring attorney to forward requests - prosecutor should be able to screen

Judge Frankel and Mr. Nafalis: A prospective defendant should have the right upon request to appear. Defendant's request to have other witnesses called ought to be heard.

Model Code of Pre-Arraignment Procedure §340.3 (1975) would limit the right of a defendant to appear to cases initiated by complaint.

(b) Grand jury may refuse to receive evidence - no specified procedure as to how decision is made. *U.S. v. Gardner*, 516 F.2d 334 (7th Cir. 1975), cert. denied, 432 U.S. 861 (1975).

Grand jury may refuse to receive evidence upon majority vote - individual to be notified of refusal.

Same as H.R. 94

(c) Target has no right to appear before grand jury and no right to notice. *U.S. v. Mandujano*, 425 U.S. 564 (1976).

Targets must be notified by government of right to request appearance unless court feels other dangers outweigh right (result in flight, endanger other witnesses, delay).

Same as H.R. 94

Prosecutors "are encouraged" to notify targets - exceptions to notice in H.R. 94 are too narrow.

Target has a right to testify provided he signs an immunity waiver. Right withheld if notification may result in flight, endanger others, or obstruct justice.

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(d) No procedure specified but grand jury generally won't allow witness to testify unless 5th Amendment privilege is waived.

Witness must waive immunity.

Same as H.R. 94

3. Duties of U.S. Attorney

(a) No duty to advise jury of impeachment or exculpatory evidence.

Advise jury of impeachment or exculpatory evidence.

Attorney must submit all exculpatory evidence.

Opposes statutory provision but has policy that no attorney shall fail to disclose exculpatory evidence.

No prosecutor shall fail to disclose exculpatory evidence.

National District Attorneys Association Standard §14.2D requires prosecutor to advise grand jury of exculpatory evidence. Opposes absolute requirement on ground that it would require a record hearing and would make procedure too onerous.

(b) Witness who has given prior notice of intention to invoke privilege may still be called. *U.S. v. Sweig*, 441 F.2d 114 (2nd Cir. 1971), *cert. denied* 403 U.S. 932 (1971).

Grand jury cannot hear any witness who has given notice of intention to exercise privilege.

Same as H.R. 94

As a matter of policy, target excused, if states in writing will exercise 5th Amendment privilege.

Judge Frankel and Mr. Naftalis: Witness should not be summoned when the prosecutor knows he intends to exercise his 5th Amendment privilege.

(c) No prohibition on prosecutor to submit cases to successive grand juries. *U.S. v. Thompson*, 251 U.S. 407 (1920).

Needs additional evidence to submit case to successive grand jury.

Same as H.R. 94

Opposes provision generally prohibiting repeated appearance if "no bill"

Prof. Clark: Practice of introducing illegally obtained evidence should be prohibited.

An indictment should be based on evidence that is legally sufficient, competent, and admissible.

Avoid presentation of evidence which is constitutionally inadmissible at trial.

Avoid use of grand jury to secure evidence against a defendant already charged.

Avoid use to secure evidence for non-criminal proceedings.

Would be an abuse of legal process for government attorney to secure evidence against a defendant already charged.

Avoid allowing government agencies to use investigative powers of grand jury for purposes solely their own.

Prof. Clark: Calls for separation of investigatory and indicting functions of the grand jury. Supports giving grand jury authority to initiate investigations of government officials.

Suggests permitting grand jurors to vote on subpoenas, immunity grants, and press contempt charges.

No applicable provision

Attorney for government cannot submit illegally obtained evidence.

No applicable provision

No applicable provision

No applicable provision

No applicable provision

(d) No prohibition on introducing illegally obtained evidence. *U.S. v. Costello*, 350 U.S. 359 (1956); *Lawn v. U.S.*, 355 U.S. 339 (1958); 8 Wigmore, *Evidence* §2184a at 40 (McNaughton ed. 1961).

(e) No constitutional, statutory or case authority for letting government prepare evidence against a defendant already charged. *U.S. v. Doss*, 545 F.2d 548 (6th Cir. 1976).

(f) FRCP 6(e) imposes a restriction against disclosure by a grand jury, an interpreter, a stenographer, an operator of a recording device and other persons to whom disclosure is permitted. Exceptions include attorneys for the government and government personnel deemed necessary to assist the attorney. Court can also permit disclosure.

Any grand jury may inquire, after giving notice to court, on its own into offenses committed by government officers or agents.

Any grand jury may, after giving notice to the court, inquire on its own initiative into any alleged crime.

Grand juries have powers of broad inquiry subject to court supervision. *U.S. v. Morton Salt*, 338 U.S. 632 (1950). In reality, many commentators state that the grand jury is a "rubber stamp" for prosecutor.

E. INDEPENDENT GRAND JURY INQUIRY

1. Right to Initiate Inquiry

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<p>2. Term</p> <p>(a) Regular grand juries may serve up to 18 months - unless discharged by court. FRCrP 6(e).</p> <p>(b) Special grand juries may serve for 18 months unless court orders discharge and can be extended up to 36 months.</p> <p>(c) Regular grand jury cannot obtain review of court's discharge order. <i>U.S. v. Smyth</i>, 104 F.Supp. 283 (N.D. Cal. 1952); <i>In Re National Window Glass Workers</i>, 287 F. 219 (N.D. Ohio 1972); FRCrP 6(g). Special grand jury may obtain review, upon majority vote, by Chief Judge of Circuit.</p>						
	18 months with 6 month extensions up to 36 months.	Same as H.R. 94				Judge Frankel and Mr. Naftalis: Call for strengthening of grand jury's power of independent inquiry.
<p>3. Right to Special Attorney</p> <p>Special prosecutors have been appointed by the Attorney General. 28 U.S.C. §§515 and 543. Legislation is presently pending that would provide for special prosecutors in appropriate cases. H.R. 9705, 95th Cong., 1st Sess. (1977).</p> <p>If government attorney is unable to or refuses to assist grand jury a special one may be appointed upon request of grand jury.</p>						
		Same as H.R. 94	Opposed to special attorney. Supports proposals for temporary special prosecutor within Department.	Opposes grand jury power to select own attorney. Supports appointment of special prosecutor in appropriate cases.	Supports H.R. 94 in principle but the language of the provision would give grand jurors too much power to investigate any type of criminal conduct.	

F. RIGHTS OF GRAND JURY WITNESSES

1. Counsel

Witness has no right to counsel in grand jury room. *Kirby v. Illinois*, 402 U.S. 682 (1972); FRCP 6(d). Witnesses may consult with counsel outside grand jury room. *United States v. Capaldo*, 402 F.2d 821 (2nd Cir. 1968), cert. denied 394 U.S. 989 (1969).

Witness would have right to counsel in grand jury room. Counsel could only advise client.

Same as H.R. 94

Opposes allowing counsel in grand jury room. Witness would "parrot" attorney, cause delay, violate the secrecy of the grand jury and make rules of evidence applicable to the grand jury.

Supports the position of H.R. 94.

Suggests that the provision is too restrictive since it would muzzle defense counsel and subject him to removal by the court. Delaying or impeding proceedings would occur when counsel and witness are conversing. Counsel can be removed for delaying or impeding the proceedings. Secrecy would not be violated.

Prof. Clark, Judge Frankel and Mr. Naftalis and Model Code of Pre-Arraignment Procedure: Support the right to counsel in the grand jury room.

2. Subpoenas

(a) Notice

Subpoenas may be issued for an immediate appearance or production of documents. *U.S. v. O'Connor*, 118 F.Supp. 248 (D. Mass. 1953). Justice Department has reported that subpoenas are usually issued two weeks in advance. FRCP 17(a) sets no time limits.

One week between service of subpoenas and appearance unless government makes a showing and the court approves a finding of special need.

Same as H.R. 94

Opposes any minimum notice of requirement. Policy of using forthwith subpoenas when swift action is necessary.

Witness should not be subject to "unreasonable delay". 72 hours notice unless special need.

Supports H.R. 94 except that in no event will a subpoena be returnable within 72 hours from the date of service.

Prof. Clark: Suggests abolishing compulsory process.

(b) Information in Subpoena

No requirement that a subpoena contain any information other than the date and place of (1) right to

Same as H.R. 94

Opposes legislative requirement - as a matter of policy targets are advised

Subpoena should include: (1) general subject of inquiry

Supports H.R. 94 plus requirement that subpoena may not issue without

Judge Frankel and Mr. Naftalis: Prospective defendant should be told he

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the appearance. <i>U.S. v. Dionisio</i> , 410 U.S. 1 (1973). Statutory provisions involved and subject matter of inquiry do not have to be stated. <i>In Re Morgan</i> , 377 F.Supp. 281 (S.D.N.Y. 1974); <i>Blair v. U.S.</i> , 250 U.S. 273 (1919). It is not required to advise a witness he is a target and of his rights. <i>U.S. v. Washington</i> , 431 U.S. 181 (1977).	counsel (2) 5th Amendment privilege of inquiry (4) whether witness' conduct under investigation (5) statutes involved, if known (6) other matters in court's discretion		of: (1) general nature or subject matter of inquiry (2) 5th Amendment privilege (3) testimony can be used against him (4) witness may leave room to consult with counsel (5) witness' conduct is under investigation. Supports telling all witnesses of subject matter, 5th and 6th Amendment rights.	Witness should also be told of: (2) right to counsel (3) 5th Amendment privilege (4) if possible inculdee	an affirmative vote of a majority of grand jurors.	is the target of the investigation.
3. Matters to Quash Subpoenas						
(a) Stay		Same as H.R. 94				
Court has discretion to stay appearance of witness or production of documents pending decision on motion. Rarely done.	If motion made before date of return of subpoena, stay to be issued until court rules on motion.					
(b) Showing by Government	Government has no obligation to make any showing of reasonableness of subpoena. Some courts have required minimal showing of relevance when witness makes allegation that subpoena is being used for a wrong purpose. <i>In Re Grand Jury Proceedings</i> , 486 F.2d 85 (3d	Same as H.R. 94	Opposes placing any new burden on prosecutor. Supports as policy - grand jury may not be used to procure evidence against indicted individual.	Supports: (1) obligation on prosecutor not to use grand jury to prepare for trial (2) duty of prosecutor not to use grand jury to assist in administrative inquiry (3) witness should		

Cir. 1973); *In Re Grand Jury Investigation*, 425 F.Supp. 717 (S.D. Fla. 1977). Subpoena is not to be used primarily for other than grand jury purposes. *U.S. v. Dardi*, 330 F.2d 316 (2d Cir. 1964). Subpoena is not to be unduly oppressive. FRCrP 17(c).

(c) Sanctions and Grounds for Quashing Subpoenas

(1) Court has discretion to quash subpoena as it deems advisable.
 (2) Court may hold witness in contempt as to same transaction repeatedly.
 (3) Witness may be called even if he gave prior notice to invoke 5th Amendment. *U.S. v. Dionisio*, 410 U.S. 1 (1973).
 (4) Government may repeatedly call witness before successive grand juries as to same transaction.

Court may quash a subpoena:

- (1) if government does not make showing as required above.
- (2) if witness has previously been held in contempt for same transaction
- (3) if written notice has been given by witness that he intends to claim 5th Amendment privilege
- (4) if there were prior grand jury investigation and no new evidence.

Same as H.R. 94

Does not oppose sanctions but while policies and procedures are binding they are not to confer rights on 3rd parties.

- (3) as a matter of policy, targets who indicate they will take the 5th Amendment in writing will be excused.

Would allow the court to determine if compliance with a subpoena would require a witness to violate a confidential privilege.

Whenever a subpoenaed witness moves to quash the prosecutor should be required to show in camera that the evidence sought is:

- (1) relevant to investigation
- (2) property within investigation
- (3) not sought primarily for another purpose.

not be subject to unnecessary repeated appearances for harassment
 (4) subpoena should be returnable only when the grand jury is sitting.

G. RECORDING OF GRAND JURY PROCEEDINGS

No requirement that proceedings be transcribed. Some courts have allowed recording of opening comments and witness appearances. FRCrP 6(e). *U.S. v. Battisti*, 486 F.2d 961 (6th Cir. 1973); *U.S. v. King*, 478 F.2d 494 (9th Cir. 1973); *U.S. v. Gramolini*, 301 F. Supp. 39 (D.R.I. 1969).

Stenographic or electronic recording required of all events at proceedings except deliberations and votes of grand jurors.

Same as H.R. 94

Supports recording of testimony and jury charges; opposes recording of comments and interchanges between attorneys and grand jurors.

Supports recording of all matters but deliberations.

Judge Frankel and Mr. Nafellis and Prof. Clark support recording of proceedings.

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H. AVAILABILITY OF TRANSCRIPTS

1. Witness Access to Transcripts

Witness is not entitled to transcript of own testimony. Court may, upon showing of "particularized need" release transcript. *U.S. v. Proctor and Gamble*, 356 U.S. 677 (1958); *U.S. v. Pittsburgh Plate Glass*, 360 U.S. 395 (1959). Defendant has right to transcript of own testimony prior to trial. FRCP 16.

Same as H.R. 94, except the transcript shall be made available no later than 48 hours after appearance.

Judge Frankel, Mr. Naftalis and Prof. Clark: Witness should have a right to a transcript of his own testimony.

2. Witness Access to Prior Statements

Witness not entitled to any statements made by him, in possession of government, before, during or after testimony.

Same as H.R. 94

3. Defendant's Access to Transcript

After the direct examination of a witness, a defendant is entitled to any available transcript of the testimony of a witness. 18 U.S.C. §3500. Also entitled to exculpatory evidence.

Same as H.R. 94

Opposes allowing defendants access to witness testimony prior to cross-examination. Favors retention of present law.

Judge-Frankel and Mr. Naftalis: Defendant should have a right to see grand jury transcripts, with appropriate safeguards. Opposes allowing transcripts to be used for challenging indictment on grounds of insufficient evidence.

4. Restrictions on Access

Under 18 U.S.C. §3500, court may withhold statements of witnesses which do not relate to subject matter of testimony. Upon "sufficient showing," court may restrict discovery. FRCrP 16.

Court may deny or restrict disclosure upon a showing of good cause.

Same as H.R. 94

Favors disclosure restrictions.

I. PRELIMINARY EXAMINATION

Defendant entitled to preliminary examination unless grand jury returns indictment before date set for exam or waived. FRCrP 5(c).

Defendant always entitled to a preliminary examination. It may be held prior to or after the filing of an indictment.

Same as H.R. 94

Opposes requirement of preliminary examination if indictment already returned.

J. REPORTS OF GRAND JURY INVESTIGATIONS

No general requirement as to reports of grand juries to Congress. Under 18 U.S.C. §3333, special grand juries may file reports as to improper but not necessarily criminal governmental activities or on organized crime.

Attorney General at the beginning of each session of Congress must report by judicial district:

- (1) number and description of grand jury investigations
- (2) number of requests and approvals for immunity
- (3) number of immunity applications granted
- (4) date, number and length of grand jury attempts
- (5) description of Justice Department use and storage of grand jury in-

Same as H.R. 94

No opposition to H.R. 94 but believes it impossible to report on all information with respect to immunity grants.

Judge Frankel and Mr. Naftalis:
Judges should receive regular reports of grand jury activities from prosecution - the subject of the inquiry, the number of witnesses called, and the results of the investigation.

Prof. Clark:
Supports reporting of grand jury activities.

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K. IMMUNITY						
1. Type						
Use - <i>Kastigar v. U.S.</i> , 406 U.S. 441 (1972). 18 U.S.C. §§6001-05 Witness Immunity Act of 1970.	Transactional - Nonconsensual	No applicable provision	Use - Nonconsensual	Transactional - Nonconsensual	Transactional - Consensual	
2. Prosecution on Permitted						
If based on independent evidence; for perjury, false statement, or failure to comply.	Perjury, false statement, or failure to comply.	No applicable provision	If based on independent evidence; for perjury, false statement; or failure to comply.	Perjury, false statement; or failure to comply.		
3. Procedure						
(a) Notice						
Statute silent - courts generally require "reasonable notice" - within court's discretion. Type of notice also within court's discretion.	One week's notice unless special need shown. Witness must be informed of nature and scope of immunity.	No applicable provision	Opposes any requirement as to prosecutor informing witness about extent and nature of immunity.			
(b) Standards for Issuance						
(1) Information necessary to public interest; (2) witness not to testify because of privilege against self-incrimination.	(1) information necessary to public interest (2) witness will not testify because of 5th Amendment	No applicable provision	Favors retention of present law. As a matter of policy, government attorney is to consider: (1) importance of	(1) testimony is in public interest (2) witness will not testify because of 5th Amendment (3) no other	Support H.R. 94 plus requirement that grant of immunity requires an affirmative vote of a majority of	

grand jurors.

reasonable way to
elicit testimony.

investigation
formation
(2) value of in-
(3) effectiveness
(4) culpability of
witness
(5) prosecution
success prior to
immunity
(6) likelihood of
adverse conse-
quence from im-
munity.

(3) testimony rel-
evant to and within
scope of invest-
igation
(4) grant of in-
munity be ade-
quate for invest-
igation
(5) summary of
evidence as to
witness is provided
to court
(6) no risk of
foreign prosecution.

L. RECALCITRANT WITNESSES

1. Procedure

Summary proceeding -
most courts provide
"reasonable time" to
prepare; for retained
counsel to be present, and
for at least a cursory
hearing. *Harris v. U.S.*,
382 U.S. 162 (1965);
U.S. v. Alter, 482 F.2d
1016 (9th Cir. 1973);
FRCP 42(b).

(1) show cause
hearing required
(2) witness right
to 72 hours notice
prior to hearing
unless special need
(3) right to
counsel

(1) show cause
hearing required
(2) witness right
to 5 days notice
unless special need
then 48 hours notice
(3) right to
counsel

Opposes mandatory
minimum time
requirement.

(1) show cause
hearing required
(2) witness right
to 10 days notice
unless special need
but a minimum of
5 days notice
(3) right to
counsel
(4) refusal to
answer cannot be
punishable if
question asked is
based on illegally
obtained evidence.

2. Place of Confinement

"Suitable Place"

Federal correctional
institution within
50 miles of court
unless witness
requests other
suitable place.

Same as H.R. 94

Supports in prin-
ciple imprisonment
close to court.

Suggests that the
requirement of a
federal correctional
institution within
50 miles be sticken.

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3. Length of Confinement

Until compliance, life of proceedings, or 18 months, whichever is shorter.

Same as H.R. 94

Until compliance, life of proceedings or 12 months, whichever is shorter.

Same as Justice Department.

4. Reiterated Contempt

No limitation - under statutes for recalcitrance. (28 U.S.C.; 18 USC §401) *U.S. v. Duncan*, 456 F.2d 401 (9th Cir. 1972).

Same witness in same transaction may not be repeatedly confined. No repeated confinement under 28 U.S.C. §1826 or 18 U.S.C. §401.

Supports limitations on reiterated contempt power for civil contempt; opposes any limitation on criminal contempt after civil contempt.

No reiterated contempt as to same witness in same transaction.

No reiterated contempt for "any related" transaction not just "some transaction" as in H.R. 94.

M. VIOLATIONS OF GRAND JURY SECRECY

1. Unlawful Disclosure

No present offense - may be criminal contempt.

Knowing disclosure - up to 6 months and/or \$500 fine. Disclosure for compensation or to effect legal proceedings - up to 5 years and/or \$20,000 fine.

Same as H.R. 94

Would like one year penalty for knowing disclosure. Believes knowing disclosure for money can be treated as obstruction of justice offense.

Supports H.R. 94 in principle.

Judge Frankel and Mr. Nafalis: Support strong sanctions to plug grand jury leaks.

Prof. Clark: Supports immunization of newpersons when reporting on government operations.

2. Exceptions

New Rule 6(e) of FRCrP excludes from secrecy:

- (1) those not present
- (2) witness
- (3) attorney and gov-

- (1) witness or counsel
- (2) attorney for government
- (3) when ordered

Same as H.R. 94 except blanket exemption for members of press.

Supports H.R. 94

Supports H.R. 94

Judge Frankel and Mr. Nafalis: Prosecutors should be allowed to answer legitimate

ernment personnel for job performance (4) when ordered by court.

by court (4) parties not present except dis-closure for compen-sation applies to press acting in professional cap-acity.

media inquiries but should be barred from announcing indictments.

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