

Federal Grand Jury Reform Report & 'Bill of Rights'



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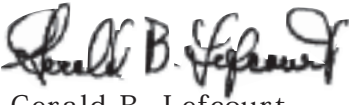
House Judiciary Committee Chairman Henry Hyde (R-IL) recently noted that the federal grand jury, originally established by the Founding Fathers as a means of protecting American citizens against government excess, is today a captive of federal prosecutors. The prosecutor exercises enormous power, unrestrained by law or judicial supervision. The grand jury process itself is largely devoid of legal rules. The process has become one that wholly fails to protect ordinary American citizens. The balance has shifted so dramatically in favor of the prosecution that it has been noted, time and again, that “A good prosecutor could get a grand jury to indict a ham sandwich.”

The Commission to Reform the Federal Grand Jury, which comprises individuals of unsurpassed breadth and expertise in the criminal justice system, has worked intensely over the past two years to examine whether reforms of the federal grand jury system are required. Our findings suggest that fundamental changes are required to restore balance and equity between individual citizens and their government. The proposed changes are all reasonable. In response to demonstrated abuses, several key states, New York and Massachusetts among them, already have successfully instituted many of these well-considered proposals into their grand jury systems.

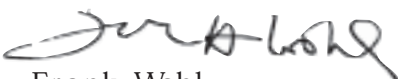
We call upon Congress to do the same at the federal level, and alter the dangerous prosecutorial rubber stamp that constitutes today’s federal grand jury. It is the hope of this Commission that Congress will use this document to take the first steps toward ameliorating this problem and restoring justice to America’s heralded criminal justice system.

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to Reform the Federal Grand Jury

Bill of Rights for the Federal Grand Jury

In 1791, when the grand jury was incorporated into our constitutional structure, its primary role was to protect the individual from unfounded accusations. As one observer has noted, “the grand jury had achieved renown as a bulwark against despotism, a protector of the common man against oppressive prosecution. The institution’s investigatory role was secondary.” But, in the subsequent 200 years, in the federal system anyway, “the protective function has been trivialized and the investigator’s function expanded to the point where the institution is almost precisely the opposite of what the Founding Fathers intended.”¹

Today, many would agree with the observation of William J. Campbell, former federal district judge in Chicago: “[T]oday, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury.”²

What this means is that the federal grand jury is a secret *ex parte* proceeding where the evidence is presented by the prosecutor and the grand jury votes whether to indict without ever hearing from the court (other than a preliminary session welcoming the grand jurors and giving some general guidelines about their duties) or defense counsel. Unsurprisingly, under these circumstances the grand jurors tend to bond with the prosecutor and indict when the prosecutor indicates there should be an indictment.

Thus, the federal grand jury today functions primarily as a tool of the federal prosecutor. Employing the power of compulsory process in a secret proceeding, the prosecutor investigates and determines, with virtually no check, who will be indicted and for what.

In the federal grand jury, the prosecutor exercises this enormous power unrestrained by law or judicial supervision. The grand jury process is largely devoid of legal rules. The prosecutor can present the evidence he or she wants to present in the manner he or she wants to present it. The only theoretical restriction is that, if an indictment is rendered, the evidence should be sufficient to establish probable cause that the accused committed the crime charged. Even that minimal test, however, finds no mechanism in the federal system for its enforcement. Any claimed insufficiency, unfairness or abuse in the grand jury proceedings is said to “merge” in the trial — prejudice from grand jury impropriety is deemed “cured” by a fair trial. But *an indictment alone* can cause enormous harm to an individual or business accused.

The result is a federal grand jury process virtually immune from judicial supervision. Because grand jury procedure presently is given little legal significance, federal courts engage in little scrutiny of what happens there. While some prosecutors may conduct grand jury proceedings with meticulous care and concern for fairness to targets, others may not. If abuses do occur, they will rarely come to light.

Blind faith that misconduct does not occur behind the grand jury door would be naive in the extreme. In recent times, this problem of virtually unbridled federal prosecutorial power over the grand jury has been exacerbated, too frequently, by a lack of prosecutorial restraint. As former Reagan Administration Deputy Attorney General Arnold Burns has written:

[M]ost prosecutors . . . work long hours with little glory trying to bring about a just result. The problem is at the margins — but the margins are growing. Increasingly, the high public profile of a target or the attention-grabbing nature of the alleged wrongdoing may have more to do with a matter’s “prosecutorial merit” than the strength of the evidence or the seriousness of the crime.

* * *

The problem has become endemic, and the solution will need to go beyond *ad hoc* displays of judicial exasperation and oversight.

* * *

What has been lost is a sense of proportionality and identification of priorities.³

Reinforcing this observation are the many recent opinions of respected jurists sharply castigating federal prosecutorial misconduct.

For example, as Seventh Circuit U.S. Court of Appeals Judge Richard Posner has so aptly put it: “[t]he increase in the number of federal prosecutors in recent years has brought with it problems of quality control.” Judge Posner went on to describe and condemn a campaign of harassment waged against a respected criminal defense attorney who was thereby forced to abandon his representation of a client in order to defend himself: “On meager grounds, the U.S. Attorney’s office launched a sting operation against the lawyer for an individual under criminal investigation by the same office. Although the operation produced zero evidence or leads to evidence of illegal conduct, it dragged on for two years.”⁴

Likewise, in a recent case in which an assistant U.S. attorney concealed evidence and then lied about it, Ninth Circuit U.S. Court of Appeals Judge Alex Kozinski wrote: “[t]roubled as we are by the prosecutor’s conduct, we’re more troubled still by the lack of supervision and control exercised by those above him. . . . How can it be that a serious claim of prosecutorial misconduct remains unresolved — even unaddressed — until oral argument in the Court of Appeals?”⁵

Indeed, as far back as 1990, a congressional subcommittee looking into the Justice Department’s internal controls asked the Department’s Office of Professional Responsibility (OPR) what disciplinary action it had taken in each of ten cases *in which federal judges had made written findings of prosecutorial misconduct*. After lengthy delay, the panel was finally informed by OPR that “no disciplinary action has been taken in any of the ten cases.” The subcommittee observed that “repeated findings of no misconduct, and the Department’s failure to explain its disagreements with findings of misconduct by the courts, raises serious questions regarding what [it] considers ‘prosecutorial misconduct.’ . . .”⁶

“The grand jury process is largely devoid of legal rules. The prosecutor can present the evidence he or she wants to present in the manner he or she wants to present it. . . .

* * *

The result is a federal grand jury process virtually immune from judicial supervision.”

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Power to Harm

Representative Henry Hyde (R-Ill.), Chairman of the U.S. House Judiciary Committee, recognized the problem in statements supporting his important legislation of 1997, to permit motions for at least some recoupment of cost by individual and small business victims of “bad faith, vexatious or frivolous” federal prosecutions: “[Some federal prosecutions are] not just wrong, but willfully wrong, frivolously wrong. They [federal prosecutors] keep information from you that the law says they must disclose. They suborn perjury.” The legislative history accompanying the statute notes that the current federal grand jury does not protect citizens from a wrongful indictment and prosecution by the prosecutor in charge of that body. The Conference Committee specifically notes that a finding of probable cause by a federal grand jury does not insulate the government from a judicial finding of a bad faith, vexatious, or frivolous prosecution.⁷

The first successful Hyde Amendment case was *United States v. Holland*, in the Eastern District of Virginia.⁸ The case involved a Virginia state senator (Richard J. Holland) and his small-town bank, in which federal “banking regulators . . . took a small-time, technical violation that usually goes unchallenged and grew it into a 31-count indictment against [Senator Holland] and his son.”⁹ Presiding Judge Morgan threw out the case at trial — “virtually unheard of in the Eastern District of Virginia.”¹⁰ In explaining to the jury his reasoning for finding the Hollands not guilty, the judge noted how the prosecution had picked and chose “only what it wanted from grand jury testimony” and had “ignor[ed] conflicting testimony and evidence.”¹¹

Similar is the case of the first Hyde Amendment motion filed, *U.S. v. Hogge*, in the Southern District of Texas — a case involving a former sales vice president of a now-defunct defense contractor, indicted for conspiring to defraud the U.S. Army. An FBI agent had assured Sharon Hogge that investigators were not focused on her. So, Ms. Hogge spoke freely with federal agents, pointing them to addresses where they found company records. She took notes during her conversations with agents, transcribing the words reflecting the agents’ assurances to her like: “no ambush,” and repeatedly scribbling, “I am not a criminal target.”¹²

Yet, when federal prosecutors convened a grand jury investigation into the company’s suspected over-billing of the Defense Department, they added Ms. Hogge to the target list and easily obtained an indictment against her — despite the fact that as a sales vice president, she did not bill the Army or even handle an inventory. She learned she had been indicted when her husband woke her one Saturday morning in 1996 and stuck a newspaper in her face.

Prosecutors pushed their shoddy case to trial. There, the government’s case fell apart. Federal judge Hoyt criticized the prosecutor for trying to “make a criminal case out of a dispute over an accounting principle.” He added: “I don’t see *any evidence* suggesting . . . that Sharon Hogge should be charged in any of these counts” [against the company’s executives].¹³ Still, during the course of the prosecution, Ms. Hogge miscarried twice from the stress of the ordeal, considered suicide, and for the first time in her life, had to start seeing a psychologist.¹⁴ Ms. Hogge was unsuccessful in her Hyde Amendment motion for fee and cost reimbursement for the ordeal, because the final order dismissing the case against her

had come down *two days* before the effective date of the Hyde Amendment, and the law does not have retroactive application.¹⁵

The Hyde Amendment is a very helpful measure for correcting wrongful prosecutions, but it comes at a fairly late stage of the proceedings. A wrongful indictment in itself — regardless of ultimate outcome — remains devastating. As Justice Kennedy noted in his plurality opinion for the U.S. Supreme Court in *Gentile v. Nevada*, in the time period between indictment and trial, the accused may suffer ruinous consequences to his reputation and employment from which he may never recover even if acquitted.¹⁶ Now, with the dramatic decrease in the proportion of federal indictments that go to trial as compared to that prior to the enactment of the sentencing guidelines in 1987, the grand jury has in effect become the body of last resort for many accused in the federal criminal justice system.¹⁷

These serious consequences make imperative efforts to restore a meaningful shield function to the federal grand jury. Additional safeguards are needed, to protect the individual or business subject to grand jury investigation, and to protect against the waste of tax dollars squandered on investigations and prosecutions that should not be pursued in the first place. We submit that basic reform of the federal grand jury is a logical and necessary next policy step for Congress to take in efforts to restore a balance of fairness to the nation's criminal justice system. While the grand jury continues to serve as a sword for the prosecutor, it has long ceased to perform its historic function as an independent entity acting as a shield to safeguard the citizenry against prosecutorial excess.

Proposals for Reform

The following ten reforms — a Bill of Rights for the Federal Grand Jury — are mainly drawn from those proposed by the American Bar Association (ABA) more than 20 years ago by its Criminal Justice Section Committee on the Grand Jury (“ABA Report”). Congress held hearings on these proposals but failed to pass them. However, recent developments, noted above, have created a new urgency for grand jury reform, as a critical policy step toward re-establishing a sense of fair balance to the now truly enormous federal prosecutorial/investigative power.

We submit that these reforms strike the appropriate balance between the public's interest in effective law enforcement and the public's interest in protecting the rights of individual citizens and businesses involved in the federal grand jury process.

The great benefit from the proposed reforms, and increased judicial scrutiny of the grand jury process, would be that flaws in potential charges might be exposed at the grand jury stage, and unwarranted prosecutions would be less likely to be brought. At least some individuals and businesses would be spared the devastating effects of being forced to face trial on meritless charges.

At the same time, none of these reforms would disrupt the effective functioning of the grand jury or add significantly to the burden of federal courts and prosecutors. Indeed, several of the proposed rules have been in effect for some time in some state jurisdictions, without any adverse consequences to effective law enforcement. N

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Criticisms of Federal Grand Jury Reform Proposals

The critique of our grand jury reform proposals is largely encapsulated in opposition to the right to counsel in the grand jury room. First, opponents claim that the presence of counsel will transform the grand jury proceeding into an adversarial situation. This runs counter to the historic function of the grand jury and turns it, in effect, into another trial. Second, opponents argue that such reform will make the system of justice less efficient by encumbering the process with additional procedures.

These concerns mirror the critiques of other federal grand jury reform proposals. For example, the U.S. Supreme Court in the *Calandra* case of the early 1970s, stated:

Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings. Suppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective. The probable result would be "protracted interruption of grand jury proceedings," effectively transforming them into preliminary trials on the merits. In some cases the delay might be fatal to the enforcement of criminal law.¹⁸

Fear of delay and of turning federal grand jury proceedings into a "preliminary trial" are both cited as reasons for not extending the exclusionary rule to grand jury proceedings.¹⁹

A third objection raised against counsel in the grand jury room is that it allows for the control of witnesses in corporate and organized crime cases, and high-level drug cases. The fear is that the subject of the investigation would control the selection of counsel for the witnesses, and that the witnesses' testimony would be less forthcoming with such counsel in the grand jury room.

Response to Criticisms

We think the critics fail to adequately appreciate the positive practical experiences of states which have implemented a number of these same reforms. Particularly notable in this respect are Colorado and New York.

In Colorado, for example, if a *Miranda*-like warning is not given to a witness before testimony, the witness cannot be prosecuted as a result of any information presented to the state grand jury. The warning includes an advisory as to the right to counsel. Defense counsel are allowed in the grand jury, but can only act as advisors, as would be the case under our proposal. According to H. Jeffrey Bayles, a former Denver chief deputy district attorney, the presence of counsel has not disrupted or impeded the functions of the grand jury. In fact, the opposite has been true. He explains:

The presence of counsel has a definitely positive effect. Prosecutors who have worked under both the new and old laws strongly prefer the new. Not only does the new law speed the process by eliminating the walk outside the room on every question, but it also reduces the number of questions requiring conferences. The educational process, which of necessity accompanies having counsel in the grand jury room, promotes a better understanding of the grand jury within the bar. The more the processes are known, the less is the aura of mystery surrounding the grand jury. When the mystery leaves, so does much of the fear and distrust of the institution. The demand for abolition of the grand jury will decrease in direct proportion to the number of counsel who attend grand jury sessions with their clients.²⁰

Experiences in other states where counsel is permitted in the grand jury room appear to have been similarly successful.²¹

The state grand jury in New York is also similar in many respects to the model we suggest. There, the rules of evidence for grand jury proceedings are virtually identical to those which govern trials. Targets have the right to testify on their own behalf and can recommend specific witnesses to the grand jury.²² Examination of reported decisions in New York, as well as the collective experience of Commission members from New York, reveals that procedures there have not led to the kind of inefficient mini-trials hypothesized by opponents of reform.

With respect to the claim that the proposal will allow control of witnesses in organized crime and drug cases, the case has not been made by critics of reform that state experiences have demonstrated that lawyers for witnesses have suborned perjury or obstructed the witness's truthful and complete grand jury testimony.

The reform proposal of permitting counsel for witnesses in the grand jury room certainly should not be rejected on the basis of what is, at best, a speculative claim. Further, should any such obstructionism actually emerge in any case, our proposal has made provision for its prompt and forceful correction by the supervising court. Our proposal is plain that the federal court with jurisdiction over the relevant grand jury shall enjoy a specific *congressionally-authorized* power (that is, not the inherent judicial power rejected by the *Williams* Court) — to remove, or otherwise sanction, an obstructionist lawyer. *See* Recommended Reform Right One, *supra*.

To the extent that some critics express concern about witness counsel in the grand jury lending itself to increased breaches of secrecy by “house counsel” to a business or organized crime organization, this can also be addressed through the courts' attorney removal and other sanctioning powers. Moreover, realistically, in-house counsel can get this information anyway, albeit perhaps a *less-than-entirely-accurate* rendition. This is true of the objection to allowing witnesses access to the transcripts of their testimony, as well. Any potential for these reforms to increase breaches of secrecy is not an appreciable risk. As Watergate prosecutor, now White House Counsel, Charles Ruff has well explained:

In the typical grand jury investigation into the activities of any hierarchically structured organization, a witness from the lower or middle levels represented by counsel hired by his superiors [the entity], will meet

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with the prosecutor and there will be some discussion both about his status and about the nature of his prospective testimony. If his lawyer advises him to assert his privilege against self-incrimination, and the prosecutor does not immunize him, it is difficult to see what added harm is created by permitting the witness' lawyer to be in the grand jury room. If the witness is advised to testify without asserting his privilege, there is some risk that he will be less candid if his employer's representative is present, but I question whether the risk is measurably greater than it is with the lawyer outside the grand jury room, since, if the witness' testimony is helpful to the government, that fact will probably become evident to the lawyer in fairly short order. If the government decides to immunize the witness, it has already announced that it considers him a potential witness against his employer, and has laid a firm basis for the [judicial] disqualification of [house] counsel.²³

Nor will our other proposed reforms disrupt the grand jury proceedings. Our proposals would not shift suppression and/or dismissal hearings back to the grand jury stage of proceedings. Rather, any suppression or dismissal motion would be made as one of several post-indictment, but pre-trial, matters.

The Supreme Court has not spoken against the policy changes we advocate. True, in the early 1970s, in *United States v. Calandra*, the Supreme Court ruled that the *judicially created exclusionary rule* does not apply in grand jury proceedings. However, neither *Calandra* nor any other Supreme Court decision regarding the courts' limited *inherent* powers to address grand jury impropriety by prosecutors addresses the policy decision, exclusively reserved to Congress, as to the advisability of re-calibrated, statutory safeguards for the individual or business called before the modern federal grand jury.

Evidence illegally obtained by *electronic surveillance* is, in fact, specifically excluded by statute from use in the federal grand jury.²⁴ In 1974, the *Calandra* Court felt it could confidently state that, "for the most part, a prosecutor would be unlikely to request an indictment where a conviction would not be obtained."²⁵ Today, however, in the wake of a recent explosion in the number of federal prosecutors — with the accompanying "problems of quality control" identified by conservative jurists like Richard Posner and Alex Kozinski, among many others — that sort of confidence is called into serious question.²⁶ With approximately four times the number of federal prosecutors, exercising vastly expanded powers over the citizenry in investigation and prosecution of manifold more federal criminal offenses, this belief is highly debatable. At least now, sound policy dictates that there simply should be no basis for a prosecutor *to even consider* utilizing in the grand jury evidence he or she believes to be unlawfully obtained.

If the federal grand jury is to serve its historical function of being shield as well as sword, the integrity of the process must be maintained. The fact that the Supreme Court has decided it does not possess the *inherent power* to supervise the federal grand jury is no argument against legislation excluding unconstitutionally obtained evidence from the process. In order to actually effectuate this sound principle, the federal courts must be congressionally empowered to dismiss, with or without prejudice, an indictment obtained through the grand jury in violation of this basic rule.

Compelling Need for Federal Grand Jury Reform: *Now More Than Ever*

The purpose of federal grand jury reform is to bring about changes in the institution so that it might again function as most feel it should — as an investigative arm of the government capable of combating crime, but also, simultaneously, a critical protector of citizens' rights. Some, following certain court precedent, may object in the belief that the federal grand jury has never ceased to act as both a sword and shield. Some federal prosecutors may perceive such reforms as a threat to their ability to obtain indictments. But maintaining the *status quo* ignores the fundamental principles that are at the heart of our justice system in America.

Despite the increasingly compelling need for reform, the federal grand jury has remained largely unchanged. Two decades ago, at the urging of the American Bar Association and many others, Congress actively considered similar reform proposals. Numerous bills were introduced, detailed studies performed, and a multitude of testimony presented.²⁷ Yet few changes resulted. Changes that did result — the recording of grand jury proceedings and issuance of prosecutorial guidelines — although helpful, have proved over the course of the intervening years to have very little impact on the core concerns that fueled the calls for modest reforms.

In the intervening decades, the number of federal prosecutors has exploded while effective controls against federal grand jury abuses have dwindled. The result has been an increase in prosecutorial excesses that has resulted in witness abuse and indictments that should never have been brought — destroying the lives, careers and businesses of innocent Americans. The need for federal grand jury reform, to safeguard the citizenry against such excess, has only gotten greater.

The federal grand jury is back in the spotlight. One can hardly open a newspaper or turn on the radio or television without hearing criticism or concerns about unfairness to citizens exposed to the grand jury process.²⁸ Americans are troubled as their fellow citizens increasingly relate grueling and costly experiences as they emerge from testifying before a federal grand jury.

Rather than repeat the mistakes of the past, we need to learn from them. At the very least, if the case was not made in the 1970s for some basic federal grand jury reforms, we submit that recent experience has made the case for reform today. The modest measures recommended in this Report will help return the institution of the federal grand jury to its rightful place within our justice system — as a viable means for helping to ferret out criminal activity *while also ensuring fairness to all individuals and businesses who come within its focus.* N

FEDERAL GRAND JURY

★ Bill of Rights ★

1. *A witness before the grand jury who has not received immunity shall have the right to be accompanied by counsel in his or her appearance before the grand jury. Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors, stop the proceedings, object to questions, stop the witness from answering a question, nor otherwise take an active part in proceedings before the grand jury. The court shall have the power to remove from the grand jury room, or otherwise sanction counsel for conduct inconsistent with this principle.*

Presently, a witness — including a target or subject of investigation — who appears before a federal grand jury is not entitled to counsel inside the grand jury room. The witness must request permission from the grand jury to consult outside the grand jury room with counsel. Nowhere else in the criminal justice process is a person who desires counsel denied the right to have counsel at his side as he is questioned.

Exclusion of counsel is unfair to the witness. A key aspect of our criminal justice system is the ability to consult with counsel. Significant legal risks confront the grand jury witness, such as the danger of self-incrimination, contempt or perjury. Also, privileges such as attorney-client privilege may inadvertently be waived. Often, the witness appears for hours. In the intimidating atmosphere of the grand jury, the witness may have difficulty remembering his attorney's instructions and may be too frightened to request a halt in the proceedings so he can consult with counsel outside the grand jury room.

As the 1977 ABA Report on grand jury reform stated: "Requiring a witness who needs advice of counsel to consult his attorney outside the grand jury room door is awkward and prejudicial. It unnecessarily prolongs the grand jury proceeding and places the witness in an unfavorable light before the grand jurors." Former Watergate Special Prosecutor (now White House Counsel) Charles Ruff testified before Congress in the 1970s to the same effect, in favor of the reform proposal: "Most prosecutors would admit that they count on the burden of leaving the room to *dissuade the witness from asserting his right to counsel.*"²⁹

This reform will actually be *less* disruptive of grand jury proceedings than the current practice of stopping the proceedings so that the witness can leave the grand jury room. The proposal precludes counsel from addressing the grand jurors or participating in the proceedings. It simply provides that if the witness wishes to consult with her lawyer, she gets to speak with counsel before answering the question. This is eminently fair, and can help prevent injustice to the witness appearing before the federal grand jury without disrupting the proceedings.

2. *No prosecutor shall knowingly fail to disclose to the federal grand jury evidence in the prosecutor's possession which exonerates the target or subject of the offense. Such disclosure obligations shall not include an obligation to disclose matters that affect credibility such as prior inconsistent statements or Giglio materials.*

The 1992 U.S. Supreme Court decision in *United States v. Williams* established that the federal courts do not possess an *inherent power* to supervise the federal grand jury.³⁰ Without congressional action, then, there is no effective judicial remedy for federal prosecutorial excesses in the grand jury process.

Because the grand jury operates virtually under total prosecutorial control, federal prosecutors can, and sometimes do, manipulate the proceedings. Fairness to the grand jury target — and respect for the grand jury’s independence — requires that the prosecution be required to present to the grand jury known evidence negating guilt.

To effectuate this proposal, Congress should pass legislation authorizing the court’s dismissal, with or without prejudice, of an indictment based upon the prosecutor’s violation of this principle. This way, the federal courts would be able to check and balance prosecutorial powers, to safeguard the citizenry and the legal system against prosecutorial excesses in the federal grand jury.

This reform will not disrupt the efficient operation of the grand jury process. It does not shift hearings back to the grand jury stage of proceedings. Rather, the defense motion to dismiss would be made, and addressed by a court, post-indictment (but still pre-trial), only.

3 ■ *The prosecutor shall not present to the federal grand jury evidence which he or she knows to be constitutionally inadmissible at trial because of a court ruling on the matter.*

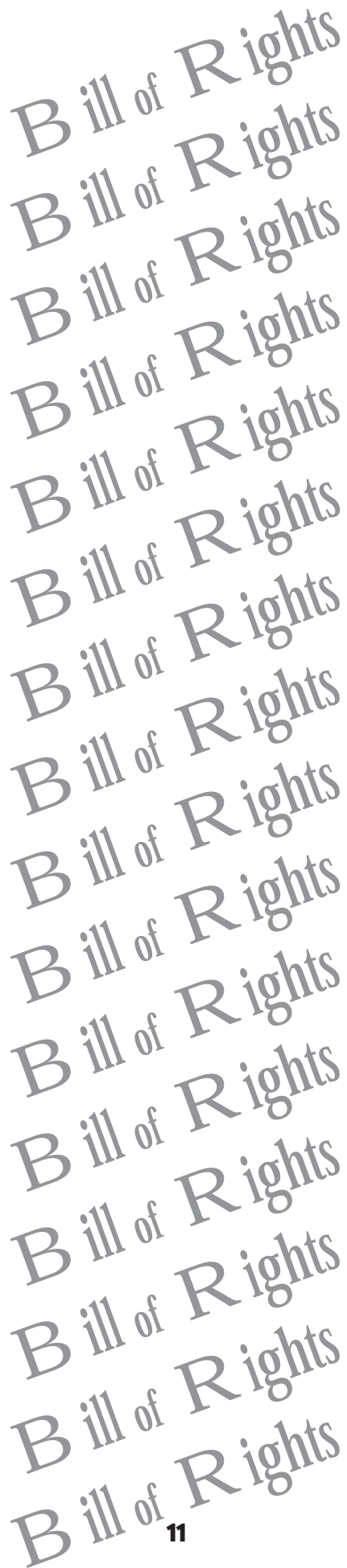
In *United States v. Calandra*, the Supreme Court ruled that the exclusionary rule did not apply in grand jury proceedings.³¹

Although evidence illegally obtained by electronic surveillance is specifically excluded by statute from use in the federal grand jury,³² under *Calandra*, virtually all other illegally seized evidence is admissible in the grand jury. *Calandra* observed that “for the most part, a prosecutor would be unlikely to request an indictment where a conviction would not be obtained.”³³ But even if this debatable proposition is accepted, there should be no basis even for a prosecutor to consider utilizing in the grand jury evidence he or she knows to be unlawfully obtained.

If the federal grand jury is to serve its historical function of being shield as well as sword, the integrity of the process must be maintained. Since the Supreme Court has decided it does not possess the *inherent power* to supervise the federal grand jury, legislation excluding unconstitutionally obtained evidence from the process is necessary.

To effectuate this principle, the federal courts must be congressionally empowered to dismiss, with or without prejudice, an indictment obtained even in part by violation of this basic rule. Under this proposal, the court would not be able to dismiss if a violation is deemed to be harmless error — that is, if other, admissible evidence before the grand jury sustains the indictment.

This reform will not disrupt the grand jury process. Like Recommended Reform Right Two, it would not shift suppression and/or dismissal hearings back to the grand jury stage of proceedings. The suppression or dismissal motion would be made post-indictment (but still pre-trial), only.



FEDERAL GRAND JURY

- 4.** *A target or subject of a grand jury investigation shall have the right to testify before the grand jury. Prosecutors shall notify such targets or subjects of their opportunity to testify, unless notification may result in flight, endanger other persons or obstruct justice, or unless the prosecutor is unable to notify said persons with reasonable diligence. A target or subject of the grand jury may also submit to the court, to be made available to the foreperson, an offer, in writing, to provide information or evidence to the grand jury.*

In its 1977 Report recommending this proposal, the ABA stated:

This principle is intended to insure that individuals are given the opportunity to testify on their own behalf prior to being indicted. This is an essential ingredient in a fairly functioning grand jury — and criminal justice — system. Without it, the grand jury's essential function of arriving at an accurate indictment is undermined because the jurors may be denied certain evidence.

In fact, it is already the rule in New York that a defendant on notice of a state grand jury investigation has an absolute right to testify before the panel if he chooses and may also recommend specific witnesses to the grand jury.³⁴

Drawing upon this New York model, our Recommended Reform Right Four proposes that a federal prosecutor be required to take all reasonable steps to notify a prospective defendant of his right to testify. The reasonableness touchstone of the proposal recognizes that, in some instances: (1) the prosecutor will truly be unable to locate such persons; or (2) notification may result in the person's fleeing, endangering witnesses or other persons or obstructing justice. In these extraordinary instances, notification of the right to testify would not be required (as it would be unreasonable). This measure should also include a specific provision permitting judicial dismissal of an indictment, with or without prejudice, for a failure to comply which does not fall within the reasonableness exceptions of the reform.

The second part of the proposal — that a target or subject may make available to the foreperson, through the court, an offer in writing to offer information to the federal grand jury — also insures that the grand jury receives all the relevant information it needs to actually make an informed decision on an indictment. There is no requirement that the foreperson accept the proffered information. Rather, the foreperson is simply made aware of its existence and afforded the choice as to whether it is relevant and helpful to the work of the grand jurors.

Still, we well recognize that the foreperson could feel inhibited from accepting the proffered information or evidence by the prosecutor's influence over the grand jury. Thus, a refusal to hear evidence proposed by the target or subject should provide the court grounds, in its sound discretion, to dismiss a resulting indictment with or without prejudice.³⁵

- 5.** *Witnesses should have the right to receive a transcript of their federal grand jury testimony.*

A number of well-reasoned opinions have held that a witness has a presumptive right to obtain a transcript of his own federal grand jury testimony.³⁶ Notwithstanding this, federal courts still routinely deny motions by witness to obtain transcripts of their own grand jury testimony.

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The reasons favoring such disclosure are strong. Notwithstanding federal prosecutors’ arguments that secrecy prohibits disclosure, Rule 6(e)(2), which deals with secrecy, does not preclude such disclosure. Indeed, a witness is free to tell the world what he has testified in the grand jury. Often, though, these oral renditions are inaccurate or untrustworthy, while a transcript would ensure accuracy.

At present, a federal grand jury witness must rely upon his memory or upon the lawyer’s debriefing notes of his earlier grand jury testimony if called again to the grand jury. Witnesses are often called for multiple grand jury appearances. To clarify ambiguity, avoid inadvertent inconsistencies and to protect against a perjury indictment, a witness should be entitled to his own grand jury testimony.

Federal prosecutors recognize the value of providing or reading to their trial witnesses a transcript of their grand jury testimony before trial. This long-standing practice serves the prosecutorial purpose of minimizing impeachment of the witness at trial and providing the opportunity to clarify ambiguity during trial preparations. If the prosecution’s witnesses enjoy such opportunity, how can it be argued that any witness should be denied a transcript of his grand jury testimony? Allowing witnesses called by the prosecutor at trial to review their own transcripts, while denying this right to any other witnesses recalled to the grand jury or called as a defense witness at trial, fosters a system of mere gamesmanship that denigrates the integrity of federal grand jury proceedings.³⁷

In short, upon our collective analysis, as observed by one federal district court, we regard prosecutorial arguments against a witness’s right of access to his grand jury testimony to be no more than “a paranoid secrecy for the sake of secrecy itself.”³⁸

6 ■ *The federal grand jury shall not name a person in an indictment as an undicted co-conspirator to a criminal conspiracy. Nothing herein shall prevent the prosecutor from supplying such names in a bill of particulars.*

In *Briggs v. United States*, the Fifth Circuit powerfully stated the case for prohibiting the naming of persons in an indictment as undicted co-conspirators.³⁹ Noting that a “grand jury indictment is a specific accusation of crime, having a threefold purpose: notice to the defendant, pleading in litigation, and the basis for the determination of acquittal or conviction,” the court stated that “none of those functions encompasses public accusations directed at persons not named as defendants.”⁴⁰

As the ABA report stated in recommending this proposal, naming persons in an indictment as undicted conspirators “stains the reputation of the person without providing any means for the person to show his innocence.” This damage is often incalculable. It is not only a public embarrassment and lasting private humiliation, but it frequently causes loss of employment and jeopardizes opportunity for election to public office. Explained the *Briggs* court:

[T]he grand jury that returns an indictment naming a person as an undicted conspirator does not perform its shielding function but does exactly the reverse. If the charges are baseless, the named person should not be subjected to public branding, and if supported by probable cause, he should not be denied a forum.⁴¹

FEDERAL GRAND JURY

Answering critics of this reform, the second part of our proposal permits the federal prosecutor to disclose the names of unindicted co-conspirators in response to an appropriate request by defense counsel. This will afford prosecutors the opportunity, assuming evidentiary requirements are met, of introducing co-conspirator statements at trial. At the same time, it prevents the unfair branding of a citizen unindicted as well as the undue ambushing at trial of a citizen defendant.

7 ■ *All non-immunized subjects or targets called before a federal grand jury shall be given a Miranda warning by the prosecutor before being questioned.*

Federal prosecutors routinely tell witnesses they are not “targets” to get them to answer questions without counsel before the grand jury, only later to indict them after they have helplessly incriminated themselves. This problem can be curbed by requiring the brief issuance of a *Miranda*-type warning to grand jury subjects or targets.

If one is called before the grand jury for more than one appearance, she should be given a fresh set of warnings before the start of questioning at each additional appearance. Waiver of the rights can be made quickly and orally, as long as they are transcribed or recorded as part of the grand jury proceedings. *See also* Recommended Reform Right Nine, *infra*.

Such a reform is only fair. Complex and important legal issues face any subject or target before the grand jury. This is especially daunting for the typical, lay subject or target. An appearance before the grand jury may subject an individual to the grave danger of self-incrimination. The subject or target may inadvertently lose his right to claim the privilege against self-incrimination by operation of the waiver doctrine.

8 ■ *All subpoenas for witnesses called before a federal grand jury shall be issued at least 72 hours before the date of appearance, not to include weekends and holidays, unless good cause is shown for an exemption.*

This reform would prohibit the ambushing of witnesses by federal prosecutors who serve forthwith subpoenas at the 11th hour. All too frequently, there is no good reason for this lack of notice to the subject of the subpoena. The prosecutor is simply seeking to gain an undue advantage over the surprised, unprepared, and less likely to be counseled, witness. The proposal makes specific provision for the true emergency situation, in which at least 72 hours’ notice is not reasonably possible.

9 ■ *The federal grand jurors shall be given meaningful jury instructions, on the record, regarding their duties and powers as grand jurors, and the charges they are to consider. All instructions, recommendations and commentary to grand jurors by the prosecution shall be recorded and shall be made available to the accused after an indictment, during pre-trial discovery, and the court shall have discretion to dismiss an indictment, with or without prejudice, in the event of prosecutorial impropriety reflected in the transcript.*

Grand jurors cannot exercise their historic powers of independence without meaningful jury instructions regarding their duties and powers as grand jurors, including the power to reject, as well as accept, the prosecutor’s request for charges. Grand jurors, additionally, are entitled to receive instructions regarding the elements of the charges they are to consider. All instructions, as well as any statements made to grand jurors by prosecutors regarding the charges or the persons who are being investigated, must be on the record, so that the court, upon a proper showing by the parties, is able to properly supervise the fairness and integrity of the grand jury process.⁴²

10. No prosecutor shall call before the federal grand jury any subject or target who has stated personally or through his attorney that he intends to invoke the constitutional privilege against self-incrimination.

The federal prosecutor may, however, seek a grant of immunity or contest the right of the witness to assert the privilege against self-incrimination. In such a case, the prosecutor shall file under seal any motion to compel the testimony of a witness who has indicated his refusal to testify in reliance upon his privilege against self-incrimination and any witness may file under seal any motion relating to or seeking to exercise or protect his right to refuse to testify. All proceedings held on such motions filed under seal shall be conducted in camera unless the witness requests a public hearing.

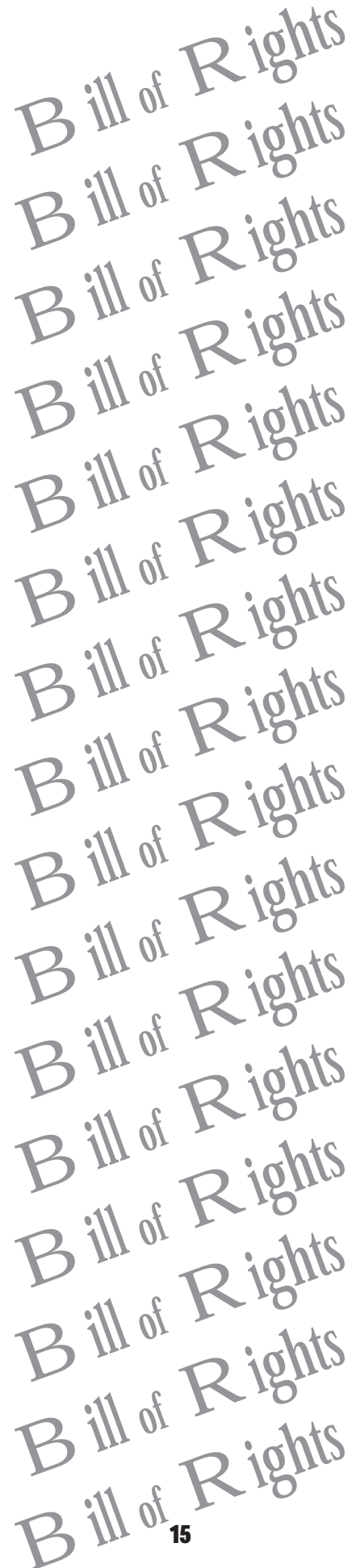
The only purpose for calling before the grand jury a witness who has indicated that he intends to invoke his right against self-incrimination is to harass or intimidate the witness, unless the prosecutor has obtained a grant of immunity.

This principle is reflected in part in the ABA Standards relating to prosecution function, Standard 3-3.6 which reads as follows:

(e) the prosecutor should not compel the appearance of a witness before the grand jury whose activities are the subject of the inquiry if the witness states in advance that, if called, he or she will exercise the constitutional privilege not to testify, unless the prosecutor intends to seek a grant of immunity according to law.

This principle also appears in amendments to the U.S. Attorneys Manual adopted by the Department of Justice in December 1977, which directs: “if a written communication from a target, signed by him and his attorney, states that they will assert the Fifth Amendment, the witness should generally be excused from testifying unless there are reasons which strongly compel his personal assertion of that right before the grand jury.”

We do not believe the Department’s position that only targets should be excused provides sufficient protection against abuse and urge that, except in the circumstances identified, no witness who asserts in writing that she or he intends to take the Fifth Amendment should be compelled to do so before the federal grand jury. N



**Reported This 18th Day of May, 2000
by the Commission to Reform the Federal Grand Jury**

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NOTES

1. David L. Finc, Comment, *Federal Grand Jury Investigation of Political Dissidents*, 7 Harv. C.R.-C.L. L. Rev. 432, 498 (1972).
2. William J. Campbell, *Eliminate the Grand Jury*, 64 J. Crim. L. & Criminology 174, 180 (1973). Our proposals are obviously more modest.
3. Arnold I. Burns, Warren L. Dennis and Amybeth Garcia-Bokor, *Curbing Prosecutorial Excess: A Job for the Courts and Congress*, The Champion, July 1998, at 12-13.
4. *United States v. Van Engel*, 15 F.3d 623, 626 (7th Cir. 1993).
5. *United States v. Kojayan*, 8 F.3d 1315, 1320 (9th Cir. 1993). Compare Paul Craig Roberts, *Ambition Above Justice*, WASH. TIMES, Mar. 26, 1998, at A18 ("A former assistant U.S. attorney described to me the extraordinary decline in prosecutorial ethics he has witnessed during his career. He laid blame on . . . the overnight expansion of the number of assistant U.S. attorneys from 1200 to more than 7000. There were not enough seasoned people to fill the posts, and the influx overwhelmed the ability of the Justice Department to inculcate a respect for justice and the majesty of law as opposed to a win-at-all-costs attitude favored by the younger law school graduates.").
6. Subcommittee on Government Information, Justice, and Agriculture, U.S. House Committee on Government Operations, "Federal Prosecutorial Authority in a Changing Legal Environment: More Attention Required," H.R. Rep. 986, (1990) (101st Cong.).
7. Pub. L. No. 105-119 (Nov. 26, 1997) (now at 18 U.S.C. 3006A note) ("Hyde Amendment" statute for recoupment of fees and costs associated with being prosecuted frivolously, vexatiously, or in bad faith); H.R. Conf. Rep. No. 105-405, at 193-94 (1998) ("a grand jury finding of probable cause to support an indictment does not preclude a judge from finding that the government's position was vexatious, frivolous, or in bad faith."). See Henry J. Hyde, "Trust a 340-84 Vote and 17 Years of Success," Oct. 27, 1997 ("Dear Colleague" regarding his amendment for fee and cost recoupment for the wrongfully prosecuted, debunking DOJ's claim that Congress need not be concerned with wrongful prosecutions because prosecutors must go to a grand jury before they can indict a defendant.) Reported decisions in just one year's time under the Hyde Amendment, regarding successful motions for fee and cost recoupment, include: *U.S. v. Holland*, 1999 U.S. Dist. Lexis 1147 (E.D. Va. 1998); *U.S. v. Ranger Electronic Communications Inc.*, 22 F. Supp.2d 667 (W.D. Mich.1998); *United States v. Gardner*, 23 F. Supp.2d 1283 (N.D. Okla. 1998); and *U.S. v. Yee Chan* (Mid Pac Electric Co.), 22 F. Supp.2d 1123 (D. Hawaii 1998). See also Pub. L. No. 105-277, Sec. 801 (Ethical Standards for Prosecutors Act, supported by U.S. House Judiciary Committee Chairman Hyde, effective April 19, 1999).
8. *U.S. v. Holland*, 1999 U.S. Dist. Lexis 1147 (E.D. Va. 1998).
9. Terry Carter, *The Zealots and the Senator*, A.B.A.J., Oct. 1998, at 60.
10. *Id.* at 67.
11. *Id.*
12. Ann Davis, *Life in a Federal Prosecutor's Cross Hairs*, Wall Street Journal, Mar. 17, 1998, at B1, B17.
13. *Id.*, at B17 (emphasis added here).
14. *Id.*
15. *Cleared of Army Fraud, Woman Loses Effort to Recover Legal Fees*, Wall Street Journal, Mar. 26, 1998, at B13.
16. *Gentile v. Nevada*, 501 U.S. 1030 (1991).
17. U.S. Department of Justice, Bureau of Justice Statistics, 1987 Sourcebook of Criminal Justice Statistics, table 5.22; 1988 Sourcebook, table 5.28; U.S.S.C. Annual Report 1998, table 10 at 20. 18. 414 U.S. at 343.
19. See, e.g., Thomas P. Sullivan and Robert D. Nachman, *If It Ain't Broke, Don't Fix It: Why the Grand Jury's Accusatory Function Should Not Be Changed*, 75 J. Crim. L. & Criminology 1047, 1062-1063 (1984).
20. See, e.g., Jeffrey Bayles, *Grand Jury Reform: The Colorado Experience*, A.B.A.J., May 1981, at 571.
21. See, e.g., Sullivan & Nachman, *supra* note 33, at 1067. See also e.g., Fla. Crim. Code 905.17 (2) ("The witness may be represented before the grand jury by one attorney. This provision is permissive only and does not create a right to counsel for the grand jury witness. The attorney for the witness shall not be permitted to address the grand jurors, raise objections, make arguments, or otherwise disrupt proceedings before the grand jury. The attorney for the witness shall be permitted to advise and counsel the witness . . .").
22. Jay Fenster, Note, *The Presence of Counsel in the Grand Jury Room*, 47 Fordham L. Rev. 1138, 1152-54 (1979).
23. Subcommittee on Constitutional Rights, U.S. Senate

- Committee on Judiciary, "Reform of the Grand Jury System," Sept. 18, 1976 (94th Cong.), at 272 (statement of Charles F.C. Ruff).
24. 18 U.S.C. 2515.
25. 414 U.S. at 351.
26. See *supra* notes 4-5, and accompanying text.
27. See e.g., Subcommittee on Constitutional Rights, U.S. Senate Committee on Judiciary, "Reform of the Grand Jury System," Sept. 28, 1976 (94th Cong.); Subcommittee on Immigration, Citizenship, and International Law, U.S. House of Representatives Committee on the Judiciary, "Grand Jury reform," Mar. 17, Apr. 27, June 1 and 29, 1997 (95th Cong.).
- Diverse supporters of reforms such as those we propose included: General Motors Corporation; Litton Industries Corporation; Bethlehem Steel Corporation; Watergate Prosecutor (now White House Counsel) Charles F. Ruff; the Alliance for Preservation of Religious Liberty; the National Council of Churches (a cooperative agency of 30 national religious bodies of Protestant, Anglican and Eastern Orthodox traditions in the country, aggregating over 40 million members); the National Council of Churches of Christ; the Reporter's Committee for Freedom of the Press; the Newspaper Guild (AFL-CIO); International Longshoemen's & Warehousemen's Union; Richard E. Gerstein, State's Attorney, Metropolitan Dade County (Florida) — the chair of the ABA Criminal Justice Section's Committee on the Grand Jury, and a former president of the National District Attorneys Association.
- Editorial endorsements of these type proposals spanned the nation. See, e.g., Denver Post, *Grand Jury Reform Merits Public Support*, June 23, 1976; Louisville Times, *Congress Can Check Grand Jury Abuses*, Nov. 15, 1976; Austin American-Statesman, *Grand Jury Reform Needed*, July 30, 1977; Charlotte Observer, *Leaky Shield — Grand Juries Need Repair*, July 11, 1977; Salt Lake City Tribune, *Grand Jury System Would Gain From ABA Reform Package*, Aug. 12, 1977. See also *Under Indictment — GM, Other Unlikely Critics Accuse Grand Juries of Abusing Rights They Are Supposed to Protect*, Wall Street Journal, June 23, 1977; *Corporate Complaints of Grand Jury Abuses*, Wash. Post, July 6, 1977.
28. See, e.g., *Win at All Costs: Government Misconduct in the Name of Expedient Justice*, Pittsburgh Post-Gazette, Nov.-Dec. 1998 (10-part series from several years' comprehensive investigation, by award-winning investigative reporter, into prosecutorial misconduct including abuses of the grand jury); Dateline NBC, Mar. 26, 1999. See also *Trial and Error: How Prosecutors Sacrifice Justice to Win*, Chicago Tribune, Jan. 1999 (5-part series from similarly comprehensive investigation into sample of murder cases alone, since 1963, contaminated by prosecutorial misconduct).
29. Subcommittee on Constitutional Rights, U.S. Senate Committee on Judiciary, "Reform of the Grand Jury System," Sept. 18, 1976 (94th Cong.), at 272 (statement of Charles F.C. Ruff) (emphasis added).
30. 504 U.S. 36 (1992).
31. 414 U.S. 613 (1974).
32. 18 U.S.C. 2515.
33. 414 U.S. at 351.
34. N.Y. Crim. Pro. L. 190.50 (5)(a): "When a criminal charge against a person is being or is about to be or has been submitted to a grand jury, such person has a right to appear before such grand jury as a witness in his own behalf if, prior to the filing of any indictment or any direction to file a prosecutor's information in the matter, he serves upon the district attorney of the county a written notice making such request stating an address to which communications may be sent. . . .".
35. 18 USC 1504 may need to be revised to reflect that this proffer of information and evidence is not improper, let alone illegal. The broadly written Section 1504 currently makes it a misdemeanor, with a maximum punishment of six months incarceration, to provide a written communication to a grand juror.
36. See, e.g., *In re Sealed Motion*, 880 F.2d 1367 (D.C. Cir. 1992); *In re Subpoena of Heimerle*, 788 F. Supp. 700 (E.D.N.Y. 1992).
37. John R. Wing and Eli Gottresdiene, *Grand Jury Investigations*, Business Crimes Journal, May 1988.
38. *In re Minkoff*, 349 F. Supp. 154, 158 (D.R.I. 1972).
39. 514 F.2d 794 (5th Cir. 1975).
40. *Id.* at 800.
41. *Id.* at 803.
42. ABA Standards for Criminal Justice, Prosecution Function, Standard 3-3.5(c) (3d edition). N

FEDERAL GRAND JURY

★ Bill of Rights ★

- 1.** Any grand jury witness not receiving immunity has the right to be accompanied by counsel.
- 2.** A prosecutor must disclose to the grand jury any evidence which exonerates the target or subject of the offense.
- 3.** A prosecutor shall not present evidence to a grand jury known to be constitutionally inadmissible at trial because of a court ruling on the matter.
- 4.** A target or subject of a grand jury investigation shall have the right to testify before the grand jury.
- 5.** Grand jury witnesses shall have the right to receive a transcript of their testimony.
- 6.** The grand jury shall not name a person in an indictment as an unindicted co-conspirator to a criminal conspiracy.
- 7.** All non-immunized subjects or targets called before a grand jury shall be given a *Miranda* warning by the prosecutor before being questioned.
- 8.** All subpoenas for grand jury witnesses shall be issued at least 72 hours before any appearance, not to include weekends and holidays, unless good cause is shown for an exemption.
- 9.** Grand jurors shall be given meaningful jury instructions, on the record, about their duties and powers as grand jurors, and the charges they are to consider.
- 10.** A prosecutor shall not call before the grand jury any subject or target who has stated personally or through an attorney an intent to invoke the constitutional privilege against self-incrimination.

