GRAND JURY PRACTICE IN THE 1970'S

DAVID L. FOSTER*

Of the many points with which one might deal in a discussion of antitrust grand juries, this article will be concerned with only the following: Immunity, access to and use of grand jury materials, and the future of the grand jury. A logical threshold inquiry into these areas is the question whether the grand jury will or should continue to be utilized in antitrust matters.

Let us first consider the proposition that the grand jury should be abolished in antitrust cases. Such a challenge to the grand jury concept is not a strange proposition. In England, the grand jury was abolished, except in a very few cases, by the Administration of Justice Act of 1933.[1] Students of criminal justice—particularly those with a civil libertarian bent—are increasingly disturbed at the existence in our society of inquisitorial bodies with virtually unfettered investigatorial powers which hail citizens into secret sessions and interrogate them without counsel being present. The following remarks by Robert Nitschke[2] concisely state the problem:

> In addition, the witness must walk into the grand jury room alone facing, in the secrecy of those chambers, the questions of prosecutor and grand juror without the protection afforded by counsel or by the presence of the court. Without the help of his lawyer the witness may be led into discussions of privileged communications or into admissions which he would not have made if he had been refreshed on the basis of all the facts. He cannot object to questions that are leading, double-edged or otherwise improper in form. Only parts of documents, or only one document of a series, may be shown to him. He cannot demand that he be allowed to explain or to controvert facts brought out before the grand jury. He may not be cross-examined to bring out full and complete facts.
>
> In these circumstances, the average individual testifies under considerable mental stress. He may forget facts that under more favorable circumstances he would readily recall. Through suggestions of the prosecutor and grand jurors he "recalls" matters of which he actually has no knowledge. He gives incomplete answers. He may tend to tell the grand jurors what he believes they wish to hear. To relieve the pressures upon himself he may make irrelevant accusations about the conduct of third persons . . . .

One who questions the present utility of the grand jury is challenging

* Member of the Ohio Bar. This paper was prepared for delivery on April 30, 1971, and in general speaks as of that time. However, it has been updated to reflect later decisions on the constitutionality of the new immunity statute and the departure of Justices Black and Harlan from the Supreme Court.

[1] T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, note 1 at 112 (5th ed. 1956).

[2] Nitschke, *Reflections on Some Evils of Expanding Use of the Grand Jury Transcript*, 37 A.B.A. ANTITRUST L.J. 198, 203-05 (1968).

a very old institution. Our entire jury trial system has some ancestoral relationship with the Frankish inquistorial procedures which were brought to England with the Norman Conquest, and in the case of the grand jury, the relationship is particularly close. Indeed Pollock and Maitland suggest that the administrative structure utilized in preparation of the Domesday Book in the 11th Century is one of the ancestors of the jury system.[3] Plucknett writes that "in the Assize of Clarendon (1166) we find the establishment of a definite system of inquisitions as part of the machinery of criminal justice which have come down to our own day as 'grand juries.' "[4] As the centuries rolled by the petit jury became a highly refined tool; virtually the entirety of the law of evidence was shaped to take advantage of the strengths and weaknesses inherent in the petit jury system.

The grand jury changed less. It remained and remains a blunt, crude instrument of brute power. Its unparalleled investigatorial powers are admittedly of vast importance to the Government in antitrust cases. But, it has lost the counter-balancing characteristics which made those powers tolerable—the protection of the innocent accused against unfounded accusations.[5]

There is a good argument that there is no justification for a grand jury in any type of case, based upon the fact that such juries almost never fail to indict. A striking illustration of that fact is the almost total absence of reference to grand juries in the ABA Foundation's recent survey of the decision to charge a suspect with a crime in American criminal justice.[6] One would assume that if the grand jury in fact performs its function, a major portion of the work analyzing the decision to prosecute would deal with the grand jury.

However, there may be cases in which a grand jury has a legitimate function to perform. The ABA study refers to motor vehicle homicide cases as presenting such a situation, in that the grand jury, by applying the standard of the general morals of society, is best able to decide whether a particular fatal accident, out of the countless numbers that occur, involves conduct sufficiently below societal norms to justify criminal prosecution.[7] In any event, an antitrust prosecution is not such a case. Experienced antitrust lawyers are well aware of the difficulties which laymen have in understanding the basic economic laws which lead to uniform pricing in commodity products. Juries can be expected to have difficulties in drawing the almost metaphysical line which exists between unlawful price fixing and perfectly lawful oligopolistic rationality. More important, the grand jury cannot protect an innocent accused in an antitrust case

[3] F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 642-44 (2d ed. 1899).

[4] T. PLUCKNETT, *supra* note 1 at 112.

[5] *See* Hale v. Henkel, 201 U.S. 43, 59 (1906).

[6] F. MILLER, PROSECUTION (1969).

[7] *Id.* at 32.

since violations of the Sherman Act, as misdemeanors, may be prosecuted simply on an information.[8]

To summarize, a grand jury has no *necessary* function to perform in an antitrust case since the case can proceed without it. Moreover, it has no *logical* function to perform since the layman's view of the propriety of conduct in question is not really of compelling concern to the Antitrust Division. But the grand jury does have one *improper* function. It provides an opportunity for secret, backroom-type interrogations without counsel present which would seem to violate the policy which underlies *Miranda v. Arizona*.[9] In such iterrogations, witnesses may be placed under oath, and then asked vague, misleading and sometimes tricky questions which they must answer, without advice of counsel, under pain of perjury. A grand jury witness of the author's once reported that he had been told: "The grand jury is entitled to your speculation." If the nature of the grand jury is such that it is entitled to compel people to speculate, its function is not consistent with due process as generally understood.

Although there are good reasons for abolition of the grand jury in antitrust cases, such a result is unlikely to occur in the 1970's. There is, however, one change that might reasonably be hoped for in that period. Witnesses might be allowed to have counsel present. Certainly the new immunity statute, discussed below, provides an urgent impetus for the presence of counsel in the grand jury room.

Concerning immunity, everyone is aware by now that the Organized Crime Control Act of 1970 repealed the earlier safe, comfortable, passive, transactional immunity statute,[10] and substituted for it the following limited protection:

> [N]o 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.[11]

The new statute differs from the old one in many respects, but the two most obvious and important differences are in the areas of waiver and scope of protection. Under *United States v. Monia*[12] it was clear that a witness testifying pursuant to subpoena received antitrust immunity from the old

[8] FED. R. CRIM. P. 7(a).

[9] 384 U.S. 436 (1966). In Commonwealth v. McCloskey, 443 Pa. 117, 277 A.2d 764 (1971), the court indicated that *Miranda* did not require that counsel be accessible to a grand jury witness at all times, but that a witness in doubt as to his rights should be allowed to come before the court accompanied by counsel. A petition for certiorari has been filed. Commonwealth v. McCloskey, 40 USLW 3198 (U.S. Oct. 26, 1971).

[10] 15 U.S.C. §§ 32-33 (1970).

[11] 18 U.S.C. § 6002 (1970).

[12] 317 U.S. 424 (1943).

statute without the necessity of any claim whatever on his part. He could, of course, voluntarily waive his right to immunity, and there was a brief period in which Antitrust Division attorneys in some areas were asking virtually every grand jury witness if he were willing to waive. That unfortunate practice appeared later to have been generally discontinued.

Under the new statute, not only must the witness take some affirmative action, he must do what most business clients find instinctively distasteful. He must refuse to answer a question on the grounds that it might tend to incriminate him. In the vernacular, he must "take the fifth." Under that statutory scheme, the witness who asserts his fifth amendment privilege against self-incrimination may then be presented with an order requiring him to testify. If he is so presented and does so testify, he obtains the testimonial use-restriction immunity described above. More specifically, under § 32 of Title 15 of the old act, the witness could not thereafter "be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise . . . ." Under the new statute, the witness clearly *can* be prosecuted for transactions about which he has testified. His only protection is against use of the compelled testimony or information directly or indirectly derived from such testimony.

Where does the order come from which is presented to the witness and which gives rise to the immunity? Under the present Act, it is clear that such orders *shall* be issued by the federal district court in the district in which the proceeding is or may be held, upon request of any United States attorney. Such a request must bear the approval of the Attorney General, the Deputy Attorney General or any designated Assistant Attorney General. A compulsion order may be requested when, in the judgment of the United States attorney, (1) the testimony or other information may be necessary to the public interest, and (2) the witness has refused, *or is likely to refuse*, to testify or provide the information on the basis of his privilege against self-incrimination. The court is charged only with the duty of finding the existence of (1) and (2) above. Once found, the court has no discretion. It *shall* issue the order.[13] The order is effective when communicated to the witness by the person presiding over the proceeding.

It is clear, of course, that the Government can obtain the order on an *ex parte* basis, even before the witness has claimed his fifth amendment privilege. It is *not* clear, however, that the proceedings leading to the order will inevitably be *ex parte.* Indeed, there is evidence that in some proceedings under the Act in the Western District of Pennsylvania the witness has appeared in open court and has there asserted his privilege against self-incrimination. However, before considering the details of

[13] H.R. REP. NO. 91-1549, 91st Cong., 2d Sess. 43 (1970).

practice under the new statute, it is important to consider whether the statute is constitutional and how and when the constitutional question should be raised.

The black letter test of constitutionality of an immunity statute is easy to state: In exchange for the fifth amendment privilege against self-incrimination does the statute accord the witness an immunity from criminal prosecution which is equivalent to the privilege? If the immunity is not co-extensive with the privilege, the immunity statute is an unsatisfactory substitute, and is unconstitutional.

The distinction between "transactional" immunity, as provided for in repealed § 32 of Title 15, and testimonial "use-restriction" immunity as provided for in the Organized Crime Control Act, is indeed an old one in our law. If transactional immunity is afforded—that is, if the witness simply cannot be prosecuted concerning anything about which he testifies—there is no doubt about the adequacy of the substituted protection. As the Supreme Court states succinctly in *Hale v. Henkel*:[14] "But if the criminality has already been taken away, the Amendment ceases to apply." Whether use-restriction immunity is sufficient involves analysis of such great cases as *Counselman v. Hitchcock*,[15] and *Murphy v. Waterfront Commission*.[16] *Counselman* involved a railroad commission agent who was asked questions before a grand jury in 1890 concerning the obtaining of transportation rates at less than the regular tariff. He declined to answer various questions on the ground that it might tend to incriminate him and persisted in that refusal when presented with an order which relied on a "use-restriction" type immunity statute. That statute provided, in pertinent part:

> No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or the enforcement of any penalty or forfeiture.[17]

The specific vice which the Supreme Court saw in the statute was related to the "fruit-of-the-poison-tree" problem. Mr. Justice Blatchford stated for the Court:

> It [the statute] could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to

[14] 201 U.S. 43, 67 (1906).
[15] 142 U.S. 547 (1892).
[16] 378 U.S. 52 (1964).
[17] 142 U.S. at 560.

> answer, he could not possibly have been convicted.
>
> The constitutional provision distinctly declares that a person shall not "be compelled in any criminal case to be a witness against himself;" and the protection of § 860 is not coextensive with the constitutional provision.[18]

Parenthetically, it should be noted that § 860 could readily have been construed to prohibit use of information *obtained from* compelled testimony. However, it is clear that the Court did not so construe it. In any event, the importance of the *Counselman* opinion for present purposes is greatly heightened by the fact that the opinion went on to establish an even broader standard for immunity provisions.

> We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for the prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.[19]

Based on the latter standard, Congress enacted on February 11, 1893 an immunity provision which provided as follows:

> [N]o person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding.[20]

This provision protected the witness from prosecution based on the *use* of his testimony directly or indirectly but it also protected him from prosecution with respect to any *transaction* to which he may have testified before a grand jury in obedience to a subpoena. In *Brown v. Walker*,[21] the Supreme Court, citing both the narrow and broad language in *Counselman*, held that the immunity was co-extensive with the privilege against self-incrimination and that the statute therefore was constitutional. Although the doctrine of "transaction" immunity has been sharply criticized,[22] in considering the constitutionality of a statute similar to the 1893 statute, the Court in *Ullman v. United States*[23] considered the doctrine so firmly established that it held:

---

[18] *Id.* at 564-65.

[19] *Id.* at 585-86.

[20] Act of February 11, 1893, ch. 83, 27 Stat. 443.

[21] 161 U.S. 591 (1896).

[22] *See* 8 J. WIGMORE, EVIDENCE § 2283 at 522-24 (McNaughton rev. 1961).

[23] 350 U.S. 422 (1956).

> Since that time the Court's holding in *Brown v. Walker* has never been challenged; the case and the doctrine it announced have consistently and without question been treated as definitive by this Court . . . . The 1893 statute has become part of our constitutional fabric and has been included "in substantially the same terms, in virtually all of the major regulatory enactments of the Federal Government."[24]

Not until *Murphy v. Waterfront Commission*,[25] was there any doubt that transaction immunity was a constitutional requirement. In *Murphy*, the defendants had refused to answer questions at a hearing before a state waterfront commission. Although they had been granted immunity from prosecution under state law, their refusal was based on the ground that they might incriminate themselves under federal law. Reversing its earlier position, the Supreme Court held that the constitutional privilege against self-incrimination protected a state witness in a proceeding under state law from subsequent prosecution under both state and federal law, that use-restriction type immunity would be accorded him by federal courts, and that, although the order to testify could stand, the contempt citation would be set aside and the witness given another opportunity to answer the questions in light of the protection now afforded him under federal law. In stating the rule, the Court clearly indicated that in this instance federal transaction immunity was not required:

> [W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled *testimony* and *its fruits* cannot be used in any manner by federal officials in connection with a criminal prosecution against him.[26]

Especially noteworthy in *Murphy* is the concurring opinion of Mr. Justice White, with whom Mr. Justice Stewart joined, which apparently expressed the view that transactional immunity is not constitutionally required. Mr. Justice White said:

> The Constitution does not require that immunity go so far as to protect against all prosecutions to which the testimony relates, including prosecutions of another government, whether or not there is any causal connection between the disclosure and the prosecution or evidence offered at trial. In my view it is possible for a federal prosecution to be based on untainted evidence after a grant of federal immunity in exchange for testimony in a federal criminal investigation.[27]

The question of the impact of *Murphy* upon *Counselman* is extremely difficult. It is clear from the legislative history of the Organized Crime Control Act that Congress thinks that *Murphy* has in fact overruled *Coun-*

---

[24] *Id.* at 437-38.

[25] 378 U.S. 52 (1964).

[26] *Id.* at 79 (emphasis added).

[27] *Id.* at 106.

selman, or, more precisely, has eradicated the *Counselman* dictum. The House Report states:

> It is designed to reflect the use-restriction immunity concept of *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) rather than the transaction immunity concept of *Counselman v. Hitchcock*, 142 U.S. 547 (1892). The witness is also protected against the use of evidence derivatively obtained.[28]

It is by no means clear that Congress' confidence in the impact of *Murphy* is justified. The courts have already split on the constitutionality of the new statute. For example, the Seventh Circuit has held the statute unconstitutional,[29] and the Ninth Circuit has repeatedly sustained it.[30] The Supreme Court has granted certiorari from the Ninth Circuit decision and presumably will resolve the question during the 1971 term.

Prediction of the outcome in the Court—always hazardous—requires analysis of the opinions of the Supreme Court subsequent to *Murphy* which shed some light on the impact of the decision. The cases are *Albertson v. SACB*[31] which applied *Counselman* to invalidate an immunity statute which, like that involved in *Counselman*, did not provide for exclusion of evidence obtained by use of the compelled testimony as an investigatory lead; *Stevens v. Marks*,[32] a factually complex "waiver" case in which the concurring opinion of Justice Harlan, joined by Justice Stewart, indicated that the sufficiency of "use restriction" was open, but intimated that *Counselman* "may point toward a negative answer";[33] and *Piccirillo v. New York*.[34] *Piccirillo* is particularly interesting because the Court had granted certiorari in order to "resolve the important question whether it is necessary to accord 'transactional' immunity . . . to compel a witness to give testimony before a state grand jury . . . ." Because the New York Court of Appeals had, subsequent to the decision under review, reached that conclusion as a matter of New York law, the Supreme Court in a per curiam opinion dismissed the writ as improvidently granted. Justices Brennan and Douglas wrote dissenting opinions with Justice Marshall concurring in each, and each opinion supports the view that a requirement of transactional immunity has become part of the fabric of our federal constitutional law. Justice Black also dissented on the ground that the judgment below should be vacated and the case remanded to the New York Court of Appeals for reconsideration in light of its later opinion.

---

[28] H.R. REP. No. 91-1549, 91st Cong., 2d Sess. 42 (1970).

[29] *See, e.g., In re* Korman, 39 U.S.L.W. 2681 (U.S. May 20, 1971).

[30] *See, e.g.*, Stewart v. United States, 440 F.2d 954 (9th Cir. 1971) *cert. granted sub nom.*, Kastigar v. United States, 402 U.S. 971 (1971) *In re* Bowden, 44 F.2d 546 (9th Cir. 1971); Charleston v. United States, 444 F.2d 504 (9th Cir. 1971).

[31] 382 U.S. 70 (1965).

[32] 383 U.S. 234 (1966).

[33] *Id.* at 249-50.

[34] 400 U.S. 548 (1971).

At this point, one is strongly reminded of the old saying that no one knows what the law is, but the Supreme Court has the last guess. It is very possible that the Supreme Court's disposition of the issue will turn on the votes of the Justices who replace Harlan and Black. The dissenting opinions in *Piccirillo* suggest that Justices Douglas, Brennan and Marshall will all vote against "use-restriction" immunity. Justice White's concurring opinion in *Murphy* indicated strongly that he will vote for constitutionality, and it is not unlikely that Chief Justice Burger and Justice Blackmun will be on the same side of the issue. That leaves the vote three to three for unconstitutionality without considering Justice Stewart, whose vote is difficult to predict, since he joined with Justice White in *Murphy*, and with Justice Harlan in *Stevens v. Marks*.

Pending a Supreme Court decision, how should a witness who wishes to raise the constitutionality of the statute proceed? The first possibility, of course, is to do nothing. That is, one might theoretically take the stand and testify, and thereafter, if indicted, allege that the immunity provisions of the Organized Crime Control Act are unconstitutional, and that accordingly the repeal of the prior statute is ineffective. Such an approach possesses the characteristics of logical rigor and practical dubiety which are common to extreme positions.

If constitutionality is to be raised at the testimonial stage, it is apparent that the witness must first assert his privilege. When he does so, he may or may not be presented to a court for a hearing which leads to an order. Very likely that order will be obtained *ex parte*. However, the witness might be hailed into open court and required there to assert his constitutional rights. If that is done, and if a proceeding looking toward issuance of the order follows, prudence suggests that the constitutional issue be raised at that time. Indeed, aside from considerations predicated upon later review, it might be possible to persuade the district judge at that point that the Act is unconstitutional. In any event, it seems reasonably clear that a witness has standing to assert his constitutional question at that stage. Pertinent cases are: *In re McElrath*,[35] *In re Bart*,[36] *Carter v. United States*[37] and *In re Grand Jury Investigation*.[38] Of these cases, *Carter* deals specifically with a constitutional challenge to an immunity statute, whereas the other three cases are primarily concerned with compliance with statutory procedures. The cases, although not decided under the Organized Crime Control Act of 1970, do raise some question as to the propriety of the *ex parte* order issuance procedure—particularly where the witness indicates a desire to be heard. In *McElrath*, which involved testimony before a congressional subcommittee, the witness was allowed

[35] 248 F.2d 612 (D.C. Cir. 1957).

[36] 304 F.2d 631 (D.C. Cir. 1962).

[37] 417 F.2d 384 (9th Cir. 1969), *cert. denied*, 399 U.S. 935 (1970).

[38] 317 F. Supp. 792 (E.D. Pa. 1970).

to intervene in the proceedings leading to issuance of the order under Federal Rule of Civil Procedure 24.

If a witness does appear, and the constitutional point is argued to no avail, can he appeal from an order granting immunity? Probably not. Pertinent precedents are: *Cobbledick v. United States*[39] and *In re Grand Jury Investigation*.[40] One could always try a peremptory writ, but the use of the All Writs Act to escape the finality doctrine presents many difficulties. What the witness apparently must do, therefore, in order to get his constitutional question before the court of appeals, is to return to the grand jury room and, when confronted with the order, refuse to testify on the ground that it might tend to incriminate him and that the immunity statute is unconstitutional. He will be cited for contempt, and, of course, an appeal lies from that citation. It is important that the witness, at this stage state before the grand jury that the immunity statute is unconstitutional, particularly if he has not had an opportunity to raise constitutionality at a proceeding leading to issuance of the order. In view of the familiar doctrine that constitutional questions must be seasonably raised, and even though some relief might be given in view of the difficult circumstances of a witness in a grand jury room without counsel present, there would appear to be no reason to take any chance on the matter.

There remains the practical problem of the witness who merely wants to obtain such protection as the statute affords. Presumably every witness who has a legitimate right to do so will assert his fifth amendment privilege and obtain immunity. For the reasons discussed above, the adverse effect on the grand jury of a fifth amendment claim is a minimal consideration. Whatever public criticism may be involved if the fact of a refusal to testify somehow becomes known outside the grand jury room will certainly be minimized if it becomes customary for businessmen to swallow their pride and assert their constitutional rights.

When the witness is in the grand jury room, he should refuse to answer any incriminating question. Under Supreme Court precedent, the standard of potential incrimination is indeed broad. Under *Blau v. United States*,[41] the witness has a right to refuse to give any answer which could form a "vital link" in a chain of evidence necessary to prosecute him. According to the language of *Hoffman v. United States*,[42] the witness has a right to invoke the privilege unless it is *perfectly clear* that the answers

[39] 309 U.S. 323 (1940) (in which an order denying a motion to quash a subpoena *duces tecum* in a grand jury investigation was not appealable because it was not a "final decision" as required by § 128 of the Judicial Code).

[40] 427 F.2d 714 (3d Cir. 1970) (holding an immunity *order* under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2514 (1970), to be non-final and unappealable on the authority of Cobbledick, *supra* note 39).

[41] 340 U.S. 159 (1950).

[42] 341 U.S. 479 (1951).

could not possibly tend to incriminate him. The breadth of the protection is clearly illustrated in *Simpson v. United States*.[43] In *Simpson*, the Court reversed the decisions of three lower courts which held that the right to invoke the privilege against self-incrimination did not apply as to the following types of questions: "Would you please state your residence?" "Were you ever in the Armed Forces?" "What is your present address?" "Did you ever attend high school?" "What is your present age?" On their face, these questions indeed appear relatively innocuous; yet, the Court, without opinion, summarily held that the witnesses had a right to refuse to answer these questions on fifth amendment grounds. Other illustrative cases are *Gulf Oil Corp. v. Tug Kate Malloy*,[44] and *In re Levinson*.[45]

If the witness fails to claim his privilege seasonably, he may waive the right to refuse to answer further questions. However, the doctrine of waiver under modern cases may not really be the trap which ultra-cautious lawyers have believed it to be. Perhaps the high water mark of the waiver concept is *Rogers v. United States*,[46] which seems to stand for the proposition that once a witness provides testimony which is self-incriminating, in order to later invoke the privilege the witness must show as to each subsequent question that there is a reasonable danger of *further* incrimination. Moreover, if that further danger constitutes, in the words of the *Rogers* court, "mere imaginary possibility," the witness will be deemed to have waived the right to invoke the privilege. However, lower federal court cases seem to have retreated from the broad sweep of *Rogers*. In this respect it is instructive to see, for example, *Hashagen v. United States*,[47] and *Shendal v. United States*.[48]

Completely apart from the waiver problem, however, if the witness is willing to claim the fifth amendment, there is simply no point in having him fill the record with a lot of testimony before he does so. While the point at which the privilege can properly be raised will necessarily differ depending upon the fact situation, it is clear, for example, that in a price fixing investigation, an executive who participated in the price determination process for his company can certainly properly refuse to answer any question which asks him what his duties are. Indeed, he can probably

---

[43] 355 U.S. 7 (1957).

[44] 291 F. Supp. 816 (E.D. La. 1968).

[45] 219 F. Supp. 589 (S.D. Cal. 1963).

[46] 340 U.S. 367 (1951).

[47] 283 F.2d 345, 353 (9th Cir. 1960) (". . . the doctrine of waiver should be confined in its operation to narrow limits and charily applied else the constitutional guarantee would be effectively nullified by a mere expedient").

[48] 312 F.2d 564, 566 (9th Cir. 1963) ("Once granted that the area of the question is within the Fifth Amendment, short of being ridiculous, it would appear wiser to let the witness pick the point beyond which he will not go").

even refuse to state his position, although it is highly unlikely that an answer such as "vice president" would constitute a waiver.

Since witnesses will generally be quite nervous about the whole process, it is a good idea for their attorney to type out a brief statement for them to read into the record by way of claiming the privilege. There is a tendency, of course, to make such written statements as sanitary as possible. However, a statement which does not clearly indicate that the witness fears that the answer may tend to incriminate him appears to be entirely too sanitary. If a witness is in doubt as to whether to claim his privilege with respect to a particular question, he should ask the examining attorney for permission to leave the grand jury room to consult his counsel. Experience indicates that that permission will almost invariably be granted.

An attorney who contemplates that his witness will assert the privilege should consider apprising the Government in advance. It is conceivable that the result of such advance information could be withdrawal of the subpoena (and consequent loss by the witness of an opportunity to claim immunity), but that risk is probably not substantively important. If the Government's attitude toward the witness is such that it would withdraw the subpoena upon receiving advance information of a planned immunity claim, that same attitude would be inconsistent with the obtaining of an immunity order if the witness asserts the privilege without advance notice. The obvious advantage in giving advance notice is that if the Government still wants to call the witness after receiving such notice, the requisite approvals, and perhaps even a court order, can be obtained in advance of the testimony. That avoids wasted time for everyone.

If the witness claims immunity without advance notification, there is an obvious possibility that the Government attorneys will feel a degree of irritation at the loss of grand jury time. Such irritation could result in unpleasantness for the witness. More important, depending upon the particular practice of the district court concerned, the Government attorneys might insist that the witness claim immunity in the presence of the court prior to an order being signed. Such a claim is not too disadvantageous if it can be done in chambers. However, there are obvious disadvantages from an open court claim.

It is important to avoid, if possible, the filing of the immunity order in open court files. Such filing may well be a matter which differs from district to district. In the Northern District of Ohio, for example, grand jury subpoenas are not public knowledge, and there is reason to believe that immunity orders will similarly be accorded confidentiality. In some other districts, subpoenas are not secret, and perhaps in those districts the order will get into the public files unless steps are taken to prevent it. A personal telephonic survey of substantially every district in the United

States taken during the electrical equipment treble damage cases showed that in about half of the districts grand jury subpoenas were kept secret.

Once a witness has been presented with an immunity order, it is important to determine its scope. The author believes that in general the orders issued under the auspices of the Antitrust Division's Great Lakes Field Office have conformed to the language of the statute and have not attempted to limit immunity to particular subject matters. If a dispute about subject matters arises with the Antitrust Division, one possibility would be to put the order in the language of the Attorney General's letter authorizing particular Antitrust Division attorneys to conduct a grand jury investigation. It should not be difficult to obtain access to those letters for any reasonable purpose. In years past, the Northern District of Ohio's letters were kept in a safe in the clerk's office but were freely displayed to interested counsel. The advantage of using the grand jury authorization letter is that if the Government contends that the question was outside an order framed in those terms, it is arguably confessing to improper use of the grand jury.

Assuming that the statute is upheld as constitutional, it is unlikely that the Antitrust Division will indict people who have testified forthrightly. It is clear that the desire for immunity under the old statute has broken investigations wide open. The electrical equipment cases are an example. It is in the Antitrust Division's best interests to encourage witnesses to testify, and to give them some degree of confidence that they will not be indicted if they do so. Moreover, the announced policy of the Antitrust Division in the past has been to refrain from calling witnesses whom it expected to indict, and that practice too may well continue. It is possible, of course, that an overly tight witness, whom the Government suspects of a lack of recollection bordering on perjury, might well prove to be an exception to the foregoing practice.

Aside from immunity, grand jury practice in this decade will involve continuing problems of access to grand jury materials. In a criminal case, the defendant's tool for obtaining access to grand jury transcripts is Rule 16.[49] Subparagraph a of that rule entitles a defendant to inspect his own recorded testimony. In the case of a corporation, the problem is to define the defendant. It is easiest to get the testimony of present officers, somewhat harder to get that of present non-officer employees and substantially more difficult to get that of former officers and employees. A decision granting broad access under Rule 16a is *United States v. Air Conditioning and Refrigeration Wholesalers*[50] in which Judge Thomas permitted inspection and copying, on motion of the defendant trade association, of testimony of any

---

[49] FED. R. CRIM. P. 16.

[50] 1971 Trade Cas. ¶ 73,617 (N.D. Ohio 1971).

> . . . witness who . . . , either presently or formerly, was an officer, director, employee or other person, whether paid or unpaid, and whose grand jury testimony may tend to incriminate the corporate defendant . . . .

Those who live in the Sixth Circuit should also consider *United States v. Levinson*,[51] and, in an amusing factual setting, *United States v. Catherine Johnson*.[52] In the latter case, Mrs. Johnson, perhaps a lady of the town, testified that her services had been utilized by certain members of the Hoffa Jury while they were confined during that celebrated trial. The decision contains a discussion of particularized need in the context of an application, which was denied, for the entire transcript of the grand jury which indicted her.

Of course, it is important to think twice before seeking discovery of transcripts. Unless there is reasonable certainty that trial is a viable possibility, a Rule 16 motion, like a request for a bill of particulars, may be more helpful to a treble damage plaintiff than it is to the defendant.

Criminal Rule 16(b) provides for discovery of other "books, papers, documents, tangible objects or places." It may be possible to use it to get grand jury transcripts which are not available under 16(a).[53] With respect to other grand jury documents, it is now a common Antitrust Division practice to offer production insofar as not objected to by the parties who produced the documents to the jury. This is done by means of a court order which sets a stated time for objecting, and provides for notice to those who furnished documents.

If discovery of grand jury transcripts under 16(a) or (b) is not effective, there are other avenues. Various decisions in the wake of *Dennis v. United States*[54] have afforded access to the transcripts of grand jury testimony of Government trial witnesses during or even in advance of their direct testimony. Such an order in the Sixth Circuit was entered in *United States v. Aeroquip Corp.*[55]

Treble damage plaintiffs probably will not have to seek grand jury documents from the Government, because they can frequently obtain copies retained by the subpoenaed corporations or their attorneys. If it is easier for such plaintiffs, however, they may apply to the court for the actual impounded documents, as was done in the Smog case in Los Angeles.[56] With respect to transcripts of witnesses, plaintiffs have been getting them ever since the electrical equipment cases.[57] The courts

---

[51] 405 F.2d 971 (6th Cir. 1968), *cert. denied*, 395 U.S. 958 (1969). *See also* Annot., 3 A.L.R. Fed. 29 (1970).

[52] 414 F.2d 971 (6th Cir. 1968), *cert. denied* 397 U.S. 991 (1970).

[53] *Contra*, United States v. Airconditioning and Refrigeration Wholesalers, at note 50 *supra*.

[54] 384 U.S. 855 (1966).

[55] Criminal No. 41312 (E.D. Mich. 1967).

[56] United States v. Automobile Mfrs'. Ass'n., Inc., Civil 69-76 JWC (C.D. Cal.).

[57] *See* Atlantic City Elec. Co. v. A. B. Chance Co., 313 F.2d 431 (2d Cir. 1963).

enunciate the usual test—a showing of "particularized need"—which in this context seems to mean that if the witnesses admit on depositions to murder or crimes against nature, the transcripts will not be made available. If they deny such vices, the plaintiffs will get the transcripts.

The role of the Antitrust Division in the area of discovery of Government transcripts is singularly uncommendable. Where a corporate defendant needs the transcript to defend itself in a criminal case, the Antitrust Division fights hard, and talks loudly about the vital principles of grand jury secrecy enshrined in Criminal Rule 6(e).[58] But where a treble damage plaintiff wants discovery, the Antitrust Division loses all its missionary zeal, forgets about the necessity of secrecy, and washes its hands of the matter.

The final subject for attention is use of grand jury transcripts in light of the proposed Federal Rules of Evidence. A provision of those Rules, Rule 801(d), which would have made admissible the grand jury transcript of any witness who testified at trial and was subject to cross-examination, fortunately has been eliminated from a later draft.[59] Traditionally, a transcript normally has been subject to the hearsay objection but could be used for impeachment or as past recollection recorded,[60] or (perhaps improperly) read aloud on the theory of refreshing recollection. Of course it was also theoretically possible to use a prior consistent statement from the transcript to support a witness whose credibility had been attacked, in that a prior consistent statement would tend to rebut the claim of recent fabrication. Under proposed Rule 801(d),[61] the existing law concerning prior inconsistent and consistent statements is preserved, except that now the statements are received as substantive evidence. Past recollection recorded is dealt with in a fairly conventional way in proposed Rule 803(5).[62] However, this statement from the Advisory Committee Note to Rule 801(d) should be considered: ". . . [I]f the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no problem."[63] That casual comment is certainly acceptable if read in the context of a brief statement concerning a particular fact. However, it might be urged to justify admission of an entire grand jury transcript on the mere basis of a present statement of the witness that: "Of course I told the grand jury the truth, as I knew it." Such a construction would go far toward restoring the prior testimony proviso which has now been omitted from Rule 801(d).[64]

---

[58] FED. R. CRIM. P. 6(e).

[59] As printed and distributed with 322 F. Supp. Adv. Sheet No. 2 (Apr. 12, 1971).

[60] *See* United States v. DeSisto, 329 F. 2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964).

[61] *See* note 59 *supra.*

[62] As printed and distributed with 322 F. Supp. Adv. Sheet No. 2 (Apr. 12, 1971).

[63] *Id.*

[64] *Id.*

Finally, of course, a grand jury transcript can come in as an admission. Under existing law, where a transcript is offered against a corporate defendant on that theory, an obvious question exists as to the circumstances under which a witness' grand jury testimony is to be regarded as testimony of the corporation. Under proposed Rule 801(d)(2),[65] a prior statement offered against a party is not hearsay if, among other things, it is his own statement "in either his individual or a representative capacity," or is "a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship. Under existing law, and to a somewhat lesser extent under the new rule, before making a Rule 16(a) motion, consideration should be given to whether the status of testimony as testimony of the corporation for purposes of discovery also renders the transcript admissible as an admission of the corporation.

In any event, if present trends continue, greater use of grand jury transcripts can be expected in the 1970's, which emphasizes all the more the need for careful preparation of witnesses.

In conclusion, it is appropriate to return to the broad social policy question raised by grand jury interrogations. Both prosecutors and treble damage plaintiffs' attorneys (and some courts) have displayed an apparently sincere feeling that witnesses are more likely to give truthful testimony before a grand jury than in a subsequent deposition or trial where they have the benefit of properly framed questions and the advice of counsel. It is even more surprising that many defense attorneys seem to share the same point of view. Consider the enormity of that proposition. If inquisitorial testimony before a grand jury is more likely to elicit truth than open court testimony in an adversary environment, our entire system is misconceived. Moreover trial lawyers as a group can no longer think of themselves as participating in a lofty calling, but precisely the opposite. If by their presence in the courtroom, trial lawyers do not serve the pursuit for truth but in fact impede it, the adversary system should be abolished.

In actual fact, it is not the adversary trial but the inquisitorial which is inferior. All too often witnesses who appear before grand juries are asked confusing and misleading questions which they can not answer on the basis of testimonial quality knowledge. Earlier, reference was made to a statement to one of the author's witnesses: "The Grand Jury is entitled to your speculation." Why? Unfounded speculation can lead only to misunderstanding; it can never advance the pursuit of truth. Honest and meaningful testimony is most likely to emerge when a proper foundation is laid, when a witness is asked a comprehensible question, and when adversary counsel are present to object to improper implications, con-

---

[65] *Id.*

clusions, and assumption of facts not in evidence. The features which make the adversary trial a viable social institution are utterly and intolerably lacking from the grand jury process.