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US. v. John Mitchell, et al
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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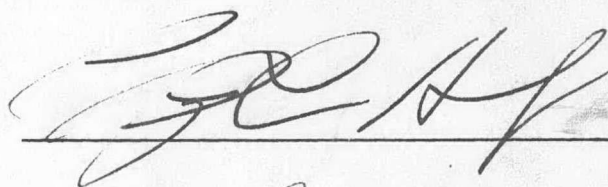
IN RE REPORT AND RECOMMENDATION
OF JUNE 5, 1972 GRAND JURY
CONDRENING TRANSMISSION OF
EVIDENCE TO THE HOUSE OF
REPRESENTATIVES

Misc. 74-21

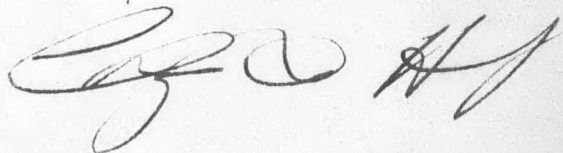
O R D E R

Upon consideration of the Motion filed by
Movant Harry R. Haldeman to extend the stay of the Court's
Order March 18, 1974 herein, and the Opposition thereto
filed by the United States, it is by the Court this 20
day of March, 1974,

ORDERED that the aforesaid Motion to extend
stay be, and the same hereby is, denied with the proviso
that execution of the Court's Order of March 18, 1974
is hereby stayed to 4:00 p.m. March 21, 1974 to allow
Movant to apply for a general extension of the stay in
the United States Court of Appeals for the District of
Columbia Circuit.



*This foregoing order was signed
by me in Judge Sirica's absence and at
his request.*



UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

9.19

No. 74-1364

HARRY R. HALDEMAN,

Petitioner,

v.

HONORABLE JOHN J. SIRICA,
JUDGE, UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA,

Respondent.

MEMORANDUM OF THE UNITED STATES
ON BEHALF OF RESPONDENT AND THE
GRAND JURY IN OPPOSITION TO THE
APPLICATION FOR A FURTHER STAY

On March 18, 1974, Respondent, then Chief Judge of the District Court, entered an order directing that the Report and Recommendation of the June 5, 1972 Grand Jury and accompanying materials, handed up to the District Court when the Grand Jury returned its indictment in the so-called Watergate affair, be delivered to the Committee on the Judiciary of the House of Representatives. Although recognizing that the defendants' standing to protest this order

in a collateral proceeding is "dubious at best" in light of all the circumstances, Respondent stayed his order for two days to permit interested parties to seek appellate review. After petitioner filed his petition now before the Court, Respondent granted a brief extension of his stay to allow petitioner to seek a further stay from this Court.

The United States, on behalf of Respondent and the Grand Jury, opposes a further stay. In doing so, we rely primarily on the Memorandum submitted to the District Court in opposition to an indefinite stay, which is attached hereto and incorporated herein by reference.

There can be no question, upon reading the opinion issued by Respondent in support of his order, that his action was eminently proper. Indeed, petitioner concedes that the federal courts have regularly upheld the power of grand juries to make reports and contends only that this Court should enforce a "policy" against any such action (Pet. at 10). This case presents no question of opening up a general policy or practice, for it is undeniable that the circumstances here are exceptional and hopefully unique. Accordingly, there is no basis for granting the extraordinary relief which petitioner seeks, relief which can be granted only upon a showing of usurpation of power.

Furthermore, petitioner has failed totally to show that he will suffer irreparable injury if a stay is not granted. His only claim of any injury is that he may suffer some pre-trial publicity from any possible disclosure of the Grand Jury's submission, which the Respondent found was concerned primarily with the President, not with any defendant in the criminal case. There will be adequate remedies later to deal with any hypothetical publicity that may or may not develop.

Since an indefinite stay clearly would not be in the public interest, petitioner has not met any of the prerequisites for granting a stay.

We need add only a brief comment to our Memorandum below. -Petitioner's basic premise is that grand juries in the District of Columbia are by practice limited to the option to "indict or ignore." Certainly, practice alone cannot establish binding limitations on an otherwise proper exercise of judicial discretion. But more important, in Gaither v. United States, 413 F.2d 1061, 1069 n.19 (D.C. Cir. 1969), this Court noted that grand juries are not limited to this narrow option. As we stated below, Respondent's order under the circumstances of this case is fully

consistent with principles established in the Fifth^{1/} and
Seventh^{2/} Circuits and two District Courts in the Fourth
Circuit.^{3/}

CONCLUSION

For the reasons stated above and in the Memorandum
submitted to the District Court, the application for a
further stay should be denied.

^{1/} In re Grand Jury Proceedings, 479 F.2d 458, 460 (5th Cir. 1973); United States v. Cox, 342 F.2d 167, 184 (5th Cir.) (Brown, J.), cert. denied, 381 U.S. 935 (1965).

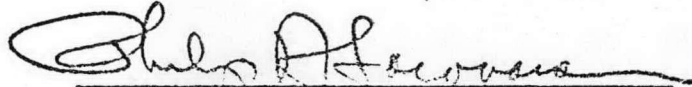
^{2/} Application of Deborah Johnson, 484 F.2d 791, 797 (7th Cir. 1973).

^{3/} In re Presentment of Special Grand Jury, January 1969, 315 F. Supp. 662, 675 (D. Md. 1970); In re Petition for Disclosure of Evidence Before October 1959 Grand Jury, 184 F. Supp. 38, 40 (E.D. Va. 1960).

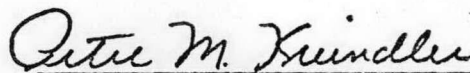
Respectfully submitted.



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DATED: March 20, 1974

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE REPORT AND RECOMMENDA- :
TION OF JUNE 5, 1972 GRAND :
JURY CONCERNING TRANSMISSION : Misc. No. 74-21
OF EVIDENCE TO THE HOUSE OF :
REPRESENTATIVES :
:

MEMORANDUM OF THE UNITED STATES ON BEHALF
OF THE GRAND JURY IN OPPOSITION TO
THE APPLICATION FOR A FURTHER STAY

On March 1, 1974, the June 5, 1972 Grand Jury returned an indictment charging seven persons with various criminal offenses in the so-called Watergate affair. United States v. Mitchell, et al., Crim. No. 74-110. At the same time the Grand Jury submitted to the Court, under seal, a Report and Recommendation that stated that the Grand Jury had heard evidence that it regards as having a material bearing on the impeachment inquiry currently being conducted by the Committee on the Judiciary of the House of Representatives. The Grand Jury recommended that the evidence should be transmitted forthwith to the House Judiciary Committee, with the further recommendation that the Committee be informed of the Grand Jury's belief that the evidence should be utilized with due regard for avoiding any unnecessary interference with the Court's ability to conduct fair trials of persons under indictment.

Counsel for defendants John D. Ehrlichman and H. R. Haldeman requested that the Report and Recommendation and accompanying materials be "expunged or returned to the Grand Jury" as an "extra-judicial act." Following full argument

by all concerned persons ^{1/}-- including counsel for the President, for all the defendants in United States v. Mitchell, and for the House Judiciary Committee -- this Court entered an order on March 18, 1974, directing that the Report and Recommendation and accompanying materials be delivered to the House Judiciary Committee. Although the Court recognized that the standing of the objecting defendants to obtain appellate review is "questionable" (p. 21), the Court stayed its order for two days to permit interested parties to apply for appellate review.

Defendant Haldeman is seeking an extraordinary writ (either mandamus or prohibition) barring transmittal of the materials and requiring this Court to expunge the Report and Recommendation, and has now applied to this Court for a further stay of this Court's order of March 18, 1974, until all appellate review is completed. The Special Prosecutor, on behalf of the United States and the Grand Jury, submits this memorandum in opposition to the application for a further stay. Despite the importance of this case, the settled principles governing stays and extraordinary writs, when considered in conjunction with the findings of this Court, require that the application be denied.

^{1/} See Transcript of Hearing of March 6, 1974, In re Findings and Recommendations of Grand Jury No. 1, of June 1972, Misc. No. 74-21 (hereinafter cited as "Tr.").

ARGUMENT

In seeking a further stay, defendant invokes the traditional equity powers of this Court. A stay, however, "is not a matter of right. . . . It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case." Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 9-10 (1942). Although the Court certainly has broad discretion to grant relief pending further proceedings, two recent decisions of the Supreme Court demonstrate that this power must not be exercised lightly, without careful regard for established limitations. See Renegotiation Board v. Bannerkraft Clothing Co., ___ U.S. ___, 42 U.S.L.W. 4203 (February 19, 1974); Sampson v. Murray, ___ U.S. ___, 42 U.S.L.W. 4221 (February 19, 1974).

The controlling decision in this Circuit -- now a landmark of equity jurisprudence -- is Virginia Petroleum Jobbers Ass'n. v. FPC, 259 F.2d 921, 925 (1958), which delineates the four factors which govern the exercise of this discretion:

- (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? * * *
- (2) Has the petitioner shown that without such relief, it will be irreparably injured? * * *
- (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? * * *
- (4) Where lies the public interest? * * *

Each of these factors militates against granting a further stay.

I.

DEFENDANT CANNOT SUCCEED IN SHOWING THAT THE GRAND JURY LACKED THE AUTHORITY TO MAKE A REPORT OR THAT THIS COURT ABUSED ITS DISCRETION IN DIRECTING THAT THE REPORT AND RECOMMENDATION AND ACCOMPANYING MATERIALS BE DELIVERED TO THE HOUSE COMMITTEE ON THE JUDICIARY

The threshold inquiry for this Court is whether defendant has met his "burden of showing a likelihood of success on the merits." Satiacum v. Laird, 475 F.2d 320, 321 (D.C. Cir. 1972). Failure to satisfy this initial burden is itself sufficient ground for denying a stay. Blankenstein v. Boyle, 447 F.2d 1280 (D.C. Cir. 1971).

In evaluating this probability, it must be remembered that defendant is applying to the Court of Appeals for an extraordinary remedy -- a petition for a writ of mandamus and/or prohibition. Thus, to secure relief, defendant must show that this Court totally lacked the power to receive or act upon the Grand Jury's Report and Recommendation or that it clearly abused its discretion in ordering that the Report and Recommendation and accompanying materials be delivered to the House Committee on the Judiciary.^{2/} "[I]t is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of [an] extraordinary remedy." Will v. United States, 389 U.S. 90, 95 (1967). Although this case is one of exceeding importance and relates to matters of profound national concern, the action of the Grand Jury and this Court, as evidenced by this Court's thorough opinion, accord with settled principles of

^{2/} See, e.g., Will v. United States, 389 U.S. 90, 95 (1967); Schlagenhauf v. Holder, 319 U.S. 104, 109-11 (1964); Donnelly v. Parker, 486 F.2d 402, 405-06 (D.C. Cir. 1973); Application of Deborah Johnson, 484 F.2d 791, 794-95 (7th Cir. 1973); In re Texas Co., 201 F.2d 177 (D.C. Cir.), cert. denied, 344 U.S. 904 (1952).

constitutional history and judicial precedent and, indeed, represent the only proper course under the circumstances of this case.^{3/}

There is little that can be added to the Court's opinion to show that an application for an extraordinary remedy would be so devoid of merit as to border on the frivolous. As the opinion discusses and as counsel for the moving defendant has indeed conceded (Tr. 9-10, 90), the power of federal grand juries to issue reports has been recognized by the Fifth and Seventh Circuits and the District of Maryland. We are not aware of a single decision holding that a federal grand jury lacks the power to return a report, without regard to its nature or contents. This basic power was so clear to the Court that it commented that any ruling to the contrary would be "unjustified" (p. 11).

Similarly, after considering the factors which control the Court's discretion in determining the extent of disclosure, the Court ruled that delivery to the House Committee on the Judiciary was virtually "obligatory" (p. 13). The factors, clearly and succinctly set forth on page 13 of the opinion, are the ones commonly taken into account by the

^{3/} Extraordinary writs also "may not be used to thwart the congressional policy against piecemeal appeals," Parr v. United States, 351 U.S. 513, 520-21 (1956), and are not available when ordinary judicial processes, including appeal, afford an adequate remedy for the denial of any rights. See Will v. United States, *supra*, 389 U.S. at 96; Cobbledick v. United States, 309 U.S. 323, 326 (1940); Donnelly v. Parker, *supra*, 486 F.2d at 406, 407-408. Here, defendant may raise any question of prejudice to his rights either in pre-trial motions or at the time of trial, and there has been no suggestion that the Court either is unprepared or ill-equipped to deal with such questions. The additional hurdle the moving defendant must clear in order to show entitlement to an extraordinary writ at this time makes his chance of success especially slim.

courts which both have disclosed and suppressed grand jury reports either in whole or in part. In short, there is no basis for arguing that the Court abused its discretion. Since the moving defendant thus cannot show anything remotely approaching a likelihood of success in pursuing appellate remedies, he has not met the threshold test for obtaining a stay of this Court's order.

II.

DEFENDANT IS NOT THREATENED WITH
IRREPARABLE INJURY BY THE COURT'S
ORDER AND, IN ANY EVENT, HAS AN
ADEQUATE REMEDY FOR ANY PREJUDICE
AT THE TIME OF TRIAL

The second factor to be considered in determining whether defendant Haldeman is entitled to a further stay is whether he will be irreparably injured if a stay is not granted. He has failed to make a sufficient showing in this regard, and for this reason alone relief should be denied. See Renegotiation Board v. Bannerkraft Clothing Co., supra, ___ U.S. ___, 42 U.S.L.W. at 4210; Sampson v. Murray, supra, ___ U.S. ___ 42 U.S.L.W. at 4229-30. Moreover, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Virginia Petroleum Jobbers Ass'n. v. FPC, supra, 259 F.2d at 925. Because there will be an adequate remedy for any prejudice at the time of trial or on appeal, mandamus or prohibition would not be an appropriate remedy now.^{4/}

Defendant argued that transmittal to the House Committee on the Judiciary inevitably would lead to increased pre-trial

^{4/} See note 3, supra.

publicity which might be prejudicial to him (e.g., Tr. 95-99). The Court concluded, however, that his standing to complain is "dubious at best given the already stated facts that (1) their mention in the Report is incidental, (2) their trials will provide ample opportunity for response to such references, none of which go beyond allegations in the indictment, and (3) considerations of possible adverse publicity are both premature and speculative." (p. 21.)

Only at the voir dire for selecting a jury can the Court determine with measured assurance whether defendant has been prejudiced because it has become impossible to select an impartial jury. The governing rule for this Circuit, as well as the underlying rationale, is stated in Jones v. Gasch, 404 F.2d 1231, 1238-39 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968):

The ultimate question . . . is whether it is possible to select a fair and impartial jury, and the proper occasion for such a determination is upon the voir dire examination. It is then, and more usually only then that a fully adequate appraisal of the claim can be made, and it is then that it may be found that, despite earlier prognostications, removal of the trial is unnecessary. Jurors manifesting bias may be challenged for cause; peremptory challenges may suffice to eliminate those whose state of mind is suspect. Frequently the problem anticipated works itself out as responses by prospective jurors evaporate prior apprehensions. (Emphasis added.)

If some impact is actually detected, the Court can fashion appropriate remedies, like a continuance or a change of venue, to deal with the problem in a concrete setting. The availability of these remedies is a two-edged sword in these circumstances, but both edges are fatal to defendant's application. Not only do they preclude a finding of irreparable injury -- a finding necessary for granting a stay -- but they eliminate any possibility that the Court of Appeals will grant his application for an extraordinary writ to upset this Court's order

rather than remitting him to the remedies that will be available to him in due course and at the proper time.

III

AN INDEFINITE STAY WOULD HARM OTHER INTERESTED PARTIES

An indefinite stay pending exhaustion of appellate remedies that seem clearly pointless would be unfair to the Grand Jury, the House Judiciary Committee, and the President, all of whom have urged that delays would adversely affect their legitimate objective of having the pending impeachment inquiry resolved promptly. Moreover, delaying the transmittal of the Grand Jury's report for several weeks or months will only create a greater, but avoidable risk of an overlap between the impeachment inquiry and the trial scheduled to begin on September 9, 1974.

IV.

THE PUBLIC INTEREST CLEARLY LIES IN DELIVERY TO THE HOUSE COMMITTEE ON THE JUDICIARY

The final factor to be considered is the public interest.


The House of Representatives, by a vote of 410 to 4, has resolved that the Committee on the Judiciary "is authorized and directed to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States." H. Res. 803, 93d Cong., 2d Sess. (February 6, 1974). There can be no question of the overriding interest of the country in an expeditious and informed inquiry. After careful consideration, the Grand Jury has determined that it has evidence that has a material bearing on this inquiry. Any delay in transmitting this evidence -- for example, until after necessarily protracted appellate proceedings -- will needlessly impede the House in the discharge of its critically important function.

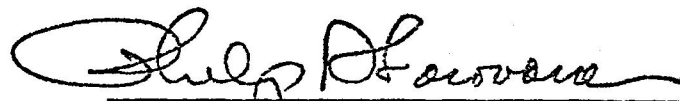
It is particularly important that the President -- the focus of the Grand Jury's Report and Recommendation -- has not opposed delivery and favors the earliest possible resolution of the impeachment inquiry. The President, last night in his nationally televised press conference, stated that he personally acquiesced in the delivery of the materials to the House Committee on the Judiciary. The objections come only from defendants, whose interests in opposing delivery at this stage are largely theoretical and barely sufficient to give them standing to object. Under these circumstances, the public interest requires immediate delivery of the materials to the House Committee on the Judiciary.

CONCLUSION

For the foregoing reasons, the application for a further stay should be denied.

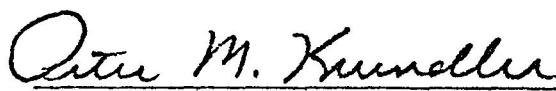
Respectfully submitted.


LEON JAWORSKI
Special Prosecutor


PHILIP A. LACOVARA
Counsel to the Special Prosecutor

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Attorneys for the United States
and the Grand Jury

DATED: March 20, 1974

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 1974, I delivered a copy of the foregoing Memorandum of the United States on Behalf of the Grand Jury in Opposition to the Application for a Further Stay to John J. Wilson, Esq., attorney for defendants Ehrlichman and Haldeman, and mailed, first class mail, postage prepaid, copies to the following:

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9.19

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE REPORT AND RECOMMENDATION]
OF JUNE 5, 1972 GRAND JURY CONCERNING]
TRANSMISSION OF EVIDENCE TO THE]
HOUSE OF REPRESENTATIVES]

Misc. No. 74-21

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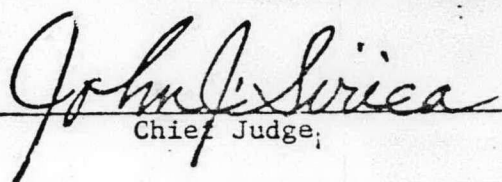
JAMES F. DAVEY, Clerk

ORDER

This matter having come before the Court upon the March 1, 1974 filing of a Report and Recommendation with accompanying materials by the June 5, 1972 Grand Jury of this district, and the Court having been requested to deliver said Report and materials to the Committee on the Judiciary, House of Representatives, Congress of the United States by the Chairman of said Committee, and the Court having heard oral argument on the matter, it is by the Court this 18th day of March, 1974,

ORDERED that, for the reasons stated in the attached opinion, the Report and Recommendation of the June 5, 1972 Grand Jury together with accompanying materials be delivered to the Committee on the Judiciary of the House of Representatives; and it is

FURTHER ORDERED that execution of this Order be stayed for two days from the date hereof to permit the initiation of whatever appellate review may be available.


Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE REPORT AND RECOMMENDATION OF]
JUNE 5, 1972 GRAND JURY CONCERNING]
TRANSMISSION OF EVIDENCE TO THE]
HOUSE OF REPRESENTATIVES]

Misc. No. 74-21

FILED
MAR 18 1974

JAMES F. DAVEY, Clerk

OPINION

On March 1, 1974, in open court, the June 5, 1972

Grand Jury lodged with the Court a sealed Report. The materials comprised in that Report were filed by the Court and ordered held under seal pending further disposition. The materials were accompanied by a two-page document entitled Report and Recommendation which is in effect a letter of transmittal describing in general terms the Grand Jury's purpose in preparing and forwarding the Report and the subject matter of its contents. The transmittal memorandum further strongly recommends that accompanying materials be submitted to the Committee on the Judiciary of the House of Representatives for its consideration. The Grand Jury states it has heard evidence that it regards as having a material bearing on matters within the primary jurisdiction of the Committee in its current inquiry, and notes further its belief that it ought now to defer to the House of Representatives for a decision on what action, if any, might be warranted in the circumstances.

After having had an opportunity to familiarize itself with the contents of the Report, the Court invited all counsel who might conceivably have an interest in the matter, without regard to standing, to state their positions concerning disposition. ^{1/}

^{1/} The Special Prosecutor notified the Court shortly before delivery of the Report that the Grand Jury intended to take such action. The Court had opportunity only for a brief review of relevant authorities, and decided to receive and hold the

(continued to next page)

The President's position, through counsel, is that he has no recommendation to make, suggesting that the matter is entirely within the Court's discretion.^{2/} He has requested that should the Report be released, his counsel have an opportunity to review and copy the materials.^{3/} The House Judiciary Committee through its Chairman has made a formal request for delivery of the Report materials.^{4/} The Special Prosecutor has urged on behalf of the Grand Jury that its Report is authorized under law and that the recommendation to forward the Report to the House be honored.^{5/} Finally, attorneys for seven persons named in an indictment returned by the same June, 1972 Grand Jury on March 1, 1974, just prior to delivery of the Grand Jury Report,^{6/} have generally objected to any disclosure of the Report, and in one instance recommended that the Report be expunged or returned to the Jury.^{7/}

1/ (continued)

Report under seal. The Court's first opportunity to peruse the Grand Jury materials came on Monday, March 4th, and a hearing was scheduled for Wednesday, March 6th, to include all those who might possibly have an interest in the matter.

The President's counsel has been permitted to review the two-page Report and Recommendation. Other counsel were offered a similar opportunity, but with one exception declined. See Transcript of Proceedings, March 6, 1974, Misc. 74-21 at pp. 63-68, 86-89, [hereinafter cited as Transcript].

2/ Transcript at pp. 2, 3, 31, 32.

3/ Letter to the Honorable John J. Sirica from James D. St. Clair dated March 7, 1974 and filed in Misc. No. 74-21.

4/ Letter to the Honorable John J. Sirica from the Honorable Peter W. Rodino, Jr., dated March 8, 1974 and filed in Misc. No. 74-21. See also Transcript at p. 30.

5/ Memorandum of the United States on Behalf of the Grand Jury filed in Misc. No. 74-21 under seal. See also Transcript at pp. 68-85.

6/ United States v. John N. Mitchell, et al., Criminal Case No. 74-110.

7/ Letter to the Honorable John J. Sirica from John J. Wilson, Esq., dated March 4, 1974 and filed in Misc. No. 74-21. See also Transcript at pp. 4-21, 51-61, 90-102.

Having carefully examined the contents of the Grand Jury Report, the Court is satisfied that there can be no question regarding their materiality to the House Judiciary Committee's investigation. Beyond materiality, of course, it is the Committee's responsibility to determine the significance of the evidence, and the Court offers no opinion as to relevance. The questions that must be decided, however, are twofold: (1) whether the Grand Jury has power to make reports and recommendations, (2) whether the Court has power to disclose such reports, and if so, to what extent.

I.

Without attempting a thorough exposition, the Court, as a basis for its discussion, notes here some principal elements in the development and authority of the grand jury. Initially, the grand jury, or its forerunner, was employed to supply the monarch with local information regarding criminal conduct and was wholly a creature of the crown. As the grand jury gained institutional status, however, it began to act with a degree of independence, and in some cases refused to indict persons whom the state sought to prosecute.^{8/} Thereafter it became common for grand juries to serve the dual function of both charging and defending. By virtue of the Fifth Amendment, grand jury prerogatives were given institutional status in the United States, and grand juries have ever since played a fundamental role in our criminal justice system.^{9/}

^{8/} The most celebrated cases in England involved ignoramus returns to charges against Stephen Colledge [8 How. St. Tr. 550 (1681)] and the Earl of Shaftesbury [8 How. St. Tr. 759 (1681)]. In the United States, the grand jury action favoring Peter Zenger is equally prominent [Morris, Fair Trial 69-95 (1952)]. See also, Kuh, The Grand Jury "Presentment": Foul Blow or Fair Play, 55 Colum. L. Rev. 1103, 1107-09 (1955).

^{9/} See generally *Branzburg v. Hayes*, 408 U.S. 665 (1972) and *Hale v. Henkel*, 201 U.S. 43 (1906).

The grand jury is most frequently characterized as an adjunct or arm of the judiciary. While such a characterization is in the general sense accurate, it must be recognized that within certain bounds, the grand jury may act independently of any branch of government. The grand jury may pursue investigations on its own without the consent or participation of a prosecutor.^{10/} The grand jury holds broad power over the terms of charges it returns,^{11/} and its decision not to bring charges is unreviewable. Furthermore, the grand jury may insist that prosecutors prepare whatever accusations it deems appropriate and may return a draft indictment even though the government attorney refuses to sign it.^{12/}

We come thus to the question of whether grand jury prerogatives extend to the presentation of documents that disclose evidence the jury has gathered but which do not indict anyone. The sort of presentment mentioned above, where government attorneys decline to start the prosecutorial machinery by withholding signature from a draft indictment, is in the correct sense such a report since grand jury findings are disclosed independent of criminal proceedings, and it appears that nowhere has grand jury authority for this practice been denied, particularly not in this Circuit.^{13/} Nevertheless,

^{10/} U.S. v. Thompson, 251 U.S. 407, 413-415 (1920); Blair v. U.S., 250 U.S. 273, 282 (1919); Hale v. Henkel, supra note 9; Frisbie v. U.S., 157 U.S. 160, 163 (1895).

^{11/} Gaither v. U.S., 413 F.2d 1061, 1066 (D.C. Cir. 1969).

^{12/} U.S. v. Cox, 342 F.2d 167 (5th Cir.) cert. denied 381 U.S. 935 (1965); Gaither v. U.S., supra note 11; In Re Miller, 17 Fed. Cas. (No. 9,552) (D.C.D. Ind. 1878); In Re Presentment of Special Grand Jury, January 1969, 315 F. Supp. 662 (D. Md. 1970); U.S. v. Smyth, 104 F. Supp. 283 (N.D. Cal. 1952).

^{13/} See Gaither v. U.S., supra note 11.

where the jury's product does not constitute an indictment for reasons other than an absent signature, there is some disagreement as to its propriety.

It should be borne in mind that the instant Report is not the first delivered up by a grand jury, and that, indeed grand juries have historically published reports on a wide variety of subjects.^{14/} James Wilson, a signer of both the Declaration of Independence and the Constitution and later an Associate Justice of the Supreme Court made these pertinent observations in 1791:

The grand jury are a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered. All the operations of government, and of its ministers and officers, are within the compass of their view and research. They may suggest publick improvements, and the modes of removing publick inconveniences: they may expose to publick inspection, or to publick punishment, publick bad men, and publick bad measures.^{15/}

On this historical basis, with reliance as well upon principles of sound public policy, a number of federal courts have upheld and defined the general scope of grand jury reportorial prerogatives. In In Re Presentment of Special Grand Jury Impaneled January, 1969, 315 F. Supp. 662 (D. Md. 1970), Chief Judge Thomsen received a "presentment" describing the course of an investigation by a Baltimore grand jury into possible corruption related to a federal construction project. The "presentment" also outlined indictments which the grand jury was prepared to return in addition to other indictments handed

^{14/} See, 55 Colum. L. Rev., supra note 8 at 1109-1110 citing examples both in England and the American colonies.

^{15/} The Works of James Wilson, ed. R. G. McCloskey, vol. II at 537 (1967).

up with the "presentment," but noted that the United States Attorney had been directed not to sign them. The "presentment" was held under seal while interested parties argued its disposition, and was then released publicly in modified form. The grand jury's common law powers, Chief Judge Thomsen ruled, "include the power to make presentment, sometimes called reports, calling attention to certain actions of public officials, whether or not they amounted to a crime."^{16/}

Chief Judge Thomsen also cited Judge Wisdom's concurring opinion in United States v. Cox, 342 F.2d 167 (5th Cir.) cert. denied 381 U.S. 935 (1965), for the proposition that, whether used frequently or infrequently, there is no reason to suppose that the powers of our constitutional grand jury were intended to differ from those of its "English progenitor."^{17/} In the Cox case four of the seven judges of the Fifth Circuit sitting en banc held that courts may order the United States Attorney to assist a grand jury by drafting "forms of indictment" according to the jury's wishes, while a different four-three combination ruled that the prosecutor could not be compelled to sign the presentment and thereby concur, on behalf of the executive branch, in prosecution. Judge Brown observed, without challenge from his brethren,

To me the thing is this simple: the Grand Jury is charged to report. It determines what it is to report. It determines the form in which it reports.^{18/}

^{16/} 315 F. Supp. at 675. Chief Judge Thomsen quotes at length from the eloquent statement of New Jersey Chief Justice Vanderbilt regarding the reasons for allowing such presentments. Id.

^{17/} 342 F.2d 167, 186 (5th Cir. 1965).

^{18/} Id. at 184. See also 342 F.2d at 180 (opinion of Rives, Gewin & Bell, JJ.), and 342 F.2d at 189 (opinion of Wisdom, Jr.): "No one questions the jury's plenary power to inquire, to summon and interrogate witnesses, and to present either findings and a report or an accusation in open court by presentment."

The Fifth Circuit recently had an opportunity to consider the specific question of grand jury reports, but was able to "pretermitt the issue" as raised by a state court judge unfavorably mentioned in the report. In Re Grand Jury Proceedings, 479 F.2d 458 (5th Cir. 1973). The court found that the portions of the report dealing with purely local affairs were of no concern to a federal grand jury and should be expunged. The remainder of the report was left intact, however, and Judge Ainsworth writing for the court observed, citing a lengthy footnote:

We point out . . . that there is persuasive authority and considerable historical data to support a holding that federal grand juries have authority to issue reports which do not indict for crime, in addition to their authority to indict and to return a no true bill.^{19/}

The Seventh Circuit, in an opinion by Judge Barnes, In the Matter of the Application of Deborah Johnson, et al., ___ F.2d ___, No. 72-1344 (7th Cir. August 3, 1973), recently

^{19/} 479 F.2d at 460 (footnote omitted).

Counsel for two of the defendants in U.S. v. Mitchell, et al., CC 74-110, suggests that the action of Congress in specifically conferring reporting powers on special grand juries under 18 U.S. Code § 3331 et seq. is probative of the contention that grand juries lacked such powers at common law. This proposal, however, overlooks the fact that power to report was there made explicit simply to be certain that there could be no question in light of Judge Weinfeld's decision in United Electrical (111 F. Supp. 858). Congressman Poff, a sponsor of the bill creating special grand juries explained that since

. . . the precise boundaries of the reporting power have not been judicially delineated . . . , the authority to issue reports relevant to organized crime investigations has been specifically conferred upon the special grand juries created by this title. The committee does not thereby intend to restrict or in any way interfere with the right of regular Federal grand juries to issue reports as recognized by judicial custom and tradition. (Congressional Record, Vol. 116, part 26, 91st Cong., 2d Sess., October 7, 1970 at 35291.)

upheld the authority of federal grand juries to issue reports. Chief Judge Robson of the Northern District of Illinois there permitted public distribution of a printed report based on the grand jury investigation into a confrontation between Chicago police and members of the Black Panther Party in which two persons were killed. Fifteen months after the report had been printed and distributed at the Government Printing Office, persons named in the report sought to have it expunged from court records. On appeal following denial of the motion, the Circuit Court noted that any harm was an accomplished fact, but more importantly, that the appellants were not charged with illegal activity. The court stated plainly, "the grand jury ^{20/} had the authority to make the report."

The cases most often relied upon in denying reportorial powers are Application of United Electrical, Radio & Machine Workers of America, et al., 111 F. Supp. 858 (S.D.N.Y. 1953), and Hammond v. Brown, 323 F. Supp. 326 (N.D. Ohio), affirmed ^{21/} 450 F.2d 480 (6th Cir. 1971). Yet each of these decisions

^{20/} Slip opinion at p. 10.

^{21/} Counsel have cited a further federal decision in this Circuit, Poston v. Washington, Alexandria & Mt. Vernon R.R., 36 App. D.C. 359 (1911), as ruling that in the District of Columbia a regular federal grand jury "has no power other than to indict or ignore." That decision, however, involved a state grand jury, and ruled only as to "the practice in the State of Virginia." 36 App. D.C. at 369.

Within state judicial systems, the dissent in Jones v. People, 101 App. Div. 55 (2d Dep't.), appeal dismissed 181 N.Y. 389 (1905) is often cited by courts rejecting grand jury reports, although the majority opinion which approved such reports in certain circumstances is apparently still the law in New York. For the proposition that state grand juries have legal authority to issue reports, Chief Justice Vanderbilt's opinion in In Re Camden County Grand Jury, 10 N.J. 23 (1952) has become a landmark. The author of the Note, The Grand Jury as an Investigatory Body, 74 Harv. L. Rev. 590, 595-96 (1961), suggests that a majority of state courts have disallowed reports unaccompanied by indictments, but have carved out exceptions for reports criticizing public officials, and for those which address general conditions and do not necessarily identify specific individuals. Consistent with federal decisions, the author further notes that state courts unanimously disallow reports made up solely of opinions and those which undertake to do nothing but advise the legislative or executive branches.

is careful to enumerate the factors militating against approval of the specific reports at issue and refrains from a blanket denial of reporting powers, although the Hammond court goes so far as to dub reports "as unnecessary as the human appendix."^{22/} Of these opinions, only that of Judge Weinfeld in United Electrical Radio and Machine Workers speaks from a fact situation involving a federal grand jury. In that case, petitioners, United Electrical and union officers, moved to expunge from court records the "presentment" of a 1952 grand jury in the Southern District of New York. The grand jury had investigated possible violations of perjury and conspiracy laws with reference to non-Communist affidavits filed with the National Labor Relations Board. Because leaks to newspapers revealed the names of persons referred to by the "presentment" or report, including petitioners, Judge Weinfeld treated the report as identifying its targets in derogatory contexts. The jury indicted no one, although its allegations could have been the basis for criminal proceedings. While recognizing that "reports of a general nature touching on conditions in the community . . . may serve a valuable function and may not be amenable to challenge,"^{23/} the court strongly disapproved of accusatory pronouncements which publicly condemn and yet bar their victim from a judicial forum in which to clear his name.

The widespread publication of the charges and the identification of petitioners as the offenders subjected them to public censure to the same degree as if they had been formally accused of perjury or conspiracy. At the same time it deprived them of the right to defend themselves and to have their day in a Court of Justice -- their absolute right had the Grand Jury returned an indictment.

* * *

^{22/} 323 F. Supp. 326, 351 (N.D. Ohio 1971).

^{23/} 111 F. Supp. 858, 869 (S.D.N.Y. 1953). The court noted that at least 14 reports had been filed by grand juries in the Southern District of New York without challenge in the 16 years prior to its decision. 111 F. Supp. at 869.

" . . . [I]f under the guise of a presentment, the grand jury simply accuse, thereby compelling the accused to stand mute, where the presentment would warrant indictment so that the accused might answer, the presentment may be expunged; . . . " [Jones v. People] 92 N.Y.S. at page 277.^{24/}

Judge Weinfeld also viewed the report in question as tantamount to an advisory opinion infringing upon matters exclusively within the province of another branch of government. The report recommended that the National Labor Relations Board "revoke the certification of the unions involved" and consider "including in each non-Communist affidavit a waiver by the signer of his Fifth Amendment privilege."^{25/}

In Hammond, the court was also troubled about separation of powers problems and concluded that "a grand jury is without authority to issue a report that advises, condemns or commends or makes recommendations concerning the policies and operation of public boards, public officers or public authorities."^{26/} There petitioners sought to defeat Ohio State indictments in which a number of them were charged, citing the prejudicial impact of a concurrent well-publicized report into which the grand jury had woven derogatory accusations against them. Among other things the jury stated that a group of 23 faculty members must share "responsibility for the tragic consequences of May 4, 1970" at Kent State University; it assigned major responsibility for the May, 1970 incident to "those persons who are charged with the administration of the University"; and it rendered "moral and social judgments on policies, attitudes, and conduct of the University administration, and some faculty and students."^{27/} Hammond relied upon Ohio law for the proposition

^{24/} Id. at 861, 867.

^{25/} Id. at 860.

^{26/} 323 F. Supp. 326, 345 (N.D. Ohio 1971).

^{27/} Id. at 336.

that the grand jury lacked statutory authority to return a report of that kind in that case, noting further that common-law crimes and common-law criminal procedures were non-existent in Ohio.^{28/}

The Report here at issue suffers from none of the objectionable qualities noted in Hammond and United Electrical. It draws no accusatory conclusions. It deprives no one of an official forum in which to respond. It is not a substitute for indictments where indictments might properly issue. It contains no recommendations, advice or statements that infringe on the prerogatives of other branches of government. Indeed, its only recommendation is to the Court, and rather than injuring separation of powers principles, the Jury sustains them by lending its aid to the House in the exercise of that body's constitutional jurisdiction. It renders no moral or social judgments. The Report is a simple and straightforward compilation of information gathered by the Grand Jury, and no more.

Having considered the cases and historical precedents, and noting the absence of a contrary rule in this Circuit, it seems to the Court that it would be unjustified in holding that the Grand Jury was without authority to hand up this Report. The Grand Jury has obviously taken care to assure that its Report contains no objectionable features, and has throughout acted in the interests of fairness. The Grand Jury having thus respected its own limitations and the rights of others, the Court ought to respect the Jury's exercise of its prerogatives.

^{28/} Id. at 343-44.

II.

Beyond the question of issuing a report is the question of disclosure. It is here that grand jury authority ^{29/} ends and judicial authority becomes exclusive.

As Chief Judge Thomsen observed regarding disclosure, "Each case should be decided on its own facts and circumstances."

The Court is the agency which must weigh in each case the various interests involved, including the right of the public to know and the rights of the persons mentioned in the presentment, whether they are charged or not. The Court should regulate the amount of disclosure, to be sure that it is no greater than required by the public interest in knowing "when weighed against the rights of the persons mentioned in the presentment."^{30/}

There, the "presentment" or report was publicly released in summarized form after the court had noted the rampant speculation about the report and had weighed "the public interest in disclosure" against "the private prejudice to the persons involved, none of whom are charged with any crime in the proposed indictment."^{31/} Judge Ainsworth, in the 1973 Fifth Circuit case, posed the following criteria governing disclosure decisions:

. . . whether the report describes general community conditions or whether it refers to identifiable individuals; whether the individuals are mentioned in public or private capacities; the public interest in the contents of the report balanced against the harm to the individuals named; the availability and efficacy of remedies; whether the conduct described is indictable.^{32/}

^{29/} In Re Grand Jury Proceedings, 479 F.2d 458 (5th Cir.1973); In the Matter of the Application of Deborah Johnson, et al., ___ F.2d No. 72-1344 (7th Cir. August 3, 1973); In Re Special Grand Jury Impaneled January, 1969, 315 F. Supp. 662 (D. Md. 1970); In Re Petition for Disclosure of Evidence, 184 F. Supp. 38 (E.D. Va. 1960). Orfield, The Federal Grand Jury, 22 F.R.D. 343, 446-447 (1959).

^{30/} 315 F. Supp. at 678.

^{31/} Id. at 679.

^{32/} 479 F.2d at 460 n. 2.

There, portions of a report relating to federal narcotics control were left in the public record. Chief Judge Bryan in In Re Petition for Disclosure of Evidence, 184 F. Supp. 38 (E.D. Va. 1960), cited the public interest, a particularized need for information and traditional considerations of grand jury secrecy in granting disclosure of a report to one agency and denying it to others. The Seventh Circuit Court of Appeals in the Chicago police - Black Panther report case considered, among other criteria, judicial discretion over grand jury secrecy, the public interest, and prejudice to persons named by the report.

We begin here with the fact that the Grand Jury has recommended disclosure; not public dissemination, but delivery to the House Judiciary Committee with a request that the Report be used with due regard for the constitutional rights of persons under indictment. Where, as here, a report is clearly within the bounds of propriety, the Court believes that it should presumptively favor disclosure to those for whom the matter is a proper concern and whose need is not disputed. Compliance with the established standards here is manifest and adds its weight in favor of at least limited divulgence, overbalancing objections, and leading the Court to the conclusion that delivery to the Committee is eminently proper, and indeed, obligatory. The Report's subject is referred to in his public capacity, and, on balance with the public interest, any prejudice to his legal rights caused by disclosure to the Committee would be minimal. As noted earlier, the Report is not an indictment, and the President would not be left without a forum in which to adjudicate any charges against him that might employ Report materials. The President does not object to release.

The only significant objection to disclosure, is the contention that release of the Report beyond the Court

is absolutely prohibited by Rule 6(e), Federal Rules of Criminal Procedure. The text of Rule 6(e) is set forth in the margin.^{33/}

Counsel objecting to release draw particular attention to the statement "[persons may disclose matters occurring before the grand jury] only when so directed by the court preliminarily to or in connection with a judicial proceeding"

In their "Notes" accompanying Rule 6(e)^{34/} the Advisory Committee on Rules, responsible for drafting Federal Rules, explains the intent of that paragraph as follows:

1. This rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure, Schmidt v. United States, 115 F.2d 394, C.C.A. 6th; United States v. American Medical Association, 26 F. Supp. 429, D.C.; Cf. Atwell v. United States, 162 F. 97, C.C.A. 4th; and see 18 U.S.C. former § 554(a)^{35/}

^{33/} Rule 6(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons. (18 U.S.C., Federal Rules of Criminal Procedure, Rule 6.)

^{34/} 18 U.S. Code Ann., Rule 6, p. 234.

^{35/} Id. (emphasis added.).

It is apparent from an analysis of the Advisory Committee's authorities that the "traditional practice of secrecy" there codified covers a rather narrow area.^{36/}

At most, the cases cited establish only that secrecy must

^{36/} The Schmidt case cited was an appeal by two attorneys from a conviction of contempt for having authorized their clients, in a criminal case, to privately obtain the affidavits of grand jurors who had voted on their indictment, in violation of the jurors oath of secrecy. The affidavits were filed in an attempt to overturn the indictments. In its holding the court stated:

Logically the responsibility for relaxing the rule of secrecy and of supervising any subsequent inquiry should reside in the court, of which the grand jury is a part and under the general instructions of which it conducted its "judicial inquiry." It is a matter which appeals to the discretion of the court when brought to its attention and we think it is sound procedural law. (115 F.2d at 397, citations omitted.)

In the American Medical Association case, indicted defendants sought court permission to obtain the affidavits of grand jurors in support of pleas in abatement and motions to quash. The court stated in its holding, "Neither indictment, arrest of the accused, nor expiration of the jury term will operate to release a juror from the oath of secrecy, as the defendants here contend. That can only be done by a court acting in a given case when in its judgment the ends of justice so require." 26 F. Supp. at 430 (citations omitted). In Atwell v. United States, the Fourth Circuit reversed the contempt conviction of a grand juror who had given statements regarding grand jury proceedings to defense counsel following indictments and dismissal of the grand jury. The court analyzed the jurors oath and held as follows:

This oath required him (a) diligently to inquire and true presentment make of all such matters and things as were given him in charge; (b) to present no one for envy, hatred, or malice; (c) to leave no one unpresented for fear, favor, or affection, reward, or hope of reward; (d) the United States' counsel, his fellows, and his own to keep secret. It may well be said that the first three obligations of this oath relate to the positive duty required of the grand juror, while the latter relates to and defines the rule of conduct to be followed by him in the discharge of these positive duties. The first three are demanded by direct mandate of the law; the latter only by its policy, and solely in order that

(continued)

prevail during deliberations, and that any later disclosure will occur at the court's discretion. The phrase in the Rule, "preliminarily to or in connection with a judicial proceeding," evidently derived from the fact that the Advisory Committee had in mind only cases where the disclosure question arose at or prior to trial. It left the courts their traditional discretion in that situation and apparently considered no others. It affirmed judicial authority over persons connected with the grand jury in the interest of necessary secrecy without diminishing judicial authority to determine the extent of secrecy. The Court can see no justification for a suggestion that this codification of a "traditional practice" should act, or have been intended to act, to render meaningless an historically proper function of the grand jury by enjoining courts from any disclosure of reports in any circumstance.

Since its enactment, the cases interpreting Rule 6(e) have varied widely on its disclosure provision. It has been held that "judicial proceeding" refers only to a proceeding in a United States District Court.^{37/} Other courts balancing need for disclosure against benefits of secrecy have both granted and denied disclosure of matters before a grand jury to state officials.^{38/} Administrative proceedings have been

^{36/} (continued)

the first three may be the more thoroughly and effectively performed. (162 F. at 99, emphasis added).

Former § 554(a) of Title 18, U.S. Code simply barred pleas or motions to abate or quash indictments on the ground that unqualified jurors voted whenever at least twelve qualified jurors concurred in the indictment. 18 U.S. Code § 554(a), 1946 edition.

^{37/} U.S. v. Downey, 195 F. Supp. 581 (D. Ill. 1961); U.S. v. Crolich, 101 F. Supp. 782 (D. Ala. 1952).

^{38/} Compare In Re Petition for Disclosure of Evidence, supra note 28 with In Re Holovachka, 317 F.2d 834 (7th Cir. 1963) and Petition of Brooke, 229 F. Supp. 377 (D. Mass 1964).

found to fit within the Rule's terms,^{39/} and not to fit.^{40/}

In the Second Circuit, Judge Learned Hand wrote that "the term 'judicial proceeding' includes any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime."^{41/} He added, "an interpretation that should not go at least so far, would not only be in the teeth of the language employed, but would defeat any rational purpose that can be imputed to the rule."^{42/} Matters occurring before the grand jury were thus made available for use in a disbarment proceeding. More recently in an opinion written by Chief Judge Friendly, the Second Circuit held that Rule 6(e) did not bar public disclosure of grand jury minutes, wholly apart from judicial proceedings, when sought by the grand jury witness.^{43/}

^{39/} Jochimowski v. Conlisk, ___ F.2d ___ (7th Cir. December 27, 1973), authorizing release of grand jury evidence for a police disciplinary investigation; In Re Grand Jury Investigation William H. Pflaumer & Sons, Inc., 53 F.R.D. 464 (E.D. Pa. 1971), permitting disclosure to agents of the Internal Revenue Service; In Re Bullock, 103 F.Supp. 639 (D.D.C. 1952).

^{40/} In Re Grand Jury Proceedings, 309 F.2d 440 (3rd Cir. 1962).

^{41/} Doe v. Rosenberry, 255 F.2d 118, 120 (2nd Cir. 1958).

^{42/} Id.

^{43/} In Re Biaggi, 478 F.2d 489 (2nd Cir. 1973). Biaggi, a New York City mayoral candidate at the time, wanted minutes released to answer charges made in the campaign that he had invoked his Fifth Amendment privilege as a witness before the grand jury.

This difficulty in application of Rule 6(e) to specific fact situations likely arises from the fact that its language regarding "judicial proceedings" can imply limitations on disclosure much more extensive than were apparently intended. As the Biaggi decision just cited implies, Rule 6(e), which was not intended to create new law, remains subject to the law or traditional policies that gave it birth. These policies are well established, and none of them would dictate that in this situation disclosure to the Judiciary Committee be withheld.

In two well-known antitrust cases, Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959) and United States v. Proctor & Gamble Co., 356 U.S. 677 (1958), the Supreme Court has listed in summary form the bases of grand jury secrecy:

- (1) To prevent the escape of those whose indictment may be contemplated;
- (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
- (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it;
- (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes;
- (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.^{44/}

Upon the return of an indictment, the first three and the fifth reasons for secrecy are rendered inapplicable. The interest represented by the fourth, encouraging free disclosure by those who possess information regarding crimes, must be protected, but as these and other cases have asserted^{45/} a compelling need and the ends of justice may still mandate release.

^{44/} 356 U.S. at 681 n.6. See also 1 Wright, Federal Practice and Procedure, § 106 at 170 (1969).

^{45/} See, e.g., U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940): "But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."

Here, for all purposes relevant to this decision, the Grand Jury has ended its work. There is no need to protect against flight on anyone's part, to prevent tampering with or restraints on witnesses or jurors, to protect grand jury deliberations, to safeguard unaccused or innocent persons with secrecy. The person on whom the Report focuses, the President of the United States, has not objected to its release to the Committee. Other persons are involved only indirectly. Those persons who are not under indictment have already been the subject of considerable public testimony and will no doubt be involved in further testimony, quite apart from this Report. Those persons who are under indictment have the opportunity at trial for response to any incidental references to them. And although it has not been emphasized in this opinion, it should not be forgotten that we deal in a matter of the most critical moment to the Nation, an impeachment investigation involving the President of the United States. It would be difficult to conceive of a more compelling need than that of this country for an unswervingly fair inquiry based on all the pertinent information.

These considerations might well justify even a public disclosure of the Report, but are certainly ample basis for disclosure to a body that in this setting acts simply as another grand jury. The Committee has taken elaborate precautions to insure against unnecessary and inappropriate disclosure of these materials.^{46/} Nonetheless, counsel for the indicted defendants, some having lived for a considerable time in Washington, D. C., are not persuaded that disclosure to the Committee can have any result but prejudicial publicity for their

^{46/} See, Procedures for Handling Impeachment Inquiry Material, Committee on the Judiciary, House of Representatives, 93rd Cong., 2d Sess., February, 1974, House Committee Print, at 1, 2.

clients. The Court, however, cannot justify non-disclosure on the basis of speculation that leaks will occur, added to the further speculation that resultant publicity would prejudice the rights of defendants in United States v. Mitchell, et al. We have no basis on which to assume that the Committee's use of the Report will be injudicious or that it will disregard the plea contained therein that defendants' rights to fair trials be respected.

Finally, it seems incredible that grand jury matters should lawfully be available to disbarment committees and police disciplinary investigations and yet be unavailable to the House of Representatives in a proceeding of so great import as an impeachment investigation. Certainly Rule 6(e) cannot be said to mandate such a result. If indeed that Rule merely codifies existing practice, there is convincing precedent to demonstrate that common law practice permits the disclosure here contemplated. In 1811, the presentment of a county grand jury in the Mississippi Territory, specifying charges against federal territorial Judge Harry Toulmin, was forwarded to the House of Representatives for consideration in a possible impeachment action.^{47/} Following a committee investigation, the House found the evidence inadequate to merit impeachment and dismissed the matter. Though such grand jury participation appears not to have occurred frequently, the precedent is persuasive.^{48/} The Court is persuaded to follow

^{47/} 3 Hinds' Precedents of the House of Representatives § 2488 at 985, 986 (1907).

^{48/} In Jefferson's words, "In the House of Representatives there are various methods of setting an impeachment in motion: . . . by charges transmitted from the legislature of a State . . . or from a grand jury . . ." Deschler, Constitution, Jefferson's Manual, and Rules of the House of Representatives, H.R. Doc. 384, 92d Cong. 2d Sess., § 603 at 296.

the lead of Judges Hastings, Barnes and Sprecher speaking for the Seventh Circuit, Judges Friendly and Jameson of the Second Circuit, Judge Wisdom of the Fifth Circuit, and Judge Thomsen of the District of Maryland.^{49/} Principles of grand jury secrecy do not bar this disclosure.^{50/}

III.

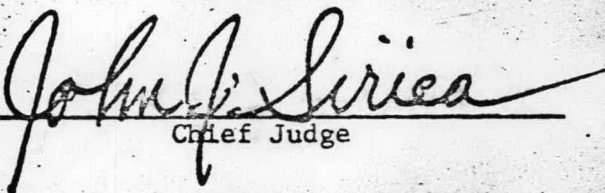
Consistent with the above, therefore, the Court orders that the Grand Jury Report and Recommendation, together with accompanying materials be delivered to the Committee on the Judiciary, House of Representatives. The only individuals who object to such order are defendants in the United States v. Mitchell, et al. case currently pending in this court. Their standing is dubious at best given the already stated facts that (1) their mention in the Report is incidental, (2) their trials will provide ample opportunity for response to such references, none of which go beyond allegations in the indictment, and (3) considerations of possible adverse publicity are both premature and speculative. Their ability to seek whatever appellate review of the Court's decision might be had, is therefore questionable. Nevertheless, because of the irreversible nature of disclosure, the Court will stay its order for two days from the date thereof to allow defendants an opportunity to pursue their remedies, if any, should they desire to do so.

^{49/} In The Matter of the Application of Deborah Johnson, et al., supra at p.7, In Re Biaggi, supra note 43, U.S. v. Cox, supra note 12, and In Re Presentment of Special Grand Jury Impaneled January, 1969, supra at p.5, respectively.

^{50/} The Court's holding renders unnecessary a consideration of Mr. Jenner's argument on behalf of the Committee that insofar as Rule 6(e) conflicts with the constitutional powers of impeachment, the Rule is pro tanto overridden. See Transcript at 32-39.

The President's request to have counsel review the Report's contents has not received comment from the Committee counsel due to their feeling that such comment would be inappropriate^{51/} It is the Court's view that this request is more properly the Committee's concern, and it therefore defers to the Chairman for a response to the President's counsel.

Having ruled that the Recommendation of the Grand Jury and request of the House Judiciary Committee should be honored, the Court relinquishes its own control of the matter, but takes advantage of this occasion to respectfully request, with the Grand Jury, that the Committee receive, consider and utilize the Report with due regard for avoiding any unnecessary interference with the Court's ability to conduct fair trials of persons under indictment.


Chief Judge

March 18, 1974

^{51/} Letter to the Honorable John J. Sirica from John Doar, Esq., dated March 12, 1974, and filed in Misc. 74-21.

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9.19

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1364

HARRY R. HALDEMAN, Petitioner,

v.

THE HONORABLE JOHN J. SIRICA,
JUDGE, UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA, Respondent.

No. 74-1368

GORDON STRACHAN, Petitioner,

v.

THE HONORABLE JOHN J. SIRICA,
JUDGE, UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA, Respondent.

MEMORANDUM FOR THE UNITED STATES
ON BEHALF OF RESPONDENT AND THE
GRAND JURY IN OPPOSITION TO THE
PETITIONS FOR WRITS OF MANDAMUS
AND/OR PROHIBITION

STATEMENT

On March 1, 1974, the June 5, 1972 Grand Jury returned an indictment charging seven persons with various criminal offenses in the so-called Watergate affair. United States v. Mitchell, et al., Crim. No. 74-110. At the same time the Grand Jury submitted to the District Court, under seal, a Report and Recommendation that stated that the Grand Jury had heard evidence that it regards as having a material bearing on the impeachment inquiry currently being conducted by the Committee on the Judiciary of the House of Representatives. The Grand Jury recommended that this evidence, submitted to the District Court contemporaneously with the Report and Recommendation, should be transmitted forthwith to the House Judiciary Committee.

Counsel for defendants John D. Ehrlichman and H. R. Haldeman requested that the Report and Recommendation and accompanying materials be "expunged or returned to the Grand Jury" as an "extra-judicial act."^{1/} Following full argument by all concerned persons^{2/} -- including counsel for the President, for all the defendants in United States v. Mitchell,

^{1/} Letter from John J. Wilson, Esq. to the Honorable John J. Sirica (March 4, 1974) (Haldeman Petition Exhibit B).

^{2/} See Transcript of Hearing of March 6, 1974, In re Findings and Recommendations of Grand Jury No. 1, of June 1972, Misc. No. 74-21 (Haldeman Petition Exhibit C) (hereinafter cited as "Tr.").

and for the House Judiciary Committee -- Respondent entered an order on March 18, 1974, directing that the Report and Recommendation and accompanying materials be delivered to the House Judiciary Committee. In his attached opinion, Respondent held that the Grand Jury had "authority to hand up" its report (p. 11), and that under the circumstances of this case, "delivery to the Committee is eminently proper, and indeed, obligatory" (p. 13). In conclusion, Respondent noted that the standing of defendants to object to transmittal of the materials is "dubious at best" because their mention in the Report is "incidental," their trials will provide ample opportunity for response to any references, and considerations of possible adverse publicity are "both premature and speculative" (p. 21). Nevertheless, Respondent stayed his order for two days to permit interested parties to seek appellate review.

On March 20, 1974, petitioner Haldeman filed a Petition for a Writ of Prohibition and/or a Writ of Mandamus barring transmittal of the materials and requiring this Court to expunge the Report and Recommendation. He also applied for a further stay of Respondent's order pending disposition of his petition.^{3/} On the same day petitioner Strachan filed a

^{3/} Petitioner Haldeman initially applied to Respondent for a similar stay. Respondent denied this application, but (footnote continued on next page)

Petition for a Writ of Mandamus and for a Writ of Prohibition seeking similar relief.^{4/}

The Special Prosecutor, attorney for the United States on behalf of Respondent and the Grand Jury, submits this memorandum in opposition to the petitions for writs of mandamus and/or prohibition. Despite the importance of this case, settled principles governing the grant of extraordinary writs, when considered in conjunction with the findings of Respondent in ordering delivery of the materials to the House Committee on the Judiciary, require that the petitions be denied.

(continuation of footnote 3)

extended his stay until 4:00 p.m. on March 21, 1974, to allow petitioner to apply to this Court. The United States has filed an opposition on behalf of Respondent and the Grand Jury to the application in this Court for a further stay.

^{4/}Petitioner Strachan also seeks an order requiring Respondent to discharge the Grand Jury. Neither the basis nor the reasons for this relief are clear from the Petition (as required by Rule 21 of the Federal Rules of Appellate Procedure), and petitioner has not cited any authority. The request is so frivolous that a response is not warranted. We note, however, that Congress has extended the term of this Grand Jury until June 4, 1974, and has provided for a further extension of six months if the Grand Jury determines that it has not completed its business. See Pub. L. 93-172, 87 Stat. 691, Nov. 30, 1973. Compare 18 U.S.C. 3331, on which this statute was modeled.

ARGUMENT

At the outset, we emphasize that petitioners are applying to this Court for an extraordinary remedy -- a petition for a writ of mandamus and/or prohibition. Certain guiding principles are clear, as delineated by this Court in its recent decision reviewing the proper circumstances for issuing these extraordinary writs. Donnelly v. Parker, ___ U.S. App. D.C. ___, 486 F.2d 402 (1973). First, the petitioner must show that the ordinary judicial processes open to him, including appeal, do not afford him an adequate remedy for the denial of any rights.^{5/} Extraordinary writs "may not be used to thwart the congressional policy against piecemeal appeals," Parr v. United States, 351 U.S. 513, 520-21 (1956). But even assuming arguendo that petitioners can overcome this hurdle, to secure relief they must show that Respondent totally lacked the power to receive or act upon the Grand Jury's Report and Recommendation or that he grossly abused his discretion in ordering that the Report and Recommendation and accompanying materials be delivered to the House Committee on the Judiciary.^{6/}

^{5/} See Will v. United States, 389 U.S. 90, 96 (1967); Cobbledick v. United States, 309 U.S. 323, 326 (1940); Donnelly v. Parker, supra, ___ U.S. App. D.C. at ___, 486 F.2d at 406-08.

^{6/} See e.g., Will v. United States, supra, 389 U.S. at 95; Schlagenhauf v. Holder, 319 U.S. 104, 109-11 (1964); (footnote continued on next page)

"[I]t is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of [an] extraordinary remedy." Will v. United States, 389 U.S. 90, 95 (1967). Furthermore, petitioners have the "burden of showing that [their] right to issuance of the writ is 'clear and indisputable.'" Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953).

It is readily apparent from an examination of the respective petitions that petitioners have wholly failed in meeting their burden. They make repeated reference to the possibility of pre-trial publicity resulting from delivery of the materials to the House Committee on the Judiciary and state that this publicity, if it occurs, may prejudice them.^{7/} Not once, however, do they answer the contention that the District Court possesses adequate remedies to protect their rights at the time of trial if any prejudice in fact results. Nor do they consider that they may raise any objections on appeal if they are convicted at trial.

(continuation of footnote 6)

Donnelly v. Parker, supra, ___ U.S. App. D.C. ___, 486 F.2d 402; Application of Deborah Johnson, 484 F.2d 791, 794-95 (7th Cir. 1973); In re Texas Co., 91 U.S. App. D.C. 272, 201 F.2d 177, cert. denied, 344 U.S. 904 (1952).

^{7/} Haldeman Petition pp. 3, 7-8, 11-13; Strachan Petition pp. 6-8.

Petitioners also failed to show that Respondent either exceeded his authority or abused his discretion. Indeed, petitioner Haldeman concedes that the federal courts regularly have upheld the power of grand juries to issue reports and the power of the District Court to publish them.^{8/} Although this case is one of exceeding importance and relates to matters of profound national concern, the action of the Grand Jury and of Respondent, as evidenced by Respondent's thorough opinion, accord with settled principles of constitutional history and judicial precedent and, indeed, represent the only proper course under the circumstances of this case.

I

PETITIONERS, IF THEY ARE PREJUDICED
BY RESPONDENT'S ORDER, HAVE AN ADE-
QUATE REMEDY FOR ANY PREJUDICE AT
THE TIME OF TRIAL

In his opinion, Respondent concluded that petitioners' standing to object to delivery of the Report and Recommendation and accompanying materials to the House Committee on the Judiciary "is dubious at best given the already stated facts that (1) their mention in the Report is incidental, (2) their trials will provide ample opportunity for response to such references, none of which go beyond allegations in the indictment, and (3) considerations of possible adverse publicity are

^{8/} Haldeman Petition p. 10.

both premature and speculative. Their ability to seek whatever appellate review of the Court's decision might be had, is therefore questionable." (p. 21.) Petitioner Haldeman, in response, cites Application of United Electrical, Radio & Machine Workers, 111 F. Supp. 858 (S.D.N.Y. 1953), as dispositive of this point. In that decision, however, Judge Weinfeld held that the parties objecting to the Report had standing because they in fact were aggrieved by the report. They were accused of filing false affidavits with the National Labor Relations Board, but deprived of the right to defend themselves. 111 F. Supp. at 861. The Report at issue here is not accusatory, and as Respondent noted, the references to petitioners are only incidental. Any prejudice they might suffer is at this time purely speculative.^{8/}

^{8/} The existence of pre-trial publicity does not support, ipso facto, a claim of prejudicial publicity. The courts "are not concerned with the fact of publicity but with the assessment of its nature." Silverthorne v. United States, 400 F.2d 627, 631 (9th Cir. 1968), cert. denied, 400 U.S. 1022 (1971). At this time it is impossible to assess the precise impact of any such publicity on forthcoming trials, but certain factors lead us to believe that the impact will be minimal.

First, the degree of publicity will depend on how the materials are used. The House Committee on the Judiciary recently promulgated rules specifically designed to guard against the publication of evidence considered by the Committee or its staff pursuant to the impeachment inquiry. (Haldeman Pet. Exh. D.)

(footnote continued on next page)

But this Court need not concern itself with the standing of petitioners in the simple constitutional sense of a "case or controversy." As they explain it, their interest in the Respondent's order granting the Grand Jury's request arises exclusively from their status as defendants in a pending criminal case. Even if delivery of the materials to the House Committee on the Judiciary results in detectable pre-trial publicity, the District Court can fashion appropriate remedies, like a continuance or a change of venue, at the time of trial, in the concrete setting of that case.^{9/} Only at

(continuation of footnote 8)

Second, any publicity stemming from the receipt and use of the Grand Jury material by the House of Representatives Committee on the Judiciary, as all prior publicity, will be largely factual and not inflammatory. Contrast Sheppard v. Maxwell, 384 U.S. 333 (1966), and Rideau v. Louisiana, 373 U.S. 723 (1963). It must be remembered, the issue presented for the courts is not whether a prospective juror is ignorant of the allegations surrounding a prosecution or the evidence on which it is based, or even whether he may have some impression about them, but whether "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 723 (1961). The Special Prosecutor is confident that notwithstanding prior publicity, if jurors are selected with the care required by the decisions in this Circuit, all defendants will receive a fair trial.

^{9/} Petitioners' arguments are wide of the mark, since suppression of this Grand Jury's Report and Recommendation, as they urge, will not terminate the House Judiciary Committee's inquiry or preclude the Committee from developing, through more cumbersome and time-consuming mechanisms, evidence that bears incidentally on them. The trial court will inevitably be obliged to assess the actual impartiality of prospective jurors in light of the publicity that has already occurred and will develop in any event.

the voir dire for selecting a jury can the court determine with measured assurance whether petitioners' predictions of prejudicial publicity have been borne out by the inability to select an impartial jury. The governing rule for this Circuit, as well as the underlying rationale, is stated in Jones v. Gasch, 131 U.S. App. D.C. 254, 261-62, 404 F.2d 1231, 1238-39 (1967), cert. denied, 390 U.S. 1029 (1968):

"The ultimate question" . . . "is whether it is possible to select a fair and impartial jury, and the proper occasion for such a determination is upon the voir dire examination." It is then, and more usually only then that a fully adequate appraisal of the claim can be made, and it is then that it may be found that, despite earlier prognostications, removal of the trial is unnecessary. Jurors manifesting bias may be challenged for cause; peremptory challenges may suffice to eliminate those whose state of mind is suspect. Frequently the problem anticipated works itself out as responses by prospective jurors evaporate prior apprehensions. (Emphasis added.)

The availability of adequate remedies in the course of ordinary judicial proceedings -- either through pre-trial motions, at the time of trial, or on appeal -- is fatal to petitioners' present applications for extraordinary relief in advance of their criminal trial and at a time when their forecasts of possible prejudice are wholly speculative.^{10/}

^{10/} See page 5 and note 5, supra.

II

THE GRAND JURY HAS THE POWER TO ISSUE REPORTS

Petitioner Haldeman contended below that grand juries in the District of Columbia are limited by practice to the option to "indict or ignore." Certainly, practice alone cannot establish binding limitations on an otherwise proper exercise of judicial discretion. But more important, in Gaither v. United States, 134 U.S. App. D.C. 154, 162 n.19, 413 F.2d 1061, 1069 n.19 (1969), a decisive ruling on grand jury procedure, this Court expressly recognized the power of a federal grand jury to make a "presentment" that does not constitute an indictment:

Even today the grand jury may investigate, call witnesses and make a presentment charging a crime. However, the presentment, even if otherwise an adequate charge, cannot serve as an indictment and hence initiate a prosecution under the Federal Rules [of Criminal Procedure] until approved by a United States Attorney. (Emphasis added; citing the Fifth Circuit's decision in United States v. Cox, 342 F.2d 167, cert. denied, 381 U.S. 935 (1965).)

We rely principally on the opinion below, which carefully analyzes the authorities which compel the conclusion that the Grand Jury had the power to return its Report and Recommendation of the type involved here (and hence, that Respondent had

the power to receive it). As the opinion discusses and as counsel for petitioner Haldeman has conceded both here (Pet. p. 10) and below (Tr. 9-10, 90), the power of federal grand juries to issue reports has been recognized by the Fifth^{11/} and Seventh^{12/} Circuits and two districts of the Fourth Circuit.^{13/} Chief Judge Thomsen recently concluded:

The common law powers of a grand jury clearly include the power to make presentments, sometimes called reports, calling attention to certain actions of public officials, whether or not they amount to a crime. ^{14/}

^{11/} In re Grand Jury Proceedings, 479 F.2d 458, 460 (1973); United States v. Cox, 342 F.2d 167, 184 (Brown, J.), 180 (Rives, Bell, & Gewin, JJ.), 189 (Wisdom, J.), cert. denied, 381 U.S. 935 (1965).

^{12/} Application of Johnson, 484 F.2d 791, 797 (7th Cir. 1973).

^{13/} In re Presentment of Special Grand Jury, January 1969, 315 F. Supp. 662, 675 (D. Md. 1970); In re Petition for Disclosure of Evidence Before October 1959 Grand Jury, 184 F. Supp. 38, 40 (E.D. Va. 1960).

^{14/} In re Presentment of Special Grand Jury, January 1969, supra, 315 F. Supp. at 675. See generally, Hale v. Henkel, 201 U.S. 43, 60 (1906); Kuh, The Grand Jury "Presentment": Foul Blow or Fair Play?, 55 Colum. L. Rev. 1103 (1955); Note, The Grand Jury as an Investigatory Body, 74 Harv. L. Rev. 590 (1961), which discuss the origins of the grand jury's common law power to make reports.

This common law power to submit reports is preserved by the grand jury's constitutional status,^{15/} and we are not aware of a single decision holding that a federal grand jury lacks the power to return a report, without regard to its nature or content.^{16/}

Petitioner Haldeman has entreated this Court to consider his application because, he argues, Respondent's opinion announces a new "policy" for the District of Columbia (Pet. p. 9). We note first that he does not cite any authority

^{15/} The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . (Emphasis added.)

It is generally recognized that the grand jury, as a constitutional fixture, is "possessed of the same powers that pertained to its British prototype." Blair v. United States, 280 U.S. 273, 282 (1919); see also Costello v. United States, 350 U.S. 359, 362 (1956); Russell v. United States, 369 U.S. 749 (1962). The grand jury's "constitutional prerogatives are rooted in long centuries of Anglo-American history" and the grand jury holds a "high place . . . as an instrument of justice." Branzburg v. Hayes, 408 U.S. 665, 687 (1972).

^{16/} The case commonly cited against the power to issue reports is Judge Weinfeld's decision in Application of United Electrical, Radio & Machine Workers, *supra*, 111 F. Supp. 858, which, as Respondent recognized, involved unusual circumstances and is clearly distinguishable from this case (pp. 9-10). Even Judge Weinfeld agreed that certain reports "may serve a valuable function and may not be amenable to challenge." 111 F. Supp. at 869. Moreover, this decision, now more than 20 years old, has not been followed by any other courts passing on the powers of federal grand juries.

indicating that this is a sufficient ground for the issuance of an extraordinary writ. In any event, this case presents no question of opening up or encouraging any general policy or practice, for it is undeniable that the circumstances here are exceptional and, hopefully, unique. There is no justification for this Court to bypass the ordinary processes of appellate review to address an issue of limited applicability -- no matter how much public interest is generated in it -- when there is clearly no usurpation of or gross abuse of judicial power. The existence of the power exercised by the Grand Jury and by Respondent in these exceptional circumstances is compellingly clear, and this case does not present the Court with an occasion to define the contours of a general policy or practice for grand juries in this District under ordinary circumstances. If a practice jeopardizing the rights of private citizens in fact threatens to emerge, and represents a clear abuse of judicial discretion, that will be the time for this Court to take appropriate action.

III

THE RESPONDENT PROPERLY EXERCISED HIS DISCRETION TO TRANSMIT THE REPORT AND RECOMMENDATION AND ACCOMPANYING MATERIALS TO THE HOUSE COMMITTEE ON THE JUDICIARY

Respondent, using the criteria set forth in In re Grand Jury Proceedings, supra, 479 F.2d 458, 460 n.2, as his touchstone,^{17/} ruled that "delivery to the Committee is eminently proper, and indeed, obligatory" (p. 13). The Grand Jury, he noted, took "care to assure that its Report contains no objectionable features, and has throughout acted in the interests of fairness" (p. 11). The Report is "a simple and straightforward compilation of information gathered by the Grand Jury." It is not accusatory, and its focus is the President of the United States and not any of the defendants in United States v. Mitchell. These factors were weighed with the consideration that "we deal in a matter of the most critical moment to the Nation, an impeachment investigation involving the President of the United States" (p. 19).

^{17/} These factors are:

. . . whether the report describes general community conditions or whether it refers to identifiable individuals; whether the individuals are mentioned in public or private capacities; the public

(footnote continued on next page)

Respondent thus took into account the factors generally considered by courts in determining whether to disclose or suppress grand jury reports in whole or in part. There is no basis here for a contention that Respondent abused his discretion.

Respondent also noted that the circumstances of this case "might well justify even a public disclosure of the Report" (p. 19). Respondent, however, took the most cautious course permitted by the compelling public interest, the course that presents the least risk of leading to prejudicial pre-trial publicity. Nevertheless, petitioners now assert that the limited disclosure ordered by Respondent violates Rule 6(e) of the Federal Rules of Criminal Procedure because the impeachment inquiry is not "preliminarily to or in connection with a judicial proceeding." Nothing in Rule 6(e) indicates that it was intended to foreclose any proper function of the grand jury. To the contrary, the Advisory Committee Notes to the Rule state that the rule merely "continues

(continuation of footnote 17)

interest in the contents of the report balanced against the harm to the individuals named; the availability and efficacy of remedies; whether the conduct described is indictable.

the traditional practice of secrecy."^{18/} Reporting is an historical function of the grand jury,^{19/} and as the cases approving disclosure of grand jury reports demonstrate, Rule 6(e) has not been a bar to publication.

In making its Report and Recommendation, the Grand Jury was respecting the tradition of the House of Representatives. In 1811, a county grand jury returned a presentment specifying charges against a federal territorial judge. The presentment, with accompanying papers, was duly transmitted to the House for its consideration of possible impeachment of that official.^{20/} 3 Hinds' Precedents of the House of Representatives § 2488, at 985 (1907). Jefferson's Manual of Parliamentary Practice as a result states that impeachment may

^{18/} 18 U.S.C.A., Rule 6, at 234 (1969).

Rule 6(e) is not absolute in controlling disclosure. The Second Circuit, in an opinion by Judge Friendly, recently held that disclosure may be ordered when all interested parties waive their rights to secrecy, even though disclosure does not fall within one of the exceptions delineated by the Rule. In re Biaggi, 478 F.2d at 489 (2d Cir. 1973).

^{19/} See pages 12-13 and notes 14-15, supra.

^{20/} The House appointed a select committee to investigate the grand jury's charges, and the committee found that they were not supported by the evidence.

be set "in motion . . . by charges transmitted from a grand jury."^{21/}

Rule 6(e) does not preclude any historically proper disclosures sanctioned by the Court. In the first place, the wording of the rule itself makes entirely clear that it simply does not apply to a case such as this, where disclosure by the court is involved.^{22/} Instead the rule is a housekeeping provision intended to restrict disclosure of information only by jurors, attorneys and other court personnel, subject to the discretion of the court.^{23/} This restriction,

^{21/} Deschler, Constitution, Jefferson's Manual, and Rules of the House of Representatives, H. R. Doc. No. 384, 92d Cong., 2d Sess., §603 at 296 (1973).

^{22/} The Grand Jury has asked the Court to exercise its discretion to disclose a Report and accompanying materials properly within Respondent's control.

^{23/} The first two sentences of the rule set forth the operative restrictions:

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by

(footnote continued on next page)

which does not apply to the court itself, is expressly made exclusive:

No obligation of secrecy may be imposed upon any person except in accordance with this rule.

In any event, even if Rule 6(e) did apply in these circumstances, the rule "merely emphasizes the large legal discretion granted to and resting in the district judge with respect to grand juries, and the disclosure of testimony given before it." Application of Johnson, supra, 484 F.2d at 796 (footnote omitted). It leaves the district court with discretion to lift this secrecy when a sufficiently strong showing of need is made. See e.g., United States v. Proctor & Gamble Co., 356 U.S. 677 (1968); Allen v. United States, 129 U.S. App. D.C. 61, 390 F.2d 476 (1968); In re Petition for Disclosure of Evidence Before the October 1959 Grand Jury, supra, 184 F. Supp. at 40. The "need" for the House to be able to make its profoundly important judgment on the basis of all available information is as compelling as any that could be conceived. The Grand Jury concluded that the materials transmitted to the court.

(continuation of footnote 23)

the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. (Emphasis added.)

could have a material bearing on the impeachment inquiry, and after examining the accompanying materials, Respondent confirmed "that there can be no question regarding their materiality to the House Judiciary Committee's investigation" (p. 3).

Furthermore, the provision of Rule 6(e) that the Court may permit disclosure of grand jury proceedings "preliminarily to or in connection with a judicial proceeding" establishes no obstacle. The phrase has been construed flexibly. See e.g., Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958); Jochimowski v. Conlisk, ___ F.2d ___ (7th Cir. December 27, 1973) (14 Crim. L. Rep. 2391), authorizing disclosure of grand jury evidence to a state bar grievance committee and to a police disciplinary investigation, respectively. It would be fatuous to contend that Rule 6(e) relegates the need of a Presidential impeachment inquiry to a lower priority than a disbarment proceeding or police disciplinary investigation.

Moreover, the function of the House of Representatives in a Presidential impeachment inquiry, in deciding whether to prefer charges for "treason, bribery, or other high crimes and misdemeanors," is akin to that of a grand jury. Impeachment results in a judicial trial before the Senate sitting

as a Court of Impeachment with the Chief Justice of the United States presiding.^{24/}

CONCLUSION

The House of Representatives, by a vote of 410 to 4, has resolved that the Committee on the Judiciary "is authorized and directed to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States." H. Res. 803, 93d Cong., 2d Sess. (February 6, 1974). In the words of Respondent, "[i]t would be difficult to conceive of a more compelling need than that of this country for an unswervingly fair inquiry based on all the pertinent information" (p. 19). It is equally clear that the public interest requires an expeditious inquiry.

^{24/} Petitioner Strachan's reliance on Powell v. McCormack, 395 U.S. 486, 513-14 (1968), and Kilbourn v. Thompson, 103 U.S. 168, 192 (1880), is misplaced. We are not concerned here with the everyday conduct of legislative affairs, whether or not quasi-judicial. An impeachment proceeding is sui generis, as Kilbourn itself recognizes. 103 U.S. at 190. Moreover, judicial "proceedings" are not confined to Article III courts. See e.g., Palmore v. United States, ___ U.S. ___, 36 L.Ed.2d 342 (1973)

Any significant delay in transmitting the materials in Respondent's custody will needlessly impede the House in the discharge of its critically important function.

It is particularly significant under the circumstances that the President -- the focus of the Grand Jury's Report and Recommendation -- personally has acquiesced in the delivery of the materials to the House Committee on the Judiciary. The objections to delivery come only from petitioners, whose interests in opposing delivery at this stage are theoretical at best and cannot override those of the Nation, the Congress and the President in an informed and expeditious impeachment inquiry.

The petitions for writs of mandamus and/or prohibition should be denied, allowing Respondent to transmit the Grand Jury's Report and Recommendation and accompanying materials to the House Committee on the Judiciary forthwith.

Respectfully submitted.

.....

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the Grand Jury

DATED: March 21, 1974

9.19

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1364

September Term, 1973

Harry R. Haldeman,
Petitioner

v.

Honorable John J. Sirica
Judge (formerly Chief Judge),
United States District Court for
the District of Columbia,
Respondent

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 21 1974

HUGH E. KLINE
CLERK

No. 74-1368

Gordon Strachan,
Petitioner

v.

Honorable John J. Sirica
United States District Judge
United States District Court
for the District of Columbia,
Respondent

Before: Bazelon, Chief Judge; and Wright, McGowan, Leventhal,
Robinson, and MacKinnon, Circuit Judges

O R D E R

This matter came on to be heard on the separate petitions for writs of prohibition or mandamus filed by Harry R. Haldeman and Gordon C. Strachan, the memorandum in opposition filed by the United States on behalf of the respondent and the grand jury, and the oral arguments of counsel.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1364
74-1368

September Term, 1973

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This relief by extraordinary writ is sought to prohibit the respondent District Judge from transmitting, as recommended by the grand jury, to the House Judiciary Committee a sealed report and accompanying grand jury evidence. The grand jury has characterized that material as bearing upon the inquiry currently being made by that Committee, pursuant to the authorization of the entire House, into possible grounds for impeachment of the President of the United States. The burden of the petitions is that the District Judge has abused his discretion in this instance and should be curbed by the use of our power to issue extraordinary writs. Although it was argued in the District Court that the grand jury was wholly lacking in power to make the report and recommendation in question, now it is said by petitioner Haldeman that it has never been the custom for grand juries in this circuit to issue reports, and that the question is, in any event, not one of law but of policy. Petitioner Strachan at oral argument represented that he was raising no objection to the grand jury's power to report, and that this question is unimportant to the position he asserts.

The position of both petitioners essentially is that the District Judge should not disclose to the Judiciary Committee evidence taken before the grand jury that returned the indictments against petitioners. It has been asserted, both in the District Court and here, that the discretion ordinarily reposed in a trial court to make such disclosure of grand jury proceedings as he deems in the public interest is, by the terms of Rule 6(e) of the Federal Rules of Criminal Procedure, limited to circumstances incidental to judicial proceedings and that impeachment does not fall into that category. Judge Sirica has dealt at length with this contention, as well as the question of the grand jury's power to report, in his filed opinion. We are in general agreement with his handling of these matters, and we feel no necessity to expand his discussion.

We think it of significance that the President of the United States, who is described by all parties as the focus of the report and

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September Term, 19⁷³

who presumably would have the greatest interest in its disposition, has interposed no objection to the District Court's action. The interest of the petitioners is said by them to be that of persons under indictment who may be unable to receive a fair trial because of unfavorable publicity likely to result from the disclosure of grand jury evidence to the House Committee. As did the District Judge, we note that this is at best a slender interest on which to support standing to seek the relief in question, but we do not turn the petitions aside on that ground.

We note, as did also the District Judge, that, if the disclosures to the public so feared by petitioners do in fact take place and have the consequences that petitioners predict, they will be free at trial to raise these claims in the light of what has actually happened, and to seek the traditional relief ranging from continuance through change of venue to dismissal of their indictments. It appears to be premature at the least to make their speculations about future prejudice the basis for present employment of our extraordinary writ power. With respect to the substance of those speculations, we cannot be unaware of the fact that the Special Prosecutor has concluded that his interests in successful prosecutions can be reconciled with this transmittal for consideration in the impeachment process--thereby suggesting that the dangers in his estimation are not great. The District Judge who received the indictment, perused the materials accompanying the report, and expressed his general interest in the fairness of the trial over which he will preside later this year, also concluded that it is unlikely that this transmittal will interfere with a fair trial.

We are asked to employ our extraordinary powers now primarily because it is said that the District Judge, being the judge who will later try the indictment and who presently has under his control grand jury evidence which, when and if disclosed publicly, may possibly create a climate of prejudice in which a fair trial may not be possible, should

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1364
74-1368

September Term, 19⁷³

-4-

take no chance in this regard and exercise his discretion in favor of the more cautious course. This claim is, obviously, that we should intervene by prohibition or mandamus to exert our supervisory power as a barrier to a step by the District Judge which, although within the legal limits of his authority, is not sound policy. It almost goes without saying that this is not the kind of abuse of discretion or disregard of law amounting to judicial usurpation for which the extraordinary writs were conceived.

Now, therefore, it is

ORDERED that the petitions pending before us for prohibition or mandamus are hereby denied; and it is

FURTHER ORDERED that execution of the District Court's order is stayed until 5:00 P. M. March 25, 1974, to permit petitioners to apply to the Supreme Court for such relief as they may deem advisable.

Mackinnon, Circuit Judge, concurring in part and dissenting in part: I concur in the implicit finding that the petitioners have standing to seek the relief here requested. My view of the record, however, after the limited research permitted by the rapidity with which this court has handled this matter, convinces me that the grand jury exceeded its authority in releasing (1) the report, (2) the so-called index, and (3) the selective evidence. Application of United Electrical, Radio & Mine Workers, 111 F. Supp. 858 (S.D.N.Y. 1953); see conflicting authorities in Judge Sirica's opinion. The process of composing the index and selecting the evidence supporting it necessarily reflects a conscious and focused judgment by the grand jury on the credibility of witnesses and the inferences to be drawn from the totality of evidence presented to it. Moreover, potentially exculpatory material may have been excluded. For these reasons, it is my opinion that the interests of justice will not be furthered by transmitting to the Committee this grand jury report and the selective evidence accompanying it. Congress would only be forced to come back for additional testimony if it is to judge credibility, as it certainly should do.

I would expunge the entire grand jury report and permit the House Judiciary Committee, on request to the District Court, to have access not only to the limited testimony accompanying the report and index but to the entire grand jury proceedings

under supervision of the court in the manner generally followed by Chief Judge Bryan in In re Petition for Disclosure of Evidence, 184 F. Supp. 38 (E.D.Va. 1960). In this way the House Committee would be better able itself to pass on credibility without having credibility prejudged for it. Chief Judge Bryan, in his opinion, supra, deferred disclosure to the state and local authorities until after the federal trials were completed. He thus protected those who were the subject of federal indictments. Those indicted here are not receiving that protection. The prosecutor here, however, has indicated that he is knowledgeably and intentionally taking a calculated risk that the transmission of this evidence with the risk of its premature disclosure may make it impossible for those indicted to receive a fair trial. In my view that is a hazard the Special Prosecutor is permitted to take at this stage of the criminal proceedings.

As for the argument made by the Special Prosecutor that Rule 6(e) does not limit disclosure by the judge in releasing grand jury testimony, it is my view that said rule is a codification of longstanding decisions that hold to the "indispensable secrecy of grand jury proceedings . . . except where there is a compelling necessity," United States v. Procter & Gamble, 356 U.S. 677, 683 (1958); United States v. Johnson, 319 U.S. 503, 513 (1943), and that the judge is as much bound by this rule as other persons. A contrary interpretation strains the language and obvious intent of Rule 6(e) and frustrates its operation.

- 3 -

At oral argument the prosecutor represented that this disclosure of the grand jury material to the House Judiciary Committee and eventually possibly to the House and Senate is being made "preliminarily to [and] in connection with a judicial proceeding," Fed. R. Crim. P. 6(e), in which due process of law will be available. My concurrence in the release of the grand jury material has taken this representation into consideration.

ROGER J. WHITEFORD 1886-1965
RINGGOLD HART 1886-1965
JOHN J. CARMODY 1901-1972
JOHN J. WILSON
HARRY L. RYAN, JR.
JO V. MORGAN, JR.
FRANK H. STRICKLER
WILLIAM E. ROLLO
CHARLES J. STEELE
JOHN J. CARMODY, JR.
JAMES EDWARD ABLARD
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COUNSEL
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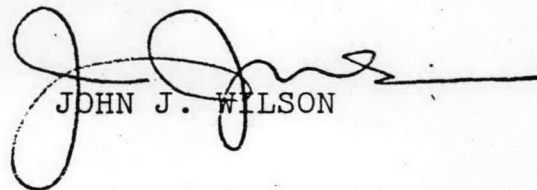
March 12, 1974

Honorable John J. Sirica
Chief Judge
United States District Court
United States Court House
Washington, D.C. 20001

Dear Chief Judge Sirica:

Would you be willing to inform us whether you were consulted by or whether you conferred with the prosecutors, the Grand Jury, or the foreman or other member thereof, regarding the report which the Grand Jury presented to you in open court on March 1, 1974, before such report was actually presented; or that you had notice of the Grand Jury's intention to present such a report prior to its actually doing so?

Respectfully,


JOHN J. WILSON

JJW:hie

cc: All Counsel

cc: *Daworski*
Kurt
Ben - Vennet
Vennet
herkovitz
not file

Central Files
9.19

ROGER J. WHITEFORD 1886-1965
RINGGOLD HART 1886-1965
JOHN J. CARMODY 1901-1972
JOHN J. WILSON
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JO V. MORGAN, JR.
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CHARLES J. STEELE

March 11, 1974

Honorable John J. Sirica
Chief Judge
United States District Court
for the District of Columbia
United States Court House
Washington, D.C. 20001

Dear Chief Judge Sirica:

We have received copy of Mr. Lacovara's letter to you, dated March 8, with enclosure of a copy of the opinion of the Seventh Circuit, dated August 3, 1973, In the Matter of the Application of Deborah Johnson and others to expunge a report of a federal grand jury in the Eastern Division of the Northern District of Illinois.

The cited case, both by the language of the District Judge and of the Circuit Court of Appeals, is authority for our position. The former's order, among other things, stated as follows:

"Furthermore, the contention that these applicants are prejudiced by the continued existence of the report also lacks merit. The report does not accuse them of any criminal conduct, nor are they under indictment in this court or any other court for activities related to the matters discussed in the grand jury report. Their reliance on Hammond v. Brown, 323 F. Supp. 326 (N.D. Ohio 1971), aff'd F. 2d (6th Cir., No. 71-1278, October 22, 1971) is therefore misplaced."

The Circuit Court of Appeals distinguished Judge Weinfield's decision in 111 F. Supp. 858 (and thus also distinguished our case), and in so doing, stated:

"Here in the record before us, no illegal activity was charged against the appellants; none were indicted; nor are they facing trial."

Honorable John J. Sirica
March 11, 1974
Page 2

In summarizing its opinion, the Circuit Court of Appeals stated:

"Thus, the distinction between the facts of this case and the cases principally relied upon by appellants is clear. The usual reasons urged to protect those individually charged with crimes, or about to be charged with crimes, does not here exist."

Upon the question of the power of a federal grand jury to do other than indict or ignore, Circuit Judge Barnes cited and quoted from In re: Report of Grand Jury Proceeding filed on June 15, 1972, Hon. Jerry Woodward, which may be found in 479 F. 2d 458. His quotation from that case on page 460 is incomplete. The entire paragraph, from which the quotation was taken, reads as follows:

"Appellant contends that the grand jury can only lawfully indict or return a no true bill, and that it is powerless to speak publicly of any other matter; indeed, that it has no other public existence. Because we decide the instant case on other grounds, we pretermitt the issue of whether a federal grand jury has the authority to make reports. We point out, however, that there is persuasive authority and considerable historical data to support a holding that federal grand juries have authority to issue reports which do not indict for crime, in addition to their authority to indict and to return a no true bill."

Moreover, we take issue with Circuit Judge Barnes when, on page 8 of the Slip Opinion he emphasizes a "large legal discretion" being granted to a District Judge under Rule 6. It is submitted there is not the slightest hint by inference or otherwise in Rule 6 that the areas of judicial discretion in any way suggest the authority to receive "reports" from a grand jury.

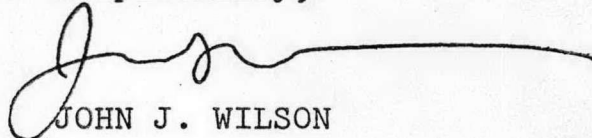
Since I have written you about Mr. Lacovara's communication, I should like to take this occasion to make a comment that I omitted last Wednesday. Regardless of what some other federal districts have done, our District has been free of grand jury reports for the past half century. Almost always some public official is the target of such reports and heated controversy follows, unlike the return of an indictment where everyone

Honorable John J. Sirica
March 11, 1974
Page 3

knows that the target will have his day in court. If Your Honor who, I assume, was not consulted in advance about the Grand Jury's contemplated action, should sanction the filing of the instant report and accompanying documents, you will be making policy -- not law -- for your fourteen or more brethren on the federal bench, and, very likely, for the some forty judges upon the Superior Court. I predict that we shall see a "rash" of "reports" of every conceivable nature deluge our fair city.

Doubtless, the Special Prosecutor's staff, unacquainted with our local custom, offered no restraint to the Grand Jury, as a resident lawyer surely would have done. Doubtless, also, the Grand Jury, being unfamiliar with such action, must have received at least the sanction of the Special Prosecutor to proceed in the manner now being contested. As I stated in court the other day, if you should decide to release the report, I submit that the interested parties should be permitted to read the grand jury transcript relating to it.

Respectfully,



JOHN J. WILSON

JJW:hie

cc: All Counsel

Files
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March 8, 1974

Honorable John J. Sirica
Chief Judge
United States District Court
for the District of Columbia
United States Court House
Washington, D. C. 20001

Dear Chief Judge Sirica:

You have presently before you the request of the June 5, 1972 Grand Jury that you take certain action with respect to a Report and Recommendation submitted to you by the Grand Jury on March 1, 1974.

Further research has disclosed an as yet unreported decision of the United States Court of Appeals for the Seventh Circuit, In the Matter of the Application of Johnson, et al. (No. 72-1344, August 3, 1973), which bears on this question. In that case the Court of Appeals upheld Chief Judge Robson's exercise of discretion to accept for public filing and to refuse to expunge a lengthy printed report from the federal grand jury in Chicago analyzing the evidence it had heard in the investigation of the confrontation between the Black Panther Party and local police.

For your convenience I am enclosing a copy of the slip opinion of the Court of Appeals and of the cover, index page and conclusion of this lengthy printed report to provide some context for the Seventh Circuit's decision. Copies of this letter and the enclosures are being sent simultaneously to all counsel who appeared at the hearing before the Court on Wednesday.

Respectfully,

Philip A. Lacovara
Counsel to the Special
Prosecutor

Enclosure

WATERGATE SPECIAL PROSECUTION FORCE
United States Department of Justice
1425 K Street, N.W.
Washington, D.C. 20005
March 8, 1974

Honorable John J. Sirica
Chief Judge
United States District Court
for the District of Columbia
United States Court House
Washington, D. C. 20001

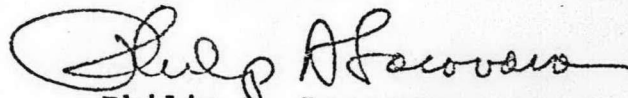
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Respectfully,


Philip A. Lacovara
Counsel to the Special
Prosecutor

Enclosure

cc: All Counsel

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1972 — APRIL SESSION, 1973

No. 72-1344

In the Matter of the Application
of DEBORAH JOHNSON, BRENDA
HARRIS and RONALD SACHEL To
Annul and Expunge from the
Records of the Court the Report
Made and Issued on May 10,
1970 by the January 1970 Feder-
al Grand Jury of the United
States District Court, Northern
District of Illinois, Eastern Divi-
sion, and for other relief.

Appeal from the
United States Dis-
trict Court for the
Northern District
of Illinois, Eastern
Division.

No. 11 C 1908
Hon. J. EDWIN A.
ROBERTS, Judge.

ARGUED APRIL 13, 1973 — DECIDED AUGUST 3, 1973

Before: HASTINGS, BARNES,* and SPRENGER, Circuit
Judges.

BARNES, Circuit Judge.

This is an appeal from a decision of the District
Court (1) declining to issue an order (a) nullifying, and
(b) directing the Clerk of the District Court to expunge,

* The Honorable Stanley N. Barnes, Senior Judge of the Ninth Cir-
cuit, sitting by designation.

from the Records of the District Court, a report made on May 15, 1970, by the January Grand Jury of the District Court for the Northern District of Illinois, Eastern Division; and (2) dismissing, on motion of the Government, the said application for such annulment and expunction.

The order made on February 24, 1972 is concise and reads as follows:

"ENTER ORDER: Granting the Government's motion to dismiss this application to expunge a grand jury report.

"The report in question was issued by the January 1970 Grand Jury upon authorization by this court on May 15, 1970. Pursuant to this court's order, copies of the report were distributed to designated public officials, the news media, and the general public at a nominal cost.

"Fifteen months after the grand jury report had been widely distributed, these three applicants moved to expunge that report on the grounds that the grand jury exceeded its lawful authority and violated Rule 6(e), Federal Rules of Criminal Procedure, by issuing the report and, further, that these applicants were prejudiced by certain statements contained in the report itself.

"The secrecy of grand jury proceedings is not absolute; authorization of disclosure by means of grand jury reports or otherwise is committed to the discretion of the court. *In Re Grand Jury January, 1969*, 315 F.Supp. 662 (D. Md. 1970), and cases cited therein. Here, the court specifically found that disclosure of the grand Jury's findings was in the public interest. The court therefore concludes that issuance of the grand jury report was lawful.

"Furthermore, the contention that these applicants are prejudiced by the continued existence of the report also lacks merit. The report does not accuse them of any criminal conduct, nor are they under indictment in this court or any other court for activities related to the matters discussed in the grand jury report. Their reliance on *Hammond v. Brown*,* 323 F.Supp. 326 (N.D. Ohio

* The correct appellate citation for *Hammond v. Brown*, *supra*, is "450 F.2d 480 (6th Cir. 1971)."

1971), aff'd F.2d (6th Cir., No. 71-1278, October 22, 1971) is therefore misplaced.

"Under all of these circumstances, this court is of the opinion that the application lacks merit and should be dismissed."

Appellants assert as grounds for their application:

(a) the Grand Jury had no authority to issue the Report;

(b) the Report and its disclosure violate the rule of secrecy of grand jury proceedings;

(c) the recommendations as to conduct of executive agencies violate the doctrine of separation of powers;

(d) the recommendations as to conduct and function of news media, and the conduct of lawyers in criminal cases, are beyond the jury's lawful authority and jurisdiction;

(e) the submission of the grand jury conclusions and recommendations to "public exposure" is beyond the authority and jurisdiction of the grand jury;

(f) that the charge and findings that the failure and refusal of certain named persons to testify before the grand jury are contrary to law and the scope of the jury's authority and jurisdiction;

(g) the repetition of newspaper reports on the purported conduct of Black Panther leaders, members and adherents, including plaintiffs, was beyond the scope of the grand jury's power;

(h) the report evidences bias against the Black Panther party, its members and adherents, including plaintiffs;

(i) the report "acted as a public Grand Censor" of the views and conduct of the community, the Black Panther Party, its members and adherents, including the "victims of the police raid of December 4, 1969, and those of the news media";

(j) applicants were accused of conduct constituting a crime.

The United States, appearing in opposition to the motion, urges there are but two questions involved:

1. Whether the order of the district court dismissing the application to expunge is an appealable order; and
2. If so, whether the district court erred in dismissing an application to expunge from the record a grand jury report published and distributed pursuant to an order of the district court where the application was made fifteen months after the publication of the report and the applicants are not accused in the report of any illegal activity.

We need to state here further background. The notice of appeal herein was timely filed on March 23, 1972. On April 3, 1972, appellants filed a petition for a Writ of Mandamus entitled *Deborah Johnson, et al. v. Chief Judge Robson*, in the district court of the Northern District of Illinois No. 71 C 1908, stating they believed a Writ of Mandamus rather than an appeal to be the correct procedure to follow. (Pet. at 7). This Court denied the petition for a Writ of Mandamus to require the District Court to expunge in a short order.¹

We agree that relief through a Petition for Mandamus is the proper procedure with which to have the Court of Appeals require a district court to consider the application.²

¹ "This matter comes before the Court on the petition of Deborah Johnson, Brenda Harris and Ronald Satchel, by their attorneys, for a writ of mandamus directed to Honorable Edwin A. Robson, Chief Judge of the United States District Court for the Northern District of Illinois, Eastern Division, to require him to annul the Report of the January 1970 Grand Jury, have the Clerk expunge the Report from the records of the Court, and reverse his order of May 15, 1970 authorizing publication of the Report. On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the said petition for writ of mandamus be and the same is hereby DENIED."

This panel is informed by the Clerk of this Court that no record was ordered for use in connection with any proposed petition for Writ of Certiorari in the Supreme Court.

² "The petitioner has sought to bring the matter here by appeal. Since it clearly is an unappealable order, we have treated the notice of appeal as a petition for a writ of mandamus" (Emphasis added.) *Petition of A. & H. Transportation, Inc.*, 319 F.2d 70 (5th Cir. 1963), cert. denied, 375 U.S. 924 (1963).

The United States Court of Appeals is a statutory court and its jurisdiction is created and established by statute alone. 28 U.S.C. §§1291 and 1292 are the statutes, covering certain final opinions and certain interlocutory orders, enabling the taking of appeals. We also have jurisdiction by use of prerogative writs, authorized by 28 U.S.C. §1651 — the "All Writs" statute. "Review by prerogative writ is extraordinary and rare." *Moore, Federal Practice*, §110.01. We have no other jurisdiction than that thus given by statute.³

There being no criminal case pending against petitioners in the district court, the order of the district court was unrelated to the merits of a criminal trial, "and thus cannot be raised on appeal." *Chase v. Robson*, 435 F.2d 1059, 1062 (7th Cir. 1970).

Because, however, such unusual motions as that made below are "final" in the sense that they are not interlocutory with relation to any pending matter, and are final as far as any relief to petitioners is concerned, the courts have at times seen fit to rely on the so-called "supervisory mandamus" power first enunciated in and recognized by the Supreme Court in *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-260 (1957). Cf. *Will v. United States*, 389 U.S. 90 (1967); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964).

While an ordinary writ of mandamus will only issue to require a district judge to act, this "supervisory jurisdiction" is said to arise under the all-writs statute, "to correct error or abuses of discretion on the part of district judges in dealing with grand jury investigations." *United States v. United States District Court*, 238 F.2d 713, 719 (4th Cir. 1965), cert. denied 352 U.S. 981 (1957).

But appellate courts are advised to be cautious in their approach to claimed rights under the all-writs statute, and "to confine an inferior court to a lawful exercise of its prescribed jurisdiction, or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n.*, 319 U.S. 21, 26 (1943). Obviously, the

³ *Moore's Federal Practice*, §§110.02, 110.28, and cases cited therein.

district court here had not refused to act; it acted when it denied the motion to quash, and dismissed the petition. Thus, the sole issue before this Court on the earlier mandamus petition was whether the exercise of the district court's jurisdiction was lawful, and not an abuse of discretion.

That mandamus was the proper procedure to obtain a review of the refusal of the district court to annul and expunge does not mean that the refusal by this Court to grant relief was error. Such a type of review is "extraordinary" and "reserved for exceptional cases." *Ex Parte Fahey*, 332 U.S. 258 (1947).

This is particularly true when the appellate courts are asked to consider the manner in which the district courts supervise grand juries. *In re Texas Co.*, 201 F.2d 177 (D.C. Cir. 1952), *cert. denied*, 344 U.S. 904 (1952); *Pet. of A. & H. Transportation Co.*, 319 F.2d 69, 70 (4th Cir. 1963), *cert. denied*, 375 U.S. 924 (1963); *Cobbledick v. United States*, 309 U.S. 323 (1940); *Chase v. Robson*, *supra*.

We hold this appeal presently before us is taken from an unappealable order, which can only be reached by a petition for mandamus. That remedy has been tried, and failed.

We recognize that other Circuit Courts have exercised jurisdiction over actions of district courts with respect to grand jury reports, either after the report had been ordered filed as a public record, or had been ordered published. An example of the former is a recent case in the Fifth Circuit, No. 72-3499, decided June 4, 1973, entitled: *In re Report of Grand Jury Proceedings filed on June 15, 1972, Honorable Jerry Woodward, et al., Appellants*. In that opinion, no reference was made to the jurisdiction of the appellate court to consider the district court's order. Neither does it appear from the opinion whether it had to do with a "special" grand jury, which was specifically authorized by Congress in 1970 (18 U.S.C. §3377) to make reports. We know it was not in this case, however, because the May 15, 1970 Order of Publication, made by Judge Robson in this case, was made prior to the Congressional enactment of 18 U.S.C. §3331, *et seq.*

(October 15, 1970 — Public Law 91-451), which authorized "special" grand juries.

In the above-mentioned *Woodward* matter, the appellant raised the same issue as was raised first here by appellant — that a "grand jury can only lawfully indict or return a no true bill and that it is powerless to speak publicly of any other matter." Because of the decision of the Fifth Circuit Court to expunge certain passages objected to by State Judge Woodward, the panel decided to "premit the issue of whether a federal grand jury has the authority to make reports." It then added:

"We point out, however, that there is persuasive authority and considerable historical data to support a holding that federal grand juries have authority to issue reports that do not indict for crime, in addition to their authority to indict and to return a no true bill."

citing voluminous authority in its note 2. (Slip Op. at 5, F.2d, No. 72-3499, decided June 4, 1973.⁴

The court ordered expunction of portions because they were found to "bear little relevance to federal subject matter," or federal concern, or purpose.

The order here appealed from is not a "collateral order" — an off-shoot from the principal litigation in which it is issued. Thus, *Cohen v. Beneficial Industrial Loan Co.* (1949) 337 U.S. 541 is not applicable. *Wright*, Fed. Cts., 2d Ed., Ch. 11, §101.

Nor can we hold that the present "appeal" could be considered by us as a petition for a common law writ of certiorari,⁵ and that 28 U.S.C. § 1651 "affords ample

⁴ We note that in one of the cases cited in Note 2 in the *Woodward* opinion (the concurring opinion of Judge Wisdom in *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965), cert. denied, 381 U.S. 935 (1965)), the following language is used:

"The decision of the majority does not affect the inquisitorial power of the grand jury. No one questions the jury's plenary power to inquire, to summon and interrogate witnesses, and to present either findings and a report or an accusation in open court by presentment." (Emphasis added), 342 F.2d at 189.

And see, generally, Note: "The Grand Jury as an Investigatory Body," 74 Harv. L. Rev. 590 et seq. (1961).

⁵ *Moore's Federal Practice*, §110.26.

authority for using the writ as an auxiliary process and whenever there is imperative necessity therefor, as a means of correcting excesses of jurisdiction, of giving full force and effect to existing appellate authority, and of furthering justice in other kindred ways." We would be required to find some such "excesses of jurisdiction" or denial of justice in the actions of Judge Robson. His action has already been rendered *res adjudicata* by our denial of the Writ of Mandamus filed by the same petitioners. Writs filed under §1651 cannot be used "to actually control the decision of the trial court." *Bankers Life & Cas. v. Holland*, 346 U.S. 379 (1953); *Will v. United States*, 389 U.S. 90, 95 (1967); *Parr v. United States*, 351 U.S. 513, 520 (1956).

A reading of Rule 6 of the Federal Rules of Criminal Procedure merely emphasizes the large legal discretion granted to and resting in the district judge with respect to grand juries,⁶ and the disclosure of testimony given before it.

Two further practical matters deserve comment.

First, the report sought to be expunged was filed by the jury on May 15, 1970, and the release, publication and distribution of the report was authorized the same day by Judge Robson, not by the jury. The Application to Expunge was filed August 3, 1971, nearly fifteen months later. Meanwhile, as the district court's order of dismissal states, "copies of the report (printed at the Government Printing Office at Washington, D.C., and sold the public for 50 cents) were distributed to designated public officials, the news media, and the general public." As the appellants themselves assert, many newspapers, and radio and television stations, both in Chicago and throughout the country, published, paraphrased, referred to, commented upon, analysed and reviewed the report.

⁶"A district judge is authorized to convene a grand jury when he thinks best, (Rule 6(a)) and discharge it when he thinks proper — within the eighteen months limitation (Rule 6(g)). He determines its size (Rule 6(a)). He appoints a Foreman and a Deputy Foreman (Rule 6(c)). He can direct disclosure (Rule 6(e)) of testimony contrary to the usual policy of secrecy of grand jury proceedings, once the 'good cause', as used in Rule 34, has been demonstrated." (Emphasis added.)

In the 35 months from the publication to the argument on appeal any harm that was done to appellants (if we assume some exists) is an accomplished fact. As was said by Judge Nordbye, a distinguished and experienced judge, when he declined to expunge a grand jury report:

"Any harm that may have resulted from [the] publicity has already taken place, . . . Rather, the result of (expunction) might be that further publicity would flow from such a ruling."

United States v. Connelly, 129 F.Supp. 786, 787-788 (D. Minn. 1955).

Thus, "no equitable remedy whereby to forestall the *fait accompli*" can be devised. *Randolph v. Willis*, 220 F.Supp. 355, 359 (S.D. Cal. 1963).

Second, appellants rely heavily on *In Application of United Electrical, Radio and Machine Workers of America*, 111 F.Supp. 858 (S.D. N.Y. 1953),⁷ (wherein applicants were charged with illegal activity) and their names "deliberately leaked" to the press; and *Hammond v. Brown*, 323 F.Supp. 326 (N.D. Ohio 1971), *aff'd*, 450 F.2d 489 (6th Cir. 1971) (wherein 30 indictments were also returned, and those indicted were about to stand trial). Here in the record before us, no illegal activity was charged against the appellants; none were indicted; nor are they facing trial.

Appellants generally allege in their briefs they were charged with illegal possession of weapons, were engaged in deliberate obstruction of justice by refusing to testify, and were accused of being violence-prone revolutionaries. The government brief denies specifically that any of said charges against appellants appeared in the report. Thus, 19 unregistered guns were found on the raided premises, and catalogued, possession of which was a violation of law — but no reference is made as to who possessed these weapons. (Report, at 106).

Again, the report refers to a possible obstruction of justice when the appellants refused to testify, by the

⁷ Compare *United Elec. Workers*, cited, with, "*In the Matter of Camden County Grand Jury*," 10 N.J. 23, 66, 89, 89 A.2d 416, 444 (1952).

actions of one Bobby Rush, not by appellants. (Report, at 102-105). Finally, the report characterizes the members of the Black Panther party as "violence-prone"—not the plaintiffs by name. (Report, at 126).*

Thus, the distinction between the facts of this case and the cases principally relied upon by appellants is clear. The usual reasons urged to protect those individually charged with crimes, or about to be charged with crimes, does not here exist.

We are satisfied that, should the dismissal by the lower court be an appealable order, and not *res adjudicata*, by reason of our previous order, we should affirm, which we do.

We affirm the action of the District Court in dismissing the application upon all grounds mentioned in the District Court's order, namely: 1. laches of the plaintiffs; 2. that the grand jury had the authority to make the report; 3. that before the disclosure, the district court properly found that such disclosure was in the public's best interest; 4. that no prejudice results to any applicant by the existence of the report; and 5. that the motion to expunge cannot be accomplished as a fact, and the seeking of such relief for expunction is moot.

A true Copy:

Teste:

.....
Clerk of the United States Court of
Appeals for the Seventh Circuit.

* In this connection we note that the Report here involved, is described by the authors of *Modern Crim. Proc.*, 3rd Ed., 1972 Supp. at p. 194 as: "A lengthy grand jury report in Chicago that severely criticized police and prosecutor conduct during 'a raid' in which two members of the Black Panther were killed."

**REPORT OF THE
JANUARY 1970
GRAND JURY**

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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INTRODUCTION

At 4:45 a.m., December 4, 1969, fourteen Chicago police officers assigned to the Cook County State's Attorney's Office, executed a search warrant for illegal weapons at 2337 West Monroe in a flat rented by members of the Black Panther Party. Nine people were in the apartment. Two were killed in the gunfire which broke out: Fred Hampton, the militant and controversial Chairman of the Black Panther Party of Illinois, and Mark Clark, a Panther official from Peoria. Four other occupants were wounded, but survived. Two police officers sustained minor injuries.

Public reaction was prompt and polarized. The State's Attorney's Office reported sketchily and then in detail that the officers were fired upon as they sought entry, that they returned the fire and secured the premises after an intense gun battle with the occupants. According to the officers' account, they had no knowledge that Fred Hampton was in the apartment, but did report that Hampton was found lying on a bed with an automatic pistol and a shotgun next to his body. The officers seized 19 weapons, including a stolen police shotgun, a sawed-off shotgun, various handguns and a large quantity of ammunition; by 7:30 a.m. the scene was deserted.

By noon Black Panther spokesmen claimed that Hampton and Clark were victims of a Chicago-style political assassination pursuant to an alleged official national policy of genocide. Newsmen, students, public officials, and neighborhood residents were given guided tours of the apartment. Panther guides claimed the physical evidence proved that the police did all the shooting.

The competing accounts were given equal and extensive coverage in all media. Responsible leaders, black and white, demanded impartial investigations; Negro congressmen announced their own investigation; a special "Blue Ribbon" Coroner's Inquest was scheduled; a citizens group headed by former Supreme Court Justice Arthur Goldberg was formed to investigate; the Chicago Black Patrolmen's League averred that the police account was untrue and promised to find and expose the facts; the Illinois Attorney General agreed to look into the matter; the Internal Inspections Division of the Chicago Police Department initiated an investigation. Letters, telegrams, delegations and editorials all called on the U.S. Department of Justice to initiate

an objective investigation to determine if there had been a violation of the civil rights of the apartment occupants.

On December 19, 1969, United States Attorney General John Mitchell appointed Assistant Attorney General Jerris Leonard and a special biracial team of experienced federal prosecutors to collect all the facts relating to the incident and present them to an inquisitorial federal Grand Jury.

This report contains the findings of the Grand Jury after hearing nearly 100 witnesses and considering over 130 exhibits,¹ including police records, photographs, moving pictures, transcripts of testimony before other bodies, voluminous investigative and scientific reports and reports of investigative interviews with over 100 potential witnesses who were not called.

The first part of this report consists of the detailed statement of the investigative approach used, the various factual disputes, the results of the FBI's ballistic and scientific examinations, and the results of other investigations. The second portion of the report contains a discussion of federal law as it applies to the facts as found by the Grand Jury. The final portion contains a discussion of the very serious law enforcement problems disclosed by the facts together with the Grand Jury's recommendations on possible solutions.

¹ Many are group exhibits consisting of as many as 200 individual items.

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CONCLUSION

This Grand Jury has sincerely endeavored to exhaust every reasonable means of inquiry to ascertain the facts of this case. The most concise conclusion is that, in this case, it is impossible to determine if there is probable cause to believe an individual's civil rights have been violated without the testimony and cooperation of that person. This cooperation has been denied to this Grand Jury. Given the political nature of the Panthers, the Grand Jury is forced to conclude that they are more interested in the issue of police persecution than they are in obtaining justice. It is a sad fact of our society that such groups can transform such issues into donations, sympathy and membership, *without ever submitting to impartial fact finding by anyone*. Perhaps the short answer is that revolutionary groups simply do not want the legal system to work.

On the other hand, the performance of agencies of law enforcement, in this case at least, gives some reasonable basis for public doubt of their efficiency or even of their credibility.

The resulting competition for the allegiance of the public serves to increase the polarization in the community.

Under these circumstances, the Grand Jury believes the best service it can render is to publish a full and factual report on the evidence it has heard so that the entire public will be made aware of the situation.

JANUARY 1970 GRAND JURY
By /s/ RONALD A. ALBION

Foreman

MAY 15, 1970.

Acknowledgment

Finally, the Grand Jury wishes to acknowledge the invaluable investigative contributions of the Federal Bureau of Investigation. Without the cooperation, professionalism and proficiency of this agency, the Grand Jury could not have completed its assignment.

(126)

385-804 O - 70 (Face p. 126)

THE WHITE HOUSE

WASHINGTON

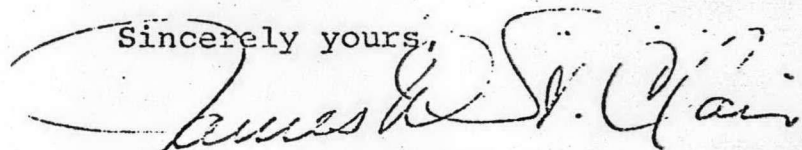
March 7, 1974

Dear Judge Sirica:

In the event that it is finally determined that the report of the grand jury and the materials submitted to the Court in connection therewith should be made available to the Committee on the Judiciary, United States House of Representatives, I request, on behalf of the President of the United States, the right to review the report and other materials and to copy same if I deem any to be relevant. It would seem that this request is in accordance with the concept of fundamental fairness and, at least by analogy, with the statutory requirement set forth in 18 U.S.C. 3333(c)(1).

I am forwarding a copy of this letter to Mr. John Doar, Special Counsel for the Committee on the Judiciary, United States House of Representatives, with the hope that he will advise Your Honor that he has no objection to the granting of this request.

Sincerely yours,



James D. St. Clair
Special Counsel to the President

The Honorable John J. Sirica
Room 2428
United States Courthouse
Third and Constitution Avenue N.W.
Washington, D.C.

cc: Mr. John M. Doar

United States District Court
for the District of Columbia

Chambers of
John F. Sirica
Chief Judge

March 8, 1974

The Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
House of Representatives
Congress of the United States
Washington, D.C.

Dear Mr. Chairman:

I am in receipt of your letter dated March 8, 1974 requesting, on behalf of the House Judiciary Committee, that I provide the Committee with materials delivered to the Court last Friday by the June 5, 1972 grand jury of this district.

As you may be aware, this matter is currently sub judice. I shall be pleased to reply to your request once a decision is reached by me in the near future.

Sincerely,

John F. Sirica

March 8, 1974

The Honorable John J. Sirica
Chief Judge
U. S. District Court for the
District of Columbia
U. S. Courthouse
Washington, D. C. 20001

Dear Judge Sirica:

At its meeting on Thursday the Committee on the Judiciary of the House of Representatives agreed unanimously to authorize and direct me respectfully to request that you provide the Committee the materials delivered to you last Friday by the Grand Jury.

On February 6, 1974, the House, by a vote of 410 to 4, authorized and directed the Committee on the Judiciary "to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States of America." A copy of that resolution, (H. Res. 803), is enclosed.

In the floor debate that preceded the vote on that resolution I explained that the purpose of the resolution was to empower the Committee to exercise in any and every case the full, original, and unqualified investigative power conferred upon the House by the Constitution. (Congressional Record - House, February 6, 1974, Page H 528.)

Last Friday the Grand Jury presented to you, as Chief Judge for the District Court, District of Columbia, two documents and a brief case. Prior to acting on its resolution, the Judiciary Committee had been informed, on the basis of public reports and disclosures in open court on the previous day that this material included a two-page grand jury report. These have all been placed under seal by the Court. On Wednesday it was stated in open court by Mr. Lacovara, Counsel to the Special Prosecutor, that the Grand Jury had requested that the material be transmitted to the House of Representatives, as necessary to its carrying out its impeachment inquiry. (Daily Transcript, Pages 78, 79, 84 and 85.)

During the same hearing the Special Prosecutor, by Mr. Lacovara, advised the Court, in light of the President's directive to turn over to the House Judiciary Committee all materials which he turned over to the Special Prosecutor, that these materials are not necessarily coterminous with the content of what the Grand Jury has asked this Court to transmit to the House Judiciary Committee. (Daily Transcript, Page 79.)

The unanimous resolution of the Judiciary Committee reflects the Committee's view that in constitutional terms it would be unthinkable if this material were kept from the House of Representatives in the course of the discharge of its most awesome constitutional responsibility.

Our Constitution intended that matters of such overwhelming national significance as the current ongoing impeachment inquiry should be decided on the basis of the best available evidence and the fullest possible understanding of the facts. Were the House to act in this impeachment inquiry without having had the opportunity to take this grand jury material into account, I fear that each House member, and, in fact, the entire country, would experience an enormous lack of confidence in our constitutional system of government.

Pending presentation of the results of the impeachment inquiry, all material received by the inquiry staff will be held strictly in accordance with confidentiality procedures adopted by the Judiciary Committee on February 22, 1974. A copy of those procedures is enclosed. The Committee, in adopting those procedures, has determined that they afford the strictest limitation that can be imposed responsibly on materials received by the inquiry staff, consistent with proper discharge of the Committee's constitutional duty.

The Committee has been proceeding and will continue expeditiously with its impeachment inquiry in a manner that takes fully into account the interests of individuals and the orderly conduct of other governmental processes. Central to the Committee's procedure, however, and to our system of government, is the essential, dominant responsibility and power reposed by the Constitution in the House alone.

Mr. Doar and Mr. Jenner have reported to the Committee your question of Wednesday whether it might be feasible to defer the impeachment inquiry until after the September 9 trial date you have set for the pending indictments. The Committee has asked me to report to you that it is in no respect possible for the Committee and the House of Representatives now to suspend for any period of time their present

The Honorable John J. Sirica

-3-

March 8, 1974

pursuit of their constitutional responsibility. The House and the Judiciary Committee are under a controlling constitutional obligation and commitment to act expeditiously in carrying out their solemn constitutional duty.

Sincerely,

PETER W. RODINO, JR.
Chairman

Enclosures

/bf

ROGER J. WHITEFORD 1886-1965
RINGGOLD HART 1886-1965
JOHN J. CARMODY 1901-1972
JOHN J. WILSON
HARRY L. RYAN, JR.
JO V. MORGAN, JR.
FRANK H. STRICKLER
WILLIAM E. ROLLO
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CABLE ADDRESS

WHITEHART WASHINGTON

March 4, 1974

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301-656-5700

JO V. MORGAN, JR.
FRANK H. STRICKLER
WILLIAM E. ROLLO
CHARLES J. STEELE

Hon. John J. Sirica
Chief Judge
United States District Court
United States Court House
Washington, D.C.

(BY HAND)

Dear Chief Judge Sirica:

As Mr. Strickler and I have been told, when the Grand Jury returned an indictment last Friday against our clients and others, some kind of report was also presented by the Grand Jury accompanied by a "bulging brief case" handed up to you by one of the prosecutors. Of course, we have no information as to the contents of the report or of the brief case. All we do know is that this action of the Grand Jury overhangs the indictment of our clients, and thus we have a legal interest in writing you this letter. *

The Grand Jury which acted last Friday is a regular grand jury, and according to the law and practice in the District of Columbia, has no power to do other than indict or ignore. ** It may not make special reports. It cannot act under Sections 3331-2-3 of Title 18, U.S. Code.

Whether our clients are targets of the report or of the accompanying contents of the brief case is not our point. If they are even incidentally mentioned therein, or if the contents of the brief case include excerpts from their testimony before the Grand Jury or documents relating to them, as well as to others, this extra-judicial act prejudices our clients and should be expunged or returned to the Grand Jury with the Court's instructions that their act was wholly illegal and improper.

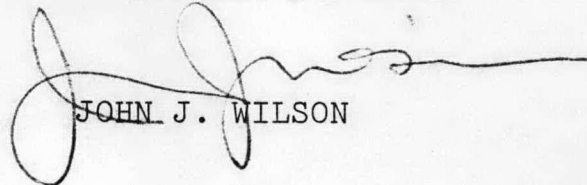
Of course, we do not have to remind you that Rule 6(e) of the Federal Rules of Criminal Procedure permits the Court to disclose or cause disclosure of matters occurring before a Grand Jury only "preliminary to or in connection with a judicial proceeding."

Hon. John J. Sirica
March 4, 1974
Page 2

If the Court has any intention to act differently from what I suggest, I hope that you will give us ample advance notice thereof, so that, if we are so advised, the matters may be presented to the Court of Appeals.

Copies of this letter are being delivered to the Watergate Special Prosecutor and to counsel for the other indicted defendants.

Respectfully yours,



JOHN J. WILSON

JJW:hie

* Cf. Application of UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, et al. (District Judge Weinfeld) 111 F. Supp. 858 (1953) (U.S.D.C.S.D.N.Y.); and HAMMOND v. BROWN, 323 F. Supp. 326 (1971), affirmed ibid, (6th Cir.), 450 F. 2d 480 (1971).

**

Beginning with POSTON v. WASHINGTON, ALEXANDRIA, & MT. VERNON RAILROAD COMPANY (1911) 36 App. D.C. 359.

Anything to the contrary which may be found In Re: GRAND JURY 1969 (Dist. Judge Thomsen) 315 F. Supp. 662 (1970) has not been recognized as the law in the District of Columbia. The fact that Congress found it necessary in 1970 (18 U.S. Code 3331-2-3), to legislate presentment power in a special grand jury for the limited purpose stated therein, is persuasive upon the point that the right did not exist at common law, as Judge Thomsen indicated in his opinion.