

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1364

September

Term, 19 73

Harry R. Haldeman, Petitioner

v.

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

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

United States Court of Appeals
for the District of Columbia Circuit

MAR 27 1974

FILED

HUGH E. KLINE
CLERK

Before: MacKinnon, Circuit Judge

O R D E R

It is ORDERED by the Court sua sponte that the order of
March 21, 1974 is amended as follows:

Page 3 of Judge MacKinnon's statement, line 5, after Fed. R.
Crim. P. 6(e), indicate a footnote reference 1/ which will read
as follows:

1/

(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.

(Emphasis added.)

Per Curiam.

APR 1 12 09 PM '74

Memorandum

TO : Philip A. Lacovara

DATE: March 25, 1974

FROM : Susan E. Kaslow *per*SUBJECT: Telephone Call from John J. Wilson, Esq.

At 9:00 this morning, Mr. Wilson called to notify us officially that he was not pursuing the Report and Recommendation matter any further. (He, of course, asked to talk to you but settled for me when I told him you were not here yet.) He further notified me that he was going to call Judge Sirica and tell him of his decision not to pursue the matter.

Mr. Wilson said he didn't know if Mr. Bray had already called to tell us officially that he was not going to pursue the matter. He said that if Mr. Bray had not, he probably would call. As an aside to the conversation, Mr. Wilson said that it was "against his better judgment" to have the Report and Recommendation sent to the House Judiciary Committee.

He said you wouldn't have to call him back because he was leaving immediately for Baltimore.

f

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No. 74-1368

FILED MAR 22 1974

Gordon Strachan,
Petitioner

HUGH E. KLINE
CLERK

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

It is ORDERED by the Court, sua sponte, that the materials transmitted to this Court pursuant to this Court's order of March 20, 1974, shall be returned to the District Court forthwith.

Per Curiam

MAR 25 11 54 AM '74

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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United States District Court
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Respondent

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 21 1974

HUGH E. KLINE
- CLERK

O R D E R

It is ORDERED, sua sponte, that the above entitled cases
are hereby consolidated for all purposes.

For the Court:

Hugh E. Kline
Hugh E. Kline
Clerk

FILED 10 44 AM '74

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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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.

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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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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

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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.

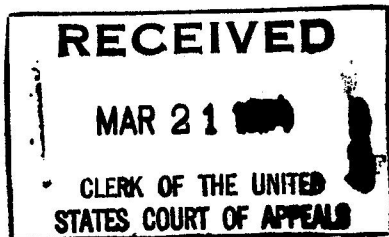
I would expunge the entire grand jury report and permit the House Judiciary Committee, on request to the District Court, to have access not only to the limited testimony accompanying the report and index but to the entire grand jury proceedings

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.

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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.



UNITED STATES COURT OF APPEALS
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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 RE-
PORT AND RECOMMENDATION AND ACCOM-
PANYING 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 individu-
als 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.

LEON JAWORSKI
Special Prosecutor

PHILIP A. LACOVARA
Counsel to the Special
Prosecutor

PETER M. KREINDLER
Executive Assistant to
the Special Prosecutor

Watergate Special Prosecution
Force
1425 K Street, N. W.
Washington, D. C. 20005

Attorneys for the United States
on behalf of Respondent and
the Grand Jury

DATED: March 21, 1974

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1364

September Term, 19 73

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

MAR 21 1974

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

O R D E R

It is ORDERED, sua sponte, that the Clerk of the District Court is directed to transmit to this Court under seal forthwith, the two page report and recommendation with accompanying materials filed with the District Court on March 1, 1974 by the June 5, 1972 Grand Jury.

For the Court:

Hugh E. Kline
Clerk

MAR 21 11 10 AM '74

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1364

HARRY R. HALDEMAN,

Petitioner,

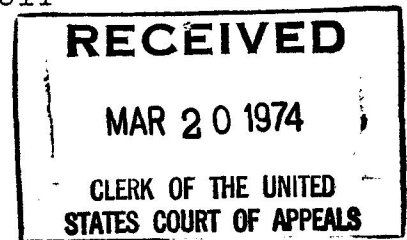
v.

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 THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HARRY R. HALDEMAN

Petitioner

vs.

No. 74-1364

HON. JOHN J. SIRICA
Judge (formerly Chief Judge),
United States District Court
for the District of Columbia

Respondent

MOTION FOR A RESTRAINING ORDER
TO MAINTAIN THE STATUS QUO OF
RESPONDENT'S ORDER OF MARCH 18, 1974

Petitioner moves for a restraining order directed to respondent because of the following reasons:

Respondent's Order, entered below on March 18, 1974, granted a stay for two days in order that any interested party could initiate appellate review. This has been done by petition filed with this Court under the above caption.

Having filed said petition about 10 o'clock A.M., today, March 20, 1974, petitioner filed with respondent a motion for a further stay until this Court acts upon said petition. Respondent denied that motion today, March 20, 1974, but stayed his Order until 4:00 P.M. Thursday, March 21, 1974, to allow petitioner time to apply to this Court for a general stay until the petition is acted upon.

Therefore this motion is being filed for an order to restrain respondent from changing the status quo of his Order

until this Court can have the opportunity to act upon said petition; or alternatively, that this Court grant a further stay for the same purpose.

JOHN J. WILSON

FRANK H. STRICKLER
Attorneys for Petitioner
Address: 815 - 15th St., N.W.
Washington, D.C. 20005
Tel. No. 638-0465

CERTIFICATE OF SERVICE

Copy delivered by hand to Philip A. Lacovara, Esq.,
counsel to the Watergate Special Prosecution Force this
date - March 20, 1974.

FRANK H. STRICKLER

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

GORDON STRACHAN
3810 Brockbank Drive
Salt Lake City, Utah

v.

No.

HONORABLE JOHN J. SIRICA
United States District Judge
United States District Court
for the District of Columbia
United States Courthouse
3rd and John Marshall Place
Washington, D.C.

3-20-74

PETITION FOR A WRIT OF MANDAMUS AND
FOR WRIT OF PROHIBITION

Petitioner, Gordon Strachan, by his undersigned counsel, hereby Petitions the court, pursuant to Rule 21 of the Federal Rules of Appellate Procedure and 28 U.S.C. §1651 to issue a Writ of Prohibition and/or a Writ of Mandamus directed to Respondent, Honorable John J. Sirica, United States District Judge for the District of Columbia, to prohibit Respondent from disclosing or transmitting the sealed Report and Recommendation of the June 5, 1972 Grand Jury, or the Grand Jury evidence transmitted therewith to Respondent for his consideration, to the United States House of Representatives Committee on the Judiciary for use in its inquiry into the possible grounds for impeachment of Richard M. Nixon, President of the United States,

and requiring Respondent to discharge the obligation and requirements of Rule 6, Federal Rules of Criminal Procedure, to maintain the secrecy of said Grand Jury proceedings and to order only such disclosures thereof that are necessary and then only in accordance with law; to discharge his obligation to refrain from any action whose direct and necessary result will be to accelerate and greatly increase the continuing and mounting avalanche of prejudicial publicity about the matters that are subject of the indictment returned on March 1, 1974 by the June 5, 1972 Grand Jury.

STATEMENT OF FACTS

Petitioner, Gordon Strachan, is a resident of Salt Lake City, Utah. Petitioner appeared on April 11, 1973 as a witness before the June 5, 1972 Grand Jury. On March 1, 1974 Petitioner, along with several other defendants, was indicted by the Grand Jury for alleged violations of 18 U.S.C. §371, 18 U.S.C. §1503, and 18 U.S.C. §1623.

On April 19, 1973, purported verbatim excerpts of his Grand Jury testimony were printed on page G 11 of the Washington Post. Petitioner is unable to verify that said excerpts are in fact verbatim since Petitioner's own requests for disclosure to him of a transcript of his Grand Jury testimony (a right unqualifiedly accorded to Petitioner under Rule 16(a), Federal Rules of Criminal Procedure) have been denied by the Watergate Special Prosecution Force.

On March 1, 1974, at the time the indictment naming Petitioner and others was returned (United States v. John N. Mitchell, et al., Cr. No. 74-110), the foreman of the Grand Jury presented to Respondent a Report and Recommendation and a quantity of materials. In the attached opinion filed by Respondent, it is disclosed that the reason for the report is that "evidence" previously presented to the Grand Jury is "material" to matters within the primary jurisdiction of the United States House of Representatives. The Grand Jury has not been discharged, but remains available for further action in this matter although Respondents opinion notes that "for all purposes relevant to this decision, the Grand Jury has ended its work." (Opinion p. 19).

After a hearing on March 6, 1974 at which Petitioner, through counsel, objected to disclosure or transmittal of said Report and Recommendation or said Grand Jury evidence to the United States House of Representatives Committee on the Judiciary, and during which all other indicted defendants in Cr. No. 74-110 objected to said disclosure, Respondent, on March 18, 1974 entered the Order attached hereto directing transmittal and disclosure of said Report and Recommendation and of said materials and evidence to the United States House of Representatives. Said Order was in accordance with the urging of the Watergate Special Prosecution Force.

Neither Petitioner nor any other defendant indicted by said Grand Jury has viewed the materials and evidence reviewed by Respondent or the compilation of information referred to at page 11 of said Opinion and covered by said Order. Petitioner, through counsel, on March 19, 1974 did read the two page Grand Jury Report and Recommendation.

ISSUES PRESENTED

1. Whether the disclosure pursuant to Respondent's Order of Grand Jury evidence or a compilation of that evidence which might in turn lead to the vote of articles of impeachment against the President of the United States involves a procedure so inherently likely to prejudice a defendant indicted by that same Grand Jury presumably on the basis of that evidence that it will be impossible to obtain a fair trial before any impartial jury due to the attendant presumption that said evidence is highly incriminating, and due to the notoriety surrounding said evidence and the impeachment proceeding to which the Grand Jury believes it may lead.

2. Whether the public interest requires disclosure to the House of Representatives of Grand Jury evidence on the basis of which Petitioner and other defendants were indicted.

3. Whether the availability to the House of Representatives of the same evidence without the need of a disclosure of evidence presented to a Grand Jury requires that such other sources of

evidence be independently explored in preference to disclosure of evidence and proceedings before the Grand Jury.

4. Whether an impeachment inquiry of the House of Representatives is, at its present investigatory stage, or at any stage, a "judicial proceeding" appropriate for receipt of Grand Jury evidence under Rule 6(e), Federal Rules of Criminal Procedure.

5. Whether a Grand Jury that has indicted several defendants but remains in session can disclose or recommend disclosure of actual evidence and testimony or whether said recommendation terminates the Grand Jury proceedings or requires that the Grand Jury be discharged.

6. Whether Petitioner has standing to petition this court based on his status as a witness before said Grand Jury or as a defendant indicted by said Grand Jury.

RELIEF SOUGHT

Petitioner requests that a Writ of Prohibition and/or a Writ of Mandamus issue to Respondent directing:

1. That he refrain from disclosing or transmitting the Report and Recommendation, the compilation of evidence, or the evidence itself to the House of Representatives.

2. That he discharge the Grand Jury.

3. For such other and further relief as the court, in the exercise of its supervisory power over the administration of justice in this circuit, deems just and proper.

STATEMENT OF REASONS WHY THE
WRIT OF PROHIBITION OR MANDAMUS SHOULD ISSUE

1. Prejudicial publicity

The materials which Respondent ordered transmitted to the United States House of Representatives, Committee on the Judiciary (hereinafter referred to as "the Committee"), consisting of a two page "Report and Recommendation" of the June 5, 1972 Grand Jury with a compilation of evidence and accompanying materials is such that its disclosure to the Committee with the high probability of disclosure of some or all of such material to the public at large would prejudice Petitioner irrevocably and render a fair trial before an impartial jury impossible. The possibility that the Committee would decide, as well they may under the Committee's "Procedures For Handling Impeachment Inquiry Material", adopted February 22, 1974 (Paragraph 4 at p. 1), to make some or all of such material "public", creates an unacceptable risk of public disclosure and broad dissemination of proceedings of the Grand Jury that indicted defendant. All or part of said evidence may be hearsay, irrelevant as to defendant but highly prejudicial. Although a Grand Jury received such hearsay or irrelevant matters, they may well be inadmissible at trial. The extensive pretrial public dissemination of evidence which is known to have been presented to the Grand Jury that indicted Petitioner and which, therefore, will be associated with him, would destroy the safeguards the Supreme Court has created to insure defendants

a fair trial by an impartial jury. See Estes v. Texas, 381 U.S. 532 (1965); Sheppard v. Maxwell, 384 U.S. 333 (1966).

Respondent, in his opinion, carefully distinguished between relevancy of the evidence to the Committee's inquiry and materiality. Respondent has concluded as to said evidence and materials that "there can be no question regarding their materiality to the House Judiciary Committee's investigation." (Opinion p. 3). Material "means to have probative weight, i.e. reasonably likely to influence the tribunal in making a determination required to be made." Weinstock v. United States, 231 F.2d 699, 702 (D.C. Cir. 1956).

Thus, briefly characterized, Respondent has concluded the evidence is clearly of significant moment. If so, its likely effect will be to generate great publicity at the cost of a fair trial for Petitioner.

While Petitioner's counsel has read the two page Report and Recommendation, such a reading fails to reveal the basis for Respondent's conclusion that the evidence is material. Respondent's Opinion does not disclose to what extent Respondent's view is based on a review of the compilation of the evidence or the evidence itself.

In any event, if this evidence, which Respondent and the Grand Jury concluded was of great import, is transmitted to the Committee and thence made public, either intentionally or inadvertently, Petitioner runs the distinct risk of being put on trial by the Legislative Branch of our Government and

of being prejudged by the general public with no opportunity to cross-examine witnesses, rebut evidence or avail himself of any of the other procedural safeguards guaranteed to him by the Constitution.

3. Grand Jury Secrecy

The general principle of Grand Jury secrecy is set forth in Rule 6, Federal Rules of Criminal Procedure. Paragraph (e) of Rule 6 sets forth the possible exception to the secrecy requirement. Regardless of Respondent's "public policy" rationale for disclosure of "matters occurring before the grand jury," the Federal Rules of Criminal Procedure, promulgated by the Supreme Court, limit the extent of disclosure. Disclosure in this instance would violate Rule 6(e) and would be contrary to law and public policy.

First, the Committee's Impeachment Inquiry is not a "judicial proceeding" under the Constitution or under Rule 6(e). It thus cannot receive evidence or proceedings before a Grand Jury.

In a case where the Speaker of the House and certain House members argued that the House of Representatives had a variety of judicial powers and that those powers were exceptions to Article III of the Constitution vesting the judicial power in the Supreme Court and inferior courts, the Supreme Court rejected the argument saying:

"We reject this contention. Article III, §1, provides that the 'judicial power . . . shall be vested in one supreme court, and in such inferior Courts as the Congress may . . . establish.'" Powell v. McCormack, 395 U.S. 486, 513-14 (1968).

Thus, the Committee's Impeachment Inquiry is not a "judicial proceeding" within the meaning of the Constitution or Rule 6(e) and disclosure to the Committee of proceedings and evidence before the Grand Jury is improper. See also, Kilbourne v. Thompson, 103 U.S. 377 at 387 (1880).

In addition, Respondent's opinion notes that it has been held that "judicial proceeding" as used in Rule 6(e) refers only to a proceeding in a United States District Court. (Opinion p. 16). However, Respondent concludes that disclosure to a legislative body is permissible on the authority of cases that, for the most part, involve Grand Jury reports and disclosures in cases where there were no indicted defendants as there are here. (See Opinion pp. 16-19).

Second, disclosure of any matters occurring before the Grand Jury while that Grand Jury is still in session has been consistently prohibited. See In re Bonanno, 344 F.2d 830 (2d Cir. 1965) where the court said,

"We have not been referred to a single case authorizing disclosure of a witness' testimony during the pendency of grand jury investigations." Id. at 834.

Courts at all levels have recognized that even where Grand Jury proceedings are disclosed they should not be disclosed while the Grand Jury is still functioning. Respondent in fact

has pointed out in his Opinion at p. 45, Mr. Justice Douglas' declaration in his opinion for the Court in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940) that,

"[g]rand jury testimony is ordinarily confidential. . . . But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it. Socony-Vacuum Oil Co., supra.

Whether a Grand Jury has power to make reports or presentations is, in Petitioner's view, unimportant to the larger issue of whether Respondent has the power to transmit allegedly highly material evidence to the Committee when the effect will be to consume Petitioner, a person not in the public eye prior to the Watergate matter, in the cyclone of publicity surrounding a presidential impeachment.

Petitioner has suffered one violation of the secrecy required of Grand Jury proceedings already when his own testimony appeared in a newspaper. Further violations of the secrecy of Grand Jury proceedings, particularly as to his own testimony, are matters of particular concern. Petitioner has no way of determining whether the materials involved contain any testimony by or about him.

Respondent's opinion does not indicate the extent to which time is critical, although the importance of the Committee's proceedings to the nation is manifest. Petitioner has to date been denied access to his own Grand Jury testimony presumably on the theory that time for him is relatively unimportant. Furthermore, for all that appears, all evidence sealed by the Grand Jury may be promptly and independently available to the Committee without the disclosure ordered by Respondent.

CONCLUSION

For the foregoing reasons, Petitioner, Gordon Strachan, requests that the Writ of Prohibition and Writ of Mandamus issue and that he be granted the Relief Sought herein, and that Respondent be directed to file an answer to this Petition.

JOHN M. BRAY
Arent, Fox, Kintner, Plotkin &
Kahn
1815 H Street, N.W.
Washington, D.C. 20006
Telephone: (202) 347-8500

Attorney for Petitioner
Gordon Strachan

CERTIFICATE OF SERVICE

I, John M. Bray, hereby certify that I delivered a true copy of the foregoing Petition for Writ of Mandamus and for Writ of Prohibition to the chambers of Respondent, Honorable John J. Sirica and to the Office of the Watergate Special Prosecution Force, 1425 K Street, N.W., Washington, D.C. this 20th day of March, 1974, and mailed copies to counsel for the President, counsel for the Committee and counsel for all other defendants in Cr. No. 74-110.

JOHN M. BRAY

Kreindler

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

MAR 20 1974

JAMES F. DAVEY, Clerk

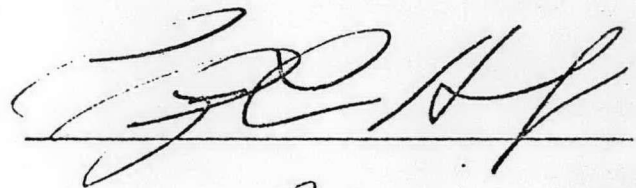
IN RE REPORT AND RECOMMENDATION
OF JUNE 5, 1972 GRAND JURY
CONDRENING TRANSMISSION OF
EVIDENCE TO THE HOUSE OF
REPRESENTATIVES

Misc. 74-21

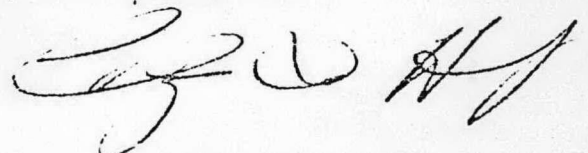
ORDER

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.



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

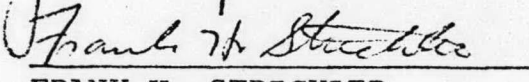
MOTION TO EXTEND STAY UNTIL FINAL DECISION
BY THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

COMES NOW Harry R. Haldeman, by his attorneys, and respectfully moves that this Court continue its stay of the delivery of the Report and Recommendation of the June 5, 1972 Grand Jury together with accompanying materials until the United States Court of Appeals for the District of Columbia Circuit has finally decided the petition of this movant filed on March 20, 1974 in said Court pursuant to Rule 21 of the Federal Rules of Appellate Procedure and 28 U.S.C. 1561. As grounds in support of this motion, movant says:

1. That the requested stay is necessary in order to afford movant his right to seek appellate review of the Order and Opinion of the Court filed herein on March 18, 1974.
2. That there are substantial reasons, of policy and law, for review of this Court's Decision by the United States Court of Appeals.

Respectfully submitted,


JOHN J. WILSON


FRANK H. STRICKLER
Attorneys for Movant
815-15th Street, N. W.
Washington, D. C. 20005
Tel. 638-0465

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 1974, I delivered [copies of the foregoing Motion to the Chambers of Hon. John J. Sirica, and to Philip A. Lacovara, Esq., Counsel to the Special Watergate Prosecutors, 1425 K Street, N. W., Washington, D. C. 20005,] and mailed, first class mail, postage prepaid, copies to the following:

James D. St. Clair, Esq.
Attorney for the President
The White House
Washington, D. C. 20500

John Doar, Esq.
Special Counsel
House Committee on the Judiciary
Congressional Annex
300 New Jersey Avenue, N. W.
Washington, D. C. 20515

Albert E. Jenner, Jr., Esq.
Minority Counsel
House Committee on the Judiciary
Congressional Annex
300 New Jersey Avenue, N. W.
Washington, D. C. 20515

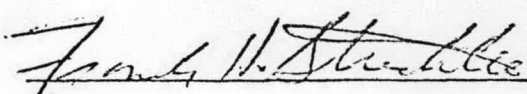
Sidney Dickstein, Esq.
Attorney for defendant Colson
1735 New York Avenue, N. W.
Washington, D. C. 20006

John M. Bray, Esq.
Attorney for defendant Strachan
1815 H Street, N. W.
Washington, D. C. 20006

William G. Hundley, Esq.
Attorney for defendant Mitchell
1709 New York Avenue, #205
Washington, D. C. 20006

Jacob A. Stein, Esq.
Attorney for defendant Parkinson
Ring Building
Washington, D. C. 20036

Thomas C. Green, Esq.
Attorney for defendant Mardian
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006



IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HARRY R. HALDEMAN
Address: 443 N. McCadden Place
Los Angeles, California
Petitioner

vs.

No. 74-1364

HON. JOHN J. SIRICA
Judge (formerly Chief Judge),
United States District Court for
the District of Columbia
Address: United States Court House
Washington, D.C.
Respondent

PETITION FOR A WRIT OF PROHIBITION
AND/OR A WRIT OF MANDAMUS

The petition of Harry R. Haldeman respectfully
represents to this Honorable Court as follows:

(1) This petition is filed pursuant to Rule 21 of
the Federal Rules of Appellate Procedure and 28 U.S.C. 1651
(the "All-Writs" Statute).

(2) Petitioner is a citizen of the United States
and a resident of the State of California, and is one of the
defendants indicted in a 13-count indictment returned by a
regular District of Columbia grand jury on March 1, 1974 in
criminal case No. 74-110. A copy of said indictment is annexed
hereto, marked Exhibit A, and made a part hereof.

(3) Respondent is a judge of the United States
District Court for the District of Columbia, and was the

judge before whom the aforesaid indictment was returned in open court.

(4) At the same time that the Grand Jury returned said indictment, it presented to the respondent an alleged 2-page communication, accompanied by a larger document and one or two brief cases, (hereafter collectively called a report or a presentment), the contents of which are not presently known to petitioner, but probably contain documents not only prepared by the grand jury but presented to them by the Watergate Special Prosecution staff as part of the evidence for the consideration of said grand jury.

(5) The reputed purpose of said report or presentment was to have the respondent release the same to the Judiciary Committee of the House of Representatives of the United States of America, which has under consideration the possible impeachment of the President of the United States of America.

(6) Petitioner has reason to believe that among the documents contained in the aforesaid presentment is a certain recording tape of March 21, 1973, or a transcription thereof, which is relied upon by the prosecutors to support the charge of perjury against this petitioner in the 8th count of the aforesaid indictment.

(7) Petitioner has reason to believe that the presentment contains other items of alleged evidence relied upon by the prosecutors to support some of the charges against

all of the defendants (or some of them) in said indictment.

(8) Petitioner was advised by his counsel that the respondent should expunge said report or presentment because (a) for nearly a half century it has been the uniform practice in the District of Columbia that the function of a regular grand jury was and is to return indictments or ignor-amuses, and not to make presentments in the nature of reports; (b) that under Rule 6(e) of the Federal Rules of Criminal Procedure, respondent may permit disclosure of matters occurring before a grand jury only where preliminarily to or in connection with a judicial proceeding (and for another purpose not here relevant), and that an impeachment proceeding by Congress is not a judicial proceeding as contemplated by said rule; and (c) the release of said report or presentment to the House Committee would likely generate publicity regarding its contents and petitioner and his co-defendants, and thus would impair and make impossible a fair trial (set for September 9, 1974) of petitioner and his co-defendants upon the aforesaid indictment.

(9) Accordingly, on March 4, 1974, petitioner's counsel delivered to respondent a letter-communication, copy of which is attached hereto, marked Exhibit B and made a part hereof. The reference in said letter to the fact that said presentment overhangs said indictment was intended to mean, and was so elaborated upon in oral argument, that it would jeopardize the constitutional right of petitioner and his co-defendants to have a fair trial.

(10) After holding two conferences in chambers with some or all of the legal representatives of the interested parties -- prosecutors, counsel to the President of the United States, counsel to the House Committee, and counsel for the indicted defendants -- respondent held a hearing upon said letter-communication in open court on Wednesday, March 6, 1974, participated in by all of the above-mentioned counsel, a transcript of said hearing being attached hereto, marked Exhibit C; and made a part hereof. Counsel for the other indicted defendants supported the arguments of petitioner's counsel. At this hearing, House Committee counsel (Mr. Doar), in answer to questions propounded by the respondent, stated that he could not "guarantee" against possible "leaks" if the grand jury material got into the hands of the Committee; and he frankly recognized the possibility of prejudice to the defendants regarding a fair trial from such "leaks" occurring before their trial. (Attached hereto is a pamphlet issued in February of this year by the House Judiciary Committee entitled "Procedures for Handling Impeachment Inquiry Material.") This attachment is marked Exhibit D, and is made a part of this petition.

(11) At or before said hearing, the prosecutors handed respondent a memorandum opposing petitioner's contentions, but so far as petitioner knows, said memorandum has not been made public. This averment is made in order to account for the failure of petitioner to attach said memorandum to this petition, and not as any omission on the part of respondent or the prosecutors. Since petitioner's counsel understood that

such memorandum contains some description of the contents of the grand jury's report or presentment, petitioner's counsel chose not to receive or read such memorandum in view of the fact that counsel felt that the contents of an illegal report should not be examined.

(12) On March 8, 1974 the prosecutors sent a communication to respondent, with copies to all counsel, a copy of which, together with a copy of its enclosure of a decision from the Seventh Circuit, is attached hereto, marked Exhibit E, and made a part thereof; and petitioner's counsel responded thereto on March 11, 1974 by a written communication to respondent (with copies to all counsel), a copy of which is attached hereto, marked Exhibit F, and made a part hereof.

(13) In addition, feeling that if respondent had advance notice of the Grand Jury's report, or the fact that it was to be submitted to him, respondent should not sit in judgment in this proceeding, petitioner's counsel addressed a letter to respondent on March 12, 1974, (with copies to all counsel), a copy of which is attached hereto, marked Exhibit G, and made a part hereof. Probably footnote 1 of pages 1-2 of respondent's opinion is intended to be an answer to this inquiry.

(14) On Monday, March 18, 1974, respondent ordered the release of said report to the House Committee by an Order of that date, accompanied by a 22-page opinion, copies of which are annexed hereto, collectively marked Exhibit H, and made a part thereof.

(15) In said Order respondent stayed execution thereof for two days "to permit the initiation of whatever appellate review may be available." Petitioner is filing this petition with this Court within that time.

(16) Statement of the issues presented:

- (a) Whether a regular grand jury in the District of Columbia may return a special report or presentment which does not reflect action to indict or to ignore.
- (b) Whether an impeachment proceeding in the Congress of the United States is a judicial proceeding within the purview of Rule 6(e) of the Federal Rules of Criminal Procedure.
- (c) Whether, assuming the answers to (a) and (b) to be in the affirmative, a district judge should release a grand jury presentment or report to a Committee of Congress where there is a risk that it will be made public before an indicted defendant is tried with respect to anything that may be therein, and thus may be deprived of his constitutional right to a fair trial as the result of such publicity.

(17) Statement of the reasons why the writ should issue.

At the outset, reference should be made to a point not raised by anyone in oral argument, but mentioned for the first time by respondent on page 21 of his opinion, namely, that the standing of the petitioner and other indicted defendants to raise these issues "is dubious at best." District Judge Weinfeld's opinion in Application of United Electrical, etc. Workers, (U.S.D.C. S.D.N.Y. 1953), 111 F. Supp. 858, is a complete answer to respondent. */

Paragraphs 6 and 7 of this petition reflect petitioner's views of connection with the report. Respondent supplied confirmation of this on page 21 of his opinion when he stated that references to the indicted defendants do not "go beyond allegations in the indictment." This is tantamount to saying that the report and/or accompanying documents reflect the evidence upon which the defendants were indicted.

Since the ultimate complaint of petitioner and the other indicted defendants is that release of the report, etc., will or may trigger publicity which in turn will deprive them of a fair trial, they have a real stake in seeking to prevent the release in advance of their trial. Public disclosure of the evidence upon which they were indicted will provoke widespread comment in the news media, which will not hesitate to evaluate

*/ This opinion also discusses reports of grand juries and Rule 6(e) of the Federal Rules of Criminal Procedure.

for public consumption the alleged facts behind the indictment. This will result in the defendants being tried in the public press and other media long before such evidence is subjected to cross-examination and rebuttal at the trial. Thus, the defendants will stand convicted before their stories are told.

Petitioner cannot believe that something which adversely affects an indicted and untried defendant will be ignored by a court in depriving him of a right to complain. In civil litigation a right to complain may be ever so thin; surely, where a man's liberty is at stake, his right need not be any greater.

Having disposed of the "standing" point, petitioner submits that the three issues listed above all merge into publicity which may affect a fair trial; not only publicity through "leaks" for which the news media alone may be blamed, but publicity emanating from the House Committee in the official handling of the evidence in advance of the trial of petitioner and his co-defendants.

The points of grand jury reports and Rule 6(e) are but stepping stones to the end result of fair trial deprivation. Petitioner will review those points in a summary way.

The District of Columbia has been free of grand jury reports for over a half century. Indeed, this Court can take judicial notice of this fact. Respondent deals in negatives and double negatives to point out that this practice has not

been denied in this District. See the text tied to footnote 13 on pages 4-5 of the Opinion; and the comment on page 11 that respondent has noted "the absence of a contrary rule in this Circuit." Petitioner replies that the presence of a favorable rule does not exist in this Circuit. As Judge Weinfeld observed on page 867 of the United Electrical opinion, the rule of reports or no reports is one of policy, and petitioner adds, not one of law.

So for the first time in over fifty years respondent has announced the policy for the District of Columbia. Should this Circuit follow Judge Weinfeld in his scholarly opinion or Chief Judge Thomsen and others in their views? The pattern has not been fully laid out in respondent's opinion. He embraces United States v. Cox from the Fifth Circuit, 342 F.2d 167 (1965), but omits from his quotation on page 7 of his opinion from In Re Grand Jury Proceedings, 479 F. 2d 458, a 1973 decision from the same Fifth Circuit, the opening two sentences of the same paragraph (page 460) reading 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."

If Cox is a beacon for the permissible-report doctrine, why did the same Circuit seven years later "pretermitt the issue?"

Petitioner submits that this Court, and not merely one district trial judge out of fifteen or more, should choose between the cases, and set the policy for the District of Columbia. This Circuit is not bound by the ruling of any other circuit. The Supreme Court of the United States has not really spoken upon the subject. On page 868 of Judge Weinfeld's opinion he mentioned that In Re Oliver, 333 U.S. 257, referred to "reports," but hastened to state:

" * * * There, the Court was discussing grand juries generally. The power to issue reports and the question here posed was not before the Court."

In footnote 19 on page 7 of respondent's opinion he quotes from Congressman Poff on page H9707 of the Congressional Record of October 7, 1970. There the Congressman cited two Supreme Court cases as authority for the right of grand juries to issue reports -- Hannah v. Larche, 363 U.S. 420, 449 and Jenkins v. McKeithen, 395 U.S. 411, 430. In the former case the Court, in referring to the power of grand juries "to indict and report," was doing exactly what Judge Weinfeld said the Court was doing in In Re Oliver; and the latter case merely quoted from Hannah in the same general sense. */

Petitioner accepts the challenge of respondent to deal broadly with Rule 6(e), namely, the judicial discretion involved which may permit the rule to be pushed beyond its literal limits. It is this judicial discretion or abuse thereof which is the nexus between the three issues outlined above.

*/ 18 U.S.C. 3331-4 do not apply to regular grand juries.

Should the report be received and delivered to the House Committee, and should the rule be stretched, if the cost deprives petitioner and his co-defendants of a fair trial. For, as stated above, the jeopardy of not receiving a fair trial embraces all the vital signs of this controversy.

Well did respondent realize that the exercise of a sound discretion lay at the foundation of the problem. He inquired whether the release could not come after the trial of petitioner and his co-defendants. This is what Chief Judge Bryan did in In Re Petition for Disclosure of Evidence, 184 F. Supp. 38 (E.D. Va., 1960), cited by respondent at the top of page 13 of his opinion. But respondent brushes this apprehension aside on the ground that it is sheer speculation that leaks will occur. Any sophisticated person knows that "leaks" are a way of life in Washington. Committee counsel could not guarantee that leaks would not occur, and it was recognized that such "leaks" could be prejudicial to petitioner and his co-defendants. See Exhibit D hereto, the Committee's "Procedures for Handling Impeachment Inquiry Material," where it is provided that a majority of the Committee can vote to make such material public.

This brings us back to the wisdom -- discretion -- of a trial judge to release safely-locked up materials in the hands of the grand jury into potentially the public domain. No one questions that the possession of such materials by the

grand jury is a guarantee against leakage, and thus will not adversely affect a fair trial, but permitting the grand jury to turn them loose to the House Committee -- judicial proceeding or no judicial proceeding -- creates a risk of exposure before trial that cannot be guaranteed against. This is an unnecessary exercise of discretion -- an unnecessary abuse. This is exactly what was held in In the Matter of the Application of Deborah Johnson and others, decided by the Seventh Circuit on August 3, 1973 (yet unreported) and attached to Mr. Lacovara's letter of March 8 to respondent, (Exhibit E to this petition). There it is apparent that the district judge and the court of appeals would have exercised a discretion not to permit the release of a grand jury report (even in a jurisdiction which sanctioned them) if the petitioning individuals were under indictment for activities related to the matters discussed in the report. The Court of Appeals stated:


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


In the case at bar, illegal activity is charged against the petitioner and his co-defendants; they are indicted; and they are facing trial. These are the usual reasons, said the Seventh Circuit, to protect those individuals charged with crime.

While respondent cites this case on pages 7-8 of his opinion, his emphasis is placed elsewhere.

said report and return it to the Grand Jury.

(c) And for such other and further relief as to the Court shall seem just and proper.


JOHN J. WILSON


FRANK H. STRICKLER

Attorneys for Petitioner
Address: 815 - 15th St., N.W.
Washington, D.C. 20005
Tel. No. 638-0465

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 1974, I delivered copies of the foregoing Petition and its several attachments (except Exhibit C -- the hearing transcript) to the Chambers of Respondent, Hon. John J. Sirica, and to Philip A. Lacovara, Esq. Counsel to the Special Watergate Prosecutors, 1425 K Street, N.W., Washington, D.C. 20005, and mailed, first class mail, postage prepaid, copies to the following counsel:

James D. St. Clair, Esq.
Attorney for the President
White House
Washington, D.C.

John Doar, Esq. and
Albert Jenner, Esq.
Counsel to the House Judiciary Committee
House Office Building
Washington, D.C. 20515

Sidney Dickstein, Esq.
Attorney for defendant Colson
1735 New York Ave., N.W.
Washington, D.C. 20006

John M. Bray, Esq.
Attorney for defendant Strachan
1815 H Street, N.W.
Washington, D.C. 20006

William G. Hundley, Esq.
Attorney for defendant Mitchell
1709 New York Avenue, #205
Washington, D.C. 20006

Jacob A. Stein, Esq.
Attorney for defendant Parkinson
Ring Building
Washington, D.C. 20036

Thomas C. Green, Esq.
Attorney for defendant Mardian
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Jim Socorro

UNITED STATES OF AMERICA

v.

JOHN N. MITCHELL, HARRY R.
HALDEMAN, JOHN D. EHRLICHMAN,
CHARLES W. COLSON, ROBERT C.
MARDIAN, KENNETH W. PARKINSON,
and GORDON STRACHAN,

Defendants.

Criminal No.

Violation of 18 U.S.C.
§§ 371, 1001, 1503, 1621,
and 1623 (conspiracy,
false statements to a
government agency, ob-
struction of justice,
perjury and false
declarations.)

INDICTMENT

EX-A

The Grand Jury charges:

Introduction

1. On or about June 17, 1972, Bernard L. Barker, Virgilio R. Gonzalez, Eugenio R. Martinez, James W. McCord, Jr. and Frank L. Sturgis were arrested in the offices of the Democratic National Committee, located in the Water-gate office building, Washington, D. C., while attempting to photograph documents and repair a surreptitious elec-tronic listening device which had previously been placed in those offices unlawfully.

2. At all times material herein, the United States Attorney's Office for the District of Columbia and the Federal Bureau of Investigation were parts of the De-partment of Justice, a department and agency of the United States, and the Central Intelligence Agency was an agency of the United States.

3. Beginning on or about June 17, 1972, and con-tinuing up to and including the date of the filing of this

indictment, the Federal Bureau of Investigation and the United States Attorney's Office for the District of Columbia were conducting an investigation, in conjunction with a Grand Jury of the United States District Court for the District of Columbia which had been duly empanelled and sworn on or about June 5, 1972, to determine whether violations of 18 U.S.C. 371, 2511 and 22 D.C. Code 1801(b), and of other statutes of the United States and of the District of Columbia, had been committed in the District of Columbia and elsewhere, and to identify the individual or individuals who had committed, caused the commission of, and conspired to commit such violations.

4. On or about September 15, 1972, in connection with the said investigation, the Grand Jury returned an indictment in Criminal Case No. 1827-72 in the United States District Court for the District of Columbia charging Bernard L. Barker, Virgilio R. Gonzalez, E. Howard Hunt, Jr., G. Gordon Liddy, Eugenio R. Martinez, James W. McCord, Jr., and Frank L. Sturgis with conspiracy, burglary and unlawful endeavor to intercept wire communications.

5. From in or about January 1969, to on or about March 1, 1972, JOHN N. MITCHELL, the DEFENDANT, was Attorney General of the United States. From on or about April 9, 1972, to on or about June 30, 1972, he was Campaign Director of the Committee to Re-Elect the President.

6. At all times material herein up to on or about April 30, 1973, HARRY R. HALDEMAN, the DEFENDANT, was Assistant to the President of the United States.

7. At all times material herein up to on or about April 30, 1973, JOHN D. EHRLICHMAN, the DEFENDANT, was Assistant for Domestic Affairs to the President of the United States.

8. At all times material herein up to on or about March 10, 1973, CHARLES W. COLSON, the DEFENDANT, was Special Counsel to the President of the United States.

9. At all times material herein, ROBERT C. MARDIAN, the DEFENDANT, was an official of the Committee to Re-Elect the President.

10. From on or about June 21, 1972, and at all times material herein, KENNETH W. PARKINSON, the DEFENDANT, was an attorney representing the Committee to Re-Elect the President.

11. At all times material herein up to in or about November 1972, GORDON STRACHAN, the DEFENDANT, was a Staff Assistant to HARRY R. HALDEMAN at the White House. Thereafter he became General Counsel to the United States Information Agency.

COUNT ONE

12. From on or about June 17, 1972, up to and including the date of the filing of this indictment, in the District of Columbia and elsewhere, JOHN N. MITCHELL, HARRY R. HALDEMAN, JOHN D. EHRLICHMAN, CHARLES W. COLSON, ROBERT C. MARDIAN, KENNETH W. PARKINSON and GORDON STRACHAN, the DEFENDANTS, and other persons to the Grand Jury known and unknown, unlawfully, willfully and knowingly did combine, conspire, confederate and agree together and with each other, to

commit offenses against the United States, to wit, to obstruct justice in violation of Title 18, United States Code, Section 1503, to make false statements to a government agency in violation of Title 18, United States Code, Section 1001, to make false declarations in violation of Title 18, United States Code, Section 1623, and to defraud the United States and Agencies and Departments thereof, to wit, the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI), and the Department of Justice, of the Government's right to have the officials of these Departments and Agencies transact their official business honestly and impartially, free from corruption, fraud, improper and undue influence, dishonesty, unlawful impairment and obstruction, all in violation of Title 18, United States Code, Section 371.

13. It was a part of the conspiracy that the conspirators would corruptly influence, obstruct and impede, and corruptly endeavor to influence, obstruct and impede, the due administration of justice in connection with the investigation referred to in paragraph three (3) above and in connection with the trial of Criminal Case No. 1827-72 in the United States District Court for the District of Columbia, for the purpose of concealing and causing to be concealed the identities of the persons who were responsible for, participated in, and had knowledge of (a) the activities which were the subject of the investigation and trial, and (b) other illegal and improper activities.

14. It was further a part of the conspiracy that the conspirators would knowingly make and cause to be made false statements to the FBI and false material statements and declarations under oath in proceedings before and ancillary to the Grand Jury and a Court of the United States, for the purposes stated in paragraph thirteen (13) above.

15. It was further a part of the conspiracy that the conspirators would, by deceit, craft, trickery and dishonest means, defraud the United States by interfering with and obstructing the lawful governmental functions of the CIA, in that the conspirators would induce the CIA to provide financial assistance to persons who were subjects of the investigation referred to in paragraph three (3) above, for the purposes stated in paragraph thirteen (13) above.

16. It was further a part of the conspiracy that the conspirators would, by deceit, craft, trickery and dishonest means, defraud the United States by interfering with and obstructing the lawful governmental functions of the FBI and the Department of Justice, in that the conspirators would obtain and attempt to obtain from the FBI and the Department of Justice information concerning the investigation referred to in paragraph three (3) above, for the purposes stated in paragraph thirteen (13) above.

17. Among the means by which the conspirators would carry out the aforesaid conspiracy were the following:

(a) The conspirators would direct G. Gordon Liddy to seek the assistance of Richard G. Kleindienst, then Attorney General of the United States, in obtaining the release from the District of Columbia jail of one or more of the persons who had been arrested on June 17, 1972, in the offices of the Democratic National Committee in the Watergate office building in Washington, D. C., and G. Gordon Liddy would seek such assistance from Richard G. Kleindienst.

(b) The conspirators would at various times remove, conceal, alter and destroy, attempt to remove, conceal, alter and destroy, and cause to be removed, concealed, altered and destroyed, documents, papers, records and objects.

(c) The conspirators would plan, solicit, assist and facilitate the giving of false, deceptive, evasive and misleading statements and testimony.

(d) The conspirators would give false, misleading, evasive and deceptive statements and testimony.

(e) The conspirators would covertly raise, acquire, transmit, distribute and pay cash funds to and for the benefit of the defendants in Criminal Case No. 1827-72 in the United States District Court for the District

of Columbia, both prior to and subsequent to the return of the indictment on September 15, 1972.

(f) The conspirators would make and cause to be made offers of leniency, executive clemency and other benefits to E. Howard Hunt, Jr., G. Gordon Liddy, James W. McCord, Jr., and Jeb S. Magruder.

(g) The conspirators would attempt to obtain CIA financial assistance for persons who were subjects of the investigation referred to in paragraph three (3) above.

(h) The conspirators would obtain information from the FBI and the Department of Justice concerning the progress of the investigation referred to in paragraph three (3) above.

18. In furtherance of the conspiracy, and to effect the objects thereof, the following overt acts, among others, were committed in the District of Columbia and elsewhere:

OVERT ACTS

1. On or about June 17, 1972, JOHN N. MITCHELL met with ROBERT C. MARDIAN in or about Beverly Hills, California, and requested MARDIAN to tell G. Gordon Liddy to seek the assistance of Richard G. Kleindienst, then Attorney General of the United States, in obtaining the release of one or more of the persons arrested in connection with the Watergate break-in.

2. On or about June 18, 1972, in the District of Columbia, GORDON STRACHAN destroyed documents on the instructions of HARRY R. HALDEMAN.

3. On or about June 19, 1972, JOHN D. EHRLICHMAN met with John W. Dean, III, at the White House in the District of Columbia, at which time EHRLICHMAN directed Dean to tell G. Gordon Liddy that E. Howard Hunt, Jr., should leave the United States.

4. On or about June 19, 1972, CHARLES W. COLSON and JOHN D. EHRLICHMAN met with John W. Dean, III, at the White House in the District of Columbia, at which time EHRLICHMAN directed Dean to take possession of the contents of E. Howard Hunt, Jr.'s safe in the Executive Office Building.

5. On or about June 19, 1972, ROBERT C. MARDIAN and JOHN N. MITCHELL met with Jeb S. Magruder at MITCHELL's apartment in the District of Columbia, at which time MITCHELL suggested that Magruder destroy documents from Magruder's files.

6. On or about June 20, 1972, G. Gordon Liddy met with Fred C. LaRue and ROBERT C. MARDIAN at LaRue's apartment in the District of Columbia, at which time Liddy told LaRue and MARDIAN that certain "commitments" had been made to and for the benefit of Liddy and other persons involved in the Watergate break-in.

7. On or about June 24, 1972, JOHN N. MITCHELL and ROBERT C. MARDIAN met with John W. Dean, III, at 1701 Pennsylvania Avenue in the District of Columbia, at which time MITCHELL and MARDIAN suggested to Dean that the CIA be requested to provide covert funds for the assistance of the persons involved in the Watergate break-in.

8. On or about June 26, 1972, JOHN D. EHRLICHMAN met with John W. Dean, III, at the White House in the District of Columbia, at which time EHRLICHMAN approved a suggestion that Dean ask General Vernon A. Walters, Deputy Director of the CIA, whether the CIA could use covert funds to pay the bail and salaries of the persons involved in the Watergate break-in.

9. On or about June 28, 1972, JOHN D. EHRLICHMAN had a conversation with John W. Dean, III, at the White House in the District of Columbia, during which EHRLICHMAN approved the use of Herbert W. Kalmbach to raise cash funds with which to make covert payments to and for the benefit of the persons involved in the Watergate break-in.

10. On or about July 6, 1972, KENNETH W. PARKINSON had a conversation with William O. Bittman in or about the District of Columbia, during which PARKINSON told Bittman that "Rivers is OK to talk to."

11. On or about July 7, 1972, Anthony Ulasewicz delivered approximately \$25,000 in cash to William O. Bittman at 815 Connecticut Avenue, N. W., in the District of Columbia.

12. In or about mid-July, 1972, JOHN N. MITCHELL and KENNETH W. PARKINSON met with John W. Dean, III, at 1701 Pennsylvania Avenue, N. W. in the District of Columbia, at which time MITCHELL advised Dean to obtain FBI reports of the investigation into the Watergate break-in for PARKINSON and others.

13. On or about July 17, 1972, Anthony Ulasewicz delivered approximately \$40,000 in cash to Dorothy Hunt at Washington National Airport.

14. On or about July 17, 1972, Anthony Ulasewicz delivered approximately \$8,000 in cash to G. Gordon Liddy at Washington National Airport.

15. On or about July 21, 1972, ROBERT C. MARDIAN met with John W. Dean, III, at the White House in the District of Columbia, at which time MARDIAN examined FBI reports of the investigation concerning the Watergate break-in.

16. On or about July 26, 1972, JOHN D. EHRLICHMAN met with Herbert W. Kalmbach at the White House in the District of Columbia, at which time EHRLICHMAN told Kalmbach that Kalmbach had to raise funds with which to make payments to and for the benefit of the persons involved in the Watergate break-in, and that it was necessary to keep such fund raising and payments secret.

17. In or about late July or early August, 1972, Anthony Ulasewicz made a delivery of approximately \$43,000 in cash at Washington National Airport.

18. In or about late July or early August, 1972, Anthony Ulasewicz made a delivery of approximately \$18,000 in cash at Washington National Airport.

19. On or about August 29, 1972, CHARLES W. COLSON had a conversation with John W. Dean, III, during which Dean advised COLSON not to send a memorandum to the authorities investigating the Watergate break-in.

20. On or about September 19, 1972, Anthony Ulasewicz delivered approximately \$53,500 in cash to Dorothy Hunt at Washington National Airport.

21. On or about October 13, 1972, in the District of Columbia, Fred C. LaRue arranged for the delivery of approximately \$20,000 in cash to William O. Bittman.

22. On or about November 13, 1972, in the District of Columbia, E. Howard Hunt, Jr., had a telephone conversation with CHARLES W. COLSON, during which Hunt discussed with COLSON the need to make additional payments to and for the benefit of the defendants in Criminal Case No. 1827-72 in the United States District Court for the District of Columbia.

23. In or about mid-November, 1972, CHARLES W. COLSON met with John W. Dean, III, at the White House in the District of Columbia, at which time COLSON gave Dean a tape recording of a telephone conversation between COLSON and E. Howard Hunt, Jr.

24. On or about November 15, 1972, John W. Dean, III, met with JOHN D. EHRLICHMAN and HARRY R. HALDEMAN at Camp David, Maryland, at which time Dean played for EHRLICHMAN and HALDEMAN a tape recording of a telephone conversation between CHARLES W. COLSON and E. Howard Hunt, Jr.

25. On or about November 15, 1972, John W. Dean, III, met with JOHN N. MITCHELL in New York City, at which time Dean played for MITCHELL a tape recording of a telephone conversation between CHARLES W. COLSON and E. Howard Hunt, Jr.

26. On or about December 1, 1972, KENNETH W. PARKINSON met with John W. Dean, III, at the White House in the District of Columbia, at which time PARKINSON gave Dean a list of anticipated expenses of the defendants during the trial of Criminal Case No. 1827-72 in the United States District Court for the District of Columbia.

27. In or about early December, 1972, HARRY R. HALDEMAN had a telephone conversation with John W. Dean, III, during which HALDEMAN approved the use of a portion of a cash fund of approximately \$350,000, then being held under HALDEMAN's control, to make additional payments to and for the benefit of the defendants in Criminal Case No. 1827-72 in the United States District Court for the District of Columbia.

28. In or about early December, 1972, GORDON STRACHAN met with Fred C. LaRue at LaRue's apartment in the District of Columbia, at which time STRACHAN delivered approximately \$50,000 in cash to LaRue.

29. In or about early December, 1972, in the District of Columbia, Fred C. LaRue arranged for the delivery of approximately \$40,000 in cash to William O. Bittman.

30. On or about January 3, 1973, CHARLES W. COLSON met with JOHN D. EHRLICHMAN and John W. Dean, III, at the White House in the District of Columbia, at which time COLSON, EHRLICHMAN and Dean discussed the need to make assurances to E. Howard Hunt, Jr. concerning the length of time E. Howard Hunt, Jr. would have to spend in jail if he were convicted in Criminal Case No. 1827-72 in the United States District Court for the District of Columbia.

31. In or about early January, 1973, HARRY R. HALDEMAN had a conversation with John W. Dean, III, during which HALDEMAN approved the use of the balance of the cash fund referred to in Overt Act No. 27 to make additional payments to and for the benefit of the defendants in Criminal Case No. 1827-72 in the United States District Court for the District of Columbia.

32. In or about early January, 1973, GORDON STRACHAN met with Fred C. LaRue at LaRue's apartment in the District of Columbia, at which time STRACHAN delivered approximately \$300,000 in cash to LaRue.

33. In or about early January, 1973, JOHN N. MITCHELL had a telephone conversation with John W. Dean, III, during which MITCHELL asked Dean to have John C. Caulfield give an assurance of executive clemency to James W. McCord, Jr.

34. In or about mid-January, 1973, in the District of Columbia, Fred C. LaRue arranged for the delivery of approximately \$20,000 in cash to a representative of G. Gordon Liddy.

35. On or about February 11, 1973, in Rancho La Costa, California, JOHN D. EHRLICHMAN and HARRY R. HALDEMAN met with John W. Dean, III, and discussed the need to raise money with which to make additional payments to and for the benefit of the defendants in Criminal Case No. 1827-72 in the United States District Court for the District of Columbia.

36. In or about late February, 1973, in the District of Columbia, Fred C. LaRue arranged for the delivery of approximately \$25,000 in cash to William O. Bittman.

37. In or about late February, 1973, in the District of Columbia, Fred C. LaRue arranged for the delivery of approximately \$35,000 in cash to William O. Bittman.

38. On or about March 16, 1973, E. Howard Hunt, Jr., met with Paul O'Brien at 815 Connecticut Avenue, N. W. in the District of Columbia, at which time Hunt told O'Brien that Hunt wanted approximately \$120,000.

39. On or about March 19, 1973, JOHN D. EHRLICHMAN had a conversation with John W. Dean, III, at the White House in the District of Columbia, during which EHRLICHMAN told Dean to inform JOHN N. MITCHELL about the fact that E. Howard Hunt, Jr. had asked for approximately \$120,000.

40. On or about March 21, 1973, from approximately 11:15 a.m. to approximately noon, HARRY R. HALDEMAN and John W. Dean, III, attended a meeting at the White House in the District of Columbia, at which time there was a discussion about the fact that E. Howard Hunt, Jr. had asked for approximately \$120,000.

41. On or about March 21, 1973, at approximately 12:30 p.m., HARRY R. HALDEMAN had a telephone conversation with JOHN N. MITCHELL.

42. On or about the early afternoon of March 21, 1973, JOHN N. MITCHELL had a telephone conversation with Fred C. LaRue during which MITCHELL authorized LaRue to make a payment of approximately \$75,000 to and for the benefit of E. Howard Hunt, Jr.

43. On or about the evening of March 21, 1973, in the District of Columbia, Fred C. LaRue arranged for the delivery of approximately \$75,000 in cash to William O. Bittman.

44. On or about March 22, 1973, JOHN D. EHRLICHMAN, HARRY R. HALDEMAN, and John W. Dean, III, met with JOHN N. MITCHELL at the White House in the District of Columbia, at which time MITCHELL assured EHRLICHMAN that E. Howard Hunt, Jr. was not a "problem" any longer.

45. On or about March 22, 1973, JOHN D. EHRLICHMAN had a conversation with Egil Krogh at the White House in the District of Columbia, at which time EHRLICHMAN assured Krogh that EHRLICHMAN did not believe that E. Howard Hunt, Jr. would reveal certain matters.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

1. From on or about June 17, 1972, up to and including the date of the filing of this indictment, in the District of Columbia, and elsewhere, JOHN N. MITCHELL, HARRY R. HALDEMAN, JOHN D. EHRLICHMAN, CHARLES W. COLSON, KENNETH W. PARKINSON and GORDON STRACHAN, the DEFENDANTS, unlawfully, willfully and knowingly did corruptly influence, obstruct and impede, and did corruptly endeavor to influence, obstruct and impede the due administration of justice in connection with an investigation being conducted by the Federal Bureau of Investigation and the United States Attorney's Office for the District of Columbia, in conjunction with a Grand Jury of the United States District Court for the District of Columbia, and in connection with the trial of Criminal Case No. 1827-72 in the United States District Court for the District of Columbia, by making cash payments and offers of other benefits to and for the benefit of the defendants in Criminal Case No. 1827-72 in the United States District Court for the District of Columbia, and to others, both prior to and subsequent to the return of the indictment on September 15, 1972, for the purpose of concealing and causing to be concealed the identities of the persons who were responsible for, participated in, and had knowledge of the activities which were the subject of the investigation and trial, and by other means.

(Title 18, United States Code, Sections 1503 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about July 5, 1972, in the District of Columbia, JOHN N. MITCHELL, the DEFENDANT, did knowingly and willfully make false, fictitious and fraudulent statements and representations to agents of the Federal Bureau of Investigation, Department of Justice, which Department was then conducting an investigation into a matter within its jurisdiction, namely, whether violations of 18 U.S.C. 371, 2511, and 22 D.C. Code 1801(b), and of other statutes of the United States and the District of Columbia, had been committed in the District of Columbia and elsewhere in connection with the break-in at the Democratic National Committee Headquarters at the Watergate office building on June 17, 1972, and to identify the individual or individuals who had committed, caused the commission of, and conspired to commit such violations, in that he stated that he had no knowledge of the break-in at the Democratic National Committee Headquarters other than what he had read in newspaper accounts of that incident.

(Title 18, United States Code, Section 1001.)

COUNT FOUR

The Grand Jury further charges:

1. On or about September 14, 1972, in the District of Columbia, JOHN N. MITCHELL, the DEFENDANT, having duly taken an oath that he would testify truthfully, and while testifying in a proceeding before the June, 1972 Grand Jury, a Grand Jury of the United States, duly empanelled and sworn in the United States District Court for the District of Columbia, did knowingly make false material declarations as hereinafter set forth.

2. At the time and place alleged, the June, 1972 Grand Jury of the United States District Court for the District of Columbia was conducting an investigation in conjunction with the United States Attorney's Office for the District of Columbia and the Federal Bureau of Investigation to determine whether violations of Title 18, United States Code, Sections 371, 2511, and 22 D.C. Code 1801(b), and of other statutes of the United States and of the District of Columbia had been committed in the District of Columbia and elsewhere, and to identify the individual or individuals who had committed, caused the commission of, and conspired to commit such violations.

3. It was material to the said investigation that the said Grand Jury ascertain the identity and motives of the individual or individuals who were responsible for, participated in, and had knowledge of unlawful entries into, and electronic surveillance of, the offices of the Democratic National Committee located in the Watergate office building in Washington, D. C., and related activities.

4. At the time and place alleged, JOHN N. MITCHELL, the DEFENDANT, appearing as a witness under oath at a proceeding before the said Grand Jury, did knowingly declare with respect to the material matters alleged in paragraph 3 as follows:

Q. Was there any program, to your knowledge, at the Committee, or any effort made to organize a covert or clandestine operation, basically, you know, illegal in nature, to get information or to gather intelligence about the activities of any of the Democratic candidates for public office or any activities of the Democratic Party?

A. Certainly not, because, if there had been, I would have shut it off as being entirely non-productive at that particular time of the campaign.

* * *

Q. Did you have any knowledge, direct or indirect, of Mr. Liddy's activities with respect to any intelligence gathering effort with respect to the activities of the Democratic candidates or its Party?

A. None whatsoever, because I didn't know there was anything going on of that nature, if there was. So I wouldn't anticipate having heard anything about his activities in connection with it.

5. The underscored portions of the declarations quoted in paragraph 4, made by JOHN N. MITCHELL, the DEFENDANT, were material to the said investigation and, as he then and there well knew, were false.

(Title 18, United States Code, Section 1623.)

COUNT FIVE

The Grand Jury further charges:

1. On or about April 20, 1973, in the District of Columbia, JOHN N. MITCHELL, the DEFENDANT, having duly taken an oath that he would testify truthfully, and while testifying in a proceeding before the June, 1972 Grand Jury, a Grand Jury of the United States, duly empanelled and sworn in the United States District Court for the District of Columbia, did knowingly make false material declarations as hereinafter set forth.

2. At the time and place alleged, the June, 1972 Grand Jury of the United States District Court for the District of Columbia was conducting an investigation in conjunction with the United States Attorney's Office for the District of Columbia and the Federal Bureau of Investigation to determine whether violations of Title 18, United States Code, Sections 371, 2511, and 22 D.C. Code 1801(b), and of other statutes of the United States and of the District of Columbia had been committed in the District of Columbia and elsewhere, and to identify the individual or individuals who had committed, caused the commission of, and conspired to commit such violations.

3. It was material to the said investigation that the said Grand Jury ascertain the identity and motives of the individual or individuals who were responsible for, participated in, and had knowledge of efforts to conceal, and to cause to be concealed information relating to unlawful entries into, and electronic surveillance of, the offices of the Democratic National Committee located in the Watergate office building in Washington, D. C., and related activities.

4. At the time and place alleged, JOHN N. MITCHELL, the DEFENDANT, appearing as a witness under oath at a proceeding before the said Grand Jury, did knowingly declare with respect to the material matters alleged in paragraph 3 as follows:

Q. Did Mr. LaRue tell you that Mr. Liddy had confessed to him?

A. No, I don't recall that, no.

Q. Did Mr. Mardian tell you that he'd confessed to him?

A. No.

Q. Do you deny that?

A. Pardon me?

Q. Do you deny that?

A. I have no recollection of that.

* * *

Q. So Mr. Mardian did not report to you that Mr. Liddy had confessed to him?

A. Not to my recollection, Mr. Glanzer.

Q. That would be something that you would remember, if it happened, wouldn't you?

A. Yes, I would.

* * *

Q. I didn't ask you that. I asked you were you told by either Mr. Mardian or Mr. LaRue or anybody else, at the Committee, prior to June 28th, 1972, that Mr. Liddy had told them that he was involved in the Watergate break-in?

A. I have no such recollection.

5. The underscored portions of the declarations quoted in paragraph 4, made by JOHN N. MITCHELL, the DEFENDANT, were material to the said investigation and, as he then and there well knew, were false.

(Title 18, United States Code, Section 1623.)

COUNT SIX

The Grand Jury further charges:

1. On or about July 10 and July 11, 1973, in the District of Columbia, JOHN N. MITCHELL, the DEFENDANT, having duly taken an oath before a competent tribunal, to wit, the Select Committee on Presidential Campaign Activities, a duly created and authorized Committee of the United States Senate conducting official hearings and inquiring into a matter in which a law of the United States authorizes an oath to be administered, that he would testify truly, did willfully, knowingly and contrary to such oath state material matters hereinafter set forth which he did not believe to be true.

2. At the time and place alleged, the said Committee was conducting an investigation and study, pursuant to the provisions of Senate Resolution 60 adopted by the United States Senate on February 7, 1973, of the extent, if any, to which illegal, improper or unethical activities were engaged in by any persons, acting either individually or in combination with others, in the presidential election of 1972, or in any related campaign or canvass conducted by or in behalf of any person seeking nomination or election as the candidate of any political party for the office of President of the United States in such election, for the purpose of determining whether in its judgment any occurrences which might be revealed by the investigation and study indicated the necessity or desirability of the enactment of new legislation to safeguard the electoral process by which the President of the United States is chosen.

3. It was material to the said investigation and study that the said Committee ascertain the identity and motives of the individual or individuals who were responsible for, participated in, and had knowledge of efforts to conceal, and to cause to be concealed information relating to (a) unlawful entries into, and electronic surveillance of, the offices of the Democratic National Committee located in the Watergate office building in Washington, D. C., and (b) related activities, through such means as the destruction of documents and other evidence of said facts.

4. At the times and place alleged, JOHN N. MITCHELL, the DEFENDANT, appearing as a witness under oath before the said Committee, did willfully and knowingly state with respect to the material matters alleged in paragraph 3 as follows:

July 10, 1973:

Mr. Dash. Was there a meeting in your apartment on the evening that you arrived in Washington on June 19, attended by Mr. LaRue, Mr. Mardian, Mr. Dean, Mr. Magruder --

Mr. Mitchell. Magruder and myself, that is correct.

Mr. Dash. Do you recall the purpose of that meeting, the discussion that took place there?

Mr. Mitchell. I recall that we had been traveling all day and, of course, we had very little information about what the current status was of the entry of the Democratic National Committee, and we met at the apartment to discuss it. They were, of course, clamoring for a response from the Committee because of Mr. McCord's involvement, etc., etc., and we had quite a general discussion of the subject matter.

Mr. Dash. Do you recall any discussion of the so-called either Gemstone files or wire-tapping files that you had in your possession?

Mr. Mitchell. No, I had not heard of the Gemstone files as of that meeting and, as of that date, I had not heard that anybody there at that particular meeting knew of the wire-tapping aspects of that or had any connection with it.

July 11, 1973:

Senator Weicker. Now, on June 19, Mr. Magruder has testified and Mr. LaRue has stated that Mr. Mitchell, that you instructed Magruder to destroy the Gemstone files, to in fact, have a bonfire with them.

* * *

Senator Weicker. Did you suggest that any documents be destroyed, not necessarily Gemstone.

Mr. Mitchell. To the best of my recollection.

Senator Weicker. At the June 19 meeting at your apartment?

Did you suggest that any documents be destroyed, not necessarily Gemstone or not necessarily documents that relate to electronic surveillance?

Mr. Mitchell. To the best of my recollection when I was there there was no such discussion of the destruction of any documents. That was not the type of a meeting we were having.

5. The underscored portions of the declarations quoted in paragraph 4, made by JOHN N. MITCHELL, the DEFENDANT, were material to the said investigation and study and, as he then and there well knew, were false.

(Title 18, United States Code, Section 1621.)

COUNT SEVEN

The Grand Jury further charges:

1. On or about July 30, 1973, in the District of Columbia, HARRY R. HALDEMAN, the DEFENDANT, having duly taken an oath before a competent tribunal, to wit, the Select Committee on Presidential Campaign Activities, a duly created and authorized Committee of the United States Senate conducting official hearings and inquiring into a matter in which a law of the United States authorizes an oath to be administered, that he would testify truly, did willfully, knowingly and contrary to such oath state material matters hereinafter set forth which he did not believe to be true.

2. At the time and place alleged, the said Committee was conducting an investigation and study, pursuant to the provisions of Senate Resolution 60 adopted by the United States Senate on February 7, 1973, of the extent, if any, to which illegal, improper or unethical activities were engaged in by any persons, acting either individually or in combination with others, in the presidential election of 1972, or in any related campaign or canvass conducted by or in behalf of any person seeking nomination or election as the candidate of any political party for the office of President of the United States in such election, for the purpose of determining whether in its judgment any occurrences which might be revealed by the investigation and study indicated the necessity or desirability of the enactment of new legislation to safeguard the electoral process by which the President of the United States is chosen.

3. It was material to the said investigation and study that the said Committee ascertain the identity and motives of the individual or individuals who were responsible for, participated in, and had knowledge of efforts to conceal, and to cause to be concealed, information relating to (a) unlawful entries into, and electronic surveillance of, the offices of the Democratic National Committee located in the Watergate office building in Washington, D. C. and (b) related activities, through such means as the payment and promise of payment of money and other things of value to participants in these activities and to their families.

4. At the time and place alleged, HARRY R. HALDEMAN, the DEFENDANT, appearing as a witness under oath before the said Committee, did willfully and knowingly state with respect to the material matters alleged in paragraph 3 as follows:

I was told several times, starting in the summer of 1972, by John Dean and possibly also by John Mitchell that there was a need by the committee for funds to help take care of the legal fees and family support of the Watergate defendants. The committee apparently felt obliged to do this.

* * *

Since all information regarding the defense funds was given to me by John Dean, the counsel to the President, and possibly by John Mitchell, and since the arrangements for Kalmbach's collecting funds and for transferring the \$350,000 cash fund were made by John Dean, and since John Dean never stated at the time that the funds would be used for any other than legal legal [sic] and proper purposes, I had no reason to question the propriety or legality of the process of delivering the \$350,000 to the committee via LaRue or of having Kalmbach raise funds.

I have no personal knowledge of what was done with the funds raised by Kalmbach or with the \$350,000 that was delivered by Strachan to LaRue.

It would appear that, at the White House at least, John Dean was the only one who knew that the funds were for "hush money", if, in fact, that is what they were for. The rest of us relied on Dean and all thought that what was being done was legal and proper. No one, to my knowledge, was aware that these funds involved either blackmail or "hush money" until this suggestion was raised in March of 1973.

5. The underscored portion of the statements quoted in paragraph 4, made by HARRY R. HALDEMAN, the DEFENDANT, was material to the said investigation and study and, as he then and there well knew, was false.

(Title 18, United States Code, Section 1621.)

COUNT EIGHT

The Grand Jury further charges:

1. On or about July 30 and July 31, 1973, in the District of Columbia, HARRY R. HALDEMAN, the DEFENDANT, having duly taken an oath before a competent tribunal, to wit, the Select Committee on Presidential Campaign Activities, a duly created and authorized Committee of the United States Senate conducting official hearings and inquiring into a matter in which a law of the United States authorizes an oath to be administered, that he would testify truly, did willfully, knowingly and contrary to such oath state material matters hereinafter set forth which he did not believe to be true.

2. At the times and place alleged, the said Committee was conducting an investigation and study, pursuant to the provisions of Senate Resolution 60 adopted by the United States Senate on February 7, 1973, of the extent, if any, to which illegal, improper or unethical activities were engaged in by any persons, acting either individually or in combination with others, in the presidential election of 1972, or in any related campaign or canvass conducted by or in behalf of any person seeking nomination or election as the candidate of any political party for the office of President of the United States in such election, for the purpose of determining whether in its judgment any occurrences which might be revealed by the investigation and study indicated the necessity or desirability of the enactment of new legislation to safeguard the electoral process by which the President of the United States is chosen.

3. It was material to the said investigation and study that the said Committee ascertain the identity and motives of the individual or individuals who were responsible for, participated in, and had knowledge of efforts to conceal, and to cause to be concealed, information relating to (a) unlawful entries into, and electronic surveillance of, the offices of the Democratic National Committee located in the Watergate office building in Washington, D. C., and (b) related activities, through such means as the payment and promise of payment of money and other things of value to participants in these activities and to their families.

4. At the times and place alleged, HARRY R. HALDEMAN, the DEFENDANT, appearing as a witness under oath before the said Committee, did willfully and knowingly state with respect to the material matters alleged in paragraph 3 as follows:

July 30, 1973:

I was present for the final 40 minutes of the President's meeting with John Dean on the morning of March 21. While [sic] I was not present for the first hour of the meeting, I did listen to the tape of the entire meeting.

Following is the substance of that meeting to the best of my recollection.

* * *

He[Dean] also reported on a current Hunt blackmail threat. He said Hunt was demanding \$120,000 or else he would tell about the seamy things he had done for Ehrlichman. The President pursued this in considerable detail, obviously trying to smoke out what was really going on. He led Dean on regarding the process and what he would recommend doing. He asked such things as -- "Well, this is the thing you would recommend? we ought to do this? is that

right?" and he asked where the money would come from? how it would be delivered? and so on. He asked how much money would be involved over the years and Dean said "probably a million dollars -- but the problem is that it is hard to raise." The President said "there is no problem in raising a million dollars, we can do that, but it would be wrong."

July 31, 1973:

Senator Baker. . . . What I want to point out to you is that one statement in your addendum seems to me to be of extraordinary importance and I want to test the accuracy of your recollection and the quality of your note-taking from those tapes, and I am referring to the last, next to the last, no, the third from the last sentence on page 2, "The President said there is no problem in raising a million dollars. We can do that but it would be wrong."

Now, if the period were to follow after "We can do that", it would be a most damning statement. If, in fact, the tapes clearly show he said "but it would be wrong," it is an entirely different context. Now, how sure are you, Mr. Haldeman, that those tapes, in fact say that?

Mr. Haldeman. I am absolutely positive that the tapes --

Senator Baker. Did you hear it with your own voice?

Mr. Haldeman. With my own ears, yes.

Senator Baker. I mean with your own ears. Was there any distortion in the quality of the tape in that respect?

Mr. Haldeman. No, I do not believe so.

* * *

Senator Ervin. Then the tape said that the President said that there was no problem raising a million dollars.

Mr. Haldeman. Well, I should put that the way it really came, Mr. Chairman, which was that Dean said when the President said how much money are you talking about here and Dean said over a period of years probably a million dollars, but it would be very hard -- it is very hard to raise that money. And the President said

it is not hard to raise it. We can raise a million dollars. And then got into the question of, in the one case before I came into the meeting making a statement that it would be wrong and in other exploration of this getting into the -- trying to find out what Dean was talking about in terms of a million dollars.

Senator Ervin. Can you point -- are you familiar with the testimony Dean gave about his conversations on the 13th and the 21st of March with the President?

Mr. Haldeman. I am generally familiar with it, yes, sir.

Senator Ervin. Well, this tape corroborates virtually everything he said except that he said that the President could be -- that the President said there would be no difficulty about raising the money and you say the only difference in the tape is that the President also added that but that would be wrong.

Mr. Haldeman. And there was considerable other discussion about what you do, what Dean would recommend, what should be done, how -- what this process is and this sort of thing. It was a very -- there was considerable exploration in the area.

5. The underscored portions of the statements quoted in paragraph 4, made by HARRY R. HALDEMAN, the DEFENDANT, were material to the said investigation and study and, as he then and there well knew, were false.

(Title 18, United States Code, Section 1621.)

COUNT NINE

The Grand Jury further charges:

1. On or about August 1, 1973, in the District of Columbia, HARRY R. HALDEMAN, the DEFENDANT, having duly taken an oath before a competent tribunal, to wit, the Select Committee on Presidential Campaign Activities, a duly created and authorized Committee of the United States Senate conducting official hearings and inquiring into a matter in which a law of the United States authorizes an oath to be administered, that he would testify truly, did willfully, knowingly and contrary to such oath state material matters hereinafter set forth which he did not believe to be true.

2. At the time and place alleged, the said Committee was conducting an investigation and study, pursuant to the provisions of Senate Resolution 60 adopted by the United States Senate on February 7, 1973, of the extent, if any, to which illegal, improper or unethical activities were engaged in by any persons, acting either individually or in combination with others, in the presidential election of 1972, or in any related campaign or canvass conducted by or in behalf of any person seeking nomination or election as the candidate of any political party for the office of President of the United States in such election, for the purpose of determining whether in its judgment any occurrences which might be revealed by the investigation and study indicated the necessity or desirability of the enactment of new legislation to safeguard the electoral process by which the President of the United States is chosen.

3. It was material to the said investigation and study that the said Committee ascertain the identity and motives of the individual or individuals who were responsible for, participated in, and had knowledge of efforts to conceal, and to cause to be concealed, information relating to (a) unlawful entries into, and electronic surveillance of, the offices of the Democratic National Committee located in the Watergate office building in Washington, D. C., and (b) related activities, through such means as the commission of perjury and subornation of perjury.

4. At the time and place alleged, HARRY R. HALDEMAN, the DEFENDANT, appearing as a witness under oath before the said Committee, did willfully and knowingly state with respect to the material matters alleged in paragraph 3 as follows:

Senator Gurney. Let's turn to the March 21 meeting.

* * *

Senator Gurney. Do you recall any discussion by Dean about Magruder's false testimony before the Grand Jury?

Mr. Haldeman. There was a reference to his feeling that Magruder had known about the Watergate planning and break-in ahead of it, in other words, that he was aware of what had gone on at Watergate. I don't believe there was any reference to Magruder committing perjury.

5. The underscored portion of the statements quoted in paragraph 4, made by HARRY R. HALDEMAN, the DEFENDANT, was material to the said investigation and study and, as he then and there well knew, was false.

(Title 18, United States Code, Section 1621.)

COUNT TEN

The Grand Jury further charges:

On or about July 21, 1973, in the District of Columbia, JOHN D. EHRLICHMAN, the DEFENDANT, did knowingly and willfully make false, fictitious and fraudulent statements and representations to agents of the Federal Bureau of Investigation, Department of Justice, which Department was then conducting an investigation into a matter within its jurisdiction, namely, whether violations of 18 U.S.C. 371, 2511, and 22 D.C. Code 1801(b), and of other statutes of the United States and the District of Columbia, had been committed in the District of Columbia and elsewhere in connection with the break-in at the Democratic National Committee Headquarters at the Watergate office building on June 17, 1972, and to identify the individual or individuals who had committed, caused the commission of, and conspired to commit such violations, in that he stated that he had neither received nor was he in possession of any information relative to the break-in at the Democratic National Committee Headquarters on June 17, 1972, other than what he had read, in the way of newspaper accounts of that incident.

(Title 18, United States Code, Section 1001.)

COUNT ELEVEN

The Grand Jury further charges:

1. On or about May 3, and May 9, 1973, in the District of Columbia, JOHN D. EHRLICHMAN, the DEFENDANT, having duly taken an oath that he would testify truthfully, and while testifying in a proceeding before the June, 1972 Grand Jury, a Grand Jury of the United States, duly empanelled and sworn in the United States District Court for the District of Columbia, did knowingly make false material declarations as hereinafter set forth.

2. At the times and place alleged, the June, 1972 Grand Jury of the United States District Court for the District of Columbia was conducting an investigation in conjunction with the United States Attorney's Office for the District of Columbia and the Federal Bureau of Investigation to determine whether violations of Title 18, United States Code, Sections 371, 2511, and 22 D.C. Code 1801(b), and of other statutes of the United States and of the District of Columbia had been committed in the District of Columbia and elsewhere, and to identify the individual or individuals who had committed, caused the commission of, and conspired to commit such violations.

3. It was material to the said investigation that the said Grand Jury ascertain the identity and motives of the individual or individuals who were responsible for, participated in, and had knowledge of efforts to conceal, and to cause to be concealed, information relating to unlawful entries into, and electronic surveillance of, the offices of the Democratic National Committee located in the Watergate office building in Washington, D.C., and related activities.

4. At the times and place alleged, JOHN D. EHRLICHMAN, the DEFENDANT, appearing as a witness under oath at a proceeding before the said Grand Jury, did knowingly declare with respect to the material matters alleged in paragraph 3 as follows:

May 3, 1973:

Q. Mr. Ehrlichman, going back to that first week following the Watergate arrest, did you have any conversations besides those on Monday with Mr. Dean?

A. Yes, I did.

Q. Will you relate those to the ladies and gentlemen of the Grand Jury?

A. Well, I don't recall the content specifically of most of them. I know that I saw Mr. Dean because my log shows that he was in my office. I think it was four times that week, once in a large meeting -- excuse me, more than four times.

He was in alone twice on Monday, and in the large meeting that I have described. He was in twice alone on other occasions, and then he was in a meeting that I had with Pat Gray -- well, that was the following week. It was a span of seven days, within the span of seven days.

* * *

Q. All right. Now at any of those meetings with Mr. Dean, was the subject matter brought up of a person by the name of Gordon Liddy?

A. I can't say specifically one way or the other.

Q. So you can neither confirm nor deny that anything with respect to Mr. Liddy was brought up at any of those meetings, is that correct, sir?

A. I don't recall whether Mr. Liddy was being mentioned in the press and would have been the subject of an inquiry by somebody from the outside. If he would have, then it is entirely probable that his name came up.

Q. All right. Let's assume for a moment that Mr. Liddy's name did not in that first week arise in the press. Can you think of any other context in which his name came up, excluding any possible press problem with respect to the name of Liddy?

A. I have no present recollection of that having happened.

Q. So you can neither confirm nor deny whether or not the name of Gordon Liddy came up in the course of any conversation you had with Mr. Dean during that week, or for that matter with anyone else?

A. That's right, unless I had some specific event to focus on. Just to take those meetings in the abstract, I can't say that I have any recollection of that having happened in any of those.

Q. All right. Let's take the example of did anyone advise you, directly or indirectly, that Mr. Liddy was implicated or involved in the Watergate affair?

A. Well, they did at some time, and I don't know whether it was during that week or not.

Q. To the best of your recollection, when was that done, sir?

A. I'm sorry but I just don't remember.

Q. Well, who was it that advised you of that?

A. I think it was Mr. Dean, but I don't remember when he did it.

Q. Would it have been within a month of the investigation? Within three months of the investigation?

A. I'm sorry but I just don't know.

Q. You can't even say then whether it was within a week, a month, or three months? Is that correct, sir?

A. Well, I think it was fairly early on, but to say it was within a week or two weeks or something, I just don't know.

* * *

Q. Now Mr. Dean advised you that Mr. Liddy was implicated. Did you advise the United States Attorney or the Attorney General, or any other law enforcement agency immediately or at any time after?

A. No. I don't think it was private information at the time I heard it.

Q. Well, did you inquire to find out whether or not it was private information?

A. To the best of my recollection, when I first heard it it was not in the nature of exclusively known to Dean, or anything of that kind.

Q. Well, was it in the newspapers that he was involved?

A. I'm sorry. I just don't remember. It probably was, but I just don't recall.

Q. You mean the first time you found out from Mr. Dean that Liddy was involved, Mr. Ehrlichman, it was in the same newspaper or the newspapers that you yourself could have read?

A. No, no. I am telling you that I cannot remember the relationship of time, but my impression is that he was not giving me special information that was not available to other people.

A lot of Mr. Dean's information came out of the Justice Department apparently, and so I think the impression I had was whatever he was giving us by way of information was known to a number of other people. That's what I meant by special information.

May 9, 1973:

Q. When did you first become aware that Mr. Liddy was involved?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. Did you ever become aware of it?

A. Well, obviously I did, but I don't know when that was.

Q. Was it in June?

A. I say I don't know.

Q. Who told you?

A. I don't know.

Q. How did you learn it?

A. I don't recall.

5. The underscored portions of the declarations quoted in paragraph 4, made by JOHN D. EHRLICHMAN, the DEFENDANT, were material to the said investigation and, as he then and there well knew, were false.

(Title 18, United States Code, Section 1623.)

COUNT TWELVE

The Grand Jury further charges:

1. On or about May 3 and May 9, 1973, in the District of Columbia, JOHN D. EHRLICHMAN, the DEFENDANT, having duly taken an oath that he would testify truthfully, and while testifying in a proceeding before the June, 1972 Grand Jury, a Grand Jury of the United States, duly empanelled and sworn in the United States District Court for the District of Columbia, did knowingly make false material declarations as hereinafter set forth.

2. At the time and place alleged, the June, 1972 Grand Jury of the United States District Court for the District of Columbia was conducting an investigation in conjunction with the United States Attorney's Office for the District of Columbia and the Federal Bureau of Investigation to determine whether violations of Title 18, United States Code, Sections 371, 2511, and 22 D.C. Code 1801(b), and other statutes of the United States and of the District of Columbia had been committed in the District of Columbia and elsewhere, and to identify the individual or individuals who had committed, caused the commission of, and conspired to commit such violations.

3. It was material to the said investigation that the said Grand Jury ascertain the identity and motives of the individual or individuals who were responsible for, participated in, and had knowledge of efforts to conceal, and to cause to be concealed, information relating to unlawful entries into, and electronic surveillance of, the offices of

the Democratic National Committee located in the Watergate office building in Washington, D. C., and related activities.

4. At the times and place alleged, JOHN D. EHRLICHMAN, the DEFENDANT, appearing as a witness under oath at a proceeding before the said Grand Jury, did knowingly declare with respect to the material matters alleged in paragraph 3 as follows:

May 3, 1973:

Q. Now with respect to that, what further information did you receive that really related to this fundraising for the defendants and the defense counsel and their families?

A. I had a call from Mr. Kalmbach within four or five days to verify whether or not I had in fact talked to John Dean. I said that I had.

Q. This was a telephone call, sir?

A. I think it was. It may have been during a visit. I'm not sure. I used to see Mr. Kalmbach periodically about all kinds of things.

It may have been during a visit, but I think it was just a phone call.

He said substantially that John Dean had called me and said that I had no objection, and I said, "Herb, if you don't have any objection to doing it, I don't have any objection to your doing it, obviously."

He said, "No, I don't mind," and he went ahead.

* * *

Q. So far as you recall the only conversation that you recall is Mr. Kalmbach saying to you, "John Dean has asked me to do this," and you stated that you had no objection. He said that he was checking with you to determine whether you had any objection or not?

A. He was checking on Dean.

Q. On Dean?

A. Yes.

Q. And you said to him, "If you don't have any objection then I don't have any objection"?

A. Right.

Q. Was there any discussion between the two of you as to the purpose for which this money was to be raised?

A. I don't think so.

Q. Did you in any way approve the purpose for which this money was being given?

A. No, I don't think so. I don't recall doing so.

Q. Based on your testimony for the background of this, there would have been no basis for your approval or for you to affirm that?

A. That's right. That's why I say that I don't believe that I did.

Q. And your best recollection is that you did not?

A. That's right.

Q. Do you have any recollection of Mr. Kalmbach inquiring of you whether or not this was appropriate, sir?

A. Questioning me with respect to that?

Q. Yes.

A. No, I don't.

Q. He did not, to the best of your recollection?

A. I don't have any recollection of his doing so.

May 9, 1973:

Q. You had never expressed, say back six or seven months ago, to Mr. Kalmbach that the raising of the money should be kept as a secret matter, and it would be either political dynamite, or comparable words, if it ever got out, when Mr. Kalmbach came to see you?

A. No, I don't recall ever saying that.

5. The underscored portions of the declarations quoted in paragraph 4, made by JOHN D. EHRLICHMAN, the

DEFENDANT, were material to the said investigation and, as he then and there well knew, were false.

(Title 18, United States Code, Section 1623.)

COUNT THIRTEEN

The Grand Jury further charges:

1. On or about April 11, 1973, in the District of Columbia, GORDON STRACHAN, the DEFENDANT, having duly taken an oath that he would testify truthfully, and while testifying in a proceeding before the June, 1972 Grand Jury, a Grand Jury of the United States, duly empanelled and sworn in the United States District Court for the District of Columbia, did knowingly make false material declarations as hereinafter set forth.

2. At the time and place alleged, the June, 1972 Grand Jury of the United States District Court for the District of Columbia was conducting an investigation in conjunction with the United States Attorney's Office for the District of Columbia and the Federal Bureau of Investigation to determine whether violations of Title 18, United States Code, Sections 371, 2511, and 22 D.C. Code 1801(b), and of other statutes of the United States and of the District of Columbia had been committed in the District of Columbia and elsewhere, and to identify the individual or individuals who had committed, caused the commission of, and conspired to commit such violations.

3. It was material to the said investigation that the said Grand Jury ascertain the identity and motives of the individual or individuals who were responsible for, participated in, and had knowledge of efforts to conceal, and to cause to be concealed, information relating to unlawful entries into, and electronic surveillance of, the offices of the Democratic National Committee located in the Watergate office building in Washington, D.C., and related activities.

4. At the time and place alleged, GORDON STRACHAN, the DEFENDANT, appearing as a witness under oath at a proceeding before the said Grand Jury, did knowingly declare with respect to the material matters alleged in paragraph 3 as follows:

Q. Did you, yourself, ever receive any money from the Committee for the Re-election of the President, or from the finance committee to re-elect the President?

A. Yes, sir, I did.

Q. Can you tell the ladies and gentlemen of the Grand Jury about that?

A. Yes, sir. On April 6, 1972, I received \$350,000 in cash.

* * *

Q. From whom?

A. From Hugh Sloan.

* * *

Q. What was done with the money after you received it from Mr. Sloan on April 6th?

A. I put it in the safe.

Q. Was the money ever used?

A. Pardon?

Q. Was the money ever used?

A. No, the money was not used.

Q. To your knowledge, was it ever taken out of the safe?

A. No.

Q. To your knowledge, is it still there?

A. No, it is not.

Q. Where is it?

A. I returned it to the committee, at Mr. Haldeman's direction, at the end of November.

Q. November of '72?

A. Yes, '72, or early December.

* * *

Q. To whom did you return it?

A. To Fred LaRue.

Q. Where did that transfer take place?

A. I gave it to Mr. LaRue in his apartment.

* * *

Q. That was either late November or early December?

A. That's correct.

Q. Well, let me ask you this: Why would it have been given to Mr. LaRue at his apartment as opposed to being given to the Committee?

A. Well, Mr. LaRue is a member of the Committee and he just asked me to bring it by on my way home from work.

Q. After Mr. Haldeman told you to return the money, what did you do? Did you contact someone to arrange for the delivery?

A. Yes, I contacted Mr. LaRue.

Q. That was at Mr. Haldeman's suggestion or direction?

A. No.

Q. Why is it that you would have called Mr. LaRue?

A. I don't think Stans was in the country at that time. He was not available.

Q. What position did Mr. LaRue occupy that would have made you call him?

A. He was the senior campaign official.

Q. That's the only reason you called him?

A. That's correct.

Q. No one suggested you call him?

A. No.

* * *

Q. Was anyone present in Mr. LaRue's apartment at the hotel when you delivered the money to him?

A. No.

Q. Did you ever tell anyone to whom you had given the money? Did you report back to either Mr. Haldeman or anyone else that you had delivered the money and to whom you had delivered the money?

A. I don't think so. I could have mentioned that I had done it. When I received an order, I did it.

Q. Did you get a receipt for the money?

A. No, I did not.

Q. Did you ask for it?

A. No, I did not.

A JUROR: Why?

THE WITNESS: I did not give a receipt when I received the money, so I didn't ask for one when I gave it back.

* * *

A JUROR: Did someone count the money when it came in and when it went out, so they knew there were no deductions made from that \$350,000?

THE WITNESS: Yes, I counted the money when I received it, and I counted it when I gave it back.

A JUROR: You solely counted it; no one else was with you?

THE WITNESS: I counted it when I received it alone, and I counted it in front of Mr. LaRue when I gave it back.

A JUROR: You had that money in the White House for seven months and did nothing with it?

THE WITNESS: That's correct.

* * *

Q. So who told you to give it to Mr. LaRue?

A. I decided to give it to Mr. LaRue.

Q. On your own initiative?

A. That's correct.

Q. Who do you report to?

A. Mr. Haldeman.

Q. Did you report back to Mr. Haldeman that you gave it to Mr. LaRue?

A. No, I did not.

Q. You just kept this all to yourself?

A. He was a senior official at the campaign. I gave it back to him. He said he would account for it, and that was it.

Q. Who told you to go to Mr. LaRue and give him the money?

A. I decided that myself.

Q. Do you have a memo in your file relating to this incident?

A. No, I do not.

Q. Did you discuss this incident with anybody afterwards?

A. Yes, I told Mr. Haldeman afterwards that I had given the money to Mr. LaRue.

Q. What did he say to you?

A. Fine. He was a senior campaign official.

Q. What time of day was it that you gave it to Mr. LaRue?

A. In the evening, after work.

Q. Does the finance committee or the Committee to Re-elect the President conduct its business in Mr. LaRue's apartment?

A. No. It was a matter of courtesy. He's a senior official. He asked me to drop it by after work.

* * *

THE FOREMAN: Do you have any idea why Mr. LaRue asked you to return this money to his apartment, where actually you could just walk across 17th Street?

THE WITNESS: No, I do not.

THE FOREMAN: And you could have had the protection of the Secret Service guards with all that money, if you were afraid someone might snatch it from you.

THE WITNESS: I wouldn't ask for the Secret Service guards protection.

A JUROR: Why not?

THE WITNESS: They protect only the President and his family.

THE FOREMAN: Or the White House guards, whoever. I mean, I find it somewhat dangerous for a person to be carrying this amount of money in Washington, in the evening, and you accompanied by your brother, when it would have been much easier and handier just to walk across 17th Street.

THE WITNESS: I agree, and I was nervous doing it, but I did it.

* * *

THE FOREMAN: I'm still puzzled. You get the money from the treasurer or whatever Mr. Sloan's position was in the Committee -- shall we say on an official basis, between the disburser and you as the receiver, and the money sits in the safe for seven months; then Mr. Haldeman decides it has to go back to the Committee. You call Mr. LaRue -- you don't call Mr. Sloan and say "Hugh, seven months ago you gave me this \$350,000 and we haven't used any of it; I'd like to give it back to you since I got it from you", but you call Mr. LaRue.

THE WITNESS: Mr. Sloan was no longer with the Committee at that time.

THE FOREMAN: Well, whoever took Mr. Sloan's place.

THE WITNESS: Mr. Barrett took Mr. Sloan's place.

THE FOREMAN: Why didn't you call him?

THE WITNESS: I honestly don't know.

* * *

Q. When you got to Mr. LaRue's apartment was he expecting you?

A. Yes. I said I would be by.

Q. And no one was present when you were there?

A. No, sir.

Q. Was the money counted?

A. Yes, sir, I counted it.

* * *

A JUROR: It must have taken a long time to count that money.

THE WITNESS: It did. It took about 45 minutes. It takes a long time to count it.

* * *

Q. How did you carry this money?

A. In a briefcase.

Q. Did you take the briefcase back, or did you leave it?

A. No, I left the briefcase.

Q. Whose briefcase was it?

A. Gee, I think it was mine. I'm honestly not sure.

Q. Did you ever get the briefcase back?

A. I don't think so.

Q. Have you spoken to Mr. LaRue since that day?

A. No -- well, I ran into him at a party two weeks ago.

Q. Did you have a discussion?

A. No, just talked to him.

5. The underscored portions of the declarations quoted in paragraph 4, made by GORDON STRACHAN, the DEFENDANT, were material to the said investigation and, as he then and there well knew, were false.

(Title 18, United States Code, Section 1623.)

A TRUE BILL

LEON JAWORSKI
Special Prosecutor
Watergate Special Prosecution
Force

Foreman

§ 1503. Influencing or injuring officer, juror or witness generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

CHAPTER 79—PERJURY

Sec.

1621. Perjury generally.

1622. Subornation of perjury.

§ 1621. Perjury generally

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. June 25, 1948, c. 645, 62 Stat. 733; Oct. 3, 1964, Pub.L. 88-619, § 1, 78 Stat. 995.

Title 18, U.S.C., Section 1623

§ 1623. False declarations before grand jury or court

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Added Pub.L. 91-452, Title IV, § 401(a), Oct. 15, 1970, 84 Stat. 932.

CRIMES

1962 Amendment: Pub.L. 87-429, § 17
(d), Mar. 20, 1962, 76 Stat. 42, inserted
item 1027.

1951 Amendment: Act Oct. 31, 1951, c.
655, § 25, 65 Stat. 729, substituted, in item
1012, "Public Housing Administration"
for "United States Housing Authority".

Alien registration, fraud and false statements, see section 1305 of Title 5, Immigration and Nationality.
 Carriers' reports to Interstate Commerce Commission, false entries, see section 20(7) of Title 49, Transportation.
 China Trade, false or fraudulent statements prohibited, see section 133 of Title 5, Commerce and Trade.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or document shall be fined not more than \$10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

Reviser's Note. Based on Title 18, U. S.C., 1940 ed., § 89 (Mar. 4, 1909, c. 321, § 35, 35 Stat. 1005 [derived from R.S. § 5438; May 20, 1906 c. 255, 35 Stat. 553]; Oct. 23, 1918, c. 164, 40 Stat. 1018; June 18, 1934, c. 557, 48 Stat. 993; Apr. 4, 1933, c. 69, 52 Stat. 157).

Section 89 of Title 18, U.S.C., 1940 ed., was divided into two parts.

The provision relating to false claims was incorporated in section 287 of this title.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Words "or any corporation is a holder" in said section 89 were omitted as unnecessary in view of definition of "agency" in section 6 of this title.

In addition to minor changes in terminology, the maximum term of imprisonment was changed from 10 to 5 years to be consistent with comparable provisions (See reviser's note under section 2 of this title.) 80th Congress House Report No. 301.

Canal Zone. Applicability of laws to Canal Zone, see section 14 of this title.

Conspiracy to defraud—
Government in regard to false claims, see section 235 of this title.
United States, see section 371 of this title.
Education, section as applicable to National Defense Education Program, see section 581 of Title 20, Education.
False claims for—
Pensions, see section 250 of this title.
Postal losses, see section 255 of this section.
False entry or certificate by revenue officer or agent, see section 741.

Ch. 19	CONSPIRACY	18 § 371
Chapter		Sec.
102. Searches and seizures	-----	2231
111. Shipping	-----	2271
112. Stolen property	-----	2311
113. Treason, sedition and subversive activities	-----	2381
117. White slave traffic	-----	2421
Heading of chapter amended by Pub.L. 87-549, Oct. 23, 1962, 76 Stat. 1119 without carrying analysis.		
Heading of chapter amended by Pub.L. 86-710, Sept. 6, 1960, 74 Stat. 503 without carrying analysis.		

CHAPTER 19—CONSPIRACY

- Sec.
 371. Conspiracy to commit offense or to defraud United States.
 372. Conspiracy to impede or injure officer.

Library references: Conspiracy § 1 et seq.; C.J.S. Conspiracy § 1 et seq.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Historical and Revision Notes

Reviser's Note. Based on Title 18, U. S.C., 1940 ed., § 83, 204 (Mar. 4, 1909, c. 344, § 37, 35 Stat. 1095 [derived from R.S. § 3440]; Mar. 4, 1909, c. 321, § 175a, as added Sept. 27, 1944, c. 425, 58 Stat. 752).

This section consolidates said sections 83 and 204 of Title 18 U.S.C., 1940 ed.

To reflect the construction placed upon said section 83 by the courts the words "or any agency thereof" were inserted. See *Hass v. Heikel*, 1909, 33 S.Ct. 240, 18 U.S. 402, 51 L.Ed. 520, 17 Ann.Cas. 1112 where court said: "The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful functions of any department of government." Also, see *United States v. Wal-*
ter, 1921, 44 S.Ct. 10, 263 U.S. 15, 68 L.

Ed. 137, and definitions of department and agency in section 6 of this title.)

The punishment provision is completely rewritten to increase the penalty from 2 years to 5 years except where the object of the conspiracy is a misdemeanor. If the object is a misdemeanor, the maximum imprisonment for a conspiracy to commit that offense, under the revised section, cannot exceed 1 year.

The injustice of permitting a felony punishment on conviction for conspiracy to commit a misdemeanor is described by the late Hon. Grover M. Moscovitz, United States district judge for the eastern district of New York, in an address delivered March 14, 1944, before the section on Federal Practice of the New York Bar Association, reported in

ROGER J. WHITEFORD 1886-1965
RINGGOLD HART 1888-1965
JOHN J. CARMODY 1901-1972
JOHN J. WILSON
HARRY L. RYAN, JR.
JO V. MORGAN, JR.
FRANK H. STRICKLER
WILLIAM E. ROLLOW
CHARLES J. STEELE
JOHN J. CARMODY, JR.
JAMES EDWARD ABLARD
KEVIN W. CARMODY

COUNSEL
DONALD L. HERSKOVITZ

LAW OFFICES
WHITEFORD, HART, CARMODY & WILSON
815 FIFTEENTH STREET, NORTHWEST
WASHINGTON, D. C. 20005

202-638-0465

CABLE ADDRESS

WHITEHART WASHINGTON

MARYLAND OFFICE
7401 WISCONSIN AVENUE
BETHESDA, MARYLAND 20014
301-656-5700

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

March 4, 1974

EXHIBIT B

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.

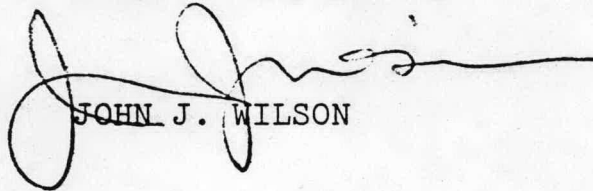
Of course, we do not have to remind you that Rule 6(e) of the Federal Rules of Criminal Procedure permits the Court to disclose or cause disclosure of matters occurring before a Grand Jury only "preliminary to or in connection with a judicial proceeding."

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.

EXHIBIT C

Reporter's transcript of the hearing before Judge Sirica in open court on March 6, 1974 is attached to the original of this petition.

93d Congress }
2d Session }

HOUSE COMMITTEE PRINT

PROCEDURES FOR HANDLING IMPEACHMENT INQUIRY MATERIAL

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-THIRD CONGRESS
SECOND SESSION

EXHIBIT D



FEBRUARY 1974

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1974

28-960

COMMITTEE ON THE JUDICIARY

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JOSHUA EILBERG, Pennsylvania	DAVID W. DENNIS, Indiana
JEROME R. WALDIE, California	HAMILTON FISH, Jr., New York
WALTER FLOWERS, Alabama	WILEY MAYNE, Iowa
JAMES R. MANN, South Carolina	LAWRENCE J. HOGAN, Maryland
PAUL S. SARBANES, Maryland	M. CALDWELL BUTLER, Virginia
JOHN F. SEIBERLING, Ohio	WILLIAM S. COHEN, Maine
GEORGE E. DANIELSON, California	TRENT LOTT, Mississippi
ROBERT F. DRINAN, Massachusetts	HAROLD V. FROELICH, Wisconsin
CHARLES B. RANGEL, New York	CARLOS J. MOORHEAD, California
BARBARA JORDAN, Texas	JOSEPH J. MARAZITI, New Jersey
RAY THORNTON, Arkansas	DELBERT L. LATTA, Ohio
ELIZABETH HOLTZMAN, New York	
WAYNE OWENS, Utah	
EDWARD MEZVINSKY, Iowa	

JEROME M. ZEIFMAN, *General Counsel*

GARNER J. CLINE, *Associate General Counsel*

HERBERT FUCHS, *Counsel*

HERBERT E. HOFFMAN, *Counsel*

WILLIAM P. SHATTUCK, *Counsel*

H. CHRISTOPHER NOLDE, *Counsel*

ALAN A. PARKER, *Counsel*

JAMES F. FALCO, *Counsel*

MAURICE A. BARBOZA, *Counsel*

FRANKLIN G. POLK, *Counsel*

THOMAS E. MOONEY, *Counsel*

MICHAEL W. BLOMMER, *Counsel*

ALEXANDER B. COOK, *Counsel*

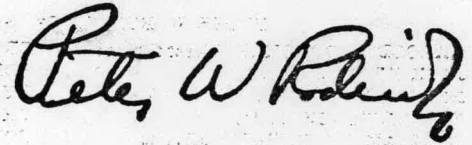
DANIEL L. COHEN, *Counsel*

(II)

Foreword

On February 22, 1974, the full Committee on the Judiciary unanimously adopted a set of procedures for handling material gathered in the course of its impeachment inquiry.

I am pleased to make available by this document a copy of the adopted procedures.



PETER W. RODINO, JR.

(III)

Procedures for Handling Impeachment Inquiry Material

1. The chairman, the ranking minority member, the special counsel, and the counsel to the minority shall at all times have access to and be responsible for all papers and things received from any source by subpoena or otherwise. Other members of the committee shall have access in accordance with the procedures hereafter set forth.

2. At the commencement of any presentation at which testimony will be heard or papers and things considered, each committee member will be furnished with a list of all papers and things that have been obtained by the committee by subpoena or otherwise. No member shall make the list or any part thereof public unless authorized by a majority vote of the committee, a quorum being present.

3. The special counsel and the counsel to the minority, after discussion with the chairman and the ranking minority member, shall initially recommend to the committee the testimony, papers, and things to be presented to the committee. The determination as to whether such testimony, papers, and things shall be presented in open or executive session shall be made pursuant to the rules of the House.

4. Before the committee is called upon to make any disposition with respect to the testimony or papers and things presented to it, the committee members shall have a reasonable opportunity to examine all testimony, papers, and things that have been obtained by the inquiry staff. No member shall make any of that testimony or those papers or things public unless authorized by a majority vote of the committee, a quorum being present.

5. All examination of papers and things other than in a presentation shall be made in a secure area designated for that purpose. Copying, duplicating, or removal is prohibited.

6. Any committee member may bring additional testimony, papers, or things to the committee's attention.

7. Only testimony, papers, or things that are included in the record will be reported to the House; all other testimony, papers, or things will be considered as executive session material.

(1)

Rules for the Impeachment Inquiry Staff

1. The staff of the impeachment inquiry shall not discuss with anyone outside the staff either the substance or procedure of their work or that of the committee.
2. Staff offices on the second floor of the Congressional Annex shall operate under strict security precautions. One guard shall be on duty at all times by the elevator to control entry. All persons entering the floor shall identify themselves. An additional guard shall be posted at night for surveillance of the secure area where sensitive documents are kept.
3. Sensitive documents and other things shall be segregated in a secure storage area. They may be examined only at supervised reading facilities within the secure area. Copying or duplicating of such documents and other things is prohibited.
4. Access to classified information supplied to the committee shall be limited by the special counsel and the counsel to the minority to those staff members with appropriate security clearances and a need to know.
5. Testimony taken or papers and things received by the staff shall not be disclosed or made public by the staff unless authorized by a majority of the committee.
6. Executive session transcripts and records shall be available to designated committee staff for inspection in person but may not be released or disclosed to any other person without the consent of a majority of the committee.

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○

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

EXHIBIT E

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

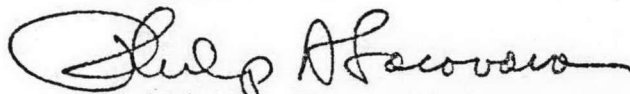
Dear Chief Judge Sirica:

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

cc: All Counsel

**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

(1)

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)

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 15,
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. 72-1344 C 1903
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 *LaBau 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 "pretermitt 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."

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citing voluminous authority in its note 2. (Slip Op. at 5, F.2d, No. 72-3499, decided June 4, 1973.)

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),¹ (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

¹ 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."

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
KEVIN W. CARMODY

COUNSEL
DONALD L. HERSKOVITZ

LAW OFFICES
WHITEFORD, HART, CARMODY & WILSON
815 FIFTEENTH STREET, NORTHWEST
WASHINGTON, D. C. 20005

202-638-0465

CABLE ADDRESS

WHITEHART WASHINGTON

MARYLAND OFFICE
7401 WISCONSIN AVENUE
BETHESDA, MARYLAND 20014
301-656-5700

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

EXHIBIT F

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.

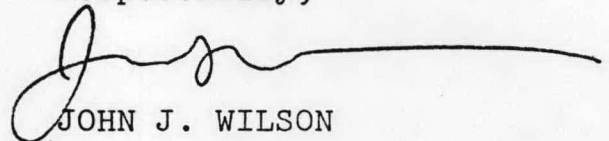
Since I have written you about Mr. Lacovara's communication, I should like to take this occasion to make a comment that I omitted last Wednesday. Regardless of what some other federal districts have done, our District has been free of grand jury reports for the past half century. Almost always some public 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

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KEVIN W. CARMODY

COUNSEL
DONALD L. HERSKOVITZ

LAW OFFICES
WHITEFORD, HART, CARMODY & WILSON
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202-638-0465

CABLE ADDRESS

WHITEHART WASHINGTON

MARYLAND OFFICE
7401 WISCONSIN AVENUE
BETHESDA, MARYLAND 20014
301-656-5700

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

March 12, 1974

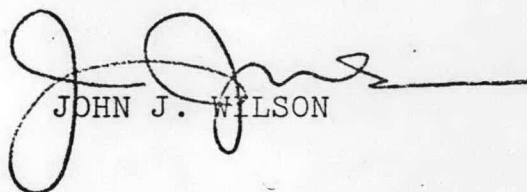
EXHIBIT G

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

EX-H

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] Misc. No. 74-21
HOUSE OF REPRESENTATIVES]

FILED

MAR 18 1974

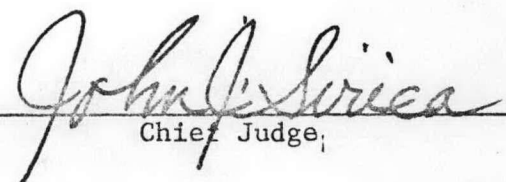
ORDER

JAMES F. DAVEY, Clerk

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 "pretermit 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 ^{36/} secrecy" there codified covers a rather narrow area.

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 un-presented 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,^{45/} but as these and other cases have asserted 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.

ROGER J. WHITEFORD 1888-1985
RINGGOLD HART 1888-1985
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
KEVIN W. CARMODY

COUNSEL
DONALD L. HERSKOVITZ

LAW OFFICES
WHITEFORD, HART, CARMODY & WILSON
815 FIFTEENTH STREET, NORTHWEST
WASHINGTON, D. C. 20005

202-638-0485

CABLE ADDRESS

WHITEHART WASHINGTON

MARYLAND OFFICE
7401 WISCONSIN AVENUE
BETHESDA, MARYLAND 20014
301-656-5700

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

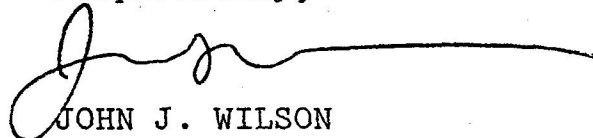
Since I have written you about Mr. Lacovara's communication, I should like to take this occasion to make a comment that I omitted last Wednesday. Regardless of what some other federal districts have done, our District has been free of grand jury reports for the past half century. Almost always some public 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

Lit

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

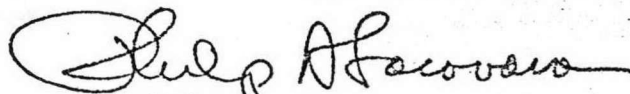
Dear Chief Judge Sirica:

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

cc: All Counsel

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 *LaBau 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),¹ (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

¹ 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.

I. THE

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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)

File

OR6

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

THE WHITE HOUSE

WASHINGTON

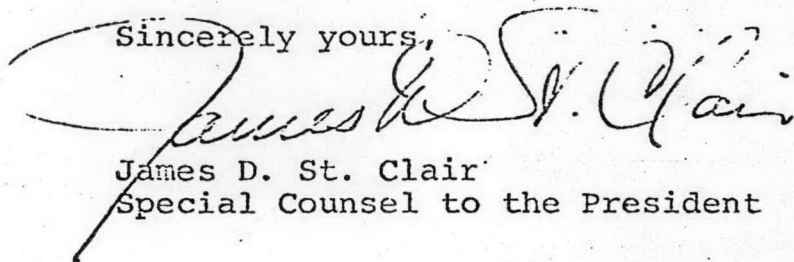
March 7, 1974

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
Hon. J. Sirica
Court House

March 8, 1974

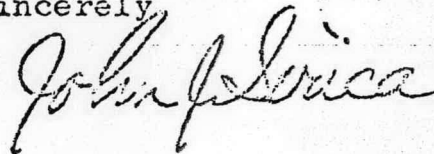
The Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
House of Representatives
Congress of the United States
Washington, D.C.

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



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 coterminal 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
CHARLES J. STEELE
JOHN J. CARMODY, JR.
JAMES EDWARD ABLARD
KEVIN W. CARMODY

COUNSEL
DONALD L. HERSKOVITZ

LAW OFFICES
WHITEFORD, HART, CARMODY & WILSON

815 FIFTEENTH STREET, NORTHWEST
WASHINGTON, D. C. 20005

202-638-0465

CABLE ADDRESS

WHITEHART WASHINGTON

MARYLAND OFFICE
7401 WISCONSIN AVENUE
BETHESDA, MARYLAND 20014
301-656-5700

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

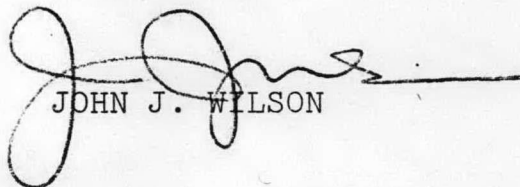
March 12, 1974

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:

Jaworski
Butt
Ben-Veniste
Volner
LaCovara
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CHRISTOFFERSON, 3/5/74-
NOT SERVED UPON DEFENSE
COUNSEL - PHR

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.
OF EVIDENCE TO THE HOUSE OF	:	
REPRESENTATIVES	:	

MEMORANDUM FOR THE UNITED STATES
ON BEHALF OF THE GRAND JURY

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 it had heard evidence relating to the impeachment inquiry currently being conducted by the Committee on the Judiciary of the House of Representatives, and that it had concluded that it should presently defer to the House and allow the House to determine what action may be warranted by this evidence at this time. The Grand Jury then recommended strongly and unanimously that the evidence referred to, and contemporaneously submitted to the Court, 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 certain defendants in the case of United States v. Mitchell, et al. have sought to challenge the

Court's power to honor the Grand Jury's recommendation. As counsel for the United States and the Grand Jury, we submit this memorandum in support of that recommendation. We shall show that regular grand juries of the federal courts have inherent power to make reports and recommendations of this type, that the Court has the right to honor the recommendation in the present matter, and that it is clearly in the overall public interest to do so. Counsel for defendants in United States v. Mitchell, et al. have not demonstrated such a compelling interest in these present proceedings to warrant acceding to their request for suppression of the Grand Jury's report and disregard of its recommendation.

I. THE ROLE OF THE GRAND JURY

As this Court and the Court of Appeals recognized in enforcing the Grand Jury's subpoena for Presidential tapes and documents, the grand jury is a unique institution in our constitutional system, with great responsibilities and commensurate powers, even in matters directly affecting the President. In assessing the right of the Grand Jury in the Watergate investigation to make a report to the Court in addition to the indictment it has returned, it is important to bear in mind that the grand jury's "constitutional prerogatives are rooted in long centuries of Anglo-American history" and that the grand jury holds a "high place . . . as an instrument of justice." Branzburg v. Hayes, 408 U.S. 665, 687 (1972).

The grand jury owes its fundamental role in the criminal justice process to its adoption by the Fifth Amendment as the basic mechanism for determining whether to charge a person with a serious federal crime. Even though it is generally

considered an adjunct of the Judicial Branch, the grand jury's constitutional status gives it an independence -- with authority derived from the people -- similar to its traditional role at common law. Thus, the grand jury can act on its own initiative, without submissions from the prosecutor,^{1/} and "it may make presentments of its own knowledge without any instruction or authority from the court."^{2/} As the Supreme Court held in reversing the dismissal of an indictment that had been returned by a second grand jury without securing prior leave of court, "the power and duty of the grand jury to investigate is original and complete . . . and is not therefore dependent for its exertion upon the approval or disapproval of the court. . . ."^{3/}

The grand jury, composed of laymen randomly selected, serves as the "conscience of the community." It may elect not to charge a crime, even if probable cause has been demonstrated, and this decision is "not subject to review by any other body"; of course, its "sweeping powers" over the terms of any charges it does return "entail very strict limitation upon the power of the prosecutor or court to change the indictment found by the jurors." Gaither v. United States, 413 F.2d 1061, 1066 (D.C. Cir. 1969).

^{1/} See generally Hale v. Henkel, 201 U.S. 43, 59-66 (1906). United States v. Cox, 342 F.2d 167, 186-189 (5th Cir.) (Wisdom, J., concurring), cert. denied, 381 U.S. 935 (1965).

^{2/} In re April 1956 Term Grand Jury, 239 F.2d 263, 268 (7th Cir. 1956). See also, In re Dymo Industries, Inc., 300 F. Supp. 532, 533 (N.D. Calif.), aff'd on opinion below, 418 F.2d 500 (9th Cir. 1969), cert. denied, 397 U.S. 937 (1970).

^{3/} United States v. Thompson, 251 U.S. 407, 413 (1920). Despite its "supervisory power" over the grand jurors, the court "cannot limit them in their legitimate investigation of alleged violations of law." Application of Texas Co., 27 F. Supp. 847, 850 (E.D. Ill. 1939). Accord, Blair v. United States, 250 U.S. 273, 282 (1919); Bursey v. United States, 466 F.2d 1059, 1071, 1075 (9th Cir. 1972).

One of the important collateral consequences of the grand jury's independence is its right to insist that the prosecuting attorney prepare the charges it believes are warranted.^{4/} Chief Judge Fee, in his exhaustive and frequently quoted discussion of the grand jury, summarized the independence of the grand jury in these words:

Unquestionably, the grand jury are under no necessity to follow the orders of the prosecutor. They can present an indictment whether he will or no. Indeed, they may make a presentment contrary to the direct orders of a judge, the prosecutor for the King or the Chief Executive. ^{5/}

Because of this independent status, a grand jury is even entitled to return, in open court, a draft indictment the United States Attorney refuses to sign. In short, the grand jury has the right to report to the court its decision about what is proper and to do so publicly, at least in the absence of the likelihood of irreparable injury to innocent persons.^{6/}

4/ The leading case in this area is United States v. Cox, 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965), where four of seven judges of the court of appeals en banc held that the court can order the United States Attorney to assist the grand jury by drafting "forms of indictment in accordance with its desires" (342 F.2d at 181, 182), but a different 4-3 combination ruled that the prosecutor cannot be compelled to give the concurrence of the Executive Branch, which they concluded is necessary to initiate an actual prosecution (342 F.2d at 171-172, 182).

The District of Columbia Circuit recognized the same principle in Gaither v. United States, supra, 413 F.2d at 1069. Chief Judge Roszel Thomsen of the District of Maryland also reached this conclusion in his thorough opinion. See In re Presentment of Special Grand Jury, January 1969, 315 F. Supp. 662, 674 (1970).

5/ United States v. Smyth, 104 F. Supp. 283, 294 (N.D. Calif. 1952) (footnotes omitted); In re Miller, 17 Fed. Cas. (No. 9,552) (C.C.D. Ind. 1878).

6/ See Rule 6(f), Federal Rules of Criminal Procedure: "The indictment shall be returned by the grand jury to a judge in open court." Under Rule 6(e), the court has power to direct that an indictment "shall be kept secret until the defendant is in custody." The rules do not provide any other grounds for sealing the proposed charge.
(Footnote continued on next page)

II. THE GRAND JURY'S POWER TO RETURN A REPORT

The foregoing discussion suggests one source of the grand jury's power to submit a report that does not constitute a formal indictment because, for example, the prosecuting attorney refuses to sign it and give it prosecutive effect.

The Court of Appeals for this Circuit in its decisive ruling on grand jury procedure has 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. Gaither v. United States, 413 F.2d 1061, 1069 n.19 (1969) (emphasis added).

Thus, there is no reason for concluding that a federal grand jury is limited, as counsel for defendants Haldeman and Ehrlichman in United States v. Mitchell et al. contend, to the options either to "indict or ignore."

The weight of modern authorities, moreover, shows that federal grand juries have the power to formulate and submit other kinds of reports as well, even if the grand jury is not proposing the indictment of any particular individual.

(continuation of footnote 6)

See generally, In re Presentment of Special Grand Jury, January 1969, supra, 315 F. Supp. at 667, 676-677, where a circuit judge initially ordered Judge Thomsen to consider these novel questions in camera but after review of the legal issues, Judge Thomsen ruled, relying on United States v. Cox, supra, that the proposed indictment is to be returned in open court.

As Judge Thomsen of the District Court for the District of Maryland 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 amounted to a crime. 7/

That common law power to submit reports is preserved by the grand jury's constitutional status. The Supreme Court's landmark decision on the attributes of the grand jury, Hale v. Henkel, supra, specifically refers to the source of this power:

Indeed, the oath administered to the foreman, which has come down to us from the most ancient times, and is found in Shaftesbury's Trial, 8 How. St. Tr. 769, indicates that the grand jury was competent to act solely on its own volition. This oath was that "you shall diligently inquire and true presentments make of all such matters, articles, and things as shall be given you in charge, as of all other matters, articles, and things as shall come to your own knowledge touching this present service," etc. 201 U.S. at 60. (emphasis added) 8/

Thus Judge Brown observed, without challenge from the other judges sitting on the en banc Fifth Circuit in Cox, supra:

7/ In re Presentment of Special Grand Jury, January 1969, supra, 315 F. Supp. at 675. See generally, 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.

8/ After the dismissal of Special Prosecutor Cox, this Court promptly summoned the Watergate Grand Jury and the Additional August 1973 Grand Jury, which had been specially empanelled at the Special Prosecutor's request, and in open court instructed them "to fully and strictly adhere" to the traditional oath they had taken. The Court quoted the oath in full, including the pledge to make "true presentment" of all offenses and not to leave "anyone unrepresented from fear, favor, affection, reward, or hope of reward." See Statement of Chief Judge Sirica to Members of Grand Juries, October 23, 1973.

To me the thing seems this simple:
the Grand Jury is charged to report.
It determines what it is to report.
It determines the form in which it
reports. 9/

The Fifth Circuit recently confronted this issue again, and while it found it unnecessary to pass squarely on the matter, the court cited and discussed the "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." In re Grand Jury Proceedings, 479 F.2d 458, 460 (5th Cir. 1973).

It is true, of course, that on a few occasions some questions have been raised about the existence and scope of this power of the federal grand jury. ^{10/} The federal case generally cited against this power is Judge Weinfeld's opinion in Application of United Electrical Radio & Machine Workers, 111 F. Supp. 858 (S.D.N.Y. 1953). ^{11/} That case involved unusual

^{9/} 342 F.2d at 184. See also 342 F.2d at 180 (opinion of Rives, Gewin & Bell, JJ.), and 342 F.2d at 189 (opinion of Wisdom, J.): "No one questions the jury's plenary power to inquire, to summon witnesses, and to present either findings and a report or an accusation in open court by presentment."

^{10/} Such doubts are expressed in Orfield, The Federal Grand Jury, 22 F.R.D. 343, 402, 446-447 (1959) and Senate Report 91-617, 91st Cong., 1st Sess. at 47 (1970), on the Organized Crime Control Act of 1970.

^{11/} Counsel for defendants Haldeman and Ehrlichman also cite the decision in Poston v. Washington, Alexandria & Mt. Vernon R.R., 36 App. D.C. 359 (1911), as establishing that, "according to the law and practice in the District of Columbia" a regular federal grand jury "has no power other than to indict or ignore." That case establishes no such rule, however. What was at issue there was the question whether the railroad company, in an action against it for allegedly causing a state grand jury of the Alexandria county circuit court to issue a libelous report, could defend on the ground the report was covered by a privilege for judicial immunity. The court of appeals held that the report was not covered by a judicial privilege because it was not a kind of presentment permitted by "the practice in the State of Virginia." 36 App. D. C. at 369.

facts -- a grand jury's recommendations to the National Labor Relations Board about the sufficiency of the "non-communist" party membership affidavits submitted to the Board. The twin grounds for decision were that those recommendations overstepped the "judicial function" under the separation of powers and violated the obligation of secrecy imposed by Rule 6(e). 111 F. Supp. at 863-866. Both reasons are circular. The grand jury derives its authority from the people under the Constitution, and as an institution has always exercised the function of making recommendations on matters of public concern. In addition, there is no reason to believe that Rule 6(e) was intended to cut off an historically proper function of the grand jury. For these reasons and others, later federal decisions discussed in this memorandum have refused to follow Judge Weinfeld's decision there.

Nor is there any reason to infer that Congress has stripped regular federal grand juries of their historic -- although infrequently exercised -- power to submit reports. The argument to this effect is based on the enactment in the Organized Crime Control Act of 1970 of explicit procedures by which a newly created institution -- a "special grand jury" -- can prepare and file a report dealing with public corruption or organized crime conditions. See 18 U.S.C. §3333. The Senate report on that bill, S. Rep. 91-617, supra, p. 47, did take note of Judge Weinfeld's decision and conclude that explicit statutory authority would be necessary to confer such power; the Committee was apparently unaware, however, of the intervening decisions like In re Petition for Disclosure of Evidence Before October 1959 Grand Jury, 184 F. Supp. 38 (E.D. Va. 1960), and United States v. Cox, supra, 342 F.2d 167, which uphold such power. Certainly there is not a word in the

legislative history of the 1970 Act suggesting that Congress intended to restrict the power of regular grand juries if, as we contend and as later cases have held, Judge Weinfeld's decision was wrong.^{12/}

With the exception of that decision, federal decisions reflect a number of different types of grand jury reports that have been found permissible. One type is the draft indictment, or "presentment", that accuses named individuals of criminal misbehavior but does not actually constitute a valid indictment in the face of the prosecuting attorney's refusal to sign it.^{13/} A second is a report analyzing local conditions and making recommendations about law enforcement policy.^{14/} Third, and most pertinently here, is a report that discloses to the court that the grand jury has heard evidence that it believes is material to legal proceedings within the jurisdiction of another agency and recommends that the court exercise its inherent power, as codified in Rule 6(e), to submit the evidence to the appropriate officials.^{15/}

^{12/} Indeed, Judge Weinfeld himself recognized that in the sixteen years prior to his 1953 decision, regular federal grand juries in the Southern District of New York had filed at least fourteen reports "without challenge." Application of United Electrical, Radio & Machine Workers, supra, 111 F. Supp. at 869.

^{13/} See e.g., United States v. Cox, supra, 342 F.2d 167; In re Presentment of Special Grand Jury, January 1969, 315 F. Supp. 662.

^{14/} See e.g., In re Grand Jury Proceedings, supra, 479 F.2d 458.

^{15/} See, e.g., In re Petition for Disclosure of Evidence Before October 1959 Grand Jury, 184 F. Supp. 38, 40 (E.D. Va. 1960).

III. THIS COURT SHOULD HONOR THE
RECOMMENDATION OF THE GRAND
JURY

Even though the grand jury is empanelled by the court, relies on the coercive process of the court, and submits its indictments or reports to the court,^{16/} the grand jury's independent constitutional status necessarily implies that the court cannot generally superintend the grand jury in the exercise of its lawful discretion or refuse to give full credit to its decision.^{17/}

Speaking of the "stubborn tenacity" of the grand jury that has developed to complement the independence of the judge,^{18/} Chief Judge Fee explained:

While the court may exercise an influence over the proceedings, there is neither a method whereby an indictment by a grand jury can be peremptorily required, nor, on the other hand, is there any method of preventing the presentment of an indictment except by summary discharge.^{19/}

Once the grand jury has submitted a report or presentment to the court, as here, the court does have the power to expunge it, in whole or in part, to the extent it is found illegal or unwarranted.^{20/} But under the standards that have been developed, there is no justification for rejecting the Report and Recommendation of the Grand Jury in the present case.

^{16/} See generally, Rule 6, Federal Rules of Criminal Procedure, 18 U.S.C. §§ 3321, 3331-3334.

^{17/} See, e.g., *Ex parte United States*, 287 U.S. 241, 249 (1932); *In re Texas Co.*, 201 F.2d 177, 180 (D.C. Cir.), cert. denied, 344 U.S. 904 (1952).

^{18/} *United States v. Smyth*, *supra*, 104 F. Supp. at 293.

^{19/} *Id.* at 292 (footnote omitted).

^{20/} See generally, Orfield, *supra*, 22 F.R.D. at 446-447.

Judge Thomsen recently formulated the proper inquiry the court should make when confronted with the question of possible suppression of a grand jury report:

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 is required by the public "interest in knowing" when weighed against the rights of the persons mentioned in the presentment. In re Presentment of Special Grand Jury, January 1969, supra, 315 F. Supp. at 678.

In that case a federal grand jury in Baltimore had been investigating possible corruption in connection with federal construction contracts, and returned a number of indictments. The grand jury foreman then appeared in open court to read a "presentment" that described the course of the extensive investigation; the presentment also stated that the grand jury was prepared to return further indictments against additional defendants, that the United States Attorney was prepared to concur in signing the indictments, but had been directed by the Attorney General not to do so. The foreman delivered the proposed indictments to the court under seal. The court solicited the views of the Department of Justice and specially appointed amicus curiae on whether the "presentment" should be kept secret. In the interim, several persons claiming they believed they were named in the proposed indictments appeared anonymously through counsel and moved for suppression and expungement of the "presentment" and the proposed indictments. After considering all the positions, the court concluded:

It is not necessary in this case to attempt to lay down a rule which should apply in all situations. Each case should be decided on its own facts and circumstances. Here, there has been much discussion and disclosure in the communications media, some true, and some not true,

particularly during the last few days. The people who have been investigated have been disclosed, and there have been rumors in the press naming persons who it does not appear have even been investigated. Under these circumstances, the Court concludes that the substance of the charges in the indictment should be disclosed, omitting certain portions as to which the Court, in the exercise of its discretion, concludes that the public interest in disclosure is outweighed by the private prejudice to the persons involved, none of whom are charged with any crime in the proposed indictment. 315 F. Supp. at 678-679.

The court thereupon filed a summary of the proposed indictment ("presentment"), including the names of the proposed defendants and the allegations against them, and also including the names of the federal officials (Sen. Russell Long, Rep. Hale Boggs, and the Architect of the Capitol) who were the intended bribe recipients but who were not charged with actually receiving any money.

In the present case, the test points inevitably toward honoring the grand jury's recommendation. The Report and Recommendation deals exclusively with evidence concerning the President, not any of the defendants in United States v. Mitchell, et al. Furthermore, the identities of the other people investigated have been discussed at length in the course of public proceedings before the United States Senate and elsewhere. To the extent that any defendants in criminal proceedings are involved indirectly, they are already the subject of the Grand Jury's formal accusation and will have an opportunity to litigate their guilt or innocence on the charges at the trial of the pending indictment.

The "public interest" in granting the Grand Jury's recommendation is paramount here. After receiving a great volume of evidence concerning the President of the United States, the Grand Jury has decided at this time to defer to the House

of Representatives and has recommended that this material be furnished to the House in order that it may discharge its primary responsibility under the Constitution on this question of the gravest national concern.

The very recent decision of the Fifth Circuit in In re Grand Jury Proceedings, 479 F.2d 458 (1973), also supports the Grand Jury's action here. In that case a federal grand jury had investigated the circumstances surrounding dismissal of state narcotics charges because of the possibility that there was a conspiracy to discredit a federal agent who had testified in the case and had given testimony before the grand jury that led to several indictments. The grand jury found no criminal violations, but filed a report commenting on the extent of the local narcotics problem, urging the local district attorney to prepare his case and his witnesses better, and criticizing the state judge for prematurely dismissing the case. The district court had accepted the grand jury's request that the report be filed as a public record. Upon the denial of the state judge's motion to expunge the report, the court of appeals reversed in part. After citing the persuasive authority for the grand jury's power to file reports and after noting some of the factors that the courts have traditionally considered in deciding whether to expunge some or all of a grand jury report, the appellate court ordered deleted those portions of the report that referred specifically to local officials because, under the circumstances, that criticism served no legitimate federal interest. Among the factors listed as pertinent to the decision of any court faced with this question were: whether the report describes general community conditions or identifiable individuals; whether the individuals are public officials or only private citizens; whether the public interest in the

contents of the report outweighs any harm to named individuals; whether the conduct described is indictable; and whether there are other remedies available to the persons involved. 479 F.2d at 460 n.2. Here, of course, the Report and Recommendation, together with the underlying material, focus on the President, and are designed to enable the House to conduct a full and fair inquiry. 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 the Grand Jury's Report and Recommendation. And those persons who are under indictment have a clear remedy open to challenge any incidental references to them -- in their trials.

Finally, similar issues arose in a related context when a federal grand jury in the Eastern District of Virginia submitted an oral and a written statement to the court recommending that the court transmit to city and state officials some of the evidence the grand jury had heard.^{21/} Sparked by that recommendation, the State Attorney General and the local district attorney applied for disclosure of the evidence. The United States opposed the release of the evidence until related indictments returned by the grand jury could be tried. Chief Judge Bryan termed the grand jury's suggestion of referral of the evidence to local authorities "wholly proper," but commented that the report should have been confined to a simple recommendation to that effect, without contemporaneous disclosure of "the tenor or purport of the evidence before them" or of "the implications

^{21/} In re Petition for Disclosure of Evidence Before the October 1959 Grand Jury, supra, 184 F. Supp. 38.

the jurors drew from this evidence."^{22/} (The Grand Jury in the present matter, of course, has scrupulously followed that caveat.) Judge Bryan ruled that the normal strictures of grand jury secrecy are relaxed "whenever the public interest would be better served by delivering up the grand jury evidence." Since the local prosecutor had shown a legitimate need for the evidence in discharging his official responsibilities to investigate and prosecute criminal offenses, the court granted the application.^{23/} The court ordered the United States Attorney to make the testimony available, through the clerk of the court, for the local prosecutor to review it. The court also urged the local prosecutor to keep the information confidential "as far as practicable" and also acceded to the United States Attorney's request that the access await the disposition of the pending federal charges. 184 F. Supp. at 41.

We have already discussed the reasons why the "public interest" in the present matter would undoubtedly be served by "delivering up the grand jury evidence" to the House of Representatives with the appropriate request that it be used in a way to minimize any impact on criminal trials. In making its Report and Recommendation, the Grand Jury was respecting the tradition of the House of Representatives which recognizes as an authoritative precedent the action of a county grand jury in returning a presentment specifying charges against a federal territorial judge which were duly transmitted to the House for its consideration of possible impeachment of that official.

^{22/} 184 F. Supp. at 40.

^{23/} The court ruled that the provision of Rule 6(e), authorizing disclosure "preliminarily to or in connection with a judicial proceeding," is not confined to proceedings in federal courts. 184 F. Supp. at 41.

3 Hinds' Precedents of the House of Representatives §2488 at 985 (1907).^{24/}

Nothing in the ordinary principle of grand jury secrecy codified in Rule 6(e) of the Federal Rules of Criminal Procedure stands in the way of granting the Grand Jury's recommendation. The Rule leaves the 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 (1958); Allen v. United States, 390 F.2d 476 (D.C. Cir. 1968). 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.

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. It would be fatuous to contend that Rule 6(e) relegates the need of a Presidential impeachment inquiry to a lower priority than, for example, that of a civil antitrust inquiry. In any event, the term "preliminarily to . . . a judicial proceeding" 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. The function

^{24/} That matter arose in 1811, shortly after the adoption of the Constitution. 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.

Jefferson's Manual of Parliamentary Practice states that impeachment may be set "in motion" "by charges transmitted from a grand jury." Deschler, Constitution, Jefferson's Manual, and Rules of the House of Representatives, H. R. Doc. No. 384, 92d Cong., 2d Sess., §603 at 296.

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 also results in a judicial trial before the Senate sitting as a Court of Impeachment with the Chief Justice of the United States presiding.

The final point to be considered is the objection of some defendants in United States v. Mitchell, et al. that transmittal of grand jury materials to the House would prejudice them and, therefore, that the Grand Jury's Report and Recommendation should be suppressed.

In asserting their "legal" interest in interposing this objection, defendants rely on Judge Weinfeld's decision in Application of United Electrical, Radio & Machine Workers, supra, and on the decision in Hammond v. Brown, 323 F. Supp. 326 (N.D. Ohio), aff'd on opinion below, 450 F.2d 480, 482 (6th Cir. 1971). Each of those cases, however, involves a grand jury report lodging formal accusations against the individuals objecting to the report. The case before this Court is far different. The Grand Jury Report and Recommendation submitted to the Court does not even refer to the defendants in United States v. Mitchell, et al., much less formally accuse them of misconduct or wrongdoing. Indeed, as the Report indicates, its object is merely to bring to the Court's attention that the Grand Jury has evidence that has a material bearing on the matters now before the House of Representatives Committee on the Judiciary and to recommend that this evidence be transmitted to that Committee. Any reference to defendants stems solely from the evidence accompanying the Report and is wholly incidental to its objective. Defendants are in no sense the "targets" of the Report.

Nor can they invoke the objection in Application of United Electrical, Radio & Machine Workers, that they are being deprived "of the right to defend themselves and to have their day in a Court of Justice." 111 F. Supp. at 861. Defendants are the subjects of an indictment resulting from the same Grand Jury investigation underlying the Report and Recommendation, and it must be presumed that they will receive a fair and speedy trial in accordance with the Fifth and Sixth Amendments, the Federal Rules of Criminal Procedure, and the Rules of this Court. In short, the concerns expressed by Judge Weinfeld are inapplicable here -- defendants will have their day in court and the opportunity to answer all charges against them.

The decision in Hammond also does not support the claim for relief here. In that case, a federal court in a civil rights action under 42 U.S.C. §1983 ordered expunged and destroyed a public report filed by a state grand jury after investigation of the Kent State tragedy. The narrative report accused unnamed but identifiable faculty members of responsibility for the tragic consequences of the demonstration because of certain public statements they had made. The court concluded that the report exceeded the grand jury's powers under Ohio law; invaded the function of the petit jury by purporting to make findings of fact, rather than allegations based solely on probable cause; and violated requirements of grand jury secrecy. None of those objections can be levelled against the Report and Recommendation in the present matter, which merely requests transmittal of material concerning the President to another tribunal for any action it considers appropriate.

Significantly, the court concluded that even the accusatory report submitted there had not denied the identifiable

individuals any rights to due process, to confront witnesses, and to be informed of specific charges under the Fifth, Sixth, and Fourteenth Amendments, but that in the circumstances the report had violated First Amendment rights of free speech and free association. See 323 F. Supp. at 337-351.

Defendants also may be concerned that they may be prejudiced by pre-trial publicity attributable to the Report, to the transmittal of the material, and to any subsequent use of the material by the Congress. That concern is wholly speculative. Although it is true that these events may provide one more instance of pre-trial publicity that defendants will be able to cite in support of a claim that the Court will not be able to empanel an unbiased jury for the trial of the charges now pending against these defendants, see, e.g., Delaney v. United States, 199 F.2d 107 (1st Cir. 1952), 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 Grand Jury has asked expressly in its Report and Recommendation that the materials transmitted be received, considered, and utilized with due regard for avoiding unnecessary interference with the fair trials of any persons under indictment. This is no idle hope. 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.^{25/} In addition to barring public disclosure unless authorized by a majority of the Committee in accordance with the Rules of the House of Representatives, the rules prohibit the copying or duplicating of all materials considered by the Committee or staff. All materials will be stored in a secure area, and examination will be limited to Committee members and staff members in that area. It can be expected under these circumstances that the Committee and its staff will use the Grand Jury materials with appropriate respect for the rights of defendants in pending criminal cases, restricting publication to the extent necessary for the impeachment inquiry.^{26/}

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.^{27/} 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

^{25/} These rules, adopted on February 22, 1974, and entitled "Rules for the Impeachment Inquiry Staff" and "Procedures for Handling Impeachment Inquiry Material", are attached hereto as Exhibit "A".

^{26/} As reflected by Local Rule 1-27(c)(6) of this Court and by the pre-trial publicity order entered by the Court in United States v. Mitchell, et al. on March 1, 1974, the concern about minimizing pre-trial publicity concerning a criminal case cannot and should not "preclude the holding of hearings or the lawful issuance of reports by legislative . . . bodies."

^{27/} This situation is wholly unlike Sheppard v. Maxwell, 384 U.S. 333(1966), and Rideau v. Louisiana, 373 U.S. 723 (1963), where the Supreme Court reversed convictions for highly inflammatory publicity harping on the guilt of particular individuals and creating the aura of public persecution.

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.

Third, any speculation about the effect of pre-trial publicity is premature. Only at the voir dire for selecting a jury can the court determine with measured assurance whether 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.

Thus, under these circumstances, there are no weighty factors tending to offset the compelling case for the Court to exercise its power to honor the Grand Jury's recommendation. 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 the trial of pending criminal cases -- will needlessly impede the House in the discharge of its critically important function. The integrity of the Court's own processes is in no sense endangered because the risk of prejudicial pre-trial publicity from following the recommendation of the Grand Jury is minimal and there are procedures for testing any such impact at a later time.

IV. CONCLUSION

Because the Court can fulfill its own responsibilities while effectuating the proper constitutional roles of the Grand Jury and the Congress, the overall public interest clearly impels the Court to grant the Grand Jury's recommendation that the evidence it identified and submitted be transmitted forthwith to the Committee on the Judiciary of the House of Representatives.

Respectfully submitted.

LEON JAWORSKI
Special Prosecutor

PHILIP A. LACOVARA
Counsel to the Special
Prosecutor

PETER M. KREINDLER
Executive Assistant to the
Special Prosecutor

Watergate Special Prosecution Force
1425 K Street, N. W.
Washington, D. C. 20005

Attorneys for the United States
and the Grand Jury

DATED: March 5, 1974

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

RULES FOR THE IMPEACHMENT INQUIRY STAFF

The Chairman and the Ranking Minority Member have made the following rules for the staff:

1. The staff of the impeachment inquiry shall not discuss with anyone outside the staff either the substance or procedure of their work or that of the Committee.
2. Staff offices on the second floor of the Congressional Annex shall operate under strict security precautions. One guard shall be on duty at all times by the elevator to control entry. All persons entering the floor shall identify themselves. An additional guard shall be posted at night for surveillance of the secure area where sensitive documents are kept.
3. Sensitive documents and other things shall be segregated in a secure storage area. They may be examined only at supervised reading facilities within the secure area. Copying or duplicating of such documents and other things is prohibited.
4. Access to classified information supplied to the Committee shall be limited by the Special Counsel and the Counsel to the Minority to those staff members with appropriate security clearances and a need to know.
5. Testimony taken or papers and things received by the staff shall not be disclosed or made public by the staff unless authorized by a majority of the Committee.
6. Executive session transcripts and records shall be available to designated Committee staff for inspection in person but may not be released or disclosed to any other person without the consent of a majority of the Committee.

EXHIBIT A p. 1

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

PROCEDURES FOR HANDLING IMPEACHMENT INQUIRY MATERIAL,

1. The Chairman, the Ranking Minority Member, the Special Counsel, and the Counsel to the Minority shall at all times have access to and be responsible for all papers and things received from any source by subpoena or otherwise. Other members of the Committee shall have access in accordance with the procedures hereafter set forth.
2. At the commencement of any presentation at which testimony will be heard or papers and things considered, each Committee member will be furnished with a list of all papers and things that have been obtained by the Committee by subpoena or otherwise. No member shall make the list or any part thereof public unless authorized by a majority vote of the Committee, a quorum being present.
3. The Special Counsel and the Counsel to the Minority, after discussion with the Chairman and the Ranking Minority Member, shall initially recommend to the Committee the testimony, papers and things to be presented to the Committee. The determination as to whether such testimony, papers and things shall be presented in open or executive session shall be made pursuant to the Rules of the House.
4. Before the Committee is called upon to make any disposition with respect to the testimony or papers and things presented to it, the Committee members shall have a reasonable opportunity to examine all testimony, papers and things that have been obtained by the inquiry staff. No member shall make any of that testimony or those papers or things public unless authorized by a majority vote of the Committee, a quorum being present.
5. All examination of papers and things other than in a presentation shall be made in a secure area designated for that purpose. Copying, duplicating or removal is prohibited.
6. Any Committee member may bring additional testimony, papers or things to the Committee's attention.
7. Only testimony, papers or things that are included in the record will be reported to the House; all other testimony, papers or things will be considered as executive session material.

ROGER J. WHITEFORD 1888-1985
RINGGOLD HART 1895-1965
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 ASBLARD
KEVIN W. CARMODY

COUNSEL
DONALD L. HERSKOVITZ

LAW OFFICES

WHITEFORD, HART, CARMODY & WILSON

815 FIFTEENTH STREET, NORTHWEST

WASHINGTON, D. C. 20005

202-638-0465

CABLE ADDRESS

WHITEHART WASHINGTON

Subscribed *Lib*
MARYLAND OFFICE
7401 WISCONSIN AVENUE
BETHESDA, MARYLAND 20014
301-656-5700

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

March 4, 1974

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.

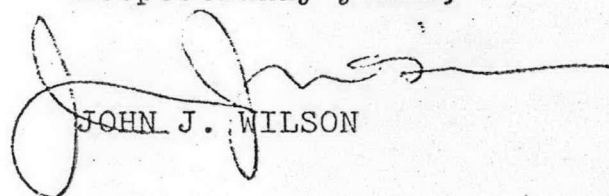
Of course, we do not have to remind you that Rule 6(e) of the Federal Rules of Criminal Procedure permits the Court to disclose or cause disclosure of matters occurring before a Grand Jury only "preliminary to or in connection with a judicial proceeding."

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).

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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.