

Winter 1984

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Recommended Citation

Michael E. Deutsch, Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists, 75 J. Crim. L. & Criminology 1159 (1984)

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THE IMPROPER USE OF THE FEDERAL GRAND JURY: AN INSTRUMENT FOR THE INTERNMENT OF POLITICAL ACTIVISTS

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Secret inquisitions are dangerous things justly feared by free men everywhere. They are the breeding place for arbitrary misuse of official power. They are often the beginning of tyranny as well as indispensable instruments for its survival. Modern as well as ancient history bears witness that both innocent and guilty have been seized by officers of the state and whisked away for secret interrogation or worse, until the groundwork has been securely laid for their inevitable conviction. While the labels applied to this practice have frequently changed, the central idea . . . remains unchanging—extraction of “statements” by one means or another from an individual by officers of the state while he is held incommunicado.¹

I. INTRODUCTION

In the United States, the government imprisons radical political activists, often called terrorists, through the grand jury subpoena power, without a specific criminal charge.² This practice deeply offends our basic constitutional principles of due process, presumption of innocence, and trial by jury.

Although the laws of apartheid in South Africa, which allow for indefinite detention of political opponents without specific charge or trial,³ and the internment laws of Britain, which were used to

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¹ *In re Groban*, 352 U.S. 330, 352-53 (1957) (Black, J., dissenting).

² In particular, the grand jury has been an instrument of political internment against the Puerto Rican and Black liberation movements, whose opposition to the U.S. government has an anti-colonial content similar to the liberation movements in Ireland and South Africa.

³ Apartheid is the Republic of South Africa's official policy of maintaining and promoting racial segregation and white supremacy. It has required a complex system of repressive legislation to perpetuate its existence. See generally J. DUGAR, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* (1978); Potts, *Criminal Liability, Public Policy and the Principle of Legality in the Republic of South Africa*, 73 J. Crim. L. & Criminology 1061 (1982).

Several different laws allow for the arrest and detention of opponents of apartheid. THE TERRORISM ACT NO. 83 OF 1967 (S. AFR. STAT. 1980) created the new offense of

imprison supporters of the Irish Republican movement solely on suspicion of their membership in the Irish Republican Army,⁴ would

"terrorism" defined as any activity likely "to endanger the maintenance of law and order." The offense of "terrorism" includes activities *inter alia* that may result in the promotion of "general dislocation, disturbance or disorder," "the achievement of any political aim, including the bringing about of any social or economic change, by violent or forcible means," increasing "hostility between the white and other inhabitants of the Republic," or embarrassment to "the administration of the affairs of the state." The Terrorism Act authorizes under Sec. 6, any police officer of, or above the rank of lieutenant colonel to arrest, without warrant or charge, anyone suspected of being a "terrorist" as defined, or of possessing information relating to terrorists or terrorist offenses. Such detainees are held incommunicado often in solitary confinement until such time as the Commissioner of Police considers that they have replied "satisfactorily" to all questions put to them by their interrogators, or until it is felt that further detention will serve "no useful purpose."

In addition, the Internal Security Act No. 79 of 1976 (S. AFR. STAT. 921 1980), formerly the Suppression of Communism Act of 1950, provides for two separate types of preventive detention without trial. Section 4 enables the Minister of Justice to order the preventive detention of any person whom he regards as a threat to State security or the maintenance of public order. Such people may be detained for up to seven days pending the formal delivery of a detention order and may thereafter be detained incommunicado and without trial for an indefinite period up to twelve months. Section 6 of the Act authorizes the Minister of Justice to detain any potential State witnesses in a political trial if it is considered likely that they would otherwise abscond or be subjected to intimidation. Witnesses detained in this way may be held for a period of six months or until the trial at which their appearance is required is concluded. Further, periodic government proclamations declaring "A State of Emergency" allow the police to make wholesale arrests and maintain incommunicado detentions. See generally AMNESTY INTERNATIONAL, POLITICAL IMPRISONMENT IN SOUTH AFRICA (1978); J. DUGAR, *supra* note 3, at 110-23, 132-36.

⁴ Beginning with the Special Powers Act of 1922, which empowered the Northern Ireland Minister of Home Affairs to make any regulation which he thought necessary for preserving the peace and maintaining order, the government has frequently used arrest without warrant and internment without trial against the Republican movement. See generally M. FARRELL, NORTHERN IRELAND: THE ORANGE STATE (1976); J. MCGUFFIN, INTERNMENT (1973). Under the Special Powers Act, the most recent use of the internment power took place between 1971 and 1975 and resulted in the imprisonment by the British Army of hundreds of political activists and supporters of the Republic movement. Within the first day of the reinstatement of the law in 1971, over 350 men were interned, all Catholics and opponents of British presence in Ireland. The Army held some of those interned for almost five years without ever charging them with a crime or ever granting them a trial. Accompanying the use of internment was the widespread use of torture and other abusive interrogation techniques. See J. HOLLAND, TOO LONG A SACRIFICE: LIFE AND DEATH IN NORTHERN IRELAND SINCE 1969 (1981).

As a result of international condemnation of Britain's internment policies, the British government was forced to abandon the direct use of detention without trial, but has dramatically restructured its legal system as applied to accused IRA members and supporters, deemed "terrorists." A "Commission on the Legal Procedures to Deal With Terrorist Activities in North Ireland," headed by Lord Diplock has instituted special procedures for the trial of suspected terrorists, codified in the Emergency Provisions Act of 1973 and 1978 and Prevention of Terrorism Act, 1976. These provisions allow for detention without access to counsel for 72 hours, trial without right to jury in special courts, and greatly liberalized standards for the admission of confessions.

In addition, to replace the intelligence gathering powers inherent in the exercise of

clearly be prohibited under the United States Constitution, a similar type of internment without charge is being employed in the United States with little public outcry.⁵

The Justice Department and the FBI use the subpoena power of the federal grand jury, coupled with compulsory immunity, to jail radicals who refuse to cooperate with government investigations.⁶ The government detains these political activists through a system of judicial procedures and congressional statutes that the Supreme Court has upheld,⁷ but that nonetheless allow the executive branch to usurp the subpoena power of the grand jury and create a law enforcement inquisition power that requires full cooperation or indefinite imprisonment — “Political Internment American Style.”

internment, the Emergency Power Act and the Prevention of Terrorism Act allow for arrest on the basis of suspicion, and the temporary detention and questioning of any person concerning his identity, movements, and all matters involving recent explosions or other similar incidents. Under Section 11 of the Prevention of Terrorism Act, an offense is created for failing to come forward “without reasonable excuse” with information that a person believes “might be of material assistance” in preventing an act of terrorism or securing the apprehension of a terrorist. *See also Northern Ireland Report*, NATIONAL LAWYERS GUILD (1985).

Similarly, the detention laws of the State of Israel as applied against the Palestinian people living there, offend the basic constitutional principles of the United States. Under Israeli law, “a military commander may be ordered to direct that any person shall be detained for any period not exceeding one year . . .” [Law of September 27, 1945, Concerning Defense Emergency Regulations (1945), Official Gazette, No. 1442, Supp.2 at 855, Art. 111]. There are no restrictions on the discretion of the military authorities and their decisions are not judicially reviewable. The justification usually advanced for such administrative detention is that it is employed only against persons—“terrorists”—that the authorities are convinced have engaged in criminal acts but whom it is impossible to convict under the Israeli rules of evidence. *See Dershowitz, Preventive Detention of Citizens During a National Emergency—A Comparison Between Israel and the United States*, 1 ISRAELI YEARBOOK ON HUMAN RIGHTS 295, 312 (1971). *See generally* Jabara, *Israel’s Violation of Human Rights in Arab Territories Occupied in June 1967*, NATIONAL LAWYERS GUILD. Ironically, before the creation of the State of Israel, Jews in Palestine were subjected to internment policies by the British Government. *See generally* A. RAMATI, BARBED WIRE ON THE ISLE OF MAN—BRITISH WAR TIME INTERNMENT OF JEWS (1980).

⁵ Although the scope of this Article is not intended to discuss the political content of the anti-government movements in South Africa, Israel, and Northern Ireland, a cursory examination of each reveals a basic commonality among them. Each concerns the question of the land and who is rightfully entitled to its benefits and resources, and each has been subjected to violent repression. While the leading organizations of these liberation movements have different ideologies, strategies, and tactics designed for the specific conditions of their respective homelands, each challenges the legitimacy of the government and agree that present policies of apartheid, colonialism, and alien subjugation (“settlerism”) must be removed by any means necessary—a position which has been repeatedly supported by the United Nations. Thus, these movements challenge the fundamental right of those in power to maintain their control and domination, and allow the existing governments to easily justify the use of repressive arrest and detention policies.

⁶ *See infra* notes 108-33 and accompanying text.

⁷ *See infra* note 139.

The contention that the legendary noble institution of the grand jury, adopted by the European settlers in America from their British cousins as a safeguard to the accused from the improper motivations of government,⁸ is being used as an instrument of political repression may well be met with great skepticism or shock. In reality, however, the history of the grand jury in England and in the United States has been predominantly one of serving the interests of the government or the prejudices and passions of the local populace.⁹ In the few well publicized cases where individual grand juries have refused to indict political opponents of the government against the wishes of the government authorities, these authorities have simply convened more compliant grand juries or found other ways to accomplish their political ends.¹⁰

This Article will provide a brief historical examination of the origins of the grand jury and its use in the United States, with particular focus on contemporary history. In recent years, the government has used the grand jury as a tool of inquisition, subpoenaing and resubpoenaing activists whom the government knows will refuse to cooperate with grand jury investigations concerning their political movements.¹¹

Next, the Article will discuss the emergence of organized opposition to the grand jury by the political groups and movements under attack.¹² This opposition includes the principle of non-collaboration — the refusal to cooperate in any manner with grand jury investigations concerning political activity. Activists from the United States and Puerto Rico subpoenaed before grand juries who assert the principle of non-collaboration frequently face internment.¹³

Finally, the Article will argue that the fundamental principles of free association and political freedom under the first amendment, coupled with the historic right against self-incrimination codified in the fifth amendment, establish a “political right of silence.”¹⁴ This right should bar the government from compelling cooperation with the grand jury under threat of imprisonment in an investigation involving political beliefs, activities, and associations.

⁸ See *infra* notes 27 and 135 and accompanying text.

⁹ See *infra* notes 15-133 and accompanying text.

¹⁰ See *infra* notes 22-26, and 37 and accompanying text.

¹¹ See *infra* notes 108-33 and accompanying text.

¹² *Id.*

¹³ *Id.*

¹⁴ See *infra* notes 134-57 and accompanying text.

II. THE GRAND JURY: A HISTORICAL OVERVIEW

A. THE ORIGINS OF THE GRAND JURY

Most scholars agree that the forerunner of the modern grand jury arose first in England during the reign of Henry II, not as a reform in the interests of the people, but as the result of the King's efforts to control the power and money of the church and barons.¹⁵ Prior to Henry II's reign, the church and barons had their own courts that allowed them to exercise power over portions of the King's realm and raise substantial revenues.¹⁶ During Henry II's reign, a system of judicial administration was consolidated in the hands of the King through two pieces of legislation: the Constitutions of Clarendon of 1164, in which the church hierarchy consented to the use of an "accusing jury" to bring formal charges against any layman charged in the ecclesiastical courts, and the Assize of Clarendon of 1166, which placed the power of appointing the members of the accusing juries in the hands of royal sheriffs or justices.¹⁷

The newly created grand jury was not an instrument for the benefit of the people. In fact, because the method of trial was by ordeal, and an accusation was tantamount to a verdict of guilty, the populace greatly feared the new "accusing jury" which operated as a direct arm of the King's power. The grand jurors were charged with raising money for the support of the King's war by confiscating the accused's land and money. The grand jurors were subject to heavy fines and intimidation for failing to indict a sufficient number of persons.¹⁸

By the 17th century, trial by ordeal was abolished,¹⁹ the petit jury appeared as a body separate from the accusing jury, and an accusation was no longer a guaranteed final determination of guilt.²⁰ Most commentators argue that in this period the grand jury emerged as the great protector of the individual against the power

¹⁵ See generally L. CLARK, *THE GRAND JURY, THE USE AND ABUSE OF POLITICAL POWER* 7-9 (1976); H. FRANKEL & G. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 6-9 (1977); Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 701-10 (1972).

¹⁶ See L. CLARK, *supra* note 15, at 8; Schwartz, *supra* note 15, at 703-09.

¹⁷ See L. CLARK, *supra* note 15, at 8-9; Schwartz, *supra* note 15, at 708-09.

¹⁸ *Id.*

¹⁹ In 1215, the Lateran Council abolished trial by ordeal. See H. FRANKEL & G. NAFTALIS, *supra* note 15, at 9.

²⁰ *Id.* Originally, after the abolition of trial by ordeal, the accused was tried by the very same jury that had indicted him. Finally, it developed that a defendant could strike from the trial jury any members of the grand jury that indicted him. Thus emerged the petit jury. H. FRANKEL & G. NAFTALIS, *supra* note 15, at 9.

of the king.²¹ Legal historians most often cite the prosecutions in 1681 of Anthony, Earl of Shaftesbury, and Stephen Colledge as establishing the grand jury as a protector against oppressive government.²²

Both the Earl of Shaftesbury and Stephen Colledge were vocal Protestant opponents of King Charles II's attempt to re-establish the Catholic Church in England.²³ Countering an attempt by the Earl of Shaftesbury to have his brother the Duke of York indicted for refusing to recognize the Anglican Church, the King presented charges of treason to a London grand jury against Shaftesbury and his follower Stephen Colledge. The London grand jury, chosen by Protestant sheriffs and packed with Protestant citizens, refused to indict either man and rejected the King's counsel's attempt to make the grand jury proceeding public.²⁴ While supporters of the grand jury often cite the London grand jury's refusal to indict Shaftesbury and Colledge as an early example of the role of the grand jury as a shield from the abuse of government power, the incident may stand for a far less noble principle.

The London grand jury, comprised of Protestants chosen by Protestant sheriffs, was, of course, unlikely to indict two Protestant men widely known to be supporters of the Anglican Church. The King recognized his error and simply took the Colledge case to Oxford where the King's supporters served in the grand jury. The Oxford grand jury promptly indicted Colledge and he was subsequently tried, convicted, and executed.²⁵ Shaftesbury, seeing the power of the King to manipulate the grand jury situs, fled the country, as did the Foreman of the London grand jury.²⁶

Far from representing the invaluable role of the grand jury as a safeguard against political persecution, the Shaftesbury/Colledge cases illustrate the political vulnerability of the grand jury to political prejudices, and the power of the executive to ultimately manipulate the process to obtain rubberstamped indictments. Despite

²¹ *Id.*

²² See Schwartz, *supra* note 15, at 710-21.

²³ *Id.*

²⁴ *Id.*

²⁵ See Schwartz, *supra* note 6, at 75; L. CLARK, *supra* note 15, at 10-12.

²⁶ See Schwartz, *supra* note 6, at 75. Charles II was also determined to remove the power of the Protestant (Whig) sheriffs to pick other Whigs to sit on London juries. Shortly after a no bill (*ignoramus* bill) was returned in the Earl of Shaftesbury's case, the Royalists were able to fix the sheriff's election in the London borough, thereby assuring the election of two Royalist Tory sheriffs. When a Tory mayor was elected, the King had control of the three chief magistrates of the London borough, bringing an end to pro-Protestant juries. See, Schwartz, *supra* note 15, at 18.

the ironic outcome of the Colledge and Shaftesbury cases, courts continue to celebrate them "as establishing the grand jury as a bulwark against the oppression and despotism of the Crown."²⁷

B. COLONIAL AMERICA AND POST-REVOLUTIONARY WAR

When the English settlers brought their institutions of government to their colonies in America, the grand jury was among them. In the colonies, the grand jury quickly became a means for the American settlers to express their grievances against the King's officials and their policies.²⁸ As the opposition to British authority became more overt, grand juries played a key role. In 1765, Boston grand jurors refused to return an indictment against those accused of leading the Stamp Act riots.²⁹ As the dispute with Britain headed toward open conflict, the grand juries issued reports strongly attacking British rule. When war broke out, grand juries returned treason indictments against colonialists who sided with the British.³⁰ Citizens who were sympathetic to the Crown were disqualified from service on grand juries.³¹

Although the Revolutionary War period may appear to be a time when the institution of the grand jury protected the individual against the arbitrary power of the government, with few exceptions,³² the grand jury was not concerned with protecting the unpopular. Rather, fueled by the passion and prejudice of its members and the sentiments of the community, the grand jury primarily operated as an instrument to further the revolutionists' opposition to British authority.³³ The grand jury did not serve as a bulwark to protect the dissenter. Instead, the grand jury reflected the predominant political opinion of the period.³⁴ Those accused

²⁷ See, e.g., *In Re Russo*, 53 F.R.D. 563, 568 (C.D. Cal. 1971).

²⁸ See generally L. CLARK, *supra* note 15, at 17.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² One famous case often referred to as an example of the grand jury as a protector of individual rights against the power of the oppressive government is the prosecution of New York publisher John Peter Zenger, for criminal libel. Two grand juries refused to indict Zenger for his publication's criticism of the colonial governor. The refusal of these grand juries to indict did not prevent the colonial government from instituting criminal proceedings against Zenger. Zenger was charged by information for a misdemeanor in printing, and was forced to stand trial. The petit jury refused to follow the law and acquitted Zenger, establishing the first well-known case of jury nullification in America. It was the courage of the petit jurors that served Zenger, not the grand jury. See generally V. BURANELLI, *THE TRIAL OF PETER ZENGER* (1957).

³³ L. CLARK, *supra* note 15, at 17.

³⁴ *Id.*

stood little chance of protection against unfounded accusation unless the grand jury members favored their political activity or ideas.

Once the United States gained its independence, the party in power, whether the Federalists or Republicans, used the grand jury for partisan purposes. For instance, when Congress passed the Alien-Sedition laws³⁵ (which punished supporters of the French Revolution and critics of President Adams), the Federalists, in power under John Adams, convened grand juries which were instructed by highly partisan Federalist judges, and indicted numerous Republicans under these laws. These grand juries sat in New England and the Mid-Atlantic states, federalist strongholds where grand jurors were hostile to Republican ideals. Rather than protecting the unpopular ideas of the Republicans, these grand juries rushed to return sedition indictments.³⁶

Similarly, when Jefferson and the Republicans obtained power, they seized upon the grand jury to punish their political enemies. Jefferson's administration tried repeatedly to indict Aaron Burr, an opponent of the Republicans and a disgraced Federalist. After two western grand juries refused to indict Burr for vague conspiracies to overthrow the Union, a third grand jury was convened in the Republican stronghold of Virginia. The overly cautious Republicans packed the jury. Despite several challenges to individual jurors, Burr could not counteract the overwhelming Republican bias, and true bills were returned against Burr and his alleged co-conspirators charging that they had levied war upon the United States.³⁷ Again, as in the case of Shaftesbury and Colledge, the refusal of prior grand juries to return indictments failed to deter a politically motivated executive from finding a sympathetic venue to obtain an indictment.

C. CIVIL WAR AND RECONSTRUCTION

The practice of grand juries during the pre-Civil War, Civil War, and Reconstruction periods illustrates again that the actions of the grand jury served the interests of those in power.³⁸ In the South,

³⁵ Alien and Sedition Law of 1798, ch. 74, § 10-4, 1 Stat. 596; See J. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* 15 (1951); Schwartz, *supra* note 15, at 721.

³⁶ See Schwartz, *supra* note 15, at 721-32. See generally E. LAWSON, *THE REIGN OF WITCHES: THE STRUGGLE AGAINST THE ALIEN AND SEDITION LAWS, 1798-1800* (1952).

³⁷ See D. ROBERTSON, *REPORTS OF THE TRIALS OF COLONEL AARON BURR FOR TREASON* 305-06 (1808); J. TRACY, *NINE FAMOUS TRIALS* 21 (1960); Schwartz, *supra* note 15, at 732-38.

³⁸ Much of the information concerning the use of the grand jury in the civil war period is taken from R. YOUNGER, *THE PEOPLES PANEL, THE GRAND JURY IN THE UNITED STATES, 1634-1941* 85-133 (1963), and the citations of authority contained therein.

one of the primary roles of the grand jury was to enforce the slavery laws.³⁹ Frequently, these grand juries indicted outspoken opponents of slavery for sedition or inciting slaves.⁴⁰

As abolitionists in the North increased their attacks against slavery, Southern grand juries took an increasingly active role in trying to prevent anti-slavery literature and speakers from coming into their states.⁴¹ In addition, Southern grand juries were active in charging people with harboring runaways or with encouraging and assisting fugitives to escape.⁴²

In contrast, in the antebellum North, the slavery question rarely concerned grand juries.⁴³ The Fugitive Slave Law of 1850 made persons who assisted runaway slaves liable for a fine of \$1,000 and six months imprisonment.⁴⁴ Abolitionists opposed the law

³⁹ R. YOUNGER, *supra* note 38, at 85-88.

⁴⁰ *Id.* at 92-95. In 1818, Jacob Guber, a Methodist Minister, denounced slavery at a meeting in Maryland and was indicted by a grand jury for attempting to incite slaves to rebellion. C. EATON, *FREEDOM OF THOUGHT IN THE OLD SOUTH* 131 (1940). In 1835, grand jurors of Tuscaloosa, Alabama indicted Robert G. Williams, the editor of the New York "Emancipator," on charges of sending his paper into Alabama in violation of a law that prohibited the circulation of seditious writings in the state. J. SELLERS, *SLAVERY IN ALABAMA* 366 (1950). A Kentucky grand jury accused John B. Mahon, one of the founders of the Ohio Anti-Slavery Society, of illegal abolitionist activities. *Id.*

⁴¹ R. YOUNGER, *supra* note 38 at 93-94. In 1835, President Andrew Jackson recommended that Congress make it a crime to send abolitionist literature through the mails. Strong mass resistance, in which former President John Quincy Adams was quite active, prevented Congress from taking this drastic action. In the South, however, it was up to the postmasters to choose what printed matter they would deliver. *See* W. FOSTER, *THE NEGRO PEOPLE IN AMERICAN HISTORY* 123 (1954). In 1841, the Maryland legislature ordered grand juries to call before them at every term of court all postmasters and deputy postmasters in their jurisdiction, to testify regarding inflammatory literature received by free colored persons. *See* J. BRACKETT, *THE NEGRO IN MARYLAND* 225 (1889).

⁴² R. YOUNGER, *supra* note 38, at 94 n.25. Severe penalties accompanied a conviction of helping fugitive slaves escape. Captain William Bayliss, an abolitionist shipmaster, was indicted by a Virginia grand jury for violating the Fugitive Slave Act. He was convicted, his ship was auctioned off, and he was sentenced to forty years in jail. *See* W. FOSTER, *supra* note 41, at 131.

Southern slaveholders posted a \$40,000 reward, dead or alive, for the courageous Harriet Tubman, called "Moses" for her work escorting slaves to freedom in the "underground railroad." *Id.*

⁴³ *See generally* R. YOUNGER, *supra* note 38. This is certainly not to imply that the rights of free negroes and abolitionists were not violated and that crimes against their persons and property were not taking place in the North. The Abolitionist Press reported 209 violent mob attacks in the North between 1830-1849. These violent assaults were not the uncontrolled outpouring of blind racism, as often suggested. Rather, mobs led by leaders of the white community were designed to repress advances in black education and employment, to repress all black organizations, and to destroy the local abolitionist movement. *See* J. SAKAI, *THE MYTHOLOGY OF THE WHITE PROLETARIAT: A SHORT COURSE IN UNDERSTANDING BABYLON* 29 (1983). Unfortunately, the grand jury did nothing to stop this mass wave of terror.

⁴⁴ Unlike the law of 1850 (9 Stat. 462-65 (1850)), the Fugitive Slave Act of 1793, (1

vehemently. Organized groups accomplished several dramatic rescues of recaptured slaves from prisons. Consequently, these rescues resulted in efforts to indict the liberators and thus, the appearance of the grand jury.⁴⁵ During one famous incident, a crowd of Bostonians, led by the abolitionist leader Theodore Parker, attacked the federal courthouse in an unsuccessful attempt to liberate an alleged fugitive slave from Virginia, Anthony Burns.⁴⁶ There was armed resistance to this attempt, and in the cross fire, one of the guards was killed. When the case was brought before a grand jury, the pro-slavery judge, in a strongly worded charge, directed the grand jury to enforce the Fugitive Slave Law and indict Parker and his colleagues.⁴⁷ In spite of this clearly improper pressure, the grand jurors remained unpersuaded and returned no indictments. Several months later, however, prosecutors convened another grand jury and presented the case again. The pro-slavery judge reiterated his prior charge; this time, however, the grand jury was specifically packed with opponents of the abolitionists. Predictably, the grand jury indicted Parker for willfully obstructing a U.S. Marshal.⁴⁸ Once again, those in power were able to manipulate the grand jury to obtain their own political desires.

During the Civil War, grand juries continued to play an active role. The results of their deliberations depended upon which side the local populace supported. In the North, grand juries frequently were concerned with desertion, draft evasion, and defrauding the government. Particularly in the border states, where sympathies were divided, charges of disloyalty and treason were frequently the subjects of the grand juries' work.⁴⁹ In some instances, government officials feared that overzealous grand juries that were swept up in the passions of the Civil War would indiscriminately return treason indictments which allowed for the death penalty.⁵⁰

Stat. 302-05 (1793)), made no provision for criminal proceedings against those who assisted runaways.

⁴⁵ See Schwartz, *supra* note 15, at 747-51 (discussing four major incidents in Boston involving abolitionists aiding runaway blacks). See also W. FOSTER, *supra* note 41, at 167-71.

⁴⁶ H. BUCKMASTER, *LET MY PEOPLE GO* 230-36 (1941).

⁴⁷ R. YOUNGER, *supra* note 38, at 103-05; Schwartz, *supra* note 15, at 744-46.

⁴⁸ R. YOUNGER, *supra* note 38, at 103-05.

⁴⁹ See *Id.* at 109-13. Younger points out that internment was an active policy of the North during the Civil War: The Lincoln administration early adopted, and continued to practice, a policy of arbitrarily arresting persons who voiced opposition to the war or appeared to be politically dangerous. Such a policy enabled the administration to hold dangerous persons indefinitely without proffering charges or bringing them to trial. *Id.* at 110.

⁵⁰ In May 1862, Benjamin H. Smith, the federal attorney in western Virginia, asked federal courts at Clarksburg and Wheeling not to summon grand juries for the spring

In the South, the newly established Confederate States of America adopted the existing court mechanisms, including the courtrooms, personnel, and even the pending cases. Similarly, the confederacy instituted the grand jury. In some Southern jurisdictions, new grand jurors were not even chosen; the Marshal merely summoned those drawn at the last term.⁵¹ Southern grand juries, like the grand juries in the North, also addressed problems of treason, harboring deserters or war profiteering, but, as expected, they operated from the perspective of protecting the confederacy.⁵²

The defeat of the Confederacy brought federal grand juries back to a South now controlled by the Reconstructionist policies of the victorious North. The Southern state grand juries, however, remained in the control of the white southerners who excluded blacks and white supporters of Reconstruction.⁵³ This contrast between the work of the federal and state grand juries in the South after the Civil War, underscores the political utilization of the grand jury.

White southerners used the state grand jury to obstruct Negro political participation and suffrage, as well as to discredit and harass officials of the Reconstructionist government. Southern grand juries indicted Reconstructionist Republicans on false and trumped-up charges. Although few indictees actually stood trial, the indictments hindered the ability of government officials to implement Reconstructionist policy. By the end of 1874, entire slates of Reconstructionist officials faced criminal charges in many southern counties.⁵⁴

The grand jury was an integral part of the former slaveholders' "reign of terror" which ultimately was successful in defeating the progressive policies of Reconstruction. State grand juries not only harassed and intimidated blacks and Reconstruction officials, but refused to enforce the new laws guaranteeing black people the right to vote. Radical legislatures passed laws against the Ku Klux Klan, but found them impossible to enforce because the grand juries refused to indict Klan members.⁵⁵

term, because he feared they would return too many treason indictments. J. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 89 (1963).

⁵¹ R. YOUNGER, *supra* note 38, at 115.

⁵² *Id.*

⁵³ See generally P. LAMSON, *THE GLORIOUS FAILURE* (1973); W. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA, 1860-1880* (1972); K. STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877* (1965); R. YOUNGER, *supra* note 38, at 118-133.

⁵⁴ R. YOUNGER, *supra* note 38, at 127.

⁵⁵ R. YOUNGER, *supra* note 38, at 128-29. The Klan, formed in 1865 in Pulaski, Tennessee, with the support of white landowners, spread throughout the South and became the military arm of the white southern efforts to overthrow Reconstruction. The

In contrast, federal grand juries which included many black members, were much more willing to enforce new federal legislation punishing interference with Negro suffrage and to indict Klan members for their activities.⁵⁶ By the end of 1873, well over 1300 cases crowded the dockets of federal courts pursuant to grand jury indictments.⁵⁷ While only the leaders of the Ku Klux Klan or other opponents of Reconstruction were tried, Republican leaders used wholesale indictments as a form of repression against their opposition.

Gradually, however, the Southern reactionary forces, led by its military arm, were able to take power and defeat all the gains of Reconstruction. By 1876, only two Southern states—South Carolina and Louisiana—were left within the control of the Reconstructionists.⁵⁸ By the following year, when Rutherford B. Hayes, in order to obtain the presidency, agreed to surrender political control of the remaining two states to the Southern Democrats, Reconstruction ended.⁵⁹ Since then, Southern grand juries, both state and federal, have consistently repressed black people in their struggle for freedom. Hundreds of blacks, who were excluded from serving on grand juries or petit juries, were indicted on false charges and

Klan carried out murders, lynchings, rapes, and other acts of terror throughout the South. During the 1868 elections in Louisiana, 2,000 blacks were killed or wounded, and many more were forced to flee the state. J. SAKAI, *supra* note 43, at 41. See also K. STAMPP, *supra* note 53, at 199-205.

Despite these rampant acts of terrorism, Southern state grand juries refused to indict. Unbelievably, “[j]urors in Blount County, Alabama, found indictments against a large number of persons for opposing the Klan. In South Carolina, a courtroom audience broke into cheers when the inquest refused to charge Klan members with intimidating colored persons.” R. YOUNGER, *supra* note 38, at 129.

⁵⁶ The Ku Klux Klan Act of 1870, 17 Stat. 140 (1870), extended federal jurisdiction over all elections and provided that the use of force or intimidation to prevent citizens from voting was to be punished by fine or imprisonment. The following year, a Federal Election Act, 16 Stat. 433 (1871), and another Ku Klux Klan Act 17 Stat. 13 (1871), were passed. The Acts provided for increased penalties on persons who “shall conspire together, or go in disguise . . . for the purpose . . . of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the law.”

A federal inquest at Raleigh, North Carolina investigated a Klan raid upon the town of Rutherford and indicted over 750 persons for taking part. In October 1871, President Grant proclaimed that “unlawful combinations and conspiracies existed in nine South Carolina counties.” Accordingly, federal troops moved in and arrested fifteen hundred persons. A federal grand jury composed of six whites and twenty-one blacks indicted over seven hundred and fifty persons for violating the Federal Election Act and the Ku Klux Klan Act of 1871. R. YOUNGER, *supra* note 38, at 130.

⁵⁷ R. YOUNGER, *supra* note 38, at 131.

⁵⁸ W. FOSTER, *supra* note 41, at 336.

⁵⁹ *Id.*

executed or imprisoned for long periods.⁶⁰

D. THE LABOR MOVEMENT

In the following decades, the government used the grand jury to repress the emergence of a militant movement on behalf of working people in the late 19th and early 20th centuries. Led by foreign born immigrants, anarchists, and syndicalists of the Industrial Workers of the World (IWW), the labor movement naturally incurred the wrath of powerful business interests and the governmental administration.

Grand juries indicted thousands of labor organizers, union leaders, and activists on framed-up charges, ranging from unlawful assembly to murder and bombings.⁶¹ Rather than protecting the innocent from political persecution, the grand jury was the willing hand maiden of oppression.

For example, grand juries tried to suppress the movement by labor for an eight-hour work day. Cook County prosecutors convened a grand jury when police provocateurs allegedly detonated a bomb in Chicago's Haymarket Square among a crowd of protesting workers who were demanding the eight-hour working day. Rather than conducting an impartial investigation to determine those responsible for the bombing and subsequent shooting, public officials whipped up public hysteria against the protesters and their leaders.⁶²

The judge presiding over the grand jury fueled the hysteria by instructing the grand jury "that anarchism must be suppressed."⁶³ The public opprobrium visited upon the protest leaders influenced the grand jurors who were already determined to have the anarchist leaders pay for the deaths and rioting in Haymarket Square. Thus, the grand jury indicted thirty-one anarchists and socialists. Consequently, eight of the most effective labor agitators were tried. Of the eight, only two were at the scene when the bomb exploded.⁶⁴

⁶⁰ See, e.g., *Powell v. Alabama*, 287 U.S. 45 (1932) (involving *Scottsboro Boys* case); See also, MENDOLSOHN, *THE MARTYRS* (1966); J. FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF AMERICAN NEGROES* (1956); W. FOSTER, *supra* note 41, at 482-83, 529; R.W. LOGAN, *THE BETRAYAL OF THE NEGRO* (1954).

⁶¹ See generally R. BOYER & H. MORAIS, *LABOR'S UNTOLD STORY* 92-97 (1955).

⁶² *Id.*

⁶³ D. LUM, *THE GREAT TRIAL OF THE CHICAGO ANARCHISTS* 48 (1886).

⁶⁴ H. BARNARD, *EAGLE FORGOTTEN* 109 (1938) (if the anarchists through some turn of events had been acquitted they would have been hanged by a mob). Other authors noted that "[a] Vigilante Committee will take the law into their own hands, and restore social order, by suspending civilization for three days." R. BOYER & H. MORAIS, *supra* note 61, at 97.

During the same week of the Haymarket incident, over 17,000 union workers in Milwaukee went on strike for an eight-hour day. The use of scabs and strikebreakers led to street battles between the workers and the police. A grand jury was convened and the presiding judge, James A. Mallory, urged them to expose the "anarchists and demagogues" responsible for the violence and bloodshed. The grand jury, which was primarily composed of businessmen, had no sympathy for the strikers. It returned an indictment for rioting and conspiracy, charging seventy leaders of the eight hour movement, including the entire district executive board of the Knights of Labor in Milwaukee.⁶⁵

In 1894, when workers at the Pullman Plant in Illinois went on strike, members of the American Railway Union, in solidarity refused to handle trains with Pullman cars. The strike spread among railway workers across the nation, resulting in fighting between militia and strikers. Federal authorities in Chicago summoned a special grand jury to indict the strikers. The presiding judge denounced the strike and called upon the grand jurors to vindicate the law. Obediently and in keeping with official opinion, the jurors returned conspiracy indictments for interfering with the United States mail against Eugene V. Debs, president of the American Railway Union, three other officers of the Union, and forty-three striking workers.⁶⁶ Federal grand juries throughout the country also indicted striking workers. In St. Paul, sixty strikers faced charges of interfering with the mails, while in San Francisco, jurors indicted one hundred and thirty-four strikers on the same charge.⁶⁷

During World War I, grand juries indicted hundreds of IWW members, Socialists, other militant labor leaders,⁶⁸ and anti-war ac-

⁶⁵ R. BOYER & H. MORAIS, *supra* note 62, at 97; R. YOUNGER, *supra* note 38, at 215.

⁶⁶ R. BOYER & H. MORAIS, *supra* note 62, at 123-31; R. YOUNGER, *supra* note 38, at 216-17.

⁶⁷ R. Younger, *supra* note 38, at 216-17.

⁶⁸ The grand jury also victimized Mexican workers in the Southwest, as they fought for better working conditions and to keep their land from the designs of the white ranchers. In New Mexico in 1890, the grand jury investigating a clandestine Mexican group, "Las Gorras Blancas" (White Caps), which was accused of attacking white ranchers who had stolen Mexican lands, indicted Mexican labor leaders. R ACUÑA, *OCCUPIED AMERICA, THE CHICANO STRUGGLE TOWARD LIBERATION 73-77* (1972).

Also, Mexican revolutionary Syndicalist leader Ricardo Flores Magon of the Partido Liberal Mexicano (PLM), which had led thousands of miners in strikes on both sides of the border and published its ideas in a magazine called "Regeneracion," was indicted several times for attacking the capitalist system through his writings, and for opposing Mexican workers' involvement in World War I. Magon was finally imprisoned in Ft. Leavenworth, where he was denied medical care and died. J. GOMEZ-QUINONES, SEMBRADORES, RICARDO FLORES MAGON Y EL PARTIDO LIBERAL MEXICANO: A EULOGY AND CRITIQUE 49-64 (1973). *See also* R.F. MAGON, *LAND & LIBERTY* (1977).

tivists under sedition and espionage charges.⁶⁹ In almost all cases, rather than safeguarding the rights of protest and dissent, the grand jury enthusiastically returned indictment after indictment, punishing activists for the exercise of their right of free speech. In one case, a grand jury in the Northern District of Illinois indicted over one hundred IWW members, including its leader, Big Bill Haywood, for sedition, espionage, and conspiracy to oppose the Selective Service Act.⁷⁰ Grand juries throughout the United States returned similar mass indictments.⁷¹ A federal jury in Canton, Ohio even indicted the veteran socialist, Eugene V. Debs, at the age of 63, for making a speech against the war and in support of socialism. Subsequently, Debs was convicted and sentenced to ten years in prison.⁷²

In addition to attacking the labor movement during this period, the government used the grand jury to attack the popular black na-

⁶⁹ R. BOYER & H. MORAIS, *supra* note 61, at 195-202.

⁷⁰ *Id.*; see also Haywood v. United States, 268 F. 795 (7th Cir. 1920); W. HAYWOOD, BILL HAYWOOD'S BOOK: THE AUTOBIOGRAPHY OF WILLIAM D. HAYWOOD 310-23 and Appendix III (1929).

⁷¹ One hundred and forty-six IWW members were indicted in Sacramento, 38 in Wichita, 7 in Tacoma, 27 in Omaha, and 28 in Spokane. Like those indicted in Chicago, virtually all were found guilty for opposing the war, and were given long prison sentences. See R. BOYER & H. MORAIS, *supra* note 6, at 198; W. HAYWOOD, *supra* note 70, at 310-26 and Appendices I and II.

On June 21, 1917 a federal grand jury indicted anarchist leaders Emma Goldman and Alexander Berkman on charges of "conspiracy to induce persons not to [register for the draft]," based upon speeches they had made against the war. R. DRINNON, *REBEL IN PRACTICE* 188-89 (1961). At her trial, Goldman, acting as her own lawyer, defended the right of those to oppose the government by force: "[A]n act of political violence at the bottom is the culminating result of organized violence at the top. . . . I refuse to cast the stone at the 'political criminal'. . . . I take his place with him, because he has been driven to revolt, because his life-breath has been choked up." *Id.* at 193. Scores of Socialists were also indicted and imprisoned, including the entire national executive committee of the Socialist Party. See R. BOYER & H. MORAIS, *supra* note 62, at 198.

⁷² R. BOYER & H. MORAIS, *supra* note 6, at 200-01. Debs was charged with ten counts of violation of the Sedition Act for a speech he made in Nimisilla Park, which stated in part: "The master class has always declared war; the subject class has always fought the battles. The master class has had all to gain and nothing to lose, while the subject class has had nothing to gain and all to lose—especially their lives. . . ." *Id.* at 200. Debs also defended himself, calling no witnesses but contending that he had the inalienable right under the first amendment to express his thoughts about his country's policies. Nevertheless, he was convicted and before sentencing told the Court:

Your honor, I ask no mercy, I plead for no immunity. I realize that finally the right must prevail. I never more fully comprehended than now the great struggle between the powers of greed on one hand and upon the other the rising hosts of freedom. I can see the dawn of a better day of humanity. The people are awakening. In due course of time they will come into their own.

Id. at 201. The Court unaffected, sentenced the elderly Debs to ten years in federal prison. When the Supreme Court upheld the conviction and sentence, finding that free speech was not involved, Debs issued the following statement:

tionalist leader Marcus Garvey. In January 1922, a federal grand jury indicted Garvey for mail fraud when his Black Star steamship line failed. Garvey was imprisoned for two years and then deported to Jamaica.⁷³ Simultaneously, the government was ignoring the lynchers and exploiters of black people and using the grand jury power to suppress the leadership of the black nationalist movement.⁷⁴ This pattern repeated itself throughout the century.⁷⁵

In periods of great turmoil and dissent, when the exploited and oppressed vocally expressed their views, often for the first time, the grand jury, rather than protecting the rights of the dissenters, stood on the side of the rich and powerful, to protect the status quo.

The decision is perfectly consistent with the character of the Supreme Court as a ruling class tribunal. It could not have been otherwise. So far as I am personally concerned, the decision is of small consequence. . . .

Great issues are not decided by courts but by the people. I have no concern with what the coterie of begowned corporation lawyers in Washington may decide in my case. The court of final resort is the people, and that court will be heard from in due time. . . .

Id. at 202.

⁷³ W. FOSTER, *supra* note 41, at 442-51. At least 38 black people died at the hands of lynching parties in 1917 and another 58 in the following year. In East St. Louis, Illinois, at least 40 black people died in a riot that grew out of the employment of blacks in a factory that held government contracts. See J. FRANKLIN, *FROM SLAVERY TO FREEDOM* 341 (1980). Although many black newspapers supported the U.S. war effort, "The Messenger," a newspaper published in New York by A. Philip Randolph and Chandler Owens, published an article "Pro-Germanism Among Negroes." For publishing this article, the editors were indicted by a federal grand jury for sedition, and imprisoned for two and one-half years. *Id.* at 342. Within a few months after the end of World War I (a war in which black soldiers had fought and died to make America safe for democracy), there were race riots in two dozen cities, rampant lynchings, and the resurrection of the Ku Klux Klan. See D. LEWIS, *WHEN HARLEM WAS IN VOGUE* 23 (1979).

In one instance, in October of 1919 in Helena, Arkansas, a local grand jury composed of a special "Committee of Seven," including the sheriff, deputy sheriff, the county judge, the mayor, and three businessmen, indicted 73 black members of a newly formed organization—The Progressive Farmers and Household Union of America—who were seeking to better their economic status. Twelve were sentenced to death, and the rest (excluding one acquitted) were rapidly convicted and sentenced to terms ranging from 5-21 years. *Id.* at 22.

⁷⁴ See sources cited at *supra* note 60.

⁷⁵ In 1942, for example, Elijah Muhammad, a Black Muslim leader, was indicted for sedition and inciting followers to resist the draft, and received a five year sentence on the latter charge. In addition, over 100 of his followers were indicted for refusing to serve in the U.S. military. See E.U. ESSIEU-UDOM, *BLACK NATIONALISM—A SEARCH FOR AN IDENTITY IN AMERICA* 67 (1962). See also I. OBADALE, *FREE THE LAND* (1984), documenting the criminal prosecutions in the 1970's against the leadership of the Republic of New Africa, a Black Nationalist group seeking to establish an independent Black Nation in five states of the Deep South; H. Newton, *To Die for the People* (1976); M. KEMPTON, *BRIAR PATCH* (1972)(documenting the prosecution of the Black Panther Party (Panther 21)).

E. POST-WORLD WAR TWO AND THE COLD WAR

1. *Birth of the Investigative Grand Jury*

With the urbanization of the United States, the proliferation of crime, and the expansion of federal criminal jurisdiction, the grand jury could no longer exercise even the minimal level of independence that it had been able and willing to exercise in the past. The volume and complexity of the cases to be reviewed by the grand jury led to its inevitable abdication to the prosecutor of any power. In the past, the grand jury had not lived up to its reputation as a shield against the abuse of government power. Now it developed into a rubber stamp of approval for prosecutory requests for indictment,⁷⁶

⁷⁶ See NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 124-26 (1931); Morse, *A Survey of the Grand Jury System*, 10 OR. L. REV. 101, 153-54 (1931) (of 6,453 cases submitted to state grand juries, the grand jurors deviated from the prosecutor's recommendation in only 5.39% of the cases). See also the testimony of Assistant Attorney General Benjamin Civiletti, stating that in 1976, 23,000 federal indictments were returned and 123 no-true bills. *Hearings on H.R. 94 Before the Subcommittee on Immigration, Citizenship, and International Law of House Committee on the Judiciary*, 95th Cong., 1st Sess. 738 (1977).

Further, Melvin P. Antell, Judge of the Essex County District Court, Newark, N.J. stated well the relationship between the grand jury and the prosecutor:

Cases presented to a grand jury are usually introduced by the prosecutor's opening statement. He will say what crime is charged, what additional or alternative charges may be considered, define the indicated crimes, and then outline the facts upon which the proceedings are based. Thereafter witnesses are called to substantiate the charges.

Though free to take part in the interrogation, the grand jurors must place enormous trust in the prosecutor's guidance. It is he, after all, who tells them what the charge is, who selects the facts for them to hear, who shapes the tone and feel of the entire case. It is the prosecutor alone who has the technical training to understand the legal principles upon which the prosecution rests, where individual liberty begins and ends, the evidential value of available facts and the extent to which notice may be taken of proposed evidence.

In short, the only person who has a clear idea of what is happening in the grand jury room is the public official whom these twenty-three novices are expected to check. So that even if a grand jury were disposed to assert its historic independence in the interest of an individual's liberty, it must, paradoxically, look to the very person whose misconduct they are supposed to guard against for guidance as to when he is acting oppressively.

Actually, the concern of protecting the individual from wrongful prosecution is one about which grand juries in general show little interest. It is edifying indeed to a new prosecutor to learn how willing people are to let trouble descend upon their fellows. In positions of authority, many are prepossessed by fancied obligations to "back up" the police, to "stop mollycoddling," to "set examples." Attitudes of understanding, of patient inquiry, of skeptical deliberation, so needed in the service of justice, recede in the presence of duly constituted officials and are replaced by a passive acceptance of almost anything which seems to bear the sovereign's seal of approval.

Thus, when a case is brought into the grand jury room the prevailing feeling is that the prosecutor wouldn't bring it there if he didn't think he could get a conviction. Accordingly, it follows in nearly all cases that unless the prosecutor does something forceful about it indictments are normally returned by the grand jury.

Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153, 154-55 (1965).

and its subpoena power became a valuable tool for wide ranging governmental investigations.

It is this later inquisitory power that appeared strongly during the Cold War period after World War II. Fueled by the fear of alleged communist subversion that was generated by ambitious politicians, the government used grand jury investigations and indictments as substitutes for a progressive foreign and domestic policy. Loyalty oaths⁷⁷ and congressional investigating committees arose to ferret out communists, spies, and sympathizers from all sectors of American society. In January 1947, the House Unamerican Activities Committee (HUAC) announced an eight-point program to expose communists and communist sympathizers in the federal government, and to reveal the "outright" communist control of "some of the most vital unions."⁷⁸

The HUAC investigations sought to expose people as communists or former communists and force them to name other friends or co-workers who were also present or former communists. This created a culture of inquisition and public denunciation. People were pressured to cooperate or suffer public disgrace and loss of jobs and career.⁷⁹

President Truman, eager to appear as hard on communism as the legislative branch, and simultaneously, to isolate and discredit his opponent Henry Wallace and the Progressive Party, seized upon the power of the grand jury to return indictments against twelve top leaders of the Communist Party shortly before the Progressive Party Presidential Convention. The governor charged the communist leaders under the Smith Act with conspiring to advocate the overthrow of the government. Truman, referring to the indictment, stated: "the fact that the communists are guiding and using the third party shows that this party does not represent American ideals."⁸⁰ The public perceived the grand jury indictments, coupled with Truman's statement, as a warning that anyone working to help the Wallace campaign might well face prosecution under the Smith Act. In October, federal grand juries began wide-ranging investigations

See also statement of federal Judge William Campbell: "This great institution of the past has long ceased to be the guardian of the people for which purpose it was created at Runnymede. . . . Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury." Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229, 253 (1972).

⁷⁷ See R. GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA, FROM 1870 TO THE PRESENT* 299-348 (1978).

⁷⁸ *Id.* at 296.

⁷⁹ See generally, V. NAVASKY, *NAMING NAMES* (1980).

⁸⁰ R. GOLDSTEIN, *supra* note 77, at 312-13.

into Communist Party activities in Ohio, Colorado, and California, subpoenaing party records and numerous activists.⁸¹

As evidence of the government's desire to lock up its citizens without trial, Congress passed the Internal Security Act in 1950, which in essence included an emergency detention provision granting legal authority for mass round-ups of dissidents, and their indefinite detention without trial during an internal security emergency declared by the President.⁸² The Attorney General's belief that a person would probably conspire in the future to engage in acts of espionage or sabotage was the sole basis for detention. In addition, the Justice Department appropriated \$775,000 in 1952 to set up six detention camps in Arizona, Florida, Pennsylvania, Oklahoma, and California.⁸³

⁸¹ *Id.* at 313.

⁸² *Id.* at 323. The conditions provided in the Act for an "internal security emergency" were three: (1) an invasion of the U.S. or its possessions; (2) a declaration of war by Congress; or (3) an insurrection within the U.S. in aid of a "foreign enemy." The statute also authorized the preparation of two general warrants, a "Master Warrant of Arrest" and a "Master Search Warrant." The arrest warrant allowed for "the arrest of the persons on the attached list . . . to be detained until further order." It could be executed at any hour of the day or night. *Id.*

The "attached list" or the "security index" was originated by J. Edgar Hoover in 1939 and was an intelligence index of people who could pose a threat to internal security. The list contained two classes of people: those to be apprehended in an emergency and those to be watched. The list which came to be called the Security Index, contained the names of radicals with a potential for sabotage, as well as the leader and functionaries of left-wing organizations. At the time the 1950 Act was passed, the Security Index (SI) was said to have 11,930 names. By 1951, the SI included 15,390 names—14,000 of them believed to be Communist Party members, and by the end of 1954 the SI contained 26,174 persons. Although the official SI ceased to function, the FBI maintained their own form of SI. In 1969 the designations of the index were prioritized under the Priority Apprehension Program and as Priority I, top level leaders of "subversive organizations and anarchist groups" were under periodic surveillance by the FBI. In 1971 the Congress repealed the Emergency Detention Act of 1950. However, then Attorney General Mitchell authorized the FBI to maintain its Security Index, which was now formally called the Administrative Index (ADEX) containing three main categories, including the leaders of revolutionary, radical, and black extremists groups and the rank and file members of these groups. Category III illustrated the detention-purpose of the Index when it included, "any non-affiliated revolutionary whose ideology makes him likely to seize upon the opportunity presented by a national emergency to commit acts of espionage and sabotage." C. ROSS & K. LAWRENCE, J. EDGAR HOOVER'S DETENTION PLAN: THE POLITICS OF REPRESSION IN THE UNITED STATES, 1939-1976, AMERICAN FRIENDS SERVICE COMMITTEE'S PROGRAM ON GOVERNMENT SURVEILLANCE AND CITIZENS' RIGHTS 14-15 (1978). In 1976, the FBI told the Senate Select Committee on Intelligence (Church Committee) that its ADEX files were no longer operational. *Id.*

⁸³ Perhaps unsurprisingly, the designated camp at Tull Lake, California, had been one of the major camps used to house Japanese-Americans during World War II. See R. GOLDSTEIN, *supra* note 77, at 322-24. No article which in any way touches on the question of political internment in the U.S. can fail to mention the fascist-like detention of Japanese-Americans in camps by executive order during World War II and the ruling of the Supreme Court in *Korematsu v. United States*, 323 U.S. 214 (1944), upholding the

This flood of repressive legislation and the use of administrative and legislative tribunals would seem to have rendered the investigative power of the grand jury unnecessary. This was not the case. In some instances, the grand jury carried out supplemental investigations of its own.⁸⁴ Even the United Nations was not spared from the grand jury/congressional witch hunt. In 1951, a Southern District of New York grand jury investigating alleged communist influence and spying at the U.N., subpoenaed forty-seven past and present American employees of the United Nations. Many of those subpoenaed asserted their fifth amendment right to silence. U.N. Secretary General Trygve Lee, under pressure from the U.S. prosecutor, dismissed almost all those subpoenaed from their jobs, insisting that a pro-communist American was an unrepresentative American. Later, under countervailing pressure within the U.N., Lee eventually condemned the use of the grand jury as a witch hunt and refused to comply with a subpoena upon himself to appear before the grand jury.⁸⁵

Following the example of the congressional investigating committees, prosecutors expanded the power of the grand jury to gather information against unpopular political activists and movements. The grand jurors were not being asked to review evidence already accumulated by the prosecution to determine whether such evidence was sufficient for an indictment—the stated constitutional purpose of the grand jury. Rather, the primary purpose of these “investigative” grand juries was not to evaluate evidence but to discover it. Those subpoenaed before these “investigatory” grand juries were not witnesses to criminal activity but targets of the investigation and sources of political intelligence.⁸⁶

There was one obstacle to the effectiveness of this type of inquisition—the witness’ fifth amendment right to silence. In the face of the escalating attacks on progressive activists throughout the cold war period, witnesses increasingly relied upon their fifth amendment right to refuse to answer questions.⁸⁷

government’s exercise of “emergency” internment power. See P. IRONS, *JUSTICE AT WAR* (1982).

⁸⁴ Beginning in the spring of 1947, a federal grand jury in New York—the same one that would indict the Communist leaders in 1948—subpoenaed scores of past and present government employees accused by government informers of belonging to the Communist Party or Communist espionage rings. The grand jury did not indict a single one, many of whom had taken the fifth amendment, but rather passed the issue to the HUAC. D. CAUTE, *THE GREAT FEAR* 56 (1978).

⁸⁵ R. GOLDSTEIN, *supra* note 77, at 326-29.

⁸⁶ D. CAUTE, *supra* note 84, at 56.

⁸⁷ See generally, Rogge, *Compelling the Testimony of Political Deviants*, 55 MICH. L. REV. 163 (1956).

2. *The Forced Immunity Statute*

Distressed by witnesses invoking this fundamental constitutional right of the fifth amendment, the government took steps to remove this obstruction. In 1954 Congress passed a special immunity law⁸⁸ ("the Act"), which applied only to matters of internal security. Upon a grant of transactional immunity⁸⁹ approved by the Attorney General, the Act compelled a witness to give testimony before a congressional committee or a grand jury. This was the first time that legislation provided for compulsory testimony in return for immunity in an area concerning political thought and activity. Prior to this Act, immunity legislation was used exclusively in the field of economic regulation.⁹⁰ Upon the passage of the 1954 Act, President Eisenhower announced that "[t]his Act provides a new means of breaking through the secrecy which is characteristic of traitors, spies and saboteurs."⁹¹ The cold war, anti-communist hysteria period was coming to an end rapidly, however, and in the nine years after its passage, the Act was used only three times.⁹² Nevertheless, the mechanism for the grand jury as a political inquisition and a tool of internment was in place. It took only the re-emergence of political dissent for the government to call the grand jury back into action.

F. THE NIXON YEARS AND THE GRAND JURY

The blatant use of the grand jury for harassment of political activists and intelligence gathering reached its height under the Nixon Justice Department. Between 1970-1973, over one hundred grand juries were convened in 84 cities; they subpoenaed over 1,000 activists.⁹³ A special section of the Justice Department, Internatl Se-

⁸⁸ Immunity Act of 1954, ch. 769, § 1, 68 Stat. 745 (1954), *repealed* by Pub. L. No. 91-452, Title II, § 228(a), 84 Stat. 830 (15 October 1970). The Act applied to the offenses of treason, sabotage, espionage, and sedition. The United States Supreme Court in *Ullman v. United States*, 356 U.S. 422 (1956), upheld this abrogation of the historic right of silence directed against political thought and action despite a vigorous dissent by Justice Douglas. *See also* Rogge, *supra* note 87. *See infra* notes 145-48 and accompanying text.

⁸⁹ "Transactional immunity" affords immunity to the witness from prosecution for the offense to which his compelled testimony relates. *BLACKS LAW DICTIONARY* 677 (5th ed. 1979). *Compare with* "use immunity," *infra* note 102.

⁹⁰ For a list of statutes that include compulsory testimony/immunity provisions for business enterprises, *see* *Shapiro v. United States*, 335 U.S. 1, 6-7 n.4 (1948).

⁹¹ Rogge, *supra* note 87, at 170.

⁹² *See* Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 *YALE L.J.* 1568, 1608 (1963).

⁹³ *See* R. GOLDSTEIN, *supra* note 77, at 493; Donner & Cerruti, *The Grand Jury Network: How the Nixon Administration Has Secretly Perverted a Traditional Safeguard of Individual Rights*,

curacy Division ("ISD"), which coordinated the various grand jury inquiries, victimized all sectors of the anti-Vietnam war movement. Student activists,⁹⁴ Vietnam veterans,⁹⁵ the Catholic left,⁹⁶ Weathermen,⁹⁷ the anti-draft movement,⁹⁸ and the academic community⁹⁹ were all targets of grand juries. Other grand juries attacked the women's movement and the black nationalist movement.¹⁰⁰ Armed with Title II of the Organized Crime Control Act of 1970,¹⁰¹ which allowed for the first time the conferring of

NATION, January 3, 1972, at 5.; Comment, *Federal Grand Jury Investigation of Political Dissidents*, 7 HARV. C.R.-C.L. L. REV. 432 (1972).

⁹⁴ See, e.g., *In Re Evans*, 452 F.2d 1239 (D.C. Cir. 1971) (grand jury investigating May Day anti-war demonstrations); *Bacon v. United States*, 446 F.2d 667 (9th Cir. 1971).

⁹⁵ *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1973). See also Recent Developments, *Grand Juries May Inquire Into Political Beliefs Only in Narrow Circumstances*, 73 COLUM. L. REV. 867, 879 n.78 (1973).

⁹⁶ *In Re Grand Jury Proceedings (Egan)*, 450 F.2d 199 (3rd Cir. 1971), *aff'd sub. nom.*, *Gelbard v. United States*, 408 U.S. 41 (1972). These cases arose out of a grand jury investigation into an alleged plot by Catholic and other religious activists to kidnap Henry Kissinger and to sabotage Washington, D.C.'s heating system. Subsequent to the indictment of six co-conspirators, the grand jury subpoenaed 34 people. Two who refused to testify—Jacques Egan and Pat Chanel—raised, *inter alia*, that the questions propounded to them were based upon illegal electronic surveillance. The government claimed a grand jury witness had no standing to raise this claim. The government's contention was rejected by the Third Circuit and ultimately by the Supreme Court. *Id.* Nevertheless, four witnesses were cited for civil contempt and four for criminal contempt.

⁹⁷ The Weathermen, a split off from the Students for a Democratic Society, pursued militant and armed actions in opposition to Vietnam war. A Tucson grand jury conducted an alleged investigation into the illegal purchase of dynamite, but focused primarily on the radical community in Venice, California and the political whereabouts of fugitives. Five political activists were cited for contempt and jailed. *United States v. Weinberg*, 439 F.2d 743 (9th Cir. 1971). The five remained incarcerated until the end of the grand jury and as they were being released, were subpoenaed again and this time cooperated. See *Donner & Cerriti*, *supra* note 93, at 6-7; Comment, *supra* note 93, at 433. See also *In Re Kinoy*, 326 F. Supp. 400 (S.D.N.Y. 1970) (grand jury subpoenaed well respected radical lawyer Arthur Kinoy in an effort to locate his daughter an alleged fugitive).

⁹⁸ *In re Vericker*, 446 F.2d 244 (2nd Cir. 1971) (Brooklyn grand jury investigating theft of records and destruction of draft files); *In re Verplank*, 329 F. Supp. 433 (C.D. Cal. 1971) (grand jury investigating anti-draft movement).

⁹⁹ *United States v. Doe (Popkin)*, 460 F.2d 328 (1st Cir. 1972) (rejected the contention that the "scholars privilege" under the first amendment entitled defendant to refuse to answer questions about the sources of his scholarly articles); *United States v. Doe (Ellsberg)*, 455 F.2d 1270 (1st Cir. 1972); *In re Russo*, 448 F.2d 369 (9th Cir. 1971).

¹⁰⁰ *Burse v. U.S.*, 466 F.2d 1059 (9th Cir. 1972) (grand jury investigation into Black Panther Party); *In re Grand Jury Subpoenas (Grusse)*, 515 F.2d 157 (1975), 402 F. Supp. 1232 (D. Conn. 1975) (grand jury investigation into women's communities in New Haven, Connecticut and in search of radical fugitives).

¹⁰¹ 18 U.S.C. §§ 6001-6005 (1982). The Internal Security Division information gathering was apparently not restricted to individual grand juries because the division also supervised the Interdivisional Informant Unit (IDIU), which in essence consisted of a

“use immunity”¹⁰² to supplant a witness’ fifth amendment right, the Justice Department was able to carry out wide ranging political intelligence gathering.

Numerous examples clearly establish the political motivations of the Nixon Justice Department’s use of the federal grand jury. One such example involved Leslie Bacon, a 19 year-old anti-war activist, who was arrested on a material witness warrant in Washington, D.C. on the eve of May Day demonstrations there. She was flown to Seattle where she was brought before a grand jury allegedly investigating the bombing of the nation’s Capitol Building. She was brought before the grand jury thousands of miles from her home without adequate consultation with a lawyer and questioned for several days in great detail about her personal and political life.¹⁰³ Similarly, twenty-three leaders of the “Vietnam Veterans Against the War” were subpoenaed on short notice to appear before a grand jury convened in Tallahassee, Florida on the same day that they were to attend a planned demonstration at the Democratic National Convention in Miami. Many were simply asked their name and address and then released, and others were imprisoned for contempt.¹⁰⁴

Testifying before a House Judiciary sub-committee investigating the tactics of an ISD grand jury which had subpoenaed five pro-Republican Irish-Americans from New York to a grand jury in Fort

computer that acted as the prime repository for domestic political intelligence. See Recent Developments, *supra* note 95, at 828 n.71.

¹⁰² “Use immunity prohibits witness’ compelled testimony and its fruits from being used in any manner in connection with criminal prosecution of the witness.” BLACK’S LAW DICTIONARY 677 (5th ed. 1979). Cf. *supra* note 89 (transactional immunity).

¹⁰³ A sample question asked by the head of the Internal Securities Division, Guy Goodwin, to one of five witnesses subpoenaed before a grand jury in Tucson allegedly investigating the transportation of dynamite, illustrates the true intent of these grand juries:

Tell the grand jury every place you went after you returned to your apartment from Cuba, every city you visited, with whom and by what means of transportation you traveled and who you visited at all of the places you went during the times of your travels after you left your apartment in Ann Arbor, Michigan, in May of 1970.

I want you to describe for the grand jury every occasion during the year 1970, when you had been in contact with, attended meetings which were conducted by, or attended by, or been any place when any individual spoke whom you knew to be associated with or affiliated with Students for a Democratic Society, the Weatherman, the Communist Party or any other organization advocating revolutionary overthrow of the United States, describing for the grand jury when these incidents occurred, where they occurred, who was present and what was said by all persons there and what you did at the time that you were in these meetings, groups, associations or conversations.

¹⁰⁴ Fine, *supra* note 90, at 433-34 n.5; Recent Developments, *supra* note 92, at 870 n.20 and 879 at n.78. Another federal grand jury, convened in San Francisco, subpoenaed 16 people from points as distant as Minneapolis and Puerto Rico to ask about their knowledge of the whereabouts of anti-war fugitives. *Id.* at 878 n.73.

Worth, Texas,¹⁰⁵ Senator Edward M. Kennedy captured the essence of the Nixonian use of the grand jury:

Over the past four years, under the present administration, we have witnessed the birth of a new breed of political animal—the kangaroo grand jury—spawned in a dark corner of the Department of Justice, nourished by an administration bent on twisting law enforcement to serve its own political ends, a dangerous modern form of Star Chamber secret inquisition that is trampling the rights of American citizens from coast to coast.¹⁰⁶

After a period of disorganization and confusion, progressive organizations began to develop a unified response to the grand jury attacks. The National Lawyers Guild, a progressive national legal organization, created a grand jury task force to coordinate legal strategies to combat the political grand jury.¹⁰⁷ Civil rights, church, and labor groups established the “National Coalition to End Grand Jury Abuse.”¹⁰⁸ Later a Grand Jury Project was formed in New York, which published a newspaper, *Quash*, and advocated resistance to grand jury subpoenas. Soon, many subpoenaed witnesses agreed that the only way to respond to the grand jury was to refuse to answer its questions and to persist in such refusal in the face of immunity and contempt. Once a witness began to answer questions, the door was open, leaving no effective way to pick and choose which questions to answer.

The position of “non-collaboration” with the political grand jury was thereby established. The theory behind non-collaboration was that witnesses could deprive the grand jury witch hunts of the information they sought, thereby subverting their mission only by a unified position of refusal.¹⁰⁹ Numerous witnesses followed the principle of non-collaboration. Some escaped civil contempt citations and jail, but many others spent months in jail without charge, until the life of the grand jury ended.¹¹⁰

Watergate drove the Nixon administration and the coordinate

¹⁰⁵ *In re Tierney*, 465 F.2d 806 (5th Cir. 1972).

¹⁰⁶ *Washington Post*, March 14, 1972, at 2, col. 3.

¹⁰⁷ The task force developed a grand jury manual that is now a basic resource for all attorneys representing witnesses before grand juries. C. BOARDMAN, *REPRESENTATION OF WITNESSES BEFORE GRAND JURIES* (1982).

¹⁰⁸ For a list of organizations that formed the national coalition, see Hixson, *Bringing Down the Curtain in the Absurd Drama of Entrances and Exits—Witness Representation in the Grand Jury Room*, 15 AM. CRIM. L. REV. 307 n.1 (1977-78).

¹⁰⁹ See, *Movimiento de Liberacion Nacional, Collaboration and Non-Collaboration: The Federal Grand Jury As An Instrument of Political Repression*, in *REPRESSION AND RESISTANCE* (Rebeldia Publications, 1983); Comité Unitario Contra La Represión, *Firm in Non-Collaboration*, in *REPRESSION AND RESISTANCE* (Rebeldia Publications, 1983).

¹¹⁰ Among the people that went to jail were Ellen Grusse and Maria Turgeen. See *In re Grand Jury*, *supra* note 100. Many of those subpoenaed to the Tuscon Grand Jury were

work of the ISD out of power, but the government's use of the grand jury as an instrument of repression and internment was far from over.

G. THE GRAND JURY TODAY

The use of the federal grand jury by the Department of Justice against the Puerto Rican Independence Movement in the United States and Puerto Rico, clearly illustrates the potential for far reaching abuse of this power in the present. The use of the federal grand jury against the Independence movement in Puerto Rico dates back to 1936, when a grand jury investigating an alleged conspiracy to overthrow the U.S. Government in Puerto Rico subpoenaed numerous officials of the Nationalist Party of Puerto Rico. The grand jury asked the subpoenaees for the records of the Nationalist Party. When the then Secretary General, Juan Antonio Corretjer, came forward claiming to have custody of the records, the subpoenas against the others were dismissed. Corretjer, however, refused the grand jurors' request to produce the records, claiming that a U.S. federal grand jury had no legitimate jurisdiction in Puerto Rico.¹¹¹ As a result of his refusal, Corretjer received a one year sentence in the federal prison in Atlanta, Georgia.¹¹²

Corretjer's refusal to recognize the grand jury has survived to the present day as a position of political principle among a broad spectrum of the Independence movement. Independence advocates view the U.S. federal grand jury as an illegal instrument of colonial authority whose powers of inquisition they must resist.¹¹³

The use of the grand jury against the Independence movement in the United States began in response to its growing public exposure and to the emergence of a clandestine pro-Independence organization called the Fuerzas Armadas de Liberacion Nacional (FALN), which had claimed credit for a series of bombings in the United States.¹¹⁴ In 1977, a federal grand jury sitting in the South-

also imprisoned. See *United States v. Weinberg*, *supra* note 97. See also *infra* note 120 regarding the imprisonment of Puerto Rican activists.

¹¹¹ Conversation with Juan Antonio Corretjer, in Guynabo, Puerto Rico (April 1980). For an excellent historical account of the nationalist period, see generally LOPEZ, *PUERTO RICAN NATIONALISM* (1977).

¹¹² A year later, the same grand jury indicted Corretjer and six other leaders of the Nationalist Party, including its leader, Harvard educated lawyer Pedro Albizu Campos, for seditious conspiracy to overthrow the U.S. Government in Puerto Rico. They were tried, convicted, and sentenced to ten years in prison. See *Albizu v. United States*, 88 F.2d 138 (1st Cir. 1937).

¹¹³ See *supra* note 109.

¹¹⁴ See *United States v. Torres*, 751 F.2d 875, 876-77 (7th Cir. 1984).

ern District of New York which was investigating activities of the FALN, subpoenaed Maria Cueto, who was then the Executive Director of the National Commission on Hispanic Affairs¹¹⁵ (the "commission") of the Protestant Episcopal Church, and her secretary, Raisa Nemekin, whom the government believed might have information about FALN members.¹¹⁶ Prior to the subpoenas of these women, the church authorities had complied, without legal challenge, with a grossly overbroad subpoena duces tecum which allowed the FBI access to all the Hispanic Commission files.¹¹⁷

Maria Cueto and Raisa Nemekin refused to testify before the grand jury, claiming that the government had no right to require them to give information about their community service work as lay ministers. They also claimed that if they cooperated with a secret government inquisition, they would destroy their community's trust in them. Both women were jailed for civil contempt in March of 1977.¹¹⁸ In August of that year, the same grand jury subpoenaed Julio Rosado and Luis Rosado — brothers, Puerto Rican Independence activists, and former members of the Hispanic Commission — and a third brother, Andre Rosado, a community health worker. Invoking the principal of "non-recognition" of the grand jury's right to investigate the Independence movement and accusing the government of trying to disrupt their political work, all three brothers refused to testify and were jailed for civil contempt.¹¹⁹ In Chicago, another grand jury investigating the FALN was convened. It subpoenaed six Puerto Rican independence supporters from Chicago and three Mexican political activists from the southwest. Initially, all refused to cooperate with the grand jury, and four ultimately

¹¹⁵ The National Commission on Hispanic Affairs had funded community programs including daycare centers, a clinic, and a local social actions organization. As the direct result of the government's grand jury investigation, the church disbanded the Hispanic desk and stopped funding all programs. Conversation with Maria Cueto (July 1982).

¹¹⁶ Two federal fugitives, Carlos Torres and Oscar Lopez, whom the FBI suspected were associated with the FALN, had been Commission members, and the FBI wanted to discover their whereabouts. *In re Cueto*, 443 F. Supp. 857 (S.D.N.Y. 1978).

¹¹⁷ The subpoena demanded:

Any and all records, documents, reports, notes, lists, memoranda, statements, books, papers and things in your care, custody, possession or control which relate to, concern, or reflect, for the years 1970 up to and including 1977; (1) the membership of the National Commission for Hispanic Affairs (the "Commission"); (2) financial statements of the Commission, including, but not limited to, statements showing expenses, salaries, income gifts and sources thereof; (3) names and addresses of all personnel employed by the Commission; (4) a list of all meetings, conferences, and convocations sponsored in whole or in part by the Commission, and (5) names and addresses of all persons attending said meetings, conferences, and convocations.

¹¹⁸ *In re Cueto*, 443 F.Supp. 857 (S.D.N.Y. 1978).

¹¹⁹ *In re Rosado*, 441 F. Supp. 1081 (S.D.N.Y. 1977).

were jailed for civil contempt.¹²⁰ Thus, within a matter of months, nine Hispanic political activists had been jailed for refusing to collaborate with the government's grand jury investigation.

Eleven months after the incarceration of Maria Cueto and Raisa Nemekin, before the life of the grand jury had ended, a United States district judge released the two women, determining that further incarceration would have no coercive effect because the women, although wrong, were sincerely committed to their principle of not testifying.¹²¹ The court also found that despite several *ex parte*, in camera attempts, the government made no showing that the women had any current information relevant to any investigation concerning the FALN.¹²² The other eight imprisoned grand jury resisters were held in prison until the respective lives of the grand juries ended, nine months for the men in New York and five months for the men in Chicago.

In November of 1981, the government again subpoenaed Maria Cueto, Ricardo Romero, Julio Rosado, Andre Rosado, and Steven Guerra, the chairperson of an organization initiated by the Movimiento de Liberacion Nacional ("MLN")¹²³—"the National Committee Against Grand Jury Repression."¹²⁴ The grand jury had moved across the bridge to Brooklyn in the Eastern District of New York, but still it was investigating the FALN. The government had no articulable basis to believe that the witnesses who had gone to jail for refusing to provide information to the grand jury in the past and who, since their release from prison had been politically outspoken against the grand jury, would now cooperate. In fact, the grand jury had no reasonable expectation of gathering any evidence by subpoenaing these political activists. Rather, the only effect of re-

¹²⁰ In re Special February 1975 Grand Jury (Lopez, Caldero & Archuleta), 565 F.2d 407 (7th Cir. 1977). Two of those jailed, Ricardo Romero from Colorado and Pedro Archuleta from New Mexico, were political organizers and also former members of the Hispanic Affairs Commission. Archuleta, while confined for civil contempt in Chicago, was subpoenaed to the New York FALN grand jury investigation. See In re Archuleta, 432 F. Supp. 583 (S.D.N.Y. 1977), 561 F.2d 1059 (2nd Cir. 1977).

¹²¹ In re Cueto, 443 F. Supp. 857, 860 (S.D.N.Y. 1978).

¹²² *Id.*

¹²³ Following their release from prison in 1978, Maria Cueto, Ricardo Romero, Julio Rosado, Pedro Archuleta, and several others from Chicago who had been imprisoned, formed an organization to further their political and social goals, including independence for Puerto Rico, and to oppose use of the grand jury as a tool of repression—the Movimiento de Liberacion Nacional (MLN). Each returned to their respective communities, Maria Cueto relocating in Arizona, to rejoin their families and resume their lives. Conversation with Maria Cueto and other founders of the MLN, Chicago, IL (March 1, 1979).

¹²⁴ THE WITNESS, Publication of Episcopal Church, 10-11, (January, 1982); Quash, Newsletter of the Grand Jury Project, Inc., Vol. 7 No. 1, 5 (Jan.-Feb. 1982).

subpoenaing them was to disrupt their political work and cause their incarceration.

In response to substantial protest from sectors of the Episcopal Church as well as within the Puerto Rican and Mexican communities, the United States Attorney declined to proceed with contempt charges when each witness refused to testify or even appear before the grand jury. The subpoenas were continued with assurances that counsel for the witnesses would be contacted if further proceedings were required.¹²⁵

Nine months later, shortly after a change in United States Attorneys, each of the five witnesses were arrested at gun point by squads of FBI agents on a sealed indictment charging each with criminal contempt for refusing to testify before the grand jury. Following these arrests, the FBI issued a nation-wide press release claiming to have arrested the "last unincarcerated leadership of the FALN."¹²⁶

The publicity generated by the arrests and the press release was highly prejudicial. Special courtroom security was instituted for the "FALN trial" to be held in federal court in Brooklyn. The apparent government strategy was to accuse the defendants in the media as the FALN, but in the courtroom to charge them with refusing to testify before a grand jury.

Because the criminal contempt penalty has no maximum limit,¹²⁷ defendants were entitled to a jury trial. On the eve of trial, the prosecution requested an anonymous jury in which the names, addresses, and work places of the jurors were not disclosed. As the justification for an anonymous jury, the government again publicly accused the defendants of being part of the FALN. The court granted the request for an anonymous jury even without an evidentiary hearing.¹²⁸

At trial, the issue for the jury was limited to whether or not the defendants testified before the grand jury. Even though the outcome of the trial was a foregone conclusion, the defendants were able to introduce some reasons for refusing to collaborate with the grand jury, including their perception of the grand jury as a political weapon against the Independence movement. In addition, they were able to introduce character witnesses from the Episcopal

¹²⁵ THE WITNESS, *supra* note 124, at 17-18 (Feb. 1982); *id.* at 9 (March 1982).

¹²⁶ *Id.* at 20-21 (Nov. 1982).

¹²⁷ 18 U.S.C. § 401(3) (1982). *Bloom v. Illinois*, 391 U.S. 194 (1968) allows for a jury trial if the potential sentence could be in excess of two years.

¹²⁸ Motion For Anonymous Jury, *United States v. Rosado*, No. 83-0025 (E.D.N.Y. 1983).

Church.¹²⁹ The jury deliberated for 16 hours and found all defendants guilty.¹³⁰

The government then sought to turn the sentencing proceeding into a trial of the defendants' FALN affiliations. The government tried to avoid the basic constitutional protections afforded to all accused by charging the grand jury resisters without sufficient evidence of specific acts of criminal wrongdoing. Asking for a sentence of 15 years, the government submitted a sentencing memorandum accusing the defendants of FALN membership. The court refused to accept the memorandum or hold a hearing and, despite the strenuous protest of the government, sentenced each defendant to three years in prison.¹³¹ The government, however, released the sentencing memorandum to the press, resulting in the public dissemination of its accusations.

In the midst of the trial, the same grand jury sitting in Brooklyn subpoenaed two Independence leaders from Puerto Rico.¹³² This was the first time that activists from Puerto Rico had ever been subpoenaed to a grand jury sitting in the United States.¹³³ Again, the

¹²⁹ The court allowed the jury to consider evidence of the defendants' state of mind in refusing to cooperate with the grand jury to determine whether the contempt was of a serious or petty nature. Subsequently, the Second Circuit found this procedure improper. *United States v. Rosado*, 728 F.2d 89 (2d Cir. 1984). See *THE WITNESS*, *supra* note 124, at 19-20 (March 1983).

¹³⁰ *THE WITNESS*, *supra* note 124, at 18 (April 1983).

¹³¹ *THE WITNESS*, *supra* note 124, at 3, 19 (July 1983). See also Sentencing Memorandum filed in *United States v. Rosado*, *supra* note 128. The Second Circuit upheld the conviction of the five on appeal, *United States v. Rosado*, 728 F.2d 89 (2d Cir. 1984).

¹³² The two leaders were Carlos Noya, a leading member of the Puerto Rican Socialist league who had just served eighteen months in U.S. prison for refusing to cooperate with a grand jury in Puerto Rico, and Frederico Clintron Fiallo, a well-respected labor activist and chairperson of the "Comite Unitario Contra La Repression," a unitarian committee against repression.

¹³³ Since 1976, eight Independence activists had been subpoenaed and jailed for refusing to collaborate with U.S. federal grand juries in *Puerto Rico* investigating the clandestine activity of the Independence movement on the island. See, e.g., *In re Pantojas (II)*, 639 F.2d 822 (1st Cir. 1980); *In re Pantojas*, 628 F.2d 701 (1st Cir. 1980). In the *Pantojas* case, Carlos Rosario Pantojas, a supporter of Puerto Rican Independence was imprisoned in May 1981 on civil contempt for refusing to appear in a lineup as requested by the grand jury. After five months of imprisonment, two days prior to the expiration date of the grand jury and Rosario's scheduled release, he was subpoenaed to a second grand jury, again requesting his appearance at a lineup. The Second Circuit in *Pantojas II* held that a grand jury's right to call a witness is not defeated by the knowledge of the probability that a witness will refuse to comply. 639 F.2d at 824. See Berkan, *The Federal Grand Jury: An Introduction to the Institution, Its Historical Role, Its Current Use and the Problems Faced by the Target Witness*, 17 *REVISTA JURIDICA DE LA UNIVERSIDAD INTER-AMERICANA* 103, 133 (1984). See also Quash, *supra* note 124, at 5.

In another case, labor leader Norberto Cintron Fiallo was arrested in January of 1981 on federal bank robbery and conspiracy charges. Bail was originally set at over a quarter million dollars. It was not until May of 1981 that Cintron was able to obtain a

government charged the two leaders with criminal contempt when they refused to collaborate with the grand jury. Miraculously, the first jury trial ended in a hung jury when several jurors refused to convict the defendants after hearing impassioned closing arguments from the defendants themselves. Several months later, the two men were retried, convicted, and sentenced to two years in prison.¹³⁴

The U.S. parole commission has continued the government's internment policy despite the lack of any evidence, accusing the grand jury resisters of aiding the FALN and denying them any parole. This decision has been held arbitrary and capricious by a federal court in Washington and is now on appeal.¹³⁵

The black nationalist movement provides another poignant example of the misuse of the federal grand jury as a prosecutor's investigative tool rather than as a protective device for the public. In the last several years, a government grand jury from the Southern District of New York, allegedly investigating the activities of the Black liberation activity, has incarcerated sixteen black nationalists and their white supporters for their refusal to cooperate with the grand jury inquiry.¹³⁶ The government is intent on pursuing a policy of subpoenaing before grand juries political activists who it is well aware will not testify or otherwise cooperate as a matter of political principle. The only result of such a policy is the imprisonment of activists, without specific charge or trial, for the exercise of their political right to silence.

bail reduction and be released pending trial. In the interim, however, Cintron was called to the grand jury which was ostensibly investigating other crimes allegedly committed by independence supporters in Puerto Rico. The grand jury requested that Cintron provide a sample of his hair, which he refused to do. Less than one week after his release on bail, Cintron was found in contempt of the grand jury and jailed. It should be noted that while in jail, Cintron had regular hair cuts, and it is therefore reasonable to assume that the government already had possession of the evidence sought.

Cintron was acquitted of the bank robbery charge in July of 1981, but he remained in jail for contempt of the grand jury. He was re-subpoenaed in October when the original grand jury term expired. The request was again only for a hair sample. Cintron stayed in jail until the statutory eighteen month term was completed. Conversation with attorney for Norberto Cintron (March 1983).

Three other Independence activists, Ricardo Montes, Raymond Soto, and Alberto De Jesus Berrios have all been imprisoned in the last several years for refusing to collaborate with the U.S. Government's use of the federal grand jury to investigate the clandestine Independence movement. Conversation with Puerto Rican attorneys for subpoenaed witnesses (March 1983).

¹³⁴ See *United States v. Cintron/Noya* No. 83-152 (E.D.N.Y. 1983). Yet another supporter of Independence is awaiting trial. *United States v. Miller/Baraldini* (E.D.N.Y. 1984).

¹³⁵ *Guerra v. Meese*, 614 F. Supp. 1430 (D.D.C. 1985), *appeal docketed*, No. 85-5912 (D.C. Cir.).

¹³⁶ Quash, *supra* note 124, at 1.

III. THE POLITICAL RIGHT TO SILENCE

As the historical review above illustrates, the grand jury has never met its stated purpose of protecting the individual against the power of the government. In fact, the grand jury has evolved into a prosecutor's tool of investigation, a use never contemplated by the Founding Fathers. When the authors of the Bill of Rights incorporated the grand jury into the fifth amendment, they certainly did not contemplate that it would become an instrument for the prosecution in government initiated investigations, "let alone [that] government initiated investigations [would be] supported by the ever-expanding repertoire of federal criminal statutes, the burgeoning technology of electronic surveillance, and the increasingly dangerous combination of the subpoena, contempt and immunity powers."¹³⁷ Unfortunately, the courts have continued to ignore the government's transformation of the grand jury power, relying instead upon the fiction that the grand jury is an independent citizens panel which safeguards the accused against abuse by the government.¹³⁸

A fair reading of the origins and purposes of the fifth amendment, coupled with the rights of political freedom contained in the first amendment,¹³⁹ should create a right to "political silence," barring any compelled testimony before a grand jury touching a witness' political activity and associations. Political activists should not be forced to choose between providing the government with political intelligence about their movement or going to prison.

The right of silence incorporated into the fifth amendment as the privilege against self-incrimination has its origins in the opposition of religious and political dissenters to the English institutions of inquisition, the Court of High Commission, and the Star Chamber.¹⁴⁰ Historically, early dissenters, refusing to be coerced by government inquisitions, courageously asserted the right of silence as part of the resistance to governmental attacks on freedom of speech and written expression. Significantly, the dissenters asserted this

¹³⁷ Comment, *supra* note 93, at 443.

¹³⁸ See, e.g., *United States v. Dionisio*, 410 U.S. 1, 17 (1972) (the grand jury (may not always) stand "as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutory."); *Wood v. Georgia*, 370 U.S. 375, 390 (1962) (the grand jury serves "as a primary security to the innocent against hasty, malicious and oppressive prosecution . . . ser(ving) the invaluable function in our society of standing between the accusers and the accused."); *Hale v. Henkel*, 201 U.S. 43, 59 (1906) (the grand jury "stands between the prosecutor and the accused").

¹³⁹ See *Barenblatt v. United States*, 360 U.S. 109, 123-25 (1959) (language from case); *Watkins v. United States*, 354 U.S. 178 (1957) (language from case).

¹⁴⁰ Z. CHAFEE, *THE BLESSINGS OF LIBERTY* 190-209 (1956); REIF, *The Grand Jury Witness and Compulsory Testimony Legislation*, 10 AM. J. CRIM. L. 829, 843-45 (1972).

right not only as to their own activity, but to the activity of friends and political associates as well. They claimed a broad right of silence as to *all* political activity.¹⁴¹

The Supreme Court has ignored the significance of the political origins of the right to silence in several cases upholding congressional immunity legislation. In *Brown v. Walker*,¹⁴² a five justice majority upheld an act which supplanted the fifth amendment and compelled testimony in return for transactional immunity. The statute in question, however, limited the grant of immunity to matters concerning the Interstate Commerce Commission and consequently did not implicate first amendment issues. Nonetheless, Justice Field, speaking for the minority, articulated the understanding of the four dissenting justices of the scope of the right to silence:

The [fifth] amendment also protects [the witness] from all compulsory testimony which would expose him to infamy and disgrace, though the facts disclosed might not lead to a criminal prosecution. It is contended, indeed, that it was not the object of the constitutional safeguard to protect the witness against infamy and disgrace. It is urged that its sole purpose was to protect him against incriminating testimony with reference to the offence under prosecution. But I do not agree that such limited protection was all that was secured. As stated by counsel of the appellant, "it is entirely possible, and certainly not impossible, that the framers of the Constitution reasoned that in bestowing upon witnesses in criminal cases the privilege of silence when in danger of self-incrimination, they would at the same time save him *in all such cases* from the shame and infamy of confessing disgraceful crimes and thus preserve to him some measure of self-respect" It is true, as counsel observes, that "both the safeguard of the Constitution and the common law rule spring alike from that sentiment of *personal self-respect, liberty, independence and dignity* which has inhabited the breasts of English speaking peoples for centuries, and to save which they have always been ready to sacrifice many governmental facilities and conveniences."¹⁴³

The majority's position in *Brown*, and in subsequent cases,¹⁴⁴ is that the fifth amendment is adequately satisfied by a grant of immunity from criminal prosecution. This position may be appropriate when it is applied to economic regulation, but when the government seeks to compel testimony concerning political beliefs, activities, and associations, however, immunity from potential criminal prosecution is inadequate. In these situations, witnesses should be

¹⁴¹ See Z. CHAFEE, *supra* note 140.

¹⁴² 161 U.S. 591 (1896).

¹⁴³ 161 U.S. at 631 (Field, J., dissenting).

¹⁴⁴ *McCarthy v. Arndstein*, 266 U.S. 34, 42 (1924); *Heike v. United States*, 227 U.S. 131, 142 (1913); *Hall v. Henkel*, 201 U.S. 43 (1906).

afforded the fifth amendment protection giving them the right not to testify.

The Supreme Court, however, did not follow this reasoning and remained consistent with its decision in *Brown* when it decided *Ullman v. United States*¹⁴⁵ almost fifty years later. In *Ullman*, the Court upheld an immunity act directed toward matters of internal security. It ruled that the act was sufficient to supplant a witness' fifth amendment right to refuse to answer questions about his communist affiliations.¹⁴⁶ In its analysis, the majority failed to apply the political context of the evolution of the fifth amendment right of silence—the refusal of the witness to disclose his unpopular political beliefs and those of his associates—or to give any consideration to the relation between the first amendment and the right to silence.

In his dissent, however, Justice Douglas, joined by Justice Black, clearly articulated the personal values of freedom of expression and self-dignity from which the fifth amendment arose. Relying on its historical antecedents, Douglas argued that the purpose of the fifth amendment, in addition to preventing criminal self-incrimination, is to protect the conscience and dignity of the individual and to prohibit any compulsory testimony which would expose the individual to infamy and disgrace.¹⁴⁷ Concluding, Justice Douglas stated:

The critical point is that the Constitution places the right of silence *beyond the reach of government*. The Fifth Amendment stands between the citizen and his government. When public opinion casts a person into the outer darkness, as happens today when a person is exposed as a Communist, the government brings infamy on the head of the witness when it compels disclosures. That is precisely what the Fifth Amendment prohibits.¹⁴⁸

With the limited perspective of the fifth amendment expressed by the majority in *Ullman* as a starting point, the further erosion of the historic protection of the fifth amendment was inevitable. Twenty years later, at the height of the Nixon Administration's use of the grand jury as a political weapon, the Supreme Court held that limited use immunity provided in the 1970 Organized Crime Control Act¹⁴⁹ afforded all the protection required by the fifth amendment.¹⁵⁰ With this decision, the government, using the subpoena

¹⁴⁵ 350 U.S. 422 (1956).

¹⁴⁶ *Id.*

¹⁴⁷ 350 U.S. at 445-46 (Douglas, J., dissenting).

¹⁴⁸ *Id.* at 454.

¹⁴⁹ 18 U.S.C. §§ 6002 *et. seq.* (1970).

¹⁵⁰ *Kastigar v. U.S.*, 406 U.S. 441 (1972). In *Kastigar*, the Court held that immunity need not be any greater than protection from prosecution based on the use and derivative use of the witness' testimony, but does not extend to transactional immunity. *Id.*

power of the grand jury, was able now to compel testimony without even guaranteeing complete immunity from prosecution.

In upholding the grand jury's "right to every man's evidence," courts often cite to the Supreme Court's language in *Blair v. United States*:¹⁵¹ "[T]he giving of testimony and attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned. . . ." ¹⁵² This general statement, however, was significantly qualified in the same opinion, as the Court went on to state:

The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government . . . is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself; . . . some confidential matters are shielded from consideration of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.¹⁵³

Once it is understood that the grand jury's right to every man's evidence is not absolute, and for "special reasons witnesses may be excused,"¹⁵⁴ the political right to silence should not be seen as such an affront to the mythical sanctity of the grand jury. In fact, in addition to fifth amendment rights, the rights afforded by the first amendment ensuring political freedom¹⁵⁵ should be preferred when raised by a witness in opposition to testifying before a grand jury and should create a constitutional bar to compulsory immunity and forced cooperation.

In addition to the first amendment, in relation to the Puerto Rican independence movement,¹⁵⁶ there is a fundamental internationally recognized human right to self-determination which must act as a bar to compelling cooperation by Puerto Rican Nationals with a United States Government controlled grand jury.¹⁵⁷ The co-

¹⁵¹ 250 U.S. 273 (1919).

¹⁵² *Id.* at 281.

¹⁵³ *Id.* at 281-82.

¹⁵⁴ *Id.*

¹⁵⁵ See, e.g., *NAACP v. Button*, 371 U.S. 415, 433 (1963); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Thomas v. Collins*, 323 U.S. 516 (1945).

¹⁵⁶ Some Puerto Ricans who support independence for their country, decline to assert U.S. constitutional rights in relation to the grand jury. They believe that if, as citizens of a sovereign nation that was militarily invaded and occupied and which is now an illegal colony, they asserted the protection of the U.S. Constitution, they would be recognizing the legitimacy of the U.S. Government's involvement in Puerto Rico.

¹⁵⁷ The Charter of the United Nations, a treaty ratified by the Senate and binding upon the United States' courts, contains the right to self-determinations. 59 Stat. 1035 (1945) Art. 1 Section 2 and Art. 55. Article 56 of the Charter states that "[a]ll Members

ercive use of the grand jury to investigate the Puerto Rican independence movement and intern its leaders and activists for refusing to provide information or cooperate¹⁵⁸ constitutes an illegal interference with the right of the Puerto Rican people to exercise their right to self-determination. In August of 1983, the United Nations' Special Committee on Decolonization adopted a Resolution on Puerto Rico in which it noted that "its members were concerned also by the intensification of repressive measures against the Puerto Rican independence forces, including the activities of the federal Grand Jury utilized by the United States as an instrument of pressure and intimidation against Puerto Rican Patriots." The U.N. Resolution went on to demand the "cessation of all repressive measures against Puerto Rican independence forces, including the intimidating activities by the federal Grand Jury which were denounced before the Committee."¹⁵⁹

IV. CONCLUSION: GRAND JURY REFORMS

Two conditions should preclude the government from compelling witnesses' testimony: if subpoenaed witnesses make colorable

pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." Further, subsequent resolutions by the General Assembly and Security Council, opinions by the International Court of Justice, and international human rights covenants, establish a customary international legal right of self-determination. *See generally* A. CRISTESCU, THE RIGHT TO SELF-DETERMINATION: HISTORICAL AND CURRENT DEVELOPMENT ON THE BASIS OF UNITED NATION INSTRUMENTS U.N. DOC. E/CN.Y (1981); Petition For Dismissal or Removal of Criminal Charges and Other Relief Under International Law, United States v. Torres, No. 83-449 (N.D. Ill. 1983).

The United Nations, through its Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries on Puerto Rico, 1983 [hereinafter "Special Commission"] has, since 1972, repeatedly found that Puerto Rico has the right to self-determination and independence and called upon the United States Government to immediately transfer all sovereign powers to the Puerto Rican people. The Special Commission has also stated, that the persecutions, harassments, and repressive measures to which organizations and persons struggling for independence have been continuously subjected constitute violations of the national right of the Puerto Rican people to self determination and independence." *See* Resolution of Special Committee, A/AC 109/707 (4 August 1982); A/AC 109/677 (20 August 1981); A/AC 109/628 (26 August 1980); A/AC 109-589 (16 August 1979); A/AC 109/574 (13 September 1975). *See also* Petition for Dismissal, United States v. Torres, No. 83-449.

¹⁵⁸ The grand jury has asked many of the subpoenaed independence activists for physical examples, such as hair samples and fingerprints, and has also asked them to participate in a lineup. *See, e.g., supra* note 133. Although no fifth amendment privilege attaches to the request for this type of evidence, the right of self-determination should preclude an order compelling compliance with the request by a U.S. federal grand jury.

¹⁵⁹ Resolution of Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries on Puerto Rico, 1983 (A/AC109/751) (24 August 1983).

claims before a district judge that they are part of a political organization or movement,¹⁶⁰ and if the testimony sought concerns their political associations or the activities of others within the movement.¹⁶¹ This standard is justified even though it may seem inadequate to protect the interest of law enforcement because the grand jury is an inappropriate vehicle for the government to pursue such evidence. The grand jury was never intended to act as a restraint on the unfettered exercise of political rights in the interests of police power.

Given the Supreme Court's disturbing approval of use immunity¹⁶² and its subsequent rejection of a newsperson's right to refuse to reveal confidential sources and information to a grand jury,¹⁶³ it is highly unlikely that the Court, as it is constituted presently, would uphold a political right of silence under the first and fifth amendments or under the U.N. Charter. Further, despite the Court's language in *United States v. Dionisio*,¹⁶⁴ that "the Constitution could not tolerate the transformation of the grand jury into an instrument of oppression,"¹⁶⁵ there is little prospect of the Court condemning the internment use of the grand jury power.

Rather than the courts making the change, public education of the true history of the grand jury and its present day repressive use,

¹⁶⁰ Federal courts in other contexts are called upon to decide whether a litigant's claim which may involve criminal activity arises in a political context and therefore requires special prosecution. An example would be the political crime exception to extradition treaties. See, e.g., *Quinn v. Robinson*, No. C-82-6688, RPA (N.D. Cal. Oct. 3, 1983); *In re Dessie Mackin*, Nos. 81-1324, 81-3064 & 81-3070 (2nd Cir. Dec. 23, 1981).

¹⁶¹ In *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972), prosecutors sought to question the staff of a Black Panther Party newspaper about the decision-making process and inner workings of the newspaper in connection with an alleged plot to kill the President. The court ruled that: "When governmental activity collides with First Amendment rights, the Government has the burden of establishing that its interests are legitimate and compelling and that the incidental infringement upon First Amendment rights is no greater than is essential to vindicate its subordinating interests." *Id.* at 1083. Under *Bursey*, no witness may be compelled to answer questions implicating first amendment interests unless and until the government demonstrates (1) an "immediate, substantial and subordinating" interest, (2) a substantial connection between the information sought from the witness and the interest asserted, and (3) the means of obtaining the information are tailored strictly to satisfy the legitimate governmental interests. *Id.* Although *Bursey* does not go far enough and probably is no longer good law, it is one of the few judicial pronouncements recognizing the importance of first amendment rights in the grand jury context.

¹⁶² See *supra* note 102 and accompanying text.

¹⁶³ *Brazenburg v. Hayes*, 408 U.S. 665 (1972).

¹⁶⁴ 410 U.S. 1, 12 (1973) (fifth amendment not violated by use of voice exemplars used for identification purposes, not for testimonial or communicative content of the utterances).

¹⁶⁵ *Id.* at 12.

coupled with congressional lobbying efforts¹⁶⁶ for restrictions on the grand jury power, are more likely to accomplish some limited changes at the present time.

In any forum, the advocate of restrictions on the grand jury power against political activists will have to meet the argument that law enforcement needs the broad investigative power of the grand jury to fight "terrorism." It is the contention of our constitutional system, however, that the expediency of law enforcement is not allowed to outweigh the fundamental freedoms of the individual. The fact that the purpose of the grand jury never was to conduct general investigations into criminal activity and that Congress has rejected giving a power of investigative subpoena to the FBI or Justice Department attorneys¹⁶⁷ support this contention. Our constitutional ideals suffer from a government that, under the guise of fighting terrorism, emasculates the prohibition against detention without specific charge and trial and disregards the right to be free from political inquisition. These policies sound frighteningly like the justifications of foreign governments for their draconian internment policies with which we so emphatically express our disapproval.¹⁶⁸

In actual practice, the use of imprisonment to coerce cooperation with the grand jury has been of little success in political cases. While the internment of activists has disrupted their political work, in almost all cases it has not produced testimony or cooperation. Witnesses whose refusal to testify is based upon the political principle of resistance to the grand jury inquisition have, in most cases, maintained this resistance despite substantial periods of incarceration.¹⁶⁹ Just like the resisters to the Star Chamber and the High Commission, the modern day resister's sense of justice and commitment not to betray his or her political movement is far stronger than

¹⁶⁶ H.R. 1407 which seeks to reform some of the grand jury potential for abuse is pending. However, this proposed legislation does not address the political use of the grand jury as an internment power.

¹⁶⁷ See *U.S. v. Minker*, 350 U.S. 179, 191 (1956) in which Justice Black in a concurring opinion stated that "apparently Congress has never even attempted to vest FBI agents with such private inquestorial power." *Id.* at 191 (Black, J., concurring).

Despite its lack of authority, the FBI in many instances treats the subpoena power as its own. It has become increasingly common for FBI agents to use the threat of a grand jury subpoena to coerce individuals into waiving their right to silence. What happens typically is that an FBI agent will ask a person some questions; when the person initially refuses to answer, the agent will threaten that person with subpoena by a grand jury investigating the matter. The layman may be frightened by the prospect of a subpoena, the legal significance of which he does not understand, and faced with the threat, will talk to the FBI. See Comment, *supra* note 93, at 485-89. In some instances the FBI has taken blank subpoenas to be filled out at the discretion of the individual agents.

¹⁶⁸ See *supra* notes 3 & 4 and accompanying text.

¹⁶⁹ See *supra* notes 112-22.

any fear of prison. For example, the government investigations into the Puerto Rican independence movement in the United States and Puerto Rico, despite the imprisonment of numerous activists, has had little effect in obtaining information about clandestine armed liberation groups.¹⁷⁰

The exercise of a government internment power only strengthens the resistance of the opposition political movements and denigrates the political freedoms guaranteed by the Constitution. We must no longer continue to blindly accept the fantasy of the grand jury as a protector of citizens against their overzealous government. Only through the demystification of the history of the grand jury and the explication of its present day potential for abuse, can we begin to educate people about the urgent need for political safeguards.

¹⁷⁰ See affidavit of FBI agent Richard S. Hahn in connection with an *ex parte* application pursuant to Title III for electronic surveillance before Chief Judge Frank J. McGarr in relation to an investigation of Puerto Rican activists alleged to be members of the FALN. In this affidavit, Hahn affirms that, "Grand Jury investigation has not been particularly successful in this case. Both in Chicago and in New York, many knowledgeable witnesses and subjects have been subpoenaed. They have routinely served substantial contempt sentences in order to frustrate the grand jury's work." (Paragraph 164, January, 1983). *United States v. Torres*, No. 83-449 (N.D. Ill. 1983).