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Title I - Special Grand Jury

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TITLE I—SPECIAL GRAND JURY

I. INTRODUCTION

Title I establishes special grand juries to sit in major population areas and other areas designated by the Attorney General.[1] These grand juries are protected from arbitrary dismissal by the district court before completion of their work.[2] They can sit for extended periods (a maximum of thirty-six months),[3] and are authorized to issue reports concerning (a) noncriminal misconduct of appointed government officials or employees involving organized criminal activity; and (b) organized crime conditions within the district.[4] When reports are issued concerning governmental misconduct, individuals named are given notice, afforded the opportunity to present evidence, file an answer, and obtain judicial review, all prior to publication.[5] This title also amends the Jencks Act (18 U.S.C. § 3500) by including grand jury minutes in its definition of "statements," and expanding its coverage to statements of prospective witnesses in the government's possession regardless of their source.[6]

II. SPECIAL GRAND JURY PROVISIONS

A. Impaneling of Special Grand Juries

In addition to regular grand juries serving in a judicial district, title I requires the district court to impanel a special grand jury at least once every eighteen months if the district has a population greater than four million, or if the Attorney General certifies that in his judgment there is criminal activity requiring such a grand jury.[7] The "four million" designation was designed to include within its confines most geographic areas of major organized criminal activity.[8] The above impaneling prerequisites apply "un-

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[1] 18 U.S.C.A. § 3331(a) (Supp. 1971).

[2] *Id.* § 3331(b).

[3] *Id.* § 3331(a).

[4] *Id.* § 3333(a)(2).

[5] *Id.* § 3333(c).

[6] Organized Crime Control Act of 1970 [hereinafter cited as O.C.C.A.] § 102, 18 U.S.C.A. § 3500 (Supp. 1971), *amending* 18 U.S.C. § 3500 (1964). *See Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess., ser. 27, at 305 (1970) [hereinafter cited as *House Hearings*].

[7] 18 U.S.C.A. § 3331(a) (Supp. 1971).

[8] As of the 1960 census, the following districts would be encompassed by this provision: Massachusetts, Eastern and Southern Districts of New York, New Jersey, Eastern District of Pennsylvania, Western District of Pennsylvania, Southern District of Florida,

less another special grand jury is then serving."[9] This qualification, read in conjunction with the prior requirements, apparently does not limit the number of special grand juries a district court could call, but does appear to limit the Attorney General's power to compel the district court to summon a special grand jury to a maximum of one per eighteen month period per district. Thus, if crime in one district required the impaneling of more than one special grand jury, or the special grand jury in existence was overburdened with work, the Attorney General would be powerless to require the summoning of an additional special grand jury. Discretion would remain in the district court.

Consistent with the established federal law concerning grand juries,[10] the ordinary term of the special grand jury is eighteen months; however the special grand jury can be discharged earlier by an order of the court *if the special grand jury determines* by majority vote that its work is completed.[11] If at the end of the special grand jury's term or any extension thereof, the district court determines that the work of the grand jury has not yet been completed, the court can extend the term for additional periods of six months, up to a maximum of thirty-six months.[12] The district court may also summon an additional special grand jury when the court determines that the special grand jury's volume of business exceeds its capacity to discharge its obligations.[13]

The special grand jury is protected from arbitrary dismissal by the district court through the grant of appellate recourse. If a district court fails to extend the term of a special grand jury upon the grand jury's application for an extension, or dismisses the grand jury before it completes its work, the special grand jury may apply to the chief judge of the circuit for the continuance of its term.[14] The term will then continue pending appeal.[15] This appeal provision, however, does not apply to the situation in which a judge rejects a special grand jury's request to impanel an additional special grand jury because its workload is too burdensome.[16] In

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Eastern District of Michigan, Northern and Southern Districts of Ohio, Northern District of Illinois, and Northern and Southern Districts of California. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT, 340-42 (1961).

[9] 18 U.S.C.A. § 3331(a) (Supp. 1971).

[10] *See* note 19 *infra*.

[11] 18 U.S.C.A. § 3331(a) (Supp. 1971). The rationale for allowing the grand jury to make this determination is that it is better able to judge when its work is completed. S. REP. NO. 91-617, 91st Cong., 1st Sess. 141 (1969) [hereinafter cited as SENATE REPORT].

[12] 18 U.S.C.A. § 3331(a) (Supp. 1971). However, under certain circumstances this maximum may be exceeded. *See* note 104 *infra* and accompanying text.

[13] 18 U.S.C.A. § 3332(b) (Supp. 1971).

[14] *Id.* § 3331(b).

[15] *Id.*

[16] *Id.* §§ 3331(b), 3332(b).

contrast, the federal law existing at the time of this Act's passage, and still applicable to regular grand juries,[17] enables a judge to discharge a grand jury "at any time, for any reason or for no reason," regardless of whether the grand jury had completed its work.[18] Moreover, these bodies are limited to a term of eighteen months with no provisions for extensions.[19]

B. Scope of Investigation

The scope of the special grand jury's investigatory authority extends to inquiring "into offenses against the criminal laws of the United States alleged to have been committed within that district."[20] Thus, the scope is the same as that provided for regular grand juries.[21] The alleged offenses may be brought to the attention of the grand jury by the court or by the prosecutor.[22] The prosecutor must present to the grand jury information of such alleged offenses which he has obtained from any other person, if requested by such person to do so.[23] In addition, the prosecutor must inform the grand jury of the identity of the complainant and the action he has taken or recommends be taken with regard to the alleged offense.[24] This requirement is a departure from the law applicable to regular grand juries where the prosecutor is given a measure of discretion with regard to the information he presents to the grand jury.[25]

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[17] *See* text accompanying notes 35-38 *infra*.

[18] *In re* Investigation of World Arrangements, 107 F. Supp. 628, 629 (D.D.C. 1952); United States v. Smyth, 104 F. Supp. 283, 292 (N.D. Cal. 1952) (proceedings on motions to dismiss indictment – extensive discussion of the powers and duties of the grand jury).

[19] FED. R. CRIM. P. 6(g). This rule states in part: "no grand jury may serve more than 18 months."

[20] 18 U.S.C.A. § 3332(a) (Supp. 1971).

[21] *See* Hale v. Henkel, 201 U.S. 43, 59-60 (1906) (grand jury may investigate without specific charge pending against an individual; the grand jurors may "inquire for themselves whether a crime cognizable by the court has been committed . . . ." *Id.* at 65). *See also* Blair v. United States, 250 U.S. 273, 282-83 (1919). It should be noted that the special grand jury is not limited to investigating organized criminal activity. *See* 18 U.S.C.A. § 3332(a) (Supp. 1971); *House Hearings* 119-20.

[22] 18 U.S.C.A. § 3332(a) (Supp. 1971).

A question could be raised over whether, by the insertion of this clause, Congress intended to restrict the traditional power of the grand jury to act on information derived from their own personal knowledge (Hale v. Henkel, 201 U.S. at 65). The clause does not appear to have this restrictive effect. By enacting § 3334, Congress has made all prior law applicable to regular grand juries apply to special grand juries to the extent not inconsistent with the other sections of this title. In addition by placing permissive language in § 3332(a) ("[s]uch alleged offenses *may* be brought to the attention . . . .") instead of words of compulsion, it appears Congress has allowed these grand juries to retain this traditional power. This interpretation is especially compelling when considered with the manifest purpose of this title to strengthen evidence-gathering processes and the grand jury system. *See Statement of Findings and Purpose*, O.C.C.A., and SENATE REPORT 48.

[23] 18 U.S.C.A. § 3332(a) (Supp. 1971).

[24] *Id.*

[25] The prosecutor is vested with certain discretion as to what cases he will present to the grand jury, the number and character of witnesses, and other details of the proceedings.

III. THE SPECIAL GRAND JURY

It is the avowed purpose of the Organized Crime Control Act "to seek the eradication of organized crime in the United States . . . ."[26] In order to implement this goal, Congress chose to strengthen "the legal tools in the evidence-gathering process."[27] Since the grand jury is recognized as a particularly effective instrument in ferreting out organized crime,[28] Congress viewed the strengthening of this body as essential to the fulfillment of the Act's objective.[29] The actual language of the statute is unclear, however, in certain respects, and could lead to difficulties in application.

A. A Definition of Special Grand Jury

While Congress intended to establish a more powerful "investigative" grand jury[30] it chose to denominate its creation a "special" grand jury.[31] Yet, not only is this term left undefined by the statute, but the common law definition of special grand jury is clearly inapplicable.[32] Conceivably, "special grand jury" might merely mean any grand jury that performs an investigation. Congress might have intended that any grand jury impaneled to per-

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Hale v. Henkel, 201 U.S. 43, 65 (1906); Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 397, 443 (1959).

[26] *Statement of Findings and Purpose*, O.C.C.A.

[27] *Id.*

[28] SENATE REPORT 48. The grand jury is also recognized as being well suited for the investigation of governmental corruption. *See* Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?* 55 COLUM. L. REV. 1103, 1117-20 (1955); Note, *Special Investigating Grand Jury*, 111 U. PA. L. REV. 954 (1963). *See generally* Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, reprinted in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 80, 83-91 (1967).

[29] SENATE REPORT 48. Title I was designed to incorporate the recommendations of the PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 200 (1967) [hereinafter cited as PRESIDENT'S COMMISSION].

[30] An investigative grand jury is simply a grand jury which at the time is engaged in an investigation. *See Special Investigating Grand Jury*, *supra* note 28, at 957.

[31] 18 U.S.C.A. §§ 3331-3333 (Supp. 1971).

[32] At common law the terms "regular" and "special" grand juries refer to the method of organization of the grand jury. A "regular" grand jury is one organized according to a statute, while a "special" grand jury is organized through an exercise of judicial discretion that is not specifically authorized by statute. *See Special Investigating Grand Jury*, *supra* note 28, at 957. However, this distinction is inapplicable in the federal system. A federal court cannot impanel a grand jury by virtue of the inherent power of a judicial tribunal; the authority must be expressed by statute. *Ex parte* Mills, 135 U.S. 263, 267 (1890); United States v. Johnson, 123 F.2d 111, 118 (7th Cir. 1941), *rev'd on other grounds*, 319 U.S. 503 (1943) (determination of whether court could reimpanel a grand jury to complete an investigation). *See* Orfield, *supra* note 25, at 367. *Cf.* United States v. Brown, 36 F.R.D. 204 (D.D.C. 1964), *cert. denied*, 389 U.S. 977 (1967) (passage of Federal Rules of Criminal Procedure eliminated any technical meaning to word "special" in special grand jury – no distinction between regular, additional or special grand juries).

form an investigation be called a "special grand jury," and have increased powers under this statute. This was apparently the intent of title I of S. 30 as it was first proposed in the Senate.[33] As originally proposed, S. 30 would have amended the existing body of law on the grand jury.[34] Under this existing law the grand jury had the power to investigate,[35] as well as return indictments; but they could not sit for extended terms[36] or appeal judicial orders for their dismissal.[37] In addition, the court had the power to summon grand juries to perform investigations whenever it felt this was required by the public interest.[38] Because of the already-existing investigatory authority, the original bill merely attempted to strengthen the powers of these grand juries in order to make them more suitable for organized crime investigations.

As title I was finally enacted, however, it did not amend the existing body of federal law dealing with the grand jury. Instead, an entirely new chapter was added to the United States Code and entitled "Special Grand Jury."[39] By rejecting its original plan to amend the "Grand Jury" chapter (chapter 215), leaving this chapter intact, and promulgating instead an entirely new chapter, it is unlikely that Congress intended to withdraw all investigative powers from the "grand jury" and transfer them, substantially strengthened, to the "special grand jury." The effect of this change results in the existence of two types of grand juries—"regular" and "special"—both of which possess investigative powers. By failing to define affirmatively a "special grand jury" Congress has provided no standards by which to determine when a grand jury is a "grand jury" under chapter 215[40] [hereinafter referred to as a "regular" grand jury], or a "special grand jury" under chapter 216.

In view of the stated purpose of the statute, it *does* seem clear

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[33] *See* S. 30, title I, as originally proposed, reprinted in *Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 5-13 (1969) [hereinafter cited as *Senate Hearings*].

[34] The body of law that was to be amended was 18 U.S.C. ch. 215 (1964), entitled "Grand Jury."

[35] For description of grand jury's investigative powers, *see* Blair v. United States, 250 U.S. 273 (1919); SENATE REPORT 47-51; Hale v. Henkel, 201 U.S. 43 (1906).

[36] *See* note 19 *supra*.

[37] *See* note 18 *supra*.

[38] FED. R. CRIM. P. 6(a) reads in part: "The court shall order one or more grand juries to be summoned at such times as the public interest requires." This section has been interpreted to give the court full discretion in the convening of grand juries, and such discretion is not reviewable on appeal. *Petition of* A & H Transportation, Inc., 319 F.2d 69, 71 (4th Cir. 1963). *See generally* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: Criminal § 101, at 151 (1969). *See also House Hearings* 553, 438.

[39] 18 U.S.C.A. ch. 216 (Supp. 1971).

[40] 18 U.S.C.A. ch. 215 (1964).

that a grand jury impaneled specifically to investigate organized criminal activity is a "special grand jury" under chapter 216.[41] At the same time, however, the "special" grand jury is not limited to investigations into organized crime.[42] Nor is a "regular" grand jury prevented from indicting individuals for offenses involving organized crime or investigating to obtain such information.[43]

The determination of whether a grand jury is "special" with extended powers, or "regular" without such increased powers may pose some problems. For example, a possible interpretation would have a regular grand jury, in the process of investigating organized criminal activity, automatically becoming a special grand jury with the passage of this Act. Furthermore, a grand jury impaneled to investigate municipal corruption could be classified as a special grand jury as a matter of course. On the other hand it might be viewed as such only when connections with organized crime are discovered. As a further illustration of this ambiguity, it is useful to examine the typical grand jury impaneled to return indictments (and not authorized to issue reports) in a metropolitan area. If it is presented with information concerning misconduct of an appointed official in connection with organized crime, but the information is not sufficient to result in an indictment, the grand jury might then be redesignated a special grand jury and a report may be issued concerning the officials' involvement with organized crime.[44] The report power clearly was not intended to be so pervasive.[45]

Furthermore, the Act does not specify *who* is to make the determination of whether a grand jury is "special." One interpretation would give this responsibility to the district judge who impanels it. Title I, since it attempts to *compel* courts periodically to convene grand jury investigations into organized criminal activity,[46] seeks to limit the court's complete discretion in the summoning of grand juries that it previously possessed.[47] This limitation is weakened where the district judge is allowed to

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[41] *See* SENATE REPORT 48.

[42] 18 U.S.C.A. § 3332(a) (Supp. 1971) imposes a duty on the special grand jury to inquire into "offenses against the criminal laws of United States," and does not restrict the inquiry to matters concerning organized crime. *See House Hearings* 120 (remarks of Senator McClellan).

[43] *House Hearings* 120 (remarks of Senator McClellan).

[44] The power to issue reports on the misconduct of appointed public officers or employees is granted to the special grand jury. 18 U.S.C.A. § 3333(a)(1) (Supp. 1971).

[45] *See* note 99 *infra* and accompanying text.

[46] 18 U.S.C.A. § 3331(a) (Supp. 1971). *See also House Hearings* 97.

[47] FED. R. CRIM. P. 6(a). Title I was originally designed to increase the independence of the grand jury, and provide some degree of control over the prosecutor and district court to protect against corruption and improper influence. *House Hearings* 118–19 (remarks of Senator McClellan).

decide whether a grand jury is "regular" or "special."[48] A judge, within the language of title I, could satisfy the technical requirements, but evade the purpose of the Act, if he designated as a special grand jury one impaneled to investigate ordinary criminal violations having no connections with organized crime. In so doing, the judge could indirectly give his blessing to organized criminal activity. Another possibility is that a court could designate as a special grand jury, any grand jury that happened to be in session at the time, and still meet the requirements of section 3331.[49] With this section's vague wording, the possibilities are numerous.

Moreover, the Attorney General's power to compel the summoning of a special grand jury is limited to situations where another special grand jury is not then serving.[50] A chief judge of a district court who resented this executive interference with the judiciary[51] could frustrate the request by declaring that the grand jury currently sitting was a "special grand jury."[52] Once again, this result may occur simply because the statute fails to provide a test for differentiating between a "special grand jury" and "such other grand juries as shall be called from time to time."[53] It is unfortunate that the legislature has neglected to specify what it meant by the term chosen to denominate an entirely new chapter in title 18 of the United States Code.

B. Appellate Recourse of the Special Grand Jury

When title I was initially drafted, it was designed to create special grand juries with increased independence from the court and prosecutor.[54] To enable it to exercise the traditional broad investigative powers deemed necessary for organized crime investigations, restrictions were proposed that would prevent the

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[48] 18 U.S.C.A. § 3331(a) (Supp. 1971). *See* letter from Circuit Judge Irving R. Kaufman, Chairman, Committee on the Operation of the Jury System, to Emanuel Celler, May 12, 1970, reprinted in *House Hearings* 122.

[49] That is, the summoning requirements of calling a special grand jury at least once in each period of eighteen months.

[50] 18 U.S.C.A. § 3331(a) (Supp. 1971).

[51] *See generally* A. VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT DAY SIGNIFICANCE (1953).

[52] *See* factual setting of United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965) (U.S. Attorney refused to sign indictment requested by grand jury—court subsequently ordered the signing and, upon a continued refusal by the U.S. Attorney, cited him for contempt of court). *Cf.* Statement of Henry S. Ruth, Associate Professor of Law, University of Pennsylvania Law School, *Senate Hearings* 332, 333, suggesting the possibility of a stalemate between the court and prosecutor resulting from the failure of S. 30 to answer other questions regarding the relationship between these branches.

[53] FED. R. CRIM. P. 6(a).

[54] *See House Hearings* 97, 118–19.

prosecutor and district court from exercising arbitrary and absolute control over the special grand jury.[55]

These changes transferred a large measure of the instruments of control over the grand jury from the court to the grand jury itself.[56] Subsequently, the bill was criticized as granting so much independence[57] that it presented the potential threat of a "runaway" grand jury.[58] The bill finally emerged with the special grand jury still under the supervision of the district court, but providing for the special grand jury appellate recourse when the special grand jury disagreed with certain actions of the district court.

Thus, the special grand jury now can appeal a dismissal order of the district court, entered before it—the grand jury—determines that its work is complete.[59] Also, it can appeal a court's failure to extend its term.[60] Unfortunately, Congress has failed to give the special grand jury any effective voice when its workload exceeds its capacity; it has no power to appeal the denial of a request for an additional grand jury to help it effectively meet its burdens. Section 3332(b) leaves complete discretion with the district court to provide an additional grand jury in this situation.

The omission of an appeal provision here is illogical when contrasted with the discharge and extension of term clauses, and considered in light of the aims of the title. If the grand jury is considered the best judge of when its work has been completed,[61] it should also be able to determine when it is overburdened with work and unable to discharge its obligations effectively. The fear of a "runaway" grand jury would be groundless if the initial discretion to impanel an additional grand jury were left to the district court, with a supplementary appeal provision. Significantly, the addition of an appeal provision *could* prevent the frustration of the grand jury investigation by an arbitrary action of a district court.[62]

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[55] *See Senate Hearings* 333 (statement of Henry S. Ruth).

[56] *See* S. 30, 91st Cong., 1st Sess. (1969), as originally proposed, reprinted in *Senate Hearings* 5–9.

[57] *See* Letter of Judge Irving R. Kaufman, *supra* note 48.

[58] *See House Hearings* 553, 560 (statement of the Section of Criminal Law of the American Bar Association). A "runaway" grand jury is a descriptive term which applies to a grand jury that has expanded its investigation beyond the recommendations of the prosecutor.

[59] 18 U.S.C.A. § 3331(b) (Supp. 1971).

[60] *Id.*

[61] SENATE REPORT 141.

[62] The original provision in S. 30 dealing with this problem compelled the district court to summon an additional grand jury upon a "showing of need" by the special grand jury. It also contained an appeal provision. *See* § 3324(d) of S. 30, 91st Cong., 1st Sess. (1969), as initially introduced, reprinted in *Senate Hearings* 7–8.

C. Presentation of Evidence to the Special Grand Jury

It was previously noted that title I requires a prosecutor, upon the demand of any person providing information concerning alleged offenses against the United States, to inform the grand jury of such alleged offense and the identity of such person.[63] The law existing at the time of the Act's passage granted the prosecutor certain discretion as to what he chose to present to the grand jury.[64] By requiring the prosecutor to inform the grand jury of all offenses alleged by any outside person, upon that persons' request, section 3332(a) enables that outside person in effect, to usurp the discretion of the prosecutor in deciding what cases or evidence to present to the grand jury. It is true that the prosecutor can also give his recommendation as to how the grand jury should act on this information, but he still is required to "inform" the grand jury.[65]

Furthermore, the scope of the special grand jury's power of investigation is not restricted to organized crime, but is the same as that of a regular grand jury; it may inquire into all crimes against the United States.[66] Thus, from the language of the statute it appears that a prosecutor, who may be in the midst of conducting a highly sophisticated investigation into organized crime with a special grand jury, can be compelled to present to the special grand jury information concerning a non-related federal criminal offense. Since individuals can demand that information be submitted to a grand jury only if it is a "special" grand jury, the likelihood of submission of non-related cases to such a grand jury is increased. This would be the case despite the fact that the prosecutor feels it more desirable for a regular grand jury to act on this information, or even though he has already presented this information to a regular grand jury. An even more disturbing result can occur when the prosecutor is presented with groundless complaints. Previously, he has had complete discretion to ignore the complaint and allow the work of a regular grand jury to continue uninterrupted. Ironically, a body that has been created to engage in the most sophisticated type of criminal investigations can be compelled to be subjected to the latest gossip in the district.[67]

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[63] 18 U.S.C.A. § 3332(b) (Supp. 1971).

[64] *See* note 25 *supra* and accompanying text.

[65] 18 U.S.C.A. § 3332(a) (Supp. 1971).

[66] *See* note 21 *supra* and accompanying text. Although the grand jury's attention may be directed to a particular field of investigation it may not be precluded from considering other matters. *See* United States v. Smyth, 104 F. Supp. 283, 309 n.110 (N.D. Cal. 1952).

[67] 116 CONG. REC. H9661-62 (daily ed. Oct. 6, 1970) (statement by Representative Abner J. Mikva).

The above result is clearly contrary to what Congress had in mind when it passed title I. As S. 30 was first proposed, it guaranteed to every person the opportunity to communicate evidence to the grand jury foreman.[68] When the bill emerged from the Senate, it still allowed individuals to transmit knowledge of alleged offenses to the special grand jury, but eliminated the language guaranteeing this opportunity.[69]

The bill then passed to the House Committee, where it suffered some criticism by the Section of Criminal Law of the American Bar Association. The subsection allowing citizen complaints to be made directly to the grand jury was in direct conflict with Standard 3.4(c) of the Tentative Draft of the *ABA Standards on the Prosecution and Defense Function.*[70] Accordingly, the ABA recommended adoption of the latter standard[71] providing for citizen complaints to be presented to the prosecutor so that he may evaluate the evidence to determine whether the complaint merits action.[72] The prosecutor would then communicate to the grand jury only his action or recommendation.[73] As stated in the *Report of the Section of Criminal Law of the ABA,* the specific aim of this standard is "[to prevent] the filing of many groundless criminal charges that can clog the criminal justice system."[74]

The manner in which Congress chose to implement the recommendation, however, gave it a completely contrary effect. By requiring the prosecutor to present the substance of each complaint, instead of just a summary of his actions, Congress appears to have completely eliminated the prosecutor's discretion.[75]

If the subsection was structured in this manner to act as a check on the prosecutor, it still does not appear to be effective. As a practical matter, the prosecutor's recommendations will usually be accepted on their face by the grand jury, and the complaints

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[68] *See* proposed § 3324(b), (c), S. 30, 91st Cong., 1st Sess. (1969), reprinted in *Senate Hearings* 7.

[69] *See* proposed § 3332(b), reprinted in SENATE REPORT 3. This deletion was made to prevent the drawing of the negative inference that individuals could not transmit information to regular grand juries. *See* SENATE REPORT 141-42.

[70] *House Hearings* 554.

[71] *Id.* 561.

[72] *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Commentary on Standard 3.4(c), at 85 (Tent. Draft 1970).

[73] *Id.*

[74] *House Hearings* 561.

[75] If only the prosecutor's actions on each complaint were required to be presented, it seems that he could proceed in summary fashion without expending much time of the special grand jury. On the other hand, by requiring the prosecutor to present, in addition, information concerning each alleged offense and the name of each complainant, it seems that the provision almost regressed to its initial stage, where groundless citizen complaints can inundate the grand jury.

will be forgotten.[76] In addition, there is no way to ascertain whether the prosecutor is indeed performing this duty. Due to the secrecy of the proceeding, a citizen complainant could not examine the minutes of the grand jury to see if his complaint was presented.[77] Although in rare instances the court might find sufficient grounds for an *in camera* examination, no record is *in fact* required to be kept on the grand jury proceedings.[78] Consequently, this provision does not seem to be an effective check on the prosecutor[79] and imposes unnecessary burdens on the special grand jury.

IV. REPORTS OF THE SPECIAL GRAND JURY

A. Reporting Procedures

Title I authorizes a special grand jury to issue two types of reports which may be submitted to the court upon the completion of the special grand jury's original term or upon the completion of each extension.[80] One type of report can be submitted "regarding organized crime conditions in the district."[81] This provision incorporates into the Act a recommendation of the President's

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[76] *See Special Investigating Grand Jury, supra* note 28, at 968:

> [The prosecutor's] role in directing the investigation is pervasive; he interviews potential witnesses and determines who will testify, conducts the interrogation before the grand jury, and advises on the law and the sufficiency of evidence. Because of his position as a lawyer and [public official], he is normally highly effective and persuasive. The National Commission on Law Observance and Enforcement has concluded that 'the grand jury is seldom better than a rubber stamp of the prosecuting attorney . . . .'

[77] *See* FED. R. CRIM. P. 6(e). In United States v. Procter & Gamble Co., 356 U.S. 677 (1958), the Supreme Court, discussing the policy of grand jury secrecy, stated:

> [A] long-established policy . . . maintains the secrecy of the grand jury proceedings in the federal courts . . . . The reasons are varied. One is to encourage all witnesses to step forward and testify freely without fear of retaliation . . . . This indispensable secrecy of grand jury proceedings, [citation omitted] must not be broken except where there is a compelling necessity . . . . *Id.* at 681-82.

[78] *E.g.*, Nipp v. United States, 422 F.2d 509, 512 (10th Cir. 1969), *cert. denied*, 399 U.S. 913 (1970); United States v. Ayers, 426 F.2d 524, 529 (2d Cir.), *cert. denied*, 400 U.S. 842 (1970); United States v. Watson, 421 F.2d 1357, 1358 (9th Cir. 1970); Loux v. United States, 389 F.2d 911 (9th Cir.), *cert. denied*, 393 U.S. 867 (1968). *See* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: Criminal § 103 (1969). This Act does not appear to alter this requirement. *See* note 100 *infra*.

[79] Even if a grand jury decided to ignore the prosecutor's recommendations and proceed upon a complaint, the provision would still not act as an effective check upon the prosecutor. Courts have held that a true bill voted by a grand jury will not become a valid indictment if the prosecutor refuses to affix his signiture. *See In re* Grand Jury Impaneled January, 1969, 315 F. Supp. 662 (D. Md. 1970); United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965). In both cases, the United States Attorney refused to sign an otherwise valid indictment. The courts refused to order the indictment to be signed. *See also* N.Y. Times, Mar. 12, 1971, at 15, col. 3 (city ed.) (U.S. Attorney for Utah refused to sign otherwise valid indictment against county sheriff).

[80] 18 U.S.C.A. § 3333(a) (Supp. 1971). *See* SENATE REPORT 142.

[81] 18 U.S.C.A. § 3333(a)(2) (Supp. 1971).

Commission on Law Enforcement and Administration of Justice.[82] Reports of this type are restricted to those of a general nature,[83] but may be comprehensive and include social, economic and other types of data.[84] This type of report may not be critical of an "identified" person.[85]

The second type of report may be submitted "concerning non-criminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action."[86] The restriction that requires the wrongdoing to be related to organized criminal activity was inserted to confine the scope of this report provision to that necessary to fulfill the purpose of the Act—to control organized crime.[87] To further serve this purpose, the clause, "misconduct, malfeasance or misfeasance in office" was substituted for the original clause "misconduct, nonfeasance, or neglect in office."[88] This change should restrict the reportable acts to those which contain some degree of "evil intent."[89]

Another amendment,[90] weakening the report provision to the extent that it may substantially frustrate its purpose, restricts those subject to reports to *appointed* "public officer[s] or employee[s]" as opposed to merely "public officer[s] or employee[s]."[91]

When a report of this type is submitted, each person named therein is given the opportunity to testify before the grand jury,[92] and may compel the attendance of a reasonable number of witnesses to testify in his favor.[93] In addition, he may file an answer,

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[82] *See* H.R. REP. NO. 91-1549, 91st Cong., 2d Sess. 40 (1970). [hereinafter cited as HOUSE REPORT].

[83] *See* SENATE REPORT 49.

[84] *Id.* 143.

[85] 18 U.S.C.A. § 3333(b)(2) (Supp. 1971). As used here, the word "identified" is not synonymous with "named," but would include any means of identification sufficient "to establish clearly to what individual a report refers." 116 CONG. REC. S8648 (daily ed. June 9, 1970) (statement by Senator McClellan). This could include identification by name, job classification, or any other clear reference. *Id. See also* HOUSE REPORT 77.

[86] 18 U.S.C.A. § 3333(a)(1) (Supp. 1971). It is to be noted that the misconduct, malfeasance, or misfeasance must not itself be criminal but must relate to organized criminal activity. *Id. See also* HOUSE REPORT 40.

[87] *See Senate Hearings* 331 (recommendation of the National Association of Counties).

[88] *See* S. 30, 91st Cong., 1st Sess., proposed § 3330(a)(1), as introduced in the Senate, January 15, 1969, reprinted in *Senate Hearings* 9. *See also Senate Hearings* 331.

[89] *Senate Hearings* 331. This change would remove from the ambit of this provision the local public official who negligently happened to miss ten zoning meetings. *Id.*

[90] *Compare* 18 U.S.C.A. § 3333(a)(1) (Supp. 1971) as enacted, *with* its structure as it entered the House. (*See House Hearings* 7).

[91] *Id.* (emphasis added).

[92] 18 U.S.C.A. § 3333(b)(2) (Supp. 1971).

[93] *Id. See* HOUSE REPORT 78 for construction inferring the use of the subpoena power to compel attendance of witnesses.

which becomes an appendix to the report subject to the court's power to strike any part inserted "scandalously, prejudiciously, or unnecessarily."[94] The answer must be submitted within twenty days of service of the report on such officer or employee, except when an extension is obtained upon a showing of good cause.[95]

Both types of reports are to be based on facts revealed in the course of an investigation into *criminal offenses*.[96] Investigations may not be conducted into noncriminal conduct for the purpose of writing a report.[97] Thus, a report concerning noncriminal conduct of appointed officials can only be submitted if supported by information disclosed incident to a criminal investigation by a special grand jury.[98] It is not proper for a report to be submitted concerning *criminal* misconduct of officials for which there is insufficient evidence to support an indictment.[99]

Before reports submitted to the court may be published as a public record, the district court must be satisfied, after an examination of the grand jury minutes,[100] that the report is based on a preponderance of the evidence, is supported by facts revealed in an authorized criminal investigation, and conforms to the other requirements set forth above.[101] The court's determination is subject to appellate review.[102] If the court is not satisfied that the

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[94] 18 U.S.C.A. § 3333(c)(2) (Supp. 1971).

[95] *Id.*

[96] *Id.* § 3333(b)(1).

[97] *Id. See* HOUSE REPORT 77.

[98] 18 U.S.C.A. § 3333(b)(1) (Supp. 1971). *See* HOUSE REPORT 77.

[99] McClellan, *The Organized Crime Act (S. 30) or its Critics: Which Threatens Civil Liberties?* 46 NOTRE DAME LAW. 55, 76–77 (1970). It is important to note this distinction, as this could be the exact situation in which a grand jury might be most tempted to issue a report.

[100] This safeguard is of dubious value when no record of the grand jury proceedings are kept. A record of this nature has not been required in the federal system, *see* note 78 *supra*, and Congress did not intend to alter this practice when enacting this Act. SENATE REPORT 144. *See also House Hearings* 125 (remarks of Representative Emanuel Celler). The SENATE REPORT, in discussing the regulation of the disclosure of grand jury testimony, specifically stated:

> There is no intention, however, to require that grand jury testimony be recorded. This follows the prevailing present practice of making recordation optional [citations omitted]. The statute is intended to come into operation only if such recordation is undertaken. *Id.* 144.

However, one legislator believes that testimony taken before a special grand jury is required to be recorded because the title requires a court to examine a submitted report "and the minutes of the special grand jury" (18 U.S.C.A. § 3333(b) (Supp. 1971)) before it can accept the report. *See* 116 CONG. REC. S8648 (daily ed. June 9, 1970) (remarks of Senator McClellan); McClellan, *supra* note 99, at 74. On the other hand, in view of the preceding language from the SENATE REPORT, it is clear that Congress did not have this intent. It would not insert specific language expressing an intent to follow the existing recording practice applicable to all grand juries, if it intended to alter, sub silentio, this practice with respect to the special grand jury.

[101] 18 U.S.C.A. § 3333(b) (Supp. 1971).

[102] *Id.* § 3333(c)(1). *See* HOUSE REPORT 78. Although this section contains a reference to an appeal, the section has been criticized for failing to set forth a specific procedure for

report dealing with official misconduct has satisfied the requirements concerning accuracy or opportunity to testify, it may seal the report or direct the taking of additional testimony.[103] The maximum term of the special grand jury may be exceeded to enable these requirements to be satisfied.[104]

In addition, reports of the type criticizing public officials may not be made public until at least thirty-one days after service of the report on each person named therein, and after an answer has been filed or the time for such filing has expired.[105] There may be no publication during the pendency of any appeal taken.[106] Also, reports of this nature may not be made public until thirty days after copies have been delivered to each body or official having authority over the named public official.[107] Copies are given to these authorities so the report can serve "as a basis for a recommendation of removal or disciplinary action."[108] The court can issue orders to prevent unauthorized publications, and can punish such publication through the use of contempt citations.[109] Moreover, if a court finds that the filing of such a report will prejudice a fair consideration of a pending criminal matter, it may seal the report during the pendency of such matters.[110]

B. Shortcomings of the Report Provisions

The grant of power to the special grand jury that allows the issuing of reports has evoked much controversy. A fundamental criticism of grand jury reports, in general, has been stated by now Chief Judge Stanley H. Fuld in an opinion of the New York Court of Appeals:[111]

> In the public mind, accusation by a report is indistinguishable from accusation by indictment and subjects

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the taking of an appeal. *See House Hearings* 302. In response, Senator McClellan stated that a fair reading of the title would lead to the conclusion that the report sections involve civil proceedings and would apply the appropriate Federal Rules of Civil Procedure concerning appeals. 116 CONG. REC. S8648 (daily ed. June 9, 1970). *See also* HOUSE REPORT 78.

[103] 18 U.S.C.A. § 3333(e) (Supp. 1971). *See* HOUSE REPORT 41.

[104] 18 U.S.C.A. § 3333(e) (Supp. 1971). *See* HOUSE REPORT 41.

[105] 18 U.S.C.A. § 3333(c)(1) (Supp. 1971). *See* HOUSE REPORT 40-41.

[106] 18 U.S.C.A. § 3333(c)(1) (Supp. 1971). *See* HOUSE REPORT 40-41.

[107] 18 U.S.C.A. § 3333(c)(1) (Supp. 1971). *See* HOUSE REPORT 40-41. These copies may not be served on the appropriate authorities before the other "delay" provisions have expired. *See* 18 U.S.C.A. § 3333(c)(3) (Supp. 1971).

[108] *See* 18 U.S.C.A. § 3333(a)(1) (Supp. 1971).

[109] *Id.* § 3333(c)(1). *See* HOUSE REPORT 41.

[110] 18 U.S.C.A. § 3333(d) (Supp. 1971).

[111] Wood v. Hughes, 9 N.Y.2d 144, 154, 173 N.E.2d 21, 26, 212 N.Y.S.2d 33, 39-40 (1961) (appeal by foreman of grand jury to set aside lower court's order sealing the grand jury's report censuring the conduct of public officials—court of appeals affirmed lower court).

> those against whom it is directed to the same public condemnation and opprobrium as if they had been indicted .... A grand jury report—which as a judicial document obviously differs radically from newspaper charges of misconduct—carries the same sense of authoritative condemnation as an indictment does, without, however, according the accused the benefit of the protections accorded to one who is indicted.[112]

Subsequent to the above decision, New York enacted a statute providing safeguards designed to ameliorate these potential injustices.[113] The presently enacted federal reporting provisions were modeled after the New York statute.[114] However, there exist significant differences between the two.

1. Reports based on Non-Probative Evidence?—A Need for Standards—The standard of evidence required to sustain the reports differs under the two statutes. The New York statute requires a court to accept a report only if the report "is supported by the preponderance of the *credible and legally admissible* evidence" (emphasis added).[115] On the other hand, title I requires only that the report be supported by "the preponderance of the evidence."[116] By the deletion of the words "credible and legally admissible," Congress has implicitly given its approval to the release of special grand jury reports based on evidence, such as hearsay, that would be inadmissible in a formal judicial proceeding[117] and the probative value of which may be outweighed by its prejudicial effect.[118]

Supporters of the provision have commented that the difference in the two standards "reflects a difference in the evidentiary rules of the two jurisdictions."[119] New York restricts the evidence the grand jury may receive in an investigation to "none but legal evidence."[120] For the grand jury to indict, the evidence should be sufficient, if unexplained or uncontradicted, to support a con-

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[112] *Id.*

[113] N.Y. CODE CRIM. PROC. § 253a (McKinney Supp. 1970). *See* 116 CONG. REC. H9649 (daily ed. Oct. 6, 1970) (statement by Representative Poff). *See also House Hearings* 122.

[114] SENATE REPORT 142. *See also House Hearings* 122.

[115] N.Y. CODE CRIM. PROC. § 253-a(2)(a) (McKinney Supp. 1970).

[116] 18 U.S.C.A. § 3333(b)(1) (Supp. 1971); *See* report submitted by the COMMITTEE ON FEDERAL LEGISLATION, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE PROPOSED ORGANIZED CRIME CONTROL ACT OF 1969 (S. 30) (1970), reprinted in *House Hearings* 291, at 301 [hereinafter cited as ABCNY].

[117] Letter from Dept. of Justice to Emanuel Celler, July 23, 1970, reprinted in HOUSE REPORT 75, at 77-78.

[118] *Cf. House Hearings* 626.

[119] *See* note 117 *supra.*

[120] N.Y. CODE CRIM. PROC. § 249 (McKinney 1958). *See Id.* § 248.

viction at trial.[121] However, the federal grand jury may indict on any credible evidence that satisfies the standard of probable cause that the accused committed the offense,[122] even if such evidence is not admissible at trial. Indictments may be supported entirely by hearsay.[123]

Although it is true, then, that grand jury indictments have different bases in the two jurisdictions, the underlying rationale for allowing the federal grand jury to act on incompetent evidence in handing down an indictment does not apply in the reporting situation. When determining whether there is sufficient evidence to indict, the grand jury is functioning as a safeguard against oppressive actions of a prosecutor or court.[124] It is not restricted by the rules of evidence since the accusation, if an indictment is returned, will be ultimately tested by a petit jury, operating under strictly applied rules, evaluating only the legally admissible evidence.[125] The determination by the petit jury is subject to appellate review. Thus, the grand jury provides an initial screening function, while a final determination, subject to review, is made on the basis of legal evidence. When the grand jury issues a report, however, it is not performing a screening function. It is not fulfilling its constitutional function of protecting an accused from unjust charges. It is itself the accusor. There will be no ultimate determination of the truth of the allegations at trial, based strictly on legal evidence, and the accused will not have the opportunity to confront and cross-examine hostile witnesses. Thus, the different nature of the function that the grand jury serves when it issues reports requires that it act only on legally competent evi-

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[121] *Id.* § 251. That is, a conviction beyond a reasonable doubt.

[122] For statements of the probable cause standard *see, e.g.*, United States v. Cox, 342 F.2d 167, 170 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); Silverthorne v. United States, 400 F.2d 627, 634 (9th Cir. 1968); *In re* Grand Jury Impaneled January, 1969, 315 F. Supp. 662, 671 (D. Md. 1970). *See* HOUSE REPORT 78.

[123] Costello v. United States, 350 U.S. 359, 363 (1956). (Court upheld indictment for tax evasion based solely on hearsay testimony of government agents who had no personal knowledge of the transactions to which they testified, *but cf.* United States v. Umans, 368 F.2d 725, 730 (2d Cir. 1966), *cert. dismissed as improvidently granted*, 389 U.S. 80 (1967). There the court accepted the vitality of *Costello*, but admonished prosecutors that "[h]earsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge."

[124] *See* United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); Wood v. Georgia, 370 U.S. 375, 390 (1962); *In re* Grand Jury Impaneled January, 1969, 315 F. Supp. 662, 671 (D. Md. 1970). The court in *Cox* stated:

> The constitutional requirement of an indictment . . . as a predicate to a prosecution for capital or infamous crimes has for its primary purpose the protection of the individual from jeopardy except on a finding of probable cause by a group of his follow citizens, and is designed to afford a safeguard against oppressive actions of the prosecutor or a court. 342 F.2d at 170.

[125] *Cf.* Silverthorne v. United States, 400 F.2d 627, 634 (9th Cir. 1968).

dence. An authoritative supporter of grand jury reports considers the preceding requirement a fundamental safeguard to prevent abusive use of the reports.[126]

Although the commentator suggests even a higher burden of proof (beyond a reasonable doubt) than a court would be applying upon review under title I,[127] the standard that does govern (preponderance of the evidence) is diluted further as a safeguard when it is not based on legal evidence. The judge, who is given no standard under title I to apply in his objective evaluation, would be weighing evidence that may contain hearsay or even double hearsay.[128]

Senator McClellan, an original sponsor of the Act, has recently made an attempt to rebut this criticism.[129] He argues that the courts do have "guidelines" for weighing the *reliability* of hearsay and are constantly doing so.[130] In this regard, a case is cited where a court, in reviewing on appeal a criminal conviction,[131] allowed hearsay to be admitted under an exception to the hearsay rule, but then rejected its probative value.[132] Yet, it is erroneous to analogize the evaluation of hearsay evidence admitted on an exception to the hearsay rule at trial with a grand jury report based on hearsay evidence. For example, critics of the Act have not contended that a court lacks ample guidelines to evaluate evidence at a criminal trial. A judge weighs the probative value of the evidence to determine whether there is sufficient evidence for a conviction,[133] and in certain cases can supercede a jury's determination in directing an acquittal for a defendant.[134] However, the strict rules of evidence that apply to criminal trials do not apply to grand jury proceedings[135] or to a district court's review of a report. Prior to enactment of title I, a federal district court had not even been permitted to weigh the sufficiency of evidence accumulated by a grand jury as a basis for an indictment.[136] Now an

[126] Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play*, 55 COLUM. L. REV. 1103, 1126 (1955).

[127] *Id.*

[128] ABCNY, *supra* note 116, at 302.

[129] McClellan, *supra*, note 99, at 74-75.

[130] *Id.*

[131] United States v. Shiver, 414 F.2d 461 (5th Cir. 1969).

[132] McClellan, *supra* note 99, at 74-75.

[133] His decision is determinative when trial is held without a jury. FED. R. CRIM. P. 23(c).

[134] *See* FED. R. CRIM. P. 29. *See, e.g.*, Gilliland v. United States, 385 F.2d 912, 915 (5th Cir. 1967).

[135] *See* note 123 *supra* and accompanying text.

[136] Costello v. United States, 350 U.S. 359, 363 (1956); United States v. Ramsey, 315 F.2d 199 (2d Cir.), *cert. denied*, 375 U.S. 883 (1963); United States v. DiFronzo, 345 F.2d 383, 386 (7th Cir.), *cert. denied*, 382 U.S. 829 (1965); United States *ex rel.* Almeida v. Rundle, 383 F.2d 421, 425 (3d Cir. 1967), *cert. denied*, 393 U.S. 863 (1968).

entirely new obligation is imposed on the courts to review the evidence upon which a grand jury report is founded, but they are not given any guidelines upon which to weigh a record that could be composed entirely of hearsay. It is unclear whether they are supposed to find the preponderance of only probative and reliable evidence, or whether the preponderance of hearsay evidence will suffice. Senator McClellan himself has pointed out the danger of equating a trial in which a determination of criminal guilt is made, with a grand jury report which does not adjudicate but only makes an accusation of non-criminal misconduct.[137]

Senator McClellan further argues that the fact that courts have had much experience reviewing decisions of administrative agencies, which are permitted to base their decisions in part on hearsay, indicates that courts can make the determination required by the Act.[138] Moreover, it is asserted that the use of hearsay evidence has not prevented the courts from reviewing the determinations of these agencies under the "substantial evidence" rule, citing section 556(d) of the Administrative Procedure Act.[139]

However, this example supports, rather than undermines, the criticism of title I. The cited section of the Administrative Procedure Act specifically requires determinations of the administrative agency to be supported by "reliable, probative, and substantial evidence." Thus Congress has set down guidelines (*i.e.*, that the evidence must be reliable and probative) for the administrative agencies to follow, and for the courts to employ on review. Yet, nowhere in title I is there any guideline as to the type of evidence necessary to sustain the preponderance standard.

The distinction between the nature of the reporting and indicting functions suggests that the district court should approve a grand jury report only if it is supported by the preponderance of *credible and legally admissible* evidence. For example, an investigative grand jury, operating unhampered by the rules of evidence,[140] might find itself considering illegally seized evidence. Although on occasion the exclusionary rule has been held not to apply to grand jury proceedings,[141] the rationale supporting these decisions has been that "the defendant [has] ample opportunity at

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[137] 116 CONG. REC. S8647 (daily ed. June 9, 1970) (statement of Senator McClellan).

[138] McClellan, *supra* note 99, at 75.

[139] 5 U.S.C. § 556(d) (Supp. III, 1968). McClellan, *supra* note 99, at 75.

[140] Note 123 *supra*. *See also* United States v. Fox, 425 F.2d 996, 1001 (9th Cir. 1970) (grand jury not governed by strict evidentiary rules that apply to trial proceedings—court has discretion to quash indictment because of incompetent evidence admitted).

[141] West v. United States, 359 F.2d 50, 56 (8th Cir.), *cert. denied*, 385 U.S. 867 (1966); Laughlin v. United States, 385 F.2d 287, 291 (D.C. Cir. 1967), *cert. denied*, 290 U.S. 1003 (1968); Truchinski v. United States, 393 F.2d 627, 634 (8th Cir. 1968).

trial to prevent any ultimate prejudice stemming from the government's illegal actions."[142] This rationale is clearly inapplicable to the report situation in which such opportunity to prevent prejudice at trial will not be granted the defendant. He should be given the opportunity when the district court reviews the report to object to illegally seized evidence used to support such a report, and to the extent he is successful, have such portions of the report expunged.

Requiring reports to be based upon legally competent evidence would not impede a grand jury investigation; the evidence gathering process would remain unaltered. The grand jury would only be prevented from basing its report on incompetent evidence to the ultimate prejudice of the defendant.

Although certain incompetent evidence, such as agents' summaries of numerous business transactions,[143] may be far less objectionable than illegally seized evidence, the same policy that precludes the admission of such incompetent evidence at trial should prevent its use to support a grand jury report. Such evidence is admissible before a grand jury since it may be burdensome to produce the appropriate witnesses and material at both the trial and grand jury proceedings.[144] However, when a trial will not be forthcoming, and instead a report is issued, no additional burden is imposed by requiring the report to be supported by competent evidence prior to publication.

The only reason suggested for the change from requiring a report to be accepted if "supported by the preponderance of the credible and legally admissible evidence," as required in the New York Statute, to "preponderance of the evidence" is that "federal grand juries can consider hearsay evidence while New York State grand juries cannot."[145] However, this rationale does not suggest any reason why a federal grand jury cannot consider hearsay evidence in its investigations, but be required to base its reports on "credible and legally admissible evidence."[146] Similarly, no reason has been advanced to show why a district court should not use this standard on review to determine whether the requisite burden of the preponderance of this type of evidence is met. Only if these steps are taken will this provision for review be a meaningful safeguard.

2. Reports on Appointed Public Officials: A Question of a

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[142] Laughlin v. United States, 385 F.2d at 291.
[143] *See, e.g.*, Costello v. United States, 350 U.S. 359, 361 (1956).
[144] *Id.* at 363.
[145] McClellan, *supra* note 99, at 74. *See also* HOUSE REPORT 77-78.
[146] *See* Kuh, *supra* note 126, at 1126-27.

Double Standard—Another significant difference between the New York statute allowing grand jury reports and the corresponding federal provisions is that the New York statute allows the grand jury to report on the misconduct of all public officers or employees,[147] whereas the federal provision limits the power to report on the misconduct of only an "appointed public officer or employee."[148] The original draft of S. 30 authorized special grand juries to report on all public officers or employees, regardless of whether elected or appointed.[149] The restricting amendment occurred after the bill had emerged from the House Judiciary Committee in its final form.[150] Although the provisions of the reports section, along with suggested changes, were extensively debated in the House of Representatives it does not appear that an amendment of this nature was ever discussed.[151] After the provision was amended, it was severely criticized and the motives of the committee were impugned. Both the strongest supporters[152] and strongest critics[153] of grand jury reports objected to this change.

Two reasons were offered in support of its enactment. First, it was suggested that the limitation will prevent the special grand jury from playing politics and attempting to abuse its power by influencing the outcome of an election.[154] Secondly, proponents of the measure contended that the limitation will avoid confusion as to what body to submit a report "as the basis for a recommendation of removal or disciplinary action." In the case of appointed officials, the report would be submitted to the appointing agency,

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[147] N.Y. CODE CRIM. PROC. § 253a(1)(a) (McKinney Supp. 1970).

[148] 18 U.S.C.A. § 3333(a)(1) (Supp. 1971).

[149] *See* S. 30, 91st Cong., 1st Sess. § 3330(a) (1969) as proposed, reprinted in *Senate Hearings* 9.

[150] *Compare* proposed 18 U.S.C. § 3333(a)(1) as reprinted in *House Hearings* 7, *with* the section reprinted in HOUSE REPORT 3.

[151] *See generally, House Hearings.*

[152] *See* 116 CONG. REC. S17773 (daily ed. Oct. 12, 1970) (statement by Senator McClellan):

> Possibly the most weakening amendment passed by the House is the one that excludes elected officials from those persons who might be made the subjects of grand jury reports . . . . I, for one, do not see how we can make applicable to others provision (sic) of a bill which we are unwilling to have apply to ourselves.

[153] *See* dissenting views of Representatives John Conyers, Jr., Abner Mikva, and William F. Ryan, HOUSE REPORT 181, at 182.

See also 116 CONG. REC. H9669 (daily ed. Oct. 6, 1970) (letter from American Civil Liberties Union):

> The committee's unwillingness to permit Congressmen to be subjected to this kind of public smearing, but to allow it to be done to appointed officials, raises a serious question about a double standard. Surely what should be sauce for the goose should be sauce for the gander.

[154] 116 CONG. REC. H9654-55 (daily ed. Oct. 6, 1970) (statement of Representative McCulloch).

but if the report covered elected officials, it would be unclear to whom such report should be submitted.[155]

The first justification ignores the safeguards in the section. A report cannot be published until a court, albeit inadequately, reviews the evidence upon which it is based.[156] The section contains other prerequisites for publication which will result in an additional time interval between the time a report may be submitted to a court and the time it may eventually be released to the press.[157] A court should be able to determine whether a grand jury has abused its powers in an attempt to wrongfully influence the outcome of an election. In that event, the grand jury can order the report sealed and prevent its becoming a public record.[158] The contempt power will serve as a deterrent against unauthorized publication.[159]

If a court determines the report *is* supported by the evidence, it is arguable that the official misconduct should be revealed to the electorate, especially immediately prior to an election.[160] If the fear is that the safeguards provided are not adequate to protect effectively an elected public official from unjustified charges of misconduct,[161] the remedy should not be the removal of elected officials from the reach of reports while appointed officials are left exposed to the danger. Rather, the solution should lie in strengthening the precautions or deleting the reports section in its entirety.

The second reason offered to support the amendment is equally questionable. It is not necessary to restrict the applicability of this provision solely for the purpose of clarifying the body to which a report should be submitted "as the basis for a recommendation of removal or disciplinary action."[162] It is just as simple to determine which body has jurisdiction over elected officials as it is to

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[155] *Id.* at H9655.

[156] 18 U.S.C.A. § 3333(c)(1) (Supp. 1971).

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[161] The American Bar Association-Section of Criminal Law expressed fear that a politically motivated prosecutor in charge of a grand jury investigation could exploit the report power of the grand jury when there is insufficient evidence for an indictment, denying the charged official the right to defend himself at trial. *See House Hearings* 561. It must be remembered that federal prosecutors—the United States Attorneys—are not elected but appointed and are more insulated from local politics. In addition, if there were probable cause for an indictment, a politically motivated prosecutor would be even more able to exploit the facts for political purposes. He could have an indictment issued just prior to an election, and the accused would be denied the opportunity to defend himself at trial before the election because of the inevitable delay that occurs between indictment and trial. With the already-existing opportunities for political exploitation, some reliance must be given to the high quality of federal appointments.

[162] 18 U.S.C.A. § 3333(a)(1) (Supp. 1971).

determine which body has jurisdiction over an appointed official.

In addition, the argument seems to suggest that only appointed officials are subject to removal or disciplinary action and that, if an official is elected, he is ipso facto not subject to such sanctions.[163] This is not necessarily the case. An official's categorization as "elected" does not automatically exempt him from the jurisdiction of a disciplinary body. For example, the Mayor of New York City, though elected,[164] is subject to removal by the Governor.[165] Other elected officials are also subject to this sanction.[166] Governors may be impeached by legislatures,[167] and federal legislators may be disciplined by their respective houses of Congress.[168]

Moreover, it is in the public interest to inform the electorate about the misconduct of their elected officials in the same way that they are informed of misconduct concerning appointed officials. In fact, it could be argued that they have a greater interest in being informed of elected officials' misconduct, as these individuals have been directly entrusted with the public confidence. In essence, the purpose of the reports section is to allow the public to determine whether its officials are acting in the public interest.[169] The exposing of misconduct inspires the "public confidence in the capacity of the body politic to purge itself of untoward conditions."[170] The public can most effectively act in this manner through the exercise of their voting franchise. The restricting amendment has withdrawn from this provision the authority to inform the public of the misconduct of those officials that are most representative of the community—its elected officials—and has thus substantially defeated the purpose of the section.[171] If this were the effect that Congress intended, it should

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[163] *See* 116 CONG. REC. H9655 (daily ed. Oct. 6, 1970) (remarks of Representative McCulloch).

[164] N.Y. CITY CHARTER § 4 (1963).

[165] *Id.* § 9.

[166] *See, e.g.*, N.Y. CITY CHARTER § 81(d) (1963) which provides for the removal of the Borough Presidents of New York City by the Governor; MICH. CONST. art. 5, § 10 which empowers the Governor to remove or suspend for misconduct "any *elective or appointive* state officer, except legislative or judicial . . . ." (emphasis added).

[167] *See, e.g.*, MICH. CONST. art. 11, § 7; N.Y. CONST. art. 6, § 24.

[168] U.S. CONST. art. I, § 5.

[169] *See* 116 CONG. REC. H9649 (daily ed. Oct. 6, 1970). (remarks of Representative Poff). *See also In re* Camden County Grand Jury, 10 N.J. 23, 66, 89 A.2d 416 (1952) (Vanderbilt, C.J.).

[170] *In re* Camden County Grand Jury, 10 N.J. 23, 66, 89 A.2d 416 (1952).

[171] It should be noted that of the states relied on to support the power to issue grand jury reports (*i.e.*, New York, California, Illinois, New Jersey, Florida, and Tennessee; SENATE REPORT 49), those that allow officials to be named make no differentiation between appointed and elected officials. *See, e.g.*, State v. Clemmons, 150 So. 2d 231, 235 (Fla. 1963); *In re* Report of Grand Jury, 152 Fla. 154, 11 So. 2d 316, 319 (1943); CAL. PENAL CODE § 919(c) (West 1970).

have deleted the power in its entirety; it should not have left appointed officials exposed to dangers which they, as Congressmen, are unwilling to face.

V. JENCKS ACT AMENDMENTS

A. Expanding the Scope of the Jencks Act

Title I also makes two significant changes in the Jencks Act.[172] Although these amendments are included in title I, they are not directly related to, nor confined to the special grand jury. Prior to these amendments the Jencks Act provided that statements made to agents of the Government by prospective government witnesses were not to be subject to discovery, inspection or subpoena until after the witness had testified on direct examination at trial.[173] These statements could be obtained after the direct examination of such a government witness to the extent that they related to the subject matter of the testimony.[174] The amendments alter the Act in the following respects: (1) the witnesses' statements encompassed by the Jencks provisions must no longer be made "to an agent of the Government," but include all such statements in the possession of the Government; (2) grand jury minutes are affirmatively brought within the scope of the definition of "statements."[175] Since this section concerns grand jury minutes in general, it is not confined to the grand jury minutes of the special grand jury.[176] In addition, the section specifically applies only to those statements before a grand jury that are recorded; it does not impose an obligation to record grand jury testimony.[177]

B. Unanticipated Effects of the Amendments

The ramifications of the Jencks Act amendments are unclear from the Hearings or Reports. It appears that these amendments

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[172] 18 U.S.C. § 3500 (1964), *as amended*, 18 U.S.C.A. § 3500 (Supp. 1971). (O.C.C.A. § 102). The relevant sections of the Jencks Act and the amendments thereto are set forth in notes 191-194 *infra*.

[173] 18 U.S.C. § 3500(a) (1964).

[174] *Id.* § 3500(b).

[175] 18 U.S.C.A. § 3500 (Supp. 1971), *amending* 18 U.S.C. § 3500 (1964) (O.C.C.A. § 102). Although some courts have allowed grand jury minutes to be discovered at trial under conditions similar to statements covered by the Jencks Act (*see, e.g.*, United States v. Youngblood, 379 F.2d 365 (2d. Cir. 1967); Harris v. United States, 433 F.2d 1127 (D.C. Cir. 1970) (en banc); United States v. Amabile, 395 F.2d 47, 53 (7th Cir. 1968), *vacated* 394 U.S. 310 (1969)), the Jencks Act, before amendment, specifically did not apply to grand jury minutes. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 398 (1959); 1957 U.S. CODE CONG. & ADMIN. NEWS 1861, 1862.

[176] *See* ABCNY, *supra* note 116, at 303.

[177] 18 U.S.C.A. § 3500(e) (Supp. 1971), O.C.C.A. § 102(d). SENATE REPORT 144. *See* note 100 *supra*. *See also House Hearings* 554 (statement of Section of Criminal Law of the ABA).

were treated as poor cousins to the special grand jury provisions. The controversy generated over the adoption of the latter overshadowed any extensive discussion of the effects of these amendments.

1. Pretrial Discovery of Grand Jury Testimony—Section 102 of the Organized Crime Control Act of 1970 was proposed to substitute a uniform statutory procedure for handling disclosure of grand jury testimony in place of the diverse practices developing among the circuit courts of appeals.[178] It was considered a liberalization of the Jencks Act as it allows a defendant to compel the production of grand jury testimony at trial without first having to demonstrate a particularized need.[179]

It has been suggested, however, that the amendments in section 102 will have a restrictive effect on pretrial discovery.[180] It is further charged that the alterations are both inconsistent with the 1966 amendments to Rule 16 of the Federal Rules of Criminal Procedure implemented to expand the scope of pretrial discovery,[181] and contrary to the "growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."[182] In addition, these changes are criticized as being enacted without any extended study or specific rationale.[183] Although the drafters might have been aware of this possible consequence, the desirability of restricting discovery was not even presented to the respective committees for consideration. It is questionable whether Congress intended this restrictive effect, and whether the resultant amendment should be interpreted as positively restricting discovery of grand jury testimony to the trial stage.

The Bar Association of the City of New York suggests that the inclusion of grand jury minutes in the Jencks Act would restrict a

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[178] SENATE REPORT 144.

[179] *See House Hearings* 625. The state of federal practice at the time of enactment of this change is divergent on this point. Some courts had already allowed this liberalization, *see e.g.*, United States v. Ayers, 426 F.2d 524, 528–29 (2d Cir.), *cert. denied*, 400 U.S. 842 (1970); Harris v. United States, 433 F.2d 1127, *supra* note 175 and other cases cited therein; while others required a showing of particularized need. *See e.g.*, National Dairy Products Corp. v. United States, 384 F.2d 457, 461 (8th Cir. 1967), *cert. denied*, 390 U.S. 957 (1968); United States v. Fuentes, 432 F.2d 405, 408 (5th Cir. 1970); Melton v. United States, 398 F.2d 321 (10th Cir. 1968).

[180] *See* ABCNY, *supra* note 116, at 305; *see also House Hearings* 493 (Statement of Lawrence Speiser, then director, Washington office, American Civil Liberties Union).

[181] *Id. See* NOTES OF ADVISORY COMMITTEE ON RULES, on Rule 16, 18 U.S.C.A. Rule 16 (1969). *See also* PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, 48 F.R.D. 553, 587 (1970). The proposed draft even further liberalizes discovery in criminal cases.

[182] Dennis v. United States, 384 U.S. 855, 870 (1966). *See* ABCNY, *supra* note 116, at 305.

[183] *See* note 180 *supra*.

court's ability to release these minutes prior to the witnesses' direct examination at trial.[184] Prior to this amendment, courts have ruled that statements made by prospective government witnesses to government agents are only discoverable under the provisions of the Jencks Act—that is, only after direct examination of the witness—and therefore, are not subject to pretrial discovery.[185] Rule 16(b) explicitly excludes from discovery statements of government witnesses that are covered by the Jencks Act.[186] Therefore, it is reasonable to infer that the inclusion of grand jury minutes within the Jencks Act would subject them to similar treatment and remove such minutes from the ambit of pretrial discovery.

However, discovery of grand jury testimony is also controlled by Rule 6(e) of the Federal Rules of Criminal Procedure in addition to the new Jencks Act amendment. The Rule provides that matters before the grand jury can be disclosed by a court "*preliminarily to* or in connection with a judicial proceeding" (emphasis added).[187] This has been interpreted to allow disclosure of grand jury minutes of witnesses before trial,[188] as well as after direct examination of the witness at trial.[189] In view of Congress' failure to alter the language in Rule 6(e) (or denote a conflict, recommending to the Supreme Court that a reconciliation be undertaken), and the purpose of the amendments,[190] the power of courts to disclose grand jury testimony "preliminarily" may not be impaired by the passage of this Act. A careful scrutiny of the section (18 U.S.C. § 3500) before and after amendment, will clarify this view.

The Jencks Act can conceptually be broken up into three sections: subsection (a) contains the general prohibition on discovery of statements until direct examination at trial;[191] subsec-

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[184] *See* note 180 *supra; House Hearings* 304.

[185] *See, e.g.*, Sendejas v. United States, 428 F.2d 1040, 1046 (9th Cir.), *cert. denied*, 400 U.S. 879 (1970); Levy v. Parker, 316 F. Supp. 473 (M.D. Pa. 1970); United States v. American Oil Co., 286 F. Supp. 742, 753 (D. N.J. 1968). *See* Palermo v. United States, 360 U.S. 343, 349 (1959).

[186] FED. R. CRIM. P. 16(b).

[187] FED. R. CRIM. P. 6(e); Dennis v. United States, 384 U.S. at 869-70.

[188] *See, e.g.*, Gibson v. United States, 403 F.2d 166, 169 (D.C. Cir. 1968); Allen v. United States, 390 F.2d 476, 482 n.16 (D.C. Cir. 1968); United States v. Hughes, 413 F.2d 1244, 1255-57 (5th Cir. 1969), *vacated sub nom.* United States v. Gifford-Hill-American, Inc., 397 U.S. 93 (1970); United States v. Zirpolo, 288 F. Supp. 993, 1021 (D. N.J. 1968); United States v. Venn, 41 F.R.D. 540, 542 (S.D. Fla. 1966) (Rule 6(e) "permits the judges to authorize the production of any Grand Jury proceedings preliminarily to trial . . . .).

[189] Dennis v. United States, 384 U.S. at 870. *See also* note 175 *supra*.

[190] *See* notes 178, 179 *supra* and accompanying text.

[191] 18 U.S.C. § 3500(a) (1964) before amendment provided:

> In any criminal prosecution brought by the United States, no statement or

tions (b)-(d) concern the procedure for discovering the statements *after* direct examination at trial;[192] and subsection (e) defines "statement." However, the definition of "statement" applies explicitly only to subsections (b), (c), and (d),[193] the sections dealing with the procedure for disclosure *after* direct examination at trial. The amendment adds grand jury minutes to the definition of "statement" in subsection (e),[194] and thus does not apply to the prohibition on pretrial discovery in subsection (a). This limited change is consistent with the discussion in the Hearings that interprets the amendment as liberalizing the Jencks Act to enable defendants to obtain access to grand jury testimony that they could not necessarily obtain before.[195] There does not appear to be any intent to restrict the pretrial discovery of these statements, and the subsection of the Jencks Act dealing with the restriction on pretrial discovery was not in fact amended (*i.e.*, in relation to grand jury testimony). Therefore, this subsection should be construed as it has been prior to the passage of this amendment: as not prohibiting the pretrial discovery of grand jury testimony.[196] This construction would be consistent with the amendment's purpose of unifying the procedure for discovery of grand jury testimony after direct examination at trial, while avoiding an unintended conflict with Rule 6(e).

2. *The Effect on Pretrial Discovery of the Amendment "to an agent of the Government"*—With respect to the change striking "to an agent of the Government," however, the congressional

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> report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

The amendment relevant to this subsection strikes "to an agent of the Government."

[192] The relevant part of these subsections was not amended, and provides: "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States . . . ."

[193] The subsection before amendment provided:

> (e) The term 'statement,' *as used in subsections (b), (c), and (d) of this section* in relation to any witness called by the United States, means—
> (1) a written statement made by said witness . . .
> (2) a stenographic . . . or other recording, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government. . . . (emphasis added).

Paragraph (2) is amended by striking "to an agent of the Government." Professor Wright specifically notes that the definition in subsection (e) does not apply to subsection (a). 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: Criminal § 417, at 205 (1969).

[194] Paragraph (3) is added to this subsection: "(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury." 18 U.S.C.A. § 3500(e)(3) (Supp. 1971).

[195] *House Hearings* 624-26.

[196] *See, e.g.*, United States v. Hughes, 413 F.2d 1244, 1255-57 (5th Cir. 1969), *vacated sub nom.* United States v. Gifford-Hill-American, Inc., 397 U.S. 93 (1970).

purpose remains a mystery. This language was struck in both subsection (a) and the definitional subsection (e).[197] Therefore, in addition to liberalizing the Act by enabling all witnesses' statements in the government's possession, regardless of whether these statements were made to a government agent or to someone else, to be examined after that witness has testified on direct examination,[198] the amendment, by striking the language in subsection (a) dealing with pretrial discovery, also appears to bar these additional statements from pretrial discovery.[199]

These additional statements were previously discoverable under Rule 16(b). A conflict between the amended Jencks Act and Rule 16(b) may arise from the provision of 16(b) which specifically excludes from pretrial discovery "statements made by government witnesses or prospective government witnesses (other than the defendant) *to agents of the government* except as provided in [the Jencks Act]" (emphasis added).[200]

However, Rule 16(b) does not appear to bar pretrial discovery of these statements of witnesses in the Government's possession that were *not* made to the agents of the Government.[201] Furthermore, if Congress intended this restrictive effect on pretrial discovery, it seems likely that it would have, in addition to amending the Jencks Act, amended Rule 16(b) by striking the similar words "to agents of the government," or at least recognized the inconsistency, giving the appropriate recommendations for an amendment of this nature. By not doing so, a conflict has been created. The language of the amendment appears to restrict pretrial discovery in this situation. Moreover, since Rule 16 is a general discovery provision while the new Jencks Act amendment specifically deals with this problem, it would appear logical that this restriction has been effectuated. However, in view of the trend toward liberal discovery in criminal cases and Congress' apparent unawareness of the restrictive effect on pretrial dis-

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[197] *See* notes 191 and 193 *supra*.

[198] An example where this change would liberalize current practice is found in United States v. Smith, 433 F.2d 1266 (5th Cir. 1970). There the defendant desired statements of a government witness after the witness testified on direct examination at trial. The motion was denied because the statements were made to the Houston police, and not the F.B.I. as alleged, and hence were not made to an agent of the Government. This amendment would alleviate this technical distinction and allow the discovery of these statements.

[199] *See* note 191 *supra*.

[200] *See* FED. R. CRIM. P. 16(b); NOTES OF ADVISORY COMMITTEE ON RULES, Rule 16, subdivision (b)(3), 18 U.S.C.A. Rule 16 (1969).

[201] *See* United States v. Fancher, 195 F. Supp. 448, 450-51 (D. Conn. 1961) (although this case was decided before the 1966 amendments to Rule 16, its holding is even stronger today as the amendment liberalized discovery under the Rule.) *See* citation with approval, United States v. Rosenberg, 299 F. Supp. 1241, 1243 (S.D.N.Y. 1969)); *cf.* United States v. Smith, 433 F.2d 1266 (5th Cir. 1970).

covery,[202] it would seem proper to resolve the conflict between section 102 of the Organized Crime Control Act of 1970 and Rule 16(b) in favor of allowing discovery under Rule 16, rather than restricting it under subsection (a) of the Jencks Act, as amended.

[202] The restrictive effect of the amendment on pretrial discovery is not treated in either the Senate or House Reports. The amendment striking "to an agent of the Government" is not even recognized as any more significant than a "minor language change." *See* SENATE REPORT 144. Section 102 was added in the Senate Committee and thus was not discussed in the *Senate Hearings*. The only discussion in the *House Hearings* that even recognizes a possible conflict between Rule 16(b) and the amendment appears at 624–26. (Although the ACLU and the Ass'n of the Bar of the City of New York point out the possible restrictive effect of this amendment in their submitted statements, *see* note 180 *supra*, these effects were not the subject of discussion during their appearance to testify.) There the issue was raised but it was not really met as the discussion focused only on those features liberalizing discovery at trial. No significant discussion on this point appears to have taken place on the floor of Congress.