

4-1-1999

# What Have You Done with My Lawyer: The Grand Jury Witness's Right to Consult with Counsel

Kathryn E. White

---

## Recommended Citation

Kathryn E. White, *What Have You Done with My Lawyer: The Grand Jury Witness's Right to Consult with Counsel*, 32 Loy. L.A. L. Rev. 907 (1999).

Available at: <https://digitalcommons.lmu.edu/llr/vol32/iss3/17>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

## WHAT HAVE YOU DONE WITH MY LAWYER?: THE GRAND JURY WITNESS'S RIGHT TO CONSULT WITH COUNSEL

*"If you described what happened in this case to a stranger and didn't [say] what country it had happened in, America is not the first place that would come to mind."*<sup>1</sup>

### I. INTRODUCTION

The facts of *Gabbert v. Conn*<sup>2</sup> are a perfect story line—a movie about a win-at-all-costs prosecutor who wields the power of the state and the grand jury against a helpless witness in an attempt to force her to incriminate herself. The movie opens with the beginning of jury deliberations in the Menendez brothers' first murder trial.<sup>3</sup> Los Angeles County Deputy District Attorneys David Conn and Carol Najera learn of and begin to look for a letter that Lyle Menendez has written to his ex-girlfriend, Traci Baker. In the letter, Menendez allegedly instructs Baker to lie under oath if she is called to testify.<sup>4</sup>

---

1. Audio tape of Oral Argument, *Gabbert v. Conn*, 131 F.3d 793 (9th Cir. 1997), No. 95-56610 (statement of Ninth Circuit Judge Michael Daly Hawkins) (on file with *Loyola of Los Angeles Law Review*) [hereinafter Audio tape of Oral Argument].

2. 131 F.3d 793 (9th Cir. 1997), *cert. granted*, 119 S. Ct. 39 (1998).

3. *See id.* at 797. The highly-publicized Menendez trial involved one of the most sordid murder cases in recent years. Brothers Lyle and Erik Menendez were tried for the 1989 shotgun killing of their parents at the family's Beverly Hills mansion. *See* Sally Ann Stewart, *Beverly Hills Horror Story*, USA TODAY, Sept. 21, 1993, at A1. Lyle and Erik Menendez were first tried simultaneously but before separate juries. *See id.* Each brother attempted to justify the killing by asserting that they suffered abuse at their parents' hands—to the point that they feared for their lives. *See id.* All twenty-four jurors found the brothers had killed their parents, but neither jury could agree on whether the brothers had committed murder or manslaughter, and whether they had conspired to kill their parents. *See* HAZEL THORNTON, HUNG JURY: THE DIARY OF A MENENDEZ JUROR xx-xxii (1995). On retrial the brothers were sentenced to life in prison without possibility of parole. *See* Ann W. O'Neill, *Menendezes Given Consecutive Terms*, L.A. TIMES, July 3, 1996, at B1.

4. *See Gabbert*, 131 F.3d at 797.

Conn and Najera subpoena Baker to testify before a grand jury and to produce any correspondence from Lyle Menendez.<sup>5</sup>

The following day, Baker's attorney, Paul Gabbert, seeks to quash the order to produce the correspondence. Conn and Najera obtain a warrant to search Baker's apartment for correspondence from Lyle Menendez while Gabbert is in court.<sup>6</sup> Baker informs Detective Leslie Zoeller that she has given any correspondence from Lyle to her attorney, and Zoeller relates this information to Conn and Najera.<sup>7</sup>

Three days later, Conn approaches Gabbert as he is walking with Baker into the building where she will testify before the grand jury.<sup>8</sup> Conn asks Gabbert if he brought the "documents," meaning the correspondence, with him.<sup>9</sup> Gabbert believes that Conn is referring to the motion to quash.<sup>10</sup> Under Conn's direction, Detective Zoeller then secures a warrant to search Gabbert.<sup>11</sup> Zoeller serves Gabbert with the warrant while Gabbert is waiting with Baker outside the grand jury room.<sup>12</sup> Special Master Elliot Oppenheim begins searching Gabbert in a private room adjacent to the grand jury room.<sup>13</sup>

Within minutes, Najera—also acting under Conn's direction—calls Baker to testify and begins questioning her.<sup>14</sup> The first question prompts Baker to ask to leave the grand jury room to consult with her attorney.<sup>15</sup> But when she leaves to talk with Gabbert, he is not outside the room because Oppenheim is searching him.<sup>16</sup> Baker

---

5. *See id.*

6. *See id.*

7. *See id.*

8. *See id.* at 797-98.

9. *See id.* at 798.

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.* In Parts III and V, this Comment discusses how grand jury models provide different ways for a witness to consult an attorney. The majority of jurisdictions do not allow witness counsel to sit inside the grand jury room and advise the witness. Instead, the witness must ask permission to leave the room, exit, and explain to the attorney what question was asked. The attorney can then advise the witness whether to assert the Fifth Amendment privilege against self-incrimination.

16. *See id.*

returns to the grand jury room and “on ‘the advice of counsel’” asserts her Fifth Amendment privilege against self-incrimination by reading a prepared statement.<sup>17</sup> The second question Najera asks also prompts Baker to leave and speak with her attorney.<sup>18</sup> Gabbert is still missing.<sup>19</sup> Baker waits for him in the hallway until a bailiff appears and tells her to return to the grand jury. Baker again reads the prepared statement and asserts her privilege against self-incrimination.<sup>20</sup> Conn then moves to hold Baker in contempt for failing to produce the subpoenaed documents.<sup>21</sup> During the grand jury’s break, “Conn, Najera, and Zoeller, with Baker in tow,” join Gabbert in the room where Special Master Oppenheim has just completed a fruitless search.<sup>22</sup> Conn directs Zoeller to conduct a “follow-up search of Gabbert’s person and effects.”<sup>23</sup> Gabbert does not consent to the second search.<sup>24</sup>

The tale of *Gabbert v. Conn* is one of unfairness. The prosecutors orchestrated all of the events.<sup>25</sup>

[T]hey controlled the timing of the execution of the search warrant on Gabbert and his client’s grand jury appearance. The only apparent reason to have both occur at the same time was the prosecutors’ desire to prevent Gabbert from communicating with his client.<sup>26</sup>

Gabbert filed an action in district court and contended that “his Fourth Amendment right to be free from unreasonable searches and seizures and his Fourteenth Amendment right to practice his profession without unreasonable governmental interference were both violated.”<sup>27</sup> The district court found that Zoeller and Oppenheim had absolute immunity, and that Conn and Najera had qualified immunity. As such, the court dismissed Gabbert’s Fourth Amendment

---

17. *Id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.*

22. *Id.*

23. *Id.*

24. *See id.*

25. *See id.* at 802.

26. *Id.*

27. *Id.* at 798.

claims.<sup>28</sup> The district court also granted the defendants' motion for summary judgment on Gabbert's Fourteenth Amendment claims for the same reasons.<sup>29</sup> Gabbert appealed. The United States Court of Appeals for the Ninth Circuit reversed in part and allowed Gabbert to assert the Fourth Amendment claims against Conn and Zoeller and the Fourteenth Amendment claims against Conn and Najera.<sup>30</sup> The case was remanded to the district court.<sup>31</sup>

During oral argument, Judges Harry Pregerson, Michael Daly Hawkins, and Charles R. Weiner<sup>32</sup> rejected the state's argument that the prosecution only took advantage of a legitimate technique to encourage Baker to testify truthfully.<sup>33</sup> Baker was told that she was the target<sup>34</sup> of a perjury investigation.<sup>35</sup> When the prosecution prevented her from speaking with her attorney, they did not do so to "encourage her to reveal the information"<sup>36</sup> but rather to "encourage her to incriminate herself."<sup>37</sup>

*Gabbert v. Conn* raises important questions about limits on prosecutorial conduct in grand jury investigations and a grand jury witness's right to consult with her lawyer during her testimony. The issue can be approached two ways. The Supreme Court has framed

---

28. *See id.*

29. *See id.* at 799.

30. *See id.* at 806.

31. The Supreme Court granted certiorari, 199 S. Ct. 39 (1998), and oral argument took place on February 23, 1999. *See* Kenneth Jost, *Lawyer Search Bemuses Court*, RECORDER, Feb. 24, 1999, at 1.

32. Judges Pregerson and Hawkins are judges of the Ninth Circuit. Judge Weiner is a Senior District Judge for the Eastern District of Pennsylvania and sat by designation. *See id.* at 797 n.\*.

33. Audio tape of Oral Argument, *supra* note 1.

34. An individual may be either a "target" of the investigation, or a "non-target"—otherwise known as a "mere witness"—when called before the grand jury. A target witness is "a person as to whom the prosecutor or the Grand Jury has substantial evidence linking him to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." Jay Goldberg, *Multiple Representation of White Collar Targets and Witnesses During the Grand Jury Investigation*, in WHITE COLLAR CRIMINAL PRACTICE 149, 152-53 (1985) (citing U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-11.256 (1977)). A mere witness—or non-target—is someone whose "conduct is within the scope of the investigation." *Id.* at 155 (citing U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-11.250 (1977)). A non-target, however, can become a target at any time during the grand jury investigation.

35. *See* Audio tape of Oral Argument, *supra* note 1.

36. *Id.* (statement of attorney Steven J. Renick).

37. *Id.* (statement of Judge Hawkins).

the issue as whether "a prosecutor violate[s] an attorney's rights under the Fourteenth Amendment by causing the attorney to be searched at the time his client is testifying before a grand jury."<sup>38</sup> The issue may alternatively be framed as whether a grand jury witness has a right to consult with counsel in order to avoid self-incrimination.<sup>39</sup> This Comment takes the second approach.

The Supreme Court has not decided whether a grand jury witness has a right to consult with a lawyer during testimony in order to avoid self-incrimination.<sup>40</sup> This Comment urges that, at a minimum, grand jury witnesses be provided with the opportunity to consult on Fifth Amendment issues. Witnesses should also be able to consult on other topics. A lawyer can help a witness preserve privileges. A lawyer can also help a witness understand and answer the grand jury's questions. Moreover, a lawyer can provide a witness with the moral support necessary to withstand the loneliness and stress arising out of the grand jury's interrogation.

This Comment discusses grand jury witnesses' right to consult with retained counsel.<sup>41</sup> Part II discusses the history of the grand jury, its English origins, and its role in America. Part III describes how grand juries operate today. Part IV explains how the Fifth Amendment privilege against self-incrimination applies in grand jury

---

38. *Conn v. Gabbert*, 119 S. Ct. 39 (1998). The Court concluded "that such conduct by a prosecutor does not violate an attorney's Fourteenth Amendment right to practice his profession." *Conn v. Gabbert*, No. 97-1802, 1999 WL 181181, at \*3.

39. In *Gabbert*, the Supreme Court did not face the issue whether Baker had a right to consult with counsel because Gabbert only asserted his right to practice law and not her right to consult with her attorney. 131 F.3d at 800. Baker would likely not have had standing to assert her right to consult with counsel because she did assert her right not to incriminate herself, and she was not held in contempt. *See id.* at 798. As such, Baker would not have the "injury in fact" required for standing. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997). Had Baker been held in contempt, she could have asserted her right to consult with counsel in California State Court on appeal from the contempt order. *See, e.g., CAL. R. CT. 1ST APP. DIST. INTERNAL OPERATING PRACTICE & P. § 36.*

40. *See WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 8.15(a)*, at 453 (2d ed. 1992).

41. A related issue exists as to whether a target witness has the right to *appointed* counsel for the purpose of consultation outside the grand jury room, but that discussion is beyond the scope of this article. For a summary of the issues and argument in favor of appointed counsel, see *United States v. Mandujano*, 425 U.S. 564, 602-09 (1976) (Brennan, J., concurring).

proceedings, and why the privilege includes the right to consult with an attorney. Part V examines three current grand jury models that recognize a witness's need to consult counsel, and provide the witness with such an opportunity. Part VI concludes that a witness in a grand jury proceeding should have the right to consult with counsel during an appearance.

## II. THE HISTORY OF THE GRAND JURY

The Frankish, Scandinavian, and Roman civilizations all used bodies that resembled a modern grand jury.<sup>42</sup> It is generally conceded that the modern grand jury is derived from the body that Henry II instituted as part of the English judiciary during the mid-twelfth century.<sup>43</sup> Henry II sought not "to protect the innocent from unjust prosecution,"<sup>44</sup> but rather to augment the judicial power of the monarchy at the expense of the church and the barons.<sup>45</sup> Henry II's purpose contrasts with the protective reasons for which the grand jury was implemented in America.<sup>46</sup>

### A. *The Grand Jury in England*

Henry II discovered two important aspects of ecclesiastical power in England shortly after his ascension to the throne. The first was that previous English monarchs had given considerable jurisdiction to the ecclesiastical courts.<sup>47</sup> The second was that the ecclesiastical courts were earning a huge profit from the fines they levied.<sup>48</sup>

Ecclesiastical courts had broad jurisdiction. They declared the law of wills, marriages, and property inheritance.<sup>49</sup> They also ruled on any criminal charges brought against clergy.<sup>50</sup> The latter power was particularly significant because clerks and various members of ecclesiastical orders could commit serious offenses, such as murder,

---

42. See Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 703 (1972); LEROY D. CLARK, *THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER* 7 (1975).

43. See CLARK, *supra* note 42, at 7; Schwartz, *supra* note 42, at 703.

44. CLARK, *supra* note 42, at 7.

45. See Schwartz, *supra* note 42, at 703-04.

46. See *id.* at 701.

47. See CLARK, *supra* note 42, at 7.

48. See *id.* at 8.

49. See *id.* at 7-8.

50. See *id.* at 8.

and then claim “the benefit of clergy.”<sup>51</sup> Clergy defendants tried before the ecclesiastical courts could suffer a punishment as light as the loss of their position.<sup>52</sup>

Henry II was irked that the church received such substantial revenues from the fines its courts levied—revenues so high that the “archdeacon’s courts . . . levied every year by their fines more money than the whole revenue of the crown.”<sup>53</sup> Henry II saw no reason to leave so much money and power with the church, and made two agreements that brought the church’s money and power under his control.

The first agreement was the 1164 Constitutions of Clarendon.<sup>54</sup> This agreement forced the church to recognize rights that Henry II claimed were the traditional rights of kings—including the right to have state officers arrest clergy, and the right to have the state accuse and punish them.<sup>55</sup> Because civilians were within the jurisdiction of the ecclesiastical courts, Henry II also addressed the way his lay subjects were accused.<sup>56</sup> Before the Constitutions of Clarendon, individuals would speak privately with the bishop to accuse laymen of crimes.<sup>57</sup> The Constitutions required either an individual or a jury to publicly accuse civilians.<sup>58</sup>

---

51. *See id.*; *see also* Schwartz, *supra* note 42, at 704 (stating that “[i]n the first eight years of Henry’s reign, more than one hundred murders had been committed by clerks and members of various ecclesiastical orders.”).

52. *See* CLARK, *supra* note 42, at 8.

53. Schwartz, *supra* note 42, at 704 (citing Alice Stopford Green, *The Centralization of Norman Justice under Henry II*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 127 (1907)).

54. *See id.* at 705.

55. *See id.* at 706. This provision can be found in Chapter 3 of the Constitutions of Clarendon. *See id.*

56. The ecclesiastical courts had wide powers over the laity:

To them alone belonged the right to enforce spiritual penalties, to deal with cases of oaths, promises, anything in which a man’s faith was pledged; to decide as to the property of intestates to pronounce in every case of inheritance whether the heir was legitimate, to declare the law as to wills and marriage . . .

*Id.* at 705 (citing Green, *supra* note 53, at 127-28).

57. *See id.* at 707. This provision can be found in Chapter 6 of the Constitutions. *See id.* at 706.

58. *See id.* at 707.



Henry II's second agreement, the Assize of Clarendon, is most often credited with being the precursor to the modern grand jury.<sup>59</sup> The Assize of Clarendon was issued in 1166, and it wrested criminal jurisdiction from the barons.<sup>60</sup> Before 1166, an injured party could privately charge a lay subject before a baronial court.<sup>61</sup> To be found "innocent," the subject would either have to find eleven people to swear to his innocence or survive a trial—by either battle or ordeal.<sup>62</sup> Under the Assize, the injured party would present evidence to sixteen men who would then decide whether or not to indict the suspect.<sup>63</sup> Once accused, the individual would face trial by ordeal.<sup>64</sup> He no longer had the option of finding eleven men to swear his innocence.<sup>65</sup> The panel of sixteen men was essentially the king's citizen police force. Each juror was expected to accuse suspects and present criminals to the panel.<sup>66</sup> Failure to perform either of these duties resulted

---

59. *See id.*

60. *See* CLARK, *supra* note 42, at 8.

61. *See id.*

62. *See id.* What constituted trial by ordeal is beyond the scope of this article, but it is interesting to note how guilt was determined in the twelfth century. Trial by ordeal had been described as "a harrowing process offering slender chance of vindication." MARVIN E. FRANKEL & GARY P. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 7 (1977). The four species of ordeal include: cold water, hot water, hot iron, and morsel—all of which required solemn religious ceremonies before the ordeal itself. In ordeal by cold water, the accused was stripped, sprinkled with holy water, and thrown into the deep—an innocent man would sink, and a guilty man would swim. Hot water required that the accused's hand be plunged into boiling water from which he had to retrieve a stone that had been suspended by a cord—the more serious the crime, the deeper the stone was. The accused's hand was then bandaged for three days—removal of the bandage would show either an innocent man's healed wound, or a guilty man's festering wound. The same was true for the ordeal by hot iron—where the accused received the hot iron in his naked hand and then had to carry it nine feet before dropping it. Ordeal by morsel involved the accused swallowing a one ounce piece of cheese or bread—an innocent man would swallow it without a problem, whereas a guilty man would choke on it. *See id.* at 7-8 (citing MELVILLE MADISON BIGELOW, PH.D., *HISTORY OF PROCEDURE IN ENGLAND* 325-26 (Rothman Reprints, Inc. 1972) (1880)).

63. *See id.*

64. *See* CLARK, *supra* note 42, at 8.

65. *See id.* He also was forced to endure ordeal by cold water—which would almost certainly kill him—because it was presumed from the presentation that he was generally thought guilty in the neighborhood. *See* Schwartz, *supra* note 42, at 708.

66. Schwartz, *supra* note 42, at 709. Grand jurors were expected to keep money flowing into Henry's treasury in order to fund wars. *See id.*

in heavy—if not “ruinous”<sup>67</sup>—juror fines.<sup>68</sup> To prevent potential jurors from shirking their responsibility to the king, they were also fined for failing to respond to a summons to serve on a panel.<sup>69</sup> Because of these burdens, Henry II’s subjects deeply feared being called for grand jury duty.<sup>70</sup>

Henry II’s grand jury did not protect the people and was not intended to. Rather, Henry II’s goals for the grand jury were to raise state revenues and render the baronial and ecclesiastical courts powerless.<sup>71</sup> The idea that the grand jury could function in a way to protect individuals against “unfounded charges and oppressive government”<sup>72</sup> appeared in 1681—more than five hundred years after the Assize of Clarendon.<sup>73</sup>

At that time, Anthony, Earl of Shaftesbury, and Stephen Colledge were “vocal Protestant opponents of King Charles II’s attempt to re-establish the Catholic Church in England.”<sup>74</sup> As such, the King and his royal prosecutors wanted the grand jury to indict both Colledge and Shaftesbury for high treason. The King demanded a publicly held grand jury proceeding.<sup>75</sup> The panel of jurors resisted a public proceeding and questioned witnesses in private—without the presence of prosecutors.<sup>76</sup> They refused to indict after hearing the evidence.<sup>77</sup> The Colledge and Shaftesbury cases have been hailed as

---

67. *Id.*

68. *See* CLARK, *supra* note 42, at 9.

69. *See id.*

70. *See* Schwartz, *supra* note 42, at 709-10.

71. *See id.* at 710.

72. FRANKEL & NAFTALIS, *supra* note 64, at 9.

73. *See id.*

74. *Id.*

75. *See id.* During the intervening years, trial by ordeal was abolished as the process of trial by jury was developed. The grand jury indicted an accused, and a separate jury would try the accused. The judges’ past practice of interrogating the accusing jury as to the reasons for indictment or acquittal became useless because it made more sense to question the trial jurors. The grand jury became an institution cloaked in secrecy, whose findings were independent and free from the courts’ control. *See* GEORGE J. EDWARDS, *The Grand Jury, in FOUNDATIONS OF CRIMINAL JUSTICE* 27-28 (1973).

76. In the seventeenth century, the grand jury was a “private proceeding[s]” that did not include the prosecutor. *See* Schwartz, *supra* note 42, at 715. Today the prosecutor is an integral part of a grand jury proceeding. *See id.*

77. *See* FRANKEL & NAFTALIS, *supra* note 64, at 9.

“marking the grand jury’s initial assertion of its role as a shield for the innocent against malicious and oppressive prosecution.”<sup>78</sup>

### B. *The Grand Jury in America*

The first formal grand jury in America was established in 1635 in Massachusetts.<sup>79</sup> Within forty-eight years, some form of the grand jury operated in all of the colonies.<sup>80</sup> It became an “indispensable part” of each Colonial government.<sup>81</sup> The original role of the colonial grand jury was to return indictments and presentments. Presentments required the grand jury to initiate an investigation, rather than to simply respond to a prosecutor’s charges.<sup>82</sup> Jurors were drawn from the local area and had firsthand knowledge of both the alleged offender and the particular offense.<sup>83</sup>

The grand jury in America developed beyond its indictment and presentment functions and adopted quasi-legislative and civil watchdog functions as well.<sup>84</sup> Grand juries were known to influence legislation and in some cases to enact ordinances directly.<sup>85</sup> Grand juries inspected, investigated, and lodged complaints. “[T]hey inspected bridges, public buildings, and jails, and then issued reports critical of public officials for failure to construct or operate them properly.”<sup>86</sup> Grand jury action in all of these areas of early American life greatly enhanced the grand jury’s reputation.

Perhaps the greatest boost to the grand jury’s reputation as the protector of the people came during the pre-Revolutionary and

---

78. *Id.* Unfortunately, all did not end well for Shaftesbury and Colledge. The King presented the case to a different grand jury, who returned an indictment. Colledge was convicted and executed; Shaftesbury fled to Holland and remained there until his death. *See id.* at 10.

79. *See* CLARK, *supra* note 42, at 13.

80. *See id.*

81. BARBARA J. SHAPIRO, “BEYOND REASONABLE DOUBT” AND “PROBABLE CAUSE” 86 (1991).

82. *See* CLARK, *supra* note 42, at 13. The conditions of colonial America—no police force and undeveloped prosecutorial functions—meant that presentments were common. *See id.* at 13-14.

83. *See id.* at 14.

84. *See id.*

85. *See id.* “In 1862 in the Carolinas, for example, legislation was promptly considered if it was suggested by a majority of the county grand juries. In a colony like New York, which had no representative assembly, the grand jury actually assumed direct ordinance-making powers.” *Id.*

86. *Id.*

Revolutionary War periods.<sup>87</sup> Before the Revolution, colonists refused to return indictments in an attempt to blunt Royalist power to prosecute those who opposed British authority.<sup>88</sup> As tension between the Colonies and England increased, juries returned treason indictments against colonists sympathetic to the Crown.<sup>89</sup> The grand jury's reputation as protector of the people grew stronger when a grand jury refused to indict the editors of the *Boston Gazette* for libeling the Royalist governor in 1768. Its reputation was sealed when a grand jury twice refused to indict John Peter Zenger for seditious libel of the Royal Governor of New York.<sup>90</sup>

The grand jury was held in such high esteem that it was included in many state constitutions. It was also included in the Fifth Amendment of the United States Constitution: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ."<sup>91</sup>

### III. THE ROLE OF THE GRAND JURY TODAY

The grand jury has been both lauded and condemned over the years. It has been praised "as the 'security of . . . lives,' the conservator of . . . liberties, and the noblest check upon the malice and oppression of individuals and states."<sup>92</sup> It has also been "bitterly assailed as 'purely mischievous' and a 'relic of barbarism.'"<sup>93</sup>

Regardless of the criticism that the grand jury has sustained, the Fifth Amendment guarantees the federal right to indictment by the grand jury—a grand jury whose historical function has been both as a "sword and a shield."<sup>94</sup> All fifty states have developed grand jury

---

87. *See id.* at 17.

88. *See id.* at 16. Often, the grand jury did not protect "innocent" people against arbitrary prosecution—it protected individuals who had clearly violated British law by failing to indict them. *See id.* at 17-18.

89. *See id.* at 17.

90. *See id.* at 18.

91. U.S. CONST. amend. V.

92. EDWARDS, *supra* note 75, at 1 (citation omitted).

93. *Id.* (citation omitted).

94. CHARLES ALAN WRIGHT, 1 FEDERAL PRACTICE AND PROCEDURE 2D § 101, at 196 (1982) (citing *In re Grand Jury January*, 315 F. Supp. 662, 671 (D. Md. 1970)). The grand jury acts as a sword when it indicts, and as a shield

systems, even though the Constitution does not require them to use them.<sup>95</sup> Some state grand juries operate the same way as the federal grand jury, while others have changed the federal model.

### A. *The Federal Grand Jury*

According to Federal Rule of Criminal Procedure 6, a grand jury may have no fewer than sixteen, and no more than twenty-three members.<sup>96</sup> Its proceedings are conducted with the utmost secrecy. Without court approval, evidence heard before the grand jury may only be revealed to federal prosecutors, their assistants, and other federal grand juries.<sup>97</sup> This secrecy requirement has led to limits on the number of people who may attend grand jury proceedings. The prosecutor, grand jurors, the testifying witness, an interpreter when needed, and stenographer or recording device operator are the only people permitted in the grand jury room.<sup>98</sup> Federal grand juries hold regular sessions, but each district determines how frequently the jurors convene.<sup>99</sup> A jury will meet less often if the local prosecutor has no need for its assistance.<sup>100</sup> Large urban districts may have several grand juries in session every single day.<sup>101</sup> Once in session, the grand jury operates unconstrained by the Federal Rules of Evidence.<sup>102</sup> Exclusionary rules also do not apply in the grand jury

---

when it refuses to do so.

95. See *Hurtado v. California*, 110 U.S. 516, 538 (1884).

96. See FED. R. CRIM. P. 6. Courts have interpreted this to mean that a grand jury cannot meet with fewer than sixteen jurors. See Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 82 (1995).

97. See Brenner, *supra* note 96, at 86-87. The secrecy requirement of Rule 6(e) is not imposed on witnesses. See FED. R. CRIM. P. 6(e)(2) advisory committee's note.

98. See FED. R. CRIM. P. 6(d).

99. See Brenner, *supra* note 96, at 81.

100. See *id.*

101. See *id.*

102. See *id.* at 83. The implications of this exemption are broad—the grand jury may indict based entirely on hearsay that would be inadmissible in a trial. But the grand jury is constrained by the law governing privileges. See *id.* at 83-84.

setting.<sup>103</sup> Finally, federal prosecutors need not present the grand jury with any exculpatory evidence.<sup>104</sup>

Professor Susan Brenner has criticized the federal grand jury as having "become little more than a rubber stamp, indiscriminately authorizing prosecutorial decisions."<sup>105</sup> Federal grand juries have become relatively passive because of prosecutors' dominance over grand jury proceedings. To begin with, federal grand jurors rely on prosecutors to explain the law and then help them to apply it.<sup>106</sup> Many federal criminal cases are legally and factually complex, and the prosecutor is the only person available who can help the jurors make sense of the case.<sup>107</sup> In addition, prosecutors have learned how to create a rapport with the jurors. Because of this rapport, jurors are more likely to identify with the prosecutor and return indictments.<sup>108</sup> Finally, the grand jury no longer has the ability to bring charges on its own initiative: "[G]rand jurors cannot return charges in the form of an indictment without a prosecutor's consent."<sup>109</sup> As a result of these three developments, the federal grand jury has lost much of the authority, influence, and independence grand juries enjoyed in early America.<sup>110</sup>

In response to these problems, there have been attempts to reform the operation of federal grand juries over the last twenty years.<sup>111</sup> In this time, two noteworthy bills have been proposed to Congress: The Grand Jury Reform Act of 1985,<sup>112</sup> and the Assistance of Counsel Before Grand Juries Act of 1987.<sup>113</sup> Both acts were based on the American Bar Association's Model Grand Jury Act.<sup>114</sup>

---

103. *See id.* at 84. This means that the grand jury has the opportunity to consider evidence that was obtained during an illegal search or through an illegal seizure.

104. *See* United States v. Williams, 504 U.S. 36, 55 (1992).

105. Brenner, *supra* note 96, at 67.

106. *See id.* at 72.

107. *See id.* at 73.

108. *See id.*

109. *Id.* (citing United States v. Cox, 342 F.2d 167, 171-72 (5th Cir. 1965)).

110. *See id.*

111. *See* Frank O. Bowman, III., *A Bludgeon By Any Other Name: The Misuse of "Ethical Rules" against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, 679-81 (1996).

112. H.R. 1407, 99th Cong. (1985).

113. H.R. 2515, 100th Cong. (1987).

114. *See* AMERICAN BAR ASSOCIATION, A.B.A. GRAND JURY POLICY AND MODEL ACT (1977-82), at 16-19 (2d ed. 1982). The ABA advocates such re-

In order to "help to ensure the proper functioning of the grand jury,"<sup>115</sup> The Grand Jury Reform Act of 1985 included:

[T]he right to counsel inside the grand jury room for grand jury witnesses; the right not to be indicted on evidence which is inadmissible at trial; the right of a witness not to be prosecuted on a charge arising from transactions about which he is forced to testify upon a grant of immunity; the requirement that prosecutors present exculpatory evidence as well as evidence that indicates guilt; the requirement that prosecutors inform witnesses, whether they are targets of investigation, the nature of the crime under investigation, and the laws applicable to the investigation; a limitation on confinement for contempt of the grand jury to not more than 12 months.<sup>116</sup>

The bill was referred to the House Judiciary Committee and never made it out.<sup>117</sup>

The proposed Assistance of Counsel Before Grand Juries Act of 1987 was much narrower than the 1985 bill but ultimately suffered the same fate.<sup>118</sup> The bill gave witnesses the right to have counsel present; it limited counsel's participation in and disclosure of proceedings; it permitted the representation of more than one witness; and it provided sanctions against attorneys who failed to abide by the bill's provisions.<sup>119</sup> Hearings were held, but the 1987 bill also died in committee.

---

forms as preventing introduction of illegally obtained evidence against a target witness; requiring prosecutors to disclose exculpatory evidence; providing witnesses the right to be accompanied by counsel in the grand jury room; and requiring prosecutors to read witnesses their rights before witnesses begin to testify. *See id.*

115. *Grand Jury Reform: Hearings on H.R. 1407 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong. 2 (1985) [hereinafter *Hearings on H.R. 1407*] (statement of Rep. Conyers, chairman of the subcommittee).

116. *Id.* (statement of Rep. Conyers, chairman of the subcommittee).

117. For the history of H.R. 1407, see 2 Cong. Index (CCH) 35,016 (Dec. 10, 1986).

118. For the history of H.R. 2515, see 2 Cong. Index (CCH) 35,044 (Dec. 12, 1988).

119. *See Grand Jury Reform: Hearings on H.R. 2515 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong. 2-3 (1987) [hereinafter *Hearings on H.R. 2515*] (text of the bill).

The American Bar Association, defense attorneys, and a professor of law<sup>120</sup> supported the bills, but neither bill was able to overcome strong opposition from the Department of Justice.<sup>121</sup> The Department of Justice argued that the grand jury needed no reform, that it was a historic success, and that reform could only eviscerate the grand jury's independence and inquisitorial nature.<sup>122</sup> The fate of both bills demonstrates how easily opponents to change can rely on history and traditions to avoid reforms that merit serious consideration.

### B. State Grand Juries

Some state grand juries mirror the federal grand jury. In those that do not, witnesses are generally afforded more rights than witnesses before federal grand juries.

State grand juries vary in size.<sup>123</sup> They may have as few as five<sup>124</sup> and as many as twenty-three<sup>125</sup> jurors. Like the federal grand jury, all state grand jury proceedings are conducted in secret.<sup>126</sup> It is largely unclear how often state grand juries convene because of the "informality surrounding the state grand jury process."<sup>127</sup> There is some indication that state grand juries are called in and meet on an

---

120. See *id.* at 42-53 (statement of Peter F. Vaira, Esq., on behalf of the American Bar Association); *id.* at 57-69 (statement of Michael D. Ross, Esq., on behalf of the National Association of Criminal Defense Lawyers); *Hearings on H.R. 1407*, *supra* note 115, at 26-54 (statement of George J. Moscarino, Chairperson, Grand Jury Committee, Criminal Justice Section, and William W. Greenhalgh, Former Chairperson Criminal Justice Section, on behalf of the American Bar Association); *Hearings on H.R. 1407*, *supra* note 115, at 131-47 (statement of Prof. Peter L. Arenella).

121. See *Hearings on H.R. 2515*, *supra* note 119, at 11-20 (statement of Joe D. Whitley, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice); *Hearings on H.R. 1407*, *supra* note 115, at 178-96 (statement of James I.K. Knapp, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

122. See *Hearings on H.R. 2515*, *supra* note 119, at 6-10 (statement of Joe D. Whitley, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice); *Hearings on H.R. 1407*, *supra* note 115, at 166-96 (statement of James I.K. Knapp, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

123. See Brenner, *supra* note 96, at 78.

124. See, e.g., VA. CODE ANN. § 19.2-19.5 (Michie 1995).

125. See, e.g., R.I. GEN. LAWS §§ 12-11-1, 12-11.1-1 (1994).

126. See Brenner, *supra* note 96, at 86 n.98.

127. *Id.* at 81-82.



“as needed basis.”<sup>128</sup> As in the federal system, state prosecutors play a key role in the grand jury—they act both as grand juries’ legal advisors and as advocates for the state by presenting evidence and submitting indictments.<sup>129</sup>

Despite these similarities among state grand jury systems, there are also important differences. Not all states use the same evidentiary rules in grand jury proceedings. Most states, like the federal grand jury, “impose few, if any, evidentiary restraints on grand jury proceedings . . . .”<sup>130</sup> Most states also allow their grand juries to consider evidence that was illegally searched for or seized.<sup>131</sup> Some states, however, do not require the prosecution to present evidence that would exculpate the accused.<sup>132</sup> Some states do apply certain

128. *Id.* at 82 & n.83 (citation omitted).

129. *See id.* at 92.

130. *Id.* at 83-84 & n.89. *See, e.g.*, ALA. R. CRIM. P. 12.8(f)(1) (“For purposes of this section, legal evidence may consist of hearsay evidence in whole or in part.”); OHIO R. EVID. 101(c)(2) (“These rules . . . do not apply in . . . [p]roceedings before grand juries.”); *People v. Wilson*, 647 N.E.2d 910, 921 (Ill. 1994) (“[P]rivilege and relevance . . . are not relevant at the grand jury stage . . . since the rules of evidence do not apply.”); *People v. Hoffman*, 518 N.W.2d 817, 828 (Mich. Ct. App. 1994) (“[A] grand jury . . . is not constrained by the rules of evidence and may consider all sources of evidence . . . .”); *see also Pitts v. Superior Court*, 862 P.2d 894, 895 (Ariz. Ct. App. 1993) (“[T]he rules of evidence do not apply in grand jury proceedings.”), *vacated sub nom.*, *Pitts v. Adams*, 876 P.2d 1143 (Ariz. 1994) (en banc); *People v. Gable*, 647 P.2d 246, 252 (Colo. Ct. App. 1982) (“[H]earsay . . . is admissible and may well be the bulk of evidence offered to the grand jury . . . .”); *Anderson v. State*, 365 S.E.2d 421, 426 (Ga. 1988) (“[T]he evidence which the grand jury receives . . . is not subject to inquiry as to admissibility . . . .”); *State v. O’Daniel*, 616 P.2d 1383, 1388 n.3 (Haw. 1980) (allowing hearsay to be admitted, but suggesting that “[u]se of hearsay should be kept to a minimum”); *Commonwealth v. Pina*, 549 N.E.2d 106, 112 (Mass. 1990) (permitting use of hearsay before grand jury); *State v. Price*, 260 A.2d 877, 879 (N.J. Super. Ct. Law Div. 1970) (“[G]rand jury is permitted to both hear and act upon hearsay evidence or even evidence unconstitutionally obtained by the police.”); *Hennigan v. State*, 746 P.2d 360, 369 (Wyo. 1987) (stating that the use of hearsay in grand jury proceedings is acceptable).

131. *See Brenner, supra* note 96, at 84 & n.92; *see, e.g.*, *People v. DeLaire*, 610 N.E.2d 1277, 1283 (Ill. App. Ct. 1993) (“The exclusionary rule does not bar a grand jury from considering evidence illegally obtained. . . .”). *Accord In re a Special Investigation No. 227*, 466 A.2d 48, 49-50 (Md. Ct. Spec. App. 1983); *Commonwealth v. Santaniello*, 341 N.E.2d 259, 260-61 (Mass. 1976); *In re Mahler*, 426 A.2d 1021, 1031 (N.J. Super. Ct. App. Div. 1981); *In re Grand Jury Proceedings*, 452 N.Y.S.2d 643, 644 (N.Y. App. Div. 1982); *State v. Dixon*, 880 S.W.2d 696, 700 (Tenn. Crim. App. 1992); *Alejandro v. State*, 725 S.W.2d 510, 513 (Tex. Ct. App. 1987).

132. *See Brenner, supra* note 96, at 85 & n.95; *see, e.g.*, ARK. CODE ANN. §

rules of evidence to grand jury proceedings,<sup>133</sup> and a few also apply their own versions of the exclusionary rule.<sup>134</sup> Some states even require prosecutors to present exculpatory evidence.<sup>135</sup>

State grand juries also differ as to who may be present in the grand jury room. All the states follow the federal model to the extent that the grand jurors, prosecutor, and an interpreter if necessary, are permitted in the room, but many states also permit a law enforcement officer's presence to "ensure security when a witness is testifying."<sup>136</sup> More than a dozen states allow for the presence of witness

---

16-85-511 (Michie 1987); IDAHO CODE § 19-1106 (1997); LA. CODE CRIM. PROC. ANN. art. 442 (West 1991); NEV. REV. STAT. ANN. § 172.145(1) (Michie 1997); N.D. CENT. CODE § 29-10.1-27 (1991); OR. REV. STAT. ANN. § 132.320(6) (Supp. 1998); S.D. CODIFIED LAWS ANN. § 23A-5-15 (Michie 1998); *People v. Beu*, 644 N.E.2d 27, 30 (Ill. App. Ct. 1994) ("[P]rosecutor has no duty to present exculpatory evidence to the grand jury.")

133. See Brenner, *supra* note 96, 84-85 & n.93. The most commonly applied rule of evidence is one that "prohibit[s] prosecutors from presenting inadmissible hearsay in grand jury proceedings." See *id.* at 83 & n.88; see, e.g., ARK. CODE ANN. § 16-85-511 ("The grand jury can receive none but legal evidence."). Other statutes reflect this rule. See CAL. PENAL CODE § 939.6 (West Supp. 1999) ("[T]he grand jury shall not receive any evidence except that which would be admissible over an objection at the trial of a criminal action . . ."); IDAHO CODE ANN. § 19-1105 (Michie 1997) (the grand jury may receive legally admissible hearsay); LA. CODE CRIM. PROC. ANN. art. 442 ("[T]he grand jury should receive only legal evidence . . ."); MONT. CODE ANN. § 46-11-314 (1997) ("[T]he grand jury shall receive no other evidence . . . than . . . that furnished by legal evidence . . ."); see also NEV. REV. STAT. ANN. § 172.135 (Michie 1997) (hearsay is inadmissible evidence for grand jury proceedings); N.M. STAT. ANN. § 31-6-10 (Michie 1978) ("Before the grand jury may vote an indictment charging an offense . . . it must be satisfied from the lawful evidence before it that an offense . . . has been committed . . ."); N.Y. CRIM. PROC. LAW § 190.30(1) (McKinney 1993) ("Except as otherwise provided . . . [the] rules of evidence . . . [are] applicable to grand jury proceedings."); S.D. CODIFIED LAWS ANN. § 23A-5-15 ("The rules of evidence shall apply to proceedings before the grand jury."). Utah allows hearsay if it would be allowed at preliminary hearings. See UTAH CODE ANN. § 77-10a-13(5)(a) (Supp. 1998).

134. See Brenner, *supra* note 96, at 84 & n.93; CAL. PENAL CODE § 939.6 (West Supp. 1999) (prohibiting the grand jury from receiving "any evidence except which would be admissible over objection at the trial of a criminal action . . .").

135. See Brenner, *supra* note 96, at 85 & n.96; see, e.g., CAL. PENAL CODE § 939.71 (West Supp. 1999) (requiring the prosecutor to "inform the grand jury of the nature and existence" of exculpatory evidence).

136. Brenner, *supra* note 96, at 89 & n.110.

counsel in the grand jury room,<sup>137</sup> and Hawaii even provides for the appointment and presence of the grand jury's own independent counsel.<sup>138</sup>

Finally, not all states have retained the indicting grand jury.<sup>139</sup> Connecticut and Pennsylvania abolished the indicting grand jury by

---

137. See LA FAVE & ISRAEL, *supra* note 40, § 8.15(b), at 455; see also ARIZ. R. CRIM. P. 12.6 (persons under investigation are allowed presence of counsel while they testify); COLO. R. CRIM. P. 6.2(b) (any witness is allowed assistance of counsel during questioning); CONN. GEN. STAT. ANN. § 54-47f(d) (West 1994) (any witness is allowed assistance of counsel during questioning); FLA. STAT. ANN. § 905.17(2) (West 1996) (a witness may have one attorney present during questioning but not as a matter of right); 725 ILL. COMP. STAT. ANN. 5/112-4.1 (West 1992) (witnesses have the right to be accompanied by counsel during questioning, but counsel may only advise witnesses of their rights); IND. CODE ANN. § 35-34-2-5.5 (Michie 1998) (a target is entitled to the assistance of an attorney); KAN. STAT. ANN. § 22-3009 (1995) (any witness is allowed to have counsel present during questioning, counsel may make objections, and the court will appoint counsel for those unable to afford their own); LA. CODE CRIM. PROC. ANN. art. 433 (West Supp. 1999) (persons under investigation may be accompanied by counsel during questioning); MASS. R. CRIM. P. 5(c) (any witness may have counsel present during questioning); MICH. STAT. ANN. § 28.959(5) (Law. Co-op. Supp. 1998) (any witness who has been granted immunity is entitled to the presence of counsel during questioning); NEB. REV. STAT. ANN. § 29-1411(2) (Michie 1995) (any witness is entitled to assistance of counsel during questioning); NEV. REV. STAT. ANN. § 172.239 (Michie 1997) (persons under investigation are entitled to assistance of counsel during questioning); N.M. STAT. ANN. § 31-6-4 (Michie 1998) (persons under investigation are permitted the presence of counsel during questioning); N.Y. CRIM. PROC. LAW § 190.52 (McKinney 1993) (any witness who has waived immunity has the right to be accompanied by counsel, and the court will provide counsel to parties who cannot afford their own); OKLA. STAT. ANN. tit. 22, § 340 (West 1992) (any witness is entitled to the presence of one attorney during questioning); 42 PA. CONS. STAT. ANN. § 4549(c) (West 1981) (witnesses may have counsel present, and counsel will be appointed for those unable to afford their own); S.D. CODIFIED LAWS § 23A-5-11 (Michie 1998) (any witness may have the presence of counsel during questioning); TENN. CODE ANN. § 40-12-216 (1997) (any witness may leave the grand jury room for consultations with counsel); UTAH CODE ANN. § 77-10a-13 (Supp. 1998) (any witness has the right to be represented by counsel and to be advised of this right); WASH. REV. CODE ANN. § 10.27.120 (West 1990) (any witness may be accompanied by counsel unless given immunity and must be advised of the right; witnesses testifying under immunity may still leave the grand jury room during questioning to consult with an attorney); WISC. STAT. ANN. § 968.45 (West 1998) (any witness appearing before the grand jury may have counsel present).

138. See Brenner, *supra* note 96, at 94-95 & nn.127-30.

139. Forty-eight states have retained the indicting grand jury. See *id.* at 101-02.

constitutional amendment,<sup>140</sup> but all fifty states have retained the investigative grand jury.<sup>141</sup>

The investigative grand jury can be classified in one of two ways:<sup>142</sup> (1) grand juries that “investigate only the criminal activity identified and submitted to them by a prosecutor or by a court,”<sup>143</sup> or (2) those that “investigate any activity that violated the criminal laws of their state and occurred within their venue.”<sup>144</sup> Grand juries in the first category have little more than a passive role. “Rather than launching their own inquiries, they merely determine whether probable cause exists to support charges for criminal activity brought to their attention by a prosecutor or a judge.”<sup>145</sup> The second category allows for more grand jury investigation. Several of the states that have grand juries of the second category either permit or require grand jurors to report any personal knowledge of criminal activity to the grand jury for further investigation.<sup>146</sup> Despite the differences among grand jury systems, it is clear that the grand jury, as an institution, is largely controlled by prosecutors. Nonetheless, courts still view the grand jury as both “a sword and a shield.”<sup>147</sup> The Supreme Court recently stated that “the whole theory of [the grand jury’s] function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people.”<sup>148</sup> It is impossible to reconcile these grandiose characterizations with a federal grand jury, which is powerless to perform investigations without the court’s aid and is unable to return an indictment without the prosecutor’s consent.<sup>149</sup>

---

140. *See id.* at 102 & n.157.

141. *See id.* at 102-03. The overwhelming majority of states have kept the indicting grand jury presumably because they have decided that the institution plays an important role in the criminal justice system. *See id.*

142. Professor Brenner creates a third category, “state analogues to the special federal grand jury,” discussion of which is beyond the scope of this Comment. *See id.* at 110-11.

143. *Id.* at 110.

144. *Id.*

145. *Id.* at 112.

146. *See id.* at 113-14 & n.195.

147. WRIGHT, *supra* note 94, § 101, at 196 (quoting *In re Grand Jury January, 1969*, 315 F. Supp. 662, 671 (D. Md. 1970)).

148. *United States v. Williams*, 504 U.S. 36, 47 (1992).

149. *See* WRIGHT, *supra* note 94, § 101, at 199-202 (discussing how the grand jury’s independence “should not be overstated.”).

#### IV. RIGHT TO CONSULT COUNSEL AND THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

*Gabbert v. Conn*<sup>150</sup> demonstrates that grand jury proceedings are not the independent proceedings history suggests they ought to be. Rather, they are orchestrated by and subject to the prosecution's biases. Witnesses before the grand jury have long enjoyed the privilege against self-incrimination. But this privilege can be truncated if prosecutors are allowed to prevent witnesses from consulting with their attorneys. Grand jury witnesses' right to not incriminate themselves will be undermined if the right does not include the right to consult an attorney about invoking the Fifth Amendment privilege.

##### A. *The Fifth Amendment Privilege Against Self-Incrimination Applies in Grand Jury Proceedings*

More than one hundred years ago, in *Counselman v. Hitchcock*,<sup>151</sup> the Supreme Court recognized that the Fifth Amendment self-incrimination privilege applies in grand jury proceedings.<sup>152</sup> The grand jury in *Counselman* was investigating railroad companies alleged to have violated an interstate commerce act.<sup>153</sup> Charles Counselman appeared before the grand jury and "decline[d] to answer" questions relating to grain transportation rates "on the ground that [his answers] might tend to criminate [him]."<sup>154</sup> The questions related to whether he obtained grain transportation rates that were less than the tariff or open rate.<sup>155</sup> After Counselman invoked the privilege, the grand jury reported the questions that Counselman had refused to answer to the judge.<sup>156</sup> The judge ordered Counselman to show cause for why he should not answer the questions.<sup>157</sup> After a hearing, the judge found his reasons "wholly insufficient."<sup>158</sup> Counselman was called before the grand jury again, and he still refused to

---

150. 131 F.3d 793 (9th Cir. 1997), cert. granted, 119 S. Ct. 39 (1998).

151. 142 U.S. 547 (1892).

152. See *id.* at 563.

153. See *id.* at 548.

154. *Id.* at 549.

155. See *id.*

156. See *id.* at 550.

157. See *id.*

158. *Id.*

answer the questions.<sup>159</sup> In a subsequent hearing, the court held Counselman in contempt, fined him \$500, and placed him in custody.<sup>160</sup>

One of the first questions the Court resolved in *Counselman* was whether the Fifth Amendment self-incrimination privilege was available in grand jury proceedings. The Court considered the purpose behind the privilege, as well as the meaning of the words "criminal case,"<sup>161</sup> and determined that the privilege must extend to grand jury proceedings:

It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.<sup>162</sup>

About fifty years later, the Supreme Court reaffirmed the application of the Fifth Amendment self-incrimination privilege to grand jury proceedings.<sup>163</sup> The Court stated that the privilege's protection must be invoked, or else it is waived forever as to the answers given: "An investigation by a grand jury is a criminal case. The Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it . . . ."<sup>164</sup> Therefore, while there is no general right to avoid the grand jury's questions,<sup>165</sup> a witness can claim the privilege against self-incrimination.<sup>166</sup>

---

159. *See id.*

160. *See id.* at 552.

161. *Id.* at 563.

162. *Id.* at 562.

163. *See* *United States v. Monia*, 317 U.S. 424, 427 (1943) (citing *Counselman*, 142 U.S. at 562 (1892)).

164. *Id.* (footnote omitted).

165. *See In re Black*, 47 F.2d 542, 543 (2d Cir. 1931) (stating that "[a] witness is not entitled to be furnished with facilities for evading issues or concealing true facts."); *see also* *United States v. Calandra*, 414 U.S. 338, 345

B. *Counsel's Advice Gives Meaning to the Self-Incrimination Privilege*

Witnesses before a grand jury may not know, and therefore must figure out when and how to claim the privilege against self-incrimination. This is a daunting task for lay witnesses or anyone who might find the grand jury proceeding somewhat strange, invasive, or unsettling. Witnesses may not only be unclear about what is incriminating, they may also be reluctant to assert the privilege in a room dominated by grand jurors and the prosecution. As such, the advice of counsel is critical in preserving and defining the witness's privilege against self-incrimination. The Supreme Court has not decided whether the Fifth Amendment carries with it the right of a grand jury witness to consult with counsel regarding the privilege,<sup>167</sup> but cases support the conclusion that the Fifth Amendment does carry such a right.

*United States v. Mandujano*<sup>168</sup> is perhaps the most important case to consider when analyzing whether a grand jury witness has the right to consult with counsel regarding the privilege against self-incrimination. Roy Mandujano was called before the grand jury to

---

(1974) (stating that the witness also cannot invoke the protection simply out of privacy interests).

166. The privilege cannot be asserted to protect others from possible criminal prosecution. *See Rogers v. United States*, 340 U.S. 367, 371 (1951).

167. LAFAVE & ISRAEL, *supra* note 40, § 8.15(a), at 453-54. Lower courts have suggested that there is no constitutional right to even consult with counsel outside the grand jury room, but this conclusion is based on a Sixth Amendment right to counsel analysis. *See id.* at 454.

168. 425 U.S. 564 (1976). In a plurality opinion, the Court stated that witnesses need not receive Miranda warnings before answering a grand jury's questions. *See id.* at 580-81. But in his opinion for the Court in *Miranda*, Chief Justice Warren wrote that "the Fifth Amendment privilege is available outside of criminal court proceedings." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). The Court in *Miranda* recognized that the purpose of the privilege was "to protect persons in all settings in which their freedom . . . is [significantly] curtailed . . . from being compelled to incriminate themselves." *Id.* The Court stated that "without proper safeguards the process of in custody interrogation of persons suspected . . . of crime . . . contains inherently compelling pressures . . . which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* The Court concluded that "[i]n order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights . . ." *Id.* One wonders why the same rights are not afforded a witness—target or otherwise—who is compelled by subpoena to testify before a grand jury, and who, like an individual in police custody, is not free to leave.

testify in a narcotics investigation.<sup>169</sup> After a few preliminary statements, the prosecutor asked Mandujano if he had contacted a lawyer.<sup>170</sup> Mandujano responded that he had not contacted one because he did not have the money to do so.<sup>171</sup> The prosecutor then made the following offer:

Well, if you would like to have a lawyer, he cannot be inside this room. He can only be outside. You would be free to consult with him if you so chose. Now, if during the course of this investigation, the questions that we ask you, if you feel like you would like to have a lawyer outside to talk to, let me know.<sup>172</sup>

The plurality opinion of four justices confirmed the prosecutor's statement as a correct recital of law, but stated that "[a] witness 'before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel.'"<sup>173</sup> The plurality then stated that it was settled law that witnesses may not insist on their attorney's presence in the grand jury room.<sup>174</sup> These statements are confusing when taken together. They lead to equally confusing characterizations of law and have led commentators to cite *Mandujano* for the broad proposition that there is no right to counsel in the grand jury.<sup>175</sup> But Justice Brennan's concurrence in *Mandujano* shows why the case does not stand for this.<sup>176</sup>

---

169. See *Mandujano*, 425 U.S. at 567.

170. See *id.*

171. See *id.*

172. *Id.* at 567-68.

173. *Id.* at 581 (quoting *In re Groban*, 352 U.S. 330, 333 (1957)).

174. See *id.* (citing FED. R. CRIM. P. 6(d)).

175. Lower court opinions, such as *In re Black*, similarly state that "[n]either at a trial nor before a grand jury is [the witness] entitled to have the aid of counsel when testifying." 47 F.2d at 543. See also *United States v. Blanton*, 77 F. Supp. 812, 816-17 (E.D. Mo. 1948) (quoting *In re Black*). Commentators focus on the lack of a Sixth Amendment right to counsel. See Kaija Blalock et al., *Procedural Issues*, 34 AM. CRIM. L. REV. 883, 885 & n.17 (1997); Max D. Stern & David A. Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783, 1805 & n.100 (1988); Abbe Smith, *Book Review*, 62 TEMP. L. REV. 651, 659 & n.54 (1989) (reviewing LISA J. MACINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* (1987)).

176. See *Mandujano*, 425 U.S. at 603-04 (Brennan, J., concurring).



Justice Brennan pointed out that the plurality opinion mistakenly relied on dicta in *In re Groban*<sup>177</sup> for the proposition that there is no constitutional right for a witness to be represented by counsel when testifying before a grand jury.<sup>178</sup> *Groban* did not even involve grand jury activity.<sup>179</sup> Rather, *Groban* involved a Fire Marshal's investigation where the Marshal excluded counsel from the proceeding pursuant to his statutory powers.<sup>180</sup> The Supreme Court nevertheless attempted to analogize the grand jury to the Fire Marshal's administrative investigation, upholding the Fire Marshal's right to exclude counsel.<sup>181</sup> *Groban* does not address the issue whether a grand jury witness has a right to consult counsel.

The Supreme Court should therefore look to its other existing precedent to answer this question. In his *Mandujano* concurrence,<sup>182</sup> Justice Brennan noted that in *Maness v. Meyers*,<sup>183</sup> the Court stated that counsel's advice is essential for a witness contemplating whether to invoke the privilege:

The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion.<sup>184</sup>

That counsel has traditionally been absent from grand jury proceedings does not mean that the tradition is constitutionally sound. Justice Brennan exposed the circular reasoning the Supreme Court used to exclude counsel from the grand jury: "Ironically, the greatest

---

177. 352 U.S. 330 (1957).

178. *See id.*

179. *See id.* at 332-33.

180. *See id.* at 331-32.

181. *See id.* at 333.

182. *See* 425 U.S. at 604 (Brennan, J., concurring).

183. 419 U.S. 449 (1975). *Maness* involved a lawyer who was held in contempt for advising his client to assert his Fifth Amendment privilege against self-incrimination. *See id.* at 450-56. The Supreme Court held that the lawyer properly performed his duties in advising his client, and that he "cannot suffer any penalty for performing such duties in good faith." *Id.* at 470.

184. *Id.* at 466 (footnote omitted).

impediment to the development of the law concerning a grand jury witness' right to some form of assistance of counsel has been reliance upon the traditional absence of counsel in grand jury proceedings for denial of assistance of counsel in administrative proceedings."<sup>185</sup>

*C. The Witness Should Be Able to Consult on Topics Other than the Fifth Amendment Privilege*

A witness needs counsel's guidance, especially in light of most witnesses' lack of professional legal skill and understanding of the self-incrimination privilege, and the Fifth Amendment's critical role "as the bulwark against [prosecutorial] abuse."<sup>186</sup> There are three key areas in which an attorney can help the grand jury process: (1) preserving the witness's privileges; (2) providing the grand jury with the answers it seeks; and (3) supporting the witness through a stressful and lonely interrogation.

The privilege against self-incrimination is not the only privilege held by a witness before the grand jury. The attorney-client privilege, the confidential marital communications and spousal privileges, and the privilege protecting patient and psychotherapist communications, among others, also apply.<sup>187</sup> Just as it is difficult for a witness to determine when to assert the Fifth Amendment privilege, it is difficult for a witness to determine when to claim other privileges. The witness needs the advice of counsel to avoid inadvertently waiving any of these privileges.

Counsel also can help the witness provide the grand jury with the information it seeks. It may be difficult for a witness to see the broader issues the grand jury is attempting to resolve when asked specific legal questions. But an attorney will see how a prosecutor's questions build on each other and discern the significance of a witness's answers. For example, an attorney can suggest that a witness answer narrowly if the issue the grand jury is broaching borders on

---

185. *Mandujano*, 425 U.S. at 603 n.19 (Brennan, J., concurring).

186. *Id.* at 604 (Brennan, J., concurring).

187. See Elizabeth Silva & Rachel Spinogatti, *Twenty-Seventh Annual Review of Criminal Procedure: II. Preliminary Proceedings, Grand Jury*, 86 GEO. L.J. 1373, 1388-90 & nn.876-83 (1998).

being privileged. Or, an attorney might suggest a longer, background-oriented explanation in order to show the grand jury "the big picture"—those circumstances that explain the witness's behavior, or perhaps even those that give rise to a defense. It is unlikely that a witness would alone be able to make such important assessments while under the grand jury's scrutiny.

Finally, the presence of counsel can help lower stress levels and lessen the intense feelings of loneliness that a grand jury witness may feel during interrogation. Picture going inside a "windowless jury room, a stark, cheaply furnished square box . . . not a friend in sight,"<sup>188</sup> where the proceeding is "intimidating, even terrifying, and unlike any other proceeding known to the American judicial system."<sup>189</sup> As one professor put it, "[t]estifying before a grand jury is a lot like a car crash . . . Sometimes you need dental charts to identify your client after it's over."<sup>190</sup> Witnesses have described the experience as "lonely," "one-sided," "isolat[ing]," and "emotionally overwhelm[ing]."<sup>191</sup> This intense experience by no means becomes easy for a witness who is permitted to consult with counsel outside the grand jury. But testifying becomes exponentially more difficult for the witness who cannot consult. Why make the experience harder on a witness than it needs to be—a more relaxed witness will probably give better testimony than one who is needlessly under stress.

The presence of defense counsel in the grand jury room would lessen a witness's anxiety, but admittedly would create concerns for prosecutors. First, prosecutors worry that witness testimony will lose much of its spontaneity if defense counsel is present.<sup>192</sup> A witness might depend too much on the lawyer and "repeat or parrot responses discussed with the lawyer, rather than [] testify[ing] fully and frankly in his or her own words."<sup>193</sup> Second, prosecutors worry

---

188. Tony Mauro & Kevin Johnson, *Grand Jury 'Very Lonely' For Witness*, USA TODAY, Mar. 3, 1998, at 1A.

189. *Id.*

190. *Id.* (quoting George Washington University law professor Jonathan Turley).

191. *Id.*

192. See *Hearings on H.R. 1407*, *supra* note 115, at 183 (statement of James I.K. Knapp, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

193. *Id.* (statement of James I.K. Knapp, Deputy Assistant Attorney General,

that defense counsel will disregard rules that limit counsel's participation and will "act . . . in a manner that will disrupt and delay the grand jury's investigation."<sup>194</sup> Finally, prosecutors are concerned that where an attorney represents multiple parties within one investigation, a witnesses' testimony will be chilled and a legitimate investigation thwarted.<sup>195</sup>

#### *D. Grand Jury Witnesses Have a Right to Consult Counsel*

The Court in *Mandujano* was not presented with the issue whether a witness has a right to consult with counsel who is present and *outside* the grand jury room. Moreover, the *Mandujano* opinion was by a plurality of four justices and as such does not have the force of law. Therefore, the Supreme Court need not overturn *Mandujano* to vindicate a grand jury witness's Fifth Amendment privilege against self-incrimination. The Court need only reaffirm its previous statement that assistance of counsel is vital to upholding the privilege.<sup>196</sup>

### V. THREE GRAND JURY MODELS RECOGNIZE COUNSEL'S INTEGRAL ROLE IN THE PROCEEDINGS

There are three distinct grand jury models in America today that provide for counsel during the proceedings. They are considered in turn, from the least to the most progressive. The "federal model" permits the witness to exit the grand jury room to consult with an attorney. The "state model" allows witness counsel inside the grand jury room to advise the witness during the proceeding. The unique

---

Criminal Division, United States Department of Justice).

194. *Id.* at 184 (statement of James I.K. Knapp, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

195. *See id.* at 186-88 (statement of James I.K. Knapp, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice). If, for example, an attorney represents an employer and an employee, the employee may be reluctant to testify about a matter concerning his employer because the employer will likely learn of the testimony through the attorney. Also, an unscrupulous attorney could "advise witnesses on how to tailor their responses in light of the testimony given by earlier witnesses . . . [and] . . . seriously mislead the grand jury in its endeavor to obtain information." *Id.* at 187 (statement of James I.K. Knapp, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

196. *See Maness v. Meyers*, 419 U.S. 449, 465-66 (1975); *accord Miranda v. Arizona*, 384 U.S. 436, 467 (1966). For a more thorough discussion of *Miranda's* application, see note 168, *supra*.

"Hawaii model" provides the *grand jury* with the advice of *independent* counsel throughout the proceeding.

### A. The "Federal Model"

The model used by all federal courts<sup>197</sup> is governed by Federal Rule of Criminal Procedure 6.<sup>198</sup> Rule 6 does not provide for the presence of the witness's counsel, but it does not prevent the witness from leaving the grand jury room during the proceedings to consult with an attorney. In fact, an important characteristic of the federal model is that it permits a witness to leave to consult with an attorney.<sup>199</sup>

Jurisdictions vary as to how often a witness can consult with counsel. Many federal courts permit witnesses to consult after each question so that the lawyer may have a complete record of all of questions asked.<sup>200</sup> Other jurisdictions are more stringent. Some limit consultation in the interest of time.<sup>201</sup> Others limit consultation to questions of privileges and do not permit questions about strategic decisions.<sup>202</sup> These variations are attempts to retain the grand jury's efficient and investigatory nature. Jurisdictions that impose limits do so because they are worried about many delays "wear[ing] the grand jury down."<sup>203</sup> They see no reason to allow for consultation if a question is not difficult.<sup>204</sup> Those jurisdictions that impose no restrictions find that litigation over refused consultation invokes even

---

197. The name "federal model" does not mean that the model is used exclusively in the federal system. In fact, several states also use this system.

198. Rule 6(d) permits only the grand jurors, witnesses, the prosecuting attorney, and a stenographer or recording device operator in the grand jury room. An interpreter may also be present if necessary. The grand jurors are alone only during voting or deliberations. See FED. R. CRIM. P. 6(d).

199. See Amy Bushyeager & Maria N. Nikiforos, *Twenty-Sixth Annual Review of Criminal Procedure: Grand Jury*, 85 GEO. L.J. 1002, 1020 & n.876 (1997). The Department of Justice has published grand jury practice guidelines. These guidelines state if the witness has retained counsel, the grand jury will permit the witness a "reasonable opportunity to step outside the grand jury room to consult with counsel" if the witness desires. 7 DEP'T OF JUSTICE MANUAL § 9-11.150(D) (Supp. 1998-4).

200. See LAFAVE & ISRAEL, *supra* note 40, § 815(c), at 456.

201. See *id.*; Bushyeager & Nikiforos, *supra* note 199, at 1020.

202. See LAFAVE & ISRAEL, *supra* note 40, § 815(c), at 456.

203. *Id.*

204. See *id.*

more delay, and that it is too difficult to determine whether a question relates to privilege or to a strategic concern.<sup>205</sup> Both limited and unlimited consultation support the witness's privilege against self-incrimination.

The federal model allows jurisdictions to preserve both the nature of the grand jury and the witness's privilege against self-incrimination. Interruptions can be limited in number and scope. The proceeding remains investigative, and does not become adversarial, because the interruptions only permit a witness to consult, and not the witness's counsel to object or otherwise disrupt the flow of the grand jury proceeding. Because witnesses are already expected to consult with counsel, formal recognition of the right would not alter the federal model—it would just ensure that prosecutors treat witnesses fairly.

### B. The "State Model"

The "state model" goes further than the federal model in allowing counsel to accompany the witness inside the grand jury room. More than a dozen states have enacted statutes that at least permit target witnesses, if not all witnesses, to consult counsel inside the grand jury room.<sup>206</sup> The statutes usually have provisions that limit counsel's role<sup>207</sup> to advising the witness.<sup>208</sup>

Whether the law should provide for the presence of counsel has been hotly debated over the last twenty years.<sup>209</sup> Supporters of reform argue that the federal model is inadequate, and that the state model provides witnesses with needed protection against witness harassment. The state model allows counsel to advise, and puts

---

205. *See id.*

206. *See id.* § 8.15(b), at 455. *See, e.g.,* Wayne F. Foster, Annotation, *Validity and Construction of Statutes Permitting Grand Jury Witnesses to Be Accompanied by Counsel*, 90 A.L.R.3D 1340 (1980) (citing cases from jurisdictions including Colorado, Georgia, Massachusetts, Michigan, and New York).

207. *See* LAFAVE & ISRAEL, *supra* note 40, § 8.15(b), at 455.

208. *See id.* Massachusetts, for example, provides that "[a]ttorneys for the Commonwealth . . . the witness under examination, the attorney for the witness, and . . . persons who are necessary . . . may be present while the grand jury is in session. The attorney for the witness shall make no objections or arguments or otherwise address the grand jury or the prosecuting attorney." MASS. R. CRIM. P. 5(c).

209. *See* LAFAVE & ISRAEL, *supra* note 40, § 8.15(b), at 455.

witnesses at ease.<sup>210</sup> Opponents of this model view it as open to abuse by counsel and believe that the burdens it places on the grand jury's ability to function outweigh the protection witnesses receive.<sup>211</sup> In their view, the federal model safely and adequately guarantees a witness' privilege against self-incrimination.<sup>212</sup>

The state model preserves the witness's Fifth Amendment privilege; but the question is whether it changes grand jury proceedings too much. Grand jury proceedings are not supposed to be trials. They sacrifice time-consuming, adversarial procedures in favor of rapid, inquisitorial proceedings intended only to determine whether there is probable cause to indict. The closer a particular state system moves towards a trial-type grand jury proceeding, the more efficiency the grand jury will lose. That loss will likely not translate into an equal gain for witness' rights. The grand jury is, at its best, the screen used to determine whether there should even be a trial. Providing a screen for the screen is wasteful.

But witnesses may need to consult an attorney during grand jury proceedings. To the extent a witness can do so inside the grand jury room without creating the beginnings of a "pre-pre-trial" proceeding, the state model works well. And it follows that an attorney can provide better advice if she hears exactly what is transpiring, rather than relying on the witness to recount everything accurately.<sup>213</sup>

210. *See id.*

211. *See id.*

212. *See id.*

213. The advantages and disadvantages of having witness counsel present in the grand jury will be further explored by the United States Judicial Conference. By September 1, 1999, the Judicial Conference is required to:

prepare and submit . . . a report evaluating whether an amendment to Rule 6 of the Federal Rules of Criminal Procedure permitting the presence in the grand jury room of counsel for a witness who is testifying before the grand jury would further the interests of justice and law enforcement . . . [and] shall consider the views of the Department of Justice, the organized Bar, the academic legal community, and other interested parties.

H.R. 4276, 105th Cong. § 622 (1998).

In conducting this study, the Judicial Conference should research and report grand jury witnesses' attitudes toward the presence of counsel. Witnesses' perspectives would either support or refute the views of the Department of Justice, the Bar, and the legal community, and would help to provide a complete picture of the grand jury system.

### C. The "Hawaii Model"

This Comment has so far only considered grand jury systems from the perspective of witnesses' constitutional rights. Hawaii has taken a completely different approach and has instituted reforms that target the grand jury's lack of independence.<sup>214</sup> In 1978, Hawaii began providing grand juries with their own independent counsel. The goal was to increase the grand jury's independence by minimizing the prosecutor's influence.<sup>215</sup> Counsel for the grand jury are appointed by the state's chief justice, serve one year terms, and are available to advise the grand jury on any legal matters that arise during the proceeding.<sup>216</sup> It has been suggested that those states that choose to follow Hawaii's lead should require that the grand jury's counsel be a lawyer who practices in the district, to reinforce the grand jury's historic role as a community voice.<sup>217</sup> Statutes should not allow counsel to serve any longer than the grand jury itself.<sup>218</sup> Counsel are permitted to advise the grand jury about hearing exculpatory evidence and about learning how evidence was obtained.<sup>219</sup> Armed with improved and impartial legal understanding, the grand jury would be able to weigh all of the information in determining whether to return an indictment.<sup>220</sup> Grand jury counsel would help restore objectivity to the grand jury process.<sup>221</sup>

The Hawaii model does not directly address the witness's Fifth Amendment right to consult with counsel, but it could. The model gives rise to possibilities that do not exist under the other models. Using it as a springboard, it is not a far leap to suggest that counsel could be appointed for the grand jury witness as well. Perhaps counsel appointed for the grand jury could be made available for witness consultation,<sup>222</sup> or entirely different counsel could be appointed for

---

214. See Susan W. Brenner, *Is the Grand Jury Worth Keeping?*, 81 JUDICATURE 190, 198 (1998) (arguing that the grand jury has lost its independence—its principal value—and that it must be restored).

215. See *id.*

216. See *id.* at 198-99.

217. See Brenner, *supra* note 96, at 124.

218. See *id.*

219. See *id.* at 125 & n.228.

220. See *id.* at 125-26.

221. See *id.* at 126.

222. This option, however, would be very difficult in practice. Ethically, a lawyer's loyalty to one client prohibits representing another client whose inter-



the witness. The Hawaii model demonstrates that there are many different ways to approach the grand jury proceeding and that a different approach can actually work.

## VI. CONCLUSION

As Judge Hawkins suggested,<sup>223</sup> one might think that *Gabbert v. Conn* is not an American story. Rather, it is one for audiences who applaud prosecutors' win-at-all-costs strategies. But win-at-all-costs prosecutors are not heroes. They are and should be expected to use their power responsibly.

Where prosecutors "have all the tools,"<sup>224</sup> as they do in grand jury proceedings, they may take advantage of a witness and prevent the witness from consulting with counsel. The result may be the witness's unknowing waiver of the privilege against self-incrimination. As such, preventing a witness from consulting with an attorney undercuts the witness's Fifth Amendment right against self-incrimination and eviscerates the grand jury's protective function.

Even after *Conn v. Gabbert*, the underlying issue still remains: Does a grand jury witness have a right to consult counsel?<sup>225</sup> The witness should have such a right. Recognition of the witness's right will not create a procedural vacuum that legislatures will have to scramble to fill because there are models already in place that provide grand jury witnesses with ways to consult counsel. But legislatures will have to decide which model will best suits their jurisdiction. All jurisdictions should at least adopt the federal model, and all should consider implementing some version of the Hawaii model.

---

ests are directly adverse. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1998) (discussing direct conflicts). Representing the grand jury and the grand jury witness gives rise to at least potential conflicts, if not direct conflicts. See *id.* Rule 1.7(b) (discussing potential conflicts). It would be extremely difficult for a lawyer to advance the grand jury's search for the truth while seeking to protect the witness's best interests. Furthermore, it is unlikely that the grand jury and witness could waive these conflicts. See *id.* Rules 1.7(a)(2), 1.7(b)(2) & cmt. The disclosure required for a valid waiver would probably violate the grand jury secrecy rule.

223 See Audio tape of Oral Argument, *supra* note 1 (statement of Judge Michael Daly Hawkins).

224. *Id.* (statement of Judge Charles R. Weiner).

225. No. 97-1802, 1999 WL 181181, at \*5.

Combining these two models will restore the grand jury's independence and at the same time protect witnesses' rights. All witnesses deserve a determination by an *independent* grand jury and should therefore be entitled to the reassuring presence and professional advice of their attorneys.

*Kathryn E. White\**

---

\* I thank Professor Laurie Levenson for suggesting this topic and for her wisdom, steady encouragement, and thoughtful guidance. I also thank Bruce Riordan for his insightful critiques, and the editors and staff of the *Loyola of Los Angeles Law Review* for their excellent work. I especially thank my husband, Joe, for his editorial comments, infinite patience, and boundless love.

