

Washington Law Review

Volume 48 | Number 2

2-1-1973

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Recommended Citation

William J. Knudsen, Jr., *Pretrial Disclosure of Federal Grand Jury Testimony*, 48 Wash. L. Rev. 423 (1973).
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PRETRIAL DISCLOSURE OF FEDERAL GRAND JURY TESTIMONY†

William J. Knudsen, Jr.*

The grand jury, an institution of ancient common law origin,¹ has been criticized during the 19th and 20th centuries.² In fact, it was abolished in Great Britain, the country of its birth, in 1933.³ The arguments most often made against the grand jury are that the jury is a needless expense; that it may be slow to act in areas where it meets infrequently; and that it seldom provides protection against unjust prosecution, since the prosecutor generally has great influence with the jury and may simply use the jury to insulate himself from responsibility. Proponents of the grand jury argue that it retains the power to serve as a check on capricious accusation, especially when dealing with political, racial or religious minorities;⁴ that the indicting proc-

† This article was originally written as a report to the Committee on Federal Rules of Criminal Procedure of the Ninth Circuit Judicial Conference by William J. Knudsen, Jr., Professor of Law, Northwestern School of Law, Lewis and Clark College, and law students R. Ray Heysell, David N. Lackey, Allen L. Reel and Muriel T. Sparkman. The authors wish to acknowledge the cooperation and assistance in this project of Lloyd F. Dunn, Esq., William G. Simon, Esq., Dean C. Smith, Esq. and The Honorable A. J. Zirpoli, all members of the Committee.

Regarding the present status of the Report, the Conference has tabled it until next year. See note 141, *infra*.

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1. Kaufman, *The Grand Jury—Its Role and Its Powers*, 17 F.R.D. 331 (1955).

2. Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L. 26, 214 (1955).

3. English opponents of the grand jury system were successful in securing its demise on the grounds that the system was very expensive, that service on it was a burden on the citizenry, and that it no longer served any useful function since it had little to do except ratify committals for trial by examining justices. Younger, *supra* note 2, at 215-17, Lieck, *Abolition of the Grand Jury in England*, 25 J. CRIM. L. 623 (1935).

4. The rationale in support of grand juries is stated succinctly as follows: "Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." Wood v. Georgia, 370 U.S. 375, 390 (1962). But see Antell, *The Modern Grand Jury: Benighted Super-government*, 51 A.B.A.J. 153 (1965), which states the counter argument: "It simply is not true that the grand jury system protects the individual from oppression; indeed, it has a far greater potential as an instrument of oppression. . . . Realistically, the most demanding task faced by a conscientious prosecutor is that of making a defendant's rights understood to a grand jury bent on indicting without sufficient evidence but on great provocation." *Id.* at 154-55. This condemnation of grand juries is echoed by Friedman:

The most serious criticism of grand juries in recent months has been directed at

esses allow the prosecution to subpoena witnesses and get their testimony on record; and that the grand jury can express the judgment of the community in certain cases of political importance.⁵

Although the grand jury system has been severely denounced, it remains firmly a part of the United States federal judicial system because of its embodiment in the fifth amendment of the Constitution, which provides in part:⁶ "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . ." Thus, one must consider the pragmatic question of whether the federal grand jury system furthers the fair administration of criminal justice.

The scope of this study is limited to what is probably the most criticized aspect of the traditional grand jury system, the restrictions on disclosure of grand jury proceedings, especially the criminal defendant's lack of access to a transcript of the testimony given before the grand jury which indicted him.⁷ Examining the history of the grand jury as it relates to the tradition of secrecy, this study discusses the philosophies underlying the practice and analyzes the impact of the Federal Rules of Criminal Procedure, federal statutes, and certain Supreme Court decisions on this tradition. This study concludes that there is no basis in fact for most of the reasons traditionally given for grand jury secrecy, and that accordingly every criminal defendant should be presumed to have the right to discover before trial all grand jury testimony which the prosecution plans to use against him. How-

the use being made of them by the Justice Department. In addition to the Pentagon Papers case, 10 separate grand juries have been conducting investigations into activities of militant antiwar groups throughout the country. Grand juries in Seattle and Detroit were investigating the bombing of the United States capitol. A Harrisburg, Pa., grand jury continued to question witnesses about the antidraft activities of the Berrigan brothers. A Los Angeles grand jury was looking into draft counselling by local priests. And in New York, a Brooklyn grand jury called nuns to testify about the theft of F.B.I. documents from its Media, Pa., office. While no one doubts that the Federal Government has the right to conduct such grand jury crime investigations, many of the witnesses called have charged that the questions asked have been based on illegal wiretapping or that the Government is forcing them to incriminate themselves or their friends with only a limited immunity.

Friedman, *Grand Juries: Strange Doings by the "Honest Countrymen,"* N.Y. Times, Nov. 7, 1971, § 4, at 8, col. 1.

5. S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 1049 (2d ed. 1969).

6. U.S. CONST. amend. V.

7. Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455 (1964); Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 668 (1962); Comment, *Federal Grand Jury Secrecy*, 5 GONZAGA L. REV. 255 (1970).

ever, the courts should retain the power to refuse discovery if the prosecution shows a compelling reason to maintain secrecy at that time. In order to prevent prosecutors from circumventing the defendant's right, this study recommends that all grand jury testimony be recorded and that Rule 6 of the Federal Rules of Criminal Procedure be amended to compel recording and allow pretrial discovery.

I. HISTORICAL BACKGROUND

Since the courts have relied upon the historic policy of grand jury secrecy to justify continued prohibition of discovery, stating that this policy "must not be broken except where there is a compelling necessity,"⁸ it is important to examine briefly the history of the grand jury, particularly its secrecy aspect, in an attempt to separate myth from reality. In England, the earliest recorded juries were employed to discover and present facts in answer to inquiries addressed to them by the King. The jury of "presentment," later the grand jury, was a lineal descendant of these bodies, and by the time of the Assize of Clarendon in 1166, it was being used regularly to discover and present to the King's officials persons suspected of serious crimes. While it was not the function of the grand jury to determine guilt, the grand jurors did form part of all of the petit juries at this time, and thus the two bodies were not entirely separate. By the middle of the 14th century, however, it was recognized that grand and petit juries had distinctive functions, and the connection between them was completely severed. The task of the grand jury was merely to determine whether, from the evidence given by the prosecution, there was probable ground for suspicion.⁹

During the three centuries that followed, the grand jury developed from a mere instrument of the Crown used to ferret out criminals to a shield for the protection of the subject against arbitrary accusations by the government.¹⁰ The full development of the secrecy privilege was a vital factor in allowing the grand jury to become an effective weapon for the protection of personal rights, although from early times it had

8. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958).

9. W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 321-22 (7th ed. 1956).

10. G. EDWARDS, *THE GRAND JURY* 27 (1906); McClintock, *Indictment by a Grand Jury*, 26 MINN. L. REV. 153, 156 (1941).

been the practice for the grand jury to hear testimony and to deliberate in private,¹¹ as evidenced by the traditional form of oath administered to grand jurors:¹²

[Y]ou . . . shall diligently enquire, and true presentment make of all such matters and things as shall be given you in charge; the king's counsel, your fellows, and your own, you shall keep secret; You shall present no one for envy, hatred or malice; . . . but you shall present all things truly as they come to your knowledge according to the best of your understanding; So help you God.

Although there is disagreement as to the original reasons for grand jury proceedings being held in secret, the most likely reason was to prevent offenders from learning of the proceedings and attempting to escape prosecution.¹³ It has also been suggested that the principle of secrecy was developed to protect the King's counsel and permit the prosecutors to have undisturbed influence over the jury.¹⁴ In any event, while secrecy of proceedings was customary, it did not become a right of the grand jurors themselves until a comparatively late period.¹⁵

This right springs from the 17th century when, during the reign of the Stuarts, the Crown was attempting to control grand juries by the device of requiring publicity of their proceedings. These attempts were finally defeated in the Earl of Shaftesbury Trial in 1681.¹⁶ The Crown wished to hold open court examination of the witnesses as to certain treasonous charges brought against the Earl, but the jurors, relying on their oaths and the "ancient custom of the kingdom," demanded the right to examine witnesses in private.¹⁷ The jurors won their right to privacy of investigation, and grand jury proceedings were thereafter invariably held in secrecy,¹⁸ free from the possibility of coercion by the state or any other party. Thus, the secrecy privilege also served the purpose of protecting the grand jurors and witnesses from coercion by the state.

11. J. WIGMORE, EVIDENCE § 2360 at 728 (McNaughton rev. 1961).

12. Earl of Shaftesbury's Trial, 8 How. St. Tr. 759, 772 (1681).

13. G. EDWARDS, *supra* note 10, at 116.

14. United States v. Smyth, 104 F. Supp. 283, 289 (N.D. Cal. 1952).

15. J. WIGMORE, *supra* note 11.

16. Earl of Shaftesbury's Trial, 8 How. St. Tr. 759, 772 (1681).

17. *Id.* at 771-74.

18. J. WIGMORE, *supra* note 11, at 729.

Pretrial Disclosure of Federal Grand Jury Testimony

The tradition of the grand jury as a bulwark against oppression by the state was brought to America by the English colonists. Mr. Justice Field in his famous Charge to a Grand Jury, while sitting as a circuit judge, stated:¹⁹

[The grand jury] was at the time of the settlement of this country, an informing and accusing tribunal only, without whose previous action, no person charged with a felony could, except in certain cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until at length it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the Crown.

[T]he institution was adopted in this country, and is continued from considerations similar to those which give it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it come from government or be prompted by partisan passion or private enmity.

When the federal government was established, the right to grand jury indictment was secured to the people in the Bill of Rights in “the fifth of those articles of amendment . . . which were manifestly intended mainly for the security of personal rights.”²⁰ Recognition that the ultimate function of the secrecy privilege was for the protection of the rights of the accused was made by Mr. Justice Harlan in his vigorous dissent in *Hurtado v. California*:²¹

In the secrecy of the investigations by grand juries, the weak and helpless—proscribed, perhaps, because of their race, or pursued by an unreasoning public clamor—have found, and will continue to find, security against official oppression, the cruelty of mobs, the machinations of falsehood, and the malevolence of private persons who would use the machinery of the law to bring ruin upon their personal enemies.

19. 30 F. Cas. 992-93 (No. 18,255) (C.C.D. Cal. 1872).

20. *Ex parte Bain*, 121 U.S. 1, 6 (1887).

21. 110 U.S. 516, 554 (1884).

Thus the grand jury developed in England and entered the stream of American tradition as a protection for the personal rights of the people. Grand jurors won the right to hold their proceedings in secret in order to perform their function of protecting these rights against both official and private coercion. In one period of the development of the grand jury in England, the grand jurors conducted the examination of witnesses themselves and did not permit the prosecutor to enter the jury room.²² However, as fear of governmental coercion gradually subsided, a prosecutor for the Crown or state was permitted to be present during the taking of testimony. In 1794, in the indictment of Hardy and others for treason, a solicitor for the Crown was allowed in the jury room to help manage the evidence,²³ and prosecutors gradually reentered the jury room. By the late 19th and early 20th centuries, there evolved greater latitude in the use of grand jury proceedings by the state, and today it is a commonly accepted right of the prosecution to direct the grand jury's investigation.²⁴ The pendulum has now swung so far that grand juries have been called the "prosecutor's alter ego,"²⁵ and prosecuting attorneys vigorously uphold grand jury secrecy as a means of protecting their cases from discovery by the defendant.

II. SECRECY AND DISCOVERY

The phrase "traditional grand jury secrecy" has been used to describe two different issues: secrecy of grand jury proceedings while they are in progress, and nondisclosure of the transcript or minutes after the proceedings have terminated. The disclosure of the grand jury proceedings while in progress and the grand jurors' deliberations and votes are not in issue, as it is generally accepted that these must be kept absolutely secret.²⁶ As to the second issue, the subject of this study, the Supreme Court has recognized that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."²⁷

22. G. EDWARDS, *supra* note 10, at 127.

23. *Id.*

24. Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 JOHN MARSHALL J. PRAC. & PROC. 18, 19 (1967).

25. Antell, *supra* note 4, at 156.

26. *See, e.g.*, Comment, *supra* note 7, at 257.

27. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940).

The amount of discovery to be permitted in a criminal proceeding is, of course, a matter of philosophical value judgment—one perhaps complicated by the privilege against self-incrimination which the defendant enjoys. The proponents of liberal discovery point to the English preliminary hearing-deposition procedure as the quintessence of discovery.²⁸ In the country which created and subsequently abolished the grand jury, a defendant prosecuted on indictment is now generally entitled by statute to a preliminary hearing at which he can be present, be represented by counsel and be allowed to cross-examine each prosecution witness. The substance of each witness' testimony is recorded in narrative form and signed by him, thus becoming a deposition. The defendant can then secure copies of these depositions.²⁹ This preliminary hearing becomes a very effective discovery device for the defense because the prosecution must offer at the hearing all the evidence which it then intends to introduce at the trial. If the prosecution later discovers additional evidence which it intends to offer it must so inform the defense. Critics have pointed out that this system is not a panacea for all the defendant's legitimate discovery needs, since the prosecution need not produce evidence it does not intend to offer at trial, even though that evidence might be helpful to the defendant in preparing his case.³⁰ However, it is a much more liberal procedure than that followed in most American jurisdictions, including those applying the federal standards.

Although philosophies in the United States have been changing, and the trend is toward a liberalization of discovery for the defendant in criminal litigation,³¹ the disparity between the very liberal discovery procedures permitted under the Federal Rules of Civil Proce-

28. Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 64 (1961).

29. *Id.* at 65.

30. *Id.* at 66.

31. See, e.g., FED. R. CRIM. P. 16; 18 U.S.C. § 3500(e)(3) (1970); *Dennis v. United States*, 384 U.S. 855 (1966). See note 49 *infra* for the text of § 3500(e)(3), and see notes 68-71 and accompanying text *infra* for a discussion of Dennis.

FED. R. CRIM. P. 16 provides as follows:

DISCOVERY AND INSPECTION

(a) **Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.** Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of phys-

dures and the much more restricted discovery permitted under the Federal Rules of Criminal Procedure³² illustrates the continuing resistance to pretrial discovery for the criminal defendant. Prior to 1946 when the Federal Rules of Criminal Procedure were adopted, federal courts closely guarded the privacy of grand jury proceedings from the eye of the defendant, mindful of the traditional common law view that grand jury proceedings were to be kept secret.³³

Judges who had been schooled in the established practice of secrecy were unresponsive to defense attorneys' pleas for disclosure,³⁴ re-

ical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) **Other Books, Papers, Documents, Tangible Objects or Places.** Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

....

(e) **Protective Orders.** Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*, the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

32. See Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228 (1964).

33. The following statement epitomizes the pre-1946 approval of secrecy in grand jury proceedings:

We agree with the authorities generally that the granting of such request [permission to inspect the minutes and records of grand jury] would dangerously impair our system of grand jury procedure. It would open the way for an exploratory expedition for the purpose of obtaining the government's evidence, and pave the way for numerous dilatory tactics.

United States v. Molasky, 118 F.2d 128, 132 (7th Cir. 1941).

34. Evidence of judges' loyalty to the tradition of secrecy is abundant; "Even if there were no precedent, I am in full accord with the policy which denies such permission [to inspect grand jury minutes]." United States v. Herzig, 26 F.2d 487, 488 (S.D.N.Y. 1928). "[The court] will not disregard the time honored precedent in this court not to grant inspection of the minutes." United States v. Foster, 80 F. Supp. 479, 483 (S.D.N.Y. 1948).

jecting all efforts to liberalize federal policy on the premise that such changes would afford the accused an undeserved and disproportionate advantage over the prosecution in the preparation of criminal cases.³⁵ Nevertheless, on occasion the traditional policy was suspended in certain limited instances when it was felt that the screen of secrecy stood in the way of justice.³⁶

III. FEDERAL PRACTICE SINCE 1946

With the adoption of the Federal Rules of Criminal Procedure in 1946, specifically Rule 6(e),³⁷ federal courts were provided with a uniform though inadequate guideline for handling matters concerning grand jury secrecy. This rule merely served to codify the existing case law on the subject, limiting disclosure to instances where the defendant was able to show the court grounds for dismissal of the indict-

35. The following statement by Learned Hand typifies judicial resistance to giving the defendant such an advantage over the prosecution by lenient pretrial grand jury discovery rules:

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see.

United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

36. See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940). "After an indictment has been found and the accused has been apprehended, the veil of secrecy surrounding grand jury proceedings may safely be lifted where justice so requires." United States v. Alper, 156 F.2d 222, 226 (2d Cir. 1946). See also Metzler v. United States, 64 F.2d 203 (9th Cir. 1933), and United States v. Perlman, 247 F. 158, 161 (S.D.N.Y. 1917), where the court stated:

The right to inspect the grand jury minutes has been accorded to defendants where sufficient reason appears therefor . . . This right, however, should be sparingly exercised, unless a strong case is made out requiring examination of the minutes in furtherance of justice, or for the protection of individual rights.

37. FED. R. CRIM. P. 6(e) reads as follows:

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

ment "because of matters occurring before the grand jury"³⁸ or "when so directed by the court preliminary to and in connection with a judicial proceeding."³⁹

Although Rule 6(e) seemed to permit the trial court a wide latitude of discretion, unfortunately no criteria for disclosure of the testimony of witnesses were included in the rule. Perhaps this was due to the inability of the draftsmen to improve on the Supreme Court's own vague standard of "where the ends of justice require it"⁴⁰ enunciated some six years previously. At any rate, the courts initially took a conservative course, limiting the exercise of judicial discretion under Rule 6(e) to situations where prejudicial irregularity on the part of the grand jury existed,⁴¹ or where perjury of the defendant before the grand jury was the issue at trial.⁴²

In 1957, however, the Supreme Court in *Jencks v. United States*⁴³ shook judicial policy toward discovery, adopting a radically new approach in federal criminal cases. Seeking to impeach certain prosecution witnesses, defense counsel in *Jencks* moved for the production and examination of pretrial reports given to the F.B.I. by those witnesses concerning subjects about which they testified at trial. The trial court denied production, but the Supreme Court reversed, holding "that the petitioner is entitled to inspect the reports to decide whether to use them in his defense,"⁴⁴ that no preliminary foundation of inconsistency between the witnesses' reports to the F.B.I. and their testi-

38. *Id.* Rule 6(e) expressly provides that at the request of the defendant the court may permit disclosure of matters occurring before the grand jury upon a showing that grounds may exist for a motion to dismiss the indictment because of such occurrences. However, this provision has been of minimal importance. There is a presumption that grand jury proceedings have been conducted with regularity. *See, e.g.,* *United States v. Weber*, 197 F.2d 237 (2d Cir. 1952). Objections based on competency or sufficiency of the evidence before the grand jury, or upon illegally obtained evidence are likely to meet with little success. *Costello v. United States*, 250 U.S. 359 (1956) (indictment based on hearsay evidence may stand); *United States v. Blue*, 384 U.S. 251 (1966) (indictment based on illegally obtained evidence may stand). Likewise the courts are reluctant to overturn an indictment on the basis of an assertion that it was the product of perjured testimony. The reason generally given is that perjury may be more appropriately detected at trial. *Coppedge v. United States*, 311 F.2d 128 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 946 (1963).

39. FED. R. CRIM. P. 6(e).

40. *Socony-Vacuum*, 310 U.S. at 234.

41. *United States v. Sugarman*, 139 F. Supp. 878, 881 (D.R.I. 1956) (dictum).

42. *United States v. Rose*, 215 F.2d 617, 628 (3rd Cir. 1954); *United States v. Remington*, 191 F.2d 246, 250 (2d Cir. 1951).

43. 353 U.S. 657 (1957).

44. *Id.* at 668.

mony at trial need be shown,⁴⁵ and that the only prerequisite to production of the witnesses' statements was that the events and activities testified to by the witnesses at the trial be related to those in the statements.⁴⁶

Following *Jencks*, there was some speculation that the Court's decision also applied to testimony of grand jury witnesses and thus diluted the traditional secrecy requirements surrounding grand jury proceedings.⁴⁷ While *Jencks* was not specifically concerned with the production of grand jury minutes, its rationale subsequently was applied to permit disclosure of such minutes even before trial.⁴⁸ In 1958, however, Congress enacted the Jencks Act,⁴⁹ which definitively limited the

45. *Id.* at 666.

46. *Id.*

47. Sherry, *supra* note 7, at 671; Comment, *The Impact of Jencks v. United States and Subsequent Legislation on the Secrecy of Grand Jury Minutes*, 27 *FORDHAM L. REV.* 244 (1958).

48. *United States v. Zborowski*, 271 F.2d 661 (2d Cir. 1959); *United States v. Rosenberg*, 245 F.2d 870 (3d Cir. 1957). See Note, *The Aftermath of the Jencks Case*, 11 *STAN. L. REV.* 297, 320 (1959).

49. The Jencks Act, 18 U.S.C. § 3500 (1970), provides as follows:
Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(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 which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

Jencks decision by (1) only allowing discovery of pretrial statements and reports made by testifying witnesses to *government agents* and (2) omitting any reference to grand jury proceedings.⁵⁰

In the same year that Congress passed the *Jencks Act*, the Supreme Court availed itself again of the opportunity to consider the secrecy of grand jury testimony. In *United States v. Proctor & Gamble Co.*,⁵¹ the government, preparing for trial in a civil proceeding, used the minutes of a grand jury investigation of antitrust law violations. When the defendants sought to do likewise by moving for production of the grand jury transcript under Rule 34 of the Federal Rules of Civil Procedure, the trial court granted the motion.⁵² The government, however, refused to obey the order, forcing the court to dismiss the action.⁵³ On appeal, with Mr. Justice Douglas writing for the majority, the United States Supreme Court reversed, stating, "we start with a long-

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(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 and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Prior to 1970, there was no subsection (e) (3), and consequently no reference to the grand jury. See note 73 and accompanying text *infra*.

50. From its legislative history, it is clear Congress intended to exclude grand jury proceedings from the operation of the statute. 1957 *U.S. Code Cong. & Ad. News* 1861, 1862.

51. 356 U.S. 677 (1958).

52. *United States v. Proctor & Gamble Co.*, 19 F.R.D. 122 (D.N.J. 1956).

53. 356 U.S. at 679-80.

The District Court entered orders directing the Government to produce the transcript in 30 days and to permit appellees to inspect and copy it. The Government, adamant in its refusal to obey, filed a motion in the District Court requesting that those orders be amended to provide that, if production were not made, the court would dismiss the complaint. Alternatively, the Government moved the District Court to stay the order pending the filing of an appeal and an application for extraordinary writ. Appellees did not oppose the motion; and the District Court entered an amended order providing that, unless the Government released the transcript by August 24, 1956, "the Court will enter an order dismissing the complaint." As the Government persisted in its refusal, the District Court entered judgment of dismissal.

established policy that maintains the secrecy of grand jury proceedings in the federal courts.”⁵⁴ From there it was but a short step to Mr. Justice Douglas’ statement that “this ‘indispensable secrecy of grand jury proceedings’ . . . must not be broken except when there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity.”⁵⁵ The Court, referring in a footnote to both *Socony-Vacuum* and *Jencks*,⁵⁶ made it clear that it was not dealing with the narrower question of using a grand jury transcript at the trial stage to impeach a witness:⁵⁷

Those are cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly. We only hold that no compelling necessity has been shown for the *wholesale* discovery and production of a grand jury transcript under Rule 34.

When the precise question of whether the Jencks Act or *Jencks* doctrine applied to grand jury testimony was reached by the United States Supreme Court a year later in *Pittsburgh Plate Glass Co. v. United States*,⁵⁸ the Court, in a 5-4 decision, rejected the proposed extension of the doctrine and held that Rule 6(e) continued to cover the situation, as it had since its inception.⁵⁹ The burden remained on the defendant “to show that ‘a particularized need’ exists for the minutes which outweighs the policy of secrecy.”⁶⁰ Notwithstanding the fact that some of the more damaging testimony of the primary witness of the government was unsubstantiated by other witnesses, the Court concluded that the defendants had not met this burden. In a vigorous dissent, Mr. Justice Brennan accused his brethren in the majority of “exalt[ing] the principle of secrecy for secrecy’s sake.”⁶¹

This was the state of the conventional wisdom relating to disclosure of grand jury minutes until 1966 when two significant events occurred: first, Rule 16 of the Federal Rules of Criminal Procedure was amended to permit the defendant to inspect and copy any “relevant . . . recorded testimony of the defendant before a grand

54. *Id.* at 681.

55. *Id.* at 682.

56. *Id.* at 683 n.7.

57. *Id.* at 683 (italics in original).

58. 360 U.S. 395 (1959).

59. *Id.* at 398-99.

60. *Id.* at 400.

61. *Id.* at 407.

jury,"⁶² and second, *Dennis v. United States*⁶³ was decided. Rule 16(a)(3) was added to provide that upon motion of the defendant the court may order the inspection of the defendant's testimony before the grand jury. Since this provision falls within the general discovery section of the Federal Rules of Criminal Procedure, it follows that if the defendant's motion is granted, he is entitled to pretrial inspection rather than having to wait until the trial commences as he must under Rule 6. Unfortunately, the amendment did not go far enough and grant the defendant access to his own testimony as a matter of right, but subjected disclosure to the discretion of the trial court.⁶⁴ As a consequence, judicial interpretation of the rule has varied from the restrictive,⁶⁵ which places the burden on the defendant, to the liberal,⁶⁶ which shifts the burden to the government. The better view is to interpret Rule 16(a)(3) as granting defendant an absolute right to his testimony subject only to the government's right to a protective order in rare cases pursuant to Rule 16(e).⁶⁷

In *Dennis* the Supreme Court once again confronted the issue of disclosure of grand jury testimony. At trial, the defendants moved for the inspection of the grand jury testimony of four government witnesses after each witness had testified on direct examination. This motion was denied by the trial court on the ground that no particularized need had been shown. The Supreme Court reversed, stating that

62. The new text of the rule states: "Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant . . . (3) recorded testimony of the defendant before a grand jury." FED. R. CRIM. P. 16(a)(3). Such access "had ordinarily been denied prior to 1966." 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 253 at 502-03 (1969).

63. 384 U.S. 855 (1966).

64. Commenting on the loopholes remaining under the new rule, one author concluded, "Specifically, a defendant proceeding under Rule 16(a)(3) may be caused trouble by the words 'relevant,' 'recorded,' and 'may.'" Comment, *Discovery by a Criminal Defendant of his own Grand Jury Testimony*, 68 COLUM. L. REV. 311, 314 (1968).

65. *United States v. Roberts*, 264 F. Supp. 622 (S.D.N.Y. 1966).

66. *United States v. Projansky*, 44 F.R.D. 550 (S.D.N.Y. 1968); C. WRIGHT, *supra* note 62, at 503 n.38; Comment, *supra* note 64, at 316.

67. C. WRIGHT, *supra* note 62, at 179, reaches a similar conclusion: "Rule 16(a) should be read as giving a defendant an absolute right to the materials there listed, save only for the requirement that they be relevant, as the rule requires, and possible protective orders under Rule 16(e)." See note 31 *supra* for the text of Rule 16(e). See also the proposed amendment to Rule 16(a)(3) by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States changing the word "may" to "shall," thus making disclosure of the defendant's grand jury testimony mandatory. *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts*, 48 F.R.D. 547, 587-88 (1970).

recent developments making grand jury testimony available to defendants were “entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice.”⁶⁸ The Court went on to cite *Jencks*, the Jencks Act and the amendments to Rule 16 as further evidence of this trend.⁶⁹

Judicial reaction to *Dennis* split two ways, undoubtedly due to the fact that the opinion was not altogether free from ambiguity. Some courts gave it a limited interpretation,⁷⁰ while others followed the lead of *United States v. Youngblood*,⁷¹ which held, prospectively only, that the defense was entitled to that part of the witness’ grand jury testimony which related to his testimony at trial without any showing of particularized need.

IV. THE JENCKS ACT AMENDMENT AND BEYOND

Three years later, the *Youngblood* rationale was adopted by Congress in the Organized Crime Control Act of 1970.⁷² Specifically, this statute amended the Jencks Act to cover grand jury testimony of witnesses who testify at trial, by adding to the definition of the word “statement” in subsection (e) the following: “(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.”⁷³ This amendment grants the defendant the same rights in connection with the grand jury testimony of witnesses as he had had with respect to statements and reports made by government witnesses to agents of the United States since the enactment of the statute.⁷⁴

68. 384 U.S. at 870.

69. *Id.* at 870-71.

70. *Stewart v. United States*, 395 F.2d 484 (8th Cir. 1968); *United States v. Hensley*, 374 F.2d 341 (6th Cir. 1967); *Walsh v. United States*, 371 F.2d 436 (1st Cir. 1967). In each of these cases, the appellate court involved interpreted *Dennis* as still requiring the defendant to carry the burden of showing a “particularized need” for the production of the grand jury records, and each court held that the defendants before it had not shown such need.

71. 379 F.2d 365 (2d Cir. 1967).

72. Organized Crime Control Act of 1970, Pub. L. No. 91-452, Title I, § 102, 84 Stat. 922. For the legislative history, see 1970 U.S. Code Cong. & Ad. News 4007, 4017.

73. 18 U.S.C. § 3500(e)(3) (1970). See note 49 *supra* for text.

74. This amendment overrides the effect of *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959). See notes 58-61 and accompanying text *supra*.

The obvious weaknesses in the amendment lie in (1) the discretion to record the testimony of grand jury witnesses, which discretion generally seems to reside with the United States Attorney,⁷⁵ (2) the use of hearsay evidence to evade the thrust of the new right,⁷⁶ and (3) the possibility of withholding key witnesses from the grand jury entirely.⁷⁷ Of the three possibilities for abuse, by far the worst is the lack of recordation; the other two possibilities would be obvious and subject to court control. As it stands now, the practice of reporting grand jury testimony varies a great deal from district to district⁷⁸ and can be expensive. We are confronted with the cold truth that there is no specific federal constitutional or statutory mandate, or uniform rule⁷⁹ requiring recordation of grand jury testimony; and at least in the Ninth Circuit⁸⁰ no local court rule exists except in the Northern District of California,⁸¹ where as a practical matter it is complied with only when the United States Attorney so wishes.⁸² This custom of allowing the government to decide the issue of recordation seems to be fairly representative in the Ninth Circuit.⁸³ In the absence of a written rule, it is

75. See note 83 *infra*.

76. This possibility was avoided in *United States v. Arcuri*, 282 F. Supp. 347 (E.D.N.Y. 1968) where the court stated that the indictment would be dismissed if hearsay evidence was presented to the grand jury when direct evidence was available.

77. This practice could be prohibited by court decision similar to that referred to in note 76 *supra*. See the dissent in *United States v. Beltram*, 388 F.2d 449, 451 (2d Cir. 1968).

78. See notes 84-86 and accompanying text *infra*.

79. *Campbell v. United States*, 368 F.2d 521, 522 (10th Cir. 1966); *United States v. Cianchetti*, 315 F.2d 584, 591 (2d Cir. 1963); *United States v. Ciampa*, 290 F.2d 83, 85 (2d Cir. 1961) (government must have a transcript of its witness' testimony before the grand jury available when the witness is called at the trial, but this duty applies only if the grand jury testimony has been recorded). *Cf.* 28 U.S.C. § 753(b)(3) (1970) (court reporters shall attend "such other proceedings as a judge of the court shall direct or as may be required by rule or order of court or as may be requested by any party to the proceedings"). FED. R. CRIM. P. 16 is silent on reporting, while Rule 6(d) is permissive.

80. The authors of this report contacted each district court in the Ninth Circuit between June and September, 1971, in order to ascertain how many of such districts, if any, had a written rule or rules relating to grand juries with special emphasis on reporting the testimony of witnesses. We received a reply from every district. Specific letters will be referred to in notes 82 to 91 *infra*. This data is now over a year old and it is entirely possible that some districts have amended their rules since then to include some provision for recordation.

81. Rule 18 of Local Rules of Practice, United States District Court for the Northern District of California, reads as follows: "In all proceedings before the federal grand jury a reporter shall be present and shall report the proceedings in the same fashion as trial proceedings in open court are reported. Transcriptions will be prepared and distributed pursuant to order of the court upon good cause shown."

82. Letter from United States District Judge Alfonso J. Zirpoli, June 14, 1971.

83. Letters from United States District Judges Alfonso J. Zirpoli, June 14, 1971; Roger D. Foley, July 19, 1971; Edward J. Schwartz, July 21, 1971; Gus J. Solomon, July 23, 1971 and Martin Pence, July 29, 1971.

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not surprising that recording in this circuit runs the spectrum from “never” in the District of Alaska⁸⁴ to “always” in the Eastern District of Washington.⁸⁵ In between these extremes, the practice is widely divergent.⁸⁶ Even when testimony is recorded, the practice of providing the defendant with a transcript varies from “always” in Idaho and Nevada⁸⁷ to “never” in the Eastern and Southern Districts of California and Hawaii unless there is a showing of “particularized need.”⁸⁸ In Montana and the Central District of California disclosure depends “on the facts in a particular case.”⁸⁹ In some instances, only the testimony of particular witnesses is recorded;⁹⁰ in others, only that of first hand witnesses is recorded, presumably “to guard against retraction.”⁹¹

Since the Jencks Act now permits the defendants to obtain the grand jury testimony of witnesses at trial if such testimony has been recorded,⁹² it seems somewhat anomalous under our adversary system to place the decision of recordation in the hands of the United States Attorney,⁹³ one of the combatants.⁹⁴ In August, 1965, the American Bar Association Special Committee on Federal Rules of Procedure recommended that Rule 6 of the Federal Rules of Criminal Procedure be amended to require disclosure of grand jury minutes after indictment and that “a reporter transcribe the minutes of all proceedings of grand jury which are accusatorial in nature [and] that the cost of such transcript be borne by the government of the United States”⁹⁵

84. Letter from United States District Judge Raymond E. Plummer, Aug. 6, 1971.

85. Letter from United States District Judge Charles L. Powell, Aug. 6, 1971.

86. The Central and Eastern Districts of California and the District of Montana generally do not record, as per letters from United States District Judges Albert Lee Stephens, Jr., Aug. 12, 1971, Thomas J. MacBride, Sept. 9, 1971, and Russell E. Smith, July 14, 1971, respectively. The Western District of Washington generally does record. Letter from United States District Judge George H. Boldt, July 23, 1971.

87. Letters from United States District Judges Ray McNichols, July 20, 1971, and Roger D. Foley, July 19, 1971, respectively.

88. Letters from United States District Judges Thomas J. MacBride, Sept. 9, 1971, Edward J. Schwartz, July 21, 1971, and Martin Pence, July 29, 1971, respectively.

89. Letters from United States District Judges Russell E. Smith, July 14, 1971, and Albert Lee Stephens, Jr., Aug. 12, 1971, respectively.

90. Letter from United States District Judge James A. Walsh, July 15, 1971.

91. Letter from United States District Judge Ray McNichols, July 20, 1971.

92. See note 73 and accompanying text *supra*.

93. See note 83 and accompanying text *supra*.

94. In *Williams v. Florida*, 399 U.S. 78, 82 (1970) the Court made this pertinent comment: “The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.”

95. *Report of A.B.A. Special Committee on Federal Rules of Procedure*, 38 F.R.D. 95, 106 (1965).

Such an amendment would not only benefit the defendant, but, it is submitted, would also have a salutary effect in controlling overreaching or improper examination of witnesses by the prosecution.⁹⁶ United States District Judge Raymond J. Pettine puts it this way:⁹⁷

In no way does recordation inhibit the grand jury's investigation. True, recordation restrains certain prosecutorial practices which might in its absence be used, but that is no reason not to record. Indeed, a sophisticated prosecutor must acknowledge that there develops between a grand jury and the prosecutor with whom the jury is closeted a rapport—a dependency relationship—which can easily be turned into an instrument of influence on grand jury deliberations. Recordation is the most effective restraint upon such potential abuses.

If the recording of grand jury testimony is to be seriously considered however, perhaps some concern should also be given to the cost of such a sweeping change in basic procedures. In fiscal year 1971, a total of 41,290 original criminal proceedings were commenced in all the districts of the United States, of which 28,666 or 69.4 percent were originated by indictment.⁹⁸ A more accurate percentage of cases commenced by indictment would appear to be 84 percent, however, since only 34,111 of the 41,290 cases were felonies. The total cost to the government for providing 409 court reporters to the federal judiciary in fiscal 1972 was estimated at \$8,000,000, not including office space in federal buildings.⁹⁹ Although the authors were unable to obtain sufficient data to estimate with any degree of accuracy what the costs of reporting and transcribing every federal grand jury proceeding would be,¹⁰⁰ we nevertheless suggest that it is unlikely, in view of the fact that in fiscal 1970 there were 16,032 cases tried, of which

96. 8 J. MOORE, FEDERAL PRACTICE, § 6.02(2) at 6-11 (1970).

97. *United States v. Gramolini*, 301 F. Supp. 39, 41-42 (D.R.I. 1969).

98. Letter from Edward V. Garabedian, Assistant Chief for Finance, Division of Business Administration, Administrative Office of the United States Courts, Oct. 1, 1971.

99. *Id.*

100. There do not appear to be any central statistics showing the number of grand jury proceedings reported, whether in whole or in part, the number of days spent on such proceedings and the time required to transcribe those portions of testimony currently demanded by United States Attorneys. Obviously, this data would be needed in order to determine what proportion of the average court reporter's time is spent on such endeavors. Moreover, the practice prior to the Jencks Act amendment, which became effective several months after fiscal 1971 began, may not be indicative of what we can expect in the future.

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9,440 were civil,¹⁰¹ that the total expense of such an enterprise would amount to more than 50 to 60 percent of the current budget for court reporters (not including office space).

Of course, it is entirely possible that electronic reporting may in time become so improved¹⁰² that such costs could be reduced significantly. However, whether we continue to use stenographic recordation or not, "the cost is clearly justified by the improved administration of criminal justice."¹⁰³

We have come a long way since Learned Hand made his classical statement on grand jury discovery in 1923.¹⁰⁴ Prior to the trial, the defendant can obtain copies of any written or recorded statements or confessions made by him which are in the government's possession, as well as his own recorded testimony made before a grand jury.¹⁰⁵ Subject to the qualification that the pretrial testimony has been recorded, the defendant may also obtain the grand jury testimony of government witnesses who testify during the trial.¹⁰⁶ What more could a defendant ask for now that he has reached this best of all possible situations in this best of all possible worlds? Well, for one thing, he could ask that all grand jury testimony be recorded,¹⁰⁷ and for another, that he be given a transcript thereof prior to the trial. That, at least, would place him more on a par with the prosecution. Furthermore, it is generally conceded that discovery is most effective when it occurs at the

101. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 1970 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table C8 at 255.

102. *But see* Boyko, *The Case Against Electronic Courtroom Reporting*, 57 A.B.A.J. 1008 (1971).

103. *United States v. Gramolini*, 301 F. Supp. 39, 42 (D.R.I. 1969).

104. *See* note 35 *supra*.

105. FED. R. CRIM. P. 16(a). *See* note 31 *supra* for text of Rule 16(a).

106. 18 U.S.C. § 3500(e)(3) (1970).

107. *See United States v. Thoresen*, 428 F.2d 654, 665-66 (9th Cir. 1970), where the Ninth Circuit Court of Appeals approved the denial by the trial court of the defendants' motion for an order compelling the presence of a court reporter at an upcoming grand jury proceeding. The appellate court stated that the rule in the Ninth Circuit is that recording or transcribing of grand jury testimony is permissive, not mandatory, and that only where there is a clear indication of prejudice will a refusal to honor an advance request that a court reporter be present result in a dismissal. Judge Ely, in a concurring opinion, took exception to the majority opinion for failing to disapprove the refusal on the part of the prosecution to allow reporting of the grand jury proceedings, expressing the personal belief that transcripts of grand jury proceedings should be made available to those indicted and that in the future such would become a matter of right with appropriate safeguards. *Id.* at 668.

pretrial stage where it can be used to prepare for the trial itself.¹⁰⁸ This philosophy, of course, underlies the provisions of Rule 16. Why should discovery of statements and grand jury testimony be dealt with differently from discovery of tangibles? The traditional reasons advanced for this distinction, found in *United States v. Proctor & Gamble Co.*,¹⁰⁹ are as follows:

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

As Wright,¹¹⁰ Calkins,¹¹¹ and Louisell¹¹² have pointed out, however, once the investigation is completed, the indictment returned and the defendant arrested, some of these grounds for secrecy become inapplicable. Clearly this is true of the first, second and fifth reasons. With respect to the argument that secrecy prevents suborning perjury or tampering with prospective witnesses at the trial, the following points have been made in opposition: since the names of witnesses are provided to the defendant prior to the trial in most jurisdictions, anyone wishing to suborn or tamper with those witnesses can do so without having access to what they said before the grand jury;¹¹³ secondly, as stated by Mr. Justice Brennan, "how can we be so positive

108. Louisell, *supra* note 28, at 78; Traynor, *supra* note 32; Semerjan, *The Right of Confrontation*, 55 A.B.A.J. 152, 156 (1969).

109. 356 U.S. 677, 681 n.6 (1958). This summary was first set out in *United States v. Amazon Industrial Chemical Corp.*, 55 F.2d 254, 261 (D. Md. 1931). It is quoted with approval in *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954). See also C. WRIGHT, *supra* note 62, at 170 n.86.

110. C. WRIGHT, *supra* note 62, at 170-71.

111. Calkins, *supra* note 7, at 458-62.

112. Louisell, *supra* note 28, at 70-71.

113. Calkins, *supra* note 7, at 462.

criminal discovery will produce perjured defenses when we have in this country virtually shut the door to all such discovery?"¹¹⁴

Of course, the rule with respect to witnesses' names does not exist in the federal courts except in cases of treason or capital offenses,¹¹⁵ and as a practical matter it would appear that most courts do not require the United States Attorney to make such information available to the defendant.¹¹⁶ It is worthy of note, however, that the ABA Project on Standards for Criminal Justice has proposed that "the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial"¹¹⁷ be discoverable as a matter of right. As for Mr. Justice Brennan's question above, it is difficult to answer. To quote Dean Wigmore, "the possibility that a dishonest accused will misuse such an opportunity is no reason for committing the injustice of refusing the honest accused a fair means of clearing himself."¹¹⁸ We might even go one step further and argue that the run of the mill defendant, whether guilty or not, should have the right to put on the very best defense possible, including the impeachment of government witnesses. Moreover, the trial courts have power to issue protective orders tailored to meet the particular situation where the prosecution contends that the safety of prospective witnesses may be jeopardized, or where intimidation, tampering or other improper conduct appears to be a distinct possibility.¹¹⁹ In addition, if the defendant or his counsel should attempt to tamper with government witnesses, the government could make greater use of the criminal sanction against obstructing justice.¹²⁰

Concerning the fourth reason—the encouragement of free and un-

114. Brennan, *Remarks on Discovery*, 33 F.R.D. 56, 62 (1963).

115. 18 U.S.C. § 3432 (1970). The law as it now stands appears to be anomalous to say the least, for in cases of treason or a capital offense the defendant is permitted access to the names of government witnesses three days prior to trial, but in less serious crimes where the defendant would seem to have less reason to attempt to influence such witnesses he has no right to the names at all.

116. *United States v. Conder*, 423 F.2d 904 (6th Cir. 1970); *United States v. Glass*, 421 F.2d 832 (9th Cir. 1969); *United States v. Eagleston*, 417 F.2d 11 (10th Cir. 1969); *Edmondson v. United States*, 402 F.2d 809 (10th Cir. 1968).

117. AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 2(1)(a)(i) (Tent. Draft 1969). See also *Preliminary Draft*, *supra* note 67, at 589-90.

118. Brennan, *supra* note 114, at 63.

119. *Dennis*, 384 U.S. at 875. Although Rule 6 does not so provide, it appears that the Supreme Court has concluded that Rule 16(e) covers the situation.

120. 18 U.S.C. § 1503 (1970).

trammled disclosures of crimes by persons with such information—the witness must realize when he is first contacted by the prosecution that any testimony he gives to the grand jury will in most cases also have to be given at the trial. Any prosecuting attorney who did not so advise a key government witness, who due to ignorance or naiveté failed to recognize this fact, would seem to be remiss in his duty.

A few states, by statute,¹²¹ provide that a defendant is entitled to a copy of the grand jury minutes. One of these, California, has been doing this ever since 1897.¹²² In view of this long experience and the fact that this paper was being prepared for the Ninth Circuit Judicial Conference, the authors prepared a questionnaire¹²³ in June, 1971, which was sent to every district attorney in that state. Of 60 such questionnaires, we received 40 replies, to wit: 18 from counties under 100,000 in population, 12 from those counties between 100,000 and 500,000, five from those counties between 500,000 and 1,000,000, four from those counties between one and two million and one from a county over two million. The first three questions asked for both objective and subjective answers concerning tampering with witnesses (Question 1), fabrication of an alibi (Question 2), and the reluctance of witnesses to testify before the grand jury (Question 3) “during the last five years.” Almost three to one (29-11) the respondents stated that they had no actual knowledge of tampering, while 23-14 believed no tampering had occurred. Of those who stated that they were aware of tampering, such misconduct had occurred in only 1.75 percent of their indictments. 23 had no knowledge of an alibi having been fabricated, while 15 had such knowledge. However, only 16 were of the opinion that no defendant had done so while 20 believed otherwise. Of the large minority of district attorneys who in fact had encountered fabricated alibis, the percentages of cases in which each believed fabricated alibis were present ranged from one through 40 with an average of three percent. The figures relating to Question No. 3, dealing with whether witnesses had been reluctant to testify because

121. CAL. PENAL CODE § 938.1 (West 1970); IOWA CODE § 772.4 (1962); KY. REV. STAT. § 516 (1970); MINN. STAT. ANN. § 628.04 (1947). See also Calkins, *supra* note 7, at 466 n.42. Apparently, at the time of Calkins' article four other states also permitted pretrial disclosure of grand jury minutes in order to prepare for trial. *Id.* at 465 n.38.

122. CAL. PENAL CODE § 938.1 (West 1970). In 1927 this practice became compulsory. Calkins, *supra* note 7, at 466 n.42.

123. See Appendix to this article *infra*.

of disclosure provisions, were almost evenly divided: 21 yeas to 19 nays based on experience, and 16 versus 17 based on opinion.¹²⁴ Again, those district attorneys who had encountered reluctant witnesses estimated that this had occurred in only five percent of their cases. 28 opined that California's disclosure provisions were "beneficial," with ten concluding they were "detrimental" to the criminal justice system. 34 out of 39 felt that "aside from tampering with witnesses, fabricating of defenses and causing witnesses to become reluctant to testify before the grand jury," there were no other reasons for refusing to provide a defendant with a copy of the grand jury transcript.¹²⁵ Of the five who felt there were other reasons, two listed "publicity," one "retaliation," one merely opposed giving the defendant the testimony of witnesses who would not be used at the trial and whose testimony would be of no help to the defendant and the fifth was of the opinion that it could affect efficient prosecution in those situations where one defendant was in custody while the other was still at large. The average number of felony prosecutions initiated by indictment was 7.38 percent in counties under 100,000 and 7.45 percent, 3.2 percent, 7.75 percent and under one percent, respectively, for the other categories. These figures are significantly lower than the federal figure of 84 percent in fiscal 1971.¹²⁶

One conclusion drawn from this survey is that the three major reasons generally offered in support of the policy of nondisclosure of grand jury testimony are based largely on unfounded fears. Neither tampering with witnesses, fabrication of alibis nor reluctance of witnesses to testify before the grand jury seems to be a problem of any significance in California. Moreover, the overwhelming majority felt there were no other reasons for denying a defendant a copy of the entire transcript. And, even with respect to the minority who believed publicity, retaliation and at-large co-defendants were a problem, these matters could be handled by protective orders. For example, counsel for both sides and the defendant could be directed by the court not to divulge to the press or others the contents of the grand jury transcript; the testimony of key witnesses could be preserved by deposition, thus

124. A number of those reporting experiences of witness reluctance failed to express an opinion.

125. A somewhat humorous note was provided by one reply: "Aren't those reasons enough?"

126. See text immediately following note 98 *supra*.

diminishing the possibility of retaliation prior to trial;¹²⁷ and the in-custody co-defendant's receipt of the transcript could be delayed to a point just prior to trial. Finally, the fact that 74 percent of the district attorneys, who have been part of a system in which complete pretrial disclosure is made to the defendant, are of the opinion that such disclosure is beneficial to the administration of criminal justice must be worthy of that additional consideration generally accorded to judgments based on experience.

Beyond the issue of scope of discovery is the question of *when* discovery should be allowed. Should the defendant have full pretrial discovery rights, or should he only be allowed a copy of a trial witness' grand jury testimony sometime after the trial has actually begun?

As far back as 1957 the California Supreme Court extended the right of the defendant in a criminal case to pretrial discovery.¹²⁸ Concededly, this case dealt only with the defendant's own signed statement and a transcript of a recording to the police, but *Funk v. Superior Court*¹²⁹ broadened this right to include statements made to the prosecution by others. Thus, we see that in 1959 California had passed somewhat beyond the limited and restrictive confines of the federal practice under the Jencks Act. Nevertheless it remained for the court in *Cash v. Superior Court*¹³⁰ to articulate the rationale of pretrial discovery in criminal cases when it stated: "the basis for requiring pretrial production of material in the hands of the prosecution is the fundamental principle that an accused is entitled to a fair trial."¹³¹ In 1964, Dean A. Kenneth Pye argued for pretrial discovery in these terms:¹³²

Every other civilized nation permits broad discovery. Our military law does so as well. Apparently the existence of discovery has not occasioned a total breakdown of any of these systems. I am sure that those of you in criminal practice are aware of the practice in our Court of General Sessions where as a result of the counter hearing there is complete discovery in almost every case. I have not heard it suggested

127. Retaliation after trial, of course, is not affected by pretrial disclosure.

128. *Powell v. Superior Court*, 48 Cal. 2d 704, 312 P.2d 698 (1957).

129. *Funk v. Superior Court*, 52 Cal. 2d 423, 340 P.2d 593 (1959).

130. *Cash v. Superior Court*, 53 Cal. 2d 72, 75, 346 P.2d 407, 408 (1959).

131. *Id.* at 75, 346 P.2d at 408.

132. Pye, *The Defendant's Case for More Liberal Discovery*, 33 F.R.D. 82, 91-92 (1960).

that the rate of perjury is higher in the Court of General Sessions than it is in the District Court.

And Mr. Justice Jackson has stated that at the Nuremberg war trials objection was made by the Soviet attorneys to the limited discovery permitted by the United States as being unfair to defendants.¹³³

In this day when most defendants are indigent and many defense counsel are appointed by or affiliated with defender offices,¹³⁴ Dean Pye suggests that fears of bribery and intimidation are somewhat unreal. Furthermore, he acknowledges his confidence in "most retained counsel"¹³⁵ and adds that if dishonest and unscrupulous attorneys are found, they should be dealt with by bench and bar. Dean Pye concludes that: "We should not, however, eliminate discovery to all defendants upon the supposition that some counsel cannot be trusted."¹³⁶ As for organized crime, the dangers of perjury, intimidation and bribery exist without discovery.¹³⁷ And, as suggested above, the court can refuse discovery in such cases or protect the prosecution's case by taking the key witness' deposition. If such a witness should be eliminated prior to trial, the testimony could still be used to convict, and, possibly of greater importance from the practical point of view, organized crime might hesitate to take punitive measures against such a witness if the reason for the witness' failure to testify in person might, directly or indirectly, come to the jury's attention. The use of protective orders, criminal sanctions and pretrial depositions of key witnesses would seem to be the answer to most, if not all, of the arguments against pretrial discovery.

133. Bull, *Nurnberg Trial*, 7 F.R.D. 175, 178 (1947), quotes Mr. Justice Jackson as follows:

The Soviet Delegation objected to our practice on the ground that it is not fair to defendants. Under the Soviet System when an indictment is filed every document and the statement of every witness which is expected to be used against the defendant must be filed with the court and made known to the defense. It was objected that under our system the accused does not know the statements of accusing witnesses nor the documents that may be used against him, that such evidence is first made known to him at trial too late to prepare a defense, and that this tends to make the trial something of a game instead of a real inquest into guilt. It must be admitted that there is a great deal of truth in this criticism. We reached a compromise by which the Nurnberg indictment was more informative than in English or American practice but less so than in Soviet and French practice.

134. Pye, *supra* note 132, at 86.

135. *Id.* at 91.

136. *Id.*

137. *Id.*

CONCLUSION

It is submitted that the present status of disclosure of grand jury proceedings under the cases, Rule 16(a), and the Jencks Act is inadequate in two respects: (1) except for the defendant's own testimony, he must wait until after the government witness has testified for a copy of such witness' grand jury testimony, and (2) he is entitled to that only if such testimony has been recorded. The Jencks Act amendment with respect to grand jury testimony suffers from the same defects as the rest of the statute in that it is time consuming and cumbersome. But of even greater significance is the fact that it precludes adequate pretrial preparation by defense counsel, thereby giving a decided advantage to the prosecution. All other items of discovery under Rule 16 are subject to pretrial disclosure, but the testimony and statements of prosecution witnesses still languish under the Jencks Act rule. The reasons set out in *Proctor & Gamble*¹³⁸ for nondisclosure have been demolished time and again,¹³⁹ but the strange inertia of the law has prevented their complete demise. We believe that pretrial disclosure of grand jury testimony is called for now, that all federal grand jury proceedings should be recorded, and that the courts stand ready to deter any improper conduct on the part of defendants or defense counsel by the use of protective orders, depositions and the criminal sanction if appropriate. Specifically, we recommend that Rule 6 be amended as follows:¹⁴⁰

(1):

(e) **SECRECY OF PROCEEDINGS AND DISCLOSURE.** Disclosure

138. See text accompanying note 109 *supra*.

139. See text accompanying notes 110-20 *supra*.

140. New matter is underlined; matter to be omitted is bracketed.

In making this recommendation we are fully aware of the statement in *Palermo v. United States*, 360 U.S. 343, 350 (1959) to the effect that the Jencks Act provides the exclusive means for discovery of statements coming within its purview. Traynor, *supra* note 32, at 241; Borillo, *Section 3500: Justice on a Tightrope*, 45 MARQ. L. REV. 205, 218-20 (1961); 47 MINN. L. REV. 693, 698-99 (1963); 58 MICH. L. REV. 888, 890-93 (1960); *but see*, *United States v. Murray*, 927 F.2d 812 (2d Cir. 1962), *cert. denied*, 369 U.S. 828 (1962); *United States v. Taylor*, 25 F.R.D. 225, 228 (E.D.N.Y. 1960). Nevertheless, we believe that the Supreme Court has the power to modify the Jencks Act through its rule making power under 18 U.S.C. § 3771 (1970), since no amendment to the rules becomes effective until the expiration of 90 days after it has been reported to Congress. If Congress takes no action on the amendment by that time the amendment supersedes all laws in conflict therewith.

Pretrial Disclosure of Federal Grand Jury Testimony

of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. After the return of an indictment and after the defendant has been apprehended, a transcript of all the testimony before the grand jury shall be provided to the defendant or defense counsel, without cost, not less than thirty days prior to the commencement of the trial of said defendant. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding [, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.]. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(2): A new subsection (f) be added, with the present subsections (f) and (g) being designated as (g) and (h), respectively:

(f) PROTECTIVE ORDERS, Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or may make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*, the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(3): A new subsection (i) be added:

(i) All testimony presented before the grand jury in the investigation of criminal causes shall be recorded, and in all cases where an indictment is returned such testimony shall be transcribed at government expense within thirty days of the indictment unless otherwise ordered by the court for good cause shown.¹⁴¹

141. Although the Ninth Circuit Judicial Conference tabled the matter of approving

We suggest that these proposals are based on sound jurisprudential policies, and that by making grand jury testimony subject to pretrial disclosure, thus placing it on a par with discovery under Rule 16 while at the same time emphasizing the government's right to protective orders when necessary, we have added the letter of the law to the spirit exemplified in *Dennis*, to wit: "disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."¹⁴²

or disapproving of this report at its annual convention in Pasadena, California in July 1972, it did express itself informally on the proposed amendments to Rule 6 as follows:

YES NO ABSTAIN

37	40	0	Proposed Amendment to Rule 6(e).
42	20	15	Proposed Amendment in the form of a new sub-section, Rule 6(f).
63	13	1	Proposed Amendment in the form of a new sub-section, Rule 6(i).

It should be noted that only 77 ballots were cast on these questions. In earlier balloting on the exclusionary rule, 198 ballots were cast. Thus less than 40 percent of the Conference membership voted on the above proposals.

142. 384 U.S. at 870.

APPENDIX

CALIFORNIA GRAND JURY QUESTIONNAIRE*

1. During the last five years has any grand jury witness ever been tampered with (intimidated, bribed or been suborned to commit perjury) as a result of the grand jury disclosure provisions of the California Penal Code?

(a) To your knowledge or in the experience of your office:

NO YES Under 1%, 3%, 5%, 10%, 15%, 20%, 30%, 40%, 50%, over 50%.

(b) In your opinion:

NO YES Under 1%, 3%, 5%, 10%, 20%, 30%, 40%, 50%, over 50%.

Comments: _____

2. During the last five years, has any defendant fabricated an alibi or other defense as a result of said disclosure provisions?

(a) To your knowledge or in the experience of your office:

NO YES Under 1%, 3%, 5%, 10%, 15%, 20%, 30%, 40%, 50%, over 50%.

(b) In your opinion:

NO YES Under 1%, 3%, 5%, 10%, 15%, 20%, 30%, 40%, over 50%.

Comments: _____

3. During the last five years, has any witness been reluctant to testify before the grand jury because of said disclosure provisions?

(a) To your knowledge or in the experience of your office:

NO YES Under 1%, 3%, 5%, 10%, 15%, 20%, 30%, 40%, 50%, over 50%.

(b) In your opinion:

NO YES Under 1%, 3%, 5%, 10%, 15%, 20%, 30%, 40%, 50%, over 50%.

Comments: _____

4. In your opinion are said disclosure provisions beneficial or detrimental to the criminal justice system?

BENEFICIAL

DETRIMENTAL

Comments: _____

5. In your opinion, aside from tampering with witnesses, fabricating of defenses, and causing witnesses to become reluctant to testify before the

* Where appropriate, please *circle* all answers, including percentages. Although all replies will be kept strictly confidential by the director of this survey, we will understand if you would rather not answer Question 7.

grand jury, are there any other reasons for not providing a defendant with a copy of the transcript of grand jury proceedings?

NO

YES

If your answer is "YES" please set forth specific reasons therefor.

6. What percentage of felony cases in your office are initiated by grand jury indictment?

_____ %

7. Name of County _____.

8. Size of County—
- a) Under 100,000 people
 - b) Between 100,000—500,000
 - c) Between 500,000—1,000,000
 - d) Between 1,000,000—2,000,000
 - e) Over 2,000,000