THE GRAND JURY
Of
TOMORROW

New Life for An Archaic Institution

COUNCIL FOR COURT EXCELLENCE
DISTRICT OF COLUMBIA GRAND JURY STUDY COMMITTEE FINAL REPORT

Recommendations To Improve the Grand Juries Of Washington, D.C.
July 2001

July 2001

Dear Fellow Citizen:

Over twenty years ago the D.C. Bar's Horsky Committee recommended that a broad scale study be undertaken of the grand jury in the District of Columbia. The Bar group proposed that the focus be on improving the relevance and effectiveness of this important yet little understood bedrock judicial branch institution. The report that follows addresses this twenty year-old challenge.

Entitled *The Grand Jury of Tomorrow*, this report was researched and developed by a special committee under the sponsorship of the Council for Court Excellence. Directed to the judiciary, the legislature, the bar, and the broader community, the report makes a variety of constructive and practical proposals for improving the grand jury process and system in the local and federal courts in the District of Columbia. Included are suggestions to improve the structure, organization, and selection of the grand jury; the independence and effectiveness of the grand jury; the protection of grand jury targets and witnesses; and finally grand jurors' safety, comfort and convenience.

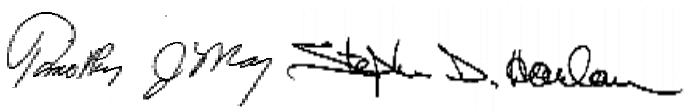
For many important reasons, the grand jury is a judicial branch institution that operates largely in secrecy. Yet its procedures, actions, and powers can have lasting effects on grand jurors, on individuals and businesses appearing before grand juries, and on our community and nation. Because of the tremendous inherent power the grand jury has, and the fact that it operates largely out of the public eye, it is even more important that our grand jury system be independently examined from time to time; that the grand jury function fairly and impartially; that it enjoy public confidence and respect; and that grand juries' independence be preserved and strengthened.

On behalf of the Board of Directors of the Council for Court Excellence, we express our sincere appreciation to the members of the D.C. Grand Jury Study Committee for all their work and study to prepare this report, and for the quality of their efforts. We were fortunate to attract such a variety of talent and competency for this initiative, and we are especially pleased to have had a number of former grand jurors participate directly in the Committee's efforts. Special thanks are due to the distinguished Co-Chairs of the Council for Court Excellence's D.C. Grand Jury Project – the Honorable John Garrett Penn, Senior Judge, U.S. District Court for D.C., and Michael D. Hays, Esquire.

The Council for Court Excellence especially acknowledges and thanks the Clark-Winchcole Foundation, and the annual contributors to the Council for Court Excellence for their financial support of this two-year study. We also wish to thank the Bureau of National Affairs, Inc. for printing this final report.

We commend this document to you for your review, and we invite your attention to its constructive reform proposals.

Sincerely,



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DISTRICT OF COLUMBIA GRAND JURY STUDY COMMITTEE

NOTE FROM THE CO-CHAIRS

We are very pleased to share with you this final report of the Council for Court Excellence District of Columbia Grand Jury Study Committee. The Committee's Report has been prepared under the active sponsorship of the Council for Court Excellence, a non-partisan law-related civic organization based in the Nation's Capital.

The Report that follows addresses both far reaching legal reform proposals as well as recommendations to enhance the quality of the grand jury experience for individual citizen grand jurors. As with the Council for Court Excellence's earlier February 1998 major petit jury policy reform report, *Juries for the Year 2000 & Beyond*, this grand jury study examines issues and policies in both the Superior Court of the District of Columbia and the United States District Court for the District of Columbia.

The quality and substance of the District of Columbia Grand Jury Study Committee's research and deliberations have been materially enhanced by the participation on the Committee of a number of former D.C. Superior Court grand jurors. (At the express request of the then United States District Court Chief Judge, Norma Holloway Johnson, no former federal district court grand juror participated on this Study Committee). In addition to former grand jurors, our Committee also included a number of judges, criminal defense lawyers, former prosecutors, and academics. We regret that the United States Attorney for the District of Columbia withdrew from service on the Committee early in our work.

The organization of this report includes a brief project overview, an explanation of the role of the grand jury in the criminal justice system, and summary descriptions of the local and federal grand jury process in the District of Columbia. The body of the *Report of the District of Columbia Grand Jury Study Committee* includes twenty-three individual recommendations together with supporting text, any dissents, and suggested implementation provisions. Several appendices are also included.

We wish to acknowledge and individually thank the members of the District of Columbia Grand Jury Study Committee for the wisdom, insight, and diligence they brought to the development and formulation of this report. Senior Judge Henry Greene, in particular, helped above and beyond the call of duty with final copy editing of the final report. We especially recognize and thank Ms. Susan Lynch, Esquire, Committee Reporter, for her extraordinary assistance. We also recognize and thank Samuel F. Harahan, Executive Director, and the staff of the Council for Court Excellence for their helpful guidance and support of the Committee's work from beginning to end.

A draft of this final report was submitted for review to the chief judges of the D.C. Superior Court and the U.S. District Court for the District of Columbia, to the United States Attorney for D.C. and to the D.C. and Federal Public Defenders. We sincerely appreciate the thoughtful and constructive comments offered to the draft final report by these respective courts and agencies. During the course of the Committee's year long deliberations, the main issues raised in these letters were considered by the Study Committee. The reader will find specific discussions throughout this report regarding many of the individual issues raised by the courts, the prosecution and the defense agencies in their latest replies. Appendix H contains copies of responses received from these entities as of the time this report went to press.

In conclusion, we commend this Report and its reform proposals to the Chief Judges and other members of the judiciary, to practicing lawyers and academics, to members of the legislative branch, and to our fellow citizens.

Honorable John Garrett Penn
Senior Judge, U.S. District Court for the District of Columbia
Co-Chair
District of Columbia Grand Jury Study Committee

Michael D. Hays, Esquire
Co-Chair
District of Columbia Grand Jury Study Committee

PROJECT OVERVIEW

The grand jury is one of the most powerful, yet least understood institutions in our democracy. In the District of Columbia local and federal trial courts, the grand jury is composed of between sixteen and twenty-three citizens, selected from the same jury lists as the petit (or trial) jurors. As an institution, the grand jury functions quite differently from the trial or petit jury. Grand juries operate in secrecy. The rule of secrecy is designed to serve important public policy considerations, including protecting the identity of witnesses, preventing those facing indictment from absconding, and preserving the reputations of the innocent. Grand jurors are thus precluded by law from unauthorized disclosure of grand jury proceedings. The grand jury does not issue press releases or status reports. Yet when the grand jury formally acts, it speaks with profound power — a criminal indictment.

Traditional grand jury secrecy has limited scrutiny of even non-confidential aspects.

Because the grand jury's proceedings are by law shrouded in secrecy, even its non-confidential aspects seldom enjoy the independent scrutiny other institutions in our democracy routinely receive. Current grand jury practice poses a number of issues that deserve attention. For example, grand jury service in the Nation's Capital imposes an enormous time burden of from four weeks to eighteen months on citizens selected to serve. Are there more efficient ways that it can perform its work, in turn minimizing greatly this burden on citizens? Also, although traditionally composed of between sixteen and twenty-three people, could grand juries in D.C. perform their functions equally well with fewer citizens, as is the case in state court grand juries in neighboring Virginia and many other states?

Can burdens on jurors be minimized by new efficiencies, such as fewer jurors and shorter terms?

Grand jury has become arm of prosecutor. Can original balance be restored through changes such as witness' right to counsel in grand jury room, and mandatory presentation of exculpatory evidence?

Moreover, although originally established as an institution designed to protect citizens from the power of the state, the grand jury is commonly viewed today as an arm of the prosecutor. Indeed, in the federal system, conventional wisdom is that grand juries issue over 99 percent of the indictments that prosecutors request.[1] Are there ways that some balance can be restored to the grand jury's function, without undermining its important investigative powers? For example, although common practice in many other state courts, in the District of Columbia grand jury witnesses are not entitled to have counsel

[1] See Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995).

present with them in the grand jury room. Is it appropriate as part of one's fundamental right to counsel for grand jury witnesses in D.C. to have counsel present with them in the grand jury room when they testify, under appropriate strictures? Further, at present prosecutors are under no legal obligation to present exculpatory evidence to the grand jury. Are there circumstances in which it would be appropriate to require prosecutors to present such exculpatory evidence to the grand jury?

Study by group of DC Superior Court grand jurors, trial and appellate judges, defense (and former prosecution) lawyers led to Report's 23 recommendations.

The Council for Court Excellence convened a group of former D.C. Superior Court grand jurors, trial and appellate judges (including a former Chief Judge of the United States District Court and a former Chief Judge of the D.C. Superior Court), defense attorneys (many of whom are former prosecutors), and scholars to address issues such as those noted above.[2] Using the same methodology employed in the 1997-1998 comprehensive study by the Council for Court Excellence of the petit jury, *Juries for the Year 2000 and Beyond*, the Grand Jury Study Committee formed a series of subcommittees to examine discrete aspects of the grand jury practice in the District of Columbia federal and local courts. The full Committee met on a monthly basis to consider the reports of its various subcommittees. The recommendations set forth in this report are the product of that effort.

In addition to its' recommendations, the Council for Court Excellence District of Columbia Grand Jury Study Committee has also included two sections at the beginning of this Report to provide additional context and background for the recommendations. The first section briefly describes the role of the grand jury in our constitutional system. The second section gives an overview of the procedures applicable in the District of Columbia to grand jury service in the United States District Court and the District of Columbia Superior Court.

[2] The immediately preceding Chief Judges of the United States District Court for the District of Columbia and of the D.C. Superior Court, the Honorable Norma Holloway Johnson and the Honorable Eugene N. Hamilton respectively, and the immediately preceding United States Attorney for the District of Columbia, the Honorable Wilma A. Lewis declined to participate in this study. The District of Columbia Grand Jury Study Committee circulated a draft of this final report to these individuals and to the federal and District of Columbia Public Defender Services prior to publication soliciting their comments. Copies of the responses received as of the publication date may be found at Appendix H.

To assist in the further consideration of the twenty-three reform proposals set forth in this report, the District of Columbia Grand Jury Study Committee has included a description of the proposed methodology for implementation with each recommendation. These implementation notes are not all-inclusive and are offered to advance the thinking about appropriate means of effecting the proposed reforms.

THE ROLE OF THE GRAND JURY SYSTEM

Federal court 5th Amendment guarantee in felony cases

The Fifth Amendment to the United States Constitution guarantees that no person shall be prosecuted for a capital or otherwise infamous crime unless indicted by a grand jury.[3] This Fifth Amendment guarantee applies to federal courts throughout the United States and to both federal and local prosecutions in the District of Columbia.[4] Thus, felony cases in the District of Columbia must be presented to a grand jury unless the defendant waives the right to an indictment.[5]

Grand jury's duties both to find probable cause *and* to protect against unfounded prosecutions

A principal duty of the grand jury is to determine whether there is probable cause to believe that an individual has committed a crime. In criminal cases where the grand jury determines that probable cause does exist, the grand jury formally acts by issuing what is called an indictment. "For centuries the grand jury's responsibilities have included ... 'the determination whether there is probable cause to believe a crime has been committed . . .'"[6] While the traditional duties of the grand jury also included '"the protection of citizens against unfounded criminal prosecutions, '" the grand jury system has

[3] United States Constitution, Amendment V.

[4] Because indictment by a grand jury is not "essential to due process under the Fourteenth Amendment," *Reed v. Ross*, 468 U.S. 1, 16 n.11 (1984), this Fifth Amendment right does not apply to the states. *Hurtado v.California*, 110 U.S. 516 (1884). However, because criminal prosecutions in the Superior Court of the District of Columbia are brought in the name of the United States, the Fifth Amendment guarantee applies directly to the Superior Court of the District of Columbia.

[5] *Smith v. United States*, 304 A.2d 28, 31 (D.C.), *cert. denied*, 414 U.S. 1114 (1973); Fed. R. Crim. P. 7(b); Super. Ct. Crim. R. 7(b).

[6] *Miles v. United States*, 483 A.2d. 649, 653 (D.C. 1984) (quoting *United States v. Calandra*,, 414 U.S. 338, 343 (1974)).

come under increasing criticism for failing to discharge this duty.[7]

Much broader range of information can be considered than at trial

In determining whether there is probable cause to indict, the grand jury may consider a variety of information, including evidence that would be inadmissible at trial. The grand jury may inquire into and consider the opinions of witnesses, rumors, and evidence obtained in violation of the Constitution:

The grand jury's sources of information are widely drawn and the character of evidence considered does not affect the validity of an indictment.[8] "[T]he prosecutor has considerable discretion in determining what evidence to present to the grand jury." [9]

Fewer protective rights before grand juries

The grand jury's "operation generally is unrestrained by the technical, procedural and evidentiary rules governing the conduct of criminal trials."[10] Thus, the indictment may rest entirely on hearsay,[11] or on evidence seized in violation of the Fourth Amendment[12] or the Fifth Amendment.[13] A grand jury can act on information from a wide variety of sources including tips and rumors.[14] The prosecutor has no duty to present evidence to the grand jury exculpating or exonerating a target or defendant. Moreover, in the local and federal courts of the District of Columbia, witnesses before grand juries have no right to have their counsel present in the grand jury room during their testimony, although witnesses appearing before grand juries in many state courts long have had such rights.

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[7] See *supra* note 1, 80 CORNELL L. REV. 260.

[8] *Miles v. United States*, 483 A.2d 649, 654 (D.C. 1984) (quoting *United States v. Calandra*, 414 U.S. 338, 344-45 (1974)).

[9] *Miles*, 483 A.2d at 654.

[10] *United States v. Calandra*, 414 U.S. 338, 343 (1974).

[11] *Costello v. United States*, 350 U.S. 359 (1956).

[12] *United States v. Calandra*, 414 U.S. at 358.

[13] *United States v. Blue*, 384 U.S. 251 (1966); *United States v. Washington*, 328 A2d 98, 100-01 (D.C. 1974), *rev'd. on other grounds*, 431 U.S. 181 (1977).

[14] *United States v. Dionisio*, 410 U.S. 1, 15 (citing *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972)).

GRAND JURY PRACTICE IN THE DISTRICT OF COLUMBIA

23 jurors: 16 for quorum; 12 required for indictment

In both the U.S. District Court for D.C. and the D.C. Superior Court, the grand jury consists of twenty-three people. Sixteen people represent a quorum to hear evidence. When voting, twelve grand jurors must vote in favor for an indictment to be issued.[15] Grand jurors may be replaced by the Chief Judge for good cause during their term.[16] The grand jury must agree on the specific charging language of the indictment in open court.[17]

Federal grand juries 18-month term, with extension of up to six months permissible

Usually 2-3 federal grand juries are sitting at any given time, two days each week.

The grand jury term in the U.S. District Court for D.C. is eighteen months. The Chief Judge may extend its service for up to six additional months if the Chief Judge determines that the extension is in the public interest.[18] As of the publication date of this Report there are usually two to three federal grand juries sitting at any one time in the U.S. District Court for D.C. They normally sit two days each week, usually on a Monday and Wednesday, or on a Tuesday and Thursday.

These federal grand juries are impaneled to hear a wide variety of federal criminal cases. One of them usually hears evidence regarding narcotics offenses, firearm violations and other arrest-generated cases where indictments must be returned within thirty days. These short-term matters often involve the presentation of evidence to the grand jury on only one day. The remaining federal grand juries hear a wide variety of cases, including those that involve lengthy federal investigations that require the presentation of evidence during many different grand jury sessions.[19] Federal grand juries in the District of Columbia meet, hear testimony, and deliberate at the E. Barret

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[15] Fed. R. Crim. P. 6(f); Super. Ct. Crim. R. 6(f).

[16] Fed. R. Crim. P. 6(g); Super. Ct. Crim. R. 6(g).

[17] *Gaither v. United States*, 413 F.2d 1061, 134 U.S. App. D.C. 154 (1969).

[18] Fed. R. Crim. P. 6(g).

[19] The Chief Judge of the U.S. District Court for D.C. in the past has impaneled special grand juries at the request of an Independent Counsel, whether such counsel were appointed pursuant to the former Independent Counsel Act or otherwise by the Attorney General of the United States. These special grand juries ordinarily only consider evidence relating to the subject matter under investigation by the Independent Counsel.

Prettyman Courthouse at Third Street and Constitution Avenue, N.W. in Washington, D.C.

Five sitting DC Superior Court grand juries, two of which meet five days/week for five consecutive weeks

In the D.C. Superior Court, while individual citizens are also subject to eighteen-month grand jury terms, with up to a six-month extension, in practice, D.C. grand juries actually sit for far shorter terms.[20] As of January 2001, on any given day, there were five Superior Court grand juries sitting and hearing matters. Two of these grand juries meet five days a week for five consecutive weeks. The grand juries with shorter terms ordinarily consider certain routine criminal offenses, usually requiring few witnesses, as part of the U.S. Attorney's Office Rapid Indictment Program. The remaining three D.C. Superior Court grand juries meet three days a week over an eight-week period.

Three DC grand juries meet three days/week over eight weeks

All grand juries then return for 2 days for final votes and late returns

After the regularly scheduled five or eight week term, each D.C. Superior Court grand jury also returns for two days approximately one week after the end of its normal service period to do final votes and grand jury returns for matters heard late in the regular grand jury session. Unlike federal grand juries, which are located within the U.S. Courthouse, D.C. Superior Court grand juries meet, hear testimony, and deliberate in separate facilities located within the offices of the United States Attorney's Office, located at 555 4th St., N.W., Washington, D.C.

Jury pool same as for petit juries

In the District of Columbia all grand jurors are selected from the same pool of citizens used, in the instance of federal grand jurors, for the selection of trial juries for federal cases, and in the instance of Superior Court grand jurors, for the selection of Superior Court trial juries. Prospective grand jurors are contacted by mail, notified of their duty to report for grand jury duty and advised of their opportunity to seek a deferment of their service for compelling reasons.

Jury Office personnel for the U.S. District Court and the D.C. Superior Court preliminarily screen prospective grand jurors for consideration of assignment to Federal and Superior Court grand juries, respectively. Individual grand juror assignment to Federal or Superior Court grand juries is made

[20] Super. Ct. Crim R. 6(g).

under direction of the Chief Judge of the United States District Court and the Chief Judge of the Superior Court, respectively. These judges also may rule whether a citizen has raised a sufficient reason to be excused from grand jury service.

SELECTION OF FOREPERSON

Chief judge of each court directs individual grand juror assignments and establishes procedures for selection of forepersons

The Chief Judges of the U.S. District Court for D.C. and the Superior Court of D.C. also establish the procedures for the selection of the foreperson, the deputy foreperson, and the secretary for each court's grand juries. The Chief Judge or one of his or her judicial colleagues will sometimes seek volunteers for these positions. At other times, the Chief Judge will make selections based upon information made available to him or her by the Jury Office, interviews with prospective grand jurors, or consultations with the United States Attorney's Office. As is the case in most other jurisdictions, the foreperson or, in his or her absence the deputy foreperson, signs indictments, swears in witnesses, notifies the Court about grand jury attendance, maintains the order and decorum of the grand jury room, and often leads the grand jury's deliberations. The foreperson is also the grand jury's liaison with both the Jury Office and, when necessary, the Chief Judge.

THE GRAND JURY CHARGE

Chief judge gives formal "charge," or instructions

After each federal or Superior Court grand jury is selected, the applicable Chief Judge, or one of the Chief Judges' colleagues, addresses and formally "charges" the new grand jury, *i.e.*, instructs the grand jury on its duties and responsibilities. The charge, or instructions, given by the Chief Judge of Superior Court to the grand jury is contained in Appendix C to this Report.[21] At this point, federal grand jurors usually receive written information that describes the purpose of the grand jury, the requirement of grand jury secrecy, procedures the grand jurors are to use during the course of their term, and more general information regarding their per diem compensation and their day-to-day routine. Federal grand jurors also receive further information about the Courthouse and security matters from a Deputy U.S. Marshal assigned for this purpose by the United States Marshal for the District of Columbia.

[21] The immediately preceding Chief Judge of the United States District Court for the District of Columbia declined to provide a copy of her grand jury instructions to the Committee.

Further orientation by US Attorney's representative

At the initial stage of service, both federal and D.C. Superior Court grand jurors also usually receive further orientation from an Assistant United States Attorney.[22] These representatives of the prosecuting authority describe generally the nature and type of matters the grand jurors will hear during the course of their terms, explain the procedures that will be followed by the prosecutors, and answer any questions the grand jurors may have.

PRESENTATION OF MATTERS TO THE GRAND JURY

Assigned prosecutor formally presents case

After the general orientation, the actual work of the grand jury begins when prosecutors assigned to the investigation of specific criminal offenses formally present specific matters to the grand jury. The prosecutor will outline the nature and scope of the investigation, which may include, among other things: the identity of the individual who has been arrested for the offense or the initial target or targets of the investigation; the documents and other types of subpoenas the prosecutor intends to issue on behalf of the grand jury; the expected witnesses who will be called to testify; and the violations that may be a part of the proposed indictment and the elements of such offenses. The grand jury ordinarily then assigns a number or a name to the investigation so that grand jurors can keep track of the progress of the specific case in their notes. These notes become increasingly important when evidence is presented over a period of several weeks during a series of grand jury sessions, rather than on a single day. The grand juror notes, which remain in the grand jury room at all times, are also used by individual grand jurors during their deliberations prior to the return of an indictment.

Grand jurors make notes to keep track of cases

Notes must remain in juror room at all times

The opening session for a particular case often includes the testimony of the first witness or witnesses in the case. In federal grand juries, witnesses remain in an area adjacent to the grand jury rooms until called to testify. The area is shielded from the public and within the control of the Deputy United States Marshal assigned to the grand juries. By contrast, for D.C. Superior Court grand juries, the witnesses are sometimes present in the common area used by the grand juries on their breaks.

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[22] In the case of a federal grand jury, the orientation may instead be presented by a trial attorney in the Criminal Division of the U.S. Department of Justice, or an Independent Counsel, depending upon the type of grand jury impaneled.

Witnesses questioned by prosecution

When a witness enters the grand jury room, he or she is sworn in by the foreperson or deputy foreperson. The witness is then questioned by the prosecutor, with questions and answers recorded stenographically by the court reporter.

Then questioned by grand jurors, procedures for which vary from case to case and from grand jury to grand jury

Following the completion of the prosecutor's questions, grand jurors may ask questions on their own, although the procedures for doing so can vary from case to case and from grand jury to grand jury. Depending on the witness and the nature of his or her testimony, prosecutors may encourage grand jurors to pose questions directly to the witness. At other times, prosecutors may first excuse the witness and then discuss with the grand jury the questions the grand jurors may want to pose.

Prosecution summarizes case and reads proposed indictment

At the conclusion of his or her presentation of the case, the prosecutor may summarize the evidence and review the elements for each of the violations to be considered by the grand jury. The prosecutor will then read the proposed indictment to the grand jurors. This process is accomplished either by reading the indictment verbatim or by distributing a copy to each grand juror. The prosecutor then leaves the room, and the grand jurors deliberate and vote on the proposed indictment.

Grand jurors deliberate, vote, and, if approved, return indictment

Where an indictment is approved, the grand jurors and the prosecutor formally "return" the indictment by presenting it in court. This process is called the grand jury return. Federal grand juries make the grand jury return before one of the three United States Magistrate Judges. D.C. Superior Court indictments are returned to the Chief Judge or the Chief Judge's designee in the applicable grand jury courtroom located within the facilities of the United States Attorney's Office or in the Chief Judge's courtroom within the D.C. Courthouse. The foreperson presents the indictment signed on behalf of the grand jury, as well as related documents. The federal Magistrate Judge or the D.C. Superior Court Chief Judge, as applicable, accepts the documents and directs the grand jurors to return to hear further evidence or excuses them for the day.

—Notes—

IMPROVING THE STRUCTURE, ORGANIZATION, AND SELECTION OF THE GRAND JURY

—Recommendation 1—

The size of grand juries should be reduced in both the federal and local courts in the District of Columbia. The grand jury should consist of fifteen persons. An indictment should be returnable only if: (a) at least eleven grand jurors are present; and (b) at least eight grand jurors vote in favor of indictment.

Reduce grand jury numbers from 23-16-12 to 15-11-8

Implementation Requirement: This Recommendation may be implemented in the D.C. Superior Court by amending Rule 6 of the Superior Court Rules of Criminal Procedure and in the U.S. District Court for D.C. by amending or rescinding 18 U.S.C. § 3321 and amending Rule 6 of the Federal Rules of Criminal Procedure.

Smaller numbers will reduce substantial burden on citizens and courts

The goal of this Recommendation is to reduce the substantial burden on citizens and the courts of the large size of the grand jury, while maintaining the integrity, diversity, and purpose of the courts' grand jury systems. At present, a grand jury panel in both the U.S. District Court for D.C. and the D.C. Superior Court consists of between sixteen and twenty-three persons.[23] A quorum requires sixteen grand jurors, and an indictment may be issued only with the concurrence of twelve or more grand jurors.

DC jury pool is overwhelmed

A jury panel of sixteen to twenty three persons places substantial burdens on this City's citizenry and on the courts. A recurring problem faced by the federal and local courts in the District of Columbia is the over-utilization of the jury pool in which the same people are called as frequently as every two years. Due to decreases in population size and increases in court caseloads, the demands on District of Columbia citizens to serve on petit and grand juries has markedly increased over the past decade. A common complaint heard from citizens is that they are summoned far too frequently for jury duty in the District of Columbia. These frequent calls for jury duty are not only an inconvenience for citizens, but also have contributed to the difficulties faced by federal and D.C. trial court personnel in filling petit and grand juries.

[23] 18 U.S.C. § 3321; Fed R. Crim. P. 6; Rule 6 of the D.C. Superior Court Rules of Criminal Procedure.

Further, a grand jury panel of sixteen to twenty three persons is administratively unwieldy and costly for the courts. Court personnel and representatives of the U.S. Attorney's Office have noted difficulties on some occasions in obtaining the quorum of sixteen persons necessary for a grand jury to hear testimony and perform its duties. The time and money spent by court personnel in summoning, selecting, and organizing grand juries also is significant. The expense to taxpayers involved in maintaining grand juries of this large size is substantial, with the annual jury fees paid to D.C. Superior Court grand jurors alone approaching $500,000.

No loss in deliberative or investigative purpose

The District of Columbia Grand Jury Study Committee believes that a significantly smaller grand jury would lessen some of the burdens on the District of Columbia jury pool and the Federal and D.C. court systems, without undermining the grand jury's investigative and deliberative purposes. We believe that a grand jury of eleven to fifteen persons could fairly investigate possible crimes and decide upon indictments.

We considered and rejected the notion that a grand jury of less than sixteen to twenty three persons would lack sufficient diversity. Similarly, we did not believe that juries of less than sixteen to twenty three were necessarily susceptible to excessive control by one or two individuals.

Guilt or innocence ultimately decided by 12 or fewer petit jurors

Several additional factors support our conclusion that a smaller grand jury could work fairly and effectively. First, petit juries deciding the most important issue in criminal cases—guilt or innocence—invariably consist of twelve or fewer persons, substantially less than the sixteen to twenty three persons now required in D.C. for a grand jury to proceed. Petit juries deciding guilt or innocence in federal court consist of twelve persons, while state criminal trials may be decided by petit juries of as few as six persons. Civil cases involving significant property and other rights are often decided by six person juries in both federal and state courts.

Second, the U.S. Supreme Court approved reductions in petit jury size in a series of cases in the 1970s and 1980s when it addressed the constitutionality of federal and state laws reducing the size of twelve person juries in civil and criminal trials. In *Williams v. Florida*, the Supreme Court held that a six-person petit jury in a state criminal proceeding did not violate

Number 23 is historical accident with no constitutional imperative

the Sixth Amendment to the U.S. Constitution.[24] The Court reviewed the history of the twelve person jury, concluding that "the fact that the jury at common law was composed of precisely twelve is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.'"[25] Similarly, the fact that a grand jury at common law consisted of twenty-three persons appears to have been a historical accident.[26]

The *Williams* Court also analyzed the impact of the smaller size on the quality of the petit juror's decision making, concluding:

> [T]he number [of jurors] should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers twelve. [27]

The *Williams* Court pointed to various sociological and empirical studies to support its view:

> What few experiments have occurred—usually in the civil area—indicate that there is no discernible difference between the results reached by the two different-sized juries. In short, neither currently available evidence nor theory suggest that the twelve man jury is necessarily more advantageous to the defendant than a jury composed of fewer members.[28]

In a later case, *Colgrove v. Battin*, the Supreme Court held that six-member juries in federal civil cases also were constitutional.[29] The Court referred to its conclusion in *Williams*

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[24] 399 U.S. 78 (1970).

[25] *Id*. at 102.

[26] *See* Marvin I. Frankel & Gary P. Naftalis, *The Grand Jury: An Institution on Trial*, 18, (1977) ("How and why the number twenty-three was settled upon is a short story, mostly because no one is really sure.")

[27] *Id*. at 100.

[28] *Id*. at 101-102 and ns. 48-49.

[29] 413 U.S. 149 (1973).

that there was "no discernable difference" between the results reached by twelve person and six person juries. According to the *Colgrove* Court, "[s]ince then, much has been written about the six member jury, but nothing that persuades us to depart from the conclusion reached in *Williams*."[30] In a lengthy footnote, the Supreme Court reviewed the various empirical studies and commentaries comparing twelve person and six person juries and explained why these scholarly papers supported a six-person jury.[31]

Majority of state grand juries are smaller than 16-23 persons

A third significant factor is that a majority of states have grand juries that are smaller than sixteen to twenty three persons. Virginia, for example, requires a grand jury of only five or seven persons.[32] We could find no evidence or commentary indicating that states with grand juries of less than sixteen to twenty three jurors have suffered any decline in the fairness of the administration of justice.

In fact, the Committee believes that a smaller grand jury size may not only make it easier to summon a panel, but also may lead to a greater sense of commitment by those who serve on grand juries. Grand jurors may feel less need to attend or to participate actively when they serve on a large grand jury. A smaller grand jury size, therefore, may lead to less absenteeism and more participation on the part of individual grand jurors.

While supporting a reduction in grand jury size, the District of Columbia Grand Jury Study Committee does not believe that there is any magic number for the perfect size. In 1997, Congressman Bob Goodlatte introduced a bill in the U.S. House of Representatives proposing that federal law be changed to require federal grand juries of between nine and 13 people, with nine jurors needing to be present and seven voting in favor to issue an indictment.[33] Although the District of Columbia Grand Jury Study Committee finds considerable merit to this proposal, we recommend a grand jury size of between eleven and fifteen persons, with eleven jurors needing to be present and

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[30] *Id*. at 159.

[31] *Id*. at n. 15.

[32] VA. CODE ANN.

[33] H.R. 1536 (Introduced May 6, 1997; 105th Cong., 1st Session).

eight voting in favor of indictment. The Committee believes that the "15-11-8" proposal is preferable because an eleven person deliberative body might be marginally more diverse.[34]

[34] Dissent to Recommendation 1—I believe boldface Recommendation 1 should be modified to provide: The size of grand juries should be reduced in both the federal and local courts of the District of Columbia. The grand jury should consist of 9 [or 11] persons. An indictment should be returnable only if: (a) at least 7 [or 8] grand jurors are present; and (b) at least 5 [or 6] grand jurors vote in favor of indictment.

Neither the process nor the decision to indict in our criminal justice system is nearly as consequential as the decision to convict or acquit. We entrust twelve jurors selected randomly from the community to make the latter decision — a decision that can result in liberty, incarceration, or even life imprisonment for an accused. It is difficult to understand why we need a larger number of grand jurors to render the former determination — one which can be ignored by a prosecutor in favor of dismissal (in the event of an indictment) or virtually ignored by the prosecutor by re-presentation to another grand jury (in the event of an ignoramus). Surely if six jurors are sufficient to "promote [the] group deliberation, free from outside intimidation" and to "provide a fair possibility for obtaining a representative cross-section of the community" that are required for a petit jury to convict in a criminal case, *see Williams v. Florida*, 399 U.S. 78, 100 (1970), no more than nine — or at most, eleven — grand jurors are necessary to achieve the same ends during grand jury proceedings.

There are some who believe that a strong case can be made for abolishing the grand jury in all non-capital cases in favor of more meaningful preliminary hearing procedures and charging by information in non-capital felonies. *See, e.g.*, Frankel and Naftalis, *The Grand Jury: An Institution on Trial*, 117-18 (Hill and Wang, 1977) (While not himself advocating abolition, Judge Frankel found a "still powerful body of opinion that favors abolition of the grand jury.") However, if we are to retain this imperfect and somewhat archaic institution, at least we should do so in a manner that provides resources for its functions that are reasonably proportional to the significance of those functions. This is particularly so in the District of Columbia where our trial courts daily confront the reality of a limited — and frequently inadequate — pool of prospective jurors to try civil and criminal cases. Thus, I believe that a proper respect for the role and significance of the grand jury should persuade the Committee to conclude that a grand jury in the District of Columbia should be comprised of no more than nine (or at most, eleven) persons, with the presence of seven (or at most, eight) and the votes of five (or at most, six) required for indictment. — *The Honorable Henry F. Greene.*

Recommendation 2

There should be two distinct terms of service for grand juries in the D.C. Superior Court and the United States District Court for D.C., depending on whether the cases involve simple or more complex felony matters.

Implementation Requirement: This Recommendation, as well as Recommendations 2a and 2b, may be implemented by the U.S. District Court for D.C. and the D.C. Superior Court by amending the courts' jury plans. No amendment to any procedural rule nor any new legislation is required.

Recommendation 2a

The following terms of service should be adopted for the D.C. Superior Court grand jury:

a. the term of service for most grand juries, including the Rapid Indictment Program (RIP) grand juries, should be reduced to three weeks, with the grand jury meeting no more than four days a week; and

b. the term of service for grand juries hearing serious felony cases requiring extended investigative time should be eight weeks, with the grand jury meeting no more than three days a week. If the government believes that additional grand jury time is needed, a petition must be made to the Chief Judge, as soon as reasonably possible, for an extension of the eight-week grand jury term.

The Annual Report of the District of Columbia Courts should include grand jury utilization statistics similar to the petit jury data which is now part of the Annual Report.

Implementation Requirement: This Recommendation may be implemented by the D.C. Superior Court by amending court policy. No amendment to any procedural rule nor any new legislation is required.

Recommendation 2b

The following terms of service should be adopted for the United States District Court for the District of Columbia grand jury:

a. the term of service for most grand juries should be reduced to three months, with the grand jury meeting no more than twice a week; and

b. the term of service for grand juries available to hear cases involving extensive investigations should be reduced to twelve months, with the grand jury meeting no more than two days a week. If the government believes that additional grand jury time is needed, a petition must be made to the Chief Judge, as soon as reasonably possible, for an extension of the twelve-month grand jury term.

The Administrative Office of the U.S. Courts should annually publish a compendium report similar to its 1990 report, entitled *1989 Grand and Petit Jury Service*.

Implementation Requirement: This Recommendation may be implemented by the U.S. District Court for D.C. by amending the court's policy. No amendment to any procedural rule nor any new legislation is required.

Two terms of service will ameliorate substantial burden imposed on citizens by lengthy service terms, and bring DC into line with many other jurisdictions that have two terms of service

Currently, the D.C. Superior Court grand jury service term is either eight weeks at three days per week, or five weeks at five days per week. In the U.S. District Court for D.C., the current term is eighteen months at two days per week. These Recommendations seek to ameliorate the substantial burden that lengthy service terms place on citizens, and to bring the U.S. District Court for D.C. into line with many other federal court jurisdictions that have two terms of service. Through focus groups of former D.C. Superior Court grand jurors, the District of Columbia Grand Jury Study Committee learned that time away from daily lives, loss of income, and other personal and family responsibilities pose an enormous burden on sitting grand jurors.[35] D.C. Superior Court grand

[35] In addition to having several former D.C. Superior Court grand jurors on the District of Columbia Grand Jury Study Committee, on February 16, 2000 the Committee convened a focus group of former Superior Court grand jurors to seek their perspectives on their grand jury service. A summary of this meeting appears at Appendix B of this Report.

jurors contacted by the District of Columbia Grand Jury Study Committee complained about the inconvenience of the length of grand jury service in D.C. Superior Court.[36, 37]

Former D.C. Superior Court grand jurors reported hearing a wide variety of cases ranging from the typical, one-day case to more protracted felony case presentations. There is a high volume of what the U.S. Attorney's office defines as Rapid Indictment Program (RIP) cases that are heard and decided within a day.[38] There are also more complex cases, such as homicides, which may require weeks of testimony, and evidence from numerous witnesses. Based on this observation, and on the experience of other jurisdictions (see discussion below), the District of Columbia Grand Jury Study Committee concludes that the Federal and D.C. Courts in the District of Columbia could function effectively using two distinct terms of grand jury service. Our proposed changes are summarized in the following chart:

Court	**Current Term of Service**	**Proposed Term of Service**
DC Superior Court **ShorterTerm**	*5 weeks, 5 days per week Total: 25 days*	*3 weeks, up to 4 days per week Total: 12 days*
DC Superior Court **Longer Term**	*8 weeks, 3 days per week Total: 24 days*	*No change recommended*
US District Court for DC **Shorter Term**	*18 months, 2 days per week Total: 156 days*	*3 months, up to 2 days per week Total: 24 days*
US District Court for DC **Longer Term**	*18 months, 2 days per week Total: 156 days*	*12 month, up to 2 days per week Total: 104 days*

[36] *Ibid.*

[37] At the express request of then U.S. District Court Chief Judge, Norma Holloway Johnson, no former federal grand jurors served on the District of Columbia Grand Jury Study Committee or were interviewed as part of this study.

[38] Rapid Indictment Program Criminal cases, also referred to same day indictment cases, usually involve only one police witness, little case complexity, and a clear factual pattern.

Two distinct terms of service, one shorter than currently in place in either federal or local DC courts

An examination of other federal and state grand jury systems indicates that the duties of the grand jurors could be accomplished with two grand jury terms, one shorter than that currently in place in both the federal and local D.C. courts. In addition, shorter service terms would result in a more diverse citizenry able to serve as grand jurors. The Committee recognizes that implementing this recommendation may impose some additional burdens on the courts' administration, but believes that the benefit to the citizenry, combined with the advantage of the availability of an increased number of eligible citizens due to a shorter service term, would outweigh any disadvantages.

While supporting two terms, one shorter and one longer, the District of Columbia Grand Jury Study Committee recognizes that there is no perfect term length (indeed, it might vary from grand jury to grand jury). However, based on the information we have gathered, we believe the above proposed terms of service are reasonable and fairly balance the respective interests of the prosecutor, the public, and the individual grand juror.

Federal Grand Juries

In the federal system, a grand jury may sit for a maximum of eighteen months, although the court can discharge the grand jury before the end of the eighteen-month period.[39] The federal rule provides that in the instance of a regular grand jury, the court may extend the term of service of the grand jury for a period of up to six months if the court determines that the extension is in the public interest.[40] This Rule contemplates only one six-month extension.[41]

Several courts have upheld the rule against claims that a modification in the eighteen-month term of grand juries affects a substantive statutory or constitutional right and thus cannot be

[39] U.S. Fed. R. Crim. P. 6(g).

[40] *Id.*

[41] Moreover, the Advisory Committee Note on Rule 6(g) indicates that extending grand juries beyond eighteen months was intended to be the exception and not the norm. The extensions, the Advisory Committee explained, were to be used to wind up existing investigations, not to convert the normal eighteen-month period into a "normal" twenty-four-month period. Advisory Committee Note to 1983 Amendment to Rule 6(g).

altered by rule. Those courts have held that there is no magical significance to the eighteen-month period, and that this period may be altered by the rule-making process, as opposed to requiring that it be done by statute.[42]

While the regular term of federal grand juries can theoretically be as long as eighteen months, many federal districts have grand jury terms that are far shorter than eighteen months, as reflected in the following chart:

[42] *See, e.g., United States v. Skulsky*, 786 F.2d 558, 562-63 (3d Cir. 1986) (holding that the eighteen-month limitation on the term of the grand jury is not constitutionally mandated); *United States v. Pisani*, 590 F. Supp. 1326, 1337-40 (S.D.N.Y. 1984), *rev'd in part on other grounds*, 773 F.2d 397 (2d Cir. 1985); U*nited States v. Schwartzbaum*, 527 F.2d 249, 256 (2d Cir. 1975).

Selected U.S. District Court Grand Jury Terms

District	Shorter Grand Jury Terms	Longer Grand Jury Terms
District of Columbia*	Only one term of service	18 months, two days a week
California (Central District)	6 months, one day a week	12 months (as needed)
California (Northern District)	18 months, one day a week or less depending on caseload; up to 24 months with a recall	18 months, one day a week or less depending on caseload; up to 36 months with a recall
Florida (Southern District)	18 months, one day a week; up to 24 months with a recall	36 months, one day a week, twice a month or more depending on caseload; up to 42 months with a recall
Georgia (Northern District)*	12 to 18 months, 2-3 consecutive days a month	Only one term of service
Illinois (Northern District)*	18 months, one day a week	Only one term of service
Maryland	3 months, one day a week	18 months, one day a week
Massachusetts	18 months, one day a week; up to 24 months with a recall	18 months, one day a week; up to 30 months with a recall
Michigan (Eastern District)	18 months, twice a month, 2-3 days a week	18 months, frequency not available
New York (Eastern District)	4 months, one day a week; up to 18 months with a recall	18 months, two days a week; up to 36 months with a recall
New York (Southern District)	1 month, five days a week	18 months, two days a week; up to 36 months with a recall
Ohio (Northern District)*	18 months, 1-3 days a month	Only one term of service
Pennsylvania (Eastern District)	18 months, once a month, 2-3 consecutive days a month	18 months, once a week
Texas (Northern District)*	18 months, 2-3 days a month; up to 24 months with a recall	Only one term of service
Virginia (Eastern District)*	12 months, 1-3 days a month	Only one term of service

**Jurisdictions which have only one term of grand jury service.*

Some opponents of a shorter term of service in the U.S. District Court for D.C. have cited that court's allegedly unique caseload as the reason for maintaining the current 18-month service term. In light of this concern, the District of Columbia Grand Jury Study Committee considered the caseload profile information in the following chart for the same districts that have a shorter grand jury term than the U.S. District Court of D.C. The Committee concluded that the criminal caseload in the District of Columbia is not sufficiently different from caseloads in other federal districts where grand jurors sit for fewer days to warrant imposing a single, longer term of grand jury service. The following chart compares the caseload for the grand jury for the U.S. District Court for D.C. with the caseloads for grand juries in other jurisdictions that sit for fewer days:

Comparison of US DC grand jury caseloads in different jurisdictions

Selected U.S. District Courts Grand Jury Judicial Caseload Profile Top 1998 Criminal Felony Filing Categories[43]

District	Felony
District of Columbia	32% Drugs, 18% Fraud, 22% Weapons & Firearms
California (Central District)	15% Drugs, 28% Fraud, 21% Immigration
California (Northern District)	21% Fraud, 23% Immigration
Florida (Southern District)	26% Drugs, 11% Fraud
Georgia (Northern District)	21% Drugs, 21% Fraud, 13% Immigration
Illinois (Northern District)	14% Drugs, 34% Fraud
Maryland	27% Drugs, 15% Fraud, 22% Weapons & Firearms
Massachusetts	30% Drugs, 25% Fraud, 12% Weapons & Firearms
Michigan (Eastern District)	30% Drugs, 21% Fraud, 16% Weapons & Firearms
New York (Eastern District)	26% Drugs, 24% Fraud
New York (Southern District)	24% Drugs, 34% Fraud
Ohio (Northern District)	19% Drugs, 28% Fraud
Pennsylvania (Eastern District)	33% Drugs, 23% Fraud
Texas (Northern District)	18% Drugs, 22% Fraud, 15% Immigration

[43] See the 1998 Federal Court Management Statistics for entire caseload percentages.

Virginia (Eastern District)	37% Drugs, 14% Fraud, 22% Weapons & Firearms,

The chart above lists the most frequent criminal case types heard by the U.S. District Court for D.C. and by fourteen other federal district courts. The chart permits one to determine whether types of cases heard by the D.C. federal court grand juries are fundamentally different from those heard by other federal courts' grand juries, seven of which sit for far fewer days than is now the case in the U.S. District Court for the District of Columbia. The Grand Jury Study Committee concludes from reviewing the data in the chart that the case profile of D.C. federal district court grand juries is not materially different in the aggregate from other federal courts. If other federal district court grand jury terms can be as short as one month to address similar types of cases, we recommend that the Board of Judges of the U.S. District Court for D.C. should consider implementing a much shorter grand jury term, especially considering the enormous imposition on citizens' lives which the current eighteen month grand jury term imposes.

State Grand Juries

The terms of state grand juries vary widely, from a minimum of ten days to a maximum of eighteen months, with extensions ordinarily available if authorized by the court. Summarized in the chart below are the various grand jury terms in the states. The terms are set by constitutional provision, statute, or rule.[44]

Selected State Court Systems Grand Jury Terms

City	Shorter Grand Jury Terms	Longer Grand Jury Terms
D.C. Superior Court	5 weeks, 5 days a week	8 weeks, 3 days a week
Alexandria, VA*	2 months, one day a month	Only one term of service
Atlanta, GA*	2 months, 2 days a week	Only one term of service
Baltimore, MD*	4 months, 2 days a week	Only one term of service

[44] Citations are listed at Appendix A.

City	Shorter Grand Jury Terms	Longer Grand Jury Terms
Boston, Massachusetts	3 months, 5 days a week for the 1st two weeks of each month of service	No minimum or maximum term of service, term ends when cases end
Brooklyn, New York	2 weeks, 5 days a week or 4 weeks, 5 days a week	6 months, one day a week, 6 months, 2-3 days a week or whenever a testimony needs to be heard
Chicago, Illinois*	One month, 5 days a week	Only one term of service
Cleveland, OH*	4 months, 2 days a week	Only one term of service
Dallas, Texas	3 months, 2 days a week	3 months, 3 days a week
Detroit, Michigan*	One person grand jury, no minimum or maximum term	Only one term of service
Los Angeles, CA*	12 months, 5 days a week	Only one term of service
Manhattan, New York*	4 weeks, 5 days a week	Only one term of service
Miami, FL*	6 months, one day a week; Up to 9 months with a recall	Only one term of service
Philadelphia, PA*	18 months, 1-2 days a week	Only one term of service
San Francisco, CA	4 months, convened at D.A.'s request	12 months, one day a week

**Jurisdictions which have only one term of grand jury service.*

Based on the experience of other federal and state courts, the District of Columbia Grand Jury Study Committee believes that the grand juries in the U.S. District Court for D.C. and in the D.C. Superior Court could perform their duties effectively with shorter term-of-service requirements, a change that would address a major concern of many former grand

jurors in the District of Columbia.[45] A shorter term of service is likely to produce the additional benefit of a more diverse grand jury pool, since many individuals currently avoid grand jury service on hardship grounds due to the lengthy service term.[46]

[45] A final and related point is the use of technology in the grand jury room to efficiently present information to grand jurors. Both D.C. Superior Court and the U.S. District Court for D.C. should explore the use of video teleconferencing to determine whether it can be used to more efficiently present information to grand jurors and possibly reduce the term of service needed. For example some witnesses' testimony might be videotaped in advance and presented at the appropriate moment to reduce delays in arranging for witnesses to appear before the grand jury. One downside to this approach, however, is that the grand jurors would not be given the immediate opportunity to question such witnesses. Videotaping would, however, be an effective way to bring new grand juries up to speed on an ongoing case initially heard by a previous grand jury, and provide the new grand jury with the opportunity to view the witness' demeanor. Thus, this recommendation complements the recommendation above regarding setting shorter terms of service since a small portion of cases may spill over into a new grand jury.

[46] Dissent to Recommendation 2: I am satisfied, based on what the former grand jurors serving on this Committee have said, that the grand jurors' time was not used efficiently and that the terms of service should probably be changed to reflect the needs of the court and the convenience of the grand jurors. However, I think it unwise for this Committee, comprised as it is of outsiders, to propose precise terms of grand jury service in the two courts. In the past, the two courts and the U.S. Attorney have adjusted the service terms of the grand juries as needs and circumstances have changed. In my mind, they are best suited to determine what changes should be made in the future. Therefore, in lieu of these recommendations, I would say something along the lines of, "[b]ased on what we have learned during the course of this study, it appears to us that the District Court, the Superior Court, and the U.S. Attorney should take a fresh look at the service terms of the grand juries, taking into account the case mix, the needs of the court and the U.S. Attorney's Office, and consideration for those citizens who will serve as grand jurors." — *The Honorable Warren R. King; joined by The Honorable Henry F. Greene, and Cary M. Feldman, Esquire*.

—Recommendation 3—

The grand jury foreperson should be selected, and the grand jurors impaneled, by the Chief Judge in accordance with written rules or procedures promulgated by the court that set out qualifications for grand jurors and the grand jury foreperson and that define the process by which grand jurors are to be impaneled and the foreperson is to be selected.

Implementation Requirement: This Recommendation may be implemented by the U.S. District Court for D.C. and the D.C. Superior Court by amending the courts' policies and, as appropriate, their jury plans. No amendment of any procedural rule or new legislation is required.

Unlike petit jury forepersons, grand jury forepersons should be selected by Chief Judge

The District of Columbia Grand Jury Study Committee does not believe that grand jury forepersons can or should be selected by grand jurors in accordance with a procedure analogous to how petit jurors select forepersons. At least two considerations inform this conclusion. First, of necessity because of their duties and responsibilities, grand jury forepersons must be selected at the very outset of a grand jury's lengthy service before the grand jurors have had a chance to become acquainted with one another and to assess the strengths and weaknesses of potential grand jury leaders. Second, because of the unique and somewhat complex responsibilities of the grand jury in general and the foreperson in particular, grand jurors are probably ill equipped by knowledge, training and experience to select forepersons—at least at the outset of their service.

Foreperson selection and grand juror impanelment should be pursuant to written procedures

However, the District of Columbia Grand Jury Committee does believe that written, structured procedures should exist in both the District Court and the Superior Court for the impaneling of grand jurors and the selection of grand jury forepersons, consistent with the substantial body of federal constitutional law requiring that grand jurors be selected with the same randomness and absence of bias as petit jurors.[47] Indeed, the absence of any rules or guidelines to make these selections could create the appearance of non-randomness, or even bias, in future selections.

[47] *See, e.g., Campbell V. Louisiana*, 523 U.S. 392 (1998); *Vasquez v. Hillery*, 474 U.S. 254, 262 (1986); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

Such procedures should not be unduly formalistic. Moreover, they should permit the assessment of qualities—*e.g.*, willingness to serve, time availability, management knowledge and/or experience, leadership potential, and personal skills—that the Committee understands are presently utilized by the Chief Judges in selecting forepersons, and which clearly *are* relevant to the ability of grand jurors to serve in that capacity.

Consequently, it is the Committee's view that the Advisory Committee on Criminal Rules in the Superior Court and the committee with comparable responsibilities in the District Court should draft a recommended rule to guide the Chief Judges of the courts in the selection of grand jurors and grand jury forepersons. Such a proposed rule then could be considered and adopted by the respective courts. At a minimum, the rule should set out qualifications to be assessed by the Chief Judge in the selection process and should define the process by which the Chief Judge's selections are made.

—Notes—

IMPROVING THE EFFECTIVENESS AND INDEPENDENCE OF THE GRAND JURY

—Recommendation 4—

The grand jury should be physically located in a secure location in a court building and proximate to the offices of the prosecutor.

Implementation Requirement: This Recommendation may be implemented by the D.C. Superior Court without amending any procedural rule or passing new legislation.

Grand jury should be in courthouse, but near prosecutor's offices

The District of Columbia Grand Jury Study Committee believes that the location of the grand jury should reflect its status as an arm of the court, independent from the prosecutor, and yet be situated convenient to the offices of the prosecutor. Consequently, we recommend that the D.C. Superior Court grand jury rooms be removed from the building that houses the offices of the prosecutor if those offices are in a building separate from the courts (*e.g.*, the Superior Court grand jury at 555 Fourth Street, N.W.) and be placed in a court building at a secure location most proximate to the prosecutor's offices (*e.g.*, 451 Indiana Avenue, N.W. or Building B at 4th and E Streets, N.W. for the Superior Court grand jury). [48] Such a location would be convenient to the prosecutor, yet reflective of the grand jury's independent status as an arm of the court.[49] For further discussion of this matter the reader is referred to the April 19, 2001, correspondence from

[48] The Committee recognizes that if the grand jury is moved to a court building without a cellblock for incarcerated witnesses, it will be necessary to construct such a cellblock.

[49] Dissent to Recommendation 4: In this Recommendation, the Committee says that the grand jury should be located in a court building near the office of the prosecutor. The U.S. District Court is currently in compliance, but the Superior Court is not. In the best of all worlds, this Recommendation is a sound one; however, it is not practical at this time for the Superior Court. Therefore, in my mind, it makes no sense for the Committee to make such a recommendation. This Recommendation is based on the notion that having the Superior Court grand jury located in the U.S. Attorney's building unduly influences the grand jurors in the prosecutor's favor. That conclusion is over-drawn, particularly in light of the comments by the members of the Committee who are former grand jurors, that no such undue influence was experienced by them. — *The Honorable Warren R. King.*

the D.C. Public Defender Service to Samuel F. Harahan, appearing at Appendix H.

—Recommendation 5—

The U.S. Attorney and the D.C. Superior Court should comprehensively review the current orientation procedures in order to provide additional procedural, administrative, and legal information to grand jurors early in their service. Among other things, the D.C. Superior Court should mail the grand jury orientation booklet to the prospective grand jurors several days before the first day of service.

Implementation Requirement: This Recommendation may be implemented by the D.C. Superior Court in cooperation with the U.S. Attorney without amending any procedural rule or passing new legislation.

Earlier and more extensive orientation required

The purpose of Recommendation 5 is to alleviate grand juror frustration and prevent confusion by providing more orientation information at an earlier time to prospective grand jurors. Most citizens are unfamiliar with the myriad rules and procedures governing the grand jury system. Therefore, the courts and the Office of the U.S. Attorney have an obligation to make information available in a user-friendly manner. Currently, citizens summoned for grand jury service do not always appreciate the significant differences between grand and petit jury service. This can result in unnecessary anxiety and misunderstandings about the expectations and legal requirements applicable to grand jurors. User-friendly information will promote effective functioning of the grand jury and will make citizens more at ease as they perform their civic duty.

User-friendly, written information needed

Explanation of differences from trial jury

To assist the District of Columbia Grand Jury Study Committee's evaluation of grand juror orientation, a meeting was convened in February 2000 with a number of citizens who had completed D.C. Superior Court grand jury service in December 1999. (A summary of this meeting is attached as Appendix B.) These citizens universally recommended that more information be made available, both at orientation and throughout the process. They described remarks made by the Chief Judge or his designee on the first day of service as helpful and informative, but more limited than desirable and, because not presented in writing, quickly forgotten. They also described the initial orientation by the U.S. Attorney's Office as instructive and helpful, but again unwritten and of limited usefulness. They saw an orientation movie but did not remember its contents. They would have appreciated a better

understanding of how the grand jury fits into the criminal justice system. Many said that, for some time, they did not realize they were not voting on guilt or innocence during their service. They also lacked background information on police procedures. For example, they did not know what was meant by the term "field test" or "nickel bag." Certain information regarding such matters may constitute evidence and thus be required to be given to the grand jury by a witness under oath.[50]

Most grand jurors were complimentary of D.C. Superior Court personnel regarding their helpfulness and professionalism. However, it remains clear that citizens need additional information to perform their duties comfortably and effectively. The orientation booklet currently provided to jurors on the first day of service would be more useful if citizens had an opportunity to review it prior to reporting for service.

The District of Columbia Grand Jury Study Committee is unable to comment on conditions for grand jurors in the U.S. District Court for D.C.[51]

[50] *See Williams v. United States*, 757A.2d 120 (2000).

[51] The District of Columbia Grand Jury Study Committee regrets that it was unable to comment on conditions for grand jurors in the U.S. District Court for D.C. because former Chief Judge Johnson of the U.S. District Court for D.C. and the U.S. Attorney's Office declined to participate in the study or to provide information to assist in the development of these recommendations.

—Recommendation 6—

The initial instructions to both the D.C. federal and local grand juries should apprise the grand jurors of the law regarding their responsibilities in accordance with the Grand Jury Charge presently given in D.C. Superior Court. Additionally, grand jurors should be told of their right to seek advice on matters of law from the court and their authority to direct the production of evidence bearing on the guilt or innocence of an accused, and should receive a written copy of the Grand Jury Charge.

Implementation Requirement: This Recommendation may be implemented by the U.S. District Court for D.C. and the D.C. Superior Court without amending any procedural rule or passing new legislation.

Grand jurors should be told of right to seek court's advice, direct production of evidence, and receive written copy of charge

The Chief Judge of the D.C. Superior Court currently instructs grand jurors at the outset of their service, prior to swearing in the grand jurors. A copy of the current Superior Court's Grand Jury Charge, with the Committee's proposed additions underscored, is attached as Appendix C. The immediately preceding Chief Judge of the U.S. District Court declined to provide to the Committee a copy of its charge to the D.C. federal grand juries.

By and large, the Committee is satisfied that the D.C. Superior Court Grand Jury Charge is thoughtful, fair, balanced and informative. However, we believe that the instruction would benefit from two additional sentences at the end of the second paragraph of the Grand Jury Charge advising the grand jury as follows:

> If, during your consideration of a case, you have a question about a legal rule or principle that has not been answered to your satisfaction by the United States Attorney, you are welcome to write out the question and ask that the Marshal place it under seal and have it delivered to me. I or another judge whom I designate will respond to it, either orally or in writing, as soon as one of us conveniently can.

Additionally, we believe that the Grand Jury Charge, consistent with Bill S. 2289 introduced in the Second Session of the 105th Congress by Senator Dale Bumpers, should apprise grand jurors of their right to direct that witnesses be called and interrogated, that papers, documents and other tangible evidence be produced, and that the grand jury be apprised of any

exculpatory evidence. Consequently, we suggest the addition of the following language at the end of the sixth paragraph of the Grand Jury Charge advising the grand jury as follows:

> In this regard, you have not only the authority to direct or request the United States Attorney to call and interrogate witnesses, but to produce for your examination, papers, documents and other tangible evidence; this may include witnesses, papers, documents and other tangible evidence that might bear on either the guilt or the innocence of an accused.

Finally, the District of Columbia Grand Jury Study Committee believes that copies of the Grand Jury Charge should be made available to each grand juror at the outset of grand jury service so that it will be available for reference by grand jurors during grand jury proceedings and deliberations.

—Recommendation 7—

The U.S. Attorney should develop a simple format for grand jurors to use in recording case information in grand jury proceedings. This might include: the provision of a three-ring binder for each grand juror; the provision of a fill-in-the-blank form on which to list each case number and other information; and explanation of the contents and use of the "Red Book."

Implementation Requirement: This Recommendation may be implemented by the U.S. Attorney without amending any procedural rule or passing new legislation

Prosecutors should use simple format for grand jurors to use in recording case proceedings

Former grand jurors described a wide range of case presentation formats by Assistant U.S. Attorneys. For many grand jurors, this made understanding each case difficult, at best. For example, some Assistants provided written outlines on each case, including the elements of the offense, while others provided nothing at all. Several grand jurors described being told about the "Red Book" (the book providing uniform instructions for charging D.C. juries regarding local crimes), but it often was not available in the grand jury room and most did not understand what it is.

Grand jurors were sometimes not given a docket number or a case description by which they could identify the case to which the witness related. Grand jurors are given a yellow pad on which to keep notes, but because witnesses relating to the same case are often not presented sequentially, jurors have difficulty associating the witnesses with the relevant case. According to one former grand juror, as her service wore on, "...this note taking procedure became increasingly cumbersome: pages became detached, making it difficult to locate specific notes during the Gaitherizing process or when a new witness was presented in an old case. A fill-in-the-blank form with room for additional notes in a three-ring binder would be very helpful." Another former grand juror commented, "…for example, if we were up to case 43 and then a witness comes to testify in case 11, you may not have left enough room for notes . . . then you have to find another place. When Gaitherizing occurs, it does not occur in order . . . you may have to

Gaitherize case 21, 8, 91, 16, and 47 and all the yellow pages get messed up." [52]

Grand jurors with whom we spoke praised several Assistant U.S. Attorneys in particular regarding their case presentation format. These Assistant U.S. Attorneys consistently used a typed format with name, case number, crime elements and other useful information and distributed this form to the grand jury. According to one grand juror, "such a format greatly facilitated grand jurors following the presentation and making their decision."

3-ring binder far superior to yellow pad

To increase grand juror understanding, the District of Columbia Grand Jury Study Committee recommends that the U.S. Attorneys Office establish uniform procedures so that each Assistant U.S. Attorney presents his or her cases to grand jurors in approximately the same way. First, the Assistant U.S. Attorney or the Court should give each grand juror a three-ring binder notebook in which to organize notes and keep track of the many cases, witnesses, and evidence presented to them during their grand jury term. The yellow pad given to grand jurors on which to take notes is not sufficient for some grand jurors. Since a grand jury may sit for as long as 8 weeks (in the D.C. Superior Court) or 18 months (in D.C. federal court), and hear information about dozens of cases, it simply makes common sense to provide materials necessary to take notes, organize those notes, and make informed decisions.

Preprinted "Case Sheet" forms

Second, the U.S. Attorney and the D.C. Superior Court should explore the development and use by grand jurors of a simple fill-in-the-blank form which lists the case name and number, with a space to list relevant evidence and other notes, and a space at the bottom of the form for each grand juror to record his or her vote and the full grand jury vote. The "case sheet" should be pre-printed and available to all grand jurors. This improvement would involve minimal costs and would be of organizational help to many grand jurors who become concerned that information may be misplaced during the grand jury service term.

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[52] "Gaitherizing" is the process where the final indictment is read to and voted upon by the grand jurors before its return to the Chief Judge. *See Gaither v. United States*, 413 F.2d 1061, 1071 (D.C. Cir. 1969). *See also* June 14, 2001, letter to William W. Taylor, III, from Ann Cunningham Keep, located in the Committee's files.

Better explanation of Red Book required

Third, the Assistant U.S. Attorney should explain the use of the "Red Book" for grand jurors. Currently grand jurors are often, but not always, informed about the Red Book, its purpose, and its contents. However, many never see this book or do not really understand its usefulness, perhaps because it is introduced at the start of service when grand jurors have so much other information to absorb. This failure to adequately advise the grand jury of the Red Book is troubling for grand jurors who are trying to do their job well, because they are unable to access - or even understand - a valuable resource. However, once grand jurors did understand and utilize the Red Book, they found it very helpful.

To address this concern, the District of Columbia Grand Jury Study Committee recommends that a complete explanation of the Red Book be incorporated into grand jury orientation, and that a copy of the book be permanently available in each grand jury room. Providing this resource will not be overly costly, and it will allow the grand jury to make more informed decisions on its own.[53]

[53] Dissent to Recommendation 7: Recommendation 7 goes into far more detail than is necessary. A recommendation in general terms would be sufficient. — *The Honorable Warren R. King, joined by The Honorable Henry F. Greene, Esquire, Cary M. Feldman, Esquire, and Susan C. Lynch, Esquire.*

—Recommendation 8—

The prosecutor should instruct the grand jury on the elements of each crime in accordance with the *Criminal Jury Instructions for the District of Columbia*, and should assure that all instructions on legal matters, including questions by grand jurors and responses to such questions, are recorded and transcribed.

Implementation Requirement: This Recommendation may be implemented by the U.S. Attorney's Office without amending any procedural rule or passing new legislation.

Prosecutor should instruct in accordance with *Criminal Jury Instructions for DC*, and assure proper recording of all instructions given

Ideally, the District of Columbia Grand Jury Study Committee believes, a judge should instruct the grand jury as to legal matters, including the elements of offenses the grand jury is considering. Nevertheless, we are aware of the practical difficulties such a policy would cause, including the necessity of a virtual full-time judicial presence in, or available to, the grand jury. Moreover, some of our concerns regarding the absence of judicial instructions about the law would be ameliorated by the addition to the Grand Jury Charge of the language we propose, advising grand jurors that they may submit questions regarding legal matters to the Chief Judge, and by sending a written copy of the Grand Jury Charge to the grand jurors for use during their proceedings and deliberations.

Consequently, so long as (1) a written copy of the Grand Jury Charge is made available to the grand jurors, (2) instructions regarding the elements of offenses uniformly track those in *Criminal Jury Instructions for the District of Columbia* (4th ed.), (3) the grand jury is advised of its right to submit questions on legal matters to the Chief Judge (or his or her designee), (4) the grand jury is instructed on the elements of the offenses under consideration, and (5) *all* instructions by the prosecutor to the grand jury regarding legal matters, including responses to questions from individual grand jurors, are recorded, transcribed, and, upon a showing of good cause, available for *in camera* review by the trial judge and, upon order of the judge, disclosable to counsel for the accused, the Committee recommends that the current practice of prosecutors instructing grand jurors regarding the legal elements of criminal offenses be retained.

IMPROVING THE PROTECTION OF TARGETS, SUBJECTS AND WITNESSES

—Recommendation 9—

A witness who is the target or subject of an investigation and who has formally indicated his intention to assert his Fifth Amendment right not to testify should not be subpoenaed before the grand jury to assert that right.

Implementation Requirement: This Recommendation may be implemented by the U.S. Attorney's Office without amending any procedural rule or passing new legislation.

Target who has indicated intention to invoke 5th Amendment right ought not be subpoenaed and forced to assert privilege

One of the most important rights of any American citizen is the right to invoke the Fifth Amendment privilege against self-incrimination when asked to testify.[54] This right exists for witnesses at all levels of a criminal proceeding, including the grand jury.[55] Witnesses who are themselves targets or subjects of a grand jury proceeding possess this privilege. Forcing a target or subject of the grand jury to invoke Fifth Amendment protection while on the stand undermines the Fifth Amendment without providing any benefit. Therefore, witnesses who also are targets or subjects of a grand jury investigation and who have formally indicated their intention to assert their Fifth Amendment privilege against self incrimination should not have to invoke the privilege before the grand jury with respect to any matter as to which the witness is a target or subject. Nothing in Recommendation 9 is intended to prevent a witness immunized pursuant to law from appearing before the grand jury.

Principle has been recognized by many state courts — since 1894

Many state courts have recognized that a witness who is also the target of a grand jury proceeding should not be compelled to testify before the grand jury.[56] As early as 1894,

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[54] U.S. Constitution, Amendment V.

[55] Tony Onorato and Tymour Okasha, *Twenty-Ninth Annual Review of Criminal Procedure: Introduction and Guide for Users: II. Preliminary Proceedings: Grand Jury*, 88 GEO L.J. 1078 (2000).

[56] *See e.g.,Boone v. Illinois*, 36 N.E. 99 (1894); *Minnesota v. Froiseth*, 16 Minn. 296 (1871); *New York v. Bermel*, 128 N.Y.S. 524 (1911); *New York v. Luckman*, 297 N.Y.S. 616 (1937), *aff'd*, 3 N.Y.S.2d 864 (1938); C*ommonwealth v. Kilgallen*, 92 A.2d. 251 (Pa. Super. Ct. 1952).

the court in *Boone v. Illinois*, disapproving of a grand jury proceeding in which the target was forced to take the stand, stated: "A right of the highest character was violated. *A privilege sacredly guaranteed by the constitution was disregarded*, and a dangerous innovation on the uniform practice in this state made."[57] A few years later, the court in *New York v. Bermel* held that "if the person testifying is a mere witness, he must claim his privilege on the ground that his answers will incriminate him, whereas, if he be in fact the party proceeded against, he cannot be subpoenaed and sworn, even though he claim no privilege."[58] These cases represent the principle that "where a grand jury investigation is directed against a particular person in such a way that, as to it, he stands in the status of a defendant in an ordinary criminal trial, then his constitutional privilege has the effect of preventing his being called to take the witness stand at all." [59]

Forcing target to invoke 5th Amendment right is inappropriate for four reasons:
1. creates unwarranted presumption of guilt,
2. presents unnecessary opportunity for harassment,
3. imposes unnecessary burden on witness, and
4. wastes grand jurors' time

The District of Columbia Grand Jury Study Committee believes that forcing a target or subject of a grand jury investigation to invoke the Fifth Amendment privilege on the stand rather than allowing its invocation without appearance before the grand jury is inappropriate for at least four reasons. First, it undermines the Fifth Amendment privilege. The Fifth Amendment is designed to prevent compelled testimony against one's self. But forcing a target or subject of a grand jury investigation to invoke that privilege while on the stand only raises the presumption of guilt in grand jurors' minds. It is one thing for the grand jurors to hear the evidence that the prosecution presents against the target or subject, but it is quite another for the grand jurors to watch as the target or subject invokes his Fifth Amendment privilege time and time again. This process necessarily colors the grand jurors' perception of the witness, and may create an unwarranted presumption of guilt.

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[57] *Boone*, 36 N.E. at 101 (emphasis supplied).

[58] *Bermel*, 128 N.Y.S. at 525. Similarly, the court in *New York v. Luckman* noted that "[a] person against whom the inquiry of the grand jury is directed should not be required to attend before that body, much less be sworn by it. . ." *Luckman*, 297 N.Y.S. at 238 (quoting *New York v. Gillette*, 126 App. Div. 665, 670 (N.Y.A.D. 1908)).

[59] E. LeFevre, *Privilege Against Self-Incrimination as to Testimony Before Grand Jury*, 38 A.L.R.2d 225 (1954).

Second, forcing a target or subject of a grand jury investigation to invoke the Fifth Amendment privilege on the stand presents an unnecessary opportunity for prosecutorial harassment.

Third, requiring the target or subject of a grand jury investigation to invoke this constitutional privilege on the stand imposes an unnecessary burden on the witness and may cause unnecessary embarrassment.

Finally, forcing a target or subject of a grand jury investigation to invoke his or her Fifth Amendment privilege on the stand wastes grand jurors' time. The criminal justice system will benefit from a more efficient grand jury process that does not allow the prosecution to interrogate a witness who has already formally indicated that he or she will not answer any questions.

For these reasons, forcing witnesses who are also targets of a grand jury investigation to invoke their constitutional privilege against self-incrimination on the stand violates the spirit of the Fifth Amendment and serves no appropriate purpose.[60]

[60] Dissent to Recommendation 9: Recommendations 9 and 12 were taken from a draft legislative proposal in the last Congress. These recommendations were considered by an ad hoc subcommittee established after all of the other recommendations had been voted on by the full Committee. The ad hoc committee's proposals were included in a draft report considered by the entire committee. The draft report, however, unlike the reports prepared by the regularly established subcommittees, did not set forth the various views that were advanced in support of, or in opposition to, the proposals presented. For that reason, I do not believe the Committee is sufficiently informed on these recommendations to intelligently vote upon them. Therefore, I do not support their adoption as committee recommendations. — *The Honorable Warren R. King.*

—Recommendation 10—

All witnesses before grand juries in the D.C. Superior Court and the U.S. District Court for D.C. should have the right to have counsel present during their testimony before the grand jury. Counsel should be authorized only to advise the witness and not to participate in the proceedings in any other manner (e.g., counsel should not speak to the grand jurors or to the prosecutor). In the event that counsel is disruptive of the proceedings, counsel should be subject to exclusion from the grand jury proceedings by the court.

Implementation Requirement: This Recommendation may be implemented by either a change in Rule 6 of the Federal Rules of Criminal Procedure and Rule 6 of the Superior Court Rules of Criminal Procedure 6, or by passing new legislation to supercede the current version of these rules.

—Recommendation 11—

Indigent grand jury witnesses who request counsel should have counsel appointed for them.

Implementation Requirement: This Recommendation could be implemented by passing a new statute or by an amendment to the Federal and Superior Court Rules of Criminal Procedure. It could also be implemented by the judiciary sua sponte*, with the cooperation of the District of Columbia Public Defender and Federal Defender Service, but it is unclear whether private counsel could be paid for grand jury representation without new legislation or rules changes.*

All witnesses should have right to have counsel present in jury room during testimony

The goal of these two Recommendations is to ensure that the right to counsel for a witness or target before the grand jury can be meaningfully and effectively exercised to protect the witness by permitting an attorney for a witness to be present in the grand jury room during the witness's testimony. Federal Rule of Criminal Procedure 6(d) and Superior Court Rule of Criminal Procedure 6(d) prohibit anyone from being present in the grand jury room other than grand jurors, prosecutors, interpreters, court reporters, and the witness under examination. The Supreme Court has held that "[a] witness before a grand jury cannot insist, as a matter of

constitutional right, on being represented by counsel." [61] Therefore, grand jury witnesses can bring counsel with them into the grand jury room only if such a right has been created by rule or statute.

Yet, grand jury witnesses often need counsel while giving testimony. The unfair derogation of a witness' legal rights in jurisdictions that prohibit the presence of counsel in the grand jury room may occur for the following reasons, among others:

Prohibition against counsel's presence is unfair derogation of witness' rights

(1) Since counsel does not hear the witness's precise testimony, counsel cannot assist the witness in correcting unintentional factual errors or misleading statements;

(2) The lawyer's presence outside the grand jury room is unlikely to deter improper questioning and harassment of the witness;

(3) Since witnesses will not leave the grand jury room to consult with counsel after every question for fear that the grand jury will believe they have something to hide, they often must rely on the previous advice of counsel that was necessarily based on counsel's speculation as to the precise phrasing of the next series of questions;

(4) Even where the witness is able to report each question to counsel before responding, it often is difficult for a lawyer who does not himself hear the question to judge the flow of the questions; and

(5) Witnesses before the grand jury are under considerable stress and may have difficulty in following their counsel's directions with respect to, among other things, privileged matters.

State Experience

21 states currently permit some witnesses to have counsel present

Recognizing the importance of these issues, twenty-one states currently permit some witnesses to have counsel present during their grand jury testimony: Arizona, Colorado, Florida, Illinois, Indiana, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Mexico, New York,

[61] *United States v. Mandujano*, 425 U.S. 564, 581 (1976).

Oklahoma, Pennsylvania, South Dakota, Utah, Virginia, Washington, and Wisconsin.[62]

11 of these 21 permit all witnesses to have counsel present

Of these twenty-one states, eleven states permit *all* witnesses to have counsel present during their grand jury testimony: Colorado, Florida, Illinois, Kansas, Massachusetts, Michigan, Nebraska, Oklahoma, South Dakota, Utah, and Wisconsin.[63] Two states grant this right only to witnesses who appear before investigative or special grand juries.[64] The remaining seven states grant this right only to witnesses who are targets of the grand jury investigation (Arizona, Indiana, Louisiana, Nevada, and New Mexico),[65] and who have not received immunity (Washington)[66] or who have waived immunity (Minnesota and New York).[67]

Nine of 21 expressly provide for appointment of counsel for indigent witnesses

Nine of these twenty-one states expressly provide that indigent witnesses must be appointed counsel: Colorado, Illinois, Indiana, Kansas, Michigan, Nebraska, New York, Oklahoma, and Pennsylvania.[68] The remaining twelve states do

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[62] *See infra*, notes 22-26. *Cf.* BEALE Bryson Felman and Elston GRAND JURY LAW AND PRACTICE §§ 4:10, 6:27 (2d ed. 1998) [hereinafter "BEALE"] (collecting statutory and court rule citations for twenty states); *see also infra notes.*

[63] **Colorado** - COLO. REV. STAT. § 16-5-204(4)(d) (1999); **Florida** - FLA. STAT. ch. 905.17 (1999); **Illinois** - 725 ILL. COMP. STAT. 5/112-4.1 (West 2000); **Kansas** - KAN. STAT. ANN. § 22-3009(2) (1999); **Massachusetts** - A.L.M.R. Crim. P. Rule 5(c); **Michigan** - MICH. STAT. ANN. § 28.959(5) (Law Co-op. 1999); **Nebraska** - NEB. REV. STAT. § 29-1411(2) (2000); **Oklahoma** - OKLA. STAT. tit. 22, §§ 340(C), 355 (B) (1999); **South Dakota** - S.D. CODIFIED LAWS § 23A-5-11 (Michie 2000); **Utah** - UTAH CODE ANN. § 77-10a-13(2) (1999); **Wisconsin** - WIS. STAT. § 968.45(1) (1999). *Cf.* BEALE at §6:27 (citing ten states).

[64] **Pennsylvania** - 42 PA. CONS. STAT. § 4549(C) (1999); **Virginia** - VA. CODE ANN. § 19.2-209 (Michie 1999).

[65] **Arizona** - Ariz. St. R.C.R.P. R. 12.5 (2000); **Indiana** - IND. CODE § 35-34-2-5.5 (1999); **Louisiana** - La. C.Cr.P. Art. 433-A(2); **Nevada** - NEV. REV. STAT. § 172.239 (2000); **New Mexico** - N.M. STAT. ANN. § 31-6-, 4-C (Michie 2000). *Cf.* BEALE at §6:27 (citing four states).

[66] WASH. REV. CODE § 10.27.120 (2000). *See* BEALE at §6:27.

[67] **Minnesota** - MINN. R. CRIM. PROC. 18.04 (1999); **New York** - N.Y. CRIM. PROC. LAW § 190.52 (Consol. 1999).

[68] **Colorado** - COLO. REV. STAT. § 16-5-204(4)(d) (1999); **Illinois** - 725 ILL. COMP. STAT. 5/112-4.1 (West 2000); **Kansas** - KAN. STAT. ANN. § 22-3009(2) (1999); **Michigan** - MICH. STAT. ANN. § 28.959(5) (Law Co-op. 1999); **Nebraska** - NEB. REV. STAT. § 29-1411(2) (2000); **New York** - N.Y. CRIM. PROC. LAW § 190.52 (Consol. 1999); **Oklahoma** - OKLA. STAT. tit.

not clearly define the right of indigent witnesses to appointed counsel.[69] Six of these states indicate that counsel *may be present* (Florida, Louisiana, Minnesota, Nevada, South Dakota, and Wisconsin).[70] A Florida statute clearly states that it "does not create a right to counsel for the grand jury witness,"[71] and Virginia law dictates that the witness has the "right to *counsel of his own procurement*."[72] The remaining five states either give witnesses the right to counsel or state that witnesses are entitled to counsel (which could be interpreted as conferring upon indigent witnesses the right to appointed counsel).[73]

All 21 limit counsel's activities

Virtually all of these twenty-one states place limitations on counsel's activities in the grand jury room.[74] All of these states authorize counsel to advise their clients in the grand jury room, while seven states expressly disallow counsel to otherwise participate in the proceedings: Illinois, Indiana, Michigan, Minnesota, Nevada, New Mexico, and New York.[75] Nine states specifically prohibit counsel from addressing the grand jury (Colorado, Indiana, Louisiana, Massachusetts, Nebraska, Nevada, New Mexico, Oklahoma, and

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22, §§ 340(C), 355 (B) (1999); **Pennsylvania** - 42 PA. CONS. STAT. § 4549(C) (1999). *Cf*. BEALE at §6:27 (citing eight states).

[69] *See Cf.* BEALE at §6:27.

[70] **Florida** - FLA. STAT. ch. 905.17 (1999); **Louisiana** - LA. CODE CRIM. PROC. ANN. art. 433-A(2) (West 2000); **Minnesota** - MINN. R. CRIM. PROC. 18.04 (1999); **Nevada** - NEV. REV. STAT. § 172.239 (2000); **South Dakota** - S.D. CODIFIED LAWS § 23A-5-11 (Michie 2000); **Wisconsin** - WIS. STAT. § 968.45(1) (1999).

[71] FLA. STAT. ch. 905.17 (1999).

[72] VA. CODE ANN. § 19.2-209 (Michie 1999) (emphasis added).

[73] **Arizona** - Ariz St RCRP R 12.6 (2000); **Massachusetts** - MASS. ANN. LAWS ch. 277, § 14A (Law. Co-op. 1999); **New Mexico** - N.M. STAT. ANN. § 31-6-4-C (Michie 2000); **Utah** - UTAH CODE ANN. § 77-10a-13(4) (1999); **Washington** - WASH. REV. CODE § 10.27.120 (2000). *Cf.* BEALE at §6:27.

[74] *See* BEALE at §6:27; *See Utah Code ANN*. §77-10(a)-13(4) (1999). For example, Utah law does not clearly define the role of counsel in the grand jury room.

[75] **Illinois** - 725 ILL. COMP. STAT. 5/112-4(b) (West 2000); **Indiana** - IND. CODE § 35-34-2-5.5 (1999); **Michigan** - M.C.R. § 6.005(J) (2000); **Minnesota** - MINN. R. CRIM. PROC. 18.04 (1999); **Nevada** - NEV. REV. STAT. § 172.239(2) (2000); **New Mexico** - N.M. STAT. ANN. § 31-6-4-C (Michie 2000); **New York** - N.Y. CRIM. PROC. LAW § 190.52(2) (Consol. 1999).

Pennsylvania)[76] and seven of these nine states (as well as two others) expressly disallow counsel from entering objections during grand jury proceedings (Colorado, Indiana, Kansas, Louisiana, Massachusetts, Nebraska, Oklahoma, Pennsylvania, and Wisconsin).[77] Four states specifically prohibit counsel from examining or cross-examining witnesses before the grand jury: Indiana, Kansas, Virginia, and Wisconsin.[78]

If the prosecutor abuses a witness in front of the grand jury or asks questions that are incompetent in form or substance, one court has concluded that counsel should advise the witness to either: (1) refuse to answer until a court has ruled on the propriety of the question, or (2) request the foreperson to allow the defendant to seek a judicial declaration.[79] At least one of these states has held that the right to advise a client inside the grand jury room includes the right to take brief and reasonable notes during the course of the witness' testimony.[80]

Committee research yielded no surveys regarding the states' experience (or their prosecutors' experience) with having counsel present during grand jury proceedings. To assess this

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[76] **Colorado** - COLO. REV. STAT. § 16-5-204(4)(d) (1999); **Indiana** - IND. CODE § 35-34-2-5.5 (1999); **Louisiana** - LA. CODE CRIM. PROC. ANN. art. 433-A(2) (West 2000); **Massachusetts** - A.L.M. R. Crim. P. Rule 5(c) (1999); **Nebraska** - NEB. REV. STAT. § 29-1411(2) (2000); **Nevada** - NEV. REV. STAT. § 172.239(2) (2000); **New Mexico** - N.M. STAT. ANN. § 31-6-4-C (Michie 2000); **Oklahoma** - OKLA. STAT. tit. 22, § 355 (B)(4) (1999); **Pennsylvania** - 42 PA. CONS. STAT. § 4549(C)(3) (1999). *See* BEALE at §6:27.

[77] **Colorado** - COLO. REV. STAT. § 16-5-204(4)(d) (1999); **Indiana** - IND. CODE § 35-34-2-5.5 (1999); **Kansas** - KAN. STAT. ANN. § 22-3009 (1999); **Louisiana** - LA. CODE CRIM. PROC. ANN. art. 433-A(2) (West 2000); **Massachusetts** - A.L.M. R. Crim. P. Rule 5(c) (1999); **Nebraska** - NEB. REV. STAT. § 29-1411(2) (2000); **Oklahoma** - OKLA. STAT. tit. 22, § 355 (B)(4) (1999); **Pennsylvania** - 42 PA. CONS. STAT. § 4549(C)(3) (1999); **Wisconsin** - WIS. STAT. § 968.45(1) (1999). *Cf.* BEALE at §6:27 (citing one state).

[78] **Indiana** - IND. CODE § 35-34-2-5.5 (1999); **Kansas** - KAN. STAT. ANN. § 22-3009 (1999); **Virginia** - VA. CODE ANN. § 19.2-209 (Michie 1999); **Wisconsin** - WIS. STAT. § 968.45(1) (1999). *Cf.* BEALE at §6:27.

[79] *See* BEALE, at § 6:27 (citing *New York v. Smays*, 594 N.Y.S.2d 101, 106 (Sup. 1993)).

[80] *See Matter of New York v. Riley*, 414 N.Y.S.2d 441, 456-57 (Sup. Ct. Queens Co. 1979) (finding neither grand jury foreperson nor a district attorney is permitted to confiscate counsel's brief and reasonable notes).

experience, the District of Columbia Grand Jury Study Committee conducted a number of telephone interviews posing the following questions to prosecutors and criminal defense attorneys from Colorado, Massachusetts, and New York:

> Generally, what has your experience been with the presence of counsel in the grand jury?
>
> Must all felony prosecutions proceed by grand jury indictment?
>
> If not, what kinds of felonies are presented to the grand jury?
>
> Is this required by law or a function of prosecutorial discretion?
>
> Has the presence of counsel increased or decreased appearances of witnesses?
>
> Has the presence of counsel increased or decreased assertions of privileges and instructions not to answer?
>
> Has the presence of counsel increased delay or disruptions in the grand jury process?

Presence of counsel has created no major concerns for prosecutors

Prosecutors and defense counsels' responses revealed no major concerns with witnesses' having counsel in the grand jury room. Specifically, the attorneys with whom we spoke saw no appreciable increase in the assertions of privilege and no significant increase in delay or disruptions. Their answers are recorded in Appendix D of this Report.

Pros and Cons

Advantages of counsel's presence:

- prevents abuse of witness' rights
- saves time
- clarifies misunderstandings

Research and Committee discussions have revealed several advantages of having witness' counsel present in the grand jury, including the following:

> (1) It prevents the unfair abuse of the witness' legal rights (e.g., privilege against self-incrimination, attorney-client privilege, doctor-patient privilege, spousal privilege, etc.).
>
> (2) It saves the grand jury's time by eliminating the witness' need to take trips outside the grand jury room to confer with counsel.
>
> (3) Counsel can clarify misunderstood questions asked of witnesses by prosecutors.[81]

[81] Wayne R. LaFave & Jerold H. Israel, *Criminal Procedures* §8.15(b), at 308-09 (2d ed. 1992).

Judicial Conference of US identified potential disadvantages

The District of Columbia Grand Jury Study Committee also considered some potential disadvantages of having a witness' counsel present in the grand jury, several of which were identified in a recent study by the Judicial Conference of the United States:[82]

> (1) Potential loss of spontaneity of testimony: The fact-finding process may be impaired because of the tendency for the witness to become dependent upon, and to repeat responses discussed with his counsel, rather than to testify fully and frankly in his own words.
>
> (2) Potential transformation of the grand jury into an adversarial proceeding: The function of the grand jury could move away from being a charging body and toward becoming a guilt-determining body, causing substantially increased delays. Counsel may interfere with the grand jury proceeding if allowed to attend. In jurisdictions like D.C., where there are many felony cases which all must go before the grand jury, there is a risk of the grand jury process becoming less efficient and bogged down by defense advocacy and tactics. For example, counsel may act beyond his or her permitted role by addressing the grand jurors, requiring the judge to be consulted and/or the attorney to be removed from the grand jury proceeding.
>
> (3) Perceived loss of secrecy: Such a loss of secrecy due to counsel's presence could: (a) chill witness cooperation; (b) cause conflicts of interest in cases of multiple representation, e.g., where the lawyer is representing a company and its employees and the witness might not want his or her employer to know what he or she said; and (c) expose the grand jurors to the possibility of undue influence or intimidation from unauthorized persons.
>
> (4) Prejudice to indigent or ordinary witnesses (or, if court-appointed counsel is provided to such witnesses, the cost to the public of paying for such court-appointed counsel): The greatest beneficiaries of having counsel present in the grand jury room, it is argued, may be persons most closely associated

[82] *See* REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON PROPOSED AMENDMENTS TO FEDERAL RULES GOVERNING THE GRAND JURY (March 1999), submitted to the Committee on Appropriations, in accordance with H.R. CONF. REP. NO. 825, 105TH CONG. 2D SESS. 11071 (1998).

> with the most serious or most profitable criminal violations, who probably will have counsel provided by their confederates or who likely can afford to hire their own counsel. The vast majority of honest Americans called before the grand jury probably will not incur the expense, and will thus be comparatively disadvantaged. If court-appointed counsel is not provided, witnesses who cannot afford counsel will be similarly disadvantaged. If court-appointed counsel is provided, the public will have to bear the expense.[83]

Judicial Conference study found unpersuasive

The District of Columbia Grand Jury Study Committee believes that the advantages of counsel's presence outweigh the disadvantages. With due respect to the Judicial Conference, the Study Committee found the Judicial Conference's report unpersuasive. The Report did not fully explore the advantages of having counsel present in the grand jury; it appears to have underestimated the number of states that permit counsel in the grand jury; it failed to examine the experience of the states that permit counsel in the grand jury; and it overestimated the severity of the drawbacks of having counsel present in the grand jury.

Potential disadvantages can be minimized

For instance, the first potential disadvantage set forth above (loss of spontaneity of testimony) could be minimized by employing the same procedure used in civil depositions of limiting the lawyer's input while a question is pending (unless the answer would involve attorney-client privileged information). Moreover, unintentional factual errors (which a lawyer's presence in the grand jury room can help correct) are often a far greater problem than intentional misstatements (which a lawyer is ethically obligated not to assist).

The second disadvantage outlined above (transformation of the grand jury into an adversarial proceeding) could be ameliorated or eliminated by prohibiting counsel from participating in the proceedings, and relying on the threat of removal to enforce this prohibition. Again, twenty-one states currently grant some grand jury witnesses the right to have counsel present subject to certain limitations.[84] The fact that presence of counsel has not been disruptive in the jurisdictions interviewed by the Committee further supports this conclusion.

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[83] *Id.*

[84] *See* BEALE, at 6:27., at *supra* note 62.

Concern regarding the third purported disadvantage (perceived loss of secrecy) is diminished by the fact that a lawyer must examine whether a conflict may exist in multiple representation before undertaking the representation. If such conflict does exist, an independent lawyer for the witness must be obtained.

Finally, the District of Columbia Grand Jury Study Committee believes that the fourth alleged drawback (prejudice to indigent or ordinary witnesses) is negated by the fact that the current, informal practice in the U.S. District Court for D.C. is that the Federal Public Defender's Office provides counsel for witnesses when requested (and needed) and that the expense for this counsel is not overly burdensome.[85] The District of Columbia Grand Jury Study Committee acknowledges that such requests happen only rarely in the U.S. District Court for D.C. (approximately 20 times per year, by one account) and that such requests may happen more frequently if indigent witnesses know they have a right to have counsel appointed. However, any increase in the expense for counsel would not likely be prohibitive because: (1) the number of such indigent witnesses that appear before the grand jury each year is relatively small (a large number of grand jury witnesses are police officers or complainants); and (2) these representations are typically brief and uncomplicated.[86]

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[85] The Criminal Justice Act, which is applicable to D.C. Superior Court, does not expressly provide for appointment of counsel for grand jury witnesses. However, Criminal Justice Act attorneys have been appointed to represent both grand jury and trial witnesses when the need has arisen.

[86] Dissents to Recommendations 10 and 11: Here the Committee recommends that *all* witnesses testifying before the grand jury should have the right to have counsel present and that any indigent witness who requests counsel should have counsel appointed by the court. With respect to the issue of counsel being present, I am not persuaded that the case has been made that the absence of counsel inside the grand jury room (as opposed to having counsel available outside the room which is the current practice) has had an adverse impact on the substantial rights of witnesses before the grand jury. At bottom, this "reform" serves little more than the convenience of defense counsel. Procedures are currently in effect to provide counsel for indigent grand jury witnesses who may have self-incrimination problems. Both the Public Defender System and Criminal Justice Act lawyers are routinely available for that purpose. I can find no justification for the Committee's Recommendation that counsel be appointed for any indigent grand jury witness who wants one, even when there is no potential self-incrimination problem. — *The Honorable Warren R. King.*

I believe that the presence of counsel in the grand jury room would have a chilling effect on the investigative process of the grand jury. When the

—Recommendation 12—

The target or subject of a grand jury investigation should, upon request, have the right to testify before the grand jury, provided that the target or subject, (1) explicitly and on the record before the grand jury, waives his or her Fifth Amendment privilege, and (2) is represented by counsel, or voluntarily and knowingly appears without counsel and consents to full examination under oath.

Implementation Requirement: This Recommendation may be implemented by the U.S. Attorney's Office without amending any procedural rule or passing new legislation.

Target or subject should have right to testify

Over twenty years ago, the American Bar Association overwhelmingly endorsed a set of proposals to reform grand juries, including a recommendation that a target or subject of a grand jury investigation have the right to testify before the grand jury.[87] Since then, Congress has held hearings on this issue but has not enacted any of these proposals. The District of Columbia Grand Jury Study Committee joins the American Bar Association in supporting such a recommendation.

State experience

A few states already have codified the right of a target or subject to testify before a grand jury. For example, in New York, a person who is aware that he or she is the target of a

witness is a friend of, or otherwise known to the defendant, as often happens in homicide cases in the District of Columbia, that witness is not usually a willing participant in the grand jury process. He often desires to give as little information as possible, either out of fear for his own safety or because he is trying to protect the defendant. The presence of his counsel in the grand jury room would probably have the effect of causing him to attempt to refuse to answer most questions or to give less information that he would otherwise do. That is not in the best interest of justice. I recommend that witnesses be allowed to have counsel present in the building, but that counsel must wait immediately outside the grand jury room, as is now the case. — *Kathy Smith, former grand juror.*

[87] See American Bar Association, Criminal Justice Policy, Grand Jury Principles, No. 5 (Aug. 1977) <www.abanet.org>. The ABA recommended: "a target of a grand jury investigation shall be given the right to testify before the grand jury, provided he/she signs a waiver of immunity. Prosecutors shall notify such targets of their opportunity to testify unless notification may result in flight or endanger other persons or obstruct justice; or the prosecutor is unable with reasonable diligence to notify said persons." *Id.*

grand jury has the right to appear before the grand jury to testify in his or her own behalf.[88] But the prosecutor has no duty to inform a person that a grand jury proceeding against him is pending or that the person has a right to testify before the grand jury.[89] In Indiana, a "target of a grand jury investigation shall be given the right to testify before the grand jury, provided he signs a waiver of immunity."[90] Unlike under New York law, however, in Indiana "the prosecuting attorney shall notify a target of his opportunity to testify unless: (1) notification may result in flight or endanger other persons or obstruct justice; or (2) the prosecutor is unable, with reasonable diligence, to notify him."[91] Nevada has a similar provision except that a judge must determine whether a prosecuting attorney has good cause not to notify the target of his or her right to testify before the grand jury.[92]

Qualified federal opportunity to testify

On the federal level, targets or subjects of federal grand juries have a qualified opportunity to testify before a grand jury.[93] Prosecutors are encouraged to notify the target or subject

[88] See N.Y. Crim. Pro. L. § 190.50(5)(a) which states: " when a criminal charge against a person is being or is about to be or has been submitted to a grand jury, such person has a right to appear before such grand jury as a witness in his own behalf if, prior to the filing of any indictment or any direction to file a prosecutor's information in the matter, he serves upon the district attorney of the county a written notice making such request stating an address to which communications may be sent. The district attorney is not obliged to inform such a person that such a grand jury proceeding against him is pending, in progress or about to occur unless such person is a defendant who has been arraigned in a local criminal court upon a currently undisposed of felony complaint charging an offense which is a subject of the prospective or pending grand jury proceeding. In such case, the district attorney must notify the defendant or his attorney of the prospective or pending grand jury proceeding and accord the defendant a reasonable time to exercise his right to appear as a witness therein[.]"*Id.*

[89] *Id.*

[90] IND. CODE ANN. § 35-34-2-9(b) (West 2000).

[91] *Id.*

[92] See NEV. REV. STAT. 172.241 (1999).

[93] The United States Department of Justice United States Attorneys' Manual states that: "under normal circumstances, where no burden upon the grand jury or delay of its proceedings is involved, reasonable requests by a 'subject' or a 'target' of an investigation . . . to testify personally before the grand jury ordinarily should be given favorable consideration, provided that such witness explicitly waives his or her privilege against self-incrimination, on the record before the grand jury, and is represented by counsel or voluntarily and knowingly appears without counsel and consents to full

of the grand jury a reasonable time before issuing an indictment to give the person the option to testify.[94]

examination under oath." United States Attorneys' Manual tit. 9, ch. 11.152 (June 2000).

When a person does not request to testify on his or her own motion, "the prosecutor, in appropriate cases, is encouraged to notify such a person a reasonable time before seeking an indictment in order to afford him or her an opportunity to testify before the grand jury . . . Notification would not be appropriate in routine clear cases or when such action might jeopardize the investigation or prosecution because of the likelihood of flight, destruction or fabrication of evidence, endangerment of other witnesses, undue delay or otherwise would be inconsistent with the ends of justice." *Id.* tit. 9, ch. 11.153 (June 2000).

[94] Dissent to Recommendation 12: For the reason stated in my dissent to Recommendation 9 supra note 60, I do not support this recommendation. Moreover, I am satisfied that the substance of Recommendation 12 is adequately covered by Recommendations 15 and 16 which I support as modified by my dissenting comments to those Recommendations — *The Honorable Warren R. King.*

—Recommendation 13—

All grand jury witnesses (other than law enforcement personnel testifying on behalf of the government) should be given the following *Miranda*-type warnings as to their rights before the grand jury:

> **You may refuse to answer any question if a truthful answer to the question would tend to incriminate you.**
>
> **Anything that you do say in the grand jury may be used against you by the grand jury or in subsequent legal proceedings.**
>
> **If you have counsel, the grand jury will permit you a reasonable opportunity to consult with your counsel.**
>
> **You have the right to consult with counsel; you also have the right to retain counsel, or if you cannot afford counsel, one can be provided free of charge.**

Implementation Requirement: This Recommendation may be implemented by either an amendment to Rule 6 of the Federal Rules of Criminal Procedure and Rule 6 of the Superior Court Rules of Criminal Procedure, or by passing new legislation that requires these warnings.

—Recommendation 14—

The government should include a list of the rights, enumerated in Recommendation 13, in the subpoena seeking grand jury testimony or otherwise inform all witnesses of these rights at the earliest practicable time prior to their testimony. In addition, the government should repeat these rights to the witness in the grand jury room and ask the witness if he or she understands them.

Implementation Requirement: The U.S. Attorney's Office could provide the warnings sua sponte and could include them with a subpoena without new legislation or rules changes. Legislation or rules amendments could require the Department of Justice to provide the warnings and to include them with a subpoena.

Witnesses should be made aware of 5th Amendment rights

The goal of Recommendations 13 and 14 is to make grand jury witnesses aware of their rights under the Fifth Amendment to the Constitution. Currently, a grand jury

witness is not required to be advised of these rights.[95] *Miranda v. Arizona* provides that, prior to any custodial interrogation, a person must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, that he has the right to the presence of an attorney, and that, if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. However, grand jury witnesses are not deemed to be in custodial interrogation. Therefore, *Miranda* does not require that the government advise a grand jury witness of these rights.[96]

Although the Supreme Court has not resolved the question whether self-incrimination warnings must be given to grand jury witnesses when they are targets of the grand jury's investigation, the Court has given the impression that it would hold that such warnings are not required.[97]

Many state statutes require grand jury witnesses be advised of 5th Amendment rights, particularly when targets

In many jurisdictions, prosecutors are required by statute to advise grand jury witnesses of their Fifth Amendment rights, particularly if the witnesses are targets of the grand jury's investigation (Arizona, Colorado, Idaho, Illinois, Indiana, Kansas, South Dakota, Texas, and Utah).[98] Although a few courts have held that such warnings must be given to targets when they are subpoenaed to testify before the grand jury (Colorado, Illinois, Indiana, Louisiana, Michigan, Missouri, New Jersey, and Utah), in the absence of statute most courts have not required that such warnings be given to all grand jury witnesses.[99]

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[95] 384 U.S. 436 (1966).

[96] *Id.*

[97] *See* BEALE at § 6:24, (citing *Miranda*.).

[98] *See e.g.*, BEALE, at § 6:24 (citing *United States v. Mandujano*, 425 U.S. 564 (1976) (holding that the failure to give self-incrimination warnings will not bar prosecution for perjury); *Minnesota v. Murphy*, 465 U.S. 420 (1984) (noting that self-incrimination warnings are not required in the grand jury setting, because the grand jury is not the sort of inherently coercive setting — such as a police station — that gave rise to the *Miranda* warnings).

[99] **Arizona** - Ariz. St. RCRP R 12.6 (2000); **Colorado** - COLO. REV. STAT. § 16-5-204(4) (1999); **Idaho** - § IDAHO CODE § 19-1121 (1999); **Illinois** - 725 ILL. COMP. STAT. 5/112-4(b) (West 2000); **Indiana** - IND. CODE § 35-34-2-5(b) (1999); **Kansas** - KAN. STAT. ANN. § 22-3009 (1999); **South Dakota** - S.D. CODIFIED LAWS § 23A-5-13 (Michie 2000); **Texas** - TEX. CRIM. P. CODE ANN. § 20.17(c) (West 2000); **Utah** - UTAH CODE ANN. § 77-10a-13(4) (1999).

DOJ guidelines require modified *Miranda* warnings be given to targets and subjects

U.S. Department of Justice guidelines for its attorneys require that modified *Miranda* warnings, contained in an "Advice of Rights" form (attached as Appendix E), be appended to all grand jury subpoenas served on any target or subject of a grand jury investigation.[100] In addition, Justice Department policy requires that these warnings be given by the prosecutor on the record to targets and subjects before the grand jury and that the witness be asked to affirm that he understands them.[101]

These warnings include the following:

> "You may refuse to answer any question if a truthful answer to the question would tend to incriminate you."
>
> "Anything that you do say may be used against you by the grand jury or in a subsequent legal proceeding."
>
> "If you have retained counsel, the grand jury will permit you a reasonable opportunity to step outside the grand jury room to consult with counsel if you so desire."[102]

The Justice Department's "Advice of Rights" form omits several of the warnings required by *Miranda*.[103] In particular, the form does not indicate that the witness is entitled to counsel since this right has not been conferred by either the U.S. Constitution or federal statute.[104]

SEC also advises witnesses of several *Miranda*-type rights

The Securities and Exchange Commission ("SEC") advises a witness of several *Miranda*-type rights in its Form 1662, which accompanies its subpoenas. Specifically, the SEC subpoena includes the following statements:

> "You may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment to the Constitution of the United States, to give any

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[100] *See* BEALE, at § 6:24.

[101] *See* United States Dept. of Justice, "United States Attorneys' Manual" § 9-11.151 (Sept. 1997).

[102] *Id.*

[103] *Id., supra* note 101.

[104] *See, e.g., U.S. v. Mandujano*, 425 U.S. 564 (1976); 18 U.S.C. sec. 3006A; BEALE, at § 6:24.

> information that may tend to incriminate you or subject you to fine, penalty or forfeiture."
>
> "Information you give may be used against you in any federal, state, local or foreign administrative, civil or criminal proceedings brought by the Commission or any other agency."
>
> "You have the right to be accompanied, represented and advised by counsel of your choice."

The District of Columbia Grand Jury Committee is aware that a number of federal prosecutors' offices across the United States, as a matter of practice, attach an Advice of Rights-type form to grand jury subpoenas to all witnesses.

A *Miranda*-type requirement to advise all witnesses (other than law enforcement personnel testifying on behalf of the government), not just targets and subjects, of their Fifth Amendment rights is subject to at least two potential criticisms:

Pros and cons of case for required warnings for all witnesses

> A *Miranda*-type requirement adds little to a grand jury witness' protection because the grand jury is not the sort of coercive setting that prompted the *Miranda* Court to impose a safeguard. Even if it is such a coercive setting, either (a) the witness already knows of his rights, or (b) the witness will be easily coerced into waiving his rights; and
>
> A *Miranda*-type requirement may unnecessarily impair the ability of the grand jury and the prosecutor to obtain evidence during an investigation.[105]

However, a *Miranda*-type requirement in this context apprises unknowing witnesses of rights that are available to them. Requiring the government to advise all witnesses other than law enforcement personnel testifying on behalf of the government (not just subjects and targets) of these rights ensures that all witnesses, some of whom later became subjects or targets, are adequately advised of their rights. In addition, this requirement serves at least two important but less-obvious functions:

> A *Miranda*-type requirement serves important symbolic functions, such as correcting the

[105] *See* BEALE 6:24; Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 398, (1999).

> appearance that the poor and the unsophisticated are particularly vulnerable to government exploitation; and
>
> Even if the witness already understands his rights, the very fact that the government must recite them may help to dispel the sense of total isolation and powerlessness that otherwise pervades much grand jury interrogation.[106]

As a result, the District of Columbia Grand Jury Committee concludes that the advantages of *Miranda*-type requirements outweigh the disadvantages.

Sanctions for failure to warn

As a means of enforcing the requirement that these warnings be given to grand jury witnesses, if the government fails to advise a grand jury witness of these warnings, the District of Columbia Grand Jury Study Committee believes that the government should not be allowed to: (1) prosecute the witness for perjury in connection with his grand jury testimony; (2) assert that the witness has knowingly and voluntarily waived a privilege or right; or (3) use any of the witness' statements against him in subsequent proceedings.[107]

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[106] LaFave & Israel, *Criminal Procedures* §6.5(d), at 514-14.

[107] Dissent to Recommendations 13 and 14: So far as I can determine, this recommendation, that all witnesses (other than law enforcement personnel testifying on behalf of the government) who appear before a grand jury must be given Miranda-type warnings, goes beyond the practice in any other jurisdiction. Some jurisdictions require that warnings be given to targets or subjects of the investigation who appear as witnesses, but I am unaware of any jurisdiction that requires that warnings be given to virtually all witnesses (I assume that 'all witnesses' includes eye witnesses, victims of crime, witnesses having custody of documents and records, and even expert witnesses). This recommendation would provide more protection than is required in the far more coercive atmosphere of a police station where warnings must be given only when there is custodial interrogation.

Justice Department guidelines require that warnings be given to anyone who is a target or subject of the grand jury investigation. There is no evidence that such warnings are not given or that they are not effective, and the Committee has not demonstrated that the Justice Department guideline is not sufficient to provide adequate protection to those appearing as witnesses before the grand jury. Moreover, no one else has made a convincing case that warnings should be given to all witnesses—*The Honorable Warren R. King.*

—Recommendation 15—

The U.S. Congress should adopt legislation incorporating § 9-11.233 of the U.S. Attorneys' Manual ("USAM") as law. The provision specifically directs that when a prosecutor conducting a grand jury inquiry is personally aware of "*substantial evidence* that *directly negates* the guilt of a subject of the investigation, the prosecution must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such person."

Implementation Requirement: This Recommendation may only be implemented by an act of Congress.

—Recommendation 16—

If the prosecution fails to present exculpatory evidence to the grand jury as required by USAM § 9-11.233, the court should dismiss the indictment without prejudice.

Implementation Requirement: This Recommendation may be implemented by passing new legislation, or by an amendment to Rule 6 of the Federal Rules of Criminal Procedure and Rule 6 of the Superior Court Rules of Criminal Procedure.

Due process and fundamental fairness dictate that substantial evidence directly negating guilt must be disclosed

Currently, prosecutors are not required to present exculpatory evidence to the grand jury. We propose the adoption of the United States Attorney Manual § 9-11.233 to address the due process and fundamental fairness issues at stake. The specific exculpatory evidence that must be disclosed is substantial evidence that directly negates the guilt of the accused. Further, to ensure compliance with this rule, "courts must be given the power to review grand jury minutes and dismiss indictments without prejudice that result from procedures where this duty is violated."[108]

Arguments in favor of requiring disclosure:

• will reduce number of unsupportable indictments

A series of arguments have been advanced in support of this reform. First, if the prosecutor is required to present exculpatory evidence to the grand jury, it will reduce the number of indictments that cannot be supported at trial because

[108] Gerald B. Lefcourt, *High Time for a Bill of Rights for the Grand Jury*, THE CHAMPION (April 1998).

the prosecutor will no longer have the incentive to indict a case on weak evidence in the hopes of obtaining sufficient evidence in the investigation before trial. This consideration is important because "the Supreme Court's assumption that the government will not indict a case that it cannot win at trial is not true in all cases."[109]

• will protect reputation of potential defendants

Second, this change will protect the reputation of potential defendants. In support of his federal grand jury legislation in July 1998, Senator Dale Bumpers vehemently argued that exculpatory evidence must be disclosed in order to avoid ill-conceived indictments that severely injure reputations:

> It is no answer to say the evidence of innocence can be considered at trial, and the jury will correct the mistakes of the grand jury. If the Government has evidence which — if it were shown to the grand jury — would lead the grand jury not to indict, the government must share that evidence with those who have power to indict.[110]

• has significant support in state practice

Third, significant support for this reform is found in state practice. Many states have recognized the prosecutor's duty to disclose exculpatory evidence to the grand jury. The states' specific interpretations of this rule vary, and their philosophies can be divided into three groups. The first group consists of a few states that have recognized that a duty does exist, but have never defined the scope of that duty.[111] The second group, consisting of most states that recognize a prosecutorial duty to disclose, requires the prosecution to present exculpatory evidence that would exonerate the accused

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[109] *Id.*

[110] Grand Jury Due Process Act, S. 2289 105th Cong. (1988) [hereinafter referred to as "Grand Jury Due Process Act"].

[111] *See, e.g.*, **IOWA** - *State v. Hall*, 235 N.W.2d 702, 712 (Iowa 1975) (dictum) (finding that dismissal of indictment is appropriate only if actual prejudice results from suppression of exculpatory evidence); **NEVADA** - *Hyler* v. *Sheriff, Clark County*, 571 P.2d 114, 116 (1977) (implying that NEV. REV. STAT. § 172.145, which requires the grand jury to order production of exculpatory evidence, creates a prosecutorial duty to disclose); **MONTANA** - MONT. CODE ANN. § 46-11-314, Commission Comments ("The Commission recognizes that revealing exculpatory evidence and allowing the grand jury to hear evidence from the defendant are basic principles that need not be restated in this statute"); **OKLAHOMA** - *Stone v. Hope*, 488 P.2d 616, 620 (Okla. Crim. 1971) (dictum) (finding that the fact that a judge at a preliminary hearing dismissed charges against the defendant should be disclosed to the grand jury).

or lead the grand jury to refuse to indict.[112] The third "group" comprises only one state — California. In the leading California case, *Johnson v. Superior Court*,[113] the California Supreme

[112] *See, e.g.*, **ALASKA** - *Frink v. State*, 597 P.2d 154, 164-66 (Alaska 1979) (holding that prosecutorial duty to present exculpatory evidence is implicit in Alaska R. Crim. P. 6(q), which requires the grand jury to order production of exculpatory evidence); **ARIZONA** - *Trebus v. Davis*, 944 P.2d 1235 (1997) (holding that a prosecutor has a duty to inform the grand jury that the defendant has requested to appear or has submitted exculpatory evidence); **CONNECTICUT** - *State v. Coture*, 482 A.2d 300, 315 (1984) (finding that since the state has no interest in accusing the wrong person, it is obligated to present to the grand jury "any substantial evidence that would negate the accused's guilt, that is evidence which 'might reasonably be expected to lead the grand jury not to indict.'"); **DISTRICT OF COLUMBIA** - *Miles v. United States*, 483 A.2d 655 (D.C. 1984) (holding that substantial evidence negating guilt that might reasonably be expected to persuade grand jury not to indict must be presented to the grand jury); **MASSACHUSETTS** - *Commonwealth v. Connor*, 467 N.E.2d 1340, 1351-52 (1984) (holding that the prosecutor is obligated to disclose evidence that "would greatly undermine the credibility of an important witness" whose testimony affected the grand jury's decision to indict); **MINNESOTA** - *State v. Roan*, 532 N.W.2d 563 (Minn. 1995) (finding that evidence that would materially affect grand jury must be disclosed); **NEVADA** - NEV. REV. STAT. § 172.145(2) ("any evidence which will explain away the charge" must be disclosed*); Lay v. Nevada*, 886 P.2d 448, 452-53 (Nev. 1994) (finding that the prosecutor is not required to disclose grand jury witnesses' prior inconsistent statements since such statements do not "explain away" the charge against the defendant); **NEW JERSEY** - *State v. Horan*, 676 A.2d533, 543 (1996) (finding that the prosecutor is required to disclose evidence that meets two standards: "it must directly negate guilt and must also be clearly exculpatory"). The prosecutor is not required to disclose evidence that does not directly negate guilt (such as information regarding lack of motive, impeachment of government witnesses) *Id.* Determining whether evidence is clearly exculpatory requires an evaluation of its "quality and reliability" in the context of "the nature and source of the evidence" and the strength of the state's case. *Id.* at 543; **NEW MEXICO** - N.M. STAT. ANN. § 31-6-11(B) (finding that the prosecutor "shall present evidence that directly negates the guilt of the target when he is aware of such evidence"); *Buzbee v. Donnelly*, 634 P.2d 1244, 1250-59 (1981) (N.M. Stat. Ann. § 31-6-11(b) creates a prosecutorial duty to present all direct (i.e., not circumstantial) evidence directly negating guilt); **NEW YORK** - *People v. Batista*, 164 Misc. 632, 625 N.Y.S.2d 1008 (sup. 1995) (finding that it is an error not to present evidence that one eyewitness described the perpetrator as white where defendant could not be mistaken for white); **OHIO** - *Mayes v. City of Columbus*, 664 N.E.2d 1340, 1348 (1995) (finding that although no statute required disclosure, in the interest of justice, the prosecutor should inform the grand jury of "any substantial evidence negating guilt... at least where it might reasonably be expected to lead the grand jury not to indict"); **OREGON** - *State v. Harwood*, 609 P.2d 1312, 1317 (1980) (finding that the prosecutor must present evidence that "objectively refutes the facts as they appear from the state's evidence").

[113] 539 P.2d 792 (1975).

Court construed a state statute allowing the grand jury to consider evidence favorable to the accused, as implicitly requiring the prosecutor to inform the grand jury of any evidence "reasonably tending to negate guilt."[114]

The Committee is persuaded that these rationales, along with fundamental fairness, support a requirement for the disclosure of exculpatory evidence to the grand jury. Many jurisdictions have already embraced this rule.[115] Requiring the prosecutor to inform the grand jury of evidence that may exonerate the accused strengthens the grand jury's ability to screen out weak cases. Enhancing the grand jury's ability to screen out unfounded prosecutions is especially important because in the great majority of cases the defendant pleads guilty and the determination of guilt is therefore made without the usual procedural safeguards available during a trial.[116]

Recommendation steers middle course between disclosure of evidence that "reasonably tends" to negate guilt, and required dismissal when disclosure likely would have altered result

While the District of Columbia Grand Jury Study Committee found considerable merit in draft legislation that would require a prosecutor to disclose evidence "which reasonably tends to negate guilt," on balance it found that such a requirement might go too far; for example it might require the introduction of evidence that could not reasonably affect a grand jury's decision to indict, but would unduly prolong and complicate the proceedings, such as the testimony of one eyewitness exonerating the defendant if contradicted by incriminating testimony of a number of other eyewitnesses. On the other hand, the District of Columbia Grand Jury Study Committee considered a proposal to require dismissal of the indictment only if there was "a substantial likelihood that presentation of the exculpatory evidence would have significantly altered the conclusion of the grand jury," but found that provision went too far in the other direction. If the prosecutor were "personally aware" of "substantial evidence" that "directly negated" the guilt of a subject, and did not

[114] *Id*. at 796. *See also United States v. Basturo*, 497 F.2d 781 (9th Cir. 1974), in which the Ninth Circuit based an assertion of the prosecution's duty to disclose exculpatory evidence on its duty to seek justice.

[115] See BEALE, § 4:8.

[116] See Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 522 (1980) (plea bargaining decides legal guilt without the usual procedural safeguards of trial).

introduce it, that should be sufficient for dismissal without prejudice.[117]

[117] Dissent to Recommendation 15: As Recommendation 15 now reads, I believe it will have minimal impact, other than its hortatory effect, because the words "substantial" (modifying "evidence") and "directly" (modifying "negates") effectively permit a prosecutor to conceal exculpatory evidence whenever he or she chooses simply by asserting that the evidence in question either was not "substantial" or did not "directly" negate the guilt of the accused. Consequently, I recommend the following language as an alternative to Recommendation 15: "**A prosecutor shall not knowingly fail to disclose to the grand jury evidence in the prosecutor's possession which reasonably tends to negate guilt with respect to the target or subject of the investigation.**" — *The Honorable Henry F. Greene, joined by Jeffrey Berman.*

While I agree with Recommendation 15 that Section 9-11.233 of the U.S. Attorneys' Manual regarding the presentation of exculpatory evidence should be adopted as law, I would amend Recommendation 16 to read (with the amending language set forth in italics) "that if the prosecution fails to present exculpatory evidence to the grand jury as required by Section 9-11.233, *and the court finds that there is a substantial likelihood that presentation of the exculpatory evidence would have significantly altered the conclusion of the grand jury*, the court should dismiss the indictment without prejudice." Not every failure to present exculpatory evidence should result in dismissal. This amendment ensures that only evidence that is 'clearly' exculpatory would be sufficient. To that end, I would adopt as legislative history, so to speak, the discussion on the issue in LaFave & Israel, *Criminal Procedures* §15.4(d), 319-20 (1984) (e.g., testimony of one eyewitness exonerating the defendant if contradicted by incriminating testimony by a number of other eye witnesses, or a defendant's self-serving statement denying involvement would ordinarily not suffice; however, testimony of a reliable, unbiased alibi witness would) — *The Honorable Warren R. King, joined by Kathy Smith.*

—Recommendation 17—

A grand jury should not name a person in an indictment as an unindicted co-conspirator to a criminal conspiracy.

Implementation Requirement: This recommendation may be implemented by the U.S. Attorney's Office without amending any procedural rule or passing new legislation.

Practice of naming unindicted co-conspirators should end

Naming a person in an indictment as an unindicted co-conspirator tarnishes the reputation of the person without providing any means for the person to prove his innocence because the person is never tried. A person often suffers public embarrassment and private humiliation as the result of the grand jury naming him as an unindicted co-conspirator. In *Briggs v. United States*, the Fifth Circuit criticized the practice of naming persons as unindicted co-conspirators in an indictment charging a criminal conspiracy. [118] The Fifth Circuit stated that an indictment by a grand jury is "a specific accusation of crime having a threefold purpose: notice to the defendant, pleading in litigation, and the basis for the determination of formal acquittal or conviction. . . . None of these functions encompasses public accusations directed at persons not named as defendants."[119] Other courts have followed this decision.[120]

ABA agrees, practice serves no meaningful purpose

The American Bar Association, in its 1977 report on grand jury reforms, also recommended that a grand jury not name a person in an indictment as an unindicted co-conspirator because naming unindicted co-conspirators serves no meaningful purpose.[121] Relying on the reasoning in *Briggs*, the

[118] 514 F. 2d 794 (5th Cir. 1975).

[119] *Id.* at 800.

[120] *See* Charles Alan Wright, 1 FEDERAL PRACTICE AND PROCEDURE 3d § 110 at 464-65 (1999 & Supp. 2000). Some cases following the logic of *Briggs* involve grand jury reports, while others involve indictments. For an explanation of the differences between indictments and grand jury reports, *see* Marvin I. Frankel & Gary P. Naftalis, *The Grand Jury: An Institution on Trial*, 31 (1977). While indictments and grand jury reports are technically distinct, for purposes of assessing a reputational injury to a named individual, they are sufficiently similar to warrant similar treatment. *See* Dennis Golladay, *Sidestepping Due Process: Federal Grand Juries and the Unindicted Co-Conspirator*, 65 JUDICATURE 363, 364 (1982).

[121] *See* American Bar Association Criminal Justice Policy, Grand Jury Principles, No. 7 (Aug. 1977), <<www.abanet.org>> (recommending that

Department of Justice U.S. Attorneys' Manual also limits the naming of persons as unindicted co-conspirators.[122] Despite the persuasive reasoning discouraging the practice of naming unindicted co-conspirators, the practice has occurred with some frequency.[123] Particularly during the tumultuous decades of the 1960s and 1970s, prosecutors were alleged to have used the strategy of naming unindicted co-conspirators as a tool to silence radical movements.[124] In more recent times, grand juries have named unindicted co-conspirators in cases involving the

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"the grand jury shall not name a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. Nothing herein shall prevent supplying such names in a bill of particulars"); *see generally* Richard E. Gerstein and Laurie O. Robinson, *Remedy for the Grand Jury: Retain But Reform*, 64 A.B.A. J. 337 (Mar. 1978).

[122] The United States Attorneys' Manual tit. 9, ch. 11.130 (June 2000) states:

Ordinarily, there is no need to name a person as an unindicted co-conspirator in an indictment in order to fulfill any legitimate prosecutorial interest or duty. For purposes of indictment itself, it is sufficient, for example, to allege that the defendant conspired with "another person or persons known." The identity can be supplied, upon request, in a bill of particulars. With respect to the trial, the person's identity and status as a co-conspirator can be established, for evidentiary purposes, through the introduction of proof sufficient to invoke the co-conspirator hearsay exception without subjecting the person to the burden of a formal accusation by a grand jury. In the absence of some sound reason (e.g., where the fact of the person's conspiratorial involvement is a matter of public record or knowledge), it is not desirable for United States Attorneys to identify unindicted co-conspirators in conspiracy indictments.

[123] Cases treating either the naming of unindicted co-conspirators or the release of grand jury reports that name persons that are not charged include: *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975); *Application of Johnson*, 484 F.2d 791 (7th Cir. 1973); *In re Report of Grand Jury Proceedings Filed on June 15, 1972*, 479 F.2d 458 (5th Cir. 1973); *United States v. Anderson*, 55 F. Supp.2d 1163 (D. Kan. 1999); *In re Grand Jury Proceedings, Special Grand Jury 89-2 (Rocky Flats Grand Jury)*, 813 F. Supp. 1451 (D. Colo. 1992); *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219 (D.D.C. 1974); *Hammond v. Brown*, 323 F. Supp. 326 (N.D. Ohio 1971); *Application of American Society for Testing and Materials*, 231 F. Supp. 686 (E.D. Pa. 1964); *Application of Turner v. Newall, Ltd.*, 231 F. Supp. 728 (E.D. Pa. 1964); *Application of United Electrical, Radio & Machine Workers of America*, 111 F. Supp. 858 (S.D.N.Y. 1953).

[124] *See* Comment, *Federal Grand Jury Investigation of Political Dissidents*, 7 HARV. C.R.-C.L. L. REV. 432, n.2 (1972).

Whitewater investigation, organized crime, and Medicare fraud.[125]

However, recommendation would allow prosecutor to disclose unindicted co-conspirators when requested by defense counsel, and to introduce co-conspirator statements at trial

Consistent with *Briggs*, the American Bar Association proposal, and the Department of Justice, the District of Columbia Grand Jury Study Committee also recommends that a grand jury should not name a person in an indictment as an unindicted co-conspirator to a criminal conspiracy. The District of Columbia Grand Jury Study Committee recommendation still would permit a prosecutor to disclose the names of unindicted co-conspirators in a bill of particulars in response to an appropriate request by defense counsel. Likewise, it would allow prosecutors the opportunity to introduce co-conspirator statements at trial. The District of Columbia Grand Jury Study Committee believes this approach strikes the proper balance between law enforcement, due process, and reputational considerations.

[125] *See e.g.*, Naftali Bindavid, *Lindsey's Status: Common Controversial Prosecutors' Tool Takes Political Toll*, LEGAL TIMES, June 24, 1996, at 1; Eva Rodriguez, *Accessory or Victim?*, LEGAL TIMES, Feb. 6, 1995, at 1; *United States v. Anderson*, 55 F. Supp.2d 1163 (D. Kan. 1999); *see also* 18 U.S.C. §§ 3331-3334 (giving special grand juries impaneled to investigate crime the power to issue reports in certain circumstances, such as organized crime investigations).

—Recommendation 18—

A witness who has testified before the grand jury and is subsequently subpoenaed or who voluntarily appears to testify at trial should have the right, upon request, to a transcript of his or her testimony.

Implementation Requirement: This Recommendation may be implemented by amending Rule 6 of the Federal Rules of Criminal Procedure and Rule 6 of the Superior Court Rules of Criminal Procedure.

Witness should have right to transcript of testimony, after indictment and when called to testify in trial

A large and growing number of federal court opinions have recognized a witness' right to his or her grand jury testimony in certain circumstances.[126] Some courts resolve a witness' right to a transcript of his or her testimony before a grand jury on a case-by-case basis, but require the moving party to make "a strong showing based on particularized need."[127] However, many federal courts routinely deny witness' motions to obtain transcripts of their testimony before a grand jury.[128] After careful consideration of the competing concerns, the District of Columbia Grand Jury Study Committee recommends that a witness should have a right to a transcript of his or her own testimony once the grand jury process has ended and the witness is subpoenaed to testify at trial.

The most common argument against allowing a witness to review his or her grand jury testimony is that disclosure would breach the duty of secrecy of the grand jury process imposed under Federal Rule of Criminal Procedure 6(e) and

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[126] *See, e.g., In re Sealed Motion*, 880 F.2d 1367, 1371-72 (D.C. Cir. 1989) (holding that "because the right to secrecy in grand jury proceedings belongs to the grand jury witness, a grand jury witness named in an independent counsel's report is entitled to a transcript of his own testimony absent a clear showing by the government that other interests outweigh the witness' right to such transcript"); *In re Subpoena of Heimerle*, 788 F. Supp. 700 (E.D.N.Y. 1992) (holding that a grand jury witness has a presumptive right to a transcript unless the government makes a clear showing that other interests outweigh the witness' right to a transcript).

[127] *See Bast v. United States*, 542, F.2d 893, 895-96 (4th Cir. 1976); *In re Subpoena of Heimerle*, 788 F. Supp. at 704 (discussing the "particularized need" approach used by other courts).

[128] *See* Frederick Hafetz and John Pellettieri, *Time to Reform the Grand Jury*, THE CHAMPION, Jan.-Feb. 1999, at 63.

Superior Court Rule of Criminal Procedure 6(e).[129] Rule 6(e) imposes a duty of secrecy on almost everyone in the grand jury process, but not on witnesses.[130] Thus, allowing a witness to review his or her testimony does not violate this rule.[131]

Nevertheless, in deference to grand jury secrecy, the District of Columbia Grand Jury Study Committee does not recommend an absolute right of a witness to obtain a transcript of his or her testimony in the pre-indictment phase, or where no indictment has been returned, or where the witness is not called to testify in a resulting trial. Concerns over breaching grand jury secrecy and compromising the government's investigation are legitimate and persuasive under such circumstances.[132]

Need for grand jury secrecy diminishes, and is outweighed by need of individual witness

When a witness is called to testify at trial after indictment, however, the grand jury is no longer being used, and the need to protect the secrecy of the grand jury process lessens.[133] Furthermore, where a grand jury witness is called to testify at trial, that witness' individual interest in obtaining a transcript of his or her testimony arguably outweighs any continuing need for grand jury secrecy. Indeed, once a witness takes the stand and testifies, federal law provides that the prosecutor must, upon request, provide the defendant with a

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[129] Fed. R. Crim. P. 6(e).

[130] *In re Sealed Motion*, 880 F.2d at 1372.

[131] *Id.*, at 1370-73.

[132] The District of Columbia Grand Jury Study Committee also believes that the current approach of many courts is insufficient for determining whether a witness should be able to obtain a transcript of his or her testimony under such circumstances. Some courts balance the interest of a grand jury witness in obtaining a transcript of his or her testimony with the interests of the government. *See, e.g., In re Sealed Motion*, 880 F.2d at 1371; *In re Subpoena of Heimerle*, 788 F. Supp. at 704. Other courts give a grand jury witness the right to review his or her grand jury testimony if the witness makes a showing of "particularized need." *See, Bast v. United States*, 542, F.2d at 895-96.

[133] *See, e.g., In re Grand Jury*, 583 F.2d 128, 130-31 (5th Cir. 1978); *but see United States v. Lopez*, 779 F. Supp. 13, 16 (S.D.N.Y. 1991) (holding that the public's interest in maintaining secrecy outweighed the witness' interest in obtaining a transcript of his grand jury testimony prior to testifying at a suppression hearing after considering the government's arguments that: (1) there is a continuing need to maintain secrecy in a case where the testimony went beyond the charges of the indictment; and (2) the witness might use the grand jury transcript to inform the defendant of the elements of the government's case against him).

copy of the witness' grand jury testimony as "Jencks" material. *See* 18 U.S.C. § 3500.

Although courts have not specifically decided whether a grand jury witness has a right to a transcript of his or her testimony on the basis of procedural fairness inherent in due process, courts have relied on procedural fairness arguments in analogous situations. For example, in *Bursey v. United States*, the U.S. Court of Appeals for the Ninth Circuit concluded that where grand jury witnesses are confronted with repetitious questioning, "concepts of fundamental fairness inherent in due process" require that grand jury witnesses be given some protection from the risk of unfair perjury prosecution.[134] The *Bursey* court suggested that a grand jury witness be allowed to review a copy of his or her grand jury testimony unless the government could demonstrate particularized reasons for opposing the release of the grand jury transcript.[135]

Procedural fairness requires same opportunities for defense as for prosecution

Similar to the situation in *Bursey*, a grand jury witness called to testify at trial runs the risk of inadvertently testifying inconsistently at trial due to the passage of time between the grand jury investigation and trial. Moreover, procedural fairness between the prosecution and the defense argues for disclosure of a defense witness's grand jury transcript before he testifies at trial. Defendants should not be placed at the disadvantage of having their witnesses precluded from reviewing their grand jury testimony in preparation for their trial testimony if prosecutors are able to prepare government witnesses for their testimony in chief at trial by reviewing *their* grand jury testimony. There is no legal presumption that prosecution witnesses are any more or less likely to testify truthfully, either in the grand jury or at trial, than defense witnesses, and procedures to "level the playing field" should be as fair as we can make them where the contest is about a matter so fundamental to the administration of criminal justice as the truthfulness of testimony presented by witnesses.

Additionally, granting a witness a right to his or her grand jury testimony if called to testify at trial would reduce the likelihood of unintentional inconsistencies and the resulting risk

[134] 466 F.2d 1059, 1080 (9th Cir. 1972) (superseded by statute on other grounds).

[135] *Id.*

of misplaced perjury prosecutions.[136] It also would enable a witness' attorney to better safeguard his or her client's interests and uncover and correct any inadvertent mistakes that may have occurred in the witness' grand jury testimony.[137]

Furthermore, on the issue of cost to provide requested grand jury witness testimony, photocopy costs to the prosecutor will be negligible. In most grand jury cases, the government routinely orders transcripts for its own use. Copying costs of a given witness testimony simply are not enough to be a credible objection.

Considering the lessened interest in grand jury secrecy at the time of trial and notions of procedural fairness, the District of Columbia Grand Jury Study Committee recommends that transcripts of a witness' grand jury testimony should be made available, upon request, to a witness called to testify at trial.

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[136] The Jencks Act already requires that the prosecution turn over some witness statements to the defendant if the witness is called to testify at trial. In pertinent part, the Jencks Act provides that:

> 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 and use.

18 U.S.C. § 3500. A "statement" includes a transcript of a witness' grand jury testimony. 18 U.S.C. § 3500(e)(3). Although the Jencks Act does not require the disclosure of statements until after the witness has testified, in practice the government sometimes discloses these statements at an earlier stage in the proceedings, and courts, in their discretion, have suggested strongly that the government do so. *See, e.g.*, *United States v. Kim*, 577 F.2d 473, 478 (9th Cir. 1978) (noting that the government voluntarily furnished a witness' prior grand jury statements well before trial); *United States v. Hinton*, 631 F.2d 769 (D.C. Cir. 1980) (finding that the government's delay in providing the defense with the requested Jencks Act material was "troubling"). The ABA *Standards for Criminal Justice* (1980) § 11-2.2 admonishes prosecutors to disclose Jencks Act material "as soon as practicable following the defense request for disclosure."

[137] *See In re Russo*, 53 F.R.D. 564, 571-72 (C.D. Cal. 1971) (involving a witness' request for a transcript of his grand jury testimony prior to testifying again before the grand jury).

—Recommendation 19—

A grand jury witness served with a *subpoena duces tecum* should be able to obtain from the government funds to cover the expense of having to make one set of copies of the documents sought by the subpoena where the witness has shown good cause to believe that such expense would constitute undue burden on the witness, based on all the circumstances.

Implementation Requirement: It is unclear whether the Department of Justice has authority to voluntarily agree to pay duplicating costs. It is clear that this Recommendation could be implemented through either a change in Rule 6 of the Federal Rules of Criminal Procedure and Rule 6 of the Superior Court Rules of Criminal Procedure, or by passing new legislation to supercede these rules.

Government funds should be provided for document production upon showing of undue burden

Grand jury subpoenas often demand that a witness (either an individual or an entity) produce voluminous documents, which may require the witness to make one or more copies of the subpoenaed documents for the witness' continued business or other use, such as defending the interests of the witnesses in the investigation.

In federal criminal actions the government may be compelled to bear a defendant's cost of complying with a grand jury subpoena upon a clear showing of oppression or unreasonableness.[138] Additionally, the Right to Financial Privacy Act of 1977 generally requires the federal government to pay copying costs of documents it has subpoenaed from financial institutions.[139] However, unlike the more liberal standard in federal civil actions,[140] federal courts in criminal cases have indicated an unwillingness in criminal cases to

[138] See FED. R. CRIM. P. 17(c); *see also In re Grand Jury Subpoena Duces Tecum Issued to Southern Motor Carriers Rate Conference, Inc*., dated August 13, 1975, 405 F. Supp. 1192, 1198-99 (N.D. Ga. 1975) (holding that where it would be virtually impossible for organization to comply with subpoena at its own expense, government must advance costs to be incurred in inspecting, assembling and photocopying documents, or supply personnel and equipment to perform the inspection and production).

[139] *See* 12 U.S.C. § 3415.

[140] *See* Fed R. Civ. P. 45. In federal civil actions, the party issuing the subpoena may be required to pay for document copies (and customarily does so upon request).

require the government to pay the copying costs of documents the grand jury has subpoenaed from non-financial institutions, finding a showing of oppression or unreasonableness only in extreme circumstances.[141]

Some states have indicated a similar disinclination to shift this cost to the government.[142] However, other states have indicated a willingness to shift this cost.[143] Moreover, at least one state (New York) provides that in criminal actions, copying costs pursuant to a grand jury subpoena are generally borne by the government.[144] In New York, only rarely will the costs of reproducing subpoenaed records be borne by the recipient of the

[141] *See e.g.*, *In re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum*, 555 F.2d 1306, 1308-09 (5th Cir. 1977) (court may consider consequences of copying costs only after it has determined that production of original documents is practical impossibility); *Matter of Midland Asphalt Corp.*, 616 F. Supp. 223, 225 (W.D.N.Y. 1985) (evidence that cost to corporations of complying with federal grand jury subpoenas duces tecum would constitute 41% of their net operating income, but less than 2% of their operating expenses, was insufficient showing of unreasonableness or oppressiveness to warrant government advancement or reimbursement of such costs, particularly where some of those costs were result of photocopying for the convenience of the corporations); *In re Grand Jury Investigation*, 459 F. Supp. 1335, 1341 (E.D. Pa. 1978) (where cost of reproducing documents which company had sent to the grand jury in response to a subpoena duces tecum and which it claimed it needed to have returned for business reasons was approximately $2,200, and where the corporation was a multimillion dollar corporation, corporation, rather than government, would be required to bear the cost of reproduction of the documents); *In re Grand Jury Subpoena Duces Tecum Issued to the First National Bank of Maryland dated November 4, 1976*, 436 F. Supp. 46, 47, 51 (D. Md. 1977) (cost of retrieving and reproducing subpoenaed records insignificant when compared to petitioner's net worth).

[142] *See*, *e.g.*, *Illinois v. Ekong*, 582 N.E.2d 233, 236 (Ill. App. 1991) (defendant not entitled to be compensated for photocopying of his records where cost of compliance was not oppressive given the magnitude of defendant's medical practice).

[143] *See*, *e.g.*, *Indiana ex rel. Pollard v. Criminal Court of Marion County, Division One*, 329 N.E.2d 573, 586 (Ind. 1975) ("[I]n a proper case, for example where production is sought of books or accounts currently in use, the court in its discretion may condition the production upon payment by the state of the necessary and reasonable costs of reproduction."); *Nichols v. Council on Judicial Complaints*, 615 P.2d 280, 285 (Ok. 1980) (recognizing that states' Fifth Amendment clause may prohibit the government from subpoenaing witness without paying copying costs).

[144] *See e.g.*, N.Y. CODE CRIM. PROC. § 610.25(2) ("The cost of reproduction . . . shall be borne by the person or party issuing the subpoena unless the court determines otherwise in the interest of justice.").

subpoena.[145] However, there are limits to this right of reimbursement.[146]

Pros and cons

The reasons for shifting copying costs to the government include:

(1) To provide greater fairness to the witness;

(2) To avoid possible Fifth Amendment concerns (a deprivation of due process of law and/or a deprivation of property without just compensation);[147]

(3) To avoid possible Fourth Amendment concerns (stemming from an unreasonable search and seizure of a witness' papers and effects); and

(4) To discourage prosecutors from over-broad document subpoenas.[148]

The potential drawbacks of shifting the cost include:

(1) Greater expenses borne by the government;

(2) The possibility that this expense might chill the use of grand jury subpoenas for valid law enforcement purposes; and

(3) Possible weakening of the principle that a witness has a public duty to comply with a grand jury subpoena.

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[145] *See New York v. Shariff*, 630 N.Y.S.2d 200, 204 (Westchester County Ct. 1995) (refusing to shift burden to defendant where government had files for six months and costs of production were substantially mitigated by fact that approximately one half of the files—1,425 files—were not needed for prosecution); *In the Matter of XYZ Nursing Home, Inc. v. Kuriansky*, 552 N.Y.2d 438, 439 (Sup. Ct., Second Dept. 1990) (government required to bear the cost of reproducing also such subpoenaed records as defendant might demand, where such copies were not sought in bad faith or with illegitimate purpose).

[146] *See In the Matter of Kuriansky v. Ali*, 574 N.Y.S.2d 805, 806-07 (Sup. Ct., Second Dept. 1991) (defendant could not refuse to comply with grand jury subpoenas on basis that they had not yet received reproduction expenses; such expenses were not due until after the subpoenaing party had possession of the documents for a reasonable period of time, and has had an opportunity to determine which documents it wishes to copy).

[147] *See, e.g., Nichols v. Council on Judicial Complaints*, 615 P.2d 280, 285 (Ok. 1989) (relying on Fifth Amendment of Oklahoma's Constitution, which parallels the Fifth Amendment of the U.S. Constitution); *United States v. Farmers & Merchants Bank*, 397 F. Supp. 418, 420 (C.D. Cal. 1975) (discussing the Due Process requirements in this context).

[148] *See, e.g., United States v. Freeman*, 388 F. Supp. 963, 970 (W.D. Pa. 1975); *United States v. Farmers & Merchants Bank*, 397 F. Supp. 418, 420 (C.D. Cal. 1975).

The District of Columbia Grand Jury Study Committee believes that the reasons for and against cost shifting will balance out differently, depending upon the circumstances. As a result, we believe that the cost should be shifted to the government where the witness has shown an undue burden, based on all the circumstances. This recommendation does not contemplate the government paying for the expense of more than one copy desired by the witness.

IMPROVING GRAND JURORS' SAFETY, COMFORT, AND CONVENIENCE

—Recommendation 20—

The U.S. Attorney, with guidance from the Superior Court, should promptly take steps to prevent the exposure of grand jurors to community witnesses by requiring that such witnesses, when not actually testifying, be segregated from the spaces where grand jurors are assembled.

Implementation Requirement: This Recommendation may be implemented by the Superior Court in cooperation with the U.S. Attorney without amending any procedural rule or passing new legislation

This Recommendation seeks to improve the security and comfort of grand jurors. The grand juries for D.C. Superior Court sit on the second floor of 555 4th Street, a building occupied principally by the U.S. Attorney's Office. Grand jury rooms are located proximate to a large space, access to which is gained through a door controlled by security. Inside the large area, however, grand jurors, prosecutors, and witnesses mingle.

Grand jurors' security and comfort an issue

Prosecutors come and go into the area, often accompanied by witnesses and police officers. Witnesses sit inside and outside the enclosed area, both of which offer a plain view of grand jurors. One grand juror expressed grave concern about the security of witnesses and indeed grand jurors themselves. This grand juror said that, as she walked around the area, she recognized people from her community and was recognized herself by persons she believed to be witnesses to very serious crimes under investigation. Another grand juror observed that she had always heard the building housing the grand jury referred to as "The Snitcher Building."

There is no excuse for not rigorously segregating witnesses from grand jurors. The District of Columbia Grand Jury Study Committee understands the limitations of the existing structure, but grand jurors should have all possible assurance of anonymity. Their service should not require them to come into uncontrolled contact with witnesses, witnesses' family members, or witnesses' friends.

—Recommendation 21—

The Superior Court should promptly assure that grand jurors are provided with more adequate lounges, including a quiet room, sanitary restrooms, food storage areas, a refrigerator, and telephone space.

Implementation Requirement: This Recommendation may be implemented by the Superior Court without amending any procedural rule or passing new legislation.

Superior Court grand juries need improved accommodations

The goal of this Recommendation is to improve the grand jurors' comfort and to minimize inconvenience for the grand jurors. One of the most serious concerns expressed by former D.C. Superior Court grand jurors to the District of Columbia Grand Jury Study Committee was the physical circumstances of grand jury service. The grand juries for D.C. Superior Court sit on the second floor of 555 4th Street, a building occupied principally by the U.S. Attorney's Office.

Almost all grand jurors interviewed identified some aspect of the grand jury area as undesirable. There are no facilities for food storage, telephones are inadequate, and toilet areas are often unsanitary. The room in which grand jurors ate lunch and made telephone calls was not cleaned regularly. Grand jurors often eat in the grand jury room; as a result, this room needs to be cleaned, and the trash cans emptied, nightly. Many grand jurors require a refrigerator for medicine or for lunches (several noted that they could not afford to buy lunch every day for the eight week service term).

Clearly, members of the public who are required to serve on grand jury duty deserve adequate facilities in which to work. The District of Columbia Grand Jury Study Committee recommends that improvement of current facilities be a priority for the D.C. Superior Court and the U.S. Attorney.

—Recommendation 22—

The U.S. Attorney and the D.C. Superior Court should notify grand jurors of specific "recall days" in the initial notice of service. Business on recall days should be limited to finishing cases heard during the term of service and should not include new cases.

Implementation Requirement: This Recommendation may be implemented by the D.C. Superior Court in cooperation with the U.S. Attorney without amending any procedural rule or passing new legislation.

Grand juries should be advised of "recall days" in mailed notice

The purpose of this Recommendation is to increase the respect with which grand jurors' time is treated. Currently, D.C. Superior Court grand jurors are summoned for either a five-week or an eight-week period. At the initial orientation grand jurors are notified that they *may* be required to return for two "recall days" to finish cases. The specific dates of the "recall days" are provided at this time. This announcement is their first notice of the "recall days." There is no mention of "recall days" in the initial mailed notice. In fact, grand jurors are frequently recalled for the two additional days, not only to complete cases, but to hear evidence and decide entirely new cases.

This practice is the source of much frustration for grand jurors. In fact, the District of Columbia Grand Jury Study Committee's interviews with former grand jurors uniformly criticized the misleading notice of the actual term of service.

Grand jurors were surprised that, in addition to finishing old cases, new cases were presented on these days. One grand juror reported that one of the new cases included multiple witnesses, giving the grand jury little time to reflect on probable cause or the merits of an indictment.

Asked to give a substantial amount of time to serve justice, grand jurors deserve to know, as much as possible, a schedule in advance; it is a matter of common courtesy and does not impose a great burden on the government. The practice of presenting new cases on "recall days" takes advantage of the good citizens of the District of Columbia who have already given much time through their service. This practice should be abandoned.

—Recommendation 23—

The Superior Court and the U.S. Attorney should solicit feedback from grand jurors at the conclusion of their service through the use of an exit questionnaire.

Implementation Requirement: This Recommendation may be implemented by the Superior Court in cooperation with the U.S. Attorney without amending any procedural rule or passing new legislation.

The purpose of this recommendation is to allow grand jurors the opportunity to propose improvements to the system, or to comment on the positive aspects of service, after their experience is over. Currently, grand jurors have no procedure by which to provide feedback to the system.

One grand juror commented, "I know that our grand jury really wanted to talk to the grand jury head to tell him about our experiences which were very positive . . . there was never time for this. An exit questionnaire would have been helpful. It seems to me that a greater dialogue between the court and the grand jurors as they leave would be enormously helpful."

The District of Columbia Grand Jury Study Committee agrees that former grand jurors are a valuable resource and recommends that the Court and the U.S. Attorney take steps to solicit their ideas and commentary through an exit questionnaire. An exit questionnaire could ask for specific comments on training, cleanliness of rooms, problems with the use of time and other matters, and then leave room for comments.[148]

[148] The District of Columbia Grand Jury Study Committee regrets that the U.S. District Court for the D.C. and the U.S. Attorney's Office declined to participate in this study and that the Committee was therefore unable to determine whether such feed back is solicited from U.S. District Court grand juries.

APPENDIX A

STATE GRAND JURY TERMS OF SERVICE, STATUTES & RULES

The terms in those states that govern their grand juries' terms by constitutional provision, statute, or rule are as follows:

Alabama. Ala. Code § 12-16-190 (six months in small counties, three months in larger counties).

Alaska. Alaska R. Crim. P. 6(s) (up to five months, unless extended for good cause).

Arizona. Ariz. Rev. Stat. Ann. § 21-403 (regular grand jury: up to 120 days, may be extended by court to finish investigation); § 21-421(c) (special grand jury: up to six months, may be extended to finish investigation).

California. Cal. Const. art. 1 § 23 (one year, but may continue if necessary to complete investigation).

Colorado. Colo. Rev. Stat. § 13-72-101 (regular grand jury: up to eighteen months); § 13-73-103 (statewide grand jury: up to one year).

District of Columbia. DC Super. Ct. R. Crim. P. 6(g) (up to eighteen months).

Florida. Fla. Stat. Ann. § 905.095 (term of court (six months), with extension of up to ninety days if needed to finish matter under investigation).

Hawaii. Haw. R. Crim. P. 6(g) (up to one year).

Idaho. Idaho R. Crim. P. 6(j) (up to six months, may be extended by court).

Illinois. 725 ILCS § 5/112-3 (eighteen months).

Indiana. Ind. Code Ann. § 35-34-2-2(c) (up to six months).

Iowa. Iowa R. Crim. P. 3.3(a) (up to one year, may be extended to complete investigation).

Kansas. Kan. Stat. Ann. § 22-3013(1) (up to three months, but can be extended by court for three additional months if necessary to complete investigation).

Kentucky. Ky. Rev. Stat. Ann. § 29A.210(3) (regular grand jury: twenty days attendance by grand jurors, but may be extended to complete the investigation); § 29A.220 (special grand jury: ninety-day term plus ninety-day extension if needed).

Louisiana. La. Code Crim. Proc. Ann. art 414 (four to eight months, except in Orleans Parish, where term is six months).
Maine. Me. Rev. Stat. Ann. § 1216 (up to twelve months).

Maryland. Md. Cts. & Jud. Proc. Code Ann. § 8-107 (term of court; may be extended by court if necessary).

Massachusetts. Mass. R. Crim. P. 5(h) (until the first sitting of next grand jury unless term is extended to complete investigation). The Massachusetts statutes also contain provisions regarding the duration and extension of grand juries in the various counties. These provisions vary slightly from county to county. *See* Mass. Gen. Laws ch 277, §§ 1, 2, and 2A-F. *See also Ventresco v. Commonwealth*, 409 Mass. 82, 565 N.E.2d 404 (1991) (twenty-month term for a grand jury not unconstitutionally long).

Michigan. Mich. Comp. Laws Ann. § 767.7a (six months; court may extend term for an additional six months).

Minnesota. Minn. R. Crim. P. 18.09 (up to twelve months, continues automatically if investigation is continuing, or if successor grand jury is not selected).

Mississippi. Miss. Code Ann. § 13-5-39 (two terms of court unless court otherwise directs).

Nevada. New. Rev. Stat. § 172.275 (at least one year).

New Jersey. NJ R. Crim. P. 3:6-10 (up to twenty weeks, unless court orders it extended; each extension can be for up to three months).

New Mexico. NM Stat. Ann. § 31-6-1 (up to six months).

New York. NY Crim. Proc. Law § 190.10, § 190.15 (term of grand jury set by local rule, may be extended by court).

North Carolina. NC Gen. Stat. § 15A-622(b) (grand juries sit continuously, with replacements appointed approximately once per year).

North Dakota. ND Cent. Code § 29.10.1-04 (ten days unless extended by court).

Ohio. Ohio R. Crim. P. 6(G) (up to four months; court may extend for up to nine months).
Oregon. Or. Rev. Stat. § 132.120 (term of court, but may be extended for any period).

*Pennsyl*vania. Pa. R. Crim. P. 204 (regular grand jury: one term of court, but may be extended from term to term to complete business presented during term for which it was summoned); 42 Pa. Cons. Stat. § 4546 (investigative grand jury: eighteen months, with extensions possible for total term of up to twenty-four months).

Rhode Island. RI Gen. Laws § 12-11-2; § 12-11.1-2 (three months unless extended).

South Dakota. SD R. Crim. P. 6(g) (up to eighteen months).

Tennessee. Tenn. R. Crim. P. 6(a)(1) (one term of court).

Texas. Tex. Code Crim. Proc. art 19.06 (one term of court).

Utah. Utah Code Ann. § 77-10-7 (until end of calendar year or completion of business; two extensions of three months each available if needed).

Vermont. Vt. R. Crim. P. 6(h) (six months unless extended).

Virginia. Va. Code § 19.2-194 (one year).

Washington. Wash. Rev. Code § 10.27.110 (sixty days, with sixty day extensions available if needed).

Wisconsin. Wis. Stat. Ann. § 756.10(6) (six months, with six-month extensions available).

Notes

APPENDIX B

FORMER GRAND JUROR FOCUS GROUP SUMMARY

On February 16, 2000 the Physical Comfort Subcommittee of the Council for Court Excellence D.C. Grand Jury Study Committee met for an informal luncheon discussion with seven citizens who completed D.C. Superior Court Grand Jury service in December 1999. Their grand jury heard 100 cases in the eight-week period of their service, of which an estimated 75% of their cases were disposed of in one day, 23% were decided after hearing testimony on several different days, and 2% of the cases were not decided.

ORIENTATION

1. The video was incomplete. Day one ended about 1 p.m. leaving the jurors unclear about their duties, etc.

2. Orientation should include :

- defining and emphasizing the probable cause standard – most of the jurors stated they had served previously as petit jurors where the standard of proof is higher – "beyond a reasonable doubt."

- It would have been very helpful on day one if someone from the U.S. Attorney's Office could explain the major groupings of cases the grand jury would likely have – bail reform act, drug cases, stolen auto cases, etc – and what they each mean.

- It would be useful if each grand juror could have a one page orientation outline to follow along with during the ASAO and D.C. Court's orientation.

- The role of the "Red Book," which details the legal elements of offenses, should always be explained at the orientation day, and not sometime later when an AUSA happens to mention it. (The grand jurors urged that a copy of the "Red Book" should be available in the grand jury room at all times.)

- The law of offenses should have been explained more clearly to the grand jurors.

- The importance of each juror taking and keeping notes on their votes in each case should be explained at orientation day because when jurors are asked to "Gaitherize" the process would be much smoother.

- The chief judge's instruction and orientation were very helpful. It would have been useful if copies of the judge's instructions could be provided each grand juror. (The grand jurors noted that on the first part of the first day they are still reeling from learning that they will be there for five or eight weeks, rather than one day/one trial; thus a lot of wdhat is said on day one needs to reinforced such as by having copies of the chief judges' instructions for the grand jurors available to read over a day or two later, etc.)

LACK OF ANY CASE PRESENTATION STANDARDS BY THE PROSECUTORS

1. Considerable time was wasted by the grand jury because the AUSAs had no consistent way of presenting cases.

- Several AUSAs used a typed format with the name, case #, crime elements, etc. which was distributed to the grand jury and was excellent. Such a format greatly facilitated grand jurors following the presentation and making their decision.

2. It would aid the grand jurors if the prosecutor had some type of preprinted blank forms for each juror where jurors could enter case numbers, case name, any other case pertinent information, and at the bottom of the form record their vote and the aggregate vote of the grand jury in the case. (The latter would help greatly in the "Gatherizing" process.)

3. Notebooks for each grand juror to keep their data sheets and related materials would also be appreciated and aid in the efficiency of the grand jury process.

PHYSICAL FACILITIES

1. The sound system in Grand Jury Room #4 was terrible. A whirring fan motor made it very hard to hear what witnesses were saying.

2. The women's bathroom facilities were appalling.

- too small for the number of people who had to use them
- dirty, no soap in the dispensers, no toilet seat covers.

3. The cleaning people did not empty the trash cans regularly, resulting in smelly residue which was unpleasant to deal with.

4. Use of the moot court room for the two Recall days hearings did not work well at all. The room is not set up to have grand jurors spend all day there.

5. Necklace type i.d. badges would be a big improvement over the current grand juror i.d. system. (The current i.d. system results in tearing holes in jurors clothing, sweaters, etc.)

6. A refrigerator is needed in the lunch room. Some grand jurors have dietary issues and need to have medicines and food kept cold.

7. The courtesy phones for grand jurors are very badly placed within the lunch room. Also there are far too few such phones for the estimated 100 grand jurors to use.

8. It would be very helpful if the Court or the USAO could hand out a one page sheet of near-by places grand jurors might go for lunch.

UNSAFE WITNESS ASSEMBLY PROCEDURES AND WAITING AREAS

The Prosecutor frequently would line up witnesses just outside the grand jury rooms instead of having them remain in assigned witness assembly room across the hall. Some of these witnesses recognized members of the grand jury from the same neighborhood. This placed the grand jurors in real fear that the unsavory witness may tell others in the community that the grand juror was "snitching" about what she saw.

RECALL DAY

The grand jurors felt the prosecutor abused the purpose of Recall day by presenting many entirely new cases on the jurors final day of service. The grand jurors believe that Recall day should be eliminated.

LENGTH OF SERVICE

1.The eight week term of service was a real hardship on several of the working grand jurors, making it extraordinarily hard to keep up with ones office work while doing ones mandated civic duty.

2.The self employed jurors were especially impacted adversely by the length of the jury term.

COURT STAFF

The court staff member at the grand jury area was excellent.

OVERALL GRAND JURORS IMPRESSIONS

1. Grand jury service was a very educational experience.
2. We learned how hard the police and prosecutors work, most impressed.
3. We learned a lot about the city; really opened our eyes.
4. A fascinating experience; the interactivity of the process was very helpful.
5. Providing us with a certificate of service would have been appreciated.

FORMER D.C. SUPERIOR COURT GRAND JURORS' COMMENTS

Orientation and Physical Comfort
Taken Last Day of Service
December 22, 1999

1- Orientation
2- Physical Comfort
3- Employer Absence

Grand Juror 1

1) Orientation on actual job of juror should be separate — in jury room and should be more personally supervised — not just a film. Jury badges and more money for expenses.
2) Physical Comfort — Think they did a great job — need a refrigerator though for people to bring lunch.
3) Use our time more effectively.

Grand Juror 2

1) Orientation- I wish we had more orientation. On the first day we were sent home about 1p.m. Our work day was already disrupted. We could have used the rest of the day for more orientation.
2) Comfort- Grand Jury 4 room was hot. The moot court room is a hard place to conduct the recall and final day. We miss the writing surface.
3) Service is too long. It puts an undo load on people with full time jobs. It should be a once in a lifetime service requirement.

Grand Juror 3

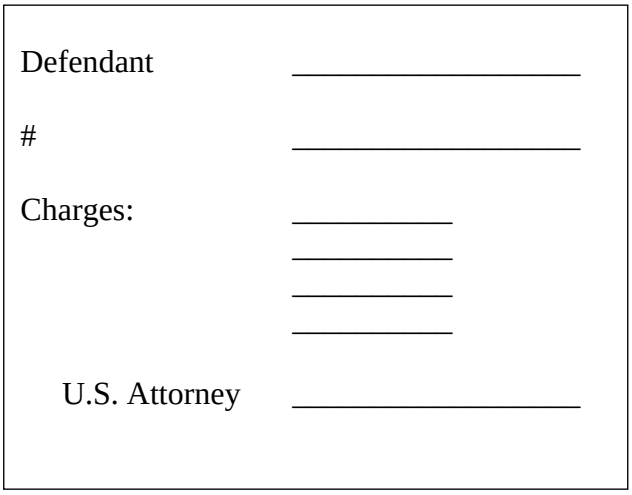
1) As to physical comfort, the jury rooms should be sanitized on a more regular basis and air exchangers should be employed which change the air, that is, bring in fresh air and remove the stale air from the room. The atmosphere feels unhealthy.
2) Also, as to orientation, perhaps a talk on each of the first three days would help guide grand jurors on what constitutes deliberation and nip in the bud any situations e.g. Chatty Cathy or Bossy Ross.

Grand Juror 4

1) Orientation- More time should be given towards more specific orientation - more time for question/answer - we were told a few times that our questions were "irrelevant" and had another orientation (still vague)
2) Physical Comfort- When a room is hot and the voice drones on and on for a long period of time (and you're a working parent) it is an extreme effort for one to stay awake. More opportunities to stretch our legs (more breaks).
3) Employer Absence - Because I work part time for a non-profit organization and have my own business, I lost a lot of potential income due to the long stretches of jury duty (especially this time of year!) My employers pay nothing when I don't go to work.

Grand Juror 5

1) Provide blank forms to use to record basic information on cases. This would organize juror's notes and enable us to keep orderly records.



2) Give in orientation, *examples* or irrelevant or improper questions. Jurors should not be 'intimidated' by some U.S. Attorneys for asking these types of questions.
3) Be ready to start on time.
4) Explain what we are waiting for.
5) Provide lunch money - or food/drinks, etc.

Grand Juror 6

1) Orientation - A longer more complete orientation would be helpful - more specific on laws, organization of U.S. Attorney's Office, etc.
2) People should be told more strongly to be on time.

—Notes—

APPENDIX C

D.C. SUPERIOR COURT GRAND JURY CHARGE

Ladies and gentlemen:

You have now been sworn in as a Grand Jury for the Superior Court of the District of Columbia. In discharging the duties of a grand juror, it is imperative that you remember that, while you will work closely with the United States Attorney, your obligation is to the court, not the prosecutors or the police.

It is my responsibility this morning to instruct you as to the law which will govern your actions and your deliberations as grand jurors. If, during your consideration of a case, you have a question about a legal rule or principle that has not been answered to your satisfaction by the United States Attorney, you are welcome to write out the question and ask that the Marshal place it under seal and have it delivered to me. I or another judge whom I designate will respond to it, either orally or in writing, as soon as one of us conveniently can. *

As a Grand Jury, your function differs from that of a trial jury, sometimes called a petit jury. A trial jury determines whether a person accused of a crime is guilty or not guilty. The purpose of the Grand Jury, however, is to determine whether there is sufficient evidence to justify the formal accusation of a crime.

The United States Attorney has the duty to prosecute persons charged with the commission of crimes in the city, and she or one of her assistants will present the matters which the government wants you to consider. Government counsel will indicate the laws which the government believes have been violated, and will bring before you such witnesses as he or she may consider important and necessary, and also any other witnesses that you may request or direct him or her to call before you.

From the evidence presented by the United States Attorney, you must decide whether to return an indictment. An indictment is the formal written document charging the accused with a crime. Your duty is to ensure that indictments are returned only when you are satisfied that there is probable cause to believe that a crime has been committed by a specific person.

As members of the Grand Jury, you, in a very real sense, stand between the government and the accused. You must ensure that indictments are returned only against those whom you believe probably committed the offense charged and to insure that the innocent are not indicted and are not compelled to go to trial. To return an indictment charging an individual with an offense, it is not necessary that you find that the accused is guilty beyond a reasonable doubt. You are not a trial jury, and your task is not to decide the guilt or innocence of the person charged. Your task is to determine whether the government's

* The underlined portion reflects the additional wording the D.C. Grand Jury Study Committee recommends adding to the existing charge.

evidence as presented to you is sufficient to cause you to conclude that there is probable cause to believe that the accused is guilty of the offense charged -- that is, whether the evidence presented is sufficiently strong to warrant a reasonable person to believe that the accused is probably* guilty of the offense with which he or she is charged. In this regard, you have not only the authority to direct or request the United States Attorney to call and interrogate witnesses, but to produce for your examination papers, documents and other tangible evidence; this may include witnesses, papers, documents and other tangible evidence that might bear on either the guilt or the innocence of an accused.*

The law requires the Grand Jury to be composed of 23 persons. At least 16 persons are necessary to constitute a quorum for the transaction of business, and an indictment may be returned only upon the agreement of 12 or more jurors. Thus, it is very important that each of you attend the sessions. Should you have difficulty attending a session, please advise your Grand Jury foreperson who has the authority to excuse you.

The foreperson or deputy foreperson is also charged with the duty of administering an oath or affirmation to witnesses who appear before you. Ordinarily, the United States Attorney will question the witness first; then, you will have an opportunity to ask any questions you may have. If you have any doubt whether a question is appropriate, you may ask the United States Attorney for advice. If 12 or more of you believe that an indictment is warranted, you will request the United States Attorney to prepare the formal written indictment. The foreperson will endorse the indictment as a true bill regardless of whether the foreperson voted for or against the return of the indictment.

Each witness has certain rights when he or she appears before a Grand Jury. The witness has the right to refuse to answer any incriminating question, and the witness has the right to know that anything that is said may be used against the witness. If the witness exercises the right against compulsory self-incrimination, the Grand Jury should hold no prejudice against that person and this can play no part in the return of an indictment against that person.

Although witnesses are not permitted to have a lawyer present with them in the Grand Jury room, the law permits witnesses to confer with their lawyer outside of the Grand Jury room. Since an appearance before the Grand Jury may present complex legal problems requiring the assistance of a lawyer, you also may draw no adverse inference if a witness chooses to exercise this right and leaves the Grand Jury room to confer with an attorney.

Your proceedings are secret and must remain secret permanently unless and until the court determines that the proceedings should be revealed in the interests of justice. You must be careful to preserve the secrecy of your proceedings by abstaining from communicating with your family or friends or any other person concerning matters, which transpire in the Grand Jury room. You may discuss these matters only amongst yourselves. Furthermore, each

* The underlined portion reflects the additional wording the D.C. Grand Jury Study Committee recommends adding to the existing charge.

grand juror is to report immediately to the court any attempt by any person who under any pretense whatsoever addresses or contacts a juror for the purpose of, or with the intent to, gain any information of any kind concerning the proceedings of the Grand Jury.

Although you may disclose matters, which come before the Grand Jury to the Assistant* United States Attorney presenting the case* for use in the performance of his or her duties, you may not disclose the contents of your deliberations or the vote taken to anyone. The United States Attorney has the right to be present when testimony is taken, but may not be present during your deliberations. When you deliberate and when you vote, you are to have complete privacy. Should an indictment be voted, the presence of any unauthorized persons in the Grand Jury room could invalidate the vote.

On a more practical note, I must ask you to refrain from eating in the Grand Jury rooms. Also, there is to be no consumption of alcoholic beverages at lunchtime on the days that you are to be sitting on the Grand Jury.

I realize that serving as grand juror inevitably causes some personal inconveniences, but the service is one that is essential to the well being of our community. As grand jurors, you are the defender of the innocent as well as the accuser of the guilty, and in both respects you vindicate the integrity of the law.

On behalf of the court, I wish to express my sincere appreciation for your willingness to assume this important duty, and hope that you benefit from your service as a grand juror.

* The underlined portion reflects the additional wording the D.C. Grand Jury Study Committee recommends adding to the existing charge.

—Notes—

APPENDIX D
SURVEY OF JURISDICTIONS ALLOWING WITNESS' COUNSEL IN GRAND JURY ROOM

Research conducted as part of Council for Court Excellence D.C. Grand Jury Sturdy Committee, Fall 2000

1. Generally, what has your experience been with the presence of counsel in the grand jury?

Colorado:

The state system, which allows counsel in the grand jury for all witnesses, works well. It certainly is better for the witnesses in terms of fairness and comfort. Because there has been minimal disruption to the process, prosecutors have no significant complaints about counsel in the grand jury. However, the presence of counsel and other procedural rights (witnesses get copies of prior statements; they are entitled to mini-Miranda warnings) have increased the debate among prosecutors regarding tactics. Prosecutors have sought legislative relief around the edges of some of these witness reforms, but counsel in the grand jury appears to be here to stay.

Massachusetts:

There have been no problems with counsel in the grand jury. In fact, counsel often make the grand jury appearance go smoother since the witnesses are more comfortable being advised and accompanied by counsel.

New York:

It is almost always a non-event with the lawyer playing a passive role as per statute. We have only had to bring a lawyer to a judge once to remind him that he has no role to play.

2. Must all felony prosecutions proceed by grand jury indictment?

a. If not, what kinds of felonies are presented to the grand jury?

b. Is this required by law or a function of prosecutorial discretion?

Colorado:

Most cases (an estimated 99%) proceed without presentation to a grand jury. While some felonies can proceed to trial on an information filed by the prosecutor, most are required to have either a probable cause hearing or an indictment. Whether to proceed by information and preliminary hearing, or grand jury indictment, is at the discretion of the prosecutor. Essentially,

only the most delicate or otherwise special cases are presented to the grand jury.

Massachusetts:

Not all felonies proceed by indictment. Felonies that carry less than a maximum period of incarceration of 30 months may be prosecuted in District Court (as opposed to Superior Court) by way of information.

New York:

Only those felonies where the defendant does not waive grand jury presentment and agree to a negotiated plea are presented to a grand jury, as required by law.

3. Has the presence of counsel increased or decreased appearances of witnesses?

Colorado:

While one practitioner reported that the right to counsel has had no impact on the number of witnesses called before the grand jury, another noted that the fact that a witness will have counsel in the grand jury is a factor in the calculus of the prosecutor in deciding whether to call that witness. Accordingly, the right to counsel in the grand jury may have the impact of reducing the number of witnesses who might otherwise be called to testify.

Massachusetts:

The presence of counsel has had no impact on the number of witnesses called before the grand jury.

New York:

Counsel is present only when client testifies and hence would have no effect on other witnesses testifying.

4. Has the presence of counsel increased or decreased assertions of privileges and instructions not to answer?

Colorado:

Although it is hard to tell, there seems to be no impact since counsel presumably would advise a client to assert a privilege and not answer a question in appropriate circumstances whether counsel was inside or outside the grand jury.

Massachusetts:

There might be more assertions of privilege, but that would be due to more witnesses having counsel. Whether counsel is inside or outside the grand jury probably makes no difference.

New York:

The presence of counsel may increase the assertions of privilege on rare occasions.

5. Has the presence of counsel increased delay or disruptions in the grand jury process?

Colorado:

There has been no added disruption or delay in the grand jury process. If anything, the presence of counsel in the grand jury may speed up the process by cutting down on the occasions when the proceedings must be recessed to allow the witness the opportunity to confer with counsel.

Massachusetts:

The presence of counsel might slow down the proceedings because of the unlimited right of the witness to confer with counsel, but the process has not been disrupted and generally works pretty well.

New York:

On rare occasions, the presence of counsel delays the process.

—Notes—

APPENDIX E

U.S. DEPARTMENT OF JUSTICE "ADVICE OF RIGHTS" FORM

It is the policy of the Department of Justice to advise a grand jury witness of his or her rights if such witness is a "target" or "subject" of a grand jury investigation. See the Criminal Resource Manual at 160 for a sample target letter.

A "target" is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. An officer or employee of an organization which is a target is not automatically considered a target organization. The same lack of automatic target status holds true for organizations which employ, or employed, an officer or employee who is a target.

A "subject" of an investigation is a person whose conduct is within the scope of the grand jury's investigation.

The Supreme Court declined to decide whether a grand jury witness must be warned of his or her Fifth Amendment privilege against compulsory self-incrimination before the witness's grand jury testimony can be used against the witness. *See United States v. Washington,* 431 U.S. 181, 186 and 190-191 (1977); *United States v. Wong*, 431 U.S. 174 (1977); *United States v. Mandujano*, 425 U.S. 564, 582 n. 7. (1976). In *Mandujano,* the Court took cognizance of the fact that Federal prosecutors customarily warn "targets" of their Fifth Amendment rights before grand jury questioning begins. Similarly, in *Washington,* the Court pointed to the fact that Fifth Amendment warnings were administered as negating "any possible compulsion to self-incrimination which might otherwise exist" in the grand jury setting. *See Washington,* at 188.

Notwithstanding the lack of a clear constitutional imperative, it is the policy of the Department that an "Advice of Rights" form be appended to all grand jury subpoenas to be served on any "target" or "subject" of an investigation. See the advice of rights list below.

In addition, these "warnings" should be given by the prosecutor on the record before the grand jury and the witness should be asked to affirm that the witness understands them.

Although the Court in *Washington, supra,* held that "targets" of the grand jury's investigation are entitled to no special warnings relative to their status as "potential defendant(s)." the Department of Justice continues it longstanding policy to advise witnesses who are known "targets" of the investigation that their conduct is being investigated for possible violation of Federal criminal law. This supplemental advice of status of the witness as a target should be repeated on the record when the target witness is advised of the matters discussed in the preceding paragraphs.

When a district court insists that the notice of rights not be appended to a grand jury subpoena, the advice of rights may be set forth in a separate letter and mailed to or handed to the witness when the subpoena is served.

Advice of Rights
The grand jury is conducting an investigation of possible violations of Federal criminal laws involving: (State here the general subject matter of inquiry, e.g., conducting an illegal gambling business in violation of 18 U.S.C. § 1955)

September 1997 1-1 Introduction
You may refuse to answer any questions if a truthful answer to the question would ten to incriminate you.

Anything that you do say may be used against you by the grand jury or in a subsequent legal proceeding.

If you have retained counsel, the grand jury will permit you a reasonable opportunity to step outside the grand jury room to consult with counsel if you so desire.

Additional Advice to be Given to Targets
If the witness is a target, the above advice should also contain a supplemental warning that the witness's conduct is being investigated for possible violation of federal criminal law.

APPENDIX F

ADDITIONAL STATEMENT OF THE HONORABLE HENRY F. GREENE

I join in the District of Columbia Grand Jury Study Committee's Report and Recommendations except for my dissents to recommendations no. 1, 2, 7 and 15, reflected, respectively, in footnotes 34, 46, 53 and 117. Additionally, I believe the Committee also should recommend that:

1. The prosecutor should not present evidence to the grand jury that the prosecutor knows will not be constitutionally admissible at trial;

2. A witness called to testify in the grand jury should not be asked leading questions (except as to undisputed preliminary matters) until such time, if any, as the witness demonstrates he or she is hostile, biased or unwilling to testify; and

3. Grand jury subpoenas should be issued at least 72 hours before witnesses are to testify, unless good cause exists for a shorter period.

I. Presentation to the Grand Jury of evidence known by the prosecutor to be constitutionally inadmissible

The Department of Justice's United States Attorneys' Manual provides that "a prosecutor should not present to the grand jury for use against a person whose constitutional rights have been violated evidence which the prosecutor personally knows was obtained as a direct result of a constitutional violation." See United States Attorneys' Manual, §9-11.231 (2001). In a like vein, the ABA Standards for Criminal Justice addressing the Prosecution Function state that "a prosecutor should ... only present evidence to the grand jury which the prosecutor believes is appropriate or authorized under law for presentation to the grand jury." See ABA Standards for Criminal Justice, *The Prosecution Function,* Standard §3-3.6(a) (3rd ed. 1993). Finally, proposed legislative grand jury reforms under review in Congress support the same principle. I believe the Committee's report likewise should support such a reform and that grand jury practice in both the Superior Court of the District of Columbia and the District Court for the District of Columbia should reflect this common principle.

Adoption of this recommendation would serve the fundamental purposes of safeguarding the Fourth Amendment rights of subjects and targets of grand jury investigations, and discouraging the indictment of persons based upon evidence that would be insufficient to obtain their conviction at trial. In this regard, it should be noted that at least one federal statute already prohibits the use in the grand jury of one type of illegally seized evidence, i.e., that obtained as a result of illegal electronic surveillance. See 18 U.S.C. §2515.

II. Propounding of leading questions to non-hostile grand jury witnesses

Significant evidentiary issues increasingly arise at trials as a consequence of the interplay among (1) the practice of prosecutors routinely posing leading questions to non-hostile witnesses when they testify before the grand jury, (2) the amendment several years ago of D.C. Code §14-102(b)(1), in conformance with Federal Rule of Evidence 801(d)(1)(A), to permit prior grand jury testimony to be used by a prosecutor not only to impeach a witness but as substantive evidence if the witness testifies at trial, and (3) the traditional rule precluding a party from leading its own witness unless hostility, bias or unwillingness to testify has been demonstrated. See, e.g., Federal Rule of Evidence 611(c). Specifically, an issue most frequently arises where a government witness testifies differently at trial from the way the witness testified in the grand jury, the government then seeks to use the witness's grand jury testimony both for impeachment purposes and as substantive evidence at trial, and the defendant opposes introduction of the grand jury testimony because it was elicited by leading questions in the grand jury that would not have been permissible at trial to elicit the same testimony. My experience as a trial judge generally has been that such grand jury testimony may not be received at trial under such circumstances; however, this can present very serious consequences for the government. A rule which proscribed leading questions to grand jury witnesses except for (1) undisputed preliminary matters or (2) where a witness is hostile, biased or unwilling to testify would largely resolve this problem.

III. Adequate notice to subpoenaed grand jury witnesses

While grand juries must function with broad powers to call witnesses in order to effectively implement their investigative responsibilities, the power to subpoena witnesses is not the power to annoy, harass or intimidate them. Occasionally there are compelling reasons for a grand jury to obtain the forthwith presence of a witness or other evidence, as when necessary to prevent flight of a witness or destruction of evidence. However, as the Department of Justice has recognized, such circumstances constitute the exception, not the rule; thus, federal prosecutors may issue forthwith subpoenas only in situations where an immediate response is justified, and then only with the approval of the United States Attorney. See United States Attorneys' Manual, §9-11.140 (2001).

Although the grand jury historically was justified as an institution that served as a shield to protect citizens from overreaching by governmental authority, in fact it now serves as a body whose powers largely are used to assist the government in investigating and prosecuting suspected criminal conduct. On occasion, as one former distinguished federal judge has noted, those powers have been misused against witnesses who, inter alia, 'have been badgered, trapped, [and] subjected to harsh, sudden and wearing appearances in distant places.' Frankel and Naftalis, The Grand Jury – An Institution on Trial, 117-18 (1977). See also Kleiman and Thomas, 1 Representation of Witnesses Before Federal Grand Juries §1.10 (4th ed. 2000) (noting incidents of misuse of essentially forthwith grand jury subpoenas to harass or intimidate witnesses). Moreover, serving a subpoena on a witness with little or no advance notice may result in both inconvenience and violation of the witness's rights; indeed, "forthwith subpoenas have been characterized as violating due process if they operate to deprive the subpoenaed party of the opportunity to consult with counsel and challenge the

subpoena prior to compliance." LaFave, Israel and King, 3 Criminal Procedure §8.7(e) (2nd ed. 1999). See also In re; Nwamu, 421 F. Supp. 1361, 1365-66 (S.D.N.Y. 1976) (subpoena duces tecum requiring immediate appearance before grand jury of witness possessing certain corporate documents found tantamount to illegal search and seizure where FBI agent told the witness records had to be produced immediately or he would be found in contempt of court).

Requiring at least 72 hours notice (not including weekends and federal holidays) before a witness must appear to testify in response to a grand jury subpoena, with a good cause exception embracing situations where flight, destruction of evidence or other compelling reasons justify a forthwith subpoena, would fairly balance both the legitimate needs of prosecutors to act with due haste when circumstances require, and the rights of citizens subpoenaed before the grand jury to be free of unnecessary harassment and inconvenience in the absence of such circumstances.

—Notes—

APPENDIX G

LETTER OF WITHDRAWAL FROM U.S. ATTORNEY WILMA LEWIS

Superior Court of the District of Columbia
500 Indiana Avenue, N.W.
Washington, D. C. 20001

Chambers of
Rufus G. King, III
Chief Judge

202-879-1600

April 13, 2001

Honorable John Garrett Penn
United States District Judge
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Michael D. Hays, Esquire
Dow, Lohnes and Albertson
Suite 800
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Dear Judge Penn and Mr. Hays:

Thank you for your letter of February 20, 2001, conveying to me the draft final report of the Council for Court Excellence District of Columbia Grand Jury Study Committee. I regret that other emergency matters have precluded my responding to your letter until now.

It is clear from a quick perusal of the draft report that the Committee has devoted very substantial time and resources to an intensive examination of the grand jury process in both Superior Court and the United States District Court for the District of Columbia. Members of both the bench and bar are indebted for the Committee's work and the Council's support thereof.

With regard to your request for any comments which I or other judges of the Court might have regarding the draft report, I believe that rather than conveying to you any personal impressions informed only by my own reading of the report, it would be useful to ask a group of judges of the Court to review the report and advise me and the Board of Judges of the desirability and feasibility of implementing any recommendations that are relevant to, or affected by, court operations. This I intend to do in the near future.

Notes

APPENDIX H

COURT AND AGENCY RESPONSES TO DRAFT FINAL REPORT

Superior Court of the District of Columbia
500 Indiana Avenue, N.W.
Washington, D. C. 20001

Chambers of
Rufus G. King, III
Chief Judge

202-879-1600

April 13, 2001

Honorable John Garrett Penn
United States District Judge
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Michael D. Hays, Esquire
Dow, Lohnes and Albertson
Suite 800
1200 New Hampshire Avenue, N.W.
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Thanks again for making the draft report available to me, and for your stewardship of this important project.

Sincerely,

Rufus G. King, III
Chief Judge

Copy to: Mr. Samuel F. Harahan
Executive Director
Council for Court Excellence

United States District Court
for the District of Columbia
Washington, D.C. 20001

Chambers of
Norma Holloway Johnson
Chief Judge

April 4, 2001

The Honorable John Garrett Penn
Co-Chair, Council for Court Excellence
Grand Jury Study Committee
United States District Court
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Michael D. Hays, Esquire
Co-Chair, Council for Court Excellence
Grand Jury Study Committee
Dow, Lohnes & Albertson
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Dear Judge Penn and Mr. Hays:

Thank you for providing a draft of the *Report of the District of Columbia Grand Jury Study Committee.* I have reviewed the report and applaud the hard work of the committee of judges, lawyers, former grand jurors, and academics.

I would like to briefly respond to the report's recommendations for altering the grand jury system of the federal court in the District of Columbia. I find that many of the recommendations would destroy the function of the grand jury system as we know it in the federal courts. Any change that would increase the disclosure of grand jury matters or that would decrease the independence of the grand jury appears to be detrimental to our system of justice.

For example, the recommendation to grant the right of all witnesses to have counsel present during their testimony before the grand jury would be contrary to both the confidentiality of matters occurring before the grand jury and to the independence of the grand jury. First, the right of witnesses to have counsel present during their

testimony increases the disclosure of matters occurring before the grand jury by granting another person access to the grand jury proceeding. Counsel for a witness owes no duty of confidentiality to a grand jury. Second, it decreases the ability of the grand jury to conduct its investigation without interference from the outside.

Another concern I have is the effect that these recommendations may have on the efficiency of the grand jury process. For example, you recommend that the term of service for most grand juries be reduced to three months. This proposal ignores the great loss of efficiency if grand jurors have only three months to serve. A longer term of service increases the effectiveness of the grand jury, which in turn increases the efficiency of the federal justice system. Also, as stated above, you suggest that witnesses have a right to have counsel present during their testimony, unless counsel is disruptive of the proceedings. The standard for removal you suggest is "disruptive of the proceedings." This subjective standard would lead to an increase in litigation over the inclusion of counsel for witnesses in the grand jury room, and therefore a loss in the efficiency of the grand jury process. Because the standard is subjective, it puts a judge in the position of a referee, which unnecessarily disrupts the grand jury proceeding.

I would suggest that you consult further with the United States Attorney for the District of Columbia or any other prosecutorial authority to address these grave concerns as well as others not here addressed. Also, it would be helpful if you discussed in your report the testimony that was presented to the House Subcommittee with respect to congressional proposals to reform the federal grand jury system. Many of the recommendations made in your report parallel the proposals investigated by Congress. If, after reviewing the testimony, your recommendations remain the same, you should address the serious concerns that officials for the Department of Justice testified to before the House Subcommittee.

I truly believe that the current grand jury system is the safest and surest way to bring those who are alleged to have violated the criminal laws to the bar of justice. Thank you for allowing me the opportunity to respond and please contact me if you have any questions.

Very truly yours,

Norma Holloway Johnson

U.S. Department of Justice

United States Attorney
District of Columbia

Judiciary Center
555 Fourth St. N.W.
Washington, D.C. 20001

March 27, 2001

The Honorable John Garrett Penn
Co-Chair, Council for Court Excellence
Grand Jury Study Committee
United States District Court
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Michael D. Hays, Esquire
Co-Chair, Council for Court Excellence
Grand Jury Study Committee
Dow, Lohnes & Albertson
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Dear Judge Penn and Mr. Hays:

I am writing to thank you for providing me with a draft of the *Report of the District of Columbia Grand Jury Study Committee,* and to respond to your invitation for my comments on the Report.

As you know, by letter dated November 24, 1999, I confirmed that the United States Attorney's Office would no longer participate in the Committee's work on the Grand Jury Project. As stated in the letter, this action was based on the withdrawal of the Chief Judges of both the United States District Court and the District of Columbia Superior Court from participation in the project. As a result, I, of course, have not been privy to all of the data and anecdotal information that underlie the Committee's recommendations. I am therefore reluctant to offer detailed comments concerning those recommendations at this time.

I would, however, like to offer some general observations about certain aspects of the Report. First, I would suggest that, for completeness, the reason for this Office's withdrawal from the Grand Jury Project should be included when the Report references that withdrawal. (Report at p. 1).

Second, in describing current grand jury practice, the Report uses terminology that suggests irregularity without providing any evidence to support that suggestion. For example, the Report refers to -- and appears to accept as true -- the perception that the grand jury is "simply an arm of the prosecutor" and that there is a need to restore "balance" to the grand jury's function (Report at p. 3), despite the absence of any empirical or anecdotal support for that perception. That view also directly contradicts Judge Warren R. King's assertion that those members of the Grand Jury Study Committee who have served as grand jurors reported that they had *not* been subjected to "undue influence" from the prosecutors. Similarly, the Report provides no support for the asserted need to "reduce the number of indictments that cannot be supported at trial" by ensuring that the "prosecutor will no longer have the incentive to indict a case on weak evidence" (Report at p. 59) -- an assertion that is belied by the relative infrequency with which indictments are dismissed by the court on motions for judgment of acquittal. In the same vein, the Report makes various references to the grand jury being "shrouded in secrecy," but fails to acknowledge that the rule of secrecy is designed to serve important public policy interests, including protecting the identity of witnesses, preventing those facing indictment from absconding, encouraging unrestrained deliberations among grand jurors, and preserving the reputations of the innocent. These examples suggest that the tone and substance of the Report should be reviewed to enhance its objectivity.

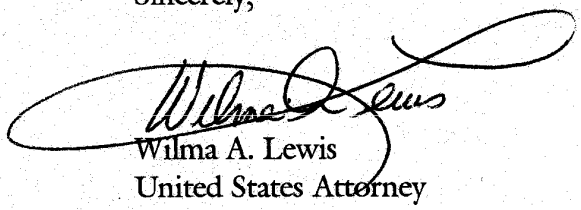
Third, with regard to the recommendations contained in the Report, I note that a number of them are similar to proposals for reforming the federal grand jury system that previously have been made to Congress. These proposals, like their counterpart recommendations, address subjects such as: (i) allowing counsel for witnesses to be present inside the grand jury room; (ii) requiring prosecutors to disclose exculpatory evidence to the grand jury; (iii) granting targets and subjects the right to testify and present evidence to the grand jury; (iv) providing witnesses with a transcript of their grand jury testimony; (v) prohibiting the naming of unindicted co-conspirators in indictments; (vi) requiring Miranda warnings for grand jury witnesses; and (vii) prohibiting prosecutors from calling witnesses who intend to invoke the right against self-incrimination. When the House Subcommittee with jurisdiction over federal grand jury reform met last year to consider the proposals, testimony was presented on behalf of the United States by James K. Robinson, Assistant Attorney General of the United States, and Loretta E. Lynch, United States Attorney for the Eastern District of New York. This testimony constitutes the official position of the United States Department of Justice as to each of these matters, and thus constitutes our response to the Grand Jury Study Committee's similar proposals. I have attached a copy of the Department of Justice testimony for your information.

Finally, as to the remaining recommendations, some are simply not practical in light of the realities of the grand jury practice in this jurisdiction. For example, while I certainly appreciate the Committee's concern that prosecutors clearly lay out the facts and the law in

their grand jury presentations, and we will continue to pursue that objective, it would be neither feasible nor desirable to implement the recommendation that prosecutors follow a uniform structure in each and every case presentation, given that our Superior Court Division alone annually indicts over 5000 cases ranging from property crimes and drug offenses to serious violent crimes such as rape and murder. Other recommendations in the Report, including those regarding measures to enhance the grand jurors' safety, comfort and convenience, are well advised and will be carefully considered as we continue our ongoing efforts to improve our grand jury practice.

Thank you again for sharing the draft Report and inviting my comments.

Sincerely,



Wilma A. Lewis
United States Attorney

cc: Chief Judge Norma Holloway Johnson
Chief Judge Rufus G. King, III
Samuel F. Harahan

PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA

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April 19, 2001

Samuel F. Harahan
Executive Director
Council for Court Excellence
1717 K Street, N.W. Suite 510
Washington, D.C. 20036

Dear Mr. Harahan:

We are writing in response to the recently-issued draft report of the District of Columbia Grand Jury Study Committee of the Council for Court Excellence. It impresses us as a thorough, thoughtful, balanced, and well-reasoned analysis of the strengths and weaknesses of the grand jury system in the District of Columbia. Because the Public Defender Service practices almost exclusively in Superior Court, and because there are limits to the access we currently have to grand jury matters, there are some recommendations that speak to issues about which we have little knowledge – those that address improving the safety, comfort and convenience of the grand jurors, for instance, and, to a large extent, those that address the structure, organization, and selection of grand jurors. As to the recommendations to improve the effectiveness and independence of the grand jury and to improve the protection of targets and witnesses, however, you have our wholehearted support. The implementation of these recommendations would go a long way towards improving the fairness of the grand jury system in the Superior Court for the District of Columbia.

We are particularly heartened to see your recommendations to remove the Superior Court grand jury from the Offices of the United States Attorney, to ensure that grand jurors receive proper legal instruction, and to allow and provide for the presence of counsel for grand jury witnesses. On the issue of legal instruction, it has been our experience that it is very difficult for defense counsel to learn what legal instruction the grand jurors have received, and there is virtually no assurance, in a given case, that the grand jurors have been operating under proper instruction regarding the potentially complex legal issues that govern the probable cause determination. Although we agree with the Committee that the best solution would be to have a judge instruct grand jurors on the law, the alternative resolution of having instructions track the "Redbook," having all instructions transcribed and available for review, and allowing the grand jurors to

direct questions to the Chief Judge, would go a long way towards standardizing the practice and allowing for appropriate challenges to be made. We would suggest that when instructions deviate from the Redbook, which may be appropriate in particular cases, or when questions arise necessitating answers that are not found in the Redbook, the government be required to inform the trial court and make the transcript available either to defense counsel or to the trial court for *in camera* review. Under such a system, defense counsel and the trial court would be safe in the operating assumption that Redbook instructions were given and would be aware when the grand jury received any instructions that were different. Defense counsel could then mount challenges when appropriate.

We strongly support the recommendation that the Superior Court grand jury be removed from its present location and be located in a court building that is proximate to the prosecutor's offices, and we do so for several reasons. First, as the Committee suggests, such a location would be consistent with the status of the grand jury as an arm of the court, independent from the prosecutor, and is therefore important to maintain the proper appearance of independence and lack of partiality of the grand jury. Even more compelling, however, is our concern that there have been very real and detrimental effects that have flowed from the years of having the grand jury located in the building that houses the Offices of the United States Attorney for the District of Columbia.[1] The individuals who have suffered these effects, we have found, are in large part the citizens of the District of Columbia who have been compelled to appear before the grand jury as witnesses, and have found themselves subject to harassment and overreaching by the assigned prosecutors. Your study committee, while including an impressive array of prosecutors and defense counsel, judges and former grand jurors, appears not to have received direct input from former witnesses, particularly those who had been unrepresented by counsel and who have been compelled to appear before Superior Court grand juries. It is unfortunately the case that the conduct of the prosecutors as it affects these individuals remains largely invisible to the judiciary and to the public at large. Indeed, it remains relatively invisible to the defense bar; as it has been our experience that witnesses who are represented by counsel often receive dramatically different treatment than witnesses who are unaware of their rights.

As the Committee may be aware, the Public Defender Service filed, on behalf of a young girl who had been subpoenaed in one case as a grand jury witness on six different dates and never placed before the grand jury, a motion before the Chief Judge of Superior Court challenging the practice of prosecutors in this jurisdiction of using grand jury subpoenas to compel the presence of witnesses in their offices for investigative

[1] Although we have not done an exhaustive review, we have compiled some data on the location of federal grand juries, and have come to the conclusion that the presence in this jurisdiction of the grand jury within a non-court building that houses the Office of the United States Attorney is quite an anomaly.

interviews.[2] It is our belief that this practice, which coerces cooperation from witnesses who are unaware of their right to refuse to be interviewed, is illegal and must be stopped. It has been our anecdotal experience that the vast majority of lay witnesses who are compelled by grand jury subpoenas to arrive at 555 Fourth Street, N.W., (like our client, Witness X), have no idea that the interviews conducted by the prosecutors and law enforcement, often over the course of days, are not compulsory, and that prosecutors do nothing to dispel the confusion. These individuals miss work, school, or caring for their children, are often harassed and badgered by authorities who are unhappy with the witness's version of events, and are never informed that they have the right to refuse all interviews and demand direct placement into the grand jury. Removing the grand jury from the office of the United States Attorney would, we believe, do a great deal to eliminate the confusion that is inherent in having a subpoena direct a lay witness to a non-court building that not only houses the grand jury, but houses the offices of the prosecutors as well.

The combination of the shroud of secrecy that governs grand jury matters and the placement of the grand jury within a building entirely controlled by the prosecutors has created, we believe, an environment in which the government has become comfortable in operating in a manner that serves its purposes, but is not entirely within the bounds of the law. In the Witness X case, the government conceded a practice of using grand jury subpoenas to direct witnesses to the offices of individual prosecutors, as opposed to the grand jury. It virtually conceded that at the time that Witness X was subpoenaed to appear, no grand jury had yet been convened to hear evidence in the particular investigation, and conceded that such conduct was also prevalent in the office. While not conceding the illegality of either practice, the government represented to the Chief Judge that it would discontinue such practices. We have found, however, that such conduct continues in substance, if not in form – although the subpoenas now indicate "second floor," the witnesses are escorted directly to prosecutors' offices. We believe that removing the grand jury out of the prosecutor's office and into a court building will be the most effective route to preventing such abuses.

It has also been our experience that the placement of the grand jury within the offices of the prosecutors has created a culture by which prosecutors routinely subpoena witnesses to appear at times that bear little relation to the times when the witnesses ultimately testify. It is convenient for a prosecutor, who may be uncertain of her own court schedule or the schedule of investigators with whom she is working, to have a witness present in her office and available starting early in the morning, even when there is no realistic expectation of the grand jury presentation taking place at that time. Thus, grand jury subpoenas are typically issued for nine o'clock in the morning, and witnesses, particularly those who are unrepresented by counsel, typically spend hours, even days, in the offices of the United States Attorney, with no attention given to whether or not the prosecutor has caused significant disruptions in the witness's job, schooling, or childcare

[2] In re: Subpoenas to Witness X, SP-2802. Although the case is under seal, Judge King has lifted the seal on Witness X's motion, the government's opposition, and the transcript of a hearing on January 10, 2001.

arrangements. Perhaps moving the grand jury to a building where access is not controlled by the prosecutors, and where the prosecutors themselves must go in order to make grand jury presentations, will encourage more attention to be paid to the scheduling of grand jury matters, and significantly decrease the hours and days that our citizens waste at 555 Fourth Street, N.W.

For the same reasons, we support all Committee recommendations that empower witnesses to know, understand, and exercise their rights – access to counsel, presence of counsel in the grand jury room, and advice of rights. Indeed, because of the experiences we have had representing witnesses, we would suggest that the advice of rights endorsed by the Committee be expanded to include advice to witnesses that any interview sought by the prosecutor prior to the presentation of testimony before the grand jury is entirely voluntary, and, if a witness does consent to such an interview, that the witness retains the right to terminate the interview at any point. The government has already agreed, during the course of the Witness X litigation, to have such language placed on the standard grand jury subpoena, although it has resisted any language that informs the witness of where to obtain legal advice.[3] We believe that this advice to witnesses should be provided both orally and in writing, and any consent to be an interview should be documented.

As we have indicated, we support the Committee's recommendation that counsel be allowed to be present in the grand jury, particularly in light of the experiences of other jurisdictions that such a system is eminently workable. We also believe that indigent witnesses should have equal access to counsel, and therefore would be happy to work with the judiciary to develop a system whereby the Public Defender Service could provide representation to such witnesses upon request. Our only concern is avoiding conflicts of interest within our agency, but we are confident that we could develop a system, particularly utilizing lawyers within our office who do not provide direct client representation in criminal cases in Superior Court, whereby we could provide representation in the vast majority of cases and avoid creating conflicts of interest. In those few cases in which any involvement at all by the Public Defender Service would be problematic, we are confident that the local law school clinics or the CJA bar could fill the gap.

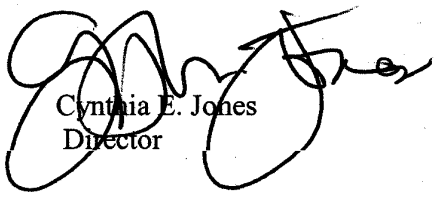
Our final comment is directed to the recommendation that the United States Attorney and the District of Columbia Superior Court comprehensively review and supplement the current orientation procedures, and particularly the comments cited by the Committee regarding some grand jurors' desires for "background information" on police procedures, including information regarding terms such as "field test" and "nickel bag." We would simply like to draw the Committee's attention to the relatively recent decision of Williams v. United States, 757 A.2d 100 (2000), in which the District of Columbia Court of Appeals held that information provided to the grand jury by a police detective about the behavior of typical narcotics users and sellers is "evidence," and as such must

[3] The precise language that we and the government have proposed can be found in the Witness X pleadings that are available to the public.

be presented to the grand jury only by witnesses who are under oath. During the course of the Williams litigation, the Office of the United States Attorney represented to the Court of Appeals that, at least with respect to Superior Court cases, it would discontinue its previous practice of having a police "drug expert" appear, unsworn, during the grand jury orientation process. Thus, to the extent that grand jurors believe that they need further information on police procedures, we emphasize that by law this information must be provided by sworn witnesses, and not included as background "orientation" material.

In conclusion, we appreciate the time, energy, and thought that the Committee has devoted to developing this extensive and critically-needed report. The citizens of the District of Columbia will surely benefit if the recommendations of the Committee are implemented. You have our support in this most important enterprise.

Sincerely,



Cynthia E. Jones
Director

FEDERAL PUBLIC DEFENDER
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Federal Public Defender

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May 31, 2001

Honorable John Garrett Penn, Co-Chair
Michael D. Hays, Co-Chair
District of Columbia Grand Jury Study Committee
Council for Court Excellence
Suite 510
1717 K Street
Washington, D.C. 20036

Dear Judge Penn and Mr. Hays,

Thank you for forwarding a copy of the February 2001 Draft Final Report of the D. C. Grand Jury Study Committee to the Federal Public Defender office for review and comment. I have reviewed the entire report and commend the committee for the detailed and thorough work product. Our local and federal court grand juries have considerable power and prestige and perform functions with which many people are unfamiliar. The Council for Court Excellence's Grand Jury Final Report should help in bringing to light how grand juries function, as well as raising options to address many of the more critical policy issues surrounding the institution.

More specifically, with the one exception noted below, the Federal Public defender office endorses the overall draft of the final report, including both the quality of life findings and recommendations to improve the treatment of the residents called as grand jurors, as well as the more substantive law reform proposals set forth in the draft final report. We are strongly supportive of the report's several proposals which are already in place in over twenty state court systems granting witnesses and defense counsel greater access to grand jury proceedings.

The one exception has to do with reducing the size of the grand jury. The recommendation is based on a cursory analysis of the history of the size of the grand jury and the consequences of such a reduction. The committee essentially admits that it has simply picked a number at random for the suggested reduction. Such a change should not be done without a much more detailed and reasoned analysis of this sensitive area.

Thank you for the opportunity to comment on the report. The lawyers in the Federal Public Defender office witness every day the consequences of the uneven playing field which is today's federal grand jury system. Hopefully, the recommendations in the report will be adopted , which would make federal grand juries more independent of the prosecutor, and thus make their

function more consistent with the intent of the founding fathers.

Sincerely,

A. J. Kramer
Federal Public Defender

ABOUT THE COUNCIL FOR COURT EXCELLENCE:

Formed in Washington, D.C. in January 1982, the Council for Court Excellence is a nonprofit, nonpartisan, civic organization. The Council works to improve the administration of justice in the local and federal courts and related agencies in the Washington metropolitan area and in the nation. The Council accomplishes this goal by:

- Identifying and promoting court reforms,
- Improving public access to justice, and
- Increasing public understanding and support of our justice system.

The Council for Court Excellence has built a substantial record of success in the major court reform initiatives it has undertaken. The Council has been the moving force behind adoption of the one day/one trial jury system in the D.C. Superior Court, modernization of the jury system, reform of the District of Columbia probate laws and procedures, expansion of crime victim rights, improvement in court handling of child abuse and neglect cases, and proposing methods to speed resolution of civil cases by the D.C. trial and appellate courts.

Since 1995 the Council for Court Excellence has devoted a substantial level of energy to petit and grand jury reform. In 1998, the Council published a comprehensive report on the trial jury system in Washington D.C. *Juries for the Year 2000 and Beyond* is available from the Council's offices. *The Grand Jury of Tomorrow* Report, July 2001, sets forth 23 policy and legislative proposals to improve local and federal grand juries in Washington D.C.

To improve the public's access to justice and increase their understanding of our justice system, the Council over the years has published and disseminated over 250,000 copies of plain-language booklets and other materials explaining a wide variety of court systems.

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Number of Characters: 134,665 (approx.)