GRAND JURIES

By Peter Young & Barry Litt
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In the last year there has been a dramatic increase in the number of federal grand juries which have been convened to investigate movement activity. In Detroit, Chicago, Vermont and Tucson, investigations focused on Weathermen; in San Francisco on the Black Panthers; in San Jose on demonstrations against President Nixon; in Isla Vista and Seattle, on the entire range of local political groups and events; and in Harrisburg, Pennsylvania, on a small group of well-known Catholic radical pacifists. It might be an understatement to suggest that the grand jury looms as the government's major new weapon for harrassing and incarcerating movement people.

The grand jury investigation in Tucson, which is largely unpublicized and mostly unnoticed by the general public, may be the most interesting case to date. Five radical movement people from Los Angeles have thus far been jailed, with sentences ranging from 60 days to indefinite periods of time (the life of the grand jury). These five have not been charged with - or even accused of - any crime; they are in jail on civil contempt as a result of their refusal to answer, despite guarantees of personal immunity, the grand jury's sweeping questions about their friends and acquaintances.

The Tucson investigation allegedly concerns the purchase of dynamite in Arizona for use in Los Angeles. But the questions asked of the five Los Angeles witnesses related instead to the nature of the L.A. movement. Typical questions were those such as: "Please describe all contacts and conversations with (named individual) during 1969 and 1970; where they took place, who else was present, and what was said." "Please describe all demonstrations, disorders or riots in which you participated or which you helped plan in 1970." It is clear that such questions, which are impossible to answer, indicate that the grand jury is being used to conduct a fishing expedition to learn more about the movement, not about an act of importing dynamite across state lines.

Historically, the grand jury was intended to be a buffer between the individual and the state. Before the grand jury came into existence it was the executive branch (the Crown) that had the power to institute a criminal prosecution against an individual. The grand jury was supposed to take over for itself the making of this judgment, and thus preclude the initiation by the state of a prosecution directed at a political enemy of the state. Although the grand jury was thus intended to operate as a body independent of the executive branch, it has not evolved in that manner. There has been a fundamental distortion and co-option of the function of the grand jury. Today the grand jury acts, not independently of the prosecutor, but as an arm of the prosecutor.

Virtually all grand jury investigations are conducted at the behest of the U.S. Attorney and the Justice Dept. The grand jury investigation is really commenced by the U.S. Attorney who is seeking indictments. Rather than actively seeking evidence on its own, the grand jury sits passively while the prosecutor tries to present it with enough evidence to get it to indict.

There is, however, a critical distinction to be made between the types of grand jury investigations that are instituted by the prosecutor. When a witness is subpoenaed to appear before the grand jury, does the prosecution seek to elicit from the witness evidence that it already has in its possession, by virtue of the investigative work of the FBI or other agencies? If so, arguably the subpoena is valid.

But this is not often the case. What usually occurs is that a witness is forced to appear before a grand jury under compulsion of subpoena and submit her/himself to a fishing expedition by the prosecutor. The latter asks questions designed not to present to the grand jury evidence which the prosecutor already has, but to discover that evidence for the first time.

Continued use of the grand jury by the Justice Dept. in this second way has cloaked this technique in the guise of legality and we have come to accept such a procedure as a matter of course. But we must recognize that this technique represents a perversion of the function of the grand jury proceeding and an attempt by the Justice Department to get around the denial by Congress of its own subpoena power.

The efforts by the FBI to obtain a subpoena power to be used in its investigations have been consistently rejected by the Congress. Today no one can be directly compelled to answer questions posed by FBI agents or produce other evidence for them. Thwarted at this end, the Justice Department has sought to evade this limitation by using the subpoena power of the grand jury as if it were its own. If a citizen is approached by the FBI but refuses to answer questions, he is then usually subpoenaed before a grand jury and asked the same questions by the U.S. Attorney.

At this point, the U.S. Attorney is using the subpoena for dual purposes: not only is he trying to present evidence to the grand jury, he is also trying to discover it. The subpoena power of the grand jury is thus being used to perform a function that the grand jury does not have; i.e., the investigative function of the FBI.

The other side of the coin is even more disturbing. When the grand jury's extra-legal investigative function is thwarted (for example, as in Tucson, where witnesses refuse to meekly supply the desired information), it can then become an efficient mechanism for the summary imprisonment of large numbers of movement people.

The movement is thus faced with an extraordinarily difficult dilemma, one to which we must apply our collective thought immediately.

The civil contempt jailing of five Venice radicals in Tucson, Arizona has posed in very concrete form the difficult political question of when, if ever, it is proper to testify before a grand jury. The Tucson investigation purportedly focuses on the illegal purchase of dynamite by an alleged Weatherman there and its transportation into California, but the Government is also proceeding under the conspiracy provision of the Federal Anti-Riot Act (the Rap Brown Law of Chicago and Seattle fame), and most of the questions delved into aboveground political work, associations, conversations and meetings and into the Venceremos Bridage. At the point when subpoenas were coming fast and furious, it appeared that the Justice Department was discriminatorily using grants of immunity as an independent punitive weapon against Movement groups. Even if that is not so, the dangers of implicating comrades and furnishing information the Government does not have and, above all, the distrust and suspicion that testifying would breed within the Movement are sufficient by themselves to warrant serious discussion around testifying and grand juries in general.

A pamphlet the Los Angeles Movement has distributed adequately covers the political question of testifying, and our aim here is to sketch the law of grand juries in the light of our experiences in Tucson. Nevertheless, our conclusion is that the political question must be faced now, for the law offers little, if any, refuge for grand jury witnesses.

Before the questioning begins the witness and her lawyer and comrades should try to discover as much as possible about the investigation. Prior witnesses are the best source of information. While grand jurors and the Government officials who work before them are prohibited from disclosing the nature of the proceedings, witnesses are not so bound, though the U.S. Attorney often tells them otherwise. In Tucson we asked Guy Goodwin, the special U.S. Attorney who conducts nearly all political grand jury inquiries across the country, what the scope of the investigation was, whether our clients were potential defendants and if so, in what way, and whether they would be granted immunity. He would only say that the Justice Department no longer subpoenas potential defendants, presumably because of the doubtful constitutionality of that practice.

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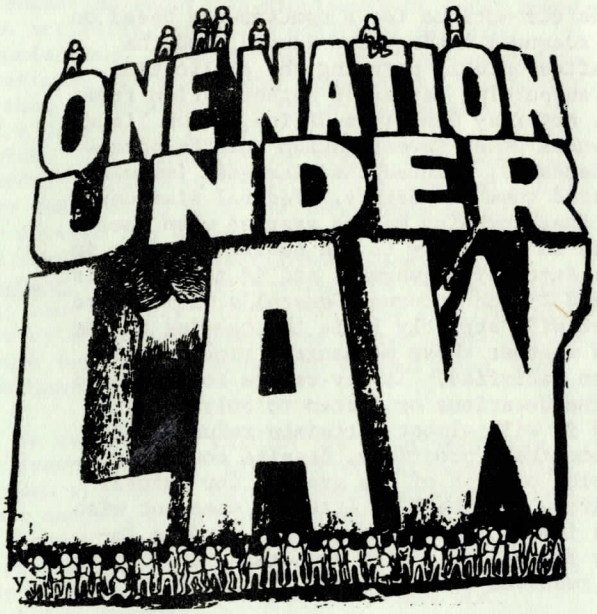
The U.S. Attorney permits the witness to leave the grand jury room to consult her attorney, and she should use that privelege after each question, explaining to the grand jury that her lawyer has asked her to do so. That allows construction of a near-perfect record of the questions that probably will not otherwise be available, it helps the witness maintain morale and confidence through a grueling ordeal, it gives the lawyer the opportunity to help her assert the appropriate grounds for refusing to answer each question and it costs the Government time.



At the outset of the Tucson questioning, the witnesses asked that their lawyer be permitted to advise them inside the grand jury room since corridor consultation is inadequate, and they requested a statement of the scope of the investigation. When those requests were denied, they asserted the sixth amendment right to counsel and immateriality and irrelevancy in response to each question. The U.S. Attorney will often ask the witness if she has had adequate opportunity to consult her attorney and whether she understands the question. Any response should be evasive; a repetition of the request for the presence of counsel in the grand jury room is probably best. The Tucson witnesses also refused to answer various questions on the basis of the first, fourth and ninth amendments, the right of privacy, overbreadth, vagueness and, in one case, the marital privilege not to testify in a proceeding against a spouse. Witnesses

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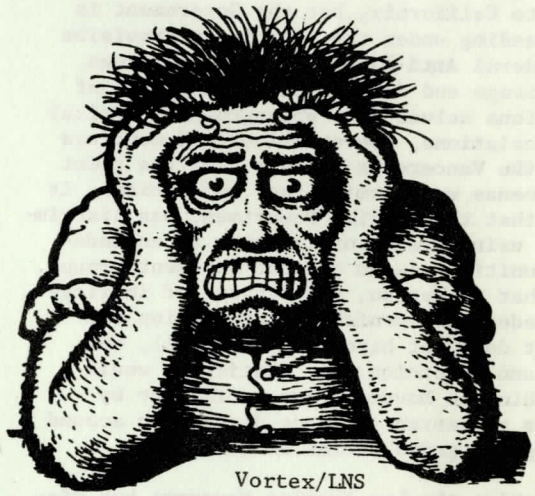
A few minutes after the first round of questioning ends the witness or her lawyer is served with an application for an order instructing her to testify and is told to report to the courtroom immediately. In each of the Tucson cases our motions for a continuance based on lack of adequate notice were denied, and the court, after quickly perusing the application and the supporting letter of authorization from the U.S. Attorney General's Office, which listed the offenses under investigation and the potential defendants, granted the witnesses immunity and ordered them to testify. Federal statutes provide that immunity may be granted when the testimony is necessary to the public interest in the U.S. Attorney's judgment and if the grant is authorized by the Attorney General's Office, and the court will strictly limit the hearing to the issue of whether those mechanical requirements have been satisfied. It may refuse to listen to any of the questions or listen to only a few of them and it will almost certainly refuse to inquire into their propriety, despite counsel's explanation of each of the grounds for refusal to testify. (If the U.S. Attorney does not wish to grant immunity and contends the witness improperly invoked the fifth amendment, that issue will be resolved at this stage.)

The Tucson witnesses were each granted immunity under 18 U.S.C. 2514, which authorizes the grant only where certain offenses are involved. Section 2514 provides for "transactional" immunity, which the courts have long held valid; the witness is insured against any criminal prosecution for any transaction or incident she testifies about. The Organized Crime Control Act of 1970, however, includes a general immunity provision (replacing or amending all federal immunity laws except 2514) which offers only "use" immunity; the compelled testimony may not be used against the witness in a criminal case but she may still be prosecuted for any incident she testifies about through the use of evidence obtained independently of the testimony. The rub lies in the difficulty of showing that the evidence used in a subsequent prosecution is derived from the compelled testimony. A long line of Supreme Court decisions indicate that the "use" immunity is invalid, but while Judge Motley held the Crime Control Act provision constitutionally insufficient in a New York district court case, the Ninth Circuit has upheld it. If "use" immunity is granted, witnesses have a good basis for appeal of their contempt sentences at least until the Supreme Court resolves the question. It is worth noting that the Crime Control Act provides that even 2514, the sole remaining "transactional" immunity statute, is repealed effective four years hence.



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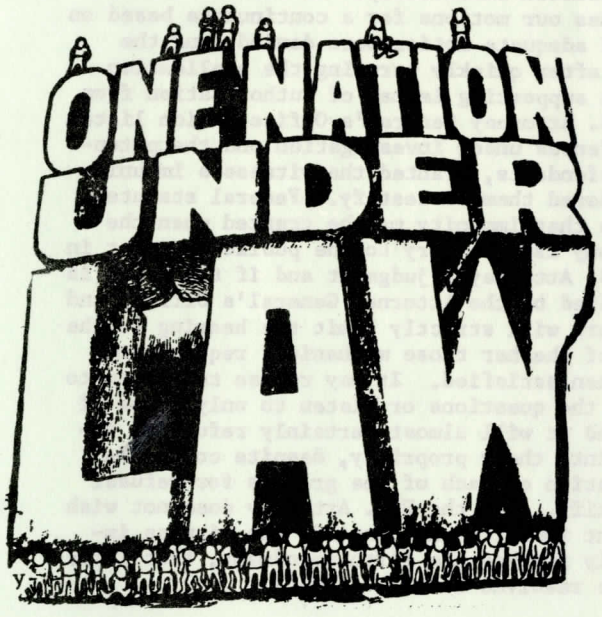

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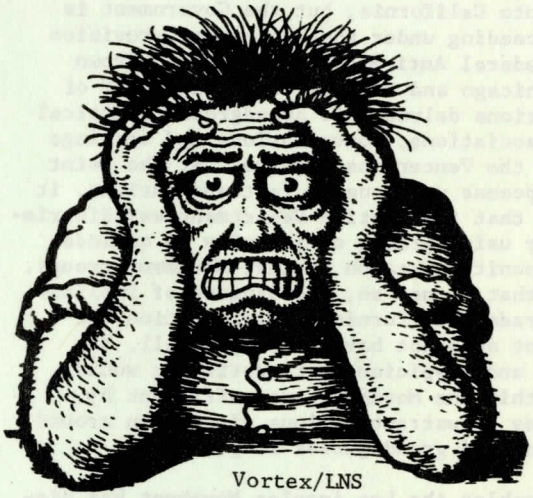

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may listen to any number of questions before ordering the witness held in contempt, but it takes only one invalid refusal to answer to support the commitment. In Tucson our requests for a continuance were denied; the Crime Control Act authorizes summary civil contempt proceeding for recalcitrant witnesses. The court ruled adversely on each of our objections to the questions, holding that it had no power to limit the grand jury investigation.

Witnesses who carry their refusal to testify this far should know what they are in for. Civil contempt is coercive; the sentence ends when the witness purges herself by testifying or when purging is no longer possible - that is, when the grand jury term, which may be extended up to 18 months, ends. If a successor grand jury undertakes the same investigation, the witness may be subpoenaed again, and if she renews her refusal to testify, the civil contempt sentence may be reimposed or continued. One court has suggested that the principles of substantive due process limit the length of "nonpunitive" imprisonment a witness may serve, but that limit has never been specifically defined. While the Supreme Court has indicated a strong preference for initial use of the civil contempt sanction, after it proves unsuccessful the witness may be tried for criminal contempt for her recalcitrance. Double jeopardy is not a defense since the civil contempt sentence is not a criminal sanction. Criminal contempt is punitive and involves a sentence of definite duration; while there is no statutory limit on the length of criminal sentences which may be imposed, imprisonment for refusal to testify has usually ranged from six to eighteen months. Criminal contempt prosecutions for refusal to testify may not be summary in nature, and the court may not impose a sentence of more than six months without a jury trial or a jury waiver. The availibility of the usual safeguards surrounding a criminal trial offers little assurance, however; there is no more a defense in criminal contempt cases than there is in civil contempt proceedings, and the most that can be hoped for is a light sentence.

In civil contempt cases the appeal process is as empty as the district court hearing; the Crime Control Act provides that appeals must be disposed of within 30 days of the filing of notice of appeal with the district court. In the Tucson cases, the Ninth Circuit Court of Appeals retroactively made our sketchy memorandum of law in support of a motion for bail pending appeal our opening brief; denied us oral argument, refused to make the transcript of the grand jury questioning part of the record on appeal; and decided the case before we had a chance to respond to the Government's brief. Such dispatch is calculated to prevent the civil contempt witness from remaining at large on bail pending appeal while the grand jury term draws to a close. Civil contempt appellants are entitled to bail if the appeal is not frivolous or taken for delay, but the Ninth Circuit's opinion in the Tucson cases, United States v. Weinberg, (January 18, 1971), puts an end to any hope of a successful bail motion and, indeed, of a reversal of civil contempt commitments involving "transactional" immunity.

Only a reading of the opinion can fully convey the blatantly political nature of the decision. The court summarily dismissed our notice arguments and did not even discuss our right to counsel argument or our contention that the Rap Brown Law, the sole statutory basis for a grant of immunity under 2514 in the Tucson cases, in unconstitutional (presumably on the basis of an earlier Ninth Circuit holding that grand jury witnesses have no standing to challenge the Government's illegal use of electronic surveillance in gathering information for the questioning).

Our attempts to limit the scope of the grand jury questioning were equally futile. We argued that before the court can compel answers to questions requiring disclosure of first amendment activities (such as political beliefs, associations, conversations, meetings and demonstrations), it must first require the Government to show a nexus between the protected activity and a legitimate subject of grand jury investigation. The Ninth Circuit itself had recently approved this requirement in limiting the grand jury questioning of a New York Times reporter who covered the Black Panther Party, relying on the legislative investigation cases. The Weinberg decision fails miserably to distinguish that case, simply holding that the chilling effect of compelled disclosure is not a recognized ground for lawful refusal to answer grand jury questions.

We argued also that if the Government may not search for and seize private conversations through electronic eavesdropping without an advance showing of probable cause, it may not do so through compelled testimony. The Supreme Court has long recognized that the fourth amendment limits constructive searches for and seizures of private documents by grand jury subpoenas duces tecum, but the Weinberg court merely held that compelled testimony is "neither a search for, nor a seizure of, oral statements in the sense envisioned by the Fourth Amendment."

In answer to other arguments, the court incorrectly held that none of the questions were vague, and while it admitted some were overbroad and compound, it disposed of that objection with the observation that the witnesses did not ask the U.S. Attorney to simplify or break down the questions. And it declared that any inquiry into the relevancy of the questions to a legitimate subject of investigation would interfere with the secrecy of the grand jury proceedings.

The court avoided the most objectionable questions by limiting its inquiry to questions read into the record at the contempt hearings, holding that the witnesses were not penalized for refusing to answer other questions. We tried to get around that limitation and the undeniable fact that the witnesses refused to answer even legitimate questions by arguing that the failure of the district court to examine the questions prior to its orders to testify rendered those orders and the subsequent contempt commitments invalid. The Weinberg court simply held that such an inquiry was not necessary and would seriously interfere with the normal course of grand jury proceedings and their secrecy. (Judge Motley's recent decision in New York indicates that due process requires such an inquiry before the order to testify is rendered.)

The important point is that even if we had won the appeal we would still face the same political dilemma. The Government would be inconvenienced somewhat if it had to give a few days' notice before the immunity and contempt proceedings, but that wouldn't halt them. No doubt the Government, if it had to, could easily show a nexus, probable cause and relevancy which would satisfy courts fearful of radical violence and revolutionaries. Finally, the objectionable questions which were the basis of the appeal were the most easily answerable; the most problematical questions are those which are undoubtedly legitimate. At most the appeal freed the Venice Five for a month of crucial political discussion and partially satisfied what we believe is an obligation to exhaust legal remedies before testimony may be given. The case is now pending before the Supreme Court, but Justice Douglas, the best man on the Court, has denied our bail application, and further legal work is merely mechanical fulfillment of that obligation. The political questions surrounding testifying must now be resolved.

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