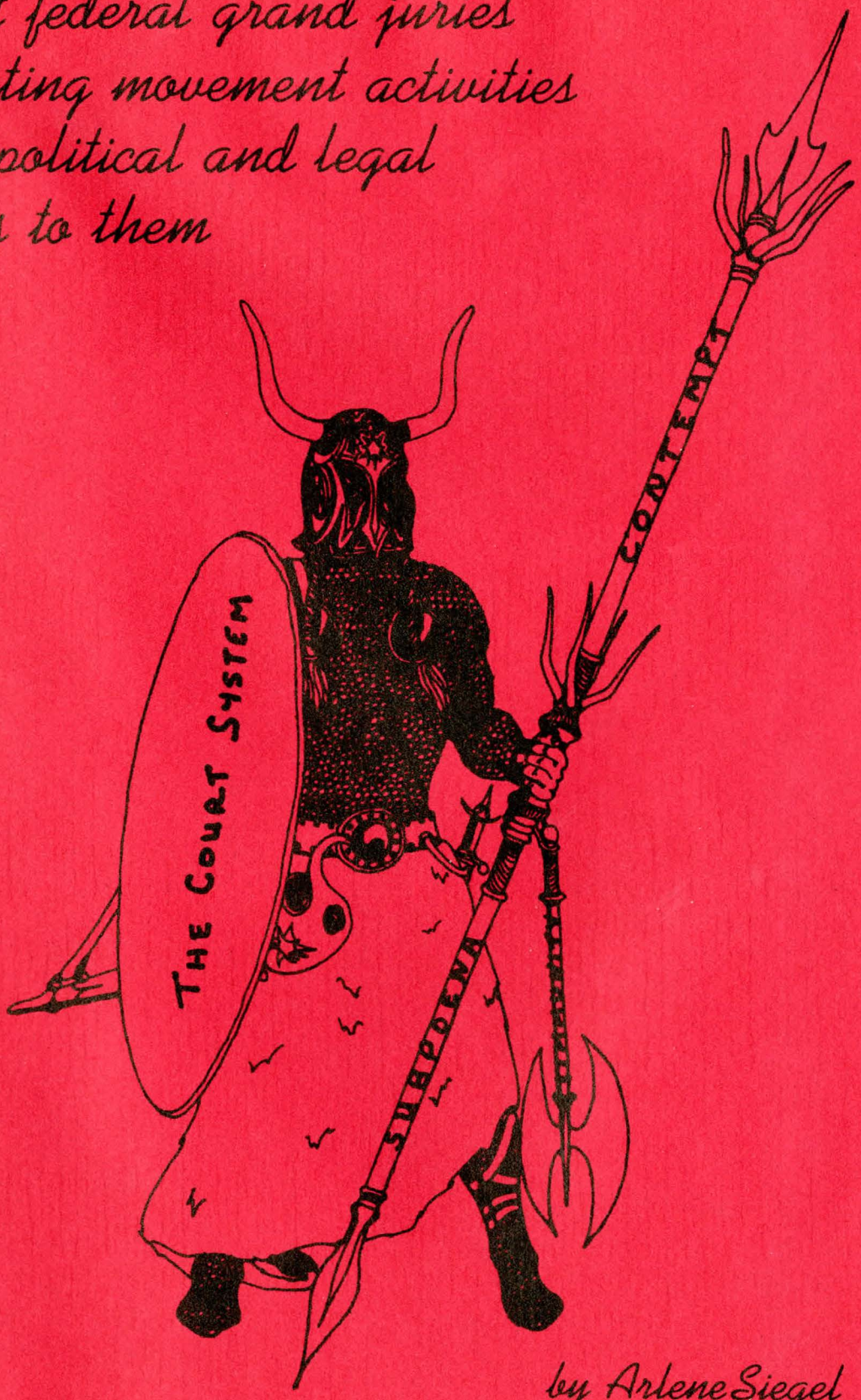
Are You Now or Have You Ever. . . .

a look at federal grand juries investigating movement activities and the political and legal responses to them



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by Arlene Siegel

SOME USEFUL DEFINITIONS

subpoena an order to present one's self for interrogation by a grand jury (or at a Congressional hearing or a trial)

immunity allegedly, adequate compensation for being deprived of one's right not to be forced to give self-incriminating testimony

- **transactional immunity** protection from prosecution for any **crime** directly or indirectly revealed by one's testimony
- **use immunity** protection only from the use of a witness' own testimony in prosecuting her for a crime revealed by that testimony

contempt refusal to comply with a court order: one is declared in contempt, for example, for refusing to testify before a grand jury after being ordered to do so by a judge

- **civil contempt** meant to **coerce** the witness into testifying: the witness goes to jail until either she agrees to testify or the term of the grand jury ends
- **criminal contempt** a **punitive** measure: the witness is given a sentence of determined length; if it is greater than six months for each contemptuous action, she is entitled to a jury trial to determine guilt or innocence

grounds for refusing to testify

- **1st amendment** freedom of speech and (political) association
- **4th amendment** protection from illegal search and seizure (i.e., from illegal surveillance)
- **5th amendment** the right to remain silent rather than give testimony that is self-incriminating
- **6th amendment** the right to have legal counsel present
- **9th amendment** the right to engage in political activity

The Bill of Rights provides that no person may be tried by the federal government for a serious crime until the evidence against her has been heard by a grand jury and a majority of the members of that grand jury have voted an indictment. There are two kinds of federal grand juries: regular, standing grand juries and specially convened grand juries. A standing grand jury is always available in each federal district to approve or reject indictments brought to it by the federal prosecutor. Each of these grand juries is in session for up to 18 months and then is succeeded by a new one. The Organized Crime Control Act of 1970 authorized special grand juries, which are empaneled to investigate the violation of specific statutes and are allowed to remain in session up to 36 months. Jurors for both are chosen from the voter registration lists of the district in which the particular grand jury is sitting. Those selected are usually white, middle- or upper-class, male, and middle-aged or older. When a witness appears before a grand jury, she is not allowed to have a lawyer present. Although she may consult with her lawyer outside the grand jury room at periodic intervals, she is not even guaranteed the right to do this after every question. Because they have not been charged with a crime, witnesses do not have the legal rights and protections accorded indictees and defendants in criminal trials. Nor do they have a right to be told the purpose of the investigation or against whom the government is seeking indictments. No judge is in the grand jury room to rule on the legality of the proceedings as they occur. Only the jurors, the prosecutor, a stenographer, and the witness are present, and all except the witness are sworn to secrecy about what transpires.

It is not surprising, then, that since the fall of 1970 the government has developed a strategy for using grand juries to obtain what it has been unable to get in any other way. Grand juries like those discussed in this article are being used to get the information the government needs to curtail Movement activities and to prosecute radical activists. Instead of deciding whether evidence already gathered is sufficent to warrant indictments, the grand jury looks on while the prosecutor uses its powers of subpoena, immunity, and contempt to try to force people to talk. First conceived of as a way of protecting citizens from the abuses of Star Chamber proceedings in medieval England, the grand jury in Amerika today has been turned into not one but many Star Chambers and the Inquisition is on. Perhaps to the government's surprise, its intended victims are refusing to acquiesce in their demise and are drawing together in an increasingly unified stand of defiance and counter-attack.

TUCSON – HARRISBURG – CLEVELAND – BROOKLYN – WASHINGTON, D.C. – SEATTLE – NEW YORK CITY – DETROIT

During the past year federal grand juries sitting in all of these cities have turned their attention to the activities of the Movement.[1] When five people from Venice, California were ordered to appear before the Tucson grand jury in the fall of 1970, there was no readily accessible information to which they could turn for help in making their decisions about how to respond to the grand jury. And so they went, refused to testify, and each spent four months in jail for contempt before being released, re-subpoenaed to a new grand jury, and finally deciding that three of the five should testify. Most of the rest of us never knew what had happened (or realized that it could also happen to us) until much later. It is now a year later, and more than 100 other people have been called before grand juries investigating Movement activities.

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[1] Although they are not discussed in this article, grand juries in Kansas City (Missouri), Los Angeles, and San Francisco have also been investigating Movement activities. The one in San Francisco is just beginning its inquiry. In Los Angeles there have been three: one was investigating the Bank of America bombings, one how the Pentagon Papers got out, and one draft counselling in southern California. That grand jury has subpoenaed lawyers, doctors, orthodontists, counsellors, and counsellees. Ten people have been indicted for draft evasion. The Kansas City grand jury has indicted four people on six courts of conspiracy to make, possess, transport, and detonate unlawful explosive devices. The indictments are based on information given by another person, who had been ruled legally insane by the courts. He was in jail on a ten-year sentence for being caught with a pipebomb; after a year of threats and persuation by authorities and psychiatrists, he finally agreed to testify. His sentence was cut to five years.

Some of those subpoenaed have testified; most have not. Some have been cited for contempt; some have had their subpoenas withdrawn or have been dismissed, perhaps to be recalled later. At this time, most of the grand juries are not meeting or have moved along to other topics. Others are just beginning to delve into the Movement. The government, faced with its failure to get the information it needed and temporarily stalemated by legal challenges, is figuring out how to proceed with the next stage of the inquisition.

It is also time for all of us on the other side to look over what has happened so far and to draw from those experiences some conclusions about what the government is trying to accomplish and what we have learned that will help us continue to fight back effectively. What has happened to the people who have appeared before these grand juries? Are there legal ways to challenge the functioning of the grand jury? What is the government using grand juries for? How should we respond? Hopefully, the experiences of those who have had to face grand juries in the past will be of value to all of us in working out our collective responses to future subpoenas.

"I want you to tell the Grand Jury what period of time during the years 1969 and 1970 you resided at 2201 Ocean Front Walk, who resided there at the time you lived there, identifying all persons you have seen in or about the premises at 2201 Ocean Front Walk, and tell the Grand Jury all of the conversations that were held by you or others in your presence during the time that you were at 2201 Ocean Front Walk, Venice, California."

TUCSON In October, 1970 a federal grand jury was empaneled in Tucson to look into the alleged illegal purchase and interstate transportation of dynamite and into possible violations of the federal anti-riot act (the conspiracy law which prohibits crossing state lines to incite a riot). It subpoenaed five people active in the Movement in the Los Angeles area: Lee Weinberg, Pam Donaldson, Karen Duncan, Teri Volpin, and David Scheffler. Lee was the first to be subpoenaed. She went and testified, partly to find out what the grand jury was investigating. Then, after Teri and David were subpoenaed and had refused to testify, Lee was called again in December along with Pam and Karen. All three also refused to testify. The questions asked by U.S. Prosecutor Guy Goodwin were extremely broad and clearly not just intended to verify evidence already in his possession. In refusing to answer, the five witnesses charged that the questions were vague and irrelevant and cited the protection of their rights under the 1st, 4th, 5th, 6th, and 9th Amendments. All five were then given transactional immunity, which allegedly protects a witness from ever being prosecuted for her involvement in any criminal activity revealed by her testimony. When they still refused to testify, they were declared in civil contempt and jailed until either they agreed to testify or the term of the grand jury ended.

After several weeks in jail David, Teri, Lee, Karen, and Pam were released on bond when the Ninth Circuit Court agreed to hear their appeal of the contempt citations. Four weeks later, on January 18, 1971, the Court denied their appeal and ordered them back to jail. By the time the grand jury was dismissed on March 23, 1971, they had each served four months in jail. And even though their contempt sentences ended when the grand jury was dismissed, they were not freed until two days later when their attorneys learned that the grand jury had ended and insisted on their release. As they left the jail, they were served with subpoenas for a new grand jury that would begin sitting two weeks later!

Since the first subpoenas had been issued in the fall of 1970, intense discussions about the possibility of testifying had been going on among those subpoenaed, their lawyers, people mentioned in the questions asked in Tucson, and others involved in the Movement above- and underground. As a result of these discussions, the first three people – Lee, Teri, and David – to be called back to Tucson did testify after being granted transactional immunity.

The decision to testify in Tucson was an extremely difficult one. Teri and David had for a time been involved with two people from the underground, John Fuerst and Roberta Smith, and David and John had travelled to Tucson in Teri's car to buy dynamite.[2] Karen, Pam, and Lee had no knowledge of David's and Teri's involvement, which had been terminated just after the trip to Tucson. Lee testified because the information she had was very limited and she had

[2]The government found out about the dynamite purchase because the clerk from whom it was purchased was suspicious and took down the license number of the car.

problems concerning the custody of her children if she went back to jail. After the government considerably narrowed the scope of their questions, Teri and David agreed to testify. They felt they could hinder the government by clearly limiting the number of people involved in the alleged conspiracy. Also, they were in danger of being indicted themselves; by testifying they both got transactional immunity and protected themselves from prosecution on any charges connected with the dynamite purchase. Karen and Pam, on the other hand, have been very involved with the Los Angeles Movement and the questions they had been asked dealt with L.A. Movement activities. When they are re-called, they plan to refuse to testify.

In a separate investigation, this grand jury has also been looking into an alleged conspiracy by local Tucson people to make and possess firebombs. Two witnesses, Ernie Olsen of the Student Liberation Action Movement (SLAM) and Tom Miller, a free-lance writer and Yippie, have been called. Tom's subpoena was withdrawn after he successfully challenged it on the grounds that he is a reporter (for the underground press) and as such has a 1st Amendment right not to be forced to testify.[3] Ernie was asked about demonstrations he might have attended, people he might know, and his knowledge of explosives and firearms. He refused to testify, was given transactional immunity, refused again, and was cited for civil contempt. After spending a month in jail he was freed on appeal bond. However, the Ninth Circuit Court refused his appeal, which charged that his subpoena was the result of illegal surveillance and that he was entitled to a hearing at which the government must disclose its illegal wiretaps. He was then ordered back to jail but was later released on $10,000 bail by Justice Douglas pending a decision by the Supreme Court as to whether or not it will hear his appeal.

HARRISBURG In late November, 1970 J. Edgar Hoover made the front page of newspapers across the country with his allegations about a plot by Philip and Daniel Berrigan and the East Coast Conspiracy to Save Lives to kidnap government officials and blow up electrical and steam conduits in Washington, D.C. Shortly thereafter, on December 18, a federal grand jury in Harrisburg, Pennsylvania began to hear testimony about this alleged plot, primarily from a government informer who had been in Lewisburg penitentiary with Philip Berrigan. On January 12, 1971 the grand jury indicted six people – Eqbal Ahmad, Phillip Berrigan, Elizabeth McAlester, Neil McLaughlin, Anthony Scoblick, and Joseph Wenderoth – for conspiring to blow up the government's underground heating system and kidnap Presidential aide Henry Kissinger. Seven others – Dan Berrigan, Tom Davidson, Marjorie Shuman, Beverly Bell, Paul Mayer, Bill Davidon, and Joques Egan – were named as co-conspirators but were not indicted.

Apparently in an attempt to uncover evidence to support the indictments, the government then subpoenaed eleven people. Guy Goodwin came from Tucson to conduct the questioning. Eight of the eleven testified. Another, Father William Michaelmas, answered some questions but refused to answer others, claiming the confidentiality of the priest-penitant relationship. The remaining two, Joques Egan and Pat Chanel, were both granted transactional immunity and then declared in civil contempt when they still refused to testify. Both appealed, claiming that the evidence on which their subpoenas were based came from illegal wiretaps. Pat Chanel's lawyer also filed a motion claiming that he should have been with her as she was being questioned because she was mentally unfit to protect her own rights.

While these appeals were pending (with Egan and Chanel out on appeal bond) the grand jury heard more testimony from several FBI agents and possibly again from Boyd Douglas, the government's informer, and then issued 28 new subpoenas. Three of these were never served; two were dropped. Of the remaining 23, 21 refused to testify and two – parents-in-law of one of the indictees – testified after being granted transactional immunity. Before they appeared, however, eight of the subpoenees who planned to refuse to testify joined in a class action suit asking that the subpoenas be quashed because the evidence used to issue them had been obtained from illegal wiretaps. This suit was rejected. All then appeared before the grand jury and refused to answer the questions on some or all of the following grounds: 5th Amendment protection against self-incrimination, that the investigation exceeded the jurisdiction of that grand jury, that the grand jury was seeking corroborative evidence for indictments already issued, and that the evidence for the subpoenas was obtained from illegal wiretaps. Most of those who refused to testify were given indefinite postponements; it is unclear whether their subpoenas are still in effect. Four witnesses – Bill Gardner, Terry McHugh, George McVey, and Ann Walsh – were cited for civil contempt; four others – Paul Couming, Joe Gilchrist, John Swinglish, and Ann Menz – were cited for criminal contempt. All are free on bail pending appeal. The criminal contempt charge against Ann Menz was dropped just before she

[3]The Court's ruling in this case was based on the *Caldwell* decision, in which the Ninth Circuit Court ruled that *New York Times* reporter Earl Caldwell could not be forced to disclose his confidential news sources to a grand jury unless the government could show the court that there was a "compelling and overriding national interest which cannot alternatively be served".

was indicted by a federal grand jury in Delaware for the destruction of draft files there on June 17-18, 1970.[4]

Following this group of witnesses, the grand jury issued a superceding indictment. The destruction of draft files was added to the charge of conspiracy to kidnap and bomb. Two new defendants – Ted Glick and Mary Cain Scoblick – were added and three co-conspirators – Dan Berrigan, Tom Davidson, and Paul Mayer – were dropped.

CLEVELAND A state grand jury inquiry into the destruction of draft files was taken over in June, 1971 by the federal grand jury there, which began investigating the destruction of government property, possession of unregistered firearms, interference with the administration of the Military Selective Service System, mutilation of public records, sabotage, and conspiracy. Five people were subpoenaed: Lynn Jackson, Jane Schaeffer, Wendy Lee Salem, Darlene Eddy, and Ken Grant. All five had been relating to the Merton Community in Cleveland, a group of radical activists.

Lynn Jackson, who had already been indicted by the state grand jury on charges stemming from a draft board action, was given transactional immunity and testified. She was asked about draft board actions, dynamite, the theft of the FBI files in Media, Pennsylvania, and Mark Rudd. Jane Schaeffer was dismissed when she refused to testify; the government did not ask that she be given immunity. The other three – Wendy, Ken, and Darlene – all testified without being granted immunity. On June 26 the grand jury issued three indictments for illegal possession of dynamite. Two of those indicted –Bob Brake and Bob Malecki – were in prison for the destruction of draft files but Bob Brake subsequently escaped; the third, Ted Soares, has not been located since he was indicted. The grand jury has not subpoenaed any more witnesses.

BROOKLYN Roger Cubbage, the prosecutor who questioned the witnesses before the Cleveland grand jury, also directed the questioning of witnesses before the Brooklyn grand jury, which was specially convened in late June. On June 25 FBI agents served subpoenas on six women; among them were workers with the Harrisburg Defense Committee and sisters from the convent where other Defense Committee people reside. Although the subpoenas contained no statement of the purpose of the investigation, the questions asked by Prosecutor Cubbage indicated that the grand jury (i.e., government!) was looking into the attempted break-in at the FBI office in Garden City, Long Island, the mutilation and destruction of government property (i.e., draft files), and the transportation of stolen government records (i.e., the FBI files from the Media office). The questions indicated either sophisticated wiretaps or an informer in the convent where two workers for the Harrisburg Defense Committee, Judy Peluso and Karen Lyndon, lived.

All six witnesses appeared but refused to testify, citing the protection of the 1st, 4th, 5th, 6th, and 9th Amendments. Sister Carol Vericker, the first called to testify, was granted transactional immunity. When she still refused to answer, she was declared in civil contempt. She appealed the contempt citation on the following grounds: that requiring her to testify against other Sisters of Charity violated her freedom of religion and association, that the FBI was using the grand jury to obtain information, that she had been the victim of unlawful electronic surveillance, that the government had gotten immunity for her by citing sections of the criminal code that did not apply to the questions they planned to ask her. In spite of their reactionary orientation, the judges in the Second District Court of Appeals overturned her contempt citation because they had to agree with her last argument. Transactional immunity is given only under certain statutes for inquiries into specific crimes and the judges were forced, albeit reluctantly, to admit that the statutes under which she was granted immunity did not cover the crime she was asked about. (She was being asked about the theft of FBI files from Media; the statute used to give her immunity concerned theft and transportation of stolen commercial goods valued at $5000 or more.)

Another witness was also given transactional immunity and was found in civil contempt when she still refused to testify. Her appeal, which is exactly the same as Carol Vericker's, hasn't been heard yet; she is free on bail and there is no reason to expect that the outcome of her case will be any different from that in the Vericker case.

WASHINGTON, D.C. Apparently the grand jury in Washington, D.C. was interested in establishing a relationship between Mayday and the Capitol bombing. So far it has called three witnesses, Jerry Coffin, Carol Evans, and Marlene Fishlowitz. Jerry, one of the authors of the tactical manual for Mayday, ap-

[4]Two others, Barry Wingard and Francis LoPresti, have have also been indicted.

peared on May 24 and refused to answer any questions. He was called again on June 22, refused again, and was dismissed. Carol, who had lived and worked with the Mayday collective and was working in the office of the People's Coalition for Peace and Justice, was also called on May 24 and also refused. On June 22 she was granted transactional immunity despite her attorney's objections to the illegal use of wiretaps and bugs, to the abuse of the grand jury function, and to procedural matters. She was ordered to answer only four questions: "What is the People's Coalition for Peace and Justice and do you have any connection with it?" "What is the May Day Collective and are you connected with it?" "Have you ever travelled for the People's Coalition?" "Have you ever been at a meeting of the May Day Collective in which May plans were discussed?" When she refused to answer the questions, she was declared in civil contempt and jailed. On June 24 she was released on personal recognizance pending appeal. Her appeal is on the same grounds as Joques Egan's (see page 0) and will not be resolved until the Supreme Court decides that case. Marlene Fishlowitz, who had worked briefly in the People's Coalition office, also refused to testify, was granted immunity, refused agian, was jailed for civil contempt, and was then released pending appeal. No other witnesses have been called.

SEATTLE During May, 1971, the federal grand jury in Seattle turned its attention from its routine business to investigate "interstate travel to organize, promote and encourage a riot; interstate transportation of explosives by a person under indictment; and conspiracy". One witness – Leslie Bacon – was called to testify.

On April 26 in Washington, D.C, Leslie Bacon was arrested and held in lieu of $100,000 bail on a warrant issued by George Boldt (federal judge in Seattle who heard the Seattle Eight case) and based on a statement from an FBI agent that she was a "material witness"[5] to the March 1 Capitol bombing and was likely to flee if merely subpoenaed to testify before the grand jury. On April 28 she appeared in a D.C. district court for a perfunctory "removal" hearing. Her removal to Seattle was ordered; a motion for a reduction in bail was denied. On April 29 she was flown to Seattle and on April 30 began testifying before the grand jury.

[5]A person can be held as a "material witness" if the government believes (or claims) she will flee or is in danger.

She later wrote: "They (the government prosecutors) said in the beginning, if you don't know anything about the Capitol bombing go in and tell them – it won't take more than six hours of questions. . ." Apparently, Leslie felt she could safely testify because she knew nothing about the Capitol bombing and trusted the prosecutors' assurances that the questions would concern only that event. Also, her lawyers advised her to answer the questions. Over the next three days she was asked about everyone and everything she had seen, talked to, or heard about; she was asked about the Ann Arbor conference in February and other planning for Mayday, about every place she had lived, worked, or travelled to and with whom. The questions Leslie was asked outlined a theory about who was involved in the Capitol bombing, the amount of explosives used, and where the plans were made. They intimated that it was begun in Ann Arbor, Michigan at the Student and Youth Conference on the Peoples' Peace Treaty and that Seattle people were involved.

On the second day Prosecutor Guy Goodwin (again!) began asking Leslie about her relationship in the fall of 1970 with the Family Trust, six of whom are in jail for the attempted firebombing of the First National City Bank in New York City. After following her lawyer's advice and answering some of these questions, Leslie realized that she was incriminating herself. The federal court in New York had just issued a complaint against her, based on evidence from her testimony in Seattle, charging her with possession of explosives and conspiracy to firebomb the First National City Bank with the Family Trust. (At the time the Family Trust people were indicted, the New York state district attorney had decided not to indict Leslie because he knew, from tapes of planning meetings supplied by an informer, that she had dropped out of the plot. He also resisted attempts by the federal authorities to get him to indict her at the time she was subpoenaed.)

"Are you the same Leslie Bacon who appeared here yesterday?"

"Yes, but I'm a lot wiser."

When Leslie began taking the 5th Amendment in response to questions about the Family Trust, Goodwin changed to questions on other subjects and she answered these that day and the next. Then the government went to court and got an order compelling her to answer the Family Trust questions on the grounds that she had waived her 5th Amendment rights by answering some of these questions before taking the 5th. On May 4 she did answer the other questions about the Family Trust but refused to an-

swer questions on any other topic, citing her 5th Amendment privilege against self-incrimination and 1st and 4th Amendment objections to the questions (respectively, as a fishing expedition and to the use of information obtained through illegal wiretaps).

On May 13 she was before the grand jury again but again refused to answer any questions. This also happened on May 18, at which time the government applied for use immunity for her. A provision of the Organized Crime Control Act of 1970, this means only that her own testimony cannot be used against her. This was granted on the morning of the 18th. Leslie was taken back to the grand jury room to answer the questions; she refused, was declared in civil contempt, and jailed. A month later she was released on personal recognizance pending a decision by the U.S. Supreme Court on the constitutionality of use immunity.

NEW YORK CITY This federal grand jury for the Southern District of New York was officially investigating Leslie Bacon's involvement with the Family Trust in order to decide whether or not to indict her on the basis of the complaint issued by the federal district court. It may also have been planning to decide whether the Family Trust people, already in jail on state charges of conspiracy to commit arson, could be charged with federal crimes on the basis of evidence revealed by Leslie Bacon's testimony in Seattle. A look at the people they chose to subpoena indicates that they were also interested in the Capitol bombing and the New York City Movement.

Twelve people were subpoenaed: Claudia Conine, Sharon Krebs, Joyce Plecha, Robin Palmer, and Marty Lewis (all of the Family Trust); John Simon and Richard Ballantine from the New York City publishing establishment; and Judy Gumbo, Stewart Albert, Jim Retherford, Sandy Wardwell, and Walter Teague, all active in the Movement on the East Coast. Many of them had been mentioned in Leslie's testimony in Seattle.

On June 15 the first group of subpoenees appeared before the grand jury. Sandy Wardwell was the first to appear. She was sworn in, asked her name name and address and if she knew Leslie Bacon, Sharon Krebs, and Robin Palmer. She gave her name and address but refused to answer the other questions. She was then released with a postponement. Then Walter Teague, Stew Albert, Judy Gumbo, and Jim Retherford were all called, asked their names, and released with postponements. On June 23 the grand jury did indict Leslie Bacon; the Family Trust people were named as co-conspirators but were not inducted. On June 30 all the subpoenas to this grand jury were withdrawn. No others have been issued.

Prior to their appearances before the grand jury, the subpoenees had joined in a strong legal suit asking that their subpoenas be quashed. This suit was never ruled on because the judge said it had been filed prematurely. However, he noted that it did have merit, and people concerned with this grand jury felt that the strength of the suit was one reason why the subpoenas were withdrawn.

DETROIT In late June Guy Goodwin surfaced in Detroit, where a newly empaneled federal grand jury subpoenaed seven people for him to interrogate.[6] Larry Clarke, Larry Canada's business manager and the first to appear, testified without immunity. Since his appearance before the grand jury, he has refused to discuss any of his questions or answers. The other six – Ken Kelley, Terry Taube, Colin Neiburger, Larry Canada, Cathy Noyes, and Michael Tola – appeared before the grand jury on June 29 and 30 and all refused to testify, charging that their 4th Amendment rights had been violated because the grand jury was acting on information obtained from illegal wiretaps. In early August Larry Canada and Cathy Noyes were recalled and again refused to testify. When Colin Neiburger and Terry Taube also again refused to testify, the next move by the government was to ask for transactional immunity for them. (They did not request it for Cathy and Larry.) Colin and Terry and their lawyers responded by challenging the applicability of the statutes under which the immunity was being requested to the questions they would be asked.. Rather than read some of the questions in open court when ordered to do so by the presiding judge, Goodwin filed notice of his intention to appeal the judge's order and thusly stalled the proceedings indefinitely.

"Tell us about being at 33rd and M in D.C. on the afternoon of March 1, 1971 where you, Judy Gumbo and Virginia Ruffalo were present. Who else was there, what was said and what was done?"

[6]One of them, Larry Canada, was arrested on a material witness warrant alleging that he was likely to flee the country; his original bail of $100,000 was eventually reduced to $25,000. He was released on bond and ordered to stay in Detroit and report daily to federal authorities. Earlier, shortly after the Capitol bombing, he was stopped by the FBI and offered $10,000 for information about the bombing.

The questions Goodwin asked in Detroit concerned the Capitol bombing and the planning for Mayday; many were either the same or strikingly similar to the ones he had asked Leslie Bacon in Seattle, indicating that there is certain information the government needs and that it will keep fishing around in an attempt to find witnesses who will provide it. A new topic was also introduced: Larry Canada and Cathy Noyes were both asked about Larry's visit in April to the Communist Chinese Embassy in Ottawa. Although they refused to answer any of these questions, Larry Canada later explained to the press that he had gone to the Embassy to request a cultural exchange visa and to return to the Chinese people a set of 10th century Taoist paintings, which were not accepted and are now in a bank vault. The government is implying that Canada passed microfilms of secret documents to the Chinese.

by some of the witnesses subpoenaed before the Harrisburg grand jury in April. District Judge R. Dixon Herman denied it, though he did not rule on whether or not there actually was illegal surveillance. Instead, he said that the witnesses were not placed in personal jeopardy by the possible use of illegal surveillance: until given immunity, they could claim their 5th Amendment right to remain silent and if given immunity they would be free from any danger of persecution. (Not necessarily true! See pages 5 and 8-10.)

A similar suit was filed by six of the witnesses subpoenaed to appear before the Detroit grand jury. It also asked that the government stop its illegal wiretaps and provide $75,000 in damages for violation of the subpoenees' civil rights. In this case the judge ruled that the suit could not be presented before the witnesses had been questioned because only then could they know whether the information the government thought they had might have come from illegal surveillance. As soon as some questions had been asked, the suit was reinstated. The court again refused to consider it, using the same reason Herman had used to deny the suit brought by the Harrisburg subpoenees.

"Who instructed you to go to Ottawa, Canada to the Chinese Embassy at the Savoy Hotel?" "Subsequent to receiving instructions to go to the Chinese Embassy what instructions did you give to others to carry out the plan?"

CONFRONTING THE GRAND JURY THROUGH THE COURTS

From peoples' recent experiences with grand juries, some useful legal tactics for dealing with them have begun to emerge. The legality of the grand jury procedure is being challenged at each step in the proceeding. To date the result of this maneuvering has been that very few people have spent extended periods of time in jail for contempt, even though most of those subpoenaed have refused to testify. However, this situation could change drastically at any time. Different circuit courts often make contradictory rulings. It is difficult to stop a prosecutor from behaving illegally before the grand jury. And the key legal questions – the constitutionality of use immunity and the question of government disclosure of illegal surveillance – are still to be decided by the Supreme Court in its 1971-1972 term. While recognizing that the law and the courts, as well as the grand juries, are tools of the government and therefore cannot be depended upon to protect people from government-instituted repression, we must also recognize that they can be utilized to protect ourselves in some ways while we organize a movement strong enough to prevent such repression.

Challenging the Subpoena –

The first response to the grand jury, made soon after the subpoena is served, is a motion challenging the legality of the subpoena itself. A class action suit asking that their subpoenas be quashed because they were based on illegally obtained information was filed

The motion to quash the subpoenas issued for the New York City grand jury contained a comprehensive challenge to the grand jury procedure: 1) Illegal electronic surveillance had been used to collect the information on which the subpoenas were based.[7] 2) The function of the grand jury was being abused. It had been called to investigate a federal complaint against Leslie Bacon, which was based on her testimony in Seattle. Because the Seattle grand jury had no legal right to question her about her involvement with the Family Trust, subpoenas based on that testimony were illegal. Also, it charged that the primary purpose of the grand jury was to collect evidence rather than to decide whether or not the government had sufficient evidence for an indictment. It is illegal to subpoena witnesses in order to collect evidence, to discover defense strategy, or to intimidate or punish. 3) The subpoenas were being used to try to coerce Leslie Bacon into testifying in Seattle about the Capitol bombing. 4) They were also an attempt to pun-

[7] In one instance the FBI had rented the apartment next to that of Judy Gumbo, one of those subpoenaed, and had run wires from its apartment into hers.

ish the subpoenees for their political beliefs. 5) The grand jury was being used as a subpoena power for the FBI, which cannot itself force people to talk since it has no subpoena power of its own. 6) The composition of the grand jury was faulty because young people, mobile people (who haven't lived any one place long enough to qualify for service), and non-voters were excluded from it. 7) The grand jury should be questioned by attorneys for the subpoenees (*voir dire*) to determine the prejudicial effect on them of pre-trial publicity. 8) The subpoenas were illegal because they were not authorized by the grand jury. When this petition was first submitted, the judge ruled that it had been presented prematurely; i.e., the subpoenees would have to be questioned first. However, he noted tht he felt it did have merit if presented at the proper time.

It was never re-submitted and ruled on. When all the subpoenas to this grand jury were withdrawn on June 30, the subpoenees and their lawyers felt that one reason for this action was the strength of their suit (especially concerning illegal surveillance and, therefore, the probability that it would be successful if presented again after the witnesses had been questioned.

None of these actions have succeeded in getting a court to order that subpoenas be withdrawn,[8] although the New York City group's suit was instrumental in achieving this result. Nevertheless, they are valuable because the same objections will be cited as reasons for refusing to testify and possibly as a defense against contempt citations. The motion to quash the subpoena establishes that the witness(es) believed that the grand jury was acting illegally from the very beginning and, therefore, had only refused to comply with something she felt was illegal.

Grounds for Refusing to Testify –

After a motion to have the subpoena withdrawn has been presented and denied, the witness must then appear before the grand jury and in almost all instances should refuse to testify.

The best-known and most commonly used reason for refusing to testify is the 5th Amendment right against self-incrimination. Although it can only be used when there is a real danger of self-incrimination, the government's use of conspiracy laws to prosecute people who cannot be charged with the commission of any overt crimes makes it clear that anyone who is involved in political activity could be the subject of such a "conspiracy" indictment and so is justified in taking the 5th.

[8]Tom Miller, who was subpoenaed by the Tucson grand jury, did succeed in getting his subpoena quashed on different grounds. See page 3 and footnote 3 for details.

Less commonly used grounds for refusing to testify include the protection of the 1st, 4th, 6th and 9th Amendments and of certain statutes and the charge that the grand jury is proceeding illegally. For example, the witnesses who were subpoenaed to Harrisburg in April refused to testify not only because of the 4th and 5th Amendment protections but also because they felt that the scope of the grand jury's investigation was exceeding its district jurisdiction and that it was seeking corroborative evidence for previously issued indictments. When the Venice Five refused to testify before the Tucson grand jury, they cited their 1st, 4th, 5th, 6th, and 9th Amendment rights and the fact that the questions were too vague and/or irrelevant. (In ruling on the appeal of their contempt citations, the Ninth Circuit Court refused to look at the questions to determine whether or not they were relevant to the investigation and said that the witnesses should have asked that they be broken down if they were too vague or complicated.) The 1st Amendment protects freedom of speech and of (political) association; the 4th, against unreasonable search and seizure, the 6th, the right to have counsel (that this established right for court trials must also apply to grand jury proceedings, since at present the lawyer must remain outside the grand jury room and the witness is not even guaranteed the right to consult with her after every question); the 9th, the right to engage in political activity.

The Great Immunity Hoax –

If the government or the grand jury really wants testimony from a witness who is refusing to talk, it can rip off her 5th Amendment right to remain silent by getting immunity for her. There are two kinds of immunity. Transactional immunity allegedly protects the witness from every being prosecuted for any illegal activity touched upon in testimony given under immunity. Use immunity provides protection from prosecution based on the testimony itself or on any of the fruits of it. However, the witness can be prosecuted for crimes she has testified about; all that is required is that the prosecutor show that the indictment is based on information obtained independently and not from information or leads provided by the forced testimony.

Historically, the Supreme Court has accepted only transactional immunity as a valid replacement for the witness' 5th Amendment right to remain silent. The first federal immunity statutes were passed in 1857. When scores of witnesses then willingly appeared before Congressional committees to testify about their crimes in order to be free from prosecution, Congress responded by passing restrictive (use) immunity statutes. The constitutionality of one of these statutes was tested before the Supreme Court in 1892 in the case of *Counselman* v. *Hitchcock* (142 U.S. 547). It was found to be unconstitutional

because it did not give witnesses sufficient protection: "(N)o statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States." In response to the *Counselman* decision, Congress enacted a transactional immunity statute in 1893. It was upheld, in a 5-4 decision, by the Supreme Court in 1896 in the case of *Brown* v. *Walker* (161 U.S. 597). The four dissenting justices argued that no immunity statute was broad enough to replace the protection of the 5th Amendment.

Between 1896 and 1964 a series of Supreme Court decisions[9] reaffirmed the *Counselman* ruling that only complete transactional immunity was an adequate replacement for the right to remain silent. However, in one of these cases, *Ullman* v. *U.S.* (350 U.S. 422 1956), Ullman argued that even transactional immunity was insufficient because it could not protect him from the extra-legal consequences (e.g., loss of job or reputation) of his forced testimony. The Court ruled that he was not entitled to legal protection from these wrongs, and that the transactional immunity he had been given was sufficient. In a dissenting opinion, Justices Black and Douglas restated the opinion of the four dissenting Justices in *Brown* v. *Walker:* "The right of silence created by the Fifth Amendment is beyond the reach of Congress."

Then came the case of *Murphy* v. *Waterfront Commissioner* (378 U.S. 52 1964): A witness before a bi-state investigatory commission had been granted immunity from state prosecution. He refused to testify because he had not also been given immunity from federal prosecution. The Court held that he must have immunity from federal use of his testimony. However, the immunity granted by the state could not protect him from federal prosecution based on independently obtained evidence. In the *Murphy* decision the Court was trying to resolve a jurisdictional question. In effect, it said that the federal government would have to respect the state's grant of immunity to the witness but that it could not be absolutely prohibited from prosecuting him for any federal crimes that might be revealed by his testimony. It would just have to do so on the basis of independently obtained evidence.

In trying to settle the question of the extent to which one jurisdiction must respect the immunity granted by another, the Court did not change the requirements for the type of immunity which must be granted to a witness by the questioning jurisdiction. And in a subsequent case, *Albertson* v. *SACB* (382 U.S. 70 1965), the Court found a federal immunity statute unconstitutional because it did not meet the *Counselman* requirement of "absolute immunity against future prosecution for the offense to which the question relates".

In spite of this decision, some people saw in *Murphy* an indication that the Supreme Court no longer felt that only transactional immunity could supplant the 5th Amendment right not to testify. The proponents of this view succeeded in writing into the 1970 Organized Crime Control Act a new federal immunity statute, which protects the immunized witness only from the use of her testimony or its fruits. This leaves her open to prosecution even within the jurisdiction in which she is granted immunity, as long as the authorities show that the evidence used to prosecute did not come from the witness' own testimony. In addition to authorizing federal grants of use immunity, the Organized Crime Control Act repealed over 50 previous immunity provisions. (In the past, federal immunity – always transactional – was granted only under certain statutes for questions relating to specific crimes. Under the new law, use immunity is general and does not require a connection between a specific statute and the questions asked.) As a result, grants of transactional immunity are limited to inquiries about murder, kidnapping, conspiracy, extortion, narcotics, and a few other serious crimes.

The suitability of federal use immunity as a replacement for the 5th Amendment right to remain silent has been challenged in several federal districts. A 7th Circuit Court ruling in *In Re Korman* held that the *Counselman* rule for immunity still applied and that the new federal use immunity statute was unconstitutional. In the Second District (New York), Judge Constance Baker Motley also ruled that it was unconstitutional when she overturned Joann Kinoy's contempt citation for refusing to testify before a grand jury there. (The government did not appeal this ruling.) In the Ninth Circuit, the Appellate Court upheld use immunity in the cases of Michael Stewart and Charles Kastigar, who had refused to testify before a Los Angeles federal grand jury investigating alleged draft evasion conspiracies. The Supreme Court has agreed to hear their appeal of this ruling, and they are free on bail until the Court rules on it. Leslie Bacon is also free pending a decision in this case.

In districts where use immunity has been declared unconstitutional, only transactional immunity can be ordered for recalcitrant grand jury witnesses. It is to the witness' advantage that transactional immunity must be granted under specific statutes for inquiries into particular topics. As it did in Carol Vericker's case, this somewhat limits the govern-

[9] Including *McCarthy* v. *Arndstein,* 266 U.S. 34 (1924), *United States* v. *Murdock,* 284 U.S. 141 (1931), *United States* v. *Monia,* 317 U.S. 424 (1943), *Adams* v. *Maryland,* 347 U.S. 179.182 (1954), *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70,80 (1956).

ment's freedom to use transactional immunity to force witnesses to testify about a wide variety of topics.

If the Supreme Court upholds the federal use immunity provision of the 1970 Organized Crime Control Act, it will have abolished the 5th Amendment. But even if it does rule federal use immunity unconstitutional, we must recognize that transactional immunity is no more than a kind of use immunity in a clever disguise, an illusion of protection with little substance. For it is always the case that immunity, even transactional, covers only the person to whom it is given (and in the case of use immunity, only from the use of her own testimony against her). Therefore, testimony given under immunity is extremely dangerous to our sisters and brothers since it never protects those about whom testimony is given. In Tucson, David Scheffler and Teri Volpin felt that they could testify because they really needed the immunity for themselves, because their grand jury testimony would be heresay in a court trial and could not be used unless they agreed to testify again (which they wouldn't), and because John and Roberta already had other serious charges against them. Perhaps it was true in their case that David and Teri really didn't incriminate anyone else by their testimony. If so, this was the exception rather than the rule. No one of us is really secure unless we all are, and noone should think so individualistically as to choose to testify under immunity to get protection for oneself while ignoring the dangers into which that testimony places others. Whatever the courts (including and especially the Supreme Court) allege about the sufficiency of immunity, it is obvious that no immunity ever provides as much protection from prosecution as does the 5th Amendment right to say nothing!

When a witness refuses to testify, the prosecutor has two choices: to dismiss the witness or to request immunity for her. Not all witnesses who refuse to testify are automatically granted immunity. In Washington, D.C. one witness was dismissed when he refused to testify (perhaps because the government hoped to indict him); the other two were granted transactional immunity and then found in contempt when they still refused. In Cleveland one witness who refused to testify was given transactional immunity; another was dismissed. Some of the group of April witnesses in Harrisburg were dismissed, possibly subject to recall, when they refused to testify; others were given transactional immunity and then found in civil or criminal contempt. Only two of the six witnesses to appear before the Brooklyn grand jury were given immunity (transactional) and then declared in contempt. But the first, Carol Vericker, won her contempt appeal and victory is almost certain in the second case as well.

In Detroit people have begun to experiment with the idea that the witness can challenge the government application for immunity instead of meekly accepting it after the immunity order has been signed by a judge. At the hearing at which the government was requesting transactional immunity for Colin Neiburger and Terry Taube, their lawyers asked that the questions for which immunity was being requested be read in open court to guarantee that they came under the statutes being used to request the immunity. The government alleged that the judge had no function other than to perfunctorily sign the immunity order. Citing the ruling in the Vericker case, the judge in Detroit ordered the government to show some connection between the questions and the statutes under which immunity was being requested. Goodwin offered to show the judge the entire list of questions in a closed session. The defendants demanded an open hearing, and the judge agreed that they should have one, indicating that the government could get the immunity grants fairly easily by reading only a few of the questions to make a minimal showing of the connections between the questions and the crimes being investigated. Surprisingly, Goodwin refused to do this and instead announced his intention to appeal the ruling. He has not yet filed this appeal, although the judges of the Sixth Circuit Court of Appeals are likely to rule in the government's favor. However, the proceedings are now stalled until either he does file the appeal and it is ruled on or until he changes his mind about reading the questions.

Goodwin did admit that some of the questions to be asked did not fall within the scope of the statutes under which immunity was being requested. If the immunity is granted, the witnesses could then go to court after each question to determine whether or not it falls within the scope of the immunity. This would slow down the grand jury proceedings incredibly.

Contempt –

If a witness refuses to answer the questions for which she is granted immunity, she is then declared in contempt.

Civil contempt is supposed to be coercive: the witness is jailed only until she agrees to testify or until the grand jury's term ends. Judges are usually reluctant to grant appeal bail in civil contempt cases, since it frees the witness while the term of the grand jury is passing by and thus significantly lessens the coercion to testify. However, as in the cases of Leslie Bacon and Joques Egan, it is possible to be freed on bail if a relevant substantive question is yet to be decided (in Leslie's case, the Supreme Court decision to hear use immunity appeals; in Joques', the overturning of her contempt citation by the Appeals Court and the government's appeal to the Supreme Court, which agreed to hear it). Other

witnesses before the Harrisburg grand jury who were found in contempt after refusing to testify on similar grounds are now free on bail until the Supreme Court rules on the Egan case. And judges in other federal districts will probably also release on bail witnesses whose defense against contempt citations asserts that they were the victims of illegal surveillance. Such a ruling by a Washington, D.C. Appeals Court has freed Carol Evans and Marlene Fishlowitz until the Supreme Court decision is handed down. Most uncooperative grand jury witnesses have been declared in civil contempt (with the exception of four charged with criminal contempt in Harrisburg), probably because of its summary procedure and its coerciveness – a judge says you're in contempt and you go straight to jail unless you cooperate or the grand jury term ends.

Criminal contempt is supposed to be punitive, and so the penalty is a fixed jail sentence. Persons charged with criminal contempt are entitled to jury trails if the sentence is more than six months.[10] It is possible to charge a witness with criminal contempt after she has already spent time in jail for civil contempt. For example, imprisoned witnesses who are not coerced into testifying by the time the grand jury's term ends could be charged with criminal contempt for their refusal to be coerced. So far, however, this hasn't happened to any of the witnesses before the grand juries discussed in this article.

The Egan Case: Can the Government be Forced to Disclose Its Illegal Surveillance?

The issue at stake in Sister Egan's appeal is whether or not she has the right, as a grand jury witness, to a hearing at which the government would be forced to disclose any illegal surveillance which produced information upon which her subpoena was based.

The Third Circuit Court of Appeals ruled that she did have this right on statutory grounds. Two of the Justices also felt there was a constitutional basis for this decision.

The statutory arguments revolve around legalistic interpretations of two sections of the United States Code, 18 U.S.C. 2515 and 18 U.S.C. 2518. Section 2515(10)(a) prohibits the presentation of improperly obtained evidence to a grand jury; Section 2518 says that an aggrieved person may move to suppress the presentation of such evidence to any hearing or proceeding before any federal authority. The legal question involved here is whether a grand jury witness is indeed an "aggrieved person". This term is not defined in Section 2518, even though the presentation of such evidence before grand juries is specifically forbidden by Section 2515.

The constitutional question has more substance and could indirectly resolve the "aggrieved person" dilemma if the Court agrees to rule on it in addition to or instead of only on the question of statutory interpretation (which isn't likely, since the Supreme Court traditionally prefers to decide cases on the narrowest possible grounds). In the Egan case two Justices on the Third Circuit Appeals Court held that, even if Egan had no statutory defense, protection of her 4th Amendment rights would demand that she be given a hearing at which the government would have to disclose any illegal wiretaps. Since she was given transactional immunity under 18 U.S.C. 2514, the government argued that this protection from self-in-

[10] In the Chicago 8/7 case Judge Hoffman got around this by charging each of the defendants with several counts of contempt and sentencing them to six months in jail for each count. In some cases the total sentence was more than four years.

crimination was adequate compensation for the government's abuse of her right to be free from illegal search and seizure. (Previous Supreme Court decisions have already stated that illegal surveillance is a form of illegal search and seizure forbidden by the 4th Amendment.) The Third Circut Appeals Court disagreed with this view, stating that immunity from prosecution dealt only with 5th Amendment protection against self-incrimination and was not compensation for the violation of 4th Amendment rights.

It also noted that she would not have any other chance to bring this question to court; having been given immunity, she would not be indicted if she testified and so would never have the right of indictees to demand either disclosure of all illegal surveillance upon which the indictment might have been based or, alternatively, the dismissal of the indictment.[11]

If the Supreme Court upholds the Third Circuit's Appellate Court decision in the Egan case (that a subpoenee is entitled to government disclosure of any illegal wiretaps which produced information resulting in her subpoena), witnesses for whom the government request immunity should then attempt to extend this ruling. This could be done by appealing the immunity grants or subsequent contempt citations on the grounds that the government should also have to disclose any illegal surveillance yielding information used to request immunity for those witnesses.[12]

Limitations of a Legal Defense –

Sister Egan's victory before the Third Circuit Court of Appeals, its stalling effect on grand jury proceedings in that district and elsewhere until the case is decided by the Supreme Court, and the potential effect of a victory there – that the government might withdraw subpoenas rather than disclose its illegal wiretaps if the Supreme Court upholds the right of subpoenees to such disclosure – all show the value of legal maneuvering as a tactic with which to confront grand juries. Challenging the legality of each stage of the proceeding not only slows it down and perhaps even stalls it; successful legal challenges also lay down new ground rules – more favorable to the subpoenees – which must then be observed by all grand juries in that federal court district or in the entire country, if the Supreme Court makes the ruling. However, while using the law and the courts to attack grand jury proceedings in every possible way, we must also be continually seeking new, extra-legal means with which to confront the grand jury. We must never forget that those who ultimately determine what the law is are part of the same team that is directing the grand jury offensive. We can sometimes turn their legalities to our advantage but we must never let ourselves be duped into believing that there is some ultimate, a-political source of law and justice to which we can turn for protection.

WHAT THEY'RE UP TO . . . .

To make sound political decisions about how to respond to grand juries, we must understand how the they are being used. Whatever purpose they may have served historically, whatever other, more "legitimate" functions they also serve, grand juries are now being used by federal prosecutors to obtain information they can't get any other way. "Certainly we use grand juries for investigative purposes," admitted Robert C. Mardian in an interview with Ronald J. Ostrow of *The New York Times* (August 1, 1971), "We wouldn't have to if we could simply send out an FBI agent and start asking questions." Mardian is the head of the Justice Department's Internal Security Division, which now is in charge of all federal investigation and prosecution of radicals. To handle the court-related aspects of this task, Mardian has the Special Litigation Section, headed by the infamous Guy Goodwin. As Goodwin goes from Tucson to Harrisburg to Seattle to Detroit there is ample evidence that he is looking for information and not just trying to present the government's case in order to obtain indictments. In Tucson, Los Angeles Movement people were asked broad questions about discussions, meetings, their activities and those of other L.A. Movement people. Witnesses in Detroit were asked many of the same questions put to Leslie Bacon in Seattle, as the government revealed its theory about the Capitol bombing, tried to link it to Mayday, and tried in general to find some way to get at the Weather Underground. In Harrisburg the group of witnesses subpoenaed in April by Goodwin's successor, William Lynch, were all asked the same general questions in the hope that one or more of them would agree to talk and so provide the necessary information. In Brooklyn it was blatantly obvious that Prosecutor Cubbage was seeking information for the FBI. He periodically left the grand jury room to consult with FBI agent John Frye, who provided him with cards containing questions the FBI wanted answered. Cubbage then returned to the grand jury room and read the questions to the witnesses.

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[11] The Sixth Circuit Court asserted this right for indictees in the case of Pun Plamundon, a White Panther. In his case, the government dropped the indictment against him rather than disclose its illegal wiretaps.

[12] This possibility was first suggested to me by Alicia Kaplow of the National Lawyers Guild in New York City. It may be tried by some of the witnesses in Detroit if the ruling on the Egan case comes soon and is a victory for us.

Nor is this investigative use of grand juries limited to federal grand juries. In Madison, Wisconsin a state grand jury is beginning an inquiry into the bombing of the University of Wisconsin Army Math Research Center. Since the four main suspects in this case have been underground for over a year now, it is realistic to assume that a major task of this grand jury will be to try to pry loose some information that will help the authorities to locate them. The grand jury will also be used to gather infromation about local Movement activities. Not surprisingly, the first four people to be subpoenaed were local organizers.

Rap Brown law (forbidding the crossing of state lines to incite a riot) was used as a front for Goodwin's attempt to uncover information about the views and actions of people active in Movement work in Los Angeles.

The government is not interested in legal tactics and the prosecution of people for real crimes; it is interested in stopping the Movement in any way it can. It is trying to find ways to unearth the Weather Underground and to discredit massive demonstrations such as Mayday. It is trying to make Movement people distrustful of each other and afraid to engage in

At a "Law Day Celebration" at the Pentagon on May 1, 1968 Deputy Attorney General Richard Kleindienst described a new kind of criminal, the *ideological criminal*, as one "who violates the law for a political purpose. He (!) is a threat to law and the values law protects". We are the ideological criminals he was talking about, and we should realize that the government fears us for what we think and advocate as much as for what we do.

We should never make the mistake of assuming that the forces of law are also subject to the law. In its quest to contain and suppress the Movement, the government has used illegal tactics, and it must be expected to use them again. For example, the federal grand jury in Seattle did not have any jurisdiction over the Family Trust conspiracy to bomb a New York City bank unless some overt act in that conspiracy actually took place in the region of its jurisdiction. Nevertheless, Goodwin questioned Leslie Bacon about this plot and when she finally did start refusing to answer, he obtained a court order which said she must continue to answer these illegal questions. The "legal" question involved here was whether she had waived her 5th Amendment right against self-incrimination by answering some of the questions before she realized where they were leading; the legality of the questions themselves was not even considered. Leslie's testimony was then passed along to the FBI in New York by the Seattle FBI office, which shouldn't have had access to it, and it was cited in her indictment. If she tries to get the indictment dismissed on this ground, the FBI can allege that all the information came from its informer in the Family Trust case, Steve Weiner. In Harrisburg, the government subpoenaed witnesses after the first indictments had been handed down, in an attempt to obtain information which would substantiate them. In Tucson the grand jury allegedly investigating the purchase and interstate transport of dynamite and possible violations of the

political activity such as demonstrations and local organizing projects. It is trying to destroy our credibility with non-Movement people[13] and to keep people off the streets by jailing them for contempt because conspiracy indictments haven't worked. But this new strategy – the grand jury inquisition – isn't working any better than the old conspiracy strategy. Through successful legal maneuvering very few people are going to jail for contempt, even though most of those subpoenaed are refusing to testify. Witnesses are publicizing the questions they are asked and their answers if they have testified. Within the Movement, people are responding by becoming more security-conscious instead of becoming distrustful of everyone, by continuing political activity instead of abandoning it, by beginning to plan collective responses to grand jury subpoenas before witnesses appear, and by publicizing and demonstrating against the activities of grand juries so that people see what the government is really trying to do with them.

[13]Perhaps this is why, of all the people working on Mayday, they picked Leslie Bacon to connect to the Capitol bombing and did it just at the time Mayday was about about to happen. They knew that, whether or not they could get any information out of her, they could make her look very bad by getting a federal complaint against her for the Family Trust bombing and thus show people what the Mayday Tribe and those who support them are really into.

HOW WE RESPOND –

Grand juries must be attacked both legally and politically, and our offensive against them should include refusing to testify, exhausting all known legal challenges and developing new ones, organizing actions and demonstrations in support of those who are subpoenaed, and continuing the kinds of work – local organizing projects, massive national actions like Mayday, and underground activities – which led to the government's malevolent interest in us.

Demonstrations and actions which show solidarity with the subpoenees and challenge or impede the functioning of the grand jury are as important for extending and strengthening the Movement as all the legal maneuvering, however it might alter the law and procedure for grand jury inquisitions. The government will soon find ways to cope with or neutralize the legal blockades we manage to throw at it if they are not backed up by a unified stand of defiance and refusal to testify and by visible support for those who do refuse. When subpoenaed to the New York City grand jury Stew Albert burned his subpoena, and he and Judy Gumbo regretfully denied any role in the Capitol bombing. When they and others appeared before the grand jury, there was a demonstration of sup port outside. In Seattle, demonstrators supporting Leslie Bacon rallied outside the courthouse; some of them splashed indeliblegreen ink on Guy Goodwin. In Detroit, support demonstrations took place outside the courthouse, and people followed Goodwin and talked to him. They also set up a gauntlet outside the grand jury room and sang "Hail the Lord High Executioner" to him as he left. Often those subpoenaed are on the edge of the Movement; they are chosen by the government because they might have useful information but aren't expected to be willing to risk jail by refusing to testify. It is crucial that they know they have support, especially if they are considering non-cooperation with the grand jury. Even when the subpoenees are people deeply into the Movement, public actions are necessary to call attention to the activities of the grand jury and to extend the movement of opposition to it. Demonstrations and the resulting publicity will help to expose the purpose and functioning of grand juries, de-mystifying them and de-sanctifying the government officials behind them.

It is also critically important that decisions about how to respond to grand jury subpoenas be made collectively. If you are served with a subpoena, talk with people you know and trust politically, with other people who have been subpoenaed, with those you feel you might be asked about, and with lawyers about the legal strategies and the possible legal consequences of the alternatives you are considering. This should be done before you appear in front of a grand jury, since you are then entirely alone except when allowed to consult with your lawyer outside the grand jury room between questions.

We have learned that we must rely on our collective political understanding of what is happening and not solely on the advice of lawyers. Leslie Bacon's lawyers advised her to answer the questions as briefly as possible and not to take the 5th Amendment unless she absolutely had to. When Goodwin began to ask her about the Family Trust, her lawyers still advised her to answer: "They're just trying to freak us out; don't take the Fifth." According to Leslie, they succeeded: "And after answering about ten questions about that, we freaked out and I started taking the Fifth." But by then it was too late. Because she had answered some of the questions, the government was able to compel her to answer the rest. And some of that testimony was used to indict her in New York. Lawyers have specialized technical knowledge about how to maneuver within the legal system. But that knowledge does not

BOYD DOUGLAS, key informer in Harrisburg, was an inmate at Lewisburg Federal Penitentiary. He claimed to have been in the Army in Vietnam and hinted at being an expert in explosives. He told some people that he had been imprisoned for a conspiracy to blow up trucks carrying napalm on the West Coast. Many of his stories were inconsistent but people didn't want to be suspicious because he seemed to be a prisoner who had become political. Although he had been convicted of two separate crimes and his first parole had been revoked, in January, 1970 he was allowed to enter a special program which permitted him to attend Bucknell University. At Bucknell Douglas became close to those active in the anti-war Catholic Left and encouraged others, especially women he dated, to become involved. When Philip Berrigan became a prisoner at Lewisburg Penitentiary, Douglas became a messenger between him and people at Bucknell. Four of the people he was close to at Bucknell were called as witnesses before the Harrisburg grand jury just after the first indictments were issued. Douglas himself has testified at least once – on January 7, 1971 – and perhaps more often. He was released on parole and has disappeared.

give them an extra-special understanding of the political situation, even when they are "Movement lawyers". Political analysis and response must be worked out by all of us – subpoenees, lawyers, and less directly involved sisters and brothers – by pooling our technical knowledge and our experiences to work out a strategy together.

There is another valuable lesson to be gleaned from Leslie's experience. When she was seized suddenly in Washington, D.C. and then shipped across the country and isolated from everyone she knew, she had to decide how to respond as she realized what was happening. Most of us have never done anything that should be of interest to a grand jury. But we cannot therefore assume that we will never be called. We should not wait until we hear about impending subpoenas to begin to think about and discuss how to respond to them. By the time Leslie began to understand, she had already given the government a lot of information and had incriminated herself. We must learn from her experience and not let it happen again.

Before a subpoena is served, one has the option of not being available for service. Federal grand jury subpoenas can be served by federal marshalls, FBI agents, or U.S. Attorneys. They must be served on the subpoenees personally and so cannot be sent through the mail or left with friends. It is probably never worth going permanently underground to avoid a subpoena. Under the 1970 Organized Crime Control Act it is a federal crime to cross state lines to avoid service of a state or federal subpoena. You can be prosecuted after the term of the grand jury has ended: the penalty is up to 5 years in prison and/or up to $5,000. However, the government must prove that you knew there was a subpoena out for you before you disappeared. This may be harder to prove than it seems. (David Poindexter was acquitted of harboring a fugitive after he was seized with Angela Davis because the government could not prove that he knew she was a fugitive.) Also, it is sometimes possible to disappear without crossing state lines.

From peoples' experiences during the past year we have learned that noone should ever testify the first time she appears before a grand jury (and should never appear unless subpoenaed and then only after attempting to have the subpoena quashed). Until the Supreme Court decides the Egan case, it is possible to refuse to testify on 4th Amendment grounds and, if denied legal standing to raise this objection to illegal surveillance, to then take the 5th. If the government tries to get transactional immunity, one can try the objection raised by the Detroit witnesses that the statute authorizing the immunity did not apply to the questions being asked. If the government tries to get use immunity in a district where it hasn't already been ruled unconstitutional, one can challenge its constitutionality. If subsequently granted immunity and found in contempt, these objections can be raised again on appeal and the contempt may actually be overturned, as it was in the Vericker case, or stayed pending decisions by higher courts.

Thus, one is not faced with the final decision as to whether or not to testify for quite awhile; it is even possible that the government will withdraw the subpoenas, as it did in New York City, or will drop them while cases are on appeal. If the Supreme Court upholds the Third Circuit's decision in the Egan case, the Justice Department might decide to withdraw subpoenas rather than have to disclose its illegal wiretaps. If the Supreme Court reverses that decision, or upholds the constitutionality of use immunity, or if the government decides it will reveal some of its surveillance, anyone who refuses to cooperate with a grand jury will be more likely to end up in jail as the eventual consequence of that refusal.

Ultimately, some of us will be forced to decide whether to testify or to go to jail for contempt. Of the people subpoenaed before the grand juries discussed in this article, only the Venice Five, Ernie Olsen (also before the Tucson grand jury), and Leslie Bacon have actually spent more than a few days in jail for contempt. However, jail is a real possibility for some people who have already been subpoenaed, if they eventually lose their contempt appeals, and for those who might be subpoenaed in the future.

"Have you during 1970 taken any trips outside the state lines in which you have made preparation or planned any riots, demonstrations or disorders?"

"Tell the Grand Jury who the individuals were that you met at the Abe Martin Lodge in Nashville, Indiana on 4/15/71 and what the conversations were with those persons."

The Venice Five first went to jail rather than testify. After they were re-subpoenaed to appear before a newly convened grand jury, the Tucson Working Committee, their collective decision-mak-

ing group, decided to have Teri, David, and Lee testify. They felt that Lee had no information of interest to the government and that it would be valuable to find out what use, if any, the government could make of the information she gave. They felt that David and Teri could, by testifying, gain immunity for themselves, provide the information the government wanted from them without endangering others, and through their testimony limit the alleged conspiracy to themselves and John and Roberta. Also, the government could not use their testimony to convict John and Roberta unless Teri and David agreed to testify at the trial, which they wouldn't. They hoped that limiting the conspiracy would halt the government's attempt to involve other L.A. people in it. Trying to second-guess the government in this way is extremely dangerous. We can never really be certain what they are after or how they intend to use any information we provide. David and Teri gave very explicit and detailed answers to Goodwin's questions, which in the least provided him with some useful insights into how people are moved to certain decisions and how they then implement them. It was good that they did not mention other people in their testimony, but they were probably wrong to feel they could protect themselves and their comrades from prosecution by their testimony and to feel that they could not endanger underground people who already had heavy charges against them.

The number of people who can be subpoenaed before grand juries is small compared to the number who work in the Movement or even to those they will be asked about and whose lives and work could be affected by their testimony. In some cases it is certainly true that the government will get the indictments from the grand juries regardless of whether or not witnesses testify. But Goodwin and his henchmen will not get the information they so desperately want if we don't testify. And it is worth the possible eventual price of some time in jail for contempt to be sure that they don't!

If you are subpoenaed by a grand jury, DON'T GO IT ALONE, Get in touch with the National Lawyers Guild (415/863-5193, 212/227-1078) or The Center for Constitutional Rights (212/265-2500) and they will help you find political and legal people with whom to figure out what you should do.

Arlene Siegel has worked with RESIST as a newsletter editor and writer and as part of the office staff. She is now working with the East Orange Press, a new Movement publishing house, and is in a women's collective.

Are You Now or Have You Ever . . . . is one of a collection of articles on movement security and legal repression. The Movement Security Kit is available for $1.00 to all Movement groups from:

RESIST
763 Massachusetts Avenue
Cambridge, Massachusetts 02139
telephone: 617/491-8076

Copies of legal briefs and court decisions relating to the grand juries discussed in these articles are available from:

National Lawyers Guild
One Hudson Street
New York City, New York
telephone: 212/227-1078

or

The Center for Constitutional Rights
588 9th Avenue at 42nd
New York City, New York
telephone: 212/265-2500

If you receive a subpoena, contact one of these groups for advice and for information on where to find help.

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