99TH CONGRESS
1ST SESSION

S. 1562

To amend the False Claims Act, and title 18 of the United States Code regarding penalties for false claims, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 1 (legislative day, JULY 16), 1985

Mr. GRASSLEY (for himself, Mr. DECONCINI, and Mr. LEVIN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the False Claims Act, and title 18 of the United States Code regarding penalties for false claims, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3729 of title 31, United States Code, is amended by—

(1) inserting "(a)" before "A person";

(2) striking out "$2,000" and inserting in lieu thereof "$10,000";

(3) striking out "2 times the amount of damages" and inserting in lieu thereof "3 times the amount of

damages in addition to the amount of the consequential damages"; and

(4) adding at the end thereof the following:

"(c) For purposes of this section, the terms 'knowing' and 'knowingly' mean the defendant—

"(1) had actual knowledge; or

"(2) had constructive knowledge in that the defendant acted in reckless disregard of the truth;

and no proof of intent to defraud or proof of any other element of a claim for fraud at common law is required.".

SEC. 2. Section 3730(b) of title 31, United States Code, is amended—

(1) in paragraph (1), by striking out the fourth sentence and inserting in lieu thereof "The action may be brought in the judicial district where the defendant, or in the case of multiple defendants, where any one defendant is found, resides, or transacts business, or where the violation allegedly occurred.";

(2) in paragraph (2), by striking out "if the Government—" through the end of the paragraph and inserting in lieu thereof "if the Government by the end of the 60-day period does not enter, or gives written notice to the court of intent not to enter the action.";

(3) in paragraph (3), by striking out "action is conducted only by the Government" and inserting in

lieu thereof "person bringing the action shall have a right to continue in the action as a full party on the person's own behalf"; and

(4) by striking out paragraph (4) and inserting in lieu thereof the following:

"(4) If the Government does not proceed with the action within the 60-day period after being notified, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date if the Government demonstrates to the court that it came into possession of new material evidence or information not known by the Government within the 60-day period after being notified of such action.

"(5) Unless the Government proceeds with the action within 60 days after being notified, the court shall dismiss the action brought by the person if the court finds that—

"(A) the action is based on specific evidence or specific information the Government disclosed as a basis for allegations made in a prior administrative, civil, or criminal proceeding; or

"(B) the action is based on specific information disclosed during the course of a congressional investigation or based on specific public information disseminated by any news media.

If the Government has not initiated a civil action within six months after becoming aware of such evidence or information, or within such additional time as the court allows upon a showing of good cause, the court shall not dismiss the action brought by the person. The defendant must prove the facts warranting dismissal of such case.".

SEC. 3. Section 3730(c) of title 31, United States Code, is amended to read as follows:

"(c)(1) If the Government proceeds with the action within 60 days after being notified, and the person bringing the action has disclosed relevant evidence or information the Government did not have at the time the action was brought, such person shall receive at least 15 percent but no more than 20 percent of the proceeds of the action or settlement of the claim. Any such payment shall be paid out of such proceeds. If the person bringing the action substantially contributes to the prosecution of the action, such person shall receive at least 20 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses the court finds to have been necessarily incurred, in addition to reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

"(2) If the Government does not proceed with the action within 60 days after being notified, the person bringing the

action or settling the claim shall receive an amount the court decides is reasonable for collecting the civil penalty and damages. The amount shall not be less than 25 percent and no more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses the court finds to have been necessarily incurred, in addition to reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.".

SEC. 4. Section 3730 of title 31, United States Code, is amended by adding at the end thereof the following new subsections:

"(e) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms or conditions of such employment by his employer in whole or in part because of the exercise by such employee on behalf of himself or others of any option afforded by this Act, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this Act, shall be entitled to all relief necessary to make him whole. Such relief shall include reinstatement with full seniority rights, backpay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. In addition, the employer shall be liable to

such employee for twice the amount of back pay and special damages and, if appropriate under the circumstances, the court shall award punitive damages.

"(f) In any action brought under this section, or under section 3729, or 3731, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

"(g) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action brought by the United States pursuant to this section, or section 3729, or 3731.".

SEC. 5. (a) Paragraphs (A), (B), and (C) of Rule 6(e)(3) of the Federal Rules of Criminal Procedure are amended to read as follows:

"(A) Disclosure, otherwise prohibited by this rule, of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

"(i) any attorney for the government for use in the performance of such attorney's duty to enforce Federal criminal or civil law; and

"(ii) such government personnel (including personnel of a State or subdivision of a State) as are deemed necessary by an attorney for the government to assist such attorney in the performance of his duty to enforce Federal criminal law.

"(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize such grand jury material for any purpose other than assisting an attorney for the government in the performance of such attorney's duty to enforce Federal criminal or civil law. Such an attorney for the government shall promptly provide the district court, before which the grand jury whose material has been so disclosed was impaneled, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

"(C) Disclosure of matters occurring before the grand jury, otherwise prohibited by this rule, may also be made—

"(i) when directed to do so by a court, upon a showing of particularized need, preliminarily to or in connection with a judicial proceeding;

"(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

"(iii) when the disclosure is made by an attorney for the government to another Federal grand jury;

"(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of State criminal law, to an appropriate official of a State or subdivision of a State for the purpose of enforcing such law; or

"(v) when so directed by a court upon a showing of substantial need, to personnel of any department or agency of the United States and any committee of Congress (a) when such personnel are deemed necessary to provide assistance to an attorney for the government in the performance of such attorney's duty to enforce Federal civil law, or (b) for use in relation to any matter

within the jurisdiction of such department, agency, or congressional committee.".

(b) The first sentence of paragraph (D) of Rule 6(e)(3) of the Federal Rules of Criminal Procedure is amended to read as follows:

"(D) A petition for disclosure pursuant to clause (i) or (v) of subsection (e)(3)(C) shall be filed in the district where the grand jury convened.".

SEC. 6. (a) Section 286 of title 18, United States Code, is amended by striking out "$10,000" and inserting in lieu thereof "$1,000,000".

(b) Section 287 of title 18, United States Code, is amended by striking out "$10,000, or imprisoned not more than five years" and inserting in lieu thereof "$1,000,000, or imprisoned for not more than ten years".

SEC. 7. This Act and the amendments made by this Act shall become effective upon the date of enactment.

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THE WHITE HOUSE

WASHINGTON

February 24, 1986

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE REFERENCE DIVISION

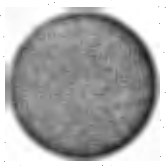
FROM: JOHN G. ROBERTS, JR.
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Testimony on H.R. 1407 the "Grand Jury Reform Act of 1985"

As requested, this office has reviewed the above-referenced testimony and has no legal objection to it.

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET



☐ O - OUTGOING
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☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Greg Jones

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: DOJ testimony on H.R. 1407 the "Drug Import Reform Act of 1985"

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU HILL	ORIGINATOR	86/02/21			1 1
	Referral Note:				
CUAT 18	R	86/02/21		S	86/03/24
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ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

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5/81

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO	Karen Wilson	Take necessary action	☐
	John Roberts	Approval or signature	☐
	John Cooney	Comment	☐
		Prepare reply	☐
		Discuss with me	☐
		For your information	☐
		See remarks below	☐
FROM	Greg Jones 2/21/86	**DATE**	

REMARKS

Please give me your comments on the attached by 4:30 PM on 2/24.
(Looks fine to me.)

Thanks.

cc: Jim Murr

OMB FORM 4
Rev Aug 70

Testimony of DAAG Jim Knapp
before House Subcommittee on
Criminal Justice
2/26/86

Chairman Conyers and members of the Subcommittee:

I appreciate the opportunity to appear before you on behalf of the Department of Justice to discuss H.R. 1407, the "Grand Jury Reform Act of 1985." The bill would make sweeping changes to the institution of the grand jury and its proceedings. For example, it provides the right for a witness before a grand jury to be accompanied by counsel during the witness' appearance, substitutes transactional immunity for use immunity as a basis for compelling testimony of a witness who asserts the privilege against self-incrimination, and requires notice to persons who are targets of a grand jury investigation.

Let me begin with some general comments about the role of the grand jury and the effect which this bill would have on it. The grand jury occupies a central position in the federal criminal justice system since by virtue of the Fifth Amendment a grand jury indictment is (unless specifically waived) the sole means by which the United States may institute felony charges. The grand jury is a charging -- not a guilt-determining -- entity. Yet in many respects, H.R. 1407 seeks to transform grand jury proceedings into adversary affairs more appropriate to the guilt-determining function of trials. The delays and other problems occasioned by this transformation would trouble an already heavily burdened criminal justice system and would pose enormous obstacles to the efficient operation of the grand jury and to the successful investigation of many federal offenses. Accordingly, the Department of Justice strongly opposes the enactment of H.R. 1407.

Initially, we point out that there is a clear lack of demonstrated need for the revolutionary changes to the grand jury system incorporated in H.R. 1407. While any institution operated by human beings may occasionally produce abuses, and certainly any abuse is regrettable, the federal grand jury system over the years has functioned, and is now functioning, remarkably well. The instances of alleged (much less proven) abuses have been few, given the fact that federal grand juries hear tens of thousands of matters each year, and that the conviction ratio on indictments returned is high (approximately 80 percent). [GET RESPONSE FROM MCCAFFERTY, AO, 633-6095 ON NO. OF GRAND JURY PROCEEDINGS AND CONVICTION RATIO]

Moreover, the law now provides an important safeguard against potential overreaching by prosecutors which did not exist in the mid to late 1970's when grand jury reform last received considerable congressional attention. In 1979 Rule 6 of the Federal Rules of Criminal Procedure was amended to mandate the recording of all matters occurring before the grand jury (other than its deliberations or voting), including not only the examination of any witness, but the making of any remarks by the prosecutor. The existence of such recordings (theretofore required in only a few districts), coupled with the opportunity for subsequent review by the court, operates as a significant deterrent to improprieties.

Finally, the Department of Justice in the past decade has substantially improved its grand jury practices, by promulgating in late 1977 (and thereafter refining) a series of provisions in

the United States Attorneys' Manual requiring federal prosecutors to accord to grand jury witnesses warnings and other procedural benefits well beyond those mandated by law. We are unaware of any alleged pattern of abuse since these improvements were instituted. Thus, whatever may have been the situation before these internal guidelines were adopted, the case for fundamental changes in grand jury practice such as are embodied in H.R. 1407 is today particularly weak.

While H.R. 1407 includes numerous provisions significantly affecting federal grand jury proceedings, I shall largely confine our specific comments to three aspects of the bill that are most objectionable from the Department's standpoint. These are the provision permitting counsel to accompany a grand jury witness to in the grand jury room, the substitution of transactional immunity for use immunity as a means to compel the testimony of a witness who asserts the privilege against self-incrimination, and the providing of remedies, particularly the extreme sanction of dismissal of an indictment, for failure to abide by the bill's procedural requirements.

COUNSEL IN THE GRAND JURY ROOM

H.R. 1407 adds a new provision to title 18, United States Code providing that a witness before a grand jury "shall have the right to be accompanied by counsel during such witness' appearance before the grand jury ...." (Proposed 18 U.S.C. §3326(a).) The section further provides that counsel shall not address the

grand jury, raise objections, make arguments or disrupt the proceedings. Finally, proposed section 3326 provides that if the court determines that counsel has exceeded the limitations imposed by the provision, the court shall take such action as necessary to ensure compliance and may exclude the offending counsel from the grand jury room.

It has been the prevailing practice and tradition in the federal criminal justice system, as reflected in Rule 6(d) of the Federal Rules of Criminal Procedure, that a witness may not be accompanied by counsel inside the grand jury room. The Department of Justice has consistently taken the position over a number of years that the traditional rule serves the vital function of preserving the grand jury as an effective investigatory institution. We remain firmly of the view that enactment of legislation like H.R. 1407 would be seriously detrimental to the interests of federal law enforcement.

A number of considerations support this view, which we note also is shared by the Judicial Conference of the United States speaking on behalf of the federal judges who, of course, are responsible for administering the federal grand jury system. [CITE STATEMENT OF JUDICIAL CONFERENCE ON H.R. 1407 BEING SENT BY PAUL SUMMITT.] First, allowing counsel to accompany a witness before a grand jury would result in a significant loss of spontaneity in the testimony. The sole purpose of calling a witness before the grand jury is to elicit whatever facts the witness knows that may be pertinent to the grand jury's investigation. If a witness were accompanied in the grand jury room by counsel,

with whom he or she could consult before answering questions, in our view the fact-finding process would be severely impaired because of the tendency for the witness to become dependent upon the lawyer and to repeat or parrot responses discussed with the lawyer, rather than to testify fully and frankly in his or her own words. See Silbert, Defense Counsel in the Grand Jury - The Answer to the White Collar Criminal's Prayers, 15 Amer. Cr. L. Rev. 293, 302 (1978). For similar reasons, we point out, witnesses at trial and in other proceedings are not permitted to consult with their counsel before responding to questions, save in rare instances. 1/

Second, we believe that allowing counsel to accompany a witness before a grand jury would fundamentally transform the federal grand jury process into a proceeding of an adversary nature inconsistent with the function of the grand jury as a charging (rather than a guilt-determining) body. At the core of our deep-seated concern in this respect is our belief that counsel for the witness will act -- inevitably even if not intentionally -- in a manner that will disrupt and delay the grand jury's investigation. It is naive to expect that counsel for a witness facing a grand jury will fail to do everything in

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1/ A witness may be permitted to confer with counsel with regard to whether or not to invoke the Fifth Amendment. The infrequent instances in which such advice is needed as to a grand jury witness are met by the universal practice of permitting the witness, without prejudice, to leave the room for a brief period for that purpose.

his or her power to seek to protect the client from questions counsel regards as irrelevant, overbroad, or in some way technically defective. While the bill attempts to limit counsel's role by precluding him or her from addressing the grand jurors, raising objections, or making arguments, counsel could still as a practical matter speak through the witness. In this way objections predicated upon various rules of evidence and procedure that have been held inapplicable to grand jury proceedings could be raised despite the bill's limitations on the role of counsel. In contrast to a court proceeding or a congressional committee hearing, there is no official present, such as a judge or committee chairman, to rule authoritatively on such objections. To deal with any obstreperous witness would require a break in the proceedings in order to obtain the aid of a court to control the witness under penalty of contempt. We are concerned that the incidence of problems of this kind would escalate if the long-established prohibition against the presence of counsel in the grand jury room were abandoned.

We also doubt the practicality of mechanisms for dealing with the problem, e.g., by exclusion of the offending counsel from the grand jury room. To begin with, the very act of seeking a judicial hearing on the matter would likely consume several days; and it is our belief that courts would be extremely reluctant to order a witness's counsel removed for a breach of the bill's provisions. There may be, in addition, at least in the case of a witness who has retained his or her own counsel, a

substantial constitutional difficulty in ordering the witness to obtain other counsel against his or her wishes.

A number of judges have echoed our concerns about the practical effects of admitting defense counsel into the grand jury. Thus, for example, five judges of the United States Court of Appeals for the Second Circuit, in a memorandum accompanying their letter to the then Chairman of the House Subcommittee considering similar grand jury reform legislation in 1977, observed that:

> In practice, however, admitting counsel to the grand jury room poses the serious risk that the proceedings will be protracted and disrupted, with the court being forced to intervene repeatedly. Experience in criminal trials demonstrates that many lawyers simply would not adhere to the idealistic conception that they would limit themselves to advising their clients in sotto voce. Once in the grand jury room, many counsel, unimpeded by the presence of the court, would seek to influence the grand jury, using tactics of the type frequently employed in criminal trials, e.g., lengthy objections to questions, in which counsel refers to irrelevant prejudicial material as the basis for an objection. Advice to a witness could be given in tones that would be overheard by every grand juror. A witness' answers would be those of the attorney rather than of the witness himself. Judges would inevitably be invoked to rule on preliminary objections as to the relevancy and materiality of questions, to discipline or remove counsel from the grand jury room, and to substitute new counsel. Moreover, should a judge discipline or remove a witness' counsel, a serious question would then arise as to whether he had interfered with the witness' constitutional or statutory right to counsel of his own choice.
> [CITE ALSO MOST RECENT STATEMENT OF JUDICIAL CONFERENCE.]

In short, the delays inevitably occasioned by permitting defense counsel inside the grand jury room promise to be lengthy and to spawn an entire, new wave of costly litigation. These

effects are inconsistent with the goal adopted by the Congress in the Speedy Trial Act of 1974 of reducing crime and the danger of recidivism by requiring speedy trials. In our view the marginal benefits to witnesses which this proposal might generate are far outweighed by the disadvantages (to defendants as well as to the government) of causing the wheels of the federal criminal justice system to grind even more slowly.

Finally, we note that H.R. 1407 fails to address an important problem relevant to permitting counsel to accompany a witness before a grand jury, namely, the representation by one attorney or closely associated counsel of several witnesses before the grand jury. Not infrequently, particularly in investigations of organized criminal enterprises, business frauds, antitrust violations, and other white collar offenses, one attorney represents several potential witnesses. At times counsel is retained by the very business, union, or other organization or syndicate whose activities are under investigation, to represent all persons connected with the group. In such situations, the individual witness may possess relevant information and would ordinarily be willing to cooperate with the investigation. Understandably, however, his willingness to cooperate may be conditioned upon the likelihood that his cooperation will not become known to his employer, fellow union members, or others whom the witness knows his attorney represents or with whom his attorney has been associated. A provision permitting counsel to accompany such a witness in the grand jury room would have a chilling effect on his potential cooperation since even a

witness' stated preference that counsel not accompany him would suggest the likelihood of his cooperation to the attorney and ultimately to others whom the attorney represents.

Multiple representation of witnesses before grand juries also poses the risk that unscrupulous counsel may thwart a legitimate investigation. Counsel representing multiple defendants possesses a valuable opportunity to advise witnesses on how to tailor their responses in light of the testimony given by earlier witnesses. Such planning and fine-tuning of testimony can seriously mislead the grand jury in its endeavor to obtain information. The problems of multiple representation of grand jury witnesses are so serious that, even in the absence of a proposal allowing counsel to accompany witnesses before the grand jury, Congressional attention and action with a view toward limiting such representation is in our opinion independently warranted. When counsel is permitted in the grand jury room, the difficulties are greatly exacerbated.

The multiple representation problem should not be underestimated. The Watergate Special Prosecutor, in his report to the Congress, noted that multiple legal representation before the grand jury operated "in many cases" to preclude a witness from "giving adequate consideration to the possibility of cooperating with the Government." Report, Watergate Special Prosecution Force, p. 140. This view has also been expressed by other commentators, see, e.g., Silbert, supra, 15 Amer. Cr. L. Rev., at 296-300; Alan Cole, Time For a Change: Multiple Representation Should Be Stopped., 2 Nat. J. Crim. Def. 149 (1978), and the

Supreme Court of Colorado adverted to the problem in sustaining that State's statute which prohibits multiple representation of grand jury witnesses except with the permission of the grand jury. People ex rel. Lovasio v. J.L., 580 P.2d 23 (1978). See generally Tague, Multiple Representation of Targets and Witnesses During a Grand Jury Investigation, 17 Amer. Cr. L. Rev. 301 (1980).

SUBSTITUTION OF TRANSACTIONAL IMMUNITY FOR USE IMMUNITY

Section 3 of H.R. 1407 would amend 18 U.S.C. §6002 to substitute transactional immunity for use immunity as a means of compelling testimony or the production of information when a witness asserts the privilege against self-incrimination. Currently, section 6002 provides, in part:

> no testimony or other information compelled under [an immunity] order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

This provision applies to the giving of testimony or the providing of information before a court, grand jury, agency of the United States, or either House or committee of Congress. The bill would amend this provision by substituting for the use immunity language quoted above broad language providing that the witness shall not be prosecuted or subject to any penalty or forfeiture on account of the compelled testimony.

We are vigorously opposed to this aspect of H.R. 1407, which would reinstate the law on this subject essentially as it existed prior to the enactment of the current provision in 1970. The constitutionality of use immunity was upheld by the Supreme Court in Kastigar v. United States, 406 U.S. 441 (1972). The Court stated:

> We conclude that the immunity provided by 18 U.S.C. §6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it. 406 U.S. at 462.

We do not believe that providing a greater degree of immunity than that which is constitutionally required would serve any useful societal purpose. On the contrary, the use immunity approach embodied in current law has distinct advantages over the transactional immunity approach. First, it eliminates conferring unnecessarily broad immunity against criminal liability upon a witness who has committed a criminal offense. Thus, the use immunity process does not create the risk that a witness who is subsequently and independently found to be more deserving of prosecution than originally thought will be absolutely immune from prosecution, despite the existence of independent evidence. Second, use immunity removes the incentive for a witness to give wide-ranging but incomplete and shallow testimony. Transactional immunity encourages such testimony, while failing to encourage complete candor, specificity, and detail since it provides absolution for every offense touched upon, however lightly. A

witness compelled to testify under current law and thereby afforded use immunity no broader than constitutionally required legally stands to gain little or nothing by his testimony and lacks motivation to withhold or to fabricate evidence.

Use immunity has built-in protections that make transactional immunity unnecessary to protect a potential defendant's interests. If a defendant establishes that he or she has testified under a grant of immunity, the government must prove that the evidence to be used in a prosecution was derived from an independent, legitimate source. Kastigar, 406 U.S. at 453, 460. Moreover, in New Jersey v. Portash, 440 U.S. 450 (1979), the Supreme Court held that compelled testimony subject to use immunity may not be used to impeach a defendant at trial.

In sum, given the clearly established constitutionality of use immunity as a means to compel testimony, the usefulness it serves to society, and the lack of reasonable arguments to eliminate it, we cannot accept the amendment of 18 U.S.C. §6002 incorporated in H.R. 1407. Moreover, we see no justification for the fact that the bill would substitute transactional immunity for use immunity to compel testimony not only in grand jury proceedings but also in any of the forums subject to section 6002, whether a court, agency, or Congressional proceeding.

DISMISSAL OF INDICTMENTS FOR PROCEDURAL VIOLATIONS

H.R. 1407 expressly provides the extraordinary remedy of dismissal of an indictment for violations of several of the procedural requirements it imposes. For example, proposed 18 U.S.C. §3323 requires the attorney for the government to disclose to the target, and if feasible to present to the grand jury, all evidence that "tends to negate one of the material elements of the crime." In addition, it requires the attorney for the government to inform the grand jury of the existence of, and the grand jury's right to call for, evidence that "bears upon a possible affirmative defense and that raises a reasonable doubt about the target's guilt." The section provides for the remedy of mandatory dismissal of an indictment if, upon timely motion of the defendant, the court finds that the prosecutor knowingly failed to comply with these provisions. 2/

Another provision that provides for dismissal of an indictment for violation of H.R. 1407's procedural requirements is proposed 18 U.S.C. §3324. This section imposes a duty on the attorney for the government to advise a person "upon whom such

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2/ In the case of the prosecutor's duty to inform the grand jury about evidence relating to an affirmative defense, there is an additional requirement before dismissal fo an indictment is mandated. The court must also find that the grand jury "would not have been justified in returning an indictment" had the prosecutor complied with the dictates of the provision. The burden placed upon the courts to construe these provisions would be substantial.

attorney or the grand jury has begun to focus an investigation" that he or she is a target of the investigation, entitled to a reasonable opportunity to testify upon waiver of immunity, and entitled to present the prosecutor with exculpatory evidence. The bill requires dismissal of an indictment that issues without the required notice unless the court finds that notification could not reasonably be accomplished or that there are reasonable grounds to believe that giving notice "would create an undue risk of danger to other persons, flight of the target, or other obstruction of justice."

Finally, additional procedural requirements are reflected in H.R. 1407 for which no sanctions are expressly provided. Proposed 28 U.S.C. §1894 3/ requires the court upon impaneling a grand jury to instruct it on its rights and duties. Such duties include, for example, the right to call and interrogate witnesses, the necessity of finding credible evidence of each material element of the crime charged, and the right to have the prosecutor draft indictments for less serious charges than those originally requested. The bill does not set forth the effect of a failure by the court to abide by this notification requirement, but it can be expected that if H.R. 1407 were enacted, defendants

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3/ We assume that this provision should be designated as section 1879 of title 28, United States Code, so as to follow numerically the provision on recalcitrant witnesses, section 1878. We also assume that a provision repealing current section 1826 on recalcitrant witnesses was inadvertently omitted from the bill since proposed section 1878 and current section 1826 cannot logically coexist.

would assert that dismissal of an indictment is appropriate in certain cases.

We strongly disagree with the notion that dismissal of an indictment is an appropriate remedy for violations of the procedural requirements imposed by H.R. 1407. Even where a Sixth Amendment violation exists, the Supreme Court has refused to order dismissal of an indictment as the remedy. Thus, in United States v. Morrison, 449 U.S. 361, 367 (1981), the Court characterized dismissal of an indictment as "drastic relief" inappropriate to the alleged violation of the Sixth Amendment right to counsel, even if the violation had been deliberate, absent demonstrable prejudice or substantial threat thereof. In Morrison government agents sought the cooperation for purposes of a separate investigation of a person indicted of a drug offense without the knowledge or permission of her counsel. The agents offered various benefits and disparaged her retained counsel. The Court assumed, without deciding the issue, that the Sixth Amendment was violated in the circumstances of the case and reached the conclusion that dismissal of the indictment was error in any event. The Court stated, "remedies should be tailored to the injury suffered from the constitutional violation," 449 U.S. at 364. The Court noted that the remedy for other constitutional violations is normally suppression of evidence at trial or the ordering of a new trial, rather than dismissal of an indictment.

In Costello v. United States, 350 U.S. 359 (1956), the Supreme Court held that a defendant may be required to stand trial and a conviction may be sustained where only hearsay

evidence was presented to the grand jury. The Court made the following noteworthy observations regarding challenges to indictments:

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more. 350 U.S. at 363.

We believe that the Supreme Court's concerns apply even more clearly to attacks on indictments premised on the nonconstitutional procedural violations outlined in H.R. 1407.

Apart from the possibility of unwarranted dismissal of indictments, we also strongly oppose the bill's codification of many aspects of grand jury procedure. While some of the safeguards incorporated in the bill are not substantively objectionable and are reflected in principle in the United States Attorneys' Manual, codification of these procedures will inevitably lead to litigation. Even if dismissal were expressly prohibited as an available sanction, defense counsel can be expected to seek other relief, such as suppression of evidence, routinely and proceedings would be unduly delayed by motions concerning the alleged denial of procedural protections./ We do not believe that there exists any problem with the functioning of the grand jury

/ Under United States v. Caceres, 440 U.S. 741 (19), by contrast, compliance with an agency's internal guidelines, is [illegible] not litigable.

in recent years under the Department's guidelines sufficient to justify these provisions and the added litigation they would engender.

CONCLUSION

The provisions discussed above constitute in our view the most salient features of H.R. 1407. We also object to certain other provisions of the bill, such as the proposed requirement to give witnesses notice of the substantive provisions of law the violation of which is under consideration by the grand jury, the requirement that all witnesses be advised of certain rights, and the prohibition against calling before the grand jury any witness who has notified the attorney for the government that such witness will invoke the privilege against self-incrimination. Because of our strongly held objections to the major provisions discussed above and our concerns regarding other aspects of the bill, we urge that H.R. 1407 not receive favorable action. The institution of the grand jury is simply not in need of, and could not survive effectively, the "reform" embodied in the bill.

I would be pleased to answer any questions you may have.