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FEDERAL IMMUNITY OF WITNESSES ACT

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HEARINGS

BEFORE

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KANSAS STATE UNIVERSITY SUBCOMMITTEE NO. 3

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FIRST CONGRESS

FIRST SESSION

ON

H.R. 11157 and H.R. 12041

TO AMEND TITLE 18, UNITED STATES CODE, TO PRESCRIBE THE MANNER IN WHICH A WITNESS IN A FEDERAL PROCEEDING MAY BE ORDERED TO PROVIDE INFORMATION AFTER ASSERTING HIS PRIVILEGE AGAINST SELF-INCRIMINATION AND TO DEFINE THE SCOPE OF THE IMMUNITY TO BE PROVIDED SUCH WITNESS WITH RESPECT TO INFORMATION PROVIDED UNDER AN ORDER

AUGUST 7, 1969

Serial No. 14

Printed for the use of the Committee on the Judiciary



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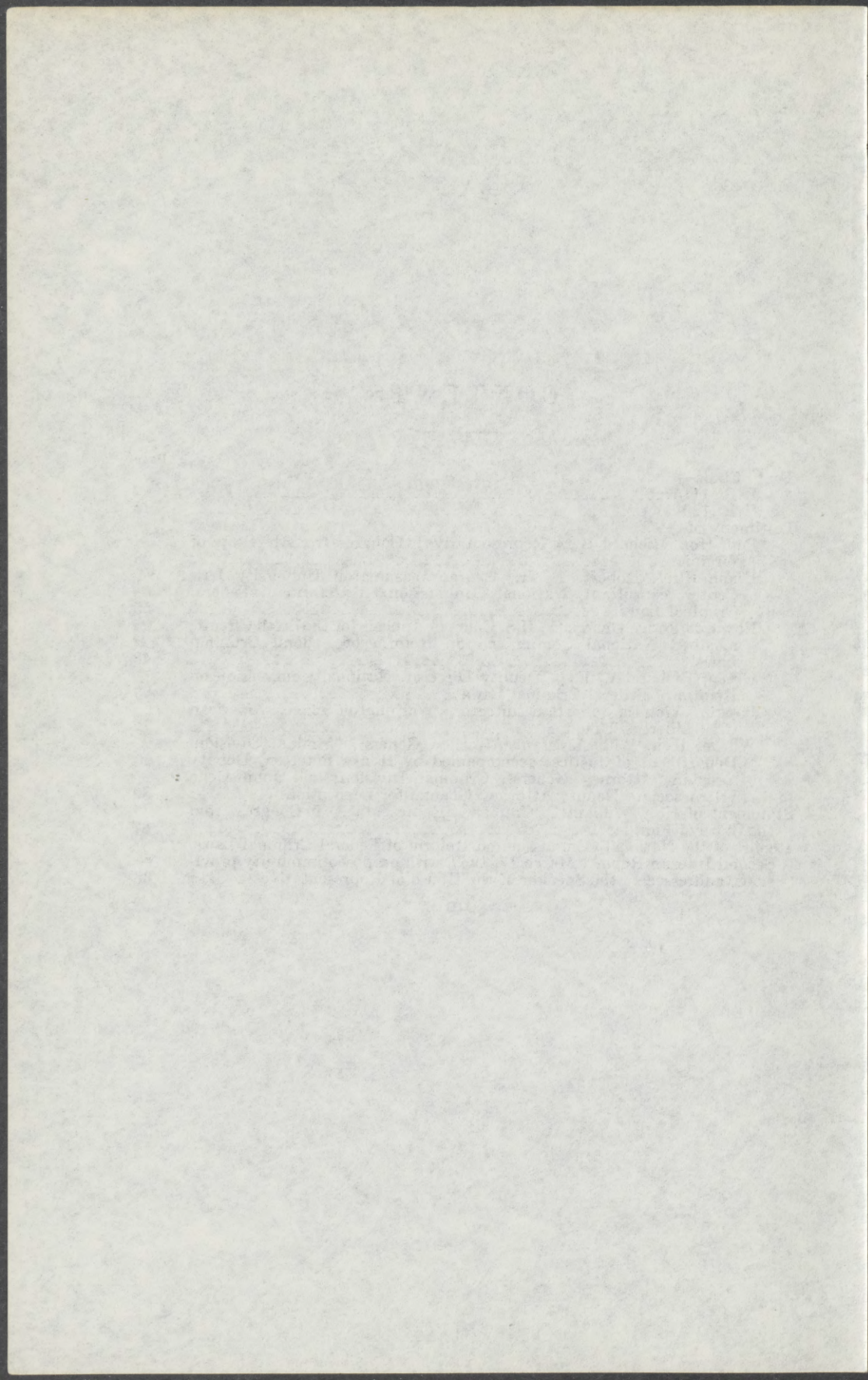
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CONTENTS

| | Page |
|---|------|
| Text of bills— | |
| H.R. 11157----- | 2 |
| H.R. 12041----- | 15 |
| Testimony of— | |
| Poff, Hon. Richard H., a Representative in Congress from the State of Virginia----- | 28 |
| Dixon, Prof. Robert G., Jr., George Washington University Law Center; consultant, National Commission on Reform of Federal Criminal Laws----- | 55 |
| Edwards, Judge George C., U.S. Court of Appeals for the Sixth Circuit; member, National Commission on Reform of Federal Criminal Laws----- | 48 |
| Green, Richard A., Esq., Deputy Director, National Commission on Reform of Federal Criminal Laws----- | 69 |
| Popkin, Victoria, assistant director, Washington office, American Civil Liberties Union----- | 72 |
| Wilson, Hon. Will, Assistant Attorney General, Criminal Division, Department of Justice; accompanied by Henry Petersen, Deputy Assistant Attorney General, Criminal Division; and John Dean III, Associate Deputy Attorney General for Legislation----- | 39 |
| Statement of Hon. William C. Cramer, a Representative in Congress from the State of Florida----- | 87 |
| Report of the National Commission on Reform of Federal Criminal Laws, Second Interim Report, March 17, 1969, with proposed immunity provisions, addressed to the Speaker of the House of Representatives----- | 36 |



FEDERAL IMMUNITY OF WITNESSES ACT

THURSDAY, AUGUST 7, 1969

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE NO. 3 OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m. in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier, (chairman of the subcommittee), presiding.

Present: Representatives Kastenmeier, Ryan, Mikva, Poff, Hutchinson, and Biester.

Also present: Herbert Fuchs, counsel, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The hearing will come to order. This morning Subcommittee No. 3 has convened to receive testimony on H.R. 11157, introduced by our distinguished subcommittee colleague from Virginia, Mr. Poff, and cosponsored by the gentleman from California, Mr. Edwards, and myself, and on an identical bill, H.R. 12041, introduced by the gentleman from Florida, Mr. Cramer.

(The bills follow:)

(1)

91ST CONGRESS
1ST SESSION

H. R. 11157

IN THE HOUSE OF REPRESENTATIVES

MAY 12, 1969

Mr. POFF (for himself, Mr. KASTENMEIER, and Mr. EDWARDS of California) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, to prescribe the manner in which a witness in a Federal proceeding may be ordered to provide information after asserting his privilege against self-incrimination and to define the scope of the immunity to be provided such witness with respect to information provided under an order.

1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*
 3 That this Act may be cited as the "Federal Immunity of
 4 Witnesses Act".

5 TITLE I—IMMUNITY OF WITNESSES

6 SEC. 101. (a) Title 18, United States Code, is amended
 7 by adding immediately after part IV the following new part:

I

"PART V—IMMUNITY OF WITNESSES

"Sec.

"6001. Immunity generally.

"6002. Court and grand jury proceedings.

"6003. Certain administrative proceedings.

"6004. Congressional proceedings.

"6005. Definitions.

1 **"§ 6001. Immunity generally**

2 "Whenever a witness refuses, on the basis of his privi-
3 lege against self-incrimination, to testify or provide other
4 information in a proceeding before—

5 "(1) a court or grand jury of the United States,

6 "(2) an agency of the United States, or

7 "(3) either House of Congress, a joint committee
8 of the two Houses, or a committee of either House,

9 and the person presiding over the proceeding communicates
10 to the witness an order issued under this part, the witness
11 may not refuse to comply with the order on the basis of his
12 privilege against self-incrimination; but no testimony or
13 other information compelled under the order (or any infor-
14 mation directly or indirectly derived from such testimony
15 or other information) may be used against the witness in
16 any criminal case, except a prosecution for giving a false
17 statement or otherwise failing to comply with the order.

18 **"§ 6002. Court and grand jury proceedings**

19 "(a) In the case of any individual who has been or
20 may be called to testify or provide other information at

1 any proceeding before a court of the United States or a
2 grand jury of the United States, the United States district
3 court for the judicial district in which the proceeding is or
4 may be held shall issue, upon the request of the United
5 States attorney for such district, an order requiring such
6 individual to give any testimony or provide any other in-
7 formation which he refuses to give or provide on the basis
8 of his privilege against self-incrimination.

9 “(b) A United States attorney may, with the approval
10 of the Attorney General (or the Deputy Attorney General,
11 or any Assistant Attorney General, designated by the At-
12 torney General), request an order under subsection (a)
13 when in his judgment—

14 “(1) the testimony or other information from such
15 individual may be necessary to the public interest; and

16 “(2) such individual has refused or is likely to
17 refuse to testify or provide other information on the
18 basis of his privilege against self-incrimination.

19 **“§ 6003. Certain administrative proceedings**

20 “(a) In the case of any individual who has been or who
21 may be called to testify or provide other information at any
22 proceeding before an agency of the United States, the agency
23 may issue an order requiring the individual to give any tes-

1 timony or provide any other information which he refuses to
2 give or provide on the basis of his privilege against self-
3 incrimination.

4 “(b) An agency of the United States may issue an
5 order under subsection (a) only if in its judgment—

6 “(1) the testimony or other information from such
7 individual may be necessary to the public interest; and

8 “(2) such individual has refused or is likely to
9 refuse to testify or provide other information on the
10 basis of his privilege against self-incrimination.

11 The agency may issue such an order no earlier than ten days
12 after the day on which it served the Attorney General with
13 notice of its intention to issue the order.

14 **“§ 6004. Congressional proceedings**

15 “(a) In the case of any individual who has been
16 or may be called to testify or provide other information
17 at any proceeding before either House of Congress or any
18 committee of either House, or any joint committee of
19 the two Houses, a United States district court shall issue,
20 upon the request of a duly authorized representative of
21 the House of Congress or the committee concerned, an
22 order requiring such individual to give any testimony or
23 provide other information which he refuses to give or
24 provide on the basis of his privilege against self-incrimi-
25 nation.

1 “(b) Before issuing an order under subsection (a),
2 a United States district court shall find that—

3 “(1) in the case of a proceeding before either
4 House of Congress, the request for such an order has
5 been approved by an affirmative vote of a majority
6 of the Members present of that House;

7 “(2) in the case of a proceeding before a com-
8 mittee of either House of Congress or a joint commit-
9 tee of both Houses, the request for such an order has
10 been approved by an affirmative vote of two-thirds
11 of the members of the full committee; and

12 “(3) no earlier than ten days prior to the day on
13 which the request for such an order was made, the At-
14 torney General was served with notice of an intention
15 to request the order.

16 “(c) Upon application of the Attorney General, the
17 United States district court shall defer the issuance of any
18 order under subsection (a) for such period (not longer than
19 twenty days from the date of the request for such order)
20 as the Attorney General may specify.

21 **“§ 6005. Definitions**

22 “As used in this part—

23 “(1) the term ‘agency of the United States’ means
24 an executive department (as defined in section 101 of
25 title 5), a military department (as defined in section

1 102 of title 5), the Atomic Energy Commission, the
2 China Trade Act registrar appointed under section 143
3 of title 15, the Civil Aeronautics Board, the Federal
4 Communications Commission, the Federal Deposit In-
5 surance Corporation, the Federal Maritime Commis-
6 sion, the Federal Power Commission, the Federal Trade
7 Commission, the Interstate Commerce Commission, the
8 National Labor Relations Board, the National Trans-
9 portation Safety Board, the Railroad Retirement Board,
10 the Securities and Exchange Commission, the Subversive
11 Activities Control Board, or a board established under
12 section 715d of title 15;

13 “(2) the term ‘other information’ includes any
14 book, paper, document, record, recording, or other mate-
15 rial;

16 “(3) the term ‘proceeding before an agency of the
17 United States’ means any proceeding before such an
18 agency with respect to which it is authorized to issue
19 subpoenas and to take testimony of witnesses under oath
20 or affirmation; and

21 “(4) the term ‘court of the United States’ means
22 any of the following courts: the Supreme Court of the
23 United States, a United States court of appeals, a United
24 States district court established under chapter 5 of title
25 28, the District Court of Guam, the District Court of

1 the Virgin Islands, the United States Court of Claims,
2 the United States Court of Customs and Patent Appeals,
3 the Tax Court of the United States, the Customs Court,
4 and the Court of Military Appeals.”

5 (b) The table of parts for title 18, United States Code,
6 is amended by adding at the end thereof the following:

“V. Immunity of witnesses..... 6001”.

7 TITLE II—CONFORMING AMENDMENTS

8 SEC. 201. The third sentence of paragraph (b) of sec-
9 tion 6 of the Commodity Exchange Act (7 U.S.C. 15) is
10 amended by striking out “of section 12 of the Interstate Com-
11 merce Act, as amended and supplemented (U.S.C. 1934
12 ed., title 49, secs. 12, 46, 47, and 48), relating to the
13 attendance and testimony of witnesses, the production of
14 documentary evidence, and the immunity of witnesses” and
15 by inserting in lieu thereof the following: “of section 12 of
16 the Interstate Commerce Act and of the Act of February
17 11, 1893 (49 U.S.C. 46), relating to the attendance and
18 testimony of witnesses and the production of documentary
19 evidence”.

20 SEC. 202. Subsection (f) of section 13 of the Perish-
21 able Agricultural Commodities Act, 1930 (7 U.S.C. 499m
22 (f)) is repealed.

23 SEC. 203. (a) Section 16 of the Cotton Research and

1 Promotion Act (7 U.S.C. 2115) is amended by striking
2 out “(a)” and by striking out subsection (b).

3 (b) The section heading for such section 16 is amended
4 by striking out “; self-incrimination”.

5 SEC. 204. The fourth sentence of subsection (d) of sec-
6 tion 10 of the Federal Deposit Insurance Act (12 U.S.C.
7 1820 (d)) is repealed.

8 SEC. 205. The seventh paragraph under the center head-
9 ing “DEPARTMENT OF JUSTICE” in the first section of the
10 Act of February 25, 1903 (32 Stat. 904, 15 U.S.C. 32) , is
11 amended by striking out “: *Provided, That*” and all that
12 follows in that paragraph and inserting in lieu thereof a
13 period.

14 SEC. 206. The Act of June 30, 1906 (34 Stat. 798,
15 15 U.S.C. 33) , is repealed.

16 SEC. 207. The seventh paragraph of section 9 of the Fed-
17 eral Trade Commission Act (15 U.S.C. 49) is repealed.

18 SEC. 208. Subsection (c) of section 22 of the Securities
19 Act of 1933 (15 U.S.C. 77v (c)) is repealed.

20 SEC. 209. Subsection (d) of section 21 of the Securities
21 Exchange Act of 1934 (15 U.S.C. 78u (d)) is repealed.

22 SEC. 210. Subsection (e) of section 18 of the Public
23 Utility Holding Company Act of 1935 (15 U.S.C. 79r (e))
24 is repealed.

25 SEC. 211. Subsection (d) of section 42 of the Invest-

1 ment Company Act of 1940 (15 U.S.C. 80a-41 (d)) is
2 repealed.

3 SEC. 212. Subsection (d) of section 209 of the Invest-
4 ment Advisers Act of 1940 (15 U.S.C. 80b-9 (d)) is
5 repealed.

6 SEC. 213. Subsection (c) of section 15 of the China
7 Trade Act, 1922 (15 U.S.C. 155 (c)) is repealed.

8 SEC. 214. Subsection (g) of section 307 of the Federal
9 Power Act (16 U.S.C. 825f (g)) is repealed.

10 SEC. 215. Subsection (b) of section 835 of title 18,
11 United States Code, is amended by striking out the third
12 sentence thereof.

13 SEC. 216. (a) Section 895 of title 18, United States
14 Code, is repealed.

15 (b) The table of sections of chapter 42 of such title
16 is amended by striking out the item relating to section 895.

17 SEC. 217. (a) Section 1406 of title 18, United States
18 Code, is repealed.

19 (b) The table of sections of chapter 68 of such title
20 is amended by striking out the item relating to section 1406.

21 SEC. 218. Section 1954 of title 18, United States Code,
22 is amended by striking out "(a) Whoever" and inserting
23 in lieu thereof "Whoever" and by striking out subsection
24 (b) thereof.

1 SEC. 219. (a) Section 2514 of title 18, United States
2 Code, is repealed.

3 (b) The table of sections of chapter 119 of such title is
4 amended by striking out the item relating to section 2514.

5 SEC. 220. (a) Section 3486 of title 18, United States
6 Code, is repealed.

7 (b) The table of sections of chapter 223 of such title is
8 amended by striking out the item relating to section 3486.

9 SEC. 221. Subsection (e) of section 333 of the Tariff
10 Act of 1930 (19 U.S.C. 1333 (e)) is amended by striking
11 out “: *Provided, That*” and all that follows in that subsec-
12 tion and inserting in lieu thereof a period.

13 SEC. 222. (a) Section 4847 of the Internal Revenue
14 Code of 1954 is repealed.

15 (b) The table of sections of part II of subchapter (D)
16 of chapter 39 of such Code is amended by striking out the
17 item relating to section 4874.

18 SEC. 223. (a) Section 7493 of the Internal Revenue
19 Code of 1954 is repealed.

20 (b) The table of sections of subchapter (E) of chapter
21 76 of such Code is amended by striking out the item relating
22 to section 7493.

23 SEC. 224. Paragraph (3) of section 11 of the Labor
24 Management Relations Act, 1947 (29 U.S.C. 161 (3))
25 is repealed.

1 SEC. 225. The third sentence of section 4 of the Act
2 entitled "An Act to provide that tolls on certain bridges
3 over navigable waters of the United States shall be just and
4 reasonable, and for other purposes", approved August 21,
5 1935 (33 U.S.C. 506), is repealed.

6 SEC. 226. Subsection (f) of section 205 of the Social
7 Security Act (42 U.S.C. 405 (f)) is repealed.

8 SEC. 227. Paragraph (c) of section 161 of the Atomic
9 Energy Act of 1954 (42 U.S.C. 2201 (c)) is amended by
10 striking out the third sentence thereof.

11 SEC. 228. Subsection (c) of section 12 of the Railroad
12 Unemployment Insurance Act (45 U.S.C. 362 (c)) is
13 repealed.

14 SEC. 229. Section 28 of the Shipping Act, 1916 (46
15 U.S.C. 827) is repealed.

16 SEC. 230. Subsection (e) of section 214 of the Merchant
17 Marine Act, 1936 (46 U.S.C. 1124 (c)) is repealed.

18 SEC. 231. Subsection (l) of section 409 of the Com-
19 munications Act of 1934 (47 U.S.C. 409 (l)) is repealed.

20 SEC. 232. (a) The second sentence of section 9 of Inter-
21 state Commerce Act (49 U.S.C. 9) is amended by striking
22 out "; the claim" and all that follows in that sentence and
23 inserting in lieu thereof a period.

24 SEC. 233. The third sentence of section 3 of the Act

1 entitled "An Act to further regulate Commerce with foreign
2 nations and among the States", approved February 19, 1903
3 (49 U.S.C. 43) is amended by striking out "; the claim"
4 and all that follows in that sentence down through and includ-
5 ing "Provided, That the provisions" and inserting in lieu
6 thereof ". The provisions".

7 SEC. 234. The first paragraph of the Act of February 11,
8 1893 (27 Stat. 443; 49 U.S.C. 46) is repealed.

9 (b) Subsection (a) of section 316 of the Interstate
10 Commerce Act (49 U.S.C. 916 (a)) is amended by strik-
11 ing out the comma following "part I" and by striking out
12 ", and the Immunity of Witnesses Act (34 Stat. 798; 32
13 Stat. 904, ch. 755, sec. 1),".

14 (c) Subsection (a) of section 417 of the Interstate
15 Commerce Act (49 U.S.C. 1017 (a)) is amended by
16 striking out the comma after "such provisions" and by
17 striking out ", and of the Immunity of Witnesses Act (34
18 Stat. 798; 32 Stat. 904, ch. 755, sec. 1),".

19 SEC. 235. Subsection (i) of section 1004 of the
20 Federal Aviation Act of 1958 (49 U.S.C. 1484 (i)) is
21 repealed.

22 SEC. 236. The ninth sentence of subsection (c) of
23 section 13 of the Internal Security Act of 1950 (50 U.S.C.
24 792 (c)) is repealed.

25 SEC. 237. Section 1302 of the Second War Powers

1 Act, 1942 (50 U.S.C. App. 643a) is amended by striking
2 out the fourth sentence thereof.

3 SEC. 238. Paragraph (4) of subsection (a) of sec-
4 tion 2 of the Act entitled "An Act to expedite national
5 defense, and for other purposes", approved June 28, 1940
6 (50 U.S.C. App. 1152 (a) (4)), is amended by striking
7 out the fourth sentence thereof.

8 SEC. 239. Subsection (d) of section 6 of the Export
9 Control Act of 1949 (50 U.S.C. App. 2026 (b)) is re-
10 pealed.

11 SEC. 240. Subsection (h) of section 14 of the Natural
12 Gas Act (15 U.S.C. 717m (h)) is repealed.

13 TITLE III—EFFECTIVE DATE

14 SEC. 301. The provisions of part VI of title 18, United
15 States Code, added by title I of this Act, and the amendments
16 and repeals made by title II of this Act, shall take effect on
17 the sixtieth day following the date of the enactment of this
18 Act. No amendment to or repeal of any provision of law
19 under title II of this Act shall affect any immunity to which
20 any individual is entitled under such provision by reason
21 of any testimony or other information given before such
22 day.

91ST CONGRESS
1ST SESSION

H. R. 12041

IN THE HOUSE OF REPRESENTATIVES

JUNE 11, 1969

Mr. CRAMER introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, to prescribe the manner in which a witness in a Federal proceeding may be ordered to provide information after asserting his privilege against self-incrimination and to define the scope of the immunity to be provided such witness with respect to information provided under an order.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Federal Immunity of
4 Witnesses Act".

5 TITLE I—IMMUNITY OF WITNESSES

6 SEC. 101. (a) Title 18, United States Code, is amended
7 by adding immediately after part IV the following new part:

I—O

"PART V—IMMUNITY OF WITNESSES

"Sec.

"6001. Immunity generally.

"6002. Court and grand jury proceedings.

"6003. Certain administrative proceedings.

"6004. Congressional proceedings.

"6005. Definitions.

1 **"§ 6001. Immunity generally**

2 "Whenever a witness refuses, on the basis of his privi-
3 lege against self-incrimination, to testify or provide other
4 information in a proceeding before—

5 " (1) a court or grand jury of the United States,

6 " (2) an agency of the United States, or

7 " (3) either House of Congress, a joint committee

8 of the two Houses, or a committee of either House,

9 and the person presiding over the proceeding communicates
10 to the witness an order issued under this part, the witness
11 may not refuse to comply with the order on the basis of his
12 privilege against self-incrimination; but no testimony or
13 other information compelled under the order (or any infor-
14 mation directly or indirectly derived from such testimony
15 or other information) may be used against the witness in
16 any criminal case, except a prosecution for giving a false
17 statement or otherwise failing to comply with the order.

18 **"§ 6002. Court and grand jury proceedings**

19 " (a) In the case of any individual who has been or
20 may be called to testify or provide other information at

1 any proceeding before a court of the United States or a
2 grand jury of the United States, the United States district
3 court for the judicial district in which the proceeding is or
4 may be held shall issue, upon the request of the United
5 States attorney for such district, an order requiring such
6 individual to give any testimony or provide any other in-
7 formation which he refuses to give or provide on the basis
8 of his privilege against self-incrimination.

9 “(b) A United States attorney may, with the approval
10 of the Attorney General (or the Deputy Attorney General,
11 or any Assistant Attorney General, designated by the At-
12 torney General), request an order under subsection (a)
13 when in his judgment—

14 “(1) the testimony or other information from such
15 individual may be necessary to the public interest; and

16 “(2) such individual has refused or is likely to
17 refuse to testify or provide other information on the
18 basis of his privilege against self-incrimination.

19 **“§ 6003. Certain administrative proceedings**

20 “(a) In the case of any individual who has been or who
21 may be called to testify or provide other information at any
22 proceeding before an agency of the United States, the agency
23 may issue an order requiring the individual to give any tes-

1 timony or provide any other information which he refuses to
2 give or provide on the basis of his privilege against self-
3 incrimination.

4 “(b) An agency of the United States may issue an
5 order under subsection (a) only if in its judgment—

6 “(1) the testimony or other information from such
7 individual may be necessary to the public interest; and

8 “(2) such individual has refused or is likely to
9 refuse to testify or provide other information on the
10 basis of his privilege against self-incrimination.

11 The agency may issue such an order no earlier than ten days
12 after the day on which it served the Attorney General with
13 notice of its intention to issue the order.

14 **“§ 6004. Congressional proceedings**

15 “(a) In the case of any individual who has been
16 or may be called to testify or provide other information
17 at any proceeding before either House of Congress or any
18 committee of either House, or any joint committee of
19 the two Houses, a United States district court shall issue,
20 upon the request of a duly authorized representative of
21 the House of Congress or the committee concerned, an
22 order requiring such individual to give any testimony or
23 provide other information which he refuses to give or
24 provide on the basis of his privilege against self-incrimi-
25 nation.

1 “(b) Before issuing an order under subsection (a),
2 a United States district court shall find that—

3 “(1) in the case of a proceeding before either
4 House of Congress, the request for such an order has
5 been approved by an affirmative vote of a majority
6 of the Members present of that House;

7 “(2) in the case of a proceeding before a com-
8 mittee of either House of Congress or a joint commit-
9 tee of both Houses, the request for such an order has
10 been approved by an affirmative vote of two-thirds
11 of the members of the full committee; and

12 “(3) no earlier than ten days prior to the day on
13 which the request for such an order was made, the At-
14 torney General was served with notice of an intention
15 to request the order.

16 “(c) Upon application of the Attorney General, the
17 United States district court shall defer the issuance of any
18 order under subsection (a) for such period (not longer than
19 twenty days from the date of the request for such order)
20 as the Attorney General may specify.

21 **“§ 6005. Definitions**

22 “As used in this part—

23 “(1) the term ‘agency of the United States’ means
24 an executive department (as defined in section 101 of
25 title 5), a military department (as defined in section

1 102 of title 5), the Atomic Energy Commission, the
2 China Trade Act registrar appointed under section 143
3 of title 15, the Civil Aeronautics Board, the Federal
4 Communications Commission, the Federal Deposit In-
5 surance Corporation, the Federal Maritime Commis-
6 sion, the Federal Power Commission, the Federal Trade
7 Commission, the Interstate Commerce Commission, the
8 National Labor Relations Board, the National Trans-
9 portation Safety Board, the Railroad Retirement Board,
10 the Securities and Exchange Commission, the Subversive
11 Activities Control Board, or a board established under
12 section 715d of title 15;

13 “(2) the term ‘other information’ includes any
14 book, paper, document, record, recording, or other mate-
15 rial;

16 “(3) the term ‘proceeding before an agency of the
17 United States’ means any proceeding before such an
18 agency with respect to which it is authorized to issue
19 subpoenas and to take testimony of witnesses under oath
20 or affirmation; and

21 “(4) the term ‘court of the United States’ means
22 any of the following courts: the Supreme Court of the
23 United States, a United States court of appeals, a United
24 States district court established under chapter 5 of title
25 28, the District Court of Guam, the District Court of

1 the Virgin Islands, the United States Court of Claims,
2 the United States Court of Customs and Patent Appeals,
3 the Tax Court of the United States, the Customs Court,
4 and the Court of Military Appeals.”

5 (b) The table of parts for title 18, United States Code,
6 is amended by adding at the end thereof the following:

“V. Immunity of witnesses----- 6001”.

7 TITLE II—CONFORMING AMENDMENTS

8 SEC. 201. The third sentence of paragraph (b) of sec-
9 tion 6 of the Commodity Exchange Act (7 U.S.C. 15) is
10 amended by striking out “of section 12 of the Interstate Com-
11 merce Act, as amended and supplemented (U.S.C. 1934
12 ed., title 49, secs. 12, 46, 47, and 48), relating to the
13 attendance and testimony of witnesses, the production of
14 documentary evidence, and the immunity of witnesses” and
15 by inserting in lieu thereof the following: “of section 12 of
16 the Interstate Commerce Act and of the Act of February
17 11, 1893 (49 U.S.C. 46), relating to the attendance and
18 testimony of witnesses and the production of documentary
19 evidence”.

20 SEC. 202. Subsection (f) of section 13 of the Perish-
21 able Agricultural Commodities Act, 1930 (7 U.S.C. 499m
22 (f)) is repealed.

23 SEC. 203. (a) Section 16 of the Cotton Research and

1 Promotion Act (7 U.S.C. 2115) is amended by striking
2 out “(a)” and by striking out subsection (b).

3 (b) The section heading for such section 16 is amended
4 by striking out “; **self-incrimination**”.

5 SEC. 204. The fourth sentence of subsection (d) of sec-
6 tion 10 of the Federal Deposit Insurance Act (12 U.S.C.
7 1820 (d)) is repealed.

8 SEC. 205. The seventh paragraph under the center head-
9 ing “DEPARTMENT OF JUSTICE” in the first section of the
10 Act of February 25, 1903 (32 Stat. 904, 15 U.S.C. 32) , is
11 amended by striking out “: *Provided, That*” and all that
12 follows in that paragraph and inserting in lieu thereof a
13 period.

14 SEC. 206. The Act of June 30, 1906 (34 Stat. 798,
15 15 U.S.C. 33) , is repealed.

16 SEC. 207. The seventh paragraph of section 9 of the Fed-
17 eral Trade Commission Act (15 U.S.C. 49) is repealed.

18 SEC. 208. Subsection (c) of section 22 of the Securities
19 Act of 1933 (15 U.S.C. 77v (c)) is repealed.

20 SEC. 209. Subsection (d) of section 21 of the Securities
21 Exchange Act of 1934 (15 U.S.C. 78u (d)) is repealed.

22 SEC. 210. Subsection (e) of section 18 of the Public
23 Utility Holding Company Act of 1935 (15 U.S.C. 79r (e))
24 is repealed.

25 SEC. 211. Subsection (d) of section 42 of the Invest-

1 ment Company Act of 1940 (15 U.S.C. 80a-41(d)) is
2 repealed.

3 SEC. 212. Subsection (d) of section 209 of the Invest-
4 ment Advisers Act of 1940 (15 U.S.C. 80b-9(d)) is
5 repealed.

6 SEC. 213. Subsection (c) of section 15 of the China
7 Trade Act, 1922 (15 U.S.C. 155(c)) is repealed.

8 SEC. 214. Subsection (g) of section 307 of the Federal
9 Power Act (16 U.S.C. 825f(g)) is repealed.

10 SEC. 215. Subsection (b) of section 835 of title 18,
11 United States Code, is amended by striking out the third
12 sentence thereof.

13 SEC. 216. (a) Section 895 of title 18, United States
14 Code, is repealed.

15 (b) The table of sections of chapter 42 of such title
16 is amended by striking out the item relating to section 895.

17 SEC. 217. (a) Section 1406 of title 18, United States
18 Code, is repealed.

19 (b) The table of sections of chapter 68 of such title
20 is amended by striking out the item relating to section 1406.

21 SEC. 218. Section 1954 of title 18, United States Code,
22 is amended by striking out "(a) Whoever" and inserting
23 in lieu thereof "Whoever" and by striking out subsection

24 (b) thereof.

1 SEC. 219. (a) Section 2514 of title 18, United States
2 Code, is repealed.

3 (b) The table of sections of chapter 119 of such title is
4 amended by striking out the item relating to section 2514.

5 SEC. 220. (a) Section 3486 of title 18, United States
6 Code, is repealed.

7 (b) The table of sections of chapter 223 of such title is
8 amended by striking out the item relating to section 3486.

9 SEC. 221. Subsection (e) of section 333 of the Tariff
10 Act of 1930 (19 U.S.C. 1333 (e)) is amended by striking
11 out “: *Provided, That*” and all that follows in that subsec-
12 tion and inserting in lieu thereof a period.

13 SEC. 222. (a) Section 4847 of the Internal Revenue
14 Code of 1954 is repealed.

15 (b) The table of sections of part II of subchapter (D)
16 of chapter 39 of such Code is amended by striking out the
17 item relating to section 4874.

18 SEC. 223. (a) Section 7493 of the Internal Revenue
19 Code of 1954 is repealed.

20 (b) The table of sections of subchapter (E) of chapter
21 76 of such Code is amended by striking out the item relating
22 to section 7493.

23 SEC. 224. Paragraph (3) of section 11 of the Labor
24 Management Relations Act, 1947 (29 U.S.C. 161 (3))
25 is repealed.

1 SEC. 225. The third sentence of section 4 of the Act
2 entitled "An Act to provide that tolls on certain bridges
3 over navigable waters of the United States shall be just and
4 reasonable, and for other purposes", approved August 21,
5 1935 (33 U.S.C. 506), is repealed.

6 SEC. 226. Subsection (f) of section 205 of the Social
7 Security Act (42 U.S.C. 405 (f)) is repealed.

8 SEC. 227. Paragraph (c) of section 161 of the Atomic
9 Energy Act of 1954 (42 U.S.C. 2201 (c)) is amended by
10 striking out the third sentence thereof.

11 SEC. 228. Subsection (c) of section 12 of the Railroad
12 Unemployment Insurance Act (45 U.S.C. 362 (c)) is
13 repealed.

14 SEC. 229. Section 28 of the Shipping Act, 1916 (46
15 U.S.C. 827) is repealed.

16 SEC. 230. Subsection (c) of section 214 of the Merchant
17 Marine Act, 1936 (46 U.S.C. 1124 (c)) is repealed.

18 SEC. 231. Subsection (l) of section 409 of the Com-
19 munications Act of 1934 (47 U.S.C. 409 (l)) is repealed.

20 SEC. 232. (a) The second sentence of section 9 of Inter-
21 state Commerce Act (49 U.S.C. 9) is amended by striking
22 out "; the claim" and all that follows in that sentence and
23 inserting in lieu thereof a period.

24 SEC. 233. The third sentence of section 3 of the Act

1 entitled "An Act to further regulate Commerce with foreign
2 nations and among the States", approved February 19, 1903
3 (49 U.S.C. 43) is amended by striking out "; the claim"
4 and all that follows in that sentence down through and includ-
5 ing "Provided, That the provisions" and inserting in lieu
6 thereof ". The provisions".

7 SEC. 234. The first paragraph of the Act of February 11,
8 1893 (27 Stat. 443; 49 U.S.C. 46) is repealed.

9 (b) Subsection (a) of section 316 of the Interstate
10 Commerce Act (49 U.S.C. 916(a)) is amended by strik-
11 ing out the comma following "part I" and by striking out
12 ", and the Immunity of Witnesses Act (34 Stat. 798; 32
13 Stat. 904, ch. 755, sec. 1),".

14 (c) Subsection (a) of section 417 of the Interstate
15 Commerce Act (49 U.S.C. 1017(a)) is amended by
16 striking out the comma after "such provisions" and by
17 striking out ", and of the Immunity of Witnesses Act (34
18 Stat. 798; 32 Stat. 904, ch. 755, sec. 1),".

19 SEC. 235. Subsection (i) of section 1004 of the
20 Federal Aviation Act of 1958 (49 U.S.C. 1484(i)) is
21 repealed.

22 SEC. 236. The ninth sentence of subsection (c) of
23 section 13 of the Internal Security Act of 1950 (50 U.S.C.
24 792(c)) is repealed.

25 SEC. 237. Section 1302 of the Second War Powers

1 Act, 1942 (50 U.S.C. App. 643a) is amended by striking
2 out the fourth sentence thereof.

3 SEC. 238. Paragraph (4) of subsection (a) of sec-
4 tion 2 of the Act entitled "An Act to expedite national
5 defense, and for other purposes", approved June 28, 1940
6 (50 U.S.C. App. 1152(a)(4)), is amended by striking
7 out the fourth sentence thereof.

8 SEC. 239. Subsection (d) of section 6 of the Export
9 Control Act of 1949 (50 U.S.C. App. 2026(b)) is re-
10 pealed.

11 SEC. 240. Subsection (h) of section 14 of the Natural
12 Gas Act (15 U.S.C. 717m(h)) is repealed.

13 TITLE III—EFFECTIVE DATE

14 SEC. 301. The provisions of part VI of title 18, United
15 States Code, added by title I of this Act, and the amendments
16 and repeals made by title II of this Act, shall take effect on
17 the sixtieth day following the date of the enactment of this
18 Act. No amendment to or repeal of any provision of law
19 under title II of this Act shall affect any immunity to which
20 any individual is entitled under such provision by reason
21 of any testimony or other information given before such
22 day.

Mr. KASTENMEIER. We hope this morning to proceed promptly and deliberately on this bill. We do have permission, I understand, to sit during general debate. We will proceed this morning until interrupted by a quorum call or vote, and if necessary, we will reconvene this afternoon.

This legislation which is quite important in terms of the Federal criminal law is recommended by the National Commission on Reform of the Federal Criminal Laws, on which Mr. Poff, Mr. Edwards, and I comprise the membership from the House of Representatives. This relates to the matter of granting immunity to a witness in order to compel him to testify despite his assertion of the privilege against self-incrimination.

We are very pleased to have as our first witness this morning our colleague, Mr. Poff, who as everyone knows, is Vice Chairman of the National Commission on Reform of Federal Criminal Laws. We are very honored to hear from our colleague, Mr. Poff.

STATEMENT OF HON. RICHARD H. POFF, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. POFF. Mr. Chairman and my distinguished colleagues, as the chairman has just indicated, I am here today wearing really three hats—one as a member of this subcommittee, one as a coauthor of the legislation, which is the subject of the hearing before the subcommittee, and one as Vice Chairman of the National Commission on Reform of the Federal Criminal Laws. This Commission, you may recall, was established by the Congress in 1966, and commissioned to undertake a study of the Federal criminal laws and to recommend revisions and improvements. My purpose principally is to present the Commission's recommendations regarding reform of the Federal immunity laws, which is the subject of an interim report of the Commission, sent to the President and the Congress on March 17, 1969.

With your permission, Mr. Chairman, I will first undertake to explain something about the nature of the Commission's project. The Commission consists of 12 members—three appointed by the President, three Federal judges appointed by the Chief Justice of the United States, three Members of the U.S. Senate appointed by the President pro tem of the Senate, and three Members of the House of Representatives appointed by the Speaker. As the chairman has already indicated, the three House Members include himself, the distinguished gentleman from California, Mr. Edwards, and myself. The three Members from the Senate are Senator McClellan, Senator Ervin, and Senator Hruska.

Judge George Edwards of the Sixth Circuit Court of Appeals, who will be a witness later this morning, is one of the members appointed by the Chief Justice. Another is Chief Judge Thomas McBride of the Northern District of California, and Judge Leon Higginbotham of the Eastern District of Pennsylvania. Appointed by the President are two distinguished lawyers in private life, Mr. Donald Scott Thomas of Austin, Tex., and Mr. Theodore Voorhees of Philadelphia. The third Presidential appointee is our distinguished Chairman, former Governor of the State of California, Hon. Pat Brown.

We also have an Advisory Committee consisting of 15 selected experts in which we now have one vacancy. The experts range from

the police commissioner of a major city to scholars in the field of constitutional law. The Chairman of the Advisory Committee, I might add, is retired Justice of the Supreme Court, Mr. Justice Tom Clark.

At the moment our principal task is the drafting of a new substantive criminal code. We will undertake to define and grade offenses, define defenses, which as you know, is something never previously undertaken by the Congress, and set forth what we think will be a comprehensive sentencing structure. When we are concluded we expect to present to the Congress for its consideration, again for the first time in its history, an integrated systematic and unified criminal code. It will contain, for example, uniform definitions of culpability, and other such explicit statements on matters heretofore left to haphazard determination by the courts. It will also contain what we think will be substantial improvements regarding problems relating to the invocation of Federal jurisdiction in criminal matters. The initial study and drafting is under the supervision of Prof. Louis B. Schwartz, a most able staff, and one who will be testifying this morning. Their work is augmented from time to time by special contract consultants and one of those, Prof. Robert Dixon, will be a witness later today.

The drafts which the staff prepare are discussed and refined at joint meetings of the Commission and the Advisory Committee. Since our proposed code will be unified, integrated, and systematic, it is difficult to consider one reform in the absence of others. We are planning to publish, we hope within the next several months, a study draft of a nearly complete code to be circulated for scholarly criticism.

At the conclusion of that effort the Commission and the committee jointly will consider the criticisms that have been registered, and thereafter we will proceed to make our final determination as a commission and present our final work product to the Congress sometime before the life of the Commission expires in November 1970. We have undertaken to deal with the question of witness immunity for a variety of reasons, all of which I will not undertake to detail here unless the committee wants me to do so.

At this point, Mr. Chairman, may I ask unanimous consent that at the conclusion of my formal testimony there be written into the record the text of the interim report sent to the President and the Congress by the Commission on March 17, 1969?

Mr. KASTENMEIER. Without objection, that report will be so included.

(The report appears at p. 36, *infra*.)

Mr. POFF. The recommendations found in that report, which was based on the report submitted to the Commission by Professor Dixon, and which will later be included in the files of the committee, were translated into what is now H.R. 11157. This bill was introduced, as the chairman has indicated, by myself, for myself, and for my colleagues, Mr. Kastenmeier and Mr. Edwards of California. In the Senate, a companion bill, identical in language, was introduced by the three Senate members of the National Commission.

Now if I may, I will undertake to explain briefly the contents of the bill. By way of preface, let me attempt, if I may, first to explain what the present law is with respect to immunity statutes. This is

something of an oversimplification, but I think it is accurate enough in this context to say that the grant of immunity to a witness today constitutes a total defense to prosecution for the crime about which the testimony is compelled.

Under H.R. 11157, the immunity grant would constitute a ground for the suppression of the use of compelled testimony and the fruits of that testimony, rather than a total defense. It would be a use restriction, a use restriction similar to the exclusionary rule which is now applied against such things as involuntary confessions, evidence acquired from unlawful searches and seizures, evidence acquired in violation of the *Miranda* warnings, to cite only a few examples. The witness could be prosecuted for his crime under this bill, provided the evidence used against him is independent of and untainted by the compelled testimony or its fruits.

On page 2 of the bill you will find section 6001. That section would provide that when a witness refuses on the basis of his privilege against self-incrimination to testify or to provide other information, and the witness is presented with an order of the court compelling his testimony, and granting him immunity from the use of such testimony and its fruits, then the witness must testify under pain of contempt of court. This immunity applies in proceedings before a U.S. court, a U.S. grand jury, an agency of the United States, either House of the Congress, a joint committee of the Congress, or a committee of either House of the Congress. This section contains the substantive change in the present witness immunity statute which I have just undertaken to define. That is to say, it grants immunity from the use of the witness' testimony, or—and I am quoting now from the bill—“any information directly or indirectly derived from such testimony or other information.” That would be in lieu of the present law which grants a complete immunity from prosecution.

Now section 6002 deals with court and grand jury proceedings. Specifically, it concerns individuals who are called to testify at any proceeding before a U.S. court or a grand jury. In such cases the U.S. attorney requests the U.S. district court to issue an order requiring the individual to give testimony or furnish information which he has previously refused to provide. However, the U.S. attorney must first secure approval of the Attorney General of the United States or his delegate, and certify that the testimony or other information is necessary in the public interest.

In section 6003, which deals with certain administrative proceedings, an application for a court order, and the Attorney General's approval are not preconditions to immunity proceedings before an agency of the United States. The only check on the agency's discretion under this section is a 10-day waiting period after the day on which it served the Attorney General with notice of its intention to issue the order. The waiting period, I might say, is designed to give the Attorney General, as coordinator, the opportunity to persuade the agency that an immunity grant might somehow jeopardize the prosecution of the witness by the Federal Government or by a State government.

Now, under section 6004, like court and grand jury proceedings, both the Attorney General and the U.S. district court play a role in immunity granted in congressional proceedings. However, unlike the court and grand jury proceedings, the Attorney General's role is not

one of approval but of notice only. The Attorney General is required to be given 10 days notice before the order is served. He also has the power under that section to defer the issuance of such an order for a 20-day period. The courts again are assigned the ministerial task of determining whether the procedures outlined in the statute have been met.

With reference to congressional proceedings, you will note that a majority vote of the Members present in the House, or in the Senate, is required. In the case of proceedings before a committee of either House, an affirmative vote of two-thirds of the members of the full committee is required.

I have just finished discussing all sections of title I except the definition section, which is self-explanatory. Title II contains the conforming amendments necessary to bring the immunity sections of the laws presently on the statute books into conformity with the new statute. I might pause to say parenthetically that we now have some 50 witness immunity provisions on the statute books.

Finally, title III fixes the effective date of the new law at 60 days following the date of enactment. It also contains a grandfather clause for witnesses who previously have been granted immunity under the present laws.

Mr. Chairman, I like, whenever possible, to anticipate the arguments that opponents are likely to make, and I am confident that the criticism which will be made here is that it may be unconstitutional. In support of that argument, great reliance will be made upon *Counselman v. Hitchcock*. I can undertake a rebuttal to the argument, but unless I am requested to do so in order to conserve time and permit other witnesses more time, I will simply say that the constitutional argument in my judgment rests upon a misreading of the *Counselman* case.

Mr. KASTENMEIER. May I interject to say we will have a witness who will raise that case and I might suggest that through cross-examination we can develop a dialog that will treat that more fully.

Mr. POFF. Very well, Mr. Chairman.

I will pass to the remainder of my testimony and it will be brief. I think it would be appropriate in support of the legislation to attempt to inventory some of the policy considerations which I think dictate action in this area.

Mr. Chairman, today's crime crisis, I believe, requires more effective techniques in the information-gathering process. The witness immunity technique is designed to gather information from a witness with unclean hands, information which can be used by the prosecution in proper cases to prosecute others involved in his joint criminal venture. Under present immunity statutes, the price that society pays for that information is a full pardon for the witness, no matter how unclean his hands might be. That price, I think, is too high. It is a gratuity which the Constitution does not require. The *Counselman* case to which I referred a moment ago speaks of the necessity of making the grant of immunity coextensive with the privilege granted by the fifth amendment.

In my judgment and in the judgment of courts which have pronounced upon the subject since the *Counselman* case, the bill, H.R. 11157, fully satisfies that constitutional test. The new use restriction

technique will make the price society pays coextensive with the witness' constitutional privilege, and yet, I think, permit society to prosecute the witness on independent and untainted evidence. It would also make it possible for society in that process to assemble the evidence necessary to prosecute others who otherwise would go without any punishment for the crimes that they have committed; a second policy consideration which I think is equally important.

This unnecessarily broad impact of the present total defense immunity statute needlessly complicates the law enforcement process between the Federal Government and the State governments. Supreme Court decisions have made it clear that a Federal immunity grant not only grants immunity from Federal prosecutions but also State prosecutions, and this by way of transporting the fifth amendment via the 14th amendment to the States. This operates as a total defense even though the State's evidence might have been gathered without any knowledge whatever of the federally compiled testimony.

Without some Federal-State clearinghouse system the Federal prosecutor is understandably reluctant to compel testimony by a grant which might immunize the witness against State prosecution for a State crime.

Without a clearinghouse system the State prosecutor, of course, is reluctant to begin a prosecution which may be frustrated. If a Federal-State clearinghouse system is impractical—and I am bound to think under our Federal system it is impractical—then the only alternative is to adopt the use restriction concept which permits the States to prosecute so long as it does not use the federally compelled testimony or any of the fruits of the federally compelled testimony. The States can live with this, Mr. Chairman. As a matter of fact, the States are already living with the use restriction concept in other areas, and I have already referred briefly to them. For example, there is really a use restriction on information obtained by a policeman, a Federal or a State policeman, without *Miranda* warnings. The same is true of information obtained from unlawful searches and seizures. The same is true of confessions that are called involuntary. So, Mr. Chairman, it seems to me that the urgency of the need is apparent. I call attention to the fact that our Commission undertook this special study at the specific request of the Judicial Conference and the Department of Justice, that our Commission without exception, recommended this legislation, and it has the enforcement of some of the foremost scholars in the field of criminal justice. As other witnesses later will testify, the need, I say, is urgent.

Mr. Chairman, if the committee would care to ask me questions I will attempt to respond, and if not, I will take my seat and don my other hat and interrogate the witnesses who follow.

Mr. KASTENMEIER. I want to thank our colleague for his most enlightening and superb testimony, characteristic of his remarkable contribution to the work of the Commission.

Mr. POFF. I thank the Chairman.

Mr. KASTENMEIER. I have but one question. Others may be saved for representatives of the Commission, and that is a question to which I think he, peculiarly unlike any other witness who will appear before us, may be able to respond. That is a general question on the use of immunity in Congress. Are you familiar with the past use of the immunity concept in the Senate and the House of Representatives?

Mr. POFF. Yes.

Mr. KASTENMEIER. Are you familiar with particular cases?

Mr. POFF. No, I cannot say I can cite passages from the cases, but in a general way I am familiar with the experience the Congress has had in that field.

Mr. KASTENMEIER. Is it your experience that this is a procedure used rarely by the Congress?

Mr. POFF. It is.

Mr. KASTENMEIER. Do you think that any change in the law will make it procedurally more frequently used?

Mr. POFF. That is difficult to anticipate, sir. Whether or not it is more frequent, I think it will be more standard and the rights of the witness will be better protected because it utilizes the procedural safeguards which will apply as well to the U.S. courts and the U.S. grand juries and to agencies of the United States.

Mr. HUTCHINSON. Mr. Chairman, I have one question that I would like to put to our distinguished colleague because I am interested in his philosophy regarding the question. I will put it this way: I am somewhat disturbed by the provision in this bill which apparently would leave it up to an executive agency, after having notified the Attorney General and the Attorney General perhaps failed to persuade the agency against it, to go ahead and issue its order and to compel testimony in some circumstances which I conceive might really be against the best interests of justice. For instance, it might be the opinion and judgment of the Justice Department that society had a pretty strong case against this witness, and to compel him to testify in another case is going to knock the props out from under the case that they have against the witness.

The agency, on the other hand, so anxious to pursue the case at hand, I fear, might say, "Well, we want to get this case finished," and go ahead and issue its order.

I am wondering why this bill does not give the Attorney General, or a court, if that is better, some actual power to make a decision and say, "You cannot compel that testimony."

Mr. POFF. I appreciate the concern the gentleman has expressed, and I call attention to the fact that the bill does require 10 day's notice to the Attorney General. The Attorney General in that 10-day period would have the opportunity to attempt to persuade the executive agency that it would be unwise to grant immunity in a particular case. As a practical matter, I cannot imagine that the head of the agency or the hearing officer empowered to make the grant would proceed to make the grant in the face of a strong injunction by the Attorney General. It might be possible, as the gentleman's question suggests, to give the Attorney General the power to veto the grant, and yet the Commission felt that it was not necessary with respect to an administrative agency to give him the same power as is given the Attorney General with respect to proceedings before grand juries, the courts, and the Congress.

I am afraid that is not a satisfactory answer, and if the gentleman would care to offer an amendment that would tend to make the procedures with respect to administrative agencies more nearly parallel with those in other cases, I am confident that the subcommittee would consider it carefully.

Mr. HUTCHINSON. I thank the gentleman.

Mr. KASTENMEIER. As I understand, the discretion does not really lie with the Attorney General.

Mr. HUTCHINSON. I do not read it that way, Mr. Chairman, with regard to the administrative proceedings.

Mr. KASTENMEIER. I see.

The gentleman from New York.

Mr. RYAN. I should like to thank our colleague for a very clear statement of the intent and purposes of the bill. I think Mr. Poff, as usual, has made a very explicit statement concerning the purpose and it is certainly very helpful, I am sure, to all of us.

Mr. POFF. I thank my colleague.

Mr. RYAN. I know we will be discussing on the committee a number of the questions which may be raised by other witnesses. I really do not have any questions at this point except perhaps to go back to this question of whether or not any discretion should as a matter of policy rest with a court which has been requested to issue an order on the basis of a request emanating from a congressional committee. Has the gentleman concluded that it would be unwise to give the court discretion in this situation so that an application might be made to the court and the court, instead of the language on page 4, would not read "shall," but would read "The District Court may issue." What would the gentleman's reaction be to that?

Mr. POFF. As my colleague, I am sure, knows, and this is undoubtedly at the root of his question, what is involved here is really a question of the separation of powers. This was one of the anxieties that have been entertained for some time in this general area. The court in the *Ullman* decision decided that because the function of the court was purely ministerial, there was no violation of the separation of powers doctrine. If we give the court the power to make decisions with respect to the merits involved in this process, we raise the question again of violation of separation of powers. That is why this language was written as it was.

Mr. RYAN. I thank the gentleman.

Mr. KASTENMEIER. The gentleman from Illinois.

Mr. MIKVA. Mr. Poff, pursuing the question that Mr. Hutchinson raises, which troubles me a little, too, the immunity from use would apply even if a prosecution were pending at the time.

Is that the case?

Mr. POFF. The immunity from use would apply if a prosecution were pending at the time.

Mr. MIKVA. Can I give the absurd example that came to my mind? Suppose the Secretary of the Interior in the Teapot Dome scandal had held a hearing and all of the witnesses that were prosecuted and convicted testified as to the evidence that was subsequently used to convict them, that would have immunized them from the use of that evidence even though the prosecution had already commenced, as I read the bill.

Mr. POFF. As the gentleman understands from the contents of this bill, it would be necessary that the witness plead the fifth amendment. Based upon his plea the U.S. attorney would have to get the permission from the Attorney General and thereafter the court would enter the order to testify. Thereafter the witness would have

the option of testifying pursuant to the order, or remain mute, and risk a contempt of court proceeding, or if he chose to testify untruthfully and risk a perjury prosecution.

Mr. MIKVA. I do not think I made my question clear, and I am sorry. The Secretary of the Interior, as I recall my history, was in the conspiracy, and he is head of one of the executive departments who has the right in effect to grant the immunity from use here. What I am saying is that even at the late date after the prosecution commenced, if the Secretary of the Interior under this statute had held a hearing and had ordered the witnesses to testify, and they had testified, then all of that evidence would have then become immunized from any further use in the prosecution. As I read this section 6003 the Secretary of the Interior would not have had to go to any court because those proceedings are automatic.

Mr. POFF. This follows the same concern expressed by the gentleman from Michigan.

Mr. MIKVA. That is right.

Mr. POFF. I repeat what I said to him. I think if the subcommittee felt that an amendment in that area were in order it would be carefully considered.

Mr. MIKVA. Thank you very much.

Mr. KASTENMEIER. Mr. Biester?

Mr. BIESTER. I have no questions of a theoretical nature to ask. I find it hard to suppress a reference to jingoism in Philadelphia and the contribution that the Philadelphia bar has made to the work of the commission.

Mr. POFF. It has been substantial, I might say.

Mr. BIESTER. I wonder if the Commission has any kind of canvass or any kind of formal or informal record as to how frequently these 50 separate sections have been used or are in current use, and the extent to which prosecutors are inhibiting themselves in the use of them.

Mr. POFF. The consultant to the Commission did, and as you will hear later from Mr. Wilson of the Criminal Division, there has been a great deal of experience in the area. Mr. Petersen will accompany Mr. Wilson and if the committee cares to hear from him, he can supply data in more definitive detail.

Mr. BIESTER. Very well.

Mr. RYAN. I have one further question relating to section 6003. As I read that section the order compelling testimony with respect to administrative agency would be issued by the agency itself; is that correct?

Mr. POFF. Yes, the language is explicit in that regard.

Mr. RYAN. In other words, there would be no requirement for the agency to apply to a court for an order to issue.

Mr. POFF. It issues the order if in its judgment the testimony may be necessary in the public interest, and if the individual has refused to testify. The agency is required, as I said earlier, to give 10 days' notice to the Attorney General.

Mr. RYAN. What power would the Attorney General have in this situation, assuming he had 10 days' notice?

Mr. POFF. It would be largely a power of persuasion.

Mr. RYAN. In other words, after 10 days the agency could proceed to issue an order to compel the testimony.

Mr. POFF. The gentleman is correct.

Mr. RYAN. How would the gentleman feel about requiring the agency to apply to the court for an order as section 6004 requires congressional committees to do?

Mr. POFF. As I have just said in response to the question of the gentleman from Michigan and Mr. Mikva, I am sure the committee would consider sympathetically any change that the subcommittee might want to present in that area. I will say, however, at this point, if I may, Mr. Chairman, that the witness who follows me representing the Commission, either Mr. Green or Mr. Dixon, will be glad to make a further explanation about the rationale which treated differently the process in section 6003 as compared with the process in other sections.

Mr. RYAN. Thank you.

Mr. KASTENMEIER. Thank you very much.

Mr. POFF. Thank you, Mr. Chairman.

(The Mar. 17, 1969, interim report of the National Commission on Reform of Federal Criminal Laws is as follows:)

THE NATIONAL COMMISSION ON
REFORM OF FEDERAL CRIMINAL LAWS,
Washington, D.C., March 17, 1969.

Hon. JOHN W. McCORMACK,
The Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: This is the second interim report by the National Commission on Reform of Federal Criminal Laws and the first recommending a specific reform for consideration by the President and Congress. The reform relates to the matter of granting immunity to a witness in order to compel him to testify despite his assertion of the privilege against self-incrimination.

As noted in our first interim report (of November 4, 1968), we are primarily engaged in drafting a new code of Federal criminal laws, defining offenses, defenses, and sentencing authority. Since it is to be an integrated and systematic code, our work does not usually lend itself to severable recommendations. We have been prompted to move ahead with the recommendations here, however, not only because the need is manifest but also because it can be met by provisions which are independent of the other reforms upon which we have been working.

We annex to this report statutory provisions recommended for reform of immunity, together with a report on Federal immunity prepared for us by Professor Robert G. Dixon, Jr., of the George Washington University Law Center. The report includes appendices consisting of a list of existing Federal immunity laws and some samples of them.

Upwards of 50 different statutes now authorize the granting of immunity in federal matters. They vary in a number of respects. The proposed reform would replace them with a single set of provisions having the following features:

1. The scope of immunity would be converted from immunity of the witness from prosecution for all matters related to his testimony to immunity from use of the testimony, or its fruits, against the witness in a criminal case.
2. The witness would have to claim his privilege in all cases before the immunity could be granted, unlike some existing statutes which confer immunity automatically when a subpoenaed witness testifies.
3. Instead of the authority to grant immunity being confined to inquiries having a specified subject, which leaves some matters of interest outside the compulsory testimony power, the immunity authority would extend to *all* court, grand jury, and Congressional proceedings, and to those administrative proceedings designated by Congress. Authority to determine when the need for information warrants an immunity grant would be vested in responsible officials to the extent of their jurisdiction.
4. To meet the concern that immunity may be improvidently conferred, a centralizing role is given to the Attorney General. He, or another high Department of Justice official, must approve grants to be authorized by a United States

Attorney; and he must be given notice of grants to be conferred in Congressional and administrative proceedings. The proposal requires notice but does not give a veto-power to the Attorney General because the likelihood of his being able to persuade the Congress or department or agency officials that a particular immunity grant would be unwise makes it unnecessary to face difficult constitutional or policy issues arising from a requirement that he approve it.

5. Since on many occasions it can be anticipated before a witness appears to testify that he will assert his privilege, the proposal permits a contingent grant of immunity by the responsible official, to become operative when the privilege is asserted. This procedure should permit avoiding inconvenience, delay, and unnecessary ritual.

6. Although we make no recommendation as to which official or what body within a department or agency should be granted the authority to confer immunity in administrative proceedings, we do provide a standard provision for the exercise of such authority once the Congress has determined by law who should have it.

We are satisfied that our substitution of immunity from use for immunity from prosecution meets constitutional requirements for overcoming the claim of privilege. Immunity from use is the only consequence flowing from a violation of the individual's constitutional right to be protected from unreasonable searches and seizures, his constitutional right to counsel, and his constitutional right not to be coerced into confessing. The proposed immunity is thus of the same scope as that frequently, even though unintentionally, conferred as the result of constitutional violations by law enforcement officers. The change from absolute immunity to a use-restriction supports our recommendation that Congress no longer confine immunity authority to inquiries regarding a limited range of legislatively-specified subjects. At the same time this change in the scope of the immunity avoids the concern, which has arisen as the result of recent Supreme Court decisions, regarding the impact of federally-compelled information on state prosecutions. State prosecutions would be thwarted only if the evidence upon which they are to proceed has been derived directly or indirectly from the federal compulsion.

The provisions we propose could appropriately be placed in Chapter 223 of Title 18 of the United States Code; at the same time the immunity provisions in Sections 895, 1406, 1954(b), 2514, and 3486 of that Title should be repealed. We further recommend that, except for Section 2424 of Title 18 (dealing with the filing of a statement required under the White Slave Act) and Section 5848 of Title 26 (dealing with registrations under the Gun Control Act of 1968), the immunity provisions of the other laws listed in Appendix A of the immunity report be repealed; at the same time legislation should be enacted naming the appropriate person or body in the various federal departments and agencies authorized to issue a direction to testify, as required by Section 3 of our proposal.

Directions to testify under Section 2 of the proposal (court and grand jury) and under Section 4 (Congress) can be enforced through existing provisions. When testimony is required by court order, refusal would be contempt under Section 401 of Title 18, United States Code. When testimony is required before Congress, refusal would be a misdemeanor under Section 192 of Title 2, United States Code.

The adequacy of existing law to deal with enforcement of directions to testify under Section 3 (formal administrative proceedings) will depend upon which officials or bodies Congress determines should have the immunity-granting authority. Existing provisions applicable to certain agencies now make it a misdemeanor to "refuse * * * to answer any lawful inquiry" of the agency. See, for example, first paragraph of Section 50 of Title 15, United States Code (Federal Trade Commission); subsection (c) of Section 78u of Title 15, United States Code (Securities and Exchange Commission); last sentence of Section 46 of Title 49, United States Code (Interstate Commerce Commission).

The Commission has under consideration a provision which would make it an offense to intentionally fail or refuse to comply with a direction to testify, lawfully issued under the provisions proposed here; but until it is forthcoming as a part of our complete code, we are satisfied with existing laws dealing with unlawful refusals to testify.

Respectfully submitted for the Commission.

Edmund G. Brown, Chairman, Don Edwards, George C. Edwards, Jr., Sam J. Ervin, Jr., A. Leon Higginbotham, Jr., Roman L. Hruska, Robert W. Kastenmeier, Thomas J. MacBride, John L. McClellan, Richard H. Poff, Donald S. Thomas, Theodore Voorhees.

NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

PROPOSED IMMUNITY PROVISIONS

Section (1). Immunity Generally

(a) A witness who asserts his privilege against self-incrimination before either House or committee of either House or a joint committee of both Houses of Congress, or a court or grand jury of the United States, or in a formal administrative proceeding may be directed to testify or produce other information as provided in this article. He shall not thereafter be excused from testifying or producing other information on the ground that his testimony or other information required of him may tend to incriminate him. But neither the testimony nor other compelled disclosures of the witness, nor any information or evidence derived therefrom, shall be used against the witness in any criminal case, except a prosecution for perjury or any other offense constituting a failure to comply with such direction.

(b) A direction to testify or produce other information authorized by this article may be issued prior to the witness's assertion of his privilege against self-incrimination; but the direction shall not be effective until the witness asserts his privilege against self-incrimination and the person presiding over the inquiry communicates the direction to him.

(c) As used in this article "other information" includes any book, paper, document, record, recordation, tangible object or other material; and "formal administrative proceeding" means any proceeding for which an agency of the United States is authorized to issue subpoenas and at which testimony of witnesses may be taken under oath.

Section (2). Immunity Before Court and Grand Jury

When the testimony or other information is to be presented to a court or grand jury, the direction to the witness to testify or produce other information shall be issued by the United States District Court upon application therefor by the United States Attorney. The application may be made whenever, in the judgment of the United States Attorney, the witness has asserted or is likely to assert his privilege against self-incrimination and his testimony or other information is or will be necessary to the public interest, and the application has been approved by the Attorney General or a Deputy or Assistant Attorney General designated by him.

Section (3). Immunity in Formal Administrative Proceeding

When the testimony or other information is to be presented in a formal administrative proceeding, the direction to the witness to testify or produce other information shall be issued by the person or persons in the agency concerned to whom such authority has been given by statute. The direction may be issued whenever, in the judgment of such person or persons, the witness has asserted or is likely to assert his privilege against self-incrimination and his testimony or other information is or will be necessary to the public interest, but no sooner than ten days after service of notice upon the Attorney General of an intention to do so.

Section (4). Immunity Before Congress

(a) When the testimony or other information is to be presented to either House or a committee of either House or a joint committee of both Houses of Congress, the direction to the witness to testify or produce other information shall be issued by a United States District Court, upon application therefor by a duly authorized representative of the House or committee concerned, and subject to the requirements of this section.

(b) Before issuing the direction, the court must find that application was authorized, in the case of proceedings before one of the Houses of Congress, by affirmative vote of a majority of the members present of that House, or in the case of proceedings before a committee, by affirmative vote of two-thirds of the members of the full committee.

(c) Notice of the application for issuance of the direction shall be served upon the Attorney General at least ten days prior to the date when the application is made. Upon request of the Attorney General, the court shall defer issuance of the direction for not longer than thirty days from the date of such notice to the Attorney General.

Mr. KASTENMEIER. The Chair would like to state that earlier he expected to have the gentleman from Florida, a former member of

the Judiciary Committee, Mr. Cramer, appear. The committee, without objection, will accept his testimony or written statement, for inclusion in the record.

At this time the committee is very pleased to welcome from the Department of Justice, the Honorable Will R. Wilson, Assistant Attorney General, Criminal Division. Mr. Wilson is well known for having made great legal and political contributions in the State of Texas before his recent appearance in Washington. Welcome to this committee, Mr. Wilson.

STATEMENT OF WILL WILSON, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY HENRY PETERSEN, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, AND JOHN DEAN III, ASSOCIATE DEPUTY ATTORNEY GENERAL FOR LEGISLATION

Mr. WILSON. Mr. Chairman, thank you.

Mr. Chairman and members of the subcommittee, I am pleased to support enactment of H.R. 11157, a bill entitled the "Federal Immunity of Witnesses Act." This bill implements a proposal of the National Commission on Reform of Federal Criminal Laws, which was endorsed by President Nixon in his statement to the Congress on April 23, 1969.

The history of Federal immunity legislation in the United States discloses that the Congress has enacted a host of regulatory statutes authorizing agencies of the executive branch of the Government and independent regulatory agencies to grant witness immunity under certain circumstances. Some of these require a witness to claim his constitutional privilege against self-incrimination and the compelling of his testimony despite such claim in order for him to receive immunity; others automatically accord witness immunity without any such claim of privilege. The Congress has not, until recently, conferred this immunity authority upon the Department of Justice despite the fact that the Department of Justice is responsible for Federal criminal law enforcement.

In the last 15 years, however, the Congress has recognized a growing need for immunity legislation in the field of criminal law enforcement. The Immunity Act of 1954 authorized grants of immunity by the Department of Justice as well as by the Congress in the field of national security (18 U.S.C. 3486). The Congress has since enacted several special immunity statutes granting the Department of Justice the authority to compel testimony necessary to the public interest in return for immunity from criminal prosecution. Such provisions are contained in the Narcotic Control Act of 1956 (18 U.S.C. 1406), the Welfare and Pension Plans Disclosure Act (18 U.S.C. 1954(b)), the Consumer Credit Protection Act (18 U.S.C. 895), and the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2514).

Utilizing these provisions, together with those contained in the various regulatory statutes, such as the Interstate Commerce Act, the Federal Communications Act, the Securities Exchange Act, and others, the Department of Justice has been able to obtain many indictments and convictions against major violators, especially in the fields of organized crime and labor racketeering, which otherwise would most probably not have been possible.

Let me illustrate. As a result of grants of immunity to witnesses under the Communications Act of 1934 convictions on interstate gambling charges were obtained in 1967 against three of the Nation's largest layoff bookmakers, Sam DiPiazza in New Orleans, Gilbert Beckley in Miami, and Eugene Nolan in Baton Rouge. In June of this year, as a result of immunity grants to various witnesses under the Labor-Management Reporting and Disclosure Act the Government was able to convict one of the most powerful labor leaders in the East, Peter Weber, president of Newark Local 825 and vice president of the International Union of Operating Engineers, on charges of extortion from contractors in connection with the construction of a major interstate oil pipeline in New Jersey. Recently Nicolo Licata, a leading Cosa Nostra figure in the Los Angeles area, was committed to prison by the Federal court in Los Angeles for civil contempt for refusing to testify pursuant to a limited grant of immunity concerning the gangland slaying of a minor figure in the Los Angeles Cosa Nostra organization. If he continues to refuse to testify in this limited area, Licata can be made to serve for almost 18 months, the duration of the grand jury. Under similar circumstances, Sam Giancana, a leading Chicago racketeer, was found guilty of civil contempt in 1965 and served over a year in Federal prison.

While the provisions of the Omnibus Crime Control Act of 1968, and the various other statutes, appear to provide the Department of Justice with a rather broad power of immunity, it is nevertheless the fact that these statutes do not allow the granting of immunity in all types of cases. The lack of uniformity in the procedures under existing Federal immunity legislation and the lack of total coverage clearly indicate a need for reform in this area.

These considerations prompted the President's Commission on Law Enforcement and Administration of Justice to call for the enactment of a general immunity statute.

The Department of Justice, therefore, strongly endorses H.R. 11157 which, when enacted, would constitute a general Federal immunity statute. It would create, in place of the present hodgepodge of existing immunity provisions tied to particular substantive statutes, a single immunity provision applicable to proceedings before courts and grand juries, agencies of the United States, and the Congress. A witness would be required to claim his privilege against self-incrimination as a precondition of obtaining immunity in all situations, thus preventing an unwitting, automatic grant of immunity as may presently occur under some existing statutes.

The legislation makes one additional major change in the immunity concept. As stated by the National Commission on Reform of Federal Criminal Laws to the President on March 17, 1969:

The scope of immunity would be converted from immunity of the witness from prosecution for all matters related to his testimony to immunity from use of the testimony, or its fruits, against the witness in a criminal case.

Thus, under the proposal the possibility of criminal prosecution based upon independent evidence remains open.

The conversion from absolute immunity from prosecution to the more limited use-restriction raises a constitutional question. It seems almost certain, however, that the use-restriction concept contained in this immunity proposal furnishes all the protection that the Constitution requires. The Supreme Court's expressions in *Murphy v.*

Waterfront Commission, 378 U.S. 42 (1964) (see especially the concurring opinion of Justice White); *Marchetti v. United States*, 390 U.S. 39 (1968); and *Gardner v. Broderick*, 392 U.S. 273 (1968) (statement of scope of immunity by Justice Fortas), indicate that complete immunity from prosecution is not essential and that a witness' privilege against self-incrimination would not be violated if he were compelled to testify under an assurance that the evidence he gave could not be used against him, either directly or indirectly, in a State or Federal prosecution. We in the Department of Justice are satisfied from these recent Supreme Court decisions that, with respect to the need for absolute immunity from prosecution, *Counselman v. Hitchcock*, 142 U.S. 547 (1892), has been rejected, or at least tacitly overruled or distinguished.

One of the most important features of this proposal is its requirement, in all three types of proceedings, of notice to a central law enforcement point, the Attorney General, as a means of attempting to insure that the public interest being promoted by one agency or branch of the Government, will not subvert the public interest sought to be promoted by another branch or agency of the Government. While the Attorney General's approval is required insofar as court and grand jury proceedings are concerned, the Attorney General is given an opportunity to object but not to veto any agency or congressional grant of immunity. This notice provision is important because it affords the agency or the Congress faced with an immunity decision the opportunity to be made aware of possible adverse consequences from a law enforcement point of view.

In our judgment this legislation constitutes a major and necessary advance in the field of criminal law and we urge its prompt enactment.

That constitutes our formal statement, Mr. Chairman.

Mr. KASTENMEIER. Section 6002 deals with court and grand jury proceedings and speaks of a witness "at any proceeding before a court of the United States or a grand jury of the United States."

What do you understand to be meant by "any proceeding?" For example, is it contemplated that the Department of Justice would be empowered to immunize witnesses in civil actions to which the United States is a party?

Mr. WILSON. I think so, yes. I think any type of discovery proceeding would apply.

I might briefly outline the general situations in which we now are confronted with this type of decision, if it would be helpful to the committee.

The first one occurs where, in much of our work, we interview or interrogate people who are already in a prison under some existing sentence. They are amenable to suggestion that they testify as to transactions and acts with which they were familiar before they entered the prison. There is a kind of bargaining process that emerges. They usually want some type of concession on their existing sentence, plus immunity from that which they are called upon to testify to if they make an agreement with the Government. That is one general situation where we use this extensively.

The second one is where we are in the process of investigating a particular individual for a particular crime and during the investigative process at some juncture the attorney for the suspect comes to

us and, in effect, offers the testimony of his client in exchange for some type of immunity from that crime which we are investigating. That is usually before any proceeding has occurred. That constitutes some of the most fruitful and productive of our uses of the immunity statute.

A typical situation occurs where there is an employee who, as an agent of a principal, is familiar with the entire transaction and the investigation is directed at that particular agent and we decide as a matter of policy that it is more important to prosecute the principal than the agent. We generally make some overtures through counsel for an exchange of immunity in that situation.

Another type of situation is in a proceeding, usually a grand jury investigation, an exploratory or discovery type of grand jury proceeding, where you are calling in a number of witnesses who might know something about the matter, but you really don't know what they are going to testify to and they are in a position to know but for one reason or another you cannot get their information by the usual process of an interview. They won't talk at all unless under subpoena and then under very limited circumstances. If, in the course of that situation the witness takes the fifth, then you have a policy decision as to whether or not to proceed with that testimony.

A fourth situation, that sometimes happens in the trial proceedings rather than in the discovery process, is where an incidental witness who may be collaterally involved through loyalty to the defendant or for other reasons just doesn't want to testify unless compelled to. He is willing to tell the truth but he doesn't want to volunteer. So he will use the fifth. A typical situation could be in a gambling, bookmaking case where you are using listed customers as witnesses—those men who have placed bets with a bookie. Obviously the Government isn't interested in extensive prosecution of 200 or 300 people who simply placed bets, so you use the immunity grant there to make the case against the central person.

There are other situations like that. This is perhaps the most valuable tool the Government has in the development of cases and the enforcement of the criminal law. We regard it as an extremely important piece of legislation.

Mr. KASTENMEIER. Would you use it in a civil action between private parties?

Mr. WILSON. I don't believe so. Offhand, I don't visualize how that would help.

We had a situation not so long ago in connection with a securities-type litigation. There was a civil suit between stockholders where some of the same testimony came up. We might have used it there, but I don't believe it would be practical to try to use it in that situation.

Mr. KASTENMEIER. You see no need for any limitation in the language of the statute? There would be no purpose for delineating specifically that this could be also used in a civil action?

Mr. DEAN. Regulatory situations could arise that are not of a typical criminal proceeding, but of a regulatory nature which could be called civil and, in an instance like this where you are trying to define criminal as against civil, you might be involved in the determination of a more generic term before the court. You would have to determine the type of proceeding before you made a determination on how you would label it and distinguish it.

Mr. KASTENMEIER. Under 6003 rather than 6002?

Mr. DEAN. Yes.

Mr. WILSON. Some of these things come up in civil service cases. In some of the more recent cases where there is some type of investigation of police corruption and the policeman is called upon to testify, the question is whether or not he can be discharged under the civil service rules. It is possible that in a civil service proceeding a witness might take the fifth. It would be in such a civil proceeding where it would be important.

Mr. KASTENMEIER. Let me lead up to this. Mr. Biester has a bill, H.R. 9704, in which the language relating to the situations in which a witness may be immunized reads as follows:

*** in any case or proceeding before any grand jury or court of the United States involving a violation of any law of the United States, or any conspiracy to violate any such law ***

That is far more restrictive in scope.

Do you think such language would be too restrictive in terms of your needs?

Mr. DEAN. I think there is very similar language in a piece of legislation before the other body and they have been considering that issue over there. I believe that they have chosen to take the recommendation of the Commission not to try to limit all circumstances and situations when you are developing a general immunity statute. That issue has been carefully considered over there, and the latest indications are that they are looking closely at the Commission's recommendations.

Mr. KASTENMEIER. I take it then the Attorney General would prefer the broader language of the bill rather than the more restrictive language?

Mr. DEAN. I think it would be very difficult to conceive of a situation where the broader language would cause any problem, and for that reason the maximum flexibility would probably be preferable to trying to restrict it, because you might run into a situation where the more restricted language would not permit you to grant immunity in a situation where you chose to grant it.

Mr. KASTENMEIER. Do the requirements in the bill that the Attorney General be served notice of intention to issue the order, suggest any administrative difficulty for the Office of the Attorney General? Will you have to add personnel to cope with these notices as they come in? Is it going to be a problem for you?

Mr. WILSON. Probably we will have to make some adjustment for that. It is hard to anticipate the volume of them, but this is a good weapon from the standpoint of development of cases. Secondly, the public knowledge of the fifth is such that there is wide acceptance of it and more people will probably use it than has been the case in the past. All this will mean that in all probability the volume will increase, which might call for some type of institutionalized staffing to process these things. It would be a rather extensive check that would have to be made, and rather rapidly in view of the 10-day period, of State intelligence sources.

Mr. KASTENMEIER. Mr. Ryan, do you have any questions?

Mr. RYAN. I would like to come back to a point Chairman Kastenmeier raised.

Section 6003 states:

In the case of any individual who has been called to testify * * * at any proceeding before an agency * * *

What kind of proceedings do you contemplate that the Attorney General would conduct outside of the grand jury where this statute would be applicable?

Mr. PETERSEN. The administrative responsibility of the Attorney General is rather limited. There are proceedings before the Board of Immigration Appeals in which we have some administrative authority; proceedings in connection with deportation before hearing examiners; perhaps some proceedings—I am not quite sure of this—under the Selective Service Act; perhaps, as the law is being developed, proceedings before the parole board—although it is not considered very wise to invoke the fifth amendment in those types of proceedings. But generally speaking, our administrative responsibilities in the Department of Justice are rather limited. I just don't think that we are going to have a great deal of responsibility in that area. Our responsibility will come largely from grand jury proceedings and court proceedings, and, of course, if the bill is enacted, in clearing requests from other administrative agencies. I don't see that we will have any other particular responsibilities.

Now, if your question is addressed to potential civil proceedings in which the United States is a party in interest—perhaps a land condemnation suit where someone on deposition might take the fifth amendment—then I can see that it might be invoked there as a direct responsibility of the Attorney General, but not beyond that.

Mr. RYAN. Suppose an assistant attorney general is questioning a witness in his office with a stenographer present. Is that a proceeding?

Mr. PETERSEN. No, sir, I don't think that would be a proceeding within the language of this statute. If the witness there decided he did not want to testify for the reason that he might incriminate himself, our recourse would be to stop that proceeding, issue a grand jury subpoena, and go back to the regular course of action.

Mr. RYAN. You can do that now, can't you?

Mr. PETERSEN. Only in limited circumstances.

Mr. RYAN. Where you have an immunity statute?

Mr. PETERSEN. Yes, but there are many instances where we do not have an immunity statute and we simply cannot proceed.

Mr. DEAN. Mr. Ryan, on page 6 of the bill, section 3 of the definitions under 6005, there is a definition of "proceeding" and the term "proceeding" is defined:

The term "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpoenas and take testimony of witnesses under oath or affirmation.

Mr. RYAN. One other question on the constitutionality: What is your view of the theory of a constitutionally protected right of silence?

Mr. DEAN. I don't believe in the context of immunity the Court has ever ruled that there is such a constitutional right of silence; not to my knowledge anyway. This has not been an issue that has been faced and there have been immunity statutes around for a number of years and that theory has not succeeded to deny the Government the opportunity to have the immunity provisions.

Mr. WILSON. I might supplement that a little bit. In the police interrogation cases that have recently been up there, there is some language in one of the opinions, concurring opinions, to the effect that when a policeman is interrogated about his acceptance of a bribe, for example, he has a right "to remain silent" or take the fifth, but that the city can then discharge him for having done it although it cannot use discharge as a whip to obtain his testimony. The fact that a public official elects "to remain silent"—that is the wording of the Court rather than the phrase "take the fifth"—does not prevent the city from discharging him, although apparently under these cases they can't threaten to discharge him for the purpose of obtaining his testimony. It is a fine distinction. That is one place where they use the "right to silence" language.

Mr. PETERSEN. Other instances of the use of the term "right to silence" have been generally in the context of the *Miranda* decision, where you are talking about what the court terms "psychological compulsion." In those cases, the "right to silence" language is cast in circumstances of qualification—the warning:

You have a right to invoke the Fifth Amendment. You have a right to counsel. You need not answer questions unless you choose to do so. If you decide to answer questions, you may stop at any time in the proceedings.

It is in that context that the court spoke about the "right to remain silent."

Mr. RYAN. I am talking about the broader concept of the fifth amendment. Where the fifth amendment provides more than simple immunity against prosecution, but provides immunity against self-degradation and provides for a person the right to remain silent if he so desires.

Mr. PETERSEN. I don't agree with that, Congressman.

Mr. RYAN. This theory has been advanced by one or two Justices of the U.S. Supreme Court.

Mr. PETERSEN. It has been advanced. I don't agree with it in the context of the fifth amendment. I think the holdings under the fifth amendment confine themselves solely to the right not to incriminate oneself. The issue has come up in connection with the first amendment qualification—the right to free speech and a right to remain silent—and also the right under the due process clause of the Constitution not to subject oneself to degradation. But those arguments have been rejected as a reason for not testifying.

They are advanced in congressional hearings and I think the Court has rejected them as a ground for refusal to testify.

Mr. KASTENMEIER. The Chair would like to interrupt to suggest that we will try to conclude questioning witnesses rather than ask them to come back.

Mr. MIKVA. I believe Mr. Wilson was in the room when the colloquy was going on with Mr. Poff. My only question is, Would the Attorney General's office care to comment on the desirability or undesirability of having a veto power in addition to the notice power, or the notice provision that is now in the bill?

Mr. WILSON. May we do that by letter?

Mr. MIKVA. Yes.

Mr. WILSON. We will prepare a letter stating the Department's position on that.

Mr. KASTENMEIER. Without objection, such a letter, when received will be made a part of the record.

(The letter follows:)

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., August 21, 1969.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During the testimony of Assistant Attorney General Will Wilson before the Subcommittee on August 7, 1969, in support of H.R. 11157, Congressman Mikva requested that the Department comment upon the desirability of amending the bill so as to provide the Attorney General with the power to veto an agency's proposed grant of immunity.

The Department believes that the present provision of the bill for notice to the Attorney General is preferable to a power of veto on his part. Since, in the bill's present form, the Attorney General's views would be advisory only, there would be no conflict between an independent regulatory commission and the executive branch which might raise problems concerning the traditional concept of commission independence, if not constitutional problems. With respect to the agencies of the executive branch, moreover, any serious conflicts could be resolved by informal Presidential direction. Finally, with the basic concept of immunity shifted from absolute immunity from prosecution to immunity from use of the witness's testimony, thus allowing prosecution of an immunized subject based upon independent evidence, it is felt that the possibility of one agency's conferment of immunity having possible adverse effects on another agency's law enforcement program would be greatly minimized.

Please advise me if I can be of any further assistance to the Subcommittee in this matter.

The Bureau of the Budget has advised that there is no objection to the submission of the views contained herein from the standpoint of the Administration's program.

Sincerely,

RICHARD G. KLEINDIENST,
Deputy Attorney General.

Mr. POFF. I will be as brief as I possibly can, Mr. Chairman, and make only one point if I may. I was impressed with the language of the gentleman on page 4 at the foot of the page which reads as follows:

A witness would be required to claim his privilege against self-incrimination as a pre-condition of obtaining immunity in all situations, thus preventing an unwitting, automatic grant of immunity as may presently occur under some existing statutes.

Would you care to enlarge upon that?

Mr. WILSON. Yes. You see, one of the most difficult things in this whole area is achieving a meeting of the minds between the prosecutor and the witness as to just what he is going to grant him immunity from. Until there is disclosure you don't know what the man has done, and until you know what he has done you don't know whether you want to grant him immunity or not. So frequently they can stumble into it.

For instance, in an interrogation about a financial transaction a prosecutor may ask, "Well, what was the \$10,000 for?" and the witness may say, "that was my fee for murdering a Government witness," which opens up a whole new crime you didn't know anything about and you didn't want to grant him immunity on and yet you have.

Mr. POFF. As I understand it, without a requirement that the witness plead the fifth amendment affirmatively it would be possible for a self-serving witness, particularly a self-serving witness with a

highly skilled attorney, to use the opportunity afforded by the order to testify to confess other crimes and in the process immunize the information that might be traceable to that testimony.

Mr. WILSON. That is entirely possible under the present system, and no doubt does happen occasionally because of the very nature of this negotiation.

Mr. POFF. Exactly. In other words, a witness testifying in a Federal case, for instance, might see the opportunity if the grant were automatic, to confess a crime defined in a State statute and thereby escape prosecution based upon evidence which was traceable to the testimony given in the Federal case.

Mr. WILSON. That is correct.

Mr. POFF. Thank you.

Mr. KASTENMEIER. The gentleman from Pennsylvania?

Mr. BIESTER. I have but two questions: One, do you think that this language will make less clear the quality of the bargain you can make with a prisoner presently in jail because you can't grant him immunity, but can only grant him something, perhaps in his view more shaggy than immunity?

Mr. WILSON. You mean will make less clear the quality of the bargain?

Mr. BIESTER. That is right.

Mr. WILSON. I think you will have to inform the prospective witness of the limitation on the authority. This does cut back the authority of the prosecutor.

Mr. BIESTER. Doesn't that make the bargain more difficult to make?

Mr. WILSON. It might in some instances, but here is the situation. The witness who is aware of both what he has done—which he will be—and what his rights are, can secure an absolute bar if he mentions the name of an indispensable witness without whom he cannot be convicted, because then you cannot use that witness. It is just as though the witness were dead. So he can achieve an absolute bar by skillfully stating the names of witnesses or leads or facts which are indispensable to the proof of his offense, and which he thereby precludes the Government from using—as far as that unit of Government is concerned.

Mr. BIESTER. How would that—

Mr. WILSON. And it might result in fewer people electing to testify.

Mr. POFF. If my colleague will yield, he makes a point of course which will be made later by other witnesses, and his point is valid, and yet I call attention to the fact that even today under the absolute immunity grant system some witnesses elect to remain silent, refuse to testify, and bear the consequences of contempt. They will do so under this system and if there is a comparison between the two perhaps the proposed system would suffer by the comparison and yet I think the other benefits that would flow from the new system would outweigh whatever disadvantage might be inherent there.

Mr. WILSON. I would like to add one other comment on your question. As a practical matter, where the witness has elected to testify under this statute, and he has been used, it would be a most unusual circumstance for the Government that used him to turn around and prosecute him. You have coupled with that—irrespective of the statute—the agreement not to prosecute.

Mr. KASTENMEIER. Thank you very much, Mr. Wilson.

We will recess until 1:30 promptly. I appreciate the fact that one of our witnesses must get away early and we will be here at 1:30 to hear him.

(Whereupon, at 11:25 a.m., the subcommittee recessed, to reconvene at 1:30 p.m., the same day.)

AFTERNOON SESSION

Mr. KASTENMEIER. The committee will reconvene.

The committee is pleased to have as its next three witnesses Judge George C. Edwards, U.S. Court of Appeals for the Sixth Circuit, Member of the National Commission on Reform of Federal Criminal Laws, accompanied by Prof. Robert G. Dixon, Jr., George Washington University Law Center, Consultant, and Richard A. Green, Deputy Director of the National Commission.

I would like to ask Judge Edwards to proceed and have the committee ask what questions they may have of Judge Edwards so that he may be free to leave. Thank you very much for coming this afternoon, Judge Edwards. As one who worked with you on the Commission, I certainly appreciate the giant work you have done and I know that you will make a fine presentation this afternoon.

Mr. POFF. Mr. Chairman, may I have an opportunity before the distinguished witness begins his testimony to join in the welcome. Those of us who have been privileged to learn something about the witness' background are impressed with his abilities, his insight, with his knowledge of this subject, with the experience he has had in the field of criminal justice as a practitioner and more recently on the bench.

I think the record should note that he has made a substantial personal sacrifice to accommodate the subcommittee in leaving his work on the bench to journey to Washington and return today.

You are very welcome, Judge.

STATEMENT OF JUDGE GEORGE C. EDWARDS, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT, MEMBER, NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

Judge EDWARDS. Thank you, Mr. Chairman and Congressman Poff. I appreciate those very kind words and that very warm welcome. I value the opportunity to be here to talk about a topic of considerable significance to the law of our country.

Perhaps I should define; perhaps I should specify the capacity in which I appear before your committee.

Your chairman, Chairman Celler, wrote me as Chairman of the Committee on Criminal Law of the U.S. Judicial Conference. This committee had referred the bill now under consideration to our Criminal Law Committee and the Judicial Conference for report and recommendation. Unfortunately, that process has not been completed. As you were notified by the U.S. Judicial Conference staff, the topic was placed on the agenda of our Criminal Law Committee but the U.S. Judicial Conference has not yet met to consider our recommendation. The Conference has found it wise, and chairmen of committees have found it wise not to make known their recommendations until

the Conference has disclosed its decision because, strangely enough, those gentlemen have independent minds of their own and are not always wedded to that which the committee proposes to them.

Concerning my remarks today, I did talk to the Chief Justice about that possible problem and I speak here in my capacity as a member of the Commission on Reform of Federal Criminal Laws and express my own views as a member of that Commission and as an individual judge.

There isn't any doubt about the fact we are dealing with a difficult problem when we deal with the problem of immunity because it approaches one of the areas—and there are many of them—of the conflict between liberty and order. This is the central conflict in our criminal law in this country. There are many governments that find this exceedingly easy to resolve. They pay no attention to the first and they accomplish the latter with pretty ruthless means. It has been the purpose of our Government from the time it was founded to seek to preserve individual liberty and preserve individual rights and to maintain in the very significant words of the preamble to the Constitution "domestic Tranquility," likewise.

This never has been easy to accomplish and it isn't easy to accomplish now.

For most of my life I have been associated in the law more with those people who were emphasizing the aspect of preservation of individual liberty than with those who were emphasizing the desirability of order in all of its multifarious forms, and I don't think that I consider that I have departed from that concern, although I think all of us have both concerns in mind.

I am not one of those who wants to repeal the trend of the Warren court. I will tell you very frankly, if you need testimony on that score, that I think in history the Warren court will go down as one of the most magnificent eras of the law in the history of these United States.

I am not a judge who wants to repeal the fifth amendment. I think the fifth amendment is there for purposes which were very farsighted in terms of our Founding Fathers and I do not want to repeal it or render it useless in any respect.

I have a background in law enforcement in the sense that I spent 2 very vivid years in the early sixties as police commissioner in the city of Detroit and derived some quite specific reactions to the problems of law enforcement in that period. I can give you some succinct summaries of them in just a very few seconds.

The problem of crime in the streets is a problem of underlying causation plus a problem of police education and police manpower, and when it is addressed in those terms, it is amenable to solution by a nation of the character and caliber of this Nation. I doubt that we really need much legislation to deal with the problem of crime in the streets. In any event, this statute, in my judgment, has nothing to do with that problem. By and large, in terms of dealing with the things which currently have our people very much up in arms about crime in the streets, the police need manpower; they need tools; they need equipment; they need training. They do not need the immunity statute.

What, then, is the sort of consideration which suggests that our Commission lay before Congress the bill which is here?

Well, first, very simply, Congress gave the Commission on Reform of the Federal Criminal Laws the mandate to look at the entire structure of the Federal criminal law and to seek to present a logical, organized pattern of the criminal law ab initio from the start.

If you seek to do this, almost immediately you find that the immunity statutes are a hodgepodge of legislation inspired by particular institutional pressures, or particular problems that have developed at particular times in history and that there is no logic to them at all.

In some sense the Commission presented this bill partly because the topic was before Congress at the time, partly because of its assignment, but also partly because it represented the sort of approach to a whole host of problems in the Federal criminal law which the Commission hopes to be able effectively to make and present to Congress in its draft of the proposed new code.

In short, we are proposing one fairly simple, quite concise, not too difficult to understand, piece of legislation as a substitute for 50 such statutes which currently exist scattered all through the criminal code and for that matter not only the criminal code, but all through the laws of the United States. Just finding those statutes is a major research task all of its own and that, of course, has been accomplished.

If that is how we reached this proposal, still to my mind if you are going to change anything, you need two sorts of justification for change. The first is that there is a problem, and the second is that you are not going to create more problems than you solve. I am sure there is a problem in the area we are dealing with here and I wanted to define it, and I believe that we have avoided creating more problems than we are solving.

What sorts of crimes are there that really produce the need for an immunity statute? Basically they are the criminal conspiracies; the violent activities of the Ku Klux Klan; the violent activities of revolutionary groups who are seeking violent overthrow of the Government; the violent activities of the Mafia. The FBI calls it Cosa Nostra and I don't care. A rose by any other name would smell just as sweet.

These conspiracies—at one time or another in my past history I have had some occasion to see a little bit of each of them—are very fundamental types of problems for a democracy because they operate in stealth and they operate with an internal discipline not amenable to the law of the country and they operate without publicly stated purposes so people know who is doing what and why. This is not typical of the usual criminal pattern.

The Mafia, for example, operates with the code of Omerta. It has come down through hundreds of years from the Sicilian background of the same folk by and large who are operating on the streets of our big cities in these United States right now, and the code of Omerta says you do not talk to the police under any circumstances about anything and you suffer death in preference thereto, or if you do talk, you die.

This is a very formidable sort of weapon for a criminal conspiracy to have available. I have seen it in operation and I have seen it defeat the reasonable and proper purposes of law enforcement time after time.

What other tools do they use? They use corruption, gentlemen, and they use corruption continually. They buy anything that is valuable, potentially valuable, to them that isn't nailed down. Here again there

is secrecy, there is reason for both sides of the bargain to keep silent. There is reason to avoid law enforcement (honest law enforcement in any event) at every turn of the road. In dealing with this sort of problem, I think there is no doubt but that the immunity statute which we propose would indeed be of significant assistance to law enforcement without any sacrifice of the constitutional rights and liberties of citizens of these United States.

Now, I have mentioned that the code proposes to substitute one statute for 50 and proposes to rationalize and make logical the procedure for the grant of immunity, whether by an administrative agency, grand jury, court, or Congress, as the case may be.

One problem that promptly comes to mind is the question of how to prevent an immunity bath being given to someone either for a corrupt purpose or a political purpose. There is no certain guarantee of anything in relation to the criminal law. So long as there is a possibility of prosecution, there is a possibility of abuse of the weapon of criminal prosecution, and all that can be done is to try to see to it that the most reasonable safeguards that can be built in are built in in advance. I have certainty that you gentlemen, if we have not in our Commission paid sufficient attention to that, will seek to pay sufficient attention to it and I have confidence in the fact that if there are any omissions in that regard you will find and correct them.

At the moment I don't know them in this draft. At the moment I feel that the draft is sound, that the requirement that approval of the grant of immunity be given by the Attorney General is an appropriate one.

It has been pointed out that possibly an independent administrative agency or an agency headed by a Cabinet member of similar stature to that of the Attorney General might decide to proceed against his caution and counsel. It seems somewhat unlikely that that would be done but, of course, if there were the intention to do it expressed by the agency concerned, the Attorney General in the structure of our Government would have the opportunity to appeal to the President and have the Presidential power employed to decide whether or not the grant of immunity should or should not be made in the public interest.

Now this would in effect be seeing to it that this public-interest decision was going to be made at the very highest level of the structure of government which we have in these United States. It seems appropriate to me that under some circumstances the decision could and should be made at the Presidential level.

Alternatively, I would personally have no great objection to contemplating that decision where there was such a difference of opinion, being tossed into the lap of the court which had to issue the order.

Up to date the drafters have thought that the division of powers of government strongly suggests that the court act principally in a ministerial capacity in relation to the agency recommendations of grant of immunity and in relation to congressional ones. I am inclined to agree that there is some considerable force to that argument.

It seems to me that there are protections in this bill which currently do not exist in the immunity statute. Under many of them agencies can proceed to employ a grant of immunity without any notice to anybody or without any public discussion or record of any kind, nature, or description. Here at least there is the requirement that the

Attorney General be notified in advance and in relation to all except the agencies; in the situation which I have just talked about, the requirement is that there be a public record with a court order.

Further than this, I suggest to you that the possibility of changing the immunity granted from the grant of immunity from prosecution for a specific crime to the grant of immunity for the employment of the compelled testimony is a practical solution to an already existing problem. In its operation I think it will not work any detriment to those who are seeking to exercise fifth-amendment rights as compared to that which currently exists under current law.

If we take a realistic look at what already exists in regard to immunity from prosecution—unless it is a complete bath of immunity from any kind of prosecution for anything that has happened up to a certain date in time—and I have never heard of such a grant of immunity ever having been made to anybody at any time, any place, anywhere—but unless that was what was granted, the grant of immunity from prosecution for a specific crime can frequently be evaded by dint of prosecution for a different, albeit somewhat related, crime. In short, the evasion of the immunity grant is possible right now just as theoretically it may be possible to seek to make use of the fact of some revelation in compelled testimony under the immunity power to find independent evidence that would prove the same thing.

What protection is there from that? Well, assuming that the Supreme Court, as those of us who are on the Commission believe it will, approves this legislation subsequent to congressional consideration and assuming adoption there, it would be my feeling that the courts would be extremely careful about just the situation which is being pointed to as a hazard.

In short, if there were a time sequence involved where there was a grant of immunity, there was compelled testimony, and then a prosecution developed from evidence uncovered thereafter, no matter how independent in fact the evidence was, if the search for that evidence was a product of the immunity grant, it would seem to me that quite probably the courts would construe that evidence as fruit of the compelled testimony.

In any event, these are the thoughts which I wish to lay before you.

I have recently had occasion to grapple with the immunity problem in terms of one of the 50 statutes and had to attempt the narrow balancing job of figuring out whether a question did or did not stay within the specific function of that particular immunity statute, or whether that made any difference and had to end up scratching my head thinking how ridiculous we can be because, quite obviously, for example, organized crime pays no attention to which particular immunity statute it may be affected. It is patent that organized crime crosses all sorts of jurisdictional lines.

Well, gentlemen, I appreciate the opportunity to be here. I commend this legislation to you. I think our Commission is unanimously in favor of it and we know that Congress will give it the attention which it merits.

Mr. KASTENMEIER. Judge Edwards, we do appreciate your coming here today. If anyone has any questions, I would urge that he be brief because I know the judge needs to leave forthwith.

Congressman Mikva?

Mr. MIKVA. You mentioned the use of the immunity statute against members of the Cosa Nostra. It would not be a tool to unraveling the conspiracy, would it? I mean, is it your opinion it would persuade them to overcome the reluctance that their own code imposes on them?

Judge EDWARDS. I think it is a tool which can reach many of the peripheral people in the mob. I think it is a tool which conceivably might reach somebody in the internal conspiracy at some time or another in the future. As to making any predictions about the latter, that I would hesitate to do except that I don't think it is beyond the realm of possibility.

Mr. MIKVA. From your experience, which I know has been extensive, you don't really think it will compel any testimony against that kind of code?

Judge EDWARDS. I think a great many of the members of the internal top command of the Mafia would go to prison for life or die before they would talk and I think that would be the norm, but it is not the norm that this statute is looking for. The thing this statute is looking for is the weak link in the illegal and violent conspiracy.

Mr. KASTENMEIER. Mr. Poff.

Mr. POFF. Judge, I share the estimate of the testimony the chairman has just made. It was penetrating and extremely useful to me in my own effort to balance the somewhat and sometimes conflicting values involved here. I agree earnestly that the legislation we have drafted strikes the best balance possible under an urgent set of circumstances.

In the hypothetical case you postulated, it is true that any evidence assembled after the testimony has been given, under an order to testify following a grant of immunity, might logically, be traced to the compelled testimony.

Judge EDWARDS. It would be at least suspect, wouldn't it?

Mr. POFF. Indeed.

The same thing is true today with respect to evidence which has been suppressed because it was unlawfully acquired. By that I mean that there were some violations of the search and seizure laws. Today the courts must grapple with precisely the same problem with respect to evidence assembled thereafter. They must decide whether it does have a connection with the unlawfully acquired evidence and, if it does, it becomes tainted and cannot be used.

So we have a good deal of case law to guide the Court in this admittedly difficult problem which might be posed by the passage of this legislation.

Would you share that feeling?

Judge EDWARDS. Yes, I think that is right and I think that already the courts have built up a backlog of experience. This leaves me feeling, as an appellate judge, that this is not an impossible burden for the courts to carry.

I think there is one other thing about this that probably ought to be pointed out and that is that in most instances a grant of immunity is going to be made to a willing witness who isn't going to be prosecuted at all. That is probably the most important aspect of the whole matter.

The prosecution will have just as much of an interest in protecting the interests of the person who has served the purposes of law enforcement in that regard as can be. As a consequence fears for the person who has willingly cooperated under the grant of immunity are, I think, probably more fanciful than real.

Mr. POFF. I am glad you made that point.

To paraphrase it, if I might, not nearly as well as you have stated it, but in the typical case under this statute, the witness, as you state, will testify under a grant of immunity with a near certainty that he will not be prosecuted, and this will be because there has been something of an informal prosecutorial agreement to withhold prosecution as the quid pro quo for the information furnished under the order. Isn't this likely?

Judge EDWARDS. I don't think there is any question about it.

Mr. HUTCHINSON. Judge, I also want to join in expressing my appreciation for your testimony. It has been very helpful.

I particularly want to thank you for your observation with regard to the problem that was raised this morning, that the Attorney General, faced with another department with which he has not been quite as persuasive as he had hoped to be, could go up to the President and perhaps use the power of the President to persuade the department to go along.

I think that the other question in my mind you responded to adequately. However, I am a little bit concerned about just where the line of demarcation might be drawn with regard to how indirectly the immunity might spread. I can easily conceive, I am sure we all can, situations where, as a result of testimony compelled, the prosecutor gets a new idea of attack and he pursues a course of investigation which perhaps in his own mind is quite independent of the testimony given but this witness might in the future be able to say: "Well, you never got that idea until I put it in your head as a result of my testimony," and I should imagine that would produce a problem in the future. I don't know how much of a one.

Mr. POFF. If my colleague will yield, it would produce a problem of rather major dimensions, I should think, if the Court should ever decide that the fifth amendment guarantee against self-incrimination includes a guarantee that the accused might remain silent. If the courts ever stressed the self-incrimination clause of the fifth amendment to include a guarantee against self-degradation, then this might be a real problem.

Mr. HUTCHINSON. I thank the gentleman.

Judge EDWARDS. I just want to leave with one word, gentlemen, if I may.

I don't think there is any criminal law tool which can't be abused. There have been abuses in my judgment in criminal prosecution, in the exercise of criminal prosecution power in the past, in the grant of immunity in the past. I think there have been abuses by courts and I think there have been abuses by congressional committees, and I don't think any time you create a tool or a grant of power to a governmental agency or group there is any certainty that there will not be possibly some abuse.

Along with the development of tools which are useful for legitimate prosecutorial purposes, there has to be a determination to maintain some restraints in the proper use of those tools. This will apply to the

courts, to the prosecutor and the Attorney General, and will apply to congressional committees in the future as it has in the past.

Thank you very much for allowing me to appear before you.

Mr. KASTENMEIER. Thank you, Judge Edwards. Have a good trip home.

Judge EDWARDS. Thank you, sir.

Mr. KASTENMEIER. Now we have Mr. Green and Professor Dixon. Did you have a formal presentation to make?

Mr. GREEN. No, I did not. Mr. Chairman. I thought I might act as a utility infielder at the end to try to cover any areas that perhaps the committee didn't think had been satisfactorily covered. However, Professor Dixon who, as you know, was the staff consultant in this matter, has prepared a statement I think largely addressing itself to this constitutional question to which he has given a great deal of attention.

Mr. KASTENMEIER. I thank you. You will be available for questions. Professor Dixon, if you will make your presentation.

Professor DIXON. Mr. Chairman, I believe you all have a copy of my statement. I would like to use it selectively and invite committee questions as I go along if you wish to break in at any time.

Mr. KASTENMEIER. Without objection, your entire statement will be accepted and printed in the record and you may refer to certain parts of it as you wish, and as you say, you are open to questioning.

Professor DIXON. At any time, yes, sir.

(The statement follows:)

STATEMENT OF PROF. ROBERT G. DIXON, JR., NATIONAL LAW CENTER OF GEORGE WASHINGTON UNIVERSITY, AND CONSULTANT TO THE NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS

Mr. Chairman, Members of the Committee: We meet this morning to discuss a proposal which may seem esoteric to some members of the public, because it deals with a peripheral aspect of the Fifth Amendment. But I would submit to you that the proposed redefinition of witness immunity is the most significant Congressional proposal in this field since 1893. It proposes nothing less than repeal of more than 50 special and disuniform witness immunity statutes and replacement with one integrated statute. It will for the first time place federal interrogation on a solid foundation and balance justly the competing claims of the public and the witness. The public, as was once remarked in the English Parliament, has a right to every man's testimony. The witness has right, also of English origin, not to be compelled to incriminate himself. This right is embodied in our Fifth Amendment.

The chief characteristic, and also vice, of the many special witness immunity statutes which the proposed statute would replace, is that they load the dice in favor of the witness and leave the public interest to chance. One might almost think that they were drafted by a panel of criminal defense lawyers and without even the spirit of Robin Hood, rather than by a body of elected representatives of the people. These present statutes confer upon an immunized witness absolute immunity from future prosecution for anything related to his testimony, even if the evidence used is wholly independent of the testimony or was in government hands before the testimony was given. The technique under some of the statutes is that the witness pleads the Fifth Amendment, is offered immunity, and then testifies (unless the public interrogator chooses to withdraw the question to avoid giving immunity). But some present statutes offer even a greater bonus. They can be called the automatic immunity statutes. Under these, every witness who is sworn and testifies gets a blanket immunity regarding anything relating to his testimony, even if he never pleads the Fifth Amendment. Under this set-up which seems ideal for persons in organized crime, the public interrogator receives no warning of immunity potentialities, and has no way of limiting the immunity bath by withdrawing questions that touch on Fifth Amendment rights.

There is an explanation for this pro-criminal overbreadth in present witness immunity statutes. The absolute immunity language was the congressional reaction in 1893 to a Supreme Court decision, *Counselman v. Hitchcock*, 142 U.S. 547 (1892), which had invalidated an earlier "underbreadth" immunity statute which gave insufficient witness protection. The invalidated statute immunized the testimony, but could be read as not immunizing also the use of the testimony to provide leads to other evidence. Most of the Court's opinion in *Counselman* is addressed to this narrow problem. (See, for example, the quotation from the opinion which appears on page 47 of my Immunity Report to the National Commission Report, No. 33.) But toward the end of the opinion Mr. Justice Blatchford in an expansive mood added the following comment:

"[The statute in question] does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. 142 U.S. at 585-586."

This statement certainly has a fine rhetorical flourish, as though written for the anthologies. But it does not fit the rest of the opinion, does not seem to be required by the Fifth Amendment, and definitely has been rejected in a series of recent Supreme Court opinions since 1964. I choose to call this statement, therefore, the *Counselman* dictum.

It was to this dictum that Congress reacted when it added the 1893 immunity statute to the Interstate Commerce Act. Instead of merely providing that the use of an immunized witness's testimony, as well as the testimony itself, could not be used against the witness in a criminal prosecution, which would have been constitutionally sufficient to replace the invalidated statute, Congress used absolute immunity language. The key phrase in this statute, and the more than 50 successor statutes is:

"No person shall be excused from attending and testifying or from producing books, papers . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise . . . *Provided*, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

By contrast the key phrase in the proposed statute, which adopts a *use-restriction* approach to immunity is:

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information . . . and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the 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 giving a false statement or otherwise failing to comply with the order."

Use-restriction is all that a person receives when a confession is extracted by physical force, or by psychological coercion, or by deception, or when he is subjected to unlawful search and seizure. He can still be prosecuted on other, untainted evidence. Convictions on remand, on untainted evidence, after reversal of a conviction based on unlawfully extracted evidence, are reported in the press almost every day. Examples include *Miranda*, of the well-known confession case *Miranda v. Arizona*, 384 U.S. 436 (1966).

Statutory witness immunity can be, and should be, handled in similar fashion, abandoning our anomalous and law-enforcement-inhibiting immunity bath practice.

Recent Supreme Court decisions support this statement. For full details see Commission Report on Immunity (Report No. 33), at pages 48-67. In the famous case in 1964 which nationalized the self-incrimination clause of the Fifth Amendment and made it applicable to the states, Mr. Justice Goldberg in his opinion for the Court expressly endorsed the use-restriction rule, and not the absolute immunity idea, as follows:

"Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that its evidence is not tainted by establishing that it had an independent legitimate source for the disputed evidence."—*Murphy v. Waterfront Commission*, 378 U.S. 52, 79n. 18 (1964).

Mr. Justice White, concurring, was equally explicit:

"In my view it is possible for a federal prosecution to be based on untainted evidence after a grant of federal immunity in exchange for testimony in a federal criminal investigation." 378 U.S. at 106.

In short, the Fifth Amendment requires only restriction against use of the compelled testimony in a criminal case. The rule is further supported by recent Supreme Court cases concerning the question of discharge of allegedly faithless public employees who plead the Fifth Amendment and refuse to cooperate in investigation of their performance of their official duties (or attorney disbarment in analogous circumstances). In two cases of this nature in 1967 Mr. Justice Fortas cast the deciding vote and wrote as follows in his separate opinion:

"This court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer. It is quite a different matter if the State seeks to use the testimony given under this lash in a subsequent criminal proceeding." (Justice Fortas concurring opinion in *Spevack v. Klein*, 385 U.S. 511 (1967), commenting on *Garrity v. New Jersey*, 385 U.S. 493 (1967).)

And this thought is reiterated in the opinions for the Court written by Mr. Justice Fortas in two additional public employee discharge cases in 1968. See *Gardner v. Broderick*, 392 U.S. 273 and *Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280 (1968).

At least two additional supporting statements for a use-restriction rule can be mentioned. In 1966, speaking for a unanimous Court, Mr. Justice Harlan observed that if the Government acquires evidence in violation of the Fifth Amendment, the remedy would be to suppress the evidence or its fruits at trial, not to dismiss the indictment. *United States v. Blue* 384 U.S. 251 (1966). In the Bookie Tax Cases in 1968, where certain registration provisions were challenged under self-incrimination principles, the majority refused to impose use-restriction, as the Government urged and thus save the statutes. But it refused *only* because it found use-restriction to be contrary to the intent of Congress that registration data be available to state prosecutors. Not construing the intent of Congress this way, Chief Justice Warren, dissenting, would have imposed use restriction and saved the constitutionality of the registration provisions. *Marchetti v. United States* and *Grosso v. United States*, 390 U.S. 39 and 62; and see similar Gun Registration case, *Haynes v. United States*, 390 U.S. 85 (1968).

Several other aspects of the proposed reform, which are discussed at length in my report to the National Commission (Report No. 33) on which this proposed statute is based are the following.

First, there must be a claim of the privilege against self-incrimination by the witness before any immunity is possible. There no longer would be automatic immunity, merely upon testifying under oath after subpoena, as is the case under the present statute in such fields as antitrust, Interstate Commerce Commission matters, some maritime matters, and others.

Second, there must be approval of the Attorney General before immunity can be granted in court and grand jury proceedings, and a notice to the Attorney General before immunity can be granted in administrative hearings and congressional proceedings. An important purpose here is to minimize the danger of casual grants of immunity by one agency that might jeopardize the interest of another agency. Another purpose is to create for the first time in our history a central source of immunity information, and a central record. We do not propose, however, giving the Attorney General a veto power over immunity grants by administrative agencies, i.e., the regulatory commissions, or by congressional committees.

Third, except in regard to administrative hearings, a United States District Court order is one of the preconditions of a grant of immunity. However, as under the handful of present immunity statutes which contain such a provision, the function of the District Court is ministerial only, to verify that certain steps have been taken, and *not* to judge whether it is sound public policy to grant immunity. Now that we have the Attorney General cast as central record-keeper, in the proposed statute, there may be no utility in imposing on United States District Courts a duty to issue immunity orders. In my report to the National Commission I give the history of the court-order requirement, question its utility, and suggest that after careful scrutiny it may be concluded that the court order requirement can be entirely deleted. (Commission Report on Immunity, Report No. 33, at pages 8-12, 31-35, 74-79).

Fourth, the proposed new statute does not continue the "penalty or forfeiture" phrase contained in present immunity statutes. Instead of this loose, and potentially dangerous term, the proposed statute hews to the language of the Constitution itself, as construed by the Supreme Court, and speaks of "criminal case."

The danger I speak of is that under present statutes a witness may acquire immunity not only against future incriminating use of his compelled testimony, but also against any unpleasant consequences whatsoever. There is indeed one case already, suggesting that an airline pilot who acquired immunity in the course of an accident investigation, not only may not be prosecuted, but also may not thereafter suffer loss of his license to fly. See *Lee v. Civil Aeronautics Board*, 225 F. 2d 950 (D.C. Cir. 1955), discussed at pages 27-30 of National Commission report on Immunity.

Fifth, provision is made for obtaining immunity orders in advance of needed use, for the sake simply of administrative efficiency. They are not operative until the witness invokes the Fifth Amendment, and the order is read to him, and he then testifies responsively.

The question may be raised whether a witness would be able to "run away" with an immunity order, talk discursively, and immunize himself in areas the interrogator did not want to reach. The answer is no, under the proposed statute, although this danger does exist under some present statutes. The proposed statute is a "claim" statute; that is, immunity is acquired only in regard to those responses which a witness is directed to give, under an immunity order, after having pleaded self-incrimination. The function of the so-called immunity order is only to empower the interrogator, if he chooses, to override a particular witness attempt to shelter himself under the Fifth Amendment, or perhaps successive attempts in an extended inquiry. A rambling discourse by the witness would be non-responsive, and outside the scope of the direction to testify.

And there is an even more important safeguard in the proposed statute against witness abuse of immunity. As already noted, the witness gets protection against direct or indirect use of his testimony against himself, but not a total immunity from prosecution. Prosecution with independent evidence remains possible, as in the general field of coerced confessions and abuse of search and seizure power. Thus, even if the line between a responsive and non-responsive answer be difficult to police, which I doubt will be the case, and even if some testimony is improperly classified as being responsive and therefore immunized, little harm would be done to the public interest. Only use-restriction would result. By contrast, under all present immunity statutes witnesses receive total immunity from all prosecution "related to" their testimony, thus presenting the problem of determining "relationship." In a sense, our present immunity statutes are not so much "immunity statutes" as they are "absolution" statutes; they are more theological than legal.

CONCLUSION

When this bill passes, as I hope it will, we will have for the first time in our history a carefully thought and regularized process for testimonial compulsion, balancing public need and private interests. The proposed revision does not undercut the Fifth Amendment. It implements it, and in the process corrects a statutory error more than 75 years old. No honest citizen need fear it; no dishonest citizen need fear it; no criminal need fear it. The only persons aggrieved by the proposed change would be those seeking an extraordinary gratuity for crime.

Professor DIXON. We are all quite familiar with the immunity statute situation as referred to by the preceding witnesses, and in the materials already filed with the committee.

I think it can be said that the proposed statute, if enacted, would, for the first time, place Federal interrogation on a solid foundation in this area and balance justly the competing claims of the public and the witness.

The chief characteristic, and also the vice, of the many special witness immunity statutes which the proposed statute would replace is that they load the dice in favor of the witness and leave the public interest to chance. One might almost think that they were drafted by a panel of criminal defense lawyers and without even the spirit of Robin Hood, rather than by a body of elected, popular representatives. These present statutes confer upon an immunized witness absolute immunity from future prosecution for anything related to his testimony. This is so even if the evidence is wholly independent of the testimony; or

even if you have a photograph of a man in the act; or even if there was material certified in government files prior to the grant of immunity, or acquired thereafter wholly independently.

The technique under some of the present statutes is that the witness pleads the fifth amendment, is offered immunity, and then testifies—unless, of course, the public interrogator chooses to withdraw the question to avoid giving immunity. But some present statutes offer even a greater bonus than simple, absolute immunity. They can be called the automatic immunity statutes. Under these, every witness who is sworn and testifies gets a blanket immunity regarding anything relating to his testimony, even if he never pleads the fifth amendment. This was the nature of the original immunity statute, the 1893 statute, which has been a model for some of our 50-odd present statutes. This automatic immunity setup seems ideal for persons in organized crime—if they choose to say a little bit in order to get immunity while not saying enough to risk death at the hands of their colleagues. The public interrogator receives no warning of immunity potentialities, and has no way of limiting the immunity bath by withdrawing questions which touch on fifth amendment rights.

In other words, there are two problems: first, the concept of absolute blanket immunity which applies in all of our present statutes and, second, the automatic feature which is present in some statutes.

Now, there is an explanation for this procriminal overbreadth in present witness immunity statutes. The absolute immunity language was a congressional reaction in 1893 to the Supreme Court decision in *Counselman v. Hitchcock*. In that case the Supreme Court had invalidated an earlier underbreadth immunity statute which gave insufficient witness protection. The invalidated statute immunized the testimony, but could be read as not immunizing the use of the testimony to provide leads to other evidence. Most of the Court's opinion in *Counselman* is addressed to this narrow problem in terms of the fruits of the testimony.

I discuss this at some length in my immunity report to the commission. Toward the end of his opinion Justice Blatchford, in a rather expansive mood, added a comment, one sentence of which goes as follows:

In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.

This statement certainly has a fine rhetorical flourish as though written for the anthologies. However, it does not fit the rest of the opinion. It does not seem to be required by the fifth amendment and definitely has been rejected, in my view, in a series of recent Supreme Court opinions beginning in 1964 and coming on at least to 1968.

I choose to call the Justice Blatchford statement, which I have quoted, the "*Counselman dictum*."

It was to this dictum that Congress reacted when it added the 1893 immunity statute to the Interstate Commerce Act. Instead of merely providing that the "fruits" of the witness' testimony, as well as the testimony itself, could not be used against the witness in a criminal prosecution, which would have been constitutionally sufficient, I believe, to replace the invalidated statute, Congress used absolute immunity language.

You might say Congress chose to play it safe and be certain to get a valid immunity statute.

The key phrase in the 1893 statute is quoted in my statement. The statute says, "No person shall be excused from testifying" and so on, after pleading the fifth.

The statute goes on to say, "but no person shall be prosecuted for or on account of any transaction matter or thing concerning which he may testify."

The only requirement is to show a relationship between the future prosecution at issue and his past testimony and a defendant can enjoy immunity. It can extend to a different offense, in my view, from the one concerning which he spoke in the immunity proceeding.

By contrast, the key phrase in the proposed statute, which is also quoted in my statement, says that "no testimony or other information compelled under the order, or any information directly or indirectly derived from such testimony, may be used against the witness."

In short, a use restriction in place of absolute immunity.

I would like to point out that use restriction is all that a person receives when a confession is extracted by physical force. That is so even if a man's leg is broken, or if he is subjected to psychological coercion, or deception; or when a person is subjected to unlawful search and seizure. That person can still be prosecuted on other untainted evidence.

Mr. POFF. Would you mind if I interrupt you?

Professor DIXON. Not at all.

Mr. POFF. The witness has approached a point that really brings into focus, I think, the concern that has been expressed in the variety of questions by members this morning. To take the case you put, let's assume that a confession has been entered in evidence and that evidence has been adduced to show that it was coerced and that the confession is then suppressed. Let's assume further that the evidence shows but for the confession the prosecutor would never have known that the accused might have been the criminal. Suppose further that following the confession and the revelation that I have just described, the prosecutor in fact assembles evidence that is absolutely independent of the confession but is sufficient in itself to prove guilt beyond a reasonable doubt. Query: Would such evidence be tainted?

Professor DIXON. Under our present doctrines that cover confession areas and search and seizure areas, the prosecutor could attempt to convince the trier of a fact, the judge, really, that his current evidence was untainted. It would be an uphill battle. The presumption would be against him but he has the opportunity.

Mr. POFF. It would not be an uphill battle if the independent evidence had been attained prior to the confession.

Professor DIXON. And certified as being acquired before the confession, certainly.

In further response to your comment, and also the comment of Congressman Ryan, I think, this morning, about the idea of an absolute right of silence, we have not had in our constitutional development so far a concept of an absolute right of silence. We have had the fifth amendment privilege; we have had immunity statutes since 1893 that have been ways of overcoming in certain situations pleas of the fifth.

Out of the cases of *Escobedo v. Illinois*, and *Miranda v. Arizona*, some persons derived some language which speaks of a general right of

silence. However, the *Miranda* case itself, where such language may appear, is one in which the Court only applied a use-restriction concept and *Miranda* was thereafter retried and convicted, as I recall. By contrast, *Escobedo* was not retried because in that case, like the case you put, the only evidence that they had was his confession. When that went out, he was not successfully retried because they had nothing left.

In the *Escobedo-Miranda* line of cases, which appear to be the high-water mark of concern for protection of witnesses and potential defendants, we still are operating on a use-restriction basis.

Mr. MIKVA. Both those cases and one of the other cases you cite in your excellent statement on which Justice Goldberg wrote the opinion, dealt with the State and the inclusion of the privilege through the 14th amendment. I have read through your statement. I skipped ahead—I apologize—and I read through the report of the Commission. I have yet to find any citation that really says that *Counselman* is no longer good law as far as the Federal privilege against self-incrimination is concerned.

I know there are all kinds of commentators who say it is dictum but I have yet to find the Court saying it is dictum and the Court suggesting that they meant anything less than they said they meant in *Counselman* and that is that once you grant immunity it has to be a complete immunity.

Professor DIXON, do you have some citations?

Professor DIXON. Yes, if I may respond to that. The most extensive discussion of that is not in my statement, but in my full report to the Commission, particularly at pages 49 and thereafter, and I will try to summarize that briefly now if you wish.

At page 49 and thereafter. I discuss the *Murphy* case, which was a State case.

Mr. MIKVA. I would appreciate your pointing me in the right direction.

Professor DIXON. Perhaps I should do it chronologically starting with the initial case in the current series.

Murphy v. Waterfront Commission was a case arising out of an interstate agency's investigation in the New York-New Jersey area. The waterfront commission was a bistate agency with investigatory power, and the witness was recalcitrant.

The *Murphy* case was the first one in which the Supreme Court had to look at the question of immunity in a State prosecution after it had for the first time in the case of *Malloy v. Hogan*, nationalized the fifth amendment and incorporated the fifth into the 14th.

Murphy then gave the court an occasion to apply the new concept in the context of a State investigation.

Justice Goldberg, speaking for the majority and looking to the future as to what the State might do when it proceeded with the inquiry—this may be in a sense an advisory opinion—said this:

We hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him.

Now, this much really incorporated the *Malloy v. Hogan* idea. He then said:

We conclude moreover that, in order to implement this constitutional rule—

The nationalization of the fifth to apply to State proceedings even though incrimination is under Federal law and not State law—

and accommodate the interests of the state and federal governments in investigating and prosecuting a crime, the federal government must be prohibited from making any such use of compelled testimony and its fruits.

Then he adds a footnote which is in my accompanying statement, page 4. He said:

Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that its evidence is not tainted by establishing that it had an independent legitimate source for the disputed evidence.

This is responsive to the case where the State is investigating.

Justice White turned it around and spoke by analogy of the situation where it is a Federal investigation. Justice White said on page 51 of my full statement, at the bottom:

The Constitution does not require that immunity go as far as to protect against all prosecutions to which the testimony relates, including prosecutions of another government, whether or not there is any casual connection between the disclosure and the prosecution, or evidence offered at the trial. In my view it is possible for a Federal prosecution to be based on untainted evidence after a grant of Federal immunity in exchange for testimony in a Federal criminal investigation. Likewise, it is possible that information gathered by a state government which has an important but wholly separate purpose in conducting an investigation and no interest in any Federal prosecution, will not in any manner be used in subsequent Federal proceedings, at least while this court sits.

Mr. MIKVA. I think that makes my point and I was going to state that to you.

Do you know of a case where the immunizing agency and the prosecuting agency were both Federal, where the Court suggested that a use restriction was sufficient to satisfy the privilege against self-incrimination?

You see, there is a difference in these cases because of the comity between States and the Federal Government.

Professor DIXON. The Supreme Court has not, since the *Murphy* case in 1964, squarely faced the case you have put.

Mr. MIKVA. They didn't face it in *Murphy* either, did they?

Professor DIXON. *Murphy* is the source of this use-restriction language in the context of the fifth amendment.

Mr. MIKVA. The last case which the Court faced, that I know of, was the *Counselman* case, and as I said, I have read legal commentators over the years saying that it was of dubious validity. But I just do not know of a case where the Court has even suggested they were going to restrict or limit the *Counselman* case as far as a Federal prosecution following the granting of immunity by a Federal agency.

Professor DIXON. The most recent case is *Gardner v. Broderick*, 1968, which was a State case in origin.

Counselman is cited in the Justice Fortas opinion in *Gardner v. Broderick*, and in my full statement on page 58, I have a lengthy quotation from Justice Fortas' opinion in the *Gardner* case, in which he does speak of *Counselman* in use-restriction terms. True, this was not a square holding, but the Court has not had a chance ever, even in

1893, to pass on the question: Is use restriction constitutional? It never had that issue before it. It had the issue before it, Is restriction of use testimony alone constitutional? It said "No." That was the *Counselman* case. It has had the question before it: Is absolute immunity constitutional? and said "Yes." That was *Brown v. Walker*. It has never faced the middle situation. Your point is very well taken, that we are dealing with an area here which never has been squarely faced by the Court, even in the 1890's. However, I do find a consistent line of comment, called dicta if you will, concerning use restriction as being adequate in the context of the fifth amendment. This is so in the opinions of Justices Goldberg and White in the *Murphy* case. Likewise, in *Gardner v. Broderick*, 1968, the most recent case. Likewise, *United States v. Blue*, a Justice Harlan opinion. The *Blue* case is cited at the bottom of page 5 of my prepared statement. Likewise, in Chief Justice Warren's separate opinion dissenting in the *Bookie Tax* cases and *Gun Registration* case, and favoring use restriction. The majority did not go along there because they did not think they could read the congressional statute that way. It was not a rejection by the majority on constitutional grounds.

The only case which repeats the *Counselman* dictum is *Stevens v. Marks*, 1966. This is discussed in my full statement at page 55. There it is a volunteered comment by Justice Douglas. In 1966 in the *Stevens v. Marks* case, the situation was one posing the question of the capacity of a witness to withdraw a waiver of the fifth amendment and immunity. Justice Douglas for the Court added the following comment:

We need not stop to determine whether the immunity said to be conferred here—which merely prevents the use of the defendant's testimony or fruits in any subsequent prosecution but, apparently, does not preclude prosecution based on "independent" evidence . . . constitutes that "absolute immunity against further prosecution" about which the Court spoke in *Counselman v. Hitchcock* . . .

This is a comment which is out of line with *Murphy* and the language of Justices Goldberg and White, out of line with Justice Harlan in his opinion of the same year in the *Blue* case, out of line with the Justice Fortas comment in the *Spevack v. Klein* ambulance chasing inquiry of 1967, and his comment in the same year in the *Garrity v. New Jersey* police inquiry case, and out of line with Justice Fortas' opinion for the court in *Gardner v. Broderick* in 1968, all cited and discussed in the full report.

Mr. Poff. May I interrupt?

Professor Dixon. Yes.

Mr. Poff. Isn't it also out of line with Mr. Justice Harlan's comment in the *Stevens v. Marks* case?

Professor Dixon. Yes. In *Stevens v. Marks*, Justice Harlan in a separate opinion made this comment:

The court today leaves undecided the question whether this immunity [that is, immunity against use of compelled testimony and its fruit] is sufficient to supplant the privilege.

In the very same year Justice Harlan also said in *U.S. v. Blue* that use restriction was the essential idea. It is on pages 55 and 56 of my full report to the commission.

The Court with Justice Harlan writing the opinion in *U.S. v. Blue* said that if the Government had acquired evidence in violation of the

fifth amendment, the remedy would be to suppress the evidence and its fruits at trial and not to dismiss the indictment, which was the request of Mr. Blue. Concerning the idea of dismissing the indictment entirely, because the fifth had been violated along the line earlier, he said:

So drastic a step might advance marginally some of the ends served by the exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.

Mr. POFF. May I interrupt the witness again?

Professor DIXON. Yes.

Mr. POFF. To offer for the record another quotation from the lips of Harlan in the *Stevens* case, which I believe illustrates graphically his lack of enthusiasm for the generally accepted construction of the *Counselman* decision. I am quoting from Mr. Justice Harlan:

As construed in *Laino*, the New York Constitution gives automatic immunity only against use of compelled testimony and its fruits, 10 N.Y. 2d, at 173, 176 N.E. 2d, at 579, and the court today leaves undecided the question whether this immunity is sufficient to supplant the privilege. While the reference to "absolute immunity against further prosecution" in *Counselman v. Hitchcock*, 142 U.S. 547, 586, may"—

And I interrupt the quotation to emphasize the permissive form of the word—

may point toward a negative answer, I agree that the question ought not to be decided until it necessarily is presented after a full briefing and argument by the parties.

I interrupt the quotation again to call specific attention to the language which follows:

It is perhaps reason enough for postponement that the negative answer would perforce invalidate one or more federal statutes which protect only against later use of compelled testimony. In addition, this Court has recently extended the fifth amendment to the States, *Malloy v. Hogan*, 378 U.S. 1, and abolished the "two sovereignties" rule, *Murphy v. Waterfront Comm'n*, 378 U.S. 52, so that an expansive reading of the privilege could have a far more serious impact than was true in the days of *Counselman*. In any event, the question need not be reached— and so forth.

What Mr. Justice Harlan is saying, I suggest, is that the construction popularly given *Counselman* may be correct and the negative inference of course is that it may be incorrect. Further, whether it is correct or incorrect some 77 years since it was first pronounced there may be altogether different reasons to interpret the law differently than the judge who pronounced the decision in *Counselman*.

Would you agree?

Professor DIXON. Yes, I think that further supports the developing concept of use restriction rather flatly stated as use restriction by several justices recently. I have now found, while you were reading the Justice Harlan comment, the comment I was looking for in regard to Justice Fortas' statement in *Gardner v. Broderick*, 1968, where he seeks to wrap up in a summary comment his view of the fifth amendment, speaking for the Court. He does cite *Counselman* also. This is on pages 65 and 66 of my full report to the Commission, and in the *Gardner v. Broderick* opinion it appears in 392 U.S. at 276.

Mr. KASTENMEIER. Professor Dixon, if I may interrupt.

Professor DIXON. Yes.

MR. KASTENMEIER. Perhaps it is unfortunate that we are only a legislative subcommittee rather than an appellate court, but let me ask you as far as all the citations that you have relied on here are concerned, do these purport to be all the relevant citations pro and con on *Counselman*, or are these only the citations you rely on to prove your own case, as it were.

PROFESSOR DIXON. Let me state at the outset that I am always impressed with my own fallibility in overlooking things in research, even though I try to cover things fairly carefully. So I would not want to say that there are no citations that I have overlooked. I think I can say this: In the period since 1964, the modern era, now that we have through *Malloy v. Hogan* nationalized the fifth amendment and amplified its meaning for immunity statute theory through *Murphy* and successor cases—in this era since 1964, I have sought to identify all of the relevant cases and opinions and concurring opinions that mentioned the matter. That is why I included the *Stevens v. Marks* case although Justice Douglas' comment does not fully support my position.

I concede it does not. But I include it. I am not aware of any comment by a Supreme Court Justice in the period since 1964, other than the ones I have indicated here, that would run counter to the language I have quoted from Justice Fortas, Justice White, Justice Goldberg, Justice Harlan, and Chief Justice Warren.

MR. MIKVA. So this is on the record because maybe I am pursuing a silly idea. Is it not a possible, valid doctrine, could you put *Counselman* with the cases since *Counselman* by saying, as I think the Court has said, and I gather you disagree, that where the immunizing agency is at one level and the prosecuting agency is at another level, meaning State and Federal, we are not going to say they cannot prosecute at all just because some State agency has granted immunity. There we will have the use of that testimony and the fruits thereof. But where both the immunizing and the prosecuting agency are at the Federal level, *Counselman* is still the law. Would that not be a valid distinction that the Court could draw as a matter of constitutional law, or would you say that would be silly?

PROFESSOR DIXON. I think it would be difficult for this reason. Despite some protestations by Justice Harlan occasionally, the tendency in the cases we call the incorporation doctrine cases, whereby various parts of the Bill of Rights are incorporated into the 14th amendment, is to view ourselves as having a unified constitutional theory once incorporation has incurred. So the first amendment means the same thing vis-a-vis a State alleged inroad, as it does vis-a-vis a Federal alleged inroad. Even though technically we are using the first amendment in the Federal case and are using the 14th's incorporation of the first in the State case.

I think this is a generalization that could be made: the Court has not given us a two-level bill of rights in the incorporation doctrine cases. It has debated the issue at great length of incorporation or no.

Then once having decided to incorporate some constitutional concept of the Bill of Rights into the 14th, the Court has done so fully with, as I say, some protestations by Justice Harlan occasionally.

MR. MIKVA. Would you say that is true in the fourth?

PROFESSOR DIXON. In the fourth amendment there was a developmental process where that was not done at the outset. I am speaking in

this context of the full development of the incorporation doctrine in *Mapp v. Ohio*. In *Mapp* the Court went beyond the earlier two-level theory which the Court did have for a short while in which it had said in the *Wolf v. Colorado* case that the exclusionary rule applied federally, but did not apply at the State level. This two-level theory was chipped away at through a series of cases in the 1950's, and we did embrace the exclusionary rule fully in *Mapp v. Ohio*, 1961. Your question is a good one; namely, whether or not we could have along with the incorporation doctrine (stemming from *Malloy v. Hogan* and the *Murphy* case), two levels of self-incrimination protection in the context of immunity statutes, a Federal one couched in absolute terms, and an intergovernmental one (Federal-State or State-Federal) couched in terms of use restriction.

I think this would be somewhat anomalous under the overall trend of our incorporation doctrine cases. I think if the Court had been thinking along those lines, we would not have had the language of Justice White in a separate opinion in *Murphy* in which he in one line speaks of a wholly Federal situation. He speaks of use restriction in a wholly Federal context. In the quotation from *Gardner v. Broderick* where Justice Fortas mentions *Counselman* and makes a summary statement, the rule is couched in general terms, and does not seem to be couched in terms of his having in the back of his mind a Federal-State relationship caveat. This is an interesting question to raise.

Mr. POFF. If my colleague would yield just for the sake of an intellectual gymnastic. Assume we did have this dual system; namely, an absolute immunity system for the Federal level of government and then a use-restriction system for the intergovernmental cases. Since every man in the United States is otherwise qualified as a citizen of the United States and entitled to the same privileges and immunities and equality of treatment under the laws as any other citizen, would not this dual system run afoul of the fourteenth amendment equal protection clause? I say this is just an intellectual gymnastic.

Professor DIXON. It is a good point. It would certainly lack symmetry. We would have a system in which certain witnesses were treated like second-class citizens vis-a-vis self-incrimination, and other witnesses would be first-class citizens in the context of the fifth because they were in a wholly Federal proceeding.

Mr. POFF. Exactly. The problem would be acute would it not, when there is an overlap of Federal and State jurisdiction for the same defined offense? There would be no problem so far as the conduct was violative of the Federal statute only. But in those cases where the conduct violated both the Federal statute and the State statute, then the problem would be acute.

I would think that any citizen who was granted an absolute immunity under this twofold system at the Federal level would have to enjoy complete immunity from State prosecution as well or would run afoul of the 14th amendment.

Mr. KASTENMEIER. The Chair would like to state there has been another call of the House. I am afraid we will have to recess and reconvene because we have another witness.

While I recognize the comments of my colleagues have been most legally and intellectually enlightening and relevant I think the public policy indicates we ought to have such a statute. I hope we can try to

bring the discussion somewhat closer to a focus after the recess. We may as well recess now and try to get back in 20 minutes.

(Recess.)

Mr. KASTENMEIER. The subcommittee will reconvene.

You had indicated that you were highlighting your prepared text and proceeded through, I think, more than half of it. So, reconvening, we will again call on you, Professor Dixon, to continue and, following your presentation, I presume there will be some further questions for you.

Professor DIXON. Thank you, Mr. Chairman. Because of the hour, I shall try to be very brief and just cover perhaps three points and invite questions as they occur.

We have spent enough time, perhaps, on constitutional questions, but I would like to add one thought. It might seem to be a little anomalous to maintain a system which we now have, under which ordinary criminals, the impoverished street crime criminals, only receive use restriction under the confession doctrine, the exclusionary rules in search and seizure and so on; whereas, by immunity statutes in the area of white collar crime, businessmen—or some aspects of the Mafia activity, if they are white collar—receive absolute immunity. I don't think it makes sense to have a system where we offer more protection to the white collar criminal in the immunity statute situation than we offer to the ordinary criminal through our use restriction doctrines arising out of the confession area, the search and seizure area, and so on.

Laying that one aside, I would like to speak briefly to the question touched on by other witnesses of the Federal court role in the immunity statute area. I do not view the Commission's proposal as being in any way an anticourt proposal. It is worth stressing that until 1954 there was no court role in the immunity statute procedure at all. The process was one controlled by the agency which possessed the immunity statute and it immunized or not as it wished, with no record being made, even in the agency possibly, and that continues now very informally under statutes such as that the ICC administers.

In 1954 Congress enacted the Immunity Act of that year which was designed to create for the first time, for Congress, at least for the first time in this century, an effective immunity statute, but it was confined to the areas of national security. It also sought to add to the powers of the Attorney General in the area of court and grand jury proceedings a power to immunize in the area of national security.

That was discussed at length in Congress. The question was raised whether or not there might be a problem if Congress wished to immunize a witness and if the Attorney General did not wish to immunize because that would interfere with the law enforcement plan of the Attorney General. Also, I think fears were expressed that congressional committees might abuse the immunity process and give a bath to persons who should not have the immunity bath.

As a result, the Immunity Act of 1954 did create a role for the U.S. district court. It provided, both in regard to congressional investigations in the areas of national security and in regard to court grand jury proceedings in the area of national security, for a process in which an application to a U.S. district court for an immunity order was part of the procedure.

This has not been tested in the U.S. Supreme Court regarding congressional investigations. It was tested in the U.S. Supreme Court in the *Ullman* case in 1956 regarding a Federal grand jury proceeding. The *Ullman* case is mentioned at some length at various points in my full report to the Commission, at page 35 and elsewhere. In the *Ullman* case the Supreme Court was asked to rule the 1954 immunity statute unconstitutional on the ground that it violated the separation of powers. The argument was that since there is no right to an immunity grant, since immunity is a matter of law enforcement discretion, it would violate the separation of powers doctrine to give a U.S. district court judge power to decide whether or not immunity should be given.

The Supreme Court, in an opinion by Justice Frankfurter, pushed aside that argument by stating that, as they read the statute, the only role contemplated for the U.S. district court in this situation was to receive the application, make certain that the record was in order—the record had to include, among other things, a certification of public need for the testimony—and then to grant the order. In short, the Supreme Court held the duty to be ministerial, and on that ground said there was no separation of powers problem.

The case says there would be a serious separation of powers problem if the U.S. district court were to have discretionary power to second-guess an agency, or Congress, or the Attorney General on the merits of immunizing a given witness, or no.

This is the background for our provision about a role for the U.S. District court in our immunity procedure. Some statutes since 1954 have copied the 1954 formula and have continued this ministerial role for the U.S. district court. It has this merit: It does make the immunity request a matter of record in those statutes that incorporate it.

We considered the matter and we decided that since there never had been any court order requirement for administrative agencies such as the Federal Trade Commission, and since there was no need for it in the past apparently, that there is still no need to create a ministerial court duty in that area and we do not.

In regard to the court and grand jury area, we considered the question at some length and felt we would continue a U.S. district court ministerial role in the court-grand jury area though I, myself, had some reservations about the need of it.

In view of the fact that we also create a requirement that the Attorney General receive notice in all cases of immunity requests, we have taken care of the recordkeeping matter in that way. The Attorney General is now a central source and, indeed, a better central source for immunity information if this bill passes than U.S. district court orders, which would be scattered across the Nation.

In regard to the congressional part of our statute, we also continue a U.S. district court role there. And following the *Ullman* case theory, we make it more clear than is the case in the 1954 statute language that the role of the court is, as I said, ministerial.

However, this does not mean that the U.S. district court would be completely powerless to protect the witness against abuses. I think we must make a sharp distinction between the U.S. district court role in the detailed procedure of granting immunity, and the U.S. district court role to safeguard the witness against the agency exceeding its

jurisdiction. In short, the distinction between a procedural role and a jurisdictional review.

In my full report to the Commission, beginning on page 74 and thereafter, I first make the point that immunity is not a matter of right or wrong and therefore not a matter of judicial discretion properly speaking. It is simply a fixed price that the Government must pay to obtain certain kinds of information and I say "Only the Government can determine how much information it wants to buy in the light of the fixed price, the price being immunity."

The President's Commission on Law Enforcement and Administration of Justice 3 years ago similarly discussed this matter. In the words of Mr. Robert Blakey, a consultant to the President's Commission, only a law enforcement official and not a U.S. district court judge would have the needed perspective to choose which investigation is most important, and which witness would be immunized and so on.

On page 91 and thereafter in my full report, I again discuss the court role, this time in the context of the congressional part of our statute. I stress the point that the ministerial duty of the court which would, in our view, prevent the court from second-guessing the investigators on the need to grant immunity, would not prevent a jurisdictional review. Indeed, there could be a kind of declaratory judgment proceeding on the question of the constitutional jurisdiction of the Congress over the inquiry area, over the scope of the resolution which authorized the inquiry; over the relevance of information sought in the inquiry, and so on.

This is discussed further at pages 93 and 94.

In short, this is not an anticourt bill. The courts came into the matter only in 1954 as a procedural element and have operated since only in ministerial fashion and only under a few statutes. We continue that. None of this precludes a jurisdictional check, or even beyond that a court check to see if there is an overreaching in the process of immunizing somebody just as a matter of due process.

Another point would be that of the Attorney General's role regarding the independent administrative agencies. He never had any role in the past. We do not create a full review power but only a right to be notified before an agency immunizes someone. The question really goes to the desires of Congress. In short, does Congress want to have independent regulatory commissions such as the FTC and the ICC with powers as they have now to operate independently, immunizing or no for their own purposes, or does Congress want to bring them back into an integrated scheme under the President and the Attorney General?

We have decided that that is beyond our jurisdiction to decide so we simply propose, for the time being at least, a continuation of the present practice of not subjecting the independent commissions to a court order requirement. We would subject them to a duty of notifying the Attorney General before they immunize anyone, but he could not veto the grant of immunity.

I think that is all I have to say.

Mr. KASTENMEIER. Do you have anything further, Mr. Green, to add to Professor Dixon's comments?

Mr. GREEN. Just one item I want to call to the attention of the committee. That is the feature of the bill which is found in the provisions

of 6002, 6003, and 6004, as given in the commission report, in the clause which permits the applying authority, or the immunizing authority, to issue the order in advance of the witness' actually appearing under oath and being asked a question.

As you have heard in testimony today from the Department of Justice and from others who have had experience with the granting of immunity, it is quite common for the interrogator, whether he is an assistant U.S. attorney in a grand jury proceeding, or some agency representative in an administrative hearing, or perhaps congressional counsel, to know in advance that a witness is going to refuse to answer. This proposed device of an advance order will permit, in those cases where the witness is willing to answer if he is granted immunity, the procedure to go forward without having to convene twice the body before whom he is testifying.

In other words, under present practice when a witness is to be granted immunity before a grand jury, he is first called before the grand jury, claims the privilege, a trip is made down to the judge, the judge issues the order and then the witness proceeds to go back and testify.

Now, under our proposal this ritual can be shortcut and the order can be issued in advance and then given to the witness by the presiding officer of the body—that would, say, be the foreman of the grand jury—at the appropriate time. It also makes more palatable the proposal, the novel proposal, that the independent agencies be required to give notice in advance to the Attorney General when they wish to grant immunity to a witness. Although it is not done very often, sometimes the occasions when they would want to grant immunity would be when a hearing examiner in the field is interrogating somebody. Under the proposed bill they must suspend the hearing for 10 days while the Attorney General is considering whether to try to persuade them, or advise them, on whether they ought to grant immunity. It might become a hardship without our additional suggestion of a power to get an immunity order in advance.

We don't say that our proposal avoids hardship in all cases. But in those cases where it could be anticipated that the witness would claim his privilege, the agency body that has the power, or the person or the body within the agency which has the power to grant the immunity, could give notice of intention before the witness has even appeared before the hearing examiner in the field and take care of this notice to the Attorney General.

We don't say it will solve all the problems that can arise. There will still be occasional circumstances where the procedures will be cumbersome, but we think it is a reasonable device to try to avoid unnecessary encumbrances in the process.

MR. KASTENMEIER. Professor Dixon, in your report to the Commission you had a draft of proposed legislative language which was included on blue pages. Is that draft and the present bill in agreement?

Professor DIXON. I believe it is. I did sit with House legislative counsel last spring at the Commission's request while they were in the process of converting the language of the Commission draft on the blue pages in the report into the proper statutory language, including all of the repealers at the end.

MR. KASTENMEIER. In other words, the Commission's deliberations did not change your recommended draft?

Professor DIXON. Correct. Our intent, and hope, and purpose is that the bill, H.R. 11157, convey the thoughts of the language on the blue pages of the Commission draft.

Mr. KASTENMEIER. Mr. Poff.

Mr. POFF. Mr. Chairman, I think the two witnesses have covered the questions raised this morning, and in order to accommodate our last witness today, I will forgo any further questions.

Mr. KASTENMEIER. Mr. Hutchinson.

Mr. HUTCHINSON. No questions, Mr. Chairman.

Mr. KASTENMEIER. Mr. Biester.

Mr. BIESTER. I have only one line and it is a brief one.

There is a consequence of this legislation that gives me some pause and that is in the sense that we are creating a crime. A man could be interrogated at the outset when a grand jury is sitting and if it sat for 18 months, and if he declined to answer on the second or third day of the grand jury sitting he could be held in contempt and spend 18 months in jail. And then he could be summoned to the next succeeding grand jury on the first day and asked a second question, and so forth. Doesn't this open the door to the kind of incarceration and harassment that is rather repugnant to our system?

Professor DIXON. Mr. Biester, that is a good question, and is directed to a problem we already have.

Mr. BIESTER. I appreciate that.

Professor DIXON. Under our present statutes, or for that matter, we already have that problem under the generic power of Congress by voting a man in jail instead of the misdemeanor process which goes to 1857 or thereabouts.

The Commission, I believe, has viewed that that matter is somewhat separate from the basic reform immunity theory and we have not covered it.

I cannot speak for the Commission, but I think we would not object to try to cover it in some way. We have not covered it now. It may be covered potentially in some future penalty provisions that the Commission may have.

Mr. Green may know more about that than I.

Mr. GREEN. We are working in the area of contempt, not only criminal contempt, which is primarily within the scope of criminal laws and our concern, but we have always had some discussion in our Commission and Advisory Committee as to what recommendations, if any, we should make regarding this problem in the civil contempt area.

It is a tremendously complex one, as I am sure you recognize, because the theory of the incarceration in the kind of case you hypothesized is coercive and not penal. Yet when a person is sitting in jail, I suppose it is hard to separate the two and there may well come a time when one may say the coercive aspect is less in the balance than the penal aspect of it. That oversimplifies the problem, and we may have something to suggest about it in our study draft, although as those who are aware of the work of the Commission know, our study draft is not going to be a Commission document in the sense it is a recommendation; we are planning, after having presented these proposals from the staff developed with the assistance of consultants like Professor Dixon, we are planning to put these ideas into the public domain where they can be criticized and we can get the benefit of suggestions.

Mr. POFF. If my colleague will yield, recognizing the full force of the statement just made by Mr. Green, I shall not undertake to argue the moral or legal implications. But just by way of commenting upon the question you raised, I think it should be borne in mind that indeed this sort of incarceration is coercive and is not intended to be a penalty. The consequence flowing from that distinction primarily is that the person who is incarcerated has it within his power to purge himself of contempt and free himself. That is all I care to say on that point.

Mr. KASTENMEIER. Have you concluded?

Mr. BIESTER. He may have the keys to that particular coercion in his pocket, but someone else may have the keys to the coercion in his pocket if he answers the question. He may be a subsoldier in the Cosa Nostra or one of the fringe people who by dint of being involved as a recipient of loan-shark money finds himself blackmailed into an operation and then because he faced a rather swift corporal punishment if he talks and faces a continued legal punishment if he does not, he finds himself trapped in quite an unfortunate circumstance.

Mr. POFF. If the gentleman will recall, he has been granted immunity and all he needs to do is obey the order of the court.

Mr. BIESTER. He does face the freedom of the incarceration. I do not suggest this is a way. I think we ought to be cognizant of the fact that this can be used.

Mr. POFF. I think it is a legitimate point.

Mr. KASTENMEIER. Thank you very much, gentlemen.

Professor DIXON. Thank you.

Mr. KASTENMEIER. Now our last witness today is Miss Victoria Popkin, assistant director of the Washington office of the American Civil Liberties Union. Welcome to the committee. You have been very patient and we regret the delay in hearing your testimony.

STATEMENT OF VICTORIA POPKIN, ASSISTANT DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

Miss POPKIN. Thank you very much.

I have a prepared statement.

Mr. KASTENMEIER. May I state without objection the entire statement of Miss Popkin will be accepted for the record in addition to her verbal commentary.

(The statement follows:)

STATEMENT OF VICTORIA POPKIN, ASSISTANT DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

I am Victoria Popkin, Assistant Director of the Washington Office of the American Civil Liberties Union. I am a lawyer and a member of the State Bar of California. The ACLU is a private non-partisan, non-profit organization which devotes its entire resources to the protection of those rights guaranteed by the Bill of Rights. It is this concern which dictates our opposition to the bill under consideration by this Subcommittee today. The ACLU opposes H.R. 11157, the proposed Federal Immunity of Witnesses Act, on the grounds that it is of doubtful constitutionality and severely undermines the Fifth Amendment privilege against self-incrimination.

H.R. 11157 embodies recommendations made by the National Commission on Reform of Federal Criminal Laws. It would replace the various witness-immunity laws now scattered throughout the U.S. Code and keyed to specific subject-matter legislation, with a single set of uniform provisions. A major consequence, its proponents stress, would be to "avoid gaps in immunity authority." In addition, it attempts to make a substantial change in the legal effect of an immunity grant.

While uniformity, clarity and the avoidance of "gaps" in authority are undoubtedly laudable goals in the construction of a criminal code, in this case they are to be achieved at the expense of significantly expanding existing authority to compel unwilling witnesses to provide otherwise constitutionally privileged information, and at the same time, failing to provide the complete protection constitutionally required to be afforded such witnesses in exchange for depriving them of their privilege. We suggest that these proposed changes are neither as benign nor as beneficial as some would suggest.

Specifically, H.R. 11157 would add a new general immunity provision to Title 18 U.S.C., applicable to (1) proceedings before any court or grand jury of the United States, (2) proceedings before any agency of the United States in which the agency is authorized to issue subpoenas and to take testimony under oath or affirmation, and (3) Congressional proceedings. It would provide that whenever a witness refuses on the basis of his privilege against self-incrimination to testify or provide other information, he may be ordered to provide the information, and

"... may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the 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 giving a false statement or otherwise failing to comply with the order." [Emphasis added]

The ACLU objects to the limited scope of the immunity conferred, to the extension of the circumstances in which testimony can be compelled to include virtually all Congressional and executive agency proceedings regardless of subject matter, and to the procedures established for ordering a witness to provide information. I shall deal with each of these separately.

I. SCOPE OF THE IMMUNITY

As quoted above, the grant of immunity to be conferred under the proposed "Federal Immunity of Witnesses Act" is limited to the guarantee that neither the testimony or other information so compelled nor any of the "fruits" thereof, "may be used against the witness in any criminal case." In our view this falls far short of the constitutional requirement of "absolute immunity" set forth in every Supreme Court case which has specifically ruled on the question, and heretofore reflected in the great majority of existing federal immunity provisions.

Since 1892, when the Supreme Court in *Counselman v. Hitchcock*, 142 U.S. 547 held an immunity statute unconstitutional because it did not prevent the use of the "fruits" of the compelled testimony from being used against the witness, federal immunity statutes have generally provided that the witness shall be immune from prosecution for or on account of any transaction, matter or thing concerning which he is compelled to testify or produce evidence. For the Court in *Counselman* held:

"We are clearly of the opinion that no state which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." [Emphasis added.]

Immunity statutes providing such "absolute" immunity were subsequently held constitutional in *Brown v. Walker*, 161 U.S. 591 (1896); *Ullman v. United States*, 350 U.S. 422 (1956); *Hale v. Henkel*, 201 U.S. 43 (1906); and *Reina v. United States*, 364 U.S. 507 (1960). Although the Supreme Court has not had occasion to consider an immunity statute of the precise breadth proposed by H.R. 11157, in our view, a statute which merely provides that the compelled evidence and its fruits cannot be used against the witness in any subsequent criminal proceeding would fall far short of the constitutional standard set forth in *Counselman*.

Some have attempted to defend the constitutionality of this limited immunity on the strength of dicta in Justice Goldberg's opinion for the Court in *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964). There, the Court held that a witness cannot be compelled by state officials to testify unless the "testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal

prosecution against him." *Id.* at 79. In a footnote it was stated that once a defendant proved he testified under immunity the burden was shifted to the prosecution to show that "their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Id.* at 79, n. 18. (See concurring opinion of Justice White, *id.* at 105-107.) Neither statement is sufficient to cast doubt on the *Counselman* standard. In *Murphy*, Mr. Justice Goldberg was concerned primarily with the scope of immunity as affected by considerations of federalism. He did not question the established interpretation of "absolute immunity" in *Counselman*.

Moreover, more recently the Court has again cast doubt as to whether any protection less than absolute immunity from prosecution is adequate under the Fifth Amendment. In *Stevens v. Marks*, 383 U.S. 236 (1966) involving a waiver of immunity exacted from a state official under threat of loss of job, it was stated:

"We need not stop to determine whether the immunity said to be conferred here—which merely prevents the use of the defendant's testimony or its fruits in any subsequent prosecution but, apparently, does not preclude prosecution based on 'independent' evidence . . .—constitutes that 'absolute immunity against further prosecution' about which the Court spoke in *Counselman v. Hitchcock*, . . . and which the Court said was necessary if the privilege were to be constitutionally supplanted." *Id.* at 244-45.

In his concurring opinion Justice Harlan pointedly observed that *Counselman* points to a negative answer to this question. *Id.* at 249. See *Adams v. Maryland*, 347 U.S. 179, 182-83 (1954) (semble).

As a practical matter, if a witness is to receive the full protection to which he is entitled by the Fifth Amendment, a negative answer is required. By forcing a prospective defendant to admit to unlawful acts while under immunity, a prosecutor gains the enormous advantage of having his search narrowed to one person. A less than candid prosecutor would be limited only by his ingenuity and diligence in uncovering an independent piece of evidence from which he could claim his investigation and its fruits proceeded. In short, the burden on the courts to police the use of the fruits of compelled testimony would be not only onerous and time consuming, but well nigh impossible in trying to protect defendants adequately.

Doubts as to the constitutionality of the approach taken by this bill were responsible for the decision of the Senate Judiciary Committee less than three years ago to reject that approach in favor of complete immunity from prosecution with respect to compelled racketeering testimony. Report on S. 2190, Senate Committee on the Judiciary, S. Rept. No. 1498, 89th Cong., 2d Sess. 19-20. The *Murphy* case had already been decided at that time and apparently the Committee was unable to use its dicta to resolve those doubts. Nothing has happened in the interim which affords a basis for disregard of such doubts now.

If a general immunity statute is to be enacted it should rest firmly on the constitutionally established standard rather than perch precariously on the slim hope that the Court might be willing to re-examine its numerous past precedents.

II. EXPANSION OF THE CIRCUMSTANCES IN WHICH TESTIMONY CAN BE COMPELLED

Regardless of the question of the constitutionality of the immunity granted, the ACLU objects to *any* general grant of immunity in that it seriously undermines the Fifth Amendment privilege against self-incrimination. Under H.R. 11157, testimony or other information could be compelled in any federal court or grand jury proceeding, civil or criminal, in any agency proceeding in which the agency may issue subpoenas and take testimony under oath, and in any Congressional proceeding, without regard to subject matter. This is a vast and limitless expansion of the circumstances under which compulsion is presently permitted by federal immunity statutes. Significantly, no justification for this expansion has been given save references to uniformity and the need to cover so-called immunity "gaps." No consideration appears to have been given to the thought that such gaps may be fully warranted.

As Mr. Justice Frankfurter pointed out in the Court's opinion in *Ullman v. United States*, "This command of the Fifth Amendment ('nor shall any person . . . be compelled in any criminal case to be a witness against himself . . .') registers an important advance in the development of our liberty—one of the great landmarks in man's struggle to make himself civilized.' Time has not shown that protection from the evils against which the safeguard was directed is needless or unwarranted." 350 U.S. at 426.

During the course of debate in Congress on the 1954 Immunity Act, held constitutional in *Ullman*, the ACLU made the following statement in opposition to the bill's passage:

"The ACLU considers the immunity law as unwise because we believe that the privilege against self-incrimination should also include protection against self-degradation. While the courts today might not accept this view, we believe that the past ruling of judges of various courts should still apply, that people should be protected against giving self-degrading testimony.

"Our democratic system is based on the concept of fairness and decent treatment of the individual, and the full power of government should not be brought to bear to force a person to condemn himself by his own words. The Fifth Amendment protection against self-incrimination is rooted in the historical struggle of men to maintain their political beliefs despite government efforts to force confessions which would result in criminal prosecutions. And even if persons testifying today do not disclose criminal activities, noncriminal disclosures about Communist matters could subject them to severe punishment."

Although that statement was cast in the context of the 1954 Immunity Act, which was confined to matters of national security, its general message applies with even greater force to the present bill which extends the cloak of immunity until little will be left of the privilege. Even if the bill proposed a constitutional grant of "absolute immunity" and thus adhered to the letter of the Fifth Amendment, it would nevertheless do violence to the spirit of that Amendment and exact a heavy toll in terms of the quality of our free society. It is a sign of government insecurity for it implies that we are powerless to detect and punish wrong-doers in conformity with criminal due process. We do not believe that our government has become so impotent that it must sacrifice its dignity.

Former Dean, and now Solicitor General, Erwin N. Griswold, in his famous re-affirmation of the privilege against self-incrimination, "The Fifth Amendment Today," described the privilege in the following words, to which we subscribe:

"If we are not willing to let the Amendment be invoked, where over time, are we going to stop when police, prosecutors, or chairmen want to get people to talk? Lurking in the background here are really ugly dangers which might transform our whole system of free government. In this light, the frustrations caused by the Amendment are a small price to pay for the fundamental protection it provides.

"One of the functions of government, based on long experience, is at times to protect the citizen against the government. This function has been performed, to some extent, by the Fifth Amendment, although not always perfectly, and not always without some loss to legitimate government interests. While protecting the citizen against the government, the Fifth Amendment has been a firm reminder of the importance of the individual.

". . . [T]he Fifth Amendment can serve as a constant reminder of the high standards set by the Founding Fathers, based on their experience with tyranny. It is an ever-present reminder of our belief in the importance of the individual, a symbol of our highest affirmations. . ." p. 81.

In considering the value of the continued, if not complete, derogation of this constitutional protection which would result from this bill, one must consider carefully, and in very practical terms, what is really likely to be gained. The great difficulty inherent in any general and expansive immunity provision such as this is that it would preclude the kind of careful balancing which has heretofore been possible where each proposed immunity grant is examined in light of the subject-matter legislation to which it is attached. In our view, "gaps" in immunity authority which have resulted from this case by case approach may be well-calculated and highly desirable.

For example, in weighing the evils which would result against the benefits to be derived, one might arrive at entirely different conclusions in one context than in another. One might decide it is worth it in the area of organized crime where, because of the terroristic methods of the criminal organization, the reluctance of witnesses to give evidence makes prosecution difficult. The same difficulties, however, are not encountered with respect to what are commonly referred to as "street crimes," or "white collar" crimes, so that the balance shifts considerably. They are essentially different problems. H.R. 11157 ignores these very real and relevant differences. Moreover, even in the case of organized crime investigations, it is not altogether clear that immunity statutes will reap the benefits justifying derogation of the privilege against self-incrimination. As former Attorney General Katzenbach stated in his testimony on the federal antiracketeering law, organized crime has institutionalized and enforces a conspiracy of

silence, which is "secured most dramatically through terror. When the tortured body of an underling is found hanging from a hook in a meat freezer, he cannot talk and his associates are not likely to."

It is difficult to see how a grant of immunity can in any way help to pierce this kind of silence.

H.R. 11157 would allow testimony, books, records, documents and other information to be compelled in any federal court proceeding, whether criminal or civil. Thus it cannot be justified in terms of a pressing need to secure organized crime convictions. Similarly, it applies to *any* Congressional proceeding. Considering the wide range of Congressional hearings, what possible overall justification can be urged? Certainly not any pressing national security need. In other words, the past justifications which Congress has found sufficient to support specific grants of immunity are not automatically applicable to this bill.

Finally, a general immunity provision such as this, barring only the use of compelled evidence rather than granting total immunity from prosecution, as a practical matter, provides actual incentive for circumvention of the Fifth Amendment, while now immunity provisions are invoked only as a last resort. A less than energetic prosecutor might be quick to rely on the limited immunity provision rather than another means to secure investigatory leads while loath to rely on a total grant for fear of immunizing the subject from any future prosecution. Similarly Congressional investigating committees and executive agencies, such as the Subversive Activities Control Board, which now hesitate to compel testimony for fear of immunizing witnesses from prosecution for acts about which information is sought, would be less hesitant to call controversial witnesses and use this power to expose and harass. Since a limited immunity provision, while affording some protection against criminal penalties, affords none against very real penalties in terms of reputation and livelihood which could result from the information elicited, it thereby derogates not only the Fifth Amendment privilege with which it specifically deals but also the right of privacy and the freedom of speech and association guaranteed by the First Amendment. As Justices Black and Douglas stated so well in their landmark dissent in the *Ullman* case, *supra*:

"The guarantee against self-incrimination contained in the Fifth Amendment is not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and freedom of expression as well. My view is that the Framers put it beyond the power of Congress to *compel* anyone to confess his crimes. The evil to be guarded against was partly self-accusation under legal compulsion. But that was only a part of the evil. The conscience and dignity of man were also involved. So too was his right to Freedom of Expression guaranteed by the First Amendment. The Framers, therefore, created the federally protected right of silence and decreed that the law could not be used to pry open one's lips and make him a witness against himself." (At 445-6.)

III. PROCEDURES

The dangers which result from expanding the situations in which immunity can be granted and testimony compelled, outlined in the previous section, are compounded by the new procedures provided for invoking the statutory powers conferred. In this respect, H.R. 11157 is an "anti-court" bill!

Although the judicial contempt power is apparently the sanction for refusing to comply with an order to testify secured under the proposed Act unless a specific statutory penalty exists or is provided, effective judicial scrutiny of the necessity, propriety or relevance of the information sought is specifically precluded. In other words the courts, where they act at all, act merely in a ministerial capacity under this bill. This is, we believe, unprecedented for an immunity provision. It has long been recognized that an important and proper function of the courts is to act as a check on "run-away" or improper use of both executive and legislative investigatory power. See, e.g. *Watkins v. United States*, 354 U.S. 178 (1957); *Camara v. Municipal Court*, 387 U.S. 523 (1967), *See v. City of Seattle*, 387 U.S. 541 (1967).

With respect to court and grand jury proceedings, H.R. 11157 provides that on the request of a United States Attorney, with the approval of the Attorney General or his designee, the United States District Court for the judicial district in which the proceeding is or may be held, *shall* issue an order requiring an individual to testify. This is a departure from the usual provision in federal immunity statutes which states that a Court *may* issue such an order. It is, as we said, an apparent attempt to prevent a Court from acting as a check on the propriety or relevance of the questions to be posed or the information sought by the U.S.

Attorney. Placing such totally unrestricted power to grant immunity in the hands of the prosecutor is unwarranted, and reduces the requirement of a court order to a mere paper procedure.

The procedures by which an administrative agency can order testimony are even more unrestricted. The agency, defined so as to include executive departments, the military and specific agencies such as the Subversive Activities Control Board, may itself issue the order without even notice to, to say nothing of approval by, a court. While notice must be given the Attorney General, he need not concur in the agency's determination that the information "may be necessary to the public interest" and is powerless to stop the order from being issued. Thus not even the Chief Executive himself has power to curb a "run-away" executive agency. This is an unprecedented grant of power to an administrative agency—a grant of power which holds dangers for the federal government itself, as well as for the individual involved.

At least three possible abuses are immediately apparent. First, an executive agency could grant immunity from criminal proceedings, regardless of whether the federal prosecutor feels this is justified in terms of the need for the information. An agency could thereby immunize witnesses and hamstring criminal prosecutions. For example, the SACB, seeking to preserve its own existence by instituting a proceeding to declare an organization to be Communist, and justify that existence by exposing a so-called Communist agent, could call an individual and compel him to testify despite the wishes of the Attorney General, and in doing so immunize that person so that he could not be convicted for an actual offense which he had committed, and for which the Attorney General had every intention of securing an indictment at a later date.

Second, since no public record in the form of a court order is required, immunity could be secretly conferred by an agency. This opens wide the door for corrupt use of the power to immunize as a pretext for insuring that a specific individual cannot be prosecuted should his crime later come to light. For example, an outgoing official of the SEC, the Internal Revenue Service or the ICC, to cite a few possibilities, knowing of a criminal violation could secretly confer immunity on the guilty party and thereby foreclose later adverse proceedings in exchange for a lucrative position with a company owned by the offender or any of a number of other kinds of favors, including, of course, outright bribery.

Third, an agency although immunizing the individual from criminal penalties when it compels testimony, does not immunize him from civil penalties, ranging from loss of a job to deportation. It thus may use this procedure with the explicit aim of gathering evidence in order to impose those civil sanctions or merely to expose for the sake of exposure. Fishing expeditions by executive agencies or witch hunts by the SACB, for example, are a very real possibility, as are personal political vendettas by an appointed official. This is entirely inconsistent with even the most rudimentary notions of due process.

As in court or grand jury proceedings, information can be compelled in Congressional hearings, only after a court order is secured, but here too, the court proceeding is purely ministerial. It is provided that the court *shall* issue the order if it finds that in the case of a proceeding before either House of Congress, the request has been approved by an affirmative vote of a majority of the members present, or in the case of a proceeding before a Congressional committee, the request has been approved by an affirmative vote of two-thirds of the members of the full committee. The Attorney General may stay the issuance of the order, but only for a period of twenty days.

This, too, represents a substantial change from existing procedures. Under the Immunity Act of 1954, 18 U.S.C. § 3486, Congress can compel testimony only after securing a court order which *may* be issued after notification of the Attorney General and ". . . thereafter having secured the approval" of the court. The elimination of any possibility of the court acting as a check as to the propriety or relevance of the information sought, coupled with the extension of the congressional power to confer immunity in instances other than national security or defense, which are the only instances in which it is presently allowed represents a broad extension of existing law and an open invitation to abuse. A Congressional committee which disagrees with the Administration's investigation and handling of a particular matter, or anxious for quick action in an election year, could immunize a witness and thereby destroy a carefully compiled criminal case. Moreover, since the bill would provide only limited immunity, Congress might be less reluctant to indulge in the harassment of unpopular witnesses by

use of this power. And in this case too, the individual is in no way protected from a whole array of civil disabilities which could result from the information elicited on pain of contempt.

CONCLUSION

As I indicated at the outset, in our view the proposed Federal Immunity of Witnesses Act is neither as benign nor as beneficial as its supporters suggest. It is an unprecedented and dangerous extension of the power to compel an individual to condemn himself by his own words. Its constitutionality is doubtful. It does violence to the spirit if not the letter of the Fifth Amendment and other constitutional guarantees, and is destructive of the values of a free society. We hope that this Subcommittee will not give its stamp of approval to this bill. Long ago, Mr. Justice Brandeis wisely warned:

"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficial . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding," dissenting in *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

Miss POPKIN. I realize that time is a very pressing matter here so I will try not to read most of it and perhaps summarize it. I hope you will feel free to interrupt me and we can dispose of it in short order.

I find myself in a somewhat unenviable position in having to disagree with all of the distinguished witnesses who have preceded me, without exception.

However, I can take some comfort in the fact that I suppose I have the last word. As you can see from the statement, the ACLU is opposed to the bill in toto. We object to the limited scope of the immunity conferred, to the extension of circumstances in which testimony can be compelled to include virtually all congressional and executive agency proceedings, regardless of subject matter, and to the procedures established for ordering a witness to provide information.

I would like to deal with each of these separately, if I can. Some of the points have been covered.

We believe, first of all, that the grant of immunity to be conferred under the proposed legislation, being limited only to a use immunity, falls short of the constitutional requirement of absolute immunity as stated in every Supreme Court case which has in one way or another specifically ruled on the question. I think the constitutional cases that were discussed in the very fine discussion that preceded my testimony show that they have never had to hold directly on the point, and I do not propose to reopen that discussion and start citing one judge's dicta against another judge's dicta. The dicta becomes more important depending on which side you are on. The comment of Justice Douglas may be volunteered whereas the comment of Justice Harlan becomes authority. I do not think it would serve any purpose to reiterate it all now. I think you cannot take comfort from the recent cases or derive any sense of assurance that the *Counselman* standard is in disrepute and would be rejected. In this regard I would like to say also that if you look at the whole trend of recent case law in which the Warren court has been a pioneer, there have been no decisions restricting the fifth amendment privilege in any way. In all other contexts where they have dealt with self-incrimination the trend has been to extend the privilege, extend the protection to the defendants rather than restrict it.

I think that is a trend that you are going against in trying to write a more restrictive provision into law here. I also would like to make a point that my statement does not include—I noticed in the discussion today and I am somewhat troubled by the easy analogy to the use

restrictions in search and seizure. I think there is a vital difference. The exclusionary rule to which you are referring has been fashioned by judicial decision, not by legislation. Judges decide cases going only as broadly as is absolutely necessary by the facts before them. They are restricted in that way. The cases have demanded that they fashion these rules. I do not think that the same problem is involved when you are dealing with a legislative decision, necessarily. Congress has been following the *Counselman* dicta or whatever you want to call it heretofore. They have been very careful to guard the rights of the defendants or the witnesses, I should say, and I think that is very good and very important.

I think it is fitting. I think by your trying to adhere only to the judicial rule which has been fashioned you are in a sense passing the buck back to the courts and you are again putting the onus on them of having to make decisions that are in effect going to result in people being let go. So that aggravates the fight that is going on now between people who are angry at the courts letting the criminals out because the courts found in policing individual abuses of the fifth-amendment standard that they have had to take this kind of action.

I think you have to consider that as well. I do not think you should put the onus on the court and I think that that is a fitting policy consideration to keep in mind. I also, would like to try and turn that analogy around a bit, if I may, and say that it seems to me you are arguing that because the courts have only said you cannot use search and seizure evidence in a coerced confession case, you are saying: "All right, therefore it is proper for the Legislature to say, here is a bill which institutionalizes ways in which you can coerce confessions." But you just cannot use the confession. I think in a sense that is what you are doing here. I do not think the exclusionary rule analogy is as easy as everybody assumes it to be.

As I said, as a practical matter, if a witness is to receive the full protection to which he is entitled by the fifth amendment, immunity from prosecution rather than use is required. By forcing a prospective defendant to admit to unlawful acts while under immunity a prosecutor gains the enormous advantage of having his search narrowed to one person. A less than candid prosecutor would be limited only by his ingenuity and diligence in uncovering an independent piece of evidence from which he could claim his investigation and its fruits proceeded.

The burden on the courts to police the use of the fruits of compelled testimony would be not only onerous and time-consuming, but well nigh impossible in really protecting defendants adequately. We feel if a general immunity statute is to be enacted, it should rest firmly on the constitutional standard which has been announced rather than on the slim hope that the Court may decide to reexamine that precedent.

Mr. KASTENMEIER. At that point, Miss Popkin, if you were rewriting H.R. 11157, I take it first of all you have no objection to writing a general immunity statute.

Miss POPKIN. We definitely do have an objection to a general immunity statute. As the statement makes clear throughout we are more inclined to embrace Justice Douglas' and Justice Black's position that there is a federally protected right to silence. I do not think you have to go that far, however, in order to disagree with the limited immunity that is being suggested in this bill. I think we feel as an organization

that you should have a right not to degrade yourself, not to be compelled to say things which can result in civil penalties even if not criminal penalties.

The civil penalties that can result are often just as severe as incarceration: Deportation, loss of job, loss of income, loss of reputation. This is something that is very serious. I think it has to be taken into account. It can affect everyone who might come across this statute. I think that has enormous implications for the quality of the society in which we live.

Mr. KASTENMEIER. You are then against the 50 existing immunity statutes?

Miss POPKIN. Generally, yes, we are. Again, I say you do not have to go that far however to oppose this. If an immunity statute is to be written, and I think the courts have indicated that immunity as a concept is possible at this point, certainly constitutionally, that it should be an immunity from prosecution about the matter or transaction to which the question relates, and that is the only way you can be given the complete protection.

Mr. MIKVA. If the chairman would yield on that point, as I read your statement and heard what you were saying, Miss Popkin, I gather it is the position of the union there is a policy matter as well as a limitation here. You are not urging old arguments on us on what the policy ought to be on past statutes but certainly the Congress has the responsibility to think what the policy ought to be on this statute putting aside the constitutional limitation. Even if there is room, we need not go to the very last bit of room the court will give us.

Miss POPKIN. That is very definitely right. You state our position well.

Mr. MIKVA. I happen to agree with it.

Miss POPKIN. Turning now to the question of expansion of the circumstances in which testimony can be compelled, as I just said, regardless of the question of constitutionality of the immunity, the ACLU objects to any general grant of immunity in that it seriously undermines the fifth amendment privilege against self-incrimination. It would apply to civil and criminal proceedings, any agency proceedings in which the agency may issue subpoenas and take testimony, and in any congressional proceeding without regard to the subject matter. Now this has been very little discussed by the witnesses who preceded me but I think it is very serious. This is an expansion of the circumstances under which compulsion is presently permitted by Federal immunity statutes, and I do not think a clear and coherent justification for this expansion, other than uniformity and order in a criminal code of procedure, has been urged upon us. No consideration appears to have been given to the fact that gaps in immunity may be fully warranted and desirable.

In considering the value of the continued, if not complete derogation of this constitutional protection which we think would result, you have to consider carefully and in very practical terms what is really likely to be gained. The great difficulty inherent in any general immunity provision such as this is that it would preclude the kind of careful balancing which has heretofore been possible where each proposed immunity grant is examined in light of the subject matter legislation to which it is attached.

For example, in weighing the evils which would result against the benefits to be derived one might arrive at an entirely different conclusion in one context than in another. One might decide it is worth it in the area of organized crime where the terroristic methods of the criminal organization or the reluctance of witnesses to give evidence, makes prosecution very difficult.

The same difficulties, however, are not encountered with respect to what are commonly referred to as street crimes or white-collar crimes, so that the balance shifts considerably. These are essentially different problems and the bill ignores that fact.

I think you also have to consider, even in the area of organized crime whether you are really going to gain anything from this—whether it can break down the terroristic conspiracy of silence which is so well known.

H.R. 11157 would allow testimony, books, records, documents, and other information to be compelled in any Federal court proceeding, whether civil or criminal. It cannot be justified thus in terms of a pressing need to secure organized crime convictions.

Similarly, it applies to any congressional proceeding. Considering the wide range of congressional hearings, what possible overall justification can be urged? Certainly not any pressing national security need. In other words, the past justifications which Congress has found to support specific grants of immunity are not automatically applicable to this bill.

Finally, we feel that a general immunity provision which bars only the use of compelled evidence rather than granting total immunity provides actual incentive for circumvention of the fifth amendment, while now immunity provisions are invoked only as a last resort. A less than energetic prosecutor might be quick to rely on the limited immunity provision rather than on other means to secure investigatory leads while now he is loath to do so for fear of immunizing the subject from future prosecution. Similarly, congressional investigating committees and executive agencies, such as the Subversive Activities Control Board, to which this specifically applies, which now hesitate to compel testimony for fear of immunizing witnesses from prosecution, would be less hesitant to call controversial witnesses and use this power to expose and harass.

A limited immunity provision, while affording some protection against criminal penalties, affords none against very real penalties in terms of reputation and livelihood. It thereby derogates not only the fifth amendment privilege with which it specifically deals, but also the right of privacy and the freedom of speech and association guaranteed by the first amendment.

I would like to turn now finally to the procedures provided in this bill. The dangers which result from expanding the situations in which immunity can be granted and testimony compelled are compounded by the new procedures provided for invoking the statutory powers conferred. I think it was we who coined the phrase used this afternoon, that it is an "anticourt" bill. Although the judicial contempt power is apparently the sanction for refusing to comply with an order to testify secured under the proposed act, effective judicial scrutiny of the necessity, propriety, or relevance of the information sought or of jurisdictional matters is specifically precluded. In other words, the courts where they act at all, act in a merely ministerial capacity.

The last witness I think raised this point, and he seemed to feel that was not the case and that is not what they meant by ministerial capacity.

If they did not mean to preclude jurisdictional questions from being raised, then we would find this somewhat less objectionable. I feel, however, for instance, in the agency proceedings provision there is no procedure even that you have to go into the court. So it puts the burden on the witness to initiate a lawsuit, to go into court to have any jurisdictional question answered. Since the order can be given before he is even called to testify, he must already put himself in contempt by refusing before he can even question it, because he may not know the order has come down.

Mr. POFF. Can you give us an example of a jurisdictional question you have in mind?

Miss POPKIN. The kind of question I have in mind is whether the congressional committee is asking questions that are unrelated to the legislative mandate for the investigation.

Mr. POFF. Do you feel this is the thing which the court should be allowed to inquire into and pronounce upon as a precondition to the grant of immunity?

Miss POPKIN. Yes, I do. If the person who is being ordered to testify feels he has a point and wants to raise it.

Mr. POFF. Do you think that ought to be an adversary proceeding before the court?

Miss POPKIN. Yes, I do, ideally.

Mr. POFF. Thank you.

Mr. MIKVA. If my colleague will yield, I can think of a couple of others which are equally pertinent just in terms of the standards that are set forth in the bill itself. Let us suppose that in fact when we are dealing with administrative agencies that it is not in the public interest or that the order has been procured by fraud. I do not want to get hung up on that one example, but again, let us talk about the oil scandal back in the twenties. The way the bill is now phrased there is no court supervision whatsoever of the order commanding the witness to testify. I assume at that point his only remedy would be to go into court affirmatively and seek relief by some kind of injunction against the agency involved, which it seems to me puts an undue burden on the witness, when in fact the agency may be completely outside its authority within the context of the bill itself.

Mr. POFF. You are presupposing that they would utilize the mechanism that this provides to grant themselves immunity.

Mr. MIKVA. Yes.

Miss POPKIN. I might add to the point, which I think is very good, that has been raised. I think it is more abrasive of the problem of separation of powers to have a court rule on an individual motion, where the court has been specifically cut out of the process in other ways in the statute, than to write some sort of protection of that kind into the bill.

Mr. POFF. Don't you agree that the negative inference of a decision in the *Ullman* case was that had the Court's responsibilities been greater than ministerial then it would have been objectionable under the separation of powers?

Miss POPKIN. I agree that is a negative inference that can be drawn from the statement. I do not agree with it. I think that could in part be

obviated by not using the word "shall" in the case of what a court can do but leaving the word "may" in there so you are not setting up a direct conflict if someone raises this kind of point.

I think also that the court should be in on the administrative agency proceedings. There is no provision at all for the courts to get anywhere in there at all. There is not even a public record required in a court before the immunity is granted.

Mr. POFF. If I follow your rationale, after the court has set up an adversary proceeding and gone into such jurisdictional and possibly substantive matters, that following the Court's decision on either question right of appeal would lie—

Miss POPKIN. Yes.

Mr. POFF. You recognize, of course, a time factor is involved.

Miss POPKIN. Yes, I do.

Mr. POFF. What do you suppose that would do to the general process of that immunity?

Miss POPKIN. I think it would make it somewhat more difficult.

Mr. POFF. It would make it relatively useless, would it not?

Miss POPKIN. No more difficult than it is under present procedures, like under the 1954 act, for instance. This is a possibility. That is how the act is written, and I think it is preferable that way. I agree with the necessity for speed and providing against unnecessary delays in the administration of justice, but I do not think at the expense of short-cutting a person's rights. I think you have to strike a balance there.

Mr. POFF. Yes, of course.

Miss POPKIN. With respect to court and grand jury proceedings, the bill provides that on request of the U.S. attorney with the approval of the Attorney General the U.S. district court for the judicial district in which the proceeding is or may be held shall issue an order requiring an individual to testify. This is a departure from usual provision in Federal immunity statutes. It is, as we said, an apparent attempt to prevent a court from acting as a check on the propriety or relevance of the questions to be posed or the information sought.

The procedures by which an administrative agency can order testimony are even more unrestricted. The agency, defined so as to include executive departments, the military, and specific agencies such as the SACB, may itself issue the order without even notice to, to say nothing of approval by, a court. While notice must be given the Attorney General, he need not concur in the agency's determination that the information may be necessary to the public interest. Thus not even the Chief Executive himself has power to curb a runaway executive agency.

I think that Congressman Hutchinson raised the point, and I don't think it was adequately answered, about the fact that where there is a conflict between the executive agency and the Attorney General, the Attorney General can go to the President for ultimate decision. I don't think that is true in all cases. For instance, in the case of independent regulatory agencies the President specifically may have no statutory power to overrule the decision. I think that it is not impossible that you have situations where an independent agency such as the SACB may be in complete disagreement with the administration and the Attorney General. I know that was partially the situation with the last administration, and now there is a bill in the Senate, S. 12, to give the SACB power to initiate work on its own without going to

Congress or the Attorney General. This is a real possibility and not just something that might happen once in a thousand times and even if it were, I think you would have to consider that.

In the statement at this point I describe some of the possible abuses which could occur in such a situation.

I must say that I think in the Senate version of this same bill, when Senator McClellan introduced it, he himself specifically said he thought it was a good idea to keep the court in on the proceedings in all cases so there would be a public record.

Mr. POFF. Was this in connection with the introduction of S. 30 or the companion bill to this one?

Miss POPKIN. The companion bill, S. 2122, I think.

As I said before, another important problem is the agency, although immunizing the individual from criminal penalties does not immunize him from civil penalties ranging from the loss of a job to deportation.

The agency thus might use this procedure with the explicit aim of gathering evidence in order to impose those civil sanctions or merely to expose for the sake of exposure; fishing expeditions by executive agencies, or witch hunts, are a very real possibility, as are personal political vendettas by an appointed official. This is entirely inconsistent with even the most rudimentary notions of due process.

As in court or grand jury proceedings, information can be compelled in congressional hearings only after a court order is secured but here too the court proceeding is purely ministerial.

The Attorney General may stay the issuance of the order, but only for a period of 20 days. We think this represents a change from our reading of the Immunity Act of 1954 which says Congress can compel testimony only after securing a court order which may be issued after notification of the Attorney General and thereafter having secured the approval of the court.

The elimination of any possibility of the court acting as a check as to the propriety or relevance of the information sought, coupled with the extension of the congressional power to confer immunity in instances other than the national security or defense, which are the only instances in which it is presently allowed, is a broad extension of existing law and an open invitation to abuse.

A congressional committee which disagrees with the administration's investigation and handling of a particular matter, or anxious for quick action in an election year could immunize a witness and destroy a carefully compiled criminal case. Moreover, since the bill would provide only limited immunity, Congress may be less reluctant to indulge in harassment of unpopular witnesses by use of this power and, in this case too, the individual is in no way protected from a whole array of civil disabilities which could result from the information elicited on pain of contempt.

Mr. POFF. I am interested in the manner in which you structure that hypothetical. As I understand it, you are assuming that you have an administration controlled by one party and a Congress controlled by another; that the administration has carefully prepared, to use your words, a criminal case against an individual and then you have implied that it might be possible for the legislative branch to set up a congressional hearing on some subject and ask the questions necessary to elicit

the testimony that would immunize the individual from the criminal prosecution so carefully prepared by the administration. Do I correctly state your hypothesis?

MISS POPKIN. Yes, you do.

MR. POFF. Do you think such a ploy would be successful? I assume, the evidence which was compiled by the administrative agency, was independent of, indeed, compiled prior to the charade in the Congress, to which you postulate, and in which case it would be possible to proceed with the prosecution notwithstanding the phony immunization process in the Congress.

MISS POPKIN. Theoretically that may be true, but it may be very difficult for the administration to show that the evidence was independently arrived at if the prosecution is brought later.

MR. POFF. But only if brought later. As I understood you, they were both brought at the same time, or had been done prior to the time the Congress took it up.

MISS POPKIN. They may not have completed getting all the material which they felt was necessary for the prosecution, and I think courts, having seen that the witness had been raked over the coals publicly in a congressional hearing, would be very zealous in guarding the rights of the individual and I think it might be very difficult for the administration to then carry a very heavy burden of proving that the evidence was independently arrived at.

MR. POFF. It might succeed a little better if the administration showed at the proper point that the Congress had approached the Attorney General and the Attorney General had recommended that the grant not be made.

MISS POPKIN. I think that would be one factor to take into account but I don't think it is definitive. Then again, as I say, you are going to put the courts in the position of being, so to speak, the fall guy for letting the guy go because nobody else is going to protect his rights at this point.

I think it is very hard to show where two bodies have the same information, exactly where and from which source it has derived. The prosecution may have to reveal the entire case to the defense too.

MR. POFF. If that revelation did not show any connection between the hearing at which immunity was granted and those who were gathering evidence for the prosecution, there would be no problem.

MISS POPKIN. Yes.

In conclusion, as I indicated at the outset, in our view the proposed Federal Immunity of Witnesses Act is neither as benign nor as beneficial as its supporters suggest. It is an unprecedented and dangerous extension of the power to compel an individual to condemn himself by his own words. Its constitutionality is doubtful. It does violence to the spirit if not the letter of the fifth amendment and other constitutional guarantees and is destructive of the values of a free society.

We hope that this subcommittee will not give its stamp of approval to this bill. Long ago Mr. Justice Brandeis wisely warned:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent * * * the greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.

MR. KASTENMEIER. Thank you for an excellent presentation in opposition to the bill.

May I ask if you know of any other organizations or individuals particularly interested in this subject area who are opposed to the bill, other than the ACLU and yourselves?

Miss POPKIN. We have not solicited the views of other organizations and I think that the bill has not been widely publicized at all. I am confident there would be other organizations that would be opposed though I cannot speak of any specifically that have taken that position.

Mr. MIKVA. Returning to the line of inquiry that my colleague, Mr. Poff, was pursuing just a moment ago, as I read the bill, even if the evidence had been independently derived by the Attorney General let us say, if in fact that same evidence was compelled under this bill by an administrative agency, that evidence is not usable in court even though it was independently derived and derived prior to the time of immunization.

I call your attention to section 6001 and ask if you read it the same way:

* * * But no testimony or other information compelled under the order may be used against the witness in any criminal case * * *.

So that even though we say we are cleaning up the bath problem, in fact we really aren't, if my reading is correct. Would you agree?

Miss POPKIN. I think that that is a possible reading of that language, yes. I don't think that was what is intended by the language.

Mr. MIKVA. I think it was not intended, but I think that the administration, for example, using the hypothetical that was being discussed before, would have no way of protecting itself if in fact any committee of Congress or any administrative agency decided they wanted to immunize somebody, even if the prosecution had commenced.

Mr. POFF. If my colleague will yield, I would like to suggest again, if I may, that this would be consequential only if this was the only evidence upon which the administration acted.

Mr. MIKVA. Or if it were crucial evidence.

Mr. POFF. Which is saying the same thing a little differently.

Mr. BIESTER. If you are dealing with a prima facie case.

Mr. POFF. We don't deal with prima facie cases in criminal prosecution except in regard to evidentiary matters.

Mr. BIESTER. That is not true in all jurisdictions. There are jurisdictions wherein the prosecutor need not submit testimony and the burden of proof shifts if he has a prima facie case. A prima facie case could be predicated on evidence entirely independent of any statement the defense might have made.

Miss POPKIN. And the bill is not limited to criminal cases. There can be a civil antitrust case where the burden might be somewhat different.

Mr. POFF. And, of course, you just suggested an area in which the statute might be useful in the future; one that was not mentioned this morning by the witness when they were discussing areas outside the criminal jurisdiction.

Miss POPKIN. Returning to your question, Congressman Mikva, I think if I were an advocate and this bill had become law, I would certainly argue for that interpretation of it and I think that would bar, perhaps, crucial evidence from being introduced later.

Mr. KASTENMEIER. Are there further questions?

Your testimony, Miss Popkin, concludes the hearing on this matter, although much of what was said at the hearing perhaps suggests some

additional thought might be given to the subject by the subcommittee. It is indeed a legally and judicially perplexing problem.

This then concluding the testimony on the subject, the committee will meet in executive session at a time to be announced. I would like to resolve this matter as soon as we can.

(Mr. Cramer's statement follows:)

STATEMENT OF HON. WILLIAM C. CRAMER, A REPRESENTATIVE IN CONGRESS FROM
THE STATE OF FLORIDA

Mr. Chairman, Members of the Committee, I regret the fact that other committee obligations kept me from testifying before Subcommittee #3 of the House Judiciary Committee, in support of my bill H.R. 12041, which, as you may know, is identical to H.R. 11157. I do wish, however, to submit this statement on H.R. 12041 to the committee, asking that it be included in the record.

We face today a world of constant change, a world that is fast moving and ever demanding in the field of crime detection, prevention and punishment. To meet this demand, we often find it necessary to modernize and streamline our methods. Realizing the need for change in our criminal codes, I have introduced H.R. 12041, a bill to replace existing immunity statutes with a new procedure for compelling testimony after a plea of the self-incrimination privilege of the Fifth Amendment, and re-defining the scope of witness immunity.

Specifically, H.R. 12041 would add a new general immunity provision to Title 18, United States Code, applicable to (1) Congressional proceedings, (2) proceedings before a court or grand jury of the United States, and (3) formal administrative proceedings. It would provide that whenever a witness refuses on the basis of his privilege against self-incrimination to testify or provide other information, he may be ordered to provide the information, and—

“ . . . may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the 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 giving a false statement or otherwise failing to comply with the order.”

This bill also provides that a direction to testify or produce other information authorized by this article may be issued by the appropriate district court or administrative agency.

This sorely needed legislation will effectively repeal more than 50 special and dis-uniform witness immunity statutes and replace them with a single uniform over-all statute. The Department of Justice has stated that “. . . the lack of uniformity in procedures under existing Federal immunity legislation and the lack of total coverage clearly indicates a need for reform in this area” I strongly feel that H.R. 12041 offers the reform that is so badly needed.

It must be stressed that H.R. 12041 is in no way a measure to repeal the Fifth Amendment or to render it useless. This legislation merely presents a new approach to an accepted and much needed procedure. It will enable the appropriate agency or court of the United States to gather information from witnesses directly involved in the crime in order that others in a joint crime venture may also be prosecuted. It will make it possible to effectively assemble the necessary information to prosecute those who would otherwise go free. This is essential in the war on organized crime in particular.

The most important, and perhaps most controversial provision is that H.R. 12041 grants immunity only from information testified before the agency or court of the United States. It in no way grants total immunity from prosecution as the many existing statutes do. As stated by the National Commission on Reform of Federal Criminal Laws to the President on March 17, 1969:

“The scope of immunity would be converted from immunity of the witness from prosecution for all matters related to his testimony to immunity from use of the testimony, or its fruits, against the witness in a criminal case.”

I cannot begin to stress the benefits this legislation will bring about should it be enacted. I feel it offers for the first time, a rational procedure for the granting of Immunity of Witnesses. In my judgment, this proposal constitutes a necessary and welcome change in the field of criminal law, and I urge its prompt enactment.

Mr. KASTENMEIER. There being no further comments or questions, the committee stands adjourned.

(Whereupon at 4:45 p.m., the subcommittee was adjourned.)

