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GRAND JURY VENUE—NORTHERN DISTRICT OF TEXAS

GOVERNMENT

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HEARINGS

BEFORE

SUBCOMMITTEE NO. 1

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

FIRST SESSION

ON

H. Res. 220, H. Res. 281, and Similar
Resolutions of Inquiry

MARCH 13, 1973

Serial No. 3



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GRAND JURY VENUE—NORTHERN DISTRICT OF TEXAS

TUESDAY, MARCH 13, 1973

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE NO. 1 OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to call, in room 2141, Rayburn House Office Building, Hon. Joshua Eilberg [chairman of the subcommittee] presiding.

Present: Representatives Eilberg, Flowers, Seiberling, Holtzman, Keating, Railsback, and Dennis.

Also present: Garner J. Cline, counsel, Arthur P. Endres, Jr., assistant counsel, and Donald G. Benn, associate counsel.

Mr. EILBERG. Today's hearings before Subcommittee No. 1 of the House Judiciary Committee have been called to consider H. Res. 220 and H. Res. 281, introduced by Congresswoman Abzug, and similar resolutions of inquiry introduced by Congressmen Koch, Rosenthal, Tiernan, Bingham, James V. Stanton, Carey, Delaney, and Wolff.

These resolutions would require the Attorney General to furnish the House of Representatives with information relating to the basis of venue in the northern district of Texas of the present grand jury investigation before which Kenneth Tierney, Thomas Laffey, Mathias Reilly, Paschal Morahan, and Daniel Crawford have been summoned.

The language of these resolutions clearly indicates that a very narrow legal issue is presented for the subcommittee's consideration. In this regard, each of the scheduled witnesses has been directed to confine his testimony to the limited issue of venue, and we will expect the cooperation of all witnesses in this matter.

This does not mean that Congress should ignore the broader issues relating to reform of the present grand jury system. In fact, H.R. 4322, introduced by Congresswoman Abzug, is presently pending before this subcommittee. This bill would provide for the transfer of grand jury proceedings where the convenience of parties or witnesses and the interests of justice so require.

For many years, prominent judges, defense and prosecuting attorneys, and legal scholars have made trenchant attacks on the modern role of the Federal grand jury. Furthermore, in recent years, many events have occurred which demonstrate the need for an exhaustive congressional investigation of this institution as well as the need for a review of the immunity and recalcitrant witness provisions of the Organized Crime Control Act of 1970.

However, such a thorough study must necessarily be detached from the subject matter of these hearings and it would be more appropriate

to consider these issues at some future time. Furthermore, detailed discussion of these matters today would only obfuscate the isolated procedural issue presented to this subcommittee by the various resolutions of inquiry.

Another reason for restricting the scope of our hearings is the fact that the grand jury before which these five individuals were called to testify has not been discharged. Consequently, this subcommittee intends to proceed in a very careful and cautious manner in order to insure that the rights of these individuals are not jeopardized.

Finally, since the legislative branch of Government still adheres to the separation of powers doctrine, we do not intend to interfere with the activities of the executive or judicial branches or to obstruct the operation of a pending grand jury investigation.

Recognizing that rule 6 of the Federal Rules of Criminal Procedure requires secrecy in grand jury proceedings, we intend to prevent the disclosure of facts which were elicited during the Texas grand jury investigation or information which may prejudice the rights of the five individuals involved.

In conclusion, the subcommittee does not intend to reach the merits of the grand jury investigation or decide the guilt or innocence of these men.

On the other hand, we do intend to listen to all relevant testimony and to receive any information which will assist us in properly considering these resolutions, which will be inserted in the record at this point.

[The resolutions follow:]

[H. Res. 220, 93d Cong., First Sess.]

RESOLUTION: *Resolved*, That the Attorney General be, and he is hereby directed to furnish the House of Representatives within ten days after the adoption of this resolution, with the following information:

1. The basis of the venue in the Northern District of Texas of the present grand jury investigation before which Kenneth Tierney, Thomas Laffey, Matthias Reilly, Paschal Morahan, and Daniel Crawford have been summoned.
2. A listing of any other districts in which the said grand jury investigation might have been conducted, together with the basis of venue for each such district.
3. Whether the said grand jury investigation has been completed.

[H. Res. 281, 93d Cong., First Sess.]

RESOLUTION: *Resolved*, That the Attorney General be, and he is hereby directed to furnish the House of Representatives within ten days after the adoption of this resolution, with the following information:

1. The basis of the venue in the Northern District of Texas of the present grand jury investigation before which Kenneth Tierney, Thomas Laffey, Matthias Reilly, Paschal Morahan, and Daniel Crawford have been summoned.
2. A listing of any other districts which were considered by the Department of Justice as sites for the said grand jury investigation, together with the basis of venue for each such district.
3. Whether the said grand jury investigation has been completed.

MR. EILBERG. Before calling the first witness, I wish to recognize those members of the subcommittee who have expressed a desire to make a statement at this time. I am hoping that these statements will be very brief and concern themselves with the venue question.

Do you have any statement, Mr. Keating?

MR. KEATING. No, Mr. Chairman, I don't have any statement at this time except to concur in your opinion that the testimony ought to be restricted to the issue in question.

MR. EILBERG. Mr. Seiberling?

MR. SEIBERLING. Mr. Chairman, I simply want to underscore what you said and, in particular, the importance of limiting the testimony to the issues raised by the resolution itself and issues that are necessarily relevant to them, such as the question of the use of grand jury proceedings in this case and whether they are consistent with our concepts of due process and the proper use of the power of investigation.

I do hope that the witnesses will do that, because I think, if we are to achieve some substantial value from this hearing, it is very important that we not get the scope of the hearing expanded beyond the confines of the resolution. Thank you.

MR. EILBERG. Mr. Dennis?

MR. DENNIS. I think I have nothing to add at this time, Mr. Chairman.

MR. EILBERG. Ms. Holtzman?

MS. HOLTZMAN. Mr. Chairman, I want to concur in what you said and what my colleague Mr. Seiberling said. I think the resolution before us raises a question of the propriety of the grand jury investigation and the procedural guarantees afforded to witnesses. These are problems that have attracted a great deal of attention in prior cases and raise question of legislative reform and very serious questions of fairness and due process that concern us here.

MR. EILBERG. Thank you.

It is my very great pleasure at this time to introduce our first witness, a gentleman who needs no introduction, who is probably one of the best known figures in the United States today. I welcome to the witness stand the senior Senator from the great State of Massachusetts, Senator Edward Kennedy.

TESTIMONY OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman, members of the committee; I am very much honored to have the opportunity of appearing before this committee on the resolution introduced by Congresswoman Abzug and cosponsored by other Members. I think it has shown great energy and foresight on her part. It is her action that has brought us together here.

I am pleased to have the privilege of appearing before you this morning at what I regard as a historic session—to my knowledge this is the first public hearing ever called by Congress to consider the rights of citizens in grand jury proceedings. In light of the story that unfolds this morning, I am certain it will not be the last.

From its origin at the Assize of Clarendon under Henry II in 12th century England, the grand jury has been justly celebrated as a shield for the common citizen against unfair criminal accusations by those in power.

By barring any indictment for a crime unless the charge was first approved by an independent body of impartial citizens, the grand jury interposed itself as a solid barrier of protection against unjust and unfounded prosecutions by the Crown.

Over the centuries, the grand jury grew into an outstanding landmark of English jurisprudence, a symbol of the law's concern for the individual's basic liberty. As such, it was one of the first and most important safeguards transported to the new American Colonies.

Indeed, it was in Massachusetts, in 1634, where the grand jury was first instituted in the new world, and in the century that followed, almost every other colony followed suit.

In those early years, the right to a grand jury was an important shield for American patriots in the pre-Revolutionary period, a bulwark against the oppressive actions of George III and his colonial governors. Because of this tradition, as well as to protect the citizens of the States of our young Republic from encroachments on their liberty by the newly created Federal Government, the Founding Fathers enshrined the grand jury in the fifth amendment to the Constitution, where it has endured ever since as an honored symbol of our own American legal tradition and a keystone of our Bill of Rights.

Today, however, as this hearing will reveal, the symbol is tarnished, the tradition dishonored. Over the past 4 years under the present administration, we have witnessed the birth of a new breed of political animal—the kangaroo grand jury—spawned in a dark corner of the Department of Justice, nourished by an administration bent on twisting law enforcement to serve its own political ends, a dangerous modern form of star chamber secret inquisition that is trampling the rights of American citizens from coast to coast.

And so, I commend Congresswoman Bella Abzug, and the co-sponsors of the House resolution before this subcommittee, for the imaginative legislative approach they have found to make this first significant congressional protest against the abuse of the grand jury.

It is my hope, Mr. Chairman, that out of this hearing and the record we begin this morning will come a strong resolve to conduct a thorough investigation of existing grand jury practices, so that Congress and the courts together can provide the safeguards we need under the Constitution to enable the grand jury to function as intended by the Founding Fathers.

I am here this morning primarily because I believe the Department of Justice is now engaged in a gross, continuing abuse of the grand jury process in Fort Worth, Tex.

The case of the Fort Worth Five is just the tip of the grand jury iceberg, but it has much to teach us about the insidious practices of the Department of Justice in several aspects of this area. As such, it merits the close scrutiny it will receive today and in the future from this subcommittee.

There is no substantial dispute as to the facts of the Fort Worth Five case.

In June of 1972, five Irish Americans—Kenneth Tierney, Thomas Laffey, Mathias Reilly, Paschal Morahan, and Daniel Crawford—all from the New York City area, were subpoenaed to Fort Worth, Tex.,

to appear before a Federal grand jury investigating the possible shipment of arms from this country to Northern Ireland.

At the time, seven other New York residents, including four high officials of the Irish Northern Aid Society, an active Irish-American group headquartered in New York City, were also called to testify, but their subpoenas were withdrawn.

The Fort Worth Five—Tierney, Laffey, Reilly, Morahan, and Crawford—all refused to answer the questions of the grand jury, on the ground that the investigation was politically inspired and violated a number of their basic legal rights.

After receiving grants of so-called use immunity, the Fort Worth Five continued to refuse to testify, and were immediately jailed for civil contempt. Last September, after 3 months in prison, the men were granted bail by Justice William O. Douglas, pending action by the Supreme Court on the legal challenges they had raised.

On January 22 of this year, the Supreme Court declined to hear the case, and on January 29 the men were again jailed in Texas on the contempt citation, where they now remain.

So far, they have spent a total of 4 months in prison, yet they stand charged with no crime, convicted of no offense. Unless the Department of Justice relents, or Congress or the courts intervene, their imprisonment may well continue throughout the life of the current grand jury, which expires on November 2.

And on November 3 as the Department of Justice has shown it is fully capable of doing within the letter of existing law, a new grand jury may be convened in Texas. They may be subpoenaed and held in contempt again, and the imprisonment of the Fort Worth Five may go on this way forever.

Gunrunning is a serious charge, and at the outset I want to emphasize that in no sense do I condone any form of such activity. As I have stated many times in the past and as I repeat today, I firmly condemn the activities of extremists on both sides of Northern Ireland.

I have made these views clear both to the Prime Minister of Great Britain and to the Prime Minister of the Republic of Ireland. And I have also made clear to each of them, as well as to Attorney General Kleindienst, that I give my full support to all legitimate activities, grand jury investigations, and other actions by law-enforcement authorities in both Britain and the United States to shut off the flow of any arms—or any funds for arms—from this country to Northern Ireland.

I am fully aware that a substantial number of weapons found in Northern Ireland have been traced to this country or to purchases made through this country. There is no question in my mind that there is a legitimate basis for an intensive investigation by the Department of Justice into these activities.

But I also believe that the Department of Justice has the obligation to obey the law in conducting any investigation it undertakes. That obligation is not only to obey the letter of the law, but the spirit of the law as well, so that the actions of the Department are fair according to the Constitution and statutes of the United States, and are seen to be fair by reasonable law-abiding citizens throughout the country.

Nearly half a century ago, this principle, that Government must obey the law, was stated eloquently by one of our greatest Supreme Court Justices, Louis Brandeis:

... Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.

Judged by that standard, I believe that the actions of the Justice Department in Fort Worth in the present case can be weighed and found severely wanting. Look at the record. Are these the actions of a Department of Justice that has a decent respect for the rights of its citizens? Are these five men being treated fairly under the Constitution and Bill of Rights? Or are they the innocent victims of a new and frightening form of secret inquisition?

Kenneth Tierney, 45, is a registered nurse and physical therapist at Columbia-Presbyterian Hospital in New York City. He lives in Yonkers with his wife and four young children. He has never been to Texas. In a sworn affidavit, he states that his only connection with Texas is that he once wrote a letter to President Lyndon Johnson.

Thomas Laffey, 34, is a real estate salesman who lives in Williston Park, N.Y., with his wife and three young children. He has never been to Texas or had any connection with Texas.

Mathias Reilly, 37, is a Manhattan busdriver who lives in Blauvelt, N.Y., with his wife and three young children. He has never been to Texas or had any connection with Texas.

Paschal Morahan, 26, is a carpenter who lives in the Bronx. He has never had any connection with Texas.

Daniel Crawford is a housepainter who lives in Manhattan. He has never had any connection with Texas.

There they are—five Irish Americans from New York City, none of them having any connection with Texas. Yet, in the spring of 1972, these five individuals were subpoenaed before a grand jury and imprisoned in Fort Worth, far from their friends and homes and families and jobs, in circumstances imposing special hardship and privation, not only on the men themselves, but also on their families.

Indeed, for some of the families, the only alternative to welfare has been the financial assistance for rent and food provided by Irish American community groups in New York City concerned about their plight.

For the men themselves, the concern they have for their families has been compounded by the dismal conditions of their own imprisonment. For virtually the entire period of their incarceration, the Fort Worth five were confined in the Tarrant County Jail in Fort Worth—a local, not a Federal, jail. Their imprisonment was carried out under especially harsh conditions, partaking of solitary confinement, with the men being denied exercise and even contact by telephone with their families or their legal counsel.

Four weeks ago, I wrote to Attorney General Kleindienst protesting these conditions and other aspects of the case. A number of others in Congress have also objected to the continuing unfair treatment. On

March 1, while I was still awaiting a reply from the Attorney General, the five were transferred to Seagoville, a renovated Federal correctional institution outside Dallas, where they are now incarcerated under less objectionable conditions.

Seagoville, of course, has other memories. In World War II, it was one of the sites of the infamous detention centers of resident American aliens. The years have passed, the facilities may be more modern, but as the present case makes clear, Seagoville still retains its image of injustice and repression.

The fact remains that the men are still in prison, denied their freedom because of what I believe is an irresponsible manipulation of the grand jury and a shocking insensitivity by the Department of Justice and its prosecutors to basic human rights.

To me, the present case demonstrates three clear aspects of grand jury abuse, for each of which the Department of Justice stands itself indicted. Each of these aspects is covered by the pending resolution of inquiry filed by Congresswoman Abzug.

The first abuse is the venue in Fort Worth. What possible justification exists for separating these men from their homes and families and friends and jobs in New York, and hauling them 1,400 miles to Texas, to appear before an alien grand jury and a hostile prosecutor?

Perhaps, at this hearing, the Department of Justice will break its long unconscionable silence on this matter and demonstrate some legitimate basis to justify the Texas venue.

The only suggested link of which I am aware is the rumor that the Department has been informed by the Government of Great Britain that the Irish Republican Army in Ulster has in some fashion attempted to purchase arms in Texas, and that, knowing nothing more, the Department decided to launch a deep-sea fishing expedition in Texas to see what they could learn from the leaders of the Irish Northern Aid Society in New York.

Yet, for reasons known only to itself, the Department withdrew the subpoenas to Fort Worth for the only men who knew anything about the Northern Aid Society. Instead, they chose only to pursue the five hard-working New York Irishmen who are now in prison, men who have no official connection at all to the Irish Northern Aid Society and who have no connection at all to Texas.

Simply put, I believe the Department is holding the wrong men in Texas and won't admit it. The Department prefers to let innocent citizens endure the pain of jail, rather than confess that its prosecutors have blundered.

There is not one shred of fact in any of the known aspects of this grand jury proceeding to suggest any possible connection between Texas and these five Irish Americans, or between Texas and any other aspect of this grand jury investigation.

We do know one thing, however. A Federal grand jury in the Southern District of New York, in the very area in which these men reside, has been conducting a separate investigation of the shipment of arms to Northern Ireland from the United States.

A number of indictments have already been returned in that investigation, one as recently as February of this year. Why couldn't the Fort Worth Five have been subpoenaed to testify before the grand jury in New York City?

Why were they railroaded to Fort Worth in such oppressive circumstances, serving no apparent law enforcement purpose? Wouldn't New York have been more convenient for all concerned—convenient for the witnesses, and convenient for the Department of Justice, too?

Perhaps that question answers itself. From the beginning, the circumstances of this case have strongly suggested that it had nothing to do with Texas, and a great deal to do with a thinly veiled attempt by the Department of Justice, at the request of the Government of Great Britain, to harass Irish Americans in the New York City area engaged in peaceful protests against British policy toward Ulster.

Given the intensely political nature of this investigation, the predictably outraged response of the Irish American community in New York, and the fact that 1972 was a Presidential election year, the convening of the grand jury in Texas may have had a great deal less to do with effective law enforcement than it did with the 1970 census, which reveals nearly 400,000 first and second generation Irish Americans living in New York State, most of them in New York City, but only 12,000 in Texas, and very few in Fort Worth.

The conclusion that the Texas venue was improper for this investigation is also compelled by the analysis of the questions asked each of the Fort Worth Five before the grand jury.

I have attached a copy of those questions as an appendix to this statement. Virtually every question that reveals enough information to disclose specific facts also reveals, without exception, that the facts relate solely to persons and places in the New York City area, and have nothing to do with Texas.

The only questions that even clearly relate at all to Texas are blunderbuss questions of the sort that begin, "Have you ever known any person in New York, Texas, or elsewhere . . .?"

The circumstances of the present case thus closely parallel the situation in *Brown v. United States*, 245 F. 2d 549 (1957). In that case, the court of appeals held that a Federal grand jury investigation in Nebraska had been conducted in bad faith, because the prosecutor's questions related exclusively to conduct in Missouri.

The same reasoning applies to the pending case, since the prosecutor's questions, stripped of the transparent effort to mask his true intent, related exclusively to conduct in New York.

Whatever validity the Texas venue may have had at the time the 12 subpoenas were originally served in New York to commence this investigation in Texas, there was no such validity by the time the Fort Worth Five went into the jury room.

If the Department of Justice still genuinely wants the testimony of the Fort Worth Five today, the only fair and rational course to follow is to discontinue this abusive grand jury investigation in Fort Worth, and continue it in New York City, where it should have been held all along.

The second abuse of the grand jury in the Fort Worth case is that the Department of Justice is punishing these men with lengthy prison terms under the guise of civil contempt.

One of the principal causes of the violence and friction in Northern Ireland has been Britain's policy of internment without trial. Yet, today in Fort Worth, we find the administration practicing its own version of internment without trial in Texas.

In a series of recent decisions, the Supreme Court has imposed strict controls on the length of sentences that can be meted out by a judge without a trial by jury in cases involving criminal contempt. The standard now is that a judge, acting alone, cannot impose a sentence longer than 6 months for criminal contempt unless the defendant is afforded a right to trial by jury.

I believe that a similar right, or some similar control, should also be available in cases involving civil contempt, in order to prevent precisely the sort of obnoxious and excessive punishment that exists in the present case.

Of course, the courts have usually allowed broad leeway for prosecutors to use the tool of civil contempt, on the traditional theory that the imprisonment is remedial, not punitive, since the prisoners hold the key to the jail in their pockets. But that ancient maxim is no longer adequate to do justice in the modern world.

Two weeks ago, in the *Grumbles* case, the Third Circuit Court of Appeals in Philadelphia moved strongly in the right direction, sustaining an order by a Federal district judge in Camden, N.J., requiring the release of a husband and wife from prison for civil contempt, on the ground that the imprisonment had clearly reached a punitive stage.

The couple had already pleaded guilty to criminal charges arising out of a separate case involving a raid on a local draft board in New Jersey. Yet, the Grumbles were also incarcerated for 13 months for civil contempt, arising out of their refusal to testify in an investigation of other antiwar and antidraft activities.

Their release from jail came a month before the grand jury was to expire, although the Department of Justice had announced its plans to subpoena them before a new grand jury if they were released.

This recent decision has direct application to the present case, and is a promising new precedent for the Fort Worth Five. In fact, the precedent may be sufficient in itself to secure their prompt release from Texas, if the fifth circuit follows the lead of its sister circuit.

Just as the imprisonment of the Grumbles for civil contempt had reached a punitive State in New Jersey, so the imprisonment of the Fort Worth Five has now clearly reached that stage in Texas.

To be sure, the third circuit decision is a novel legal breakthrough. Perhaps it will not survive an appeal to the Supreme Court, which has showed little concern so far over the frightening excesses by which grand juries operate.

Yet, the third circuit case demonstrates how the law responds and grows under the stimulus of unfair actions by official power.

The pressure begins quietly in a local jail. It arouses the concern of a local Federal judge. Soon the courts of appeals begin to act. Side by side, concern begins to build in Congress, as Members respond to the protests of their constituents. Apparently isolated incidents reinforce each other across the country, as separate cases are pieced together to reveal a full blown nationwide pattern of abuse.

At last, the pressure builds into a force the Supreme Court and Congress cannot ignore in their historic function of protecting the constitutional rights of citizens.

In the Fort Worth case the Department of Justice still seeks to hide behind the traditional distinction between civil and criminal contempt. They argue that the current incarceration is not punitive, because the Fort Worth Five can end their imprisonment as soon as they agree to testify before the grand jury.

But if the grand jury itself and the terms of their imprisonment are illegal, why should they have to testify or give up any other basic rights to gain their freedom? The condition the Justice Department seeks to impose as the price of freedom is too high—it is no more valid than if the Department agreed to release them on the condition that they henceforth refrain from exercising their first amendment right to criticize British policy in Northern Ireland.

Indeed, that sort of first amendment harassment is widely regarded as the Department's real goal in this present grand jury, just as the same allegation has been raised against many other grand juries convened by the Department of Justice in recent years to harass individuals and groups whose politics and philosophy do not sit comfortably with the present administration.

The suspicion is very great, therefore, that the current investigation has two aspects—the first aspect, the grand jury in New York City is engaged in a professional and lawyerlike investigation of gunrunning to Northern Ireland. Indictments have been returned and trials will follow. But the second aspect, more unsavory, is the Texas grand jury, convened for no apparent law enforcement purpose, a political grand jury sitting to harass and intimidate individuals and organizations in New York opposed to British policy in Ulster.

As these proceedings demonstrate, there is a heavy burden on the Department of Justice to prove that the first amendment rights and other rights of the Fort Worth Five have not been infringed, that their continued incarceration is not punitive and that it fulfills all the guarantees of due process of law.

Two further points should be made on the question of punishment. One concerns the innocence or guilt of the witnesses themselves. The other concerns the status of the Justice Department's ongoing investigation, or lack thereof.

I do not know, and I suspect the Department of Justice does not know either, whether the Fort Worth Five are guilty of any offense. But I do know, unless our system of justice is being stood on its head by the administration, that they are innocent until proven guilty.

Now, the *O'Gara* case in New York, in which an indictment has been returned, mentions three members of the Fort Worth Five, but in circumstances making no implication of their guilt.

The indictment states simply that in purchasing arms illegally in the New York area on three separate occasions, the defendant *O'Gara* identified himself as one of the Fort Worth Five and displayed a driver's license in that name. The indictment does not list any of the Fort Worth Five as codefendants, and it does not name any of them as coconspirators.

If the Department of Justice thinks these men are guilty of some offense, let it indict them. Let it bring them to trial. But at least, let it end this cruel charade in Texas, by which these men are being punished without ever being charged or tried.

Lewis Carroll had words for this behavior. In the final chapter of "Alice in Wonderland," just before Alice awakens from her dream, we read these lines about the trial by the King and Queen of Hearts:

"Let the jury consider their verdict," the King said, for the 20th time that day.

"No, no," said the Queen. "Sentence first, verdict afterward."

"Stuff and nonsense," said Alice loudly. "The idea of having the verdict first."

"Hold your tongue," said the Queen, turning purple.

"I won't," said Alice.

"Off with her head," the Queen shouted at the top of her voice.

But this is no dream or game of cards in Texas. Real human beings are in jail, their rights denied, their families torn apart in violation of the law.

I say it is long past time the Internal Security Division stopped playing the Queen of Hearts in Texas and started behaving like a Department of Justice by freeing the Fort Worth Five.

With respect to the current status, or lack thereof, of the Department's investigation in Texas, the issue is equally serious.

It appears that the Fort Worth grand jury has long since discontinued its investigation of this case. There is no indication that the grand jury has sat for a single additional hour, or heard a single additional witness in this investigation since these five men were originally held in contempt in June of 1972.

The seven other witnesses originally called before the grand jury are long forgotten, their subpoenas withdrawn. There appears to be no reasonable possibility that the investigation will ever be resumed, or that additional witnesses will ever be called in.

In this situation, the continued imprisonment of the Fort Worth Five is punishment pure and simple. Justice demands that they be freed at once, but the Department of Justice allows them to rot in jail. The smell is unmistakable. The Department is punishing the Fort Worth Five in the guise of civil contempt.

In similar cases in the past, the Department of Justice has not always been so obstinate and unyielding. Last November in Boston, the Department released Prof. Samuel Popkin of Harvard University from jail in somewhat similar circumstances.

Professor Popkin had been imprisoned for contempt for refusing to testify before a grand jury investigating various aspects of the *Pentagon Papers* case. Freed on bail pending his legal challenge to the contempt citation, Popkin was imprisoned again when a Boston Federal judge denied the challenge.

But he was released after only 7 more days in jail, when the Department of Justice, reviewing the case, found that the grand jury was about to expire and was no longer actively pursuing the investigation.

Why doesn't the Department apply this policy to the Fort Worth Five? A large price in human suffering has already been exacted from these men for no apparent purpose. If the investigation is over, they should be released from prison now, and allowed to return to New York to rejoin their friends and families.

It would be a travesty of justice and even-handed law enforcement for five ordinary Irish-American citizens to remain in jail because

their plight has not received the national notoriety and attention generated by the imprisonment of a professor at Harvard University.

The third abuse of the grand jury in Fort Worth is that the Department of Justice is continuing the incarceration of these men after indictments have already been returned in related investigations in New York.

Perhaps the most obvious abuse in this respect concerns the *O'Gara* case in New York. It appears that the Department is using the grand jury in Fort Worth to gain further evidence to bolster its case against O'Gara when he goes to trial in New York.

If the Department wants this information, let it subpoena the Fort Worth Five to appear at the O'Gara trial in New York City. It is unconscionable for the Department to use a grand jury to seek additional evidence on a case after an indictment has been returned.

Going back over many years, courts throughout the country, including the Supreme Court, have condemned the practice. It is my understanding that the Department itself has consistently avoided this objectionable practice in the past. Why does it not adhere to that consistent tradition today?

Another indictment is also involved in the present case. One of the questions the Fort Worth Five refused to answer before the Texas grand jury concerned a notorious arms dealer named Agramonte who does business in Yonkers, N.Y.

Agramonte was indicted in New York City in August 1972. In January 1973, he pleaded guilty to reduced charges, thereby closing the case.

Yet, the Fort Worth Five are still in jail, 2 months after one of the obvious and principal targets of the Texas grand jury investigation had been indicted and pleaded guilty.

It is bad enough for the Department to use the grand jury to seek evidence for the upcoming O'Gara trial, but it defies reason and the Constitution for the Department to use the grand jury to investigate a case that has already been closed by the Department's own actions.

On this latter ground alone, it appears to me that the Fort Worth Five may well be entitled at least to their temporary freedom now, as soon as a new application for bail can be brought pending resolution of this issue.

On January 17, 1973, the Supreme Court granted bail in the *Meisel* case, arising in San Francisco. One of the principal issues in that case concerns the fact that the imprisonment of two witnesses for civil contempt had been allowed to continue beyond the indictment of the person who was the obvious target of the investigation.

Surely, on that issue, the Fort Worth Five also deserve the benefit of bail.

Taken separately, each of these areas I have discussed this morning demonstrates a clear abuse of the grand jury in Fort Worth. Taken together, they make an overwhelming case for the immediate freedom of the Fort Worth Five.

Indeed, if the Department does not itself respond as a result of the new interest generated by this hearing, I would hope that the foreman of the grand jury and the other members of the Fort Worth panel would take the initiative themselves, in accord with the ancient

time-honored role of grand jurors, and demand an explanation from the prosecutor as to why these five men must remain in jail.

In any event, I suggest the five will soon regain their freedom as a result of new legal challenges that may be filed, by habeas corpus or other petitions in the courts.

And perhaps, if the abuse has become sufficiently manifest by the time they regain their freedom, an action for false imprisonment and damages may also lie against the offending officials responsible for their plight.

Unfortunately, the Fort Worth case fits the now all too familiar and mushrooming recent pattern of grand jury abuse and secret inquisitors by Justice Department officials around the country, a practice raising serious questions in Congress and the Nation about the fairness and legality of the Department's current operations and about the very security of our fundamental freedoms and basic liberties.

There are no shortcuts to law and order and certainly not to justice. Perhaps the most ominous single sign of our national drift away from liberty is the epidemic of grand jury harassment that has plagued the country in recent years.

Sixteen years ago, the issue was put this way by Justice Hugo Black, perhaps the greatest champion of the Bill of Rights ever to sit on the Supreme Court:

Secret inquisitions are dangerous things justly feared by free men everywhere. They are the breeding place for arbitrary misuse of official power. They are often the beginning of tyranny as well as indispensable instruments for its survival. Modern as well as ancient history bears witness that both innocent and guilty have been seized by officers of the state and whisked away for secret interrogation or worse until the ground work has been securely laid for their inevitable conviction. While the labels applied to this practice have frequently changed, the central idea * * * remains unchanging—extraction of "statements" by one means or another from an individual by officers of the state while he is held incommunicado.

The use of "political" grand juries by the present administration is unprecedented. In a sense, of course, the practice is a throwback to the worst excesses of the legislative investigating committees of the 1950's.

In this respect, the Internal Security Division of the Justice Department represents the second coming of Joe McCarthy and the House Un-American Activities Committee.

But, the abuses of power of the Department's overzealous prosecutors do not even know the bounds of a Joe McCarthy, because their insidious contemporary activities are carried out in the dark and secret corners of the grand jury, free from public scrutiny.

When I said at the beginning, that the Fort Worth case is just the tip of the iceberg of grand jury abuse, I meant the very small tip, indeed. Call the role of notorious grand juries in recent years and you begin to get some idea of the dimensions of the problem.

The Fort Worth Five are not alone. In too many cases, infringement of basic rights is a way of life today for the Internal Security Division of the Department of Justice.

Last July, on the day the Democratic National Convention began in Miami, 25 members of the southern leadership of the Vietnam Veterans Against the War were subpoenaed 500 miles to the Florida Panhandle, to appear before a Federal grand jury in Tallahassee.

The group was compelled to remain in Tallahassee under subpoena for the entire week, in what was widely regarded as a dragnet political grand jury convened to embarrass both the antiwar movement and the Democratic Convention.

Mr. DENNIS. Mr. Chairman, I dislike to interrupt the distinguished Senator, but if I understand the chairman's statement at the beginning of this session, with which I fully concur, we are going to confine the testimony here to the narrow issue of the question of the propriety of venue on the matter before us.

I, therefore, respectfully object to allowing Senator Kennedy to go into a general attack regarding his objections to grand jury proceedings all over this country.

Mr. EILBERG. We have discussed that with the Senator. I am sure he knows what he is doing. He is entitled to his opinion. The Senator knows the disposition of the subcommittee. I don't want to restrict the Senator from discussing matters which relate to our inquiry.

Senator KENNEDY. It seems to me, Mr. Chairman, that the thrust of my statement relates directly to the resolution which was introduced by Ms. Abzug.

The statements I make about the abuse of the grand jury are thoroughly documented in my testimony. Others might gather a different conclusion from it, but I think that the statements are supported by analysis of those cases.

There may be disagreements. I think this is why, as I stated at the outset, this committee is fulfilling an important service. I think the Fort Worth situation is the most grievous and outrageous abuse of all the cases I document.

I find it difficult to be able to talk about the abuse of the grand jury in Fort Worth, without putting it in the perspective of other existing abuses.

So I would like to continue. I don't have a great deal more.

Mr. SEIBERLING. Mr. Chairman, if the Senator will yield, I want to say that, as the committee members know, no one has been more concerned than I that we stay within the confines of the resolution and its direct implications.

It seems to me that it is perfectly within the confines to bring out, if that is the case, that this is part of a general pattern of possible abuse of the grand jury process. I wish to state that I think this is quite within the scope of the hearing.

Mr. DENNIS. Mr. Chairman, I would simply observe that in the part of the Senator's statement in which he is now entering and which he began to list here orally, and which I have read here at the desk, he goes into about six or eight specific other matters to which he objects which are completely unconnected, and obviously unconnected, with the Fort Worth case, matters which are completely irrelevant to anything before this committee, which are definitely outside the scope of this hearing as announced by the chairman; and which constitute simply a general attack on the conduct of grand juries under the present administration.

I think if the chairman's statement has any validity that that should be prevented here. I must protest at this procedure.

Mr. EILBERG. Mr. Keating?

Mr. KEATING. I think that my colleague, Mr. Dennis, has explained my position very clearly. I think this has been a concern at the outset of these hearings. This is a highly emotionally charged issue and I don't think this committee should be the platform for this, but rather should determine the legal issue before us which I think the chairman stated at the outset.

Mr. EILBERG. Perhaps you might summarize the remaining portion of your statement, Senator, in view of the statements made by the Members.

Senator KENNEDY. I hope you will let the statement be included and stand. I know the restrictions that may be placed upon witnesses over in the House, but we provide a fairly broad latitude to Member witnesses in the Senate.

I would certainly hope that the material which has been included in my testimony would stand.

Mr. EILBERG. Ms. Holtzman?

Ms. HOLTZMAN. I wish to record for the record, as well, the fact that I share the views of my colleague, Mr. Seiberling, inasmuch as the practice with respect to other similar cases concerning grand juries may shed some light on the motivations of the Justice Department in bringing the case in Texas. It may also shed some light on procedural safeguards of the witnesses.

If this is part of a general pattern, this is something we should know.

Senator KENNEDY. 19-year-old Leslie Bacon was arrested in Washington, D.C., in April 1971, as a material witness in connection with the bombing of the Capitol. But then she was spirited away to a grand jury investigation in Seattle, where, as it turned out over days of intensive questioning, the Federal prosecutors were far more interested in the "Mayday Demonstration" in Washington that spring and her private beliefs and political associations and unusual life style, than they were in the Capitol bombing.

No one denies that the bombing of the Capitol should be vigorously investigated, but it is difficult to believe this goal was advanced at all in Seattle by the peculiar interest of this grand jury prying into the private life of a teenage girl.

In Tucson, Ariz., in October 1970, after an indictment had been returned in a case involving the purchase of explosives by a Weatherman, the Justice Department's chief prosecutor subpoenaed five young members of a commune in Los Angeles to appear before the grand jury.

The subpoenas served no obvious law enforcement purpose, although one of the witnesses was known to have a tenuous connection with the defendant in the case. As an appendix to this statement, I have attached a copy of the portion of the questions one of the witnesses was asked to answer.

It is impossible here to convey the full flavor of the intimidation that can be brought to bear by a skillful prosecutor questioning a witness in a grand jury room, but the attached questions reveal something of the stifling and oppressive atmosphere that must have been created by the prosecutor's aggressive and blunderbus probe into the witness' private beliefs and associations.

At first, all the witnesses resisted the pressure. They were jailed 4 months for contempt. When the grand jury expired, a new grand jury was convened, and the witnesses were again subpoenaed and cited for contempt. Faced with the prospect of 18 more months in jail, most of them capitulated and agreed to testify.

In the *Malone* case in San Francisco in November 1972, Robert Meisel and Barbara Jean Fitch were imprisoned for civil contempt for refusing to testify in a grand jury investigation into the shipment of arms to Northern Ireland, apparently unrelated to the actions of the grand juries in Fort Worth and New York City.

Meisel was a house painter living in Malone's home. Fitch was the Malone's babysitter, caring for the family's seven children and also living in the house. At the time Meisel and Fitch were cited for contempt, the grand jury had already returned two indictments against Malone.

Yet, the questions they refused to answer were directed almost entirely against Malone, in circumstances strongly suggesting that the prosecutor was seeking to bolster his case for trial.

Moreover, Malone has now pleaded guilty. Yet the Justice Department persists in seeking further testimony from these two witnesses—one his close friend, the other his babysitter. The witnesses are now free on bail granted by the Supreme Court, pending resolution of this and other legal issues raised by their imprisonment.

In Harrisburg, Pa., the grand jury that indicted Philip Berrigan and Elizabeth McAlister in January 1971, for plotting to kidnap Henry Kissinger and bomb the Washington steam tunnels, was called back into session, and 34 additional witnesses, including priests and nuns, were subpoenaed in an obvious effort to bolster the prosecutor's flimsy case for trial.

At the end of April, a superseding indictment was returned with new counts inserted, tailored to enable a jury to convict the defendants without proof of the bomb and kidnap plot.

Eventually, the defendants were convicted, but only for the offense of smuggling letters out of a Federal penitentiary, an offense for which they almost certainly would not have been indicted, absent the highly charged political atmosphere of the case.

One of the most serious of all the grand jury abuses, and certainly the most highly publicized, has been the barrage of grand jury subpoenas sprayed on news reporters in recent months around the country, to compel disclosure of their sources and other information long thought protected by the first amendment.

Time and again, like the Fort Worth Five and many other grand jury witnesses, reporters have chosen to stand on their rights and go to jail, rather than yield to the pressure of the Government's intrusive questions, or allow themselves to become unwilling investigators for the prosecutor's office.

Even Congress itself is not immune from the encroaching tide of Executive abuse, as we learned last year when an aide to Senator Mike Gravel was subpoenaed to appear before a Boston grand jury investigating the *Pentagon Papers* case.

The grand jury investigating this case in Los Angeles was also notable for its own abuses, not least for the subpoena served on Daniel

Ellsberg's 15-year-old son at 7:30 in the morning, demanding his appearance before the grand jury 2 hours later that very day.

And so it goes, as the special litigation section of the Internal Security Division plies its trade, with its small army of grand inquisitors barnstorming back and forth across the country, hauling witnesses around behind them, armed with dragnets of subpoenas, immunity grants, contempt citations, and prison terms.

These tactics are sufficient to terrify even the bravest and most recalcitrant witness, whose only crime may be a deep reluctance to become a Government informer on his closest friends or relatives, or an equally deep belief that the nose of the U.S. Government has no business in the private life and views and political affiliations of its free citizens.

It is a tribute, I think, to the real vitality of the American political spirit that so many citizens today are willing to sound the alarm and stand their ground and endure the pain of prison, rather than forgo these basic rights they cherish.

To some extent, the exalted historical role of the grand jury as the protector of the citizen is myth. From its beginning in medieval England, the grand jury was frequently a pawn in the struggle between the Crown and the church.

In modern times, grand juries have often failed in their role as guardians of the people. As one who has served as a prosecutor in the Commonwealth of Massachusetts, I know how easy it is for the grand jury to slip into the passive role of a rubberstamp for the prosecutor, a compliant appendage to the local district attorney's office instead of the vigilant people's guardian it ought to be.

By the end of the 19th century in Britain, the abuses of the grand jury had come to outweigh its protective features by so wide a margin that its role was sharply curtailed. It was later abolished outright in Britain, and a similar step was recommended for the United States by the Wickersham Commission in 1933.

Today, in Britain and in nearly half of our own States, prosecutions are now commenced by filing criminal informations, with a preliminary hearing replacing the grand jury as the guardian of the citizen's rights.

Perhaps that is the route our own Federal legal system will eventually have to take, if the modern abuses prove too great, if we fail in our efforts to preserve the valid purpose the grand jury is supposed to serve.

In a sense, of course, the seeds of the current problem have been with us for many years. The question is why they have sprouted so suddenly, so oppressively, and so massively.

To be sure, immunity and civil contempt are nothing new in American criminal law. As conventional grand jury tools, they are weapons of longstanding use by generations of Federal, State, and local prosecutors in this country. What is new today is the enormous growth of these weapons, and the manner in which recent well-intentioned crime control legislation has been twisted to unintended ends.

The novel, wide-ranging so-called use of immunity power conferred by the Organized Crime Control Act of 1970 appears to be responsible for almost all of the current problem. Indeed, the promiscuous and

wholesale current application of this power threatens to make a shambles of the fifth amendment's protection against self-incrimination, in a way that the old and far more sparingly used "transactional" immunity never even remotely approached.

In part, of course, Congress is to blame for the present crisis, because Congress failed to recognize the sinister potential abuses lurking beneath the innocuous surface of the 1970 law.

In part, the Department of Justice is to blame for lulling Congress not only with excessive protestations of the need for this new act as a law-and-order tool, but also with equally excessive and wholly unfulfilled promises of good behavior if only the act would pass.

Today, in consequence, the investigative grand jury has become a powerful new engine of political oppression. But the excesses are now so great, the Department of Justice has now so far overreached itself in these activities, that public opinion is at last aroused.

There are many hopeful signs that this modern tide of grand jury abuse is cresting and may now recede. Possibly, the Department of Justice itself will yield, and pull back from this brink of destruction of civil liberties, now that the spotlight of public opinion is focused on its actions.

The Federal courts have also begun to intervene. In addition, the bar is clearly aroused, thanks to the imaginative actions of attorneys in individual cases, such as Paul O'Dwyer and Frank Durkan for the Fort Worth Five, and to the skillful manner in which civil liberties groups are developing the issue, such as the Center for Constitutional Rights in New York City and the grand jury project of the American Civil Liberties Union in San Francisco.

As this hearing demonstrates, and as the massive current hearings on newsman's privilege also demonstrate, both the Senate and the House have begun to stir as well. Working together, I am confident that we can fashion rules and due process guarantees to protect both newsman and ordinary citizens.

There are a number of directions that immediate reform can take in Congress, directions that will in no sense hamstring law enforcement in legitimate investigations of any crime, but which will provide needed new protection for innocent citizens against the abuses now so prevalent.

To prevent abuse of grand jury venue, Congress can require a prosecutor to justify the forum he has chosen, when a witness demonstrates that his appearance at a distant location will impose substantial or unnecessary hardship on himself or on his family.

I believe that in such cases a witness should be entitled to a public hearing in the district of his residence, on a motion to quash the subpoena, and that a judge should be entitled to take into account such factors as the significance of the overt acts alleged to have taken place in the jurisdiction, and whether related investigations are being carried out or could easily be carried out in locations more convenient than the one chosen by the Government.

To prevent abuse of civil contempt as a device to punish recalcitrant grand jury witnesses instead of to obtain their testimony, Congress should impose a firm upper limit of 6 months on any term of imprisonment for such contempt.

And, at any date prior to that time, a court should be entitled to vacate an order of contempt, upon a showing that, by the preponderance of the evidence involving changed circumstances in the case, the primary purpose of the imprisonment has turned punitive.

To prevent abuse of the grand jury as a device to secure evidence against defendants already indicted, Congress should allow a court to quash a subpoena or vacate an order of contempt against a witness, upon a showing that there is no other substantial purpose for which the testimony of the witness is being sought.

These three suggestions would be of obvious benefit in cases like the Fort Worth Five, but they are only the beginning of the reforms we should seek. Many others also come to mind:

To insure the overall fairness of the grand jury, a witness should be entitled to challenge the composition of the body on grounds that it is not truly representative of the community from which it is drawn.

Use immunity should be available only for a narrow range of specified offenses, not for every criminal investigation that happens to catch a prosecutor's fancy.

A witness should be entitled to the assistance of counsel in the grand jury room. This change would involve no disruption or delay in current grand jury operations. In fact, it might even expedite them, since in most jurisdictions today, a witness is entitled to leave the grand jury room after every question in order to consult with counsel.

The Department of Justice should be required to file detailed reports with Congress and the courts each year, describing the investigations undertaken, the grants of immunity used, the contempt citations imposed, and other appropriate measures of grand jury activity.

Strict rules should be enacted to prevent the grand jury from abusing its broad subpoena power to extract evidence in violation of other constitutional guarantees, such as the first amendment and the fourth amendment.

Earlier this year, for example, in *United States v. Dionisio*, the Supreme Court held that the Constitution itself did not prohibit the grand jury from issuing a dragnet series of subpoenas to compel 20 different witnesses to provide samples of their voices, even though such samples could not have been obtained under the search and seizure provisions of the fourth amendment without a showing of reasonable cause.

Obviously, however, as in the case of newsman's privilege, the decision was on constitutional grounds alone, and leaves ample scope for the exercise of Congress legislative power.

Each of these reforms is, I submit, an urgent one. For too long we have allowed the grand jury to roam at will, free of the most elementary restraints of due process of law. Together, we can now begin to restore the grand jury to the noble function it has usually served so well since the beginnings of our Nation, and make it truly the guardian of our constitutional rights as citizens of this country.

One final word on the Fort Worth Five. Mathias Reilly and his wife, Mary, who are immigrants to this country from Ireland, were scheduled to attend an important ceremony last Friday, to be held in New York, N.Y., at the courthouse for Rockland County.

At that ceremony, following in the great tradition of generations of immigrants before them, they were to salute the American flag, and take the solemn oath to become citizens of the United States.

But the Department of Justice cancelled the ceremony for Matthias Reilly. He could not attend, they said, because he is in the custody of the Attorney General of the United States in a Texas jail.

And, in perhaps the unkindest stroke of all, the Department of Justice tried to cancel Mary Reilly's ceremony, too, for reasons which are unknown to me, but which, I suspect, the Department will not care to spread upon the public record.

But Mary Reilly shares her husband's courage and strong spirit. She insisted that her own ceremony should go on, and it did. So at 10 a.m. last Friday morning, Mary Reilly stood before Justice Joseph Hawkins of the Supreme Court of the State of New York and became an American citizen, while her three young children tried to understand the meaning of the rights their family now had earned.

Mr. Chairman, this concludes my statement. So that the record of this hearing may be as complete as possible, I would like to submit for inclusion in the printed record the following additional materials: exchanges of correspondence I have had with the Department of Justice on this case; the memorandum I filed in the Supreme Court supporting bail for the Fort Worth Five; a series of news articles on the *Popkin* case, on the recent *Grumbles* case, and on the Internal Security Division; a major article from *The Nation* in 1972, on the grand jury; a statement by Mr. Paul O'Dwyer after a visit to the Tarrant County jail, a series of affidavits by the Fort Worth Five, a copy of the O'Gara indictment; the legal papers filed in the Supreme Court on certiorari in this case; the order of the Supreme Court denying certiorari and the dissenting opinion of the Justice Douglas; the briefs in the Court of Appeals; appeals, excerpts from the bail hearing of the district court last September, the text of the Organized Crime Control Act of 1970.

Mr. EILBERG. We will take all that under consideration.

[The material referred to is printed in part and may be found in the appendix at p. 107. The remainder has been placed in the committee files.]

Mr. EILBERG. I know you have to go back to the Senate. Some members of the committee may have a few questions at this time. Are there any questions of Senator Kennedy?

Mr. RAILSBACK. Senator, I am wondering if there were an investigation into a conspiracy and a conspiracy to perhaps purchase arms and subsequently ship them to a foreign country in violation of the law, if you would have any objection in such a case where perhaps it was alleged that it was a nationwide conspiracy, in that kind of a case, having subpoenas issue from, say, what was regarded as possibly the focal point or situs of the conspiracy.

In other words, if that kind of a situation was known to exist or shown to exist, I take it, in that kind of a case, you probably would not object?

Senator KENNEDY. No, absolutely not. As I mentioned I think there should be a full prosecution investigation by the Department of Justice of such violations of the law, and of any individuals who are

transporting weapons illegally to Great Britain. If that appears in the form of a conspiracy, I think it ought to be pursued.

I tried in my testimony to distinguish this particular case from such a possibility. I am not here to say with any degree of certainty that such a conspiracy did or did not exist. I am saying: If the Justice Department had materials that led them to this belief, then they ought to continue to investigate the case and to bring these men to trial. Certainly they are entitled to this.

But on the venue issue, the Fort Worth Five never should have been brought to Texas. I say this, based on the examination I have made of the list of questions asked by the prosecutor in Texas. You can read them and you will hardly see any reference to Texas included.

Mr. RAILSBACK. I caught that in your statement. I looked briefly at the questions. I wonder, on the other hand, if it was apparent to the grand jury and to the Government attorneys that, from the very beginning, none of the witnesses were going to respond to the questions, if there would be any real reason to continue the questioning. That is what it appears like to me from the list of questions you submitted.

In fact, I have some reason to believe that one of the witnesses was asked how to pronounce his own name and he sought the advice of counsel on that—how to pronounce his name.

Senator KENNEDY. There has not been a scintilla of evidence that has tied any activities of these men to Texas. This is the heart of this issue. There is a related investigation going on by the Justice Department in New York—why didn't the grand jury in New York City handle this case? If the Department wanted to ask these questions about New York, why didn't they ask them in New York?

If you are trying to say there are some circumstances to justify some investigation in Texas, that is another issue, but it still doesn't explain why these men were called from New York to Texas. I am familiar enough with the situation of exportation of some weapons that has taken place in Latin America. That has been a source of some difficulty. I can't reject the possibility that at some time there has been transportation of weapons out of any State—I can't imagine there is any of the 50 States where there has not been a movement of weapons illegally at some time.

But the Justice Department has not come and explained to any Member of Congress, let alone to the families or counsel of these men, any connection between Texas and the Fort Worth Five.

Mr. RAILSBACK. You would agree that the situation is a little different where, as I understand it, they were flown to Fort Worth as witnesses. They are entitled to a certain per diem. They were granted immunity. They refused to answer any questions. You would agree with the general observation that they could get out if they had answered the questions?

Senator KENNEDY. I thought that the fifth amendment still had some meaning in this country and that you were not to be placed in jail; civil contempt, in the guise of punishment is wrong and it is illegal.

If you are talking about the age-old concept of civil contempt, that still stands. I think it has been heavily abused here. The courts have been moving in the contrary direction, both in the area of crimi-

nal contempt and in the area of civil contempt. The abuse is especially clear in the present case, however, the entire investigation of the case has been brought to a halt by the Justice Department.

Mr. RAILSBACK. Well, I agree with you about the fifth amendment protections, but, of course, they were granted immunity. That is a very significant factor, I think.

Senator KENNEDY. This reaches the whole idea of "use" immunity and the impact it has had on the protection of civil rights and liberties since the 1970 act was passed. I think this case is a classic example of abuse of "use" immunity.

The very real threat to the rights and liberties of individuals in the way that "use immunity" has been interpreted in the last 2 years ought to cause serious pause to every person. This is another example of the abuse of the grand jury in this case, and an additional reason why this hearing is as important as it is.

Mr. EILBERG. Mr. Keating?

Mr. KEATING. Senator, if the grand jury had convened in New York City and the same result would have taken place, would you be here today on the issue?

Senator KENNEDY. Certainly not on the first issue, the venue issue. I would have been, I expect, on the question of the grand jury process being used to punish the men, or to seek information. The subjects of the investigation have been indicted.

I think there are three different prongs of the case which bring me here today. Any one of them is serious enough to have brought about this hearing. So I would not be here talking on the venue issue, which I think is perhaps the most outrageous abuse, but I would be here on the fact that the grand jury is being used for punishment, and to gain information against attendants already indicted. So the answer would be yes, sir.

Mr. KEATING. How do you reconcile the differences between witnesses if you object to the venue and there are other witnesses from different parts of the country—Texas, for example; where are you going to have the grand jury hearing if you have the incident occurring in Texas or you have other witnesses in Texas; whose rights are you going to look after most?

Senator KENNEDY. That is not the case we are talking about at the present time.

Mr. KEATING. I am asking you to reconcile that.

Senator KENNEDY. How can I reconcile something in your mind with something happening in Texas? I don't intend to speculate on it at this time.

Mr. KEATING. There was a witness from one other State.

Senator KENNEDY. Just one witness from one other State, yet we are talking about these five men who have never been to Texas or knew anybody there. We also know that seven other Irish-Americans from New York were subpoenaed to Texas, but their subpoenas were withdrawn. That makes 12 from New York altogether.

Mr. KEATING. Is there any question on the numbers of how many you transport?

Senator KENNEDY. I think it has to be viewed as a whole. You have five men here, who live with their families in New York, none of

whom, at least to my information, have spent any time or had any connection with Texas.

Mr. KEATING. I take it you have a serious question in your own mind as to the immunity granted to these five individuals in the grand jury hearing? You don't feel that this should impinge in any way on the fifth amendment rights?

Senator KENNEDY. I think that is a terribly important issue and one which, I might say as a member of the Judiciary Committee in the Senate, we have not focused on, in the 1970 act. We have seen how "use" immunity has provided one of the greatest threats to the fifth amendment since the founding of this Republic.

I don't think any of us, on the Senate committee, had any comprehension of the dimensions that "use" immunity would acquire. But it has virtually abolished the fifth amendment for these particular five men.

Mr. KEATING. What role do you think the House or Senate should take as pertains to the particular problems of grand jury hearings as it relates to travel and hearings?

Senator KENNEDY. Let me say, first of all, I think the whole question of grand juries—its functions and workings and its usefulness and importance—is an entirely worthwhile and enormously valuable service for this committee and our Senate committee to study.

I think we have seen some shocking examples of abuse, which I tried to mention in my statement. We have also seen the grand jury serving its protective role. Not long ago, in the *Les Whitten* case involving the alleged theft of Indian papers, we saw how the grand jury worked probably for the protection of an individual's rights. It refused to indict Mr. Whitten.

But with "use" immunity so controversial I think its effect on individual rights and liberties is entirely appropriate for us to examine.

I am here today on the question of grand jury abuse in a particular situation, in support of the resolution that has been introduced by Congresswoman Abzug.

Mr. EILBERG. I recognize Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman. Senator Kennedy, in my brief examination of the law on this issue, I have discovered that there seems to be very few, if any, standards regulating venue of grand jury investigations. Apparently no witness has any right to challenge the venue of a grand jury before which he or she appears.

In view of the questions that were asked as you have appended them and even assuming, in light of those questions, that there was any attempt or offer of evidence relating to events in Texas, you are assuming that the Justice Department had information about illegal activities in Texas.

Don't you think that, in view of the great distances the witnesses had to travel, the Justice Department might use concurrent grand juries and we might think of proposing such regulations?

Senator KENNEDY. I think that is a constructive and positive suggestion. Congress could do many things. It could allow a court to quash a subpoena or vacate an order of contempt on a showing that there is no valid purpose for which the testimony of the witness is

being sought. To insure the overall fairness of a grand jury, the witness should be entitled to make some challenges. I mention a number of reforms in my statement.

I think we might permit a witness to question before a Federal judge the appropriateness of a subpoena, the reason for which it is being served, its importance in terms of law enforcement and other matters of justice, and other considerations. I think we might consider procedures where subpoenas could be challenged locally.

I think, if that had occurred in this case, we would not have seen the present abuse.

I think, if the Justice Department could proceed with certain reforms administratively, we could avoid the kind of situation we have now. We are all interested in the same results, whether it is legislative or administrative. I have tried to outline in my statement some procedures that could be followed to remedy the problems, not just those in the Fort Worth case, but in other cases as well.

Mr. EILBERG. Mr. Dennis?

Mr. DENNIS. Senator, you are aware of the fact that the statute provides that, except as otherwise expressly provided by an act of Congress, any offense against the United States begun in one district and completed in another or committed in more than one district may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Senator KENNEDY. You tell me what was begun in one district and continued in another, Congressman.

Mr. DENNIS. You tell me, Senator.

Senator KENNEDY. There are five people who want to be told down in Fort Worth.

Mr. DENNIS. Are you telling the committee that you have any personal knowledge as to the factual details of this alleged conspiracy and indicating where they did or did not take place?

Senator KENNEDY. I answered that in my formal statement and in an earlier question. I go by the fact that people are presumed to be innocent in this country until they are proven guilty. I think you will have a difficult time convincing the people in the Fort Worth jail of that today.

Mr. DENNIS. I ask you again: Do you know whether or not a substantial part of the facts inquired into did or did not take place in Texas?

Senator KENNEDY. I have answered that and indicated, at some length in my formal statement, that I do not. But the questions asked the witnesses show no connection to Texas, and many connections to New York.

Mr. DENNIS. All right. Suppose it should develop here in the testimony that, as a matter of fact and according to the information in the hands of the Government prosecutors which is not in your hands or in mine, that a substantial part of the transaction being inquired into did, in fact, take place in the State of Texas. Would that meet your objections?

Senator KENNEDY. I think it would be outrageous for such information to be developed in this committee room, and not where it should

have been developed—either in the grand jury or in an indictment against accused individuals.

Mr. EILBERG. I might react here a little further.

Mr. DENNIS. Just a minute, Mr. Chairman; I have the floor. I don't want to yield at the moment.

Senator, will you agree with me that the statute I have quoted to you does contemplate a certain amount of discretion in the prosecuting officers of the Government based on the facts of the case?

Senator KENNEDY. Not as applied to this case, I would not. If the Justice Department comes up here, as you suggest, and gives further information in testimony before this hearing, I think that is a worse indictment of the kind of justice these people have received.

Mr. DENNIS. Let us see what the procedure is.

Senator KENNEDY. I think there is an appropriate place for the development of evidence. It is certainly not here in the committee room. We are dealing with the facts as they are related before us and as we are considering them here today.

Mr. DENNIS. In the ordinary criminal trial, is it not true that weighing the various circumstances of the case where the facts took place, et cetera, the U.S. attorney will, acting under this statute, make an election as to venue? He doesn't usually justify that to the newspapers or to the Congress ahead of time. He weighs these facts and circumstances and brings his charge. Now, that is a perfectly normal procedure in and of itself which happens every day; isn't that true?

Senator KENNEDY. No; that is not true.

Mr. DENNIS. I think it is.

Senator KENNEDY. There are court cases to the contrary.

Mr. DENNIS. Let me go back to the question I asked you a moment ago. If it develops in fact that a large part of this transaction did, in fact, take place in Texas, would that meet your objection as far as the venue goes?

Senator KENNEDY. A large part of what transaction?

Mr. DENNIS. The transaction this grand jury was inquiring about.

Senator KENNEDY. Mr. Congressman, I refuse to be put into a situation of speculating about other transactions these men are involved in. We were charged by this committee to be relevant and pertinent. We can't try to anticipate whether there are other transactions, and how sizable they are.

If the Justice Department has the material, they ought to bring it forward and indict these people, prosecute them to the fullest extent.

You are giving me a speculative question about how much activity took place and how involved they were. I don't understand why that is important in the sense of this resolution. I think it is a disservice to the men who are involved.

Mr. DENNIS. I am really asking you a very simple question——

Senator KENNEDY. I know what you are asking.

Mr. DENNIS. Would you mind letting me complete a question before you make your answer, just one time?

Mr. EILBERG. Your question will have to be with more respect or I will rule you out of order. You are asking him a hypothetical question he cannot possibly answer. The Justice Department has said they will

not give the factual information. You have asked that question twice already.

Mr. DENNIS. Senator Kennedy has come here and attacked the procedure of asking these men to testify before a grand jury in Texas which was inquiring into a matter which neither he nor I know entirely what it was but which we all seem to think had to do with gunrunning.

All I am asking is that if it develops in the evidence here that, in fact, the facts that they were inquiring into did not take place in New York but took place as to a substantial part in Texas, not New York, would the Senator still feel, on the venue part only, that there was any abuse?

Senator KENNEDY. I have answered the question, Mr. Chairman. I am not going to speculate on the circumstances of these men's activities or the merits of a particular case.

The kind of question that is being asked now about material that may be known to the Congressman is unknown to me and has been unknown to the Justice Department—at least that's what they have indicated in all their responses to our inquiries.

I don't think it is useful with regard to this particular resolution to indulge in speculative questions. It is like asking, "When did you stop beating your wife?" You can say, "Suppose these men were involved in crimes of violence. Then do you think it would be all right?" I am not prepared to go into that kind of speculation.

If the Justice Department has the type of information mentioned in the Congressman's question, it is clear that they have refused to reveal it in the series of correspondence that we have had or at any other time.

Mr. DENNIS. Let me ask one other point. That is the matter of punishment. Are you objecting, in general, as a matter of principle, to the use of punishment for civil contempt if the witness refuses to testify?

Senator KENNEDY. Being abused as it is in this case, yes. I follow the third circuit on it. That was a very reasonable decision in the *Camden* case, which I referred to in my testimony. I think the court outlined a fair and reasonable balance between punishment and a legitimate effort to obtain testimony. I am hopeful that the fifth circuit will embrace the decision.

Under that test, the kind of internment under which these men are being held is punishment. I don't think it should be continued.

Mr. DENNIS. If I understood your testimony, you base the idea that this is punishment and an abuse of the contempt statute primarily on the fact that, as you say, the Government has not continued the investigation?

Senator KENNEDY. No; that is not correct.

Mr. DENNIS. Partly on that?

Senator KENNEDY. That was the point about the failure to continue the overall investigation of the case. A separate question is whether they are trying to get additional kinds of information on an existing case in which indictments have already been filed.

That has been rejected as a principle and as a practice by the Justice Department in the past. That was point three in my statement.

The second point was that it is punishment because they are not continuing any other aspect of the investigation.

Mr. DENNIS. All right. You said they are not continuing this investigation of the Texas grand jury. All right. Now, isn't it quite possible—

Senator KENNEDY. Or even in New York.

Mr. DENNIS. Isn't it quite possible, neither you nor I knowing, that the reason, if it be true that they are not continuing this particular investigation by the Texas grand jury, is because the recalcitrance of these witnesses has made any continuation of that particular case completely impossible?

Senator KENNEDY. How long are we going to leave them in jail?

Mr. DENNIS. I am suggesting that it would not be fair to criticize this as an abusive process and punishment because there is no continuing investigation if the reason that there is no continuing investigation is because the only people with information have told the Government they will not cooperate.

Senator KENNEDY. Your interpretation of the law as it exists today to the contrary, Mr. Congressman, there is a requirement that there be a good-faith continuation of the investigation and legitimate interest in securing the testimony in order for the contempt to stand. That has been upheld in court decision after court decision. I don't know of any precedents to the contrary, and I challenge you to name one. When people are put in jail for contempt of a grand jury and the complete investigation is later halted, the people are released.

Mr. DENNIS. Aren't you assuming there is no investigation going on?

Senator KENNEDY. I hope you will ask the Justice Department that.

Mr. DENNIS. I think we should; but we shouldn't assume so until we do.

Senator KENNEDY. There is no evidence I have seen. Perhaps you will find some evidence of it from the Justice Department. But those who have been involved, who have followed this case closely, have not been able to detect it.

I think the burden is on the Justice Department to show they are investigating it, if they are.

Mr. EILBERG. We are running out of time, Mr. Dennis.

Mr. DENNIS. In view of that I would like to bring one other topic up.

You went into the broader field of use immunity as against transaction immunity. Of course, that is a question of policy. However, you do realize that the Supreme Court in the case of *Gastigan v. United States*, which was handed down in May of 1972, has held that while transaction immunity is of course broader, that use immunity does satisfy the constitutional requirements and the Court has so held.

Senator KENNEDY. Yes, I understand that, but it does not mean Congress should not act to end the abuses that exist.

Mr. EILBERG. Senator Kennedy, thank you very much for coming here and testifying.

I also thank you for the continuing role you have played.

Senator KENNEDY. Thank you very much, Mr. Chairman, and members of the committee.

[The prepared statement and appendixes thereto of Hon. Edward M. Kennedy follow:]

STATEMENT BY EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

I am pleased to have the privilege of appearing before you this morning at what I regard as a historic session—to my knowledge this is the first public hearing ever called by Congress to consider the rights of citizens in grand jury proceedings. In light of the story that unfolds this morning, I am certain it will not be the last.

From its origin at the Assize of Clarendon under Henry II in twelfth century England, the grand jury has been justly celebrated as a shield for the common citizen against unfair criminal accusations by those in power. By barring any indictment for a crime unless the charge was first approved by an independent body of impartial citizens, the grand jury interposed itself as a solid barrier of protection against unjust and unfounded prosecutions by the Crown.

Over the centuries, the grand jury grew into an outstanding landmark of English jurisprudence, a symbol of the law's concern for the individual's basic liberty. As such, it was one of the first and most important safeguards transported to the new American colonies. Indeed, it was in Massachusetts, in 1634, where the grand jury was first instituted in the new world, and in the century that followed, almost every other colony followed suit.

In those early years, the right to a grand jury was an important shield for American patriots in the pre-revolutionary period, a bulwark against the oppressive actions of George III and his colonial governors. Because of this tradition, as well as to protect the citizens of the states of our young Republic from encroachments on their liberty by the newly created Federal Government, the Founding Fathers enshrined the grand jury in the Fifth Amendment to the Constitution, where it has endured ever since as an honored symbol of our own American legal tradition and a keystone of our Bill of Rights.

Today, however, as this hearing will reveal, the symbol is tarnished, the tradition dishonored. Over the past four years under the present Administration, we have witnessed the birth of a new breed of political animal—the kangaroo grand jury—spawned in a dark corner of the Department of Justice, nourished by an Administration bent on twisting law enforcement to serve its own political ends, a dangerous modern form of Star Chamber secret inquisition that is trampling the rights of American citizens from coast to coast.

And so, I commend Congresswoman Bella Abzug, and the cosponsors of the House Resolution before this Subcommittee, for the imaginative legislative approach they have found to make this first significant Congressional protest against the abuse of the grand jury.

It is my hope, Mr. Chairman, that out of this hearing and the record we begin this morning will come a strong resolve to conduct a thorough investigation of existing grand jury practices, so that Congress and the Courts together can provide the safeguards we need under the Constitution to enable the grand jury to function as intended by the Founding Fathers.

I am here this morning primarily because I believe the Department of Justice is now engaged in a gross continuing abuse of the grand jury process in Fort Worth, Texas.

The case of the Fort Worth Five is just the tip of the grand jury iceberg, but it has much to teach us about the insidious practices of the Department of Justice in several aspects of this area. As such, it merits the close scrutiny it will receive today and in the future from this Subcommittee.

There is no substantial dispute as to the facts of the Fort Worth case.

In June of 1972, five Irish Americans—Kenneth Tierney, Thomas Laffey, Mathias Reilly, Paschal Morahan and Daniel Crawford—all from the New York City area, were subpoenaed to Fort Worth, Texas, to appear before a Federal grand jury investigating the possible shipment of arms from this country to Northern Ireland. At the time, seven other New York residents, including four high officials of the Irish Northern Aid Society, an active Irish-American group headquartered in New York City, were also called to testify, but their subpoenas were withdrawn. The Fort Worth Five—Tierney, Laffey, Reilly, Morahan and Crawford—all refused to answer the questions of the grand jury, on the ground that the investigation was politically inspired and violated a number of their basic legal rights.

After receiving grants of so-called "use" immunity, the Fort Worth Five continued to refuse to testify, and were immediately jailed for civil contempt. Last September, after three months in prison, the men were granted bail by Justice William O. Douglas, pending action by the Supreme Court on the legal challenges they had raised. On January 22 of this year, the Supreme Court declined to hear the case, and on January 29 the men were again jailed in Texas on the contempt citation, where they now remain.

So far, they have spent a total of four months in prison, yet they stand charged with no crime, convicted of no offense. Unless the Department of Justice relents, or Congress or the courts intervene, their imprisonment may well continue throughout the life of the current grand jury, which expires on November 2. And, on November 3 as the Department of Justice has shown it is fully capable of doing within the letter of existing law, a new grand jury may be convened in Texas. They may be subpoenaed and held in contempt again, and the imprisonment of the Fort Worth Five may go on this way forever.

Gun-running is a serious charge, and at the outset, I want to emphasize that in no sense do I condone any form of such activity. As I have stated many times in the past and as I repeat today, I firmly condemn the activities of extremists on both sides in Northern Ireland. I have made these views clear both to the Prime Minister of Great Britain and to the Prime Minister of the Republic of Ireland. And I have also made clear to each of them, as well as to Attorney General Kleindienst, that I give my full support to all legitimate activities, grand jury investigations and other actions by law enforcement authorities in both Britain and the United States to shut off the flow of any arms—or any funds for arms—from this country to Northern Ireland.

I am fully aware that a substantial number of weapons found in Northern Ireland have been traced to this country or to purchases made through this country. There is no question in my mind that there is a legitimate basis for an intensive investigation by the Department of Justice into these activities.

But I also believe that the Department of Justice has the obligation to obey the law in conducting any investigation it undertakes. That obligation is not only to obey the letter of the law, but the spirit of the law as well, so that the actions of the Department are fair according to the Constitution and statutes of the United States, and are seen to be fair by reasonable law-abiding citizens throughout the country.

Nearly half a century ago, this principle, that Government must obey the law, was stated eloquently by one of our greatest Supreme Court Justices, Louis Brandeis:

"... Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution."

Judged by that standard, I believe that the actions of the Justice Department in Fort Worth in the present case can be weighed and found severally wanting. Look at the record. Are these the actions of a Department of Justice that has a decent respect for the rights of its citizens? Are these five men being treated fairly under the Constitution and Bill of Rights? Or are they the innocent victims of a new and frightening form of secret inquisition?

—Kenneth Tierney, 45, is a registered nurse and physical therapist at Columbia-Presbyterian hospital in New York City. He lives in Yonkers with his wife and four young children. He has never been to Texas. In a sworn affidavit, he states that his only connection with Texas is that he once wrote a letter to President Lyndon Johnson.

—Thomas Laffey, 34, is a real estate salesman who lives in Williston Park, New York, with his wife and three young children. He has never been to Texas or had any connection with Texas.

—Mathias Reilly, 37, is a Manhattan bus driver who lives in Blauvelt, New York with his wife and three young children. He has never been to Texas or had any connection with Texas.

—Paschal Morahan, 26, is a carpenter who lives in the Bronx. He has never had any connection with Texas.

—Daniel Crawford is a housepainter who lives in Manhattan. He has never had any connection with Texas.

There they are—five Irish Americans from New York City, none of them having any connection with Texas. Yet, in the spring of 1972, these five individuals were subpoenaed before a grand jury and imprisoned in Fort Worth, far from their friends and homes and families and jobs, in circumstances imposing special hardship and privation, not only on the men themselves, but also on their families. Indeed, for some of the families, the only alternative to welfare has been the financial assistance for rent and food provided by Irish American community groups in New York City concerned about their plight.

For the men themselves, the concern they have for their families has been compounded by the dismal conditions of their own imprisonment. For virtually the entire period of their incarceration, the Fort Worth Five were confined in the Tarrant County Jail in Fort Worth—a local, not a Federal, jail. Their imprisonment was carried out under especially harsh conditions, partaking of solitary confinement, with the men being denied exercise and even contact by telephone with their family or their legal counsel.

Four weeks ago, I wrote to Attorney General Kleindienst protesting these conditions and other aspects of the case. A number of others in Congress have also objected to the continuing unfair treatment. On March 1, while I was still awaiting a reply from the Attorney General, the five were transferred to Seagoville, a renovated Federal correctional institution outside Dallas, where they are now incarcerated under less objectionable conditions.

Seagoville, of course, has other memories. In World War II, it was one of the sites of the infamous detention centers of resident American aliens. The years have passed, the facilities may be more modern, but as the present case makes clear, Seagoville still retains its image of injustice and repression.

The fact remains that the men are still in prison, denied their freedom because of what I believe is an irresponsible manipulation of the grand jury and a shocking insensitivity by the Department of Justice and its prosecutors to basic human rights.

To me, the present case demonstrates three clear aspects of grand jury abuse, for each of which the Department of Justice stands itself indicted. Each of these aspects is covered by the pending resolution of inquiry filed by Congresswoman Abzug.

VENUE

The first abuse is the venue in Fort Worth: What possible justification exists for separating these men from their homes and families and friends and jobs in New York, and hauling them 1,400 miles to Texas, to appear before an alien grand jury and a hostile prosecutor?

Perhaps, at this hearing, the Department of Justice will break its long unconscionable silence on this matter and demonstrate some legitimate basis to justify the Texas venue.

The only suggested link of which I am aware is the rumor that the Department has been informed by the Government of Great Britain that the Irish Republican Army in Ulster has in some fashion attempted to purchase arms in Texas, and that, knowing nothing more, the Department decided to launch a deep sea fishing expedition in Texas to see what they could learn from the leaders of the Irish Northern Aid Society in New York. Yet, for reasons known only to itself, the Department withdrew the subpoenas to Fort Worth for the only men who know anything about the Irish Northern Aid Society. Instead, they chose only to pursue the five working New York Irishmen who are now in prison, men who have no official connection at all to the Irish Northern Aid Society and who have no connection at all to Texas.

Simply put, I believe the Department is holding the wrong men in Texas and won't admit it. The Department prefers to let innocent citizens endure the pain of jail, rather than confess that its prosecutors have blundered.

There is not one shred of fact in any of the known aspects of this grand jury proceeding to suggest any possible connection between Texas and these five Irish Americans, or between Texas and any other aspect of this grand jury investigation.

We do know one thing, however. A Federal grand jury in the Southern District of New York, in the very area in which these men reside, has been conducting a separate investigation of the shipment of arms to Northern Ireland

from the United States. A number of indictments have already been returned in that investigation, one as recently as February of this year. Why couldn't the Fort Worth Five have been subpoenaed to testify before that grand jury in New York City? Why were they railroaded to Fort Worth in such oppressive circumstances, serving no apparent law enforcement purpose? Wouldn't New York have been more convenient for all concerned—convenient for the witnesses, and convenient for the Department of Justice, too?

Perhaps that question answers itself. From the beginning, the circumstances of this case have strongly suggested that it had nothing to do with Texas, and a great deal to do with a thinly veiled attempt by the Department of Justice, at the request of the Government of Great Britain, to harass Irish Americans in the New York City area engaged in peaceful protests against British policy toward Ulster.

Given the intensely political nature of this investigation, the predictably outraged response of the Irish American community in New York, and the fact that 1972 was a presidential election year, the convening of the grand jury in Texas may have had a great deal less to do with effective law enforcement than it did with the 1970 Census, which reveals nearly 400,000 first and second generation Irish Americans living in New York State, most of them in New York City, but only 12,000 in Texas, and very few in Fort Worth.

The conclusion that the Texas venue was improper for this investigation is also compelled by the analysis of the questions asked each of the Fort Worth Five before the grand jury. I have attached a copy of those questions as an appendix to this statement. Virtually every question that reveals enough information to disclose specific facts also reveals, without exception, that the facts relate solely to persons and places in the New York City area, and have nothing to do with Texas. The only questions that even clearly relate at all to Texas are blunderbuss questions of the sort that begin, "Have you ever known any person in New York, Texas, or elsewhere . . .?"

The circumstances of the present case thus closely parallel the situation in *Brown v. United States*, 245 F. 2d 549 (1957). In that case, the Court of Appeals held that a Federal grand jury investigation in Nebraska had been conducted in bad faith, because the prosecutor's questions related exclusively to conduct in Missouri.

The same reasoning applies to the pending case, since the prosecutor's questions, stripped of the transparent effort to mask his true intent, related exclusively to conduct in New York. Whatever validity the Texas venue may have had at the time the twelve subpoenas were originally served in New York to commence this investigation in Texas, there was no such validity by the time the Fort Worth Five went into the jury room.

If the Department of Justice still genuinely wants the testimony of the Fort Worth Five today, the only fair and rational course to follow is to discontinue this abusive grand jury investigation in Fort Worth, and continue it in New York City, where it should have been held all along.

PUNISHMENT

The second abuse of the grand jury in the Fort Worth Case is that the Department of Justice is punishing these men with lengthy prison terms under the guise of civil contempt. One of the principal causes of the violence and friction in Northern Ireland has been Britain's policy of internment without trial. Yet, today in Fort Worth, we find the Administration practicing its own version of internment without trial in Texas.

In a series of recent decisions, the Supreme Court has imposed strict controls on the length of sentences that can be meted out by a judge without a trial by jury in cases involving criminal contempt. The standard now is that a judge, acting alone, cannot impose a sentence longer than six months for criminal contempt unless the defendant is afforded a right to trial by jury.

I believe that a similar right, or some similar control, should also be available in cases involving civil contempt, in order to prevent precisely the sort of obnoxious and excessive punishment that exists in the present case.

Of course, the courts have usually allowed broad leeway for prosecutors to use the tool of civil contempt, on the traditional theory that the imprisonment is remedial not punitive, since the prisoners hold the key to the jail in their pockets. But that ancient maxim is no longer adequate to do justice in the modern world.

Two weeks ago, in the Grumbles case, the Third Circuit Court of Appeals in Philadelphia moved strongly in the right direction, sustaining an order by a Federal district judge in Camden, New Jersey, requiring the release of a husband and wife from prison for civil contempt, on the ground that the imprisonment had clearly reached a punitive stage. The couple had already pleaded guilty to criminal charges arising out of a separate case involving a raid on a local draft board in New Jersey. Yet, the Grumbles were also incarcerated for 13 months for civil contempt, arising out of their refusal to testify in an investigation of other anti-war and anti-draft activities. Their release from jail came a month before the grand jury was to expire, although the Department of Justice had announced its plans to subpoena them before a new grand jury if they were released.

This recent decision has direct application to the present case, and is a promising new precedent for the Fort Worth Five. In fact, the precedent may be sufficient in itself to secure their prompt release from Texas, if the Fifth Circuit follows the lead of its sister Circuit. Just as the imprisonment of the Grumbles for civil contempt had reached a punitive state in New Jersey, so the imprisonment of the Fort Worth Five has now clearly reached that stage in Texas.

To be sure, the Third Circuit decision is a novel legal breakthrough. Perhaps it will not survive an appeal to the Supreme Court, which has showed little concern so far over the frightening excesses by which grand juries operate.

Yet, the Third Circuit case demonstrates how the law responds and grows under the stimulus of unfair actions by official power. The pressure begins quietly in a local jail. It arouses the concern of a local Federal judge. Soon the Courts of Appeals begin to act. Side by side, concern begins to build in Congress, as members respond to the protests of their constituents. Apparently isolated incidents reinforce each other across the country, as separate cases are pieced together to reveal a full blown nationwide pattern of abuse. At last, the pressure builds into a force the Supreme Court and Congress cannot ignore in their historic function of protecting the constitutional rights of citizens.

In the Fort Worth Case, the Department of Justice still seeks to hide behind the traditional distinction between civil and criminal contempt. They argue that the current incarceration is not punitive because the Fort Worth Five can end their imprisonment as soon as they agree to testify before the grand jury.

But if the grand jury itself and the terms of their imprisonment are illegal, why should they have to testify or give up any other basic rights to gain their freedom? The condition the Justice Department seeks to impose as the price of freedom is too high—it is no more valid than if the Department agreed to release them on the condition that they henceforth refrain from exercising their First Amendment right to criticize British policy in Northern Ireland.

Indeed, that sort of First Amendment harassment is widely regarded as the Department's real goal in this present grand jury, just as the same allegation has been raised against many other grand juries convened by the Department of Justice in recent years to harass individuals and groups whose politics and philosophy do not sit comfortably with the present Administration.

The suspicion is very great, therefore, that the current investigation has two aspects—the first aspect, the grand jury in New York City, is engaged in a professional and lawyer-like investigation of gun-running to Northern Ireland. Indictments have been returned and trials will follow. But the second aspect, more unsavory, is the Texas grand jury, convened for no apparent law enforcement purpose, a political grand jury sitting to harass and intimidate individuals and organizations in New York opposed to British policy in Ulster. As these proceedings demonstrate, there is a heavy burden on the Department of Justice to prove that the First Amendment rights and other rights of the Fort Worth Five have not been infringed, that their continued incarceration is not punitive and that it fulfills all the guarantees of due process of law.

Two further points should be made on the question of punishment. One concerns the innocence or guilt of the witnesses themselves. The other concerns the status of the Justice Department's ongoing investigation, or lack thereof. I do not know, and I suspect the Department of Justice does not know either, whether the Fort Worth Five are guilty of any offense. But I do know, unless our system of justice is being stood on its head by the Administration, that they are innocent until proven guilty.

Now the O'Gara case in New York, in which an indictment has been returned, mentions three members of the Fort Worth Five, but in circumstances making

no implication of their guilt. The indictment states simply that in purchasing arms illegally in the New York area on three separate occasions, the defendant O'Gara identified himself as one of the Fort Worth Five and displayed a driver's license in that name.

The indictment does not list any of the Fort Worth Five as codefendants, and it does not name any of them as coconspirators. If the Department of Justice thinks these men are guilty of some offense, let it indict them. Let it bring them to trial. But at least, let it end this cruel charade in Texas, by which these men are being punished without ever being charged or tried.

Lewis Carroll had words for this behavior. In the final chapter of *Alice in Wonderland*, just before Alice awakens from her dream, we read these lines about the trial by the King and Queen of Hearts:

"Let the jury consider their verdict," the King said, for the twentieth time that day.

"No, no!" said the Queen. "Sentence first, verdict afterward."

"Stuff and nonsense," said Alice loudly. "The idea of having the verdict first!"

"Hold your tongue!" said the Queen, turning purple.

"I won't!" said Alice.

"Off with her head!" the Queen shouted at the top of her voice.

But this is no dream or game of cards in Texas. Real human beings are in jail, their rights denied, their families torn apart in violation of the law. I say, it's long past time the Internal Security Division stopped playing the Queen of Hearts in Texas and started behaving like a Department of Justice by freeing the Fort Worth Five.

With respect to the current status, or lack thereof, of the Department's investigation in Texas, the issue is equally serious. It appears that the Fort Worth grand jury has long since discontinued its investigation of this case. There is no indication that the grand jury has sat for a single additional hour, or heard a single additional witness in this investigation since these five men were originally held in contempt in June of 1972. The seven other witnesses originally called before the grand jury are long forgotten, their subpoenas withdrawn. There appears to be no reasonable possibility that the investigation will ever be resumed, or that additional witnesses will ever be called in.

In this situation, the continued imprisonment of the Fort Worth Five is punishment pure and simple. Justice demands that they be freed at once, but the Department of Justice allows them to rot in jail. The smell is unmistakable. The Department is punishing the Fort Worth Five in the guise of civil contempt.

In similar cases in the past, the Department of Justice has not always been so obstinate and unyielding. Last November in Boston, the Department released Professor Samuel Popkin of Harvard University from jail in somewhat similar circumstances. Professor Popkin had been imprisoned for contempt for refusing to testify before a grand jury investigating various aspects of the Pentagon Papers Case. Freed on bail pending his legal challenge to the contempt citation, Popkin was imprisoned again when a Boston Federal judge denied the challenge. But he was released after only seven more days in jail, when the Department of Justice, reviewing the case, found that the grand jury was about to expire and was no longer actively pursuing the investigation.

Why doesn't the Department apply this policy to the Fort Worth Five? A large price in human suffering has already been extracted from these men for no apparent purpose. If the investigation is over, they should be released from prison now, and allowed to return to New York to rejoin their friends and families. It would be a travesty of justice and even-handed law enforcement for five ordinary Irish-American citizens to remain in jail because their plight has not received the national notoriety and attention generated by the imprisonment of a professor at Harvard University.

POST-INDICTMENT INVESTIGATION

The third abuse of the grand jury in Fort Worth is that the Department of Justice is continuing the incarceration of these men after indictments have already been returned in related investigations in New York. Perhaps the most obvious abuse in this respect concerns the O'Gara case in New York. It appears that the Department is using the grand jury in Fort Worth to gain further evi-

dence to bolster its case against O'Gara when he goes to trial in New York. If the Department wants this information, let it subpoena the Fort Worth Five to appear at the O'Gara trial in New York City.

It is unconscionable for the Department to use a grand jury to seek additional evidence on a case after an indictment has been returned. Going back over many years, courts throughout the country, including the Supreme Court, have condemned the practice. It is my understanding that the Department itself has consistently avoided this objectionable practice in the past. Why does it not adhere to that consistent tradition today?

Another indictment is also involved in the present case. One of the questions the Fort Worth Five refused to answer before the Texas grand jury concerned a notorious arms dealer named Agramonte who does business in Yonkers, New York. Agramonte was indicted in New York City in August 1972. In January 1973, he pleaded guilty to reduced charges, thereby closing the case. Yet, the Fort Worth Five are still in jail, two months after one of the obvious and principal targets of the Texas grand jury investigation had been indicted and pleaded guilty.

It is bad enough for the Department to use the grand jury to seek evidence for the upcoming O'Gara trial, but it defies reason and the Constitution for the Department to use the grand jury to investigate a case that has already been closed by the Department's own actions.

On this latter ground alone, it appears to me that the Fort Worth Five may well be entitled at least to their temporary freedom now, as soon as a new application for bail can be brought pending resolution of this issue.

On January 17, 1973, the Supreme Court granted bail in the Meisel Case, arising in San Francisco. One of the principal issues in that case concerns the fact that the imprisonment of two witnesses for civil contempt had been allowed to continue beyond the indictment of the person who was the obvious target of the investigation. Surely, on that issue, the Fort Worth Five also deserve the benefit of bail.

Taken separately, each of these areas I have discussed this morning demonstrates a clear abuse of the grand jury in Fort Worth. Taken together, they make an overwhelming case for the immediate freedom of the Fort Worth Five.

Indeed, if the Department does not itself respond as a result of the new interest generated by this hearing, I would hope that the foreman of the grand jury and the other members of the Fort Worth panel would take the initiative themselves, in accord with the ancient time honored role of grand jurors, and demand an explanation from the prosecutor as to why these five men must remain in jail.

In any event, I suggest the five will soon regain their freedom as a result of new legal challenges that may be filed by habeas corpus or other petitions in the courts. And perhaps, if the abuse has become sufficiently manifest by the time they regain their freedom, an action for false imprisonment and damages may also lie against the offending officials responsible for their plight.

POLITICAL GRAND JURIES TODAY

Unfortunately, the Fort Worth Case fits the now all too familiar and mushrooming recent pattern of grand jury abuse and secret inquisition by Justice Department officials around the country, a practice raising serious questions in Congress and the nation about the fairness and legality of the Department's current operations and about the very security of our fundamental freedoms and basic liberties.

There are no short-cuts to law and order and certainly not to justice. Perhaps the most ominous single sign of our national drift away from liberty is the epidemic of grand jury harassment that has plagued the country in recent years. Sixteen years ago, the issue was put this way by Justice Hugo Black, perhaps the greatest champion of the Bill of Rights ever to sit on the Supreme Court:

Secret inquisitions are dangerous things justly feared by free men everywhere. They are the breeding place for arbitrary misuse of official power. They are often the beginning of tyranny as well as indispensable instruments for its survival. Modern as well as ancient history bears witness that both innocent and guilty have been seized by officers of the state and whisked away for secret interrogation or worse until the ground work has been securely laid for their inevitable conviction. While the labels applied to this practice have frequently changed, the central idea . . . remains unchanging—extraction of "statements" by one means

or another from an individual by officers of the state while he is held incommunicado.

The use of "political" grand juries by the present Administration is unprecedented. In a sense, of course, the practice is a throwback to the worst excesses of the legislative investigating committees of the 1950's. In this respect, the Internal Security Division of the Justice Department represents the Second Coming of Joe McCarthy and the House Unamerican Activities Committee. But the abuses of power of the Department's overzealous prosecutors do not even know the bounds of a Joe McCarthy, because their insidious contemporary activities are carried out in the dark and secret corners of the grand jury, free from public scrutiny.

When I said at the beginning that the Fort Worth Case is just the tip of the iceberg of grand jury abuse, I meant the very small tip indeed. Call the role of notorious grand juries in recent years and you begin to get some idea of the dimensions of the problem.

The Fort Worth Five are not alone. In too many cases, infringement of basic rights is a way of life today for the Internal Security Division of the Department of Justice.

—Last July, on the day the Democratic National Convention began in Miami, twenty-five members of the Southern leadership of the Vietnam Veterans Against the War were subpoenaed five hundred miles to the Florida Panhandle, to appear before a Federal grand jury in Tallahassee. The group was compelled to remain in Tallahassee under subpoena for the entire week, in what was widely regarded as a dragnet political grand jury convened to embarrass both the antiwar movement and the Democratic Convention.

—19 year old Leslie Bacon was arrested in Washington, D.C. in April 1971 as a material witness in connection with the bombing of the Capitol. But then she was spirited away to a grand jury investigation in Seattle, where as it turned out over days of intensive questioning, the Federal prosecutors were far more interested in the Mayday Demonstration in Washington that spring and her private beliefs and political associations and unusual life style, than they were in the Capital bombing. No one denies that the bombing of the Capitol should be vigorously investigated, but it is difficult to believe this goal was advanced at all in Seattle by the peculiar interest of this grand jury prying into the private life of a teenage girl.

—In Tucson, Arizona, in October 1970, after an indictment had been returned in a case involving the purchase of explosives by a Weatherman, the Justice Department's chief prosecutor subpoenaed five young members of a commune in Los Angeles to appear before the grand jury. The subpoenas served no obvious law enforcement purpose, although one of the witnesses was known to have a tenuous connection with the defendant in the case. As an appendix to this statement, I have attached a copy of the portion of the questions one of the witnesses was asked to answer. It is impossible here to convey the full flavor of the intimidation that can be brought to bear by a skillful prosecutor questioning a witness in a grand jury room, but the attached questions reveal something of the stifling and oppressive atmosphere that must have been created by the prosecutor's aggressive and blunderbuss probe into the witness' private beliefs and associations. At first, all the witnesses resisted the pressure. They were jailed four months for contempt. When the grand jury expire a new grand jury was convened, and the witnesses were again subpoenaed and cited for contempt. Faced with the prospect of 18 more months in jail, most of them capitulated and agreed to testify.

—In the Malone case in San Francisco in November 1972, Robert Meisel and Barbara Jean Fitch were imprisoned for civil contempt for refusing to testify in a grand jury investigation into the shipment of arms to Northern Ireland, apparently unrelated to the actions of the grand juries in Fort Worth and New York City. Meisel was a house painter living in Malone's home. Fitch was the Malones' baby sitter, caring for the family's seven children and also living in the house. At the time Meisel and Fitch were cited for contempt, the grand jury had already returned two indictments against Malone. Yet, the questions they refused to answer were directed almost entirely against Malone, in circumstances strongly suggesting that the prosecutor was seeking to bolster his case for trial. Moreover, Malone has now pleaded guilty. Yet the Justice Department persists in seeking further testimony from these two witnesses—one his close friend, the other his baby sitter. The witnesses are now free on bail granted by

the Supreme Court, pending resolution of this and other legal issues raised by their imprisonment.

—In Harrisburg, Pennsylvania the grand jury that indicted Philip Berrigan and Elizabeth McAlister in January 1971 for plotting to kidnap Henry Kissinger and bomb the Washington steam tunnels was called back into session, and 34 additional witnesses, including priests and nuns, were subpoenaed in an obvious effort to bolster the prosecutor's flimsy case for trial. At the end of April, a superseding indictment was returned with new counts inserted, tailored to enable a jury to convict the defendants without proof of the bomb and kidnap plot. Eventually, the defendants were convicted, but only for the offense of smuggling letters out of a Federal penitentiary, an offense for which they almost certainly would not have been indicted, absent the highly charged political atmosphere of the case.

—One of the most serious of all the grand jury abuses, and certainly the most highly publicized, has been the barrage of grand jury subpoenas sprayed on news reporters in recent months around the country, to compel disclosure of their sources and other information long thought protected by the First Amendment. Time and again, like the Fort Worth Five and many other grand jury witnesses, reporters have chosen to stand on their rights and go to jail, rather than yield to pressure of the government's intrusive questions, or allow themselves to become unwilling investigators for the prosecutor's office.

—Even Congress itself is not immune from the encroaching tide of executive abuse, as we learned last year when an aide to Senator Mike Gravel was subpoenaed to appear before a Boston grand jury investigating the Pentagon Papers Case. The grand jury investigating this case in Los Angeles was also notable for its own abuses, not least for the subpoena served on Daniel Ellsberg's 15 year old son at 7:30 in the morning, demanding his appearance before the grand jury two hours later that very day.

And so it goes, as the Special Litigation Section of the Internal Security Division plies its trade, with its small army of grand inquisitors barnstorming back and forth across the country, hauling witnesses around behind them, armed with dragnets of subpoenas and immunity grants and contempt citations and prison terms. These tactics are sufficient to terrify even the bravest and most recalcitrant witness, whose only crime may be a deep reluctance to become a government informer on his closest friends or relatives, or an equally deep belief that the nose of the United States Government has no business in the private life and views and political affiliations of its free citizens.

It is a tribute, I think, to the real vitality of the American political spirit that so many citizens today are willing to sound the alarm and stand their ground and endure the pain of prison, rather than forego these basic rights they cherish.

To some extent, the exalted historical role of the grand jury as the protector of the citizen is myth. From its beginning in medieval England, the grand jury was frequently a pawn in the struggle between the Crown and the Church. In modern times, grand juries have often failed in their role as guardians of the people. As one who has served as a prosecutor in the Commonwealth of Massachusetts, I know how easy it is for the grand jury to slip into the passive role of a rubber stamp for the prosecutor, a compliant appendage to the local District Attorney's office instead of the vigilant people's guardian it ought to be.

By the end of the nineteenth century in Britain, the abuses of the grand jury had come to outweigh its protective features by so wide a margin that its role was sharply curtailed. It was later abolished outright in Britain, and a similar step was recommended for the United States by the Wickersham Commission in 1933. Today, in Britain and in nearly half our own states, prosecutions are now commenced by filing criminal informations, with a preliminary hearing replacing the grand jury as the guardian of the citizen's rights. Perhaps that is the route our own Federal legal system will eventually have to take, if the modern abuses prove too great, if we fail in our efforts to preserve the valid purpose the grand jury is supposed to serve.

In a sense, of course, the seeds of the current problem have been with us for many years. The question is why they have sprouted so suddenly, so oppressively, and so massively.

To be sure, immunity and civil contempt are nothing new in American criminal law. As conventional grand jury tools, they are weapons of longstanding use by

generations of Federal, State and local prosecutors in this country. What is new today is the enormous growth of these weapons, and the manner in which recent well-intentioned crime control legislation has been twisted to unintended ends.

The novel, wide-ranging so-called "use" immunity power conferred by the Organized Crime Control Act of 1970 appears to be responsible for almost all of the current problem. Indeed, the promiscuous and wholesale current application of this power threatens to make a shambles of the Fifth Amendment's protection against self-incrimination, in a way that the old and far more sparingly used "transactional" immunity never even remotely approached.

In part, of course, Congress is to blame for the present crisis, because Congress failed to recognize the sinister potential abuses lurking beneath the innocuous surface of the 1970 law. In part, the Department of Justice is to blame, for lulling Congress not only with excessive protestations of the need for this new Act as a law and order tool, but also with equally excessive and wholly unfulfilled promises of good behavior if only the Act would pass.

Today, in consequence, the investigative grand jury has become a powerful new engine of political oppression. But the excesses are now so great, the Department of Justice has now so far overreached itself in these activities, that public opinion is at last aroused.

There are many hopeful signs that this modern tide of grand jury abuse is cresting and may now recede. Possibly, the Department of Justice itself will yield, and pull back from this brink of destruction of civil liberties, now that the spotlight of public opinion is focused on its actions. The Federal courts have also begun to intervene. In addition, the bar is clearly aroused, thanks to the imaginative actions of attorneys in individual cases, such as Paul O'Dwyer and Frank Durkan for the Fort Worth Five, and to the skillful manner in which civil liberties groups are developing the issue, such as the Center for Constitutional Rights in New York City and the Grand Jury Project of the American Civil Liberties Union in San Francisco.

As this hearing demonstrates, and as the massive current hearings on newsman's privilege also demonstrate, both the Senate and the House have begun to stir as well. Working together, I am confident that we can fashion rules and due process guarantees to protect both newsman and ordinary citizens.

There are a number of directions that immediate reform can take in Congress, directions that will in no sense hamstring law enforcement in legitimate investigations of any crime, but which will provide needed new protection for innocent citizens against the abuses now so prevalent:

To prevent abuse of grand jury venue, Congress can require a prosecutor to justify the forum he has chosen, when a witness demonstrates that his appearance at a distant location will impose substantial or unnecessary hardship on himself or on his family. I believe that in such cases, a witness should be entitled to a public hearing in the district of his residence, on a motion to quash the subpoena, and that a judge should be entitled to take into account such factors as the significance of the overt acts alleged to have taken place in the jurisdiction, and whether related investigations are being carried out or could easily be carried out in locations more convenient than the one chosen by the government.

To prevent abuse of civil contempt as a device to punish recalcitrant grand jury witnesses instead of to obtain their testimony, Congress should impose a firm upper limit of six months on any term of imprisonment for such contempt. And, at any date prior to that time, a court should be entitled to vacate an order of contempt, upon a showing that, by the preponderance of the evidence involving changed circumstances in the case, the primary purpose of the imprisonment has turned punitive.

To prevent abuse of the grand jury as a device to secure evidence against defendants already indicted, Congress should allow a court to quash a subpoena or vacate an order of contempt against a witness, upon a showing that there is no other substantial purpose for which the testimony of the witness is being sought.

These three suggestions would be of obvious benefit in cases like the Fort Worth Five, but they are only the beginning of the reforms we should seek. Many others also come to mind:

To insure the overall fairness of the grand jury, a witness should be entitled to challenge the composition of the body on grounds that it is not truly representative of the community from which it is drawn.

"Use" immunity should be available only for a narrow range of specified offenses, not for every criminal investigation that happens to catch a prosecutor's fancy.

A witness should be entitled to the assistance of counsel in the grand jury room. This change would involve no disruption or delay in current grand jury operations. In fact, it might even expedite them, since in most jurisdictions today, a witness is entitled to leave the grand jury room after every question in order to consult with counsel.

The Department of Justice should be required to file detailed reports with Congress and the courts each year, describing the investigations undertaken, the grants of immunity used, the contempt citations imposed, and other appropriate measures of grand jury activity.

Strict rules should be enacted to prevent the grand jury from abusing its broad subpoena power to extract evidence in violation of other constitutional guarantees, such as the First Amendment and the Fourth Amendment. Earlier this year, for example, in *United States v. Dionisio*, the Supreme Court held that the Constitution itself did not prohibit the grand jury from issuing a dragnet series of subpoenas to compel 20 different witnesses to provide samples of their voices, even though such samples could not have been obtained under the search and seizure provisions of the Fourth Amendment without a showing of reasonable cause. Obviously, however, as in the case of newsman's privilege, the decision was on constitutional grounds alone, and leaves ample scope for the exercise of Congress' legislative power.

Each of these reforms is, I submit, an urgent one. For too long, we have allowed the grand jury to roam at will, free of the most elementary restraints of due process of law. Together, we can now begin to restore the grand jury to the noble function it has usually served so well since the beginnings of our nation, and make it truly the guardian of our constitutional rights as citizens of this country.

One final word on the Fort Worth Five. Matthias Reilly and his wife Mary, who are immigrants to this country from Ireland, were scheduled to attend an important ceremony last Friday, to be held in New City, New York at the courthouse for Rockland County. At that ceremony, following in the great tradition of generations of immigrants before them, they were to salute the American flag, and take the solemn oath to become citizens of the United States.

But the Department of Justice cancelled the ceremony for Matthias Reilly. He could not attend, they said, because he is in the custody of the Attorney General of the United States in a Texas jail. And, in perhaps the unkindest stroke of all, the Department of Justice tried to cancel Mary Reilly's ceremony, too, for reasons which are unknown to me, but which, I suspect, the Department will not care to spread upon the public record.

But Mary Reilly shares her husband's courage and strong spirit. She insisted that her own ceremony should go on, and it did. So, at 10 a.m. last Friday morning, Mary Reilly stood before Justice Joseph Hawkins of the Supreme Court of the State of New York and became an American citizen, while her three young children tried to understand the meaning of the rights their family now had earned.

APPENDIX A

QUESTIONS ASKED THE FORT WORTH FIVE BY THE GRAND JURY

Kenneth Tierney

Q. Mr. Tierney do you collect firearms?

Q. Mr. Tierney, have you ever purchased firearms from a weapons dealer in Westchester County, New York, named Edward Agramonte?

Q. Mr. Tierney, have you ever given your driver's license to any other individual to be used as identification in the purchase of firearms?

Q. Mr. Tierney, have you ever accompanied any other individual at which time firearms or explosives were purchased?

Q. Mr. Tierney, are you engaged with any other person in New York, in Texas, or any other place in the purchase of illegal weapons or explosives or the purchase of legal weapons illegally?

Q. Mr. Tierney, do you have any knowledge of any person or person (sic) who, in New York, Texas, and elsewhere are engaged in the purchase of illegal weapons and explosives or in the purchase of legal weapons illegally?

- Q. Mr. Tierney, have you ever purchased any weapons?
 Q. Mr. Tierney, have you ever given your driver's license to any other individual to be used in the purchase of any weapons?
 Q. Mr. Tierney, are you acquainted with a Peter Finnegan?
 Q. Are you acquainted with a Mr. Daniel Crawford?
 Q. Have you ever accompanied either one of these men or any other men to purchase weapons or explosives?
 Q. Mr. Tierney, are you acquainted with a Patrick Purcell?
 Q. Have you ever been to a firearms dealer whose name is John Jalowsky?

Mathias Reilly

Q. Mr. Reilly, are you presently licensed to drive a car in the State of New York?

Q. Have you ever furnished your driver's license, given it to any other individual for the purpose of purchasing firearms?

Q. Mr. Reilly, have you ever purchased a number of Armalite rifles, and to aid you in this matter, these are commonly referred to as AR-180 from a licensed firearms dealer?

Q. Have you ever purchased or acquired illegal firearms or explosives or purchased otherwise legal firearms illegally or engaged in such activities in the New York or Texas or other areas?

Q. Mr. Reilly, have you ever knowingly allowed your name to be used in connection with the purchase of any firearms?

Q. Mr. Reilly, has James O'Gara ever given you money for the purchase of Armalite rifles?

Q. Mr. Reilly do you have any knowledge of any person or persons who have purchased or acquired illegal firearms or explosives or have legally (sic) purchased otherwise legal firearms in New York or Texas or other areas?

Q. Do you have any knowledge of any other people or individuals who have purchased or acquired in any fashion illegal firearms or explosives or have purchased legal firearms illegally?

Q. Have you ever furnished your driver's license, given it to another individual for the purpose of purchasing firearms?

Q. Have you ever purchased or acquired illegal firearms or explosives or purchased otherwise legal firearms illegally?

Q. Mr. Reilly, have you ever knowingly allowed your name to be used in connection with the purchase of firearms?

Q. Mr. Reilly, have you ever purchased or acquired illegal firearms or explosives, or purchased illegal firearms or explosives, or purchased otherwise legal firearms illegally or engaged in such activities in the State of New York or Texas?

Daniel Crawford

Q. Mr. Crawford, are you presently licensed to drive a car in the State of New York?

Q. Do you have any knowledge of persons engaging in the purchase of illegal weapons or explosives or . . . the illegal purchase of legal weapons in New York or Texas or other place?

Q. Mr. Crawford, are you acquainted with a Charles or Liam Murphy?

Paschal Morahan

Q. Mr. Morahan, have you ever aided any person or persons in the illegal purchase of firearms?

Q. Mr. Morahan, do you know James O'Gara?

Q. Mr. Morahan, have you ever given your driver's license to another individual for the purpose of purchasing firearms illegally?

Q. Mr. Morahan, do you have knowledge of any person or persons who have engaged in the illegal purchase of otherwise legal firearms in the State of New York and Texas or who may have acquired or purchased illegal firearms or explosives in those two states or other places?

Q. Mr. Morahan, have you ever engaged in activities involving the acquisition or purchase of illegal firearms or explosives in the States of Texas, New York, or elsewhere, or the purchase of otherwise legal firearms illegally in those locations?

Q. Mr. Morahan, do you have knowledge of any person or persons who have engaged in the illegal purchase of otherwise legal firearms in the States of New York and Texas or who have acquired or purchased illegal firearms or explosives in those two states or other places?

Thomas Laffey

Q. Mr. Laffey, have you ever purchased any firearms or explosives?

Q. Mr. Laffey, have you ever purchased Armalite rifles designated AR-180's from a gun dealer in New York operating under the name of Edleman's?

Q. Mr. Witness, I show you what appears to be a Thermofax copy of a document. It's Alcohol, Tobacco and Treasury Form 4473. I call your attention to the buyer's signature and ask if that is your signature?

Q. Mr. Laffey, have you ever received any money from any person for the purpose of purchasing weapons or explosives?

Q. Mr. Laffey, have you ever used the driver's license of any other individual for the purpose of identification in purchasing firearms?

Q. Mr. Laffey, have you any knowledge of any person or persons in the States of New York or Texas or elsewhere who are engaged in the purchase of legal weapons illegally or the illegal purchase of weapons or explosives?

Q. Mr. Laffey, have you ever received any money from any person for the purpose of purchasing weapons or explosives?

Q. Mr. Laffey, have you ever used the driver's license of any other individual for the purpose of identification in purchasing firearms?

Q. Mr. Laffey, have you any knowledge of any person or persons in the State of Texas, State of New York or elsewhere who are engaged in the purchase of legal weapons illegally or the illegal purchase of weapons or explosives?

Q. Have you any knowledge of any person or persons in the State of Texas, the State of New York, or any other State of the United States of America who are engaged in the purchase of legal weapons illegally or in the illegal purchase of weapons and explosives?

Q. Mr. Laffey, have you any knowledge of any person or persons in the State of New York or Texas or elsewhere who are engaged in the purchase of legal weapons illegally or the illegal purchase of weapons or explosives?

APPENDIX B

QUESTION ASKED A LOS ANGELES WITNESS BY MR. GUY L. GOODWIN, CHIEF OF THE SPECIAL LITIGATION SECTION, INTERNAL SECURITY DIVISION, DEPARTMENT OF JUSTICE, AT A TUCSON GRAND JURY IN 1970

Tell the grand jury, please where you were employed during the year 1970, by whom you are employed during the year 1970, how long you have been so employed and what the amount of remuneration for your employment has been during the year 1970.

Tell the grand jury every place you went after you returned to your apartment from Cuba, every city you visited, with whom and by what means of transportation you traveled and who you visited at all of the places you went during the times of your travels after you left your apartment in Ann Arbor, Michigan, in May of 1970.

I want you to describe for the grand jury every occasion during the year 1970, when you have been in contact with, attended meetings which were conducted by, or attended by, or been any place when any individual spoke whom you knew to be associated with or affiliated with Students for a Democratic Society, the Weathermen, the Communist Party or any other organization advocating revolutionary overthrow of the United States, describing for the grand jury when these incidents occurred, where they occurred, who was present and what was said by all persons there and what you did at the time that you were in these meetings, groups, associations or conversations.

Mr. EILBERG. The next witness is the Honorable Bella S. Abzug, Congresswoman from New York.

TESTIMONY OF HON. BELLA S. ABZUG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Ms. ABZUG. Good morning, Mr. Chairman, my colleagues on the committee.

I appreciate the opportunity to come this morning and present my views on House Resolution 220, a resolution of inquiry which I

introduced on February 19 of this year. I am pleased to note that eight of my colleagues—Jonathan Bingham, Hugh Carey, James Delaney, Edward Koch, Benjamin Rosenthal, James V. Stanton, Robert Tiernan, and Lester Wolff—have joined in sponsoring this or similar resolutions.

I ask that a copy of this resolution be included in the record at the conclusion of my opening statement, if not already in the record at this point.

Mr. EILBERG. It will be included in the record.

Ms. ABZUG. This resolution has only one purpose. It is intended to secure for the House of Representatives information—facts—which, considered together with other conduct and practices of the Department of Justice with respect to grand jury investigations, will help us as Members of Congress to decide whether there have been abuses of the grand jury system, whether any corrective legislation is needed and, if so, what form it should take. That is all we seek here, and I believe that this information is absolutely necessary to enable us to discharge our constitutional responsibility of representing the people of the United States.

The inquiries posed in my resolution relate specifically to the case of the Fort Worth Five, a group of Irish-American residents of the New York area who were subpoenaed to appear last June 19 before a Fort Worth grand jury investigation into alleged procurement of weapons destined for use in Northern Ireland. The five men—Kenneth Tierney, Thomas Laffey, Mathias Reilly, Paschal Morahan, and Daniel Crawford—invoked their fifth amendment rights against self-incrimination and declined to answer questions put to them by the grand jury. They were then offered grants of immunity from prosecution which, for reasons not at issue in this resolution, they believed insufficiently broad to protect their rights against self-incrimination.

Subsequently, on June 27, 1972, the men were held in civil contempt of the grand jury and jailed for 3 months before Justice William O. Douglas ordered bail granted pending the appeal of their case.

The U.S. Court of Appeals for the Fifth Circuit affirmed the contempt citation and the U.S. Supreme Court decided in January of this year that it would not hear the case. Bail was thereupon revoked, and the men returned to jail on January 29, 1973. They remain there at this time. They have thus far spent a total of 4½ months in jail.

This resolution is not concerned with the question of Northern Ireland. That issue is within the province of the Committee on Foreign Affairs, which has in the past taken an active interest in the Irish situation and which I hope will continue to do so.

This resolution is not concerned with the question of the guilt, innocence, or involvement of any individual with regard to any crime or alleged crime.

This resolution is not concerned with the questions of grants of immunity, the self-incrimination clause of the fifth amendment, information gained by wiretapping, or any other issues which have been or might be raised in connection with this case. I do think that the entire question of our immunity statutes and their use by the Department of Justice merits a careful examination by Congress, even though that issue is not within the ambit of my resolution of inquiry.

Finally, this resolution is not intended to constitute any improper interference with the administration of justice. It does not seek to try this case in Congress. It requests only information which is directly and unquestionably relevant to basic questions of due process of law to which witnesses are entitled, to the power and responsibility of Congress to legislate regarding the rights of witnesses before grand juries and grand jury procedures generally.

What we are trying to ascertain here is why the Department of Justice caused these men to be summoned before a grand jury some 1,400 miles from their homes, their families, their friends, and their lawyers, thus raising serious questions involving the right to due process of law under the fifth amendment and the right to counsel under the sixth amendment.

These five individuals are working people with wives and children who depend upon them for support. Kenneth Tierney is a nurse, Mathias Reilly a bus mechanic, Paschal Morahan a carpenter, Daniel Crawford a house painter, and Thomas Laffey a real estate salesman.

For one thing, they cannot afford the enormous expense of having their lawyers, who live and practice in New York City, shuttle back and forth to Fort Worth. More basically, they are far from the love and support of their friends and families. Their circumstances are a powerful argument for extending to the grand jury system the venue protections which the Constitution and the common law provide with respect to criminal trials.

There are some facts about this case of which we are already aware, and it is their disquieting import which leads me to seek further information by means of this resolution.

First, all five of these men are from the New York City area. I am informed that affidavits of each of the men have been submitted to this subcommittee in which each swears that he had never been in the State of Texas, spoken with anyone in the State of Texas, or received any written communication from anyone in the State of Texas prior to being summoned before the Fort Worth grand jury. With the exception of a letter which Kenneth Tierney once wrote to the late Lyndon Johnson, none of the five had ever written to anyone in Texas either.

Second, one of several investigations into the same subject matter being conducted by the Justice Department has been in progress for quite some time in the southern district of New York. All five of these men live in that district or within a few miles of its borders.

Third, according to a New York Times article last June 25, the reason for locating this particular investigation in Fort Worth was "the high regard in which Attorney General Klienendienst holds Mr. Mahon," at that time the U.S. attorney for the northern district and now a district judge there "and" U.S. District "Judge Brewster."

I ask that the text of this article appear in the record at the conclusion of my statement.

Mr. EILBERG. It will be included.

[The article referred to is at p. 59.]

Ms. ABZUG. Fourth, the Department of Justice has indicated that none of these five men has ever been a criminal suspect, and the offers of immunity tend to bear this out.

The information for which House Resolution 220 calls would help us to fill in some of the gaps in the circumstances I have just noted. It would afford us a chance to view the matter clearly from the standpoint of the Department of Justice when it began this investigation. This will in turn aid us in making our own determination of whether the behavior of the Department in the case has included in its motivation political harassment, whether it has violated any law, and whether it indicates a need for corrective or amendatory legislation.

When this case first arose last summer, I joined with numerous other Members of Congress in seeking information from the Department of Justice. After many requests were made, the Department finally agreed to have Assistant Attorney General A. William Olson brief interested Members. However, Mr. Olson canceled out on about 10 minutes' notice and the meeting was never rescheduled despite the repeated requests of interested Representatives.

Since that time, and continuing up to the present, many Members of Congress have made numerous requests for an explanation from the Department of Justice of why these men were taken to Texas when every indication we have is that they could have been called before the grand jury in New York. None of these inquiries has received a satisfactory response.

It is against this background that I have finally resorted to so formal an information-seeking device as a resolution of inquiry to find out what this case is all about.

This case is far from the first questionable use of the grand jury under the administration of Richard Nixon, John Mitchell, and Richard Kleindienst, nor is this the first time that I have questioned the use of the grand jury under the stewardship of these men.

Early in 1971, I introduced a resolution asking for an investigation of the Federal Bureau of Investigation. One event which led me to propose it was the *Harrisburg* Case, in which a number of individuals prominent in the antiwar movement were accused of plotting to kidnap Henry Kissinger and blow up steam tunnels here in Washington.

One question I raised in my statement in support of that resolution was: "How was Harrisburg chosen as the place of venue?" (Congressional Record, Apr. 7, 1971, p. 10127.) It seemed apparent to me at that time that Harrisburg had been chosen because of its relatively rural, conservative setting, far from the friends and counsel of the defendants. I note that with the exception of two convictions for illegally passing letters in and out of a Federal correctional institution, no convictions for either substantive offense or for conspiracy were secured.

We had last summer the case of 40 Vietnam veterans who were down in Miami to make their views heard during the Presidential nominating conventions being held there. Before they could begin their petitioning for a redress of grievances, they were hauled before a Federal grand jury at the other end of the State of Florida and effectively prevented from exercising their right of peaceful protest.

Leslie Bacon was picked up just a few blocks from where we sit for questioning in the March 1971 bombing of the Capitol Building, also within walking distance of this spot. Where was she taken before a

grand jury? In Seattle, Wash., 3,000 miles away. She, too, was never indicted.

The Justice Department claims that the Northern District of Texas is a proper locus of venue in that it is investigating criminal violations "occurring within the district." As a matter of law, this may be so. In an effort to find out whether it is so, the resolution before you asks for the "basis of the venue in the Northern District." Without this information, we have no way of finding out whether the legal requirements of venue have been satisfied here.

Even if the Department of Justice has some basis of venue here in a strict legal sense in that they are investigating some shipment of arms, we are left with the question of whether there were other locations, far more convenient to these five men and no less so for the Government, where this investigation might have taken place. It is to secure the answer to this question that my resolution asks for "a listing of any other districts in which the said grand jury investigation might have been conducted, together with the basis of venue for each such district."

House Resolution 281, a later version of this resolution of inquiry, varies this particular question slightly to dispose of a possible technical objection to the resolution on the ground that it seeks opinion rather than fact. This version seeks "a listing of any other districts which were considered by the Department of Justice as sites for the said grand jury investigation, together with the basis of venue for each such district."

Finally, even if there was at one time a reasonable basis for having taken these men to Fort Worth for questioning, that basis would no longer exist if the investigation there has been concluded. That is the reason for the third portion of my resolution, which asks whether the investigation has been completed. This is a simple question. Yet nowhere has any Member of Congress been able to get its answer.

The historic role and purpose of the grand jury was not to serve as an extension of the prosecutor, but as a barrier and a protection between the prosecutor and the private citizen. Its job is supposed to be the making of an independent weighing of the evidence presented by the prosecution and an independent determination as to whether there is sufficient ground to prosecute. That is why the fifth amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a grand jury * * *."

The significance of venue and the potential for its abuse by taking an individual far from his family, friends, and counsel is also recognized in the Constitution. Article III, section 2, clause 3 provides that all criminal trials "shall be held in the State where the said crimes have been committed" and the sixth amendment guarantees the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed."

These concepts are the basis of our liberty. The absence of such protection in the Thirteen Colonies led to the stormy formation of the United States of America.

What kind of liberty have we when men charged with no crime are separated from the families whom they love and support and the

attorneys whose advice they need and taken 1,400 miles away to be questioned when they could be questioned practically on their door-steps?

What kind of due process of law have we when such men are confined in an old, dank jail with no exercise facilities and unpalatable food? I visited the Fort Worth five when they were in the Tarrant County Jail, and I, there, learned that they were being permitted no phone calls. I note that they have now been transferred to the Federal prisons at Seagoville, Tex., where conditions are said to be somewhat better.

What kind of freedom have we when such men are not permitted to make telephone calls to their loved ones, or are permitted to make such calls once every week for a period of 5 or 10 minutes?

I practiced law for many years before I came to Congress. I am quite familiar with the grand jury system and how it can be abused by a prosecutor. I have been for some time concerned by the misuse of the grand jury in cases such as this one, and the extreme and unconscionable deprivation of liberty which we have seen in this case, together with information about other recent cases with political overtones, make out a strong case for remedial legislation.

In fact, it was the shocking circumstances of this case which impelled me to introduce at the last session of Congress a bill to establish for grand jury proceedings a *forum non conveniens* procedure similar to that presently available in civil cases. The bill has been introduced in this session as H.R. 4322 and referred to this subcommittee. It would provide for the transfer of a grand jury proceeding "for the convenience of witnesses, where the interest of justice so requires . . ." to any other district where it might properly have been convened.

This *forum non conveniens* proposal may not represent the best or only solution for this problem. It is, however, a serious suggestion which I hope will soon be joined by other such suggestions, so that you can delve into the general questions raised by the Fort Worth five case and determine what changes or improvements may be in order with respect to our grand jury system.

In the meantime, we as representatives of the people of the United States have a responsibility to secure full knowledge about this and similarly suspicious cases. As a coequal branch in our federal system of government, we share with the other two branches the duty of seeing to it that the commands of the Constitution, including the command that no person in this country shall be "deprived of life, liberty, or property, without due process of law," are fully and strictly obeyed.

I thank you for your kind attention, and urge upon you the favorable reporting of House Resolution 220 to the full Judiciary Committee and the full House, so that we may learn the truth about the treatment of these five Americans.

I note with great interest that the scheduling of this hearing resulted yesterday in a meeting of this committee with representatives of the Justice Department. This meeting was not open to the public or Members of Congress, and was, I gather, a closed conversation. Is this not somewhat contrary to what we just recently enacted in the House for open proceedings of subcommittees and committees?

In any case I would hope that we have already gotten some information from the Justice Department in response to the questions asked by this resolution of inquiry as a result of conversations between the representatives of the Justice Department and this committee. If so, I hope that information can be made available to us as soon as possible.

Mr. EILBERG. Ms. Abzug, for your information and for the record we did hold an informal discussion yesterday with the members of the subcommittee. The concern of the chairman was that there would be an effort to table the resolution prior to these hearings.

This has been a matter of great concern to me because I feel this hearing is proper and we should go ahead with it.

At the same time, the areas of concern were that the peripheral issues affecting Northern Ireland may come into this and the emotions concerning that struggle may become involved in this hearing and that the thrust of the testimony here would be in the nature of a political attack against the Attorney General.

So we decided to hold an informal discussion yesterday for the purpose of determining the parameters of the testimony that would be considered or admitted in these hearings.

The purpose of the hearing was not, as far as I am concerned, to elicit any facts that should not immediately be made available to the public.

It turned out, to my satisfaction at least, that the representatives from the Attorney General's office were present. They provided some background on the matters that are under discussion here.

You certainly have a right to feel that this meeting should have been open to the public. However, the purpose of the meeting as far as the chairman was concerned was to insure that this meeting would take place today. That was the sole purpose.

Ms. ABZUG. Thank you. I just wanted to get some clarification. I had hoped, frankly, that it might have resulted in some answers to the questions raised in my resolution. Obviously, I appreciate your concern about the parameter of this hearing. I have assured you, and I think my testimony indicates, that I understand the parameters of this matter.

Those other relevant matters, we discuss in other forums. All of us here as well as many people around this country are very much concerned with justice. We want to get information—facts—which I think would lead to the release of these men who have been incarcerated, in a way that is contrary to our concept of liberty, for much too long. This case has not been aired in public and it must be.

Mr. EILBERG. I think Mr. Railsback has a question.

Mr. RAILSBACK. I want to compliment you on your statement. I think that it was very provocative. Also, I thought it was very restrained. I am sure if I had constituents that were vitally concerned, that I would want to maybe get involved in some of the ancillary issues.

But let me ask you this: If the Government had reason to believe that certain individuals, say from New York City, were involved in attempting in Fort Worth, Tex., to obtain illegal weapons from sources in Mexico for shipment to a foreign country and say that there were other people involved, other than just people from New York, but that there was some focus on Fort Worth as being the area where the al-

leged illegal offense occurred, would you feel differently if that information was made available to you, that these individuals who may have had some information relevant to the inquiry, that they then should be compelled to testify under those circumstances, given immunity?

Ms. ABZUG. Now you are asking me about whether I agree that they should have been given immunity or used their fifth amendment rights.

You are trying to restrict me to parameters of the facts in my resolution and I have agreed to be so restricted. I would be very happy to discuss that issue with you, by the way. I want to make clear that I am prepared to do so. I previously restrained myself, which, as some of you know, is very difficult for me.

Mr. RAILSBACK. Let me just make myself clear.

Ms. ABZUG. I do understand your question.

Mr. RAILSBACK. You notice that I acted with some degree of restraint in not mentioning the details. I am trying to pose for you a hypothetical that may be what confronted the Federal Government in this case. I am wondering if in discussing the forum, you mentioned *forum non conveniens*, and perhaps that should be applicable. I am interested in your suggestion. I am wondering, given the circumstances which I have given you, if you might feel that in that case Fort Worth would be a proper forum.

Ms. ABZUG. I want to make clear that your desire to question a witness about an event that may have taken place other than where that person resides is not necessarily a sufficient basis for bringing a person to that jurisdiction.

Mr. RAILSBACK. I don't think you really responded.

Ms. ABZUG. You asked me whether I realized that when a government wanted to question someone with respect to events which took place, whether after an offer of immunity, he or she could still raise the question of self-incrimination.

That is what I thought your original question was.

Mr. RAILSBACK. I am assuming that we could even take your suggestion about having some kind of *forum non conveniens*. What happens if you have something that affects several States and may involve people from different States and the alleged illegal transaction occurred in one jurisdiction, wouldn't it, under those circumstances, be a proper jurisdiction to summon witnesses to testify?

Ms. ABZUG. It might or might not be. That is what the *forum non conveniens* standard would determine.

Mr. RAILSBACK. I think that is what Senator Kennedy's response was. I agree with that. It may or may not be.

Ms. ABZUG. But that is not the situation in this particular case.

I want to make one other point. It has not been unusual in our legal system that in connection with persons living elsewhere from where the trial or hearing has taken place, their depositions have been taken.

Mr. RAILSBACK. In respect to that, let me point out that 1,400 miles is a long way, but we are in a time of air travel. They were flown there. There are some reasons for a grand jury to have the people there in person to respond to questions, not by the discovery process.

Ms. ABZUG. I have no objection to that. I think they could be subject to a discovery process in the grand jury in New York if the law so provided. I think from every bit of evidence we have read about, without being privy to what the Attorney General may know or think he knows, there seems to be no basis in this situation, whatever the nature of that grand jury investigation is, for taking these men to Texas and keeping them in that jurisdiction.

There has been no suggestion these men were involved in those shipments or anything of that kind.

In this case I see no basis for keeping them in that jurisdiction in order to secure the testimony. Certainly 4½ months is a very long time.

Mr. RAILSBACK. Well, if they had answered the questions put to them after being granted immunity, they would not be there.

Ms. ABZUG. The question of immunity statutes is something that has long interested me. The immunity statutes as enacted by this Congress and amended in 1970 have created some very serious problems. The problem is, as claimed in this case, that the immunity is not as broad as the protection guaranteed under the fifth amendment.

Our primary responsibility is to the fifth amendment. It is fascinating that immunity is most frequently offered in cases where there are political differences between the Administration and the witnesses.

Perhaps what was intended in the passage of the Organized Crime Act of 1970 was to provide a way in which to nab some real criminals. It seems a pity we have not done that with that statute and instead have been using the offer of immunity far too frequently in cases of a political nature. We have used it in many cases where we have been unable to secure an indictment of these people because, indeed, a political difference is not a wrongdoing.

Mr. EILBERG. Ms. Abzug, Mr. Railsback asked you, as he did a former witness, wasn't it true that the travel expenses were paid for by the government. I ask you, also, isn't it true that attorneys' fees are not paid for by the Government for someone called to some other situs?

Ms. ABZUG. I should say that is true. I don't think we have done enough in this record to indicate the enormous suffering involved, not only on these men, their families and their friends. These are people who are poor. They have children and have no means of visible support. They are being severely victimized financially.

It has been difficult to raise the funds for food and shelter of these families, let alone to pay any for legal fees or travel expenses. They have been fortunate in getting the services of outstanding attorneys like Paul O'Dwyer, Doris Petersen, Ed Polk, and Frank Durkan. I understand that they have asked to testify here today, but have not been granted that opportunity.

I wondered, at this moment, Mr. Chairman, if I could request on behalf of the attorneys in the case that the subcommittee allow the insertion into the record of statements that these attorneys wish to present in connection with this resolution of inquiry.

I think it might give us facts which are not otherwise in the record to aid you in your determination.

Mr. EILBERG. Ms. Abzug, I don't think the subcommittee is prepared to rule on that.

My disposition is that we will take those statements under advisement and decide later whether to make them a part of the record.

Mr. Flowers?

Mr. FLOWERS. One comment and question of Ms. Abzug.

The suffering you mentioned, which I, for one, can see has happened to these families, could have happened in New York as well as in Texas, assuming the grand jury in New York asked for the testimony and they refused to testify. They could conceivably be found in contempt in New York and jailed as well there as in Texas.

Ms. ABZUG. There is a very great difference.

Mr. FLOWERS. What is the difference?

Ms. ABZUG. They would be in close proximity to their friends, family, and attorneys. They could be visited. There could be all kinds of things which would alleviate the suffering.

There is a premise here. Without any information being given by the Justice Department, it would appear that this is a wholly improper imprisonment. That is suffering enough. We don't have to compound it by taking them—

Mr. FLOWERS. You can't tell me that 3 hours on an airplane from New York City to Texas makes all that much difference in the suffering of the families and people involved.

Ms. ABZUG. It certainly does, Mr. Flowers. If you cannot communicate with your friends, family, and lawyers on a regular basis, and you are held in prison for 4½ months, and you feel you have committed no crime and the government has charged no crime, there is an extra amount of suffering. These are working people, they do not have the large sums of money needed to fly their families back and forth to Fort Worth. When we are in trouble, we like to be near our loved ones and our attorneys who help us.

Mr. FLOWERS. You are not responding to our question.

Ms. ABZUG. I think I am completely, sir.

Mr. FLOWERS. I am in understanding of the thrust of your resolution; however, I don't buy the fact that in this day and age that air transportation from New York to Fort Worth by the lawyer or anybody else will run up the legal fees.

Ms. ABZUG. These people have no money, Mr. Flowers. We are a democracy. We are not an elitist country. We like to have justice that is a reality.

Mr. FLOWERS. I don't think the justice in New York City is any better than the justice in Texas.

Ms. ABZUG. I was not suggesting that we compare it.

Mr. FLOWERS. They probably have better jails in Texas, more comfortable.

Ms. ABZUG. I am not suggesting we compare the jails. Jail is rotten, no matter where it is.

All I am suggesting is that they should perhaps be in a forum relatively close to where they come from and where they live. If you take somebody far away without charging them with a crime, not allowing them to see their attorneys and family, and there is no money to create the close proximity by airplane as you suggested—this is more

harassment, and it might well constitute an abuse of the grand jury system.

Mr. FLOWERS. The suffering you detailed would have occurred had they been asked the same questions by a New York grand jury and refused to answer and have been put in jail.

Ms. ABZUG. I am not suggesting that they would not have been jailed there.

Mr. FLOWERS. If they answered the questions in New York, perhaps they would not have been held in contempt of court. I am not assuming that.

Mr. EILBERG. I would like to observe that my opinion is different from Mr. Flowers'.

There is no doubt if they were in jail in New York, their families could get on a subway and see them, instead of spending a couple of hundred dollars for air transportation. It makes it far more difficult for any individuals to have possible peace of mind when they are physically removed, distance and expensewise.

Ms. Holtzman?

Ms. HOLTZMAN. Thank you, Mr. Chairman.

I would like to say first that I am very pleased that Congresswoman Abzug has introduced this resolution because I think it focuses the attention of Congress to this particular instance of the Fort Worth Five, the very serious question of the control of grand jury process, a question that I think has been of concern not only to legal scholars but to the public in general in a number of different cases.

I have a few questions. One, the questions addressed to Senator Kennedy had to do with the fact that criminal trials may be brought if there is a conspiracy affecting a number of different States in any one of those States.

Isn't it also true, Congresswoman, that a defendant in a criminal case can raise the question of forum non conveniens and proceed to transfer that case to a forum more convenient to his defense? But no such right is granted to a witness before a grand jury?

Ms. ABZUG. That is true, under rule 21(b) of the Federal Rules of Criminal Procedure. That is why I feel we should consider it in this connection.

Ms. HOLTZMAN. I also wanted to ask you whether, even assuming that there was a basis for an investigation of illegal activities in Fort Worth, Tex., couldn't the Justice Department have convened a grand jury investigation in New York City of these witnesses and, if they found evidence to corroborate its assumptions, could have transferred them to Fort Worth if they thought that would have been the best way to proceed? But wouldn't the investigation in New York not in any way obstruct the investigation of a larger criminal matter assuming that there was evidence of such a larger criminal violation?

Ms. ABZUG. It is my view that, indeed, that not only could have been done, but in light of the fact that a parallel investigation has taken place in the southern district of New York, it should have been done. That parallel investigation makes even more questionable the fact that these witnesses were subpoenaed to Texas.

It is quite clear that the inquiries could have been made of these witnesses in the southern district of New York and the information

these witnesses had transferred to any grand jury proceeding anywhere in this country.

Ms. HOLTZMAN. And the fact that it might have been brought in New York, does that indicate to you anything about the motivations of the Justice Department in commencing this investigation in Texas:

Ms. ABZUG. It certainly does, and I alluded to that in my testimony. It may be that the purpose of bringing them to Texas was, as has also been the case in other situations, the presence there of a more favorable judge or more favorable climate where certain political results can be more quickly or more surely obtained.

Ms. HOLTZMAN. I have no further questions, Mr. Chairman. Thank you.

Mr. EILBERG. Ms. Abzug, thank you very much.

Mr. DENNIS. Mr. Chairman.

Mr. EILBERG. I am sorry, Mr. Dennis, I didn't mean to ignore you.

Mr. DENNIS. Ms. Abzug, the first point of your resolution is to inquire as to the basis of venue in the northern district of Texas. I have here a copy of a statement which Mr. Olson, the Assistant Attorney General, is going to give, I take it, before this committee. He has not yet appeared.

In that he says, "Information in our possession which had been developed by the Bureau of Alcohol, Tobacco and Firearms of the Department of the Treasury, indicated that certain individuals, apparently from New York City, using aliases, were attempting in Fort Worth, Tex., to purchase large numbers of illegal weapons from sources in Mexico for shipment to Ireland. We had reasons to believe that the witnesses subpoenaed"—the people we are talking about here—"before the grand jury in Fort Worth possessed relevant information concerning this investigation."

Assuming that that statement is accurate, would you feel that there was adequate basis for laying this venue in Texas?

Ms. ABZUG. Not necessarily. That is why I also asked the second question.

Mr. DENNIS. I will come to that, but let's take them one at a time.

Would you be willing to agree that this is certainly a basis for a venue in Texas if these facts were taking place there, if this conspiracy was going on there and these people had information about it?

Ms. ABZUG. I don't know. That is what I am trying to find out.

Mr. DENNIS. I know. But I am saying to you, assuming these facts were true, that would be a basis for the venue in answer to your inquiry, wouldn't it?

Ms. ABZUG. It may be a legal basis for venue, but not necessarily a proper one for these witnesses being subpoenaed to testify.

Mr. DENNIS. You don't take the position, do you, that a witness who has information which is relevant to an inquiry by a grand jury can never be subpoenaed to a grand jury meeting out of the district where he lives?

Ms. ABZUG. No; I didn't suggest that at all.

My resolution raises the very question you are raising and says, now, look, there is a very terrible situation here. These men have been held here for four and a half months. What are the facts of the venue and what other places were considered.

What we are talking about is how you handle witnesses who may just have some information, but who are not potential defendants or even necessarily key sources of information?

What's the parameter, since you have been involved in the discussion of parameters, as to where you can bring somebody, how far you can go in using a grand jury for the purpose of questioning a witness? How footloose can you be?

Because you happen to have some events which may have taken place partly in Texas, is that the only place you can question a possible witness?

Mr. DENNIS. Your second point is a listing of any other districts which were considered by the Department of Justice.

On that point Mr. Olson says,

In view of the information known to us at the time the most logical locus for the grand jury investigation was the northern district of Texas. It is possible that a grand jury investigation involving this same conspiracy could have been brought in either Florida or New York—

and your people would have had to travel there, or New York—

however, the substantial activity known to us at that time took place in the northern district of Texas.

Now, if that is true, would you feel there was a legitimate ground for bringing the investigation there and asking people who have knowledge to appear there?

Ms. ABZUG. No; I would not. There was admittedly another grand jury in New York which was conducting an investigation on the same issues.

Therefore, it becomes clear that without more facts—and I hope we will get more facts from the Justice Department—as to why they had to bring these people to Texas to get this information which they may have. We have no way of knowing which loci were either legal or proper. You will grant they have this information wherever they are. It is not going to be different by virtue of their being in Texas. Therefore, the interesting question is: Why were they dragged all the way to Texas and kept there for over 4½ months when there is no apparent information, unless the Government now provides us with that in answer to these questions, as to why it is so essential to the administration of justice?

Mr. DENNIS. The answer from the Justice Department, of course, is that they were investigating a matter which was basically going on in Texas, and they found some fellows in New York who know something about that, and they subpoenaed them.

Ms. ABZUG. That is not sufficient reason to subpoena witnesses, 1,400 miles from their homes and to have them incarcerated there, since apparently there is not much going on in Texas right now except the incarceration of these gentlemen.

Mr. DENNIS. You have asked three questions here:

One, whether the said jury investigation has been completed. In response to that Mr. Olson says,

I can respond to this question with a categorical no. There is no question that the Texas grand jury's investigation has been thwarted to a great extent by the refusal of these people to testify. Notwithstanding, we are hoping that the investigation will continue.

If that is true, that would answer your third question, wouldn't it?
 Ms. ABZUG. I don't know whether it is a factual statement. It says it will continue, but it seems that no investigation is going on at this time.

Mr. DENNIS. The Assistant Attorney General says it has not been completed and it will continue. I assume he is telling the truth.

I am asking you to assume it, for the purpose of the answer.

If so, that would be an adequate answer to your third inquiry, wouldn't it?

Ms. ABZUG. I don't consider it an adequate answer.

I think they should answer in terms of facts, not just conclusions. There is no suggestion that they are at this moment conducting an investigation.

Why should these people be kept down there? Why can't they be transferred up to the New York area.

I would like to know, since I raised this resolution, their intentions in terms of calling additional witnesses. What are the dates for this, for example? I think specifics are essential in a case of this kind.

Mr. DENNIS. You referred to the affidavits submitted to the committee by these five. Did you have an opportunity to read them?

Ms. ABZUG. Yes.

Mr. DENNIS. Did you notice in looking at the affidavits that, while they made such statements as to fact, which is more an opinion, that, "I never had any connection with Texas," and that, "I never wrote a letter to Texas," or the fact that, "I never was in Texas," that not one of these affidavits states they had no knowledge of the matter before the grand jury in Texas?

Ms. ABZUG. I think that the issue as to whether or not they know what the grand jury is investigating is a matter that is not in any way relevant to my resolution and that, by the way exceeds the parameter's that you and the subcommittee have set for this hearing.

Mr. DENNIS. But my point is that none of them contend in their affidavit that they did not have any knowledge.

Ms. ABZUG. My impression is that they have made statements to this effect. They have asserted their fifth amendment rights, which means they have not been willing to discuss the nature of any alleged crime that is being suggested here. That is why they are in jail. They have asserted their fifth amendment rights. They have been offered immunity which they claim is not broad enough to protect them under the Constitution, so they are not going into this issue with you or anybody else in this affidavit.

Mr. DENNIS. Is it not true in all these procedures in which they have been represented by counsel that they have never raised the question of the jurisdiction of this grand jury or challenged the subpoena?

Ms. ABZUG. May I just give you some information?

Mr. DENNIS. You may say anything you want to.

Ms. ABZUG. I want to answer your previous question. I have in front of me an affidavit of one of the men who says, "I have not the slightest connection with any events of any character in the State of Texas."

That was sworn to on February 15, 1973. So, obviously, there is a record of statements by these men that they have no connection or knowledge with any events in Texas.

Mr. DENNIS. Not no knowledge. I beg to differ.

Ms. ABZUG. "I have not had the slightest connection with any events in the State of Texas."

Now what was the next question?

Mr. DENNIS. I haven't got a next question.

Ms. ABZUG. Can I ask you a question?

Mr. DENNIS. My last question, to which I would like to have the answer, is whether or not during these legal procedures these people ever made any legal challenge to the jurisdiction of the grand jury?

Ms. ABZUG. Whether they moved to quash the subpoena, is that what you mean?

Mr. DENNIS. Anything of that sort, or claimed the grand jury did not have jurisdiction over them?

Ms. ABZUG. I really don't know what all the legal aspects of the case are. I am not the attorney in the case.

But may I ask Mr. Dennis a question, Mr. Chairman, which may be very relevant?

Mr. EILBERG. Go ahead.

Ms. ABZUG. You have been reading to me a statement which, so far as I know, is not in the committee record, a statement purportedly of the Attorney General or somebody from the Attorney General's Office.

Is that going to be presented to this committee in open hearings?

Mr. EILBERG. It was my impression that Mr. Dennis was reading to you excerpts from the statement of Mr. Olson who will, we understand, testify this afternoon. He was the one who had the authority to pick the Fort Worth site.

I felt, and really do feel, that it has been unfair to you as a witness to expect you to react without having an opportunity to read or study that statement.

I would observe here that I would expect from your reaction that you are hearing for the first time today, March 13, after some 10 months in this case, that there is the concept of purchase of arms in Mexico.

Is this the first you heard of that?

Ms. ABZUG. This is the first mention in this case that I have heard about Mexico or Florida.

I don't understand what it is about.

Mr. EILBERG. It is interesting that it is 10 months afterward that you are hearing it for the first time today.

Ms. ABZUG. Yes; it is.

Perhaps it may have sounded facetious to you earlier when I said that I hoped we would have some information from the Justice Department as a result of your meeting yesterday.

I was very much interested in knowing what the Justice Department's position is.

I find it rather strange, Mr. Chairman, that after many Members of Congress and many people of public note and prominence have sought to secure some information in this matter, which they regard as creating a serious injustice, and people have made phone calls and

been promised all kinds of meetings where they could have a discussion of facts and response to certain questions, that the first time I hear any semblance of facts, though I do not think them sufficient to answer my resolution, is in a question asked of me as a witness by Mr. Dennis. Nobody else seems to be privy to this information, and I consider this to be somewhat of an abuse of our committee system, and the method by which we function in public hearings, in addition to everything else.

Mr. EILBERG. We will recess in just a few moments.

I will be giving you a copy of the statement of Mr. Olson.

Ms. ABZUG. I appreciate it.

Mr. EILBERG. We have to move along.

Mr. DENNIS. Mr. Chairman, I would like to make a statement.

Mr. EILBERG. You are not recognized at this time.

Ms. Holtzman?

Ms. HOLTZMAN. In view of the testimony, Congressman, that the Justice Department intends to give to us later this afternoon with respect to some evidence indicating there was an attempt in Fort Worth, Tex., to purchase large numbers of illegal weapons in Mexico for shipment to Ireland, isn't it rather surprising in view of the questions asked of these witnesses, that you obtain some information, isn't it rather surprising?

Ms. ABZUG. That is my reaction.

It is like being a lawyer again and being caught by what we call "surprise." This, I think, is a very serious matter, and I think it raises deeper questions about this whole inquiry and the whole question of the grand jury investigation and the holding of these witnesses in Fort Worth.

I certainly would like to have a copy of any of the statements of the Justice Department. I think that this incident creates an even greater responsibility on the part of this subcommittee to press for the exact, factual answers to the questions and to report favorably my resolution of inquiry, if they are not forthcoming. That way, we can secure further information from the Justice Department by means of a formal request from the House.

Mr. DENNIS. Will the distinguished chairman recognize me?

Mr. EILBERG. Yes, I shall.

Mr. DENNIS. I wish to observe that when Senator Kennedy was here this morning I asked him essentially the same question I asked Ms. Abzug. His answer was that I was putting to him a hypothetical case which he could not answer. Now I put the same question to Ms. Abzug simply using as the basis of the hypothesis that the statement which the Attorney General will give this afternoon, which is not secret, and will be a part of the record, which Ms. Abzug can see, using that as a basis of the hypothesis, whether, if these facts are true, that he is going to give us, she would be satisfied.

That avoided the idea, I thought, that I was asking a hypothetical question. I got an answer, and her answer is that it would not satisfy her. From which I say I can deduce that the people on that side of the question will not be satisfied by any answer.

Ms. ABZUG. I think that is unfair. It reminds me of when I tried some cases in my younger days, when the opponents would get up to

argue and just say, "Everything to support my contention is right here in the Supreme Court reporter."

Mr. EILBERG. I would like to say, when you offered your resolution, we wrote to the Attorney General and asked for some information. We got a reply back 2 weeks ago which said nothing about purchases in Mexico. So I don't know what to make of this myself.

It does raise serious questions when this question is raised the first time with the pressure on the Attorney General for the meeting here today.

[The prepared statement of Hon. Bella S. Abzug follows:]

STATEMENT OF HON. BELLA S. ABZUG, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF NEW YORK

Chairman Eilberg, distinguished members of Subcommittee No. 1, I appreciate the opportunity to appear before you this morning to present my views on House Resolution 220, a resolution of inquiry which I introduced on February 19th of this year. I am pleased to note that eight of my colleagues—Jonathan Bingham, Hugh Carey, James Delaney, Edward Koch, Benjamin Rosenthal, James V. Stanton, Robert Tiernan and Lester Wolff—have joined in sponsoring this or similar resolutions. I ask that a copy of this resolution be included in the record at the conclusion of my opening statement if not already in the record at this point.

This resolution has only one purpose. It is intended to secure for the House of Representatives information—facts—which, considered together with other conduct and practices of the Department of Justice with respect to grand jury investigations, will help us as Members of Congress to decide whether there have been abuses of the grand jury system, whether any corrective legislation is needed and, if so, what form it should take. That is all we seek here, and I believe that this information is absolutely necessary to enable us to discharge our constitutional responsibility of representing the people of the United States.

The inquiries posed in my resolution relate specifically to the case of the "Fort Worth Five," a group of Irish-American residents of the New York area who were subpoenaed to appear last June 19th before a Fort Worth grand jury investigation into alleged procurement of weapons destined for use in Northern Ireland. The five men—Kenneth Tierney, Thomas Laffey, Mathias Reilly, Paschal Morahan and Daniel Crawford—invoked their Fifth Amendment rights against self-incrimination and declined to answer questions put to them by the grand jury. They were then offered grants of immunity from prosecution which, for reasons not at issue in this resolution, they believed insufficiently broad to protect their rights against self-incrimination.

Subsequently, the men were held in civil contempt of the grand jury on June 27, 1972 for three months before Justice William O. Douglas ordered bail granted pending the appeal of their case. The U.S. Court of Appeals for the Fifth Circuit affirmed the contempt citation and the U.S. Supreme Court decided in January of this year that it would not hear the case. Bail was thereupon revoked and the men returned to jail on January 29, 1973. They remain there at this time. They have thus far spent a total of four and one-half months in jail.

This resolution is *not* concerned with the question of Northern Ireland. That issue is within the province of the Committee on Foreign Affairs, which has in the past taken an active interest in the Irish situation and which I hope will continue to do so.

This resolution is *not* concerned with the question of the guilt, innocence or involvement of any individual with regard to any crime or alleged crime.

This resolution is *not* concerned with the question of grants of immunity, the Self-Incrimination Clause of the Fifth Amendment, information gained by wire-tapping, or any other issues which have been or might be raised in connection with this case. I do think that the entire question of our immunity statutes and their use by the Department of Justice merits a careful examination by Congress, even though that issue is not within the ambit of my resolution of inquiry.

Finally, this resolution is *not* intended to constitute any improper interference with the administration of justice. It does not seek to try this case in Congress.

It requests only information which is directly and unquestionably relevant to basic questions of Due Process of Law to which witnesses are entitled, to the power and responsibility of Congress to legislate regarding the rights of witnesses before grand juries and grand jury procedures generally.

What we are trying to ascertain here is why the Department of Justice caused these men to be summoned before a grand jury some 1400 miles from their homes, their families, their friends and their lawyers, thus raising serious questions involving the right to due process of law under the Fifth Amendment and the right to counsel under the Sixth Amendment.

These five individuals are working people with wives and children who depend upon them for support. Kenneth Tierney is a nurse, Matthais Reilly a bus mechanic, Paschal Morahan a carpenter, Daniel Crawford a house painter and Thomas Laffey a real estate salesman. For one thing, they cannot afford the enormous expense of having their lawyers, who live and practice in New York City, shuttle back and forth to Fort Worth. More basically, they are far from the love and support of their friends and families. Their circumstances are a powerful argument for extending to the grand jury system the venue protections which the Constitution and the common law provide with respect to criminal trials.

There are some facts about this case of which we are already aware, and it is their disquieting import which leads me to seek further information by means of this resolution.

First, all five of these men are from the New York City area. I am informed that affidavits of each of the men have been submitted to this subcommittee in which each swears that he had never been in the State of Texas, spoken with anyone in the State of Texas or received any written communication from anyone in the State of Texas prior to being summoned before the Fort Worth grand jury. With the exception of a letter which Kenneth Tierney once wrote to the late Lyndon B. Johnson, none of the five had ever written to anyone in Texas either.

Second, one of several investigations into the same subject matter being conducted by the Justice Department has been in progress for quite some time in the Southern District of New York. All five of these men live in that district or within a few miles of its borders.

Third, according to a *New York Times* article last June 25th, the reason for locating this particular investigation in Fort Worth was "the high regard in which Attorney General Kleindienst holds Mr. Mahon [at that time the United States Attorney for the Northern District and now a District Judge there] and [United States District] Judge Brewster." I ask that the text of this article appear in the record at the conclusion of my statement.

Fourth, the Department of Justice has indicated that none of these five men has ever been a criminal suspect, and the offers of immunity tend to bear this out.

The information for which House Resolution 220 calls would help us to fill in some of the gaps in the circumstances I have just noted. It would afford us a chance to view the matter clearly from the standpoint of the Department of Justice when it began this investigation. This will in turn aid us in making our own determination of whether the behavior of the Department in the case has included in its motivation political harassment, whether it has violated any law, and whether it indicates a need for corrective or amendatory legislation.

When this case first arose last summer, I joined with numerous other Members of Congress in seeking information from the Department of Justice. After many requests were made, the Department finally agreed to have Assistant Attorney General A. William Olson brief interested Members. However, Mr. Olson cancelled out on about ten minutes' notice and the meeting was never rescheduled despite the repeated requests of interested Representatives.

Since that time, and continuing up to the present, many Members of Congress have made numerous requests for an explanation from the Department of Justice of why these men were taken to Texas when every indication we have is that they could have been called before the grand jury in New York. None of these inquiries has received a satisfactory response.

It is against this background that I have finally resorted to so formal an information-seeking device as a resolution of inquiry to find out what this case is all about.

This case is far from the first questionable use of the grand jury under the administration of Richard Nixon, John Mitchell and Richard Kleindienst, nor is this the first time that I have questioned the use of the grand jury under the stewardship of these men.

Early in 1971, I introduced a resolution asking for an investigation of the Federal Bureau of Investigation. One event which led me to propose it was the Harrisburg Case, in which a number of individuals prominent in the antiwar movement were accused of plotting to kidnap Henry Kissinger and blow up steam tunnels here in Washington. One question I raised in my statement in support of that resolution was, "How was Harrisburg chosen as the place of venue?" (Congressional Record, April 7, 1971, page 10127). It seemed apparent to me at that time that Harrisburg had been chosen because of its relatively rural, conservative setting, far from the friends and counsel of the defendants. I note that with the exception of two convictions for illegally passing letters in and out of a Federal correctional institution, no convictions for either substantive offense or for conspiracy were secured.

We had last summer the case of forty Vietnam veterans who were down in Miami to make their views heard during the presidential nominating conventions being held there. Before they could begin their petitioning for a redress of grievances, they were hauled before a Federal grand jury at the other end of the State of Florida and effectively prevented from exercising their right of peaceful protest.

Leslie Bacon was picked up just a few blocks from where we sit for questioning in the March 1971 bombing of the Capitol Building, also within walking distance of this spot. Where was she taken before a grand jury? In Seattle, Washington, 3000 miles away. She, too, was never indicted.

The Justice Department claims that the Northern District of Texas is a proper locus of venue in that it is investigating criminal violations "occurring within the District." As a matter of law, this may be so. In an effort to find out whether it is so, the resolution before you asks for the "basis of the venue in the Northern District." Without this information, we have no way of finding out whether the legal requirements of venue have been satisfied here.

Even if the Department of Justice has some basis of venue here in a strict legal sense, we are left with the question of whether there were other locations, far more convenient to these five men and no less so for the Government, where this investigation might have taken place. It is to secure the answer to this question that my resolution asks for "a listing of any other districts in which the said grand jury investigation might have been conducted, together with the basis of venue for each such district."

House Resolution 281, a later version of this resolution of inquiry, varies this particular question slightly to dispose of a possible technical objection to the resolution on the ground that it seeks opinion rather than fact. This version seeks "a listing of any other districts which were considered by the Department of Justice as sites for the said grand jury investigation, together with the basis of venue for each such district."

Finally, even if there was at one time a reasonable basis for having taken these men to Fort Worth for questioning, that basis would no longer exist if the investigation there has been concluded. That is the reason for the third portion of my resolution, which asks whether the investigation has been completed.

The historic role and purpose of the grand jury was not to serve as an extension of the prosecutor, but as a barrier and a protection between the prosecutor and the private citizen. Its job is supposed to be the making of an independent weighing of the evidence presented by the prosecution and an independent determination as to whether there is sufficient ground to prosecute. That is why the Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a Grand Jury. . . ."

The significance of venue and the potential for its abuse by taking an individual far from his family, friends and counsel is also recognized in the Constitution. Article III, Section 2, Clause 3 provides that all criminal trials "shall be held in the State where the said Crimes have been committed."

These concepts are the basis of our liberty. The absence of such protection in the 13 colonies led to the stormy formation of the United States of America.

What kind of liberty have we when men charged with no crime are separated from the families whom they love and support and the attorneys whose advice

they need and taken 1400 miles away to be questioned when they could be questioned practically on their doorsteps?

What kind of Due Process of Law have we when such men are confined in an old, dark jail with no exercise facilities and unpalatable food? I visited the Fort Worth Five when they were in the Tarrant County Jail and I there learned that they were being permitted no phone calls. I note that they have now been transferred to the Federal prison at Seagoville, Texas, where conditions are to be somewhat better.

What kind of freedom have we when such men are not permitted to make telephone calls to their loved ones, or are permitted to make such calls once every two weeks for a period of five minutes?

I practiced law for many years before I came to Congress. I am quite familiar with the grand jury system and how it can be abused by a prosecutor. I have for some time been concerned by the misuse of the grand jury in cases such as this one, and the extreme and unconscionable deprivation of liberty which we have seen in this case, together with information about other recent cases with political overtones, make out a strong case for remedial legislation. In fact, it was the shocking circumstances of this case which impelled me to introduce at the last session of Congress a bill to establish for grand jury proceedings a *forum non conveniens* procedure similar to that presently available in civil cases. The bill has been introduced in this session as H.R. 4322 and referred to this subcommittee. It would provide for the transfer of a grand jury proceeding "for the convenience of witnesses, where the interest of justice so requires, . . . to any other district where it might properly have been convened."

This *forum non conveniens* proposal may not represent the best or only solution for this problem. It is, however, a serious suggestion which I hope will soon be joined by other such suggestions, so that you can delve into the general questions raised by the Fort Worth Five case and determine what changes or improvements may be in order with respect to our grand jury system.

In the meantime, we as representatives of the people of the United States have a responsibility to secure full knowledge about this and similarly suspicious cases. As a co-equal branch in our Federal system of government, we share with the other two branches the duty of seeing to it that the commands of the Constitution, including the command that no person in this country shall be "deprived of life, liberty, or property, without due process of law," are fully and strictly obeyed.

I thank you for your kind attention, and urge upon you the favorable reporting of House Resolution 220 to the full Judiciary Committee and the full House, so that we may learn the truth about the treatment of these five Americans.

[From the New York Times, June 25, 1972]

U.S. JURY FOCUSES ON GUNS FOR I.R.A.

BALKY WITNESSES CALLED IN FORT WORTH INVESTIGATION

FORT WORTH, June 24.—Attorney General Richard G. Kleindienst has ordered a Federal grand jury investigation here into the alleged smuggling of American guns into Northern Ireland to supply the Irish Republican Army.

The inquiry, which has already stretched from New York to Texas, is expected to involve I.R.A. sympathizers in a number of American cities.

Mr. Kleindienst, acting after the British Government reportedly asked the Nixon Administration to halt gun smuggling, was said to have dispatched two special prosecutors, Brandon Avery and Robert Merkle, to Fort Worth this week to coordinate the national investigation with United States Attorney Eldon Mahon.

The first witnesses before the grand jury here, mostly Irish-surnamed residents of the metropolitan New York area, refused to testify even after Federal District Judge Leo Brewster offered them immunity from prosecution.

WITNESSES DEFENDED

Frank Durkan, one of several New York lawyers representing the witnesses, defended his clients' right not to testify on the ground that the United States immunity laws could not keep a foreign nation such as Britain from having American citizens extradited for trial on alleged offenses overseas. The United States and Britain entered into a new extradition treaty two weeks ago.

Kenneth Tierney of New York, the first witness, was jailed for contempt of court by Judge Brewster and, Mr. Durkan said, immediately began a hunger strike in protest against the Federal grand jury system.

James McKeon, a prospective witness, has been allowed to return to New York after collapsing in the Federal Courthouse here. A heart patient, Mr. McKeon was treated at a local hospital, where his collapse was diagnosed as resulting from acute nervous stress.

Prosecutors have indicated that other witnesses face jailing for refusing to answer questions about the alleged gun smuggling after being granted immunity from prosecution.

Tight security has surrounded the investigation. Federal guards search the courthouse for bombs at least hourly each day the grand jury meets.

RULING IS DELAYED

Late yesterday Judge Brewster postponed a ruling on an application for immunity for four additional witnesses until the Federal Bureau of Investigation and the Treasury Department could confirm or deny that Government information had been obtained by placing wiretaps on the home or business telephones of lawyers representing the witnesses.

Meanwhile, Mr. Tierney, the jailed witness, was declaring himself a political prisoner through his attorney, who reported he was giving his food to black prisoners in adjoining cells and sending his regards to the Irish people.

And since prosecutors have not hesitated to request immunity for early witnesses, some sources said, that none of those now under subpoena are suspected of leadership in the alleged smuggling operations but simply have information that could lead to the identification of the leaders.

The inquiry is expected to continue for at least several weeks, according to Mr. Mahon, who yesterday was appointed a Federal judge for the Northern District of Texas by President Nixon. He is a brother of Representative George H. Mahon, Democrat of Texas, chairman of the House Appropriations Committee.

The inquiry reportedly focused here because of reports that some of the weapons supplied the I.R.A. were purchased in north-central Texas and because of the high regard in which Attorney General Kleindienst holds Mr. Mahon and Judge Brewster.

Mr. EILBERG. I apologize to the other members here, but a couple of members of the committee have a luncheon appointment.

We will recess until 1:30.

[Whereupon, at 12:07 p.m., the subcommittee recessed, to reconvene at 1:30 p.m., the same day.]

AFTER RECESS

[The subcommittee reconvened at 1:30 p.m., Hon. Joshua Eilberg presiding.]

Mr. EILBERG. The hearing will resume.

We will call first upon Congressman Bingham, who has been most interested in this matter, to give us his point of view on the resolution before us.

TESTIMONY OF HON. JONATHAN B. BINGHAM, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. BINGHAM. Thank you, Mr. Chairman. I don't have a prepared statement, I would appreciate the indulgence of the committee to make a very brief comment or two.

I am most appreciative of the fact that you are holding this hearing. I think the fact of the hearing itself is extremely helpful, and the fact this has apparently produced real action and information from the executive branch that we have not been able to get before.

I am a cosponsor of the resolution of inquiry. I am in support of the statements that were made by Senator Kennedy and Representative Abzug this morning.

I would say from the discussion this morning, a good deal of which I heard, that the validity of the resolution itself, and the questions that have been raised has in a sense already been established. What exists are a lot of unanswered questions. Whether they will be answered this afternoon to the satisfaction of the committee is another thing. Certainly there are serious questions that have been raised.

I would like to stress one other point which I hope the committee will consider, either at this hearing or at some future point. That is the apparent inadequacy of the 1970 statute for a witness who claims that the assurance of immunity is not effective. That is the position of these defendants here.

The executive branch position simply is that the witnesses could get out any time they wanted to by testifying. Their position is that they are not satisfied by the assurance of immunity, and this raises very serious questions about the adequacy of the law we passed in 1970.

One of the five who are in the Fort Worth proceeding is from my district. I am very much concerned. Again I want to say I appreciate the concern of you, Mr. Chairman, and of the committee. I am sure that you will come up with a helpful resolution of the problems.

Thank you very much.

Mr. EILBERG. Are there any questions of Congressman Bingham?

Mr. DENNIS. I think not, Mr. Chairman.

Ms. HOLTZMAN. No, thank you, Mr. Chairman.

Mr. EILBERG. Thank you very much.

Mr. BINGHAM. I might add that the reason I asked to be heard first is that I am needed on the floor this afternoon in connection with a pending bill.

Mr. EILBERG. Thank you for your patience in waiting so long. We had originally intended to call Members of Congress who had indicated an interest in appearing, which is normal protocol.

I note Congressman Wolff is in the hearing room. He has agreed with me that it would be most appropriate, or more appropriate at this time, to hear Mr. William Olson, Assistant Attorney General of the Internal Security Division of the Department of Justice.

We would like to hear from Mr. Olson now for any additional information he can supply to the subcommittee.

Would you come forward, Mr. Olson? Would you identify the gentleman with you?

TESTIMONY OF WILLIAM OLSON, ASSISTANT ATTORNEY GENERAL, INTERNAL SECURITY DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY KEVIN T. MARONEY, DEPUTY ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. OLSON. Mr. Chairman, I brought with me Mr. Kevin T. Maroney, Deputy Assistant Attorney General with the Department of Justice. He has been with the Department of Justice for about 28 years.

Mr. EILBERG. Thank you. Will you proceed when you are ready.

Mr. OLSON. Mr. Chairman, I am appearing here today in response to your invitation to the Attorney General, or an appropriate delegate of the Department of Justice, to appear before this subcommittee to express the Department's view concerning House Resolutions 220 and 223. Both of these resolutions relate to the pending grand jury investigation in the northern district of Texas, before which Kenneth Tierney, Thomas Laffey, Mathias Reilly, Paschal Morahan, and Daniel Crawford had been summoned.

As I informed Chairman Rodino in my letter of March 7, 1973, I am pleased to appear for this purpose. However, as I noted, since this matter involves an ongoing investigation, I cannot discuss specific details of the investigation which are not already matters of public record.

I am, of course, prohibited by Federal Criminal Rule 6(e) from disclosing, without the permission of the court, any matters occurring before the grand jury, or which have not heretofore been disclosed in the litigation growing out of the contempt proceedings against these five individuals.

Nor am I at liberty to discuss any other information which has been obtained in the course of the Government's investigation of this matter which might prejudice potential defendants in any prosecution which might eventuate from this investigation.

Within these strictures, I shall be pleased to afford the subcommittee as much information as I can which may be useful to your consideration of the resolutions of inquiry.

Before turning to the three specific questions in the resolutions, I think it would be helpful if I briefly summarized for you the legal proceedings in this case to date.

The witnesses were subpoenaed on June 13, 1972, to appear on June 19 before a Federal grand jury investigating violations of Federal firearms statutes, the Organized Crime Control Act, and the Foreign Agents Registration Act.

All appeared—Tierney on June 19, Daniel Crawford and Mathias Reilly on June 21, Thomas Laffey and Paschal Morahan on June 22—but each refused to answer any probative questions.

Immunity was sought and granted for all five—Tierney on June 19, the others on June 27—but even upon their reappearance, where they were frequently excused for consultation with their attorneys present in Fort Worth to protect their rights, no meaningful testimony was forthcoming.

The witnesses were brought again before the district court, and, following the indication of their continued refusal, all were held in contempt. Tierney was committed June 23. The others were committed July 3.

All five immediately filed notices of appeal, Tierney on June 26, the others on July 5, to secure review, which by statute must be completed within 30 days.

The case was decided on the merits by the court of appeals on August 3, 1972, in an opinion according individual attention to all issues briefed and argued previously in chambers.

The court determined that all rights of counsel had been adequately protected, that the witnesses had shown no sufficient possibility of foreign prosecution arising from their grand jury testimony, that the Government's obligations regarding electronic surveillance had been fully discharged, and that the grants of testimonial immunity were in each case properly requested, and properly granted following a hearing fully observant of the witnesses' due process rights.

Between September 23, 1972, and January 29, 1973, while their petition for certiorari was pending before the Supreme Court, the witnesses were at liberty on bail.

The Supreme Court denied their petition for a writ of certiorari to review the appellate decision on January 22, 1973. The witnesses surrendered to Federal custody on January 29, 1973, and are currently incarcerated in the Federal Correctional Institution at Seagoville, Tex., pending their agreement to testify.

I might observe that I know of no recent case in which the legal issues raised by the defendants have been given a more extensive and thorough review by the district and appellate courts. All of these issues have been decided by the courts in favor of the Government.

I am certain you will agree, therefore, that it would serve no useful purpose here to discuss the legal issues which have already been judicially decided.

I believe that it is important, however, for me to note here that during the entire course of the litigation, both at the district court and appellate levels, neither the five individuals nor their attorneys ever raised the issue of whether the grand jury, sitting in the northern district of Texas, had authority to conduct this investigation.

No issue was raised as to whether the grand jury proceedings should have been in another judicial district.

No argument was made that subpoenaing these witnesses from the New York City area to appear before the Texas grand jury imposed an undue hardship upon them.

No contention was advanced that they did not possess information of relevance to the grand jury in its inquiry into violations of Federal laws occurring in the northern district of Texas.

At no time did the witnesses claim that they lacked any knowledge of the facts sought to be elicited from them.

On the contrary, the Findings of Fact and Conclusions of Law of the District Court, as well as the opinion of the U.S. Court of Appeals for the Fifth Circuit, make quite clear that the witnesses' refusals to answer were in every instance based on asserted constitutional grounds.

In its opinion, filed August 3, 1972, the court of appeals took pains to note that:

The facts of record disclose that appellants appeared before the grand jury in Fort Worth, Texas, in response to subpoenas. They are residents of New York and were accompanied by counsel upon their arrival in Fort Worth. Tierney was the first of the five appellants to be called before the grand jury. The pattern of his conduct before the grand jury and the general proceedings thereafter with respect to each appellant are similar to the extent that we may consider all as being in the same factual posture for the purpose of considering the issues presented by the appeals.

Several questions were propounded to Tierney. The only one answered was as to the correctness of his name. Each question concerned a matter relevant to the investigation. They had to do with whether the witness (and this applies to each

of appellants) had purchased firearms on certain dates and at certain places, whether they had used the driver's license of any other individual for the purpose of identification in purchasing firearms, whether their own driver's license had been loaned to others for that purpose, and whether they had any knowledge of any person or persons in this country who were engaged in the illegal purchase of weapons and explosives. Tierney sought permission to consult with attorneys before answering the questions and permission was granted or taken, depending on how one reads the transcript of the event. In either case, after conferring with his attorneys, he refused to answer each question, claiming protection under the First, Fourth, Fifth, Sixth, and Ninth Amendments to the Constitution and the United States Code.

A more extensive exposition of the grand jury's interrogation of the witnesses and their responses is to be found in the Findings of Fact and Conclusions of Law and Judgment of the District Court filed on June 23, 1972.

Like the court of appeals, the district judge clearly states that the questions were not only relevant to the witnesses' knowledge of violations of law, but that they obstinately refused to furnish any information of any kind to assist the grand jury in its inquiry.

I have previously furnished the staff of this subcommittee with several copies of the District Court's Findings of Fact, Conclusions of Law and Judgment, and I have brought with me enough copies of both this Judgment and the Circuit Court Opinion for each member of this subcommittee. I urge that each of you read them.

Turning now to the three specific questions in the resolution:

The first question is: "The basis of the venue in the northern district of Texas of the present grand jury investigation before which Kenneth Tierney, Thomas Laffey, Mathias Reilly, Paschal Morahan, and Daniel Crawford have been summoned."

The legal bases for venue are three: the sixth amendment to the Constitution, rule 18 of the Federal Rules of Criminal Procedure, and section 3237 of title 18, United States Code.

The sixth amendment provides, among other things, that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

Because there was evidence, as I shall point out in a moment, that criminal violations had occurred in the northern district of Texas, venue for any prosecution which might result from the grand jury's inquiry would lie in that jurisdiction. The grand jury sitting in that district would, of course, be the proper forum to investigate such violations.

Federal Criminal Rule 18 states that—

Except as otherwise permitted by statute or these rules, prosecution shall be had in the district in which the offense is committed.

And section 3237 of title 18, United States Code, provides:

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Our information at the time this grand jury was convened for this investigation and these witnesses were subpoenaed was that possible violations had occurred in the northern district of Texas of title I of

the Gun Control Act of 1968, title II of the Gun Control Act of 1968, title XI of the Organized Crime Control Act of 1970, Foreign Agents Registration Act, and conspiracy.

Information in our possession which had been developed by the Bureau of Alcohol, Tobacco and Firearms of the Treasury Department indicated that certain individuals, apparently from New York City, using aliases, were attempting, in Fort Worth, Tex., to purchase large numbers of illegal weapons from sources in Mexico for shipment to Ireland.

We had reason to believe that the witnesses subpoenaed before the grand jury in Fort Worth possessed relevant information concerning this investigation. We had no reason to assume, if granted immunity from prosecution, that these witnesses would be recalcitrant and refuse to testify.

We were, of course, mindful of the considerable distance which these witnesses would be compelled to travel. However, as the Supreme Court pointed out in *Blair v. United States*:

* * * it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personnel sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.

It is not, of course, unusual for witnesses before Federal grand juries and in Federal criminal cases, as well as before congressional committees, to be required to travel from one part of the country to the other for the purpose of furnishing relevant testimony.

As a matter of fact, for many years it has been commonplace for witnesses from different sections of the country to testify before a single grand jury in investigations of organized crime, tax violations, civil rights cases, antitrust cases, as well as internal security matters.

Congress, recognizing this fact, has sought to ameliorate the hardship by providing very adequate travel expenses and an ample allowance of \$36 per day for the witnesses' living expenses.

The second inquiry in the resolution seeks:

A listing of any other districts in which the said grand jury investigation might have been conducted, together with the basis for each district.

In view of the information known to us at the time, the most logical locus for the grand jury investigation was the northern district of Texas. It is possible that a grand jury investigation involving this same conspiracy could have been brought in either Florida or New York. However, the substantial activity known to us at that time took place in the northern district of Texas. Subsequently, we have presented evidence to grand juries in other districts, including New York and San Francisco, concerning similar types of activity, as a result of which indictments were returned.

The third inquiry is:

Whether the said grand jury investigation has been completed.

I can respond to this question with a categorical "No." There is no question that the Texas grand jury's investigation has been

thwarted to a great extent by the refusal of these witnesses to testify. Notwithstanding, this investigation will continue, and we are hopeful of summoning additional witnesses before the grand jury.

I cannot predict at this time the outcome of the investigation, but charged as we are with the obligation of enforcing the laws which Congress has enacted, we are duty bound to exhaust every investigative effort before terminating the grand jury's inquiry.

In conclusion, I want you to know that I share the concern of this subcommittee that no witness be harassed, and I believe it appropriate for the subcommittee to inquire into such allegations whenever they come to your attention.

But I assure you that no witness in this case has been harassed, and that the ethnic or religious background of any person has not for a single moment been a consideration in this investigation.

However, I am sure that you will agree that the violations which the grand jury has been looking into are matters of substantial concern to us all, and we in the Department of Justice have a most serious obligation to see that the laws which you have enacted are vigorously, fairly, and uniformly enforced.

Mr. EILBERG. Mr. Olson, we thank you for that statement.

Before we get into questioning you, I would like to read rule 5(b) of the Judiciary Committee for the benefit of members, which reads:

In the course of the hearing, each member shall be allowed five minutes for the interrogation of a witness until such time as each member who so desires has had an opportunity to question the witness.

I suggest we try as best we can to try to do this in as orderly a fashion as possible. Under the rule, if more time is required, we will keep going until each member has another turn, or as many turns as necessary.

That applies to the chairman as well, Mr. Olson.

Mr. Olson, first would you say that you are the individual who made the decision to hold this particular investigation before the grand jury in Fort Worth, Tex.? What was your role?

Mr. OLSON. I would have made the ultimate decision in consultation with the U.S. attorney and the rest of my staff.

Mr. EILBERG. So in this case you made a decision which was approved by all others concerned to hold the investigation in Fort Worth?

Mr. OLSON. Yes.

Mr. EILBERG. What was the role of Mr. Maroney in this regard; in connection with the investigation, initiation, or what ensued?

Mr. OLSON. All litigating matters in our Division pass over Mr. Maroney's desk as my primary deputy. He concurred with me in that decision.

Mr. EILBERG. Mr. Olson, following the introduction of the resolutions considered today, House Resolution 220 and the others that followed it, Chairman Rodino of the Judiciary Committee wrote you a letter and asked for information regarding Ms. Abzug's resolution, and you replied by letter of February 26.

I believe you have a copy of that letter.

Mr. OLSON. I believe I do.

[The letters referred to follow:]

FEBRUARY 23, 1973.

HON. RICHARD G. KLEINDIENST,
Attorney General of the United States,
Department of Justice, Washington, D.C.

DEAR MR. ATTORNEY GENERAL: The following bills have recently been referred to the Committee on the Judiciary: H. Res. 220 and H. Res. 223, Resolutions of inquiry with respect to a pending grand jury investigation in the Northern District of Texas. Copies of these measures are enclosed.

To assist us in the consideration of these measures, I would very much appreciate it if you would provide us with the following information as soon as possible:

1. The basis of the venue in the Northern District of Texas of the present grand jury investigation before which Kenneth Tierney, Thomas Laffey, Mathias Reilly, Paschal Morahan and Daniel Crawford have been summoned.
2. A listing of any other districts in which the said grand jury investigation might have been conducted, together with the basis of venue for each such district.
3. Whether the said grand jury investigation has been completed.

Sincerely,

PETER W. RODINO, JR.,
Chairman.

Enclosures.

DEPARTMENT OF JUSTICE,
Washington, February 26, 1973.

HON. PETER W. RODINO, JR.
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The Attorney General has asked me to reply to your request for information regarding Congresswoman Abzug's resolution of inquiry directed to the Department of Justice with regard to Kenneth Tierney, Thomas Laffey, Mathias Reilly, Paschal Morahan and Daniel Crawford who are currently incarcerated in Fort Worth, Texas, on a charge of contempt of court. For your benefit, and that of your Committee, I thought it advisable to acquaint you with the facts of this matter. I am certain that you appreciate, that because of the secrecy of the grand jury and the fact that this is an ongoing investigation, I am limited to providing you only that information which is a matter of public record.

A Federal grand jury for the Northern District of Texas is investigating violations of various Federal criminal statutes occurring within that District and relating to the purchase of weapons and explosives in the Northern District of Texas for shipment to Ireland. The grand jury possessed information indicating that the subpoenaed individuals had knowledge of this attempt to purchase weapons and explosives in Texas.

During the week of June 19, 1972, these five men were subpoenaed to give testimony before the grand jury. In each instance they refused to testify citing their privilege against self-incrimination under the Fifth Amendment to the Constitution. Among the questions each refused to answer was whether or not he had personal knowledge of the purchase of illegal firearms or the purchase of legal firearms in an illegal manner in the State of Texas. Subsequent to their invocation of their rights under the Fifth Amendment, the government sought to grant them immunity from prosecution in an attempt to secure their testimony. Although their attorneys strongly resisted the application for immunity, the District Court granted the petition and ordered them to answer all relevant questions. Thereafter, they persisted in refusing to testify and were held in civil contempt of court and ordered confined until they testify in response to the court order or until the grand jury expires. The case was appealed to the Fifth Circuit which affirmed the contempt citation in *In re Tierney*, 465 F. 2d 806 (5th Cir., 1972), *cert. denied*, S. Ct., ———— U.S. ———— (January 1972). Upon this denial the five witnesses were recommitted to the custody of the United States Marshal. Of course, they can be released at any time they purge their contempt by testifying before the grand jury.

This investigation into violations of Federal law committed within the Northern District of Texas is continuing; however, the activities of the grand jury in connection with this investigation have been thwarted to a great extent by the refusal of these witnesses to testify.

It is certainly now a matter of public knowledge that the Department of Justice has been investigating in several districts violations of criminal law by individuals who are purchasing firearms illegally and illegally shipping them to Ireland. To date we have returned indictments and secured convictions in the Southern District of New York and the Northern District of California. Investigations continue in all of these districts as well as others where evidence of the commission of Federal crimes has been developed.

In this connection I would like to point out that James O'Gara was indicted in the Southern District of New York on February 16, 1973 for conspiracy, shipping weapons to Ireland in violation of the Munitions Control Act and purchasing weapons falsely by utilizing the names and identifications of other persons. In this latter regard, the indictment charges that O'Gara used the drivers' licenses of three of these individuals, namely, Daniel Crawford, Mathias Reilly and Paschal Morahan to purchase weapons illegally. A copy of our press release is enclosed herewith.

In the final analysis, these witnesses who have exhausted their legal remedies are still refusing to cooperate with a legitimate grand jury investigation. As the Supreme Court recently reiterated in *United States v. Antonio Dionisio*, decided January 22, 1973, "... These are recent reaffirmations of the historically grounded obligation of every person to appear and give his evidence before the grand jury. 'The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.' *Blair v. United States*, 250 U.S. 273, 281."

Sincerely yours,

A. WILLIAM OLSON,
Assistant Attorney General.

Enclosure.

Mr. EILBERG. One question at this point. May I ask why there was no reference in that letter to the explanation you provided today, namely, that you had evidence that there were conversations in Texas having to do with purchasing the arms in Mexico?

There is no reference in the February 26 letter to that, and I would like to know what your reasons might be.

Mr. OLSON. I believe that I have been more specific here as to the factual basis for venue than I was in the letter to Chairman Rodino.

In preparation for this appearance here, we went over this matter very carefully and decided how far we could go in publicly stating to the committee the factual basis of the jurisdiction.

Mr. EILBERG. I certainly don't want to put words in your mouth, but the pressure of the hearing today suggested that you dig deeper and see what other information you could provide?

Mr. OLSON. No. We have been aware of this information all the time.

All we said in our correspondence before was that we were aware of possible criminal violations that occurred in the northern district of Texas.

I understand that you people want to know as much as you can about the nature of the facts behind that.

Mr. EILBERG. I will not pursue this beyond this, but the thrust is why you could not have said in answer to Mr. Rodino, which some of us felt was not adequate, what you said here today, that as you say, this is your position, that there were conversations in Texas about the purchase of arms in Mexico.

Why didn't you say that in the letter to Chairman Rodino?

Mr. OLSON. I think we are very loath in the Department of Justice to discuss in any manner an ongoing investigation on a factual basis which resulted in an indictment, to become public.

Mr. EILBERG. Mr. Olson, you testified in your prepared statement that the witnesses here received immunity.

As I understand it, that is known as "use" immunity under the 1970 law.

I wonder if you would just describe the kind of protection that that use immunity provides.

Mr. OLSON. Yes.

Section 6002 or 6003 of title 18, which is the use immunity statute, recently sustained in the *Kastigar* case as to its constitutionality, prohibits the use of any matters testified to by the witness in front of a grand jury to be used against him or any information derived therefrom in subsequent criminal prosecution.

Mr. EILBERG. Is it correct, however, that the information that initiates from such testimony might be the basis for you to develop independent evidence, and that independent evidence might be the basis of prosecution?

Mr. OLSON. I don't think that is a fair statement, because under the statute, if the evidence used is in any way derived from the testimony given, it cannot be used.

Our burden is to prove an independent source entirely.

Mr. EILBERG. That is your burden, but you are not ruling out the possibility that something might be given in grand jury testimony that might be the basis for other evidence.

Mr. OLSON. No, I cannot go along with that, because I think if we use it as a basis, we would not have an independent source.

Mr. EILBERG. Well, that is my reaction to the testimony—that it could be the basis, but you are the witness.

Mr. OLSON. I would like to say that by way of policy, and, of course, this statute has been in existence only a couple of years, and has only been sustained for a little over a year, just before this case, we would not, once a person has been given use immunity, ordinarily we would not prosecute that person even if we technically could get something with an independent source, unless we had what we would call an "aggravated" case.

Mr. EILBERG. Mr. Olson, is it possible that testimony given before a Federal district grand jury, notwithstanding its secrecy, could at some subsequent time be released by order of the judge?

Mr. OLSON. Yes, if the judge, upon application by the witness himself, many times in connection with subsequent criminal proceedings, orders the testimony released.

Mr. EILBERG. So that a witness could have that concern, that the testimony he has given before a grand jury, might at some future time be released by the judge?

Mr. OLSON. Yes.

Mr. EILBERG. It is also possible, is it not, that if a proceeding develops as a result of a grand jury investigation, that the testimony given by that witness be available, and that the witness be available for further questions?

Mr. OLSON. That is true. The witness could be called as a witness in trial and have to testify, and it might be necessary to use, for impeachment purposes, the grand jury testimony.

Mr. EILBERG. I know that the fifth circuit decided, and the Supreme Court agreed, that there was not substantial basis for foreign prosecution, but is it possible that a foreign prosecution might occur in the case involving the "Fort Worth Five?"

Mr. OLSON. I can't rule that out, no.

Mr. EILBERG. You cannot say, either, that the "Fort Worth Five" here might have substantially been concerned about that, in good faith. Is that not right?

Mr. OLSON. I am sure that they were concerned about that, but the court of appeals did deal with the problem. I think it is one of the legal issues that have been settled.

Mr. EILBERG. The bells have just rung. I think we had better take a brief recess to go over and vote. We will be back in 15 minutes.

When we get back, we will start the questioning by the other members.

[Brief recess.]

Mr. EILBERG. The hearing will resume.

Mr. OLSON, we apologize to you. We know you understand. We had two votes we had to cast.

Mr. Seiberling?

Mr. SEIBERLING. Thank you, Mr. Chairman.

I would just like to ask a few brief questions of the Assistant Attorney General.

In his statement, Senator Kennedy stated that in his belief the prosecutor's questions to the witnesses, the five witnesses, related exclusively to the conduct in New York.

I realize, and he pointed out, that they mentioned Texas in one or two cases, but the specific questions that related to specific acts related exclusively to acts of persons in New York. I wonder if you would care to comment on that.

Mr. OLSON. I think Senator Kennedy only has part of the questions. Only part of the questions are available.

I cannot say here the context of all the questions posed to them. They all have not been made public. The ones which are the basis of contempt have been public. Nor can I say what questions we might have asked if the interrogation had gone forward.

I think some of the questions relate to New York, and some relate to no particular locus at all, the reported questions I have seen in the court's opinion and in the briefs filed by both sides.

Mr. SEIBERLING. But isn't it a fair characterization that the specific questions that were brought out in the contempt proceedings did relate ostensibly to New York rather than Texas?

Mr. OLSON. I can't agree that substantially all the questions did. Some of them certainly did. We didn't get to all the questions.

Mr. SEIBERLING. Second, Senator Kennedy made the point that there is no indication that the grand jury has sat for a single hour, or heard a single additional witness in this investigation, and this is the Fort Worth grand jury, since these men were originally held in contempt. Is that correct?

Mr. OLSON. That is correct. We have presented no further evidence to this grand jury.

Mr. SEIBERLING. He also made the point that several other witnesses originally called before that grand jury have had their subpoenas withdrawn. Is that correct?

Mr. OLSON. That is correct. We withdrew the subpoenas of four or five other witnesses summoned at that time.

Obviously, we did not get anywhere with the five we had. We felt these other witnesses were in the same posture. We discharged them from their subpoenas at that time.

Mr. SEIBERLING. Then I am a little puzzled by your statement that the investigation, the Fort Worth aspects of this, is continuing.

Mr. OLSON. The investigation is continuing by the Bureau of Alcohol, Tobacco, and Firearms.

The calling of witnesses by subpoena for testimony before the grand jury is not the only method we use to investigate the criminal activity that went on in that jurisdiction. There is a continuing investigation going on by A.T. & F.

We also may well call other witnesses back before that grand jury.

Mr. SEIBERLING. Is it the Department's policy where witnesses have been cited for contempt for refusal to testify, that when and as the investigation or proceeding, other than the contempt proceeding, is finally ended, that they would no longer be incarcerated for their contempt, where it is a civil contempt?

Mr. OLSON. Do you mean if the overall investigation were completed, and their testimony would no longer be needed?

Mr. SEIBERLING. Yes.

Mr. OLSON. I think under those circumstances we probably would.

Mr. SEIBERLING. It would almost appear essential, wouldn't it, because the basis for the incarceration would no longer be there?

Mr. OLSON. Yes.

Mr. SEIBERLING. Then I take it you would not agree with Senator Kennedy's conclusion that the continued imprisonment of these five men is punishment?

Mr. OLSON. No, I would not agree.

Mr. SEIBERLING. With no other purpose?

Mr. OLSON. We are very interested in having their testimony.

Mr. SEIBERLING. One other statement the Senator made which I would like to get your reaction on: He said it appears that the Department is using the grand jury in Fort Worth to gain further evidence to bolster its case against O'Gara when he goes on trial in New York.

Mr. OLSON. I would say that is not true. My colleague points out: We have not used the grand jury. If he means were we using it at the time we called these witnesses last June, I would say certainly not.

Mr. SEIBERLING. Mr. Chairman, I have no further questions. Thank you.

Mr. EILBERG. Mr. Railsback?

Mr. RAILSBACK. I would like to direct a question to Mr. Maroney.

Mr. Maroney, I remember yesterday when we met with you, you indicated that you had been with the Justice Department for some time. How long have you been with the Justice Department?

Mr. MARONEY. Since 1946, and in the Legal Division since 1950.

Mr. RAILSBACK. So I take it that you have had an opportunity to become very well versed with the operation of the Justice Department, and under Republican administration, under Democratic administrations.

Let me ask you: Is there anything unusual about this particular case? Are you familiar with other cases where they have subpoenaed witnesses into other States and into other jurisdictions?

Mr. MARONEY. I don't see anything unusual about it.

As Mr. Olson's statement points out, it happens frequently in many types of grand jury investigations, antitrust, Civil Rights Division cases, organized crime, almost across the board in the investigation of criminal cases.

I think any time you have a multistate series of transactions which appear to have some interrelation, you necessarily have potential witnesses coming from several States. If a grand jury commences to investigate it in any one place, it will necessarily be subpoenaing people from various places.

Mr. RAILSBACK. In your experience, has there ever been another case where the Congress has had the Justice Department before it in investigating grand jury proceedings, or have there been any inquiries similar to this?

Mr. MARONEY. In my experience, it is unprecedented.

Mr. RAILSBACK. Then I would like to ask a question of Mr. Olson.

Mr. Olson, I take it from what you just said in response to Mr. Seiberling, the questions that were attached to Senator Kennedy's testimony were not all of the questions that were propounded, nor did they represent questions that perhaps would have been asked if the witnesses had not been recalcitrant. Is that correct?

Mr. OLSON. That is correct. That is what I intended to bring out by my answer to that question.

We are dealing with a difficult area to testify before a committee.

Mr. RAILSBACK. I don't know if you can answer this or not. Were there witnesses from Texas that were going to be called at one time?

Mr. OLSON. We had approximately six witnesses that would have been from Texas that we would have eventually called in connection with that grand jury.

Had we held the same investigation in New York, and assuming we had jurisdiction to do so, we would have had to call those witnesses from Texas and Florida to the other sites.

Mr. RAILSBACK. In your statement, I think you do get a little more specific maybe even than you were yesterday. You indicate that the investigation revealed that there were going to be some purchases made in Fort Worth.

Is that the reason why you elected to use that as the site of the grand jury proceeding? Can you tell us a little more on that?

Mr. OLSON. I believe the statement is clear in that the major activity the grand jury was investigating there was a plot, conspiracy, what-have-you, centering in Fort Worth, Tex.

I don't think I have to add any more to what is contained in the statement. That is the activity we were investigating.

Mr. RAILSBACK. Had you had any previous dealings with the Fort Worth Five in New York City prior to the issuance of subpoenas for them?

Mr. OLSON. What do you mean by any further dealings with them?

Mr. RAILSBACK. Had they ever been charged or subpoenaed before in the New York area?

Mr. OLSON. No; they had never been subpoenaed before.

Mr. EILBERG. Ms. Holtzman?

Ms. HOLTZMAN. Mr. Olson, I am a little troubled by your answer to a recent question.

Am I correct in interpreting from your testimony that there are six witnesses who may have relevant testimony about a crime that has been or may have been committed, and they have not been called before the grand jury?

Mr. OLSON. That is what I mean; yes.

I mean for us to finish the evidence and present it to the grand jury, we would have had to call these witnesses from Texas and other places. We had not gotten around to calling them at that time.

Because of the delay in the grand jury proceedings, because we were not able to have these, we stopped, and did not call them before the grand jury at that time.

That is what I mean.

Ms. HOLTZMAN. I am concerned, as I am sure everybody in this room is, that the Government prosecute fairly, evenly, and promptly any crimes that are being committed.

You are telling me you have six witnesses who have relevant information, and the Government has not called them to testify since June. That troubles me. If the grand jury is seriously considering the investigation of possible criminal violations in the northern district of Texas, and there are six witnesses who have relevant information, it seems to me they should be called by this time.

Mr. OLSON. That doesn't mean that they will not be called in the future. I am saying to complete the investigation and possibly to obtain the indictments, we would possibly have to call these witnesses.

I should add a couple more reasons. There are other reasons that are difficult to discuss here.

I appreciate the levity at the answer.

For example, whether or not an informant should be disclosed at a particular time by calling the informant before the grand jury.

I hope you can understand the reasons behind this, why we should have some discretion as to whether or not we call a particular informant at a particular time. Whether we call other adversary witnesses in a particular jurisdiction, if we are not at the particular point in an investigation where we think we should be, we defer calling them until later is a matter of investigative discretion.

If I can indicate the problems with a question like this that you are asking me, we are going back into an investigation, investigative techniques, and prosecutorial techniques, and so on are all involved.

Ms. HOLTZMAN. Mr. Olson, you are giving me a hypothetical with respect to an informer. I don't know if you are at liberty to testify as to whether that is the case here.

What concerns me is that you are keeping five men in prison because of the urgency you say that they testify, and at the same time you have six witnesses who you are not calling at all. I find that troublesome.

Mr. OLSON. I don't believe we are keeping these men in prison. I believe the court is keeping them in prison on contempt. They can get themselves out any time they want to, by just answering the questions propounded to them and purging themselves of contempt.

They have exhausted their legal remedies. It has gone all the way up to the Supreme Court.

I don't think you should put us in the posture of keeping them in prison.

Ms. HOLTZMAN. They are in prison. Perhaps I was incorrect to implicate you precisely, but they are in prison, and at the same time the prosecution is not going ahead with the prosecution.

I have some other questions on some of your prior testimony.

Am I correct, from your statement on page 9, and from your testimony in answer to Mr. Eilberg's question, that the matter under investigation was an attempt to purchase in Mexico arms for sale to Northern Ireland?

I was a little unclear about where the purchase was supposed to be made.

Mr. OLSON. The purchase was to be in Fort Worth, Tex., arms from Mexico. They were to come into Fort Worth, Tex.

If there is an ambiguity there, that is what the meaning is.

Ms. HOLTZMAN. Thank you. I was unclear about the subject.

In basing your decision on where to select venue, is it a policy of the Justice Department at all to consider the question of distances witnesses have to travel, or where the witnesses are from, to make a decision with respect to venue?

Mr. OLSON. I don't believe that that consideration would enter into a case like this, where we felt that the only substantial activity that this grand jury was to be concerned with took place in Texas.

I would say that in some circumstances, where we had two particular jurisdictions that were equally applicable to an investigation, in the interest of expense to the Government, if the majority of the witnesses were in one location and not another, that certainly would become a factor, as well as the convenience of those witnesses.

Ms. HOLTZMAN. Is it correct, Mr. Olson, that aside from these witnesses, the residence of the other witnesses called before the grand jury, one being in Texas, who was a Government employee, and the other from Florida?

Mr. OLSON. The information I gave you yesterday, that we called a Government employee from Texas, is not true. That person was not called before the grand jury.

Of the other witnesses called, one was from Florida, the others were from New York.

So the information I gave you about our calling another one from Texas, who was a Government agent, is not correct. We have not called that witness yet, and still have not.

Ms. HOLTZMAN. So that none of the witnesses who appeared before the grand jury were from the State of Texas.

Mr. OLSON. That is correct.

Ms. HOLTZMAN. Again directing your attention to page 9 of your testimony, there is another ambiguity I would like to clear up for my own information.

When the grand jury was convened, did you have at that time the information that you referred to at the bottom of the page; namely, that there was an attempt to purchase in Fort Worth, Tex., arms from Mexico?

Mr. OLSON. Would you repeat the question?

Ms. HOLTZMAN. Was that information in the hands of the Justice Department at the time the grand jury was convened in June?

Mr. OLSON. Yes. I believe I went into that thoroughly in our session yesterday.

That was the first information that we received from A.T. & F. when we first were brought into the case, which was 4 months prior to this June 19 grand jury.

Ms. HOLTZMAN. I am also a little confused with respect to the statement: the questions that appear as an appendix to Senator Kennedy's testimony are not all the questions that were asked of the witnesses.

It was my understanding from his testimony that the other questions related really to the names of the individuals.

Are we talking about substantive questions? Were they substantive questions relating to the investigation that were asked, aside from the ones contained in appendix A of Senator Kennedy's testimony?

Mr. OLSON. Would you repeat that, please?

Ms. HOLTZMAN. Aside from the questions asked as they appear in appendix A to Senator Kennedy's testimony, were there substantive questions asked of these witnesses before that grand jury, relating to the purpose of the investigation?

I mean to exclude from that the names of the witnesses and where they reside, questions of that nature.

Mr. OLSON. I have not seen the summary of the questions repeated in Senator Kennedy's statement. I have read the questions in the district court's opinion, some that were propounded to each, and maybe that is the source for Senator Kennedy.

It seems to me they had to do with a number of subjects, including: were they aware of any unlawful acquisition of weapons taking place in the country. They were asked to identify certain individuals.

What other questions that they were asked, and which have not yet become a matter of public record, I am not at liberty to divulge at this time, and what questions were not asked, which could have been asked, because of the way the proceedings turned out, I cannot discuss.

Ms. HOLTZMAN. I want to make clear that I was not attempting to in any way delve into the secrecy of the grand jury investigation, except there was testimony here by you that I was trying to get clarified.

That was the district court's opinion in citing the questions that were asked. My question is that it seems to me, from your testimony, that there were other substantive areas relating to the investigation itself, as opposed to the witness' name and address that were asked.

Mr. OLSON. I am sure there were other substantive questions that were asked, bearing upon the activity in the northern district of Texas.

Ms. HOLTZMAN. No further questions.

Thank you, Mr. Chairman.

Mr. EILBERG. Mr. Dennis?

Mr. DENNIS. Although it was brought out in your colloquy with the chairman that in your testimony this afternoon you had gone into somewhat more specific detail as to the basis of venue here than in your letter to Mr. Rodino, it is nevertheless true that in your letter of February 26, in the second paragraph, you stated that the Federal grand jury for the northern district of Texas is investigating violations of various Federal criminal statutes occurring within that district and relating to the purchase of weapons and explosives in the northern district of Texas for shipment to Ireland.

The grand jury possessed information indicating that the subpoenaed individuals had knowledge of this attempt to purchase weapons and explosives in Texas.

That was your statement to him, was it not?

Mr. OLSON. Yes, that is correct.

Mr. DENNIS. It is also your statement, if I understand you, that this is very definitely an ongoing investigation that the Alcohol, Tobacco and Firearms Unit is pursuing, and when the prosecution feels enough information has been developed to justify it, that you intend to proceed before this same grand jury.

Mr. OLSON. That is true. We intend to do that.

Mr. DENNIS. It is also your statement, if I understand you, that this matter has had a thorough review in the appellate courts. Is that correct?

Mr. OLSON. We feel it has had one of the most thorough reviews of any such matter.

Mr. DENNIS. The question of whether or not testimony, if given, could be in any event disclosed so that it could be used in prosecution by a foreign government was considered in some detail by the fifth circuit in *In re Tierney*. Is that not true?

Mr. OLSON. The circuit court based its opinion on that, I believe.

Mr. DENNIS. And they found that the testimony given before the grand jury was secret unless the court ordered otherwise. It was unrealistic to feel that the grand jury would order disclosure, and there was no danger that the secrecy would be violated. Isn't that essentially what they held?

Mr. OLSON. That is essentially what they held.

Mr. DENNIS. Throughout this litigation, which has also gone up to the Supreme Court, I believe, and they refused to indicate further—

Mr. OLSON. Actually, it has gone before the Justices of the Supreme Court three or four times. On two bail applications, it went before Justice Powell, and it was denied, and once before Justice Douglas on the petition for certiorari, and it was denied.

Mr. DENNIS. And in all that litigation, if I understand your testimony, no claim was ever made on the part of the five individuals that the venue was incorrectly laid, or that this grand jury did not have jurisdiction to the subject matter, or anything of that type.

Mr. OLSON. I cannot find anything in the record.

Mr. DENNIS. If I understand your testimony and that of Mr. Maroney, the procedure in this whole matter has been in accordance

with the customary and usual procedure in your experience in the Department. Is that correct?

Mr. OLSON. We certainly feel so.

Mr. DENNIS. I have no further questions.

Mr. EILBERG. Mr. Olson, I believe it was Mr. Maroney who testified that there was nothing unusual about this case, the selection of a situs in Fort Worth. I wondered whether that is a considered statement. I would like to have your opinion.

The fact is that, at the very time of the Fort Worth grand jury, the New York grand jury was also sitting. Is that not correct, that there were concurrent grand juries actually sitting that could have considered the case?

Mr. OLSON. Certainly. There were probably a number of grand juries in the southern district of New York, and also in Florida. In most districts there are one or more grand juries in operation at the same time.

Mr. EILBERG. Isn't it true that these very witnesses, despite the information you believe they had, could have been quite properly called before another grand jury? That is my question.

Mr. OLSON. I don't agree that it is quite obvious that the investigation could have been held at any place.

I think I said it is possible that this grand jury investigation could have been held in New York, or Florida. I think I said the most logical place is where we did call it.

I don't think it is unusual, when you have a multistate operation, that there are several sites in which an investigation might be had. I think section 3287 applies.

Mr. EILBERG. Mr. Maroney gave his background in the Department in answering the questions. His long experience is impressive. He said there is nothing unusual in this case.

The fact is that the law was changed just 2 years ago. I wonder, with all your experience, whether that is not an unusual experience, since we have a new kind of immunity on the books, that a lot of us are not clear about. Doesn't that make the case unusual?

Be fair, Mr. Olson.

Mr. OLSON. No; I don't believe so.

The use immunity is new.

Mr. EILBERG. Well, at least we got you to admit something was unusual about this.

Mr. OLSON. The calling of witnesses and granting immunity, and holding them in civil contempt with their refusal to testify, is something that has gone on for a number of years, with a number of statutes.

The fact that we used 6002 has no particular relevance to the inquiry your committee is dealing with here, such as the subpoena of witnesses from New York to Texas, and the possible harassment of these witnesses by the Department of Justice, et cetera. I don't think that particular statute has any bearing.

Mr. EILBERG. But the granting of "use" immunity is something less than the "transaction" immunity. Isn't that so?

Mr. OLSON. It is somewhat more limited.

Mr. EILBERG. This is a new change in our law, so that all the experience the Department may have had prior to that may not have a great deal of bearing insofar as that particular point is concerned. That is what I am trying to drive at here.

Mr. OLSON. I believe the previous cases have a lot of bearing. Both transactional immunity and use immunity would equally protect these defendants from foreign prosecution.

Mr. EILBERG. Again on the question of whether this was unusual, for this purpose again I hear experience is awfully important, but I wonder if you are being objective when you tell us in this matter there were five witnesses from New York and one from Florida.

Mr. OLSON. I think it gives a false impression to say of the witnesses we had subpoenaed at that time, five were from New York and one from Florida.

As I told Ms. Holtzman, we had six or seven other witnesses from the Texas area that we eventually, in winding up the grand jury proceedings, would have called.

If we had held this same investigation in New York, for example, and been able to, we would have had to bring people from Texas to testify up there.

I don't think we should get into a question of percentage of witnesses from one jurisdiction to another. We were in a proper location.

Mr. EILBERG. Mr. Olson, when was the Texas grand jury convened?

Mr. OLSON. Using my own language in my statement, I said we convened the grand jury. I meant we convened it for the purpose of hearing our testimony that particular day, which I believe was the 19th of June. Maybe it was the 15th of June.

It had been in existence since sometime in May. That grand jury's life was 18 months, sometime in May to 18 months hence, which would be November of this year.

Mr. EILBERG. Do you have the exact date of that grand jury?

Mr. OLSON. I would say about the 8th of May.

Mr. MARONEY. Our brief submitted in the court of appeals indicates that the particular grand jury was convened on May 2, 1972, in Fort Worth, Tex.

These particular witnesses were served with subpoenas to appear on June 19. They were served on June 13.

Mr. OLSON. The grand jury was not convened by us. It was one in existence.

Mr. EILBERG. It was a regular grand jury which was given a specific task?

Mr. OLSON. Yes. We got some jury time commencing with the 19th of June.

Mr. EILBERG. There is nothing unusual about that?

Mr. OLSON. No. That is the way we usually operate with the grand juries, and what time they have available. We work out with them when they will be able to spare time for an investigation we are interested in.

Mr. EILBERG. When was the grand jury convened in the investigation in New York, the one that indicted O'Gara?

Mr. OLSON. That I don't know. There are probably a number of grand juries in New York. It is a busy district.

Mr. EILBERG. But couldn't you have brought this matter before a grand jury sitting in New York?

Mr. OLSON. If you mean was there a grand jury available——

Mr. EILBERG. Yes.

Mr. OLSON. I would say it is very likely we could have found grand jury time for a proper case in New York; yes.

Mr. EILBERG. Do you have the date of the *O'Gara* case in your records?

Mr. OLSON. No. We just obtained that indictment probably less than a month ago. I would assume that that particular grand jury may not have been in existence a year ago. I don't know.

Mr. EILBERG. Could you provide us with that information sometime after this hearing?

Mr. OLSON. Yes.

Mr. EILBERG. We would like to have that.

[The information requested follows:]

DEPARTMENT OF JUSTICE,
Washington, March 14, 1973.

Mr. GARNER J. CLINE,
Counsel, Subcommittee No. 1, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR Mr. CLINE: During my appearance before the Subcommittee yesterday, Chairman Eilberg requested that I furnish the Subcommittee with information which I did not have at that time regarding the grand jury which recently indicted James O'Gara in the Southern District of New York.

This grand jury was first impaneled on February 6, 1973. On February 16, 1973, it handed down a six-count indictment against James O'Gara. A copy of this indictment has previously been submitted to the Subcommittee.

I believe the foregoing is the information desired by Chairman Eilberg.

Sincerely,

A. WILLIAM OLSON,
Assistant Attorney General.

Mr. EILBERG. Do you have criteria for initiation of a particular grand jury investigation, or is this something within your discretion?

Mr. OLSON. We have no other guidelines than the legal sources that I testified to in my statement, and rule 18, the Constitution, and title 18, section 3287.

I think it has never been felt to be necessary to have other guidelines than those, other than probably instructions to the attorney citing the legal sources I quoted.

Mr. EILBERG. Perhaps it is a rhetorical question. The very existence of the study we are now conducting, the fact that the subcommittee is sitting, perhaps there should be further guidelines.

To what extent do you consider the residence of the witnesses when you are issuing subpoenas?

Mr. OLSON. It would enter into our consideration if we have a number of witnesses, the cost to the Government of subpoenaing witnesses. We might select the one that was the least expensive, if they were two equally viable locations.

I don't think we had the choice in this particular case. I think in any test of the proper place for this investigation, it was in the northern district of Texas. Therefore it did not become a consideration in this case.

Mr. EILBERG. When this Fort Worth grand jury expires on November 2, 1973, if the Fort Worth Five continue to refuse to testify to that grand jury—

Mr. OLSON. They would be released, if they had not prior to that time purged themselves in contempt. If they still had not testified, they would be released upon the expiration of that grand jury.

Whether or not we would call them back, we would base on circumstances at that time.

Mr. EILBERG. Do you have any present intention to do that?

Mr. OLSON. I don't know that right now. It is too hypothetical to say.

Mr. EILBERG. Any further questions?

Mr. Keating?

Mr. KEATING. On the question of immunity, which has been covered pretty much, I would like to ask the question: Are either one of you gentlemen aware of any situation, where immunity has been granted, where there has been a later prosecution by a foreign country?

Mr. OLSON. I am not aware of any situation, but that doesn't mean there might not be.

Do you mean whether there has been a foreign prosecution based upon a grant of immunity given in this country?

Mr. KEATING. Yes.

Mr. OLSON. I know of none.

Mr. KEATING. The question has been raised, there is a threat of foreign prosecution in Great Britain.

The question is: Is that a real problem, or not?

Mr. OLSON. This is one of the defenses that was urged by these witnesses in this case before the courts, and was litigated. It was decided by the courts that there was no substantial threat.

I don't think I can add anything to what the courts have ruled.

Mr. KEATING. I yield to Mr. Railsback.

Mr. RAILSBACK. Isn't it true in title 18 dealing with secrecy of grand jury proceedings that those proceedings are limited as to what can be done with the information obtained?

My recollection is that under Rule 6(e) the information can be made available to the Government attorneys in fulfilling their duties, or something like that, but otherwise, that information is to be kept secret, is it not?

Mr. OLSON. Except as otherwise ordered by the judge.

Mr. DENNIS. We have had talk here about use immunity and transactional immunity. Is it not true that this question that has been raised with respect to venue can arise under either type?

Mr. OLSON. Certainly. I don't think the immunity statute has anything to do with the venue question.

Mr. DENNIS. Likewise, the question, if any, as to foreign prosecution can arise regardless of what type of immunity it is?

Mr. OLSON. That was the point I made in reply to Chairman Eilberg's question.

Mr. DENNIS. That is what I thought you said.

If I understood your testimony, while it is possible that under the statute this particular investigation might have been brought several places, the reason it was brought in Texas is that the main activities

you were interested in were taking place in Texas. Is that correct?

Mr. OLSON. Yes. The major unlawful activity that we were aware of at that time was in that district.

Mr. DENNIS. I think that is all. Thank you.

Mr. EILBERG. Mr. Keating.

Mr. KEATING. I would like to pursue that a little bit further.

There was some basis, then, on which to use the grand jury in Texas, involving the transaction as part of the reason you brought them into Texas. Is that correct?

Mr. OLSON. That was the sole reason.

Mr. KEATING. Is there any present intention on the part of the Justice Department to bring in the witnesses from Texas, these witnesses who presently reside in Texas, that you have listed as witnesses, that you said you would have brought in had these others testified?

Mr. OLSON. Yes, there is a present intention to call further witnesses, including the ones you have alluded to, before that grand jury. I can't give you the time or date, but we do have the intention.

Mr. KEATING. But it is your present intention to complete the hearings before this grand jury prior to the expiration of this grand jury in 1973, to the extent possible?

Mr. OLSON. Yes, that is correct.

Mr. KEATING. Will an additional effort be made to have these witnesses, or will an additional opportunity be given to the Fort Worth Five to, purge themselves of contempt by asking them if they are willing to testify again before this grand jury?

Mr. OLSON. I don't believe that we have to ask them.

Mr. KEATING. I am not suggesting that you have to. I am asking are you going to?

Mr. OLSON. Our offer is open at all times. We would be very happy to take them before the grand jury tomorrow, if they so desire to purge themselves of the contempt by answering the questions.

That is a continuing offer.

Mr. KEATING. Do you know of any other legal remedy that the Fort Worth Five can pursue at this stage?

Mr. MARONEY. No, sir.

Mr. KEATING. They have pursued them all through the Supreme Court?

Mr. MARONEY. That is correct.

Mr. KEATING. Is that why you consider this to be a very rare hearing today, because of the exhaustion of all legal rights by someone in confinement?

Mr. OLSON. I would say that is one of the reasons. This matter has created more interest, probably, than most civil contempt cases we have, other than just the fact that the exhaustive legal proceedings have been had.

Mr. KEATING. I don't believe that this is the only case in the years of experience that Mr. Maroney has had in the Justice Department that has created some interest. I am sure every matter before the grand jury is not routine.

I am suggesting this is not an unusual procedure for a committee of Congress to take.

Mr. MARONEY. I think many times matters such as this become controversial. I think back in the 1950's, with one of the immunity statutes, there was a fairly celebrated case involving Mr. Ulman, who was held in contempt, and the case went to the Supreme Court.

Mr. KEATING. Was there a hearing by a committee of the House or Senate at that time?

Mr. MARONEY. Not to my recollection.

Mr. KEATING. Did anyone ask you if you can give us an estimate of the number of witnesses that you still have to call before the grand jury, at least at the present state of things?

Mr. OLSON. Approximately six. There are approximately six from the Texas area.

Do you want me to give you an estimate of all other potential witnesses?

Mr. KEATING. On this subject matter before this grand jury, yes.

Mr. OLSON. I can't give you an accurate estimate. It would be between 6 and 15, but that is not very accurate.

Mr. KEATING. Would it accelerate the progress of this case if the Fort Worth Five would testify immediately?

Mr. OLSON. It certainly would.

Mr. KEATING. I have no further questions.

Mr. DENNIS. You gentlemen testified this matter has been handled in the ordinary fashion.

How many times have either of you been called before a committee of Congress to justify the venue you have chosen in a criminal prosecution?

Mr. OLSON. I have only been here a couple of years. Mr. Maroney has been here quite a few years longer, and he has never been.

Mr. MARONEY. That is correct.

Mr. DENNIS. How many times have you been called for that purpose?

Mr. MARONEY. None, sir.

Mr. EILBERG. Mr. Olson and Mr. Maroney, do you feel this subcommittee is harassing you?

Mr. OLSON. No, sir.

Mr. EILBERG. Do you know of any other resolution of inquiry having been offered in a Congress before this one?

Mr. OLSON. I know of none. I was not familiar with the procedures.

Mr. EILBERG. How about you, Mr. Maroney? Do you know of any resolution of inquiry ever offered to a Congress before?

Mr. MARONEY. I am unfamiliar with any, Mr. Chairman.

Mr. EILBERG. Ms. Holtzman has a question.

Ms. HOLTZMAN. Does the witness before the grand jury have a standing to object to the venue of a grand jury?

Mr. OLSON. No, I could not cite you a case.

Ms. HOLTZMAN. Isn't it correct that the authority is in fact otherwise, that the witness before a grand jury has no standing to object to the venue of that grand jury?

Mr. OLSON. I do not know that the issue has been litigated.

Ms. HOLTZMAN. Would you be able to elucidate on that?

Mr. OLSON. I don't know that the question has ever been raised by a witness, claiming standing to object to the venue of a grand jury. I don't know of any cases on one side or another of that proposition.

By the same token, I don't believe it is the law that a witness has the standing to object to the venue of a grand jury.

Ms. HOLTZMAN. I have one other question, Mr. Olson.

You said that the grand jury in New York might have had proper venue to concern itself with the investigation this Texas grand jury commenced. Would it have been a burden on the investigation if the current grand jury had been convened in New York, perhaps to deal with the witnesses in New York, and that testimony given to the grand jury in Texas?

Mr. OLSON. Is your question that maybe we could have convened a grand jury in New York for purposes of obtaining any indictments we recently have, and also take some testimony regarding this matter?

Ms. HOLTZMAN. Yes.

Mr. OLSON. And then use that testimony before the grand jury without bringing the witnesses down to Texas?

Ms. HOLTZMAN. Well, to use the testimony, if that were necessary, or if it became clear that the testimony of the witnesses would be helpful, the witnesses themselves.

Mr. OLSON. It is possible we could have done that. I don't believe we went to New York until the fall of that year, which was probably about November when we indicted the first people in New York on similar activity.

We had presented this to a grand jury in New York and had several indictments in November and December, and some in January.

We made a prosecuting judgment back in June that the major unlawful activity we were aware of and wanted to investigate occurred in Texas, and we decided to go there. We decided not to go on what we thought were smaller matters in New York until a later time.

We were thwarted in our investigation in Texas, and then we went to New York on other matters.

Ms. HOLTZMAN. I was getting at whether a meeting of the grand jury would have been a burden with respect to the New York witnesses, would have been a burden in the investigation of this matter, convening the New York grand jury.

Mr. OLSON. I don't see that we would be in any different posture if we had done it that way, except that the situs of their incarceration would be in New York instead of Texas. There is no indication that they would rather give us their testimony in New York than they would in Texas.

Ms. HOLTZMAN. Has the Department used the device of concurrent grand juries in the past to investigate crimes in the same manner?

Mr. OLSON. Ordinarily, unless there is connected activity in two jurisdictions, we don't use the concurrent grand jury procedure.

I think there has to be connection between the activity that is being investigated, there has to be a multijurisdiction activity. I believe where there is such, it has been used, yes.

Ms. HOLTZMAN. I have no further questions, Mr. Chairman.

Mr. DENNIS. May I inquire?

Mr. EILBERG. Yes.

Mr. DENNIS. Am I correct in my understanding that while the matters on which indictments were returned in the fall in New York were of a generally similar nature to those being investigated by the

Texas grand jury, that they were nevertheless separate and different cases?

Mr. OLSON. There is no question about that.

The indictments in New York have been instances of individuals unlawfully purchasing weapons, or unlawfully exporting one or two weapons out of the country without a license.

They are similar in the overall picture, but entirely different, as I set forth in my statement, from the major activity that we were investigating in the northern district of Texas.

Mr. DENNIS. Thank you.

Thank you, Mr. Chairman.

Mr. EILBERG. But, Mr. Olson, in the *O'Gara* case, there was a connection with three of the Fort Worth Five in that case, as to possession of drivers' licenses. So there was some connection. Is that not correct?

Mr. OLSON. That is correct. It was stated in the indictment, the defendant in that case, O'Gara, used the identification of three of the Fort Worth Five in the purchase of three or four of the weapons involved in that indictment. But they were not named as conspirators, or any other way.

Mr. EILBERG. We thank you very much. We hope we have not made you feel too uncomfortable. We appreciate your cooperation.

[The prepared statement of Mr. Olson follows:]

STATEMENT OF A. WILLIAM OLSON, ASSISTANT ATTORNEY GENERAL,
INTERNAL SECURITY DIVISION, DEPARTMENT OF JUSTICE

Dear Mr. Chairman: I am appearing today in response to your invitation to the Attorney General, or an appropriate delegate of the Department of Justice, to appear before this Subcommittee to express the Department's views concerning House Resolutions 220 and 223. Both of these Resolutions relate to the pending grand jury investigation in the Northern District of Texas, before which Kenneth Tierney, Thomas Laffey, Mathias Reilly, Paschal Morahan, and Daniel Crawford had been summoned.

As I informed Chairman Rodino in my letter of March 7, 1973, I am pleased to appear for this purpose; however, as I noted, since this matter involves an ongoing investigation, I cannot discuss specific details of the investigation which are not already matters of public record. I am, of course, prohibited by Federal Criminal Rule 6(e) from disclosing, without the permission of the court, any matters occurring before the grand jury, or which have not heretofore been disclosed in the litigation growing out of the contempt proceedings against these five individuals. Nor am I at liberty to discuss any other information which has been obtained in the course of the Government's investigation of this matter which might prejudice potential defendants in any prosecution which might eventuate from this investigation. (See *Delaney v. United States*, 199 F. 2d 107 (1st Cir., 1952)). Within these strictures, I shall be pleased to afford the Subcommittee as much information as I can which may be useful to your consideration of the Resolutions of inquiry.

Before turning to the three specific questions in the Resolutions, I think it would be helpful if I briefly summarized for you the legal proceedings in this case to date.

The witnesses were subpoenaed on June 13, 1972, to appear on June 19 before a Federal Grand Jury investigating violations of Federal firearms statutes, the Organized Crime Control Act, and the Foreign Agents Registration Act. All appeared (Tierney on June 19; Daniel Crawford and Mathias Reilly on June 21; Thomas Laffey and Paschal Morahan on June 22), but each refused to answer any probative questions. Immunity was sought and granted for all five (Tierney on June 19; the others on June 27), but even upon their re-appearance, where they were frequently excused for consultation with their attorneys present in

Fort Worth to protect their rights, no meaningful testimony was forthcoming. The witnesses were brought again before the district court, and, following the indication of their continued refusal, all were held in contempt (Tierney was committed June 23; the others were committed July 3). All five immediately filed notices of appeal (Tierney on June 26; the others on July 5), to secure review, which by statute must be completed within thirty days.

The case was decided on the merits by the Court of Appeals on August 3, 1972, in an opinion according individual attention to all issues briefed and argued previously in chambers. The court determined that all rights of counsel had been adequately protected; that the witnesses had shown no sufficient possibility of foreign prosecution arising from their grand jury testimony; that the Government's obligations regarding electronic surveillance had been fully discharged; and that the grants of testimonial immunity were in each case properly requested, and properly granted following a hearing fully observant of the witness' due process rights.

Between September 23, 1972, and January 29, 1973, while their petition for certiorari was pending before the Supreme Court, the witnesses were at liberty on bail.

The Supreme Court denied their petition for a writ of certiorari to review the appellate decision on January 22, 1973. The witnesses surrendered to Federal custody on January 29, 1973, and are currently incarcerated in the Federal Correctional Institution at Seagoville, Texas, pending their agreement to testify.

I might observe that I know of no recent case in which the legal issues raised by the defendants have been given a more extensive and thorough review by the district and appellate courts. All of these issues have been decided by the courts in favor of the Government. I am certain you will agree, therefore, that it would serve no useful purpose here to discuss the legal issues which have already been judicially decided.

I believe that it is important, however, for me to note here that during the entire course of the litigation, both at the district court and appellate levels, neither these five individuals, nor their attorneys, ever raised the issue of whether the grand jury, sitting in the Northern District of Texas, had authority to conduct this investigation. No issue was raised as to whether the grand jury proceedings should have been in another judicial district. No argument was made that subpoenaing these witnesses from the New York City area to appear before the Texas grand jury imposed an undue hardship upon them. No contention was advanced that they did not possess information of relevance to the grand jury in its inquiry into violations of Federal laws occurring in the Northern District of Texas. At no time did the witnesses claim that they lacked any knowledge of the facts sought to be elicited from them.

On the contrary, the Findings of Fact and Conclusions of Law of the District Court, as well as the Opinion of the United States Court of Appeals for the Fifth Circuit, make quite clear that the witnesses' refusals to answer were in every instance based on asserted constitutional grounds. In its Opinion, filed August 3, 1972, the Court of Appeals took pains to note that:

"The facts of record disclose that appellants appeared before the grand jury in Fort Worth, Texas, in response to subpoenas. They are residents of New York and were accompanied by counsel upon their arrival in Fort Worth. Tierney was the first of the five appellants to be called before the grand jury. The pattern of his conduct before the grand jury and the general proceedings thereafter with respect to each appellant are similar to the extent that we may consider all as being in the same factual posture for the purpose of considering the issues presented by the appeals.

"Several questions were propounded to Tierney. The only one answered was as to the correctness of his name. Each question concerned a matter relevant to the investigation. They had to do with whether the witness (and this applies to each of appellants) had purchased firearms on certain dates and at certain places, whether they had used the driver's license of any other individual for the purpose of identification in purchasing firearms, whether their own driver's license had been loaned to others for that purpose, and whether they had any knowledge of any person or persons in this country who were engaged in the illegal purchase of weapons and explosives. Tierney sought permission to consult with attorneys before answering the questions and permission was granted or taken, depending on how one reads the transcript of the event. In either case,

after conferring with his attorneys, he refused to answer each question, claiming protection under the First, Fourth, Fifth, Sixth, and Ninth Amendments to the Constitution and the United States Code."

A more extensive exposition of the grand jury's interrogation of the witnesses and their responses is to be found in the Findings of Fact and Conclusions of Law and Judgment of the District Court filed on June 23, 1972. Like the Court of Appeals, the District Judge clearly states that the questions were not only relevant to the witnesses' knowledge of violations of law, but that they obstinately refused to furnish any information of any kind to assist the grand jury in its inquiry. I have previously furnished the staff of this Subcommittee with several copies of the District Court's Findings of Fact, Conclusions of Law and Judgment and I have brought with me enough copies of both this Judgment and the Circuit Court opinion for each member of this Subcommittee. I urge that each of you read them.

Turning now to the three specific questions in the Resolution :

The first question is: "The basis of the venue in the Northern District of Texas of the present grand jury investigation before which Kenneth Tierney, Thomas Laffey, Mathias Reilly, Paschal Morahan, and Daniel Crawford have been summoned."

The legal bases for venue are three: the Sixth Amendment to the Constitution; Rule 18 of the Federal Rules of Criminal Procedure; and Section 3237 of Title 18, United States Code.

The Sixth Amendment provides, among other things, that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district *wherein the crime shall have been committed*. Because there was evidence, as I shall point out in a moment, that criminal violations had occurred in the Northern District of Texas, venue for any prosecution which might result from the grand jury's inquiry would lie in that jurisdiction. The grand jury sitting in that district would, of course, be the proper forum to investigate such violations.

Federal Criminal Rule 18 states that "except as otherwise permitted by statute or these rules, prosecution shall be had in the district in which the offense is committed." And Section 3237 of Title 18, United States Code provides: "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was *begun, continued, or completed*."

Our information (at the time this grand jury was convened for this investigation) and these witnesses were subpoenaed, was that possible violations had occurred in the Northern District of Texas of Title I of the Gun Control Act of 1968 (18 U.S.C. § 921 *et seq.*) ; Title II of the Gun Control Act of 1968 (76 U.S.C. § 5861; Title XI of the Organized Crime Control Act of 1970 (18 U.S.C. § 842 *et seq.*) ; Foreign Agents Registration Act (22 U.S.C. § 611 *et seq.*) ; and conspiracy (18 U.S.C. § 371). Information in our possession which had been developed by the Bureau of Alcohol, Tobacco and Firearms of the Treasury Department indicated that certain individuals apparently from New York City, using aliases, were attempting, in Fort Worth, Texas, to purchase large numbers of illegal weapons *from sources in Mexico for shipment to Ireland*. We had reason to believe that the witnesses *subpoenaed before the grand jury in Fort Worth possessed relevant information concerning this investigation*. We had no reason to assume, if granted immunity from prosecution, that these witnesses would be recalcitrant and refuse to testify.

We were, of course, mindful of the considerable distance which these witnesses would be compelled to travel. However, as the Supreme Court pointed out in *Blair v. United States*, 250 U.S. 273 (1919) :

"... it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. (250 U.S. at 281). Cf. Also, *United States v. Bryan*, 339 U.S. 323 (1950)."

It is not, of course, unusual for witnesses before federal grand juries and in federal criminal cases, as well as before Congressional committees, to be re-

quired to travel from one part of the country to the other for the purpose of furnishing relevant testimony. As a matter of fact, for many years it has been commonplace for witnesses from different sections of the country to testify before a single grand jury in investigations of organized crime, tax violations, civil rights cases, antitrust cases, as well as internal security matters.

Congress, recognizing this fact, has sought to ameliorate the hardship by providing very adequate travel expenses and an ample allowance of \$36 per day for the witnesses' living expenses.

The second inquiry in the Resolution seeks: "A listing of any other districts in which the said grand jury investigation might have been conducted, together with the basis for each district."

In view of the information known to use at the time, *the most logical locus for the grand jury investigation was the Northern District of Texas*. It is possible that a grand jury investigation involving this same conspiracy could have been brought in either Florida or New York; however, the substantial activity known to us at that time took place in the Northern District of Texas. Subsequently, we have presented evidence to grand juries in other districts including New York and San Francisco concerning similar types of activity, as a result of which indictments were returned.

The third inquiry is "Whether the said grand jury investigation has been completed."

I can respond to this question with a categorical "no." There is no question that the Texas grand jury's investigation has been thwarted to a great extent by the refusal of these witnesses to testify. Notwithstanding, this investigation will continue and we are hopeful of summoning additional witnesses before the grand jury. I cannot predict at this time the outcome of the investigation, but charged as we are with the obligation of enforcing the laws which Congress has enacted, we are duty bound to exhaust every investigative effort before terminating the grand jury's inquiry.

In conclusion, I want you to know that I share the concern of this Subcommittee that no witness be harassed and I believe it appropriate for the Subcommittee to inquire into such allegations whenever they come to your attention. But I assure you that no witness in this case has been harassed, and that the ethnic or religious background of any person has not for a single moment been a consideration in this investigation. However, I am sure that you will agree that the violations which the grand jury has been looking into are matters of substantial concern to us all and we in the Department of Justice have a most serious obligation to see that the laws which you have enacted are vigorously, fairly and uniformly enforced.

Mr. EILBERG. Congressman Wolff of New York.

Congressman, you have done so much in this case you probably know more about it than any Member sitting up here. We welcome you here.

TESTIMONY OF HON. LESTER L. WOLFF, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. WOLFF. Thank you.

First of all, let me compliment you on calling this hearing because it has been extremely difficult to obtain any information from the Department of Justice. We have perhaps what they have suggested in the Middle East, proximity negotiations. We can't seem to get information relative to the Department of Justice activities except at a hearing such as this which you are conducting today.

Second, I should like to, before the Department of Justice leaves, refer them to *United States v. Kneff* and *Blair v. United States*, which says "that a witness cannot challenge the authority of a grand jury which has de facto existence and organization, and therefore has no status before the grand jury in challenges." That is in answer to the question posed by Ms. Holtzman.

So, therefore, the statement Justice makes "that there was no challenge made" has no validity and was not responsive in the resolution of inquiry in which I joined Mr. Carey and Mr. Delaney, Resolution 258.

Before commencing my statement, I would like to note for the record that I consider that the prior release of the Assistant Attorney General's statement by a member of the subcommittee to be a violation of the rules of the House that should not go unnoted. The release of a portion of the statement is a grievous violation of the custom of congressional committees.

It should be clear that the statements released are not to be deemed adequate fulfillment of the resolution's intent. Rather they are to be evaluated by the subcommittee or full committee in determining whether to report this resolution to the House.

I deeply question whether the testimony of the Justice Department is the last word on the inquiry. I do not consider the testimony of the Justice Department to be responsive.

I say this due to the fact that maybe in answer to Ms. Holtzman's question about Mexico, perhaps Justice is sensitive and there are reasons for them not to divulge facts about Mexico and its situs to the committee in response to its letter; there have been noted in the press recent stories of bank transactions in connection with the Watergate case that have not as well been revealed to congressional committees by the Justice Department.

While I reserve detailed comment on Mr. Olson's statement, even a cursory reading of the remarks indicates that they contain statements that do not contain full answers to the resolution of inquiry.

I would like to take some of the points made by Mr. Olson for a moment.

He said no issue was raised as to whether grand jury proceedings should have been in another judicial district. I want the subcommittee to understand that I, in a personal appearance before Mr. Kleindienst, as well as an appearance before the acting U.S. attorney for the northern district of Texas, made such representations.

The fact that no argument was made about subpoenaing these witnesses imposing an undue hardship is, to say the least, not responsive.

These people are working people. They don't have the funds to make available the ready transportation to Texas. In fact, Mrs. Laffey, who is the wife of my constituent, has since become pregnant and finds it very difficult to travel the distance to Washington no less to travel to Texas.

The Attorney General also said that the accused should enjoy the right to a speedy and public trial. I think that is what everyone wants, a speedy trial. If these people are guilty, they should be tried. They have that right guaranteed by the Constitution—the right to a speedy trial.

The mere fact that the Assistant Attorney General sat here and said it had been 6 months since the last witness had been brought before this grand jury is a travesty on their constitutional privileges and rights.

Now he alludes to possible violations that occurred in the northern district of Texas. He says: We had reason to believe the witnesses

subpenaed before the grand jury possessed relevant information. If he had reason to believe that, then bring them to trial. They certainly can be brought to trial. If guilty let them be punished for their actions. If not, they must be freed.

I had intended to hold my testimony, as you had admonished previous witnesses, to the resolution itself, but so many extraneous facts have been brought to bear, I think these things should be answered.

In fact, I think the Assistant Attorney General had the temerity to say, on page 11, that Congress, recognizing hardship sought to ameliorate the hardship by providing travel allowances and \$36 a day to witnesses.

These people have not ever received the \$36 a day. They are still in jail. I think they should bring an action to get this \$36 a day. Mrs. Laffey cannot afford to live in her own home today under the circumstances because she refuses to go on welfare.

So, some of the statements made by the Assistant Attorney General have certainly not been responsive and require direct answers requested in the resolution of inquiry.

I would also say that I should like to ask unanimous consent that the Members who have testified before should have the opportunity to respond to the testimony of Mr. Olson, since they responded before they were aware that Mr. Olson was going to testify.

Mr. EILBERG. We will have to take that under advisement.

Mr. WOLFF. I would like to say for the record that I am currently drafting legislation that would amend 18 U.S.C. 26 so that the situation we have now could be avoided in the future. In this case I have asked the Department of State to provide me with all information they may have regarding representations that have been made to the effect that the British Government was the instigator of the grand jury probe.

Since last summer I have been speaking on the House floor on the rights of Mr. Laffey. He lives in my district. He is currently incarcerated in Seagoville, Tex.

The record of my involvement in this case has been quite precise. I have never stated nor implied that any or all of the so-called Fort Worth Five were guilty or innocent. I do not condone violence or those who support it. Rather, I have protested the handling of this investigation, because I felt that these men were being treated with less consideration than even convicted Federal criminals, when they had not been and are not now charged with any crime. They are in jail only for their refusal to answer certain questions of the Federal grand jury in the northern district of Texas.

I might add that no sponsors of El-Fatah who are involved with the death of two of our foreign diplomats are being questioned by grand juries.

As I have indicated, my involvement in this matter stems directly from the constituent-representative relationship that serves as the basis for so much of our work in Congress. Last July, Mrs. Eileen Laffey asked me if I could visit her husband in Fort Worth to see if he was being properly treated.

I agreed to undertake this trip if I would receive the necessary clearance from the Department of Justice. My original request for permis-

sion to visit Mr. Laffey was denied, and I was also denied as a member of the Foreign Affairs Committee to visit the Longkesh prisoner camp in Northern Ireland. I had to use a cover name to get into Longkesh.

I did not have to use a name like that to get into the Fort Worth County Jail. It was only after I spoke in the House Chamber that I received a very apologetic follow-on call from the Department saying that they would really have no objection to my meeting with my constituent, particularly since he was a Federal prisoner.

It is custom and practice that any Member of Congress has a right to visit any constituent in a house of detention.

Another aspect of my dealings with the Department of Justice in this case revolved around an "off-the-record" congressional briefing which I had scheduled last fall between a group of approximately 15 of our colleagues and the Chief of the Justice Department's Internal Security Division, Mr. A. William Olson.

This meeting which was to have provided us with some background material on the investigation in question was canceled only about 10 minutes before the meeting was to be held. As a matter of fact, Mr. Delaney was just coming into my office as I finished my phone conversation with Mr. Olson, who told me that the Department could not make the meeting.

Very simply, Mr. Chairman, I attempted to secure the type of information requested in the resolution of inquiry in a private, confidential, and direct meeting with officials of the Justice Department. Unfortunately, this exchange did not take place.

Instead, inasmuch as the very important and, I must say, perplexing questions surrounding this investigation remain unanswered, I joined in introducing House Resolution 258 which would require the Department of Justice to provide us with the information that we requested several months ago.

The information that we want is, I feel, both very specific and very available. As I understand it, there were some 13 witnesses subpoenaed to appear before the Fort Worth grand jury as part of this particular investigation.

Twelve of the thirteen witnesses were residents of the Metropolitan New York area. Therefore, it is logical for us to inquire as to why the grand jury was impaneled in the northern district of Texas as well as to investigate in what other districts the grand jury's probe took place.

I feel it is almost unnecessary to point out that the fact that all of the men named in this resolution are of Irish extraction and that the investigation reportedly concerns alleged gunrunning activities in connection with the current violence in the north of Ireland would make such a grand jury inquiry in New York a cause celebre while it would receive relatively little notice in Texas.

If the Justice Department's record of the determination of venue in this inquiry were finally made available to us, we might be able to answer to our own satisfaction, and that of our constituents, this very nagging question.

There are serious questions created by the Congresswoman from New York, Ms. Holtzman, serious questions as to why the investigation has been halted of the seven men from Texas who were supposed to testify.

Furthermore, I believe it essential that we be informed as to whether the investigation has finally been completed. It obviously has been held in limbo.

Mr. Chairman, when I visited Fort Worth last July and spoke with the acting U.S. attorney for the northern district of Texas, he told me in no uncertain terms that he was engaged in a large number of investigations. I feel sure that this grand jury has heard and will be hearing many cases other than the one in question. I wonder if this would continue in progress had it not been for the resolution of inquiry presented before this subcommittee.

For this reason I must wonder why these five men are still in jail. The law provides for incarceration in order to induce recalcitrant witnesses to answer the grand jury's questions. Clearly, this provision is meaningful only if the investigation is in progress, or if there is some expectation that the information will be forthcoming.

I feel that if there is no prospect for the grand jury continuing its inquiry into this case, these men should be freed. Their continued incarceration for the life of the grand jury, rather than the life of the investigation, would be merely the result of the pique of the judge involved in the contempt ruling.

In summary, Mr. Chairman, five men continue to sit in jail, without bail, and without being charged with any crime, because of their failure to answer certain questions. Meanwhile, as their elected representatives, we find it difficult to get the answers to our questions about why they continue to be held as prisoners.

I strongly urge the subcommittee either to get the information from the Justice Department or to report this resolution to the full committee favorably so that the Department of Justice will be required to provide us with the information that we are seeking.

I believe that this material will be crucial not only to a better understanding of this particular case, but may also be invaluable in assisting us as we reevaluate and reexamine the operation of the grand jury system in this country. It seems to me that this clearly falls within our oversight function.

I thank you for the opportunity of appearing before you.

Mr. EILBERG. Congressman Wolff, we want to congratulate you on a very fine statement. It is so clear that I have polled the members of the subcommittee and they don't have any questions of you. Your position is very clear.

Mr. WOLFF. I had hoped I would make everything perfectly clear.

Mr. EILBERG. Thank you.

[The prepared statement of Hon. Lester L. Wolff follows:]

STATEMENT OF HON. LESTER L. WOLFF, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF NEW YORK

Mr. Chairman, I am delighted to have this opportunity to address your distinguished Subcommittee and I am gratified that the Subcommittee is looking into this important matter. I will limit my remarks, Mr. Chairman, to the thrust of H. Res. 258. However, I would like to point out for the record that I am currently drafting legislation to amend 18 U.S.C. § 1826, so that this type of situation might be prevented in the future. I might also point out that in connection with this case, I have asked the Department of State to provide me with any and all information that it may have regarding the alleged representations of the British Government in the instigation of the grand jury probe.

Since last summer I have been speaking out on the House floor on behalf of the basic rights of a constituent of mine, Mr. Thomas Laffey of Williston Park, New York, who is named in this resolution of inquiry and who is currently incarcerated under the above-cited statute in the Federal Correctional Institution in Seagoville, Texas. The record of my involvement in this case has been quite precise—I have never stated nor implied that any or all of the so-called Fort Worth Five were innocent or guilty. Rather, I have protested the handling of this investigation because I felt that these men were being treated with less consideration than even convicted federal criminals, when they had not been and are not now charged with any crime. They are in jail only for their refusal to answer certain questions of the federal grand jury in the Northern District of Texas.

As I have indicated, my involvement in this matter stems directly from the constituent-representative relationship that serves as the basis for so much of our work in Congress. Last July, Mrs. Eileen Laffey asked me if I could visit her husband in Fort Worth to see if he was being properly treated. I agreed to undertake this trip if I would receive the necessary clearance from the Department of Justice. My original request for permission to visit Mr. Laffey was denied and it was only after I spoke in the House chamber that I received a very apologetic follow-on call from the Department saying that they would really have no objection to my meeting with my constituent, particularly since he was a federal prisoner.

Another aspect of my dealings with the Department of Justice in this case revolved around an "off-the-record" Congressional briefing which I had scheduled last fall between a group of approximately fifteen of our colleagues and the chief of the Justice Department's Internal Security Division, Mr. A. William Olson. This meeting which was to have provided us with some background material on the investigation in question was cancelled only about 10 minutes before the meeting was to be held. As a matter of fact, Mr. Delaney was just coming into my office as I finished my phone conversation with Mr. Olson.

Very simply, Mr. Chairman, I attempted to secure the type of information requested in the resolution of inquiry in a private, confidential, and direct meeting with officials of the Justice Department. Unfortunately this exchange, did not take place. Instead, inasmuch as the very important and, I must say, perplexing questions surrounding this investigation remain unanswered, I joined in introducing H. Res. 258 which would require the Department of Justice to provide us with the information that we requested several months ago.

The information that we want is, I feel, both very specific and very available. As I understand it, there were some 13 witnesses subpoenaed to appear before the Fort Worth grand jury as part of this particular investigation. Twelve of the thirteen witnesses were residents of the Metropolitan New York area. Therefore, it is logical for use to inquire as to why the grand jury was impelled in the Northern District of Texas as well as to investigate in what other districts the grand jury's probe took place. I feel it is almost unnecessary to point out that the fact that all of the men named in this resolution are of Irish extraction and that the investigation reportedly concerns alleged gun-running activities in connection with the current violence in the North of Ireland would make such a grand jury inquiry in New York a cause celebre while it would receive relatively little notice in Texas. If the Justice Department's record of the determination of venue in this inquiry were finally made available to us, we might be able to answer to our own satisfaction, and that of our constituents, this very nagging question.

Furthermore, I believe it essential that we be informed as to whether the investigation has been completed or when it is expected to be completed. Mr. Chairman, when I visited Fort Worth last July and spoke with the Acting U.S. Attorney for the Northern District of Texas, he told me in no uncertain terms that he was engaged in a large number of investigations. I feel sure that this grand jury has heard and will be hearing many cases other than the one in question. For this reason, I must wonder why these five men are still in jail. The law provides for incarceration in order to induce recalcitrant witnesses to answer the grand jury's questions. Clearly, this provision is meaningful only if the investigation is in progress, or if there is some expectation that the information will be forthcoming. I feel that if there is no prospect for the grand jury continuing its inquiry into this case, these men should be freed. Their continued incarceration for the life of the grand jury, rather than the life of the investiga-

tion, would be merely the result of the pique of the judge involved in the contempt ruling.

In summary, Mr. Chairman, five men continue to sit in jail, without bail, and without being charged with any crime, because of their failure to answer certain questions. Meanwhile, as their elected representatives, we find it difficult to get the answers to our questions about why they continue to be held as prisoners. I strongly urge the Subcommittee either to get the information from the Justice Department or to report this resolution to the full Committee favorably so that the Department of Justice will be required to provide us with the information that we are seeking. I believe that this material will be crucial not only to a better understanding of this particular case, but may also be invaluable in assisting us as we reevaluate and reexamine the operation of the grand jury system in this country. It seems to me that this clearly falls within our oversight function. Thank you.

Mr. EILBERG. Our next witness is Congressman Carey of New York, who has been deeply concerned with this subject.

I hope, Mr. Carey, that you have had an opportunity to get a copy of the Assistant Attorney General's statement since you all have been waiting for that with bated breath. I hope you can give us your observations on this.

TESTIMONY OF HON. HUGH L. CAREY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. CAREY. Thank you, Mr. Chairman.

I shall be very brief, as the hour would seem to indicate, and ask that my statement in support of H. Res. 258 and kindred resolutions be placed in the record.

Mr. EILBERG. Without objection, the statement will be made part of the record.

[The statement referred to is at p. 96.]

Mr. CAREY. I commend the subcommittee for its prompt attention to these resolutions. I believe it has achieved largely what we set out to accomplish in that the Justice Department has responded. I am satisfied with the earnest nature of their response.

I have some questions:

I would like to know, as an American and a New Yorker, what reason the Justice Department had to believe that these witnesses, procured from my jurisdiction to a Texas grand jury, were relevant and necessary to the prosecution of this case? I am not satisfied that I have that information yet.

I question the judgment of the Department in calling these witnesses that distance. My concern here as an American and as an attorney is that it would appear that the Justice Department doesn't have the kind of a case to prosecute in Texas absent testimony that would amount to self-incrimination by these witnesses.

Again, my area of principal concern again is that witnesses called before a grand jury in an inconvenient forum are not cloaked with the protections we devise for defendants. Yet, these witnesses are possibly worse off than any criminal defendants could be.

They are incarcerated for unlimited terms, subject only to the possible expiration of the grand jury. They could not invoke certain defenses that criminal defendants can, such as questioning the forum and asking time for counsel and having access to counsel.

We note in Mr. Olson's statement that the subpoenas were issued on the 15th, and the men were required to be there on the 19th. That would not give me time were I a defendant, to meet with counsel and be properly advised.

I think in this committee's function of enlarging on the areas being examined in the code of evidence, the protection of the press under the first amendment, the very helpful pursuit in which you are engaged in the terms of the procedural safeguards with which we in Congress are concerned for all Americans in the criminal process area, that this work you are engaged in today is most rewarding.

I say this because we know that these particular defendants are part of a national and emotional issue which is of great concern to Americans of all nationalities, ethnic origins, et cetera, because it involves a great injustice far away from these shores.

But I think we need to point out that there may be many witnesses who are not part of the Irish group in this country or any other nationally known and recognized element. I wonder how their rights as witnesses are being attended when a great arm of our Government, the Department of Justice, subpoenas them to a jurisdiction far away from their homes.

I think you have touched upon a matter of great consequence to the Congress: Have we sufficient guidelines, procedural regulations, if you will, or statutes if need be, to attend the rights of witnesses called before grand juries in strange environs of our country, and are they really in keeping with the protections we mean to give in criminal prosecution to witnesses? And the persons we speak of in these hearings, the five in Fort Worth, as far as the basic contraband shipment statute regarding arms to another nation is concerned, they are still innocent persons but are not being treated as such.

I think that my final concern is that, having been drawn down there and now suffering from sentences imposed for civil contempt, the time is ripe for the subcommittee to look at the question of civil contempt being imposed upon a witness from a far-removed jurisdiction before a court—and being in contempt of that court in another jurisdiction.

Perhaps a trial in that court would better be had in a home jurisdiction, even though the offense is found in the northern district of Texas. I think once a contempt is found perhaps the trial on that issue would be better had in the forum of the witness' jurisdiction.

I hope the committee will try to find out who in the Justice Department gave them reason to believe that the witnesses who were summoned before the grand jury in Fort Worth had any relative information.

If the case in Fort Worth is so weak that it can only be perfected by self-incriminating statements from these witnesses, that is indeed a weak case for the Justice Department to present to a court. It may call our attention to a lot of improper advocacy in building a case.

I think the committee has done a fine job. I welcome the opportunity to appear before it. I don't want to be repetitious because so much has been covered in the record.

I am satisfied that we can improve the law, given the very great expertise in this field that I find on this great committee.

Mr. EILBERG. Congressman Carey, I want to thank you on behalf of the committee for your statement.

I would like to observe that this hearing, as far as this member is concerned, is a forerunner to a study of the grand jury system, including legislation such as that Congresswoman Bella Abzug has suggested concerning *forum non conveniens*.

I am sure all of us have done considerable reading and I for one, as a lawyer, was unaware of how the grand jury evolved and is now practically a tool of the prosecution and is not a body in and for the people, so to speak. It seems to me there is obvious need for legislation in the field.

Much of what you said addresses itself to the system we have, this being a prime example of the inadequacies of the system.

Any questions?

Mr. DENNIS. I have one question. As you say, Mr. Carey, the Justice Department has now given a response. You have indicated you would like a more detailed response, and that is certainly very understandable. But there is just one thing that gives me concern there. I think it might also give you concern:

Would it not be quite possible that if here in this hearing we would go into all the details and all the facts as to why this venue was brought in the northern district of Texas, that at the same time we would almost necessarily disclose the very matters as to which these five people who claim privilege have refused to answer and in which they are most interested in maintaining secrecy, as well perhaps as the constitutional rights of others who may be involved?

It seems to me if we get into the factual basis in great detail, we may go down that road.

Mr. CAREY. I have the feeling that justice would best be served both for the Government and the defendants here if all of the matters the Justice Department had in evidence and all it can speculate and all it seems to believe were put into the record as soon as possible, because I think there has been a dilatory factor here. This has been going on since last June.

Normally when a prosecutor has a case ready for presentation to the grand jury, the witness proceedings go on very expeditiously. If there are some witnesses hiding somewhere whose testimony will rely on corroboration from something these defendants know, I am curious about that.

Frankly, my idea is that the Justice Department has its hands on what we would call in Brooklyn a "hot potato." I don't think it knows how to deal with it. I think it is waiting with great anxiety for the grand jury to terminate and that will be the end of this case and all we may ever hear about it again. That is my opinion.

Mr. DENNIS. That is your opinion, and you may or may not be right. But it seems to me it is possible here—and I call your attention to the fact that these gentlemen have never claimed a lack of knowledge—they have asserted other things but they have never claimed a lack of knowledge—It seems to me it is possible that if we spread on the record all the facts the Government relied upon in establishing the venue, it seems to me that whereas the court has said that they are protected from the Government of Great Britain, we may thereby

be handing that Government everything it wants in order to handle this case.

Mr. CAREY. I am thankful that the Justice Department is protecting the Irish militants from the tentacles of British law. I wish I were better convinced of that.

Let me suggest that if the knowledge in the minds of these five witnesses-defendants in Fort Worth is that insurrection and terrorism are going on in Northern Ireland, and people on both sides were parties in trying to assist in alleviating that condition, there may be 1 million potential witnesses marching up Fifth Avenue in New York this Saturday, all of whom have the same amount of knowledge as these men. That is what I think is the extent of their knowledge.

Mr. DENNIS. Thank you.

Mr. EILBERG. Thank you.

[The prepared statement of Hon. Hugh L. Carey follows:]

STATEMENT OF HON. HUGH L. CAREY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

I appear today in support of my resolution, H. Res. 258, to instruct the Department of Justice to furnish the House of Representatives with such facts as are set forth in the resolution. I urge action in this Committee on such a resolution in aid of legislation in the Federal field of criminal justice. Currently, this great Committee is reviewing, line by line, such matters as the new code of evidence, and will in all likelihood be exploring the powers of the executive branch, the first amendment rights of the press, etc.

In addition, I feel that this is a proper matter for this Committee by reason of the facts in the case of the prosecution of the Fort Worth Five. On the surface there appears to be capricious or perhaps even guileful misuse of the choice of venue in the U.S. code, not only in this case but in others as well; for example, the Berrigan trial, the Leslie Bacon case and perhaps even Watergate. It might well be said that the Justice Department has embarked on a process of "venue shopping" with little or no regard for the rights of defendants' convenience, counsel or, indeed, a forum of their peers. As a matter of fact, if this process is not checked, it is possible that a resident of my District will have to appear before a jury in Alaska, Hawaii or perhaps even Guam. I believe this to be a blatant disregard of the safeguards so carefully written into the Constitution.

I would be the last to pass unfair or rash judgment upon the Department of Justice. In order that I not be called upon to do so, let the Department of Justice set forth the facts as called for in this resolution.

As a New York Representative in Congress, I have a right to know why my neighbors are charged in Texas when the allegations, as they have been made public, suggest that all alleged conspiracy was based in Westchester County, New York. Are they in Texas because Texas has so few Irish militants? Could there be any substance to the implications that this case is being tried with Texas delicacy as an accommodation to the British Home Office? Is the State Department instructing the Justice Department in its choice of venue?

The Members of Congress and those imprisoned deserve answers to questions fairly addressed, as they are in this resolution. Without question, under the Sixth Amendment, the Federal Government is required to prosecute crimes before an impartial jury within the state or district wherein the crime was committed. The question for this Committee is: May the government ignore that right and try the case wherever it chooses without good and sufficient reason?

When our Bill of Rights was written, our Founding Fathers were all too familiar with the Crown's practice of transporting colonial offenders to Canada or Great Britain. In light of that experience, it would seem fair and reasonable that the place of venue be no more than a reasonable distance from the home of the defendants in a case where five defendants their counsel and their families' rights of visitation are involved.

To allow continuance is to give to the already massive power of Federal prosecution a device which could be as venal in its use as any of those used by King George on the colonists. I would remind this panel that it was Lord Mountjoy,

head of the Commission to determine why it was that America was born and that England lost a great colony in the New World, who stated to the Parliament of Great Britain his conclusion that "We have lost America through the Irish." What a pity it would be if we forget our debt to the Irish and clap them into a Texas jail to rot away as our forefathers did in the hulls of British prison ships.

All we seek for these men is a fair and equitable trial on the alleged charges within a reasonable distance from their home so that they may have counsel of their choice and access to their families and loved ones.

Mr. EILBERG. Our next witness is Congressman Peyser from New York, who has been involved in this case for a long time. He also went to Fort Worth and was involved in having the witnesses transferred from the Fort Worth County Jail to the Federal correctional institution at Seagoville.

Congressman Peter Peyser of New York.

TESTIMONY OF HON. PETER A. PEYSER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. PEYSER. Thank you.

I congratulate the members of this committee.

Due to the hour, I would like to have my written statement put into the record and make a couple of statements in addition to that.

Mr. EILBERG. It is so ordered.

[The statement referred to is at p. 100.]

Mr. PEYSER. Perhaps I can make one statement.

Mr. Dennis has been asking one question, and at least I can give him a part of a statement that was given to me in relation to it.

I first got into this case when the members of this group, Ken Tierney, wrote me a joint letter from the Tarrant County Jail.

Two of these men happen to be constituents of mine. They asked me for help. I did not know a great deal about the case. I certainly did not know these men at all.

I decided the only way I would have any insight into what was happening, and before I was willing to automatically write some letters saying, "Let's help these men," was for me to go to Fort Worth.

I called the Justice Department. They were most cooperative in arranging for me to see all five of these individuals.

I flew down to Fort Worth. I spent a couple of hours talking with these men, individually, and then collectively.

One, I was impressed with the fact that these were five average men with families and jobs. These are no terrorists or men who would run around with weapons in their hands. They are normal, average men who were concerned with their families, jobs, and the hope of getting home.

I asked them a couple of questions. I asked them whether they had been in Texas before, or communicated with anybody in Texas or had had any relationship with anybody in Texas. They indicated flatly that they had never had any such relationships.

I told them I was going to be very frank with them, if they were involved in any illegal activity, that I would not be taking part in their support. They said it is good for me to know the details of their case.

I said, "Have you been involved in any activity that you can relate to being illegal activity as you understand the law?" And I said specifically also anything dealing with the acquisition or shipping of guns or anything of this nature.

Each one of them told me they absolutely had not, that they had never been involved in any such activity that they had collected moneys for clothing for Irish relief and they have participated in selling tickets for some Irish programs, but that was the full extent of it.

So I felt that I should pursue their case, and I have actively pursued it with the Justice Department.

We have made certain progress at certain times. These men were out of jail, and the Supreme Court ruling of course put them back into jail.

We have requested a change of prisons. After much discussion, they were moved to the Federal penitentiary outside of Dallas, Tex.

I know there has been so much testimony today and so much said that I don't want to go over it at this time. However, it would seem to me that after reviewing what has been said today, your subcommittee might want to reach the decision of making the request of the Justice Department that these men are transferred to the Federal penitentiary closer to their homes; possibly in Danbury, Conn. After all, if they are in a Federal prison, which they are at this time, it would seem to me that with the request of this committee and other members that the Justice Department might be willing to have them at least transferred closer to home.

This, however, doesn't speak to the major problems involved here, but at least it would bring relief to these men's families, and I think it would be a step forward until the final legal decisions can be made.

As you gentlemen know, I am not an attorney, so I am not about to enter into any great legal discourse on this subject.

I think from a human point of view, this is the kind of action we can take, then it would have to proceed through the channels from there.

That is all I would like to say at this time. I appreciate the opportunity.

Mr. EILBERG. We are very grateful to you.

I would first like to inquire whether you have had an opportunity to study the Assistant Attorney General's statement and if you have any observations?

Mr. PEYSER. Mr. Chairman, I just had the opportunity of scanning it about 5 minutes ago.

I don't feel that I could make any comment at this time. I have not had the opportunity today of looking at it, but I intend to read it.

Mr. EILBERG. May I suggest when you do, if you have any further reaction, we will be more than happy to get some expression on it.

We have not decided to have any further hearings on this question. But we would certainly like to have any written or other communication from you.

Mr. PEYSER. I appreciate that and will take advantage of it.

Mr. EILBERG. Also, there has been some concern and anxiety about the propriety of this particular hearing.

You are the last witness of the day, and I will ask you if you think this was a fair hearing today?

Mr. PEYSER. Yes, sir. I spent several hours here today. I think the hearing has been conducted fairly and stayed to the main topic.

I would like to congratulate the chairman and the committee for keeping it here today.

Mr. EILBERG. Do you feel this has been a political show as far as the chairman or otherwise has been concerned?

Mr. PEYSER. No, I certainly don't. I think it has been fairly done. At least during the time I have been here today I don't think there has been any area of politics on the Republican or Democratic side playing a part in this hearing.

Mr. EILBERG. Do you think we stuck basically to the legal questions of venue involved in the resolutions offered?

Mr. PEYSER. I think during the time I have been here today that has certainly been the case.

Mr. EILBERG. Mr. Keating?

Mr. KEATING. I don't have any questions really of Congressman Peyser.

I recognize that out of the Fort Worth Five I believe you said two were constituents of yours. I can certainly understand your sympathetic attitude towards their position. I think also we recognize from some of our questions that they have exhausted all legal remedies.

The questions come up, too, what duties and responsibilities all of us have as citizens to testify before grand juries.

These are certainly some of the things we have to consider before us.

I think anytime that a Congressman such as yourself extends himself on behalf of his constituents the way you have, he is to be congratulated. It certainly shows a great deal of concern to travel to Texas, which is quite a distance, in their interest.

For that I congratulate you.

I think the issues are complex and complicated, which is indicated by the questions that I and some other members have asked. I think it becomes a question of exhausting legal remedies and also a question of what duties we do have as citizens.

These people can purge themselves at any point, but it is not always quite that simple.

I do commend you for the efforts you have made.

Mr. PEYSER. Thank you.

Mr. EILBERG. Mr. Dennis?

Mr. DENNIS. After the individuals had spoken to you and denied any connection with the State of Texas, and so forth, did they offer any explanation to you as to why in that event they refused to answer on the ground that it might tend to incriminate them?

Mr. PEYSER. Yes, they did. I appreciate your asking that question, because I probably should have brought it out in my own testimony.

I asked that question. It seems like a very logical one to ask. Their concern was, as they expressed it to me at that time, that having no real involvement that they saw in any illegal activity, that other people they knew, and they were in effect being asked to name names of other

people perhaps involved in similar activities such as they had been, which had been raising some funds for Ireland, clothing for the children and this type of thing, would then be subject to exactly the same situation that they were subject to.

They seemed to feel very strongly that if they were to name somebody who was also on one of their fund drives, that they would be subpoenaed just this way and they would be changing places with them.

I think they felt very strongly that they did not want to do that. This was the reason they gave me for not answering any questions, naming names, which was my understanding in talking with them as to what was being sought.

MR. DENNIS. That was their basis, as given to you, for invoking the fifth amendment, is that correct?

MR. PEYSER. Yes. In the Irish community, and, incidentally, there is a substantial Irish community in my area and in New York City, in many ways they are close-knit in their interests, I think their feeling was that they might be betraying some other member, not in any illegal sense, but they would be giving names of, as one example, lottery tickets sold for an Irish cause and these people might be subject to exactly what they were being subjected to.

That was what they indicated to me.

MR. DENNIS. They didn't indicate to you any thought on their part that as citizens of this country they had any duty to cooperate with the grand jury as a process of justice?

MR. PEYSER. They all expressed a loyalty to this country to me, but they felt that they just didn't want to jeopardize other people the same as they felt they were being held in jeopardy by their situation.

MR. DENNIS. I thank you, sir. I do congratulate you on working hard for your constituents.

MR. PEYSER. Thank you.

[The prepared statement of Hon. Peter A. Peyser follows:]

STATEMENT OF HON. PETER A. PEYSER, A REPRESENTATIVE IN CONGRESS FROM
THE STATE OF NEW YORK

MR. Chairman: I am pleased to appear today on behalf of my constituents. It is my belief that they are entitled to a full hearing to clear up many of the intricate and frankly confusing aspects of this mysterious case.

I am not certain that I understand why my constituents were required to travel all the way to Texas to give a grand jury information, when the exact same proceedings could have taken place in New York. This distresses me greatly. They are, and have been, separated from their families and friends, incarcerated in a state where they had never, based on their testimony to me personally, never set foot in their lives, nor have had any correspondence or dealings with anyone from Texas. To date, no criminal charges have been brought against them. Certainly this is not consistent with our traditional concepts of justice. It is my hope that this subcommittee will begin to untangle the intricate legal web that is serving to obscure what should be the central question in this case: Does the Federal Government have any evidence that these men have violated Federal law. If it does, let the Government bring them to trial. If these men are guilty of any crime against our government, then I have no further interest in trying to defend their situation. But the men do deserve the right to a quick and fair trial.

At the moment, we have the worst possible situation which our laws permit. Five men are in a jail thousands of miles from their homes, their families and

their friends, and they are not indicted on any charges. I have met with the wives and families of these men in my home. These are honest people who are bewildered by the action that we as a government are taking against these men.

I cannot see how justice is being served in this case. The hardships which have been imposed upon these men are extremely significant. Just imagine if anyone in this room was forced to defend themselves in this type of situation. The cost and burden of having your own attorney with you during all these proceedings would be enormous. Yet they have endured this now for six months. I am pleased, though, that I can report that after serving six months in the Tarrant County Jail, the men have been transferred, at my request and insistence, to the Federal Jail in Dallas. This is one burden that has been mitigated.

It is imperative, in my opinion, that this subcommittee establish the answer to just exactly why this venue was granted, and under what circumstances any citizen could be subject to the same procedure. The subcommittee should also determine the nature and extent of any evidence which the government may have against these men, and, if there is evidence, why the government has not brought the men to trial.

As my constituents, these men look to their Congressmen for assistance. I want to be able to tell them that the Congress is concerned about their plight, and is taking action to see that they are not harassed, but are rather afforded their complete constitutional safeguards.

Mr. EILBERG. Thank you, Mr. Peyser.

The hearing is now adjourned.

[Whereupon, at 4:28 p.m., the hearing was adjourned.]

ADDITIONAL STATEMENTS

STATEMENT OF HON. JAMES J. DELANEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman, I am glad to have this opportunity to speak in strong support of H. Res. 258, a measure I sponsored, which calls on the Attorney General to furnish the House of Representatives a complete record of the reason for imprisoning five Irish-Americans from the New York area in Texas.

The individuals concerned are under suspicion of having been involved in furnishing arms to factions in Northern Ireland. However, the government has made known no evidence that might support an indictment.

The Justice Department has had sufficient time to act in this case. In the event there is sufficient evidence to hold these men—although such evidence is not now publicly known—they are entitled to reasonable bail, and to be held at a place nearer their homes.

If evidence can not support their retention, they should be immediately released.

Mr. Chairman, I am shocked at the arbitrary and high-handed methods used in this case.

Last year, these men were imprisoned without bail for several months in an area far remote from their residences and loved ones. Later, grossly excessive bail of \$100,000 was set for each of them. Finally, they were temporarily released on bail ranging from \$5 thousand to \$15 thousand.

I am greatly concerned that our government might have chosen sides with respect to the distressing conflict in Northern Ireland, and given at least tacit support to the predominant faction.

These men are in America. They are entitled to the full protection of their rights.

The imposition of excessive bail, incarceration in remote areas of the country, and cruel and unusual punishment to extract confessions are violations of the letter and spirit of our Constitution.

As far distant in time and place as this situation is from the cruelty and barbarism of Nazi and Soviet concentration camps, the case of these Irish Americans serves as a chilling reminder that totalitarian ideas can take root in our own country.

It is imperative that we make every effort to assure the protection of the rights of all our citizens. If the rights of some are allowed to be trampled, the rights of all our in jeopardy.

Therefore, Mr. Chairman, it is vital that the Congress be provided a complete report on this situation, and I strongly urge that this legislation be reported out as quickly as possible.

STATEMENT OF HON. BENJAMIN A. GILMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman: From the beginning of my concern in the case of Kenneth Tierney et al. vs. the United States, dating from the end of January, 1973, I have endeavored to maintain complete objectivity. At no time have preconceptions as to the guilt or innocence of the "Fort Worth Five" motivated my efforts on behalf of my constituent, Mr. Matthias Reilly.

The entire thrust of my concern has been, and is now, with the Department of Justice's resolve that these five men be incarcerated such a long distance from their families, their loved ones, and their lawyers.

I have written Attorney General Richard Kleindienst, urging the Department of Justice "to move with rapidity and dispatch to dispose of this matter" and that "these men be transferred to an institution in closer proximity to their homes, in order to permit family visitation and consultation."

In a letter of February 15, 1973 to Assistant Attorney General Olsen I reiterated my request. More recently, I have been in correspondence with Judge Leo Brewster, United States District Court, Northern District of Texas, expressing concern over reports that the men in question had been refused the right to exercise and to make telephone calls to their families and counsel.

These five men have now been transferred to the Federal Correctional Institution at Seagoville, Texas, but they are still being detained far from their homes. Recent indictments handed down by a Federal Grand Jury in the Southern District of New York give greater credibility to the contentions of my colleagues and myself that these men be transferred to an institution in New York State.

House Resolution 220 calls for answers to the questions I have been addressing to the Justice Department. In the hope that the question of venue might finally be resolved, I join my colleagues in support of this resolution of inquiry.

STATEMENT OF HON. HENRY B. GONZALES, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF TEXAS

Mr. Chairman: When you look at the situation in which the group of persons known as the "Fort Worth Five" find themselves in, and have been in, since June of 1972, I don't think you can help but wonder what is wrong with our system of justice.

We find that five individuals from New York City are hauled down to Fort Worth, Texas, before a "Special Grand Jury," placed in the local jail with practically no privileges, without bail (except for a short-term release forced by the Supreme Court) and with no charges or trial even in sight. The entire picture is disconcerting, but the question of venue and forum becomes particularly acute in view that a "regular" grand jury has convened right in the State of New York and handed down indictments on the very same question of alleged gun-running-to-Ireland conspiracy.

The injustice becomes clear when you consider the difference in treatment these same persons would receive if they had been brought before the regular grand jury in New York. To begin with, they would not be halfway across the country away from their families and friends. But besides having a more convenient forum, they would have received the benefit of the safeguards available under our traditional notions of jurisprudence. The grand jury would be charged with specific duties and would have to decide whether or not they should be indicted for having committed a crime or for being in the process of committing a crime. And, then, a trial with all the due process requirements of our constitutional government would be made available.

What, one may ask, is the Justice Department doing subjecting these five persons to the mercy of a far-away jurisdiction for almost a year, under a system which provides none of the traditional safeguards?

The resolution which Congresswoman Abzug and others have proposed would ask this very basic question to the Justice Department which has unlimited discretion and nationwide jurisdiction on convening such "special" grand juries. It seems to me it would be quite interesting to see what facts the Justice Department took into account in choosing the Texas Forum for these five New Yorkers. I am sure one might be able to determine whether there was an abuse of discretion; but more than that, it would allow the Congress to see what criteria are used to determine the forum. I, therefore, believe that the resolution of inquiry on the "Fort Worth Five" would be quite appropriate.

But, the problem is not limited to these particular individuals in this case, because I am aware of at least eleven more situations which amount to nothing short of "political trials" under the auspices of "special" grand jury investigations.

The root of the problem is the enabling legislation for the establishment of these new creatures called special grand juries in much the same consistency as "putty." Questions of motive for convening these juries, and questions of the unlimited and unbridled discretion allowed, were bound to arise.

In 1969 the traditional notions of the duties of a grand jury—of presentments and indictments on specific crimes—were overlooked when Title I of the Omnibus Crime Control Act was enacted to provide for a reversion to the old English "Star Chamber" type of approach. Cloaked with good intentions of covering organized crime, a new and dangerous mechanism was concocted too easily used for purely political purposes and fishing expeditions.

I believe this Congress would be derelict if it did not take a second look to see what shape this "putty" is taking.

On October 7, 1970 when the organized crime control bill was before the Congress, I foresaw the dangers in establishing the special grand jury, and it's clear and inevitable susceptibility to abuse.

I, therefore, respectfully urge that the House Judiciary pass the resolution of inquiry regarding the Fort Worth Five; and then proceed to go to the root of the problem to determine what this Congress must do in order to preclude situations such as those pending now.

STATEMENT OF HON. BERTRAM L. PODELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman, I understand that the scope of this hearing is confined to the question of *venue* in the case of the "Fort Worth Five." I shall respect the Subcommittee's decision to so limit the nature of the testimony, pausing only to note that this is a very difficult and very important case, and that there are many other issues involved—issues of Constitutional law, domestic and foreign politics, and international diplomacy.

In June of last year, the five men involved in this case were issued subpoenas and ordered to appear before a grand jury conducting a secret investigation in Fort Worth, Texas. The men were all Irish-born Catholics, and all were residents of the New York City area. The men had been active in protesting the political situation in Northern Ireland.

The first clue we had as to the basis of venue in the Northern District of Texas appeared in a front-page article in The Dallas Morning News of June 20, 1972:

The News was told that the Justice Department selected Fort Worth for the investigation because its lawyers have evidence that numerous calls were made to the Dallas-Fort Worth area by a New York group seeking to buy guns and other weapons.

Three days later, however, the same newspaper published a far more comprehensive explanation for the choice of venue:

The Justice Department apparently chose the Fort Worth grand jury, which U.S. District Judge Lee Brewster empaneled, for these reasons:

—The grand jury had jurisdiction since there was evidence that IRA sympathizers tried to arrange for gun purchases in the Dallas-Fort Worth area.

—There was little chance for picketing or demonstrations in Fort Worth by Irishmen and others to support the terrorist groups.

—Judge Brewster has a reputation as a "no nonsense" judge and government lawyers felt he would insist that reluctant witnesses answer questions.

Mr. Chairman, if the Justice Department ever had any evidence to link these five men with some alleged crime in the Fort Worth area, that evidence was certainly never made public. As to the other criteria supposedly used in selecting this locale, they are not sanctioned by the United States Criminal Code. The fact that a particular judge has a reputation for "toughness" is not a sufficient legal basis for convening the grand jury in his district. Nor is the absence of local sympathy for a particular political cause adequate basis for venue.

The case of the "Fort Worth Five" has once again dramatized one of the great defects in the grand jury system: People may be subpoenaed to appear before a grand jury virtually anywhere in the country where the Government feels it will have an advantage. At this crucial point, the entire criminal process is vulnerable to the political whims of whatever administration happens to be in power. In political "conspiracy" cases, for example, the Department of Justice can choose to convene the grand jury—and thus conduct the inevitable trial—in any jurisdiction having the slightest connection with the alleged conspiracy. Thus the celebrated "Berrigan Conspiracy" trial, on charges of conspiring to kidnap Henry Kissinger and commit acts of sabotage in Washington, was held not in Washington but in Harrisburg, Pennsylvania. The basis for this venue, and it was pretty tenuous, was that one of the alleged conspirators had been serving a prison term in Pennsylvania at the time of the acts in question. The real reason for selecting this particular judicial district, however, seems to have

been that the Department of Justice felt that supposed anti-Catholic sentiment in the area would ensure a conviction of the priests and nuns. As we all know, the plan backfired, and the defendants were acquitted of all conspiracy charges.

In the present case, the sole link between the alleged gun-running and the city of Fort Worth is an unsubstantiated claim that some guns *could* have been purchased in Texas. On this flimsy pretext these five Irish-Americans were taken from their homes in New York, where most of the major alleged crimes would have occurred, if indeed there were any crimes at all. Obviously, the Justice Department felt that the relatively small number of persons of Irish extraction in Texas would give them better odds for convictions than they would have in New York, with its large population of Irish-Americans. So the five men were dragged several thousand miles away from their homes and families, and were ordered to testify in a locale where the administration felt there would be little sympathy for them.

Mr. Chairman, a system which allows the government such a tremendous political advantage in choosing the forum for a trial is incompatible with a society of law and justice. In this case, the government's abuse of venue has resulted in untold hardships for these witnesses.

I urge this Subcommittee to give prompt approval to H. Res. 220. Moreover, I believe that it is time for a full investigation of the criteria employed in selecting sites for grand jury hearings, and today I will introduce legislation to authorize such an investigation.

STATEMENT OF HON. ROBERT O. TIERNAN, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF RHODE ISLAND

Mr. Chairman: Our concern today is two-fold. We are interested in protecting the rights of grand jury witnesses in general, and we are gravely concerned about the conduct of the Justice Department in the investigation involving the Fort Worth Five.

House Resolution 220 is a direct and simple request to the Justice Department to provide us with the data which lead the Department to believe that Fort Worth, Texas is the proper district for an investigation of alleged gun-running to Northern Ireland in violation of the Gun Control Act of 1968, The Omnibus Crime Control Act of 1970 and The Foreign Agents Registration Act.

We are also concerned with determining whether there is any other district in which this investigation might alternatively be conducted. More specifically, we are concerned with whether there is a district which is more convenient to these New York witnesses and which would more properly serve the interests of justice. If there is such a district available, we feel that it is the proper concern of the Congress to inquire into the Justice Department's refusal to conduct this investigation in the more convenient district. If it is determined from this hearing and from other relevant data that the Justice Department does not have a sufficient concern for the basic rights of American citizens called as grand jury witnesses in distant jurisdictions, then it is my belief that Congress should enact H.R. 4322 which will provide a change of venue when the legitimate interests of the subpoenaed witnesses and the interests of justice so dictate.

I would like to briefly outline the questions to which the Members of Congress are seeking answers today.

1. Why were the subpoenas in this case filed in blank and why were repeated defense counsel inquiries into the nature of the investigation not answered?

These five American citizens were taken from New York, supposedly as witnesses *aiding* the investigative process, to an area which they believe to be alien without the slightest hint as to the nature of the inquiry.

As a lawyer, I am well aware of the need for secrecy in the grand jury system. However, there is nothing violative of the secrecy rules in at least informing witnesses who are not defendants of the "nature" of the proceedings.

We would like to know if it is the general practice of the Justice Department to serve grand jury subpoenas in blank and if so why? We would also like to know if it is the Department's general practice to refuse to answer the inquiries of subpoenaed witnesses? I am sure the Department is aware that the witnesses can move to quash the subpoena to determine if the Fort Worth grand jury has jurisdiction to make this investigation. Is it the policy of the Department of to force witnesses to exercise this legal remedy as a means of determining why

they have been subpoenaed to appear thousands of miles from home? In the interests of justice and in aid of the effort to prevent an unnecessary clogging of the courts, would it not be preferable for the Department to display a proper courtesy to non-defendant witnesses?

2. Once these witnesses finally appeared before the grand jury they pleaded the Fifth Amendment, after which the government granted them immunity pursuant to 18 USC 6001, 6002, 6003. When they were questioned they once more refused to answer because of their fears as to the extent of the immunity granted. These witnesses are convinced that the British Government will allege that any knowledge they have of IRA activities violated some English law and is a basis for extradition to England. This raises a serious Constitutional question. Do our immunity laws prevent extradition by a foreign state?

This issue was raised by the Fort Worth Five in their application for certiorari to the Supreme Court. The court denied the application for certiorari, but it is an established constitutional principle that *no* conclusions can be drawn from such a denial. Therefore this issue has in no way been resolved. I would like the Justice Department's views on the witnesses' contentions as to the extent of the immunity given? Can they be extradited, and, if so, can the Justice Department grant immunity preventing extradition under the present statutory structure? If this cannot be done, I would suggest that the Judiciary Committee investigate a reform of the statute to prevent extradition. Surely it is contrary to the reasoning behind an exception to the constitutional guarantee against self-incrimination that a citizen could be made to testify in the United States and then extradited to a foreign state to be prosecuted on the basis of the admissions.

3. The line of questioning followed by the United States Attorney during the grand jury proceedings was concerned with people and transactions located entirely in New York. For example, they were asked at the Fort Worth grand jury bearing whether they had purchased Armalite AR-180 rifles from Edward Agramonte, a gun dealer in Yonkers, New York. Agramonte and two others have since been indicted by a New York grand jury for alleged gun running to Northern Ireland.

Though rumors of gun-dealing in Texas towns have circulated through law enforcement agencies in Dallas and Fort Worth, no Texas dealers have been called by the Fort Worth grand jury and none have been in any way implicated in the investigation. Since no other people and no other transactions have thus far been in any way implicated in this investigation, it thus seems fair to say that those already indicated were the target of the Fort Worth investigation.

Setting aside the question of the jurisdiction of the Fort Worth grand jury, the Members of Congress would like to know why these men are being held in the Seagoville Federal Penitentiary if the object of the investigation has been fulfilled. The Members would also like the Justice Department's view of the precedential value of a recent New Jersey habeas corpus decision in a case of similar factual setting in which jailed witnesses were released after indictments against those being investigated were secured.

4. Of note also is the comparable case of Professor Popkin of Harvard University who refused to testify with respect to the Pentagon Papers Case. He was jailed, as were the Fort Worth Five for their refusal, but he was released when it became evident that a Boston Grand Jury was no longer pursuing the matter. In this case, the Grand Jury in Texas is equally dormant, but no release is in sight.

We would like to ask the Justice Department if it is common practice to release prisoners held in immunity cases when the grand jury ceases its investigation. Specifically, we would like to know why Professor Popkin was released while the Fort Worth Five languish in jail.

The questions raised concerning the manner in which this investigation was conducted involve serious Constitutional problems. It is our goal today to ascertain the kind of hard-core data necessary in formulating a sound legislative policy.

It may be time for Congress to take a long look at the possibility of reforming the Federal Grand Jury System. We are not here to accuse but to find facts. We expect the full cooperation of the Justice Department in removing the cloud that has surrounded this entire issue. I sincerely hope an amicable resolution will be forthcoming.

Thank you Mr. Chairman.

APPENDIX

UNITED STATES SENATE,
Washington, D.C., August 1, 1972.

Hon. RICHARD G. KLEINDIENST,
Attorney General,
Department of Justice,
Washington, D.C.

DEAR MR. ATTORNEY GENERAL: I am writing to protest what I believe is the unjustifiable treatment by the Department of Justice of five Irish-Americans now imprisoned in the Tarrant County Jail in Fort Worth, Texas.

These five individuals—Thomas Laffey, Matthias Reilly, Kenneth Tierney, Daniel Crawford and Paschal Morahan—have been imprisoned for more than a month on charges of contempt of court arising out of their refusal to answer certain questions before a Federal Grand Jury convened by the Department of Justice in Fort Worth to investigate possible gun-running from the United States to the Irish Republican Army in Northern Ireland. I understand that this investigation was initiated by the Department of Justice, upon the basis of representations made by the Government of Great Britain.

I hold no brief for the Irish Republican Army. In no way do I condone the indiscriminate killing and maiming of the people of Ulster that has been taking place for so long at the hands of the IRA. I recognize the obligation of the Department of Justice to investigate and prevent the shipment of arms to Ulster from this country, and I fully support a legitimate investigation.

But the circumstances of the present case strongly suggest that the Department of Justice has exceeded the bounds of legitimate investigation in the present case and is now engaged in a double abuse of the grand jury process:

First, the convening of the grand jury in Fort Worth, Texas, and the subpoenas to these men—all residents of New York State—to appear before that grand jury, far from their homes, their families, and their friends, has imposed a serious hardship on the witnesses for no apparent law enforcement purpose. As I understand it, these men are the only known witnesses to appear before the grand jury, and the grand jury has set aside its inquiry without additional testimony. In these circumstances, it seems to me that the Department of Justice has a strong obligation to demonstrate that the grand jury was a part of a legitimate Federal investigation, and that some substantial law enforcement purpose was served by the extraordinary inconvenience inflicted on these witnesses.

Second, the imprisonment of these witnesses without bail, on charges of contempt, for refusing to answer certain questions before the grand jury, appears to be an even more clear-cut abuse of the grand jury process. In order to compel their testimony, the Department of Justice granted immunity to the witnesses, invoking the relevant Federal immunity statute. The refusal of the witnesses to answer the questions asked by the grand jury, even after receiving the Department's grant of immunity, was based on their view that the immunity was too narrow to protect them from self-incrimination, in violation of their rights under the Fifth Amendment to the Constitution, since the immunity would protect them only from prosecution by the British Government.

I understand that this issue of immunity is at the heart of the prisoners' appeal now pending in the Federal courts. The issue is a substantial one, going to the root of the interpretation of the Fifth Amendment and our basic constitutional rights as Americans. Given the very real legal doubts as to the validity of the contempt citations in these circumstances, I find it unconscionable that the Department of Justice refuses to acquiesce in the grant of bail to the prisoners pending resolution of the issue.

Overall, as I have indicated, the pending investigation raises extremely serious questions of abuse of the grand jury process by the Department of Justice. The

peremptory and heavy-handed investigation has every appearance of being another unfortunate step in the politicization of the Department of Justice. It is a travesty on fundamental principles of American justice, and a thinly veiled attempt to harass and intimidate peaceful and legitimate activities by Irish American individuals and groups in this country in support of equal justice for the Catholic minority in Northern Ireland.

I urge you to make a thorough inquiry into the circumstances of this investigation, and to take whatever steps may be necessary to secure the prompt release of the five men now unfairly imprisoned in the Tarrant County Jail.

Respectfully,

EDWARD M. KENNEDY.

DEPARTMENT OF JUSTICE,
Washington, D.C., August 10, 1972.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR KENNEDY: The Attorney General has asked me to send this interim reply acknowledging receipt of your letter of August 1, 1972, concerning the incarceration, on the basis of civil contempt of court, of five individuals in Fort Worth, Texas.

One point in your letter, however, should be clarified at this time. You express your understanding "that this investigation was initiated by the Department of Justice, upon the basis of representations made by the government of Great Britain." It should be definitely understood that this Department's investigation was in no respect initiated at the suggestion or the request of the government of Great Britain.

The Attorney General is having prepared a full reply to the matters raised in your letter, and you can expect to hear from him in the near future.

Sincerely,

A. WILLIAM OLSON,
Assistant Attorney General.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR KENNEDY: This is in response to your letter of August 1, regarding the incarceration, for civil contempt of court, of five individuals in Fort Worth, Texas.

The five individuals about who you inquire were served subpoenas to appear before a Federal grand jury which was investigating violations of the Gun Control Act of 1968, the Organized Crime Control Act of 1970, the Foreign Agents Registration Act, and the conspiracy statute, 18 U.S.C. 371. None was, or is, a direct criminal suspect. Their testimony was sought to assist the grand jury in an ongoing criminal investigation.

When these witnesses appeared before the grand jury, they refused to testify, citing, among other things, their privilege against self-incrimination, guaranteed by the Fifth Amendment to the Constitution. Subsequently, the Government submitted to the United States District Court an application for the conferral of immunity, pursuant to 18 U.S.C. § 6002, which the Supreme Court recently found to be fully protective of a witness' Fifth Amendment rights. *Kastigar v. United States*, No. 70-117, O.T. 1971, 40 U.S.L.W. 4550 (Decided May 22, 1972).

Even after this immunity application was granted, and the Court had directed the witnesses to testify, they persisted in their refusal to cooperate with the grand jury. Consequently, all five were found to be in civil contempt of court and were ordered incarcerated until such time as they purged themselves of contempt or until the grand jury was discharged. The Court pointed out to each witness that he need only comply with the order to testify to purge himself of contempt and be released. The United States Court of Appeals for the Fifth Circuit has recently affirmed these contempt citations in *In re Kenneth Tierney, et al.*, Nos. 72-2333 and 72-2339 (Decided August 3, 1972).

The investigation which led to the incarceration of these five men has been conducted, in all respects, in consonance with well-established precepts of American jurisprudence. Under our legal system, it is the proper function of a Federal grand jury to investigate violations of Federal law. As Mr. Justice Black, writing for the Court in *Costello v. United States*, 350 U.S. 359 (1956), noted, the grand jury is, under the Constitution, the preferred method for initiating criminal

prosecutions. The grand jury has acquired this preferred status in large part because it is "pledged to indict no one because of prejudice and to free no one because of special favor" (350 U.S. at 362), and is thus able to stand as a shield between citizen and prosecutor.

An essential concomitant to this role of the grand jury is the obligation of every citizen to cooperate, when called upon to provide evidence. As the Supreme Court pointed out, in *Blair v. United States*, 250 U.S. 273 (1919), under the American system of criminal justice:

"... it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public" (250 U.S. at 281). Cf. also, *United States v. Bryan*, 339 U.S. 323 (1950).

In order to enforce this obligation, both English and American law have long provided that a recalcitrant witness should be held in civil contempt and incarcerated until he agrees to answer the questions propounded by the grand jury. See *Shillitani v. United States*, 384 U.S. 364, 370 (1966); *In re Grand Jury Investigation of Giancana*, 352 F. 2d 921 (7th Cir., 1965), *cert. denied*, 382 U.S. 959 (1965). This constitutes no punishment for criminal conduct; it is simply the only means available to secure an individual's compliance with his lawful obligations. In such a situation, witnesses are said to "carry the keys of their prison in their own pockets." *In re Nevitt*, 117 Fed. 448, 461 (C.C.A. 8, 1902).

While defendants under indictment are generally admitted to bail pending a final determination of their guilt, release on bail of a recalcitrant witness who has been held in contempt would, for obvious reasons, defeat the very purposes of confinement. By its nature, confinement is limited to the life of the grand jury, which, in this case, is 18 months from May 2, 1972. Where these witnesses to obtain bail pending a normal appeal and subsequent petition for certiorari to the Supreme Court, the result would be to render the civil contempt sanction meaningless and, possibly, to deprive the grand jury of evidence essential to the conduct of its investigation. Thus, in the past, it has become common procedure for courts to deny bail pending appeal in cases such as this. See *United States v. Coplon*, 339 F. 2d 192 (6th Cir., 1964); *United States v. Testa*, 326 F. 2d 730 (3rd Cir., 1964), *cert. denied*, 376 U.S. 931 (1964).

Recently, the procedures outlined above were codified in 28 U.S.C. § 1826, enacted as Title III of the Organized Crime Control Act of 1970, Public Law 91-452, the statute pursuant to which these witnesses were confined. On the question of bail pending appeal, covered by 28 U.S.C. 1826(b), the legislative history provided by the Senate Report is unequivocal:

"Section 1826(b) provides that bail shall not be granted pending the determination of an appeal taken from an order of confinement. *Granting bail would undermine the purpose of civil confinement.* This provision is designed to make mandatory what is now present practice. . . . *Only where there is a substantial possibility of reversal may a court grant bail here.*" S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969) 149 (Citations omitted; emphasis added).

In this case, two different panels of the Fifth Circuit Court of Appeals, acting on separate applications, denied bail to these five witnesses, finding no substantial issues raised on appeal to justify their release, including the witnesses' contention that the immunity conferred did not shield them from foreign prosecution. Mr. Justice Powell, to whom the applications for a stay of commitment and for bail pending appeal were thereafter presented, ruled likewise. Moreover, the apparent harshness of the unavailability of bail is mitigated by the fact that 28 U.S.C. 1826(b) required that these witnesses' appeals be finally decided within thirty days, thus assuring prompt judicial disposition of their claims.

The claims of Government harassment and abuse of the grand jury procedure made in your letter were raised by these witnesses both in the District Court and on appeal. In ordering the witnesses held in contempt, the District Court wrote an extensive and thorough opinion exploring, and dismissing, each one of their claims. The Fifth Circuit has now ruled, similarly finding these contentions to be without merit. (A copy of the Fifth Circuit's decision is enclosed). Thus, all these claims have been given full and prompt judicial consideration, and have been rejected.

The locale of a grand jury inquiry is determined primarily by the geographical area where the major matter under investigation is alleged to have occurred. 18

U.S.C. §3237 expressly authorizes the investigation of offenses committed against the United States in any district where such offenses were either begun, continued or completed. This grand jury was convened in Fort Worth since criminal activity can only, under the Constitution, be prosecuted in the venue where it transpired.

The Supreme Court has on several occasions noted that the fact that the grand jury is located at a great distance from the witness does not excuse him of his obligation to appear and testify. *New York v. O'Neill*, 359 U.S. 1, 11 (1959); *Blair v. United States*, *supra*. Indeed, in one case, the Court sustained the obligation where a subpoena had been served on a citizen of the United States residing in Paris. *Blackmer v. United States*, 284 U.S. 421 (1932). Any hardship attendant upon a witness' appearance before a distant grand jury is substantially alleviated by the fact that Federal law prohibits any employer sanctions due to absence from work and the fact that witnesses are entitled to travel expenses of \$.10 per mile (approximately twice the average airline fare) in addition to a *per diem* and witness fees ranging up to \$36 per day.

Finally, let me reiterate and reconfirm the assurance, previously expressed to you by A. William Olson Assistant Attorney General, Internal Security Division, that this criminal investigation was in no respect initiated at the suggestion or the request of the Government of Great Britain.

Sincerely,

RICHARD G. KLEINDIENST,
Attorney General.

Enclosure.

UNITED STATES SENATE,
Washington, D.C., February 14, 1973.

The ATTORNEY GENERAL,
Department of Justice,
Washington, D.C.

DEAR MR. ATTORNEY GENERAL: I am writing to urge you to review the circumstances involving the recent re-imprisonment of five Irish Americans in a Fort Worth jail.

The five, all from the New York City area, were jailed in June of 1972 for contempt for refusing to answer questions before a Federal grand jury in Texas investigating the possible shipment of arms to Northern Ireland from this country. After several weeks in jail, the men were granted bail by Supreme Court Justice William O. Douglas last September, pending action by the Supreme Court on legal challenges involving their appearance before the grand jury. On January 22 of this year, the Supreme Court declined to hear the case, and on January 29 the men were again jailed in Fort Worth on the contempt charge. Unless steps are taken to review the case, the imprisonment may well continue throughout the life of the current grand jury which expires in November.

I am asking the Department of Justice to review the case in order to determine whether the continued imprisonment of the men is justified in the present circumstances of the investigation. As I have repeatedly stated in the past, I strongly condemn activities of extremists in Ulster, and I emphasized this concern to Prime Minister Lynch of Ireland and Prime Minister Heath of Great Britain in their recent visits to this country. In this connection, I strongly support all legitimate activities, investigations and other actions to shut off the flow of any arms or funds for arms from this country to Northern Ireland. But it is also clear that the Department of Justice itself has an obligation to obey the law in conducting any investigation it undertakes.

The serious doubts I have that justice is being done in Fort Worth arises from the following considerations:

First, the circumstances under which the men had originally been hauled before the Texas grand jury, far from their homes and friends and families, had imposed serious hardship on the witnesses for no apparent law enforcement purpose and was an abuse of the grand jury process. Why couldn't the men have been subpoenaed to testify before a grand jury in the New York area? It is known that grand juries in New York have been engaged in related investigations in recent months.

Second, it appears that the re-imprisonment of the men has been at the command of the United States Attorney in Texas acting on his own, when in fact the case deserves complete review by Justice Department officials in Washington. The Department should study the case itself, in order to avoid the implication

that the men have been jailed again for vindictive reasons, serving no valid law enforcement function.

Third, the Department of Justice itself has stated in the past that the five individuals were not, and are not, direct criminal suspects in the Federal investigation.

Fourth, although the Supreme Court exercised its discretion last month by declining to review the case on certiorari, an earlier ruling of the Court indicates substantial doubt as to the legality of the type of grand jury immunity grant under which the men had been asked to testify.

Fifth, it appears that the current imprisonment is being carried out under especially harsh conditions, with the men incarcerated in a local, not Federal, jail, and being denied exercise and even contact by telephone with family or legal counsel. In fact, the conditions appear unduly punitive, partaking of solitary confinement. There can be no justification for this treatment, since the men are neither convicted offenders nor security risks.

As a result of the many questionable circumstances surrounding the investigation, and in light of the persistent reports linking the Government of Great Britain to the case, it appears that the clear effect, and most likely purpose, of the grand jury investigation is to harass Irish American groups in this country opposed to British policy in Northern Ireland.

In calling on the Department to review the case, I note that last November in Boston, the Department of Justice released Professor Samuel Popkin of Harvard University from jail in somewhat similar circumstances. Popkin had been jailed for contempt for refusing to testify before a grand jury investigating one aspect of the Pentagon Papers Case. Freed on bail pending his legal challenge to the contempt citation, Popkin was re-imprisoned when a Boston Federal judge denied the challenge, but was released after seven days in jail, when the Department of Justice reviewed the case and found that the grand jury was about to expire and was no longer pressing the investigation.

According to available public information, the Texas grand jury in the Fort Worth Case has not pursued the investigation for many months, and there appears to be no possibility that the investigation will be resumed. In this situation, too large a price in human suffering has already been exacted from the men for no apparent purpose, and they should be released from prison now and allowed to return to New York to rejoin their friends and families. It would be a travesty of justice and even-handed law enforcement for five ordinary citizens to remain in jail because their plight has not received the national notoriety and attention of Professor Popkin's case.

Unfortunately, the present case fits the all-too-familiar and growing recent pattern of grand jury harassment by Justice officials in a variety of cases, a practice raising serious questions in Congress about the Department's current operations. If the Department had shown the same zeal in pursuing individuals like Donald Segretti before a grand jury as it has shown in the case of the Fort Worth Five, we might know a great deal more than we know today about the Watergate affair.

I look forward to hearing from you at your earliest opportunity.

Sincerely,

EDWARD M. KENNEDY.

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., March 6, 1973.

HON. EDWARD KENNEDY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR: I have your letter to the Attorney General of February 14, 1973, requesting a review of the circumstances involving the incarceration of five individuals in Fort Worth, Texas, for civil contempt of court.

I note you reiterate a number of the same allegations regarding the Department's conduct of this case which were contained in your letter to Attorney General Kleindienst of August 1, 1972, and to which he responded in considerable detail in his letter on the 16th. I am certain you will agree that no useful purpose would be served to repeat here his earlier comments. I am enclosing for your assistance a copy of Mr. Kleindienst's previous response.

As you observed in your letter, following a full review of this case by the United States Court of Appeals for the Fifth Circuit, the Supreme Court declined

to hear this case. Certainly, this extensive judicial review, and the conclusions reached by the courts, demonstrate that there have been no legal irregularities in the proceedings conducted before the grand jury, or in the District Court's order committing these five individuals to jail for contempt of court.

In Mr. Kleindienst's letter to you of August 16, 1972, he noted that none of these witnesses were direct criminal suspects. That statement was made in the context of the sentence which follows in his letter and which points out that their testimony was sought to assist the grand jury in an ongoing criminal investigation. At that time we had, and continue to have, reason to believe that these individuals have knowledge of facts which would shed light on alleged unlawful activity. You may have noticed, perhaps, that the recent indictment of James O'Gara for violations of the Gun Control Act and the Munitions Control Act alleges that he used the names and identifications of three of these witnesses to illegally purchase weapons for shipment to Ireland. The government continues to desire the testimony of these witnesses under the grant of immunity already offered.

It is the policy of the Department of Justice to attempt to identify and prosecute all violations of the Congressional statutes relating to the unlawful purchase and sale of weapons. The investigation with which these individuals have refused to cooperate was instituted as a result of this policy. Not infrequently, those who engage in criminal activities of this type believe that their actions are justified by either domestic or foreign political considerations. Political action by violence is, however, alien to our constitutional system. American citizens concerned about the unfortunate situation in Northern Ireland are free to exercise their political rights in pursuit of whatever goals they consider constructive. They enjoy, I am sure, the concern of members of Congress such as yourself as well as that of those agencies of the Executive Branch charged with the formation and implementation of American foreign policy.

The normal investigative procedures of the Department of Justice have been followed in this case. No personal malice or desire to harass or intimidate any ethnic, religious, or racial group, nor any desire to dissuade any person or group from the exercise of his, her or their political rights, lies behind this case.

At the time of your letter these men were incarcerated in the Tarrant County Jail. This facility is under a contract with the Department of Justice and the conditions of the jail are periodically inspected. I have been advised that it meets all requirements. Your allegation that these men have been denied access to counsel is a serious one. It would be helpful if you provided specific information as to the time and circumstances of such events. On February 28, 1973, these five men were transferred to the Federal Correctional Institution at Seagoville, Texas.

It is not correct, as you have assumed, that there "appears to be no reasonable possibility that the investigation" of the Texas grand jury will be resumed. On the contrary, this investigation into violations of Federal law committed within the Northern District of Texas is continuing; however, the activities of the grand jury in connection with this investigation have been thwarted to a great extent by the refusal of these witnesses to testify. As the Attorney General earlier informed you, the five individuals, who were incarcerated for their refusal to testify under an immunity grant, were subpoenaed to appear in the Northern District of Texas because there was evidence that criminal violations of Federal law had occurred in that judicial district. The Constitutional requirement that criminal cases be tried in the District where the crime was committed was designed for the protection of defendants; but unfortunately, it may also from time to time impose hardship on both possible witnesses and defendants.

I hope that these five witnesses will elect to provide the grand jury with whatever information they may have regarding violations of our laws. Since their testimony cannot be used against them, they will then be at liberty to return to their homes and their families.

It is the intention of the Department of Justice to continue its efforts to enforce fairly, but firmly, the laws Congress has enacted to prohibit the unlawful acquisition and transportation of weapons, explosives and other destructive devices. If we are successful in this endeavor we will, at the same time, achieve the objective which you indicate in your letter that you seek: "to shut off the flow of any arms from this country to Northern Ireland."

Sincerely,

JOSEPH T. SNEED,
Deputy Attorney General.

Enclosure.

STATE OF TEXAS, COUNTY OF TARRANT

SS.:

KENNETH TIERNEY, being duly sworn, deposes and says:

I am a registered nurse duly licensed to practice in the State of New York. Until my incarceration in Tarrant County, I resided with my wife and four young children in Yonkers, New York. I have never been a resident of Texas. I have never, prior to my incarceration, visited Texas. I have never, until my incarceration, known anyone in Texas, telephoned anyone in Texas, or received telephone calls from anyone in Texas. In all my life the only time I ever even wrote a letter to anyone in Texas was when I corresponded with our late President, Lyndon B. Johnson in connection with a matter unrelated to the circumstances in which I am now involved. I have never negotiated, directly or indirectly, with anyone in Texas for the purchase or sale of materials or goods of any kind or description. In short, my connection with the State of Texas prior to my incarceration was absolutely and totally nil.

Notwithstanding all of this, and notwithstanding that I have not had the slightest connection with any events of any character in the State of Texas, I was brought down here to face a Federal Grand Jury which purports to be investigating occurrences claimed to have taken place in the State of Texas. Attempts were made to question me in regard to matters totally unrelated to anything with which I could by any stretch of the imagination be associated in the State of Texas.

Convinced that the entire purpose of the questions was to obtain information for use of the British Crown, I refused to play the role of "informer", a role which is repulsive to my culture; this, entirely apart from the fact that I have never had anything to do with anything in the State of Texas in regard to which I could inform anybody about anything.

It is obvious to me that I was dragged down here from my home for purposes unrelated to any appropriate matter having any relation to the events occurring in the State of Texas. For this, I have been cast in jail and held there more than three months in 1972, and I have again been put in jail and held since January 29, 1973 with the prospect of remaining incarcerated for the term of the Grand Jury which, I believe, extends to November 4, 1973. I am not even allowed to telephone my children who are 1400 miles away from me, a right freely given in other prisons to convicted felons.

I had always thought that our Constitution protected citizens against being dragged from their homes to distant places by our Government. Such a right is embodied in our Constitution and protects persons against prosecution in a place other than that where the events upon which the prosecution is based arose. I had always assumed that this basic right expressed a principle at least equally applicable to persons who are merely purported witnesses in a criminal inquiry.

I believe in our Constitution and I honor its provisions. I find that my Government manifests no such concern for the rights which our people established when they tore themselves away from the British Crown. I am treated as a common criminal and yet accorded none of the rights of a common criminal.

I have been deprived of my livelihood and rendered unable to support my wife and children. It is shocking to me that our great Nation, acting as an arm of the British Crown, should deal so cruelly with one of its own citizens whose rights our Government was created to protect.

My distress and the cruelty inflicted upon my family, on my fellow prisoners and on their families, is, I believe, so grave an injustice and so contrary to the basic principles upon which our Nation rests, that it cries out for a Congressional investigation.

KENNETH TIERNEY.

Sworn to before me, this 15th day of February, 1973. Bobby M. Cox, Notary Public, Tarrant County, Texas.

STATE OF NEW YORK, COUNTY OF NEW YORK

SS.:

THOMAS LAFFEY, being duly sworn, deposes and says:

I live in Williston Park, New York. I have a wife and three small children, the eldest one is six and the youngest is three. I am a real estate salesman. My

roots are solidly in my home in New York. I am an honorably discharged Veteran of the United States Armed Forces.

Before my incarceration here, I was never in Texas. I had never had the slightest connection with anyone in the State of Texas. I had never been in Texas. I never wrote to anyone in Texas nor received any letters from anyone in Texas. I never even telephoned anyone in Texas nor received a telephone call from anyone in Texas. In short, Texas was as alien to me as any foreign and distant place.

What Mr. Tierney says in his Affidavit applies equally to me. Yet, I too, have been dragged 1400 miles from my home to a Grand Jury proceeding in Texas, taken from my family and deprived of even a chance to talk to my little children, to whom my absence is a mysterious affliction for reasons unknown to me, and totally incomprehensible to my babies.

There is something ugly and strange about this whole affair which demands the attention of Congress. It is obvious that the so-called investigation in Texas is taking place at the request of the British Crown and that our Department of Justice is acting as the servant, not of our own people, but of an alien government.

I join in my comrades' request that there be a Congressional investigation into the oppressive conduct of the Department of Justice.

THOMAS LAFFEY.

Sworn to before me, this 15th day of February, 1973. Bobby M. Cox, Notary Public, Tarrant County, Texas. Bobby M. Cox.

STATE OF TEXAS, COUNTY OF TARRANT

SS.:

MATHIAS REILLY, being duly sworn, deposes and says:

I reside in Blauvelt, New York with my wife and three young children. I have been taken from my home and jailed in Tarrant County, Tex. This has been done on the pretense that I was somehow associated with activities supposed to have taken place in Texas. I have been deprived of a chance to support my family and they have been left in desperate straits. I have been deprived of an opportunity to even telephone my wife and little children who are separated from me by 1400 miles and who have neither the funds nor the energy to travel down here to see me.

Before I was put in prison, I was never in the State of Texas. I did not know anyone in the State of Texas. I had never even written to anyone in the State of Texas or received a letter from anyone in the State of Texas. I had never even telephoned anyone in the State of Texas or received any calls from anyone in the State of Texas. In short, I did not have the slightest connection with the State of Texas, directly or indirectly, or with any activities taking place in the State of Texas.

My position is like that stated by my fellow prisoner, Mr. Tierney. I and my fellow prisoners are victims of an oppressive Government and I urge Congressional intervention on our behalf and the instituting of a Congressional inquiry into the oppressive and illegal acts of our Department of Justice.

MATHIAS REILLY.

Sworn to before me, this 15th day of February, 1973. Bobby M. Cox, Notary Public, Tarrant County, Texas. Bobby M. Cox.

STATE OF TEXAS, COUNTY OF TARRANT

SS.:

PASCHAL MORAHAN, being duly sworn, deposes and says:

I am a resident of New York City. I am a carpenter by trade. I had never been a resident of Texas until my recent incarceration here under the circumstances described in the attached Affidavit of Kenneth Tierney. I had never visited Texas. I had never been associated with anyone in the State of Texas. I had never even telephoned anyone in the State of Texas or written or received any communication of any nature from or with anyone in Texas. I have not the slightest information in connection with activities taking place within the State of Texas.

I am in the same position in this respect as my fellow prisoners, Tierney, Crawford, Reilly and Laffey.

My sentiments are expressed in Mr. Tierney's Affidavit. I join in urging a Congressional investigation into this obviously cruel and oppressive misuse by our Government of naked power, in violation of our basic rights.

PASCHAL MORAHAN.

Sworn to before me, this 15th day of February, 1973. Bobby M. Cox, Notary Public Tarrant County, Tex. Bobby M. Cox.

STATE OF TEXAS, COUNTY OF TARRANT

SS.:

DANIEL CRAWFORD, being duly sworn, deposes and says:

I am a resident of New York City. I am a house painter by trade. I, too, was never in Texas until my incarceration here. My situation is substantially identical to that of Mr. Tierney. I had never been in Texas. I had never been in communication with anyone living in Texas. I had never written to or received any communication from or with anyone in Texas. I had never even made a telephone call to Texas. In short, at no time had I ever had the slightest connection, directly or indirectly, with the State of Texas.

My imprisonment in Texas violates basic rights guaranteed to me by our Constitution. It is obviously part of a plan to exercise oppression against me without the slightest cause. I am deprived of a chance to make a livelihood. I am not even permitted to telephone my own lawyer in New York.

I join my comrades in urging intervention by the Congress of the United States and a Congressional investigation into the misconduct of the Department of Justice.

DANIEL CRAWFORD.

Sworn to before me, this 15th day of February, 1973. Bobby M. Cox, Notary Public Tarrant County, Tex. Bobby M. Cox.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

Indictment 73 Cr.

UNITED STATES OF AMERICA

v.

JAMES O'GARA, DEFENDANT

The Grand Jury charges:

1. From on or about the 1st day of September, 1971, up to and including the date of the filing of this indictment, in the Southern District of New York, JAMES O'GARA, the defendant, unlawfully, willfully and knowingly, did combine, conspire, confederate and agree together and with Frank Henry and James Lagan, named herein as co-conspirators but not defendants and others who are to the Grand Jury known and unknown, to commit offenses against the United States, to wit, to violate Title 18, United States Code, Section 922(a) (6) and Title 22, United States Code, Section 1934.

2. It was part of said conspiracy that the defendant, in connection with the acquisition of firearms, to wit, a rifle and a semi-automatic firearm, from a licensed dealer in firearms, would make false written statements and furnish and exhibit false, fictitious and misrepresented identification with respect to his name, age and place of residence, intended and likely to deceive such dealer with respect to a material fact as to the lawfulness of the sale of such firearm, pursuant to Chapter 44, Title 18, United States Code, in that he would display New York state drivers licenses in the names of Peter Finegan and Daniel Crawford as identification, and further signed the names Peter Finegan and Daniel Crawford to Firearms Transaction Records Form 4473 in violation of Title 18, United States Code, Section 922(a) (6).

3. It further was part of said conspiracy that the defendant and others would export and attempt to export from the United States articles on the U.S. Muni-

tions List, to wit, a rifle and a semi-automatic firearm, referred to in Paragraph 2 above, without having first obtained a license therefor, or written consent from the Department of State or an exemption from this requirement.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts among others were committed in the Southern District of New York and elsewhere:

1. On or about September 28, 1971, in the Southern District of New York, JAMES O'GARA, the defendant, purchased a Springfield Garand rifle, serial number 1396858, from Edward Agramonte, Inc., in Yonkers, New York.

2. On or about September 29, 1971, in the Southern District of New York, JAMES O'GARA, the defendant, purchased an Armalite AR180 semi-automatic rifle, serial number S10056, from Edward Agramonte, Inc., in Yonkers, New York.

3. On or about October 19, 1971 Frank Henry possessed two suitcases which contained the weapons referred to in Overt Acts 1 and 2, while on board the cruise liner Queen Elizabeth II, which was then in the vicinity of Cobh, Republic of Ireland.

(Title 18, United States Code, Section 371; Title 22, United States Code, Section 1934; Title 22, Code of Federal Regulations, Sections 121, *et seq.*)

COUNT TWO

The Grand Jury further charges:

On or about the 14th day of October, 1971, in the Southern District of New York, JAMES O'GARA, the defendant, unlawfully, willfully and knowingly, did export and attempt to export from the United States articles on the U.S. Munitions List, to wit, one Springfield Garand rifle, serial number 1396858 and one Armalite AR180 semi-automatic rifle, serial number S10956 without first having obtained a license therefor, or written approval from the Department of State or an exemption from the requirement.

(Title 22, United States Code, Section 1934; Title 22, Code of Federal Regulations, Sections 121 *et seq.*; Title 18, United States Code, Section 2.)

COUNT THREE

The Grand Jury further charges:

On or about September 28, 1971, in the Southern District of New York, JAMES O'GARA, the defendant, in connection with the acquisition of a firearm, to wit, a Springfield Garand rifle, serial number 1396858, from a licensed dealer in firearms, unlawfully, wilfully and knowingly, did make a false written statement, and furnish and exhibit false, fictitious and misrepresented identification with respect to his name, age and place of residence, intended and likely to deceive such dealer with respect to a material fact as to the lawfulness of the sale of such firearm, pursuant to Chapter 44, Title 18, United States Code, in that he displayed a New York state drivers license in the name of Peter Finegan as identification, and further signed the name Peter Finegan to Firearms Transaction Record Form 4473.

(Title 18, United States Code, Section 922(a) (6).)

COUNT FOUR

The Grand Jury further charges:

On or about September 29, 1971, in the Southern District of New York, JAMES O'GARA, the defendant, in connection with the acquisition of a firearm, to wit, an Armalite AR180 semi-automatic rifle, from a licensed dealer in firearms, unlawfully, wilfully and knowingly, did make a false written statement and furnish and exhibit fictitious and misrepresented identification with respect to his name, age and place of residence, intended and likely to deceive such dealer with respect to a material fact as to the lawfulness of the sale of such firearm, pursuant to Chapter 44, Title 18, United States Code, in that he displayed a New York state drivers license in the name of Daniel Crawford as identification, and further signed the name Daniel Crawford to Firearms Transaction Form 4473.

(Title 18, United States Code, Section 922(a) (6).)

COUNT FIVE

The Grand Jury further charges:

On or about October 23, 1971, in the Southern District of New York, JAMES O'GARA, the defendant, in connection with the acquisition of firearms, to wit, two Armalite AR180 semi-automatic rifles, serial numbers S11098 and S11099, from a licensed dealer in firearms, unlawfully, wilfully and knowingly, did make false written statements, and furnish and exhibit false, fictitious and misrepresented identification with respect to his name and place of residence, intended and likely to deceive such dealer with respect to a material fact as to the lawfulness of the sale of such firearms, pursuant to Chapter 44, Title 18, United States Code, in that he displayed a New York state drivers license in the name of Mathias Reilly as identification, and further signed the name Mathias Reilly to Firearms Transaction Form 4473.

(Title 18, United States Code, Section 922(a) (6).)

COUNT SIX

The Grand Jury further charges:

On or about November 6, 1971, in the Southern District of New York, JAMES O'GARA, the defendant, in connection with the acquisition of a firearm, to wit, an Armalite semi-automatic rifle AR180, serial number S11684, from a licensed dealer in firearms, unlawfully, willfully and knowingly, did make a false written statement, and furnish and exhibit false, fictitious and misrepresented identification with respect to his name, age and place of residence, intended and likely to deceive such dealer with respect to a material fact as to the lawfulness of the sale of such firearm, pursuant to Chapter 44, Title 18, United States Code, in that he displayed a New York state drivers license in the name of Pascal Morahan as identification, and further signed the name Pascal Morahan to Firearms Transaction Record Form 4473.

(Title 18, United States Code, Section 922(a) (6).)

Foreman.

WHITNEY NORTH SEYMOUR, JR.,
United States Attorney.

SUPREME COURT OF THE UNITED STATES

KENNETH TIERNEY ET AL. *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-623. Decided January 22, 1973

The petition for a writ of certiorari is denied.

MR. JUSTICE DOUGLAS, dissenting.

Petitioners and other Irish-Americans living in New York were subpoenaed to appear before a federal grand jury sitting in the Northern District of Texas. Even though they had been granted immunity under 18 U.S.C. § 6002 and § 6003, petitioners refused to answer various questions regarding the purchase of firearms in the United States. Petitioners were held in civil contempt.

Petitioners based their refusal to testify on the grounds that their counsel had been overheard on a Government wiretap two days prior to their appearance before the grand jury, and that the use immunity they had been granted under 18 U.S.C. §§ 6002-6003 was ineffective to protect them against foreign prosecution. At the time the contempt hearing was held before the District Court, the Government alleged that there was no overhearings of the petitioners counsel and the District Court held that there was no substantial possibility of foreign prosecution. By the time the appeal was heard by the Court of Appeals, the Government had disclosed the wiretapped conversation, which the Court of Appeals examined *in camera*, and determined was not relevant to the petitioners. The Court of Appeals sustained the determination of contempt.

I granted petitioners bail pending the determination of their petition for certiorari on the grounds that the issues presented were substantial. *Tierney v. United States*, — U.S. —. I would grant certiorari for those same reasons.

In my dissent from denial of certiorari in *Russo v. Byrne*, — U.S. —, I pointed out the Court's concern in *Alderman v. United States*, 394 U.S. 165, with the necessity of allowing the parties themselves to assess and argue whether or not overhearings were relevant to their specific case. An *in camera* determination of relevancy will seldom, if ever, be a sufficient safeguard against the governmental interference with the constitutionally protected area of right to counsel. In the instant case, upon admitting that the overhearing had occurred, the Government stated that it was "in connection with a separate aspect of the investigation." If the overhearing had anything to do with the grand jury investigation for which petitioners were called as witnesses, no one but petitioners and their counsel were in a position to determine in what ways the conversation might relate to overall strategy or defenses. The right to counsel is especially important to a person involved with a grand jury investigation. Numerous and complex rights and liabilities are often involved, yet the average citizen may have even less knowledge of these rights than of his rights as a defendant in a criminal proceeding. Anything which undermines the effective assistance of counsel will severely handicap those who are forced to testify.

The Court itself in *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 481, although not deciding the questions raised by the possibility of testimony for which a witness had been granted §§ 6002-6003 immunity being used against him in foreign prosecution, indicated the constitutional importance of such questions. In the instant case the possibility of foreign prosecution is not insignificant. There are indications that the impetus for the grand jury investigation was the request of foreign powers.¹ It is not enough to say that petitioners are not subject to foreign jurisdiction: At any time petitioners could be traveling in a foreign country or find themselves the subject of various international extradition treaties. Neither is it an answer that grand jury testimony is secret. There are innumerable circumstances in which access to grand jury testimony can be had.²

I would grant the writ of certiorari.

SUPREME COURT OF THE UNITED STATES

Nos. A-49 and A-80

A-49

KENNETH TIERNEY *v.* UNITED STATES

A-80

MATHIAS REILLY *et al.* *v.* UNITED STATES

APPLICATIONS FOR BAIL

[September 12, 1972]

MR. JUSTICE DOUGLAS, Associate Justice.

These are applications for bail which raise the questions comparable to those presented in *In re Beverly*, A-31, in which I granted bail.

In the present cases there was electronic surveillance on a telephone which a court had approved pursuant to 18 U.S.C. § 2518. During that surveillance a conversation of petitioners' attorney was intercepted.

Petitioners were testifying before a grand jury having been granted immunity under 18 U.S.C. § 6002 and § 6003. On refusing to answer certain questions propounded, they were committed for civil contempt.

¹ Both news articles in the New York Times, July 17, 1972, and in the Dallas Morning News, June 23, 1972, indicated that the British Government had requested that the Nixon administration take steps to cut off the alleged flow of arms from the United States to Northern Ireland.

² A witness' compelled grand jury testimony can be used as a basis for a perjury prosecution of him, wherein an *in camera* proceeding would violate the accused's right to a public trial. In addition, grand jury testimony is regularly disclosed to criminal defendants without court order pursuant to *Brady v. Maryland*, 373 U.S. 83, and *Jencks v. United States*, 353 U.S. 657.

The standard for bail in civil contempt proceedings is set forth in 28 U.S.C. § 1826(b) which specifies that bail shall be granted if the issues are not frivolous and if the appeal is not taken for delay. Here the immunity granted the petitioners was a so-called "use" immunity as distinguished from the "transactional" immunity which some of us thought was required when the issue was before us last Term in *Kastigar et al. v. United States*, 406 U.S. 441.

It is now argued that petitioners have obtained all the immunity to which they were constitutionally entitled and that there is no longer an attorney-client privilege to be protected. Hence it is argued that the Sixth Amendment right to counsel which weighed heavily with me in *Russo and Ellsberg v. Byrne* (in which I granted a stay on July 29, 1972) is not relevant here.

I accept of course the Court decision that only "use" immunity, not "transactional" immunity, is the constitutional standard under the Fifth Amendment. The fact remains, however, that the "leads" obtained from testimony given after the "use" immunity has been granted can be used to indict and convict the petitioners. It seems to me therefore that the attorney-client privilege does continue and indeed may be much more vital to the petitioners than it would have been had the "transactional" immunity been the one adopted by the Court.

The question remains whether a search warrant issued for electronic surveillance under the Fourth Amendment can invade the domain of the Sixth Amendment and destroy the attorney-client relation. (That is an exceedingly serious question on which this Court has not spoken.)

Beyond those two questions there is a further one—whether on the issue of relevance an *in camera* proceedings is adequate or whether an adversary hearing is required. That is the question central to both *Russo and Ellsberg*, to *In re Beverly*, and to the present two cases.

Hence in spite of the fact that my Brother POWELL has heretofore denied bail in these cases, I have reluctantly concluded that the requisite for bail in civil contempt cases, 28 U.S.C. § 1826(b), has been satisfied here.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(No. 72-2333—Summary Calendar*)

IN RE KENNETH TIERNEY

(No. 72-2399—Summary Calendar*)

IN RE PASCHAL MORAHAN

IN RE DANIEL CRAWFORD

IN RE MATHIAS REILLY

IN RE THOMAS LAFFEY

Appeals from the United States District Court for the Northern District of Texas

(August 3, 1972)

Before BELL, DYER and CLARK, Circuit Judges.

BELL, Circuit Judge: These cases are consolidated for appeal. Appellants are incarcerated under adjudications of civil contempt for failing to testify before a federal grand jury after having been accorded use immunity under 18 USCA, §§ 6002, 6003.¹ The incarceration is pursuant to 18 USCA, § 1826.² The appeals

¹Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5 Cir., 1970, 431 F.2d 409.

²§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

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

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

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

are subject to the statutory thirty day requirement of 18 USCA, § 1826(b). The record and briefs were filed on short notice in order to comply with the statute. For reasons stated in our order of July 25, 1972, we extended the expiration date of the thirty day period in No. 72-2333 from July 26, 1972 to August 4, 1972, which is the statutory expiration date in No. 72-2399. [Order attached as Appendix "A"].

There are six assignments of error. They are common to each appellant. The two principal assignments center on (1) the alleged refusal of the district court to permit appellants to consult with counsel while being questioned before the Grand Jury, and (2) the contention that use immunity was insufficient protection under the Fifth Amendment privilege against self-incrimination because of the possibility of prosecution in Great Britain. Two additional assignments are (1) that because the government failed to negate sufficiently a claim of electronic surveillance, appellants were justified in refusing to testify; and (2) that the Department of Justice failed to follow its guidelines in applying to the district court for orders to compel appellants to testify. The other assignments of error go to the conduct of the proceedings in the district court: (1) that appellants were not afforded adequate notice and a meaningful opportunity to prepare for the hearings on the applications of the government for the compulsory testimony orders and for the subsequent contempt proceedings; and (2) the trial judge demonstrated such partiality as to require his disqualification under due process standards and the federal supervisory power. We affirm.

I

The facts of record disclose that appellants appeared before the grand jury in Fort Worth, Texas, in response to subpoenas. They are residents of New York and were accompanied by counsel upon their arrival in Fort Worth. Tierney was the first of the five appellants to be called before the grand jury. The pattern of his conduct before the grand jury and the general proceedings thereafter with respect to each appellant are similar to the extent that we may consider all as being in the same factual posture for the purpose of considering the issues presented by the appeals.

Several questions were propounded to Tierney. The only one answered was as to the correctness of his name. Each question concerned a matter relevant to

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 perjury, giving a false statement, or otherwise failing to comply with the order. § 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

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

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

§ 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

the investigation.³ They had to do with whether the witness (and this applies to each of appellants) had purchased firearms on certain dates and at certain places, whether they had used the driver's license of any other individual for the purpose of identification in purchasing firearms, whether their own driver's license had been loaned to others for that purpose, and whether they had any knowledge of any person or persons in this country who were engaged in the illegal purchase of weapons and explosives. Tierney sought permission to consult with attorneys before answering the questions and permission was granted or taken, depending on how one reads the transcript of the event. In either case, after conferring with his attorneys, he refused to answer each question, claiming protection under the First, Fourth, Fifth, Sixth, and Ninth Amendments to the Constitution and the United States Code.

At this stage, as to each appellant in turn, there was a proffer of immunity as required under § 6003, *supra*. After hearing, immunity was granted to each of the appellants by the district court in written orders.

Each appellant was then instructed to answer the questions propounded by the grand jury. Each, in turn, refused. The government moved to have them adjudicated in civil contempt and, after hearings, such a result ensued. Bail was denied by the district court and by this court. These appeals followed.

II

The first assignment of error rests on the contention that appellants were denied their Sixth Amendment right to effective assistance of counsel and their Fifth Amendment right to due process of law through the denial to them of their right to consult with counsel before answering questions propounded to them before the grand jury. The difficulty with the position of appellants is that the record does not make out a denial of counsel.

Appellants were in fact permitted to consult with counsel during their appearances before the grand jury with respect to the questions propounded. This opportunity was granted by the foreman of the grand jury on request from each of the appellants, and we do not perceive that the district court has ruled to the contrary. Such remarks as the district court made with regard to consultation with counsel were in the beginning of the proceedings and were directed to preventing an abuse of the privilege of consultation. The court was specific in stating that appellants were not to leave the grand jury room without permission from the foreman. It was implicit, of course, and in practice it developed, that appellant could leave for consultation upon being granted permission by the foreman. The record is clear that permission was freely granted by the foreman although not after each question. There was some reluctance to let Tierney leave the grand jury room to consult counsel but none whatever as to the other four appellants. Each was granted permission by the foreman to so consult, and usually after two and at no time after more than three questions had been propounded.

It goes without saying that the district court had the power to prevent a breakdown in the grand jury proceedings by frequent departures from the grand jury room for frivolous reasons and with intent to frustrate the proceedings. On the other hand, the privilege of consulting with counsel can be accommodated to the grand jury proceedings as was done through cooperation between the witness and the foreman of the grand jury.⁴

In sum, we need not reach the question of a right, and if a right, the extent thereof, of a witness before a grand jury who has been granted immunity to consult with counsel outside the presence of the grand jury. It is sufficient to say that here appellants were not denied the right to consult with counsel. They were accorded such a right and, after consultation, refused in every instance to answer.

³ The grand jury was investigating possible violations of Title I of the Gun Control Act of 1968 (18 U.S.C. § 921 et seq.); Title II of the Gun Control Act of 1968 (76 U.S.C. § 5861); Title XI of the Organized Crime Control Act of 1970 (18 U.S.C. § 842 et seq.); Foreign Agents Registration Act (22 U.S.C. § 611 et seq.), and conspiracy (18 U.S.C. § 371).

⁴ Government counsel could facilitate the proceedings by making a set of questions available at one time to the witness so that they might be discussed as a group with counsel.

III

The next assignment of error concerns the extent of the reach of use immunity as provided under § 6002, *supra*. The position of appellants is that they are entitled to protection under the Fifth Amendment from possible incrimination as to crimes under the laws of Great Britain through answers given to the questions propounded to them before the grand jury. Their position is that use immunity is insufficient to afford them protection from such foreign prosecution. Whether the reach of the Fifth Amendment is such as to protect against foreign prosecution is an open question and we need not reach it in this case. The question was presented to the Supreme Court in *Zicarelli v. The New Jersey State Commission of Investigation*, 1972, — U.S. —, — S.Ct. —, 32 L.Ed.2d 234, but was not answered. There the court concluded that Zicarelli could be adequately safeguarded from foreign prosecution by limitations on the questions to be propounded to him. No substantial risk of foreign prosecution was posed. We are of like view in these cases but for a different reason. We adhere to the reason given in denying appellant Tierney's motion for bail.

Our view then and now is that because of the secrecy of the grand jury proceedings no substantial risk of foreign prosecution is posed. Rule 6(e), F.R. Crim. P., provides for this secrecy.⁵ The same court which grants immunity is the court which prevents violation of the secrecy. The government represented that it could not violate the secrecy, even under the first sentence of allowing it to disclose matters in the performance of its duties, without a court order. This is answer enough to the contention of appellants that the government might disclose their testimony.

The Tenth Circuit rejected a similar claim on the following reasoning, which we find to be apt, although the appeal was later ordered dismissed as being moot. *In Re Parker*, 10 Cir., 1969, 411 F.2d 1067, vacated and remanded for dismissal as being moot, *Parker v. United States*, 1970, 397 U.S. 96, 90 S.Ct. 819, 25 L.Ed. 81.

"Rule 6(e), Fed.R.Crim.P., with an exception not applicable herein, prevents disclosure of matters occurring before the grand jury unless otherwise ordered by a federal court and since for a court to so order under the circumstances presented in the subject case would defeat one of the purposes for grand jury secrecy, i.e. the encouragement of free disclosure by those who have information of crimes, *United States v. Procter & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077, as well as the court's 'promise' of immunity, it cannot be assumed that a court would grant such an order or accordingly that there is a danger of incrimination. By virtue of the application of Rule 6(e) any evidence, inculpatory or otherwise, related by appellant during the grand jury proceeding, would be unavailable to the Canadian government in either an extradition proceeding in the United States or in a criminal proceeding in Canada." 411 F.2d at 1069-70.

Appellants point to specific circumstances where it might be necessary to disclose the testimony of appellants, one where it became necessary in the defense of another, and the other in showing derivative use of testimony given under immunity. The answer is that the court granting immunity could protect appellants by refusing to make their testimony available to defendants in other cases, where it is shown to be necessary to the defense, although the refusal might lead to an acquittal. The court could control any problem as to derivative use of the testimony by an in camera proceeding.

Appellants also argue that secrecy would be breached in the event their testimony was used to impeach them or in perjury proceedings against them. Again the initial protection would come from an in camera proceeding. Thereafter, if impeachment or a perjury prosecution should seem indicated to the district court, the question would arise as to whether the scope of the Fifth Amendment embraces protection against perjury or impeachment. We will not now rule on such a speculative hypothesis but cf. *Kastigar v. United States*,

⁵ Rule 6(e), F.R. Crim. P.: Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. . . .

1972, — U.S. —, — S.Ct. —, 32 L.Ed.2d 212, on the limit of the Fifth Amendment privilege. See also *Harris v. New York*, 1971, 401 U.S. 222, 225, 91 S.Ct. 643, 28 L.Ed. 1; *United States v. Knox*, 1969, 396 U.S. 77, 90 S.Ct. 363, 24 L.Ed.2d 275. It is sufficient to say that this hypothesis does not make out a substantial risk of foreign prosecution.

We do not consider the government's argument that appellants would be protected by a refusal to grant extradition. No treaty protection based on the extension immunity has been called to our attention. Thus, a refusal to extradite, assuming Fifth Amendment protection from foreign prosecution, would be of little solace to one who might wish to travel to Great Britain.

IV

Relying on *Gelbard v. United States*, 1972, — U.S. —, — S.Ct. —, — L.Ed.2d — (40 L.W. 4862), appellants contend that they were entitled to refuse to answer the questions propounded to them before the grand jury because of the intervention of a claim of illegal electronic surveillance of them and their counsel. Their position is not so much that there has been electronic surveillance but that the government's denial of electronic surveillance is inadequate. The district judge assumed standing to raise the illegal electronic surveillance claim. We hold that they do have such standing.

Nevertheless, here again, the claim falls under the weight of the facts as disclosed by the record. The testimony for the government was that the Department of Justice had checked with every government agency that had any connection with the investigation and this included the Department of Treasury, which includes Secret Service, Customs, Internal Revenue Service, Alcohol, Tobacco and Firearms Division; the Bureau of Narcotics and Dangerous Drugs, and the Federal Bureau of Investigation, and found that there had been no electronic surveillance of appellants nor of their counsel. This testimony was given under oath, and counsel was subjected to cross examination.

It is the position of appellants that this denial was inadequate because it was hearsay, their argument being that the person who actually made the check should have testified or should have filed an affidavit. The denial was adequate. See *United States v. Reynolds*, 9 Cir., 1971, 449 F.2d 1347, 1351; *In Re Russo*, 9 Cir., 1971, 448 F.2d 369, 374.

Appellants also state that the testimony did not make it clear that there had been no electronic surveillance of the telephones listed to appellants and their counsel. We reject this contention. The testimony is to the contrary.

It is also urged that the denial was inadequate because there was no report from the Central Intelligence Agency, nor from the Departments of State and Defense. This was unnecessary in view of the testimony that reports had been obtained from every agency having anything to do with the investigation in process.

It now appears that there was an overhear of one of counsel for appellants on June 17, 1972 and that this did not come to the attention of government counsel until July 18, 1972 after the matters on appeal were concluded in the district court. This overhear was called to our attention in the brief of the government. The overhear was on a telephone which was not the subject of inquiry in the district court. It was incidental to a surveillance authorized by court order under 18 USCA, § 2518. Counsel made a call to the telephone under surveillance. The court issuing the order has by further order made its surveillance order, the pertinent log of calls over the telephone in question, and the transcript of the particular conversation of counsel available to us for in camera examination. We have made an in camera examination of the transcript of this overhear. It contains nothing of evidentiary substance nor does it in anywise have to do with the right to counsel or the adequacy of representation by counsel. This incident does not afford a basis for the refusal of appellants to testify before the grand jury.

V

The next assignment of error has to do with the alleged failure of the Department of Justice to follow its own guidelines in applying to the district court for orders to compel appellants to testify. This failure is said to have rendered invalid the orders of the district court to testify and thus the judgments of contempt for disobedience of those orders.

We are unable to discern any merit in the supposed departure from the guidelines. The Acting Assistant Attorney General in charge of the Internal Security Division of the Department of Justice authorized the seeking of the grants of use immunity by the United States Attorney and recited that the testimony sought was necessary and in the public interest. This was in compliance with the statutory requirements. § 6003, *supra*.

The guidelines on which appellants rely are directed to the handling of requests by United States Attorneys within the Department of Justice for permission to seek orders granting immunity. They are not directed to the procedural or substantive rights of prospective witnesses.

VI

We come now to the claimed procedural due process defalcations in the district court. The first of these has its genesis in the contention that appellants were not given adequate notice and a meaningful opportunity to prepare for the hearings on the applications for compulsory testimony orders and for the contempt proceedings. They allege that Rules 6(d) of the F.R.Civ. P.⁶ was violated in that they were not given five days notice before the time specified for the hearings. That rule, assuming its applicability to proceedings such as these, contains an exception for allowing a different time to be fixed by the court. This exception would hardly be more appropriate than in proceedings having to do with the progress of matters before a grand jury. A case in point is *United States v. Weinberg*, 9 Cir., 1971, 439 F.2d 743. This assumes a sufficient amount of time or notice for counsel to be able to represent their clients adequately, and the record is clear that the times in question here were more than ample. There is no suggestion of prejudice from the shortened times utilized by the district court.

Lastly, appellants charge the district court with partiality to the government and hostility to counsel for appellants in its handling of these proceedings. We have studied the entire record. Our conclusion is that the district court was engaged in handling a difficult and technical matter where experienced counsel were representing appellants with the end in mind of taking full advantage, as was their right, of every available legal means to prevent appellants from having to give testimony to the grand jury. The district court made it clear in the beginning that he would exercise firm control of the situation. This was the duty of the district court. The district court is more than an umpire: the court has full responsibility for the orderly administration of proceedings before it. The record is entirely bereft of a showing of partiality to the government, or of hostility to counsel. Appellants and their counsel were accorded courteous treatment throughout the continuous period of the handling of this matter—from June 18 until July 3, 1972. Every available procedural right for the protection of appellants was employed. No line of testimony has been given. The conduct of the district court throughout was firm, patient, meticulous and impartial. The complaint against the district court is without merit.

AFFIRMED.

⁶ F.R.Civ.P., Rule 6(d): For Motions—Affidavits. A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.