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THE CHAIRMAN: There is a time problem this afternoon. We are going to start a little more quickly than usual.

The subject matter of our hearing this afternoon is that of grand jury reports or presentments. I do not know what really needs to be said in preface to this hearing. Concerning Wood v. Hughes and there has been considerable agitation on the part of some district attorneys, law enforcement officers and groups, and others to restore in one degree or another the right of the grand juries to make reports other than the return of indictments.

Two of our speakers have other engagements. As a matter of fact, one of them has to catch a train in a few minutes. I am going to take them out of order, and I will first call upon the President of the District Attorneys' Association of New York State, Mr. John Casey, from Rensselaer County, Troy.

MR. CASEY: I thank you, Mr. Chairman, for taking me out of order and because you were so kind I shall be extremely brief.

I would, first of all, like to file with this Committee a statement that was made by our Association's secretary last year on the hearings on the Mitchell and the Bonom Bill, and it contains in my opinion some cogent arguments advanced by our Association for the adoption of legislation necessary to

have grand jury reports.

I also would say that at a recent meeting of the Legislative and Executive committee of our Association we were unanimous in adopting and giving unequivocal and wholehearted support to the Grand Jury's Association bill which, I believe, is before this Commission at this time and our Association wants to endorse that without reservation.

We feel in the District Attorneys' Association, very briefly, that there is no part of the law more misunderstood than the grand jury report. Grand Jury reports have been criticized because it is said that they accuse persons of criminal activity without giving them the right to be heard. We feel, on the other hand, that there are situations where this is not true. For example, I had myself a murder case at one time where a woman was accused of murdering her husband and it was handled in the lower court preliminarily and it was written up in the newspapers. The Grand Jury heard the case, she testified and there was no indictment found against her. The judge who presided at the time the grand jury report was handed up refused to take it on the ground that it was in the nature of a presentment. Despite the fact the judge may have been wrong in so refusing, this woman did not get publicity commensurate with the publicity she got when accused and was not exonerated in the proper manner by having the grand jury hand up a report of no indictment against her.

We feel, too, that the grand jury report is oft times the only remedy that a public officer wrongfully accused can have in order to straighten out the record. Not every public officer that is accused is accused rightfully and as it is, without grand jury reports, there are no forums where this officer can go, if publicly accused, to clear himself of any implication of guilt that may have been had against him by individuals which have been publicly advertised in the newspapers and in television, and so forth.

The third situation we feel is necessitated by facts such as these: Oft times, many of our investigations originate in the grand jury. There is no preliminary proceeding held in the Justice or in the Police Courts. These cases are presented directly to the grand jury and the grand jury can or cannot indict.

Now if they don't indict and if no specific individual have been named or charged in the lower courts, then the public and the press never have any knowledge of what the grand jury has done. It is done in secret and they never know that this case has even been considered by the grand jury because the grand jury can hand up no indictment bill against nobody.

When it is all considered in those lights, we feel these grand jury reports are very necessary to the good administration of justice.

This bill, we feel, that has been sponsored by the

Grand Jury Association does -- in a fair and workmanlike manner with proper safeguards and protection to the individuals concerned by a review of the court, an opportunity to be heard, an opportunity for appellate review -- does protect the individual much more than he was protected prior to the decision of Wood v. Hughes. We will admit that prior to the decision of Wood v. Hughes that perhaps on occasions -- I don't know how many in number -- the grand jury report or presentment was abused by district attorneys sometimes, by grand juries, perhaps,

We feel that this bill with its safeguards -- and a reading of it, I am sure, will bear this out -- properly protects individuals who are concerned with grand jury reports for the reasons that I have advanced and, for the good administrations of justice, the District Attorneys' Association gives this bill its wholehearted endorsement.

Thank you, very kindly.

THE CHAIRMAN: Thank you, Mr. Casey.

I am next going to call on Mr. Harris Steinberg, speaking for the Committee on Penal Law and Criminal Procedure of the New York State Bar, of which you are appearing. Are you also appearing for the City Bar --

MR. STEINBERG: No, I am not.

I appreciate the opportunity to be here and speak to you gentlemen and I appreciate the courtesy in calling me

early because of my commitment elsewhere.

Our Committee wishes to go on record as opposing any change in the rule of Wood v. Hughes. The rule, we feel, that was enunciated by the Court of Appeals, while, of course, it could be changed by legislation, we think is a wise one. We think it is in consonance with the policy of this State; it is in consonance with justice and fairness to the individual.

As I listened to the last speaker, his logic seemed to go something like this: A person may be wrongfully accused and, therefore, he should have a chance to air this wrongful controversy further in the newspapers.

The extent of a grand jury, as it is historically been known in our State, is that of an accusing body in criminal matters. Look at the things that go with it. The statute say the grand jury shall hear none but legal evidence. What is legal evidence? Evidence relevant to an issue. What is the issue and what evidence will be admissible and what would be inadmissible when we are going to go rumor-mongering? What are you going to do about a subpoena served on a witness, "Bring all your books and records in our look under the rug. It may not be criminal, true, but we would like to know about it. You may be wrongfully accused by newspapers. Bring in your books and records and let's have it out in the grand jury and we will make a report about it."

Then they say, "Well, there are safeguards because you

can go in and quash it."

In fairness, and the bill provides, I think, that the report criticizes persons or groups who have not been invited to be heard by the grand jury. That, in itself, permits another incursion in the violation of Constitutional rights. It is traditional that you don't call before the grand jury the person accused. However, here, under the guise of fairness you are putting a premium on calling the very person whose name is being bandied about and in the guise of helping him, you say, "Come to the grand jury and, of course, sign a waiver of immunity because this will help you get off the hook."

These safeguards are not safeguards. This bill, to my mind, is a snare and a delusion and the whole thing is very strongly reminiscent of a novel by Kafka.

The grand jury is not selected for its knowledge of public affairs. The grand jury has no qualifications other than any other citizen to delve into abstruse questions of finance or abstruse questions of public policy or politics, or whatever will seem interesting to them.

My good friends, Mr. Lee Thompson Smith and his cohort who have given very valiant and worthwhile service to the public are members of an association, but the grand jurors who go to make up that association, their qualifications are not in the judiciary law; there is nothing there about going to college or studying engineering or studying accounting or

psychology or all the skills necessary to be a private eye. They just happen to be citizens called to do their duty in the secret chamber rather than petty jury in the court room. That does not give these people any competence, in my humble opinion, to pass on the type of thing that they demand to have the right to pass on.

We have machinery in this State -- well established machinery -- to look into every possible problem which the public will requires to be looked into. Thus, you have a Maulin Commission if the executive feels they want to look into something. They can call people; they require testimony; they can call witnesses.

You have a legislative inquiry if you feel that needs to be looked into. You have enumerable provisions throughout the consolidated laws, fish and game wardens and the corporation commission and the Secretary of State and everybody who can write can issue subpoenas in this state and hold hearings. Why do you have to have this untrained body depart from its traditional duties where it does a good job and where it has the confidence of the community and dispel that confidence by having them get into a fussy area where they have no business?

Now if a grand jury indicts for crime and there is a trial, that is going to be resolved in court, but if a grand jury comes out and says that someone is charged with non-criminal conduct and, "We will give you a right to appeal" and

the judge is elected and minding his own business and there is a controversy between Democrats and Republicans, he has got to come out and decide the grand jury was unfair, the grand jury didn't do the right job; he is going to push this controversy back under the rug.

I say to you that it is an unfair burden to put on the judge; it is unrealistic that the judge will fulfill it and the normal human instinct will be to pass the buck on to someone else, but the buck should stop right here. This bill should not be adopted. I would say that the policy behind it is a wrong one and I say it is destructive of civil liberties and it goes contrary to the well-established powers and the understood functions of a grand jury.

Thank you, very much, gentlemen. Are there any discussions or questions? I will be happy, until my train leaves, to debate this with you.

MR. CONWAY: You said that why should the grand jury depart from its tradition position and go into this matter in which they know nothing. Wasn't Woods v. Hughes a departure from the traditional position of the right of the grand jury to inquire into the functions of public officers?

MR. STEINBERG: The grand jury has a right to inquire into the function of public officers insofar as it is relevant to any charge of crime. Woods v. Hughes didn't purport to be a departure. It was enunciating what the constitutional

statute of this State has said. It was an interpretation of our provisions.

MR. CONWAY: Why must it interpret?

MR. STEINBERG: Because there are many aspects of the law where -- our system of common law is such that unless there is a controversy between A and B and someone brings it into court and gets a decision, it goes on. There have been many things happening in the courts which are different from what has happened before because no one had the guts or brains to bring them up before.

MR. CONWAY: You recall the Mark Lane accusations against Speaker Carlino and he had the Assembly Ethics Committee refer to it and cleared himself of the accusations. Suppose a similar charge had been made by Lane against Mr. Lefkowitz or Levitt? Where could they have gone to have their actions determined?

MR. STEINBERG: Without reference to the names of these eminent gentlemen, the problem that exists is where someone is wrongfully accused and gets publicity in the newspapers and we will assume that the newspapers are so irresponsible as to print libelous or wrong statements about someone. Does that mean that you have to create a forum to rebut what is in a newspaper? Go back to the newspapers if you want trial by newspaper, but don't create a forum because you want to rebut something that someone wrongfully put in the

paper.

MR. CONWAY: Isn't it the argument that always prevails against grand jury presentments, that the accused had no forum.

MR. STEINBERG: The accused had no forum to answer an accusation that is not an accusation. It goes beyond that, in my opinion. That is one of the things. When you say accusation, where is the accusation made? Nobody tacks it up on the court house wall. A newspaper is going to say it and if you have a newspaper which is run by a Republican in a Democratic county or vice versa, you can bet your boots that they will say something, especially around election time.

JUDGE HALPERN: Mr. Steinberg, in your eloquent presentation, would you draw a distinction between public officials and private persons?

MR. STEINBERG: No. I think that public officials, if they do something wrong, can be indicted. If they do something wrong that is not criminal, they can be removed. There are all sorts of taxpayer's proceedings, all sorts of executive and other investigations possible. I do not think that to the already distasteful burdens on public service which take many of our best citizens away from public service we ought to tack another one on, making him subject to debate in a body about some wrongful charge.

JUDGE HALPERN: Do you see some analogy in the

provision of the Constitution which requires a waiver of immunity by public officials under penalty of loss of position and the making of a distinction here?

MR. STEINBERG: Not at all, Your Honor. In the present posture of the New York State Constitution, the provision referred to, it is implicit that you don't call a man before the grand jury unless you are investigating criminal conduct on his part. The State policy is such that if he is a public official and he is suspected of having committed a crime, we say that you must hold your office on the condition that you account for your stewardship in a criminal investigation. You give up that right, but should a man be asked to give up that right to counter a rumor? Should a man be asked to give up his constitutional rights because a newspaper chose to harass him on a rumor? I think that is unfair.

JUDGE HALPERN: There is no limitation at the present time? It is any inquiry into official conduct?

MR. STEINBERG: You have the Wood v. Hughes rule. You have the present well-understood function of the grand jury. A district attorney can't start an investigation because it pleases him, without some basis -- some good faith basis.

PROFESSOR WECHSLER: It has been authorized.

THE CHAIRMAN: By who?

PROFESSOR WECHSLER: The law.

MR. STEINBERG: The New York State grand jury system and the way it works under New York State Constitution is far better than the federal system. Ever since the Costello Case and the United States Supreme Court's interpretation of the situation there, the grand jury, in effect, there, can indict without evidence; the grand jury there does not have to keep minutes; the grand jury there does not have to prove guilt beyond a reasonable doubt unless explained. None of the safeguards that we have here in the State exist in the federal jurisdictions. I do not think that is a step forward. I think we ought to be proud of the fact that our grand jury system has functioned so well with so many safeguards.

JUDGE HALPERN: On this specific matter the federal rule is in accordance with you.

MR. STEINBERG: No presentments, yes. I think if you are going to fool around with our system, you are going to weaken it.

MR. DENZER: How can the grand jury or the district attorney get this matter before the public? For example: In a case where there has been one of these John Doe investigations, for example, and a great deal is turned up that there are legislative gaps and so forth and no indictments result, but there is a situation that requires remedial treatment, legislative action and so forth, and it shrieks for the --

MR. STEINBERG: Mr. Denzer, you are assuming that it

is in the public interest for the district attorney to add things in the newspapers which are not crimes.

MR. DENZER: I am not talking about the newspapers.

MR. STEINBERG: How do you get something before the public?

MR. DENZER: Before the Legislature.

MR. STEINBERG: It is easy to get before the Legislature. The district attorney can go to a legislative committee and say, "We have evidence that such and such situation exists. If you want to order a legislative inquiry, we will cooperate with you."

He can do that in a letter; he can do that in a conversation, but he doesn't have to announce it to the press.

MR. DENZER: I wasn't thinking of the --

MR. STEINBERG: I would say this: In the past, on many occasions and I am sure with the best safe in the world, district attorneys who have been faced with unpleasant situations have welcomed the relief afforded them by saying, "Well, I'm not going to indict so and so but I will criticize him and that will still the fervor and that will show something to the public who wants a victim, but I feel in my conscience I can't really indict this fellow because there is no crime, but I feel perhaps it will satisfy the anger of the populous by half a loaf."

I don't think that is the kind of thing to pursue. I

don't think that's a necessary thing for a grand jury to be able to do. If the district attorney has a problem, if he is going to be unpopular because he didn't indict and if he did not indict because he has no evidence, he has got to have the guts to stand up and be a district attorney, it seems to me.

MR. DENZER: Don't you think it is a bit unfair when some of these administrative and legislative agencies throw evidence cases at him which they themselves have publicly advertised and led the public to believe that they are very clear cases where as a matter of fact they haven't got a thing? The poor district attorney sits there and he presents to the grand jury nothing and as a result he can't explain to anyone why he didn't get any indictments, and there he is stuck.

MR. STEINBERG: My heart bleeds for this poor district attorney. Here's a man who wants to get it off his chest and wants to look good to the public because some other --

MR. DENZER: He doesn't want to be blamed for something that isn't his fault.

MR. STEINBERG: Where does he want to look good -- in the newspapers?

MR. DENZER: He just doesn't want to be blamed for something that is somebody else's fault.

MR. STEINBERG: That is the trouble with public service. People are afraid to be blamed and afraid to take a position and want an easy way to get off the hook and don't

care whose rights are trampled on.

MR. KEARING: He has a right to get off the hook.

MR. STEINBERG: I do not think he is on the hook if he has got character.

PROFESSOR WECHSLER: Suppose the grand jury report was limited to reporting no bill.

MR. STEINBERG: Which is what you have now, and a district attorney is a man of stature and integrity and is trusted. Now Mr. Denzer's own Chief, and he was my chief, is such a man. Frank Hogan. If he comes out, "I have advised thus and so and we found no bill," nobody is going to think he threw the case for money. I think Frank Hogan has enough stature to say, if he has investigated, that there is no bill. That's the end of it. If somebody keeps whining and making--

PROFESSOR WECHSLER: Did you say the grand jury found no bill?

MR. STEINBERG: He can. He files it in court. The Code of Criminal Procedure requires it to be filed in court.

THE CHAIRMAN: Mr. Steinberg, assuming hypothetically that this Commission determined it was going to recommend to the Legislature some right of reporting on the part of the grand jury, have you made any analysis on the safeguards related in this bill offered by the Grand Jury Association? Do you have a comment?

MR. STEINBERG: I have this comment: That inherent

in the whole situation is the fact that the basic thing this bill seeks to do is so unfair, so far into what should be allowed that the so-called safeguards are not really safeguards.

I gave you one example before, that one of the reasons -- first page -- "Unless for good cause it strikes the report in whole or in part" and so forth "and good cause for striking and impounding shall exist" and then they go "A, B, C." Jump to the middle, "if the report criticizes persons or groups or classes of persons who have not been invited to be heard by the grand jury either individually or by a member or members of such group or class --" that purports to be a safeguard.

I say that far from being a safeguard, it is another incursion on your constitutional rights. In the guise of making it look fair, you say to the fellow, "Come on in"; and then if he doesn't waive immunity, then you say, "We will give you a chance. Therefore, now we can criticize you." That is typical.

A report does not reflect the credible and legally admissible evidence heard by the grand jury. Who is going to decide that? The court?

The court will read the secret testimony and then he will come up and say, "I --" one man -- "say that the 23 of you plus the district attorney have written a report which does not reflect the credible and legally admissible evidence, so you cannot have it." A squawk will go up. Your own

experience in reading newspapers will be they are muzzling him, the judge is thwarting him; and if the judge should be of another party, the squawk will be deafening, and where you have an extraordinary term it is invariable you will get somebody from another party.

This is the kind of thing which purports to be a safeguard which in every one of these things, in my reading, is not a safeguard. Basically, even if this business about a defense -- a person accused, having the right to go in and challenge on appeal, it's like the dilemma that is offered to a man who is accused of possessing contraband and he wants to make a search and seizure motion to suppress. He has got to come in and say it is mine and, therefore, I seek to suppress it. So, if he loses his motion to suppress, he has convicted himself. By coming in here and challenging, you are advertising to the world and the court you are the fellow being criticized and if the judge does not go along with you, you have sunk yourself. I think this is ludicrous.

MR. DENZER: Suppose you had some provisions where these hearings didn't have to be public? They could be held behind closed doors. Would that meet your objection?

MR. STEINBERG: No, it wouldn't meet my objection at all. In the first place, my friends of the press are going to yell it is the worst kind of Russian proceedings; and the judge has a right to do it in or out and very few judges are going

to do it inside; and after he decides it out, it comes out.

What is the criterion? What is the hearing? What is the legal issue? That a man is being charged for something that is not criminal -- misconduct that is not criminal.

Well, the criminal statute has four corners on it. It has a standard, the Fourteenth Amendment, which says unless it has that standard it is not a good criminal standard. Here, you are out in left field without a guiding star or compass, without a standard. You are being accused of not being a nice fellow or being rather stupid or being inept or being lazy, according to someone else's hindsight.

JUDGE HALPERN: In the conduct of public office. Isn't most of your argument directed to the old practice where the presentment could deal with any private official or activity? Have there been many presentments in all the years before Woods v. Hughes as to conduct of public officials?

MR. STEINBERG: I don't know the statistics, Judge, but I do know there have been substantial numbers of them. Last year's hearing in Senator Mitchell's case, Mr. McHugh said there were 400.

JUDGE HALPERN: That was all presentments. If you split those up into those that dealt with public conduct of public officials and with those that dealt with private persons, you would have a different picture.

MR. STEINBERG: Do you say it is a good thing to do

this to public officials?

JUDGE HALPERN: I am not expressing any view. I am completely open-minded on this issue as distinguished from some others.

MR. STEINBERG: I say this is a bad thing to do to public officials; I say that irresponsible attacks on public officials have made decent, able people say, "Why should I take less money? Why should I move, take my children out of school and sell my house to take a job where I am going to have my head handed to me for something I didn't hear?"

JUDGE HALPERN: I heard the same argument in 1938 against the provision requiring the waiver of immunity by public officials. Would you agree that has been a salutary provision in the last 25 years?

MR. STEINBERG: I am not sure. I don't want to louse this thing up by going into something else.

THE CHAIRMAN: Your objection extends equally?

MR. STEINBERG: My objection extends across the board to this entire concept of a Kafka trial, no issue, no standards and the men to try it are my good friends of the Grand Jury Association with no qualifications for the job other than the earnest intention to be good citizens.

I trust I have been helpful, but if not, it wouldn't be the first time. I want to thank you again, gentlemen.

May I leave a copy, for whatever help it may be, of

last year's report of bills then pending which we filed and if the opportunity presents, if you should get into litigation, we would like the opportunity to present a report on that.

THE CHAIRMAN: Very well. As a matter of fact, if you have the opportunity, we would appreciate a report by way of comment on the Grand Jury Association. This does not deal with that.

MR. STEINBERG: This is last year's bill which is quite similar. I think the little icing that has been added to the fruitcake does not change it. The same things we said last year are still wrong with it. I will give you one addressed specifically to the exact provisions of the current bill.

Thank you, gentlemen, very much.

THE CHAIRMAN: I want to announce that a statement has been submitted by the Police Commissioner, Commissioner Michael J. Murphy, of the New York City Police Department.

We will hear next from the Grand Jury Association of New York County represented by Manuel Lee Robbins, Counsel.

MR. ROBBINS: Thank you, very much. On behalf of the Association, I am certainly indebted and gratified that we have a chance to give a full coverage to our position.

I obviously find myself considerably at odds with the prior speaker. My view is quite the opposite and I thank him for saying I am a good citizen, but as many years the head of

the Indictment Bureau of New York County I have dealt with some thousands of grand juries and have been instrumental in some 50 or more reports in those years. I also speak here at their request on behalf of Mr. Hogan's office and Commissioner Murphy's office, who telephoned to us yesterday. The Grand Jury Associations of Dutchess and Orange Counties, who cannot come, also asked me to represent them as did the Board of Trade in New York.

THE CHAIRMAN: I think someone is going to speak from Mr. Hogan's office.

MR. ROBBINS: I did not know Mr. Uviller was coming or not. I see he is here.

Actually, I want to additionally comment that the State Bar Committee, who Mr. Steinberg represents, is not the expression of the State bar itself just of that committee. Last year, in commenting on the prior bill, which is in many ways similar, it was somewhat ambiguously reported in the newspapers; it was virtually the State Bar's opinion. I just wanted to correct that impression. The State Bar, as a bar association as a whole, has not passed on it.

Coming down to the issues and merits before Woods v. Hughes, it was in fact the tradition and the manifold experience throughout the state for grand juries to also make reports. I am not going to dwell into the long legal common law history of this, but the books are full of reports that grand juries made

where non-criminal conduct was involved. Of course, they made reports with respect to private matters, which is not involved in this current bill at all, but also made many reports with respect to the conduct or misconduct of public officials. Obviously, after the close decision of Woods v. Hughes, no reports were feasible and when the matter was presented to the Legislature last year -- as you all recall, we had two bills, one the Mitchell bill and one the Brook bill -- there was a divergence as to the scope and coverage of what short reports should be. Ultimately, that was reached in the closing days of the session and since that did not emerge as legislation last year, Mr. Kuh, on behalf of the District Attorneys' Association, and I went to work and we have put together this bill which has now been submitted to the Commission and which in many ways is identical with the bill of last year with some additional provisions, which I will come to later.

This Committee, as I understand Speaker Carlino's reference, was asked to consider the issue with the statement that many people who oppose grand jury presentments, oppose them on the grounds that it was a form in which someone could be injured without an adequate chance to reply. The bill, itself, cannot be sloughed over as far as its safeguards are concerned. The actual bill reads that the grand jury may issue reports concerning non-criminal misconduct, non-feasance or neglect in office of public officers or employees or persons

employed in government business.

Now there is a realm of misconduct which is not import crime and does not constitute crime and investigating grand juries do not start off by saying, "Let's issue a report. They will start off by considering certain evidence or certain facts brought to their attention about misconduct, we'll say, in the Bureau of Sanitation. They do not know at the time they commence the investigation that they are going to find a crime or they are not going to find a crime or whether the conduct of public officials there is perfect or falls far below standard. That results at the end of the investigation.

So, I shouldn't want anyone to think that this is a busybody little group that will say, "Well, who shall we knock off next." They actually go in, normally, on the investigation of an alleged criminal conduct and at the conclusion of their investigation if they do not establish facts which constitute a crime, they may nevertheless have uncovered unsalutary situations, dangerous situations, situations that need to be corrected and, hence, to avoid letting all this go to waste, to avoid having the world know not a thing about this, they feel obligated as a public conscience duty to issue a report where a report is warranted.

Obviously, if everybody had done their job perfectly or there were minor little inconsistencies, probably no report would be issued; but where grave conditions exist and they do

not constitute a crime either because there is a loophole in legislation or because there is some other situation which prevents the filing of an indictment -- I'm not referring to the statute of limitations -- but where we have uncovered a broad enough, or where there is a new field that has emerged that the Legislature hasn't brought its attention to or whether the whole conduct of the personnel is so slipshod, so inexcusably dilatory, or any of those things, that its conduct should be publicly -- misconduct should be publicly brought to superior attention, that is when reports emanate and not as an opening busybody function.

The bill goes on and points this out: that this grand jury may also issue reports expressing recommendations for legislative or executive action in the public interest and the grand jury basis for making such recommendations --

Mr. Steinberg and others have skimmed over in some deprecating fashion the so-called safeguards. These safeguards were in the bill last year and I think they are so important and cannot be minimized that I would like to specifically call them to your attention.

Where it says, first, that the report does not reflect the credible and legally admissible evidence heard by the grand jury, we are trying to avoid those rare instances -- and they have occurred, in all candor, in the long history, they have occurred -- we are trying to avoid those instances where

somebody has brought in a lot of hearsay, not credible evidence and we don't want anybody injured by this kind of testimony. One of the reasons we give the court the right to strike out the report in whole or in part is where he, from reading the minutes, can find the evidence was legally inadmissible. The report is not the product of a fairly conducted inquiry or is it self-biased or is it the product of partisanship. I need not dwell on this. The report should be kicked out in whole or in part.

MR. PFIEFER: Does that mean that the report will examine individual grand jurors for the basis of their vote?

MR. ROBBINS: That is not what this means. If, from reading the grand jury minutes, this has become, quite apparently, a whole Democratic against Republican or Republican against Democratic issue or a Protestant against Catholic or a rich against poor issue, or something of that -- or business against labor issue, and that all the questions and the scope of examinations and the method of examination of the people hailed before the grand jury showed a bias or a malice, that the report should be kicked out.

MR. PFIEFER: The court would deal with the record as it came to it.

THE CHAIRMAN: By "the record" you don't mean the minutes?

MR. ROBBINS: I do mean the minutes.

THE CHAIRMAN: Is it required here that the minutes be submitted?

MR. ROBBINS: When the report is filed to the judge, first of all, the judge has at all times complete control over the minutes. He has already had that, but even additionally, here, before having this report proceed any further, he should examine the minutes.

THE CHAIRMAN: Does your bill require that?

MR. ROBBINS: It does later on. It is almost implicit the minutes be before him because if there is any objection, he cannot file this unless he sees what these objections are.

THE CHAIRMAN: It refers to the report reflecting that credibly and legally admissible evidence is the basis for it.

JUDGE KALPERN: Isn't it implicit in it that he reads the minutes?

MR. DENZER: I assume, first of all, according to this bill, he must notify anyone who might possibly be injured; and if there is any objection, certainly the minutes then must be read, I suppose.

MR. ROBBINS: It would be clearer, I think, if it is stated initially rather that the timely report is filed, the minutes of the grand jury inquiry should be filed with the report. I think that should be an initial clarification handed

to the judge. The whole concept is handed to the judge and let the minutes go to the judge, so he doesn't have to take the trouble to order them. He knows --

JUDGE HALPERN: In a parenthetical expression, you said you did not contemplate presentment would be permitted if a crime was charged but the statute of limitations had run against him. Where is that covered?

MR. ROBBINS: It is not specifically covered, but I would --

JUDGE HALPERN: I can't --

THE CHAIRMAN: There is one thing in the bill --

MR. ROBBINS: The report charges criminal conduct for which the grand jury has failed to indict and in connection with no -- that is safeguarding.

JUDGE HALPERN: You think that would cover it?

MR. ROBBINS: I think that would cover it, yes. If that requires additional clarification, I think it is our feeling that we did not like to subvert the statute of limitations.

JUDGE HALPERN: You want to carry out the policy of the statute.

What about the policy requiring corroboration of accomplices? That is an important issue dealing with conduct of public officials. Suppose the grand jury finds that the mayor has accepted a bribe and they have the testimony of the

bribe given, but they can't find any corroboration; therefore, they don't indict because they don't think there would be success upon a trial. Do they have a right to make a presentment?

MR. ROBBINS: They don't have that right about saying anything about accepting a bribe, because they are charging criminal conduct. They could say the mayor is always late and never available for anybody and may be drunk constantly in his public office, but they can't say anything about taking a bribe. We wouldn't allow that under the bill -- if he was constantly unavailable and never amenable to the public requirements of his duty and forever on long vacations, or something like that. I am grasping for things because I don't recall any mayor that did this.

THE CHAIRMAN: Do you have any extra copies of the proposed bill with you or does anyone have copies with them?

MR. ROBBINS: I thought they were sent up to the Commission.

THE CHAIRMAN: They have been, but we don't have them with us.

MR. DENZER: Somehow or another we don't have enough.

JUDGE HALPERN: You are addressing yourself to the one received on June 5th?

MR. ROBBINS: Yes.

JUDGE HALPERN: It is different than the bill --

MR. ROBBINS: We have not come to the differences yet. There are minor differences, but the differences come on page 3, which I haven't arrived at yet.

The rest of these safeguard provisions, I think, speak for themselves. The one Mr. Steinberg particularly -- which particularly invited his objection was D, which says the report criticizes persons or groups or classes of persons who have not been invited to be heard by the grand jury individually -- members of such group or class. Obviously, we are fully aware of the niceties and the privileges against self-incrimination. It is our point to go looking for indictments on larceny or public corruption or bribery and, as I say, officers come before the grand jury and when nothing has been said about waivers of immunity at any time.

The waiver of immunity situation remains. This doesn't change the waiver of immunity whatsoever and, frankly, the only point of this safeguard is not in the connection where a crime is charged; it is a connection where, again, the mayor has been found to be never available or putting unqualified subordinates in office or being sloughful in the conduction of his office; and in those kinds of cases, since no crime is charged and no crime can be charged, there would be no problem upon assisting upon a waiver of immunity. If they didn't want to sign a waiver of immunity, they would let him go. They are

not giving --

THE CHAIRMAN: Can you give us some example of the sort of misconduct you envision would be dealt with by a grand jury under this bill?

MR. ROBBINS: Comptroller Levitt actually made the original investigations which were involved in Woods v. Hughes. It was his original audit, I believe, that led to some material

THE CHAIRMAN: That was never made public.

MR. ROBBINS: That was never made public.

THE CHAIRMAN: They are made public.

MR. ROBBINS: According to Woods v. Hughes they were not made public.

THE CHAIRMAN: You mean the reports of the Comptroller's Office were not made public?

MR. ROBBINS: What he did was to tell the District Attorney of Schenectady County that he found some serious situation, would he open investigation.

THE CHAIRMAN: What he found was made public?

MR. ROBBINS: I don't know that. I know he reported to the district attorney. Maybe that subsequently was made public. You may be right. I just don't know.

There are instances, if I have to come up with specific instances, Matter of Quinn, which was a report concerning a public officer. I was a Councilman in New York and it was -- I am frank to say I forgot what the misconduct

was, but it ultimately led to removal proceedings which were held up. There were --

MR. DENZER: Conflict of interests.

MR. ROBBINS: There was no statute particularly, at the time, that covered it -- covered that conflict of interest.

There were quite a number of "Matter of Quinns" on the conflict of interest situations. There was one very important report, which was the report of a New York County grand jury in the matter of Richard Knight. This was a report that exonerated and one should always keep that in mind.

Mr. Knight was an attorney who had accused the Presiding Justices of the First and Second Department, the Governor of the State of New York and the District Attorney of New York County, and a few other people, of being in one unholy conspiracy to frustrate his children from their inheritance; and he made these charges openly and continuously, and a grand jury looked into them with great thoroughness and issued a report which was filed, which said all these people were completely blameless, there wasn't a word of truth in these charges and Mr. Knight should be and was recommended for disbarment. There is an exoneration which served its purpose.

In Mr. Kuh's very able analysis here he shows reports from Upstate counties. One Mr. Richard Dawson, the District Attorney of Cattaraugus County reported that in the last year several reports were made criticizing the poor conditions of

the jail and court house facilities of the County seat and making recommendations by the grand jury for construction of a new jail and court house.

JUDGE HALPERN: That is covered by another subdivision of the statute.

MR. ROBBINS: That is where grand juries may inquire into private --

JUDGE HALPERN: Wood v. Hughes did not deprive the grand jury of the power to make a report.

MR. ROBBINS: I am just saying in the course of such report one could criticize, perhaps, the continual refusal as the Kings County correction official was accused by a Kings County grand jury of consistently refusing to entertain new thoughts and plans for a new jail.

MR. BENTLEY: Wait a minute. You better not talk about Dawson's jail. They can't agree themselves.

MR. ROBBINS: I don't know about Dawson's jail. I report what the district attorney reported.

Raymond C. Baratta, the District Attorney of Dutchess County, reported presentments were reported and publicized concerning Green Haven Prison, Mattewan State Hospital and Wassaic State School. They were instrumental in bringing about security measures in these three institutions which were beneficial to the people who live in this community. They brought about some changes the Department of Mental Hygiene

and the State Correction Department were unable to obtain due to budget troubles.

THE CHAIRMAN: They can do that now.

MR. ROBBINS: Wallace J. Stakel, the District Attorney of Genesee County, reported that the grand juries, several years, did criticize the Board of Supervisors for failing to modernize the county infirmary. The building was thereafter erected. That is not a jail.

William H. Earl, that's Niagara -- that may be a prison case.

THE CHAIRMAN: Your infirmary example, for example, Mr. Robbins, that obviously is nothing they came across in the course of investigation of alleged criminal conduct; is it?

MR. ROBBINS: I don't know how the investigation is initiated. It may or may not. Once you get into cases where, perhaps, crimes were committed on or about or near prisons, these things sometimes flow from that.

JUDGE HALPERN: Also, in the case of Mr. Knight, the lawyer who criticized all the public officials, in the end the presentment was a presentment against Mr. Knight, was it not, or about Mr. Knight?

MR. ROBBINS: The only thing it did say -- it wound up with the statement that they recommended that proceedings be initiated to determine whether or not he should be disbarred. The inquest was taken not to start disbarment, because the New

York County grand jury has nothing to do with that. The inquest --

JUDGE HALPERN: Wouldn't the case come within paragraph C, so that the presentment would not be permitted under your bill?

MR. ROBBINS: Under C of the new bill?

JUDGE HALPERN: C of the old bill. That presentment was completely directed against Mr. Knight.

MR. ROBBINS: No, it was directed to inquire whether certain charges --

JUDGE HALPERN: I am not talking about the inquiry. I am talking about the presentment.

MR. ROBBINS: The principal body of the presentment was the exoneration. I mean, we could have a presentment about a public official without always criticizing him.

MR. CONWAY: You can leave out the one sentence about Knight.

MR. ROBBINS: If you leave out that last sentence, it would still be a presentment.

MR. CONWAY: Could they leave out the mayor was the greatest mayor the city ever had? Could you leave that out?

MR. ROBBINS: I suppose they could.

MR. PFIETTER: Under the guise of investigating, can you come out with an accolade?

MR. ROBBINS: That could be technically possible to

have it. I think the judge would probably have good enough sense to say, "This serves no purpose whatsoever" and probably he would be upheld. I haven't been able to analyze where that would be. I don't see it has any relevance. The accolade that comes normal is perfectly permissible because the original inquiry was to examine these various serious charges about presiding justices, district attorneys and so forth.

MR. DENZER: That would come under B. The report is not the product of a fairly conducted inquiry or it is biased or the product of malice.

MR. ROBBINS: I want to address myself, now, to the rest. I think the rest of these safeguards were put in because we were sensitive all the time to the objections that we had always met -- the report is an unfair form and the fellow doesn't get a chance and he doesn't know how to defend himself. We have been as sensitive about this as anyone and we have strove, last year, to put these safeguards in, and we were still met with objections.

We now come to our next safeguard which was the product of the Cook - Robbins Conferences in late May and June.

PROFESSOR WECHSLER: Before you come to that, Mr. Robbins, can I ask you about one thing: And that is the concept of a report which does not deal with misconduct but which expresses recommendations for legislative or executive acts in the public interests. Now the underlined conception

here is that it is appropriate for grand juries to investigate any kind of public problem that might call for remedial action, legislative or executive. Isn't that the concept?

MR. ROBBINS: I am alive to the point that we are not social welfare experts and we are not correctional experts and we are not financial experts, but it was put in with the thought not that it should engender these kinds of investigation in and of itself. It is put in with the thought that if in fact you have uncovered, in the course of a real, hard criminal investigation conducted in the grand jury to determine whether crimes were committed, a situation such as the famous parole board -- the grand jury of New York County some many years ago was investigating -- the misconduct of officials and, perhaps, crimes -- possible crimes committed by parole board members in this constant release of parolees, which seemed inadvised and had caused a lot of other crime. Investigating whether anybody was delinquent in their duty or perhaps criminal in their duty, they noticed and could not help notice the rather serious shortcomings in the parole board regulations. Consequently, although no indictments were returned, an extensive report covering suggestions for parole legislation was reported and it went to the Legislature, and almost all those recommendations were enacted.

PROFESSOR WECHSLER: Why should the views on a legislative matter of a group of men on a grand jury, who, of

course, are entitled as any other group of men to have views on legislative matters and to make them known in appropriate places, but why should the machinery of the grand jury be employed?

MR. ROBBINS: Only in those instances, Professor Wechsler where their particular knowledge has been generated by a close examination of needs for legislation because of the facts brought out in the cases they were examining which would be something that might be of particular value to a legislative body, that they would not ordinarily have. They were investigating situations close --

PROFESSOR WECHSLER: They are citizens. Why don't they make proposals?

MR. ROBBINS: As citizens, they might not have known all the facts produced.

PROFESSOR WECHSLER: They have learned them. You might learn something practicing law that is significant of legislation. You can go up and make your proposal.

MR. ROBBINS: I agree that as citizens they could make the proposals. It comes with added status and I don't deny it has a stature aspect to it, that people who made a close investigation and had facts adduced before them by experts. After all --

PROFESSOR WECHSLER: You deny that if this bill were passed it would be appropriate for a grand jury to use its

power and its facilities for the purpose of conducting an investigation as to whether the parole laws should be modified or the correction law changed or the legislative law changed, or something else?

MR. ROBBINS: Whether that be technically feasible--

PROFESSOR WECHSLER: You don't mean that?

MR. ROBBINS: I don't really mean that.

MR. SMITH: May I interrupt. I happened to be Foreman of that grand jury that investigated the parole system. I could probably answer your question rather than Counsel Robbins. The reason we thought we became experts in the parole case is we spent one entire year at our own expense and own time in visiting every State penitentiary and prison to find out just what was going on there as to how parolees were rated. We sat with the Parole Board. When we finished, we took all the recommendations that we thought we gathered from our year's experience, we took them to Warden Lawes, we took it to Mr. Kass of the Prison Association, we took them to Mr. Ed Lewiston and men like that to see if our recommendations had any sense to them.

Much to our surprise, of the 47 recommendations we did not have one original one. One had gone back to the time when Sing Sing Prison was in Greenwich Village. So, we knew nothing could be done unless we tried to bring to the public attention that these legislative suggestions that had been made

would help the Parole Board, and it was a 150-page document, and it was considered a textbook. The reforms that we suggested were put into effect.

There was only one recommendation which was new and that was that the grand jury convening one year from that day should pick up the investigation to find out if anything had been done about it, but they didn't do it.

MR. DENZER: Mr. Robbins, isn't it true that this section does not enlarge the scope of investigation of grand juries? In other words, it doesn't entitle the grand jury to investigate beyond the criminal orbit as a whole; it simply authorizes them to suggest legislation, and so forth, when a criminal investigation -- investigation into crimes discloses some need for legislation in the criminal area?

MR. ROBBINS: That's what I was about to say. It is exactly the point I want to make in answer to Professor Wechsler. This doesn't give them a broader base. It means, however, should this incidentally evolve from a real criminal investigation, there is no reason why they shouldn't be allowed to forward the material to the proper channel.

PROFESSOR WECHSLER: Obviously.

MR. ROBBINS: That's what it means. It doesn't mean to broaden the right to impanel the grand jury and see whether or not the sanitation department is functioning at topnotch.

MR. DENZER: That is controlled by other provisions.

PROFESSOR WECHSLER: There is another section that prevents that.

MR. DENZER: Yes. The scope of the grand jury, as I understand it, is controlled by other statutes, not by this one.

PROFESSOR WECHSLER: Would that statute be --

MR. DENZER: The one that has three or four subdivisions saying -- authorizing the grand jury to probe into crime --

MR. ROBBINS: 253, 1 and 2, I think it is.

PROFESSOR WECHSLER: That is the answer to my question.

JUDGE HALPERN: I want to put to you a case. I had it in Allegany County or Cattaraugus County.

The Volunteer Firemen's Association had been conducting a Bingo game. That was presented to the grand jury presumably with a view to determining whether a crime was committed and to be indicted. The grand jury decided to no bill. The Volunteer Firemen's Association, which was so popular with the jury that the jury came out with a presentment -- not only a no bill, but a presentment that the law of the State ought to be changed so as to legalize Bingo.

When I read that presentment I said, "There is a provision in the constitution forbidding gambling. I don't

think the Legislature could act on your presentment without a constitutional amendment." So they went back into session and they came out with a second presentment that the constitution should be amended to legalize Bingo.

Do you think that is a proper function for a grand jury?

MR. ROBBINS: Personally?

JUDGE HALPERN: I do not care in what capacity you testify.

MR. ROBBINS: If I was a grand juror, I wouldn't vote for those presentments. My bill intended to allow that. I suppose, technically, it would. Anything for the Legislature to enact laws on, I suppose would be a proper function. Yes, it would.

I am distressed that they should have done that in this case, but I have to stand my ground and say that when a grand jury suggests something to the Legislature as a result of an investigation that that is technically within the confines of the bill.

JUDGE HALPERN: Mr. Denzer raises a point. This paragraph C, I find this is very confusing. You start out by saying individuals or groups or classes of persons at whose conduct the report is primarily directed are not public officers. That is a ground for suppressing the bill. Then you say, however, the provision shall not constitute a basis

for striking the report which makes these recommendations for legislative or executive action. That would seem to depart from the primary idea which you have in paragraph 1 of the bill, where you are talking about misconduct, malfeasance, neglect of public officials, etc. Paragraph C as it reads originally down to the "however" clause, meant that the Court was to strike it out if it dealt primarily with that subject. When you say it is to strike it out ^{if} it deals with private purchases and not public purchases, but nevertheless this provision is not to bar recommendations, it seems to me Professor Wechsler's point is entirely valid, then, that you have thrown it wide open concerning any public policies that they want to make.

MR. ROBBINS: It reaches to criticisms but not to referral for executive action.

JUDGE HALPERN: Related to misconduct of public officials or not?

MR. ROBBINS: The first thought is that the report should be stricken if it doesn't apply to individuals or groups who are not public officers or persons employed in government business. However, this provision shall not be stricken when such report does not criticize and is not directed at or identified but expresses recommendations for legislative action or executive action in the public interest.

JUDGE HALPERN: However true, the "however" clause

did not have the same idea in mind as the person who drew the original paragraph C.

MR. ROBBINS: I don't want to profess any responsibility for the original paragraph C. When we sat down in June, we saw some limitation to our private efforts. This, we think, is more explicit.

JUDGE HALPERN: I don't want to argue about semantics. I can't understand this. Is it your intention that these presentments shall deal only with the conduct of public officials and the recommendations for legislative or executive action shall deal only with public officers?

MR. ROBBINS: As far as the public, we don't want any report given about private individuals. That was basic. It is a ground for striking this report if it is dealing with Joe's Grocery Store.

JUDGE HALPERN: Or a TV station?

MR. ROBBINS: Right. But if we are making a presentment that liquor should not be sold to anybody until he is 21, or something, that's a recommendation for legislation that incidentally affects, perhaps, public officials, and we don't want that to be disallowed because it may have some incidental affect against public officials, it is not a right criticism of public officials.

JUDGE HALPERN: Take Judge Schweitzer's case. You agree that under this bill you are upholding Judge Schweitzer's

decision to suppress a presentment dealing with the conduct of a TV station in a program, but then suppose the grand jury finds there is no crime committed and they are dealing only with the private officials, with private persons, and not public officials, under your bill would that grand jury that investigated the quiz shows on TV then be authorized, under the last part of Paragraph C, to make recommendations that the Legislature should forbid all quiz shows and prize contests on TV?

MR. ROBBINS: Bypass for the moment the business of state and federal authority over TV. Assuming there is no such issue there if without criticizing private persons in any way, I would say that they could then make recommendations to the Legislature that there ought to be a strict control or additional legislative safeguards against fraud on TV. I know this is a federal subject. That's --

JUDGE HALPERN: That is what I am getting at.

MR. ROBBINS: The judge could very well strike and say, "No legislature has anything to do with this. It is a federal subject."

JUDGE HALPERN: You have now got a double-barrel bill. There can be presentments on public officials and also presentments on any matter coming up for grand jury attention dealing with--

MR. ROBBINS: It depends on what you mean by

presentments. There could be criticism or exoneration of public officials, but there can be material afforded on other matters of legislative or executive interest. That's the only way I can explain that.

THE CHAIRMAN: Or executive interest?

MR. ROBBINS: For legislative or executive action in the public interest, at the end of subsection C.

PROFESSOR WECHSLER: Do you feel, actually, that if the language after "however" were dropped from C that the bill would be greatly weakened?

MR. ROBBINS: Probably not.

PROFESSOR WECHSLER: On the whole, you are dealing with situations where no individual would have an objection where grand juries are actually slow to act and always in danger of making fools of themselves.

MR. ROBBINS: I don't think this is crucial and, perhaps, it is inartistically worded. It was put in merely to suggest the distinction between criticism and referral. I do not consider it crucial at all.

The same thought may be easily employed in another way. The new safeguards of this year's bill was to take care of the objections which were voiced at the last hearing about the real problem is a fellow doesn't get a chance, he is all of a sudden--even after all the safeguards have been satisfied, all of a sudden he is in a report that says he is done as a

public officer and he has done nothing; the newspapers then have it and he never gets a chance to initially show that it isn't so and that he has been wrongfully accused even though he had a chance to testify in the grand jury before. The Section 3-- big 3 on page 3 was what was evolved for this bill. It is a bit elaborate, but I think it bears close watch.

Prior to filing and making public any report, so that it is still secret, the court to which such report is returned shall within five days cause any person whom the report criticized, directly or indirectly, or any such group or class of persons, to be notified of the existence of such report. In such notifications, the court shall set a date for a hearing and shall invite any such person or group or class of persons, individually or by members of such group or class, to attend such hearing to contest the validity of the report and so forth.

The hearing, whether it is to be public or private, is in the discretion of the court and is to be held in not less than 15 days. The court also has the discretion to reveal to the parties concerned such portions of the report or such information concerning the report as the court may deem necessary for the proper conduct of the hearing. The court's determination concerning whom shall be invited and its exercise of discretion concerning the public or private nature of the hearing and revelation of the contents of the report shall be final and not reviewable.

After that hearing, the court determines whether or not portions or parts should be stricken of the report. This gives him one good forum under secrecy.

THE CHAIRMAN: Not necessarily secrecy.

MR. ROBBINS: I beg your pardon?

THE CHAIRMAN: What is the point of discretion in there?

MR. ROBBINS: I will put it this way: We debated that and it may well be that the interest of the other person might even be served by having a chance to have it public and we wanted to have it either way.

THE CHAIRMAN: You left it to the discretion of the judge to hope the grand jury has reported.

MR. ROBBINS: It might be the person criticized might want it publicly.

MR. CONWAY: Couldn't you have it in his election-- at the election of the accused?

MR. ROBBINS: I think that is preferable. In fact, I gladly accept that. I think that is preferable.

MR. ATLAS: If he didn't chose the road of publici he might have the opportunity to exonerate himself.

MR. ROBBINS: I speak for the Grand Jury Association not for the District Attorneys' Association. For my point of view, I think an amendment there is preferable.

MR. ATLAS: May I ask a question which I think is

basic: Why should the grand jury, as such, have this power either of criticism or approval when there are already so many agencies to reveal public derelictions? Why should this be lodged in the grand jury?

MR. ROBBINS: Why should it? It investigates. The grand jury has, for many many years intelligently and by far, in the most instances, exercised this power. It is often in a position to give a very good criticism because of an intensifie study it has made of the particular cases where no evidence warranted an indictment. Particular situations were carefully studied and minutely examined so that it has a very good view of it.

Also, it is an impartial, non-partisan group of persons who represents the conscience of the community and in the best sense, in the main, the history of our grand jury is it has always done a fair and workmanlike job.

MR. ATLAS: I have an auxiliary question.

MR. DENZER: Just on that question, Mr. Atlas, I think another reason is the grand jury is the only one who knows about it, the only one who can disclose a particular matter.

MR. ATLAS: I have an auxiliary question. The grand jury is under the control of the judge who swore it in; is that not so?

MR. ROBBINS: I do not think you mean under the

legal control?

MR. ATLAS: The legal control, yes.

MR. ROBBINS: When you said control, that is an ambiguous word.

MR. ATLAS: I mean legal control. I don't think the judge sits in there among the 16 to 23 who make decisions.

What I wanted to know is this: Is there any safeguard in your proposed bill against any judges holding a grand jury beyond a reasonable time and beyond a reasonable term?

MR. ROBBINS: This bill doesn't deal with that subject.

MR. ATLAS: You realize that is a problem?

MR. ROBBINS: Yes, and I am sure there are many other bills to be considered with respect to those matters. We do not deal with that subject. I can understand the concern on that issue, but I have no comment on that.

PROFESSOR WECHSLER: Would you help me on another technical point. What is the relation between the provision that the court's determination as to the revelation of the contents of the report shall be final and not reviewable and the later review system that is established? It is on filing.

MR. ROBBINS: Yes, there are subsidiary questions that are not reviewable. As we have it phrased here now, whom to invite, public or private hearing and what portions of the report he can hand over to the subjects are decisions he has to

make on the spot and we are letting him make those without being challenged and reviewed. Whether or not his ultimate action in striking, in whole or in part, that is completely reviewable.

PROFESSOR WECHSLER: If the court makes a determination to reveal--

MR. ROBBINS: Reveal to the parties?

PROFESSOR WECHSLER: To the parties and it is a public hearing, then it means it is revealed to the press.

MR. ROBBINS: Then that would be silly. I agree with you.

PROFESSOR WECHSLER: How do we put that together?

MR. ROBBINS: If I had to redraft that portion, I think I would -- I might eliminate that portion about the -- I think the parties, I would give the subject of the report the initiative as to whether he wanted private or public. And as far as I was concerned, I would give the court the right to turn over anything that he thought was necessary for the hearing and not say anything about whether it is reviewable or not.

PROFESSOR WECHSLER: Drop review?

MR. ROBBINS: Drop review on that issue. I wouldn't bother with that statement.

PROFESSOR WECHSLER: There is not much importance on the review.

MR. ROBBINS: The thing that would be important on

the review is the main issue of striking or not striking portions of the report.

PROFESSOR WECHSLER: You think that is important even after being made public?

MR. ROBBINS: I don't envisage too much of this would be made public. If we take the amendment suggested here, that it would be made public, the only time it would be made public is if the subject wanted it made public. Then you still have your bottle baby.

THE CHAIRMAN: If the determination by the judge is adverse to the respondent or the subject matter of the report, then I take it that upon his filing notice of appeal --

MR. ROBBINS: He can review.

THE CHAIRMAN: The report is --

MR. ROBBINS: Everything is kept locked up until final appellate action. In other words, this never hits the papers when it is against. It never hits the papers until all appeals have been exhausted.

JUDGE HALPERN: You have a provision for that?

MR. ROBBINS: Yes. As you continue, Section 518-A, on page 4, is a new section. We have an ultimate appellate review.

The next two pages deal with the new things for appellate review by both the Appellate Division and Court of Appeals.

JUDGE HALPERN: Is there a provision about if there is a stay in the meantime?

THE CHAIRMAN: Is there a provision for a stay as to the release of the report?

JUDGE HALPERN: You could word it as a substantive provision that the report shall not be publicly filed--

MR. ROBBINS: I thought there was a stay provision.

MR. ATLAS: Doesn't this involve the keeping of the content of the person named in the presentment and his appeal private? How do you do it?

THE CHAIRMAN: This is an impossibility as I see it. Once there is an appeal to the Appellate Division, it becomes public matter.

MR. ATLAS: That is my point. I am glad you said that. Supposing that my name, which has a certain innocence, is mentioned in a presentment--I am assuming that it has an innocence and I hope my colleagues join me.

Suppose my name is mentioned in a presentment. First in order to defend myself I would have to come into court and say, "You got the wrong guy." That's one thing.

Then if the judge decides against me, I have got to go on appeal. I have got to print my appeal. It goes to the Appellate Division. How am I going to keep that private? Tell me that?

MR. ROBBINS: If it is over the appeal route, it

could not be done. It doesn't have to disclose the criticism of Nicholas Atlas. It could say, "In the Matter of Nicholas Atlas."

MR. ATLAS: Somebody might think that is a disbarment proceeding. Haven't I, therefore, been foolish to make myself a public spectacle because some grand jury of 23 people of more or less -- you will certainly concede that the 23 are of varying degrees of intelligence and experience -- they have decided to name me in a report and I have got to be publicized because I want to clear my good name.

MR. ROBBINS: It could be entitled, "In the Matter of the Report of the 3rd of October, 1962, of New York County." The name "Atlas" would not be there. The press isn't going to read the report.

MR. ATLAS: These details go to the heart of the bill. The question is: Why should I be put upon to defend myself when I am an innocent man to start with? That is the question.

THE CHAIRMAN: Mr. Robbins, what in here would permit the appellate division, for example, would permit them to hear the people in private? How do you prevent the file papers on appeal from becoming public?

MR. ROBBINS: I suppose the actual appeal, the filing of the appeal, the most we can do about an appeal is to at least circumscribe the bad effect. The petition for

appellate review shall briefly set forth the reasons relied upon in urging that the report should be filed in whole or in part or be struck in whole or in part. The Appellate Division of the Supreme Court in the department the report was tendered shall have the discretion to permit the filing of papers in opposition of the presentment. Neither portion of the report is accepted for filing by the court nor the grand jury minutes may be part of the moving or opposing papers, although they may be sent for, examined and considered by the appellate court and be disclosed insofar as is appropriate in the opinion of the appellate court.

That isn't as good as a stay. It obliquely suggests you can't get them publicly examined except by the appellate division.

MR. BASS: When you are in the appellate division and you are on appeal, you have before the appellate division the record on appeal which has to contain, printed, the grand jury minutes and the other papers despite what you have in there.

MR. ROBBINS: Not necessarily, because this report is never made part of the record.

MR. BASS: The court rules of all the appellate divisions requires that the record on appeal be printed to them in a certain manner.

THE CHAIRMAN: If the trial judge in the trial court

determines that this ought not to be made public on one of the enumerated grounds--and there is one ground, incidentally, which I don't see enumerated and that is he considers the neglect or non-feasance to be of such insignificance that it ought to be--he has determined it ought not to be made public and the district attorney appeals from that determination, how is he going to appeal? How is he going to prepare moving papers? How can it legally be argued without these very questions being discussed in the court room of the appellate court?

MR. ROBBINS: You mean inevitably the discussion of the appeal will bring some publicity to it. I suppose I can never avoid that but at least until that juncture -- until that juncture, you have eliminated a good deal of the trouble along that line. Toward the final lines, I am certainly going to be defeated on the ground of not avoiding all publicity. I can't do that. I have carried the ball as far as I can carry the ball.

PROFESSOR WECHSLER: Do you think the situation would be fair if the position came to this: That it was up to the judge to determine whether to accept the report? If the judge rejected the report, it would not be filed and that would be the end of it. If the judge accepted the report, you would still give an opportunity for appellate review as you have now?

MR. ROBBINS: That's right.

PROFESSOR WECHSLER: Why can't the appellate situation be left the way it is now?

MR. ROBBINS: That is what I am saying.

PROFESSOR WECHSLER: It means dropping part of your appeal provision.

MR. ROBBINS: You mean leave it the way it is now. We may have elaborated our position that you are -- or elaborated things that have not really helped. You might be quite right.

MR. ATLAS: Mr. Robbins, I am concerned mostly with the publicity aspect of persons who may turn out to be innocent. Now, of course, your bill addresses itself to public servants. Supposing I know a public servant and am associated by implication or by indirection in the course of a report with some public servant in his dereliction. I want to come in and defend myself. I am going to wind up being publicized to the extent where people say, "That damn Atlas is a liar, anyhow. His whole position is a lying position and the only reason he came out to defend himself is because he is being mentioned."

These are the things that give me a very great moral concern. I would like to be reassured about that.

MR. ROBBINS: I can't reassure you except -- in any way except by saying that no report could, in effect, criticize

you under this bill. If they criticized a public officer and you weren't in that public office, I don't see how any reference to you would be germane. It would be stricken.

MR. ATLAS: Supposing it criticized the Board of Water Supply for making nefarious and against the public interest, contracts with a lawyer named Nicholas Atlas.

MR. ROBBINS: The implication would be that you and the Board of Water Supply were equally nefarious. I would say your name could not be included in that report.

MR. ATLAS: In other words, nobody could say that the vote of this Commission was controlled by my long-standing friendship with Mr. Robbins?

MR. ROBBINS: The Board of Water Supply had no business making this unconscionable contracts with a lawyer. They could say that. They couldn't say a lawyer, Nicholas Atlas, or a former employee of the board, or something like that.

JUDGE HALPERN: What provision prevents that?

MR. ROBBINS: This only applies to public persons, public officials.

JUDGE HALPERN: C says individuals or groups or classes of persons at whose conduct the report is principally directed are not made public. If you principally direct it to a public office, you could then include the one with whom he is supposed to be in cahoots.

MR. ROBBINS: Principally, it means that the report

might have something else in it. The report is principally directed, not the criticism.

JUDGE HALPERN: Shouldn't you give the judge, if you are going to have a judicial review, shouldn't you give the judge the power to redact the report, edit the report. Suppose he finds in the report they have needlessly named names when their whole point is to the conduct of public --

THE CHAIRMAN: It strikes a portion of it. It says that.

MR. ROBBINS: It strikes in whole or in part. On page 1.

JUDGE HALPERN: I would like to see that clarified. We have that problem in confessions in criminal cases where one defendant makes a confession in which he names his co-defendant and if it is possible to redact the confession so as to eliminate the name of the other defendant, that is done, because of the fact that the jury would otherwise hear it and despite the court's admonition would be prejudiced by it. I think that should be clarified that the judge has the right to strike out names.

MR. DENZER: In 2C, instead of having individuals or groups or classes of persons at whose conduct the report -- just say it is a ground for striking that individuals or groups or classes of persons who are mentioned.

PROFESSOR WECHSLER: Criticized in the report?

MR. DENZER: Yes -- are not public officers, period.

MR. ROBBINS: That is a better way of saying it.

MR. DENZER: Just one thing on that. I am a little puzzled. It says the court may for good cause strike. It doesn't say the court has to strike, if any of these things are said.

MR. ROBBINS: It should be compulsory rather than permissive. I accept that, again. That's a better way of phrasing it.

THE CHAIRMAN: Some standard ought to be in here as to the significance of the revelations of the report. If they are trivial criticisms of the --

MR. ROBBINS: I agree with that. That should be incorporated by us. We will, ourselves, make some amendment here, but obviously if any bill ever emanates from this committee to the extent that it incorporates those things, we certainly would fully endorse it. We agree and, as I say, I assume the State District Attorneys' Association will go along, but certainly the Grand Jury Association would agree with that.

I think all the issues have been expounded as much as I can. I thank you for the very courteous audience.

MR. ATLAS: I want the record to show that this is a Dewey man.

THE CHAIRMAN: The record will so indicate.

So we may have some idea how long we are going to run this afternoon, I would like to inquire who else wants to be heard this afternoon other than Mr. Taylor, representing the newspaper editors? Is Mr. Smith here? Not you (indicating).

MR. CONWAY: He changed his mind.

THE CHAIRMAN: He is not coming.

Mr. Ryan, did you want to be heard this afternoon?

MR. RYAN: Yes.

MR. MC FARLANE: Kings County would also like to be heard.

THE CHAIRMAN: Kings County Grand Jury Association.

MR. MICOLOSI: And Queens County.

THE CHAIRMAN: I have Queens.

MR. CRAIG: Westchester County, a brief paper.

THE CHAIRMAN: We have Westchester listed.

MR. DAVIS: Nassau.

MR. DAVIDSON: Suffolk County.

THE CHAIRMAN: I take it that a number of these persons will be brief and will be in support of Mr. Robbins' position.

UNIDENTIFIED SPEAKER: Bronx County.

THE CHAIRMAN: Fine.

I am going to declare a recess until a quarter of four and then we will continue until we finish the hearing.

(Whereupon, a short recess was taken after which

the proceedings resumed.)

THE CHAIRMAN: We will hear next from the representative of the New York State Newspaper Editors' Association, Mr. Mason Taylor, from Utica.

MR. TAYLOR: Gentlemen, I am Executive Editor of the Utica Observer-Dispatch and the Utica Daily Press and Chairman of the New York State Society of Newspaper Editors' Subcommittee on Grand Juries.

I am here today as a representative of the society and also to offer some comments based upon my own experience.

The society, as you perhaps know, has gone on record in favor of restoring the right of grand juries to make reports.

Immediately following the Court of Appeals four to three decision in the Schenectady County case in 1961, many newspapers around the state spoke out editorially in favor of grand jury reports.

Subsequently, at meetings of the Editors' Society in July of 1961 and January 1962 and this past July, the subject was discussed at length and in July, 1961, the Society's right to know committee recommended that the Society take immediate and forceful steps to persuade the Legislature to restore the right of grand juries to make presentments. Last January a special committee that continued the study recommended that appropriate legislation be introduced to revoke the ban on public reports.

Following the third discussion, this past July a resolution was adopted which said in part, "Whereas, since the Court of Appeals decision was handed down on February 23, 1961, many of the newspapers in New York State have gone on record editorially calling for a return of the grand jury's right to make public presentments;

"And whereas these positions are in keeping with this Society's dedication to the principal of the people's right to know;

"Now, Therefore, be it resolved that this Society call upon the State Legislature to restore to grand juries of this state their traditional authority to issue public presentments.

Now, since we had no legal counsel present at the drafting of this resolution, it perhaps is faulty in two respects. For one thing, I understand grand juries in this state perhaps never had a clear legal right to make reports. The other error, perhaps, is the use of the word "presentments" which lawyers tell me is technically obsolete and is now used synonomously with "indictment," but --

THE CHAIRMAN: Lawyers ignore the distinction themselves all the time, so go right ahead.

MR. TAYLOR: What we meant was grand jury reports of public matters where there is no indictment.

All of us are aware that the people's right to know what public officials and public agencies are doing is

gradually being whittled away in federal government, sometimes in state government and all too often at the local level.

Too many officials elected or appointed to serve the public seem to take the position that the public's business is not the public's business, but only so much of it as they may think is good for the public.

Most grand jury reports, in my experience, have been directed at derelictions of public officials or public matters that a fair-minded person would agree needed the spotlight of public attention. I covered the courts for about 12 years in three different judicial districts in this state and I can't recall an instance where a grand jury report could be fairly criticized for impropriety.

I have great respect for the legal profession and for the judiciary, but I also have great respect for the wisdom and the good judgment of the citizens who make up our grand juries and I am sure that not even the wildest jury has ever approached in a report the sometimes irresponsible charges political opponents often hurl at each other during, before and after political campaigns, and we think nothing of it and no one objects, of course, to criticisms of public officers made in periodic reports of the State Department of Audit and Control. So why this fear of grand juries? If a grand jury cannot call public attention to, say, the laxity of public officials, who is going to do it--their political cronies?

I come from a county--Oneida--that recently was the scene of a special investigation with an extraordinary grand jury and a special prosecutor. It began under former Governor Harriman and was continued by Governor Rockefeller.

We and our newspapers were deeply involved in this affair and the events that preceded it. But I can tell you that it would, perhaps, never have come about had it not been for the actions of two grand juries--one in 1957 and the other in 1958. The first one brought in a rather innocuous report regarding vice and gambling in our city, but which made perfectly clear to anyone who read it carefully that there was something awfully wrong with our law enforcement agencies.

The second jury, obviously, frustrated by its inability to obtain legal evidence, did a very unorthodox thing: it issued a public appeal for its citizens to come in and present any facts they had about vice and crime. That didn't work either. But just before its term expired, this grand jury asked Governor Harriman to convene an extraordinary grand jury and requested the then single State Commissioner of Investigation to provide the jury with legal assistance.

Subsequently, Governor Harriman directed its new State Crime Commission to look into the situation and after questioning officers of the grand jury, newspaper men, city officials and the district attorney, the Commission recommended the convening of a special grand jury with the special

prosecutor.

Now five years ago a New York City newspaper termed Utica a "sin city." This month, Utica was one of the finalist cities for an All American City award and I think we may win it.

The point is: If these things had occurred subsequent to the 1961 Court of Appeals decision, I doubt if these juries^o could have done or said all of the things they did.

I am sure that if the long record of grand jury reports in the past 20 years was examined, for every one of dubious worth there would be a hundred that contributed to the betterment of the community.

Let's take one hypothetical case. This is the season when there are a lot of fires and since the heating season beg a number of people, including children, have lost their lives in fires around the state. Let's assume in one such case a landlord is suspected of criminal negligence. A grand jury, after hearing the evidence, finds no grounds for an indictment but it does find that the inspector of buildings, the fire prevention bureau, or whatever agency is responsible, has been lax in enforcing the multiple residence laws or regulations relating to fire escapes. It believes that this situation should be forcibly called to public attention. Now in the face of this gag on grand jury reports, what does it do?

It is argued, and we have heard the argument here

today, that a report critical of a public official can be damaging if he does not have opportunity to reply or to have his day in court, and I think it is only fair that he should.

With every good newspaper and with the wire services, it is standard operating procedure whenever anyone is accused of anything in such a situation, to invite his comments. If he has none, the story says so. If he isn't available, the story says that, too. In this, I am not presuming to speak for the editors, but I feel personally that there should be provision in the law for any person or group censored or otherwise criticized in a grand jury report to have its day in court.

I believe that after hearing all of the facts, if the judge deems the allegations improper or capricious, he should have the authority to so find and to expunge the accusation or the report from the record.

I do not feel, gentlemen, that any jurist should be granted the right to do so without a full and public hearing. Again, I say I have confidence in the good judgment of grand jurors. When we start questioning the right of a body of citizens sworn to perform its duty in accordance with the dictates of the law, to speak its mind on the basis of legal evidence, another little bit of our democratic process has been chiseled away and when enough of it is gone our liberty and freedom may be gone also.

Thank you.

THE CHAIRMAN: Thank you, very much, Mr. Taylor.

MR. ATLAS: May I have a question. I would like to ask one, first, please. Does your organization have a position on the bill which has been drafted by the Grand Jury Association?

MR. TAYLOR: No, we don't.

THE CHAIRMAN: I take it from having listened to the discussion this afternoon, you are in favor of some safeguard machinery?

MR. TAYLOR: I got the impression that this goes too far in these safeguards, particularly, the one to do with public or private hearings.

MR. ATLAS: I have, I think, three questions. If there are four, you will forgive me.

First question: Is it not a fact that the exoneration of a person accused receives less news space than the accusation of a person accused?

MR. TAYLOR: Well, this has not been my experience and I would not say it would be so, particularly in the case of a public official.

I would, based on my own news judgment -- let's say there was a welfare official who was accused of something or other in a grand jury presentment, The case came before a judge and on the basis of what he heard of the grand jury minutes, he threw out this report, expunged it from the

record.

I think there would be as much news in this -- perhaps, even more -- the fact that these accusations were found groundless.

MR. ATLAS: I don't know what your experience is Upstate, Mr. Taylor, but from a slight experience in the days when I was innocent and worked for a newspaper, I found that accusations would get columns but exonerations would get inches. That is one thing.

Now I would like to ask you another question. You realize, of course, don't you, Mr. Taylor, that there is a veil of secrecy over what goes on in a grand jury, which is something that even lawyers and defendants cannot penetrate it without permission of the court. In the light of that, what do you mean by the "public right to know?" and then going on with that, aren't you satisfied with the number of senatorial and assembly and congressional committees which are revealing instances of corruption in public office without invading the province of the grand jury where the law, abinitio, imposed a veil of secrecy?

MR. TAYLOR: I agree with you. We have the -- particularly, at the federal level and I sometimes don't agree with their procedures, but we don't have too many.

MR. ATLAS: That is where you and I do agree.

MR. PFIEFER: The power is there for the local

legislative committee in the State of New York. We have had a lot of them.

MR. DENZER: How is the legislative committee going to exonerate a person in connection with a grand jury investigation which they know nothing about?

MR. ATLAS: Why should the grand jury start an investigation which is not about to lead to an indictment and then set themselves up as a public critic, a criticizing factor to deliver over an opinion in public.

MR. DENZER: How do they know it is going to lead to an indictment? They start an investigation and find some condition that requires rectification, so they come out with a presentment.

THE CHAIRMAN: We can't, gentlemen -- it is seven after four and we can't get into a debate among the members.

PROFESSOR WECHSLER: I have a question. Everything you spoke of had to do with laxity in law enforcement. Is that what gets into your mind?

MR. TAYLOR: Not necessarily. Anything to do with public officials on this matter of legislative committees. For example, in our area we have had only one experience with a legislative committee in recent years and this was preceding this particular situation when we had the Watchdog Committee, I think they called it, of the Legislature hold hearings for one or two days in New York City and then they were off on

something else and left it all up in the air, and so accusations were made.

THE CHAIRMAN: Thank you, very much, Mr. Taylor.

Can we have representatives of the several grand jury associations?

The Kings County Association.

MR. MC FARLANE: My name is Robert McFarlane. I am President of the Kings County Grand Jury Association.

THE CHAIRMAN: Do you have a statement that you will read?

MR. MC FARLANE: The problem of the grand jury presentment centers squarely on the issue of whether the people are best served by its use or omission. As far as legality is concerned, when judges of the state's highest court disagree as markedly as they did recently, by the closest of margins the people are left wondering. They may therefore justifiably decide that resolution of the presentment problem rests on the basis of common sense applied to their interests.

Rather than read this and take up your time, I would like to file it and go on record as being in approval with the New York County Grand Jury Bill.

THE CHAIRMAN: Fine.

Queens County.

MR. MICOLOSI: My name is Frank Micolosi. I am Counsel to the Queens County Grand Jury Association and I want

to call your attention that I am here with the president, the past president and one of the vice presidents. We were here last year.

I think that the people who have spoken here today and the Committee have lost sight of the fact that the grand jurors don't want something that they have never had. The grand jurors always have had the right to make presentments. They have had it for centuries. It was only because of the decision by the Court of Appeals which, incidentally, as you know, was four to three, that they have lost that right.

Now the question is -- let me say this, too: The grand jury usually never starts an investigation merely to make the report. Usually, a report is the culmination of an investigation that is made or evidence presented to the grand jury where the district attorney seeks an indictment, but they find that there isn't enough evidence to indict and they make a report, and that report is very beneficial to the community.

Now we have a committee in our grand jury association -- and I have copies which I will leave with you -- they have really made a terrific study of it. We have made examples of reports that have been made. For instance, in the Bronx and Brooklyn, where the grand jury reported on slum landlords and as a result of their report, matters were corrected.

You had in Rockland County, where the gentlemen of the press said about a fire -- there, a grand jury in the

investigation of one of the matters before it, found that they weren't enforcing multiple dwelling regulations and as a result a fire occurred where three persons were burned to death; and as a result of that report, matters were corrected.

In Queens County we had a sewer investigation, a sewer scandal, and it was only because of the report of the grand jury that that situation was corrected. We had the tow wagon scandal in Queens County. There were indictments, it is true, but it was because of the report that was made by the grand jury that matters were corrected.

Now in New York County we found in the last 90 years over 500 reports or presentments were made.

THE CHAIRMAN: In the last how many years?

MR. MICOLOSI: 90 years.

We overlook the fact that the grand jury isn't trying to get something we never had.

MR. PFIEFER: I don't think we are overlooking it. We are all aware and we have read the opinion. The question now is: What are we to do, the Court of Appeals having done it? I don't think we have overlooked something.

MR. MICOLOSI: On behalf of the Queens County Association, I say we are in favor of a bill -- we are in favor of the bill that has been submitted by the New York Grand Juror's Association though, frankly, I feel we have too many safeguards. Presentments did operate properly in years past.

We had no law, we had no safeguards. It was left to the judge to whom the presentment was given. If the court felt that names were named, they could expunge them from the record. If they found that the report was not proper, they would not make it public and no report ever came out.

MR. DENZER: Did you ever read any of those 500 presentments in New York County?

MR. MICOLOSI: I did not.

THE CHAIRMAN: I think you would change your mind about it.

MR. MICOLOSI: I appeared amicus curiae on behalf of the Queens County Association and supported Judge Schweitzer's view because we did not feel that the presentments at that time made was proper.

Normally, no names are mentioned in a presentment. Nobody is named. They don't mention John Smith or John Doe; no names are named and usually where a court gets a presentment or a report that has names, those names are expunged from the record.

Now the reason that this bill is presented is the fact that last year many came up and said that the person accused had no forum in which to apply. They felt that the person who might be accused, although his name does not appear, would have the right to appear and question the findings of the grand jury that made the report and for that reason this

bill is made long.

Frankly, I don't think you need all of the safeguards that are in the bill if you leave it to the court, but we are in favor of a bill which would give to the grand jury the right to make presentments, because we feel that it is beneficial to the community where the grand jury sits and many things are brought out by a grand jury that would never be known by the public and would not be rectified except for the fact that a report is made by the grand jury.

Sir, on behalf of the Grand Jury of Queens County, I hand you some copies of our recommendation. You will find that a rather complete study of the situation.

Thank you, very much.

THE CHAIRMAN: Thank you, very much, for appearing.
Nassau County.

MR. DAVIS: My name is Ernest Davis. I have with me Mr. Munson and Mr. Piersall.

We wish to endorse the stand taken by the New York County Grand Jurors Association. We also endorsed the remarks made by Mr. Taylor.

THE CHAIRMAN: Suffolk County.

MR. DAVIDSON: My name is Oliver Davidson. I am President of the Suffolk County Grand Jurors Association.

I was sent up here to represent our association and endorse the bill as proposed by the New York County Grand

Jurors Association. This was all I intended to say until hearing some of the remarks passed here and it amazes me, after attending two of these sessions in Albany, that such a flagrant right to people's legal rights has been allowed to be tolerated in the state for over 300 years and only discovered within the last two.

This, I don't think is a credit to the learned barristers, lawyers and legislators we have had in our history.

THE CHAIRMAN: Judges?

JUDGE HALPERN: He didn't say judges.

MR. DAVIDSON: Everybody connected with it.

The other thing I had in mind was the statement: Why should a grand jury be permitted to investigate when we have so many bodies in the state to do it? Gentlemen, we are, perhaps, doing you a favor. Two words that are commonly associated -- often more commonly than they should be -- with appointed or elected or selected commissions of investigations are either "whitewashed" or "cover-up" and other such derogatory words.

To the best of my knowledge I can never recall hearing any one accusing a grand jury presentation as being a whitewash or a cover-up. We neither have been accused of being witch hunters.

Thank you for your attention.

MR. ATLAS: The record doesn't show that the

decision of Judge Weinfeld, on the federal courts on grand jury presentments is over four years old and nobody is convinced this judiciary right has existed for centuries nor that it is traditional.

THE CHAIRMAN: We have a representative of the Westchester County Association.

MR. CRAIG: Mr. Chairman and members of the Commission: My name is Stephen Craig, address 77 Woodruff Ave., Eastchester, Westchester County, New York, and I am President of the Westchester Grand Jurors Association and represent that association of 625 members and Mr. Walter Stein of Mount Vernon Chairman of our Legislative Committee, who has been in correspondence with you and who follows this matter with great interest. He is ill and cannot appear here.

I also represent our past president, Mr. Richard Roth and our first vice president, Mr. Richard Holbrook.

I consider it a privilege to be able to address this Commission on the subject of whether or not the authority of grand jury reports or presentments to the court be restored to grand jurors in this state. My Association wishes to go on record as being in favor of the restoration of this privilege to grand jury panels.

In spite of what Mr. Steinberg, the second speaker, said so eloquently, no man knows all about everything, but I do feel that a panel of grand jurors is a meeting of the minds

of men under advice of counsel, the district attorney, and they bring to the room experiences that they have obtained in the various walks of life.

Of equal importance as the franchise or vote, we feel that the ordinary citizen, the man in the street, should not lose the right, in concert with others on a panel of ordinary citizens, to report a condition in public life that in their opinion would be sufficiently serious or grow into such a condition as to be seriously detrimental to a large segment of other citizens. This report or presentment should be to a court having sufficient authority to initiate an investigation.

To avoid abuses of this privilege which caused the recent adverse majority decision by the Court of Appeals, we feel that these objections can be met by the bill proposed by the Grand Jury Association of New York County or some similar bill of your own construction. We also feel that the name of an individual should not be damaged without opportunity to make reply and believe this can be obviated by the provision for the court to seal the presentment for as long as necessary to accomplish this.

THE CHAIRMAN: Thank you, very much.

Are there any other Grand Jurors' Associations?

MR. MICOLOSI: In stating who was here, I forgot to mention the names and I feel the record should show it.

Lawrence J. Hammel, President; Stephen F. Schneider and Charles

Scala of the Queens County Grand Jurors Association.

THE CHAIRMAN: Thank you, sir.

We will now hear from the New York Civil Liberties Union, represented by Mr. Arnold Hoffman.

MR. HOFFMAN: My name is Arnold Hoffman. I am Chairman of the Legislation Committee of the New York Civil Liberties Union. I am here with George Rundquist, who is the Executive Director of the Union, and our purpose here is to oppose, on behalf of the New York Civil Liberties Union, the bill sponsored by the Grand Jurors Association and the District Attorneys' Association to confer upon grand jurors the power which the Court of Appeals held they never had.

There has been a great deal of discussion here about the proposed legislation. I think that the thing that, first of all, should be borne in mind is that we are concerned with whether or not a power should be conferred upon the grand jury. It therefore behooves the opponents of the bill to establish the necessity and the desirability for restoring or for conferring that power -- I hesitate to use the word "restore" because I don't believe it ever existed -- to confer that power on the grand jury. I don't think any such showing has been made.

Let me turn, first of all, to the other statements that have been made by proponents of the legislation. You have heard a lot of talk about criticisms of the grand jury

reports because the accused has no forum in which to answer. I suppose the New York Civil Liberties Union is responsible, to a large extent, for that criticism levied against grand jury reports. We continue to adhere to that position. A person who is accused of a neglect, non-feasance, misconduct in office, has no forum in which to answer those charges, even under the proposed safeguards which are presumably incorporated in this proposed legislation.

It seems to me what Article 3 of this proposed legislation does is to decide whether or not the reports should or should not be filed as a matter of public record. We have already had a lot of discussion about whether or not it could ever be kept secret if there were in fact an appeal.

I think that what you are talking about in Article 3 or Section 3 of the bill here, is whether or not the bill should be made public -- or the report should be made public or not. It doesn't go to the question as to whether or not the person who was accused in this report of neglect, misconduct or non-feasance is in fact guilty of these charges, nor does it afford him a forum in this hearing to answer the question as to whether or not he has -- I hesitate to use the word "guilty" has committed these offenses or however you wish to characterize them.

Our point is if a public official, just like every other citizen, is charged with misconduct, neglect or

whatever it is, in office, he should have an appropriate forum in which to answer those charges and the grand jury report does not furnish him with a forum in which to answer those charges.

MR. DENZER: Why isn't the hearing provided therein a forum to answer the charges?

MR. HOFFMAN: What I see in Section 3 here is a determination by the judge as to whether or not this report should or should not be impounded -- that is, whether it should be made a matter of public record.

In deciding that question, he is presumably going to apply the tests that are provided in Section 2. Assuming that the tests in Section 2 are favorably decided in favor of the grand jury, the report will be accepted for filing. The report, as filed, charges misconduct, neglect, nonfeasance in office on the part of a public officer. Where has he had a chance to answer that particular charge?

MR. CONWAY: He has had the forum of the grand jury forum under that.

MR. HOFFMAN: That is correct. It is entirely possible that the person against whom these charges have been levied -- in fact, it is probably necessary -- or maybe not, depending upon immunity statutes.

Supposing this person has appeared before the grand jury. He has offered an explanation for his conduct. The

grand jury disagrees with him. The grand jury then issues a report saying he is guilty of misconduct, neglect or nonfeasance in office. Now, this is the grand jury's determination. The person who is accused has had no opportunity to cross examine the witnesses who have made the charges against him. He has had no opportunity to be represented in the cloistered chambers of the grand jury by counsel. He has had no opportunity to introduce witnesses on his own behalf. Nevertheless, the grand jury has accused him of being responsible for misconduct, neglect, nonfeasance, whatever it may be.

PROFESSOR WECHSLER: The bill says that he shall have the opportunity to attend such hearing to contest the validity of such reports, the validity of such record.

MR. ATLAS: That comes after the presentment.

PROFESSOR WECHSLER: That's right.

I am just curious to understand what you think the words, "to test the validity of the report" means.

MR. HOFFMAN: I think the words here, as I read this section, it means simply as to whether or not the statutory standards which have been written --

THE CHAIRMAN: The enumerated standards.

MR. HOFFMAN: The enumerated standards have been applied other ways.

PROFESSOR WECHSLER: Whether it rested on legal evidence presented?

MR. HOFFMAN: That is right. There is no provision in here, in the alternative construction that a person could test whether or not he was responsible for misconduct, nonfeasance, or what have you. Where is the provision here that says he can call in his witnesses?

MR. DENZER: I think it is quite implicit that he can contest the accuracy of it and he will be permitted to call witnesses. I think it is quite plain.

As far as the grand jury, itself, is concerned, the defendants actually indicted don't have counsel or anybody else in the grand jury any more than this man.

THE CHAIRMAN: But they enjoy a trial after the indictment.

MR. DENZER: This is comparable to a trial.

MR. HOFFMAN: The establishment of a court of law--

MR. ATLAS: I just want to make it clear that what he can do, Mr. Denzer, is what comes after the presentment. Isn't that true?

MR. DENZER: Yes.

PROFESSOR WECHSLER: It's not been published. The presentment, itself, is a document.

MR. ATLAS: It is written and it is ready to be published and it is waiting for publication.

JUDGE HALPERN: I can't agree with our counsel's interpretation of the statement. The judge is not to decide on

the merits whether the charges made were sound or unsound. All he has to decide is whether it is to be made public and to decide whether there is bias, prejudice or lack of legal evidence, or some such ground.

If the interpretation of it is to have a full dress trial before the judge, then you are inviting a new kind of proceeding. In other words, the grand jury presentment is to be the initial complaint or document in a newly invented statutory proceeding of censure. To censure the public official, the grand jury report then becomes the initial process, and then he is to have the right to call all the grand jurors as witnesses in public and cross examine them and then produce his own witnesses.

I don't think that is contemplated in this bill.

MR. DENZER: I assume one of the main purposes of the--one of the main contentions made would be "it is inaccurate is it not so."

JUDGE HALPERN: Let Mr. Robbins come back, the Grand Juror's counsel, and we will find out.

MR. ROBBINS: I thought to contest the validity meant a full hearing.

JUDGE HALPERN: Full dress trial.

MR. ROBBINS: Not with a jury. Full dress judgment of the merits of the criticism.

PROFESSOR WECHSLER: That is what I understand.

JUDGE HALPERN: Then his decision at the conclusion should not be whether the report should be made public, but he should make a determination whether in fact that the report was sound in making the charges.

MR. DENZER: That is one reason for going into the desirability of making it public, whether the--

JUDGE HALPERN: This has put an entirely different color on this bill. This is a new kind of proceeding of censure. The presentment is only an initial process and in which there is going to be a full dress trial before a judge.

MR. HOFFMAN: If this bill is construed to provide that we shall have a full scale trial on the issue of whether or not a public official has been guilty of misconduct, neglect or nonfeasance in office, then my argument that he doesn't have a forum in which to present his case obviously falls of its own weight.

JUDGE HALPERN: Are you for that type of proceeding?

MR. HOFFMAN: Our position is that a public official should be held up to some kind of responsibility. My only question here is whether or not the grand jury presentment is an appropriate device for achieving this goal. I say that there are other ways by which you can insure probity in public office. This may or may not be a civil action.

MR. PFIEFER: It is likely to be utilized, though, on the local level as would be the case if you had a grand jury

presentment.

MR. HOFFMAN: If the bill were reconstrued as I have just argued it, perhaps, ought to be--we are pretty close, are we not, to the criminal law? There is no penalty provided here but we are establishing certain kinds of standards.

JUDGE HALPERN: It is a civil censure proceeding, a proceeding to censure or criticize the public official. The conclusion will be, on determination by a judge, whether this official is deserving of censuring.

MR. ATLAS: It may result in finding a culpable witness the grand jury didn't find.

PROFESSOR WECHSLER: The logic of it is, as I understand it, that this is an answer to the criticism that the ex-parte critique by the grand jury is unfair. Why is it unfair? Because it may be wrong.

Now the answer to that was: Why not give the people criticized a chance to show it was wrong? That presupposes some judge is going to determine whether he should do it or not

MR. ATLAS: Which makes for a trial that isn't called for in the first place.

PROFESSOR WECHLER: Is that your view--it isn't called for, it is a substitute for ex-parte censure, which is the system that was objected to by the Court of Appeals decision?

JUDGE HALPERN: If we are going to have such a

proceeding, that is very different from giving a power to grand juries to make presentments under the guise of a safeguard. It is a backhand way of setting up a complete new trial procedure for civil censure which may or may not have merits, but it is not merely a safeguard.

PROFESSOR WECHSLER: What it is doing is to retain a grand jury as an accusatory agency short of charging crime in relation to public officials who are charged with misconduct.

If the view is that that is one of the functions previously performed, then that function is to be restored subject to an adjudicated proceeding.

JUDGE HAPLERN: I think it is a very interesting suggestion.

PROFESSOR WECHSLER: It is the suggestion we were talking about all afternoon.

JUDGE HALPNER: I thought we were talking about safeguards and making public reports, not of full dress trials to determine the conclusion reached by the grand jury.

MR. HOFFMAN: I have already prepared--and I think I have distributed--copies of the statement. If there is anybody who hasn't a copy of our statement, I have some more here.

Briefly, my argument is the grand jury presentment and report as it was proposed in the past has not provided a forum in which the person charged could apply.

Secondly, that the grand jury has no expertus to perform the function it seeks.

Thirdly, other jurisdictions, the power does not exist, and that there are alternative and better ways of providing the kind of protection against misconduct, nonfeasance or neglect in office than the grand jury.

THE CHAIRMAN: Have you made examinations to determine just what the status of the law is in other jurisdictions?

MR. HOFFMAN: In my memorandum, I have set forth a summary statement. I have not made an extensive and completely thorough investigation.

I can briefly say it does not exist in the federal courts, has not since 1953. As a result of Judge Weinfeld's decision, in the majority of the states grand jury reports are not permitted.

You will find those cases collected in Woods v. Hughes at page 148, Note 2. In England and in Canada the grand jurors are not allowed to make reports. In fact, they don't exist for the purpose of charging crimes and alternative ways are available. You will find in my statement on page--well, starting with page 8 and running through page 9 "Experience in other jurisdictions."

JUDGE HALPERN: In view of what has been said here as to the purpose of this bill to have a full dress trial,

wouldn't you want to have added here as one of the grounds for striking out the report that the judge find that on the merits the criticism of the public official is not justified?

MR. HOFFMAN: I want more. I want what constitutes misfeasance and/or misconduct in office just as we have statutes giving definitions for charging crimes. I think we ought to have statutory definitions of what these are.

PROFESSOR WECHSLER: They aren't defined in the Civil Service Law, and why do they have to be defined?

MR. HOFFMAN: Why can't we establish these same criteria which are applicable in the civil laws for determination of the circumstances under which a person may be dismissed from service? We can do it by incorporation. I have no objection to that.

PROFESSOR WECHSLER: The point is: it has got to be defined on a case by case basis and not by some principle or declaration.

THE CHAIRMAN: Thank you, very much, Mr. Hoffman.

I think we have two witnesses left, the two district attorneys.

I call on Mr. Ryan, first.

MR. RYAN: Mr. Commissioner, Chairman, members of the Commission: Apparently, I am speaking on the side of the issue that is opposite from that of the District Attorneys' Association. However, may I say as to that, that my experience

in the jurisdiction that I represent seems to differ from the experience of my fellow district attorneys. Inasmuch as this is a Commission considering the enactment of laws that may affect all of New York, it appears that you Honorable Gentlemen of this Commission would welcome different views.

As to the legal advisers of the Grand Jurors Association and the Grand Jurors Association of the State of New York, I would ask them to simply accept my experience as advisory, though it may be the advice of a minority.

All of us have a common purpose, the purpose of enforcement of law. It does little good, I would say, to enforce laws vigorously in one area of the State of New York and not so vigorously in another.

I have prepared here exhibits that I have brought with me from Onondaga County and I am going to attempt to summarize and submit the entire report that I have and I would strongly recommend that the members of this commission read the exhibits, not so much my comments.

Insofar as this decision of the Court of Appeals in the matter of Wood, my own observation is that this is one of the more enlightened decisions of the Court of Appeals in recent years. The effect of that decision was to release the grand jurors of New York State from a form of political bondage and to make them more staunch and determined in their efforts to deal directly with crime in our society. Each grand juror

today, at the conclusion of an investigation, cannot vacillate. He must look into the eyes of his fellow grand jurors and say, "I will vote an indictment for this crime" or "I will condone this crime and stand silent forever."

Judge Fuld, in his decision, wrote the following. I think that he very adequately stated the law.

"The grand jury's historic function, as embodied in our statute, is to determine whether there is evidence establishing the commission of crime. If there is such evidence, the grand jury ought to find an indictment. If, however, there is no such evidence, it must dismiss the charges or remain silent."

MR. CONWAY: Do I understand that in Onondaga each grand juror looks into the eyes of the other grand jurors and tells how he is going to vote?

MR. RYAN: I never sat there while they did it. The district attorney is excluded from the voting time, but I should imagine that when the law is advised to the grand jury, now the grand jury is advised and it would seem to me that they must bill or no bill, and that's it.

JUDGE HALPERN: That is under Wood v. Hughes.

THE CHAIRMAN: You have become district attorney since Wood v. Hughes was decided?

MR. RYAN: Yes.

JUDGE HALPERN: There were some laws we found you

weren't following. However, there has been some reversals.

MR. RYAN: After trial, yes, but that was on--

MR. CONWAY: Sometimes even before trial.

THE CHAIRMAN: Let's have a look back in the grand jury room.

MR. RYAN: In writing that decision, Judge Fuld quoted Judge Woodward, and he used the following words. He said, "'there are two great purposes' to be served by the grand jury, Judge Woodward wrote in his masterly dissent in Matter of Jones, 'one to bring to trial those who are properly charged with crime, the other to protect the citizen against unfounded accusation of crime. When the grand jury goes beyond this and attempts to set up its own standards, and to administer punishment in the way of public censure, it is defeating the very purpose it was intending to conserve, and its action cannot, therefore, be lawful.'"

Onondaga County is a community of about a half million residents. Right about the middle of it is the City of Syracuse, population of approximately a quarter million residents. It is a community large enough to be important, small enough to be studied. The problems of neighbors of the City of Syracuse are comparable to the problems of the neighborhoods of the Bronx, Manhattan, Buffalo, Rochester or any major city of the State of New York.

What I would like to do in summary, in order to

shorten this up, is to constrain for you the investigations and presentments made by the grand jury in Onondaga in the years 1947-1959. This is an investigation into the same type of criminal activity in this period of time, contrast that with an investigation by another independent body and finally an investigation by a grand jury after the Wood decision.

First of all, to allude to that, the first exhibit is the ordinary returning of a report. It reads, "The Grand Jury of Onondaga County, March 1947, is hereby discharged from duty." It was a final report and they made a presentment of four or five pages long. To summarize it, this is the way it went: The grand jury found that for some time prior to January 27, 1947, there were in Onondaga County quoted repeated to have been horserooms, places where people can assemble and make bets on horse races in other parts of the country. There were in existence a number of slot machines. Individual police officers had never been given express direction in respect to those matters and that for some period of time a sort of tolerance of these conditions existed" and, still quoting, "for this, of course, we indict the whole community on account of the community's indifference."

The grand jury then referred to the fact that the district attorney had presented a mass of evidence to them, that the district attorney announced that gambling places--and this is in caps--WOULD REMAIN CLOSED DURING THE NEXT THREE

YEARS. (Capitalized in the original text.) The period referred to was 1947 to 1950."

The grand jury further made a finding that "there has not been offered to us one solitary piece of evidence that any official, police officer or otherwise, has profited one cent in tribute as protection. The evidence does not show that there has been a complete lack of police work in respect to gambling."

The report closes: "Finally, we want to extend our appreciation for the fine cooperation extended to us by the district attorney and his staff and all police officials concerned in our investigation."

That grand jury report was in 1947. Within two months after that report was out, there was a fire in one of the major loft buildings and signs as big as that sign behind you were thrown down on the street and printed across the top of it was "Fast Track, Hialeah Slow Track--"

Then the 1959 report is annexed. That is Exhibit 2. It is a little shorter and covers the whole problem of gambling with much more aplomb and finality: "Gambling is not a major problem in the city and county."

Of what value were these presentments by the grand jury to the county, to the state? Well, I would refer for an answer, not to me, but to the Third Annual Report of the Temporary Commission of Investigation of the State of New York

Exhibit No. 3.

Let me quote some from that: "Syracuse had a history of 'major crackdown pronouncements' regarding gambling but relatively insignificant enforcement action thereafter. This pattern was followed by the filing on August 15, 1959--" I just referred to it-- "of a widely publicized grand jury presentment stating gambling was not a major problem in Syracuse and no evidence of syndicated gambling. Sam Silver of Rochester, New York, one of the major professional gamblers in the entire central New York area--has operated for years in Syracuse without interruption by authorities. His routine gambling contacts were in Montreal, Chicago, Youngstown, Cincinnati and elsewhere. Charles Simone testified that for 23 years he has operated the Salina Coffee Shop. During this period, it was merely a 'front' for his professional gambling activities."

In addition--

JUDGE HALPERN: You are reading from reports that were made up in prior years.

MR. RYAN: Yes, sir, just made public.

JUDGE HALPERN: You are not now involving us in making public statements for the first time?

MR. RYAN: No, no.

THE CHAIRMAN: Mr. Silver has already had his publicity, I take it?

MR. ATLAS: Why did you have to mention Rochester?

MR. CONWAY: No offense.

MR. CONWAY: No offense.

MR. RYAN: Now these two decisions were spaced 12 years apart. They accomplished nothing for the State of New York. They accomplished nothing for the community of Syracuse and I think that is a charitable statement. If I wanted to be really critical, I might say the presentments were really opiates, administered when public resentment at lack of vigorous law enforcement grew too strong.

Incidentally, when that 1947 grand jury presentment came out, the former lieutenant governor of the State of New York, the Honorable Mr. Schenk was living at that time and he made the statement--I meant to bring it with me, but I forgot. I think I can quote him very closely--he said that if the grand jury, if those people, instead of substituting their own statute of limitations, had used the statute of limitations of the State of New York, that the situation would have been a little different.

I would like to turn to the May 1960 grand jury which had to investigate the condition and management of the public prisons of Onondaga County.

When I said this statement previously--that by saying indict or stand silent, that this had the effect of cutting--releasing the grand jury from a form of political bondage, I

wish to point this out: Grand jurors just don't come out of a hatbox. They are related to public officials, they like public officials, they may even be married to public officials. They come from all walks of life and so when they have to make a decision, they take many, many of their own personal problems into consideration.

This particular grand jury in the investigation as a result of the indictment disclosed presidents of a degenerate criminal fraternity that included narcotics peddlers, pimps, murderers, car thieves, burglars, muggers, smugglers, and shop lifters and then it went further--just let me cut this down now by reading a portion of an indictment returned by them.

MR. PFIEFER: You mean the 1960 grand jury?

MR. RYAN: 1962 grand jury. This is the 1962 grand jury. This is a grand jury that indicted a number of very prominent public officials and there was a furor about it, but let me--

JUDGE HALPERN: Aren't you and I disqualified in this matter? Haven't both of these indictments been dismissed and--

MR. RYAN: They have been dismissed on a demurrer.

JUDGE HALPERN: Don't you think we ought to wait for the courts to deal with them?

MR. RYAN: What I am talking about has been tried. The jury has returned a verdict. All I want to read--

THE CHAIRMAN: You are trying to point out, as I gather, since Wood v. Hughes, grand juries have busied themselves about returning indictments and before that they took that same time to hand down presentments?

MR. RYAN: Look at the problem this way: If your trial juror had one of three verdicts to return--one of guilty, one of not guilty and one of censure and you had 12 people in that jury room fighting with one another as to which degree of crime or whether it was to be an acquittal, they are bound to come out with a censure of that defendant when he is either entitled to be acquitted or the people are entitled to his conviction, and I think what the Court of Appeals has done is placed the same degree of responsibility on that grand jury without having a judge sit in there to tell them precisely what the law is.

This is the law--you either indict or you condone in silence. If there is crime involved in that investigation.

THE CHAIRMAN: Can you imagine a set of safeguards, so-called, in connection with presentments of reports that would make them palatable to you?

MR. RYAN: No, under no set of circumstances. It allows the grand jury to be less than a forceful and vigilant body insofar as ferreting out criminal activity in our community is concerned.

These grand juries today under this law are held to a

much higher standard than the standards of the past and because of that they are performing in silence and I think they are doing a far better job because of the standards they are now required to conform to.

THE CHAIRMAN: Thank you, Mr. Ryan:

MR. RYAN: Thank you, gentlemen.

THE CHAIRMAN: Mr. Uviller, you wanted to be heard on this.

MR. UVILLER: Mr. Chairman, Mr. Denzer, members of the commission: My situation this afternoon is quite different from what it was this morning. At that time I had nothing to say. This afternoon--

THE CHAIRMAN: You said a great deal this morning.

MR. UVILLER: I hope to be a lot briefer inasmuch as I do have something to say.

I am here to represent the position of the New York County District Attorneys' Office which is to forcibly and vigorously recommend the adoption of the bill which has been sponsored by the New York Grand Jurors' Association or its substantial equivalent.

During the course of the interesting proceeding this afternoon, there were a number of minor changes, I believe, in certain of the sections of that bill, and, of course, we are not insisting on it in its present form, but we do feel that there is a crying need for what I would call the restoration

of the traditional grand jury power to report. We have had an interesting semantic division as to whether the records restore and confirm this afternoon. I think, perhaps, this is very near the heart of the inquiry. It depends on what you consider to be the function of the grand jury. I think Mr. Robbins has so carefully and thoroughly analyzed the provisions of the bill that I should like to go into a somewhat different direction and inquire: What is the function of a grand jury?

I think that the framers of the constitution and those who have formulated the system of government under which we operate wrote into it a theory of government by meddling outside groups. I think this is inherent in our system of checks and balances. I think there is a feeling--and there has been traditionally--in our government that the protection of the citizen depends upon the interested but uninvolved outside groups participating in overseeing, interfering with, if you will, the functions of their public officials. Perhaps, this is a feeling which I gained during the brief period of time which I was working in the federal government in Washington. Certainly, there is there the ever-present notion that somebody is looking over your shoulder. If you are working in the executive department, it may be the consciousness that you will have to account for your actions and you will be challenged by some legislative hearing, perhaps, in connection with budgets,

perhaps on a special investigation. Certainly, there is the ever-present feeling that the press is interested in what you are doing and you will be accounting to the public through the press for your actions.

I don't think that this is any accident. I don't think that this is the kind of burden which we should resent. I think it is part of the design of our government. This has been expressed, perhaps, by the press and by others. I think if it is a right, it is an inchoate right, but the press prefers to call this the right to know, the right of the public to know. Perhaps, it is. It might be more realistic to call it the right of the public to interfere in the actions of their public officials. I think it is a healthy interference and I think it is an interference which public officials, themselves, should recognize as important to the preservation of this idea of public officials being in the service of the citizens.

If we are then bound to the idea that there should be some responsible overlooking of a public official's actions, then I ask what better qualified group or organization could there possibly be to undertake this function than a grand jury?

Certainly, the abuses which we are all familiar with in investigating and so-called investigations of bodies whose powers to investigate have never been doubted, the information --the important information gathering power of the legislative branch is almost as sacrosanct as the power of the press to

interview and print statements on matters they consider newsworthy. I should think that if we are astounded, if we are offended by the injustices that are done in the name of official investigations by qualified official groups, if we feel that the press has abused its right on occasion and has unnecessarily tarnished the reputation of a man on what we call pure hearsay or unsubstantiated accusations, then I should think we would turn with gratitude, that we would turn with enthusiasm to the grand jury as a body for making the official inquiry-- or rather inquiry into the official affairs. Nowhere else is the evidence upon which criticism or comment based on sworn evidence; nowhere else is the substance of that testimony subject to judicial scrutinies, and then appellate scrutinies; nowhere else is there a mandate, a requirement for a response both before the forum and subsequently of any public official who may be involved or who may be the target of the investigation; nowhere else are the proceedings, themselves--and I suggest that this is extraordinarily vital--the proceedings, themselves, conducted in an atmosphere which, by law, is curtailed by absolute secrecy. I suppose now you would leave that to the hearing after the handing up of the report. That has been suggested here; this should be at the option of the accused--at the option of the individual involved.

There might be situations in which he would prefer to make his statement publicly.

THE CHAIRMAN: Do you also conceive this stage two proceeding before the trial judge to be the equivalent of a trial?

MR. UVILLER: I am not sure. I wouldn't think so.

As Judge Halpern put it, there would be some sort of a finding by the court, something like the finding of a civil crime, if you accept the term. I don't think it is a proceeding in that sense. I don't think there is a judgment, but I think that necessarily the acceptance of the report should be predicated partially on its validity and I think validity means that the evidence justifies it.

THE CHAIRMAN: Its truthfulness.

MR. UVILLER: Yes.

JUDGE HALPERN: It is an ambiguous word. Suppose there are two conflicting views--the views of one set of witnesses before the grand jury and another set of witnesses produced by the defendant presents a different view. The judge is not required to choose between those views. The presentment is valid if there is legal evidence to support that view of the grand jury. That is what it means.

In other words, he is not to suppress because he decides on the merits and he would decide in favor of the defendant, and there would be no censure.

MR. UVILLER: I absolutely agree. I think the report of the jury--let's bring it back to what it actually is

The report of the grand jury is not an accusation of a civil crime. It may have the effect upon the person accused of an accusation.

THE CHAIRMAN: Of at least that.

JUDGE HALPERN: It may take the comparison of disciplinary proceeding affecting lawyers. It is not a disbarment. It is not a suspension. It is a censure.

MR. UVILLER: I wouldn't go as far as that. I think what it really is is a report. What a report means is a summary a narrative description of condensation of materials heard.

PROFESSOR WECHSLER: Of what has happened.

JUDGE HALPERN: Not involving any criticism of the official?

MR. UVILLER: There may be a conclusion based upon it, yes. Essentially, it is not.

All reports that I know of are rather lengthy items. They don't merely say, like an indictment, "On the basis of what we have heard, you are accused of malfeasance."

JUDGE HALPERN: Take the case Mr. Ryan cited in the early days in Syracuse, when the grand jury said, "There is laxity of law enforcement, there is vice, gambling," and they accuse, directly or indirectly, the sheriff or district attorney of not doing their duty.

MR. UVILLER: Such an accusation would be explicit or implicit.

THE CHAIRMAN: In most cases, the reports which I have read are rather lengthy documents which present a summary, perhaps, in a detached form. In other words, rather than naming the witnesses they have heard and the individuals about whom those witnesses testified, they would merely get the gist of the testimony. But I think this is what the word implies, and that is a report to the community of a condition which the evidence presented to them and, again, I emphasize the word "evidence-- legal evidence" presented to them has justified them as concluding it exists. But I think this is what the word implies, and that is a report to the community of a condition which the evidence presented to them and, again, I emphasize the word "evidence-- legal evidence" presented to them has justified them in concluding it exists.

I don't think it is an accusation in the sense of an accusation of a civil crime. When the report is made public, this report, I think, in most instances, is a conscientious combination of efforts between the district attorney and the grand jury.

I think, for example, of the quality and caliber of the grand juries who participated in the lengthy investigation which resulted in Judge Schweitzer suppressing the report on the T.V. quiz situation.

JUDGE HALPERN: Let us take a public officer. Isn't this what this bill would give the grand jury the power to do?

To make a report criticizing a public official or censuring him for misconduct where the evidence falls short of proving a crime or where the misconduct is of the type not covered by a criminal statute? Isn't that what it is meant to do?

MR. UVILLER: That is one thing it is meant to do. It is also meant to encourage and stimulate positive recommendation for legislation.

There is a notable example in New York County where a grand jury presentment concerned itself with what they considered to be a lack of coverage of a particular situation involving boxing by the absence of appropriate penal statutes. The Legislature, I believe, promptly enacted, on the basis of this recommendation, and it was a positive and constructive suggestion coming from a group which I think was peculiarly qualified to make it.

This was not a group which has any political axe to grind. It was not a group facing election or re-election. It was not a group which was seeking personal advancement in a profession. If anything, it was an anonymous citizens group.

Their recommendation, I think it can be said, in all fairness, to be based purely on a sense of responsibility to the community's welfare, and that is not just a catch slogan. Grand jurors and grand jury associations in my experience, and I think in the experience of all district attorneys who have had any personal dealings with them, are extraordinarily

conscientious men of the community. They are people who even by their very service have deprived themselves and undertaken to take up a substantial portion of their own time solely for the purpose of sitting and performing this function. I think that takes a certain amount of dedication. There is no hope of personal enrichment or personal advancement or any political gain on the part of any individual grand juror who participates.

I think individuals of this nature, operating under procedures which are in the grand jury, hearing evidence which may or may not result in an indictment, but certainly results in a matter of serious public importance, certainly should have the opportunity to make known to the public, to the Legislature the results of their investigation provided that that does not unnecessarily impinge upon the rights of the individuals named or described.

Now up to this time, we have not had any specific procedure, I don't think, for the exoneration or the reply or response of the person so indicated, and I don't think that this caused a great deal of consternation. Perhaps, it was because individuals were rarely named; perhaps, at that time we didn't think of that in terms of impairment or infringement of that individual's rights.

When Commissioner Atlas raises the point that he may be an innocent man who is accused in an information and he wants his forum in which to apply, certainly, we are all

concerned with the innocent man. Yet, an innocent man may also be indicted.

We are providing here, as close as possible, is an informative proceeding, a proceeding which conforms as closely as possible to that in a criminal proceeding and I think that's going very far.

MR. ATLAS: My self defense, if my name were mentioned in a presentment, would have to be in the light of public scrutiny which I don't deserve, because I am innocent.

MR. UVILLER: I don't know if you are innocent, why are you fearful of public scrutiny?

MR. ATLAS: I am protecting an honorable man whose name is linked to a corrupt public official in some report who may want to come in and defend himself; and in so doing expose himself to what might otherwise not be exposed at all.

I respect the veil of secrecy of the grand jury and I want to see that it is maintained.

MR. UVILLER: I think that the--

MR. ATLAS: If you will, forgive me. A practice which virtually denied 90% of all motions to inspect the grand jury minutes ought not to be subverted to this kind--and I say subverted personally--I speak for nobody but myself--it is not to be used, in any event, for this kind of public exposure. That is my point.

MR. CONWAY: Do you know of any incident that you

have in mind where an innocent public official, or otherwise, was pilloried by grand juries during the 180 years when there were no safeguards?

MR. ATLAS: They haven't had a chance to, yet.

MR. UVILLER: I can't think of an instance, Mr. Conway. I think that the chance of such an occurrence under these procedures is substantially less than that which pertains under the ordinary and common investigatory techniques of public agencies and of the press. I would hope that there could be similar restraints upon the investigative groups, the investigative commissions, the Legislative investigations and so forth and upon the press.

I think that that is an exemplary example, if I can use that phrase, of an--

MR. ATLAS: It is just a redundancy. I know you speak better English than I. I am for you.

MR. UVILLER: I think that this is an outstanding example of the kind of restraint which we should expect from a public organization, whether it be a grand jury or a legislative commission. I think that once we have achieved it, I think that at that point it is senseless to stand back and say that whatever injustice creeps through is not justified by this historic right of the public to be informed.

PROFESSOR WECHSLER: I confess I am becoming more rather than less confused about this section 3 of the bill. I

thought I saw it clearly before, but your answer is different from the previous answer and I am not sure, not only who is right on the bill as it stands, but as it ought to be.

I am really more concerned about the way it ought to be. You could imagine a protective hearing in which the function of the court was limited, as Judge Halpern implied, to looking at minutes and seeing whether this was a reasonable report, in your terms, based on the evidence, whether it was legally competent evidence and period, that would be a protection against--in other words, not an erroneous report, but an abusive report. That is one possibility.

I take it that the legislative background was such that that really isn't enough and that the draftsman of three tried to do more than that. Obviously, they meant to give the criticized person a chance to reply. Is that really an operable way to reply?

MR. UVILLER: I don't know. I am not clear of that myself. There is a provision that he should be provided with those portions of the minutes. It says, "such section of the report or such information concerning the report as the court deems necessary."

When I looked at those words just now, I began to think that the draftsman was very careful not to refer to the evidence or the transcript, the minutes.

JUDGE HALPERN: Paragraph 3 doesn't seem to be though

through very well; does it?

MR. UVILLER: Don't compel me to commit myself on that.

JUDGE HALPERN: I am not speaking of the language. I am thinking of what we are planning here.

MR. UVILLER: Actually, the structure of the bill seems to be a little awkward in several regards.

First, in paragraph 1 is what the jury may do. Then it lists--gives a list of striking out. None of the bases for striking out is stated affirmatively in it. I assume we now know the limits of the power of affirmative action.

JUDGE HALPERN: Among those listed as grounds for striking out is that there is no grounds, that the judge finds on the merits, after hearing both sides, that the censure is not justified.

MR. UVILLER: Those grounds for striking out, perhaps, all reflect on the face of it.

JUDGE HALPERN: On the face of the minutes?

MR. UVILLER: I am not sure. Of the minutes or the presentment, itself. It talks about intemperate language, people named, not public officials and so forth. All of these things seem to be matters which can be determined without the necessity of--I feel that the purpose of Section 3 is to provide that additional safeguard of matters which would not appear either on the minutes or on the face of the presentment.

JUDGE HALPERN: What is the impact of that? Suppose the defendant convinces the judge that his story is right, but still there are witnesses who support the grand jury's view. He still isn't going to suppress it.

MR. UVILLER: There certainly is no standard of burden of proof set forth.

JUDGE HALPERN: He is not to make any finding or decision on the merits?

MR. UVILLER: I don't think there is a decision.

JUDGE HALPERN: What does that phrase mean "contest the validity," the one that Professor Wechsler called my attention to? It is ambiguous.

MR. UVILLER: I think there is certainly ambiguity in it which would probably have to face the test of actual practice. These matters, at best, are informal in nature. I would assume that the purpose of the section is to be as broad as possible and as liberally construed as possible in order that the judge who is receiving this report from the grand jury might afford justice to the person named or accused.

JUDGE HALPERN: Speaking for the judiciary, I can't accept that. I think the legislative body has to decide, first, what the philosophy of the whole bill is, not to leave the judges to work it out, because you will have a difference of opinion, such as four to three on it.

What is the philosophy of it? Are you in favor--are

you personally in favor of the Section 3 which would provide a full dress hearing with a determination by the judge of the merits or justification of the criticism?

MR. UVILLER: No, sir. I think that would be interposing the judge in place of the grand jury.

JUDGE HALPERN: It would make a trial.

MR. UVILLER: I don't think the purpose--

THE CHAIRMAN: Of what significance is the notice to the person named in the report unless it is to afford him an opportunity to protect himself and to offer proof in defense?

MR. UVILLER: I think it gives him an opportunity-- first, he says he has no forum for response; if he elects a public hearing, it gives him a forum of response.

MR. ATLAS: Suppose he wants a private hearing?

THE CHAIRMAN: For him to accomplish what?

MR. UVILLER: To give his side--"It wasn't me; it was somebody else," or whatever it might be, or "Those who appeared against me were corrupt and bribed," whether or not--

PROFESSOR WECHSLER: He doesn't know who they are, he may not--

MR. UVILLER: If it was necessary for the hearing, it would be disclosed to him.

THE CHAIRMAN: It would seem always necessary for the hearing.

PROFESSOR WECHSLER: Do you think he would call them-

call the witnesses who have been before the grand jury?

THE CHAIRMAN: To cross examine them?

MR. UVILLER: I think that would certainly be permissible within the scope of the bill. I don't say it is a necessary part of the hearing in every case.

JUDGE HALPERN: We were talking about traditions. District attorneys say the law has, for centuries, a traditional confidence for the capacity of cross examination to bring out the truth.

MR. UVILLER: Yet that has never been a part of the grand jury proceeding.

JUDGE HALPERN: We are talking about Section 3, not a grand jury proceeding.

MR. ATLAS: Supposing that in a case in which an indictment is returned and an accusation is made, somebody is mentioned as being linked with the prosecutive defendant, the accused, do you want to give him any chance to come in and clear himself?

MR. UVILLER: His name could be stricken.

MR. ATLAS: You are opening a door here.

MR. UVILLER: I don't think so. I think his name could be stricken before any hearing.

On the question that Judge Halpern mentioned, I do not envisage Section 3 as creating a new trial procedure, which is necessary in the case of every presentment that is

handed up.

JUDGE HALPERN: I didn't either until our counsel suggested that. I didn't think it was that contemplative. That could be a different problem from which we have before us now. It would not be simply setting up safeguards for presentments. It would be the creation of a new procedure and becomes the initial process.

MR. UVILLER: Is the choice that the pillorized must accept a full dress hearing?

JUDGE HALPERN: I am suggesting that a trial on the merits means that--

MR. UVILLER: I think Section 3 does not intend anything so broad as an adjudication. What it intends is an opportunity to reply and an opportunity to point out, on a hearing, defects which render it invalid.

JUDGE HALPERN: Could we take an analogy from administrative law, the difference between a full hearing and an opportunity to be heard?

MR. UVILLER: Yes, I think it would be analogous.

MR. PFIEFER: Could we test it? What does the judge have to do at the end of the hearing? Does he do anything more--he makes no comment one way or the other, he strikes or doesn't--

MR. UVILLER: That's right.

JUDGE HALPERN: He suppresses or makes public.

MR. ROBBINS: I still say that we expect a fully contested hearing and even, I suppose, the calling of witnesses. We do not expect the judge to make a finding except insofar as he will suppress.

JUDGE HALPERN: What are you calling witnesses for?

MR. ROBBINS: How else could you find, under the safeguards, whether there was bias?

JUDGE HALPERN: You used two contradictions by words. You want no finding and you want to find out.

MR. ROBBINS: I don't agree with that. I don't want any finding by a judge. He is merely to determine--to determine whether it should be suppressed or issued.

THE CHAIRMAN: Is it true the accusation is an issue at this hearing?

MR. ROBBINS: That is a hard question to answer. He is getting a fully contested hearing to test the validity of the report. The only thing in issue is whether it is a fair and full report of what transpired.

THE CHAIRMAN: Of what transpired. Then the truth of the report is in issue?

MR. ROBBINS: One doesn't envisage an endorsement by the judge, "I found that the commissioner of correction was bad and I agree with the grand jury."

PROFESSOR WECHSLER: Would this be a thought, perhaps if the person brought under suspicion adduced evidence which

led the judge to think the grand jury might really have made a mistake, then that would be grounds for suppressing the report?

MR. ROBBINS: Yes.

JUDGE HALPERN: Based on his finding that they made a mistake? You said he wasn't to make a finding.

MR. ROBBINS: He could make a finding that it is not a full and fair hearing--that is covered in the safeguards --as to whether the evidence was credible, reliable.

JUDGE HALPERN: You misunderstood the import.

PROFESSOR WECHSLER: I didn't mean he was critical of the grand jury. The grand jury took the evidence that came before it and drew its conclusion, but then in this contested hearing--

MR. ROBBINS: Additional evidence was brought forth.

JUDGE HALPERN: You have got to face up to the question that where two different interpretations, two different factual inferences are drawn in conflict with each other, is the judge to decide which one is correct and on the basis of his decision is he to decide to suppress or make public the report? Will Mr. Robbins answer that?

MR. ROBBINS: I still basically state that his only decision is whether to suppress or release the report; and I concede with you that inferentially under all those circumstances it is inevitable to conclude that if he doesn't suppress it he must agree with it.

JUDGE HALPERN: That is a full trial.

MR. ROBBINS: It is an inescapable conclusion, but I don't want the stigma on the persons before the grand jury to also say the judge says, "I think the grand jury did a great job here."

MR. ATLAS: Doesn't that amount to saying that so and so is nefarious being implicated in a situation concerning which we cannot indict him? Isn't that the same thing?

THE CHAIRMAN: They are charging him with something that constitutes a crime because that is one of the conclusions.

MR. ATLAS: Why should he be mentioned?

MR. ROBBINS: Why not?

THE CHAIRMAN: We can debate that.

JUDGE HALPERN: You and Mr. Robbins seem to differ.

MR. UVILLER: I don't think so, Judge.

THE CHAIRMAN: Mr. Uviller, do you still have something more to say?

MR. UVILLER: The word "valid," I believe that is used in Section 3--or "validity," in other words, it is to be filed and made public if valid and if not valid, it is to be suppressed.

Now, you Judge Halpern, have used the word "truthful."

JUDGE HALPERN: No, Professor Wechsler.

MR. UVILLER: "Truthful." I think, perhaps, the word Mr. Robbins used is the best word for that particular

slot and that is the word "well founded"; and for that I think we would return to traditional areas of grand jury inspections which is simply, the evidence which the grand jury heard, without passing upon the credibility of the witnesses.

JUDGE HALPERN: Without passing on the defensive matters introduced.

MR. UVILLER: And without passing on matters of defense justify the report.

THE CHAIRMAN: You think the--that is the extent to which the inquiry should go?

MR. UVILLER: That is the extent.

PROFESSOR WECHSLER: It has been misrepresented. If that is what it is, that is not giving him a forum and I don't think the draftsman meant that. That may be the way you read it.

MR. UVILLER: If the proceedings here today, Professor, constitute the legislative history of this bill, should it be enacted, I have sympathy for those who, in the future, will try to interpret it. I think that, perhaps, there should be a clearer statement both in the form of the bill, itself, and, perhaps, in some sort of report which might accompany it, which touches upon this particular proceeding.

PROFESSOR WECHSLER: Maybe the language might be improved and that will eliminate the need for the report.

MR. ATLAS: You don't want the judge to put an

improper monitor upon the improbability in mentioning the name in a presentment which he is going to broadcast to the public.

MR. UVILLER: I don't. I certainly don't want the judge to put an impromptu of having it now, having a report issuing from the report.

JUDGE HALPERN: I understand you, but we can't certainly understand you are in agreement with Mr. Robbins.

MR. UVILLER: I wonder if Mr. Robbins thinks I am in agreement.

MR. ROBBINS: No.

JUDGE HALPERN: I think you are alone in that.

MR. UVILLER: They are only comments and certainly, he has the authority as draftsman.

I thank you for the opportunity of being heard.

MR. PFIEFER: Your contribution has been to make clear certain things that were said before.

THE CHAIRMAN: I think we have one last witness. Mr. Condon, you wanted to appear on this matter; did you not?

MR. CONDON: Those matters that have been discussed here, that the public has a right to know, our committee is in accord with; and that public officials, particularly, being held up to scrutiny and at times to be criticized, we are agreeing with; and that grand juries have the right and the function to operate, we agree it is just a question of what that function is. We believe the function that they have is

to indict or not indict, return a true bill or no bill and the fact that these things should be done, censures coming out by a body constituted for the purpose of investigating crime, it is entirely different when someone else makes such a presentment. We think these things should be done, but it is not the function of a grand jury to do it.

It smacks from an entirely different concept when a grand jury would do it, because judiciary takes notice of it rather than another forum at another place.

THE CHAIRMAN: You oppose, then, any reporting by the grand jury other than the returning of a bill?

MR. CONDON: Yes; and any safeguards that are brought to our attention we figure are outweighed by the complexities and the possible abuses they may have.

MR. ROBBINS: May I have the liberty to have this filed?

THE CHAIRMAN: Sure.

We thank you all for attending.

MR. SMITH: My name is Lee Thompson Smith. I am president of the New York County Grand Jurors' Association and I want to express, on behalf of our Association, as well as the other grand jury associations, our deep appreciation for the interest shown by your committee in this question. Rarely have I attended a session where legislators or committees set for four solid hours, pretty near, as long as you fellows have, and we all appreciate that.

THE CHAIRMAN: Thank you, Mr. Smith. That concludes the hearing.

(Whereupon, the stenographic record was concluded at 5:20 p.m.)

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