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Grand Jury Secrecy: A Grand Jury Witness' Right to His Own Testimony

Only within the past thirty years have the courts begun to intrude into the theretofore inviolate secrecy of the grand jury process.¹ Defendants have been far more successful in obtaining access to grand jury testimony than have the grand jury witnesses themselves, despite many similarities in circumstance and the logical inconsistencies that such differences in treatment display.² Traditionally, courts cite the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts"³ as a talisman to ward off further analysis of the validity of grand jury secrecy.⁴ They have been reluctant to permit access to grand jury testimony except "discreetly and limitedly."⁵ The Court of Appeals for the Fourth Circuit, in *Bast v. United States*,⁶ used this talismanic approach to deny a grand jury witness a transcript of his testimony despite reasonable, even compelling, justifications for such disclosure as of right.

Plaintiff in *Bast* had testified voluntarily before a grand jury, which subsequently returned no indictments. He was not a probable defendant, nor had he testified under a grant of immunity.⁷ Plaintiff claimed that he was entitled to a copy of his grand jury testimony, offering several justifications for his need. The most compelling reasons advanced were the necessity of correcting any inadvertent errors in his testimony and the need to combat rumors he claimed were being circulated that he was a government informer.⁸

1. This rise roughly coincides with the introduction of Federal Rule of Criminal Procedure 6 in 1946. Comment, *Grand Jury Secrecy: Should Witnesses Have Access to Their Grand Jury Testimony as a Matter of Right?*, 20 U.C.L.A. L. REV. 804, 811 n.36 (1973).

2. As will be shown, an analysis of the reasons for grand jury secrecy presents a far more compelling justification for a witness to obtain a transcript of his own grand jury testimony than for a defendant to obtain testimony of grand jury witnesses.

3. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958).

4. See Justice Brennan's dissent in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 406 (1959): "The Court, while making obeisance to a 'long-established policy' of secrecy, makes no showing whatever how denial of [defendant's] grand jury testimony serves any of the purposes justifying secrecy."

5. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958).

6. 542 F.2d 893 (4th Cir. 1976). Judge Widener wrote the majority opinion from which Judge Wyzanski dissented.

7. *Id.* at 894.

8. *Id.* Other reasons cited by plaintiff were: (1) he was suing the federal government in the United States District Court for the District of Columbia; (2) a transcript would insure accurate disclosure of his testimony; and (3) he might subsequently be indicted as a result of his appearance before the grand jury.

The district court denied Bast's motion requesting a copy of his grand jury testimony and the Fourth Circuit affirmed.⁹ The court of appeals based its decision on the principle, set out in *United States v. Procter & Gamble Co.*,¹⁰ that release of proceedings of the grand jury should only be granted upon a showing of some "particularized need."¹¹ The majority in *Bast* did not find persuasive the argument that since Federal Rule of Criminal Procedure 6(e)¹² imposes no condition of secrecy on a grand jury witness there is no justification for nondisclosure.¹³ The majority found that there was no evidence of possible transcript error and that there was no substantiation of Bast's claim as to the rumors that he was a government informer.¹⁴

The dissent in *Bast* noted the factual distinction between this case and *Procter & Gamble*, which it felt rendered *Procter & Gamble* inapposite as precedent.¹⁵ Citing the "equities" of allowing disclosure the dissent felt that plaintiff's voluntary testimony gave him a prima facie right to a copy of his own testimony, absent a showing by the government of some compelling need for secrecy.¹⁶

An analysis of *Bast* requires a brief review of the historical development of grand jury secrecy.¹⁷ Although the grand jury may have

9. *Id.* at 897.

10. 356 U.S. 677 (1958).

11. *Id.* at 683.

12. FED. R. CRIM. P. 6(e) provides in part:

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for the use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment No obligation of secrecy may be imposed upon any person except in accordance with this rule.

13. 542 F.2d at 896.

14. *Id.* at 896-97.

15. *Id.* at 898 (Wyzanski, J., dissenting). Judge Wyzanski cited with approval the reasoning of Judge Frankel in *United States v. Projansky*, 44 F.R.D. 550 (S.D. N.Y. 1968), and Judge Hufstedler in *Burse v. United States*, 466 F.2d 1059 (9th Cir. 1972). *Id.* at 897.

16. *Id.* at 898-99. Although not mentioning Rule 6(e) specifically, Judge Wyzanski discussed the illogic of refusing to give plaintiff a copy of his testimony although he was free to divulge its contents. He also cited the ability to correct mistakes in the record as another factor militating for disclosure. *Id.* at 898.

17. See generally Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455 (1965); Whyte, *Is the Grand Jury Necessary?*, 45 VA. L. REV. 461 (1959); Comment, *Secrecy in Grand Jury Proceedings: A Proposal for a New Federal Rule of Criminal Procedure 6(e)*, 38 FORDHAM L. REV. 307 (1969); Comment, *supra* note 1.

had its deepest roots in Roman, Scandinavian and Greek criminal law,¹⁸ its common law inception occurred in 1166 with the Grand Assize.¹⁹ The Grand Assize served more of a prosecutorial, as opposed to investigatorial, function and its deliberations were open to the public.²⁰ In 1368, after the slow decline of the Grand Assize, a new body arose—*le grande inquest*—which was charged with lodging all criminal prosecutions. This body adopted the custom of hearing witnesses in private.²¹ Secrecy, however, did not become institutionalized until the trials of Stephen College²² and the Earl of Shaftesbury²³ at which time it became a method of preventing influence and control of the grand jury by the Crown.²⁴

The grand jury was brought to America with the same basic premise of secrecy.²⁵ Eventually, fear of government abuse of the grand jury process subsided and government prosecutors were permitted to be present during testimony.²⁶ Governmental influence on the grand jury has increased and today the prosecutor often directs and controls the grand jury.²⁷ Secrecy is no longer juxtaposed between the grand jury and the government²⁸ but is used, instead, to shield the witnesses²⁹ from the defendant.

18. Whyte, *supra* note 17, at 462. See also Kuh, *The Grand Jury "Presentment": Foul Blow Or Fair Play?*, 55 COLUM. L. REV. 1103, 1106 (1955).

19. Calkins, *supra* note 17, at 456-57.

20. *Id.* at 456-57. "This was an age when little regard was given to the rights of private citizens." *Id.* at 456.

21. *Id.* at 457.

22. 8 How. St. Tr. 550 (1681). The grand jury demanded to hear evidence of College's treason against Henry II in private. After considering the matter the grand jury refused to indict College. G. EDWARDS, *THE GRAND JURY* 28-29 (1906).

23. 8 How. St. Tr. 759 (1681). This was another case involving treason against Henry II. After initially being forced to hear the witness' testimony in public the jury requested and was finally granted the right to hear him in private. The jury refused to indict based on the evidence heard in private. Calkins, *supra* note 17, at 457.

24. Calkins, *supra* note 17, at 458. One article, Tigar & Levy, *The Grand Jury as the New Inquisition*, 50 MICH. ST. B.J. 693, 694 (1971), asserts that secrecy was for the protection of the private individual while Watts, *Grand Jury: Sleeping Watchdog or Expensive Antique?*, 37 N.C.L. REV. 290, 292 (1959), claims that secrecy arose for the protection of the defendant.

25. Comment, *supra* note 1, at 806. In the American case of Peter Zenger, 17 How. St. Tr. 675 (1735), closely paralleling those of College and Shaftesbury, an American grand jury used secrecy to protect the accused from political pressure by the governor of New York. Although the grand jury refused to indict Zenger for his newspaper attacks on the governor, he was finally charged by information. See Kuh, *supra* note 18, at 1108-09.

26. Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 J. MAR. J. PRAC. & PROC. 18, 19 (1967).

27. See, e.g., Comment, *supra* note 1, at 807-08.

28. See *In re Russo*, 53 F.R.D. 564, 569 (C.D. Cal.), *aff'd*, 448 F.2d 369 (9th Cir. 1971).

29. See Calkins, *supra* note 26, at 20.

The majority's opinion in *Bast* is paradigmatic of the approach that most courts take in this area.³⁰ The court cited with approval the "historic" justifications for grand jury secrecy and cited precedents that uphold the sanctity of secrecy,³¹ but failed to evaluate the validity of these reasons in the context presented. A contextual analysis of grand jury secrecy reveals that not only are there no justifications for imposing secrecy in this instance,³² but there are compelling reasons why disclosure should be granted as a matter of right to such a witness.³³

The initial question in the analysis of a grand jury witness' right to a copy of his own testimony³⁴ is whether any of the historical justifications for secrecy are viable in this context.³⁵ Modern courts have generally summarized these historical justifications in five reasons:

- (1) To prevent the escape of those whose indictment may be contemplated;
 - (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
 - (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trials of those indicted by it;
 - (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes;
 - (5) to protect the innocent accused who is exonerated
-³⁶

This analysis must be carried out in light of Federal Rule of Criminal Procedure 6(e), which imposes no bond of secrecy on a grand jury witness and allows him freely to disclose what has transpired during his presence as a witness.³⁷ Thus, the witness is allowed to disclose

30. See generally *In re Grand Jury Witness Subpoenas*, 370 F. Supp. 1282 (S.D. Fla. 1974); *In re Alvarez*, 351 F. Supp. 1089 (S.D. Cal. 1972).

31. 542 F.2d at 894-95.

32. See text accompanying notes 37-42 *infra*.

33. See text accompanying notes 73-78 *infra*.

34. Under FED. R. CRIM. P. 6(e) the court has the power to order disclosure. *In re Minkoff*, 349 F. Supp. 154, 155-57 (D.R.I. 1972).

35. This analysis assumes, as was true in *Bast*, that the grand jury has already been dismissed. "[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940).

36. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958) (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)). These reasons were first set out in *United States v. Amazon Indus. Chem. Corp.*, 55 F.2d 254, 261 (D. Md. 1931).

More recent discussions of these reasons for secrecy tend to combine reason (1) with (3) as a single policy consideration. See *In re Russo*, 53 F.R.D. 564, 569 (C.D. Cal.), *aff'd*, 448 F.2d 369 (9th Cir. 1971). See also 8 J. WIGMORE, EVIDENCE § 2360, at 734-35 (McNaughten rev. 1961).

37. See *In re Disclosure of Evidence Before October, 1959 Grand Jury*, 184 F. Supp. 38 (E.D. Va. 1960).

the very information of which he is trying to obtain a transcribed copy.³⁸

The grand jury's deliberation and vote are in total secrecy and disclosure of a witness' recorded testimony does not interfere with the jurors' freedom.³⁹ Thus the second reason is inapposite. At first blush, the first and third reasons seem persuasive, but, since the witness is free to disclose all that he knows, the "evil" is in the witness' freedom to disclose, not in furnishing him with a transcript. The last justification is perhaps the most persuasive, but again the witness' freedom to disclose his own testimony makes production of a written copy no more damaging to the grand jury's secrecy. Continued existence of Rule 6(e) impliedly indicates that the innocent accused has not suffered under this rule of disclosure.

The remaining justification for secrecy is to encourage free disclosure by grand jury witnesses without fear of retaliation. This rationale is also inapplicable when the witness is seeking his own testimony. If the witness has the right to disclose his own testimony, then furnishing him with a recorded transcript in no way further violates the protection that he has essentially waived.

It is important to note that allowing a witness to obtain a recorded copy of his testimony in no way *forces* him to divulge the contents of his testimony. Existing practices that prevent disclosure of the witness' testimony absent some "compelling necessity"⁴⁰ are logically consistent with disclosure to the witness, since the privilege of non-disclosure is that of the witness himself.⁴¹ Thus the major distinction in *Bast* is that the witness is seeking his own testimony, and in light of Rule 6(e) none of the justifications for secrecy seem valid.⁴²

The majority in *Bast* cited *United States v. Procter & Gamble Co.* for the proposition that grand jury testimony will not be disclosed without a showing of "particularized need."⁴³ An examination of the factual setting in *Procter & Gamble* indicates that the pronouncement may

38. It is evident from the fact that Rule 6(e) has been in effect for over 30 years without substantial change that its policy of allowing a witness the freedom to disclose his own testimony is sound and that freedom has not undermined the grand jury's effectiveness. See *In re Russo*, 53 F.R.D. 564, 570-71 (C.D. Cal.), *aff'd*, 448 F.2d 369 (9th Cir. 1971).

39. See Calkins, *supra* note 26, at 25.

40. See *Arlington Glass Co. v. Pittsburgh Plate Glass Co.*, 24 F.R.D. 50, 52 (N.D. Ill. 1959).

41. 8 J. WIGMORE, *supra* note 36, § 2362, at 736.

42. See *Dennis v. United States*, 384 U.S. 855, 872 n.18 (1966).

43. 542 F.2d at 895 (citing 356 U.S. at 681-82). In 1957, in *Jencks v. United*

not be applicable in the *Bast* situation.⁴⁴ *Procter & Gamble* involved a defendant in a civil antitrust suit who sought discovery under Federal Rule of Civil Procedure 34⁴⁵ of the *entire* grand jury transcript. The Court, in denying defendant discovery, relied heavily upon one justification of the rule of secrecy: "To encourage all witnesses to step forward and testify freely without fear of retaliation."⁴⁶ In the context

States, 353 U.S. 657 (1957), a case dealing with a criminal defendant's right to review secret FBI reports, the Court announced a broad policy of disclosure. 353 U.S. at 667-72. Because the language was so broad, many commentators interpreted this policy to include grand jury testimony. Comment, *supra* note 1, at 812.

The next year the Court, in *Procter & Gamble*, retreated from this broad policy and announced the "particularized need" test. See 356 U.S. at 681-82. The formulation of this test was never clear. Justice Douglas listed examples of situations where particularized need was shown, such as: (1) to impeach a trial witness, (2) to refresh a trial witness' recollection and (3) to test credibility of a trial witness. *Id.* at 683. But the Court failed to announce any specific criteria. Referring to the case at hand the Court held that no compelling necessity had been shown "for wholesale . . . production of a grand jury transcript," *id.* at 684, indicating that perhaps defendant's transgression was to ask for too *broad* a discovery. Indeed, it should also be kept in mind that the defendant was seeking discovery under FED. R. Civ. P. 34, which specifically requires a showing of "good cause."

44. In the year following the *Procter & Gamble* decision the Court extended the "particularized need" test to cover a criminal defendant's attempt to discover a trial witness' grand jury testimony. In *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1958), the majority refused to allow disclosure over the strong dissent of four Justices who felt that the majority had "exalt[ed] the principle of secrecy for secrecy's sake." *Id.* at 407. The dissenters in *PPG* were particularly disturbed by the majority's reliance on *Procter & Gamble* as precedent, since in *PPG* defendant was seeking only a particular portion of the grand jury testimony rather than the whole testimony. They felt that the purpose of the "particularized need" test was to prevent "fishing expeditions," not to deny defendant this type of legitimate access. See Comment, *supra* note 1, at 814.

The specific holding in *PPG* has been changed by statute. The 1970 amendment to the Jencks Act, 18 U.S.C. § 3500 (1970) provides in part:

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

(e) The term "statement," as used in subsection (b) . . . means—

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

45. FED. R. Civ. P. 34 provides in part:

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control

46. 356 U.S. at 682.

of *Procter & Gamble* this protection of the witness by non-disclosure may be valid.⁴⁷ Providing a witness with his own testimony, however, is not inconsistent with this policy.

The court of appeals ignored the most recent examination by the Supreme Court of grand jury secrecy. In *Dennis v. United States*,⁴⁸ the Court reversed a criminal defendant's conviction and remanded for a new trial because the trial court had refused defendant's request seeking disclosure of grand jury testimony of four government witnesses.⁴⁹ The trial court had based its denial on defendant's failure to show "particularized need."⁵⁰ The majority, finding that defendant had demonstrated a "particularized need,"⁵¹ recognized the long-established policy of secrecy but emphasized "the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."⁵²

The significance of *Dennis* is that for the first time the Supreme Court took a pragmatic approach to the scope and intended purpose of the secrecy doctrine.⁵³ The implication of *Dennis* seems to be that the "particularized need" test of *Procter & Gamble* is simply a balancing test, weighing the traditional reasons for secrecy against the need for disclosure.⁵⁴ In fact, the Court seemed to be citing *Procter & Gamble* as one in a line of cases in the trend of liberalizing disclosure of grand jury testimony.⁵⁵ Thus, even under the "particularized need" test, if there is no need for secrecy, the grand jury testimony should be disclosed.⁵⁶

47. In the *Procter & Gamble* context, where the grand jury testimony of a witness is being sought by another person (there a defendant) at least reason (4) has some validity. *But see* 8 J. WIGMORE, *supra* note 36, § 2362, at 736.

48. 384 U.S. 855 (1966).

49. *Id.* at 875.

50. *Id.* at 868.

51. *Id.* at 872.

52. *Id.* at 870.

53. Calkins, *supra* note 26, at 32.

54. One commentator has argued that the factors that the Court in *Dennis* relied on as supporting defendant's "particularized need" were so general and confusing as seemingly to render the test a nullity. *See Note, Impeaching the Prosecution Witness: Access To Grand Jury Testimony*, 28 U. PITT. L. REV. 338, 341-42 & n.21 (1966). *See also* *United States v. Projansky*, 44 F.R.D. 550 (S.D.N.Y. 1968).

In criticizing the majority's use of the "particularized need" test, the dissent in *PPG* stated: "Grand jury secrecy is, of course, not an end in itself. Grand jury secrecy is maintained to serve particular ends. But when secrecy will not serve those ends or when the advantages gained by secrecy are outweighed by a countervailing interest in disclosure, secrecy may and should be lifted . . ." 360 U.S. at 403 (Brennan, J., dissenting).

55. 384 U.S. at 869-71.

56. "[W]hen once the reasons for a policy to be pursued no longer exist, certainly

It is clear from recent developments in statutory law that the validity of this policy of liberalizing disclosure has been recognized.⁵⁷ Federal Rule of Criminal Procedure 16(a)(1)(A) provides in part: "Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph . . . recorded testimony of the defendant before a grand jury which relates to the offense charged." It is clear from the 1975 amendment to Rule 16, which changed the Rule's language from "the court may order" to "the government shall permit,"⁵⁸ that a defendant's right is not subject to the court's discretion.⁵⁹ Disclosure to the defendant of his grand jury testimony is mandated by the growing recognition of the proper mode of criminal prosecution and by the recognition that providing a defendant with his own testimony does not violate any of the traditional justifications for grand jury secrecy.⁶⁰

The dissent in *Bast* argued that it follows *a fortiori* from Rule 16(a)(1)(A) that a voluntary witness has a right to a copy of his own grand jury testimony.⁶¹ The analogy to 16(a)(1)(A) is convincing especially in light of the previous conclusion that secrecy has no validity with respect to a witness' own testimony. The dissent felt that, analogous to a defendant's right under Rule 16(a)(1)(A), a witness was entitled to a transcript of his testimony as of right, absent a showing by the government of compelling grounds for non-delivery.⁶²

Another recent extension of this liberalized disclosure policy is seen in the 1970 amendment to the Jencks Act.⁶³ This statute, passed in response to the Supreme Court's decision in *Jencks v. United*

the requirement to pursue that policy ends." *Atwell v. United States*, 162 F. 97, 99 (4th Cir. 1908).

57. The majority in *Bast* saw FED. R. CRIM. P. 16(a)(1)(A) as a method by which plaintiff could obtain his testimony if he was indicted. 542 F.2d at 897. No analogy was drawn between a criminal defendant's rights under the rule and the rights of plaintiff in this case.

58. Many courts interpreted the old language as implying that disclosure was discretionary. The change reflects the policy that, not only is a defendant's right to his own testimony mandatory, but the defendant need not even seek court approval for disclosure. See 1975 Comm. Note to FED. R. CRIM. P. 16.

59. For a case anticipating the non-discretionary nature of Rule 16(a)(1)(A) discovery see *United States v. Projansky*, 44 F.R.D. 550 (S.D.N.Y. 1968).

60. See 8 J. MOORE, FEDERAL PRACTICE ¶ 16.05[2], at n.20 (1976). See also *Dennis v. United States*, 384 U.S. 855, 871-72 & n.18 (1966).

61. 542 F.2d at 899 (Wyzanski, J., dissenting).

62. *Id.* "It is not suggested in the case at bar that the government has shown or could show any extraordinary circumstances militating against disclosure Nor is it indicated that . . . plaintiff would be unwilling to meet his fair share of any expense already incurred or hereafter to be incurred." *Id.* at 897.

63. 18 U.S.C. § 3500 (1970), quoted in note 44 *supra*.

States,⁶⁴ allows a criminal defendant to discover pretrial statements of a witness after the witness has testified at trial.⁶⁵ The most significant provision of the amendment broadens the scope of the defendant's discovery to allow a witness' grand jury testimony to be discovered.⁶⁶ The underlying policy is that once a grand jury witness testifies at trial there is no longer any need for secrecy of his grand jury testimony, and the possibility of inconsistencies because of perjury or the passing of time militates for discovery.

This statutory development of liberalized disclosure in favor of the criminal defendant and the lack of statutory provisions for disclosure to the grand jury witness is not a rejection of the witness' concomitant rights to discovery of his own testimony. It is merely a recognition of the urgent need for expanding the rights of the criminal defendant, especially in light of the reluctance that the courts have traditionally displayed.⁶⁷

Implicit in the disclosure policies of Rule 16(a)(1)(A) and the Jencks Act, as well as in a witness' request for a transcript of his grand jury testimony, is the assumption that such a transcript exists. Presently, there is no requirement that testimony before a federal grand jury be recorded verbatim.⁶⁸ Acknowledged to be the "better procedure,"⁶⁹ it is argued by commentators that recording should be made mandatory.⁷⁰ Failure to record circumvents the usefulness of statutory discovery procedures⁷¹ such as Rule 16(a)(1)(A) and the Jencks Act as well as the benefits flowing from disclosure to the witness.⁷²

It is perhaps not enough to say that there is merely no valid justification for non-disclosure of a witness' testimony. It is clear, though, that disclosure aids the criminal process in several ways. Some of these reasons were expounded in Judge Ferguson's opinion in *In re Russo*,⁷³ a case involving the right of a grand jury witness to condition

64. 353 U.S. 657 (1957).

65. The pre-1970 Act did not include a witness' grand jury testimony. See *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 398 (1959).

66. See note 44 *supra*.

67. See Comment, *supra* note 1, at 816.

68. See 8 J. MOORE, *supra* note 60, at ¶ 6.02[2][d] n.24.

69. *United States v. Cramer*, 447 F.2d 210, 214 (2d Cir. 1971).

70. See 8 J. MOORE, *supra* note 60, at ¶ 6.02[2][d] nn.24 & 24.1. See also Comment, *supra* note 1, at 821.

71. See the dissent in *United States v. Cramer*, 447 F.2d at 223.

72. See text accompanying notes 73-77 *supra*.

73. 53 F.R.D. 564 (C.D. Cal.), *aff'd*, 448 F.2d 369 (9th Cir. 1971).

his testimony on receiving a transcribed copy afterwards.⁷⁴ Judge Ferguson felt that a written transcript would insure that the witness' attorney was provided with an *accurate* record of the proceedings.⁷⁵ A written transcript would also minimize the possibility of the witness' publicizing false information regarding the grand jury proceedings.⁷⁶ Judge Ferguson was especially impressed by the opportunity a written transcript would give the witness and his attorney to correct errors in the transcript or inadvertent mistakes in the testimony itself.⁷⁷ After examining the traditional justifications for secrecy, in the light of Rule 6, and finding none of them applicable when a witness seeks his own testimony, Judge Ferguson held that a witness could obtain a copy of his testimony upon "show[ing] only that his testimony was recorded and a transcript could be made."⁷⁸

Jurisprudential thought has progressed substantially from Learned Hand's pronouncement, in *United States v. Garsson*, that "the accused

74. The case involved the grand jury testimony of Anthony Russo concerning his connection with the Pentagon Papers episode. Russo was subpoenaed to appear before the grand jury but refused, claiming a privilege against self-incrimination. At the government's request, the district court granted him immunity, but Russo still refused to testify. He was then held in contempt and committed to custody.

The litigation in *Russo* involved Russo's motion to submit to grand jury questioning if a copy of his testimony were supplied to him. The district court had approved Russo's motion, but after testifying, he was refused a transcript. Although the question raised was whether the court had "the power to purge the witness of civil contempt of court by accepting his promise to testify if he is furnished a transcript of his testimony," 53 F.R.D. at 566, Judge Ferguson considered the issue of whether a grand jury witness had any right to a transcript of his testimony and held that he did. *Id.* at 572.

75. 53 F.R.D. at 571. Disclosure not only assures that errors in transcripts can be detected but also gives the witness' attorney an opportunity to discover governmental excesses. See Comment, *supra* note 1, at 819.

See also *Burse v. United States*, 466 F.2d 1059 (9th Cir. 1972), in which the court held that a grand jury witness could obtain a copy of his testimony in order to protect him from repetitious questions, unless the government could show "some particularized and substantial reason why this should not be allowed." *Id.* at 1080.

76. The opposite side of this coin was presented in *Bast*, where the witness wanted a copy of the testimony to counter rumors that he was a government informer. See 542 F.2d at 894.

77. 53 F.R.D. at 571. As Judge Ferguson said:

Any attorney who has ever undertaken the laborious process of deposing witnesses knows how errors and mistakes creep into the reporter's transcript. Any trial judge who has had to determine motions to correct transcripts knows that mistakes are made and how vitally important it is that they be corrected immediately when the testimony is still fresh in the minds of the court, counsel and witnesses.

Id. at 571-72.

The dissent in *Bast* also cited correction of errors as a motivation for disclosure. 542 F.2d at 898. This motivation does not require any showing of actual mistake or even probability of actual mistake.

78. 53 F.R.D. at 572. See also *In re Craven*, 13 CRIM. L. REP. (BNA) 2100 (N.D. Cal. 1973).

has every advantage.”⁷⁹ The development of the defendant’s rights to discovery have included substantial rights to examine heretofore secret grand jury testimony. Unfortunately, concomitant rights of the grand jury witness have not developed as rapidly. Too often the courts, in denying the witness a copy of his own grand jury testimony, refuse to examine the present validity of the “historical” justifications for grand jury secrecy. Such an examination leads inexorably to the conclusion that these justifications are not viable where the witness is seeking his *own* testimony, and that the benefits of disclosure mandate it *as of right*.

ALAN A. HARLEY

Labor Law—Application of Right-To-Work Laws in Multistate Workforce Situations

Sections 8(a)(3)¹ and 14(b)² of the Labor Management Relations (Taft-Hartley) Act³ provide that union⁴ and agency⁵ shop agree-

79. 291 F. 646, 649 (S.D.N.Y. 1923).

1. 29 U.S.C. § 158(a)(3) (1970). This section provides in part:
(a) It shall be an unfair labor practice for any employer—

. . . .
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later

2. 29 U.S.C. § 164(b) (1970). This section provides: “Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law.”

3. Act of June 23, 1947, ch. 120, 61 Stat. 136 (codified at 29 U.S.C. §§ 141-187 (1970)).

4. Section 8(a)(3), passed in 1947 as a reaction to widespread abuses of closed shop agreements originally allowed under § 8(3) of the National Labor Relations Act, Act of July 5, 1935, ch. 372, sec. 8(3), 49 Stat. 452, bans the closed shop in industries covered by federal labor law, but continues to permit union shops subject to § 14(b). The union shop requires the employee to join the union within a specified time after hiring, whereas the closed shop requires union membership as a prerequisite to both initial and continued employment.

5. It is well settled that § 14(b) applies to the agency shop as well as the union shop agreement. See *Retail Clerks Local 1625 v. Schermerhorn*, 373 U.S. 746 (1963).