

Communications with a Grand Jury

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Conclusion

Before the widespread use of liability insurance, the holdings of the courts in denying intra-family negligence actions were generally correct. The reasoning of the doctrine might not have been clearly articulated nor logically presented, but the general revulsion of the community to such suits was reason enough for their disallowance. It must be remembered, however, that the immunity doctrine was established at a time when accident litigation was looked upon as a private contest between individuals with which society was not concerned; ⁷¹ liability was considered as shifting the loss from the person who suffered it to the person who caused it.⁷² There is today, however, an altogether different approach to tort law. Society has a definite and vital interest in accidents and their resulting losses.⁷³

Furthermore, since section 167(3), which excepts a spouse from the other spouse's insurance coverage unless the policy specifies such coverage, is subject to a recent trend to limit its application, it is poor authority for disallowing personal tort actions between parent and child.

Upon analysis of the reasons urged for its support, it is clear that present application of the rule prohibiting suits between parent and child would be contrary to logic and good reason. The doctrine should therefore be abolished.



COMMUNICATIONS WITH A GRAND JURY

Objections to the validity of indictments in recent cases have spotlighted the problem of grand jury secrecy, especially as it pertains to unauthorized communications.¹ The purpose of this note is to examine this area of the law.

Secrecy has cloaked grand jury proceedings for centuries.² The

⁷¹ See McNiece & Thornton, *Is the Law of Negligence Obsolete?*, 26 ST. JOHN'S L. REV. 255, 258 (1952); BOWMAN, *ELEMENTARY LAW* 80 (1929).

⁷² See James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

⁷³ *Id.* at 549-50.

¹ *United States v. Powell*, Crim. No. 156-15, S.D.N.Y., July 22, 1958.

² See *Goodman v. United States*, 108 F.2d 516, 519 (9th Cir. 1939); *Latham v. United States*, 226 Fed. 420, 421 (5th Cir. 1915); *People v. Hulbut*, 4 Denio 133, 135 (N.Y. 1847); EDWARDS, *THE GRAND JURY* 28 (1906); 8 WIGMORE, *EVIDENCE* § 2360, at 716 (3d ed. 1940).

grand jurors themselves,³ the prosecution staff,⁴ clerks⁵ and stenographers,⁶ when authorized to be in the grand jury room, are sworn to secrecy. Although witnesses were not sworn to secrecy at common law,⁷ some states today impose secrecy on them by statute⁸ or usage.⁹ Before the revision of the criminal code in 1948, the federal courts followed the rule, laid down in the *Goodman* case,¹⁰ that each district court could, in its discretion, require witnesses to take an oath of secrecy. However, rule 6 (e) of the Federal Rules of Criminal Procedure, promulgated in 1948, provides that "a juror, attorney, interpreter or stenographer" may disclose matters only when so directed by a court.¹¹ It further provides that ". . . no obligation of secrecy may be imposed upon any person except in accordance with this rule."¹² Apparently this language makes the *Goodman* case inapplicable.¹³ Of course, under certain circumstances, to serve the ends of justice, a court may dispense an individual from his oath of secrecy.¹⁴

The Purpose of Grand Jury Secrecy

The purposes of the secrecy surrounding grand jury proceedings have been stated to be:

³ FED. R. CRIM. P. 6(e); N.Y. CODE CRIM. PROC. §§ 238-40, 258; Charge to Grand Jury, 30 Fed. Cas. 992 (No. 18255) (C.C.D. Cal. 1872); *Ex parte Sontag*, 64 Cal. 525, 2 Pac. 402 (1884). See *Ward Baking Co. v. Western Union Tel. Co.*, 205 App. Div. 723, 728, 200 N.Y. Supp. 865, 869 (3d Dep't 1923); *Coblentz v. State*, 164 Md. 558, 166 Atl. 45, 49 (1933); *State v. Rector*, 158 S.C. 212, 155 S.E. 385, 390 (1930); EDWARDS, *op. cit. supra* note 2, at 96.

⁴ See *Gargotta v. United States*, 77 F.2d 977 (8th Cir. 1935); *Latham v. United States*, *supra* note 2; *State v. Kemp*, 126 Conn. 60, 9 A.2d 63, 68 (1939).

⁵ See *Gargotta v. United States*, *supra* note 4; *State v. Hamlin*, 47 Conn. 95, 115 (1879); *Gitchell v. People*, 146 Ill. 175, 33 N.E. 757, 760 (1893); *People v. Hulbut*, 4 Denio 133, 135 (N.Y. 1847).

⁶ Cases cited note 5 *supra*.

⁷ See *Goodman v. United States*, 108 F.2d 516, 518 (9th Cir. 1939); *United States v. Central Supply Ass'n*, 34 F. Supp. 241, 245 (N.D. Ohio 1940).

⁸ See, e.g., Mo. ANN. STAT. § 540-110 (1958); TEXAS CODE CRIM. PROC ANN. art. 388 (1958).

⁹ See *Goodman v. United States*, *supra* note 7; *State v. Kemp*, 124 Conn. 639, 1 A.2d 761, 763 (1938).

¹⁰ *Goodman v. United States*, 108 F.2d 516 (9th Cir. 1939).

¹¹ FED. R. CRIM. P. 6(e).

¹² *Ibid.*

¹³ *In re* Hearings before the Committee on Banking and Currency of the United States Senate, 19 F.R.D. 410 (N.D. Ill. 1956). See also Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 348, 353, 356, 357 (1958) where the author indicates that witnesses were purposely omitted from rule 6(e) in spite of requests to include them.

¹⁴ FED. R. CRIM. P. 6(e); N.Y. CODE CRIM. PROC. § 259. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-34 (1940); *People v. Miller*, 257 N.Y. 54, 57, 177 N.E. 306, 307 (1931); *Barnett v. McClain*, 153 Ark. 325, 240 S.W. 415, 416 (1922).

- 1) To protect grand jurors from fear of retaliation or pressure because of their decisions;
- 2) To prevent the natural hesitancy which a witness might feel in testifying if the content of his testimony was to be released;
- 3) To prevent advance information of an indictment coming to the knowledge of the one indicted, thus enabling him to flee the jurisdiction or to procure perjured testimony in rebuttal;
- 4) To protect the reputation of persons investigated but not indicted.¹⁵

It has often been declared that secrecy is for the benefit of the jurors, the state, and parties investigated, but not for the benefit of the person indicted.¹⁶

The enumeration of the persons bound to secrecy and the purposes of the secrecy rule indicate that the evil to be avoided is disclosure to outsiders of what takes place *within* the grand jury room. Information sent into the grand jury room, while possibly raising other problems, does not involve the same problems or present the same evils which it is the purpose of grand jury secrecy to prevent. That the founders of the system never considered communications to the grand jury a secrecy problem is evident from the development of the grand jury system.

Originally, the purpose of the grand jury was not to report those they believed guilty, but "to give up the names of those who are defamed by common repute . . . of crimes. The composition of the juries was such that they were 'handing on and "avowing" as their own a rumor that has been reported to them by others.'"¹⁷ Since the jury sat for a relatively small geographical area, each juror was expected to have personal knowledge of the crimes occurring therein and it was not unusual for a juror to initiate charges of his own knowledge.¹⁸ It was also permissible for private citizens to initiate charges against their neighbors—usually those whose crimes affected

¹⁵ See *In re Bullock*, 103 F. Supp. 639, 642 (D.D.C. 1952); *United States v. Central Supply Ass'n*, 34 F. Supp. 241, 245 (N.D. Ohio 1940); *United States v. Amazon Indus. Chem. Corp.*, 55 F.2d 254, 261 (D.C. Md. 1931); 8 WIGMORE, EVIDENCE § 2360, at 722 (3d ed. 1940).

¹⁶ *United States v. Smyth*, 104 F. Supp. 283, 304 (D.C. Cal. 1952). See *United States v. Central Supply Ass'n*, 34 F. Supp. 241, 244 (N.D. Ohio 1940).

¹⁷ 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 642 (2d ed. 1899). See also EDWARDS, THE GRAND JURY 11 (1906); 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 313-23 (3d ed. 1922); PLUNKETT, CONCISE HISTORY OF THE COMMON LAW 106-10 (4th ed. 1948).

¹⁸ See *Hale v. Henkel*, 201 U.S. 43, 60 (1906); *United States v. Central Supply Ass'n*, 34 F. Supp. 241, 243 (N.D. Ohio 1940); EDWARDS, *op. cit. supra* note 17, at 11.

them.¹⁹ Later, when the area for which each grand jury was responsible was extended, the jurors relied not on rumor or repute, but on the information of others or their own knowledge.²⁰ The custom of private prosecutions fell into disuse when the state itself took a firm lead in prosecuting crimes.²¹ Hence, we see that historically there was no limitation on persons presenting their views before a grand jury nor on the type of evidence which could be received by a grand jury. The jurors had the right to base indictments on any type of evidence they had—their own knowledge, rumor or common repute.

Today in federal jurisdictions the evidence before the grand jury must satisfy the grand jurors of the accused's guilt.²² There is no requirement that evidence before federal grand juries must be legally admissible before a trial jury.²³ Actually, it has been held that an indictment returned solely on hearsay evidence will not be set aside.²⁴ A question has arisen as to the desirability of indictments based on non-legal evidence—the Supreme Court apparently sustaining indictments valid on their face²⁵ with one Justice insisting that the evidence before the grand jury be rationally persuasive of the accused's guilt.²⁶ There is some lower court support for invalidating indictments based solely on illegally obtained wiretap evidence; evidence obtained by illegal search and seizure; or evidence obtained in violation of the defendant's rights under the fifth amendment.²⁷

In New York, the indictment must be based on evidence legally admissible before a trial jury²⁸ and sufficient to warrant a verdict of guilty at trial.²⁹ However, in spite of the requirement of legal evidence, inadmissible evidence before a grand jury will not invalidate an indictment if prejudice is not shown and if there existed at least a base of legal evidence sufficient to indict.³⁰

¹⁹ See *Hale v. Henkel*, *supra* note 18, at 59; *United States v. Central Supply Ass'n*, *supra* note 18, at 243; *EDWARDS, op. cit. supra* note 17, at 7, 9-10.

²⁰ *EDWARDS, op. cit. supra* note 17, at 7.

²¹ See *United States v. Central Supply Ass'n*, *supra* note 18, at 243; *EDWARDS, op. cit. supra* note 17, at 7.

²² *FED. R. CRIM. P.* 6(f).

²³ *Costello v. United States*, 350 U.S. 359 (1956).

²⁴ *Ibid.*

²⁵ *Lawn v. United States*, 355 U.S. 339, 349-50 (1958); *Costello v. United States*, 350 U.S. 359, 363 (1956).

²⁶ *Costello v. United States*, *supra* note 25, at 364 (concurring opinion). See also *United States v. Geller*, 154 F. Supp. 727 (S.D.N.Y. 1957).

²⁷ *United States v. Powell*, Crim. No. 156-15, S.D.N.Y., July 22, 1958, p. 23 (dictum).

²⁸ *N.Y. CODE CRIM. PROC.* § 249.

²⁹ *N.Y. CODE CRIM. PROC.* § 251; *People v. Leary*, 305 N.Y. 793, 113 N.E.2d 303 (1953); *People v. McGahan*, 155 Misc. 707, 281 N.Y. Supp. 249 (Rensselaer County Ct. 1935).

³⁰ *People v. Feld*, 305 N.Y. 322, 113 N.E.2d 440 (1953); *People v. Sexton*, 187 N.Y. 495, 80 N.E. 396 (1907); *People v. Shea*, 147 N.Y. 78, 41 N.E. 505 (1895).

When moving to quash indictments, the defendant has the burden of showing insufficiency of evidence³¹ or actual prejudice.³² The defendant is required to show a reasonable basis for believing these defects to exist *before* the judge will consider a motion to quash.³³ This makes the defendant's burden severe. Moreover, the courts as a matter of policy are loath to become involved in passing on grand jury proceedings and prefer to let the defendant prove his case before the trial court.³⁴

This approach to the problem appears to be sound in the light of the history of the grand jury system, and the protection afforded the defendant in a jury trial. In addition, courts save much time by not becoming involved in technical objections which might require the perusal of voluminous grand jury minutes.

Communications as a Crime

It is a crime to attempt to corruptly influence the decisions of a juror.³⁵ This law applies to grand jurors.³⁶ A federal statute on the subject was passed in 1872 and has been in effect ever since.³⁷ Shortly after this statute was passed, Mr. Justice Field, in his now famous charge to a grand jury,³⁸ laid down some rules as a guide to their actions, among which was a prohibition against allowing

. . . private prosecutors to intrude themselves into your presence, and present accusations. Generally such parties are actuated by private enmity, and seek merely the gratification of their personal malice.³⁹

He pointed out that the proper course for such a private person to take was to bring the matter to the attention of the district attorney, and if he failed to act, to a committing magistrate before whom the matter could be investigated. He indicated that if neither of these parties saw fit to act it would be safe to assume that there was no reason for the grand jury to be interested.⁴⁰ The judge further

³¹ Carrado v. United States, 210 F.2d 712 (D.C. Cir. 1953).

³² See United States v. Amazon Indus. Chem. Corp., 55 F.2d 254, 262-64 (D.C. Md. 1931).

³³ United States v. Papaioanu, 10 F.R.D. 517, 518 (D.C. Del. 1950).

³⁴ See United States v. Pappagoda, 288 Fed. 214, 215 (D.C. Conn. 1923); United States v. Papaioanu, *supra* note 33; Gitchell v. People, 146 Ill. 175, 33 N.E. 757, 760 (1893).

³⁵ 18 U.S.C. §§ 1503-04 (1952); N.Y. PEN. LAW §§ 376, 376-a; United States v. Russell, 255 U.S. 138 (1921); People v. Glen, 173 N.Y. 395, 66 N.E. 112 (1903).

³⁶ 18 U.S.C. §§ 1503-04 (1952); N.Y. PEN. LAW § 370 (Supp. 1958).

³⁷ REV. STAT. §§ 5404-05 (1875) which was the original version of the present statute, 18 U.S.C. §§ 1503-04 (1952).

³⁸ Charge to the Grand Jury, 30 Fed. Cas. 992 (No. 18255) (C.C.D. Cal. 1872).

³⁹ *Id.* at 994.

⁴⁰ *Ibid.*

stated that a rash of private communications ". . . filled with malignant and scandalous imputations upon the conduct and acts of those against whom the writers entertained hostility . . ." had descended upon previous grand juries. "All such communications are calculated to prevent and obstruct the due administration of justice . . ." ⁴¹ He then quoted from Judge King in *Commissioner ex rel. Jack v. Crans*: ⁴²

Let any reflecting man be he layman or lawyer, consider of the consequences which would follow, if every individual could at his pleasure throw his malice or his prejudice into the grand jury room, and he will of necessity conclude that the rule of law which forbids all communications with grand juries, engaged in criminal investigations, except through the public instructions of courts, and the testimony of sworn witnesses, is a rule of safety to the community.⁴³

Mr. Justice Field then mentioned the new federal act passed to prevent the continuance of this "pernicious" practice. He quoted from Revised Statutes, sections 5404 ⁴⁴ and 5405,⁴⁵ and concluded that it was the intent of Congress to protect jurors ". . . from intimidation or personal influence of any kind." ⁴⁶

It must be noted that the evil of which Mr. Justice Field was warning consisted of communications which in fact were attempts to influence the jurors. When he stated "all such communications are calculated to prevent and obstruct the due administration of justice . . ." ⁴⁷ he had in mind those communications to which he had just referred, namely, actual attempts to influence. Again, in the quotation from Judge King ⁴⁸ we note that the judge spoke of a communicant injecting his private malice or prejudice into the grand jury room and gave the impression that all communications were outlawed to protect the safety of the community. Yet, in that very case, it appears that a letter written to the same grand jury by a county commissioner, urging them to ignore the defendant's attempt to influence them, was not considered a crime. The court distinguished the character of the remarks and the motives of the commissioner.⁴⁹ It would appear that although all communications are forbidden, not all are crimes. The motives of the sender and the nature of the communication have some bearing on the matter.

The process of solidifying the Field charge as it refers to communications with a grand jury was aided by dictum in *United*

⁴¹ *Id.* at 995.

⁴² 2 Clark 172, 3 Pa. L.J. 442 (1844).

⁴³ Charge to Grand Jury, 30 Fed. Cas. 992, 995 (No. 18255) (C.C.D. Cal. 1872).

⁴⁴ REV. STAT. § 5404 (1875).

⁴⁵ REV. STAT. § 5405 (1875).

⁴⁶ Charge to Grand Jury, *supra* note 43, at 995.

⁴⁷ *Ibid.*

⁴⁸ See text accompanying note 43 *supra*.

⁴⁹ *Commissioner ex rel. Jack v. Crans*, 2 Clark 172, 3 Pa. L.J. 442 (1844).

*States v. Kilpatrick*⁵⁰ where the court states that Mr. Justice Field ". . . dwelt at some length and referred to high authority, urging the importance of securing grand juries against outside influences and improper interferences. . . ." ⁵¹

In *Duke v. United States*⁵² the defendant was being investigated on suspicion of crime. Believing that an indictment would be returned against him, he sent the grand jurors a letter containing his version of the facts, asking them to ignore hearsay evidence, and giving certain high officials as character references. An indictment and prosecution under the federal statute⁵³ followed. At the trial, "the court charged the jury that the act of the defendant in delivering the letter to the grand jury, for the purpose of being considered by it, amounted to an attempt to influence the action of the grand jury within the meaning of the statute."⁵⁴ The court of appeals held that this charge was correct.⁵⁵ It would appear that the court was implying that any communication would violate the statute, especially when it stated:

Congress for the protection of grand and petit jurors from this sort of interference has not only forbidden attempts to influence them "corruptly, or by threats or force, or by any threatening letter or communication" . . . but has also forbidden any attempt to influence by the sending of *any* letter relating to any matter pending before them.⁵⁶

However, the court appeared to back away from such a conclusion when it immediately afterwards said, "cases can be imagined in which a serious question might arise as to whether a letter was an attempt to influence within the meaning of the statute. . . ." ⁵⁷ It went on to hold that the letter under consideration *on its face* showed that it was intended to influence the grand jury, "and one who knowingly sends a letter to a grand jury which shows *upon its face* the intention that it shall be considered with respect to a pending case, cannot be heard to say that he did not attempt to influence the grand jury thereby, as the intent to influence is inherent in the act of knowingly sending such a letter."⁵⁸

⁵⁰ 16 Fed. 765 (W.D.N.C. 1883).

⁵¹ *Id.* at 771.

⁵² 90 F.2d 840 (4th Cir. 1937).

⁵³ 18 U.S.C. § 243 (1946). "Whosoever shall attempt to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any letter or communication, in print or writing, in relation to such issue or matter shall be fined not more than \$1,000, or imprisoned not more than six months or both." *Ibid.* This statute is the predecessor of 18 U.S.C. §§ 1503-04 (1952).

⁵⁴ *Duke v. United States*, 90 F.2d 840, 841 (4th Cir. 1937).

⁵⁵ *Duke v. United States*, 90 F.2d 840 (4th Cir. 1937).

⁵⁶ *Id.* at 841. (Emphasis added.)

⁵⁷ *Ibid.*

⁵⁸ *Id.* at 842. (Emphasis added.)

It would thus seem that several possible interpretations exist as to the federal statute on communications. One view is that any communication is per se criminal. This is the impression left by the cases on the subject. However, on careful examination those cases reveal that some room for doubt exists as to whether "innocent" communications are in fact included. For instance, in disposing of one of defendant's arguments for quashing an indictment on the ground that the grand jury "received unauthorized writings from unauthorized persons,"⁵⁹ the court in *United States v. Smyth*,⁶⁰ said:

The purpose of 18 U.S.C.A. §1504 was to prevent anyone from attempting to bring pressure upon or intimidate a grand juror by a written communication *with that intent*. But that section does not prohibit a grand juror from receiving a communication, written or oral. The grand jury could indict anyone for a violation of that section *if the requisite elements were present*. But not if they solicited a communication or indicated a willingness to receive one; then *the requisite intent* would not be present and there would be no crime.⁶¹

This certainly seems to indicate that an intent other than the mere intent to send the communication is required and, in the light of the stated purpose of the statute as indicated by the court, that intent must be to influence, intimidate or bring pressure on the grand jury. This latter view is further supported by the sentence added to section 1504 in 1952, "Nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury."⁶²

Communications as Contempt

Communications which attempt to influence, corrupt or insult a grand jury are punishable under the court's contempt powers as an interference with the administration of justice.⁶³ It has been held that a communication which *on its face* is libelous or shows an attempt to corrupt or influence the grand jury is contemptuous and the intent to send such a communication is sufficient to convict.⁶⁴ That an area of uncertainty exists when a communication not *on its face* actionable is involved may be seen in *Fishback v. State*,⁶⁵ where the Indiana court considers the problem. There, an affidavit by the

⁵⁹ *United States v. Smyth*, 104 F. Supp. 283, 305 (N.D. Cal. 1952).

⁶⁰ 104 F. Supp. 283 (N.D. Cal. 1952).

⁶¹ *Id.* at 299. (Emphasis added.)

⁶² 18 U.S.C. § 1504 (1952).

⁶³ *In re Cuddy*, 131 U.S. 280 (1889); *In re Tyler*, 64 Cal. 434, 1 Pac. 884 (1884); *Field v. Thornell*, 106 Iowa 7, 75 N.W. 685 (1898); *In re Cheeseman*, 49 N.J.L. 115, 6 Atl. 513 (1886); *State v. Doty*, 32 N.J.L. 403 (1868).

⁶⁴ *People v. Parker*, 374 Ill. 524, 30 N.E.2d 11 (1940).

⁶⁵ 131 Ind. 304, 30 N.E. 1088 (1892).

defendant disclaiming any intent to interfere with the administration of justice was taken as conclusive and the contempt was dismissed.⁶⁶ Although this treatment seems to be unique, the case indicates that a problem of intent is involved.⁶⁷

The applicability of contempt proceedings to communications with a federal grand jury is narrowed by statutes restricting the court's contempt power itself.⁶⁸ In *United States v. American Mach. Co.*,⁶⁹ a contempt citation for publishing certain pamphlets decrying the effects of high jury awards was dismissed when the court held that its power to punish for contempt was limited by statute.⁷⁰ The court found that in this case it could punish for contempt only if the act complained of took place within the geographical presence of the court or so close thereto as to obstruct the administration of justice.⁷¹

Even after a court finds that an act occurred within its contempt jurisdiction, it is submitted that a further problem concerning intent arises. For example, consider the *Cammer* case,⁷² in which a lawyer was held in contempt for sending harassing questionnaires to a grand jury which had indicted one of his clients and which was considering similar indictments against others. The lower court considered the defendant's absence of intent to obstruct the administration of justice in mitigation of the penalty.⁷³ The court of appeals affirmed the decision.⁷⁴ The Supreme Court reversed because the defendant was found not to be an officer of the court within the meaning of the statute, and so not within the contempt power of the court.⁷⁵ However, it is interesting to note that speaking of the defendant's actions the Court said, "we find it unnecessary to decide this but it is not out of place to say that no statute or rule of court specifically prohibits conduct such as petitioner's."⁷⁶ As to the applicability of section 1503 the Court continued, "of course it does not cover this case because there is no charge that petitioner attempted improperly to influence the jury or violate section 1503 in any other way."⁷⁷

When this decision was rendered and even when the indictment was drawn, the Supreme Court knew of the existence of section 1504; certainly if "the only intent required was the intent to send the

⁶⁶ *Ibid.*

⁶⁷ See *People v. Sheridan*, 349 Ill. 202, 181 N.E. 617 (1932); *People v. Graydon*, 333 Ill. 429, 164 N.E. 832 (1929).

⁶⁸ 18 U.S.C. § 401 (1952).

⁶⁹ 116 F. Supp. 160 (E.D. Wash. 1953).

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *In re Cammer*, 122 F. Supp. 388 (D.D.C. 1954).

⁷³ *Ibid.*

⁷⁴ *Cammer v. United States*, 223 F.2d 322 (D.C. Cir. 1954).

⁷⁵ *Cammer v. United States*, 350 U.S. 399 (1956).

⁷⁶ *Id.* at 404.

⁷⁷ *Id.* at 407.

communications"⁷⁸ the conduct of the defendant here would clearly be proscribed. By way of dicta the Court says that even if the federal courts have contempt power in this case, what the defendant did violates no law or rule of court. This would indicate that mere sending of communications is not in itself a violation of section 1504 or a ground for contempt.⁷⁹ In view of the disagreement and confusion in the area of intent it cannot be denied that a problem exists.⁸⁰

Conclusion

It appears obvious that communications with a grand jury do not involve the question of secrecy at all. Grand jury secrecy is not violated by an outsider sending information to a grand jury. A problem does arise, however, when we consider communications as evidence. An indictment based solely on such evidence would be quashed in states requiring legal evidence. In the federal courts, apparently, an indictment will not be dismissed if based on improper communications if the indictment is valid on its face. However, both in states requiring legal evidence and in the federal jurisdictions, such communications do not affect indictments which have a basis of other evidence sufficient to indict. Furthermore, the defendant must come forward and show the defects in an indictment before it will be quashed.

The statutes punishing communications, and the court's power to punish them by contempt as interferences with the administration of justice, raise serious problems because of the uncertainty of the type of intent required to make the act criminal. A strong regard for fair play and the constitutional requirements of the criminal law make a definitive clarification of this troublesome element desirable.

⁷⁸ See text accompanying note 54 *supra*.

⁷⁹ *Cammer v. United States*, 350 U.S. 399, 407 (1956).

⁸⁰ A further restriction upon the courts in this area is the freedom of the press provision in the first amendment to the Constitution. When newspaper publications are involved there must be present that extremely high degree of the substantive evil which would justify punishment of the publications. See *Hoffman v. Perrucci*, 117 F. Supp. 38 (E.D. Pa. 1953). In this area it is interesting to note the treatment of contempt charges arising from the circulation of pamphlets which decried high jury awards and linked them with higher insurance and the rising cost of living. The same pamphlets were involved in three separate suits. *Hoffman v. Perrucci*, 117 F. Supp. 38 (E.D. Pa. 1953); *United States v. American Mach. Co.*, 116 F. Supp. 160 (E.D. Wash. 1953); *Hendrix v. Consolidated Van Lines, Inc.*, 176 Kan. 101, 269 P.2d 435 (1954). Generally speaking, the courts weighed the freedom of the press guarantee of the first amendment and determined that there was not present that degree of danger to warrant contempt punishment.