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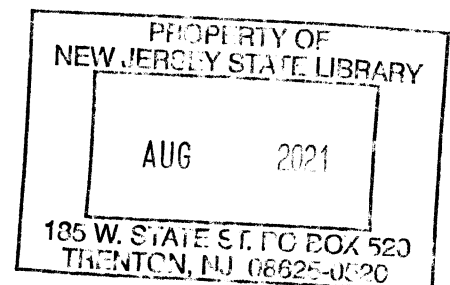
on

SENATE BILL NO. 34
[Witness Immunity Bill]

before

SENATE COMMITTEE ON LAW AND PUBLIC SAFETY

Held:
May 9, 1967
Assembly Chamber
State House
Trenton, New Jersey



MEMBER OF COMMITTEE PRESENT:

Senator Ned J. Parsekian [Chairman]

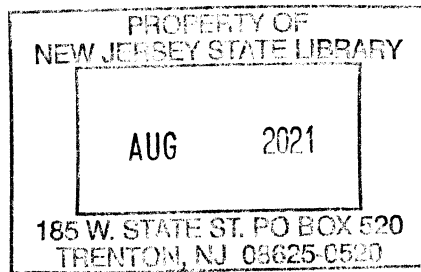
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SENATOR NED J. PARSEKIAN [Chairman]: These hearings are conducted before the New Jersey State Senate Committee on Law and Public Safety on Senate No. 34, introduced January 10, 1967, the Witness Immunity Bill.

I must explain to our distinguished first witness, Mr. Lombard, that last night the New Jersey Legislature was in session until a little after 4:00 A.M., and the members left these halls about 4:30, and that is the reason the other members of the Committee aren't here at this 10 o'clock the next morning opening.

MR. LUMBARD: I think it is remarkable you are here.

SENATOR PARSEKIAN: We appreciate your being kind enough to come and I assure you that the transcript will be distributed and read with great interest by the members of the Committee and will be distributed to the other members of the Legislature.

I also would like to ask Mr. Michael Kates - I know you have signed this sheet first, but Mr. Lombard has appointments in Manhattan and I am taking the liberty of calling him first.

MR. KATES: That is quite all right.

SENATOR PARSEKIAN: Mr. Lombard, thanks for coming, and would you please for the Committee first state your background before proceeding, sir?

E L I O T H. L U M B A R D: Surely. I have been admitted to the Bar in New York since 1953. I served as an Assistant United States Attorney for the Southern District of New York from 1953 to 1956. I was in private practice thereafter for several years during which I did a good bit of defense work and was assigned defense counsel. Then in 1958 New York established what is popularly known as the New York State Crime Commission. Its technical name is the Temporary State Commission of Investigation. I was appointed its first Chief Counsel and served in that position for three years until 1961, at which time Governor Rockefeller asked me to join the Executive Chamber Staff in New York, and I did, as his Special Assistant Counsel for Law Enforcement. I held that position until May 1st of this year when I returned to private practice.

SENATOR PARSEKIAN: Mr. Lumbard, would you tell this Committee what your experience has been under a witness's immunity act in general before discussing the specifics of this bill?

MR. LUMBARD: Yes, I would be pleased to because I have had occasion, as my experience will indicate, to live under both the Federal law, such as it exists in this area, and the State law in New York. They are vastly different. The Federal system has a very awkward and confined set of immunity statutes so far as meaningful crime investigation is concerned. The most

important crimes where you would need immunity do not provide for immunity with the exception of narcotics in the last few years. On the other hand, the Federal government has a whole array of miscellaneous immunity statutes covering a lot of white-collar crimes and a lot of what some people might even consider very marginal areas for immunity. Perhaps the single most-used Federal use of immunity is the anti-trust field, which perhaps indicates the peculiar nature of the point I am trying to make.

On the other hand, New York has a very powerful, useful and strong immunity statute, a most effective system, which I commend to you.

Now there are various systems by which you can grant immunity. I would merely try at this point to disclaim any knowledge of what the New Jersey law is at the present time or what the New Jersey system is or isn't, other than, of course, I know you have a privilege against self-incrimination. So I cannot comment on a drafting level as to a lot of the details in your particular Senate No. 34. I can talk, and I would be happy to, conceptually about the problems presented by immunity. If you have a privilege against self-incrimination, as you do, it seems to me absolutely essential in this day and age that immunity be a feasible, workable concept or you simply cannot develop hard-hitting investigative activity in my judgment. The expansion of the scope of the privilege against self-incrimination,

a very proper expansion on all levels of government, has simply led to the point where any claim of the privilege, however specious, is honored, must be honored, by the courts.

Anyone who is active in this field knows very well that on a large number of occasions self-incrimination is now claimed as a simple cover for a reluctance to testify whether or not actual self-incrimination is involved. We have passed over this line as a matter of law about ten years ago in terms of practice in our state. Therefore, we are at the point where there are terrific impediments to actual investigative work of the most important and difficult kind. You must have a means for granting a "no holes," unqualified immunity so that the privilege against self-incrimination can be set aside validly, fairly, constitutionally, and you must particularly have this kind of investigative power for the two most difficult kinds of cases to investigate, in the area of organized crime and in the area of political corruption. Let me use the latter as a more specific illustration. The average bribery consists of two people, the giver and the taker. In most states both are equally guilty or certainly both come within a conspiratorial concept. With very rare exceptions it is impossible to develop a prosecution in such cases unless one of the two can be made into a witness. To make one of the two into a witness will require in almost all cases within my experience a grant of immunity to one of the two. And thereafter

to force him to testify surrounding him with a box consisting of sides made of perjury, contempt, the substantive offense and immunity. And unless you put him in that box and really work at him hard, although fairly within the law, you aren't going to develop the most important or very many hard-hitting political corruption cases in my judgment.

Now it seems to me the political corruption case is easier to understand, more dramatic, because everyone is on the wave length of a bribe.

In the area of organized crime, the nature of the violations may run a whole spectrum. Therefore, it isn't as easy to develop simple categories as in corruption. But equally so, the main failure to prosecute organized crime in my judgment lies with the difficulty in getting the facts, in producing live, real, admissible testimony in the court room. Very frequently the authorities know who is committing an offense and exactly what he is committing. The reason they cannot proceed is because they do not have admissible evidence. One of the two most important tools in getting that evidence is, in my judgment, an immunity statute.

I don't think I need go any further at this point in terms of that unless you wish me to. At this stage I think the law books in New York are filled with volumes of cases of how useful this has been. I would say the prosecutive activity in District Attorney Hogan's office in New York County alone would illustrate

the proper and important use of immunity. The activities of the Commission of which I was counsel for a few years would so indicate. I think the current ethics on the part of all the Federal prosecutive authorities and the unanimous recommendations of United States Attorney Generals for the last 17 years, I believe, of the need for a clarifying and general immunity statute in the United States system make that point. The President's Crime Commission reported in February of this year and in the chapter on organized crime it called very clearly for a general immunity statute in the Federal system as being vital in the fight against organized crime and their recommendation in that report is contained in the chapter on organized crime.

In the view of some, I perhaps might be an over zealous type. If so, let me only say that I don't think anybody would charge the members of the President's Crime Commission with being that and their report was unanimous on this point and it includes such persons as Professor Herbert Wechsler of Columbia Law School and Judge Charles Breitel who is now on the highest court in New York and who had been a prosecutor in Dewey's office and counsel to Governor Dewey. It includes a very distinguished group from across the country.

Therefore, I think I could say that it seems to me generally acknowledged by those persons who are most emersed in the practical problems of the administration of criminal justice today across this country so far as I know that an effective

program must have an effective immunity provision.

SENATOR PARSEKIAN: Mr. Lumbard, could you give us any specific case example or examples from your experience that might highlight the value of witness immunity as it operates in New York?

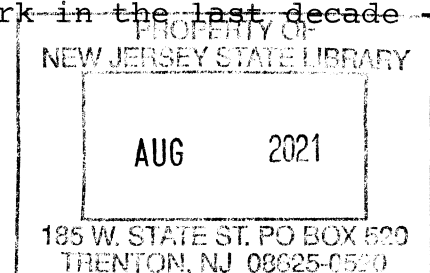
MR. LUMBARD: Well, you mean a particular prosecution?

SENATOR PARSEKIAN: Yes.

MR. LUMBARD: Well, you could take almost every political corruption prosecution that has come out of any consequence in the last decade with which I am familiar. Almost every one of them has involved immunity. In fact, you could say that they either involve immunity or eavesdropping under the court authorized New York system or a combination of both. I don't myself know of one really significant case offhand in New York in that area that has not involved one or both of those two tools, if I can use that word, and that I think is a partial explanation of why District Attorney Frank Hogan and the leading prosecutors in New York - everyone that I know of connected with New York - are so disturbed at the possibility that eavesdropping may be lost as a result of a potential Supreme Court decision in the Berger Case which is now sub judice with the court. What would be lost would be stupendous.

SENATOR PARSEKIAN: May I ask you this: You said almost every political corruption case in New York ~~in the last decade~~

MR. LUMBARD: Of consequence.



SENATOR PARSEKIAN: [Continuing] -- of consequence involved this. If you hypothetically did not have the eavesdropping tools, could you have proceeded with witness's immunity successfully in the large number of cases?

MR. LUMBARD: In some cases you can, yes, but I tried to make the point very clearly that to make those kinds of cases you will find one or the other of those devices or both having been utilized by the prosecutor in order to make the case and in almost every such case the evidence is largely one witness, the other side of the transaction, if you will, plus some minor corroborating evidence. They are close cases evidencewise and very difficult to develop.

SENATOR PARSEKIAN: There is - the reason I asked the question - some strong opposition to eavesdropping. I don't know that we have settled that debate yet.

MR. LUMBARD: I don't think it will ever be settled.

SENATOR PARSEKIAN: I am sure that there would be strong objections to both eavesdropping methods and witness's immunity by the American Civil Liberties Union and I expect they will testify today.

MR. LUMBARD: To immunity?

SENATOR PARSEKIAN: Yes, I expect that type of testimony.

MR. LUMBARD: I have never heard that before and I think it is fair to say I have been in fairly close touch with the Civil Liberties Union in New York. I have never understood or been

informed that the Civil Liberties Union nationally or in New York has ever taken such a position. I may be uninformed and they may have taken such positions but they have not to my knowledge and I find it very difficult to understand the rationale. If the immunity as given is a blanket wipe-out of any problems connected with prosecution, with incrimination, so long as that is present, and such must be present for the grant to be constitutional, I don't see their problem unless they are going to try to extend the concept of self-incrimination to a further step which it has never been taken legally to my knowledge and that is to sort of say, well, we don't want people to be forced to degrade themselves, which is different from being subject to prosecution. I would be intrigued with what legal, practical or moral argument they would make.

SENATOR PARSEKIAN: I will send you a copy of the testimony that we anticipate having on the subject. I don't know what the argument will be. We haven't yet heard it.

MR. LUMBARD: I wish you would because, as I say, so long as there is absolutely a complete wipe-out of any possibility of prosecution, I don't see the problem because the Constitution only says a witness shall not be compelled to testify if he shall incriminate himself. If you eliminate the "incriminate himself," what is the legal basis for the opposition? The cases in New York on this are five feet high.

SENATOR PARSEKIAN: Then, anticipating that there may be

some testimony in this direction, I ask the question whether witness's immunity would be a useful tool without eavesdropping.

MR. LUMBARD: I definitely think it would

SENATOR PARSEKIAN: It would?

MR. LUMBARD: Without any question, yes.

SENATOR PARSEKIAN: May I ask a general question, Mr. Lumbard --

MR. LUMBARD: Let me make it clear why I feel that way so there is no doubt that I am trying to confuse the two.

In most cases where you would wish to use immunity the facts have already occurred. That is, you are dealing with a historical event. You are trying to get somebody to come forward and testify to something that has occurred in the past. You are trying to get it out of him, so to speak, whereas the point of wire tapping and eavesdropping is that it deals with a contemporaneous event. You have to have the order ahead of time and you have to have the installation ahead of time so as to record at the moment it occurs. So they deal with two different things, conceptually and practically and factually. They are both means of getting that which cannot otherwise be obtained factually and that's the heart of the matter.

SENATOR PARSEKIAN: Mr. Lumbard, at the President's Conference on Crime earlier this year, you mentioned some interest in the British system.

MR. LUMBARD: Well, Senator, before we get to that - I know you want to go into that and I will be happy to - let me say a couple of other things about the New York system --

SENATOR PARSEKIAN: Fine.

MR. LUMBARD: [Continuing] -- because I have read Senate 34 and my immediate reaction is that perhaps, while I agree wholeheartedly with the general intent and concept, more attention should be given to the system by which that general expression or intent is placed into operation. I would not, myself, be for any system of granting immunity that is so simple that it could be made the subject of great abuse. Indeed, I have never known anyone to be opposed to the concept of immunity other than on the ground that it could be abused, say, for corrupt purposes itself or for political objectives or as a means of some particular political group drowning all its favorite sons in a bath of immunity, as it is sometimes portrayed. This seems to me the only opposition on an intellectual level.

The answer to that, it seems to me, lies in two directions: Number one, to have a state system of administering criminal justice that starts with the Governor's Office as the Chief Executive and radiates down and concerns him and gives him power with respect to all persons involved in administering criminal justice - supervise their activities even though he doesn't try to run their office - has the power to inspect - has the power to supersede or remove. That power if properly laid out rarely

has to be used, but it is a magnificent deterrent behind the scenes. I would suggest that to you. That is number one. That isn't vital.

The thing that is vital is to have a mechanical system, as we have in New York, of granting immunity that does several things. First of all, it confines very tightly those who may grant immunity. They are defined in the statute. Secondly, the context within which they grant immunity can be worked out and to the extent it can be stated in the statute, I think it is an appropriate protection. In most grants of immunity, I think it is advisable that there be some central state source, whether it is to be one state agency or official or another, I am not competent to say here in New Jersey. But there should be such a central clearing house where immunity must be first requested or notified so that there is at least an inquiry to appropriate public officials other than the person granting immunity. While I wouldn't make a favorable response an absolute condition, I think in practice it so works that if notice is given, then a lot of behind-the-scenes activity takes place that amounts to the same thing. I, myself, have never known a public official in New York to give immunity over the objection of somebody who has been notified according to the system in New York. That also has the advantage of bringing to the attention of other persons the possible grant which might affect pending activity in their office. They don't need necessarily to explain what that

activity is to the other person, but they can bring to his attention the fact that they are concerned with him. This again is part of the system that I am talking about. The more you could work such a system in terms of one central state source, I think the more effective and useful it would be.

I could speak more about this kind of thing. I don't know whether you wish me to.

SENATOR PARSEKIAN: I wish you would, yes.

MR. LUMBARD: I would refer you to the New York system. There are several ways you can work this. In the current New York system, which is tailored around Section 2447 of the Penal Law, that is a general enabling statute which says that immunity can be granted only by certain "competent authorities" and they are spelled out in the statute and those authorities may only grant immunity for certain named crimes and those crimes are spelled out at various places in the Penal Law. I would not, myself, want to see you get involved with the kind of immunity program that allowed someone to grant it for an almost insignificant crime and as a result thereafter be able to claim that he has been bathed, so to speak, for a much broader spectrum of crimes, much more serious in nature. That requires, therefore, some hard work in analyzing your penal structure, your penal law, and deciding item by item which statute you think is of sufficient significance for you to allow this.

With those safeguards in terms of your system, which is

different from the concept, I think you will have a very workable system and I can report to you that that kind of system in New York has been workable, has been useful, intensely useful, and I know of absolutely no cry in New York to eliminate it after decades of experience. I think that is very significant also. There are some people who might want to work a bit at the system, and indeed there are a number of those. There are various alternatives you might want by way of the system, but no one is going after the grant concept itself to my knowledge.

SENATOR PARSEKIAN: Thank you.

Mr. Lumbard, at the Crime Conference in Washington, you discussed briefly the British system whereby the Home Office subsidizes to some extent, some substantial extent, the local police officials. As I recall it, 50 per cent of the administrative cost, entire administrative cost, salaries and overhead, is borne by the Home Office as against local police from the lowest level up to local chiefs. I wonder if you would care to comment on that system and comment on whether you felt that it had any tangential benefits to law enforcement.

MR. LUMBARD: Well, I can't remember the exact context in which I got into speaking about that at the Washington Conference, Senator, where we met. But I went to England in 1965, on a search for a number of ideas and came away with those and some others and considerable education.

One of the things that intrigued me greatly was why the British were able to by and large have a more effective police structure than we had in this country and I was convinced before I went over that it must be more complicated than simply saying to yourself that the average British citizen has a greater respect for law and order. You have to go back a question: Why do the citizens have that respect for law and order and why do they sustain it over generations? They obviously do that because of their administrative structure, their administrative practices, their approaches, the kinds of people they put into office and so on. That's what is the guts of the thing.

I did talk with some principal people in the Home Office which in England is largely responsible for the administration of criminal justice in the entire spectrum, from police right through parole, with the exception, of course, of the court system which is independent, although the Home Office ties to the court system are very close, much closer than we have here.

I was greeted right away with the observation that they couldn't understand why we didn't understand that police departments were perhaps too important to just sort of leave wandering around autonomously doing what they wish in small fragmented, uncoordinated units. In one sentence that expresses the British philosophy. They came to the conclusion many generations ago that this was bad. So they set up a subsidy system by which the

central British Government provides 50 per cent of the budget of any police department that qualifies for that money in the view of Her Majesty's Inspectors of the Constabulary, a wonderful phrase which means a very first-rate, small group of high British police officers who rove around from police department to police department throughout the year and at any time to inspect every aspect of the department and make sure it is up to snuff and qualifies. They also use this subsidy approach in a very direct way and they will cut off a department if it wanders or becomes less than satisfactory and the nature of the subsidy is of such a degree that even the hint of that happening has a catastrophic reaction in the local community which has to supply and make up the budget if the money doesn't come. So it is a most salutary, swift device. They also use it to frankly force police consolidation and I commend to you a report called, "The Royal Commission on Police," I think it is in 1962, which led to the British Police Act of 1964, both very good leadership kind of documents in my judgment.

In that report - and I was told elsewhere - the British have set up some standards. They have decided, as I recall the figures and I may be off a little bit - but they have decided that no police department of less than 100 men in this day and age can give effective police service. They are just too small to sustain adequate specialist services and squads, etc. They think really no department should be below a minimum of 250 men and the

optimum department lies in the area of 500 or more. And they simply say to various communities, "We think you should combine your police departments," and they have a hearing system by which this goes on. The local communities usually protest and then the central government says, "Combine," and they do. And they work hard, therefore, at administration, at structure, in a way that we do not in this country. I came away convinced this has a very great deal to do with the quality of the British police service and with the respect that the average Englishman has for the departments.

SENATOR PARSEKIAN: These combinations would go across the governmental jurisdictions.

MR. LUMBARD: They quite frequently do.

SENATOR PARSEKIAN: They have a county and municipal system?

MR. LUMBARD: It is a little different. They have a borough system. They have many systems. But by and large without getting involved in labels, it is quite comparable to the kinds of local government we have in this country.

SENATOR PARSEKIAN: How do they, if you know, solve the problems of contributions from the various local communities, if there is a combination, of the Home Office pressures or demands?

MR. LUMBARD: You mean in terms of the tax structure?

SENATOR PARSEKIAN: In terms of the contribution by

the local municipalities.

MR. LUMBARD: Well, I never went beyond the fact that they worked out some kind of ratio with each government involved. There are many precedents for doing that in this country.

SENATOR PARSEKIAN: This rule of thumb of 100 minimum, 500 optimum, was arrived at, I suppose, ---

MR. LUMBARD: Well, I want to suggest to you this report that I mentioned because this is laid out right there, the pros and cons and so forth.

SENATOR PARSEKIAN: I suspect that implied in what you said about these minimums that this is the minimum force required in order to have certain research facilities and so on.

MR. LUMBARD: Not so much research as to have effective police service. Like most things, there is a minimum level beyond which if you are in size so small you cannot produce a quality of product. You could even say the same thing about a law school or a university. If you cut the faculty down to a certain point, you simply cannot have a first rate operation any more.

SENATOR PARSEKIAN: Well, let's take a police force of 25, which is not unusual in many communities in our state.

MR. LUMBARD: Don't even say another word. Let's take it this way.

SENATOR PARSEKIAN: What does it do?

MR. LUMBARD: It can't do much. If you have 25 in your

police department, right away you have to have one man who is top guy in charge, 24 hours a day, 7 days a week. That's 3. If you then start talking about any kind of patrol coverage 24 hours a day, 7 days a week - of course, we can't without knowing something about the geography, population density, and a few other factors of the community make any great judgments - but you'll see right away that with a 25-man force, at least 3 involved in your command structure, probably 5 as a practical, political fact, you have almost everybody on shifts on patrol. You have a few people who are at any one time going to be involved in the court structure, processing cases, presenting cases or whatever. So your patrol right along is going to be very weak and you just don't have the manpower there for training, for adequate detective services of a first-rate nature that can span a variety of cases running from homicide, checks, etc., and I think the experience of our state indicates quite clearly that the quality of your investigative service, your detective service, which is essential, is almost directly related to the degree to which you can get specialist's knowledge and forces and training involved. You can't have in a department of 25 that kind of service.

If you began to put together 4, 25-man departments at a minimum, you would begin to get to the number of personnel where you could have such approaches - a lab man. You couldn't possibly have a qualified lab man in a 25-man force with heroic

exceptions.

This is all aside from costs where if you spread your motor pool, your communications and so forth, all on a broader base, you would wind up saving a lot of money in addition to better quality of action.

In fact, if I were to make a generality, I would say the greatest single problem that now confronts the police and that affects the quality of police service in and around New York State is fragmentation, tiny, ineffective departments all over the landscape. They look glorious marching in the parade twice a year and any relationship between them and modern police work is purely accidental, despite courage, heart and patriotism.

In that connection, I would commend to you what I think is the most successful experiment for you to observe if you wish and that is the Suffolk County Police Department in Suffolk County, New York - that is the outer end of Long Island - a department that now has countywide investigative services and patrol activities that cover about 90 per cent of the population. The county is just short of a million people now. I think all the kinds of problems of police consolidation were there, petty jealousies, pensions, political problems, etc., etc. But they can be solved because they were solved there and the way they did it, which would take too long to explain here, is something that is really worthy of a hard look.

SENATOR PARSEKIAN: Who would be the chief officer there,

Mr. Lombard?

MR. LUMBARD: They have a Commissioner of Police, John Barry, who is now a regular recipient of visitors from all over about police consolidation and he has it all laid out. Just go see him and he can tell you all about it.

SENATOR PARSEKIAN: It seems to me, Mr. Lombard, that one of the obvious benefits of a consolidation would be the problems of erasing jurisdictional lines. Has this presented a problem to law enforcement, the fact that a crime may be committed in municipality A and the perpetrator may finally find his way to municipality B or C or the fact that the crime may cross over municipal lines, and could you with consolidation or the British-type approach effect some more sense to that system of apprehension and so on?

MR. LUMBARD: I think it is clear that it does. I don't think there is any doubt and even more important, let's take a very serious crime, one that leads to a lot of publicity like a homicide or a bank robbery - bank robbery is maybe not a good illustration - but a serious assault or a stick-up, you may find quite frequently a behind-the-scenes, unknown to the public, bitter jurisdictional dispute among the police departments for an hour or two hours or three hours as to whose case it is. Yet those are the crucial hours so far as solution is concerned. There are many other aspects of this problem where the public service is affected adversely by having these tiny, fragmented

units, aside from pure efficiency.

SENATOR PARSEKIAN: Can you estimate how long the British have had this system, Mr. Lombard?

MR. LUMBARD: I should remember, but I don't, but it goes well back in the 1800's. It has been in effect a very long time and they are very satisfied with it. It is not a matter of political or practical discussion. It is absolutely accepted by all parties in Britain..

SENATOR PARSEKIAN: Some weeks ago, Mr. Lombard, I had suggested that this might be worth consideration in New Jersey and I have been in the process of drafting proposed legislation for the purposes of debate and perhaps adoption in this state. Would you say that that approach may be worth considering in a state such as New Jersey, with its size, location, etc.?

MR. LUMBARD: With a disclaimer about my knowledge or lack of knowledge of the peculiarities of New Jersey - and I want that to be a very big disclaimer - I would say, certainly, and I would use if I were you two principal items to focus my study around - the British Police Act and that study I mentioned to you - the Police Act of '64 and the Suffolk County charter and the history of how they did it in Suffolk County, all the questions of local law, because they did it there within the county itself as a matter of local communities voting to join what they set up as a police district, the Suffolk County Police District, which includes those towns who

voted to go in and excludes those who voted to stay out. And everyone out there with the exception of a handful of people, I think, are convinced that in due course after certain local chiefs who oppose the initial consolidation are gone from the scene, there will be almost complete acceptance. As I say, it is already completely accepted on the detective or investigative level countywide. The only thing that is left now is patrol.

SENATOR PARSEKIAN: Thank you, Mr. Lombard. Is there anything else that you wish to say before we conclude your testimony?

MR. LUMBARD: No, I haven't. I am happy to come here and hope it has been useful.

SENATOR PARSEKIAN: Mr. Lombard, may I ask one last question. The problem of control over the grant of witness immunity through a central agency - in our state we have an appointed judiciary. Would that in any way affect the residing of that power in the judiciary as against the New York system of elected office holders?

MR. LUMBARD: I would not want to see the judiciary the control mechanism in granting immunity or not because those decisions are often intensely involved with prosecutive decisions and it would be up to the judiciary to sit in judgment under the general American system of criminal justice on those decisions. Also if some question later arises about the grant,

it must be interpreted, or after having been granted immunity, the witness is recalcitrant and you must bring a contempt proceeding against him, or if he testifies perjurally after having been given immunity, tells you a false story in the continuing effort to evade, of course, the court must sit in judgment on those. So I think the judiciary would be most inappropriate as a place to seat the clearing-house function, the decision-making function, as to who should get immunity with certain rare exceptions and they are spelled out in the statutes in New York, just as an indication. Most grants of immunity are given without the court ever even knowing about it in New York or being involved in any way.

SENATOR PARSEKIAN: Would you recommend the Executive Branch of state government?

MR. LUMBARD: Yes, using executive to mean those who are involved in law enforcement. Now I don't want any confusion about the fact that some people think of the Grand Jury, which in New York is an immunity-granting body, as part of the judiciary. I think a Grand Jury should have the power. That is the place it will occur most frequently by far.

SENATOR PARSEKIAN: Thank you very much, Mr. Lumbard. I appreciate your coming down from Manhattan to testify today. It was extremely helpful and I know the rest of the Committee will be pleased to have this testimony.

MR. LUMBARD: Thank you.

SENATOR PARSEKIAN: Mr. Michael Kates of the New Jersey Civil Liberties Union.

Mr. Kates, thank you very much for coming and as with Mr. Lombard, I want to explain that the Legislature was in so very late last night that the other Committee members aren't here, but they will be very pleased to have your testimony and the position of the Civil Liberties Union on this problem of witness immunity.

I might ask you as you proceed you cover, if you can, first the generic problem and then the specific problem; that is, the theory, and secondly, as to S 34, itself. You may have a critique as to its technique.

M I C H A E L K A T E S: I might say that I am not used to public speaking and I have prepared a statement in advance which I would like to read into the record if I may. It's pretty short.

SENATOR PARSEKIAN: Yes, you may. Is this it (indicating)?

MR. KATES: Yes, that's the prepared statement and there is also a legislative memorandum.

My name is Michael Kates and I am on the Legislative Committee of the New Jersey American Civil Liberties Union. I am a third year student at Rutgers Law School and Chairman at the Law School of the law students civil rights research council. I am a resident of Teaneck, New Jersey.

The ACLU opposes the adoption of S 34 and A 165. I will attempt briefly to outline our objections to the bill and try to answer your questions.

Proponents of S 34 base their support on policies which are sound and with which the ACLU has no objection. These are the policies that (1) there is a demonstrated need for broad, searching and exhaustive grand jury investigations into criminal conduct in this State; and (2) this legitimate and necessary inquiry should be permitted to operate as free from the restraints of uncooperative, silent and hostile witnesses as is constitutionally permissible. Our concern is not that these policies have no merit; we assume their legitimacy as a basic premise. Rather our concern is whether the approach taken by the bill or the tool, as Mr. Lumbard refers to it, is constitutionally permissible.

S 34 and A 165 attempt to circumvent the problem of the so-called "uncooperative witness," the witness who "pleads the 5th," by enabling his testimony to be compelled in exchange for a grant of immunity. Now the constitutional objection simply stated is that the type of immunity which this bill, S 34, offers is not co-extensive with the Fifth Amendment's privilege against self-incrimination.

I would like at the outset to explain the apparent inconsistency between the New York Chapter and the New Jersey Chapter on this matter. The explanation is very simple. The New York statute grants immunity from prosecution; S 34 grants

immunity from use, which I will explain later. Therefore, the bill and statute are inconsistent and this explains our different positions.

Let there be no mistake as to the nature of the testimony being offered to you now. This statement in opposition to the bill is not to be taken as a matter of "counter-vailing policy." The ultimate role of this Committee will not be to weigh or balance the gravity of the need for this legislation with any misconstrued counter-vailing policy of a witness's privilege against self-incrimination. The Bill of Rights are not statements of policy; they are constitutional imperatives. And this legislation must conform to the minimal requirements set out in the Fifth and Fourteenth Amendments of the United States Constitution or it will be declared by the courts to be null and void.

Now where does the proposed S 34 fall short of the constitutional imperative I have alluded to? Well, let us first examine the language of the bill. I have a copy of the bill here.

S 34 immunizes the witness from having his "answer" or the "evidence" he has produced under compulsion "used to expose him to criminal prosecution or penalty or to a forfeiture of his estate, . . ." I emphasize the word "used." This bill does not grant immunity from prosecution; that is, immunizing the witness from subsequent prosecution by the State for matters

about which he was compelled to testify. It merely excludes the use of such testimony as evidence in a subsequent prosecution. Is this legitimate? Is it constitutional?

Well, over 70 years ago, the Supreme Court held that, "No statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege," or as Mr. Lumbard referred to it, wiping out the privilege. This was the Counselman Case, Counselman v. Hitchcock, decided in 1892. The continued vitality of state immunity-from-use statutes after the Counselman Case, is due to the fact that Counselman dealt with a Federal statute and contemporaneous court decisions had refused to extend the Fifth Amendment privilege to state proceedings.

This notion that a state witness had a lesser right to protection against self-incrimination than did a Federal witness was finally dispelled by the court in 1964. In Malloy v. Hogan, the Court held (1) that the 5th Amendment privilege is fully applicable to the states through the 14th Amendment, and (2) that the Federal standard must be used in determining whether a witness is justified in claiming the privilege. In the context of this bill of compelled testimony via immunity legislation, the Federal standard is that announced in the Counselman Case. Thus, the conclusion is inescapable that a state's order compelling a witness to abandon his constitutional privilege to remain

silent must, in turn, offer immunity from subsequent prosecution.

It has been my purpose to advise this Committee what the U. S. Constitution requires in this area. I would be remiss, however, if I did not attempt to offer some brief insights as to why the constitutional standard is, in the opinion of some, so strict. This standard is a function of two things: (1) the nature of the interest protected, the privilege, and (2) the effectiveness of the statutory scheme which seeks to circumvent the accepted mode and at the same time preserve that privilege.

Now what is the nature of this protected interest?

No definition is more compelling than that of the jurist, and perhaps no other jurist is more compelling in describing our constitutional freedoms than Mr. Justice Black. His dissenting opinion in *Feldman v. United States* analyzes the nature of the privilege against self-incrimination. He states briefly at 501:

"The founders of our federal government were too close to oppressions and persecutions of the unorthodox, the unpopular, and the less influential to trust even elected representatives with unlimited powers of control over the individual. From their distrust were derived the first ten amendments, designed as a whole to 'limit and qualify the powers of Government,' to define 'cases in which the Government ought not to act, or to act only in a particular mode,' and to protect unpopular minorities from oppressive majorities... The first of the ten amendments erected a Constitutional shelter for the people's liberties of religion, speech, press, and assembly.

"History teaches that attempted exercises of the freedoms of religion, speech, press, and assembly have been the commonest occasions for oppression and

persecution. Inevitably such persecutions have involved secret arrests, unlawful detentions, forced confessions, secret trials, and arbitrary punishments under oppressive laws. Therefore it is not surprising that the men behind the First Amendment also insisted upon the Fifth, Sixth, and Eighth Amendments. . . . They sought by these provisions to assure that no individual could be punished except according to 'due process,' by which they certainly intended that no person could be punished except for a violation of definite and validly enacted laws of the land, and after a trial conducted in accordance with the specific procedural safeguards written in the Bill of Rights. If occasionally these safeguards worked to the advantage of an ordinary criminal, that was a price they were willing to pay for the freedom they cherished. And one of the specific procedural safeguards which they inserted to shield the individual was the prohibition against compulsion of self-incriminatory testimony."

A little earlier he defines this more clearly. He says:

"The real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminatory testimony was that thought to inhere in using a man's compelled testimony to punish him. By broadly outlawing the practice of compelling such testimony the Fifth Amendment struck at this evil at its source, seeking to eliminate the possibility that compelled testimony would ever be available for use to punish a defendant."

This opinion that I referred to was a dissenting opinion, but became the majority position in 1964 when the Murphy Case, *Murphy v. Waterfront Commission*, was held by the Supreme Court to overrule *Feldman*. That gives you some kind of idea of the sanctity of the Fifth Amendment privilege.

Now let's look again at the proposed bill and see if it is effective in meeting the constitutional test.

The failure of immunity-from-use statutes to effectively counterbalance the loss of the privilege is the second factor

creating the Counselman standard. Consider a hypothetical case and determine whether the safeguards incorporated in S 34 offer guarantees equal to the constitutional privilege. This is my hypothetical, by the way.

Mr. X is subpoenaed to testify before a county grand jury investigating the incidence of violations of crime C. In response to a question X refuses to answer, claiming his Fifth Amendment privilege to remain silent. Application is made under this bill to compel X to answer and the judge so orders. X complies and answers, but with the understanding that he will receive immunity from use of the answer or its fruits in any subsequent prosecution. Two months later X is indicted for violating crime C. He moves to dismiss the indictment, alleging that the indictment is based on evidence received in exchange for immunity.

At this stage in the proceeding, the burden shifts to the state to show the the indictment is the product of an independent investigation or derived from an independent source. The state produces its own witness - let's call him Mr. Q, who simply states that he knew X to be engaged in crime C. This apparently under the Murphy Case satisfies the state's burden. But where does it leave X? He must now assume the burden of showing that an investigation about which he knew nothing or a witness whom he has never seen before, is related to and a product of his privileged testimony. X's burden is an impossible

one, while the state's burden is relatively easy.

Now I am moving from the area of the constitutional prohibition to one of policy; that is, we are willing to accept that there is no constitutional argument once you amend S 34 to grant immunity from prosecution, and now I am stating the ACLU's policy position against immunity statutes in general.

SENATOR PARSEKIAN: You are now testifying for the New Jersey ACLU. I take it from what you said earlier that the New York ACLU and the National does not agree with the following position.

MR. KATES: With the position that follows now?

SENATOR PARSEKIAN: Yes.

MR. KATES: Well, I don't know because, of course, we don't speak with one voice and in fact in the Legislative Committee in New Jersey there were those who said, "Well, if it's constitutional, we'll take it," and there were other purists in the group who said that they didn't feel that immunity legislation was worth anything because of the possible abuses which I will discuss.

SENATOR PARSEKIAN: In discussing this with the New Jersey Chapter there was a difference of opinion as to whether the New Jersey Chapter of ACLU should oppose an immunity from prosecution statute. Am I right?

MR. KATES: That's correct.

SENATOR PARSEKIAN: And you speak not for the ACLU National

or New York, but only New Jersey.

MR. KATES: That is correct.

SENATOR PARSEKIAN: And the New York and National chapters do not oppose an immunity from prosecution.

MR. KATES: I don't know.

SENATOR PARSEKIAN: You don't know?

MR. KATES: No. And the position against immunity-from-prosecution statutes, I might add, is a majority position of the Legislative Committee.

SENATOR PARSEKIAN: How about of the Chapter?

MR. KATES: Well, I am speaking for the State Legislative Committee, which incorporates the whole state.

SENATOR PARSEKIAN: But is the Legislative Committee a sub-unit of the Chapter?

MR. KATES: We are a functional unit. See, the Chapter is on the state level and there is a unit in each county. But anything emanating from the State Headquarters is the state position.

SENATOR PARSEKIAN: Well, does the Legislative Committee speak for the state position?

MR. KATES: Yes, it does.

SENATOR PARSEKIAN: O.K.

MR. KATES: In the 1964 case of *Murphy v. Waterfront Commission*, the U.S. Supreme Court refused to give a state grant of immunity from prosecution its fullest effect. Instead

of determining that prosecution in the federal courts would be subsequently barred to a witness compelled to testify in a state proceeding, the Court suggested that a federal court need only apply the exclusionary rule to the objected to evidence. I might add the state statute in question is on our books New Jersey Revised Statutes 32:23-1 to 98, which is an immunity from prosecution statute.

By this decision it is clear that a state grant of immunity from prosecution does not extend to complete protection in the federal courts. Indeed, it cannot; the state cannot exceed its extra-territorial limits -- its territorial limits. Excuse me. In view of increased overlapping of state and federal criminal laws, and the fact that state prosecutions can and often times do provide the basis for subsequent federal prosecutions, the Union urges that even an amended bill would provide insufficient protection, although it would seem to satisfy the constitutional test.

We are now in the area of weighing two counter-vailing policies.

SENATOR PARSEKIAN: Now, let's hold there a minute. You say that a prosecution bill would probably in the opinion of the ACLU come within the constitutional test.

MR. KATES: This is affirmed this morning in the New York Times. Yesterday the Supreme Court denied certiorari to a case emanating from New York involving the contempt conviction of Mr.

Epton from the Leftist Progressive Labor Movement in Harlem. Now he was granted immunity under the State of New York's law, which is an immunity-from-prosecution law. The Supreme Court had the opportunity there to knock out that law. It didn't. It denied cert. So the conclusion is that Murphy is good law and that any state's immunity-from-prosecution law does not involve a constitutional violation.

SENATOR PARSEKIAN: Now, what you are saying is something remarkable. You are saying the ACLU recognizes then that the prosecution-type legislation meets the constitutional test, but the ACLU recommends that the state go beyond the constitutional requirements. Do I understand you correctly?

MR. KATES: Not go beyond. That is what I mean, yes.

SENATOR PARSEKIAN: O.K.

MR. KATES: -- that the state on policy grounds alone should not pass an immunity act.

SENATOR PARSEKIAN: What is policy?

MR. KATES: It is not constitutional policy.

SENATOR POLICEY: No. I say, what is policy? Isn't the Constitution policy?

MR. KATES: It certainly is. It is one form of policy.

SENATOR PARSEKIAN: No. Isn't it the basic policy of the state and the Nation?

MR. KATES: Yes, but when I refer to policy, I don't speak of it as compulsive. I speak of it as discretionary within

this body to determine whether one policy should be predominant over another. When I speak of the constitutional imperative, I speak of a line, this far and no further. I am saying that an immunity-from-prosecution statute does not go further than the Constitution prescribes. I am saying that on policy lines, behind the line, that we have objection to such a statute.

SENATOR PARSEKIAN: Mr. Kates, what more basic policy can there be extant than the Constitution? Is it possible for society to state or adhere to a policy that is not based on the Constitution?

MR. KATES: Of course not; I think our objection is semantic. If you want to call it constitutional imperative power, that is fine with me. I am saying that this is certainly a valid policy. I am saying there are other policies and I am beginning to enumerate them now.

SENATOR PARSEKIAN: Based on what? If there are other policies --

MR. KATES: Based on experience.

SENATOR PARSEKIAN: [Continuing] -- they must be based on something.

MR. KATES: Based on experience, based on edicts of the court which have decided that one procedural remedy is O.K. while another procedural remedy is not. We are forecasting now the effect of an immunity from prosecution statute. How will it be applied?

SENATOR PARSEKIAN: Well, it can't be based on court because court is based on Constitution. We can't say it is based on court. Now you said based on experience and based on court. You have to drop court. So it is based on experience. Well, are you then saying that, in effect, you think that the Constitution should be amended to be broadened to include the policy that you feel should be adopted? Isn't that what you are saying really?

MR. KATES: No, I am not. I am merely operating from precedent. I can say to you that such and such a group is opposed to this bill because it feels it is unconstitutional, but in all good conscience I can't come to you and say that an immunity-from-prosecution statute is unconstitutional because the court has decided it is not.

SENATOR PARSEKIAN: That is where the rules of the game are decided.

MR. KATES: That is true, but there are also certain considerations which I was told in Poli. Sci. 201 are legislative considerations.

SENATOR PARSEKIAN: They can't be.

MR. KATES: They are supplemental considerations.

SENATOR PARSEKIAN: They can't be. We can't legislate beyond the Constitution.

MR. KATES: I am not asking you to legislate beyond the Constitution. I am saying don't go beyond the Constitution. I

have said to you that this type of legislation is constitutional. Now that is fine. If you want to leave it at that, leave it at that. But some legislators, I am sure, will also need some kind of policy considerations to decide - "O.K., given it is constitutional. Am I going to vote for it anyway?"

SENATOR PARSEKIAN: All right.

MR. KATES: Now one of these policy considerations is the Murphy Case which I have stated. And to repeat, it says that under a state immunity statute, immunity from prosecution, the federal courts will honor it, but only in so far as to grant exclusion of the compiled testimony in a federal court. They will not honor complete immunity, immunity from prosecution.

The second policy consideration is simply that there is a viable alternative. This is suggested in a scholarly analysis of the Murphy Case in 20 Rutgers Law Review 336 in 1966. In that article, the author suggests:

"A congressional enactment could provide that, once state authorities have determined that a witness has properly invoked the privilege, and it has been deemed necessary to compel testimony, application could be made to the Attorney General of the United States for permission to grant immunity from federal prosecution."

I discussed this in more detail in the memorandum which you also have before you.

It is the Union's position that if such a federal law was in effect, there would be no objection to a state immunity-from-prosecution statute simply because the immunity will be

a complete immunity with the Attorney General's concurrence. He can bar prosecution in the federal courts if Congress gives him that power. There are some in our membership, however, who would still hesitate to endorse such legislation for the reasons enumerated below.

These are three fold. First, in a good-faith state prosecution the authorities do not specifically know what testimony they are compelling under a grant of immunity. Thus, a witness's admissions may be more than what was bargained for and justice is denied because a prosecution cannot be brought when it should have been brought. Second, immunity legislation opens the door to the so-called "immunity bath," where corrupt prosecutors seize on the opportunity to protect criminal interests by offering immunity. I think the gentleman who spoke before me mentioned that the New York Act incorporates certain safeguards in so far as immunity baths are concerned and I note that one of them was limiting the granting power - exactly who can grant immunity. I say to you that S 34 allows either the Attorney General whom I grant is a visible official, and the county prosecutor who is more invisible than visible, to grant this immunity. So as far as corruption on the county prosecutor level is concerned, the immunity bath policy argument is not mitigated. The third policy argument is that immunity legislation creates a powerful prosecutorial tool for engaging in the persecution of "undesirable" elements, be they political groups

or others. Such prosecutions would be for contempt, short-circuiting and avoiding the burdensome problems of prosecution for truly substantive crimes.

For all of the foregoing reasons, it is respectfully submitted that this argument opposed to an immunity-from-prosecution statute overrides the arguments in support of the bill in its amended form. We urge you to leave the privilege against self-incrimination intact.

If I can be of any other service answering any of your questions, I would be glad to.

SENATOR PARSEKIAN: Can you tell me what case that was that the Supreme Court denied cert and was reported in the New York Times yesterday.

MR. KATES: Yes. It was William McAddo versus State of New York, May 8, 1967.

SENATOR PARSEKIAN: The May 8th Times?

MR. KATES: It is today's Times, May 9th. The basis of the appeal was the five witnesses had been granted immunity from prosecution, but they asserted that a state could not grant immunity from federal prosecution, the same argument that was in Murphy, and that they could be forced thereby to incriminate themselves if compelled to testify. And the court in denying cert impliedly said that the argument had no merit.

SENATOR PARSEKIAN: They didn't say anything; they just denied cert.

MR. KATES: They just denied cert.

SENATOR PARSEKIAN: Thank you very much.

MR. KATES: I might add that as far as precedents for prosecution statutes in our books, I took a compilation from Wigmore's thesis on how many of our state statutes grant immunity from prosecution and how many grant immunity from use and the compilation is: There are 13 now on the books that grant immunity from prosecution and 3 that grant immunity from use. So the precedent for amending this type of legislation is in the statute.

SENATOR PARSEKIAN: Do you have a Zerox of that?

MR. KATES: I can leave this with you.

SENATOR PARSEKIAN: I would like to have it.

I would like you to do two other things if you will. Can you send me a letter, if you can find out, indicating the position of the New York ACLU and the National ACLU on the question of witness immunity use, witness immunity prosecution.

MR. KATES: Fine.

SENATOR PARSEKIAN: O.K.

MR. KATES: Thank you.

SENATOR PARSEKIAN: Mr. Joseph Hoffman, Assistant Attorney General of the State of New Jersey.

J O S E P H A. H O F F M A N: Senator, for the record, I am Assistant Attorney General Joseph Hoffman, counsel to the

New Jersey State Police, Director of the Criminal Investigation Section of the Attorney General's Office, and Supervisor of Trial Litigation for the Attorney General.

I am appearing this morning for and in behalf of Attorney General Arthur Sills in support of Senate 34, the Witness Immunity Bill. This bill would grant the Attorney General and county prosecutors the power to compel a witness to testify about any matter despite the self-incriminating nature of the testimony. In exchange for the testimony, the government is disabled from obtaining penal sanctions against the witness for those matters revealed by the testimony.

This bill and the concept of witness immunity are vigorously supported by the Attorney General, as well as virtually every law enforcement officer in the State. It is a proven and effective weapon of law enforcement.

I would like to call your attention to the President's Crime Commission Report, page 201, Chapter 7, dealing with organized crime. One of the primary recommendations of that report is that a general witness immunity statute should be enacted at the federal and state levels providing immunities sufficiently broad to assure compulsion of testimony.

Witness immunity can operate at two levels. First, it provides a method whereby the government may sacrifice prosecution of a relatively small and insignificant criminal in order to obtain information about the real source of the criminal activity

involved. Second, it is an effective legal weapon against persons in organized crime. Since these persons are generally loyal to their code of silence, law enforcement officials may use the contempt powers under this concept to deal with this type of individual. A good case in point is the case of the United States versus Sam Giancano and in that case he refused to talk about activities of his esteemed organization which the Federal Grand Jury was looking into in Illinois and he was held in civil contempt until such time as he would answer questions to the Grand Jury and this was accomplished through the Federal Witness Immunity Statute. I think the statute was in the Federal Communications Act.

Witness immunity is not new to New Jersey. There are presently on the books in a fragmented form immunity statutes dealing with banking, savings and loans institutions, civil service, securities, water policy, shell fish protection and the Waterfront Commission.

Now I was somewhat taken aback by the position of the Legislative Committee of the ACLU. It is completely beyond my comprehension. Without question, the concept of witness immunity is constitutional. In 1953 in the Knapp Case - I don't have that citation with me - Justice Frankfurter wrote a very learned opinion in upholding the concept of witness immunity. Based upon that opinion, the New Jersey Supreme Court upheld the Witness Immunity Statute which appears in New Jersey law and in New York

law, which creates the Waterfront Commission. Now that opinion went to the United States Supreme Court and that was the opinion that my predecessor here was talking about, Murphy versus Waterfront Commission, 84 Supreme Court 1594. Now that case has to be viewed in its context. That was the companion case, decided the same day, handed down at the same time as Malloy v. Hogan, which was the famous recent case of the Warren court which held the Fifth Amendment applicable to state prosecutions.

Now in light of that, the Supreme Court upheld the New Jersey Witness Immunity statute in the Waterfront Commission Act and so that there is no doubt as to what that meant in the far-reaching import of its decision, I would like to quote briefly from it. This is what the holding was in the opinion: "We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the state and federal governments in investigating and prosecuting crime, the federal government must be prohibited from making any such use of the compelled testimony and its fruits. This exclusionary rule, while permitting the states to secure information necessary for effective law enforcement, leaves the witness and the federal government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity. It follows that petitioners here may now be compelled to answer the questions propounded to them." There is no question that our Witness Immunity statutes and the concept of witness

immunity are constitutional and constitutional by the court that sits in Washington today, the Warren court.

One of the small arguments raised against witness immunity is that it encourages informing and informing is not "the American way of life." Well, it may not be the American way in the context of a small boy telling on his friend who broke a window with a baseball. On the other hand, when placed in perspective, a more realistic analogy would be the case of Kitty Genovese, who was murdered on the public streets of New York while many people stood and watched and failed to inform on the assailant. In this light, it is perfectly clear that witness immunity is the American way since it is a very effective tool in protecting society against fear and crime.

Now I would like to respond briefly to some of the things that were said by Mr. Lumbard here this morning. To begin with, wiretapping is illegal in New Jersey. It is against the law. The police cannot wiretap in New Jersey. I am not going to get into a discourse on that. But prosecutors agree, as does the Crime Commission agree, as did Mr. Lumbard agree, that the two most effective tools against organized crime are (a) wiretapping, and (b) witness immunity. I am not arguing for wiretapping. I am vigorously supporting witness immunity. I think our state needs one.

Now under this bill the prosecutor and the Attorney General

both have the power of granting immunity in New Jersey. Now in the context of New Jersey law, I think this power in the bill is well delegated because prosecutors and the Attorney General, both appointed by the Governor - the Attorney General has general supervisory powers over prosecutors to some extent and the Governor may supersede a prosecutor by making the Attorney General the prosecutor at any time. So I think the delegation of power is perfectly proper in the context of our state laws.

As a practical matter, both the Attorney General and the prosecutors are really a coordinate body. We do meet on a monthly basis. We have a high degree of coordination and our relations are very close.

As another practical matter, I am sure witness immunity as most other general problems of law enforcement are coordinated in the United States Attorney.

If you have any further questions, Senator, I would be happy to answer them. I would just like to say that we vigorously support the bill. We think New Jersey has gone too long without one.

SENATOR PARSEKIAN: Mr. Hoffman, discussing wiretapping and witness immunity, would you say in view of the fact that wiretapping is illegal in New Jersey that it becomes even more important then for us to have the tool of witness immunity in prosecutions?

MR. HOFFMAN: You will note in the Crime Report on the chapter on organized crime, Senator, that New Jersey is one of the shaded states and according to the Crime Commission organized crime is in New Jersey. And in my opinion, witness immunity is imperative if we are to successfully combat the crime problem in this state.

SENATOR PARSEKIAN: What do you mean by one of the shaded states?

MR. HOFFMAN: Well, I can't recall the exact page, but the Commission set forth their opinions as to where organized crime existed in the United States somewhere in Chapter 7 and New Jersey was a shaded area. It is page 192.

SENATOR PARSEKIAN: My question is: What is the significance of the shaded area?

MR. HOFFMAN: The significance is that according to the Commission, they said organized crime operated in the shaded states. All of the populous states in the Union were shaded.

SENATOR PARSEKIAN: There was some testimony by both Mr. Lumbard and Mr. Kates concerning the distinction between the use statutes and the prosecution statutes of witness immunity. In view of that testimony, do you have any remarks?

MR. HOFFMAN: No. I frankly feel that in the context of S 34, as I read it, it is a distinction without a constitutional difference. It cannot be used to expose him to criminal

prosecution or penalty or to forfeiture of his estate.

I don't think this is truly a use statute, although the word or the form of the word "use" is present in the statute.

I think that the answer which he gives as a result of the immunity cannot be used to expose him to criminal prosecution and I think it is frankly the best of both worlds.

Certainly something he doesn't testify to or is not granted immunity to or information that he volunteers will not come within this statute and, of course, most of these problems arise out of the administration of the program.

The first line of the second paragraph is: "If such person complies with such order." Naturally the order must be couched in proper terms to protect the individual. He will have his counsel and the immunity granted here is as broad as the privilege protected. With respect to that, the ACLU's argument seemed to be that this statute is capable of abuse. I know of no law or no state power or no privilege that is not capable of abuse. That is just no argument whatsoever.

SENATOR PARSEKIAN: Well, I don't know. I suspect there are degrees and if we can forge the statute so that its possibility of use for improper reasons can be limited, I am sure you would agree we ought to.

MR. HOFFMAN: I would certainly agree that you should. But I note in this bill we talk about criminal investigation or proceeding before a grand jury or any criminal trial, so that

the immunity is granted in the context of constitutional protections and safeguards before you even begin to discuss immunity. The grand jury minutes are secret. The trial is before a judge in open court. So I think built into our immunity statute are all the safeguards of our Constitution.

SENATOR PARSEKIAN: How about the problem that this statute does not grant immunity from federal prosecution?

MR. HOFFMAN: That problem was completely laid to rest in the Murphy Case which I read to you.

SENATOR PARSEKIAN: Murphy says that it doesn't protect.

MR. HOFFMAN: It does protect.

SENATOR PARSEKIAN: Oh, does - I misunderstood you then.

MR. HOFFMAN: Let me repeat it, Senator, to make it clear because that was the question in Murphy.

SENATOR PARSEKIAN: Fine. I am satisfied.

MR. HOFFMAN: That was the very issue in the Murphy Case.

SENATOR PARSEKIAN: I wonder if you would, Mr. Hoffman, take a copy of the ACLU testimony. Do you have it?

MR. HOFFMAN: No, I don't.

SENATOR PARSEKIAN: I will see that you get it. And would you let me know by letter whether in view of that testimony you feel that Senate Bill 34 should be revised in any way to more strongly pattern after a prosecution statute such as New York has. I would like you to give it that consideration.

MR. HOFFMAN: I will. It is my understanding though of

New York that they don't have a witness immunity statute; they have a fragmented system such as we presently have in New Jersey now where certain different areas within certain different acts there are given immunity statutes. Illinois and several other states have broad immunity statutes and have had them for years, such as the one your Committee contemplates now. But the New York system is slightly different than this.

SENATOR PARSEKIAN: But would you take a look at it in the context of the criticism?

MR. HOFFMAN: I certainly will.

SENATOR PARSEKIAN: I would like to hear from you on it.

Is there anything else you thought you might like to point out?

MR. HOFFMAN: No, Senator.

SENATOR PARSEKIAN: In view of Mr. Lumbard's testimony on the need to centralize the authority, do you think that there should be a centralization to the Attorney General through the prosecutor before immunity is granted?

MR. HOFFMAN: Well, that is a difficult question for me. As an Assistant Attorney General it never bothered me to see something like that coming through our office. My own personal feeling - and I have to give you my personal opinion on this - is that a prosecutor should also have the power. I think he is subject to many of the same limitations and safeguards that an Attorney General in our state is subject to. He is the

man confronting the problems, the every-day problems of crime, more than we are. I would feel that it is properly delegated to a prosecutor.

SENATOR PARSEKIAN: How about the problem of interfering with cases that might be in process in the Attorney General's office or at some other prosecutor level? Shouldn't we through centralization clear the possibility that it might upset another important case?

MR. HOFFMAN: As a practical matter, I cannot imagine immunity being granted by a prosecutor without his touching base with the Attorney General and with the United States Attorney. It just isn't done in enforcement circles. But I would have no objection whatsoever to such coordination being placed at least at the state level, not at the federal level, because I don't think the Legislature has the power, but at least at the state level. I have no objection to such coordination being written into the statute.

SENATOR PARSEKIAN: How about notice to other prosecuting officials?

MR. HOFFMAN: Well, it depends where you want to stop. I would think that notice to the Attorney General would suffice. We generally know what is going on throughout all 21 counties and, if we felt that a given prosecution was broader, I think we would be in a good position to contact those prosecutors who might be affected. Otherwise, you have to give notice to 21

prosecutors and the Attorney General and where do you draw the line? There are also municipal prosecutors in this state with respect to lower forms of criminal activity.

SENATOR PARSEKIAN: Could you find out for the Committee and in your note to me include what ambit of notification is the statutory or practical approach in New York?

MR. HOFFMAN: Well, I certainly can.

SENATOR PARSEKIAN: Unless you know it.

MR. HOFFMAN: Well, I don't know New York. I can give you as an example the Waterfront Commission's present statute which requires before the grant of immunity 24-hour notice to each of the Attorney Generals of New York and New Jersey since it is a bi-state commission and to any prosecutor within whose jurisdiction the witness comes from or the matter is laid. That is how it works presently. Of course, you understand that is a bi-state commission and probably the same thing could be worked with notice to the Attorney General.

SENATOR PARSEKIAN: But would you make that inquiry of the New York statute.

MR. HOFFMAN: I certainly will.

SENATOR PARSEKIAN: I would like to know and you might then on reflection let us have your opinion as to whether an amendment to S 34 should include notice. If notice is a handy tool, I think you might agree that we may as well make it statutory, at least to the Attorney General, if not to others,

even though that may be the practice.

MR. HOFFMAN: Right.

SENATOR PARSEKIAN: Why leave it open?

MR. HOFFMAN: It is quite workable and I agree.

SENATOR PARSEKIAN: Thank you.

MR. HOFFMAN: Thank you, Senator.

SENATOR PARSEKIAN: Mr. Ford.

T H O M A S P. F O R D: I am Thomas P. Ford, First
Assistant Prosecutor of Essex County.

Senator, let me state unequivocally at the outset that the Essex County Prosecutor's office supports the Legislature's proposed bill Senate No. 34, authorizing the granting of immunity both in theory and in the form as the bill now exists.

I would like to point out that no one up to this point, the proponents nor the detractors of the proposed legislation, in any way question the constitutionality of the bill, but merely skirt the issue by a reference to whether it be a use or a prosecution immunity, which I will deal with very briefly in a few moments. One aspect of the bill that strikes me as being eminently fair, both as a prosecutor and as a lawyer, and as such, of course, I am an officer of the court, is the fact that this bill in its very brief wording very eloquently pays tribute to the division of power in our state and national constitution by calling into use two of these agencies, the Executive and

the Judicial, any time a grant of immunity is sought to be made. So I think this should put to rest some of the questions that might confront the Committee and the detractors of the bill.

The prosecutors and the Attorney General have the authority under this bill to apply to the court and to request that immunity be granted. However, in effect, all they have is the right to make this request. The right to grant the immunity resides in the court. I think the way the bill reads now the Attorney General acting alone or any prosecutor acting alone cannot in any way grant any immunity under this particular legislation. So there will be a relatively complete review and undoubtedly a court transcript of all the proceedings that lead to this. I think this is one of the manners in which any illegal or improper use of this particular immunity will be prevented.

Mr. Lumbard indicated earlier that he felt perhaps there should be some central power and that this power should not reside in the courts. I think in effect there was not a complete analysis of this proposed legislation when that statement was made because here in effect there is a power, you might say a centralized power, to make a request; however, the court must pass upon its applicability to a particular case. Now he said he felt the courts were not a good avenue through which to make this approach, that perhaps that power should rest

in some particular official and that no request need be made to any court. I think in New Jersey the right of the court to in effect play a part in law enforcement in a judicial way no less has already been and is being carried out on a regular basis. The prosecutor and the Attorney General have the right to propose for dismissal any crime that is committed within their jurisdiction, no matter what that crime might be. It could be murder, manslaughter, robbery, any one of them. However, his right to dismiss it is subject to approval by the assignment judge of the Superior Court. Also the issuing of search warrants, you might say, the right to determine what place is to be searched, is something that is the right that a police official must decide. It is not for the court to determine in effect whether or not an investigation should lead police officials into a particular back room. What the court does is review whether or not the police as a result of their investigation have developed enough evidence to make this a legal invasion as distinguished from a fanciful flight in search of evidence.

So the courts in New Jersey and throughout the country, and particularly in wiretap cases, which we are not seeking and which is not here, but there also the courts in most jurisdictions must pass on the legality of a wiretap. So I take issue with Mr. Lumbard's request that this be not channelled through the courts. I think this provides one of the great deterrents

against an illegal or improper or imprudent use of this particular power which I concede is an important power.

I think also that while corruption is an issue to be considered here as corruption is an issue to be considered whenever criminal laws are being enforced, we cannot disrupt the power of the state to properly legislate and properly control its unlawful minority in a way that is detrimental to society as a whole and I think right now without this particular power the rights of the state are being detrimentally affected on a daily basis.

Where is this important? As you might say, a practical prosecutor, one who is involved on a daily basis with trial and supervision of nine trial courts, we do come into many situations where we find this particular legislation would be helpful. In police corruption and political crimes, it is a very vital area.

How is it vital in police corruption cases, not to emphasize these to the exclusion of others nor to indicate there is any undue police corruption? But an individual who would have been, in effect, approached by a police officer for a bribe would be subject to prosecution for proffering that bribe if he came forward and gave testimony before a grand jury. So this undoubtedly would detract from the rights of individuals to come forward and give evidence that would be useful in prosecutions. They would be afraid - and there is a very valid

reason for that fear - that the grand jury might turn around and say, "We believe the police officer; we do not believe you. Therefore, in this particular case, we will indict you." So as a result you get no testimony.

Those involved in the lower echelon of political life in municipalities and counties that have some smattering knowledge regarding an illegal operation going on might because of their past indifference be fearful that a grand jury or a court might scrutinize their conduct and might in effect indict them if they came in to give testimony against those that were the main beneficiaries of this illegal operation. They might be detracted.

I am not going to go into organized crime and gambling to any great degree. I think that has been very thoroughly explored. I think everyone knows - everyone is aware of the problems that you face on a daily basis where lottery runners would be picked up, the smallest fish in an illegal pool. There would be 300 or 400 lottery runners that might make anywhere from \$5 a day to \$75 or \$100 a day and through these individuals channel a large amount of revenue into the illegal coffers of syndicated crime. Now these individuals are guilty of a crime by having possession of these lottery slips if they are in the business of lottery and these people, therefore, would not have anything to gain by coming in and testifying as to those in the higher reaches. In fact, the law in this particular

area practically negates or prohibits the possibility of getting to those in the higher reaches.

Narcotics is a problem that faces the Legislature, that faces prosecutors and faces society as a whole. I think this would be an invaluable tool in the hands of the Attorney General and the various county prosecutors in seeking information from those unfortunate victims of what we might call the disease of using narcotics, by opening up to them an avenue of rehabilitation if they were willing to give testimony that would be useful. These people could serve a beneficial interest to themselves and also society as a whole if this particular statute existed.

Auto theft rings - this is something that many people don't stop to realize, but it is one of the biggest areas of crime today. This, Senator, based upon our experience is big business. The individuals must steal the vehicles. They have to have means of repainting them. They have to have outlets through which distribution is made. This isn't a question of young people stealing a car for their own use, but in many instances of people going out and stealing to order. In our own county we have had several instances of this. If the lower echelon people, the people that were the ones that were stealing the cars, much like the individuals that were the victims of narcotics, could come in and make a clean breast of this operation, I think a strong wedge could be driven into this type of

operation.

Complicated fraud cases always present a problem in the analysis of the business operations; the flow of moneys, the manner in which various individuals participate perhaps in the conspiracy to violate the laws - these are crimes of the mind. These are crimes of intent. And crimes of the mind and crimes of intent can best in most instances be exposed verbally. It is not a question in many instances of documented evidence, finding a stolen car, finding a woman that was victimized, but rather exploring the imaginations of their minds and by having lower echelon people come in and be in a position to expose those higher, we will be again making a strong wedge into organized crime.

There is one other area that wasn't touched on in any detail at all and because of the nature of our office I feel that this is something that we recognize perhaps more than those that deal in a theoretical vein, and that is, in the area of the trial. This legislation very wisely does not limit itself to the grand jury, but states that in criminal trials immunity may be granted. This is a distinct problem because right now in all deference to our courts, a very cumbersome hearing and a very cumbersome procedure must be followed whenever anyone claims the Fifth Amendment during a trial. The trial must stop. A hearing must then be transferred to another judge to determine as to whether or not the evidence that this individual might give

would in effect incriminate him. The very nature of the hearing, of course, restricts the testimony that can be taken before the court to determine whether or not the testimony in itself is self-incriminating because to come in before the court and to give a complete exposure of one's motives would in effect be giving the testimony which the individual felt proscribed not to give before. And this is something in our system of criminal justice where once a trial has been completed and an acquittal has been returned, nothing can reopen that case; double jeopardy prohibits it. Now the trial can be very briefly interrupted. A hearing can be brought before the assignment judge who is readily available, upon motion of the prosecutor who is readily available, and an order can be issued immediately requiring that person to testify. Many individuals, Senator, will be willing to take the Fifth Amendment to protect a co-conspirator in a trial and in effect protect themselves. But many individuals faced with the sure choice of subsequent conviction under this particular section will think twice and I think that a just result will be arrived at in many trials where previously perhaps it might have been thwarted.

The ALCU takes the position that this will be of little benefit. I think they should wholeheartedly embrace it because of the fact that this will in many instances in the case of interrogating witnesses eliminate the back room or the so-called tendency toward third degree which at one time did exist by giving

police officers a legal means to appear before a court of justice and have this particular testimony that an individual should give ordered to give and, if he refuses to give the same, then, of course, a penalty can ensue. What right does an individual have to withhold pertinent information from society if he is giving the same under proper safeguards? Does the criminal have a constitutional right to be protected against any possible legal means to expose him? I say emphatically not and I think that the legislation proposed by you concurs and for that reason we concur in that.

I think I have indicated from the number of crimes and the exposure we have had in the past we can qualify for perhaps a slightly better definition than given by the preceding witness who stated the county prosecutor is an invisible figure. I would like to state that our office has 26 or 27 assistant prosecutors, well over a hundred clerical employees, and occupies practically an entire floor in the Essex County Court House. I don't think this is invisible government. The reason I made that particular remark is that on the idea of centralization, I agree with Mr. Hoffman. I think over-centralization has a tendency to destroy. A tool that one can reach for to meet a particular problem is an effective tool. One that because of over-centralization becomes unwieldy is a tool that is going to lay in the arsenal of law enforcement and remain unused. A hammer that is locked in a tool box doesn't help one repair a

broken wall. Certainly I would think in a state where there are only 21 counties, the authorization to 22 individuals to make this proposal to the court would not be an unwieldy weapon or an unwieldy law. The problem I brought out before, Senator, regarding the use of this in trial would perhaps be made difficult if the county prosecutor during the heat of a trial had to contact an individual in Trenton and explain in detail the nature of a case and then have that particular individual wire back or indicate, "It's perfectly all right for you to go ahead and do this." I think this is made unnecessary by the previous use of checks and balances which were placed in the bill by saying that the county prosecutor must go before the court.

Also on the question of use in narcotic cases, Senator, being in our society that there is a tremendous volume of narcotics cases that come before a grand jury in a county like Essex each week, and a tremendous number of gambling cases that come before a grand jury in a county like Essex, the prosecutor through the use of his detectives, his assistant prosecutors, and through the coordinating use of State Police, has available for him at all times a list of organized criminals and knows best what organized crime is going on in his county. I think if there is any question as to the wisdom of his using it, he would undoubtedly coordinate with the proper officials. I think to place this in the legislation would present problems in that, if this particular

authority were not properly granted, would this become an issue for the courts to determine in subsequent litigation? What would be the mechanics whereby this would be done? Would it be a question of a telephone call? Would it be a written communication? Would it be a personal visit?

SENATOR PARSEKIAN: Well, that could be spelled out.

MR. FORD: But the restricting nature of that, I think, would in effect in many instances detract from the possible use of it. I think that we are not over decentralizing when, as I indicated before, in the state the size of New Jersey only 22 people would have the right to use this particular power.

As far as the use and prosecution theory, I think that, as one of the individuals, I believe the gentleman from the Civil Liberties Union indicated, is a semantic difference. I think that the testimony that the individual gives is the core of the issue. If that testimony cannot be used to incriminate him and subsequently evidence separate and apart that might be perhaps brought to light might cry out for a prosecution and might make a prosecution necessary. I think the issue here is whether or not the testimony and what logically would flow from that testimony could be used to incriminate the individual. We are not seeking to give him any rights that would not be made necessary by this particular section. In other words, the fact that he comes in to testify requires that he be given rights

against prosecution for any testimony that might be adduced at that particular time.

I don't think there is any need to give any broader protection than that.

I think I have basically covered the points that I felt were necessary in order to indicate why our office and why law enforcement I think generally supports this particular bill and why there is such a crying need at this particular point. But if you have any questions, I will be glad to endeavor to answer them.

SENATOR PARSEKIAN: Thank you very much, Mr. Ford.

Are there any other witnesses? [No response.]

These hearings are adjourned until Friday, June 9th, at 10:00 A.M., at this same place.

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