

1992

In the Matter of A Criminal Investigation 7th District Court No. CS-1 : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Stephen B. Nebeker; John A. Adams; Ray, Quinney & Nebeker; F. Robert Reeder; Francis M. Wikstrom; Parsons, Behle & Latimer; Donald B. Holbrook; Elizabeth M. Haslam; George W. Pratt; Jones, Waldo, Holbrook & McDonough; Attorneys for Respondents.

David L. Wilkinson; Attorney General; Paul M. Warner; Robert N. Parrish; Assistant Attorneys General; Attorneys for Appellant.

Recommended Citation

Brief of Respondent, *Criminal Investigation 7th District Court No. CS-1 v.*, No. 920268.00 (Utah Supreme Court, 1992).
https://digitalcommons.law.byu.edu/byu_sc1/4229

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

DOCUMENT

K F U

45.9

.S9

IN THE SUPREME COURT OF THE STATE OF UTAH

920268

IN THE MATTER OF A
CRIMINAL INVESTIGATION,

:
:
:
:

Case No. 20268

7th District Court No. CS-1

BRIEF OF RESPONDENTS STOTT, COLBY AND MAXFIELD

APPEAL FROM A FINAL ORDER OF THE SEVENTH JUDICIAL DISTRICT
COURT, HONORABLE BOYD BUNNELL, DISMISSING THE CRIMINAL
INVESTIGATIVE AUTHORIZATION IN THIS MATTER AND RULING THE
PROSECUTORS' SUBPOENA ACT UNCONSTITUTIONAL

DONALD B. HOLBROOK,
ELIZABETH M. HASLAM, and
GEORGE W. PRATT
JONES, WALDO, HOLBROOK
& McDONOUGH
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101
Attorneys for Respondents
Stott, Colby, and Maxfield

STEPHEN B. NEBEKER and
JOHN A. ADAMS,
RAY, QUINNEY & NEBEKER
P.O. Box 3850
Salt Lake City, Utah 84145-3850
Attorneys for Utah Power & Light Company

F. ROBERT REEDER and
FRANCIS M. WIKSTROM
PARSONS, BEHLE & LATIMER
185 South State Street
Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147
Attorneys for Respondent Emery Mining Corporation

DAVID L. WILKINSON
Attorney General
PAUL M. WARNER
ROBERT N. PARRISH
Assistant Attorneys General
236 State Capitol
Salt Lake City, Utah 84114
Attorneys for Appellant

FILED

FEB 22 1985

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF A	:	
CRIMINAL INVESTIGATION,	:	Case No. 20268
	:	
7th District Court No. CS-1	:	

BRIEF OF RESPONDENTS STOTT, COLBY AND MAXFIELD

APPEAL FROM A FINAL ORDER OF THE SEVENTH JUDICIAL DISTRICT COURT, HONORABLE BOYD BUNNELL, DISMISSING THE CRIMINAL INVESTIGATIVE AUTHORIZATION IN THIS MATTER AND RULING THE PROSECUTORS' SUBPOENA ACT UNCONSTITUTIONAL

DONALD B. HOLBROOK,
ELIZABETH M. HASLAM, and
GEORGE W. PRATT
JONES, WALDO, HOLBROOK
& McDONOUGH
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101
Attorneys for Respondents
Stott, Colby, and Maxfield

STEPHEN B. NEBEKER and
JOHN A. ADAMS,
RAY, QUINNEY & NEBEKER
P.O. Box 3850
Salt Lake City, Utah 84145-3850
Attorneys for Utah Power & Light Company

F. ROBERT REEDER and
FRANCIS M. WIKSTROM
PARSONS, BEHLE & LATIMER
185 South State Street
Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147
Attorneys for Respondent Emery Mining Corporation

DAVID L. WILKINSON
Attorney General
PAUL M. WARNER
ROBERT N. PARRISH
Assistant Attorneys General
236 State Capitol
Salt Lake City, Utah 84114
Attorneys for Appellant

LIST OF PARTIES

Respondents Norman Maxfield ("Maxfield"), Karl J. Stott ("Stott"), and Orrin T. Colby, Jr. ("Colby") are represented by the law firm, Jones, Waldo, Holbrook & McDonough. They were served with subpoenas by the Attorney General of Utah pursuant to the above-captioned criminal investigation and moved to quash those subpoenas in a May 30, 1984 hearing before Judge Boyd Bunnell of the 7th Judicial Court of Emery County. Appellant, the Utah Attorney General, represented by Robert N. Parish, Suzanne M. Dallimore, Stanley H. Olsen, and David J. Schwendiman, opposed the Motion to Quash, and in these proceedings appealed the decision of Judge Bunnell issued on September 20, 1984. Utah Power and Light Company (the "Company") appeared at the May 30, 1984 hearing and was represented by the law firm, Ray, Quinney & Nebeker. Emery Mining Company ("Emery"), represented by the law firm of Parsons, Behle and Latimer, presented argument at a September 12, 1984 hearing on the Motion of Stott, Maxfield and Colby for Reconsideration of the Court's prior ruling on the Motion to Quash. Other parties appeared at the September 12, 1984 hearing as indicated in the list of parties contained in the Attorney General's brief on appeal.

TABLE OF CONTENTS

	<u>Page</u>
LIST OF ALL PARTIES	i
TABLE OF AUTHORITIES	iv
STATEMENT OF ISSUES PRESENTED ON APPEAL	1
CONSTITUTIONAL PROVISIONS AND STATUTES.	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	3
ARGUMENT.	9
I. THE SUBPOENA ACT UNCONSTITUTIONALLY PERMITS AND ENCOURAGES THE VIOLATION OF FOURTH AMENDMENT RIGHTS OF PERSONAL LIBERTY	9
A. The Subpoena Act Expressly Permits the Unreasonable Compulsion of Evidence by Creating a Subjective Standard of Relevance	10
B. The Statutory Scheme Effectively Precludes Meaningful Judicial Review of Subpoenas	14
C. The Subpoena Act Sanctions Prosecutor Fishing Expeditions	17
II. THE SUBPOENA ACT VIOLATES THE FUNDAMENTAL CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION AND THE PRIVILEGE NOT TO GIVE EVIDENCE AGAINST ONESELF	20
III. THE STATUTORY GRANT OF BROAD INVESTIGATORY POWERS TO A PROSECUTOR VIOLATES DUE PROCESS	23
A. Due Process Requires That a Prosecutor's Investigation Powers be More Carefully Circumscribed Than Those of a Grand Jury or Administrative Agency	23

Page

B.	The Subpoena Act Unconstitutionally Authorizes the Prosecutor to Conduct Public Trials Without Providing Any Safeguards to Protect Individuals Under Investigation	31
IV.	THE SUBPOENA ACT IS VOID ON ITS FACE FOR VAGUENESS	34
V.	IT IS NOT A JUDICIAL FUNCTION TO REWRITE A STATUTE BY INTERPRETATION	41
VI.	THE SUBPOENA ACT SHOULD BE DECLARED UNCONSTITUTIONAL ON ITS FACE	44
A.	Unlike the Search Warrant Statute, the Subpoena Act Requires No Prior Judicial Approval of Subpoenas Issued Under Its Authority	45
B.	The Subpoena Act Contains No Effective Deterrent Against Its Improper Application	46
C.	The Subpoena Act Encourages Prosecutors to Use It Improperly	46
VII.	THE SUBPOENA ACT RUNS AFOUL OF THE SINGLE SUBJECT RULE	48
CONCLUSION	50
ADDENDUM I	Statutes and Constitutional Provisions .	i
ADDENDUM II	Subpoenas of Colby, Stott and Maxfield, and Excerpts From Darcey White Deposition .	vii
ADDENDUM III	Memorandum Decision Relative to Constitutionality, September 20, 1984; May 30, 1984 Ruling	xxxi
ADDENDUM IV	Legislative Debates Re: Subpoena Act and Former Statute	xxxviii

TABLE OF AUTHORITIES

	<u>Page</u>
 A. CASES CITED	
<u>Allen v. Trueman</u> , 37 Utah 528, 110 P.2d 356 (1941) . . .	41
<u>Berger v. New York</u> , 388 U.S. 41, 53 (1967)	9
<u>Broadrick v. Oklahoma</u> , 413 U.S. 601, 613 (1973)	47
<u>Calhoun County v. Galbraith</u> , 99 U.S. 214 (1878)	43
<u>Donovan v. Lone Steer</u> , _____ U.S. _____, 52 U.S.L.W. 4087, 4089 (1984)	9
<u>Endicott Johnson Corp. v. Perkins</u> , 317 U.S. 501 (1943) .	13
<u>Federal Trade Commission v. American Tobacco Company</u> , 264 U.S. 298, 306 (1923)	9, 17
<u>Gouled v. United States</u> , 255 U.S. 298 (1921).	9
<u>Great Salt Lake Authority v. Island Ranching Company</u> , 18 Utah 2d 276, 421 P.2d 504, 505 (1966) .	37
<u>Greaves v. State</u> , 528 P.2d 805 (Utah 1974)	41
<u>Hale v. Henkel</u> , 201 U.S. 43, 59 (1906)	6, 9
<u>Hannah v. Larche</u> , 363 U.S. 420, 442, 488 (1960), <u>reh'g denied</u> 364 U.S. 855 (1960)	9, 25, 29
<u>Hansen v. Owens</u> , 619 P.2d 315 (Utah 1980)	20
<u>Harris v. United States</u> , 331 U.S. 145, 150 (1947)	9
<u>Hoffman Estates v. Flipside</u> , 455 U.S. 489, 494 (1982) . .	47, 48
<u>In Re Barnett's Estate</u> , 275 P. 453 (Cal. 1929)	43
<u>In Re Boyer</u> , 636 P.2d 1085 (Utah 1981)	41
<u>In Re Groban</u> , 352 U.S. 330, 336-37, 346-7, 350-1 (1957) .	16, 25, 26, 27, 28
<u>Interstate Circuit v. Dallas</u> , 390 U.S. 676, 690 (1968) .	42

	<u>Page</u>
<u>Jenkins v. McKeithen</u> , 395 U.S. 411, 414, 427-29 (1969) .	16, 28, 29, 32, 33, 34
<u>Kolender v. Lawson</u> , 461 U.S. 352, 75 L. Ed. 2d 903, 909, 911 (1983),	35, 36, 37, 38, 47
<u>Mapp v. Ohio</u> , 367 U.S. 643 (1961), <u>reh'g denied</u> , 368 U.S. 871 (1961)	9
<u>Marbury v. Madison</u> , 1 Cranch 137 (1803)	43
<u>Miranda v. Arizona</u> , 384 U.S. 436, 490 (1966)	21, 22, 23, 43
<u>Mountain States Telephone & Telegraph Co. v. Public Service Commission</u> , 107 Utah 530, 155 P.2d 184, 185 (1945)	43
<u>Oklahoma Press Pub. Co. v. Walling</u> , 327 U.S. 186, 208, 219 (1946)	11, 12, 13, 15, 18
<u>Park v. Edgewater, Inc. v. Joy</u> , 416 N.Y.S.2d 266, 68 A.D.2d 107 (1979)	42
<u>Smith v. Goguen</u> , 415 U.S. 566, 574-75 (1974)	37
<u>State v. Ruggeri</u> , 19 Utah 2d 216, 429 P.2d 969, 973, 975 (1967)	20, 21, 22, 23, 40, 43
<u>Stirone v. U.S.</u> , 361 U.S. 212, 218	25
<u>United States v. Crocker</u> , 568 F.2d 1049 (3rd Cir. 1977) .	22
<u>United States v. Dionisio</u> , 410 U.S. 1, 16-17, 45 (1973) .	5, 6, 25
<u>United States v. Jacobs</u> , 574 F.2d 772 (2d Cir. 1976) <u>cert. dismissed</u> 436 U.S. 31 (1978)	22
<u>United States v. Mandujano</u> , 425 U.S. 564, 582 (1976) . .	22
<u>U.S. v. Monia</u> , 317 U.S. 424 (1943)	42

	<u>Page</u>
<u>United States v. Washington</u> , 431 U.S. 181, 186, 190-191 (1977)	22
<u>United States v. Wong</u> , 431 U.S. 174 (1977)	22
<u>Wisconsin v. Constantineau</u> , 400 U.S. 433, 437 (1971) . .	34
<u>Wood v. Georgia</u> , 370 U.S. 375 (1962)	6, 25
 B. CONSTITUTIONAL PROVISIONS AND STATUTES CITED	
U.S. Const. amend. IV	9
U.S. Const. amend. V	20
Utah Const. art. I, § 12	20, 21
Utah Const. art. I, § 14	9
Utah Const. art VI, § 22	49
<u>Iowa Code</u> , § 813.2, Rule 5(6) (1979)	30
<u>Kan. Stat. Ann.</u> , § 22-3101 (1981)	30
<u>La. Rev. Stat. Ann.</u> , Art. 66 (West Supp. 1984)	30
<u>Mont. Code Ann.</u> , § 46-4-304 (1983)	30
<u>Utah Code Ann.</u> , § 77-11-3 (1982)	5, 44
<u>Utah Code Ann.</u> , § 77-11-3(2) (1982)	31
<u>Utah Code Ann.</u> , § 77-11-10(1) (1982)	40
<u>Utah Code Ann.</u> , § 77-22-1 through 3 (1982)	1
<u>Utah Code Ann.</u> , § 77-22-2(1) (1982)	5, 7, 12
<u>Utah Code Ann.</u> , § 77-22-2(3) (1982)	31
<u>Utah Code Ann.</u> , § 77-22-3(3) (1982)	38

<u>Utah Code Ann.</u> , § 77-23-1 (1982)	5, 44, 45
<u>Utah Code Ann.</u> , § 77-23-3(1) (1982)	5
<u>Utah Code Ann.</u> , § 77-35-12(g) (1982)	46
<u>Utah Code Ann.</u> , § 77-35-14(g) (1982)	15

C. OTHER AUTHORITIES CITED

C. Sands, <u>Sutherland Statutory Construction</u> , § 28.10, at 327 (1972)	50
--	----

0533h
EMH

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Does the Subpoena Act violate constitutionally protected rights of personal liberty, including the right to not give evidence against or incriminate oneself and the right to be free from unreasonable searches and seizures?

2. Is the Subpoena Act unconstitutionally vague and violative of due process because it fails to set forth essential procedural safeguards necessary to avoid unconstitutional and arbitrary enforcement?

CONSTITUTIONAL PROVISIONS AND STATUTES

Statutes and constitutional provisions determinative of the issues on appeal are set forth in Addendum I attached hereto.

STATEMENT OF THE CASE

This is the Attorney General's appeal from an order of the Seventh Judicial District Court ruling that Utah Code Ann. § 77-22-1 through 3 (1982) (the "Subpoena Act") is unconstitutional and withdrawing judicial authorization for an investigation conducted by the Attorney General's office under the Subpoena Act. The decision was entered by Judge Boyd Bunnell on September 20, 1984 and is attached as Addendum III.

STATEMENT OF FACTS

On January 26, 1983, Judge Boyd Bunnell authorized the Attorney General's office to conduct a criminal investigation

pursuant to the Subpoena Act. R. at 8.¹ At that time, the court further ordered that the Subpoena Act's secrecy provision should apply. R. at 4. Thereafter the Utah Attorney General issued numerous subpoenas. Colby, Stott and Maxfield were each subpoenaed in April, 1984. Copies of their subpoenas are attached as Addendum II.

On May 14, 1984, Maxfield, Stott, and Colby moved to quash the subpoenas duces tecum on the basis that the Subpoena Act is unconstitutional on its face and as applied. R. at 57, 62. The Attorney General responded with a Request for Order Requiring Testimony and Production of Documents. R. at 136. On May 30, 1984, Judge Bunnell heard the foregoing motions and thereafter ruled the Subpoena Act constitutional, but set forth constitutional guidelines to be followed by prosecuting attorneys under the Subpoena Act. The May 30 ruling is attached as part of Addendum III.

On July 13, 1984, Colby, Stott and Maxfield filed a Motion to Reconsider the Court's May 30, 1984 order in part on the basis of newly discovered legislative history indicating that the Subpoena Act does not reflect true legislative intent

¹ The following abbreviations are used for the purpose of citation in this Brief: (1) "R." stands for the record on appeal, (2) "A.G.'s Br." stands for the Utah Attorney General's brief on appeal and (3) "Decision" means the September 12, 1984 Memorandum Decision Relative to Constitutionality by Judge Boyd Bunnell.

and further on the basis that judicial rewriting of a statute to avoid a constitutional attack is not permissible. R. at 255. Thereafter, the Attorney General withdrew all outstanding subpoenas issued under the investigation except one to the custodian of records of Emery. On August 21, 1984, Emery moved to quash this only outstanding subpoena. R. at 633.

On September 12, 1984, Judge Bunnell considered the Motion to Reconsider of Colby, Stott and Maxfield, the Company's motion for a protective order, and Emery's motion to quash. At that time, Judge Bunnell quashed the outstanding subpoena to Emery and took under advisement the issues as to the constitutionality of the Subpoena Act.

On September 20, 1984, Judge Bunnell issued his Memorandum Decision Relative to Constitutionality holding the Subpoena Act unconstitutional. The criminal investigation authorized by the Subpoena Act was accordingly dismissed. R. at 734.

SUMMARY OF ARGUMENT

To fully appreciate the constitutional issues raised on this appeal, it will be helpful to keep in mind that the Subpoena Act confers on the prosecutorial arm of government criminal investigative powers far beyond those existing in the federal system and under state laws generally. The statute grants to the State's prosecutors virtually unlimited

discretion to carry out criminal investigations unfettered by judicial restraint, but under the guise of court authority. The Subpoena Act provides that the prosecuting attorneys of Utah, upon the approval of the district court, may conduct a criminal investigation. Once having received the court's general approval of the investigation, prosecuting attorneys may issue subpoenas to obtain evidence and documents deemed relevant to the prosecutor. The prosecuting attorneys may also have the district court order, as in the case at bar, that the proceedings be secret. The statute does not require that self-incrimination or any other warnings be given to witnesses or targets of the investigation except their entitlement to be represented by counsel. Further, prosecuting attorneys are not required to obtain court approval prior to issuance of subpoenas or to file a return of service of subpoenas so that the court's file contains a complete record of subpoenas issued.

Prior to the enactment of the Subpoena Act in 1980, Utah law enforcement officials (prosecutors and police) had the following carefully limited investigative tools:

1. A subpoena to testify or produce documents could be obtained under the 1971 version of the Subpoena Act, but only upon a court approved showing of "good cause" for the issuance of each subpoena. In 1980 this important safeguard was eliminated, without discussion, during a busy budget

session. See excerpts from 1971 and 1980 legislative history, attached as Addendum IV.

2. A search warrant could be obtained, but only upon a showing of probable cause to an impartial magistrate, and under defined limitations. Utah Code Ann. § 77-23-3(1) (1982).

The Subpoena Act sweeps away the previously existing "probable cause" requirements to obtain evidence, and grants the prosecution heretofore unseen powers of criminal investigation. In express violation of the Fourth Amendment requirement that searches and seizures be reasonable, the prosecutor may now unilaterally subpoena witnesses and documents upon his subjective determination that evidence sought is relevant to the authorized investigation. Utah Code Ann. § 77-22-2(1) (1982).

Ironically, the Subpoena Act confers greater investigative powers upon a prosecutor than those hitherto reserved to the Utah grand jury. Under Utah law a grand jury must warn a witness that he is a target of the investigation and advise him of his rights against self-incrimination. Further, a grand jury may receive only "legal evidence." Utah Code Ann. § 77-11-3 (1982). The irony, of course, is that even greater powers of investigation are now in the hands of the prosecutor--the entity against which grand juries serve as a buffer to protect the suspected and accused.

The breadth of the investigative powers enjoyed by a grand jury has always been premised on the existence of vital assumptions about the grand jury process. See U.S. v. Dionisio, 410 U.S. 1, 45 (1973), Marshall J., dissenting. The grand jury finds its roots in the beginnings of the common law. Historically and in practice, the grand jury has served as "an investigative body 'acting independently of either prosecuting attorney or judge,' (citation omitted) whose mission is to clear the innocent no less than to bring to trial those who may be guilty. . . ." U.S. v. Dionisio, supra, 410 U.S. at 16-17. The grand jury serves "as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor" Id. (emphasis added). See also Wood v. Georgia, 370 U.S. 375 (1962); Hale v. Henkel, 201 U.S. 43, 59 (1906). The vesting of traditional grand jury powers in the prosecutor encourages and has resulted in the abuse of the investigative process.

Although Judge Bunnell had only a handful of the subpoenas that have been issued in this criminal investigation before him, he concluded that:

The Act has been abused and is subject to continued abuse under its broad terms and provisions that set no limitations upon the State or any guidelines to the use of their subpoena power. . . .

. . . .

This Court has, therefore concluded that the Act is too vague and does not give proper protection to individual citizens against the violation of their constitutional right of due process and protection against self incrimination and allows for an absolute abuse of power without the benefit of judicial review or control once the general subpoena power is granted and finds the Act is unconstitutional.

Decision at 4.

Judge Bunnell's conclusion is premised in part on his determination that the Attorney General has used the unfettered discretion granted him under the Subpoena Act to subpoena documents that are plainly irrelevant to the investigation and upon his determination that subpoenas served are overbroad in light of the authorized scope of the investigation.

The Subpoena Act's sanction of "an absolute abuse of power," in Judge Bunnell's words, is the natural consequence of certain critical deficiencies in the statute. The exorbitant breadth and scope of information sought is attributable to the absolute discretion granted the prosecutor. Information sought pursuant to the Subpoena Act need only be "relevant to the investigation in the judgment of the attorney general or county attorney." Utah Code Ann. § 77-22-2(1) (1982). The Attorney General is thus vested by the Subpoena Act with complete discretion to determine what is relevant.

In addition to granting a prosecutor virtually complete discretion to delve into the personal lives of Utah

citizens, the Subpoena Act fails to provide witnesses with vital protections that even a witness subpoenaed by a Utah grand jury would have--the right to be advised if he is a target of an investigation and of his privilege against self-incrimination. Further, the judicial oversight present in the grand jury system is absent under the Subpoena Act.

Because the Subpoena Act permits an investigation to be conducted in complete secrecy, an individual served with a subpoena has no means whatsoever to intelligently determine whether the information sought is relevant to the matters under investigation by the prosecutor and therefore lawful in light of Fourth Amendment constraints. Alternatively, if a prosecutor chooses to not invoke the secrecy allowed under the Act, a prosecutor may conduct a public investigation with the result that innocent suspects may be subject to public incrimination by virtue of their association with a criminal investigation.

For reasons set out in more detail below, the deficiencies in the Subpoena Act render it unconstitutional in several respects. It authorizes unreasonable searches and seizures, fails to provide adequate safeguards to protect the privilege against self-incrimination, and otherwise denies procedural safeguards inherent in due process. The failure of the Subpoena Act to establish minimal constitutional safeguards further renders the Subpoena Act void for vagueness.

ARGUMENT

I. THE SUBPOENA ACT UNCONSTITUTIONALLY PERMITS AND ENCOURAGES THE VIOLATION OF FOURTH AMENDMENT RIGHTS OF PERSONAL LIBERTY.

The Fourth Amendment to the United States Constitution and Article I, Section 14 of the Utah Constitution provide the people of Utah with fundamental protections against unreasonable searches and seizures. The security of one's privacy against arbitrary governmental intrusion is at the core of the Fourth Amendment and basic to a free society. See, e.g., Berger v. New York, 388 U.S. 41, 53 (1967); Mapp v. Ohio, 367 U.S. 643 (1961), reh'g denied, 368 U.S. 871 (1961). Gouled v. United States, 255 U.S. 298 (1921).

Fourth Amendment rights are respected as foundational of our political and social system. The United States Supreme Court has "consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment . . . are to be regarded as of the very essence of constitutional liberty" Harris v. United States, 331 U.S. 145, 150 (1947). The Fourth Amendment protections apply whether the invasion is made through a subpoena duces tecum or a search warrant. Donovan v. Lone Steer, _____ U.S. _____, 52 U.S. L.W. 4087, 4089 (1984); Hannah v. Larche, 363 U.S. 420, (1960), rehearing den. 364 U.S. 855; Federal Trade Commission v. American Tobacco Company, 264 U.S. 298 (1923); Hale v. Henkel, 201 U.S. 43 (1906).

The Attorney General defends the Subpoena Act's Fourth Amendment deficiencies essentially on the basis that every citizen's Fourth Amendment rights are adequately protected by the implicit right to obtain pre-compliance judicial review of a subpoena duces tecum by moving to quash on Fourth Amendment grounds. Contrary to this view, the Subpoena Act expressly allows the prosecuting attorneys of Utah to serve and demand compliance with constitutionally defective subpoenas. Furthermore the secrecy and penal nature of the statutory framework created by the Subpoena Act and related rules discourages the assertion of Fourth Amendment rights and consequently encourages abuse of prosecutorial subpoena power.

A. The Subpoena Act Expressly Permits the Unreasonable Compulsion of Evidence by Creating a Subjective Standard of Relevance.

Counsel for respondents Stott, Colby and Maxfield have extensively researched both state and federal law relating to the subpoena power of a prosecuting attorney and have discovered no authority validating a statute granting the prosecutorial agency of government the breadth of discretion to compel testimony and documents pursuant to a secret or public inquisitorial process, as sanctioned by the Subpoena Act.

Respondents do not disagree with the concept that extensive legal powers are enjoyed by a grand jury or

administrative agency to issue subpoenas. However, Respondents take issue with the analysis that such power compels the conclusion that the Subpoena Act sustains a Fourth Amendment attack where such powers are given to a prosecutor who under the Subpoena Act also holds the power to (1) investigate in secret or public proceedings, (2) bring charges based on such investigation and (3) prosecute charges resulting therefrom with adversarial zeal.

The Attorney General relies extensively on Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946) for the proposition that a federal agency may constitutionally issue subpoenas, without prior judicial approval, so long as: (1) each subpoena is issued pursuant to an investigation having a lawfully authorized purpose, (2) the documents or evidence sought are relevant to the inquiry, and (3) the documents to be produced are not unduly broad or burdensome and are adequately described. The Court in Walling, supra, observes that if a citizen believes a subpoena violates his Fourth Amendment rights, he may obtain access to the courts to quash the subpoena. Assuming, arguendo, that Walling is determinative of the constitutional issues here, the Subpoena Act cannot withstand the standards set forth therein.²

² The facts before the Court in Walling are importantly distinguishable from the facts at issue here.

The essential "relevancy" standard found in Walling is absent from the Subpoena Act. Walling necessarily requires an objective determination of relevance, such determination being a principal part of the equation for testing the "reasonableness" of the seizure of documents under the Fourth Amendment. 327 U.S. at 208. Walling does not stand for the proposition that "relevance" may be determined by the issuing party. Otherwise, the availability of judicial review to determine the reasonableness of a subpoena would be meaningless.

The Subpoena Act, in contravention of the constitutional requirement that subpoenas be "relevant", provides that the prosecuting attorney may subpoena evidence which he deems relevant. Utah Code Ann. § 77-22-2(1) (1982).

2 (Continued) First, the issues in the case did not involve an attack on the validity of a statute authorizing subpoena power. Rather, the question was whether an agency could conduct a fishing expedition into books and records in order to secure evidence that petitioners had violated the Fair Labor Standards Act, 29 U.S.C.A. § 211(a) (1938). The obvious distinction between an administrator issuing subpoenas under the Fair Labor Standards Act and the Attorney General subpoenaing records are that: (1) a person served with a subpoena by the federal agency knows the nature of the inquiry by virtue of the agency serving the subpoena, i.e., the subpoena relates to matters authorized for investigation under the Fair Labor Standards Act (not any one of a multitude of crimes found throughout the criminal statutes in Utah); (2) the Fair Labor Standards Act, unlike the Subpoena Act, does not endow an agency with rights and powers of secrecy which prevent a party from being served with a subpoena from having any knowledge regarding the nature and scope of the investigation or the target of the investigation.

A literal interpretation of the Subpoena Act requires a judge reviewing the lawfulness of the subpoena under the Subpoena Act to uphold its validity so long as a prosecutor can make a good faith showing that in his or her judgment the subpoena requires evidence relevant to the investigation. This would be true notwithstanding the fact that a judge, exercising his own independent review, is not in agreement with the reasonableness of the request. The subjective test of relevance in the Subpoena Act stands in express violation of the Fourth Amendment requirement that subpoenas be objectively reasonable.

It is no surprise that, as described more fully below, several subpoenas issued by the Attorney General under the Subpoena Act have been abusive. The Attorney General admits in his brief that he has interpreted and applied the Subpoena Act in a manner totally at odds with the constitutional requirements set out in Walling. In the Attorney General's view, the evidence sought is "relevant" as long as it "is not plainly incompetent or irrelevant to any lawful purpose of the agency" A.G.'s Br. at 23-24. In support of this extraordinarily broad interpretation of the constitutional concept of relevance, the Attorney General cites Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943) where the Fourth Amendment rights were not at issue. The Attorney General, then, according to his interpretation, may subpoena documents

which in his mind are not plainly irrelevant. Such broad power to compel evidence cannot withstand Fourth Amendment scrutiny.

B. The Statutory Scheme Effectively Precludes Meaningful Judicial Review of Subpoenas.

In defense of his position that pre-compliance judicial review cures any constitutional defect in the exercise of subpoena power, the Attorney General states that any attempt to circumvent an unconstitutional subpoena "will" be thwarted by the court upon motion. A.G.'s Br. at 17. In the same thought the Attorney General observes that any failure to so object will constitute a waiver of protected rights. Id. With these affirmative statements in mind, it is interesting to note that the Attorney General has been pursuing a criminal investigation since January, 1983. R. at 4. Presumably during that period the Attorney General has issued numerous subpoenas which have been responded to. It was not until May, 1984, that any party objected or moved to quash a subpoena. That objection was made by Respondents Colby, Stott and Maxfield on May 25, 1984.

It is not surprising that there have been few objections to subpoenas. First, the subpoenas in the Record nowhere advise a witness of his asserted right to quash. Moreover, the subpoenas in the record (and presumably all subpoenas issued in the criminal investigation) explicitly

provide that "[t]his subpoena duces tecum is authorized by order of the District Court. Disobedience to this order is punishable by contempt of Court." See Addendum II. While the Attorney General's threat of contempt of court may be misleading in that it may be misinterpreted to mean a court has specifically reviewed and ordered the subpoena, the threat has force and meaning under the Utah Criminal Rules of Procedure. Under the Utah Rules of Criminal Procedure "failure to obey a subpoena without reasonable excuse may be deemed a contempt of court by the court responsible for its issuance". Utah Code Ann. § 77-35-14(g) (1982). The threat of being penalized for failure to comply, together with the respect for and fear of the authority of the prosecutor serving a subpoena necessarily acts as a real and practical deterrent to the free exercise of Fourth Amendment rights.

Justice Murphy, dissenting in Oklahoma Press Pub. Co. v. Walling, 327 U.S. 217 (1946), aptly characterized the impact of agency subpoenas:

To allow a non-judicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of that power. It is no answer that the individual may refuse to produce the material demanded. Many persons have yielded solely because of the air of authority with which the demand is made, a demand that cannot be enforced without subsequent judicial aid. Many invasions of private rights thus occur without the

restraining hand of the judiciary ever intervening. . . . Liberty is too priceless to be forfeited through the zeal of an administrative agent.

327 U.S. at 219.

The potential for abuse under the Subpoena Act is even greater than that observed by Justice Murphy where the subpoena power rests in the hands of a zealous prosecutor. See, e.g., In Re Groban, 352 U.S. 330, 336 (1957); Jenkins v. McKeithen, 395 U.S. 411 (1969) discussed infra.

The secrecy provisions of the Subpoena Act further discourage the assertion of fundamental rights. According to the Attorney General, the Subpoena Act allows a prosecutor to decline disclosure of the nature of the pending investigation or whether a witness is a target of the investigation. See Addendum II, excerpts from Darcey White deposition. Without such knowledge it is impossible for a party compelled to submit documentary evidence to assess the relevancy and therefore the constitutionality of a subpoena. Under the framework of the Subpoena Act, each subpoena must be questioned for constitutionality inasmuch as the validity thereof is impossible to test absent a request for judicial review regarding relevancy. The fact that Respondents Colby, Stott and Maxfield were the first to request their constitutional right to judicial review indicates that the secrecy provisions

of the Subpoena Act, together with the fear of contempt penalties and the intimidating authority of prosecuting attorneys has effectively discouraged and deterred the exercise of the fundamental right to be free from unreasonable searches and seizures by the other participants in the criminal investigation.

C. The Subpoena Act Sanctions Prosecutor Fishing Expeditions.

It is fundamental that a government investigation cannot be used to engage in a fishing expedition. Long ago, in Federal Trade Commission v. American Tobacco Company, 264 U.S. 298 (1923), Justice Holmes said:

Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (citations omitted) and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of a crime.

Id. at 306 (emphasis added).

Due to the secrecy employed by the Attorney General, it cannot be stated unequivocally that the Attorney General is conducting an unconstitutional fishing expedition. However, the circumstantial facts indicate that this is so. Perhaps the most telling indication is the Attorney General's actions in the proceedings below. Shortly after Colby, Stott and Maxfield

moved below for reconsideration of Judge Bunnell's May 30, 1984 ruling, the Attorney General withdrew all outstanding subpoenas, save one directed to Emery. Significantly this subpoena, the only one not withdrawn, was quashed by Judge Bunnell as "too broad in any investigation of any criminal activity". Decision at 2.

Oklahoma Pub. Co. v. Walling, supra, which the Attorney General argues sets the controlling standard in this case, requires that to satisfy the Fourth Amendment, a subpoena duces tecum may not be overly broad or burdensome and it may request only "relevant" evidence.

Although only a handful of them are in the record, several of the subpoenas duces tecum issued in this criminal investigation fail to meet the Walling standard. Respondents Stott and Colby were each "commanded to bring . . . any and all books, records, documents, accounts, or papers pertaining to Utah Power & Light including, but not limited to: information and documentation regarding all uranium properties purchased, controlled and managed by Utah Power & Light" See Addendum II. The request is not limited by time, by specific document, the type of document, or the individual preparing the document. Literally, the subpoenas require production of all books and records pertaining to Utah Power and Light Company.

Judge Bunnell found that the subpoenas requested irrelevant documents, because they "attempted to get into Utah Power and Light Company's dealings in uranium mining, when in fact the original Good Cause Affidavit mentioned no indication of any criminal dealings in this area." Decision at 2.

The subpoena duces tecum served on Emery Mining Company commanded it to produce:

Records which identify all officers, directors, consultants, and employees (both union and non-union, professional and mining) of Emery Mining for the period 1979 to the present. Such shall include, but not be limited to, names, addresses, telephone numbers, dates of employment and employee numbers, if known.

Decision at 2.

This request is similarly not limited by subject matter, the specific document or type of document, but requires the production of documents over an indefinite period of time and may require production of numerous documents irrelevant to the government's investigation. Accordingly, Judge Bunnell ordered it "suppressed as being too broad in any investigation of any criminal activity." Id. The overbreadth, lack of specificity, and unlimited time periods covered by the subpoenas duces tecum illustrate the "fishing expedition" nature of the investigation and reveal the abusive exploitation of the Act by the Attorney General.

II. THE SUBPOENA ACT VIOLATES THE FUNDAMENTAL CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION AND THE PRIVILEGE NOT TO GIVE EVIDENCE AGAINST ONESELF.

The Fifth Amendment of the United States Constitution provides all citizens with the privilege against self-incrimination. Article I, Section 12 of the Utah Constitution provides the more expansive right that a person may not be compelled to give evidence against himself. Hansen v. Owens, 619 P.2d 315 (Utah 1980).

The secrecy provisions of the Subpoena Act (according to the Attorney General) empower prosecuting attorneys to refuse to inform a witness who is the target of a criminal investigation that he is the target and to refuse to disclose to him the nature of the investigation, with the effect that a suspected participant in a crime is denied the right to make an intelligent decision to invoke his privilege of not giving evidence against himself. A.G.'s Br. at 28-34.

In State v. Ruggeri, 19 Utah 2d 216, 429 P.2d 969 (1967), this court held that a person under investigation by a grand jury must be informed that he is the target of the investigation, the nature of the charges against him, and in connection therewith, he must be informed of his constitutional right not to be a witness against himself. 429 P.2d at 973. In so doing the court recognized that inherent in

constitutional privileges is the right to exercise them intelligently. 429 P.2d at at 975.

In Ruggeri, a county commissioner was called before the grand jury. Unbeknownst to him, he was the target of the grand jury investigation which subsequently indicted him and others. He was also subsequently indicted for perjury in connection with the testimony obtained by the district attorney before the grand jury. The district court suppressed the evidence given by the county commissioner, and this court upheld the ruling, basing its opinion on Article I, Section 12 of the Utah Constitution and the United States Supreme Court decision, Miranda v. Arizona, 384 U.S. 436 (1966). The court acknowledged the rule that an ordinary witness before a grand jury must give testimony except where it might incriminate him, but that

[O]ne being investigated for crime is not just a witness and cannot be treated as such. The target of an investigation is an accused within the meaning of the Constitution, and when he is detained in any significant way, he may not be interrogated unless he is advised of the charges against him then under consideration. To fail to so warn one so being investigated is to entrap him and to violate his constitutional privilege against self-incrimination.

Id. at 973. (emphasis added).

Implicit in Ruggeri is the notion that it is an integral part of each citizen's constitutional right against

self-incrimination that one have the knowledge necessary to make an informed decision to exercise or waive such right:

It would seem that a witness who is unaware that he is a target of a grand jury investigation could not intelligently determine whether or not he needed counsel unless he was fully advised of the charges being considered against him; and until he has full knowledge regarding that matter, he will not know when to assert his constitutional claim of privilege against self incrimination. It would also be difficult to believe that he could intelligently waive the right to counsel under such circumstances.

429 P.2d at 975.

The Attorney General argues that Ruggeri is not necessarily good law, noting that there is apparently no Miranda warning requirement in federal grand jury proceedings. In fact the United States Supreme Court has specifically declined to rule whether a grand jury witness must be warned of his or her Fifth Amendment privilege. United States v. Washington, 431 U.S. 181, 186, 190-191 (1977); United States v. Wong, 431 U.S. 174 (1977); United States v. Mandujano, 425 U.S. 564, 582 (1976). The Circuit Courts are split on the question. United States v. Jacobs, 574 F.2d 772 (2d Cir. 1976), cert. dismissed, 436 U.S. 31 (1978) (warning is required); United States v. Crocker, 568 F.2d 1049 (3rd Cir. 1977) (no warning required). This body of federal law cited by the Attorney General is certainly no authority for a holding

that the Ruggeri rule is wrong. If anything, it upholds the merit of the Ruggeri decision. A state court cannot interpret a statute to restrict the fundamental constitutional right to exercise the privilege against self incrimination, but a state court has authority to more liberally construe those rights to protect against governmental incursions into personal liberty. See, e.g., Miranda v. Arizona, 384 U.S. 436, 490 (1966).

As discussed infra, the rule laid down in Ruggeri, regarding the rights of a witness before a grand jury proceeding, necessarily applies with greater force in an investigatory proceeding under the Subpoena Act where the protective shield of the grand jury does not stand as a buffer between the accuser and the accused.

III. THE STATUTORY GRANT OF BROAD INVESTIGATORY POWERS TO A PROSECUTOR VIOLATES DUE PROCESS.

A. Due Process Requires that a Prosecutor's Investigation Powers be More Carefully Circumscribed Than Those of A Grand Jury or Administrative Agency.

Without analysis, the Attorney General equates the legitimacy of investigative powers conferred by the Subpoena Act with the powers of investigation granted to grand juries, A.G.'s Br., at 23-4, and the investigatory powers conferred on various administrative agencies. A.G.'s Br. at 19. In effect, the Attorney General's position is that it makes no

self-incrimination that one have the knowledge necessary to make an informed decision to exercise or waive such right:

It would seem that a witness who is unaware that he is a target of a grand jury investigation could not intelligently determine whether or not he needed counsel unless he was fully advised of the charges being considered against him; and until he has full knowledge regarding that matter, he will not know when to assert his constitutional claim of privilege against self incrimination. It would also be difficult to believe that he could intelligently waive the right to counsel under such circumstances.

429 P.2d at 975.

The Attorney General argues that Ruggeri is not necessarily good law, noting that there is apparently no Miranda warning requirement in federal grand jury proceedings. In fact the United States Supreme Court has specifically declined to rule whether a grand jury witness must be warned of his or her Fifth Amendment privilege. United States v. Washington, 431 U.S. 181, 186, 190-191 (1977); United States v. Wong, 431 U.S. 174 (1977); United States v. Mandujano, 425 U.S. 564, 582 (1976). The Circuit Courts are split on the question. United States v. Jacobs, 574 F.2d 772 (2d Cir. 1976), cert. dismissed, 436 U.S. 31 (1978) (warning is required); United States v. Crocker, 568 F.2d 1049 (3rd Cir. 1977) (no warning required). This body of federal law cited by the Attorney General is certainly no authority for a holding

that the Ruggeri rule is wrong. If anything, it upholds the merit of the Ruggeri decision. A state court cannot interpret a statute to restrict the fundamental constitutional right to exercise the privilege against self incrimination, but a state court has authority to more liberally construe those rights to protect against governmental incursions into personal liberty. See, e.g., Miranda v. Arizona, 384 U.S. 436, 490 (1966).

As discussed infra, the rule laid down in Ruggeri, regarding the rights of a witness before a grand jury proceeding, necessarily applies with greater force in an investigatory proceeding under the Subpoena Act where the protective shield of the grand jury does not stand as a buffer between the accuser and the accused.

III. THE STATUTORY GRANT OF BROAD INVESTIGATORY POWERS TO A PROSECUTOR VIOLATES DUE PROCESS.

A. Due Process Requires that a Prosecutor's Investigation Powers be More Carefully Circumscribed Than Those of A Grand Jury or Administrative Agency.

Without analysis, the Attorney General equates the legitimacy of investigative powers conferred by the Subpoena Act with the powers of investigation granted to grand juries, A.G.'s Br., at 23-4, and the investigatory powers conferred on various administrative agencies. A.G.'s Br. at 19. In effect, the Attorney General's position is that it makes no

constitutional difference whatsoever who has been empowered to conduct a criminal investigation.

The Attorney General overlooks perhaps the most offensive feature of the Subpoena Act--it grants the broad powers of investigation traditionally vested solely in a grand jury to the prosecutor, the public official whose sworn duty is to obtain convictions and put people in jail. The Attorney General ignores critical differences between the prosecutor, on the one hand, and the grand jury or administrative agency on the other. As demonstrated below, the broad powers of investigation granted to grand juries and administrative agencies is premised on vital assumptions about the roles played by those entities, assumptions which do not pertain when broad investigatory powers are conferred on a prosecutor. It is important to keep in mind that whether a particular grant of investigative authority is consistent with due process always depends on the specific facts and circumstances at issue:

Due process is an elusive concept
[It] embodies the differing rules of fair play, which through the years, have become associated with different types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

Hannah v. Larche, 363 U.S. 420, 442 (1960). Accord In Re Groban, 352 U.S. 330, 337 (1957).

1. The Broad Powers of Investigation Conferred on the Grand Jury are Predicated on its Historical Role as a Buffer Between the Accused and the Prosecutor.

The grand jury system is of ancient common law origin and serves the purpose of providing protection against vindictive and malicious government prosecutions. Wood v. Georgia, 370 U.S. 375 (1962). Historically and in practice, the grand jury has served as "an investigative body 'acting independently of either prosecuting attorney or judge, Stirone v. U.S., 361 U.S. 212, 218, whose mission is to clear the innocent no less than to bring to trial those who may be guilty." U.S. v. Dionisio, 410 U.S. 1, 16-17 (1973). The grand jury serves "as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor" Id. at 17. The role of the grand jury was expressed cogently by Justice Black:

The traditional English and American grand jury is composed of 12 to 23 members selected from the general citizenry of the locality where the alleged crime was committed. They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state

seriously to abuse or deceive a witness in the presence of the grand jury.

In Re Groban, 352 U.S. 330, 346-7 (1957), Black, J., dissenting. (Emphasis added). Although this language appears in a dissenting opinion, it unquestionably articulates the function of the grand jury in the administration of criminal justice.

Implicit in the grand jury system is the notion that a prosecuting attorney may not act with the proper motives and objectivity during investigatory proceedings. The prosecutor is obviously different than a grand jury. He is the officer the grand jury is designed to protect the citizenry from. In light of the adversarial role the prosecutor plays in the criminal justice system, due process requires greater procedural protections when broad powers of investigation exercised by a prosecutor.

2. Administrative Agencies Enjoy Broad Powers of Investigation Because, Unlike a Prosecutor, They Do Not Perform an Accusatory Function.

Like the grand jury, administrative agencies enjoy broad powers of investigation due to the particular role they play in the governmental process. The United States Supreme Court has held that the requirements of due process are greater when investigatory powers are conferred on a prosecutor, as opposed to an administrative agency. In In Re Groban, 352 U.S.

330 (1957), for example, the Court considered an Ohio statute authorizing a fire commissioner to subpoena and interrogate witnesses secretly to determine the cause of a fire. The Court upheld the statute against a claim that its failure to permit interrogated individuals to be represented by counsel violated due process.

Six of the Justices in Groban, however, articulated the crucial difference between granting investigatory powers to a purely fact-finding body as opposed to a prosecutor. Justice Frankfurter, in a concurring opinion joined by Justice Harlan, agreed with the result of the majority opinion on the basis that the investigation performed by the fire commission served a purely fact-finding function. He distinguished the facts at bar from the prosecutorial power to conduct a secret investigation:

What has been said disposes of the suggestion that, because this statute relating to a general administrative, non-prosecutorial inquiry into causes of fire is sustained, it would follow that secret inquisitorial powers given to a District Attorney would also have to be sustained. The Due Process Clause does not disregard vital differences.

Id. at 337.

The four dissenting Justices were even more adamant. Justice Black recoiled at the possible implications of the majority's holding:

[T]he opinion could readily be applied to sanction a grant of similar power to every state trooper, policeman, sheriff, marshal, constable, FBI agent, prosecuting attorney, immigration official, narcotics agent, health officer, sanitation inspector, building inspector, tax collector, customs officer and to all the other countless state and federal officials who have authority to investigate violations of the law. I believe that the majority opinion offers a completely novel and extremely dangerous precedent--one that could be used to destroy a society of liberty under law and to establish in its place authoritarian government.

Id. at 350-1 (emphasis added).

If they do not condemn a secret investigation conducted by a prosecutor as per se unconstitutional, the six concurring and dissenting Justices in Groban at the very least recognize a vast difference between vesting investigatory powers in law enforcement officials, as opposed to those who perform a fact-finding function. The Constitution requires greater procedural safeguards to protect fundamental rights when citizens are investigated by a prosecutor.

The United States Supreme Court again expressed the critical constitutional difference between granting powers of investigation to a fact-finding body and a prosecutor in Jenkins v. McKeithen, 395 U.S. 411 (1969). In Jenkins, the Court held that individuals interrogated by a commission created under Louisiana law to investigate criminal violations

in the field of labor-management relations were entitled to basic due process protections because of the accusatory function performed by the commission. The Court distinguished the case from Hannah v. Larche, 363 U.S. 420 (1960), where the investigative body at issue performed a purely information-gathering function, and cited the following language from Justice Frankfurter's concurring opinion in Hannah:

"Were the [Civil Rights] Commission exercising an accusatory function, were its duty to find that named individuals were responsible for wrongful deprivation of voting rights and to advertise such finding or to serve as part of the process of criminal prosecution, the rigorous protections relevant to criminal prosecutions might well be the controlling starting point for assessing the protection which the Commission's procedure provides."

Jenkins, 395 U.S. at 428 (quoting Hannah v. Larche, 363 U.S. 420, 488 (1960)). In short, the Court found that because the Louisiana commission in Jenkins performed the functions of a prosecutor, and was not a mere fact-finder, that due process required the imposition of greater procedural safeguards.

3. The Constitution Requires More Stringent Procedural Safeguards to Control Investigative Power Granted to a Prosecutor.

The foregoing authorities compel the conclusion that a prosecutor conducting an investigation is different in kind

than a grand jury or administrative agency doing the same thing. A prosecutor obviously cannot act as a buffer between himself and the public, like a grand jury; nor does he serve a simple fact-finding function. Instead, by definition, a prosecutor is an adversary of the accused with the sworn duty to act zealously in the public interest to obtain convictions. Due to this vital law enforcement role of the prosecutor, greater procedural safeguards are constitutionally mandated to keep his power in check.

Respondents would not go so far as to say that any grant of investigative power to the prosecutor violates due process, however. Respondents submit that the Subpoena Act would be rendered constitutional if it simply provided for prior judicial approval of each subpoena sought to be served by the prosecutor. This vital protection has been incorporated into the statutes of other states that grant subpoena power to the prosecutor. See Iowa Code, § 813.2, Rule 5(6) (1979); Kan. Stat. Ann., § 22-3101 (1981); La. Rev. Stat. Ann., Art. 66 (West Supp. 1984); Mont. Code Ann. § 46-4-304 (1983).

Significantly, the 1971 version of the Subpoena Act provided for prior judicial approval of subpoenas, but this important safeguard was removed in 1980 without discussion, during a busy budget session. See Addendum IV (legislative history of 1971 predecessor to Subpoena Act and 1980 revision).

In addition, the Subpoena Act should at least incorporate the safeguards that now exist under Utah law to protect the rights of grand jury witnesses, the right to be advised whether one is a target, and the right to be advised of one's privilege against self-incrimination. See Utah Code Ann. § 77-11-3(2) (1982).

B. The Subpoena Act Unconstitutionally Authorizes the Prosecutor to Conduct Public Trials Without Providing Any Safeguards to Protect Individuals Under Investigation.

Although the criminal investigation before this court has been conducted in secret, secrecy is not required by the Subpoena Act. The decision to conduct a secret investigation is entirely in the discretion of the prosecutor. Utah Code Ann. § 77-22-2(3) (1982) provides in relevant part that:

The Attorney General or any county attorney may make written application to any district court and the court may order that interrogation of any witness shall be held in secret; that such proceeding be secret; and that the record of testimony be kept secret unless and until the court for good cause otherwise orders. (emphasis added).

Thus, the Subpoena Act expressly authorizes prosecutors to conduct their investigations publicly.

It takes little imagination to envision the phenomenal abuse resulting if the prosecutor, in his discretion, were to make his investigations public. Anyone who, in the

prosecutor's judgment, might know something relevant to the subject of an authorized inquiry could be questioned at length concerning that matter. Unlike grand jury investigations which, for anciently recognized reasons, are conducted in secrecy, the Subpoena Act would authorize the prosecutor to conduct the same type of investigation in public. The press could, and no doubt would, be invited, and reputations could be destroyed.

In practice it would permit the prosecutor to conduct public trials without probable cause to believe a crime has been committed. Instead, the prosecutor's "judgment" would be sufficient to interrogate a witness in public. The Subpoena Act permits this type of interrogation and at the same time denies a witness any right to defend himself or present evidence in his behalf, thus failing to provide due process guarantees recognized by the Supreme Court in Jenkins v. McKeithen, 395 U.S. 411 (1969).

In Jenkins, as discussed supra, the Supreme Court considered the constitutional implications of a special commission created under Louisiana law whose purpose was "the investigation and findings of facts relating to violations or possible violations of criminal laws of the state of Louisiana or of the United States arising out of or in connection with matters in the field of labor-management relations." Id. at 414. Under the Louisiana Act, the Commission's investigations

could be held in public. The Commission itself had no authority to make an adjudication of criminality, but was authorized to make findings and recommendations to the Attorney General.

Despite the fact that the Commission exercised an exclusively investigatory function, the Court nonetheless found that a witness interrogated by the Commission was entitled to basic due process rights:

It is true . . . that the Commission does not adjudicate in the sense that a court does, nor does the Commission conduct, strictly speaking, a criminal proceeding. Nevertheless, the Act, when analyzed in light of the allegations of the complaint, makes it clear that the Commission exercises a function very much akin to making an official adjudication of criminal culpability. . . . [It] is empowered to be used and allegedly is used to find named individuals guilty of violating the criminal laws of Louisiana and the United States and to brand them as criminals in public.

Id. at 427-8 (emphasis added).

The Court held that because, by conducting public investigations, "the Commission exercises a function very much akin to making an official adjudication of criminal culpability, . . . " (even though it had no authority to convict), that due process requires that an individual under investigation by the Louisiana Commission was entitled to cross-examine witnesses and present evidence on his own behalf. Id. at 428-9.

The Subpoena Act could potentially be applied in precisely the same manner as the statute at issue in Jenkins. The prosecutor, to expose violations of the criminal laws, is empowered to subpoena and interrogate witnesses in public. Even though no determination of criminality may be made pursuant to the investigation, under Jenkins a witness interrogated in public is entitled to present his own evidence and cross-examine witnesses against him. The Subpoena Act's failure to provide these protections alone renders it unconstitutional.

Furthermore, because the Subpoena Act provides no protection whatsoever to permit an individual interrogated in such a manner to clear his name, the individual's reputation, a protected "liberty" interest, may effectively be ruined by a prosecutor with an axe to grind, without due process of law. See Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). Although no prosecutor has yet used the Subpoena Act in this manner, if it is upheld there is no guarantee this would not happen in the future.

IV. THE SUBPOENA ACT IS VOID ON ITS FACE FOR VAGUENESS.

Judge Bunnell below held the Subpoena Act unconstitutional for a number of reasons, but in part because he "concluded that the Subpoena Act is too vague"

Decision at 4. The Attorney General dismisses the vagueness concept summarily: "Vagueness is an inappropriate way to characterize any perceived problem with the statute." A.G.'s Br. at 40. The Attorney General then discusses at length what, in his view, Judge Bunnell really meant when he referred to the statute's vagueness.

Respondents submit that Judge Bunnell knew exactly what he was talking about when he found the statute too vague. He agreed with respondents' contention asserted below that a statute is unconstitutionally vague when it fails to "establish minimum guidelines to govern law enforcement." Kolender v. Lawson, 461 U.S. 352, 75 L. Ed. 2d 903, 909 (1983).

Kolender involved a challenge to the facial validity of a California criminal statute requiring a person stopped by the police to provide "credible and reliable" identification. Under the statute, a person failing to provide the police with "credible and reliable" identification could be arrested. The petitioner in Kolender asserted that the statute, by failing to more specifically define what identification would be "credible and reliable", granted an impermissible degree of discretion to law enforcement officials, and was therefore unconstitutionally vague under the due process clause.

The Supreme Court, in a 7-2 opinion authored by Justice O'Connor, agreed. The Court noted that "[a]s generally

stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." 75 L. Ed. 2d at 909. This is apparently the only strand of the void-for-vagueness doctrine the Attorney General considered in his contention that "[v]agueness is an inappropriate way to characterize any perceived problem with the statute."

As the Supreme Court notes in Kolender, however, the doctrine has broader implications:

Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness [sic] doctrine "is not actual notice, but the other principal element of the doctrine - the requirement that a legislature establish minimal guidelines to govern law enforcement." (quoting Smith v. Goguen, 414 U.S. 566, 574 (1974)). Where the legislature fails to provide such minimum guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." (quoting Smith, supra, at 475).

Id. (emphasis added).

Applying the foregoing principles to the statute before it, the Court found that it:

contains no standard for determining what a suspect has to do in order to satisfy the

requirement to prove a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute An individual . . . is entitled to continue to walk the public streets "only at the whim of any police officer" who happens to stop that individual (Citations omitted).

Id.

In short, because the statute before it failed to "establish minimum guidelines to govern law enforcement" and thus "vest[ed] virtually complete discretion in the hands of the police", the Court held that it was void-for-vagueness and contravened the due process clause of the Fourteenth Amendment. Accord Smith v. Goguen, 415 U.S. 566, 574-75 (1974).

For reasons similar to the rationale of the Supreme Court in Kolender, this court has invalidated a statute creating a governmental authority but which failed to prescribe the authority's territorial boundaries and set no definite standards or limitations on the authority granted. Great Salt Lake Authority v. Island Ranching Co., 18 Utah 2d 276, 421 P.2d 504, 505 (1966).

The Subpoena Act, like the statute in Kolender, vests virtually complete discretion in the hands of law enforcement, and fails to establish minimum guidelines to govern their conduct. The Subpoena Act wholly fails the Kolender "minimal

guidelines" test because it permits the prosecutor to require the production of documents and other items "which constitute evidence which may be relevant to the investigation in the judgment of the attorney general or the county attorney."

(emphasis added). The Subpoena Act fails to answer, however, how and within what parameters the judgment of the attorney general or county attorney must be exercised. The Subpoena Act supplies no guidance or standard whatever for the exercise of such extraordinary power.

It is thus vulnerable, like the statute in Kolender, because it permits the prosecutor to determine at his whim what may be relevant to the court-authorized investigation. Due to the vast discretion conferred, the Subpoena Act indeed "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups who merit their displeasure.' (citations omitted)". Kolender, id. at 911.

The Subpoena Act's secrecy provisions are likewise unconstitutionally vague. The Act provides that if requested by the prosecutor, the district court "may order that interrogation of any witness shall be held in secret; that such proceeding be secret; and that the record of testimony be kept secret unless and until the court for good cause otherwise orders." Utah Code Ann. § 77-22-3(3) (1982). The Act

completely fails to specify, however, what it means "that such proceeding be secret."

The Attorney General has apparently already interpreted and applied this vague language in a way that impinges on fundamental rights. Toward the end of the deposition of Darcie H. White, Assistant Attorney General Olsen admonished the witness as follows: "I would just remind you that the proceedings here, the questions, etc., are secret. They certainly may be discussed with Mr. Nebeker, but not with others." See Addendum II.

Mr. Nebeker then took issue with the Attorney General's view of the secrecy provision, indicating he did not interpret the statute to prevent the witness from discussing his deposition with others. Id.³

At best, the Act's secrecy provisions fail to set out with sufficient clarity whether the secret nature of the proceedings prevents a witness from discussing his deposition with others afterwards. Unlike the Utah grand jury statute, which states explicitly that no one "may disclose or be

³ Assistant Attorney General Dallimore expressed the following interpretation of the secrecy provision: "Well, Steve, I think, at a minimum, it would be better for everyone concerned if a lot of people didn't do a lot of talking to each other about these proceedings and, specifically, of course, if Mr. Fletcher called you on the phone, don't you think it would be more appropriate that it not be discussed?" Id. at 164.

compelled to disclose what he or any grand juror or other person may have said" during a grand jury proceeding, Utah Code Ann. § 77-11-10(1) (1982), the Subpoena Act fails to set forth any guidelines in this regard. Particularly where, as here, the Act's vagueness is subject to an interpretation by the Attorney General that potentially impinges on the First Amendment right of free speech of interrogated witnesses, the statute must be declared unconstitutionally void for vagueness.

Finally, the Subpoena Act is unconstitutionally vague because it fails to establish minimal guidelines with respect to the constitutionally required procedural safeguards to be afforded a witness to an investigation. While the Attorney General contends that the self-incrimination and target warnings required by this Court in State v. Ruggeri, 19 Utah 2d 216, 429 P.2d 969 (1967) in the grand jury context, may also be implied in the language of the Subpoena Act (A.G.'s Br. at 37-40), the fact is the required warnings are absent from the statute and the Attorney General has hitherto refused to give them. See Addendum II, Excerpts from Darcie White Deposition at 4-6. In fact, the Attorney General argues that Ruggeri warnings are not required under the Subpoena Act at all. A.G.'s Br. at 27-35. Thus, the Attorney General's own analysis and application of the Subpoena Act leads to the conclusion that the statute is too ambiguous to adequately guide the

Attorney General, who is only one of thirty prosecutorial bodies empowered to conduct criminal investigations.

V. IT IS NOT A JUDICIAL FUNCTION TO REWRITE A STATUTE BY INTERPRETATION.

It is a well established rule that legislative enactments are endowed with a strong presumption of validity and that statutes should not be declared unconstitutional if there is any reasonable basis upon which they can be found to come within the constitutional framework. Greaves v. State, 528 P.2d 805 (Utah 1974). However, this presumption of validity is a rebuttable one. Courts are under a duty to say what the law is; even if that means rendering void a statute passed by the legislature.

Where a statute affects or may encroach upon fundamental personal liberties, a stricter judicial scrutiny is required and the presumption of validity is more easily overcome. This court has recognized this limitation on the presumptive validity of statutes on several occasions. In Re Boyer, 636 P.2d 1085 (Utah 1981); Allen v. Trueman, 37 Utah 528, 110 P.2d 356 (1941).

The Utah Court in Greaves v. State, supra, while upholding a statute in the face of a vagueness challenge, also noted that the focus in such a challenge must be on the language of a statute:

A statute will not be declared unconstitutional . . . if under any sensible interpretation of its language it can be given practical effect. (emphasis added.)

Id. at 807. In the case at hand, it is the absence of language that constitutes the Subpoena Act's fatal flaw.

Judge Bunnell in his May 30, 1984 order read into the Subpoena Act a requirement of target and self incrimination warnings. See Addendum III. The Attorney General says these warnings, if required, may be incorporated into the statute by implication or interpretation. A.G. Br. at 37-40. Such an implication or interpretation finds no basis in the language of the statute.

Unless statutory language is ambiguous, a court may not supply through interpretation a statutory omission without transcending the judicial function. Park v. Edgewater, Inc. v. Joy, 416 N.Y.S.2d 266, 68 A.D.2d 107 (1979). It is not the province of the Court to draft legislation. Interstate Circuit v. Dallas, 390 U.S. 676, 690 (1968). "The absence of narrowly drawn, and reasonable and definite standards for the officials to follow (citations omitted) is fatal." Id. See also United States v. Monia, 317 U.S. 424 (1943).

This court has also recognized that supplying omitted language or otherwise rewriting a statute in an effort to validate it is not an appropriate judicial function. In

Mountain States Telephone & Telegraph Co. v. Public Service Commission, 107 Utah 530, 155 P.2d 184 (1945), this court observed "the interpretation must be based on the language used, and . . . the court has no power to rewrite a statute to make it conform to an intention not expressed." 155 P.2d at 185.

The foregoing decisions are founded on the principles underlying the American system of tri-partite government. It is the judicial function to apply and interpret the law. It is the province of the legislature to make the law. Marbury v. Madison, 1 Cranch 137 (1803); Calhoun County v. Galbraith, 99 U.S. 214 (1878). It is the legislature's prerogative to establish those standards necessary to bring prosecutorial subpoena power in line with the Constitution.

The Attorney General argues that the courts may supply procedures omitted by the legislature, and cites In Re Barnett's Estate, 275 P. 453 (Cal. 1929) for the concept that a court cannot supply omissions in a statute which are of a substantive nature, but may supply procedures. A.G.'s Br., p. 37. Respondents submit that the constitutional right to a Miranda warning is a substantive right, and not merely a procedure. The Attorney General says that the courts in Miranda v. Arizona, 384 U.S. 436 (1966) and State v. Ruggeri, 19 Utah 2d 216, 429 P.2d 969 (1967) are excellent examples of a

procedure being implied into a statute. In each of those cases the lawfulness of a statute was not at issue, rather it was the safeguards provided in police interrogation, on one hand, and the grand jury on the other. It is notable that shortly following the Ruggeri decision, the Utah legislature enacted the safeguards required therein. Utah Code Ann. § 77-11-3 (1982). It is not the judicial function for a court to rewrite the Subpoena Act to incorporate substantive judicial safeguards which the legislature failed to include.

VI. THE SUBPOENA ACT SHOULD BE DECLARED UNCONSTITUTIONAL ON ITS FACE.

Although the Subpoena Act has been abused, and in Judge Bunnell's words, "allows for an absolute abuse of power," and although the Attorney General apparently concedes it has resulted in the violation of Fourth Amendment rights, see A.G.'s Br. at 39, the Attorney General argues that this is no reason to hold the statute unconstitutional on its face. The Attorney General takes refuge in his view that the power granted prosecutors by the Subpoena Act should be treated just like the power conferred on law enforcement officers generally to obtain a search warrant, pursuant to Utah Code Ann.

§ 77-23-1 et seq. (1982):

[T]he remedy for the single violation of a citizen's Fourth Amendment right is not a ruling that the Act under which the

violation occurred is unconstitutional. Instead, it is the suppression of evidence, if the violation is substantial and not in good faith, § 77-35-12(g), Utah Rules of Criminal Procedure.

A.G.'s Br. at 39.

The Attorney General argues, with some persuasiveness, that a statute conferring authority on governmental officials should not automatically be held unconstitutional simply because it may, in certain circumstances, result in the violation of constitutional rights. Clearly, the government must have authority to conduct searches and make arrests, and cannot be denied this authority altogether simply because, in some circumstances, it may do these things in an unconstitutional manner.

A. Unlike the Search Warrant Statute, the Subpoena Act Requires No Prior Judicial Approval of Subpoenas Issued Under Its Authority.

By simply likening the Subpoena Act to the search warrant statute, however, the Attorney General glosses over significant differences between those statutes. First, a search warrant cannot be issued unless probable cause is first demonstrated to an impartial magistrate. Utah Code Ann. § 77-23-1, et seq. (1982). The statutorily required need for prior judicial authorization to conduct a search greatly diminishes the possibility of constitutional violations perpetrated under the search warrant statute.

B. The Subpoena Act Contains No Effective Deterrent
Against Its Improper Application.

Secondly, the remedy of exclusion of unconstitutionally obtained evidence, while it may provide an effective deterrent to unconstitutional searches, provides no effective deterrent to the "fishing expedition" sanctioned under the Subpoena Act. Under Utah's statutory enactment of the "exclusionary rule", Utah Code Ann. § 77-35-12(g) (1982), an effective deterrent exists to prevent police investigating discrete criminal conduct from conducting a search without first obtaining a warrant from a magistrate upon a showing of probable cause. The specific evidence of the suspected crime under investigation may not be usable if the statutory procedures are not followed.

It is far from clear, however, that this statute would ever deter a prosecutor, interested in roaming the files and records of a Utah citizen from doing so. While the police most often use the search warrant statute to find evidence of specific criminal conduct, a prosecutor is more apt to use the Subpoena Act to find evidence of criminality that was previously unsuspected. The exclusionary rule is not an effective deterrent to this type of abuse.

C. The Subpoena Act Encourages Prosecutors to Use It
Improperly.

Finally, and most importantly, the Subpoena Act should not be upheld because, although it may be possible to apply it

constitutionally, the very language and structure of the Subpoena Act encourages the prosecutor to apply it in an abusive and unconstitutional way. It should therefore be declared unconstitutional on its face. This is a practical necessity especially when 29 county attorneys are vested with the powers of the Subpoena Act along with the Attorney General.

It may not be appropriate in every case to declare a statute facially unconstitutional simply because some of the applications contemplated within its language may impinge on constitutional rights. See, e.g., Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). However, the United States Supreme Court has held that a statute should be held facially unconstitutional if it reaches "a substantial amount of constitutionally protected conduct." Hoffman Estates v. Flipside, 455 U.S. 489, 494 (1982). Applying this principle, the Court in Kolender v. Lawson, 461 U.S. 352, 75 L. Ed. 2d 903 (1983), discussed at length in Part IV supra, impelled by its concern that "the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute," id. at 909, did not hesitate to declare the statute facially unconstitutional, even though the statute at issue there clearly had several constitutional applications. See id. at 910, n. 8.

Respondents submit that the statute here, like the statute in Kolender, should be declared unconstitutional on its

face. Not only, due to the vast discretion it confers, does the statute reach "a substantial amount of constitutionally protected conduct," Hoffman, supra at 494, it literally encourages the prosecutor to exploit it in an abusive and unconstitutional manner. The Subpoena Act vests a vaguely defined and far-reaching power of investigation in thirty prosecutors, each with a sworn duty to obtain convictions and put people in jail. In their zeal to fulfill this function, all of these prosecutors cannot reasonably be expected to apply it in a way that safeguards constitutional rights.

If the statute is not declared facially unconstitutional, the court is virtually inviting the prosecutor to continue to use the statute in the manner it has been applied already, with little regard for constitutional boundaries. Where a statute has been applied unconstitutionally, and further invites and encourages such unconstitutional application, respondents submit it must be declared invalid on its face.

VII. THE SUBPOENA ACT RUNS AFOUL OF THE SINGLE SUBJECT RULE.

As more fully discussed in the record below, the Subpoena Act is not of recent vintage. Rather, the Subpoena Act is a revision of a former statute enacted in 1971 (codified in Chapter 45 of Title 77 as §§ 19, 20 and 21, Utah Code Ann.

(1953) (the "Former Act"). See Addendum I at iv. Under the Former Act, a prosecutor could not issue a subpoena without obtaining prior approval of the district court. Id. This judicial restraint was imposed on prosecuting attorneys by the 1971 Legislature for the purpose of avoiding a constitutional attack similar to the ones made in the case at bar. Addendum IV at xlii-xlv, xlvii-1. It was eliminated from the Subpoena Act in the 1980 budget session of the legislature as part of the recodification of the Utah Code of Criminal Procedure. Id. at lix-lxxxiv.

A review of the legislature debates surrounding the Former Act indicates that judicial approval of subpoenas was deemed an essential constitutional safeguard in the minds of the 1971 Legislature. No mention was made of the removal of this procedure during the 1980 budget session at which time the Subpoena Act was enacted. Rather, legislators urged the passage of the bill containing the Subpoena Act with the warning that "[t]he Bill's not perfect . . . but the need to have this occur is so great and we are so hamstrung now with the confusion regarding the rules of the game . . . " that its passage is required. Id. at lx.

The Subpoena Act violates the "one-subject rule" found in Article VI, § 22 of the Utah Constitution which requires that, except for bills providing for the codification and general revision of laws, "no bill shall be passed containing

more than one subject . . . " Contrary to the characterizations of the 1980 legislators, the Subpoena Act is not a codification of laws. Where a statute, such as the Former Act, is codified or recodified, it is presumed to be enacted without change, even though it is reworded and rephrased. See, e.g., C. Sands, Sutherland Statutory Construction, § 28.10 at 327 (1972). The Subpoena Act contains numerous changes from the Former Act and is thus not excluded from the application of the one-subject rule as a codification.

CONCLUSION

For the reasons set forth above, respondents Karl J. Stott, Norman Maxfield, and Orrin T. Colby, Jr., respectfully request this Court to affirm the district court's decision holding the Subpoena Act unconstitutional.

RESPECTFULLY SUBMITTED this 22nd day of February, 1985.

JONES, WALDO, HOLBROOK, & McDONOUGH

By: George W. Holbrook

Donald B. Holbrook

Attorneys for Respondents
Karl J. Stott, Norman Maxfield,
and Orrin T. Colby, Jr.

ADDENDUM I

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Utah Constitution, Article I, Section 12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to

testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Utah Constitution, Article I, Section 14

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

SUBPOENA ACT

Utah Code Annotated, Sections 77-22-1 through 77-22-3

77-22-1. Declaration of necessity. It is declared, as a matter of legislative determination, that it is necessary to grant subpoena powers in aid of criminal investigations and to provide a method of keeping information gained from investigations secret both to protect the innocent and to prevent criminal suspects from having access to information prior to prosecution and to clarify the power of the attorney general and county attorneys to grant immunity from prosecution to witnesses whose testimony is essential to the proper conduct of a criminal investigation or prosecution.

77-22-2. Right to subpoena witnesses and require production of evidence -- Contents of subpoena --- Interrogation before closed court. (1) In any matter involving the investigation of a crime, the existence of a crime or malfeasance in office or any criminal conspiracy or activity, the attorney general or any county attorney shall have the right, upon application and approval of the district court, for good cause shown, to conduct an investigation in which the prosecutor may subpoena witnesses, compel their attendance and testimony under oath before any certified court reporter, and require the production of books, papers, documents, recordings and any other items which constitute evidence or may be relevant to the investigation in the judgment of the attorney general or county attorney.

(2) The subpoena need not disclose the names of possible defendants and need only contain notification that the testimony of the witness is sought in aid of criminal investigation and state the time and place of the examination, which may be conducted anywhere within the jurisdiction of the prosecutor issuing the subpoena, and inform the party served that he is entitled to be represented by counsel. Witness fees and expenses shall be paid as in a civil action.

(3) The attorney general or any county attorney may take written application to any district court and the court may order that interrogation of any witness shall be held in secret; that such proceeding be secret; and that the record of testimony be kept secret unless and until the court for good cause otherwise orders. The court may order excluded from any investigative hearing or proceeding any persons except the attorneys representing the state and members of their staffs, the court reporter and the attorney for the witness.

77-22-3. Immunity granted to witness -- Refusal of witness to testify or produce evidence -- Powers granted prosecuting attorneys in addition to other powers. In any investigation or prosecution of a criminal case, the attorney general and any county attorney shall have the power to grant transactional immunity from prosecution to any person who is called or who is intended to be called as a witness in behalf of the state whenever the attorney general or county attorney deems that the testimony of such persons is necessary to the investigation or prosecution of such a case. No prosecution shall be instituted against the person for any crime disclosed by his testimony which is privileged under this action, provided that should the person testify falsely, nothing herein contained shall be construed to prevent prosecution for perjury.

If during the investigation or prosecution a person refuses to answer a question or produce evidence of any kind on the ground that he may be incriminated thereby, the attorney issuing the subpoena may file a request in writing with the district court in which the examination is being conducted for an order requiring that person to answer

the question or produce the evidence requested. The court shall set a time for hearing and order the person to appear before the court to show cause, if any he has, why the question should not be answered or the evidence produced, and the court shall order the question answered or the evidence practiced unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction. If the witness still refuses to answer or produce the evidence, he shall be guilty of contempt of court and punished accordingly. If the witness complies with the order and he would have been privileged to withhold the answer given or the evidence produced by him except for this section, that person shall not be prosecuted or subjected to penalty or forfeiture on account of any fact or act concerning which, he was ordered to answer or produce evidence except he may nevertheless be prosecuted or subjected to penalty for any perjury, false swearing or contempt committed in answering, failing to answer, or for producing or failing to produce any evidence in accordance with the order.

The powers specified in this chapter are in addition to any other powers granted to the attorney general or county attorneys.

FORMER SUBOPENA ACT EFFECTIVE 1971

Section 1. Purpose -- Subpoena Powers.

It is declared, as a matter of legislative determination that there has been a marked increase in crime and criminal activity within this state, and that in order to protect the public health, safety, and morals, it is necessary to grant subpoena powers in aid of criminal investigations conducted by the attorney general, district attorneys and county attorneys, and to provide a method of keeping information gained from investigations secret both to protect the innocent and to prevent criminal suspects from having access to information prior to prosecution to the detriment of the proper enforcement of the criminal laws of this state, and to clarify the power of the attorney general, district attorneys, and county attorneys to grant immunity from prosecution of

witnesses whose testimony is essential to the proper conduct of an investigation of criminal activities and prosecution of crimes committed within this state.

Section 2. Subpoena Powers -- Procedural Requisites
-- Court Procedure.

In any matter involving the investigation of a crime, the existence of a crime, or any criminal conspiracy or activity, the attorney general, any district attorney or any county attorney shall have the right, upon application and approval of the district court for good cause shown, to subpoena witnesses, compel their attendance and testimony under oath before any certified court reporter, and require the production of books, papers, documents, records and other tangible items which constitute or may contain evidence which is or may be relevant or material to the investigation in the judgment of the attorney general, district attorney or county attorney.

The subpoena need not disclose the name or names of possible defendants and need only contain notification that the testimony of the witness is sought in aid of a criminal investigation and state the time and place of the examination, which may be conducted anywhere within the jurisdiction of the attorney issuing the subpoena, and inform the party served that he is entitled to be represented by counsel. Witness fees and expenses shall be tendered and paid as in any civil action.

In addition to the foregoing rights and powers to compel attendance and obtain evidence, the attorney general, any district attorney, or any county attorney may make written application to any district court and the court may order that interrogation of any witness shall be before a closed court; that such proceeding be secret; and that the record of such testimony be kept secret unless and until the court for good cause otherwise orders. The court shall have the power to exclude from any investigative hearing or proceeding, any and all persons except the attorneys representing the state and members of their staffs, the court reporter, and the attorney for the witness.

GRAND JURY STATUTE

Utah Code Annotated, Section 77-11-3

77-11-3. Evidence receivable - Witness to be advised of rights. (1) The grand jury shall receive no other evidence than is given by witnesses under oath or affirmation, or documentary evidence, or the deposition of a witness taken as provided by law. The grand jury shall receive only legal evidence.

(2) Any person called to testify before the grand jury may be advised of his right to be represented by counsel. If a witness is or becomes a subject of the investigation, he shall be advised of that fact and of his right to counsel, and of his privilege against self incrimination. On demand of a witness for representation by counsel, the proceedings shall be delayed until counsel is present. In the event that counsel of the witness' choice is not available, he shall be required to obtain or accept other counsel.

DAVID L. WILKINSON
Attorney General
PAUL M. WARNER
Assistant Attorney General
Chief, Litigation Division
STANLEY H. OLSEN
Assistant Attorney General
Attorneys for State of Utah
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-7626

FILED
IN THE SEVENTH JUDICIAL DISTRICT COURT
OF UTAH IN AND FOR EMERY CO.

NOV 25 1984

By BRUCE C. FUNK Clerk
LOUIS Deputy

IN THE SEVENTH JUDICIAL DISTRICT COURT OF EMERY COUNTY
STATE OF UTAH

IN THE MATTER OF A : SUBPOENA DUCES TECUM
CRIMINAL INVESTIGATION : CS NO. 1

THE STATE OF UTAH TO:

Orrin T. Colby
1407 West North Temple
Salt Lake City, Utah 84116 535-4040

You are hereby commanded to set aside all business and excuses and appear at the Office of the Attorney General of the State of Utah, 236 State Capitol, Salt Lake City, Utah, at the hour of 2:00 p.m., on Tuesday, the 24th day of April, 1984, to give testimony in support of a criminal investigation. You are entitled to be represented by legal counsel.

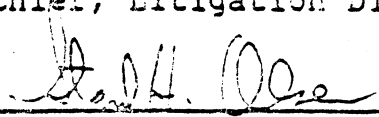
You are also commanded to bring with you any and all books, records, documents, accounts, or papers pertaining to Utah Power and Light to include, but not be limited to: information and documentation regarding all uranium properties purchased, controlled and managed by Utah Power and Light; a detailed reconciliation of all changes in balances for all uranium properties as reflected in reports to the Federal Energy Regulatory Commission for the years 1979 and 1980 to include all of the detailed documentation (vouchers, checks, etc.) reflecting and supporting reported increases in balances for all uranium properties from 1979 to 1980.

This subpoena duces tecum is authorized by order of the District Court. Disobedience to this order is punishable by contempt of Court.

Given under my hand this 4th day of April, 1984.

DAVID L. WILKINSON
Attorney General
PAUL M. WARNER
Assistant Attorney General
Chief, Litigation Division

By:


STANLEY H. OLSEN
Assistant Attorney General
Attorneys for State of Utah

DAVID L. WILKINSON
Attorney General
PAUL M. WARNER
Assistant Attorney General
Chief, Litigation Division
STANLEY H. OLSEN
Assistant Attorney General
Attorneys for State of Utah
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-7626

FILED
IN THE SEVENTH JUDICIAL DISTRICT COURT
OF UTAH IN AND FOR EMERY CO.

MAY 25 1984

By BRUCE G. PUNK Clerk
KEVIN L. OLSEN Deputy

IN THE SEVENTH JUDICIAL DISTRICT COURT OF EMERY COUNTY
STATE OF UTAH

IN THE MATTER OF A : SUBPOENA DUCES TECUM
CRIMINAL INVESTIGATION : CS NO. 1

THE STATE OF UTAH TO:

Norman Maxfield
1407 West North Temple
Salt Lake City, Utah 84116

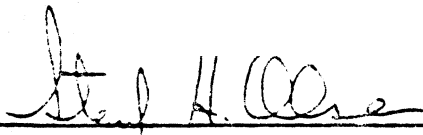
You are hereby commanded to set aside all business and excuses and appear at the Office of the Attorney General of the State of Utah, 236 State Capitol, Salt Lake City, Utah, at the hour of 9:00 a.m., on Friday, the 13th day of April, 1984, to give testimony in support of a criminal investigation. You are entitled to be represented by legal counsel.

You are also commanded to bring with you any and all books, records, documents, accounts, or papers pertaining to Mike Thompson, Mike Ziemski, Bruce Conklin, et al., MTA, Vanguard, Great Basin Patrol, and L. Brent Fletcher.

This subpoena duces tecum is authorized by order of the District Court. Disobedience to this order is punishable by contempt of Court.

Given under my hand this 4th day of April, 1984.

DAVID L. WILKINSON
Attorney General
PAUL M. WARNER
Assistant Attorney General
Chief, Litigation Division



STANLEY H. OLSEN
Assistant Attorney General
Attorney for State of Utah

DAVID L. WILKINSON
Attorney General
PAUL M. WARNER
Assistant Attorney General
Chief, Litigation Division
STANLEY H. OLSEN
Assistant Attorney General
Attorneys for State of Utah
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-7626

FILED
IN THE SEVENTH JUDICIAL DISTRICT COURT
OF UTAH IN AND FOR EMERY CO

MAY 25 1984

By BRUCE J. TUNK Clerk
[Signature] Deputy

IN THE SEVENTH JUDICIAL DISTRICT COURT OF EMERY COUNTY
STATE OF UTAH

IN THE MATTER OF A : SUBPOENA DUCES TECUM
CRIMINAL INVESTIGATION : CS NO. 1

THE STATE OF UTAH TO:

Karl J. Stott
1407 West North Temple
Salt Lake City, Utah 84116 525-2828

You are hereby commanded to set aside all business and excuses and appear at the Office of the Attorney General of the State of Utah, 236 State Capitol, Salt Lake City, Utah, at the hour of 3:30 .m., on Thursday, the 24th day of April, 1984, to give testimony in support of a criminal investigation. You are entitled to be represented by legal counsel.

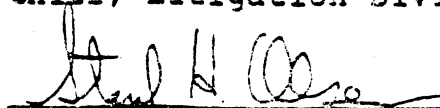
You are also commanded to bring with you any and all books, records, documents, accounts, or papers pertaining to Utah Power and Light to include, but not be limited to: information and documentation regarding all uranium properties purchased, controlled and managed by Utah Power and Light; a detailed reconciliation of all changes in balances for all uranium properties as reflected in reports to the Federal Energy Regulatory Commission for the years 1979 and 1980 to include all of the detailed documentation (vouchers, checks, etc.) reflecting and supporting reported increases in balances for all uranium properties from 1979 to 1980.

This subpoena duces tecum is authorized by order of the District Court. Disobedience to this order is punishable by contempt of Court.

Given under my hand this 4th day of April, 1984.

DAVID L. WILKINSON
Attorney General
PAUL M. WARNER
Assistant Attorney General
Chief, Litigation Division

By:


STANLEY H. OLSEN
Assistant Attorney General
Attorneys for State of Utah

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR EMERY COUNTY, STATE OF UTAH

-000-

IN THE MATTER OF A
CRIMINAL INVESTIGATION

: Case No. CS No. 1
: Deposition of:
: DARCIE H. WHITE

-000-

BE IT REMEMBERED that on the 3rd day of April, 1984, the deposition of DARCIE H. WHITE, produced as a witness herein at the instance of the Attorney General's office, in the above-entitled action now pending in the above-named Court, was taken before Rashell Garcia, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, commencing at the hour of 9:00 a.m. of said day, at the offices of the Attorney General, 236 State Capitol Building, Salt Lake City, State of Utah.

That said deposition was taken pursuant to Subpoena.

-000-

ORIGINAL

RASHELL GARCIA
LICENSE #144

INDEPENDENT
REPORTING
SERVICE
1200 Beneficial Life Tower
Salt Lake City, Utah 84111

801-322-1029

A P P E A R A N C E S

For the Attorney General's Office: STANLEY H. OLSEN
SUZANNE DALLIMORE
Assistant Attorney Generals
236 State Capitol Building
Salt Lake City, Utah 84114

WAYNE WICKIZER
Special Investigator
236 State Capitol Building
Salt Lake City, Utah 84114

For the Witness: STEPHEN NEBEKER
Ray, Quinney & Nebeker
400 Deseret Building
Salt Lake City, Utah 84111

-oOo-

I N D E X

<u>Witness</u>	<u>Page</u>
DARCIE H. WHITE:	
Examination by Mr. Olsen	6
Examination by Ms. Dallimore	46
Continued Examination by Ms. Dallimore	84
Further Examination by Mr. Olsen	158
<u>Exhibits</u>	<u>Marked</u>
1 Agreement dated 2/28/78 between UP&L and MTA	30
2 Agreement dated 3/81 between UP&L and MTA	30
3 Agreement dated 10/1/82 between UP&L and MTA Security Services, Inc.	30
4 Memo dated 2/10/78 from MTA	84
5 Overview report dated 9/1/78 from MTA	84
6 Letter from Mr. Fletcher dated 11/19/81	84
7 Letter dated 1/29/83 from Dennis Cole	84
8 Task force report dated 4/15/83	84
9 Audit memo-security by Dave Clement	84
10 Summary of differences in hours	84
11 Handwritten memo regarding Park City hours	84

P R O C E E D I N G S

MR. OLSEN: This is the time set for the deposition of Mr. Darcie White pursuant to a subpoena given to Mr. Stephen Nebeker, his counsel. Steve, you delivered that to Mr. White and are here pursuant to that subpoena; is that correct?

MR. NEBEKER: That's correct.

MR. OLSEN: Let me just indicate who is present. Steve Nebeker is here representing Mr. Darcie White. Stan Olsen from the Attorney General's office, and Ms. Suzanne Dallimore -- and why don't you spell that.

MS. DALLIMORE: D-a-l-l-i-m-o-r-e.

MR. OLSEN: And Wayne Wickizer, investigator with the office of the Attorney General.

Before we went on the record, we had a discussion concerning the questioning in this case. For the record, I want to indicate that I will be asking the questions to a certain point in time, and then at the time when it will be my intention to turn the questioning over to either Suzanne or Wayne, then I think it would be appropriate at that time for us to put on the record our respective positions in that regard. Steve, if you have any statement, go ahead.

MR. NEBEKER: Fine. First of all, I would like to ask if in fact this is being conducted pursuant to the criminal investigative docket that's been opened up in

1 Emery County?

2 MR. OLSEN: It is.

3 MR. NEBEKER: And the subpoena carried that
4 designation on it, did it not?

5 MR. OLSEN: That's my understanding. Is that
6 correct, Wayne?

7 MR. WICKIZER: Yes.

8 MR. NEBEKER: Secondly, I would like to ask you on
9 the record if in fact Mr. Darcie White who has been subpoenaed
10 here is a target in the investigation?

11 MR. OLSEN: Right. My response to that, as it was
12 off the record, is that we intend to ask Mr. White a series
13 of questions concerning his employment and relationships with
14 not only his current employer but with previous employees and
15 contractors with Utah Power & Light. I don't have a more
16 specific answer to give than that.

17 MR. NEBEKER: Can you state more specifically
18 whether or not he is in fact being considered as a target of
19 the investigation?

20 MR. OLSEN: There isn't a way for me to be more
21 specific than that. I think it is fair to say that as we
22 continue the investigation, that all persons who we've become
23 aware of or interview or depose, that we would review their
24 depositions or information that we gain about those persons
25 and review their potential criminal liability. That's as

1 specific as I'm able to be.

2 MR. NEBEKER: Well, for the record, I think I would
3 say that I don't think that response is adequate because I
4 think he's entitled to know whether or not he is the subject
5 of a criminal investigation. I think you should, at this
6 time, be required to tell him whether or not he is the subject
7 of the investigation because I think certain questions that
8 may be put to him may require him to take the Fifth Amendment
9 if he deems it necessary. I think he's entitled to know that.

10 MR. OLSEN: I understand that concern and I'm being
11 as candid as I can. I think it's fair to say, Steve, that
12 if there is a question asked, for example, if he did anything
13 which we may later look at as being a potential criminal
14 violation, then we would look at it and review it with a
15 view to potential prosecution. I'm honestly being as
16 candid as I can about that. I don't know that we have said
17 as to any person that we have absolutely eliminated that
18 specific person. We have not done, nor, I think, can we
19 legitimately do that. I'm honestly not holding back anything
20 there. That's my response and we're not eliminating anyone
21 at this point.

22 MR. NEBEKER: Well, if that's all you're willing
23 to put on the record, then I guess we'll just have to let
24 the record stand as it is, but my position is that he's
25 entitled to know that. I think the Attorney General's office

1 should be required to tell him that.

2 EXAMINATION

3 BY MR. OLSEN:

4 Q Mr. White, I wonder if you would give us your full
5 name and the spelling of each of the names, please.

6 A Okay, my name is Darcie, D-a-r-c-i-e, middle initial
7 H, White, W-h-i-t-e.

8 Q Mr. White, what is your business and home addresses,
9 please?

10 A My business address is 1407 West North Temple,
11 Salt Lake City. My home address is 2817 Cherry Blossom Lane
12 in Salt Lake City.

13 Q Would you give us your telephone numbers as well,
14 please.

15 A At the office, my business phone is 535-2460. At
16 home, it's 277-9797.

17 Q Could you give us your date of birth?

18 A September 20, 1926.

19 Q If you would, give us the name of your current
20 employer?

21 A Utah Power & Light Company.

22 Q How long have you been employed with Utah Power &
23 Light?

24 A Just short of 34 years.

25 Q What is your current position?

1 also discussed that he had been up here for his deposition.
2 Did he express some concern over the deposition and the
3 pending investigation?

4 A Only the fact that it had taken place. He didn't
5 give me any details or any specific concerns.

6 Q Mr. White, did you have -- let me ask it this way:
7 Do you have reason or did you, at any time, have reason to
8 suspect that Mr. Fletcher may have been benefiting outside
9 his UP&L salary from his contractual relationship -- from the
10 security contracts that we've discussed during this deposition?

11 A I never had any concern about that.

12 Q Have you read Mr. Fletcher's deposition that was
13 given? Have you read his deposition he gave in this office?

14 A No, I have not. I only know he told me he had
15 given a deposition.

16 Q Just a summary question, Mr. White. In terms of
17 the negotiation of the initial contract, was its signing
18 on your behalf recommended by Mr. Fletcher?

19 A The contract was recommended by Mr. Fletcher
20 subsequent to a review by our Legal Department that it was
21 in the company's interest. I did sign it.

22 MR. NEBEKER: It seems to me we've been over this
23 a couple of times.

24 THE WITNESS: I think we have.

25 Q (By Mr. Olsen) Anyone else other than Mr. Fletcher

1 other than the legal people who made the recommendation?

2 A Well, of course Mr. Fletcher's supervisor recommended
3 it, also.

4 Q Then Mr. Maxfield and Mr. Fletcher recommended its
5 signing by the company and review by the Legal Department?

6 A Yes.

7 Q Would that have been true as to the third contract,
8 then?

9 A I don't specifically recall talking to Mr. Maxfield
10 about that, but I'm sure it went through the same process.

11 Q Did Mr. Fletcher recommend that?

12 A He did.

13 Q Are you familiar with where Mr. Fletcher resides?

14 A I believe, though I'm not sure, that he lives in
15 Bountiful.

16 Q Have you been to his home?

17 A No.

18 Q Mr. White, let me just remind you of something that
19 Steve may well have talked to you about, but for purposes of
20 making sure that we're clear on this, the proceedings here
21 are pursuant to an investigative subpoena and are under a
22 secrecy order. I would just remind you that the proceedings
23 here, the questions, etc., are secret. They certainly may
24 be discussed with Mr. Nebeker but not with others. The other
25 question I have is -- well, let me ask you if you understand

1 that.

2 MR. NEBEKER: Let me ask you on what authority
3 you're telling him that he can't discuss this with anyone?

4 MR. OLSEN: Pursuant to the secrecy order.

5 MR. NEBEKER: I didn't see a copy of that.

6 MR. OLSEN: Well, I guess my question is does he
7 understand that --

8 MR. NEBEKER: No, he does not understand that.

9 THE WITNESS: No, I didn't.

10 MR. NEBEKER: We have never been served with a copy
11 of that order..

12 MS. DALLIMORE: There's a statute that requires
13 that all procedures be kept secret that we take pursuant to
14 criminal subpoenas unless the witness waives his right to
15 keep them secret.

16 MR. OLSEN: I think we sent you a copy of that
17 as well, Steve.

18 MR. NEBEKER: The secrecy order?

19 MR. OLSEN: Yes.

20 MR. NEBEKER: I've never seen it. At least, if
21 I have, I don't have it in my file. Is it the order signed
22 by Judge Bunnell?

23 MR. OLSEN: Yes.

24 MR. NEBEKER: The last one he signed? Is that the
25 one we're referring to?

1 MR. OLSEN: We're not talking about the deletion
2 of the name, we're talking about the initial secrecy order,
3 a copy of which was supplied to you. I'd be glad to do it
4 again.

5 MR. NEBEKER: Well, I may have really just not seen
6 that but the order that I have here -- maybe this is the
7 one you're referring to, the one dated January 26, 1983.

8 MR. OLSEN: That's the one.

9 MR. NEBEKER: And this is from Judge Bunnell.

10 MR. OLSEN: Correct.

11 MR. NEBEKER: It says that "hereby orders that the
12 proceedings and record in the above-entitled investigation
13 may be kept secret and any and all persons may be excluded
14 from access." My understanding is that simply seals the
15 file. I don't have any understanding that, for instance,
16 Mr. White can speak to anybody besides me as the attorney for
17 the company. I think we better have that understood because
18 he has talked to Mr. Eliason and, in fact, talked to him
19 yesterday after the deposition.

20 MR. OLSEN: Well, I guess we'll just have to --

21 MR. NEBEKER: Are you telling me --

22 MR. OLSEN: I guess we'll have to disagree about
23 that.

24 MR. NEBEKER: Are you saying that this order says
25 that these people cannot talk to anyone? Is that how you're

1 interpreting this?

2 MR. OLSEN: Well, I think with the exception of
3 the attorney, that is correct. I don't know what the --

4 MR. NEBEKER: I just read it entirely different.
5 It says "Based upon the above application of Attorney General
6 and documents on file herein, good cause appearing: It is
7 hereby ordered that the proceedings and records in the above-
8 entitled investigation may be secret" -- may be secret --
9 "and that any and all persons may be excluded from access
10 to any such proceedings or record except the attorneys
11 representing the State of Utah and members of their staff,
12 the court reporter that witnessed, and the attorney for the
13 witness".

14 MS. DALLIMORE: Well, Steve, I think, at a minimum,
15 it would be better for everyone concerned if a lot of people
16 didn't do a lot of talking to each other about these
17 proceedings and, specifically, of course, if Mr. Fletcher
18 called you on the phone, don't you think it would be more
19 appropriate that it not be discussed?

20 MR. NEBEKER: Outside of this court order, which
21 we understand has been issued by the Court, I guess each
22 person has to interpret that and if you interpret that as
23 saying to Mr. White that he can't talk to anyone about this
24 except me, then I think I need to know that because I don't
25 -- we don't want to violate the Court order but, on the other

1 hand, I think this simply says that the record and proceedings
2 are to be kept secret. In fact, we have looked at the file
3 in Emery County and part of it is sealed and part of it is
4 not sealed, as you're probably aware.

5 MR. OLSEN: Sure.

6 MR. NEBEKER: And so all of the file is not even
7 being kept secret. I'm not sure that these people aren't
8 entitled at the company to talk to each other. If you're
9 saying that they cannot do that, maybe we better have an
10 understanding there, and I think maybe we better find out
11 from the Judge if that is the way this is to be conducted.

12 MR. OLSEN: I suppose we can have another conversa-
13 tion with him.

14 MR. NEBEKER: I mean, I just don't want to get
15 these people in violation of a court order and have them --
16 for instance, Mr. White talked to Norm Maxfield and then
17 have you, in effect, say to these people, You shouldn't do
18 that. If they're not to do it, we better tell them now,
19 but I have not understood that up until now because I've
20 talked to Mr. White and I've talked to Mr. Eliason. They
21 have spoken to each other, merely because they happened to
22 be here at the same time, one was coming and one was leaving.

23 MR. OLSEN: Sure, I understand.

24 MR. NEBEKER: We don't intend to violate the
25 court order, but we need to have an understanding on the

1 basic ground rules as to how the investigation is being
2 conducted. Merely for the sake of protecting these people
3 and myself as attorney for the company, I think we need to
4 have that clarified. If I'm wrong, then I certainly could
5 be corrected by the Judge.

6 MR. OLSEN: It's something we should perhaps
7 clarify and we're --

8 MR. NEBEKER: Let me say he has no way of controlling
9 if Mr. Fletcher calls him.

10 MS. DALLIMORE: Certainly not.

11 MR. NEBEKER: Or if Mr. Ziemiński calls or if
12 Mr. Wall calls him. I don't know whether those people --
13 what instructions they have been given. Mr. Fletcher himself
14 came back and talked to Mr. White after his deposition. He
15 apparently was not under any concept that he was not to talk
16 to anyone. So, I merely state that on the record because I
17 think it's important for us to know where we stand with
18 regard to that. I think it is not the intent of Utah Power
19 & Light or its employees to violate any of the court orders
20 in connection with this criminal investigation, but I think
21 we are entitled to know the questions I have already asked
22 which I think have not been answered as to who is the subject
23 of this investigation and, further, I think we're entitled
24 to know now that you are claiming that they cannot talk to
25 each other.

1 MR. OLSEN: Well, I think we have already stated
2 what our position is on that and if we want to try to reach
3 the Judge again today, as we did before, we can do that, or
4 we can try to reach him by conference call at a later time.

5 MR. NEBEKER: All right.

6 MR. OLSEN: The only other question I have and,
7 perhaps you have questions, Steve, but my last question is
8 to ask whether you have any additional statements or clarifi-
9 cations that you would like to make, Mr. White, about what's
10 been testified to?

11 MR. NEBEKER: In terms of what his testimony has
12 already been?

13 MR. OLSEN: Yes.

14 MR. NEBEKER: Any corrections?

15 MR. OLSEN: Any corrections or any other statements
16 he would like to make.

17 MR. NEBEKER: Now, wait a minute. I don't think
18 it's proper to ask him just to make a statement on the record.

19 MR. OLSEN: I'm not asking him to. My question
20 was does he want to make corrections or does he want to make
21 any other statement. I'm not saying to make a statement,
22 I'm asking if he wants to, that's all.

23 MR. NEBEKER: Do you understand what they're saying?
24 If you have anything you think needs to be corrected, you're
25 certainly entitled to make any corrections. You will have

1 a chance to read your deposition.

2 THE WITNESS: Sure.

3 MR. NEBEKER: If I understand your question, you're
4 asking him if he wants to make any other comments on questions
5 that have been asked, and I'm going to instruct him not to
6 answer that. I don't think that's a proper question.

7 MR. OLSEN: It's not a question so much, Steve,
8 as an invitation to --

9 MR. NEBEKER: I'm going to instruct him not to
10 respond. I don't want him to respond to an open-ended request
11 like that.

12 MR. OLSEN: I understand that, and that's all I
13 have.

14 MS. DALLIMORE: One other matter, and that is
15 concerning documents. The only documents I think we have
16 identified today that we would like to see copies of are
17 the assignment of contract and Mr. Fletcher's manuals and
18 writings. Also, if he made security manuals, reports or
19 those kinds of things.

20 MR. NEBEKER: Now, I think in terms of Mr. Fletcher's
21 manuals, you better subpoena those. I don't know if we have
22 those. In terms of the assignment, since it's just been
23 executed, I think within the last month, I guess we should --

24 THE WITNESS: Within the last month, yes.

25 MR. NEBEKER: I think maybe I better have you

1 subpoena that, and you can just direct it to Mr. White.

2 MR. OLSEN: Should we send it to you, Steve, and --

3 MR. NEBEKER: You can send it to me and I will get
4 it to Mr. White.

5 MS. DALLIMORE: We can go off the record.

6 (An off the record discussion
7 was held.)

8 MR. NEBEKER: Let the record show I don't have
9 any questions of Mr. White.

10 (Whereupon, the taking of this
11 deposition was concluded.)

12 -oOo-

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

STATE OF UTAH)
 :
COUNTY OF SALT LAKE)

I HEREBY CERTIFY that I have read the foregoing
testimony consisting of 169 pages, numbered from
3 to 169 inclusive, and the same is a true and
correct transcription of said testimony except as I
have corrected it in ink, giving my reasons therefor
and affixed my initials thereto.

DARCIE H. WHITE

* * *

Subscribed and sworn to at Salt Lake City, Utah,
this _____ day of _____ 198__.

Notary Public

My Commisiion expires:

C E R T I F I C A T E

STATE OF UTAH)
 :
COUNTY OF SALT LAKE)

THIS IS TO CERTIFY that the deposition of Darcie H. White
the witness in the foregoing deposition named, was taken before me,
Rashell Garcia, a Certified Shorthand Reporter and Notary Public
in and for the State of Utah residing at Salt Lake City, Utah.

That the said witness was by me, before examination duly sworn to
testify the truth, the whole truth and nothing but the truth in said
cause.

That the testimony of said witness was reported by me in steno-
type, and thereafter caused by me to be transcribed into typewriting,
and that a full, true, and correct transcription of said testimony so
taken and transcribed is set forth in the foregoing pages numbered from
3 to 169, inclusive, and said witness deposed and said as in the
foregoing annexed deposition.

I further certify that after the said deposition was transcribed
the original of same was delivered to Mr. Nebeker, attorney for
the Witness to be by him submitted to the witness for reading
and signature, signed before a Notary Public and to be returned to me
for filing with the Clerk of the said court.

I further certify that I am not of kin or otherwise associated with
any of the parties to said cause of action, and that I am not interested
in the event thereof.

WITNESS MY HAND and official seal at Salt Lake City, Utah, this
11 day of April 1984.

My commission expires:
December, 15, 1984.


RASHELL GARCIA C. R. S.

SEP 21 1984

BRUCE C. FUNK, Clerk
By Depu

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR EMERY COUNTY,
STATE OF UTAH

IN THE MATTER OF
A CRIMINAL INVESTIGATION

MEMORANDUM DECISION
RELATIVE TO
CONSTITUTIONALITY

CS NO. 1

On September 12, 1984, a hearing was held in this Court pursuant to Notice on Motions submitted by parties who were subject to subpoena under this Criminal Investigation proceeding. The Court ruled from the bench on most Motions and took under advisement the challenge to the constitutionality of the Act (77-22-1 et seq.), authorizing the investigative procedure being used as raised by several of the parties for the first time in their own behalf and by other parties on a Motion to reconsider.

The Court previously considered the constitutional challenge to the Act at a hearing held on May 30, 1984, and the Court ruled at that time that the Court would give the Act the presumption of constitutionality provided that in its application the State Prosecutors comply with the following requirements:

1. Witnesses subpoenaed pursuant to the Act must be informed whether or not they are targets of the investigation;

Recorded in Judgment Record
at Page
BRUCE C. FUNK, Clerk

2. Such witnesses must be informed of the nature of the matter under investigation and the scope of the investigation;

3. Investigations conducted under the authority of the Act must be limited to criminal investigations within the parameters of the initial good cause affidavit.

Since that ruling, the Court has had opportunity to see the manner in which the Act has been applied and is being applied and the way it can be used to violate the personal rights of the citizens of this state.

For instance, the subpoena duces tecum served upon Emery Mining Company commands that Company to produce:

"records which identify all officers, directors, consultants and employees (both union and non-union, professional and mining) of Emery Mining for the period 1979 to the present. Such shall include, but not be limited to, names, addresses, telephone numbers, dates of employment and employee numbers, if known."

Upon challenge, this Court ordered that general subpoena suppressed as being too broad in any investigation of any criminal activity.

A previous subpoena issued by the Attorney General's Office attempted to get into Utah Power and Light Company's dealings in uranium mining, when in fact the original Good Cause Affidavit mentioned no indication of any criminal dealings in this area. The State withdrew this subpoena when challenged in this court.

Another subpoena issued out of this proceeding was directed to a CPA firm and ordered the production of the following:

"You are commanded to bring with you any and all books, records, papers of any kind relating to Mike Thompson and Associates, Guardex, Alarmex, Vanguard, Mike Thompson, individually; Mike Ziemski, individually; Bruce Conklin, individually; Patsy Bowman, individually; and all other individuals and/or entities associated therewith."

This subpoena was withdrawn by the State upon challenge in this Court.

The deposition of L. Brent Fletcher, taken pursuant to subpoena issued under this investigative proceeding, did not comply with the requisites that this Court feels must be imposed to make the Act constitutional in its application in that the witness never was informed that he was a target, nor as to the nature of the investigation and, because of the Secrecy Order, he had no way of knowing whether the matter being inquired into was within the perimeter of the good cause showing. He was allowed, and did have, his attorney present with him during these proceedings.

Some criminal charges have already been filed in Salt Lake County based upon information obtained through this proceeding, and a civil anti-trust case has been filed in Salt Lake County, also as a result of some of the information derived from this investigative proceeding. This investigative proceeding is

still open and being used for whatever purposes the State desires and solely within their discretion under the Act, without limitation as to when a criminal investigation becomes a prosecution or controlling the ultimate use of the findings for civil purposes.

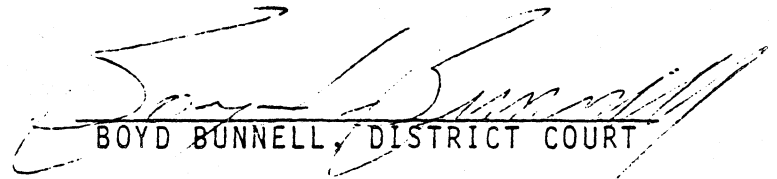
The Act has been abused and is subject to continued abuse under its broad terms and provisions that set no limitations upon the State or any guidelines to the use of their subpoena power. The Court quite agrees with the Utah Supreme Court in its statement given in the case of *In Re The Matter of Nelda Boyer*, 636 P2d 1085, wherein the Court states as follows:

"When State action impinges on fundamental rights, due process requires standards which clearly define the scope of permissible conduct so as to avoid unwarranted intrusion on those rights."

This Court has, therefore, concluded that the Act is too vague and does not give proper protection to individual citizens against violation of their constitutional right of due process and protection against self-incrimination and allows for an absolute abuse of power without the benefit of judicial review or control once the general subpoena power is granted and finds the Act is unconstitutional.

THEREFORE, the Court does hereby dismiss this
Criminal Investigative Proceeding and strikes the Investigative
Subpoena Power heretofore granted to the State by this Court.

DATED this 20th day of September, 1984.


BOYD BUNNELL, DISTRICT COURT

MAILING CERTIFICATE

I hereby certify that I mailed true and correct copies of the foregoing MEMORANDUM DECISION RELATIVE TO CONSTITUTIONALITY, by depositing the same in the United States Mail, postage prepaid, to the following:

Stanley H. Olsen, Esq.
David J. Schwendiman, Esq.
Suzanne M. Dallimore
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

Donald B. Holbrook, Esq.
JONES, WALDO, HOLBROOK &
McDONOUGH
1500 First Interstate Place
170 South Main Street
Salt Lake City, Utah 84101

Sumner J. Hatch, Esq.
HATCH & McCAUGHEY
72 East 400 South, Suite 300
Salt Lake City, Utah 84111

Max D. Wheeler, Esq.
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Suite 1100
P. O. Box 3000
Salt Lake City, Utah 84110

Stephen B. Nebeker, Esq.
John A. Adams, Esq.
RAY, QUINNEY & NEBEKER
400 Deseret Building
79 South Main Street
P.O. Box 3850
Salt Lake City, Utah 84110

John F. Clark, Esq.
SESSIONS & MOORE
400 First Federal Plaza
505 East 200 South
Salt Lake City, Utah 84102

F. Robert Reeder, Esq.
Francis M. Wikstrom, Esq.
Michael L. Larsen, Esq.
PARSONS, BEHLE & LATIMER
185 South State Street, Suite 700
P. O. Box 11898
Salt Lake City, Utah 84147

DATED this 20th day of September, 1984.

Secretary

SEVENTH JUDICIAL DISTRICT COURT
COUNTY OF EMERY, STATE OF UTAH

BOYD BUNNELL, Judge
John Greenig, Court Reporter

Date May 30, 1984
Case No. _____

TITLE (Parties Present)

COUNSEL (Counsel Present)

MINUTE ENTRY

Proceedings Before the Court - HEARING

This matter came before the Court on a Hearing. Counsel present for the Plaintiff was Suzanne Dallimore, Assistant Attorney General, Stan Olsen, and David Sundeman. Counsel present for the Defendant was Donald Holbrook, Jeffery Filburg, Stan Nebeker, and John Adams.

Discussion in this matter concerned three areas. 1) Targets being deposed need to be told if they are a target in the investigation so that they might be given time to seek counsel. 2) Targets should be advised of the nature and scope of which they are charged. 3) Subpoenas should not request documents that are not relevant to that particular case.

After much argument by counsel, the Court ruled: 1) Persons must be told he is target when he becomes such. 2) Target must be told nature and scope of investigation so that he may claim privileges. 3) Can not request documents unless it discloses information for that particular case. 4) Information gathered can not be used for civil discovery.

ADDENDUM IV

APPENDIX I

TRANSCRIPTS OF LEGISLATIVE DEBATES,
THIRD READING OF HOUSE BILL 121,
MARCH 10 & 11, 1971

Clerk: An act relating to the subpoena powers in aid of criminal investigations and prosecutions, authorizing the Attorney General, District Attorneys, County Attorneys to compel the attendance and testimony of witnesses; providing for the procedural requisites necessary for securing a subpoena, the court procedure to be followed in obtaining the testimony or evidence, and the procedures for securing an order requiring the person subpoenaed to testify or produce evidence; and establishing the power of the Attorney General to grant immunity from prosecution to witnesses in aid of criminal investigations and prosecutions.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF UTAH:

Section 1: It is declared, as a matter of legislative determination that there has been a marked increase in crime and criminal activity within this state, and that in order to protect the public health, safety, and morals, it is necessary to grant subpoena powers in aid of criminal investigations conducted by the Attorney General, District Attorneys, and County Attorneys, and to provide a method of keeping

information gained from investigations secret both to protect the innocent, and to prevent criminal suspects from having access to information prior to prosecution to the detriment of the proper enforcement of the criminal laws of this state, and to clarify the power of the Attorney General, District Attorneys, and County Attorneys to grant immunity from prosecution of witnesses whose testimony is essential to the proper conduct of an investigation of criminal activities and prosecution of crimes committed within this state

Mr. Speaker: Representative Fisher.

Representative Fisher: Speaker, I move that we suspend the rules and discontinue reading the remainder of the bill and consider it read and ready for consideration of the committee report.

Mr. Speaker: It has been moved and seconded that we dispense with the reading of the rest of the bill. Those in favor say "Aye".

Response: Aye

Mr. Speaker: Opposed, "no."

(No response)

Mr. Speaker: The motion is carried and we will ask the reading clerk to read the committee report.

Clerk: Mr. Speaker the committee on judiciary (inaudible) the House (inaudible) House Bill 121 by Mr. Fisher that all subpoena powers has carefully considered said bill and reports the same not favorably with the following amendments: Page 2, delete lines 27, 28 and 29; Page 2, line 31, delete the words "with the approval of the attorney general". That's page 2, line 31, delete the words "with the approval of the attorney general." Page 3, line 1, after the word "general", add these words: "district attorney or county attorney." Page 3, line 29, delete the word "faction" and add the word "act." Page 3, line 29, delete the words "the subpoena" and add the words "any other." Page 3, line 30, delete the word "of" and add "granted to." Page 3, line 30, after the word "and" add "or." Well, that's "/or"; they have "and/or". Page 3, line 31, delete "greeted" under Section 77-45-1. Respectfully represented by Representative Florence, Chairman.

_____: Mr. Speaker, I move the adoption of the committee report.

Mr. Speaker: It is been moved and seconded we adopt the committee report. Those in favor say "Aye."

Response: "Aye."

Mr. Speaker: Opposed.

(no response)

Mr. Speaker: Report is adopted. Representative Fisher.

Representative Fisher: Thank you Mr. Speaker and members of the House. The purpose of the bill is to permit the investigation of criminal activities and suspect crimes by those who are charged with investigation, be it the present district attorney, the county attorney, or the attorney general's office by allowing those offices to grant immunity to those giving testimony and allowing them to subpoena witnesses and to bring people before them for the purpose of obtaining information for the filing of criminal complaint. There are some subpoena powers at this time available to these people but they are based upon the filing of complaint and then the subpoena of witnesses and this action would take place prior to

the filing of complaints and would not necessarily come about in the filing of a criminal complaint or culminate in that activity. There is one suggested amendment that I think appropriate and that is on page 2, line 4. It is suggested that the subpoena power be limited to approval of the district court and so on line 4, after the word "right" "have the right", insert the word "upon application and approval of the district court for good cause shown."

Rep. Fisher: It would then read, if I may begin with section 2, "In any matter involving the investigation of a crime the existence of a crime or an criminal conspiracy or activity the attorney general, any district attorney or any county attorney shall have the right upon application and approval of the district court for good cause shown to subpoena witnesses, compel their attendance, etc." I realize that the amendment exceeds ten words and I move the waiver or the suspension of the rules for the submission of that amendment and the adoption of the amendment.

Mr. Speaker: It's been moved then that the rules be suspended and the bill go amended to insert the words "upon application and approval of the district court for good cause shown." Any discussion or plea (interruption by another voice):

Mr. Speaker, I'm against that amendment. The purpose of this is to give the investigative officer the opportunity to issue a subpoena in order that he might make his investigation complete. I appreciate the fact that there are some who would like to get the court involved in this thing, but I really feel that if we elect a county attorney, district attorney and attorney general who are competent and responsible individuals they will not abuse this power, but at the same time if it is going to be necessary for them to go to a court and obtain from the court permission to do this, to a very large extent this subpoena filed will be nullified and I think that we ought not do any more than we now have done with respect to this matter and I urge that you do not support this amendment.

Mr. Speaker: Representative Mecham, do you want to speak on the amendment?

Representative Mecham: No, I'd like to speak on the bill.

Mr. Speaker: Alright.

Another Voice: Question?

Mr. Speaker: Question . . . Representative Florence.

Representative Florence: Amendment, yes. I've had it expressed to me by a couple of county attorneys that they are in favor of this amendment not so much that they are in fear of abuse by their own office, but it is subject to possible abuse. In a sense, it involves a possible dragnet situation if we allowed complete discretion with the prosecuting attorney to subpoena any person that he may want even though that individual would have to be given immunity prior to testifying to any criminal implication. It is still something which delves upon an individual's personal freedom and right to privacy and there should be some limited area where a person could, in fact, have this reviewable by a judicial body based on probable cause so it cannot be a spurious subpoena to investigate into matters which totally are without the realm of some criminal activity.

Mr. Speaker: Representative Cottle.

Representative Cottle: I would like to concur. I'm in favor of this because I could see a possible abuse of this. In fact I feel that the subpoena law at the present time is

being abused and so I vote to just say that I would be in favor of it.

Mr. Speaker: Those in favor of the amendment say "Aye".

Response: "Aye".

Mr. Speaker: Opposed, "No".

Response: "No".

Mr. Speaker: The amendment is carried. The bill is before us as amended. Representative Fisher.

Representative Fisher: Members of the house I am not a grammarian, but the amendment . . . (interrupted)

Mr. Speaker: Yes, Representative Buckway.

Representative Buckway: (inaudible)

Mr. Speaker: Yes, that was part of the amendment; that was part of the motion, I should say, that the rule has

been suspended and the amendment be made; so the amendment is now in the bill. Continue Representative Fisher.

Representative Fisher: Thank you. On page 3, the committee added the words "and/or" and as I review those two words in years past in legal language they were used every other word and every other sentence and they are now more than archaic; they ought to be dead. The same with the word "said" the "said parties or the said contracts". I think that it is understood now that when the word "or" is used it applies to either or all of them together and I think the words "and/or" have no place in modern grammatic construction. I may stand corrected but that's my own feeling about it and I think in that correction on line 30 of line 3, we ought to strike the words "and" and the "slash" and leave the word "or" as it's been inserted.

Mr. Speaker: The amendment then is to take the "slash" and the "or" out.

Representative Fisher: No, the "slash" and the "and".

Mr. Speaker: The "slash" and the "and"?

Representative Fisher: Yes.

Mr. Speaker: Alright. Is there any debate on this motion? (No response.) Those in favor say "Aye".

Response: Aye

Mr. Speaker: Opposed, "No". The amendment is carried. Thank you. Is there any further debate on this bill? Representative Mecham?

Representative Mecham: I have some concern about this bill because I wonder if we're not really eating away at our freedoms by going this subpoena power. I guess the tax commission of the supreme power; does the governor have subpoena power? does the auditor? the treasurer? We ought to go a little slower with this and I don't say that I disfavor this bill, but ... seems to me that the more openly we give this tremendous power of subpoena to these other offices and, I just wonder if it's right. I don't know if it is or if it isn't, but I think that we ought to make sure that what we do here is right. I know that the attorney general and the district attorney and the county attorney ought to be able to investigate crime. They've been doing for it many, many years

but now we're going to tighten down a little and put somebody in jail, I suppose, if he perjures himself through an examination resulting from the issuance of a subpoena. And, I don't know. I have some hesitations about the whole bill because I think that maybe we are destroying just a little more of the right that we have as citizens and I think that somebody and I would like to be the proponent of this feat along the realms that I ask so that you see the other side of the picture. It just doesn't matter if giving this power away so lightly and anyway this power of subpoena has a lot of, just what the word says, it's power because you can be (handed) in; you can get what the lawyers call a subpoena duces tecum and they can require you to bring your automobile and all of your books and records and you can sit there before a court reporter and be examined and cross-examined and new actions will be found and I don't know about that. I would like to have somebody defend this bill a little more. It seems to me that, it appears that I wouldn't want to hamstring law enforcement because I'm for that too, but on the other hand, when you weigh these things and the balance, you see there is quite a problem here and anyone (inaudible) some your rights. What do you say about that, Representative Fisher?

Mr. Speaker: Representative Fisher?...

Representative Fisher: Mr. Speaker and members of House, subpoena powers are used for the purpose of obtaining evidence and testimony. I think I can only use the example that was given to me by the attorney general's office from where this bill comes. There is some indication that one of the small counties in northern, . . . or small cities in northern Davis County has had some difficulty with the creaming off of funds from construction contracts. And they've endeavored for a number of months to obtain evidence by testimony concerning that but, without the power to grant immunity, they've been unable to obtain that evidence. Also, without the opportunity to bring testimony prior to the filing of complaint by subpoena they are unable to obtain that evidence. With the subpoena power, they could obtain that evidence and if it showed what is believed is occurring, then the action could be brought and a complaint filed. If it does not come to fruition, then a lot of embarrassment as to one public official could be salvaged without going further. That was a simple example of part of the reason of this act and I don't believe it's an area where abuse will be taken.

Representative Mechem will remember that his Ombudsman Bill was declared unconstitutional because it gave no protection to the subpoena power that that committee obtained under the bill that we passed and, for that reason, the court said it was not a

constitutional act; at least in this instance. Now, we have required that these subpoenas be issued the same as would a search warrant of a person's home or search warrant of his car or his person.

Mr. Speaker: Representative Gardner.

Representative Gardner: I agree with Representative Mecham. Possibly this should take a little further study and, noting the hour, I moved that we adjourn until ten o'clock in the morning.

Response: (Aye)

Mr. Speaker: It's been moved and seconded that we adjourn until 10:00 a.m. tomorrow morning. Are there any announcements before I place that motion? Representative Buckway?

Representative Buckway: (Inaudible)

Speaker: Thank you.

Representative Gardner: Thank you. State, Federal and Military Affairs in Room 313 immediately.

Mr. Speaker: Representative Humphrey.

Representative Humphrey: Public Safety at five o'clock in Room 309.

Mr. Speaker: Representative Peterson.

Representative Peterson: Highways and Aeronautics will meet immediately after adjournment.

Representative Oberhansen: Political Subdivisions will meet at 5:00.

Representative Warren: Revenue and Taxation will meet at 5:00 in 303.

Mr. Speaker: Are there any further announcements? Those in favor of adjourning until tomorrow morning at 10:00 a.m. say "Aye".

Response: Aye.

Opposed, "No".

Response: No.

Motion is carried.

CONTINUATION OF DEBATE ON H.B. 121, MARCH, 11, 1971

House Bill 121

Mr. Speaker: I'm happy to have you students come and visit us. Representatives, at adjournment time yesterday, we were considering HB 121 and it's now unfinished business and we will revert to that measure. This is a measure on which there was some debate and there were people standing at adjournment time to debate it further. The chair recalls that there had been some amendments proposed and adopted. Representative Fisher?

Representative Fisher: HB-121 is the subpoena powers granting to the attorney general, the county attorneys and for two more years, presumably, the district attorneys an opportunity to obtain evidence by investigation without the filing of complaint for the determination of whether or not criminal complaints should be filed. We inserted an amendment on page 2 indicating that the subpoena should be issued pursuant to the authority and approval of the district court and I think with that amendment, we have a bill that is usable and of great benefit to law enforcement.

Mr. Speaker: Thank you.

Mr. Speaker: We'll be in a position here to vote in just a minute. [Long pause while inaudible discussion goes on]

Mr. Speaker: Representatives, for your information, President Barlow has requested that they be allowed to work on Senate bills today in view of the fact that the House apparently has passed more bills now than the Senate has and he wants time to catch up and since we only have two Senate bills, I told him that subject to the approval of the House that we would work on House bills today. Yes, Representative Cottle?

Representative Cottle: Is the measurement in that vein be in order now?

Mr. Speaker: Yes, it would be.

Cottle: I make the motion then that we work on House bills today rather than the Senate bills.

Mr. Speaker: Thank you. It's been moved and seconded that we work on House bills today. Is there any discussion? Those in favor say "Aye."

Response: Aye.

Opposed, "no."

Response: No.

Mr. Speaker: Motion is carried. Representative Warren?

Representative Warren: Mr. Speaker, members of the House, we have a lot of very important bills on the calendar. In the interest of time, I'm wondering if a motion wouldn't be in order to limit debate to not exceed 30 minutes today. I so move.

Mr. Speaker: It's been moved and seconded that on measures today that debate be limited to 30 minutes. Is there any discussion on this proposal? Representative Redd?

Representative Redd: I would like to amend that motion that we limit each participant or speaker to a 2-1/2 minute time limit.

Mr. Speaker: You would limit 30 minutes per bill but 2-1/2 minutes for each speaker?

Representative Redd: Right.

Mr. Speaker: Is there any debate on that amendment?
Representative Carling.

Representative Carling: I think that in some cases, if you've got an important bill and it's going to take some explanation, such 2-1/2 minutes might be too short. I think the 1/2 hour limit is probably a good limit. And let that be divided as the speaker would see fit between the two parties, the two sides, if there is two sides. And I haven't got a bill up there and I don't intend to talk. (Ha. Ha. Ha.)

Mr. Speaker: Representative Woodmurphy.

Representative Woodmurphy: I think we're kind of categorizing all these bills, aren't we? We're all saying that they are all going to be equally important or equally unimportant. However, you will . . . there may be some bills to which we should give further attention. And some to which we should give less. Might we consider a degree of flexibility

here? In our last session, we had motion "A" as I recall. I don't know quite how to delineate this situation here, . . .

Mr. Speaker: Well, I could observe this that in the event that an important bill came up and the House decided that more than 30 minutes was necessary, I could always at the end of 30 minutes vote to continue the debate.

Representative Woodmurphy: Okay, thank you.

Mr. Speaker: It's been moved and seconded then that debate be limited to 30 minutes on each bill and that no speaker take longer than 2-1/2 minutes and I would assume that this would mean the sponsor, however, could have 2-1/2 minutes at the start and 2-1/2 minutes at the end. Those in favor of the motion Representative Starr, did you want to speak?

Representative Starr: No.

Mr. Speaker: Those in favor say "Aye."

Response: "Aye."

Opposed, "No."

Response: "No."

Mr. Speaker: The motion is carried. Now Representatives, we are in a position to vote on HB-121 and voting is open and will each member record his vote. [PAUSE]

Mr. Speaker: Stevens have you voted? Thank you. Rep. Anderson is absent. Rep. Atkin, Gardner, Sowards, Rep. Mathisen, Rep. Nolder; Okay, all right, etc. Rep. Hansen, Clark.

Mr. Speaker: It appears to the Speaker that everyone present has voted. The voting will be closed and HB-121 is passed by a vote of 42 to 17 and will be referred to the Senate for its further action. Representative Dimitrich?

0329h

EMH/DW

APPENDIX III

Transcripts of Legislative Debates, House Bill Number 32,
January 19, 20, and February 1, 1980, State of Utah

House Debate on House Bill Number 32, January 1980

Speaker: All in favor say Aye

Response: Aye.

Speaker: Those opposed say no. (No response)

Speaker: Motion carries. Go ahead.

Representative: Thank you Mr. Speaker. Ladies and gentlemen of the house . . .

Representative: Just a minute, that has not been read in. Read it in please.

Representative: House Bill No. 32 Utah Code of Criminal Procedure by Representative Roger A. Livingston. Be it enacted by the Legislature of the State of Utah . . .

Speaker: Representative Livingston.

Representative Livingston: Thank you Mr. Speaker.

Ladies and gentlemen, if I could introduce House Bill 32 to you by relaying as accurate as I can a telephone conversation I had this morning. The Chief of Police of Provo City, whom I had never met before, called and asked for the status of House Bill 32 and literally pleaded with me for the sake of his local law enforcement that House Bill 32 be passed and his comment is not far different from those that I've related to you before from county attorneys, from judges and others throughout the state who have said, "the Bill's not perfect, it's not the way that I would write it if I had the total authorship but the need to have this occur is so great and we are so hamstrung right now with the confusion regarding the rules of the game, the rules of procedure that we need this Bill passed." As he expressed to me a great deal of frustration as others have who work in this area why it has taken so many years and years and years to have this remodification take place. House Bill 32 is a lengthy bill and I apologize to you for the length of that particularly in the budget session. It's a cumbersome thing to have before you. Let me point out that a third of what is before you is already in the Utah Code. It's simply reprinting and reenacting it. Why are we reprinting it? Well to put it in

proper sequence, to have it sequestially work hand in hand with the substantive criminal code that Representative White earlier alluded to. Some six or seven years ago this completely repealed and reenacted a new penal code that defined what the crimes are in the State of Utah. At that time there should have been a new Code of Criminal Procedure enacted that would work hand and glove with that as the old procedure worked hand in hand with the old law and that's never taken place. The net result that there is a tremendous amount of ambiguity, of confusion, of difficulty in administering the entire criminal and penal process. I mentioned that a third of this bill is simply reenactment of the prior law. Additionally, a substantial portion of this is placing into the Code what is now the law relating to procedure as a result of both Utah Supreme Court case and the United States Supreme Court case law and those are already the law of the State of Utah but because it's not set forth clearly and succinctly and in a proper sequence it makes it very very confusing for people who work in this area. So House Bill 32 is the result of a Herculean effort over many years by many people in trving to pull together a desperately needed task and that is the entire recompilation or remodification of all the rules of criminal procedure. Because of the length of the bill and the logistical problems of having them prepared and typed and the

versions of them, there were some amendments made last year by this body to this bill as well as amendments made by the Interim Committee which were not included in the bill as it was presented and introduced into this body and accordingly there were amendments made by the Standing Committee and those amendments appear in the pink sheets in your book.

Additionally, Mr. Speaker, I do have a page and a half of amendments that I would like to move at this time. I believe they've all . . . they've been passed out to all of the Representatives. It's on a page and a half of loose sheets. If any of you don't have this, would you raise your hand and I'll make sure a messenger brings one to you. Mr. Speaker, would I be in order to move all of the amendments at one time? I have . . . if it would be in order, I'd like to just refer to these amendments and then move them in one motion.

Speaker: All right, go ahead.

Representative Livingston: The first amendment refer to . . . add some language that this body overwhelmingly suggested on a separate bill sponsored by Representative Selleneit which requires a defendant upon certain conditions to pay part of the cost of a criminal defense. And this is the amendment regarding page 44, line 12. The next section

provides some protection to a defendant regarding night search warrants and this is kind of a controversial thing and that, generally, prosecutors don't want it, defense attorneys do want it. Those that do want the amendments and this motion is made and these amendments are submitted in the spirit of compromise and, being conciliatory, I think it's the feeling of the county attorneys that the need for the bill is so great that they would rather include this and make it a little more defense oriented for the . . . just so that we can get the bill passed at this time. The final amendment on the first page regards protection to newspaper, news media and others who have expressed some concern about the ability of law enforcement people to search newsrooms and other areas that have constitutionally protected rights and, so, that amendment requires that if a subpoena would obtain the information, then a search warrant would not be issued and it provides the specific protection for news sources and confidentially protected relationships like that and I believe this is the amendment that Representative Fox inquired about earlier. There is a deletion of the no-knock provision on page 66, line 13 and then the final amendment is to administrative search warrant provision and this is one that Representative Selleneit called to our attention and it places the requirement for probable cause that a crime has been committed before an

administrative search warrant could issue. Without that amendment, there is some fear of OSHA or some other administrative agency perhaps overstepping their bounds with respect to search warrants. So these amendments that I'm moving at this time, I hope would alleviate any of the prior controversy which you may have heard concerning these bills. It's a good faith effort by the county attorneys, associations and others to make this bill as acceptable to as many groups as possible and I would move all of these amendments as a group, Mr. Speaker.

Speaker: Would someone . . . We need those amendments in the circle. It's very important we have them and correctly stated or it won't get into the journal that way and you're in trouble. Does everyone have those amendments? They're on a white sheet. They should be on a pink sheet but we'll overlook that. Now to the Livingston amendments. I see no lights on Representative Livingston, we'll call for the question on your amendments. All in favor say Aye.

Response: Aye.

Speaker: Those opposed say no. (No response)

Speaker: Motion carried. Now the bill as amended.
To the bill. Representative Fox.

Representative Fox: I'm a bit concerned about the size of this bill that we have before us in this very busy budget session. It's 161 pages long. There are some very subtle but very significant changes that are being made in our criminal code. I'm concerned that we, as busy legislators, haven't had the time to read all 161 pages and understand the changes. I'm still trying to find out what all of the amendments did to the present bill before us. If you've read the Salt Lake City Tribune for Monday and Tuesday, you'll notice that they editorialized both days against this bill and I think that they did that for substantive reasons. I think there's no question that we need a revision in our criminal code, but I believe that that revision should be done at a time when we as legislators have enough time to be able to take a solid look at what these changes are going to mean. Criminal Code revisions should be put over until the next regular session. If we act too hastily, we're going to be impacting the state for years to come until these changes are finally worked out. I think there's no real great rush to move into this. The Salt Lake Tribune talked about two aspects, one was use immunity and the other was the search warrants. They

pointed out that they believed that these provisions did not need to be changed. I'm not sure what those amendments did and I believe that most of the legislatures in here don't know what those amendments did. I think we've got plenty of time to talk about this bill and I think we should continue it in the next session. I would urge you to vote against it.

Speaker: Thank you. Representative Selleneit.

Representative Selleneit: Mr. Speaker, I rise to support the bill. I had many concerns on the bill too and have spent a great deal of time and I would say that 95% of my concerns have been addressed in the amendments as made. I think it is needed and I would encourage your support.

Speaker: Thank you. Representative Livingston, seeing no further lights, do you want to quickly sum it?

Representative Livingston: Thank you, Mr. Speaker. Again, Representatives, this is a bill that represents a monumental task in bringing it to you. I assure you that if I had the total prerogative of authorship, there would be amendments that I would want and I am sure that there are many who would have that. But we need the remodification that needs

to be done at this time and in subsequent sessions there could be fine tuning to it; but, as county attorneys and police officials and others throughout the entire state, both prosecution and defense attorneys, saying we need this, this has to be done and I urge your favorable support. Thank you.

Speaker: Thank you. Voting is now open. There is a chair that all present have voted. Voting will now be closed. HB 32 as amended has received 47 affirmative votes, 22 negative votes. Pass this house and will be sent to the Senate for their further consideration. Representative Bishop.

House Debate of H.B. 32, February 1, 1984
(after Senate Consideration)

Speaker: Utah Code of Criminal Procedure by Representative Roger A. Livingston. The bill is returned here for further house action. Respectfully, Sophia C. Buckmiller, secretary to the Senate.

Speaker: Senate Bill 43 will be signed as 15. 32, is that the next one you read? Representative Livingston.

Representative Livingston: Mr. Speaker, I would (inaudible) that we concur with the Senate amendments regarding House Bill 32.

Speaker: You've heard the motion that we concur with the Senate amendments on . . . Bill 32 . . .

Representative: Does that require a roll call vote Mr. Speaker?

Speaker: . . . Yes that requires a roll call vote. First we'll take your motion to place it and then we'll go to the roll call. All in favor say Aye.

Response: Aye.

Speaker: Those opposed say no. (No response)

Speaker: Motion carried We'll now have to vote again on that bill. Let's quickly vote. All present have voted on this. Voting will now be closed. House Bill 32 received 64 affirmative, zero negative votes. Passed this House.

Senate Debate on House Bill 32, January 1980

President: House Bill 32, Utah Code of Criminal Procedure by Representative Roger A. Livingston. This is a long title so . . .

Senator: Mr. President, I move that under suspension of the rules we suspend reading of the entire title on this bill.

President: All in favor of suspending the rules in reading this short title say Aye.

Response: Aye.

President: Opposed. (No response) So be it.

President: The Senators I'm sure will remember that the long length of time that we spent last session on these two bills. They are the same bills, House Bill 32 and House Bill 31, are the same bills that we started in the Senate last time. You'll recall that we passed them here in this body and they they died in the final crunch over in the House, partly because they were late getting in. They're such big bills that

it took our legal services a long time to finish the drafting of it, but partly because a few people over in the House had some questions about parts of it. And so its now had another year of study. Let me just fill in the background. You'll recall that in 1963 the Legislature, through their interim committees process organized an interim study with regard to our Criminal Code which ultimately resulted in, eight years later, in 1973, in a complete revision of the Criminal Code of the State of Utah. It was a massive project. Simultaneously, and in relation to that, there was also a review by Interim Committee of the Criminal Procedures Code. Part of the problem was that our Criminal Procedure Laws for the State of Utah essentially all of them dated back to the original statehood in 1898. Those procedures had been here and there through patchwork legislation modified over the year but, substantially have remained the same. We've updated and modernized our Criminal Code but, we need to modernize and conform to that Criminal Code, our Criminal Procedures Code and also the rules that the Court use in applying the Code of Criminal Procedure. Now, further, I'll refresh your memory that the study on these particular code amendments began as an interim study group nine years ago under Judge Croft and members of our interim legislative study who spent four years redrafting all of our Code of Criminal Procedures. After that was done a follow up

committee was organized under the direction of Judge Crockett in the Supreme Court who then took work and went back paragraph by paragraph and sentence by sentence reviewing, revising, modifying and updating it. That group spent four years on it. I was a member of that committee and so were another legislature and they had sessions in the areas of criminal defense and criminal prosecution working on that. As a result of that, the bill was brought in last session. We made some amendments and there are some that will need to be put in here from the floor to conform with the same bill that we has last session, but, essentially what I'm saying is we've had nine years of (inaudible) a detailed study of this criminal procedure code by experts and by members of the legislature to come in with recommendations. It has to do with many areas of the code which is used by the courts to determine or to confirm procedures in criminal prosecutions. It is a very broad thing. Its many pages long, I have sent out to the desks of the Senators about a twenty page summary earlier today so we would have an opportunity to refresh your memories on it and essentially what it does is. Bring current and update our statutes of criminal procedure, it repeals all of the existing procedural law and replaces them with this broad and extensive change much of which, by the way, merely reenacts Code sections the way they presently are but in those areas where we needed

to conform it to the criminal code or to update it, it makes the changes. So, I would be glad to respond to questions if there are questions but essentially its the same bill that we passed last session.

Senator Asay: Mr. President.

President: Senator Asay.

Senator Asay: As a member of the Joint Judiciary Committee, we studied this for some months last, during the interim, and I tried to make a real conscientious study of the bill because of its great length and complexity, I've just . . . didn't have the understanding to (inaudible) and, so, I called those who would know more about it. Both legal and in the legal profession and otherwise and I feel good about the bill. I recognize that it isn't perfect and I see the House has done some (inaudible) on it work done on it but I can vote yes on this bill as well as the Code of Criminal Procedure.

President: That's good. Next Mr. _____.

Senator: Mr. President, I too was a member of that committee and heard the testimony and some of the concerns that were voiced. Senator Jackson indicated that it has been a total of nine years being studied by experts, studying all these nine years to refine it and bring it to its current (inaudible) and yet the House needed to amend it and I understand there are other amendments being proposed. I'm concerned (about) the length of this bill, the complexity of it. We have ought not to be considering it in this budget session when we have such limited time. If its been the nine years in the process, one more year will not make or break it; so, I fail to see the urgency of this and maybe Senator Jeffs can point out some emergencies I'm not aware of.

President: Senator Jeffs.

Senator Jeffs: I think I can. I guess it depends on your philosophy as to what's needed. I personally feel that we need more strength in the unit of our criminal prosecution system and its urgent that we tighten it down. In many areas, that's precisely what this does and while we go on having prosecutions that are ineffectual because our statute's unclear and having perhaps defense counsel getting defendants free on technicalities, the purpose of this is to tighten it down so we

don't have so many problems with technical errors in criminal prosecution. I think thats urgent.

President: Are there further questions?

Senator: Senator Farley, I think has some . . .

President: Senator Farley.

Senator Farley: I expect to get this vote now. Mr. President, I have an amendment. I'm beginning to feel like a broken record on this amendment. Both of you who were here in 1977 will remember that we successfully amended this criminal code revision the same way that we also successfully amended it last year and here we are again. What we're doing is really not an amendment, it is (inaudible) the immunities (inaudible) as our (inaudible) rather than replacing it with use immunity. For those of you who are not familiar with what it is, I've had passed out an editorial from the Tribune, Tuesday morning's Tribune of this week which explains relatively (inaudible) immunity so what I would like to ask you, and by the way I'm submitting this amendment which you have on a buff sheet with the concurrence of the author of the bill, concurrence of Roger Livingston, Representative Roger Livingston, to this amendment

and I would like now to ask you if you would consider on page 62 (inaudible) that you find on the buff sheet. I think it probably shouldn't be necessary for me to read this entire sheet since this is the same amendment that you approved last year and the same amendment that you approved three years ago, Four years ago, '77, '79 and '80.

Senator Jeffs: Mr. President.

President: Senator Jeffs.

Senator Jeffs: Responding to that, let me just comment that what this amendment would do would be to make a new law essentially the same as the present law and the new code section didn't have a recommendation for a modification. I agreed with Senator Farley last time that it should be amended this way if we want to make a determination at a later date as to whether or not use immunity should or should not be granted in Utah, I think that should not be done in this bill and so I support her amendment.

President: Thank you Senator Jeffs.

President: You've heard the motion to amend is there further discussion? (Inaudible) called for on Senator Farley's amendment on the buff sheet. Any discussion? All in favor of the amendment say Aye.

Response: Aye.

President: Opposed. (No response) The motion carries.

Senator: I have a question, Senator Jeffs. On page 12 where they're talking about impeachment proceedings, it looks like the House amended that. Do you know what the logic is there?

Senator Jeffs: There's something about (inaudible) of the House or apparently prosecute the proceedings before this body I don't feel that it hurts or helps, I just . . .

Senator: No, I have not received a copy of it, but, I listened to Representative Livingston, the chief sponsor, he said it was some of them over there preferred this different language and he saw no objection to it.

Senator: I don't either but I was curious as to the logic of it.

Senator Jeffs: Mr. President.

President: Senator Jeffs.

Senator Jeffs: Yes, our State Highway Patrol has contacted me in connection with an amendment that apparently has been left out in terms of a typo and I've had that passed out. Also, Senator Snow has an amendment that if somebody can bring him in, I think he wants to make. While he's coming, let me explain to you the nature of this amendment. It's been handed out to you and it is on page 25. Having to do with the fresh pursuit and the basic problem is that in the typing of the buff sheet, we gave the right to out of state police officers to come racing into Utah under fresh pursuit, but, we left out the language that allows our own officers to do it and you can imagine that our officers were a little concerned with that, so, that I offer this amendment on page 25, line 31 after the words "proceedings", add the new section 77-9-3 to put back into this code, the right that they presently have to not pursue.

President: You've heard the motion by Senator Jeffs.
Hot isn't it?

Senator: Yes.

President: All in favor of Senator Jeffs' amendment to House Bill 32 on page 25, line 31. All in favor of that amendment say Aye.

Response: Aye.

President: Opposed no. (No response) Motion carried.

President: Now, Senator Snow.

Senator Snow: Let me direct your attention to the short page. I would propose on page 3, line 6 after the word "power" delete the lines "nullify the Commissioner of Public Safety as to such establishment" and in lieu thereof, insert the words "make application to the Commissioner of Public Safety and be certified by the Commissioner as (inaudible) the rules to regulations promulgated by the Department of Public Safety." Now let me indicate to you what we're dealing with here. We're looking at the category 1, police officer status

and where the same is given to institution of higher education and there appears to be considerable concern about that action. I think most of it is not well understood, however. But in order to satisfy some of those concerns for what may be intemperate action or ill-prepared security services, we would reverse the situation here, rather than simply having them notify the Commissioner that they have established such security service that they seek permission and qualify for that status through the Commissioner of Public Safety. It would again require, of course, the Commissioner of Public Safety to promulgate the necessary rules and regulations for making that determination.

President: Are there questions to Senator Snow?

Senator: Mr. President, I might just comment that the Governor ask us to add this additional language on that section.

President: Any further discussion? Now call for the motion to vote on Senator Snow's amendment on page 3, line 3. All those for his amendment say Aye.

Response: Aye.

President: Opposed. (No response) No. Motion carries.

Senator: He's always out of order. (Laughter)

President: Senator Snow, do you have another one.

Senator Snow: Yes, let me address all of them together and indicate to you what the purpose of these amendments are. It so happens that there was a Senate Bill that sought to accomplish essentially the same thing here. Senate Bill 37, which I ask to be tabled in committee because of this provision here in HB 32, which was covering the same section. Currently now, there are commitments made to the Utah State Hospital and the charges for that commitment under the present law are to be born by the several counties. It seems that once those commitments are made that there is little interest on the part of the court for lifting that commitment even though the individual has completed the diagnosis or indeed the treatment and this remains to be a cost to be born by the hospital and, so, these amendments that you find on the buff colored page are intended to correct that problem and they're aimed at reducing the budgetary burdens that are placed upon the state hospital because of that and providing the procedure

whereby the hospital could return to the court and notify the court of the fashion of completion of its evaluation. Essentially, that what is accomplished here by the several amendments.

Senator Renstrom: Mr. President.

President: Senator Renstrom.

Senator Renstrom: I'm just a little confused Senator Snow. Are we talking about people here that have been committed by the court as a result of mental hearings as well as people that have been committed to the court who we've found not guilty by virtue of insanity?

Senator Snow: We're talking about individuals who have appeared before the court and, before the court does anything, they've remanded them, if you will, whatever term is appropriate for evaluation, to the Utah State Hospital.

Senator Renstrom: Well, if I understand what your trying to do, it would reduce the budget of the State Hospital but increase the budget of the counties.

Senator Snow: But, the law now really says that the county must assume that burden and that's clear under the statutes. I might indicate, however, that some counties unilaterally have decided that they don't want to do that but that is the law and I can cite that to you quite quickly.

Senator Renstrom: I guess I'm still trying to find out what the gist of your amendment is. If its going to reduce the budget of at the Utah Hospital?

Senator Snow: It will reduce the budget. Its going to reduce, I think, strains on the hospital because they're not now getting the dedicated credit that they ought to be collecting from the counties as required by the law because there seems to be some ambiguity but, secondly, once those commitments, I think that's the proper term to use, but be patient with me if it isn't, to the hospital, if you're sent there for thirty days and hospital can do nothing about it until the Judge lifts the order, even after thirty days and we're trying to avoid that so that the Director of the hospital can go back to the court and notify the court and . . .

Senator Renstrom: That's always the truth.

Senator Snow: That's correct.

Senator Renstrom: All right.

President: Further questions on Senator Snow's amendment?

Senator: I would move the adoption of the amendments on the buff colored sheet.

President: To the Motion of Senator Snow's , 1-5, page 35 and anything on page 40. All in favor of his amendment say Aye.

Response: Aye.

President: Opposed no. (No response) Motion carries. Do we have other amendments?

Senator: If there are no further questions or discussions, Mr. President, I believe question on the bill.

CERTIFICATE OF SERVICE

I hereby certify that on this the 22nd day of February, 1985, I caused to be hand-delivered, ^{sent} a true and correct copy ^{is} of the foregoing Brief, to the following parties of record:

David L. Wilkinson
Paul M. Warner
Robert N. Parrish
UTAH STATE ATTORNEY GENERAL
Attorneys for Appellant
236 State Capitol Building
Salt Lake City, Utah 84101

Sumner J. Hatch, Esq.
HATCH & McCAUGHEY
72 East 400 South, Suite 300
Salt Lake City, Utah 84111

Max D. Wheeler, Esq.
Rodney R. Parker, Esq.
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Respondents
Thompson, Conklin, Ziemski,
Bowman, Mike Thompson &
Associates, Guardex,
Alarmex, and Vanguard, Inc.
10 Exchange Place, Suite 1100
P. O. Box 3000
Salt Lake City, Utah 84110

Stephen B. Nebeker, Esq.
John A. Adams, Esq.
RAY, QUINNEY & NEBEKER
400 Deseret Building
79 South Main Street
P. O. Box 3850
Salt Lake City, Utah 84110

F. Robert Reeder, Esq.
Francis M. Wikstrom, Esq.
Michael L. Larsen, Esq.
PARSONS, BEHLE & LATIMER
185 South State Street, Suite 700
P. O. Box 11898
Salt Lake City, Utah 84147

Will D. Dahl