

1992

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

Utah Supreme Court

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VET NO. 20268 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 RESPONDENT UTAH POWER & LIGHT COMPANY

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

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Clerk, Supreme Court, Utah

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LIST OF ALL PARTIES

The appellant is the State of Utah, by and through its Attorney General, David L. Wilkinson. The respondents include Utah Power & Light Company, Orrin T. Colby, Jr., Karl J. Stott and Norman Maxfield. In addition to these respondents, additional parties were present at the September 12, 1984 hearing before Judge Bunnell. Those additional parties were Emery Mining Corporation, represented by F. Robert Reeder and Francis M. Wikstrom; Michael C. Thompson, Bruce A. Conklin and Michael Ziemski, represented by Max D. Wheeler; and L. Brent Fletcher, represented by Sumner J. Hatch.

The Attorney General apparently takes the position that Emery Mining Corporation is a proper party on appeal but that Messrs. Thompson, Conklin, Ziemski and Fletcher are not. See Appellant's Brief at i. In the preliminary hearings before this Court, counsel for Emery Mining Corporation and counsel for the individuals, Thompson, Conklin, Ziemski and Fletcher have all been present and have participated in the proceedings, including the filing of motions.

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether Utah Code Ann. §§ 77-22-1 through 3 (1953) (the "Mini-Grand Jury Act") violates either the Constitution of Utah or the Constitution of the United States because it permits the compulsory processes of the State to be employed without sufficient judicial supervision and without adequate procedural safeguards.

2. Whether proceedings conducted by prosecutors under the Mini-Grand Jury Act are accusatory in nature and therefore require greater due process procedural safeguards than are provided under the Act.

3. Whether the Mini-Grand Jury Act violates the Constitution of Utah because it fails to require prosecutors to disclose to witnesses the nature and scope of the criminal investigation pursuant to which they have been subpoenaed.

4. Whether the Mini-Grand Jury Act violates the Constitution of Utah because it fails to require prosecutors to give target warnings and to advise witnesses of their right to assert the privilege against self-incrimination.

5. Respondent Utah Power and Light Company incorporates by this reference the additional issues presented on appeal that are set forth in the briefs of Respondents Colby, Stott, Maxfield and of Respondent Emery Mining Corporation.

STATEMENT OF THE CASE

This is an appeal from a September 20, 1984 final order of the Seventh Judicial District Court, the Honorable Boyd Bunnell, in which he declared the so-called Mini-Grand Jury Act, Utah Code Ann. §§ 77-22-1 through 3 (1953), unconstitutional and withdrew judicial authorization for the Utah Attorney General to continue the criminal investigation previously approved by the court.

STATEMENT OF FACTS

Utah Power and Light Company is in basic agreement with the Attorney General's statement of the facts except for two points that warrant clarification. See Appellant's Brief at 5-9. The Attorney General correctly states that Messrs. Darcie H. White, W. Jack Eliason, Scott H. Christensen and David Clement appeared pursuant to subpoena in April, 1984, with counsel and were deposed. Mr. Richard J. Riche also was deposed in April, 1984. Each of these men is or at one time has been employed by Utah Power and Light Company.

Mr. Nebeker, who accompanied each of these men to their depositions, specifically and repeatedly inquired of the Assistant Attorneys General conducting the depositions whether these men were subjects or targets of the criminal investigation. See Depo. of Darcie H. White at 4-6 (Apr. 3, 1984); Depo. of W. Jack Eliason at 3-4 (Apr. 3, 1984); Depo. of Scott H. Christensen at 4 (Apr. 13, 1984); Depo. of Richard J. Riche at 3-5 (Apr. 17, 1984) (The cited portions of these depositions are included in the Addendum.)

Furthermore, Mr. Nebeker explicitly stated his reasons for wanting to know whether any of the witnesses were targets of the investigation. At the outset of Mr. White's deposition, Mr. Nebeker stated in part: "I think you should at this time, be required to tell him whether or not he is the subject of the investigation because I think certain questions that may be put to him may require him to take the Fifth Amendment if he deems it necessary. I think he's entitled to know that." Depo. of Darcie H. White at 5 (Apr. 3, 1984). Two weeks later during the deposition of Mr. Riche, Mr. Nebeker specifically referred to the procedural safeguards that exist in grand jury proceedings and took the position that the same safeguards should be extended to Mr. Riche at that deposition. Depo. of Richard J. Riche at 4-5 (Apr. 17, 1984).

At the conclusion of the May 30, 1984 hearing before Judge Bunnell, Mr. Nebeker was directed by the court to prepare an order setting forth the court's rulings and then circulate it for five days among the other counsel for their objections. Transcript of the May 30, 1984 Hearing at 72-73. That procedure was followed. Because of differences among counsel as to the wording of Judge Bunnell's ruling on the constitutionality issue, two versions of an order were prepared. No consensus was reached. Finally, to comply with the court's earlier direction Mr. Nebeker submitted both versions of the order to Judge Bunnell along with a clear explanation that the various counsel had been unable to agree upon a form for the order. See Record at 361-367.

SUMMARY OF ARGUMENT

The so-called Mini-Grand Jury Act suffers from several deep-rooted constitutional deficiencies, some of which are addressed by the other respondents in their briefs. The essence of UP&L's position is that the Mini-Grand Jury Act does not contain critical procedural safeguards that are mandated by the Constitution of the United States, the Constitution of Utah and related state law.

UP&L's analysis is straightforward: The Supreme Court precedent which controls the types and extent of procedural protections required in this case focuses on whether the body at issue performs an investigatory or accusatory function. The Attorney General and county attorneys, as the State's own prosecutors of criminal offenses, clearly fulfill an accusatory role under the Act. Accordingly, greater procedural protections must be afforded to persons subpoenaed under the Act than are extended to those who are compelled to give evidence before purely investigative or fact-finding bodies.

Notwithstanding the accusatory function filled by prosecutors under the Act, it is actually the case that the statutes and rules of procedure governing administrative subpoenas tend to guarantee the crucial procedural safeguards that are missing from the Mini-Grand Jury Act.

One of the most basic safeguards missing from the Act is any provision for ongoing judicial supervision of the subpoena power wielded by prosecutors once the criminal investigation has started. The Attorney General argues that "inherent" in the Act is

the opportunity to move to quash a subpoena and that such a procedure allegedly provides an effective pre-compliance remedy against prosecutorial abuse. However, the Act does not state expressly that any such right exists and ordinary citizens cannot be presumed to know that such a right may be inherent in our judicial system. Since the Act does not require prosecutors to disclose to a witness the nature and scope of the investigation, a person subpoenaed under the Act has no basis for determining whether the demands of the subpoena are appropriate and cannot make an informed decision about exercising his privilege against self-incrimination.

It is beyond dispute that the right to assert the privilege against self-incrimination applies to criminal investigations. Utah statutory law, which codifies this Court's interpretation of the Utah Constitution, requires that target warnings and notice of the privilege against self-incrimination be given in grand jury proceedings. A refusal to extend the same protections to persons compelled to give evidence in proceedings under the Mini-Grand Jury Act violates both the equal protection and due process provisions of the Utah Constitution.

Finally, the Attorney General should be precluded from using any information or evidence gathered as part of this criminal investigation in any civil proceeding. Any exception to that prohibition must come as a result of express judicial approval after a showing of particularized need by the Attorney General. No such showing has been made in this case.

ARGUMENT

I. THE MINI-GRAND JURY ACT IS UNCONSTITUTIONAL BECAUSE IT NEITHER ESTABLISHES ADEQUATE PROCEDURAL SAFEGUARDS TO PROTECT INDIVIDUAL RIGHTS NOR PROVIDES FOR JUDICIAL SUPERVISION OF OTHERWISE UNBRIDLED PROSECUTORIAL DISCRETION.

Judge Bunnell in his September 20, 1984 Memorandum Decision Relative to Constitutionality summarized in precise terms his reasons for declaring Utah Code Ann. §§ 77-22-1 through 3 (1953)(the "Mini-Grand Jury Act"¹ or the "Act") unconstitutional:

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.

Id. at 4. Judge Bunnell's observation that the Act "allows for an absolute abuse of power without the benefit of judicial review or control" accurately portrays the unbridled prosecutorial discretion given to prosecutors under the Act.

Section 77-22-2(1) authorizes the attorney general or any county attorney to subpoena witnesses and require the production of books, papers, documents, recordings and any other items that

¹This Court in KUTV, Inc. v. Conder, 635 P.2d 412, 413 (Utah 1981), referred to Utah Code Ann. §§ 77-22-1 through 3 as the "Mini-Grand Jury Act". The Attorney General frequently refers to the statutes as the "Subpoena Powers Act".

constitute evidence or that "may be relevant to the investigation in the judgment of the attorney general or county attorney." The plain language of the Act leaves solely to the judgment of the prosecutor the determination of what is "relevant" to his investigation. The Act imposes no standards or guidelines to limit his exercise of judgment. The Act does not expressly authorize anyone to second guess his judgment. In short, the prosecutor possesses unfettered discretion to employ the powerful enforcement machinery of the State any way he wants.

In an attempt to down play the likelihood of arbitrary or capricious conduct, the Attorney General challenges the district court's ruling by claiming that that the opportunity to make a motion to quash prior to compliance with a subpoena provides an effective remedy against prosecutorial abuse. Appellant's Brief at 9-10, 13-17. The Attorney General's extensive treatment of this point suggests that his reliance on the purported opportunity for an effective pre-compliance challenge is the crux of his position. Moreover, the Attorney General concedes that "[i]f an investigative subpoena is issued or executed in a manner that does not allow re-compliance [sic] challenge, it might run afoul of the Fourth Amendment." Appellant's Brief at 18 (citation omitted). In light of that concession, the real issue is whether the manner in which the Attorney General is allowed to issue subpoenas under the Act is tantamount to no opportunity for a pre-compliance challenge.

Utah Power and Light Company ("UP&L") agrees with the general proposition that administrative subpoena statutes that provide an effective pre-compliance remedy, which UP&L believes necessarily includes clear notice of the right for judicial intervention, pass constitutional muster. However, UP&L sharply differs with the Attorney General's characterization of the Mini-Grand Jury Act as such a statute. The Mini-Grand Jury Act does not provide any effective pre-compliance remedy. The subpoenas issued by the Attorney General under the Act in this case gave the misleading impression that they had been individually approved by the district court and threatened contempt of Court sanctions for failure to comply.² Furthermore, the subpoenas gave no clue as to the purpose or scope of the investigation. When the language of the Act fails to even inform citizens of the right to judicially challenge a subpoena and when the actions of those issuing the subpoenas have the effect of further obfuscating that right, it is difficult to accept the argument that a technical right of pre-compliance challenge effectively protects those fundamental privacy interests protected by the Fourth Amendment and its counterpart in the Constitution of Utah.³

²For example, the May 16, 1984 subpoena issued to the Custodian of the Records, Utah Power and Light Company, stated in part: "This Subpoena Duces Tecum is authorized by order of the District Court. Disobedience to this order is punishable by contempt of Court." See Addendum.

³Article I, section 14 of the Constitution of Utah states:

The right of the people to be secure in
their persons, houses, papers and effects

The Attorney General spent so much time in his brief discussing requirements for subpoenas issued by administrative agencies that he never critically focused on the determinative question of what the Utah Mini-Grand Jury Act actually provides - or fails to provide. A careful examination of the Act shows that it fails to provide any effective pre-compliance remedy for at least four reasons: (1) the Act does not contain any procedural safeguards other than the right to counsel and an award of immunity if a witness is compelled to give testimony against himself, (2) the Act does not give notice of any "inherent" right to challenge the subpoena, (3) proceedings under the Act are accusatory, not investigatory in nature, and (4) the Act fails to establish even the key procedural safeguards contained in purely investigative subpoena statutes or regulations.

A. The Mini-Grand Jury Act Lacks Essential Procedural Safeguards.

Apart from a right to counsel and an award of immunity if a subpoenaed person is compelled by a court to give incriminating

³Continued:

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 persons or thing to be seized.

It also should be noted that the Fourth Amendment has been held applicable to corporations. See Oklahoma Press Publishing Company v. Walling, 327 U.S. 186, 205-06 & n.35, 90 L. Ed 2d 614, 628 & n.35, 66 S. Ct. 494 (1946) and cases cited therein.

testimony against himself, the Mini-Grand Jury Act does not provide any procedural safeguards to the subpoenaed person. In fact, the Act expressly states that "[t]he 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." Utah Code Ann. § 77-22-1(2). The Act fails to require prosecutors (1) to inform witnesses of the nature and scope of the investigation, (2) to give target warnings, and (3) to advise witnesses of their right to assert the privilege against self-incrimination.⁴

B. The Mini-Grand Jury Act Provides No Notice Of The Availability Of A Pre-Compliance Remedy For Challenging The Validity Or Reasonableness Of A Subpoena.

Nowhere in the text of the Mini-Grand Jury Act is there any statement that a person served with a subpoena pursuant to the Act has a right to move the court to quash or otherwise challenge the validity or reasonableness of the subpoena. The Attorney General cites no authority establishing that such a right exists but merely asserts that "[t]he opportunity to challenge a subpoena is inherent in Utah's Act." Appellant's Brief at 19; see id. at 10, 17, 26, 45. Although Judge Bunnell did entertain motions to

⁴If this Court were to conclude, as UP&L contends infra at 12-19, that proceedings under the Act are actually accusatory rather than purely investigative in nature, then the Court should consider whether due process requires the additional procedural safeguards of the right to present evidence and the right to confront and cross-examine witnesses.

quash subpoenas in this proceeding, nothing in the language of the Act suggests that he was under any obligation to do so.⁵ The complete absence of any provision in the Act clearly stating that such a right exists underscores the deficiency of the statute. A person who (a) cannot afford to retain legal counsel, (b) does not believe that he may need legal counsel because the subpoena on its face does not appear to implicate him, or (c) does not think that retaining legal counsel would be useful since the subpoena purports to already have been issued (and therefore by implication reviewed) by order of the district court, should not be expected to know about either the existence or efficacy of some right "inherent" in the Act that he can exercise.

⁵Although UP&L certainly does not maintain that the district court was without power to quash the subpoenas issued pursuant to the criminal investigation it approved, UP&L does contend that an express grant of that power is neither found in the Act nor in the Utah Rules of Criminal Procedure. Rule 14(b) of the Utah Rules of Criminal Procedure states in part that "[t]he court may quash or modify the subpoena if compliance would be unreasonable." However, Rule 14(a) which enumerates certain types of subpoenas does not appear to encompass subpoenas issued by the Attorney General under the Mini-Grand Jury Act unless it be by implication. Rule 14(a) states in part:

A subpoena to require the attendance of a witness or interpreter before [1] a court, [2] magistrate, or [3] grand jury, in connection with a criminal investigation or prosecution may be issued by the magistrate with whom the information is filed, the county attorney on his own initiative or upon the direction of the grand jury, or the court in which an information or indictment is to be tried. . . .

Utah Code Ann. § 77-35-14.

The Attorney General's argument that the Mini-Grand Jury Act provides an effective pre-compliance remedy is predicated on two erroneous assumptions: First, the Attorney General equates investigative proceedings under the Mini-Grand Jury Act with those conducted by federal administrative agencies, legislative committees, or even grand juries. See discussion regarding grand juries in Section III, infra at 36-43. Secondly, the Attorney General proceeds on the mistaken assumption that the two procedural safeguards contained in the Mini-Grand Jury Act are somehow equivalent to the multiple procedural safeguards embodied in the statutes or rules of procedure governing federal administrative agencies, legislative committees or grand juries.

C. Prosecutors' Actions Under The Mini-Grand Jury Act Are Accusatory, Rather Than Purely Investigative Or Fact-Finding In Nature.

UP&L disputes the Attorney General's apparent suggestion that this case is governed by Oklahoma Press Publishing Company v. Walling, 327 U.S. 186, 90 L. Ed. 614, 66 S. Ct. 494 (1946). Walling is of some relevance, but UP&L maintains that the controlling cases are Hannah v. Larche, 363 U.S. 420, 4 L. Ed. 2d 1307, 80 S. Ct. 1502 (1960) and Jenkins v. McKeithen, 395 U.S. 411, 23 L. Ed. 2d 404, 89 St. Ct. 1843 (1969). The Supreme Court in Walling established standards to govern administrative subpoenas which are not the same as those issued by a prosecutor under the Act. In Hannah and Jenkins, the Court distinguished between accusatory and

purely investigative bodies and made clear that due process requires greater procedural safeguards in accusatory proceedings.

1. Hannah v. Larche--Establishment of the Accusatory/Investigatory Distinction.

In Hannah, the Federal Commission on Civil Rights sought review of two lower court judgments that invalidated certain rules of procedure adopted by the Commission pursuant to which it was holding hearings in Louisiana to investigate alleged Black voting deprivations. The voting registrars and private citizens who brought suit to challenge the Commission's hearings argued that the due process clause of the Fourteenth Amendment required under the circumstances of that case that (1) they be informed of the specific charges being investigated, (2) the identity of the complainants be revealed, and (3) they be entitled to cross-examine the complainants and other witnesses.

In determining what procedural rights the subjects of the investigation were to be afforded, the Supreme Court began its analysis by explaining that the requirements of due process frequently vary according to the type of proceeding involved. The Court then outlined the duties to be performed by the Commission which consisted of investigating written, sworn allegations of discrimination; studying and collecting information on legal developments relating to equal protection of the laws; and reporting to the President and Congress on its activities, findings and recommendations. Id., 363 U.S. at 440-41, 4 L. Ed. 2d at

1320. Regarding the nature of the Commission's function, the Court concluded:

As i[s] apparent from this brief sketch of the statutory duties imposed upon the Commission, its function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.

Id., 363 U.S. at 441, 4 L. Ed. 2d at 1320-21 (emphasis added).

Having concluded that the Commission's function was purely an investigative and fact-finding one, the Court elaborated upon the difficulties that would arise if the more complex procedural safeguards traditionally associated with the judicial process were infused into the investigative process. The Court explained in some detail that the Commission's procedures were not foreign to the procedures used in other forms of governmental investigation, e.g., legislative committees, administrative regulatory agencies (specific reference was made to the Federal Trade Commission and the Securities and Exchange Commission), presidential commissions and grand juries. See id., 363 U.S. at 444-449, 4 L. Ed. 2d at 1322-25. The Court clearly noted that it was not suggesting that

the investigative functions performed by legislative committees, grand juries and executive agencies were identical in all respects.⁶

2. Jenkins v. McKeithen--Clarification of the Accusatory Function.

In Hannah, the decisive distinction was whether the investigative activities of the Commission affected legal rights or not. Further clarification of that distinction came in Jenkins, supra, when an investigative commission was determined to be different from other administrative agencies and executive commissions because it served an accusatory function. In Jenkins, a labor union member brought an action for declaratory and injunctive relief challenging the constitutionality of a Louisiana statute and the actions of state officials thereunder. The statute

⁶The Court stated on this point:

Although we do not suggest that the grand jury and the congressional investigating committee are identical in all respects to the Civil Rights Commission,³⁰ we mention them, in addition to the executive agencies and commissions created by Congress, to show that the rules of this Commission are not alien to those which have historically governed the procedure of investigations conducted by agencies in the three major branches of our Government.

Hannah, supra, 363 U.S. at 449 & n.30, 4 L. Ed. 2d at 1325 & n.30. Citing to Walling and other cases, the Court did observe in footnote 30 that courts had "likened" investigative agencies of the executive branch to a grand jury. For a comparison of the Utah grand jury statutes and the Mini-Grand Jury Act, see Section III, infra at 36-43.

in question created a Labor-Management Commission of Inquiry that investigated, only upon referral from the Governor, alleged criminal violations in the field of labor-management relations. The statute authorized the Commission to hold public hearings to determine whether probable cause existed to believe that criminal violations had occurred, to make public findings, and to recommend to appropriate authorities that criminal prosecutions be commenced. Nothing in the statute provided for the preparation of findings or reports to be submitted to the Governor or the legislature for the purpose of legislative action.

The Louisiana statute did grant certain procedural rights to witnesses. Those persons subpoenaed to testify were given "notice of the general subject matter of the investigation." Id., 395 U.S. 15 417, 23 L. Ed. 2d at 414. In addition to the right to counsel, a witness was entitled to have his own counsel both question him as to any relevant matter and submit proposed questions to the Commission to ask other witnesses. Furthermore, the Commission had the right to meet in executive session when it appeared that "testimony to be given 'may tend to degrade, defame or incriminate any person.'" Id. 395 U.S. at 418, 23 L. Ed. 2d at 414. In executive session the person who might be degraded, defamed or incriminated was entitled to appear and be heard, and to call a reasonable number of witnesses on his behalf.

The Supreme Court specifically noted that the Louisiana statute had been drafted with the Court's decision in Hannah in

mind. This meant that the Louisiana Legislature had attempted to characterize the Commission as an investigatory body so that the more rigorous procedural safeguards applicable to accusatory bodies would not be required in the Commission's proceedings. However, the Court concluded that its earlier decision in Hannah was not controlling in Jenkins because of substantial factual differences between the two cases.

Whereas the Court in Hannah found the function of the Commission on Civil Rights to be a purely legislative and fact-finding one, it found that the function of the Commission of Inquiry in Jenkins was limited to criminal law violations. The Court observed that "everything in the Act points to the fact that it is concerned only with exposing violations of criminal laws by specific individuals." Jenkins, supra, 395 U.S. at 427, 423 L. Ed. 2d at 420. The Court in a plurality opinion⁷ concluded that due process at least required the rights of confrontation, cross-examination and presentation of evidence, but left to the lower court in the first instance the responsibility to determine the extent of the procedural safeguards to be employed. Id., 395 U.S. at 430, 23 L. Ed. 2d at 421-22.

⁷In addition to the three justices who joined in the plurality opinion, Justices Black and Douglas, who had dissented in Hannah, only concurred in the result in Jenkins because the opinion did not go far enough. Jenkins, supra, 395 U.S. at 432-33, 23 L. Ed. 2d at 423. Both Justices Black and Douglas believed that the commissions' proceedings in both Hannah and Jenkins clearly violated due process.

3. The Hannah/McKeithen Analysis Pinpoints the Glaring Due Process Deficiencies of the Mini-Grand Jury Act.

The accusatory function performed by prosecutors under the Mini-Grand Jury Act is even more clear cut than that of the Commission of Inquiry in Jenkins. Whereas the Commission of Inquiry commenced proceedings only upon referral from the Governor and thereafter made recommendations to others that prosecutions be instituted, prosecutors under the Mini-Grand Jury Act determine themselves who will be investigated and actually conduct the prosecutions. There is no provision in the Act stating that the Attorney General or county attorneys should make findings to be presented to the Legislature, the Governor or other executive officers. The Attorney General or county attorneys do not need to make findings and then turn them over to some disinterested party or prosecuting entity to determine whether a criminal prosecution should be instituted because they are the prosecutors. Theirs is solely an accusatory function. They are specifically trained for that role. They use the Act as a vehicle for the specific purpose of gathering evidence to support the criminal charges they intend to instigate. If they can gather sufficient evidence to justify commencing a criminal prosecution, the criminal prosecution will be started.

As demonstrated by the plain language of the Mini-Grand Jury Act itself in section 77-22-2(1), and as conceded by the Attorney General, "[t]he only limitation existing in this statute is that crime or malfeasance in office be investigated."

Appellant's Brief at 21. The declaration in section 77-22-1 states that the Act's purpose in part is "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." (Emphasis added). In view of that explicit language declaring the purposes of the Act, it is wholly specious to suggest that proceedings under the Act are of no different character than those purely investigative activities of legislative committees, administrative agencies or presidential commissions.

Notwithstanding the fact that prosecutors under the Act are much more certainly "accusers" than the Commission of Inquiry was, the Louisiana statute provided more procedural protections to witnesses than the Mini-Grand Jury Act does. The Louisiana statute (1) required notice to be given of the general subject matter of the investigation, (2) permitted counsel to ask questions of their own clients and to submit proposed questions to be asked of other witnesses, and (3) under certain circumstances, allowed persons under investigation to be heard and to call witnesses on their behalf. The Mini-Grand Jury Act, in contrast, only permits a witness to be accompanied by counsel.

D. The Mini-Grand Jury Act Fails To Even Guarantee The Key Procedural Safeguards Provided In Statutes And Regulations Governing Purely Investigative Subpoenas.

Assuming for purposes of argument only that investigative proceedings under the Mini-Grand Jury Act were of the same

character as those conducted by administrative agencies or legislative committees, then it stands to reason that the witnesses or subjects of criminal investigations being subpoenaed pursuant to the Act are entitled to the same procedural safeguards that are extended to witnesses or subjects of administrative investigations. However, significant disparities exist between the procedural safeguards afforded to witnesses subpoenaed pursuant to the Mini-Grand Jury Act and those subpoenaed pursuant to federal or some state administrative statutes. The Mini-Grand Jury Act does not even provide all the essential procedural safeguards that are present in many statutes and regulations governing purely investigative or administrative subpoenas such as notice of the nature and scope of the investigation, the opportunity to challenge in court the validity and reasonableness of a subpoena, and the right to assert the privilege against self-incrimination.

Careful analysis shows that Walling, supra, which the Attorney General cites frequently as authority for his arguments, actually undercuts the Attorney General's position that the Act offers adequate judicial supervision. Essential to the Court's decision in Walling was the fact that judicial involvement was expressly provided for by statute before any adverse consequences affected individual rights. In Walling, the Court reviewed judgments from the Third and Tenth Circuits in which those courts either affirmed or directed the respective district courts to enter orders requiring two publishing companies to comply with subpoenas

duces tecum issued by the Wage Hour Administrator in the course of an investigation into the applicability and violations of the Fair Labor Standards Act. In both instances, the Supreme Court affirmed the judgments of the courts of appeals that the publishing companies must comply with the subpoenas duces tecum. To understand why the decision and reasoning of the Court in Walling undermine the Attorney General's position, the subpoena power provisions of the Fair Labor Standards Act must be reviewed.

Section 9 of the Fair Labor Standards Act (29 U.S.C. § 209) makes sections 9 and 10 (15 U.S.C. §§ 49, 50) of the Federal Trade Commission Act, relating to the attendance of witnesses and production of books, papers and documents, applicable to investigations and hearings provided for under the Fair Labor Standards Act. The crucial point here is that section 9 of the Federal Trade Commission Act specifically required the commission to turn to a federal district court for enforcement of any subpoena. See Walling, supra, 317 U.S. at 200 n.24, 90 L. Ed. at 624 n.24. An enforcement action begun in federal district court involved both notice and hearing and therefore assured the right to any subpoenaed party to raise its objections to the subpoena. It was this statutorily prescribed judicial involvement before compliance with the subpoena that preserved the constitutionality of the procedure. The Court's opinion in Walling repeatedly emphasized that the compliance order was proper because the courts, not the

Administrator, had reviewed the situation and found no abuse or lack of authority in the issuance of the subpoenas.*

The Supreme Court in Hannah, supra, observed that in the investigative (not adjudicative) proceedings held by the Federal Trade Commission, persons summoned to appear are entitled under the Commission's rules to general notice of the purpose and scope of the investigation. Id., 363 U.S. at 446, 4 L. Ed. 2d at 1323.

*The following excerpts from the Court's opinion in Walling, supra, confirm that active judicial supervision of the subpoena requests had occurred:

[1] No officer or other person has sought to enter petitioner's premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to order of court authorized by law and made after adequate opportunity to present objections, which in fact were made. Nor has any objection been taken to the breadth of the subpoena or to any other specific defect which would invalidate them.

Id., 327 U.S. at 195, 90 L. Ed. at 622 (footnote omitted) (emphasis added).

[2] . . . [R]equiring them to submit their pertinent records for the Administrator's inspection under every judicial safeguard, after and only after an order of court made pursuant to and in exact compliance with authority granted by Congress.

Id., 327 U.S. at 196, 90 L. Ed. at 622 (emphasis added).

[3] The Administrator is authorized to enter and inspect, but the Act makes his right to do so subject in all cases to judicial supervision. Persons from whom he seeks relevant information are not required to submit to his demand, if in any respect it is unreasonable or overreaches the authority Congress has given. To it they may make "appropriate defense" surrounded by every safeguard of judicial restraint.

Id., 327 U.S. at 217, 90 L. Ed. at 634 (emphasis added).

Since Walling was decided, new legislation has been enacted specifically dealing with civil investigative demands initiated by the Federal Trade Commission. 15 U.S.C. § 57b-1(c)(1) does not require court approval before issuance of such investigative demands, but subsection (c)(2) states: "Each civil investigative demand shall state the nature of the conduct constituting the alleged violation which is under investigation and the provisions of law applicable to such violation."

Besides providing for the right to counsel (subsection (c)(12)(D)(i)) and an express right to assert the privilege against self-incrimination or any other privilege (subsection (c)(12)(D)(ii)), the statute allows a person upon whom a civil investigative demand has been served by a commission investigator to file with the commission a petition for an order modifying or setting aside the demand (subsection (f)). Finally, the commission is required to petition an appropriate federal district court for enforcement of its investigative demands if a person fails to comply or otherwise challenges the demand (subsection (e)).

The subpoena provision of the Federal Administrative Procedure Act, which applies to most federal administrative agencies, expressly notifies interested parties of their right to challenge a subpoena:

Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the

court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

5 U.S.C. § 555(d) (emphasis added). Although the statute does not expressly state the type of notice, if any, that must be given to subpoenaed witnesses, the rules of practice followed by many of the agencies notify the witnesses as to the nature and scope of the investigation. See, e.g., Appendix to the Opinion of the Court in Hannah v. Larche, 363 U.S. 420, 454-485, 4 L. Ed. 2d 1307, 1328-52, 80 S. Ct. 1502 (1960).

The Attorney General cites the case of In re Investigation No. 2 of Governor's Organized Crime Prevention Commission, 577 P.2d 414 (N.M. 1978), to support the proposition that investigatory subpoenas issued by him are to be equated with administrative subpoenas.⁹ A brief comparison of the provisions of the Mini-Grand Jury Act with those of the New Mexico Organized Crime Act, as amended, § 39-1-1 et seq., N.M.S.A. 1953 (Supp. 1975 & Inter. Supp. 1976-77), clearly shows that even if subpoenas issued by the Attorney General were to be considered the same as

⁹It is noteworthy that the Supreme Court of New Mexico in determining that subpoenas issued by the Governor's Organized Crime Prevention Commission were administrative subpoenas, first determined that the Commission was an investigatory rather than an accusatory body. Id. at 415. Thus, it used the same analysis employed by the Supreme Court in Hannah and Jenkins, supra.

administrative subpoenas, the Mini-Grand Jury Act does not provide nearly as many procedural safeguards as the New Mexico statute does. The following excerpts from the New Mexico Supreme Court's opinion identifies the significant differences:

Under the Act the Legislature provided that the Commission must petition the district court to obtain a subpoena. The district court must determine whether the investigation is within the power of the Commission, whether the subpoena is definite enough and whether the material sought is reasonably relevant. What is reasonably relevant depends on the nature and purpose of the investigation and relevancy cannot be determined in the absence of a stated purpose. Once the purpose is ascertained it must be shown that the material sought has a logical relation to the purpose of the investigation. . . .

After a subpoena is issued the individual or institution upon whom it is served has an opportunity to challenge it. The subpoenas issued under the Act ask only for voluntary compliance. Under § 39-9-4 D, N.M.S.A. 1953 (Inter. Supp. 1976-77) of the Act the Commission is authorized to go to any district court to seek enforcement of the subpoena. The Legislature must have contemplated that the subpoenaed person would be allowed to show at that hearing why the subpoena should not be enforced.

Id. at 416 (emphasis added).

The very authority cited by the Attorney General to buttress his arguments shows the inconsistency of his position. In contrast, UP&L's position is sound: Criminal investigations conducted by the Attorney General under the Act are accusatory rather than investigatory in nature. However, even if this Court should determine that the Attorney General's exercise of subpoena powers pursuant to the Act is investigatory in nature and therefore

comparable to administrative subpoenas, then witnesses are entitled to at least the same procedural safeguards that are extended to witnesses served with administrative subpoenas.

E. The Opportunity For A Pre-Compliance Challenge To A Subpoena Is Meaningless Unless Witnesses Are Notified Of The Nature And Scope Of The Investigation.

Without at least the guarantee that witnesses subpoenaed by the Attorney General will be informed as to the nature and scope of the investigation, the alleged opportunity for a pre-compliance challenge to the subpoena is meaningless. Even assuming for the moment that Walling were controlling here, which is the assumption upon which the Attorney General proceeds, the Supreme Court's opinion states that the scope of the inquiry must be known to determine the reasonableness of a subpoena:

[T]he requirement of reasonableness . . . comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.

Id., 327 U.S. at 209, 90 L. Ed. at 630 (footnote omitted).

Inasmuch as the Attorney General maintains that the "burden of persuasion" as to both the relevancy and adequate specification requirements are upon the party challenging the subpoena, see Appellant's Brief at 24, a party subpoenaed by the Attorney General under the Act is in the precarious situation of bearing the burden of having to show that a subpoena is irrelevant or excessive

without knowing the nature, purposes or scope of the criminal investigation as originally approved by the district court.

Neither relevance nor reasonableness can be determined in a vacuum. A party can make a reasoned and intelligent decision whether to comply with or challenge a subpoena duces tecum only if it knows the nature and scope of the investigation pursuant to which the subpoena was issued. For example, Judge Bunnell pointed out that "[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 dealing in this area." Memorandum Decision at 2.

Judge Bunnell alluded to the statutory requirement that the Attorney General or a county attorney apply to and obtain the approval of a district court, for good cause shown, to conduct a criminal investigation. Utah Code Ann. § 77-22-1(1). The Mini-Grand Jury Act also authorizes the district court upon application of the prosecutor to issue a secrecy order which was done here. Id. at § 77-22-2(3). Since the good cause showing is the prosecutor's declaration to the court of the justification(s) for allowing the criminal investigation and delineates the nature and scope of the investigation, a subpoenaed party has no basis for determining the appropriateness of the subpoena duces tecum unless it is informed as to the nature and scope of the investigation. Because the Act does not require the prosecutor to disclose to the

witness the nature and scope of the investigation, the party's only hope of discovering the nature and scope of the investigation is if it is granted by the court an opportunity to review the good cause showing. However, the Act makes no provision for such an examination.

Judge Bunnell, in a dialogue with one of the Assistant Attorneys General about the operation of his order that the Attorney General could not use the criminal investigation to venture into civil matters or to explore matters beyond the good cause showing, expressed during the May 30, 1984 hearing his uncertainty and frustration over the procedure that should be followed to permit a party to challenge a subpoena:

But I think the nature and scope would be those general terms that you've used in your good cause order.

There's one point in this statute that bothers me a little bit, you see, and that is when does an accused get the opportunity to challenge what I've just ordered. Because he's never allowed to see the good cause order or its content unless you come in, I guess, and make application to make it known to him. I don't know. You see, on search and seizure, all that's available: the affidavit, whether the [sic] officer saw the guy do it and swears to it, and the Courts review it to see whether he's right. This thing--it troubles me a little that we don't allow anybody to see that that's being investigated. So he never knows. . . .

Transcript of May 30, 1984 Hearing before Judge Bunnell at 46-47.

Judge Bunnell assumed that an in camera inspection of the original good cause showing might be available. He reasoned by

analogy to search and seizure procedures that such a safeguard should be available. An Assistant Attorney General, without citing any provision in the Act or other authority, then suggested that in camera inspection was clearly available. Id. at 47-48. Judge Bunnell simply concluded: "That could be possible. If they want to see it, perhaps they could petition and maybe we'll let you see it, Mr. Nebeker and Mr. Holbrook." Id. at 48. If the very judges who are called upon to interpret the Act and protect the rights of individuals cannot ascertain with confidence the manner in which the Act is to operate and cannot define the procedural safeguards to which a person is entitled under the Act, then it defies reason and makes a mockery of due process to claim that such a statute provides the ordinary citizen who is unschooled in the law with an effective pre-compliance opportunity to challenge a subpoena.

Perhaps the most insidious aspect of the Attorney General's argument that a motion to quash is a sufficient remedy against a denial of constitutional rights is that such a system would place upon individual citizens the economic and legal burden of policing the state's use of its power. Our constitutional system was designed to insure just the opposite result. The vast resources and compulsive powers of government may be levelled against individuals only in carefully defined ways. They may not be unleashed without regard for individual rights until held accountable by citizens who wade through the judicial process to obtain relief. The Constitution prohibits the government from

doing certain things to citizens and dictates that other things be done only within carefully drawn limits. The only effective pre-compliance safeguard against abuses by prosecutors is the Constitution itself, not a motion to quash.

II. UTAH LAW REQUIRES THAT WITNESSES SUBPOENAED TO TESTIFY IN A CRIMINAL INVESTIGATION BE ADVISED OF THEIR RIGHT AGAINST SELF-INCRIMINATION AND BE INFORMED IF THEY ARE OR WHEN THEY BECOME TARGETS.

Article I, Section 12 of the Utah Constitution establishes the right against self-incrimination and states in pertinent part:

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, . . . The accused shall not be compelled to give evidence against himself;

(Emphasis added). Whereas the Fifth Amendment to the United States Constitution guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself," the Utah Constitution provides that an accused "shall not be compelled to give evidence against himself." (Emphasis added). The distinction is significant because the Utah constitutional privilege is broader in its protection than the Fifth Amendment in that it does not require an accused to give "evidence" (implies either testimonial or tangible evidence) against himself whereas the Fifth Amendment only protects a person from having to be a "witness" (implies testimonial evidence alone) against himself. See State v.

McCumber, 622 P.2d 353, 358 (Utah 1980); Hansen v. Owens, 619 P.2d 315, 316-17 (Utah 1980). Thus, under the Utah Constitution one cannot be compelled to produce books, records, documents or papers that would incriminate himself.

A. The Privilege Against Compelled Self-Incrimination Applies To Criminal Investigations.

In detailing the breadth of the privilege against self-incrimination, the United States Supreme Court stated in In re Gault, 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967):

The privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory . . . it protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used.

Id. 387 U.S. at 47-48, 18 L. Ed. 2d 527, 557 (emphasis in the original) quoting Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 94, 12 L. Ed. 2d 678, 704, 84 S. Ct. 1594 (1964) (White, J., concurring). That same principle has since been reaffirmed in Maness v. Meyers, 419 U.S. 449, 464, 42 L. Ed. 2d 574, 587, 95 S. Ct. 584 (1975), and in Kastigar v. United States, 406 U.S. 441, 444, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972). The Utah Supreme Court has stated that the Utah constitutional privilege against compelled self-incrimination applies to grand jury proceedings. State v. Ruggeri, 19 Utah 2d 216, 429 P.2d 969, 973 (1967). The Utah Legislature later codified that rule by enacting Utah Code Ann. § 77-11-3.

B. Under Utah Law A Subpoenaed Person Has The Right To Be Informed That He Is A Target Of A Criminal Investigation.

The respective courts of last resort have interpreted both the Constitution of the United States and the Constitution of Utah to extend the right against self-incrimination to criminal investigations. As an added protection, under Utah law, the subject of a criminal investigation when compelled to give evidence against himself must be advised that he is a target of the investigation. The rationale underlying the target warning requirement is that unless a potential defendant is advised that charges might be brought against him, he is not in the position to make an informed and intelligent decision about exercising his right to assert the privilege against self-incrimination.

The leading Utah Supreme Court case on the duty of prosecutors to disclose to witnesses who are compelled to testify that they are targets of a criminal investigation is State v. Ruggeri, 19 Utah 2d 216, 429 P.2d 969 (1967). In Ruggeri, the State of Utah sought an extraordinary writ in the nature of mandamus to compel a state district court judge to reverse his holding and admit into evidence testimony that he had ruled to be inadmissible. Judge Ruggeri, in a matter before him, had granted defendant's motion to suppress testimony given before a grand jury.

C. W. Brady, a county commissioner, had been criticized publicly for paying more in rentals on a bit paving machine than it would have cost to buy a new machine. Brady was summoned to appear

before a grand jury, at which time he requested the assistance of counsel. Utah law at that time precluded the presence of counsel in the grand jury room. Brady did not know at the time that he was the target of the grand jury investigation. He was subsequently indicted, along with others, on a criminal conspiracy charge and also was indicted for perjury.

In refusing to issue the requested extraordinary writ, the Utah Supreme Court stated in a plurality opinion:

However, one 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.

Whether the examination needed to be terminated when Brady requested counsel need not be decided, for we think it was improper to call him in the first place when the purpose was to secure testimony from his own lips to be used against him in a trial which would result from the proposed indictment.

Id. at 973 (emphasis added). Although the quoted language appears in what is styled as a plurality opinion consisting of two justices, an additional justice who concurred in the result stated in his concurring opinion that he agreed with the plurality in their reasoning on this point.¹⁰

¹⁰Justice Ellett authored the plurality opinion in which Justice Tuckett concurred. Then-Chief Justice Crockett authored a specially concurring

The two justices concurring specially echoed the statements in the plurality opinion to the effect that Brady should have been informed that he was a suspect in the criminal investigation. Then-Chief Justice Crockett wrote in his special concurrence:

But the important point in my mind is that the district attorney and the grand jury knew of the possible implications of crime and the questions being asked, while Brady did not. Insofar as it is shown in this record, the questioning of Mr. Brady appears to have been part of a sort of general inquiry to discover possible misdoings in county government. But there was no indication to him that he was suspected of any crime, what any such suspected crime may have been, nor what connection he or the testimony elicited might have with it. He therefore would not have any basis for knowing how the statements he was making might relate to any particular crime, nor whether they might implicate him therein.

¹⁰Continued:

opinion in which Justice Callister concurred. Of particular importance is the opinion of Justice Henroid that is designated as "concurring in the result." However, the actual language of Justice Henroid's opinion reveals that he concurred in more than the result. Justice Henroid stated at the outset of his opinion:

I concur in the result, and in the reasoning of Mr. Justice Ellett, except that I think those cases cited anent extraordinary writs do not apply in this particular case.

State v. Ruggeri, 19 Utah 2d 216, 429 P.2d 969, 977 (1967) (emphasis added). The critical language in Justice Ellett's opinion that bears on the issues in this case does not relate at all to extraordinary writs. Hence, Justice Henroid's statement that he concurred also in the reasoning of Justice Ellett, except as it related to extraordinary writs, indicates that those portions of Justice Ellett's opinion not relating to extraordinary writs command a majority of the Court and are not just a plurality position.

To avoid being misunderstood, I interpose this observation: I have no doubt that if a person testifying before a grand jury falsifies concerning a material matter he can be convicted of perjury. But the proceedings should be carried on properly and with due regard for the constitutional rights of the witness. If his rights of non-incrimination and to have counsel are to be meaningful, they should be made available in a practical way when they are needed. The witness should be made sufficiently aware of the situation he faces that he is able to make an informed and deliberate choice whether to waive or to claim those rights. In that regard it seems to me that a sense of fairness and justice on the part of the district attorney and/or the grand jury would suggest that when the witness is or becomes the target of an investigation for a particular crime he should be so advised and afforded an opportunity to invoke his constitutional rights if he so desires. Cf. Escobedo v. State of Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed 2d 977. There is no indication that this was done here.

Id. at 976 (emphasis added). Regardless of any differences in the underlying reasoning, there was agreement among all five justices of the Utah Supreme Court on at least the single point that a subpoenaed witness should be informed if he is or becomes the target of a criminal investigation.

Some years after the Utah Supreme Court's decision in Ruggeri, the prevailing rule of law on target warnings was codified by the Utah Legislature in 1980. Utah Code Ann. § 77-11-3(2), relating to the rights of witnesses summoned to appear before grand juries, states in relevant part:

(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. . . .

(Emphasis added). Thus, the necessity of giving target warnings in grand jury proceedings and, UP&L believes, in any criminal investigative proceeding, is clearly established in Utah.

III. THE SAME PROCEDURAL PROTECTIONS ACCORDED TO PERSONS SUBPOENAED TO TESTIFY BEFORE A GRAND JURY MUST BE EXTENDED TO PERSONS SUBPOENAED TO TESTIFY UNDER THE MINI-GRAND JURY ACT.

The Attorney General in advancing his argument that subpoenas issued under the Mini-Grand Jury Act should be equated with administrative subpoenas seizes upon language from Oklahoma Press Publishing Company v. Walling, 327 U.S. 186, 90 L. Ed. 614, 66 S. Ct. 494 (1946), suggesting that grand jury proceedings are comparable to administrative investigatory proceedings. UP&L does not dispute the proposition that many administrative agencies perform an investigative function that in some respects is similar to that of the grand jury, see id., 327 U.S. at 216, 90 L. Ed. at 634, but maintains that the grand jury definitely fulfills an accusatory function that is aided by its investigatory activities.

The United States Supreme Court in Jenkins v. McKeithen, 395 U.S. 411, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969), discussed the due process procedural safeguards that should be available before bodies that perform an accusatory function. After reaffirming that whether a particular procedural right obtains in a specific proceeding depends upon a number of factors, the Court

focused on the special role of the grand jury that is constitutionally sanctioned:

We do not mean to say that this same analysis applies to every body which has an accusatory function. The grand jury, for example, need not provide all the procedural guarantees alleged by appellant to be applicable to the Commission. As this Court noted in *Hannah*, "the grand jury merely investigates and reports. It does not try." Moreover, "[t]he functions of that institution and its constitutional prerogatives are rooted in long centuries of Anglo-American history." Finally the grand jury is designed to interpose an independent body of citizens between the accused and the prosecuting attorney and the court. Investigative bodies such as the Commission have no claim to specific constitutional sanction.

Id., 395 U.S. at 430-31, 23 L. Ed. 2d at 422 (citations omitted).

The Attorney General's willingness to draw parallels between grand jury proceedings and proceedings under the Mini-Grand Jury Act dissipates when the discussion turns to the critical procedural safeguards of advising witnesses of the privilege against self-incrimination and giving target warnings. It already has been discussed that Utah Code Ann. § 77-11-3(2) codifies the Ruggeri rule by requiring that "[i]f 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." Whereas those safeguards are expressly provided for in grand jury proceedings, they are conspicuously absent from the provisions of the Mini-Grand Jury Act.

A. The Equal Protection Provision Of The Constitution Of Utah Requires That An Accused Receive The Same Procedural Protections

Regardless Of The Manner In Which The Prosecution
Is Commenced.

UP&L contends that under Utah constitutional law the same procedural safeguards extended to those suspected of criminal offenses that are investigated by a grand jury must be granted those investigated pursuant to the Mini-Grand Jury Act. A brief comparison of prosecution by indictment vis-a-vis prosecution by information reveals why an accused under either procedure should be entitled to a parity of protections. First, unlike the federal Constitution, the Constitution of Utah specifically provides for alternative initial tracks for prosecution. Article I, section 13 of the Constitution of Utah states:

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be prescribed by the Legislature.

Moreover, the Utah Rules of Criminal Procedure place prosecution by indictment or information on a parity with each other.¹¹

¹¹Rule 4 of the Utah Rules of Criminal Procedure, relating to the prosecution of public offenses, states in part:

(a) Unless otherwise provided, all offenses shall be prosecuted by indictment or information sworn to by a person having reason to believe the offense has been committed.

(b) An indictment or information shall charge the offense for which the defendant is being prosecuted by using the name given the offense by common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge. . . .

Even the statutory definitions of "Indictment" and "Information" both define each in part as "an accusation, in writing." Utah Code Ann. § 77-1-3 (2), (3).

Given the fact that prosecutions by indictment or by information are on an equal constitutional and statutory footing, the immense disparity between procedural protections afforded an accused, which disparity is solely a function of the form the prosecution takes, raises serious constitutional issues. The Constitution of Utah contains its own equal protection clause which provides: "All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require." Utah Const. art. I, § 2.

A comparison of the equal protection language from the state constitution with that from the federal Constitution which states, "nor deny to any person within its jurisdiction the equal protection of the laws," suggests that the wording of the state constitution is broader. The phrase "equal protection of the laws" from the federal Constitution has given rise to the rational relationship test, i.e., the traditional analysis of whether there is any rational basis justifying the unequal operation of a particular law upon different classes of persons.

Nothing in the wording of the Utah equal protection constitutional provision indicates that it should be confined to

the same interpretations given the federal constitutional provision. The more expansive language in the Constitution of Utah simply states that free governments are founded upon the authority of the people for their equal protection. Free governments are founded on the authority of all the people, including those who have been or might be accused of wrongdoing. Certainly each person accused by a prosecutor of a particular offense should be entitled to the same protections afforded others accused of the same offense, albeit the accusations against others are presented by a grand jury. UP&L maintains that article I, section 13 of the Constitution of Utah, as presently applied through the derivative legislation thereto, impacts discriminatorily upon that class of accused persons for which the State elects to prosecute by means of an information and for which the State has gathered evidence by means of subpoenas or subpoenas duces tecum issued pursuant to the Mini-Grand Jury Act.

The current state of the law in Utah assures an accused prosecuted pursuant to a grand jury indictment that he will receive a target warning and be informed of his right to counsel and the privilege against self-incrimination. By contrast, the Act only guarantees an accused prosecuted pursuant to an information that he will be advised of his right to counsel. It is wholly within the discretion of the state's prosecutors to determine which prosecution track will be used. This is the very arbitrariness and capriciousness that the constitution abhors and that equal protection was designed to eradicate.

B. The Mini-Grand Jury Act Violates The Due Process Clause Of The Constitution Of Utah Because It Does Not Require Prosecutors To Notify Witnesses Of The Purpose Of The Inquiry.

Another basis for requiring parity of procedural protections comes from the Constitution of Utah's due process clause which closely tracks the Fourteenth Amendment to the Constitution of the United States and states: "No person shall be deprived of life, liberty or property, without due process of law." Utah Const. art. I, § 7. The leading case of this Court interpreting article I, section 7 of the Constitution of Utah is Christiansen v. Harris, 109 Utah 1, 163 P.2d 314 (1945). This Court's extended discussion in Harris of procedural due process guarantees arose during its consideration of the procedural formalities necessary to sustain a district court's revocation of probation. In concluding that one of the essentials of due process in depriving one of life or liberty is "notice to the person of the inauguration and purpose of the inquiry and the time at which such person should appear if he wishes to be heard," this Court stated:

Some rules affecting all types [of proceedings], are not found in the statutes, but in that great basic body of the law commonly known as the decisions or rules of the courts. But all these methods and means provided for the protection and enforcement of human rights have the same basic requirements--that no party can be affected by such action, until his legal rights have been the subject of an inquiry by a person or body authorized by law to determine such rights, of which inquiry the party has due notice, and at which he had an opportunity to be heard and to give evidence as to his rights or defenses.

Id. at 317 (emphasis added). It should be self-evident that the liberty of a person who is the subject of a criminal investigation is in jeopardy. The criminal investigation is a preliminary but integral part of the prosecution by which one is potentially deprived of his liberty.

Notwithstanding UP&L's argument that an accused should be afforded the same procedural protections regardless of whether the investigation is by means of a grand jury or a prosecutor, if any disparity of treatment were to be sanctioned, there is at least one compelling reason why greater protections should be afforded to those compelled to give evidence to prosecutors. As previously noted, the grand jury system places an independent body of citizens between the accused and the prosecutor during the period in which the investigation proceeds and during which the determination is made whether to return an indictment.¹²

¹²The United States Supreme Court in Ex Parte Bain, 121 U.S. 1, 11, 30 L. Ed. 849, 852-53, 7 S. Ct. 781 (1887), elaborated on the importance of the grand jury's independent role:

Yet the institution [the grand jury] was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial.

By contrast, no independent person or group is interposed between the accused and the prosecutor during the period of the investigation and while a determination is made by the prosecutor to file an information. It is true that the information may be reviewed by a magistrate who is an independent party, but by that point in time evidence incriminating the accused already may have been illegally obtained by the prosecutor. That possibility raises again the importance of informing a person that he is or has become a subject of the investigation so that he can make an intelligent and informed decision whether to exercise the privilege against self-incrimination. Although tainted evidence in the search and seizure context may be excluded at trial, the Mini-Grand Jury Act in this instance, as in so many others, makes no provision for such a procedure.

C. The Act Should Be Declared Unconstitutional Under the Due Process Void-For-Vagueness Doctrine.

This Court has stated that decisions relating to the Fifth and Fourteenth Amendments to the United States Constitution are highly persuasive when interpreting the due process clause of the Utah constitution. Vali Convalescent & Care Institution v. Industrial Commission of Utah, 649 P.2d 33, 35-36 (Utah 1982). The United States Supreme Court in a line of cases¹³ has

¹³See, e.g., Kolender v. Lawson, 461 U.S. 352, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982); Smith v. Goguen, 415 U.S. 566, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974); Grayned v. City of Rockford, 408 U.S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972).

developed the void-for-vagueness doctrine which "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." Kolender v. Lawson, 461 U.S. 352, ___, 75 L. Ed. 2d 903, 909, 103 S. Ct. 1855 (1983).

As was the case in Kolender, statutes that run afoul of the void-for-vagueness doctrine typically are held to be unconstitutional on their face. Id., 461 U.S. at ___, 75 L. Ed. 2d at 911. The touchstone for maintaining a facial challenge to a law is that it reaches "a substantial amount of constitutionally protected conduct." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, 71 L. Ed. 2d 362, 369, 102 S. Ct. 1186 (1982). Although the constitutionally protected activity that is ordinarily infringed upon involves the First Amendment rights of free speech and association, other conduct is also constitutionally protected. In Kolender, for example, the Court suggested that to the extent a statute "criminalizes a suspect's failure to answer such questions put to him by police officers, Fifth Amendment concerns are implicated." Id., 461 U.S. at n.9, 75 L. Ed. 2d at 910-11, n.9 (emphasis added). In this case, the vagueness of the Mini-Grand Jury Act deters the exercise of the privilege against self-incrimination. Hence, constitutionally-protected conduct is directly affected.

The Court has observed that "perhaps the most meaningful

aspect of the vagueness 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. Smith v. Goguen, 415 U.S. 566, 574, 39 L. Ed. 2d 605, 613, 94 S. Ct. 1242 (1974).¹⁴ The danger with vague statutes is that "[s]tatutory language of such a standardless sweep allows policemen, prosecutors and juries to pursue their personal predilections." Id., 415 U.S. at 575, 39 L. Ed. 2d at 613.

It is true that the Mini-Grand Jury Act, strictly speaking, is not a penal statute. It is most definitely, however, a criminal procedure statute that bears directly on penal statutes. The Act is, in many instances, the muscle behind the penal statutes because it is the means by which prosecutors gather evidence to obtain convictions for criminal offenses. Thus, the authority given prosecutors in the Act to carte blanche set their own standards for criminal procedure is patently unconstitutional

¹⁴Along the same lines, the Court stated in Grayned v. City of Rockford, 408 U.S. 104, 108-09, 33 L. Ed. 2d 222, 227-28, 92 S. Ct. 2294 (1972):

[If] arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

(Footnotes omitted).

on void-for-vagueness grounds and renders the entire Act unconstitutional on its face.

IV. EVIDENCE OBTAINED THROUGH CRIMINAL INVESTIGATIONS CANNOT BE USED IN CIVIL ACTIONS UNLESS JUDICIALLY APPROVED AFTER A SHOWING OF PARTICULARIZED NEED.

During the May 30, 1984 hearing, Judge Bunnell ordered, among other things, that the "[i]nvestigations conducted under the authority of the Act must be limited to criminal investigations." Memorandum Decision at 2. After the second hearing, Judge Bunnell in his Memorandum Decision criticized the Attorney General's use of information obtained through this criminal investigation for civil proceedings:

Some criminal charges have already been filed in Salt Lake County based upon information obtained through this proceeding, and a civil antitrust 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.

Id. at 3-4.

The Attorney General's denial that any portion of the civil antitrust action filed in Salt Lake City was based on information derived from the criminal investigation, see Appellant's Brief at 22, appears to be contradicted by his April 19, 1984 Motion for Partial Release of Secrecy Order and Order

CS#1. (Record at 33-34).¹⁵ In arguing that information obtained from the criminal investigation may be used in civil proceedings, the Attorney General clouds the controlling rule of law by describing the exception to the general rule without clearly labeling it as such. The general rule is that evidence gathered in a criminal investigation cannot be used for civil enforcement. The Fourth Circuit in In re Grand Jury Subpoenas, April, 1978, at Baltimore, 581 F.2d 1103 (4th Cir. 1978), cert. denied sub nom. Fairchild Industries, Inc. v. Harvey, 440 U.S. 971, 59 L. Ed. 2d 787, 99 S. Ct. 2294 (1979), made clear that "[i]f the powers of the grand jury, including the power to subpoena documents, are used, not for the purpose of criminal investigation but rather to gather evidence for civil enforcement, there exists an abuse of

¹⁵In his April 19, 1984 Motion for Partial Release, the Attorney General, pursuant to U.C.A. § 77-22-2(3) made application to the court for an order authorizing the release of certain information necessary for the filing and presentation of civil and criminal actions. The Attorney General stated in part:

This Motion is made on the further conclusion that certain information gathered during the course of the Court's previously authorized investigation will, of necessity, be made public at the time of the filing of criminal and/or civil actions.

This information includes the contents of depositions, documents and other information obtained from witnesses.

(Record at 33). Judge Bunnell granted the Attorney General's motion. (Record at 34).

the grand jury process." Id. at 1108. See Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1118 (E.D. Pa. 1976) (grand jury cannot be used by government as cover to obtain records for civil investigation).

Even in United States v. Procter & Gamble Company, 356 U.S. 677, 683, 2 L. Ed. 2d 1077, 1082, 78 S. Ct. 983 (1958), one of the cases cited by the Attorney General, the Supreme Court stated that if "the prosecution was using criminal procedures to elicit evidence in a civil case, . . . it would be flouting the policy of the law." In Procter & Gamble, the Court was faced with a situation in which counsel for defendants was attempting to gain access to a transcript of grand jury proceedings in which no indictment was returned but from which the government used information to proceed with a civil action for alleged violation of the antitrust laws. The Court expressed its great reluctance to remove the cloak of secrecy from any more of the grand jury proceedings than was necessary.

It should be readily apparent that Procter & Gamble presented a factual situation far different from the circumstances of this case. It is beyond dispute that there are extraordinary instances in which limited information from a criminal investigation properly may be authorized to be used in a civil action. However, the use of such evidence is permitted only after a showing of particularized need which necessarily means that the practice is not favored. Judge Bunnell never was approached with

such a showing of particularized need and yet concluded that information obtained through the criminal investigation he approved was improperly used to assist the Attorney General in its civil action in Salt Lake City.

CONCLUSION

The Mini-Grand Jury Act is constitutionally flawed. Prosecutors' actions taken under the aegis of the Act are accusatory in nature. And yet, persons summoned to give evidence pursuant to administrative subpoenas tend to enjoy greater procedural protections than are afforded persons under the Mini-Grand Jury Act. Because the Act fails to give notice of any pre-compliance opportunity to challenge subpoenas and because prosecutors are not required to inform witnesses of the nature and scope of the investigation, no effective or just pre-compliance remedy exists.

Moreover, Utah law requires that persons compelled to appear as witnesses before grand juries be informed if they are or become subjects of an investigation and that they be advised of their right to assert the privilege against self-incrimination. Both the equal protection and due process provisions of the Constitution of Utah mandate that the same protections be extended to those compelled to give evidence under the Mini-Grand Jury Act.

The constitutional infirmities of the Act relate to its basic structure and are so fundamental that they cannot be

rectified absent an impermissible, wholesale judicial rewriting of the Act. Thus, UP&L submits that Judge Bunnell's September 20, 1984 Memorandum Decision Relative to Constitutionality should be affirmed.

DATED this 25th day of February, 1985.

RAY, QUINNEY & NEBEKER

By John A. Adams
Stephen B. Nebeker
John A. Adams

Attorneys for Respondent
Utah Power and Light Company

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of February, 1985, true and correct copies of the foregoing Brief of Respondent Utah Power and Light Company were hand-delivered to the following:

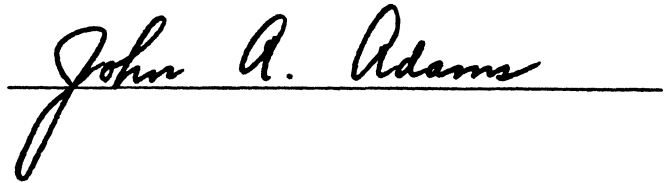
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A handwritten signature in cursive script, reading "John A. Adams", is written over a horizontal line.

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ADDENDUM

Constitutional Provisions and Statutes

Constitution of the United States, 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 offence 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.

Constitution of the United States, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Utah, Article 1, Section 2:

Sec. 2. [All political power inherent in the people.]

All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.

Constitution of Utah, Article 1, Section 7:

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Constitution of Utah, Article 1, Section 12:

Sec. 12. [Rights of accused persons.]

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.

Constitution of Utah, Article 1, Section 13:

Sec. 13. [Prosecution by information or indictment--Grand jury.]

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature.

Constitution of Utah, Article 1, Section 14:

Sec. 14. [Unreasonable searches forbidden-
Issuance of warrant.]

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

Utah Code Ann. §§ 77-22-1 through 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 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. 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 person 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 produced 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.

Utah Code Ann. § 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.

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

-oOo-

IN THE MATTER OF A
CRIMINAL INVESTIGATION

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

-oOo-

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.

-oOo-

COPY

RASHELL GARCIA
LICENSE #144

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

801-322-1029

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?

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

-ooo-

	:	Case No. CS No. 1
IN THE MATTER OF A	:	Deposition of:
CRIMINAL INVESTIGATION	:	<u>W. JACK ELIASON</u>

-ooo-

BE IT REMEMBERED that on the 3rd day of April, 1984, the deposition of W. JACK ELIASON, 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 11:30 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.

-ooo-

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1200 Beneficial Life Tower
Salt Lake City, Utah 84111

801-322-1029

1 MR. OLSEN: With respect to your second question,
2 let me see if I can be more direct and phrase it this way:
3 It's my intention to ask a question or questions of
4 Mr. Eliason, among many others, and the answers, depending
5 on what they are, might indeed subject him to criminal
6 liability, depending on the answers.

7 MR. NEBEKER: All right, fine. I think we'll let
8 him go ahead and answer the questions but I think we under-
9 stand generally that you're approaching Mr. Eliason the same
10 way you're approaching Mr. White in the substance of asking
11 him questions and you're leaving open the question of whether
12 or not there might be criminal charges pending.

13 MR. OLSEN: That's correct.

14 One other further thing in terms of preliminaries,
15 Mr. Eliason is here pursuant to our serving of a subpoena
16 on him through --

17 MR. NEBEKER: Yes, that's correct.

18 MR. OLSEN: Mr. Eliason, let me give you a quick
19 preliminary --

20 MR. NEBEKER: Be sure to keep your voice up,
21 Mr. Eliason has a hearing aid and I think he would appreciate
22 it if you would speak loudly to him.

23 EXAMINATION

24 BY MR. OLSEN:

25 Q Mr. Eliason, I don't know if you have had your

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

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	:	CS No. 1
IN THE MATTER OF A	:	Deposition of:
CRIMINAL INVESTIGATION	:	<u>SCOTT H. CHRISTENSEN</u>

-oOo-

BE IT REMEMBERED that on the 13th day of April, 1984, the deposition of SCOTT H. CHRISTENSEN, produced as a witness herein at the instance of the Office of the Attorney General of the State of Utah, 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 2:15 p.m. of said day, at the office of the Attorney General, 236 State Capitol Building, Salt Lake City, State of Utah.

That said deposition was taken pursuant to Subpoena.

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1 I would also like to again ask of the representative
2 of the Attorney General's Office who's here to take the
3 deposition if Utah Power & Light or any officer or employee
4 or agent of the company is the target of the investigation
5 that's currently being conducted by the AG's office.

6 MS. DALLIMORE: Well, in response to that,
7 Mr. Nebeker, all I can say is that at this point the focus
8 on targets is not completed so that anyone is potentially
9 a target of this investigation. Beyond that, I cannot go.

10 MR. NEBEKER: Let me again state my objection to
11 that response inasmuch as I think we are entitled to know if
12 any of those entities, to wit, the company itself, either
13 the officers or directors of the company or any agents or
14 employees of the company are the target of the investigation.
15 We have not had that identified to us at this time.

16 MS. DALLIMORE: I would suggest, though, that if
17 there are questions that I ask that may incriminate
18 Mr. Christensen or may be incriminating to any of your
19 other clients, you, of course, would maybe want to think
20 about advising him not to answer those. I am sure that you
21 will do that. I take it you are here representing
22 Mr. Christensen as an officer or employee of Utah Power &
23 Light?

24 MR. NEBEKER: Yes, I'm here as attorney for Utah
25 Power & Light representing Mr. Christensen as an employee of

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

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IN THE MATTER OF A : Deposition of:
:
CRIMINAL INVESTIGATION. : RICHARD J. RICHE

-o0o-

BE IT REMEMBERED that on the 17th day of April, 1984, the deposition of RICHARD J. RICHE, produced as a witness herein at the instance of the Attorney General's Office herein, 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 10:15 a.m. of said day at the Attorney General's Office, State Capitol Building, Room 307, Salt Lake City, Salt Lake County, State of Utah.

That said deposition was taken pursuant to Subpoena.

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called as a witness by and on behalf of the Attorney General's Office, being first duly sworn, was examined and testified as follows:

Present is the witness; his counsel, Mr. Steve Nebeker, Stan Olsen, the attorney from the Attorney General's Office; and Wayne Wickizer, also from the Attorney General's Office.

MR. OLSEN: Well, I can respond as we have before with respect to the witness and maybe a bit more specifically with regard to Mr. Riche. He is not at this point considered a target of any investigation. That is not to say that the result of what we find out here would not change that, but I'm comfortable in saying to you and to him that he's not here and is not specifically the target of our investigation at this point.

1 MR. NEBEKER: Okay.

2 MR. OLSEN: With regard to the company, we are
3 not ruling that possibility out either in previous deposi-
4 tions or to date.

5 MR. NEBEKER: Let me state that under the statute
6 that gives the Attorney General's Office that authority to
7 proceed with such an investigation, it's my understanding
8 that that statute has been referred to as the Grand Jury
9 statute. Under Section 77-11-3 of the Utah Code
10 Annotated, which deals with the powers and duties of a
11 Grand Jury, it states, and I quote, "Any person called to
12 testify before the Grand Jury may be advised of his right
13 to be represented by counsel." And then it goes on to
14 say, "If a witness is or becomes a subject of the investiga-
15 tion, he shall be advised of that fact and of his right to
16 counsel, and of his privilege against self-incrimination."
17 And then it goes on to say, "On demand of a witness for
18 representation of counsel, the proceedings shall be delayed
19 until counsel is present."

20 And I really make that statement on the record
21 for the reason that we view these proceedings to be under
22 the same guidelines as those that relate to Grand Jury,
23 Grand Jury investigations, and it's our position--and it
24 may be at some time that we'll have to take this to court--
25 that each one of the witnesses are entitled to be advised of

1 whether or not they are the subject of the investigation and
2 we're entitled to inquire whether or not the company itself
3 is the subject of the investigation. However, for purposes
4 of proceeding now, we're going to simply make our record
5 clear on that matter.

6 MR. OLSEN: Okay, understood.

7 EXAMINATION

8 BY MR. OLSEN:

9 Q Sir, will you give us your name, please, your full
10 name?

11 A Richard J. Riche.

12 Q Will you spell that for the reporter, please.

13 A R-i-c-h-a-r-d, capital J., R-i-c-h-e.

14 Q And it's pronounced Riche; is that right?

15 A Yes.

16 Q Mr. Riche, what's your home address? Where do
17 you live?

18 A It's either Post Office Box 477 or 749, Castle Dale
19 Road, Helper, Utah.

20 Q How long have you lived at that address, approxi-
21 mately?

22 A Approximately--oh, it's been about 10 years.

23 Q Where are you currently employed?

24 A With Utah Power & Light out at the Hunter steam
25 plant located at Castle Dale.

DAVID L. WILKINSON
Attorney General
PAUL M. WARNER
Assistant Attorney General
Chief, Litigation Division
STANLEY H. OLSEN
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-7627

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: Custodian of the Records
Utah Power & Light Company
Stephen B. Nebeker
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 Thursday, the 31st day of May, 1983, 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:

1. Invoices, vouchers, checks and all documentation in support of requests for reimbursement for guard services from MTA and Vanguard for 12/1/77 to the present.

2. Any and all correspondence to or from MTA, Vanguard and L. Brent Fletcher which has not already been produced.

3. Any and all L. Brent Fletcher work product, i.e., manuals, forms, documents, papers, research, publications and other such records not already produced.

4. The most recent assignment of contract or other agreement between Utah Power and Light and Vanguard.

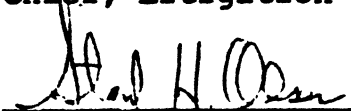
5. All expense vouchers and supporting documentation for L. Brent Fletcher.

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 16th day of May, 1984.

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

By:


STANLEY H. OLSEN
Assistant Attorney General
Litigation Division