

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN RE: GRAND JURY SUBPOENA TO)
DRAKE UNIVERSITY)

No. M-1-39

) MEMORANDUM OF LAW IN
) SUPPORT OF MOTION TO
) INTERVENE AND MOTION TO
) QUASH GRAND JURY SUBPOENA
) DUCES TECUM
)

Petitioners, by counsel Bruce D. Nestor, submit this Memorandum of Law in Support of Motion to Intervene and Motion to Quash Grand Jury Subpoena Duces Tecum.

INTRODUCTION

The National Lawyers Guild and the Drake Chapter of the National Lawyers Guild move to quash the subpoena duces tecum issued in this proceeding to Drake University. The subpoena, in seeking records of associational activities criticizing current policies of the United States government and the Department of Justice, is unreasonable and oppressive in violation of Fed. Rule Crim.Pro. 17, infringes upon the rights of the Petitioners as protected by the First and Fourteenth Amendments to the Constitution of the United States, and has no purpose or effect other than to harass and intimidate persons engaged in constitutionally protected advocacy and expression. As the subject of the records sought, the Petitioners have rights, privileges, and interests in protecting the records that are independent of Drake University and which Petitioners assert on behalf of their individual members.

FACTUAL BACKGROUND

The National Lawyers Guild is a non-profit corporation organized under the laws of the State of New York for the purpose of advancing the principle “to the end that human rights shall be held as more sacred than property interests.” It operates both through its national office in

New York City, and through chartered affiliates, with membership in the affiliates being equivalent to membership in the National Lawyers Guild. The Drake University student chapter of the National Lawyers Guild is a duly chartered affiliate and operates as an autonomous, unincorporated association. Membership categories in the National Lawyers Guild include legal workers, jailhouse lawyers, law students, and attorneys. The National Lawyers Guild has approximately 6,000 members throughout the United States.

The National Lawyers Guild was founded in 1937 as a progressive bar association and alternative to the American Bar Association which at that time barred the membership of African-Americans and Jews. Although many members of the National Lawyers Guild originally served in the executive, legislative, and judicial branches of government, by the 1950s the National Lawyers Guild was under attack from the Department of Justice and Congressional committees due to its advocacy of civil rights, economic justice, and international law. Many members of the National Lawyers Guild suffered as result of their public association with the Guild, and many members felt compelled to resign. Throughout the period from the 1960s to the present, the National Lawyers Guild has continued to oppose many international and domestic policies of the government of the United States and worked vigorously to defend the rights of persons in the United States to engage in protest, dissent, and opposition to those policies. Particularly since the attacks of September 11, 2001, the National Lawyers Guild has vocally condemned the illegality of United States military action abroad and the attacks on civil liberties and human rights at home. The National Lawyers Guild also frequently sponsors or supports litigation which challenges illegal and unconstitutional government surveillance and repression directed at protected associational and expressive activity. Unjustified government investigation, surveillance, disruption, and harassment of the National Lawyers Guild will undoubtedly result

in a loss of membership and an unwillingness of persons to associate with the National Lawyers Guild out of fear of being identified with an organization which is a target of legally sanctioned official disfavor and criminal investigation.

The subpoena duces tecum in this matter was issued on February 3, 2004, to Drake University and seeks “all records and documents in the possession of Drake University relating to the conference held on November 15, 2003,” titled, “Stop the Occupation! Bring the Iowa Guard Home!” The subpoena, which is attached to this memorandum and the terms of which are incorporated by reference, also seeks records “relating to the scheduling of the conference,” the identity of all “persons that actually attended the meeting,” the identity of the officers of the Drake chapter of the National Lawyers Guild, all “meeting agenda or annual reports of this organization filed with the University since January 1, 2002,” and all “records of Drake University campus security reflecting any observations made of the November 15, 2003 meeting, including any records of persons in charge or control of the meeting, and any records of attendees of the meeting.” The return date on the subpoena for the records requested is February 10, 2004, at 11:00 a.m.

ARGUMENT

I. THE SUBPOENA DUCES TECUM’S POTENTIAL INFRINGEMENT ON THE PROTECTED RIGHTS OF THE NATIONAL LAWYERS GUILD REQUIRES THE GRANTING OF THE MOTION TO INTERVENE PURSUANT TO RULE 24(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

A party seeking to intervene in a matter pursuant to FRCP Rule 24(a) need only show an interest in the subject matter of the proceeding and that the disposition of the matter would impair the party’s ability to protect that interest. As argued below, the Petitioners have made a substantial showing that the production of the documents sought would infringe upon their constitutionally protected rights of association and expression. Petitioners need not in their

pleadings convince this court that their challenge to the subpoena will succeed on the merits. Rather, as intervenors, Petitioners need only demonstrate a colorable claim of standing based upon a showing that they will be adversely affected by the subpoena's enforcement. See, In Re Grand Jury Proceeding, 640 F.Supp. 149 (E.D. N.C. 1986)(allowing employer to intervene when 18 employees subpoenaed to appear on same day).

Federal courts have routinely recognized the right of organizations to intervene and seek to quash subpoenas directed to third-parties when it is claimed that enforcement of the subpoena will infringe on First Amendment rights. In holding that an antitax organization had standing to challenge, on First Amendment grounds, a grand jury subpoena directing a bank to produce its records, the Tenth Circuit stated, "The Supreme Court has acknowledged that an organization and its members have standing to protect the members from unwarranted governmental invasion of their First Amendment right of association, although the governmental action is directed at third parties." In Re First National Bank, Englewood Colo., 701 F.2d 115, 118 (10th Cir. 1983), citing to Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975). The Eighth Circuit, in United States v. Citizens State Bank, 612 F.2d 1091 (8th Cir. 1980), also recognized the right of an association to intervene and challenge a subpoena to a bank which sought records pertaining to members of the association. See also, Gravel v. United States, 408 U.S. 606 (1972)(allowing U.S. Senator to intervene in grand jury proceedings to quash a subpoena directed to a legislative assistant); Local 1814, International Longshoremen's Association v. Waterfront Commission, 667 F.2d 267, 270-71 (2d Cir. 1981)(upholding right of organization to bring Motion to Quash on behalf of its members).

In this proceeding, all the records sought by the grand jury subpoena are records of the Drake Chapter of the National Lawyers Guild. The records are only in the possession of Drake

University because the National Lawyers Guild would have provided those documents to Drake University as part of the routine process of registering as an official student organization, of reserving rooms to hold public meetings and forums in university facilities, and of otherwise engaging in activity on campus as an association of students and faculty members with common interests. Drake's interest, if any, in protecting these records of associational activity is minimal and Petitioners should be allowed as matter of right to intervene in order to protect their personal rights and freedoms. Further, counsel for Drake University has indicated the intention of Drake to comply with the subpoena duces tecum despite requests from the Drake Chapter of the National Lawyers Guild that the university act to fully protect the associational rights of its students and faculty.

II. A JUDICIAL ORDER QUASHING THE SUBPOENA DUCES TECUM TO DRAKE UNIVERSITY IS REQUIRED IN ORDER TO PROTECT THE PETITIONERS' ASSOCIATIONAL RIGHTS AND TO PREVENT POTENTIAL ABUSE OF THE GRAND JURY PROCESS

Petitioners are at a disadvantage in showing that compliance with the subpoena duces tecum issued by the grand jury would be unreasonable as they do not know the nature of the government's investigation or the precise target of the grand jury. "After all, a subpoena recipient 'cannot put his whole life before the court in order to show that there is no crime to be investigated,' Marston's, Inc. v. Strand, 114 Ariz. 260, 270, 560 P.2d 778, 788 (1977)," U.S. v. R. Enterprises, 498 U.S. 292, 302-203 (1991).

However, the information publicly available to date makes it appear that the government prosecutors running the grand jury are targeting an anti-war conference held on November 15, 2003, at Drake University, and a protest the following day at the Iowa National Guard Armory during which twelve people were arrested during a peaceful demonstration. It is difficult to discern the relationship of these events to a federal criminal grand jury investigation.

Under these circumstances, where the government seeks records of who organized and attended an explicitly political event critical of government policy and having little obvious relevance to a potential violation of federal criminal statutes, the court should require the government to disclose the subject of its investigation prior to holding an evidentiary hearing in this matter. See, United States v. R. Enterprises, Inc., 498 U.S. at 301-302 (recognizing that upon a preliminary showing of unreasonableness in the issuance of a subpoena the Government should be required to reveal the subject of the grand jury's investigation prior to the party moving to quash having to carry its burden of persuasion).

Disclosure of the subject of the government's investigation is also necessary because the specific nature of the records requested by the subpoena raise significant First Amendment concerns. The subpoena requests the names of officers of the Drake Chapter of the National Lawyers Guild, the names of all persons attending an event sponsored by the Drake Chapter, the location of the offices of the Drake Chapter, all agendas and meeting reports of the Drake Chapter dating back to January of 2002, documents describing the purpose and content of the presentations at the meeting, as well as any records of Drake University campus security with respect to the meeting. These requests clearly impact the associational rights of the Drake Chapter, as persons who knew their names would be subject to disclosure to a grand jury investigation would be less likely to seek to become officers of the Chapter and intimidated from attending public meetings sponsored by the Chapter. The breadth of the request would extend to names of speakers at the conference, descriptions of topics discussed, and other documents relating to protected associational and expressive activity.

Production of these records would clearly impact the rights of the Petitioners to unfettered exercise of the freedom to engage in association for the advancement of beliefs and

ideas@ which is one of the most valuable rights guaranteed to us by the First Amendment. NAACP v. Alabama, 357 U.S. 449, 460 (1958). Because the disclosure of the identities of a group=s members, financial contributors, and associates, may have the practical effect of infringing upon protected associational rights, governmental efforts to compel such disclosures must be subjected to strict scrutiny. See, Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963); Shelton v. Tucker, 364 U.S. 479 (1960).

Once a party has made a prima facie showing of First Amendment infringement, the government must show a compelling need for the requested records and that such records have a substantial relationship to this compelling interest. In addition, the government must show that the relevant information can not be obtained through less intrusive means. National Commodity and Barter Association v. United States, 951 F.2d 1172, 1174 (10th Cir. 1991). Because the Petitioners have made such a showing of infringement on protected rights, both with respect to the apparent general nature of the investigation and with respect to the specific records sought, the burden then shifts “to the government to make the appropriate showing of need for the material.” United States v. Citizens State Bank, 612 F.2d 1091 (8th Cir. 1980).

The United States Supreme Court has also directed the federal courts to ensure that grand jury investigations respect the First Amendment. In Branzburg v. Hayes, 408 U.S. 665 (1972), the Supreme Court held that although the First Amendment does not protect newspaper reporters from being subpoenaed to testify about their sources, Agrand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. . . . We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.@ Branzburg, 408 U.S. at 707-08. As the Fifth Circuit recognized in Ealy v Littleton, 569 F.2d 219 (5th Cir. 1978), A[i]t would be a sorry

day were we to allow a grand jury to delve into the membership, meetings, minutes, organizational structure, funding and political activities of unpopular organizations on the pretext that their members might have some information relevant to a crime. @ *Id.* at 229. It is precisely this type of forbidden inquiry that the government seeks to make in this matter and which the court should prohibit by granting the Motion to Quash.

Petitioners are also deeply concerned that that the United States government is improperly employing the grand jury to investigate political associational activity that is protected by the First Amendment and to discourage protests against the invasion and occupation of the nation of Iraq by the United States government. This concern is based on both the specific nature of this investigation which is currently known to the public, as well as the history and structure of the grand jury system in the United States.

The grand jury system is enshrouded in secrecy and is, by its very nature, susceptible to abuse. See generally, Mark Kadish, *Behind the Locked Door of An American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 Fla. St. U. L. Rev. 1 (1996); Michael Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. Crim. L. & Criminology 1159 (1984). A consequence of grand jury secrecy is that neither the courts nor Congress, nor, especially, the public, can gauge how the institution is being used. @ Marvin E. Frankel & Gary P. Naftalis, *The Grand Jury: An Institution on Trial* 125 (1977).

Very few of the procedural protections guaranteed to defendants in criminal trials are available during grand jury proceedings. For example, an indictment may be based entirely on hearsay evidence, Costello v. United States, 350 U.S. 359 (1956), the prosecutor has no obligation to present exculpatory evidence, United States v. Williams, 504 U.S. 36 (1992), and

the Fourth Amendment exclusionary rule does not apply, United States v. Calandra, 414 U.S. 41 (1972). According to established practice, 18 U.S.C. ' 3332, and Fed. R. Crim. P. 6 and 17, a United States attorney may cause a grand jury subpoena to issue without specific grand jury authorization. See, In re Lopreato, 511 F.2d 1150 (1st Cir. 1975); In re Grand Jury Proceedings (Schofield), 486 F.2d 85 (3d Cir. 1973).

Furthermore, unlike witnesses summoned to appear before a court, witnesses subpoenaed before a grand jury have almost no procedural protections available to them. Under Blair v. United States, 250 U.S. 273 (1919), a witness subpoenaed before a grand jury has no standing to challenge a grand jury investigation. Witnesses are interrogated in secret without any members of the public or press present and, because grand jury proceedings are not adversarial, only the prosecution is represented. The witness is not even permitted to have counsel present in the grand jury room. The prosecutor may examine, cross-examine or present evidence without complying with the Federal Rules of Evidence, and the witness has an absolute duty to answer all questions, subject only to a valid Fifth Amendment claim. @ United States v. Mandujano, 425 U.S. 564, 581 (1976). The witness, who may be the target of the investigation, is not entitled to notice of the privilege against self-incrimination or the possibility of representation by counsel.

The grand jury is frequently referred to as a tool of the prosecutor. @ Although grand jury subpoenas are occasionally discussed as if they were the instrumentalities of the grand jury, they are in fact almost universally instrumentalities of the United States Attorney's office or of some other investigative or prosecutorial department of the executive branch. @ In re Grand Jury Proceedings (Schofield), 486 F.2d 85, 90 (3d Cir. 1973). The enormous range of discretion held by prosecuting authorities in the United States allows them to use the law for political and other ends. @ Norman Dorsen & Leon Friedman, *Disorder in the Court: Report of the*

Association of the Bar of the City of New York Special Committee on Courtroom Conduct 170 (1973).

In light of the susceptibility of the grand jury to abuse, it comes as no great surprise that the history of the grand jury system both in England, where it originated in the seventeenth century, and in the United States, is tarnished with instances where improper political motivations were permitted to interfere with its proper function. For example, during the antebellum South, the grand jury system was used to enforce slavery laws and indict outspoken opponents of slavery for sedition. Richard D. Younger, *The People=s Panel: The Grand Jury in the United States*, 85-133 (1963). Similarly, in the post-Civil War South, the grand jury system formed an integral part of the Reign of terror@ in which blacks and Reconstruction officials were indicted in order to harass and intimidate them, while Ku Klux Klan members who deprived blacks of their right to vote were not indicted. *Id.* at 128-29.

Earlier this century, the grand jury system was improperly used to frame labor organizers and union leaders and to facilitate witch hunts for Communist sympathizers. Deutsch, *supra*, at 1171-73, 1175-78. More recently, during the Nixon administration, over one thousand political activists were subpoenaed to more than one hundred grand juries across the nation. *Id.* at 1179. The targets of these grand juries included anti-Vietnam War activists, leftist academics, the Catholic left, and supporters of the women=s movement and the black nationalist movement. *Id.* at 1180. Members of the National Lawyers Guild were frequently involved in representing persons called before grand juries and also worked to expose the abuses of the grand jury system. The grand juries were widely understood at the time to be domestic intelligence-gathering operations, which prompted many activists to go to jail rather than cooperate. *Id.* at 1182. As Senator Edward M. Kennedy astutely observed, Under the [Nixon] administration, we have

witnessed the birth of a new breed of political animal--the kangaroo grand jury--spawned in a dark corner of the Department of Justice, nourished by an administration bent on twisting law enforcement to serve its own political ends, a dangerous form of Star Chamber secret inquisition that is trampling the rights of American citizens from coast to coast. @ *Washington Post*, March 14, 1972, at 2, col. 3. Similar concern has been expressed with respect to the subpoena at issue in this proceeding by Tom Harkin, Senator from Iowa: "I don't like the smell of it," said Sen. Tom Harkin, adding that he did not know details of the investigation. "It reminds me too much of Vietnam when war protesters were rounded up, when grand juries were convened to investigate people who were protesting the war." *Des Moines Register*, February 7, 2004.

To the extent that the grand jury is being employed for the purposes of probing into protected political and associational activities or intimidating and harassing supporters of the peace or anti-war movement, the grand jury has clearly overstepped its authority. Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass. @ *United States v. R. Enterprises, Inc.*, 498 U.S. at 299 (1991). Rather, the proper role of the grand jury is to serve as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will. @ *Wood v Georgia*, 370 U.S. 375, 390 (1962). See also, *Costello v. United States*, 350 U.S. 359, 362 (1956); *Hale v Henkel*, 201 U.S. 43, 59 (1906).

Petitioners request initially that the court grant a continuance for Drake University to respond to the subpoena duces tecum and that the court require the government to identify the nature of its investigation. The government must then demonstrate that the requested records

bear a substantial relationship to a compelling governmental interest, and that the required information can not be obtained through alternative means. If that showing is made by the government, Petitioners should then be allowed to present evidence with respect to the infringement of their First Amendment rights, so that the court may then determine whether the demonstrated governmental interest outweighs the First Amendment concerns raised by Petitioners.

CONCLUSION

Petitioners respectfully request that this court find that Petitioners have made a prima facie showing that production of the requested records would infringe on their First Amendment rights, and that absent the requisite showing by the Government, the Motion to Quash be granted.

Date: _____

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Certificate of Service

I, Bruce D. Nestor, certify that on the 9th day of February, 2004, I caused the foregoing Memorandum in Support of Motion to Intervene and Motion to Quash and associated documents to be served on the U.S. Attorney's Office, Southern District of Iowa, by mailing a copy of the documents by First Class U.S. mail. In addition, faxed copies of all documents were sent to the U.S. Attorney's office on the 9th day of February, 2004, at 515-284-6281.

Bruce D. Nestor