

S. 1260. A bill to amend the Securities Act of 1933 and the Securities Exchange Act of 1934 to limit the conduct of securities class actions under State law, and for other purposes (Rept. No. 105-182).

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second time by unanimous consent, and referred as indicated:

By Mr. GRASSLEY:

S. 2029. A bill to reduce temporarily the duty on sodium bentazon; to the Committee on Finance.

By Mr. BUMPERS:

S. 2030. A bill to amend the Federal Rules of Civil Procedure, relating to counsel for witnesses in grand jury proceedings, and for other purposes; to the Committee on the Judiciary.

SUBMISSION OF CONCURRENT AND SENATE RESOLUTIONS

The following concurrent resolutions and Senate resolutions were read, and referred (or acted upon), as indicated:

By Mr. TORRICELLI (for himself and Mr. COVERDELL):

S. Con. Res. 93. A concurrent resolution expressing the sense of the Congress with respect to documentation requirements for physicians who submit claims to Medicare for office visits and for other evaluation and management services; to the Committee on Finance.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. BUMPERS:

S. 2030. A bill to amend the Federal rules of Civil Procedure, relating to counsel for witnesses in grand jury proceedings, and for other purposes; to the Committee on the Judiciary.

THE GRAND JURY DUE PROCESS ACT

Mr. BUMPERS. Madam President, I am today introducing legislation which will remedy a longstanding injustice in our criminal justice system by granting to grand jury witnesses the right to the presence of counsel when testifying before the grand jury.

In our legal system, the right to counsel is fundamental. Every person, no matter how guilty or innocent, deserves to have an advocate. So fundamental is this right to counsel that it was recognized by the founders and enshrined in the sixth amendment to the Constitution. Along with the right to an impartial jury, public trial, and the right to confront witnesses, it is a universal element of fundamental fairness recognized by every civilized system of justice. Lawyers may never be popular, said William Shakespeare in *Henry VI, Act III Scene II*: "The first we do, let's kill all the lawyers."

But lawyers are a necessity. No one in his right mind wants to confront the judicial system without the benefit of a lawyer.

The Anglo-American criminal justice system has given us more freedom and

better justice than any country in the history of civilization. The rights of American citizens evolved over centuries of English and American history and are now enshrined in the Bill of Rights and are the standards of freedom and liberty all over the world. We must not allow those rights to be eroded. No American would claim that our system is perfect, nor do I so claim. I am convinced beyond a doubt that our system has serious flaws, one of which most people are probably not even aware and many might find hard to believe in this day and age. A witness summoned before a grand jury has no right to the presence of his lawyer in the grand jury room. Depriving anybody of the right to counsel is fundamentally wrong. No person should be required to face any part of the criminal justice system without the presence of his or her lawyer if he or she chooses.

Think of it this way. Police have absolutely no right to question an arrestee without his lawyer in the room unless the individual waives that right. The police even have a constitutional duty under the *Miranda* decision to advise people of their rights to a lawyer, even though anybody who has watched television in the last 35 years ought to know that they are entitled to a lawyer. If the police fail to observe this constitutional requirement, the statement by the accused is inadmissible in court.

But when an ordinary citizen is called before a grand jury, no lawyer—no lawyers are allowed to be present. The prosecutor and the grand jury have the unlimited ability to question the witness, who is not even under arrest, without an attorney present. This gross inconsistency can only be described as Byzantine, an anachronism.

I have never been one to say that criminal defendants have too many rights. They have no more than the Constitution entitles them. In this instance, however, a criminal defendant has more rights than the average ordinary citizen called before a grand jury. A criminal defendant cannot be questioned without a lawyer present, and he or she may invoke his or her right not to testify under the fifth amendment privilege against self-incrimination.

But a witness, a witness in the grand jury room who may later become a target under criminal investigation, has no such rights. He or she must testify fully and truthfully, no matter how burdensome or embarrassing or impertinent or irrelevant the questions may be, and without the assistance of counsel. The rules of evidence which normally require that questions be relevant and material do not apply in the grand jury room. On the contrary, so-called "fishing expeditions" have become commonplace. No matter how irrelevant or outrageous the questions, the witness must answer.

Madam President, I ask you or any American to consider whether, if you or your son or daughter were served a

subpoena to testify before the grand jury on a criminal case, even though the grand jury is supposedly investigating somebody else, would you want the right to have your own lawyer in the room? Would you feel the process was a fair one if you were told that you were not legally entitled to have a lawyer present? What if you or your loved one were called before the grand jury for a second, third, or fourth time? Would you begin to feel that you might be under suspicion for something? And would you feel comfortable answering endless questions without your lawyer present?

The grand jury is the only circumstance I can imagine in life where a free person does not have a complete legal right to hire a lawyer and have that lawyer accompany him in any kind of proceeding. No matter how serious the matter under consideration, no matter what the question—from the most complex matter of tax accounting to the most personal, intimate family concerns—no matter how hazy your recollection might be, you have no right to a lawyer before the grand jury. The grand jury room is the one and only room in the courthouse, the very temple of justice, where the proceeding is entirely one-sided.

Under existing law, there could be a sign on the grand jury room saying, "No lawyers allowed." The Government has as many lawyers as the Treasury can pay. The witness has zero. Notwithstanding that he or she may be there against his or her will, notwithstanding the power of the grand jury and the prosecutor to indict, a witness before a grand jury is defenseless. He or she has no friend in the room. Surely, nobody feels so alone as a grand jury witness, knowing that the weight of the Federal criminal justice system rests on his or her every word. Give the wrong answer, you can be accused of perjury, obstruction of justice, or any other of a number of crimes. If you refuse to answer, you can go directly to jail without benefit of a trial, being held in contempt.

Madam President, I ask you to consider, What kind of atmosphere is created in this one-sided proceeding? Is it one of fairness or is it one of intimidation? Bear in mind that there is no limit on the number of times a person may be called to testify before the same grand jury. In recent news reports—we have all read them—some people have been called to testify for the fifth or sixth time—no lawyer allowed—before the same grand jury. If you were in this position, or a member of your family were, how would you feel about being called for the sixth time to testify without your lawyer present? Would you feel threatened or intimidated? And this kind of proceeding not only does not provide justice and fairness, it doesn't even provide the appearance of justice and fairness, which is essential if citizens are to have confidence in our criminal justice system.

This system needs changing. The bill I am introducing is a modest proposal to give some balance to a very unlevel playing field. The main purpose of the original grand jury was probably helping in the collection of taxes. These ancient roots precede even the right to jury trial, because in the earliest times, trial was by ordeal. The accused was required to put his hand in boiling water or was tested by drowning. Needless to say, there weren't very many acquittals.

The grand jury has always symbolized the power of the criminal justice system to bring any person before the bar of justice. No one is beyond the power of the grand jury to seek evidence and to indict if there is probable cause to believe that a crime has been committed. Even before the right to trial by jury was secured, English grand juries had power to investigate and to accuse. Composed of ordinary citizens, grand juries had the power to compel any person to appear and give testimony or evidence. Historically, the grand jury was a guarantor of liberty—a guarantor of liberty.

The courts have often stated that the grand jury has a dual function. Listen to this. The courts have said that the grand jury has a dual function, "to clear the innocent, no less than to bring to trial those who may be guilty." The grand juries exist "as a means of protecting the citizen against unfounded accusation, whether it comes from the government, or be prompted by partisan passion or private enmity."

We just saw what private enmity is when somebody tried to set up Howard Baker in a tax fraud case.

The Founding Fathers so respected the institution that they enshrined the right to indictment by a grand jury in the sixth amendment to the Constitution. Here it is:

No person shall be held to answer for a capital, or otherwise infamous crime, [and that has been interpreted many times to mean a felony] unless on 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 * * *.

That is amendment 5 to the Constitution. The grand jury should be both a sword and a shield, a powerful tool in the hands of prosecutors and a defender of liberty by protecting against meritless or overzealous prosecutions.

In colonial America, a grand jury in Boston helped signal the beginning of the end of colonial government when the jurors refused the Government's request to indict the Stamp Act rioters. In modern times, however, the grand jury has become almost exclusively a sword and not a shield. Examples of the grand jury as a shield are hard to come by. In short, we have allowed the protection intended by the founders to take a 180-degree turn.

The Supreme Court has conceded that the grand jury does not always serve its intended purpose of protecting

the innocent. This is what the Supreme Court said in *U.S. v. Dionisio*:

The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor.

Those were the words of Justice Douglas. Douglas said in dissent in that case—he was much more explicit:

It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the government, is now a tool of the Executive.

Despite its ancient origins, the grand jury remains one of the most controversial aspects of our judiciary system. Most States have abandoned or abolished grand juries in favor of the filing of information by prosecutors. That is the way we do it in my home State of Arkansas. Many would argue that the grand jury is an anachronism which costs more than it is worth. In one of the most famous critiques of the institution, the Chief Judge of the State of New York stated that most grand juries would "indict a ham sandwich" if the prosecutor requested it.

While some have argued for eliminating the grand jury, I am not one to second-guess the wisdom of our Founding Fathers. Rather, I believe we should make the system work as intended—as a protector of freedom—by reforming the grand jury system so as to ensure due process of law for all concerned.

In the 1970s, there was considerable debate in Congress over the merits of the grand jury following revelations of abuses of the system under the Nixon administration. There has been no serious congressional debate over the grand jury system for over 10 years. The time for that debate has come.

Over 30 years ago, the Supreme Court said in *Gideon v. Wainwright* that counsel must be appointed for those who cannot afford a lawyer before any criminal trial in which a prison sentence may result.

The bill I am introducing today is a logical extension of the sixth amendment to the Constitution, as well as the fifth amendment's promise of due process of law. Granted, a witness before a grand jury is not under immediate threat of indictment, but most of them are there against their will, and they are certainly looking over the abyss.

Let me emphasize that my bill, although a departure from historical practice, is still a modest proposal. This bill would not in any way change criminal procedure except for allowing a witness' lawyer to be present in the grand jury room. The lawyer would not be allowed to speak to the jury or to examine witnesses. He or she would be able to advise his or her client and no more.

Allowing the mere presence of a witness' lawyer will in no way disrupt or slow the grand jury proceedings. What it might do is to deter a prosecutor from doing something improper simply because he knows there is no other lawyer watching. It may give a witness

some comfort to be able to ask his or her lawyer for advice before answering a complex question. That right is provided today, but the witness has to go outside the courtroom to see his or her counselor because the counsel is not allowed in the grand jury room.

My bill will thus allow for grand juries to operate more smoothly and efficiently, reducing the need to stop proceedings so the witness can go out of the room and talk to his or her lawyer.

This bill goes to the very reason lawyers exist. It may give the public more confidence that the proceedings are fair and balanced at a time when public confidence in the judicial system is about as low as it has ever been. If any of these purposes are met, my legislation will have served a noble purpose.

Mr. President, I hope that all Senators will take note of this bill and that they will support it. It will be referred to the Judiciary Committee, and I hope that the committee will schedule hearings very promptly.

I ask unanimous consent that the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 2030

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Grand Jury Due Process Act".

SEC. 2. GRAND JURIES.

(a) IN GENERAL.—Rule 6 of the Federal Rules of Criminal Procedure is amended—

(1) in subdivision (d), by inserting "and counsel for that witness (as provided in subdivision (h))" after "under examination"; and

(2) by adding at the end the following:

"(h) COUNSEL FOR GRAND JURY WITNESSES.—

"(1) IN GENERAL.—

"(A) RIGHT OF ASSISTANCE.—Each witness subpoenaed to appear and testify before a grand jury in a district court, or to produce books, papers, documents, or other objects before that grand jury, shall be allowed the assistance of counsel during such time as the witness is questioned in the grand jury room.

"(B) RETENTION OR APPOINTMENT.—Counsel for a witness described in subparagraph (A)—

"(i) may be retained by the witness; or

"(ii) in the case of a witness who is determined by the court to be financially unable to obtain counsel, shall be appointed as provided in section 3006A of title 18, United States Code.

"(2) POWERS AND DUTIES OF COUNSEL.—A counsel retained by or appointed for a witness under paragraph (1)—

"(A) shall be allowed to be present in the grand jury room only during the questioning of the witness and only to advise the witness;

"(B) shall not be permitted to address the attorney for the government or any grand juror, or otherwise participate in the proceedings before the grand jury; and

"(C) shall not represent more than 1 client in a grand jury proceeding, if the exercise of the independent judgment of the counsel on behalf of 1 or both clients will be, or is likely to be, adversely affected by the representation of another client.

"(3) POWERS OF THE COURT.—

"(A) IN GENERAL.—If the court determines that counsel retained by or appointed for a

witness under this subdivision has violated paragraph (2), or that such action is necessary to ensure that the activities of the grand jury are not unduly delayed or impeded, the court may—

“(i) remove the counsel and either appoint new counsel or order the witness to obtain new counsel; and

“(ii) with respect to a violation of paragraph (2)(C), order separate representation of the witnesses at issue, giving appropriate weight to the right of each witness to counsel of his or her own choosing.

“(B) NO EFFECT ON OTHER SANCTIONS.—Nothing in this paragraph shall be construed to affect the contempt powers of the court or the power of the court to impose other appropriate sanctions.

“(4) NOTICE.—Upon service of any subpoena requiring any witness to testify or produce information at any proceeding before a grand jury impaneled before a district court, the witness shall be given adequate and reasonable notice of the right to the presence of counsel in the grand jury room, as provided in this subdivision.”.

ADDITIONAL COSPONSORS

S. 850

At the request of Mr. AKAKA, the name of the Senator from Michigan (Mr. LEVIN) was added as a cosponsor of S. 850, a bill to amend the Packers and Stockyards Act, 1921, to make it unlawful for any stockyard owner, market agency, or dealer to transfer or market nonambulatory livestock, and for other purposes.

S. 1069

At the request of Mr. MURKOWSKI, the names of the Senator from Iowa (Mr. GRASSLEY) and the Senator from Ohio (Mr. DEWINE) were added as cosponsors of S. 1069, a bill entitled the “National Discovery Trails Act of 1997.”

S. 1141

At the request of Mr. ROBERTS, his name was added as a cosponsor of S. 1141, a bill to amend the Energy Policy Act of 1992 to take into account newly developed renewable energy-based fuels and to equalize alternative fuel vehicle acquisition incentives to increase the flexibility of controlled fleet owners and operators, and for other purposes.

S. 1180

At the request of Mr. CRAIG, his name was added as a cosponsor of S. 1180, a bill to reauthorize the Endangered Species Act.

S. 1220

At the request of Mr. DODD, the name of the Senator from California (Mrs. FEINSTEIN) was added as a cosponsor of S. 1220, a bill to provide a process for declassifying on an expedited basis certain documents relating to human rights abuses in Guatemala and Honduras.

S. 1264

At the request of Mr. HARKIN, the name of the Senator from Connecticut (Mr. DODD) was added as a cosponsor of S. 1264, a bill to amend the Federal Meat Inspection Act and the Poultry Products Inspection Act to provide for improved public health and food safety through enhanced enforcement.

S. 1286

At the request of Mr. JEFFORDS, the names of the Senator from California (Mrs. BOXER) and the Senator from Massachusetts (Mr. KENNEDY) were added as cosponsors of S. 1286, a bill to amend the Internal Revenue Code of 1986 to exclude from gross income certain amounts received as scholarships by an individual under the National Health Corps Scholarship Program.

S. 1348

At the request of Mr. LIEBERMAN, the name of the Senator from Louisiana (Ms. LANDRIEU) was added as a cosponsor of S. 1348, a bill to provide for innovative strategies for achieving superior environmental performance, and for other purposes.

S. 1360

At the request of Mr. ABRAHAM, the name of the Senator from Ohio (Mr. GLENN) was added as a cosponsor of S. 1360, a bill to amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to clarify and improve the requirements for the development of an automated entry-exit control system, to enhance land border control and enforcement, and for other purposes.

S. 1391

At the request of Mr. DODD, the name of the Senator from California (Mrs. BOXER) was added as a cosponsor of S. 1391, a bill to authorize the President to permit the sale and export of food, medicines, and medical equipment to Cuba.

S. 1464

At the request of Mr. HATCH, the name of the Senator from Alabama (Mr. SESSIONS) was added as a cosponsor of S. 1464, a bill to amend the Internal Revenue Code of 1986 to permanently extend the research credit, and for other purposes.

S. 1677

At the request of Mr. CHAFEE, the name of the Senator from Illinois (Mr. DURBIN) was added as a cosponsor of S. 1677, a bill to reauthorize the North American Wetlands Conservation Act and the Partnerships for Wildlife Act.

S. 1724

At the request of Ms. COLLINS, the name of the Senator from Arizona (Mr. MCCAIN) was added as a cosponsor of S. 1724, a bill to amend the Internal Revenue Code of 1986 to repeal the information reporting requirement relating to the Hope Scholarship and Lifetime Learning Credits imposed on educational institutions and certain other trades and businesses.

S. 1733

At the request of Mr. ROBERTS, his name was added as a cosponsor of S. 1733, a bill to require the Commissioner of Social Security and food stamp State agencies to take certain actions to ensure that food stamp coupons are not issued for deceased individuals.

S. 1737

At the request of Mr. MACK, the name of the Senator from South Carolina

(Mr. HOLLINGS) was added as a cosponsor of S. 1737, a bill to amend the Internal Revenue Code of 1986 to provide a uniform application of the confidentiality privilege to taxpayer communications with federally authorized practitioners.

S. 1879

At the request of Mr. BURNS, the names of the Senator from Oklahoma (Mr. INHOFE), the Senator from Utah (Mr. BENNETT), the Senator from Montana (Mr. BAUCUS), the Senator from Idaho (Mr. KEMPTHORNE), and the Senator from North Carolina (Mr. HELMS) were added as cosponsors of S. 1879, a bill to provide for the permanent extension of income averaging for farmers.

S. 1903

At the request of Mr. THOMAS, the names of the Senator from New York (Mr. D'AMATO) and the Senator from Oklahoma (Mr. INHOFE) were added as cosponsors of S. 1903, a bill to prohibit the return of veterans memorial objects to foreign nations without specific authorization in law.

S. 1924

At the request of Mr. MACK, the name of the Senator from Ohio (Mr. DEWINE) was added as a cosponsor of S. 1924, a bill to restore the standards used for determining whether technical workers are not employees as in effect before the Tax Reform Act of 1986.

SENATE CONCURRENT RESOLUTION 88

At the request of Mr. ASHCROFT, the names of the Senator from Colorado (Mr. ALLARD), the Senator from North Dakota (Mr. DORGAN), the Senator from Iowa (Mr. GRASSLEY), the Senator from Utah (Mr. HATCH), the Senator from South Dakota (Mr. JOHNSON), the Senator from Alaska (Mr. MURKOWSKI), and the Senator from Oregon (Mr. WYDEN) were added as cosponsors of Senate Concurrent Resolution 88, a concurrent resolution calling on Japan to establish and maintain an open, competitive market for consumer photographic film and paper and other sectors facing market access barriers in Japan.

SENATE CONCURRENT RESOLUTION 93 EXPRESSING THE SENSE OF CONGRESS WITH RESPECT TO MEDICARE DOCUMENTATION REQUIREMENTS

Mr. TORRICELLI (for himself and Mr. COVERDELL) submitted the following concurrent resolution; which was referred to the Committee on Finance:

S. CON. RES. 93

Whereas adequate documentation is necessary to assure quality and appropriateness of services;

Whereas effective strategies to eliminate waste, fraud, and abuse in the Medicare program should not result in excessive documentation requirements being imposed on physicians that will interfere with patient care;

Whereas if the documentation in the medical record does not meet program requirements, payments for such claims may be denied and an investigation into potential fraud and abuse may result;