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## Saying No to the prosecutor: Why Steve Kurtz's colleagues refused to testify to the grand jury

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### A death and a taste of blood

Steve Kurtz's wife Hope died of a heart attack May 11. Steve, an associate professor of art at University at Buffalo, called 911. The police who came saw some of the materials for an art exhibit on genetic modification and called the FBI. The FBI came in, cordoned off half the block, confiscated Hope's body, Steve's computer, his notebooks, his art supplies and their cat. They took him into custody. Two days later they let him and the cat go and whoever had the wife's body released for burial. There was no supposition of foul play in the death. Kurtz is a member of the highly-regarded Critical Arts Ensemble, a group that does confrontation art works designed to make people think about the role corporations play in modern life.

Federal prosecutors subsequently convened a grand jury, with Kurtz as its target, presumably on charges of bioterrorism. To everyone who knows anything about Kurtz, his associates or his work, this appears lunatic. But this is John Ashcroft's Justice Department and it's only a few months since they tasted blood in nearby Lackawanna.

FBI agents have been talking to almost everyone connected with Steve Kurtz in any way, shape, or fashion. They've interviewed museum curators in Massachusetts and the state of Washington, colleagues in New York and California, and students. Federal prosecutors have convened a grand jury to go after Kurtz. There were reports last week that, on the advice of counsel, Kurtz's two associates in the Critical Arts Ensemble and five of the other six witnesses called by the grand jury refused to testify.

### **Shouldn't innocent people talk to anybody?**

And that has led to a good deal additional confusion. Someone asked us, "If they're refusing to testify, they must be guilty, right?" Someone else asked, "Why are his friends tossing him to the wolves rather than helping him? Why don't they just go in there and tell them he's innocent?" And another person, a research scientist, asked, "Why wouldn't they want to go in there and just tell them the truth? Get the truth out, that can't hurt anybody."

The answer to the first question is no, their refusal to testify has nothing to do with guilt or innocence. The answer to the second question is, testimony to the grand jury by other members of the CAE would not, in all likelihood, be helping Steve Kurtz. And the answer to the scientist is, "Grand juries aren't about truth, and you don't control what you say in there anyway." You get to answer only the questions the prosecutor wants you to answer.

### **Taking the Fifth**

You can refuse to testify if there is a possibility that testimony will incriminate you in a criminal procedure. The right to refuse to provide possibly self-incriminating testimony is provided by the Fifth Amendment to the United States Constitution which reads, in its entirety:

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.  
(Emphasis added)

You cannot refuse to testify because you might be divorced by your spouse or fired by your boss. You cannot refuse to testify because your words might incriminate your closest friend, your spouse, your child, or someone you are certain is innocent. You cannot claim Fifth Amendment protection for anyone but yourself. Members of certain professions often claim an extension of Fifth Amendment protection as a professional privilege: doctors with patients, priests with penitents, journalists with informants, police with snitches. These privilege claims are frequently challenged in court, but nobody has successfully challenged a person's Constitutional right to refuse to help the prosecutor fit and tie the noose.

In situations not protected by the Fifth Amendment or some unchallenged privilege, the agencies wanting testimony have options for trying to coerce it. By "coerce" I don't mean by torture, as in Abu Ghraib, but through accepted, legal, public means of coercion, such as fines or jail terms for contempt. Ordinary courts have that power, legislative committees may have such power if it is included in their authorization, and grand juries have it.

### **Grand juries**

Grand juries aren't neutral bodies merely checking up on goings on in society. They are instruments of prosecutors. It is a commonplace in the legal profession that a federal or state grand jury will indict a stick of firewood, a porkchop, a dead man, if only the prosecutor requests an indictment.

Grand juries are not subject to the rules of evidence that limit prosecutorial misbehavior in criminal trials. Prosecutors can offer hearsay evidence and evidence that was obtained illegally. They can keep exculpatory evidence from the grand jury. The target of the grand jury hearing cannot have an attorney in the room to say "That's a trick question" or "You don't have to answer that" or "The first part of what the prosecutor just said is a bald-faced lie."

The product of a grand jury isn't the truth. That, presumably, is the product of a petit jury trial. The product of a grand jury is an indictment, and, on the occasions when it is used by the prosecutor as an investigating device, a report.

Grand jurors aren't bound to do what the prosecutor asks, but it is very rare that they do anything else. Grand juries have the power to go off on their own, to look at things and incidents and people the prosecutor didn't ask them to look at. Those are called "runaway" grand juries and they are extremely rare. A 1999 Justice Department study showed that 99.9% of defendants brought before a grand jury were indicted.

### **The silence of the CAE**

So why did the other two members of CAE and five of the other six persons subpoenaed by the grand jury refuse to testify?

Because the federal prosecutors said they were "subjects" of the grand jury. No one is quite clear what "subject" means in this context. It is clear what "target" is: that's the guy they're going after. Steve Kurtz is a "target" of this grand jury. The attorneys for the other CAE members decided that "subject" was close enough to "target" for them to protect their clients' rights.

If the Justice Department had said, "Oh, no, you're not of interest to us and you never will be, it's only Kurtz we're trying to hang here," then things would be different. If they were granted immunity, they would have to testify, no matter how much they wished not to, or they would risk a contempt conviction. But why should they go into that hostile place without benefit of counsel, a place where none of the usual laws of evidence and responsibility and truth apply, and provide a prosecutor information with which he might persecute them, just as he's persecuting Steve Kurtz?

Nobody outside of Ashcroft's Justice Department knows what Ashcroft's Justice Department is really up to here. Thus far, they've come up with nothing other than Kurtz had some bottles marked *e. coli*—common stuff in labs around any university, easily and legally obtained. They knew that the first day they had him in custody. Perhaps they are inflating

this merely to make their own initial overreaction to the confused call for help from the first responders seem anything but foolish overkill. Neither threat of terrorism nor passion for justice appears to have anything to do with what is now going on. Maybe they're just doing it because they can, because they have the power to do it.

And that is exactly why the Founding Fathers wrote the Fifth Amendment: to protect us from zealous government officials doing something to us just because they have the power to do it. The Fifth Amendment is the people's shield. The only inference that can be made when someone invokes it is that the Constitution belongs to us as much as it does to the policeman.

**For more information:**

[CAE Defense Fund web site](#)

["NY Bioterror Case Grinds On," \*The Scientist\*, 17 June 2004](#)

[Federal Handbook for Grand Jurors](#)

[FindLaw annotations to the Fifth Amendment](#)

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