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Federal Rule of Evidence 801(d)(1)(A)—Prior Inconsistent Statements—Scope of the Term Other Proceeding—United States v. Castro-Ayon, 537 F.2d 1055 (9th Cir. 1976)

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FEDERAL RULE OF EVIDENCE 801(d)(1)(A)—PRIOR INCONSISTENT STATEMENTS—SCOPE OF THE TERM "OTHER PROCEEDING"—*United States v. Castro-Ayon*, 537 F.2d 1055 (9th Cir. 1976).

In *United States v. Castro-Ayon*,[1] the Court of Appeals for the Ninth Circuit enunciated a broad-sweeping interpretation of Federal Rule of Evidence 801(d)(1)(A) (the Rule),[2] which allows the use of prior inconsistent statements as substantive evidence. It was held that the term "other proceeding" in the Rule included statements made by a witness in an immigration interrogation, and that these statements were admissible as substantive evidence.[3] In so holding, the court has exceeded the desired and intended scope of the Rule by giving it effect in this type of setting.

I. INTRODUCTION

Castro-Ayon was the registered owner of a van in which co-defendant Flores was stopped while transporting eleven illegal aliens into the United States. Castro-Ayon was not present when the van was stopped. The passengers were taken to a border patrol station in California where they were advised of their *Miranda* rights, placed under oath,[4] and interrogated by a border patrol agent. The defendants were charged with inducing illegal immigration, transporting illegal immigrants, and conspiracy.[5]

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1. 537 F.2d 1055 (9th Cir. 1976).

2. FED. R. EVID. 801(d)(1)(A) provides in part:

> A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . .

3. 537 F.2d at 1057.

4. Immigration officers are authorized to place the witnesses under oath pursuant to 8 U.S.C. § 1357(b) (1970), which provides in part:

> Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths . . . .

In addition, 8 C.F.R. § 287.1(c) (1976) authorizes any immigration officer to exercise all the powers conferred by section 287 of the Immigration and Naturalization Act of 1952, which is codified at 8 U.S.C. § 1357 (1970). Finally, 8 C.F.R. § 287.5 (1976) gives any immigration officer the authority to administer oaths.

5. 537 F.2d at 1056.

Three of the illegal aliens were called by the Government as witnesses at the trial but their testimony tended to exculpate Castro-Ayon. After laying a proper foundation, the Government called an agent who testified to the substance of statements made during the in-custody interrogation at the border patrol station. As related by the agent, these statements conflicted with the in-court testimony and tended to inculpate Castro-Ayon.[6] No additional evidence was introduced.

The jury was instructed to weigh the prior inconsistent statements of the witnesses, not only in testing their credibility, but also in considering the defendant's guilt. The jury subsequently returned a verdict of guilty on all three counts.[7] On appeal, Castro-Ayon challenged the admission of these prior inconsistent statements and the instruction permitting the jury to use them as substantive evidence.[8]

The Ninth Circuit affirmed the conviction. The court found: (1) that the statement was given under oath subject to the penalty of perjury; and (2) that the station-house interrogation, while not qualifying as a trial, hearing or deposition, did fit within the scope of "other proceeding."[9]

The court looked first to the Rule's legislative history to find guidance for a proper interpretation of the term "other proceeding," since an immigration interrogation could obviously not qualify under the Rule as a "trial, hearing, . . . or in a deposition."[10] As the court admitted, the term "other proceeding" did not, by itself, "reveal its own dimension."[11] Noting that Congress consciously intended a grand jury proceeding to be within the ambit of "other proceeding," the court then compared a grand jury setting to the immigration interrogation and ultimately concluded that it too was within the meaning of the Rule.[12] After considering the two major views on the admissibility of prior inconsistent statements,[13] this casenote will analyze the court's reading of the pertinent legislative history and will evaluate the soundness of extending the reach of the term "other proceeding" to a border interrogation.

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6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 1057.
10. *Id.*
11. *Id.*
12. *Id.* at 1058.
13. See text accompanying notes 14-21 *infra.*

II. Prior Inconsistent Statements as Substantive Evidence—Majority and Minority Views

There are two opposing positions concerning the extent to which a witness' prior statements may be introduced at trial without violating hearsay rules of evidence. The orthodox view, adopted in both criminal and civil cases in the vast majority of jurisdictions,[14] is that extrajudicial statements are hearsay and therefore inadmissible as substantive evidence. The out-of-court statements are inadmissible for the truth of the matter asserted because the fact-finder cannot adequately test the declarant's perception, memory, narrative ability, or sincerity.[15]

Proponents of the orthodox rule assert that prior statements possess the dangers characteristic of hearsay evidence and are therefore inherently unreliable: first, the out-of-court statement is usually not made under oath; second, the trier of fact cannot observe the declarant's demeanor when the statement is made; and third, there is no opportunity for cross-examination at the time the statement is made.[16] Accordingly, under this view the statement may not be offered to show its truth. It can be introduced, however, under appropriate limiting instructions, for the purpose of impeaching the credibility of a witness who offers a conflicting story at trial.[17]

In contrast, the minority view,[18] adopted in some jurisdictions and

14. There is an extensive collection of cases representing the majority position in 3 J. Wigmore, Evidence § 1018 (3d ed. 1940) [hereinafter cited as Wigmore]; *see, e.g.*, State v. Saporen, 285 N.W. 898 (Minn. 1939).

15. *See* C. McCormick, Law of Evidence § 245 (2d ed. 1972) [hereinafter cited as McCormick]; 39 Mo. L. Rev. 472 (1974).

16. *See* Ruhala v. Roby, 150 N.W.2d 146 (Mich. 1967); State v. Saporen, 285 N.W. 898 (Minn. 1939). The Supreme Court of California in People v. Johnson, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599, *cert. denied*, 393 U.S. 1051 (1968), concluded that a departure from the orthodox rule violated the sixth amendment right of confrontation. This conclusion was later rejected in California v. Green, 399 U.S. 149 (1970).

17. As early as 1847, the court in Charlton v. Unis, 45 Va. 37, 4 Gratt. 58 (1847), enunciated the rule that proof of prior inconsistent statements of a witness can be introduced and considered only for the purpose of impeachment and not as substantive evidence of the truth of the matter stated, and the court must instruct the jury that they can consider the evidence for that purpose only. McCormick states that according to the traditional definition, a prior statement of a witness is hearsay if used to prove the truth of the matter asserted.

> This categorization does not, of course, preclude using the prior statement for other purposes, e.g., to impeach the witness by showing a self-contradiction if the statement is inconsistent with his testimony . . . .

McCormick, *supra* note 15, at § 251; *see* 41 Marq. L. Rev. 317, 318 (1957-58) for a defense of the limited use of prior inconsistent statements.

18. *See* United States v. De Sisto, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964); Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969); Gelhaar v. State, 163 N.W.2d 609 (Wis. 1969), *cert. denied*, 399 U.S. 929 (1970).

supported by such legal scholars as Dean Wigmore[19] and Professor McCormick,[20] favors admission of prior inconsistent statements not merely for impeachment, but for use as substantive evidence. The basis for this less restrictive position is a belief that hearsay dangers are absent where the declarant is in court, under oath, and subject to cross-examination as to the prior inconsistent statement.[21]

In *United States v. Tavares*,[22] decided shortly before the effective date of the Federal Rules of Evidence, the Ninth Circuit aligned itself with the majority position. The court emphasized that "the orthodox rule is the law of this circuit and every circuit."[23] It did note that exceptions to the orthodox rule had been carved out by the Second Circuit, which had admitted prior inconsistent statements in the form of sworn testimony at a former trial or before a grand jury.[24]

III. LEGISLATIVE HISTORY OF RULE 801(d)(1)(A)

The Rule, as submitted by the Supreme Court[25] and passed by the Senate, adopted the minority position by allowing all prior inconsistent

19. For a discussion of the use of prior inconsistent statements as substantive evidence, *see generally* WIGMORE, *supra* note 14, at § 1018 (Chad. rev. 1970).

20. MCCORMICK, *supra* note 15, at § 34.

21. According to Wigmore, the basis for the minority position is the fact that since "the witness is present and subject to cross-examination, there is ample opportunity to test him as to the basis for his former statement. The whole purpose of the hearsay rule has already been satisfied." WIGMORE, *supra* note 14, at § 1018 (Chad. rev. 1970); *see also* MODEL CODE OF EVID. Rule 503(b) (1942) and comments.

22. 512 F.2d 872 (9th Cir. 1975).

23. *Id.* at 874 & n.6; United States v. Lemon, 497 F.2d 854, 857 (10th Cir. 1974); United States v. Lester, 491 F.2d 680, 682 (6th Cir. 1974); Subecz v. Curtis, 483 F.2d 263, 267 & n.5 (1st Cir. 1973); United States v. Hill, 481 F.2d 929, 932 (5th Cir.), *cert. denied*, 414 U.S. 1115 (1973); United States v. Clardy, 472 F.2d 578 (9th Cir. 1973); United States v. Small, 443 F.2d 497, 499 (3d Cir. 1971); United States v. Bensinger, 430 F.2d 584, 595 (8th Cir. 1970); Century Indemnity Co. v. Serafine, 311 F.2d 676, 679 (7th Cir. 1963).

24. 512 F.2d at 874-75 (9th Cir. 1975). In United States v. Cunningham, 446 F.2d 194 (2d Cir.), *cert. denied*, 404 U.S. 950 (1971), the government sought to use prior inconsistent statements made to an F.B.I. agent during an interrogation. Judge Friendly held their statements inadmissible except for purposes of impeachment because the agents' statements were not made at a former trial or before a grand jury. *Id.* at 197. *See also* United States v. Jordano, 521 F.2d 695 (2d Cir. 1975); United States v. Rivera, 513 F.2d 519 (2d Cir. 1975); United States v. De Sisto, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964).

25. In March 1965, Chief Justice Warren appointed an advisory committee to formulate rules of evidence for the federal courts. The preliminary draft prepared by the committee was published and circulated in March, 1969. *See* 46 F.R.D. 161. By order entered on November 20, 1972, the Supreme Court prescribed Federal Rules of Evidence to be effective July 1, 1973. *See* 56 F.R.D. 183. Pursuant to various enabling acts, Chief Justice Burger transmitted the rules to Congress on February 5, 1973. Congress then amended the rules and enacted them into law. 28 U.S.C. app. (Supp. V 1975).

statements to be used as substantive evidence.[26] This version departed from the position held by most of the circuits,[27] and it received a harsh reception in the House of Representatives.

The House subcommittee which considered the Rule[28] was unwilling to adopt the unrestricted Supreme Court version passed by the Senate. It sought to limit the proposed rule by requiring that the original statement be made under oath, subject to the penalty of perjury, and given at a trial, hearing, deposition, or before a grand jury.[29] The subcommittee reasoned that only in these settings could one be certain that the original statement was in fact made. Further, an assurance of reliability was provided because the declarant was under oath at the time of the original statement.[30] The effect of these limitations was to achieve a position similar to that of the Second Circuit.[31]

The House Committee on the Judiciary then added a further limitation, requiring that the original statement must have been subject to cross-examination.[32] Moreover, the reference to grand jury proceedings was deleted.[33] Thus, the House's version imposed harsh restrictions on the substantive use of prior inconsistent statements.

The Advisory Committee on the Rules of Evidence strongly objected to the changes made by the House.[34] The Committee argued that in-court cross-examination was adequate to discern the truthfulness of the prior statement. It reasoned that a witness, who has made an earlier statement which is later contradicted at trial, is given the opportunity to explain the inconsistency under cross-examination and in the presence of the court or jury. Thus, according to the Advisory Committee, any dangers that might otherwise accompany the admission of prior statements are removed.[35]

In its resolution of the House-Senate conflict, the Conference Com-

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The effective date of the rules was the 180th day after the date of enactment: July 1, 1975.

26. S. REP. No. 1277, 93d Cong., 2d. Sess. 15-16 (1974).

27. *See* note 23 *supra.*

28. House Subcommittee on Criminal Justice. *See* 120 CONG. REC. H543 (daily ed. Feb. 6, 1974) (remarks of Rep. Mann).

29. *See* 120 CONG. REC. H560-61 (daily ed. Feb. 6, 1974) (remarks of Rep. Mayne).

30. *Id.*

31. *See* note 24 *supra.*

32. H.R. REP. No. 650, 93d Cong., 1st Sess. 13 (1973).

33. *Id.*

34. *See Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary,* 93d Cong., 2d Sess. 64-66 (1974).

35. *Id.*

mittee adopted the Senate version with an "amendment," which added the requirements that the prior inconsistent statement be: (1) given under oath; (2) subject to prosecution for perjury; and (3) given in a "trial, hearing, other proceeding, or in a deposition."[36] In fact, the amendment was the limitation originally imposed by the House subcommittee.[37] Therefore, as finally adopted, the Rule imposed conditions upon the substantive use of prior inconsistent statements. As a result of the compromise, the House's requirement of cross-examination was not added to the amendment, but the Rule implicitly covered statements made before a grand jury.[38]

From its reading of the legislative history, the court in *Castro-Ayon* concluded that "Congress intended the term 'other proceeding' to include the immigration interrogation held by [the agent]."[39] The court's conclusion was based on the following reasoning. First, rather than use the words "grand jury" to limit the Rule, the Conference Committee used the term "other proceeding," which the court felt evinced an intention to extend the limits beyond a grand jury proceeding.[40] Rather than adopt the House version of the Rule and delete restrictions, the Conference Committee adopted the less restrictive Senate version and added limitations. Second, the court compared a grand jury proceeding to an immigration interrogation and found no significant differences.[41] This reasoning will be considered in the course of the following analysis.

IV. THE MEANING OF THE TERM "OTHER PROCEEDING"

A. A Critique of the Court's Reading of the Legislative History

A proper reading of the legislative history behind the Rule reveals that the term "other proceeding" was adopted with reference to a grand jury proceeding.[42] If the debates partially centered around the inclusion or exclusion of this type of proceeding, then it seems clear that extending the limits of "other proceeding" to an immigration interrogation goes well beyond the spirit of compromise reached by

36. H.R. CONF. REP. No. 1597, 93d Cong., 2d Sess. 10 (1974).
37. See text accompanying notes 28-30 *supra.*
38. H.R. CONF. REP. No. 1597, 93d Cong., 2d Sess. 10 (1974).
39. 537 F.2d at 1057.
40. *Id.* at 1058.
41. *Id.*; see discussion of comparison of grand jury to immigration proceeding in text accompanying notes 51-61 *infra.*
42. See text accompanying notes 29-33 *supra.*

the House and Senate.[43]

The Senate had advocated an unqualified use of prior inconsistent statements.[44] The House had placed strict limits on the substantive use of prior inconsistent statements.[45] The Rule attempts to strike a delicate balance and must, of necessity, embrace both positions. The compromise reached adopts the Senate version with an amendment. It would appear that such an amendment must refer to the *limits* asserted by the House, lest the meaning of the compromise be read out of the Rule.[46] Conversely, if the Conference Committee had adopted the House version with an amendment, such amendment would refer to the Senate position and thus delete some of the restrictions. The inclusion of the term "other proceeding" was the result of the compromise. As a compromise, it was intended to inject into the Rule the stricter limitations of the House version.[47]

Any interpretation consistent with the spirit of the compromise cannot support the conclusion of the Ninth Circuit in *Castro-Ayon* that Congress meant "other proceeding" to include immigration interrogations. This interpretation would read out of the Rule the limitations intended by the compromise draft and its arduously achieved enactment.

B. Principles of Statutory Construction

The Rule encompasses only prior inconsistent statements made under oath "at a trial, hearing, other proceeding, or in a deposition."[48] According to fundamental principles of statutory construction, non-judicial proceedings were not meant to be included within the scope of the Rule. Words and phrases used in statutes must be construed with reference to the words with which they are associated and in the context in which they occur.[49] A catch-all provision should be read to

43. See text accompanying notes 36-38 *supra.*

44. See text accompanying note 26 *supra.*

45. See text accompanying notes 29-33 *supra.*

46. A compromise requires that both conflicting positions be represented in the final embodiment of the Rule. Therefore, if the Senate Amendment is adopted, but with a further amendment, the latter amendment must be the guarantee that the position taken by the House remains a part of the Rule.

47. Further, since the term "other proceeding" is not part of the Senate version of the Rule, see notes 25-27 *supra* and accompanying text, but contained in the amendment to it, the term reflects the stricter limitations intended by the House.

48. FED. R. EVID. 801(d)(1)(A).

49. *See, e.g.*, Federal Maritime Comm'n v. Seatrain Line, Inc., 411 U.S. 726, 734 (1973).

bring into a statute only categories similar in type to those specifically enumerated.[50] Using these principles of statutory construction, "other proceeding" must be a proceeding no less formal than a deposition and no more formal than a trial or hearing. The order in which the words are arranged in the statute indicates a descending sequence from the most formal to the least formal setting. While a trial represents the maximum formality, a deposition sets the minimum formality acceptable under the Rule. Therefore, an analysis must be made to determine whether the formalities involved in an immigration interrogation entitle such an interrogation to assume a position in the wording of the Rule between "hearing" and "deposition."

1. Comparison to Grand Jury

The legislative history reveals that "[t]he rule as adopted covers statements before a grand jury."[51] Moreover, as the court in *Castro-Ayon* recognized, the term "other proceeding" was not limited to grand jury proceedings.[52] The question, however, is whether it is meant to extend to an immigration interrogation.

In *Castro-Ayon*, "many similarities" were noted between a grand jury proceeding and an immigration interrogation.[53] Specifically, the court noted that "[b]oth are investigatory, ex parte, inquisitive, sworn, basically prosecutorial, held before an officer other than the arresting officer, recorded, and held in circumstances of some legal formality."[54] In fact, the court concluded that an immigration interrogation provides *more legal rights* for the witness than a grand jury proceeding.[55] This determination, combined with the court's reading of the legislative history, enabled it to hold that the interrogation qualified as an "other proceeding."[56]

The court, however, failed to acknowledge fundamental distinctions between a grand jury proceeding and an immigration interrogation. In a grand jury proceeding, the jurors serve as a disinterested trier of

50. *Id.*
51. H.R. CONF. REP. No. 1597, 93d Cong., 2d Sess. 10 (1974).
52. 537 F.2d at 1058. If Congress intended the term "other proceeding" to include only grand jury proceedings, the Rule would have been limited to include statements given at a "trial, hearing, grand jury, or deposition."
53. 537 F.2d at 1058.
54. *Id.*
55. *Id.*
56. *Id.* at 1057-58.

fact.[57] At an immigration interrogation, a disinterested third party does not supervise, or even observe, the border patrol agent's investigatory techniques. Further, there are no procedural guidelines delineating the permissible course of an interrogation.[58] Questioning frequently takes place behind closed doors in an inherently coercive atmosphere. It is difficult to see how such a "proceeding" rises to the level of a trial, administrative or legislative hearing, or grand jury proceeding.

The fact that the witness has more constitutionally guaranteed rights in the immigration interrogation is indeed a recognition of the inherently coercive atmosphere. Yet the court seems to feel that these rights serve as a prophylactic device which is conducive to truthfulness. In a grand jury proceeding, although *Miranda* rights are not given,[59] the jurors are present to observe the propriety of the investigation.[60] In

57. There are differences in opinion as to whether grand jurors must be impartial and unbiased. *Compare* United States v. Anzelmo, 319 F. Supp. 1106, 1113-14 (E.D. La. 1970) (permitting challenges to jurors on grounds of bias) *with* United States v. Knowles, 147 F. Supp. 19, 21 (D.D.C. 1957) (not allowing a bias challenge). However, grand jurors exercise considerable independence from the prosecutor in both their investigative and screening function. For example, they may act as a buffer between the prosecutor and the public by serving as an "independent legal body." *See* A.B.A., STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 3.5(a) (approved draft 1971).

Most grand jurors are drawn randomly from a list of all registered voters. It is the express policy of the United States government that "all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community . . . ." Jury Selection and Service Act of 1968 § 1861, 28 U.S.C. § 1861 (1970) (Declaration of policy).

58. Any police activity " 'likely to or expected to elicit a confession constitutes 'interrogation' under *Miranda.*' " Commonwealth v. Hamilton, 285 A.2d 172, 175 (Pa. 1971), *quoting* Commonwealth v. Simala, 252 A.2d 575 (Pa. 1969).

An analogy may be made to the tactics and techniques for interrogation suggested by Professor Inbau. According to Inbau:

> the only approach to a possible solution of the crime is the interrogation of the criminal suspect himself, as well as others who may possess significant information. . . . [T]hese interrogations, particularly of the suspect/himself, must be conducted under conditions of privacy and for a reasonable period of time; and they frequently require the use of psychological tactics and techniques that could well be classified as "unethical," if we are to evaluate them in terms of ordinary, everyday social behavior.

Inbau, Police Interrogation—A Practical Necessity, 52 J. CRIM. L.C. & P.S. 16 (1961), *reprinted in* POLICE POWER AND INDIVIDUAL FREEDOM 147 (C. Sowle ed. 1962). Inbau notes his particular approval of such techniques as trickery and deceit which, in his words are "frequently necessary in order to secure incriminating information from the guilty, or investigative leads from otherwise uncooperative witnesses or informants." *Id.*

59. *See* United States v. Mandujano, 96 S. Ct. 1768 (1976).

60. In *In re* Groban, 352 U.S. 330 (1957), Justice Black in dissent wrote:

> [The grand jurors] bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are

an immigration interrogation, *Miranda* warnings are frequently diluted by the context in which they are given and may thus be qualitatively less meaningful to the defendant than those safeguards provided in a grand jury proceeding.

Since Congress meant to include grand jury proceedings within the meaning of the term "other proceeding,"[61] unless the protections available in an immigration interrogation are qualitatively similar to those in a grand jury proceeding, such interrogation should not be considered an "other proceeding," and therefore should not be entitled to assume a position in the Rule's continuum between "hearing" and "deposition."

C. Policy Considerations

The Rule represents a delicate balance between the conflicting positions of the House and the Senate.[62] As a result, the term "other proceeding" was left undefined except for its implicit inclusion of grand jury proceedings. Any court interpretation of the term should therefore go no further than is clearly supportable by the legislative history and principles of statutory construction.

The court has not expressed a per se rule concerning an interrogation setting.[63] Rather, it leaves unanswered the question of whether the *Castro-Ayon* rule is applicable to every sworn statement given during a police-station interrogation.[64] At the same time, the court does note the many similarities between the police-station interrogation and the immigration interrogation.[65]

The only guidance provided by the court for interpreting the term "other proceeding" is the requirement that the setting in which the prior inconsistent statement was made be "similar" to a grand jury proceeding,[66] and be one of "some legal formality."[67] The meaning of this latter term is unclear and therefore open for potential abuse.

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not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officers' misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury.

Id. at 347 (Black J., dissenting).

61. See text accompanying notes 36-38 *supra.*

62. See note 36 *supra.*

63. 537 F.2d at 1058.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

The primary dangers presented by any further extensions of the court's ruling are three-fold: first, the possible abuse to the defendant, who, because of fear and intimidation, may make unreliable statements influenced by an atmosphere of coercion or expectations of early release; second, from a pragmatic standpoint there is little protection from an overzealous law enforcement officer; and third, the elevated use of the prior inconsistent statement, *i.e.*, for substantive purposes, makes its reliability critical.[68]

V. CONCLUSION

The Ninth Circuit has interpreted the term "other proceeding" in Federal Rule of Evidence 801(d)(1)(A) as allowing prior inconsistent statements made at an immigration interrogation to be used as substantive evidence. The Ninth Circuit's interpretation misreads legislative history, incorrectly interprets the statute, and broadens the Rule to a point that is undesirable as a matter of policy.

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68. Since a prior inconsistent statement may be used as substantive evidence under the court's ruling, its reliability is even more critical than if used merely to impeach the witness. Senator Ervin, who was on both the Judiciary and Conference Committees when the Rule was proposed, expressed the following concern as to the use of such evidence:

> I would throw this thing on the scrap heap of injustice myself. This would authorize a conviction of a man who has no accuser on the ground that a witness who say [*sic*] the defendant is not guilty of anything has a poor memory or is a liar.
>
> . . . .
>
> My quarrel with the Supreme Court is that they did not hold that there was a violation of the sixth amendment, which gives the accused in all criminal cases the right to be confronted by his accusors. He has no accusor at all under this rule.
>
> . . . .
>
> Oh, I could go along with it if I thought that verdicts of guilty should be preferred over verdicts of "not guilty."

Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary, 93d Cong., 2d Sess. 51-52 (1974).

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